

CANADA / JUDGMENT

Jones v. McMann

2020 BCSC 1645

COURT

Supreme Court of British Columbia

DECIDED

4 November 2020

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

2020 BCSC 1645 Jones v. McMann

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Jones v. McMann,

2020 BCSC 1645

Date: 20201104

Docket: M1710240

Registry: Vancouver

Between:

Kevin Jones

Plaintiff

And

Neil McMann, Her Majesty the Queen in Right of the Province of British Columbia / the Government of the Province of British Columbia, or Her Majesty the Queen in Right of the Province of British Columbia as represented by the Ministry of Attorney General, Sherriff Services; BC Sherriff Services; John Doe

Defendants

Before: The Honourable Madam Justice Francis

Reasons for Judgment

Counsel for the Plaintiff:

B. Cooper

Counsel for the Defendants:

C. Megaffin

Place and Date of Trial/Hearing:

Vancouver, B.C.

September 28-30 and

October 1-2, 2020

Place and Date of Judgment:

Vancouver, B.C.

November 4, 2020

- [1] Kevin Jones seeks damages for injuries he claims to have suffered in the parking lot of the Vancouver Law Courts while being transported by sheriffs from the courts to pre-trial detention. On December 8, 2015, the sheriff's vehicle transporting Mr. Jones hit a concrete barrier while backing up (the "Accident"). Mr. Jones was sitting in the back seat of the vehicle in handcuffs and leg shackles at the time. He claims that the impact caused injuries to his neck, back, hip, knee, and ankle.
- [2] Liability has been admitted by the defendants and the matter proceeded to trial on damages only.
- [3] The plaintiff seeks non-pecuniary damages and damages for cost of future care. The defendants submit that Mr. Jones has failed to prove a causal connection between his alleged injuries and the Accident, and they submit that his evidence of his injury symptoms lacks credibility. The defendants resist all elements of the plaintiff's claim.

Background Facts

Before the Accident

- [4] Mr. Jones was charged with first degree murder and was taken into pre-trial custody in or around June 2014. He has been in custody ever since. In May 2016, he was sentenced to life in prison with no possibility of parole for 25 years.
- [5] Mr. Jones had an active life prior to his incarceration. Video evidence shows him playing basketball at an outdoor court in Yaletown in 2013, and lifting weights at the Steve Nash Sports Club on Granville Street. He testified that he enjoyed running on the seawall and participating in outdoor activities with his fiancée.
- [6] Mr. Jones and his fiancée, Yvette Bikus, have been in a relationship since 2010. They have a five-year-old daughter. Ms. Bikus testified that Mr. Jones has always been extremely fit and active, and that physical fitness plays a large part in Mr. Jones' sense of self worth.

- [7] In 2012, Mr. Jones injured his left knee while working out at Steve Nash. The severity of this pre-existing injury and the amount of pre-Accident knee pain the plaintiff had from this injury were matters in dispute at trial.
- [8] For some time prior to the Accident, Mr. Jones had ongoing issues with a three tooth bridge that he says was faultily installed in his mouth and caused him ongoing pain. In the year prior to his incarceration, he visited the emergency room at St. Paul's Hospital at least three times due to pain from his bridge.
- [9] Also prior to the Accident, while in pre-trial custody at Surrey Pretrial Service Centre, Mr. Jones was prescribed Marinol and Cesamet, both synthetic THC medications, as treatment for post-traumatic stress disorder. He did not give evidence, nor was he cross-examined, on when he was diagnosed with PTSD or what symptoms he experienced from his PTSD.
- [10] Mr. Jones' pre-Accident medical records were not in evidence, with the exception of his Pharmanet Profile and his MSP printout for the two years preceding the Accident. Therefore, the only source of evidence for any pre-existing conditions suffered by Mr. Jones was Mr. Jones himself. Mr. Jones testified that he was healthy prior to the Accident and required no medical care, with the exception of some visits to the doctor for pain related to his dental problems and some ongoing digestive complaints.

