
CANADA / JUDGMENT

Broomfield v. Lof

2019 BCSC 1155

COURT

Supreme Court of British Columbia

DECIDED

17 July 2019

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2019 BCSC 1155 Broomfield v. Lof

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Broomfield v. Lof,

2019 BCSC 1155

Date: 20190717

Docket: M151769

Registry: Vancouver

Between:

Clare Broomfield

Plaintiff

And:

Ryan E. Lof and Lisi Mechanical Contractors Ltd.

Defendants

Before: The Honourable Justice Young

Reasons for Judgment

Counsel for the Plaintiff:

S. D. Ballard

Counsel for the Defendants:

C. D. Jago and R. Rakhra

Place and Date of Trial:

Vancouver, B.C.

June 10 - 14, 2019

Place and Date of Judgment:

Vancouver, B.C.

July 17, 2019

Introduction

- [1] The plaintiff was injured in a motor vehicle accident on January 7, 2014. She was 42 years of age at the time of the accident. The defendants' vehicle rammed into the back of the plaintiff's vehicle while her vehicle was stopped at a traffic light. The impact was significant and liability has been admitted for the accident. The plaintiff suffered injuries to her neck, right shoulder, right arm and lower back. She also suffered from headaches, dizziness and depression. The quantum of non-pecuniary damages, damages for loss of future earning capacity and loss of housekeeping capacity are at issue.
- [2] At the time of the accident, the plaintiff had been working full-time as a special education assistant for several years. As a result of the accident she was off work for fourteen months and started a gradual return to work in March 2015. She took a further leave from work in January 2016 and made a few attempts to return to work which were unsuccessful until November 2018 when she returned to work 80% of full-time with medical modifications.
- [3] The plaintiff says that while she had some health issues prior to the accident, she was not suffering from any limitation to her ability to work or participate in sports and social activities. The defendants assert that there were some limitations on her ability to work prior to the accident.
- [4] It is agreed that the plaintiff has been very diligent in her attempts to recover from her injuries.

Non-pecuniary damages

Injuries

- [5] On impact, the plaintiff's head was turned to the left as she was checking for oncoming traffic. She immediately felt a funny sensation on the top of her head and all through her jawline. She felt nauseous and ill. Her neighbour took her to her family doctor the same day. Her family doctor diagnosed her with a concussion and soft tissue injury and told her to stay off work.

- [6] For the first three months, the plaintiff suffered constant headaches, and severe neck and jaw pain which radiated to her shoulders and arms. She also suffered back pain from the bottom of her neck to the top of her hips.
- [7] The plaintiff experienced dizziness and nausea immediately after the accident. After six months, the headaches stopped being constant. She would still experience them four times a week and although the frequency decreased, the intensity did not. Severe headaches causing nausea could last for days.
- [8] Two weeks after the accident, the plaintiff became depressed, irritable, argumentative and withdrawn. Her mental condition worsened in this six months to one-year period. She was diagnosed with severe depression. She also suffered anxiety about driving and about potential social interactions. She has been treated with antidepressant medication.
- [9] At the time of trial, 4 1/2 years after the accident, the plaintiff still suffers from mild depression and continues to take antidepressant medication. She has been diagnosed with chronic somatic symptom disorder which was previously referred to as chronic pain disorder. Her headaches have improved in frequency, but she still gets 2 to 3-day headaches with nausea connected to neck pain.
- [10] At her examination for discovery in May 2016, the plaintiff estimated that her neck pain had improved 60% to 70%. Since then, she has suffered an increase of neck pain and would estimate that, at the present time, she has only had a 50% to 60% improvement in her neck pain.
- [11] The plaintiff's shoulder pain and right arm pain has improved 60% to 70% and she has regained some range of motion. She has had a 50% to 60% improvement in her low back pain and she had had some increased range of motion. Her hip pain has improved 70% to 80%. The plaintiff says that she has returned to some of her social activities. She has not returned to her pre-accident physical activities, but is attempting short cycling trips and walking longer distances.

Plaintiff's condition prior to the motor vehicle accident

- [12] The plaintiff and four lay witnesses testified as to her physical and emotional condition prior to and after the motor vehicle accident.
- [13] The plaintiff testified in a forthright and credible manner about her injuries and her path of recovery. Her lay witnesses were also very credible.
- [14] The plaintiff testified that she was a consistently hard worker for many years before she started working as a special education assistant. She had worked as a veterinary assistant for several years and worked at Starbucks at the same time. Before the accident, she was employed by West Vancouver School Board from 2008 to 2014 as a special education assistant at an elementary school. She worked with children on the autism spectrum, children with severe physical disabilities, and children with extreme behaviour issues. She

also worked with children who had medical conditions such as diabetes or seizures, and children with learning disabilities. At the time of the accident, she was working with children from the kindergarten level to grade 7 on a full-time basis five days a week for a total of 27.6 hours per week.

