
CANADA / JUDGMENT

Sananin v. MacHale

2006 BCSC 672

COURT

Supreme Court of British Columbia

DECIDED

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2006 BCSC 672 Sananin v. MacHale

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Sananin v. MacHale,

2006 BCSC 672

Date: 20060427

Docket: M040347

Registry: Vancouver

Between:

Donald Kenneth Sananin

Plaintiff

And

Laurie Cassandra MacHale

Defendant

Before: The Honourable Mr. Justice E. R. A. Edwards

Reasons for Judgment

Counsel for the Plaintiff

J. M. Rice

K. C. Jarvis

Counsel for the Defendant

K. D. Duncan

Date and Place of Trial/Hearing:

March 23 and 24, 2006

Vancouver, B.C.

- [1] This is an assessment of damages, under Rule 66, arising from a motor vehicle accident ("the accident") which occurred on January 29, 2002.
- [2] The defendant's vehicle rear-ended the plaintiff's vehicle. The accident was reported as a "Low Velocity Impact Claim" on January 31, 2002. Damage to the plaintiff's vehicle was limited to two minor marks to the rear bumper.
- [3] According to the opening of plaintiff's counsel, the plaintiff, now age 58, is "mystified and frustrated by the extent and duration of his injuries from the accident".
- [4] The plaintiff attributes the severity of his lower back pain to pre-existing problems in the lumbar area of his back, diagnosed as spondylolysis and spondylolisthesis in radiology reports in 1987, 1993 and 1996.
- [5] The plaintiff testified his lower back had been asymptomatic for six years before the accident despite these diagnosed conditions.
- [6] The plaintiff testified he felt pain in his neck and back immediately after the accident and had ringing in his ears.
- [7] He visited his general practitioner, Dr. Teh, the day of the accident. Dr. Teh diagnosed mild soft tissue injuries to the plaintiff's back and neck and prescribed an anti-inflammatory drug and "Deep Cold" ointment rub for the affected areas.
- [8] Dr. Teh's prognosis was that the plaintiff's back and neck pain would "gradually improve" with "partial disability" of six to 12 weeks, but he noted that "psychosocial" stresses occasioned by the plaintiff's divorce might impede recovery.
- [9] The plaintiff testified his neck pain resolved within one year of the accident. I infer the psychosocial stresses, to the extent they might have impeded recovery, had ended by then.
- [10] Within two days of the accident, the plaintiff reported to Dr. Teh that his lower back pain had increased after he had lifted 50 pounds.
- [11] On March 1, 2002, the plaintiff returned to his job on a fish boat after a seasonal layoff. He injured his hand on the job.
- [12] On March 27, 2002, he complained to Dr. Teh of lower back pain after he helped his mother move.

- [13] After attending physiotherapy on April 9 and 12, 2002, the plaintiff told Dr. Teh his lower back pain got worse. Nevertheless, he continued physiotherapy prescribed by Dr. Teh approximately twice per week during April, May, and June 2002.
- [14] On August 6, 2002, the plaintiff slipped and fell aboard a fish boat, although Dr. Teh made no note of it until December 2002 when the plaintiff reported it. ICBC had required the plaintiff to get a referral from Dr. Teh for a further active rehabilitation program which the plaintiff attended from December 2002 to February 2003.
- [15] On August 17, 2003, the plaintiff again fell on board a fish boat and wrenched his back. He received workers' compensation. The plaintiff applied in October 2003 for further benefits. His Notice of Appeal from the denial of this claim for further benefits stated "the October [2003] work injury was a recurrence of the August 17 work injury".
- [16] On October 21, 2005, the plaintiff suffered yet another injury to his back at work.
- [17] The plaintiff testified that he never fully recovered from the lower back pain he suffered as a result of the accident before it was exacerbated by the subsequent trauma, the most serious of which were the work-related accidents of August 2003 and October 2005.
- [18] It is the defendant's contention that the lower back pain which resulted from the accident was merely one of a series of such episodes to which the plaintiff was susceptible because of the pre-accident condition of his lower back.
- [19] The issue is whether the accident rendered the plaintiff's lower back more susceptible to injury than it had been prior to the accident as a result of its pre-accident condition.
- [20] In this context "more susceptible" does not mean more likely to suffer an accident resulting in trauma to the back, but more likely that any trauma to the back would cause the plaintiff to experience more pain, in terms of intensity or duration or both, than he would have but for the accident.
- [21] This is a factual question to be resolved on the basis of expert medical evidence. The plaintiff was examined by two doctors in November 2005. Each provided an "independent medical assessment".
- [22] The first was prepared by Dr. H. E. Hawk, a specialist in orthopaedic and traumatic surgery, on November 1, 2005. He examined the plaintiff, took a history from him and considered the clinical records of Dr. Teh, the records of the plaintiff's physiotherapy treatments since the accident and other relevant documents.
- [23] Dr. Hawk noted with respect to the back injury the plaintiff suffered on October 21, 2005, which caused bruising over the right posterior lumbar back region, that "this problem had largely resolved by the time I saw him on November 1." The bruising leads to the inference this injury was more serious than that which resulted from the accident.

