

Date: 19980424
Docket: B961547
Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

VALERIE HUTCHINSON and RONALD HARDER

PLAINTIFFS

AND:

BEVERLEY MARLENE HOLM

DEFENDANT

REASONS FOR JUDGMENT

OF THE HONOURABLE CHIEF JUSTICE

Counsel for the Plaintiffs

Graham Taylor

Counsel for the Defendant

Timothy H. Pettit

Date and Place of Hearing: April 14 - 16, 1998
Vancouver, British Columbia

I

[1] On August 6, 1995 the plaintiff while travelling north on Willingdon Avenue started to merge with north bound traffic on Canada Way when she was struck from behind by the defendant's vehicle.

[2] Liability is admitted.

[3] She did not have any immediate complaints following the accident though that night she developed a headache and soreness all over. She was able to arrange an appointment with the doctor on August 8th and complained of pain in her right shoulder, arm and neck. Medication and physiotherapy were prescribed but the

disability seemed to worsen causing her much pain, discomfort and missed time at work throughout the balance of 1995.

[4] In 1996 she resumed work to the extent she was able, but suffered continual pain until the summer when these pains began to lessen. Her condition improved for some months.

[5] While she was not symptom free during this period she believed that she was on the mend. Later in the fall of 1996 her condition began to deteriorate and in early 1997 it began to get worse to the point where her left shoulder, lower back and both knees became painful and debilitating.

[6] As 1997 wore on she had headaches, sleeping problems, stiffness every morning and tiredness from sleep deprivation.

[7] She began to get depressed and found she was unable to work full days either because of physio appointments, tiredness, pain or lack of energy. From the beginning of 1998 until the date of the trial the plaintiff's condition did not improve and indeed in her view it seems to be getting worse.

[8] The plaintiff's position is that the original pain and discomfort apart from the period of remission in the summer of 1996 has always been with her but has turned into a generalized pain which one of her specialists has diagnosed as fibromyalgia.

[9] The defendant has experts who doubt the diagnosis of fibromyalgia though they acknowledge injuries and pain to the right shoulder and neck region. The defendant does not argue that the plaintiff's pains are imaginary or contrived but only that the generalized pain, (that is, other than the right shoulder and neck) do not amount to fibromyalgia and that even if they do, the fibromyalgia was not caused by the accident.

[10] The plaintiff's claim is for general damages (non-pecuniary), loss of income, past and future and special damages for future physio etc.

II - The Plaintiff's Background

[11] The plaintiff is a pleasant, vivacious, energetic 49 year old single mother, whose life has been dedicated to hard work, winning promotions, gymnastics, baseball, and bringing up a family. She has overcome many obstacles including an ex-spouse who did not pay support payments, an anorexic daughter and two previous accidents, one when she was a teenager and thrown through the windshield of a car, another a motor vehicle accident in February 1994. In this accident she suffered an injury to her neck and shoulder, which subsided within a few months.

[12] She had also suffered intermittent bouts of pain in her hip pre-accident.

[13] At the time of the accident in question she was not suffering from any after effects from either of the two earlier accidents. Her matrimonial problems and those of the anorexic child had all been resolved. She was as she put it in one of the best phases of her life, healthy, happy and winning sales awards for her efforts at work. This evidence was not disputed by the defence.

[14] The plaintiff had worked for many years as a sales representative for several companies and in each case had been either the leading sales representative in Canada or one of the best they had ever seen. In addition to this, she had become a judge in the area of gymnastics and was described as one of the most energetic fully involved, highly competent judges in the Province. At the same time, the plaintiff played baseball and was very active in other sports and exercise endeavours.

[15] By all standards the plaintiff was an over achiever and one who for that reason sometimes became what might be described as "stressed out". In 1986 this happened to her and again it appeared to be happening in the early 1990's. She was certainly however a happy prosperous person at the time of the accident. Her enthusiasm and positive attitude did not seem to wane even after it. What did happen, were constant problems, particularly with her neck and shoulder which sapped her strength causing her to have to give up the gymnastics and other athletic endeavours, though she continued and still continues to this date to exercise regularly and walk briskly on a regular basis.

