
CANADA / JUDGMENT

D.K.B. v. British Columbia

2011 BCSC 418

COURT

Supreme Court of British Columbia

DECIDED

5 April 2011

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

2011 BCSC 418 D.K.B. v. British Columbia

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

D.K.B. v. British Columbia,

2011 BCSC 418

Date: 20110405

Docket: 004743

Registry: Victoria

Between:

D.K.B.

Plaintiff

And

Her Majesty the Queen in Right

of the Province of British Columbia

Defendant

Before: The Honourable Mr. Justice Dley

Reasons for Judgment

Counsel for the Plaintiff:

D.W. Thompson

Counsel for the Defendant:

K.L. Johnston

Place and Date of Trial:

Victoria, B.C.

February 28-March 4, March 7 & March 10, 2011

Place and Date of Judgment:

Victoria, B.C.

April 5, 2011

- [1] The plaintiff was a talented 13-year old hockey player when he was sexually abused by his coach. The plaintiff continued with a professional hockey career, but fell short of reaching what he says was his real potential. The question is to what extent the sexual abuse impacted the victim's ability to earn income.

Background

- [2] The Province of British Columbia is a defendant because of the outcome in D.N. and D.S.G. v. The Corp. of the Dist. of Oak Bay, 2005 BCSC 1412. In that case, Silverman J. found that a probation officer failed to notify the minor hockey association that a convicted sex offender was a volunteer coach within its organization. The Province was vicariously liable for the failure of the probation officer to warn the minor hockey association of the danger posed by the coach.
- [3] The same coach sexually assaulted this plaintiff. The defendant Province has admitted liability.
- [4] The parties have agreed that the general damages are to be assessed at \$125,000 and the special expenses at \$3,000.

Facts

- [5] The plaintiff was born in 1975. By the age of 10 he had attended hockey schools for goaltenders. He was often away during the summers attending these hockey camps. His abilities were such that he played and excelled in older age divisions.
- [6] The plaintiff met and became close to Richard Hall, who held himself out as a goalie coach. When the plaintiff was about the age of 10, Mr. Hall regularly attended his games and gave him goaltending advice. Mr. Hall took the plaintiff fishing, to the movies and socialized with his family. The plaintiff looked upon Mr. Hall as a father figure and big brother.
- [7] In the summer of 1988, Mr. Hall sexually abused the plaintiff on two occasions.

- [8] Mr. Hall said that his niece wanted to engage in oral sex with the plaintiff. He convinced the plaintiff that it was necessary for him to be blindfolded at the time. The plaintiff complied with the instructions. Unbeknownst to the plaintiff, the person performing the oral sex was Mr. Hall.
- [9] In the second encounter, Mr. Hall convinced the plaintiff that the niece wanted to use a strap on penis and engage the young man in anal intercourse. The plaintiff was then to reciprocate. The plaintiff again complied with the instructions, but during the intercourse he lifted his blindfold and realized that he was engaged with Mr. Hall.
- [10] The plaintiff was horrified as to what had occurred and terminated his relationship with his assailant. The plaintiff was ashamed and embarrassed. He told no one.
- [11] The plaintiff carried on playing hockey that winter and had a good year. He buried the abuse for the time being.
- [12] In 1989, Mr. Hall's actions were publicized and the plaintiff disclosed the abuse to his parents. He was taken for a medical examination by his father, but no counselling was provided.
- [13] In September 1989, at the age of 14, the plaintiff attended Athol Murray College Notre Dame in Wilcox Saskatchewan. He found the beginning of Grade 9 at Notre Dame boring and he experienced separation anxiety. As the year went on, he settled down and his academic performance improved. However, he felt isolated and the abuse memories returned. The plaintiff had difficulty forming relationships and had few close friends. He had regular thoughts of violence against Mr. Hall and he dwelt on how he might have prevented the abuse from occurring.
- [14] The hockey had become less fun and the coaches were more serious. His mood and emotions changed. He experienced an undercurrent of anger when he walked into a rink.
- [15] The plaintiff returned to Notre Dame at the age of 15 and started Grade 10. On ice, he had a very good year. Once the season ended, the memories of the abuse became more prevalent. He was ashamed, embarrassed and angry.
- [16] He was introduced to alcohol toward the end of Grade 10. He first drank alcohol to fit in with his peers and to experience intoxication.
- [17] When he returned to Notre Dame as a 16-year-old in Grade 11, he and his schoolmates drank alcohol on a more regular basis.
- [18] On ice, the plaintiff continued to play at a high level.
- [19] During his Grade 11 year, the plaintiff received letters of interest from Michigan State and Cornell universities.

