

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Kailey v. Kellner,***
2007 BCSC 1449

Date: 20070928
Docket: M053550
Registry: Vancouver

Between:

Jagjit Singh Kailey

Plaintiff

And

Kenneth Kellner

Defendant

- and -

Docket: M061521
Registry: Vancouver

Between:

Jagjit Singh Kailey

Plaintiff

And

**Raminder Singh Kailey, Navender Singh, G & R Janitorial Services Ltd.,
and DaimlerChrysler Financial Services Canada Inc./Services Financiers
DaimlerChrysler Canada Inc.**

Defendants

Before: The Honourable Mr. Justice Parrett

Reasons for Judgment

Subject to Rule 66

Counsel for the plaintiff: S.K. Johal and K.L. Simon
Counsel for all defendants: K. Lim
Date and Place of Trial: May 2, 3, 4, 14, 2007
Vancouver, B.C.

INTRODUCTION

[1] This is a trial involving two actions for damages arising out of two separate motor vehicle accidents. Liability is admitted in both accidents.

[2] In the first collision on April 2, 2005, the plaintiff was the driver of a motor vehicle stopped in traffic on Columbia Street in New Westminster when he was struck from behind by a vehicle owned and operated by the defendant Kenneth Kellner.

[3] In the second collision on August 15, 2005 the plaintiff was a passenger in a vehicle driven by the defendant Raminder Singh Kailey headed south over the Alex Fraser Bridge when it was struck from behind by a vehicle operated by the defendant Navender Singh.

[4] The plaintiff seeks non-pecuniary general damages, wage loss, special damages, cost of future care, future wage loss and diminishment of earning capacity in relation to each accident, as well as court order interest and costs.

[5] The parties have agreed on past wage loss at \$2,982.50 and special damages at \$320.00. All other heads of damage are in issue.

BACKGROUND

[6] The plaintiff is 61 years of age. He was born in the Punjab on August 6, 1946 and came to Canada from India on August 13, 2003. At the time of the first of these two collisions he had been in Canada for just under 20 months.

[7] His wife of some 30 years had passed away in 1997 and his son had sponsored him to come to Canada. He lives in a home in Surrey with his three sons and his daughter and their families.

[8] Mr. Kailey completed grade 10 in India where his family were farm owners. Most of his working life was spent working on the family farm with his father. Since coming to Canada he found work with a security company providing site security. He was on his way to his work site in the early morning when the first accident occurred.

NARRATIVE AND FINDINGS OF FACT

[9] The first of these two motor vehicle collisions occurred on April 2, 2005 on Columbia Street in New Westminster when the plaintiff's vehicle was rear-ended while stopped at a red light. The plaintiff described his vehicle being moved 2 to 3 feet to the left. There was minor damage to the plaintiff's vehicle which totalled \$1,241.91.

[10] He continued on to work. He notified his supervisor and then his daughter-in-law, who arrived at his work site at about noon. He was eventually relieved at about 6:00 p.m.

[11] Mr. Kailey testified that his daughter-in-law took him to a walk-in clinic but that they would not take ICBC cases, so he went home. The next day he took some medication he had at home and the following day he saw his family doctor.

[12] He testified that he began feeling pain in his left shoulder and on the left side of his neck by the evening. He described the pain as becoming “significant”, with headache and low back pain in the centre of his back.

[13] Mr. Kailey attended physiotherapy twice a week for five weeks where he did exercises and had heat and ‘an electric machine’ applied. He testified that after these sessions he felt better for 4 to 5 hours but that the pain in his left shoulder, the left side of his neck and down to his left elbow returned.

[14] Mr. Kailey returned to work on the 6th or 8th of May and he testified that by that time his low back pain had resolved and the injuries to his neck and shoulder had improved, although they were painful with certain activities such as taking a bath or washing his hair.

[15] On August 15, 2005 Mr. Kailey was a passenger in a vehicle travelling from Vancouver toward Surrey and approaching the Alex Fraser Bridge when a vehicle struck them from behind. At the time Mr. Kailey was in a large Mercedes Benz ML320. He described feeling a jolt when the defendant Navender Singh struck the rear of the Mercedes with his 1995 Geo Metro. The damage to the Mercedes was \$216.57.

