CANADIAN BAR ASSOCIATION: PERSONAL INJURY

CASE COMMENT AND UPDATES

JUNE 2013 – JUNE 2014

Fractured Sternum, TMJ, Knee Injury, Back and Neck Pain, Depression, and Quantum of Damages for Income Loss

Minhas v. Hayden, 2013 ABCA 305, 5 C.C.L.T. (4th) 120

Appeal by defendant tortfeasors on the issue of quantum of damages for income loss

The Respondent Minhas, then 50 years old, was injured in a motor vehicle accident when a car driven by the Appellant Hayden crossed the centre median and collided with his vehicle. The Appellant conceded liability and the trial only concerned the quantum of damages. The Respondent suffered a fractured sternum, a TMJ injury, injury to his right knee, and the aggravation of back and neck pain from a previous accident. He also suffered emotional and psychological injury in the form of depression and fear of driving. As a result of his injuries, the Respondent had to leave his job and at the trial nine years later he was still off work. The only issue on appeal was the trial judge's calculation of the Respondent's past and future earning loss; $218,012.13 ($327,166 including pre-judgment interest) was awarded to compensate for past loss of income and $172,363 was awarded with respect to future lost income. The Appellants argued that the trial judge erred in his method of calculating the past and future loss of income because he failed to properly consider his finding that the Respondent had physically recovered from his injuries, and had failed to mitigate his loss of income, although the trial judge did reduce the ultimate award by 15% to account for the failure to mitigate. The trial judge made specific findings about when the Respondent should have recovered from his injuries, but found that the Respondent had an eggshell personality and continued to suffer from depression and anxiety, which conditions were exacerbated by the accident. The trial judge accepted that the Respondent's lost position was his dream job and concluded that, were it not

for the accident, he would have continued to work there until his retirement, projected at age 65. The trial judge dealt with the possibility that the Respondent's disabilities would have rendered him incapable of continuing his job by reducing by 10% the pre-trial and post-judgment loss of income award; he dealt with the possibility of the Respondent losing his job for other reasons by a further reduction of 25%; and he reduced both the pre- and post-judgment loss of income capacity award by a further 15% to reflect the failure to mitigate.

The applicable standard of review was that an award of damages should only be interfered with if a trial judge applied a wrong principle of law, or if the overall amount awarded is patently unreasonable and a wholly erroneous estimate. The Court of Appeal found that there was no specific evidence about when the Respondent could return to work, notwithstanding his psychological injuries. The trial judge would have been in the best position to make such a finding of fact, and although the reduction of only 15% for failure to mitigate was low, given the standard of review, the Court of Appeal declined to interfere with the finding. They held that while there may have been a different reasonable way to allow for the plaintiff's loss and to calculate damages, an assessment for loss of income capacity is an area where more than one method of remedying the loss could be proper. The appeal was dismissed. [*ad hoc* Court of Appeal]

Value of Loss of Support and Household Services

Pulwicki v. Primmum Insurance Co., 2013 ABQB 744, [2014] I.L.R. I-5544

Value of loss of support and household services provided by deceased mother

The Defendant issued a standard policy of automobile insurance that included an SEF 44 Family Protection Endorsement. In 2009 a man named Rae was operating a stolen vehicle when he went through a red light at an intersection and drove into the driver's side of the plaintiff's vehicle. The occupants of the vehicle were two parents and their son; the mother was killed, and the father and son suffered personal injuries. The plaintiffs sued Rae, who failed to defend, so the Motor Vehicle Accident Claims Fund

took up the action. The Claims Fund paid the maximum allowed under its legislation of $200,000 plus costs. The father's damages were valued at $15,000, the son's at $17,500, and special damages in the amount of $13,818.27. Bereavement amounts under the *Fatal Accidents Act* were also paid; the total of agreed damages was $255,818.27. Since the Motor Vehicle Accident Claims Fund paid the maximum of $200,000, the amount of $55,818.27 was left payable by the defendant pursuant to the SEF 44 Endorsement. The parties had not agreed upon the value of the loss of support to the plaintiff family arising from her death, nor on the value of the loss of household services.

At the time of the accident, the father was retired and had ongoing income of $9,902.00 per annum; the mother was employed as a systems analyst with the Calgary Regional Health Authority at the time of her death. The parties had been married for more than 25 years and had two daughters in addition to their son. The mother was 58 years of age at the time of the accident; her family doctor testified she was essentially healthy at the time of her death with an average life expectancy. The father was disabled from a back injury, but otherwise essentially healthy with an average life expectancy.