[16] So far as work is concerned, she started with Rogers Cable as a sales representative in 1994 and but for a slow start in the first two months began to achieve a high volume of sales to the point where she was the leading sales person in Canada in 1995 and 1996 notwithstanding the adverse effects of the accident. In 1997 she was as she put, pennies behind the leader and second in the country. Her income in each year increased. That of course is mainly attributable to her sales commissions. She estimates that in 1995 she lost 560 hours of work. In 1996 she claims to have lost some 248 hours and in 1997, 383 hours. These figures are only estimates on her part but she bases the latter part of 1996 and 1997 on a calendar which was produced as Exhibit 7.

[17] At the present time she experiences real difficulty in her right shoulder, her neck, headaches, low back and sometimes her knees.

[18] She also experienced pain in her left shoulder for the first time in 1997. At the present time she wishes to continue with her employment notwithstanding the pain which it causes. She is not prepared to make a switch to an easier office job as recommended by her doctor.

III

[19] The medical evidence with respect to her condition is somewhat detailed and complicated first by virtue of certain pre-accident

features, second because of new symptoms emerging a year and a half after the accident itself, and third due to the delayed development of fibromyalgia. Because of this complicated background and the dispute on causation, I shall elaborate quite extensively on her medical history.

[20] Although her previous accidents had left her symptom free as at August 1995, she had suffered from pain in her hip for some years and, accordingly to Dr. Martin in x-rays of August 16, 1995 she showed evidence of a pre-existing "degenerative disc lesion of moderate severity involving C5-6".

[21] The complaints following the accident were essentially pain in the base of the neck, pain in the shoulder and associated headaches. Dr. Padilla's prognosis was that the matter should clear up with time.

[22] Dr. Anthony Preto saw her on or about March 28, 1996 and he found mild restriction of movements of the glenohumeral joint, pain in the scapula and into the shoulder and right elbow, and radiation of pain down the right arm. His prognosis was that her symptoms were related to cervical spondylosis and mild adhesive capsulitis of the glenohumeral joint on the right. He prescribed physiotherapy which prescription she honoured. She was seen by Dr. Cameron, a neurologist on April 12, 1996 and his assessment was that all nerve functions were intact and normal, and that her pain and suffering were due to musculoskeletal soft tissue injury as a result of a motor vehicle accident. His prognosis was eventual recovery within months.

[23] She was seen by Dr. Hawk, an orthopedic surgeon, on behalf of the defendant on October 3, 1996 and in his report he refers to pain in the right shoulder blade region, pain in the right elbow region and recurrent shooting pains in her right arm extended up to the right hand. He reviewed several reports and stated that in his view

...She has more persistent right posterior shoulder pain and dysesthesia involving her right upper extremity. She presents with symptoms consistent with her having a mild right soft tissue shoulder impingement syndrome consistent with a mild shoulder bursitis. Her neurologic examination is normal.

[24] He says:

...I have no reason to doubt her present subjective complaints of right shoulder pain and suspect that she does have some continued mild subacromial bursitis in this right shoulder region. I believe that with further time that this problem will subside...

[25] She was seen by Dr. Andrew Travlos in February of 1997 who noted at that time that she had symptoms not only pertaining to her neck and right shoulder but also her left shoulder and upper back. In addition she complained of headaches and lower back pain. He noted that, since the accident, she had dizziness and blurry vision, pain, swallowing difficulties, and pain in the front of her neck. She also had dreams of the accident. He then outlined her complaints, that she had stiffness in the morning but her condition would worsen as the day went on. Her pain would start up the right side inside the shoulder region and radiate up to the shoulder, across the shoulder and down into the right arm and elbow, then pain to the left side though not so much involved as the right. She complained of low back symptoms bilaterally, though intermittent, perhaps once or twice a week for a couple of hours. He noted that she remained active daily and exercises regularly.

