

Flis v. Chan 2004 ABQB 853

The Plaintiff and the Defendant were involved in a motor vehicle accident on April 3, 1996. Liability was not disputed; the only issue at trial was the quantum of damages. Chomicki Baril Mah LLP represented the Defendant.

The Plaintiff was involved in a prior motor vehicle accident in 1993. The issue therefore rested with quantifying the damages caused to the Plaintiff by the 1996 accident. The Plaintiff claimed that the 1996 accident materially contributed to his current state of chronic pain and claimed he was unable to return to the workforce as a result.

Madam Justice Moreau found the 1996 accident to have caused an exacerbation of the Plaintiff's pre-existing soft tissue injuries to the left shoulder, neck and lower back, which he sustained in the 1993 accident. Moreau J. found the Plaintiff to have returned to his original condition four (4) years after the 1996 accident; she therefore assessed damages for this four (4) year period. She further held that there is no ongoing impairment to those injured areas as a result of the 1996 accident.

The Plaintiff's claimed a new injury to his sternoclavicular joint. Moreau J. found the Plaintiff to have exaggerated his symptoms to this area. She accepted the views of defence experts Dr. Huckell and Dr. Anthony Russell and found the Plaintiff to be preoccupied with the asymmetry present at that joint. Also, Moreau J. placed quite a bit of emphasis on the defence's surveillance footage of the Plaintiff taken in 2001. In this video, the Plaintiff was seen doing some digging activity. Moreau J. remarked that the Plaintiff's sternoclavicular joint complaints did not seem to hamper his ability to do the abduction type motion involved in the digging activity. She found the 1996 accident to have caused ligamentous stretching to the area and that this new soft tissue injury was minor in nature.

With regard to the Plaintiff's TMJ complaints, Moreau J. found the Plaintiff to have grown dependent on the use of the splint as a result of the 1993 accident and concluded that the use of this splint would have continued indefinitely had the 1996 accident not occurred. Moreau J. found the 1996 accident to have aggravated the Plaintiff's pre-existing soft tissue TMJ injuries and determined the Plaintiff had returned to his original position within four (4) years of the 1996 accident. Moreau J. agreed with defence expert Dr. Major who found the Plaintiff's bite to be normal and saw no reason why he could not maintain a regular diet.

Generally, Moreau J. held that the Plaintiff's reporting with regard to the severity of his pain to various healthcare professionals was not in keeping with clinical findings. She held that the Plaintiff exaggerated his pain complaints and disability. Also, she found the Plaintiff failed to mitigate his injuries. She found that although his primary care giver, Dr. Sawicki, failed to follow the recommendations of specialists seen by the Plaintiff, that it was not reasonable for the Plaintiff to therefore do nothing. She held that the Plaintiff was in a position to make rational decision about his own care. She reduced her award of damages by 10% for failure to mitigate.

In the end, Moreau J. made the following assessment of damages:

General Damages	-	\$54,000 (\$60,000 less 10% for failure to mitigate)
Past loss of income (3 years said to be caused by 1996 accident)	-	\$51,327 (\$57,030 reduced by 10% for failure to return to light duties although this was recommended)
Past Cost of Care	-	\$3,582.28

The Total Award was \$108,909.28 plus costs and interest. There is some issue with regard to costs to be awarded as it relates to the Formal Offer made by the Defendant. This issue remains to be resolved.