

CANADA / JUDGMENT

Ali v. Stacey

2020 BCSC 465

COURT

Supreme Court of British Columbia

DECIDED

30 March 2020

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

2020 BCSC 465 Ali v. Stacey

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Ali v. Stacey,

2020 BCSC 465

Date: 20200330

Docket: M154833

Registry: Vancouver

Between:

Saeideh Nessar Ali

Plaintiff

And

Paul J. Stacey

Defendant

Before: The Honourable Mr. Justice Gomery

Reasons for Judgment

Counsel for the Plaintiff:

I. Kordic

P. Bosco

Counsel for the Defendant:

A.W. Watchorn

A. Aujla, Articled Student

Place and Dates of Trial:

Vancouver, B.C.

February 18-21, 24-25, 2020

Place and Date of Judgment:

Vancouver, B.C.

March 30, 2020

Table of Contents

Introduction.. 3

Ms. Nessar Ali's injuries. 4

Background. 4

Credibility of Ms. Nessar Ali 5

Ms. Nessar's life and daily activities before the accident 6

The accident 7

Ms. Nessar Ali's physical injuries. 8

Ms. Nessar Ali's chronic pain and psychological injuries. 9

Effect of the injuries on Ms. Nessar Ali's daily life. 11

Prognosis. 11

Analysis. 12

(a) How much should Ms. Nessar Ali be awarded as non-pecuniary damages?. ... 12

(b) Is Ms. Nessar Ali entitled to a separate award for loss of housekeeping capacity?. 15

Legal framework. 16

Analysis. 18

(c) Is Ms. Nessar Ali entitled to an award in trust for her daughter in respect of household services provided by her daughter since the accident?. 19

(d) How much should Ms. Nessar Ali be awarded for the cost of future care?. 23

(e) Disputed special damages. 25

Disposition.. 26

Introduction

- [1] Ms. Nessar Ali was injured when the vehicle she was driving was struck by a vehicle owned and driven by the defendant. She sues for negligence and the defendant admits liability. This trial concerned the assessment of Ms. Nessar Ali's damages.
- [2] Ms. Nessar Ali is 70 years old. The accident took place on November 8, 2013, when she was 63 years old. The defendant's vehicle struck Ms. Nessar Ali's vehicle from the side and she ran into a pole. Her airbags deployed and her engine caught on fire. Her vehicle was a write-off.
- [3] Ms. Nessar Ali's case is that the accident changed her life for the worse, and the change was profound. Prior to the accident, she was in good health and enjoyed life. Since then, she has struggled with a shoulder injury that required surgery, an injury to her nose that required surgery, chest, back and knee pain, tinnitus, dizziness and balance issues, depression, anxiety, and post traumatic stress disorder, all caused by the accident. The defendant concedes most of this.
- [4] The parties have settled Ms. Nessar Ali's claim for wage loss (\$28,000) and the defendant concedes that she has suffered special damages totalling \$20,395.41. The issues are as follows:
 - (a) How much should Ms. Nessar Ali be awarded as non-pecuniary damages?
 - (b) Is Ms. Nessar Ali entitled to a separate award for loss of housekeeping capacity?
 - (c) Is Ms. Nessar Ali entitled to an award in trust for her daughter in respect of household services provided by her daughter since the accident?
 - (d) How much should Ms. Nessar Ali be awarded for the cost of future care?
 - (e) Is Ms. Nessar Ali entitled to further special damages?

Ms. Nessar Ali's injuries

Background

- [5] Ms. Nessar Ali is fluent in six languages. She is intelligent and articulate, and has had an unusual and eventful life.
- [6] Ms. Nessar Ali was born in Pakistan in March 1949. She attended university there, graduating at the age of 22 with an M.Sc. in applied psychology. She moved to Iran, where she had family on her mother's side. She taught psychology in a university for ten years in Iran. She married and had two children. Her daughter, Leily Saffari, was born in 1979, and her son, Jahan Saffari, was born in 1982. Both testified at the trial.

- [7] In 1982, following the revolution in Iran, Ms. Nessar Ali and her husband lost their jobs and fled the country. They went to Italy, where they were able to live on student visas. Ms. Nessar Ali studied phonetics and obtained a further university degree, but she could not work in Italy and had to leave when her university program concluded.
- [8] In 1988, Ms. Nessar Ali and her family came to Vancouver. She could not obtain credentials to work as a psychologist or teach psychology in a university in Canada. She found work cleaning awnings and, a year later, found work with a theatre company at an hourly wage.
- [9] In 1997, Ms. Nessar Ali left the theatre company to work for Kamloops Mental Health. This was work that called on her academic training. She found it fulfilling and was devastated when she was asked to leave after about a year. She experienced an episode of depression for which she was treated by a psychiatrist. After three or four months, she felt better and the treatment ended.
- [10] Ms. Nessar Ali separated from her husband in 2000. He returned to Iran and the children remained here with Ms. Nessar Ali. Ms. Nessar Ali and her husband are now divorced.
- [11] Ms. Nessar Ali found employment with Future Shop and then, in 2002, she qualified as an insurance agent and began working for American Income Life. This new occupation took her to many smaller centres across British Columbia, selling life and disability insurance to unionized workers. Ms. Nessar Ali enjoyed meeting with clients and driving from town to town. She becomes lyrical in describing the experience of driving long distances through British Columbia's mountains and high plains.
- [12] Ms. Nessar Ali was still employed as a life insurance agent at the time of the accident in November 2013, but she was experiencing and had experienced periods of short term disability in 2006, 2007, 2010, 2012 and 2013. In 2006 and 2007, she was treated for Hepatitis. The 2010 episode resulted from a bout of sciatica and the 2012 episode from a fall in which she hurt her tailbone. In 2013, she was off work following eye surgery for glaucoma. None of these episodes gave rise to health problems that persist today, except that compromised liver function resulting from the Hepatitis limits her ability to process some medicines.

