CANADA / JUDGMENT

Tang v. Duong

2020 BCSC 85

COURT
Supreme Court of British Columbia

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2020 BCSC 85 Tang v. Duong

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Tang v. Duong,

2020 BCSC 85

Date: 20200204

Docket: M173725

Registry: Vancouver

Between:

Yuefeng Tang

Plaintiff

And

Luan Duong

Defendant

Before: The Honourable Mr. Justice Thompson

Reasons for Judgment

Counsel for the Plaintiff:

S. Leung

Counsel for the Defendant:

M. Thurber

K. Vaid

R. Powell, A/S

Place and Dates of Trial:

Vancouver, B.C.

January 13-17, 2020

Place and Date of Judgment:

Vancouver, B.C.

February 4, 2020

[1] This is an assessment of damages arising from a motor vehicle collision in Burnaby on 21 May 2015. The plaintiff, Yuefeng Tang, was driving his car through an intersection when the defendant's SUV, heading the opposite direction, suddenly turned left in front of him. The air bag deployed in Mr. Tang's car, following what the evidence shows was a very heavy impact. Each vehicle was a total loss.

[2] Mr. Tang is 52 years old. He works in the financial services industry. He suffered soft tissue injuries to his neck and back, attended by sleep disturbance, low mood, and anxiety. He has attained a fairly good recovery, although he has some residual pain, stiffness, and anxiety. The prognosis for a complete recovery is guarded. I say at the outset that Mr. Tang impressed me as an honest and hard-working man who has carried on as best he can despite significant MVA-related problems. And, notwithstanding a few mistaken recollections of the type that almost invariably occur with the passage of time, I find that Mr. Tang is a reliable historian.

[3] Mr. Tang claims non-pecuniary damages, loss of capacity to earn income, and compensation for past and future care costs. His case consists of his own evidence, admissions by the defendant, and the evidence of his general physician, Dr. Herman Lee. The defendant filed the report of Dr. Kevin Letcher, a physiatrist who examined Mr. Tang at the behest of the defendant, and called Bradley Trainer who was one of Mr. Tang's supervisors at CIBC.

Before the Motor Vehicle Accident

[4] Mr. Tang was born in China in 1967. He studied international business at the Shanghai Institute of Foreign Trade before leaving for the USA, where he obtained a bachelor's degree with a business major at the City University of New York in May 2006. This achievement evidences Mr. Tang's intelligence, and focused determination: to study abroad in a newly learned language and obtain a university degree when nearing one's fortieth birthday is no mean feat.

[5] Mr. Tang immigrated to Canada in June 2006, to join his wife. They had married in 2005. They have a son, now 11 years old. Mr. Tang and his wife divorced in 2013, and he has joint custody of his son. His parenting time is on weekends.

[6] Mr. Tang's first job in Canada was at a furniture store, working as a salesperson. He worked there from September 2006 to February 2007. He received an offer from CIBC in May 2007. He worked as a personal banking representative, located in a Superstore in East Vancouver. CIBC had an agreement with the company that operated Superstores to market CIBC services in some of its stores. This arrangement was branded as "PC Financial." Mr. Tang worked for CIBC in this capacity until the beginning of 2011. On average, he estimated his annual earnings as $45,000 during this first stint at CIBC.

[7] When Mr. Tang left CIBC in 2011, he took a mortgage broker course and thereafter joined a mortgage broker firm. He was there for a year. He testified that his income was wholly based on commissions, and business was slow. A CIBC manager contacted him, and offered a PC Financial position at a Superstore in Burnaby. Mr. Tang accepted this offer to work in the same role as he had at the other Superstore, and he started in August 2012. He received a base salary and a bonus based on sales performance.

[8] Mr. Tang worked for CIBC at this Burnaby store up until the time of the May 2015 MVA. He excelled at this work, exceeding sales targets established by CIBC. His income in 2013 was $57,091 ($38,800 salary plus $18,291 bonus), and $54,693 in 2014 ($39,600 salary plus $15,093 bonus).

[9] Just before the MVA, Mr. Tang had applied for and obtained a transfer to the Metrotown CIBC branch as a financial services representative. He explained that Metrotown is a busy branch, and he hoped that working there would open up opportunities for promotion at CIBC that were not likely available to him working in a Superstore.

[10] Mr. Tang was in good health before the MVA. He focused on his work, but he took time out once a week to attend a table tennis club. He also did some swimming with his son, and, in the summer, played tennis at a park close to his home.

