

CANADA / JUDGMENT

McPhail v. Ross

2022 BCCA 122

COURT

British Columbia Court of Appeal

DECIDED

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2022 BCCA 122 McPhail v. Ross

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

McPhail v. Ross,

2022 BCCA 122

Date: 20220324

Docket: CA45881

Between:

Cory McPhail

Appellant

(Plaintiff)

And

Kyle Ross

Respondent

(Defendant)

Before:

The Honourable Mr. Justice Groberman

The Honourable Mr. Justice Fitch

The Honourable Mr. Justice Hunter

On appeal from: Orders of the Supreme Court of British Columbia, dated

January 9, 2019 (McPhail v. Ross, 2019 BCSC 21, Vancouver Docket S149600) and

April 18, 2019 (McPhail v. Ross, 2019 BCSC 896, Vancouver Docket S149600).

Oral Reasons for Judgment

Counsel for the Appellant

(via videoconference):

M.B.J. Stainsby

Counsel for the Respondent

(via videoconference):

M.R. Milne

Place and Date of Hearing:

Vancouver, British Columbia

March 22, 2022

Place and Date of Judgment:

Vancouver, British Columbia

March 24, 2022

Summary:

The appellant was injured in a motor vehicle accident for which the respondent admitted liability. After an 8-day trial on quantum of damages, the judge found that the appellant suffered soft tissue injuries to his back and neck as well as some psychological symptoms. She considered that the injuries substantially resolved within four months, and that the appellant was essentially fully recovered, physically and psychologically, a short time later. She awarded \$35,000 for non-pecuniary damages. She rejected the appellant's claims for loss of earning capacity and for cost of future care. The appellant appealed, arguing that the award was inordinately low and that the judge made numerous errors of fact. Held: Appeal allowed; matter remitted to the trial judge for further consideration. The judge made no reversible error in her findings of credibility, nor did she make palpable and overriding errors in her assessment of the appellant's physical injuries. She did, however, misapprehend the evidence of a psychiatrist, causing her to reject the proposition that the accident caused ongoing psychiatric problems. Assuming the psychiatrist's evidence is accepted, the non-pecuniary damages award must be revised upward to recognize the additional harm caused by the accident. It is not clear whether the error affected the judge's conclusions with respect to lost earning capacity or cost of future care. In the interests of efficiency, the matter is remitted to the trial judge to allow her to revise her assessment to deal with the psychiatric evidence.

- [1] GROBERMAN J.A.: Mr. McPhail was injured in a motor vehicle accident on December 12, 2012. The defendant admitted responsibility for the collision, and Mr. McPhail's claim went to trial to quantify his damages. The judge awarded him \$35,000 in non-pecuniary damages, together with special damages in the amount of \$2,475. She made no award for loss of earning capacity or for cost of future care.
- [2] The award was much lower than Mr. McPhail was seeking. It was also lower than the final settlement offer of \$100,000 that the defendant made in the days before the commencement of the trial. As a result of that offer, which the trial judge concluded ought to have been accepted, Mr. McPhail was granted costs only up to the week before the commencement of trial, with the defendant receiving costs for the period thereafter.
- [3] Mr. McPhail appeals to this Court. In his factum, which he prepared on his own, he alleges that the trial judge made numerous errors in her findings of fact. Indeed, his written argument takes issue with almost every important finding made by the judge. Many of the propositions put forward in the factum lack a foundation and are not arguable. Fortunately, Mr. McPhail was represented by counsel at the hearing of this appeal, and counsel has refrained from pressing points that are totally lacking in merit. He has concentrated on two arguments: that the judge's approach to the issue of credibility reflected errors in principle, and that the judge misapprehended certain psychiatric evidence.
- [4] For reasons that follow, I am not persuaded that the judge made any error in her approach to credibility. On the other hand, the judge does appear to have misconstrued some of the evidence given by the psychiatrist called by the respondent. It appears, therefore, that the non-pecuniary damage award requires some upward revision. It is also possible, though by no means certain, that the judge might have taken a different view on lost capacity to earn income and on cost of future care had the misapprehension not occurred. It is appropriate, in these circumstances, to remit the matter to the trial judge so that she can consider what changes need to be made to the award.

