IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Davies v. Larabie et al,***
2005 BCSC 1167

Date: 20050811
Docket: M033098
Registry: Vancouver

Between:

Linda Davies

Plaintiff

And

Francois Larabie and
National Car Rental (Canada) Inc.

Defendants

Before: The Honourable Mr. Justice Silverman

Reasons for Judgment

Counsel for the Plaintiff	D. Hill
Counsel for the Defendant	T.H. Pettit
Date and Place of Trial:	June 7-10, 2005 Vancouver, B.C.

INTRODUCTION

[1] The plaintiff claims damages for injuries suffered in a motor vehicle accident on September 21, 2001, (the "M.V.A."). Her injuries are all of the soft tissue variety.

[2] The defendants argue that the plaintiff is entitled to only nominal damages, for two reasons:

1. The damage to both vehicles was minimal, and therefore, the defendant argues that the injuries must also have been minimal; and

2. The plaintiff's injuries pre-date the M.V.A., by many years, during which she has received treatment for these injuries, regularly and frequently.

THE IMPACT

[3] The collision occurred on Granville Street, where the vehicle which the plaintiff was driving was rear-ended by the rental vehicle which the defendant Larabie, (the "defendant") was driving. Liability is admitted.

[4] In his testimony, the defendant, described the force of the impact as being close to none.

[5] The impact caused a small dent in the defendant's front bumper, although the paint from the bumper was not disturbed, even at the point of impact. The cost of the repair was $211.19, including tax, although this was a discount price given to the owner of the vehicle, which is a car rental company, (the corporate defendant).

[6] In her testimony, the plaintiff described the impact as a jolt. Her rear bumper was minimally dented and the cost of its repair was $523.32 including tax.

[7] The plaintiff testified that, despite the minimal damage to the vehicles, the impact had enough force to cause her injuries of a type and intensity that she had not suffered for many years prior to the accident. Discomfort from the injuries began not long after the impact, and progressively got worse for at least one year. Even then, she did not return to her pre-M.V.A. condition, and was still symptomatic at the time she gave evidence.

[8] The defendants argue that the lack of serious damage to the vehicles indicates that the force of the impact was minimal, and it is therefore highly unlikely that the plaintiff could have suffered more than trifling injury. I was referred to a number of cases where the Court took this view.

[9] In ***Butler v. Blaylock Estate,*** [1981] B.C.J. No. 31 (S.C.)(QL) at paras. 18-19, McEachern C.J.S.C. said:

18. I am not stating any new principles when I say that the Court should be exceedingly careful when there is little or no objective evidence of continuing injury, and when complaints of pain persist for long periods extending beyond the normal or usual recovery period.

19. An injured person is entitled to be fully and properly compensated for any injury or disability caused by a wrongdoer. But no one can expect his fellow citizen or citizens to compensate him in the absence of convincing evidence -- which could be just his own evidence if the surrounding circumstances are consistent -- that his complaints of pain are true reflections of a continuing injury.

See also ***Price v. Kostryba*** (1982), 70 B.C.L.R. 397 (J.C.).

[10] In ***Boag v. Berna,*** 2003 BCSC 779, Williamson J. said this:

12. I am satisfied that the motor vehicle accident could not be described as violent. However, I am aware that it is often inappropriate to equate the damages to a motor vehicle to injuries that may be sustained by occupants of that vehicle. That a piece of steel is not dented does not mean that the human occupant is not injured.

[11] The plaintiff's doctor at the time, Dr. Debbie Hoeburg, testified that in her opinion, injuries of the type suffered in this case can occur even when there is minimal impact between vehicles, and minimal damage.

[12] In view of all of the foregoing, I view the plaintiff's injuries with extreme caution. Having said that, and considering all of the evidence, I believe the plaintiff's testimony that the pain which began shortly after the M.V.A.,

and that had not been a significant bother to her for some years, was significantly increased by the impact against her rear bumper on September 21, 2001.

