

CANADA / JUDGMENT

Rutkowski v. Nadarajah

2020 BCSC 583

COURT

Supreme Court of British Columbia

DECIDED

16 April 2020

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

2020 BCSC 583 Rutkowski v. Nadarajah

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Rutkowski v. Nadarajah,

2020 BCSC 583

Date: 20200416

Docket: M172960

Registry: Vancouver

Between:

Dariusz Tadeusz Rutkowski

Plaintiff

And

Sivasothynathan Nadarajah

Defendant

Before: The Honourable Madam Justice Francis

Reasons for Judgment

The Plaintiff, appearing in person:

D. Rutkowski

Counsel for the Defendant:

K.D. Cowan

Place and Date of Trial:

Vancouver, B.C.

January 13-15 and 17, 2020

Place and Date of Judgment:

Vancouver, B.C.

April 16, 2020

Table of Contents

I. introduction.. 3

II. Background Facts.. 3

A. Prior to the Accident 3

B. The Accident 4

C. Injuries. 5

D. Life after the Accident 6

III. expert evidence.. 7

A. Dr. Brian Day. 7

B. Dr. Marilena Ticea. 8

IV. credibility.. 9

V. causation.. 10

A. Left Knee. 11

B. Ganglian Cyst 11

C. Depression, PTSD and Alcohol Consumption. 12

D. Hip. 13

VI. mitigation.. 14

VII. damages.. 19

A. Non-pecuniary damages. 19

B. Loss of income earning capacity. 22

C. Loss of housekeeping capacity. 23

D. Cost of future care. 24

E. Special damages. 26

VIII. summary of orders made.. 27

IX. costs.. 27

I. introduction

- [1] On June 12, 2015, the plaintiff, Dariusz Rutkowski, was riding his bicycle to work. He was stopped at the intersection of Willingdon Avenue and Frances Street in Burnaby when a motor vehicle driven by the defendant collided with his bicycle (the "Accident").
- [2] Liability was admitted by the defendant and the matter proceeded to trial on the issue of damages only.
- [3] The plaintiff's primary complaints relate to injuries to his left knee, right hip and right wrist that he claims to have sustained in the Accident.
- [4] The defendant admits that the plaintiff was injured in the Accident, specifically that he suffered a tear to his left anterior cruciate ligament ("ACL"). However, the defendant argues that the remaining injuries that the plaintiff purports to suffer from, namely his hip injury, the ganglian cyst on his right wrist, and his ongoing sleep and mental health issues, were not caused by the Accident. The defendant takes the position that the plaintiff is entitled to a modest amount of non-pecuniary damages and some special damages, but that his claims for loss of income earning capacity, housekeeping capacity and cost of future care should be dismissed.

II. Background Facts

A. Prior to the Accident

- [5] The plaintiff was born in Poland. He obtained a technologist diploma and was four years into a five-year university degree when he moved to Canada as a young man in 1989. While he has a background and a keen interest in computers, his credentials were not recognized when he moved to Canada and, as he described it, he began working in entry level positions and worked his way up.
- [6] At the time of the Accident, and at the time of trial, the plaintiff worked as a test engineer at a company called Tantalus that makes smart metering and grid management systems for the electrical industry. The plaintiff's job involves designing and building quality control devices that are used by Tantalus clients to test the products that Tantalus makes. Some of his work is done at a computer and some involves the assembly of quality control devices. There is an element of physical labour involved in the assembly work. The plaintiff is good at his job and has consistently received positive performance reviews, annual raises and bonuses.
- [7] The plaintiff testified that before the Accident, he loved his job. His wife sometimes raised the topic of retirement with him and he always told her he never wanted to stop working.

- [8] Before the Accident, the plaintiff had a very active lifestyle. He regularly commuted on his bicycle from his home in Coquitlam to his office in Burnaby, a 26 kilometer ride. He was an avid downhill skier and runner. He described himself as a very social person who enjoyed dancing with his wife and engaging in outdoor activities with his two children, who are now adults.
- [9] The plaintiff's wife, Joanna Rutkowski, testified that, prior to the Accident, her husband was an "early to bed, early to rise" kind of person who motivated his wife and children to be active. She described him as organized, determined and always busy. In addition to working full-time, the plaintiff was active in the care and maintenance of their home. He painted the outside trim of the house, laid down flooring, and learned wiring and plumbing so he could take care of odd jobs around the house. He also liked to cook and bake for his family.

B. The Accident

- [10] The plaintiff was 52 years old at the time of the Accident.
- [11] When the defendant's vehicle collided with the plaintiff's bike, the plaintiff was thrown off his bicycle onto the ground. He has no recollection of how he landed on the ground after impact nor what part of his body absorbed the impact from the collision or the subsequent fall.
- [12] The plaintiff is unable to recall much about the Accident. He doesn't recall calling 911, although he knows that he did, and he recalls that a firetruck and an ambulance attended. He recalls his wife picking him up and driving him home and he recalls attending a walk in clinic for his injuries sometime later that day.