[15] The plaintiff testified that she had no physical limitations in performing her duties. She did, however, suffer from a knee injury many years ago and had to withdraw from an exercise science course. She was diagnosed with a benign pituitary tumor in 2012 and missed time from work while adjusting to medication. She has suffered from occasional migraines and hypertension prior to the accident.

[16] In 2012, she requested a modification in her employment when she was working with a particularly challenging child. In an email to her employer dated September 12, 2012, the plaintiff said:

As you may know because of my medical condition I am not able to run around and chase students and unfortunately I feel my stress level rising at many times throughout the day.

[17] Her employer wrote back and asked the plaintiff for a doctor's note indicating how her medical condition affected her ability to fulfil her duties in working with this particular student.

[18] The plaintiff's family physician, Dr. Ellison, wrote a note for her on September 9, 2012. Dr. Ellison admitted in his testimony that he was advocating for his patient. In his letter to the employer he wrote:

Ms. Broomfield suffers from migraines, hypertension and brain tumors. Exposure to this child greatly exacerbates her medical problems.

If asked, I would recommend that Clare either job share with this child's care or be reassigned to a new job.

[19] In cross-examination, the plaintiff made efforts to downplay her pre-accident condition by saying that she worded the email to her employer incorrectly. When she said she could not "chase students" she intended to say I cannot "chase this student through a forested playground". Her explanation is that this letter related specifically to one particularly difficult child and that she had no limitations in her employment.

[20] I accept the plaintiff's evidence that this was a particularly challenging child, but I do not accept her evidence that the plaintiff had no limitations. Her pituitary tumor did cause her occasional migraine headaches up to twice a month. Occasionally, she had to take time off work which is estimated at 3 to 4 days of work per year. Presumably when she referred to her stress level in her first email she was making reference to her hypertension. There is no evidence that her pre-existing knee problem was still causing her limitations at this time.

- [21] I conclude that she had some minor limitations at work which were causing her to miss 3 to 4 days of work per year which is not a significant limitation.
- [22] I also accept the plaintiff's evidence that her job was very physical, and required her to chase children and participate in physical activities to model the activities for her students. She spent a lot of time on her feet or squatting down beside desks speaking to students. She was also responsible for supervising the playground during the recess and lunch breaks.
- [23] Prior to the accident the plaintiff participated in long-distance cycling, hiking, stand-up paddle boarding 12 times a season and snowboarding four times a season. She also participated in a strenuous outdoor boot camp on Saturdays. She always had a dog and would walk the dog on a daily basis.
- [24] She was active in her home and doing crafts and hobbies. She was outgoing and socially gifted. She organized hallway parties and birthday parties for the owners on her floor of her condominium complex.
- [25] By all accounts, the plaintiff was a fastidious housekeeper.
- [26] The lay witnesses who testified on behalf of the plaintiff consistently endorsed this evidence of the plaintiff's pre-accident physical and social activities.

The impact of the motor vehicle accident on the plaintiff's physical and social activities

- [27] Due to her physical injuries and depression, I find that the motor vehicle accident had a significant impact on the plaintiff's enjoyment of life.
- [28] The plaintiff became frustrated, irritable, argumentative and withdrawn as a result of her initial severe depression. She did not want to socialize. In fact she did not want to step out of her door and have a conversation with neighbours with whom she actively socialized before the accident.
- [29] She had been in a romantic relationship for 1 1/2 years which broke up after the accident. She attributes the break up to her irritable condition. She lost friendships as a result of her irritability.
- [30] She could not drive for six months and is still anxious about driving to this day. She had difficulty with sleeping because she could not get comfortable.
- [31] She had to rely on her neighbour to walk her dog and after six months hired a professional dog walker.
- [32] She could not do her housework in the first three months after the accident. She could not afford a cleaner and so has had to rely on her boyfriend and her neighbour to assist her with cleaning tasks.

