

Citation: McKelvie v. Ng et al
2002 BCCA 657

Date: 20021204
Docket: CA029534
Registry: Vancouver

COURT OF APPEAL FOR BRITISH COLUMBIA

ORAL REASONS FOR JUDGMENT

Before:

The Honourable Madam Justice Huddart

December 4, 2002

The Honourable Madam Justice Saunders

The Honourable Madam Justice Levine

Vancouver, B.C.

BETWEEN:

RONALD MCKELVIE

RESPONDENT
(PLAINTIFF)

AND:

KAM YIN ALICE NG and CHI TO OTTO NG

APPELLANTS
(DEFENDANTS)

M.M. Skorah
E. Montague
T.J. Delaney

appearing for the Appellants

appearing for the Respondent

[1] **SAUNDERS, J.A.**: This is the second appeal from a damage award in a personal injury action arising from a motor vehicle accident. In the original order the trial judge awarded:

Non-pecuniary damages	\$110,000
Past loss of income	\$68,963.78
Loss of future earning capacity:	
Retraining	\$10,000
Loss of opportunity	\$200,000

In addition, there was a modest award for special damages and cost of future care bringing the total damages to \$401,559.84.

[2] That order was appealed. On May 24, 2001, this panel of this Court allowed the appeal of the order as it related to non-pecuniary damages and loss of future earnings, directing that the matter be remitted to the trial court for re-assessment to address the issue of the effect of two conditions said to pre-exist, ankylosing spondylitis, which I refer to as AKS, and fibromyalgia, upon those heads of damages. Our first decision was based upon ***Athey v. Leonati*** (1996), 140 D.L.R. (4th) 235.

[3] The matter was remitted to the trial judge and the damages were assessed by her. She stated the situation succinctly:

[3] In relation to the issue of non-pecuniary damages and loss of future income, the Court of Appeal concluded that I had erred in considering only the pre-existing knee condition of the plaintiff, and that I had failed to consider the two other pre-existing conditions of ankylosing spondylitis (AKS) and fibromyalgia (FM).

[4] There is no question that the plaintiff suffered from the pre-existing conditions of AKS prior to the accident. There is also some evidence he was diagnosed with FM some time before the accident of July 27, 1994. In my judgment, I failed to consider if there was any measurable risk with regard to these two pre-existing conditions. Would these two conditions have detrimentally affected the plaintiff in the future, with regard to enjoyment of life and a loss of future income?

(emphasis added)

[5] On revisiting the evidence and submissions of counsel, and my original award, it is apparent I did not take AKD and FM into consideration to the extent that I should have.

[4] After reviewing the evidence she addressed the effect of any pre-existing AKS and fibromyalgia on the assessment of his damages:

[14] What would the future of this plaintiff be if there had been no motor vehicle accident? He was having occasional AKS flare ups, he was ageing. He was also staying active, participating in a great number of sports, working full time, and following medical advice.

[15] From the evidence, I am unable to say that there is a measurable risk of fibromyalgia constituting a debilitating effect on this plaintiff in the future. However, the same cannot be said for AKS.

[16] The Court of Appeal quoted paragraph 35 from the judgment of Justice Major in ***Athey v. Leonati*** (1996), 140 D.L.R. (4th) 235, a decision of the Supreme Court of Canada. That quote reminds this court that "If there is a measurable risk that the pre-existing condition would have detrimentally affected the plaintiff in the future, regardless of the defendant's negligence, then this can be taken into account in reducing the overall reward." There is a further reminder that the plaintiff must not be placed in a better position than he would have been without the accident.

[17] With regard to fibromyalgia, I find there is no measurable risk of debilitating effect in the future of that condition, had there not been the motor vehicle accident.

[18] With regard to AKS, my original award should have taken into account the pre-existing condition of AKS in considering if there was a measurable risk, particularly with regard to non-pecuniary damages

and loss of future income. Mr. McKelvie's pre-accident earning capacity was limited somewhat by his pre-existing condition of AKS, and that was made considerable worse by the accident. His pre-accident enjoyment of life did not appear to be affected by AKS, except in perhaps a slight way when he suffered occasional flare ups. That changed significantly with the accident.

[19] It may be that in later years, AKS would have interfered with the plaintiff's enjoyment of life, but based on the evidence, it is difficult to say that the change would be anything other than slight. Therefore, with regard to the award for non-pecuniary damages, originally assessed at \$110,000, that award is reduced to \$105,000.

[20] With regard to loss of future earning capacity, the loss of opportunity was originally set at \$200,000. Having re-assessed the loss of future income with regard to the pre-existing condition of AKS, in my view it is appropriate to reduce the loss of opportunity from \$200,000 to \$180,000. The amount for re-training \$10,000, remains the same.

[5] The appellant, today, focuses on two issues. The first is the effect of fibromyalgia as a basis for the award of non-pecuniary and future earnings loss damages. The appellants say that the evidence did not support the conclusion that the respondent's fibromyalgia would be disabling into the future. The second issue is the effect of AKS on the award under those two heads. The appellants say that the trial judge erred in para. 18, in particular, in this sentence:

Mr. McKelvie's pre-accident earning capacity was limited somewhat by his pre-existing condition of AKS, and that was made considerably worse by the accident.

On this second issue counsel for the appellants has referred us to evidence that the pre-existing AKS was not made worse by the trauma of the accident. Counsel for the respondent agrees that the evidence established that AKS itself was not worsened by the accident but says that it played a part in the development of fibromyalgia.

[6] On the first issue presented today the respondent submits that the appellants seek to re-argue the first appeal and focuses on the effect of the fibromyalgia at date of trial rather than the deduction to be made, if any, for a pre-existing condition. He says that the issue does not arise from the limited remittance of the case to the trial court. I agree. The challenge to the order on the fibromyalgia issue, in my view, arises from the first set of reasons of the trial judge, not the second. I would not give effect to this ground of appeal.

[7] The second issue focuses on para. 15 and 18 of the second set of reasons which I have referred to earlier. Despite the able submissions of Mr. Skorah for the appellants, I consider that those paragraphs, read in the context of the entire reasons and keeping in mind the limited scope of the trial judge's re-assessment to ensure that the plaintiff was only compensated for damages caused by the accident in the fashion discussed in *Athey v. Leonatti*, say no more than that Mr. McKelvie's earning capacity, limited to some degree by AKS prior to the accident, was diminished because of the accident.

[8] The learned trial judge reduced the award by about 10 percent to take account of the pre-existing AKS. That discount bears some relationship to evidence that AKS becomes powerfully disabling in about five percent of cases. It follows that I consider that the trial judge performed the limited function required of her and I see no basis to interfere with the order.

[9] I would dismiss the appeal.

[10] **HUDDART, J.A.:** I agree.

[11] **LEVINE, J.A.:** I agree.

[12] **HUDDART, J.A.:** The appeal is dismissed.

"The Honourable Madam Justice Saunders"