Injuries and Extent of Disability

[11] It is convenient to begin with Dr. Letcher's evidence, which I accept in its entirety. On physical examination in September 2019, over four years after the MVA, Dr. Letcher identified tenderness and palpable trigger points on the right side of Mr. Tang's neck, and the right side of his low back. Dr. Letcher reviewed the medical documentation made available to him, and noted the documentation of significant and prolonged low mood, anxiety disorder, sleep disturbance, as well as decreased exercise/activity tolerance. This was consistent with the history provided to him by Mr. Tang, and consistent with Mr. Tang's evidence at trial, which I accept.

[12] Dr. Letcher's opinion is that the MVA probably caused acute muscle and ligamentous strains to Mr. Tang's neck and back, which would have healed within about eight weeks, but he has subsequently developed regional myofascial pain syndrome affecting his neck and low back. At the time that Dr. Letcher examined Mr. Tang, there was no clear evidence of a more diffuse chronic pain syndrome such as fibromyalgia. I accept this evidence, and despite Dr. Lee's diagnosis of fibromyalgia, I am not satisfied on the balance of probabilities that Mr. Tang ever met the diagnostic criteria for that condition.

[13] Dr. Letcher's opinion is that Mr. Tang's depressed mood, anxiety, and sleep disturbance complicate his prognosis, which Dr. Letcher describes as "guarded given the chronicity of his symptoms." His neck and back pain will most likely persist into the foreseeable future, with some improvement with treatment strategies. Although Mr. Tang is not disabled from work, Dr. Letcher emphasized that he would need to "work around his symptoms as best as possible."

[14] Where there are differences between the opinions of Dr. Letcher and Dr. Lee, I prefer the evidence of Dr. Letcher. In fact, I am not inclined to attach any significant weight to Dr. Lee's evidence. I agree with the defendant that Dr. Lee's report was not properly organized -- it blended summaries of particular clinical visits with overall opinion on Mr. Tang's condition, in such a fashion that it made it difficult to discern the reasons for Dr. Lee's opinions. There are inaccuracies in the report that do not seem to have their genesis in what Mr. Tang told his doctor; for instance, the description in the report of the MVA as a rear-end collision. Further, I found Dr. Lee's evidence at trial difficult to follow in some respects. The best example is his assertion that a post-concussion syndrome is possible even where a patient has not suffered a concussion.

[15] To be clear, I do not accept Dr. Lee's diagnosis of post-concussion syndrome. The evidence does not support a loss of consciousness, but this, of course, does not rule out the possibility of a concussion. The hospital records make it clear that Mr. Tang struck his head and while it is possible that he was concussed, the evidence supporting a concussion diagnosis is not clear, cogent, or convincing. I consider that Mr. Tang's post-MVA cognitive complaints are fully accounted for by sleep disturbance, low mood, and anxiety, all of which I find are related to the MVA.

Non-Pecuniary Damages

[16] The Court of Appeal outlined the proper approach to the assessment of non-pecuniary damages in Stapley v. Hejslet, 2006 BCCA 34 at paras. 45-46. The factors to be considered include Mr. Tang's age, the nature of his injuries, the severity and duration of his pain, disability, emotional suffering, loss or impairment of life, the impairment of family and social relationships, the impairment of physical and mental abilities, and loss of lifestyle. A stoic nature -- and I find that Mr. Tang is stoic -- ought not to result in a lesser award.

[17] Mr. Tang has endured a significant amount of pain, and although I find he has achieved a recovery on the order of 80 percent, the likelihood is that he will always have some pain and stiffness in his neck and low back. Work is important to Mr. Tang, and the effects of his injuries causes him to have to work around his symptoms. He has been able to keep up with domestic chores since the summer of 2015. His injuries have affected his recreational pursuits, but in a modest way.

[18] Each case must be decided on its own facts. An individualized assessment is called for, and it is neither possible nor desirable to develop a tariff: Lindal v. Lindal, [1981] 2 S.C.R. 629 at 637; Dilello v. Montgomery, 2005 BCCA 56 at paras. 39-43. However, reference to awards made in similar cases can be of assistance in arriving at a fair award for non-pecuniary damages.

[19] Mr. Tang submits that an award in the range of $80,000 to $100,000 is appropriate, citing Jaehrlich v. Kuechler, 2019 BCSC 1126 ($110,000); Ahonen v. Thauli, 2013 BCSC 1607 ($100,000); Lewis v. Wang, 2020 BCSC 16 ($90,000); and Roemer v. Shafi, 2020 BCSC 1 ($80,000). The defendant submits that $50,000 is the appropriate figure, relying on Matharu v. Gill, 2016 BCSC 624 ($45,000); Zamora v. Lapointe, 2019 BCSC 1053 ($50,000); and Gartner v. Baumeister, 2019 BCSC 1291 ($50,000).

