

IN THE SUPREME COURT OF NOVA SCOTIA

Citation: Dibattista v. Deslaurier, 2008 NSSC 344

Date: 20081120

Docket: SH 164552

Registry: Halifax

Between:

Emidio Dibattista

Plaintiff

and

Vanessa Deslaurier and
Ebenezer's Stone Ministry and
David Hennessey

Defendants

Judge: The Honourable Justice Glen G. McDougall

Heard: September 18 - 26, 2006, in Halifax, Nova Scotia

Counsel: Jeffrey Moors, on behalf of the plaintiff
D. Blair Pritchett and Alex Benitah, on behalf of the defendants
DesLaurier and Ebenezer's Stone Ministry
David Farrar, Q.C., on behalf of the defendant Hennessey

By the Court:

[1] This is a trial of two separate actions arising out of motor vehicle accidents involving the plaintiff, Emidio Dibattista ("Mr. Dibattista"). The first accident occurred on the 5th day of July, 1998; and the second occurred on the 19th day of October, 2000. By order of this Court the two actions were consolidated and ordered tried together.

BACKGROUND FACTS

First Accident:

[2] On July 5, 1998 Mr. Dibattista was driving his 1990 Toyota Tercel automobile in downtown Dartmouth. He was stopped at an intersection; the traffic light was red. While stopped he was struck from behind by a motor vehicle owned by Ebenezer's Stone Ministry and driven by Vanessa DesLaurier. The force of the collision drove Mr. Dibattista's vehicle part way through the intersection. Mr. Dibattista was wearing his seat belt at the time of the collision. His vehicle was equipped with head restraints.

[3] After the collision Mr. Dibattista exited his vehicle and exchanged vehicle registration and insurance information with the operator of the other vehicle. He then went immediately to the Queen Elizabeth II for medical attention. He complained of a headache and pain on his left side. He also felt some pain in his shoulder area. X-rays were taken after which he was discharged.

[4] On the day following the accident Mr. Dibattista said he felt sore. He stated that he had experienced pain in his back and shoulder area. He also complained of neck pain and reported a tingling sensation down his left arm. He also stated that he had bouts of dizziness and headaches. His sleep was affected.

[5] Mr. Dibattista saw his family doctor, Dr. Thomas Chui, on the day following the accident. Dr. Chui advised him to use heat and prescribed anti-inflammatory medication to help with the pain. He also recommended rest and arranged for Mr. Dibattista to receive treatment at Renova Physiotherapy. He received physiotherapy three times a week for a period of six to eight months.

[6] Dr. Chui referred Mr. Dibattista to Dr. Reginald Yabsley, an orthopaedic surgeon. Dr. Yabsley provided an initial medical report on August 13, 1998 followed by a second one on November 11, 1998.

[7] In addition to seeing Dr. Chui on a regular basis, Mr. Dibattista was referred to Dr. J. J. P. Patil, a specialist in physical medicine and rehabilitation. After seeing Mr. Dibattista in September, 1999, Dr. Patil recommended that he continue certain exercises and prescribed Elavil (20 mgs) for pain.

[8] Dr. Patil saw Mr. Dibattista again in February, 2000. He increased the dosage of Elavil to 30 mgs and recommended the application of heat and continued exercises.

Dr. Patil's assessment of the injuries sustained by Mr. Dibattista was a mild to moderate cervical and lumbar sprain. He also suggested that Mr. Dibattista suffered from non-restorative sleep.

[9] Mr. Dibattista participated in a two-day functional capacity evaluation on May 3 and 4, 2000. Tom A. Stanley, a registered physiotherapist, testified that based on his assessment, Mr. Dibattista was capable of performing a full eight hours of light to medium work activities per day with some difficulty in performing activities overhead or activities involving prolonged neck flexion.

Second Accident:

[10] On October 19, 2000, while still feeling some residual effects from the first accident that had occurred some 27 months earlier, Mr. Dibattista was involved in a second motor vehicle accident. While stopped behind a vehicle at an intersection, Mr. Dibattista's vehicle was struck from behind by another vehicle driven by David Hennessey. The force of the impact caused damage to the rear of Mr. Dibattista's vehicle. The cost for repairs amounted to \$230.00.

