

CANADA / JUDGMENT

Tanaka v. Gill

2023 BCSC 344

COURT

Supreme Court of British Columbia

DECIDED

8 March 2023

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2023 BCSC 344 Tanaka v. Gill

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Tanaka v. Gill,

2023 BCSC 344

Date: 20230308

Docket: M203513

Registry: Vancouver

Between:

Gary Tanaka

Plaintiff

And

Samantha Gill and John Baldev Gill

Defendants

Before: The Honourable Mr. Justice Milman

Reasons for Judgment

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Place and Dates of Trial:

Vancouver, B.C.

January 23-27, 30-31

and February 1, 2023

Place and Date of Judgment:

Vancouver, B.C.

March 8, 2023

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I. Introduction

- [1] On March 21, 2019, the plaintiff, Gary Tanaka, was injured while he was cycling to work eastbound on a designated bicycle route on 37th Avenue at the intersection of Willow Street in Vancouver. His face struck a door of the defendant's parked vehicle as it was being opened. As a result, he suffered a mild traumatic brain injury ("MTBI") as well as soft tissue injuries. Liability for the accident has been admitted.
- [2] Although his physical injuries have largely resolved, he continues to suffer from post-concussive symptoms. He says that these have adversely affected his mental faculties and thereby altered the course of his career, which in turn has led to anxiety and depression.
- [3] The defendants dispute that Mr. Tanaka's current symptoms are causally connected to the accident, and assert that, to the extent they are, Mr. Tanaka has failed to mitigate his loss by not following the medical advice he received.
- [4] At issue in this action is the amount that should be awarded for general damages, loss of earning capacity (past and future) and the cost of future care. The parties agree on the amount of special damages owing.
- [5] For the reasons that follow, I have concluded that Mr. Tanaka is entitled to damages as set out below.

II. The Background Facts

A. Before the Accident

- [6] Mr. Tanaka was born in 1972 and grew up in Coquitlam. He graduated from secondary school in 1990 and attended Douglas College and then BCIT. He obtained a diploma in computer science in 1995. After that, he worked for a variety of employers providing IT support services.
- [7] In January 2000, a colleague introduced him to a start-up printing company known as "Creo", which was later acquired by the Kodak group. He joined that company initially as an IT support technician.

- [8] Around the same time that he began his new job with Creo, he reconnected with the woman who was to be his future wife, Mayumi Tanaka. She was then a professional snowboarder. They were married in 2001. Soon after that, Ms. Tanaka went back to school to study marketing management. She ultimately became qualified as a licensed realtor.
- [9] During the early years of the marriage, the couple led a very active lifestyle. They regularly worked out at the gym. Mr. Tanaka played various sports, including hockey, ball hockey and baseball. He regularly cycled to work. In 2012, he and Ms. Tanaka joined a conditioning gym
- [10] That period of heavy athleticism ended in August 2015, when Mr. Tanaka tore his meniscus while lifting heavy weights. It was the second time he had injured that knee. He had had surgery on the same knee 25 years before and now required surgery again. The operation took place on May 18, 2016. After he recovered, he was able to resume cycling but did not engage in the same strenuous activities as before.
- [11] In 2007, he was promoted within Creo/Kodak to the role of systems manager, which involved programming the software that operated the printing machines.
- [12] By 2014 he was reporting to his family physician, Dr. David Steinson, that he was experiencing low moods, panic attacks and insomnia due to stress from work.
- [13] When he began in his new position, Mr. Tanaka was part of a team of seven individuals. By 2017, he was the only one left. With all the departures, he became increasingly anxious about his own future.
- [14] In March 2016, he began taking Celexa/citalopram for anxiety and continued to do so until October of that year. In 2016, he also developed sleep apnea and was referred to a specialist. He was put on a CPAP machine and was able to resume a more normal sleeping pattern thereafter.
- [15] In February 2017, he left Creo/Kodak to join another technology-based start-up company known as "Avigilon", an affiliate of the Motorola group that sells security and surveillance systems. His role was to design software for security cameras. After the move, he was again anxious, had difficulty sleeping and concentrating and sometimes missed deadlines at work. He was uncomfortable with the amount of supervision to which he was subjected at the new company. He suffered from hypertension and high cholesterol. He resumed taking Celexa and was prescribed 90 20mg tablets with one refill, but did not take the refill.
- [16] Despite his anxiety in the new job, he performed above expectations and was promoted to the position of senior systems developer. Ironically, he was advised of the promotion while he was off work during the month following the accident.

B. The Accident

- [17] The accident occurred on March 21, 2019. Mr. Tanaka had no memory of seeing the door of the vehicle open before the collision. His head struck the door with sufficient force to bend its hinges, although there was no damage to his bicycle.
- [18] His memory of the event was patchy. He was unsure about whether he was on the ground or standing immediately after the collision. He remembered being in shock and disoriented. He remembered someone asking if he was alright and advising him that he was bleeding. He remembered stating that he was having trouble thinking.
- [19] He was unsure if he walked or cycled back home, which was only a block away. Once there, he tried to stop the bleeding from his cheek by using medical glue and gauze. He remembered lying down on the floor and realising that he should go to the hospital. Ms. Tanaka drove him there.
- [20] When he got there, he was dizzy and nauseous and spitting up blood. A CT scan of his brain yielded a normal result. He was told that he had probably sustained a concussion and sent home.

C. After the Accident

- [21] Mr. Tanaka took the following month off work and stayed at home. He spent most of that time sleeping or otherwise in bed. He continued to feel dizzy and nauseous. He was unable to tolerate bright light or loud noises. He had intense pain in his lower back.
- [22] On March 26, 2019, he saw a locum physician and was sent for physiotherapy, which he started on the following day. He found some of the activities helpful, others less so. He continued to attend physiotherapy for the next year and saw some improvement. He stopped attending physiotherapy with the onset of the pandemic in February 2020 and did not resume until March 2021.
- [23] During that period, Dr. Steinson recommended on at least three different occasions that he exercise in order to address his symptoms. When asked in cross-examination why he did not do so, he responded that the gym was closed because of the pandemic. In fact, it had reopened for virtual sessions in late March 2020 and for in-person sessions in May 2020. Meanwhile, he and Ms. Tanaka had installed a gym in their home.
- [24] During the month following the accident he began seeing Lydia Lee, an occupational therapist. At his request, she approved his return to work after one month. He testified at trial that in retrospect, he was not yet ready to go back to work but felt compelled to do so for financial reasons. Ms. Tanaka had just had her worst year ever as a realtor, and they depended on his salary to make ends meet.