- [20] As he was completing Grade 11, the plaintiff wrote the SAT exam (required for admission to American universities). He was aware that the SAT could be written more than once, and the best result would be used. The plaintiff got drunk the night before the exam and was hung over when he wrote it at the insistence of one of his teachers. The plaintiff rationalized the drinking as an indication that he simply did not want to take the test.
- [21] During Grade 11, the plaintiff's grades declined and he received three disciplinary notices from the college. On two occasions, the plaintiff was involved in alcohol-related incidents. The other matter arose from the plaintiff, his brother and a friend, making and selling false pieces of identification to other students.
- [22] In spite of his difficulties during Grade 11, Notre Dame still wanted him to return for grade 12, because the college was confident that he would receive an NCAA scholarship.
- [23] The plaintiff was aggressively pursued and recruited by Mr. Johannson on behalf of the Tri-City Americans of the Western Hockey League ("WHL"). The plaintiff was offered a premier education package which guaranteed payment of four years of university schooling immediately upon signing a WHL contract. His parents were supportive of the plaintiff going to Tri-City, because university education would be covered.
- [24] The plaintiff completed his Grade 12 during his first year in Tri-City. He found that the education requirements were easily attained, and with the academic pressure terminated, he could concentrate completely on hockey. He was relieved that he could concentrate solely on hockey. However, he continued to feel anger and a lack of emotional control on the ice.
- [25] As a 17-year-old, he had a good year and was drafted in the eighth round of the NHL entry draft by the Toronto Maple Leafs (the "Leafs"). He attended the Leafs' training camp in September 1993. He injured his knee at the end of camp and that prevented him from playing for eight weeks. During that time, he was depressed because of the knee injury and recurring memories of the abuse.
- [26] The plaintiff continued to drink sporadically and generally with teammates at club gatherings. Drinking alcohol was part of the junior hockey culture. At times, the plaintiff drank in order to punish himself for being a victim of sexual abuse. Mr. Johannson observed that the plaintiff was not "getting with the program" and that he was a distraction to everybody.
- [27] The plaintiff was not close to any of his teammates and had difficulties with people in authority, including some of his coaches. However, he got along well with the head coach, Bob McCammon.

- [28] The plaintiff was also sceptical and distrustful of the Leafs' goalie coach, Rick Wamsley. Mr. Wamsley was the plaintiff's first goalie coach since his experience with Mr. Hall. However, the plaintiff got along well with the Leafs' western scout, Garth Malarchuk, and spent some time at the Malarchuk ranch near Calgary.
- [29] In the spring of 1994, the plaintiff was suspended by Tri-City (the "bus incident"). He and several teammates consumed a mixture of sleeping medication and alcohol in preparation for a 24-hour bus ride to Brandon, Manitoba. They intended to "knock themselves out" so as not to endure sitting through the trip in a conscious state. The plaintiff's condition was noted by the coaching staff and he was sent home, much to the chagrin of Mr. Wamsley who was waiting in Brandon to monitor the progress of his drafted goaltender.
- [30] Mr. Johansson did not consider the bus incident to be an isolated matter in light of numerous behavioural issues relating to the plaintiff.
- [31] As a result of that incident, Tri-City arranged for the plaintiff to get counselling with Karen Herriott-Davies, a registered clinical counsellor. The twenty counselling sessions he attended with Ms. Herriott-Davies assisted the plaintiff with learning how to cope with the stresses of his hockey career and minimize the use of alcohol.
- [32] Tri-City tried to trade the plaintiff, but encountered difficulty, in part, due to the large educational obligation attached to him.
- [33] The plaintiff never consumed alcohol either on a game day or the previous night. His drinking was occasional and sporadic. At times, his performance was subpar in practices and he neglected his off ice workouts when he had been drinking.
- [34] In September 1994, the plaintiff again attended the Leafs' training camp. He performed well. The assistant general manager, Bill Watters, was impressed and he told the plaintiff that the team intended to offer him a contract in due course.
- [35] The plaintiff returned to Tri-City, but the first part of the season did not go well. The team struggled. The plaintiff was traded in January 1995, ultimately ending up in Lethbridge.
- [36] The plaintiff showed a lack of emotional control while playing, and lashed out at his defensemen and on ice officials.
- [37] In June 1995, the Leafs' management told the plaintiff that a contract would not be offered.
- [38] The plaintiff was aware that being drafted did not mean he would necessarily play in the NHL.
- [39] He returned to complete his final year of junior hockey in Lethbridge.

- [40] At the conclusion of the Lethbridge training camp in September, the plaintiff consumed a large amount of alcohol and engaged in a much-publicized incident (the "Lethbridge incident"). He was arrested by the police after punching out windows of a stranger's house and running almost naked through the streets.
- [41] For the plaintiff, this incident was his "bottoming out". He disclosed the abuse to team management, and was provided with counselling. He took therapy during the season. The plaintiff played 50 games and it was the best year of his junior career.
- [42] The plaintiff had two options at the conclusion of his junior eligibility. He could take advantage of the four years of education covered by Tri-City and attend a Canadian university, or play professional hockey.
- [43] The plaintiff determined that his best route to the NHL would be by turning professional. He was confident that he could play at a high level.
- [44] He accepted a tryout with Baltimore of the American Hockey League ("AHL"). He was not successful at the AHL level and played most of the 1996-97 season with Columbus of the East Coast Hockey League ("ECHL").
- [45] The plaintiff's nine-year career was spent mainly in the ECHL with occasional call ups to the AHL or International Hockey League ("IHL").
- [46] Prior to the 2000 - 2001 season, the plaintiff was a prospect for both the expansion Minnesota Wild and the St. Louis Blues. St. Louis was considering the plaintiff for their AHL affiliate. The plaintiff decided to sign a three-way contract with Minnesota. He received a \$25,000 signing bonus and became the organization's fifth goaltender. The three-way contract meant that the plaintiff would receive different salaries depending upon whether he played in the NHL, AHL, IHL or ECHL.
- [47] In his early years of playing professional, the plaintiff continued to binge drink occasionally. The counselling that he received through Lethbridge had provided him with an insight to the anger, shame and blame caused by the abuse. As time went on his anger lessened.
- [48] Mr. Hall was charged with a number of sexual assaults and the plaintiff was interviewed by the police in June 1997. That disclosure was part of the healing process for the plaintiff.
- [49] The plaintiff secured a license to sell real estate in South Carolina and intended to retire at the end of the 2004 season. He married earlier that year and decided that it was time to move on with another career.
- [50] In May 2005, the plaintiff and his wife separated. There was conflict over his inability to generate income. The plaintiff described his wife as emotionally abusive. They attempted to reconcile, but the relationship ended after he assaulted her.

