COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Poirier v. Aubrey,* 2010 BCCA 266

Date: 20100527
Docket: CA037835

Between:

Laurie Poirier

Appellant
(Plaintiff)

And

Fenton W. Aubrey, WS Leasing Ltd. and Canadian Car and Truck Rental Ltd.

Respondents
(Defendants)

Before: The Honourable Madam Justice Rowles
The Honourable Mr. Justice Lowry
The Honourable Madam Justice Neilson

On appeal from: Supreme Court of British Columbia, January 20, 2010
(*Poirier v. Aubrey*, 2010 BCSC 75)

Counsel for the Appellant:	T. J. Delaney
Counsel for the Respondents:	R. B. Pearce and P. M. J. Arvisais
Place and Date of Hearing:	Vancouver, British Columbia May 11, 2010
Place and Date of Judgment:	Vancouver, British Columbia May 27, 2010

Written Reasons by:
The Honourable Mr. Justice Lowry

Concurred in by:
The Honourable Madam Justice Rowles
The Honourable Madam Justice Neilson

Reasons for Judgment of the Honourable Mr. Justice Lowry:

[1] Laurie Poirier suffered soft tissue injury in a motor vehicle accident in September 2006 which led to the development of chronic pain that has affected all aspects of her life including her ability to earn an income. She appeals from a damages assessment indexed as 2010 BCSC 75 that is predicated on the judge having found as follows at para. 11(u):

> In light of the findings made thus far by me as the trier of fact, the case becomes one in which the plaintiff is an accurate source of information, there was no relevant significant pre-existing condition and the doctors may differ as to what label should be applied to the plaintiff's condition – fibromyalgia, fibromyalgia-like syndrome, chronic pain condition – but the fact is that she suffers from chronic widespread pain that is, for her, debilitating and with respect to which the prognosis is guarded. An "optimal fibromyalgia based treatment protocol", including biofeedback, is recommended and there is a real and substantial possibility, bordering on likelihood, that her pain and discomfort will be relieved and her functioning improved. (Exhibit 5 Tab B Page 6). But no "cure" is in prospect.

[2] In the main, the question is whether this optimistic prognosis is supported by the medical evidence.

[3] The page the judge referenced as the basis of his finding is taken from a report of Dr. I. A. Hyams, a family physician specializing in the treatment of chronic pain who began treating Ms. Poirier in the fall of 2009 a few months before the trial. The opinion stated on that page is as follows:

> I note that in Dr. Shuckett's report that she does mention that this patient's prognosis is extremely guarded due to the time span that has occurred between the initial accident on September 5, 2006, up until the present date. She has been on the appropriate treatment protocols involving medication for the conditions mentioned above, as well as various rehabilitation interventions. Her condition is not improving but is actually deteriorating, which is concerning. I am of the opinion as well, that this patient's prognosis is not good, due to the progression of her symptoms with the appropriate treatment given. It is highly unlikely that she will make a complete recovery. The purpose of a further treatment intervention program would be to reduce her pain as much as possible and to increase her level of functioning. If this is possible, she may be able to consider some part time work in the future; however, the chance of her returning to her premorbid level of functioning remains unlikely.

[4] Despite the respondent's concerted effort to show us evidence that is said to support the prognosis, I am unable to see how it could be said there is a "real and substantial possibility, bordering on likelihood, that Ms. Poirier's pain and discomfort will be relieved and her functioning improved". It appears to me there is no evidence that supports that finding so the appeal will have to be allowed.

The Assessment

[5] Ms. Poirier was 38 years of age at the time of the trial. She is married but she and her husband separated for the second time shortly before the trial for reasons the judge found were not established to have resulted from the accident. She has children and young grandchildren. The family enjoyed a healthy active outdoor recreational life of camping and hiking.

[6] Ms. Poirier described the debilitating pain she has experienced in various parts of her body since the accident as being at times "excruciating". The worst is in the front of her neck, around her sternum and collar bones, in her arms, her upper back, and across her shoulder blades. She said she is in pain every day and has always to take care not to exacerbate her condition.

[7] The judge stated the impact of the accident on the life she once enjoyed as follows:

> [22] I find that all of this has been lost to her, or severely curtailed, because of the effect on her of the defendant's negligence on September 5, 2006. The plaintiff's pain and suffering on and after September 5, 2006 has varied between what I would describe as severe and what I would describe as simply significant.
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> [23] Soft tissue damage is the source of her problems. I have kept *Maslen v. Rubenstein* (1993), 83 B.C.L.R. (2d) 131 (C.A.) in mind. I find that the plaintiff is one of that small percentage of people, well known to the law, whose pain and suffering continues long after science would say that the injured tissue must have healed. I have cautioned myself about the need to be slow to rely on what are uncorroborated reports of long-standing pain and discomfort. But, on the whole of the evidence I have decided that her complaints of pain are true reflections of a continuing injury and are not a product of desire by the plaintiff for things such as care, sympathy, relaxation or compensation and that she has used every ounce of willpower she has to overcome her problems and could not reasonably be expected to have achieved more by her own inherent resources or willpower. (*Maslen v. Rubenstein*, *supra*, paragraphs 8 and 15).