- [25] Once back at work, he was unable to do any heavy lifting but was able to type. He began making more mistakes. He had trouble remembering what his supervisor had told him the day before.
- [26] On several occasions (April 8, 2019, September 30, 2020, May 27 2021), Dr. Steinson recommended that he see a psychologist to address his ongoing anxiety but he did not do so. He was diagnosed with depression secondary to work stressors in December 2021 and was, again, urged to seek counselling. Mr. Tanaka did not accede to that recommendation until January 2022. Once he did, he found it helpful and wished he had started sooner.
- [27] He resumed taking Celexa in early 2020 but skipped doses in late 2020 and early 2021. He was no longer taking Celexa when his mood hit a new low in May 2022 following a conversation with another individual who had previously been injured in an accident, which left him in tears. The ensuing bout of depression caused him to take another leave of absence from work until September 2022.
- [28] In March 2022, he received an epidural injection to address his lingering back pain. The procedure was successful and appears to have resolved most of his physical pain symptoms. He no longer suffers from sensitivity to light, dizziness, nausea or headaches.
- [29] On the other hand, his cognitive and psychological symptoms have persisted. He has been able to resume some of the household chores he used to do, but he still relies on Ms. Tanaka to do the heavier housework. She has noticed that he can be absent-minded. For example, he has left the stove running on more than one occasion, despite being admonished about this.
- [30] Mr. Tanaka remains emotionally fragile and is frequently moved to tears, which is different from how he was prior to the accident. He is regularly tired and spends his evenings after work sleeping, whereas before the accident he would use that time to play video games. He has been unable to drive a car. He stopped cycling in the first year after the accident, but has more recently been able to resume that activity at a slower pace. He has also been able to resume other physical activity. Just prior to the trial, he enrolled in rowing classes.
- [31] Most damaging of all has been the impact of his impaired cognitive and psychological functioning on his performance at work. His immediate supervisors testified at trial about the deterioration in the quality of his work since the accident. He has, of late, been receiving increasingly negative feedback, which has further damaged his self-esteem. He is now worried about losing his job. He has been given a new role which involves less responsibility for programming. He has also begun considering alternative employment.

III. The Medical Evidence

A. Plaintiff's Experts

Dr. Donald Cameron (Neurology)

- [32] Dr. Donald Cameron is a neurologist. He assessed Mr. Tanaka by way of a Zoom appointment on October 21, 2022. He prepared two reports for this litigation: a primary report dated October 27, 2022 and a rebuttal report, dated November 20, 2022, in response to the report of Dr. Sun, a defence expert, dated October 24, 2022.
- [33] In his primary report, Dr. Cameron concluded Mr. Tanaka received an MTBI in the accident and that he continues to suffer from significant symptoms of post-traumatic brain injury syndrome, including: headaches, decreased memory, concentration and attention span, multitasking difficulties, inability to complete complex tasks at work, problems with being slow in completing his work, making repeated mistakes, decreased ability to socialise because of noise sensitivity, light sensitivity, inability being around crowds of people, loss of libido, initial photophobia and phonophobia, and decreased self-confidence and self-esteem.
- [34] According to Dr. Cameron, Mr. Tanaka's main ongoing complaints are cognitive problems that arose as a result of the MTBI, his physical symptoms flowing from the soft tissue injuries, disrupted sleep and the associated anxiety and depression. Mr. Tanaka remains partially disabled and his disability is, in Dr. Cameron's view, probably permanent. Moreover, because the injury to Mr. Tanaka's brain occurred at the microscopic level, it would not have been visible in the CT scan that was done at the hospital on the day of the accident.
- [35] In his rebuttal report in response to Dr. Sun, Dr. Cameron stated that a MTBI is a neurological condition not a neurosurgical problem. He disagreed with Dr. Sun's suggestion that neuropsychological or other testing could justify a different diagnosis.
- [36] During his testimony at trial, Dr. Cameron stated that Mr. Tanaka's leave of absence from work over the summer of 2022 was inconsistent with the normal recovery trajectory for a MTBI and more likely to have been associated with his having been weaned off antidepressant medication around that time.
- [37] Although Dr. Cameron acknowledged in cross examination that he had not been told about Mr. Tanaka's pre-accident episodes of anxiety, he added, when the relevant records were put to him in re-examination, that they did not change his opinion.

Dr. Stephen Anderson (Psychiatry)

- [38] Dr. Stephen Anderson is a psychiatrist. He assessed Mr. Tanaka on October 18, 2022 and prepared a report dated October 21, 2022.
- [39] Dr. Anderson diagnosed Mr. Tanaka with an adjustment disorder with mixed anxiety and depression. In Dr. Anderson's view, Mr. Tanaka also had major depressive disorder at the time he was off work over the summer of 2022, but he no longer qualifies for that diagnosis. Nevertheless, Mr. Tanaka is, in Dr. Anderson's view, unlikely to return to his premorbid level

of emotional or cognitive functioning and is likely to remain emotionally vulnerable and at risk of emotional deterioration if faced with further stressors. In his view, Mr. Tanaka likely has a permanent partial disability as a result of the accident. His present cognitive difficulties are likely attributable to a number of accident-related factors, including pain, insomnia, fatigue, anxiety and depression and the residual effects of the MTBI.

