
CANADA / JUDGMENT

Nowicki v. Moslehi

2003 BCSC 425

COURT

Supreme Court of British Columbia

DECIDED

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Oral Reasons for Judgment

The Honourable Mr. Justice Crawford

March 5, 2003

BETWEEN:

BEATA NOWICKI

Plaintiff

AND:

Arash Moslehi

Defendant

Counsel for the Plaintiff by teleconference:

M. Maryn

Counsel for the Defendant by teleconference:

M. Martin

- [1] THE COURT: I will read from my notes, and I will claim editorial ability later if these are printed and need any revisions, which I trust are minor.
- [2] This is a motor vehicle case. The plaintiff seeks summary trial of her claim for damages for her personal injuries arising from a motor vehicle accident. The defendant has a jury trial set to begin on March 17, 2003; a number of days, 12 days away, as we look at it today.
- [3] Ms. Martin has vigorously opposed the Rule 18A application. She says it is late. She wants examination of the plaintiff's doctor. She says there are significant differences in the medical opinions. She says the plaintiff's evidence is exaggerated, unreliable, and credibility is an issue. Amongst other things, she points to the use of the interpreter at discovery but not on affidavits, the variations in statements given to doctors and others, the questions as to wage loss, and the like. Her arguments were well put. There is a good deal of case law on this issue. Counsel provided same to me and I will briefly refer to some of the authorities.
- [4] Mr. Justice Harvey, in *Brayshaw v. Sommerfeld*, 1996 BCJ 432, reviewed eight judgments of the court at that time where the plaintiff had sought damages for personal injuries from a motor vehicle accident, liability was admitted, and the defendant sought a trial by jury. He concluded disposition under Rule 18A was appropriate where (a) the claim is a modest one and the work loss is minimal, (b) there is no suggestion of malingering, (c) the case is not complicated, (d) there is an absence of any obvious or serious inconsistencies in the evidence or anything to suggest the claim is bogus, (e) there is no serious issue as to the plaintiff's credibility.
- [5] In 1998, Mr. Justice Harvey, in *Hagerty v. Connor*, 1998 BCJ 1773, noted the judgments he was referring to were in the \$12,000 range. However, more recently, the Court of Appeal in *Mattu v. Mattu*, 2001 BCCA 140, noted that 18A applications should not be limited by Mr. Justice Harvey's observations regarding the modest claim.
- [6] If I can just refer to that, there the judgment of the court was delivered by Chief Justice Finch, and in para. 8 he noted the defendants say judgment under Rule 18A should be limited to cases where the claim for damages is modest, citing *Brayshaw v. Sommerfeld*.
- [7] In para. 9 he says:

With respect, I do not believe that applications under Rule 18A are subject to any such limitations. I would not be prepared to add qualifications to the use of Rule 18A beyond those expressed by this court in *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1998) 36 B.C.L.R. (2d) 202 (C.A.).

- [8] In para. 10 he says:

While the amount potentially involved is a matter the summary trial judge may properly take into account when deciding whether to proceed under the Rule, it is not determinative. Many cases involving substantial claims have been heard and disposed of under the rule.

[9] Much of what Mr. Justice Fraser Wilson said in *Caleta v. Honaizer*, 2001 BCSC 1726, I find applicable here. In para. 3 of his decision, he noted that:

Counsel for the defendant submits that the matter should not be determined summarily, pursuant to Rule 18A, upon the grounds that there are conflicts in the medical evidence, that the complaints of the plaintiff are subjective, and that there are inconsistencies, and a propensity of the plaintiff to overstate his complaints, which would be particularly useful for cross-examination before a jury. He relied particularly on a party's right to require a jury trial ...

[10] That is much the same argument put by Ms. Martin in this case. He further notes, however, in *Mattu v. Mattu*, that Chief Justice Finch considered the *Brayshaw v. Sommerfeld* requirements and, as I noted, did not think the applications under Rule 18 should be so limited (i.e. to "modest" claims).

[11] He noted that in *Inspiration Management* Chief Justice McEachern stated if the chamber judge can find the facts, then he must give judgment as he would upon a trial, unless, for any proper judicial reason, he has the opinion it would be unjust to do so.

