IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Hagreen v. Su,*
2009 BCSC 1455

Date: 20091023
Docket: M073973
Registry: Vancouver

Between:

Erik Hagreen

Plaintiff

And

Zi Hua Su and Li Xia Lu

Defendants

Corrected Judgment: On the front page J.D. Barnes has been added as Counsel for the Plaintiff

Before: The Honourable Mr. Justice Brooke

Reasons for Judgment

Counsel for the Plaintiff:	E.J. McNeney, Q.C. J.D. Barnes
Counsel for the Defendants:	T.P.K. Tsang
Place and Date of Trial/Hearing:	Vancouver, B.C. January 29 and 30, 2009
Place and Date of Judgment:	Vancouver, B.C. October 23, 2009

[1] This personal injury action arises out of a motor vehicle accident in the 2400 block of East Broadway in Vancouver on October 6, 2005, at approximately 8:45 in the morning. There was some rain; the plaintiff, Mr. Hagreen, was riding his bicycle to work as he did every day, and the defendant, Mr. Su, had just parked his car in front of his house to pick up his child, who appeared ill, in order to the take the child to the doctor. A collision occurred between the bicycle and the car door when Mr. Su opened the door and the door was struck by the plaintiff's bicycle. While liability and damages are both in issue, the principal issue that must be decided is the quantum of damages.

[2] At the time of the accident, Mr. Hagreen was employed by Advanced Mobility Products, which modifies and customizes wheelchairs and fabricates aids to assist persons who are disabled. At the time of the accident, he had been employed by that company for seven years.

[3] On the day of the accident, Mr. Hagreen was wearing a helmet as well as reflective stripes on his jacket and boots and was proceeding eastward. Cars were parked on his right side in the 2400 block of East Broadway, and as a matter of course, the plaintiff said that while monitoring the vehicle traffic in the two lanes to his left, he also monitored the driver's side of the parked cars, in order to alert himself to any potential risk. Mr. Hagreen estimated his speed at 25 to 30 km/hr when he said, without any warning, the driver's door of Mr. Su's vehicle opened; that he, Mr. Hagreen, yelled, "Whoa," but immediately hit the door. He described his upper body hitting the door, and he injured his ankle as well when he hit the ground. Emergency services were called, the first responder being a fire truck before the ambulance arrived, and Mr. Hagreen was transported to hospital. He indicated that he believes that he passed out in hospital, but after being seen by a physician, he was told that he could go home. Mr. Hagreen said that when he tried to put his shirt on, he could not lift his left arm above his head, and this resulted in x-rays being taken of his left arm region. Mr. Hagreen saw his family doctor, Dr. Montgomery, who prescribed Tylenol and Codeine to treat the pain throughout the plaintiff's upper

body, principally in the area of the right collar bone. As a result of continuing complaints of pain in the left collar bone, the plaintiff was referred for physiotherapy which provided some relief for what he was told were soft tissue injuries. Mr Hagreen was off work for seven days, and on his return, he avoided heavy lifting and stretching which resulted in other employees having to do that work.

[4] The defendant, Mr. Su, said that on the day of the accident, it was raining and his child was ill, so he had moved the car to the front of the house to take the child to the doctor. He said that he checked what was behind him, and he saw a cyclist about six or seven houses back, and he felt that he had enough time to get out. He said that he put one leg out and turned his body when the bicycle crashed into the door. In cross-examination, Mr. Su acknowledged giving a statement shortly after the accident, and in that statement, he said that he opened the car door slightly and made shoulder check, then he opened the door further and moved both of his legs out, when he saw the bike approaching “really fast” and the resulting collision occurred. Mr. Su had earlier indicated that he had passed the test in English for a second language, although most of his customers speak Chinese rather than English. Mr. Su was asked in cross-examination whether it was true that he did not see the bicycle until the door was opened and that it was then too late, and he acknowledged that that was true but indicated that it was some few years past. It was put to Mr. Su that he did not see the bicycle until it was too late, to which he said yes, and it was put to him that that was the truth, to which he also said yes.

