COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Khudabux v. McClary,*
2018 BCCA 234

Date: 20180608
Docket: CA44055

Between:

Yasmin Khudabux

Appellant
(Plaintiff)

And

Mark Daniel McClary

Respondent
(Defendant)

Corrected Judgment: Paragraph 1, last line has been amended where changes were made on June 8, 2018.

Before: The Honourable Madam Justice Saunders
The Honourable Mr. Justice Frankel
The Honourable Madam Justice Stromberg-Stein

On appeal from: An order of the Supreme Court of British Columbia, dated October 14, 2016 (*Khudabux v. McClary*, 2016 BCSC 1886, New Westminster Docket M146936).

Counsel for the Appellant:	J. Jachimowicz
Counsel for the Respondent:	K. Armstrong
Place and Date of Hearing:	Vancouver, British Columbia May 16, 2018
Place and Date of Judgment:	Vancouver, British Columbia June 8, 2018

Written Reasons by:
The Honourable Madam Justice Stromberg-Stein

Concurred in by:
The Honourable Madam Justice Saunders
The Honourable Mr. Justice Frankel

Summary:

Ms. Khudabux was awarded damages for injuries as a result of two motor vehicle accidents. The judge considered her pre-existing conditions and subsequent additional accidents as part of his analysis. She appeals on the basis that the judge misapplied the legal framework for liability, divisibility and damages, and erred in fact and law in assessing damages. Held: Appeal dismissed. The judge applied the legal framework correctly and in assessing damages properly considered Ms. Khudabux's pre-existing conditions and intervening events.

Reasons for Judgment of the Honourable Madam Justice Stromberg-Stein:

[1] Yasmin Khudabux appeals an order for damages for injuries arising from a motor vehicle accident in 2011, which was tried together with a 2014 motor vehicle accident. No appeal is taken from the award of damages in the amount of $8,000 for injuries arising from the 2014 accident.

[2] The appellant submits the judge erred in law with respect to his findings on causation, liability and damages. Specifically, she says the trial judge erred in not finding joint and several liability; in not properly considering and applying the concepts of indivisibility and divisibility with respect to her injuries; and in reducing her damages due to other non-tortious injuries. The latter issue raises concern about the methodology the judge used in his assessment of non-pecuniary damages and the sufficiency of his reasons in that regard.

Background

[3] The first of the two subject accidents occurred on April 6, 2011, ("the 2011 accident") and the second on March 24, 2014 ("the 2014 accident"). Ms. Khudabux's claim was complicated by numerous tortious and non-tortious incidents prior to and subsequent to the 2011 and 2014 accidents, which caused or aggravated her chronic mental and physical ailments.

Personal and Medical History

[4] A detailed review of Ms. Khudabux's history is set out in the trial judge's reasons indexed as *Khudabux v. McClary*, 2016 BCSC 1886. I will summarize the main points.

[5] Ms. Khudabux immigrated to Canada and moved to Vancouver in 1995. She qualified for work in the insurance industry but has not had stable employment since at least 2006. She worked as an insurance agent in many brokerages over the years, usually lasting only a few weeks or months before she was fired or quit.

[6] She has a significant psychiatric history, apparently developing a major depressive disorder in 2000 following her separation from her husband. Since then she has taken medication and has been seen by various doctors and psychiatrists.

[7] In January 2006, as a pedestrian, she was hit by a van and suffered substantial long-term injuries, including a concussion and injuries to her neck, shoulders, mid- and lower-back, knees, ankles and feet, which left her with headaches and pain. Her claim for damages relating to this incident was settled in 2010. The terms of the settlement were not revealed at trial.

[8] In 2009 she was diagnosed with PTSD, major depressive disorder and chronic pain disorder. In June 2010 she was rear-ended by another driver, which aggravated all her physical symptoms from the 2006 accident.

[9] Just prior to the 2011 accident, Ms. Khudabux had been assessed by her doctor. At the time of the 2011 accident Ms. Khudabux was still symptomatic from the 2006 and 2010 accidents. She had ongoing symptoms of depression, chronic back pain and debilitating knee pain. At trial, Ms. Khudabux said that just before the 2011 accident she was “somewhat better” and “back to 50%” of her pre-2010 accident condition: at para. 26.

