IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Everett v. Solvason,*
2012 BCSC 140

Date: 20120130
Docket: M100887
Registry: Vancouver

Between:

Jacob Everett

Plaintiff

And

Eric D. Solvason

Defendant

Before: The Honourable Mr. Justice Jenkins

Reasons for Judgment

Counsel for the Plaintiff:	W. D. Mussio E. Goodman
Counsel for the Defendant:	R. Pici
Place and Date of Trial:	Vancouver, B.C. January 11-13, 2012
Place and Date of Judgment:	Vancouver, B.C. January 30, 2012

[1] The plaintiff, Jacob Everett, claims damages for personal injuries sustained in a motor vehicle accident which occurred on September 3, 2009. At the time of the accident, the plaintiff was 40 years of age, unemployed and living on his own in a home in Surrey, B.C. with his mother and step-father. Liability is not in issue.

[2] On September 3, 2009, the plaintiff was driving his 1986 Toyota Camry westbound on the 152nd St. onramp to Highway 1. In the front passenger seat at the time was his then girlfriend, Shirley Ann Elmourne. While stopped waiting for traffic to start moving once again, Mr. Everett's Toyota was struck from behind by the defendant's vehicle, a 2005 GMC Sierra Crew Cab pickup, thrusting Mr. Everett's vehicle into another vehicle in front of the Toyota. It was then that the defendant's vehicle struck Mr. Everett's Toyota once again.

[3] Prior to the initial impact and realizing his vehicle was about to be struck, Mr. Everett braced his left foot for the impact. His evidence is that the result of bracing his left foot was that it caused a twisting sensation in his left knee upon impact. Mr. Everett stated at trial that he felt "no great pain originally", but within a few hours he felt pain in his left knee, neck and back and also had pain in his left elbow. Later he felt increased pain in his back and neck and increased knee pain.

[4] His evidence is that he was wearing his seatbelt at the time of the accident.

[5] Two previous events caused injury to Mr. Everett which are relevant to his claim for injuries arising from the accident of September 3, 2009.

[6] The first of those events was another motor vehicle accident which occurred on May 16, 2008. At the time, Mr. Everett was sitting in the front passenger's seat in his mother's vehicle and their vehicle was rear-ended on the Knight Street bridge by a moving truck. The damage to both vehicles was admittedly minor and Mr. Everett's family doctor at the time, Dr. Sawatzky, referred in his report of December 3, 2008 only to minor soft tissue injuries evidenced by a stiff and sore upper and lower back, shoulders, neck and a headache. He was prescribed Tylenol 3 and Flexeril, and advised to start active rehabilitation therapy, which Mr. Everett did not pursue. Mr.

Everett testified that by the time of the September 3, 2009 accident, he was 90% recovered from the minor injuries suffered on May 16, 2008.

[7] Initially his claim for personal injuries arising from the 2008 accident was declined by the insurer but eventually the claim for pain and suffering was settled for the sum of $15,000.

[8] Of more significance was an injury suffered by Mr. Everett while playing softball at a tournament in Nanaimo over the August long weekend, just over a month before the accident which is the subject of this litigation. The evidence is that while running the bases and just after rounding third base, he realized he would not be able to get home safely and stopped to turn back to third base. On stopping, Mr. Everett's words were that he "blew out his left knee". Swelling of the knee began very shortly thereafter, he experienced instability in the knee and was also in considerable pain as a result. Mr. Everett attempted to play softball again in mid-August but experienced some pain and instability, especially while moving laterally. He promptly gave up playing softball for the time being.

[9] Not long after the incident, Mr. Everett attended the King's Cross Medical Clinic where he was attended upon by Dr. Chemerika. Dr. Chemerika undertook a brief exam and referred Mr. Everett to an orthopaedic surgeon, Dr. Hicks, who he did not see until September 9, almost a week after the September 3, 2009 accident. Mr. Everett did not receive treatment for the knee injury before the September 3, 2009 accident and stated that prior to the accident, the swelling was reducing as was the pain in his knee.

[10] A major issue in this case arising from the September 3, 2009 accident is whether the knee injury suffered while playing softball was aggravated in the September 3, 2009 accident or was solely an injury resulting from the softball incident.

General Damages

[11] I will now turn to the evidence of the injuries and the claim of Mr. Everett for damages for pain and suffering arising from the September 3, 2009 motor vehicle accident.

[12] The claim is for an aggravation of Mr. Everett's neck and back injuries first incurred in the May 2008 accident, damages for aggravation of the left knee injury suffered playing softball, headaches and as well his elbow injury, the last of which had healed and was not causing any pain or suffering after 4 – 6 weeks. It is apparent that the elbow injury was very minor.

