

CANADA / JUDGMENT

Chapman v. Zilm

2020 BCSC 695

COURT

Supreme Court of British Columbia

DECIDED

5 May 2020

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

2020 BCSC 695 Chapman v. Zilm

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Chapman v. Zilm,

2020 BCSC 695

Date: 20200505

Docket: 84069

Registry: Nanaimo

Between:

Victor Randall Punshon Chapman

Plaintiff

And

Carol-Ann Zilm and Kayla Zilm

Defendants

Corrected Judgment: The text of the judgment was corrected at paragraph [41] on May 8, 2020.

Before: The Honourable Mr. Justice Baird

Reasons for Judgment

Counsel for the Plaintiff:

T. Huntsman

Counsel for the Defendants:

J. Bradbury

Place and Dates of Trial:

Nanaimo, B.C.

December 10-12, 2019

Written Submissions of the Plaintiff Received:

January 6, 2020

Written Submissions of the Defendants Received:

January 21, 2020

Reply of the Plaintiff Received:

January 23, 2020

Place and Date of Judgment:

Nanaimo, B.C.

May 5, 2020

INTRODUCTION

- [1] This is a motor vehicle negligence action. On November 30, 2016, at around lunchtime, the plaintiff Victor Chapman was proceeding southbound through the intersection of Sandwick and Ryan Roads in Courtenay, B.C. The defendant Kayla Zilm was travelling northbound through the same intersection intending to turn left. The parties' vehicles reached the middle of the intersection more or less simultaneously. Ms. Zilm turned left into Mr. Chapman's path of travel causing a low-impact collision.
- [2] The defendant Carol-Ann Zilm is Kayla Zilm's mother and the registered owner of the vehicle that her daughter was driving. She was named in the lawsuit for no other reason. She was not a witness and took no part in the trial. Hereafter when I refer to the "defendant" I mean Kayla Zilm.

LIABILITY

- [3] November 30, 2016 was a clear day. The weather was fine. The intersection in question is flat. There are no obstructions to sight-lines. Neither driver was travelling too fast. The plaintiff was a through-vehicle on a green light. He was fully committed to the intersection and was approaching its mid-point. I conclude in the circumstances that he was the dominant driver. I am not persuaded that he was distracted or engaged in other activity that rendered him the servient driver. The plaintiff had the right of way over the left-turning defendant, who should have seen him and yielded. Instead, she executed her left turn when the plaintiff was an immediate hazard and it was unsafe to do so. I find her to be entirely at

fault for the resulting collision: *Nerval v. Khehra*, 2012 BCCA 436 at para. 33.

BACKGROUND

- [4] The parties agree that the force of the collision was very minor. The plaintiff gave no evidence of a whiplash mechanism or any physical blow resulting from it. His vehicle was not rotated by the impact. None of the vehicle's contents were disturbed or shifted. The airbags did not deploy. Only minor damage was caused to the plaintiff's vehicle and almost none to the defendant's. Both vehicles could be driven away. No police or ambulance attended. The defendant and her passenger, Ms. Herd, were completely uninjured. Each testified that contact between the vehicles was so slight as to be almost imperceptible. The parties exchanged information and left the scene.
- [5] The plaintiff telephoned his insurance providers and reported that he was uninjured. As he drove away from the scene, however, he experienced some pain in his neck after performing a shoulder-check and phoned ICBC to report this. He then drove down to Nanaimo, just over an hour to the south, and visited a walk-in clinic. The next day he flew to Florida on a family holiday. Thereafter he returned to full-time employment as a constable with the RCMP. He never missed work because of the accident.
- [6] The plaintiff had pre-existing back, shoulder, arm, and elbow injuries for which he was already being accommodated by his employer. He was issued a special light-weight utility belt, for example, and it was agreed that he should conduct his patrols in a large SUV or pickup truck rather than a more cramped squad car. No additional occupational accommodations were required after the accident.
- [7] The plaintiff testified to a post-accident/pretrial history of headaches, left knee and hip problems, and left shoulder soreness, but these arose only months after the collision and the whole of the evidence makes it clear that they cannot be causally related to it. I find as a fact that the plaintiff's only residual accident-related deficit is localised mild to moderate pain in the left posterior neck area aggravated by head and neck rotation.
- [8] The plaintiff was 33 years old at the time of the collision. He is now 36. He has been with the RCMP for just over a decade. He is married with two young children. In recent years he has been stationed in rural postings where call-out volumes are low. He is 6'2" and weighs 240 lbs. He is physically fit. His recreational activities include power lifting, kayaking, fishing and camping. He claims that his neck pain is constant but varies somewhat in severity. He notices it particularly when doing "shoulder-checks" while driving. It has also made him reticent about physical play with his children. He exercises less and does not lift as much weight during workouts as before. He continues to engage in all of his pre-accident activities but with decreased intensity. He said that his neck bothers him constantly and his enjoyment of life is diminished by it. He testified that his symptoms became more acute in the months after the accident reaching their worst in June or July 2017.

