

CANADA / JUDGMENT

Cegielka v. Grace

2020 BCSC 115

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Supreme Court of British Columbia

DECIDED

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2020 BCSC 115 Cegielka v. Grace

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Cegielka v. Grace,

2020 BCSC 115

Date: 20200131

Docket: M192911

Registry: New Westminster

Between:

Jakub Cegielka

Plaintiff

And

Aubrey Grace and Reginald Flamant

Defendants

Before: The Honourable Mr. Justice Macintosh

Reasons for Judgment

Counsel for the Plaintiff:

N. Mulholland

Counsel for the Defendants:

S. Grewal

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Place and Dates of Trial:

New Westminster, B.C.

December 16-20, 2019

Place and Date of Judgment:

New Westminster, B.C.

January 31, 2020

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Introduction, the Accident

- [1] From a motor vehicle accident on June 4, 2016, Mr. Cegielka seeks compensation under three headings, non-pecuniary damages, loss of future earning capacity and cost of future care. Liability is not in issue, and the parties have reached agreement for past income loss, at \$18,876.66, and special damages, at \$1,721.24.
- [2] The accident occurred at the intersection of the Lougheed Highway and Allen Way in Pitt Meadows. Mr. Cegielka's vehicle was rear-ended. I accept the accident description, as follows, from paragraphs 3-5 and 13-16 of the Plaintiff's written argument:
3. Mr. Cegielka testified that he was the driver and sole occupant of a 2006 Toyota Matrix, described in the industry as a "crossover-utility vehicle," a mid-sized import hatchback with generous cargo space.
 4. The force of the impact was sufficient to propel the Plaintiff's vehicle forcefully into the vehicle ahead, and it was ultimately declared a total loss.

5. In the course of the collision, the Plaintiff recalls striking his head on the steering wheel and his knee on the underside of the dashboard. He believes he was rendered unconscious for a few seconds as a result, due to his fragmented memory of the initial and secondary collisions.
13. Mr. Cegielka described the Accident as a violent collision of which he had neither a visual nor auditory warning. He recalls being on his way to buy produce in Langley and being stopped at a red light, eastbound on Lougheed Highway at Allen Way in Pitt Meadows, when he was struck from behind by the Defendant's vehicle and recalls broken glass flying by his headrest. His vehicle was then pushed into the vehicle ahead and he struck his forehead on the steering wheel, at which point he believes he lost consciousness briefly.
14. He recalls that his driver's side door was jammed shut against the doorframe and bystanders had to assist in opening it. Once the door was opened, he was able to exit his vehicle without assistance.
15. He recalls the fire department attending the scene first and a firefighter directing him to sit back in his vehicle while the firefighter held his head in place pending the arrival of the ambulance paramedics, due to apparent concern that he may have suffered a serious neck injury. He remembers bleeding from his forehead.
16. When he viewed the damage to his vehicle, he observed that "the back three feet of [his] trunk was gone." He was transported to Ridge Meadows Hospital by ambulance and his vehicle was towed from the scene and later written off by his insurer. He was discharged from the hospital later that day.
- [3] Mr. Cegielka was 32 when the accident happened. Immediately after the accident, he said that he experienced pain in his neck, his back and his left side.

Mr. Cegielka's Worklife

- [4] Mr. Cegielka returned to his work three and a half months after the accident. He was a carpenter in the construction industry. In 2009, he began work with Double V Construction Ltd. His father had worked at Double V, and still does, and the Plaintiff continues to work there. The company treats its employees well, and Mr. Cegielka enjoys working there.
- [5] From the evidence of several witnesses, Double V is an exceptional employer, conscientiously looking after its employees' interests. Double V has been in business for over 50 years. It trains its employees, and generally promotes from within.
- [6] Mr. Cegielka has always performed well at Double V. He continues to do so. He began there as a labourer. His starting wage was \$17 an hour. Within his first two weeks on the job, he negotiated his wage up to \$21 an hour. By 2011 or 2012, he was up to \$24 an hour, and was raised to \$28 an hour in 2013. Before the accident in 2016, Mr. Cegielka was earning \$30 an hour.

