

CANADA / JUDGMENT

Gravelle v. Seargeant

2013 BCSC 536

COURT

Supreme Court of British Columbia

DECIDED

28 March 2013

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2013 BCSC 536 Gravelle v. Seargeant

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Gravelle v. Seargeant,

2013 BCSC 536

Date: 20130328

Docket: M61290

Registry: Nanaimo

Between:

Dylan Gravelle, an infant,

by his Litigation Guardian, Sandi Gravelle

Plaintiff

And

Michael Seargeant, John Beldham

and Amanda Green

Defendants

Before: The Honourable Mr. Justice Kelleher

Reasons for Judgment

Counsel for the plaintiff:

Richard Johnston

T. Brubaker

Counsel for the defendants:

Richard Hornquist

Place and Date of Trial:

Nanaimo, B.C.

December 12 - 14 & 17, 2012

Place and Date of Judgment:

Nanaimo, B.C.

March 28, 2013

- [1] Dylan Gravelle was injured in two motor vehicle accidents. The first occurred on April 25, 2008 and the second occurred on December 2, 2009. The accidents led to these proceedings.
- [2] In the April 25, 2008, accident, the plaintiff was walking along the gravel shoulder of Lantzville Road, in Lantzville, B.C. The defendant, Michael Seargeant was driving a Dodge Viper. His vehicle struck Mr. Gravelle. The force of the impact threw the plaintiff between 15 and 30 feet. Liability is admitted.
- [3] On December 2, 2009, Mr. Gravelle was driving a Jeep Cherokee. He was involved in a rear-end collision at the intersection of Ware Road and the Island Highway in Nanaimo. The vehicle that struck his vehicle was owned by the defendant John Beldham and driven by the defendant Amanda Green. These defendants admit liability as well.
- [4] In the first accident, the plaintiff sustained a fractured right femur. As well, he complains of injuries to his lower back, right groin and right knee.
- [5] The second accident resulted in upper back and neck pain. These symptoms resolved after three weeks to a month. The injuries were comparatively minor.

The Plaintiff

- [6] Dylan Gravelle was 16 at the time of the first accident and is now 20. He is the youngest of four children. His two brothers, Jesse and Austin, work as drywallers and live in Whistler. His sister Candy, the oldest child, is a personal trainer and lives in Port Alberni.
- [7] Dylan spent his early years in Ajax, Ontario. In October 2004, the family moved to Lantzville. Dylan did Grade 7 in Lantzville and then attended Dover Bay Secondary School for grades 8 - 12. The plaintiff was in grade 10 when the accident occurred.

- [8] The evidence establishes that before the accident, Dylan was not a strong student. Sandy Gravelle, his mother, testified that in his first several years of school in Ajax, he had concentration problems. She helped him with school on a daily basis. He had tutoring assistance for reading, math and English.
- [9] The difficulties persisted when the family moved to British Columbia. Dylan attended Kumon, an after-school tutoring program, for math and reading. He continued at Kumon when he began secondary school.
- [10] Dylan's evidence is that he did not enjoy school or homework. Although he rarely missed a class, he found the work difficult.
- [11] Ms. Gravelle testified that he was an active and happy child but quieter and less confident than his siblings. He liked individual sports more than team sports.
- [12] Dylan enjoyed the outdoors. As a child he went to summer camp and enjoyed, swimming, wakeboarding, kayaking, canoeing and archery. He is a strong swimmer.
- [13] He took up snowboarding at an early age and had a season's pass at a ski hill near his home in Ajax.
- [14] When Dylan came to British Columbia, he was introduced to the ski hills Whistler Blackcomb and Mt. Washington. He became very proficient at snowboarding. He enjoyed snowboarding in powder, on groomed runs, in the trees and in the terrain park. He did jumps including 180 degree and 360 degree turns..
- [15] Dylan also enjoyed mountain biking. The family lived close to biking trails in Lantzville. It was a frequent activity. Dylan liked skateboarding as well. He played rugby in Grade 8 but gave it up in Grade 9 so he could get a job and save money to buy a car.
- [16] The plaintiff had part-time jobs before the accident. He worked at Superstore from April 2006 until March 2008. He did various jobs including price checking and serving as a courtesy clerk.
- [17] In March 2008 he began working at the Bite Cafe. This was a coffee shop operated by his aunt and uncle. He chose the job because he wanted to learn cooking. The job, however, was mostly dishwashing and busing.