The Accident

- [11] At the time of the Accident, Mr. Jones had been in custody for more than a year.
- [12] The Accident took place after one of Mr. Jones' court appearances. He was sitting in the back seat of the sheriff's vehicle. The vehicle had a hard fiberglass seat and no seat belts. The sheriff who was driving backed the vehicle into a concrete pillar while driving at a low speed. Because Mr. Jones was in handcuffs and leg shackles, he was sitting in an awkward position when the vehicle struck the pillar. He claims that on impact, he hit his head on the bars inside the vehicle, his knee smashed into the side of the vehicle door. He described the chain around his ankles "snapping" on impact in a jerking motion.
- [13] Mr. Jones testified that he immediately felt pain in his neck, upper back, lower back, hip, left knee, and right ankle.
- [14] Mr. Jones received first aid at the scene of the Accident and was returned to Surrey Pretrial Centre where he received further medical attention.
- [15] The initial post-Accident medical chart note from Surrey Pretrial says that Mr. Jones reported that he had been sitting at an angle when the sheriff's vehicle collided with a pillar. The author of the notes states that Mr. Jones sustained injuries only to the left side of his body.

After the Accident

- [16] Mr. Jones claims that since the Accident he suffers from headaches, left neck and trapezius pain, upper back pain, right lower back pain, left hip pain, left knee pain, right ankle pain, and sleeping problems.
- [17] On October 4, 2016, Mr. Jones registered a grievance with Correctional Service Canada about a doctor's refusal to prescribe him synthetic THC-based products. In that grievance he wrote that he wished to be "properly treated for my PTSD and injuries sustained in a car accident December 2015" and that he had previously been treated with Marinol "to treat my disabilities". When asked on cross-examination what disabilities he was referring to, Mr. Jones testified that he could not recall. It is therefore not entirely clear whether Mr. Jones ever received synthetic THC-based medication for his Accident-related injuries, or whether these medications were prescribed only for his PTSD.
- [18] Mr. Jones' grievance was unsuccessful and he is no longer prescribed THC-based products.
- [19] According to the clinical records, between the date of the Accident and the date of trial, Mr. Jones had nine separate doctor's appointments with respect to pain complaints. He also had five consultations with nurses during this period of time, also related to his pain complaints. He received 23 physiotherapy treatments between October 2016 and September 2018.
- [20] Mr. Jones takes non-prescription painkillers every day.
- [21] Mr. Jones has had some medical imaging done since the Accident. A December 19, 2015 X-ray of his cervical spine showed mild degenerative disc disease, and an X-ray of the lumbar spine taken the same day showed a mild 2 mm anterolisthesis. X-rays of the left knee and thoracic spine taken the same day were normal.
- [22] Another set of X-rays was done on April 30, 2018. These X-rays showed degenerative changes in Mr. Jones' lumbar spine.
- [23] William Todd McGladdery, a physiotherapist, testified that he treated Mr. Jones before and after the Accident. He described Mr. Jones complaining to him after the Accident about right lower back pain, and to a lesser extent, right neck pain and some left knee pain. He also described treating Mr. Jones for an Achilles tendon injury prior to the Accident.
- [24] Mr. McGladdery's notes suggest that the most consistent complaint that Mr. Jones made to his physiotherapist after the Accident was lower back pain. Mr. McGladdery testified that during the time he was treating Mr. Jones, he observed that Mr. Jones had decreased motion in his lower back, pelvis, and hip, as well as muscle tightness in his right low back and right hip. To a lesser extent, he had decreased motion in his mid-back and neck, and thickening of his right Achilles tendon.
- [25] A clinical entry from March 2, 2018 refers to Mr. Jones seeking medical assistance for "chronic pain from multiple stab wounds including a car accident causing nerve pain to lower back and left hip and knee." The defendants did not cross-examine Mr. Jones on this

particular clinical record, but Mr. Jones did admit in cross-examination that there were at least two post-Accident incidents in which he was stabbed by another inmate. He denied chronic pain from these incidents. In addition to the two stabbing incidents, there were at least two other incidents post-Accident of Mr. Jones being physically assaulted by another inmate, although Mr. Jones denied that any of the assaults contributed to his ongoing neck, upper back, lower back, hip, knee, or ankle complaints.