- [7] Reflecting Mr. Cegielka's initiative, and Double V's supportive attitude to its employees, in the three and a half months he was off work after the accident, Mr. Cegielka trained in first aid, and was able to return to work, in September 2016, as a safety officer, without any drop in pay. By late in 2016, he was also doing some construction work.
- [8] Mr. Cegielka was promoted to foreman, in March 2018, at a wage of \$32 an hour. He also continued as a safety officer. Today, he works exclusively as a foreman. He is earning \$38 an hour at present. He is the youngest foreman at Double V, and is in charge of a crew of between four and eight labourers. His plan is to rise to being a supervisor, the next level above foreman. At each promotion, from labourer to foreman, and from foreman to supervisor, there is less physical demand, as the work becomes more supervisory and administrative.
- [9] It is apparent from the evidence of how Mr. Cegielka has coped after the accident, and from his reputation as a worker before and after the accident, that he is a natural achiever. He worked his way through any pain that he had from the accident. In the result, he has suffered, to this point, little or no observable diminishment in his earning capacity. There was evidence that after the accident, Mr. Cegielka had to support his tool belt with a harness, somewhat like suspenders, but the evidence showed also that most of the workers on site, from about their mid-30s onward, also use such a device. Since the accident, Mr. Cegielka has frequently worked significant overtime hours.
- [10] The evidence of Mr. Cegielka, and that of his wife, sought to attribute economic, recreational, and psychological setbacks the family has encountered, entirely, or almost entirely, to the accident in 2016 giving rise to this claim.

Home Life

- [11] Mr. Cegielka testified that the accident also changed a seemingly-perfect marriage to a troubled one, and caused him to question, if not abandon, his religious beliefs, which were strongly-held before the accident. Similarly, he said that his life generally, and his capacity as the parent of his new son were markedly impaired by the accident. He testified that the accident greatly diminished his snowboarding, mountain biking, hiking, camping, travelling and social life.
- [12] In my view, Mr. Cegielka, and to a lesser extent his wife, overstated the impact of the accident on the life of the Cegielka family, economically, recreationally and psychologically.
- [13] As noted earlier, the accident was on June 4, 2016. The Cegielkas had married in August 2012. Ms. Cegielka worked outside the home after the marriage, so that the family had two incomes. However, the salon and spa where she was working in 2015 went out of business. At that time, she was in the first trimester of her pregnancy, leading to the birth of the Cegielkas' first child, Adam, who was born in August 2015, about nine months before the accident. Ms. Cegielka had been anxious about the pregnancy because of difficulties in the Cegielkas' earlier efforts to have a child. On her doctor's advice, she stopped work, or

looking for work, in about the spring of 2015.

- [14] When the baby arrived, in August 2015, he suffered constantly, in his first six months, from an intestinal virus, which Mr. and Ms. Cegielka also caught. The baby's sheets had to be changed about seven times a day from the effects of the virus.
- [15] Ms. Cegielka testified that after she was pregnant with Adam, Mr. Cegielka's free time was taken with renovating their house, converting a den to a nursery.
- [16] Mr. Cegielka testified that the accident generally impaired his ability to help around the home, and that he has not been able to resume his pre-accident level of household work. However, that is not what Mr. Cegielka reported to several doctors who examined him in preparation for their testifying at this trial. I adopt here the following summary of the medical evidence on this point, from paragraphs 14-18 of the Defendants' the written argument:
14. However, Dr. Faraday's report says he was "back to his usual activities at home" (Exhibit 1, Tab 16, pg. 6). And, Dr. Ballard's report says that he had "resumed all of the pre-accident housekeeping and home maintenance duties, albeit with some pain" and further that he had "returned to his pre-accident caregiving duties" to his son (Exhibit 1, Tab 11, pg. 6). Similarly, Dr. Richardson's report states that, "he does his own household duties. He is able to cook, carry his groceries, and do his own laundry and personal care." (Exhibit 1, Tab 24, pg. 10). Finally, Dr. Faraday testified that the Mr. Cegielka reported to him that he was back to his pre-Accident level of cooking, cleaning, and childcare.
15. Furthermore, in cross-examination Mr. Cegielka confirmed that in the time that he was off of work, he was able to spend more time with his son than if he had been working. Mrs. Kathy Cegielka similarly confirmed that although Mr. Cegielka's ability to do certain activities was impacted, he could also do more of other activities during that time period. Currently Mr. Cegielka's ability to do things with his son seems to have returned to a more normal state as Mr. Shantz testified that Mr. Cegielka can throw his four year old son into the air and catch him.
16. Regarding energy levels, in direct-examination, Mr. Cegielka testified that since the Accident, he finds it difficult to muster up the energy to do chores after work and also does not have the energy for social activities. However, he reported to Dr. Faraday "there is currently no alteration in his energy or cognitive ability as a result of the accident" (Exhibit 1, Tab 16, pg. 6). He confirmed this in cross-examination when he testified that he doesn't feel like his energy levels have been impacted drastically by the Accident and that he still can perform.
17. Regarding his mood, Mr. Cegielka testified that he was in shock after the Accident and experienced changes in his mood. However, he reported to Dr. Ballard "that he did not experience shock or changes in his mood following the subject accident" (Exhibit 1, Tab 11, pg. 4).

