



# Civil Resolution Tribunal

Date Issued: September 27, 2023

File: VI-2022-003798

Type: Accident Claims

Category: Fault & Damages

Civil Resolution Tribunal

Indexed as: *Stilwell v. Genoveffa*, 2023 BCCRT 825

B E T W E E N :

DAVID WADE STILWELL

**APPLICANT**

A N D :

FUMO GENOVEFFA

**RESPONDENT**

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## REASONS FOR DECISION

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Tribunal Member:

Kristin Gardner

## INTRODUCTION

1. This dispute is about a motor vehicle accident that took place on July 7, 2020 in Burnaby, British Columbia, between the applicant, David Wade Stilwell, and the respondent, Fumo Genoveffa.<sup>1</sup>
2. In the Dispute Notice, Mr. Stilwell claimed a total of \$97,000 in personal injury damages, including \$50,000 for future income loss, \$20,000 for future care costs, \$25,000 for extra subcontractor expenses, and \$2,000 for special damages (out-of-pocket expenses). The monetary limit at the Civil Resolution Tribunal (CRT) for liability and damages claims within its accident claims jurisdiction is \$50,000. Mr. Stilwell was informed about this limit and expressly agreed to abandon his claim to any amount over \$50,000.
3. Liability for the accident is not disputed.
4. The Insurance Corporation of British Columbia (ICBC) insures both parties. ICBC is not a party to this dispute.
5. The respondent says Mr. Stilwell has not provided sufficient evidence to prove he is entitled to any of the claimed damages.
6. Mr. Stilwell is self-represented. The respondent is represented by an authorized ICBC employee.

## JURISDICTION AND PROCEDURE

7. These are the CRT's formal written reasons. The CRT has jurisdiction over motor vehicle injury disputes, or "accident claims", brought under section 133 of the *Civil Resolution Tribunal Act* (CRTA). Section 133(1)(c) of the CRTA and section 7 of the

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<sup>1</sup> The CRT has a policy to use inclusive language that does not make assumptions about a person's gender. As part of that commitment, the CRT asks parties to identify their pronouns and titles to ensure that the CRT respectfully addresses them throughout the process, including in published decisions. As mentioned, Fumo Genoveffa is represented by ICBC. ICBC did not provide their pronouns or title. Because of this, I will refer to Fumo Genoveffa as the respondent and will use gender neutral pronouns for them throughout this decision, intending no disrespect.

*Accident Claims Regulation* give the CRT jurisdiction over the determination of liability and damages claims, up to \$50,000.

8. Section 2 of the CRTA states that the CRT's mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly. In resolving disputes, the CRT must apply principles of law and fairness.
9. Section 39 of the CRTA says the CRT has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. Here, I find that I am properly able to assess and weigh the documentary evidence and submissions before me. Further, bearing in mind the CRT's mandate that includes proportionality and a speedy resolution of disputes, I find that an oral hearing is not necessary in the interests of justice.
10. Section 42 of the CRTA says that the CRT may accept as evidence information that it considers relevant, necessary and appropriate, whether or not the information would be admissible in a court of law. The CRT may also ask questions of the parties and inform itself in any other way it considers appropriate.

## **ISSUE**

11. The issue in this dispute is to what extent, if any, Mr. Stilwell is entitled to his claimed damages.

## **BACKGROUND, EVIDENCE, AND ANALYSIS**

12. In a civil claim such as this, Mr. Stilwell as the applicant must prove his claims on a balance of probabilities (meaning "more likely than not"). While I have read all the parties' evidence and submissions, I only refer to what is necessary to explain my decision. I note that Mr. Stilwell did not provide any written final reply submissions, despite having the opportunity to do so.

