
CANADA / JUDGMENT

Szczurowski v. Diaconu

2021 BCSC 420

COURT

Supreme Court of British Columbia

DECIDED

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2021 BCSC 420 Szczurowski v. Diaconu

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Szczurowski v. Diaconu,

2021 BCSC 420

Date: 20210210

Docket: M166839

Registry: Vancouver

Between:

Krzysztof Szczurowski

Plaintiff

And

George Diaconu

Defendant

Before: The Honourable Mr. Justice Tammen

Oral Reasons for Judgment

Counsel for the Plaintiff:

Z.P. Wiseman

E. Holden

Counsel for the Defendant:

R. LaPlante

O. Wilson

Place and Dates of Trial:

Vancouver, B.C.

January 11, 13-15, 18 & 19, 2021

Place and Date of Judgment:

Vancouver, B.C.

February 10, 2021

- [1] THE COURT: The plaintiff, Krzysztof Szczurowski, seeks damages for injuries caused by a motor vehicle accident on September 15, 2014, in Port Moody, British Columbia. Liability for the collision is not in issue. Mr. Szczurowski was struck from behind while his truck was stopped for pedestrians.
- [2] The issues are as follows:
- 1) causation of some of the injuries, specifically the extent to which some soft tissue injuries pre-existed this accident and most particularly, whether or not Mr. Szczurowski's serious urologic injuries were caused by the motor vehicle accident.
 - 2) the appropriate quantum of non-pecuniary damages, which hinges to a large degree on the finding on causation of the urologic injuries.
 - 3) whether Mr. Szczurowski has suffered any loss of income, past or prospective, as a result of injuries caused by the collision.
 - 4) quantum of special damages.
 - 5) cost of future care.
- [3] Mr. Szczurowski is 59 years old, divorced with one teenage daughter, and lives alone. He immigrated to Canada from Poland as a young man and has worked as a floor installer for more than 30 years. For large portions of that time, he has been self-employed. His business affairs have been structured in a way which permits him to earn income through his business, Shadow of Grain Hardwood Floors Inc., and pay some taxes at the corporate rate, and some at the higher personal rate. That fact is only important when I come to consider the claim for loss of income.
- [4] Mr. Szczurowski was in a previous motor vehicle accident in 2007 and suffered soft tissue injuries as a result. The extent to which he was still suffering from those injuries is a matter of some dispute. Dr. Ableman, the plaintiff's family doctor, treated him following both motor vehicle accidents and was a witness at trial. He wrote a report in November, 2011, which referenced chronic and ongoing neck and back pain associated with the 2007 motor vehicle

accident. That report also notes things, which the plaintiff told Dr. Ableman about his inability to enjoy recreational activities and perform household chores because of those injuries. Dr. Ableman confirmed in evidence that the plaintiff told him those things at the time.

- [5] Also of note, Dr. Ableman saw Dr. Szczurowski several times in January and February of 2014 for complaints of back and leg pain, including chronic back pain and acute back spasms. Thus, it seems extremely likely that the effects of the injuries suffered by the plaintiff in 2007 had not resolved at the time of the September 2014 motor vehicle accident. Nonetheless, it is equally apparent that the 2014 motor vehicle accident exacerbated those soft tissue injuries considerably. For that, Mr. Szczurowski is entitled to be compensated.
- [6] Mr. Szczurowski described the injuries immediately following the motor vehicle accident as follows: soreness to his head, neck pain, strong pain in his groin, strong pain in his low back, and some numbness in his left leg. Mr. Szczurowski saw Dr. Ableman that day, again the next day, and on September 23 and October 2, 2014. His initial complaints related solely to back pain. He first mentioned groin and bladder pain to Dr. Ableman on October 2, 2014. Dr. Ableman's shorthand notes indicate that he interpreted the complaints made at that time by Mr. Szczurowski as being consistent with a condition he called prostatism.
- [7] Mr. Szczurowski had earlier complained of left groin pain to Dr. Adrian, to whom Dr. Ableman referred him, on September 24, 2014. Dr. Adrian's notes state "some hesitancy of urination and no incontinence" and that the pain had disturbed his sleep for some period of time.
- [8] Based on all of that, I am satisfied that Mr. Szczurowski experienced groin pain almost immediately after the motor vehicle accident and that his urologic symptoms developed very shortly thereafter.
- [9] Mr. Szczurowski described in some detail the ongoing difficulties he has in this regard. He has issues with bladder control and voiding. He often gets up multiple times in the night to attempt urination. His bladder does not empty properly, so he must use catheters multiple times each day for that purpose. That process is quite painful. He cannot use catheters on the job site, so must return home for a bathroom break on occasion. He has experienced episodes of urinary incontinence, which are extremely embarrassing and necessitate a change of clothes during the work day. His bladder becomes sore if he drives for prolonged periods of time necessitating bathroom stops.
- [10] In addition, Mr. Szczurowski has developed erectile dysfunction, which has in turn caused him to feel depressed. This has impacted his willingness to engage in romantic relationships. He has tried Viagra but cannot use it because of adverse side effects.
- [11] Mr. Szczurowski saw several urologists post-accident, most recently Dr. Warner, who wrote a report and testified at trial. Dr. Warner's opinion as set out at pages 7 and 8 of his medical legal report is in part as follows:

It is my opinion that his urologic findings relate directly to the motor vehicle accident on September 15, 2014. That is consistent with the absence of symptoms prior to the accident and the distinct temporal onset of his symptoms immediately after the accident. The findings as described by Mr. Szczurowski indicate interruption of the descending inhibitory pathways which normally are in place to prevent overactivity. This may occur in motor vehicle accidents where the severity of injury appears relatively minor. This can occur where back problems, including disc disease and/or protrusion, compress the spinal cord or where the microscopic nerve fibres in the pelvis are disrupted. When this type of injury occurs, it tends to be permanent, and while it does not progress other urologic factors due to age, including enlargement of the prostate and significant residual urine, may aggravate the symptoms. Mr. Szczurowski is shown to have a large residual urine on several assessments, which may be partly responsible for his symptoms of loss of urine when bending at the waist.

[12] And then further down on page 8:

Mr. Szczurowski has a difficult combination of overactive bladder/neurogenic bladder symptoms and a significant residual urine. He has not responded to standard treatment because of ineffectiveness or side effects. His prognosis for improvement of his urologic symptoms is unlikely. It is my opinion that his symptoms will continue for the rest of his life impacting on his ability to work and enjoy recreational activities. The aging factor of prostate enlargement may worsen the symptoms with time.

[13] I accept and rely on Dr. Warner's opinion. There was no contradictory medical evidence. In particular, I accept Dr. Warner's opinion that the motor vehicle accident likely caused the urologic injuries.

[14] To the extent the opinion relies on acceptance of Mr. Szczurowski's evidence concerning onset of symptoms, I accept that evidence. I am unconcerned about the delay of one to two weeks in reporting groin pain to doctors. Likewise, I am not troubled by the lack of specificity in the initial complaints. That is easily attributable to the language barrier, given that English is Mr. Szczurowski's second language, and to the embarrassing nature of the complaints. I accept Dr. Warner's opinion about the chronic nature of the medical problem and impact on Mr. Szczurowski's personal and professional life.

[15] I also accept the evidence of Dr. Axler, a psychiatrist who assessed Mr. Szczurowski. Dr. Axler notes that Mr. Szczurowski has not yet had any psychotherapy related to his sexual dysfunction but could benefit from same. He recommends a course of treatment that will cost \$3,500 and will involve cognitive behavioural therapy.

[16] The only real dispute among the various medical experts who assessed the soft tissue injuries was the extent to which the 2014 motor vehicle accident exacerbated the plaintiff's neck injuries. All the doctors agree that there was significant aggravation of his back pain and exacerbation of symptoms related to the back injury. Given the passage of time and limited recovery, Mr. Szczurowski is likely to experience chronic pain for an indeterminate period of time. I tend to accept the evidence of Mr. Szczurowski that he also experienced

neck pain in the aftermath of the 2014 motor vehicle accident and that such forms part of his chronic pain mosaic.

- [17] On the issue of quantum of non-pecuniary damages, to compensate Mr. Szczurowski for pain, suffering, and loss of enjoyment of life, there is little disagreement between the parties. Both agree that there are few helpful precedents that consider a combination of chronic pain associated to soft tissue injuries, and some form of bladder or urologic injury.
- [18] The plaintiff relies on the case of *McLeod v. Goodman*, 2014 BCSC 839. Ms. McLeod developed chronic pain syndrome affecting her neck, shoulders, face, and jaw. Following surgery, she developed a bladder problem that caused discomfort and occasional incontinence. Her non-pecuniary damages were \$130,000. Here, the plaintiff seeks an award of \$120,000.
- [19] The defendant relies on *Desjarlais v. Desjarlais*, 1999 CanLII 6557 (BCSC). In that case, the plaintiff suffered mild to moderate soft tissue injuries in addition to a prolapsed bladder, which the judge described as a "serious injury." It resulted in chronic pain and an uncertain prognosis. The non-pecuniary damages were \$80,000, which is the figure defence counsel submits is appropriate here.
- [20] In my view, the injuries suffered by Mr. Szczurowski are more serious than those referred to in *Desjarlais*. I also note the age of that case, which in and of itself would require an adjustment for inflation. On balance, I am satisfied that the figure proposed by plaintiff's counsel, \$120,000, is the appropriate amount for non-pecuniary damages. I make that award.
- [21] The more contentious issue is whether there should be any damages awarded for loss of income-earning capacity. Mr. Szczurowski testified that his ability to work has been adversely impacted by the injuries he suffered in the 2014 motor vehicle accident. He can no longer endure prolonged periods of certain tasks which require bending at the waist. He tends to take smaller jobs and attempts to avoid those jobs that require him to lift and move heavy flooring materials. All of those impediments arise because of the soft tissue injuries.
- [22] However, in my view the work restrictions or modifications occasioned by his urologic injuries are more significant. Mr. Szczurowski no longer has the energy and inclination to go out on evenings and weekends to do job estimates. He cannot endure prolonged driving times in his truck. He must carefully choose his jobs, wishing to be close to home so that he can return during the day to attend to his urologic tract needs or change clothes, if necessary. I accept that his ability to work and be productive has been curtailed. I am satisfied there is a real and substantial possibility that but for the injuries sustained in the motor vehicle accident, Mr. Szczurowski would have been able to work more and earn a greater income than he has for the past five plus years.

