IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Fell v. Morton,*** 2012 BCSC 428

Date: 20120217
Docket: M105334
Registry: Vancouver

Between:

Patricia Jennifer Fell

Plaintiff

And

Lovena Morton and Ralph Allan Liebel

Defendants

Before: The Honourable Madam Justice Fenlon

Oral Reasons for Judgment

Counsel for the Plaintiff:	K.L. Simon
Counsel for the Defendants:	D. Georgetti (agent for C.J. Watson)
Place and Date of Trial:	Vancouver, B.C. January 30 and 31, 2012 February 1 and 2, 2012
Place and Date of Judgment:	Vancouver, B.C. February 17, 2012

[1] **THE COURT:** The 36-year-old plaintiff, Jennifer Fell, was injured two years and nine months ago when the car she was driving was rear-ended by the defendants' vehicle. Liability for the accident is admitted. Causation and quantum remain in dispute.

[2] There are two main issues: first, whether the plaintiff's back and neck pain and migraine headaches were pre-existing problems that were temporarily aggravated by the accident before returning to baseline; and second, whether the plaintiff has suffered loss of earning capacity due to her injuries.

[3] At the time of the accident, Ms. Fell was self-employed in the film industry as a first aid/craft services provider, which involved being on location during filming to provide first aid at a Level 3 certification as needed, and to provide snacks and light meals for actors, directors, and the film crew, including any extras.

[4] At times, Ms. Fell was responsible for providing these services for up to 1,000 people a day. She often worked 16-hour days, Monday to Friday, had Saturday off, and then spent eight hours on Sunday shopping to purchase food for the next week.

[5] A project could last from days to months, and it was typical for Ms. Fell to work intensely during the course of a project and then to take a month or two off before starting another. Ms. Fell had been working in the film industry for about 10 years at the time of the accident.

[6] Following the accident, she continued to work as a first aid/craft services provider until taking a maternity leave just before the birth of her second child in July 2011. She was on maternity leave at the time of trial.

What injuries has Ms. Fell sustained?

[7] The plaintiff claims that she suffered the following injuries in the May 2009 accident: headaches, migraine headaches, injury to her neck, injury to her upper

back and shoulders, numbness and tingling of the left arm and left leg, and injury to the left wrist.

[8] The injury to her left wrist, numbness and tingling in the left arm and leg, and pain going into her left leg, all resolved within a few weeks of the accident. Ms. Fell says that her back, neck, and shoulder pain persist, as do debilitating migraine headaches, although the symptoms have decreased in frequency, with the migraines occurring once or twice a month rather than weekly.

[9] There is substantial agreement among the medical professionals who assessed and/or treated Ms. Fell. They acknowledge that she suffered soft tissue injuries in the accident and that she remained symptomatic as of the date of trial. They also agree that soft tissue injuries in her neck and upper back trigger headaches which can turn into migraines.

[10] The experts disagree on whether the accident is the cause of Ms. Fell's ongoing back and neck pain and her migraines. The plaintiff's medical experts say the accident is the cause; the defendants' medical expert holds the opinion that Ms. Fell's back and neck complaints and migraines predated the accident and were only aggravated by the accident for about one year before returning to pre-accident levels.

[11] It is, therefore, necessary to choose between the medical opinions. I begin with the plaintiff's pre-accident condition. There is common ground that the plaintiff experienced neck tightness and pain brought on by the relatively heavy physical nature of her work, and that muscle tightness in her neck would cause headaches. It is also common ground that the plaintiff has, since puberty, suffered from migraine headaches that occurred on average once each month, being triggered by the hormonal fluctuations associated with her menstrual cycle.

[12] The plaintiff says the migraines increased in frequency in the first three months of her first pregnancy in 2004, but stopped in the second trimester and did

not recur after her son was born in 2005. If the plaintiff's evidence is accepted, she was migraine-free for about four years before the accident.

