
CANADA / JUDGMENT

Poon v. Chiu

2020 BCSC 1382

COURT

Supreme Court of British Columbia

DECIDED

13 March 2020

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2020 BCSC 1382 Poon v. Chiu

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Poon v. Chiu,

2020 BCSC 1382

Date: 20200313

Docket: M177062

Registry: Vancouver

Between:

Yuk Leung Poon

Plaintiff

And

Mercedes-Benz Financial Services Canada Corporation

and Giselle Chiu

Defendants

Before: The Honourable Mr. Justice Edelmann

Oral Reasons for Judgment

Counsel for the Plaintiff:

S.W.M. Leung

Counsel for the Defendants:

J.E. Nason

J. Newton

Place and Date of Trial:

Vancouver, B.C.

March 9-13, 2020

Place and Date of Judgment:

Vancouver, B.C.

March 13, 2020

- [1] THE COURT: I am giving oral reasons for decision. These will be edited for clarity should a written version be requested. I will add citations and other elements that I do not intend to read out today.
- [2] This action arises out of a motor vehicle collision that occurred on September 19, 2015, near the intersection of 54th Avenue and Duff Street in Vancouver, British Columbia ("the MVA"). Mr. Poon was driving on 54th when the defendant's vehicle came out in front of him from Duff Street. The front of his vehicle struck the defendant's vehicle and the airbags deployed. He was thrown back against the seat and headrest. An ambulance attended the scene and Mr. Poon's spouse drove him to the Burnaby hospital. The vehicle was a total loss and not repaired.
- [3] Following the MVA, Mr. Poon reported ongoing pain in his neck and lower back. He went to see his family doctor who referred him to physiotherapy. He pursued physiotherapy until July 2016. He then pursued active rehabilitation, attending a clinic and doing exercises at home. In or around April 2017, Mr. Poon says he began to experience numbness and a needles sensation in three digits of his left hand. He has had some improvement, but continues to suffer pain in his back and neck. He estimates he is about 70 percent recovered but that his improvement plateaued around 2018.
- [4] Mr. Poon had some history of back pain dating back to 2012 or 2013. He went to see a doctor in relation to back pain at his regular clinic in April 2013 and suffered a sprain to his back in August of 2013.
- [5] Mr. Poon is currently 50 years old and employed as a cabinet maker. A significant portion of his job consists of the operation of a panel saw, requiring him to move larger pieces of wood and panelling into the saw and move the cut panels out. Since the MVA, he has needed some assistance in moving the wood pieces that he would not have needed before. At the end of the workday, he finds himself much more fatigued than prior to the MVA. While his work has become more tiring and has required some accommodation, he is claiming neither past wage loss nor loss of future earning capacity as independent heads of damage.

- [6] Both Mr. Poon and his spouse describe a significant reduction in his participation in household chores following the MVA. There are some inconsistencies in the evidence that make it difficult to assess the exact scope of the reduction of his participation in household chores, but I accept that he is more fatigued and less engaged in the home as a result of his issues with ongoing pain.
- [7] Mr. Poon reports that the injuries have also had an impact on his hobby of fishing. Both Mr. Poon and his spouse describe him as an avid salmon fisherman who has regularly pursued fly fishing during salmon season for many years. Both Mr. Poon and his wife report that the frequency of his fishing trips were reduced since the MVA, although given inconsistencies in Mr. Poon's testimony, the level of that reduction remains unclear. I accept that the injuries in question have had some impact on Mr. Poon's ability to engage in fly fishing, which is a physically engaging mode of fishing.

Expert Evidence

- [8] Two neurosurgeons prepared reports and testified in this matter. Dr. Heran was called by the plaintiff and Dr. Chaudhary was called by the defence. Both doctors examined Mr. Poon in September 2019. The neurosurgeons largely agree on a number of issues.
- [9] Both neurosurgeons concluded Mr. Poon suffered myofascial injuries to the neck and back. While it is more clearly stated in the report of Dr. Heran that these injuries are a result of the MVA, a similar conclusion can be inferred from the report of Dr. Chaudhary.
- [10] In reviewing the medical evidence and imaging, it appeared clear to both doctors that Mr. Poon has a degenerative disc condition that pre-existed the MVA. The condition in many cases remains asymptomatic. Both doctors agreed that traumatic events like an MVA can increase the risk of the degenerative condition becoming symptomatic, and they are both in agreement that the prognosis for further recovery is guarded given the timeframe since the MVA with respect to the injuries to the back and neck.
- [11] The neurosurgeons are in agreement that the discomfort in the plaintiff's digits is as a result of a radiculopathy or pinched nerve. Both doctors agree that a traumatic event like the MVA in this case would increase in the probability of a radiculopathy. The primary disagreement is with respect to whether the MVA was the more probable cause in Mr. Poon's case.
- [12] Dr. Heran opines that it is probable that the MVA was the trigger for the degeneration that has led to the radiculopathy. The delay of some 18 months in the onset of the symptoms was, in his view, consistent with his assessment of causation. While he did not claim to be certain about his diagnosis, he considered it more probable than a spontaneous onset.
- [13] Dr. Chaudhary opines that the radiculopathy was caused independently of the MVA. She based this conclusion on the existence of the degenerative condition and because of the "large time gap" between the onset of the radiculopathy and the MVA.

