COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Bradshaw v. Matwick,* 2011 BCCA 111

Date: 20110311
Docket: CA037161

Between:

William Andrew Bradshaw aka Bill Bradshaw

Respondent
(Plaintiff)

And

Arrow J. Matwick and Gwendolyn G. Matwick

Appellants
(Defendants)

Before: The Honourable Chief Justice Finch
The Honourable Madam Justice Kirkpatrick
The Honourable Mr. Justice Groberman

On appeal from: Supreme Court of British Columbia , April 28, 2009
(*Bradshaw v. Matwick*, 2009 BCSC 564, Vancouver Registry No. M072350)

Counsel for the Appellants:	Alison L. Murray, Q.C. Karen E. Jamieson
Counsel for the Respondent:	Wesley D. Mussio
Place and Date of Hearing:	Vancouver, British Columbia December 1, 2010
Place and Date of Judgment:	Vancouver, British Columbia March 11, 2011

Written Reasons by:
The Honourable Mr. Justice Groberman

Concurred in by:
The Honourable Chief Justice Finch
The Honourable Madam Justice Kirkpatrick

Reasons for Judgment of the Honourable Mr. Justice Groberman:

[1] This is an appeal by the defendants from an assessment of damages in a personal injury action. They say that the trial judge erred in four respects:

a) in finding that a tear in the respondent's left knee medial meniscus was caused by the accident;

b) in finding that the respondent did not fail to mitigate his damages;

c) in awarding damages for past wage loss for a period when the respondent was absent from work for reasons unrelated to the accident; and

d) in the manner in which he assessed future income loss, and, in particular, in his treatment of capacity to earn overtime pay.

[2] For reasons that follow, I am of the view that the trial judge did not make any reviewable error except in respect of the past wage loss.

The Knee Injury

[3] The plaintiff was injured on April 26, 2006, when his vehicle was rear-ended by a vehicle driven by the first defendant and owned by the second defendant. The defendants admitted liability for the accident, and the trial proceeded on quantum of damages.

[4] The defendants acknowledged that the plaintiff suffered soft tissue injuries to his neck and back in the accident. They argued, however, that an injury to the plaintiff's knee was unconnected to the accident.

[5] The plaintiff's evidence was that he had an immediate "sensation" in his left knee at the scene of the accident. He testified that when he attended his doctor's office later that day, he continued to have "issues" with his knee. He also testified that following the visit to the doctor, he felt "pain sensations" in his knee.

[6] The clinical notes of the general practitioner who saw the respondent at his family doctor's office on the day of the accident did not record any complaint of knee problems. When the plaintiff next attended his doctor, on May 1, 2006, he mentioned a "click" in his knee, but does not appear to have described it as painful. On examination, the doctor detected "crepitus" and diagnosed a soft tissue injury to the knee. In his evidence at trial, the doctor described crepitus as being a very fine "crackling" or "grinding" behind the knee cap, attributable to inflammation or tiny cracks in the cartilage. He described the finding as "not a normal finding", saying that, "[i]t's often associated with symptoms such as pain, but not always so". The doctor did not note any swelling, discolouration, abrasion, pain or tenderness at that

time.

[7] The plaintiff subsequently saw his family doctor on May 8, 2006, at which time he had a complaint of left knee pain. He also reported left knee pain on several subsequent visits to his family doctor, and on occasions when he visited physiotherapy and chiropractic clinics.

[8] On August 10, 2007, an MRI scan revealed that the respondent had both a lateral meniscus and a medial meniscus tear in the left knee. While the expert evidence at trial did not attribute the lateral meniscus tear to the accident, there was disagreement with respect to the medial meniscus tear.

[9] The trial judge found that the medial meniscus tear was caused by the accident, relying primarily on the opinion of Dr. Anton, a specialist in physical medicine and rehabilitation. Dr. Anton, in turn, relied on the family doctor's report to ICBC on June 5, 2006, which diagnosed a left knee contusion.