- [40] Dr. Anderson's prognosis is guarded. He believes that further treatment may improve Mr. Tanaka's symptoms but is unlikely to resolve them entirely. In particular, that additional counselling will help him in dealing with his emotional response to his cognitive issues, but not the cognitive issues themselves.
- [41] Dr. Anderson made the following recommendations for further treatment:
- (a) referral to a registered psychologist for a course of psychotherapy, including 15-20 sessions of cognitive behavioural therapy ("CBT") before assessing the need for further treatment;
 - (b) that Mr. Tanaka continue taking Celexa in the long term and that he increases his dose to 40mg;
 - (c) that Mr. Tanaka take a low dose of antidepressant at night, such as Nortriptyline to improve sleep and nighttime pain; and
 - (d) that Mr. Tanaka engage in a supervised exercise programme.
- [42] In cross-examination, Dr. Anderson testified that he was aware of Mr. Tanaka's previous work-related anxiety and that he likely had a predisposition to developing adjustment disorder. His anxiety is, in Dr. Anderson's view, best treated by CBT, and the sooner he undertakes that treatment, the better the outcome is likely to be.

Dr. Desmond Coen (Neuropsychology)

- [43] Dr. Desmond Coen, a registered psychologist, conducted two days of neuropsychological testing of Mr. Tanaka on October 24 and November 7, 2022. He then prepared two reports - a primary report dated November 14, 2022 and a rebuttal report dated January 19, 2023, in response to the report of Dr. Bhalla, one of the defendants' experts.
- [44] In his primary report, Dr. Coen diagnosed Mr. Tanaka with the following conditions:
- (a) sleep apnea;
 - (b) mild concussion; and
 - (c) mild neurocognitive disorder due to MTBI, causing deficiencies in Mr. Tanaka's cognitive functioning, in relation to memory and select tactile-motor learning skills.

- [45] Dr. Coen concluded that Mr. Tanaka is partially disabled from performing any aspect of the duties required of him in his current employment, and that the duration of his disability is indeterminate. Dr. Coen also believes that Mr. Tanaka is partially disabled from doing household tasks for an indefinite time into the future.
- [46] In response to Dr. Bhalla's criticisms (described below), Dr. Coen stated in his supplemental report that Dr. Bhalla's report is problematic because he did not interview Mr. Tanaka or take a history. Nothing in Dr. Bhalla's report caused Dr. Coen to change his opinions, but he agreed that the vast majority of Mr. Tanaka's test results were not in the impaired range.

Dr. Maziar Badii (Rheumatology/Spine Medicine)

- [47] Dr. Maziar Badii is a rheumatologist, with a specialty in spine medicine. He is one of Mr. Tanaka's treating physicians. He prepared a report, dated May 9, 2022, for this action. In it, he states that Mr. Tanaka displays pre-existing degenerative disc and facet changes in the lumbar spine. He also has a longstanding bilateral L5 pars defects, producing a Grade 1 L5-S1 spondylolisthesis. He notes a congenital fusion at the L12-L1 level.
- [48] Dr. Badii concluded that Mr. Tanaka's back pain was likely caused by pre-existing, but asymptomatic, lumbar degenerative disc changes, spondylosis, facet osteoarthritis and spondylolisthesis that were rendered symptomatic by soft tissue injuries sustained in the accident. In cross-examination, Dr. Badii accepted that these conditions may in fact have been symptomatic prior to the accident. In any event, Dr. Badii would attribute any future back pain or functional limitations to Mr. Tanaka's pre-existing conditions rather than the accident, which would have affected his back primarily in the first year or two thereafter.
- [49] Dr. Badii's prognosis is favourable. At the time of the report, Dr. Badii thought that Mr. Tanaka had recovered to at least 90% of his pre-accident status. The accident did not increase the risk of developing accelerated degenerative disc disease, inflammatory arthritis, neurological impairments or the need for surgery. Mr. Tanaka should, in Dr. Badii's view, be able to manage his tasks at work and at home. His current physical symptoms are attributable primarily to his deconditioning. Dr. Badii therefore recommends a course of active rehabilitation with a kinesiologist to address this.

B. Defendants' Experts

Dr. Johann Brink (Psychiatry)

- [50] Dr. Johann Brink is a psychiatrist. He assessed Mr. Tanaka on September 7, 2022. He prepared two reports for this action. The first, his primary report, is dated October 24, 2022 and the second, a rebuttal report, dated January 26, 2023 to address further medical history from Mr. Tanaka's family physician, Dr. Steinson.

- [51] In his primary report, Dr. Brink diagnosed Mr. Tanaka with major depressive disorder, which was by then in partial remission, and mild neurocognitive disorder. When his cognitive abilities were tested during the assessment, Mr. Tanaka's performance indicated memory and mathematical concentration and reasoning difficulties, which Dr. Brink considered to be significant given the nature of Mr. Tanaka's vocation as a computer and systems engineer. In Dr. Brink's view, however, his depression and related anxiety had, by the time of his assessment, largely resolved and a full recovery was expected, with ongoing vulnerability to relapses.
- [52] Dr. Brink attributed Mr. Tanaka's relapse in the summer of 2022, at least in part, to the interrupted nature of his use of antidepressant medications. In Dr. Brink's view, Mr. Tanaka would have benefited from earlier engagement with a psychologist. He deferred to experts in neuropsychology regarding the future effect of his cognitive symptoms on his ability to work in the future.
- [53] Dr. Brink recommended that Mr. Tanaka:
- (a) continue with Celexa for at least 12 months;
 - (b) take Remeron/mirtazapine (a sedating antidepressant) to assist with sleep; and
 - (c) participate in CBT-based therapy two times per month for at least 12 sessions.
- [54] In his supplemental report of January 26, 2023, Dr. Brink noted that in March 2016, Mr. Tanaka had complained of stress at work that had commenced two years before, and had escalated in the previous three months. He was, at that time, experiencing insomnia, irritability, low mood and panic attacks. His test score was indicative of mild to moderate anxiety. Dr. Steinson put him on Celexa and recommended three sessions of psychotherapy through work. He also started him on zopiclone. When he was seen three months later, on April 6, 2016, Mr. Tanaka reported significant improvement. In August 2016, he complained of sleep apnea and began using a CPAP machine. In February 2017, he was complaining again of work-related anxiety, having started a new job.
- [55] From these records, Dr. Brink revised his opinion to note that, contrary to Mr. Tanaka's self-report on the date of his initial assessment, Mr. Tanaka had a history of mental health problems and treatment prior to the accident. In the result, he concluded that Mr. Tanaka had a pre-existing vulnerability to psychiatric decomposition in the wake of stress. The accident was, therefore, not the sole cause of his symptoms but it did increase the likelihood that he would become anxious and depressed. Dr. Brink stated that his original opinions otherwise remained unchanged.