THE M.V.A. INJURIES

[13] The plaintiff suffered soft-tissue injury to her neck, lower back and shoulders. She also suffered from headaches and fatigue. The pain from her injuries continued to progressively worsen for at least one year. Since then, she has gradually improved, although she is not yet to her pre-M.V.A. status. Prior to the M.V.A., the plaintiff participated in, and enjoyed a number of recreational activities, including swimming, jogging, skiing and fitness classes. She has returned to some, but not all of those activities. After the M.V.A., the plaintiff continued to work at her job until some time in December 2001, when she quit due to continuing pain from the M.V.A. She makes no claim for wage loss in this action.

[14] In Dr. Hoeburg's Report of February 15, 2003, she stated, *inter alia*, that the plaintiff made "six office visits" to her office between the date of the accident and September 18, 2003, after which the plaintiff changed doctors. She continued:

> It is my assessment that Linda Davies sustained a mild to moderate (Grade 2) soft tissue strain type injury to the cervical spine and a mild (Grade 1) soft tissue injury to the lumbosacral spine as a result of the motor vehicle accident of September 21, 2001.
>
> Ms. Davies did not loose [sic] time from work because of her injuries, but she had difficulty in performing certain aspects of it e.g. lifting of heavy objects. In fact, Ms. Davies quit her job in December of 2001, partly due to her physical discomfort. Her ongoing symptoms and partial disability influenced her decision about her new job choice.
>
> Although Ms. Davies has not yet returned to her pre-accident condition, her prognosis for full recovery is good. Most patients will fully recover by the second anniversary of their M.V.A. I do not anticipate any permanent partial disability, however, it must be remembered that soft tissues, once injured, do not return entirely to normal, and may remain susceptible to reinjury and fatigue with possible recrudescence of symptoms.
>
> Ms. Davies would benefit from an Active Rehabilitation program of guided exercise by a physiotherapist or personal trainer in order to expedite her recovery. She may, on occasion, also require the services of a manual therapist over the next six months, to help her settle any episodes of exacerbation of her symptoms.

[15] Dr. Michael Foran, a chiropractor, noted in his Report of March 11, 2003, the following:

> Diagnosis as a result of a MVA September 21, 2001 is grade II cervical spine acceleration deceleration injury ... .
> Since the MVA Ms. Davies reports headaches, neck, shoulder, mid and low back pain, stiffness with restricted motion. ...
>
> ...
>
> Ms. Davies has continued to work with pain and restrictions, which included prolonged standing and lifting as this aggravated her condition. She states household chores like vacuuming and lifting cause her pain.
>
> Ms. Davies reports 70% improvement to date and continues to have occasional symptoms of headache, neck and back pain. ...
>
> Ms. Davies has not yet returned to her pre accident state. ...Due to the prolonged frequency of

treatment I assume she has reached maximum improvement at this time.

There should be no immediate permanent disability directly related to the injury however there is a real probability of accelerated cervical spine disc degeneration and spondylosis due to the alordosis of the cervical curve which may lead to future osteoarthritis of the cervical spine and future restrictions sytmptomolgy and partial disability.

PRE-EXISTING INJURIES

1. General

[16] The defendants argue that the plaintiff suffered from the same injuries for many years prior to the M.V.A., and that her post-M.V.A. condition would have been the same even if the M.V.A. had not occurred.

[17] The most generous view of the plaintiff's evidence that the defendants allow is that she may have come to believe, purely subjectively, that she was hurt in the M.V.A., but an analysis of her pre-existing conditions lead to the conclusion that she suffered no further injuries from the M.V.A., when considered objectively.

[18] The defendants argue that the plaintiff suffered from a "crumbling skull" and that the M.V.A. did not contribute materially to her post-M.V.A. condition.

[19] The defendants argue that the injuries suffered by the plaintiff in the M.V.A. were nothing more than a mild and transient aggravation of long standing chronic neck and back injuries, and headaches. The defendants further argue that the plaintiff had returned to her pre-accident state within six months of the accident.

[20] The plaintiff acknowledges that she had prior injuries, but says that she suffered from a "thin skull" rather than a "crumbling skull", and that the M.V.A. contributed materially to her post-M.V.A. difficulties.