EXPERT EVIDENCE

- [9] None of the plaintiff's treating clinicians testified. Instead I received opinion evidence from two examining physicians, one retained by the plaintiff and the other by the defendant, who met the plaintiff only once and formed their views of his condition and fitness based largely on what he told them. The plaintiff also commissioned a functional capacity report that was submitted in evidence without cross-examination.

Dr. Timothy Deutscher

- [10] Dr. Deutscher is a physiatrist engaged by the plaintiff to perform an independent medical examination on May 6, 2019. He determined that the plaintiff had full cervical range of motion for forward flexion, extension, side flexion and right rotation. Left rotation was limited to approximately 70% of normal. He noted that the plaintiff had end range discomfort with left cervical rotation localized to the left lower cervical paraspinal muscles and medial trapezius region.
- [11] Dr. Deutscher formed the opinion that the plaintiff sustained cervical soft tissue injury in the subject collision and that his pain was consistent with whiplash associated disorder. He concluded that other reported problems such as hip and knee pain were not related to the accident. He recommended kinesiology and a renewed exercise regime to restore the plaintiff to maximum functionality. However, he suggested that the plaintiff's prognosis for total resolution of the neck symptoms was poor given the amount of time that has passed since the accident.
- [12] Dr. Deutscher reported that the plaintiff is capable of continuing with all of his described police duties and maintaining his recreational and other activities. He suggested that the plaintiff should be restricted to work duties that allow light to moderate physical demands and which allow for frequent changes of position, and to avoid frequent cervical rotation. He also said that the plaintiff is "likely at some degree of increased risk of injury or increased risk of aggravation of his symptoms" if he gets into a violent confrontation at work.

Dr. Robin Rickards

- [13] Dr. Rickards is an orthopaedic surgeon engaged by the defendant to perform an independent medical examination of the plaintiff on September 6, 2019. Dr. Rickards noted a full range of motion in all planes of the plaintiff's cervical spine with pain at the extreme of lateral flexion and rotation to the left. He noted pain on palpation to the left of midline at C3-C4 level with no associated muscle spasm or soft tissue defect. Passive motion of the neck into lateral flexion and rotation to the left with extension caused discomfort.
- [14] All other physical tests performed on the plaintiff were unremarkable. Dr. Rickards suggested that the plaintiff's neck symptoms were consistent with irritation of the facet joints likely caused by the force, such as it was, of the accident. On the history taken from

the plaintiff he concluded that his reported difficulties, such as the left sternoclavicular joint irritation and left lateral hip and knee symptoms, were unrelated. He reported that the prognosis for cervical facet joint syndrome is usually good with most cases clearing up in 6-12 weeks.

- [15] Dr. Rickards expressed the opinion that even now, almost three years after the accident, the plaintiff's participation in a structured and disciplined exercise regime could yield improvement in his neck condition over 6-18 months. He also said that the plaintiff might benefit from taking anti-inflammatories. He concluded that the plaintiff's facet joint irritation is not serious enough to require intrusive measures such as medial branch blocks or radiofrequency ablation.

