For Reasons for Judgment on Costs, see 1848.95.Date of Release: September 19, 1995

IN THE SUPREME COURT OF BRITISH COLUMBIA

No. C911774)

New Westminster Registry)

)

BETWEEN:)

)

TONY KOSKO)

)

PLAINTIFF)

)

AND:)

)

DARYL COLLIE and)

BARBARA POLLOCK)

) REASONS FOR JUDGMENT

DEFENDANTS)

) OF THE HONOURABLE

)

No. S0-1799) MR. JUSTICE LEGGATT

New Westminster Registry)

)

BETWEEN:)

)

TONY KOSKO)

)

PLAINTIFF)

)

AND:)

)

MEE HYAE CHOI, SUK-BUM CHOI,)

INSURANCE CORPORATION OF)

BRITISH COLUMBIA)

)

DEFENDANTS)

Counsel for the Plaintiff: Kerry Deane-Cloutier

Counsel for the Defendants: Timothy H. Pettit

DATES OF HEARING: September 5, 6 and 7, 1995

1 The plaintiff claims damages for personal injuries suffered in two motor vehicle accidents. The first occurred on June 30, 1989, in Port Moody. The plaintiff was a passenger in a vehicle driven by the defendant Barbara Pollock and struck by the defendant Daryl Collie. The plaintiff has discontinued against Barbara Pollock and the liability is admitted on behalf of the defendant Daryl Collie. The injury claimed to be sustained in that accident involved the plaintiff's left knee.

2 On April 12, 1990, the plaintiff was driving westbound on Kingsway in Burnaby, stopped at a red light and was struck by the defendant Suk-Sum Choi in the rear. A second rear end collision occurred impacting on the plaintiff's vehicle from another person unknown to the plaintiff. The defendants again concede liability. The plaintiff alleges the second accident resulted in permanent damage to his neck.

3 The plaintiff is 67 years old and is a retired builder.

Accident No. 1

4 The plaintiff was a passenger in the back seat. Although he was wearing his lap and shoulder belt, as a result of the collision, his knees hit the back of the front seat. He was able to get out of the car, and looked to find a way of reporting the accident, walked to a nearby home, but by that time a police car had arrived on the scene. He said he felt a cold spot and a burning sensation in the knee. Ten days later his knee felt heavy and was swollen. He felt an insecurity with respect to the knee although he has not apparently had any problems in his walking. It no longer aches. He felt it had corrected itself about a year ago. The plaintiff did not claim any loss of work as a result of the injury. He did not see fit to attend a doctor with respect to his knee until March, 1990, some nine months after the accident. His general practitioner described the knee injury as a knee ligament strain and a possible small minuscule tear. No surgery was indicated. In his last independent medical examination by Dr. H. Kerry Outerbridge the plaintiff related that when he was unloading top soil for his garden his knee might become a little uncomfortable and begin to ache, but otherwise he is totally free of symptoms. Given the mild nature of the symptoms suffered and the full recovery, the suggestion by defendant's counsel of $6,000 for non pecuniary damage is, in my view, reasonable and fair and in the appropriate range. Accordingly, the award for the knee will be $6,000.

Accident No. 2

5 On this occasion the plaintiff was a driver of a Dodge pick-up and was rear ended in the rear bumper. A second rear collision occurred to the car behind causing a second impact on the plaintiff's vehicle. With respect to an apportionment of the damage I am not able to distinguish the responsibility between the two defendants for accident No. 2 and, accordingly, the division of liability there will be 50/50 between the two defendants.

6 Again, the plaintiff did not attend for medical attention immediately, but two weeks later he noticed some symptoms and noticed his neck started to stiffen up. One and a half years later he noticed some tingling in his hands when he was long distance driving and some discomfort in his left shoulder a year after the accident. His first attendance for medical attention wasn't for some three weeks after the accident. All the medical reports confirm that he has an ongoing neck problem. In the report of H.K. Outerbridge dated July 21, 1995, he summarizes his findings as follows:

> This man has clinical and radiological evidence of quite advanced degenerative arthritis involving his cervical spine. This is responsible for his quite marked limitation of neck movement. Today, when I examined him, I could find no evidence to suggest an underlying nerve root compromise. I am in agreement with Dr. Porayko when he states "I think the combination of soft tissue and the destabilization of pre-existing spondylosis has resulted in what probably now is a permanent symptomatic neck condition with discomfort and stiffness." I also agree with Dr. Porayko that there is no evidence to suggest that surgery will make him any better.
>
> To answer your specific questions:
>
> 1. I feel that Mr. Kosko's knee condition has recovered completely. What symptoms he is experiencing are extremely minimal and do not restrict his lifestyle.
>
> 3. I believe that Mr. Kosko's neck condition is likely to persist. The main objective findings consist of a significant restriction of his neck range of motion.
>
> 4. His clinical findings are certainly consistent with arthritic changes in his neck.
>
> 6. I have no doubt the arthritic changes predated the motor vehicle accident, however, I agree with Dr. Porayko that it is very likely that the motor vehicle accident aggravated his condition. It is possible that the arthritic changes were accelerated to some degree by the motor vehicle accident.

7 In a radiological report of December 1, 1975, Dr. Manning reported the following:

> There is, however, a posterior indentation of the proximal subglottic portion of the trachea by what appears to be a soft tissue density. I do not feel that this represents a hematoma but probably reflects anterior displacement of the esophagus by the presence of prominent lower cervical spine osteophytes.

