
CANADA / JUDGMENT

Weinmuller v. Tait

2006 BCSC 416

COURT

Supreme Court of British Columbia

DECIDED

14 March 2006

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2006 BCSC 416 Weinmuller v. Tait

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Weinmuller v. Tait,

2006 BCSC 416

Date: 20060314

Docket: MO50167

Registry: Vancouver

Between:

Anna Weinmuller

Plaintiff

And

Stewart Winston Tait

Defendant

Before: The Honourable Mr. Justice Rice

Reasons for Judgment

Counsel for the Plaintiff

D.M. McGregor

Counsel for the Defendant

D. Poulin

Date and Place of Trial/Hearing:

February 28 - March 3, 2006

Vancouver, B.C.

- [1] The plaintiff sues for damages for soft tissue injuries caused by the defendant when his vehicle rear-ended hers at about 3:00 p.m. on March 13, 2003, in New Westminster, B.C. Liability is admitted, and there is no question that the plaintiff was injured as a result. The issue is whether and to what extent her pre-existing degenerative skeletal condition should affect the award.
- [2] The plaintiff is a 68-year-old widow living alone in retirement in the Burnaby home that she shared for many years with her late husband and the four children they raised. She was always physically active, keeping the home up, walking, and involving herself continually in family, church, and community activities. She loved to dance. She always seemed to be cheerful, busy, positive, and fun-loving.
- [3] The plaintiff was not hospitalized after the accident. She drove home, but suffered immediate neck and back pain, pain to her chest from impact with the steering wheel, and pain in her left knee. She went to a walk-in clinic where a Doctor Love prescribed Tylenol 3, Diclofenac, Cytotec, and Ativan. She went the next day to see her family physician, Dr. Mary Loewen. Over the next two days the plaintiff also noticed pain in her left hip.
- [4] Dr. Loewen noted limited range of motion in her neck and extremely tender neck and lumbar muscles. She diagnosed the plaintiff as having soft tissue injuries. She told the plaintiff to continue with the medication prescribed by the walk-in clinic doctor.
- [5] The plaintiff returned to see Dr. Loewen on March 27, 2003, stating that her neck and back were feeling worse. Her lower back was very painful, and there was also pain in her left hip and leg, shoulder, neck, chest wall, and right breast. X-rays were ordered, and the plaintiff began seeing a massage therapist.
- [6] The plaintiff continued to suffer and continued to see her doctor over the next several months. Pain in her right leg developed by July 2003 and appears to continue to bother her. She tried physiotherapy a few times, but did not find it helpful. Dr. Loewen advised the plaintiff to continue with the massage therapy and range of motion exercises that she had been taught and to try swimming or Aquafit classes for exercise.
- [7] Dr. Loewen's clinical records indicate that the plaintiff displayed symptoms of a degenerative condition in her back in January 2003 not long before the accident. She told Dr. Loewen at that time that she had back pain when sitting and getting out bed. Dr. Loewen found spasms and tenderness and sent her for X-rays which showed degeneration of her lower spine and neck. The notes of Dr. Love, who saw the plaintiff on the date of the accident, indicate the plaintiff saying that she had previous hip arthritis pain and back pain.

[8] Dr. Loewen reported on November 9, 2003:

Thus, in summary, Mrs. Weinmuller suffered and continues to suffer from soft tissue injuries of her neck, back and leg muscles as a result of her injuries in the above accident. These injuries are exacerbated by pre-existing degenerative changes of her neck and back. The neck degenerative changes were asymptomatic prior to the accident while the back degenerative changes had begun to become symptomatic in the last three to four months prior to the accident, however, they were not causing any limitations in her activities until after the accident, thus the accident must have accelerated symptoms due to the early degenerative changes present. I expect that the soft tissue injuries will slowly improve with continued therapy and time using medication to control her symptoms so that she can improve her activity levels to that prior to the accident. The neck and back pain may never full resolve as it is at least somewhat related to the degenerative changes which are present in her spine and it is usual for these degenerative changes to slowly worsen over time. However, this worsening can be moderated to some extent by regular exercise and medication as needed.

