

CANADA / JUDGMENT

Nielsen v. Gabriel

2023 BCSC 186

COURT

Supreme Court of British Columbia

DECIDED

8 February 2023

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2023 BCSC 186 Nielsen v. Gabriel

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Nielsen v. Gabriel,

2023 BCSC 186

Date: 20230208

Docket: M159333

Registry: Vancouver

Between:

Raquel Nielsen

Plaintiff

And

The Sunshine Coast Regional District, Her Majesty the Queen in Right of the Province of British Columbia, as represented by the Ministry of Transportation and Infrastructure, Rockline Construction Ltd. and Hilbar Enterprises, Inc. dba Capilano Highway Services Company and Daniel Robert Gabriel

Defendants

Before: The Honourable Madam Justice W.A. Baker

Reasons for Judgment

Counsel for Plaintiff:

K.E. Hennebery

The Defendant, appearing in person:

Daniel Gabriel

Place and Date of Hearing:

Vancouver, B.C.

January 30, 2023

Place and Date of Judgment:

Vancouver, B.C.

February 8, 2023

I. Introduction

- [1] On July 3, 2014 Ms. Nielsen was driving along Highway 101 near Wilson Creek, B.C. Mr. Gabriel was driving towards her and swerved to avoid a deer. His car crossed the centre line of the highway striking Ms. Nielsen's car on the driver's side near the centre between the front and rear doors. Ms. Nielsen was injured and seeks non-pecuniary damages, damages for past wage loss, and special damages.
- [2] Mr. Gabriel was uninsured at the time of the accident.
- [3] Ms. Nielsen initially claimed against a number of defendants. However, the claims against all but Mr. Gabriel were dismissed under a consent order prior to this application.
- [4] The matter proceeded by way of summary trial before me. While Mr. Gabriel did not file a response to the application, he did appear without counsel and made brief submissions.
- [5] On January 9, 2023 Ms. Nielsen issued a notice to admit to Mr. Gabriel, seeking the admission of facts set out in six numbered paragraphs. Before me, Mr. Gabriel stated he did not really understand the import of the final admission, which was that he admitted his negligence caused the accident. He agreed with the other five paragraphs in the notice to admit. The key paragraph, which Mr. Gabriel does not dispute, is paragraph five:

The Accident was caused when the defendant Daniel Gabriel slammed on his brakes and swerved into the eastbound lane, to avoid a deer on the road, colliding with the plaintiff's vehicle.

II. Issues

- [6] This case raises the following issues:
- Is this matter appropriate for determination pursuant to Rule 9-7?
 - Is Mr. Gabriel liable for the accident as alleged by the Ms. Nielsen?
 - Did the accidents cause or exacerbate Ms. Nielsen's injuries?

d) Is Ms. Nielsen entitled to any damages?

III. Analysis

A. Is this matter appropriate for determination pursuant to Rule 9-7?

- [7] This a very straightforward case. Ms. Nielsen recovered from her injuries, and is now effectively retired. Ms. Nielsen is only seeking three heads of damage. Total damages sought are a maximum of \$160,000.
- [8] Liability can be determined on the basis of the notice to admit and the other evidence led by way of affidavits. Mr. Gabriel filed no affidavits and, therefore, there is no conflict in the evidence before me. Mr. Gabriel made no submissions that the case was not ready to proceed, or that he was opposed to the action being resolved in summary fashion.
- [9] The accident occurred almost nine years ago. The trial was scheduled and adjourned twice before.
- [10] I am satisfied that the matters in dispute can be fairly resolved in a summary trial, and the interests of justice are served in resolving this action on this application.