Dr. John Sun (Neurosurgery)

- [56] Dr. John Sun is a neurosurgeon. He examined Mr. Tanaka on September 12, 2022 and prepared a report dated October 24, 2022.

- [57] Dr. Sun diagnosed Mr. Tanaka with a MTBI and soft tissue injuries as a result of the accident. Given Dr. Sun's understanding that Mr. Tanaka had returned to work at his previous capacity, Dr. Sun could not confirm whether Mr. Tanaka's cognitive complaints were objectively verified. He recommended neuropsychological evaluation to determine if Mr. Tanaka has subtle ongoing problems.
- [58] Dr. Sun was of the view that Mr. Tanaka's prior neck pain was attributable to the accident. His back pain was said to be the result of pre-existing susceptibility that was rendered more symptomatic by the accident. Dr. Sun did not believe that Mr. Tanaka's leg pain in December 2020 was attributable to the accident and thought it probable that he would have developed leg pain as he did in any event.
- [59] Dr. Sun understood Mr. Tanaka to have made a full functional recovery with respect to his cognitive activities, his neck pain and lower back pain, although his back pain is susceptible to relapse given his pre-existing condition.
- [60] Dr. Sun acknowledged in cross-examination that his opinion with respect to Mr. Tanaka's cognitive recovery might change if he had the benefit of additional information about Mr. Tanaka's ability to function at work and at home.

Dr. Rishi Bhalla (Neuropsychology)

- [61] Dr. Rishi Bhalla is a psychologist. He did not examine or interview Mr. Tanaka. He prepared a report dated January 4, 2023, commenting on the primary report of Dr. Coen.
- [62] Dr. Bhalla's main criticisms were to the effect that, in preparing his report, Dr. Coen:
- (a) used non-technical descriptors that tended to overstate Mr. Tanaka's degree of impairment;
 - (b) used outdated normative data; and
 - (c) overstated Mr. Tanaka's years of education, thereby artificially inflating the degree of impairment revealed by the testing.
- [63] From his review of Dr. Tanaka's medical records, Dr. Bhalla formed the view that there was a "clear trajectory of recovery from Mr. Tanaka's concussion symptoms following the [accident]." He saw "gradual improvement in cognitive and functional abilities". The cause of mental health issues in 2020 was not the MTBI itself. His cognitive difficulties can, according to Dr. Bhalla, more plausibly be attributed to factors other than the MTBI, such as mental health symptoms, sleep disturbance, fatigue and pain, rather than the MTBI directly.
- [64] Dr. Bhalla disagreed with Dr. Sun's diagnosis of mild neurocognitive disorder due to MTBI, given that his cognitive deficits are better explained by another disorder (in this case, obstructive sleep apnea and adjustment disorder).

[65] Finally, Dr. Bhalla disagreed with Dr. Sun's conclusion that Mr. Tanaka was "partially disabled from performing any aspect of those duties which are required by current employment." The basis for that disagreement was a performance review dated March 28, 2022, suggesting that Mr. Tanaka was either achieving or exceeding expectations in various respects.

IV. Discussion

A. Conclusions on Medical Issues

[66] Based on the opinions of Dr. Brink, Dr. Anderson and Dr. Coen, I am satisfied that Mr. Tanaka suffers from a neurocognitive disorder and adjustment disorder attributable to the MTBI he sustained in the accident. There is no basis in the evidence for the defendants' submission that the diagnosis of Dr. Brinks, their own expert, should be considered "provisional."

[67] Although Dr. Bhalla disagreed with the diagnosis of neurocognitive disorder, I am not prepared to give his opinion in that regard any weight, given the limited information available to him and the qualified nature of the report he prepared. On the other hand, I do accept that Dr. Bhalla's criticism casts doubt on the reliability of several of Dr. Coen's conclusions.

[68] In any event, much of the dispute between Dr. Bhalla and Dr. Coen deals with the interpretation of third-party records describing the extent of Mr. Tanaka's recovery and cognitive deficits. None of the experts heard the testimony that I did from Mr. Tanaka's employer, friends and family. That testimony satisfies me that his cognitive symptoms have not resolved and continue to compromise his career and mental health.

B. Pre-Existing Conditions

[69] The defendants submit that Mr. Tanaka's general damages and damages for the cost of future care should be reduced by 10% to reflect the real and substantial possibility that he would have suffered similar symptoms in any event of the accident, given his pre-existing conditions, particularly his susceptibility to back pain and work-related anxiety. In support of that submission, they rely on *Debruyn v. Kim*, 2021 BCSC 620.

[70] I agree with the defendants that the evidence discloses a real and substantial possibility that Mr. Tanaka's predisposition to back pain and work-related anxiety would have manifested themselves in the future at least to some extent, regardless of the accident. In his supplemental report, Dr. Brink concluded that, in light of the additional records he reviewed, Mr. Tanaka had a pre-existing vulnerability to psychiatric decomposition in the wake of stress. Dr. Anderson agreed in cross-examination that Mr. Tanaka had a predisposition to developing adjustment disorder, given his pre-accident history of work-related anxiety. Dr. Badii's report justifies a similar conclusion with respect to Mr. Tanaka's back pain, given the pre-existing conditions he identified.

[71] I am therefore reducing the awards made for general damages and the cost of future care by 10% to account for that possibility, as the defendants urge.

C. Mitigation

[72] The defendants also seek a 20-25% reduction from the awards for general damages and past loss of earning capacity, to account for Mr. Tanaka's failure to mitigate his loss by choosing not to follow medical advice. In particular, the defendants say that such a reduction is warranted because Mr. Tanaka unreasonably:

- (a) declined a workplace visit by Lydia Lee, the occupational therapist, in 2019;
- (b) contrary to medical advice, did not exercise for the year that elapsed between February 2020 and March 2021 and then again following the conclusion of his course of physiotherapy in April 2022;
- (c) did not take Celexa as directed in late 2020 and early 2021;
- (d) did not resume taking Celexa in May 2022, when his psychiatric symptoms recurred;
- (e) did not seek CBT counselling until January 2022, which was almost three years after Dr. Steinson first recommended it in April 2019, and despite subsequent recommendations in September 2020 and May 2021; and
- (f) did not follow the advice of Dr. Anderson, Dr. Brink or Dr. Coen.

