
CANADA / JUDGMENT

Smith v. Bhangu

2009 BCSC 485

COURT

Supreme Court of British Columbia

DECIDED

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2009 BCSC 485 Smith v. Bhangu

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Smith v. Bhangu,

2009 BCSC 485

Date: 20090408

Docket: M94698

Registry: New Westminster

Between:

Michaela Marie Smith

Plaintiff

And

Amandeep Bhangu and

Romesh Bhangu also known as Romesh Shander Bhangu

Defendants

Before: The Honourable Mr. Justice Grist

Reasons for Judgment

Counsel for the Plaintiff:

D.J. Elgee

Counsel for the Defendants:

D. Gautam

Date and Place of Trial/Hearing:

January 22, 2009

Chilliwack, B.C.

- [1] This personal injury action comes on for quantum assessment under Rule 18A. Both parties are satisfied that a judgment should be rendered after review of the material produced on this summary trial.
- [2] The Plaintiff, now 23, was a 14-year-old passenger in a vehicle struck from behind by the Defendant, Amandeep Bhangu, on September 8, 1999. She initially did not appear to be injured but developed neck, back and shoulder pain shortly after the collision. She was kept out of school the next day and taken to her family doctor, Dr. Arntsen, who noted tenderness in the area of the right cervical spine and upper thoracic spine with some limitation of movement of the cervical spine.
- [3] There were no further visits to Dr. Arntsen due to complaints associated with the motor vehicle collision recorded following September 9, 1999; however, the Plaintiff says that she continued to have problems with her neck and upper back. She said that over time these subsided to a degree but that during this recovery she began to develop symptoms in her lower back.
- [4] Her evidence on examination for discovery was that the lower back complaints began in the weeks or months following the collision, but that she could not recall when they first came on. When she was referred to a recorded visit to a walk-in clinic in March, 2004, referencing lower back pain, she said she was not sure if this was the first time she attended a doctor with this complaint, but that it was a long time before she actually went to see anybody about these symptoms. When asked why she did not go to the doctor with continuing complaints of injury following the collision she said she was young and didn't know any better and that she was busy at school and at work. She began part-time work at Canadian Tire at age 16, working 15 to 20 hours per week while going to school. She was 18 years old, in March 2004, when she attended the walk-in clinic. When asked at discovery why she attributed her lower back complaints to the 1999 collision, she said that there were no other incidents that could have accounted for the complaints prior to their onset.
- [5] The lower back pain progressed to the point where it was interfering with her ability to participate in sporting activities at school, especially tennis. Her evidence is that she also periodically lost time from work at Canadian Tire, although she is not able to provide any specific dates in respect of this. She continued to work at Canadian Tire after grade 12, but was eventually terminated because of absences. Her evidence is that following this, there was a succession of short-term jobs, each of which she lost because of time taken off work.

- [6] By March, 2004, she had developed spasms in her lower back which at times became debilitating. On March 15, 2005, she was seen at Maple Ridge Hospital Emergency Ward as a result of one of these incidents. The Emergency/Ambulatory Care clinical record from that attendance noted, "motor vehicle - ongoing from MVA 1999." The diagnosis made at the Emergency was of intermittent lumbar spine muscle spasm.
- [7] The doctors who attended Ms. Smith at the two walk-in clinics in 2004 noted the onset of the lower back pain as being the result of a motor vehicle collision two years prior. The defendant argues that this indicates a cause for her complaints other than the 1999 collision. However, there is no record of any other motor vehicle collision from 2002, or during the period from 1999 to 2004. Further, a later record from a walk-in clinic in 2006 notes lower back pain occurring since the 1999 motor vehicle collision. On balance, I am satisfied that the two earlier references were also references to the 1999 motor vehicle collision, notwithstanding the error in reporting the year of the collision during the first two of the three walk-in clinic attendances.
- [8] There was a further incident subsequent to these reports, in November, 2006, when the Plaintiff fell from the back of the tailgate of a pickup truck. This resulted in a head laceration but there is no attribution of an increase in back pain due to this incident and there is no evidence it played any part in ongoing complaints.
- [9] The Plaintiff's general practitioner, Dr. Arntsen, has provided a report that only comments on the neck and upper back soft tissue injuries. The defendant says this again indicates some other cause for the lower back complaints. This, however, is consistent with the fact that Dr. Arntsen only received complaints of upper back injuries during the visit to her office shortly after the collision. The subsequent complaints of lower back pain were recorded by walk-in clinics and Emergency ward attendants.
- [10] The Plaintiff has seen two specialists. The first was Dr. Hershler, a specialist in physical medicine. He saw her on February 14, 2006. He summarized her complaints as follows:

Michaela Smith presents with an approximate six and a half year history of episodic pain in her neck (referring to the low back) associated with spasms. Some of these spasms are immobilizing and have required her to be taken to an Emergency Room for injections. These symptoms date from a motor vehicle accident on September 8, 1999.