- [24] Dr. Hawk did not conclude the accident had rendered the plaintiff more susceptible to back pain. Dr. Hawk opined that the plaintiff's pre-accident back condition disposed the plaintiff to back pain, stating: "It is my opinion this man has had a longstanding lumbar spondylolisthesis with a Grade 1 slip at the L3-4 level. He also has degenerative spondylosis of his L5-S1 level. As a result of these problems he has a history of recurrent lower back pain." [Emphasis added.]
- [25] The second report was prepared by Dr. A. Travlos, a specialist in physical medicine and rehabilitation, on November 16, 2005. He examined the plaintiff, took a history from him and considered most of the same records Dr. Hawk did, with the exception of the plaintiff's MSP records and WCB records.
- [26] Dr. Travlos noted with respect to the October 21, 2005, injury that the plaintiff "has improved and has not quite returned to the level that he was at before this recent event" but was "off all the Percocet and Tylenol No. 3 pills used to treat this."
- [27] In short, both doctors agreed that the symptoms from the October 21, 2005, back injury had largely abated by the time each saw the plaintiff. I find on the basis of Dr. Hawk's report this occurred by November 1, 2005.
- [28] Having noted the symptoms from the October 21, 2005, back injury had largely abated, Dr. Travlos concluded the plaintiff's "current symptoms are residual from the accident of January 29, 2002", "this accident left him with an increased susceptibility to injury" and "it was the accident which essentially rendered [the spondylolisthesis, spondylolisthesis and the degenerative disease] symptomatic". [Emphasis added.]
- [29] Dr. Travlos makes no mention of the back injury sustained by the plaintiff on August 17, 2003. I do not criticize him for this. I assume he was not told of it. He acknowledged on cross-examination that he did not glean it from Dr. Teh's clinical records. Since Dr. Travlos did not have the WCB records, he was unaware that the plaintiff had appealed the cessation of benefits awarded as a result of that injury on the basis that the back pain he was suffering in October 2003 was a "recurrence" of the August 2003 injury.
- [30] Since Dr. Travlos does not refer to the August 2003 injury, his report does not explain how he reached the conclusion that the plaintiff's "current symptoms" as of November 2005 were "residual from the accident" of January 2002 rather than from the subsequent August 2003 injury.
- [31] I am unable to accept this conclusion of Dr. Travlos in light of the fact the plaintiff himself characterized his symptoms in October 2003, two months subsequent to the August 2003 injury, as a "recurrence", that is a continued consequence, of that injury.