C. Injuries

- [13] The plaintiff testified that the day after the Accident, he started to feel considerable pain and bruises emerged on various parts of his body. Pictures taken in the days after the Accident show significant cuts and bruises on the plaintiff's legs.
- [14] A few days after the Accident, the plaintiff noticed a cyst like growth on his right wrist. He reported the growth to his doctor a couple of weeks after the Accident.
- [15] As the swelling and bruising on his legs went down, in the days following the Accident, the plaintiff noticed that his left knee felt "loose" and it began to regularly buckle when he was walking or going about his day to day activities. The plaintiff reported this to his GP, Dr. Ticea. He also told Dr. Ticea that he was feeling pain in his right hip. Dr. Ticea sent him for an MRI on his left knee and an x-ray of his right hip.
- [16] A June 18, 2015 x-ray report shows osteoarthritis in the plaintiff's right hip.

- [17] A September 16, 2015 MRI report (the "MRI Report") shows a tear in the plaintiff's left ACL. The MRI Report also reveals prior surgery to the plaintiff's left medial collateral ligament and early degenerative changes from osteoarthritis. Upon reviewing the MRI Report, Dr. Ticea referred the plaintiff to Dr. Tarazi, an orthopedic surgeon, who scheduled him for knee surgery.
- [18] The plaintiff's knee surgery took place on October 20, 2016. Unfortunately, it was unsuccessful. Mid-surgery, Dr. Tarazi determined that the plaintiff's osteoarthritis in his knee had advanced to a level at which there was too much degeneration for ACL repair surgery to be successful. Dr. Tarazi terminated the surgery without repairing the ACL. Dr. Tarazi later advised the plaintiff that he was concerned that if the ACL was repaired it may actually increase, rather than decrease, the plaintiff's pain from his osteoarthritis.
- [19] The failed surgery was devastating to the plaintiff. Before the surgery, he believed that he would eventually be rehabilitated to his pre-Accident state. After the surgery, he suspected that he would never return to his previous active lifestyle.
- [20] The ganglion cyst is a growth on the inside of the plaintiff's right wrist. The plaintiff and his wife both testified that the cyst fluctuates in size, growing bigger over the course of four to six months and then bursting and disappearing, only to start growing again in a similar spot a few weeks later. The plaintiff's wife testified that it can grow up to the size of an egg before it bursts.
- [21] In April 2016 and April 2018 the plaintiff saw Dr. Bertrand Perey about options for treating the ganglion cyst. Dr. Perey recommended non-operative treatment for the cyst because surgery could lead to complications. To date, the ganglion cyst remains untreated.

D. Life after the Accident

- [22] Since the Accident, many elements of the plaintiff's previously active lifestyle have been curtailed. He no longer rides a bike, skis or runs. He cannot walk the dog or do many of the jobs around the house he used to do. He can no longer go dancing with his wife. The injury to the plaintiff's knee, and particularly the pain and the instability arising from his torn ACL, is the primary reason he can no longer engage in these leisure activities.
- [23] The plaintiff testified that he "feels like a broken man" and feels shame that he is unable to function at his previous capacity. He testified that he is depressed and believes that he suffers from post traumatic stress disorder ("PTSD") as a result of the Accident. He has chronic insomnia and has been prescribed zopiclone for sleep. He drinks more heavily than he used to, consuming alcohol every day.
- [24] With respect to his work, the plaintiff testified that he has lost all joy in his vocation. While he previously thought he would never want to retire, now he feels like he can't bear the thought of working until he is age 65.

- [25] The plaintiff's wife described a stark change in her husband after the Accident. She testified that he used to have many hobbies but "his hobby is now drinking," which causes friction in their relationship. He doesn't do any of the maintenance chores around the house that he used to do and their active social life has come to an end. She described him as depressed, lacking in motivation and without any goals, a contrast from his previously ambitious and highly competitive personality.
- [26] The plaintiff's co-worker, Chris Clarke, testified that he used to run with the plaintiff in the Tantalus running club. The plaintiff no longer participates in this group activity.
- [27] A selection of the plaintiff's performance reviews from Tantalus were in evidence. There was nothing in those reviews to suggest that the plaintiff's performance at work has declined since the Accident.

III. expert evidence

A. Dr. Brian Day

- [28] The only medical expert who testified at the trial was Dr. Day, who was qualified as an expert in orthopedics. Dr. Day examined the plaintiff on September 4, 2019.

- [29] Dr. Day opined as follows:

Based on my interview and assessment, and based on my review of the documents, I believe that Mr. Rutkowski did sustain soft tissue injuries to the right wrist and left knee, and possibly minor soft tissue injuries to the neck and low back, in the accident of June 12, 2015.

At the present time, his most pressing issues are the left knee and the right wrist.

With respect to the left knee, I believe Mr. Rutkowski did sustain a tear of the anterior cruciate ligament. He certainly had pre-existing advanced osteoarthritis in that same knee. He has had a previous meniscectomy.

Despite the arthritis, his left knee is so unstable that I think he would benefit from arthroscopically-aided anterior cruciate ligament reconstruction. This would address his main symptom of instability.

I think Mr. Rutkowski was likely to have developed progressive osteoarthritis even in the absence of the motor vehicle accident. I think that both with and without the anterior cruciate ligament injury he would likely have required knee joint arthroplasty in the next 10 to 15 years or so.

- [30] A large portion of the cross-examination of Dr. Day was focussed on his recommendation that the plaintiff undergo surgery to repair his ACL. This recommendation differs from the conclusion reached by Dr. Tarazi, who declined to complete the ACL repair when performing surgery on the plaintiff in 2016.

