Citation: McKelvie v. Ng & Ng
2001 BCCA 384

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COURT OF APPEAL FOR BRITISH COLUMBIA

ORAL REASONS FOR JUDGMENT

Before:
The Honourable Madam Justice Huddart
The Honourable Madam Justice Saunders
The Honourable Madam Justice Levine

May 24, 2001

Vancouver, B.C.

BETWEEN:

RONALD McKELVIE

PLAINTIFF
(RESPONDENT)

AND:

KAM YIN ALICE NG and CHI TO OTTO NG

DEFENDANTS
(APPELLENTS)

M.M. Skorah — appearing for the Appellants

T.J. Delaney, S. Donnelly — appearing for the Respondent

[1] SAUNDERS, J.A.: This appeal is from a damage award in a personal injury action arising from a motor vehicle accident in which the appellants' vehicle broadsided a vehicle driven by the respondent. Liability was admitted. The only issue was the quantum of damages.

[2] The trial judge awarded the following damages:

(a) Non-pecuniary damages: $110,000

[2] Past loss of income:

1. Loss of income $45,000

2. Loss of overtime $14,000

[3] Lost earnings from

July 27 to Sept. 24,

$2,770.23

[4] Interest on past

Income $7,193.55

[3] Loss of future earning capacity

1. Retraining $10,000

[2] Loss of opportunity $200,000

(d) Special damages $2,309.56

(e) Cost of future care $10,286.50

TOTAL $401,559.84

[3] The trial judge found that the plaintiff had three pre-existing conditions: ankylosing spondylosis, which I refer to as the parties have as AKS, fibromyalgia and degenerative arthritis in both knees.

[4] The appellant says the trial judge erred:

> 1) in stating the test for causation and her reference to ***Athey v. Leonati*** [1996] 3 S.C.R. 458;
>
> 2) In misunderstanding the impact of the evidence concerning the plaintiff's original position; and
>
> 3) In assessing damages for loss of future earning capacity both because of errors with respect to the effect of ***Athey***, her misunderstanding of the evidence and because she took an approach which was too mathematical.

[5] Although the appellants had framed the first issue as focusing upon causation, the real issue on appeal is whether the trial judge erred in failing to consider the pre-existing conditions when she evaluated the plaintiff's the original position, that is, whether the trial judge adequately dealt with the issue of future debilitating effects of these pre-existing conditions within the reasoning of ***Athey v. Leonati***. In my view there is no basis to the complaint that she was too mathematical, an issue raised in the third ground. Indeed, the reasons of the trial judge show a rounding out of numbers demonstrative of the necessary application of judgment to the assessment of damages. As to the complaints that the trial judge erred in her understanding of the evidence I take that to be a complaint that the trial judge did not assess the potential for the pre-existing conditions to have limited Mr. McKelvie's enjoyment of life or earning opportunities in the future, the issue which is at the heart of this appeal.

[6] In her reasons for judgment the learned trial judge related the plaintiff's medical history, his employment history, the accident and the plaintiff's activities and lifestyle. Her findings of fact are best summarized in this paragraph of the reasons for judgment:

> [22] I think it is apparent from the evidence that while the plaintiff is able to keep his job, he has, in essence, lost his lifestyle, and that which gave him joy in his life, his active and competitive participation in many sports.

[7] The trial judge then went on to review the medical evidence. She dealt with the evidence of three specialists: Dr. van Rijn, Dr. Wade and Dr. Stolar. In reviewing the evidence of Dr. van Rijn she noted:

> [24] ...Dr. van Rijn's report noted that "by history, Mr. McKelvie's ankylosing spondylosis was likely 'quiescent' at the time of the MVA." His conclusion was that the plaintiff would have difficulty in any job that would require heavy lifting or carrying, but that he could perform jobs of a sedentary nature where light work activity would be called for.

[8] In reviewing Dr. Wade's evidence she noted:

> [25} Dr. John Wade, a rheumatologist, felt that Mr. McKelvie's symptoms were in keeping with fibromyalgia because the plaintiff was functioning "at a fairly high level" prior to the accident. It was the opinion of Dr. Wade that if the fibromyalgia pre-existed the accident, "I do not think it was a significant problem." In commenting on AKS, Dr. Wade noted that patients cover a wide spectrum of symptoms, with some people unaware that they even have AKS, and on the other end of the spectrum, a few become seriously disabled. The majority would lead a responsible quality of life, able to cope with AKS. Dr. Wade was of the opinion that three factors may have contributed to the fibromyalgia, the pre-existing AKS, the degeneration in the plaintiff's knee, and the motor vehicle accident. He was unable to say whether they contributed equally or which might have contributed more or less than the other. It was his opinion that a person with AKS who was involved in the trauma of a motor vehicle accident would be more likely to experience worse symptoms, and therefore take longer to recover.

[9] In dealing with Dr. Stolar's evidence she said:

> [26]... I will say that I found her evidence most helpful in assessing the medical evidence with regard to this plaintiff. She felt that Mr. McKelvie would never return to the sports that had taken up such a great part of his life before the accident. It was also her opinion that the accident had aggravated the condition of AKS and that that conditions had been "fairly quiescent prior to the motor vehicle accident"

[10] In dealing with causation she said:

> [30] ... I find that the motor vehicle accident in July 1994 was a substantial cause of injuries to the plaintiff, and the defendants are responsible for the injuries and loss suffered by the plaintiff.

