IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Sylte v. Rodriguez,*
2010 BCSC 207

Date: 20100218
Docket: M073374
Registry: Vancouver

Between:

Kristine Sylte

Plaintiff

And

Daniel Olivera Rodriguez and Hernandez Figueroa

Defendants

Before: The Honourable Mr. Justice Sewell

Reasons for Judgment

Counsel for the Plaintiff:	Graham Taylor
Counsel for the Defendants:	P.G. Kent-Snowsell
Place and Dates of Trial:	Vancouver, B.C. July 6, 7, 8 & 9, 2009 February 15, 2010
Place and Date of Judgment:	Vancouver, B.C. February 18, 2010

[1] The plaintiff Kristine Sylte sues for damages which she suffered as a result of a motor vehicle accident. The defendants have admitted that their negligence was the sole cause of the accident.

[2] On September 15, 2005 Ms. Sylte was driving her small pickup truck on Prairie Avenue, Port Coquitlam, British Columbia. She entered the intersection of Prairie and Coast Meridian Road, in which the car driven by the defendant Daniel Rodriguez was attempting to make a left hand turn. Mr. Rodriquez failed to yield the right of way and his vehicle collided with Ms. Sylte's truck, which suffered only minor damage in the collision. Mr. Rodriquez left the scene of the accident without stopping but Ms. Sylte was able to pursue him in her truck. She followed him to a nearby community centre and made a mental note of his license number. She then returned to the scene of the accident and called the RCMP from a nearby gas station. The police attended the scene and located and detained Mr. Rodriguez.

[3] Ms. Sylte was on her way to work at Royal Columbian Hospital when the accident occurred. Ms. Sylte was and is employed as a nurse's aide at the hospital. She carried on to work but experienced a general sensation of pain, burning in her right arm, and general weakness. The head nurse on her ward sent her to the emergency department and Dr. Wong, one of the emergency room doctors, examined her and told to go home.

[4] Ms. Sylte first saw her family doctor, Dr. Shu, on September 20, 2005. At that time she was being treated with Tylenol 3 and anti-inflammatory medications as prescribed by Dr. Wong.

[5] Ms. Sylte again saw Dr. Shu on September 28, 2005. She reported that her neck and shoulder pain had improved greatly. However, Ms. Sylte's lower back pain persisted. At that time she was taking 200 mgs. of ibuprofen three times a day and Tylenol 3 for pain as needed. By mid to late October 2005 it seems that Ms. Sylte's neck and shoulder pain had largely disappeared but she continued to suffer from low back pain.

[6] In the course of the next year, Ms. Sylte saw Dr. Shu about 16 times. In February 2006 Ms. Sylte began to experience depressive symptoms. Dr. Shu prescribed 150 mgs. of Wellbutrin twice a day for these depressive symptoms. He did not, however, refer her for psychiatric counselling.

[7] On June 14, 2007, almost two years after the accident, Ms. Sylte continued to experience occasional back pain radiating down her leg and buttocks. This pain was aggravated by physical activity. Dr. Shu prescribed Flexeril 10 milligrams once a day and Tylenol 3 every four hours for pain.

Medical Evidence

[8] Dr. Shu prepared his first medical/legal report in this case on October 2, 2007. As of that date he had not seen Ms. Sylte since June 14, 2007. In that report Dr. Shu commented that there was no evidence of any serious injury demonstrated by x-ray or CT scan. His diagnosis was that Ms. Sylte had suffered a soft-tissue injury to her lower back and that in time with "proper exercise and a good frame of mind it should resolve completely with no permanent disability."

[9] On October 18, 2007, Ms. Sylte again saw Dr. Shu and complained about continuing back pain in her left sacroiliac area. Because Ms. Sylte's back pain continued to trouble her, Dr. Shu ordered an x-ray. The x-ray did not disclose any abnormal finding. Dr. Shu referred Ms. Sylte to Dr. Trevor Stone, who first saw her on December 20, 2007.

