Citation: Mullican v. Steuart
2003 BCSC 0289

Date: 20030225
Docket: 13717
Registry: Prince George

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

AMBER DAWN MULLICAN

PLAINTIFF

AND:

ROBERT A. STEUART

DEFENDANT

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE CHAMBERLIST

Counsel for the plaintiff: D. Byl

Counsel for the defendant: I. Henderson

Date and Place of Trial: December 5,6, 13, 2002
Prince George, BC

INTRODUCTION

[1] On March 14, 2001, the infant plaintiff, Amber Dawn Mullican, was a rear seat passenger in her mother's 1993 Ford Aerostar Van when it was struck from behind by the defendant's vehicle and moved forward into a vehicle immediately in front of it.

[2] Liability for the accident is admitted. Damages sustained to the 1993 van were some $4,500, including GST.

[3] Ms. Mullican was born April 3, 1983, and was, at the time of the accident, 17 years of age. She had her seatbelt attached and describes being flung forward at the time of impact, hitting her head on the back of the front seat. She experienced no loss of consciousness and felt no major pain at the time of the accident.

[4] After the accident occurred her mother, who had been driving her to school, continued on with taking her to school and thereafter to the hospital. On attendance at the hospital she complained of pain to her left hip and neck pain. A diagnosis of soft tissue injury was made.

[5] Two days later she attended at the offices of her mother's chiropractor, Dr. David Wheatcroft. While she had not previously seen Dr. Wheatcroft she decided to use his

services rather than Dr. Rigler, another chiropractor she had previously consulted, because of the methodology of treatment utilized by Dr. Wheatcroft.

[6] The infant plaintiff was treated by him between March 16th and May 16th, 2001, on a regular basis. His clinical notes make reference to TMJ (temporomandibular jaw) on numerous occasions, commencing with the March 23rd visit and concluding on the May 16th, 2001 visit.

[7] Ms. Mullican described experiencing headaches, starting the day following the accident, along with pain to her neck, shoulders and back. She described her pain level as being 6 on a scale of 1 to 10.

[8] Two days after the accident, Ms. Mullican experienced clicking in her jaw. Associated with the clicking of her jaw were soreness of the jaw, earaches and headaches. Five days after the accident she attended for the first time at her family physician. At that time, she complained of pain in her upper and lower back, neck and headaches. Dr. Murray, in his medical/legal report of August 28, 2002, states that at that time examination of her revealed normal range of movement of her neck, shoulders and back, although her straight-leg raising was only 40° which was less than expected.

[9] She was referred by Dr. Murray to Phoenix Physiotherapy and was thereafter seen by Dr. Murray on March 26, 2001. At that time Ms. Mullican again complained of stiffness and soreness. Dr. Murray observed that her range of movement of her neck was reduced in rotation and flexion and was less than expected for her age. She was prescribed Ibuprofen at that time and advised to continue with physiotherapy.

[10] She was again seen on April 9, 2001, at which time she reported to Dr. Murray that she felt well except for reduced range of movement of her shoulders and slight pain over her lateral chest wall. Dr. Murray commented in his clinical note of that date:

> Slight click in her TMJ on R. side
> Is getting a dental guard of some sort from the Chiro.

[11] Although the medical/legal opinion of Dr. Murray is dated August 28, 2002, he comments, on page 3 of his report, that the plaintiff was reviewed for the purpose of the report on September 18, 2002. Dr. Murray comments that Ms. Mullican's complaints were unchanged from before, specifically with respect to pain in her neck and back.

[12] In his summary, on the last page of the report, Dr. Murray states:

> In summary, Amber Mullican has been involved in a motor vehicle accident on March 14th, 2001. She suffered some soft tissue injuries at that time. She has improved from the time of the accident up to my last review of September 18th, 2002. She has some complaints of pain in her neck and back still. However there is no abnormality on examination of her back and therefore I do not believe that this back problem in [sic] anything more than a minor injury which has resolved. Her neck complaints coupled with some tenderness persist and she has a slight reduction in her movement of her neck. This should continue to improved [sic] with time and I would expect it to clear up completely. Physiotherapy would most likely have benefited her, but she was not in a position to pay for this modality.

[13] Under cross-examination Ms. Mullican was questioned with respect to the lack of comment by her regarding her jaw to Dr. Murray. She responded that Dr. Murray only wanted to deal with one problem at a time.