The First Accident and its Aftermath

- [18] Dylan testified that he was in severe pain in the moments following the impact. He did not lose consciousness. In fact, he telephoned his mother from where he was lying to tell her of the accident.
- [19] An ambulance attended and transported him to Nanaimo Regional General Hospital. Surgery could not be performed that day, so his leg had to be straightened to put it in a splint. He testified this procedure was very painful.

- [20] The following day, Dr. Colbus Smith performed surgery on his right femur. Dr. Smith said he attempted the closed reduction method but that was not possible. The surgery resulted in the insertion of an intramedullary nail and proximal locking screws.
- [21] Dylan was in the hospital for eight days. During that time, he was medicated and slept a lot. He was discharged with a wheelchair, crutches, and a walker.
- [22] When he was first discharged, a physiotherapist attended at his home every day. This evolved to attendances every two or three days.
- [23] One month after the plaintiff's discharge, he was referred to a physiotherapist, Michael Wawrykow. This involved both aquatic exercises and work in the gym.
- [24] Dylan did not return to school that term. He was given some home assignments but testified that he had difficulty concentrating. The school permitted him to progress to grade 11.
- [25] In March 2009, Dr. Smith referred the plaintiff to the Long Lake Physiotherapy Clinic for further treatment. After the accident, he did not work until September 1, 2009, when he began a part-time job at Moxie's Grill. Again, he hoped to do some cooking. He spent one year working there, until September 1, 2010 (apart from three weeks he missed in December 2009 following the second accident). He worked 10 to 20 hours per week. His job included dishwashing. He found that standing for more than 4 hours resulted in pain in his groin and lower right side.
- [26] Dylan completed Grades 11 and 12 as scheduled. His courses were largely non-academic including automotive mechanics. He completed Grade 12 in June 2010.
- [27] In September 2010, he returned to work at the Bite Cafe. He stopped working there in January 2011 when his family moved from Lantzville to Nanaimo.
- [28] The plaintiff's next job was at Byte Computer Camp. He worked there from March to June 2011. This involved teaching elementary students to create games with software.
- [29] Mr. Gravelle decided to pursue a course in computer skills at Vancouver Island University. He applied in 2011 but learned that his mark in English 12 was too low for admission to the program. He redid English 12 and achieved the necessary mark for admission. Mr. Gravelle began the course in September 2012. The course includes some 12 hours of classes per week. He achieved a "B" mark in his mid-terms.
- [30] Mr. Gravelle is also working part-time at Quality Foods. This job includes some baking.
- [31] Mr. Gravelle has spent considerable time exercising at home and attending at a gym. This included one on one training at Core Essentials, strengthening his right leg and his core.
- [32] The plaintiff saw Dr. Smith again on January 5, 2012. Dr. Smith recorded these complaints:
1. snowboarding leads to groin pain by the end of the day;

2. bending down causes some pain in the lumbosacral junction on the right side;
3. standing for periods of more than 4 hours results in groin pain;
4. walking for more than 1 kilometre causes similar pain.

The pain has remained the same since one year after the injury. It includes anterior groin pain and right posterior back pain.

[33] Dr. Smith expressed his prognosis in these terms:

In my opinion, Mr. Gravelle has not made a full recovery from his collision related injuries. His two medical problems (lower back pain and right groin pain) will persist into the future. There is a less than 50% chance that removing either the proximal locking screws or the locking screws and the intramedullary nail will alleviate his right groin pain.

