

CANADA / JUDGMENT

Hufty v. Graham

2023 BCSC 16

COURT

Supreme Court of British Columbia

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2023 BCSC 16 Hufty v. Graham

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Hufty v. Graham,

2023 BCSC 16

Date: 20230105

Docket: M-173733

Registry: Vancouver

Between:

Martin Bruce Hufty

Plaintiff

And

Tracey Dawn Graham

Defendant

Before: The Honourable Justice Edelmann

Reasons for Judgment

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Place and Date of Trial:

Vancouver, B.C.

October 24-25, 27-28, 31

November 1-4, 2022

Place and Date of Judgment:

Vancouver, B.C.

January 5, 2023

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Introduction

- [1] This action arises out of a motor vehicle accident that occurred in Pitt Meadows, BC, on November 24, 2015 (the "MVA"). Mr. Hufty's vehicle was rear-ended by the defendant Ms. Graham and pushed into the vehicle in front of him. The defendant accepts that Mr. Hufty was injured in the MVA and that Ms. Graham's negligence was the cause of the MVA. The only issues to be decided are the extent of the injuries caused by the MVA and the damages resulting from those injuries.

Injuries and Causation

- [2] At the time of the collision, Mr. Hufty describes being thrown forward and back in his vehicle but does not recall hitting his head. He did not seek medical attention at the time, but went to see his family doctor in the following days. He describes pain in the shoulder area where the seat belt would have restrained him, soreness in his arm and tingling in his fingers, all of which resolved in the weeks following the MVA. After taking about five days off, he was able to return to his work as a property manager.
- [3] The primary physical injuries which continued after this initial period were pain in his upper and mid back, headaches and tinnitus. The headaches had largely resolved by 2017. Mr. Hufty had suffered from tinnitus in the past as a result of his work in railroad maintenance. The tinnitus had become a background issue that did not bother him but was aggravated after the MVA for a significant period of time. The tinnitus had returned to the previous background level by the time of trial.
- [4] Mr. Hufty had pre-existing issues with his lower back and had been seeing a chiropractor regularly since 2014. He distinguishes two areas of pain in his back. The issues in his lower back were as a result of manual work on railroads in the 1990s and have been an ongoing minor issue since then, which can be aggravated by certain activities. The problems with his neck and upper back manifested themselves after the MVA and continued for some years afterwards.
- [5] Mr. Hufty also described a number of psychological effects which continued after the initial five-day recovery period. In particular, his sleep, memory and concentration were affected in the years following the MVA. He says he was unable to remember details relevant to his work as a property manager and would have to rely more on assistants and other employees. Both he and his spouse describe him being more irritable during this period.
- [6] Mr. Hufty also experienced driving anxiety for a period of time following the MVA, although he continued driving regularly for work. The anxiety appears to have largely resolved following sessions with a psychotherapist in the fall of 2017.
- [7] By 2017 or 2018 Mr. Hufty's physical injuries had largely stabilized or improved significantly. However, around 2019 a "knot" formed in his mid to lower back which continued to be an issue at the time of trial. Mr. Hufty describes the knot as forming when he sits in the same position for a long period of time, and in particular when he is driving. He describes feeling like someone is squeezing the muscle to the point where he needs to pull his car over to stretch the muscle as he cannot continue driving. Once he is able to shift positions or stretch the knot becomes manageable.

- [8] Both the plaintiff and the defendant tendered expert opinion evidence on various issues. The plaintiff called Dr. Zeeshan Waseem, a physiatrist; Dr. Gordon Robinson, a neurologist; Dr. Leslie Kiraly, a psychiatrist; Dr. Vance Tsai, an otolaryngologist, and Ms. Cheryl Black, an occupational therapist. The defendant called Dr. Dommann, a neurologist, and Dr. Mike Berger, a physiatrist.
- [9] The experts largely agree that the soft tissue injuries in Mr. Hufty's neck and upper and mid back were likely caused by the MVA. The aggravation of the tinnitus is also consistent with the nature of the MVA. There was some disagreement between the neurologists and the psychiatrist about whether or not Mr. Hufty suffered a concussion during the MVA. In my view, not much turns on this distinction in the present case. The alternative explanation is that the psychological impacts of sleep loss, memory loss and irritability were caused by the pain from the physical injuries. Whether these symptoms resulted from a concussion or pain disorder, I am satisfied they were caused by the MVA. While a diagnosis of concussion might have been significant for the prognosis of the symptoms, this issue is somewhat moot as the psychological issues had largely resolved by the time of trial.