Credibility of Ms. Nessar Ali

- [13] Ms. Nessar Ali is, for the most part, a credible witness. Her testimony was sincere and heartfelt. Most of it was uncontradicted and important parts of it were corroborated by her children.
- [14] I must add that Ms. Nessar Ali has a somewhat extravagant personality and some tendency to exaggerate. A rosy glow infuses her account of her life before the accident. In fairness, she is acutely unhappy now, and earlier times seem better to her now than they probably seemed at the time.

- [15] For example, in her evidence in chief, she testified that she enjoyed a vibrant social life: hosting monthly dinner parties for 10 to 15 people for whom she would cook 10 course meals, and frequently going out dancing with friends at their houses. She testified that, since the accident, she has lost all her friends. She is no longer able to dance or cook food for others. This testimony may be contrasted with an account of her earlier life offered to her treating psychiatrist, Dr. Nelken. He states, in his report:

Saeideh hadn't felt at home here since immigrating. She always felt alone and felt little in common with others. Having had experienced episodic hurtful events socially and interpersonally precluded nurturing close friendships and social supports. More significantly, having experienced a number of traumatic, life-changing events here, in addition to her MVA, eroded her trust and openness with others. At one time she described her experience here as "Hell". Essentially her work and her family has been her life. Prior to the MVA she did socialize, despite her feelings, and was reasonable, cordial, and adaptable to others and to a variety of social circumstances.

[Emphasis added]

- [16] As another small example, she testified in chief that she used to love reading, but she does not do that any more. She said that she can no longer focus, because of her severe depression. On the other hand, the defence expert, Dr. Calvert, reports that in November 2019, she told him that she no longer knits and sews but "she now reads in her spare time".

Ms. Nessar's life and daily activities before the accident

- [17] Immediately before the accident, Ms. Nessar Ali was still unable to drive in the aftermath of her cataract surgery. She was getting better and expected to return to work that she enjoyed.
- [18] Ms. Nessar Ali's daughter, Ms. Saffari, was married and living in San Diego with her husband. Her son, Mr. Saffari, was living in Toronto. Despite the distance, Ms. Nessar Ali maintained a close and affectionate relationship with both her children. She also kept in touch with her relatives in Iran and was planning a trip to Iran in late 2013.
- [19] Ms. Nessar Ali's children both describe their mother, before the accident, as a cheerful, optimistic, energetic and hard-working person. I have no reason to doubt this description.
- [20] Ms. Nessar Ali had a settled social life in Vancouver that suited her. She was a capable cook who enjoyed preparing meals for others. I accept her evidence that she regularly organized dinner parties for friends. While she says that she often went dancing at friends' homes, I suspect that this was more of an occasional activity. Many of Ms. Nessar's activities were solitary and I think she was content with that. She enjoyed reading, listening to music, knitting, crocheting, and gardening on the outdoor patio of her apartment. She took long walks for exercise and practised yoga on her own, and occasionally in a studio. She would sometimes go on outings to museums or just for a drive to see the sights.

The accident

- [21] On November 8, 2013, Ms. Nessar Ali was alone in her car, driving south on Cambie Street in Vancouver, towards the Oakridge shopping centre. It was mid-afternoon. At the intersection with 39th Avenue, the defendant's vehicle struck Ms. Nessar Ali's car on the driver's side, near the front wheel. The defendant's vehicle knocked Ms. Nessar Ali's off course, and she struck a pole head-on. Ms. Nessar Ali could not control her car and saw that she was going to hit the pole. She thought that she was going to die.
- [22] An airbag in Ms. Nessar Ali's car inflated, hitting her face and breaking her glasses. Her car's engine caught on fire. Despite the incentive provided by the fire and some help from bystanders, she had difficulty getting out of the car. She was taken to a hospital in an ambulance. She complained of pain in her eyes, nose, face, jaw, ear, legs, knees, right arm and chest.
- [23] Late that night, the hospital gave Ms. Nessar Ali a chit for a taxi and sent her home. She lives in a co-op apartment in the False Creek area. She was able to attract the attention of a neighbour who helped her up the stairs.
- [24] In the period immediately following the accident, Ms. Nessar Ali was in considerable pain. She could not get up and down stairs, bathe herself, or wash her hair. Friends helped for a few days, and then her daughter came from San Diego to stay with her. After that, she flew to Toronto where her son was living, and then flew with him to Iran to be cared for by her family. She returned to Vancouver several months later.

Ms. Nessar Ali's physical injuries

- [25] There is little dispute as to the physical injuries suffered by Ms. Nessar Ali as a consequence of the accident. They are:
- a) a torn rotator cuff in the right shoulder, which was surgically repaired, with some success, in February 2016. She is right-handed. This injury had a significant impact on Ms. Nessar Ali's ability to perform activities of daily living and she still experiences ongoing limitations of movement and pain from this injury;
 - b) lower back pain;
 - c) a deviated nasal septum, which was surgically repaired in 2015 and no longer causes her significant discomfort;
 - d) dizziness;
 - e) tinnitus; and
 - f) a left knee injury that, in conjunction with the back pain, dizziness, and anxiety, have caused her to curtail walking for pleasure and exercise.

