

CANADA / JUDGMENT

Callow v. Van Hoek-Patterson

2023 BCCA 92

COURT

British Columbia Court of Appeal

DECIDED

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2023 BCCA 92 Callow v. Van Hoek-Patterson

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Callow v. Van Hoek-Patterson,

2023 BCCA 92

Date: 20230224

Docket: CA47588

Between:

Matthew Michael Callow

Appellant

(Plaintiff)

And

Adriene Van Hoek-Patterson,

Raquel Wang and John Hogan

Respondents

(Defendants)

Before:

The Honourable Justice Frankel

The Honourable Justice Dickson

The Honourable Justice Griffin

On appeal from: An order of the Supreme Court of British Columbia, dated June 8, 2021 (Callow v. Van Hoek-Patterson, 2021 BCSC 1423,

Vancouver Docket M167288).

Counsel for the Appellant:

T.G. Kornfeld

Counsel for the Respondents,

R. Wang and J. Hogan:

J.J.L. Brun, K.C.

D.P.L. Evans

Place and Date of Hearing:

Vancouver, British Columbia

October 12, 2022

Place and Date of Judgment:

Vancouver, British Columbia

February 24, 2023

Written Reasons by:

The Honourable Justice Frankel

Concurred in by:

The Honourable Justice Dickson

The Honourable Justice Griffin

Summary:

The appellant appeals a non-pecuniary damages award of \$35,000 made to compensate him for injuries sustained in a motor vehicle accident on the basis that it is inordinately low. Held: Appeal allowed. Having regard to comparable cases, the range for non-pecuniary damages is \$50,000 to \$60,000 for cases of persons in their 20s who sustained moderate soft tissue injuries to their neck, back, and shoulders, who remained symptomatic for years, and whose condition has improved but the likelihood for future improvement is poor. The \$35,000 award is inordinately low and an award of \$55,000 is substituted.

Reasons for Judgment of the Honourable Justice Frankel:

Introduction

- [1] The appellant, Matthew Michael Callow, appeals a non-pecuniary damages award of \$35,000 made to compensate him for injuries sustained in a motor vehicle accident. Liability was admitted and damages were assessed by Justice Coval of the Supreme Court of British Columbia. The trial focused on damages for pain and suffering and cost of future care. There was no claim for past or future wage loss. Mr. Callow submits appellate intervention is warranted because \$35,000 is inordinately low in comparison to awards made in similar cases.
- [2] For the reasons that follow, I would increase the award to \$55,000.

Background

The Accident and the Injuries to Mr. Callow

- [3] The accident occurred in September of 2014, when Mr. Callow's vehicle was struck from behind by a vehicle owned by the respondent John Hogan and driven by the respondent Rachel Wang. At the time of the accident, Mr. Callow was 20 years old and in his third year of university; he was 27 at the time of trial.
- [4] Mr. Callow testified at the trial. Evidence was given by his mother, his partner and a doctor specializing in the diagnosis and treatment of musculoskeletal conditions whose expert report Mr. Callow tendered. The respondents did not present any evidence. There was no dispute the accident caused moderate soft tissue injuries to Mr. Callow's neck, upper back, and shoulders which, despite treatment, remained symptomatic. There were no pre-existing issues with his neck, back, and shoulders,
- [5] In reasons for judgment indexed as 2021 BCSC 1423, the trial judge noted that sports and exercise have always been a part of Mr. Callow's life. He was an accomplished soccer player and played on the University of Victoria's varsity team for two years. Prior to the accident he decided to focus on his studies and played only recreational intermural soccer. In 2019, after having obtained degrees from the University of Victoria and the University of British Columbia, he went to work for the City of Vancouver.
- [6] Following the accident, Mr. Callow made what the trial judge described as a "dedicated effort to get better". This included over 40 physiotherapy sessions from October 2014 to July 2018, with some painful trigger point injections in 2017, and 11 sessions with the Canadian Back Institute in 2019. At home, he performed the exercise recommended to him.

