

CANADA / JUDGMENT

Wong v. Pannu

2020 BCSC 1158

COURT

Supreme Court of British Columbia

DECIDED

10 August 2020

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2020 BCSC 1158 Wong v. Pannu

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Wong v. Pannu,

2020 BCSC 1158

Date: 20200810

Docket: M180769

Registry: Vancouver

Between:

Tristen Wong, an infant, by her Mother and

Litigation Guardian, Wai Man Yao

Plaintiff

And

Andrew Lawrence Pannu and Peng Xue

Defendants

Before: The Honourable Madam Justice Francis

Reasons for Judgment

Counsel for the Plaintiff:

M.J. Neathway

Counsel for the Defendants:

D. Cieloszczyk

D. Abichahine

Place and Date of Trial/Hearing:

Vancouver, B.C.

June 8 - 12, 2020

Place and Date of Judgment:

Vancouver, B.C.

August 10, 2020

I. Introduction

- [1] On July 11, 2017, Tristen Wong sustained injuries in a motor vehicle collision at the intersection of Bridgeport Road and Shell Road in Richmond, B.C. (the "Accident").
- [2] Liability was admitted by the defendants and the matter proceeded to trial on the issue of damages only.
- [3] Ms. Wong complains of back, shoulder, and neck pain and headaches as a result of the Accident.
- [4] The defendants say that any injuries suffered by the plaintiff in the Accident were minor and were resolved within a few months. The defendants argue that the plaintiff is entitled to a modest amount of non-pecuniary damages and some special damages, but that her claims for loss of income earning capacity and cost of future care should be dismissed.

II. Background Facts

A. Prior to the Accident

- [1] When the Accident took place, Ms. Wong was fourteen years old and had just completed Grade 9 at Richmond Christian School. At the time of trial, she was in the final weeks of her Grade 12 year.
- [2] Ms. Wong is a gifted student and an accomplished musician. She is involved in many extracurricular leadership activities and has a vibrant social life. She had a bright future before the Accident, and she continues to have a bright future after the Accident.
- [3] Approximately a year before the Accident, Ms. Wong completed Grade 10 of the Royal Conservatory of Music program for piano. Prior to the Accident, Ms. Wong played bass guitar in the school band and was active in Model United Nations. She consistently maintained an academic average of more than 90%. While she did not play on any sports teams, she enjoyed skiing and swimming. During the summers, including the summer of the Accident, she volunteered as a counsellor at a day camp run by her church. Around the

house, she frequently cooked and baked for her family. By all accounts, Ms. Wong was a busy, happy teenager.

B. The Accident

- [4] When the Accident occurred, Ms. Wong was sitting in the front passenger seat of her grandfather's vehicle. The vehicle was struck from behind in a three car rear end collision. The Accident caused minimal damage to Ms. Wong's grandfather's vehicle.

C. Injuries

- [5] Almost immediately after the Accident, Ms. Wong began to feel discomfort and tightness in her back. Her discomfort increased over the ensuing days and spread through her upper and lower back, neck, and shoulders. In the weeks after the Accident, Ms. Wong's discomfort occasionally flared up, causing periods of significant pain. She developed headaches that accompanied the flare-ups.
- [6] Shortly after the Accident, Ms. Wong saw her family doctor about her Accident related injuries. The doctor prescribed a painkiller and suggested that Ms. Wong pursue physiotherapy. The physiotherapist gave her a number of stretches to do at home, and these stretches were helpful in alleviating her pain.
- [7] Ms. Wong testified that she suffers flare-ups of intense pain once or twice a week. This usually involves neck and back pain and an associated headache. She testified that her condition has remained virtually unchanged since shortly after the Accident in 2017.

D. Life after the Accident

- [8] After the Accident, Ms. Wong continued to volunteer as a day camp counsellor for the duration of the summer of 2017. Ms. Wong testified that due to her post-Accident back and neck pain, she could no longer engage in active play with the day campers. However, she continued to be able to carry out other aspects of her volunteer job, such as supervision.
- [9] In August 2017, Ms. Wong went on a family trip to Florida. On this trip, she was able to swim in the ocean and ride on amusement park rides. However, she testified that the break in physiotherapy necessitated by the trip made her recovery more difficult.
- [10] In September 2017, Ms. Wong started Grade 10. She resumed almost all of the school and extracurricular activities that she had done previously. However, she gave up playing bass guitar in the school band and switched to playing the marimba, in part because carrying the heavy guitar and amplifier hurt her back. Additionally, she testified that it became challenging for her to study in Grade 10, because it was difficult for her to sit for long periods of time without her back pain flaring up. She often had to excuse herself from class to stretch her back. Notwithstanding these challenges, she continued to achieve an A average in school. She also continued to participate in Model United Nations. Her science fair project that year was selected for a regional science fair at UBC. She maintained an

active social life.