His right lower lumbosacral back pain has persisted at the same levels of intensity and frequency throughout the last three years and has not improved despite adequate physiotherapy, rehabilitation and conditioning.

From assessing his functional capacity evaluation, it appears that he remains chronically weak on his right side with inability to perform activities to the same level as on his uninjured side.

After nearly four years of rehabilitation and reconditioning, I have to accept that this will persist into the foreseeable future and has a possibility of being aggravated by subsequent surgery like removing of the intramedullary nail.

I, therefore, have to conclude that both his injuries are permanent to such an extent that it can affect his daily living, recreational and social activities, as well as his ability to carry out housework and yard work.

[34] Dr. Smith is of the view that the femur fracture has healed well.

[35] The plaintiff's description of his current symptoms is consistent with what Dr. Smith's recorded. He said that standing for long periods of time results in knee pain. He experiences groin pain if he lifts his knee more than 90 degrees, climbing a ladder for example. He says that swimming and treading water leads to hip pain.

[36] Mr. Gravelle went snowboarding 2 weeks before the trial. He said he was less aggressive than before the accident and took more breaks. All the same, he said he felt pain during the day and was very stiff the following day.

[37] The plaintiff has seen three orthopaedic surgeons: Dr. Smith, who performed the surgery; Dr. Stanley Leete, who saw Mr. Gravelle at the request of counsel for the plaintiff; and Dr. Alan Richardson, who performed an independent medical examination at the defendant's request.

[38] After consideration of the evidence of these physicians and the plaintiff, I conclude that Mr. Gravelle suffered the following injuries in the accident:

(a) Right femur fracture

[39] There is no dispute that Mr. Gravelle suffered a comminuted fracture (that is, broken in a number of pieces) in the accident. The fracture itself has healed well.

(b) Soft tissue injury to the lower back

[40] Counsel for the plaintiff referred him to Dr. Leete. Dr. Leete concluded that the plaintiff had a leg length discrepancy and this could lead to back pain. He ultimately agreed in cross-examination that the plaintiff had suffered no back injury in the accident.

[41] I do not accept that conclusion. Dr. Leete saw him on one occasion. As Dr. Smith has noted, and as I observed, the plaintiff is not always forthcoming regarding his symptoms. This is an aspect of his stoicism.

[42] The plaintiff has testified that his back pain continues to be a problem, especially after working a full shift at work. Dr. Smith's opinion is that the accident caused a "lower back injury mostly to the musculotendinous tissues of the right lumbar spine". Dr. Smith, after all, saw the plaintiff on several occasions in the course of post-surgical care. He came to this conclusion:

Dylan's lower back pain, although not a "dangerous" type of condition, will persist into the indefinite future with moderate disability associated, also influencing his recreational and occupational endeavours to a moderate degree.

I accept and agree with this conclusion.

(c) Knee pain

[43] Mr. Gravelle has intermittent knee pain. He testified it bothers him when running or biking on the stationary bike.

[44] Dr. Richardson concluded that the prognosis is "moderate to good" as these symptoms are only intermittent.

[45] Paul Pakulak is an occupational therapist who performed a functional capacity evaluation. Mr. Pakulak stated that Mr. Gravelle reported "occasional aching and burning pain in the right knee (a few times per month) that usually comes on with more intense physical activity".

(d) Right groin injury

[46] Mr. Gravelle's evidence is that the right groin pain is present all the time and is aggravated by bending, standing, and walking when working at the bakery in Quality Foods. Dr. Smith in his January 17, 2012, report states that the anterior groin pain persists.

[47] Mr. Gravelle said that he experiences more pain at the end of the day he has had a long day of work, or participated in activity such as riding the stationary bike, running, or snowboarding.

