
CANADA / JUDGMENT

Fung v. Dhaliwal

2020 BCSC 279

COURT

Supreme Court of British Columbia

DECIDED

2 March 2020

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

2020 BCSC 279 Fung v. Dhaliwal

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Fung v. Dhaliwal,

2020 BCSC 279

Date: 20200302

Docket: M184895

Registry: New Westminster

Between:

Alex Ka Chun Fung

Plaintiff

And

Jagraj S. Dhaliwal, South Coast BC Transport Authority,

David A. Fung, and Angela Hoi Yan Fung

Defendants

Before: The Honourable Madam Justice Forth

Reasons for Judgment

Counsel for the Plaintiff:

M. Morgan

Counsel for the Defendants:

A. H. MacLennan

Place and Date of Hearing:

New Westminster, B.C.

November 19-22, 2019

Place and Date of Judgment:

New Westminster, B.C.

March 2, 2020

Introduction

- [1] The plaintiff, Alex Ka Chun Fung, was injured in a motor vehicle accident that occurred on November 30, 2013 in Richmond, BC. Mr. Fung was riding as a passenger in a car driven by his sister. He was sitting in the rear seat behind the front passenger seat. His mother was in the front passenger seat. The car was struck by a vehicle driven by the defendant Jagraj S. Dhaliwal. Liability for the accident has been admitted. The case proceeded as a fast track trial pursuant to R. 15-1 of the Supreme Court Civil Rules, B.C. Reg. 168/2009.
- [2] With respect to the physical injuries, Mr. Fung suffered some strain and bruising to his right upper arm and soreness to his right thigh and hip area. These injuries resolved within a few weeks. He also sustained a cut to the middle of his left long finger. This is the injury that continues to impact his enjoyment of life.
- [3] Regarding the psychological effects of the accident, Mr. Fung has some anxiety when he drives or is a passenger in a vehicle. The symptoms were initially severe but they have gradually reduced. He does drive but will avoid doing so if he can.
- [4] The parties have agreed on the quantum for special damages in the amount of \$755.00.

Issues

- [5] The issues raised by the pleadings, evidence, and submissions are:
1. What are the nature, extent, and duration of the injuries suffered by Mr. Fung?
 2. What is the appropriate award for general damages for pain and suffering and loss of enjoyment of life?

Background

- [6] Mr. Fung was 17 years old and in Grade 12 when he was injured in the accident.

- [7] When he was about 5 years old, he expressed an interest in playing piano. His father bought him a toy piano. His interest continued and within a few years, he was taking piano lessons on an electric piano. He continued to excel and commenced lessons on an upright piano. He commenced his studies with the Royal Conservatory of Music with Jonathan Ng, a professional performer and a certified Associate of the Royal Conservatory of Music ("ARCT") teacher.
- [8] Throughout his schooling, he continued with his piano, and by the spring of 2013, in his final semester of Grade 11, he took the Grade 10 Conservatory piano exam. He achieved a standing of first class honours. The Grade 10 exam required him to learn five pieces. For the Grade 10 exam, he played two pieces: Liebestraum No. 3 in A flat major by Franz Liszt and "Revolutionary" Étude Opus 10, No. 12 by Frédéric Chopin.
- [9] The various Conservatory levels required students to study music history and harmony course requirements. Mr. Fung received very high marks at each level. A video clip of Mr. Fung playing piano in September 2012, when he was just starting to learn the Liebestraum No. 3, is a testament to how skilled of a piano player he had become.
- [10] Mr. Fung testified that he would practice for up to three hours a day when preparing for a Conservatory exam. Otherwise, he would usually practice for two hours a day.
- [11] After obtaining his Grade 10 Conservatory Level standing, Mr. Fung began working towards his teacher's ARCT accreditation. He testified that this is normally a two-year project. He had selected his syllabus pieces, including "Heroic" Polonaise in A flat major, Opus 53 by Frédéric Chopin and La Campanella by Franz Liszt.
- [12] In school, Mr. Fung was an excellent student. In Grade 8, he was the top academic student in the school and received a perfect score on a worldwide math contest for students in his grade. He received a number of scholarships. He studied Cantonese and Mandarin.
- [13] In September 2014, he commenced his university studies at the University of British Columbia ("UBC"). His plan was to continue to work towards his ARCT accreditation while attending university.
- [14] Mr. Fung testified in a forthright, honest, and straightforward manner. He presents as a hardworking and ambitious young man, a son who both of his parents should be proud of.