B. Is Mr. Gabriel liable for the accident?

- [11] Mr. Gabriel advised me that he was not represented by counsel when he agreed to the notice to admit and, on reflection, he probably should not have admitted that his negligence caused the accident. While he agrees that he caused the accident, he says the accident occurred because he was avoiding a hazard on the road, namely the deer that had entered the highway.
- [12] Mr. Gabriel will be found liable if he created an objectively unreasonable risk of harm when he swerved into the oncoming traffic. Mr. Gabriel admitted he slammed on his brakes and swerved into the oncoming traffic. Swerving into oncoming traffic clearly creates an objectively unreasonable risk of harm to those cars in the opposite lane, such as Ms. Nielsen.
- [13] While it is reasonable to try to avoid hitting a deer, it is possible that other steps could have been taken which would not have resulted in swerving into oncoming traffic and striking Ms. Nielsen's car. I have no evidence before me that would allow me to find that Mr. Gabriel acted reasonably in the efforts he took to avoid the deer. For example, I have no evidence of the speed Mr. Gabriel was travelling, road conditions on the day of the accident, the visibility at the time and place of the accident, where the deer came from, whether Mr. Gabriel could have swerved into the shoulder on his side of the road, or whether necessity required him to swerve into the oncoming traffic.
- [14] The only evidence I have before me is that Mr. Gabriel swerved into oncoming traffic. I find that Mr. Gabriel was negligent in his control of his vehicle on July 3, 2014, and his negligence resulted in the accident at issue.

C. Did the accidents cause or exacerbate Ms. Nielsen's injuries?

1. Ms. Nielsen's abilities and health pre-accident

[15] Ms. Nielsen was 59 years old at the time of the accident. She was employed by BC Ferries, and had been working there since 1995.

[16] In January 2014 Ms. Nielsen was in a single vehicle car accident, when she lost control of her car on black ice on Highway 101, and landed in the ditch. In the January accident, Ms. Nielsen suffered a number of injuries. She attended her treating physician who noted the following issues on examination:

- a) Post concussion syndrome,
- b) Myofascial dysfunction to the neck and lower back,
- c) Post traumatic stress disorder affecting her ability to drive to work, and
- d) Hypertension.

[17] Ms. Nielsen had a large hematoma on her head as a result of the accident, which required a CT scan. She experienced headaches, which were made worse with physical and cognitive exertion, and she experienced sensitivity to noise and bright lights. She experienced tenderness over her cervical and lumbar spine and had reduced range of motion. She had some pain and restricted movement in her right shoulder.

[18] Ms. Nielsen received appropriate treatment and therapies. By May 2014 she had some residual effects of her physical injuries, and continuing issues with stress and anxiety.

[19] On June 5, 2014, Ms. Nielsen attended her physician, reporting that she had injured her back at work. She was diagnosed with a sprain, and placed on pain reliever medication. Her doctor assessed that Ms. Nielsen was still continuing with late effects of injuries and trauma. However, Ms. Nielsen was cleared to return to work on June 8, 2014, on a graduated basis for 8 days, and then a return to full time work.

2. Ms. Nielsen's abilities and health post-accident

[20] After the July accident, Ms. Nielsen again attended her treating physician. The concerns noted at that time included:

- a) Exacerbation of post traumatic stress disorder,
- b) Myofascial dysfunction of neck and shoulder,
- c) Right shoulder pain and limited range of movement (internal rotation) due to tendinopathy, right supraspinatus tendon tear, and right subacromial impingement,
- d) Paresthesia and radicular symptoms to right hand, and
- e) Deconditioning of muscles due to disuse.

- [21] Ms. Nielsen received appropriate treatment for her injuries, and attended physical therapies as recommended.
- [22] Ms. Nielsen had to stop work as a result of her injuries, and did not return to work until April 2015. Upon her return to work, her repetitive job duties aggravated her pain in her right shoulder. After about six months of pain at work, Ms. Nielsen had to take a second disability leave in November 2015. In February 2016, following an MRI, Ms. Nielsen was diagnosed with a tear in the supraspinatus tendon.
- [23] At the date of this application, Ms. Nielsen's injuries had mostly resolved. Her post traumatic stress disorder is resolved. She still experiences neck pain which she says can cause headaches. Her right shoulder pain is resolved. She sometimes experiences lower back ache, which is brought on by sitting for long periods of time and lifting heavy objects.
3. Causation
- [24] Mr. Justice Kent, in *Kallstrom v Yip*, 2016 BCSC 829, summarized the law of causation:
- [318] The basic legal principles respecting causation are found in the seminal case of *Athey v. Leonati*, 1996 CanLII 183 (SCC), [1996] 3 S.C.R. 458, repeated many times since, and which include:
1. the general, but not necessarily conclusive test for causation is the "but for" test requiring the plaintiff show his injury and loss would not have occurred but for the negligence of the defendant;
 2. this causation test must not be applied too rigidly. Causation need not be determined by scientific precision as it is essentially a practical question of fact best answered by ordinary common sense;
 3. it is not necessary for the plaintiff to establish that the defendant's negligence was the sole cause of the injury and damage. As long as it is part of the cause of an injury, the defendant is liable; and
 4. apportionment does not lie between tortious causes and non-tortious causes of the injury or loss. The law does not excuse the defendant from liability merely because causal factors for which he is not responsible also helped to produce the harm.
- [25] In assessing damages, the "defendant is liable for the injuries caused, even if they are extreme, but need not compensate the plaintiff for any debilitating effects of the pre-existing condition which the plaintiff would have experienced anyway. The defendant is liable for the additional damage but not the pre-existing damage.": *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 35; *Danroth v. Dufresne*, 2021 BCSC 864.
- [26] Therefore, if I find that there is a realistic chance that some or all of Ms. Nielsen's present injuries or conditions would have occurred at some point in the future even had the July accident not occurred, then I must reduce the overall damage award to reflect this

