

SUPREME COURT OF NOVA SCOTIA
Citation: Walji v. Boudreau, 2009 NSSC 349

Date: 20091103
Docket: Hfx. No. 251021
Registry: Halifax

Between:

Frances Walji and Ginger Walji

Plaintiffs

-and-

James Boudreau and Carol Myer

Defendants

Decision

Judge: The Honourable Justice Robert W. Wright

Heard: November 3, 2009 in Chambers at Halifax, Nova Scotia

**Oral
Decision:** November 3, 2009

**Written
Decision:** November 20, 2009

Counsel: Counsel for the Plaintiffs - Robert Carter
Counsel for the Defendants - Connie Morrissey

Wright J. (Orally)

[1] This is a combined motion by the plaintiffs Frances Walji and Ginger Walji Dunphy for an order for summary judgment and an order for an interim payment of damages, made under Civil Procedure Rules 13.04 and 70.08 respectively.

[2] The proceeding arises out a rear-end motor vehicle accident which occurred on June 7, 2003. The plaintiffs were the two occupants of their vehicle which was rear-ended by the defendant Boudreau. The plaintiff Frances Walji is seeking an interim payment of \$38,000 towards her non-pecuniary damages claim. Her daughter Ginger is seeking an interim payment of \$150,000 of which \$100,000 is the proposed contribution towards her past earnings loss claim.

[3] The defence has admitted fault for the accident itself. What the defence does not admit is any causation of the injuries to either of the plaintiffs as a result of the accident. It is on that basis that the motion for summary judgment is contested.

[4] Extensive medical records and reports have been filed as part of this motion, consisting of hundreds of pages. I am satisfied on the whole of the medical evidence I have reviewed that it is indisputable that there was some degree of injury to both plaintiffs that is attributable to the motor vehicle accident. The main issue driving this litigation is the causation of the various forms of injuries and medical conditions the plaintiffs have endured, given their respective pre-existing conditions.

[5] The issue of the degree of causation of the plaintiffs' injuries as a result of the motor vehicle accident is one that can and should be dealt with as part of the assessment of damages. Because I am satisfied that both plaintiffs suffered some degree of compensable injury as a result of the accident, they are therefore entitled to an order for summary judgment with damages to be assessed.

[6] That finding enables the Court to consider the motion for an interim payment of damages under Civil Procedure Rule 70.08. It reads as follows:

(1) A party who claims damages may make a motion for an interim payment when the other party admits liability or the party who makes the motion is entitled to have the damages assessed in accordance with Rule 8 - Default Judgment, or in accordance with an order made under Rule 13 - Summary Judgment.

(2) The order for an interim payment must grant judgment in the interim amount with the balance to be assessed.

(3) The order for an interim payment must provide for a reasonable contribution towards damages that the person making the claim is likely to recover, less any deduction to which the other party is likely to be entitled.

(4) the party who makes a motion for an interim payment must file the party's undertaking to repay the difference if the interim payment is greater than the amount allowed on assessment.

[7] The wording of the new Civil Procedure Rule 70.08 is a bit different from the old Rule 33.01(A) but in my view, the law essentially remains unchanged on such motions. The court continues to retain a discretion as to whether or not to grant an interim payment in any given case. There is nothing mandatory about it once liability is established, notwithstanding the use of the word "must" in Rule 70.08(2), as propounded by counsel for the plaintiffs.

[8] Once satisfied that the plaintiff is entitled to judgment, as I have found here, the Court must then strive with the evidence before it to form an opinion of what damages are likely to be recovered by a plaintiff and the court may then order a reasonable contribution towards those damages as an interim payment. It must always be kept in mind that a motion for an interim payment is not a substitute for an assessment of damages, nor is it a mini-trial of any sort. Rather, the court has the discretionary power to order an interim payment to a plaintiff based on its opinion of the amount of damages the plaintiff is likely to recover, subject to the reasonable proportion limitation. Where the level of that limitation should be set in any given case is left to the discretion of the court.

[9] Whenever faced with an assessment of damages in a case involving pre-existing injuries, the Court's approach is to determine what each plaintiff's medical condition would have been but for the accident having regard to those pre-existing conditions (the "original position"), and what it will be because of the accident (the "injured position"). The court must ultimately look at those two sliding doors in its approach to an assessment of damages in a case of this nature. The defendants are liable for the additional injury, loss and damage caused by their negligence but not the pre-existing damage.

[10] That assessment is a difficult enough task for a trial judge after hearing all the evidence. The task of a Chambers judge is no easier when trying to project what the plaintiff is likely to recover at trial, and fixing a reasonable contribution towards damages pursuant to Rule 70.08(3).

[11] Bearing these legal principles in mind, I now turn to the interim payment motion on behalf of the plaintiff Ginger Walji Dunphy.

[12] The medical evidence discloses that Ms. Dunphy had three significant pre-existing medical conditions. They consisted of a prior neck fracture at the C6 -7 level at age 10; secondly, a jaw injury at age 16 which has caused ongoing TMJ dysfunction and ongoing treatment for TMJ dysfunction; and thirdly, right knee pain in respect of which she was diagnosed pre-accident with patellofemoral syndrome. To complicate matters even further, the plaintiff suffered a fall down the stairs in June of 2006, which is post-accident.