[10] Following the 2011 accident she sustained further injuries in two non-tortious events: in May 2011 she slipped and fell, which aggravated her 2011 accident injuries; and in March 2012, while vacationing in Africa, she slipped and fell in a shower and hit her head, suffering increased headaches, swelling of her left foot, and back spasms. In May 2012 she was involuntarily hospitalized for psychiatric issues flowing from significant conflict with family members. In July 2012 she was rear-ended by another driver, which she said aggravated pain “everywhere” - in her

neck, mid-back, lower-back, knees and feet. In October 2013, in another non-tortious event, she fell out of a reclining chair and injured her back. She described "all of her symptoms coming back" and said she experienced severe pain. She resigned from her job and has not worked since.

[11] Some or all of these incidents caused or contributed to chronic pain in her lower and mid-back, extreme headaches, pain in her arms, legs, feet and neck, and chronic and unstable depression.

The 2011 and 2014 Accidents

[12] The 2011 accident, which actually involved two separate collisions, occurred in the eastbound lanes of Highway 1 near the Grandview Highway on-ramp. Ms. Khudabux swerved from the fast lane into the HOV lane in an attempt to avoid hitting a grey car in front of her. In doing so, she clipped the back left corner of the grey car with the front right corner of her car. She continued into the space next to the central median and stopped. The back right corner of her car was sticking out into the HOV lane. She did not activate her hazard lights and proceeded to unfasten her seatbelt. Mr. McClary, who was driving a truck behind her, also swerved into the HOV lane to avoid the grey car. He hit the back right corner and side of Ms. Khudabux's car.

[13] After striking the grey car, Ms. Khudabux said she felt pain in her neck, left shoulder and knee; she felt dizzy, and "was in no condition to move": at para. 34. After being struck by Mr. McClary's truck, she said her head, back and knees struck the inside of her car and she had acute chest pain. She claimed all her previous symptoms - headache, arm pain and back pain - were aggravated: at para. 37.

[14] In the 2014 accident, Ms. Khudabux's car was rear-ended by Mr. MacDonald. She said this accident was "the worst of all" and at one point thought she was paralyzed: at para. 83. She testified that her condition has not improved since then, although her doctor said the accident resulted in only "a temporary exacerbation of [her] symptoms": at para. 142.

Trial Judge's Findings

Factual Findings

[15] The judge considered the 2011 accident in two parts. He found Ms. Khudabux was entirely at fault for the first collision with the grey car, both she and Mr. McClary were at fault for the second collision, and she was 20% contributorily negligent for her injuries caused by the second collision: at paras. 50, 51, 56.

[16] Mr. MacDonald admitted fault for the 2014 accident.

[17] The judge found the evidence at trial to be lacking. Ms. Khudabux's testimony was incoherent and contradictory, making it unreliable. The three doctors who testified as expert witnesses could add little in terms of opinions that were not dependent on Ms. Khudabux's subjective reporting or based on an incomplete understanding of her personal and medical history.

[18] Nevertheless, the judge made several findings of fact regarding the effects of the 2011 accident. He found that accident was not a cause of her current headaches or psychiatric issues beyond *de minimus*. He concluded the 2011 accident caused: (1) significant aggravation of pre-existing mid-back pain; (2) moderate temporary aggravation of headaches, shoulder, neck and knee pain; (3) aggravation of myofascial pain; and (4) a modest reduction of resiliency.

[19] The judge concluded the 2014 accident caused a temporary aggravation of Ms. Khudabux's symptoms and a slight loss of resilience.

Liability

[20] Ms. Khudabux argued at trial that the two defendants should be jointly and severally liable because the injuries caused by the two accidents were indivisible. The judge rejected this submission and determined that once causation was found, the question remaining was "quantifying the aggravation caused by the subject accidents": at para. 161. As it was possible to determine the extent to which the two accidents had caused additional injury to Ms. Khudabux, the judge concluded it was

not a “true case of ‘indivisible’ injury as between the two present defendants, at least not in respect of all of the plaintiff’s symptoms”: at para. 161.

