
CANADA / JUDGMENT

Zen v. Readhead

2011 BCSC 190

COURT

Supreme Court of British Columbia

DECIDED

16 February 2011

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2011 BCSC 190 Zen v. Readhead

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Zen v. Readhead,

2011 BCSC 190

Date: 20110216

Docket: M070125

Registry: Vancouver

Between:

Paul Zen

Plaintiff

And

Michelle Readhead

Defendant

Before: The Honourable Madam Justice Fenlon

Reasons for Judgment

Counsel for the Plaintiff:

K.C. Jarvis

J.M. Rice

Counsel for Defendant:

L.P. Stevens

M.L. Colwell

Place and Date of Trial:

Vancouver, B.C.

October 25-29, 2010

November 1-5, 15-19, 2010

Place and Date of Judgment:

Vancouver, B.C.

February 16, 2011

I. Introduction

- [1] The 45-year-old plaintiff, Paul Zen, was injured in a car accident five-and-a-half years ago. The defendant, Michelle Readhead, admits liability for the accident but disputes the extent of the plaintiff's injuries and the amount of damages, in particular the plaintiff's claim for loss of past and future profits from three family businesses.

II. Analysis

1. What injuries has Mr. Zen sustained?
- [2] I begin with the accident. On April 1, 2005, Ms. Readhead ran a stop sign. Her pick-up truck struck Mr. Zen's sedan on the front passenger side. Mr. Zen's car ended up against a curb; Ms. Readhead's came to rest on the boulevard where it struck and damaged a tree. Both vehicles were "written off". Mr. Zen does not recall whether he struck the inside of his car with any part of his body, but I find it probable, in light of the pain he experienced immediately to his left arm and the "fuzziness" he experienced at the scene and for a few weeks after, that his head and left side hit the driver's side of the vehicle in the accident.
- [3] Mr. Zen claims the accident caused the following injuries:
 - a. soft tissue injury to the left arm and elbow (90% resolved);
 - b. chronic post-traumatic headaches;
 - c. injuries to the soft tissue structures of the lumbar spine and pelvis resulting in chronic mechanical pain;
 - d. cognitive disturbance including diminished concentration and forgetfulness;
 - e. dizziness;
 - f. ringing in the ears (tinnitus) and hearing loss;

- g. short-lived knee pain;
- h. impaired sleep; and
- i. mood disturbance.

The plaintiff says that the knee and left arm pain have resolved, but the other injuries continue to impede his ability to work and enjoy life.

- [4] The defendant acknowledges that Mr. Zen suffered injuries as a result of the collision, but says they were relatively minor soft tissue injuries to his back and left side that substantially resolved within nine months and were nothing more than a flare-up of pre-existing health issues.
- [5] The plaintiff led a great deal of expert evidence that supports his claim that he continues to suffer from injuries caused by the car accident. As in most cases in which there are no objective findings, much turns on the credibility of the plaintiff; the medical experts based their opinions on the symptoms and history the plaintiff reported to them -- if the plaintiff did not tell the truth about his health, the medical opinions cannot be relied on.
- (a) Should the plaintiff be believed?
- [6] Counsel for the defendant submits that Mr. Zen recovered fully from the accident within months but "simply will not admit it." She argues that Mr. Zen "is an opportunist who has intentionally exaggerated his pain behaviour and reporting in the hope of being rewarded significant compensation."
- [7] In *Bradshaw v. Stenner*, 2010 BCSC 1398, Dillon J. summarized the factors to be considered when assessing credibility at para. 186:

Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis*, [1926] 31 O.W.N. 202 (Ont. H.C.); *Faryna v. Chorny*, [1952] 2 D.L.R. 152 (B.C.C.A.) [*Faryna*]; *R. v. S.(R.D.)*, [1997] 3 S.C.R. 484 at para.128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (*Faryna* at para. 356).

- [8] The defendant argues that Mr. Zen's testimony is inconsistent with his pre-accident medical records which "show that Mr. Zen was a man with significant emotional and physical problems." By way of example, the defendant points to six episodes of back pain reported by

the plaintiff in May 1990, May 1993, August and September 1993, January 1997, and July 2002. Based on these episodes of back pain over the 16 years before the accident, the defendant says that the plaintiff should not be believed when he says he did not have a chronic back problem, but only "the odd episode of lower back pain".

- [9] The defendant also argues that the plaintiff should not be believed because a Revenue Canada tax audit suggests that Mr. Zen improperly claimed personal expenses (such as a trip to the Wickaninnish Inn with his wife) as business expenses. The defendant described Mr. Zen as "a man with few ethical qualms", "intoxicated with self importance and feelings of entitlement", whose testimony should be rejected whenever it was not corroborated by objective, reliable evidence.
- [10] There are times when a trial judge listening to submissions about the credibility of a party is left to wonder if judge and counsel have heard the same evidence. This is such a case.
- [11] Mr. Zen testified at length and was cross-examined for two days. I found his evidence as a whole to be forthright, consistent, and inherently believable. It was in keeping with the evidence of other witnesses, including his co-workers and wife. Mr. Zen's evidence, in general, was also consistent with the documentary evidence and voluminous medical records.
- [12] It was apparent that Mr. Zen is a man who shows a brave face to the world and is not comfortable talking about his own weakness. He gave evidence in a direct, unemotional manner, but broke down and wept as he described the way his injuries have affected his family life, in particular his relationship with his three daughters and his wife. He described a life that has been significantly changed by the accident.
- [13] Mr. Zen was an athlete, described by one medical expert as "an exercise junkie". Mr. Zen expressed frustration and anger about the limitations he has experienced at work and socially since the accident. He described daily pain from constant low-grade headaches and occasional severe and sometimes disabling headaches that overwhelm him and "knock him out". He testified to ongoing severe low back spasms, and constant back pain.
- [14] Mr. Zen has followed all recommendations for treatment. He has gone to extraordinary lengths to find relief for his symptoms, including prolotherapy involving saline injections by needle into his skull, neck and low back. These are not the actions of a malingerer or a man who is not highly motivated and focused on getting well.
- [15] In summary on this issue, I found the plaintiff to be a credible witness. I turn now to a consideration of the specific injuries reported by Mr. Zen.
- (b) Were the injuries caused by the accident?