[14] While this criticism of Dr. Murray by the plaintiff may be groundless, I would comment that his medical/legal report dated August 28, 2002, which somehow refers to the September 18th attendance, is not consistent with his clinical records. His clinical records, under the date 2002.09.18, references these complaints which were not included in his medical/legal report:

> . . . She also complains of TMJ pain, aggravated by eating chewy foods like steak and apples. The dentist has given her a nightguard which she says she wears all the time.

> There is a click on movment [sic] of the TMJ,
> greater on the right.
> TMJ syndome [sic].

[15] How much credence should be put into the observations of Dr. Murray or the reporting of those observations is not something I necessarily have to deal with.

[16] Dr. Wheatcroft testified to his observations of TMJ and confirmed the observations he had noted in his clinical records. He also confirmed providing the plaintiff with a mouth guard.

ISSUES

[17] In the assessment of the plaintiff's injuries sustained in the accident, the defendant submits that while the plaintiff suffered a whiplash type injury, it was only minor and has effectively resolved itself as of date of trial. The defendant takes issue with the plaintiff's claim that she suffered a temporomandibular jaw injury as a result of the accident and submits that the plaintiff has not established, on a balance of probabilities, that any TMJ problem is in fact associated with the motor vehicle accident in question.

[18] The defendant submits that it is associated with, if anything, the removal of three of the plaintiff's wisdom teeth in May 2001 rather than the motor vehicle accident. With

respect to the TMJ issue, I will first deal with the interesting question that arose at the trial of this matter.

[19] By consent, a common book of documents was marked Exhibit "1" in these proceedings. By agreement the Exhibit was entered as proof of the contents of the documents contained therein, except for Tabs 13, 14, 15 and 16. Tabs 13 and 14 contain the medical report and letter from Dr. Robert W. Elliott, a certified specialist in orthodontics. Tab 14 was a follow-up letter dated November 28, 2002, setting out a cost for splint treatment for the finding of temporomandibular joint dysfunction which he had diagnosed following his assessment of the plaintiff on November 5, 2002.

[20] Dr. Elliott's expert report had been delivered to defence counsel within the 60 days notice provision of R. 40A. Defence counsel objected to the late delivery of the expert report and objected to the report being tendered at the trial of this matter. As a result, an application to adjourn the trial was made by the plaintiff on the 27th of November 2002. On that date, Parrett J. allowed an amendment to the plaintiff's statement of claim to particularize temporomandibular joint dysfunction as an injury sustained by the plaintiff in the accident, and an amendment with respect

to wage loss claims. The order also provided that Dr. Elliott would be tendered at trial for cross-examination.

[21] Prior to trial, there was also a telephone conference with Dr. Elliott, at which questions were asked of Dr. Elliott by counsel for the defence.

[22] At trial, Mr. Byl, on behalf of the plaintiff, sought to extract a further opinion from Dr. Elliott, which opinion was not included in the medical/legal report. The medical/legal report did not contain an opinion as to whether or not the temporomandibular joint dysfunction identified by Dr. Elliott was or was not causally connected to the motor vehicle accident in question.

[23] I allowed the following question to be put to Dr. Elliott on the basis that I would rule on the admissibility of any answer in these reasons. The question put to him was:

> Assuming no other trauma to this plaintiff's head, neck or jaw other than the trauma of the motor vehicle accident, can you say that the motor vehicle accident on a balance of probabilities caused or materially contributed to Amber Mullican's TMJ as you found it?

Dr. Elliott answered:

> Yes - it materially contributed to the TMJ.

Shortly thereafter I heard submissions with respect to whether or not this evidence should be allowed in the trial proper.

[24] The plaintiff submits that in the *voir dire* held to determine the admissibility of Dr. Elliott's opinion regarding causation, the defence did not challenge Dr. Elliott's opinion. No other possibility was put to Dr. Elliott by defence counsel..

[25] The plaintiff submits that the determination of the admissibility of Dr. Elliott's testimony on causation must be considered within the context of the adjournment application that had been brought on by the plaintiff on November 27th. The plaintiff says that on or about August 22nd, 2002, plaintiff's counsel requested an adjournment in order to set up the medical examination with Dr. Elliott with respect to a possible temporomandibular joint dysfunction problem.

[26] The defence refused this request.