- [33] The plaintiff has had to borrow close to \$100,000 from her parents to assist her in paying her mortgage. Eventually she moved out of her condominium and rented it out so that she could retain it. She is living in her father's basement suite. She is very anxious about borrowing so much money from her parents and says that it has put a strain on her relationship with her siblings.
- [34] I will deal with the impact of the motor vehicle accident on the plaintiff's employment below, but in terms of assessing her loss of enjoyment of life, the plaintiff has returned to work on medical modifications, but is very concerned about her job security.
- [35] She is now attempting short cycling trips along a flat trail from her home in Kitsilano to Jericho Beach along point Grey Road. She has tried it four times since January 2019. She is able to walk her dog around her home and occasionally along the beach or in the UBC endowment lands. She attempted stand-up paddle boarding once and did not continue as it aggravated her back. She has not attempted snowboarding or any hiking.
- [36] Her social life has improved somewhat because she has been in a relationship with Nick since 2015. Much of her prior social life revolved around physical activity and so some of those social outlets have not resumed.

Medical investigation and treatment

- [37] I agree that the plaintiff has diligently followed her doctor's treatment plan. She underwent massage therapy and physical therapy up to twice a week. She underwent a further round of physiotherapy from June 2017 to February 2019 with a different physiotherapist using different techniques. She purchased a massage chair to assist in easing her pain.
- [38] The plaintiff also underwent two courses of active rehabilitation. She attended CARP fitness under ICBC's funding. After ICBC discontinued the funding for her program she attended the Back in Motion program funded by her private insurer. Although she still suffers chronic pain, she has been able to strengthen herself and improve her range of motion. She also attended several sessions with a psychiatrist, but had limited opportunity to receive cognitive behavioural therapy.

Expert opinions

Dr. Ellison - Family Physician

- [39] Dr. Ellison has been the plaintiff's family physician since 1985. He has recently retired.
- [40] He diagnosed the plaintiff's flexion and extension injury to her neck and prescribed anti-inflammatories and told her to stay off work. He prescribed physiotherapy and acupuncture in the summer of 2014. She became quite depressed after her injuries and he referred her to Dr. Mittler, a psychiatrist, regarding her depression and insomnia. At that time Dr. Mittler felt she showed features of major depression with chronic pain and insomnia. He prescribed one antidepressant which she could not tolerate and then switched her to

Wellbutrin. Her depression seemed to worsen in 2015.

- [41] In June 2018, due to her ongoing neck pain, Dr. Ellison ordered an MRI of her cervical spine. It showed at C-4 to C-5 there were mild posterior disc osteophytes. There was also moderate left neural stenosis caused by osteoarthritis. She saw a neuromuscular specialist in 2018 who said that her neck showed some degenerative changes which were not terribly pronounced. It is Dr. Ellison's opinion that the plaintiff's limitations will persist for the foreseeable future for both her work and non-work activities.

Dr. Steven Helper - Physiatrist

- [42] Dr. Helper was qualified to give opinion evidence on physical and rehabilitation injuries caused by motor vehicle accidents.
- [43] His primary diagnosis is that the plaintiff suffered soft tissue injury to the neck. He also has a differential diagnosis of mechanical pain of the cervical spine and suspicion that her pain emanates from the cervical facet joints.
- [44] On physical examination, Dr. Helper noted that the plaintiff has a rotated posture. Her right pelvis is rotated anteriorly which results in an external rotation of her right leg and a gentle right lumbar and left thoracic scoliotic curve. He does not believe that this rotated posture causes significant pain, but may have made her more susceptible to muscle imbalance across the shoulder resulting in soft tissue pain. This is of significance because he thinks this postural imbalance should be treated first.
- [45] Dr. Helper cannot tell whether the plaintiff's rotated posture was caused by the accident or was pre-existing.
- [46] In Dr. Helper's opinion, the plaintiff's low-back complaints result from a soft tissue injury caused by the motor vehicle accident. The symptoms may be aggravated by her rotated posture. The plaintiff's prognosis has been negatively influenced by the passage of five years since the event in question. More likely than not, she will experience neck pain for the foreseeable future. He is more optimistic about her lower back pain recovery.
- [47] Dr. Helper recommends that the plaintiff pursue alignment and stability therapy and recommends a particular physiotherapist at Form Physiotherapy in False Creek for this treatment. He recommends that she does this before she commences another active rehabilitation program.
- [48] Because Dr. Helper has not ruled out mechanical neck pain, he suggested that the plaintiff undergo a diagnostic medial branch block to determine whether radiofrequency ablation would reduce her pain. If the diagnostic test is not remarkably successful then there would be no point in undergoing further treatment. However, if she has a dramatic result from the diagnostic nerve block then he would recommend she undergo radiofrequency ablation. This procedure results in a pain reduction, but only in those patients who have had a dramatic result from the diagnostic nerve block. Unfortunately the reduction in pain from

this treatment is not permanent. The typical duration of the benefit is 6 to 18 months and so patients must undergo a repeat procedure. In addition to being inconvenient, the immediate aftereffects of the procedure are two weeks of significant pain which settles and then the patient hopefully experiences a significant reduction in pain.

