

 **Cheema v. Bains**

British Columbia Judgments

British Columbia Supreme Court
New Westminster, British Columbia

G.B. Gomery J.

Heard: August 17-19, 2021.

Oral judgment: August 19, 2021.

Docket: M216735

Registry: New Westminster

[2021] B.C.J. No. 1949 | 2021 BCSC 1766

Between Dilsher Singh Cheema, Plaintiff, and Harjinder Singh Bains and Harbinder Singh Bains,
Defendants

(61 paras.)

Case Summary

Damages — Types of damages — General damages — For personal injuries — Considerations — Extent of incapacity — Loss of earning capacity — Non-pecuniary damages — Pain and suffering — Affecting recreational activities — Action by plaintiff for damages for injuries suffered in January 2018 motor vehicle accident allowed — Liability was admitted -- plaintiff suffered soft tissue injuries to lower back, neck and shoulders, and later developed leg pain — Lower back and leg pain was ongoing — Injuries affected recreational activities and ability to help at home — Plaintiff was awarded non-pecuniary damages of \$50,000 — Despite injuries — Plaintiff accomplished goal of becoming long-haul truck driver — Injuries could affect plaintiff's ability to change jobs — Damages of \$50,000 were awarded for loss of future earning capacity.

Action by the plaintiff for damages for injuries suffered in a January 2018 motor vehicle accident. The plaintiff was injured when the pickup truck he was driving was rear-ended while he was stopped at a red light. Liability for the accident was admitted. The plaintiff suffered soft tissue injuries to his lower back, neck and shoulders. He later developed radiating pain down his left leg to the back of his knee. The neck-and-shoulder pain and the associated headaches resolved within three to five months of the accident. The lower back pain and the leg pain was ongoing. The plaintiff was 21 years old at the time of the accident and 25 at trial. At the time of the accident, the plaintiff was working as a yard runner at a lumberyard and helping out in the family trucking business. His long-term plan was to work as a long-haul truck driver in the family business.

HELD: Action allowed.

The plaintiff's injuries set him back in his physical activities of basketball, soccer and hiking. He could no longer walk his dog. He was also unable to cut the grass at the family home. The plaintiff remained overall in good health and good physical form. He was awarded non-pecuniary damages of \$50,000. Following the accident, the plaintiff was off work for 10 days because of his injuries. He was able to return to work at the lumberyard but required assistance with the physical aspects of his job. He left the lumberyard in 2019 and began long-haul driving. The plaintiff purchased his own truck in April 2021. His injuries did not currently impair his productivity or income. However, if the plaintiff was forced to change careers, his back and leg pain would constrain his employability in other vocations for which he was suited. An award of \$50,000 was made for future economic loss. The parties agreed before trial on the amount of past loss of wages and special damages. No damage award was made for cost of future care.

Counsel

Counsel for the Plaintiff: B. Yu.

Counsel for the Defendants: A. Grewal.

Oral Reasons for Judgment

G.B. GOMERY J. (orally)

Introduction

1 THE COURT: Dilsher Cheema was injured when the pickup truck he was driving was rear-ended while he was stopped at a red light. The accident occurred on January 28, 2018. The defendants admit liability. The issue is the assessment of damages to compensate Mr. Cheema for his injuries.

2 In this trial, I heard evidence from a number of Mr. Cheema's male relatives, all sharing his last name. For simplicity and intending no disrespect, I will refer to these witnesses by their first names.

The Issues

3 The defendants concede that Mr. Cheema was injured in the accident and that he is entitled to recover damages. Though they dispute the amount of the claim. Damages for past wage loss are agreed at \$1,257.26. Special damages are agreed at \$805.60. The following heads of damages claimed by Mr. Cheema are disputed:

- a) non-pecuniary damages;
- b) future economic loss;

- c) loss of housekeeping capacity; and
- d) cost of future care.

Mr. Cheema's Injuries

4 There is no significant dispute as to the injuries suffered by Mr. Cheema because of the accident. He suffered soft tissue injuries to his lower back, neck and shoulders.

5 Mr. Cheema became aware of stiffness and pain in his back, neck and shoulders the morning after the accident. He found small motions irritating, and it hurt to bend over. In the following weeks, he suffered headaches that he associated with the neck and shoulder pain. He took 10 days off work while he was recovering from the acute phase of these injuries.

