

CANADA / JUDGMENT

Clay v. Montagliani

2024 BCSC 633

COURT

Supreme Court of British Columbia

DECIDED

22 March 2024

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2024 BCSC 633 Clay v. Montagliani

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Clay v. Montagliani,

2024 BCSC 633

Date: 20240322

Docket: M211141

Registry: Vancouver

Between:

Michael Thomas Clay

Plaintiff

And

Luciano Montagliani, John Doe And/Or Jane Doe, And Insurance Corporation of British Columbia

Defendants

Corrected Judgment: The text of the judgment was corrected on the front cover on March 10, 2025

Before: The Honourable Justice Tammen

Oral Reasons for Judgment

Counsel for the Plaintiff:

D. Gomel

R. Kalsi

Counsel for the Defendant, Luciano Montagliani:

E. Logan

No other appearances.

Place and Dates of Trial:

Vancouver, B.C.

January 29-31 and

February 1-2, 2024

Place and Date of Judgment:

Vancouver, B.C.

March 22, 2024

- [1] THE COURT: In this action which was heard pursuant to R. 15-1 under the Supreme Court Civil Rules as a fast track trial, the 42-year-old plaintiff, Michael Thomas Clay, seeks damages for injuries he sustained when he was propelled over the handlebars of his bicycle and broke his wrist in the fall after braking to avoid a collision with a left-turning vehicle.
- [2] The defendant, Luciano Montagliani, disputes both liability for the injuries and quantum of damages. The accident occurred on July 24, 2019, at approximately 10:00 p.m. on Lakewood Drive near the alleyway between East 1st Avenue and East 2nd Avenue in Vancouver, BC.
- [3] The plaintiff was travelling northbound on his bicycle to his home on Pandora Street. Earlier in the evening, he attended a Vancouver Canadians baseball game at Nat Bailey Stadium. The plaintiff was wearing a helmet, cycling at a moderate speed using his iPhone for illumination and intending to stop at the stop sign at 1st Avenue.
- [4] As he approached the mouth of the south alley of 1st Avenue, the plaintiff said a southbound vehicle commenced turning left into the alley without signalling immediately in front of him. The plaintiff applied both front and back brakes simultaneously and with some force and was then catapulted over the handlebars.
- [5] He landed on his head and used his hands to break the fall. His helmet cracked in several places, and his left wrist was broken. He also suffered abrasions or road rash in several places. There was no impact between the plaintiff's bicycle and the left-turning vehicle, which stopped prior to crossing the path of the bicycle.
- [6] The plaintiff did not see the car after the accident. He sat on the road facing south and said he was aware of the car's presence by its headlights illuminating the immediate area. A man he believed to be the driver of the car spoke with him and said that help was on the way.

- [7] Shortly after the interaction, police arrived on scene, then an ambulance, which transported the plaintiff to Vancouver General Hospital where he was treated for his injuries. He was discharged from hospital the following day. The defendant testified that he lives at 2114 East 1st Avenue, which is the second house to the east of Lakewood Drive. The defendant parks his vehicles in a garage and parking pad which are accessed from the south lane of 1st Avenue.
- [8] On July 24, 2019, the defendant was driving a red Alfa Romeo GT. He had been at a social club on Commercial Drive and was returning home. He testified that almost immediately after he turned right from 1st Avenue on to Lakewood Drive, he saw a man tumbling on his bicycle and landing in the middle of the road. The defendant stopped his car and pulled over to the curb. He said he parked approximately 20 feet south of 1st Avenue and 70-80 feet from the fallen cyclist. He then got out of his car and approached the cyclist.
- [9] By the time he got there, a neighbour couple was already speaking with the cyclist. Two police officers came a short time later, and then the cyclist was taken away in another vehicle. The defendant stayed and spoke with his neighbour for a while, then went home.
- [10] The defendant said that he saw no other vehicles around the scene, and he did not see any vehicles leaving the scene. The defendant agreed that he was intending to turn left into the south alley of 1st Avenue after making his right turn onto Lakewood Drive to get to his home. The defendant denied that he commenced turning left in front of the cyclist and said he was too far away from the bicycle to have had anything to do with the fall. Importantly, the defendant was adamant that nobody else had turned left into the path of the cyclist.
- [11] On the issue of liability, I must first determine how the accident occurred. In particular, I must decide if the plaintiff has proved that he braked to avoid an imminent collision with a left-turning car and if the defendant was the driver of that car. I have no hesitation making both findings on a balance of probabilities. I accept the evidence of the plaintiff concerning events leading up to the accident.
- [12] On the issue of imminent threat from a left-turning vehicle, his evidence was unchallenged on cross-examination. The defence theory was that it was a different car which must have fled the scene unnoticed by both the plaintiff and the defendant. I find such a theory to be speculative and unsupported by any evidence, direct or circumstantial. I reject the evidence of the defendant as to his actions immediately before and after the accident.
- [13] I agree with the plaintiff's submission that it would be a coincidence of remarkable proportions for the plaintiff to have correctly guessed the intentions of the defendant to make a left turn into the alley in precisely the manner the plaintiff described the movements of the unidentified vehicle he braked to avoid hitting.

