CANADIAN BAR ASSOCIATION: PERSONAL INJURY

CASE COMMENT AND UPDATES

JUNE 2015 – JUNE 2016

Lumbar Back Pain, General Damages, Loss of Housekeeping and Pension; Pre-Existing Condition

Sorochan v Bouchier, 2015 ABCA 212, [2015] AJ No 689

Appeal by plaintiff from personal injury damages award resulting from motor vehicle accident

The appellant plaintiff, a 57-year old teacher, was injured when her car was struck from behind by a large flatbed delivery truck. The appellant sued in negligence and sought pecuniary damages for medical expenses, loss of income and housekeeping services, as well as non-pecuniary damages for pain and suffering in the amount of $125,000. Negligence was admitted. Quantum and certain other items in the appellant's claim were disputed at trial.

The trial judge found that the plaintiff suffered a 21% permanent partial disability following the accident, and that she had a pre-existing condition (degenerative stenosis or narrowing of the lumbar spine) that could lead to back problems. The judge determined that that the accident was a "triggering event such that the Plaintiff's previous asymptomatic condition became symptomatic". He concluded that while the defendant had caused the plaintiff to be permanently partially disabled, half of the plaintiff's disability was attributable to the accident; the other half to her pre-existing condition.

The Court of Appeal determined that the judge had made an error in this regard. Referring to ***Athey v Leonati***, [1996] 3 SCR 458, 140 DLR (4th) 235, the Court found that the presence of non-tortious contributing causes of the plaintiff's injuries (i.e., her

pre-existing condition) did not reduce the extent of the defendant's liability. The defendant's liability was for any injuries caused or contributed to by the negligence. The Court did not modify the judge's award of $75,000 despite its findings with respect to causation; rather, it referenced the judicially-mandated cap which limits awards for non-pecuniary damages, as enunciated in ***Andrews v Grand & Toy Alberta Ltd***, [1978] 2 SCR 229, 83 DLR (3d) 452, to support the reasonableness of that award. However, the Court increased the housekeeping award, which had been reduced because of the finding by the judge regarding causation.

The Court of Appeal also concluded that the judge had made a palpable and over-riding error in in deciding that there was an insufficient evidentiary base at trial to award the plaintiff compensation for her loss of future income. The Court proceeded to calculate loss of future income in the amount of $50,820, plus $15,000 for loss of pension benefits during that period. [Memorandum of Judgment from the Court]

Contributory Negligence; Apportionment of Liability; *Traffic Safety Act*; Negligence; Apportionment of Liability

Bradford v Snyder, 2016 ABCA 94, [2016] AJ No 331

Appeal by defendant driver from decision that she had failed to take reasonable care to avoid collision

This case involved a collision between a Volkswagen van and a cyclist. The cyclist had been traveling northbound, when she slowed, but did not stop in approaching a stop sign at an intersection. The van had been traveling westbound through a playground zone at approximately 30-35 km/hr. Neither the cyclist nor the driver of the van saw each other before the collision. The cyclist sustained injuries and sued the driver. The only issue at trial was the extent, if any, of the driver's liability.

The trial judge held that Section 186 of the ***Traffic Safety Act***, RSA 2000, c T-6 (***TSA***) applied, which imposed a reverse onus on the defendant driver to prove that she was not negligent. The judge found that the driver had not discharged that onus,

since she had taken her eyes off the road before entering the intersection of the playground zone. The judge also found the cyclist contributorily negligent because she had failed to stop at the stop sign. The judge apportioned liability 2/3 to the cyclist and 1/3 to the driver of the van. The decision was appealed by the driver.

The Court of Appeal found that the judge did not err in holding that Section 186 of the ***TSA*** applied in this case to impose an onus on the driver to prove that the accident was not caused entirely or solely by her negligence. The Court noted that, had the driver acted lawfully and without negligence, the appellant would have fully discharged the reverse onus imposed by the ***TSA***.

