
CANADA / JUDGMENT

Stone v. Kirkwood

2008 BCSC 1295

COURT

Supreme Court of British Columbia

DECIDED

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2008 BCSC 1295 Stone v. Kirkwood

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Stone v. Kirkwood,

2008 BCSC 1295

Date: 20080926

Docket: M072699

Registry: Vancouver

Between:

Cameron Stone

Plaintiff

And:

Miles Kirkwood, Maria Kirkwood and

Nissan Canada Inc.

Defendants

Before: The Honourable Mr. Justice Curtis

Reasons for Judgment

Counsel for the Plaintiff

A. Khanna

Counsel for the Defendants

R. Hodgins

Date and Place of Trial:

June 11-13, 2008

Vancouver, B.C.

- [1] Cameron Stone claims damages for personal injuries he suffered in a motor vehicle accident August 30, 2005. Liability for the collision is admitted but the nature and extent of his injuries and the quantum of damages are in issue.
- [2] On August 30, 2005, Cameron Stone was 25 years of age. Although he found school difficult, particularly reading comprehension because he suffered from dyslexia he had graduated from Grade 12 at Handsworth School in 1998.
- [3] He worked as a lift operator at Grouse Mountain and later at Whistler. He tried attending Capilano College in 2000 and 2001 but found the academic courses too difficult. Always a physically active person with interests in sports such as rugby which he played at a high level, snowboarding and running, he decided to pursue a more physical career. Mr. Stone chose carpentry, beginning as an apprentice in 2001. He worked in the construction field, chiefly in heavy labour and form work through the union hall, and passed three of the four levels necessary to become a journeyman carpenter. Each level required a certain number of hours of work as a carpenter and schooling of six weeks for the first three levels and four for the last level. In January of 2005, Mr. Stone was working for Bosa Construction. Knowing that he would be off work in the spring for school he was working 14 hours per day, five days per week. When he started school, he went to a chiropractor and for 14 massage treatments related to back pain. Dr. Anderson's note of March 18th attributes his pain to a rugby injury which occurred when he was tackled, fell on a ball and hyper-extended his back in 2003 or 2004.
- [4] When his schooling was finished for the year in May of 2005, Mr. Stone formed a company with his friend Chris MacIntyre to work as a subcontractor for Cambie Roofing putting on cedar shake roofs. This work involved long hours of heavy labour including carrying heavy bundles of roofing up ladders. The company was called MacRon Enterprises. It had six or seven jobs before the accident and he and his partner were working eight to 16 hours per day and paying themselves \$20 per hour.
- [5] At about 4:00 p.m., August 30, 2005, Mr. Stone was driving his girlfriend's Ford Escape to his father's home with his brother as a passenger. He was travelling on Lonsdale Avenue in North Vancouver intending to turn left onto 18th Avenue. He stopped at the intersection for a red light and when the light turned green he moved into the intersection and paused for the traffic to clear. While he was waiting, the defendant Maria Kirkwood, who was driving children from a visit to the Laser Dome up Lonsdale for ice cream, drove her vehicle into the back of the Cameron vehicle. It appears Ms. Kirkwood saw the light turn green and accelerated then realized there was a stationary vehicle in front of her and braked before

colliding with it.

- [6] Cameron Stone and his brother got out of the vehicle and spoke with Ms. Kirkwood. Mr. Stone then drove to his father's residence where he said "within an hour my back was killing me" and he went to a walk-in clinic.
- [7] Mr. Stone had previously scheduled a vacation for the week after the accident. He did go to the family home in Peachland but his vacation was ruined by pain. He could not water ski, kneeboard or do any of the activities he had planned.
- [8] The following week Mr. Stone went back to his roofing job. He saw his family doctor, Dr. Anderson, on September 8, 2005. Dr. Anderson noted problems with his neck, shoulder and lower back. Mr. Stone testified that on his return to work his lower back was extremely painful. Mr. Stone and his partner did a number of jobs following his injury but Mr. Stone, although he could work, was no longer working as efficiently as he had been. At the end of October, the roofing jobs ran out, roofing in Vancouver generally being seasonal work. Mr. Stone began work on his father's house with his partner but he and Mr. MacIntyre parted and MacRon ceased doing business in November 2005. In December 2005, Clifford Stone, Cameron Stone's father, a realtor of 34 years experience, noticed that Cameron was not able to work and not doing well. He offered him work as an office assistant starting at \$1,600 per month plus 10 percent of the gross commission in his business of rural recreational land sales. Cameron Stone started in that position January 1, 2006 and has continued with that to the present time now earning \$2,000 per month plus 10 percent of the gross commissions. He took the Real Estate Course which he failed in January 2008 but passed in April 2008 and plans to try his hand at being a realtor because he feels he cannot return to heavy labour.
- [9] Dr. Anderson has written a report dated March 26, 2008. Her opinion is that Cameron Stone sustained a mild to moderate flexion/extension injury to his back and neck with a secondary strain contusion type of injury to his right shoulder. She did not see Mr. Stone after July 2007.
- [10] Dr. J.F. Schweigel, an orthopaedic surgeon, did a medical assessment of Cameron Stone September 25, 2006. He wrote in his report of September 25, 2006 at page 5:

Diagnosis:

This gentleman sustained some soft tissue injuries to the cervical area, mid back and low back. He also sustained some soft tissue injuries to the right shoulder. These soft tissue injuries would have been a strain of muscles and ligaments. He also has a developmental anomaly of the spine called scoliosis (abnormal twist).

Causation:

The cause of the soft tissue injuries was the MVA of August 30/05. The scoliosis was present prior to the above MVA.

Prognosis:

Patients with these soft tissue injuries do not develop degeneration, do not develop arthritis and do not require surgery as the joints are not damaged with the soft tissue injuries. Patients with scoliosis usually develop disc degeneration and arthritis in the scoliosis part of the spine.

Disability:

This gentleman could have been disabled between three and six months. After that he should have been able to return to work in a graduated fashion.

And at page 7:

The physical examination of this patient's cervical, thoracic and lumbar spine was essentially normal. I found no evidence of scoliosis although the plain x-rays of 2005, in March showed some scoliosis. He had full cervical, thoracic and lumbar motion, no spasm, no deformity and no neurological deficits. I found no pathology in the right shoulder. In my opinion his soft tissue injuries have healed. His current pain is most likely coming from an underlying scoliosis and possible degenerative process in the thoracic and lumbar spine secondary to problems he has had over the years. To attribute his current problem to the MVA would be inaccurate. He has obviously had problems with his back prior to the MVA and his new job, roofing etc, in my opinion aggravated a pre-existing (prior to the above MVA) back problem. The MVA obviously aggravated a pre-existing problem, but the type of work he was doing, roofing, lifting heavy bundles of material, climbing up ladders, bending and twisting all day long, probably caused his underlying abnormal spine, (scoliotic spine) to become more symptomatic. I suspect that he has some early degeneration in the spine, either thoracic or lumbar or both if an MRI scan was performed. I do not think it is necessary to perform an MRI, but that would be my working diagnosis based on the fact that he has scoliosis. When a patient has scoliosis their spine moves in an abnormal fashion. When this happens the discs begin to wear out and the facet joints begin to wear out and arthritis develops. I think the MVA temporarily aggravated this pre-existing problem that was present prior to the MVA. However, again, because of the type of work he was doing, I think that the type of work he was doing, roofing, caused him to have more pain and constant pain. Because of his scoliosis he was predisposed to having problems with his back regardless of the MVA.

If he continues to do his exercises in a diligent fashion he should continue to improve. However if he has not improved within six months, the chance of him improving is not very high and he will have to decide whether he wants to carry on with heavy labour type work or go into another career.

[11] Dr. Schweigel testified at trial. He said while soft tissue injury usually heals in three to six months he has seen people in his clinic who have not healed in that time. He agreed that his physical examination did not reveal the scoliosis shown by x-rays and that there was no x-ray evidence of degeneration of the spine. He agreed he would not expect a man of Mr. Stone's age to have had back pain as long as he has.

[12] Dr. Travlos, a specialist in Physical Medicine and Rehabilitation saw Mr. Stone on May 4, 2007 for a medical assessment at the request of Mr. Stone's counsel. In his report of May 4, 2007 Dr. Travlos writes:

It is my opinion that the complaints Mr. Stone had following his August 29, 2005, accident, which included pains in his neck, back and shoulder, were a direct result of the accident. It is probable that he had some underlying susceptibility to injury given the complaints of pain that he had in the spring of 2005, but he was doing a labour-intensive job and had not been seen, either by his massage therapist or his family doctor in regards to any back pain for several months prior to the accident. It is possible that he may have gone on to develop a flare up in his back pains in the absence of this accident, but I think it unlikely that they would have limited him the way the accident-related symptoms did. It is more probable than not that had he had a flare up in his back pain in the absence of the accident that it would have followed the same path as his previous complains. In other words, it would not have limited his work activities or his ability to continue gainful employment as a labourer.