13. Mr. Stilwell was rear-ended in a motor vehicle accident on July 7, 2020. There is no suggestion that Mr. Stilwell was responsible for the accident. It is also undisputed that Mr. Stilwell was injured as a result of the accident.
14. The evidence shows that ICBC internally determined that Mr. Stilwell's injuries were "minor injuries" under the *Insurance Vehicle Act* (IVA), and that Mr. Stilwell accepted ICBC's offer of \$5,627 for his non-pecuniary damages (pain and suffering). Mr. Stilwell does not dispute ICBC's minor injury determination or the non-pecuniary damages settlement.
15. However, Mr. Stilwell says that he has not recovered from his injuries, and that they have prevented him from working to his previous capacity. He says this has and will continue to impact his company's profits and his ability to earn a living. He also says he has not been reimbursed for treatment expenses he has incurred, and that he will require further treatment for his ongoing injuries.
16. As noted, Mr. Stilwell claims \$25,000 for additional subcontractor expenses for his company (which I find is a claim for past income loss), \$50,000 for future income loss, \$20,000 for cost of future care, and \$2,000 for special damages. However, as noted above, Mr. Stilwell expressly agrees to limit his claimed damages to \$50,000.

### ***Past income loss***

17. Mr. Stilwell says that he has suffered constant lower back, neck, and shoulder pain since the accident. He says his injuries have also negatively impacted his sleep. As a result, Mr. Stilwell says that he has largely been unable to perform his job duties.
18. Mr. Stilwell owns a company called Vidtech Security Services Inc. (Vidtech). Vidtech installs and repairs security cameras and equipment. The evidence shows that Mr. Stilwell is Vidtech's sole director, shareholder, and employee.
19. Mr. Stilwell does not argue that he has suffered direct past wage loss due to the accident. The tax returns in evidence show that Vidtech continued to pay his regular

salary, which Mr. Stilwell says was necessary for Vidtech to qualify for the COVID-19 Basic Canada Emergency Wage Subsidy.

20. However, despite receiving the government subsidy, Mr. Stilwell says that Vidtech still lost money due to his inability to work at his previous capacity. Specifically, he says Vidtech had to rely more on subcontractors to do work that he normally would have done himself but was unable to because of his injuries.
21. I find that Mr. Stilwell is entitled to recover a loss suffered by his company, given he is the controlling shareholder, so long as he proves the alleged loss and that it is directly linked to his injuries: see *Rezaei v. Leland*, 2013 BCSC 1650, referring to *Everett v. King* (1982), 1981 CanLII 716 (BC SC).
22. I turn first to the medical evidence of Mr. Stilwell's injuries.
23. The respondent provided clinical records from Mr. Stilwell's family doctor, Dr. William Grootendorst, as well as reports prepared by Mr. Stilwell's physiotherapist and chiropractor. These treatment providers each diagnosed soft tissue injuries to Mr. Stilwell's neck and lower back from the accident. None of the records suggest Mr. Stilwell had any pre-existing musculoskeletal injuries.
24. Dr. Grootendorst's records show that Mr. Stilwell's first visit was on July 20, 2020, 13 days after the accident. I acknowledge the respondent's submission that the record from that visit did not mention any recommendation that Mr. Stilwell take time off work. However, Dr. Grootendorst prepared an initial medical assessment report for ICBC during that visit, which stated that Mr. Stilwell had been absent from work as a result of the accident. The report indicated that Mr. Stilwell was then working modified duties and hours, but it did not provide any further details.
25. I also note that on a July 12, 2020 ICBC Insurance Claim Application (CL22), Mr. Stilwell indicated that he was unable to work, and in the box asking for the anticipated length of time off, Mr. Stilwell wrote: "see how treatment goes".

