SUPREME COURT OF NOVA SCOTIA
Citation: *Johnson v. Touchie*, 2022 NSSC 3

Date: 20220106
Docket: Hfx No. 407853
Registry: Halifax

Between:

Lloyd Johnson

Plaintiff

v.

John Touchie and John Wheelock Touchie

Defendants

DECISION ON MOTION FOR ASSESSMENT OF DAMAGES

Judge:	The Honourable Justice Scott C. Norton
Heard:	December 21, 2021, in Halifax, Nova Scotia
Decision:	January 6, 2022
Counsel:	Lyndsay Jardine, for the Plaintiff Peter Lederman, Q.C., for John Touchie

By the Court:

Introduction

[1] The Plaintiff, Lloyd Johnson, seeks an assessment of damages for personal injuries following interlocutory judgement obtained against John Touchie by Order dated November 12, 2013. The claim against the Defendant, John Wheelock Touchie, was previously dismissed by Order dated November 14, 2013.

[2] The evidence on the motion consisted of an affidavit of Lloyd Johnson sworn October 8, 2021. The affidavit attached medical and other treatment records, employment records, medical reports, and a medical-legal report prepared by a specialist in physical medicine and rehabilitation dated January 17, 2015, the author of which has since died.

Preliminary Issue

[3] As a preliminary matter, at an assessment of damages hearing the Plaintiff bears the burden of establishing their damages as of the date of the motion through admissible evidence on a balance of probabilities. *MacKean v. Royal & Sun Alliance Insurance Company of Canada*, 2014 NSSC 33, reversed on other grounds, *MacKean v. Royal & Sun Alliance Insurance Company of Canada*, 2015 NSCA 33.

[4] At the outset of the hearing I raised my concern that the evidence before the court, other than Mr. Johnson's personal testimony, was largely hearsay. No affidavit was obtained from the authors of the medical reports or treatment records. In addition to the hearsay issue, none of the medical reports containing opinion evidence, including the medical-legal report, complied with the requirements of *Civil Procedure Rule* 55. As to the fact that the author of the medical-legal report has died, formal proof would require the retention of a new expert in the same field of expertise to adopt the report.

[5] On a motion for assessment of damages, a defendant is placed in the difficult position whereby if they insist on these evidentiary requirements being fulfilled, the expense to the Plaintiff in obtaining the affidavit evidence and expert reports is significantly increased and the claim against the defendant for disbursements increases accordingly.

[6] In this case, the Defendant did not object to the hearsay medical, employment and opinion evidence being accepted by the court. Plaintiff counsel in other matters should be cautious to obtain advance consent of the defendant if possible, or work out with the defendant how such evidentiary concerns will be addressed.

Facts

[7] Mr. Johnson was born on June [..], 1949. His claim arises from a slip and fall incident that occurred on February 7, 2011 when he was 61 years old. He is now 72 years old. He fell when attending the premises located at 62 Layman Street in Truro, Nova Scotia, owned by the Defendants. He slipped on ice on a walkway, landing on his right knee on an icicle.

[8] Mr. Johnson says that he twisted his right knee in the process of falling and heard a "popping sound". He felt immediate pain and returned home to rest. That night, and for the next few days, the knee began to swell and the pain increased in severity. After a week, the pain became unbearable and the Plaintiff made an appointment with his family doctor, Dr. Murdo Ferguson.

[9] The Plaintiff was first seen by Dr. Ferguson on February 17, 2011 and was diagnosed with a minor knee sprain. He was advised to rest, apply ice, and to take Advil to alleviate the pain. Despite following these directions, the knee remained swollen and painful. He returned to see Dr. Ferguson on February 28, 2011. Dr. Ferguson sent him by way of urgent referral to the Emergency Department of the Colchester Regional Hospital ("ER").

[10] On arrival at the ER that day, the Plaintiff's knee was aspirated (drained of fluid) by a physician, who diagnosed the knee joint to be septic. The Plaintiff was sent by ambulance to the QEII Hospital in Halifax for assessment.

[11] At the QEII, the Plaintiff was placed under the care of orthopedic surgeon Dr. Chad Coles. On March 1, 2011, Dr. Coles performed an arthroscopic irrigation and debridement of the right knee and right bursa (a fluid filled sac in the knee area). Dr. Coles diagnosed right parapatellar septic bursitis and a right knee effusion. The Plaintiff was treated with intravenous antibiotics and pain killers.