- [14] As noted, neither the plaintiff nor the defendant said they saw any other vehicle in the area, and certainly neither saw another vehicle leaving the scene immediately after the plaintiff's fall. The inescapable conclusion is that the accident happened as described by the plaintiff, and that the car he braked to avoid hitting was the Alfa Romeo driven by the defendant.
- [15] Based on those findings, it is also an inescapable conclusion that the defendant was negligent in commencing a left turn into the path of an oncoming cyclist. A left-turning driver must yield the right of way to oncoming traffic including cyclists pursuant to the Motor Vehicle Act, R.S.B.C. 1996, c. 318, s. 174. I am also persuaded on a balance of probabilities that but for the negligence of the defendant, the plaintiff would not have fallen from his bicycle. It was the negligent act of the defendant commencing a turn in front of the oncoming cyclist which necessitated evasive action--in this case, braking--by the plaintiff in order to avoid a collision.
- [16] As for contributory negligence, I find none. The defendant is 100% at fault for the accident. On this score, I agree with the plaintiff's submissions that the concept of "agony of the collision" is applicable. In that regard, I respectfully adopt what was said by Justice Griffin, as she then was, in *Davies v. Elston*, 2014 BCSC 2435.
- [216] The law has long recognized that if an emergency situation on the road is created by a driver's negligence, another road user's response to the emergency will be viewed less strictly. The kinds of tough decisions made by road users facing an emergency are sometimes referred to as decisions made in the agony of the collision.
- [217] The "agony of collision" doctrine was summarized in *Gerbrandt v. Deleeuw* (citation given) where Hunter J. stated as follows:
- [10] An often quoted summary of the law concerning the agony of collision is found in an old text, *Huddy on Automobiles*, 7th Ed., page 471 and page 335 (this passage is relied upon by the Saskatchewan Court of Appeal in *English v. North Star Oil Limited* [1941] 3 W.W.R. 622 (Sask. C.A.) and *Reineke v. Weisgerber* [1974] 3 W.W.R. 97 (Sask. Q.B.)):
- "Under circumstances of imminent danger an attempt to avoid a collision by turning one's course instead of stopping the vehicle is not necessarily negligence. Or an attempt to stop when a turn would have been a more effective method of avoiding the collision is not necessarily negligence . . . one who suddenly finds himself in a place of danger and is required to consider the best means that may be adopted to evade the impending danger is not guilty of negligence if he fails to adopt what subsequently and upon reflection may appear to have been a better method, unless the emergency in which he finds himself is brought about by his own negligence."
- [11] In *Gill v. C.P.R.* [1973] 4 W.W.R. 593 Mr. Justice Spence speaking for the court said the following:

It is trite law that, faced with a sudden emergency the creation of which the driver is not responsible, he cannot be held to a standard of conduct which one sitting in the calmness of a courtroom later might determine was the best course.

[Emphasis added.]

