



Date: 19970128
Docket: 31635
Registry: Prince George

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

ANNA-LEE TERI GRAY, Guardian Ad Litem for JEREMIAH JASON GORDON MYRE, and the said ANNA-LEE TERI GRAY

PLAINTIFF

AND:

JOSEPH PHILIAS MYRE

DEFENDANT

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR JUSTICE A. F. WILSON
(IN CHAMBERS)

Counsel for the Plaintiff:

D. Byl and
M. Erickson, Articled Student

Counsel for the Defendant:

T. Matte

Place and Date of Hearing:

Prince George, B.C.
January 23, 1997

I INTRODUCTION

[1] On August 7th, 1995, Jeremiah Myre, who was age 12, was coming home from a day of fishing with his father and cousins. On the way home, their vehicle went off the road and rolled. Jeremiah had fallen asleep before that, and his next awareness was of lying on the side of the road, being treated by a paramedic.

[2] This application, pursuant to Rule 18A, is to assess the damages of Jeremiah Myre arising from the accident on August 7th, 1995. Liability is not in issue, nor are there issues of contributory negligence or failure to mitigate.

[3] The evidence comes from the examination for discovery of Jeremiah, and the affidavit of Anna-Lee Teri Gray, his mother and guardian ad litem. A number of medical records and reports are attached to that affidavit. The issue before the court is how to interpret those reports, and the evidence with respect to Jeremiah's ongoing complaints of hearing loss. Counsel for the plaintiffs submits that I should construe that evidence in such a way that the appropriate range of non-pecuniary damages is between \$20,000 and \$25,000. Counsel for the defendant says the evidence, as properly construed, justifies an award in the range of \$7,000 to \$8,000. There are no claims outstanding apart from non-pecuniary damages.

II REVIEW OF THE EVIDENCE

[4] Ms. Gray, in her affidavit, indicated that Jeremiah sustained the following injuries:

- (a) A concussion with a short period of amnesia;
- (b) Conductive hearing loss in the right ear;
- (c) Fracture of the sixth right rib;
- (d) Abrasion and scarring to the right side of his chin and jaw;
- (e) Slight scarring to his left thigh;
- (f) Soft tissue injuries to his neck, back and shoulders.

[5] At his examination for discovery, on August 13, 1996, Jeremiah said that he had cuts and scrapes on his left leg, but that they were healed within three weeks. They did leave two or three small scars, which do not bother him. He also had scrapes on his right wrist, which healed within two weeks, without leaving any scarring. He had a cut under his chin, which healed within two weeks, leaving a small scar. He had a broken rib, which healed within two and one-half months, leaving no ongoing problems. Regarding the hearing loss in his right ear, he said there had been no improvement in that, that he experienced headaches when his ear pops, which occurred every two to three weeks, and lasted from 1/2 to 3/4 of an hour, and were relieved by taking Tylenol.

[6] In her affidavit, Ms. Gray stated:

5. THAT Jeremiah is substantially recovered from the injuries that he sustained in the motor vehicle accident. He is recovered from all his injuries save and except for the following:
 - a. There is still slight scarring under his right jaw. This is small and does not bother Jeremiah. The same can be said for the slight scarring on the front of his left thigh.
 - b. There is hearing loss in his right ear and this will likely be permanent.
6. THAT with respect to this hearing loss, Jeremiah does have the following problems:
 - a. He cannot hear high frequency notes with his right ear;
 - b. He occasionally has ringing sounds in his right ear and has dizzy spells, especially upon vigorous exercise such as basketball;
 - c. He occasionally has difficulty picking out voices in crowds or picking out specific conversations in a room or place where many conversations are going on simultaneously.

[7] Because of the dispute with respect of the interpretation to be given to the medical evidence, I shall set it out in some detail.

[8] The Admission History at Prince George Regional Hospital indicated that, on admission to the emergency room, Jeremiah had a hard collar on. He was only complaining of some chin

pain, as well as pain in his left leg. He was alert and fully oriented to time, place and self, and no neurological deficit was noted. He had an abrasion on his right chin, and a large abrasion on his left front thigh. Because he had a period of amnesia, he was admitted for observation. He was in the hospital for three days. On the Discharge Summary, it was noted that, on questioning, he and his mother felt that he had only about 10 minutes of amnesia around the event. He had no symptoms of concussion while in the hospital, and "actually felt well". However, there was one episode in which he said he felt fluid running down his right cheek from his ear, and in hospital he consistently noted that the hearing in his right ear was reduced from normal.

[9] When seen by his family doctor, Dr. Carter, four days after the accident, Dr. Carter noted that Jeremiah was asymptomatic with the exception of reduction of hearing to his right ear. Examination of the ear and face was normal. Dr. Carter saw Jeremiah again on August 17th, 1995, by which time Jeremiah had developed a pain affecting the right chest. An x-ray taken that date showed the sixth rib was fractured. However Dr. Carter considered that the only aspect of Jeremiah's injuries which might cause prolonged symptoms was the hearing loss.