[12] Also on March 1, 2011, the Plaintiff was treated with endoscopic surgery for a bleeding gastric ulcer. He had a 10 year history of a bleeding peptic ulcer and this bleed was considered likely to be caused by the substantial amount of ibuprofen he had been taking over the past two weeks.

[13] The Plaintiff was discharged from the QEII on March 16, 2011 (after 14 days) and on March 23, 2011 returned to see Dr. Coles for a follow up examination of his knee. Since his discharge, he had home nursing twice daily to change his dressing and administer IV antibiotics (through a peripherally inserted central catheter or PICC line). Dr. Coles noted that he continued to experience significant pain and was taking Dilaudid. He was scheduled to begin physiotherapy the next day. The

Plaintiff was told to continue his IV antibiotics until April 10, 2011. Dr. Coles encouraged the Plaintiff to return to work but discouraged him from driving until he was no longer in need of a walker.

[14] The Plaintiff was seen next by Dr. Lynn Johnston for Dr. Coles on April 4, 2011. The Plaintiff reported his knee felt good with much less pain. Dr. Johnston ordered the IV antibiotics to continue for two more weeks and advised that there was no need for the Plaintiff to return to the orthopedic clinic.

[15] The Plaintiff attended physiotherapy at the Colchester Regional Hospital from April 5, 2011 until May 31, 2011. The discharge report (dated August 2, 2011 because the chart was held until after his June appointment with Dr. Coles) advised that Mr. Johnson

> was doing great on last visit; no further concerns; on discharge pain resolved, playing golf, … normal gait, normal range of motion, swelling resolved and just a minor decrease in quadricep muscle strength (80%) and strength improving with activities

[16] Mr. Johnson returned to see Dr. Coles on June 1, 2011. He reported that he had just finished the oral antibiotics and his knee range of motion was good. He was doing some gardening the previous week and did a fair bit of kneeling which may have irritated his knee. Dr. Coles encouraged him to avoid kneeling activities to

allow the knee to completely heal. Dr. Coles advised that he is at an increased risk of arthritis. No other follow up was arranged.

[17] On January 12, 2015, three and one half years later, the Plaintiff was seen at the request of his counsel by Dr. Robert Mahar, a specialist in physical medicine and rehabilitation, for the purpose of a medical-legal examination and report. Dr. Mahar diagnosed the injuries sustained as:

> Septic prepatellar bursitis left knee … 2011 – resolved;
> Septic arthritis left knee … 2011 – resolved; and
> Gastric ulcer with acute gastrointestinal hemorrhage.

[18] Dr. Mahar's reference to the left knee is a typographical error. On physical examination Dr. Mahar found no wasting of the right quadricep and normal range of motion of the right knee. The Plaintiff could perform deep knee bends and arise without difficulty. Dr. Mahar endorsed the opinion of Dr. Coles that the Plaintiff is at an increased risk of premature degenerative arthritis in the right knee. He encouraged the Plaintiff to lose weight as having a beneficial effect on the risk of arthritis and that it would be desirable for the Plaintiff to continue his regular walking program.

[19] The Plaintiff prepared a form for Dr. Mahar relating to his activities of daily living. He indicated on the form that the following activities could be done with difficulty: dressing, bath tub, rake leaves, snow shovelling, mow lawn, gardening,

walking, stairs. Activities that he indicated he could not do were: running and kneeling.

[20] No more recent medical records or reports were placed in evidence.

[21] Against this factual background, I will consider the heads of damage claimed by the Plaintiff.

Damages Analysis

[22] As a preliminary matter, the Defendant's brief raised the issue of the proximate cause of the pain and suffering endured by the Plaintiff. He asserted that Dr. Ferguson had perhaps made an error in diagnosing the injury as a minor sprain and prescribing Advil despite the history of a bleeding ulcer.

[23] This submission is, in essence, an argument of *Novus actus interveniens*. With respect, that is a liability issue that ought to have been pleaded in a defence. As no defence was filed, it is not open to the Defendant to raise this issue at the time of the assessment of damages. In any event, there is no evidence before me to allow me to make a such a finding.

General Damages

[24] The Plaintiff cited three cases in support of his claim. One was from the British Columbia Supreme Court. I find that case has little persuasive merit to a valuation of a claim in Nova Scotia.

[25] In *McKeough v. Miller*, 2009 NSSC 394, the pedestrian plaintiff was struck by a vehicle resulting in multiple fractures to both legs which required extensive surgeries to repair. She suffered from post-traumatic arthritis and it was determined that it was likely that she would need knee replacement surgery. The Court awarded general damages of $85,000 (that Mr. Johnson calculates to be $105,675 with inflation). Mr. Johnson acknowledges that these injuries are more severe and extensive than his own.

