
CANADA / JUDGMENT

Sequeira v. Higgins

2015 BCSC 1192

COURT

Supreme Court of British Columbia

DECIDED

9 July 2015

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2015 BCSC 1192 Sequeira v. Higgins

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Sequeira v. Higgins,

2015 BCSC 1192

Date: 20150709

Docket: M141335

Registry: Vancouver

Between:

Joseph Sequeira

Plaintiff

And

Christopher Higgins and Can-Co-Operative Auto Network

dba Modo Carsharing

Defendants

(Subject to Rule 15-1)

Before: The Honourable Mr. Justice Burnyeat

Reasons for Judgment

(From Trial)

Counsel for Plaintiff:

T.W. Clifford

Counsel for Defendants:

I.M. Knapp

Place and Date of Trial:

Vancouver, B.C.

June 17-19, 2015

Place and Date of Judgment:

Vancouver, B.C.

July 9, 2015

- [1] This is an action for damages arising out of a motor vehicle accident on May 5, 2012 at the intersection of Inverness Street and West 41st Avenue in Vancouver. The negligence of the Defendant, Christopher Higgins is admitted. The only issues are to the extent that the injuries suffered by Mr. Sequeira continued after August of 2012 and the damages available to Mr. Sequeira as the result of the negligence of Mr. Higgins.

BACKGROUND

- [2] While Mr. Higgins initially took the position that the vehicle driven by Mr. Sequeira hit his vehicle from behind, Mr. Higgins was subsequently forced to admit that his vehicle had backed into the front of the vehicle of Mr. Sequeira.
- [3] At the time of the accident, Mr. Sequeira was 81. It is easy to come to the conclusion that Mr. Sequeira is a remarkable man who is extremely confident and optimistic. Mr. Sequeira trained as a heavy duty mechanic and worked in that capacity until he retired. He remained in exceptionally good physical shape including working as a fitness instructor in his 60's, a job he continued for nearly 15 years and starting karate at age 73 and earning his black belt at age 78. Mr. Sequeira testified that, while working as a fitness instructor, he would arrive early at work and would exercise between one hour and one and half hours a day. While this exercise regimen at the gym ceased when he was no longer working as a fitness instructor, Mr. Sequeira testified that he continued to do exercises at home. Just prior to the accident, Mr. Sequeira had stopped practising karate. Mr. Sequeira was also active in dancing with his spouse but this also ended prior to the accident. I find that he was an extremely healthy 81 year old man at the time of the accident and that he was able to manage all aspects of his life without pain or difficulty. I also find that, he was free from any back or hip pain.
- [4] Mr. Sequeira testified that the collision caused "such force" that he thought the whole front of his car was smashed. Despite that description, the damage to his vehicle was limited to "minor paint scuffing to front cover at left side of license plate area" with a total cost to repair of \$469.49. Mr. Sequeira testified that he was thrown forward as a result of the impact

and that his thumb and hand impacted into the steering wheel. At the accident scene, Mr. Sequeira testified that his thumb and hand began to ache and his chest hurt. He testified that he was very shaken and that, after exchanging information, he decided to go home to rest. Mr. Sequeira did not feel there was a need to attend a hospital.

- [5] At home, Mr. Sequeira testified that his whole body began to hurt, his neck ached, his hip was painful from his foot being positioned on the brake of the car, and he developed a headache. In the week following the accident, I find that Mr. Sequeira was having trouble sleeping, his hand was aching and swollen which made it difficult for him to write, his ribs hurt, and that he had to rest rather than resume his regular schedule.

