



Date: 19981116
Docket: 32092
Registry: Prince George

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

COLLEEN PAULA AUSTIN

PLAINTIFF

AND:

ROBIN AUSTIN

DEFENDANT

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE PARRETT

Counsel for the Plaintiff:

Dick Byl

564-3400

Counsel for the Defendant:

Ron Tindale

Place and Date of Trial:

Prince George, B.C.
July 22 - 23, 1998

[1] In this action the plaintiff who was a passenger in a vehicle driven by her husband seeks damages for the injuries she sustained in a motor vehicle accident on Highway 16 east of Prince George on January 1, 1996.

[2] Liability is not in issue. The issues relate to the quantum of damages and in particular the wage loss claim advanced by the plaintiff.

BACKGROUND

[3] The plaintiff is 38 years of age. She and the defendant married in 1985. Their one child was born in 1990.

[4] In December 1995 the plaintiff decided to move to Terrace where she set up a business selling satellite reception equipment. The major focus of their business is selling, installing and servicing satellite equipment and home theatre equipment.

[5] On January 1, 1996 the plaintiff was returning from a business trip to Jasper. She was a passenger in a vehicle operated by her husband travelling west towards Prince George. The conditions were not good, the road was icy, with blowing snow. Her husband lost control and the vehicle in which they were travelling left the road rolling down an embankment before coming to rest.

[6] The plaintiff was conveyed by friends they were travelling with to the Prince George Regional Hospital where she was examined, given medication and released. The plaintiff's home was still located in Surrey although she was in the process of moving to Terrace. She remained in Prince George staying with friends until the middle of January when she travelled to Terrace. Over the days immediately following the accident, she developed bruising along the line of her seatbelt, and difficulties involving her right shoulder, knee and hip. Back pain became a major difficulty for her. This was accompanied by severe headaches, sleep disturbance and depression.

[7] The plaintiff also testified that beginning the day following the accident she developed incontinence which has continued.

[8] The plaintiff is a capable and intelligent woman who held a variety of jobs before beginning employment with TCI Entertainment in Abbotsford in 1995. In late 1995 she began the transition to Terrace working initially in Prince George for TCI. Her initial income from this job was based on commissions earned. After finishing her training she began as a sales representative whose task it was to follow up telemarketing contacts. After starting in Terrace she began earning a minimum weekly salary of \$600 plus commissions. The plaintiff was to manage the Terrace operation and as part of

the move she set up a company, 9247 Holdings Inc. to, as she put it, "allow me to run through expenses." The details of this company's structure and indeed of the Terrace business itself are far from complete on the evidence.

[9] What is clear is that the plaintiffs' husband, the defendant, is an equal or near equal shareholder in the company.

[10] In February of 1996 the relationship of the Terrace operation to TCI changed and the plaintiff began receiving her cheques from Great Western Cable in Edmonton. This continued until October of 1996 when, as she put it, she saw a chance to change the nature of the business. She testified that the business became more of a retail store opening its doors on November 1, 1996.

[11] The details of these changes and the reasons behind them are remarkably vague and imprecise given the fact that in this action the plaintiff is advancing both a substantial wage loss claim and a claim for losses and expenses suffered by her holding company.

[12] To complicate matters further an economic downturn in the Terrace area including the closure of some local mills corresponded with the opening of the retail operation in November of 1996.

SUBMISSIONS

[13] It is central to the submissions of the plaintiff that prior to this motor vehicle accident she was a healthy individual with no ongoing difficulties. The nature of the accident subjected her, she submits, to a complex series of forces and motions.

[14] Those forces, according to Mr. Byl, have subjected the plaintiff to a "constellation" of injuries which have severely affected her life since the accident and impacted severely on her fledgling business and her income. Among the difficulties revealed in her evidence are that since the accident she has suffered from virtually unrelenting back pain, headaches which are only now becoming less frequent, incontinence and a variety of other difficulties.

[15] Mr. Byl submits that these difficulties warrant a substantial general damage award, a substantial award for past wage loss, a small future wage loss award to permit her to concentrate on rehabilitation and a significant award to compensate her holding company for the extra expense it incurred (by way of employees) as a result of her injuries.