[11] As a result of this collision, Mr. Dibattista complained of neck pain, upper back and shoulder pain, headaches and occasional dizziness. On the day following the accident, he once again saw Dr. Patil. Dr. Patil noted that Mr. Dibattista was experiencing neck pain but that the tingling he had previously been feeling in his left arm had subsided. He was, however, experiencing a pulling sensation on both the left and right sides of his neck. He also reported disturbance with sleep once or twice a night.

[12] Dr. Patil felt that Mr. Dibattista was not in any "acute" pain. He had mild to moderate decreased range of movement in his cervical spine along with a mildly decreased range of motion in the lumbar spine. Dr. Patil recommended that he continue with neck, shoulder and back exercises while applying heat or ice as required.

[13] Dr. Patil next saw Mr. Dibattista on April 12, 2001. He noted that Mr. Dibattista had increased symptoms of neck pain along with a mildly-decreased range of motion in the cervical spine.

[14] Mr. Dibattista saw Dr. Patil on November 13, 2001 and again on May 3, 2002. His notes for May 3rd indicated that Mr. Dibattista was "not regular with his neck exercises."

[15] In his report of July 11, 2002, Dr. Patil expressed the opinion that Mr. Dibattista probably sustained a mild degree of cervical sprain as a result of the second motor vehicle accident. He stated:

"Generally with this type of sprain can be symptomatic for a couple of months up to a year. Factors such as underlying anxiety, depression, panic attacks,

non-restorative sleep pattern or inappropriate forms of therapeutic exercises can prolong the pain process in spite of the fact that the healing process is over.”

[16] Dr. Patil did not see a need for any formal physiotherapy, massage therapy or chiropractic treatment. He recommended to Mr. Dibattista that he continue with the medications that he was taking. He also recommended use of local heat or ice and a continuation of exercises. In reply to an inquiry from Mr. Dibattista’s lawyer, Dr. Patil wrote in a letter dated July 29, 2002 that Mr. Dibattista might need to take Elavil and Celebrex for “at least another 12 to 18 months.”

Mr. Dibattista’s Medical History:

[17] In addition to seeing the medical specialists to whom he had been referred Mr. Dibattista continued to see his family doctor, Dr. Chui, on a fairly regular basis. He was also a patient of Dr. E. M. Rosenberg, M.D. Dr. Rosenberg specializes in psychiatry. Mr. Dibattista was first referred to Dr. Rosenberg by Dr. Chui in 1990. Dr. Rosenberg diagnosed Mr. Dibattista’s condition as a “major depressive disorder, recurrent, of mild-moderate severity.” With treatment and medication, Mr. Dibattista has seen “a reduction both in symptoms of anxiety and depression” according to Dr. Rosenberg. In a letter to Mr. Dibattista’s legal counsel dated January 18, 2000 Dr. Rosenberg stated “Mr. Dibattista’s recovery from injuries he may have sustained in the motor vehicle accident of July 1998 has not been prolonged as a result of depressive illness which he suffered prior to the accident.” Dr. Rosenberg goes on to say “I am unable to confirm an exacerbation or aggravation of his depressive illness by any physical injuries he may have suffered in the motor vehicle accident.” As this report letter pre-dated the second accident, there is no mention of any fallout from the latter event. Mr. Dibattista continues to be seen by Dr. Rosenberg for treatment of his condition. He also continues taking the medication prescribed by Dr. Rosenberg.

[18] Mr. Dibattista had seen various other medical professionals prior to the 1998 accident. His list of complaints included headaches, neck pain, dizziness, problems with sleep, fatigue, numbness in the hands, problems with his wrists (ie. carpal tunnel syndrome) and back pain. All of these pre-accident problems, but especially his depressive state, affected his ability to maintain regular employment. His condition was such that on March 30, 1998 Mr. Dibattista’s father applied to Revenue Canada (as it then was) for a Disability Tax Credit Certificate claiming that his son was disabled. The application was supported by Dr. Rosenberg who indicated that Mr. Dibattista’s problems existed since 1990.

