

Citation: Cavalieri v. Bott et al

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File No:

01-13429

Registry:

North Vancouver

IN THE PROVINCIAL COURT OF BRITISH COLUMBIA  
CIVIL DIVISION

BETWEEN:

MARCELO DANIEL CAVALIERI

CLAIMANT

AND:

JULIAN GAYLE BOTT, GLEN WILLIAM ST. GODARD  
and MALCOLM ALEXANDER FORSTER

DEFENDANTS

REASONS FOR JUDGMENT  
OF THE  
HONOURABLE JUDGE J. GEDYE

Counsel for the Claimant:

P. Poyner

Appearing for the Defendants:

T. Pettit

Place of Hearing:

North Vancouver, B.C.

Date of Hearing:

April 15, 2004

Date of Judgment:

November 1, 2004

[1] This litigation is about compensation for injuries received from a motor vehicle accident that occurred May 2, 2000. Mr. Cavalieri, as claimant, explained that he was stopped at an intersection when a chain reaction of collisions occurred behind him with his as the last car in the chain. His foot was off the brake and when his car was hit it was pushed forward one car length at a slow rate of speed, about 5 k.p.h. He heard the sound of the other collisions behind him but did not know what was happening until he was hit. His then 6 year old daughter remained asleep in her car seat located behind the driver's seat. Other cars received more damage, with his receiving a slight mark on the bumper. Police and an ambulance arrived at the scene and when asked Mr. Cavalieri said he was "O.K." even though he noticed some pain in his right shoulder and neck. Once home he remembered taking 4 Advil for the pain. During the night he could not sleep because of a "terrible headache" with stiffness increasing in his shoulder and neck. The next morning his shoulders were "burning" and his back, neck and arms were stiff and painful with some tingling sensation in his hands. He went to see his family doctor the day after the accident and was diagnosed with a mild soft tissue injury, a whiplash. He was told to see either a chiropractor or physiotherapist.

[2] He visited a chiropractor he was familiar with, Dr. Domingo, six times in May, 2000 but stopped because he could not afford to continue the visits and had no financial assistance. He resumed seeing Dr. Domingo in January, 2001 when his symptoms had not improved and he was able to make arrangements for delayed payments. The chiropractor's records noted various areas of "stiffness" or "restrictions". Dr. Domingo would adjust the joints, and apply massage or ultrasound treatments to those areas to try to loosen up the muscles. Visits to the chiropractor continued until July, 2001 and since then Mr. Cavalieri has, at his home, had the use of a portable muscle stimulating machine similar to the one used in the chiropractor's office.

[3] Mr. Cavalieri also attended a physiotherapy clinic two or three times in January, 2001 where he was shown exercises he could continue at home. He did those exercises and started a programme of swimming three or four times a week, plus stretching, to loosen up his shoulders. That exercise regime continues to the present.

[4] He complained that the pain and stiffness were at their worst in November and December of 2000, continued until July 2001, and have never been completely resolved. He believes he now has 60% movement in his shoulders and 75-85% movement in his neck. He was referred to other doctors in April and May, 2001 when the pain in his shoulders & neck, along with numbness in his arms and hands continued. He was told to continue with stretching and applications of hot & cold to the sore areas.

[5] He described his work history beginning with training as a journeyman carpenter. He had been working as a carpenter in 1996 when he suffered a groin injury, had surgery and later had aggravated his injury while lifting a heavy window. He started seeing Dr. Domingo, who ultimately wrote to Workers' Compensation recommending that Mr. Cavalieri not continue with heavy labour because of his injuries which were not improving and which were negatively affecting his spine. Mr. Cavalieri found work in sales but eventually returned to carpentry. He said that at the time of the motor vehicle accident he was working with a construction company. He found the drywall and concrete form work too painful with heavy, vibrating power tools and heavy lifting. He changed to lighter construction work with hand tools and sanding but even light work was too painful. He left construction and tried to find work in sales again but was not successful. He took some small jobs, such as helping a friend repair a boat, but was very limited in the type of work he could do. He started his own company in 2003.