- [11] Ms. Wong attended regular physiotherapy appointments from shortly after the Accident until the end of 2017. She found these appointments helpful. In March 2018, she started receiving chiropractic therapy instead of physiotherapy. She testified that she switched to seeing a chiropractor on her doctor's suggestion, and because the physiotherapist she had previously been seeing had moved. She attended regular chiropractic appointments until the end of 2018. These provided her with some short term relief of her pain.
- [12] In summer 2018, Ms. Wong began working as a paid staff member at the church day camp where she had previously volunteered. Her new role involved less active participation with campers, and was therefore less hard on her injuries.
- [13] Ms. Wong's grade 11 year was more academically focussed than prior years. She ceased taking band or physical education and chose courses focussed on science and math. She continued to have an A average. She testified that as her schoolwork became more challenging, she had to study for longer periods, and this increased the frequency and severity of pain flare-ups. In addition to her academic course-load, she continued with Model United Nations, ran a youth-led science fair, took the Young Investor Program at Sauder School of Business, and participated in a university level science course for high school students at Science World.
- [14] In the fall of 2018, Ms. Wong, on her family doctor's advice, started an active rehabilitation program that she continued until the spring of 2019. She found active rehabilitation helpful for her flexibility, but it did not eliminate her pain.
- [15] Ms. Wong testified that in her grade 12 year, her academic workload doubled. She was taking a very demanding set of science and math courses in order to qualify for her preferred university program. She testified that the extra time spent studying exacerbated her pain symptoms.
- [16] Ms. Wong readily admits that she continues to have a meaningful and fairly active life post-Accident. She continues to excel in school, and she has been accepted into the biochemistry program at the University of Alberta for the fall of 2020. Since the Accident, and in addition to her full school course load, she has continued to participate in a number of extra curricular activities.
- [17] Ms. Wong aspires to go to medical school to become a pediatrician. She described her "back up" career plan as working in research in some capacity.
- [18] Some of Ms. Wong's pre-Accident leisure activities have been curtailed by her injuries. While her piano playing has not stopped completely, Ms. Wong testified that she plays the piano less than she did before. She is not able to ski as much or at her previous performance level. She cooks and bakes less at home.

- [19] Two of Ms. Wong's friends testified at trial. Crystal Chung, a friend from both school and Ms. Wong's church youth group, testified that Ms. Wong sometimes needs to sit out of physical activities during youth group. She also testified that Ms. Wong frequently cracks her neck and back in class.
- [20] Nathan Quach, a fellow counsellor at the summer day camp, testified that, post-Accident in the summer of 2017, Ms. Wong often needed to sit out of strenuous physical activities at camp. He also testified that he and Ms. Wong participated together in the Young Investor Program, and that Ms. Wong often needed to take breaks to stretch during a three-hour lecture session.
- [21] Ms. Wong's mother, Wai Man Yao, testified that Ms. Wong often complains about pain in her back and neck, and cracks her neck in front of her mother. She testified that since the Accident, Ms. Wong plays the piano much less frequently and does less cooking and baking than she previously did.

III. Expert Evidence

A. Dr. Sammy Lee

- [22] Dr. Lee is Ms. Wong's general practitioner. He prepared an expert report and was cross-examined at trial. He opined that Ms. Wong's neck and back pain were caused by the Accident. He concluded that Ms. Wong's condition would continue to improve with time and exercise:

The long term prognosis for Ms. Wong is good, mostly because of her young age and I believe she could recover much better than an older adult. I believe she could improve further by getting more exercise routine in her life. She will need more manual therapy on and off in the form of physiotherapy and chiropractic treatment during pain exacerbation. She could function as a normal student but part time work in a physically demanding industry may prove to be out of the question for her as it would aggravate her pain.

