Date: 19980205
Docket: B940311
Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

DOROTHY CUMMING

PLAINTIFF

AND:

BARRY WHITE, DECEASED

DEFENDANT

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE COWAN

Counsel for the Plaintiff: F.G. Potts

Counsel for the Defendant: M.P. Ragona, Q.C. and D.L. Devlin

Place and Date of Hearing: Vancouver, B.C. January 5-8, 1998

[1] The plaintiff sues to recover damages for injuries she sustained in a motor vehicle accident which occurred on January 23, 1992. The defendant White died on June 16, 1992. He is represented in these proceedings by counsel pursuant to the provisions of the Insurance (Motor Vehicle) Act.

[2] Liability is admitted.

[3] The accident occurred at the intersection of Granville and Nanton Streets in the City of Vancouver. The plaintiff was driving a 1990 Dodge Caravan Minivan. She was proceeding northbound on Granville Street and had stopped at the intersection in the centre lane preparatory to making a left turn onto Nanton Street. While stopped her vehicle was struck in the rear by a Black Top Taxi which in turn had been struck by a vehicle driven by the defendant White, deceased, causing the taxi to be propelled into the rear of the plaintiff's vehicle. The impact caused the plaintiff's vehicle to be moved forward about one-half a car length. The plaintiff was wearing a shoulder and lap seat belt, but her head was propelled forward by the impact and then backwards causing her to strike the rear of her head on the headrest of her seat with some force. The damage to her vehicle was minimal.

[4] Following the accident the plaintiff parked her vehicle in the northbound curb lane on Nanton Street. She then took one of the children who was in the van to the child's home a short distance way. She returned to the scene with the child's father. By her return an ambulance was on the scene. She was questioned by the ambulance attendants as to her condition. Their report indicates that she complained to them of "mid-lower back pain". Their examination disclosed, among other things, pain in the cervical area and pain on palpation to the lower thoracic area.

[5] The ambulance attendants applied a splint, immobilized her neck and placed her on a backboard. She was transported by them to Shaughnessy (University) Hospital. She was seen there by an emergency room physician who examined her and decided she could be discharged. He gave her Tylenol and recommended that she should see her family physician. The notes of the emergency room nurse disclose that the plaintiff's complaints at that time were that she noticed numbness and tingling down her arms and in her left leg and mid-thoracic area and weakness in her arms.

[6] The plaintiff did not see her family physician as recommended by the emergency room physician but rather attended Dr. Viken, a chiropractor whom she had seen on previous occasions starting in July 1991 until September 1991 with respect to injuries she sustained in a skiing accident. His records indicate that her complaints at that time were similar to those of which she complained following the motor vehicle accident.

[7] She did attend her family physician, Dr. Porten, on February 12, 1992 who recorded complaints of spasm in the neck, shoulder and thoracic spine. No leg problems were noted until a visit to Dr. Porten on March 27, 1992. The plaintiff continued to see Dr. Viken until August 21, 1992 when he retired. He testified that her condition was improving at that time.

[8] The plaintiff made sporadic visits to Dr. Porten in 1993, 1994 and 1995.

[9] The plaintiff also had massage therapy treatments on a fairly regular basis from February 1994 to July 1997. It was the opinion of her massage therapist dated November 1, 1997 that the plaintiff had made overall improvement and would continue to make gradual improvement "with less severe pain during the times of symptom aggravation".

[10] In January 1994 at the plaintiff's insistence Dr. Porten referred her to the Sports Medicine Clinic at the University of British Columbia where she was treated by Dr. D.C. McKenzie. Dr. McKenzie's practice is limited to musculoskeletal problems and specific injuries and illness related to exercise.

[11] He continued to see the plaintiff through March 1996. He prescribed a regimen of exercises, massage therapy and anti-inflammatory medications. It was his diagnosis that the plaintiff was suffering from fibromyalgia. He was of the opinion that the plaintiff would be left with a chronic pain syndrome.

[12] At the behest of the defendant, the plaintiff was also seen by Dr. George E. Price, a specialist in rheumatology. In addition to his examination of the plaintiff he also reviewed the several medical records and reports of the various health professionals who had examined and treated the plaintiff, including that of Dr. McKenzie.

[13] He saw the plaintiff on April 22, 1996. In his report dated May 2, 1996 he concluded that contrary to Dr. McKenzie's view the plaintiff "did not have fibromyalgia syndrome". He concluded from his physical findings that they "supported the diagnosis of myofascial pain syndrome".

[14] He also stated that:
... In the last two years she progressed considerably both symptomatically and functionally, so that she was now able to do many things that she could not do in the first two years after the accident, and her pains have diminished on average approximately 40%.