- [23] In addition, I make the same finding going forward. Mr. Szczurowski plans to retire at age 65, so he has approximately six years of working full time remaining. Mr. Szczurowski testified that his capacity to work has been diminished by 40 percent. I am skeptical of that estimate. Exhibit 2 contains the past ten years' income information for both the company and Mr. Szczurowski personally. I agree with defence counsel that no clear picture emerges which demonstrates trends pre- or post-accident.
- [24] However, I can determine Mr. Szczurowski's total income for a given year or a longer time period from those documents. Plaintiff's counsel has helpfully placed some of that data into charts. Exhibit 6 shows Mr. Szczurowski's T4 or personal income figures for the period 2014 to 2020. Exhibit 7 shows the profits, both gross and net, for his company, Shadow of Grain.
- [25] Exhibit C for identification replicates Exhibit 7, but with two additional columns which add back for net pre-tax income purposes some mixed-use expenses. I have examined the financial statements and I am satisfied that the calculations in those columns seem to accord with general accounting principles. In short, many of those items are things which are permissible business-use deductions for tax purposes but which would represent income for other purposes such as calculating child support.
- [26] I am also satisfied that to calculate Mr. Szczurowski's actual income for a given year, one must add figures from the final column in Exhibit 6 to that found in Exhibit C. For each year, Mr. Szczurowski's T4 personal income figure is part or all of a figure shown on the corporate return as "subcontract labour," which is excluded for all purposes in arriving at net pre-tax income in both Exhibit 7 and Exhibit C. Thus, I am satisfied that in final submissions, plaintiff's counsel presented the appropriate income figures for calculation purposes.
- [27] Where I part company with the plaintiff is the percentage by which work capacity has been affected. The charts provided to me show figures based on adding either 30 or 40 percent to the actual earnings. I decline to do so. I have arrived at a global figure for past wage loss that is closer to 20 percent. The total income earned by Mr. Szczurowski for the five-year period claimed is \$197,326. I find that an appropriate amount to award for past lost of opportunity is \$40,000. For future loss of capacity, I award \$60,000.
- [28] The parties agree on most of the amount recoverable as special damages, the out-of-pocket expenses incurred by Mr. Szczurowski to date. The disputed amount is approximately \$1,167. For most of that amount, the dispute is based on absence of receipts. I would not make that bar to recovery, and I accept Mr. Szczurowski's evidence on those expenditures. The only deduction I make for those expenses is \$329.97, the cost of a portable massage table. There is no evidence that such purchase was medically necessary. The amount I award for special damages is \$3,591.57.
- [29] The final matter in dispute is quantum recoverable for cost of future care. However, again the gulf is not particularly wide at the end of the day. Defence counsel conceded that if I was satisfied as to cause of the urologic injury, then the amount recommended by Dr. Axler for cognitive behaviour therapy was reasonable. I accept the position of defence counsel as to

the items that would be paid by the Medical Services Plan, the range for active rehabilitation expenses, and the need for only one modality of treatment as among chiropractic, massage, and physiotherapy. Thus, I agree with the total proposed by defence counsel of \$3,244. To that I add the \$3,500 for cognitive therapy, bringing the running total to \$6,744.

[30] However, I must also add an amount for self catheterization supplies, which will likely cost in excess of \$1,500 annually. I award an additional \$15,000, bringing the total for cost of future care to \$21,744.

[31] To summarize, the damages award is as follows:

a) Non pecuniary damages

\$120,000

b) Past loss of income

\$40,000

c) Future loss of income

\$60,000

d) Special Damages

\$3,591.57

e) Cost of Future care

\$21,744

[32] The total amount is \$245,335.57.

[33] Unless there are circumstances of which I am unaware, the plaintiff is entitled to his costs at Scale B.

"Tammen J."

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