[12] I also note, in para. 4, Mr. Justice Fraser Wilson said this:

In this case, I am satisfied that it is appropriate to grant judgment under Rule 18A, notwithstanding the defendant's election of a trial by judge and jury. Liability for the accident, although not admitted, was not seriously in dispute; there was no affidavit of the defendant filed regarding the circumstances of the collision. Although there are some differences between the medical report of the plaintiff's family physician and the specialist retained by the defendant, they are in substantial agreement with respect to the diagnosis and prognosis. The complaints of the plaintiff are not "objective" in the sense that he has no broken bones or injuries which would show up on x-rays. The doctors must thus rely on his complaints, which may have been exaggerated during his evidence taken in his examination for discovery; but that is not out of the ordinary for soft tissue injuries, and certainly does not make an assessment based on affidavits unjust. On the other hand, the claim is a relatively small one, and the savings to both parties is a factor to be taken into account.

And he went on to deal with the 18A application.

[13] This is not a complex matter, in my view. The claim is modest. The cost of a trial will be expensive. I also refer to the words of Mr. Justice K.J. Smith (as he then was) in *Way v. Frigon*, 2001 BCSC 573, para. 21.

[14] In my view, the claim is modest, the facts necessary for judgment are discernible, and judgment can be given.

- [15] I now propose to review the materials provided.
- [16] Ms. Nowicki is 44, a mother, and a healthcare worker. The car accident occurred on September 20, 2000. The plaintiff claims she sustained injuries to her neck, her back and hips, and resulting headaches. Liability is admitted. The trial notice was given on September 10, 2001. The defendants filed notice of trial by jury October 12, 2001. Examination of the plaintiff took place on February 28, 2002.
- [17] In the early part of this year, there was a late flurry of activity on both sides. The plaintiff sought summary trial, in a late report of the family doctor and a consequent court-ordered independent medical assessment by Dr. Boyle. As well, there has been late provision by the defendant of an engineering opinion. The issues really, though, are the extent of the injuries in a minor motor vehicle collision and the lost-income claim of the plaintiff.
- [18] I will touch on some of the affidavit evidence. Ms. Nowicki gave an affidavit and deposed in that, on January 31, 2003, that the motor vehicle accident took place at Moody and Spring Street in Port Moody, and Nowicki's 1991 Geo Tracker was rear-ended by a 1990 Mazda 626. She gave a statement to I.C.B.C. on September 25, 2000. She stated she was a personal care attendant for a physically-handicapped lady and had been so for some five-and-a-half years. She worked four days a week, 8:30 to 4:30. The accident occurred at 6:30 p.m. on September 20, 2000. The Nowickis' motor vehicle was stopped when it was rear-ended. She was wearing her seatbelt. She said the collision occurred without warning. She had no initial complaints, but later felt sore in her shoulders and neck and had a headache.
- [19] On September 22, she saw her family doctor. On September 25, the day of her statement, she said that she felt pain in her hips and neck, but the headache was gone. She had no prescription for medications. She noted she had two children, age 17 and 14.
- [20] Mr. Nowicki's statement noted the Tracker was pushed forward at impact "a little bit into the traffic". Apparently both cars then drove across the intersection and stopped, and they exchanged the relevant information. Mr. Nowicki noted damage to the Tracker's right-rear bumper and the front of the Mazda motor vehicle. Mr. Nowicki was not injured in the car collision. The police were not called.
- [21] Repairs to the Mazda's fender, headlight, signals and hood were estimated at \$2,379.34, while the Tracker's bumper and related items were estimated at approximately \$500.
- [22] The defendant driver provided an affidavit where he said that he was coming to a stop at the time of the collision. He does not say why he did not stop before the impact. He does not say what the location of the motor vehicle was after the impact. No one appeared injured at the time.