- [49] In cross-examination Dr. Helper predicted only a small chance of resolution of the plaintiff's pain. Dr. Helper assumes that her past physiotherapy treatments were not greatly successful because they did not focus on realigning her rotated posture first. He believes this postural alignment treatment will improve her condition within six month of intense therapy.
- [50] Even after vigorous cross-examination, Dr. Helper was clear that his opinion on prognosis did not change. He believes that the plaintiff will have some improvement with intense therapy but he cannot predict the extent.

Dr. Paul Devlin - Psychiatrist

- [51] Dr. Devlin treated the plaintiff on four or five occasions prior to being asked to prepare a medical legal report. He had her complete two Beck Depression inventories. The first inventory was for 2019 when he interviewed her. The second inventory addressed how she felt six months previously. Her 2019 score was 20 which falls at the top of the borderline clinical depression range. Her score for a time period 6 months earlier was 36 which falls in the middle of the severe depression range. Dr. Devlin noted that the plaintiff scored 39 on the Beck Depression inventory administered by Dr. Mittler in 2016.
- [52] Clinically, the plaintiff appeared depressed to Dr. Devlin. She complained of low mood, ongoing pain and difficulty sleeping. She was under stress because of her finances, her job insecurity and the instability of her relationship.
- [53] In Dr. Devlin's opinion the plaintiff sustained two primary psychological injuries directly related to the motor vehicle accident:
1. Major depression, DSM-V code 293.83
 2. Chronic somatic symptom disorder previously referred to as chronic pain disorder DSM-V 300.82
- [54] In Dr. Devlin's opinion, the plaintiff continues to suffer from major depression, secondary to a major underlying cause of chronic pain. In coming to a diagnosis of somatic symptom disorder, Dr. Devlin found the plaintiff to have disproportionate and persistent thoughts about the seriousness of her symptoms and a persistently high level of anxiety about symptoms.
- [55] Dr. Devlin recommends that the plaintiff undergo cognitive behavioural therapy as well as continuing with her antidepressant therapy.

- [56] Dr. Devlin also recommends that the plaintiff attend a pain clinic such as the CHANGEpain clinic in Vancouver or the Jim Pattison Outpatient Care and Surgery Centre.
- [57] In Dr. Devlin's opinion, the plaintiff has been significantly affected by her injuries and the prognosis for complete recovery at this point, 5 years after her accident, is guarded at best.
- [58] Dr. Devlin was cross-examined on the fact that the plaintiff's symptoms were not constantly persistent. He said they were persistent, but did ebb and flow. Defence counsel took the position that this fluctuation did not fit the definition of "persistent" which is not defined in the DSM.
- [59] Dr. Devlin did not waver in his opinion that the plaintiff's symptoms were persistent enough to meet the diagnostic criteria. I accept Dr. Devlin's opinion that it was a judgment call as to whether symptoms met the criteria.

Dr. Neufeld - Occupational Injury and Disease Assessor

- [60] Dr. Neufeld prepared two reports at the request of the defendants, one dated March 27, 2015 and the second dated February 28, 2019. I will focus on the latter report. He is a medical practitioner who has certified as an evaluator of disability and impairment ratings. He has worked extensively in the occupational health field serving as a WorkSafe BC medical advisor since 1992. In that capacity, he provides expert advice on medical aspects of work-related injury and disease.
- [61] He noted that the plaintiff had a prior history of occasional migraines and depressed mood which indicated she was vulnerable to developing headaches and mood disorder following the motor vehicle accident. He was of the view that her cervical spondylosis on the MRI imaging had no clinical relevance to her experience of neck pain headaches and arm numbness.
- [62] Dr. Neufeld was of the opinion that the plaintiff's soft tissue injuries had healed and that her persistent pain should be addressed by transitioning to a self-directed exercise program and gradual return to work.
- [63] He found that the plaintiff had developed a chronic pain condition with persistent myofascial neck and upper back shoulder and lower back pain with reduced range of neck motion due to pain and guarding. This condition had improved over time. He also noted she suffered from cervicogenic post-traumatic headaches that are likely related to chronically increased neck muscle tension, which is a component of the chronic pain condition affecting her neck. That condition has improved over time.
- [64] In terms of assessing the plaintiff's physical abilities, Dr. Neufeld was of the opinion that her tolerance for stooping, kneeling, crouching and low level work was limited by pain. In his opinion she is capable of limited strength demands (up to 5 kg) as defined by the National Occupational Classification which is the level required by her current job.