[20] Each of these cases has been of some help in making the assessment, but, naturally, each has important distinguishing features. Making an individualized assessment, I consider that $80,000 is a fit award for non-pecuniary damages.

Past Loss of Earning Capacity

[21] In Rowe v. Bobell Express Ltd., 2005 BCCA 141 at paras. 30-31, the Court of Appeal explained that a claim for what is often described as "past loss of income" is actually a claim for past loss of earning capacity -- i.e., "a claim for the loss of the value of the work that the injured plaintiff would have performed but was unable to perform because of the injury." The value of the loss may be measured in different ways: for example, by actual earnings the plaintiff would have received, by a replacement-cost evaluation of tasks that the plaintiff is now unable to do, or by an assessment of reduced business profits. The test to be applied to hypothetical events, whether past or future, is whether there is a real and substantial possibility that the events would occur: Athey v. Leonati, [1996] 3 S.C.R. 458 at para. 27; Smith v. Knudsen, 2004 BCCA 613 at para. 29; Grewal v. Naumann, 2017 BCCA 158 at paras. 43-46; Rousta v. MacKay, 2018 BCCA 29 at para. 14.

[22] Mr. Tang submits, and I accept, that after the MVA his productivity was affected by chronic neck and back pain, and the effects of not sleeping well. He claims for losses during 2016 and 2017. He urges an award of $27,000 on the basis of postulated additional bonuses he would have received in these two years, but for the MVA. Recall that he earned approximately $57,000 in 2013 and $54,700 in 2014. In the year of the MVA, approximately half the year was spent at the Superstore and half at the CIBC Metrotown branch, and his

earnings were about $51,300. He made about $47,000 in 2016, and $45,800 in 2017. The plaintiff's claim is calculated on the basis of the difference between his average annual bonuses of $16,500 in the years before the MVA (i.e., 2013-2014), and the bonuses he received in 2016 and 2017 -- only about $3000 per annum.

[23] The problem with assessing Mr. Tang's loss in this fashion is that the timing of the MVA roughly corresponded with his transfer from the Superstore to the Metrotown branch -- he made the move within three months of the MVA. Bradley Trainer, one of his CIBC managers, explained that the bonus system worked very differently for the Superstore and branch positions: it was much more difficult to earn bonus money in the branch. On the other hand -- and this echoed Mr. Tang's evidence -- the branch position presented better opportunities for career advancement. Essentially, CIBC employees who chose to make the jump from Superstore positions to busy branches like Metrotown were likely to experience a short-term drop in income in exchange for long-term opportunities.

[24] I conclude that this is not a loss that can be assessed mathematically, other than the lost income during the two weeks that Mr. Tang was off work following the MVA. Despite carrying the burden of chronic pain and its effects, including sleep disturbance and some anxiety, his work was described by Mr. Trainer as being of high quality. Nevertheless, had he not been injured I have no doubt that Mr. Tang's work performance would have been better still. I find that his bonus income would likely have been slightly higher had he not been injured. More importantly, I think there is a real and substantial possibility that Mr. Tang lost some momentum toward fulfilling his goal of advancing at CIBC during 2016 and 2017. This aspect of the claim is difficult to assess. Taking account of the loss for time he was off work immediately after the MVA, and some lost bonus income and loss of opportunity, I think an award of $20,000 for loss of capacity to earn income during the period claimed for is fair to both the plaintiff and the defendant. I reduce this sum to $17,000 to reflect that this aspect of the damages award must be net of income tax.

[25] Mr. Tang received short term disability benefits for the time he missed from work in the two weeks following the MVA. The defendant submits that this disentitles the plaintiff to claim for his losses during this period or allows the defendant to deduct the amount of benefits paid. However, the summary of the benefits package filed as an exhibit speaks clearly to CIBC's right to recovery of the STD benefits paid to Mr. Tang:

If you become disabled, you may receive a payment, or be entitled to receive a payment, from a third party -- either a person or organization -- where the payment is intended as income replacement, wages, or other benefits. For example, this could happen if you were injured in an automobile accident and received a legal settlement -- if all or part of that settlement was intended to replace wages you lost due to the injury.

If you receive any such payments for the same period of disability for which you receive similar benefits under the STD or LTD plans, then you are required to notify and reimburse CIBC or Great-West Life, respectively, for those payments.

[26] There is no evidence that CIBC has waived its right to reimbursement from the plaintiff of the STD benefits upon receipt by Mr. Tang of a judgment that includes compensation for his lost wages for the STD period. In these circumstances, the plaintiff is entitled to put forward the claim for his losses, and the defendant is not entitled to deduct the STD benefits paid to him by his employer. See Provost v. Bolton, 2018 BCSC 1090 at paras. 43-63.