The court held that the father's receipt of the mother's RRSP's did not warrant any deductions, and the mother's income should be grossed up for non-wage pension benefits. In addition, contingencies for non-voluntary unemployment, death, divorce, and remarriage should be applied to the calculation and a cross-dependency method of calculating the loss should be applied.

Each side had an economist assess the loss of income dependency. The court found that the mother had been providing services to the family of 3 hours per day, and would have continued to do so until she retired; 25% of these services were for her sole benefit, and were not to be considered to be the family's loss. The court set the number of hours of service she would have provided after retirement at 4.5 hours per day, with 35% being deducted as for her sole benefit. The court permitted the cost estimate of $16.00 per hour for such labour. The rate of dependency was to be set at 72% for the father, and 4% for each surviving child. The parties were directed to have

their expert economists perform calculations based on the court's findings, and arrive at an amount under the SEF 44 Endorsement. [R.J. Hall J]

Wrongful Death, Rights of Partner to Recover Economic Loss

Dotto Estate v. Thickson, 2013 ABQB 348, 23 C.C.L.I. (5th) 305

Application by motor vehicle liability insurer for summary dismissal of wrongful death application; Cross-application for determination of point of law

The insurer AMA made an application to strike a wrongful death action. The deceased was drunk and got into an altercation with the occupants of another vehicle. The exchange escalated and the 15-year old driver of the other car struck the deceased with his car, killing him. The deceased's partner, estate, and family members started the action. AMA denied liability and applied to strike the partner's claim. The deceased and his partner had lived together for just over 16 months when he was killed and she sued as the common law spouse of the deceased; she also claimed a derivative right to loss of valuable services and financial support through the deceased's estate. AMA's argument was that you cannot be liable to someone for killing his or her boyfriend or girlfriend, and therefore the partner had no claim through the estate.

The court found that the law in this area was unsatisfactory; the rule comes from a case over 200 years old, ***Baker v. Bolton*** (1808), 1 Camp. 493 (Eng. Nisi Prius); 10 RR 734: "In a civil court the death of a human being could not be complained of as an injury." This rule has never been successfully challenged; the main exceptions are statutory. The court found that the rule is out of step with developments in the law of negligence: "In terms of ordinary negligence, policy would seem to *favour* a duty rather than negativing one" (at para. 18). However, none of the possible common law avenues of recovery were of help to the partner, because they all ran up against the rule from ***Baker v. Bolton***. The problem with the partner's estate claim was that it could not be recoverable indirectly through the estate, but would have to be claimed directly, in her own right. The relationship between the parties was spouse-like, but did not meet the minimum timeline set out in the statute. The *Fatal Accidents Act*

confers a cause of action on children, parents, spouses and adult interdependent partners of deceased persons; the partner did not qualify under the Act. The court concluded that there were triable questions of law at play in the case, and dismissed the application for summary dismissal. The court also ruled against the partner on the question of law. [W.S. Schlosser, Master]

Lumbar Back Pain, General Damages, Loss of Income Including Loss of Pension, Loss of Housekeeping, Special Damages

Sorochan v. Bouchier, 2014 ABQB 37

Action for damages resulting from motor vehicle accident

The plaintiff was a 56-year old retired teacher in 2005 when she was stopped at a red light. A large flatbed delivery truck rear-ended her vehicle, pushing her into the intersection. The plaintiff had been wearing her seatbelt, and the vehicle sustained significant damage. She did not experience any pain immediately after the accident and did not seek medical attention that day, but went to a clinic after. The plaintiff experienced sharp, constant painful headaches after the accident, which have since ceased; she developed neck pain the day following the accident that now only very occasionally recurs. She had sharp shoulder pain and pain at the top of her spine for which she went to physiotherapy, which dissipated the pain. The plaintiff's main complaint was for lumbar back pain, for which she went to physiotherapy 40 times. The lumbar pain has been ongoing since the accident and she now has radiating pain down her legs. The plaintiff attempted to return to her job as a teacher but experienced enough pain that she had to stop and a CT scan revealed that she had bulging lumbar discs. She was forced to retire from her teaching career early. The plaintiff had to hire a housekeeper to assist her as a result of her constant back pain. The plaintiff's physician described her general health as being very good prior to the accident but that since then, her condition has deteriorated. However, another medical expert testified that her back pain was due to muscle spasm and degenerative disc disease common to women of her age group. An expert testified that the plaintiff suffered from functional impairment and did not possess adequate functional abilities/ tolerances to meet the physical demands of being an elementary school teacher. The

expert assumed a loss of 5.8 hours of housekeeping capacity per week until age 75, reducing 20% to age 80 when the claim would terminate. However, the defendant's expert showed a chart prepared based on the plaintiff's self-reporting that showed she only had slight restrictions on her abilities.