Past Loss of Income and Loss of Earning Capacity

- [10] Mr. Hufty continued to work full time as a property manager for the Affordable Housing Society ("AHS") from the time of the MVA until his retirement in April 2022. The only issue relating to loss of earning capacity is whether Mr. Hufty had to retire earlier than he otherwise would have done as a result of his injuries from the MVA.
- [11] The principles applicable to a claim of past lost earning capacity are the same as the principles applicable to a claim of future lost earning capacity: *Grewal v. Naumann*, 2017 BCCA 158 [Grewal] at para. 46, citing *Smith v. Knudsen*, 2004 BCCA 613 at para. 29. The plaintiff must establish (i) impairment of earning capacity, and (ii) a real and substantial possibility of an event resulting in a loss: *Grewal* at para. 48.
- [12] While in many cases the actual lost income will be the most reliable measure of the loss, it is not the actual lost income but the lost capacity which is compensable (see *Ibbitson v. Cooper*, 2012 BCCA 249 at para. 19). That being said, compensation for past loss of earning capacity is to be based on what the plaintiff would have, not could have, earned but for the injury that was sustained: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30; *M.B. v. British Columbia*, 2003 SCC 53 at para. 49.
- [13] The AHS operates rental units for low-income individuals throughout the lower mainland. Mr. Hufty was hired as a senior property manager in 2013. His portfolio would come to include just over a dozen buildings in the area between New Westminster and Mission. He was responsible for managing tenants, repairs, renovations and other issues with the assistance of the resident managers at each building. With the exception of a period during the COVID-19 pandemic, he was expected to attend each of the buildings at least once in each two week period.

- [14] By 2022, Mr. Hufty was earning \$82,628 per year in his employment. He testified that his plan was to work until he was 67/68 or more before retiring. This was in part because his spouse was a few years younger than him. Another significant factor was that he and his spouse had sold their assets and travelled to the South Pacific when she had been diagnosed with terminal cancer some 20 years ago. Fortunately, she recovered fully but they were left with more limited assets for retirement and therefore would have to work longer.
- [15] As noted above, when the knot formed in his back in 2019, it affected Mr. Hufty's ability to drive. During the initial stages of the COVID-19 pandemic, he was able to do much of his work from home and was not required to visit the sites. As operations returned to normal, Mr. Hufty says the requirement for regular driving became too much for him and as a result he ultimately decided to retire early in April 2022. He seeks damages for 3-5 years of lost salary for a total of just over \$400,000. I do not accept that Mr. Hufty has established a loss of that magnitude.
- [16] Mr. Hufty's evidence about his retirement plans was somewhat equivocal. In his testimony he said that he did not have fixed retirement plans, but would likely have worked until he was 67, 68 or 69. In recent years, Mr. Hufty and his spouse had decided they would retire in Nova Scotia as homes were more affordable there and they could not afford to buy in British Columbia. They made an offer on a home in Nova Scotia in January 2021, purchasing the property in July 2021. Mr. Hufty's testimony about his intentions at that time were somewhat unclear. It would appear that in July 2021 he did not intend to move to Nova Scotia right away but was going to continue working for some time and rent the home in the meantime, although no arrangements were ever made to rent the property. Sometime later that year, Mr. Hufty decided that the driving at work was too much for him and that he would retire at age 65. Mr. Hufty and his spouse moved Nova Scotia in early May, 2022. Notably, Mr. Hufty drove the family vehicle from Maple Ridge to Nova Scotia in May, 2022. His spouse said that he had to pull over from time to time to stretch and rest, but it is clear that he was able to drive for long periods without significant impediment.
- [17] Therefore, while I accept Mr. Hufty's evidence that the discomfort he regularly felt when driving rendered a position that required almost daily driving to be unsustainable, I do not find that it was at a crisis point. Mr. Hufty quite candidly admits that he made no efforts to find alternative employment either prior to or after leaving AHS. If Mr. Hufty planned to work past the age of 65, there is no explanation as to why he would not have sought alternate employment that did not require the extent of driving he says was unsustainable. He clearly demonstrated an ability to deploy his skillset remotely for AHS during the initial stages of COVID-19. He was also actively engaged in a leadership role at his local masonic lodge up until the time of his departure, which would further indicate an ability to continue in a management-type role that did not require driving. I therefore do not find that Mr. Hufty has established that his injuries were an impediment to finding alternate employment.

