

Date: 19990706  
Docket: S025680  
Registry: New Westminster

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

BRENT R.F. DYCK

PLAINTIFF

AND:

DAVE BUCK FORD SALES LTD.,  
LORJACK CONTRACTING LTD., and  
RICK CASANO

DEFENDANTS

REASONS FOR JUDGMENT  
OF THE  
HONOURABLE MR. JUSTICE BOYLE

Counsel for the Plaintiff: T.J. Delaney

Counsel for the Defendants: J.D. Spencer

Place and Dates of Hearing: New Westminster, B.C.  
June 21, 22, 23,  
and 24, 1999.

[1] The plaintiff was injured when the van he was driving was rear-ended by a three-quarter ton truck October 1, 1994, as he waited for a traffic light to change from red to green. Liability was not in issue. The impact was not great.

[2] The plaintiff is 33.

[3] His continuing complaint of injury emanates from back and left leg pain. The defendant argues the plaintiff's major problem, disc herniation which occurred in June 1996, was not materially related to the collision and that the plaintiff was back to normal by May 1995, from the consequences of the collision.

[4] Assessment of causation and degree of suffering and incapacitation is made more complex than usual because, three days before the collision, the plaintiff was diagnosed (Dr. Green) as having the symptoms of sciatica.

[5] Dr. Green's initial diagnosis was based upon symptoms, not X-ray or CT Scan analysis.

[6] Dr. Green (July 25, 1996) described the pre-collision event as "an acute L3-4 prolapse (subsequently amended to a diagnosis of possible L4-5 prolapse) of (the plaintiff's) left lumbar disc with a left L3 sciatica", proclaiming itself by left leg pain. He prescribed bed rest, anti-inflammatory

medication, muscle relaxants and pain killers.

[7] When the collision occurred the plaintiff, a plumber, was on his way to pick up some supplies for a job, which I took to be not part of his regular employment. After exchanging information with the personal defendant (Casano) he went on to the supplier and then to the job site. The supplies included a bathtub which he helped unload. He did not remain after leaving the supplies because he was feeling pain in his neck.

[8] The defendant argues the plaintiff voluntarily aggravated his injury by those activities against the advice of Dr. Green who had recommended bed rest.

[9] The collision took place on a Saturday. On the following Monday the plaintiff went to his then regular job site at which he had supervisory obligations. Having ensured the crew was on the job, he returned home having advised his employer he was unable to work.

[10] The next day he returned to Dr. Green. Dr. Green reported (July 25, 1996): "He was complaining of increased pain in the left lower limb with shooting pain radiating from the buttock area down into the posterior lateral left thigh."

[11] "Initially he felt pain in the neck but there was no increase in any stabbing pain in the lower back or any increase in the radiations of those pains into the lower limbs." That is in keeping with the plaintiff's own evidence at trial although it is in conflict with records of what he told others.

[12] Dr. Green's diagnosis (summary July 25, 1996), was of a "moderate whiplash injury to the neck area and an exacerbation of the left L3 sciatica ...". He agreed on cross-examination he could not be sure on causation and that all events in the plaintiff's life should be looked at for contributory factors.

[13] Although there was no evidence of an immediate increase in the severity of low back and left leg symptomatology, Dr. Green reported that, four days after the collision, he saw the plaintiff again who told him of continuous back pain and shooting pains down the plaintiff's left thigh and into his knee. Six days after that, Dr. Green noted: "low back pain and radiations into the lower limbs became intractable and prompted a visit to the Surrey Memorial Emergency Department."

[14] Dr. Green reported very heavy medication (Percocet, Restoril, Voltaven, Tylenol, Flexeril) and his recommendation for extended bed rest. He noted improvement November 3, 1994, and again on December 5, 1994. Of the latter time Dr. Green reported the plaintiff was "still having some pain in the left lower limb but primarily in the posturolateral left thigh. He could walk for about one hour ... without having to stop. He was able to tie his own shoes ...".

[15] On January 5, 1995, Dr. Green noted: "(the plaintiff) told me he then was 90% better than what he felt immediately following the motor vehicle accident. He felt that he could return to work ..."

[16] Dr. Green saw the plaintiff on January 17, 1995, and May 10, 1995, for problems other than his back although the plaintiff was still complaining of some lower back and left leg pain on May 10, 1995. "When I saw him on May 25, 1995, he was still working off and on for several companies but there was no problem with his back." (The work "for different companies" was because of availability of jobs, not because of symptoms).

[17] The plaintiff was exercising regularly.