The Court referred to ***Heller v Martens***, 2002 ABCA 122 to explain that apportionment of liability is to be determined using the *comparative blameworthiness approach*. This approach is based on the degree to which each party departs from the standard of care, *not* the extent to which each party's conduct caused the damage. The Court determined that the trial judge was correct in applying the ***Contributory Negligence Act***, RSA 2000, c C-27 and the *comparative blameworthiness* approach to the issue of apportionment in this case. The appeal was dismissed. [Memorandum of Judgment from the Court]

Application to Strike; Action against Crown; Statutory Immunity; Occupiers' Liability, Negligence; Duty of Care

Butler (Litigation Representative of) v Ma-Me-O Beach (Summer Village), 2015 ABQB 364, 22 Alta LR (6th) 45

Application by the Crown to strike plaintiff's claims in a Statement of Claim

The Province of Alberta (**Province**) applied to strike all of the plaintiff's claims made against it in the Statement of Claim. The Plaintiff had been seriously injured when he jumped off the Ma-Me-O Beach pier, and alleged that the Province was negligent in failing to control the water levels and plant growth in the area where the Plaintiff

dove, and in allowing or causing rocks to be placed at the bottom of the Lake around the pier.

The Province argued: (1) the statutory regime did not create a duty of care on the part of the Province to maintain the Lake in the manner alleged; (2) the statutory immunity provisions contained in both the ***Environmental Protection and Enhancement Act*** RSA 2000, c E-12 (***EPEA***) and the ***Water Act***, RSA 2000, c.W-3 (***WA***) shielded the Province from any liability in the nature alleged by the Plaintiff; and (3) if a duty of care did, in fact, arise, there were policy reasons why the claim should not be allowed to proceed.

With respect to the Province's first argument, Lee J determined there was no established category of tort relating to lake level and plant growth in natural bodies of water. Further, a natural body of water did not fit within the definition of *premises* as defined in the ***Occupiers' Liability Act***, RSA 2000, c. O-4. Finally, the Court determined the plaintiff had no reasonable prospect of success as there was insufficient proximity and foreseeability to establish a private law duty of care against the Province in the circumstances. For the second argument, the Court found that the ***EPEA*** and ***WA*** contained strong immunity clauses that were designed to exclude private duties of care. As for the third, Lee J determined that a private law duty of care towards every individual who may choose to jump or dive into any natural body of water situated within the province could create indeterminate liability against the Province. Lee J added that the law does not impose an absolute liability on occupiers to insure a visitor's safety, and it does not absolve a visitor from having to take reasonable care of themselves.

The Court struck the paragraphs of the Statement of Claim alleging negligence as against the Province. Lee J allowed paragraphs relating to allegations concerning the Province taking active steps regarding the Lake pier area (as opposed to simply being an owner of a naturally occurring body of water that it controlled) to remain. In particular, allegations concerning the Province's allowing or causing rocks to be placed at the bottom of the Lake around the pier head were allowed. [D. Lee J]

Summary Dismissal; Duty and Standard of Care; Negligence; Social Host; Liability; Occupiers' Liability

Robinson v Lewis, 2015 ABQB 385, [2015] AJ No 860

Action for injuries sustained from an assault at a house party

This was a summary judgment application seeking dismissal of the plaintiff's action as against the applicant. The applicant was a defendant, who was the host of a party at which the plaintiff was assaulted by another guest. The plaintiff was injured when the guest assaulted him by punching him in the head. The plaintiff sustained injuries, and the plaintiff's action as against that defendant was not resolved at time of this application.

The applicant swore evidence to the effect that he served no alcohol at the party, and that the only person at the party who appeared to be intoxicated was the plaintiff. He also swore that he was not led to believe that the assaulting defendant was going to assault the plaintiff. In granting the summary dismissal, the Court dealt with each of the plaintiff's causes of action. Regarding negligence, the Court determined that the assault, being spontaneous between one guest and another, was not reasonably foreseeable. If the Court was wrong on that point, Yungwirth J could see no evidentiary basis to support a breach of the applicant's standard of care. For instance, there was no evidence to suggest the applicant had allowed excessive consumption of alcohol, or that he failed to monitor or control the behaviour of his guests.