[16] Mr. Tindale on behalf of the defendant submits that there are serious credibility issues emerging from the plaintiff's evidence in this case. The vague and imprecise nature of the evidence with respect to her business is but one aspect of the

difficulty. He submits that there are significant problems with her evidence concerning her injuries and that this evidence is substantially contradicted by the medical evidence.

[17] Mr. Tindale submits that there is no medical report which concludes she was disabled and that there is reason to question her description of her injuries. Most notably there is a hiatus in her medical treatment and complaints from approximately the middle of 1996 for a period of a year after which it appears that new complaints emerge.

[18] The defence submits that although the plaintiff was injured her injuries were much less serious than those she now presents and her claim for wage loss and a loss to her business are highly questionable.

MEDICAL EVIDENCE

[19] Upon presentation at the Prince George Regional Hospital Emergency department the plaintiff is recorded as having complained of right shoulder pain, abrasions to her right shoulder and breast, right sided neck tenderness and left sided lower lateral rib pain. No bruising nor deformity was noted.

[20] The chart notes that there is "Nothing to x-ray" and instructions to return if she has pain anywhere.

[21] On January 4, 1996 three days after the accident the plaintiff attended on a chiropractor, Dr. David Wheatcroft. On this occasion she completed a Confidential Patient Information form. On the form she records that she had previously suffered from the same or a similar condition following a previous accident in 1984. She also records that she had had surgery for her gall bladder in 1989 and for a tumour in 1995.

[22] Under the section asking her to record if she has ever suffered from various conditions she records positive responses with respect to, among others, loss of sleep, nervousness/depression, low back pain, neck pain or stiffness, frequent urination, and cramps or backache.

[23] Under the question asking her to record the purpose of the appointment she records the following:

Back, R. Leg, Shoulder, Neck, Arm, L. Hip.

[24] Ms. Austin goes on to note that these problems are aggravated by walking or resting and that these problems have been getting progressively worse.

[25] Following this appointment the plaintiff next saw a chiropractor, Dr. R. D. Greenwood, in Terrace on January 18, 1996 some two weeks later. According to Dr. Greenwood her main presenting complaint was that of what he described as "multiple injury sites" these he describe as including "lower back

discomfort, right knee pain (lateral), cervical pain and dysfunction, and a fuzzy sensation in the right arm."

(emphasis added)

[26] Dr. Greenwood in a report dated December 8, 1996 notes that:

Subjective findings include difficulty walking downstairs, numbness in the right arm, sharp pain/spasm of the lower back musculature, sleep disturbances, headaches of a sub-occipital-frontal nature and dizziness.

Objective findings showed cervical ROM diminished to the right in flexion and rotation 20°/40°, lumbar ROM to left, flexion 15°/rotation 20°. Mrs. Austin presented with a moderate antalgic gait right, and passive attitude. Positive orthopedic tests included Adsons, right shoulder depressor, left foramina compression, left Kemps and tripods right. Muscle testing showed weak deltoids, subscapularis and anterior pectoralis bilateral. Station and rhomberg were negative. Deep tendon reflexes presented +3 right and +3 left for biceps, triceps and patellar.

Radiographic investigation was not performed.

Treatment consisted of specific adjustment of subluxation complexes of the cervical and lumbar spine, soft tissue mobilization, hot/cold pack utilization, cervical support ie. soft collar and specific exercises.

Mrs. Austin was treated for an atlanto-occipital, atlanto-axial subluxation complex, a midthoracic fixation complex and disarticulation of the right ilium with related muscle strain of cervical paravertebral and lumbar erector groups bilateral.

This case has followed the usual pattern for this type of injury. When there are no fractures or dislocations, but evidence of ligamentous and musculature strain and sprain to the spine or other joints of the body, pain and discomfort are usually encountered and experienced for a period of six to twelve months following the injury.

[27] Ms. Austin's visits to Dr. Greenwood continued through 1996 with a total of 6 visits in January (18, 19, 22, 23, 25, 29); 2 in February (2, 9); one each in March, April and May (on the 7th, 4th, and 2nd respectively); 2 in June (6, 28) before concluding with visits on August 26 and October 21.