18. Similarly, Dr. Faraday testified that Mr. Cegielka told him that his energy was still good and that he was not feeling tired.
- [17] To repeat somewhat, I find that Mr. Cegielka to some extent overstated in his testimony the adverse impact of the accident on all aspects of his life. He suffered some injuries from the accident, as can be seen from the medical evidence summarized below, but he has also made a substantial recovery. As important, the equally, if not more, significant life-altering event for the Cegielkas was the stressful pregnancy, the birth, and the early illness, of their first child, born in August 2015.
- [18] One example of the Cegielka's change in life, perhaps a small one, is to do with snowboarding. Ms. Cegielka introduced the Plaintiff to that sport. She testified that she wanted to restrict snowboarding substantially, and did so, as soon as she knew she was pregnant. Similarly, she testified that after the pregnancy, all the family's recreational activities lessened, as the couple adjusted themselves to addressing a potentially difficult pregnancy, and the pending birth. By contrast, Mr. Cegielka, in his testimony, led one to believe that the accident, and only the accident, was the reason for the couple's changes in their life. Less snowboarding was one example he spoke of. The evidence as a whole, however, does not support him on that point. By the time of the accident, the Cegielkas had already markedly reduced their travel and recreational activities, and even their social life to some extent.

Medical Evidence

- [19] Doctors Faraday, Ballard, Bourne, and Waseem testified on behalf of the Plaintiff.
- [20] Dr. Faraday in his report noted that the Plaintiff, as a result of the accident, suffered injuries to his neck, upper back, left shoulder and lower back, with the injuries in the latter two areas having substantially resolved. He also noted ongoing depressive and anxiety symptoms, and concussion symptoms, which resolved within a month of the accident. He said that Mr. Cegielka's prognosis for a full recovery was guarded, and that he would expect him to have ongoing neck and upper back pain symptoms in the foreseeable future.
- [21] However, Mr. Cegielka reported to Dr. Faraday that he is back to his usual activities at home, and that he has experienced no diminishment of his energy or cognitive ability as a result of the accident. Dr. Faraday found that Mr. Cegielka's accident-related injuries should not affect his future ability to work as a carpenter foreman, with his ability to assign heavier work to others. Also, although Mr. Cegielka will continue to have pain, his work duties will not cause his injuries to get worse in the future. Dr. Faraday concluded that Mr. Cegielka will probably experience acute exacerbations of his pain symptoms in the future, likely once a year on average. At those times, he will require increased pain medication.
- [22] Dr. Ballard diagnosed cervical spine strain and back strain in Mr. Cegielka. Dr. Ballard noted in her report that Mr. Cegielka, by his report, did not experience shock or changes in mood following the accident. He reported that he experienced persistent neck pain and low back

pain, and reported an improvement of 85% in his accident-related symptoms to date. (The date of the assessment was February 15, 2018.) He reported to Dr. Ballard that he had resumed all of his pre-accident housekeeping and home maintenance duties, and that he had returned to his pre-accident caregiving duties. Dr. Ballard opined that Mr. Cegielka's prognosis is "optimistic". Based on her clinical examination, and review of the documents she was provided, there were no impairments identified. The orthopedic, neurological, and range of motion testing was normal. Dr. Ballard's concluding observations were as follows:

Although there are no restrictions or limitations imposed on Mr. Cegielka, he will likely continue to experience an exacerbation of his symptoms with his engagement in the shoveling tasks at work and with his leisure activities.