[13] The defendants' expert, Dr. Christian, is an orthopedic surgeon. He based his opinion that the accident did not cause Ms. Fell's migraines on the assumption that she was suffering from migraines right up to the time of the accident. Not surprisingly, he therefore concluded that the accident temporarily exacerbated the neck pain and increased the frequency of headaches, but was not the cause of those problems.

[14] Dr. Christian's assumption was based on the records of Dr. Sheikh, a chiropractor from whom the plaintiff sought treatment starting in February 2009, about three months before the accident. These treatments were ongoing. The plaintiff had been to the chiropractor on the morning of the accident.

[15] The intake records of the chiropractor record that, in response to the question "What would you like the chiropractor to help you with?", Ms. Fell wrote "Neck/back pain, headaches." In response to the question, "How does the above affect your daily life or activities?" Ms. Fell wrote, "Always uncomfortable. Sometimes unable to lift or carry objects."

[16] Dr. Sheikh took a medical history from Ms. Fell and he recorded under the heading, "Migraines": "One time per month, nausea, vomit, less with cycle since baby, since puberty."

[17] The defendants submit that the logical and plain meaning of this note is that the plaintiff was suffering from migraines once per month in February 2009, but had suffered from them even more frequently before her first pregnancy.

[18] Dr. Sheikh testified at trial, but could not recall his discussion with Ms. Fell, nor could he add anything to the note he had made. He could not say whether he was referring to Ms. Fell's experience with migraines in the past or her current experience.

[19] I do not find Dr. Sheikh's note to be as clear as the defendants would have it. Histories taken by other doctors Ms. Fell saw record monthly migraines commencing in puberty that essentially stopped after her first son was born, although she also told them she might have had one migraine headache since. It is quite possible that Dr. Sheikh's note "less with cycle since baby" was a summary of that information. In any event, given the ambiguity in the chiropractor's notes, all of the evidence on this issue must be considered.

[20] The PharmaNet records show use of migraine prescription drugs up to 2005, when Ms. Fell's first son was born, and not thereafter until after the accident, a period of about four years. The hospital records, too, show no hospital visits to the emergency room to seek assistance with controlling migraines, and there have been two such visits since the accident.

[21] Finally, there is no evidence that Ms. Fell missed work due to migraines between 2005 and the date of the accident, whereas there was compelling evidence from Nancy Kress, (another first aid/craft services provider who is more senior to Ms. Fell and who often hired her to manage the second unit on a film project), that Ms. Fell had difficulties performing her work after the accident because of severe headaches. Ms. Kress related finding Ms. Fell sitting in a truck trying to cope with such a headache, and noted that she often looked glassy-eyed and unwell as she tried to work after the accident.

[22] Although neither Dr. Hershler, the physiatrist called by the plaintiff, nor Dr. Robinson, a neurologist and headache specialist called by the plaintiff, had the benefit of reviewing the chiropractic records before they provided their opinions, neither expert moved off his opinion that what Ms. Fell was experiencing post-accident was qualitatively different from what she had experienced in terms of headaches and neck stiffness prior to the accident. Both accepted that, based on the history and medical evidence, Ms. Fell had experienced a marked increase in migraine headache activity after the accident that continued to the date of their last assessment.

[23] Having considered all of the evidence, I find that Ms. Fell suffered soft tissue injuries to her upper neck and back as a result of the accident. I further find that those injuries triggered a recurrence of migraine headaches that had been almost entirely in remission since the birth of her first son.

[24] The migraines initially occurred twice per week, gradually decreasing to about once or twice each month by the time of trial. Ms. Fell's headaches are debilitating, involving nausea and extreme sensitivity to light and sound. They sometimes last for two or three days, and all Ms. Fell can do is lie in a darkened room. She could not attend her wedding reception in Mexico in April 2010 because of a migraine headache.