- [51] The plaintiff was recruited to play for the new ECHL team in Victoria starting in September 2005. It was not a happy experience. The team played poorly and the franchise was disorganized. The plaintiff retired from hockey in December of that year and embarked on a full-time career as a commercial realtor.
- [52] During his professional hockey career from 1996 - 2005, the plaintiff earned about \$200,000 in total. In the five years since then, he has had gross earnings of approximately \$225,000.
- [53] The plaintiff has added to his realtor's license by studying for and receiving a mortgage broker's license. He easily completed the academic requirements of the mortgage course.
- [54] In addition to selling commercial real estate, the plaintiff has also sat as a member of the Commercial Council within the Victoria Real Estate Board for the past four years.
- [55] The plaintiff still drinks. However, it is now restricted to once per week consisting of a couple of social drinks after work. He no longer engages in binge drinking.
- [56] The plaintiff enjoys selling real estate, but is unsure if he has enough passion for that occupation to continue with it. He is considering a career in the stock market.

Issues

- [57] The plaintiff claims that the abuse resulted in a loss of opportunity to earn income - both past and future. The defendant says that the abuse was not a factor in the plaintiff's inability to land an NHL contract or earn more income at the higher levels of minor pro hockey.
- [58] The plaintiff also claims that there is an ongoing cost of care and expenses associated with a change in careers. The defendant says that those damages are not causally linked to the abuse.

The Law

- [59] The burden is on the plaintiff to prove on a balance of probabilities that the abuse caused or materially contributed to the loss of opportunity. The plaintiff does not need to prove that the wrongful conduct was the sole cause of the damage: *Athey v. Leonati*, [1996] 3 SCR 458 at paras. 13 - 20.
- [60] If the plaintiff discharges that burden then the loss becomes a certainty. Because these are hypothetical events, the loss is assessed according to proof based on the standard of a real possibility. The question then is whether there is a real possibility that the loss occurred and to what degree: *Smith v. Knudsen*, 2004 BCCA 613 and *Morrow v. Outerbridge*, BCSC 2009 BCSC 433 at para. 274.

Causation

- [61] The defendant did not strenuously deny a link between the abuse, and the likelihood that it would cause damage to the plaintiff in the nature of a loss of opportunity. The more contentious issue for the defendant was the actual amount of the loss suffered by the plaintiff.
- [62] I conclude that the abuse likely resulted in an impairment of the plaintiff's ability to earn income. I have relied on evidence given by Dr. O'Shaughnessy.
- [63] Dr. O'Shaughnessy is a clinical psychologist. He was qualified to give expert evidence in evaluating individuals who were sexually abused in childhood.
- [64] Dr. O'Shaughnessy opined that the plaintiff suffered from Mood Disorder, Substance Abuse Disorder and Personality Disorder. These disorders began to develop during the plaintiff's time at Notre Dame, and worsened up to the time of the Lethbridge incident.
- [65] Dr. O'Shaughnessy was of the opinion that the plaintiff suffered from Major Depressive Disorder at the time of the Lethbridge incident. The treatment following that event was successful.
- [66] The plaintiff has continued to suffer from Dysthymia which is characterized by chronic low levels of depression. Individuals with Dysthymia can function without disability.
- [67] The Personality Disorder caused significant interpersonal problems disrupting the plaintiff's ability to develop close relationships with his peers. The Personality Disorder did not affect the plaintiff's ability to function vocationally, but impacted his capacity to have emotional intimacy with males and females, together with a mistrust of authority.
- [68] Dr. O'Shaughnessy recognized that the issue of causation was complicated by other factors, but the plaintiff did not have any evidence of genetic vulnerability to the disorders that were diagnosed. Dr. O'Shaughnessy concluded:

...It is possible he may have developed difficulties in any event, having left home at age 14 to attend school where he was away from his family and would have been more strongly influenced by his peers at school. Undoubtedly his group of peers likely engaged in alcohol abuse and this could have been a significant factor in his own development of substance abuse difficulties over time. Ultimately, however, I am impressed that given the nature of the sexual assaults and in particular at the critical developmental point that more likely than not the sexual assaults were a material factor in the development of his Mood Disorder and his substance abuse as well as his Personality Disorder. While indeed he may have gone on to develop problems with substance abuse in any event, I think the sexual abuse was a critical factor and more likely than not he would not have gone on to develop these difficulties had the sexual assaults not occurred. [My emphasis]

[Dr. O'Shaughnessy report, June 25, 2007, page 16]

- [69] The defendant called Dr. Saul Miller. He was qualified to give opinion evidence as a psychologist with an expertise in sports psychology of athletes, particularly hockey players. Dr. Miller was unable to provide an opinion as to whether or not the abuse would have impaired the plaintiff's ability to earn income. Dr. Miller had not examined the plaintiff nor had he reviewed relevant clinical records.
- [70] By reason of Dr. O'Shaughnessy's more extensive experience in dealing with victims of childhood abuse, his personal interviews with the plaintiff and his review of relevant records, I prefer his opinion to that of Dr. Miller.

