
CANADA / JUDGMENT

Healey v. Chung

2015 BCCA 38

COURT

British Columbia Court of Appeal

DECIDED

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2015 BCCA 38 Healey v. Chung

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Healey v. Chung,

2015 BCCA 38

Date: 20150203

Docket: CA041711

Between:

Douglas Healey

Appellant

(Plaintiff)

And

Sun Im Sunnie Chung also known as Sun I. Chung

Respondent

(Defendant)

Corrected Judgment: The summary was corrected at p. 2 on February 4, 2015.

Before:

The Honourable Madam Justice Saunders

The Honourable Madam Justice Kirkpatrick

The Honourable Madam Justice D. Smith

On judicial review from: An order of the Supreme Court of British Columbia,
dated March 14, 2014 (Healey v. Chung, 2014 BCSC 429,
New Westminster Docket No. M98684).

Counsel for the Appellant:

G.R. Cameron

Counsel for the Respondent:

P. Mazzone

Place and Date of Hearing:

Vancouver, British Columbia

November 17, 2014

Place and Date of Judgment:

Vancouver, British Columbia

February 3, 2015

Written Reasons by:

The Honourable Madam Justice Saunders

Concurred in by:

The Honourable Madam Justice Kirkpatrick

The Honourable Madam Justice D. Smith

Summary:

The appeal is from an award of damages for injuries sustained when the appellant in a crosswalk with the light in his favour, was struck by a vehicle driven by the respondent. He contends the judge erred in receiving as expert reports, consulting reports from physicians to his doctor disclosed to the defendant in the family physician's clinical records, in misapprehending aspects of his medical files, in misapprehending evidence concerning the appellant's recollection of the accident, in misapprehending evidence relating to his employment and loss thereof, and in considering the issue of mitigation of damages. Held: Appeal allowed. The two consulting reports in issue which were material to the order appealed, did not satisfy the requirement for attestation of the reports by the experts required by R. 11-2, or contain the essential requirements required by R. 11-6. As such, they were not expert reports for the purposes of R. 11-6(10) and (11). Further, the complaints of misapprehension of the medical files, and evidence of the appellant's recollection of the accident, are established. On these two bases, a new trial is ordered.

Reasons for Judgment of the Honourable Madam Justice Saunders:

- [1] Mr. Healey appeals from the judgment of \$50,652.64 awarded to him for personal injuries suffered when, as a pedestrian, he was struck by a motor vehicle driven by the respondent, Ms. Chung.
- [2] Liability was admitted and the only issue at trial was the quantum of damages. Mr. Healey claimed the accident caused him ongoing physical and psychological injuries from what he said was a significant incident. Mr. Healey claimed damages of \$485,000 or more for his injuries, including a significant sum for future loss of income.
- [3] In his reasons for judgment Mr. Justice Ball did not accept Mr. Healey's view of the gravity of the incident or the injuries he claimed. Further, he held that Mr. Healey had failed to mitigate his damages.
- [4] Mr. Healey contends that the judge's assessment of his credibility cannot stand for two reasons. First, he says the judge's view of his evidence was heavily influenced by evidence in the form of consulting reports that he says were wrongly admitted as expert reports. Second, he contends that the judge misapprehended the evidence in matters relevant to the assessment of his credibility. Mr. Healey also submits that the judge erred in law in respect to the onus to prove a failure to mitigate by finding such a failure absent findings of fact that employment was or would have been available to Mr. Healey.
- [5] The accident occurred on December 4, 2005, at the intersection of 41st Avenue and Clarendon Street, in Vancouver, British Columbia. Mr. Healey was walking southbound across 41st Avenue in a marked crosswalk with a green light in his favour. As he crossed the street he was struck by a vehicle driven by Ms. Chung.

