

Editor's Note: Erratum released on February 18, 2013. Original judgment has been corrected with text of erratum appended.

## IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Hood v. Wrigley*,  
2013 BCSC 231

Date: 20130215  
Docket: S21864  
Registry: Chilliwack

Between:

**Peter Warne Hood**

Plaintiff

And

**Patricia Maureen Wrigley**

Defendant

Corrected Judgment: The text of the judgment was corrected on the front page  
on February 18, 2013

Before: The Honourable Mr. Justice Grist

### Reasons for Judgment

Counsel for the Plaintiff:

J.L. Zacharias and A.R. Ayliffe

Counsel for the Defendant:

J.L. Upper

Place and Date of Trial:

Chilliwack, B.C.  
May 28-31; and June 1, 2012

Place and Date of Judgment:

Chilliwack, B.C.  
February 15, 2013

[1] The plaintiff was injured in a motor vehicle collision on his way to work on July 5, 2010. He was stopped in traffic westbound on the No. 1 Highway when rear-ended by a vehicle driven by the defendant. He left work early that day with the onset of neck stiffness and pain in his right leg.

[2] The plaintiff was 61 years of age at the time of the motor vehicle collision and worked as a manager at a large retail store in Coquitlam. He had worked at different locations operated by his employer since 2004. Prior to this he had various jobs since he retired from the military in 1994.

[3] The plaintiff had been off work for approximately five months in the year before the collision, from May to November 2009, after being diagnosed with a large, cancerous tumor located in the muscle tissue of his right thigh. The tumor was surgically removed, following which Mr. Hood was treated with chemotherapy and radiation. After the radiation treatment he was left with a mass of hardened muscle tissue in his right thigh and damaged nerves in his right leg which caused hypersensitivity and a burning sensation.

[4] Following the motor vehicle collision the plaintiff developed neck pain and increased pain in his right leg, causing a marked limp and loss of his ability to do the physical aspects of his work. Additionally, the effects of his injuries impacted on many of the activities of his daily life.

[5] The plaintiff claims non-pecuniary damages, loss of earnings and earning capacity, the cost of future care and household assistance, and special damages.

[6] The defence disputes causation, saying that the injuries from the motor vehicle collision were relatively minor and that the plaintiff's pre-existing conditions have resulted in the continuing disability.

[7] The defence also argues the plaintiff is not disabled from all employment he is capable of performing, and that he has not taken certain recommended treatment in order to mitigate his physical complaints.

[8] Lastly, the defence says that the plaintiff received a settlement in lieu of notice in respect of a constructive dismissal claim he brought against his former employer, a claim advanced after the motor vehicle collision in respect of a job reclassification by his employer which occurred approximately three months prior to the collision.

### **The medical evidence**

[9] The plaintiff's pre-existing conditions at the time of the collision, in addition to the residual effects of the radiation therapy to his right thigh, included the residual effects of a disc injury and subsequent surgery that caused Mr. Hood periods of low back pain. The injury was sustained while Mr. Hood was in the military and the disc was removed in 1989. Subsequent to this, Mr. Hood was released from the military for medical reasons relating at least in part to this injury. During the time he was in the military, Mr. Hood also suffered an eye injury that left him with partial vision in his right eye. He also has a loss of hearing in respect of his right ear.

[10] The low back injury had the effect of episodes of back pain brought on through physical activity. Mr. Hood has dealt with this by pain medication, notably tablets of Tylenol 3. There is no record of loss of time from employment as a result of these incidents and the evidence of Mr. Hood's co-workers was that he was hard-working and fully participated in the often physically demanding activities their work requires. Moving pallet loads of merchandise on to the floor, assembly of furniture and moving it onto the floor, and carrying and mixing buckets of paint, were cited as examples of the physical work the job entailed.

[11] The motor vehicle collision caused a somewhat similar flare up of low back pain and this subsided in similar fashion as it had previously. The more significant effects of the collision were the onset of increased leg pain and neck pain.

