

CANADA / JUDGMENT

Thompson v. Fraser

2021 BCSC 541

COURT

Supreme Court of British Columbia

DECIDED

26 March 2021

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2021 BCSC 541 Thompson v. Fraser IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Thompson v. Fraser, 2021 BCSC 541 Date: 20210326 Docket: S082137 Registry: Vancouver Between: Andrew Thompson Plaintiff And Ralph Mackay Fraser Defendant Corrected Judgment: The text of the judgment was corrected at paragraph [2] on March 30, 2021. Before: The Honourable Mr. Justice Baird Reasons for Judgment Counsel for the Plaintiff: D. Grunder Counsel for the Defendant, Ralph Fraser: R. Mostar Place and Dates of Trial: Vancouver, B.C. March 1-2, 2021 Place and Date of Judgment: Vancouver, B.C. March 26, 2021

Introduction

- [1] At issue in this case is the measure of compensatory damages payable to the plaintiff for personal injuries inflicted by the defendant's violent, unprovoked and wholly unjustifiable assault upon him on February 17, 2008. The date recorded is not a typographical error: the wrongful act in question was committed over 13 years ago. No one involved in this brief trial was able to explain this extraordinary delay.

Facts

- [2] On the material date, the plaintiff was a security guard at the Pan Pacific Hotel in Vancouver, B.C. He was 21 years old. The defendant was in his early 50s, and a teacher at Shawnigan Lake School on Vancouver Island. Earlier in the evening the defendant attended a banquet where he had too much to drink.
- [3] After the banquet, the defendant and a number of other people, including the headmaster of Shawnigan Lake School, repaired to the lounge bar of the Pan Pacific Hotel to carry on drinking and socialising. The defendant became embroiled in some kind of puerile contretemps with a couple of other bar patrons, resulting in a scuffle. The bar staff called security and the plaintiff duly arrived to sort things out.

- [4] As the plaintiff was escorting the defendant from the bar, a task undertaken at the request of the head bartender, who had determined that the defendant was drunk and disorderly and had to be removed, the defendant sucker-punched the plaintiff in the face, badly and permanently damaging the bony structure around his left eye. The defendant attempted to flee the scene and had to be pursued by hotel staff, who apprehended and held him until the police arrived.
- [5] This was, in short, a thoroughly disgraceful incident. If the defendant is a person of any conscience, he will be immobilised by shame every time he thinks of it. I would emphasise that the plaintiff was barely older than the students, most of them full-time boarders, who are committed by their parents to the defendant's care every day of the school year. I am amazed that he was not fired from his employment.
- [6] The defendant was charged criminally with assault causing bodily harm contrary to s. 267(b) of the Criminal Code, R.S.C. 1985, c. C-46. This is a serious personal injury offence punishable by a maximum of 10 years imprisonment. He entered a guilty plea in Provincial Court and came away with a conditional discharge. He was dealt with extremely leniently. Part of the reason for this, I have no doubt, was the understanding that eventually he would have to answer for his misconduct in a civil lawsuit and, in all likelihood, pay the plaintiff a sizeable sum in damages. The Plaintiff
- [7] This was a profoundly painful, upsetting and life-changing incident for the plaintiff. He was seriously injured. The consequences have been marked and permanent. He was completely incapacitated for weeks after the assault. Emergency facial surgery was required, as a result of which the plaintiff has metallic gear fused into his facial bones that causes him significant pain and discomfort when it is cold outside. There is a screw directly beneath his left eye that he can feel with his finger and causes a great deal of pain on incidental contact.
- [8] The plaintiff told me, and I accept, that this injury has forced him to abandon his long-cherished goal of becoming an RCMP constable, a career ambition that I conclude was eminently achievable before the defendant's violent and cowardly attack upon him. The plaintiff impressed me as a highly intelligent, hard-working, disciplined and honest person. Prior to the incident he was in excellent physical health. He was a world class athlete who represented Canada on multiple occasions at international karate competitions.
- [9] The plaintiff's mother is a civilian member of the RCMP in Prince George, B.C., where the plaintiff was born and raised. He had plenty of exposure to RCMP members growing up, and he desperately wanted to follow in their footsteps. His ambition was constant and serious. He twice attended the RCMP Youth Academy before he graduated high school. He applied to the force as soon as he was old enough. When he was told that there was a minor deficiency in his eyesight, he immediately and successfully underwent a laser procedure to correct it so that his application could proceed.