The Accident

- [5] The accident occurred on December 12, 2012. At that time, Mr. McPhail was a student in a master's program at the University of British Columbia. He was in good health prior to the accident, apart from a cyst in his groin that developed in May 2012. Mr. McPhail was physically active, particularly in cycling, swimming and skiing. He trained for triathlons. The cyst had, however, curtailed his cycling activities in the months prior to the accident.
- [6] At the time of the accident, Mr. McPhail was driving his Honda Civic along 4th Avenue West in Vancouver. The defendant's vehicle made a left turn onto 4th Avenue from a side street without stopping at a stop sign. It entered the street in front of Mr. McPhail's vehicle. Although Mr. McPhail attempted to take evasive action, swerving to the left, he could not avoid a collision. The force of the impact was sufficient that the passenger side airbag deployed in Mr. McPhail's vehicle. His vehicle was forced into the oncoming lane of traffic,

where a bus was approaching. Fortunately, the bus was able to come to a stop and did not hit Mr. McPhail's vehicle, but the experience was very frightening.

- [7] Mr. McPhail experienced significant pain in his neck, shoulders and back in the immediate aftermath of the accident, but no emergency personnel were called to the scene, and Mr. McPhail did not seek medical attention at that time. Although his car was, it appears, a write-off, it was sufficiently functional that he was able to drive it to his home, which was a few blocks from the accident site.

Post-Accident Recovery and Medical Evidence

- [8] Mr. McPhail saw his doctor two days after the accident, reporting neck and back pain and headaches, as well as "intrusive thoughts" about the oncoming bus. The doctor found that he had a limited range of motion in his neck and back. He considered that Mr. McPhail was suffering from neck and back strain, and also made a provisional diagnosis of post-traumatic stress disorder ("PTSD"). He advised Mr. McPhail to take over-the-counter analgesics to control the pain and to follow a course of physiotherapy. Mr. McPhail attended at the same medical clinic the following week, though he was seen by a different doctor. That doctor ordered x-rays, which did not disclose any acute injuries.
- [9] As a result of the accident, Mr. McPhail had to discontinue his running and swimming for awhile. He had, as I have indicated, already ceased riding his bicycle pending an operation to remove a cyst. That operation took place, as scheduled, on December 21, 2012. Shortly thereafter, Mr. McPhail went to San Francisco for a Christmas holiday with his parents and brothers. He described the trip as stressful.
- [10] Between January and May 2013, Mr. McPhail attended physiotherapy approximately three times a week. The physiotherapist took notes of the sessions. Those notes record Mr. McPhail's progress in returning to an active lifestyle, which was quite rapid. By January 15, 2013, he had begun to swim again, and in subsequent visits that month he reported playing volleyball, completing an 8-kilometre run, riding his bicycle for one hour without any sharp pain, and skiing.
- [11] At a session on April 16, 2013, Mr. McPhail reported that he was doing well, and felt that he was now functioning at "90%".
- [12] Mr. McPhail's progress in returning to training and activities is highlighted by his participation in the 122-kilometre GranFondo bicycle race between Vancouver and Whistler in September 2013. He completed the race in 4½ hours.
- [13] Despite the return to diverse athletic activities, Mr. McPhail maintained, at trial, that he had continued to suffer from debilitating pain.