- [18] I do accept that finding alternate employment at the age of 65 would have been challenging and that Mr. Hufty may well not have found employment at the same level of remuneration. However, without any effort on his part to find such employment or any type of evidence on the relevant labour market conditions, it is somewhat challenging to assess how limited his options may have been at that time or continue to be now. There is little doubt that the decision to move to rural Nova Scotia is likely to have further limited any employment prospects Mr. Hufty might have had, and the decision to move was not related to his injuries from the MVA.
- [19] Ultimately, the onus is on the plaintiff to establish his loss. On the evidence before me, I find that it was reasonable for Mr. Hufty to make a transition from a position that required extensive driving to a position that did not have such a requirement. I also accept that there would likely have been some loss of income inherent in such a transition, in particular given Mr. Hufty's age at the time.
- [20] In my view, half a year of his salary at the time of retirement provides an adequate approximation of the loss that has been made out on the evidence before me. I find such an award to adequately balance the fact that Mr. Hufty left his employment at AHS earlier than he would have done but for the injuries suffered in the MVA with the fact that he had a residual capacity to work which he chose not to employ. As the award takes into consideration both an early departure from AHS and a subsequent reduction in earning capacity, I find an appropriate allocation to be \$20,000 for the period between April, 2022 and the date of trial and \$21,000 in future loss of earning capacity.

Non-Pecuniary Damages

- [21] Non-pecuniary damages are awarded to compensate the plaintiff for pain, suffering, loss of enjoyment of life, and loss of amenities. In *Stapley v. Hejslet*, 2006 BCCA 34, the Court of Appeal outlined the factors to be considered when assessing non-pecuniary damages including the age of the plaintiff; nature of the injury; severity and duration of pain; disability; emotional suffering; and loss or impairment of life. 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.
- [22] There is no question that the MVA had an impact on Mr. Hufty's life. At the time of the MVA, he was an active 58-year-old man who did extensive gardening, yardwork and regularly played golf. The MVA not only caused him physical injuries, but also impacted his mental capacity and psychological wellbeing for a significant period of time. While he was able to resume many of his activities, his physical capacity has been reduced and he continues to suffer from symptoms resulting from the MVA some seven years later.

- [23] The plaintiff submits that the appropriate range of non-pecuniary damages is between \$130,000 and \$165,000: *Kennedy v Cumming*, 2019 BCSC 983 [Kennedy] (\$110,000); *Kijowski v. Scott*, 2015 BCSC 2335 [Kijowski] (\$140,000), *Halvorson v. West*, 2021 BCSC 1322 (\$110,000). I find the nature and impact of the injuries in the cases cited by the plaintiff to be substantially different in several respects from the situation before me. For example, in *Kennedy*, the plaintiff broke his back and was off work for ten months finding himself almost bankrupt as a result. In *Kijowski*, the plaintiff had suffered permanent hearing loss and ongoing bouts of dizziness resulting in subsequent falls.
- [24] The defendant submits that \$50,000 to \$80,000 in non-pecuniary damages is an appropriate award under this head of damage, relying on the following authorities: *Nagra v. Stapleton*, 2017 BCSC 2225 (\$45,000) [Nagra]; *Yip v. Saran*, 2014 BCSC 1283 (\$55,000); *Graydon v. Harris*, 2013 BCSC 182, *aff'd* 2014 BCCA 412 (\$60,000); *Riley v. Ritsco*, 2018 BCCA 366 (\$85,000) [Riley]; *Clubine v. Paniagua*, 2018 BCSC 146 [Clubine] (\$55,000) and *Chaudhry v. Henville*, 2021 BCSC 2318 (\$80,000).
- [25] While no two cases are identical, I find that the overall impact on the plaintiffs in the cases cited by the defendant more closely approximates the situation before me, although less so in the cases at the lower end like *Nagra* and *Clubine*. While many of Mr. Hufty's initial psychological injuries were somewhat similar to those in *Riley*, they have since resolved unlike the situation before the Court of Appeal in that case. Taking all the circumstances into consideration, I find that an award of \$70,000 for non-pecuniary damages is warranted.