26. While there is no reference in Dr. Grootendorst's August 19, 2020 clinical record to Mr. Stilwell's employment, it noted ongoing symptoms, treatment referrals, and a prescription for anti-inflammatory medication. Dr. Grootendorst's September 2, 2020 clinical record stated that Mr. Stilwell had been off work since July 7, 2020 and was unable to perform his work duties. It also stated that his job did not involve any light duties. I interpret that to mean Mr. Stilwell's job duties required medium or heavy work, which he was unable to perform.
27. Mr. Stilwell's physiotherapist provided an initial report to ICBC on September 10, 2020, and a reassessment report dated January 29, 2021. The reassessment report stated the physiotherapist recommended that Mr. Stilwell work modified duties, and to specifically avoid repetitive overhead work.
28. There were also several references in Dr. Grootendorst's records to Mr. Stilwell working modified or light duties, including on June 22, 2021, June 28, 2021, and July 15, 2021. Dr. Grootendorst's July 15, 2021 reassessment medical report for ICBC stated that Mr. Stilwell was not working full duties or hours because he was unable to go up and down ladders or lift heavy items. I find those tasks are likely required to install security cameras and equipment.
29. Mr. Stilwell's chiropractor provided an initial chiropractic report to ICBC on July 16, 2021. In it, the chiropractor also recommended Mr. Stilwell work modified hours and modified duties. Notably, the chiropractor stated that Mr. Stilwell was too tender to properly assess him, with palpatory tenderness in his cervical and lumbar spine, as well as sensory deficit, motor weakness, and deep tendon reflex deficits noted particularly in his left arm.
30. I note that ICBC's medical calendar shows Mr. Stilwell attended regular treatment for his injuries, including massage, physiotherapy, and chiropractic treatments, between July 2020 and January 2022. Further, Dr. Grootendorst wrote an April 28, 2022 medical note stating that Mr. Stilwell required further massage therapy for myofascial and ligamentous injuries from the accident and recommended 12 more sessions.

31. In a September 14, 2022 medical note, Dr. Grootendorst stated that Mr. Stilwell reported he had missed work from July 7, 2020 to July 31, 2021 due to myofascial injuries from his motor vehicle accident, and that because his job did not involve any light duties, he relied on subcontractors to assist him. This is the most recent medical document before me.
32. Overall, I find the medical evidence shows that Mr. Stilwell's neck and lower back injuries impacted his ability to work in security system installation for more than a year after the accident. I agree with the respondent's submission that, based on Dr. Grootendorst's September 2, 2020 clinical record, Mr. Stilwell's time off work completely from July 7 to September 30, 2020 was medically supported. Given that Mr. Stilwell was Vidtech's only employee, I find that Vidtech likely relied on subcontractors to perform all security camera and system installation work during that period.
33. As Mr. Stilwell reported he was working modified hours and duties after October 1, 2020, which I find his treatment providers supported, I find that Mr. Stilwell was likely unable to perform all of his job duties from October 1, 2020 to at least July 31, 2021. So, I find Vidtech likely relied more heavily on subcontractors to perform installation work than it otherwise would have during that period.
34. Given my findings that Mr. Stilwell's injuries impacted his capacity to work after the accident, I turn to whether he has proven Vidtech suffered a corresponding loss.
35. Mr. Stilwell did not explain how he calculated the claimed \$25,000 loss for additional subcontractor expenses. He relies, in part, on a September 13, 2022 email from Vidtech's bookkeeper that set out the following about how much Vidtech spent on subcontractors in the year before the accident compared with the following 2 years:
- Year end July 31, 2020 - gross income: \$193,812.79, subcontractor expenses: \$40,164.80 (21% of income)

- Year end July 31, 2021 - gross income: \$181,841.18, subcontractor expenses: \$57,801.73 (32% of income)
- Year end July 31, 2022 - gross income \$234,501.86, subcontractor expenses: \$50,749.20 (22% of income)

36. I find those amounts are supported by the income tax and financial statements in evidence. So, while Vidtech's gross income went down in the year following the accident (which is undisputedly attributed to the COVID-19 pandemic), its spending on subcontractors increased.

37. Further, in a November 24, 2022 email to ICBC, Vidtech's bookkeeper set out the following comparison of Vidtech's 2019 income and subcontractor expenses for July 1 to October 31 and the same period in 2020:

- July 1 to October 31, 2019 – income: \$93,298.50, subcontractor expenses: \$10,861.90 (12% of income)
- July 1 to October 31, 2020 – income \$62,798.45, subcontractor expenses: \$10,105.60 (16% of income)

38. The respondent says that based on these figures, Vidtech had a 25% increase in subcontractor expenses for the 4 months after the accident compared with the same period the previous year. So, the respondent argues that the maximum loss due to extra subcontractor work should be \$2,526.25 (25% of Vidtech's \$10,105.60 in subcontractor expenses).