The Occupiers' Liability claim failed because the duty imposed by the statute comes to an end if "the risk on the premises or the conduct of the visitor becomes reasonably unforeseeable". The actions of the assaulting defendant were not, on the evidence, reasonably foreseeable to the applicant.

Yungwirth J considered ***Childs v Desormeaux***, 2006 SCC 18, [2006] 1 SCR 643 in assessing the plaintiff's social host liability claim. The Court rejected that claim too, given that there was no basis to conclude that a reasonable person would have anticipated the assaulting defendant would have punched the plaintiff. The Court

noted that even if social host liability was a distinct cause of action from negligence, the evidence adduced did not disclose any issue of merit genuinely requiring a trial. [D.A. Yungwirth J]

Civil Battery; TMJ Injury; Psychological Issues; Provocation; Damages; Summary Trial

Jagodnik v Oudshoorn, 2015 ABQB 456, [2015] AJ No 792

Action for damages resulting from battery

The female plaintiff sued the defendant male for, among other things, damages arising from battery. Liability was not at issue. The defendant had grabbed the plaintiff and had shaken her, after which she grabbed the defendant's shirt and nose to push him away. The defendant then pushed her down and punched her nose. Ross J found that the plaintiff had proven a TJM injury as a result of the battery, as well as temporary shoulder pain. The plaintiff's PTSD was found to be an aggravation of her existing psychological problems.

The plaintiff was awarded $65,000 in general damages. She was also awarded $49,500 for future dental and TMJ care. There was no award for loss of housekeeping, as the plaintiff should have been able to complete those duties as before, given her injuries. The plaintiff was unable to prove loss of income, in that she already lacked an ability to be competitively employed as a result of her pre-existing psychological condition. The Court also dismissed the plaintiff's claim for punitive damages, given that the context of the battery was a mutual altercation; it was not a situation where the defendant was acting maliciously or with premeditation.

While the primary issue was the measure of damages, another was whether the plaintiff had provoked the defendant. Ross J found that the defendant had not met the onus, on a balance of probabilities, to prove that the plaintiff's conduct had caused him to lose his power of self-control. Had the defendant been successful on this issue, it would *not* have provided a defence to the allegations, but rather it should have resulted in a reduction of damages.

Worth noting is that this action was resolved by way of a summary trial. Ross J indicated in this respect that there were not serious causation issues which depended solely on the credibility of the plaintiff and the medical witnesses, which otherwise may have precluded a summary trial or necessitated *viva voce* evidence. During the hearing, however, the Court set over the issue of provocation for an additional hearing by way of *viva voce* evidence, given that the determination of this issue depended almost completely on findings of credibility. [J.M. Ross J]

Occupiers' Liability, Negligence; Duty of Care; Duty to Warn

Dougherty v A Clark Enterprises Ltd, 2015 ABQB 562, [2015] AJ No 967

Action for damages resulting from personal injury at golf course

The plaintiff was injured when she sustained a fall down a riverbank while golfing at a golf club near Rosebud, Alberta. The riverbank was a major feature of the property, and the location where the plaintiff fell had a drop of approximately 18 inches to two feet, followed by a fairly steep taper before reaching the riverbed. The sole issue at the trial was liability.

The Court considered whether the defendants had breached the duty of care owed to the plaintiff under the ***Occupiers' Liability Act***, RSA 2000, c O-4 (***OLA***). Hunt McDonald J first determined that it was reasonably foreseeable that someone could fall and injure themselves at the edge of the riverbank; the defendants, therefore, were under a duty to take reasonable care. However, the Court found that the defendants met the standard of care imposed on them by the ***OLA***, by, among other things, daily visual inspections of the riverbank and identifying the riverbank as a lateral hazard, which they marked with red stakes. Such actions, the Court found, were adequate to determine if any conditions existing on a particular day could be characterized as a foreseeable risk requiring a warning to visitors. The Court noted that the defendants' remedial measures of installing a warning sign after the accident was not to be taken as an admission of negligence.