[8] Ms. Poirier has a high school education. She began working in 1992 and had begun working as an insurance adjuster in early 2006. The judge found her to be "someone who works well and consistently and reveals no evidence of her being a slacker". Following the accident, she was off work for about six weeks and then returned to work half-time for two months. Save for a two-month period in the summer of 2008 when she did not work, she worked full time until May 2009. She did not work after that. The judge said:

> [19] ... I am satisfied that the plaintiff enjoyed her work, was good at it, did all she could by way of taking courses to improve her position as an adjuster, and worked through the pain and discomfort that was her lot as a result of the September 5, 2006 motor vehicle accident but was eventually worn down by her pain and discomfort. The fact that she was observed to lift this or that or was able to drive to her assignments is entirely consistent with the picture painted by the witnesses. It is obvious to me that the plaintiff was valuable to the firm and her duties were adjusted in an attempt to permit her to remain at work. In spite of her making her best effort, and [her boss]'s doing all he could, ultimately she wilted. And I find that she did so because of the results for her of the September 5, 2006 motor vehicle accident.

[9] The judge assessed damages for Ms. Poirier's non-pecuniary loss at $60,000:

> [26] I turn to the assessing of non-pecuniary damages. The plaintiff has been burdened thus far for 39 months. Her prospects are not bleak, but guarded. The level of the pain and discomfort she has endured was such that her life apart from work has been turned from one full of activity to one devoted to rest and recovery. She is not housebound. She drives a car for up to 20 hours a week and makes herself useful in the lives of her children. The level of her pain and discomfort resulted in this woman – whom I am convinced is not a slacker and enjoyed her job in the world of insurance adjusting – being off work for six weeks, returning to work at half-time for two months and, ultimately, stopping work after having her employer cooperate in every way possible to reduce the demands of the job so that she could continue working. That speaks volumes about her condition. Additionally, the fact she actually enjoyed her work and has had it curtailed as a result of the defendant's negligence must weigh heavily in the assessment of non-pecuniary damages. I have considered the cases placed before me by counsel. To track some of the language used in *Knauf v. Chao*, 2009 BCCA 605, I classify this as a case in which there is a real and substantial possibility that the plaintiff's soft tissue injury will prove to be "permanent" but the degree of pain and discomfort cannot be considered to be "the most severe in nature" when compared with that of plaintiffs in other such cases. Taking into account not just what I have said here but the whole of the evidence and all I have said thus far in these reasons for judgment, I award the plaintiff $60,000 by way of non-pecuniary damages.

[10] The judge included in the award an unspecified amount for Ms. Poirier's frustration over the upkeep of her home which was below the standard she maintained before the accident.

[11] Past wage loss was assessed at $38,000.

[12] Accepting Ms. Poirier had demonstrated the ability to earn an income of $50,000 a year, the judge assessed the loss of her capacity to earn income at $100,000. In arriving at that amount he said:

> [37] It is obvious to me that the plaintiff's capacity to earn income from all types of employment has been adversely affected and will be adversely affected, although the extent of the problem defies description. It is obvious that as she is, the plaintiff is less marketable or attractive as an employee to potential employers and that the extent to which she will become – hopefully – more attractive defies description. It is obvious that as things are, and as they very may well prove to be in the future, the plaintiff has at least a reduced capacity to take advantage of all job opportunities that might be open to her. It is obvious that as she is now, and as she may very well be in the future, the plaintiff is less valuable to herself as a person capable of earning income in a competitive labour market. At that point my crystal ball clouds over.

[13] The judge then awarded special damages of $10,503 and future care costs of $15,000 for a total award of $223,503.

[14] Ms. Poirier contends the judge's awards for non-pecuniary loss and the loss of her earning capacity are too low. She also says the judge erred in not awarding her anything for her loss of her housekeeping capacity.