[26] Dr. Travlos noted there were definite "trigger points" present in the rhomboid major, the supraspinatus and trapezius muscles on the right side. The left side was essentially noncontributory. The different trigger points referred pain into areas mostly involving the right neck, shoulder and arm.

[27] In his assessment Dr. Travlos says:

Ms. Hutchinson is a very straightforward lady with no pain behaviours whatsoever. She was symptomatically well prior to a motor vehicle accident that she was involved in on August 6, 1995...There were no ongoing complaints of any nature for several years predating this accident.

...there is definite evidence of a previous longstanding injury in the neck between C5 and 6.

[28] Though the doctor found that she was symptom free at the time of the accident, he goes on to say:

I do, however, feel that there was an underlying propensity to be injured at this particular area, and hence it is more likely than not that the accident did injure this same area, causing further damage, and is therefore responsible for her current ongoing symptoms.

I believe that her current symptomatic complaints are a combination of mechanical neck dysfunction and myofascial pain symptoms of the neck and shoulder girdle....It is because of these ongoing mechanical findings that I believe that the accident has specifically accelerated the degenerative process in the neck. Had the accident not occurred, it is more probable than not that she would have continued to go on for many years without any neck symptoms. Whether should would

have ultimately developed neck symptoms at all is impossible to say, but it is possible that over the next ten to fifteen years she would have developed some neck complaints. This is a significant difference to her current ongoing problems.

...she has been doing the right activities to try to treat them already.

Despite this, I still believe that there will be some ongoing improvement of her neck complaints...

Her headache complaints seem to emanate from the neck. I believe they likely start out as muscle contraction headaches from the neck and ultimately become migrainous in nature. As her neck symptoms settle, so I expect the headaches to decrease.

Her low back complaints are fairly nonspecific. I could not find any particular concerning features on today's examination and therefore have no specified diagnosis to make...

...There is a potential that surgery may be required to her neck if her pain becomes intractable and nonresponsive to therapy, but I believe the chances of this are substantially less than 50%.

[29] Dr. Travlos' prognosis was that there will be slow, steady improvement in her neck and shoulder complaints and headaches but that it is less likely that there will be a complete resolution of her symptoms. It is more probable than not that she will have ongoing symptom complaints with intermittent flare-ups in the course of each year causing her to limit her maximal participation in her career and certainly some of her recreational activities as well.

[30] In September of 1997 she was seen by Kerry Maxwell of the Grove Physiotherapy & Sports Injury Clinic, who reported:

I also believe her rigorous work schedule has added to the longevity of her recovery and will continue to create recurrent flare-ups of her condition.

[31] In September of 1997 she was seen by a general practitioner, Dr. S. Bowling whose report was not as helpful as it might have been since it depended so heavily on specialists' reports she had read. She did however testify that she agreed with the specialists from the examination that she had of the plaintiff and she did say that she agreed with Dr. Travlos and that in her opinion:

...The degenerative disease of her neck, that seems to be excellerated (sic) by the accident, will

probably be a permanent problem throughout her life...

[32] It was her opinion that it might be best for the plaintiff to change her careers, and expressed that opinion at or about the same time she referred the plaintiff to Dr. Lawrence Hollands, specialist in general internal medicine with particular expertise in rheumatology. Dr. Hollands in a report dated January 26, 1998 (and confirmed in a later report) concluded that she had fibromyalgia. He says:

I have made the diagnosis of Fibromyalgia on clinical grounds and the purpose of my assessment of her was for medical reasons and not for medical-legal reasons. The fibromyalgia tender points I elicited are outlined on my consultation note. In addition to these findings, she had a sleep disturbance and morning stiffness, both of which often go along with the diagnosis of fibromyalgia.

...My experience is that it can occur in situations like this following a major traumatic incident. It can also occur in the context of other illnesses including systemic arthritis. It can also occur without any inciting factors at all.

