IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Tanaka v. Gill,*
2023 BCSC 821

Date: 20230512
Docket: M203513
Registry: Vancouver

Between:

Gary Tanaka

Plaintiff

And

Samantha Gill and John Baldev Gill

Defendants

Before: The Honourable Mr. Justice Milman

Supplementary Reasons to *Tanaka v. Gill*, 2023 BCSC 344

Reasons for Judgment

Counsel for the Plaintiff:	R. Marcoux
Counsel for the Defendants:	J. Milligan
Place and Date of Hearing:	Vancouver, B.C. April 19, 2023
Place and Date of Judgment:	Vancouver, B.C. May 12, 2023

I. Introduction

[1] On March 8, 2023, I released my reasons for judgment following the trial of this motor vehicle action. My decision is indexed at 2023 BCSC 344. Before the final order is entered, both parties seek clarification and a reconsideration of my decision, urging me to adjust the award for future loss of earning capacity in their favour, on the basis that I overlooked evidence (as the plaintiff submits) or argument (as the defendants submit). Each opposes the proposed adjustment sought by the other.

[2] These supplemental reasons for judgment address those requests.

II. Applicable Principles

[3] The parties agree on the legal test to be applied in these circumstances, which is as set out in *Sew Cozzi Ventures Inc. v. Apex Outdoor Innovations Corp*., 2017 BCSC 1500. In summary, the court retains a discretion, before the final order is entered, to reconsider a judgment that has been pronounced following a trial. The power should be exercised sparingly but can properly be invoked in order to avoid a miscarriage of justice, such as where the original judgment is in error because it overlooks or misconstrues material evidence, or where it is so expressed as to lead to uncertainty and confusion. It has also been held that the discretion is appropriately exercised where a relatively discreet error in math or some mechanical consideration of the evidence is clearly in error. On the other hand, a party may not use the rule to re-argue, re-cast or re-state his or her case.

III. The Plaintiff's Request for Clarification

[4] My analysis in quantifying the award for loss of future earning capacity was as follows:

> [101] The dispute between the parties focuses primarily on the third stage of the analysis, namely, assigning a value to the loss. I agree with the defendants that, given the difficulty in quantifying it, the capital asset approach is more appropriately used here, but it does not follow that Mr. Tanaka's proposed methodology is entirely unsupported by authority. It is possible to use hypothetical lost earnings as a proxy for the value of the lost earning capacity.

> [102] I agree with the defendants that Mr. Tanaka has overstated his loss by assuming that he would have earned $140,000 but for the accident and will now, in his injured state, earn about half that amount for the remainder of his career to age 70. I have already found that in the three years following the accident, while still employed with Avigilon, he lost just over $25,000, or about $8,333.33 per year, after accounting for his failure to mitigate his loss. Using his 2021 T4 earnings of $116,997 as a baseline, I am prepared to assume that he would currently be earning just over $125,000 at Avigilon but for the accident.
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> [103] Looking to the future, it is also appropriate to account for the real and substantial possibility that he will lose his job at Avigilon and will have to seek less demanding work elsewhere, perhaps as an IT consultant. Based on the evidence I heard from his supervisors, that scenario must be given a relatively high probability, in the range of 50%. Before he was employed at Avigilon, Mr. Tanaka worked for Creo/Kodak and earned, between 2013 and 2016, an annual salary as follows:
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> 2013 $85,809
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> 2014 $86,425
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> 2015 $81,699
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> 2016 $81,732
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> [104] Those amounts yield an annual average of $83,916.25. Taking that figure as a rough proxy for what he could earn each year as an IT consultant if he lost his position at Avigilon, this would reflect a loss of $41,083.75 from a posited “without-accident” salary at Avigilon of $125,000.
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> [105] Based on those assumptions, Mr. Tanaka’s annual loss can roughly be estimated as the average of $8,333.33 and $41,083.75, or $24,708.54. Applying the prescribed multiplier for the next 20 years (17.1686) yields a net present value of $424,211.04.
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> [106] After accounting for the possibility that Mr. Tanaka would not have worked at full capacity to age 70 in any event, and that he will see future improvement in his symptoms with exercise, therapy, counselling and medication, I am awarding him a net total of $400,000 for future loss of earning capacity.

[5] As the plaintiff points out, his actual 2022 income ($128,065) was in evidence but not mentioned in the judgment. He submits that it would have made more sense to use his 2022 income, rather than 2021, as the “baseline” identified in the last sentence in para. 102, and to recognise that there had been nearly four years, rather than three, of pre-trial earnings since the accident. Reconstructing my calculations using those revised assumptions, the plaintiff submits that the award should be increased from $400,000 to $460,000.

[6] The defendants disagree. They note that 2022 was not a typical year for the plaintiff because he spent part of the year on a leave of absence collecting long-term disability benefits. In any event, they say, the proposed adjustment would convert the analysis from one based on a "capital asset" model to one based on an "earnings" model, contrary to my stated intention.