[19] Even prior to this, on May 12, 1993, Mr. Dibattista applied for Employment Insurance disability benefits. Dr. Chui's diagnosis indicated "cervical disc with nerve irritation R/O Bilateral carpal tunnel syndrome." It is clear that Mr. Dibattista had health problems long before the first accident in 1998.

[20] Prior to the first accident Mr. Dibattista lived with his parents. In the past he worked at a number of different relatively low level jobs. For a time he worked as a barber alongside his father who was also a barber.

[21] Immediately prior to the first accident, Mr. Dibattista looked after the books for his father's business. He was paid approximately \$60.00 per week for this work. Mr. Dibattista also spent time building and renovating a cottage he owned near Mt. Uniacke. He purchased the land in 1982 and over the years he worked on improving the property. Dr. Rosenberg encouraged him to keep busy working on the project as part of his treatment.

[22] Mr. Dibattista testified that sometime around 1995 he decided to devote more time to completing the work on the cottage so that he could eventually sell it. Out of the proceeds of sale he thought he could then purchase another property and perhaps construct something else to sell. As part of his claim for damages, Mr. Dibattista seeks compensation for his inability to complete the work he feels must be done in order to sell the property.

Liability and Causation:

[23] Liability is not really an issue in this case. The defendants are liable in negligence for the two accidents involving Mr. Dibattista. On both occasions Mr. Dibattista was stopped at an intersection when he was hit from behind by another vehicle. There is no evidence of any contributory negligence on his part. I am satisfied that most of Mr. Dibattista's problems were caused by the negligence of the defendants. Their negligence also exacerbated some problems that he had prior to the accidents.

[24] In the case of the first accident which occurred on July 5, 1998, Mr. Dibattista was diagnosed by Dr. Patil to have suffered a mild to moderate cervical sprain. Dr. Patil was not aware of the fact that Mr. Dibattista has previously been struck by another vehicle while walking. This had occurred a number of years before. Upon

being hit by the vehicle, Mr. Dibattista's head struck the windshield causing him to suffer a concussion and back pain.

[25] When Mr. Dibattista met with Dr. Yabsley he denied "any prior problems with headaches, neck pain or similar symptoms of which he is complaining at this time." Both Dr. Yabsley and Dr. Patil indicated on cross-examination that their opinion might have changed if they had known about this earlier incident.

[26] I am satisfied, however, that Mr. Dibattista did suffer injuries as a result of the accident. Not all of his injuries were new. Some were existing complaints that were exacerbated by the first collision and further exacerbated by the second accident.

[27] Based on the extent of the injuries sustained in the first accident, Mr. Dibattista is entitled to general damages for pain and suffering. His condition had considerably improved by the time the second accident happened.

[28] The intervention of the second accident caused further pain and suffering for Mr. Dibattista. His recovery from the first accident was set back as a result. The added recovery time can be measured in months as opposed to years. Nonetheless, Mr. Dibattista should be compensated for the additional pain and suffering he was forced to endure.

General Damages:

[29] I conclude that the nature and extent of Mr. Dibattista's injuries put him in the range of damages set out in the case of **Smith v. Stubbart** (1992), 117 N.S.R. (2d) 118. Given Mr. Dibattista's state of health prior to the first accident and the fact that he did not always do the exercises recommended by his doctors, I assess general damages for non-pecuniary loss nearer the lower end of the **Smith v. Stubbart** scale. I award \$27,500.00 for pain and suffering which should be apportioned between the defendants as follows:

1st Accident/Deslaurier & Ebenezer's Stone Ministry @ 80% = \$22,000.00

2nd Accident/Hennessey @ 20% = \$5,500.00

I do so based on the fact that the second accident was a relatively minor collision which caused an exacerbation of the existing injuries and a setback to the overall recovery process.

[30] Mr. Dibattista is also entitled to pre-judgment interest on the apportioned amounts from the date of the respective accident to the date of judgment at the rate of 2.5% per annum.

