IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: Toopitsin v. McMullen,
2014 BCSC 1486

Date: 20140807
Docket: 1241469
Registry: Prince George

Between:

Lianna Toopitsin
by Litigation Guardian Luda Toopitsin

Plaintiff

And

Chelsea McMullen

Defendant

Before: The Honourable Mr. Justice Rogers

Reasons for Judgment

Counsel for the Plaintiff:	D. Byl M. Jeffic, Articling Student
Counsel for the Defendant:	D.A. McLauchlan
Place and Dates of Trial/Hearing:	Prince George, B.C. July 7-11, 2014
Place and Date of Judgment:	Prince George, B.C. August 7, 2014

Introduction

[1] The plaintiff in this case is a young woman in her mid-teens. She suffered soft-tissue injuries in a car accident some six years ago. She maintains that her function is still limited by pain from those injuries and claims damages for pain and suffering and reduction of earning capacity.

[2] The main issue in the case concerns the future for the plaintiff's accident-related injuries. The plaintiff maintains that her injuries will trouble her on a permanent basis. The defence argues that her prognosis is not so gloomy and that, with appropriate exercise and a sensible regimen of physical activity, the plaintiff's complaint may abate and may, in fact, completely resolve. On this issue turns the quantum of the plaintiff's claims for non-pecuniary loss and reduction of earning capacity.

The Facts

[3] On March 1, 2008, the plaintiff Lianna Toopitsin was 9 years old and a passenger in the front seat of her mother's minivan. Ms. Toopitsin was wearing her seatbelt. Ms. McMullen failed to yield the right of way to the Toopitsin vehicle at an urban intersection. The cars collided: the Toopitsin right front bumper hit the McMullen driver's door. The impact was substantial but not catastrophic.

[4] Ms. Toopitsin did not feel pain at the scene. Later on the day of the accident her mother took her to a walk-in clinic. Dr. O'Malley assessed her. There, she complained of pain in her neck.

[5] At the walk-in clinic Ms. Toopitsin also complained of pain in her lower back. She did not mention her lower back to a medical professional again until November 2010, some 30 months later. According to the plaintiff's rheumatologist, Dr. Schuckett, the lengthy gap between those complaints indicates that it is more likely than not that as of November 2010, whatever the problem may be with Ms. Toopitsin's low back, that problem is not related to the accident. I accept Dr. Schuckett's opinion on that point. To his credit, plaintiff's counsel, Mr. Byl,

conceded the issue on his client's behalf. I find that the accident caused Ms. Toopitsin to experience a very brief period of low back pain and that any problems she had with her low back after November 2010 are not causally related to the collision.

[6] Ms. Toopitsin's major areas of consistent complaint since the accident have been in her neck, shoulders, and in her upper back in the area between her shoulder blades. The accident happened on a Saturday morning. By Sunday evening those areas were quite sore. She nevertheless carried on with her education - she was home schooled by her mother through to the completion of grade 9. She missed no school and her school marks did not suffer as a result of accident-caused pain in her neck, shoulders, and upper back.

[7] Ms. Toopitsin, despite her young age, had been put to work by her mother in her mother's janitorial business. On the Friday evening following the accident, Ms. Toopitsin worked her regular shift helping her mother clean the offices of an engineering firm. She was responsible for emptying the recycling bins, washing windows, and wiping down the office conference table. Ms. Toopitsin was able to do all of these tasks, albeit with pain, and she missed no shifts of work in her mother's business. Ms. Toopitsin worked for her mother from the accident through until April 2013. In that time her janitorial responsibilities increased so that in her last year of working for her mother she did all that she did as a child, plus cleaning the kitchen area and mopping the office floors. Again, she completed all of these tasks albeit with pain and she missed no work due to accident-related problems.

[8] Shortly after the accident, Ms. Toopitsin's family physician, Dr. O'Brien, recommended that she attend physiotherapy. She did. By October 2008, Ms. Toopitsin reported to her physiotherapist that she felt 70 percent better. She then started a course of exercises at a gym. She worked under the guidance of a kinesiologist. Her gym pass expired at the end of December 2008. By then, she was feeling considerable relief from her symptoms. Her accident-related problems at that

time were limited to pain in her neck and shoulders after prolonged periods of sitting or studying.