Admission of Clinical Records

- [6] Mr. Healey's first complaint is that the judge wrongly admitted documents found in the clinical records of the family physician (described by the parties as consult letters) as expert reports.
- [7] The medical evidence and evidence of Mr. Healey's physical capacity consisted of expert reports from seven expert witnesses: Dr. Kuo, Mr. Healey's family physician (three reports); Dr. Hershler, a specialist in physical medicine and rehabilitation (three reports); Dr. O'Shaughnessy, a psychiatrist; Dr. Schmidt, a clinical psychologist qualified in neuropsychology; Mr. Worthington-White, an occupational therapist (two reports); Ms. Landy, a registered nurse with expertise in rehabilitative nursing; and Dr. Powers, an expert in vocational rehabilitation.
- [8] Ms. Chung adduced one report from an independent medical examiner, Dr. Schweigel, an orthopaedic surgeon. In addition, Ms. Chung proffered as evidence the consulting reports of Dr. To and Dr. Truong, psychiatrists, reporting to Dr. Kuo following a referral of Mr. Healey. Mr. Healey says these two documents were wrongly admitted as expert reports. Dr. To's consulting report is entitled "Mental Health Initial Assessment - Consult" and refers to a

"psychiatric assessment", but the doctor's qualifications are not revealed in the report, nor is it signed. Dr. Truong's consulting report is entitled "Psychiatric Assessment" and refers to the doctor as a psychiatrist, although it does not describe more fully the doctor's qualifications. It is signed.

- [9] The two contested documents were part of the clinical file of Dr. Kuo, and were properly disclosed to Ms. Chung. Prior to trial, counsel for Ms. Chung advised counsel for Mr. Healey that she intended to rely on these documents as expert reports. Counsel for Mr. Healey did not respond to the letter, being of the view that the documents were not expert reports within the meaning of R. 11-6 of the Supreme Court Civil Rules and that the law therefore did not require him to provide notice of his objection unless and until they were tendered at trial.
- [10] When the two documents were tendered at trial, counsel for Mr. Healey objected on the basis they were not admissible opinion evidence, in form or content. Counsel for Ms. Chung offered to produce the doctors for cross-examination, although they were never called.
- [11] The judge ruled that the two documents met the admissibility requirements of the Supreme Court Civil Rules, saying:
- [8] In the case before me I am obliged in the circumstances to look at Rule 11-6, and particularly Sub-Rule 1, where the requirements for an expert's report [are] discussed. The rules are not to be taken out of context. In the context of this case, it is very clear that Dr. Kuo, who was the treating physician of Mr. Healey, the plaintiff, was well aware of the location, area of expertise, address, name, qualifications of the persons to whom she sent Mr. Healey because these reports resulted from her sending Mr. Healey to both doctors.
- [10] As a result, we have a document which in these circumstances the expert's name, address, and area of expertise, with his qualifications, employment and educational experience are well known. The instructions are simple. The nature of the opinion sought and the issues are set out. The expert's opinion is there on the issues and I am satisfied that the expert's opinion contains the required factual underpinning set out in 11-6(1)(f).
- [18] In the circumstances, I am satisfied that while it is not perfect compliance with the rules, it is certainly sufficient compliance in the circumstances where the parties knew so well who the experts were and, therefore, the documents will be treated as expert reports in the normal way. I will therefore admit the document signed by Agnes To and the document prepared by Dr. Truong to which I have referred.
- [12] Rule 11-6 of the Supreme Court Civil Rules sets out the requirements for tendering an expert report:
- (1) An expert's report that is to be tendered as evidence at the trial must be signed by the expert, must include the certification required under Rule 11-2 (2) and must set out the following:

- (a) the expert's name, address and area of expertise;
- (b) the expert's qualifications and employment and educational experience in his or her area of expertise;
- (c) the instructions provided to the expert in relation to the proceeding;
- (d) the nature of the opinion being sought and the issues in the proceeding to which the opinion relates;
- (e) the expert's opinion respecting those issues;
- (f) the expert's reasons for his or her opinion, including
 - (i) a description of the factual assumptions on which the opinion is based,
 - (ii) a description of any research conducted by the expert that led him or her to form the opinion, and
 - (iii) a list of every document, if any, relied on by the expert in forming the opinion.

[13] Rule 11-2 referred to in R. 11-6(1) provides:

- (1) In giving an opinion to the court, an expert appointed under this Part by one or more parties or by the court has a duty to assist the court and is not to be an advocate for any party.
- (2) If an expert is appointed under this Part by one or more parties or by the court, the expert must, in any report he or she prepares under this Part, certify that he or she
 - (a) is aware of the duty referred to in subrule (1),
 - (b) has made the report in conformity with that duty, and
 - (c) will, if called on to give oral or written testimony, give that testimony in conformity with that duty.