[9] The plaintiff was sent to see a neurologist, Dr. Murphy, on September 3, 2003. Dr. Murphy reported that degenerative change in the spine was likely the main cause of her ongoing pain but that there was also some soft tissue inflammation that was a contributing factor. Dr. Murphy agreed with Dr. Loewen that Aquafit or swimming was the best means for the plaintiff to keep active and that improved fitness might improve her pain "somewhat."

[10] In addition to her pain, the plaintiff also suffers from depression. In 2000, the plaintiff was devastated by a tragedy in her family. Her daughter-in-law and four of her grandchildren were all killed in a car accident. She admits that she continues to suffer from grief over that as well as over the loss of her husband in 1997 due to colon cancer. According to the plaintiff, the trauma from this accident has reawakened some of her terrible pain from those events. It contributes to her depression, and she finds herself afraid to drive a car. She agreed to take Effexor for her depression; however, she has not been scrupulously following her doctor's advice to take one pill every day.

[11] Over the year following the accident, many of the plaintiff's injuries resolved themselves. Her neck continued to bother her occasionally, and her two remaining serious problems were her hip and lower back.

[12] On April 22, 2005, the plaintiff was sent to a physical medicine and rehabilitation specialist, Dr. Elliott B. Weiss. Dr. Weiss noted that on physical examination the plaintiff had localized areas of tenderness in her back and neck. She was tender also over her right greater trochanteric region. He observed the results of radiological studies performed March 27, 2003, indicated multi-level degenerative changes involving her cervical spine and lumbar spine. His opinion was that her injuries were consistent with a moderate sprain of her axial skeleton including her cervical, thoracic, and lumbosacral spine and an acute soft tissue injury of her shoulder girdle, pelvic musculature and knees. Dr. Weiss reported that:

It is a generally accepted medical principal [sic] that a period of 6 to 12 weeks is sufficient to allow for healing of a soft tissue injury of this type and magnitude. In the case of Ms. Weinmuller, she has well-documented evidence of pre-existing degenerative changes along her axial skeleton. From a functional perspective, an individual with advanced degenerative changes has less flexibility and/or cushioning effect to absorb the forces applied. It is my clinical experience that the presence of pre-existing degenerative and/or arthritic changes not only produces more intense symptoms, but the recovery is slower and less complete.

Post-injury, over the course of weeks and months there has been a slow and gradual improvement in her abilities, but she has yet to regain all of her lost capacity. Her on-going complaints of pain and discomfort are in keeping with diminished flexibility as well as deconditioning and limitation of movement in her spine. It is not surprising that she has lost her pre-accident ability to comfortably perform many tasks at home and in the community, which is a reflection of the residual effects of this accident in terms of lost strength, stamina, flexibility and endurance.

[13] Dr. Weiss stated that not having pre-accident radiological studies to review and compare, he could only speculate that the pre-existing degenerative changes progressed or worsened as a result of the accident, but in his opinion, it was a possibility. He stated that the presence of degenerative changes on the post-accident X-rays is not necessarily associated with pre-injury symptoms as these changes usually develop slowly over years.

[14] The plaintiff was also sent to an orthopaedic surgeon, Dr. J. F. Schweigel. He examined her and reported on May 9, 2005, that her pain then was due to the degenerative condition called spinal stenosis.

[15] Dr. Schweigel examined her once more on October 26, 2005, on request from defence counsel. In his report, he agreed with Dr. Loewen that the accident caused the degeneration in the cervical spine to become symptomatic. He also agreed that although the plaintiff had begun to display symptoms of degeneration and arthritis in her back before the accident, the accident accelerated those symptoms.

[16] With respect to her diminished capacity, Dr. Schweigel stated that:

This lady is still disabled from heavy work and from social activities such as walking more than a few blocks because of back and leg pain, reading for along [sic] periods of time because of neck discomfort, and from doing heavy physical work in the house, e.g. vacuum cleaning, bending and scrubbing the floors. etc. She is capable of light work in the house and walking for short distances. Her leg pain and even some of her back pain may be decreased if she has epidural steroid injections.

[17] Dr. Schweigel's prognosis was guarded. He did not think her pain would get worse in the future, but it would probably not get any better. He reported that:

She doesn't require any help in the home, as she is able to do most of the activities herself. Although she has pain and some limited motion in the neck and back, she is not incapacitated to any large extent because of these problems. Because of arthritis in her neck and back that preceded the MVA she was predisposed to having similar problems regardless of the MVA.