[16] Mr. Kailey testified that his injuries from the first accident had gotten worse and the pain had increased 'a lot'. This pain, he testified, continued for 3 to 4 months after which they started to improve. By August of 2006 he says he had pain in his neck and left shoulder every 2 to 3 days, and which has continued to the date of trial.

[17] Mr. Kailey testified that his left arm is significantly restricted and during his testimony he actually reached over and used his right arm to lift his left arm to show that he couldn't raise it. Then minutes later I observed him lift his left arm unassisted and scratch his head near his left ear.

[18] He went on to describe his lingering injuries as preventing him from assisting with grocery shopping, performing repairs around the house, lifting and playing with his grandchildren and doing the gardening he used to enjoy.

[19] After returning to work following the first accident he missed no more work and, in fact, now earns \$9.37 per hour compared to the \$8.25 he earned at the time of the first accident. Past wage loss is agreed to be \$2,982.50.

THE MEDICAL EVIDENCE

[20] The plaintiff first saw his family doctor, Dr. Amrik Tung, on April 4, 2005, two days after the first collision. At that time he presented with complaints of neck and upper back pain. Notably, and contrary to the plaintiff's evidence, there is no report of pain in his left shoulder.

[21] Dr. Tung's physical examination that day revealed tenderness over his posterior cervical muscles, the left trapezius muscle and the left intrascapular area. He also observed that his range of motion of his neck was slightly decreased and painful. Dr. Tung's diagnosis was (a) neck strain, and (b) upper back strain.

[22] The plaintiff returned to see Dr. Tung on April 6, 8, 11, 22 and 28. The first mention of shoulder pain was on April 28, 2005, on his sixth visit.

[23] On August 16, 2005, the plaintiff saw Dr. Tung following the second collision the day before. On this occasion he presented with complaints of pain in his neck and his left shoulder. He was seen in follow-up with similar complaints on August 29, September 16 and October 26 of 2005.

[24] Interestingly enough Dr. Tung, in his report of January 22, 2006, writes that:

Total disability from August 15, 2005 motor vehicle accident was about five to six weeks. Prognosis is overall satisfactory.

[25] The evidence is that the plaintiff missed no work following this second accident.

[26] B.S. Rai was the plaintiff's physiotherapist who treated the plaintiff twice a week over a period of five weeks. He testified that Mr. Kailey was improving throughout the five weeks he attended treatments.

THE COMPETING EXPERTS

[27] At this trial both sides called an orthopaedic surgeon who had examined the plaintiff. Their divergent opinions are a central part of the contest at this trial.

Dr. Barry Vaisler

[28] Dr. Vaisler was the specialist called by the plaintiff. Dr. Vaisler examined the plaintiff on March 15, 2007 and produced a written report of March 26, 2007. The results of Dr. Vaisler's physical examination are set out on pages 3 and 4 of his report:

On examination, he did not appear to be in any obvious discomfort during the interview, nor did he exhibit any abnormal pain behaviour. There was minimal forward protraction of both shoulders. On examining his cervical spine, he had a full pain free range of motion. There was moderate tenderness of the left trapezius muscle belly and medial proximal left scapula. No paracervical muscle spasm was palpable. His thoracic spine was normal and he had a full pain free range of motion of his lumbosacral spine. His right should forward flexed 160° with 90° of external rotation with his arm abducted, 45° of external rotation with his arm at his side and 85° of internal rotation.

On examining his left shoulder, there was minimal winging of his left scapula with reaching with his left shoulder. His left shoulder forward flexed 160° with 90° of external rotation with his arm abducted and some pain at the extremes of movement. There was 45° of external rotation with his arm at his side and 80° of internal rotation, again with pain at the extreme. The impingement findings of O'Brien's test for internal impingement were mildly positive and he had minimal pain on stress of the left biceps tendon. No weakness or instability of his left shoulder was present. The remainder of both upper limbs was normal with no evidence of any neurological or vascular abnormalities.