- [10] The plaintiff told me that he was hoping to go to the RCMP depot in Regina, Saskatchewan in 2009, the year after the assault. I think it likely that he would have been recruited and hired. The RCMP would have been lucky to get him. He had a career path worked out in his mind. He would pay his dues as a regular patrol member and investigator before applying for the Emergency Response Team. He told me that his goal in life was to help people when they needed it most.
- [11] In other words, the injury wilfully and illegally inflicted by the defendant forced the cancellation of a useful and durable vocational plan that the plaintiff had been dreaming about since early childhood. Making the best of a bad situation, the plaintiff decided to "pivot", and attended a university in New York for specialised training in criminal justice issues. He told me that this was "the next best thing" for him. His main academic interest is in forensic interviewing techniques. He has landed a remunerative job as an investigator with a New York law firm. He makes more money there than he would as an RCMP officer.
- [12] Money is not the most important thing in the plaintiff's life, however. He wanted to serve and protect the public as a peace officer. He testified that, if his facial injury could be magically healed, and the hardware in his facial bones could be removed, he would submit another application for RCMP recruitment immediately. His present employment is satisfactory, but it is not what he wanted to do with his life. To this day he feels a keen regret and even bitterness about this. I do not blame him. Award
- [13] The plaintiff is seeking a measure of compensatory damages that I consider to be modest in all of the circumstances. He has asked for an award of \$50,000 for non-pecuniary damages, and the defendant made no argument against it. I will make that order, and grant him the requested additional award of \$10,000 in aggravated damages for ongoing pain, distress and embarrassment resulting from the defendant's high-handed and outrageous conduct: see *Vorvis v. Insurance Corp. of British Columbia*, [1989] 1 S.C.R. 1085; *Huff v. Price*, [1990] B.C.J. No. 2692 (B.C.C.A.).
- [14] A claim for what is often described as "past loss of income" is actually a claim for loss of earning capacity; that is, 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: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30.
- [15] The assessment of past earning capacity involves a consideration of hypothetical events. When determining what would have happened but for the injury, the plaintiff need not prove the past event on a balance of probabilities. Rather, the 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: *Grewal v. Naumann*, 2017 BCCA 158 at para. 48. Allowances must be made for the contingency that the assumptions upon which an award is based may prove to be wrong: *Falati v. Smith*, 2010 BCSC 465 at para. 41, *aff'd* in 2011 BCCA 45.

- [16] I have no difficulty with the plaintiff's general method of calculating pretrial loss of income earning capacity. He has asked to be compensated in the amount of \$6,329.60 for the two months after the assault when he was totally incapable of working as security guard. He makes no claim for 2009 or 2010 because he had strong earnings in those years and no provable losses. However, from 2011 to 2017 inclusive, while he was working part-time to put himself through university, he made a lot less money than he would have done as a member of the RCMP, which I find is likely what he would have been doing if not for the injuries caused by the defendant's assault.
- [17] According to RCMP salary classifications provided to me in the form of admissions, the difference in what the plaintiff actually earned from 2011 to 2017 and what he would have earned as an entry-level RCMP recruit over the same period, combined with the lost security guard income from 2008, comes to \$184,330. Defence counsel urged a reduction based on the contingency that the plaintiff might not have been recruited, or that the process would have taken longer than planned. I acknowledge that nothing is certain in life, and that it would be fair to reduce the award sought by a small amount to account for this. My award under this heading is \$166,000.
- [18] I decline to order punitive damages. The defendant has taken responsibility for his behaviour by pleading guilty in criminal court and admitting liability in this lawsuit. He is now obligated to compensate the plaintiff in damages, including aggravated damages, which added together will sufficiently achieve the goals of punishment and deterrence: *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 at para. 196. Summary
- [19] In summary, I award the plaintiff the following amounts: Non-Pecuniary Damages: \$50,000 Aggravated Damages: \$10,000 Loss of Income Earning Capacity: \$166,000 TOTAL: \$226,000
- [20] The plaintiff will have his costs throughout on Scale B. "Baird J."

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