Evidence of Dr. Faraday

- [26] Dr. Trent Faraday prepared an expert report and testified at trial as an expert in musculoskeletal injuries, musculo-ligamentous injuries, chronic pain arising from accidents, and pain management.
- [27] Like any doctor diagnosing soft tissue injuries, Dr. Faraday relied on the subjective reporting of Mr. Jones to assist him in coming to his conclusions. Dr. Faraday interviewed Mr. Jones and also reviewed his post-Accident medical records. He was not provided with any pre-Accident medical records to review.
- [28] Dr. Faraday concluded that Mr. Jones has chronic neck, upper back, lower back, left hip, left knee, and right ankle pain that is probably musculo-ligamentous. He opined that Mr. Jones sustained all of these injuries in the Accident.
- [29] On cross-examination, Dr. Faraday was taken through the X-ray reports from December 2015 and April 2018. While he agreed that the X-rays were consistent with a diagnosis of mild arthritis, he noted that mild arthritis often is not associated with any pain. He did not agree that the X-rays supported the defendants' theory that Mr. Jones' pain is caused by degenerative changes in his spine.
- [30] Dr. Faraday testified that if he had known that Mr. Jones was treated for an Achilles injury pre-Accident, this could change his opinion as to causation with respect to Mr. Jones' current ankle pain. He was not asked to what extent, if any, he thought Mr. Jones' pre-existing knee injury was a contributing factor to his ongoing knee pain.
- [31] When Dr. Faraday prepared his expert report, he was not given Mr. Jones' MSP history. On cross-examination, he was asked to review a printout of Mr. Jones' MSP claims from January 20, 2014 - March 26, 2017. By referring to the diagnostic codes used by MSP, Dr. Faraday was able to discern that Mr. Jones had five doctor's visits between January 2014 and the Accident, and that the diagnostic code used by the doctors was not the diagnostic code for neck pain, back pain, or knee pain. Dr. Faraday was not familiar with the diagnostic codes that were used so he was unable to say anything about the nature of Mr. Jones' five pre-Accident doctor visits.

Credibility

- [32] The court cannot assess credibility solely on the demeanour of a witness. Credibility must be assessed in accordance with the preponderance of probabilities when reviewing the evidence as a whole: *Faryna v. Chorny*, (1952) 2 D.L.R. 354 (B.C.C.A.) at 356; *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 187.
- [33] The assessment of credibility involves a host of considerations, including whether a witness' evidence harmonizes with independent evidence that has been accepted, the ability of the witness to resist the influence of interest to modify his recollection, and whether the witness changes his testimony during direct and cross-examination: *Bradshaw* at para. 186.
- [34] There are a number of problems with Mr. Jones' evidence that call into question his credibility and reliability. They include:
- a) Mr. Jones testified that he had no ankle or Achilles injury or pain before the Accident. His treating physiotherapist, Mr. McGladdery, testified that he first treated Mr. Jones for an Achilles tendon strain in the summer of 2015, six months before the Accident. The post-Accident clinical records refer at least twice to a prior Achilles injury. A January 27, 2020 entry refers to Mr. Jones having "chronic Achilles tendon pain post partial tear years ago."
 - b) Mr. Jones testified that since the Accident he is no longer able to lift weights. Mr. McGladdery testified that Mr. Jones continues to lift weights and he has assisted Mr. Jones with developing a weight lifting routine that is safe for his injuries.
 - c) Mr. Jones testified that he received no medical services prior to the Accident other than the treatment of his dental problems and stomach indigestion. However, he admitted that he initiated a grievance with Correctional Service Canada when he was no longer prescribed marijuana products for a PTSD diagnosis that predated the Accident. He also appears to have had a pre-Accident knee injury, which he disclosed to Dr. Faraday, and a pre-Accident Achilles injury, which he did not disclose to Dr. Faraday.
 - d) Mr. Jones testified that he only suffered one injury while in custody but on cross-examination admitted to four separate violent incidents in prison that caused him physical injury and required medical attention.
 - e) On a number of questions on cross-examination, Mr. Jones simply answered "I don't recall", including:
 - i. what medication he took before the Accident;
 - ii. whether he was taking any form of medication prior to incarceration in June 2014; and
 - iii. whether he consumed any narcotics while in custody since the Accident.

- [35] Because of the inconsistencies in the plaintiff's evidence, I must exercise caution and examine his evidence carefully. This is particularly true because of the nature of the plaintiff's injuries and the fact that they are proven primarily on the basis of subjective reporting.
- [36] As Mr. Justice Smith noted in *Edmondson v. Payer*, 2011 BCSC 118, aff'd 2012 BCCA 114:
- [2] Neither the medical profession nor the court can measure or confirm the existence of pain. Some accident victims may consciously or unconsciously exaggerate their pain or become unduly focussed upon it. It is therefore well settled that where a plaintiff's case relies on subjective symptoms with little or no objective evidence of injury, the court must be "exceedingly careful" in its examination of the evidence: *Price v. Kostryba* (1982), 70 B.C.L.R. 397 at 399 (S.C.).
- [3] However, in my view, it is equally the case that a defendant who accuses a plaintiff of deliberate falsification—an accusation that effectively amounts to one of fraud and perjury—must be prepared to present the court with something more than speculation and innuendo.
- [37] In this case, the defendants' arguments about credibility and reliability go beyond speculation and innuendo. The defendants have pointed to instances where the plaintiff has been untruthful or evasive in the evidence he has given to the Court on matters that are central to his claim. As such, I have approached Mr. Jones' evidence with great care.