- [11] He described his physical examination of her in these terms:

Movements of the lumbar spine were compromised by pain. There was evidence of splinting. She was limited in flexion by pain which she localized to the lower part of the lumbar spine particularly the left hand side. The pain referred down the left hand border of the sacrum. She felt that most of the pain was either in the lower part of the lumbar spine or in the sacrum itself. To a lesser extent, she experienced pain on the right hand side. Direct palpation of the soft tissues on the left hand side of the lumbar spine and on the left side of the sacrum caused pain. Again, similar palpation on the right side caused a milder response. Both sets of lumbar

paraspinals were tender to touch but more so on the right than of the left.

[12] His diagnosis was soft tissue injury to the neck and soft tissue injury to the lumbar spine. He commented during his diagnosis:

Based on the history and physical examination, it is my opinion that these symptoms [which have now been present for six and a half years] and injuries were caused by the motor vehicle accident on September 8, 1999. Michaela is clear that she had no history of injury prior to the accident nor that she had ever experienced back spasms or pain in her spine before.

[13] Dr. Hershler gave a guarded prognosis and ordered an MRI examination.

[14] The second specialist report was from Dr. Kokan, an orthopaedic surgeon. His comments were as follows:

From the description [of the motor vehicle collision] and the review of medical records, it appears that she did sustain sprain of cervical and upper dorsal spine. Subsequently, there is no clear description of low back symptoms though Ms. Smith tells me that these symptoms were gradually getting worse after the neck symptoms started subsiding. The more painful area can mask the symptoms in a less a painful area.

It is quite likely that in the accident of 1999 she did sustain soft tissue trauma of the neck, upper back and based on the history obtained from Ms. Smith the low back could also have been injured.

[15] Dr. Kokan had the opportunity to review the MRI ordered by Dr. Hershler. His comments were these:

MRI of lumbar spine shows the herniation of lumbrosacral disc. The degenerative changes of lumbar spine are rare in the young age and it is possible that the injuries have contributed to degenerative lumbrosacral discs.

[16] Dr. Kokan commented on her career plan to take training to be a social worker and said:

The current spinal symptoms should not be a significant barrier for her studies and working as a social worker thru the adult life. At this time she remains disadvantaged as to which occupation she is to choose, she would have difficulty doing physically demanding job requiring lots of walking, standing, bending, lifting, twisting, carrying and climbing. The ideal occupation for her would be a semi-sedentary-semi-ambulatory type of work.

I do not believe that back surgery will be required, there is no medical necessity for passive form of treatment such as passive physio, massage or chiropractic treatment, the active rehabilitation program is preferable for her problem.

The current prognosis is uncertain at this time though the young age and the good general health is in her favour, long periods of inactivity and obesity will interfere initially with rehabilitation. However, if she is willing participant in the rehab program I expect significant improvement in her condition. However, she will remain more vulnerable to re-injuries in the future.

[17] The Plaintiff has been seen by Ms. Quastel, an occupational therapist. Ms. Quastel's comments are as follows:

Test results indicate that Michaela is capable of working at occupations in the limited and light physical activity categories, with some further limitations. She needs an occupation in which she can alternate between sitting, standing and moving around, with limited requirements for repetitive crouching and repetitive bending and limited requirements for working in awkward body positions.

[18] Ms. Smith has not completed grade 12 and Ms. Quastel's comments were, "Michaela has a better chance of succeeding at vocational training of a more practical rather than an academic nature." She also notes that Ms. Smith is deconditioned and over-weight and recommends development of a suitable and progressive exercising conditioning program requiring 12 to 18 sessions with a physiotherapist, at an average cost of \$45 per session.