- [26] Ms. Nessar Ali's complaints of shoulder and lower back pain are her most significant ongoing physical ailments. Except for the nasal septum, all of these injuries are ongoing more than six years following the accident and are unlikely to improve in the future.
- [27] Some of the doctors who gave evidence record complaints by Ms. Nessar Ali of a hip injury, but she did not mention a hip injury in her evidence and I take no account of it.
- [28] Similarly, some of the doctors record Ms. Nessar Ali's complaints of pain in the face, right jaw, and chest. In her evidence, she described these as pains suffered in the immediate aftermath of the accident, but not as ongoing complaints.
- [29] I accept Ms. Nessar Ali's evidence that her physical injuries from the accident presently limit her ability to pray; tend to personal care, such as washing herself and changing her clothes; tend to household chores; care for her grandchildren and take them in her arms; take long walks; and go for long drives. I accept her evidence that the shoulder, lower back and knee injuries in particular cause chronic pain that materially impairs her enjoyment of life. She is often aware of her pain.

Ms. Nessar Ali's chronic pain and psychological injuries

- [30] It is common ground that Ms. Nessar Ali suffered psychological injuries resulting from the accident. There is some dispute as to whether there is a psychological component to the chronic pain still experienced by Ms. Nessar Ali. Three expert witnesses testified as to these injuries.
- [31] Dr. Gillian Simonett, a physiatrist, testified that the chronic pain experienced by Ms. Nessar Ali has become chronic pain syndrome. She described this as "a general 'wind-up' or sensitivity to pain (that is, the nervous system gets 'better' at transmitting pain, even to the point that one can experience pain from a relatively minor stimulus)".
- [32] Dr. Nelken, a psychiatrist, testified that Ms. Nessar Ali suffers from Somatic Symptom Disorder ("SSD"). This is a psychiatric diagnosis from the Diagnostic and Statistical Manual used to diagnose mental disorders (commonly abbreviated, the "DSM-5") that identifies a psychological component in complaints of chronic pain.
- [33] Dr. Okorie, an independent psychiatrist retained by the defence, disagrees that Ms. Nessar Ali suffers from SSD. Dr. Okorie explained that chronic pain is a physical, not a psychiatric disorder, and he would defer to a physiatrist as to the presence of chronic pain. SSD is diagnosed where there is a reaction to pain that is outside the reaction one would expect; as he put it, SSD implies a psychological mechanism on top of what is obvious to everyone.
- [34] I do not need to decide whether there is a psychological component to Ms. Nessar Ali's complaints of chronic pain to quantify her claim for damages. It is enough that the pain is severe, persistent, and difficult to treat successfully. Drs. Simonett, Nelken and Okorie all agree that Ms. Nessar Ali's pain has these qualities.

[35] Dr. Nelken and Dr. Okorie agree that Ms. Nessar Ali has a Persistent Depressive Disorder with anxious distress in consequence of the accident. I accept their evidence. Translating this diagnosis out of the terminology of the DSM-5, Dr. Nelken testified that Ms. Nessar Ali experiences chronic depression: she is hyper-vigilant, constantly anxious, irritable, frustrated, impatient, has low energy, little desire, a negative attitude, and is unmotivated. All of this is consistent with Ms. Nessar Ali's own description of her mental state and her children's observations.

[36] Equivalently, Dr. Okorie states in his report:

Ms. Ali has persistent sadness, fatigue, sleep disruption, worthlessness, hopelessness, social isolation, excessive tearfulness, loss of interest/enjoyment, anxiety, and worries related to her future and occasional passive death wishes. In addition, she was flat and quite psychomotor retarded when I met with her.

Ms. Ali has been quite unhappy about the course of her life since she left Iran in the 80's and has struggled with integrating into Canadian society since she arrived in Canada in 1988. She had an episode of depression in the late 90's. By self-report and medical file review, Ms. Ali had no clinically significant emotional disorders in the years immediately prior to her subject MVA. In my opinion, her current depressive and anxiety symptoms were more than likely caused by her subject accident.

[37] Dr. Nelken and Dr. Okorie disagree as to whether Ms. Nessar Ali suffers from Post Traumatic Stress Disorder as a result of the accident; the dispute centres on whether she is experiencing flashbacks from the accident itself. She did not testify that flashbacks are now a problem for her.

[38] Dr. Nelken and Dr. Okorie agree that Ms. Nessar Ali has a particular anxiety associated with driving, which Dr. Okorie diagnoses as Specific (Driving) Phobia. I accept that, because of the accident, Ms. Nessar Ali suffers from an anxiety disorder specifically associated with driving. In effect, she has lost the ability to enjoy an activity she used to love. Ms. Nessar Ali's son, Mr. Saffari, confirms that she has become an anxious driver. He now avoids driving with her because she becomes terrified about what other drivers may do.

Effect of the injuries on Ms. Nessar Ali's daily life

[39] I have already summarized the limitations imposed on Ms. Nessar Ali's daily activities by her physical injuries. Taking her chronic pain and her psychological injuries into account, the effects on her life have been profound.