[18] On May 31, 1995, the plaintiff reported to Dr. Green that he was still feeling some "pulling" in the back of his left thigh but Dr. Green noted: since then "I have seen (the plaintiff) eight times and none have been for injuries that he had sustained in the motor vehicle accident. There has been no recurrence of his sciatica, etc."

[19] Dr. Green summarized on July 25, 1996: "The motor vehicle accident resulted in a moderate degree of whiplash injury to the neck which took approximately a month and a half to resolve completely. The (collision) also caused an exacerbation of his

sciatica which resulted in severe pain preventing work from the second half of October 1994 (after morning attendance at the job site)."

[20] Dr. Green reported complete disability to January 5, 1995, and partial disability to May 31, 1995. He said in his July 25, 1996, report: "(the plaintiff) would be completely free of his symptoms relatable to the motor vehicle accident certainly by July 30, 1995."

[21] As something of a footnote but not irrelevant to these proceedings, the plaintiff has an undeveloped sacrum which resembles one more lumbar vertebra than is usual. It is sacralized and exhibits pseudoarticulation. Dr. Green noted: it "does increase the potential for back injury both mechanical and acute prolapse of the disc."

[22] After his July 1996 report, Dr. Green had, on September 16, 1996, prescribed Percocet to cope with (the plaintiff's) left sciatica" which pain "apparently was getting worse". (He had prescribed Percocet earlier for severe kidney stone symptoms the plaintiff experienced).

[23] Dr. Green saw the plaintiff on November 1, 1996. By then he had resiled from the July 1996 opinion. He reported (July 6, 1998) that the plaintiff had expressed complaints of "increased back pain once again with a sciatica radiating down into the left ankle and the lateral aspect of the left foot".

[24] The plaintiff had returned to work three months after the collision. Dr. Green reported "there was no improvement after that". Prolonged physiotherapy and chiropractic manipulation had not been helpful.

[25] The plaintiff was referred at this stage to Dr. Chan, a neurosurgeon. The plaintiff told Dr. Chan there had been an increase in the intensity of pain June 6, 1996, without new trauma. Oddly, there is no note in Dr. Green's records of increased pain of that kind at or near that date.

[26] There was an inconsistency in what Dr. Chan noted from the plaintiff: "He denied any back problems before that (the collision)", which is not in keeping with Dr. Green's September 30, 1994, observation and note: "I ... do have the documentation of (the plaintiff's) thoracic back pain dating back to 1991." Dr. Green recorded further: "... (the plaintiff) has had some low back pain from time to time throughout his life ..."

[27] Dr. Chan diagnosed: "Clinically he had left S-1 radiculopathy (Spinal nerve root disorder). CT Scan showed left L5-S1 disc herniation." Subsequently (January 16, 1997), Dr. Chan performed a bilateral L5-S1 discectomy.

[28] The operation went well. "The back was fine. There was no leg pain per se. He was no longer on pain medication." The plaintiff described only a pins and needles sensation in the left leg.

[29] In his written "Discussion", Dr. Chan commented (inter alia):

On October 1st, 1994 he most likely injured the lumbar disc two days before the motor vehicle accident. The fact that he had pain that radiated down to the left lower limb indicated there was nerve root irritation. This is probably a result of significant disc bulge or a small disc herniation. Following the accident the pain increased. This may be a result of further disc bulge or a small disc protrusion. The fact that he recovered to the point that he was able to return back to work and does a physically demanding labour job required by a plumber in early January 1995 indicated that most likely it was a further disc bulge rather than actual disc herniation. He was able to carry on with chiropractic manipulation in 1995 with the plumbing job. Around June 1996 he took a bad turn. The pain increased significantly. He required 100 tablets of Percocet per month for pain relief. I think that this rupture occurred around June 1996.

[30] Turning to causation, Dr. Chan said:

I think the disc herniation occurred around June 1996. I don't think the disc herniation occurred in 1994. I think he had some injury with disc bulge, probably slightly more prominent on the left, which occurred a couple of days before the motor vehicle accident. The motor vehicle accident further aggravated the disc bulge. Whether there was a small herniation as a result of the motor vehicle accident is very difficult to tell. He did not have a CT scan before or after the accident. Based on the rate that he recovered, he probably had further disc bulge as a result of the motor vehicle accident.

...

There is no contraindication to do a physical labour job as long as he lifts properly. I have encouraged him to carry on with his job hunting.

The surgery itself will not affect his ability to function as a plumber. As long as he lifts properly, then he should be able to carry on with his former job.