X-rays taken of his cervical spine on April 4, 2005, demonstrated minimal anterior traction spur formation at the C.5/6 and C.6/7 levels.

[29] The important feature of Dr. Vaisler's opinion is that which relates to the plaintiff's left shoulder. This portion of Dr. Vaisler's written report begins on page 5:

With respect to his left shoulder, he most probably sustained a contusion to his left shoulder against the seat belt at the time of the accident of April 2, 2005. This most probably resulted in some swelling and thickening of the subacromial bursa of his left shoulder. Similar findings can also result from paracervical muscle spasm, secondary to a soft tissue injury to the neck. This leads to restricted scapulothoracic movement of the shoulder and as a result the scapula fails to rotate out of the way with reaching activities, and the greater tuberosity of the humerus impinges against the under surface of the acromion, entrapping the insertion of the rotator cuff and the subacromial bursa. Swelling and thickening of the subacromial bursa often occurs leading to pain with reaching activities. Typically shoulder symptoms from this subacromial impingement, are present with sustained or repetitive reaching at and

above shoulder level, sudden reaching, lying on either shoulder at night, and dressing.

When I saw him on March 15, 2007, the tenderness of his left trapezius muscle belly and superomedial border of the left scapula was suggestive of underlying spasm of the left trapezius muscle and some restricted scapulothoracic movement. Most of his present symptoms are due to subacromial impingement of his left shoulder. On examination he had objective clinical findings of subacromial impingement, and also had some loss of stabilization of his left scapulothoracic joint as evidenced by the scapula winging or prominence with reaching. Although the MRI examination showed findings consistent with a partial tear of the supraspinatus tendon, it is unlikely he sustained a tear of the tendon or rotator cuff at the time of either of the motor vehicle accidents. Partial tearing of the supraspinatus tendon is a common degenerative finding at his age and can render the shoulder more at risk for sustaining an injury as a result of the motor vehicle accident.

I noted from Dr. Tung's clinical records that he was complaining of pain in his left shoulder during the summer of 2004, with symptoms suggestive of early degenerative osteoarthritis of the acromioclavicular joint. There was no further mention of left shoulder symptoms in the records provided to me up until the initial motor vehicle accident in spite of multiple visits to Dr. Tung. At the time I saw him on March 15, 2007, I could find no symptoms or abnormal physical findings related to his left acromioclavicular joint. More likely than not, his present left shoulder symptoms are directly related to the motor vehicle accident of April 2, 2005 and are consistent with a blow against the shoulder strap portion of the seat belt.

[30] Dr. Vaisler goes on to recommend specific types of exercise programs designed to stabilize the shoulder. He also goes on to give the opinion that there is "a little better than even chance" that the plaintiff will continue to complain of pain and may require an arthroscopic subacromial decompression of his left shoulder.

Dr. Duncan McPherson

[31] The defence called Dr. Duncan McPherson, who examined the plaintiff on February 15, 2007 and authored three separate written reports; two dated February 22, 2007 and a third dated April 12, 2007.

[32] In his first report Dr. McPherson described his physical examination of the plaintiff:

On examination the patient is 5'1" and weighs 200 lbs. An alert and cooperative person who complains of his left trapezius area and states that he has pins and needles in his left fourth and fifth fingers.

The neck flexes to bring his chin to 1" from the sternum, extends 60° from neutral, rotates 70° right and left with normal stability and no tenderness. He has a powerful shrug; there is no response in the trapezius areas upon pressure. His shoulders have full range of movement and normal power. He is right handed with full range of motion, reflex and power, except for voluntary restriction of power in the left arm. He cannot force his left hand down with the aid of gravity, but has normal power on distracted testing.

He states he has "pins and needles" in the left fourth and fifth fingers, but he feels light touch. There is no wasting or power loss in the ulnar distribution of the left hand.

When standing, the patient can flex forward to 3" from the floor, with full extension and lateral flexion of the spine. There is no spasm, no deformity and no tenderness. He does an easy sit-up and sustained straight-leg raise. Hips have full range of motion. Straight-leg raising in the usual way is only 60°, but actually one can flex his knees to 90° with the hips fully flexed, which indicates there is no sign of nerve root irritation. His legs have full power, reflex, sensation and range of motion. Stance, gait and balance are normal.