[26] In *Roscoe v. Halifax (Regional Municipality)*, 2011 NSSC 485, the plaintiff injured her right knee playing badminton. She suffered a torn meniscus which required arthroscopic surgery to repair. She suffered an aggravation to pre-existing bursitis in her hips. General damages were awarded in the amount of $25,000 (that Mr. Johnson asserts is $29,634 adjusted for inflation). Mr. Johnson asserts that his injuries impacted him more negatively than was the case in *Roscoe*.

[27] The Defendant did not provide me with any case authorities or submission on valuation. He asserted that as of the completion of physiotherapy Mr. Johnson was

doing well with a return to golf and was doing well with pain resolved. In other words, the injury was quite minor.

[28] Having regard to the evidence before me, I consider *Roscoe* to be a fair comparison to the Plaintiff's injuries, pain, suffering, and loss of amenities. Taking inflation into account I award $30,000 for general damages.

[29] With regard to pre-judgment interest, I am satisfied that the assessment of damages could reasonably have been brought before the court for determination within four years of the date of the incident. Accordingly, I award interest of 2.5% for four years which amounts to $3,000.

Loss of Income

[30] At the time of the incident, the Plaintiff was employed as an Economic Development Officer with the Millbrook First Nation. At the time of his injury he was earning $1,806.88 weekly, or $361.37 per work day. He had to use 19 of his banked sick days which carried over year to year if they were not used. As such the loss of the sick days are a recoverable loss (*Hill v. Ghaly*, 2000 NSSC 112). I calculate his loss of past income to be $6,866.14.

[31] The Plaintiff is entitled to pre-judgment interest on this amount at a rate of 5% for a period of four years or $1,373.23.

Past and Future Cost of Care

[32] There is no medical opinion provided that supports any specific ongoing care necessary to treat the injuries that would not be covered by public health insurance. There is no proof of past cost of care other than that which is included in the subrogated claim pursuant to the *Health Services and Insurance Act*, R.S., c.197, s. 18(1)(b) by the Nova Scotia Department of Health ("DOH"). That claim is proved in the amount of $29,155.52.

Past and Future Valuable Services

[33] The Plaintiff now lives with his son. Prior to his injury he owned a large property and performed both indoor and outdoor maintenance activities. When he turned 65, the Millbrook First Nation took over responsibility for mowing his lawn and shoveling his driveway. He continues to perform indoor maintenance and chores. He says he is able to do them but must be careful how he moves his body. He needs to be particularly careful in how he descends the stairs with laundry which is located on the second floor of the home.

[34] The Plaintiff refers to the decision of this Court in *Warnell v. Cumby*, 2017 NSSC 88, where Robertson J. stated, at para 107:

> [107] Mrs. Warnell was able to resume most of her housekeeping duties after the accident, such as sweeping, vacuuming, hanging clothes on the line, attending to the woodstove in the basement. She testified that she can perform these tasks, but simply does them more slowly.
>
> [108] She does require help with the lawns and snow removal particularly in the months her husband is working offshore. I award $15,000 under this head of damage.

[35] In this case there is minimal evidence that the Plaintiff, now age 72, has suffered a direct economic loss in that his ability or capacity to perform pre-accident duties and functions around the home have been impaired. In addition, the Millbrook First Nation has taken over the heavy outside work of lawn care and snow removal. On the facts of this case, I award the sum of $2,500 for valuable services.

Costs and Disbursements

[36] As requested by the Plaintiff, pursuant to *Rule* 77 and Tariff C, I find that the costs payable on the motion are $1,000.

[37] As to disbursements, I reduce the claim for the charge for prints and photocopies to 10 cents from 30 cents per page and direct Plaintiff counsel to provide clarification as to the purpose of the $80 charge for “payment of invoice”. Plaintiff

counsel should submit a revised claim for disbursements before the Order is presented for my approval.

Summary

[38] In summary, I assess the Plaintiff's damages as:

1.	General Damages	$30,000.00
2.	Pre-judgment interest (2.5%)	3,000.00
3.	Loss of Past Income	6,866.14
4.	Pre-judgment interest (5%)	1,373.23
5.	Cost of Past and Future Care	NIL
6.	Subrogated DOH Claim	29,155.52
7.	Past and Future Valuable Services	2,500.00
8.	Costs	1,000.00
9.	Disbursements	TBD

[39] Order accordingly.

Norton, J.