[12] The medical evidence relating to the fibrous tissue in Mr. Hood's right leg resulting from radiation therapy indicated that the affected tissue likely caused irritation of nerves in the thigh and a burning sensation over much of the surface of

the upper leg. This was noted fairly soon after Mr. Hood was treated with radiation, however, did not prevent Mr. Hood from returning to full duties at his employment in November 2009. At that time, he worked at the Chilliwack store. He continued at this store until May 2009, following which he was assigned to his last work location in Coquitlam.

[13] In January 2010, Mr. Hood was seen by Dr. Karvat, at the Abbotsford Centre of the BC Cancer Agency, who noted, "Other than some limited mobility and mild pain in the right lower extremity, Mr. Hood is doing well."

[14] In April 2010, Dr. Karvat noted: "He has been having increased pain in the thigh that is interfering with his functioning." But in May 2011, a Cancer Agency physician noted, "He is able to ambulate without difficulty today."

[15] Dr. Weatherston, Mr. Hood's general practitioner, saw him on three occasions after his return to work and before the collision. These clinical records contain a single entry relating to a burning pain in Mr. Hood's right thigh, on June 18, 2010. The next clinical note was two days following the collision, "Also reports (increased) leg pain since accident."

[16] Mr. Hood's co-workers at the Chilliwack store said that he returned to full duties, and that they did not see anything like a limp that would have indicated Mr. Hood was having difficulty with his right leg.

[17] Dr. Grover, an orthopaedic surgeon who presented evidence for the plaintiff, commented on the effect of the collision on Mr. Hood's leg function at page 9 of his March 2011 report:

There is however a history of treatment to his right thigh where he had very extensive surgery followed by chemotherapy and radiotherapy which very likely impaired the neurological function in his right thigh. This has been aggravated by the said motor vehicle accident. He now has frank neurogenic pain, which is much worse than what it used to be prior to the motor vehicle accident in question.

[18] In the week following the collision, Mr. Hood began to walk with a cane. He now uses a cane when he has to walk any distance. At times he also uses an

electric scooter. His gait has changed; he now swings his leg from the hip as he walks.

[19] Mr. Hood had no previous history of neck pain prior to the collision, however, an x-ray ordered by Dr. Grover showed mild to moderate cervical spine degenerative disc disease which would have likely been in place prior to the collision. This, however, was not symptomatic and there was no evidence the condition would have likely caused pain in the future. In Dr. Grover's opinion the force of the collision aggravated the neck condition resulting in the onset of pain.

[20] The primary effect of the neck pain was that Mr. Hood has had difficulty turning his head. With his limited sight in his right eye and loss of hearing in his right ear, this causes him to turn his head more often than would otherwise be the case. The restriction is particularly bothersome when he is driving.

[21] Dr. Grover's comment on Mr. Hood's vocational disability resulting from his injuries is at pages nine and ten of his March 2011 report, "... he has been unable to return to work because of pain in his neck and pain in his right thigh. His right thigh pain is the worse of the two problems."

[22] There is no evidence that the cancer treatment caused a progressively deteriorating condition in Mr. Hood's right leg. The medical records suggest he was managing with the residual effects of his cancer treatment. He had returned to full duties at his employment, without any indication of impairment, and the onset of his limp and functional disability closely ties to the collision. On the basis of this evidence, I conclude that Mr. Hood has been disabled from his employment because of the effects of the motor vehicle collision; and although the radiation treatment in his leg left him with residual effects, but for the injury he would not have incurred the disability that makes him unsuitable for his previous employment.

[23] The prognosis in respect of the injury to the right leg is not hopeful, however, the prognosis for the neck injury is more optimistic. Dr. Grover concluded that while his neck complaints are likely to be long term, they weren't likely to be permanent.

His view was that Mr. Hood should be sent for physiotherapy and acupuncture, which may or may not help, but that in any event, the condition should resolve on its own.