Mr. Timothy Winter

- [16] Mr. Winter is an occupational therapist with expertise in functional capacity evaluation. He assessed the plaintiff over approximately 7 hours of testing on June 12, 2019. He reported that the plaintiff is capable of performing all tasks expected of a front line RCMP officer. He is not functionally limited and will be able to continue tolerating full-time police work, just as he has without any interruption since the accident save for unrelated issues and problems.
- [17] Mr. Winter reported that the plaintiff's left neck rotation was somewhat limited. He noted that the plaintiff often compensated for this with upper body rotation, in other words turning from the waist. The plaintiff could perform tasks requiring repetitious or sustained neck extension but experienced some degree of pain while doing so. Mr. Winter suggested that the plaintiff could manage his problems by taking intermittent postural breaks. Otherwise he concluded that the plaintiff was capable of performing work tasks in the "Heavy Strength Capacity" category listed in the Dictionary of Occupational Titles.
- [18] Overall, the plaintiff's functional capacity testing showed that he was physically strong, agile and had good cardiovascular fitness. He successfully completed all tasks intended to simulate foot pursuit, physical control and carrying an individual to safety. His performance did not suggest that he would be at a competitive disadvantage in the event of a physical confrontation at work. Mr. Winter concluded that the plaintiff is well-suited to the physical demands of policing or any other occupation requiring heavy strength capacities.

DISCUSSION

- [19] Defence counsel argues that the plaintiff has failed to establish that his ongoing neck pain was caused by the defendant's negligence. He stresses, in particular, that there was no evidence of physical forces produced by the collision that could conceivably account for a whiplash injury. While I accept that a minor collision can cause physical injury (*Greenway-Brown v. MacKenzie*, 2019 BCCA 137 at para. 27), this is not to be presumed. In every case the plaintiff bears the burden of establishing the cause, nature, and extent of the injuries

claimed. In this connection, I agree that the plaintiff gave no evidence to support the theory of an acceleration/deceleration mechanism of injury.

- [20] On the other hand, while I acknowledge Dr. Rickards' reference to a possible degenerative disc condition, I accept the plaintiff's undisputed evidence that he experienced previously unknown neck pain almost immediately after the accident, and I decline to draw the inference that he is attributing a pre-existing injury to it. Both Drs. Deutscher and Rickards posited that the plaintiff's mild to moderate neck pain is consistent with the effects of a whiplash or flexion mechanism, and each came to the straightforward conclusion that given the temporal proximity of its onset the accident was the probable cause. Dr. Rickards' theory about facet joint syndrome strikes me as plausible enough, even though plaintiff's counsel went to significant lengths, both in cross-examination and in submissions, to discredit it. This syndrome, Dr. Rickards said, can be produced by a minor event such as a sudden twist or flexion. I find that such an event might very well have been produced in the subject accident, minor though it was, and it accounts for the plaintiff's symptoms soon afterwards.
- [21] While I am by no means overwhelmed by the strength of the plaintiff's case, the causation of injury does not have to be proved to the level of scientific certainty. The "but for" test on the balance of probabilities establishing a substantial connection with the defendant's negligent conduct is all that is required: *Resurface Corp. v. Hanke*, 2007 SCC 7 at paras. 22-24. In the present case, given the close temporal connection between the collision in question and the onset of the plaintiff's neck symptoms, I am prepared to accept, or at least I have no compelling reason to reject, the medical opinion evidence presented by both sides that there is a probable causal nexus between the two.
- [22] Moreover, given the length of time that has elapsed between the collision and now, while I will certainly entertain the contingency that improvement is possible with kinesiology and exercise, in my view it is now more likely than not that the plaintiff's left-sided neck flexion pain will persist indefinitely. I agree with Dr. Rickards, however, that this condition is nowhere near so serious as to require invasive treatments such as medial branch blocks or radiofrequency ablation. In my opinion the plaintiff's lengthy cross-examination and extensive submissions on this subject did nothing to advance his case.
- [23] I reject the plaintiff's testimony that there was an accident-related worsening of his overall physical health declining to a nadir of functionality in July 2017. He conceded in cross-examination that he never complained of such a deterioration to his treating physicians or therapists during this interval, and the medical opinion evidence adduced at trial does not support such a claim. I am satisfied that the majority of the plaintiff's reported physical deficits such as headaches, emotional stress, and pain in the back, knee, hip, elbow and clavicle, are wholly unrelated to the collision. As for his neck pain, the evidence is clear that neither whiplash associated disorder nor facet joint syndrome is a "progressive" condition. Neither gets worse as months pass. In fact, most people experience improvement and full recovery within weeks or months.