Causation

- [38] The test for factual causation is the "but for" test. The defendants' negligence must be necessary to bring about the injury - in other words the injury would not have occurred but for the defendants' negligence: *Clements v. Clements*, 2012 SCC 32 at para. 8.
- [39] I accept the truthfulness of Mr. Jones' evidence with respect to his chronic pain, insofar as I accept his evidence that he feels pain in his neck, back, hip, knee, and ankle on a daily basis. Since the Accident, Mr. Jones has consistently complained to doctors and nurses at Kent Institution and Pacific Institution, the two federal penitentiaries where he has resided since the Accident, about his chronic pain. I found him to be persuasive and credible in his evidence about the various ways in which pain impacts his day to day life.
- [40] However, I do not accept that all of his chronic pain started at the time of the Accident, or was caused by the Accident.
- [41] Mr. Jones did not disclose his pre-Accident Achilles tendon injury to Dr. Faraday, or to the Court in direct examination. He sought to minimize his pre-Accident knee injury which, according to Dr. Faraday, was a pre-Accident source of pain. He was vague and at times misleading about his pre-Accident medical condition more generally, including the medications he was taking and the conditions he was diagnosed with.

- [42] Mr. Jones' credibility challenges are not assisted by his counsel's decision not to put any pre-Accident medical records before the Court. In the course of submissions, counsel for the defendants advised that they had demanded but never received pre-Accident medical records, with the exception of Mr. Jones' MSP and Pharmanet printouts. For reasons that could not be explained by the defendants' current counsel (who was retained just a few weeks before trial), prior counsel for the defendants never brought an application to compel the plaintiff to disclose any pre-Accident medical records.
- [43] The burden is on the plaintiff to establish that the Accident caused his injuries. I must determine causation on a balance of probabilities on the basis of the record. The plaintiff has demonstrated himself to be an unreliable historian and no medical records have been put into evidence to support his claim that he was injury-free before the Accident. According to the evidence of each of Dr. Faraday and Mr. McGladdery, Mr. Jones had pre-existing injuries to his knee and Achilles tendon before the Accident. I find that Mr. Jones has not proven on a balance of probabilities that his chronic knee and ankle pain was caused by the Accident.
- [44] However, based on the evidence of Dr. Faraday and Mr. McGladdery, I find that Mr. Jones has met the burden of proof with respect to his neck, upper back, lower back, and hip injuries. Both professionals did physical examinations of Mr. Jones and identified range of motion limitations and other indicators of chronic lower back/hip pain. Dr. Faraday opined that, due to the fact that Mr. Jones was in handcuffs and leg shackles and had no seatbelt, it was medically plausible that the low velocity impact of the Accident could lead to multiple musculo-ligamentous injuries. Dr. Faraday also was able to discern from the MSP printout for Mr. Jones that none of the plaintiff's five medical visits in the two years prior to the Accident related to back or neck pain. I am satisfied that Mr. Jones has met the burden of proving, on a balance of probabilities, that the Accident is the cause of his ongoing neck, upper back, lower back, and hip pain.

Non-Pecuniary Damages

- [45] The plaintiff seeks an award of \$70,000 for non-pecuniary damages. The defendants argue that the plaintiff should not receive any damages.
- [46] Non-pecuniary damages are awarded to compensate a plaintiff for pain, suffering, loss of enjoyment of life and loss of amenities. In assessing non-pecuniary damages, the court may look to awards made in analogous cases. However, each case must turn on its own unique facts. No two personal injury claims are identical and awarding damages involves an exercise of judgment: *Kapelus v. Hu*, 2013 BCCA 86 at para. 16.