[10] In cross-examination at trial, the family doctor resiled from the diagnosis of a left knee contusion:

> Q I'm just showing you, Dr. Spooner, a document that's entitled "Medical Report" at the top.
>
> A Right.
>
> Q And under section B is the physical examination findings?
>
> A Right.
>
> Q You were asked to complete this form on behalf of Mr. Bradshaw to report your diagnosis of his accident injuries?
>
> A Yes.
>
> Q And in the middle of section B it says "other injury"?
>
> A Right.
>
> Q And then it's got "L," which I take it is "left"?
>
> A Yes.
>
> Q "Knee contusion"?
>
> A Right.
>
> Q "Post-traumatic headache." Now, I'm going to suggest to you that the diagnosis of contusion is not supported by any objective findings from your examinations?
>
> A Yes, you're right. Yeah. And that -- you're right in that a contusion would normally be showing some other signs of problem, either a bruise or soft tissue swelling. But it was -- it was a soft tissue injury, not a contusion.

[11] Dr. Anton was later cross-examined with respect to the importance of the diagnosis of "left knee contusion" to his opinion:

Q And I take it your opinion connecting the medial tear to the accident is based on the assumption that that diagnosis is true?

A In part. It's based on the assumption that there was clear documentation of left knee symptoms after the accident, and to put this in context, tears may occur without any history of recent trauma. It may be an incidental finding. So you always have to link the MRI findings to the history, and, of course, the most significant component of the history is left knee pain, swelling, bruising or other features that would suggest acute trauma.

Q And if there are no reports of immediate pain, swelling or bruising, then it's less likely that the medial tear is related --

A Right.

Q -- to the accident?

A As a rule of thumb, you'd like to see some symptoms, or findings, within a week. The further out it gets, the less likely it is that the problem is due to trauma.

[12] The defendants say that since the family doctor's diagnosis of a contusion was in error, Dr. Anton's opinion was undermined, and ought not to have been relied upon. They say, in the circumstances, that the trial judge's finding that the medial meniscus tear was caused by the accident constituted a palpable and overriding error.

[13] I am not persuaded that the trial judge made any reversible error in relying on the opinion of Dr. Anton. While Dr. Anton had relied on an erroneous diagnosis by the family physician, he indicated that the diagnosis was only important in that it provided evidence that the knee symptoms commenced within a short time of the accident. There was other evidence capable of showing the same thing: the plaintiff's own testimony, the family doctor's finding of crepitus and diagnosis of soft tissue injury on May 1, and the subsequent clinical notes showing complaints of pain within a few days of the accident. It is clear that the trial judge believed the plaintiff's evidence that he had knee pain on the day of the accident. That would satisfy Dr. Anton's requirement that there be some evidence of acute trauma within a week of the accident. Dr. Anton's opinion, therefore, continued to have some support in the evidence. The trial judge was entitled to accept the opinion in the circumstances.

Failure to Mitigate

[14] The defendants alleged that the plaintiff failed to mitigate his damages by returning to work in August 2006 rather than continuing in a full-time rehabilitation program.

[15] In August 2006, the plaintiff's family doctor recommended that the plaintiff stop working and enter into a full-time rehabilitation program. He felt that the plaintiff's recovery would be hastened by entering into such a program. The plaintiff had, however, resisted the recommendation, telling his doctor that his financial situation was such that he needed to continue working.