[10] Dr. Stone arranged for Ms. Sylte to receive a cortical steroid injection in her left sacroiliac region on April 25, 2008. This resulted in some mild relief but no significant improvement in her symptoms. Dr. Stone's opinion was that Ms. Sylte was not a candidate for surgical intervention. He diagnosed mechanical low back pain.

[11] It appears that Ms. Sylte was making slow improvement up to June 26, 2008, when she was involved in another motor vehicle accident. In Dr. Shu's opinion, the second accident aggravated her existing back pain and caused some neck pain.

[12] Ms. Sylte continues to suffer from left side back pain around her sacroiliac joint area. In Dr. Shu's opinion this pain is caused by the initial car accident of September 15, 2005, but is definitely aggravated by the second accident. Dr. Shu does not expect a complete recovery as the pain has been on-going since 2005. He thinks that Ms. Sylte will experience on-going back pain for the foreseeable future.

[13] I also heard evidence and was provided with medical reports from Dr. Stone and Dr. Duncan McPherson. I do not think it is necessary to refer to their evidence in any detail. In this case, the consensus of medical opinion is that Ms. Sylte is suffering from low back pain in the left sacroiliac area. The doctors also all agree that there is no objective evidence of underlying injury causing this pain. They are all of the view that as the pain has persisted since June 2005 it will in all likelihood continue to persist for the foreseeable future.

[14] Dr. McPherson's initial opinion was that there was no objective evidence of disability. However in cross examination at trial he did agree that he thought Ms. Sylte still had back pain as of the date of his examination in 2006. I did not take him to be disagreeing with Dr. Shu's opinion that Ms. Sylte will probably continue to suffer from ongoing back pain for the foreseeable future. However, I do not think that Dr. Shu considered that Ms. Sylte suffers from any significant disability as a result of her injuries.

[15] The conclusion I have reached is that any restriction on Ms. Sylte's activities is caused by pain rather than physical limitation. The pain is however very real to Ms Sylte and the functional effect of that pain is that Ms. Sylte no longer feels able to do all the things she did before the accident.

[16] Based on the evidence before me I conclude that Ms. Sylte suffered a soft-tissue injury to her lower back in the motor vehicle accident which continues to cause her chronic pain in her lower back area. I also conclude that she developed depressive symptoms which she would not have developed had the accident not occurred.

Damages

[17] Counsel for the parties are agreed that in assessing damages in this case I should treat Ms. Sylte's injuries from both motor vehicle accidents as causing one indivisible injury. I understand from Mr. Taylor that Ms. Sylte has settled her claim for damages for the second accident. Counsel are agreed and I conclude that in these circumstances the appropriate course of action is for me to assess damages on an indivisible basis and for the global amount of the settlement of the other action to be deducted from the amount payable pursuant to any award I make. See *Ashcroft v. Dhaliwal*, 2008 BCCA 352.

Non-Pecuniary Damages

[18] Ms. Sylte is 51 years old. She testified that prior to the first motor vehicle accident she was an active, energetic individual. She enjoyed playing mixed softball, golf and skiing. She was employed as a nurse's aide at the Royal Columbian Hospital in New Westminster. She was a single mother whose adult son, Josh, lived with her.

[19] Ms. Sylte said that as a result of the pain which she is now experiencing she is no longer able to play softball and can golf only very occasionally. She simply finds these activities too painful to pursue. In addition she no longer skis. She indicated that Josh is now required to do many of the more physically demanding tasks around the house. She also indicated that she finds it difficult to drive long distances and that her general quality of life has deteriorated significantly as a result of her pain. She indicated that this pain is about 4 out of 10, with 10 being the worst pain imaginable.

[20] Josh gave evidence at the trial. He generally corroborated the drop in Ms. Sylte's activity level since the motor vehicle accident. He also indicated that his mother had become much less social after the accident. Josh, who is now 31, does much of the heavy work around the house.

[21] Ms. Sylte has suffered a significant impact on her social and recreational life as a result of the injuries she suffered in the accident. The evidence before me is that these symptoms will be permanent. I note that Ms. Sylte is no longer able to play softball, participate in golf in any meaningful way or pursue skiing. She is in more or less constant discomfort from the injuries she has suffered. As I have found, she is genuinely experiencing the pain which, I have no doubt, has some psychological component.