[25] The migraine headaches Ms. Fell has experienced since the accident are also more difficult to control than the headaches she experienced prior to the birth of her first child. In relation to the latter headaches Ms. Fell described being able to take Advil and Tylenol and migraine medication when she felt a headache developing, and generally being able to stay on top of the migraine. In contrast, now she is completely incapacitated by the migraines and cannot function. As she described it, she "gets lost in the headache" and cannot seem to pull herself out of it.

[26] As for the prognosis, the medical experts agree that there is potential for improvement in Ms. Fell's condition over time, although Dr. Hershler qualified that opinion by saying that improvement would not mean a full return to pre-accident condition, but rather an improvement in the plaintiff's ability to function with her limitations.

[27] Having determined that the accident caused Ms. Fell's current problems, I must also consider, in accordance with *Athey v. Leonati*, [1996] 3 S.C.R. 458, para. 35, whether there were pre-existing injuries and "a measurable risk that the pre-existing condition would have detrimentally affected the plaintiff in the future, regardless of the defendant’s negligence". The latter question is relevant because the plaintiff is only entitled to be restored to her original position.

[28] I find that prior to the accident Ms. Fell tended to suffer regularly from neck and upper back pain and headaches that were brought on by exertion. She sought regular massage therapy and chiropractic treatment in relation to those symptoms. She also had a proclivity to develop migraine headaches, and that condition meant she was susceptible to something else triggering her headaches in future.

[29] Ms. Fell should not be compensated for her pre-existing condition or the potential for it to reoccur quite apart from the injuries sustained in the motor vehicle accident.

What non-pecuniary damages should be awarded to Ms. Fell?

[30] An award of non-pecuniary damages compensates a plaintiff for loss of amenities, pain, suffering, and loss of enjoyment of life. In *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46, the Court of Appeal outlined the factors a trial judge should consider when assessing such damages:

> The inexhaustive list of common factors cited in *Boyd* [*Boyd v. Harris*, 2004 BCCA 146] that influence an award of non-pecuniary damages includes:
>
> (a) age of the plaintiff;
>
> (b) nature of the injury;
>
> (c) severity and duration of pain;
>
> (d) disability;
>
> (e) emotional suffering; and
>
> (f) loss or impairment of life;
>
> I would add the following factors, although they may arguably be subsumed in the above list:
>
> (g) impairment of family, marital and social relationships;
>
> (h) impairment of physical and mental abilities;
>
> (i) loss of lifestyle; and
>
> (j) the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff: *Giang v. Clayton*, [2005] B.C.J. No. 163 (QL), 2005 BCCA 54).

[31] The defendants submit that, based on mild soft tissue injury and migraine headaches that were aggravated for about 12 months with some residual soft tissue

flare-ups since, an appropriate award of damages for pain and suffering is $30,000 to $40,000.

[32] Based on my finding that the migraine headaches did not return to baseline levels, but have increased significantly since the accident and remain a problem along with the soft tissue injuries, I find that range of non-pecuniary damages to be too low.

[33] The plaintiff relies on cases with similar fact patterns in which damages for pain and suffering and loss of enjoyment of life have been awarded between $65,000 to $120,000, and submits that an award of $80,000 would be appropriate in this case.

[34] Awards of damages in other cases provide a guideline only. I must apply the factors listed in *Stapley* to Ms. Fell's particular circumstances.

[35] By all accounts, Ms. Fell used to be a cheerful, outgoing, enthusiastic, and exceptionally hard-working woman, who managed the responsibilities of her own business, motherhood, and home without difficulty. She worked hard during the week when she was on a project, but still had the energy on weekends to do housework and recreational activities with her husband, including dog walking, camping, and spin classes.

[36] Since the accident, Ms. Fell's injuries have caused her to be more irritable. She regularly spends a day or two in bed with a migraine, unable to participate in the care of her young children, their activities, or recreational outings with her husband. After struggling to carry on as a first aid/craft services provider for two years after the accident, Ms. Fell has accepted that she is unable to perform at her previous level. She has sold her cube van and some of her equipment. She is on maternity leave at this point, but intends to retrain as a lab technician.

