
CANADA / JUDGMENT

Fillo v. Yoshime

2022 BCSC 1578

COURT

Supreme Court of British Columbia

DECIDED

3 August 2022

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2022 BCSC 1578 Fillo v. Yoshime

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Fillo v. Yoshime,

2022 BCSC 1578

Date: 20220803

Docket: M-200678

Registry: Vancouver

Between:

Randy Fillo

Plaintiff

And

Hannah Yoshime, Mercedes-Benz Financial Services Canada

and Car2Go Canada Ltd.

Defendants

Before: The Honourable Mr. Justice Stephens

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff:

F. Jiwa

Counsel for the Defendants:

S. Eriksson

B.E.M. Moffitt

Place and Dates of Trial:

Vancouver, B.C.

April 12-14, 2022

Place and Date of Judgment:

Vancouver, B.C.

August 3, 2022

Introduction

- [1] THE COURT: On February 11, 2018, the plaintiff, Randy Fillo, then 60 years old, was hit from behind in his truck on his way to meet a friend for lunch. He experienced some pain and discomfort in his right neck and shoulder/back after the accident. Liability for this rear-end collision has been admitted. Now 64, he seeks quantification of his claim for non-pecuniary damages caused by the collision, there being no claim made for past or future loss of earning capacity.
- [2] The plaintiff seeks an award of non-pecuniary damages of \$75,000. The defendants contend the amount should be \$20,000 to \$30,000. For the reasons which follow, I award the plaintiff \$63,000 for non-pecuniary damages, plus special damages at an agreed amount.

Background

The Plaintiff's Life Before the Accident

- [3] At the time of the accident, the plaintiff was 60 years old, living with his mother and brother in East Vancouver. He was single, but had two children from two previous relationships and two grandchildren. One of the previous relationships was with Linda Leadley, with whom he shares two grandchildren and who testified at trial.
- [4] For 16 years, he had worked as a truck driver delivery person for a food services company, delivering food to businesses, including restaurants and care homes. His job involved manual labour, starting early in the day. He loaded and moved food items.

- [5] The plaintiff's mother was elderly and he was responsible for doing home maintenance activities, such as mowing the lawn, trimming trees and shrubs, and power washing. He also did gutter cleaning and shingle repair to the house, as well as some plumbing and electrical work. He also helped Ms. Leadley with her car and undertook household maintenance around her house.
- [6] The plaintiff regularly played with his grandchildren, who are now age seven and nine, which was an important part of his social life. Since the accident, he now has a third grandchild, currently age three.
- [7] The plaintiff had no problems doing his job, performing home maintenance activities, or playing with his grandchildren before the accident. Ms. Leadley testified he did everything - started the mower, did the car, fixed holes and plaster cracks - that dads/husbands do with no complaining. The plaintiff also enjoyed fixing up old cars and riding a dirt bike, which were his recreational activities. He had no problems with these activities prior to the accident.

The Accident

- [8] The plaintiff was hit from behind in his pickup truck on February 11, 2018, while waiting to turn at an intersection. The force was enough to knock his vehicle approximately two feet forward. The collision was jarring, although no airbags were deployed, nor emergency vehicles called, and he did not go to hospital. Later on, the plaintiff developed pain in his right neck, shoulder/back area. He saw his family doctor up until November 2020 and did physio and other treatment up until November 2019. He testified he stopped going to treatment and seeing his doctor, since he did not feel it was helping anymore. The plaintiff agreed that his pain had improved by about 80% by the time of his last physio session. He also testified his pain later worsened during the last year before trial, which I will return to below.
- [9] The plaintiff now takes over-the-counter medication to manage his pain and discomfort.

After the Accident

- [10] At trial, the plaintiff described having continued pain in his right neck, shoulder, and back area. He testified he can still work but has had to modify his work to avoid pain or discomfort, taking lighter loads and adjusting his work practices. He testified he does not ride his dirt bike or fix up cars anymore. He is limited in what maintenance activities he can do at home and for his former partner, Ms. Leadley.
- [11] Additionally, he is more limited in the activities he can do with his grandchildren.

Issues

- [12] The two main issues in this case are: (1) the plaintiff's credibility; and (2) the quantum of the plaintiff's non-pecuniary damages, allowing for any contingencies.
- [13] Credibility is a main issue since there is no expert evidence supporting the nature and severity of the plaintiff's injuries. The plaintiff's claim for damages rests on his largely subjective testimony as to his symptoms, and the defendants challenged his credibility, contending his evidence should be given only "limited weight".