[5] I am satisfied that the defendant is solely responsible for the collision, having opened his door when it was unsafe to do so. Section 203(1) of the *Motor Vehicle Act*, R.S.B.C. 1996, c. 318, says:

> (1) A person must not open the door of a motor vehicle on the side available to moving traffic unless and until it is reasonably safe to do so.

[6] I find that the defendant, Mr. Su, is wholly responsible for the collision and that the plaintiff took all reasonable steps available to him to avoid the collision, but that the door was not opened by Mr. Su until the plaintiff was so close that he had no opportunity to brake or to take evasive action. I now turn to the question of damages.

[7] The x-rays of the plaintiff's upper body were normal with no fracture or fractures demonstrated. The plaintiff, however, continued to complain of joint pain in the upper left shoulder area, and in the result, the plaintiff's family doctor, Dr. Montgomery, obtained a CT scan on December 27, 2007, which revealed a displaced fracture through the left costochondral junction of the left first rib with evidence of sclerotic margins at the fracture site and small osteophytes.

[8] The plaintiff was referred by Dr. Montgomery to Dr. E.A. Condon, a specialist in musculoskeletal pain and injury. Dr. Condon saw the plaintiff on August 30, 2007, and he recommended a bone scan and ultimately the CT scan. Dr. Condon referred Mr. Hagreen to Dr. Joe Schweigel, an orthopaedic surgeon.

[9] Dr. Schweigel saw the plaintiff on March 13, 2008, and considered that he would likely require further surgery for the minimally displaced fracture through the left costochondral junction of the first rib. (In his medical/legal report, Dr. George Aitken, an orthopaedic surgeon, described the costochondral junction as "the junction between the bony part of the rib and the cartilaginous anterior part which attaches to the breast bone".) Dr. Schweigel referred Mr. Hagreen to a vascular surgeon, Dr. Peter Fry.

[10] Dr. Fry's report dated May 28, 2008, notes that the plaintiff is very fit and works out all the time, but his pain pattern is difficult to pin down and says:

> ...He gets infrequent symptoms but when they do occur they are represented by very severe, sharp pain in the left upper chest and clavicular area likely related to his fracture.
>
> He also gets some musculoskeletal pain, occasional headaches, shoulder pain, etc but no neurological symptoms in his upper extremities to suggest a neurogenic thoracic outlet syndrome.
>
> It has been suggested that he have bone graft or first rib resection in terms of resolution of this pain.

[11] Dr. Fry says this with regard to the suggested bone graft or first rib resection:

> This is a complicated issue because first rib resection in him would be a major undertaking and I am not aware of anybody who would be willing to re-

> staple or bone graft the costochondral junction in a setting like this as access is very difficult, especially in a muscular individual.

[12] Dr. Fry then says that a resection of the cartilage could be undertaken but that this would not necessarily resolve the symptoms. A series of nerve blocks were recommended and Mr. Hagreen was referred back to Dr. Condon.

[13] Dr. Aitken, as I have indicated, is an orthopaedic surgeon, who reviewed the clinical material comprising the emergency department records, the clinical records of Dr. Montgomery, the clinical records of Dr. Condon, the clinical records of Dr. Schweigel, the clinical records of Dr. Fry, and the clinical records of Deep Cove Physiotherapy. He saw Mr Hagreen on October 6, 2008, at the request of counsel for Mr. Hagreen. Dr. Aitken noted that in early 2006, Mr. Hagreen resumed many of his earlier activities, including snowboarding and, most importantly, playing wheelchair basketball.

[14] When Dr. Aitken saw the plaintiff on October 6, 2008, there were no signs of overstated pain or any embellishment. He noted that the plaintiff suffered a crush injury to his chest on the right side over the collarbone and to the left side around the breastbone. He noted that the CT scan showed a fracture at the costochondral junction of the first rib between the cartilage and the bone that was not healed. He noted that there was no indication of thoracic outlet narrowing and that the options of grafting or removal are difficult, as Dr. Schweigel noted. In cross-examination, Dr. Aitken was asked whether the high level of basketball the plaintiff played could be the cause of his pain. Dr. Aitken said that he did not think so, that the physiotherapist had recorded a left-side breastbone pain on October 19, 2006. He was also asked whether a nerve block was a treatment that he would recommend, and Dr. Aitken said no that a nerve block was more of an investigative tool to demonstrate the source of the pain. In re-examination, Dr. Aitken was asked whether the osteophytes and sclerotic imaging demonstrated in the CT scan were significant, and he said that, in his view, they were and that these are consistent with the accident causing the injury and would take approximately six months to a year to

develop. He concluded that the motor vehicle accident was the cause of the injury to the costochondral junction.