[13] Ms. Dunphy was engaged in ongoing treatments of a medical maintenance nature for both her neck injury and her TMJ dysfunction right up until the time of the accident and of course, has increasingly done so since the accident. The difficulty facing the court on this motion is being able to form an opinion of what the plaintiff is likely to recover at trial, given the existence of this significant history of pre-existing conditions. The fact that no discovery examinations have yet been conducted in this case, of either the plaintiffs or any medical experts, adds to that difficulty. Such cases involving significant pre-existing conditions do not easily lend themselves to interim payment motions when the plaintiff's complaints are in large measure of a subjective nature and the issue of causation of the injuries pervades the analysis.

[14] I am satisfied that Ms. Dunphy is likely to recover some compensation from the injuries sustained or aggravated by this motor vehicle accident. But the question on this motion is whether, on the basis of the medical reports provided, the Court is able to form an opinion of what damages or range of damages are likely to be to be recovered. We are here dealing with a very long and complex medical history and treatment of Ms. Dunphy. The nature and the extent of her pre-existing conditions and the ongoing consequences thereof are going to be the central issue in this case. Findings of fact and findings of credibility are going to have to be made. Medical evidence is going to have to be tested and weighed.

[15] It is not enough for a plaintiff to simply establish that some compensation will likely result at the end of the day. Rather, as I said earlier, the Court must be able to form an opinion of what damages are likely to be recovered (or at least within some identifiable range) against which a reasonable contribution can be fixed.

[16] I conclude in this case that there are simply too many variables and too many uncertainties, given Ms. Dunphy's complex medical history ,to give the Court any confidence that it can form a proper opinion of what she is likely to recover, simply by reading her medical dossier. To do so would involve too much speculation and guesswork. The Court therefore declines to exercise its discretion to make an interim payment for non-pecuniary damages.

[17] Similarly with respect to the past loss of earnings claim, which is the largest component of the amount sought today, the evidentiary record does not adequately support the granting of an interim payment. All we have in evidence on this motion is three paragraphs from Ms. Dunphy's affidavit, which simply recite that at the time of the accident she was recently self-employed as a massage therapist; that after the accident she was forced to reduce her client workload for a period of six months; and that her normal workload of 25 to 30 clients a week was reduced to about 15, which at \$70 per client represents an approximate loss of between \$700-\$1,000 a week in income. The affidavit goes on to say that her medical advisors recommended in 2005, a year later, that she again reduce her workload on the same basis, resulting in a similar loss of income since that time. It is on the basis of that evidence alone that the Court is asked to make an interim payment for past loss of earnings to the tune of \$100,000.

[18] Apart from similar issues of causation of such earnings loss that will inevitably arise and which are very difficult to predict in their outcome, such a bare and untested affidavit of this plaintiff with no supporting records of any kind, and based only on a track record of about six weeks of employment in her fledgling massage therapy business, is simply an insufficient evidentiary basis upon which the Court could award the suggested figure of \$100,000 for loss of past earnings or indeed any other figure. The Court is unable, based solely on this evidence and in light of the causation issues, to form an opinion of what the plaintiff would likely recover under this head of damages. The interim payment motion of the plaintiff Dunphy is therefore dismissed in its entirety.

[19] Turning to the claim of Frances Walji, the medical evidence shows that she sustained lesser injuries than those of her daughter. They consisted of a cervical sprain and soft-tissue injuries to the shoulder and thoracic spine. She has had other injuries that have since resolved. In addition, Ms. Walji has had post-traumatic stress syndrome, the medical evidence on which is very voluminous and very complicated. The causation of that syndrome is very much in issue.

[20] The Court is satisfied that Ms. Walji is likely at the end of the day to get some compensation for her injuries or the aggravation thereof. However, she also had a history of pre-existing conditions. The difficulty is compounded by the fact that the latest medical information the court has on this motion is dated by four years, late 2005 being the most recent. Ms. Walji did not file an affidavit, nor has she or any other party been examined on discovery. The court therefore has no evidence before it whatsoever as to what Ms. Walji's current medical condition is and how it has evolved in the last four years. Without that, the court is simply not in a position to form an opinion of what amount of damages Ms. Walji is likely to recover.

[21] As further complications, she suffered two falls since the accident (one in 2005 and one in 2006) and so again, causation is very much a central issue in respect of her claim as well. Findings of fact and findings of credibility are likewise going to have to be made. Between the issue of causation of her injuries and the absence of any evidence whatsoever as to the plaintiff's current medical condition, her motion for an interim payment of damages is likewise dismissed.

[22] As for costs, there has been divided success today insofar as the plaintiffs are both entitled to an order for summary judgment with damages to be assessed, but at the same time their motion for an interim payment has been denied. In light of that outcome, I simply direct that each party bear their own costs of these combined motions.

J.