- [31] Dr. Day testified that he agreed with Dr. Tarazi that one needs to be careful operating on an ACL tear when osteoarthritis is present in the knee. However, he testified that the protocol for ACL repairs on patients with osteoarthritis has changed in recent years and such surgeries are becoming more common and having better results than in the past. He recommended that the plaintiff try again with ACL repair surgery.
- [32] Dr. Day opined that ACL repair surgery would bring stability to the plaintiff's knee and eliminate the most significant pain and functional limitations the plaintiff complains of. On cross-examination, the plaintiff asked Dr. Day if he could guarantee that if the plaintiff had a second surgery, the surgeon would not do the same thing as Dr. Tarazi and terminate the surgery without repairing the ACL. Dr. Day was not prepared to make such a guarantee.

B. Dr. Marilena Ticea

- [33] Dr. Ticea did not testify at the trial but her expert report was in evidence. The defendant had asked the plaintiff to produce Dr. Ticea for cross-examination and the plaintiff failed to do so. As a result, the parties reached an agreement that Dr. Ticea's report would go into evidence, but that Dr. Ticea's opinion on the cause of the right wrist injury would not be considered by the court.
- [34] Dr. Ticea is the plaintiff's GP. In her report she summarized her visits with the plaintiff and opined as follows:

It is difficult to predict how long until Mr. Rutkowski is pain free. Even now, more than four years after his accident, he still has pain in his knee, wrist and back. We know from experience that most improvement in soft tissue pain occurs in the first 6 to 12 months after the injury. The fact that Mr. Rutkowski still has pain now is an indication that his pain became chronic and is likely not going to resolve.

IV. credibility

- [35] The factors to be considered in assessing credibility and reliability are set out by Madam Justice Dillon in *Bradshaw v. Stenner*, 2010 BCSC 1398, *aff'd* 2012 BCCA 296, leave to appeal *ref'd* [2012] S.C.C.A. No. 392:
- [186] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis*, [1926] 31 O.W.N. 202 (Ont.H.C.); *Farnya*

v. Chorny, [1952] 2 D.L.R. 152 (B.C.C.A.) [Farnya]; R. v. S.(R.D.), [1997] 3 S.C.R. 484 at para.128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (Farnya at para. 356).

- [36] The defendant does not directly attack the plaintiff's credibility. However, the defendant submits that the reliability of the plaintiff's evidence on certain points is questionable. The defendant notes that at trial, the plaintiff testified to significantly more painful, intrusive and debilitating injuries than what he described to his treating professionals, as reflected in the clinical records. The defendant argues that "Mr. Rutkowski's perception has coloured his evidence in a fashion that makes it unreliable to accept it over the more objective evidence before this court."
- [37] I do not find that there is a significant difference between the symptoms described by the plaintiff at trial, and the symptoms he described to his doctors as reflected in the notes of the medical practitioners that were in evidence. To the contrary, the notes of Dr. Ticea reflected that the plaintiff has consistently and regularly reported to his doctor that he has ongoing pain in his left knee, neck, back and right hip as well as ongoing problems with a ganglionic cyst on his right wrist. There is no meaningful inconsistency between what the plaintiff reported to his doctors and what he testified to at trial.
- [38] The defendant also relies in part on four questionnaires completed by the plaintiff in June 2015 and November 2015 (the "Questionnaires") in which he answered questions about his injuries. The defendant says that the Questionnaires show the plaintiff reporting a much milder level of disability than what the plaintiff testified to at trial. The Questionnaires, in which the plaintiff self reported his pain and functional limitations at around the time of the Accident, are helpful in assessing the state of the plaintiff's injuries at the time they were completed. I have relied on them in assessing damages. However, contrary to the defendant's submission, the symptoms and limitations reported in the Questionnaires are not so significantly different from the plaintiff's testimony that it would cause me to question the credibility or reliability of his evidence at trial.
- [39] I cannot agree with the defendant that the plaintiff's evidence is significantly out of harmony with the clinical notes, the Questionnaires and the objective evidence. The plaintiff came across as a proud man who is embarrassed that he is not the person he once was. He was often emotional on the witness stand but his evidence about his injuries did not appear to be overstated or exaggerated. I find the plaintiff and his wife to be wholly credible in their testimony with respect to the profound impact the injuries from the Accident have had on the plaintiff's life.

V. causation

- [40] The plaintiff must establish 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. As long as a defendant is a material part of the cause of an injury, the defendant is liable, even where his act alone was not enough to create the injury: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at paras. 13-17.
- [41] The defendant in this case does not dispute that the Accident caused the tear in the plaintiff's left ACL. However, with respect to the other injuries the plaintiff claims to have sustained, namely injuries to his right hip and wrist and his mental health issues, the defendant argues that causation has not been proven.
- [42] A new issue arose at trial when Mr. Vagay, the plaintiff's physiotherapist, testified that the plaintiff was involved in a second accident in October 2019 (the "2019 Accident"). The plaintiff has advanced a claim with respect to headaches, neck and back pain arising from injuries he suffered in the 2019 Accident. It was apparent at trial that the defendant only learned of the 2019 Accident during the course of Mr. Vagay's testimony. The defendant was given an opportunity to cross-examine the plaintiff about the 2019 Accident.
- [43] It appears that the 2019 Accident may have moderately aggravated the plaintiff's injuries but I cannot find (nor has the defendant asked me to find) that it is an intervening cause that should impact the analysis of causation in this case.