[15] Dr. Aitken describes paragraph 27 of his medical/legal report of October 6, 2008, that the plaintiff's chief complaints of pain involved:

> a) Pain in the left side of the neck involving the muscles.
>
> b) Periodic sharp stabbing pain in the region of the left first rib/sternoclavicular joint.

[16] When asked what he cannot do, Dr. Aitken reported the plaintiff telling him there was nothing he could not do absolutely, although there were several things limited by pain. At paragraph 28 of his medical/legal report, Dr. Aitken says this:

> In particular he finds it very difficult to install hand controls in a vehicle that involves him lying on his back and working with his arms vertically upwards.
>
> He is still able to play wheelchair basketball, but finds that his shot is less powerful and is less well controlled.
>
> He lacks full extension to be able to shoot baskets.

[17] In his clinical impression, Dr. Aitken, because the plaintiff has switched to managerial work from heavy physical labour, he has not had any serious work impairment but that, if his job classification changed and he would be required to do heavy repetitive work, he would likely have trouble doing so.

[18] The plaintiff described his work prior to the accident, that he serviced and modified manual and electrical wheelchairs and elevators, including platform lifts; that the installation and modification work was heavy and involved awkward lifting; and that since the accident, he has been unable to do any large elevator installation, although he has continued to do installations of platform lifts. His work prior to the accident also included the installation of chair lifts, which involved the placement of rails on stairs which he did four or six times a year as an installer. The weight amounts to 80 to 100 lb and it is bulky and hard to carry. The plaintiff described doing the work "right" and doing it alone previous to the accident and taking pride in the result. He also described ceiling track lifts for getting into a bathtub or onto a

toilet and that the installation of these involved overhead work, which he does now but finds uncomfortable. He also installs hand controls in cars to enable the disabled to drive but that this involves lying down and working up and that, since the accident, he has trained another employee to do this work.

[19] With regard to his work, Ms. Elder, the principal of Advanced Mobility, gave evidence. She described the plaintiff as having had no difficulty in doing installations involving elevators, platforms, ceiling tracks, bed and bathroom lifts, and vans prior to the accident but that, since then, he has had difficulty installing ceiling tracks and that chair lifts are awkward and heavy and difficult for him to do. She describes the plaintiff as one of her most experienced employees, and when asked whether she would recommend him for rehiring, she said, “He would be hired yesterday.” In cross-examination, Ms. Elder described Mr. Hagreen as “shop boss” not because of the accident, she says, but because she likes him best as a trusted employee who is very handy and very conscientious.

[20] I am satisfied that the plaintiff, in his work, has adjusted well to the effects of an injury that continues to limit his capacity, that he has suffered a diminishment in his physical capacity, and that is a diminishment of a capital asset and is, of course, compensable.

[21] One of the unique factors in this case is that Mr. Hagreen had played wheelchair basketball even though he, unlike many of the other players, is physically able. Mr. Hagreen is passionate in the pursuit of excellence in wheelchair basketball, and he strives to be recognized at the national level (able players are unable to compete at the international level) as Most Valuable Player. Mr. Hagreen described training four or five days per week and that he found that to be inspirational and that able people take their level of fitness for granted, while disabled players overcome their disability in order to compete. The plaintiff described this game as a speed game and that he was a good shot. He described practising, trying to take 300 shots on the basket. He described wheelchair basketball being organized at the provincial level into two divisions: Division I being the better and Division II being the lesser. In

2005, Mr. Hagreen described his elation in being named an “All Star” and voted best player in his class. Following the accident, Mr. Hagreen said that the quality of his play had deteriorated from an All Star to a competent player. He said that he took Advil to treat pain (in no small part because he was concerned that more potent analgesics could disqualify him from play) and that his shooting suffered. He considered that after the motor vehicle accident, he was fairly consistently scoring 10 or 11 less points than he had been prior to the accident. He continued to seek medical assistance, but he was reluctant to take the nerve blocks that Dr. Condon could have given him because he understood the medication included steroids that could disqualify him and his team from competition.