Analysis

Credibility

- [14] *Kim v. Baldonero*, 2022 BCSC 167, at paras. 62 to 63, recently summarized the applicable law in this area:
- [62] Credibility has two components--honesty and reliability. The evidence of an honest witness may be unreliable despite their genuine effort to tell the truth: *Ahonen v. Thauli*, 2013 BCSC 1607 at para. 34 [*Ahonen*].
- [63] In assessing a witness's credibility, courts consider a number of factors such as: the witness's ability and opportunity to observe events; the firmness of the witness's memory; the witness's ability to resist the influence of interest to modify their recollection; whether the witness's evidence harmonizes with independent evidence that has been accepted; whether the witness changes his or her testimony during direct and cross-examination; whether the witness's testimony seems unreasonable, impossible, or unlikely; whether a witness has a motive to lie; and the demeanour of a witness generally: *Bradshaw v. Stenner*, 2010 BCSC 1398 at paras. 186-187, *aff'd* 2012 BCCA 296.
- [15] I find the plaintiff credible in his testimony. He provided his answers in a forthright manner, describing his pain and discomfort and his new limitations after the accident. Ms. Leadley corroborated his testimony as to the physical manifestations of the plaintiff's pain, for example, describing that the plaintiff would play with his grandchildren before the accident in a more robust way, such as, picking them up when playing with them, and he does not do so now.
- [16] The defendants contend that both the plaintiff and the witness Ms. Leadley gave evidence which was inconsistent and lacked credibility, and as a result, submit their evidence should be given little or no weight. I do not accept this. The plaintiff did have some inconsistencies, but he explained some of them with reference to the fact that his pain symptoms changed after his examination for discovery. Other instances of alleged inconsistency in his testimony, or as between his testimony and his examination for discovery, are, in my opinion, not direct inconsistencies impacting his credibility. I will return to this below.

- [17] In regard to Ms. Leadley, I did not find her testimony changed significantly in cross-examination and, with one exception where she gave a non-responsive answer when asked to agree with the proposition that checking automobile brakes does not require physical exertion, which she clearly disagreed with, her answers were fair and forthright.
- [18] I find that, in the main, Ms. Leadley corroborated the plaintiff's testimony that after the accident he is more restricted in his physical activities and with his grandchildren.
- [19] As averted to above, a main issue with the plaintiff's testimony is the difference between certain things he said on discovery, as contrasted with evidence on similar points during his examination in chief or cross-examination at trial. I find the points where the plaintiff was impeached on his discovery were either: (a) not material contradictions in his evidence; or (b) were explained by the changed nature of his symptoms at trial as compared to at discovery.
- [20] For example, the plaintiff was taken to his discovery about the accident where he admitted his vehicle moved two feet forward. This was not inconsistent with his evidence at trial. Similarly, the plaintiff testified at trial the impact of the accident was hard, and was taken to his discovery where he described it as a medium impact, but in my view, this is not a significant inconsistency in his evidence.
- [21] The plaintiff also testified at trial that he had not been able to go dirt biking since the accident, since it was too hard to hold on and steer the bike, and then was taken to his discovery where he testified he had gone to Mission for a day in July 2020 and attempted to venture out on his bike for a few hours, but realized he could not do it comfortably. Similarly, at trial he testified he had not been able to do car restoration work since the accident, while at discovery he testified he had just one car right now that he was currently working on.
- [22] I find these are not inconsistencies. The plaintiff had to try these recreational activities in order to realize he was unable to do them. Stating in his evidence at trial that he no longer performs these activities is not materially inconsistent with him having tried them after the accident only to find out if he is no longer able to do them.
- [23] Finally, the plaintiff was taken to his discovery on several points where his evidence at trial as to his symptoms was materially different from his answers on discovery:
- a) while he said at trial he had headaches five or six times a week, on discovery he said maybe twice a month;
 - b) while at trial he testified as to experiencing shoulder pain every day, on discovery he testified he did not get shoulder pain on a daily basis;

- c) he also testified at trial that he did not sleep through the night and it was rare if he slept straight through, while on discovery he testified he usually slept through the night without waking up and maybe once a week got up in the middle of the night because he could not sleep; and
 - d) at trial, he testified he could not do regular yard maintenance activities, while on discovery he testified he was able to do so for four hours a week, although not up to his usual standards.
- [2] However, on re-examination, the plaintiff explained that his symptoms had been better at the time of his discovery on February 26, 2021, and had worsened by the time of trial, which was approximately 13 months later. This provides a reasonable reconciliation between his evidence on discovery and that at trial, which I accept.
- [3] In summary, I find the plaintiff's evidence was credible.