- [23] Going back to Ms. Nowicki's affidavit, she said that Dr. Tomaszewski, her family doctor, suggested the plaintiff take some time off and get massage therapy. I will come back to Dr. Tomaszewski's evidence later. She started massage therapy on October 3, and took six treatments. She said that did not help her.
- [24] In mid-October, I note she went to hospital emergency, complaining of a sore neck. In late October 2000, she went to a chiropractor and had some 16 treatments. Those range into 2002. She said they were most helpful.
- [25] She says her neck pain has continued to the present time and it is all the time. Her headaches only occur when her neck pain flares. Her back pain, she says, has plateaued and is aggravated by lifting and bending at work. However, there is nothing specific in the information provided in her affidavits that is of assistance to the court. She is not specific about her hips in any fashion there. The generalities do not give any specifics.
- [26] Dr. Tomaszewski provided a report. It is dated January 19, 2003. It is late, having regard to Rule 40A and a trial date of March 17, 2003, but I do note the request for the doctor's letter was made on November 21, 2002.
- [27] Dr. Tomaszewski has practiced in British Columbia since 1985 as a family physician. He notes that the plaintiff's past history was unremarkable. She had no prior history of neck or back complaints. Nothing in his reports records objective findings of injury to the plaintiff. In fact, cervical motion on the first visit is recorded as normal.
- [28] He sees the plaintiff September 22 and 28, October 12, 16 and 31, and November 20 of the year 2000. He does not see the plaintiff, then, at least related to this matter, until December 6, 2001, when she complains of some recurrent pain between her shoulder blades. At that time, she told him she, in her view, thought she had recovered 50 percent of her pre-accident health, whatever that might mean. She said she was attending chiropractic and massage therapy.
- [29] Because of the request for the medical report in November of 2002, Dr. Tomaszewski saw the plaintiff on January 18, 2003. She continued to complain of pain between her shoulder blades. She said there had been no improvement since December 2001; that she had attended massage therapy irregularly and was taking Advil and Ibuprofen.
- [30] In summary, he finds this 44-year-old female patient sustained soft tissue injury to the neck, back, and anterior chest wall as a result of the motor vehicle accident of September 20, 2000. He says it appears to him that the recovery reached a plateau December 2001, and that she continued to be symptomatic with pain between the shoulder blades, aggravated by work and any lifting and transferring of patients.
- [31] I note, then, no mention of neck, no mention of headache, no indication of low back or hip pain; only some symptomatic pain between the shoulder blades. All of that is based on the subjective complaints of Ms. Nowicki.

- [32] As to her wage loss, Ms. Nowicki deposed that she was off work, she says, some 59 days, plus lost overtime, and the calculation is made in para. 21 of her affidavit, indicating an overall loss of income for the period from the time of the accident into January of 2001 in the amount of \$13,726.80.
- [33] She also puts forward other expenses that have been incurred, for massage treatment and for chiropractic treatment and travel, at \$420.
- [34] There is mention in the medical reports proffered of a knee injury in May, 2001. In my view, this bears no relation and has no effect on her motor vehicle claim.
- [35] In the affidavit of Ms. Boyal, who works in the office of the defendant solicitor, is contained a report of Mr. Ising, an engineer, dated December 12, 2002, but I understand not served until January 23, 2003. Shortly put, it estimates a velocity change in the vehicles of 3.7 to 7.4 kilometres at impact. It notes the repair sheets and the contact would be much as I have already indicated. It would be between the left front of the Mazda vehicle and the right rear of the Geo Tracker.
- [36] There is little information provided to the court regarding the plaintiff's limitations, if any, due to her injuries. The nature of her work is such that it is indeed heavy work, aiding a lady crippled by multiple sclerosis who I understand weighs some 160 pounds. She bathes and cleans this lady. It involves diaper changing, changing clothing and bedding, laundry work and housework, so her work is physically demanding.
- [37] There are complaints of lack of disclosure on the part of Dr. Tomaszewski. Indeed, he seems to have edited some of his clinical records and not provided all that he might have, and there may be other medical consultations. But the plaintiff in this case has brought the 18A application and I have to deal with what evidence I have before me.
- [38] While there have been some concerns expressed by the defendant as to the wage loss claim, I am satisfied that the initial statement by Ms. Nowicki is correct, that she was working four days a week. There is a report from the accountant indicating that the calculations, at least, might be correct, but, as well, it usefully confirms and was argued by the defendant that there is a seasonal change in overtime, namely Ms. Nowicki works more overtime in the summer and less in the winter, and there is no indication of any time lost other than the basic four days a week at the time of the motor vehicle accident.
- [39] Dr. Boyle is an orthopedic surgeon who has practiced in Abbotsford since 1988. At the direction of the court, he interviewed and examined Ms. Nowicki on February 20, 2003. Her history given is much as previously noted. He also noted that she stood some five foot three inches tall and weighed 160 pounds. Her principal complaints were intrascapular and neck pain. The examination, which I do not propose to review in detail, was thorough and marked by findings of normal or unremarkable.

