



JUDGE AGREES WITH EXPERTS THAT A CHANGE IN CAREER IS A REAL AND SUBSTANTIAL POSSIBILITY FOR THE PLAINTIFF.

K vs. E

2021 BCSC 797

The Reasons for Judgment of The Honourable Mr. Justice Wilson were given on April 28, 2021 at Kelowna, British Columbia.

The plaintiff, Mr. K, was involved in two motor vehicle collisions in 2011. The defendants have admitted liability and accordingly the issue at trial involved an assessment of the plaintiff's damages. Mr. K seeks damages for loss of both past and future income, cost of future care, non-pecuniary damages and special damages. His primary ongoing complaint is lower back pain which radiates into his right leg. He is currently 38 years of age and has been married to his wife, Melissa, for 15 years. He works as a custodian for the local school board, a position which he held at the time of the collisions.

The plaintiff had no injuries prior to these two accidents. He enjoyed hiking, camping, fishing and golf. Since the accidents his activities have been significantly curtailed as a result of his injuries. He is able to go for brief walks, and only on level ground. He is unable to play golf or baseball and he has not been camping. His work activities have also been curtailed.

September 26, 2011 – Mr. K was driving his car and waiting to turn left when the car in front of him reversed into his vehicle. He reported back and neck pain, as well as headaches. He attended massage therapy. Although he had not fully recovered, he was much improved by the time of the second accident.

November 4, 2011 – Mr. K was driving his vehicle on Highway 97 when he noticed the vehicle in front of him start to fishtail. He applied his brakes and would have avoided the truck in front but for the fact that his vehicle was struck violently from the rear by another vehicle. Mr. K's vehicle was written off. This accident was the more significant of the two in terms of injuries suffered and the forces involved.



The plaintiff missed two months from work and started a graduated return to work program in January 2012. As of February 13, 2012 he returned to full time work but with modifications to his duties. Mr. K has attended physiotherapy and massage therapy. He uses a massage chair at home, an inversion table, a TENS machine, heating pads, ice packs, topical creams and both over-the-counter and prescription medications in an attempt to alleviate his constant pain. In addition to curtailing his recreational activities and domestic chores, he continued to have difficulty with the physical demands of his job as a school custodian. The plaintiff now weighs approximately 100 pounds more than he did at the time of the accidents. He is very concerned that he will need to find a new career due to the physical nature of his job. In 2016 he applied for a 10-month permanent fulltime relief position. In this position he may be assigned to any of the schools in the district. It still includes a guaranteed 40 hours per week but allows him to avoid the heaviest of the tasks assigned to custodians which are generally done during the school breaks when there are no children in school. The plaintiff's supervisor, Ms. Carpenter, is aware of his limitations and tries to assign him to shifts that are less physically demanding when possible. She has received complaints in the past from others when the plaintiff has been unable to do his share of the work and she tries to avoid assigning him to situations where a problem may arise. She has no complaints about his work ethic or effort.

MEDICAL EVIDENCE

Mr. Justice Wilson found that “the evidence of the medical experts was largely consistent.” The Court was provided with medical reports of three practitioners. For the plaintiff, Dr. Michael Boucher, a medical doctor with a practice focused on chronic pain medicine, and Dr. Christopher Watt, Occupational Medicine Specialist. The defendants submitted the report of Dr. Randall Loch, Orthopedic Surgeon.

Dr. Boucher diagnosed the plaintiff with both chronic pain and Chronic Pain Syndrome, “a psychosocial diagnosis which makes it even more difficult for the patient to overcome or deal with their chronic pain”. In order for a diagnosis of Chronic Pain Syndrome, at least three of the six major characteristics of the syndrome must be present. In Dr. Boucher's opinion Mr. K presents with five of the six criteria.

In Dr. Watt's opinion Mr. K is at maximum medical improvement with regard to the pain in his neck, upper back and lower back, and he considers his condition to be permanent. Dr. Watt made some recommendations including epidural nerve block, progressive exercise program, weight loss, and assessment for sleep apnea. While Dr. Watt agreed on cross-examination that the plaintiff's weight gain since the accident is a significant contributor to his ongoing low back pain and that weight loss may benefit him, he points out that the statistics for people who have been overweight their entire lives, such as the plaintiff, is that only about 17 percent of those people are successfully able to reduce weight and maintain the lower weight. When he examined the plaintiff, he found his core strength was very



poor and while improved conditioning would not be curative, it could improve function. Dr. Watt was of the view that the plaintiff was not well suited for the position of a school custodian and recommended vocational counselling and rehabilitation.

Dr. Lochter's opinion does not differ greatly from those of the plaintiff's doctors.

“[28] He concluded that there is no specific identified reason for the plaintiff's pain reports in terms of an organic tissue pathology. He therefore concludes that the pain is contributed to by other factors, including central sensitization and a psychological overlay. Unlike the plaintiff's doctors, however, he does not agree that the plaintiff has reached maximum medical improvement as he has not had maximum medical management.

[29] Dr. Lochter's recommendations are very similar to those of Dr. Watt. He also recommends the plaintiff improve his sleep, and a weight loss program but does not recommend any ongoing passive treatment modalities.”

Mr. Justice Wilson found “the plaintiff to be a credible witness, and I accept that he suffered and continues to suffer from the pain and the symptoms he described to both the medical practitioners and the Court.” He goes on to say:

“[34] The doctors who testified in this case do not differ substantially with regard to either their findings or their recommendations. The plaintiff continues to experience chronic pain in his low back, with pain radiating down his right leg. His symptoms will remain.”

With respect to the plaintiff's claim for future wage loss Mr. Justice Wilson states:

“[87] Both Dr. Boucher and Dr. Watt were of the view that a change in career is a real and substantial possibility for the plaintiff. The possibility of a change in employment was first discussed by the plaintiff during his meeting with Dr. Lichtenstein in 2013. At that time, she suggested that he should consider his alternatives. According to the plaintiff, he was most reluctant to do so as he had a job that provided him with security, a good wage and benefits. I consider the fact that he remains in his position as confirmatory of his attachment to his job notwithstanding the difficulties it presents him.

[88] I am satisfied that there is a real and substantial likelihood that the plaintiff will need to give up his job as a school custodian at some point in the future. Both Dr. Boucher and Dr. Watt expressed this opinion during their evidence, and Dr. Lichtenstein [the plaintiff's family doctor] was clearly concerned as long ago as 2013 when she raised the subject. According to both the plaintiff and his wife, it is only now that he is starting to appreciate that he may need to make a career change.”



Mr. Justice Wilson summarized as follows:

[116] The plaintiff is entitled to the following:

Past loss of income:	\$17,993.50
Future income loss	\$90,000.00
Costs of future care:	\$5,000.00
Non-pecuniary damages:	\$100,000.00
Special damages:	\$13,275.87

TOTAL AWARD: **\$226,269.37**

The full Reasons for Judgment of the Honourable Mr. Justice Wilson [CAN BE FOUND HERE](#)

WRITTEN BY STELLA GOWANS, PARALEGAL

**IF YOU WOULD LIKE TO BOOK ASSESSMENTS WITH DR. MICHAEL BOUCHER, CHRONIC PAIN;
DR. CHRISTOPHER WATT, OCCUPATIONAL MEDICINE; OR DR. RANDALL LOCHT, ORTHOPEDIC
SURGEON, PLEASE CONTACT US AT INTEGRA**