[40] Ms. Nessar Ali is no longer a cheerful, optimistic, energetic and hard-working person. She is depressed, anxious, pessimistic, and lacks energy and motivation.

- [41] Ms. Nessar Ali no longer has a settled social life that suits her. She now has very little social contact, apart from her daughter and grandchildren who now live with her. While her relationship with Ms. Saffari remains affectionate and they support one another, it is also complicated. Ms. Saffari attributes the collapse of her marriage to her decision to come to Vancouver to look after Ms. Nessar Ali. Ms. Nessar Ali is grateful for the support, but wishes that she had more time of her own.
- [42] Ms. Nessar Ali mostly spends her days at home. She no longer cooks for others. She still enjoys listening to music. I find that she still reads for pleasure, though not as much as before. She no longer drives for pleasure. She only walks relatively short distances. She gardens very little, and has given up knitting and crocheting.

Prognosis

- [43] None of the expert witnesses suggest that Ms. Nessar Ali is likely to get better. Her physical condition is stable. She has been under treatment for her psychological ills by Dr. Nelken since 2015.
- [44] Dr. Nelken has been treating Ms. Nessar Ali by a course of psychotherapy. The administration of antidepressants has been complicated by her compromised liver function and an aversion to medications on the part of Ms. Nessar Ali. She is taking an antidepressant, Trazodone, to help her to sleep, but only at a dosage that Dr. Okorie says is subtherapeutic for depression. It is not suggested that she has failed to comply with any recommendations for treatment. The defendant does not suggest that she has failed to mitigate.
- [45] The closest any of the experts comes to anticipating improvement lies in suggestions by Dr. Okorie of possible treatments that have not been tried and might assist Ms. Nessar Ali. These suggestions were not put to Dr. Nelken, who is the treating physician, and I do not know whether they will or should be attempted. Given Ms. Nessar Ali's present unhappy state and her lack of progress since 2015, it is plausible that something in addition to the present course of psychotherapy should be attempted, but that is a medical judgment I am not qualified to make. In any event, Dr. Okorie acknowledges that "the chronicity of her emotional disorders and her ongoing pain would challenge symptomatic and functional improvement in her case".
- [46] On the evidence before me, I must find that Ms. Nessar Ali is likely to continue to experience the physical and psychological ailments I have described for the rest of her life.

Analysis

- (a) How much should Ms. Nessar Ali be awarded as non-pecuniary damages?

- [47] 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 ref'd, [2006] S.C.C.A. No. 100 [Stapley]. 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.
- [48] Many of these factors point in the direction of a substantial award in this case. Ms. Nessar Ali suffered serious physical injuries in the accident. She has undergone two surgeries and is left with significant physical impairments. She experiences persistent severe pain that has become chronic and is likely to continue for the rest of her life. She experiences significant emotional suffering. Her personality has changed. Her relationship with her daughter is strained. She now lacks an emotional resilience she formerly possessed. She no longer enjoys her life as she did before, and she can no longer carry out many activities she formerly enjoyed.
- [49] 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.
- [50] Ms. Nessar Ali seeks an award of \$135,000. She relies on *Banic-Govc v. Timm*, 2018 BCSC 1073, aff'd 2019 BCCA 413 [Banic-Govc], *Ingram v. Munroe*, 2019 BCSC 234, *Paterson v. Hindle*, 2017 BCSC 1104 [Paterson], *Popove v. Attisha*, 2019 BCSC 1587, and *Sarginson v. Nordquist*, 2019 BCSC 1386.
- [51] The defendant relies on the following cases awarding damages equivalent to \$86,000 to \$100,000 in today's dollars: *Furlan v. The Owners, Strata Plan BCS3202*, 2016 BCSC 213 [Furlan]; *Park v. Donnelly*, 2017 BCSC 778 [Park]; and *Raptis v. Chalabiani*, 2017 BCSC 1548 [Raptis].
- [52] I find the defendant's cases unhelpful. They involve plaintiffs who were substantially younger than Ms. Nessar Ali and whose life circumstances were very different. In all three cases, the plaintiff's physical injuries dominated and mood issues were secondary. In *Furlan*, there was no psychiatric diagnosis. In *Park*, the plaintiff suffered anxiety and depression that resolved after eight to ten visits to a counsellor. In *Raptis*, the plaintiff suffered a mild pain disorder and an adjustment disorder with mixed anxiety and depression that was mild in intensity. In none of these cases, was the plaintiff's emotional suffering and psychological injury comparable to the profound injury suffered by Ms. Nessar Ali. In none of these cases, was the plaintiff left complaining of persistent, severe chronic pain comparable to that suffered by Ms. Nessar Ali.

