
CANADA / JUDGMENT

Dennstedt v. Lepine

2018 BCSC 220

COURT

Supreme Court of British Columbia

DECIDED

15 February 2018

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

2018 BCSC 220 Dennstedt v. Lepine

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Dennstedt v. Lepine,

2018 BCSC 220

Date: 20180215

Docket: M153134

Registry: Vancouver

Between:

Christine Dennstedt

Plaintiff

And:

Sheilagh Lepine and Roger Lepine

Defendants

Before: The Honourable Mr. Justice D.M. Masuhara

Reasons for Judgment

Counsel for Claimant:

David J. Gomel

Tanya Martin

Counsel for Defendants:

Jennifer R. Loeb

Place and Date of Trial:

Vancouver, B.C.

December 4-8, 2017

Further Written Submissions:

December 11, 2017

Place and Date of Judgment:

Vancouver, B.C.

February 15, 2018

I. Introduction

- [1] These reasons deal with injuries suffered by the plaintiff, Dr. Dennstedt, a registered clinical counsellor, in a motor vehicle accident on May 6, 2013 (the "Accident"). She was rear-ended while stopped at a stop light at the intersection of Highway 99 and Nesters Road in Whistler, B.C. Dr. Dennstedt was driving a 2004 Toyota Prius. The defendant, Ms. Lepine, was driving a Chevrolet Suburban owned by Mr. Lepine and licenced in Alberta. Though drivable after the Accident, the damage to the plaintiff's vehicle resulted in repairs assessed at \$4,031.29. Liability is admitted by the defendants. The defendants plead ss. 83 and 84 of the Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231.
- [2] Dr. Dennstedt asserts that she suffered various soft tissue injuries which involve her neck, upper back, lower back, leg and wrist.
- [3] The witnesses at trial were:
- The plaintiff;
 - Dr. Z. Waseem, a physical medicine and rehabilitation specialist;
 - Mr. R. McDonnell, a registered clinical counsellor who works in Whistler, B.C.;
 - Ms. C. Clark, economist;
 - Ms. L. Dennstedt, mother of the plaintiff; and
 - Dr. C. Lewis, husband of the plaintiff.
- [4] The defence did not call a case. The defence acknowledges that the plaintiff suffered soft tissue injuries in the Accident, and does not disagree that, in part, the injuries continue to be symptomatic.

- [5] The key dispute in this case is the extent of the ongoing symptoms on her work capacity as a counsellor.

II. Background

- [6] On May 6, 2013, the plaintiff was driving from her home in Whistler to her parent's home in Vancouver when the Accident occurred. She stopped at a red light when she was rear-ended by a large sport utility vehicle. Her young daughter was in a car seat in the rear of the car as was the family dog. Fortunately, neither daughter nor dog were injured.
- [7] The plaintiff testified that her vehicle was not pushed forward by the impact. Her foot was on the brake at the time. She described the impact as harsh and that her head hit the headrest hard. The bottom rear window of the Prius broke. Her car also had a bike rack attached to the rear.
- [8] The drivers exchanged information and the plaintiff continued on in her Prius to her parent's home.
- [9] At her parent's home, where she would spend the night, she began to feel sore and stiff and developed a headache. The next day she went to work at Peak House where she had a contract to supervise and train family therapists and counsellors. She had a sore neck, pain in her mid and low back, right leg, and right wrist. As a result, she went to a medical clinic to see a physician who she knew. She described her circumstances. She is not sure if any medications were prescribed.
- [10] She also went to see her acupuncturist, who she had been seeing for fertility purposes. He provided her acupuncture treatment for her neck, shoulder and back pain. She found the treatments helpful.
- [11] A week after the Accident, the plaintiff went to meet her husband in Baja, Mexico. This trip had been planned in advance. He had left earlier with his friends and was to meet up with the plaintiff. She took a five-hour direct flight to San Jose with her daughter who was on her lap. She described the flight as "terrible" as she was constrained in her seat holding her daughter and was suffering from pain in her neck, and upper and lower back. When she arrived in Mexico she did some surfing but not as much as she had planned because of the pain. She swam in the resort pool and sat in the hot tub where they were staying.
- [12] Upon her return to Vancouver she went to see her family physician, Dr. Johnston. This was two or three weeks after the Accident. She advised the doctor of the Accident and that her neck and back were sore and that she was having numbness in her wrists. She stated that she was advised to stretch and have massage therapy. The plaintiff testified that after a few weeks the problems with her wrists and leg resolved.