- [40] In his conclusion at p. 5, he finds, of course in retrospect from this vantage point some three years down the road, that a disability period of four to six weeks might have been appropriate on his findings and that a return to work would not be more than another four to six weeks on top of it. In other words, potentially some 12 weeks or three months of disability, both full and partial. He did not see a reason for her being off work as long as she was. He makes no findings regarding her present complaints.
- [41] In sum, then, I find Ms. Nowicki has complained of injury to her chest, her neck, her back and her hips, and that she had headaches. The examination for discovery clearly acknowledged that her pain had gone from her lower back and hips after some six to 12 weeks. Her doctor referred her to massage therapy. He did not make any statement of any other referral or indicate that she was not to stop work. He gave no advice about work, nor did he give any opinion in that regard.
- [42] There is, in fact, little medical evidence after January, 2001 that assists the court. She did attend a chiropractor. No opinion has been provided by the chiropractor, and his records indicate five attendances in November, 2000 and then various scattered attendances over the course of the following year. Ms. Nowicki said the massage treatment she initially had did not work for her.
- [43] She returned to work in January 2001. She has not missed any work since.
- [44] As I have noted, in December, 2001, when she saw Dr. Tomaszewski, she had subjective complaints of pain between her shoulder blades. There is no mention of neck pain or headaches.
- [45] I have touched on Dr. Boyle's opinion regarding her disability period.
- [46] On the facts that I have before me, and I am again obliged to counsel for their case law, but on these facts this is not a large claim. This is a relatively short-lived claim and a rather minor or modest injury. I put Ms. Nowicki's non-pecuniary claim at \$5,000.
- [47] As to the claim for special damages, in reviewing that I could not find substantiation for all of the chiropractor's bills, and I reduce the chiropractor's bills to \$100. The balance of the claim regarding the expenses for the massage therapy and travel allowance can stand.
- [48] As to the wage loss, I gather from counsel the rough use of 25 percent discount will reflect the exercise of s. 54 of the Insurance (Motor Vehicle) Act, R.S.B.C. 1996, c. 231, on the claim for past wages.
- [49] The defendant says that the claim by the plaintiff for her past wages reflects overtime that has historically occurred in the summer and not the winter. Secondly, that the plaintiff is seeking a claim for full compensation in the situation where none of the attending medical personnel have given evidence that Ms. Nowicki was incapable of working. That is a fairly-put argument. Accordingly, they say that \$7,500 gross would be appropriate.

[50] I am largely in agreement with that, save I will put the past loss of income at \$8,000 and, applying the 25 percent discount, that gives a net past wage loss of \$6,000.

[51] Unless you have argument to the contrary, costs would follow the event.

[52] MR. MARYN: Thank you, My Lord, at level 3?

[53] THE COURT: At level 3.

[54] MR. MARYN: Thank you, My Lord.

[55] MS. MARTIN: My Lord, I do have one point, and that's with respect to an order of Master Tokarek that was made on February 14, 2003. It had to do with the costs relating to the lost jury fees of the defendant from having to pay jury fees on February 14. In that chambers appearance, Master Tokarek ordered that the plaintiff would pay to the defendant, in any event of the cause, the amount of jury fees thrown away, regardless of the outcome of whether the case proceeded by way of 18A or not.

[56] THE COURT: Right.