- [23] Dr. Bourne performed a functional capacity evaluation of Mr. Cegielka on September 18, 2018. He said in his report that Mr. Cegielka is well-suited to full-time work. He demonstrates full medium strength and most aspects of heavy strength.
- [24] Dr. Waseem opined that the soft-tissue injuries to Mr. Cegielka's neck and lower back had become chronic.
- [25] For the defence, Drs. Richardson and Bentley testified. Defendants' counsel summarized their evidence as follows, at paragraphs 38 and 40 of their written argument. I accept that summary as being accurate, and accept the Doctors' evidence:

Dr. Richardson

- 38. Dr. Richardson explained that Mr. Cegielka has 1% clinical impairment of the cervical, thoracic and lumbar spine. He explained that this represents a mild impairment and that a person can function in day to day life. He testified that any limitations would be based on symptoms and not for medical reasons. Dr. Richardson testified that he believes Mr. Cegielka has high pain self-efficacy. He further testified that he does not have true functional restrictions and any restrictions will be based on pain symptoms and subjective tolerance for pain.

Dr. Bentley

- 40. Dr. Bentley opined " the prognosis is considered favourable given that Mr. Cegielka has returned to a heavier position at work, has resumed an independent gym and pool program, and has no present reported disability apart from participation in more vigorous physical activity pursuits" (Exhibit 1, Tab 24, pg. 13). He further opined that "from a Physical Medicine perspective, there is not anticipated permanent disability in any domain" (Exhibit 1, Tab 24, pg. 14)

- [26] The Defendants, in summary, submit that Mr. Cegielka sustained from the accident soft tissue injuries to his neck, thoracic spine and lumbar spine. Further, they submit that although Mr. Cegielka may experience intermittent pain in the future if he engages in specific activities to a specific level, he will not experience an impairment or disability.
- [27] The medical evidence taken as a whole leads to the conclusion that Mr. Cegielka, although not impaired or disabled, will have ongoing, periodic neck and back pain.

Non-Pecuniary Damages

- [28] Mr. Cegielka seeks between \$85,000 and \$100,000 under this head of damages. The Defendants submit that an award of between \$25,000 and \$35,000 is called for.
- [29] Plaintiff's counsel stresses in his argument the toll the accident has taken on Mr. Cegielka's work, his relationships at home, and his recreational activities. However, I have addressed earlier in these reasons my findings that the Plaintiff has overstated to some extent the impact of the accident on his life, while downplaying, somewhat unfairly, other events, notably his wife's difficult pregnancy before the birth of the Cegielkas' child, and the child's illness in his first six months. In addition, of course, the presence of the first newborn itself served to curtail a good part of Mr. Cegielka's recreational life before the date of the accident.
- [30] In his work, Mr. Cegielka has to a significant extent overcome any difficulties arising from the accident, evidenced in part by his extensive overtime work for two or three months on a school project Double V was building last summer.
- [31] Nonetheless, Mr. Cegielka today does have mild ongoing neck and back pain from time to time as a result of the accident.
- [32] Our Court of Appeal, in *Stapley v. Hejslet*, 2006 BCCA 34, at para. 46, set out a non-exhaustive list of factors to consider in assessing non-pecuniary damages, including the age of the plaintiff, the nature of the injury, the severity and duration of pain, disability, emotional suffering, impairment of life, impairment of family, marital and social relationships, impairment of physical and mental abilities, and loss of lifestyle. A plaintiff's stoicism should not, generally speaking, penalize the plaintiff in the assessment. While applying the relevant factors from *Stapley*, I must also remember that it is only damages caused by the accident which are to be taken into account. The other factors in Mr. Cegielka's life, discussed earlier, mean that proof of causation in this case is not straightforward.
- [33] Mr. Cegielka's counsel relies particularly on the following four decisions of this Court addressing non-pecuniary damages. (After citing here each of the decisions, the pecuniary damages awards from each decision are set out: *Lafond v. Mandair*, 2017 BCSC 523, \$100,000; *Lewis v. Rubboli*, 2018 BCSC 17, \$85,000; *Thompson v. Choi*, 2015 BCSC 1283, \$90,000; and *Tzotzolis v. Wyman*, 2019 BCSC 2026, \$95,000.