2. Defendants' Argument

[21] A review of the medical records of Dr. Hoeburg, which are in evidence, indicates that the plaintiff periodically attended at Dr. Hoeburg's office from July 4, 1989 to September 18, 2003. She attended numerous times with complaints to her neck, back and of headaches, in addition to a variety of other physical complaints.

[22] The medical records of Gary Schweitzer, registered massage therapist, are also in evidence and indicate that the plaintiff attended for his services numerous times from September 19, 1995, to August 1, 2003, with complaints of neck, back and headache pain.

[23] The records of the Vancouver Naturopathic Clinic indicate that the plaintiff attended for treatments there from January 16, 2001, to June 7, 2002, with respect to neck, back and headache pain.

[24] The defendants point to the following factors, found in the various medical records relating to the plaintiff which are in evidence, together with the evidence of the plaintiff herself:

1982	plaintiff injured her right hip and lower back playing volleyball.
July 1989	plaintiff was in a motor vehicle accident (the "1989 M.V.A.").
July 4/89	neck strain ... lower back pain radiating to legs.
July 14/89	lower back strain ... persistent neck stiffness ... para vertebral spasm.
Sept. 14/89	lower back pain when standing ... neck symptoms 3x/wk.

Oct. 30/89 neck more symptomatic ... advised against chiro.

Feb 2/90 neck and lower back still symptomatic ...back worse.

May 30/90 2-3 days/week symptomatic with neck and lower back pain ...Pacific Massage therapy.

Oct. 2/90 neck still symptomatic ... neck and lower back pain occurring intermittently.

Mar. 14/91 Still having pain 1/week ... seeing massage therapist 1/wk ... seeing chiro 1/month ... discouraged from using massage therapy on a regular basis ... chiro use discouraged

May 13/92 ongoing problems ... neck and back pain ... seeing massage therapist.

Dec. 22/92 specialist in internal medicine, Dr. Carruthers. Dr. Carruthers reports lumbar and upper back pain ... pain in right arm ... low back pain when working ...right hip problems ... she feels her recovery has plateaued ... not enough (points) to fulfill the criteria for fibromyalgia ... chronic post-accident pain ... an alignment problem.

1992-1993 Continuing neck and back pain.
July 21/93 Locum in Dr. Hoeburg's office diagnosis chronic soft tissue neck/low back pain ... referral to massage therapy.

Sept. 19/95 Commences massage therapy with Gary Schweitzer. Attends for treatment twenty-three times between September 1995 and February 1999. Gary Schweitzer notes: left shoulder pain.

Nov. 7/95 Same

Dec. 6/95 Same

Jan. 17/96 Complaints of left shoulder pain.

July 5/96 Pain with lifting

Aug. 1996 Spinal range of movement problems ... stiffness and massage therapy.

1997 Physiotherapy 8 times ... upper trapezius and neck ... neck pain ... mid-back.

July 1997 Massage therapy. Notes complaint of right shoulder and neck pain. Massage for shoulder problems ... unable to use weights.

July 8/97 Plaintiff sees Dr. Stager at St. Paul's Hospital who diagnoses "mild impingement syndrome" in her shoulder.

Aug. 1997 Still going to physio.

Aug. 1998 Went to physio five times for hip, back and neck pain.

1998 Continues with physio.

1999 Continues with physio for neck, back and headaches.

Jan. 16/01 Commences attending Vancouver Naturopathic Clinic for headaches, fatigue and back. Completes application form ticking off "back, muscle, joint pain" and writing in "car accident 11 years ago".

Sees doctor at the Naturopathic Clinic on two dates after the M.V.A. (September 24 and 25, 2001) and the clinical notes makes no mention of the M.V.A. of September 21.

Oct 4/01 First mention in any clinical records (Dr. Hoeburg's) of the M.V.A. of September 21.

3. Plaintiff's Argument

[25] The plaintiff acknowledges that she suffered a variety of similar physical problems prior to the M.V.A., but argues that the injuries were quiescent for some years before the M.V.A. The plaintiff gave evidence that she had recovered from the injuries from the 1989 M.V.A. within approximately five years.