(a) Medical Treatment

- [6] Mr. Sequeira was delayed in seeing his family doctor until May 10, 2012. In her December 3, 2013 medical legal/report, Dr. Condon states that the symptoms of Mr. Sequeira were of "upper back pain which came on the night of the accident, swelling and pain of his right hand, and right buttock pain". On examination Dr. Condon found that there was restricted range of motion of his cervical spine to approximately 50% in all directions, tenderness and muscle spasm in his upper back, and a swollen first web space in his right hand with tenderness but a good movement of his thumb and fingers. Physiotherapy was recommended.
- [7] Mr. Sequeira saw Dr. Condon until September 27, 2012 but then not again until April 9, 2013. From the clinical records of Dr. Condon, I note the following: (a) "Headache persisted pain right thumb cannot hold a pen and write." (May 24); (b) "Thumb better. Shoulder 50% better. Right buttock area better but still painful." (July 4); (c) "Right buttock area remains painful. Thumb and shoulder are better." (July 9); and (d) "Feels 100 [better]" (September 27).
- [8] In her December 3, 2013 opinion, Dr. Condon made this statement regarding the July 4, 2012 appointment:

Mr. Sequeira reported that his thumb and right buttock area were better as was his shoulder.

His symptoms continued to improve. The most persistent symptom was the pain in his right buttock and hip area...

(b) Physiotherapy Treatment

- [9] Mr. Sequeira commenced physiotherapy at Treavor Physiotherapists (J.D. Snip) on May 11, 2012. The reports of Mr. Snip are in evidence and include the following: (a) "Reports right side sharp pain into right buttock. Constant headaches low grade" (May 18); (b) "Lower back on right side into buttock pain walking and sitting." (June 8); (c) "All areas improving except right lower back/buttock" (June 27); (d) "Still feels low back & flare up with left wrist/thumb" (July 6); (e) "Reports wrist & thumb improved of symptoms. Upper back minor soreness" (July 13); (f) "Reports improving but still low back on right side pain with prolonged walk" (July 27); and (g) "Right hip pain increased" (August 27).

- [10] Mr. Sequeira had continued physiotherapy treatment on a weekly basis. On the basis of the evidence of Mr. Snip, I find that Mr. Sequeira exerted full effort and reported improvement from his treatment. Mr. Snip also testified that Mr. Sequeira would almost always say that he was "doing well" at the beginning of each treatment session but that, once the treatment began, he would observe that Mr. Sequeira was experiencing pain and stiffness. While he was not discharged from treatment at his physiotherapist, Mr. Sequeira did not return to physiotherapy until April 2, 2014.
- [11] However, I find that Mr. Sequeira continued to perform the stretching and exercises that had been recommended by Mr. Snip.
- [12] When he returned to physiotherapy in April of 2014, Mr. Snip testified that Mr. Sequeira presented with the same symptoms in the same areas as were being treated in the Summer of 2012.
- (c) The Spouse of Mr. Sequeira
- [13] Mr. Sequeira's partner was 11 years older than he was so that she was 89 at the time of this accident. On May 24, 2012, she had fallen and hit her head requiring her to be taken to hospital by ambulance. She remained in hospital for three months before she was discharged. Mr. Sequeira testified that he remained in hospital often sleeping in the hospital bed next to her and that he would leave for short periods to attend physiotherapy which was located a short distance from the hospital. I accept that testimony and make that finding.
- [14] When his partner returned home in late August 2012, I find that Mr. Sequeira's attention changed to focus on her care. While Dr. Condon had recommended that she be put in a care facility as the task of caring for her was too much for Mr. Sequeira to handle, he refused. Mr. Sequeira commenced what he referred to as 24 hour care of her. Mr. Sequeira testified that he was required to do everything for her including bathing her, taking her to the bathroom, cleaning her afterwards, helping her walk, giving her medication, and cooking for her. I accept the testimony of Mr. Sequeira that, when it was necessary for him to leave the house, he would hire the services of a neighbour to watch over his partner.
- [15] In mid-2013, her condition deteriorated and she was experiencing dementia. When it became impossible for Mr. Sequeira to continue to care for her, his partner was readmitted to hospital where she remained for four months until her death on October 10, 2013. I accepted the testimony of Mr. Sequeira that he spent every night with her in the hospital until she died.
- [16] I accept the testimony of Mr. Sequeira that he was devastated by her death as she has "saved his life". After Mr. Sequeira lost his son to an accident and lost his house as a result of the separation and divorce from his former wife, Mr. Sequeira ended up living on the street for three years. I find that, due to his faith and his determination, Mr. Sequeira was able to re-establish himself when he met Mary who he described as "the love of his life". I have no hesitation in coming to the conclusion that he had less interest in the physical problems