- [34] The Defendants rely on the following authorities, *Hill v. Swayne*, 2012 BCSC 1126, \$22,400; *Hussainyar v. Miller*, 2012 BCSC 405, \$30,200; and *Berry v. LaBelle*, 2010 BCSC 239, \$35,800. (The non-pecuniary damages awards in the Defendants' authorities have been stated by the Defendants in 2019 dollars.)
- [35] In my view, the facts found in the authorities cited by the defence are, generally speaking, closer to the facts before me than are the facts found in the authorities Mr. Cegielka has cited.
- [36] I award Mr. Cegielka \$40,000 in non-pecuniary damages.

Loss of Future Earning Capacity

- [37] Mr. Cegielka submits he has demonstrated a real and substantial possibility (see, *Perren v. Lalari*, 2010 BCCA 140, at para. 32), resulting from the accident, that he will suffer a loss of income earning capacity, and that his loss should be assessed at \$228,000.
- [38] Both sides have, correctly in my view, employed the so-called capital asset approach to determine lost future earning capacity, reflecting the relative difficulty of measuring the loss from the facts of this case. \$228,000 is derived from three years of Mr. Cegielka's current annual income of \$76,000.
- [39] The Defendants submit that if there is to be any award under this head, an appropriate award is \$38,000, or six months of Mr. Cegielka's current annual income.
- [40] There are, on the facts of this case, clear indicators on both sides of the analysis for this Court to consider in this most uncertain task of seeking to predict what the future will hold for Mr. Cegielka's income prospects.
- [41] On one hand, Mr. Cegielka has proven himself to be a resolute and ambitious employee at Double V in his 10 years of working at that long-established and successful company, known for looking after its employees' interests. Mr. Cegielka is now the youngest foreman at the company. He plans to eventually become a supervisor. From his work history to date, and the testimonials he received at trial from two witnesses who have worked with him, it is reasonable to conclude that he will succeed in his ambition. Today, he is earning more at Double V than at any other time in the past.
- [42] On the other hand, Mr. Cegielka, who is only in his mid-30s, is working in the construction industry, not at an office desk. Double V is both successful and supportive, but no employment is guaranteed in the three decades to come when Mr. Cegielka will probably still hope to be employed. He has some residual, periodic pain he would not have without the accident, and, in my view, there is a real and substantial possibility that the chronic pain will in the long run prejudice his employment prospects.

- [43] This Court has found plaintiffs entitled to damages for lost earning capacity even though, after the accident, they were capable of carrying on with their prior work without having lost income. See, *De Groot v. Heller*, 2018 BCSC 14; *VanderVeen v. Amante*, 2019 BCSC 2079; *Clark v. Kouba*, 2012 BCSC 1607; *Munoz v. Singh*, 2014 BCSC 567; *Rahimi v. Ma*, 2014 BCSC 710; and *Preece v. Leonard*, 2014 BCSC 173. Each of those decisions of course turned on its own facts, from which the Court was able to find a real and substantial possibility of future lost earning capacity due to pain or other difficulties, notwithstanding that the plaintiffs were able to carry on with their prior work at the same incomes.
- [44] I conclude that Mr. Cegielka should receive slightly less than one year of his present annual income, or \$65,000, under this head.

Cost of Future Care

- [45] Mr. Cegielka presented no expert evidence of estimated costs for his future medical and related needs stemming from the accident.
- [46] He claims \$20,000 under this head. The Defendants submitted he has no reasonable claim, citing *Milina v. Bartsch*, (1985), 49 B.C.L.R. (2d) 33, which calls for a plaintiff to show medical justification and reasonableness in a claim for future care costs.
- [47] The Plaintiff asks me to note that the Defendants have agreed to special damages of \$1,721.24 for medications and treatment since the accident, and that experts who testified support Mr. Cegielka receiving analgesic medications as needed, and trigger point injections. The Defendants reply that Mr. Cegielka has rejected medications recommended to him, preferring his own herbal cures, and has expressed in his testimony no wish to pursue further recommended treatments.
- [48] The most I can award Mr. Cegielka under this head is \$2,500, on the assumption that he will eventually require the analgesic medications, and I make that award.

Summary

- [49] Mr. Cegielka is entitled to the following:

Non-Pecuniary Damages \$40,000

Loss of Future Earning Capacity \$65,000

Cost of Future Care \$2,500

- [50] Costs were not spoken to and I will hear from the parties if costs are in issue.

"Macintosh J."

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