39. I do not agree with the respondent's position. Given the nature of Vidtech's business, I find it likely that the higher its revenue is, the more work it has, and the more it will have to subcontract out some of the work. In other words, I find that the proportion of Vidtech's revenue spent on subcontractors likely increases as its revenue increases, and the lower Vidtech's revenue is, the greater the proportion of work Mr. Stilwell can likely complete himself.



40. With that framework in mind, I find that Mr. Stilwell has established that Vidtech likely experienced a loss due to increased spending on subcontractors for work Mr. Stilwell was unable to perform after the accident.
41. Specifically, as Vidtech's income dropped by about 33% for the period July 1 to October 31, 2020 compared with the same period in 2019, I find its spending on subcontractors likely should have also decreased by at least 33%. Yet, it increased by 25%. Further, because Vidtech likely had less work during that period, I find Mr. Stilwell would have been able to complete a higher proportion of it himself. Instead, I find Vidtech had to rely exclusively on subcontractors during much of that period.
42. Similarly, the evidence shows that Vidtech's revenue decreased by about 6% in the full year following the accident (from \$193,81279 to \$181,841.80), yet its spending on subcontractors increased by 42% (\$40,164.80 to \$57,801.73). I find this increase was likely due to Mr. Stilwell's inability to work at all for the first 3 months after the accident and then working modified hours and duties due to his injuries. There is no other reasonable explanation before me.
43. Had Vidtech's subcontracting expenses decreased by the same 6% as its income decreased, it would have spent about \$37,750 on subcontractors in the year ending July 31, 2021. So, I find Vidtech likely spent about \$20,000 more than it would have if Mr. Stilwell had been working at his full capacity. Overall, I find Mr. Stilwell has proven Vidtech suffered an approximate \$20,000 loss due to increased spending on subcontractors because of Mr. Stilwell's injuries. I award Mr. Stilwell \$20,000 for past income loss.

### ***Future income loss***

44. I find the medical and financial evidence does not support Mr. Stilwell's claim for any income loss after July 31, 2021. There are no records from Dr. Grootendorst or any of Mr. Stilwell's other treatment practitioners after that date. So, I find it unproven that Mr. Stilwell was incapable of working full hours and full duties after July 31, 2021. I note that Dr. Grootendorst's September 14, 2022 medical note stated that Mr.

Stilwell's own report was that he only missed work to July 31, 2021. So, while Mr. Stilwell may not have fully recovered from his injuries, I find he has not established that his injuries prevented him from working after July 31, 2021.

45. Further, I find Vidtech's income and subcontractor expenses for the year ending July 31, 2022 do not show the same losses as the previous year. That is, Vidtech's revenue in 2022 increased by about 20% from what it was in 2020 (\$234,501.86 from \$193,812.79) and its subcontractor expenses increased by about 25% (\$50,749.20 from \$40,164.80). I find the increase in subcontractor spending likely reflects that Vidtech was busier (given the increased revenue), and so it had to subcontract out a greater proportion of the work.

46. I dismiss Mr. Stilwell's claim for future income loss.

### ***Special damages***

47. Mr. Stilwell says he has spent over \$1,400 on massage therapy that ICBC did not reimburse him for. Mr. Stilwell did not explain the difference between that amount and the claimed \$2,000 for special damages. Mr. Stilwell also did not provide any receipts, nor any other supporting documentation to show how much he spent on treatment or what treatment expenses he says ICBC has not reimbursed.

48. I note that section 88(1) and Schedule 3.1 of the *Insurance (Vehicle) Regulation* (IVR) set out the prescribed amounts for certain "health care loss" expenses, which includes massage therapy. The prescribed amounts are what ICBC is obligated to reimburse individuals for approved treatment under their first-party insurance, even if the treatment cost is more than the prescribed amount. The amount paid over the prescribed amount is generally referred to as a "user fee".

