

Citation: Briglio v. Faulkner and Reichel
1999 BCCA 0361

Date: 19990607
Docket: CA022293
CA022294
Registry: Vancouver

COURT OF APPEAL FOR BRITISH COLUMBIA

BETWEEN:

DIANA BRIGLIO

PLAINTIFF
(APPELLANT)

AND:

JANET K. FAULKNER

DEFENDANT
(RESPONDENT)

AND:

DIETER REICHEL

DEFENDANT
(RESPONDENT)

Before: The Honourable Mr. Justice Hinds
The Honourable Madam Justice Rowles
The Honourable Mr. Justice Hall

Art Vertlieb	Counsel for the Appellant
Don J. Holubitsky	Counsel for the Respondent
Place and Date of Hearing	Vancouver, British Columbia 20 and 21 April 1999
Place and Date of Judgment	Vancouver, British Columbia 7 June 1999

Written Reasons by:

The Honourable Mr. Justice Hinds

Concurred in by:

The Honourable Madam Justice Rowles
The Honourable Mr. Justice Hall

Reasons for Judgment of the Honourable Mr. Justice Hinds:

INTRODUCTION

[1] This appeal and cross appeal involve an award of damages, the apportionment of damages and a reduction of damages for failure to mitigate, for the condition of fibromyalgia allegedly developed by the appellant as a result of injuries she received in two separate motor vehicle accidents.

BACKGROUND

[2] The appellant, who was born in 1965, was involved in a motor vehicle accident on 18 September 1989. The appellant's motor vehicle was struck from behind by a motor vehicle owned

and operated by the respondent Reichel. The appellant sustained a flexion-extension type of injury of the cervical spine for which she received medical treatment. Liability for the accident was admitted by Mr. Reichel.

[3] On 8 June 1990 the appellant was involved in another motor vehicle accident. Her motor vehicle was struck on the front passenger side by a motor vehicle owned and driven by the respondent Faulkner. The appellant sustained injuries to her spine for which she received further medical treatment. Liability for the second accident was admitted by the respondent Ms. Faulkner.

[4] Hereafter I shall refer to the accident of 18 September 1989 as the "First Accident", and the accident on 8 June 1990 as the "Second Accident", and both of them together as "The Accidents".

[5] Following each of The Accidents the appellant was seen by her family physician, Dr. Beverly J. Donner, on a number of occasions concerning her continuing aches and pains. Between December 1990 and August 1991 she was pregnant and during that time she suffered back and neck problems and wore a back brace. Medical reports indicated that she suffered from residual low back and neck pain, tightness of her neck and low back and sleeping difficulties.

[6] In 1992 Dr. Donner referred the appellant to Dr. Rhonda Shuckett, a rheumatologist. In July 1992 Dr. Shuckett diagnosed the appellant as suffering from fibromyalgia. That condition manifests in pain in multiple areas of the body, fatigue, sleep disturbance and morning stiffness.

[7] Between 1992 and 1996 (the year of trial) the appellant attended numerous health care professionals, including those to whom she was referred by her own treating physicians, and those by whom she was examined at the request of the respondents. The general thrust of the medical evidence was that the appellant suffered from fibromyalgia. The evidence indicated that there were a number of factors which may have contributed to her condition of fibromyalgia including the injuries she had sustained in three minor motor vehicle accidents which preceded The Accidents and which were not involved in this litigation, the injuries she received in The Accidents, her intermittent depression, stress arising from marital discord which eventually resulted in marital separation, stress related to financial problems, and stress related to the ongoing litigation.

[8] At the time of the First Accident the appellant worked for the federal Department of Supply and Services.

[9] After the Second Accident she took six weeks off work, returned to part-time work for six weeks and resumed full time work in September 1990. From July 1991 to February 1992 she took maternity leave. In July 1994 she took six months off work. Thereafter she returned to work until May 1995 when she reduced her work load to three days per week. That continued until July 1995 at which time she ceased work entirely. Since then she has not resumed work outside her home.

[10] By consent order dated 23 March 1995 the appellant's action against the respondent Dieter Reichel and her action against the respondent Janet K. Faulkner were, subject to the direction of the trial judge, ordered to be tried at the same time. The 11 day trial commenced in December 1995 and was completed in March 1996. Reasons for judgment were handed down on 16 August 1996, a few months prior to the decision of the Supreme Court of Canada in *Athey v. Leonati*, [1996] 3 S.C.R.

458, 140 D.L.R. (4th) 235, [1997] 1 W.W.R. 97, to which I shall later refer.