[9] Ms. Toopitsin's evidence at trial was that she could not say whether accident-related symptoms interfered with her life between early 2009 and the Spring of 2010. Her mother, Ms. Toopitsin Sr., testified that during this interval her daughter appeared to still be suffering from pain, especially after doing strenuous activities such as carrying heavy pails of water or pushing a lawn mower.

[10] In March 2010, Ms. Toopitsin visited a locum at her family physician's clinic. The locum was a Dr. Murray. Dr. Murray noted that Ms. Toopitsin appeared to be focused on her pain rather than on her function. On examination, he found slight tenderness of the left supraspinatus, i.e.: the muscle that lies along the top edge of her left shoulder blade. Ms. Toopitsin told him that she had stopped doing the exercises that the kinesiologist had taught her in late 2008. Dr. Murray recommended that Ms. Toopitsin keep up with those exercises. He did not recommend that she have any passive therapies such as massage or physiotherapy, but neither did he advise against such treatment.

[11] Ms. Toopitsin next visited her new family physician, Dr. O'Malley, in November 2010. There, she complained of continuing pain in her neck. She had returned to physiotherapy on her own initiative. Dr. O'Malley endorsed that treatment. Ms. Toopitsin continued to see the physiotherapist, Ms. Laverdure, until mid-June 2011.

[12] In October 2011, Ms. Toopitsin returned to Dr. O'Malley with continuing complaints of daily pain in her neck and mid-back. Dr. O'Malley advised that chiropractic treatment might assist her.

[13] In August 2013, Ms. Toopitsin saw Dr. O'Malley again, still complaining of pain in her neck and back. She advised the doctor that massage and chiropractic treatments were of some temporary value in reducing her symptoms. Dr. O'Malley prescribed massage and chiropractic treatments.

[14] Ms. Toopitsin testified that from November 2010 through to the present the pain in her neck, shoulder, and upper back has actually worsened. This is so despite the physiotherapy treatments she received from Ms. Laverdure and, since 2013, her regular attendances at massage therapy and chiropractic treatments.

[15] Ms. Toopitsin's scholastic achievements have not been impaired by problems caused by the accident. She says that studying causes pain in her neck, shoulders, and upper back. She has nevertheless maintained good marks in her home school program and has achieved a record of straight A's at the private school she has attended for grades 10 and 11.

[16] Ms. Toopitsin's entry into the labour force has not been impaired by her complaints, although it has to be said that she had not been tested with full-time employment. Until April 2013, she worked only one evening shift per week for her mother's janitorial service. In April 2013, she started a part-time job at the Jolly Market convenience store close to her family home in Prince George. She left the Jolly Market in March 2014. Between those two dates, she worked every hour and every shift made available to her at the store. She was able to perform every task assigned to her, including washing 40 to 50 pizza pans and scrubbing out a chicken rotisserie. Those activities did, however, aggravate the pain in her neck, shoulders, and upper back.

[17] As noted earlier, the rheumatologist Dr. Schuckett assessed Ms. Toopitsin in July 2013. At that time, Ms. Toopitsin complained of activity-related pain in her neck, shoulders, and upper back. Dr. Schuckett opined that it was unusual for soft tissue injuries to reach the level of recovery that Ms. Toopitsin's symptoms did at the end of 2008 and then to get worse. Nevertheless, Dr. Schuckett accepted Ms. Toopitsin's history as it was given to her. Dr. Schuckett opined that now, six years post-accident, it is likely that Ms. Toopitsin has attained maximum medical recovery from her soft-tissue injury and that it is likely that those injuries will continue to bother her on a permanent basis.

[18] In the course of defence counsel's patient, focused, and effective cross-examination, Dr. Schuckett came to testify that Ms. Toopitsin's low back complaints are probably not related to the accident. She also agreed that some people develop neck pain from everyday activities like reading for a long time or doing physical activities such as snowboarding or playing soccer. Dr. Schuckett also agreed that it is possible that the course of massage and chiropractic treatments that Ms. Toopitsin has had since 2010 have either created or exacerbated symptoms in Ms. Toopitsin's neck, shoulders, and upper back.

[19] Dr. Shuckett recommended against continued massage and chiropractic treatments unless they provide marked relief from symptoms. Dr. Shuckett said that these passive treatments will not provide medical benefit nor will they promote healing.