[16] In accordance with *Athey v. Leonati*, [1996] 3 S.C.R. 458, I must determine first whether the accident caused Mr. Zen's current problems, and second, whether there were pre-existing injuries and "a measurable risk that the pre-existing condition[s] would have detrimentally affected the plaintiff in the future, regardless of the defendant's negligence" (at para. 35).

[17] The latter question is relevant because a plaintiff is entitled only to be restored to his or her original position. In *Athey*, Major J. states at para. 32:

The essential purpose and most basic principle of tort law is that the plaintiff must be placed in the position he or she would have been in absent the defendant's negligence (the "original position"). However, the plaintiff is not to be placed in a position better than his or her original one. It is therefore necessary not only to determine the plaintiff's position after the tort but also to assess what the "original position" would have been. It is the difference between these positions, the "original position" and the "injured position", which is the plaintiff's loss.
[Underlining in original.]

i. Low Back and Pelvic Symptoms

[18] I have already alluded to the defendant's submission that the plaintiff had a history of mechanical back pain that would flare up on a regular basis. That submission was supported by the evidence of Dr. Maloon, an orthopaedic surgeon who was the only expert called by the defendant. Dr. Maloon found no objective signs of injury and opined that the plaintiff's complaints were consistent with his "well established history of mechanical low back pain." It was Dr. Maloon's opinion that Mr. Zen would have experienced flare-ups of back pain even without the collision. He attributed Mr. Zen's post-traumatic pain and dysfunction to the natural history of his back and the wear and tear that most people Mr. Zen's age experience.

[19] I do not accept the assumption underlying Dr. Maloon's report that Mr. Zen had a well established history of mechanical low back pain. Mr. Zen has experienced significant and ongoing low back and pelvic pain since the collision that has prevented him from engaging in his usual activities. There is no evidence that Mr. Zen experienced similar chronic problems prior to the accident. The back complaint closest in time occurred in July 2002, almost three years earlier. Dr. Cortese, a chiropractor, treated Mr. Zen five times between July 15 and July 24, 2002. He said that the principal reason for Mr. Zen's attendance at that time was "infra-scapular pain or tenderness in the mid-back region". He also treated Mr. Zen for some posterior right hip pain and noted that Mr. Zen had a perfectly normal range of motion for a man his age in forward flexion, -80 degrees.

[20] Dr. Cortese said that Mr. Zen's condition when he saw him in 2008, five years post-accident, was dramatically different from his condition in 2002. Mr. Zen sought treatment after experiencing a flare-up following an attempt to ski on gentle slopes with his daughter. Dr. Cortese treated Mr. Zen forty times, and all of his attendances related to the initial complaints he presented with, including low back/pelvic pain, headaches, dizziness, ringing in the ears and memory and visual problems. Forward flexion in January 2008 was 10 degrees, with virtually no mobility.

[21] In short, I do not accept that Mr. Zen's back problems post-accident were the same as those he experienced before the accident. In the 16 years prior to the accident, Mr. Zen had five incidents of back pain requiring medical treatment. He was asymptomatic for three years before the accident. In the five years since the accident, Mr. Zen has had significant and unremitting back pain with the occasional debilitating episode. I find that the back problems experienced by Mr. Zen are due to the accident and were not a pre-existing condition.

ii. Headaches

[22] Headaches are the plaintiff's second major complaint. Before the accident, he had headaches two or three times a year that lasted about half a day. He described some of them as feeling as though they were "in [his] eye". Mr. Zen claims he has experienced intense right-sided headaches since the accident which feel like "sharp spikes". He reports that the left-sided headaches he experienced immediately following the accident have resolved, although he sometimes has a sensation of pressure on his left side.

[23] The defendant asserts that Mr. Zen had similar headaches before the accident, pointing to a note in a physiotherapy record that reported Mr. Zen saying he had "occasional eye cluster headaches". Dr. Robertson, a neurologist called by the plaintiff, unequivocally rejected that notion because Mr. Zen's headaches have none of the distinct qualities of cluster headaches. Dr. Robertson was of the opinion that Mr. Zen has never had eye cluster headaches but now suffers from post-traumatic headaches.

[24] I accept Dr. Robertson's evidence. The plaintiff did not have a headache disorder prior to the accident. He was involved in a significant collision. He reported headaches shortly after the collision that have not gone away in the five years since. I find that the plaintiff has experienced headaches of a nature and frequency markedly different from those experienced before the collision.

iii. Hearing Loss and Tinnitus

[25] Mr. Zen complains of loss of hearing and ringing in his right ear (tinnitus) since the accident. The plaintiff relies on the opinion of Dr. Vance Tsai, an ear, nose and throat surgeon, who concluded that Mr. Zen's hearing loss and tinnitus are a result of the motor vehicle accident. He explained that tinnitus is closely associated with hearing loss and is the sound that occurs when hearing is absent.