Damages

University

- [71] The plaintiff was a good student. His parents had emphasized schooling from a young age. Both he and his younger brother attended private school. It was expected that both children would attend university.
- [72] The plaintiff claims that he was unable to concentrate on his academics in Grade 11. The plaintiff was of the view that the abuse impacted his emotional state to the point where he would not be able to handle the academic requirements of an American university. As a result he decided to play in the WHL and forfeited any opportunity to secure an NCAA scholarship.
- [73] The plaintiff says that had he gone to an NCAA university he would have achieved a degree resulting in a higher income at the conclusion of his hockey career. The plaintiff says that he had always been interested in a business degree.
- [74] I have concluded that the plaintiff cannot succeed against the defendant under this head of damage, notwithstanding that the plaintiff did develop disorders stemming from the abuse while at Notre Dame. The casual connection between the abuse and the choice to forfeit the NCAA scholarship has not been proven as a reasonable likelihood.
- [75] The plaintiff was recruited by Notre Dame. The school was selling to the plaintiff its reputation to provide hockey training along with the avenue to a university education. I infer from the evidence of the plaintiff that getting a university education funded by a scholarship was of paramount importance to his parents.
- [76] The plaintiff hated Notre Dame. He found it to be isolated and he chafed at the discipline. He had "zero interest" in religious studies. He described the school as akin to a prison.
- [77] The plaintiff's interest was hockey. He found that the coaching was more serious and the game was not as much fun as when he was younger. Nonetheless, the plaintiff continued to excel even though he competed against older age groups.

- [78] The plaintiff's grades slipped in Grade 11. However, the course load was much heavier than in prior years, sciences were not his strength and he was travelling more during the hockey season. His worst grade was in religious studies and it was apparent that he put no effort into that course.
- [79] The plaintiff was disciplined for three incidents in Grade 11. Two were related to alcohol consumption. The third was simply a desire to make money by selling fake identification.
- [80] Although I acknowledge that the plaintiff had begun to suffer Alcohol Abuse Disorder, I do not accept that he was drinking as often as suggested by the plaintiff or his brother. The plaintiff was under scrutiny by school staff. Had he been drinking to the extent suggested, it is likely that his alcohol consumption would have been detected more than once; of the two occasions he was caught, one occurred away from Notre Dame while en route to Victoria.
- [81] The plaintiff viewed academics as an unnecessary intrusion to his focus on playing hockey. Accordingly, I conclude that the plaintiff's academic decline in Grade 11 was not sufficiently related to the abuse to prove a causal connection to his not having attended university.
- [82] Mr. Johansson was the assistant general manager of Tri-City in 1992. He regarded the plaintiff as the best goaltender not currently playing in the WHL.
- [83] When Mr. Johansson learned that the plaintiff's grades had slipped in Grade 11, he pounced. He aggressively recruited the plaintiff and his family. He took the plaintiff to Tri-City to sell him on the hockey program and the benefits of leaving Notre Dame to pursue his hockey aspirations in the WHL. Mr. Johansson's enticement was a full university scholarship immediately upon the plaintiff agreeing to play in Tri- City.
- [84] The plaintiff's father was focussed on having a university education paid for. He supported the move to Tri-City once the university scholarship was offered.
- [85] I have concluded that the plaintiff was not prepared to endure the Notre Dame experience any longer. The school's environment did not suit him and when his father was satisfied that university was paid for, the plaintiff bolted to the WHL. The plaintiff wanted to concentrate on his hockey future - he did not have the time or inclination to devote to academics.
- [86] The plaintiff conceded in cross-examination that he drank the night prior to the SAT because he was not enthusiastic about taking the exam. I infer from that testimony that the plaintiff was not interested in furthering his schooling - his sole focus was to pursue a hockey career.
- [87] This single-minded focus on a hockey career was further confirmed by the plaintiff's failure to advance his education following the expiration of his junior eligibility.
- [88] Accordingly, I find that the decision to forego the NCAA scholarship was not materially connected to the abuse and no damages flow from that event.

Failure to Reach Full Potential As Goaltender

[89] The plaintiff claims that the abuse occurred at such an early stage of his development as a goaltender that he failed to reach his full potential and this has caused losses and damage. The plaintiff claims that the loss of earning capacity amounts to \$2.3 million.

[90] The defendant has argued that there is no real likelihood that the abuse resulted in an impairment of the plaintiff's income earning ability. The defendant argues that it is highly speculative that:

- a) the plaintiff would have been drafted higher had the abuse not occurred; and
- b) his symptoms negatively affected his hockey career.