B. Dr. Zeeshan Waseem

- [23] Dr. Waseem is a psychiatrist whose expert report was tendered at trial. The defendants did not cross-examine him.
- [24] Dr. Waseem opined that Ms. Wong sustained soft tissue injuries of the cervical, thoracic, and lumbar spine as a result of the Accident. He opined that those injuries resulted in chronic myofascial pain of the cervical and thoracic spines, and chronic lower back pain secondary to sacroiliac joint dysfunction.

- [25] In his report, Dr. Waseem was reluctant to opine on Ms. Wong's prognosis. He recommended that Ms. Wong undertake a course of active rehabilitation and stated that her prospects for recovery would only be clear once such a course of treatment was completed. Dr. Waseem assessed Ms. Wong on December 20, 2018, and Ms. Wong completed a course of active rehabilitation during the first four months of 2019. No follow up report from Dr. Waseem was tendered in evidence.

C. Dr. Raymond Zabieliauskas

- [26] Dr. Zabieliauskas was qualified as an expert in physical medicine and rehabilitation. He prepared an expert report and appeared for cross-examination at trial. He reached a different conclusion than Dr. Lee and Dr. Waseem with respect to Ms. Wong's ongoing pain and discomfort. He opined that any ongoing back pain suffered by Ms. Wong is caused by the fact that she is 25 pounds overweight. He opined that if Ms. Wong lost 25 pounds, her back pain would go away.
- [27] On cross-examination, Dr. Zabieliauskas was asked how he came to the conclusion that Ms. Wong is 25 pounds overweight, since he did not calculate her body mass index ("BMI") when he met with her on February 27, 2020. He testified that when he examined Ms. Wong, she advised him that she weighed 155 pounds, and that her preferred weight was 130 pounds. It appears that this was the basis for Dr. Zabieliauskas' conclusion that Ms. Wong was 25 pounds overweight at the time he examined her.
- [28] Plaintiff's counsel suggested to Dr. Zabieliauskas that Ms. Wong has a BMI of 24.96, which is within the healthy weight range (between 18.5 and 25 on the BMI Scale). The doctor's response to this suggestion was, "if you say so." He then noted that Ms. Wong is "not a big boned girl" and as a result, she should have a BMI at the low end, not the high end, of the healthy weight range.
- [29] It is questionable whether Dr. Zabieliauskas' opinion that Ms. Wong is "not big boned", and his opinion as to how this would impact an analysis of Ms. Wong's BMI, fall within his area of expertise. More critically, his failure to even consider her BMI puts his factual assumption that she is 25 pounds overweight into question.
- [30] Dr. Zabieliauskas appears to have derived the factual assumption that Ms. Wong is 25 pounds overweight from two sources: Ms. Wong's self-reporting about her current and target weight at the time of examination, and a notation in Dr. Lee's records that said that in 2015, Ms. Wong weighed 130 pounds (25 pounds less than what she advised her weight to be when she met with Dr. Zabieliauskas in 2019 and what she testified her weight to be at trial in 2020). I find that Ms. Wong's personal and subjective views about her target weight ought to have no bearing on a doctor's conclusion about whether she is overweight. I also cannot accept the suggestion that Ms. Wong's weight ought to have remained stable between 2015, when she was 13 years old, and 2020, when she was 17 years old. In making such a suggestion, Dr. Zabieliauskas appears to have overlooked normal human growth during adolescence.

- [31] Dr. Zabieliauskas' opinion is based on the unproven factual assumption that Ms. Wong is 25 pounds overweight. Because this factual assumption is unproven, I cannot accept Dr. Zabieliauskas' conclusion that Ms. Wong's back pain is attributable to her being overweight.

IV. Credibility

- [32] While the defendants do not directly attack Ms. Wong's credibility, they have asked the Court to approach it "with caution".
- [33] I found Ms. Wong to be a forthright witness. Her evidence was not overstated. She readily admitted to propositions put to her on cross-examination, even if they were not helpful to her case. The defendants did not point to any evidence given by Ms. Wong that was significantly out of harmony with the clinical notes or the other evidence at trial. I find that Ms. Wong's evidence with respect to her injuries is credible.