[10] Included with Dr. Carter's report was the report to him of an audiological evaluation done on August 24, 1995. Pamela

Phelps, the audiologist, concluded that Jeremiah demonstrated "mild conductive component for the right ear in the low and mid frequencies and normal hearing sensitivity at the left ear. Impedance Audiometry and air bone gap for the right side are consistent with injury to this right side".

[11] As a result of ongoing complaints of hearing loss in the right ear, Dr. Carter referred Jeremiah to Dr. Prendergast, an otolaryngologist, in July, 1996. Included with that referral was a copy of a further audiological assessment, done on July 11th, 1996. The comments on it are:

Jeremiah presents a bilateral slight conductive loss, worse in the right ear. Impedance testing shows quite negative middle ear pressure, again worse in the right ear, suggestive of eustachian tube dysfunction. . . .

[12] Dr. Prendergast saw Jeremiah on July 25, 1996. He ordered a further audiological assessment of his hearing, the report of which has not been provided. However, Dr. Prendergast stated:

Further assessment of his hearing done at the Health Unit showed perfectly normal hearing bilaterally and good speech understanding. The middle ear function was now back to normal.

He went on to state:

It is my opinion that at his initial injury this young boy did suffer some degree of inner ear disturbance which we often refer to as concussive effect which had resulted in the transient vertigo and imbalance he suffered. It is likely his hearing loss had resulted from blood in the middle ear space.

I had not seen this chap immediately after his accident and during the time between his accident on August 17 and when I saw him November 23, 1995 it was more than enough time for blood to clear from the middle ear space although some of the middle ear function would not have been fully back to normal. This latter was confirmed by the various tests he had.

This child has not been seen by me since July 25, 1996. On that date his ears were relatively normal. . . .Clinically and audiologically this boy seems to be fully recovered from the effects of his accident and there is currently no evidence that he will have any lasting abnormality judged from these reports.

Please note the above report deals entirely with this lad's hearing subsequent to his accident of August 7, 1995. As stated above, I have not seen him since July 1996. I would anticipate he has continued to do well and is functioning normally.

[13] There is some conflict between the comments in the audiological assessment done on July 11th, 1996, on the one hand, and the results of Dr. Prendergast's examination on July 25th, and the further audiological assessment on August 7th, on the other. The July 11th assessment indicated a slight hearing loss on both sides, worse in the right ear. Dr. Prendergast indicated that on July 25th, "his ears were relatively normal". He reported that the assessment on August 7th showed perfectly normal hearing in both ears. It is unlikely that Jeremiah's hearing would have recovered completely in less than a month, when it had not done so in the previous year. And, in fact, Jeremiah indicated that it had not at the examination for discovery on August 13th, 1996. However, Dr. Mittermaier, who took over Dr. Carter's practice, in his report commenting on the July 11th assessment, stated: "This shows an improvement

and is essentially back to normal". He also noted that there is no guarantee that the tinnitus (ringing in the ears) will disappear. The evidence, in the affidavit of Ms. Gray, is that the ringing occurs only occasionally, together with dizzy spells, especially upon vigorous exercise such as basketball.

[14] I conclude that, while the function of Jeremiah's right ear has improved, there are still some symptoms associated with the injury: minor hearing loss, occasional ringing sounds and dizzy spells, and difficulty picking out voices in crowds. However, I find the ongoing problems to be minor, and not ones which will affect Jeremiah in any of his activities.

III ASSESSMENT OF DAMAGES

[15] Based on my findings regarding Jeremiah's injuries, and the effect of those injuries, the cases cited by his counsel are of little assistance. As he quite candidly stated in his submissions, each involved significantly more serious hearing loss, even assuming I found Jeremiah did have a significant ongoing hearing problem. In the cases cited, there were other injuries, more severe than those sustained by Jeremiah, and the loss of hearing had a significant effect upon the plaintiffs' activities. On the other hand, most of the cases cited by the defendant did not involve any hearing loss. The one case involving a hearing loss is *Noel v. Brass Rail Enterprises (1979) Ltd.*, 16th December, 1987, Kamloops Registry Number SC11040, B.C.S.C. In that case, the plaintiff sustained

bruising as a result of a physical assault in a bar. He had quite severe headaches for about two weeks after the incident, and a partial but permanent hearing loss in his right ear. It was characterized by his doctor as a fairly severe hearing loss, and described by the plaintiff as loss of approximately 1/2 of his hearing in that ear. It is thus more serious than the loss of hearing sustained by Jeremiah. In that case, the plaintiff was awarded non-pecuniary damages of \$10,000. On the other hand, the case was decided in 1987, and the plaintiff does not appear to have had the other injuries sustained by Jeremiah, the fractured rib, and abrasions resulting in minor scarring.

[16] Taking those factors into account, I award non-pecuniary damages in the amount of \$12,500.

[17] As agreed by both counsel, the plaintiff will be entitled to costs, to be assessed on Scale 3, unless there are any other considerations of which I am not presently aware.

AFW, J.