IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Bagasbas v. Atwal,*
2009 BCSC 793

Date: 20090507
Docket: M081193
Registry: Vancouver

Between:

Myla Bagasbas

Plaintiff

And

Gursimran Atwal and Sarbjit Atwal

Defendants

Before: The Honourable Madam Justice Satanove

Oral Reasons for Judgment

Counsel for the Plaintiff:	D. Grunder
Counsel for the Defendants:	P.G. Kent-Snowsell
Place and Date of Hearing:	Vancouver, B.C. May 7, 2009
Place and Date of Judgment:	Vancouver, B.C. May 7, 2009

2009 BCSC 793 (CanLII)

[1] **THE COURT:** The plaintiff was involved in a motor vehicle accident on June 1, 2006. The defendant admitted liability but took the position that the collision was of minimal impact and that the plaintiff had experienced no compensable injuries.

[2] The plaintiff commenced this action on March 14, 2008. The trial was heard by me on March 26 and 27, 2009. I found that the plaintiff had suffered mild soft tissue injuries to her neck and shoulder area and was entitled to thirty-five hundred dollars non-pecuniary damages. Any other complaints of the plaintiff I found to be associated with her herniated disc for which there was no evidence linking it to the accident and for which the plaintiff made no claim.

[3] The defendant submits that the plaintiff is entitled to her disbursements only because she should have brought her case in Small Claims Court. The plaintiff submits that she is entitled to her full costs because at the time she commenced this action the precise nature of her ongoing injuries was unknown and it was reasonable to assume non-pecuniary damages might exceed the Small Claims jurisdiction of $25,000.

[4] The law regarding the effect of Rule 57(10) was canvassed by our Court of Appeal in *Reimann v. Aziz*, 2007 BCCA 448, 286 D.L.R. (4th) 330. In that case, Chiasson J.A. stated that the approach generally taken by the Supreme Court up to that point in time was too limited. It over-emphasized the policy of encouraging parties to proceed in the Provincial Court but failed to consider the equally compelling policy consideration that parties were entitled to have respected their legitimate choice of forum. It also ignored judicial pronouncements concerning the phrase, "bring an action", and gave insufficient weight to the overall scheme of the legislation. Justice Chiasson found in that case that Rule 57(10) is directed towards the initiation of litigation.

[5] Plaintiff's counsel in the case at bar has filed an affidavit from the plaintiff's solicitor of record setting out the state of affairs that existed at the time the plaintiff

2009 BCSC 793 (CanLII)

asked him to initiate the action. This solicitor relied primarily on a medical-legal report requisitioned by him from the plaintiff's general practitioner, Dr. Ladhani. Dr. Ladhani's report dated February 8, 2008, concluded that subsequent to the accident, the plaintiff developed pain in her neck, upper and lower back areas, as well as her right hip area. He found she had made slow but steady progress over the last 20 months but that she continued to have some pain in the upper and lower back areas, as well as her right hip. He anticipated that the plaintiff would continue to improve over the next few months but if her condition did not improve, he may have to order a CAT scan of her lower back.

2009 BCSC 793 (CanLII)

[6] Let me pause at this juncture and say that I find it eminently reasonable for counsel faced with a medical-legal report of this nature to commence an action in Supreme Court as opposed to Provincial Court. The prognosis was unclear and further radiography was required. Later, a CAT scan showed the plaintiff to have a herniated disk but as I have said, the plaintiff did not claim that this was due to the accident.

[7] The difficulty that arises which has caused the parties to appear before me is that on cross-examination of Dr. Ladhani at trial, it became apparent that the plaintiff had not been fully forthright with her doctor. From the date of the accident to September 2, 2006, she advised Dr. Ladhani that she continued to get pain in the right side of her neck and upper back and lateral movements of these areas produced discomfort. Later, in subsequent visits, she complained of pain in her lower back, tenderness in her spine, difficulty wearing high heels, inability to run or kayak or jog and the other matters which are itemized in Dr. Ladhani's report. She did not tell him that between June and September 2006, she had taken a camping trip to the United States, had attended her Filipino dance rehearsals regularly, had flown to Antwerp, Belgium for two weeks where she participated in dance performances and after-hours celebrations. Dr. Ladhani seemed surprised to see the many photographs shown him by defence counsel which photographs depicted the plaintiff in quite intricate dance manoeuvres, sometimes in high heels looking comfortable and smiling. The plaintiff also did not tell Dr. Ladhani of her ongoing

activities after September 2006, including such things as a trip to Cancun, to Hawaii and further dance appearances in Kamloops, Victoria and other places.

[8] Dr. Ladhani was not asked if knowing of these facts in February 8, 2008, would have changed his opinion at that date but it certainly reduced the weight I gave to his opinion.

[9] In my view, a plaintiff who does not fully inform his or her treating physician and legal counsel of the pertinent facts at the time medical or legal advice is sought runs the risk of receiving inaccurate or erroneous advice through no fault of the professional advisors. If all the evidence I heard at trial about the plaintiff's condition before February 8, 2008, had been in the possession of counsel at the time he commenced the action, I expect he would have advised the plaintiff to start an action in Small Claims Court where this case belongs.

[10] The onus is on the plaintiff under Rule 57(10) to establish sufficient reason for bringing the proceeding in Supreme Court and I find that she has not done so. In no way is her counsel to blame. This regrettable outcome for the plaintiff lies at her feet alone. Therefore, the plaintiff is not entitled to costs other than her disbursements.

"The Honourable Madam Justice Satanove"

2009 BCSC 793 (CanLII)