- [24] For the sake of completeness, I decline defence counsel's invitation to draw an adverse inference from the plaintiff's failure to call his treating physicians and therapists as witnesses. The plaintiff's cross-examination included a reasonably comprehensive survey of consultations with anterior clinicians in the months after the collision, and there is no material controversy about what he reported to whom. In my view additional testimony in this connection, if admissible at all, would have been superfluous. I note, as well, that the individuals in question were well-known and available to be called by the defendant if there had been any serious question that they had material evidence to relate: see *Singh v. Reddy*, 2019 BCCA 79 at para. 8.
- [25] Finally, I reject the defendant's argument that the plaintiff attempted to mislead Drs. Deutscher and Rickards into believing that all of his various physical deficits were caused by the accident. The fact that, three or so years after the collision, the plaintiff gave these examining physicians a current account of his overall physical health is only to be expected. He was simply answering questions put to him. He reported accurately that most of his problems arose only after the accident. Neither Dr. Deutscher nor Dr. Rickards had any difficulty excluding the accident as their cause. The plaintiff made no material claim to the contrary during his testimony and said explicitly in submissions that the case was about neck pain and nothing else.
- [26] In summary, I have concluded that the defendant's negligence has caused the plaintiff persistent, enduring, but thankfully quite minor left posterior neck pain which manifests itself only in the final extremities of lateral flexion. I would characterise this injury as only marginally incapacitating. On all of the evidence, I find that the extent to which it has interfered with the plaintiff's personal and working life is not terribly significant, especially when considered alongside his various other physical deficits and limitations unrelated to the accident, which viewed cumulatively are far more debilitating than his neck pain.
- [27] Before turning to the individual heads of damage, reference was made in the plaintiff's written submissions to "subrogated claims" that the RCMP may pursue against him for reimbursement of wages and expenses paid since the collision. On this account certain sums were simply added - without documentation, explanation or evidentiary foundation - to the compensation demanded for loss of past income earning capacity and special damages.
- [28] For reasons that I will presently explain, the defendant did not cause any compensable loss of pretrial earning capacity and is responsible for no expenses other than those specifically allowed below. The "subrogated claims", whatever they might be, are strictly a matter between the plaintiff and his employer and have nothing to do with the defendant.

NON-PECUNIARY DAMAGES

- [29] A non-pecuniary damages award is intended to compensate a plaintiff for pain, suffering, and loss of enjoyment of life and amenities: *Pololos v. Cinnamon-Lopez*, 2016 BCSC 81 at para. 105. The award must be fair to both parties. Fairness may be measured against awards in comparable cases bearing in mind that each case turns on its own facts: *Olson v. Farran*, 2016 BCSC 1255 at para. 156.
- [30] In *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46, the Court set out a non-exhaustive list of factors to be considered in assessing non-pecuniary damages. These include the plaintiff's age; nature of the injury; severity and duration of pain; disability; emotional suffering; loss or impairment of life; impairment of family, marital and social relationships; impairment of physical and mental abilities; and loss of lifestyle. The plaintiff's stoicism should not, generally speaking, penalise the plaintiff: *Giang v. Clayton, Liang, and Zheng*, 2005 BCCA 54 at paras. 54-55.
- [31] In seeking an award of \$80,000 to \$95,000 under this heading, the plaintiff relies on the following cases:
- *Austin v. Reardon*, 2014 BCSC 37: The plaintiff was a 17-year-old male in a reasonably significant rear-end collision on a highway. He suffered chronic pain in his mid-back. His prognosis for recovery was poor and he was forced to take time off work. By the time of trial, he had returned to working a physically demanding job and was still able to participate in some of his recreational activities. He was awarded \$65,000 for non-pecuniary damages.
 - *Blackman v. Dha*, 2015 BCSC 698: The plaintiff was a 37-year-old active and healthy married female with 3 children and a career as an elementary school music teacher. She was involved in a low velocity rear-end collision. At trial she continued to suffer from headaches and pain on the left side of her neck, shoulder and upper back. Right wrist and forearm pain had resolved. Her doctors agreed that she suffered from chronic pain and had a poor prognosis for full recovery. Her pain restricted her ability to play instruments and participate in some community activities she once enjoyed. She was awarded \$80,000 in non-pecuniary damages.
 - *Severud v. Smit*, 2016 BCSC 1021. The plaintiff was a 38-year-old (at the time of trial) healthy and physically active care aide worker involved in an accident while turning left in an intersection. As a result she suffered from headaches, neck pain, left hip pain, lower back pain, and most significantly, shooting pains through her left shoulder and down her left arm. She was unable to return to work for over two years after the accident. She had reached maximum medical improvement and her residual pain was likely to be permanent. She was significantly impacted in her ability to perform household chores, play with her children and to work with pre-accident intensity at her job. She was awarded \$130,000 in non-pecuniary damages before deductions for contributory negligence.

