COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***Agar v. Morgan,***
2005 BCCA 579

Date: 20051129
Docket: CA030835

Between:

Lloyd Agar

Respondent
Appellant on Cross Appeal
(Plaintiff)

And

Daniel Cody Morgan and
Mazda Canada Credit Inc./Credit Mazda Canada Inc.

Appellants
Respondents on Cross Appeal
(Defendants)

Before: The Honourable Madam Justice Ryan
The Honourable Mr. Justice Mackenzie
The Honourable Mr. Justice Low

L.G. Harris	Counsel for the Appellants
D.G. Cowper, Q.C. and M. Kazimirski	Counsel for the Respondent
Place and Date of Hearing:	Vancouver, British Columbia January 31, 2005
Place and Date of Judgment:	Vancouver, British Columbia November 29, 2005

Written Reasons by:
The Honourable Mr. Justice Mackenzie

Concurred in by:
The Honourable Madam Justice Ryan
The Honourable Mr. Justice Low

Reasons for Judgment of the Honourable Mr. Justice Mackenzie:

[1] The issues on this appeal involve the complications to an assessment of damages for personal injuries arising from the plaintiff/respondent, Lloyd Agar's pre-existing Cystic Fibrosis ("CF"). The injuries he sustained in a motor vehicle accident on 4 March 1999 compromised his ability to exercise and thereby accelerated the progress of his CF. The trial judge found that he required a double-lung transplant three years earlier than he would have required one if the accident had not occurred. Fortunately for him, a matching donor was found and a successful transplant operation was performed on 24 August 2002, three months before the trial in November 2002. The trial judge awarded Mr. Agar $175,000 in non-pecuniary damages. The appellants contend that this award is inordinately high and they also raise an issue of costs. Mr. Agar has cross appealed on the award for loss of future earning capacity.

Facts

[2] Mr. Agar was involved in a two-car collision and suffered soft-tissue injuries to his neck and lower back, bruising of his chest, an injury to the articular cartilage of his right knee and a tear to the meniscus of the knee. At the time of trial, three and one-half years after the accident, Mr. Agar continued to suffer periodic pain in his neck and back but the injuries to his knee presented the most consequential disability. They placed stress across the knee cap, causing pain from prolonged periods of standing or sitting and impairing his ability to climb stairs, squat or engage in heavy lifting. Mr. Agar worked as a longshoreman, primarily as a forklift truck

operator, and while he continued to work after the accident, it was at a reduced level and involved substantial pain. Most seriously, the knee injury compromised the plaintiff's CF exercise program.

[3] The plaintiff had been diagnosed with CF at the age of six months. CF is a hereditary disease that causes malfunctions of mucous glands of the body. It affects particular organs including the lungs where it produces chronic illness and decreased survival. It creates a predisposition for the colonization of bacteria within the airways that results in inflammation, scarring and subsequent narrowing of the bronchial tubes, eventually impairing the function of the lungs by preventing an adequate intake of oxygen and elimination of carbon dioxide. Patients ultimately die of respiratory failure.

[4] The most effective means of slowing the progress of the disease is to clear the lungs through exercise that makes the patient breathe hard. The exercise loosens the secretions in the lungs and allows them to be eliminated more easily.

[5] CF is inevitably fatal but medical advances in recent years have dramatically extended the life expectancy of patients. Mr. Agar is in the first generation of patients to have survived into adulthood. The present life expectancy of a CF patient is 35 but one-third of British Columbia patients are over that age and a few have reached their 50s and 60s. Mr. Agar was 36 at the date of trial.

[6] There remains a high degree of variability in the progress of the disease among patients and the experts declined to estimate Mr. Agar's life expectancy.

[7] Mr. Agar had virtually no respiratory symptoms in his first 19 years but from his early 20s onward, he has been hospitalized several times a year for treatment for respiratory infections. His annual visits to hospital varied from three to seven in the five-year period preceding the accident. Patients are hospitalized as soon as there is any indication of an infection, which is treated as aggressively as possible to minimize the amount of scarring and reduction in lung function.

[8] At the time of the accident, Mr. Agar's treating physicians characterized the progress of his lung disease as moderate to severe. In 1997, he developed diabetes which had been primarily managed through diet.

[9] Mr. Agar enjoyed cycling and it was his primary form of exercise to maintain respiratory function. Prior to the accident, he routinely cycled 20 to 30 km. He continued to cycle after the accident, but at a much reduced level as a result of his knee injury.

[10] The trial judge concluded that Mr. Agar's level of lung function had been stable for about five years prior to the accident and that if the accident had not occurred, it would likely have remained stable for a further three years. At that point, the trial judge concluded that his lung function would begin to deteriorate at approximately the same rate that it did after the accident, leading to the requirement for a lung transplant in a further three years.

[11] The criterion for a lung transplant is deterioration in respiratory function to the point where the patient's chance of survival for a further two years is less than 50 percent. That prognosis was reached in January 2002 and a matching donor

became available in August 2002, when a cyclist with a healthy matching set of lungs was killed in an accident.