- [13] The plaintiff received acupuncture, physiotherapy and massage treatments. She went to yoga classes, did stretching, and remained active. She also did yoga and stretching at home to alleviate her pain. Her husband would also massage her neck.
- [14] The plaintiff has not been prescribed medications for her injuries. She told Dr. Waseem that she did not take any medication for her injuries because she did not feel they were warranted. She takes Advil or Tylenol about once a week. Naproxen if the pain is stronger.
- [15] She continued, without interruption, her work at Peak House supervising and training therapists, and teaching at City University. She was also able to continue with her limited counselling work. She had last worked full-time as a counsellor in 2011, just prior to the birth of her first child.
- [16] In August 2013, the plaintiff competed in a community women's bike race in Whistler. In June or July 2015 on short notice, she participated with her husband in a physically gruelling seven-day mountain bike race, which involved riding 1-4 hours a day on green to black diamond trails and travel to different locations throughout the province. She received massage treatments after the race for back spasms and also went for one session of IMS. She did not return (until this past summer) for further IMS treatments because the need did not arise.
- [17] In September 2013, the plaintiff became pregnant. She had nausea throughout her pregnancy, and pubic synthesis pain in her left leg. She received physiotherapy and massage treatments for it, as well as for the pain from the Accident.
- [18] In May 2014, the plaintiff's second child was born. The plaintiff took time off for a period after the birth; but continued to see one client in Squamish and supervised a therapist.
- [19] In 2015, the plaintiff for a period of three months drove her daughter to Vancouver from Whistler once a week for blood tests due to a medical condition the child was experiencing. She also began to teach at City University and supervise students. This took up about twenty to thirty hours per month.
- [20] The plaintiff continues with her mountain biking to this day. She also continues to travel on family vacations (including Mexico, Costa Rica, and Hawaii), surf (including at their property in Port Renfrew which they visit regularly), snow ski several times a week during ski season, skate-ski (a faster form of cross country skiing) several times a month, practice power yoga, pilates, and has water skied.
- [21] In 2016, the plaintiff looked into obtaining space for her practice. However, in discussions with her husband, it was determined that it was best that the plaintiff remain at home with the children but that once their youngest started pre-school she would go back to work.

- [22] The plaintiff testified that it is her intention to return to a full-time counselling practice once her second child starts full-time school, which is to be in 2018. Her hours would be 9:00 a.m. to 2:30 p.m. She agrees that her husband will be the primary breadwinner for the family and that she would be scheduling around his timetable.

III. Evidence of Ms. Dunnsedt pre- and post-Accident

- [23] Evidence of Dr. Dennstedt's pre- and post-Accident was provided by the plaintiff, her husband and her mother.
- [24] The evidence establishes that the plaintiff had a happy upbringing and that she was an energetic, active, and caring child who did well at school. From an early age she developed an interest in counselling. Her interest continued through her university studies where she received her bachelor of arts: psychology (1996), Master of Arts: counselling psychology (2001), and PhD: social sciences (2010) in psychology. She is an accomplished and caring person.
- [25] Following her undergraduate degree from 1997 to 2014 she worked for various organizations as a therapist and counsellor to youth and families. The organizations were: Operation Go Home, Watari, Elizabeth Fry Society, Delta Youth Services, VISTA, and Peak House.
- [26] Dr. Dennstedt also has been an instructor in her field. From 2003 to 2010 she was an instructor in counselling psychology.
- [27] She has had an active past, enjoying running, mountain biking high difficulty trails, skiing, tennis, skating, and surfing.
- [28] In 2010 she suffered a partial shoulder dislocation as result of a fall while skiing. In 2012 she injured her right wrist as a result of repetitive motion from mountain biking.
- [29] She met her husband in 2004 and married in 2006. The two enjoyed mountain biking, skiing and surfing. The two moved to Squamish for work.
- [30] From 2006 through 2010, the plaintiff worked towards obtaining her PhD from the Taos Institute at Tillburg University. At the same time, she built a private family counselling practice where she would see six to seven clients per day. Between seeing clients, teaching and work at Peak House and Vista, she was working between 50 and 60 hours per week. She continued with her recreational activities.
- [31] In 2010, the couple moved to Whistler, where her husband, Dr. Lewis, took up a position at the hospital as an emergency physician. Their first child was born in November 2011.
- [32] Dr. Lewis testified as to the plaintiff's condition prior to and after the Accident. He stated that having a career is part of the plaintiff's identity and that she loved her work as a counsellor and the independence it allowed her in respect to her schedule. He spoke to the toughness of the plaintiff and gave examples of seeing her crash on her bike and while skiing. She would be bleeding from these incidents but would not complain. He spoke to the

plaintiff still being able to mountain biking and surf but that she does not ride on as hard trails or ride as long; or surf as long as she did in the past. He spoke to the plaintiff's problems with stiffness in her neck after longer drives. In terms of her teaching, which she is required to sit before a computer for longer periods that she has to break up her time in front of the computer as she gets sore. He also spoke to her becoming grumpier because of her soreness.

- [33] Mrs. Dennstedt, the plaintiff's mother testified to the plaintiff's nature from childhood to the present. She also spoke of the plaintiff's activities and the things the two did together. She stated that the plaintiff was not a complainer. She testified to her observations of the plaintiff since the Accident, particularly, the difficulties with sitting for a prolonged period to read materials, at a concert, or driving longer distances.
- [34] Despite the acupuncture, physiotherapy, and massage to deal with her pain, which she stated were somewhat helpful in managing her pain, her symptoms persist. Though she is able to care for her children and do housekeeping chores, they are activities which cause her pain which she did not have pre-Accident. She has had to struggle with postural requirements for breastfeeding and relies more on using a stroller than she would have otherwise. Picking up and carrying her children has been more difficult, but says she is able to do so by "pushing through" the pain. Her pain levels increase or decrease depending on her level of activity. In particular, she finds that sitting for long period of time aggravate her low back and neck pain. She can sit for 60 minutes but says after 30 minutes she has to shift and adjust her posture due to her neck pain. The reduction in her sitting tolerance was supported by the testimony of her husband and her mother.