[33] Dr. McPherson's opinion differs markedly from that of Dr. Vaisler:

Summary: This patient, in the first motor vehicle accident, was a fully restrained driver in a rear-end collision with neck and left shoulder complaints, who has had physiotherapy.

In the second motor vehicle accident, he was a fully restrained right front passenger in some form of small truck in a rear-end collision with neck complaints. He has had minimal time loss. At this time, he has voluntary restriction of power in the left arm. He has some mild ulnar symptoms, which might relate to an ulnar nerve irritation, but there are no other physical findings at this time.

At this time, there is no objective evidence of disability related to either motor vehicle accident. One would not be inclined to limit his activities in any way. There seems no medical indication for treatment unless a diagnosis is established.

[34] In his report of April 12, 2007, delivered three weeks before the trial commenced, Dr. McPherson was even more direct in the assessment he presents:

When I examined the patient, I found him to have normal range of neck motion and a full normal range of shoulder movement with full reflexes, movement, power and sensation in his upper limbs, except that he voluntarily restricted the power in his left arm such that he could not force his left hand down even with the aid of gravity. However, it was quite normal on distracted testing. While he described pins and needles in his left fourth and fifth fingers, he could feel light touch and there was no wasting or power loss in the ulnar nerve distribution of the left hand. His spine had a

normal full range of motion. I could find no objective evidence of a disability related to either motor vehicle accident and felt his activities should not be limited in any way and could find no medical indication for treatment unless a diagnosis was established.

[35] Dr. McPherson then embarks upon a detailed examination and recital of the clinical records which were available to him and, in fact, formed the substance of his second report of February 22, 2007. The expressed reason for this expansion of his earlier report was his receipt of the transcription of "the clinical records of Dr. Sidhu".

[36] In the four pages of this report the only references to Dr. Sidhu are the two initial references to receiving the transcription of his clinical records.

[37] At page 3 of this report Dr. McPherson begins his critique of Dr. Vaisler's opinion with the following:

Dr. Vaisler advances a most unusual mechanism of injury for a fully restrained driver in a rear-end collision, suggesting, "a blow to his left shoulder against the seatbelt". This might be a reasonable concept in a frontal collision, but it does not apply to someone restrained in a belt who is in a rear-end collision. There is no way that one would receive a significant force to the shoulder from the seatbelt in this situation.

In his summary of visits, he does not make any reference to visits from August 26, 2005, which actually should be August 29th, up to January 5th of 2006, but the patient was seen on nine occasions where pain in the shoulder was mentioned on only two visits. Dr. Vaisler does acknowledge that the patient had pain in his left shoulder prior to the motor vehicle accident, mentioning July 5, 2004 and August 11, 2004, but is apparently not aware of the visit that occurred on January 14, 2004, so that there is an established pattern of left shoulder complaints prior to the two motor vehicle accidents.

It is useful briefly to consider the patient's visits and the reasons. Considering the visits for left shoulder complaints as opposed to total visits in 2003, there were no shoulder complaints and three total visits. In 2004, there were three shoulder complaint visits and ten **actually 11** visits in total including other reasons. In 2005, the patient had eight **actually 7** visits where the left shoulder is mentioned and 25 visits including other complaints for that year. In 2006, the patient had two visits which mentioned the left shoulder out of seven **actually 9** for which he attended his physician.

[My inserts]

[38] Dr. McPherson concludes at page 3 with the following:

It is useful to realize that shoulder complaints in older workmen are very common. They are usually short-lived and they are aggravated by certain movements. There may be a certain degree of wear and tear on the shoulder but in the presence of full power, normal stability and a full range of motion, they are not serious and are more likely described, clinically at least, as a tendonitis affecting the rotator cuff or the supraspinatus muscle tendon and its insertion in the rotator cuff. The normal treatment for somebody who is significantly symptomatic would be to do an injection of local anaesthetic and steroid into the area, expecting resolution of the tendonitis complaints over the next couple of weeks.

This patient has a previous history of left shoulder complaints which has continued with a slightly more frequent visit rate in the year 2005, reverting to a less frequent visit rate in the year 2006.

