

CANADA / JUDGMENT

D.J.W. v. Biswal

2023 BCSC 1274

COURT

Supreme Court of British Columbia

DECIDED

25 July 2023

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

2023 BCSC 1274 D.J.W. v. Biswal

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

D.J.W. v. Biswal,

2023 BCSC 1274

Date: 20230725

Docket: M190623

Registry: Vancouver

Between:

D.J.W., by his litigation guardian D.P.W.

Plaintiff

And

Amitabh Biswal

Defendant

Before: The Honourable Mr. Justice Veenstra

Reasons for Judgment

(Post-Trial Application for Management Fees)

Counsel for the Plaintiff:

N.J. Hartney

C. McIvor

Counsel for the Defendant:

L. Chow

S.B. Stewart

Written Submissions of the Plaintiff:

March 30 and July 19, 2023

Written Submissions of the Defendant:

April 28 and July 20, 2023

Place and Date of Judgment:

Vancouver, B.C.

July 25, 2023

Table of Contents

Introduction. 3

Background Facts. 3

Legal Context. 6

Positions of the Parties. 10

Analysis. 11

Conclusion. 12

Introduction

- [1] On February 1, 2023, I gave reasons for judgment, indexed as D.J.W. v. Biswal, 2023 BCSC 148 (the "Trial Judgment"), awarding the plaintiff damages totalling \$976,042.90, arising from a motor vehicle collision on June 16, 2017 (the "MVA").
- [2] The plaintiff had asked at trial that certain matters be reserved for further submissions once the award on other heads of damages had been determined. At paras. 344 and 347, I stated:
- [344] The plaintiff is at liberty to make subsequent application for management fees or tax gross-up, which shall be made in accordance with my directions below.
- [347] If either party seeks orders for management fees or tax gross-up, for clarification in respect of mathematical errors, or for costs other than the usual order, that party should provide its submission to me in writing through Supreme Court Scheduling within 60 days of the date of this judgment. The other party may reply within 30 days thereafter. I will advise whether I believe a hearing is necessary - although the parties are welcome to indicate in their submissions whether they believe a hearing would be appropriate.

- [3] The parties have been able to agree on several of the outstanding matters but disagree on the issue of management fees. The plaintiff has thus applied for an order for management fees.

Background Facts

- [4] The facts are set out in detail in the Trial Judgment.
- [5] The plaintiff was, at the time of the MVA, 12 years of age and about to complete grade 7. At the time of trial, he was 17 years old and about to graduate from high school. At the present time, he is 18 years old. He will reach the age of majority in the fall of 2023.
- [6] I do not intend to review the Trial Judgment in depth for purposes of the present determination. My conclusions with respect to the plaintiff's physical injuries are set out at paras. 199-207. Those injuries include ongoing soft tissue injuries and concussion symptoms, with frequent headaches that affect the plaintiff's ability to concentrate and focus on any academic work at school.
- [7] My conclusions with respect to the impact of the MVA on the plaintiff's mental health are set out at paras. 208-212. Those impacts include depression, chronic post-traumatic stress, Generalized Anxiety Disorder and Somatic Symptom Disorder with Predominant Pain. I generally accepted the evidence of Dr. Schultz on these issues. Her evidence, which provides a more detailed review of these conditions, is discussed at paras. 149-168 of the Trial Judgment. Of particular significance for present purposes are her comments with respect to future impacts, and the plaintiff's need for accommodation, set out at paras. 163-167 - which comments I discussed at paras. 297-301.
- [8] I note as well my discussion in the Trial Judgment of a mental health crisis the plaintiff had in 2022, which led to an increased openness on the part of the plaintiff to counselling, and a hope that his mental health would improve over time.
- [9] With respect to cognitive issues, I concluded that the plaintiff had not suffered a cognitive disorder as a result of the MVA, noting at para. 215 that:
- [215] The inference I draw from the testing results as a whole, as well as from the evidence of his academic performance since the MVA, is that when the plaintiff's mental health is somewhat under control, he is able to work at a high cognitive level for a period of time until his physical symptoms begin to impact his concentration. Thus, I see the plaintiff as having the cognitive capacity to do complex academic work, but with limits as to the volume of such work that he can do on any given day. His limitations come from his chronic pain and headaches, not from a lack of cognitive ability.
- [10] The total award of damages of \$976,042.90 included awards for future loss of earning capacity of \$700,000 and loss of housekeeping capacity of \$31,000. As will be discussed below, both of those judgments provide lump sums which it is anticipated will be invested over time in order to provide compensation for future income loss and care needs.