Defendants' Request for Adverse Inference

- [24] The plaintiff testified that after the accident, he told his employer he was not sure he would be able to work until he was 70, since he was not sure he could last at his job for another five years and might have to retire early because the pain in his shoulder was too much. The defendants contend an adverse inference should be drawn against the plaintiff, since he did not call his employer to give evidence on this point to corroborate his testimony about the impact of his injury and his expected retirement date.
- [25] An "adverse inference may be drawn against a party if, without sufficient explanation, that party fails to call a witness who might be expected to provide important supporting evidence if their case was sound." The adverse inference "is not to be drawn if the witness was equally available to both parties and unless a prima facie case is established": Kim at para. 71, citing *Thomasson v. Moeller*, 2016 BCCA 14 at para. 35; *Singh v. Reddy*, 2019 BCCA 79 at para. 27.
- [26] Here the plaintiff's employer's evidence was not in the exclusive control of the plaintiff. The defendants could have sought details of the employer's evidence on discovery and they could have, but did not, issue a subpoena for the plaintiff's supervisor to provide testimony at trial. I decline to draw an adverse inference against the plaintiff for failing to call a representative of his employer to corroborate his testimony.

Findings Regarding the Plaintiff's Accident-Related Injuries

- [27] Prior to the accident, the plaintiff was active doing household maintenance, fixing up cars, riding his dirt bike, and playing with his grandchildren, including throwing a ball or frisbee and lifting them up at the playground when needed. He described these as things he did with his grandchildren before the accident that he cannot do now because of the pain.

- [28] While the defendants contend that the plaintiff did not expressly say in his evidence these things were important to him, I find that they were significant to him. The fact that the plaintiff would lift up his grandchildren while playing with them before the accident is evidence he found it important. Conversely, that he is now limited in doing so with his three grandchildren, including the youngest who is now three years old, is a loss of enjoyment of his life. I do not accept the defendants' submission the plaintiff's current difficulties with throwing a ball and lifting his grandchildren are merely occasional and of minimal significance.
- [29] The defendants urge for a common-sense approach to the determination of this action. In my view, my finding the plaintiff has suffered a loss of enjoyment of life in respect of the interactions with his grandchildren, given how he played with them before the accident as compared with after and their still relatively young age, accords with common sense. This finding is a material factor in my non-pecuniary damages award analysis set out below.
- [30] I further find, as a result of the accident, the plaintiff has had to adjust his work practices to reduce its physical strain and minimize his discomfort. Even by doing so, he still experiences some pain and discomfort while working. He has not, however, experienced any psychological trauma or anxiety or depression as a result of his injury.

Non-Pecuniary Damages

- [31] The case of Kim recently summarized well-settled law with respect to non-pecuniary damages, quoting that case:
- [79] The purpose of non-pecuniary damages is to compensate the plaintiff for pain, suffering, disability, and loss of enjoyment of life. Non-pecuniary loss must be assessed for both losses suffered by the plaintiff to the date of trial and those he will likely suffer in the future
- [80] In Stapley the Court of Appeal listed common factors influencing an award of non-pecuniary damages. They include: the plaintiff's age; the nature of the injury; the severity and duration of pain; level of disability; emotional suffering; loss or impairment of life; impairment of family, marital and social relationships; impairment of physical and mental abilities; and loss of lifestyle. Generally, stoicism should not penalize the plaintiff
- [81] An award of non-pecuniary damages must be fair and reasonable to each party. Fairness is measured in part against awards made in comparable cases. However, other cases only serve as a rough guide as each case must be decided on its own facts. The amount of the award does not depend only on the seriousness of the injury, but rather also on the loss in the context of the specific plaintiff's circumstances

[Citations omitted]