- [53] The cases put forward by Ms. Nessar Ali involve older plaintiffs and damage awards in the range of \$110,000 to \$135,000. I agree with Ms. Nessar Ali's counsel, Ms. Kordic, that Banic-Govc is the closest to the present case on its facts. Ms. Banic-Govc was 61 years old at the time of the accident and 65 at the time of trial. As a result of an accident, she suffered headaches, constant back pain, a knee injury, and a mild depressive disorder with anxiety. She was awarded non-pecuniary damages of \$130,000, equivalent to \$135,000 in today's dollars. Justice Affleck found as follows:
- [54] The plaintiff has been transformed from a physically active woman into an inactive woman with constant, debilitating pain. Her physical condition is not likely to improve. The plaintiff's ability to engage in hiking or biking as she did before May 2014 is severely limited. Her social life has been greatly restricted. Her physical relationship with her husband has, at best, become a source of pain and of emotional distress. She was formerly a meticulous housekeeper but now finds herself distressed to realize that her house is "messy" and there is little she can do about it. Much of the housework is now impossible for her. She has enjoyed gardening when capable of doing so but much of that activity causes such pain that she cannot continue. Importantly, I accept that the plaintiff would have continued in her employment with the Boys and Girls Club to at least the age of 70 but the accident has brought that ambition to an end. It was one of the greatest sources of pleasure in her life.
- [Emphasis added]
- [54] The transformation is Ms. Banic-Govc's life, as described by Affleck J., is equivalent to that suffered by Ms. Nessar Ali, although the depressive disorder suffered by Ms. Banic-Govc appears to have been less serious than the psychological difficulties suffered by Ms. Nessar Ali.
- [55] Paterson is also instructive, although the plaintiff, Ms. Paterson, was significantly older (79 years old at the time of the accident). As a result of the accident, she suffered a head injury, a concussion, soft tissue injuries to her neck, shoulders and upper and lower back, and injuries to her pelvis and thighs. While some of these injuries resolved with time, at the time of trial she was experiencing chronic pain in her neck and ongoing cognitive and psychological problems, including memory problems, depression and anxiety. Justice Gerow awarded non-pecuniary damages of \$125,000, equivalent to \$132,000 today. She found as follows:
- [69] As noted earlier, although Ms. Paterson suffered from some depression and anxiety prior to the accident and had taken diazepam for many years, the evidence is that prior to the accident she was a very engaged and active senior. The accident caused a significant change in her personality and activity level. Since the accident she has been unable to return to many of the activities she enjoyed prior to the accident, including hiking, camping, driving, travelling, photography and writing. It is apparent from the evidence that Ms. Paterson has lost much of her independence since the accident, and has had a personality change, in that she is no longer as social and has lost her sense of humour.

[Emphasis added.]

- [56] While every case is different in its details, I find Banic-Gove and Paterson similar to this case, in that they involved hitherto active women in their 60s or 70s who suffered, as a result of an accident, significant physical injuries, chronic pain, a depressive disorder, and a loss of much that they valued in their lives before the accident.
- [57] Taking everything into account in light of these authorities and the other authorities cited by counsel, I award Ms. Nessar Ali non-pecuniary damages of \$135,000.
- (b) Is Ms. Nessar Ali entitled to a separate award for loss of housekeeping capacity?
- [58] Ms. Nessar Ali seeks an award of \$12,900 for loss of housekeeping capacity. The claim would be for an award of \$15,000, but Ms. Nessar Ali also claims \$2,100 in special damages for amounts paid to a house cleaner and she recognizes, correctly I think, that it would be double-counting for the amounts claimed to overlap.
- [59] The defendant maintains that compensation for loss of housekeeping capacity is ordinarily subsumed into compensation for non-pecuniary loss, and that should be the result here.

Legal framework

- [60] Each side rests its position on a recent considered decision of the Court of Appeal. Ms. Nessar Ali relies on *Kim v. Lin*, 2018 BCCA 77 at paras. 27-37 [Kim] and the defendant relies upon *Riley v. Ritsco*, 2018 BCCA 366 at paras. 96-103 [Riley]. Riley, which is the later of the two decisions, does not reference Kim.
- [61] In *Kim*, the plaintiff was a young woman who was rendered permanently unemployable by her injuries. The trial judge awarded damages in excess of \$1.78 million. This included an award of \$418,000 for loss of housekeeping capacity in addition to substantial non-pecuniary damages. The defendants appealed the award for loss of housekeeping capacity. The appeal failed.
- [62] In *Riley*, the plaintiff was a man nearing retirement age. His injuries were much less serious than those suffered by Ms. Kim. The trial judge awarded non-pecuniary damages of \$65,000 and refused Mr. Riley an award of \$10,000 for loss of housekeeping capacity. Mr. Riley appealed both points (and a third point of no present significance). The Court of Appeal allowed Mr. Riley's appeal of the non-pecuniary award, increasing the damages to \$85,000. It upheld the trial judge's dismissal of the claim for loss of housekeeping capacity.
- [63] Ms. Kim's \$418,000 claim for loss of housekeeping capacity succeeded, and Mr. Riley's \$10,000 claim failed. They were plainly different claims. Ms. Kim was struggling with devastating injuries that rendered her unemployable. Mr. Riley was not incapacitated to nearly the same degree.

[64] Chief Justice Bauman gave judgment for the Court in Kim. He described the issue - the valuation of loss of housekeeping capacity and whether it should be considered as pecuniary or non-pecuniary - as "somewhat vexing". At para. 31, he noted authorities emphasizing that "a loss of housekeeping capacity was just that, a loss of capacity, or the loss of an asset that should be compensated as a pecuniary loss regardless of whether the replacement services which are used to value the loss and determine the quantum of the award are actually purchased" [emphasis is that of Bauman C.J.B.C.]. He concluded:

[33] Therefore, where a plaintiff suffers an injury which would make a reasonable person in the plaintiff's circumstances unable to perform usual and necessary household work -- i.e., where the plaintiff has suffered a true loss of capacity -- that loss may be compensated by a pecuniary damages award. Where the plaintiff suffers a loss that is more in keeping with a loss of amenities, or increased pain and suffering, that loss may instead be compensated by a non-pecuniary damages award. However, I do not wish to create an inflexible rule for courts addressing these awards, and as this Court said in Liu, "it lies in the trial judge's discretion whether to address such a claim as part of the non-pecuniary loss or as a segregated pecuniary head of damage": at para. 26.