[12] In the result, the trial judge concluded that if he had not been injured in the accident Mr. Agar's condition would still have deteriorated to the point where he would have required a double-lung transplant, but the time when he required the transplant was accelerated by three years as a result of those injuries. She therefore assessed damages related to the CF as a loss of three years stable condition. She assessed non-pecuniary damages for that three-year loss of stability, together with the effects of the knee, back and neck injuries apart from the CF complication, at $175,000.

[13] The appellants submit that this award is inordinately high, applying the test of appellate review laid down in the well-known case of ***Nance v. B.C. Electric Railway***, [1951] 3 D.L.R. 705, 2 W.W.R. (N.S.) 665 (J.C.P.C.), applied by this Court in ***Cory v. Marsh*** (1993), 77 B.C.L.R. (2d) 248 (C.A.).

[14] For comparative purposes, the trial judge referred to ***Bracey (Public Trustee of) v. Jahnke***, [1995] B.C.J. No. 1850 (S.C.) (QL), varied on other grounds (1997), 34 B.C.L.R. (3d) 191 (C.A.), ***Boren v. Vancouver Resource Society for Physically Disabled***, 2002 BCSC 1134, since varied on other grounds, 2003 BCCA 388, ***McAllister v. Sotelo***, [1999] B.C.J. No. 2132 (QL) and ***Heska v. Little***, [1999] B.C.J. No. 652 (QL), affirmed 2000 BCCA 255.

[15] Each of those cases involved physical injuries complicating seriously disabling pre-existing conditions, and non-pecuniary damages were awarded

between $105,000 and $150,000. The trial judge found those decisions to be helpful although not analogous.

[16] In my view, the important difference between those cases and the present one is that in those cases the complications from the accident-related injuries to the pre-existing condition would extend over the whole of the remaining life expectancy of the plaintiff. Here in contrast, the effect of the accident was simply to accelerate by three years a CF condition that would have resulted in any event, and the compensation is for the loss of the stable condition during that three-year period rather than over the whole of Mr. Agar's life expectancy.

[17] The appellants add that in the normal course, Mr. Agar's chance of obtaining a matching double set of lungs for transplant was small and that Mr. Agar overcame substantial odds against him in obtaining a successful transplant. On the odds, he might well not have found a transplant if there had been no accident and his pre-transplant period of stability had been extended. Without a transplant, his average life expectancy would have been reduced to two years from the point at which he would have become eligible.

[18] The appellants say that the results of the accident were in this sense fortuitous and that Mr. Agar did get a transplant and a substantial extension of his life expectancy which on the odds he likely would not have received otherwise.

[19] We have not been referred to any authorities which consider analogous circumstances. The trial judge did not directly address Mr. Agar’s prospects for a successful transplant if the accident had not occurred and the evidence on this point

was limited and imprecise. In any event, the odds of a successful transplant are a fortuity unrelated to the accident except by the coincidence of time and I think it would be unfair to allow the appellants to derive an offsetting benefit by contending that the accident, in leading to a successful transplant, has extended Mr. Agar's life expectancy beyond his life expectancy as estimated on the odds of a successful transplant occurring had there been no accident.

[20] The appellants rely on two cases where motor vehicle accidents were found to have triggered the onset of Multiple Sclerosis ("MS") symptoms: ***Haney v. Malichewsi*** (1997), 41 B.C.L.R. (3d) 230, appeal dismissed 1999 BCCA 500, and ***York v. Johnston*** (1997) 37 B.C.L.R. (3d) 235, 148 D.L.R. (4th) 225 (C.A.). In ***Haney***, the 26 year old plaintiff was awarded $95,000 in non-pecuniary damages when a motor vehicle collision triggered symptoms of MS. The plaintiff otherwise sustained minor soft-tissue injury that the trial judge would have assessed alone at $18,000. The trial judge discounted the loss of future earnings claim by 65 percent to reflect the likelihood that the plaintiff would have experienced MS symptoms in the future if the accident had not occurred. While not explicit in the trial judge's reasons, that contingency presumably also influenced the non-pecuniary damage award.

[21] In ***York***, the 51 year old plaintiff had a history of MS symptoms but she had been symptom-free for more than ten years before the motor vehicle accident that triggered a re-occurrence. The plaintiff's symptoms continued to the date of trial, two years' post-accident, and her future prognosis was uncertain. There were two significant contingencies — the symptoms might improve or recede entirely as they did in her pre-accident history, or the plaintiff might have suffered a re-occurrence of

symptoms in the future apart from the accident. On appeal, this Court concluded that the future earnings claim should be discounted by 75 percent to reflect future contingencies. The award for non-pecuniary damages was increased from $60,000 to $85,000.

[22] In my view, ***Haney*** and ***York*** are of assistance in determining the appropriate award for non-pecuniary damages in the present case where the accident accelerated Mr. Agar's need for a lung transplant which on the evidence would have been required at a later time apart from the accident.