You have asked a specific question of whether there is a definite cause and effective relationship between the motor vehicle accident and the development of fibromyalgia in Ms. Hutchinson's case. I am afraid that all I can say in this regards is that she did not as far as I can tell, have fibromyalgia before the accident. And after the whiplash injury etc, she did develop it.

[33] In respect of his prognosis, he says:

...In general, fibromyalgia is difficult to treat and our treatment options are limited.

The symptoms wax and wane over time.

Her best prognosis will be achieved by maintaining a program of activity and aerobic fitness. Adequate management of the sleep disorder is frequently helpful.

In Mrs. Hutchinson's case it would seem that despite her symptoms she has been able to remain active in her life and work. This in itself is a good prognostic indication for her.

[34] In a January 28, 1998 report Dr. Hollands says:

This is in response to your further question:

(Counsel for the plaintiff)

"What is the most likely cause of Ms. Hutchinson's fibromyalgia?"

As far as I can determine the sequence of events is as follows:

Ms. Hutchinson did not have symptoms to suggest fibromyalgia before her motor vehicle accident. She then had a motor vehicle accident which involved a whiplash injury. She had neck pain and shoulder pain as a result of this. She had to wear a cervical collar for two months and went on to of stress with all of these events.

have physiotherapy. Clearly she was under a great deal

At some point she began to develop more wide spread soft tissue pain and this evolved into the syndrome which we refer to as "Fibromyalgia".

I cannot say if it was the motor vehicle accident itself which caused the fibromyalgia as it could just as well have been the effects of the whiplash, or even all of the emotional and psychological stresses involved in the various events that have occurred since the motor vehicle accident.

Considering the whole picture however, I think that it is unlikely that she would be suffering from fibromyalgia at this time if she had never been involved in a motor vehicle accident at all and never suffered whiplash injury and all the subsequent stresses involved.

[35] She was seen by Dr. Gabriel Hirsch, Physical Medicine and Rehabilitation, on behalf of the defendant on February 9, 1998. He outlined her complaints and reported that she had weakness in both arms and a "electric-like sensation in both upper extremities". He said:

...A jump response was documented at most of these sites, even with minimal pressure being applied. Fifteen out of eighteen fibrositic sites were tender to palpation on direct questioning, but only one of them during maneuvers when Ms. Hutchinson was distracted. All control sites were negative.

[36] Dr. Hirsch indicated that he had difficulty quantifying the severity of her injuries but that she did have significant symptoms associated with "partial and total vocational disability for several months after the accident directly attributable to those injuries". In respect of the diagnosis of fibromyalgia by Dr. Hollands, Dr. Hirsch said:

...Ms. Hutchinson would fulfill the diagnostic criteria for this syndrome. Along that line, however, I would like to point out that essentially all the fibrositic tender points were not reported as painful during periods of distraction...The diagnosis of this particular condition is still highly disputed among medical professionals. There is no imaging study or laboratory test which either confirms or rules out this diagnosis.

[37] He also said:

Ms. Hutchinson's condition is best described as a pain amplification syndrome...To ascribe the diagnosis of fibromyalgia to her condition may be helpful to her by providing her with a label but really doesn't add anything with respect to her long term management, which should be strictly conservative...

According to the review of the clinical records of Dr. Randsalu, it appears that Ms. Hutchinson had no pre-motor vehicle accident symptoms suggestive of a diagnosis of fibromyalgia. Therefore, it appears that there is a temporal relationship regarding the motor vehicle accident in question and her current clinical presentation. However, given the time relationship.

interval, I would seriously question a cause and effect

* * *

Overall I was impressed with Ms. Hutchinson being an honest, straightforward individual. She appears to have been compliant with all the recommendations outlined to her by her attending physicians and allied health care professionals. In addition, she has taken on a proactive role regarding her own rehabilitation program.

...I am of the opinion that Ms. Hutchinson will be able to continue her current line of work. Because of the persistent painful symptoms, however, her work productivity and efficiency has conceivably been permanently negatively impacted upon.