[19] Ms. Smith has moved to Nova Scotia where she is employed at a car dealership. She continues to have upper back discomfort from time to time, but the lower back complaints are the most significant aspect of her present condition. She says that she continues to experience episodes of back pain on a weekly basis and that she has difficulties in performing tasks such as putting on socks or doing household chores such as vacuuming, sweeping and grocery shopping.

[20] The defence takes the position that there is insufficient evidence to establish a causal link between the motor vehicle collision and the onset of lower back problems, and further, that the Plaintiff's condition would have been significantly mitigated should she have lost weight and improved her physical conditioning.

[21] I am satisfied that the evidence provides, on a balance of probabilities, a causal link between the motor vehicle collision and the lower back condition. I accept the Plaintiff's evidence that the lower back complaints presented after a period of weeks or months from the motor vehicle collision and that there were no prior or subsequent events causing or contributing to the condition. Further, I accept that following the initial visit to the doctor, she did not present these continuing complaints for medical treatment until lower back spasms developed in 2004 and 2005. I also note Dr. Hershler's comment that, based on the history and his physical examination, both the neck and lower back symptoms were referable to the motor vehicle collision.

[22] The upper back condition continues to be symptomatic from time to time, but as in many cases, has shown improvement, and the overall effect of the assessments in the medical reports is an expectation of further progress.

- [23] The lower back condition, however, is more of a problem. The MRI shows a herniated lumbrosacral disk which continues to cause episodes of back pain, sometimes debilitating to the point of prompting attendance at an Emergency Ward. I accept that at age 14, this was not likely a degenerative condition and, as I have previously indicated, on the evidence, is most likely attributable to the collision.
- [24] Dr. Kokan expressed optimism that Ms. Smith may, with an active rehabilitation program, find some improvement. However, she would remain disadvantaged in physically demanding jobs. I take from this that her lower back injury can be considered a chronic one. Ms. Quastel categorizes her capability as restricted to limited and light physical activities. She would be able to do the duties of a social worker, but there is no support in the occupational assessment indicating that she would succeed in training for this. More practical and less academic vocational training is advised. Unfortunately, this level of aptitude works to her disadvantage as more practical occupations require greater levels of physical endurance. In these circumstances, her diminished physical capability leads to significant concern with respect to loss of future earning capacity.
- [25] The second issue raised by the defence is one of mitigation. It is argued that the plaintiff has not taken reasonable steps to become physically conditioned and that she is overweight. There is, however, no evidence of a treating physician prescribing any particular course of training, or weight-loss program to advance her rehabilitation. I agree that the recommendation of Dr. Kokan has the prospect of improving her future condition, but this has come through his medical legal report and was not a recommendation of a treating physician. There is insufficient evidence to support an argument of unreasonably rejecting a recommended medical course of treatment.
- [26] The evidence on past wage loss is insufficient to support an assessment. I accept that Ms. Smith has had difficulty in sustaining employment but there is simply no evidence of how much time she had to take off work.
- [27] In respect of loss of future employment, there is again no evidence leading to loss of any specific form of employment. The assessment, supported on the evidence, is one of loss of future earning capacity. Accordingly, except for the future cost of instituting a rehabilitation program, general damages and loss of future earning capacity are the sole heads of damage presented on the evidence.
- [28] Counsel have referred to a number of cases on quantum. I find *Haughain v. Kaufman*, 2006 BCSC 911, [2006] B.C.J. No. 1353; *Kahle v. Ritter*, [2002] B.C.J. No. 825, 202 BCSC 199; and *Andres v. Leslie*, 2005 BCSC 1096, [2005] B.C.J. No. 1722 most helpful. These cases all involved young plaintiffs with continuing neck and back pain, and significant loss of earning capacity. The general damages awarded in these cases were \$40,000; \$50,000; and \$65,000 respectively. Loss of earning capacity was assessed at \$75,000; \$80,000; and \$175,000.

- [29] Damages in this case, should also take into account the MRI finding of a herniated disc in addition to the soft tissue injuries suffered. In my view, general damages should be assessed at the top of the range indicated, \$65,000.
- [30] It is apparent that the Andres case was exceptional in respect of the highly regarded employment qualities of the plaintiff. This case, I think, is properly assessed in similar fashion to the other cases cited and I set loss of earning capacity at \$80,000.
- [31] The cost of a training program will be accepted at 15 sessions, at \$45 per session, for \$675 in total. Accordingly, total damages are assessed at \$145,675.

"W.G. Grist J."

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