

**IN THE SUPREME COURT OF BRITISH COLUMBIA**

Citation: **Carlson v. GMAC Leaseco Ltd. et al,**  
2003 BCSC 1567

Date: 20031016

Docket: M004351  
Registry: Vancouver

Between:

**Bradford Scott Carlson**

Plaintiff

And

**GMAC Leaseco Ltd., Colliers Macaulay Nichols Inc.,  
Donald Klasen and Ryan L. Klasen**

Defendants

Before: The Honourable Madam Justice Stromberg-Stein

**Reasons for Judgment**

Counsel for the Plaintiff:

K.D. McGee

Counsel for the Defendants:

T.H. Pettit

Date and Place of Trial:

September 22-26, 2003  
Vancouver, B.C.

[1] This action arises out of a motor vehicle accident, which occurred on November 24, 1998. The plaintiff, Bradford Scott Carlson, was the front passenger in a small hatchback, driven by his common-law wife, that was rear-ended. Mr. Carlson had no warning of the impending accident. The back of the car was "crushed in", suffering extensive damage, including structural damage. The car, initially determined to be a total loss, was repaired with used parts at an approximate cost of \$3,000.

[2] Liability is not in issue. There is a dispute about the nature and extent of injury and assessment of damages.

[3] Mr. Carlson's evidence is that the accident caused him to suffer from back, neck and shoulder pain, with accompanying headaches. While the back pain essentially resolved over the first two years he maintains he has been left with chronic daily neck and shoulder pain that limits his ability to work either as an illustrator or in any other physical capacity. He maintains he is unable to sustain the postures required to work as an illustrator and he is unable to work more than two 8-hour days in a row as an art store clerk. At this time, almost five years post-accident, Mr. Carlson contends that no further recovery is likely and the only option is to attend a chronic pain clinic where he can learn strategies to cope with his pain and disability.

[4] I find Mr. Carlson was at times an unreliable witness. At times his evidence was vague, inconsistent, and somewhat exaggerated. It is troubling that he did not report his pre-existing chronic recurrent neck pain (of four years duration which had been treated with chiropractic care) to health care professionals during his post-accident visits. Despite these reservations, I find Mr. Carlson and his common-law wife to be credible.

**MEDICAL HISTORY**

[5] Mr. Carlson has a history of what was thought to be Crohn's disease but, in 1997, was determined to be irritable bowel syndrome.

[6] Mr. Carlson saw Dr. William Didyk, a chiropractor, for eleven visits between November 7, 1996 to January 16, 1997. He reported chronic recurrent neck pain from 1992 that began during a camping trip; he felt like there was a "pebble in his neck". Thereafter pain would come and go

depending on the amount of time he spent at his drafting table, but the pain did not interfere with his work or activities.

[7] Dr. Didyk's physical examination showed a reduced range of motion of the cervical spine in all directions, but the reduced ranges of motion were all still normal ranges of motion. Dr. Didyk did not feel at the time that Mr. Carlson had any serious condition. Mr. Carlson had "significant relief" after the first treatment but a flare-up is recorded in the second to last treatment. While Dr. Didyk felt Mr. Carlson was still somewhat symptomatic when he discontinued treatment, Mr. Carlson maintains he was better. At trial, Dr. Didyk testified that, with Mr. Carlson's history of recurrent chronic neck pain over a period of four years, he would anticipate that Mr. Carlson would have some ongoing problems. However, Dr. Didyk's hypothetical opinion is not borne out by the fact that Mr. Carlson maintains he did not experience ongoing problems or seek treatment after his last visit to Dr. Didyk.

[8] In the 22 months before the accident, there are no recorded musculoskeletal complaints, other than joint aches associated with "Crohn's" attacks. I accept Mr. Carlson's evidence in that he was fully functional prior to the accident and he only experienced episodic stiffness related to the postures required by his work as an illustrator.

[9] In the opinion of Dr. James White, Mr. Carlson's general practitioner, Mr. Carlson suffers ongoing chronic neck pain that he attributes to degenerative changes in the cervical spine. As of July 2000, Dr. White recommended normalization of activities, with no restrictions, and encouraged Mr. Carlson to reactivate his life. Dr. White recommended a chronic pain clinic, estimated to cost \$10,000 to \$15,000, to help Mr. Carlson get on with his life despite his suffering; but this was not expected to cure him.

[10] Dr. Matishak, a neurosurgeon who assessed Mr. Carlson on March 20, 2001 at the request of his lawyer, reviewed X-ray films of Mr. Carlson's neck taken on July 15, 1999 and a CT scan taken June 23, 2000. The X-ray films show early degenerative changes and a narrowing of the C5-6 disc space. The CT scan reveals foraminal stenosis, nerve space narrowing at C4-5 and C5-6, more on the left than the right. It is Dr. Matishak's opinion that Mr. Carlson's current neck complaints are related to the motor vehicle accident and his previous neck complaints for which he received chiropractic treatment play little role in his ongoing complaints. However, a prognosis for four years of recurrent neck pain would be guarded as the neck pain would likely continue in the future.