I disagree with Dr. Schweigel, whose report of September 25, 2006, indicated that Mr. Stone's symptoms were primarily as a result of his scoliosis and underlying degenerative change. The degree of scoliosis that Mr. Stone has is not visible clinically and is therefore extremely minor. The x-ray report from the radiologists describes this as a "very mild scoliosis" and there would be no reasonable expectation for a minor scoliosis such as this to cause pains. Although anything is possible, the potential for this being symptomatic is fairly unlikely. There is also no indication that Mr. Stone has the onset of degenerative changes in the x-ray report. X-ray changes, even if showing underlying degeneration, are not necessarily symptomatic and the majority of adults with degenerative changes in their spine do not have symptoms from those changes, even if they were found to be present in Mr. Stone's x-ray.

Prognostically, Mr. Stone has improved and is now some 85% better. It is my opinion that he should probably still undergo further recovery over the course of the next year and I think it is probable that he will return to some 95% full recovery. It is, however, likely that he will continue to have morning stiffness, as he complains of now, and these symptoms will vary depending on his activities. He will likely still experience intermittent pain flare-ups, but should be capable of reasonable physical activity. He will learn to avoid certain recreational activities and certain types of work activities in order to manage his pains and by so doing should have reasonable pain control.

Mr. Stone is capable of participating in home chores and activities as necessary. I would discourage Mr. Stone from returning back to recreational contact activities such as ice hockey or rugby. His risk of symptom aggravation is definitely increased if he does do so.

Mr. Stone did not really lose much time off work following his accident and continued to work in a self-employed position. Self-employed individuals tend to work despite significant limitations and pains, as there is really no option to take time away from the workplace. Given the symptoms that he was having and the type of work that he was doing, it was realistic that Mr. Stone was not

able to be as productive as he was before the accident. His plan to look for lighter duties was reasonable based on the ongoing symptoms that he had. This allowed for him to be gainfully employed and to continue to earn income.

If Mr. Stone desperately wanted to return back to his carpentry work, I would recommend that he undergo a very intense work-conditioning program of up to three months' duration to develop the strength and fitness level to return to that line of work. It is probable that by the end of that time he would have enough fitness and strength to indeed work in that capacity, but his risks of injuries and flare-ups over his working career would be reasonably high, affecting his work and even the types of jobs that he would be able to undertake.

Mr. Stone is in the process of completing his realtor's license and at this point in time should be able to work indefinitely without limitation in that capacity, even with his current ongoing symptoms.

- [13] Dr. Travlos also testified at the trial. He agreed that in light of Mr. Stone's previous back problems he could have developed back pain in the future without the August 30 collision. Dr. Travlos did not know Mr. Stone was successfully playing 16 games of in-line hockey from April to July and commented that if he was managing to do so then he was probably recovering well. He stated he didn't think Mr. Stone could have worked as hard as he did before the accident if he had had major back problems prior to the collision. He thought that Mr. Stone's scoliosis was unlikely to be causing his pain and that a program of strengthening his back would help.
- [14] The defendant played surveillance video tapes of June 15, 2007 and May 10, 2008 showing Mr. Stone playing in-line roller hockey. Mr. Stone played in-line roller hockey for the 2007 and 2008 seasons. The season consists of 16 games from April to July each year. In 2007, Mr. Stone played all 16 games and was the leading scorer for his team. He testified his back did not prevent him from playing but was notably painful the following day. The May 2008 tape shows him handling a heavy hockey bag with ease. He appears to have good speed and stick handling abilities and appears to play aggressively. I did not notice any heavy body contact during play - the league is a no contact league but of course contact is to an extent unavoidable.
- [15] I am persuaded by the evidence to conclude on the balance of probabilities that Cameron Stone suffered a flexion extension injury to the soft tissues of his neck, back and shoulder. Considering the persistent difficulty that he has had with his lower back, the injury is fairly described as moderate in nature. Mr. Stone had back trouble related to his rugby injury and on occasion his extremely heavy work load prior to his injury for which he sought treatment, but I accept his evidence that his previous back problems were intermittent and less severe before the accident. Mr. Stone had already given up rugby and snowboarding prior to his injury. His ability to play in-line hockey demonstrates that he does not have a functional disability, his problem is that demanding activities can cause the onset of significant pain.

[16] I accept Dr. Travlos' opinion that:

He will likely still experience intermittent pain flare ups, but should be capable of reasonable physical activity. He will learn to avoid certain recreational activities and certain types of work activities in order to manage his pains and by doing so should have reasonable pain control.