- [32] In the absence of some clear medical explanation, it is counter-intuitive and illogical that residual symptoms in November 2005 after six trauma to a back susceptible to injury as a result of pre-existing conditions diagnosed in 1996 are more likely attributable to the accident in 2002 rather than to the injury in August 2003, which, unlike the accident, was sufficiently serious to prevent the plaintiff from working.
- [33] On cross-examination, Dr. Travlos explained that the August 2003 injury was "consistent" with the plaintiff having increased susceptibility to back injury after the accident.
- [34] As a matter of semantics, the August 2003 injury is also "consistent" with Dr. Hawk's opinion that the plaintiff's "history of lower back pain" is a "result of" a "longstanding" back condition which both doctors recognize predated the accident.
- [35] I find no basis to prefer Dr. Travlos' opinion that the accident made the plaintiff more susceptible to back injury to Dr. Hawk's opinion that the plaintiff's "history of lower back pain" was a result of his pre-accident back conditions diagnosed by CT scan in 1996, following a series of work-related back injuries reported to the WCB in 1972, 1978, 1982 and 1987.
- [36] Dr. Hawk noted that a 2004 CT scan showed the "spondylolisthesis was comparable to his 1996 examination", indicating that condition had not worsened as a result of either the accident or the August 2003 injury or the other trauma the plaintiff reported during that period, lifting 50 pounds two days after the accident, helping his mother move two months later and falling in August 2002.
- [37] This case is distinguishable from *Athey v. Leonatti*, [1996] 3 S.C.R. 458, which was relied upon by the plaintiff. In *Athey*, the plaintiff, who had a history of back problems, was involved in two motor vehicle accidents, both of which exacerbated those problems. While he was exercising as part of his recovery from the second accident the plaintiff's back "popped". He had herniated a disc in his back. This was a hitherto undiagnosed back condition, which the trial judge found was caused in part by the accidents. The Supreme Court of Canada found that the defendants who admitted liability for the accidents were fully liable for the consequences of the herniated disc.
- [38] In the present case, there is no evidence that the plaintiff suffered a new, discretely diagnosed injury such as the herniated disc in *Athey*, subsequent to the accident. Pre and post accident, the plaintiff's "underlying susceptibility to injury in the lumbar spine" which Dr. Travlos attributed to "spondylolysis, spondylolisthesis and the degenerative disease at the L3 and L4 level" and "arthritis seen on the CD scan at the L5 S1 level", which Dr. Hawk also reported, was the continuing diagnosis. There was no new or worsened condition diagnosed. The CT scans of 1996 and 2004 were "comparable" which I take to mean essentially unchanged.

- [39] At no time was the plaintiff diagnosed with a new condition caused by the accident or by subsequent injuries. He experienced symptoms which resulted from the accident and from subsequent injuries, each of which, in turn, exacerbated the condition of his back as diagnosed by 1996.
- [40] The lower back injury attributed to the accident was apparently less severe than the August 2003 injury. The former did not prevent the plaintiff from lifting 50 pounds within two days, returning to work within a month or helping his mother move within two months, all of which he reported to Dr. Teh had exacerbated his back pain.
- [41] The August 2003 injury, by contrast, resulted in the plaintiff missing work and reporting to the WCB that he was unfit to return to work in October 2003.
- [42] I find that the plaintiff has not proved it was more likely than not that the duration of the symptoms attributable to the accident extended beyond the work-related injury of August 2003 or that the intensity of the pain he experienced as a result of the August 2003 injury was exacerbated by the accident. As noted, the plaintiff himself attributed his symptoms in October 2003 to the August 2003 injury when seeking more workers' compensation, not to the accident.
- [43] I find the plaintiff has not proved that the accident made his back more susceptible to injury than he was as a result of his pre-existing back condition diagnosed in 1996. I find the accident was the first in of a series of back injuries to which the plaintiff was susceptible as a result of the degenerated but asymptomatic condition of his back before the accident.
- [44] The plaintiff reported five incidents to Dr. Teh which exacerbated his lower back symptoms following the accident. I have concluded no symptoms after the more serious injury of August 2003 have been proven to be attributable to the accident rather than the plaintiff's long-diagnosed pre-accident back conditions. It follows that damages recoverable from the defendant are limited to those incurred before August 2003.
- [45] I find the plaintiff suffered a mild soft tissue injury to his neck as a result of the accident which resolved within one year. I find he suffered a mild soft tissue injury to his lower back, its duration, for the reasons stated, was not proven beyond the more serious injury in August 2003, 18 months post accident.
- [46] The plaintiff also reported a minor exacerbation of his underlying tendency for tinnitus from his exposure to the noise of machinery as a marine engineer, about a year after the accident. Dr. Samad attributed this to the medication he took for back and neck pain.
- [47] The plaintiff was able to work continuously despite the injuries he sustained in the accident, although subsequent work injuries caused him to lose some time from work between the date of the accident and the trial.
- [48] The plaintiff's reported income from fishing was \$23,247 in 2001, \$20,278 in 2002, \$26,550 in 2003 and \$13,076 in 2004.