A. Left Knee

- [44] The defendant concedes that the plaintiff has suffered a tear to his left ACL and that the Accident caused this injury.

B. Ganglionic Cyst

- [45] The defendant argues that the Accident did not cause the ganglionic cyst and its emergence on the plaintiff's wrist several days after the accident is simply coincidental.
- [46] The plaintiff testified that he has no recollection of the Accident and whether he fell on his wrist.
- [47] The July 16, 2015 x-ray of the plaintiff's wrist showed degenerative changes.
- [48] On cross-examination Dr. Day opined that the cyst could have been caused by trauma or by arthritis. In his expert report, he opined that the plaintiff suffered soft tissue injuries to his wrist in the Accident. Dr. Day also testified that ganglionic cysts are not well understood in the medical community.

- [49] In light of Dr. Day's opinion that the plaintiff sustained soft tissue injuries to his wrist in the Accident, and the timing of the symptoms in his wrist emerging within days of the Accident, I find that on a balance of probabilities, the ganglion cyst on the plaintiff's right wrist was caused by the Accident.

C. Depression, PTSD and Alcohol Consumption

- [50] The plaintiff submits that since the Accident he suffers from depression and PTSD. He also gave evidence about his increased alcohol consumption since the Accident, although he did not go so far as to claim that the Accident has caused him to develop alcoholism.
- [51] There is no reference in the medical records to the plaintiff reporting symptoms of depression or PTSD to his medical professionals. He has reported his insomnia to his GP, who has prescribed zopiclone. He has not sought counselling. There is no medical opinion evidence that speaks one way or another to the question of whether the Accident caused an injury to the plaintiff's mental health.
- [52] The plaintiff continues to work full-time and there is no evidence suggesting that an injury to his mental health has impacted his work performance.
- [53] As Madam Justice Marzari recently said in *Watts v. Lindsay*, 2019 BCSC 2239:
- [36] With respect to mood disorders, the Supreme Court of Canada in *Saadati v. Moorhead*, 2017 SCC 28 at paras. 34 - 36, has clarified that the legal test for a compensable mental injury is no different as for finding a physical injury in that there is no need for proof of a specific diagnosis. It is sufficient that a mental or psychological harm or injury that was caused by the accident is established on the evidence.
- [54] While there is no need for a psychiatric diagnosis in order for me to find a compensable mental injury, the plaintiff still must establish on the evidence that he suffers from a mental or a psychological harm or injury that was caused by the Accident.
- [55] No evidence was placed before the court, other than the testimony of the plaintiff and his wife, to suggest that the plaintiff's low mood and increased alcohol consumption since the Accident have a medical cause. As Dr. Day noted in his cross-examination, it is normal and consistent with the pain resulting from a long-term injury for a patient to feel sadness. I accept that the plaintiff has struggled with the limitations of his injury and that this has impeded his happiness and enjoyment of life. However, I cannot find that the plaintiff has established on a balance of probabilities that he suffers from depression or PTSD, or that such conditions were caused by the Accident.

D. Hip

- [56] The defendant argues that the plaintiff has not proven on a balance of probabilities that the pain he presently suffers in his right hip was caused by the Accident. The defendant points out that x-ray imaging shows osteoarthritis in the plaintiff's right hip and this is the more likely cause of his ongoing pain.
- [57] Dr. Ticea opined that the plaintiff suffered injuries to his right hip in the Accident.
- [58] Dr. Day's report does not directly opine on the cause of the plaintiff's hip pain. On cross-examination he was asked if the right hip pain could be the result of favouring one side over the other to compensate for the left knee injury. Dr. Day agreed that this was possible but noted that the right hip pain could also be the result of osteoarthritis.
- [59] On the basis of Dr. Ticea's opinion, and in the absence of expert evidence supporting the defendant's submission that osteoarthritis is the more likely cause of the plaintiff's right hip injury, I find that the plaintiff has proven on a balance of probabilities that his right hip pain was caused by the Accident.

VI. mitigation

- [60] A plaintiff has an obligation to take all reasonable measures to reduce his or her damages, including undergoing treatment to alleviate or cure injuries: *Danicek v. Alexander Holburn Beaudin & Lang*, 2010 BCSC 1111 at para. 234.
- [61] Once the plaintiff has established the defendant's liability for his or her injuries, the onus is on the defendant to prove any failure to mitigate on the part of the plaintiff. To establish that the plaintiff failed to mitigate their damages, the defendant must prove that the plaintiff acted unreasonably and that reasonable conduct would have reduced or eliminated the loss. Whether the plaintiff acted reasonably is a factual question and it involves a consideration of all of the circumstances: *Gilbert v. Bottle*, 2011 BCSC 1389 at para. 202.
- [62] The test for establishing a failure to mitigate as a result of not pursuing recommended treatment is set out in *Chiu v. Chiu*, 2002 BCCA 618 at para. 57:

In a personal injury case in which the plaintiff has not pursued a course of medical treatment recommended to him by doctors, the defendant must prove two things: (1) that the plaintiff acted unreasonably in eschewing the recommended treatment, and (2) the extent, if any, to which the plaintiff's damages would have been reduced had he acted reasonably.