6 Several weeks following the accident, Mr. Cheema developed an additional symptom, a radiating pain down Mr. Cheema's left leg to the back of the knee, also attributable to the accident. Mr. Cheema's mother, Ms. Brar, testifies that Mr. Cheema was complaining of the leg pain immediately after the accident, but I find that she is mistaken on this point. Mr. Cheema recalls that the leg pain developed later, and the leg pain is not mentioned in the clinical records recording Mr. Cheema's complaints until his third visit to his family doctor in connection with the accident, several weeks after it occurred.

7 Mr. Cheema's neck-and-shoulder pain and the associated headaches resolved within three to five months of the accident. His lower back pain and the leg pain persisted and continue to this day. At present, the back pain comes and goes. It may be aggravated by physical activity or long periods of driving. If aggravated, it may last for a day or into the next day. The leg pain is triggered when the back pain reaches a certain level, described by Mr. Cheema as a 5 or a 6.

8 Mr. Cheema began physiotherapy treatments prescribed by his family doctor about 10 days after the accident. The physiotherapy included electrotherapy, exercises and stretches. In consultation with his family doctor, Mr. Cheema discontinued the physiotherapy in July 2018 after 23 appointments because he found that the appointments were providing only short-term symptomatic relief for his continuing low back pain. He found the exercises and especially the stretches helpful to manage his pain and has continued doing them as needed ever since.

9 The only expert opinion evidence is that of an orthopedic surgeon, Dr. Grover. He describes Mr. Cheema's continuing injury as chronic mechanical lower back pain caused by the accident. He opines that more likely than not, Mr. Cheema will continue to suffer some degree of lower back pain while at work for the foreseeable future. In his report prepared in January 2020, Dr. Grover says:

He has good healing potential, and he will very likely improve with passage of time and treatments.

That said, it has to be balanced against the fact that Mr. Cheema continues to have chronic pain two years after the accident.

Keeping both these factors in mind, I would have to say that his prognosis is guarded at this stage and his lower back pain is likely to persist for the foreseeable future.

10 Nothing in Mr. Cheema's evidence of his condition since January 2020 calls this prognosis into question.

Analysis

Non-pecuniary loss

11 Mr. Cheema claims non-pecuniary damages of \$85,000 to \$95,000. The defendants submit that there should be an award in the range of \$30,000 to \$40,000.

Legal Framework

12 Non-pecuniary damages are awarded as compensation for past and future pain, suffering, disability and loss of enjoyment of life. The court must take into account both the seriousness of the injury and the ability of the award to ameliorate the condition or offer solace to the victim: *Stapley v. Hejslet*, 2006 BCCA 34, at para. 45, leave to appeal refused, 2006 SCCA no. 100. In *Stapley* at para. 46, the court noted a non-exhaustive list of factors to be considered: age of the plaintiff; nature of the injury; severity and duration of pain; disability; emotional suffering; loss or impairment of life; impairment of family, marital and social relationships; impairment of physical and mental abilities; loss of lifestyle; and stoicism as a factor that should not, generally speaking, penalize the plaintiff.

13 An award must be fair and reasonable, and fairness is measured against the awards made in comparable cases, recognizing that other cases provide only a rough guide. Each case must be decided on its own facts, *Trites v. Penner*, 2010 BCSC 882, at para. 189.

***Stapley* Considerations**

14 Mr. Cheema is 25 years old. He was 21 at the time of the accident.

15 I have described Mr. Cheema's injuries. The most significant is the lower back injury. Together with the associated leg pain, it has troubled Mr. Cheema for more than three years and is likely to persist for the foreseeable future.

16 Mr. Cheema's injuries do not disable him from pursuing his chosen career as a long-haul truck driver. He is able to cope with long hours on the road by taking breaks to stretch every two or

three hours. He is not reliant on painkillers. The pain he suffers is not distracting to the point that he cannot concentrate.

17 Allowing for the fact that Mr. Cheema is clearly possessed of a somewhat stoic disposition, he describes his symptoms matter of factually and without emotion. He has not experienced significant emotional suffering.