[26] Dr. Tsai's opinion was predicated on the flawed assumption that Mr. Zen did not have hearing loss before the accident. When Dr. Tsai prepared his report, he was unaware of a WCB mobile hearing screening test performed in 1991. That test showed marked right-sided hearing loss which is essentially the same as the hearing loss measured post-accident. Dr. Tsai said that mobile screening tests are not as reliable as lab hearing tests, but he also acknowledged that it is unusual for the sound of a collision to cause hearing loss.

[27] I find that the plaintiff has not proven on a balance of probabilities that his hearing loss and tinnitus were caused by the defendant's negligence. In any event, I find that the tinnitus and hearing loss have had an insignificant impact on Mr. Zen's functioning and enjoyment of life. The symptoms were described by Mr. Zen as "the least of his problems". Dr. Tsai said that people with tinnitus cope with symptoms by learning to ignore them, and hearing loss can be dealt with by obtaining a hearing aid.

iv. Mood Disorder

[28] Mr. Zen testified that since the accident he has lost much of his outgoing "life of the party" attitude. He is irritable from pain and lack of sleep and no longer looks forward to social events. Sonja Zen describes her husband as someone who used to be "the practical joker of the family and full of fun". She says he is very different now: low energy, sad, and frustrated with his limitations.

[29] The defendant submits there is nothing new here because Mr. Zen was seeing a psychologist, Dr. LaCombe, for about eight months before the accident. He sought counselling at that time because he was having trouble managing his anger.

[30] Dr. LaCombe described the nature of her treatment of the plaintiff pre-accident as "helping him to deal with life stress that everyone commonly experiences." According to Dr. LaCombe, Mr. Zen, and his wife Sonja, the sessions helped; Mr. Zen was reacting to events in a more relaxed manner prior to the accident. After the collision, the nature of Dr. LaCombe's treatments changed, focussing on the collision and the impact of Mr. Zen's injuries on him emotionally and psychologically. Dr. LaCombe testified Mr. Zen's complaints about sleep problems became much more pronounced and she recalled observing him to be in so much pain that he had difficulty getting off the couch. It was Dr. LaCombe's view that the sessions after April 1, 2005 dealt primarily with the consequences of the car crash. She saw little improvement during those sessions, which ended about two years after the accident.

[31] Dr. O'Shaughnessy is a highly qualified forensic psychiatrist. He examined Mr. Zen in December 2008. In his opinion Mr. Zen is suffering from an adjustment disorder with some depression and anxiety. He found as follows:

He has difficulties in coping since the accident, in large measure because he is no longer able to utilize physical activity as a means of coping with the stresses of work and family life. As noted, he is in a high stress position and although he tends to downplay the extent of the demands upon him, it is clear that these are indeed substantial.

...

In my opinion the accident and in particular the injuries, the headaches, and the sacroiliac joint pain are the critical factors triggering his Adjustment Disorder and possibly aggravating any sleep difficulties.

- [32] Mr. Zen agreed on cross-examination that in July 2007, he reported to a psychiatrist retained by the defendant that he was "no worse" in relation to his pre-accident mood and anger problems. However, Dr. O'Shaughnessy observed in his report that Mr. Zen also denied depressed mood in the interview with him even though Mr. Zen had many symptoms of depression, including chronic fatigue and low energy commonly seen in depression, loss of motivation, diminished competitiveness, loss of libido, as well as an inability to experience the type of pleasure and joy he experienced in the past.
- [33] I accept Dr. O'Shaughnessy's characterization of Mr. Zen pre-accident as a man without mental illness who had sought counselling only to cope with the usual problems of living; post-accident Mr. Zen had significant social and vocational dysfunction. I find that Mr. Zen now has an "Adjustment Disorder with depressed mood" due to pain from the injuries sustained in the accident.

v. Impaired Sleep

- [34] It is common ground that, prior to the motor vehicle accident, Mr. Zen was not a "good" sleeper. He often had trouble falling asleep because he could not unwind, but he never needed more than four to six hours a night with a top up of eight hours on the weekend. Further, prior to the accident he did not consistently have trouble staying asleep, which is now the case. Mr. Zen and his wife describe a typical night as Mr. Zen "roaming the house trying to get comfortable". He starts out in bed, moves to the floor, and often to a couch in the living room or the bench seat in the kitchen. He says that he cannot get comfortable because of the pain in his lower back and hip. It is common for him to get one-and-a-half to three hours sleep now instead of the four to six he routinely got prior to the accident. To get a better sleep, he needs Tylenol 3 and morphine but he does not like to take these medications every night.
- [35] I find that Mr. Zen has proved that the pain from his injuries is disrupting his sleep and that the impaired sleep is, therefore, attributable to the negligence of the defendant.

vi. Dizziness

- [36] Mr. Zen first noticed dizziness and reported it to his family doctor five days after the accident. It is periodic, occurring one to two times per month on average. Mr. Zen gets hot and dizzy and feels as though the room is spinning. The episodes last from one to five hours and are totally debilitating; he cannot do anything except lie down and wait for them to end. This problem has improved since the accident because it occurs less frequently now, but the intensity of the episodes has not abated.
- [37] Although there was no specific medical opinion that this symptom was caused by the motor vehicle accident, I find, given the absence of such symptoms prior to the accident and the temporal link to the accident, that it is more probable than not that the motor vehicle accident is responsible for the dizziness Mr. Zen is experiencing.