- [65] In terms of prognosis, Dr. Neufeld is of the opinion that the plaintiff has an excellent prognosis for gaining a satisfactory quality of life at home, work and recreation even though she may be left with some degree of chronic pain on a permanent basis.
- [66] He recommended a trial of medication for pain and sleep. He recommended that she participate in an active rehabilitation program with a kinesiologist.
- [67] It is Dr. Neufeld's opinion that the plaintiff's pain-related limitations are appropriately accommodated in her current job. It is more likely than not that she will be limited on a permanent basis to work that does not require amounts of stooping, kneeling, crouching or low level work and that she will be limited on a permanent basis to work that does not require more than limited strength.
- [68] On cross-examination, Dr. Neufeld agreed that the plaintiff will have some pain on a permanent basis. She will require permanent limitations on her work. He agreed that restraining difficult children was not a good match for her. He acknowledged that she likely needed some assistance doing housework, but did not accept an estimate of four hours per week. He thought two hours of housekeeping assistance would be fair. Regarding the medication that he recommended, he said some people get relief from chronic pain, but that none of the effects of the medication are as amazing as the manufacturers would have one believe.

Dr. Dorothy Reddy - Psychiatrist

- [69] Dr. Reddy provided an independent psychiatric opinion at the request of the defendants on March 6, 2019 after assessing the plaintiff on December 19, 2018.
- [70] In Dr. Reddy's opinion, the motor vehicle accident likely caused the plaintiff's major depressive disorder and anxiety. As of December 2018, the plaintiff met the criteria for a major depressive disorder. She also met the criteria for a generalized anxiety disorder.
- [71] Dr. Reddy recommended a neuropsychological assessment to better understand the plaintiff's functioning in a number of areas including intelligence, executive functioning, attention, memory, language, perception, motor functions, motivation and mood state.
- [72] In terms of medical conditions pre-dating the motor vehicle accident, Dr. Reddy noted that the plaintiff has a very low ferritin (iron) level which may lead to fatigue and decreased cognitive clarity. She is receiving medication for her pituitary tumor. Some of the dizziness, fatigue, headache, depressed mood, insomnia and loss of appetite could be side effects from that medication and/or from Wellbutrin.
- [73] In treatment of her depression, Dr. Reddy recommends 40 sessions of cognitive behavioural therapy to address her depression and anxiety.

- [74] Regarding medication, she is of the view that the plaintiff's current dose of Wellbutrin should be increased to 450 mg. If that is not effective, she recommends a different medication, namely, Trintellix.
- [75] She recommends that the plaintiff wear her CPAP mask regularly to address her sleep apnea. She recommended that her iron levels be checked regularly. She further recommended that the plaintiff decrease or discontinue her use of alcohol.
- [76] Dr. Reddy is not able to give an opinion on whether the plaintiff's injuries have resulted in disabilities until the plaintiff has had her psychiatric symptoms properly treated. Without proper treatment, her prognosis is guarded, but with proper treatment Dr. Reddy believes her psychiatric prognosis is good.

Analysis of the medical evidence

- [77] It is clear on the evidence of all the physicians that the accident caused the plaintiff's injuries and that she now suffers ongoing depression and chronic somatic symptom disorder. The effects of the accident on the plaintiff's enjoyment of life are dramatic. At the time of trial, five years after the accident, she is only 70% improved at most.
- [78] The plaintiff has already tried the antidepressants and two were not tolerated by her. It is possible that increasing the dosage of the Wellbutrin may have a positive effect. It is also possible that the cognitive behavioural therapy will have a positive effect. I will consider these possibilities as positive contingencies. I am also aware that people suffering from major depression can have relapses. I conclude that it is more likely than not that the plaintiff's depression will continue to improve with therapy, but that she may have episodic relapses.
- [79] I also conclude that the plaintiff should follow through with Dr. Helper and Dr. Neufeld's recommendation that she attend the pain clinic. The timing of her attendance should be left to the experts overseeing the pain clinic. It could be that she should undertake the physiotherapy to align her posture recommended by Dr. Helper and the adjustment in her antidepressant medication first.
- [80] It is my view that she should attend the CHANGEpain clinic and that the cost of this therapy should be borne by the defendants.

Non-pecuniary damages

The Plaintiff's position

- [81] The plaintiff seeks non-pecuniary damages in the range of \$125,000 to \$135,000 and relies on the decisions of Ahonen v. Thauli, 2013 BCSC 1607; Kam v. Van Keith, 2015 BCSC 1519; Flores v. Burroughs, 2018 BC SC 334; Sclesa v. Taylor, 2016 BC SC 1122.