IV. Evidence of Mr. McDonnell

- [35] Mr. McDonnell is a registered clinical counsellor who has a private practice in Whistler, B.C. He described the high demand in the area for a therapist and that he is under contract with several companies for his services. He works 9:00 a.m. to 2:00 p.m. each day except for Mondays when he works longer. He typically sees five patients a day for fifty minutes and takes ten minutes to write his reports. On Mondays he sees seven. He described that he does not take breaks between clients and "gauges" over the course of his work day. In his sessions he sits and asks reflective questions and does not regularly get up but does when the situation permits. He indicated he has colleagues who work 2-3 days to suit their circumstances. He also described his hourly rate but that he has a discount rate or even zero for certain clients. He also takes six to eight weeks of holiday a year.

V. Medical Evidence

- [36] The medical evidence opinion adduced in this case was that of Dr. Z. Waseem, a physiatrist. He was called by the claimant to speak to his report of May 15, 2017.

[37] After describing a thorough physical examination, Dr. Waseem states that the claimant "appears to have initially sustained sprain/strain soft tissue injuries predominantly of the cervical and lumbar spines, post-traumatic headaches, right wrist and right thigh as a result of the subject motor vehicle accident."

[38] He opined that "[t]hese injuries have resulted in chronic myofascial pain of the cervical spine and chronic episodic low back pain" and that "[h]eadaches and the injuries of the right wrist and right thigh have resolved."

[39] Under the heading Post-Accident Functional Status, Dr. Waseem wrote:

Ms. Dennstedt has remained independent with respect to personal care, mobility and ambulation, and has resumed driving.

Ms. Dennstedt has resumed her normal housekeeping tasks, though at a slower pace, using load splitting, taking breaks and with pain. Tasks are not performed to her usual standards.

She continued with her caregiving activities, although reduced the amount of time carrying her youngest child. Currently, she continues to limit her carrying of her children due to her neck and/or low back pain.

Ms. Dennstedt has resumed her normal athletic and recreational activities, however does so with pain.

[40] In terms of causation he opined:

On the balance of probabilities, the presenting physical complaints are attributable to the subject accident. There is no reported or documented history of similar complaints pre-dating the subject accident. The onset of symptoms is reported and documented to be within a reasonable time frame of the accident. The injuries are biologically plausible given the described mechanism of injury. The symptoms have persisted unabated since. Involvement in a subsequent cycling incident August 2015 caused her low back pain to flare up, however this returned to pre-incident baseline levels after approximately one week. Pregnancy, labour and delivery post-accident did not impact her accident related complaints. There is non evidence otherwise of a subsequent event or injury to more plausibly explain the current physical presentation.

[41] In terms of prognosis, Dr. Waseem opined:

The prognosis for a full symptomatic recovery is poor given the long-standing nature of her symptoms that have persisted for over 4 years post-accident. While some further improvement with the outlined treatment recommendations is possible, she will continue to experience pain. Her physical condition would be considered chronic and unremitting and, therefor, permanent.

Recreational activities are completed with pain. Household activities are performed with pain and completed with modifications and slight limitation. Given the flexible nature of her work that allows her to accommodate her physical condition, she has been able to remain gainfully employed despite pain. In future, should she to decide to take to take on more work or increase

her work hours, she may encounter difficulty given her physical condition. Her need to take breaks between clients may limit the total number of clients she can see and reduce her future earning capacity. She will continue to experience distracting pain while working that may impact the quality of her work and the therapy that she provides.

Impairments of the cervical spine predisposes Ms. Dennstedt to recurrent trauma and a real risk of future injury.

[42] Dr. Waseem's recommendations for future treatment were stated as follows:

My recommendations for future treatments include:

- As she has not been subject to a supervised exercise program, I recommend a three month, 2-3 times per week, course of active rehabilitation administered by an appropriately trained and experienced regulated health professional designed to educate and demonstrate the incorporation of transverse abdominis core strengthening exercises, activation of the thoracic multifidus muscles, postural corrective exercises and deep neck flexor strengthening exercises with the intent to develop a program that can then be maintained independently following the conclusion of formalized care
- Low-impact cardiovascular exercises for 20-30 minutes performed 4-5 times per week initially at a low intensity eventually graduating to a moderate intensity as tolerated
- 4-6 trial session of intramuscular stimulation and/or active release therapy administered by a trained, qualified and experienced health care practitioner; if effective in reducing pain and/or improving function these can be repeated at monthly intervals as required
- Continued use of over-the-counter analgesic as per her current rate of utilization.