- [63] In *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 56 [Gregory], Madam Justice Garson described the mitigation test as a "subjective/objective test," which asks:

"whether the reasonable patient, having all the information at hand that the plaintiff possessed, ought reasonably to have undergone the recommended treatment. The second aspect of the test is "the extent, if any to which the plaintiff's damages would have been reduced" by that treatment. The Turner [2008] B.C.J. No. 2561 case, on which the trial judge relies, uses slightly different language than this Court's judgment in Chiu: "there is some likelihood that he or she would have received substantial benefit from it ...".

[64] Dr. Day recommended that the plaintiff undertake ACL repair surgery. Dr. Tarazi refused to complete ACL repair surgery in October 2016, on the basis that the repair would only make the plaintiff's symptoms worse. However, Dr. Day opined that such surgery would likely increase the plaintiff's stability and reduce his pain.

[65] The plaintiff, who was re-called for cross-examination after Dr. Day's testimony, said that notwithstanding Dr. Day's recommendation, he would not pursue ACL repair surgery. The plaintiff submitted that he could not bear the risk of another unsuccessful operation.

[66] I find the plaintiff's position on a second knee surgery to be eminently understandable, but also unfortunate. It does appear that the plaintiff could undergo arthroscopic day surgery with a short recovery time, after which he may be vastly more comfortable and stable than he is now. Dr. Day did not think that the surgery would make the plaintiff's condition worse, even if it were not successful.

[67] The defendant argues that the plaintiff's refusal to try a second surgery must be considered in the damages assessment. If the court is to find that damages are payable as a result of the plaintiff's ongoing knee pain, then the defendant says I must consider the plaintiff's refusal to undergo the second surgery as a failure to mitigate.

[68] To be clear, the defendant does not argue that the plaintiff has failed to mitigate his damages to date. The plaintiff has followed all the rehabilitation advice he received from his GP and physiotherapist. He has attended more than one-hundred physiotherapy appointments. Up until the trial, or at least up until his consultation with Dr. Day on September 4, 2019, the plaintiff could not reasonably have taken any further steps to mitigate his ongoing symptoms. He had tried surgery and it hadn't worked. There was no reason for him to think that a second surgery with a different doctor could resolve his problems.

[69] However, the defendant relies on the trial testimony of Dr. Day and the plaintiff in asking this Court to find that:

- a) The plaintiff has now been advised that a second surgery will alleviate his symptoms; and
- b) The plaintiff has unreasonably refused to have a second surgery.

[70] In this respect, this case bears some similarity to *Janiak v. Ippolito*, [1985] 1 S.C.R. 146 [Janiak], a case in which the plaintiff's damages were reduced because of his unreasonable refusal to undergo surgery. In *Janiak*, the Supreme Court of Canada considered the duty to mitigate in the context of a plaintiff whose doctors had recommended surgical treatment

that had a 70% chance of success and, if successful, a 100% chance of recovery. The plaintiff feared surgery and, like the plaintiff in this case, said he wouldn't undergo surgery unless there was a 100% chance of success.

- [71] In determining whether a person has been reasonable in refusing to accept recommended surgery, the court must take into consideration the degree of risk from the surgery, the gravity of the consequences of refusing it, and the potential benefits to be derived from it: Janiak, para. 31.
- [72] Dr. Day testified that there would be little risk from the surgery as arthroscopic surgery has a very low infection rate. However, he noted that, as with any surgery, there are risks associated with ACL repair surgery. In terms of potential benefits, Dr. Day opined that ACL repair surgery would make the plaintiff's knee more stable and would eliminate the most significant pain and functional limitations he presently suffers from. Dr. Day did not say that the surgery would eliminate all pain. On cross-examination he said: "I can't say whether you would have complete pain relief. All I can say is that I think it would be a lot better than it is now."
- [73] Dr. Day admitted that it was possible that a second surgery would end the way the first one did, with the surgeon beginning the operation to the knee and, upon visual observation of the level of deterioration, deciding not to proceed with the surgery. However, he added that it was very unusual for a doctor to approach the 2016 surgery as Dr. Tarazi did. This is because any surgeon would know prior to surgery, from imaging, that there was osteoarthritis in the knee. Dr. Day therefore believed it to be unlikely that a second surgeon would terminate the surgery as Dr. Tarazi did.
- [74] If the only medical opinion the plaintiff had ever received with respect to ACL repair surgery was from Dr. Day then I would conclude that the plaintiff's refusal to undergo a second surgery was unreasonable. Dr. Day's opinion with respect to the low degree of risk from the surgery, the long-term consequences of refusing it, and the potential benefits to be derived from it all weigh heavily in favour of a second surgery.
- [75] However, the reasonableness of the plaintiff's views on surgery must be assessed in light of both the failed surgery in 2016 and Dr. Tarazi's post-operative advice to the plaintiff that ACL repair surgery would only cause him more pain.
- [76] A defendant who seeks to establish a failure to mitigate on the part of a plaintiff in the face of conflicting medical advice received by the plaintiff bears a heavy onus of showing that a plaintiff has acted unreasonably: *Byron v. Larson*, 2004 ABCA 398 paras. 23-28; *Penner v. Silk*, 2009 BCSC 1682 at para. 50; *Janiak*, at para. 29.
- [77] While Dr. Day is a leader in his field, and his views on the benefits of ACL surgery should be taken seriously by the plaintiff, the remarks of the Alberta Court of Appeal in *Byron* at para. 25 are helpful in this context:

While the relative expertise of conflicting medical practitioners may be a relevant factor in determining reasonableness, plaintiffs should not bear too heavy a burden to assess the quality of the medical advice they receive. Rather, reasonableness must be assessed from the position of the appellant, bearing in mind the knowledge she had.