[37] I refer to this under the non-pecuniary head of damages because the loss of this occupation goes beyond the ability to earn income. First aid/craft services

provider is a unique occupation that combined Ms. Fell's two passions, healthcare and cooking. It was the perfect job for her in many ways, permitting her to work hard in stretches, and then to spend a few months at a time as a full-time mother. Although Ms. Fell may be able to replace the income she earned annually as a craft services provider, she will not likely be able to find another job that permits her to earn that amount of money in short periods of time, doing an occupation she loves.

[38] Ms. Fell is a stoic individual whose attitude in the face of life's difficulties is to get on with it, in her words, "to suck it up". She should not receive a lower award of non-pecuniary damages because of that stoicism. Indeed, to the contrary, it is appropriate to include under this head the suffering she endured while she pushed herself to keep working after the accident, despite her injuries.

[39] In summary, the injuries from the accident have affected all areas of Ms. Fell's life. While she has periods of time when she is unaffected by her injuries, in particular when she avoids exertion, she has curtailed her recreational activities, no longer camping, exercising at the same level, or taking her dogs for on-leash walks with her husband. She has found it difficult to pick up her children and cannot interact with them when she has a migraine. However, as I have earlier noted, I must also take into account her pre-existing condition and proclivity to develop migraine headaches.

[40] Taking all of these considerations into account, I set non-pecuniary damages at $65,000.

What special damages should be awarded?

[41] The plaintiff seeks out-of-pocket expenses of $6,843. The defendants admit that massage therapy, chiropractic visits, and prescriptions 12 months following the accident are payable in the amount of $1,460.90. The defendants submit that the remainder of the expenses sought were incurred after the plaintiff returned to her baseline condition or were not services recommended by doctors in relation to her injuries.

[42] I have found that the plaintiff's injuries did not resolve within one year, and accordingly do not accept the 12-month cut-off. But in light of the plaintiff's pre-accident use of massage therapy and chiropractic services, I would allow about one-half of those expenses after May 2010, when the frequency of her symptoms decreased.

[43] The treatments were recommended and provided by qualified healthcare providers, and I do not find them to be unreasonable in these circumstances.

[44] I also allow the prescription and non-prescription medical expenses.

[45] In the result, the plaintiff is awarded special expenses for prescriptions of $352.16, non-prescription expenses of $58, massage therapy expenses of $2,056.53, mileage and parking of $3.75, acupuncture treatments, $38, and chiropractic treatments of $1,665, for a total of $4,173.44, which I round to $4,175.

What is the cost of future care?

[46] In order to recover damages under this head, the plaintiff must prove that there is a real and substantial possibility that she will incur future care costs as a result of the injuries sustained in the accident. Those future expenses do not have to be a medical necessity, but they must be medically justified and reasonable: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.).

[47] The plaintiff seeks $5,000 to $7,500 to cover the cost of prescription and over-the-counter medications, as well as massage therapy and active rehabilitation and chiropractic. She also seeks the sum of $25,000 to cover Botox injections to relieve the muscles causing headaches ($400 to $600 per treatment every three months, or $2,000 per year). The $25,000 reflects about half of the cost to maintain that treatment over Ms. Fell’s lifetime.

[48] The defendants submit that nothing should be paid for Botox treatments, because the plaintiff has not tried them and there is no guarantee, according to the

plaintiff's own expert, that they would be successful. The defendants further submit that no sum should be awarded for future care costs, given Ms. Fell's pre-accident need for massage, chiropractic, and medications.

[49] I will deal first with the claim relating to Botox treatments. Ms. Fell has not tried Botox treatments, identified as a possible treatment by Dr. Robinson, because she was pregnant and is now breastfeeding, and Botox injections are contraindicated in those circumstances. The effectiveness of the Botox treatments is speculative and they are very expensive. I conclude that the plaintiff has failed to prove that they are either medically justified or reasonable expenses.