[43] The defence submits that Dr. Waseem's opinion should be afforded little weight. The bases of the argument include his process for conducting independent medical exams and writing medical/legal reports. Dr. Waseem testified that he delegates the task of receiving and organizing the individual's medical records to a Mr. Miller who has administrative skills but is not medically trained. He also testified that he delegates the task of obtaining an individual's medical history to Dr. Cerulli, a chiropractor, who is not trained in physical medicine or rehabilitation. Dr. Waseem testified that he obtains a history when he is with the examinee, which he states enhances the accuracy of the examinee's history.

[44] In this case Dr. Waseem made no notes on the examination sheet which he uses in his practice. There is a specific space on the sheets where his comments are to be noted and there are none in this case. He did not insert his initials in the space provided on the sheet, which I presume is to verify that he as the assessor had completed the examination. I note that Dr. Cerulli placed his initials in the requisite space provided for the assistant.

[45] When questioned about whether he had made any notes, Dr. Waseem became argumentative, engaging in a semantic debate, that the notes made by Dr. Cerulli became his own because he had conducted his own examination which did not differ from Dr.

Cerulli. He then indicated that he typed notes into his computer after he completed his examination. Later in re examination, Dr. Waseem stated that he entered information into his computer as he conducted his examination. He produced no notations made in his computer.

- [46] Dr. Waseem has a busy practice. His clinical practice is in Ontario and his consulting practice is in B.C. The IME was conducted May 9, 2017; however, his report was written May 15, 2017. I tend to agree with defence counsel that there is some question as to whether certain information he actually relied upon was his own in respect to the plaintiff's history, complaints and examination.
- [47] Another aspect of his testimony which somewhat dampens the full value of his opinion was Dr. Waseem's listing of various clinical notations of the plaintiff's family doctor's from May 2013 through November 2015. Dr. Waseem stated he included the clinical notes for completeness but curiously excluded clinical notations of the plaintiff having no neck pain, having normal shoulder range of motion, being free of pain, and having good range of motion. He stated that he determined that the excluded notations were irrelevant. Also, he was unable to explain the statement in his report that "[a] summary of the documents was prepared by Mr. Daryl Miller. The clinical records were reviewed in their entirety by Dr. Waseem and edits to the summary were made as needed." Dr. Waseem testified that there was no summary prepared by Mr. Miller and could not provide an explanation other than it being a typo. Dr. Waseem also noted that the plaintiff had seen her physician three times in the past year-and-a-half, when the records only show one such visit.
- [48] While there are some questions raised, I do not discount the evidence of Dr. Waseem in the manner argued by defence counsel; however, its weight in supporting the plaintiff's claim is somewhat dampened.

VI. Economic Evidence

- [49] Ms. Clark provided economic evidence through her report dated June 5, 2017. Her report provides actuarial income multipliers to calculate present values of future employment incomes or losses of employment incomes. The present values extend to the ages of 65, 67, and 70. The income multipliers have been adjusted for survival but do not incorporate statistical allowances for other positive and negative contingencies.

VII. Findings on Injuries

- [50] Where a plaintiff's case relies on subjective symptoms, the court must be exceedingly careful in examining the evidence and assessing credibility and reliability: *Price v. Kostyba* (1982), 70 B.C.L.R. 397 (S.C.).

- [51] I find that the plaintiff has established injuries to her neck, upper and lower back, right wrist, right leg, and suffered headaches. The wrist and leg injuries, as well as headaches resolved fairly shortly after the Accident, a few weeks.
- [52] As to the ongoing effects and extent of the soft tissue injuries to her neck, upper and lower back, and I accept that there are ongoing and intermittent effects. There may be other factors which contribute to her situation as both her husband and Dr. Waseem indicated such as recreational, sports and child caring activities.
- [53] My finding on the effects and extent of ongoing symptoms here is made in the context of the plaintiff's continuation of an active lifestyle, which includes surfing, skiing (one to three times per week during ski season), skate-skiing (once or twice per month during ski season), water-skiing, power yoga and mountain biking (including completion of a gruelling seven-day race across the province within three months of the Accident). I note she now experiences pain in these things and does not participate as much as before. It is apparent that the plaintiff has maintained a social life and her passion for her teaching and counselling work. There are reports of her being grumpy because of pain, however there is no suggestion in the evidence indicating problems in the family as occurs in other cases. The plaintiff does not have a need to routinely take medications for pain. She takes analgesics (two pills) about once a week. Moreover, she says that she does not believe medications are warranted. There are no prescription medications recommended in this case. The plaintiff has indicated that her condition has improved approximately 70% since the Accident. Dr. Waseem opined that with his recommended treatment some further improvement was possible.
- [54] Further, Dr. Waseem acknowledged in cross examination that the comment in his report that "should she to [sic] decide to take on more work or increase her work hours, she may encounter difficulty given her physical condition" was only a possibility. He also agreed that not all chronic injuries are permanent but could resolve.
- [55] I do not find the evidence sufficiently substantiates the level of debilitation argued. I provide further details later in these Reasons.