- [49] This income is dependent, as I understand the plaintiff's evidence, on his share of the catch which is unpredictable.
- [50] The plaintiff testified he lost the opportunity for some fishing income because he turned down some fishing trips after the accident. The only one he referred to specifically was a bottom dragging trip in 2005 from which he might have earned "\$8,000 or \$9,000". In light of my finding that the duration of the injuries attributable to the accident was not proven after August 2003, loss of the opportunity to earn fishing income from this trip is not compensable by the defendant.
- [51] For the same reason, I find the defendant is not liable for the plaintiff's loss of opportunity to earn income from two labouring jobs he was offered in 2005, but turned down as a result of his concern he could not perform them because of the condition of his back.
- [52] The plaintiff also claimed the loss of opportunity to earn income from shrimping, using a boat he outfitted and licensed but used only once for that purpose. The plaintiff acknowledged he made little from this enterprise on the one trip he completed in 1999 and that there is no guarantee he would make a profit in future.
- [53] The plaintiff was able to work at his fishing job from the opening of the season after the accident until his work related accident in August 2003, but testified he was unable to pursue shrimping during that period because it is more physically taxing. He also testified it involved annual overhead of about \$18,000, which I note approximates his fishing income in recent years. He testified two successful shrimping trips in one year might net \$40,000.
- [54] The prospect of the plaintiff earning income from shrimping during the period between the accident and August 2003 is subject to so many negative contingencies that I conclude it is too speculative to support an award for loss of earning capacity.
- [55] The plaintiff claimed damages for loss of housekeeping capacity as a result of the fact his low back pain precluded him from doing heavy lifting aspects of a home renovation he had in progress before the accident and some yard work. He testified he paid his friend Ed Feurst about \$3500 to help him with this work over the past four years. Mr. Feurst confirmed this, though neither had any records of the payments so it is not possible to determine how much was paid during the period prior to August 2003. I have included this aspect of the claim in the award for non-pecuniary damages.
- [56] Special damages claimed were for prescribed pain medication paid for by the plaintiff between February 2003 and January 2004 and paid on his behalf by Pacific Blue Cross from February 2004 to January 2006. According to the receipts provided, \$95.97 was paid by the plaintiff before August 17, 2003. Based on my conclusion that the defendant's liability ends on that date, I award that amount as special damages.
- [57] Based on that same conclusion, I make no award for the claimed cost of future care.

- [58] Post accident, the plaintiff curtailed his recreational activities including gardening, home renovation, biking, and hiking, and has quit "pumping iron", tennis and badminton, because he has gone into "protective mode" in respect of his back.
- [59] For pain, suffering, loss of enjoyment of life, including the curtailment of recreational activities and expense the plaintiff incurred paying his friend Mr. Feurst to help him with "grunt work" during the period up to August 2003, I award the plaintiff general non-pecuniary damages of \$20,000. I award special damages of \$95.97 for the same period. I make no award for loss of income, loss of earning capacity or cost of future care.
- [60] The plaintiff is entitled to costs under the Rule 66(29), subject to submissions counsel may wish to make in respect of any settlement offer delivered pursuant to Rule 37 or 37A.

"E.R.A. Edwards, J."

The Honourable Mr. Justice E.R.A. Edwards

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