V. Causation

- [34] The plaintiff must establish on a balance of probabilities that the defendants' negligence caused or materially contributed to an injury: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at paras. 13-17.
- [35] The defendants admit that the plaintiff sustained a cervical strain and a thoracolumbar strain in the Accident, but say that the injuries were substantially resolved no later than six months after the Accident. In the alternative, the defendants submit that Ms. Wong's injuries substantially resolved by the end of her active rehabilitation program in April 2019. Thus, the defendants argue that while Ms. Wong may have experienced back pain as a result of her injuries in the past, because these injuries have since resolved, Ms. Wong's current back pain is not causally linked to the Accident. Instead, the defendants ask the Court to accept Dr. Zabieliauskas' view that Ms. Wong's current pain is mechanical lower back pain as a result of being overweight.
- [36] As noted, Dr. Zabieliauskas based his conclusion on a factual assumption that has not been proven, namely that Ms. Wong is 25 pounds overweight. On the matter of the cause of Ms. Wong's current pain complaints, I prefer the opinions of Dr. Waseem and Dr. Lee to that of Dr. Zabieliauskas.
- [37] As such, I am satisfied that the neck and back pain that Ms. Wong has suffered from since 2017, and continues to suffer, was caused by the Accident.

VI. Damages

A. Non-pecuniary damages

- [38] The plaintiff seeks an award of \$55,000 - \$60,000 for non-pecuniary damages. The defendants submit that non-pecuniary damages should be assessed in the range of \$14,000 - \$22,000.

- [39] Non-pecuniary damages are awarded to compensate a plaintiff for pain, suffering, loss of enjoyment of life and loss of amenities. In assessing non-pecuniary damages, the court may look to awards made in analogous cases. However, each case must turn on its own unique facts. No two personal injury claims are identical and awarding damages involves an exercise of judgment: *Kapelus v. Hu*, 2013 BCCA 86 at para. 16.
- [40] In *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46, the Court of Appeal enumerated the factors to be considered in assessing non-pecuniary damages. The factors to be taken into account include: the plaintiff's age; the nature of the injury; the severity and duration of pain; disability; emotional suffering; impairment of family, marital and social relationships; impairment of physical abilities; loss of lifestyle; and the plaintiff's stoicism.
- [41] The plaintiff put the following cases before the court in support of her position on non-pecuniary damages: *Dhaliwal v. Randhawa*, 2016 BCSC 2005 (\$65,000); *Aubin v. Ball*, 2013 BCSC 962 (\$75,000); *Sekhon v. Nguyen*, 2013 BCSC 281 (\$45,000); and *Cartwright v. Cartwright*, 2012 BCSC 1140 (\$60,000).
- [42] The defendants put the following cases before the court in support of their position on non-pecuniary damages: *Ward v. Zhu*, 2012 BCSC 782 (\$20,000); *Mak v. Eichel*, 2008 BCSC 1102 (\$20,000); *Nair v. Cindric*, 2013 BCSC 2128 (\$30,000); and *Randhawa v. Chiang*, 2014 BCSC 631 (\$40,000).
- [43] I have considered the cases cited by both counsel. All cases turn on their particular facts. I note that three of the four cases cited by the defendants involved plaintiffs in their mid or late-20s rather than their early teens. I also note that the cases cited by the plaintiff generally involved plaintiffs with little chance of improvement in their symptoms, whose enjoyment of life was more detrimentally impacted by their injuries than Ms. Wong.
- [44] In assessing non-pecuniary damages, I must look at the various injuries suffered by the plaintiff through the lens of the *Stapley* factors, as enumerated above.
- [45] Ms. Wong is young and it is possible that she will be dealing with back and neck pain for the rest of her life. However, none of the medical experts opined that this was likely. Dr. Lee suggested that Ms. Wong's symptoms could improve further with more exercise and Dr. Waseem opined that Ms. Wong's prognosis was unclear at the time of his report, since she had not yet completed a course of active rehabilitation. Ms. Wong argues that, since she has done the active rehabilitation and is still in pain, I must conclude that she is not going to recover any further from her pain. I do not agree with this proposition. The Court did not have the benefit of a follow up opinion from Dr. Waseem, so it is unknown what his opinion would be about Ms. Wong's prognosis now that she has completed a course of active rehabilitation.