VIII. Damages

A. General Damages

- [56] In *Lindal v. Lindal*, [1981] 2 S.C.R. 629 at p. 637, the Supreme Court of Canada stated the approach to damages under this head this way:

Thus the amount of an award for non-pecuniary damage should not depend alone upon the seriousness of the injury but upon its ability to ameliorate the condition of the victim considering his or her particular situation. It therefore will not follow that in considering what part of the maximum should be awarded the gravity of the injury alone will be determinative. An appreciation of the individual's loss is the key and the "need for solace will not necessarily

correlate with the seriousness of the injury" (Cooper-Stephenson and Saunders, *Personal Injury Damages in Canada* (1981), at p. 373). In dealing with an award of this nature it will be impossible to develop a "tariff". An award will vary in each case "to meet the specific circumstances of the individual case" (Thornton at p. 284 of S.C.R.).

- [57] Damages under this head is an assessment. Awards made in other cases involving similar circumstances and injuries provide some guidance but each case requires an assessment based on the unique circumstances of the subject individual. Assessments under this head are guided by many factors. A non-exhaustive listing of factors to considerations listed in *Stapley v. Hejslet*, 2006 BCCA 34: age of the plaintiff; nature of the injury; severity and duration of pain; disability; emotional suffering; impairment of life; impairment of family, marital and social relationships; impairment of physical and mental abilities; loss of lifestyle; and the plaintiff's stoicism (which should generally not detract from the award).
- [58] Ultimately, an award must be fair and reasonable to the parties.
- [59] The plaintiff submits that the appropriate range for damages under this head is \$75,000 to \$100,000 and takes the position that \$85,000 is what is appropriate in the circumstances. Cases handed up in support are: *Lally v. He*, 2016 BCSC 2187; *Willette v. Rose*, 2017 BCSC 627; *Merko v. Plummer*, 2016 BCSC 1403; and *Odian v. Carriere*, 2016 BCSC 112.
- [60] The defendants submit that the appropriate range under this head is \$40,000 to \$50,000. Cases handed up in support are: *Kop v. Lobb*, 2008 BCSC 1237; *Christoffersen v. Howarth*, 2013 BCSC 144; *Kostecki v. Li*, 2014 BCSC 1056; *Hubbard v. Saunders*, 2008 BCSC 486; and *Travelbea v. Henrie*, 2012 BCSC 1532.
- [61] In my view, the cases handed up in support of the plaintiff's claim reflect conditions and impacts that are generally more significant than in the instant case. I note as well, the aspect of stoicism in those cases and take that into consideration in this case.
- [62] My assessment of reasonable damages under this head is \$70,000.

B. Loss of Earning Capacity

- [63] Goepel J.A. in *Grewal v. Naumann*, 2017 BCCA 158, recently summarized the approach to the past and future loss of earning capacity:
- [48] In summary, an assessment of loss of both past and future earning capacity involves a consideration of hypothetical events. The plaintiff is not required to prove these hypothetical events on a balance of probabilities. A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation. If the plaintiff establishes a real and substantial possibility, the Court must then determine the measure of damages by assessing the likelihood of the event. Depending on the facts of the case, a loss may be quantified either on an earnings approach or on a capital asset approach: *Perren v. Lalari*, 2010 BCCA 140 at para. 32.

- [49] The assessment of past or future loss requires the court to estimate a pecuniary loss by weighing possibilities and probabilities of hypothetical events. The use of economic and statistical evidence does not turn the assessment into a calculation but can be a helpful tool in determining what is fair and reasonable in the circumstances: *Dunbar v. Mendez*, 2016 BCCA 211 at para. 21.
- [64] As an initial threshold issue, the plaintiff must demonstrate both impairment to her earning capacity and that, whether there is a real and substantial possibility that the diminishment in earning capacity will result in a pecuniary loss. It is not to be an exercise in the abstract though at the same time it was described in *Andrews v. Grand & Toy Alberta Ltd.* (1978), 83 D.L.R. (3d) 452 (S.C.C.) as "gaz[ing] deeply into the crystal ball".
- [65] There are two ways of quantifying loss: the earnings approach and the capital asset approach. An earnings approach is more useful when the loss is more easily measurable. The capital asset approach will be more useful when the loss is not easily measurable. With respect to the latter approach, Finch J. (as he then was) in *Brown v. Golaiy*, (1985), 26 B.C.L.R. (3d) 353 (S.C.) identified several considerations for assessing loss, namely, whether:
1. the plaintiff has been rendered less capable overall from earning income from all types of employment;
 2. the plaintiff is less marketable or attractive as an employee to potential employers;
 3. the plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to him, had he not been injured; and
 4. The plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market.
- [66] The plaintiff provided low and high loss scenarios which ranged from \$432,492 to \$608,126. A minimal reduction to account for negative contingencies of 10% is suggested by the plaintiff. Alternatively, under the capital asset approach, based on the cases of *Farand v. Seidel*, 2013 BCSC 323; and *Kaiser v. Williams*, 2015 BCSC 646, the plaintiff submits that an award of \$350,000 would be appropriate.
- [67] The plaintiff cited various cases which were offered as being similar to the present case to support the award of damages under this head. They included: *Jurczak v. Mauro*, 2013 BCCA 507; *Raptis v. Chalabiani*, 2017 BCSC 1548; *Herman v. Paley*, 2017 BCSC 728; *Litt v. Guo*, 2015 BCSC 2207; and *Carr v. Simpson*, 2010 BCSC 1511.
- [68] The defendants submit that the plaintiff has not established that she is in any way disabled from performing her work as a result of the Accident and that the plaintiff has failed to demonstrate that there is a "real and substantial" possibility of a future income loss. The defendants submit that the plaintiff has not established that she will suffer any economic loss as a result of any modifications she will have to make because of her Accident-related injuries; or that, these economic losses could not be offset by altering her currently

intended schedule. As a result, the defendants argue that no award under this head should be made.

