

CANADA / JUDGMENT

Carothers v. Imus

2020 BCSC 456

COURT

Supreme Court of British Columbia

DECIDED

27 March 2020

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2020 BCSC 456 Carothers v. Imus

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Carothers v. Imus,

2020 BCSC 456

Date: 20200327

Docket: S196432

Registry: Vancouver

Between:

Tiffany Ann Lillian Carothers

Plaintiff

And:

Brian Imus, Jamie Wilson,

John Doe #1 and John Doe #2

Defendants

Before: The Honourable Madam Justice Horsman

Reasons for Judgment

Counsel for the Plaintiff:

D. Grunder

No one appearing for the Defendants:

Place and Date of Trial:

Vancouver, B.C.

March 11, 2020

Place and Date of Judgment:

Vancouver, B.C.

March 27, 2020

INTRODUCTION

- [1] At issue in this trial is the assessment of the plaintiff's damages for injuries she suffered in a snowmobile accident in Fort. St. John, British Columbia, in the early morning hours of January 5, 2002 (the "Accident").
- [2] At the time of the Accident, the plaintiff was a passenger on a snowmobile driven by the defendant, Brian Imus. Mr. Imus' snowmobile collided with a snowmobile operated by the defendant, Jamie Wilson, crushing the plaintiff's left leg in between the two snowmobiles.
- [3] The plaintiff filed a writ of summons and statement of claim in the Victoria Registry in December 2003. Mr. Imus filed an appearance, but did not file a defence and, thereafter, has not participated in this litigation. Mr. Wilson has never responded to the plaintiff's claim and did not file an appearance. A copy of the statement of claim was served on Mr. Wilson by way of newspaper advertisement pursuant to an order for substituted service granted in 2004. The plaintiff obtained default judgment against Mr. Wilson on August 5, 2005 and against Mr. Imus on April 11, 2006, with damages to be assessed at a later date.
- [4] The reasons for the delay in the scheduling of the trial to assess damages is not entirely clear from the record, and not relevant in any event. The plaintiff's current counsel assumed conduct of the action in 2018, and took steps to have the file transferred to Vancouver. This led to complications as the original file in the Victoria Registry had been destroyed. On May 31, 2019, Mr. Justice MacKenzie granted an order giving the plaintiff leave to file copies of the pleadings, and that once filed the copies would be treated as originals. The action was then transferred to the Vancouver Registry for all purposes.
- [5] The Supreme Court Civil Rules, B.C. Reg. 168/2009 [SCCR] require service of the notice of trial, trial record, and trial briefs on all parties of record. A "party of record" is defined in R. 1-1 of the SCCR as "a person who has filed a pleading, petition or response to petition in the proceeding". Out of an abundance of caution, the plaintiff served her notice of trial, trial record, and trial brief on Mr. Imus because he filed an appearance. As noted, Mr. Wilson has never filed any document in this proceeding that could be construed as a pleading and, therefore, the plaintiff did not attempt to serve Mr. Wilson. Neither of these defendants appeared at trial.

- [6] In the circumstances, I am satisfied that it is appropriate to proceed with the assessment of the plaintiff's damages at this trial, despite the non-appearance of any defendant. If it is necessary to cite authority for proceeding with a trial to assess damages in the absence of a defendant in these circumstances, such authority is found in R. 12-5(76) of the SCCR.