18 Mr. Cheema is close to his family, and his family are close to him. It is clear that they share a respectful bond that has not been impaired by Mr. Cheema's injuries. Some of them comment he is crankier and more easily upset than he used to be. His mother and father say that he is no longer as polite as he used to be. His family interpret Mr. Cheema's crankiness as an indicator that he is in pain, and they make allowances. Mr. Cheema's cousin, Brahnjeevan, stresses that Mr. Cheema is not much of a complainer.

19 Mr. Cheema gave no evidence concerning intimate relationships. So far as the evidence discloses, since high school his social relationships seem to have centred on physical activities: pick-up basketball, pick-up soccer and hiking the Grouse Grind in the summer. In these activities, his injuries have set him back. He no longer runs and can no longer complete the Grouse Grind. He will hang out with friends at the basketball court and maybe shoot but is cautious about playing. He no longer walks his dog, who pulls on the leash, but has delegated that activity to Brahnjeevan.

20 Mr. Cheema, his parents, brother, aunt and uncle, two cousins and a grandparent, share a substantial house on a large lot. They share chores. Before the accident, Mr. Cheema was enthusiastic to cut the grass and did more than his share of this chore. Since the accident he is no longer enthusiastic. His back pain makes cutting the grass difficult, and other family members sometimes step in to finish the job when it is his turn.

21 Mr. Cheema's loss of physical capability is a real injury. He was competitive in high school league sports and aggressive in maintaining a high level of fitness prior to the accident. He was able to dead lift 200 pounds and can no longer do that. Brahnjeevan describes Mr. Cheema as a really competitive person and observes that he is no longer willing to try things because he is no longer able to succeed as he used to. Everyone has to confront the loss of capability at some point in their lives. Usually in middle age, and deal with it in one way or another. Mr. Cheema has been forced to the confrontation early on, when he was only 21, and the loss is poignant for him because he was physically proficient prior to the accident.

22 It is important to observe that Mr. Cheema remains overall in good health and good physical form. He is trim, and Dr. Grover observed on examination that he seemed to be in excellent physical condition.

Comparable Cases

23 Counsel for Mr. Cheema relies on authorities cited in *Wong v. Campbell*, 2020 BCSC 243, at para. 127, summarizing the plaintiff's submission in that case. *Wong* itself is unhelpful. It is a case in which the plaintiff was suffering both ongoing headaches and lower back pain, both of which were expected to persist. In Mr. Cheema's case, his headaches resolved within months of the accident. Mr. Yu submits that the authorities cited in *Wong* support an award of non-pecuniary damages in the range of \$85,000 to \$110,000, for injuries similar to those suffered by Mr. Cheema.

24 Mr. Yu's submission passes by the authorities cited by the defendants in *Wong*, which were submitted to support an award of \$60,000 to \$75,000 in the circumstances of that case.

25 I am not persuaded that the cases cited by Mr. Yu establish that the range of non-pecuniary damages for soft tissue, back or neck injuries resulting in chronic pain starts from \$85,000. Most of the awards cited at para. 127 of *Wong* turn on the presence of psychosocial factors warranting a substantial award in addition to relatively modest physical injuries. *Blackman v. Dha*, 2015 BCSC 698, at para. 77; *Carson v. Ehman*, 2019 BCSC 2120, at para. 41; *Sekhon v. Gill*, 2019 BCSC 811, at paras. 75 to 77. The remaining cases involved prolonged painful injuries that substantially affected the plaintiff's life. *Williams v. Nekrasoff*, 2008 BCSC 1520, at para. 26; *Ruscheinski v. Biln*, 2011 BCSC 1263, at paras. 90 to 92.

26 The defendants' cases all involve less serious injuries having a less significant effect on the plaintiff's life. They are *Chapman v. Zilm*, 2020 BCSC 695; *Pond v. Bucsis*, 2013 BCSC 2001; *Christoffersen v. Howarth*, 2013 BCSC 144; and *Callow v. Van Hoek-Patterson*, 2021 BCSC 1423. The awards in these cases range between \$30,000 and \$35,000 or \$40,000 taking inflation into account. I note that in *Callow*, at paras. 39 to 45, Justice Coval lists cases involving awards in the \$80,000 range. These cases involve more significant pain and associated difficulties suffered by the plaintiffs than Mr. Cheema suffers.