- [69] Again, in my view the cases put forward by the plaintiff reflect conditions that are more significant than in the present. However, each case is to be viewed in its own unique circumstances.
- [70] Based on the medical and lay witness evidence, I accept that there has been some diminishment in earning capacity. However, I have difficulty with the plaintiff's submission as to extent, duration and effect.
- [71] In this regard, I have considered particularly (not in any order of importance):
- (a) the ability to continue post-Accident with an active and vigorous recreational and sports life, on a regular basis, though not without pain;
 - (b) the ability to continue post-Accident regular housekeeping and child care (now two children) post-Accident, though with pain and in the plaintiff's view not to as high a standard as pre-Accident. Pre-Accident the plaintiff had a hired housekeeper. The family has no plans to hire a nanny for the children;
 - (c) the ability to continue post-Accident with teaching and graduate student advisory work. Including her recent acceptance to take on another teaching course which would cross over with an existing course she is teaching;
 - (d) though not a necessary requirement, the absence of a functional capacity report. I note that in all but perhaps one of the plaintiff's cases on general and future loss of capacity, a report was tendered. A common feature of a report by an occupational therapist in addition to evaluating capacity is the identification of strategies and items which could assist an individual in performing their work adequately;
 - (e) the plaintiff's limited need to use over-the-counter medications (two pills once a week); and the absence of prescription medications for the plaintiff's condition;
 - (f) the independence and flexibility in scheduling afforded by a private clinical practice to accommodate the plaintiff's circumstances;
 - (g) Dr. Waseem's opinion, that though the prognosis was poor for a full symptomatic recovery, some further improvement was possible with the recommended treatment covered in his report. He also agreed that chronic conditions were not necessarily permanent and could resolve;
 - (h) The plaintiff's testimony that she had reached about 70% recovery of her pre-Accident condition. My sense of the evidence is that it is greater and could improve;
 - (i) Dr. Waseem's adjustment to the plaintiff's neck posture which he stated relieved some pain;

- (j) Dr. Waseem's restrained opinion that "[i]n future, should she to decide [sic] to take on more work or increase her work hours, she may encounter difficulty given her physical condition." [emphasis added]. In cross examination, Dr. Waseem acknowledged that he did not conduct a functional capacity evaluation and was not knowledgeable of the work requirements of counsellors;
 - (k) Dr. Waseem's evidence that the plaintiff's mountain biking, surfing, skiing and carrying a child could be contributors to the plaintiff's pain; and
 - (l) the lack of evidence as to why measures could not be applied or taken when she felt discomfort or pain in her counselling sessions or when at her computer, e.g. taking breaks, modifying her position or adapting movement into her session when with a client, or the use of various supportive braces or wraps for her lower and upper back, or elevating desk surface devices. The use of pain medication to provide relief for her to perform her work has also not been addressed.
- [72] The key scenario in terms of damages here is the plaintiff resuming her private counselling practice; and that as a result of her injuries she will not be able to see as many clients. The plaintiff says that this amounts to about one client a day, in a four day a week practice.
- [73] While there is some loss of capacity and that there is a real and substantial possibility of a loss. The plaintiff's condition while real is not as diminished as argued. My assessment is that the loss would be in the area of one client per week. There are a variety of contingencies which include improvement in the plaintiff's condition; the plaintiff continues as a full time mother (a role she has taken seriously and enjoys) past her intended return to work; the effective adoption of strategies and use of supports/devices which would avoid reductions in work; the use of analgesics to reduce pain could be more effective than thought; the use of after school child minding services as described by Mr. McDonnell; the plaintiff working less and focusing on lifestyle balance; the reduced work load as one reaches retirement age; and a greater focus on teaching.
- [74] Using the earnings approach the amount would be in the area of \$90,000. My view is that under a capital loss approach a similar figure would result.
- [75] Weighing hypothetical events which have real and substantial possibilities, my assessment of the future loss is \$90,000.

C. Cost of Future Care

- [76] An award under this head is governed by the principles set out in *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.); *aff'd* (1987), 49 B.C.L.R. (2d) 99 (C.A.), namely that: (a) there must be a medical justification for the claim; and (b) the claim must be reasonable.