[14] Rules 11-6(10) and (11) deal with notice of objection to an expert report in these terms:

- (10) A party who receives an expert report or supplementary report under this Part must, on the earlier of the date of the trial management conference and the date that is 21 days before the scheduled trial date, serve on every party of record a notice of any objection to the admissibility of the expert's evidence that the party receiving the report or supplementary report intends to raise at trial.
- (11) Unless the court otherwise orders, if reasonable notice of an objection could have been given under subrule (10), the objection must not be permitted at trial if that notice was not given.

- [15] Mr. Healey contends that the documents of Dr. To and Dr. Truong failed to set out the qualifications and educational experience of the doctors, the instructions provided to the doctors, the nature of the opinions sought and, significantly, most of the items required by R. 11-6(1)(f).
- [16] I will start with R. 11-2. While all of the authors referred to in para. 7 above attested as required by that Rule (Dr. Kuo in the last of her three reports), neither of the impugned consulting reports contains a commitment to the standards of R. 11-2, or evinces the author's awareness that the documents would be tendered as expert reports. It is plain the two consulting reports were simply in response to Dr. Kuo's referrals of Mr. Healey in the course of treatment. As such, while opinion, they do not meet the requirements of R. 11-2 in any respect.
- [17] It is plain, also, that the documents do not comply with R. 11-6(1). Indeed, I read the judge's ruling on this issue as recognizing that they do not. Yet he held that there was "sufficient compliance" because the parties "knew so well who the experts were". In particular, the judge referred to Dr. Kuo's knowledge of the qualifications of Dr. To and Dr. Truong. In my respectful view, referral by a family doctor to a physician with specialized knowledge does not equate to knowledge by the patient of the specific information R. 11-6(1) requires in the expert report. Apart from the obvious fact that the family physician is not naturally privy to the knowledge, education, or experience of another physician, whatever is known to the family physician does not become the patient's knowledge unless the doctor communicates that knowledge to the patient. More importantly, Dr. Kuo's knowledge and comfort with the clinical expertise of Dr. To and Dr. Truong is of little assistance to the court seeking to determine the weight to be accorded various pieces of evidence, including not only the reports those physicians authored but also the evidence from other physicians.
- [18] Nor is there adequate recitation in the documents authored by Dr. To and Dr. Truong of the bases for the opinions expressed. For example, Dr. To states "[Mr. Healey] is very selective and inconsistent when he tells me what happens from that time on" and "[i]t seems that he has different interaction among the different health professionals who have been involved in his care", but she does not describe the documents or research conducted that led to those opinions (R. 11-6(1)(f)), thereby to permit the court to assess the validity of the statements.
- [19] It is well established that clinical consulting reports, without more, may not be admitted for the validity of opinions expressed in them. In *Mazur v. Lucas*, 2010 BCCA 473, 325 D.L.R. (4th) 385, this court observed:
- [42] New Rule 11-6 expands on what an expert was required to state under old Rule 40A, but does not alter the general principle that it is essential for the trier of fact to know the basis of an expert opinion so that the opinion can be evaluated. The Rule has a dual purpose. The second purpose is to allow the opposing party to know the basis of the expert's opinion so that they or their counsel can properly prepare for, and conduct, cross-examination of the expert, and if appropriate, secure a responsive expert opinion. Thus, the result of these

reasons would be the same if this case had arisen under the new Rules. There is nothing in these Rules touching directly on the question of the admissibility of hearsay evidence in expert reports.