27 In *Chapman* the plaintiff suffered minor neck pain that manifested only in the final extremities of lateral flexion and that did not cause a terribly significant interference with the plaintiff's personal and working life, at para. 26. In *Pond*, the plaintiff was much older than Mr. Cheema. She suffered a mild injury to her neck and shoulder resulting in pain that had only a modest effect on her recreational activities, somewhat impaired her ability to enjoy her life, modestly impaired her family relationships and did not significantly change her lifestyle at para. 54. In *Callow*, the plaintiff suffered mild soft tissue injuries to his neck, upper back and shoulders, but was still jogging and playing recreational soccer, para. 37, neither of which is an activity Mr. Cheema now enjoys.

28 The defendants' case that is closest to this one is *Christoffersen*. The plaintiff was 22 at the time of the accident and 35 at the time of trial. He suffered mild whiplash resulting in continuing intermittent neck and lower back discomfort by the time of the trial two and a half years after the

accident. Unlike Mr. Cheema, his prognosis was excellent, para. 64. Justice Weatherill awarded him non-pecuniary damages of \$35,000 equivalent to \$40,000 today.

Assessment of Non-pecuniary Loss

29 The award in this case should be higher than the \$40,000 award in *Christoffersen* because the injuries are similar, and Mr. Cheema's prognosis is worse. Taking everything into account, I award Mr. Cheema non-pecuniary damages of \$50,000.

Future Economic Loss.

Legal Framework

30 An award for future loss of income-earning capacity requires the plaintiff to prove that there is a real and substantial possibility of a future event leading to an income loss. The question is whether in the oft-quoted words of Justice Finch as he then was in *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 (S.C.), Mr. Cheema's injuries make him "less valuable to himself as a person capable of earning income in a competitive labour market."

31 Once that hurdle is crossed, the loss may be quantified by comparing the currently expected earning stream to that which might have been expected but for the accident, or on the footing of the damage to a capital asset caused by the plaintiff's injuries, *Perren v. Lalari*, 2010 BCCA 140, at para. 32. In either case, the assessment is a matter of judgment, not a mathematical calculation. *Rosvold v. Dunlop*, 2001 BCCA 1, at para. 18.

32 In some cases, such as *Brown, Letourneau v. Min*, 2003 BCCA 79, and *Kralik v. Mount Seymour Resorts Ltd.*, 2008 BCCA 97, the courts have quantified an award for loss of future earning capacity by awarding the plaintiff an award equal to one or two years' earnings. In other cases, such as *Westbroek v. Brizuela*, 2014 BCCA 48, courts have adopted an earnings approach, forecasting potential earnings with allowances for contingencies.

33 Using the earnings approach, it is often easy to generate very large numbers. On the other hand, if there are mathematical aids that may be of some assistance, the court should start its analysis by considering them; *Jurczak v. Mauro*, 2013 BCCA 507, at para. 37. The cases emphasize that the court must always consider the overall fairness and reasonableness of the award, taking into account all of the evidence; *Rosvold* at para. 11.

Analysis

34 Mr. Cheema seeks an award of \$150,000 to \$200,000. Mr. Yu emphasizes several points as establishing that Mr. Cheema has suffered a loss of future earning capacity. He is obtaining help from his cousins in off-loading on local trips. He has turned down jobs when he is not feeling

well. He is challenged by essential tasks such as pre-trip inspections and tying down and loading pallets, and he requires many breaks while he is driving. Mr. Yu observes that Mr. Cheema expects to earn \$52,000 this year and has an income-earning capacity of \$60,000 annually. This implies, he submits, a lifetime earning capacity in the order of \$1.75 million. A 10% allowance would be \$175,000.

35 The defendants maintain that Mr. Cheema has not established that there is a real and substantial possibility that he will suffer a future income loss.

36 At the time of the accident, Mr. Cheema was working as a yard runner at Dick's Lumber and helping out in the family trucking business, Arur Transport. The work at the lumberyard was part time, three days a week for 10 hour days. It was heavy physical work requiring Mr. Cheema to help customers load vehicles and keep the yard clean. Mr. Cheema was sometimes called upon to load cement bags weighing at least 30 to 40 pounds.