The court found that the plaintiff had proven on a balance of probabilities that the defendant had caused injury to her which resulted in a 10.5% permanent partial disability as a result. The plaintiff was awarded general damages of $75,000. The court found that her decision to retire was voluntary and that she had failed to prove that she would have retired later had the accident not occurred; her claim for loss of income was dismissed, as was her claim for loss of pension income. The plaintiff did not apply for any further long-term disability benefits, although they were available to her: this was impossible to reconcile with her claim that she intended to work until age 65. In addition, the plaintiff had made statements to insurance adjusters and doctors, and had failed to request an accommodation from her employer. The plaintiff was awarded $10,000 for future housekeeping assistance, discounted using a rate of 3.5% for present value. The assessment of loss of household services claim was complicated by the fact that the plaintiff had an overall partial disability of 21%, but only 10.5% was attributable to the accident. The plaintiff had paid $8,546 for housekeeping assistance up to the date of the trial, but 25% was deducted from this given the disability factor unrelated to the accident. She was awarded loss of housekeeping to the date of the trial in the amount of $6,400, and was also awarded special damages of $2,000. [R. Paul Belzil J]

Brain Injury, Fatigue, Hip Pain and Hip Replacement, Depression, Seizures, TMJ, Loss of Consortium, General and Special Damages

Sutherland v. Encana Corp., 2014 ABQB 182, 2014 CarswellAlta 511

Action for damages following motor vehicle accident

The plaintiffs Teresa and Tom Sutherland claimed damages following a motor vehicle collision in which the defendants admitted liability. Teresa was rear ended by the defendant's vehicle, which had been travelling at approximately 100 km/h. She was

taken to the hospital by ambulance but discharged that day. After the accident Tom described Teresa as having twitching episodes and periods of disorientation, incidences that had not happened before. Prior to the collision Teresa had been an administrator with AISH; she returned to work after the accident on a part-time basis. Upon finding difficulties with her return to work, Teresa visited a neuropsychologist who diagnosed her with a brain injury and told her she was unemployable. She was forced to quit her job at AISH but continued to work in other, more menial jobs. Teresa was diagnosed with depression, post-concussion syndrome, and post-traumatic stress disorder; her episodes were diagnosed as seizures. In terms of housekeeping duties, Teresa complained of being distracted and having difficulty lifting heavy items. Various physicians expressed differing opinions as to the extent of her injuries, in particular as to the severity of any neck injury or pre-existing hip conditions. However, Teresa did undergo full replacement of both hips. The plaintiff's neurological condition was also debated.

The court found that, based on the evidence, Teresa suffered from a pre-existing cognitive impairment that was exacerbated by the accident and complicated by injuries and pain including the post-concussion symptoms, depression, and seizures. All of these injuries were caused by the collision. The accident caused her to sustain a mild traumatic brain injury that, on its own, would have resolved within 12-24 months. However, it was problematic that the plaintiff had sustained a diagnosis of post-traumatic seizures, but treatment did not begin until almost four years after the collision: this contributed to uncertainty around the frequency of the seizures and the significance of their impact on her functioning. There was no dispute to the finding of post-traumatic epilepsy, but the experts disagreed on the frequency of the actual seizures.

The court found that until mid-2009 Teresa was adversely affected by collision-related pain. They concluded that the evidence failed to support a diagnosis of PTSD as such. The plaintiff was seeking general damages for pain and suffering of $195,000, based on the collision being the cause of her hip and knee pain (which the court rejected) and a more serious brain injury than was ultimately concluded; the court assessed general damages in the amount of $135,000. The plaintiff was to be compensated for past loss of income and loss of opportunity, and was awarded loss of

competitive advantage in the amount of $40,000. Past and future loss of housekeeping capacity was awarded at $25,000 and future cost of care at $17,500. Loss of consortium was assessed at $7,500. [Peter Michalyshyn J]