[73] In support of that submission, the defendants cite *Ladhani v. Lundy*, 2021 BCSC 449; *Redmile v. Beaulieu*, 2019 BCSC 1571; and *Mullens v. Toor*, 2016 BCSC 1645.

[74] Counsel for Mr. Tanaka opposes any such reduction, citing *Han v. Ha*, 2020 BCSC 1136, in which Forth J. said:

[92] Mr. Han filled the prescription for Trintellix on May 30, 2017. There is no evidence to support that the delay of a little over three weeks made any difference in this treatment. Mr. Han is held to a standard of reasonableness, not perfection, and mere delay in seeking recommended treatment is not necessarily unreasonable: see *Lourenco v. Pham*, 2013 BCSC 2090 at paras. 52-56.

[75] The relevant principles to be applied in considering whether a reduction in damages is warranted on that ground were conveniently summarised in *Debruyne* as follows:

[169] The onus is on the defendant to prove that the plaintiff would, on the balance of probabilities, have avoided all or a portion of her loss. In this regard, the defendant must prove (1) 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 she acted reasonably: *Gill v. Lai*, 2019 BCCA 103 at para. 26; *Gregory* at para. 56.

- [170] In determining the first prong of the test, the plaintiff's personal circumstances can be taken into account, including (a) whether she understood, appreciated, and was capable of following the advice given, and (b) whether a reasonable person in the plaintiff's circumstances would have done so: Gill at para. 26.
- [76] In Ladhani, the applicable test was summarised as follows:
- [60] In Chiu v. Chiu, 2002 BCCA 618, the Court of Appeal summarized the test in relation to mitigation as follows:
- [57] The onus is on the defendant to prove that the plaintiff could have avoided all or a portion of his loss. 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 recommended treatment, and (2) the extent, if any, to which the plaintiff's damages would have been reduced had he acted reasonably
- [61] In assessing the reasonableness of a plaintiff refusing treatment, courts should consider the degree of risk versus the potential benefits, as well as the consequences of refusal: Janiak v. Ippolito, [1985] 1 S.C.R. 146.
- [62] In Forghani-Esfahani v. Lester, 2019 BCSC 332, the court clarifies that the consideration as to whether damages would have been reduced is a "hypothetical event", and therefore the standard of proof is not a balance of probabilities (at para. 67). Rather, the defendant must only prove that there was a "real and substantial possibility" that any part of the losses could have been avoided:
- [69] If that is established, the court will assess the degree of probability that the loss or some part thereof would have been avoided, and assess damages accordingly.
- [77] I agree with the defendants that, at least in some respects, this case is more like Ladhani, Redmile and Mullens than Han. A reduction in damages is warranted here due to Mr. Tanaka's failure to follow the advice of his treating physicians, particularly Dr. Steinson and Dr. Badii that he exercise regularly, pursue counselling and take Celexa when needed. Dr. Anderson's opinion was that Mr. Tanaka's cognitive difficulties are likely attributable to the effects of pain, insomnia, fatigue, anxiety and depression, all of which could, the evidence suggests, have been reduced in severity had Mr. Tanaka followed the advice he received.
- [78] On the other hand, I am not persuaded that it would be appropriate to reduce Mr. Tanaka's damages award for failure to follow advice of Dr. Anderson, Dr. Brink or Dr. Coen. They are not treating physicians. The defendants argue that a reduction can properly be made to account for a plaintiff's failure to follow the advice of forensic experts, citing Mahdi v. Bains, 2022 BCSC 1158. However, in Thomasson v. Moeller, 2016 BCCA 14 at para. 39, the Court of Appeal held that a plaintiff is not obliged to follow the recommendations of a forensic expert, who has been retained by counsel for litigation purposes, nor is he required to discuss such recommendations with his treating physicians. It does not appear that Thomasson was brought to the attention of Douglas J. in Mahdi, and I consider it binding on

me.

[79] On balance, I am satisfied that a reduction of 10% from the awards for general damages and past loss of earning capacity is appropriately made to account for Mr. Tanaka's failure to mitigate his loss.

D. General Damages

[80] General or non-pecuniary damages are intended to compensate a plaintiff for pain and suffering and the loss of enjoyment of life and its amenities. The factors to be considered in assessing damages in this category were set out by Kirkpatrick J.A., writing for the Court, in *Stapley v. Hejslet*, 2006 BCCA 34. She listed the following factors as relevant to the analysis:

- (a) age of the plaintiff;
- (b) nature of the injury;
- (c) severity and duration of pain;
- (d) extent of the disability;
- (e) emotional suffering;
- (f) loss or impairment of life;
- (g) impairment of family, marital and social relationships;
- (h) impairment of physical and mental abilities; and
- (i) loss of lifestyle.

[81] Mr. Tanaka is now 50 years old. The accident occurred four years ago. In its immediate aftermath, he suffered from fatigue, sensitivity to light and noise, nausea and dizziness, but those symptoms resolved within a few weeks. He continued to feel pain, especially in his back, until he received the epidural injection in March 2022. Although his physical symptoms have now largely resolved, he continues to suffer from cognitive deficiencies and psychiatric symptoms, particularly anxiety and depression. He has been diagnosed with a neurocognitive disorder and adjustment disorder, with anxiety and depression secondary to these. He is not performing to his previous standard at work, which has contributed to low self-esteem and fear for the future. His injuries have impacted his ability to carry on the activities that he used to enjoy. His social relationships have been adversely affected.

[82] His counsel seeks an award of general damages in the range of \$200,000-\$250,000, relying on the following authorities, in each of which the plaintiffs were awarded \$200,000, or the equivalent of between \$255,000 and \$270,000 after accounting for inflation:

- (a) *Felix v. Hearne*, 2011 BCSC 1236;
- (b) *Burdett v. Eidse*, 2011 BCCA 191;

(c) Chowdhry v. Burnaby (City), 2008 BCSC 1337; and

(d) Young v. Anderson, 2008 BCSC 1306.