possibility.

- [27] On the other hand, if I find that any of Ms. Nielsen's pre-existing conditions were not likely to worsen, but for the accident, but those conditions rendered her more vulnerable to the effects arising from the accident, she is to be compensated. The defence is liable for any damages arising from his negligence, "even though the plaintiff's losses are more dramatic than they would be for the average person": Athey at para. 34.
- [28] While Ms. Nielsen has some ongoing pain in her back, and suffers from headaches, I am not satisfied those were caused or aggravated by the July accident. I find Ms. Nielsen's back pain arose because of the January accident and the back strain she suffered at work. There is no medical evidence which satisfies me that Ms. Nielsen suffered a back injury in the July accident. Similarly, Ms. Nielsen injured her head in the January accident, and reported headaches following the January accident. Dr. Tong's opinion does not support headaches associated with the July accident.
- [29] However, the shoulder pain experienced by Ms. Nielsen was clearly exacerbated by the July accident. There was some evidence of a shoulder injury in the January accident. That earlier accident might have rendered Ms. Nielsen more vulnerable to the more serious shoulder injury which resulted from the July accident. However, Mr. Gabriel must take Ms. Nielsen as she was at the time of the accident.
- [30] Mr. Gabriel submits that Ms. Nielsen has established no baseline data, such as an MRI which predated the July accident, to demonstrate that the shoulder injury resulted from the accident. It is unlikely that most people can resort to a pre-accident medical work up to demonstrate their baseline before the accident. That would be an unreasonable burden to impose upon plaintiffs in proving their case. Immediately after the accident, Ms. Nielsen attended at her doctor's office reporting pain in her right shoulder which required numerous interventions in the following months, including physiotherapy, and a number of visits to an orthopedic surgeon. While Ms. Nielsen had some soft tissue pain from the January accident, I am satisfied that the severity of her shoulder injury greatly increased following and as a result of the July accident.
- [31] Similarly, Ms. Nielsen's post traumatic stress disorder, which began with the January accident, was exacerbated by the July accident. She experienced flash backs to the earlier accident, and returned to her psychiatrist for further treatment.
- [32] I am satisfied that Ms. Nielsen has established on a balance of probabilities that the July accident caused or materially contributed to Ms. Nielsen's injuries to her right shoulder and neck, and her post traumatic stress disorder.

D. Is Ms. Nielsen entitled to damages?

- [33] The plaintiff claims non-pecuniary damages, damages for past loss of income, and special damages.

1. Non-pecuniary damages;

[34] Non-pecuniary damages are awarded to compensate a plaintiff for pain, suffering, loss of enjoyment of life, and loss of amenities. As stated by our Court of Appeal in *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46:

[46] The inexhaustive list of common factors cited in *Boyd* [*Boyd v. Harris*, 2004 BCCA 146] that influence an award of non-pecuniary damages includes:

- (a) age of the plaintiff;
- (b) nature of the injury;
- (c) severity and duration of pain;
- (d) disability;
- (e) emotional suffering; and
- (f) loss or impairment of life;

I would add the following factors, although they may arguably be subsumed in the above list:

- (g) impairment of family, marital and social relationships;
- (h) impairment of physical and mental abilities;
- (i) loss of lifestyle; and
- (j) the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff: *Giang v. Clayton*, [2005] B.C.J. No. 163 (QL), 2005 BCCA 54).