[11] She then said, concerning ***Athey v. Leonati***:

> The decision in ***Athey v. Leonati*** (1996), 140 D.L.R. (4^{th}) 235, a decision of the Supreme Court of Canada, clearly disregards apportionment in a case such as this, where there is the presence of pre-existing contributing causes, in this case, AKS and fibromyalgia, amongst others. It is my view that the negligence of the defendants aggravated and accelerated the existing conditions of AKS and FM, both of which had been largely quiescent for approximately five years before the accident.

I note in this passage that the learned trial judge referred to both AKS and fibromyalgia as pre-existing.

[12] In dealing with the damages the learned trial judge first addressed non-pecuniary damages. She reviewed the changes in lifestyle that had followed the motor vehicle accident. Clearly she was impressed by the diminishment in the quality of Mr. McKelvie's life, and to the extent that she has found Mr. McKelvie's enjoyment of life much diminished her findings cannot be assailed. In dealing with non-pecuniary damages, however, she referred to only one of the pre-existing conditions, the knee problem, holding that the problem likely would not have led to degenerative changes for 25 to 30 years. Although she earlier found that Mr. McKelvie had two other pre-existing problems, AKS and fibromyalgia, she did not refer to these conditions in assessing non-pecuniary damages. Likewise, in her discussion of the other heads of damages, particularly the future loss of income, she did not make reference to those pre-existing conditions.

[13] In my view the reasons for judgment do not reflect a recognition by the trial judge of the need to consider, and adjust a damage award for, any measurable risk established by the evidence that the pre-existing conditions would have detrimentally affected the plaintiff in the future, regardless of the defendant's negligence. That consideration is discussed in ***Athey v. Leonati*** as necessary to assessment of the plaintiff's original position. Such a consideration ensures that the plaintiff is compensated only for the losses suffered as a result of the defendant's negligence. Justice Major in ***Athey v. Leonati*** discussed this at paragraph 35 of his reasons for judgment:

> The defendant is liable for the injuries caused, even if they are extreme, but need not compensate the plaintiff for any debilitating effects of the pre-existing condition which the plaintiff would have experienced anyway. The defendant is liable for the additional damage but not the pre-existing damage.... Likewise, 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. This is consistent with the general rule that the plaintiff must be returned to the position he would have been in with all its attendant risks and shortcomings and not a better position.
>
> [citations deleted]

[14] Mr. Delaney, on behalf of Mr. McKelvie, contended vigorously that we should infer from the reasons for judgment that the trial judge did consider the potential effect of AKS and fibromyalgia in assessing damages and, in particular, he refers us to paragraph 33 where she says:

> The accident accelerated what would have been an eventual lessening of activity with age, together with further degenerative changes.

[15] In my view, on a reading of the whole of the reasons for judgment, such an inference is not warranted. I say this for three reasons. First, the reasons are framed in the context of addressing the situation of the plaintiff as it was at trial, and not to his future. Second, the discussion of ***Athey v. Leonati*** in the decision focuses on the apportionment issue, a question which is not engaged here because the trial judge found that the negligence of the defendants was a necessary contributing cause of the injuries. Third, the trial judge did address the issue of the pre-existing condition of the knees when she concluded that the degenerative condition in the knees likely would not have become debilitating for 25 to 30 years. In the presence of that express consideration I do not think we should infer conclusions on the other two conditions.

[16] Mr. Delaney also contends that the evidence was not sufficient to establish a measurable risk of detrimental effect. I do not agree. There was evidence that anatomical progression of AKS was the general rule, that a certain small percentage of persons with AKS became totally disabled by the disease, that one group have such mild symptoms they may be unaware of AKS and another group would be more symptomatic. There was further evidence of the type of jobs and activities that would be recommended on a long-term basis for persons with AKS. In the face of this evidence I do not think one could say that there was not a measurable risk of debilitating effect in the future, of that condition. If so it should be reflected in the damage award both as to non-pecuniary damages and the loss of future income.

[17] In may be that the case was not presented to the learned trial judge in a fashion which focused on this second aspect of ***Athey v. Leonati***. However, in my view, once having found pre-existing conditions of the nature that existed here, the trial judge was obliged to either indicate that they did not form a measurable risk, as was essentially done in ***Heska v. Little*** [2000] B.C.J., No. 998, April 20, 2000 (C.A.), or to indicate in some fashion that the risk was taken into account in the overall assessment of damages.

[18] For these reasons I have concluded that the learned trial judge did not complete the entire assessment required by the authorities and the basic principle that a plaintiff is to be compensated only for the negative consequences of the defendant's negligence.

[19] I have concluded, therefore, that the award for non-pecuniary damages and damages for loss of income in the future must be set aside. However, this is not a case in which this Court should substitute an assessment of damages as that assessment would depend largely upon facts which were not found by the trial judge in her reasons for judgment.

[20] I would therefore remit this matter to the trial court for an assessment of damages.

[21] HUDDART, J.A.: I agree.

[22] LEVINE, J.A.: I agree.

"The Honourable Madam Justice Saunders"