vii. Cognitive Dysfunction

- [38] The plaintiff reports problems with memory and concentration since the collision. He says he has trouble reading blueprints for work. Sonja Zen said he used to be a voracious reader but has not finished a book since April 2005.
- [39] Diagnostic brain scans (a CT in January 2006 and an MRI in September 2006), recorded normal findings. Neuropsychological testing was undertaken but no medical/legal report was tendered documenting cognitive deficits. During psychological testing in November 2006, the plaintiff said that he "can concentrate as well as ever". The plaintiff also reported that his memory was good for things he feels are important although he now writes appointments in his day timer. Dr. Salvino, Mr. Zen's family doctor, first recorded complaints relating to memory in August 2008, more than two years after the accident, although he did record concentration problems on November 21, 2005, with the next complaint in April of 2007. Mr. Zen could not say with certainty when his alleged memory difficulties first arose.
- [40] I find that these symptoms are minor and are the side effect of poor sleep and medication use attributable to the accident.

viii. Elbow

- [41] Mr. Zen hurt his elbow in the collision. The pain in his arm gradually diminished. He said it is 90% recovered and that he only experiences some stiffness and soreness occasionally on exertion which does not affect his physical activity level. I accept the opinion of Dr. Adrian, a medical and physical rehabilitation specialist, that Mr. Zen suffered a minor soft tissue injury to his left elbow as a result of the collision.

ix. Plantar Fasciitis

- [42] Mr. Zen has had bouts of plantar fasciitis over the years. The defendant argues that this condition has continued to plague Mr. Zen, has prevented him from exercising, and is responsible for much of Mr. Zen's functional limitation and pain.
- [43] The defendant relied on a body diagram completed by Mr. Zen in 2009 on which he circled his left heel. Dr. Hamm, a specialist in occupational medicine, was called to explain his records. He said nothing in the history, physical exam, and review of records relating to that diagram disclosed any functional limitations due to the foot.
- [44] I find that Mr. Zen's plantar fasciitis has not been a problem since the summer of 2004, when he underwent five physiotherapy treatments for plantar fasciitis and obtained night splints and orthotics.

x. Knees

- [45] Mr. Zen was a high level athlete, playing soccer for a year with a professional club in Rome. He routinely ran 40 kms a week over two or three runs at a pace of four-and-a-half minutes a kilometre. He did the Grouse Grind every weekend in 42 minutes and played soccer two to

three times a week. Sports injuries to his knees necessitated four surgeries prior to the accident: his left knee in 1988, right knee in 1995, left knee staple removal in July 2000, and a partial meniscectomy in May 2001. Following all of these surgeries, Mr. Zen successfully rehabilitated his knees, returning to his former level of athletics and to long hours at work without difficulty.

[46] Post-accident, Mr. Zen also had surgery to his left knee unrelated to injuries from the accident. Sometime in 2008, Mr. Zen began experiencing increasing pain in his left knee. The pain was significant enough that he opted for private surgery in March 2010. An arthroscopy with some debridement was done and was a complete success. Mr. Zen was back at work the next day and testified at trial that "the knee felt great".

[47] I find that the plaintiff suffered significant pain in his knee during 2008, 2009 and until his surgery on March 25, 2010. The knee problem thus accounted for some of his pain and functional limitations during this period. The defendant is not liable for that part of Mr. Zen's pain and suffering experienced because of his left knee problem. I will return to this in the assessment of non-pecuniary damages.

(c) Summary

[48] The issue of causation is to be determined by applying the principles articulated by the Supreme Court of Canada in *Athey v. Leonati* and *Resurfice Corp. v. Hanke*, 2007 SCC 7, [2007] 1 S.C.R. 333. In *Athey*, the court held at 467:

It is not now necessary, nor has it ever been, for the plaintiff to establish that the defendant's negligence was the sole cause of the injury. There will frequently be a myriad of other background events which were necessary preconditions to the injury occurring. ... As long as a defendant is part of the cause of an injury, the defendant is liable, even though his act alone was not enough to create the injury. There is no basis for a reduction of liability because of the existence of other preconditions: defendants remain liable for all injuries caused or contributed to by their negligence. [Underlining in original.]

Applying the "but for" test, I find that all of Mr. Zen's ongoing injuries are due to the car accident other than the hearing loss, tinnitus, and left knee complaint.

[49] It follows that I do not accept the defendant's position that the plaintiff's injuries all resolved within nine months of the accident. This is not a case of a plaintiff's baseline physical and psychological conditioning being interrupted by a nine month flare-up of symptoms and then returning to normal as the defendant submits. The plaintiff suffered significant and debilitating injuries in this accident, most of which have become chronic. There is no other reasonable explanation; they were not present prior to the accident and there is a marked temporal proximity between the motor vehicle collision and the onset of the injuries. The temporal connection and the evidence of the plaintiff's experts, which was largely uncontradicted, lead me to conclude that the plaintiff has proved that the defendant's negligence caused the injuries complained of with the exceptions I have noted.

2. What damages should be awarded to Mr. Zen?

(a) Non-Pecuniary Damages

[50] An award of non-pecuniary damages compensates a plaintiff for loss of amenities, pain, suffering, and loss of enjoyment of life.

[51] In *Stapley v. Hejslet*, 2006 BCCA 34, 263 D.L.R. (4th) 19 (at para. 46), the Court of Appeal outlined the factors a trial judge should consider when assessing such damages:

The inexhaustive list of common factors cited in *Boyd* [*Boyd v. Harris*, 2004 BCCA 146] 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).

[52] Based on a nine-month mild soft tissue injury, the defendant submits that an appropriate award of damages under this head is \$30,000. Having found that Mr. Zen has chronic injuries caused by the negligence of the defendant, I do not accept this range of damages as appropriate.