- [20] While there is, perhaps, room for some latitude in determining whether a document meets the requirements of the Rules, for example as to including the address and expertise where those are capable of easy determination based upon the information in the document, the essential components of qualifications, education, experience, information and assumptions on which the opinion is based, the instructions given, and the research, must be included to justify receipt of the report as an exception to the hearsay rule. This conclusion is consistent with authorities addressing the admissibility of opinion or consulting reports included in clinical records: *Seaman v. Crook*, 2003 BCSC 464, 14 B.C.L.R. (4th) 132; *Cunningham v. Slubowski*, 2003 BCSC 1904; and *F.(K.E.) v. Daoust* (1995), 3 B.C.L.R. (3d) 128, 34 C.P.C. (3d) 393 (C.A.). In *F.(K.E.)*, Mr. Justice Hutcheon said, in relation to R. 40A of the Rules of Court, which was less demanding in the content of an admissible expert report than current R. 11-6(1):
- [13] I can only say that what occurred was most unsatisfactory. The admissibility into evidence of the written reports of experts is an exception to the usual rule that witnesses be examined and cross-examined in open court. The exception was introduced into this Province in 1976 by way of an amendment to the Evidence Act. Certain safeguards were and are provided including the delivery of the report some days before trial (now at least 60 days) and a statement of the qualifications of the expert. The safeguards did not operate in this case.
- [15] Other than the information on her letterhead we know nothing of the qualifications of Dr. Sivertz. No order was made to dispense with the requirement of Rule 40A(5)(b).
- [20] Whatever the explanation, I am of the view that the plaintiff did not consent to the admissibility of Dr. Sivertz's report under the provisions of Rule 40A. I am further of the view that in the circumstances of this case the report ought not to have been admitted as an opinion on the vital question of causation.
- [21] It is true, as the respondent contends, that *Seaman* and *F.(K.E.)* are cases in which the opinion sought to be adduced was found in clinical records that were voluminous, but I do not consider that circumstance detracts from the principle that a clinical record containing an opinion, such as these consulting reports, must substantially comply with the requirements of the Rules in order to attract the exception to the usual rule for examination of witnesses spoken of by Mr. Justice Hutcheon.
- [22] The respondent contends that she gave notice to Mr. Healey of her intention to use the letters, that Dr. Kuo knew of the qualifications of the two doctors, and that other deficiencies were "minor". She says Mr. Healey was obliged to express his objections as required by R. 11-6(10) and (11).

- [23] Forthrightness between counsel is favoured and is to be expected in litigation. Yet I cannot say there was anything to which we have been referred that put the positive legal duty on Mr. Healey to object under those Rules for the reason that the consulting reports sent to Dr. Kuo and disclosed as part of her clinical records were simply not 'expert reports' as regulated by the Rules. While they may be professional opinions from one doctor to another in the course of treatment, the impugned documents do not comply with R. 11-2; I do not consider they carry the basic hallmark of an 'expert report', being an opinion intended by the author, at some point, to be presented for the assistance of the court. Significantly, they contain none of the information that is essential to qualification of the author as an expert, nor the information reviewed by the author by which the court may assess the cogency of the opinion.
- [24] As I do not consider that these clinical records can be considered to be 'expert reports' as that term is used in the Rules, entitled to the privileged treatment for receipt of hearsay evidence discussed by Mr. Justice Hutcheon, I conclude that R. 11-6(10) and (11) did not require a notice of objection.
- [25] In the alternative to the two documents coming within R. 11-6, Ms. Chung says the judge could have exercised his discretion and admitted the documents as opinions under R. 11-7. Rule 11-7 provides latitude to a judge to receive opinion evidence that is not included in an expert report:
- (1) Unless the court otherwise orders, opinion evidence of an expert, other than an expert appointed by the court under Rule 11-5, must not be tendered at trial unless
 - (a) that evidence is included in a report of that expert that has been prepared and served in accordance with Rule 11-6, and
 - (b) any supplementary reports required under Rule 11-5 (11) or 11-6 (5) or (6) have been prepared and served in accordance with Rule 11-6 (5) to (7).
 - (6) At trial, the court may allow an expert to provide evidence, on terms and conditions, if any, even though one or more of the requirements of this Part have not been complied with, if
 - (a) facts have come to the knowledge of one or more of the parties and those facts could not, with due diligence, have been learned in time to be included in a report or supplementary report and served within the time required by this Part,
 - (b) the non-compliance is unlikely to cause prejudice
 - (i) by reason of an inability to prepare for cross-examination, or
 - (ii) by depriving the party against whom the evidence is tendered of a reasonable opportunity to tender evidence in response, or
 - (c) the interests of justice require it.

[Emphasis added.]

[26] Ms. Chung does not contend the judge exercised his discretion under R. 11-7(1). Her approach is consistent with the record that shows the judge was not asked to exercise his discretion, and it is consistent with Ms. Chung's submission at trial which approached the question as one of compliance with R. 11-6. We are invited, however, to approach these documents as admissible in the exercise of discretion.

