



Date: 19990520
Docket: 34035
Registry: Prince George

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

RYAN WILLIAM HIRVI

PLAINTIFF

AND:

SHELDON ROY and MARY VERNA SWAIN

DEFENDANTS

AND:

INSURANCE CORPORATION OF BRITISH COLUMBIA

THIRD PARTY

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE MEIKLEM

Counsel for the Plaintiff:

564-3400
D. Byl

Counsel for the Third Party
I.C.B.C.:

Carolyn M. Lawlor

Place and Date of Trial:

Prince George, B.C.
May 17 & 18, 1999

[1] The plaintiff Ryan Hirvi was injured in a motor vehicle accident on May 10, 1996 at age 18. Liability is admitted by the defendants, whose vehicle crossed the centre line of a street, initially striking another motorcyclist, then causing the plaintiff to upset his motorcycle.

[2] The plaintiff was thrown to the street but remained mobile and went to assist his friend. He sat on the adjacent curb for a while and rode to the hospital in the same ambulance that transported the more seriously hurt companion. Mr. Hirvi remained in the emergency department for 4 or 5 hours until he was released suffering bruising and abrasions on the left flank and thigh, abrasions on the lower left leg.

[3] Following his discharge from emergency he was next examined on May 14th, by his family physician, Dr. Jan Burg, whose November 22, 1996 report states in part:

He was seen in follow up in my office on May 14th. He showed a considerably bruised pelvic bone on the left hand side. He was complaining of aches and pains everywhere in that area, the flank, lower back and now also had some complaints of a painful neck. At the time there were no signs of bony tenderness or vertebral injury. He certainly had some significant pain in the back of his left leg, some weakness in the left leg and he had reduced reflexes on the left hand side although the leg was quite painful and difficult to examine. I assumed that he had some irritation of the sciatic nerve. He was not treated in any significant way again and was asked to return in follow up in a couple of weeks time. In fact, he was seen one month later on June 14th. He had lower back pain as his primary complaint. His bruising had settled down. The sciatic nerve distribution pain continued to bother him and it was decided to X-ray him as a result of this ongoing pain. Also his ankle

was bothering him at the time. The pain in the lower back radiated up the left hand side into the thoracic area but he had no sign of bony tenderness, vertebral fracture of other major injury.

Interestingly, his X-ray showed some retrolisthesis from L4, L5, mild changed of degenerative disk disease and a probable spondylolisthesis in L5 although not specific. In the event that further symptoms are dramatic or his sciatic nerve became a problem, it would be likely that we would continue the investigation by means of a CT Scan. There were, however, no signs of any traumatic injury to the lower lumbar sacral spine.

. . .

The diagnosis is that of soft tissue injury to the lower lumbar sacral spine, pelvis and hip with abrasions and contusions in the initial period, followed by irritation of the nerve root in the distribution of the sciatic nerve on the left hand side. This complicated by an irritable, painful lower back from the period of May 1996 until October 1996 and continuing.

The prognosis in this case is good. Mr. Hirvi should not have any permanent residual deficit related to this motor vehicle accident. The presence of the underlying minor changes in his lumbar sacral spine indicate that he probably would have had some symptoms related to his lower spine at some time. This motor vehicle accident, however, has precipitated acute symptoms and has caused Mr. Hirvi a considerable amount of pain and discomfort. This pain and discomfort is likely to continue in the short and long term and although he will be able to cope with this quite well, he might require the use of anti-inflammatory and/or pain killing medication in the future. Mr. Hirvi however has no specific deficit, fracture or other fractures, injuries or other problems relating to this motor vehicle accident. His general health continues to be excellent and he should have no other problems in the future relating to this motor vehicle accident.

[4] Approximately one year later Dr. Burg's December 3, 1997 letter provided an update as follows:

He was reviewed in my office today. He was complaining only of the symptoms that he has continued to complain of right from the start and this is pain in the lower back daily. he uses Tylenol 3's occasionally. He uses no other medications. He feels that his mobility is affected by his pain. Standing for a long time or sitting for a long time gives him back pain and he feels that functionally he gets pain if he works hard or plays hard. All this is localized to the lower lumbar sacral spine and has no other specific symptoms. He claims the pain is a constant aching discomfort that is made worse by any of these activities. he describes radiation to the lower thoracic region and no other specific radiation.