- [7] The judge found that Mr. Callow continues to suffer from neck, shoulder and back pain. He is able to play recreational soccer, jog, and weightlift but has to monitor his physical exertion for pain; he often experiences some degree of upper back/shoulder discomfort after exercise or exertion. He sometimes has discomfort from prolonged sitting and working on a screen. As a gardening enthusiast, Mr. Callow must be careful with prolonged heavy work; the same with household chores.
- [8] With respect to Mr. Callow's prognosis, the judge found the likelihood of future material improvement to be poor, but not impossible. Based on Mr. Callow's age, fitness, and dedication, he found there is an unlikely, but nonetheless real and substantial, possibility of improvement. The judge also found that: (i) while Mr. Callow continues to suffer from occasional headaches, they are not a material problem for him; (ii) Mr. Callow's use of heat and ice for pain and painkillers is infrequent, if at all; and (iii) while Mr. Callow likely experiences some lingering driving anxiety, this is not a material problem for his mental health or functioning.

Mr. Callow's Position on Damages

- [9] Mr. Callow sought non-pecuniary damages of between \$70,000 and \$88,000. At the start of his submission, he referred to *Lambert v. Dong*, 2021 BCSC 249, as being a case falling outside his suggested range. That case involved a plaintiff who was 22 at the time of a motor vehicle accident and approximately 28 at the time of trial. He had suffered soft tissue injuries to his neck, shoulder and back. The prognosis for a full recovery was guarded; he would experience ongoing pain to his neck and shoulder particularly after physical labour. The judge awarded \$60,000.
- [10] In support of his position, Mr. Callow relied on the following cases (updating the amounts in some of the older ones to account for inflation using a Bank of Canada inflation calculator):
- *Blackman v. Dha*, 2015 BCSC 698: \$80,000 awarded (updated to \$89,000); plaintiff 32 at time of accident, 37 at time of trial; soft tissue injuries to neck and shoulder; would permanently have mild intermittent recurring neck pain and resulting headaches; injuries causing emotional suffering including frustration with not being able to participate fully in family activities; had to adjust her lifestyle, including household chores; ability to play musical instruments affected.
 - *Carson v. Ehman*, 2019 BCSC 2120: \$85,000 awarded (updated to \$87,900); plaintiff 22 at time of accident, approximately 27 at time of trial; soft tissue injuries to neck, shoulder, and upper back; symptoms had improved but plateaued; weekly headaches and trouble sleeping; anxiety experienced about once a month; help required with heavy household chores; recreational and sporting activities limited.

- *Nguyen v. O'Neil*, 2020 BCSC 2036: \$75,000 award; plaintiff 20 years old at time of the accident; approximately 23 at time of trial; soft tissue injuries to neck, shoulder, and back; although she did not have disabling pain she continued to have muscle spasms, numbness and tingling in arms, sleep disturbance and weekly headaches, all of which were expected to continue into the foreseeable future; no longer able to participate in certain activities important to her.
- *Vankoll v. Williamson*, 2020 BCSC 271: \$85,000 awarded; plaintiff 19 at time of accident, approximately 25 at time of trial; soft tissue injuries to lower back; chronic pain which may improve but will never completely resolve; reduction in frequency of recreational activities but still able to engage in them.
- *York v. Svensson*, 2021 BCSC 341: \$70,000 awarded; plaintiff 26 at time of the accident, 30 at time of trial; soft tissue injuries to neck, upper back, and right shoulder; no significant ongoing problems or functional limitations; able to go about his life and work with mild ongoing complaints; will continue to have increases in pain levels when involved in heavier activities.
- *Fowler v. Ford*, 2021 BCSC 324: \$80,000 awarded; plaintiff 23 at time of the accident, 28 at time of trial; soft tissue injuries to her neck, shoulders, upper and lower back; chronic pain preventing comfortable sleep; headaches persisting; unable to return to competitive pre-accident activities; exhausted at the end of the work day; reduced social interactions.

Respondents' Position on Damages

[11] The respondents submitted the award should be between \$30,000 and \$40,000. They referred to the following decisions, updated for inflation when necessary:

- *Hunter v. Yang*, 2010 BCSC 1526: \$35,000 award (updated to \$42,000); plaintiff 28 at time of accident, 32 at time of trial; soft tissue injuries to neck back and shoulders; pre-accident had an energetic, active, and social life; condition plateaued; continuing pain flare-ups from ordinary activities such as carrying groceries, doing laundry, and house cleaning; sleep disruption; using painkillers.
- *Lumley v. Bailio*, 2013 BCSC 1052: \$25,000 awarded (adjusted to \$28,400); plaintiff 22 at time of accident, 25 at time of trial; soft tissue injuries to neck and back; symptoms largely resolved within a year and thereafter did not significantly interfere with her enjoyment of life or her resumption of all her normal activities; current mild symptoms could be controlled with occasional use of non-prescription pain medication.
- *Christoffersen v. Howarth*, 2013 BCSC 144: \$35,000 awarded (adjusted to \$40,000); plaintiff 22 at time of accident, 25 at time of trial; mild whiplash injury; experienced heartburn, headaches, trouble sleeping, fatigue when engaging in sports activities, and difficulty with other day-to-day activities; continuing to have mild neck and back discomfort; good prognosis for recovery.