What are the Nature, Extent, and Duration of the Injuries Suffered in the Accident?

Plaintiff's Position

- [15] The soft tissue injuries resolved quickly with no medical intervention. His mental anxiety while driving reduced after he receive some psychological counselling in the spring of 2017, although he still suffers from anxiety when driving.

- [16] The major issue in this case is the residual impact of the injury to his left long finger on his ability to play the piano. He has a scar and bump on his finger and he no longer can flex it completely. Mr. Fung agrees that his left long finger is functional for day-to-day life. However, Mr. Fung's position is that he is no longer able to play the piano with the same speed, dexterity, smoothness, and power. His ability to flex and curl his finger impacts his ability to play larger chords. He can no longer practice for hours in the manner that he did previously. After playing for about 10-30 minutes, he develops pain and numbness to a degree that he cannot continue. The result is that he has given up pursuing any ARCT exams. He does still play the piano, but he is limited to playing simple pieces and can only play for up to 30 minutes.
- [17] This loss in his ability to play the piano for the same duration or to the same level of competency represents a significant loss of his enjoyment of life. He believes this is a permanent loss. He did attend for some physiotherapy for his left long finger in March and April 2014 but did not continue because his symptoms were not improving.

Position of the Defendants

- [18] The defence position is that Mr. Fung did suffer some injuries in the accident but he did not miss any work or school. He made a substantial recovery within months. He has been left with a three millimetre scar on his left long finger.
- [19] The defence submits that Mr. Fung's evidence of his left long finger impairment is inconsistent with the expert reports. They point to the following evidence:
1. Mr. Fung made no left long finger complaints to his family doctor between December 31, 2014 to July 10, 2019, despite numerous visits;
 2. Dr. Perey, an orthopedic surgeon, who examined Mr. Fung at the request of the defence, opined that the left long finger was impaired for no more than a few months after the accident; and
 3. There exists no expert evidence to support that Mr. Fung's lack of ability to flex his left long finger was caused by the accident.
- [20] The defence submits that the only evidence of ongoing dysfunction in respect to Mr. Fung's ability to play the piano is his own evidence and the "self-serving" evidence from his immediate family members.

Applicable Law

- [21] In order to establish that the accident caused his injuries, Mr. Fung must prove on a balance of probabilities that but for the accident he would not have suffered the injuries of which he complains.

[22] The Supreme Court of Canada considered causation in *Clements v. Clements*, 2012 SCC 32, and confirmed that the basic test for determining causation remains the "but-for" test articulated in *Snell v. Farrell*, [1990] 2 S.C.R. 311, and *Athey v. Leonati*, [1996] 3 S.C.R. 458. The plaintiff bears the burden of proving that but for the negligent act or omission of the defendant, the injury would not have occurred. The "but-for" test recognizes that the plaintiff should only received compensation for the negligent conduct where there is a substantial connection between the injury and the defendant's negligent conduct: *Resurfice Corp. v. Hanke*, 2007 SCC 7 at paras. 21-23.

Application of the Law to the Facts

- [23] As a result of the accident, Mr. Fung suffered some soft tissue injuries and an injury to his left long finger. He also suffers from some anxiety symptoms when driving.
- [24] I accept Mr. Fung's evidence that the residual impact of the injury to his left long finger is that he can no longer play the piano with the same degree of dexterity and strength.
- [25] David Fung, Mr. Fung's father, testified to how, before the accident, his son could listen to music on the TV, radio, or on a CD and then play it. He confirmed his son was a dedicated piano player who practiced piano daily. His son had a dream that he would one day become a piano teacher. After the accident, his son tried to play piano but had trouble warming up and his father noticed a big difference from before the accident. Now, his son can only practice for a short while.
- [26] Angela Fung, Mr. Fung's older sister, testified to how passionate her brother was about playing the piano. She also recalled that her brother planned to teach piano once he had passed his ARCT exams. After the accident, he would try and play for 10 to 15 minutes and then he would stop. He was not able to play as smoothly or as quickly.
- [27] Some YouTube videos were played during the trial of other pianists playing the pieces that either Mr. Fung learned or was learning before the accident. It is clear from the videos the degree of precision, force, and speed that is required to play such technically difficult pieces.
- [28] The defence submission that Mr. Fung's credibility should be impacted because he did not report complaints about his finger to his family doctor is of little weight.
- [29] The absence of any clinical note respecting Mr. Fung's finger in Dr. Wong's records does not necessarily lead to an inference of the non-existence of any symptoms: *Edmondson v. Payer*, 2011 BCSC 118 at para. 36, *aff'd* 2012 BCCA 114. As noted at para. 37:

The same applies to a complete absence of a clinical record. Except in severe or catastrophic cases, the injury at issue is not the only thing of consequence in the plaintiff's life. There certainly may be cases where a plaintiff's description of his or her symptoms is clearly inconsistent with a failure to seek medical attention, permitting the court to draw adverse conclusions about the plaintiff's credibility. But a plaintiff whose condition neither deteriorates

nor improves is not obliged to constantly bother busy doctors with reports that nothing has changed, particularly if the plaintiff has no reason to expect the doctors will be able to offer any new or different treatment. Similarly, a plaintiff who seeks medical attention for unrelated conditions is not obliged to recount the history of the accident and resulting injury to a doctor who is not being asked to treat that injury and has no reason to be interested in it.

- [30] Mr. Fung had complained to Dr. Wong that his finger bothered him while playing piano. He had been referred to physiotherapy for his finger in March and April 2014 and it did not help. There was no reason for Mr. Fung to continue to complaint about the condition of his left long finger when the only impairment it caused him was the loss of playing piano to the same level.
- [31] Dr. Perey examined Mr. Fung on July 30, 2019. Mr. Fung testified that the appointment was 15 minutes long, with 10 minutes spent on medical history. This account leaves five minutes for the physical examination of the hand by Dr. Perey. Dr. Perey has no recollection of the length of the examination or any details about it.
- [32] Mr. Fung testified that during the examination, he demonstrated his ability to move his finger up and down and in circles. He had no difficulty with this display. Dr. Perey did not ask him to perform any repetitive movements with his hand. There were no questions asked about what was required to play classical piano pieces. He was not asked to demonstrate the kinds of movements that were required to play technically difficult pieces of music.
- [33] Dr. Perey is clearly a very knowledgeable hand surgeon but his report and testimony at trial did not address the impairment that Mr. Fung has. Mr. Fung does not have a functional impairment of his left long finger for everyday activities but only for the very demanding ability to learn and play difficult technical classical piano pieces. In my view, Dr. Perey's report and testimony does not impact Mr. Fung's credibility on the impairment he has. As such, I place little weight on Dr. Perey's report.
- [34] The defence is correct that there is no expert evidence opinion on the cause of Mr. Fung's inability to flex his left long finger in the same manner as before the accident. However, the evidence supports that Mr. Fung had the ability to flex it before the accident and that since the accident, he has lost that ability. I accept his testimony of the change and that the cause of the change is the injury and sequelae from it.
- [35] As noted above, Mr. Fung testified in a credible manner. He was not prone to exaggerate the impact of the other injuries he suffered. He was honest in testifying about the recovery he made respecting the other injuries. He was candid in admitting that the only functional impairment he was left with related to playing piano. Throughout his evidence, he presented as a forthright and reliable witness. I see no basis to reject his evidence, which is supported by his father and sister, on the ongoing impairment to his ability to play piano.

What is the Appropriate Award for General Damages for Pain and Suffering?

[36] Mr. Fung seeks an award of \$50,000 for general damages for pain and suffering. The defendants submit that the appropriate award is \$30,000.

Applicable Law

[37] The plaintiff is entitled to reasonable damages for his pain and suffering. The plaintiff should be placed in the same position that he would have been in if the accident had not occurred, but not in a better position: *Parypa v. Wickware*, 1999 BCCA 88 at para. 29.

[38] Non-pecuniary damages are awarded to compensate the plaintiff for pain, suffering, loss of enjoyment of life, and loss of amenities. The compensation awarded should be fair to all parties, and fairness is measured against awards made in comparable cases. Such cases, though helpful, serve only as a rough guide. Each case depends on its own unique facts: *Trites v. Penner*, 2010 BCSC 882 at paras. 188-189.