[91] For the reasons that follow, I find that the damage to the plaintiff's career was the loss of a first contract, being a three-year contract, with an NHL team.

[92] Dr. O'Shaughnessy opined that the plaintiff's disorders caused significant difficulties in his hockey career. In particular, Dr. O'Shaughnessy identified alcohol abuse and an inability to trust most authority figures or form emotional intimacies with others as being detrimental to the plaintiff's career.

[93] Messrs. Johansson and Wamsley, and Dr. Miller, all noted that there is a significant mental and emotional aspect to playing hockey at the professional level. Mr. Johansson noted that players need to be able to adapt, as they are passed from organization to organization, changing roles and changing coaches. He noted that discipline and trust are part of successfully adapting. Dr. Miller indicated that apart from physical ability, hockey players need emotional control, mental toughness, a strong sense of identity, trust, a positive attitude and coachability to excel at the game.

[94] Dr. O'Shaughnessy provided evidence that abuse of the kind suffered by the plaintiff, at the age at which he experienced it, would grossly disrupt the development of his sense of person and his identity. It would result in him perceiving himself to be damaged and angry. It led to the development of personality, depressive, and alcohol abuse disorders.

[95] The plaintiff had difficulty connecting with Mr. Wamsley, his first goalie coach since Mr. Hall. He mistrusted him and could not develop a close working relationship with him. Mr. Wamsley expressed chagrin at the plaintiff's behaviour during the bus incident, because he had been looking forward to monitoring the progress of his drafted goaltender.

[96] Mr. Wamsley confirmed that the bus incident raised a red flag about the plaintiff's character. Mr. Johansson indicated that the bus incident was not a one-off, and that there were other behavioural issues that had contributed to the decision to trade the plaintiff.

[97] The plaintiff's alcohol abuse would have been known to the Leafs and other NHL teams at some point. Mr. Watters commented that a player's reputation gets around easily. Mr. Johansson emphasized that there are no secrets in hockey.

- [98] I am satisfied that the plaintiff's disorders, which affected his mental health, had a negative impact on the mental and emotional tools required to fully realize one's potential as a professional hockey player. What remains to be determined is the extent of the damage caused to the plaintiff's career by the disorders.
- [99] I note that there was no evidence to suggest that any NHL team was aware of the plaintiff's drinking when he was drafted. There was no evidence as to why the Leafs "took a chance" on drafting the plaintiff in the eighth round. Nonetheless, common sense would suggest that the NHL team was sufficiently impressed with his potential so as to hold his rights for the next two seasons.
- [100] Although Mr. Wamsley said that he advised the Leafs not to sign the plaintiff, it was not clear from the evidence of Mr. Watters why a contract was not offered. Mr. Wamsley had changed his role within the organization during the 1994-95 season. He was no longer the goalie coach. There was no indication that he saw the plaintiff's performance during that year.
- [101] Mr. Watters acknowledged that he had no access to any records or documents relating to the plaintiff and he was relying on memory as to what had occurred over fifteen years ago. He did not say that concerns relating to the plaintiff's off-ice conduct, psychological or non-physical issues were the reasons for not offering a contract.
- [102] It was apparent from the testimony of Messrs. Wamsley and Watters that they were both struggling to recall the events surrounding the plaintiff, as there was no documentary assistance available to them.
- [103] I conclude that the Leafs did not offer a contract because the plaintiff had failed to develop to the point where a monetary investment in him was considered prudent.
- [104] The plaintiff theorized that the bus incident was central to decisions that adversely affected his ability to secure a contract. However, the causal connection to the abuse is undermined by the reason for the drinking. Whereas on other occasions, the plaintiff may have consumed alcohol to punish himself, the bus incident was motivated by other reasons. He, along with others, drank so as not to endure the rigours of a long bus ride.
- [105] I have some concerns regarding the reliability of the plaintiff's evidence. The most glaring example was the plaintiff's recollection of the bus incident. He said that it occurred in the 1994-95 season and that shortly after he was traded to Lethbridge. This incident he maintained was what caused the Leafs to lose interest in him.
- [106] However, the evidence was clear that the bus incident occurred in the 1993-94 season. He attended the Leafs' training camp after that and impressed team management. He was not traded until January 1995, which was close to a year after the event, as opposed to shortly thereafter.