- [77] While a physician need not testify to the medical necessity of every item of care that is claimed, there must be some evidentiary link drawn between the physician's assessment of the plaintiff's condition and recommended treatment and the care recommended by a qualified health care professional.
- [78] The plaintiff relies upon the recommendations of Dr. Waseem and seeks \$22,800. I note that Dr. Waseem did not identify the costs associated with the items he recommended. I note that massage therapy is not in the recommendations of Dr. Waseem. I also note that the plaintiff has not sought costs for low impact cardiovascular exercises recommended by Dr. Waseem. The plaintiff seeks the following:
- (a) Active rehabilitation supervised by a trained and regulated health professional, between two and three times a week for three months: \$3,600;
 - (b) Intramuscular stimulation (IMS) and/or active release therapy administered by a trained health practitioner, between four and six trial sessions. If effective in reducing pain and improving functioning, then sessions repeated monthly are recommended. At a median of five sessions per year at a cost of \$110/session, at ten years, the plaintiff seeks \$5,500;
 - (c) Over the counter analgesics. The plaintiff assumes \$20 annually for ten years: \$200; and
 - (d) Massage therapy once a month at a cost of \$100/session, at ten years: \$12,000. Plaintiff's counsel admitted that this figure is a guess.
- [79] The defence notes that the plaintiff had two sessions of IMS, one in the summer of 2015 and once in early 2017, but provided no explanation as to why she did not return for further IMS sessions for a year-and-a-half after the first session. The defence notes that while the plaintiff testified that if time allowed she would be willing to participate in a supervised exercise program, she did not provide any explanation for why she had not participated in such a program or continued to attend physiotherapy. Further, it is submitted that the plaintiff has not provided any evidence of what the anticipated cost of either the supervised exercise program or IMS therapy. In respect to massage therapy, the defence points out that there is no evidence from the plaintiff or treating medical professionals that future massage therapy is recommended, thus an award for future massage therapy has not been established. The defence submits that the claim for over-the-counter medication to treat her Accident-related injuries of \$200 is reasonable.
- [80] The defence also notes that at the time of the Accident the plaintiff held a valid BC driver's licence and as a result has first party benefits for rehabilitation costs under s. 88(1) and 88(2) of the Insurance (Vehicle) Regulation B.C. Reg. 447/83 (Part 7 Benefits). It is submitted that the plaintiff has not applied for coverage for a supervised exercise program through her Part 7 Benefits but should have coverage if she chooses to participate in such a program. As a result, it is submitted that the damages for this item should not be awarded against the defendants.

- [81] Though there are no costs provided by a medical or health professionals for supervised active rehabilitation or for IMS, the treatment receipts provide some evidence for IMS as well as for massage therapy. Further, this court decides cases such as the instant on a steady basis. The costs advanced here as well as for massage sessions appear reasonable. While Dr. Waseem did not recommend massage treatment, it is clear that such treatment was recommended by the plaintiff's physician in the past, as was shown in clinic records. It is also reasonable to infer that such treatments would fall within the scope of the medical opinion of Dr. Waseem. Where I find difficulty is the duration and/or number of sessions for IMS and massage therapy. A reasonable estimate, relative to the plaintiff's history, leads me to reduce the amounts for both by one-half. Accordingly, the award here will total \$12,550.
- [82] Section 83 of the Insurance (Vehicle) Act requires a trial judge to estimate the amount of benefits a plaintiff is or would be entitled to under the Regulation and to take that estimate into account before entering judgment: *Jurczak v. Mauro*, 2013 BCSC 1370 at para. 9. The relevant principles were summarized by Abrioux J. in *Li v. Newson*, 2012 BCSC 675 at para. 14:
- (a) the defendant bears the onus of proving that the plaintiff is entitled to the benefits which the defendant seeks to deduct ;
 - (b) strict compliance with the statute is required ;
 - (c) uncertainty as to whether a Part 7 benefit will be paid must be resolved in favour of the plaintiff ;
 - (d) the ability to make the deduction is not dependant on the actual receipt of benefits by the plaintiff. Issues between the plaintiff and ICBC regarding the benefits are not relevant to the deductibility by a tort-feasor from an award to the plaintiff ;
 - (e) is it no longer a requirement that there be a match between the heads of damage for a tort award and specific heads of damages under the benefit recovery scheme ;
 - (g) the task of the court is to estimate the amount of Part 7 benefits, if any, the plaintiff is or would be entitled to receive for the costs reflected in the future care award ... It then must make the appropriate deduction;
 - (h) benefits under s. 88 (2) of the Regulations arise when ICBC's medical adviser holds the opinion that the costs are "likely to promote the rehabilitation" of the plaintiff. The term "rehabilitation" is defined in s. 78 of the Regulation as follows:

"Rehabilitation" means the restoration, in the shortest practical time, of an injured person to the highest level of gainful employment or self-sufficiency that, allowing for the permanent effects of his injuries, is, with medical and vocational assistance, reasonably achievable by him.

- (i) the uncertainty of the entitlement of payment created by the Regulation may lead the court to conclude that only a nominal deduction is appropriate. Trial judges must be cautious in their approach to determining the estimate inasmuch as a reduction results in a lessening of the award in the tort action. If that is a result of uncertainty created by the Regulation, ICBC cannot be heard to complain ;
- (j) the court is to take into account ICBC's discretion with respect to whether certain amounts will be paid in addition to restrictions in the Regulation with respect to amounts payable[.]