- [11] The plaintiff has submitted, in support of this application, two expert reports: the report of a financial advisor, Mr. Bain, and the report of an economist, Mr. Sheldon.
- [12] Mr. Bain's evidence is that he would expect the plaintiff to pay investment management costs of 1.5% to 2.5% annually for the remainder of his investment horizon in order to prudently invest the awards for loss of future earning capacity and loss of housekeeping capacity, in order to generate an income stream. He recommends that the funds not be allowed to "languish in a too-conservative portfolio, only to generate humble returns in a rising-cost world", and that the plaintiff should have a "substantial allocation to growth investments". He opines that the plaintiff would be best served by having professional investment counsel in order to prudently invest the funds in the recommended manner.
- [13] Mr. Sheldon has calculated the present value of management fees of 1.5% as \$359,200. At 1%, the present value would be \$218,900.
- [14] The defendant has submitted a report from an economist, Mr. Gosling. Mr. Gosling took issue with some of the Mr. Sheldon's calculations, including with respect to whether they adequately reflected the tax deductibility of investment management fees.
- [15] Mr. Gosling also put forward alternative approaches to the question of management fees. He commented that "Investors can typically receive free advice at their local financial institution if they are using that institution's investment products", and that "For an individual who is capable of interpreting and acting on such advice, no management fees would be required".
- [16] Mr. Gosling also commented that if an individual requires more comprehensive advice, it may be appropriate to retain an investment professional to set up and implement a financial plan (Level 1) and perhaps even review and adjust that plan periodically over time (Level 2). In terms of calculations, he noted that the Law Reform Commission of British Columbia, Report on Standardized Assumptions for Calculating Income Tax Gross-up and Management Fees in Assessing Damages (Vancouver: Ministry of Attorney General, 1994) (the "LRC Report") suggested that the fee for Level 1 advice was \$1,000. He calculated the present value of \$1,000 in 1994 dollars as being \$1,812. For Level 2, he calculated the present value of an expenditure of \$1,812 over five years as \$13,500.

Legal Context

- [17] The basis for an award for management fees was explained in *Pestano v. Wong*, 2019 BCCA 141, at para. 9:
- [9] Because the law recognises that future loss awards must be invested to provide sufficient funds for the future income stream in respect of which they are made, an additional sum may be needed to cover fund management. As explained in [the LRC Report], the rationale for awarding fees for fund management services, investment management services or both is that the fund will be exhausted prematurely if the plaintiff is unable to perform these functions and, therefore, must pay others to do so. In other words, the purpose of including

fund and investment management fees in a future loss award is to ensure that the value of the award is maintained over time and thus to adhere to the principle of awarding the plaintiff full and fair compensation: Townsend at paras. 5-6.

[18] In *Mandzuk v. Insurance Corporation of British Columbia*, [1988] 2 S.C.R. 650, 1988 CanLII 16, Justice Sopinka noted that the question of whether a management fee should be awarded to a plaintiff in a personal injury case is essentially a question of fact in each case, turning on whether the plaintiff is either unable to manage his affairs or lacks the acumen to invest funds awarded "so as to produce the requisite rate of return": para. 2. At para. 5, Justice Sopinka set out the following facts to be established and considered by the trial judge:

- (i) evidence that management assistance is in fact necessary;
- (ii) evidence that investment advice is in fact necessary in the circumstances;
- (iii) evidence as to the cost of such services.

[19] Pestano confirmed that the "requisite rate of return" in British Columbia is the statutory discount rate provided pursuant to s. 56 of the Law and Equity Act, R.S.B.C. 1996, c. 253. As noted at para. 7:

[7] These statutory discount rates are predicated on the assumption that awards for income loss and other future losses will be invested in low risk fixed-income securities which will produce the required annual payments from a fund that is self-liquidating in nature: *West v. Cotton* (1995), 10 B.C.L.R. (3d) 73 at para. 30 (C.A.). In *Cherry v. Borsman* (1992), 70 B.C.L.R. (2d) 273 (C.A.), this Court held that the statutory discount rate must be assumed to reflect reality as a matter of law.

[20] An award for management fees is based on the level of services necessary to achieve a rate of return equivalent to the statutory discount rate (1.5% for loss of future earning capacity, 2.0% for costs of future care). That statutory discount rate is predicated on the investment of awards in conservative interest-producing securities. As noted in Pestano at paras. 11-12, a defendant cannot go behind the deemed statutory discount rate to prove that greater returns will be achieved, and if the recipient of the award wishes to secure a greater return through diversification, the cost of investment advice for that purpose should not be charged to the defendant.

[21] The LRC Report recommended (at 52) a standardized four-level classification system to assess the third of the Mandzuk questions, noting that many plaintiffs will require at least a minimum level of assistance. The four levels are:

Level 1 - The plaintiff requires only a single session of investment advice and the preparation of an investment plan at the beginning of the period the award is to cover.

Level 2 - The plaintiff will require an initial investment plan and a review of the investment plan approximately every five years throughout the duration of the award.