- [14] I prefer the evidence of Dr. Heran who demonstrated a strong grasp of the facts and the timeline of the case and articulated a coherent basis for preferring his theory of causation to that of spontaneous onset.
- [15] Dr. Chaudhary's theory was much more summarily articulated and there were a number of issues with the report that raised questions about the level of attention to the details of the case, including the articulation of the timeline which was at the centre of her findings. I would note that at page 2 of her report, she states that the discomfort in the thumb and two fingers began more than a year following MVA. This is not inconsistent with the other evidence, including that of Mr. Poon who reported the sensations beginning around April 2017. However, in the section entitled "Facts", Dr. Chaudhary states that the discomfort was exhibited for the "past year". As the examination and writing of the report were in late 2019, this would place the initiation of the issue in the fingers in late 2018, almost double the timeframe from the date of the MVA. Dr. Chaudhary addressed this error in testimony, and the defendant argues that the timeline would have been evident given that the imaging she was reviewing was from 2017. I would note, however, that this error is in the context of a number of other "typos" throughout the report, notably with respect to dates and with respect to the details on the imaging reports in question. Aside from the lack of attention to detail, the errors are not consistent with a strong focus on the dates in the timeline.
- [16] While I give some weight to Dr. Chaudhary's overall opinion, I give her assessment of causation less weight given the importance of the timeline in her conclusions.

Causation

- [17] The plaintiff must establish causation on a balance of probabilities that the defendant's negligence caused or materially contributed to an injury. The defendant's negligence need not be the sole cause of the injury so long as it is part of the cause beyond the range of de minimus. Causation need not be determined by scientific precision: citing *Athey v. Leonati*, [1996] 3 S.C.R. 458 at paras. 13-17, *Farrant v. Laktin*, 2011 BCCA 336 at para. 9.
- [18] The primary test for causation asks but for the defendant's negligence, would the plaintiff have suffered the injury? The "but for" test recognizes that compensation for negligent conduct should only be made where a substantial connection between the injury and the defendant's conduct is present: *Resurface Corp. v. Hanke*, 2007 SCC 7 at paras. 21-23.
- [19] In special circumstances, the "but for" test proves unworkable and the law has applied a material contribution test. As Chief Justice McLachlin wrote in *Clements v. Clements*, 2012 SCC 32 at paragraph 46:
- [46] The foregoing discussion leads me to the following conclusions as to the present state of the law in Canada:

- (1) As a general rule, a plaintiff cannot succeed unless she shows as a matter of fact that she would not have suffered the loss "but for" the negligent act or acts of the defendant. A trial judge is to take a robust and pragmatic approach to determining if a plaintiff has established that the defendant's negligence caused her loss. Scientific proof of causation is not required.
- (2) Exceptionally, a plaintiff may succeed by showing that the defendant's conduct materially contributed to risk of the plaintiff's injury, where (a) the plaintiff has established that her loss would not have occurred "but for" the negligence of two or more tortfeasors, each possibly in fact responsible for the loss; and (b) the plaintiff, through no fault of her own, is unable to show that any one of the possible tortfeasors in fact was the necessary or "but for" cause of her injury, because each can point to one another as the possible "but for" cause of the injury, defeating a finding of causation on a balance of probabilities against anyone.
- [20] Causation must be established on a balance of probabilities before damages are assessed, as McLachlin, C.J.C. stated in *Blackwater v. Plint*, 2005 SCC 58 at paragraph 78:
78. It is important to distinguish between causation as the source of the loss and the rules of damage assessment in tort. The rules of causation consider generally whether "but for" the defendant's acts, the plaintiff's damages would have been incurred on a balance of probabilities. Even though there may be several tortious and non-tortious causes of injury, so long as the defendant's act is a cause of the plaintiff's damage, the defendant is fully liable for that damage. The rules of damages then consider what the original position of the plaintiff would have been. The governing principle is that the defendant need not put the plaintiff in a better position than his original position and should not compensate the plaintiff for any damages he would have suffered anyway: *Athey*.
- [21] I am satisfied on the evidence before me that the MVA caused the ongoing neck and back pain from which Mr. Poon suffers. Although I accept that he had some history of lower back pain and a degenerative condition, I conclude that on a balance of probabilities, the onset of the pain in his neck and back following the MVA was caused by the collision. I also accept the opinion of Dr. Heran that it is more likely than not the MVA was the trigger for the degenerative consequences described above.