The patient's previous existing complaints in the shoulder may have been mildly aggravated in relation to this motor vehicle accident, but it is not due to a blow to the shoulder and it has apparently become quiescent once more. I would not anticipate that he would need further treatment, except for an injection if he became significantly symptomatic in the future.

[39] Two aspects of Dr. McPherson's reports and evidence are disturbing. Firstly, he demonstrates a lack of care and precision in conducting an analysis purporting to support his opinion by giving it a superficial appearance of careful analysis.

Secondly, in my view, he steps away from the proper role of an expert witness to engage in open advocacy.

[40] While not accepting everything contained in Dr. Vaisler's opinions, I prefer his evidence to that of Dr. McPherson. Dr. Vaisler, in my view, is more carefully neutral and objective in his assessment of the plaintiff's situation.

ANALYSIS AND CONCLUSIONS

[41] The plaintiff seeks general damages of \$40,000 to \$60,000 for the first motor vehicle accident and between \$7,000 and \$10,000 for the second.

[42] In addition, he seeks an award for the cost of future care of \$3,000; \$25,000 for diminishment of earning capacity; as well as a future wage loss of \$4,722.48 to cover loss of earnings associated with what he submits will be necessary future surgery.

[43] The defence submits initially that the plaintiff has failed to prove a loss on a balance of probability or alternatively that he has established only a mild level of injury which was not long lasting and included no injury to his left shoulder.

[44] The defence submits that the plaintiff had largely recovered after two months, although some minor symptoms persisted beyond that time range.

[45] They submit that the effect of the second accident was extremely minor and that, in any event, the plaintiff failed to mitigate by not taking the recommended physiotherapy, particularly after the second accident.

[46] The defence submits that the appropriate range of damage for both accidents is in the range of \$3,500 to \$4,500 apportioned between the two, with no award for loss of earning capacity, loss of future income or the cost of future care.

[47] With the greatest of respect to the defence, the suggestion that the plaintiff has failed to establish a loss on a balance of probability is completely untenable.

[48] The defence has not simply admitted liability with respect to these two accidents, they have also agreed to and admitted that the plaintiff suffered past wage loss of \$2,982.50 and special damages of \$320. Given the admissions made

at the opening of this trial, it is not, in my view, open to the defence to argue that the plaintiff was not injured in the first accident.

[49] The approach to the assessment of damages where there have been successive events has long been established by our Court of Appeal's decision in **Long v. Thiessen** (1968), 65 W.W.R. 571 at 591:

I think that the way in which justice can best be done here is: (a) To assess as best as one can what the plaintiff would have recovered against the Thiessens had his action against them been tried on April 22, 1996 (the day before the second accident) and to award damages accordingly; (b) To assess global damages as of the date of the trial in respect of both accidents; and (c) To deduct the amount under (a) from the amount under (b) and award damages against Laliberte in the amount of the difference.

[50] This approach has been applied in **Hicks v. Cooper; Hicks v. Canadian Petrofina Ltd.** (1973), 41 D.L.R. (3d) 454 (Ont. C.A.); **Berns v. Campbell** (1974), 59 D.L.R. (3d) 44 (Ont. H.C.); and **Masson v. Rowan**, [1988] 4 W.W.R. 430 (Man. Q.B.).

[51] Despite criticism of this approach it remains the law in British Columbia.¹

[52] The central question in this case is, in my view, the causal link between some of the plaintiff's symptoms and the motor vehicle accidents. This is particularly so with respect to the plaintiff's left shoulder.

¹ See: Cooper-Stephenson, *Personal Injury Damages in Canada*, 2nd ed. (1996) at 906-907 **Kozak v. Funk**, [1998] 5 W.W.R. 232 at para. 30; **Pryor v. Bains** (1986), 69 B.C.L.R. 395 (C.A.); **Zylstra v. Huches**, 2001 BCCA 326 at para. 15; **Resvick v. Behan**, 2004 BCCA 166.

[53] The defendants submit that there is a credibility issue with respect to the plaintiff's evidence. There is, in my view, an issue as to the accuracy of the plaintiff's evidence but overriding that issue is the causal connection mentioned above.