[53] The plaintiff relies on similar cases in which damages for pain and suffering and loss of enjoyment of life of \$100,000 to \$130,000 were awarded, and submits that an award of \$120,000 should be made.

[54] Awards of damages in other cases provide a guideline only. I must apply the factors listed in *Stapley* to Mr. Zen's particular case. Mr. Zen is now 45-years-old. He used to be an outgoing, charismatic athlete who weekly ran 40 kms, did the Grouse Grind, and took an active role in the lives of his daughters, all while working long days in the family business including most Saturdays. Today he is a different man. He is sleep-deprived and in chronic pain, which makes him irritable and prone to frustration and anger. He can no longer push himself

athletically, which was a central part of his life and the way he managed stress. He has a diminished role in the lives of his daughters, and in particular his youngest daughter, Olivia. Mr. Zen's relationship with his wife has been significantly affected and he has, in his words, "missed out on the best years of [his] life".

[55] Taking all of this into account and excluding from this analysis the pain and inconvenience caused by his left knee before the March 2010 surgery, I find that Mr. Zen is entitled to non-pecuniary damages of \$110,000.

(b) Special Damages

[56] The plaintiff has proven that he spent significant sums on rehabilitation. I find Mr. Zen was highly motivated, trying every therapy recommended to him by his general practitioner and other specialists. The only question before me is whether all of the expenses were reasonable ones. If so, the defendant must compensate the plaintiff for these out-of-pocket expenses.

i. Personal Training Sessions

[57] Initially Mr. Zen participated in a KARP rehabilitation program recommended and paid for by ICBC. The kinesiologist who worked with him was Mr. DiTomaso. When that program ended, Mr. Zen continued to attend sessions with Mr. DiTomaso, paying for them himself initially at KARP in 2006, and then resuming sessions in 2010, when Mr. DiTomaso moved to Sport Synergy.

[58] The defendant argues that personal training fees should not be allowed for two reasons: first, because Mr. DiTomaso no longer keeps clinical records so this cannot be characterized as treatment; and second, because the plaintiff spent 10 to 15 hours per week before the accident on exercise that he has now replaced with personal training.

[59] I accept Mr. Zen's evidence that the workouts with Mr. DiTomaso are not a replacement for his previous exercise regime which focused on outdoor running, soccer, and the Grouse Grind. The sessions are qualitatively different and focus squarely on maintaining the health of his back and hips. Accordingly, I find Mr. Zen is entitled to \$10,640 under this category of special damages covering expenses over the past five-and-a-half years.

ii. Physiotherapy and Chiropractic Treatment

[60] Physiotherapy and chiropractic treatments are recoverable at \$640, and \$1,120 respectively.

iii. Integrative Therapy and Prolotherapy

- [61] The plaintiff seeks to recover out-of-pocket expenses for less traditional therapies such as prolotherapy and structural integration. Prolotherapy involves injections of sucrose and lidocaine into ligaments for pain relief. Mr. Zen received injections to his hip, back and head which he described as "really painful and unpleasant". On the recommendation of his family doctor, he tried six treatments, but abandoned this modality because it did not give him either temporary or sustained relief.
- [62] Structural integration involves painful deep tissue massage which often leaves bruises on Mr. Zen's hip flexor area. He has nonetheless continued with this treatment because it has helped him with sitting and moving from sitting to standing. He combines this with sessions with Mr. DiTomaso because he has optimal flexibility then to do the exercises for his back and hips. Of all the therapies he has received, Mr. Zen describes the structural integration and personal training as the most helpful for managing his lower back and hip problems.
- [63] The defendant objects to the payment of these "unorthodox" treatments on the basis that the plaintiff incurred the expenses approximately four years after the accident, which makes it unlikely they were related to any ongoing injuries caused by the collision. That gap, however, is explained by the plaintiff's effort to make use of more traditional modalities which failed to give him relief. He undertook the integrated therapy and prolotherapy on the advice of his family physician. I find these to be reasonable expenses. Mr. Zen is awarded \$10,411 for the cost of these therapies.

iv. Psychological Counselling

- [64] Mr. Zen had been seeing Dr. Suzanne LaCombe in relation to stress and anger management before the accident. He continued to see her until May 10, 2007. Mr. Zen seeks compensation for all of the post-accident sessions with Dr. LaCombe. The defendant opposes payment for any of them on the basis that they were simply the continuation of counselling that had nothing to do with the accident.
- [65] I find that most of the therapy after April 1, 2005, related to management of ongoing pain and functional limitations. However, I also find it probable that some of the sessions continued to address the problems which had been on the table immediately prior to the accident. Accordingly, I allow two-thirds of these expenses and award Mr. Zen \$4,285.

v. Mileage and GP Fees

- [66] Mr. Zen paid his family doctor \$70 for completion of a short term disability form and provision of clinical records to his disability insurer. He is entitled to recover that sum from the defendant.
- [67] Mr. Zen gave evidence that he has incurred travel expense, attending therapy over the past five-and-a-half years. He estimates those expenses to be \$1,260. I accept that he has incurred some expense under this heading and award \$500 in damages.