[13] The cause of the left knee injury and whether or not the injury was aggravated in the motor vehicle accident has been a most controversial issue and Mr. Everett's credibility in describing this injury has been questioned. Firstly, in a written statement provided to ICBC 6 days after the accident (Exhibit 7), he stated: "As a result of this accident I suffered an aggravation of my neck and back from a previous accident." There was no mention of injury to his knee as a result of the accident in that document. However, a second version (Exhibit 9) of this early statement was put to Mr. Everett on cross-examination on which the typed portion contained identical words to those on Exhibit 7 but also included handwritten words, following the above quote, which were: "Also injured elbow and re-injured knee". Both versions of this document were apparently provided by Mr. Everett to his solicitors. There is no explanation as to how both documents came into existence or how the handwritten clause was added to one of the documents. Also there was an attempt to say Exhibit 7 was delivered in error and that Exhibit 9 should have been delivered instead. Eventually both documents appeared on the List of Documents prepared by Mr. Everett's solicitors, who stated that Exhibit 7 should not have been included on the list. The fact is that both were produced, both were executed by Mr. Everett, both were presumably intended for the eyes of an adjuster at ICBC and they are inconsistent statements as to his injuries made shortly after the accident. There is an inference that Exhibit 7 reflects the original statement of Mr. Everett and Exhibit 9 was subsequently prepared with the added words regarding his knee injury.

[14] As a result of the knee injury suffered playing softball, Mr. Everett had been referred to see Dr. Tracey E. Hicks, an orthopaedic surgeon. Dr. Hicks met with and examined Mr. Everett on September 9, 2009, six days after the September 3, 2009 accident. At that appointment, Dr. Hicks only examined the injured left knee and it was reported to him by Mr. Everett that "overall his knee is gradually slowly getting better." Dr. Hicks found that "He has a completely ruptured ACL and he wished to discuss operations, which I did with him". After this appointment, Mr. Everett called back to advise he was getting a second opinion and Dr. Hicks had no involvement with him after that day.

[15] Of interest in reviewing the report of Dr. Hicks (Exhibit 12) is that he was told of the September 3, 2009 accident wherein Mr. Everett "said he injured his neck and has headaches and is taking Tylenol 3 and is gradually responding". There was no mention of an aggravation or re-injury of the left knee.

[16] During the fall of 2009 Mr. Everett received several chiropractic and massage treatments, but no physiotherapy as pain in his back, neck and left knee continued.

[17] Eventually on November 20, 2009, Mr. Everett found his way to Dr. G. Parhar, a general practitioner with considerable experience in the assessment and treatment of persons with soft tissue injuries. Following the appointment, Dr. Parhar referred Mr. Everett for an MRI of the lumbar spine and left knee which was carried out on December 4, 2009. Dr. Parhar reported in a letter of November 25, 2010 that the results of those MRI tests, carried out by Dr. Leipsic, "concluded that the lumbar spine had lumbar spondylosis and the left knee had a complex tear to the medial meniscus and a probable partial tear of the ACL (anterior crucial ligament). A small to moderate joint effusion was also noted." Dr. Parhar went on to state that as a result of the collision on September 3, 2009, there had been an aggravation of the left knee condition originally incurred during the softball incident and that Mr. Everett told him of increased knee pain following the collision of September 3, 2009.

[18] Dr. Parhar then referred Mr. Everett to Dr. Chin, an orthopaedic surgeon, who examined Mr. Everett on December 22, 2009. Based upon Dr. Chin's report of the same day, it appears as though Dr. Chin restricted his examination to the damage caused to the left knee as there is no mention of the other injuries. Dr. Chin did find a "Degenerative medial meniscal tear of the left knee, horizontal cleavage complex component tear with a possible partial tear of the ACL fibres." The plan was to undertake surgery to repair the tear to the medial meniscus.

[19] Following the appointment with Dr. Chin, Mr. Everett underwent surgery on February 4, 2010 when Dr. Chin performed a left knee arthroscopic partial medial meniscectomy of the left knee. Subsequent to the surgery, Dr. Parhar stated in his report of November 25, 2010 that "With respect to his left knee condition, he seems to have had some improvements with surgery." Clearly, there were improvements as in May 2010 Dr. Parhar cleared Mr. Everett for work. There were no limitations noted in the type of work activities he could undertake. He found work promptly, doing power washing at a large condominium project for a Mr. Boos. That work included the use of long brushes to be held up against the building, which required Mr. Everett to constantly look up during the washing of the buildings. This activity resulted in some further pain to his neck. Mr. Everett's surgically repaired left knee did not appear to cause him any further pain or suffering during the time he was involved working on this project. He has subsequently been able to find further work, including contract work with other employers, performing physically demanding work.