[27] Thereafter, on or about the 16th of October 2002, a consent order was sent to defence counsel with respect to the amendments later granted by Parrett J. on November 27th. Counsel for the defence refused to sign this order.

[28] After Dr. Elliott's report of November 14, 2002, was forwarded to the defence, plaintiff's counsel, on the

following day, asked for the defence position with respect to the admissibility of the Elliott report. Against this background, the plaintiff says that the defendant cannot claim surprise or prejudice when it was the defence who opposed the application for an adjournment, and more significantly, that the defence cannot claim prejudice or surprise when, in the *voir dire*, it failed to put its theory of causation to Dr. Elliott.

[29] The plaintiff further submits that in my consideration of the admissibility of the further opinion of Dr. Elliott, the considerations that led to the enactments of s. 11 of the ***Evidence Act*** and R. 40A of the Rules of Court should be considered. The plaintiff argues that the provisions were enacted firstly to prevent surprises and secondly to eliminate delays of trials. The plaintiff submits that I ought to exercise my discretion to allow the further opinion related to causation as part of the trial proper because there simply was no surprise.

[30] The plaintiff relies on ***Haida Inn Partnership v. Touche Ross & Company*** (1989), 34 B.C.L.R. (2d) 80, [1989] B.C.J. No. 43, a decision of Madam Justice Huddart, as she then was. In that case counsel for the plaintiffs, in cross-examining a defence witness, sought to elicit an opinion from him, which

opinion amounted to an expert opinion. In that case, the court admitted into evidence the opinions of the witness solicited by plaintiffs' counsel in cross-examination, likening the situation to the case where rebuttal reports are provided to opposing counsel within a period less than 60 days.

[31] Madam Justice Huddart, alternatively, held that if she was wrong in permitting the expert evidence to be given then she would exercise the discretion given to her by s. 11 of the ***Evidence Act*** in the particular circumstances of that case. I note however that the evidence admitted by Huddart J. in that decision was more similar to rebuttal evidence for which, of course, there is no timing requirement for disclosure.

[32] The decisions cited to me by the plaintiff are essentially decisions respecting rebuttal expert evidence and I do not find them helpful.

[33] The defendant submits that there was never any indication given to the defence that the plaintiff would be calling Dr. Elliott to give any further evidence. He says that he requested the telephone conference with Dr. Elliott because he wanted to cross-examine him and speak to him before the trial. He says the purpose of the telephone conversation was to clarify the meaning of the report and how he and his office

came about to prepare the report. He admits that there was some discussion regarding causation at that telephone conference but it was not a causation focused discussion.

[34] The defence submits that there was no notice of any other information that was intended to be elicited from Dr. Elliott and that he proceeded to trial on that basis. The defence submits that it prepared its case and cross-examination based on the case the defence had to meet. He says that had he known the plaintiff was going to raise causation issues he would have prepared his case more thoroughly on the issue of TMJ and on the various ways it can occur. He submits that he would have spoken to some other expert in the field to find out exactly what questions should have been asked of Dr. Elliott. Therefore, the defence says it only had partial disclosure of the evidence of Dr. Elliott and the question and answer with respect to causation ought not to be permitted.

[35] Weighing the submissions of counsel, I have concluded that the question and answer ought to be admitted into the evidence heard at this trial. The form of statement did not meet the requirements of R. 40A(5) in that it did not set out the facts and assumptions on which Dr. Elliott's opinion was based. It was totally lacking in an opinion as to the causation of the TMJ dysfunction identified by Dr. Elliott.

[36] Against this failing must be weighed the other provisions of R. 40A. Rule 40A(13) provides:

> A party who receives a written statement under subrule (2) or (3) shall notify the party delivering the statement of any objection to the admissibility of the evidence that the party receiving the statement intends to raise at trial.

Subsection (14) further provides:

> No objection under subrule (13) of which reasonable notice could have been given, but was not, shall be permitted at trial unless the court otherwise orders.

[37] The background I have already referred to makes it clear that in August the issue of the TMJ claim was raised by plaintiff's counsel. Defence would not agree to an adjournment. The report of Dr. Elliott was delivered as soon as it came into plaintiff's hands. The deficiency in the report ought to have been noted by both counsel.

[38] After Parrett J.'s order of November 27, 2002, it would have been obvious to the defence that the TMJ claim was a substantial claim. It should have been obvious even in August or September that the TMJ claim was substantial, given the plaintiff's indication at that time that the plaintiff would be going to see a specialist in orthodontics.