Hunt McDonald J also held that Section 7 of the ***OLA***, which deals with voluntary assumption of risk, absolved the defendants in the event she was wrong about the defendants' not having breached the standard or care. The Court determined that the plaintiff had willingly accepted the risks associated with her fall and injuries. [S.L. Hunt McDonald J]

Medical Malpractice; Negligence; Duty and Standard of Care; Informed Consent

Cooper v Flood, 2015 ABQB 567, [2015] AJ No 968

Action for medical malpractice

A 68-year old female underwent a Tension Free Vaginal Tape Procedure (**TVT Procedure**) due to urinary incontinence issues. The female sustained injuries during the procedure, including perforation of the bladder and bowel. She sued and, by the time of the trial, the only remaining issues were liability-related; namely, was the standard of care owed to the plaintiff breached, and did the plaintiff provide an informed consent for the procedure.

Nielsen J concluded that the defendants were negligent in the manner they conducted the TVT Procedure on the plaintiff. The Court noted that a physician conducting the procedure would not have breached his or her standard of care when a bowel perforation was the result of an undetectable risk factor, such as an unanticipated anatomical feature. However, such a factor was absent in this case. The right side trocar on two separate occasions diverged from its correct path during the procedure. Both the resident surgeon, who was performing the procedure, and the attending surgeon, who did not detect the error, were found to be negligent.

With respect to informed consent, the Court accepted the testimony of the defendant doctors about their standard practices at the time regarding the giving of informed consent to their patients, including to the plaintiff. Further, the plaintiff had executed

the consent form, which identified that the TVT Procedure and its risks had been explained to the plaintiff by the attending surgeon. The Court also determined that the attending surgeon had explained to the plaintiff that she would be assisted in the surgery by healthcare staff including residents. Nielson J further determined that, if the Court was incorrect regarding informed consent having been given, a reasonable patient with the plaintiff's characteristics would have balanced the risks of the procedure, evaluated the potential involvement of a resident surgeon, and decided to proceed with the TVT Procedure. [K.G. Nielsen J]

Chronic Pain, Low Back Pain, Lumbar Strain, General Damages; Credibility; Costs of Experts

Bumstead v Dufresne, 2015 ABQB 787, [2015] AJ No 1371

Action by plaintiff for damages sustained in motor vehicle accident

A 43-year male plaintiff was involved in a motor vehicle accident in which his vehicle was struck from behind by the defendant. Neither the police nor an ambulance attended the scene of the collision and neither party required emergency medical attention. Causation and damages were the primary issues in the trial. Liability was not at issue.

The Plaintiff recalled no pain or discomfort initially but he reported that his symptoms progressed as time went on. The plaintiff claimed chronic pain with continuing severe disability. But for the first week after the accident and three other failed attempts, the plaintiff did not work again following the accident. Horner J indicated that this was a difficult and unusual case where the plaintiff claimed continuing severe disability arising from what was essentially a minor rear-end collision where the driver of the other vehicle walked away unscathed. The injuries the Plaintiff claimed to have suffered were all soft tissue in nature and could not be explained by reference to any organic cause.

The Court did not find the plaintiff to be a credible witness, and it could not conclude with certainty that the plaintiff has accurately and honestly presented his treatment providers with a reliable description of his symptoms and condition. As a consequence, his ability to prove on a balance of probabilities that he suffered from disabling chronic pain such that he had not been able to work and could not work in the future in any capacity was significantly undermined. As a result, Horner J considered the objective findings of the medical service providers to determine what injury, if any, the Plaintiff suffered in the accident.

Based on video surveillance taken of the plaintiff, approximately 2.5 years following the accident, the Court was satisfied that by this date the plaintiff was able to return to work, at least in a light work capacity. The most significant portion of the video recordings showed the plaintiff working on his truck for more than three hours without any apparent pain, etc.