[38] Dr. Hawk reviewed all the medical reports and submitted his own report March 16, 1998 and then testified before me. Although he had not seen the plaintiff since March of 1996, in reliance upon the medical reports he had seen, he offered the opinion:

Although it is possible that Ms. Hutchinson has developed this syndrome, (fibromyalgia) I find it difficult to fully relate the onset of this problem to her motor vehicle accident which occurred approximately 2-1/2 years previously.

[39] Dr. Hawk's evidence before me was given in a straightforward manner as I would have expected, and in answer to questions in cross-examination he agreed that fibromyalgia was definitely a possible diagnosis even though he did not consider it probable. He acknowledged that he had not seen the patient since March of 1996 and further that a rheumatologist would likely have had more experience than he, as an orthopedic surgeon, in diagnosing the fibromyalgia syndrome.

IV

[40] I have carefully reviewed the medical evidence in total and the able submissions by both counsel. I am also fully aware of controversy surrounding a diagnosis of fibromyalgia and that it can be a syndrome commensurate with features other than trauma. I accept the diagnosis of Dr. Hollands that the plaintiff does have the fibromyalgia syndrome.

[41] Counsel for the defendant has strongly contended that there is no evidence conclusively tying the fibromyalgia to the accident itself. He notes that even Dr. Hollands was unwilling to state in clear terms that the accident caused the fibromyalgia. He is quite correct of course in contending that the plaintiff must establish the causation, and that it is not up to the defendant to negative same. However I am satisfied on all of the evidence, and particularly the evidence of Dr. Hollands that while there has not been conclusive proof of causation, on the balance of probabilities this motor vehicle accident either caused or contributed to the present condition of the plaintiff, whether it be labeled fibromyalgia or as Dr. Hirsch would call it "pain complication syndrome".

[42] This finding is in line with the judgment in *Athey v. Leonati* (1996), 140 D.L.R. (4th) 235 (S.C.C.). The judgment of the Court was delivered by Major, J.. At page 236 he posed the question:

The issue in this appeal is whether the loss should be apportioned between tortious and non-tortious causes where both were necessary to create the injury.

[43] On page 239, he quotes *Snell V. Farrell* (1990), 72 D.L.R. (4th) 289 (S.C.C.), as a case where:

...this Court recently confirmed that the plaintiff must prove that the defendant's tortious conduct caused or contributed to the plaintiff's injury. The causation test is not to be applied too rigidly....

It is not now necessary, nor has it ever been, for the plaintiff to establish that the defendant's

negligence was the sole cause of the injury. There will frequently be a myriad of other background occurring...(emphasis in original)

events which were necessary preconditions to the injury

[44] At page 240 Major, J. continued that:

The law does not excuse a defendant from liability merely because of other causal factors for which he is not responsible also helped produce the harm...

[45] Having disposed of the causation issue, I turn now to the various heads of damage.

IV - Loss of Wages

[46] The plaintiff has continued with her job as a sales representative with Rogers Cable Advertising ever since the accident. She has of course missed a considerable amount of time.

[47] The defendant does not seriously contend that there was no loss of past or future earnings though he does seriously question the time estimates of the plaintiff as to time missed.

[48] The plaintiff received a base salary each year which had been established in January 1995. This component was unaffected by the accident. The salary was established as \$26,000 per year. In addition to that she had a commission arrangement based on sales. In addition to the commission (of 15%) she was also awarded an additional increasing bonus for budget achievement or sales above budget.

[49] In 1995 she received total employment income of \$98,893 of which \$61,271 was commissions from which she was entitled to deduct \$21,439 in expenses incurred in making those sales. Her net income after deducting those expenses came to \$77,454.

[50] In 1996 her gross income was \$93,396 and her net income was \$71,906.

[51] In 1997 her gross income was \$119,746 and her net income was \$95,240.