Level 3 - The plaintiff will need management services in relation to custody of the fund and accounting for investments on a continuous basis.

Level 4 - The plaintiff will require full investment management services on a continuous basis, including custody of the fund, accounting, and discretionary responsibility for making and carrying out investment decisions. Such a plaintiff is likely to be mentally incapacitated or otherwise incapable of managing personal financial affairs.

- [22] This classification system has been referred to repeatedly, and provides a useful analytical tool for judges in the assessment of claims for fund and investment management fees and services, although it must be kept in mind that it does not provide a set of rigid categories into which every plaintiff will neatly fit: Pestano at para. 15.
- [23] Justice Saunders wrote a brief concurring judgment in Pestano (with which the majority concurred), noting the inherent conflict between the obligations of a trustee acting as a prudent investor to ensure a reasonable diversification of the type and class of investment, and the presumption underlying the discount rate that funds will be invested conservatively in fixed-income securities (i.e. without diversification).
- [24] Pearson v. Savage, 2020 BCCA 133, was an appeal of an award for management fees of \$278,500 in respect of a judgment that included an award of \$1.25 million for loss of future earning capacity and just over \$400,000 for cost of future care. The Court of Appeal (para. 12) concluded that there was no evidence justifying a conclusion that Ms. Pearson was so incapable of managing her own financial affairs that she required constant investment management services to achieve the required rate of return. It allowed the appeal and reduced the award of management fees to \$25,000.
- [25] Ms. Pearson's injuries included soft tissue injuries leading to chronic pain in her neck, back and left knee as well as debilitating headaches. She also sustained psychological injuries that left her with depression (a major depressive disorder, now in remission), anxiety, posttraumatic stress disorder, symptoms of cognitive dysfunction, altered sleep, and somatic symptom disorder.
- [26] As in this case, Ms. Pearson sought management at a mix of Levels 3 and 4, and provided an economist's report calculating fees of \$350,764. As in this case, the defendants relied on a report of Mr. Gosling suggesting that the plaintiff could simply purchase an available product from any financial institution and incur no management fees. Mr. Gosling alternatively assessed the cost associated with Level 2 management fees to be approximately \$15,270. [There is not sufficient information in the Pearson judgment for me to determine the difference between the \$15,270 Mr. Gosling calculated in that case and the \$13,500 he calculated in the present case, particularly given the young age of the plaintiff in the present case.]
- [27] At paras. 118-120, Justice Fitch stated:

- [118] Mr. Gosling was of the opinion that Level 1 management fees would be adequate to provide for a financial planner to develop a straightforward investment plan sufficient to obtain the required rate of return at the outset of Ms. Pearson's investment. The difference between Level 1 and Level 2 financial management fees is that Level 2 services provide for a review of the plan every five years. Given the length of time over which the award must last Ms. Pearson, I accept that periodic updates to an investment plan will be required over Ms. Pearson's lifetime.
- [119] Mr. Gosling said that Level 2 management fees sufficient to achieve the required rate of return would cost \$15,270. I accept, as the appellants did at trial, that Ms. Pearson may require a "higher touch" level of service given her persistent, post-accident difficulties managing anxiety.
- [120] In the result, I would allow the appeal and reduce the management fees award to \$25,000.
- [28] Pestano and Pearson have been applied in more recent judgments of this Court, the most recent of which is the judgment of Justice Forth in *Sidhu v. Hiebert*, 2023 BCSC 1021. That case involved a substantial award on which management fees were claimed on a Level 4 basis of \$2 million. Justice Forth noted at para. 20 that:
- [20] I accept that the plaintiff, although he is cognitively intact, is not able to make investment decisions such as assessing the potential return on various products, whether to purchase certain stocks, when to sell stocks, assessing the risk profile of different products, and how best to ensure that the monies he receives can best meet the needs he has over his life-span. He is capable of speaking to a financial institution about what types of products should be purchased and understanding the various rates of return that can be achieved.
- [29] She concluded that:
- [26] I am not persuaded that the plaintiff is entitled to a management fee in excess of \$2 million to achieve a 2% real return. However, I am persuaded that this plaintiff, with his unique needs, is entitled to some objective financial advice from a financial advisor on issues relating to which products would be best suited for him, whether the financial institution is providing the independent advice needed, and how various withdrawals should be made.
- [29] I further note that I am not bound by the various levels as set out in the LRC Report, but can craft an award that addresses this plaintiff's unique circumstances.
- [30] I am not persuaded that the alternative position of the defendants, being an award of \$5,000 every five years, adequately addresses this plaintiff's need for advice. In my view, this plaintiff is entitled to a "higher touch" level of service given the catastrophic physical injuries suffered and the time and energy that the plaintiff has, given the multiple medical conditions he faces: Pearson at para. 119. It is my view that this plaintiff, with the unique circumstances he faces, should be entitled to more independent advice from someone other than the bank manager where his funds might be held. This financial advisor would be in a position to give independent objective financial advice on the various products that the

financial institution has recommended. I accept that the number of hours should be more in the range of 10 hours of advice each year.