[23] The difference between the present case and the others is that Mr. Agar's injuries, apart from the CF complications, are more serious. Mr. Agar's knee injury has resulted in a permanent disability which limits his activities, particularly his cycling exercise, and it results in pain from prolonged periods of sitting and standing. These injuries should attract significant non-pecuniary damages apart from the CF complications. In my view, it should raise the amount of damages above the $85,000 to $95,000 amounts awarded in ***York*** and ***Haney***. Nonetheless, I think that the award of $175,000 inordinately over-weights those injuries. In my view, the upper limit of a reasonable award on non-pecuniary damages in this case is $125,000.

[24] I would therefore set aside the award of $175,000 for non-pecuniary damages as inordinately high and substitute an award of $125,000.

Costs

[25] The trial judge awarded Mr. Agar costs on Scale 5 on the ground that the factual issues were ones of "uncommon, remarkable and exceptional difficulty" as those terms were stated in ***Bradshaw Construction Ltd. v. Bank of Nova Scotia*** (1991), 54 B.C.L.R. (2d) 309 (S.C.), cross appeal as to costs dismissed (1993), 73 B.C.L.R. (2d) 212 (C.A.). The appellants dispute this conclusion and submit that there was substantial agreement among the experts on the relevant aspects of CF and there were no complicated scientific issues that required determination.

[26] An order for costs is discretionary and this Court will only interfere with the trial judge's discretion if there is misdirection or the decision is so clearly wrong as to amount to an injustice: ***Laurin v. Ford Credit Canada Ltd.*** (1992), 86 B.C.L.R. (2d) 282 (C.A.), at para. 7. The trial judge had the advantage of hearing the expert evidence and I cannot say that her evaluation of the difficulty of the factual issues related to the complex nature and rapidly evolving treatment of CF was clearly wrong. I would dismiss this ground of appeal.

The Cross Appeal

[27] Mr. Agar cross appeals the award of $75,000 for loss of future earning capacity. An appeal from the award of $28,969.78 for cost of future care was abandoned. The trial judge started her assessment by assessing the damages for loss of earning capacity for the three-year period from trial to 2005 at $50,000 to reflect Mr. Agar's pre-accident prospects in the three years during which Mr. Agar

would not have required a transplant if the accident did not intervene. This part of the assessment was not seriously contested.

[28] The trial judge then turned to the loss of earning capacity thereafter and began with a figure of approximately $875,000 taken from the economic report of G.F. Taunton representing $50,000 annual earnings over the twenty years from 2005 to 2025. She then made deductions for contingencies. She relied on the evidence of Dr. Robert D. Levy, a specialist in respiratory medicine, who estimated that lung transplant recipients have an anticipated survival rate of 75 percent for one-year post-transplant and in the range of 50 percent for five years. Fifty percent of transplant recipients have a chronic occupational disability.

[29] The trial judge started with two-thirds of the present value figure to reflect Mr. Agar's pre-accident work history and then deducted a further 25 percent for one-year post-transplant mortality, an additional 50 percent for five-year mortality and a further 50 percent reduction for chronic disability, which produced a net figure of about $100,000. She added the $50,000 for the first three years referred to above to reach a figure of $150,000. From this she deducted $75,000 as her estimate of Mr. Agar's likely actual post-transplant earnings to produce her award of $75,000.

[30] Mr. Agar submits that the trial judge failed to appreciate that Dr. Levy's five-year post-transplant mortality rate of 50 percent included the 25 percent mortality in the first year and that the trial judge erred in double counting the 25 percent and 50 percent mortality rates from the one and five-year estimates. If this error is removed, the estimate of earning capacity after contingencies is increased by approximately

$35,000. In my view, the trial judge did err in following Dr. Levy's evidence in this respect and the award derived from her analysis should have been $35,000 higher. I would therefore allow the cross appeal and increase the award of damages for loss of future earning capacity from $75,000 to $110,000.

[31] Mr. Agar submits that the trial judge failed to take into account the disability resulting from the knee injury in the calculation of loss of future earning capacity. In my view, the effects of that injury in terms of earning capacity are so overshadowed by the CF-related disabilities that the trial judge did not err in failing to make an additional allowance on that account. Mr. Agar also submits that the trial judge erred in treating Mr. Agar's pre-accident prospects of needing a transplant as "a certainty" rather than a contingency. In my view, that submission misapprehends the trial judge's reasons. She did treat the prospect of a lung transplant as a contingency but on the evidence before her concluded that on balance the prospect of needing a transplant in three years was a realistic estimate of that contingency, and I am not satisfied that there was any error in her approach in this regard. I reject those submissions.

Conclusion

[32] In the result, I would reduce the award for non-pecuniary damages from $175,000 to $125,000 and I would increase the award for loss of future earning capacity from $75,000 to $110,000. I would not disturb the trial judge's award of costs in the Supreme Court.

[33] As success has been substantially divided in this Court, I would direct that the appellants and Mr. Agar each pay their own costs of the appeal and the cross appeal.

"The Honourable Mr. Justice Mackenzie"

I AGREE:

"The Honourable Madam Justice Ryan"

I AGREE:

"The Honourable Mr. Justice Low"