FACTUAL BACKGROUND

The Accident and the Plaintiff's Injuries

- [7] The plaintiff testified at trial. She tendered in evidence a number of documentary exhibits, including photographs of the area of the Accident and a notice to admit. The plaintiff also tendered an expert medical report from Dr. William Regan, an orthopedic surgeon. The evidence relating to the circumstances of the Accident and the plaintiff's injury is as follows.
- [8] The plaintiff is presently 37 years old, and was 18 years old at the time of the Accident. She was born and raised in Fort St. John and was in good health prior to the Accident. In her spare time, she liked to do such activities as hiking, fishing, skating, and snowmobiling. She walked everywhere or rode her bike.
- [9] The plaintiff graduated from high school in Fort St. John in 2001. In November 2001, she was hired as an office assistant by McElhanney Ltd. ("McElhanney"). She was working at McElhanney at the time of the Accident.
- [10] On the evening of January 4, 2002, the plaintiff and a group of friends, including Mr. Imus and Mr. Wilson, decided to snowmobile from Fort St. John to Charlie Lake and back. There were six in the group, and three snowmobiles. The plaintiff rode on a snowmobile driven by Mr. Imus. It was extremely cold at the time, although the plaintiff cannot recall the exact temperature. The roads were icy.
- [11] As the group returned to Fort St. John sometime after midnight in the early morning hours of January 5, 2002, Mr. Imus was proceeding east on 89th Avenue with the plaintiff as a passenger on his snowmobile. The plaintiff says she felt scared at the time because she believed that Mr. Imus was going too fast for the road conditions. A snowmobile operated by Mr. Wilson was stopped and facing west on 89th Avenue. The left side of Mr. Imus' snowmobile collided with the right side of Mr. Wilson's snowmobile as Mr. Imus attempted to turn right to avoid a collision. The plaintiff's left leg was crushed between the two snowmobiles.
- [12] The plaintiff's friends assisted her to a nearby shop. They removed her boot and observed her leg to be very swollen. The plaintiff was in a significant amount of pain. The plaintiff's friends transported her to the emergency ward at the Fort St. John Hospital. X-rays were taken of the plaintiff's left leg on January 5, 2002, which indicated the plaintiff had suffered a tibial fracture. Doctors at the Fort St. John Hospital suggested that the plaintiff ought to see a pediatric orthopedic surgeon. She was transferred via ambulance to a hospital in Grande Prairie, Alberta, the same day.

- [13] On January 7, 2002, the plaintiff underwent a closed reduction surgery on her left distal tibia under general anesthesia at the Grande Prairie hospital. The plaintiff's leg remained in a plaster cast for several weeks following the surgery, and then was replaced by a fibreglass cast.
- [14] The plaintiff was off work for approximately three months after the Accident. She stayed with her grandparents during this period as they were able to take care of her. The plaintiff remained in a significant amount of pain, which she managed by taking Tylenol 3s.
- [15] The plaintiff returned to work at McElhanney in early April 2002, after her cast was removed. The plaintiff was able to manage her job duties with some accommodation. For example, the plaintiff's employer provided her with a chair on which she could rest her leg and also allowed her to take more breaks. The plaintiff did not take Tylenol 3s for much longer after the cast was removed, although she continued to use Tylenol and Advil to manage pain.
- [16] On the recommendation of her doctor, the plaintiff began physiotherapy sessions at Fort St. John Physiotherapy in November 2002. She did not continue these sessions for long as they were expensive and she could not afford them.
- [17] The plaintiff resumed physiotherapy in 2004 when she moved to Edmonton, Alberta. The plaintiff briefly returned to live in Fort St. John before permanently moving to Edmonton in 2006.

The Plaintiff's Current Condition and Prognosis

- [18] The plaintiff currently lives in Spruce Grove, Alberta, with her husband and two children, aged 8 and 9. She is enrolled in a dental administration program and expects to graduate in June.
- [19] The plaintiff says that the injury to her leg as a result of the Accident continues to impact her daily life. She cannot do many of the activities she previously did and she misses out on participating in activities with her children. She cannot ride a bicycle more than a short distance, and cannot skate or ski. The plaintiff feels persistent numbness, swelling, and pain in her left leg. She cannot walk for more than a few hours without experiencing pain that requires her to rest and ice her leg. She has to take Advil or rest her leg following physical activity at least two to three times a month. This is despite the fact that the plaintiff generally tries to avoid physical activity that will cause pain to her leg.
- [20] The plaintiff was assessed by Dr. Regan in March 2010. As noted, his expert report is in evidence. Dr. Regan reviewed the plaintiff's clinical records and examined her. He also ordered and reviewed a CT scan of her left ankle. Dr. Regan diagnosed the plaintiff with an "incomplete union left distal tibial fracture, residual posttraumatic pain distal tibia". I understand Dr. Regan's diagnosis to indicate that the plaintiff's tibial fracture did not heal properly, leaving her with a cavity in the bone.

[21] Dr. Regan's opinion on the plaintiff's prognosis is as follows:

At this point in time, she has a permanent partial disability with respect to pain, a sense of instability, swelling as well as constant awareness of her ankle being an issue such that she will not perform any recreational endeavors or any higher risk endeavors due to fear of repeat injury. I don't believe this will change as it has now been eight years since her accident.

Any change in her symptoms will require operative intervention. This would likely require an opening of the posterior deficiency in the cortex and bone grafting of the tibial metaphysis with either synthetic auto or allograft bone. This would likely require additional mobilization in a cast boot. I do not believe rigid immobilization would be required and early weightbearing would be advocated. It would take her approximately three months to gain complete union of this fracture.