[50] I turn now to the other treatment modalities. I accept that Ms. Fell may incur some additional chiropractic, acupuncture, and massage therapy costs as a result of the migraine headaches and soft tissue injuries sustained in the accident, and may benefit from an active rehabilitation program. However, given her baseline use of chiropractic and massage therapy, I allow $2,500 under this head of damages.

Has the plaintiff proved past wage loss?

[51] Ms. Fell submits that, but for the accident, she would have completed at least one additional feature for IATSE, the union for which higher-end film work is done. She says she would have done fewer television series work and made-for-television movies, both of which have lower budgets, are shorter in duration, and generally do not pay as well.

[52] Ms. Fell says she has lost income to date because she shifted from working on features to job-sharing on television series, and also took a longer maternity leave of 12 months after her second son was born in July 2011, rather than the four months she had taken with her first son born in November 2005.

[53] The plaintiff's claim for past wage loss is based on lost opportunity and must be assessed, as all hypothetical events must be, on the standard of reasonable possibility rather than on a balance of probabilities.

[54] The defendants quite rightly point out that the plaintiff did not tender evidence of offers of work turned down or of the availability of better-paying work open to her. However, Ms. Kress testified that there was "enough work to go around in 2010 and 2011". I do not accept the defendants' submission that, because Ms. Kress did not turn work away in 2010 and 2011, it follows that there were no other features available for Ms. Fell to work on (the implication being that Ms. Fell would only get the work Ms. Kress turned away and sent to her.)

[55] Ms. Kress acknowledged that she was one of many leading craft service providers. It is unlikely, in my view, that she would know about or be approached about every feature being filmed in Vancouver. Ms. Kress did, however, acknowledge that the industry had slowed down in 2010 and 2011, compared to 2008 and 2009.

[56] The defendants also point out that the plaintiff's income tax returns do not support her contention that she was earning less money after the accident than she was before. In the three years pre-accident, the gross revenues earned through the company Ms. Fell incorporated were as follows: in 2006, $116,700; in 2007, $77,500; in 2008, $132,800; in 2009, the year of the accident, $101,300, and in 2010, the year following the accident, her gross revenues were $109,900.

[57] The plaintiff's personal income drawn from her company in those years was surprisingly low given her gross revenues: in 2006, $18,700; in 2007, $36,400; in 2008, $12,200; in 2009, $14,750; in 2010, $53,175.

[58] Ms. Fell could not explain the reason for such low net income, attributing it perhaps to equipment purchases such as her truck and other kit, or to cell phones and part of her vehicle expenses being allocated as corporate expenses. She did not have to pay for the food supplies she used in her business, which were reimbursed as an out-of-pocket expense by the production company. The low income figures are puzzling, especially given her pre-incorporation income of $47,000 in 2000, $38,000 in 2002, and $94,400 in 2003.

[59] The plaintiff's understanding of her personal and corporate finances, and the evidence she led on this subject can only be described as extraordinarily deficient.

[60] In assessing loss of opportunity, I am mindful that the question is not whether Ms. Fell made as much or even more than she did before the accident, but whether she would have made more than she did in those years but for her injuries. In that regard, a summary of the plaintiff's work on features from 2000 to date supports her submission that she did less IATSE work after the accident: in 2008, she worked 177 days doing features; in 2009, 152 days; in 2010, 113 days; and in 2011, a year for which income tax returns are not available, 41 days in the six months prior to maternity leave, which extrapolates to 82 days for the year.

[61] However, at the same time that Ms. Fell took on less work from features, she took on more work on television series. Cumulatively, her income from both types of work resulted in her earning more in 2010 than she had prior to the accident. Her personal income tax returns show, in fact, that she earned substantially more in 2010.

[62] Ms. Fell has the burden of proving a real and substantial possibility that, but for her injuries, she would not have missed opportunities and would have earned more. In my view, Ms. Fell has not met that burden, and I therefore make no award for past loss of income.