[22] Mr. Hagreen described his range of motion at the time of the trial as diminishing in a tournament, more on the left side than on the right, and that even with anti-inflammatories, his range of motion on the left side is 80 to 85 per cent of normal. Nevertheless, Mr. Hagreen continues to strive to achieve his goal of being “Most Valuable Player”. Following the accident, rather than the 300 shots he made in practice prior to the accident, he now made 200 most of the time. In cross-examination, Mr. Hagreen was asked whether he would report pain in practice, and he responded no, that he would say, if asked, “No problem” – an athlete’s response. It was put to him that in April 2006, he was playing at the same level as he was before the accident, and he agreed that he played Division I but at a lower level, more fun and less competitive. He acknowledged with some pride that at a national championship, he was the first able athlete to win All-Star status. He was also cross examined with respect to the quality of his play in January and March 2007 when, in one game, he was top scorer and in competing against another able player, McDonald, he scored 32 points to McDonald’s 27. The thrust of Mr. Hagreen’s evidence was that he works through pain, and while he still achieves at a high level, he does not have the physical capacity that he enjoyed prior to the motor vehicle accident. Moreover, while he continues to aspire to be voted Most Valuable Player, he understands that that is a greater challenge to him post-accident than it was previously.

[23] Ross McDonald gave evidence that wheelchair basketball requires a lot of arm and shoulder strength and upper body strength in general. He describes the exceptional level of play of the plaintiff prior to the accident but says that that has diminished following the accident. He says that Mr. Hagreen's shooting is not as good, that he takes more outside shots, and that he uses both hands and arms to shoot rather than one. He describes the plaintiff's interest as passionate, that he loves the sport. In cross-examination, Mr. McDonald said that the plaintiff continues to play at a very high level and that he remains a better scorer than he is, but that Mr. Hagreen's scoring is not as consistent. Mr. McDonald says that the plaintiff is capable of exceptional scoring in any given game but that his average over four or five games has declined.

[24] I find that prior to this motor vehicle accident, the plaintiff was an exceptionally fit and energetic person whose passion for wheelchair basketball and whose skills and training were such that he was capable of achieving his goal of being Most Valuable Player at a national level. It is an example of his character that he continues to strive to achieve this goal notwithstanding that it may be beyond his reach. I found Mr. Hagreen to be a good historian, a careful but spontaneous witness who effectively told his story without embellishment. I find that the injury he sustained will not likely result in any acceleration of the normal degenerative processes and that he will continue to be able to play wheelchair basketball at a Division I level. However, his enjoyment of life has been significantly diminished and will likely continue to be diminished far into the future. I find that the plaintiff has taken all reasonable steps to remedy or relieve the pain he continues to experience and that, in view of the opinions of Dr. Fry and Dr. Aitken, a graft or surgical removal of the cartilage is, as Dr. Fry describes it, "a complicated issue". I am also satisfied that the prospect of temporary obliteration of pain as a result of local anaesthetic blocking of the fracture sight is not so sure to be helpful or so without risk that refusing such treatment is unreasonable, particularly when the injections may have the unintended consequence of disqualifying Mr. Hagreen from high level wheelchair basketball.

[25] I now turn to damages. The plaintiff submits that an appropriate award for non-pecuniary damages is $130,000 and relies on the decision of this court in *Bonham v. Smith* (1998), 50 B.C.L.R. (3d) 350 (S.C.). There, the plaintiff was an established ironman tri-athlete capable of earning very substantial income as a top world athlete. The plaintiff had sustained serious head and shoulder injuries when she was struck by a van while riding a bicycle. The injuries resulted in ongoing cognitive difficulties. Non-pecuniary damages were assessed at $130,000. At para. 37, Mr. Justice Leggatt said:

> ...It is as well to remember that the Plaintiff was not an aspiring athlete when she had her accident, she had arrived. The accident has left her frustrated and unable to complete the necessary intensive training for the highest level of success.