[20] In the Spring of 2014, Ms. Toopitsin underwent a functional capacity evaluation. The occupational therapist who conducted the evaluation tested the validity of Ms. Toopitsin's effort. He found that she exerted good effort throughout. He did not note any inappropriate pain behaviour which might indicate that that her complaints were manufactured or exaggerated.

[21] The functional capacity evaluation revealed that Ms. Toopitsin is capable of engaging in all activities commonly required in the workforce. However, her tolerance for a number of activities is limited by pain in her affected areas. Those activities include bending or stooping for more than a few minutes at a time, lifting or carrying weights in excess of 20 kilograms, and working with weighty objects overhead. Further, Ms. Toopitsin is able to work in a sedentary position but did require regular standing or stretching breaks to ease discomfort in her neck, shoulders, and upper back.

[22] I accept as accurate the results of the functional capacity evaluation.

[23] The vocational consultant, Mr. Lawless, considered the opinion of Dr. Schuckett and the result of the functional capacity evaluation and came to the

conclusion that Ms. Toopitsin was capable of obtaining whatever post-secondary education she might desire, but that her progress in school could be negatively affected by pain-limited tolerance for long periods of study. Mr. Lawless opined that Ms. Toopitsin ought not pursue a career in which she would have to spend a lot of time bending or stooping. Mr. Lawless opined that Ms. Toopitsin's limitations will negatively affect her ability to participate in 53 percent of the occupations for which she is suited.

[24] Ms. Toopitsin testified that she expects to complete grade 12 and then to pursue some sort of post-secondary education. Her goal is to have a career. Earlier in life she had some thought of becoming a dental technician but, upon reading Mr. Lawless' opinion, she has now ruled out that occupation. She has taken that decision owing to the amount of time a dental technician must spend bent over the patient's chair.

[25] Ms. Toopitsin has no firm career goals at present.

[26] The Toopitsin family appears to be tight knit and relatively traditional. All of the Toopitsin children, and there are six of them, were home schooled by their widowed mother. Ms. Toopitsin currently attends a private school. From the fact that the school grades its student's bible study and credits students for memorizing passages from the Old Testament, I infer that it is at least a moderately conservative institution. Ms. Toopitsin testified that she hopes to get married and to raise a family.

[27] Ms. Toopitsin's mother is an extremely resourceful, focused and dedicated individual. I have no doubt that she has demonstrated to her daughter the importance of attaining social and financial independence. Ms. Toopitsin's history of working from an early age establishes that she has a positive attachment to the work force. Given these facts, I have little difficulty accepting the proposition that Ms. Toopitsin will obtain an education in a field that interests her and that will provide her with a reasonable career. I also accept the proposition that Ms. Toopitsin's participation in the work force is likely to be punctuated by periods of child birth and rearing. There is, however, no way at present to confidently predict what field of

work will attract her adult interest. The best one can say is that she will certainly engage in a career of some sort and that career will more likely than not be one that requires a post-secondary degree.

[28] Currently, Ms. Toopitsin does all of the things that she would ordinarily do, including studying, snowboarding, playing keeper on her school's soccer team and, until recently, working at her part-time job at the convenience store. However, these activities do aggravate her discomfort. This is especially so if she exerts herself strenuously.

Parties' Positions

Plaintiff

[29] Mr. Byl, for Ms. Toopitsin, argues that the only medical opinion concerning Ms. Toopitsin's future comes from Dr. Shuckett and that she says that Ms. Toopitsin is likely to suffer from her accident-related symptoms on a permanent basis. Mr. Byl acknowledges that his client's symptoms are, in the overall scheme of things, relatively mild. He seeks non-pecuniary damages in the range of $40,000 to $50,000.

[30] Mr. Byl submits that if Ms. Toopitsin's symptoms will be a permanent feature of her life, they will interfere with what would otherwise be an unfettered opportunity to engage in the work force. Mr. Byl notes that Mr. Lawless' recommendation against a career as a dental technician stands as good proof that Ms. Toopitsin's injuries will have a significant negative impact on her future earning capacity. He seeks damages for reduction of earning capacity of $75,000.

[31] Mr. Byl argued that Ms. Toopitsin should recover special damages of $3,365.05. These are expenses for the various physiotherapy, chiropractic and massage therapies provided to Ms. Toopitsin between November 2008 and the present.