- *Ceglielka v. Grace*, 2020 BCSC 115: \$40,000 award; plaintiff 32 at time of accident; approximately 36 at time of trial; soft tissue injuries to neck, shoulder, and back; not impaired or disabled; will continue to have periodic mild neck and back pain.
- *Chapman v. Zilm*, 2020 BCSC 695: \$30,000 award; plaintiff 33 at time of accident, 36 at time of trial; soft tissue injury to neck; only marginally incapacitating; able to continue with pre-accident recreational activities, but with less intensity; minor neck pain will persist indefinitely; pre-existing conditions more debilitating.

Trial Judge's Decision

[12] The judge based his assessment on the approach set out in *Stapley v. Hejslet*, 2006 BCCA 34, 263 D.L.R. (4th) 19, i.e., on the non-exhaustive list of factors that influence an award of non-pecuniary damages commonly referred to as the "Stapley factors". In that case, Justice Kirkpatrick described those factors as follows:

[46] The inexhaustive list of common factors cited in [*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).

[13] The judge stated that the cases Mr. Callow cited, "while similar in terms of many of the Stapley factors, involve more pain and associated functioning difficulties than [Mr. Callow's] case": para. 39. He opined that in terms of those factors, the respondents' cases were "similar in terms of the Stapley approach and considerations", and "closer in terms of [Mr. Callow's] pain, suffering, and harm to lifestyle and well-being": para. 46. In conclusion, he said this:

- [53] Applying the Stapley considerations to this case and using the cases described above as guidance, particularly the defendants' cases which are closer to our situation, in my view, Mr. Callow's circumstances fall into the \$30,000-40,000 range. He is therefore awarded \$35,000.

Standard of Review

- [14] The standard of review applied when a non-pecuniary damages award is challenged on the basis that it is inordinately low is well-established and involves a comparative approach, i.e., a consideration of recent awards in generally similar cases. This is evinced by the following passage from the *Tisalona v. Easton*, 2017 BCCA 272:
- [41] This court's role in determining whether a non-pecuniary damage award is inordinately low was discussed in *Morlan v. Barrett*, 2012 BCCA 66, where the following standard of review was explained:
- [63] As already mentioned, a trial judge's assessment of damages is entitled to considerable deference. The approach to be taken when an award is challenged on the basis that it is inordinately high or inordinately low was discussed by Mr. Justice K. Smith in *Marois v. Pelech*, 2009 BCCA 286, 95 B.C.L.R. (4th) 243:
- [22] In *Cory v. Marsh* (1993), 77 B.C.L.R. (2d) 248 at para. 8, 22 B.C.A.C. 118 (C.A.), this Court held that an award of damages will be a wholly erroneous estimate if it is "inordinately high, low or disproportionate [to the circumstances of the case]", that is, if it "falls substantially beyond the upper or lower range for damage awards in the same class of case". This "classification" of cases, which has over time produced a "grid" or "tariff" system, is arguably based on a misinterpretation of the comment of Dickson J. (as he then was) in *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229 at 265, 83 D.L.R. (3d) 452, [1978] 1 W.W.R. 577, where he fixed an upper limit of \$100,000 for non-pecuniary damages "in cases of this nature": see *Dilello v. Montgomery*, 2005 BCCA 56, 37 B.C.L.R. (4th) 72 at para. 41, 208 B.C.A.C. 165. However, the comparative approach set out in *Cory v. Marsh* has been followed in this Court for many years and, in *Le v. Luz*, 2003 BCCA 640, 20 B.C.L.R. (4th) 283 at para. 13, 189 B.C.A.C. 155, it was assimilated to the palpable and overriding error test stated in *M.B. v. British Columbia*. Thus, we may intervene in this case if the trial judge's awards were inordinately high under the test in *Cory v. Marsh*.

[Emphasis added.]