[83] The defendants submit that the appropriate award would be in the range between \$100,000 and \$125,000, before accounting for the reductions for Mr. Tanaka's pre-existing conditions and failure to mitigate. They rely on the following authorities:

(a) Nahal v. Ram, 2016 BCSC 39 (\$100,000);

(b) Laybolt v. Baylis, 2021 BCSC 1798 (\$110,000); and

(c) Millar v. Wasden, 2020 BCSC 1210 (\$125,000).

[84] The cases cited by Mr. Tanaka's counsel generally involved more serious impacts. In Felix, the plaintiff suffered from physical injuries that had not resolved by the time of the trial to the extent that Mr. Tanaka's have. The plaintiff in Burdett appears to have suffered more extensive cognitive difficulties and damage to his personal relationships. He was found to be "competitively unemployable, or put at its best, is minimally employable" (at para. 41). In Chowdhry, the plaintiff, unlike Mr. Tanaka, continued to suffer from PTSD and major depressive disorder and was found to be effectively unemployable. In Young, the plaintiff's physical symptoms persisted. He had chronic pain and continued to experience tinnitus and sensitivity to light. As a result of his change in personality, he and his wife no longer shared a bedroom.

[85] On the other hand, Nahal involved a plaintiff with very similar injuries to those of Mr. Tanaka, although the plaintiff was much younger (19). In Laybolt, the plaintiff (67) was older than Mr. Tanaka and had stopped working after the accident. She was found to be "able to carry on with her lifestyle as it was prior to the accident with some obvious limitations to her ability to work and leisure activities" (at para. 119). The plaintiff in Millar (67) was likewise older than Mr. Tanaka but otherwise suffered similar, and in some ways even more serious impacts.

[86] In my view, this case lies at the upper end of the range suggested by the defendants. I am therefore awarding Mr. Tanaka \$120,000 in general damages. After accounting for the 20% reductions discussed above, the net award is \$96,000.

E. Past Loss of Earning Capacity

[87] Mr. Tanaka is entitled to be compensated for past loss of earning capacity based on the difference between the amount that he would have earned, had he not been injured, from the date of the accident until the date of the trial, and what he actually earned during that same period.

[88] The legal principles to be applied in assessing damages for that aspect of his loss were conveniently summarised by Goepel J.A. in Grewal v. Naumann, 2017 BCCA 158, as follows:

- [48] In summary, an assessment of loss of both past and future earning capacity involves a consideration of hypothetical events. The plaintiff is not required to prove these hypothetical events on a balance of probabilities. A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation. If the plaintiff establishes a real and substantial possibility, the Court must then determine the measure of damages by assessing the likelihood of the event. Depending on the facts of the case, a loss may be quantified either on an earnings approach or on a capital asset approach: *Perren v. Lalari*, 2010 BCCA 140 at para. 32.
- [49] The assessment of past or future loss requires the court to estimate a pecuniary loss by weighing possibilities and probabilities of hypothetical events. The use of economic and statistical evidence does not turn the assessment into a calculation but can be a helpful tool in determining what is fair and reasonable in the circumstances: *Dunbar v. Mendez*, 2016 BCCA 211 at para. 21.
- [89] The parties agree that Mr. Tanaka suffered a loss of income in the amount of \$10,101.96 when he took a month off work and then gradually returned to work in the immediate aftermath of the accident.
- [90] Mr. Tanaka also seeks an additional \$33,687.66 to compensate him for the extra income that he would have received by way of additional performance bonuses, promotions and stock option incentives had his performance continued at the same level as before. He also seeks to be compensated for the time that he lost due to the second leave of absence during the summer of 2022.
- [91] The defendants argue that those scenarios do not rise above the level of speculation and therefore do not justify any additional award in this category. The leave of absence in the summer of 2022 was, the defendants say, entirely unrelated to the accident.
- [92] I accept that Mr. Tanaka has demonstrated a real and substantial possibility that he would have earned extra income as he has assumed in calculating his proposed award, but I disagree that he should receive the entire sum that he claims. That sum reflects a virtual certainty that he would have earned all of that extra income. Some of the assumptions used in his calculation are more plausible than others. Although it is relatively likely, for example, that he would have received larger merit-based bonuses had his performance not faltered due to the accident, other assumptions are either speculative (such as the loss of opportunity to fill the managerial role previously occupied by his supervisor, which lacks any solid evidentiary foundation) or relatively less likely (such as the loss of stock options, which were said to have been rarely given). The latter two assumptions account for most of the additional award sought - over \$10,000 and \$15,000, respectively. In addition, although I agree that there is a real and substantial possibility that he would not have missed work over the summer of 2022 had he not been injured, that aspect of the award must, as the defendants argue, be reduced to reflect Mr. Tanaka's failure to mitigate his loss.

[93] After accounting for these contingencies, I am awarding Mr. Tanaka $\$10,101.96 + \$15,000 = \$25,101.96$ for past loss of earning capacity.

F. Future Loss of Earning Capacity

[94] In *Honeybourn v. Aghdasidehaji*, 2022 BCSC 258, Blok J. conveniently summarised recent jurisprudence dealing with the assessment of damages for future loss of earning capacity, stating as follows:

[129] The law applicable to loss of future earning capacity was summarized as follows in *Villing v. Hussemi*, 2016 BCCA 422:

[17] In order to receive an award for loss of earning capacity, a plaintiff must prove a real and substantial possibility that his or her earning capacity has been impaired: *Perren v. Lalari*, 2010 BCCA 140 at paras. 30-32 [Perren]. If the plaintiff has discharged the burden of proof, then the judge must turn to an assessment of damages. The assessment may be based on an earnings approach or a capital asset approach: *Perren* at para. 32. An earnings approach is most appropriate where the loss is more easily quantifiable. In general, a party may be forced to default to a capital asset approach where the loss is not easily quantifiable.