- [82] In *Kam*, the 36-year-old athletic plaintiff sustained injuries to her neck, upper back, lower back and shoulders along with depression, sleep disturbance, fatigue and headaches. She made rigorous efforts to rehabilitate, but the symptoms persisted. She was awarded \$125,000 for non-pecuniary damages.
- [83] The facts in *Sclesa* are also similar to the present case. In that case, the 39-year-old plaintiff suffered injuries to her neck and back. She attempted to return to work, but was not able to continue in position. She suffered from chronic pain syndrome, as it was then called, which was associated with poor sleep and changes in mood. She significantly cut back on her usual recreational pursuits. Justice Neil Brown awarded the plaintiff \$125,000 in non-pecuniary damages.
- [84] At para. 234 of *Sclesa*, Justice Brown noted a higher range of damage awards were awarded in cases where plaintiffs exhibited more intense iterations of depression such as social isolation or significant loss of social contact. Chronic myofascial pain, permanent or significant loss of work previously highly valued by the plaintiff and significant loss of earning capacity also mark cases in the range of \$100,000 or more.

The Defendants' position

- [85] The defendants submit that the plaintiff should receive no more than \$70,000 of non-pecuniary damages. The defendants rely on *Stapleton v. Andrew*, [2019] B.C.J. No. 756; *Kagrimanyan v. Weir*, [2018] B.C.J. No. 3075; *Senger v. Graham* [2018] B.C.J. No. 301 and *Dosangh v. Xie*, [2017] B.C.J. No. 2152.
- [86] In the *Stapleton* decision the plaintiff's injuries were not as severe as the plaintiff in the present case. That plaintiff returned to work after three days and worked for approximately a month and then took a month off work due to her injuries. The plaintiff did sustain soft tissue injuries to her neck, shoulder blade, mid and lower back, and suffered pain which persisted for four years. Her symptoms made it difficult for her to work in the kitchen which was her true passion. That plaintiff did not suffer from substantial depression as the plaintiff in the present case has.
- [87] In *Kagrimanyan*, the 34-year-old plaintiff sustained injury in a rear-end collision. She experienced headaches and neck and low back pain which continued for 4 1/2 years. She became more withdrawn after the accident and no longer enjoyed cooking or hosting family and close friends on holidays and special occasions because of her injuries. She was physically active before the accident and found it difficult to participate in recreational pursuits after the accident. She continued to work five days a week, but found it difficult. Again this plaintiff did not suffer any significant depression.

- [88] In Senger, the plaintiff suffered soft tissue injury which interfered with her schooling, housework and recreational activities. She was able to complete her dental hygienist course and work, but found it difficult working five days a week. The court found she was likely never able to work full-time again. Her injuries were likely to plague her for the rest of her life. She had reached maximum rehabilitation at the time of trial. The trial judge awarded \$80,000 non-pecuniary damages. Again this plaintiff did not suffer from depression.
- [89] In Dosangh, the 50-year-old plaintiff suffered soft tissue injury to her back, left shoulder, between her shoulder blades and her ribs. She was off work for two months and began a gradual return to work program. Her pain continued until the date of trial which was four years after the accident. This plaintiff did suffer from lower mood and depression and was forced to cut her work back to 32 hours per week. She had previously worked full-time and overtime up to 48 to 60 hours per week. The trial judge concluded that Ms. Dosangh sustained moderate soft tissue injuries and develop chronic pain which continued to affect her ability to work enjoy work and have a happy home life. General damages of \$70,000 were awarded.

Decision on Non-Pecuniary Damages

- [90] The facts in Kam and Scelsa are very similar to the case at bar. The injuries sustained in the cases relied on by the defendants were not as severe at those of this plaintiff. In particular the period of disability from working in the defendants' authorities was not as extensive and the plaintiffs either suffered no depression or their depression was not as significant as that suffered by this plaintiff.
- [91] I assess general damages for this plaintiff at \$130,000 which factors in some inflation since Kam and Scelsa were decided.

Past loss of wages

- [92] The parties have agreed that the plaintiff's wage loss net of taxes is \$77,147. This amount is subject to arguable deductions under s. 83 of the Insurance (Vehicle) Act and is subject to an accounting for a deduction for any award made under the outstanding arbitration with the School Board. It is possible that the plaintiff will receive compensation in that arbitration for monies lost from September 4, 2018 to January 15, 2019.