Defence

[32] Mr. McLauchlan, for the defence, argues that Ms. Toopitsin has not shown that her injuries will bother her for the rest of her life. The defence points out that Ms. Toopitsin experienced good relief from her symptoms while she was doing her exercises in late 2008 and early 2009, and says that if she maintains a regime of exercise her problems are likely to disappear. The defence submitted that an appropriate range of damages for non-pecuniary loss is $25,000 to $35,000.

[33] The defence further argues that Ms. Toopitsin has not acted reasonably in mitigation of her loss. According to the defence, the evidence of that lies in her failure to keep up with her exercises in 2009 and her failure to follow Dr. Murray's advice in March 2010 to return to those exercises.

[34] Mr. McLauchlan goes on to argue that if Ms. Toopitsin's symptoms do abate, then there will be no evidence foundation for an award for reduction of earning capacity.

[35] Finally, the defence submits that because in March 2010 Dr. Murray recommended only physical exercise to Ms. Toopitsin, there is no medical evidence to support Ms. Toopitsin's claim for the cost of passive therapy sessions after that date.

The Law

Non-Pecuniary Loss

[36] In 2006 the B.C. Court of Appeal provided a useful compendium of the factors to take into account when assessing non-pecuniary damages. The case was Stapley v. Hejslet, 2006 BCCA 34. The Court said:

> [46] The inexhaustive list of common factors cited in Boyd that influence an award for non-pecuniary damages includes:
>
> (a) age of the plaintiff;
>
> (b) nature of the injury;
>
> (c) severity and duration of the pain;
>
> (d) disability;

(e) emotional suffering; and

(f) loss or impairment of life

I would add the following factors, although they may arguably be subsumed in the above list:

(g) impairment of family, marital and social relationships;

(h) impairment of physical and mental abilities;

(i) loss of lifestyle; and

(j) the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff: Giang v. Clayton, [2005] B.C.J. No. 163 (QL), 2005 BCCA 54).

Loss of Earning Capacity

[37] A successful claim for loss of earning capacity must be founded on evidence that there is a real and substantial possibility of a future event leading to an income loss: Perren v Lalari, 2010 BCCA 140. The factors that need to be considered in assessing the impact of that possible future event on earning capacity include whether:

1. The plaintiff has been rendered less capable overall from earning income from all types of employment;
2. The plaintiff is less marketable or attractive as an employee to potential employers;
3. The plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to him, had he not been injured; and
4. The plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market.

(Brown v. Golaiy (1985), 26 B.C.L.R. (3d) 353 at paragraph 8)

[38] Some claims for reduction of earning capacity are amenable to calculation and actuarial assessment, but many are not. The claims that are not typically involve claimants who have not yet entered the work force or have settled on a career or occupation. In those cases, the loss is assessed rather than tabulated. The assessment process must take into account all of the relevant evidence relating to the claimant's circumstances as well as the positive and negative contingencies that do or will bear upon the claimant's working life.

Mitigation

[39] The onus lies on the party asserting a failure to mitigate to show that the claimant failed to act reasonably in refusing recommended treatment and the extent to which the claimant's damages would have been reduced had she acted reasonably: Chui v. Chui, 2002 BCCA 618.

Discussion

[40] Interestingly, this is not a case in which the defence's main object was to show that the plaintiff's symptoms stem from something other than the accident or that they are not as real or debilitating as the plaintiff would have the world believe. The defence explicitly admitted that Ms. Toopitsin was a credible witness. The only caveat the defence raised concerning her evidence was that, given her age, her recollection of events may not be entirely reliable. In the same vein, the defence did not challenge the evidence of Ms. Toopitsin's mother.

[41] Instead, the defence concentrated its argument the evidence concerning the degree to which accident-related symptoms will affect Ms. Toopitsin in the future.

[42] The difficulty with the argument that Ms. Toopitsin will not be troubled by her symptoms in the future is that it is not supported by the medical evidence. The only expert medical evidence on that issue was the opinion of Dr. Schuckett. In her report, she said that as of July 2013, Ms. Toopitsin had reached maximum medical recovery from her accident-related injuries. She did not opine in her report or under cross-examination that those symptoms will diminish or disappear in the future.

[43] The defence argument that the symptoms might go away in the future is based upon the progress that Ms. Toopitsin experienced while she was going to the gym in late 2008 and early 2009. That relief was temporary. No medical evidence endorsed the defence's position that Ms. Toopitsin will have a full recovery if she adheres to a regimen of physical exercises in the future. That is not a proposition that the court can or should adopt as an exercise in intuition or speculation.