[11] Dr. Kokan is an orthopaedic surgeon who conducted an IME. He examined Mr. Carlson on August 16, 1999 and October 18, 2002. Dr. Kokan's final report, dated February 28, 2003, considers all the medical records including a MRI showing osteophytes at C4-5 and a bulge at C5-6 and C6-7 discs consistent with degenerative cervical disc disease. These findings could have predated the accident or could have developed following the accident. In his opinion, Mr. Carlson's neck symptoms are likely related to pre-existing degeneration of cervical discs aggravated by the accident of November 1998.

[12] The plaintiff accepts this opinion.

[13] Mr. Carlson has been compliant and has followed recommendations made by his treating practitioners. He continues a regular exercise routine, is twenty-five pounds lighter than at the time of the accident, and is more fit and strong. However, these efforts have not resolved his symptoms, but have provided some relief.

## **DAMAGES**

### **General Damages**

[14] The law applicable to an assessment of damages is found in *Athey v. Leonati*, [1996] 3 S.C.R. 458. The law does not permit apportionment between tortious and non-tortious causes. A basic principle of tort law is that the plaintiff is entitled to be placed in the same position he would have been but for the defendant's negligence. The defendant is not required to place the plaintiff in a better position than the plaintiff's original position. The defendant is liable for injuries caused but not for pre-existing damage. A defendant is not required to compensate a plaintiff for the effects of a pre-existing condition the plaintiff would have suffered in any event.

[15] Prior to the accident Mr. Carlson had no significant restrictions on his activities or work as an illustrator. I do not agree with the defendant's assessment that before the accident Mr. Carlson suffered chronic recurrent neck pain, that he now suffers chronic recurrent neck pain, and that the effects of the accident were transient or temporary, ending about August 1999. I accept that the accident continues to impact Mr. Carlson's ability to work effectively as an illustrator and as a clerk due to chronic pain despite the fact no limits have been placed on his activities. General damages, reflecting both his physical and emotional pain, are assessed at \$20,000.

### **Past Income Loss or Past Loss of Opportunity**

[16] At the time of the accident Mr. Carlson was a 30 year old struggling artist/illustrator.

He was being supported by his common-law wife. He is now 35 and works part-time in an art supply store, earning about \$10,000 a year.

[17] Mr. Carlson had six years of post-secondary education as an artist and illustrator and had been out of college less than 5 years when the accident occurred. Mr. Carlson's earnings were meager in the years immediately preceding the accident. He attributes this, in part, to a changing style of work in an effort to find a unique look and style. His lawyer described him as the poster child of the starving young artist, committed to his craft and living frugally while his common-law wife worked as a waitress to support him. Since the accident Mr. Carlson has been able to earn more in any year through part-time dog walking and working in an art store, than his illustrations ever earned him.

[18] The evidence of past income loss or past loss of opportunity is unreliable and unsubstantiated. The income tax returns are inaccurate. There is no evidence of medical advice to support an inability to participate in work-related activities following the accident. The claim for past income loss or past loss of opportunity is unproven. In any event, I would find a failure to mitigate.

#### **Loss of Capacity**

[19] There is some evidence that the plaintiff has sustained some loss of capacity. The four considerations enunciated in *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 at 356 (S.C.) are applicable: (1) he has been rendered less capable overall from earning income from all types of employment; (2) he is less marketable or attractive as an employee to potential employers; (3) he has lost the ability to take advantage of all job opportunities which might otherwise have been open to him, had he not been injured; and (4) he is less valuable to himself as a person capable of earning income in a competitive market.

[20] To a limited degree I accept that Mr. Carlson has been rendered less capable of illustration work as well as any physical work. He is a relatively young man who will be required to shoulder more of the family support burden as his common-law spouse's health deteriorates. The accident has limited the plaintiff's ability to work at most jobs.

[21] Despite an irregular pattern of employment, I assess loss of capacity at \$10,000, based on approximately one year's salary, at his present clerking job.

#### **Future Care**

[22] I am unable to accept Dr. White's recommendation that Mr. Carlson attend at a chronic pain clinic. The one and only mention of such a program was in May 2003 following Mr. Carlson's display of emotional lability during an office visit. Psychological counselling was recommended by the doctor. Mr. Carlson has been offered extensive passive therapies and exercise programs. It is not appropriate to fund an expensive pain clinic in the circumstances of this case.

#### **Special Damages**

[23] Special damages claimed in the amount of \$1,767.79 are allowed. The MRI is a proper claim. The MRI was ordered by Dr. Matishak but the results were provided to the defence and the review of the MRI was prominent in Dr. Kokan's final opinion.

#### **COSTS**

[24] If the parties cannot agree on costs they may make written submissions within 30 days.

"S.S. Stromberg-Stein, J."  
The Honourable Madam Justice S.S. Stromberg-Stein