· Wahid v. Caporusso, 2016 BCSC 1743: The plaintiff was an athletic and physically active RCMP officer. She was involved in two rear-end motor vehicle accidents, one at the age of 26 and the other at 27. She suffered from chronic pain syndrome in her neck, upper back, left shoulder and headaches. Doctors agreed she would likely continue to experience pain for the foreseeable future. She missed work and took periods of medical leave after both accidents, and it took her almost three years to return to work full-time on a fully operational basis. She was unable to be as active or social as she had been before the accident. She was awarded \$100,000 for non-pecuniary damages.

· Walks v. Cody, 2019 BCSC 1371: The 26-year-old plaintiff was a passenger in a truck that was struck from behind by a semi tractor trailer. She suffered back, shoulder and neck injuries, anxiety and depression. It was found that she would not fully recover from the back, shoulder and neck injuries but that her condition might improve with strength training. She was on course for a full recovery from the depression. She had some driving anxiety. She was unable to perform any household chores for the first six months after the accident. She was awarded \$90,000 in non-pecuniary damages.

[32] In support of an award in the range of \$5,000 to \$30,000, the defendant relies on the following cases:

· Bagasbas v. Atwal, 2009 BCSC 512: The plaintiff was stopped at an intersection when rear-ended by the defendant who was travelling between 10 and 20 km/hr. The impact was minor without significant damage to either car. The plaintiff suffered pain and stiffness to the right side of her neck which resolved. She had continued to work without accommodations and she continued with her pre-accident recreational activities. The trial judge found that the plaintiff suffered mild whiplash which substantially resolved itself within three months. She was awarded \$3,500 in non-pecuniary damages.

· Mohammed v. Rai, 2005 BCSC 1918: The plaintiff spouses both received soft tissue injuries in the same rear-end collision. The husband suffered injuries to his neck and back. He had to avoid doing some household chores and had difficulty sleeping for the first four months after the collision. He took 10 days off work on his doctor's recommendation but returned to work thereafter. The wife suffered from neck pain and headaches. She missed school activities with her children and cooked less at home. Their injuries were reported to have lasted beyond the normal recovery period and there was no objective evidence to support the complaints. The husband was awarded \$3,000 and the wife \$5,000 in non-pecuniary damages.

· Pond v. Bucsis, 2013 BCSC 2001: The plaintiff was a 45-year-old single mother and care aid worker at a home for adults with disabilities. The defendant backed into her vehicle in a parking lot. The collision was minor. The plaintiff sustained mild soft tissue injuries to her neck and shoulders. She did not miss any work after the accident despite its physically demanding nature. The court found that the plaintiff's pain was not constant or severe but was likely to be chronic and permanent and did cause loss of enjoyment of life. The plaintiff's life had not changed in any significant way. She was awarded \$30,000 in non-pecuniary damages before a deduction for

failing to mitigate.

· *Montes v. Lee*, 2007 BCSC 1238: The plaintiff was 34 years old and working for a courier company as an independent contractor when involved in a liability-admitted rear-end collision. The plaintiff took two weeks off work before returning to light duties. His doctor diagnosed him with moderate myofascial pain or moderate whiplash type injury in his neck, extending to his right shoulder, his low back and headaches. Most of his problems had resolved within 18 months of the accident but he continued to suffer from back pain at the time of trial. He was unable to perform household chores for a year after the accident and his recreational activities were restricted such that he gained 23 pounds. He was unable to play competitive basketball at the same level he had before the accident which made him feel depressed. He was awarded \$30,000 in non-pecuniary damages.