- [18] In a final follow-up report of January 30, 2006, Dr. Schweigel expressed his impressions of surveillance videos taken of the plaintiff on three occasions in December 2005. He noted that he saw her running at one stage, pushing a shopping basket, lifting her arms up with no difficulty above the shoulder level, and sliding into her car. He said it did not look as if she had any obvious discomfort on those days as she was doing fairly vigorous things. Those videos were presented at trial, and it is true that they showed the plaintiff moving in an agile fashion and bending at the hip level with no obvious discomfort.
- [19] By the plaintiff's own account, which is supported by the testimony of Ms. Lily Klimas, a close friend who testified, her life has changed very much for the worse since the accident. Before, she was an active, positive, outgoing person in good health. She had rarely suffered any medical problems. The plaintiff says she now has pain in her back all the time. She has to take Tylenol 3 everyday for that. Her neck bothers her once in a while, particularly when she does something that aggravates it such as working at the computer. Her hip bothers her everyday as well. Headaches that she had from before are not bothering her very much now. Her chest is better. Her neck responded well to massage therapy.

Analysis:

- [20] There is no doubt that the plaintiff suffered soft tissue injuries from this accident. The defendant does not deny it. The shoulder injury resolved within about two months, and the neck injury was largely resolved with the help of massage therapy after one year or a few months longer. The plaintiff spoke of periodic flare-ups in her neck, but her testimony seemed to vary on that point so that it is not certain how frequently such flare-ups occurred.
- [21] The hip injury has not resolved, and neither has her lower back injury. They are likely to give her pain and disability for the foreseeable future. As for her work capacity, the video evidence showed the plaintiff in good form and able, it seems, to do the light activity mentioned. The plaintiff can do light housework, but she has to ask her daughters to come and do the heavier work such as vacuuming, washing the floors, and cutting the lawn. Her son comes over to tend to maintenance and repairs.
- [22] The goal of tort law is, as far as possible, to place the plaintiff in the position she would have been in had the tortious conduct not occurred. Damages must be assessed for all of the injuries that were caused or contributed to by the defendant's negligence. The defendant is not required to compensate the plaintiff for pain she would have suffered in any event due to natural progression of the degeneration in her spine. Nevertheless, where the evidence indicates that the negligence triggered the onset of symptoms related to the degeneration or accelerated the progression of those symptoms, the plaintiff is entitled to compensation for

the additional pain and injury: *Athey v. Leonati*, [1996] 3 S.C.R. 458, 140 D.L.R. (4th) 235; *Hosak v. Hirst* (2003), 9 B.C.L.R. (4th) 203, 2003 BCCA 42 at ¶ 72.

- [23] Weighing the opinions of the physicians, I find that the pain suffered by the plaintiff was directly the result of injuries in the collision, most of which were resolved within a year of the accident. The hip bursitis was similarly caused mostly by the accident. However, it had healed within approximately two years. The plaintiff's ongoing difficulties are the result of degenerative changes for the most part, which had begun to become symptomatic before the accident but were not then debilitating. The accident accelerated the advance of those symptoms, causing the plaintiff to suffer the debilitating effects that she has experienced earlier than she otherwise would have.
- [24] There is, unfortunately, no evidence as to when, but for the accident, the natural progression of the plaintiff's degenerative condition would have reached the point it has today. Possibly it would have progressed slowly and not produced any serious effects for several years. Nevertheless, the fact that the plaintiff had begun to show some symptoms prior to the accident increases the likelihood that the degenerative changes and accompanying discomfort would have reached their current stage in the not-too-distant future and certainly before the end of her life expectancy. In the circumstances, and on the weight of the available medical evidence, it seems reasonable to assume that the plaintiff would have suffered the debilitating effects of her pre-existing condition by age 75.