Non-Pecuniary Damages - First Accident

[48] The purpose of non-pecuniary damages is to ameliorate the condition of the victim considering his particular situation. It is essential to appreciate the nature of the loss of the individual. An award must meet the circumstances of each case: *Lindal v. Lindal* [1981] 2 S.C.R. 629 at 637.

[49] In *Stapley v. Hejslet*, 2006 BCCA 34, the British Columbia Court of Appeal reviewed the factors to be generally considered in awarding non-pecuniary damages:

[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 arguable 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).

[50] The following is the application of these factors to the plaintiff:

- (a) Age of the plaintiff:

Mr. Gravelle was 16 when the accident happened. The evidence establishes that he will likely suffer some measure of pain for the rest of his life.

- (b) Nature of the injury:

Mr. Gravelle suffered a fractured right femur that required an open reduction and insertion of an intramedullary nail and locking screws. He also suffered injuries to his low back, right groin and right knee, which remain a cause of pain.

(c) Severity and duration of pain:

He was in severe pain for a short period of time. He was required to take pain medication for 4 - 6 months. Four and a half years after the accident he continues to suffer pain.

(d) Disability:

The plaintiff was totally disabled for some six months, and continues to have some measure of disability.

(e) Emotional suffering:

The plaintiff's mother testified that the plaintiff was isolated and less confident following the first collision. He did not seek counselling for this.

(f) Loss and impairment of life:

Mr. Gravelle's life was interrupted and altered by the first collision. He missed part of Grade 10. His mobility was significantly restricted during the summer. He has permanent injuries and has some impairment of his ability to perform physical labour and enjoy his former physical pursuits.

(g) Impairment of family, marital and social relationships:

Mr. Gravelle does not enjoy spending a lot of time with friends. He was somewhat like this before the accident as well.

(h) Impairment of physical and mental abilities:

He has a permanent impairment of his physical capabilities. There is no impairment of his mental abilities.

(i) Loss of Lifestyle:

Mr. Gravelle was unable to engage in snowboarding, an important part of his life, for some time. He has been able to return to it, but pain prevents him from snowboarding in the same manner as before.

(j) Stoicism:

Mr. Gravelle is somewhat stoic in his presentation. The defendant agrees that the plaintiff should not be penalized for this.

- [51] I have reviewed several authorities, including those the parties referred to in argument: Hildebrand v. Musseau, 2010 BCSC 1022; Meghji v. Lee, 2011 BCSC 1108; Verse v. Chan, 2012 BCSC 876; Bouchard v. Brown Bros. Motor Lease Canada Ltd., 2012 BCCA 331; Hutchings v. Dow et al, 2006 BCSC 629; Slocombe v. Wowchuk, 2009 BCSC 967; Cantin v. Petersen; 2012 BCSC 549; Klassen v. AG Canada, 2004 BCSC 479; Taylor v. Depew; 2012 BCSC 1403; and Nicoll v. The Owners of Strata Plan 1611; 2005 BCSC 770.
- [52] Of course, each plaintiff's circumstances are distinct. Some of the cases involve traumatic brain injuries. Some involve depression. Thankfully, neither of those situations is present here. Nonetheless, these cases read together are instructive as to the range of damages awarded in analogous cases.
- [53] Having considered the plaintiff's injuries and the factors listed above, in light of the case law, I assess non-pecuniary damages at \$85,000.

Non-Pecuniary Damages - Second Accident

- [54] Mr. Gravelle's evidence is that he experienced pain in his neck and upper back for three to four weeks following the second accident. He was off work for three weeks. He has no residual pain.
- [55] These were minor soft tissue injuries divisible from those sustained in the first accident.
- [56] I assess non-pecuniary damages at \$3,500.

Special Damages - First Accident

- [57] The plaintiff and defendant are agreed that an award of \$2,589.72 is appropriate for special damages. It is so awarded.