caused by the accident than for his need to care for Mary on a 24 hour basis. I accept this explanation and find that the need to care for his partner was the cause of Mr. Sequeira not continuing the physiotherapy between August 24, 2012 and April 2, 2014 and not seeking medical attention from Dr. Condon between July 4, 2012 and April 9, 2013.

[17] I also find that Mr. Sequeira was devastated by the death of Mary and that he decided to get away so that he left for India to visit his family.

(d) Return to Canada in February, 2014

[18] Mr. Sequeira returned to Canada in February of 2014. At that time, he moved from Vancouver to Surrey.

[19] Between April 2, 2014 and November of 2014, Mr. Sequeira attended physiotherapy with Mr. Snip on a weekly basis. The records of Mr. Snip indicate the following: (a) Ongoing lower back & hip right issues since MVA" (April 2, 2014); and (b) "Reports doing well is still noticing some right hip discomfort" (September 14, 2014).

[20] In November of 2014, Mr. Sequeira returned to India to visit his brothers who were in failing health. While there, he undertook physiotherapy treatment on 15 occasions. Mr. Sequeira returned from India in March of 2015 and, while he reported improvement with his pain and stiffness and that he was determined to get on with his life, he testified that his pain and stiffness continue.

[21] Mr. Sequeira returned to karate in June of 2015 although only as a holder of a white belt due to his limitations. Mr. Sequeira has also returned to physiotherapy with Mr. Snip on a weekly basis.

[22] Dr. Condon saw Mr. Sequeira on April 9, 2013 and she noted: "At that time the most persistent symptom was the pain in his right buttock and hip area...". Dr. Condon also noted:

On June 5, 2013, Mr. Sequeira told me he had purchased an exercise ball and the exercising and stretches on the ball were beneficial. His hip pain was improved when seen on July 15, 2013 although he had residual tightness mentioned at his August 29, 2013 visit, and again at his most recent visit on October 24, 2013. At that last visit, I prescribed an anti-inflammatory to see if it would relieve his residual pain. I did go over his stretching routine with him and it appeared to be appropriate.

In her March 20, 2015 opinion, Dr. Condon made the following comments:

- (a) "buttock pain exacerbated by walking" with an x-ray showing a "tentative diagnosis of bursitis (February 24, 2014);
- (b) a bone scan done on March 13, 2014 "showed mild to moderate increased activity in the inferior aspect of the right SO L joint suggestive of degenerative change"

- (c) an x-ray of the right hip showed calcific spurring of the soft tissue insertion into the greater trochanter" showed Mr. Sequeira stretches to help alleviate his discomfort" and made a referral for physiotherapy (March 20, 2014);
- (d) an anti-inflammatory medication to apply to the trochanteric area of his right hip" with the notation "His pain was improving" (May 1, 2014);
- (e) the notation "he was feeling better with less low back pain" and "he was exercising as instructed by the physiotherapist (July 1, 2014);
- (f) notation "I requested that he continue for physiotherapy for his residual right hip symptoms" (September 10, 2014); and
- (g) notation "He was visiting the physiotherapist as needed, and symptoms due to his right trochanteric bursitis were easing" and a renewal of the subscription for Voltaren gel (October 29, 2014).

[23] In her March 20, 2015 opinion, Dr. Condon concluded:

In summary, Mr. Sequeira has continued to recover from soft tissue injuries to his back, right gluteal trochanteric area, right thumb and hand. I would anticipate that he will recover from the injuries sustained in this accident. He will need to maintain his regular exercise and stretching routine and may need occasional physiotherapy visits. Mr. Sequeira is a very active 83-year-old. I do not anticipate that the accident will slow him down or interfere with any of his regular recreational or household activities in the long run.