- [15] In *Cory v. Marsh* (1993), 77 B.C.L.R. (2d) 248 (B.C.C.A.), leave to appeal ref'd [1993] 2 S.C.R. viii, Mr. and Mrs. Cory had sustained various soft tissue injuries in a motor vehicle accident. A jury awarded non-pecuniary damages of \$71,250 to Mr. Cory and \$94,000 to Mrs. Cory. On appeal, Chief Justice McEachern (for the majority) reduced those awards to \$40,000 and \$50,000 respectively. He did so on the basis that the original awards were inordinately higher than the range of awards made by trial judges in generally similar cases. With respect to ascertaining that range, the Chief Justice stated:

- [12] While all cases are different, and it is impossible to find cases with completely comparable facts and circumstances, it is much easier today than it was at the time of [Nance v. British Columbia Electric Railway, [1951] A.C. 601 (J.C.P.C.)] to ascertain the range of damages for various kinds of cases. Because there are so many more cases it is easier to determine whether a particular award is inordinately or disproportionately high or low.
- [13] I have examined a great many decisions decided in our Courts in addition to those cited by counsel. They are largely cases of moderate soft tissue injuries to persons in the age group of these plaintiffs, but with continuing complaints, or other difficulties. In some of them the ongoing problems endured by victims of motor vehicle accidents include depression and other psychological problems. I shall set out a brief sampling of these cases, which are only a few of the many I have considered:
- [36] These cases suggest a range for the kind of non-pecuniary damages suffered by these Plaintiffs of from \$20,000 to \$40,000.

Analysis

Updating for Inflation

- [16] In their submissions to the trial judge in 2021, the parties put forward what they said were appropriate comparator cases. In light of this Court's recent decision in Valdez v. Neron, 2022 BCCA 301, Mr. Callow submits three of the cases the respondents put forward should not have been considered by the trial judge and should not be considered on appeal, because they are "dated", namely, Hunter v. Yang (2010) (\$35,000 adjusted to \$42,000); Lumley v. Bailio (2013) (\$25,000 adjusted to \$28,400); Christoffersen v. Howarth (2013) (\$35,000 adjusted to \$40,000).
- [17] Valdez involved an appeal by a plaintiff injured in a motor vehicle accident who had been awarded \$600 in non-pecuniary damages by a jury in 2020. This Court held the appropriate range to be \$30,000 to \$40,000 and increased the award to \$35,000. In coming to that decision, the Court had regard to comparator cases. Those submitted by the defendants in support of their position that the range was \$12,000 to \$29,000 included trial decisions from 2004, 2008, and 2009, in which the inflation-adjusted awards were in that range. In holding those decisions were not appropriate comparators, Justice Abrioux said this:
- [58] Nor do I accept the range suggested by the respondents. That is because many of the authorities relied on are dated and it is not appropriate to take a case such as [Dao v. Vance, 2008 BCSC 1092] where the award was made in 2008 and simply adjust it for inflation to 2020. That approach ignores that awards for non-pecuniary damages have continued to increase over the years in addition to the inflationary component.

He then went on to set out the decisions he found to be of assistance, being ones from 2013 to 2021.

[18] In light of Valdez, I agree Hunter v. Yang (2010), should not be considered at all; it was decided more than a decade before Mr. Callow's trial. However, I will have regard to Lumley v. Bailio (2013) and Christoffersen v. Howarth (2013), keeping in mind that more recent decisions may be of more persuasive value in determining the present range.

The Appropriate Range

[19] It is important to keep in mind that determining the appropriate range entails ascertaining the "the upper and lower range for damage awards in the same class of case": Cory at para. 8 (emphasis added). Given no two cases are alike--either the injuries are more or less severe, or have a greater or lesser impact on the plaintiff's quality of life--defining the class is a generalized exercise that takes place at a high level of abstraction.

[20] Mr. Callow no longer contends the range for a plaintiff in his circumstances is \$70,000 to \$88,000. Resiling from the position he took at trial, he now says Lambert v. Dong is an appropriate comparator and reflects the lower end of the range he now suggests, being \$60,000 to \$75,000. For their part, the respondents maintain their position that the range is \$30,000 to \$40,000.

[21] Other than Mr. Callow's change in position with respect to Lambert v. Dong, the parties' submissions on appeal mirror those they made at trial; they rely on the same cases. In addition to those cases, I consider the following recent decisions to be of assistance in determining the range here:

- Lin v. Yim, 2019 BCSC 1071: \$60,000 awarded; plaintiff 22 at time of accident, 28 at time of trial; soft tissue injuries to neck, back, and shoulder; some pain symptoms not resolved at trial but with appropriate treatment will probably improve significantly, able to go to gym but less frequently than before.