[35] Ms. Nielsen seeks non-pecuniary damages in the range of \$75,000 to \$95,000. Mr. Gabriel submitted no position on non-pecuniary damages.

[36] Ms. Nielsen relies on *Jenkins v. Irving*, 2020 BCSC 391, *Khakh v. Josol*, 2020 BCSC 286, and *Honeybourn v. Aghdasidehaji*, 2022 BCSC 258 where awards ranged from \$90,000 to 100,000 for plaintiffs suffering soft tissue injuries, chronic pain and resulting psychological injuries.

[37] Each case is unique. Non-pecuniary damages must be assessed taking into account the unique factors arising in the case at bar. None of the cases relied on by Ms. Nielsen are particularly helpful, as they address plaintiffs with serious continuing chronic pain.

[38] In the case before me, Ms. Nielsen did suffer an exacerbation of her shoulder injury, which took several years to heal, and also suffered from an exacerbation of her post traumatic stress disorder which took a year to resolve. These injuries she suffered in the accident have resolved. I do not agree that her remaining periodic back pain and headaches resulted from the July accident.

[39] I was not provided with any evidence as to ongoing impacts to Ms. Nielsen's lifestyle, impairment of life, impacts on relationships, or modifications required to maintain her physical health in the face of her injuries. She was off work for a substantial period of time, and later in this decision I will deal with the financial impact of her inability to work. I am satisfied that Ms. Nielsen did suffer pain from her ongoing injuries until they resolved, and Ms. Nielsen is entitled to compensation for her pain. However, the award proposed by Ms. Nielsen is not reflective of the impact of the injuries on her life. I am satisfied that Ms. Nielsen is entitled to an award of \$25,000 for non-pecuniary damages.

2. Past wage loss

[40] Ms. Nielsen does not seek an award for loss of earning capacity. She advances a claim for past wage loss only.

[41] Ms. Nielsen was employed by BC Ferries as a second cook since 1995, and was in that position at the time of the January and July accidents. She was off work from the January accident for several months, and was just completing her gradual return to work when the July accident happened.

[42] Following the July accident, Ms. Nielsen was off work for approximately 10 months, returning to work in April 2015. Unfortunately, her work caused her shoulder injury to flare up, and in November 2015 she went off work again for another nine months. I am satisfied that Ms. Nielsen was off work for two reasons resulting from the July accident, namely her post traumatic stress disorder in the initial months, followed by her injuries to her shoulder which prevented her return to full time work until early July, 2016.

[43] Ms. Nielsen received benefits from Canada Life during all of the time she was off work after July 3, 2015, in the gross amount of \$45,169.42. Canada Life asserts a subrogated claim to recover the benefits paid to Ms. Nielsen.

[44] Canada Life prepared a schedule setting out the total wage loss suffered by Ms. Nielsen, based on an average monthly income of \$4,520/month. Her gross wage loss, after July 3, 2015, as calculated by Canada Life is \$88,637.25. Ms. Nielsen submits a marginal tax rate of 28.20%, based on an average annual income of \$60,000, should be applied, resulting in a net wage loss of \$63,642.

[45] I find the calculation prepared by Canada Life to be reasonable and consistent with the pre-accident earnings of Ms. Nielsen. I award Ms. Nielsen damages for past wage loss in the amount of \$63,642.

3. Special damages

[46] As a result of her injuries sustained in the July 3 accident, Ms. Nielsen attended 67 physiotherapy sessions beginning on July 15, 2015 and completing on January 17, 2017. In addition, Ms. Nielsen attended two massage therapy sessions in 2019. The special damages claimed total \$2,204.74. Mr. Gabriel did not take issue with the special damages claimed, and the sessions appear to be consistent with the recommendations recounted in the report of Dr. Tong.

[47] I find the special damages claimed to be reasonable, and award special damages in the amount of \$2,204.

IV. Conclusion

[48] Ms. Nielsen is awarded the following damages against the defendant:

a) Non-pecuniary damages

\$25,000

b) Past loss of earning capacity

\$63,642

c) Special damages

\$2,204

[49] The total damages are awarded in the amount of \$90,846.

[50] I award costs to Ms. Nielsen at Scale B.

"W.A Baker J."

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