- [17] Here, there was a need for the plaintiff to react quickly in an attempt to avoid a collision with a motor vehicle, which collision would almost certainly have caused him serious injury. I cannot say that the plaintiff in any way overreacted, nor that his response, applying both brakes forcefully, was inappropriate. The action of sudden braking caused him to be propelled over the handlebars. However, the plaintiff's decision to apply the brakes was not imprudent, and he is not contributorily negligent as a result of those actions.
- [18] The only other basis advanced by the defendant for a finding of contributory negligence was intoxication. Constable Hearst, one of the police officers who attended the scene, testified that he thought the plaintiff appeared intoxicated, but he could not say why he thought that. Constable Hearst gave no evidence of indicia of impairment nor any other observations which supported his lay opinion on this point. Constable Hearst took no notes of the incident, and he had no reliable touchstone for this memory.
- [19] Although I find Constable Hearst to be a credible witness, on this issue, his evidence is unreliable, and I give it no weight. Rather, I accept the plaintiff's evidence, supported by that of Sarah Teigland, that he was not intoxicated when he set out for home after the baseball game.
- [20] The plaintiff said he consumed three alcoholic beverages at the game between approximately 7:00-9:30 p.m. Ms. Teigland is a coworker of the plaintiff who attended the baseball game with him as part of a work event. Ms. Teigland saw the plaintiff consume two alcoholic beverages, and she said that when she saw him depart on his bicycle, he did not appear intoxicated. I accept that evidence. I find that there was no contributory negligence caused by intoxication.
- [21] Consequently, I find the defendant 100% liable for the accident and resulting injuries to the plaintiff.
- [22] With respect to quantum of damages for nonpecuniary damages, those are intended to compensate a successful plaintiff for pain, suffering, loss of enjoyment of life, and loss of amenities. A non-exhaustive list of factors which may be considered are these, from the well-known case of *Stapley v. Hejslet*, 2006 BCCA 34: Age of the plaintiff, 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, loss of lifestyle, and the plaintiff's stoicism as a factor that should not penalize the plaintiff (para. 46).

- [23] In the present case, there was considerable evidence from both the plaintiff and his spouse, Hannah Perry, about the impact of the injuries on the plaintiff in the immediate aftermath of the accident, persisting to some extent to present day.
- [24] The plaintiff has undergone two surgical procedures, one of which left plates and screws inserted in his wrist. The plaintiff has ongoing discomfort and limited range of motion in his left wrist. There continue to be adverse impacts on the plaintiff's active lifestyle and daily activities.
- [25] Dr. Farhad Moola, an orthopedic surgeon, diagnosed the following: an intra-articular left distal radius fracture, a fracture of the ulnar styloid, and diastasis of the scapholunate interval, which is gapping between the scaphoid and lunate bones. Dr. Moola opines that those injuries were a direct result of the accident. He estimated a 10-20% chance that the plaintiff will eventually develop symptomatic arthritis in his wrist as a result of the injuries suffered in the accident.
- [26] Dr. Moola's prognosis for the left wrist was as follows:
- I do not anticipate that there would be any further improvement in either range of motion, discomfort, or functional return seen with any additional therapy modalities or nonsurgical treatment.
- [27] Dr. Moola believed the hardware in the plaintiff's wrist might be contributing to the ongoing discomfort. A further surgery to remove the hardware might resolve some but not all of the symptoms. Diminished range of motion would likely persist, and there is a chance that the achy discomfort experienced by the plaintiff would also continue post surgery.
- [28] The plaintiff limits his submission, as he must pursuant to the fast track Rules, to seeking damages of \$100,000. However, in support of that submission, the plaintiff relies on case authorities from this Court which support an award of nonpecuniary damages between \$108,000-\$130,000. Those cases, as accurately summarized in the plaintiff's written materials are as follows.
- [29] *Ozeer v. Young*, 2015 BCSC 542, in which a 29-year-old male plaintiff was involved in a motor vehicle accident and sustained a wrist fracture. X-rays revealed an intra-articular fracture with some carpal dislocation. As a result, the plaintiff required three surgeries. He continued to experience ongoing pain. Expert evidence revealed that he had permanent wrist stiffness and associated weakness, that the further surgery other than hardware removal was unlikely. Expert evidence further revealed there was nothing further that could restore the plaintiff's wrist motion and strength. The court inferred that his pain and discomfort would likely worsen due to the onset of arthritis. The award for nonpecuniary damages was \$95,000 which adjusted for inflation would be approximately \$119,000.
- [30] *Ackermann v. Pandher*, 2017 BCSC 880, in which a 52-year-old male plaintiff involved in a motor vehicle accident sustained a perilunate dislocation injury resulting in soft tissue and ligament disruption in his wrist. The injuries required surgery involving insertion of plates.

Expert evidence showed that the condition was chronic with a likelihood of deterioration over time. Prior to the accident, the plaintiff led an active lifestyle. The court found that his injuries significantly affected his ability to participate in recreational activities and awarded nonpecuniary damages of \$90,000 which adjusted for inflation is approximately \$109,000.