As I have noted earlier, Mr. Stone had pain in his back prior to the collision and would have had it in the future if the collision had not occurred, but his motor vehicle injuries have increased his susceptibility to back pain and made that back pain worse when it occurs. I assess Cameron Stone's claim for general damages for pain and suffering which has been and will be caused by his motor vehicle injuries above and beyond that which he would have had had he not been so injured at \$40,000.

[17] Cameron Stone also claims damages for past wage loss between August 30, 2005 and the present.

[18] If he had not been injured in the August 30 collision, Mr. Stone would have continued his work with MacRon Enterprises doing cedar shake work until the end of the roofing season, in or about October. The evidence is that Mr. Stone went back to that work but was not able to do it efficiently. It appears that this inefficiency contributed to Mr. MacIntyre leaving the company, however there is no evidence that jobs were lost and the split occurred at the end of the roofing season.

[19] It is likely that once the roofing season ended Mr. Stone would have gone back to his work as an apprentice carpenter. He had 531 hours left to complete before taking his four week level four schooling and exam. The failure rate for the final exam is significant and it is possible Mr. Stone would have encountered difficulty. I expect that he would have succeeded in becoming a journeyman carpenter at some point and would probably be continuing with that career had he not been injured.

[20] Mr. Stone's annual income has been as follows:

2003 \$20,191

2004 \$35,078

2005 \$16,671

2006 \$31,859

2007 \$39,700

[21] Chris MacIntyre who worked with Mr. Stone in MacRon Enterprises continued with roofing after they went their separate ways. He gave evidence that he continued as a roofing subcontractor until February 2008. He said in that work he earned \$72,000 less wages and cost of tools in 2007. He did not produce his financial records.

- [22] Mr. Duck, the Vice-President and Dispatcher for the Carpenters Union Local 1995, gave evidence that the average number of hours worked for the union's 1400 members is 1800 per year. According to his evidence, a fourth-year apprentice earned \$27.59 with benefits in 2006 and \$29.69 in 2008, and a journeyman, \$30.55 and \$32.88. Average incomes for carpenters would therefore be about \$49,000 in 2006 and \$53,000 in 2008 for an apprentice and \$55,000 in 2006 and \$59,000 in 2008 for a journeyman carpenter. It appears, however, that if Mr. Stone had continued in the roofing business as Chris MacIntyre did or they had continued together the work could well have been considerably less profitable.
- [23] An assessment of a claim for past loss of income involves considerable uncertainty as it is not possible to know what would have happened. Most likely, Mr. Stone would have continued with roofing for some time but eventually gone back to working for a wage. In doing so, I am satisfied he would probably have made somewhat more than he actually did. I assess the sum of \$30,000 as a reasonable amount of compensation for his gross loss of income, and reducing that by 30% for tax, I award him \$21,000 for past loss of income.
- [24] Mr. Stone also claims for loss of earning capacity. He submits that he is unable to resume heavy labour occupations such as carpentry. He did however go back to work one week after his injury at the very heavy labour of roofing. What he encountered was not functional disability but inefficiency and pain. He has substantially recovered since that time. I accept Dr. Travlos' assessment that Mr. Stone will learn to avoid certain activities in order to manage his pain. I am satisfied that there are many tasks in carpentry that Mr. Stone could reasonably do, but there are some he could not do without incurring more pain than a reasonable person would care to inflict on themselves. A part of this pain he would have encountered even if he had not been hurt in the accident - but as I stated earlier, the accident has made this worse. Mr. Stone could go back to carpentry but that would involve exposure to back pain and he has quite reasonably chosen to try real estate although he is not particularly fond of working as his father's assistant. That could well change if he succeeds as a realtor in his own capacity. However that may be, Mr. Stone has, as a result of his accident injuries, become permanently at risk for more back pain from particularly heavy labour. This limits his ability to do some aspects of carpentry or other heavy labour jobs.
- [25] The British Columbia Court of Appeal discusses the assessment of awards for loss of earning capacity in the case of *Rosvold v. Dunlop*, 2001 BCCA 1, 84 B.C.L.R. (3d) 158, in the following terms:
- [8] The most basic of those principles is that a plaintiff is entitled to be put into the position he would have been in but for the accident so far as money can do that. An award for loss of earning capacity is based on the recognition that a plaintiff's capacity to earn income is an asset which has been taken away: *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229; *Parypa v. Wickware* (1999), 65 B.C.L.R. (3d) 155 (C.A.). Where a plaintiff's permanent injury limits him in his capacity to perform certain activities and consequently impairs his income earning capacity, he is entitled to compensation. What is being compensated is not lost

projected future earnings but the loss or impairment of earning capacity as a capital asset. In some cases, projections from past earnings may be a useful factor to consider in valuing the loss but past earnings are not the only factor to consider.