37 Mr. Cheema's long-term plan was to obtain his class 1 driver's licence and work full time as a truck driver at Arur.

38 Following the accident, the parties agree that Mr. Cheema was off work for 10 days because of his injuries. He was able to return to work at the lumberyard. He obtained help from other employees when he was challenged by the physical requirements of the job but did not obtain formal accommodations from his employer. Mr. Cheema continued working at the lumberyard for more than a year until May 2019.

39 In May 2019 Mr. Cheema obtained his class 1 driver's licence. He left the lumberyard and joined his father and uncle at Arur. For the next two years he shared long-haul driving assignments with his father. In April 2021, he bought his uncle's truck and began driving solo.

40 Mr. Cheema's driving takes him on routes into the eastern United States and back. The round trips typically take 10 days but may last for as many as 15 days, driving 11 hours a day and sometimes working 13 hours a day. Typically, Mr. Cheema works 20 days a month. Some aspects of the work aggravate Mr. Cheema's symptoms, notably the pre-trip check and long hours of driving. He copes with his injuries by stopping for stretches every two or so hours.

41 Mr. Cheema's father, Inderjit, identifies one occasion when Mr. Cheema's need to stop and stretch contributed to a late arrival. If a truck is late for personal reasons, it can result in financial loss for the driver, but as Inderjit put it, it is not a big deal if it is just one time.

42 Mr. Cheema's ambition was to become a long-haul truck driver, and he has achieved that ambition. His injuries did not thwart or delay his progression. In cross-examination he acknowledged that he is able to complete all his duties as a truck driver.

43 I find that to this point, Mr. Cheema's injuries have not impaired his income as a truck driver. Mr. Cheema testified that he sometimes declines opportunities to help with unloading that would earn him between \$75 and \$250 each time as an additional income. He did not testify that he was declining these opportunities because of his injuries. He testified that he sometimes obtains help from his cousins to unload local jobs. His cousin Jujhar testified that he helps Mr. Cheema so that he will not overexert and injure himself. Mr. Cheema did not testify that he asks for help because of his injuries, and he manages without his cousins' help on the long haul trips that make up the greater part of his workload.

Is there a real and substantial possibility that Mr. Cheema will suffer a future income loss?

44 In his report, Dr. Grover states:

As far as vocational disability is concerned, Mr. Cheema is likely to suffer some degree of impairment of his ability to work free of pain. While he will still be able to work at his job as a truck driver, he will continue to report pain while at work, which is likely to affect his productivity. He is likely to face impairment of employability for other heavy physically demanding jobs for the foreseeable future. He is likely to face some degree of impairment of productivity for office-based sedentary jobs because he has back pain, which is made worse by prolonged sitting in a chair. Again, his vocational disability is likely to persist for the foreseeable future.

45 Accepting as I do Dr. Grover's opinion that Mr. Cheema will probably continue to report pain while at work, the evidence I have reviewed does not support his inference that the pain is likely to affect Mr. Cheema's productivity in his present occupation. To date Mr. Cheema's injuries have not affected his productivity as a truck driver. There is no evidence that Mr. Cheema is likely to suffer a deterioration in his condition that would make driving more difficult for him than it is now.

46 Mr. Cheema is at the very beginning of a working life that may last for 35 or 40 years. His only academic credential is his high school graduation diploma. In a world buffeted by technological and economic change, it is possible that long-haul driving will cease to be a viable career for Mr. Cheema more generally. If Mr. Cheema were to have to change careers, I accept Dr. Grover's opinion that his back and leg pain would constrain his employability in other vocations for which he is suited. To this limited extent, I find that Mr. Cheema is "less valuable to himself as a person capable of earning income in a competitive labour market." There is a real and substantial possibility that he will suffer a future income loss.

47 While the contingency is difficult to quantify, the risk I have described is not a large one, and it takes its place among the myriad risks faced by every young person at the start of their career. In the circumstances, it is fairest to value it by reference to Mr. Cheema's current income.

48 Mr. Cheema earned \$22,825 in 2020. Now that he owns his own truck and is driving solo, he expects to earn \$52,000 in 2021. He will probably earn approximately \$60,000 in 2022.

49 I award Mr. Cheema \$50,000 as the approximate equivalent of one year's income to compensate him for future economic loss.