[21] The judge noted that, in any event, the relief Ms. Khudabux sought was unavailable to her because she was partially at fault. Section 1 of the *Negligence Act,* R.S.B.C. 1996, c. 333, requires fault to be apportioned between the parties where a party is contributorily negligent. As a result, joint and several liability was not available even if the injuries were indivisible. Further, the judge observed that such an approach would not take into account the significance of the 2006, 2010 and 2012 car accidents, for which there was very little evidence presented at trial, and for which, at least with respect to the 2006 accident, compensation had already been awarded. In addition, the judge concluded that the approach of joint and several liability would ignore the appellant’s responsibility for her current condition and her pre-existing condition, and would disregard her original position.

Damages

[22] In determining the quantum of damages, the judge set out several principles that the appellant does not take issue with. He recognized his duty was to restore Ms. Khudabux, as much as can be done through a monetary award, to the state she would have been in had the injury never occurred: at para. 145. This entailed consideration of her original position and the condition she would have gone on to attain but for the tortfeasor’s conduct, including the effects of injuries incurred after the 2011 accident.

[23] In his approach to assessing damages the judge explained:

> [200] Rather than making a global assessment of the plaintiff’s current condition as the product of a series of events creating indivisible injuries, and then parsing out responsibility severally amongst the actors whose tortious conduct has historically contributed to those injuries, I approach the assessment of damages by making findings as to the contribution made by the 2011 and 2014 MVAs to the plaintiff’s condition since the 2011 MVA, having regard to the factors set out in *Stapley* [*v. Hejslet*, 2006 BCCA 34].

[24] The judge assessed the contribution of the 2011 and 2014 accidents on the appellant's current condition, setting out his findings of fact and methodology as follows:

> [201] I am not persuaded that there is a "but for" causative link between either of the subject accidents and the plaintiff's current headaches.
>
> [202] I am similarly unpersuaded with respect to her current psychiatric issues, such as they have been identified by the doctors who testified – that is, her depression and any Chronic Pain Disorder or Somatic Symptom Disorder she may now be suffering from. If there is any continuing causative contribution, I am not persuaded that it is more than negligible. There can be little doubt, on the evidence, that Ms. Khudabux was in a psychiatrically or psychologically fragile state prior to the 2011 MVA. Her documented history of depression, her 2009 diagnosis of chronic PTSD and Chronic Pain Disorder, her continuing psychiatric treatment, and her conflicts with co-workers leading to an unstable employment record all point to a significant pre-existing level of disability.
>
> [203] With respect to her physiological injuries, Ms. Khudabux was experiencing ongoing physical symptoms of pain prior to the 2011 MVA. Further, as noted, her pre-2011 MVA condition had already been aggravated by the first collision in the 2011 MVA by the time she was hit by McClary. I find that the collision with the McClary vehicle in the 2011 MVA likely resulted in a significant aggravation of pre-existing mid-back pain, and continues to contribute to the plaintiff's symptoms in that regard. It resulted in moderate, temporary aggravation of the plaintiff's pre-existing headache symptoms, which have now resolved. I also find that the collision with McClary in the 2011 MVA aggravated the myofascial pain that she was already suffering as a result of the 2006 and 2010 MVAs. The first and second collision together likely aggravated, temporarily, the pre-existing neck, shoulder and knee pain. It is likely that the impact of both the first and second collisions had the additional effect of further reducing the plaintiff's resiliency, in terms of her ability to recover from the physical and mental (psychiatric and psychological) effects of future trauma, though to a relatively modest degree.
>
> [204] That fact of the plaintiff's pre-existing level of disability, of course, does not in itself mitigate the defendants' liability; a tortfeasor must take the victim as they are found. The issue is whether, and to what extent, the second collision in the 2011 MVA made any appreciable difference in respect of the factors enumerated in *Stapley*, in light of the independent traumas that followed. Those traumas include the 2011 slip-and-fall accident; the shower accident in Africa; the 2010 and 2012 MVAs; and, most significantly, the 2013 fall from the recliner chair. (I note that neither Ms. Khudabux's November 30, 2013 resignation letter, nor her letter to her son on January 14, 2014, made any reference to the motor vehicle accidents). The traumas she endured also include the cumulative psychological impact of the numerous incidents of interpersonal conflict she has experienced, including conflicts in the workplace and within her family.