· *Rosso v. Balubal*, 2014 BCSC 1786: The plaintiff was 31 years old and driving his small delivery car when the defendant swerved into him travelling in the same direction. The plaintiff suffered headaches and anxiety with mild neck and back pain. He alleged various other disabilities not established in evidence. The court accepted that his accident-related pain would persist but could be managed with exercise. He was awarded \$20,000 for non-pecuniary damages.

· *Erwin v. Buhler*, 2017 BCSC 362: The plaintiff was a 53-year-old working in a physically demanding job who also enjoyed hiking, biking, kayaking and other activities. He suffered neck, shoulder and low-back injuries in a rear-end accident. These were mostly resolved within one year. However, the court determined that he continued to suffer from intermittent headaches and neck and back pain. He was awarded \$40,000 in non-pecuniary damages.

· *Hunter v. Yuan*, 2010 BCSC 1526: The plaintiff was a healthy and active 28-year-old full time secretary involved in a minor rear-end collision. She suffered soft tissue injuries to her shoulders, upper right back and neck with accompanying headaches and sleep disruption. She missed approximately three weeks of work after the accident. By 2008 she was 85% recovered but continued to suffer intermittent headaches and shoulder, upper back and neck pain. Her recovery had plateaued. She continued to avoid some of her pre-accident activities and her symptoms continued to affect her mood. She was awarded \$35,000 in non-pecuniary damages.

· *Mak v. Eichel*, 2008 BCSC 1102: The female plaintiff was 27 years old at the time of a rear-end collision. She sustained injuries to her neck, back and shoulders and had trouble sleeping. She was not able to work for two weeks after the accident. Several months after the accident her symptoms had mostly resolved but she continued to suffer from stiffness in her neck and soreness in her shoulder. She was less able to manage physical labour at work, though her condition would likely improve and she would likely not suffer any permanent disability. There was not much impact on her lifestyle beyond the first two weeks. She was awarded \$20,000 in non-pecuniary damages.

· *Robinson v. Anderson*, 2009 BCSC 1450: The plaintiff was a 47-year-old single mother of two children on the autism spectrum. She suffered soft tissue injuries to her neck, back, left shoulder and right knee in a rear-end collision. She had no history of physical limitation before the

collision. She took a total of 12 days off work but was otherwise able to continue working after the accident with some accommodations. She continued to suffer pain at the time of trial. However, the Court noted some post-morbid improvement in her condition and the absence of proof of permanent or long-term injury. Her medical advisers agreed that a significant, if not full, recovery was very likely if the plaintiff worked on her fitness. She was awarded \$25,000 for non-pecuniary damages.

[33] In the present case, the plaintiff has not fully recovered in the three years since the accident. While there is some possibility for improvement through directed exercise and kinesiology, it is likelier than not that his present symptoms will persist indefinitely. He has been able to continue with his pre-accident recreational activities, though with some decrease in intensity. I am satisfied that the pain he suffers from his injury will continue to cause him some loss of enjoyment of life.

[34] In my assessment, the case authorities relied on by the plaintiff refer to more seriously debilitating injuries than he has suffered, but the awards at the lower end of the defendant's suggested range are inadequate. I have concluded that the authorities in roughly the \$25,000 to \$30,000 range are more consistent with the facts at bar, with the Pond decision being a plausible comparator. I hereby award the plaintiff \$30,000 under this heading.

PAST LOSS OF INCOME EARNING CAPACITY

[35] In *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at paras. 30-31, the Court of Appeal explained that a claim for what is often described as "past loss of income" is actually a claim for past loss of earning capacity -- that is, for the loss of the value of work that the injured plaintiff would have performed but was unable to because of the injury.