[15] He went on in his report to state:
... In addition, in my view, she needs specific treatment aimed at the myofascial pain syndrome, with trigger point therapy which could take the form of so-called "stretch and spray", or injection of local anaesthetic to trigger points followed by appropriate stretching exercises. This is best carried on by a physiotherapist who is knowledgeable in these techniques. Given application of these modalities of

treatment, and barring re-injury, I expect she will continue to improve and return to her pre-accident status, but predictions as to timing of her full recovery are not possible because of the many variables that are operative in the genesis and maintenance of chronic pain of this sort. Given her rate of improvement however it would be reasonable to assume she will be back to her usual self within a year.

I would be pleased to discuss with you any parts of this examination which need clarification. In addition it might be helpful to share the report with her treating physicians.

[16] Dr. McKenzie, in a second report prepared by him on October 31, 1997 after he had read and considered Dr. Price's report, agreed with Dr. Price that the plaintiff did not have fibromyalgia syndrome and that contrary to his earlier opinion concurred that the correct diagnosis was of a myofascial pain syndrome. He concluded, however, that the plaintiff's "prognosis is guarded".

[17] In his evidence at trial Dr. Price was asked why there would have been no improvement in the plaintiff's ongoing symptoms. He stated that the reason was that there has been a wrong diagnosis of fibromyalgia and as a result the plaintiff was not properly treated.

[18] Surprisingly and inexplainably the plaintiff who received a copy of Dr. Price's report did not read it until just before the trial. As a consequence she did not follow up on his recommendation that the report be shared with her treating physicians and the recommended treatment was therefore not embarked upon. I find Dr. Price's evidence persuasive and to constitute an acceptable and rational evaluation of the plaintiff's situation.

[19] The plaintiff at trial testified that she continues to suffer intermittent bouts of pain and discomfort. Prior to the accident the plaintiff was actively engaged in sports activities, gardening, cycling and swimming. She was also active in church affairs. Her participation in those activities has been restricted to some degree as a result of the injuries she sustained in the accident as well as some injuries she suffered following the accident while employed as a nurse.

[20] With respect to that employment, the evidence discloses that the plaintiff in May 1992 and again in January 1994 passed physical examinations which were prerequisites to the employment she obtained in nursing on those occasions.

[21] The evidence also discloses, and I find as a fact, that the plaintiff was less than pro-active in seeking and continuing with appropriate and recommended treatment programs. Had she done so the evidence is clear in my opinion that her condition would have materially improved with, if not complete recovery, certainly recovery to a far greater degree than that which her evidence as to her present condition would indicate.

[22] With respect to the quantum of non-pecuniary damages to be awarded, I have reviewed the several cases cited by counsel as well as various of the other authorities cited therein. I have concluded that an appropriate award of non-pecuniary damages in this case is the sum of $45,000.

[23] The plaintiff also seeks damages for past and future wage loss.

PAST WAGE LOSS

[24] The plaintiff is married and has three children.

[25] The plaintiff, who is now 43 years old, graduated in nursing from the B.C. Institute of Technology in August 1974. She began employment in December of that year in the maternity ward at Grace Hospital in Vancouver. She continued to be employed in various nursing jobs at Grace Hospital and Vancouver General Hospital.

[26] She also obtained a Bachelor of Science degree in Nursing at the University of British Columbia. She rose to the position of head nurse of a post-partem ward at Vancouver General Hospital in December 1979 and in 1981 recommenced employment at Grace Hospital as coordinator of post-partem nursing. In December 1983 she resigned from that position when she gave birth to her first child. She subsequently had two other children.

[27] She remained out of her profession, devoting herself to her family, until September 1991 when she entered into a nurse refresher course through the Open Learning Agency, it having always been her intention to return to nursing particularly in the maternity area.

[28] She was reinstated as a Registered Nurse and obtained employment at Grace Hospital as a pre-natal instructor in March 1992 which involved working four hours a week.

[29] In May 1992 she was successful in passing the prerequisite health assessment and began employment at Grace Hospital in the ante-partem area. She worked on a casual basis in that area which involved one to two 12-hour shifts per week. It was her choice to seek this type of part-time employment.

[30] She resigned her nursing position at Grace Hospital in July 1992 and resigned her employment as a pre-natal instructor in September 1993 because she intended to go to England where her husband, a lawyer, proposed to further his legal education. The family remained in England until September 1994.

[31] While in England the plaintiff tried to find employment in the nursing field but was unable to qualify there.