In summary there has been no change in the condition of Mr. Ryan Hirvi. He has been reviewed by a neurosurgeon who could offer us no new insights to his disability. He complains of pain in his lower back in the same manner as he has done right from the start of this complaint. No other significant factors are noted. His prognosis is unchanged and he will continue to have pain as a result of the congenital abnormalities of his lower spine and as a result of the motor vehicle accident. It is very difficult to delineate the specific cause of the symptoms. He will continue to be monitored over the long term period. He has no other specific or new abnormalities.

[5] At the insistence of the plaintiff and his father, Dr. Burg referred Ryan Hirvi to a neurologist, Dr. Adams. The plaintiff's symptoms were described by Dr. Adams as: "a constant aching discomfort which can occasionally throbs and may radiation superiorly up the back to the lower thoracic region. There is never radiation to the legs or to the buttocks." Dr. Adams found no neurological deficits and suggested Mr. Hirvi should be assessed by an orthopaedic surgeon.

[6] The orthopaedic surgeon, Dr. Michael M. Moran examined the plaintiff on the 17th of June, 1998 and his medical/legal report states in part:

. . . Shortly after the accident, Mr. Hirvi developed low back pain that has persisted. He has a congenital abnormality in his spine. This abnormality is often responsible for low back pain. However, the nature of the motor vehicle accident can also be responsible for low back pain. As Dr. Burg mentioned in his medico-legal report, it is extremely difficult to distinguish between the two. Mr. Hirvi has had continuing problems with his back which would be compatible with the spondylolisthesis. However, in the interval of almost two years between the x-rays, there has been no evidence of progression of the spondylolisthesis. The motor vehicle accident was responsible for a soft tissue injury to the back that would normally be expected to slowly improve.

It is probable that a portion of Mr. Hirvi's back pain was caused by the motor vehicle accident. Unfortunately, this is likely superimposed on back pain that would be caused by the spondylolisthesis. I am unable to place a percentage of responsibility for each of the components.

I don't think that he should be restricting his activities. He should be able to partake in all recreational and occupational activities without restriction. He may find that as he becomes more active, or if he is doing heavy lifting, that he may develop an ache in the back or tiredness but there is no reason that that should stop him from proceeding. I don't believe he can cause any structural damage to his back.

Physiotherapy in the form of abdominal strengthening exercises and range of motion exercises should help to minimize the pain and I think Mr. Hirvi should perform these on an ongoing basis. This should become part of his activities of daily living and these will help minimize the back pain he has.

PROGNOSIS:

The prognosis overall is good. I expect that Mr. Hirvi will continue to slowly improve and that his back pain will be minimal. There is, however, a risk of progression of the spondylolisthesis. This is not associated with the motor vehicle accident at

all. This is a natural progression and if the spondylolisthesis does progress, his back pain may increase. He may also require surgical intervention at some stage if this does progress to a significant extent.

With regard to the motor vehicle accident itself, I see not reason that there will ever be any need for surgical intervention or other treatment apart from physiotherapy and some mild analgesics on a p.r.n. basis.

. . .

In summary Mr. Hirvi sustained a soft tissue injury to his lower back. He has continued to be bothered by pain in the lower back. As a complicating feature he has a spondylolisthesis which is also associated with low back pain. Mr. Hirvi has no structural injury to his back that should preclude him from being involved in all recreational and occupational activities. He may notice an increase in pain with heavy lifting or heavy work but I don't believe that he will do himself any damage. he should not be restricted in any way. The fitter he keeps his back, the less difficulty he will have with long term pain.

[7] The third party does not dispute that Mr. Hirvi suffered a soft tissue injury to the low back that is responsible for 3 weeks disability from his employment as a parts man with his father's business. The third party argues that the present symptoms and the continuation of back pain past the end of 1996 are attributable to the pre-existing spondylolisthesis further aggravated by the snowmobiling accident that occurred on January 12, 1997. Mr. Hirvi did not mention the snowmobile accident to any of his examining doctors or his treating physiotherapist and at his Examination for Discovery in this matter on October 23, 1997, testified to the effect that he had been involved in no subsequent accidents with any type of

vehicle and was involved in no accidents at all since the motor vehicle accident of May 10, 1996.

[8] The plaintiff was in fact involved in an accident on January 12, 1997 wherein a new Polaris snowmobile struck a stump and overturned necessitating repair costs of \$2,684.40. Mr. Hirvi's evidence is that he did not roll under the machine but was thrown off the other side into powder and he was not injured at all, he said that he righted the machine and was able to ride it home.