- [14] In addition to physical activity, Mr. McPhail was also able to accomplish academic work. He continued to write his master's thesis, which he submitted in April 2013, and successfully defended in May of that year.
- [15] Mr. McPhail was unable to secure employment after he completed his degree, and eventually could not afford his rent and started living in his car. At the time of trial, he was homeless. He was employed as a labourer with a moving company. He attributed his inability to find work to the accident, though he did not provide the court with a full explanation of how the accident was connected to his lack of employment.
- [16] Mr. McPhail saw his general practitioner in June 2014 and in February and March 2015. He reported to him that he still had neck and back pain. The doctor noted some reduction from a normal range of motion and ordered an MRI. The MRI did not show any significant abnormalities.
- [17] Mr. McPhail was examined by three independent medical experts engaged by the respondent in April 2018: a neurologist, an orthopaedic surgeon, and a psychiatrist.
- [18] The neurologist was of the opinion that Mr. McPhail had suffered a whiplash injury. Although he was unable, when he examined Mr. McPhail, to give an opinion on either the seriousness or duration of the injury, he indicated that it was not likely to have been a severe injury, given the athletic pursuits that Mr. McPhail had been able to engage in. He considered that, at the time of his assessment, the whiplash symptoms were "trivial", and that they would continue to improve.
- [19] The orthopaedic surgeon determined that, at the time of examination, Mr. McPhail's range of motion was normal. Mr. McPhail was still reporting some pain and stiffness, as well as numbness, at least occasionally. There were, however, no clinical findings in respect of those complaints. The surgeon accepted that the pain and stiffness could "possibly" be a result of the 2012 accident but declined to accept that that was probable.
- [20] The psychiatrist examined Mr. McPhail primarily in relation to a claim that he was suffering from PTSD. His conclusion was that Mr. McPhail's symptoms did not fully meet the clinical criteria for PTSD. He diagnosed him as suffering from "unspecified trauma- and stressor-related disorder", a label that appears to cover symptoms similar to PTSD but failing to meet all of its diagnostic criteria. On the issue of the relationship of that disorder to the accident, he said, "In my opinion, Mr. McPhail developed the symptoms as a direct consequence of the MVA of 2012." In a supplementary report he noted:

Mr. McPhail reports ongoing pain since the MVA of 2012. He would benefit from seeing a Psychologist trained in CBT [Cognitive Behavior Therapy] for both chronic pain and trauma. CBT will help him learn psychological skills to deal with his reported chronic pain. The psychologist could also help clarify psychological contribution towards his symptom of pain.

The Findings of the Trial Judge

- [21] The judge noted the contrast between Mr. McPhail's account of his pain and slow recovery and the evidence of his relatively quick return to strenuous physical training and competitive activity, as well as his completion of his master's thesis in the first few months following the accident. She noted that, in the absence of objective evidence supporting his claim, she would exercise caution in finding that it was established:
- [102] Where, as here, a plaintiff's case relies on subjective symptoms with little or no objective evidence of continuing injury, the court must be exceedingly careful in examining the evidence and assessing credibility: *Price v. Kostyba* (1982), 70 B.C.L.R. 397 (S.C.).
- [103] I do not doubt Mr. McPhail's intelligence. However, I have concluded that I must approach most of Mr. McPhail's evidence, especially where it relates to his pre- and post-accident prospects, with a great deal of caution.
- [104] Mr. McPhail was in the difficult and challenging position of presenting his own case. However, he was very strongly committed to the perspective that, in a life that was full of promise before the accident, the accident devastated all of his hopes and plans. In my view, that perspective permeated the whole of his evidence. To put it another way, in giving his evidence, Mr. McPhail was unable to resist arguing his case. He was incapable of resisting the influence of interest in building his case, and incapable of presenting facts and events in anything close to an objective way. His description of events, including his use of language (which was often conclusory rather than factual), was, in my view, being tailored specifically to argue his case. All of this damaged both his credibility and his reliability.
- [22] The judge's concerns about Mr. McPhail's evidence were particularly important, as his only witnesses were himself and his general practitioner. He failed to call any collateral or independent witnesses who might shed light on his pre- and post-accident situations. The judge said:
- [111] I have only Mr. McPhail's evidence - essentially, his opinions - about his employment prospects after completing his Master's degree. Independent evidence and collateral information, which might provide some objective basis for his opinions, are altogether lacking. Given the need to establish a causal link between the accident and the injuries he sustained, and what Mr. McPhail claimed were his post-accident losses, the lack of credible and reliable evidence in this area is a major weakness for Mr. McPhail's case.
- [112] [The general practitioner's] opinion evidence is largely based on Mr. McPhail's subjective reports, with little in the way of objective findings that can be related in any meaningful way to the accident. Mr. McPhail was the only source of information concerning his circumstances when [the doctor] saw Mr. McPhail for the last time. Because of the problems with Mr. McPhail's credibility and reliability, I can give [the doctor's] opinion evidence, to the extent it differs from the other opinion evidence, very little weight. His opinion concerning the extent of Mr. McPhail's disability is not consistent with other evidence, for