[20] In a second report dated November 30, 2011, Dr. Parhar made little mention of the knee injury, stating: "With respect to his left knee condition, he did not mention this on the last two visits, so I am led to conclude that this situation has stabilized." The last two visits he was referring to were on June 20 and October 24, 2011. The last visit before those was on February 3, 2011.

[21] The defence called Dr. Brian Day, an orthopaedic surgeon, who never did examine Mr. Everett but did review a great many reports and other documents

including medical records which were in evidence at this trial. He concluded that the softball injury of July 30, 2009 was responsible for the injury to the left anterior cruciate and medial meniscus, i.e. the left knee injuries. In cross examination Dr. Day was clear that the accident of September 3, 2009 was not the cause of the knee injuries, in that he said that these kind of knee injuries are the result of a significant rotational movement in which the knee pops, swells, bleeds and would be the main complaint of the injured party. According to Dr. Day, the plaintiff having planted his left foot in anticipation of the impact from the vehicle behind would not likely have caused these injuries. The nature of the left knee injury is, however, consistent with the plaintiff's description of the softball incident. It is clear to me, especially from Dr. Day's evidence, that the cause of the knee injury was the softball incident. However, he did say that the accident could have resulted in a further tear of the medial meniscus originally torn in the softball incident. In the circumstances, I find that the plaintiff likely suffered a minor aggravation to the knee injury as a result of the September 3, 2009 accident.

[22] Regarding the extent of the injury, Mr. Everett's mother, Mrs. Wendy Pierce, gave evidence at the trial and reported that by mid 2010, Mr. Everett had recovered significantly, and that he had returned to playing softball in the spring. Mr. Everett testified that in this period of time he had recovered by approximately 80-90% and was having "good days and bad days", not unlike the time period before the accident.

[23] Shirley Ann Elmourne, with whom the plaintiff had maintained a lengthy relationship that ended in February 2011, testified that she never did observe any swelling of his knee after the accident, that she observed him playing softball on several occasions in 2010 and other than problems he was having with his knee in one game, there was not much change in his activity level.

[24] As a result of this evidence, I find that Mr. Everett had recovered significantly by the summer of 2010 and was able to undertake most activities he had been

engaged in prior to the accident of September 3, 2009 but for the injuries sustained in the softball incident.

[25] Regarding the back and neck pain suffered by the plaintiff, the defendant accepts that the plaintiff suffered a temporary aggravation of his pre-existing chronic pain condition, originally caused by the impact of the 2008 accident in which he was a passenger in his mother's vehicle. Dr. Parhar found that the plaintiff suffered paracervical muscle strain, paralumbar muscle strain and muscle tension headaches arising from the accidents of May 16, 2008 and September 3, 2009. Neither Dr. Chin nor Dr. Day commented on the neck and back pain.

[26] I also note that the use of prescriptions for Tylenol 3, Naproxen and another drug, two of which were for pain and one a muscle relaxant, fell off significantly during 2010 and is consistent with the plaintiff's claim that by mid 2010 he was having some good days and some bad days. Likewise with the chiropractic and massage therapy, these treatments fell off considerably after the summer of 2010.

[27] Although the plaintiff continued to have some neck and back pain along with headaches after the summer of 2010, the extent of those symptoms was nominal after that time. I find that the plaintiff did suffer from neck and back pain together with headaches as a result of the aggravation of pre-existing injuries caused by the accident of September 3, 2009 for a period of approximately one year.

[28] During the trial there was also evidence of events subsequent to the accident of September 3, 2009 including an incident in the fall of 2009 when the plaintiff was assisting his mother clear branches and sections of stump on his mother's property. That incident made clear that the plaintiff had no serious back or neck problems at the time as he was undertaking physical work voluntarily and carrying out that work. He did injure his back while lifting a heavy section of branch or stump but the pain did not continue. Likewise, the incident in a swimming pool in Vernon in 2011 has no connection to the damages suffered in the accident. Finally, Mr. Everett was involved in three further motor vehicle accidents in 2011, the last of which, in October 2011, was serious and caused considerable damage, especially to his face,

as a result of hitting a power pole and being projected into the windshield of his automobile. I find that these three motor vehicle accidents are not significant in the assessment of damages as the injuries sustained in these accidents were not of the same kind as those suffered in the 2009 accident.