Non-pecuniary loss

[15] A brief outline of the treatment Ms. Poirier underwent in the year preceding the trial is necessary to understanding the basis of the judge's optimism concerning her future. In January 2009, the Insurance Corporation of British Columbia arranged for Ms. Poirier to be examined by Dr. John Watterson, a specialist in adult rheumatology. He expressed the opinion that Ms. Poirier's recovery had been slowed by a lack of an active rehabilitation program. She had until then relied largely on medications prescribed for her by her family doctor, chiropractic treatments, acupuncture, and trigger point injections to address her pain. In recommending such a program, he said:

> At this time, in my opinion, because of the lack of an active rehabilitation program an overall prognosis in regard to resolution of her symptoms is difficult to make comment upon. As I have described above however there does not appear to be any significant structural etiopathogenesis to her current symptoms which would lead one to feel the overall prognosis is good as long as compliance with a rehabilitation program is made.

[16] Ms. Poirier then embarked on an intensive two-month program of physiotherapy in the spring and summer of 2009 at KARP Rehabilitation. The concluding report of the therapist was that she had attained a short term goal of increased mobility in parts of her body, but she remained unable to work without "undue discomfort". The therapist suggested further improvements were likely.

[17] Ms. Poirier then began being treated by Dr. Hyams upon whose report the judge specifically relied as quoted at the outset. Dr. Hyams prescribed a new course of treatment which was ongoing at the time of the trial.

[18] In addition to the opinion of Dr. Hyams, the judge relied on the opinions of two other physicians in concluding Ms. Poirier had a real and substantial prospect of improvement, having particular regard for the new course of treatment on which she had embarked a few months before the trial:

> [25] To use language employed by Dr. Jaworski, the prognosis is "guarded". Taken together, the evidence of Dr. Hyams, Dr. Shuckett and Dr. Jaworski bottoms the conclusion that what is now in place – an ongoing, positive, pro-active approach, to echo Dr. Shuckett – means that there is a real and substantial possibility that significant improvement is in the offing. To date, the plaintiff has sought help in such things as prescription drugs, chiropractic treatments, physiotherapy, massage, acupuncture and trigger point injections. Only now is the plaintiff in the course of an organized effort to both alleviate her pain and discomfort to the extent possible and teach her techniques and methods of dealing with and surmounting her pain and discomfort.

[19] I am, however, unable to find in what the three said anything amounting to the prognosis the judge attributed to them.

[20] Dr. J. S. Jaworski is a specialist in physical medicine and rehabilitation. He saw Ms. Poirier on five occasions between May 2007 and June 2008 on referral from her family doctor. His ultimate opinion, as expressed in his report in October 2008, was as follows:

> The prognosis for the Disorder is guarded. It can certainly affect her quality of life. I don't think, though, that her competitive employability potential must be affected to a significant degree.

[21] In cross-examination, he said he could not comment on her current condition, was unable to say what the future held in respect of Ms. Poirier's condition, and he could not comment on her employability because he had not seen her for over a year.

[22] Dr. Rhonda Shuckett specializes in internal medicine and rheumatology. She examined Ms. Poirier and prepared a report in July 2009. She recommended various medications, a psychological assessment, exercise, and an active rehabilitation program. Her prognosis was:

> By now, it is over two and a half years since the subject MVA and she remains symptomatic and, if anything, feels like she is getting worse. This is concerning and it may be that she has difficulty improving from her current status in the future. Still, I feel an ongoing positive proactive approach is in order.
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> * * *
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> Her future as far as a work return is uncertain. Hopefully, this 38 year old woman would be able to return to some form of work in some capacity in the future and but again, this will remain to be seen. I think that it could be informative to see how she does over the next year. This will help to better prognosticate.

[23] Dr. Hyams' report was the most recent available to the judge. It was made in October 2009. The

essence of his opinion is as quoted at the outset. Most significantly, he says Ms. Poirier has been on the appropriate treatment protocols involving medication for her condition as well as various rehabilitation interventions, but her condition was not improving; it was actually deteriorating. In fact, he said it was his opinion the prognosis was "not good" due to the progression of Ms. Poirier's symptoms despite the treatment she had received. He put the prospect of a complete recovery at "highly unlikely". He explained the objective of his proposed course of treatment was to reduce Ms. Poirier's pain and increase her functioning and concluded that "if" that was possible she might be able to consider some part time work sometime in the future. After then explaining the proposed treatment, he expressed the "hope and expectation" of some measure of success.

[24] There is, in my respectful view, nothing in what Dr. Hyams or the other two physicians said, either in their reports or in their testimony at trial, that amounts to an opinion there is a real and substantial possibility her pain and discomfort will be relieved and her functioning improved. I do not see how it could be said that, on Dr. Hyams' evidence in particular, that possibility was "bordering on likelihood" as the judge suggested.