[22] I have concluded that there should be a substantial award for non-pecuniary damages in this case. I was referred to in a number of cases which seem to establish a range of approximately $35,000 to $125,000 for non-pecuniary damages for plaintiffs who suffer permanent pain symptoms without significant physical disability. In my view, an appropriate amount for non-pecuniary damages in this case is $45,000.

Past Income Loss

[23] The major dispute between the parties is over the effect that Ms. Sylte's injuries have had on her capacity to work both up to the time of trial and in the future.

[24] Ms. Sylte was off work from September 19, 2005 to December 31, 2006. On January 2, 2007 she returned to work under a graduated return-to-work program mandated by her employer. Ms. Sylte's evidence, which I accept, was that because of the responsibilities of her duties as a nurse's aide in the surgical department at Royal Columbian Hospital, she is subject to her employer's policy of not allowing employees to return to work until the employer is satisfied that they are medically capable of performing their work. Employees who have been off work for a long period of time are required to undergo a gradual return-to-work program, initially under supervision of another employee.

[25] For the defendants, Mr. Kent-Snowsell submitted that Ms. Sylte had not taken all reasonable steps to minimize her past income loss. In my view, there is no merit in that submission. Ms. Sylte testified that her ability to return to work was

dependant on, not only her own wishes, but also on her employer being satisfied that she was able to discharge her duties.

[26] As part of her union's collective agreement with the Fraser Health Authority, Ms. Sylte was enrolled in a long-term disability plan with Great West Life. Great West Life continued to make long-term disability payments to Ms. Sylte until she returned to work. These payments are of course not to be taken into account in determining Ms. Sylte's loss of past earnings, but the fact that Great West Life continued the payments supports my conclusion that there is no basis for any finding that Ms. Sylte has failed to mitigate her loss.

[27] After the conclusion of this trial, counsel for Ms. Sylte applied to reopen her case and to submit reports from an occupational therapist and doctor who advised Great West Life to rebut any adverse inference arising from her failure to lead evidence to support her explanation for the long period she had not worked. I granted the application because those reports had been in the possession of the defendants' counsel, but had not been disclosed. In my view the contents of those reports support Ms. Sylte's explanation for not returning to work sooner.

[28] I do not think that Ms. Sylte acted unreasonably in participating in her employer's long term disability program and in not seeking other employment while she was unable to work at Royal Columbian. Ms. Sylte enjoyed considerable seniority with that employer and had the benefit of favourable fringe benefits that it is unlikely she would have able to duplicate elsewhere.

[29] The onus of proving failure to mitigate is on the defendants. In my view, the defendants have presented nothing more than unsubstantiated conjecture in support of this submission.

[30] Ms. Sylte's counsel submits that the regular wages lost by Ms. Sylte during the period of her total disability were $40,658. In addition, Ms. Sylte has suffered damages in the form of loss of pension entitlement, vacation pay and sick leave credits. Ms. Carol Doutaz, the payroll supervisor for the Royal Columbian Hospital, gave evidence that, based on the terms of the collective agreement between

Ms. Style's union and the Fraser Health Authority, Ms. Sylte lost employer's contributions of 7.99% of her base salary, 78.85 hours of vacation time and 34.95 hours of sick time. The total value of these losses, based on an average base pay of $20.14 was approximately $5,000.

[31] I accept Mr. Taylor's submissions that these amounts are properly recoverable in this action as being attributable to the fault of the defendants and accordingly have concluded that Ms. Sylte has suffered a past loss of income in respect of the period in which she was unable to work as follows:

(a)	2005	$	9,189.00
(b)	2006	$	35,768.00
(c)	2007	$	978.00
	Total:	**$**	**45,935.00**

Loss of Past and Future Earning Capacity

[32] Ms. Sylte also makes a claim for loss of earning capacity between the date of the accident and the date of trial, and in the future. As Ms. Sylte was working the same regular hours after February 1, 2007 as she was before the accident, this claim must be based on Ms. Sylte establishing a substantial possibility that as a result of the injuries she suffered in the accident her capacity to earn income has been impaired. Ms. Sylte's evidence is that she would have liked to work more shifts and take on over-time once she returned to work, but as a result of the pain and discomfort which she is experiencing she is unable to do so. The evidence supports the conclusion that more hours were available to her had she been able to work them.