Loss of Housekeeping Capacity

Legal Framework

50 In *Ali v. Stacey*, 2020 BCSC 465, I considered two recent considered decisions of the Court of Appeal addressing claims for loss of housekeeping capacity, *Kim v. Lin*, 2018 BCCA 77, at paras. 27 to 37; and *Riley v. Ritsco*, 2018 BCCA 366, at paras. 93 to 103. I concluded at para. 67:

[67] Read together, these two judgments establish that a plaintiff's claim that she should be compensated in connection with household work she can no longer perform should be addressed as follows:

- a) The first question is whether the loss should be considered as pecuniary or non-pecuniary. This involves a discretionary assessment of the nature of the loss and how it is most fairly to be compensated; *Kim* at para. 33.
- b) If the plaintiff is paying for services provided by a housekeeper, or family members or friends are providing equivalent services gratuitously, a pecuniary award is usually more appropriate; *Riley* at para. 101.
- c) A pecuniary award for loss of housekeeping capacity is an award for the loss of a capital asset; *Kim* at para. 31. It may be entirely appropriate to value the loss holistically, and not by mathematical calculation; *Kim* at para. 44.
- d) Where the loss is considered as non-pecuniary, in the absence of special circumstances, it is compensated as a part of a general award of non-pecuniary damages; *Riley* at para. 102.

Analysis

51 There is no evidence that Mr. Cheema or anyone in the household has paid for household services that Mr. Cheema is unable to perform.

52 As I have mentioned, the male members of the Cheema household share responsibility for outside chores, taking out the garbage, cutting the lawn and gardening. In addition, Mr. Cheema cleans his own room and does his own laundry. Ms. Brar testifies that Mr. Cheema no longer does his own laundry, but I prefer Mr. Cheema's evidence on this point.

53 Mr. Cheema and Inderjit presently work as long-haul truck drivers, and his uncle did the same

until recently. As already noted, this work takes the driver away from town at irregular intervals for periods of time ranging from 10 to 15 days at a stretch. On average Mr. Cheema is away more than half the month. I infer from this that the allocation of chores is informal and flexible, depending on who is present in the house at any given time.

54 Shared living arrangements among family members inevitably involve shared responsibilities and a certain amount of give and take. While it is clear that Mr. Cheema is doing less than he used to do around the house, I am not satisfied that he is doing less than his share, taking his work schedule into account. Nor is it clear that Mr. Cheema would not be able to cope with ordinary household chores at a smaller property if he eventually moves out to establish a household of his own.

55 To the extent that Mr. Cheema is experiencing and will experience pain in performing household chores, he will be compensated by the award I am making for non-pecuniary loss. A separate pecuniary award for household work is not justified in this case.

Cost of Future Care

Legal Framework

56 The purpose of an award for the cost of future care is, so far as is possible with a monetary award, to restore the plaintiff to the position he or she would have been in had the accident not occurred. The award based on what is reasonably necessary on the medical evidence to promote the mental and physical health of the plaintiff, *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351, at paras. 29 to 30; citing *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.); and *Aberdeen v. Zanatta*, 2008 BCCA 420, at para. 41.

57 Each part of the claim must be supported by the medical evidence. At the end of the day, an award for the cost of future care is assessed, not calculated mathematically.

Analysis

58 The evidence does not support an award for the cost of future care. The only medical evidence that could support an award is the following passage from Dr. Grover's report:

Mr. Cheema will benefit from going to the gym and working out, and I would recommend that funding be made available so that he can have a pass to the gym.

59 Mr. Cheema's present circumstances are such that he does not need a gym pass for the reason given by Dr. Grover. He has at home the machines and weights he would use at a gym, and his practice has been to work out at home. He would accompany a friend to a gym only occasionally when the friend could make the gym available to him on a pass.

Disposition

60 For these reasons, I award Mr. Cheema damages totalling \$102,062.86 as follows:

- a) non-pecuniary damages of \$50,000;
- b) \$1,257.26 for past wage loss;
- c) \$50,000 for future earning capacity; and
- d) special damages of \$805.60.

61 Unless there are matters that must be brought to my attention, Mr. Cheema is entitled to his costs.

G.B. GOMERY J.

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