[22] Absent surgical intervention, it is Dr. Regan's view that the plaintiff will continue to experience her current symptoms. The plaintiff says she would be open to further surgery if it would help, but she has not explored that option to date.

ISSUES

[23] As default judgment has already been granted against Mr. Imus and Mr. Wilson, there are no issues relating to liability that require a decision at this trial. All that remains from the plaintiff's perspective is to assess damages.

[24] The plaintiff does not seek damages for loss of future earning capacity or future care costs. Accordingly, I must decide the following issues:

I. What is the nature, extent, and duration of the injuries suffered by the plaintiff as a result of the Accident?

II. What is the appropriate award of non-pecuniary damages?

III. What is the appropriate award for loss of past earning capacity?

IV. What is the appropriate award of special damages?

ANALYSIS

Issue I: The Nature, Extent, and Duration of the Plaintiff's Injuries

[25] The causation analysis is straightforward in this case. The evidence indicates, and I accept, that the plaintiff suffered a tibial fracture in her lower left leg as a result of the Accident. The injury required surgery, and the plaintiff underwent a closed reduction of her left distal tibia on January 7, 2002. I accept Dr. Regan's opinion that the fracture healed incompletely, leaving her with ongoing pain and associated symptoms.

- [26] I accept the plaintiff's evidence as to the impacts that the injury to her leg have had, and continue to have, on her life. The plaintiff was a forthright and credible witness who did not exaggerate or overstate her evidence. If anything, the plaintiff might more accurately be described as stoic in her resolve to carry on with her life as best she can despite the physical limitations resulting from the Accident.
- [27] In the immediate aftermath of the Accident, the plaintiff experienced severe pain and impacts to her life. She was off work for three months. Since the Accident, the plaintiff has been unable to resume her formerly active life. She avoids physical activities, and experiences pain when she does engage in too much activity.
- [28] I accept Dr. Regan's opinion that the plaintiff's ongoing symptoms in her lower left leg are unlikely to resolve absent further surgical intervention.
- [29] I find that the Accident was the direct cause of the plaintiff's tibial fracture, and her ongoing symptoms are a result of its incomplete healing. She is entitled to damages from the defendants to compensate for these injuries.

Issue II: Assessment of Non-Pecuniary Damages

- [30] The purpose of non-pecuniary damages is to compensate the plaintiff for pain, suffering, disability, and loss of enjoyment of life. Non-pecuniary loss must be assessed for both losses suffered by the plaintiff to the date of trial and in the future: *Tisalona v. Easton*, 2017 BCCA 272 at para. 39.
- [31] As set out in *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46, leave to appeal ref'd [2006] S.C.C.A. No. 100, common factors influencing an award of non-pecuniary damages include:
- a) age of the plaintiff;
 - b) nature of the injury;
 - c) severity and duration of pain;
 - d) disability;
 - e) emotional suffering;
 - f) loss or impairment of life;
 - 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).

- [32] An award of non-pecuniary damages must be fair and reasonable to each party. Fairness is measured in part against awards made in comparable cases. However, other cases only serve as a rough guide as each case must be decided on its own facts: *Trites v. Penner*, 2010 BCSC 882 at paras. 188-189.
- [33] The plaintiff seeks an award of non-pecuniary damages in the amount of \$100,000. She relies on the following cases as providing guidance on the appropriate range in cases said to be comparable in terms of the circumstances of the plaintiff or the nature of the injury:
- *Tenhunen v. Tenhunen*, 2015 BCSC 26 (\$80,000);
 - *Isbister v. Delong*, 2014 BCSC 1395, aff'd 2017 BCCA 340 (\$100,000); and
 - *Falati v. Smith*, 2010 BCSC 465, aff'd 2011 BCCA 45 (\$85,000) [*Falati*].
- [34] I find *Falati* to be of greatest assistance by way of comparison. In that case, the 33-year-old plaintiff suffered a crush-type fracture to his tibia and a fracture of the fibula when he was hit by a car while walking down the sidewalk. The plaintiff continued to experience pain in his leg at the time of trial, which was three years after the accident, although the Court was not persuaded that the plaintiff's disability would be permanent. After adjustment for inflation, the present value of the \$85,000 award for non-pecuniary damages in *Falati* is just under \$100,000.
- [35] While the plaintiff's injuries in *Falati* were more extensive, the plaintiff in the present case has suffered more serious complications over time due to the incomplete healing of her fracture. Given her age, the impact that the injury has had on her physical condition and quality of life for the past 18 years, and the likelihood that her symptoms will continue in the future, I conclude that \$100,000 is fair and reasonable compensation for her non-pecuniary damages.