[Emphasis added.]

[65] Mr. Justice Groberman gave judgment for the Court in Riley. He stated:

[101] It is now well-established that where a plaintiff's injuries lead to a requirement that they pay for housekeeping services, or where the services are routinely performed for them gratuitously by family members or friends, a pecuniary award is appropriate. Where the situation does not meet the requirements for a pecuniary award, a judge may take the incapacity into account in assessing the award for non-pecuniary damages.

[Emphasis added.]

[66] The defendant relies particularly on the following passage from the next paragraph in the judgment:

[102] In my view, segregated non-pecuniary awards should be avoided in the absence of special circumstances. There is no reason to slice up a general damages award into individual components addressed to particular aspects of a plaintiff's lifestyle. While such an award might give an illusion of precision, or suggest that the court has been fastidious in searching out heads of damages, it serves no real purpose. An assessment of non-pecuniary damages involves a global assessment of the pain and suffering, loss of amenities, and loss of enjoyment of life suffered by a plaintiff. By its nature, it is a rough assessment and not a mathematical exercise.

[Emphasis added.]

- [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

- [68] I must consider the nature of the loss claimed by Ms. Nessar Ali in connection with household work.
- [69] Immediately following the accident, Ms. Nessar Ali was unable to care for herself. Her daughter, Ms. Saffari, and her son helped her. Ms. Saffari's assistance is the subject of an in trust claim I consider separately below.
- [70] Independently of the assistance provided by her children, Ms. Nessar Ali paid her friend, Ms. Chu, to assist her with housework. I have already noted that the amounts paid to Mr. Chu are the subject of a claim for special damages that is also considered separately below. However, it is relevant to note here that Ms. Chu provided her services for 34 hours in 2015, 47.5 hours in 2016, 53.5 hours in 2017 and only 9 hours in 2018. Ms. Chu has not cleaned for Ms. Nessar Ali since April 2018. Ms. Saffari and her children moved in with Ms. Nessar Ali in October 2017, shortly after the birth of Ms. Saffari's second child in August 2017. I infer that Ms. Saffari gradually took over responsibility for the housekeeping Ms. Chu had been doing, and that is why Ms. Chu's services were no longer required.
- [71] Ms. Saffari testified that Ms. Nessar Ali can do light cleaning with a Swiffer, and Ms. Saffari does the rest: deep cleaning, vacuuming, and the bathrooms. Ms. Saffari does all the cooking.

- [72] I find that, as a result of the accident, Ms. Nessar Ali requires assistance to cope with regular housekeeping chores. If Ms. Saffari were not living with her, Ms. Nessar Ali would have to pay Ms. Chu or someone else for housekeeping services. In short, Ms. Nessar Ali has suffered a loss of housekeeping capacity best remedied by a pecuniary award. This will enable Ms. Nessar Ali to pay for the housekeeping assistance she will require in the future.
- [73] It is not a big apartment and I doubt that Ms. Saffari and her children will live there indefinitely. In any event, any in trust award I make for Ms. Saffari's benefit will look backwards to services already provided, and not forward to housekeeping that may or may not be done by Ms. Saffari in the future.
- [74] Ms. Chu charged \$15 per hour for the housekeeping services she provided. Over 2015 through 2017, Ms. Nessar Ali paid Ms. Chu an average of \$660 annually. I find that an overall award of \$10,000 will fairly compensate Ms. Nessar Ali for her loss of housekeeping capacity. Subtracting the \$2,100 claimed as special damages to avoid double counting, the award is \$7,900.
- (c) Is Ms. Nessar Ali entitled to an award in trust for her daughter in respect of household services provided by her daughter since the accident?
- [75] Ms. Nessar Ali seeks an "in trust" award of \$92,240 in recognition of care and services provided by Ms. Saffari from the date of the accident to the date of trial. The claim is based on an estimate of hours spent by Ms. Saffari (3,360) at an effective hourly rate of \$27.45. The rate is a compromise between the \$15 per hour charged by Ms. Chu and the \$30-\$40 per hour charged by a bonded professional.
- [76] The defendant resists the claim on two grounds: first, that the services provided by Ms. Saffari are no more than what is typical for a family relationship; and second, that Ms. Saffari has obtained benefits in the form of free room and board from her living arrangement with Ms. Nessar Ali.
- [77] It is settled law that a damage award may include an "in trust" component in recognition of the care and services provided to the plaintiff by a family member such as Ms. Saffari; *Dykeman v. Porohowski*, 2010 BCCA 36 at para. 28 [*Dykeman*]; *Farand v. Seidel*, 2013 BCSC 323 at paras. 99-100. Though described as "in trust" awards, the plaintiff recovers them and British Columbia courts do not generally impose trust terms in their orders; *Dykeman* at para. 28. Despite occasional dicta to the contrary, these awards are not limited to cases in which the injury is "grievous" or serious; *Dykeman* at para. 29. The care and services provided must be necessary because of the plaintiff's injuries and they must be over and above what is to be expected from the family relationship.
- [78] Ms. Saffari's services in caring for her mother were necessary in light of the injuries suffered by Ms. Nessar Ali, and they went well over and above what was to be expected from the family relationship. Accordingly, an in trust award is justified in this case. The amount of the award is another matter.

