COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Mattu v. Fust,*
2010 BCCA 254

Date: 20100514
Docket: CA037181

Between:

Jasbir Singh Mattu

Respondent
(Plaintiff)

And

Danny Edward Fust

Appellant
(Defendant)

And

Lila Kanta Dutta and
The Attorney General of Canada

Respondents
(Defendants)

Before: The Honourable Chief Justice Finch
The Honourable Mr. Justice Donald
The Honourable Madam Justice Levine

On appeal from: Supreme Court of British Columbia, May 8, 2009
(*Mattu v. Fust*, 2009 BCSC 624, Vancouver Registry M043152

Oral Reasons for Judgment

Counsel for the Appellant:	J.M. Noble
Counsel for the Respondent:	K.L. Simon
Place and Date of Hearing:	Vancouver, British Columbia May 14, 2010
Place and Date of Judgment:	Vancouver, British Columbia May 14, 2010

[1] **DONALD J.A.**: The ground of this appeal is that the trial judge did not give effect to the argument of the defendant (appellant) that the plaintiff (respondent) failed to mitigate his loss. I am not persuaded the judge so erred and I would dismiss the appeal.

[2] This is a personal injury claim arising from a motor vehicle accident on 16 March 2004. The respondent was the driver in the lead vehicle of a three vehicle accident caused by the admitted negligence of the appellant. The assessment of damages was conducted by Madam Justice Brown who delivered judgment on 8 May 2009: 2009 BCSC 624.

[3] The judge awarded: non-pecuniary damages of $60,000; special damages of $7,180.29; past income loss of $47,965, subject to statutory deductions; future care costs of $13,943.46; loss of opportunity at $50,000; and costs.

[4] The mitigation argument was that the respondent did not follow medical advice. The judge dealt with the argument in this way:

> [73] The defence argues that Mr. Mattu has failed to mitigate his loss. The defence bears the burden of establishing that the plaintiff has failed to act reasonably to mitigate his loss, in this case that he failed to follow medical direction, and that had he followed that advice, he would have recovered further or faster: see ***Janiak v. Ippolito***, [1985] 1 S.C.R. 146 at 163-66.
>
> [74] The defence says that for the first three months after the accident, Mr. Mattu pursued treatment from a number of practitioners: physiotherapy, chiropractic treatments, massage, acupuncture, and herbal and prescription medication. For 14 months, from July 2004 until September 2005, he saw only Dr. Parhar, took medication and ice, heat and rest. He did not take physiotherapy, massage therapy, kinesiology or acupuncture as recommended by Dr. Parhar. The defence says that Mr. Mattu also did not retain a personal trainer or follow the structured exercise program recommended by various practitioners.
>
> [75] Since September 2005, Mr. Mattu has attended a chiropractor on a regular basis, sometimes more than once/week, and more recently every four to six weeks. Mr. Mattu says that for a period he could not pursue recommended treatments because he had exceeded his coverage and did not have the resources himself to pay for treatment privately. He says that he purchased a home gym and exercise balls and has pursued exercise at home.

> [76] In September 2004, Dr. Parhar recommended that Mr. Mattu limit his treatment program to massage and physiotherapy, and increase his active modalities, such as swimming and exercises. By May 2005, when he saw Dr. Hershler, Mr. Mattu had acquired a new mattress for his back, as well as a home gym. He had purchased a gravity extension table which he found to be a useful traction device. He was occasionally receiving massage and acupuncture. He was taking prescription and herbal medication. He was using the infrared sauna at the White Rock facility. Dr. Hershler recommended that Mr. Mattu continue to use the sauna, perform specific stretches two to three times per day, and take massage and chiropractic treatments as well as acupuncture. He also recommended pulsed electromagnetic field therapy. He said, "I cannot be absolutely sure whether any or all of these treatments will lead to complete recovery."
>
> [77] The medical evidence does not satisfy me that had Mr. Mattu pursued the recommendations of Dr. Parhar or others to the letter, as opposed to pursuing the treatment he took, he would have recovered more fully, or more quickly. Dr. Parhar was asked whether the chance of recovery is better if a doctor's advice was followed and agreed that it was. He was not asked whether, in his opinion, had Mr. Mattu followed a particular recommendation, Mr. Mattu would have recovered better. The broad "motherhood" proposition put to Dr. Parhar is not sufficient to satisfy me that Mr. Mattu has failed to mitigate his loss as the defence argues.

[5] The appellant says the judge erred in two ways: (1), in failing to refer to evidence that supported the mitigation defence and, (2) the judge relied upon Dr. Hershler's statement about not being "absolutely sure" and set a standard of proof higher than the balance of probabilities. The complaint behind the first point is that the judge failed to mention that Dr. Parhar applied the general statement about following medical advice to the respondent.

[6] A judge is not required to recite all of the evidence in reasons for judgment. The failure to mention certain aspects of the evidence does not permit this Court to substitute its opinion for that of the trial judge. In *Marois v. Pelech*, 2009 BCCA 286, this was said:

> [46] Once again, the difficulty faced by the appellants is that the trial judge crafted his reasons as a response to the submissions of counsel, which they have not put before us. They survey the evidence in detail in their attempt to demonstrate error in the reasons for this award. In my view, they seek to have us substitute our judgment for that of the trial judge. That is not our function on appellate review. The failure of the trial judge to discuss the evidence in detail is not sufficient reason for this Court to re-examine it unless it gives rise to a "reasoned belief that the trial judge must have forgotten, ignored, or misconceived the evidence in a way that affected his conclusion":

> *Van de Perre v. Edwards*, 2001 SCC 60, [2001] 2 S.C.R. 1014 at para. 15, aff'd *Housen v. Nikolaisen,* at paras. 39, 72. That test has not been satisfied here.

[7] I am not prepared to assume the judge ignored the evidence, nor can I say that the evidence was so important that it required specific mention. The judge concluded the respondent was well motivated in seeking recovery from his accident injuries and that conclusion is reasonably based on the record. The judge was not, in my opinion, looking for absolute proof of a failure to mitigate. The fact of the matter is that on the civil standard the appellant failed to establish that the respondent's less than full compliance with medical recommendations would have made any difference to his continuing disability. The respondent never took the case on mitigation beyond generalities, such as: it is always preferable to follow your doctor's advice. The judge drew an inference from the evidence that the respondent did not fail to mitigate. On the palpable and overriding error standard, I can see no basis for interfering with her finding in this regard.

[8] I would dismiss the appeal.

[9] **FINCH C.J.B.C.**: I agree.

[10] **LEVINE J.A.**: I agree.

[11] **FINCH C.J.B.C.**: The appeal is dismissed.

"The Honourable Mr. Justice Donald"