[25] In assessing non-pecuniary damages the judge explained his methodology as follows:

> [205] Without taking into account the comparison between Ms. Khudabux's current with-accident and notional without-accident condition, and accounting not only for the aggravation of her pre-existing injuries from the 2011 MVA but also from the tortious and non-tortious injuries she subsequently sustained, I would assess her non-pecuniary damages globally at $75,000.
>
> [206] I then must account for what position I find Ms. Khudabux would likely have been in in any event, but for the 2011 MVA. I am unpersuaded that there is a great disparity, given Ms. Khudabux's "original position" and given the number of other intervening traumas she has sustained, between the pain, suffering, and loss of enjoyment of life that Ms. Khudabux now endures, and the situation she would find herself in had the collision with McClary never occurred. I find there is a high probability that Ms. Khudabux would be nearly as substantially incapacitated and affected as is now the case. Accordingly, I reduce Ms. Khudabux's award to reflect this probability and the extent to which her current condition is only marginally worse than what otherwise would have been the case. (Note that this adjustment has no bearing on the damages she is entitled to for the acute phase of her injuries; the adjustment begins at the point at which her pre-existing and subsequent injuries predominate.) On that basis I reduce the $75,000 amount to $30,000.

[26] As can be gleaned from the above-quoted paragraphs, the judge concluded the tortious and non-tortious injuries Ms. Khudabux had sustained in the 2011 accident and afterwards were deserving of a global non-pecuniary assessment of damages in the amount of $75,000. However, he found that the effects of the 2011 accident left her condition only marginally worse than it would have been had the accident not occurred, given her significant pre-existing condition and the several tortious and non-tortious events that occurred after the accident that also contributed to her condition. Therefore, he reduced the damages to $30,000 to reflect his findings of fact. He then deducted 20% for Ms. Khudabux's contributory negligence: at para. 207. Along with other awards that have not been appealed, the total assessment of damages for the 2011 accident was $34,004.37.

Issues

[27] The following issues are raised on appeal:

1. Did the judge misapply the law when determining whether Ms. Khudabux's injuries were divisible and whether the defendants were joint and severally liable?
2. Did the judge misapply the law by considering post-accident traumas when determining what Ms. Khudabux's condition would have been but for the 2011 accident?
3. Did the judge err in reducing the damages due to Ms. Khudabux's other accidents?

Standard of Review

[28] The first two issues on appeal allege the judge misapplied the legal framework in reaching his conclusions, which would attract a correctness standard: *Farrant v. Laktin*, 2011 BCCA 336 at para. 48; *Housen v. Nikolaisen*, 2002 SCC 33, at paras. 26-36. The last issue alleges an error in fact and law, which attracts a standard of review of palpable and overriding error.

Discussion

1. Divisibility and Liability

[29] The appellant submits her injuries from previous accidents, as well as her injuries from subsequent tortious and non-tortious accidents, are indivisible from her injuries in the subject accidents. She says the judge erred in finding otherwise because he did not connect each injury to each cause. As a result, the tortfeasors should be jointly and severally liable and the judge should have assessed damages globally from the date of her 2011 accident to the 2014 accident.

[30] The judge was live to the distinction between causation and damages, quoting from *Blackwater v. Plint*, 2005 SCC 58:

> 78. It is important to distinguish between causation as the source of the loss and the rules of damage assessment in tort. The rules of causation

> consider generally whether "but for" the defendant's acts, the plaintiff's damages would have been incurred on a balance of probabilities. Even though there may be several tortious and non-tortious causes of injury, so long as the defendant's act is a cause of the plaintiff's damage, the defendant is fully liable for that damage. The rules of damages then consider what the original position of the plaintiff would have been. The governing principle is that the defendant need not put the plaintiff in a better position than his original position and should not compensate the plaintiff for any damages he would have suffered anyway: *Athey*.

[31] The first question is whether the tortfeasor caused or contributed to an injury, thus making him liable. Whether injuries are divisible or indivisible is relevant to whether liability is owed jointly. Where an injury is divisible, the torfeasor is only liable for that part of the injury which he caused: *Athey v. Leonati,* [1996] 3 SCR 458, at para. 24.