[33] In support of this claim Mr. Taylor has compared partial payroll records for the years 2003, 2004 and 2005 and the period in 2007 to 2009 after Ms. Sylte returned to work. These appear to show that Ms. Sylte has worked fewer hours per pay period since she returned to work. However, Ms. Sylte produced records for only 14 payroll periods prior to the date of the accident. This has significantly handicapped me in addressing this issue. On the other hand, I found Ms. Sylte to be a credible witness. I also think there is sufficient evidence of depressive symptoms caused by

the accident which could reasonably be expected to affect her capacity to work. I have come to the conclusion that Ms. Sylte has established a substantial possibility that, as a result of her injuries, she suffered a loss of earning capacity before and after the date of trial.

[34] On behalf of Ms. Sylte, Mr. Taylor submitted that the evidence supports a finding that Ms. Sylte has been unable to work on average one shift per pay period less since the date of the accident than before and that that situation will continue until her retirement at age 65.

[35] However, given the paucity of evidence with respect to Ms. Sylte's pre-accident employment, the fact that Ms. Sylte is approaching an age at which she could reasonably be expected to work less overtime than she did formerly and the general uncertainty surrounding this issue, I conclude that it would be inappropriate to take an arithmetical approach in assessing damages for loss of income earning capacity. Instead, I have taken into account Ms. Sylte's base salary and her evidence with respect to the overall effect that her injuries have had on her. I have also considered the lack of clinical findings suggesting any significant impairment in her overall physical capacity. Taking these factors into account, I assess damages for loss of past income earning capacity at $5,000, and damages for loss of future income earning capacity at $15,000.

Special Damages

[36] Special damages are claimed by Ms. Sylte in the amount of $3,612.70. These are made up as follows:

Extended Health Premiums:		
November 1, 2005 to March 31, 2006 (5 months at $231.22 per month)		$1,156.10
Extended Health Premiums: April 2006		$ 244.44
Physiotherapy	Pacific Blue Cross	$ 522.40
Prescriptions	Pacific Blue Cross	$ 340.51
Physiotherapy	Client Owed	$ 410.60
Prescriptions	Client Owed	$ 521.45
Medical Form Fees		$ 65.00

Parking	$ 18.00
Stationery, Fax, Postage & Photocopying	$ 16.67
Mileage to Dr. Shu (22 visits x 21.56 kms X $0.40/km)	$ 189.73
Mileage to Dr. Stone (2 visits x 28.60 kms X $0.40/km)	$ 22.88
Mileage to Physiotherapy (57 visits x 4.08 kms X $0.40/km)	$ 93.02
Mileage to CT Scan (1 visit x 29.78 kms X $0.40/km)	$ 11.90
TOTAL SPECIAL DAMAGES	**$3,612.70**

[37] I am satisfied that the amounts claimed for special damages are reasonable and appropriate in the circumstances of this case and are caused by the injuries suffered by Ms. Sylte in the accident. I award special damages in the amount of $3,612.70.

[38] Ms. Sylte has made no claim for cost of future care.

Summary

[39] In summary, I assess damages as follows:

a.	Non-Pecuniary Damages	$45,000.00
b.	Past Wage Loss	45,935.00
c.	Loss of Past Earning Capacity	5,000.00
d.	Loss of Future Earning Capacity	15,000.00
e.	Special Damages	3,612.70
	TOTAL	**$114,547.70**

[40] I have reviewed the global award and consider it to be appropriate given Ms. Sylte's injuries. As indicated in para. 17, this amount will be reduced by the amount of the settlement of the first action.

[41] Subject to any further submissions, Ms. Sylte is entitled to costs on Scale B.

"Sewell J."

The Honourable Mr. Justice Sewell