- [78] The defendant asks me to find that the plaintiff's refusal to undergo surgery is unreasonable because it is contrary to Dr. Day's recommendations. I cannot agree that the plaintiff's position is unreasonable. There are three reasons for this.
- [79] First, up until his consultation with Dr. Day in September 2019, the medical advice received by the plaintiff had been consistent. He was told that ACL repair surgery would not assist him. Dr. Tarazi performed surgery on the plaintiff's knee and visually inspected the level of deterioration from osteoarthritis. He opined that ACL repair surgery was inadvisable. In the face of this, it is not unreasonable for the plaintiff to prefer the opinion of Dr. Tarazi, a doctor who had not only examined him but who had visually inspected the deterioration in his knee in the course of surgery, to the opinion of Dr. Day.
- [80] Second, I find it would be unfair to the plaintiff to find a failure to mitigate on the basis of evidence he gave about his future plans on cross-examination. At the time he was cross-examined on the question of whether he intended to undergo a second surgery, the plaintiff had not had an opportunity to consult with another orthopedic surgeon about Dr. Day's recommendation. Indeed, he was recalled for cross-examination and asked about his intentions with respect to a second surgery immediately after Dr. Day testified. There was little time for him to consider and absorb Dr. Day's cross-examination evidence, which was almost entirely focussed on the benefits and risks of a second surgery, before he was asked to commit to whether or not he would undertake the second surgery.
- [81] Third, Dr. Day is not the plaintiff's treating physician. He stated on cross-examination that he does not perform surgeries for patients in the public health care system. There is no possibility of Dr. Day performing the surgery on the plaintiff. While it seems likely on the basis of Dr. Day's opinion that another orthopedic surgeon could perform the surgery, the plaintiff has not at present been referred to an orthopedic surgeon who has said they will do the surgery. There is therefore some uncertainty about whether the surgery is indeed an available option for the plaintiff.
- [82] I therefore decline to find that the plaintiff has acted unreasonably in saying he will not undergo another surgery.

VII. damages

A. Non-pecuniary damages

- [83] The plaintiff seeks an award of \$150,000-\$180,000 for non-pecuniary damages. The defendant submits that non-pecuniary damages should be assessed in the range of \$70,000.

[84] 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.

[85] 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.

[86] The plaintiff put the following cases before the court in support of his position on non-pecuniary damages:

- *Chappell v. Loyie*, 2016 BCSC 1722: this case involved a plaintiff who suffered multiple complex injuries when his motorcycle was struck by a vehicle. The plaintiff had multiple surgeries as a result of his injuries, some of which were successful and some of which were not. He missed lengthy periods of work and ultimately had to leave a job he loved as a result of his injuries. He was diagnosed with depression and anxiety as a result of the accident. He was awarded \$150,000 for non-pecuniary damages.

- *Jafferi v. Hardcastle*, 2018 BCSC 486: this case involved a 59-year-old plaintiff who suffered injuries to his upper back, shoulders and neck. He had unsuccessful surgery on his neck and would likely need further surgery. The court awarded \$150,000 in non-pecuniary damages.

- *Hubbs v. Escueta*, 2013 BCSC 103: this case involved a 43-year-old journeyman electrician. He suffered injuries to his head, neck, right arm, right shoulder, right leg and right knee, back, left wrist and left ankle. He was off work for a number of months and had two surgeries. His injuries impacted his ability to work and his family relationships. He was awarded \$130,000 for non-pecuniary damages.

- *Tompkins v. Bruce*, 2012 BCSC 266: the plaintiff was a 50-year-old plumber and gasfitter. He suffered major injuries in a high speed collision on the Sea to Sky Highway. He had a collapsed lung, a fracture in his left hip, a fracture of his right femoral shaft, and a fracture of his right patella. He had multiple surgeries and would require more. He lost most of his mobility as a result of the accident, and lost his ability to work in his trade at employment he enjoyed. His romantic relationship suffered and his partner ultimately left him, largely because of his post-accident anger and irritability. He was awarded \$200,000 for non-pecuniary damages.