[32] Divisible injuries are those that can be separated so that their damages can be assessed independently: *Bradley v. Groves,* 2010 BCCA 361, at para. 20.

[33] It is where injuries are indivisible, in that the injuries cannot be separated, that each tortfeasor is jointly and severally liable (absent contributory negligence): *Bradley* at paras. 24, 32. Consideration of other contributing causes occurs when assessing damages. This distinction is discussed in depth in *Moore v. Kyba*, 2012 BCCA 361, at paras. 36-43, as well as in *T.W.N.A. v. Canada (Ministry of Indian Affairs)*, 2003 BCCA 670, at para. 16 and *Bradley*, at para. 37.

[34] The judge held that this was not a case of true indivisible injury and determined that, despite the tangled nature of Ms. Khudabux's various injuries, he was able to determine the extent to which the two defendants at trial had caused or aggravated those injuries. He made clear findings of fact on that issue. He was not required, as the appellant suggests, to determine the extent to which Ms. Khudabux's other injuries contributed to her current condition. That analysis is relevant to damages.

[35] In my view, the judge made no error in concluding the defendants at trial were not jointly liable after having found this is not a case of true indivisible injuries.

Further, as the judge noted, even if the injuries were indivisible, joint liability would not be available due to the provisions of the *Negligence Act*. Given the judge's conclusion that Ms. Khudabux was contributorily negligent in the McClary collision, which finding of fact has not been challenged, joint liability was unavailable in any event. In my view, the judge did not err on this point.

2. Consideration of Post-accident Incidents

[36] As to her second ground of appeal, Ms. Khudabux submits the judge misapplied the law by considering post-accident traumas when determining what her condition would have been but for the 2011 accident. She says the judge erred by reducing the award for damages due to other injuries after the 2011 accident. She submits the judge did not determine those injuries were divisible and so the tortfeasor is liable for all of her injuries.

[37] The issue of intervening events is more properly approached through the lens of causation. Having determined the appellant had suffered damages for injuries subsequent to the 2011 accident, and having determined the global amount of damages was $75,000, the judge then deducted the amount for which he found as a fact that the defendant was not responsible. Implicit in his analysis is a finding that those injuries were not caused by the 2011 accident. As such, the judge was required to consider the impact of those unrelated intervening events when determining Ms. Khudabux's original position: *T.W.N.A.* at para. 36: *Athey* at paras. 31-32. I find no error in the judge's approach.

3. Reduction of Damage Award

[38] Lastly, Ms. Khudabux submits that, in light of the judge's finding of fact that the 2011 accident aggravated her pre-existing conditions, his conclusion is unsupportable that her condition would not be significantly different had the collision with Mr. McClary not occurred. She takes issue with the following statement (at para. 204):

> The issue is whether, and to what extent, the second collision in the 2011 MVA made any appreciable difference in respect of the factors enumerated in

> *Stapley*, in light of the independent traumas that followed. Those traumas include the 2011 slip-and-fall accident; the shower accident in Africa; the 2010 and 2012 MVAs; and, most significantly, the 2013 fall from the recliner chair.

[39] Ms. Khudabux's reliance on *Sangha v. Chen*, 2013 BCCA 267, and *Bouchard v. Brown Bros. Motor Lease Canada Ltd*., 2012 BCCA 331, is, in my view, misplaced. In *Sangha* the trial judge erred in determining the plaintiff's injuries would have occurred absent the accident due to his pre-existing condition while at the same time finding the plaintiff's pre-existing conditions were aggravated. In *Bouchard* the judge erred in reducing the damage award on the basis that a pre-existing condition would have caused the same loss without accounting for the fact that the accident caused the loss to occur sooner. Neither case deals with subsequent injuries.

[40] In this case, the judge clearly identified the extent to which the 2011 accident aggravated Ms. Khudabux's pre-existing injuries and he found that she was entitled to compensation for that additional loss. He also found that the intervening, unrelated events that occurred after the 2011 accident led to some of the same types of injuries. Thus, while Ms. Khudabux's condition was made worse by the 2011 accident, some of that loss would have occurred due to the subsequent events. In this way, I find that this case is distinguishable from *Sangha* and *Bouchard*.