POSITION OF THE PARTIES

- [24] Counsel for Mr. Sequeira submits that Mr. Sequeira suffered soft tissue injuries of his gluteal trochanteric area, soft tissue injuries of his upper back, contusions to his right thumb and hand, and headaches as a result of the negligence of Mr. Higgins and, that three years after the accident, Mr. Sequeira continues to have right hip pain and tightness, to experience difficulty when trying to stand from a sitting position, and to limp when having to walk or stand any length of time.
- [25] Counsel for Mr. Higgins submits that the injuries suffered by Mr. Sequeira as a result of the negligence of Mr. Higgins, showed gradual improvement and resolved by August or September of 2012.

CASE AUTHORITIES AND DISCUSSION

- [26] In *Stapley v. Hejslet* (2006) 263 D.L.R. (4th) (B.C.C.A.), Kirkpatrick JA on behalf of the majority outlined a number of factors to be considered when assessing non-pecuniary damages:

The inexhaustive list of common factors cited in *Boyd* [*Boyd v. Harris* (2004), 237 D.L.R. (4th) 193 (B.C.C.A.)], 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, 2005 BCCA 54 (B.C.C.A.)). (at para.46)

[27] Regarding the age of Mr. Sequeira and the potential for limited life expectancy, I adopt the statement made by Schultes J. in *Mathroo v. Edge-Partington* [2015] B.C.J. No. 139 (S.C.):

I do not feel comfortable relying on *Olesik* [*Olesik v. Mackin*, [1987] B.C.J. No. 299 (S.C.)] to reduce the non-pecuniary damages on the basis of Mr. Mathroo's limited remaining life expectancy, as urged by Mr. Edge-Partington's counsel. Its applicability on that issue has been questioned by other decisions of this Court. In *Giles v. Attorney General of Canada*, [1994] B.C.J. No. 3212 (S.C.) varied on other grounds (1996) 71 B.C.A.C. 319, Mr. Justice Fraser held that the principle described in *Olesik* and the golden years doctrine essentially balanced each other out, so that advanced age should not be a factor either way in arriving at an appropriate award. This view was adopted more recently in *Duifhuis v. Bloom*, 2013 BCSC 1180. (at para. 96)

(e) Non-Pecuniary Damages

[28] On the basis of the testimony of Mr. Sequeira and the evidence of Dr. Condon and Mr. Snip, I make the following findings of fact:

- (a) The hand and thumb pain and swelling resolved within four months;
- (b) Headaches caused by the pain had largely resolved within four months.
- (c) Back pain continues to be experienced by Mr. Sequeira from time to time and is exacerbated by walking and by standing for extended periods of time;
- (d) Right buttock pain continues and is exacerbated by walking; and
- (e) Right hip pain continues with "residual tightness".

