IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Galbraith v. Marin et al,***
2004 BCSC 671

Date: 20040519
Docket: 35211
Registry: Kamloops

Between:

Joyce Galbraith

Plaintiff

And

Melissa S. Marin and Darren H. Rock

Defendants

Before: The Honourable Madam Justice D. Smith

Reasons for Judgment

Counsel for the Plaintiff:	S.D. Dley
Counsel for the Defendants:	E.A. Harris
Date and Place of Trial:	May 10, 2004 Kamloops, B.C.

[1] The plaintiff, Joyce Galbraith, age 76, was a front seat passenger in a motor vehicle that was involved in a low-velocity, front-end collision in the Lower Mainland on October 26, 2002 (the “accident”). Although she was wearing a seat belt, it failed to lock because of the vehicle’s reduced speed. Upon impact, her head hit the visor and cracked its inside mirror.

[2] As a result of the accident Ms Galbraith suffered headaches and pain in her neck and back. Her back pain resolved after a few months. However, she continues to experience intermittent neck pain and associated headaches when she attempts any strenuous activity. She seeks non-pecuniary damages for her pain and suffering. Liability is admitted. Special damages are agreed at $195.

[3] The medical evidence at trial was very limited. Following the accident Ms Galbraith saw her daughter’s doctor. Dr. Baird prescribed some medication and physiotherapy. His clinical records were not available.

[4] Upon her return home to Chase, B.C. she saw a family doctor at the medical clinic she regularly attends. Dr. Mann had not previously seen Ms Galbraith. She noted that Ms Galbraith moved around in no apparent distress but complained of pain mainly in her neck, shoulder and hip. Ms Galbraith

had muscle tension in her shoulders, both of which were tight, but Dr. Mann saw no factors that would impede Ms Galbraith's recovery "except for her age". She prescribed Tylenol for the pain and gave Ms Galbraith a referral for physiotherapy.

[5] Dr. Mann diagnosed Ms Galbraith with a "Grade II" neck and back injury. She noted, "Physiotherapy providing benefit. Due to patient's age (72 years) likely has some degenerative disease in spine and may require longer course of physiotherapy."

[6] Ms Galbraith had been in a previous accident in May, 1997, in which she had sustained a soft tissue injury to her neck. However, physiotherapy treatments had resulted in her having a full recovery after about a year.

[7] Ms Galbraith also has pre-existing degenerative disc disease of the cervical spine at C5 and C7, with minimal disc narrowing at C7 to T1. There is a slight forward displacement of C5 on C6 and C4 on C5 of about 1 mm. Facet osteoarthritis exists at many levels from C3-4 to C6-7.

[8] This underlying spinal spondylosis condition predisposed Ms Galbraith to muscle shortening and increased pain sensitivity. However, other than periodic muscle tightening,

there was no evidence that Ms Galbraith suffered any neck pain from the spondylosis condition before the accident.

[9] Between November 18, 2002, and January 14, 2003, Ms Galbraith received 12 physiotherapy treatments. At the conclusion of those treatments Ms Galbraith was “doing well”; with the exception of some flare ups when she was bowling. Her back pain appeared resolved, her neck range of motion was improved, and she was back to the general strengthening and flexibility exercises she had been doing for a number of years. She was shown a posture technique for bowling and similar activities such as vacuuming.

[10] About two months later, on March 6, 2003, Ms Galbraith returned to the medical clinic with complaints of significant pain in her neck. Dr. Kolkind noted a marked impairment of her cervical spine with impaired rotation and extension by at least 50% and a reduction in neck flexion. He also noted that she had not been doing her home physiotherapy exercises and that her sternoclavicular arthritis on her right side was quite prominent. Dr. Kolkind showed her some home exercises for her neck to loosen the muscles. He was hopeful that the exercises would alleviate her symptoms. He also recommended she take Tylenol three or four times a day.