3. Cost of Future Care

- [68] In order to recover damages under this head, the plaintiff must prove that there is a real and substantial possibility that he will incur future care costs as a result of the injuries sustained in the accident. Those future expenses do not have to be a medical necessity, but they must be medically justified and reasonable: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.) at 78. The defendant made no submission on future care costs, other than to say that the plaintiff has no ongoing injuries to warrant such care.
- [69] The plaintiff seeks damages to cover the cost of a private, multidisciplinary residential pain management program of \$17,500 recommended by Dr. Hamm. However, in light of Dr. O'Shaughnessy's and Dr. Adrian's recommendation for treatment by way of further psychological counselling in the form of cognitive behavioural therapy for pain and/or adjustment disorder management, I do not find private residential treatment justified or reasonable. I therefore award \$5,000 to compensate Mr. Zen for the cost of the future counselling and pain management recommended by Drs. O'Shaughnessy and Adrian.
- [70] Mr. Zen seeks an allowance for non-MSP funded Botox injections for his post-traumatic headaches four times a year. At a cost of between \$520 and \$720 per session, the yearly cost would be \$2,000 to \$2,800. Mr. Zen has not tried this treatment for his post-traumatic headaches. Dr. Hamm said that Botox therapy "could be considered". There is no certainty that it will be effective. I find that the plaintiff has not proved that this is a reasonable expense.
- [71] The final cost of future care sought by Mr. Zen is an allowance for continued personal training, structural integration and physiotherapy. Dr. Salvino and Dr. Adrian agree that the plaintiff should continue with these programs. Dr. Adrian has recommended a physiotherapy allowance for acute flare-ups of Mr. Zen's low back injuries. Averaged over the five-and-a-half years since the collision, Mr. Zen has incurred expenses for these three treatments in the range of \$6,000 per year.
- [72] I find it likely that Mr. Zen should be able to manage with fewer personal training sessions as he learns how to exercise safely on his own. I allow this expense at \$4,000 per year to age 70. Using a multiplier value of 16,217, the present day value of that sum is \$64,868 for Mr. Zen's lifetime.
4. Loss of Income Earning Capacity
- [73] The plaintiff's ability to earn income is a capital asset. If that capacity has been diminished, he is entitled to compensation for that loss.
- [74] This head of damage is both the most significant and most difficult aspect of Mr. Zen's claim. It is common ground that Mr. Zen's salary has not decreased because of his injuries. Rather, Mr. Zen claims that his injuries have affected his ability to work and as a result, the three Zen family companies have underperformed since his accident. He says this has led to a decrease in corporate profits and a corresponding decrease in the dividends available to him.

- [75] I begin by noting that a personal plaintiff is entitled to recover a business loss suffered by a company which he controls if the loss is proven and is directly linked to the injuries sustained: *Everett v. King* (1982), 34 B.C.L.R. 27 at p. 30, *aff'd* (1983) 53 B.C.L.R. 144.
- (a) Has the plaintiff's capacity to earn income been diminished?
- [76] The first question to be addressed is whether the plaintiff's earning capacity has been impaired to any degree by the injuries caused by the accident. The plaintiff must prove on a balance of probabilities the causal connection between the accident-related injuries and impairment of his ability to work: *Smith v. Knudsen*, 2004 BCCA 613 at para. 36. In order to assess this claim, it is necessary to consider in some detail the corporate structure of the companies and Mr. Zen's role in the family business.
- [77] There are three companies selling two basic categories of aluminum rail. East & West is the largest company. It is based in Vancouver and sells primarily custom aluminum rail for large commercial projects. STAR Systems Inc. ("SSI") is located in Minnesota and STAR Calgary is located in Alberta. Both sell primarily a pre-fabricated, snap tight aluminum rail system patented by the Zen family. East & West has supplied the aluminum rail on 80 to 90% of the high-rise buildings in the Lower Mainland, including the Shangri-La Hotel and the Olympic Athletes' Village.
- [78] Paul Zen and his brother Sergio Zen are the only shareholders in SSI and STAR Calgary. Their mother holds the shares in East & West, having inherited them from their father, but Sergio and Paul Zen are the beneficial owners of those shares. Under the current structure, I find that the plaintiff is entitled to half of the Zen companies' profits.
- [79] Bidding and production of custom rail in particular requires careful reading of architectural blueprints, called "take-offs" to determine where rail is required (for example, balconies and stairwells) and how it needs to be designed. Doing a take-off also involves identifying upsides for the contractor -- potential savings which could be achieved with a slightly different design or approach. Even a small error in reading blueprints can be significant: missing a few feet of rail, repeated over many floors and units, can be the difference between turning a profit and losing money on a job.
- [80] As a child, Mr. Zen learned the business from his father. He took over as CEO of the companies when his father retired in 2000 and has been the driving force behind the companies' success and growth since then.
- [81] New business development is critical to ensure a continuous flow of future work, referred to as the "pipeline". Bringing work in has been the most important part of Mr. Zen's contribution to the companies. Mr. Zen's strengths are his ability to deal with people and problem-solve with customers. Mr. Zen's enthusiasm was palpable as he described loving his work before the accident, and especially "the negotiation, the art of the deal". His aptitude for closing deals and his drive were confirmed by the witnesses who work with him. They also confirmed Mr. Zen's evidence that he is not performing at the same level now.

[82] Before April 1, 2005, Mr. Zen worked six days a week putting in 60 to 80 hours. Since the accident, he has not worked Saturdays and does not work as many hours a day. I find he works about 30% less than he did previously and that he is less effective and productive in many aspects of his job.

[83] In summary on this issue, Mr. Zen has proved that his injuries limit his capacity to perform work-related activities.

(b) Has the plaintiff's loss of earning capacity caused income loss?

[84] The next issue is whether the impairment has caused pecuniary loss to the plaintiff in the past and whether it will continue to cause pecuniary loss into the future.