The "Golden Years" Doctrine

- [32] The plaintiff referred me to the "Golden Years" doctrine in support of his submission. The "Golden Years" doctrine recognizes that injuries may have more of a detrimental impact on older plaintiffs: *Kassam v. Wong*, 2020 BCSC 764 at para. 79, citing *Fata v. Heinonen*, 2010 BCSC 385 at para. 88.
- [33] In particular, older plaintiffs may be more constrained by their injuries than younger plaintiffs, in that their age has already limited them to certain activities and they may have less opportunity to replace those activities with other interests: *Fata* at para. 88.
- [34] Some cases simply consider the loss of enjoyment of a plaintiff's golden years in making an award: *Fata* at para. 88. However, there is a line of authority which holds that the idea that an older plaintiff may have a shorter life expectancy than a younger person and consequently is entitled to a smaller pecuniary award is balanced out by the "Golden Years" doctrine: citing *Giles v. Canada (Attorney General)*, [1995] B.C.W.L.D. 1829 (S.C.), reversed on other grounds, 21 B.C.L.R. (3d) 190 (C.A.).
- [35] In effect, the competing considerations of the plaintiff's older age and the "Golden Years" doctrine balance each other out and should not reduce the non-pecuniary award amount: citing *Duifhuis v. Bloom*, 2013 BCSC 1180 at para. 59 citing *Giles*; *Mathroo v. Edge-Partington*, 2015 BCSC 122 at paras. 95-96; *Johal v. Radek*, 2016 BCSC 454 at para. 52; *Basic v. Barjaktarovic*, 2019 BCSC 142 at para. 85..
- [36] I have considered the "Golden Years" doctrine in making my decision on non-pecuniary damages set out below.

Non-Pecuniary Damage Award Assessment

- [37] The plaintiff cites authorities with a range of non-pecuniary damages from \$60,000 to \$85,000: citing *Kalaj v. Stuart*, 2020 BCSC 2078; *Bucholtz v. Zhang*, 2020 BCSC 571; *Siegrist v. Wiens*, 2022 BCSC 493; and *Carson v. Ehman*, 2019 BCSC 2120.
- [38] The defendant, by contrast, cites cases with a range of non-pecuniary damages from \$20,000 to \$27,000: *Anderson v. Cejka*, 2010 BCSC 772; *Gendron v. Moffat*, 2010 BCSC 1231; *Wallner v. Uppal*, 2012 BCSC 1602; *Harshenin v. MacLeod*, 2013 BCSC 2219; and *Vela v. MacKenzie*, 2012 BCSC 438. Most of the cases provided by the defendants are over 10 years old.
- [39] In my view, *Kalaj* and *Bucholtz* are recent decisions of this Court and are the most helpful as a rough guide, in that the plaintiffs in those cases suffered similar injuries to Mr. Fillo that did not fully resolve. In addition, the plaintiffs in *Kalaj* and *Bucholtz* were generally able to continue working in their jobs, but experienced a decline in their enjoyment of life after the accident due to aggravation of their symptoms. However, these cases are merely a rough guide and this case before me must be decided on its own facts.

- [40] Returning to the Stapley factors, I find as follows: The plaintiff was 60 years old at the time of the accident and is now 64. He suffers a moderate amount of pain and discomfort due to the accident, which has fluctuated since the accident. He is not disabled, but limited in his recreational activities, and while he has not missed any work, he has had to modify his work practices to accommodate his discomfort. He has had no emotional suffering, but has suffered a moderate degree of overall impairment to the quality of his life, most notably including restricting the manner of his ability to play with his grandchildren and also in his recreational pursuits, which has caused him to change his lifestyle.
- [41] The plaintiff has "suffered in silence" as Ms. Leadley put it, and should not be penalized for his stoicism. His pain is not severe, but it has disrupted his life and caused more than merely a minimal impact.
- [42] Having regard to my review of these factors and the case law which the parties have relied on, I find this case has some similarities to Kalaj and Bucholtz, although I consider Mr. Fillo's pain symptoms to be somewhat less severe than in Kalaj and in Bucholtz, and I note in those cases there were also awards for loss of future earning capacity.
- [43] In the circumstances, using Kalaj and Bucholtz as reference points, I find that \$70,000 is a fair and reasonable starting point for the compensation for the plaintiff's non-pecuniary loss.