REASONS FOR JUDGMENT OF THE TRIAL JUDGE

[11] The trial judge found that the appellant had met the burden of proving that trauma can contribute causally to the development of fibromyalgia. Moreover, she found The Accidents had been one of several contributing factors in the development of fibromyalgia in Mrs. Briglio.

[12] The trial judge apportioned liability for the development of the appellant's fibromyalgia condition, 40% to The Accidents and 60% to other unrelated factors. She then reduced the liability of the respondents to 30% due to the failure of the appellant to mitigate her damages.

[13] As set forth below, the trial judge assessed damages under the following heads, and awarded 30% thereof to the appellant:

	100%	30%
Non-pecuniary damages	\$100,000.00	\$ 30,000.00
Past wage loss	38,867.85	11,660.40
Future loss of income	300,000.00	90,000.00
Cost of future care	115,572.00	34,671.00
Special damages	3,696.89	1,109.00
Total	\$558,136.74	\$167,440.40

[14] The formal Order contained the following additional provision:

AND THIS COURT FURTHER ORDERS THAT the Plaintiff be at liberty to apply regarding management fee and tax gross-up.

That portion of the final order was not raised as an issue on this appeal.

ISSUES ON APPEAL

[15] The following issues were raised on the appeal:

1. Whether the trial judge erred in reducing the respondents' liability for damages to 40% on the basis that The Accidents contributed to the extent of 40% to the appellant's loss.
2. Whether the trial judge erred in finding that the appellant failed to mitigate her loss and, further, in reducing her award of damages by a factor of 10%.

ISSUES ON CROSS APPEAL

[16] The following issues were raised on the cross appeal:

1. Whether the trial judge erred in finding that The Accidents were a contributing cause of the appellant's fibromyalgia.
2. Whether the trial judge erred in her assessment of non-pecuniary damages, damages for loss of income and damages for the cost of future care.

DISCUSSION

[17] At the commencement of the hearing of the appeal we suggested, and counsel agreed, that the cross appeal should be argued first, because if the respondents are successful on the first issue of the cross appeal it would be determinative of the issues raised in the main appeal. Counsel proceeded accordingly.

1. First Issue on Cross Appeal

[18] The first issue raised by counsel for the respondents on the cross appeal related to the matter of causation. He asserted that the appellant had not met the burden of proving that trauma could materially contribute to the development of fibromyalgia in a person injured in a motor vehicle accident. He further submitted that the appellant had not met the burden

of proving that the injuries she had sustained in The Accidents materially contributed to her condition of fibromyalgia.

[19] In her comprehensive reasons for judgment the learned trial judge summarized a great deal of the general evidence and also a great deal of the medical evidence including the expert opinions of some of the medical witnesses. She then dealt with the issue of causation. She referred to the following comments of Sopinka J. in *Snell v. Farrell*, [1990] 2 S.C.R. 311 at 330:

The legal or ultimate burden remains with the plaintiff, but in the absence of evidence to the contrary adduced by the defendant, an inference of causation may be drawn although positive or scientific proof of causation has not been adduced.

...

It is not therefore essential that the medical experts provide a firm opinion supporting the plaintiff's theory of causation. Medical experts ordinarily determine causation in terms of certainties whereas a lesser standard is demanded by the law.

[20] After referring to those comments of Sopinka J. she made the following significant findings:

Bearing in mind Mr. Justice Sopinka's statement that an inference of causation may be drawn, I find that the plaintiff has met the burden of proving that trauma or other factors can contribute causally to the development of fibromyalgia. ...In this case, the medical evidence satisfies me that the burden of proof of causation has been met.

...

I accept the opinions of Drs. Shuckett and Yorke that the motor vehicle accidents contributed to causing Ms. Briglio's fibromyalgia.

...

I find that residual pain from the 1985 and 1987 accidents, pain from the 1989 and 1990 accidents, caesarean section surgery, sleep deprivation in the newborn period and stress of returning to work after the newborn period were contributing factors.

[21] Counsel for the respondents referred us to various portions of the evidence of the appellant's expert rheumatologist, Dr. Rhonda Shuckett, the evidence of the respondents' expert rheumatologist, Dr. A.J. Yorke, and other expert evidence in an attempt to persuade us that the trial judge had misinterpreted the expert medical evidence. In essence, he was asking us to re-try the case. I have considered all of the references to which we were referred.

[22] On the other hand, counsel for the appellant cited portions of the evidence which supported the premise that trauma from a motor vehicle accident could result in the condition of fibromyalgia and that the injuries the appellant received in The Accidents materially contributed to her condition of fibromyalgia.