[7] I agree with the plaintiff that an adjustment of some kind is called for. My awards for loss of earning capacity, past and future, were premised on the assumption that the plaintiff is currently earning less than he would be had he not been injured. By assuming a present "without accident" income of only $125,000, when his actual "with accident" income in 2022 was $128,065, my award could be said to be founded on a misapprehension of the evidence. Had I been alive to his actual 2022 income, I would not have assessed those damages as I did.

[8] The defendants argue that if I am disposed to increase the award to account for that fact, as I am, then there should also be a corresponding adjustment downward to account for the fact that I used the plaintiff's incomes in the period from 2013 to 2016 as a proxy for his future "with accident" earning potential as an IT consultant, without accounting for inflation. I agree with the defendants that, having agreed to make an upward adjustment on the grounds proposed by the plaintiff, it is also appropriate to adjust for the even more dated source that I chose as a proxy for the plaintiff's present-day earning potential as an IT consultant.

[9] Recognising that this is an assessment rather than a calculation, I have concluded that the award should be increased from $400,000 to $425,000 in order to account for those factors.

IV. The Defendants' Request for Clarification

[10] In their closing submissions at the trial, the defendants argued that the plaintiff's general damages and damages for future loss of earning capacity should be reduced by 20-25% to account for the plaintiff's failure to mitigate his loss, particularly by failing to follow medical advice.

[11] In my decision, I erroneously stated (at para. 72) that the defendants were seeking such a reduction in respect of general damages and *past* loss of earning capacity. In the result, I accepted the defendants' arguments in part and, on that basis, reduced the general damages award and part of the award for past loss of earning capacity by 10%.

[12] However, I did not expressly address the question of mitigation when assessing damages for *future* loss of earning capacity. The defendants now seek clarification and ask if the omission was intentional.

[13] The plaintiff, while acknowledging my error in misstating the defendants' position, argues that such a reduction would not have been justified in any event, because the failure to mitigate that I found to have occurred was only a temporary one, with short-lived consequences. In particular, the plaintiff submits that by the time of the trial, he was already complying with the advice of his treating physicians, thereby justifying my refusal to apply the reduction to that award.

[14] In addition, the plaintiff says that there should be no such reduction because my finding was only that his failures "could" (not "would") have made a difference to his recovery, which was insufficient to meet the legal standard.

[15] My finding on mitigation was as follows:

> [77] I agree with the defendants that, at least in some respects, this case is more like *Ladhani, Redmile* and *Mullens* than *Han*. A reduction in damages is warranted here due to Mr. Tanaka's failure to follow the advice of his treating physicians, particularly Dr. Steinson and Dr. Badii that he exercise regularly, pursue counselling and take Celexa when needed. Dr. Anderson's opinion was that Mr. Tanaka's cognitive difficulties are likely attributable to the effects of pain, insomnia, fatigue, anxiety and depression, all of which could, the evidence suggests, have been reduced in severity had Mr. Tanaka followed the advice he received.

[16] My observation in that last sentence was simply that the evidence supported the conclusion that any of those items (namely, the pain, insomnia, fatigue, anxiety and depression), alone or in combination, could have been reduced in severity had the plaintiff followed medical advice. Ultimately, my finding was that the failure to

follow medical advice probably did adversely impact his recovery through one or more of those means, without attempting to distinguish among them. I therefore disagree with the plaintiff's submission that my findings were insufficient to support any reduction.

[17] Although I misstated the defendants' position as to which heads of damage ought to be subject to reduction, I did turn my mind to the issue of whether a reduction should also be made to the award for future loss of earning capacity. In the end, I decided that such a reduction was not warranted for two reasons.

[18] First, I began my assessment by positing an annual loss of income (assuming the plaintiff remains employed at Avigilon), using what I had found to be the value of his past loss of earning capacity over the preceding three years. That figure was net of the reduction I had made for mitigation during that period, as I specifically noted in para. 102. Had I not used a figure already reduced to account for mitigation, the annual loss at Avigilon would have been larger. A reduction to account for the plaintiff's failure to mitigate was therefore already incorporated into the award, at least to some extent.

[19] Second, the evidence satisfied me that the significance of the plaintiff's failure to follow medical advice has been waning over time, to the point that it is now, or will soon be, having no measurable effect on his condition. I say this because the plaintiff had, by the time of the trial, already sought counselling. The failure to take Celexa occurred in 2020 and 2021. Only one of the alleged omissions, the failure to exercise regularly, could be said to have been ongoing at the time of the trial. Even in that case, however, there was evidence to suggest that, with his physical symptoms in remission following the epidural injection, he is now resuming a more active exercise regimen (for example, by taking up rowing, a fact noted in para. 30). What I found to be more significant for the future was the prospect of his seeing greater improvement through the treatment and activities he *was* now doing. Indeed, I reduced the award to account for that contingency (at para. 106).

[20] I have therefore concluded that no further reduction to the award for future loss of earning capacity is warranted on this ground.

V. Disposition

[21] The plaintiff's application for reconsideration is allowed in part. The defendants' application for reconsideration is refused.

[22] In the result, I am revising my award for future loss of earning capacity from $400,000 to $425,000.

"Milman J."