[Citations omitted.]

[83] Part 7 Benefits fall into two categories: mandatory (s. 88(1)) and discretionary (s. 88(2)).

[84] The defendants have provided neither evidence nor authority to establish that the plaintiff's supervised exercise program would be paid by ICBC under either category.

[85] The plaintiff claims the costs of a supervised exercise program. Dr. Waseem recommends one "by an appropriately trained and experienced regulated health professional". The defendant highlights the word physical therapy in s. 88(1), but it is by no means self-evident that such a program necessarily constitutes physical therapy. In *Olson v. Farran*, 2016 BCSC 2149, several medical experts had recommended a supervised exercise program involving physiotherapists and kinesiologists. A portion of special damages relating to physiotherapy was deducted; nothing related to the kinesiology was deducted.

[86] Respecting discretionary benefits, this must be determined on evidence. As the plaintiff submits, such evidence often includes an affidavit from an ICBC adjuster: *Stanikzai v. Bola*, 2012 BCSC 1904; and *Jurczak*. I note that where the affidavit was equivocal, judges may decline to make any deduction: *Paskall v. Scheithauer*, 2012 BCSC 1859 at para. 14.

[87] For these reasons, I agree with the plaintiff that the defence application is premature and instead must be made post-judgment, on application by the defendant with proper evidence.

D. Special Damages

[88] The plaintiff submitted varying amounts under this head. The final amount sought appears in the plaintiff's written reply submission, which I understand to be \$1,538.22 in special damages; \$1,620.55 for a subrogated claim to the Chamber of Commerce Group Insurance Plan; and \$129.24 for a subrogated claim to the Ministry of Health under the Health Care Costs Recovery Act, S.B.C. 2008, c. 27.

[89] The defence does not dispute the claim for the Ministry of Health. The defence proposes \$1,448 for the claim related to the Chamber of Commerce Group Insurance which I have assumed continues even though that figure is proposed in the context of the plaintiff's higher claim identified in her closing written submission.

- [90] In terms of the plaintiff's revised schedule of special damages the defence submits that \$259.50 should be removed based on the submission that these are physiotherapy and massage treatments arising from the plaintiff's participation in the August 2015 BC Bike Race and not due to the Accident. Further, the defence submits that the plaintiff has not provided any evidence suggesting that she has sought recovery of any of her rehabilitation costs through her Part 7 Benefits. It is argued that while not all would have been paid under that coverage, a portion would have been. The defence proposes a further 25% reduction to reflect this. In sum, the defence submits that \$929.79 is appropriate for special damages.
- [91] In my view, the evidence supports the necessary relationship between the plaintiff's condition and the massage treatments received in the BC Bike Race and thus are approved. Accordingly, \$1,538.22 under this head is awarded. Also, \$1,620.55 for the Chamber of Commerce subrogated claim is awarded.
- [92] In terms of reimbursement under Part 7 benefits, application should be made for such benefits. Again, in this case this is a post-judgment matter.

IX. Mitigation

- [93] In order to establish that a plaintiff has failed to mitigate by not pursuing recommended treatment, the defendant must prove, on a balance of probabilities, that the plaintiff acted unreasonably and also the extent to which the plaintiff's damages would have been reduced had the plaintiff undergone the treatment in question: *Chiu v. Chiu*, 2002 BCCA 618 at para. 57.
- [94] The defence argues that the plaintiff failed to act reasonably in reducing the effectiveness of her course of treatment. The defence submits that the plaintiff admitted that she had not consistently followed up with her doctor, or participated in rehabilitation since the Accident. In respect of the plaintiff's need to focus on her second child's health problems during the first two years, the defence argues that it may have been reasonable for the plaintiff to not have the time to see a doctor or go for rehabilitation while she was taking her child to weekly appointments in Vancouver, this was only for a three-month period. The defence argues that the plaintiff has not explained why she did not treat herself after her daughter's condition improved after the three months.
- [95] In my view, given the circumstances of the plaintiff in being the primary caregiver in the family, the health of her second child, the actions that she took as regular exercise, stretching, yoga, as well as attending for acupuncture, massages, IMS, pilates, and the discussions she had with their husband regarding her situation; as well as the nature of her injuries, I am not persuaded the defence has met the necessary level to establish mitigation failure.

X. Conclusion

- [96] In summary, the damages awarded under the various heads are:

General Damages:

\$70,000.00

Loss of Future Earnings:

\$90,000.00

Cost of Future Care:

\$12,550.00

Special Damages:

\$1,538.22

Subrogation Claim

\$1,620.55

TOTAL:

\$175,708.77

[97] Viewing the award in totality, I find a total award of \$175,708.77 to be fair and reasonable.

[98] If the parties wish to address costs, they may do so by contacting trial scheduling; otherwise, costs on Scale B are awarded to the plaintiff.

"The Honourable Mr. Justice Masuhara"

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/18/02/2018BCSC0220.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/dennstedt-v-lepine-2018>

Prepared on 28 October 2026 · Esheria