[26] That description fits Mr. Hagreen, even though Mr. Hagreen continues to aspire to the highest level of success. Non-pecuniary damages are a once and for all award for pain and suffering and loss of enjoyment of life. Wheelchair basketball is central to Mr. Hagreen's enjoyment of life, and while there has been no significant expression of frustration in his inability to achieve his goal, there is a reasonable prospect of that and a consequent diminution of his enjoyment of life. The defendant says that the plaintiff remains fully capable of doing everything and that he continues to believe that he can enjoy his goal of being the most valuable player at the national level. She submits that an appropriate award of non-pecuniary damages is $37,000 and relies upon *Tripp v. Kumar*, [1989] B.C.J. No. 13 (S.C.), and *Pennykid v. Escribano*, [2004] B.C.J. No. 1497 (S.C.). In *Tripp*, the plaintiff was an excellent athlete and enjoyed competitive hockey in particular. There is not in *Tripp* the same passion for hockey or other competitive sports that there is in this case.

[27] I find an appropriate award for non-pecuniary damages is $110,000.

[28] There is also a claim for loss of capacity to earn income in the future. While on the evidence before me that there is little risk that the plaintiff will lose his present employment, there is always a risk that his employer may sell the business or find the plaintiff's limitations too great for his continued employment. The plaintiff relies

upon the decision of Mr. Justice Finch (as he then was) in *Brown v. Golay* (1985), 26 B.C.L.R. (3d) 353 (S.C.), where at para. 8, this is said:

> [8] The means by which the value of the lost, or impaired, asset is to be assessed varies of course from case to case. Some of the considerations to take into account in making that assessment include whether:
>
> 1. The plaintiff has been rendered less capable overall from earning income from all types of employment;
> 2. The plaintiff is less marketable or attractive as an employee to potential employers;
> 3. The plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to him, had he not been injured; and
> 4. The plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market.

[29] While on the balance of probabilities, it may be unlikely that the plaintiff will lose his present employment; that is not the standard. I am satisfied that there is a reasonable possibility that the plaintiff will not continue in his present employment until retirement and that his position in a competitive labour market would be considerably diminished from what it was. The plaintiff relies upon *Klein v. Dowhy*, 2007 BCSC 1151; *Lo v. Thompson*, 2007 BCSC 1330; *Mosher v. Bennett*, 1995 CarswellBC 1801 (B.C.S.C.); and *Murray v. Clement*, 1999 CarswellBC 172 (B.C.S.C.).

[30] The defendant relies upon *Parypa v. Wickware*, [1999] B.C.J. No. 270 (C.A.); *Steward v. Berezan*, [2007] B.C.J. No. 499 (C.A.); and *Love v. Lowden*, [2007] B.C.J. No. 1506 (S.C.). In *Berezan*, a future loss award of $50,000 was attacked as being a claim for a mere theoretical loss. After referring to *Palmer v. Goodall* (1991), 53 B.C.L.R. (2d) 44 (C.A.) by Mr. Justice Donald (p. 59):

> Because it is impairment that is being redressed, even a plaintiff who is apparently going to be able to earn as much as he could have earned if not injured or who, with retraining, on the balance of probabilities will be able to do so, is entitled to some compensation for the impairment. He is entitled to it because for the rest of his life some occupations will be closed to him and it is impossible to say that over his working life the impairment will not harm his income earning ability.

[31] I am satisfied that the plaintiff has proven a substantial possibility that the plaintiff will lose his present somewhat protected employment and a consequential loss in income. I assess for diminished future earning capacity at $30,000. There is no claim advanced for past wage loss, and special damages have been resolved by agreement. Costs will follow the event, unless there are matters that need to be brought to my attention. In which event, counsel may do so in the ordinary way.

"T.R. Brooke, J."
The Honourable Mr. Justice Brooke