Issue III: Assessment of Loss of Past Earning Capacity

- [36] An award of damages for loss of earning capacity, whether in the past or the future, compensates for a plaintiff's pecuniary loss. Compensation for loss of past earning capacity is based on what a plaintiff would have earned prior to trial but for the accident-related injuries. This requires the court to assess how a plaintiff's life would have unfolded in the pre-trial period absent the injury. Such hypothetical events need not be proven on a balance of probabilities. Instead, they are given weight according to their relative likelihood, and will be taken into consideration as long as the hypothetical event is a real and substantial possibility and not mere speculation: *Grewal v. Naumann*, 2017 BCCA 158 at paras. 44, 48.
- [37] Under this head of damages, the plaintiff seeks compensation for the 61 days she was off work following the Accident from January 5, 2002 until her return on April 2, 2002. The plaintiff has calculated her past earning loss through the following steps:

- i. At an hourly wage of \$13, the plaintiff's gross income loss over 61 working days between January 5 and April 2, 2002 is \$5,947.50;
 - ii. Deducting 16% federal tax and a 7.3% provincial tax, as dictated by the 2001 tax schedules, the plaintiff's past net income loss is \$4,561.73;
 - iii. The plaintiff is entitled to \$1,429.46 in prejudgment interest on the net income loss, for a total past loss of earning capacity claim of \$5,991.19.
- [38] I have already found that the plaintiff suffered an injury in the Accident that led her to be off work for approximately three months. For the purpose of clarity, I conclude that plaintiff's inability to work during that period of time was a direct result of the Accident. She is entitled to compensation for her income loss.
- [39] In my view, the approach proposed by the plaintiff is a fair method of assessing her past wage loss, and it is an approach supported by the evidence before me. I, therefore, assess the plaintiff's damages for loss of past earning capacity, on a net income basis and inclusive of prejudgment interest, at \$5,991.19.

Issue IV: Assessment of Special Damages

- [40] Special damages compensate a plaintiff for pre-trial pecuniary expenditures associated with the Accident. When assessing special damages, the standard is the reasonableness of the expense claimed in the context of the injury suffered. Medical justification, as well as subjective factors, can be considered in determining whether the treatments were reasonably necessary: *MacIntosh v. Davison*, 2013 BCSC 2264 at para. 128.
- [41] The plaintiff seeks a relatively small award for past care costs, or special damages, in the amount of \$629.76, plus prejudgment interest in the amount of \$197.34. This claim relates to the plaintiff's attendance at physiotherapy sessions following the Accident, in both Fort St. John, BC and Edmonton, Alberta. The plaintiff does not have receipts for these visits and therefore does not claim the costs of the sessions themselves. She seeks only to be compensated for mileage associated with her transportation to the sessions.
- [42] It is clear from the evidence that the plaintiff attended physiotherapy sessions, and the evidence also establishes the distance she was required to travel for that purpose. The plaintiff testified, and I accept, that she attended physiotherapy on the recommendation of her doctor and that the sessions were intended to assist her with the injury caused by the Accident.
- [43] I, therefore, conclude that her attendance for physiotherapy was a necessary and reasonable step for her to take in order to seek treatment for Accident related-injuries. She is entitled to compensation to cover her associated costs. I assess the plaintiff's special damages as \$827.10, inclusive of prejudgment interest.

CONCLUSION

[44] In summary, I find the plaintiff is entitled to the following compensation for her Accident-related losses:

Non-pecuniary damages:

\$100,000.00

Past loss of earning capacity:

\$5,991.19

Special damages:

\$827.10

Total:

\$106,818.29

[45] The plaintiff is also entitled to her costs of this action at Scale B, including disbursements.

[46] It is not necessary to apportion fault between the defendants, Brian Imus and Jamie Wilson, for the purpose of determining the extent of their liability to the plaintiff, which is all that is in issue at this trial. Pursuant to s. 4(2) of the Negligence Act, R.S.B.C. 1996, c. 333, each of the defendants, Brian Imus and Jamie Wilson, is jointly and severally liable to the plaintiff for her damages and costs. Only in the event that one defendant seeks contribution from the other in the future will it become necessary to apportion fault between them.

"Horsman J."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/20/04/2020BCSC0456.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/carothers-v-imus-2020>

Prepared on 25 October 2026 · Esheria