[39] The question posed to Dr. Elliott was very general and excluded, by the nature of the question, other causal possibilities. Dr. Elliott gave his opinion as to causation at a time when the plaintiff had finished her evidence in direct but before she was cross-examined. The issue of other possible causes could have been canvassed with the plaintiff at that time but was not. I do not accept that the defence would have been conducted differently if it had known that this further opinion evidence was to be offered by Dr. Elliott at trial.

[40] On the particular facts of this case there was intense focus on Dr. Elliott's report from the time it was received to the time it was delivered to defence counsel and thereafter when the matter came before Parrett J. on November 27, 2002. There was also the opportunity to discuss the report when both counsel and Dr. Elliott were on a three-way telephone conference. No objection was taken by defence counsel to the internal problem of Dr. Elliott's report.

[41] In my view, fairness dictated that notice of the defect ought to have been given if the defect was known to defence counsel at that time. The defence, if it knew of the defect, could have given reasonable notice at any time prior to the

commencement of trial and the matter could have been dealt with at that time.

[42] If I am wrong in exercising my discretion under R. 40A in admitting the further opinion evidence of Dr. Elliott, relative to causation, then I would also find that there is sufficient evidence of causation without the further *viva voce* evidence of Dr. Elliott given at trial.

[43] The notations of chiropractor Dr. Wheatcroft regarding TMJ are numerous throughout his clinical records. The first entry of TMJ is March 23, 2001, and they precede the removal of the plaintiff's three wisdom teeth in May 2001. Similarly, Dr. Murray, in his clinical note of April 9, 2001, notes:

> . . .
> Slight click in her TMJ on R side.
> Is getting a dental guard of some sort from the chiro.

[44] Lastly, the evidence of the plaintiff with respect to the "clicking" and "popping" sounds in her TMJ joints was believable and credible. Her testimony as to when the discomfort in the jaw started is consistent with the evidence of Dr. Wheatcroft, Dr. Murray and her mother. The plaintiff was not cross-examined extensively with respect to the TMJ evidence and her mother was not questioned at all. No pre-existent cause or intervening cause other than the removal of

the wisdom teeth and the motor vehicle accident was suggested as being the cause of the TMJ dysfunction.

[45] There can be no doubt as to the existence of TMJ dysfunction. Both Dr. Wheatcroft and Dr. Elliott made this diagnosis. While Dr. Wheatcroft is a chiropractor, it became clear from his cross-examination that he has had a great deal of experience in the area of identifying TMJ dysfunction. He indicated that while he identifies the dysfunction it is his practise to refer patients for a further opinion.

[46] I have concluded that Dr. Wheatcroft's diagnosis of TMJ, coupled with his experience in this area, signifies without a doubt that the TMJ dysfunction was symptomatic within a few days of the motor vehicle accident and continuing observations were made by him of this dysfunction up to an including May 16th, 2001. That evidence, together with the evidence of the plaintiff and her mother, as well as Dr. Murray's clinical records, is sufficient proof to establish on a balance of probabilities a causal connection between the TMJ dysfunction and the motor vehicle accident of March 14, 2001.

[47] The plaintiff last saw Dr. Wheatcroft on May 16, 2001, and she last attended physiotherapy on May 29, 2001.

[48] At the trial I heard evidence from the plaintiff's mother as to her economic situation. I am satisfied on the evidence of the plaintiff's mother, and the plaintiff's own evidence, that both of them were, at the material times, facing significant economic difficulties in the months following the accident and were unable to afford the costs of treatment for physiotherapy. The plaintiff's mother testified that she was a single mother of five children, all of whom were living at home during the timeframe in question. The plaintiff's mother was on a fixed income and was a student at the time. I am of the opinion that the plaintiff and her mother have provided a reasonable explanation for discontinuance of chiropractic treatment and physiotherapy. I am of the opinion that it was only the lack of financial resources that prevented further treatment and not, as the defence submits, that the plaintiff was substantially recovered by the end of May 2001.

[49] The plaintiff resorted to self-help techniques because her pain and discomfort in her neck and jaw continued after chiropractic and physiotherapy treatments were discontinued. Also, the plaintiff and her mother testified that on a daily basis ice and heat by way of "magic bags" were applied to the plaintiff's neck.