[9] A January 15, 1998 letter from the plaintiff's employer North Country Equipment Ltd. owned by his father lists the plaintiff's days off due to injuries received in the May 10, 1996 accident and includes absences on January 14, 16, 17, 22 and 24, 1997 and February 3 to 7 and February 10 and 11th. The plaintiff attended Dr. Burg's office on January 22, 1997 and the notes on his chart are "has back pain as per usual. He has pain in the interscapular region now though which is probably unrelated to his lower back pain. This seems as if it could possibly be a muscle spasm in the interscapular region".

[10] Mr. Hirvi stated on re-examination that he did not report the snowmobile incident to Dr. Burg because he was not hurt and at the Examination for Discovery he answered as he did because he did not think a snowmobile accident was a motor vehicle accident when the first question was asked and in response to

the second question, just did not think of the snowmobile accident. Plaintiff's counsel submitted that the plaintiff's answers on discovery should be attributed to the plaintiff's difficulty expressing himself. He further argues that no conclusion regarding the violence of the snowmobiling accident can be made on the evidence.

[11] Mr. Byl for the plaintiff concedes there was a pre-existing condition but argues on the basis *Athey v. Leonati* (1996), 140 D.L.R. (4th) 235, that there should be no apportionment of damages to the pre-existing condition because it was not symptomatic and there is no evidence that it would have led to the plaintiff's painful condition in any event.

[12] In *Athey v. Leonati* op. cit at p. 244 it is stated:

The "crumbling skull" argument is the respondent's strongest submission, but in my view it does not succeed on the facts as found by the trial judge. There was no finding of any measurable risk that the disc herniation would have occurred without the accident, and there was therefore no basis to reduce the award to take into account any such risk.

[13] Dr. Burg's November 27th medical/legal report quoted above of course provides some evidence that Mr. Hirvi would have had symptoms related to his congenital defect, "at some time". Although Dr. Burg also testified at trial the plaintiff did not have him elaborate on that opinion and he was not cross-examined as to the delay of onset of symptoms that he thought probable. Dr. Moran noted that although the low back pain was

consistent both with the motor vehicle accident mechanics and the congenital abnormality and he seemed to be of the view that the pain was contributed to by both causes, he noted that in the interval of almost two years between the initial x-rays and his 1998 x-rays there was no evidence of progression of the spondylolisthesis.

[14] The evidence is not as well developed as it might have been in this case but there is evidence that would support a finding that Mr. Hirvi would have suffered low back pain from his congenital abnormality at some point in time without the accident having occurred. In my view, there is no sound basis for finding on a balance of probabilities that that would have occurred prior to the present time. I think therefore that the reasoning in *Athey v. Leonati* is applicable to all heads of damage up to the trial date, and in respect of losses to date the pre-existing condition is in effect a "thin skull" rather than a "crumbling skull" situation.

[15] I turn now to a consideration of the January 12, 1997 snowmobile accident as an alleged intervening cause. Ms. Lawlor argues that this was an injury which should have resolved itself within six months of the accident and the only reason it did not was because of the accident on January 12, 1997.

[16] I must say that I did not find Mr. Hirvi's responses on re-examination as to why he did not disclose the snowmobile accident at the examination for discovery very plausible, nor do I accept that he had a difficulty expressing himself at the examination for discovery. The only communication problem that I noted in his trial testimony was that his answers were barely audible and Mr. Byl had to ask him to repeat himself to ensure they were recorded. Mr. Hirvi appeared flushed and somewhat uncomfortable in providing his muted explanations. I simply do not believe his explanation that he did not report the snowmobile incident to Dr. Burg on January 22nd because he was not hurt, in light of Dr. Burg's clinical note that "Mr. Hirvi now had pain in the interscapular region which could possibly be a muscle spasm." From the recorded absences from work which are concentrated in the aftermath of that incident it is clear that his pain was significantly increased. The cost of repairs to the snowmobile and the fact that he was thrown are suggestive of significant forces being applied to his body. The only common sense inference that I can make is that Mr. Hirvi decided to minimize the accident so as not to complicate matters with the insurer in relation to his initial back injury.

[17] Dr. Burg testified in cross-examination to the rather obvious fact that other accidents could have a contributory effect to symptoms and I find that the snowmobiling accident is primarily responsible for the time lost on January 14, 16, 17,

22, 24; February 3, 4, 5, 6, 7, 10 and 11th a total of nine full working days two half days and one two hour period. I note that the original disability period immediately following the May 10, 1996 accident was 15 days, by comparison.