- [47] In *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46, the Court of Appeal enumerated the factors to be considered in assessing non-pecuniary damages. The factors to be taken into account include: the plaintiff's age; the nature of the injury; the severity and duration of pain; disability; emotional suffering; impairment of family, marital, and social relationships; impairment of physical abilities; loss of lifestyle; and the plaintiff's stoicism.
- [48] Mr. Jones' counsel relies on a number of cases to support his non-pecuniary damages claim. Only one of those, *Friesen v. Moo*, 2018 BCSC 1866, involved a plaintiff in custody. In *Friesen*, the plaintiff had injuries somewhat similar to the plaintiff in this case and the Court awarded \$60,000 in non-pecuniary damages. However, the plaintiff in *Friesen* was on the verge of being released from prison, which meant the court properly considered his recreational life outside of prison when assessing damages for loss of enjoyment of life.
- [49] Mr. Jones is serving a sentence for first degree murder. His enjoyment of life has been primarily curtailed not by the Accident but by the fact that he is serving a long sentence in a federal prison. It is not helpful, therefore, to look at Mr. Jones pre-incarceration life in order to determine his loss of enjoyment of life. Thus, the cases relied on by the plaintiff, all of which involve active young men whose ability to enjoy their active lives was curtailed by accident-related injuries, are of very little assistance.
- [50] Mr. Jones also testified that he is a practicing Muslim and his ability to engage in daily prayers is negatively impacted by his accident-related injuries. He relies on *Ali v. Rai*, 2015 BCSC 2085, for the proposition that injury-related impediments to engaging in Muslim prayers five times a day should be considered in assessing a non-pecuniary damages award.
- [51] Mr. Jones testified that his knee and ankle are sore when he tries to kneel and bow to the ground in prayer position. I accept that the pain in his knee and ankle would likely be exacerbated by these motions. However, having found that Mr. Jones' knee and ankle pain were not caused by the Accident, I have not considered this impediment as part of a non-pecuniary damages award.
- [52] Mr. Jones also submits that I should consider his ability to play with his child and step-children as part of a non-pecuniary damages award. Prior to the Covid-19 pandemic, Mr. Jones' fiancée and her children visited Mr. Jones approximately once every two months. Mr. Jones testified that sometimes on those visits, his daughter likes to climb on him and engage in horseplay, and when this happens he experiences back pain. I accept that Mr. Jones derives great joy from seeing his family and playing with his daughter. However, since these visits only take place approximately six times a year, I cannot find that any back pain Mr. Jones suffers when his child climbs on him exceeds the *de minimis* range in terms of impacting his enjoyment of life.
- [53] I accept that Mr. Jones' lower back pain has impacted his ability to do some of the recreational and fitness activities he enjoys in prison. This is relevant to his entitlement to a non-pecuniary damages award. Mr. Jones is still lifting weights, running, and playing basketball, just not at the level he was able to before. The primary impediments to him

playing basketball appear to be his knee and Achilles, not the parts of his body that were injured in the Accident. Any non-pecuniary damages award he is entitled to is therefore modest.

[54] I find that an award of \$10,000 for non-pecuniary damages is appropriate in the circumstances.

Cost of Future Care

[55] The test for assessing future care costs is whether the costs are reasonable and whether the items are medically necessary: *Tsalamandris v. McLeod*, 2012 BCCA 239 at para. 62.

[56] Dr. Faraday made a number of treatment recommendations, all based on his opinion that the plaintiff's neck, upper back, lower back, left hip, left knee, and right ankle pain were caused by the Accident. I have found that only the neck, upper back, lower back and hip injuries were caused by the Accident.

[57] However, Dr. Faraday's recommendations are all related to pain management and all appear to be reasonable and medically necessary to treat Mr. Jones' lower back and hip pain. Dr. Faraday testified that one could expect the plaintiff's symptoms to improve over 3-5 years, so the recommended treatments are for a duration that does not exceed five years.

[58] The plaintiff originally sought \$1,700 for cost of future care, but after trial amended his claim to exclude the cost of Advil. Therefore, the only items the plaintiff seeks are:

- a) TENS machine, one time purchase: \$230.00
- b) Lumbar pillow, replaced once \$70.00

[59] I am satisfied that the claimed future care costs are reasonable and are medically recommended.

Conclusion

[60] In summary, the damages are assessed as follows:

Non-pecuniary damages

\$10,000

Cost of Future Care

\$ 300

[61] If the parties are unable to agree on costs, they may make arrangements through Supreme Court Scheduling to appear before me to speak to the issue, but they must do so no later than thirty days from the date of this judgment.

"Francis 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/20/16/2020BCSC1645.htm>

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

Prepared on 25 October 2026 · Esheria