8 Dr. Porayko, a treating doctor, reported on February of 1994 the following:

> The patient would appear to have sustained a soft tissue injury to the neck related to the motor vehicle accident in 1990 and has had ongoing discomfort in the posterior neck up to the present time and stiffness resulting in reduced range of motion. there is no evidence of myelopathy or radicalopathy. X-rays show rather advanced diffuse spondylosis through the cervical spine at sp... C4-5. I think a combination of soft tissue injury and the destabilization of the pre-existing spondylosis has resulted in what is probably now a permanent symptomatic neck condition with discomfort and stiffness. Surgical intervention is not indicated. He has no evidence of neurological involvement and therefore detailed neurographic investigation is not indicated.

9 The defendant argues that the plaintiff, a reasonably stoic individual in bearing his pain, has in fact exaggerated his symptoms for

purposes of increasing any damage award. Certainly, much of the information contained in the medical reports is sourced from the plaintiff's recounting of his history and symptoms. There can be no question, however, that he currently suffers some permanent neck disability. The real issue for the court is to determine which portion of that disability is attributable to the second motor vehicle accident.

10 The plaintiff initially claimed a loss of wages for some three weeks as a result of his neck injury. He instructed his lawyer to file the following as a portion of his statement outlining his injury and the circumstances of the accident:

> I have not been able to do manual labour since about April 22, 1990.

11 Initially, the plaintiff did not make a claim for loss of wages nor did he complain of there being a problem with his neck. It was only subsequently that I.C.B.C. was advised that the plaintiff was suffering a neck injury. In October 30 he instructed his lawyer to file invoices for work done on his behalf by his son. This letter stated as follows:

> Mr. Kosko has provided me with four invoices dated May 21, May 28, June 11 and June 18, 1990, each in the sum of $720 for work done by his son, Rick Kosko. Mr. Kosko was unable to work during the period May 21 to June 25, 1990, and he hired his son to assist him. We enclose copies of those invoices.

12 In Dr. Outerbridge's report dated August 9, 1990, he states at page 4:

> His neck symptoms were severe enough to warrant him taking three weeks off work. Immediately after the accident, he returned to work for about two weeks and then he took three weeks off.

13 Once the defendants became aware of the neck injury they elected to hire someone to conduct surveillance on the plaintiff. The surveillance dates were May 3, 4, 7, 11, and 14, 1990. A considerable amount of the court's time was taken in reviewing the video tape surveillance and there can be no question that the plaintiff was working very hard in a construction capacity, particularly in reference to lifting concrete portions of a broken concrete slab with a shovel. His original statement was that he could not do manual labour since April 22, 1990. His wage loss claim was for three weeks following that date which would pretty well take that into the same period of time that the camera surveillance was used. It is also noted that the attempt to correct the wage claim to a period subsequent to the surveillance leads the court to question very seriously the validity of any wage loss claim initially filed. While I appreciate that the wage loss claim has been abandoned, quite frankly the plaintiff's credibility has been shattered. I can only conclude that the plaintiff has mislead his lawyer on two occasions and followed up by misleading Dr. Outerbridge in conducting the independent medical.

14 The court must still, however, deal with the question of the neck condition currently suffered by the plaintiff which is confirmed by all the medical reports. The plaintiff argues that this is a situation in which the principle of Pryor v. Bains should apply. In my view the correct answer in this case lies in the case of Hooiveld v. Van Biert 87 B.C.L.R. (2d) 160. Quoting from p. 169:

> This finding seems to be one which would lead in the present case to apportionment of the plaintiff's post-accident condition as between that which she would have experienced in any event and the exacerbation, or aggravation, of that condition which was caused by this accident. The judge, however, goes on to say:
>
> In my view, the plaintiff was virtually asymptomatic at the time of this accident and following the law as I understand it explained in *Pryor v.*

Bains (1986), 69 B.C.L.R. 395 (C.A.), and *Martin v. Jordan* (1988), 31 B.C.L.R. (2d) 266 (C.A., the thin skull principle would apply and I should award full damages for the injury, rejecting any notional apportionment of the damages among other possible causes.

The judge thus proceeded from the finding that the plaintiff's pre-existing chronic back pain condition was "stable" prior to this accident, and that she was "virtually asymptomatic" immediately before it, to the conclusion that her condition thereafter should be ascribed solely to the accident injury.

We are of the view that the finding that the accident "exacerbated the previous condition" could lead to application of the "thin skull" rule only if the plaintiff's previous condition was one from which it was not to be expected that she would otherwise ever have suffered again in the future. The judge does not say that this was so nor, in our view, could be, on the evidence before him, have made such a finding.

On the basis of the findings of the trial judge it was thus necessary for him to apportion responsibility for the plaintiff's back condition as between the disability which she had before the accident and the exacerbation, or aggravation, of that condition brought about by the accident.

15 The onus to establish causation lies with the plaintiff.

16 There is little question that in the case at bar the plaintiff whether symptomatic or not suffered from an ongoing arthritic condition in the cervical spine which was evidenced many years previously by bone spurs. In my view, the current condition being suffered by the defendant is one that he would be suffering in any event. This was a low impact super imposed on a degenerating condition. That is evidenced by his initial delay in seeking medical attention and the lack of cervical tenderness initially. He was never required to wear a cervical collar and as I have already noted it had minimal impact on his ability to work. Accordingly, approximately four months would be the most I would find attributable to the motor vehicle accident. Dr. Outerbridge places the whiplash soft tissue injury in the mild category.

17 Given my finding that the second accident added very little to the plaintiff's current condition, I award $4000 for the second accident. Total non pecuniary award is $10,000. Special damages are allowed at $309.72.

New Westminster, B.C. "S.M. Leggatt J."

18 September 1995