[54] The plaintiff, in his evidence, described a "blow" from the seatbelt to his left shoulder; yet in his evidence at his examination for discovery he said there was no blow.

[55] During his examination by Dr. Vaisler he also described ". . . a blow to his left shoulder against the seat belt . . ." He went on in his evidence to describe bruising relating to this blow, yet Dr. Tung, when he examined him, found and noted no bruising and, indeed, noted no complaint related to the shoulder.

[56] The plaintiff described the damage to the vehicle as \$3,000 to Dr. Vaisler, and \$3,500 to Dr. Tung when it was in fact \$1,241.91.

[57] He also described virtually immediate low back pain and headaches in his evidence yet reported neither to Dr. Tung, Dr. Vaisler or his physiotherapist Mr. Rai.

[58] The plaintiff also testified that he could not raise his left hand without the assistance of his right arm and that he could not lift the left arm above the level of his chin. This evidence was contrary to my observations of the plaintiff in the courtroom during his evidence, but more importantly, contrary to the evidence and physical findings of Dr. Vaisler, Dr. McPherson and Mr. Rai, particularly with respect to his range of motion.

[59] An MRI examination of the plaintiff's left shoulder was conducted on February 15, 2007. This MRI investigation had been suggested by the plaintiff's counsel and then requested by Dr. Tung. The findings included the following:

There is increased T2 signal equal to that of fluid within the substance of the supraspinatus tendon and its articular side, at its attachment to the greater tuberosity of the humerus, indicative of a partial tear. There is also likely a bursal side component of this tear, with a well circumscribed high T2 signal focus noted more proximally in the anterior supraspinous tendon. A physiologic amount of fluid is noted in the subdeltoid subacromial bursa. The infraspinatus tendon is unremarkable. Subscapularis tendon is normal, and the biceps tendon normal in location and signal. The acromion is a type 1 acromion. The AC joint demonstrates moderate hypertrophy, but only minimal degenerative change.

[60] Dr. Vaisler was of the view that these findings were a common degenerative finding at his age and unlikely to be a result of the motor vehicle accident.

[61] Given the whole of the evidence, including the plaintiff's previous complaints of problems with his left shoulder, his age and the inconsistencies in his evidence taken together with the absence of any initial reporting of shoulder pain, I find that these problems with his left shoulder are not, on a balance of probabilities, caused by the motor vehicle accidents.

[62] Both of these accidents were low velocity collisions resulting in minimal damage to the vehicles involved. While it is clear that the amount of physical damage to vehicles does not determine the extent of physical injury to the occupants of those vehicles², it is a factor to be considered along with the specific mechanism of the collision where the evidence deals with that relationship.

² **Gordon v. Palmer** (1993), 78 B.C.L.R. (2d) 236

[63] The plaintiff suffered soft tissue injury to his neck and upper back in the collision of April 2, 2005. His initial disability lasted approximately five weeks and resulted in his being unable to work for about a month. He returned to work on May 8, 2005 at which time his major symptoms had improved although his neck pain and occasional headaches continued.

[64] On August 15, 2005, Mr. Kailey was injured in a second motor vehicle collision which resulted in a mild aggravation of his existing soft tissue injuries. These symptoms, primarily of neck pain, lasted for a further five to six weeks by which time those related symptoms had largely dissipated.

[65] Mr. Kailey's continuing symptoms stem from his left shoulder and, in my view, have not been shown to be related to these motor vehicle accidents.

[66] I assess the non-pecuniary damages related to the first accident as at August 14, 2005 at \$15,000, and the global non-pecuniary damages related to both collisions at \$20,000.

[67] I award non-pecuniary damages for the first accident of \$15,000, and for the second of \$5,000.

[68] There is, in my respectful view, no established basis for an award for the cost of future care, diminishment of earning capacity, or future wage loss.

[69] The plaintiff will also recover past wage loss, as agreed, at \$2,982.50 and special damages of \$320.

[70] If counsel are unable to agree on costs they may be spoken to.

The Honourable Mr. Justice Parrett