Non-pecuniary damages:

- [25] An award of non-pecuniary damages must recognize the fact that, due to the accident, the plaintiff is likely to suffer chronic lower back and hip pain and some recurring neck pain with an attendant loss of enjoyment of life. However, the award must be reduced by the consideration that some or all of these symptoms are likely to have become manifest in any event at some point in the future because of the degenerative changes in the plaintiff's spine.
- [26] Special consideration is warranted for the plaintiff's depression. It is no doubt true that her family tragedies have, independent of the accident, been a cause of her depression. However, the evidence indicates that she was able to cope with that loss much better before the accident and that the trauma of the March 23, 2003, accident and the chronic pain that it triggered are also causes of the plaintiff's depression. As with the plaintiff's physical pain, the fact that there is a pre-existing depression does not limit the defendant's liability, but it does require a reduction in the potential damage award by an amount sufficient to recognize the debilitating effects that the plaintiff would have experienced anyway: *Hosak v. Hirst*, *supra*, at ¶ 71. In addition, I must consider that the plaintiff might have suffered less if she had taken her medication regularly as prescribed.

- [27] Defendant's counsel has submitted authority establishing a range for non-pecuniary awards in cases of this general nature of \$10,000 to \$20,000. The authorities provided by plaintiff's counsel suggest a range of \$32,500 to \$50,000.
- [28] Of the cases submitted, *Williams v. Nicholson* (2005), 141 A.C.W.S. (3d) 237, 2005 BCSC 922, is the most closely analogous in that Ms. Williams suffered a degenerative condition that had produced some pain prior to the accident that formed the subject matter of the litigation, but that pain had not limited her activities in any way. After the accident, her usual activities had to be seriously curtailed. Ms. Williams was awarded \$45,000 for non-pecuniary damages.
- [29] Because each case involves its own unique constellation of facts, other cases are necessarily of limited assistance in assessing general damage awards. On the facts of the *Williams* case as they are set out in the reasons for judgment, Ms. Williams appears to have suffered a greater change in her lifestyle than the evidence indicates in the case presently at bar. Considering the authorities submitted by counsel and all of the circumstances of this case, I find that the plaintiff's pain and suffering due to the accident entitles her to an award for non-pecuniary loss of \$35,000.

Cost of future care:

- [30] The plaintiff, because of her pain, has lost the capacity to attend to some of the heavier work around her home such as vacuuming, washing floors, and mowing the lawn. Until now, she has been relying on the generosity of her friends and primarily her children, who have helped her with these things. She is entitled to compensation for her lost capacity, even if her family members continue to volunteer their help. That compensation may be assessed with reference to the approximate cost required to hire someone to do these heavier chores for her: *Kroeker v. Jansen* (1995), 123 D.L.R. (4th) 652, 4 B.C.L.R. (3d) 178 (C.A.); *McTavish v. MacGillivray* (2000), 74 B.C.L.R. (3d) 281, 2000 BCCA 164 at ¶ 68-69.
- [31] She is also entitled to compensation for the cost of medication and treatment that she requires as a result of the accident and the earlier onset of pain caused by the degeneration of her spine.
- [32] For cost of future care, I award her a present value amount of \$26,100, based on \$737 per year to cover the cost of Effexor for four years and \$3570 per year to age 75 for the rest. The latter amount includes all of the plaintiff's claims for medications with some deductions for variability in use over time and deduction of the claim for Serc betahistine dihydrochloride, which she takes for vertigo that was not caused by the accident. It also includes the claim for massage therapy once each month at \$50 per session, but not the claim for the cost of a fitness trainer, fitness pass, or equipment as these are not reasonably necessary. She enjoys as much exercise now as she wants and needs. As for housekeeping help, the amount includes \$2400 per year, an amount roughly equal to half the amount claimed, which I have estimated is sufficient to assist her with the more strenuous cleaning and maintenance. She is able to do the lighter housekeeping duties herself.

Special damages:

[33] The parties have agreed that the plaintiff's special damages amount to \$1,132.77. I award her that amount.

Summary:

[34] In summary, the plaintiff will receive an award in the following amounts:

Non-pecuniary damages: \$35,000.00

Cost of future care: \$26,100.00

Special damages: \$ 1,132.77

Total: \$62,232.77

[35] Unless there has been a formal offer to settle that would require the parties to address the issue of costs, the plaintiff will have her costs at scale 3.

"E. Rice, J."

The Honourable Mr. Justice E. Rice

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