[130] In a trilogy of cases, the Court of Appeal recently clarified the law relating to the assessment of future losses of earning capacity: *Dornan v. Silva*, 2021 BCCA 228 [Dornan]; *Rab v. Prescott*, 2021 BCCA 345 [Rab]; and *Lo v. Vos*, 2021 BCCA 421. In *Rab*, the court articulated a three-step process:

[47] From these cases, a three-step process emerges for considering claims for loss of future earning capacity, particularly where the evidence indicates no loss of income at the time of trial. The first is evidentiary: whether the evidence discloses a potential future event that could lead to a loss of capacity (e.g., chronic injury, future surgery or risk of arthritis, giving rise to the sort of considerations discussed in *Brown*). The second is whether, on the evidence, there is a real and substantial possibility that the future event in question will cause a pecuniary loss. If such a real and substantial possibility exists, the third step is to assess the value of that possible future loss, which step must include assessing the relative likelihood of the possibility occurring - see the discussion in *Dornan* at paras 93-95.

[131] *Rab* states that the first step (i.e. the evidentiary inquiry) gives rise to the four considerations set out in *Brown v. Gola* (1985), 26 B.C.L.R. (3d) 353 at para. 8 (S.C.) [Brown]. The questions are whether:

- 1) The plaintiff has been rendered less capable overall from earning income from all types of employment;
- 2) The plaintiff is less marketable or attractive as an employee to potential employers;
- 3) The plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to her, had she not been injured; and

- 4) The plaintiff is less valuable to herself as a person capable of earning income in a competitive labour market.
- [132] In considering the second and third steps set out in *Rab*, hypothetical events are given weight according to their relative likelihood. A hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation: *Turner v. Dionne*, 2017 BCSC 1905 at para. 316, citing *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 27. See also *Dornan* at paras. 93-94.
- [95] In this case, Mr. Tanaka seeks to be compensated on the basis that he has lost the difference between his hypothesised "without-accident" earning capacity of \$140,000 per year and his projected "with accident" earnings of between \$70,000 to \$85,000 per year, a difference of \$55,000 to \$70,000 annually, yielding a present value (assuming he would continue working in the same capacity for another 20 years, to age 70) of between \$900,000 and \$1.2 million.
- [96] In support of that approach, Mr. Tanaka relies on *Chau v. Pereira*, 2019 BCSC 809; *Khashei v. Pirro*, 2020 BCSC 1048; *Hoang v. Dean*, 2021 BCSC 2211 and *Dhanda v. Thind*, 2022 BCSC 1003.
- [97] The defendants argue that Mr. Tanaka's claim is not calculated in a manner consistent with authority, insofar as it fails to identify a future event yielding a loss, and then fails to assign probability to the posited loss, treating it instead as a certainty. The calculation relies on an earnings approach when, according to the defendants, a capital asset approach is more appropriate in the circumstances of this case. Further, the figure posited for Mr. Tanaka's residual earning capacity is, the defendants argue, entirely unsupported by expert or any other evidence.
- [98] Instead, the defendants submit that the appropriate award would be two years of Mr. Tanaka's annual salary (which in 2020, was \$116,997), for a total of \$233,994, citing *Redmile, Helgason v. Bosa*, 2010 BCSC 1756 and *Fortin v. Bircham*, 2021 BCSC 1618.
- [99] I am satisfied that the evidence discloses a future loss of earning capacity. The medical evidence, coupled with that of Mr. Tanaka's supervisors, suggests that his ability to do his job has been adversely affected by his cognitive symptoms, and that these are likely to be ongoing.
- [100] I am also satisfied there is a real and substantial possibility this loss of earning capacity will cause a pecuniary loss - indeed, my finding in the previous section is that it already has.
- [101] The dispute between the parties focuses primarily on the third stage of the analysis, namely, assigning a value to the loss. I agree with the defendants that, given the difficulty in quantifying it, the capital asset approach is more appropriately used here, but it does not follow that Mr. Tanaka's proposed methodology is entirely unsupported by authority. It is possible to use hypothetical lost earnings as a proxy for the value of the lost earning capacity.

[102] I agree with the defendants that Mr. Tanaka has overstated his loss by assuming that he would have earned \$140,000 but for the accident and will now, in his injured state, earn about half that amount for the remainder of his career to age 70. I have already found that in the three years following the accident, while still employed with Avigilon, he lost just over \$25,000, or about \$8,333.33 per year, after accounting for his failure to mitigate his loss. Using his 2021 T4 earnings of \$116,997 as a baseline, I am prepared to assume that he would currently be earning just over \$125,000 at Avigilon but for the accident.

[103] Looking to the future, it is also appropriate to account for the real and substantial possibility that he will lose his job at Avigilon and will have to seek less demanding work elsewhere, perhaps as an IT consultant. Based on the evidence I heard from his supervisors, that scenario must be given a relatively high probability, in the range of 50%. Before he was employed at Avigilon, Mr. Tanaka worked for Creo/Kodak and earned, between 2013 and 2016, an annual salary as follows:

2013 \$85,809

2014 \$86,425

2015 \$81,699

2016 \$81,732

[104] Those amounts yield an annual average of \$83,916.25. Taking that figure as a rough proxy for what he could earn each year as an IT consultant if he lost his position at Avigilon, this would reflect a loss of \$41,083.75 from a posited "without-accident" salary at Avigilon of \$125,000.

[105] Based on those assumptions, Mr. Tanaka's annual loss can roughly be estimated as the average of \$8,333.33 and \$41,083.75, or \$24,708.54. Applying the prescribed multiplier for the next 20 years (17.1686) yields a net present value of \$424,211.04.

[106] After accounting for the possibility that Mr. Tanaka would not have worked at full capacity to age 70 in any event, and that he will see future improvement in his symptoms with exercise, therapy, counselling and medication, I am awarding him a net total of \$400,000 for future loss of earning capacity.