[27] I do not consider that this is an appropriate case for us to engage for the first time in a full analysis of discretion, so as to draw our own conclusions. At trial the judge did not consider his R. 11-7 discretion and accordingly the possibility of exercising discretion is without his expansion. In *XY, LLC v. Zhu*, 2013 BCCA 352, 366 D.L.R. (4th) 443, Madam Justice Newbury for the Court adopted this description from *Perry v. Vargas*, 2012 BCSC 1537 at para. 22:

In my view the discretion provided for in R.11-7(6)(c) must be exercised sparingly, with appropriate caution, and in a disciplined way given the express requirements contained in Rules 11-6 and 11-7. That is, the "interests of justice" are not a reason to simply excuse or ignore the requirements of the other Rules. There must be some compelling analysis why the interests of justice require in a particular case the extraordinary step of abrogating the other requirements of the Supreme Court Civil Rules. None was provided.

[28] Adopting that approach, in my view this is not a case for us to exercise the discretion that was available to the judge under R. 11-7. There was ample medical evidence before the court, absent the opinions from these documents, to guide the trial judge in findings of fact. Further, it was open to the defendant to develop her own body of medical opinion and to advance it in proper form, including as to the required description of qualifications and experience and listing of opinion sought and matters considered. I see no compelling reason to derogate from the requirements of either R. 11-2 or R. 11-6 in this case. To do so, in my view, would admit into evidence opinions that were not crafted for that purpose and that are without the necessary information to permit consideration of their substance and effect in the context of the issues before the court.

[29] Last, Ms. Chung contends that the two documents, in any event, were inconsequential in the judge's reasons, and thus the admission of these documents had little impact on the outcome of the case.

[30] One of the issues at trial was the assertion by Mr. Healey that he suffered from depression caused by the accident. This allegation bore upon the assessment of damages. To support this allegation was an expert report from Dr. O'Shaughnessy. Based upon the medical records and his interview with Mr. Healey, Dr. O'Shaughnessy diagnosed Mr. Healey as having an Adjustment Disorder with anxiety and an Adjustment Disorder with depressed mood. Yet the judge rejected all allegations of depression and instead relied upon the two consulting reports, saying:

- [58] Mr. Healey stated that he suffered from depression because of the accident. Depression was not reported in his post-accident symptomatology until 2008. Dr. Kuo's records do show that in 2003 she concluded that Mr. Healey had symptoms consistent with depression. This reporting, however, preceded the accident, and according to the psychiatric specialists Dr. Kuo referred Mr. Healey to in 2009 and 2010, no evidence supported any Axis 1 diagnosis in the DSM-IV, and no symptoms met the criteria for post-traumatic stress disorder.
- [31] I would first observe that Dr. Truong's report cryptically states "Axis 1: Adjustment d/o with depressive symptoms - in remission" and by so saying Dr. Truong's report appears to be inconsistent with the judge's statement: "according to the psychiatric specialists [Dr. To and Dr. Truong] no evidence supported any Axis 1 diagnosis". Perhaps this exemplifies the effect of non-compliance with the requirements for expert reports, as the judge drew from the report a categorical absence of any Axis 1 diagnosis which appears to be inconsistent with Dr. Truong's report. Setting that discrepancy between the judge's assertion and the notation in Dr. Truong's report aside, it is clear from the judge's para. 58 that he put weight on the consulting reports and drew conclusions from them adverse to Mr. Healey. In other words, they were consequential in the judge's reasoning; one cannot say the reports had little bearing on the outcome, in my view.

Errors of Fact

- [32] Mr. Healey also complains of several factual matters. The judge rejected Mr. Healey's evidence, saying:
- [2] I reject the bulk of the plaintiff's evidence regarding the nature of the accident and the injuries he claims to have sustained. He was not a credible witness. The plaintiff's almost complete lack of credibility made determining what actual injuries occurred during the pedestrian-vehicle accident quite complicated.
- [3] Many profound differences exist between the facts of the accident as I found them and the factual assumptions that many of the medical and other experts who have proffered opinions made (these differences seriously question the evidentiary value of those reports).
- [33] Mr. Healey says that this conclusion is fatally flawed because the judge misapprehended evidence, including evidence material to his credibility. He focuses on three areas of misapprehension of the evidence: his reporting of symptoms to doctors as understood by the judge; the mechanics of the accident; and his return to work. I need only address the first two of these complaints as they are sufficient, in my view, to amount to palpable and overriding error. Thus I do not address the more complex complaint as to the judge's treatment of the evidence concerning Mr. Healey's return to work.
- [34] In my respectful view, the judge overlooked and misapprehended evidence materially bearing on the credibility assessment, thus fatally undermining the judgment.
- [35] As to the evidence relating to Mr. Healey's reports of symptoms, the judge found:

- [58] Mr. Healey stated that he suffered from depression because of the accident. Depression was not reported in his post-accident symptomatology until 2008. Dr. Kuo's records do show that in 2003 she concluded that Mr. Healey had symptoms consistent with depression. This reporting, however, preceded the accident, and according to the psychiatric specialists Dr. Kuo referred Mr. Healey to in 2009 and 2010, no evidence supported any Axis 1 diagnosis in the DSM-IV, and no symptoms met the criteria for post-traumatic stress disorder.
- [67] Dr. Schweigel, who conducted an independent medical legal examination of the plaintiff, confirmed that, apart from complaints of chest pain related to coughing during a viral illness, chest pain was not complained of until summer 2007. In other words, it was too far away in time to be associated with the accident.
- [87] With a single exception much later in the course of treatment by Dr. Kuo, none of the medical legal reports or clinical records presented by Dr. Kuo or any of the locums who dealt with Mr. Healey's case mention vomiting.
- [88] The law is clear that the failure to report a single symptom to a doctor will not itself become a basis for a negative credibility finding. In this case, one of the ongoing problems, as noted above regarding complaints about the nature of the accident or with symptoms in the ribs or chest, is that erroneous facts become the diagnostic basis for an expert doctor to connect a specific symptom with a specific injury. Here, no expert report connects vomiting with any injury caused by the accident.
- [Emphasis added.]
- [36] Mr. Healey contends, correctly in my view, that these passages reflect a misapprehension of evidence as to the first reporting of depression, vomiting and chest pain. Rather than the first report of depression being 2008, Dr. Kuo's report reveals that Dr. Kuo addressed the potential issue of medicine and counselling for post-traumatic stress disorder on December 12, 2005, eight days after the accident. Dr. Kuo also administered the Beck Depression Scale and discussed antidepressant medication with Mr. Healey on August 31, 2006. He gave Mr. Healey samples of an antidepressant on October 13, 2006, all within one year of the accident.
- [37] So too, the judge's reference to a failure to report vomiting to doctors appears to overlook evidence concerning stomach ailments found in Dr. Kuo's reports, first that a month after the accident Mr. Healey was advised to take Advil rather than Voltarin because Voltarin often gives stomach upset and second that in June 2006 Mr. Healey was diagnosed with gastritis and reflux most likely due to use of anti-inflammatories to treat the on-going pain. And the clinical records of Dr. Posen, a naturopathic doctor, note on August 8, 2006, that Mr. Healey reported episodes of nausea and vomiting.
- [38] Dr. Kuo's reports also note that contrary to the judge's view that there was no complaint of chest pain until the summer of 2007, on the examination the day after the accident Mr. Healey reported chest pain.