[44] For those reasons, I am driven to the conclusion that Ms. Toopitsin's accident-related symptoms will be a permanent feature of her life.

[45] Those symptoms will not, however, have a devastating impact upon her function in the future. I find that Ms. Toopitsin's symptoms will limit her tolerance for activities that require prolonged bending or stooping, lifting or carrying heavy weights, and sitting in one position for more than two or three hours at a stretch. Her symptoms will not prevent her from doing these things, but she will experience increased pain as a result of doing them.

[46] She is a young person and will experience these limitations for a long time to come. She is somewhat stoic in her approach to her symptoms, but that does not make them any less real or bothersome for her.

[47] In my view, an award of $45,000 for non-pecuniary loss would adequately compensate Ms. Toopitsin for her non-pecuniary loss.

[48] There is clear evidence to support Ms. Toopitsin's claim for loss of earning capacity. Given her slight physical build and obvious intellectual talent, it is much more likely than not that Ms. Toopitsin will elect to engage in a relatively sedentary career - one that emphasizes her executive functions rather than her physical might. One career, i.e.: dental technician, is probably ruled out for her owing to her limited tolerance for bending and stooping. She will be able to do any desk job, but the pain she experiences in her neck, shoulders, and upper back will limit her ability to persevere at a desk for prolonged periods. She will have to find a career or an employer that will accommodate her need to stand, stretch, and move about on a regular basis throughout the work day.

[49] Ms. Toopitsin is likely to be in and out of the work force as her family responsibilities wax and wane. Periodic periods of unemployment while child rearing must be taken into account as contingencies that will reduce the impact of her injuries on her working life.

[50] Because Ms. Toopitsin has not yet selected a career, the correct approach to valuing her claim for reduced earning capacity is assessment rather than calculation. None of the potential careers Mr. Lawless suggested for Ms. Toopitsin in his report generated average incomes as much as $100,000 per year, but several were in the $60,000 - $75,000 range. Those careers included dental technician at $71,000 per year.

[51] Given the contingencies that apply in this case, and the relatively mild impact that Ms. Toopitsin's injuries will have on her working life, while still recognizing that those injuries will have a negative impact, and taking into account the fact that Ms. Toopitsin's entire working life lies ahead of her, I assess her claim for reduction of earning capacity at $60,000.

[52] The defence argument that Ms. Toopitsin has not mitigated her loss suffers from two significant flaws. The first is that Ms. Toopitsin was just a little girl when, in 2008 and 2009, she let slip her adherence to an exercise routine. I do not think it reasonable to expect the same level of foresight and perseverance in a 10-year-old girl as one does from an adult. The other flaw in the argument is that it is not supported by medical evidence. It is true that in March 2010, Dr. Murray saw Ms. Toopitsin exactly one time and during that visit he recommended that she take up her exercises again. There is, however, no medical evidence to support the proposition that had she done so her symptoms would have been reduced and her level of function increased. Absent such evidence, the mitigation argument cannot succeed.

[53] The defence argument that no special damages ought to be awarded after March 2010 also suffers from two flaws. The first flaw is that in that month Dr. O'Brien did not negate ongoing treatment; he simply recommended that Ms. Toopitsin resume the exercise regime she started in December 2008. The second flaw is that in November 2010, October 2011, and July 2013, Dr. O'Malley actually prescribed chiropractic and massage therapies. It cannot, therefore, be said that Ms. Toopitsin engaged in those treatments and incurred expense for them

absent or contrary to medical advice. The contrary is true. For those reasons, I am persuaded that Ms. Toopitsin should recover the whole of the special damages she claims. That claim, net of third-party payors and treatment for an unrelated ankle injury, totals $3,365.05.

Conclusion

[54] Ms. Toopitsin is entitled to an award as follows:

Non-Pecuniary Loss	$45,000.00
Reduction of Earning Capacity	$60,000.00
Special Damages	$ 3,365.05

Costs

[55] This matter proceeded under Rule 15-1. Absent an application for costs other than as prescribed by that Rule and made within thirty days of the release of these reasons, Ms. Toopitsin shall have her costs as set out in Rule 15-1.

"Rogers J."
The Honourable Mr. Justice Rogers