Contingency Analysis

- [44] However, the analysis does not end there. A court fixing non-pecuniary damages may consider whether contingency should affect the net calculation of the award. Contingencies can be positive or negative, and in *Dornan v. Silva*, 2021 BCCA 228, a contingency reduction was applied to a non-pecuniary damages award at paras. 177 and 178.
- [45] The test for finding a contingency is as follows: first, on the evidence, is the contingency or risk a "real and substantial possibility", meaning a risk that is measurable and not mere speculation: *Dornan*, para. 63. Such a risk need not be proven on a balance of probabilities. Second, if the court determines the contingency is a real and substantial possibility, it must assess its relative likelihood: *Dornan* at paras. 63-64, 93, 95, and 105.
- [46] Here the plaintiff attended physiotherapy, a chiropractor, and received acupuncture following the accident. His last physiotherapy appointment was in November 2019, approximately one year and nine months after the motor vehicle accident. About 15 months later, the plaintiff was examined for discovery in February 2021. I have referred to some of his discovery evidence above. At trial, in re-examination, the plaintiff explained he did not feel as good as he did at the time of discovery, in that his pain and symptoms had since worsened. However, the fact remains the plaintiff did experience some improvement in his pain symptoms and, for example, was sleeping better at the time of his discovery than he was at trial.

- [47] This is evidence on which I find the pain and discomfort the plaintiff is suffering is not consistent over time and has previously improved.
- [48] A contingency deduction concerns a potential future event which can impact the assessment of damages for a compensable injury: Dornan, para. 63.
- [49] In this case, the relevant contingency is that the plaintiff's pain symptoms may improve in the future and be similar to how they were at the time of his discovery, and that his present state at the time of the trial is not his permanent state. I find the plaintiff has had a period of time where his pain has been better in the four years and two months following the motor vehicle accident to the time of trial. I find there is evidence to find a measurable risk of a real and substantial possibility the plaintiff will enjoy a phase or phases in the future where his pain is better than it is now at trial, as it was at the time of discovery.
- [50] Given the evidence before me and considering the fact the plaintiff's pain symptoms were better, although he was still not pain free at his discovery, I find the likelihood of this is not significant and assess its relative likelihood of improving, incorporating the fact that the potential improvement is not to a completely pain-free state, at 10%.
- [51] The plaintiff contended it was also possible that the plaintiff's symptoms could also become worse in the future, not better. I have also considered the possibility that the discomfort will worsen beyond what it was at the time of trial, but have no evidence upon which to conclude there is a real and substantial possibility it will worsen. No expert evidence was tendered at trial by the plaintiff to support this possibility and accordingly I find that it is a risk which, in the words of the case law, is not measurable and is mere speculation.
- [52] In all the circumstances, I find that a 10% reduction for the contingency that the plaintiff's pain may improve in the future to be what it was at the time of his discovery to be appropriate.
- [53] Accordingly, I assess non-pecuniary damages at \$70,000 minus a 10% contingency reduction of \$7,000, for a total non-pecuniary damage award of \$63,000.
- [54] I find on the facts of the plaintiff's case, in the context of the loss the plaintiff has suffered as a result of the accident, this amount is fair and reasonable.

Conclusion and Order

[55] In summary, I award the plaintiff the following damages:

Non-pecuniary loss:

\$63,000

Special damages as agreed:

\$853.89

Total:

\$63,853.89

[56] Interest shall be paid on the special damages portion of this award pursuant to the Court Order Interest Act, R.S.B.C. 1996, c. 79.

[57] Counsel, are you prepared to speak to costs at this time, or would you request leave to make written submissions on costs?

[Discussion regarding timing of costs submissions]

[58] THE COURT: So I will then direct as follows: The parties are at liberty to speak to the matter of costs with the plaintiff providing written submissions of no more than five pages within 10 days of this date, and the defendants providing responsive written submissions of no more than five pages within 10 days thereafter. The plaintiff shall have five further days to provide a written reply, if any, of no more than three pages.

[59] Counsel, do you have any questions with regard to that?

[60] [Further discussion regarding costs submissions and timelines]

[61] THE COURT: Is there anything else, counsel, you wish to speak to at this time, or may we now adjourn?

[62] CNSL F. JIWA: Nothing further from me, Mr. Justice.

[63] CNSL B. MOFFITT: Nothing further from me, Justice.

[64] THE COURT: Thank you, counsel.

[65] CNSL B. MOFFITT: Thank you, Justice.

[66] CNSL F. JIWA: Thank you.

"Stephens J."

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Prepared on 25 October 2026 · Esheria