- [39] These three symptoms selected by the judge for comment significantly bear upon the foundation for the judge's findings of credibility. On my reading of his reasons, the judge used the evidence in respect to these three symptoms to explain his rejection of much of the medical evidence advanced by Mr. Healey. They are, thus, material and bear upon the resulting order.
- [40] Mr. Healey also is highly critical of the judge in his view of the mechanics of the accident. The judge said:
- [7] Mr. Eng, who was a driver in the accident's immediate vicinity, was the sole witness who saw the accident, and he testified at trial. He said Mr. Healey recognized he was going to be struck by a vehicle because Mr. Healey turned toward the vehicle putting both hands on the vehicle's hood and pushing away from the vehicle.
- [8] According to Mr. Eng, Mr. Healey's body ended up on the road by the driver's side door of Mr. Eng's vehicle.
- [9] Mr. Eng said the Chung vehicle was not speeding but did not stop for Mr. Healey. He said Mr. Healey "went maybe five to eight feet in the air" and landed about 10 feet from where he was struck.
- [12] Mr. Eng was an independent witness and presented his evidence in a forthright and credible manner. I accept Mr. Eng's version of the events of the accident as correct.
- [41] Referring to Mr. Healey in relation to the accident, the judge said:
- [17] Mr. Healey used far more dramatic terms than Mr. Eng to describe the accident - especially to medical practitioners.
- [42] After discussing references in the medical reports to Mr. Healey saying he was told he had been flung 30 to 40 feet forward in the accident, the judge concluded with a minimal view of the accident:
- [35] As previously noted, I accept Mr. Eng's evidence as to the events of the accident. He was in a uniquely immediate position to see the accident from a stationary position. He was not distracted, and nothing blocked or reduced his vision. I accept his description of the accident and that Mr. Healey landed approximately 10 feet from the location where he pushed himself away from the Chung vehicle. While he gave no estimate of the actual speed the Chung vehicle was travelling, I also accept the evidence of Mr. Eng that the Chung vehicle was not speeding.
- [36] The immutable laws of physics inform my analysis: they dictate that the force necessary to cause an adult body struck by a motor vehicle to fly 20 feet in the air and 40 feet from impact to landing is far more significant than the force necessary to move an adult body pushing against a vehicle's hood to move 10 feet from impact to landing.

- [37] Moreover, and perhaps more importantly, the immediate deceleration landing in contact with the hard asphalt surface of 41st Avenue following a 40 foot flight would be expected to cause injury well beyond "minor contusions".
- [38] I reject any suggestion that Mr. Healey flew 20 or 40 feet to a height of 15 or 20 feet from impact to place of rest. The evidence does not support that submission.
- [43] Later in the reasons for judgment, the judge directly attributed to Mr. Healey a version of the accident that was not true. He said:
- [161] His "story" is at odds with the evidence of the accident, and he reported a variety of "stories", inconsistent circumstances, and symptoms to the variety of medical practitioners whose expert reports were presented at trial.
- [162] This trial's only issue was the nature and extent of accident and its effect on the plaintiff. I find that his evidence was fabricated.
- [44] The "story" of the accident, and the nature and extent of the accident attributed to Mr. Healey in these paragraphs appears to be the one rejected, that is, of being flung 30 to 40 feet. Yet Mr. Healey never professed to recall the details of the accident, and attributed his knowledge of the event to what he was told by others.
- [45] Reading the reasons as a whole, then, it appears to me that the judge, in the end analysis, has factored into his assessment of Mr. Healey, as if it was Mr. Healey's own recollection of the accident, the story of Mr. Healey flying 30 to 40 feet.
- [46] It was certainly open to the judge to accept the independent witness's account and it was open to say the medical expert opinions were unreliable to the extent they relied on the greater travel distance to support the physical injuries alleged at trial. However, it was not open, given Mr. Healey's evidence of the source of his version of the accident, to discount Mr. Healey's reports to doctors as exaggeration because of his account of the accident unless the judge concluded Mr. Healey was not so informed, a finding that the judge did not make and an issue he did not address. Nor, in my view, was it open to attribute to Mr. Healey a "story" of the accident to which he professed no independent recollection.
- [47] I am mindful of the deference this court must accord a judge's findings of credibility. However, where evidence is misapprehended that bears upon credibility in a way that is material to the outcome, the basis for this court's interference is established. In this case, the finding against the appellant's credibility pervades the judge's rejection of his claim for greater damages. I consider that in the area of the three symptoms, and Mr. Healey's lack of independent recollection of the accident, the judge's comments fatally undermine his finding of credibility of Mr. Healey and bear upon the reliability of the expert reports.

Conclusion

[48] In my respectful view, both the error in admitting the consulting reports as expert reports and the misapprehensions of evidence I have discussed were material to the judgment. I conclude the appeal must be allowed. Accordingly, as this matter should be returned to the trial court for a new trial, I see no need to address mitigation of damages or the assertions by Mr. Healey challenging the findings of fact relating to his employment.

[49] I would allow the appeal, set aside the order, and remit the case to the trial court for a new trial.

"The Honourable Madam Justice Saunders"

I AGREE:

"The Honourable Madam Justice Kirkpatrick"

I AGREE:

"The Honourable Madam Justice D. Smith"

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