[85] The plaintiff says the Zen companies would have made more sales and enjoyed greater profits if he had been functioning at his pre-accident work capacity. He says that his loss of capacity to work will continue to affect profitability and his dividends. An assessment of loss of both past and future earning capacity thus involves consideration of hypothetical events. The plaintiff is not required to prove these hypothetical events on a balance of probabilities: the hypothetical event is to be given weight according to its relative likelihood: *Athey v. Leonati* at para. 27. Accordingly, the plaintiff must prove that there is a real and substantial possibility that but for his injuries the company would have earned increased profits in the past and would earn increased profits in the future.

[86] I accept the evidence of Ted Caine, chief financial officer for the companies, that the loss of Mr. Zen's drive in marketing has negatively affected the companies' profitability:

Sales are generated by an individual who is going out and seeking business. A company has a flow of business from its customers ... What I have observed about Paul, before and after, him being the driver of the pipeline and the backlog of sales, is that he was creating ongoing flow of business; there was no one who could replace him; him being who he is being there so many years, and his drive comes from him being the owner of the business; you don't get that from any employee normally. [Emphasis added.]

[87] Determining the loss of sales is not straightforward. The companies' sales continued to grow after Mr. Zen's accident from \$17.5 million in 2005 to \$22.7 million in 2009, with the pipeline peaking in 2008 at \$27 million before falling to its current level of \$5 million. Because jobs are bid on and awarded three to five years in advance of the company manufacturing and selling product to a customer, the impact of a loss in marketing effectiveness takes three to five years to appear in the financial statements.

[88] The plaintiff initially tendered an expert's report to prove lost sales in two of the three Zen companies: SSI and STAR Calgary. The expert, a chartered accountant, purported to measure the incremental loss of sales flowing from Paul Zen's injuries based on a correlation between building starts and sales. The defendant objected to admissibility of the report. The accountant was on the stand in direct and cross-examination for about two days. He testified that he had not prepared an analysis of East & West's lost profits because the

plaintiff was not a shareholder of that company. His cross-examination was adjourned when it was discovered that he had not produced all of his working files, in particular electronic documents. Those documents demonstrated that a much fuller analysis of East & West had originally been undertaken and then abandoned. The plaintiff took the position that it no longer wished to tender the accountant's report on the basis that it "understated the losses".

[89] Plaintiff's counsel now proffers an entirely different basis for determining losses to the companies attributable to Mr. Zen's reduced capacity to work. He says that at its peak in 2008 the pipeline had \$27 million worth of work, while today it has \$5 million, a \$22 million difference. Mr. Zen testified that he thought about half of the lost incremental sales were due to his poor performance and the other half to the economic downturn which occurred in the fall of 2008. The plaintiff therefore submits that \$11 million in decreased sales are attributable to his injuries. Applying a conservative profit margin of 15%, the lost profit to the company would be \$1.65 million, \$825,000 of which would go to Paul Zen pre-tax. Post-tax, assuming a 50% income tax rate, Mr. Zen says his loss is about \$415,000. Given that there will be some savings on taxes through payment out of dividends, the plaintiff estimates his loss from decreased sales over the past five years at \$500,000.

[90] As for future income loss, the plaintiff has now hired effective managers to market the companies' products. Nonetheless, the plaintiff argues that people hired to replace him will not be able to generate the same kind of enthusiasm and sales. The plaintiff submits that the past can be used as a measure of the future and argues that damages of \$1 million gross (\$500,000 grossed back up to include taxes) would compensate Mr. Zen adequately for the next five years' loss of earning capacity due to decreased sales.

[91] Quantifying loss of earning capacity using an earnings approach is one of the two approaches that may be used. Garson J.A. observed in *Perren v. Lalari*, 2010 BCCA 140 at para. 32:

[T]he plaintiff may prove the quantification of that loss of earning capacity, either on an earnings approach, as in *Steenblok*, or a capital asset approach, as in *Brown*. The former approach will be more useful when the loss is more easily measurable, as it was in *Steenblok*. The latter approach will be more useful when the loss is not as easily measurable, as in *Pallos* and *Romanchych*.

[92] While I accept that the loss of earnings approach is an appropriate way to quantify damages in this case, I do not accept the particular calculation used by the plaintiff. There is no evidence supporting an allocation of 50% of lost pending "pipeline" sales to the economy and 50% to Mr. Zen's decreased work performance. Furthermore, sales made or lost in a given year do not affect the bottom line of the companies for three to five years. The accident occurred on April 1, 2005. The first losses attributable to the accident could not have occurred until 2008 at the earliest, or 2010 at the outside. Taking the middle ground and assuming decreased sales would have been reflected in the companies' 2009 calendar year, I find that Mr. Zen has proved pecuniary loss from his reduced work capacity commencing in 2009.