[18] I do not find as invited by Ms. Lawlor that the injuries from the motor vehicle accident on May 10, 1996 were fully resolved by December, 1996 because I note that there were also nearly 3 full days of time off work in mid-December together with some time loss in September. However, in light of the snowmobiling incident I am also not persuaded on a balance of probabilities that the injuries sustained in the May 10, 1996 accident remain a necessary cause of the continuation of Mr. Hirvi's symptoms at the plateau described in Mr. Byl's argument. As indicated in Dr. Moran's letter, soft tissue injury to the back would normally be expected to slowly improve.

[19] In summary I find this is a case where there is a likelihood that the pre-existing condition would have detrimentally effected the plaintiff in the future regardless of the defendant's negligence. On the principles enunciated in *Athey v. Leonati* that should therefore be taken into account in reducing the overall reward. The subsequent accident intervening prior to the date of trial has muddied the evidentiary waters and protracted the plaintiff's recovery period so that it is impossible to determine when the injuries

incurred on May 10, 1996 may have but for that snowmobiling accident fully resolved themselves.

[20] The plaintiff has referred me to cases awarding general damages for roughly comparable chronic pain situations in a range of \$40,000 to \$45,000. This is the range that would be appropriate if pain was likely indefinitely and there was no reduction for the likelihood of the plaintiff developing problems in the future from his pre-existing condition and if there were no reduction for a portion of his pain being attributable to the intervening cause.

[21] The defendant argues that the appropriate range for non-pecuniary damages is \$5,000 to \$8,000 by comparison to a group of case awarding damages in the \$8,000 to \$12,000 range. This range is appropriate if I had accepted the defendants argument that the injuries from the motor vehicle accident were resolved prior to the snowmobile accident. I have not accepted that argument because as indicated above Mr. Hirvi did have a congenital abnormality constituting at least in the short term a "thin skull" which magnified the effects of the accident and protracted recovery. I accept that there was no ongoing or chronic pain from the spondylolisthesis prior to the accident and I think it is unlikely that the condition would have produced chronic pain in the absence of either of the accidents prior to the trial date.

[22] In the absence of clear evidence on some of the factual issues, the Court must assess damages that are fair to both parties bearing in mind that the burden of proof generally lies with the plaintiff and in this case some of the lacunae are attributable to the plaintiff's failure to disclose the subsequent accident to examining physicians.

[23] I conclude that the defendants are liable for injury to the plaintiff's back which disabled him from his job for 3 weeks in the immediate aftermath, and for intermittent absences for a further 60 hours. The plaintiff continued to have nearly constant bothersome low grade back pain which interfered with his sleep, and often required him to sleep on the floor with his legs raised. He required physiotherapy, anti-inflammatories and pain relievers, including Tylenol #3 and Voltaren. Although he suffered the constant aching discomfort which was made worse by vigorous pursuit of work or recreational activities, he was advised to continue with those activities and was able to do so. He appears to have done so until he aggravated his back further with the accident while he was snowmobiling recreationally in January 1997. But for the latter accident, I conclude that his injuries attributable to the defendants would have been fully resolved prior to the trial date.

[24] I assess general damages at \$20,000.

[25] In respect of the wage loss claim the record of employment indicates that there was no loss of pay in respect of the days off work in September and December of 1996 and the claim is properly limited to the 3 weeks in May, 1996 immediately after the accident. North Country Equipment Ltd. provided a letter stating that the plaintiff's rate of pay from May 15, 1995 to June 3, 1996 was \$18.50 per hour. Mr. Hirvi's father testified that he was deducting \$9.00 an hour pay towards the price of a vehicle he had sold to his son. The plaintiff's accident benefit application stated that he was earning \$9.00 per hour for 47 hours per week. The plaintiff indicated that he had stated that rate because it was his net rate after making his loan payment, however, it appears he did not make a loan payment in May, 1996. Upon his return to work on June 3rd he was paid \$9.00 per hour but he said that was because he was re-hired as a labourer rather than a parts man. Notwithstanding that rate of pay it appears he did make loan payments in June, August and September. I find the most reliable evidence is the salary information provided on the accident benefit application and I assess past wage loss at \$1,269. No claim was made for special damages.

[26] The plaintiff is *prima facie* entitled to costs on Scale 3.