Driver Liability; Dominant and Servient Drivers

Guan v. Unrah, 2013 ABQB 397

Action to determine liability

The plaintiff was a passenger in a transit bus owned by the City of Calgary, and operated by the defendant Unrah. The bus had stopped at a bus stop and was pulling into a dedicated turnout lane abutting the sidewalk. As the bus started to leave the bus stop, the defendant applied the brakes to avoid a collision with a van. There was no collision but the plaintiff was propelled forward and was injured. The van was driven by the defendant Thai and owned by the defendant Hungkee Holdings Co. Ltd. The van was oblivious to what had happened and left the scene. The bus was forty feet long and equipped with rear view mirrors, a driver's side mirror, and video recording device. Unrah had only been driving a bus for approximately three months at the time of the accident. The van driven by Thai was approximately 7 feet tall, and he was unaware of what happened on the bus; the court concluded there was no evidence to suggest the van had been speeding, although it did mount the sidewalk to get around the bus.

The question of damages had been settled between the parties and the issue before the court was which driver was at fault, the driver of the bus or the van. Both the plaintiff and defendant agreed that drivers' respective duties to respond to specific situations depends on their characterization as "dominant" or "servient" drivers; right of way gives a driver dominant status. The evidence established that Thai was in the curb lane when Unrah decided to enter it and Thai was in the curb lane when Unrah first noticed him. The court concluded that Thai had the right of way, given that the evidence established that Unrah was moving into the curb lane; this made Thai the dominant driver and Unrah the servient driver. This being the case, the evidence did not establish that Thai was at fault. The court concluded that the accident occurred

because Unrah placed the bus in motion when it was unsafe to do so; this put her solely at fault for the accident and the damages arising therefrom. The City of Calgary had sole vicarious liability. [C.M. Jones J]

Slip and Fall; Wrist and Shoulder Injury Requiring Arthroscopic Surgery

Swagar v. Loblaws Inc., 2014 ABQB 58

Action for damages in negligence under Occupiers' Liability Act

The plaintiff slipped on a broken egg on the floor of the defendants' store, causing injury to his right shoulder and wrist. The plaintiff sued for negligence under the Alberta *Occupiers' Liability Act*. At issue before the court was whether the defendants were liable for the plaintiff's injuries by breaching the duty of care they owed him, and if so, what was the extent of these injuries and appropriate compensation. At the time of the accident, the plaintiff was 57 years of age; he was a self-employed consultant selling seismic data to oil and gas companies. He was an avid gardener, occasional golfer, and led a moderately active lifestyle. In 2005 the plaintiff had pain in his left shoulder from sleeping in a bad position, and went to a chiropractor for successful treatment. He later attended at a doctor for pain in his right shoulder from sleeping in a bad position. This pain was also resolved with treatment.
Immediately after the fall, the plaintiff requested an employee to get the manager, and as he was waiting he noticed an egg carton partially opened with one egg missing on top of a garbage can a couple of aisles away. The manager helped the plaintiff finish his shopping and carried his groceries to his car; the plaintiff drove himself home using his left hand. He did not go to a doctor that night. However the next morning the plaintiff went to a walk-in clinic and was prescribed physiotherapy. An ultrasound revealed "almost a full thickness tear that involves the distal supraspinatus tendon." Further examinations revealed limited range of motion in the shoulder; the plaintiff later received arthroscopic surgery on the shoulder that identified a partial thickness rotator cuff tear.

The court stated that the *Occupiers' Liability Act* places the evidentiary burden on the occupier to demonstrate that it applied a reasonable degree of care, required by the

foreseeable risk, sufficient to keep visitors reasonably safe. To meet the burden, the occupier must establish that it had implemented a reasonable system to keep its premises reasonably safe from foreseeable harm, and that it actually adhered to or followed the system. If the occupier fails to establish this, and a hazard develops that harms a visitor, the occupier will be held liable for the harm occasioned. The standard of care to meet is that of reasonableness, not perfection. In this case, the defendants had a sweep log that showed some inconsistencies; the surveillance footage of the relevant time was missing. The manager did not comply with the defendants' established procedures to follow after an incident, and failed to obtain witness statements from two employees. The court concluded that the defendants breached their duty of care to the plaintiff and were negligent in failing to take reasonable steps to maintain the floors in a safe condition for the use of its customers.

Special damages were awarded in the amount of $2,571.74. The court found that the accident caused the plaintiff's partial tear to his right shoulder rotator cuff. General damages, including past loss of housekeeping capacity, were awarded in the amount of $45,000. No award was made for loss of future care or future loss of housekeeping capacity. [G.A. Campbell J]

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