[50] The plaintiff described the utilization of the "magic bag" as a nightly ritual from the discontinuance of treatments to the present day, and was not cross-examined on this point. At trial the plaintiff testified that the clicking and popping sound in her TM joint, which she demonstrated at trial, continued from shortly after the accident to the date of trial. She also testified that, if anything, the pain and discomfort occasioned by moving her jaws was not improving and, in fact, getting worse over the past 16 months.

[51] In his medical/legal report of November 14, 2002, Dr. Elliott gave this as his tentative diagnosis:

> The patient's symptoms are consistent with TMD, temporomandibular joint dysfunction, as this is a generalized term the diagnosis more specifically can be described as:
> 1. Right and left temporomandibular joint disc displacement with reduction.
> 2. Overlying myofacial pain.

[52] Under the heading treatment, Dr. Elliott recommends occlusal splint therapy and massage therapy. The occlusal splint therapy recommended falls into two distinct portions. In the first portion called the ARS splint therapy, lasting some 6 months, a splint would have the plaintiff's jaw positioned in a more anterior relationship with the goal being to relieve some of her immediate symptoms, and thereafter, for

a period of time of 6 months to indefinite, an MRS splint could be inserted.

[53] Under prognosis, Dr. Elliott comments that prognosis for relief is good, although the plaintiff may have to rely on night time splint wear for an indefinite period of time. In his follow-up letter of November 28, 2002, he gives the costs for splint treatment at $2,832.00. If treatment is required longer than two to three years then a replacement splint would cost some $625.00, in present dollars.

NON-PECUNIARY DAMAGES

[54] Ms. Mullican was 17 years old at the time of the accident and is now 19 years of age. At the time of time, some twenty-one months had elapsed. I find that the soft tissue injuries in her neck and back had significantly cleared up within six months of the accident. Her headaches and TMJ dysfunction have, however, continued to impact her up to the present time. Obviously, her pain is not debilitating but it causes intermittent discomfort and I accept her evidence that it has gotten worse over the past sixteen months. I am, of course, mindful that the plaintiff was examined for discovery on January 23, 2002, some nine months post-accident, and some eleven months prior to this trial. At that time she stated that she only wore the mouth guard provided by Dr. Wheatcroft

when her jaw gets "really bad". When asked how often that would be, she responded "maybe once a month".

[55] While "really bad" was not further examined on, it would appear from that comment that some nine months after the accident the plaintiff was only experiencing severe pain once monthly.

[56] Her enjoyment of life has been adversely affected by the motor vehicle accident, and based on a minimum of one year orthodontic treatment she will continue to experience discomfort associated with the treatment for some time to come.

[57] I do not find that the motor vehicle accident has limited the plaintiff's activities to the extent indicated by her. While she indicated that she had to give up rugby as a result of the motor vehicle accident, it is clear from her discovery evidence that she had given that up because of an injury sustained by a friend. She has, however, been unable to take part in certain unorganized sports and must be compensated for that.

[58] Her headaches, I find, are also directly related to the accident and the injuries sustained by her at that time.

[59] I have concluded that an appropriate award of $25,000.00 (twenty-five thousand dollars) for non-pecuniary damages is appropriate in all the circumstances.

FUTURE CARE COSTS

[60] The plaintiff claims the amounts of $2,832.00 plus the replacement cost of $625.00 for the splint, for a total of $3,457.00. I find that the replacement cost for the splint, after two to three years, is too speculative based on the evidence before me and ought not to be included as part of a special damages award. Dr. Elliott's prognosis and treatment is predicated on a twelve month fixed term with perhaps an indefinite period thereafter. The life span of a single splint is some two to three years and, in my view, meets the contingency of an extended period of time being required for treatment.

SPECIAL DAMAGES

[61] The plaintiff incurred expenses relating to physiotherapy treatments and chiropractic treatments (Phoenix Physiotherapy Clinic and Dr. Wheatcroft) in the amount of $320.00, which special damages are allowed as claimed.

SUMMARY

[62] In the end result, the defendant shall pay to the plaintiff the following amounts:

Non-Pecuniary Damages	$ 25,000.00
Future Care Costs	$ 2,832.00
Special Damages	$ 320.00
TOTAL	**$ 28,152.00**

[63] The plaintiff is entitled to applicable pre-judgment interest and costs on Scale 3.

Mr. Justice Chamberlist