[39] In *Stapley v. Hejslet*, 2006 BCCA 34, leave to appeal ref'd [2006] S.C.C.A. No. 100, the Court of Appeal outlined the factors to be considered when assessing non-pecuniary damages at para. 46:

The inexhaustive list of common factors cited in *Boyd [v. Harris]*, 2004 BCCA 146] that influence an award of non-pecuniary damages includes:

- (a) age of the plaintiff;
- (b) nature of the injury;
- (c) severity and duration of pain;
- (d) disability;
- (e) emotional suffering; and
- (f) loss or impairment of life;

I would add the following factors, although they may arguably be subsumed in the above list:

- (g) impairment of family, marital and social relationships;
- (h) impairment of physical and mental abilities;
- (i) loss of lifestyle; and
- (j) the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff: *Giang v. Clayton*, 2005 B.C.J. No. 163 (QL), 2005 BCCA 54).

[40] The assessment of non-pecuniary damages is necessarily influenced by the individual plaintiff's personal experiences in dealing with his or her injuries and their consequences, and the plaintiff's ability to articulate that experience: *Dilello v. Montgomery*, 2005 BCCA 56 at para. 25.

- [41] Mr. Fung's counsel advised it was difficult to find a case equivalent to the plaintiff's case. In support of the general damages award, reference was made to: *Kerr v. Macklin*, 2004 BCSC 318; *Blackman v. Dha*, 2015 BCSC 698; *Traquair v. National Arts Centre Corp.*, [2004] O.J. No. 4198 (S.C.J.); *English v. Jao*, 2016 BCSC 1975; and *Kirkham v. Richardson*, 2014 BCSC 1068. Plaintiff's counsel conceded that in all of these cases the extent of injuries suffered by the plaintiff was more extensive. I agree. It is clear that all of those plaintiffs suffered injuries that were more severe and extensive.
- [42] The defence cited *Nair v. Cindric*, 2013 BCSC 2128, which involved a 14 year old plaintiff who sustained a soft tissue injury to her back. Her symptoms carried on at the time of the trial but had a "relatively minimal" impact on her daily functioning. An award of \$30,000 was made for non-pecuniary damages. The defence further submits that all of the plaintiff's cases cited involved injuries that were more extensive with a greater impact on the respective plaintiffs.

Application of Law to the Facts

- [43] Mr. Fung suffered some minor soft tissue injuries that resolved within a few months. He has been left with some anxiety while driving which has now plateaued. He has also been left with a permanent residual injury to his left long finger.
- [44] The injury to his left long finger has resulted in a loss of his ability to play the piano in the same manner as he did prior to the accident. I accept that for Mr. Fung that loss has been profound. It is a significant loss. It changed his future plans, which previously included becoming a professional piano teacher and possibly a performer. He has given up his goal of being certified as an ARCT teacher.
- [45] This change of plans has not affected his overall career aspirations and he has gone on to graduate from the UBC with a Bachelors of Science in Microbiology and Immunology. He works as a researcher at the UBC and BC Children's Hospital. At UBC, he was awarded the Science Scholar Distinction and was on the Dean's Honor list each year. This is a further testament to his dedication as a student.
- [46] I have little doubt, with Mr. Fung's personality of being a hard worker and a dedicated student, that he would have had further success in his piano achievements. This he has now lost. In his words, the loss of not being able to express himself musically was like "taking a part of joy from my life, almost like taking colour away".
- [47] In assessing this loss, I have to also consider that Mr. Fung has not been impaired in any other aspect of his life, and that he suffers no functional impairment in the use of his left long finger in everyday life.

- [48] My views is that Mr. Fung's loss is greater than the loss experienced by the plaintiff in the Nair case. In that case, Justice Skolrood found that the plaintiff was to able to play volleyball and dance but with greater pain and discomfort: para. 55. In addition, the evidence did not support that the plaintiff had aspirations to continue with these activities after graduation from high school: para. 75.
- [49] I have reviewed the cases provided, and in assessing the particular circumstances of Mr. Fung, I am of the view that a fair and reasonable award for non-pecuniary damages is \$42,000.00.

Conclusion

- [50] In summary, Mr. Fung is entitled to damages in the amount of \$42,000.00 for non-pecuniary damages and \$755.00 for special damages.
- [51] With respect to the special damages, Mr. Fung is entitled to pre-judgment interest.
- [52] If the parties are not able to agree on costs, then the plaintiff's counsel is at liberty to file a written submission within 60 days from the date of this judgement. Counsel for the defendants is to file a written submissions within 15 days of the receipt of the plaintiff's submissions. Any reply submissions by the plaintiff must be filed within 10 days of the receipt of the defendants' submissions.

"Forth J."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/20/02/2020BCSC0279.htm>

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

Prepared on 29 October 2026 · Esheria