[57] MS. MARTIN: And that particular order, I did -- on that court appearance date, Mr. Maryn did not attend and he sent his legal assistant instead. And I had drafted the order and provided it to Mr. Maryn, understanding that he would likely have a right to review it and to endorse or not, because he did appear through an agent, albeit not another counsel. But Mr. Maryn has advised me that he -- he's not prepared to endorse or not endorse it. So I do -- his legal assistant, who was there, did confirm in writing that the terms of my draft order did correspond with her understanding of what the Master said, and I'm wondering if I could obtain from Your Lordship either a direction that Mr. Maryn's signature's not required, because he wasn't personally attended -- in attendance, or an order dispensing with his signature so that I could have that order entered and have that taken into account as part of the judgment.

[58] MR. MARYN: My Lord, I'd like to speak to this.

[59] THE COURT: All right.

[60] MR. MARYN: My friend brought an application returnable on a Friday when I was -- in New Westminster when I was in trial in Vancouver. I advised her in writing and by phone at least four or five times that I was unavailable on that date, requesting that she put the matter over to the next week. She chose to proceed anyway. I did send a legal assistant from my office with a letter advising the court I was before Madam Justice Loo in trial. And I wasn't there, so I'm not aware of what happened.

[61] My submission is, first and foremost, that the jury fees did not have to be paid that Friday. The date for the payment was the following Monday; that there was no reason that the matter should have been heard on -- on the Friday, at any rate. Second, there is no reason that the -- the defendants could not have asked us for an extension for filing the jury fees or,

alternatively, ask the court for an extension under Rule 2 of the Rules of Court. And I would, of course, agree to that, but at no time did they ask for that. Thirdly, My Lord, they proceeded on an application before the master where only one version of events was heard by the master, and the master's order did not take into consideration the position of the plaintiff because there was no one there to argue it on the plaintiff's behalf. And I submit that that order should be vacated by the court and the costs should just go as ordered by this court.

[62] THE COURT: Well, Mr. Maryn, that sounds to me like you are arguing an appeal from the order of the master, and I can't deal with that.

[63] MS. MARTIN: That would be my submission, as well, My Lord. I don't accept all of Mr. Maryn's description.

[64] THE COURT: No, and I can't get into that anyway.

[65] MS. MARTIN: This isn't the place, My Lord, to argue about the events that led up to that particular appearance.

[66] THE COURT: No, I am not going to deal with that, Ms. Martin.

[67] If Master Tokarek's order was made, there are other ways of dealing with that, and it is not to be dealt with in this fashion.

[68] MR. MARYN: All right, My Lord.

[69] MS. MARTIN: All right, My Lord.

[70] THE COURT: So I will dispense with Mr. Maryn's signature on the order. As a matter of information for me, what would be the jury fees thrown away in this circumstance?

[71] MS. MARTIN: \$1,000, My Lord. The total jury fees were \$3,300, but \$1,000 is kept by the court when -- when the jury trial is cancelled, and they remit the balance as long as the trial (indiscernible - telephone feedback).

[72] MR. MARYN: Sorry. I'm sorry.

[73] THE COURT: That's all right.

[74] MS. MARTIN: They remit the balance back to counsel out of that \$1,000 if the trial has not, in fact, commenced at the time that the cancellation is received. So it will be \$1,000.

[75] THE COURT: All right. Well, that, presumably, is an offsetting aspect to the costs here, but I am not going to make any order on that, save that you may dispense with Mr. Maryn's signature - he was not there - and you may go ahead and file the order. Mr. Maryn has his rights of appeal from that.

[76] MR. MARYN: Thank you, My Lord.

[77] MS. MARTIN: Thank you, My Lord.

[78] MR. MARYN: Thank you, My Lord, for, again, giving us this time during your judgment week.

[79] THE COURT: Not at all. I just reiterate, and it goes to both houses, that if these applications are to be brought on, they should be brought on 60 days before trial, and my reasons will reflect this post-note, if I can. But on the other hand, I do not see any reason that this kind of case should be taking up four or five days of a judge and jury's time.

(EXCERPT CONCLUDED)

"R. Crawford, J."

The Honourable Mr. Justice R. Crawford

FOOTNOTE:

Further to the transcript, the Rules Committee is moving towards a Rule requiring Rule 18A applications to be brought no later than 60 days before trial. Kindly govern yourselves accordingly.

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