- [31] Using the rate of \$250 per hour, as set out in Mr. Streigervald's report, this amounts to 50 hours of advice each five years, being \$12,500. Using the multiplier of \$4,371 per \$1,000, this amounts to a present value figure of \$54,637.50 ($(\$12,500 \div \$1,000) \times \$4,371$). As such, I would assess the present value of the management fees at \$55,000.

Positions of the Parties

- [30] The plaintiff submits that, due to his age and psychological injuries, he is "unable to manage his affairs and/or lacks the acumen to produce the requisite rate of return", and as a result, he does not have the capacity to obtain and follow investment advice. He is currently 18 years old and suffers from significant psychological impairments which impact his ability to manage his affairs - particularly a large sum of money like that awarded in this case.
- [31] The plaintiff notes that his father (who is also the plaintiff's litigation guardian in this matter) is a sheet metal worker, who did not complete high school, while his mother suffered significant injuries in the same motor vehicle as did the plaintiff and is not in a position to provide much support with respect to investment.
- [32] The plaintiff thus submits that he will require Level 3 or 4 advice over the long term - Level 4 advice at the outset and then perhaps a transition to Level 3 when he matures and if his psychological condition were to improve.
- [33] In the alternative, the plaintiff submits that if the Court concludes that at some point in the future the plaintiff will be in a position to obtain and follow investment advice, then an award of \$100,000 should be made representing a period of time at Level 3 or 4 advice followed by a transition to Level 2.
- [34] The defendant submits that on the evidence, the plaintiff is capable of receiving advice and giving instructions to invest his future pecuniary awards in low risk, fixed income securities, all at no cost to him, and accordingly no management fee is warranted. Alternatively, the defendant submits that an award could appropriately be made in the sums calculated by Mr. Gosling for Level 1 (\$1,812) or Level 2 (\$13,500) support.

Analysis

- [35] I begin by noting that Mr. Bain's report reflects the course of action that a prudent investor would take, including investing an award in a diversified portfolio, with fees arising from such an investment strategy. However, Pestano makes clear that, notwithstanding what a prudent investor might do, the need for management fees is determined based on what is necessary to properly invest funds in conservative, interest-bearing products, so long as such an approach will generate the required (1.5% or 2.0%) return. Nothing in the record before me establishes that an appropriate set of investments in such products cannot

generate the required level of income to meet the goals of the award.

- [36] In my view, this is not the sort of case in which Level 3 or 4 management services are required or appropriate. The plaintiff is cognitively intact, and while he may require time to figure things out, he has sufficient intelligence to get there. My sense of the plaintiff is that he is someone who wants to do the right thing, and that if he is given the right supports in a timely manner he will most likely make use of them.
- [37] However, I do have significant concerns about the plaintiff's ability to manage the substantial award made without any objective, paid advice given the amount to be invested, the long timeframes over which the money is to be invested, the plaintiff's young age, and the lack of any significant experience in his family with respect to money management. I have specific concerns arising from the plaintiff's psychological condition, and the environment of depression and anxiety within which he is currently operating. The plaintiff's experience with anxiety is of specific concern in considering the appropriate time frame within which he is to have access to independent financial advice.
- [38] In light of these concerns, it is my view that a version of Level 2 management services, adapted to the plaintiff's particular circumstances, is appropriate. As in the Pearson case, I conclude that the plaintiff's conditions including his anxiety and his struggles with mental health issues give rise to a need for a "higher touch" level of services, and in particular, services not limited to the once-every-five-years approach contemplated in the LRC Report. As in Sidhu, I see value in providing for the plaintiff to have occasional consultations with an independent financial advisor who can provide objective financial advice on available investment options.
- [39] It is my view that an award of \$30,000 is consistent with awards in cases such as those I have cited and is appropriately tailored to the plaintiff's specific needs and circumstances.

Conclusion

- [40] I would thus award the plaintiff management fee in the sum of \$30,000.
- [41] I understand that the parties are unable to determine their positions on costs until the award for management fees is known. If one of the parties seeks an order as to costs other than the usual order (being costs to the plaintiff on Scale B), and the parties are unable to agree, then the party seeking an order as to cost other than the usual award should provide its submission to me in writing through Supreme Court Scheduling within 35 days of the date of this judgment. The other party may reply within 21 days thereafter.

"Veenstra 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/23/12/2023BCSC1274.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/d-j-w-v-biswal-2023>

Prepared on 26 October 2026 · Esheria