- [93] Despite rejecting the plaintiff's calculation of lost earnings, I accept that there is a real and substantial possibility that Mr. Zen's injuries have caused and will continue to cause a loss of sales to the companies and potential dividends to the plaintiff. I must assess those losses.
- [94] Finch J.A. in *Pallos v. Insurance Corp. of British Columbia* (1995), 100 B.C.L.R. (2d) 260 (C.A.) at 271 described the various approaches to a loss of capacity claim as "equally arbitrary". At the end of the day, in the words of Huddart J.A., "[t]he assessment of damages is a matter of judgment, not calculation": *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 18.
- [95] In the circumstances of this case, I conclude that it is appropriate to assume that, but for his injuries, Mr. Zen would have generated 20% higher sales in the years between the accident and trial. Using actual sales from 2000 to 2009, the average sales per year are \$15,873,000. Twenty percent of that figure is \$3,174,600. Based on a 15% profit margin, lost sales of that magnitude translate into lost pre-tax corporate income of \$476,190. Mr. Zen's 50% share of that corporate income would be \$238,095. Using a rough estimate of 50% to reflect both the likelihood of corporate income tax and Mr. Zen's personal tax, I find that he has lost income of \$120,000 for each of the years 2009 and 2010. This loss occurred despite Mr. Zen's hiring of two employees to cover the work he could not do.
- [96] In assessing the quantum of damages for loss of future earning capacity, I note that there are both positive and negative contingencies that affect the assessment. These include the economy, the potential for Mr. Zen to hire a particularly driven and effective marketer, and the possibility that the system sold by the Zen companies may be outperformed by a competitor.
- [97] There is evidence that new and effective sales people have been hired recently for Star Calgary and SSI as well as for East & West. I accept it has not been easy to find the right people and that the plaintiff has made adequate efforts to do so prior to trial. I also find that it is likely that, while the people hired will improve sales, they will not entirely replace the sales-generating capacity of the plaintiff who, as an owner/operator, brought a particular commitment and skill set to marketing the companies' products.
- [98] I therefore assess loss of future earning capacity based on the loss of half of the dividends flowing from a loss of sales of 10% per year to age 65. Using average sales over the past ten years of \$15.873 million, and assuming a 15% profit margin, the company will lose pre-tax income of \$238,095. Taking into account corporate tax and the contingencies discussed above, I estimate Mr. Zen's gross loss of income per year at \$100,000.
- [99] Based on a four-year lag in sales impact, the new sales people hired would not affect sales volume for four years, which could justify continuing to assume a 20% reduction in sales until 2014. I am nonetheless satisfied that a 10% reduction is an appropriate basis to assess damages, in light of the fact that the multiplier does not take into account any negative contingencies other than premature death. Using a future income loss multiplier of 14,850 (as provided in the actuarial report), and assuming a loss of \$100,000 per year, damages for future loss of income due to decreased sales are \$1,485,000.

- [100] The plaintiff also claims that he has lost and will continue to lose dividends because the companies incurred additional expenses by hiring two employees to cover work the plaintiff could do before he was injured. I turn now to that issue.
- [101] Claudius Leica, a quantity surveyor, was hired in 2005 to help with reading blueprints. Mr. Leica does not perform at the same level as Paul Zen, however, and has not entirely replaced the plaintiff's diminished blueprint reading and bidding capacity. Sergio Zen checks all of Mr. Leica's work; on one job Mr. Leica missed 300 feet of railing on drawings -- a mistake that cost the company \$33,000 on a project in Los Angeles. Mr. Leica is paid \$50,000 a year. I find that Mr. Leica's salary to trial would not have been incurred but for the accident. I also find that he will not be required in future because of the decreased sales volume and Sergio Zen's efforts to cover this work.
- [102] Tony Dente was hired in 2006 as office manager. I find that Mr. Dente has effectively replaced the management/administration role Paul Zen can no longer fill within the office and has improved operations. Mr. Dente receives \$106,000 per year plus bonuses.
- [103] While I accept that the companies would not have hired Mr. Leica but for the plaintiff's injuries, I do not find that to be so in relation to Mr. Dente. The plaintiff was under considerable stress managing all of his work responsibilities before the accident as the annual sales steadily grew from about \$9 million in 2000 to \$22 million in 2009. Ted Caine said the number of employees grew from 40 in 2000 to closer to 100 when the business was at its peak in 2007/08 with a "pipeline" of \$27 million. Despite Paul and Sergio Zen's evidence that they would not have hired Tony Dente if Paul had not been injured, I find it likely that they would have needed some help with administration based on the increased sales volume alone. However, I also find it likely that they hired Mr. Dente about one year before they otherwise would have. Taking into account the efficiencies brought to bear by Mr. Dente, I find one year of the cost of his salary should be attributed to the accident.
- [104] In summary, I find that Mr. Leica and Mr. Dente have added a cost to the company due to Paul Zen's injuries of \$250,000 and \$110,000 respectively from the date of their hiring to trial. It is probable that Mr. Zen would have received half of those sums. Based on \$180,000 in pre-tax earnings, and taking taxes into account I set that loss at roughly \$100,000.
- [105] The plaintiff claims he has also lost income because Sergio Zen received a raise from East & West of \$28,000 a year to compensate him for the blueprint take-off work he was doing that had been done by Paul Zen. I am not satisfied, however, given the non-arms length nature of that decision, that the increase in Sergio's salary should be treated as a loss to the plaintiff.
- [106] In summary on this issue, I set past loss of earning capacity at \$340,000. I set future loss of earning capacity at \$1,485,000.

III. Conclusion

[107] In summary, damages are awarded as follows:

Non-pecuniary damages

110,000

Special Damages:

Personal Training Sessions

10,640

Physiotherapy and Chiropractic Treatment

1,760

Integrative Therapy and Prolotherapy

10,411

Psychological Counselling

4,285

Mileage and GP Fees

570

Cost of Future Care

Counselling and Pain Management

5,000

Training and Structural Integration

64,868

Loss of Earning Capacity to Trial

340,000

Future Loss of Earning Capacity

1,485,000

TOTAL:

\$2,026,534

IV. Costs

[108] If the parties are unable to agree on costs, they may speak to the issue.

The Honourable Madam Justice L.A. Fenlon

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/SC/11/01/2011BCSC0190.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/zen-v-readhead-2011>

Prepared on 29 October 2026 · Esheria