Loss of future earning future earning capacity

- [93] The plaintiff is now working a four-day week because of her injuries. She was previously working a five-day week before the motor vehicle accident. Based on that figure alone the parties agree that she is entitled to a future loss of earnings in the amount of \$100,491. This is based on the medical opinions of Dr. Ellison, Dr. Devlin and Dr. Neufeld who are of the opinion that the plaintiff's restrictions are permanent.

- [94] The defendants do not agree to any additional wage loss. The plaintiff submits that there is a real and substantial possibility that she may have to consider switching to another career path entirely and some possibility that she will lose her current job if she still requires extensive accommodation.
- [95] The functional capacity testing of Dr. Neufeld demonstrated that the plaintiff is permanently limited by her chronic pain to a type of work that does not require significant amounts of stooping, kneeling, crouching or low level work and that she will be limited on a permanent basis to work that does not require more than limited strength. This renders her unsuitable for many types of work should she be looking for work.
- [96] The plaintiff suffers from depression which is under reasonable control now. It could improve or she could have relapses which may require some time off work.
- [97] The defendants are more optimistic and say that there is a chance that the plaintiff will improve with all the therapies that have been recommended. I accept that submission. If the plaintiff's posture is realigned, she may receive greater benefit from an active rehab program. If she is one of the people who respond to the nerve ablation treatment, she may have pain-free months where she is able to build up her endurance. No one was willing to predict a percentage chance of improvement, so it is difficult to quantify her chance of improvement.
- [98] The plaintiff's future contingencies are uncertain and unquantifiable. I find one sets off the other. The plaintiff is able to work at reduced capacity. She may have relapses and periods of unemployment related to her injuries and her limitations. To accommodate for those setbacks which I find are quite foreseeable, I will add on year of salary to the \$100,491 figure provided by the economist and consented to by the parties.
- [99] Accordingly, I award to the plaintiff the sum of \$133,491 for loss of future earning capacity.

Special damages

- [100] The parties have agreed on most of the special damages in the amount of \$7,225.59. A small amount of \$152.72 is in dispute. I deny the amount in dispute. The herbal supplements recommended by the plaintiff's physiotherapist and the salmon oil and probiotics are, in my view, non-prescription optional supplements taken by the plaintiff and do not classify as a special damage. The unidentified prescription from London Drugs and of which the plaintiff has no recollection does not meet the evidentiary burden the plaintiff has to prove as a special damage.

Loss of housekeeping capacity

- [101] The plaintiff seeks a substantial award for loss of housekeeping capacity. She seeks compensation for four hours of housekeeping services at \$25 per hour per week which equals \$5,200 per year. She is seeking housekeeping services to the end of her life expectancy which is 38.4 years. Using the present value calculator of 26.4406, the plaintiff seeks a total loss of housekeeping capacity of \$137,491.12.
- [102] The plaintiff relies on the case of *Amini v. Mondragaon*, 2014 BCSC 1590 where Justice Grezell said at para. 138 that it is well recognized that damages for loss of housekeeping capacity may be awarded even if housekeeping services are gratuitously replaced by a family member.
- [103] The evidence is that the plaintiff was a fastidious housekeeper prior to the accident. This is confirmed by her neighbour, her boyfriend, her mother and her long-time friend.
- [104] The plaintiff originally estimated that she relied on other people to assist her 30 hours per week during her initial recovery. This included driving her to and from doctors' appointments and lawyers' appointments and walking her dog as well as doing grocery shopping and housekeeping services. She required this level of assistance for the first 26 weeks after the accident. She estimates that her housekeeping service requirements decreased to 20 hours per week for the next 26 weeks, 15 hours for year two, and five hours per week from January 7, 2016 to the date of trial. Her total past lost of domestic capacity equals \$71,000 if a mathematical calculation is done.
- [105] The defendants submit that this is a gross exaggeration for someone living in a one-bedroom apartment. It is clear from Dr. Helper's opinion that the plaintiff had moderate limitations of her activities of daily living which fit in the category of discomfort or mild limitation period.
- [106] The medical experts agree that the plaintiff's limitations are permanent and that she will need assistance with housekeeping duties. Their opinions vary as to the extent of that assistance. I accept Dr. Neufeld's opinion that two hours' assistance per week is reasonable.
- [107] The plaintiff did depose at her examination for discovery that she was able to do what she wanted if she pushed through the pain. The defendants assert that the plaintiff has not established a sufficient ground for loss of future housekeeping capacity.
- [108] I accept the plaintiff's testimony that for the first 26 weeks after the accident she was incapacitated. She could not drive or walk her dog. She could not unload the dishwasher, do her laundry, take care of her condo, or buy her groceries. She was heavily dependent on her neighbour and her mother. Of those 26 weeks, I am prepared to award her 25 hours per week.