[23] There was ample evidence to support the foregoing findings of fact of the trial judge. It is apparent that she carefully considered the complex and sometimes conflicting medical evidence. She accepted some of the expert medical evidence and

rejected other portions of that evidence as indeed she was entitled to do.

[24] It is unnecessary to review in detail all of the evidence which supported the foregoing findings of fact. The following examples are representative and will, in my view, be sufficient.

[25] In his 14 page medical report dated 6 August 1993, when referring to fibromyalgia, Dr. Yorke (the respondents' expert) stated at 12:

... it is accepted that the condition [fibromyalgia] may manifest itself after an event of trauma such as a motor vehicle accident. ...

[26] Dr. Shuckett stated in cross-examination: There is strong evidence in the literature of a high frequency of fibromyalgia occurring in the sequela, immediate sequela, of a trauma or an injury.

[27] Dr. Shuckett also stated in her medical report dated 9 July 1992 at 4:

It [fibromyalgia] often will occur secondary to certain antecedent conditions such as trauma or an MVA.

[28] In the testimony of Dr. Yorke taken by deposition the following occurred:

Q In your opinion, were the 1989 and 1990 motor vehicle accidents the likely cause of Ms. Briglio's fibromyalgia syndrome?

...

A I believe that they were contributing factors.

...

[29] In the testimony of Dr. Shuckett the following occurred:

Q And my friend asked you about scientific certainty with a diagnosis. Do you think it more probable than not that the motor vehicle accidents caused the plaintiff's fibromyalgia?

A Yes, I do.

[30] In my view there was no palpable or overriding error in the findings of fact made by the trial judge: she did not ignore conclusive or relevant evidence, or fail to understand the evidence or draw erroneous conclusions from the evidence: see *Toneguzzo-Norvell v. Burnaby Hospital*, [1994] 1 S.C.R. 114, 110 D.L.R. (4th) 289. At 292-293 of the latter report McLachlin J., in giving judgment of the Court, stated:

It is by now well-established that a Court of Appeal must not interfere with a trial judge's conclusions on matters of fact unless there is palpable or overriding error. In principle, a Court of Appeal will only intervene if the judge has made a manifest error, has ignored conclusive or relevant evidence, has misunderstood the evidence, or has drawn erroneous conclusions from it: see *P.(D.) v. S.(C.)* (1993), 108 D.L.R. (4th) 287 at pp. 322-3, [1993] 4 S.C.R. 141, 18 C.R.R. (2d) 1 (per L'Heureux-Dub, J.), and all cases cited therein, as well as *Geffen v. Goodman Estate* (1991), 81 D.L.R. (4th) 211 at pp. 235-6, [1991] 2 S.C.R. 353, 42 E.T.R. 97 (per Wilson J.), and *Stein v. The [Ship] "Kathy K"* (1975), 62 D.L.R. (3d) 1 at pp. 3-5, [1976] 2 S.C.R. 802, 6 N.R. 359 (per Ritchie J.). A Court of Appeal is clearly not entitled to interfere merely because it takes a different view of the evidence. The finding of facts and the drawing of evidentiary conclusions from facts is the province of the trial judge, not

the Court of Appeal.

I am not prepared to interfere with the findings of fact made by the trial judge.

[31] The general principles relating to causation were reviewed by Major J., who gave the reasons for judgment in the recent decision of the Supreme Court of Canada in *Athey*. At 102-103 of the *Western Weekly Report* Major J. stated:

Causation is established where the plaintiff proves to the civil standard on a balance of probabilities that the defendant caused or contributed to the injury: *Snell v. Farrell*, [1990] 2 S.C.R. 311; *McGhee v. National Coal Board*, [1972] 3 All E.R. 1008 (H.L.).

The general, but not conclusive, test for causation is the "but for" test, which requires the plaintiff to show that the injury would not have occurred but for the negligence of the defendant: *Horsley v. MacLaren*, [1972] S.C.R. 441.

The "but for" test is unworkable in some circumstances, so the courts have recognized that causation is established where the defendant's negligence "materially contributed" to the occurrence of the injury: *Myers v. Peel (County) Board of Education*; [1981] 2 S.C.R. 21, *Bonnington Castings Ltd. v. Wardlaw*, [1956] 1 All E.R. 615 (H.L.), *McGhee v. National Coal Board*, supra. A contributing factor is material if it falls outside the *de minimis* range: *Bonnington Castings Ltd. v. Wardlaw*, supra; see also *R. v. Pinsky* (1988), 30 B.C.L.R. (2d) 114 (C.A.), affirmed [1989] 2 S.C.R. 979.