### **The occupational therapist's report**

[24] The occupational therapist's report, prepared by Mr. Shew, assessed Mr. Hood's physical and functional capacity. Mr. Shew's opinion was that Mr. Hood was not well-suited and likely unsafe to return to his previous form of employment. His further opinion was that, "... when considering his physical difficulties, the significant accommodations and work modifications he will likely require from a future employer, his age and his extended time away from work, his job prospects are likely severely limited." The defence argues that in the past Mr. Hood has managed a 7-Eleven store and worked for the British Columbia Corps of Commissionaires ("BCCC"). He also has had experience and training as a materials handler and truck driver, dating back to his service with the military. The defence submission is that some form of employment likely can be fashioned from this varied background.

[25] Mr. Hood is now 63 years of age. It is now 19 years since he left the military. There is no evidence his training has current value in qualifying him for any present employment. The work of managing a convenience store still requires physical capabilities which the occupational therapist suggests he is not capable of. The evidence from Mr. Hood and Mr. Mutton of the BCCC makes it clear that he would be unlikely to find employment there in any current capacity. In light of his age I conclude that Mr. Hood will be disabled from employment over his remaining working lifespan. His evidence was that he intended to work to age 65, and perhaps in some more limited capacity beyond this age. I think work beyond age 65 was speculative, and unlikely in Mr. Hood's case. Accordingly, I assess loss of capacity to his 65<sup>th</sup> birthday.

[26] Mr. Hood’s T4 earnings for 2008, 2009 and 2010 were as follows:

<b>Year:</b>	<b>T4 Earnings:</b>
2008	\$31, 317.00
2009 (*6 - 7 months)	\$22,018.00
2010 (*approximately 6 months)	\$20,118.00

[27] The economic consultant’s report prepared by Mr. Hildebrand identified the plaintiff’s annual income by way of salary, benefits and bonus at \$41,400.00 per year. The period of past wage loss is approximately 22 and one-half months. The appropriate multiplier in respect of the past wage loss is that indicated at Table 1, of Mr. Hildebrand’s report, \$1,701.00. Accordingly, the past wage loss is: \$76,383.00.

[28] The loss of economic opportunity covers a period of approximately three and one-half years. The appropriate multiplier is that indicated at Table 2 of Mr. Hildebrand’s report: \$2,464.00. Accordingly, the loss under this head of damages is \$102,010.00.

[29] The plaintiff claims for loss of his travel allowance in addition to the income indicated above. There is no evidence to indicate that there was any net benefit to him of this travel allowance over his expenses in travelling to work. Accordingly, I have not included any additional amount for the loss of this benefit.

**Cost of future care and household assistance**

[30] The items indicated in Mr. Shew’s report as constituting this claim include: an orthopaedic bed and adaptive aids; items that would assist with mobility such as orthopaedic shoes, recurrent expenses of handicapped decal and a cane, and potentially an electric scooter. Periodic costs are also forecast for assistance with household management chores and in respect of rehabilitation costs.

[31] I viewed the extra expense of the orthopaedic bed, cane, decal replacement, and orthopaedic shoes as being reasonable items to include under costs of future care. I expect a reasonable award in respect of these items is \$1,500.00. I have not

included a provision for an electric scooter as Mr. Hood's evidence indicates that he presently has one.

[32] The cost of assistance with household maintenance and yard work is presented as a yearly expense for various services. Mr. Hood is not totally incapacitated and does assist with work around the house and meal preparation. The greatest impact on him is that he has to secure someone to help with the heavier yard work and any household repairs that might be needed. He also would need assistance with power-washing and snow removal. These are recurrent costs and I expect that a sum of \$1,000.00 per year is a reasonable amount to see to these extra services. Using the multiplier indicated in the economic consultant's report this indicates an award of \$14,000.00.

[33] Dr. Grover recommends a further course of physiotherapy. Mr. Hood has been satisfied to date to do exercises recommended by a physiotherapist on his own. The remainder of the health related costs listed in Mr. Shew's report relate to advice from a kinesiologist and membership in a fitness facility, with some provision for fitness equipment. There's been no history of Mr. Hood undertaking these rehabilitative measures and I judge it unlikely that he will do so in the future.