[11] Ms Galbraith returned to see Dr. Kolkind on March 18, 2003. Her range of motion had decreased significantly to 40% in all directions and she complained of pain when doing her exercises. Dr. Kolkind recommended that she continue with the exercises within her limit of comfort and that she continue with the medication. He also suggested the use of a soft collar if she was sitting for long periods.

[12] Since March, 2003, Ms Galbraith has been maintaining her neck exercises at home on an almost daily basis. She also does her strength and flexibility exercises when she has time and continues to take Tylenol on a daily basis, particularly before she does any activity. While her neck symptoms have improved, she continues to experience intermittent pain and disability with certain activities.

[13] The only other medical evidence at trial was a report of Dr. Phimister, another practitioner with the medical clinic at Chase. His report of September 30, 2003, was based on the findings and assessments of Dr. Kolkind and Dr. Baird, and an interview with Ms Galbraith. There was no indication in his report that he had examined Ms Galbraith.

[14] Dr. Phimister saw Ms Galbraith on June 27, 2003. At that time she complained of daily neck pain of moderate severity when she engaged in simple activities such as pushing,

pulling, lifting, weeding the garden, vacuuming the house and bowling. She advised Dr. Phimister that she continued to take Tylenol on a daily basis which helped to relieve the pain and stiffness in her neck, particularly when she was involved in recreational activities.

[15] In his report, Dr. Phimister summarized Dr. Baird's and Dr. Kolkind's assessments as follows:

> Injuries include soft tissue injuries of the cervical spine and lumbar spine. These have been caused by the accident. The recovery time of three (3) months can be prolonged for several months or years if there is underlying spinal spondylosis. This was shown on a cervical spine X-ray. Spondylosis predisposes to associated muscle shortening and increased pain sensitivity which explains the delayed recovery time.

[16] He recommended a course of intermuscular stimulation (needle therapy) at his office over several weeks. He was hopeful that such treatment would relieve the muscle shortening which he stated contributed to Ms Galbraith's pain and disability. However, he qualified his opinion by stating that if the cervical paraspinal muscles were fibrotic in nature, the effect of the needle therapy would be minimal and Ms Galbraith's impairment of function would likely continue. No explanation was provided as to what was involved in the needle therapy treatment.

[17] Dr. Phimister also recommended continued regular use of Tylenol. He concluded his report by stating:

> Comment on permanent disability will be given in several weeks following intermuscular stimulation treatment and therefore current opinion cannot be given at this time.

[18] Ms Galbraith declined to receive the recommended needle therapy because of an aversion to needles. She did not pursue any other course of treatment and no further medical evidence was provided.

[19] Before the accident Ms Galbraith was an active, healthy senior. She had worked throughout her adult life except for brief periods when she was at home with her children. Since her retirement she has lived in Chase in a home on a double lot with a large garden. She did her own housekeeping, yard work and snow shovelling. She also golfed and bowled.

[20] About a year after the accident, she had returned to most of these activities except for golfing and snow shovelling. She found it painful to swing a golf club and decided not to invest in a golf membership, in part, because of the limited number of times she had used it before the accident. Her neighbour now helps her with snow shovelling. However, she continues to suffer from neck pain and associated headaches when she engages in some of the above activities.

[21] I am satisfied that before the accident Ms Galbraith's pre-existing osteoarthritis and spinal spondylosis minimally affected her functioning and caused her little if any discomfort except for some muscle tightening. Exercises appeared to keep her limber and there was no indication of any associated pain. Ms Galbraith's underlying spondylosis did, however, make her more vulnerable to a prolonged recovery for a soft tissue injury to her cervical spine although she had fully recovered from her previous neck injury and was asymptomatic of any painful condition or injury at the time of this accident.

[22] By the end of January, 2003, her headaches, and pain in her neck and back had improved with Tylenol and physiotherapy treatments. As often occurs with soft tissue injuries, her failure to diligently maintain an exercise regime at the conclusion of the physiotherapy treatments resulted in a relapse by March, 2003. Since her return to daily neck exercises her condition has improved to where it appears to have reached a plateau at this time. While she is able to participate in most of her pre-accident activities, she continues to experience some residual neck pain and disability associated with increased and more strenuous activity.