Costs of Future Care

- [26] Since his last massage therapy session in January 2022 and subsequent move to Nova Scotia, Mr. Hufty has not incurred any expenses related to caring for his injuries from the MVA. He seeks an award for the costs of future care in the event that his symptoms were to flare up again. Given Mr. Hufty's history of back issues over the past seven years, I accept that there is a real possibility that some of Mr. Hufty's symptoms will flare up again and that he will require physiotherapy, chiropractic or massage therapy in the future as a result. In my view, given the significant improvement in his symptoms since the move to Nova Scotia, \$1,500 provides an adequate approximation of the cost of caring for any future flare-ups.

Special Damages

- [27] Mr. Hufty seeks a total of \$22,482.04 in special damages. The defendant only takes issue with a few items.
- [28] Mr. Hufty claims the costs of a moving company for his move to a new house in August 2017. He testified that but for his injuries he would have done the moving himself with the assistance of friends. He conceded that neither he nor his friends had a moving van and I accept that it is reasonable to assume he would have had to rent a moving van in any event. Without any further evidence of the cost of a van, I find that a deduction of \$200 from the moving expenses is a reasonable approximation of the cost of a moving van given the

distance in question. The defendant does not challenge the need for the moving services themselves.

- [29] In 2018, Mr. Hufty purchased a rowing machine from Costco which he has used three or four days a week since that time. Several medical professionals have recommended that Mr. Hufty remain active and strengthen his core. While none of them specifically recommended a rowing machine, I find that the purchase of the machine was related to Mr. Hufty's injuries and reasonable in the circumstances. I note that given his regular use of the rowing machine, it has proven to be more economical than most gym memberships. I will allow this expense.
- [30] The defendant argues that she should not be responsible for the full amount of the chiropractic visits with Dr. Reed as Mr. Hufty was already attending the chiropractor for his pre-existing back issues and those visits would have continued regardless of the MVA. While I accept that it is likely Mr. Hufty would have gone to the chiropractor for his pre-existing back and neck issues, it is also clear that the primary complaints that were being addressed after November 2015 were MVA-related injuries. In my view, a 15% deduction adequately approximates the amount of chiropractic services attributable to non-MVA causes. I will therefore deduct \$654 from the amount sought.
- [31] The defendant accepts that the travel expenses for Mr. Hufty to attend a defence-initiated Independent Medical Exam in Vancouver should be allowed, but takes issue with the purchase of a "premium economy" rather than an "economy" ticket. This issue was not put to Mr. Hufty and he did not have an opportunity to explain why such a ticket was purchased, nor is there any evidence before me that a more economic ticket was available. I will therefore allow the expense in question.
- [32] Given the two deductions set out above, I will therefore order \$21,628.04 in special damages.

Summary

[33] Damages are awarded as follows:

- a) Past income loss (subject to deductions): \$20,000;
- b) Loss of future earning capacity: \$21,000;
- c) Non-pecuniary damages: \$70,000;
- d) Cost of future care: \$1,500
- e) Special damages: \$21,628.04.
- f) Subrogated Claim of Pacific Blue Cross: \$1,325.60

Costs

[34] If the parties are unable to agree on costs, they may arrange to make submissions on the matter within 30 days of the issuance of these reasons.

"Edelmann, J."

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