[87] Counsel for the defendant relied on the following cases in support of the submission that non-pecuniary damages should be assessed in the \$70,000 range:

- *Milsom v. Verron*, 2005 BCSC 1452: this is a pre-Stapley case in which the plaintiff sustained a knee injury and tore her ACL. The court awarded her damages of \$25,000. Recognizing that this award was made 15 years ago, the defendant submits that if I were to provide for an equivalent award in the case before me, the amount would increase to approximately \$31,000 to account for inflation. The defendant concedes that this case represents the low end of the range.
- *Parker v. Ingalls*, 2007 BCSC 1763: the plaintiff sustained an ACL tear in a martial arts gym. The plaintiff had arthroscopic surgery to repair the tear. The plaintiff was unable after his injury to participate in many of the recreational activities he previously enjoyed. He was awarded \$80,000 in non-pecuniary damages.
- *Sidhu v. BC Transit Authority and Berry*, (unreported: 1998 Vancouver Registry B974058): this is an older case that the defendant relies upon because it involves a plaintiff who developed a ganglionic cyst. In that case, the plaintiff received \$40,000 in non-pecuniary damages.
- *Mladjo v. Etheridge*, 2019 BCSC 950: The plaintiff was in her early 50s. She suffered injuries to her back, neck, knees, shoulder and ankle. As a result of her injuries, she was unable to pursue her career goals and she was diminished in her ability to enjoy recreational activities such as dancing and working out. She was awarded \$80,000 in non-pecuniary damages.

[88] I have considered the cases cited by both counsel. All cases turn on their particular facts.

[89] In assessing non-pecuniary damages, I must look at the various injuries suffered by the plaintiff through the lens of the Stapley factors. While I have found that the ganglionic cyst was caused by the Accident, I agree with the defendant that the ganglionic cyst does not contribute in a large way to the plaintiff's overall loss of enjoyment of life. While it is unsightly, there are no ongoing medical risks associated with it. Dr. Perey has offered surgical removal as an option.

[90] With respect to the plaintiff's knee pain and, to a lesser extent, his hip pain, I find that the plaintiff's loss of enjoyment of life has been significant. He has gone from being an extremely active, energetic father and husband, a man who participates in a variety of sports and activities, to being a self described "broken man".

[91] Any assessment of non-pecuniary damages must be individualized. The consequences of an injury of this nature for someone who had a more sedentary lifestyle pre-Accident would be less severe. However, in this case, the injury to the plaintiff's knee has proven life changing. It has impaired his relationship with his spouse and it has drained much of the enjoyment out of his working and recreational life.

[92] In all the circumstances, I find that an award of \$80,000 for non-pecuniary damages is appropriate.

B. Loss of income earning capacity

- [93] The plaintiff claims \$159,406 for future loss of earning capacity, based on a calculation of two years of his salary of \$79,703.04. The defendant takes the position that the plaintiff has not demonstrated on a balance of probabilities that his earning capacity has been diminished by the Accident.
- [94] The legal principle that governs the assessment for loss of earning capacity is that, insofar as is possible, the plaintiff should be put in the position he or she would have been in but for the injuries caused by the defendant's negligence: *Lines v. W & D Logging Co. Ltd.*, 2009 BCCA 106 at para. 185.
- [95] The plaintiff must demonstrate both an impairment to his or her earning capacity and that there is a real and substantial possibility that the diminishment in earning capacity will result in a pecuniary loss. If the plaintiff discharges that requirement, he or she may prove the quantification of that loss of earning capacity either on an earnings approach or a "capital asset" approach: *Perren v. Lalari*, 2010 BCCA 140 at para. 32. Regardless of the approach, the court must endeavour to quantify the financial harm accruing to the plaintiff over the course of his or her working career: *Pett v. Pett*, 2009 BCCA 232 at para. 19.
- [96] The plaintiff lost only four days of work from the Accident. He testified that he lost no income as a result of missing these days of work as they were taken as sick days.
- [97] There is no past wage loss. The performance reviews and other employment documents in evidence suggest that the plaintiff has continued to perform well at work and earn bonuses and salary increases on an annual basis. There is no evidentiary basis on which I could find a past loss of earning capacity.
- [98] With respect to the plaintiff's claim for loss of future income earning capacity, the plaintiff argues that he is worried about his future at work. He is much less enthusiastic about working and thinks he may need to retire early because of his difficulty in performing his job duties in the face of his injuries. He testified that the ganglionic cyst impairs his ability to do some of the more physical aspects of his job, such as using a screwdriver. When the cyst gets particularly large, writing and typing become difficult.
- [99] The plaintiff submits that he is at risk of getting laid off. It is notable that there have been periodic lay offs at Tantalus in the past, including after the Accident, and to date the plaintiff has kept his job. To the extent that the plaintiff believes he is at greater risk for being laid off because of his injuries, I cannot find that this is a rational belief given the plaintiff's long and apparently successful tenure working at Tantalus. Subjective worry over losing one's job is not enough to ground a claim for loss of income earning capacity: *Kim v. Morier*, 2014 BCCA 63 at para. 8.

[100] Given the lack of evidence to support the proposition that the plaintiff's job performance has been diminished in any way, or will be diminished in the future, I am unable to find a basis for a loss of income earning capacity award.

C. Loss of housekeeping capacity

[101] The plaintiff seeks damages in the amount of \$50,000 for loss of housekeeping capacity. In support of this claim, he submits that he is not as helpful around the home as he used to be. Specifically, he can no longer do yard work, landscaping, painting and electrical and plumbing work in the house.

[102] The plaintiff did not testify that his injuries completely prevent him from doing the work around the house that he previously did. He conceded that he does most of the required tasks around his home, but his level of performance is lower.