Future Loss of Earning Capacity

[27] A plaintiff is required to prove a substantial possibility of a future event resulting in a loss in order to recover damages for loss of future earning capacity. If such an event is proven, then the loss may be quantified according to the earnings that he will lose (the "earnings approach"), or by the harm that has been caused to his capacity as a capital asset in the working world (the "capital asset approach"): Perren v. Lalari, 2010 BCCA 140 at para. 32. The earnings approach will be appropriate when the loss is more easily measurable: Westbroek v. Brizuela, 2014 BCCA 48 at para. 64.

[28] The capital asset approach involves considering factors such as: (1) whether the plaintiff has been rendered less capable overall of earning income from all types of employment; (2) whether the plaintiff is less marketable or attractive as a potential employee; (3) whether the plaintiff has lost the ability to take advantage of all job opportunities that might otherwise have been open; and (4) whether the plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market: Brown v. Golaiy (1985), 26 B.C.L.R. (3d) 353 at 356 (S.C.); Morgan v. Galbraith, 2013 BCCA 305 at paras. 53, 56.

[29] At the beginning of 2018, Mr. Tang decided to leave CIBC for self-employment as a mortgage broker. I accept his estimate of his 2019 income as $50,000. His decision to alter his career path aligns with Dr. Letcher's opinion that it is important that Mr. Tang "work around his symptoms as best as possible." His new career allows him to calibrate his work efforts according to the degree to which his chronic pain is troubling him. Although he is currently earning not much less than the amount he earned before the MVA, I have no hesitation in concluding that there is a real and substantial possibility of events resulting in future loss, given what I find to be his compromised ability to work at full capacity in a more structured work environment.

[30] Adopting the capital asset approach, Mr. Tang submits that $20,000 would be proper compensation under this head of damages. I adopt this submission as moderate and reasonable, given that it is highly likely that Mr. Tang will continue to suffer residual effects of his MVA injuries, and that all of the Brown v. Golaiy factors have application in this case.

Cost of Future Care

[31] Damages for cost of future care compensate for expenses to be incurred to sustain or promote mental or physical health. The services and items must be reasonable -- both in the sense of being medically required or justified, and in the sense that Mr. Tang will be likely to

incur them. See Milina v. Bartsch (1985), 49 B.C.L.R. (2d) 33 at 78 (S.C.), aff'd (1987), 49 B.C.L.R. (2d) 99 (C.A.); Krangle (Guardian ad litem of) v. Brisco, 2002 SCC 9 at paras. 21-22; Gignac v. Insurance Corporation of British Columbia, 2012 BCCA 351 at paras. 28-30; and O'Connell v. Yung, 2012 BCCA 57 at paras. 55-56. There must be a link between a physician's assessment of pain, disability, and recommended treatment and the recommended future care item: Gregory v. Insurance Corporation of British Columbia, 2011 BCCA 144 at para. 39; Gao v. Dietrich, 2018 BCCA 372 at paras. 68-70.

[32] Dr. Letcher's opinion is that Mr. Tang's treatment henceforth ought to focus on an exercise-based active rehabilitation program, and strategies to address stress, anxiety, depression and sleep disturbance. For specific treatment of his myofascial pain, options include treatment by a registered massage therapist, trigger point injections, and intra-muscular stimulation treatments by a physiotherapist. Dr. Letcher expects that these pain-related treatments will be required for a minimum of six months.

[33] Mr. Tang submits that an award of approximately $14,000 is appropriate. The defendant submits that $10,000 is fair. The plaintiff's submission is based on five years' gym membership fees, and the cost of six months of massage therapy, intra-muscular stimulation, and psychological counselling. The defendant takes issue with the gym membership costs on the basis that they are claimed at a higher amount than the gym membership fees currently being paid by Mr. Tang. I think this point is well taken, and I must also take account of the possibility that Mr. Tang may not require all of the different treatment modalities identified by Dr. Letcher. That said, I must also remember that Dr. Letcher indicated that the treatments for myofascial pain will be required for a minimum of six months -- I must bring into the equation the possibility that more treatment will be required.

[34] On balance, I conclude that $12,500 is the appropriate award for cost of future care.

Special Damages

[35] The amount of special damages is agreed at $5848.

Summary

[36] I am satisfied that this award of damages, taken as a whole, is fair to both parties:

Non-pecuniary damages

$ 80,000

Past loss of earning capacity

17,000

Future loss of earning capacity

20,000

Cost of future care

12,500

Special damages

5,848

Total

$ 135,348

The plaintiff is also entitled to court order interest on his past pecuniary losses.

[37] Unless there are matters of which I am unaware, the plaintiff will have his costs, subject to Rule 15-1(15) because this is a fast-track case.

"Thompson J."

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