Past Wage Loss - First Accident

- [58] The plaintiff claims a wage loss of \$4,984.20. This amount is based upon his return to part-time employment on September 1, 2009. The plaintiff argues he should be awarded \$2,527.20 for the period from the date of the accident to December 31, 2008. This is a period of just over six month (36 weeks x 7.5 hours/week x \$9/hr x 1.04 for vacation pay).
- [59] The claim for the period from January 1, 2009 until September 1, 2009 is a further \$2,457 (35 weeks with the same formula).
- [60] The evidence does not establish that the plaintiff was disabled beyond 2008. He was a full-time grade 11 student in the 2008-09 school year. His course work included Cooking 11 which required he work Monday to Friday in the cafeteria.
- [61] The plaintiff led no evidence, medical or otherwise, to substantiate such an extended period of disability.

[62] I agree with defence submissions that an eight month disability period is warranted. I award wage loss of \$2,527.20.

Past Wage Loss - Second Accident

[63] The parties agree that Mr. Gravelle lost three weeks of part-time work, or 28.2 hours at \$10 per hour. There is no dispute that the plaintiff was disabled from December 2 to December 23, 2009. I award \$282.

Diminished Earning Capacity - First Accident

[64] Mr. Justice Savage in *Parker v. Lemmon*, 2012 BCSC 27 at para. 42, summarized Madam Justice Garson's decision in *Perren v. Lalari*, 2010 BCCA 140, as follows:

- (1) A plaintiff must first prove there is a real and substantial possibility of a future event leading to an income loss before the Court will embark on an assessment of the loss;
- (2) A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation;
- (3) A plaintiff may be able to prove that there is a substantial possibility of a future income loss despite having returned to his or her employment;
- (4) An inability to perform an occupation that is not a realistic alternative occupation is not proof of a future loss;
- (5) It is not the loss of earnings but rather the loss of earning capacity for which compensation must be made;
- (6) If the plaintiff discharges the burden of proof, then there must be quantification of that loss;
- (7) Two available methods of quantifying the loss are (a) an earnings approach or (b) a capital asset approach;
- (8) An earnings approach will be more useful when the loss is more easily measurable;
- (9) The capital asset approach will be more useful when the loss is not easily measurable.

[65] The evidence establishes the first hurdle in *Perrin v. Lalari*: the plaintiff has established a real and substantial possibility of a future event leading to an income loss.

[66] Dr. Richardson said this about future employment:

There is no absolute contraindication for Mr. Gravelle to carry out whatever activities he desires, as long as he can tolerate the symptoms of those activities. However, Mr. Gravelle most probably will want to restrict his activities to decrease his symptomatology. This would include most heavy, labour intensive work. As well, if impact activities increase symptomologies, he may want to avoid those.

[67] Paul Pakulak conducted a functional capacity evaluation in July 2011. His conclusions included these:

In my opinion, Mr. Gravelle demonstrated the physical capacity to be employed on a full time basis at up to a modified medium level (with some rare lifting at medium to modified heavy level provided it is not from the floor) with limitations as noted above. Below waist level work should be kept to an occasional basis in order to limit right leg and back strain.

Thus it is also my opinion that his overall capacity to compete for work in an open job market has been reduced due to his ongoing limitations related to back and leg pain. That is, the overall number of jobs that he would be able to compete for is limited compared to prior to his injuries.

[68] He also said:

In my opinion Mr. Gravelle demonstrated the capacity for activity requiring modified medium level strength. He demonstrated the capacity for some aspects of full medium strength activity but did not demonstrate this level of strength in all aspects of lifting and carrying. He demonstrated specific limitations related to prolonged and repetitive below waist level work. Given his response to testing (significant increase in reported pain levels during the assessment and a reduction in speed and capacity over the course of the assessment), I would anticipate that prolonged activity above a modified medium level and/or without provision for the above limitations will adversely impact his productivity and safety.