[16] The trial judge found that the plaintiff had acted reasonably in returning to work in August 2006, and that he had generally followed recommendations for rehabilitative exercise:

> [40] In regards to Mr. Bradshaw continuing to work in August 2006, against his doctor's advice, Mr. Bradshaw had no choice. The plaintiff had a less than accommodating employer. The plaintiff was aware that in order to keep his job, he had to work at his job. It would be reasonable for the plaintiff to conclude based on his job circumstances, that taking a substantial time off to recover would result in the loss of his job. The effects for the plaintiff in this respect would be devastating. He has worked for Rebelle for over twenty years. He has limited reading and writing skills which would make any new job which would require training difficult for him. It was not unreasonable for the plaintiff, in light of this circumstance, to make the decision to struggle on and hope for the best in his recovery while continuing to work.
>
> [41] Additionally, the plaintiff had significant commitments to a wife and two children. He, at best, earns a moderate to good income in the $50,000 range. It is highly unlikely that he could have survived on the modest wage loss funds available to him either through the defendants' insurer or through the employment insurance program. His wife, Ms. Bennett, has only ever worked part-time and although she no doubt contributes to the family expenses, the household consists of two adults, and two children, in a home they own with a mortgage.

[17] On appeal, the defendants point to evidence from the plaintiff's doctor to the effect that he would have given the plaintiff a medical note recommending full-time rehabilitation if one had been requested, and to the employer's evidence that it would have given the plaintiff a leave of absence if such a note had been provided. They also argue that the plaintiff presented only minimal evidence of his financial position in August 2006, and contend that the trial judge relied on inadmissible hearsay. The defendants say that, in the face of that evidence, the judge's finding that it was reasonable for the plaintiff to return to work represents a palpable and overriding error.

[18] I am unable to accept the defendants' assertion. There was considerable evidence concerning difficulties in the relationship between the plaintiff and his employer. In the circumstances, it was open to the trial judge to accept that the plaintiff had a reasonable apprehension that he might lose his employment if he did not return to work. While the evidence of the plaintiff's precise financial position in August 2006 was limited, there was sufficient information before the trial judge to allow him to conclude that the plaintiff's financial position was not sufficiently secure to allow him to risk losing his job.

[19] In any event, even if it had been unequivocally established that the plaintiff's recovery was delayed by his decision to return to work in August 2006, it would not prove that the decision resulted in an exacerbation of his damages. The plaintiff's immediate wage losses were significantly reduced by his decision to return to work. It is not at all apparent that any consequential increase in his non-pecuniary losses or subsequent wage losses would have offset the immediate gains. Thus, the defendants have failed to show that the decision to

return to work in August 2006 resulted in any net increase in the plaintiff's damages.

[20] The defendants also assert that the plaintiff failed to mitigate his damages by failing to continue with particular exercise programs, and failure to avail himself of certain therapeutic options.

[21] The evidence established that the plaintiff undertook a number of exercise and therapeutic programs in the course of his recovery. His doctor considered him to be generally well-motivated and compliant with his rehabilitation programs. The trial judge concluded:

> [42] In regards to the suggestion that the plaintiff unreasonably refused to follow medical advice which would hasten his recovery, the balance of the evidence suggests that the plaintiff continually followed his doctor's advice in regards to a structured exercise program. This has resulted in some improvement but not significant improvement. There is no satisfactory evidence before me that enhanced physiotherapy would have caused the plaintiff's injuries to abate or improve faster than they have with the plaintiff following his doctor recommended exercise regime.

[22] As the defendants point out, there was evidence from which a different inference might have been drawn. The issue was, however, one for the trial judge. There was evidence supporting the inferences he drew, and it is not for this Court to interfere with those findings.

Past Wage Loss

[23] The trial judge assessed past wage loss, in part, by comparing the plaintiff's 2007 earnings to those of the person who took over some of his job responsibilities as lead hand.

[24] There was undisputed evidence that the plaintiff missed 4.5 weeks of work in 2007 in order to have surgery that was unrelated to the motor vehicle accident. The defendants contend that the lost income attributable to that 4.5-week period ought not to have been awarded. Using the trial judge's methodology for determining past wage loss, they suggest that the 2007 losses totalled $8,360 rather than the $12,095 assessed by the trial judge, a difference of $3,735.

