
CANADA / JUDGMENT

Urwin v. Hanson

2019 BCSC 1145

COURT

Supreme Court of British Columbia

DECIDED

15 July 2019

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2019 BCSC 1145 Urwin v. Hanson

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Urwin v. Hanson,

2019 BCSC 1145

Date: 20190715

Docket: M157736

Registry: Vancouver

Between:

Darren Robert Urwin

Plaintiff

And

Brittany Hanson, City of Surrey, Bachittar Singh Grewal

and Jaskirat Singh Takhar

Defendants

Corrected Judgment: The text of the judgment was corrected on

July 19, 2019 at para. 67

Before: The Honourable Mr. Justice Ehrcke

Reasons for Judgment

Counsel for the Plaintiff:

A.A. Pang

Counsel for the Defendants B. Hanson and City of Surrey:

F. Mohamed

R.S. Grewal

Place and Date of Trial:

Vancouver, B.C.

May 27-31, 2019

Place and Date of Judgment:

Vancouver, B.C.

July 15, 2019

INTRODUCTION

- [1] The plaintiff, Darren Robert Urwin, claims damages for injuries he sustained following a motor vehicle accident on September 2, 2014 (the "Motor Vehicle Accident").
- [2] Liability has been admitted, and the issues at trial are the extent to which the injuries were caused by the Motor Vehicle Accident, and the quantification of damages.

THE MOTOR VEHICLE ACCIDENT

- [3] On September 2, 2014, the plaintiff was driving his 2000 Chevrolet Tahoe northbound when he stopped for a red light at the intersection of 132nd Street and 96th Avenue in Surrey, British Columbia. While he was stopped, his vehicle was struck from behind by a 2001 GMC Sonoma, operated by Brittany Hanson. She testified that she applied her brakes, but she nevertheless slid into the plaintiff's vehicle. She described the impact as moderate. She said she felt it, but she was not hurt. Mr. Urwin testified that his airbags did not deploy, but the rear bumper of his vehicle was pushed in.
- [4] Because of the impact, Mr. Urwin's vehicle was pushed into the vehicle in front of him, owned by Jaskirat Singh Takhar and driven by Bachittar Singh Grewal.
- [5] Both Ms. Hanson and Mr. Urwin drove to the shoulder of the road, exited their vehicles, and exchanged information.
- [6] No emergency personnel were called, but a fire truck that was driving by stopped and attended to the parties. Mr. Urwin was able to drive his vehicle away from the scene.

ISSUES AT TRIAL

- [7] Liability has been admitted by the defendants, Brittany Hanson and the City of Surrey. The action has been discontinued against the defendants, Bachittar Singh Grewal and Jaskirat Singh Takhar.
- [8] The issues are the nature and extent of the plaintiff's injuries, whether all of his injuries were caused by the Motor Vehicle Accident, and the quantum that should be awarded for non-pecuniary damages, past wage loss, loss of future earning capacity, cost of future care, and special damages.
- [9] On the issue of causation, the parties specifically disagree about whether injuries sustained by the plaintiff in a workplace accident on February 14, 2018 are attributable to the Motor Vehicle Accident.

- [10] The plaintiff submits that he is entitled to the following awards:

Non-Pecuniary Damages:

\$175,000.00

Past Income Loss / Loss of Past Earning Capacity:

\$26,462.66

Loss of Future Earning Capacity:

\$460,000.00

Future Care:

\$160,000.00

Special Damages:

\$3,454.45

TOTAL (plus costs, disbursements and interest)

\$824,917.11

- [11] The defendant submits that the awards should be as follows:

Non-Pecuniary Damages:

\$40,000 - \$60,000

Past Wage Loss:

\$12,000

Loss of Future Income Earning Capacity:

\$0

Future Care:

\$1,593

Special Damages:

\$3,248.46

TOTAL

\$56,841.46 to \$76,841.46

FACTS AND EVIDENCE

- [12] Nine witnesses were called at trial, including the plaintiff, Darren Urwin; his wife, Stacey Urwin; his long-time friends, Jaret Kaufman and Derek Vokey; his family doctor, John Stockburger; Mark Jaschke, an expert in occupational therapy; Dr. Raphael Chow, an expert in physical medicine and rehabilitation; the defendant, Brittany Hanson; and Dr. Marc Boyle, an expert in orthopedic surgery.
- [13] Numerous exhibits were filed, including an agreed statement of facts, photographs, a book of documents including clinical records, and a book of expert reports. From the evidence, the following facts emerge.
- [14] Mr. Urwin is 43 years old. He is married and has two daughters ages 9 and 11. He completed high school in 1994, and obtained a diploma in Business Administration from Selkirk College in 1999.
- [15] Following graduation, he worked at Pacific Custom Dye for 6 months and then began his career at Cloverdale Paint Inc. in 2000. He worked as an order picker in the sundries department until 2003.
- [16] Prior to the Motor Vehicle Accident, Mr. Urwin had a number of Workers Compensation Board ("WCB") claims, including a claim for a right arm bicep sprain in 1995; a claim for a back injury in 2002; a claim for asbestos exposure in 2003; a claim for left elbow pain in May 2009; a claim for left elbow tendonitis in June 2009; a claim for left elbow and forearm in August 2009; a claim for neck injury in February 2012; a claim for back injury in April 2012 for which he was off work for two months; a claim for a cut left pinky finger in August 2012; a claim for pain in big toe in January 2013; and a claim for left neck pain on June 23, 2014. He was still having treatment for this last injury up to four weeks prior to the Motor Vehicle Accident.

- [17] At the time of the Motor Vehicle Accident, Mr. Urwin was working 40 hours per week in ten hour shifts as a Warehouse Receiver at Cloverdale Paint. His job duties included distribution of paint throughout the warehouse, using a forklift. Each gallon of paint weighs about 12 lbs. He is certified to operate four different kinds of forklifts.
- [18] Following the Motor Vehicle Accident, Mr. Urwin attended his family physician, Dr. Stockburger, complaining of pain in his neck, mid-back, low-back, right shoulder, and left elbow. He was not sent for any imaging of his neck or back, and he was not sent to a specialist for his neck or back.
- [19] He saw Dr. Grunau for a consult on his left shoulder, but by the time of his appointment his shoulder was better.
- [20] Mr. Urwin was off work for about four months after the Motor Vehicle Accident and then took some vacation before a gradual return to work on January 12, 2015. He and his family took a trip to Florida over Christmas.
- [21] In 2015, Mr. Urwin continued to complain of neck and back pain. He went on a trip to Osoyoos that summer, but had trouble enjoying wakeboarding and boating, activities he had been doing since 1992. He sold his boat after this trip to Osoyoos and purchased an RV. He and his family also took a trip to New York that year.
- [22] By 2016, Mr. Urwin said he was still feeling a nagging pain in his neck and back on a daily basis. He felt that his symptoms had plateaued. That summer he went camping with his family in Merritt. He brought his paddle board, but it was mainly used by family and friends. His father-in-law had a boat which he went out on, but he did not participate in any water sports. That year, he and his family also took a trip to San Diego. He did about 60% of the driving, but he felt uncomfortable.
- [23] Mr. Urwin said that by 2017, he was still feeling pain in his back. He had completed his active rehabilitation program and had not felt much improvement. That summer, he tried hunting with his father-in-law, which involved 20 hours of driving and a 1 km hike. He said the drive was very uncomfortable for him.
- [24] The family's most recent trip was to Belize. On the way there, they took an extra 13 hour layover, which they would not typically have done prior to the Motor Vehicle Accident.
- [25] Mr. Urwin testified that his relationships have been affected since the Motor Vehicle Accident. He said he argues more with his wife, and has not been able to attend his elder daughter's swimming competitions or his youngest daughter's skating competitions.
- [26] As well, Mr. Urwin says that his recreational activities have been affected. He sold his motorbike in 2010 and because of the Motor Vehicle Accident, he has not purchased another, although he used to go bike riding with his family a few times a year. He used to go golfing 4-5 times a year, but he has not returned to golfing. He says that his ability to do household chores has also been affected. In his direct examination, he described working

on the driveway, deck, garage, bathroom renovation and kitchen renovation. His evidence is that he would not be able to do these things again around the house. For example, he has hedges which are 16 feet tall. Prior to the Motor Vehicle Accident, he would go up on a ladder to trim the hedges without any problems. He is now doing the bare minimum, and he is not using a ladder.