[69] Mr. Pakulak said with respect to his employment at the Bite Cafe, that it was significant that the plaintiff reported that the work there was not as fast paced as it was at Moxie's and there were more opportunities to sit down over the course of the shifts.

[70] In assessing the future loss, it is important to note that Mr. Gravelle is not academically inclined.

[71] Sandy Gravelle testified that tutoring was necessary for Mr. Gravelle throughout his elementary and secondary school years. John Gravelle, Dylan's father, testified that none of his children have gone to university and it did not occur to him that Dylan would do so.

[72] Both before and after the accident, Mr. Gravelle has had little interest in academic subjects.

[73] Derek Nordon performed a vocational evaluation, based on his interview and testing of Mr. Gravelle and his review of Mr. Pakulak's report.

[74] Mr. Nordon administered a number of tests measuring academic achievement, aptitude, and vocational interests. Mr. Nordon as well concluded that Mr. Gravelle is not academically inclined and best suited to work for positions where training occurs primarily on the job. He felt Mr. Gravelle would be able to cope with a short-term training program of one year's duration.

[75] Mr. Nordon concluded that a number of occupations were not available to him: working in the pulp and paper or forest industry.

- [76] Mr. Gravelle has expressed an interest in pursuing culinary studies. Mr. Nordon is concerned about the aggravation of symptoms with prolonged standing. This is a characteristic of culinary work.
- [77] Mr. Nordon concluded that web design and animation for internet applications was a worthwhile type of work to pursue. That kind of work is not unrelated to the studies in which Mr. Gravelle is currently enrolled.
- [78] The difficulty with web design work is that much of it is part-time.
- [79] It is particularly difficult to assess future loss of income in a case like this. Mr. Gravelle is a young man. His interests could change. While cooking is seen by Mr. Nordon as unlikely because of the prolonged standing required, there may be work options where breaks could be taken. Given Mr. Gravelle's interest in cooking, one cannot rule out that type of work. It may well be, from Mr. Gravelle's point of view, worth the trouble. Nonetheless, it is clear that higher paid labouring jobs are not likely available to the plaintiff. He has sustained a loss.
- [80] Balancing all of the factors, it is reasonable to assess damages based on a future loss of income to age 70. Mr. Gravelle is certainly able to work in a number of occupations. Other occupations which are likely more lucrative are foreclosed to him.
- [81] My assessment of an appropriate award is \$290,000.

Loss of Domestic Maintenance Capacity

- [82] The plaintiff testified that several household chores which he performs cause pain and therefore take longer to perform: cleaning the bathroom, shovelling snow, mowing the lawn, gardening, vacuuming and doing dishes.
- [83] While the plaintiff is presently living at home, that situation will not be permanent. When he lives on his own, he will have difficulty with heavier aspects of yardwork and home maintenance. Mr. Pakulak said in his functional capacity evaluation that the amount of assistance would depend on the size and layout of his home and yard.
- [84] In the circumstances, a modest award is justified. I award \$10,000.

Cost of Future Care

- [85] The plaintiff argues that an adult pass at the City of Nanaimo Recreational Centre is necessary. That pass will enable him to continue the rehabilitation program designed for him by Mr. Goaks at Core Essentials. I assess the cost of future care at \$10,000.
- [86] To summarize, I award the following:

Non-Pecuniary Damages - First Accident

\$85,000.00

Non-Pecuniary Damages - Second Accident

\$3,500.00

Special Damages - First Accident

\$2,589.72

Past Wage Loss - First Accident

\$2,527.20

Past Wage Loss - Second Accident

\$282.00

Diminished Earning Capacity - First Accident

\$290,000.00

Loss of Domestic Maintenance Capacity - First Accident

\$10,000.00

Cost of Future Care - First Accident

\$10,000.00

TOTAL:

\$403,898.92

[87] Costs may be spoken to.

"S.F. Kelleher J."

The Honourable Mr. Justice Kelleher

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Prepared on 29 October 2026 · Esheria