- [29] I cannot accede to the submissions made on behalf of Mr. Higgins that the injuries suffered by Mr. Sequeira had resolved by August of 2012. First, that is not the opinion of Dr. Condon or Mr. Snip. Second, I find that the emotional turmoil caused by the medical condition of his spouse caused Mr. Sequeira not to continue with treatment or physiotherapy even though he was continuing to experience pain. Third, it is just too much of a coincidence that, after Mr. Sequeira recovered from the loss of his spouse, he sought treatment and physiotherapy for exactly the same pain in exactly the same areas.
- [30] I find that the negligence of Mr. Higgins caused and continues to cause Mr. Sequeira pain and suffering and that an award for non-pecuniary damages should be made in an amount to reflect that continuing pain and suffering some three years after the accident.
- [31] In submitting that the non-pecuniary damages of Mr. Sequeira should be assessed at between \$40,000 and \$45,000, counsel for Mr. Sequeira relies on the following decisions:
- a) Krohn v Weidner, 2013 B.C.S.C. 767, the 64 year old plaintiff claimed for mechanical neck pain, right rotator cuff injury, injury to left thigh, headaches, and soft tissue pain in both wrists. While the injuries of the plaintiff caused physical limitations, the injuries were not severely or moderately disabling and the plaintiff was able to carry out daily activities without problem. (\$45,000);
 - b) Fata v Heinonen, 2010 B.C.S.C. 385, the 59 year old plaintiff, suffered soft tissue injuries. He had pain in his neck on the night of the accident and his pain increased in the following days. He had complaints of pain in his neck, upper back, left shoulder, elbow, and forearm. The pain continued and he underwent physiotherapy and wore a splint on his wrist. The injuries to his neck and forearm caused some discomfort and required him to undergo treatment, but these injuries had resolved by the time of the trial. The injury to his shoulder would likely continue to cause pain and limitation into the future. He was unable to garden or complete home projects as he had before, and was unable to do all of the activities in his retirement that he had planned. (\$45,000); and
 - c) Yip v Chi, 2009 B.C.S.C. 451, the 59 year old plaintiff suffered injuries when his vehicle was struck from behind. He was taken to hospital and discharged with complaints of pain in his neck, shoulder, and knee. His knee injury improved quickly. However, the plaintiff's neck and shoulder pain persisted. He had restricted range of motion, stiffness, pain, and difficulty sleeping. The plaintiff underwent physiotherapy, chiropractic treatment, and took pain medication. Because of his ongoing symptoms, he abandoned many of the recreational activities that he had enjoyed prior to the accident. Prior to the accident, the plaintiff suffered from degeneration and arthritis of the cervical spine. These pre-existing conditions were not aggravated by the accident. (\$45,000)

- [32] Because counsel for Mr. Higgins submitted that Mr. Sequeira had not established that he had suffered any permanent or long term injury and that, in any event, his symptoms had resolved to the point that he is left with only "minor or trifling symptoms", counsel for Mr. Higgins submitted that damages in the range of \$7,000 to \$10,000 were an appropriate range of damages to be awarded. In this regard, counsel for Mr. Higgins relies on the following decisions:
- a) *Saluja v. Wise*, 2007 B.C.S.C. 706, where the court found that the 35 year old plaintiff suffered mild soft tissue injuries which, except for occasional pain, should have resolved within three to six months. (\$3,500);
 - b) *Lee v. Dueck*, 2012 B.C.S.C. 530, the 37 year old plaintiff was found to have substantially recovered from her accident injuries within approximately seven months and was left with only chronic, intermittent short-term pain triggered by certain activities which she was capable of avoiding. The court found that her injuries did not significantly impact her work as a homemaker or her ability to pursue her preferred activities. (\$5,000);
 - c) *Hoy v. Harvey*, 2012 B.C.S.C. 1076, the most substantial injuries were soft tissue injuries to his neck, shoulders, and back. The court found his neck and shoulder injuries largely resolved within approximately seven months. His back substantially resolved within three month following the collision, however he was left with flare-ups approximately once per month, which was aggravated by bending and lifting. These flare-ups completely resolved within approximately one year. The court found the plaintiff's injuries only had a minor impact on his life or his lifestyle. (\$7,000)
- [33] The decisions relied upon by counsel for Mr. Higgins deal with young plaintiffs who experienced pain and suffering for periods between three and seven months. While the hand and thumb pain and the headaches resolved within four months, the remaining injuries continue although I share the opinion of Dr. Condon that the injuries suffered as a result of Mr. Higgins are not likely to slow down Mr. Sequeira or interfere with any of his regular recreational or household activities "in the long run". For a man who has been so active in his life, pain which is "not unbearable" in his hip and on the back of his right leg after he stands up or during short walks, is an impairment of life which requires an award to be made of \$45,000 for non-pecuniary damages.
- (f) Future Care Costs
- [34] Mr. Sequeira is currently taking physiotherapy sessions at a cost of \$60 per session. Dr. Condon is of the opinion that Mr. Sequeira needs to maintain his regular exercise and stretching routine and may need occasional physiotherapy visits. Dr. Condon further states that Mr. Sequeira would benefit from anti-inflammatories from time to time as needed. The claim on behalf of Mr. Sequeira for future care costs is \$5,000.