Horner J found that the defendant was liable for the plaintiff's damages only up to the date of this surveillance. The damages award included general damages in the amount of $50,000 (the plaintiff had claimed $185,000), special damages of $5,130.59 and loss of past income of $273,735. There was no award for loss of future income or cost of future care. The plaintiff was awarded costs. However, he was denied costs for a number of the experts he had retained, since the Court found that the multiple experts had the result of further confusing issues or failing to add anything new or more helpful. [K.M. Horner J]

Occupiers' Liability; Duty of Care; Liability; Contributory Negligence

Motta v Clark, 2016 ABQB 211, [2016] AJ No 363

Action for injuries suffered when plaintiff fell down stairs of defendant's house

The plaintiff sued the defendant for injuries he suffered when he fell down the stairs of the defendant's house. Only liability was at issue. The defendant had been invited as a guest to the defendant's property, where they were drinking beer together in the garage. The defendant needed to use the washroom in the plaintiff's house. He asked permission to do so, and was given that permission. It was dark out, and there were no lights turned on outside or inside the back door to the house. The plaintiff opened the door, tried unsuccessfully to find a light switch, then accidentally fell down the stair case, which was adjacent to the back door. He injured his wrist and arms in the fall.

The defendant was an occupier under the ***Occupiers' Liability Act***, RSA 2000, c O-4. Hall J found a duty on the part of the plaintiff to take care that the defendant would be reasonably safe in using the premises for the permitted purpose of going to the bathroom. The Court was satisfied this duty was breached, since: he had invited the defendant to the property, he had given specific permission to use the bathroom, and the house was dark when the defendant entered it.

The Court apportioned liability 2/3 for the defendant and 1/3 for the plaintiff. The reason the plaintiff was partially liable was that he had a duty to be prudent and to care for his own safety. He could have done this by using his lighter or cell phone to help see in the dark, or by going back to the garage to seek help from the defendant. [R.J. Hall J]

Chronic Pain, General Damages; Fibromyalgia; Credibility;

Jones v Stepanenko, 2016 ABQB 295

Action for damages resulting from motor vehicle collision

The Plaintiff, a 19-year-old nursing student, was injured when her car was struck from behind by another vehicle which further caused a front-end collision. Liability was not at issue. The Plaintiff had severe soft tissue injuries to her neck, back, shoulder, wrist, hip, jaw as well as lacerations to her face and frequent headaches. She was diagnosed with chronic pain condition that was variably described as fibromyalgia, myofascial pain disorder and chronic pain disorder.

The Plaintiff was awarded $80,000 in general damages. The Plaintiff's submission for $125,000 in loss of earning capacity was accepted by the court and noted as a conservative estimate for the impact the injuries might have on the Plaintiff's long nursing career. Housekeeping was minimal and future care was put at $36,500. In total the Plaintiff received **$282,683.65**. Pre-existing medical history was not an issue in damages assessment. ***Chisholm v Lindsay*** 2012 ABQB 81 and ***McLean v Parmar*** 2015 ABQB 62 were seen as the most persuasive cases by Justice Eidsvik.

Another issue in this case was the credibility of and methods of diagnosis used by the Defendant's independent medical examiners. Justice Eidsvik chastised Dr. Myron Stelmeschuk for basing his IME diagnosis on the medical model, not the definitions in the Minor Injury Regulations, even though the Regulations are in his report. Justice Eidsvik stated that it was inappropriate for Certified Medical Experts to rely on definitions and tests of disability that do not coordinate with definitions set out by the Legislature and Regulations. Dr. Anthony Russell's defence IME was entirely rejected due to inconsistencies and disagreement with widely held beliefs on fibromyalgia.

Dr. John Bauman found "no evidence of ongoing injury" with the Plaintiff during his IME. However, on cross-examination, he admitted that he meant this statement only in a sense of his orthopaedic knowledge. Dr. Bauman conceded this could mean that

the Plaintiff was suffering from headaches and other pain outside of his area of expertise. This clarification was noted as much too late by Justice Eidsvik as the Plaintiff's Section B benefits were cut off because of the 'no ongoing injury' assessment. [K.M. EIDSVIK J].

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