[29] Turning to the quantum of general damages for pain and suffering, the plaintiff seeks the sum of $60,000 while the defendant submits an appropriate award for damages is in the range of $10,000 - $12,000.

[30] Of the authorities relied upon by the plaintiff, all judgments had findings of injuries more significant and long lasting than my findings regarding the injuries to Mr. Everett. The closest comparison of damage was in the decision of *Hutchinson v. Cozzi*, 2009 BCSC 243, a decision of Justice Williamson. At para. 25, the learned judge found “significant injury to his neck, mid-back and lower back” and “the injuries were disabling for a period of approximately six months, and continued on for some time thereafter, limiting him to light forms of work.” Justice Williamson further found at para. 26 that “he is not completely recovered”, which was a finding made four years after the accident. The learned judge awarded non-pecuniary damages of $40,000.

[31] The plaintiff also relied on the decision of *Lawson v. Vu; Lawson v. Kubo et al*, 2000 BCSC 206, in which Madam Justice Baker found at para. 82:

> ... that in future, the symptoms of pain and swelling will probably increase, and that there will be functional impairment of the knee due to arthritic changes in the knee. ...

Further, Madam Justice Baker further found:

> ... that the injury to the knee did not cause the osteoarthritis to develop, but that it is more probable than not that Mr. Lawson will experience acceleration of arthritic changes in the left knee as a result of the trauma to the knee.

[32] By the time of the trial in that case, over five years had lapsed since the accident. With the finding of a continuation of the pain and likely acceleration of the pain and suffering in that case, the award of $85,000 was appropriate, but the

injuries were much more serious and not comparable to those suffered by the plaintiff in the case at bar.

[33] In *Niessen v. Sepulveda and Miller*, 2008 BCSC 1567, the plaintiff had claims arising from two motor vehicle accidents, both occurring in 2004. Justice Savage found mild to moderate soft tissue injury of the cervical spine and lumbar spine, and at para. 81 that the plaintiff in that case would be:

> ... prone to ongoing muscular discomfort in the neck and lower back in the future and it is unlikely that her symptoms will settle altogether.

[34] Non-pecuniary damages were awarded in an amount of $55,000. Again, the duration of the pain and suffering and the extent of the same in that case were much longer than in the case at bar.

[35] The defendant referred to three decisions which are applicable. The first of those, and the assessment of damages which I find is most similar to the case at bar, is *Morales v. Nielsen*, 2009 BCSC 1890, a decision of Justice Verhoeven. The learned judge stated:

> [84] ... the plaintiff suffered from a mild soft-tissue injury to the neck and left shoulder, which also caused him associated headaches. The injury resulted in a recurrence on at least some occasions of the plaintiff's previous well-established problems with sleep.
>
> [85] There was very little interference with the plaintiff's activities of daily living, leisure activities, and work.
>
> [86] I find that the plaintiff currently has few if any residual effects of the accident.
>
> ...
>
> [90] ... I find that the plaintiff's injuries were substantially resolved within one year of the accident at the latest, and any lingering complaints were minor. There is no concern about any ongoing future effects of the motor-vehicle accident injuries.

[36] In that case, an award of $11,000 was found appropriate for general damages. Although in the case at bar there was some interference with the plaintiff's recreational softball activities, he did return to play in the spring of 2010, once the season opened following the winter. Moreover, his injuries had little effect on his daily living and, as I will point out below, had little effect on his ability to work.

[37] Two other cases relied on by the defendant are applicable. The first is *Dohla v. Heft*, 2011 BCSC 738, a decision of Justice Bruce in which she awarded general damages amounting to $7,000 and $10,000 respectively to two plaintiffs who were brother and sister. Regarding the brother, neck and back pain was completely resolved by November 2010, some 18 months after the accident, there was no treatment in the form of physiotherapy and the plaintiff's lifestyle was only marginally impacted by the injuries. Those injuries resulted in the award of $7,000. The plaintiff sister's soft tissue injuries were more serious but after six to nine months the pain was found not to be affecting her life in any manner. The result was an award of $10,000. I find the injuries in this case were less serious than those in the case at bar, but this case is still a good yardstick for comparing the injuries for the purpose of assessing general damages.

[38] The final case relied upon by the defendant was *Hough v. Wyatt*, 2011 BCSC 910, a decision of Stromberg-Stein J. (In Chambers). The learned judge found no new injuries to the plaintiff save for damage to his wrist which had been expected to clear up in two years but was still causing some pain, aggravation of pre-existing neck, shoulder and back problems to a minor degree, little effect on his life and within two months after the accident he had been back at work. The award for general damages in that case amounted to $15,000.