[28] In a subsequent report dated November 29, 1997 Dr. Greenwood updates his report from a visit on September 22, 1997 noting that:

Subjective findings now include intermittent lumbar discomfort, continued sacroiliac difficulties, pain in the right shoulder, headaches of an infrequent nature, and recently, bilateral foot pain.

Objective findings showed an improved gait and attitude, however, bilateral eversion of the feet was noted. Muscle tonus in the lumbar erector groups was not as spastic and cervical paravertebral musculature demonstrated near normal.

Orthopedic findings showed an improved cervical ROM to 45° flexion, rotation 60° bilateral. Lumbar ROM to the left had increased to 30° flexion and 45° rotation. Orthopedic checks still testing positive include right shoulder depressor, left Kemps and right tripods. Muscle strength continued to be weak and included the right deltoid, right subscapularis and right anterior pectoralis. It should be noted at this time that Mrs. Austin was treated for a right rotator cuff strain during this time period by Kermodé Physiotherapy.

(emphasis added)

[29] On February 6, 1996 Ms. Austin attended on Dr. Greg Linton a general practitioner from Terrace. This is the first occasion on which she sought medical assistance (as opposed to

attending on a chiropractor) after the accident. In a report dated August 2, 1996 Dr. Linton writes that:

This woman came to see me for the first time on February 6, 1996 regarding a motor vehicle accident sustained on January 1, 1996. She complained of headaches, back pain and difficulties with bladder control. Apparently she was involved in a roll-over accident in her Explorer. There was a possible momentary loss of consciousness but nothing definite in that respect. She complained specifically of interscapular and lower back pain and was seeing a chiropractor. She noted as well, that she had right knee instability particularly when walking down stairs but there is no evidence of locking. She had no previous knee injury.

At the time after examination, it was determined she had soft tissue injuries likely secondary to a motor vehicle accident and was prescribed nonsteroidal anti-inflammatory drugs. She was to have x-rays done which included lumbosacral spinal views. The results suggested early osteoarthritic changes but no evidence of any trauma induced problems in the lower back.

Her prognosis was one of improvement in her soft tissue pains with no long term disability expected.

She was seen on further occasions in May and at that time described no ongoing problems with right knee pain or interscapular pain. It was therefore determined that no further problems associated with this particular MVA were continuing.

(emphasis added)

[30] On May 8, 1997, a year later, Ms. Austin began a course of physiotherapy with respect to her right shoulder and ankle.

[31] In a report dated June 4, 1997 Dr. Linton records his further findings and the start of physiotherapy:

Colleen's situation has remained essentially unchanged from a previous letter that was provided to your firm. She does also report right shoulder pain

which has not been improving, as she had not sought any help for this because she had been focusing on other unrelated medical problems at the time.

On examination, she has no palpable tenderness to the right shoulder. She has a negative anterior and posterior drawer test with full range of motion of the shoulder. She has some tenderness with full abduction and external rotation. She had been diagnosed with a right rotator cuff strain which is mild and is otherwise doing well. She will be receiving physiotherapy for this, and if physiotherapy does not improve her situation, she will require some further investigations.

(emphasis added)

[32] On September 19, 1998 Ms. Austin consulted Dr. Michael Feist of Terrace, concerning a problem with her right ankle. In a lengthy report dated May 18, 1998 Dr. Feist describes the history given to him:

The patient does not recall exactly the number of times the vehicle rolled but does know that once it came to rest she was resting upside down on her seat belt. During the process of the injury the patient was tossed around the inside of the vehicle even though she was restrained by a seat belt. She recalls hitting her head and striking the passenger door. She does not recall any specific injuries to the lower extremity but states that so much was happening at once that it was impossible to recall exactly all of the possible injuries.