[103] An award ordered for homemaking costs is for the value of the work that would have been done by the plaintiff but which he or she is incapable of performing because of the injuries at issue. The plaintiff has lost an asset: his or her ability to perform household tasks that would have been of value to him or herself as well as others in the family unit but for the Accident: *Westbroek v. Brizuela*, 2014 BCCA 48, at para. 74.

[104] Home maintenance, repair and renovation costs have been included in claims for past loss of housekeeping capacity: *Chappell*, at para. 258.

[105] I am satisfied that there are some household chores that the plaintiff can no longer do as a result of his injuries. He testified that he is no longer able to engage in heavy outdoor work such as lawn mowing, cleaning gutters, and landscaping. However, he admitted that he is able to do most of the day-to-day household maintenance he did before, albeit more slowly and with greater effort.

[106] There are a relatively small number of household tasks that the plaintiff performed pre-Accident that he is now unable to do as a result of his injuries. In these circumstances, I consider an award of \$10,000 to be sufficient to provide fair compensation for the past and future loss of housekeeping capacity.

D. Cost of future care

[107] The plaintiff has made a cost of future care claim in the amount of \$88,219.90. This includes the cost of physiotherapy, psychological counselling, exercise instruction with a kinesiologist, a swim pass, non-prescription medications, occupational therapy, participation in a pain management program, and the following specific items: custom knee brace, neck pillow, back support, TENS and electrodes.

- [108] The plaintiff frankly admitted in his closing submissions that there are a number of items in his cost of future care claim that are not medically recommended. Rather, they are items that he saw claimed in other personal injury cases, and thought might be helpful to him.
- [109] Future care costs are intended to compensate a plaintiff for expenses that are reasonably necessary for his future medical care. These expenses must be reasonable and they must be medically justified: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.) at 84, *aff'd* 49 B.C.L.R. (2d) 99 (C.A.).
- [110] In her report, Dr. Ticea recommends active rehabilitation. On cross-examination, Dr. Day testified that low impact exercise like swimming and stationary biking are helpful for knee rehabilitation. Mr. Vagay testified that the plaintiff continues to benefit from physiotherapy and that a knee brace would be helpful. This is the extent of the evidence presented at trial to support the reasonableness and medical justifiability of the plaintiff's cost of future care claim.
- [111] I find that the following treatments and therapies are medically justified: physiotherapy, kinesiology, swimming and a custom knee brace.
- [112] I am not, however, persuaded that the amounts claimed for each of the treatments and therapies are reasonable. The plaintiff seeks the following:
- a) physiotherapy: \$37,770 to cover weekly sessions for nine years,
 - b) kinesiology: \$4,320 to cover six sessions a year for nine years,
 - c) swim pass: \$3,942, and
 - d) a custom knee brace to be replaced as needed: \$10,500.
- [113] I am not persuaded that the plaintiff will need weekly physiotherapy for nine years. Nor am I persuaded that a custom knee brace will require seven replacements as claimed by the plaintiff.
- [114] Also relevant to the cost of future care claim is the defendant's argument that the plaintiff and his wife (who is a registered nurse), likely have access to extended benefits through work which would offset the cost of some of the necessary therapies. No evidence was presented by either party on this point. It appears likely that some of the plaintiff's costs of future care would be covered under his, or alternatively his wife's, extended health plan.
- [115] As Justice Williams noted in *Dunne v. Sharma*, 2014 BCSC 1106 at para. 179, it is not the role of the court to micromanage the manner in which the plaintiff's future care will proceed. Taking into account the contingencies which apply, I find that a fair award for the plaintiff's cost of future care is \$40,000.

E. Special damages

[116] The plaintiff has claimed special damages in the amount of \$11,378.33. Special damages are intended to cover the expenses incurred, where reasonable, as a result of the plaintiff's injuries or loss from the Accident up to the date of trial. In submissions at trial the plaintiff abandoned a number of his special damages claims, such as his claim for free weights, which he admitted he has purchased but not used. He also admitted that some of his claims, such as the amount he has spent on over the counter painkillers and his commuting costs, are exaggerated.

[117] The defendant consents to pay special damages for a number of items such as physiotherapy, the cost of a massage roller, and the cost of a knee brace. The defendant also agrees to pay a portion of the plaintiff's claim for over the counter painkillers (reduced from \$1,000 to \$300) and mileage and parking costs (reduced from \$2,000 to \$670). The defendant opposes the plaintiff's claims for an exercise bench, roof cleaning, yard maintenance, stationary bike, and inversion table, on the basis that these items are either insufficiently receipted or (in the case of the stationary bike, exercise bench and inversion table) insufficiently proven to have any relationship to the treatment of the plaintiff's accident related injuries. I agree with the defendant that the special damages that have not been consented to have not been proven as special damages and are not payable by the defendant. The total of the special damages consented to by the defendant is \$2,962.

VIII. summary of orders made

[118] The defendant is liable to the plaintiff for damages in the following amounts:

1)

Non-pecuniary damages

\$80,000

2)

Loss of housekeeping capacity

\$10,000

3)

Cost of future care

\$40,000

4)

Special damages

\$ 2,962

IX. costs

[119] If the parties are unable to agree on costs, they may make arrangements with Supreme Court Scheduling to appear before me to speak to costs.

"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/20/05/2020BCSC0583.htm>

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

Prepared on 29 October 2026 · Esheria