In *Snell v. Farrell*, supra, this Court recently confirmed that the plaintiff must prove that the defendant's tortious conduct caused or contributed to the plaintiff's injury. The causation test is not to be applied too rigidly. Causation need not be determined by scientific precision; as Lord Salmon stated in *Alphacell Ltd. v. Woodward*, [1972] 2 All E.R. 475 at 490 (H.L.), and as was quoted by Sopinka J. at p. 328, it is "essentially a practical question of fact which can best be answered by ordinary common sense". Although the burden of proof remains with the plaintiff, in some circumstances an inference of causation may be drawn from the evidence without positive scientific proof.

It is not now necessary, nor has it ever been, for the plaintiff to establish that the defendant's negligence was the sole cause of the injury. ... As long as a defendant is part of the cause of an injury, the defendant is liable, even though his act alone was not enough to create the injury. There is no basis for a reduction of liability because of the existence of other preconditions: defendants remain liable for all injuries caused or contributed to by their negligence.

...

The law does not excuse a defendant from liability merely because other causal factors for which he is not responsible also helped produce the harm: *Fleming*, supra, at p. 200. It is sufficient if the defendant's negligence was a cause of the

harm: Assiniboine South School Division No. 3 v. Greater Winnipeg Gas Co., [1971] 4 W.W.R. 746 (Man. C.A.), at p. 753, affirmed [1973] 6 W.W.R. 765, [1973] S.C.R. vi. Ken Cooper-Stephenson, Personal Injury Damages in Canada (2nd ed. 1996), at p. 748.

[32] Although the decision of the trial judge in this appeal pre-dated the decision of Athey, it is apparent that she complied with the general principles of proof of causation as set forth in the latter decision.

[33] Counsel for the respondents submitted that the appellant had not satisfied the "but for" test referred to by Major J. in the foregoing quotation from Athey. He asserted that the appellant had not proved that her fibromyalgia would not have occurred but for the negligence of the respondents. In my view that is a restricted interpretation of the principle expressed by Major J. It overlooks the additional statement that "[t]he 'but for' test is unworkable in some circumstances, so the courts have recognized that causation is established where the defendant's negligence 'materially contributed' to the occurrence of the injury:".

[34] It also overlooks the additional comment by Major J. under the heading of "Application of Principles to Facts" at 108 where he stated:

The applicable principles can be summarized as follows. If the injuries sustained in the motor vehicle accidents caused or contributed to the disc herniation, then the defendants are fully liable for the damages flowing from the herniation. The plaintiff must prove causation by meeting the "but for" or material contribution test.

[Emphasis added.]

[35] In my view the "but for" test was inapplicable in the circumstances of this case; causation was established by meeting the "material contribution" test.

2. Second issue on the cross appeal - assessment of damages

[36] The submissions of the respondents on this issue were premised on the expectation that the respondents would succeed on the first issue on the cross appeal - that this Court would conclude that the appellant had not established causation. On the basis of that expectation the respondents submitted that the appellant's entitlement to damages would be limited to damages for injuries sustained in two relatively moderate motor vehicle accidents. Because the respondents have not been successful in overturning the trial judge's conclusion on causation, that The Accidents materially contributed to the appellant's fibromyalgia, it is unnecessary to give further consideration to the respondents' submissions on the assessment of damages. The trial judge's assessment of damages, summarized in paragraph 13 hereof, are confirmed.

3. First Issue on main appeal - apportionment

[37] When dealing with apportionment the trial judge stated:

Doing the best I can with the various interrelated factors and effects disclosed in the evidence, and taking into account my findings with respect to Ms. Briglio's credibility, I find that the motor vehicle accidents of September 18, 1989 and June 8, 1990 contributed 40% to the development and current status of Ms. Briglio's condition.

[38] In making the foregoing apportionment of liability the trial judge followed a number of British Columbia authorities. A few months after her decision was released, the Supreme Court of Canada released its decision in *Athey*. Under that decision causation is established where a defendant's negligence materially contributes, above the *de minimis* range, to the injury or medical condition suffered or developed by a plaintiff. If a plaintiff can establish that tortious conduct caused or materially contributed to the plaintiff's injury the defendant will be held liable even though his or her negligence was not the sole cause of the plaintiff's injury. Apportionment between tortious and non-tortious causes of the plaintiff's injuries was held to be contrary to the principles of tort law.

[39] In this case the trial judge found that there were a number of factors which contributed to the appellant's fibromyalgia including the injuries she sustained in *The Accidents*. Her apportionment against the respondents of 40% of the liability for the appellant's fibromyalgia clearly reveals that the material contribution of the respondents substantially exceeded the *de minimis* range.