example, [the physiotherapist's] evidence concerning Mr. McPhail's reports of increased activity and progress at physiotherapy, that I accept. [The general practitioner] appeared to be unaware that Mr. McPhail had never followed [his] recommendation, given at the appointment on December 14, 2012, to take analgesics for pain. In addition, since the facts underlying [his] opinion that Mr. McPhail is "still partially disabled" have not been set out in his report, I cannot give that opinion any weight. The same is true with respect to his diagnosis of PTSD, which is stated as a conclusion based on Mr. McPhail's self-report and without any reasoning to justify it.

[Emphasis in original.]

- [23] She concluded that the absence of independent evidence left her unable to conclude that Mr. McPhail had made out a case for a large damages award:
- [117] Mr. McPhail asserts he is entitled to very substantial awards for both non-pecuniary damages and loss of earning capacity. Indeed, he asserts a claim in the millions of dollars for the latter. However, as part of his evidentiary burden, he must prove, on a balance of probabilities, a causal connection between the injuries sustained and what he claims are his losses. In my opinion, the absence of any independent evidence based on which I might infer some causal connection between the injuries Mr. McPhail claims to have sustained in the accident and the substantial damages he claims he has suffered, combined with my very significant concerns about Mr. McPhail's credibility and reliability, mean that Mr. McPhail has failed to prove that he is entitled to such damages.
- [24] At para. 119, the judge accepted that Mr. McPhail had "sustained whiplash type, or soft tissue, injuries to his neck and back, as well as some psychological symptoms." At para. 122, she found that "by mid-April 2013, the symptoms from his soft-tissue injuries had substantially resolved to the point where he was feeling 90%." This finding was based largely on Mr. McPhail's self-report to his physiotherapist and on the physiotherapist's own observations. The judge found, further, that "by the time Mr. McPhail did his successful thesis defence in May 2013, he had essentially recovered, physically and psychologically, from the effects of the injuries he sustained in the accident." While the judge did not doubt the general practitioner's finding that there was some reduced range of motion in June of 2014, she was unable to attribute that finding to the accident.
- [25] At para. 126, the judge addressed the psychiatric diagnoses. She indicated that she considered the expert report of the psychiatrist to be more persuasive than that of the general practitioner. She stated, "I note that [the psychiatrist] did not draw a causal link between his psychiatric diagnosis of Unspecified Trauma- and Stressor-Related Disorder and the accident. Thus, while I accept [his] opinion evidence concerning the psychiatric diagnosis for Mr. McPhail as of April 2018, I am unable to find that the condition was caused by or resulted from the accident."

[26] As I have indicated, the psychiatrist's report did draw a causal link between the accident and the symptoms exhibited by Mr. McPhail in April 2018. He further confirmed the link in the course of his cross-examination:

I used [the diagnosis of "]unspecified trauma- and stress[or]-related [disorder"] to acknowledge that you do have ongoing symptoms because of that accident but you don't meet the full criteria [of PTSD].

The Credibility Findings

[27] Counsel who appeared for Mr. McPhail on the appeal acknowledged that there was evidence capable of supporting the judge's finding that the physical injuries resolved themselves by April 2013. He put forward, as I have indicated, two arguments on the appeal: first, that the judge had erred in her approach to findings of credibility; and second, that the judge misapprehended the evidence of the psychiatrist.