[25] The plaintiff does not dispute the assertion that the defendants are not responsible for his wage loss during the 4.5-week period that he was off work for surgery in 2007. They say, however, that there was evidence upon which the trial judge could have found a past wage loss in excess of $12,095 for 2007, and that the award was not, therefore, unreasonable.

[26] In my view, the defendants must succeed on this issue. The trial judge had the task of determining how best to assess the plaintiff's past wage loss. The method that he chose was a reasonable one. It should not be interfered with. However, in assessing the loss for 2007 using that method, the judge failed to omit the 4.5-week period during which the plaintiff

suffered losses that were not attributable to the defendants. The assessment must be corrected to take account of that error.

[27] In the result, I would allow the appeal in respect of past wage loss by reducing the amount by $3,735.

Future Wage Loss

[28] Finally, the defendants argue that the trial judge over-estimated the plaintiff's future wage loss. The trial judge accepted that the plaintiff's job responsibilities were reduced after the accident due to his inability to work as a lead hand. His wages were also reduced. As well, due to diminished stamina and a change of work responsibilities, his overtime opportunities were diminished.

[29] The trial judge considered a number of measures of wage loss, and ultimately assessed the loss of future wages at $11,960 per year. That amount represented the difference between $59,675 – the amount that the plaintiff would have made at his pre-accident wage if he worked 40 hours per week plus an average of three hours per week in overtime – and $47,715, the amount that the plaintiff would earn if he worked 40 hours a week at his new wage, and worked no overtime. The judge acknowledged that the plaintiff may be unable to hold onto his current employment, which would greatly increase his losses. On the other hand, there was a possibility that the plaintiff would more fully recover from his injuries, which would decrease his future losses. In the end, the judge determined that the positive and negative contingencies were more-or-less in balance.

[30] The defendants argue that the trial judge over-estimated the plaintiff's prospects for future income in the event that the accident had not occurred. They point out that in 2008, overtime hours were not generally available to employees due to a downturn in the business. They also say that the trial judge under-estimated the plaintiff's post-accident earning potential, noting that he made more than $47,715 in 2008.

[31] I am unable to accept the defendants' arguments in this respect. In projecting income into the future, the trial judge was engaging in an exercise of judgment, not in a calculation. While the plaintiff's post-accident earnings and the overtime earnings of others in that period provided some evidence from which to predict the future, they did not form the whole picture. The judge was not required to assume that 2008 was the template for future income. This is particularly true in light of the difficulties that the plaintiff was experiencing at work, and in light of the judge's acknowledgement that 2008 was a slow year for the business.

[32] The evidence established, to the satisfaction of the trial judge, that the plaintiff suffered

from a diminished capacity to earn income. After the accident, he was unable to work as quickly, as well, or as long as he did before the accident. The judge recognized that there were numerous positive and negative contingencies. The assessment that he made was, in some respects, a rough one. There were many variables that could have been brought to bear on an estimate of future losses that were not explicitly included in the arithmetical calculations that he made to assist him in his assessment. That said, he approached the issue by considering how the various factors played out, and by adopting an assessment that he thought reflected the various contingencies.

[33] As this Court has noted on many occasions, an assessment of future income loss is an exercise in judgment and assessment, and not a mathematically precise calculation – see *Parypa v. Wickware*, 1999 BCCA 88 particularly at para. 36. The figures relied on by the trial judge were well within the range that was supportable on the evidence, and do not reflect any error in principle with respect to the assessment. I would not interfere with his award with respect to future income loss.

Conclusion

[34] In the result, I would dismiss the appeal, except in respect of the past wage loss. That loss should be reduced by $3,735 from $34,130 to $30,395. Notwithstanding this minor adjustment of the damages award, the plaintiff has been substantially successful on this appeal. Accordingly, the plaintiff should have his costs.

"The Honourable Mr. Justice Groberman"

I agree:

"The Honourable Chief Justice Finch"

I agree:

"The Honourable Madam Justice Kirkpatrick"