- [79] Immediately after the accident, Ms. Saffari came to Vancouver from her home in San Diego and spent two weeks caring for her mother, who then required help with activities of daily living such dressing, moving about, personal care and meal preparation. This was much more than was to be expected as a normal part of the family relationship. I accept Ms. Saffari's evidence that she averaged 40 hours a week or 80 hours in total caring for her mother in this period.
- [80] In the fall of 2015 to the spring of 2016, Ms. Saffari and her husband moved to be closer to Ms. Nessar Ali to help her cope. Ms. Saffari left her job in San Diego, where she had worked as a bank teller. Her husband left his job and looked for work and a home for the family in Bellingham. Ms. Saffari and her son (born in May 2014) moved in with Ms. Nessar Ali. From the fall of 2015 until February 2016, Ms. Saffari estimates that she spent 40 hours per week cooking, cleaning, shopping, driving her mother to appointments and so on. Ms. Nessar Ali submits that 50% of this time - 20 hours per week for 24 weeks or 480 hours in total - should be compensated. The other 50% would represent time spent by Ms. Saffari looking after herself and her infant child.
- [81] In February 2016, Ms. Nessar Ali had her shoulder surgery and the work required of Ms. Saffari became more intensive. She estimates that she spent 60 hours per week as a caregiver for about a month, and then the workload went back down to 40 hours per week. This lasted until November 2016, when her husband found a place for them in Bellingham, and she and her son moved out. Ms. Nessar Ali submits that 100% of a four-week period at 60 hours a week (240 hours) and 50% of the following 20 weeks at 40 hours a week (400 hours) should be compensated.
- [82] Ms. Saffari's decision to abandon her job and return to Canada to look after her mother was more than what was ordinarily to be expected of an adult daughter. An award is justified in respect of this period. Bearing in mind that Ms. Saffari was looking after a young child throughout the period from the fall of 2015 to November 2016, I think that Ms. Nessar Ali's submissions overstate the claim in one respect. While the estimate of time dedicated to Ms. Nessar Ali's care are for the most part reasonable, the estimate for the period of the surgery should be reduced to 180 hours. Accordingly, I would allow for 1,060 hours of service in total for this period.
- [83] Ms. Saffari lived in Bellingham with her husband until the fall of 2017. Her second child was born in August 2017. She testifies that, in this period, she visited her mother three or four times a week. She was cooking and freezing meals for her mother. Ms. Chu was doing the cleaning. Ms. Saffari estimates that she spent 20 hours a week helping her mother this way. Ms. Nessar Ali submits that I should allow 20 hours a week or 960 hours in total for the help provided by Ms. Saffari in this period. I do not think this is reasonable. Assuming there were four visits per week, I am sure that there was some time spent socializing and Ms. Saffari would not have spent, on average, five hours per visit dedicating herself to cooking and freezing meals. I would allow 480 hours for the help provided by Ms. Saffari in this period.

- [84] In the fall of 2017, Ms. Saffari and her husband separated and she and the children moved in with Ms. Nessar Ali. Since then, she estimates that she has devoted approximately 20 hours per week to caring for her mother. She is not paying rent. Ms. Nessar Ali submits that, taking into account that some of the housekeeping is for the benefit of Ms. Saffari and her children and the benefit to Ms. Saffari of rent-free accommodation, she should be compensated for services at 10 hours per week or an estimated 1,200 hours in total.
- [85] I find that, in this period, Ms. Nessar Ali has continued to benefit from personal care and housekeeping provided by Ms. Saffari that is over and above what is ordinarily to be expected of a family member. The net benefit to Ms. Nessar Ali, on a weekly basis, is equivalent to the assistance provided by Ms. Saffari when she was living in Bellingham, that is, 10 hours per week, or 1,200 hours in total.
- [86] Accordingly, I find that there should be an in trust award reflecting a total of 2,820 hours of personal care and assistance provided by Ms. Saffari over the six years and four months since the accident.
- [87] Some of the care and assistance provided by Ms. Saffari could have been provided by someone like Ms. Chu working at \$15 per hour. Some of the personal care would reasonably have required more professional assistance. The evidence is that professional home support services cost \$25.75 to \$27.50 per hour in 2016 and now cost \$30 to \$40 per hour. I find that it is reasonable to value the care and assistance provided by Ms. Saffari at a blended rate of \$22 per hour.
- [88] Accordingly, I award Ms. Nessar Ali an in trust award of \$62,000 (rounded from \$62,040) in respect of the care and assistance provided by Ms. Saffari.
- (d) How much should Ms. Nessar Ali be awarded for the cost of future care?
- [89] Ms. Nessar Ali seeks an award of \$92,240 for the cost of future care. The award is to compensate Ms. Nessar Ali for Advil, cognitive behavioural therapy, occupational therapy and home care. The claim for home care (\$80,080) represents the greater part of the claim.
- [90] The defendant disputes that an award for the cost of future care is justified, although he accepts that Ms. Nessar Ali may require Ms. Chu's assistance with household cleaning in the future.
- [91] The legal principles governing awards for the cost of future care are settled. The purpose of such an award is to restore, so far as is possible with a monetary award, the plaintiff to the position she would have been in had the accident not occurred. The award is 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. 29-30 [*Gignac*], citing *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.) and *Aberdeen v. Zanatta*, 2008 BCCA 421 at para. 41.