Whether the accident is responsible for the surgery or not is difficult to tell. Based on the fact that he was able to recover within about three months and return back to a physically demanding job indicates that the motor vehicle accident did not result in actual rupture of the L5-S1 disc. However, I think it probably caused some further tearing of the annulus fibrosus (vertebral disc fibre) to allow further bulging. Therefore, it does add some injury to the L5-S1 disc which eventually required surgery. I do not think that the accident itself is the cause of the actual herniation. I think the actual herniation is a result of his job demands and occurred around June 1996. It is very difficult to quantify the exact amount of disc injury by the motor vehicle accident. The amount of damage to the motor vehicle was about \$600. He was undoubtedly in a lot of pain after the motor vehicle accident. Part of it was from the swelling per se. I think the disc was already injured before the motor vehicle accident. The portion that was further aggravated by the motor vehicle accident that eventually led to the surgery would probably be about 25%. I think the majority of his injuries probably occurred as a result of job related demands and also the injury prior to the motor vehicle accident. This is a rough estimate. There are no specific guidelines for this percentage and is open for debate.

[31] Dr. Turnbull, who reviewed clinical records and reports but did not see the plaintiff, challenged Dr. Green's conclusions. He said:

When Dr. Green first saw him in September, 1994, he postulated that he had an L3-4 disc prolapse. Subsequent x-ray reports have discussed an abnormality of the S1 vertebra. Dr. Chan operated for what he describes as a herniated L5-S1 disc. It is most probable that this is the correct diagnosis for the problem and that the radiological variations and the postulated L3-4 disc are of no relevance to the situation.

[32] Dr. Turnbull agreed with Dr. Chan's interpretation of the history:

I agree that in September, 1994, Mr. Dyck probably

developed a disc bulge which responded satisfactorily to conservative treatment, so that he was able to return to his work as a plumber in early 1995. He then went on to develop a frank disc herniation sometime around June, 1996, possibly precipitated by chiropractic manipulation. This herniation was associated with clear neurological signs indicating involvement of the S1 nerve root, as commonly occurs when an L5-S1 disc herniates. The surgery of January, 1997 appears to have been successful in dealing with the problem.

[33] While agreeing with the history of symptoms, Dr. Turnbull disagreed on causation:

Mr. Dyck developed symptoms of a bulging lumbar disc over a period of three days leading up to September 30, 1994, when he visited Dr. Green. The following day he was involved in an MVA in which his car was struck from behind. This did not cause any immediate aggravation of his leg pain, but the pain did become worse in the next few days. The mechanism of the injury is such that it commonly causes strain to the muscles and other soft tissues in the neck, but does not put any particular strain on the low back. Had it done so, he would have noted an immediate aggravation of his left leg pain problem, but this did not occur. What aggravates a bulging disc and leads to increased pain is continued activity such as one would undertake working as a plumber. The bending and lifting that is required causes far more mechanical stress on the lower lumbar discs than would be produced by having an automobile accident such as he suffered. The symptoms that he reported to Dr. Green on September 30th were of such a magnitude that Dr. Green correctly postulated that there had been a disc herniation. Such a problem simply does not clear up quickly and certainly does not clear up if one continues to engage in physical work of any kind.

I think the MVA had either no influence or next to no influence on the subsequent course of events that culminated with surgical treatment being required.

[34] Accepting as I do the opinion of Dr. Chan, his allocation of a probable 25% of the aggravation "that eventually led to surgery", brings the plaintiff within the rather broad threshold of Athey v. Leonati (1996), 140 D.L.R. (4th) 235.

[35] Dr. Chan agreed the issue of causation - work or collision - was "open to debate" but I did not take that to mean a withdrawal from his 25% estimate on the question of causation. However, it is relevant to the baseline for which the court must look in its estimation of damages.

[36] The plaintiff reads Athey to say that once a tortious act has been found to be a material cause of injury, then a defendant becomes liable for all damages flowing from that injury.

[37] I do not read Athey to say that.

[38] Athey is a case about causation.

[39] The ratio of Athey goes first to liability for cause but, at p. 245, para. (41), Major J. for the court ruled:

The plaintiff must prove causation by meeting the "but for" or material contribution test. Future or hypothetical events can be factored into the calculation of damages according to degrees of probability but causation of injury must be determined to be proven or not proven.

[my emphasis]

[40] At p. 243, he said at para. 35:

The defendant need not put the plaintiff in a position better than his or her original position. 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.