Following the accident the patient and her family were taken to the Prince George hospital where the primary concern was the patient's son. Colleen states that she was quickly looked over by the staff and presumed "fine". No X rays were taken and the patient states that no even her blood pressure was taken in the Emergency Room in Prince George. Approximately two days following the injury the patient's soft tissue injuries became apparent with bruises to the abdomen, the right breast, the right shoulder, and upper back pain. The patient does not recall any specific bruises to her leg. Since the motor vehicle injury the patient explains that she has had back pain, a right shoulder rotator cuff tear

[33] The final medical report is a further update by Dr. Linton dated May 6, 1998. This report raises substantial concerns about the accuracy and reliability of the plaintiff's evidence. Dr. Linton writes, in part:

By her report, as of January 1998, she was experiencing worsening lower lumbar back pain radiating to the upper back since the Fall of 1997. As well, she had ongoing right ankle problems which continued since her motor vehicle accident despite having seen the Podiatrist, Dr. Feist, and undergoing traction treatment which seemed to help to some extent. She noted that prior to Fall of 1997, she was going to physiotherapy twice weekly for traction and acupuncture treatments for headaches. She, at the time, had been experiencing difficulty sleeping secondary to her headaches and back pain; however, she had instituted a stretching and relaxation program just prior to being seen in the office, and it was her resolve to lose weight because she was "heaviest I have ever been".

Despite these sentiments, she was again seen in April and she was having difficulty with instituting a weight loss program and exercising on a regular basis. Furthermore, she related that for many months, she had been experiencing depressed mood with tearfulness which she has been unable to discuss with me until this time.

On examination, she has an obvious depressed mood with tearfulness. Examination of her back reveals left rhomboidal tenderness as well as tenderness on palpation of facet regions of L4-5 bilaterally. Spinous processes T5-6 as well as L1 are tender to palpation as well as right facet joints T9, L1 and L3. Her range of motion revealed forward flexion of her lumbar spine allowing fingertips to 37 cm from the floor; lateral flexion to the right revealed fingertips at 50 cm from the floor and to the left 61 cm to the floor. Examination of the right ankle revealed a positive anterior drawer test with tenderness over the crural joint anteriorly. Left ankle showed stable ligaments. She had obvious tenderness of both the right and left sacroiliac joints. She is obviously morbidly obese.

It is my feeling that this woman is suffering from major depression, facet joint tenderness of the lumbar spine, rhomboid strain, thoracic and spinous process pain, and right ankle ligament instability. It is not possible for me to comment on the origin of these musculoskeletal concerns as I did not examine this patient prior to her motor vehicle collision. Her ongoing rhomboid tenderness, thoracic spinous process tenderness, lumbar facet joint tenderness, as well as right ankle pain is likely associated with her motor vehicle mishap as well as her morbid obesity. While her intent to rehabilitate her injuries post motor vehicle collision has been genuine, her ability to carry out rehabilitation has been extremely difficult not only because of her morbid obesity but also because of her underlying depressed state and financial constraints. It is hoped that with the introduction of massage as well as an antidepressant medication in the form of Prozac that this woman will be able to significantly address her rehabilitation in a positive way.

[34] Three immediate concerns arise from this report (1) in Dr. Linton's earlier reports he reported that by May of 1996 he had concluded that there were no continuing problems associated with the motor vehicle accident and in his June 1997 report, despite the passage of a year, there is no mention whatsoever of continuing back pain; (2) Ms. Austin apparently told Dr. Linton that she had ongoing right ankle problems ". . . which continued since her motor vehicle accident. . ." a complaint which never appears in his previous reports and one she told Dr. Feist began "approximately one year following the accident. . .", and (3) if, as she apparently told Dr. Linton, she was attending physiotherapy twice weekly taking traction and acupuncture treatments for headaches, no such records were produced at this trial nor does any doctor describe such a referral or treatment program.

DISCUSSION

[35] Ms. Austin's evidence at trial described almost immediate, continuing and severely disabling headaches. This is contrary to the description given to Dr. Linton, to whom, she described the headaches as being much less frequent, less severe and more controllable in 1997.

[36] She testified that for the first two weeks she suffered from severe back pain that continued 24 hours per day which has neither resolved nor improved. When asked to describe this pain on a scale of 0 to 10 with 10 being the most severe, she, without hesitation, described it as a 10.

[37] It is inconceivable that someone suffering from this type of constant unrelenting pain would fail to mention it in her visits to Dr. Linton or to respond to the reports he provided to her lawyer.