- [107] The plaintiff has also testified that he did not trust his coaches. However, he got along well with Mr. McCammon and other coaches that are referenced in the clinical notes. In addition, the plaintiff had a good relationship with Mr. Malarchuk and spent time at his ranch.
- [108] I do not regard the plaintiff as a witness who deliberately sought to mislead the court, but nonetheless there are lingering questions about the accuracy of his evidence. Not every misfortune or disappointment experienced by the plaintiff was caused or contributed to by the abuse.
- [109] There was no statistical data tendered to reflect the plaintiff's career during his tenure in the WHL. However, the plaintiff contends that his best season was after the Lethbridge incident. He had received counselling and medication, and had successfully dealt with the major depressive disorder. In spite of the success he enjoyed during that year, the plaintiff still did not receive any contract offers.
- [110] The plaintiff was represented by a player agent. He commenced his hockey career in the ECHL and played at that level for the majority of the next nine years. Occasionally, he was elevated to play in the AHL or the IHL. The statistics indicate that at the higher levels of professional hockey, the plaintiff was not as effective - his save percentage decreased.
- [111] Of the eight full years played in the minor leagues, in only three seasons did the plaintiff play more than half of the scheduled games. That would indicate that he was not generally the team's starting goaltender.
- [112] The plaintiff was devoted and driven in his commitment to play at the highest level of hockey. He trained diligently during the summers. He drank little during the off season. As he grew older, his anger lessened and he learned to cope with the effects of the abuse.
- [113] The plaintiff was careful not to let alcohol affect his on-ice performance. Although it appears he had some reputation as a disruptive or troubled young man, there was no indication that he refused the assistance of coaches, regardless of his perhaps distant relationships with them, or that he had such an unsavoury reputation that it discouraged teams from giving him opportunities.
- [114] The evidence indicates that the plaintiff was a good ECHL goaltender. That was the level of competition that he could sustain. There was nothing unusual about the fact that he did not play at the NHL level - the overwhelming majority of hockey players do not achieve that goal.
- [115] However, the fact that the plaintiff likely did not have the overall ability to play at a higher level does not result in an elimination of the claim for loss of opportunity.
- [116] The plaintiff was injured at a young age. There was no evidence that measured the impact of the abuse on the plaintiff while he was progressing through his career up to the point when he received the counselling in Tri-City and Lethbridge. However, it is clear from Dr.

O'Shaughnessy's opinion that the abuse was a factor in the disorders that affected the plaintiff. Those disorders materially contributed to the reputation attached to the plaintiff. They also negatively impacted the mental and emotional health and control that were needed to develop as a hockey goaltender.

- [117] The plaintiff performed at a high level throughout his junior career - high enough that he was drafted in the eighth round. Without the disorders, I conclude that there was a real possibility that the plaintiff would have been drafted higher. During his developmental years at Notre Dame and early in his junior career, the plaintiff did not have the benefit of any counselling or treatment. He carried on while being under the burden of the abuse disorders.
- [118] A higher draft position would likely have resulted in the plaintiff being given a better chance to secure a contract. A contracted player is an investment for an NHL team and given a greater opportunity to develop. The plaintiff was denied that opportunity.
- [119] The Leafs' decision not to offer a contract came before the Lethbridge incident. However, even though the plaintiff had his best season after that incident, he was still not signed by any team. The inference to be drawn is that the Lethbridge incident, coupled with the reputation attached to the plaintiff, likely discouraged any team from offering a contract.
- [120] The plaintiff argues that his damages are to be compared to the earnings of other goaltenders that had multiple contracts over several years. The plaintiff urges the court to take the average of those contract earnings as his measure of damages.
- [121] The claim as framed by the plaintiff seeks damages that trace others who secured several NHL contracts. While that claim might succeed under different circumstances, it is not supported by the evidence in this case. To find that the plaintiff's disorders caused or contributed to the plaintiff not earning more money throughout his career would be speculative - the threshold of a reasonable possibility has not been satisfied.
- [122] I conclude that the damage suffered by the plaintiff was the loss of a first contract (being a three year contract) with an NHL team. There was a reasonable possibility that the disorders were the cause of NHL teams initially shying away from the plaintiff.
- [123] The plaintiff was able to showcase his abilities during the balance of his professional career and was successful in securing an NHL contract with Minnesota. He had undergone therapy and overcome his major depressive disorder, and was doing significantly better than he had been around the time of the Lethbridge incident. The disorders did not impede his ability to stop the puck or hamper his ability to take advantage of opportunities once he began playing professionally. However, the plaintiff was not able to replace the loss of that first contract.

- [124] The damages suffered by the plaintiff are difficult to assess. Nonetheless, the court must gaze into the crystal ball and determine what would be a fair and just decision. The damage award is to place the plaintiff into the same position as if the abuse had not occurred.
- [125] The damages are not a mathematical calculation, but rather an assessment based on the evidence at trial. In assessing damages, both positive and negative contingencies must be accounted for.
- [126] There were references made to the earnings of other goaltenders such as Neil Little and Tom Askey. However, I do not find those to be of assistance. Those goaltenders signed multiple NHL contracts. The assessment of the plaintiff's damages is limited to the first contract, which on a reasonable possibility would have been executed.
- [127] Mr. Johansson provided the range of income for eighth round draft picks. The signing bonuses ranged from \$100,000 - \$250,000. Minor league salaries (i.e. AHL and IHL) were \$60,000. The average salary in the ECHL was \$16,000.
- [128] I conclude that the bonus available to the plaintiff would have been more than the minimum. The minimum is not applicable because there was a reasonable possibility that the plaintiff would have been drafted in a higher round. I assess the sum of \$175,000 as a signing bonus.
- [129] If the plaintiff had been signed by the Leafs, he would have been the fifth goalie in the system. That would have started his career in the ECHL. However, if the plaintiff had been contracted by another team, it is reasonably possible that he would have started out in the AHL. The first contract would have resulted in earnings of \$60,000 per year in the minor leagues. That takes into account the contingencies associated with playing in either the AHL, IHL or ECHL. I set the sum of \$180,000.00 as the salaries the plaintiff could reasonably have earned in his first contract.
- [130] The total amount of the first contract amounts to \$355,000 (\$175,000 signing bonus + \$180,000 salaries = \$355,000).
- [131] Dr. Miller was of the view that the plaintiff had only a 10% chance of being signed to a contract. He pointed out that the plaintiff was an average junior goaltender and that his statistics were not overwhelming.
- [132] Margaret McFarlane, an accountant with BDO Canada, did a statistical analysis for the defendant which indicated that late round draft selections had only a 25% chance of being signed.
- [133] I do not accept either of these opinions.