- [9] Because damage awards are made as lump sums, an award for loss of future earning capacity must deal to some extent with the unknowable. The standard of proof to be applied when evaluating hypothetical events that may affect an award is simple probability, not the balance of probabilities: *Athey v. Leonati*, [1996] 3 S.C.R. 458. Possibilities and probabilities, chances, opportunities, and risks must all be considered, so long as they are a real and substantial possibility and not mere speculation. These possibilities are to be given weight according to the percentage chance they would have happened or will happen.
- [10] The trial judge's task is to assess the loss on a judgmental basis, taking into consideration all the relevant factors arising from the evidence: *Mazzuca v. Alexakis*, [1994] B.C.J. No. 2128 (S.C.) (Q.L.) at para. 121, *aff'd* [1997] B.C.J. No. 2178 (C.A.) (Q.L.). Guidance as to what factors may be relevant can be found in *Parypa v. Wickware*, *supra*, at para. 31; *Kwei v. Boisclair* (1991), 60 B.C.L.R. (2d) 393 (C.A.); and *Brown v. Golaiv* (1985), 26 B.C.L.R. (3d) 353 (S.C.) per Finch J. They include:
- [1] whether the plaintiff has been rendered less capable overall from earning income from all types of employment;
 - [2] whether the plaintiff is less marketable or attractive as an employee to potential employers;
 - [3] whether the plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to him, had he not been injured; and
 - [4] whether the plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market.
- [11] The task of the court is to assess damages, not to calculate them according to some mathematical formula: *Mulholland (Guardian ad litem of) v. Riley Estate* (1995), 12 B.C.L.R. (3d) 248 (C.A.). Once impairment of a plaintiff's earning capacity as a capital asset has been established, that impairment must be valued. The valuation may involve a comparison of the likely future of the plaintiff if the accident had not happened with the plaintiff's likely future after the accident has happened. As a starting point, a trial judge may determine the present value of the difference between the amounts earned under those two scenarios. But if this is done, it is not to be the end of the inquiry: *Ryder (Guardian ad litem of) v. Jubbal*, [1995] B.C.J. No. 644 (C.A.) (Q.L.); *Parypa v. Wickware*, *supra*. The overall fairness and reasonableness of the award must be considered taking into account all the evidence.
- [26] There are some jobs in carpentry and other fields of heavy labour that it would not be reasonable to expect Mr. Stone to undertake. The vast majority of work he might be called upon or wish to pursue remains open to him. Mr. Stone may well succeed as a real estate agent. That field, however, has not been his real interest and he has a learning disability which hampers his reading skills. There is a real possibility that in the future Mr. Stone will

not succeed as a real estate agent and may find it necessary to fall back on his carpentry training. If that occurs, there is a real possibility he will suffer a loss of income in the future because pain will prevent him from doing some of the carpentry work available. I am satisfied Mr. Stone has suffered a loss for which he must be compensated. I do not find it realistic to put forth specific calculations for this real possibility of future loss but it is a loss for which a fair assessment of compensation must be made. I find a reasonable award for his proven reduction in earning capacity to be \$25,000.

[27] I award Mr. Stone the following special damages:

Park Royal Physio \$1,040.00

Moveo Sports Clinic 2,505.00

Foam Roller 12.00

Prescriptions 29.22

Personal Trainer 331.08

Gym passes (50 percent) 416.86

UBC Real Estate Program 875.00

Real Estate Examiners Fees 250.00

Real Estate Licence 1,050.00

Residential Services Applied

Practice Course 498.75

[28] I have reduced the gym fees by 50 percent because Mr. Stone would likely be going to the gym and paying fees even if he had not been hurt, but probably less consistently. There is no basis for the claim for the payment regarding MacRon Enterprises. That was a business he was in which would likely have failed in any event. The damages for real estate training represent his costs to mitigate his wage loss but should only be paid if actually incurred.

[29] With respect to Mr. Stone's claim for future care expenses, I find that a guided strengthening program under the care of a personal trainer is advisable and reasonable and I award him \$1,500 for the cost of such treatment.

"V.R. Curtis J."

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