- [46] I therefore am not prepared to find that Ms. Wong's pain is chronic and will likely last her whole life. Rather, I find that she has a good chance of improvement if she commences a regular exercise routine as recommended by Dr. Lee. However, as I recognize that there remains some risk of her suffering long-term pain, I have factored this risk into the non-pecuniary damages award.
- [47] Ms. Wong's social, intellectual and recreational life has not been seriously curtailed by her injuries. She is still able to participate in all the activities that she participated in before the Accident. She must moderate some of her activities. She is limited to skiing intermediate blue runs instead of expert black runs. Her endurance for sitting has been compromised such that it is difficult for her to play piano for long periods of time. She has given up playing bass guitar in the school band, although it is likely that she would have done so in any event, as she did not take band class in high school beyond grade 10. She cooks and bakes less often than she used to, but she is still able to bake for her family. There are no social, recreational, family or vocational activities that Ms. Wong enjoyed prior to the Accident that she is no longer able to do.
- [48] Ms. Wong argues that I should consider loss of housekeeping capacity in the context of the non-pecuniary damages award rather than as a separate heading. Her loss of housekeeping capacity claim is based mostly on the fact that she is not able to cook and bake as much as she did prior to the Accident. I am not satisfied that cooking and baking has to date been anything more than a hobby for Ms. Wong. However, that will change when she moves into the adult world and has to cook her own meals. To the extent that her ability to cook and bake for herself has been limited by her ongoing back and neck pain, it is appropriately factored into the non-pecuniary damages award.
- [49] In all the circumstances, I find that an award of \$40,000 for non-pecuniary damages is appropriate.

B. Loss of income earning capacity

- [50] Ms. Wong claims \$25,000 for future loss of earning capacity. The defendants take the position that the plaintiff has not demonstrated on a balance of probabilities that her earning capacity has been diminished by the Accident.
- [51] The legal principle that governs the assessment for loss of earning capacity is that, insofar as it is possible, the plaintiff should be put in the position he or she would have been in but for the injuries caused by the defendant's negligence: *Lines v. W & D Logging Co. Ltd.*, 2009 BCCA 106 at para. 185.
- [52] The plaintiff must demonstrate both 1) an impairment to his or her earning capacity, and 2) a real and substantial possibility that the diminishment in earning capacity will result in a pecuniary loss. If the plaintiff discharges that requirement, he or she may prove the quantification of that loss of earning capacity either on an earnings approach or a "capital asset" approach: *Perren v. Lalari*, 2010 BCCA 140 at para. 32. Regardless of the approach, the

court must endeavour to quantify the financial harm accruing to the plaintiff over the course of his or her working career: *Pett v. Pett*, 2009 BCCA 232 at para. 19.

- [53] Ms. Wong is a very impressive young person. Her academic record in high school, her extensive musical, leadership and extra curricular activities, and her bright and personable demeanour all suggest that she is likely to continue the pattern of success she has established in her high school years. Her goal to become a pediatrician appears to be entirely attainable. If she does not pursue medicine, it is likely that she will have success in whatever alternative career path she chooses to apply her talents to.
- [54] In light of this, I cannot find that there is a real and substantial possibility that Ms. Wong will suffer any income loss as a result of her injuries. Her performance in all elements of her life has been unchanged as a result of the Accident. While I accept that she suffers pain from her injuries, her pain has not impeded her considerable success, and there is no basis on which I could find a real and substantial possibility of her success being impeded by her injuries in the future. As such, I decline to make an award for loss of earning capacity.

C. Cost of future care

- [55] The plaintiff has made a cost of future care claim in the amount of \$2,890.
- [56] Future care costs are intended to compensate a plaintiff for expenses that are reasonably necessary for her future medical care. These expenses must be reasonable and they must be medically justified: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.) at 84, *aff'd* 49 B.C.L.R. (2d) 99 (C.A.).
- [57] Ms. Wong's cost of future care claim is extremely modest and consists only of physiotherapy treatments. I am satisfied that further physiotherapy, as recommended by Dr. Lee, is reasonable and medically justified and I award the plaintiff the cost of future care claim in the amount she seeks.

D. Special damages

- [58] The parties agree on special damages in the amount of \$2,276.72.

VII. Summary of Orders Made

- [59] The defendants are liable to the plaintiff for damages in the following amounts:

1)

Non-pecuniary damages

\$40,000

3)

Cost of future care

\$2,890

4)

Special damages

\$2,276.72

VIII. Costs

[60] If the parties are unable to agree on costs, they may make arrangements with Supreme Court Scheduling to appear before me to speak to costs.

"Francis J."

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