[25] I consider the evidence establishes that, as the judge said, there is a "real and substantial possibility" Ms. Poirier's injury will prove to be permanent. There is no cure. There is treatment for her condition, but the prospect of her pain being relieved to a significant degree is indeed guarded. She is unlikely to ever be pain free and can at best hope that, with continued treatment, she may in time achieve a sufficient reduction in her pain and increase in her functioning that would permit her to regain some of the enjoyment of her life she has lost and to undertake part time employment.

[26] Ms. Poirier cites three awards in particular that she says reflect what plaintiffs who have suffered somewhat comparable non-pecuniary losses to hers have been awarded: *Hooper v. Nair*, 2009 BCSC 862; *Barnes v. Richardson*, 2008 BCSC 1349, aff'd 2010 BCCA 116; and *Djukic v. Hahn*, 2006 BCSC 154, aff'd 2007 BCCA 203. The respondents cite *Heartt v. Royal*, 2000 BCSC 1122; *Mowat v. Orza*, 2003 BCSC 373; and *Esau v. Myles*, 2010 BCSC 43. These awards reflect a broad range: those cited by the respondents are $50,000 to $70,000; those cited by Ms. Poirier are $85,000 to $125,000. I consider Ms. Poirier's loss to be more consistent with the losses in the awards she cites. Of particular significance is the permanent nature of her injury that causes her ongoing debilitating pain, the effect it has had and will continue to have on the enjoyment of her life, and the uncertainty there is that her condition will in time improve even to the point of permitting her to return to work part time.

[27] I would set aside the judge's award of $60,000 for non-pecuniary loss and substitute an award of $100,000.

Loss of capacity to earn an income

[28] Ms. Poirier adduced actuarial evidence establishing a lifetime earnings loss of $970,000 if she were unable to work again. Ms. Poirier and the respondents agree that, if the judge erred in his finding concerning Ms. Poirier's prognosis (as I find he did), taking all of the contingencies into account, she is entitled to an award for her loss of capacity to earn an income of something between $300,000 and $400,000. No

argument for any more specific amount is advanced.

[29] On the evidence, I can then do no better than to settle on the midpoint of the parties' agreement. I would set aside the judge's award of $100,000 and substitute an award of $350,000.

Loss of housekeeping capacity

[30] The ability to take care of her home and cook her meals in the same way as she once did is one aspect of Ms. Poirier's life that has been altered. The judge recognized this in considering her claim for her loss of housekeeping capacity. Her evidence was that she and her husband had shared the tasks associated with maintaining a well-kept house equally, but since the accident she was unable to do much of her part. Her husband did all of the cleaning and her daughter would come to the house to do the laundry. After she and her husband separated, she moved to a small basement apartment. There she was coping, although the move was made not long before the trial so she could not testify to any established pattern. Her ability to clean her home and perform chores like regularly washing the dishes is problematic. She is unable to clean the floors and must rely on a friend to help her. Sometimes she needs help with food shopping and she is for the most part limited to making simple meals or eating pre-prepared meals.

[31] The judge did not suggest Ms. Poirier's evidence was not to be accepted. Indeed, as is evident from what I have quoted from his reasons, he found her to be an entirely credible witness. But he found her "real loss" lay in her frustration at having to live with lower housekeeping standards than she did before the accident and, as indicated, he saw fit to include an unspecified award for this loss in his award for her non-pecuniary loss.

[32] This is not a case where evidence was adduced to prove an actual pecuniary loss of housekeeping capacity. There was no independent assessment of Ms. Poirier's needs in this regard or what it might cost to address them. But there can be no question she established a loss for which she is entitled to be compensated beyond the frustration for which the judge awarded her some compensation: *McTavish v. MacGillivray*, 2000 BCCA 164, [2000] 5 W.W.R. 554, although care must be taken not to compensate for more than can reasonably be said to have been lost (para. 9). Her loss is the loss of her ability to do what is necessary to take care of her home and prepare her meals as she was once able to do. It contains a past component that is certain and a future component that is contingent on what, if any, improvement there may be in her condition over time. It can only be compensated in this instance by an award of non-pecuniary loss.

[33] To do the best I can on the evidence, I would award her $15,000 for her loss of housekeeping capacity.

Disposition

[34] It follows I would set aside the judge's total award of $223,503 and substitute an award of $528,503, comprised of:

Non-pecuniary damages:	$100,000
Past wage loss:	38,000
Loss of capacity to earn income:	350,000
Cost of future care:	15,000
Special damages:	10,503
Loss of housekeeping capacity:	15,000
Total:	$528,503

"The Honourable Mr. Justice Lowry"

I agree:

"The Honourable Madam Justice Rowles"

I agree:

"The Honourable Madam Justice Neilson"