[6] His leisure activities of running, biking, hiking and swimming changed after the motor vehicle accident, decreasing by more than 70%. He has recently begun short, simple hikes and bike rides with his daughter but nothing like he used to do.

[7] Mr. Cavalieri's cross-examination was delayed to allow for the evidence of his chiropractor, Dr. Domingo. In 1996, 4 yrs before the motor vehicle accident, Mr. Cavalieri started chiropractic treatments for his groin and right hip. Dr. Domingo's clinical notes of that first visit indicate "problems with his gait", because in apparent compensation for pain he was adding stress to other areas along his spine. There were no notes of postural problems concerning his neck although the chiropractor did manipulate the neck and back. On February 29, 1997 there was a neck massage. In April, 1997 he had surgery to repair his groin injury. By October, 1997 he was "doing well - return as needed". Mr. Cavalieri apparently returned to construction work. In April, 1998 he returned to the chiropractor for treatment of a stiff neck and spine. Those treatments continued into May, 1998 when Dr. Domingo wrote to Workers' Compensation [WCB] recommending that Mr. Cavalieri not continue with heavy labour because his groin injuries were not improving and were negatively affecting his spine. He was seen again in July, 1998 and Dr. Domingo updated his recommendation to WCB that he continue with no heavy labour.

[8] Dr. Domingo saw Mr. Cavalieri shortly after the motor vehicle accident in May, 2000. The primary problem was diagnosed as a mild soft tissue injury to the neck and upper back. There was no noticeable difference between his two shoulders. Mr. Cavalieri was seen 6 times in May, 2000 and then not seen again until January 2001. Mr. Cavalieri reported returning to concrete construction work in September, 2000 and when he saw the chiropractor in January, 2001 he was complaining of numbness in his hands and neck and pain in his right groin. He had difficulty lifting his right arm and had tingling sensations in his hands. A new "popping" noise in his shoulder concerned him. He complained on January 25, 2001 that after 8 hours at work and repetitive arm

movements with a hammer his shoulder was particularly sore. The clinical notes show that on May 16, 2002 Mr. Cavalieri had some problems after "working out". On that date he asked if his continuing problems were as a result of the motor vehicle accident and the chiropractor believed he told Mr. Cavalieri it was unlikely his problems were a continuation of the motor vehicle accident. The clinical notes from Dr. Domingo end in July, 2001.

[9] Cross-examination of Mr. Cavalieri focussed on pre-existing and intervening factors that may have contributed to his complaints. His work history was examined in considerable detail with a focus on dates and type of work. Until a groin injury in 1996 he was involved with considerable heavy lifting and repetitive movements with heavy equipment. He stopped that work and changed to sales work for several years. After surgery in April, 1997 he had some relief and returned to construction work but continued chiropractic treatments until July 1998 when he felt he had achieved all the benefits he could. He also explained he was in "dire financial straights" and what income he had was used to support his family and their new daughter. Heavy labour in 1997 and 1998 "made things worse" and he went back into sales work. This motor vehicle accident occurred in May, 2000. In August, 2000 he lost his sales job and began looking for other sales work. This evidence was contrary to his evidence in direct that he was working in construction at the time of the motor vehicle accident. He explained that he was unable to find other sales jobs but found a series of odd jobs such as helping a friend repair a boat. In October, 2000 he started working for Hollingsworth in construction carpentry. He did concrete work and other heavy construction work until his symptoms were too severe, then he went on sick leave and received employment insurance from January to March, 2001. He agreed that in January, 2001 he had worked 8 hours building a wall with repetitive hammering and his right hand and right shoulder were very sore and admitted he had been doing that type of repetitive work doing while full-time for Hollingsworth for the 3 months from September to December, 2000 just prior to his sick leave. When he went back to work in April, 2001 he went to work with another construction company, PAX but with light duties and reduced hours. That continued until sometime in 2003 when he started his own company where he is no longer involved in heavy lifting.