Non-pecuniary damages

- [22] 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 (see *Trites v. Penner*, 2010 BCSC 882 at paras. 188-189).
- [23] In *Stapley v. Hejslet*, 2006 BCCA 34, the Court of Appeal outlined the factors to be considered when assessing non-pecuniary damages at paragraph 46:

[46] The inexhaustive list of common factors cited in Boyd 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).

[24] 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. That is from *Dilello v. Montgomery*, 2005 BCCA 56 at para. 25.

[25] Mr. Poon does not claim any loss of capacity to earn income, either in the past or the future, as an independent head of damages. Along with any loss of housekeeping capacity, he suggests that these factors should be considered as part of the general damages.

[26] Counsel for the plaintiff submits that non-pecuniary damages in the range of \$110,000 to \$125,000 are appropriate. She has referred me to *Tzotzolis v. Wyman*, 2019 BCSC 2026, *Hanger v. Shin*, 2019 BCSC 99 and *Chawla v. Lambright*, 2017 BCSC 1884. The damages in *Tzotzolis* were \$95,000; in *Hanger*, \$120,000; and in *Chawla*, \$125,000.

[27] The defendant submits that the plaintiff is entitled to an award in the order of \$40,000 and refers me to the cases of *Mothe v. Silva*, 2015 BCSC 140, *Pavan v. Guolo*, 2016 BCSC 324, and *Erwin v. Buhler*, 2017 BCSC 362 in which such awards were made.

[28] Each of these cases have been of some help in making the assessment, but naturally each has important distinguishing features. While I find in many ways the situation in *Mothe* and *Tzotzolis* most closely approximate the situation of Mr. Poon, I would note that my finding with respect to the triggering of a degenerative process is an important distinguishing feature with *Mothe*, and I would also note that the \$40,000 award is in 2015 dollars.

[29] There are a number of features distinguishing Tzotzolis, notably the significant family and psychological impact which Mr. Poon has not suggested is relevant in his case. Making an individualized assessment in all the circumstances of the case, I find that an award of \$65,000 is appropriate, given the impact of these injuries on the life of Mr. Poon, and in particular given the chronic and ongoing nature of the pain that he is suffering.

Cost of future care

[30] Our Court of Appeal summarized the law regarding the cost of future care in *Gao v. Dietrich*, 2018 BCCA 372 at paragraph 68 to 70:

[68] An award for damages for cost of future care is based on the principle of restitution. In *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229 at 241-242, Dickson J., as he then was, explained the purpose of an award for cost of future care:

In theory a claim for the cost of future care is a pecuniary claim for the amount which may reasonably be expected to be expended in putting the injured party in a position where he would have been in had he not sustained the injury. Obviously a plaintiff who has been gravely and permanently impaired can never be put in the position he would have been in if the tort had not been committed. To this extent, "restitutio in integrum" is not possible. Money is a barren substitute for health and personal happiness but to the extent, within reason, that money can be used to sustain or improve the mental or physical health of the injured person it may properly form part of the claim.

[69] An award for cost of future care is based on what is reasonably necessary, on medical evidence, to promote the mental and physical health of the claimant: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.) at 78, aff'd (1987), 49 B.C.L.R. (2d) 99 (C.A.); *Aberdeen v. Zanatta*, 2008 BCCA 420 at para. 41; *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at para. 30. An award for future care must (1) have medical justification, and (2) be reasonable: *Milina* at 84; *Aberdeen* at para. 42.

[70] In *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144, this Court clarified that the medical necessity of future care costs may be established by a health care professional other than a physician, such as an occupational therapist, if there is a link between a physician's assessment of pain, disability, and recommended treatment, and the health care professional's recommended care item (at para. 39).

[31] I note that an assessment of damages for the cost of future care is not a precise accounting exercise, and that is where I would refer to *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at paragraph 21.

- [32] The plaintiff seeks between \$18,200 and \$19,600 of costs of future care based on the full implementation of the combined recommendations of Drs. Heran and Chaudhary. While I am not satisfied the evidence before me has established that Mr. Poon will in fact require or pursue all of the suggested courses of treatment, I do accept that in managing chronic pain, he will pursue some of the elements of the modalities of future care set out in Exhibit 1.
- [33] In my view, an award of \$5,000 adequately approximates these future costs in the overall context of Mr. Poon's past engagement with treatment and testimony in relation to future treatment.

Special damages

- [34] Both parties agree that the plaintiff suffered special damages in the amount of \$3,355.83.

Summary

- [35] In summary, the damages awarded are as follows:

- [36] Non-pecuniary damages: \$65,000

- [37] Cost of future care: \$5,000.00

- [38] Special damages: \$3,355.83

- [39] Total: \$73,355.83

Costs

- [40] If the parties are unable to agree on costs, they may arrange to make submissions on the matter.

"Edelmann J."

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