- [134] Dr. Miller was talking about a goaltender performing at the same level as the plaintiff, but who was not encumbered by the abuse disorders faced by the plaintiff. Without the abuse, the plaintiff likely would have performed better. Dr. Miller's view did not take into account that the plaintiff was already damaged.
- [135] Likewise, Ms. McFarlane's analysis did not account for the fact that the plaintiff might have been a higher draft choice but for the abuse. Her opinion was simply a statistical examination of players selected in the later rounds.
- [136] Hypothetical earnings are subject to discounts for contingencies. In the case of a hockey player, the most relevant would be the risk of injury or being relegated to the lower minor leagues.
- [137] The risk of injury is confined to the time period prior to a contract offer and the impact on the amount of the bonus. The pre-contract period is applicable because the bonus would be earned upon signing and not subject to performance measurements.
- [138] The relegation contingency is confined to the post-contract time and only with respect to the annual salaries. The post-contract time is applicable because the plaintiff's performance would establish the salary depending upon which league he played in.
- [139] However, contingencies need to be balanced by positive aspects, which in this case would be the possibility of being elevated to the NHL and earning a much higher salary.
- [140] Taking into account the enormous odds against players reaching the NHL, the positive contingencies are small. The plaintiff had a relatively injury-free career and that reduces the amount of negative discounts. Balancing the positive and negative factors, I have set a 10% reduction in the assessment of damages for downward contingencies.
- [141] After the reduction for contingencies, the value of the first contract amounts to \$319,500 (10% of \$355,000 = \$35,500; \$355,000-\$35,500 = \$319,500).
- [142] Mr. Johannson allocated \$16,000 as the average salary in the ECHL. There has been no documentary evidence to confirm the plaintiff's earnings in the ECHL. Accordingly, the sum of \$16,000 per year is deemed to be the amount that the plaintiff earned during his first three years in the ECHL. The three-year total of \$48,000 is to be deducted from the assessed damages to ensure there is no double recovery or windfall to the plaintiff.
- [143] The award for the loss of opportunity in securing the first hockey contract is \$271,500 (\$319,500-\$48,000 = \$271,500).

Post Hockey Career

[144] Niall Trainor assessed the plaintiff and provided a vocational rehabilitation report. Mr. Trainor concluded that the plaintiff enjoyed his career as a commercial realtor. The plaintiff enjoyed good working relationships with his employer, co-workers and clients. However, Mr. Trainor opined that the plaintiff's Dysthymia put him at risk of decreased productivity, resulting in reduced income, and loss of opportunity for advancement and dismissal.

[145] Mr. Trainor diagnosed the plaintiff as follows:

... in my opinion, DKB now qualifies as a case of "presenteeism". Presenteeism occurs when people show up for work sick, injured, stressed or burned-out and, thus, are unable to be as productive in the workplace as they would normally be. Presenteeism can result in: (a) taking longer to start working after arriving at work, (b) lack of concentration on work, (c) making mistakes and needing to repeat tasks, (d) performing work at a slower pace than usual, (e) feeling fatigued at work, and (f) attending work but not actually doing work. DKB acknowledged that all of these symptoms have applied to him from time to time. Workers with presenteeism are less likely to be promoted and they have an increased risk of job loss due to their inefficiency. They can also experience a catastrophic reaction to job stress, characterized by complete cessation of employment for an indefinite period of time. [Page 8 of the Vocational Rehabilitation Assessment Report, November 17, 2010]

[146] Mr. Trainor was of the view that the plaintiff did not need to undertake a career change at this time. The plaintiff did express interest in other occupations, all of which were similar to his present career and similar in income levels.

[147] Mr. Trainor opined that the plaintiff would have more difficulty than others in adjusting to changes in the labour market as a result of his lowered self-worth and reluctance to form interpersonal relationships with others. That would likely result in the plaintiff having longer gaps between employment positions.

[148] In order to cope with labour market adjustments, Mr. Trainor recommended that the plaintiff have access to a vocational rehabilitation consultant. Mr. Trainor suggested a range of \$10-\$20,000 to be a lifetime budget for such services.

[149] Mr. Trainor has referred to the costs associated with post-secondary education. However, the plaintiff has not expressed interest in pursuing such education in the past. The plaintiff has expressed interest in becoming a stockbroker, which does not require the kind of training contemplated by Mr. Trainor.

[150] The plaintiff earned the following net income since retiring as a hockey player:

2005

\$7,486.00

2006

\$28,394.00

2007

\$40,160.00

2008

\$99,148.00

2009

\$3,251.00

2010

\$40,000.00 (estimated)

[151] The 2005 year is an anomaly because the plaintiff was still playing in the ECHL. Excluding 2005, the plaintiff earned about \$210,000 (rounded off), providing an annual average earning capacity of \$42,000.