[34] The last item has to do with the services of an occupational therapist. I think Mr. Hood is reasonably content with the measures he has already adopted to modify his activities and I doubt this will be pursued.

### **The constructive dismissal action and mitigation**

[35] Mr. Hood commenced an action for constructive dismissal against his employer in the fall of 2010. The claim related to a change in status within the corporation instituted in May 2010, three months before the collision. He was apparently reclassified as an assistant manager from his then current position as a manager. This was roughly coincident with being moved to the Coquitlam store. It may have had some foundation in the fact that his assignment to the Coquitlam store was for a limited time and he was to work along with the store manager at that

location. It may also have had something to do with whether the corporation was going to continue to cover his mileage costs to travel to Coquitlam. The change in status was published along with a weekly schedule posting work hours for various employees. Mr. Hood was never given formal notification of this change in status at the time.

[36] Mr. Hood continued with his employment and there was little more said about the matter until after the date of the collision. The small claims action was settled after the pleadings were filed and no evidence was introduced indicating the basis for the settlement or the amount involved.

[37] A constructive dismissal through reclassification can be a claim advanced without the plaintiff repudiating the employment and mitigation by way of continuing with the employment may be expected in any event. Notwithstanding that the claim argued a period of severance; this appears to have been a matter that was brought up with the employer to correct the supposed reclassification rather than as any basis for ceasing employment. Without further evidence, I have no basis to consider this as an element mitigating the loss, and no quantum to apply. Accordingly, there will be no deduction from past wage loss in this regard.

[38] The other claim referencing mitigation is in respect of therapies the defence says Mr. Hood should have pursued as a result of medical advice he received. This is in regard to further physiotherapy and possibly, acupuncture, and a consultation with a neurologist. The medical evidence in regard to the first two modalities is that they may or may not have assisted him, however, there would have been little lost in undertaking them.

[39] Mr. Hood's evidence was that he continues with neck exercises as recommended during his initial physiotherapy. He was not asked directly about his willingness to undergo acupuncture, but in any event, the medical advice is not compelling in establishing that these measures are likely to provide relief.

[40] Dr. Grover also recommends a consultation with a neurologist in respect of the pain in his right thigh. He says this form of pain is notoriously difficult to cure but that a neurologist can sometimes assist with pain relief. Mr. Hood has relied on treatment recommendations from his general practitioner, who has not made the same recommendation for a consultation with a neurologist. There is no specific treatment indicated in any of this and there is no firm evidence of a prospect of success. Whatever might be the result of such a consultation it appears the best that could be expected is some moderation of symptoms.

[41] The argument for mitigation is really no more than speculation and, specifically, there is no reliable evidence to establish the first two elements of the test for a failure to mitigate: that some recommended course of treatment would have helped with the symptoms; and that a reasonable person would have undertaken the treatment (*Antoniali v. Massey*, 2008 BCSC 1085).

### **Non-pecuniary damages**

[42] The final assessment is non-pecuniary damages. The plaintiff's position is that the non-pecuniary damages in this case should amount to \$100,000.00. The defence suggests a much more modest range in the order of \$20,000 to \$30,000.

[43] The plaintiff suggests the following cases as comparators:

- *Fox v. Danis*, 2005 BCSC 102 at para. 115;
- *Fox v. Danis*, 2006 BCCA 324;
- *Notenbomer v. Andjelic*, 2008 BCSC 509;
- *Tsalamandris v. MacDonald*, 2011 BCSC 1138;
- *Poirier v. Aubrey*, 2010 BCCA 266;
- *Bouchard v. Brown Bros. Motor Lease Canada Ltd.*, 2011 BCSC 762;

- *Neumann v. Eskoy*, 2010 BCSC 1275; and
- *Dulay v. Lachance*, 2012 BCSC 258 [*Dulay*].