[36] The value of any such loss may be measured in different ways: for example, by actual earnings the plaintiff would have received, by a replacement-cost evaluation of tasks that the plaintiff was unable to do, or by an assessment of reduced business profits. The test to be applied to hypothetical events, whether past or future, is whether there is a real and substantial possibility of their occurrence: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 27; *Smith v. Knudsen*, 2004 BCCA 613 at para. 29; *Grewal v. Naumann*, 2017 BCCA 158 at paras. 43-46; *Rousta v. MacKay*, 2018 BCCA 29 at para. 14.

[37] As I mentioned earlier, the plaintiff returned to full time work in his usual occupation as a police officer immediately after the collision. He has never taken any time off for reasons related to the accident. While he was on disability leave for a month in 2018 he was quite clear that this was because of a recent and wholly unrelated clavicle injury and stress in his personal life. In recent years, in fact, with over-time and isolation pay, he has earned significantly more than a regular RCMP constable's basic pay of \$86,000. He gave no evidence concerning the possibility during the pretrial period of lost income or remunerative opportunities from the RCMP or any other source. It follows that there is no basis for an award under this heading.

FUTURE LOSS OF EARNING CAPACITY

[38] In *Pololos v. Cinnamon-Lopez*, 2016 BCSC 81 at para. 133, the Court summarized the following principles for determining loss of future earning capacity:

- a) To the extent possible, a plaintiff should be put in the position he/she would have been in, but for the injuries caused by the defendant's negligence; *Lines v. W & D Logging Co. Ltd.*, 2009 BCCA 106 at para. 185, leave to appeal ref'd [2009] S.C.C.A. No. 197;
- b) The central task of the Court is to compare the likely future of the plaintiff's working life if the Accident had not occurred with the plaintiff's likely future working life after the Accident; *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 32;
- c) The assessment of loss must be based on the evidence, but requires an exercise of judgment and is not a mathematical calculation; *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 18;
- d) The two possible approaches to assessment of loss of future earning capacity are the "earnings approach" and the "capital asset approach"; *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 at para. 7 (S.C.); and *Perren v. Lalari*, 2010 BCCA 140 at paras. 11-12;
- e) Under either approach, the plaintiff must prove that there is a "real and substantial possibility" of various future events leading to an income loss; *Perren* at para. 33;
- f) The earnings approach will be more appropriate when the loss is more easily measurable; *Westbroek v. Brizuela*, 2014 BCCA 48 at para. 64. Furthermore, while assessing an award for future loss of income is not a purely mathematical exercise, the Court should endeavour to use factual mathematical anchors as a starting foundation to quantify such loss; *Jurczak v. Mauro*, 2013 BCCA 507 at paras. 36-37.
- g) When relying on an "earnings approach", the Court must nevertheless always consider the overall fairness and reasonableness of the award, taking into account all of the evidence; *Rosvold* at para. 11.

[39] For emphasis, the plaintiff must always prove a real and substantial possibility of a future event resulting in an income loss. In the absence of such proof the claim must be dismissed. Mere speculation is not enough. I recognise that the possibility of a future loss may be established even where the plaintiff has returned to his regular employment and salary: *Perren v. Lalari*, 2010 BCCA 140 at para. 32.

[40] I should stress, perhaps, that the present defendant's compensatory responsibility to the plaintiff is limited to the infliction of a minor, non-degenerative neck injury. She is not to be held contingently responsible for future additional harm done to the plaintiff by other people. However, the plaintiff argues that the defendant must pay damages for what he claims to be the real and substantial possibility of future pecuniary loss arising from an accident-related predisposition to further neck injury or aggravation of his symptoms, particularly if he is involved in a violent confrontation at work.