[39] Considering the above cases, I find a reasonable award for general damages for pain and suffering is in the amount of $15,000.

Wage Loss

[40] The plaintiff claims wage loss in the amount of $15,000.

[41] At the time of the accident the plaintiff was unemployed. He has a history of work as a labourer but had previously fallen into problems with drugs which had resulted in him spending several months in 2008 in a recovery house. Starting later in 2008, after leaving the recovery house, he did work for about six months driving a forklift until May 2009 when his employer went bankrupt. During the first five months of 2009 the plaintiff had earned $13,696.

[42] From May 2009 until the accident of September 3, 2009 the plaintiff applied for several jobs, submitting a résumé online through an employment website but met with no success. There is no other evidence of attempts on his part to find work between May and September 3, 2009. The plaintiff gave evidence that he was able to work following the accident up to December 12, 2009 but could not perform work which was physically demanding. That evidence is corroborated by the evidence of Yvette Meyer, a Payment Service Officer employed by Service Canada in Surrey, B.C. Ms. Meyer made notes of her discussion with the plaintiff on December 18, 2009. Those notes were made contemporaneously with the discussion and there is no reason to doubt the accuracy of the notes. In reference to the September 3, 2009 accident, the plaintiff told Ms. Meyer

> ... he was only sore for a few days and so he didn't declare any sick days. Client states that his back was injured, but he decided himself that he was capable of working, but not doing anything with heavy lifting. And so, he continued on regular benefits this whole time and was applying for jobs he thought he would be capable of doing.

Later, the notes continued,

> Client states he thought he was capable of working until December 12, but now states he is too injured.

[43] The significance of December 12, 2009 is that it is the date it was determined he would have surgery to repair the tears of the medial meniscus in his left knee.

[44] That surgery was in fact carried out on February 4, 2010. Clearly the plaintiff was not able to work after the surgery until late April or early May, when he was cleared to return to work by Dr. Parhar. In mid-May 2010, the plaintiff did find employment, firstly power washing a condominium, and although he changed jobs, he continued to work on a contract basis doing physical labour on ships including construction work and painting. There is some evidence he missed two to four days of work in his first month of employment due to soreness from the injuries sustained in the accident.

[45] The award for loss of wages should be nominal in these circumstances. Firstly, there was little prospect the plaintiff would have found work in the fall of

2010, even though he stated he was able to work at jobs which were not physically demanding. Overall, considering the time off due to the surgery, some time missed after commencing work in May 2010 and the plaintiff's difficulties in finding work irrespective of his injuries, an award of $4,000 is reasonable compensation for his loss of wages.

Special Damages

[46] The plaintiff's claim for special damages includes costs incurred for massage therapy, chiropractic treatment, prescription medication, physiotherapy, miscellaneous expenses and a mileage claim for the cost of travel to and from his appointments for treatment and are detailed in Exhibit 3. I agree with counsel for the defendant that as the plaintiff's symptoms continued for approximately one year, there should be a cut off date for the expenses incurred by him and I so I have set September 1, 2010 as the cut off date.

[47] Therefore, I find the plaintiff entitled to the costs of massage therapy of $2,450, chiropractic treatment of $2,025, prescriptions of $335.49 (after an agreed disallowance of some specific prescriptions), physiotherapy of $415, miscellaneous expenses of $2,048.64 and travel costs of $500 for a total of $7,774.13. I have included the invoice for $2,015 in the miscellaneous category for the MRI procedure which had been ordered by Dr. Parhar, even though Dr. Hicks had recommended against the procedure. My reasoning for allowing the same is that Dr. Hicks had mis-diagnosed the knee injury as a tear to the ACL whereas the actual injury requiring surgery was the tear of the medial meniscus. Ordering the MRI was reasonable and justified.

Future Care

[48] Regarding future care, I make no award. Dr. Parhar's report of November 30, 2011 makes it clear that future care and expenses related to the accident are very unlikely.

[49] To conclude, I find the plaintiff is entitled to the following damages:

General damages for pain and suffering	$15,000.00
Wage loss	$4,000.00
Special damages	$7,774.13
Total	$26,774.13

[50] The plaintiff is entitled to court order interest on the awards for wage loss and special damages.

[51] The defendant has had substantial success in this matter, having regard to the matters that were in dispute, specifically the quantum of non-pecuniary damages, so unless there were offers to settle or other matters of which I am unaware, he will be entitled to his costs in the usual way. If it is necessary, the parties may speak to costs or address them by written submissions, as they prefer

"Jenkins J."