- [27] After his return to work in January 2015, Mr. Urwin did not miss further time from work due to the Motor Vehicle Accident. He has worked regular hours, overtime hours and double overtime. He had a salary increase in 2015, and another in January of 2018.
- [28] On February 14, 2018, Mr. Urwin suffered a workplace injury when he was moving a 50-pound pail of paint thinner. The following day he felt numbness and tingling in his leg. He saw Dr. Stockburger's colleague, Dr. Nadine Velay, who put him on the list for an MRI, which he did about a month later. He then was referred to a neurosurgeon, Dr. Richard Chan, for disc rupture and underwent a discectomy on May 8, 2018. After the surgery, he completed occupational therapy, physiotherapy and active rehabilitation.
- [29] Following this workplace injury on February 14, 2018, Mr. Urwin was off work until October 1, 2018. He was under the care of Occupational Rehabilitation through WCB, and he was paid his wages by WCB. He says he is still feeling symptoms of sciatica with pain radiating down his glutes.

CAUSATION

- [30] The claim under the various heads of damages cannot properly be assessed without first determining whether the plaintiff is responsible for the consequence of the disc herniation in February 2018.
- [31] The parties are in general agreement about the relevant case law concerning causation, including most notably, *Athey v. Leonati*, [1996] 3 S.C.R. 458, and *Resurface Corp. v. Hanke*, [2007] 1 S.C.R. 333.
- [32] They disagree about whether the 2014 Motor Vehicle Accident caused or contributed to the disc herniation and operation that followed the February 14, 2018 workplace accident.
- [33] The plaintiff relies on the expert evidence of the physiatrist, Dr. Chow, who opined that the Motor Vehicle Accident materially contributed to the vulnerability of Mr. Urwin's lumbar spine with subsequent development of radiculopathy.
- [34] The defendant relies on the expert evidence of Dr. Boyle, an orthopaedic surgeon who opined that the disc rupture following the work place accident in 2018 would have occurred in any event, and that the 2014 Motor Vehicle Accident did not materially contribute to it.
- [35] Dr. Boyle wrote, at pages 13-14 of his report:

Considering his prior history of a low back strain with significant time away from work and the likelihood of significant spondylosis present prior to the 2018 event, it is this writer's opinion that the motor vehicle accident contributed to a minor degree to his predisposition to the L5-S1 disc rupture. It is this writer's opinion that the main contribution came from his prior history of low back strain requiring five months away from work, as well as the inciting event of lifting a 50-lb weight. Such events are not uncommon in the general population absent motor vehicle accidents. They are common in the general population with a prior history of back strain and time away from work.

This writer feels that, more likely than not (greater than 50%) the degree of contribution of the events of the MVA of 2014 to the later event of 2018, is relatively minor. The patient did indicate that he continued to manipulate paint, as he had prior to his back strain, following the back strain, prior to the MVA, and following the MVA. He had had a previous strain with that activity when manipulating a four-pack (i.e. 4 gallons of paint). That a similar outcome occurred as a result of manipulating a 50-lb container of paint thinner reflects a similar episode, i.e. a lumbar strain with a well known mechanism of injury that would lead to a disc rupture.

It is this writer's opinion that, absent the MVA, the patient remained susceptible to a disc herniation with the mechanism described.

- [36] Counsel for the plaintiff points out that there are a few factual inaccuracies in Dr. Boyle's report, most notably, that in the passage cited above, he referred to Mr. Urwin being off work for five months following his April 2012 WCB claim for back injury, when in fact, he was only off work for two months as a result of that back injury. In my view, that, and the other minor factual errors pointed out by plaintiff's counsel, do not affect the validity of Dr. Boyle's opinion. As well, I do not accept the submission of counsel for the plaintiff that Dr. Boyle's opinion is biased.
- [37] In my view, it is significant that in the three months prior to the disc rupture in 2018, Mr. Urwin had not missed any work, any treatment or any visits. He appears to have been improving, as shown by the fact that he was seen by his family doctor only three times in 2017. His last visit to his family doctor before the disc rupture was in September 2017, and at that time, he made no mention of back pain. His last complaint of low back pain recorded by his family doctor was in April 2017.
- [38] It is also significant that the plaintiff did not tender any expert opinion evidence from Dr. Chan, the surgeon who performed the discectomy in 2018. His clinical notes are, however, in evidence, and in them it appears that Dr. Chan made no note of the Motor Vehicle Accident being a cause of the disc herniation.
- [39] On the evidence, I find that the 2014 Motor Vehicle Accident was not a cause of the disc herniation in 2018, and that the disc herniation would have occurred even in the absence of the Motor Vehicle Accident. I do not agree with the plaintiff's submission that but for the Motor Vehicle Accident, the plaintiff would not have suffered the disc herniation.