[38] What is apparent in the present case is that there are other events going on in Ms. Austin's life over the material time which are only touched upon in the evidence.

[39] Dr. Linton in his June 4, 1997 report refers to her focussing on "other unrelated medical problems", and in her evidence she described having a traumatic miscarriage in June or July of 1996.

[40] In her evidence at trial she also testified that she only attended physiotherapy with respect to her shoulder and ankle a statement directly contradicting the statement attributed to her in Dr. Linton's last report.

[41] There may well be a variety of reasons for the difficulty with the plaintiff's evidence, but, I am satisfied having reviewed that evidence carefully within the context both of the details of the medical evidence presented and the overall pattern of her attendance on medical professionals that her testimony is inaccurate and unreliable.

[42] I find that the plaintiff has, in her evidence, exaggerated her symptoms and withheld information which would have adversely affected her claim. I am unable on the evidence to reach a conclusion as to whether this is deliberate or attributable to other, unrevealed factors. I have little doubt that these were difficult times for the plaintiff, her injuries in the motor vehicle accident were difficult, particularly coming as it did at a time when she was in the process of relocating and starting a new business. When you add to this picture a miscarriage within 6 months or so of the accident and an economic downturn that corresponded with the opening of her retail business you have the potential for very difficult times, and complex factors at work on this plaintiff.

[43] I am satisfied on the whole of the evidence that the plaintiff was injured in this accident suffering primarily soft tissue injuries of the moderate variety. I am satisfied that in the aftermath of the accident she suffered from headaches, lower back pain and difficulty with bladder control. I am equally satisfied that she suffered some form of injury to her right knee which affected her mobility and, in particular, her ability to manage stairs.

[44] I find that these difficulties had settled primarily by the end of May 1996, some five months after the accident. Some lingering difficulties persisted beyond that time frame, but, I am not satisfied that her ankle difficulties which surfaced nearly a year later, her depression or that continued back pain or headaches, if they in fact occurred after the end of 1996, have been shown to have been caused by this motor vehicle accident.

[45] I assess the plaintiff's general damages at \$15,000.

[46] Turning to the plaintiff's wage loss claim it is necessary once again to point out that the plaintiff's evidence is vague in the extreme as to how her injuries affected her ability to perform her job.

[47] The plaintiff's evidence was to the effect that something like 50% of her time was spent training sales representatives

during her association with TCI. The rest of her time was apparently spent with paperwork, including approving and processing conditional sales contracts and other financial paperwork, and both taking and making telephone calls together with general office work.

[48] The plaintiff's claim under this category is not based on her being wholly unable to work, indeed there is no medical report which suggests that was the case but rather on the basis that she paid other employees to be available to assist her.

[49] Despite this it was the plaintiff's evidence that she was there and working most of every day.

[50] The evidence in this case is insufficient to support a claim that the plaintiff is entitled to reimbursement for all or some percentage of the wages paid to Lisa Woodcock, Vivian Reid and Ann Chiswell. Those wages from January 2, 1996 until the date of trial totalled some \$45,000. On the evidence before the court I am unable to conclude that, but for her injuries these expenses would not have been incurred. As a result of the factual conclusions I have reached it is unnecessary to deal with the intriguing argument developed by Mr. Byl to distinguish the reasoning in *D'Amato v. Badger* (1993) 95 B.C.L.R. 46.

[51] In my view, the plaintiff is entitled to recover a sum for past wage loss. It is clear on the evidence, that contrary to her original plans she did not continue on to Terrace but remained in Prince George for a period of two weeks. The evidence shows her attendance at some 45 appointments with doctors, chiropractors and therapists. I equate the time off work, doing the best I can with the evidence at 11 weeks. Applying the weekly minimum of \$600 per week I would award the plaintiff \$6,600 under this head of damage.

[52] I would decline to make any award with respect to future wage loss.

[53] Special damages were agreed upon between the parties at \$500.

SUMMARY

General Damages	\$15,000
Loss of Past Wages	6,600
Special Damages	<u>\$ 500</u>
TOTAL	\$22,100

[54] In the event counsel are unable to agree on costs they may speak to them.

J.P.S.