G. Cost of Future Care

[107] The principles to be applied in assessing damages for the cost of future care were set out by McLachlin J. (as she then was) in *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33, [1985] B.C.J. No. 2762 (S.C.), aff'd (1987), 49 B.C.L.R. (2d) 99, [1987] B.C.J. 1833 (C.A.) as follows:

- [187] The "additional expense" approach is preferable where the plaintiff will continue to lead basically the same life as she would have led had she not been injured, with the aid of additional assistance and physical facilities. In such a case, the simplest way of calculating the loss caused by the accident is by totalling the cost of the extra assistance facilities which the plaintiff will require.
- [198] The test for determining the appropriate award under the heading of cost of future care, it may be inferred, is an objective one based on medical evidence.
- [199] These authorities establish that (1) there must be a medical justification for claims of cost of future care; and (2) that the claims must be reasonable.
- [108] The relevant principles were more recently set out by Butler J.A., writing for the Court, in *Quigley v. Cymbalisty*, 2021 BCCA 33 as follows:
- [43] The purpose of the award for costs of future care is to restore the injured party to the position she would have been in had the accident not occurred: *Andrews v. Grand & Toy Alberta Ltd.* (1978), 83 D.L.R. (3d) 452 (S.C.C.) at p. 462; *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at para. 29. This is based on what is reasonably necessary on the medical evidence to promote the mental and physical health of the plaintiff: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33, adopted in *Aberdeen v. Zanatta*, 2008 BCCA 420 at para. 41.
- [44] It is not necessary that a physician testify to the medical necessity of each item of care for which a claim is advanced. However, an award for future care must have medical justification and be reasonable: *Aberdeen* at para. 42; *Gao* at para. 69.
- [109] In *Golkar-Karimabadi v. Bush*, 2021 BCSC 990, Adair J. described the test as follows:
- [107] An award for cost of future care is based on what is reasonably necessary, on medical evidence, to promote the mental and physical health of the claimant. The award must (1) have medical justification, and (2) be reasonable. The medical necessity of future care costs may be established by a health care professional other than a physician, such as an occupational therapist, if there is a link between a physician's assessment of pain, disability and recommended treatment, and the health care professional's recommended care item. See *Gao v. Dietrich*, 2018 BCCA 372, at paras. 69-70. No award is appropriate for costs that a plaintiff would have incurred in any event: *Shapiro v. Dailey*, 2012 BCCA 128, at paras. 51-55. Moreover, future care costs must be likely to be incurred by the plaintiff. The onus is on the plaintiff to show that there is a reasonable likelihood that she will use the suggested services: see *Lo v. Matsumoto*, 2015 BCCA 84, at para. 20.
- [110] In this case, Mr. Tanaka seeks an award of \$55,000-\$70,000, to compensate him for his anticipated need for the following items, in the following amounts, to age 75:

Treatment

Cost

Frequency

Annual Cost

Multiplier

Total to Age 75

Celexa

\$2/capsule

1 capsule/day

\$725

18.4244

\$13,357

Nortriptyline/Mirtazapine

\$0.5/capsule

1 capsule/day

\$180

18.4244

\$3,316

CBT

\$207/hour

8-12 sessions

\$1,656-\$2,484

18.4244

\$30,510-\$45,766

Active Rehab

\$80

30-40 sessions

N/A

N/A

\$2,400-\$3,200

Gym Pass

\$400

Once/year

\$400

18.4244

\$7,369

Occupational Therapy

\$118/hour

3 hours

N/A

N/A

\$354

\$57,306-\$73,362

[111] Although the defendants agree that the above table accurately reflects the cost of the proposed items, they dispute the necessity of many of the items claimed or the duration of the need. Instead, they argue that a fair award would include the following items, totalling \$10,765:

- (a) 30 sessions of kinesiology at \$80 per session = \$2,400;
- (b) 20 sessions of CBT at \$207 per session = \$4,140;
- (c) Celexa at 40 mg per dose for two years = \$1,500;
- (d) mirtazapine at 15 mg per dose for two years = \$365; and
- (e) 20 sessions with an occupational therapist at \$118 = \$2,360.

[112] With respect to the prescription medications, Celexa and mirtazapine, the difference between the parties' proposed awards is attributable to the defendants' having restricted their use to two years. There is no basis in the evidence for that restriction. However, Mr. Tanaka has not been consistent in taking Celexa in the past, and it is unlikely in any event that he would need to be on these medications every day for the rest of his life until age 75, given that his periods of anxiety have historically been episodic. I am therefore awarding him 75% of the amount claimed in this category, or $\$13,357$ and $\$3,316 = \$16,673 \times .75 = \$12,504.75$.

- [113] By far the largest single item in Mr. Tanaka's claim is CBT, which he anticipates needing on a regular basis until age 75. This item appears to have been quantified based on Dr. Anderson's recommendation that Mr. Tanaka receive 15-20 sessions initially, and then 8-12 per year thereafter. Dr. Brink's recommendation was that the CBT continue for at least 12 sessions. On that basis, the defendants argue that only 20 sessions are needed. I accept that more than 20 sessions are likely to be needed, but not as many as Mr. Tanaka has claimed. I am therefore awarding him \$20,000 for this aspect of his claim.
- [114] Finally, Mr. Tanaka seeks to be compensated for 30-40 sessions of active rehabilitation (\$2,400-\$3,200), three hours with an occupational therapist (\$354) and a gym pass (\$7,369). The defendants have not addressed the claim for active rehabilitation but accept the need for 20 sessions with an occupational therapist at \$118 per session, for a total of \$2,360. On that basis, I am awarding Mr. Tanaka both items as claimed at the low end of the range, for a total of \$2,754. I agree with the defendants that a gym pass is probably not necessary given that Mr. and Ms. Tanaka have built themselves a gym at home and I received no evidence to explain why it would not suffice for his reasonable needs.
- [115] The amounts I have awarded are $\$12,504.75 + \$20,000 + \$2,754 = \$35,258.75$. After reducing the claim by 10% to account for the possibility that Mr. Tanaka would have developed a need for many of them in any event due to his pre-existing conditions (as discussed above), I am awarding him a net total of \$31,732.88 in this category.

H. Special Damages

- [116] The parties have agreed that \$1,575.02 is owing for special damages. I am therefore making that award.

V. Summary and Conclusion

- [117] I am awarding Mr. Tanaka the following:

- (a) \$96,000 in general damages;
- (b) \$25,101.96 (gross) for past loss of earning capacity;
- (c) \$400,000 for future loss of earning capacity;
- (d) \$31,732.88 for the cost of future care; and
- (e) \$1,575.02 in special damages.

- [118] The parties have leave to speak to costs if they are unable to agree on the appropriate order in light of my decision.

"Milman J."

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Prepared on 26 October 2026 · Esheria