49. Section 82.2(2) of the IVA says that, in an action for damages, a person may not recover an amount that is more than the amount established or determined for the particular health care loss under the IVR. I find the effect of this section is that an applicant such as Mr. Stilwell is not entitled to claim "user fees" as damages, as the legislation provides they are limited to recovery of only the prescribed amount.

50. The evidence shows that ICBC paid the prescribed amount for various treatment expenses Mr. Stilwell submitted to ICBC. So, to the extent that Mr. Stilwell's claim is for reimbursement of any remaining "user fees", I find he is not entitled to such reimbursement.
51. It is unclear whether Mr. Stilwell is claiming that ICBC improperly failed to reimburse the prescribed amounts for certain massage therapy treatments. In any event, I find such a claim would be against ICBC under the CRT's jurisdiction over accident benefits.
52. For all these reasons, I dismiss Mr. Stilwell's claim for special damages.

### ***Future cost of care***

53. In the Dispute Notice, Mr. Stilwell also claims \$20,000 for future care costs. An award for cost of future care is generally based on evidence about various anticipated costs of providing adequate care for an injured party over their lifetime: see *Townsend v. Kroppmanns & Currie*, 2002 BCCA 365 at paragraph 33. Mr. Stilwell did not provide any evidence or submissions to explain what care he says he will require in the future. As noted above, the evidence indicates that ICBC has funded various treatment for Mr. Stilwell and there is no evidence that ICBC has refused to cover recommended treatment going forward.
54. Further, as noted above, the most recent medical note stating that Mr. Stilwell required further massage therapy treatment was dated April 28, 2022. I find this is insufficient to prove Mr. Stilwell will require treatment in the future. To receive an award for future care costs, Mr. Stilwell must establish what costs are reasonably necessary, and must provide medical evidence to support his claim: see *Aberdeen v. Zanatta*, 2008 BCCA 420 at paragraphs 41 and 42. I find Mr. Stilwell has not proven he is entitled to any award for future care costs. I dismiss this aspect of his claim.

## **FEES, EXPENSES, AND INTEREST**

55. The *Court Order Interest Act* applies to the award for Mr. Stilwell's past income loss. However, I find the evidence does not establish that the loss was incurred evenly over the approximate 13-month period that the award covers. So, on a judgment basis, I find Mr. Stilwell is entitled to pre-judgment interest on the \$20,000 from July 31, 2021, the end date of the loss period. This equals \$936.74.
56. Under section 49 of the CRTA, and the CRT rules, a successful party is generally entitled to the recovery of their CRT fees and reasonable dispute-related expenses. I find the parties were each partially successful, and so they are each entitled to reimbursement of half their CRT fees. Mr. Stilwell paid \$175, half of which is \$87.50. The respondent paid \$25, half of which is \$12.50. The net result is that Mr. Stilwell is entitled to reimbursement of \$75 for CRT fees.
57. Mr. Stilwell also claims \$350 for Vidtech's bookkeeper to prepare its monthly expenses. However, he provided no supporting documentation of this alleged expense, and so I find it is unproven. I dismiss Mr. Stilwell's claim for dispute-related expenses. The respondent did not claim any dispute-related expenses.

## **SUMMARY**

58. In summary, Mr. Stilwell is awarded \$20,000 in past income loss.
59. As noted above, pre-judgment interest and reimbursement for CRT fees are also payable to Mr. Stilwell.

## **ORDERS**

60. Within 30 days of the date of this decision, I order the respondent to pay Mr. Stilwell a total of \$21,011.74, broken down as follows:
- a. \$20,000 in damages,

- b. \$936.74 in pre-judgment interest under the *Court Order Interest Act*, and
- c. \$75 in CRT fees.

61. Mr. Stilwell is also entitled to post-judgment interest, as applicable.

62. Under section 57 and 58 of the CRTA, a validated copy of the CRT's order can be enforced through the Supreme Court of British Columbia or the Provincial Court of British Columbia if it is under \$35,000. Once filed, a CRT order has the same force and effect as an order of the court that it is filed in.

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Kristin Gardner, Tribunal Member