[44] The defence relies on the following cases as comparators:

- *Costello v. Rafique*, 2010 BCSC 441 [*Costello*];
- *Gendron v. Moffat*, 2010 BCSC 1231 [*Gendron*];
- *Hussain v. Cho*, 2012 BCSC 194;
- *Kelly v. Yuen*, 2010 BCSC 1794;
- *Olianka v. Spagnol*, 2011 BCSC 1013;
- *Penland v. Lofting*, 2008 BCSC 507;
- *Ryan v. Klakowich*, 2011 BCSC 835; and
- *Sananin v. MacHale*, 2006 BCSC 672 [*Sananin*].

[45] As is often the comment at this point, each of these cases has its own particular circumstances and it is often difficult to make a direct comparison. This case has a particular aspect of distinction in that Mr. Hood suffered from a chronic condition resulting from radiation therapy, made markedly worse by the injury sustained in the collision. In short, he would have had ongoing leg pain if the injury had never happened. This, as I have already discussed, would not have disabled him from his employment or from his everyday activities at home, but nonetheless, he would have suffered a fair degree of discomfort from the pain and burning sensation in his leg.

[46] In *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 35, Mr. Justice Major makes the following point:

[35] ... The defendant need not put the plaintiff in a position better than his or her original position. The defendant is liable for the injuries caused, even if

they are extreme, but need not compensate the plaintiff for any debilitating effects of the pre-existing condition which the plaintiff would have experienced anyway. The defendant is liable for the additional damage but not the pre-existing damage: *Ken Cooper-Stephenson, Personal Injury Damages in Canada* (2nd ed. 1996), *supra*, at pp. 779-780 and John Munkman, *Damages for Personal Injuries and Death* (9th ed. 1993), at pp. 39-40.

[Emphasis added.]

[47] The parameters of a non-pecuniary damages award are those indicated in the judgment of Madam Justice Kirkpatrick in *Stapley v. Hejslet*, 2006 BCCA 34. On review of the authorities cited by the defence, I note that in *Costello, Gendron* and *Sananin*, the plaintiffs failed to prove any long term exacerbation of a previous condition. In the other cases cited, the injury was more moderate and less likely permanent than seen here.

[48] In reviewing the cases cited by the plaintiff, many concern more severe injuries; however, I find the effects of the injury in *Dulay* to be comparable. This said, *Dulay* did not have the complication of the pre-existing condition. Non-pecuniary general damages were assessed in *Dulay* at \$75,000.

[49] In my view, the now more painful and disabling condition of the right thigh is an exacerbation of considerably more effect on the plaintiff than the pain and restriction on his mobility originally associated with the results of the radiation therapy. In addition to this, he is coping with the improving but still symptomatic neck condition. In light of these factors, I assess non-pecuniary damages in this case at \$60,000.

### Conclusion

[50] Accordingly, the damages awarded are:

Past wage loss:	\$76,383.00
Lost earning capacity:	\$102,010.00
Cost of future care:	\$15,500.00

Non-pecuniary damages: \$60,000.00

Total: \$253,893.00

[51] Unless there is more to be heard on this matter, judgment is in the above sum and costs will be to the plaintiff at Scale B.

“W.G. Grist J.”

MEMORANDUM

TO: The Parties and Legal Counsel  
CC: All Legal Publishers  
FROM: Superior Courts Judgment Office  
DATE: February 18, 2013  
RE: **Case Name: *Hood v. Wrigley***  
**Neutral Citation: 2013 BCSC 231**  
**Docket: S21864**  
**Registry: Chilliwack**

2013 BCSC 231 (CanLII)

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Please be advised that the attached Reasons for Judgment of Mr. Justice Grist dated February 15, 2013 have been corrected as follows:

1. On the front page A.R. Ayliffe has been added as co-counsel for the Plaintiff.

A copy of this memorandum and attached Reasons for Judgment will be placed in the court file. The original Reasons for Judgment which were previously distributed will be retained in the court file.

Please direct any enquiries to the Superior Courts Judgment Office at: [scpublishing@courts.gov.bc.ca](mailto:scpublishing@courts.gov.bc.ca).

W.G.G. J.