[26] After the M.V.A. of September 21, 2001, the plaintiff's attendance at various doctors increased dramatically compared to her attendance prior to the M.V.A. Specifically:

1. She commenced seeing Dr. Michael Foran, chiropractor, on October 17, 2001, and continued to see him until May 23, 2003. She did not see him prior to the M.V.A.

2. Dr. Schweitzer, a registered massage therapist, whom the plaintiff commenced seeing on September 19, 1995, last saw the plaintiff prior to the M.V.A. on February 16, 1999, that is approximately two and a half years before the M.V.A. It was only after the M.V.A. of September 21, 2001, that she commenced seeing Dr. Foran again, and she saw him twenty-three times between October 2001, and August 2003.

3. She commenced seeing Lesley Spinks, (for physiotherapy and acupuncture) on November 27, 2001, (that is, after the M.V.A.), and continued until November 5, 2002. She had not seen her prior to the M.V.A.

[27] The plaintiff relies upon the evidence of the witness, William Chamberlain, who met with the plaintiff at a pre-arranged appointment immediately after the M.V.A. He had also met with her on a regular basis for many months prior to the M.V.A. He gave evidence that she was visibly uncomfortable in the manner in which she was sitting, at the meeting on the date in question, as contrasted with her apparent comfort at meetings prior to that date. I accept his description of the plaintiff's apparent discomfort, and the comparison with his observations on other dates, as being accurate.

[28] The plaintiff relies upon the evidence of her spouse, Graham Way, who gave evidence of the observations he made of the change in the plaintiff's discomfort and appearance after the M.V.A., as compared with prior to the M.V.A. I accept his evidence of his observations as truthful and accurate.

[29] The plaintiff relies upon the opinion of Dr. Hoeburg as noted in her written Report of October 11, 2004, where she reported, *inter alia*, the following with respect to the 1989 M.V.A.:

> In the next seven office visits (between August 1993 and July 1997), Ms. Davies made no mention of any symptoms related to the accident. At her check-up on July 2, 1997, the patient requested a referral for massage therapy for right shoulder problems. She had been unable to use weights in her exercise program and wondered if this related to past M.V.A.-related injuries. She was referred to a sports medicine specialist, Dr. A. Stager, who assessed her on July 8, 1997 and determined that the shoulder had been injured in an exercise class about a year and a half prior and that Ms. Davies was suffering from a mild shoulder impingement syndrome. ...

> In the next seven office visits that took place between August 1997 and the motor vehicle accident of September 21, 2001, the patient did not make any mention of any neck or back symptoms.
> In summary, Linda Davies sustained a grade II cervical and lumbosacral strain type injury in the motor vehicle accident of July 1, 1989. It is my impression from my medical records that the patient had recovered from these injuries years before the second accident occurred on September 21, 2001. It is possible, however, that the first accident predisposed Ms. Davies to the re-injury that occurred in September 2001... .

[30] Dr. Foran in his Medical Report of March 11, 2003, notes the following with respect to the M.V.A. of September 21, 2001:

> It is more likely than not that the injury arose from the subject motor vehicle collision.

4. Plaintiff's Credibility

[31] The defendants argue that I should be suspect of the plaintiff's credibility, largely because the defendant says that she made certain comments to him, indicating that she was not hurt, immediately after the M.V.A., as well as during two telephone conversations he had with her during the next several weeks.

[32] I reject this argument and find the plaintiff credible, although not always reliable in her recollections.

[33] I do not find the alleged comments to the defendant particularly helpful, and I consider it more likely that his recounting of those recollections is based on a misunderstanding of what Ms. Davies said, or that she misunderstood what she was being asked. In this regard, I note the defendant's evidence that they were both "kind of stunned by it all".

[34] The plaintiff's credibility is also enhanced by the numerous admissions she made in Court that she was uncertain, or did not recall, certain matters, when a clear and distinct recollection would likely have advanced her case, if believed.