[52] It is clear that her performance, in keeping with all of the witnesses who testified before me and the reports of the doctors, was an extraordinary one even without an injury. She was the top sales person in Canada for Rogers in 1995 and 1996 and came second "by pennies" in 1997. This performance demonstrates her extraordinary energy and desire to succeed, but it also shows that she undoubtedly has operated on a highly stressful level, (perhaps because it is in her nature) which may have contributed to a longer recovery or indeed it may have contributed to her present condition whether labeled fibromyalgia or not.

[53] In spite of the above, there is no doubt that the more time a sales person in her position spends "on the road" the more sales she will make and the more commissions she will earn. One of her most serious problems or course is driving. Driving her car bothers her perhaps as much as anything else in her life.

[54] Although she has estimated (and she admits that all she can do is estimate) that she had a loss of about 25% of her time over the whole period until the trial, other calculations which she has made and recorded in Exhibit 7 indicate that it may have been in the order of 20%. The plaintiff has calculated on the basis of earnings what this amounts to in dollars. In terms of past earnings it is the plaintiff's claim that she has lost \$55,200 to date of trial.

[55] The defendant however points out that the plaintiff's figures ignore the reality of her three year working history. Mr. Pettit points out in reference to 1995 where he acknowledges that she did miss some time, the assessment should be between \$7,500 and \$20,000 at the outside. He uses the figure of 15%.

[56] In reference to 1996, since had a remission period from the summer until the late fall, he would award very little. He attributes any losses in 1997 to her generalized pain. In the latter regard of course, I have found that that is related to the accident.

[57] In reference to future loss of earnings or work capacity, the plaintiff argues that I should accept the proposition from *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 (B.C.S.C.) of one year's loss of wages for the plaintiff which amounts to \$80,956 with a gross up of 25% to account for the earnings being made while operating at reduced capacity, for a total of \$101,000.

[58] The defendant argues that no wage loss has been established whatsoever in light of the plaintiff's brilliant performance on the evidence before me. The plaintiff he says, has failed to establish a true loss of earnings. Counsel argues alternatively that an assessment of \$7,000 to \$20,000 would be the maximum amount for 1995 and that nothing or almost nothing should be awarded for 1996 and 1997. As to the future loss, it is the defendant's position that the best the plaintiff could hope for would be something in the order of \$25,000 - \$40,000.

[59] In reference to the non-pecuniary damages the plaintiff has demonstrated how much this has interfered with her life in terms of gymnastics, her athletic endeavours and her social life. As the plaintiff as put it, "the positive ball of energy has diminished". The defendant, while not denying some loss, points out that the pain condition is not likely to be permanent and that she is still able to operate albeit in a somewhat restricted manner.

[60] The special damages claimed by the plaintiff are for future physiotherapy.

VI

[61] Damage claims in cases such as the case at bar simply do not lend themselves to the application of formulae. We are here dealing with time estimates, sales that did not happen because of pain and suffering or medical appointments, and pain which cannot be measured in its intensity nor permanence. In spite of these complications it is my duty to arrive at an appropriate award and in reference to the general damages (non-pecuniary) I am of the view that she has suffered considerable pain and suffering, has lost an enjoyable part of her lifestyle and that this will continue indefinitely. I would award \$55,000.

[62] In terms of earnings past and future, I believe that notwithstanding her sales leadership (with the injuries restricting her) she would have done better and would have earned higher commissions, though I do not believe they would have been quite as high as estimated by the plaintiff. Taking into account time missed during the last five months of 1995, the first three and a half months of 1998 and the two full years of 1996 and 1997, I have concluded that a fair award for past loss of earnings would be \$30,000.

[63] In terms of future loss of earnings or reduction in work capacity, I do not consider that this is an appropriate set of facts to adopt the Brown v. Golaiy approach as argued by the plaintiff. The plaintiff will, however, for an indefinite period yet to come, suffer some reduction in capacity, and I would establish that at \$50,000.

[64] For special damages I would award the sum of \$2,000.

"Williams, C.J.S.C."
The Honourable Bryan Williams

April 24, 1998