Loss of Income Claim:

[31] Mr. Dibattista also claimed damages for past loss of income and loss of earning capacity. I am not prepared to order any amount for either. The evidence established that Mr. Dibattista's income was extremely modest in the years prior to the first accident. He took care of the books for his father's business earning between \$3,000.00 and \$3,700.00 per year. In the year following the first accident his annual income actually increased as a result of providing child care for his sister's children while continuing to work for his father.

[32] Counsel for Mr. Dibattista attempted to advance a claim for lost income based on his client's inability to complete renovations on the Mt. Uniacke property which delayed its potential sale. In an effort to establish the extent of the loss, the plaintiff proposed to introduce a report of a real estate appraiser who was asked to estimate the approximate value or selling price of the property assuming that all the renovations contemplated by Mr. Dibattista had been completed. The idea was to convince the Court that Mr. Dibattista had suffered a monetary loss due to his inability to complete the proposed renovations which, in turn, delayed the property's potential sale. The Court ruled against the use of the appraisal for this purpose. Firstly, it did not comply with the filing requirements for an expert's report under the *Civil Procedure Rules*. Furthermore, it was based on pure speculation as to what work would be done and with little or no consideration given to the quality of labour and materials required to complete the job. Although Mr. Dibattista may have contemplated renting or selling the property, he has not persuaded me that he has suffered a loss because of delays caused by the injuries he sustained in either accident. He has been working on improvements to this property since first acquiring it back in the early 1980's. Since being diagnosed with depression by Dr. Rosenberg in 1990, work on the project has been more in the nature of therapy than a commercial venture. Depending on which way the real estate market goes, the value of the property might even increase in time. This seems to be the trend, particularly with recreational properties as this one is. The

delayed sale, if indeed that was Mr. Dibattista's intention, could work to his advantage. I refuse to award any monetary damages under this head of damages.

[33] The plaintiff has also failed to establish a claim for loss of income or any future loss based on diminution of earning capacity. Consequently no damages are awarded under these categories.

Special Damages:

[34] In terms of special damages I am satisfied, based on receipts for medication that have not already been reimbursed to Mr. Dibattista, that he is owed \$1,262.19. I am not prepared to award any special damages for landscaping costs on other expenditures for labour and materials on the Mt. Uniacke property. Presumably he will recover these when, and if, the property is sold. I will, however, allow an amount to cover the anticipated costs of future prescriptions that Mr. Dibattista might need to help alleviate pain. Based on the medical evidence heard, his symptoms should diminish in time. They might never totally resolve, but it should, at least, be easily managed. I set this estimated figure at \$2,000.00. Mr. Dibattista is entitled to interest at the rate of 4% per annum on the \$1,262.19 already expended prior to trial. These amounts are to be apportioned between the two defendants using the same percentages as for general damages.

[35] The defendant, Mr. Hennessey shall reimburse Mr. Dibattista for the cost to repair the damages to his motor vehicle (\$230.00) caused by the second accident. He is also entitled to be paid pre-judgment interest of 4% per annum on this amount for the requisite period.

SUMMARY

[36] The plaintiff, Emidio Dibattista, is awarded general damages of \$27,500.00 together with pre-judgment interest on the amount apportioned to the first accident (80% = \$22,000.00) from the date of that accident to the date of judgment at the rate of 2.5% per annum. Similarly, Mr. Dibattista is entitled to pre-judgment interest at the same rate on the amount apportioned to the second accident (20% = \$5,500.00) from the date of that accident to the date of judgment.

[37] In addition, Mr. Dibattista is awarded special damages of \$1,262.19 together with pre-judgment interest of 4% per annum over the relevant period of time for

medical prescriptions. An additional sum of \$2,000.00 is awarded to cover anticipated future prescription costs.

[38] The defendant, Mr. Hennessey shall reimburse Mr. Dibattista \$230.00 plus pre-judgment interest at 4% per annum to cover repair costs to his vehicle resulting from the second accident.

[39] Finally, Mr. Dibattista is also entitled to receive his costs of the action. I will leave it to counsel to try and agree on the appropriate amount. If an agreement cannot be reached, counsel are asked to file written submissions on costs within 60 days of the date of release of this decision.

J.