[40] I find that the injuries attributable to the 2014 Motor Vehicle Accident were all soft-tissue injuries to Mr. Urwin's neck, back and shoulders, and that they had largely resolved by the summer of 2017. The symptoms that appeared following the 2018 workplace accident and the disc herniation are not attributable to the Motor Vehicle Accident. The evidence of Dr. Chow and Mark Jaschke about the plaintiff's prognosis and their recommendations about future care are therefore of limited value in assessing damages for this Motor Vehicle Accident.

NON-PECUNIARY DAMAGES

[41] In *Stapley v. Hejslet*, 2006 BCCA 34 our Court of Appeal set out, at para. 46, a helpful list of factors to consider in assessing non-pecuniary damages:

[46] The inexhaustive list of common factors cited in *Boyd* that influence an award of non-pecuniary damages includes:

- (a) age of the plaintiff;
- (b) nature of the injury;
- (c) severity and duration of pain;
- (d) disability;
- (e) emotional suffering; and
- (f) loss or impairment of life;

I would add the following factors, although they may arguably be subsumed in the above list:

- (g) impairment of family, marital and social relationships;
- (h) impairment of physical and mental abilities;
- (i) loss of lifestyle; and
- (j) the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff: *Giang v. Clayton*, [2005] B.C.J. No. 163 (QL), 2005 BCCA 54).

[42] In seeking an award of \$175,000 for non-pecuniary damages for Mr. Urwin, his counsel cites the following cases: *Bouchard v. Brown Bros. Motor Lease Canada Ltd.*, 2011 BCSC 762; *Bouchard v. Brown Bros. Motor Lease Canada Ltd.*, 2012 BCCA 331; *Sirak v. Noonward*, 2015 BCSC 274; and *Chawla v. Lambright*, 2017 BCSC 1884.

[43] All of these cases involved injuries sustained in rear-end accidents, and to that extent, they are similar to the case at bar.

- [44] In Bouchard, where the plaintiff required a discectomy, the Court of Appeal awarded \$160,000 for non-pecuniary damages but applied a 20% contingency reducing the award to \$128,000, which is \$145,000 when adjusted for inflation. In that case, the plaintiff was intermittently prevented from working for two and one-half years as a result of the accident.
- [45] The plaintiff in Sirak had an L5-S1 disc herniation for which surgery was recommended. He was awarded \$160,000 for non-pecuniary damages, which is \$172,000 after adjustment for inflation. Mr. Sirak had complained of numbness immediately following the accident, unlike Mr. Urwin, whose numbness appeared after the disc herniation in 2018.
- [46] In Chawla, the plaintiff suffered back pain and radiculopathy, for which surgery was recommended. His award for non-pecuniary damages was \$125,000, or \$134,000 after adjustment for inflation.
- [47] In evaluating the relevance of those authorities, it must be kept in mind that I found the defendant in the present case not responsible for Mr. Urwin's disc herniation.
- [48] The defendant relies on the following cases in suggesting an award of \$40,000 to \$60,000 for non-pecuniary damages: Uppal v. Chung, 2017 BCSC 80, where the award was \$40,000; Mothe v. Silva, 2015 BCSC 140, where the award was \$40,000; Farbatuk v. Lagrimas, 2014 BCSC 1879, where the award was \$60,000; and Perry v. Vargas, 2012 BCSC 1925, where the award was \$40,000 for general damages.
- [49] Of these cases, I find Farbatuk v. Lagrimas the most similar to the case at bar. Mr. Farbatuk was 47 years old when he was involved in a rear-end collision while stopped for traffic. As a result of the accident, he suffered moderate to severe whiplash in his neck and back. He spent about half a year attending treatment and rehabilitation before a gradual return to his employment at the paper mill where he had worked for 25 years. This was heavy work, involving twelve-hour shifts. Prior to the accident, Mr. Farbatuk had been in good health and living an active life style that included golfing, cycling, hiking and home renovations. All those activities were curtailed by his injuries, and his family members described his mood changes after the accident. The award of \$60,000 for general damages was made in 2014, and inflation must be taken into account.
- [50] No two cases are ever identical on their facts, and the cases cited by both counsel simply provide guidance as to an appropriate award for comparable pain, suffering, and loss of amenities of life.
- [51] On the facts of this case, I am satisfied that Mr. Urwin should be awarded \$75,000 in non-pecuniary damages.

