Citation: McKelvie v. Ng et al
2002 BCSC 366

Date: 20020311
Docket: B962843
Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

RONALD MCKELVIE

PLAINTIFF

AND:

KAM YIN ALICE NG AND DHI TO OTTO NG

DEFENDANTS

**REASONS FOR JUDGMENT
OF THE
HONOURABLE MADAM JUSTICE MORRISON**

Counsel for the Plaintiff	Timothy J. Delaney & S. Donnelly
Counsel for the Defendants	Edward Montague & M. Mark Skorah
Date and Place of Trial:	September 10, 2001 Vancouver, BC

[1] On May 24th, 2001 by judgment of the Court of Appeal, the original award in this case for non-pecuniary damages and damages for loss of future income were set aside. The Court of Appeal remitted this matter back to the trial court for an assessment of damages.

[2] Counsel for the parties appeared before me on September 10, 2001 and I have now had an opportunity to revisit the evidence in this trial together with the submissions of counsel.

[3] In relation to the issue of non-pecuniary damages and loss of future income, the Court of Appeal concluded that I had erred in considering only the pre-existing knee condition of the plaintiff, and that I had failed to consider the two other pre-existing conditions of ankylosing spondylitis (AKS) and fibromyalgia (FM).

[4] There is no question that the plaintiff suffered from the pre-existing conditions of AKS prior to the accident. There is also some evidence he was diagnosed with FM some time before the accident of July 27, 1994. In my judgment, I failed to consider if there was any measurable risk with regard to these two pre-existing conditions. Would these two conditions have detrimentally affected the plaintiff in the future, with regard to enjoyment of life and a loss of future income?

[5] On revisiting the evidence and submissions of counsel, and my original award, it is apparent I did not take AKS and FM into consideration to the extent that I should have.

[6] In assessing any measurable risk, the court must take into consideration both the negative and positive contingencies, if they exist. Expert medical evidence at the trial revealed that while some persons with AKS become totally disabled, other may have mild symptoms, to the extent that they are actually unaware that they have AKS. It obviously varies, and is difficult to predict.

[7] Mr. McKelvie was diagnosed with AKS at the age of 22, in 1983, when his symptoms were sufficiently severe to cause him to discontinue his work as a sheet metal apprentice. However, from 1985 to the time of the accident, the evidence of both the plaintiff and the medical evidence seem to confirm that his AKS was quiescent. For approximately five years before the

accident, the only flare up of AKS was noted approximately one month before the accident and this appeared to have been a minor flare up.

[8] Prior to the accident, Mr. McKelvie appears to have been one of the more fortunate people who was able to continue work and lead a very active, athletic and recreational life without regard to AKS. But there was the evidence that generally, AKS is a progressive disease. There was also evidence from Dr. Van Rijn that AKS can diminish with age. However, defence counsel pointed out that the evidence of Dr. Van Rijn that symptoms of AKS could fade over time was not consistent with the evidence given by the rheumatologists.

[9] Dr. Wade confirmed that patients cover a wide spectrum of symptoms with AKS, but the majority would lead a reasonable quality of life.

[10] Fibromyalgia was first referred to when there was a referral to a doctor after a flare up of AKS in April, 1989. At that time there was a possible diagnosis of fibrositis syndrome now known as FM. There was little mention of FM other than that, until post accident.

[11] At the time of the re-hearing, the issue of the plaintiff's credibility was raised. I will state that my views on the credibility of the plaintiff have not changed. Those views are set out in my original judgment.

[12] Dr. Wade's evidence suggested that fibromyalgia was not a significant problem for the plaintiff prior to the accident.

[13] Although both AKS and FM were conditions pre-existing the accident, the evidence with regard to FM is slim, but the evidence with regard to AKS is not.

[14] What would the future of this plaintiff be if there had been no motor vehicle accident? He was having occasional AKS flare ups, he was ageing. He was also staying active, participating in a great number of sports, working full time, and following medical advice.

[15] From the evidence, I am unable to say that there is a measurable risk of fibromyalgia constituting a debilitating effect on this plaintiff in the future. However, the same cannot be said for AKS.

[16] The Court of Appeal quoted paragraph 35 from the judgment of Justice Major in ***Athey v. Leonati*** (1996), 140 D.L.R. (4th) 235, a decision of the Supreme Court of Canada. That quote reminds this court that "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 reward." There is a further reminder that the plaintiff must not be placed in a better position than he would have been without the accident.

[17] With regard to fibromyalgia, I find there is no measurable risk of debilitating effect in the future of that condition, had there not been the motor vehicle accident.

[18] With regard to AKS, my original award should have taken into account the pre-existing condition of AKS in considering if there was a measurable risk, particularly with regard to non-pecuniary damages and loss of future income. Mr. McKelvie's pre-accident earning capacity was limited somewhat by his pre-existing condition of AKS, and that was made considerable worse by the accident. His pre-accident enjoyment of life did not appear to be affected by AKS, except in perhaps a slight way when he suffered occasional flare ups. That changed significantly with the accident.

[19] It may be that in later years, AKS would have interfered with the plaintiff's enjoyment of life, but based on the evidence, it is difficult to say that the change would be anything other than slight. Therefore, with regard to the award for non-pecuniary damages, originally assessed at $110,000, that award is reduced to $105,000.

[20] With regard to loss of future earning capacity, the loss of opportunity was originally set at $200,000. Having re-assessed the loss of future income with regard to the pre-existing condition of AKS, in my view it is appropriate to reduce the loss of opportunity from $200,000 to $180,000. The amount for re-training, $10,000, remains the same.

"N. Morrison, J."
Madam Justice N. Morrison