- [35] Because counsel for Mr. Higgins is of the view that Mr. Sequeira has not established that he suffered any permanent or long term injuries and that his symptoms have resolved to the point that he is only left with "minor or trifling symptoms", counsel for Mr. Higgins is of the view that no award for future care costs is appropriate.
- [36] While physiotherapy sessions are still recommended by Dr. Condon, her March 10, 2015 opinion is that what is required for physiotherapy is on a "as needed" basis and that Mr. Sequeira may only "need occasional visits". If all of the \$5,000 requested was used for physiotherapy sessions at \$60/session, a total of 83 sessions would be available. This would allow sessions on a monthly basis for just under seven years and on a weekly basis for a year and a half. I cannot conclude that this number of physiotherapy sessions fits within what Dr. Condon has described as "occasional" and "as needed". I find that Mr. Sequeira is diligently undertaking the exercise program that was recommended by Mr. Snip so that only occasional visits are required for physiotherapy supervised by Mr. Snip. Accordingly, I award \$1,200 for future physiotherapy sessions.
- [37] While Dr. Condon states that Mr. Sequeira would benefit from anti-inflammatories from time to time as needed, there is no costing of anti-inflammatories in evidence. Accordingly, I limit the total award for future care costs at \$1,200.

(g) Special Damages

- [38] Mr. Sequeira claims a total of \$4,521.38 for special damages. Although he does not explain how he arrived at \$491.00, counsel for Mr. Higgins submits that special damages should only be awarded for that amount.
- [39] Special damages relating to treatment at Treloar Physiotherapy include: (a) User fees for 45 visits (\$1,662); (b) Mileage from his Vancouver home at \$.50/km (\$38.40); and (c) Mileage from his Surrey home (\$2,061) for a total of \$3,761.40. Special damages relating to treatment by Dr. Condon include: (a) Mileage from his Vancouver home to her office (\$71.20); and (b) Mileage to her office from his Surrey home (\$574.60) for a total of \$645.80. Mr. Sequeira also claims \$114.18 as the cost of attending and the kilometres travelled to attend the physiotherapy centre in India.
- [40] While counsel for Mr. Higgins was satisfied that it was appropriate for Mr. Sequeira to continue to see Dr. Condon as his family doctor, it is the submission of counsel for Mr. Higgins that Mr. Sequeira should not have continued with Treloar Physiotherapy and that he should have found a physiotherapist in Surrey in order to reduce the claim for mileage that is submitted.
- [41] I have no hesitation in allowing the special damages claim for the physiotherapy undertaken in India as well as the mileage claim for the sessions with Dr. Condon. Regarding the mileage claimed for the visits to Treloar Physiotherapy, I am satisfied that it was appropriate for Mr. Sequeira to continue to seek physiotherapy treatment from Treloar Physiotherapy. First, the personnel there could effectively track his program, any progress being made and

any difficulties that were resulting from what they had recommended and demonstrated. Second, I am satisfied that Mr. Sequeira had confidence in Treloar Physiotherapy so that what they were recommending and the home exercises that he was undertaking were acceptable to him.

[42] I allow the special damages claim of Mr. Sequeira at \$4,521.38 as appropriately incurred.

SUMMARY:

[43] As a result of the negligence of Mr. Higgins, Mr. Sequeira is awarded \$50,721.38 made up as follows:

- (a) general damages - \$45,000;
- (b) future care costs - \$1,200; and
- (c) special damages - \$4,521.38.

[44] Unless the parties wish to be in a position to speak to the question of costs, Mr. Sequeira will be entitled to his costs as set out in Rule 15-1(15)(c).

"Burnyeat J."

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Prepared on 29 October 2026 · Esheria