[41] Considering first principles of tort law, a plaintiff is entitled to be put in the same position he or she would have been absent the defendant's negligence: *Athey* at para. 35. This entails determination of his or her original position, and the effects of pre-existing conditions and intervening events, to ensure the tortfeasor compensates only for the injury he or she caused and the plaintiff is not left in a better position than he or she otherwise would have been. This is discussed in depth in *T.W.N.A.* starting at para. 21.

[42] McLachlin C.J.C. noted in *Blackwater*:

> 80. Where a second wrongful act or contributory negligence of the plaintiff occurs after or along with the first wrongful act, yet another scenario, sometimes called the "crumbling skull" scenario, may arise. Each tortfeasor is entitled to have the consequences of the acts of the other tortfeasor taken into account. The defendant must compensate for the damages it actually caused but need not compensate for the debilitating effects of the other wrongful act that would have occurred anyway. This means that the damages of the tortfeasor may be reduced by reason of other contributing causes: *Athey*, at paras. 32-36. [Emphasis added.]

[43] Here the judge determined that by the time of the trial Ms. Khudabux's condition was worse than it would have been had the 2011 accident and all the subsequent accidents never happened. He assessed a damage amount for her injuries globally at $75,000. This took into account her pre-existing conditions. He then found that Mr. McClary was not responsible for all of the additional injuries as some were caused or overtaken by later tortious and non-tortious accidents. Therefore, as he explained, he reduced the damages award to reflect this. His finding is entitled to deference.

[44] Determining what reduction is appropriate is not a simple task. As discussed in *Blackwater*:

> 74. The calculation of damages for sexual assault to Mr. Barney is complicated by two other sources of trauma: (1) trauma suffered in his home before he came to AIRS; and (2) trauma for non-sexual abuse and deprivation at AIRS that was statute barred. In reality, all these sources of trauma fused with subsequent experiences to create the problems that have beset Mr. Barney all his life. Untangling the different sources of damage and loss may be nigh impossible. Yet the law requires that it be done, since at law a plaintiff is entitled only to be compensated for *loss caused by the actionable wrong*. It is the "essential purpose and most basic principle of tort law" that the plaintiff be placed in the position he or she would have been in had the tort not been committed: *Athey v. Leonati*, [1996] 3 S.C.R. 458, at para. 32. [Underlining added.]

[45] These comments in *Blackwater* mirror the task facing the judge and his approach and methodology in assessing damages in this case:

> 82. The trial judge correctly apprehended the applicable legal principles. He recognized the "daunting task" of untangling multiple interlocking factors and confining damages to only those arising from the actionable torts, the sexual assaults (2001 decision, at para. 365). He tried

> his best to award fair damages, taking all this into account. He recognized the thin skull principle, but in the absence of evidence that Mr. Barney's family difficulties prior to coming to AIRS had exacerbated the damage he suffered from the sexual assaults he sustained at AIRS, the trial judge had no choice but to attempt to isolate those traumas. Similarly, there was no legal basis upon which he could allow damages suffered as a result of statute-barred wrongs committed at AIRS, like the beatings, to increase the award of damages.

[46] In this case the judge "tried his best" to fairly assess damages, which was a complex task in the circumstances. The appellant's disagreement with the approach of the judge lies not with the principles he applied but with his factual conclusions about what Ms. Khudabux's position would have been in any event of the accident with Mr. McClary. The judge was unpersuaded that there was a great disparity, given her "original position" and the number of other intervening traumas. For that reason he concluded there was a "a high probability that Ms. Khudabux would be nearly as substantially incapacitated and affected as is now the case": at para. 206. As a result, he reduced the global amount of damages he had assessed to account for the intervening events (and her contributory negligence). That was one approach to assessing damages. There may have been other methods he could have chosen, but I cannot conclude that he was wrong in his approach. Absent palpable and overriding error the judge's findings of fact will not be overturned.

[47] In my view, the judge made no error in his approach or methodology to assessing damages in this complicated case.

Conclusion

[48] I would dismiss the appeal.

"The Honourable Madam Justice Stromberg-Stein"

I Agree:

"The Honourable Madam Justice Saunders"

I Agree:

"The Honourable Mr. Justice Frankel"