- [92] Each part of the claim must be supported by the medical evidence. If the plaintiff relies on the report of an occupational therapist or rehabilitation consultant, there must be an evidentiary link between the medical evidence and the recommendations in the report; Gignac at para. 31. If the plaintiff has not used or sought out a service in the past, it will usually be difficult for her to justify a claim in respect of that service; Warrick v. Diwell, 2018 BCCA 53 at para. 55.
- [93] Ms. Nessar Ali's claim is based in part on a report prepared by an occupational therapist, Ms. Wong. Unfortunately, Ms. Wong's report is four years old and was prepared before Ms. Nessar Ali's shoulder surgery. Ms. Wong's recommendations are stale, and I must take that into account.
- [94] I turn to the various items making up the claim for the cost of future care.
- [95] Ms. Nessar Ali takes Advil daily. She is in pain and Advil provides symptomatic relief. Though her usage of Advil is noted in various expert reports, the only evidence that any physician has actually recommended it is Dr. Nelken's recommendation for "judicious use of medications, as indicated". There is no evidence that any physician has advised against it. I am satisfied that Ms. Nessar Ali's continuing consumption of Advil is reasonably necessary in light of her medical needs and condition. Ms. Wong's report estimates the annual cost at \$456. Considering Ms. Nessar Ali's age, I award \$4,560 for Advil.
- [96] The claims for cognitive behavioural therapy and occupational therapy are based on Dr. Okorie's evidence that these are treatment modalities that might assist Ms. Nessar Ali. Dr. Okorie is not the treating physician and there is no evidence from a treating physician recommending these therapies. Ms. Nessar Ali has not pursued these therapies and did not testify that she wishes to pursue them. I am unable to find that she is likely to incur these costs.
- [97] I turn to the claim for home care. Dr. Nelken recommends that home support services be available. I am satisfied that Ms. Nessar Ali will continue to require support at home. As set out in Ms. Wong's report, her need for support resulting from the accident, as compared to her need for support resulting from the inevitable incidents of old age, will eventually diminish.
- [98] Ms. Nessar Ali's need for home care is simply a continuation of the need that gave rise to the in trust award and can be quantified consistently. The in trust award includes an allowance for time spent by Ms. Saffari tending to housekeeping. I have awarded \$7,900 for loss of housekeeping capacity. To avoid double counting, I estimate Ms. Nessar Ali's need for future home care, excluding housekeeping, at eight hours rather than ten hours a week. This implies a need for 416 hours of home care per year. At \$22 per hour, the anticipated annual cost is \$9,152. I accept Ms. Nessar Ali's submission that the annual cost may be forecast to reduce (by comparison to what she would have needed in any event) to \$2,288 after she attains age 75, and to zero after she attains age 78. Accordingly, I award \$43,500 (rounded from \$43,472).

(e) Disputed special damages

- [99] Ms. Nessar Ali claims \$10,699.14 for special damages in addition to those conceded by the defendant. The defendant accepts that Ms. Nessar Ali incurred the expenditures in question but disputes that they are properly claimed. The disputed expenditures fall into two categories: housekeeping services provided by Ms. Chu, at \$15 per hour (\$2,100); and transportation expenses incurred for taxis (\$897.96) and rental cars (\$7,770.18) following the accident. The defendant notes that all of the disputed transportation expenses were incurred after June 2014, when Ms. Nessar Ali was paid \$637.28 for her car, which was all that it was worth.
- [100] It will be obvious from my analysis to this point that I consider that the amounts paid to Ms. Chu were necessarily and reasonably incurred.
- [101] All of the disputed transportation expenses were incurred after Ms. Nessar Ali sold her car in June 2014. The defendant says that, from that point forward, it was up to Ms. Nessar Ali to pay her own transportation costs again, either by buying another car or making other arrangements. Ms. Nessar Ali says that she could not afford to buy another car with the amount she was paid.
- [102] The defendant is correct. It is unfortunate for Ms. Nessar Ali that she was driving a car that had so depreciated in value that she could not pay for a replacement with the money she received for it, but it would not be right or fair to the defendant require it to pay Ms. Nessar Ali's transportation costs indefinitely. Moreover, Ms. Nessar Ali's assertion that she could not afford to replace the car does not withstand scrutiny. She had sufficient funds to be able to spend more than \$7,700 on car rentals between August 2014 and January 2016. She could undoubtedly have purchased a used car to replace the one she lost for less than that.
- [103] I allow \$2,100 for disputed special damages. This is in addition to the agreed special damages of \$20,395.41. The total is \$22,495.41.

Disposition

- [104] For these reasons, I award Ms. Nessar Ali damages totalling \$298,895.41 as follows:
- a) special damages: \$22,495.41;
 - b) agreed wage loss: \$28,000;
 - c) non-pecuniary damages: \$135,000;
 - d) loss of housekeeping capacity: \$7,900;
 - e) in trust award: \$62,000; and
 - f) cost of future care: \$43,500.

[105] Unless there are matters that must be brought to my attention, Ms. Nessar Ali is entitled to her costs on scale B. If the parties wish to make submissions concerning costs, they may do so in writing through the registry. The parties' written submissions should not exceed 5 pages in length (excluding any appendices) and should be exchanged according to a schedule to be agreed between counsel.

"Gomery J."

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/20/04/2020BCSC0465.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/ali-v-stacey-2020>

Prepared on 25 October 2026 · Esheria