[23] The burden of proof is on Ms Galbraith to establish on a balance of probabilities that the injuries she seeks to be compensated for were caused by the defendant's negligence. At law she is also required to act reasonably by mitigating or lessening her loss. Damages are not recoverable for any loss that could have been avoided through reasonable action. The standard of conduct for mitigation is not a high one provided Ms Galbraith can be found to have acted reasonably in the circumstances.

[24] The burden of proof is on the defendant to establish on a balance of probabilities that Ms Galbraith failed to mitigate her loss by refusing to act reasonably. The defendant must do more than merely suggest that some other course of conduct would have been more beneficial, in order to meet this burden.

[25] Counsel for the defendant submits that Ms Galbraith failed to mitigate her loss when she abandoned her exercise program after the physiotherapy treatments were concluded in January, 2003, and failed to receive the needle therapy as recommended by Dr. Phimister. The only explanation provided for her refusal to take the recommended treatment was her aversion to needles. As a result, Dr. Phimister was unable to provide a prognosis and in particular give an opinion on whether Ms Galbraith would likely have a permanent disability.

[26] I am not satisfied the defendant has established on a balance of probabilities that Ms Galbraith's present complaints of ongoing intermittent pain would have been minimized or not occurred had she continued with her exercises between January and March, 2003. Relapses often occur with soft tissue injuries and, in the absence of any medical evidence to support the defendant's submission I am not prepared to make such a finding. As soon as Ms Galbraith saw Dr. Kolkind she followed his advice and returned to her neck exercises, which appears to have reduced her symptoms.

[27] However, Ms Galbraith's failure to take the recommended needle therapy leaves the court with no evidence of whether such treatment might have resolved her ongoing complaints. Indeed, no evidence was led regarding the purpose and nature of the proposed needle therapy treatment. By failing to follow her doctor's advice, the court is left with no final prognosis for her recovery. It can only conclude that Ms Galbraith's refusal to participate in the recommended treatment, which may have assisted in her recovery, was unreasonable.

[28] In the result, there is insufficient evidence upon which the court can conclude that Ms Galbraith has a permanent residual disability. In my view, Ms Galbraith has not met the

burden of proof for establishing that she has a permanent residual disability caused by the accident.

[29] Counsel for Ms Galbraith submits the range of damages is $20,000 to $30,000. In that regard, he relies on the following decisions: ***Gladish v. Cymbaluk,*** 2003 BCSC 485; ***Chartrand v. Grace Lutheran Church Society,*** 2003 BCSC 1377; ***Beick v. Webb,*** 2003 BCSC 1251; and, ***Falconar v. Le***, 2003 BCSC 1434. He further submits that given Ms Galbraith's age, the impact of her injuries is more significant, which should be reflected in the amount of the award. In support of that submission he relies on the comments of Oliver J. in ***Bracey (Public Trustee of)*** **v.** ***Jahnke,*** [1995] B.C.J. No. 1850 (S.C.), varied on other grounds (1997), 34 B.C.L.R. (3d) 191 (C.A.), where he stated at ¶27:

> To rob a disabled person of what little she has left is a monstrous injury, for that little she has is, for her, the whole of her life.

[30] Counsel for the defendant submits the range of damages is $3,000 to $10,000. She further submits that every plaintiff must be assessed individually without making inferences regarding any one segment of society. In support of her position she relies on the following decisions: ***Hosak v. Hirst,*** 2000 BCSC 1813, rev'd (2003), 9 B.C.L.R. (4^{th}) 203

(C.A.); ***Way v. Frigon***, 2001 BCSC 573; ***Bucher v. McClaugherty,*** 2001 BCSC 665; ***Nichollson v. Armstrong,*** 2003 BCSC 1988; and, ***Booth v. Hedderick,*** 2004 BCSC 132.