PAST INCOME LOSS / LOSS OF PAST EARNING CAPACITY

- [52] Plaintiff's counsel submits that Mr. Urwin should be awarded \$26,462.66 for past income loss or loss of past earning capacity. That claim is based in part on calculations related to a deferred profit sharing scheme, but no evidence was led as to the circumstances under

which a worker is entitled to such payments. As well, the calculation done by plaintiff's counsel includes wage loss following the 2018 workplace accident, notwithstanding that the plaintiff's wages for that period were paid by WCB. In any event, I have found that the 2018 disc herniation was not caused by the 2014 Motor Vehicle Accident.

- [53] Mr. Urwin admitted during his cross-examination at trial that his past wage loss from the Motor Vehicle Accident was \$12,000. From an examination of his 2014-2015 pay stubs, however, I am satisfied that a more accurate assessment of his net wage loss, including the potential for overtime, is \$17,000. I find that he is entitled to an award of that amount under this head of damages.

LOSS OF FUTURE EARNING CAPACITY

- [54] Mr. Urwin testified that as a result of the Motor Vehicle Accident, he has reduced stamina, and he worries about his future. As he put it, the weight of the pails never changes. He said he is worried that if the company he works for is sold, there may be a change of management that would affect him.
- [55] Dr. Chow, in his May 28, 2017 report, offered his opinion that Mr. Urwin's job as a warehouse receiver exceeds his functional limits.
- [56] In his reports, Mark Jaschke opined that Mr. Urwin did not meet the full physical demands of his pre-accident job as a Warehouse Receiver or his current job as a Receiver Foreman.
- [57] Nevertheless, following the completion of his graduated return to work, Mr. Urwin did not miss any further time from work as a result of the Motor Vehicle Accident. He received promotions and now earns a higher hourly wage than before. He continued to work significant amounts of overtime and double overtime. He resumed heavy lifting work. In my view, the evidence does not establish a real and substantial possibility of a future event leading to economic loss.
- [58] I would not make any award for loss of future earning capacity.

COST OF FUTURE CARE

- [59] A plaintiff injured in an accident by a defendant's negligence is entitled to an award for the cost of future care, based on what the medical evidence shows to be reasonably necessary to preserve and promote the plaintiff's mental and physical health: *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351. The two-fold test is an objective one based on the medical evidence: first, there must be a medical justification for the cost; and second, the claim must be reasonable: *Tsalamandris v. McLeod*, 2012 BCCA 239.

- [60] The occupational therapist, Mark Jaschke, made a series of recommendations in his report for various forms of therapy, rehabilitation, exercise programs, and home services, for a total cost of between \$164,970 and \$254,475. In my view, the evidence does not establish that these recommended interventions are reasonably necessary in relation to the injuries caused by the Motor Vehicle Accident.
- [61] At page 15 of his report Dr. Boyle recommended that Mr. Urwin should be seen by a kinesiologist once per week for 12 weeks to learn and refine a rehab program, including stretching and strengthening exercises. He also approved the use of non-steroidal anti-inflammatories. He said that a one-year gym pass would likely be of benefit.
- [62] In my view, the only reasonably necessary items for future care are 12 kinesiology appointments at \$70 each, for a total of \$840; non-steroidal anti-inflammatory medication totaling \$100; and a gym pass for \$660.
- [63] I would therefore award a total of \$1,600 for the cost of future care.

SPECIAL DAMAGES

- [64] Mr. Urwin claims \$3,454.45 in special damages. The defence submits that he has already been paid some of these expenses by Sun Life, and that the award for special damages should be limited to \$3,248.46.
- [65] The award for special damages will be \$3,400.

SUMMARY AND CONCLUSION

- [66] I award the following damages to Mr. Urwin for the injuries he suffered in this Motor Vehicle Accident:

Non-Pecuniary Damages:

\$75,000

Past Wage Loss:

\$17,000

Loss of Earning Capacity:

nil

Cost of Future Care:

\$1,600

Special Damages:

\$3,400

TOTAL:

\$97,000

[67] The parties may appear before me for submissions on costs if they cannot agree on the appropriate order.

The Honourable Mr. Justice W.F. Ehrcke

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