[32] In January 1994 the plaintiff resumed her employment at Grace Hospital as a pre-natal educator, again passing a health assessment for that position. In March 1994 she applied for and was offered and accepted a teaching position in the Vancouver Health Department's Prenatal and Parenthood Education Program. This again was a casual position in which she had to be available for home care two days per week and one weekend in four or two days a week and twenty-four evening shifts a year.

[33] In August 1995 she made application to the Vancouver Health Department for two positions which were open in the Community Health Care field. She was not offered either of those positions.

[34] In December 1995 she decided to reduce her work hours with the Vancouver Health Department to enable her to complete course prerequisites prior to entering into a program at U.B.C. leading to a Master of Science in Nursing Degree (M.S.N.), a course which she subsequently enrolled in in January 1996. She is continuing in that degree program with reduced course loads due to her other outside activities.

[35] In April 1997 she obtained an appointment as a casual Registered Nurse in Prenatal Education with the B.C. Women's Hospital and Health Centre Society. Her ultimate goal is to obtain employment in community health care in a clinical capacity. She stated that she was of the view that her hours of employment in that field would be greater if she were to obtain her M.S.N. degree.

[36] It is contended by the plaintiff that she has lost income since the accident because certain areas of employment in the nursing field were not open to her, particularly in the labour/delivery area of maternity nursing due to the injuries she sustained in the accident, and as well, had it not been for the problems she was having arising from the accident she would have been able to obtain employment on a part-time rather than a casual basis.

[37] In my opinion the evidence does not support that position.

[38] I am satisfied on the evidence and find as a fact that the plaintiff sought casual employment positions as she did as such employment fit well with her family obligations, including the needs of her three young children as well as her other church and social activities. It has not been established by the evidence that her not seeking more than casual employment was

causally connected to the motor vehicle accident.

FUTURE INCOME LOSS

[39] The plaintiff also contends in respect to this head of damages that she will be precluded from earning the income she would otherwise have earned because of her continuing pain problems. As well it is contended it was necessary for her to pursue her M.S.N. degree also as a consequence of her injuries.

[40] I am unable to agree that it is the case that her inability to obtain the employment she wished and the need for a further degree can be said to be causally connected to the accident. Rather, I find that there were and are a number of other factors which affected and will affect her future employment prospects. The evidence of the plaintiff's witnesses: Ms. Brissenden, Ms. Hynamaka and Ms. Dahya make it clear in my opinion that factors such as seniority (which the plaintiff lacked), the large number of nurses seeking employment brought about by the closure of Shaughnessy Hospital and the "accord" reached in regard to them whereby they were given priority in employment and the government instituted programs emphasizing community care as opposed to hospital care, were all matters which had and will have an impact on the plaintiff's employment prospects.

[41] As to the decision the plaintiff made to obtain an M.S.N. degree, I am satisfied that this is a decision which she would have made in any event because of the factors affecting employment prospects and cannot be said to be a decision necessitated by any physical problems suffered by the plaintiff as a result of the accident. I would make no award for future income loss.

LOST EARNING CAPACITY

[42] It is submitted on behalf of the plaintiff that as a result of her injuries she will be restricted in her future employment opportunities in the nursing field. She, it is alleged, will not be able to work full time and that areas of nursing which involve the lifting of patients or equipment will be foreclosed to her. So that overall her earning capacity in the future will be reduced.

[43] I agree that that is the case, but only to a limited degree. The several factors earlier mentioned, seniority, etc., presently and in the future will have more of a limiting factor on the plaintiff's employment opportunities than restrictions imposed on her by her physical limitations. She is, however, entitled to some compensation for the limited loss of earning capacity she will suffer due to her injuries. Given the plaintiff's reasonable prospects of full recovery if she follows the appropriate treatment regimen as testified to by Dr. Price whose evidence I accept in that regard, I consider that a fair and reasonable award under this head of damages is the sum of $30,000.

COST OF FUTURE CARE

[44] If the plaintiff follows the treatment program prescribed by Dr. Price she will undertake what he termed the "stretch and spray" trigger point therapy through a knowledgeable physiotherapist. No evidence was presented by the plaintiff as to the cost of that or other care which the plaintiff may require or undertake in the future, or whether such costs would be covered under the Medical Services Plan. Absent such evidence it is not appropriate in my view to make any award under this head of damages.

SPECIAL DAMAGES

[45] Counsel stated that claims in this regard could be settled by them.

[46] The plaintiff is entitled to costs on Scale 3 unless circumstances dictate otherwise.

"J.C. Cowan, J."
THE HONOURABLE MR. JUSTICE COWAN