- [31] *Ferguson v. All-Can Express Ltd.*, [1998] B.C.J. No. 78, 1998 CanLII 4718 (B.C.S.C.), in which a 37-year-old male plaintiff was involved in a motor vehicle accident and suffered injuries to his neck, back, and left wrist. The neck and back problems resolved within weeks, but the wrist injury persisted requiring three surgeries. Expert evidence revealed that the plaintiff would be left with permanent weakness in his left hand. The Court awarded \$75,000 in nonpecuniary damages which adjusted for inflation is approximately \$130,000.
- [32] *Burke v. Schwetje*, 2017 BCSC 2098, in which a 67-year-old male plaintiff, a commercial fisherman with pre-existing mildly symptomatic arthritis, suffered a permanent injury to his right hand and wrist including carpal tunnel syndrome. He also suffered chest bruising and neck and back stiffness which had resolved. The plaintiff's hand and wrist pain required two surgeries. The Court recognized that the plaintiff's livelihood had changed substantially as a result of the accident, and that his career had been shortened by the aggravation of his pre-existing arthritis. The court awarded nonpecuniary damages of \$95,000 which adjusted for inflation is approximately \$115,000.
- [33] The defendant submits that an appropriate award of nonpecuniary damages is between \$55,000-\$80,000. The primary cases relied on by the defendant are as follows.
- [34] *Charters v. Jordan*, 2023 BCSC 954, in which a 29-year-old plaintiff suffered injuries while riding her bike and being thrown from the bicycle and bracing her fall with her hands. As a result of the accident, the plaintiff suffered a right wrist fracture and minor injuries to her right hip and right knee. She was required to modify her work duties due to wrist pain. Her symptoms improved, and she was able to return to many of her pre-accident activities. However, she avoided some activities such as lifting heavy objects, golfing, and snowboarding. She continued to experience discomfort and pain in her wrist and required minor modifications. The plaintiff was awarded \$70,000 in nonpecuniary damages.
- [35] *Pringle v. Pringle*, 2020 BCSC 75, in which a 31-year-old plaintiff suffered injuries in a motor vehicle accident which included a broken wrist, a pulled rotator cuff, and a compression fracture in his back. The plaintiff fractured the wrist and had abrasions on his left hip and knees. He had surgery for the wrist fracture which required wires to be inserted to hold the bones in place while the fracture healed. After six weeks, the wires were removed, and the plaintiff's wrist was placed in a cast. Nonpecuniary damages were assessed at \$50,000.
- [36] *Birrer v. Thomas*, 2019 BCSC 1642, in which a 31-year-old plaintiff was injured in a motor vehicle accident. The injuries included an injury to the left wrist, soft tissue pain in the neck, back, and right arm, cuts and scrapes to the face and body. Most of the symptoms were resolved within six months of the accident, but the plaintiff had ongoing pain and limitation relating to the left wrist injury with ongoing pain and reduced function in his left forearm at

the time of trial four years after the accident. Nonpecuniary damages were assessed at \$55,000.

- [37] The assessment of nonpecuniary damages is a question of fact. Previous awards made for similar injuries are helpful but by no means determinative. In this case, I find that because of the need for multiple surgeries, the significant impact on the daily activities of the plaintiff, and the ongoing, likely permanent discomfort, and limited range of motion, the range of damages suggested by the plaintiff is more appropriate than that suggested by the defendant.
- [38] For nonpecuniary damages, I award the plaintiff \$110,000. The parties agree that there should be an award of special damages of \$1,155.72, and I also make that award. I make no award for future loss of income or for cost of future care. Both awards are premised on the plaintiff undergoing further surgery to remove the hardware from his wrist and missing time from work and incurring expenses for physiotherapy thereafter.
- [39] Based on all the evidence, but in particular that of the plaintiff, I cannot find there is a real and substantial possibility of a future loss of income. The plaintiff said he had only recently been advised about the potential to have a further surgical procedure and had not yet fully considered whether he wished to do so. He had some reservations about the surgery.
- [40] Moreover, there was no actual evidence about the wage loss which would be occasioned by the surgery. I am unable to find that the risk of a future loss of income rises above the speculative and thus make no award under that heading.
- [41] Likewise, given the uncertainty of the evidence, I do not find there is a real and substantial possibility of the plaintiff incurring further care costs, specifically for physiotherapy, as part of the rehabilitation from any future surgery. I make no award under that heading.
- [42] In conclusion, I award the plaintiff nonpecuniary damages of \$110,000 and special damages of \$1,155.72 for a total of \$111,155.72. The plaintiff has been wholly successful at trial. Unless there are circumstances of which I am unaware, he is entitled to his costs of this proceeding. Those costs are fixed by application of R. 15-1(15).

"Justice Tammen"

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