[152] Robert Carson, an economist, provided a report setting out the incomes for realtors net of all labour market contingencies (table 7 - column 9). From 2006 to 2010, the average annual earnings were \$72,000.

[153] The plaintiff would have experienced a lower income when starting out. The plaintiff gradually increased his business until he exceeded the average earnings in 2008. Coincidental with the global recession, the plaintiff's earnings plummeted in 2009.

[154] Not all of the reduced income can be attributed to the plaintiff's abuse disorders.

[155] While he may have continued sporadic binge drinking at the time that he saw Dr. O'Shaughnessy in December 2006, the plaintiff no longer abuses alcohol.

[156] The plaintiff's brother testified that alcohol abuse continued to be an issue. He said that the plaintiff continued to binge drink 5 to 10 times per month. The plaintiff denied that to be the case and no other witness confirmed such regular consumption. I accept the evidence of the plaintiff when he says that he was a sporadic binge drinker, which is less than as described by his brother. I also prefer the evidence of the plaintiff when he says that he no longer abuses alcohol.

[157] The plaintiff's current employer said that the plaintiff is underperforming, but is not in jeopardy of losing his position. The employer is very supportive of the plaintiff.

[158] Taking into account the expected lower annual income at the outset of a new career, the uncertainties of the real estate market and the downturn in the economy, I assess \$20,000 to be the plaintiff's income loss from 2005 until the trial date.

- [159] The plaintiff had no difficulties in securing his mortgage broker's license and it is not likely that he will have difficulties in qualifying for other careers should he choose. However, taking into account the recommendations of Mr. Trainor with respect to vocational rehabilitation services, the plaintiff is awarded \$10,000.
- [160] There is a real possibility that the plaintiff will suffer future income losses because of the chronic symptoms arising out of the abuse. At present, the plaintiff is progressing well. His alcohol consumption is under control; he enjoys his employment and gets along well with his employer and co-workers.
- [161] The plaintiff is intelligent, articulate and energetic. He is driven to succeed. The ongoing effects of a personality disorder and Dysthymia can be managed through psychotherapy. The future is bright for the plaintiff.
- [162] The actuarial tables produced by Mr. Carson are of some assistance, but the future loss is an assessment rather than a mathematical calculation. I have assessed the future loss by awarding one year's salary being the equivalent of the present annual average earnings for realtors and rounding it off to \$75,000.
- [163] The plaintiff will benefit from a psychotherapy treatment program. Dr. O'Shaughnessy anticipated 20 to 30 hours of psychotherapy at \$150 per hour. Since the maximum amount of psychotherapy is likely to assist the plaintiff's recovery and thereby reduce the amount of future losses, I award \$4,500 (30 hours at \$150 per hour).
- [164] The defendant argues that the plaintiff failed to mitigate his loss because he did not receive counselling when he disclosed the abuse to his father and failed to take counselling benefits as awarded by the Criminal Injury Compensation Board in 1999.
- [165] The onus is on the defendant to prove that the plaintiff failed to take reasonable steps in mitigation.
- [166] The plaintiff was 13 years old when he was abused. There is no evidence to show that the plaintiff was aware of, or would have appreciated the benefits of counselling at that time.
- [167] The plaintiff testified that he was not aware of the counselling benefits awarded in 1999. He said that his mother made the application and he could not recall if he was ever advised as to the outcome.
- [168] There was no evidence with respect to the nature of the counselling or the impact it might have had on the plaintiff's disorders.
- [169] The defendant has failed to prove that the plaintiff did not mitigate his loss, and accordingly there will be no reduction in the damages as assessed.

[170] The losses awarded to the plaintiff for his hockey related damages, being the loss of his first contract, are to be converted into US dollars since all contracts were negotiated in American funds. The date for the conversion calculation is to be January 1, 1998. If counsel are unable to agree on the conversion calculation, either party may apply within 30 days.

[171] The plaintiff is entitled to prejudgment interest on his past losses.

[172] The interest on the damages flowing from the loss of the first contract is also to be calculated from January 1, 1998. That date is selected as the halfway point of the contract, and keeping in mind that the signing bonus would not have necessarily been paid in a lump sum at the beginning of the contract.

[173] The interest on the past income loss as a realtor shall be calculated from July 1, 2008, which is the halfway point of the loss period. That date takes into account that some of the losses would have been incurred during various times between 2005 and the trial date.

[174] The plaintiff shall be entitled to his costs. If there are any issues relating to the award of costs, either party may apply within 30 days.

Summary

[175] The plaintiff is awarded damages as follows:

a) non-pecuniary damages (as agreed):

\$125,000.00

(b) past income loss

i) loss of first hockey contract

ii) loss of realtor income

\$271,500.00 (U.S.)- approximately \$372,000.00 Cdn.

\$20,000.00

(c) future income loss

\$75,000.00

(d) cost of future care

i) vocational rehabilitation services:

ii) psychotherapy program

\$10,000.00

\$4,500.00

(e) special damages (as agreed)

\$3,000.00

TOTAL:

\$605,000.00

"S.D. Dley J."

DLEY 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/11/04/2011BCSC0418.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/d-k-b-v-british-columbia-2011>

Prepared on 24 October 2026 · Esheria