[35] I also take note that the plaintiff has not advanced a wage loss claim in circumstances where it appears that one would be at least arguable. While this, by itself, is determinative of nothing, it is a factor that assists me in concluding that this plaintiff is telling me the truth about the basis for her claims, and nothing more than the truth.

[36] In terms of her reliability, I conclude that the plaintiff's memory is not as precise as would be preferred in a perfect world, but that it is precise enough to satisfy me of the likelihood of a number of factors. One of those important factors is her evidence that her pain in all relevant areas of her body was under control, and of less significance and intensity prior to the M.V.A., than it was after the M.V.A.

5. The Law

[37] In addressing the issue of a "crumbling skull" vs."thin skull", I am guided by the decision in ***Athey v. Leonati***, [1996] 3 S.C.R. 458, as follows:

> 34. ... The "crumbling skull" doctrine is an awkward label for a fairly simple idea. It is named after the well-known "thin skull" rule, which makes the tortfeasor liable for the plaintiff's injuries even if the injuries are unexpectedly severe owing to a pre-existing condition. The tortfeasor must take his or her victim as the tortfeasor finds the victim, and is therefore liable even though the plaintiff's losses are more dramatic than they would be for the average person.
>
> 35. The so-called "crumbling skull" rule simply recognizes that the pre-existing condition was inherent in the plaintiff's "original position". The defendant need not put the plaintiff in a position better than his or her original position. The defendant is liable for the injuries caused,

> even if they are extreme, but need not compensate the plaintiff for any debilitating effects of the pre-existing condition which the plaintiff would have experienced anyway. The defendant is liable for the additional damage but not the pre-existing damage: ***Cooper-Stephenson***, *supra*, at pp.779-780 and John Munkman, *Damages for Personal Injuries and Death* (9th ed. 1993), at pp.39-40. Likewise, if there is a measurable risk that the pre-existing condition would have detrimentally affected the plaintiff in the future, regardless of the defendant's negligence, then this can be taken into account in reducing the overall award: ***Graham v. Rourke***, *supra*; ***Malec v. J.C. Hutton Proprietary Ltd.,*** *supra*; ***Cooper-Stephenson****, supra*, at pp.851-852. This is consistent with the general rule that the plaintiff must be returned to the position he would have been in, with all of its attendant risks and shortcomings, and not a better position.

6. Conclusion

[38] Applying the evidence in the case at bar to those matters that need to be determined in accordance with ***Athey***, I make the following findings:

1. The plaintiff suffered from a variety of physical ailments prior to the M.V.A. at a much lower level of significance and intensity than after the M.V.A.

2. If not for the M.V.A., the plaintiff would have continued to suffer from various ailments at a lower level of significance and intensity.

3. The significance of the pre-existing ailments was minimal when compared with the impact upon the plaintiff of the M.V.A. itself.

4. The plaintiff's injuries from the M.V.A. have been unexpectedly severe owing to the pre-existing ailments, however, those pre-existing ailments would not have increased in significance *but for the M.V.A. itself.* The M.V.A. contributed materially to the post-M.V.A. condition of the plaintiff.

5. The plaintiff, at the time of the accident, had a "thin skull" not a "crumbling skull".

[39] It follows that the defendants must take the victim as they find her. The defendants are responsible for the plaintiff's losses, even though they are more dramatic than they would be for the average person.

[40] In coming to these conclusions, I am particularly influenced by the opinion of Dr. Hoeburg where she said in her Report of October 11, 2004:

> It is my impression from my medical records that the patient had recovered from these injuries years before the second accident occurred on September 21, 2001. It is possible, however, that the first accident predisposed Ms. Davies to the re-injury that occurred in September 2001.

QUANTUM

[41] I conclude that the plaintiff suffered a moderate whiplash, the symptoms of which include pain to her neck, her back and headaches. Her symptoms were significant for in excess of two years, and have not yet completely abated. She continues to be symptomatic.

[42] She continued to try to work in her job at a hospital, but, because of the pain from the injuries had to quit working approximately three months after the M.V.A.. She was involved in a number of recreational activities before the M.V.A., including swimming, jogging, skiing and fitness classes. She has not yet fully returned to all of those activities. In addition, she has been unable to perform the chores around her home that she used to perform with the same degree of ease, and her relationship with her spouse has suffered to some extent.