- [109] I rely on this court's endorsement in *Amini v Mondragoon*, 2014 BCSC 1590, para. 198 and *Hrnic v Bero Investments Ltd.*, 2018 BCSC 1880, that \$25 per hour is a reasonable hourly rate for housekeeping services which accords with my own experience.
- [110] For the first 26 weeks post-accident, I award to the plaintiff \$16,250 for housekeeping services provided by others.
- [111] I accept the plaintiff's evidence that she gradually increased her strength and tolerance, but during this time, her depression was worse and she had low energy to do anything. Her evidence is that she could do some household chores, but she could not vacuum or mop. She could load and unload the dishwasher with some difficulty. She still had help from her parents and her friends, Heather and Marie. By then she was dating Nick who testified at trial. He assisted her with household chores and shopping. During this time, I find that it would be appropriate to award the plaintiff five hours per week at \$25 per hour for 26 weeks which is \$3,250.
- [112] From 12 months after the accident to the present time, the plaintiff has gradually increased her pain tolerance and her depression has improved to some extent. She is now living in a one-bedroom basement suite which should not take a substantial amount of time to clean. Nick provided her with a great deal of help moving into this suite. During this time, I find it appropriate to award the plaintiff two hours per week cleaning services and once every six months an additional six hours for deeper cleaning services such as window or blind washing, cupboards, walls and baseboard washing. In addition, I award \$500 for 20 hours of assistance with her move.
- [113] The past award is for \$2,900 per year for 4.4 years in addition to \$19,500 for the first year. I award \$32,760 for past loss of housekeeping capacity.
- [114] I make an ongoing housekeeping award of \$3,000 per year for the plaintiff's life expectancy of 38.4 years. According to the Law and Equity Act, R.S.B.C. 1996, c. 253, s. 56(2)(b) and Reg. 352/81, 2.0% must be used to calculate future losses (other than income). Section 56 (2)(b) stipulates that the discount rate is deemed to be the future difference between the investment rate of interest and the rate of general price inflation.
- [115] The appropriate multiplier is therefore 26.4406. I award future loss of housekeeping capacity award of \$80,000.

Future care costs

- [116] The plaintiff claims prescription expenses for her antidepressants which cost \$20 per three months under her extended health benefit. She intends to continue on this medication and Dr. Reddy recommends she double her dose. I will therefore double the amount claimed for Wellbutrin which will cost her \$160 per year for life. I award the plaintiff \$4,230 for the future cost of antidepressant medication.

- [117] Dr. Devlin recommended that the plaintiff be referred to the pain clinic such as CHANGEpain in Vancouver. The cost is between \$10,000 and \$25,000. The plaintiff will be able to access many of the therapies that have been recommended by the treating physicians. I will award \$20,000 so that the plaintiff can access the CHANGEpain clinic if she chooses.
- [118] Dr. Helper was strongly recommending that the plaintiff attend Form Physiotherapy in False Creek for some postural alignment. I accept the plaintiff's claim for six months of treatment in the amount of \$2,100.
- [119] Dr. Reddy and Dr. Devlin recommended that the plaintiff undergo cognitive behavioural therapies. I am not certain whether these therapies are provided at CHANGEpain or not. I will therefore award \$5,000 for cognitive behavioural therapy to be accessed wherever the plaintiff chooses.
- [120] I award the plaintiff \$31,330 for cost of future care.

Summary

[121] In summary the plaintiff is awarded:

- a) Non-pecuniary damages \$130,000.
- b) Past loss of earnings and net \$77,147, subject to deductions under s. 83 of the Insurance (Vehicle) Act and to deductions for any arbitration award for money lost from September 4, 2018 to January 15, 2019.
- c) Loss of future earning capacity \$133,491.
- d) Special damages \$7,225.59.
- e) Past loss of housekeeping capacity \$32,760.
- f) Future loss of housekeeping capacity \$80,000.
- g) Cost of future care \$31,330.

TOTAL - \$491,953.59.

Costs

- [122] The plaintiff is entitled to her costs at scale B. The parties have liberty to make further submissions as to costs in writing in the event that either party wishes to bring an offer to settle to my attention. That party must provide their written submission no later than July 25, 2019 and the responding party must provide their response no later than August 2, 2019. The first party shall reply no later than August 12, 2019.

"B. M. Young, J."

The Honourable Madam Justice Young

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Prepared on 26 October 2026 · Esheria