- Lowe v. Johnson, 2019 BCSC 1283: \$60,000 awarded; plaintiff 26 at time of accident, 33 at time of trial; soft tissue injuries to neck, back, and right shoulder, aggravating injuries from prior accidents; lower back pain, headaches, and right elbow pain completely resolved in a year; ongoing shoulder symptoms and flare-ups; likely to have a full or near full recovery.

- McBurney v. Levesque, 2019 BCSC 1897: \$50,000 awarded; plaintiff approximately 23 at time of accident, approximately 26 at time of trial; soft tissue injuries to neck and upper back along with a concussion; withdrawn and irritable for 18 to 24 months; symptoms (sleep issues, headaches, and fatigue) largely resolved by time of trial.

- Saunders v. Rempel, 2019 BCSC 2177: \$30,000 awarded plus \$20,000 for impairment of ability to play competitive hockey; plaintiff 18 at time of accident, 24 at time of trial; sprain and strain soft tissue injuries to spine causing myofascial pain; symptoms mild and manageable; no impairment of capacity to perform normal housekeeping tasks.

- *Stocking-Pearson v. Vinette*, 2019 BCSC 2182: \$80,000 awarded; plaintiff 21 at time of accident, 27 at time of trial; soft tissue injuries to neck and lower back; neck pain resolved within six months; back pain improved but ongoing symptom management required; continuing to have discomfort particularly following physical activities; soreness and stiffness every workday.
- *Findlay v. Sun*, 2020 BCSC 1330: \$55,000 awarded; plaintiff approximately 27 at time of accident, 31 at time of trial; bruising and soft tissue injuries to neck and upper back; continues to experience flare-up after exerting herself; able to enjoy most of her pre-accident activities--social, housekeeping, and vocational--by avoiding what causes flare-up.
- *Stewart v. Dhoulthon*, 2020 BCSC 1439: \$55,000 awarded; plaintiff approximately 28 at time of accident, 33 at time of trial; soft tissue injuries to neck and upper back; likely to continue to struggle with neck and back pain for the rest of her life; able to perform athletic activities she enjoys but at a lower level of intensity.
- *Bagri v. Heran*, 2020 BCSC 2002: \$50,000 awarded; plaintiff 26 at the time of the first of three accidents, 29 at time of trial; soft tissue injuries to neck and upper and lower back in the first accident; second and third accidents caused flare-ups; some injuries resolved, others continuing to cause manageable pain; full recovery possible, but risk she will have to contend with discomfort indefinitely; unable to exercise as intensely as before.
- *Johal v. Bhullar*, 2021 BCSC 427: \$25,000 awarded; plaintiff 23 at the time of accident, 28 at the time of trial; mild soft tissue injuries to neck, shoulder, and lower back; symptoms fully resolved within 16 months.

[22] At a high level of abstraction, Mr. Callow's situation can be described in the following terms:

A person in their 20s who sustained moderate soft tissue injuries to their neck, back, and shoulders which, despite treatment, remained symptomatic for years. Although their condition has improved, they will continue to experience some pain flare-ups and the likelihood for future improvement is poor. With caution, can continue to participate in previous activities while monitoring physical exertion for pain.

[23] For a person in Mr. Callow's situation, I am of the view that the judge's award was inordinately low. On the basis of the awards I have reviewed, particularly the more recent ones, and bearing in mind it will always be possible to find higher or lower awards, I am of the view that the present range for non-pecuniary damages in the type of case I have just described is \$50,000 to \$60,000. Further, I consider the mid-point of that range to be fair to both parties.

Final Comment

[24] In fairness to the trial judge, I wish to point out that counsel did not provide him with the most relevant up-to-date and, therefore, most helpful authorities. Rather, they took what can be described as "highball" and "lowball" approaches. The recent authorities cited in para. 21 above all pre-date the trial. I have no doubt that, had those authorities been drawn to the judge's attention, he, too, would have found them helpful.

Disposition

[25] I would allow this appeal and substitute an award of \$55,000 for non-pecuniary damages.

"The Honourable Justice Frankel"

I AGREE:

"The Honourable Justice Dickson"

I AGREE:

"The Honourable Justice Griffin"

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