[my emphasis]

[41] In looking for a baseline there are several factors that must be weighed to determine their relevance (if any) as well as considering the consequences of the collision itself. Those factors include:

- (a) a history of back injury;
- (b) the incidence of sciatica-like pain the day prior to the collision;
- (c) Dr. Green's evidence and that of the plaintiff's wife of silent suffering - a "macho" attitude and concern to keep working to support his family;
- (d) emotional stress and depression of long standing:
  - i. his mother's death;
  - ii. murder of a friend;
  - iii. family differences which led to separation from his wife and three children (although she stood by him in this action);
  - iv. lack of success in his own enterprise;
- (e) a motor vehicle collision subsequent (May 1995) to that in issue here - no injury reported;
- (f) a fall on ice in January 1996 - injured rib and left leg "pulled" and painful;
- (g) an Alberta Workers Compensation claim arising from a motor vehicle collision April 1, 1999, from which the plaintiff testified to experiencing lower back and left leg pain, and to receiving therapy which, if not successful, would lead to alternative employment. He has not worked since. No medical records were filed.
- (h) sacralization of the sixth lumbar vertebrae;
- (i) the plaintiff's return to a job site (which included helping unload a bathtub) just after being rear-ended despite Dr. Green's advice the day before of bed rest;
- (j) Dr. Green's evidence that it might take a week to ten days for the sciatica he diagnosed September 30, 1994, to show its full colours;
- (k) the possibility attested to by Dr. Chan that the herniation could occur at some other time than it did without the collision caused trauma; and
- (l) the evidence of Dr. Chan that the immediate neck pain from the collision may have masked an increase in low back and leg pain.

#### FUTURE WAGE LOSS

[42] A claim for future wage loss cannot be substantiated on the evidence. The plaintiff was working full time from July 1, 1998, in Calgary until being injured in a work-related accident in that city in April this year. There was no medical evidence at this trial relating to that event and so a material link (if any) between that event and the injury at issue here, has not been shown.

[43] The plaintiff did testify to back and leg pain after the Calgary accident but I would be no more than guessing to find attribution for its cause. My guess might be right but it would not have the status of a necessary inference.

[44] The admissible medical evidence of weight ends with the opinion of Dr. Chan that his surgery was successful and that there would be no limitation on the plaintiff's continuation of physical work so long as he took reasonable care with bending and lifting - as anyone should.

[45] Dr. Green's evidence was that, even given the successful surgery, the plaintiff would have an increased chance of back pain in the future. Dr. Turnbull testified that the plaintiff would be in a category of those susceptible to early onset of arthritis and degenerative disease. However, I accepted the more sanguine opinion of Dr. Chan which was in keeping with events post-surgery.

[46] There was no evidence of impairment on the various jobs at which the plaintiff was employed after surgery and the crystal ball goes blank at the time of the Calgary injury (of which the defendant learned for the first time during the proceedings). It is at that event, not this, that the plaintiff is to be taken as he is found for the purpose of predicted future impairment and loss of capacity. The case must be decided in the real world.

[47] The observations made in paragraph [41], when placed in the context of the evidence as a whole, do not effect wage loss or loss of future earning capacity, but do have some contingent effect on the non pecuniary claim.

[48] The report of Dr. Hartzell (Work Capacity Evaluation) was not helpful being outdated and prepared before the plaintiff returned to work at his trade in Calgary and was injured there. The same applies to the report of Dr. Magrega (Residual Employability Assessment).

[49] Nothing said here is intended as an adverse criticism of the plaintiff as a person. He has been beset with many tribulations despite which he has shown a determination to work when work was available. There was inconsistency in what he said at various times about the onset and severity of symptom but the case turns not on subjective report but on medical opinion of an objective nature. I found the plaintiff credible at trial.

#### PAST WAGE LOSS

[50] I accept the plaintiff's calculation on past wage loss - \$2,500 per month for seven months. The plaintiff was at the mercy of the job market and so there is some discount built in to that estimate which comes to \$17,500.

#### SPECIAL DAMAGES

[51] The claim for special damages was challenged only on the basis of challenged causation. That argument having been found against, there is no reason not to accept the plaintiff's figure, \$1,268.

#### FUTURE CARE

[52] A problem arises on the question of future care costs. There would be no reason not to accept the Associated Economic Consultant's calculation of \$10,673 with some discount, already agreed by the plaintiff, and for back pain history (see the observations on Athey above) and medication, except that the long range consequences of the Calgary injury may have some bearing on this figure. If counsel cannot reach agreement, an arbitrary decision may have to be reached.

#### NON PECUNIARY DAMAGES

[53] The plaintiff's submission that non pecuniary damages fall into the \$40,000 to \$55,000 range, is far from extravagant even given the above observations on Athey. They will be fixed at \$55,000.

[54] Interest at the Registrar's rates.

[55] The three defendants remained in the action. There was no submission in respect to allocation of obligation.

"BOYLE J."

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BOYLE J.