[43] The plaintiff has suggested that an appropriate award for non-pecuniary damages is $20,000 to $30,000. The defendants, (relying on the "crumbling skull" argument) suggest $5,000.

[44] I have been referred by both counsel to a number of cases with similar injuries, although naturally every case is dependent on its own facts. The cases that I have been referred to, and the amount of non-pecuniary damages awarded are as follows:

1.	***Bridges v. Brennan*** 2003 BCSC 456	$5,000
2.	***Pennykid v. Escribono***, 2004 BCSC 954	$14,000
3.	***Craddock v. Wood***, 2002 BCSC 1528	$22,000
4.	***Linekar v. Andreiko***, 2004 BCSC 494	$22,000
5.	***Arnold v. Richmond Imports Ltd.,*** 2004 BCSC 672	$30,000
6.	***Remenik v. Marchand***, [2003] B.C.J. No. 172	$30,000

[45] In all the circumstances, I assess non-pecuniary damages at $18,000.

SPECIAL DAMAGES

[46] The plaintiff presents a claim for special damages in the amount of $5,083.99, comprised of the following details:

Dr. Foran	$1,225.00
Leslie Spinks, R.M.T.	$1,000.00
Gary Schweitzer, R.M.T.	$1,960.00
Additional Medical Treatment Expenses	$ 898.99
TOTAL:	$5,083.99
Less M.S.P. Reimbursements:	-$ 265.71
TOTAL MEDICAL EXPENSES:	$4,818.28

[47] The defendants say that reimbursement for approximately six months should be allowed and nothing more, which would have the effect of reducing the amounts claimed.

[48] In view of my previous findings concerning the length of the recovery, and in particular Dr. Hoeburg's opinion that the plaintiff had not yet returned to her pre-M.V.A. condition by February 2003, and comments with respect to the possibility of two and a half years of recovery, I reject this argument of the defendants and am prepared to allow reimbursement for all treatment for which there has been proper proof provided.

[49] The plaintiff has provided a number of receipts and cancelled cheques with respect to the amounts claimed. However, there are several amounts claimed for which there is no proper documentation, and I disallow those claims.

[50] With respect to Dr. Foran, the material presented supports payment of all of the amount claimed, being

$1,225, less a total of $315, for which there has been no receipt presented. Consequently, I allow the amount of $910.

[51] With respect to Lesley Spinks, I am satisfied that the letter from Ms. Spinks is sufficient proof of payment, therefore, the full amount claimed of $1,000 is allowed.

[52] With respect to Gary Schweitzer, the receipts support an amount of $980, and I allow that amount.

[53] With respect to "additional medical treatment expenses", I am satisfied with all of the amounts claimed, except for travel costs of $400 for which there are no receipts or details. Consequently, I allow the amount claimed less $400 for a total of $498.99.

[54] The evidence does not establish which payments are covered by the M.S.P. reimbursement amount of $265.71. The burden is on the plaintiff on this matter and consequently, I have subtracted the full amount from the total that will be allowed.

[55] In sum, the total allowed for special damages is as follows:

Dr. Foran	$ 910.00
Lesley Spinks	$1,000.00
Gary Schweitzer	$ 980.00
Additional Medical Treatment Expenses	$ 489.99
TOTAL:	$3,379.99
Less M.S.P. Reimbursements:	-$ 265.71
TOTAL AMOUNT ALLOWED:	$3,114.28

CONCLUSION

[56] Judgment is granted in favour of the plaintiff in the amount of $18,000 for non-pecuniary damages, and $3,114.28 for special damages for a total of $21,114.28.

[57] Costs in the cause.

"A. Silverman, J."
The Honourable Mr. Justice A. Silverman

August 25, 2005 – ***Revised Judgment***

Corrigendum to the Reasons for Judgment issued advising that the name of counsel for the defendants should be changed from "K.E. Lafontaine" to read "T.H. Pettit".