[10] Mr. Cavalieri's family doctor, Dr. R. Glynn-Morris, provided a medical-legal report [Exhibit 1, tab 7] concerning the effects of this motor vehicle accident on Mr. Cavalieri. The report included the doctor's observations, information reported to him by Mr. Cavalieri and reports from referrals to a chiropractor, physiotherapy, psychiatrist, an expert in chronic pain and an expert in sport medicine. With respect to medication, Mr. Cavalieri took only over-the-counter extra strength medication for pain and inflammation except in May, 2001 when he was prescribed a week of morphine by a pain specialist

[11] The only pre-existing injury in the doctor's records was the groin injury of 1996. Paragraph 9 of the medical-legal report includes the comment:

"He stated he had no previous neck or back pain while engaged in heavy work before the accident but right after the crash he could hardly get out of the car"

[12] In paragraph 10 of the medical-legal report the doctor comments that:

"I have not seen him or examined him for five months, but from my last encounter it was 13 months after the accident and this 36 year old man was still having difficulties with heavy concrete work and carpentry. I was concerned he was developing a chronic pain pattern."

[13] Paragraph 12 of the same report, entitled "causation from the motor vehicle accident to his complaints and problems" includes:

"He stated he was in a ...Honda Accord and hit from behind in a chain reaction. I have no further details or engineering report of the accident and vehicle damage or collision speed, so I cannot be certain what proportion of his complaints stem from the crash and what from the nature of his heavy repetitive work, but I note that none of his present complaints occurred before the crash."

[14] Finally, in paragraph 13 the doctor includes "other comments including observations of attitude and personality":

"He stated that he was interested in obtaining full treatment at ICBC's expense as he had no previous neck or musculoskeletal problems before the crash. He stated that ICBC's reluctance to pay for adequate treatment early on had jeopardized [sic] his future employment prospects. He stated he was very worried and anxious he would be unable to return to heavy carpentry and concrete construction - his only skill - because of weakness and pain causing limitations."

[15] There is a question as to the evidentiary weight to be attached to the medical-legal report of Dr. Glynn-Morris. With reference to the quotes above, from that report, and specifically the comments of "no previous neck or back pain", "hardly get out of the car", "none of his present complaints occurred before the crash", "no previous neck or musculoskeletal problems before the crash" I find that the doctor was either uninformed or misinformed, with the result that the medical-legal report can have very little weight attached to it. The comments that I have highlighted have been contradicted by the evidence primarily of the accused but also the

evidence at trial of the chiropractor.

[16] There is evidence that there was a soft tissue injury after the motor vehicle accident of May 2, 2000 but the extent of the injuries, the time required to heal and the influence of other aggravating factors that interfered with healing are the issues left to the court to decide.

[17] There is inconsistent evidence about the time it took for the injuries to heal. The visits to the chiropractor stopped May 24, 2000 with a note, in part, of "neck better" on that last visit. In September or October, 2000 Mr. Cavalieri felt well enough to return to heavy construction work with Hollingsworth and he continued with that work for 3 months, until he went on sick leave. He then returned to heavy construction work in April, 2001 but quickly moved to light duties.

[18] Repetitive, heavy construction work was a considerable problem before the motor vehicle accident but it was not the work he was involved with at the time of the accident. He could not find sales work and returned to construction work some 4 or 5 months after the motor vehicle accident, but his pre-existing problems recurred. It is difficult to separate the pre-existing problems, the effects of the motor vehicle accident and the return to repetitive aggravating work when determining the extent of the liability for only the motor vehicle accident.

[19] The claimant is required to prove on balance that he has a valid claim for injuries. There is evidence to show a soft tissue injury to an area that was not at the time of the injury causing the claimant any problems although it was an area that had required treatment prior to the accident. The pain and stiffness as a result of this minor motor vehicle accident were sufficiently back to "normal" for this claimant when he returned to work in heavy construction 5 months after the motor vehicle accident.

[20] The claim will be allowed for pain and suffering for the period from May, 2000 until October, 2000 in an amount of \$5000 plus his chiropractic expenses during that time, plus costs and disbursements for this litigation.

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The Honourable J. Gedye, P.C.J.