[28] In respect of credibility findings, counsel cited *Malak v. Hanna*, 2019 BCCA 106 for the proposition summarized at para. 113 of that decision:

[113] Disbelief of a witness is not proof of the opposite: *Haynes v. Haynes*, 2017 BCCA 131 at para. 20, 97 B.C.L.R. (5th) 63. To paraphrase Lord Justice Scrutton in *Hobbs v. C.T. Tinling & Co.*; *Hobbs v. Nottingham Journal Ltd.*, [1929] 2 K.B. 1 at 21 (C.A.), if a man testifies he did not go to Rome and is disbelieved, that is not evidence he went to Rome.

[29] While the proposition is undoubtedly a sound one, I am not persuaded that it has any application to this case. The onus of proving his injuries was on Mr. McPhail. To the extent that his evidence was not credible, he failed to meet that onus. I do not see that the judge, in any part of her judgment, treated Mr. McPhail's statements as proof of the opposite of what he said. Rather, once Mr. McPhail's evidence was discounted, there was simply no evidence to support the inferences he sought to have drawn.

[30] There was an abundance of evidence calling into question the nature and extent of Mr. McPhail's injuries. Indeed, it would have been difficult for any judge to square Mr. McPhail's description of his circumstances with the objective evidence of his physical capabilities in the months following the accident and at the date of trial. In particular, it is noteworthy that Mr. McPhail engaged in extensive and physically demanding athletic activities, and later took employment doing heavy labour work as a mover.

Misapprehension of the Psychiatric Evidence

[31] As I have indicated, the trial judge appears to have misapprehended the evidence of the psychiatrist. The psychiatrist did draw a causal link between Mr. McPhail's psychiatric diagnosis of unspecified trauma- and stressor-related disorder and the accident, though the judge appears to have understood that he did not. Further, the judge did not deal with the psychiatrist's opinion that the psychological harm caused by the accident continued to exist

at the date he examined Mr. McPhail in 2018. This opinion would appear to be contrary to the judge's finding that Mr. McPhail had essentially recovered from his psychological injuries by May 2013.

- [32] The respondent says that the damages award was within the appropriate range, even if the continuing psychological condition did not form part of the basis for the judge's award. In my view, the failure of the judge to consider what might be an important component of the damages in making her award cannot be dismissed simply by considering whether, in some sense, the damages awarded might fall within an appropriate range. Mr. McPhail was entitled to have his continuing psychological injury assessed by the judge.
- [33] At the very least, the continuing psychological injury does not appear to be a trivial one, and would appear to justify at least a modest increase in general damages. Depending on the judge's assessment of the injury, it might be seen as more important. There is even a possibility that the judge might wish, in light of the psychiatrist's evidence, to reassess her conclusion that no loss of earning capacity or cost of future care has been proven.
- [34] It is impossible for us to know what impact resulted from the judge's misapprehension of the psychiatrist's evidence. It will, however, be a comparatively straightforward task for her to reconsider the award in light of what the psychiatrist said in his report and in his testimony. In the interests of efficiency, the matter should be remitted to the trial judge in order for her to reconsider the issue.

Conclusion

- [35] I would, therefore, allow the appeal and remit the matter back to the trial judge in order to allow her to reconsider the assessment of damages in light of the psychiatrist's evidence that the accident caused Mr. McPhail's unspecified trauma-and stressor-related disorder and that that disorder continued at the date of trial.
- [36] I would leave it to the trial judge to determine whether, given the time that has now passed, further evidence should be heard on the issue.
- [37] I am satisfied that the appellant has had substantial success on the appeal. He is entitled to his costs of the appeal.
- [38] FITCH J.A.: I agree.
- [39] HUNTER J.A.: I agree.
- [40] GROBERMAN J.A.: The appeal is allowed and the matter is remitted back to the trial judge in order to allow her to reconsider the assessment of damages in light of the psychiatrist's evidence that the accident caused Mr. McPhail's unspecified trauma-and stressor-related disorder.

"The Honourable Mr. Justice Groberman"

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