[31] In assessing Ms Galbraith's claim for non-pecuniary damages I am mindful of the comments of Smith J.A. in ***W.R.B. v. Plint*** (2003), 235 D.L.R. (4th) 60, 2003 BCCA 671, where he stated at ¶174-5:

> First, at the trial level, damages are a question of fact in each case, to be decided on the evidence adduced. Trial judges refer to awards in similar cases to explain their own awards, but they are not bound by them. Decisions in similar cases serve simply to inform judges of what other trial judges might view as appropriate awards in the particular cases before them. It is possible to use trial judges' awards in this way because they are published and are readily accessible. Thus, patterns and ranges may be discerned.
>
> Next, awards made by trial judges are useful for comparative purposes because they come with explanation. This is of particular importance for appellate courts, which may interfere with a trial judge's award only if "palpable and overriding error" in approach is identified. Reasons given by trial judges expose clear errors that may have had a controlling effect on the result.

[32] A plaintiff's advanced years has been a factor considered in reducing an award for non-pecuniary damages based on "the necessarily limited duration of the plaintiff's future suffering": ***Olesik v. Mackin,*** [1987] B.C.J. No. 229 at 5 (S.C.); ***Munro v. Faircrest,*** [1987] B.C.J. No. 1389 (C.A.);

Knutson (Guardian ad litem of) v. Farr (1984), 55 B.C.L.R. 145 (C.A.); and, ***Wipfli (Guardian ad litem of) v. Britten*** (1984), 56 B.C.L.R. 273 (C.A.). However, in those cases the plaintiffs' injuries were severe and evidence was tendered of the plaintiffs' shortened life expectancy because of advanced years.

[33] In comparison, a more balanced approach was adopted by Fraser J. in ***Giles v. Canada (Attorney General),*** [1994] B.C.J. 3212 (varied on other grounds (1996), 21 B.C.L.R. (3d) 190 (C.A.), in light of competing comments by Lord Sachs of the English Court of Appeal in ***Frank v. Cox*** (1967), 111 Sol. J. 670 (C.A.). In ***Frank***, the court noted that physical impairments impacting life's pleasures and activities may be more serious in advanced years because of the limited time left to enjoy life. At ¶37 in ***Giles,*** Fraser J. concluded:

> The decision in *Olesik* focuses on life expectancy. The decision in *Frank v. Cox*, on the other hand, focuses on the impact of age on a loss of physical capacity. It is my view that one must be balanced with the other.

[34] ***Giles*** has been followed in ***Thomson v. Brunt,*** [1996] B.C.J. No. 1859 (S.C.); ***Gogol v. F.W. Woolworth Co.,*** [1996] B.C.J. No. 2047 (S.C.); and, ***Robinson v. Lions Gate Hospital,*** 2003 BCSC 1381.

[35] Thus, in my view the comment referred to in ***Bracey*** was made in order to draw attention to the gravity of taking from an already disabled person, some portion of their remaining faculties. This conclusion is supported by other decisions that have considered ***Bracey*** and other similar cases. See ***Agar v. Morgan***, (2003), 15 C.C.L.T. (3d) 159, 2003 BCSC 630 at ¶229 where damages were increased because the plaintiff, who had cystic fibrosis, was no longer able to exercise which greatly impacted the functioning of his lung.

[36] The circumstances of this case are very different from ***Bracey*** and ***Agar.*** There was no evidence of Ms Galbraith's life expectancy; the impact of her injuries from the accident was considerably less severe; and, there was no medical evidence regarding her final prognosis. Accordingly, I have concluded that Ms Galbraith's age is not a factor that should affect her award for non-pecuniary damages.

[37] I am of the view that her asymptomatic spinal spondylosis condition, which was for the most part asymptomatic at the time of the accident, increased her pain sensitivity and likely contributed to her prolonged recovery from the injuries she sustained in this accident. What the length of that recovery might be, or if she could reasonably expect a full recovery, is unclear from the limited evidence. In these

circumstances, I have concluded that an appropriate award for her non-pecuniary damages is $12,000.

[38] Costs are awarded at Scale 3.

"D.M. Smith, J."
The Honourable Madam Justice D.M. Smith