- [41] I acknowledge that Dr. Deutscher referred to such a predisposition in his report. In my view, however, he did so only in a passing and unsubstantiated comment couched in qualified language amounting to speculation rather than a real and substantial possibility. His primary opinion, one which was amply confirmed by Mr. Winter's report, is quite plainly to the effect that the plaintiff is capable of all the physical requirements of policing. These would include the obligation to subdue unruly suspects now and again. On the subject of the plaintiff's functional capacity I much prefer Mr. Winter's objective testing and undisputed evidence. According to him, the plaintiff is a strong, capable and agile person who continues to be fit for all the rigours of his occupation and who would be at no competitive disadvantage in a physical confrontation.
- [42] I would note, in any event, that the plaintiff has actually been in very few physical confrontations during his decade of policing, and his only time off work between the accident and the time of trial was the result of a 2018 clavicle injury and stress in his personal life. The RCMP seems to have paid the plaintiff's salary and benefits during this period of temporary disability even though, on the evidence presented, it was not obviously a work related absence.
- [43] Also, at the risk of repetition, the plaintiff has suffered from a number of other physical injuries and limitations unrelated to the accident which viewed cumulatively are far more limiting than his neck pain. These have all been satisfactorily accommodated by his employer, and no additional accommodations have been required since the accident. I am not persuaded that any risk of future pecuniary loss is posed by the superimposition of the plaintiff's comparatively minor neck complaint.
- [44] Finally, the plaintiff testified that he is eligible for retirement on a full RCMP pension at the age of 53. He gave no indication that he wished to retire early or that there was any risk of premature dismissal, demotion or lack of promotion opportunities within the organisation for reasons of physical incapacity. Neither did he testify about any vocational or business opportunities that he wished to pursue outside full-time policing.
- [45] Once again, Mr. Winter's undisputed functional capacity evidence is that, even considering the full range of the plaintiff's physical limitations including his sore neck, he is capable of any occupation requiring heavy strength capacities. I was referred to no alternative occupation contemplated by the plaintiff now or in the future, either in addition to his present police work or later on after retirement from the RCMP, for which he would be ineligible because of physical incapacity.
- [46] In short, the plaintiff has failed to establish there is a real and substantial possibility of a future event leading to a loss of income because of the defendant's negligence. This part of his claim is dismissed.

SPECIAL DAMAGES

- [47] Since the accident the plaintiff has taken intermittent massage, chiropractor, and physiotherapy treatments. The defendant's position is that the amount of \$1,105 was reasonably incurred in the months after the accident for treatments focussed on plaintiff's neck complaint and no further award is justified.
- [48] I am satisfied that the plaintiff continued to seek treatment for his neck after the first few months post-accident. After approximately July 2017, however, he received treatment for his more generalised physical problems, of which his neck complaint was only one. He conceded for this reason that all-in compensation under this heading should be limited to \$2,773, a position which I consider to be reasonable and sustainable. The plaintiff will have his award in that amount.

COST OF FUTURE CARE

- [49] The question under this heading is whether proposed future care costs are reasonable and medically necessary. The emphasis under this heading is on provision of adequate future care if required to restore the plaintiff as far as possible to his uninjured functionality. An award is based on what is reasonably necessary, on medical evidence, to promote the mental and physical health of the plaintiff: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 at page 78; affirmed (1987), 49 B.C.L.R. (2d) 99 (C.A.); *Gao v. Dietrich*, 2018 BCCA 372 at para. 69.
- [50] While there must be some evidentiary link between a medical expert's assessment of disability and the care recommended, it is not necessary that a medical expert testify to the medical necessity of each and every item of care that is claimed: *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 39; *Aberdeen v. Zanatta*, 2008 BCCA 420 at paras. 43, 63.
- [51] In the present case, both Drs. Deutscher and Rickards recommended that the plaintiff should commit to a program of targeted exercise, perhaps under the supervision of a kinesiologist. The plaintiff testified that he would be willing to pursue such a course. He seeks compensation for 10 sessions at a cost of \$75 each for a taxes-included total of \$787.50. The defendant questions whether the plaintiff sincerely intends to incur this cost, and suggests that 10 sessions may be more than is required, but I am prepared to allow this claim as being medically justified and reasonable in all of the circumstances.
- [52] I am unaware of any medical recommendation that the plaintiff should take future chiropractic treatments for his neck complaint. His claim for the cost of such treatments is dismissed.

CONCLUSION

- [53] I award the plaintiff the following:

- a) \$30,000 in non-pecuniary damages.
- b) \$2,773 in special damages.
- c) \$787.50 for cost of future care.

[54] Costs may be spoken to if necessary.

"Baird 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/20/06/2020BCSC0695cor1.htm>

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

Prepared on 25 October 2026 · Esheria