Has the plaintiff's proved loss of earning capacity?

[63] Ms. Fell's ability to earn income is a capital asset. If that capacity has been diminished, she is entitled to compensation for that loss. Ms. Fell submits that because of her soft tissue injuries and migraine headaches, she is not as competitively employable as she once was. She seeks an award of $100,000 under this head.

[64] The defendants argue that the plaintiff should receive nothing under this head of damages because there is no real and substantial possibility of income loss due to those injuries.

[65] As set out in *Perren v. Lalari*, 2010 BCCA 140, loss of earning capacity is a pecuniary head of damages. As such, the plaintiff will be awarded damages for loss of earning capacity only if she is able to prove, on the standard of real and substantial possibility, that she is going to be out-of-pocket; that is, that she will earn less in future with her injuries than she would have without them.

[66] A number of factors must be taken into account in assessing whether the evidence establishes a real and substantial possibility that Ms. Fell will earn less in future because of the soft tissue injuries and migraines she has experienced since the accident:

1. There is a potential for some improvement in the longer term in Ms. Fell's condition, although Dr. Hershler was of the view that she will not fully recover.

2. The physical limitations and discomfort Ms. Fell experiences doing the job of a first aid/craft services provider mean that she will not be able to work in that industry.

3. Before the accident, Ms. Fell intended to work as a craft services provider until age 45, about another 10 years, before returning to work in a less onerous job such as a lab technician.

4. Her soft tissue injuries and migraines make it more difficult for her to perform any physical work, including being a care aid, which was her employment before she moved into the film industry.

5. Even before the accident, Ms. Fell was experiencing some soreness in her neck and discomfort in her back when work required physical

exertion, such as carrying water bottles or emptying and filling coffee urns as a craft services provider.

6. Before the accident, Ms. Fell was on her way to becoming a top craft services provider on features. She was a hardworking, ambitious young woman who thrived on the challenge of the job. It was a uniquely good fit for her, combining her interest in healthcare and her love of cooking. Ms. Fell's personality, too, was well-suited to dealing with film crews and the demands the work placed on her. Ms. Kress described Ms. Fell as a capable, reliable worker she could trust with running the food services for the second unit on a production without having to give her another thought. I find it likely that Ms. Fell's success would have continued, her reputation would have grown, and but for her injuries, she would likely have worked primarily in features over the next 10 years.

7. As a result of her injuries, Ms. Fell will be retraining and moving into a position such as a lab technician about 10 years earlier than planned, or she will continue to take day work in the industry and do some first aid attendant work, which will not be as lucrative as working full-time on a project. Although there is no evidence before the Court of the earnings of a lab technician, the gross revenues earned by Ms. Fell and her pre-incorporation personal income, along with the evidence of Ms. Kress that as a first unit services provider she can pay for a new car by working for a few months on a single project, suggest that the work of a first aid and craft services provider is one with potentially higher income than a nine-to-five lab technician position.

[67] Considering all of these factors, I find that Ms. Fell has established a real and substantial possibility of future income loss due to her physical limitations. That loss is not a certainty, but she is not required to meet that standard of proof. Assessing the future loss of earning capacity in this case does not lend itself to a precise

mathematical calculation of lost earnings. Using the capital asset approach, I award the plaintiff $50,000 under this head of damages.

[68] In summary, damages are awarded as follows:

Non-pecuniary damages:	$65,000
Special damages:	$4,175
Cost of future care:	$2,500
Past wage loss:	$0
Loss of earning capacity:	$50,000
TOTAL:	$121,675

[69] In the ordinary course, the plaintiff would be entitled to costs under Rule 15-1(15). Is there any need to speak to costs?

[DISCUSSION WITH COUNSEL]

[70] The parties have leave to appear before me to speak to the issue of costs, but must set the matter down by March 16, 2012.

The Honourable Madam Justice L.A. Fenlon