[40] The respondents made the following concession in their factum:

The Respondent further concedes that if the Trial Judge was correct in finding that the Defendant's negligence in the subsequent motor vehicle accidents was a material contributing cause of the Plaintiff's fibromyalgia, then under the principles outlined in *Athey*, the Defendants ought to be held fully liable for the loss and damage flowing from the Appellant's fibromyalgia.

[41] A similar concession was made by counsel for the respondents in the course of his oral submissions.

[42] As I have upheld the decision of the trial judge that the negligence of the respondents with respect to *The Accidents* materially contributed, above the *de minimis* range, to the development of the appellant's fibromyalgia, I conclude that the respondents must be held fully liable for the damages awarded to the appellant by the trial judge. There should be no apportionment.

[43] Subject to the reduction (if any) in the total award of damages by reasons of the alleged failure of the appellant to mitigate, I would therefore allow the appeal on the first issue and confirm that the appellant should receive the full amount of damages assessed by the trial judge.

4. Second issue on the main appeal - mitigation

[44] In her reasons for judgment the trial judge referred to the fact that there was medical evidence that indicated that if the appellant had engaged in an "active, structured, progressive exercise program" and had partaken of marital counselling, the extent and duration of her complaints of pain or disability would probably have been lessened. The trial judge continued and stated in her reasons for judgment:

... the failure of Ms. Briglio to engage in these recommended courses of action likely had some negative effect on her condition. Her explanations of why she did not continue in the exercise programs she started and did not obtain marital counselling are not objectively reasonable, although they may be subjectively understandable.

Ms. Briglio's failure to mitigate is a factor to be taken into account in determining her damages.

The medical experts expressed uncertainty about the actual effectiveness of any treatment for fibromyalgia, including exercise, and are of little help in determining the precise effect of her failure to undertake or continue their suggestions. Because of the degree of uncertainty, I assign a minor role to her failure to mitigate and reduce the defendants' responsibility for her damages to 30%.

In effect, the trial judge reduced the award of damages by 10% due to the appellant's failure to mitigate.

[45] In the course of his submissions on this issue counsel for the appellant abandoned his contention that the trial judge had erred in reducing the award of damages for the appellant's failure to engage in an "active, structured, progressive exercise program". He restricted his argument to the matter of the alleged failure of the appellant to be involved in marital counselling.

[46] Upon a review of the relevant evidence I am satisfied that there was evidence before the trial judge upon which she could base her conclusion that the appellant, without reasonable excuse, failed to follow the recommendations of her medical advisers to be engaged in professional marital counselling, and that such counselling would have assisted in the improvement of her fibromyalgia condition.

[47] Counsel for the appellant further submitted that the trial judge erred in applying the 10% reduction to the assessment of damages for future loss of income for failure to mitigate. In my view the trial judge had evidence before her upon which she could apply the 10% failure to mitigate factor on the award for future loss of income as well as on the other heads of damage.

[48] The trial judge did not apportion the 10% figure between the appellant's failure to engage in an exercise programme and the appellant's failure to take marital counselling. The former may have been of greater importance than the latter. However, the total reduction of 10% for failure, without reasonable excuse, to mitigate the appellant's loss was not unreasonable. I would not interfere with that determination by the trial judge.

SUMMARY

- [49] 1. I would not accede to the argument concerning the first issue raised on the cross appeal and I would confirm the finding of the trial judge that The Accidents materially contributed to the appellant's condition of fibromyalgia.
2. I would not accede to the argument concerning the second issue raised on the cross appeal and I would confirm the assessment of damages made by the trial judge.
3. I would accede to the argument concerning the first issue raised on the main appeal and find that there ought to be no apportionment between causes concerning the damages assessed by the trial judge.
4. I would not accede to the argument concerning the second issue raised on the main appeal and I would confirm that there should be a 10% reduction in the damages assessed by reason of the failure of the appellant to mitigate.
5. Taking into account the 10% reduction figure for failure to mitigate, the appellant will have judgment

against the respondents for the following amounts:

(a) non-pecuniary damages	\$ 90,000.00
(b) past wage loss	34,981.07
(c) future loss of income	270,000.00
(d) cost of future care	104,014.80
(e) special damages	3,327.21
Total	\$502,323.08

[50] Accordingly, I would allow the appeal to the extent described above.

"The Honourable Mr. Justice Hinds"

I AGREE:

"The Honourable Madam Justice Rowles"

I AGREE: ,

"The Honourable Mr. Justice Hall"