

CANADA / JUDGMENT

Dhami v. Madden

2020 BCSC 573

COURT

Supreme Court of British Columbia

DECIDED

15 April 2020

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

2020 BCSC 573 Dhami v. Madden

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Dhami v. Madden,

2020 BCSC 573

Date: 20200415

Docket: M171122

Registry: Vancouver

Between:

Komalpreet Dhami

Plaintiff

And

Paul Madden, Gail Lande,

Larry Lande and Navdeep Josan

Defendants

Before: The Honourable Mr. Justice Mayer

Reasons for Judgment

Counsel for the Plaintiff:

Y. Wong

Counsel for the Defendants:

R. Mohan

R. McMullan

Place and Date of Trial/Hearing:

Vancouver, B.C.

March 9 - 13, 2020

Place and Date of Judgment:

Vancouver, B.C.

April 15, 2020

Table of Contents

Introduction.. 3

Background.. 3

Issues.. 5

Causation.. 5

Lay Witness Testimony. 8

The Expert Medical Evidence. 9

Headaches. 9

Neck and Back Pain.. 10

Conclusion Regarding Causation. 11

Anxiety, Forgetfulness, Reduced Concentration, Fatigue and Sleeplessness. 11

Headaches. 12

Neck and Back Pain.. 12

Non-Pecuniary Damages.. 13

Discussion and Conclusion on Non-Pecuniary Damages. 14

Loss of Past Income Earning Capacity.. 16

Discussion and Conclusion on Loss of Past Income Earning Capacity. 17

Loss of Future Income Earning Capacity.. 19

Discussion and Conclusion on Loss of Future Income Earning Capacity. 20

Cost of Future Care.. 22

Discussion and Conclusion on Cost of Future Care. 23

Special Damages.. 23

Conclusion.. 23

Introduction

- [1] This action involved a claim by the plaintiff, Ms. Komalpreet Dhami, for damages arising from two motor vehicle accidents (collectively, the "Accidents").
- [2] The first accident was a low speed collision which occurred in a super market parking lot on February 12, 2015 (the "First Accident"). In the First Accident Ms. Dhami's vehicle was struck on the left, driver's side door, when the defendant Paul Madden failed to stop his pickup truck at a stop sign.
- [3] The second accident, a multi-vehicle rear-end collision, occurred on August 26, 2016 (the "Second Accident"). In the Second Accident Ms. Dhami's vehicle was stopped at a red-light and was struck from behind by the vehicle driven by the defendant Gail Lande, whose vehicle had been pushed forward after being struck by the vehicle driven by the defendant Navdeep Johal.
- [4] Liability for the Accidents has been admitted by the defendants.
- [5] Ms. Dhami seeks non-pecuniary damages for the injuries she sustained in the Accidents, past and future wage loss, special damages and cost of future care.

Background

- [6] Ms. Dhami is currently 26 years old and resides with her parents, older brother and grandparents in a family home in Surrey, British Columbia. She moved to Canada with her family at the age of 14.
- [7] After completing high school Ms. Dhami completed a one-year diploma program to become a licensed practical nurse ("LPN"). She first worked with a company teaching nurses how to use glucometers and then moved on to work as a care-aid with a private home-care company, providing a combination of general and nursing care to private clients in both care facilities and private homes.
- [8] Shortly after obtaining her LPN Ms. Dhami decided that she wanted to become a registered nurse ("RN"). After completing some pre-requisite courses she commenced an RN transitional program at Langara College in Vancouver. During the first year of her studies at Langara College she was able to continue working as a care-aid on an almost full-time basis.

- [9] When the First Accident occurred Ms. Dhimi was on a break from work as a care-aid. She returned to work that day, but ended up leaving early because she started feeling neck and headache pain, primarily on her left side. She saw her family Doctor, Dr. Manga, who recommended that she take time off. She ended up taking approximately two months off from work. During this time, she rested at home and attended at physiotherapy and chiropractic treatments.
- [10] Ms. Dhimi completed a clinical placement at a hospital in Richmond in the summer of 2015 and in the fall of that year began a more intensive Bachelor of Science in Nursing ("BSN") program at Langara College. In the spring of 2016 she obtained a new job as a nurse, with a medical clinic in Surrey.
- [11] Ms. Dhimi says that after the Second Accident on August 26, 2016, she felt symptoms of anxiety, increased headaches and neck pain. She took approximately two weeks off of work and received various rehabilitative treatments.
- [12] During her last year of school in 2017, Ms. Dhimi took on a student nursing position at a hospital in Surrey under the supervision of an emergency room nurse. She completed her BSN program in August 2017 and passed her national licensing exam and obtained her RN status in October of that year. After she obtained RN credentials, Ms. Dhimi worked a few more shifts (approximately two shifts) at the hospital in Surrey before taking a full-time job at the medical clinic where she had previously worked on a part-time basis.
- [13] In April 2018, Ms. Dhimi accepted a full-time position as an ER nurse at a hospital in White Rock, where she continues to work at this time. She kept her job working part-time at the medical clinic until 2019, when she began teaching nursing students at a lower mainland private college.
- [14] In 2019, Ms. Dhimi applied for admission into a two-year, full-time masters' in nursing program, which would lead to a designation as a Nurse Practitioner, but was not accepted.

Issues

- [15] Ms. Dhimi claims that as a result of the Accidents she sustained injuries resulting in, primarily, chronic headaches and ongoing back and neck pain and anxiety. She says that these injuries and the related symptoms have impacted her quality of life and reduced her ability to earn overtime income as an ER nurse.
- [16] The defendants contend that Ms. Dhimi has not proven that the Accidents caused her injuries and related symptoms or alternatively, if they did, that she has not suffered any income loss, either past or prospective.
- [17] The primary issues for determination are therefore as follows:
- a. Which of Ms. Dhimi's injuries and related physical symptoms were caused by the Accidents?

- b. What damages is Ms. Dhami entitled to as a result of the injuries she sustained in the Accidents and the related physical symptoms?

Causation

[18] A plaintiff must establish on a balance of probabilities that a defendant's negligence caused or materially contributed to an injury. The defendant's negligence need not be the sole cause of the injury so long as it is part of the cause beyond the range of *de minimus*. Causation need not be determined by scientific precision: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at paras. 13-17 [*Athey*]; *Farrant v. Laktin*, 2011 BCCA 336 at para. 9.

[19] The primary test for causation asks: but for the defendant's negligence, would the plaintiff have suffered the injury? The "but for" test recognizes that compensation for negligent conduct should only be made where a substantial connection between the injury and the defendant's conduct is present: *Resurface Corp. v. Hanke*, 2007 SCC 7 at paras. 21-23.

[20] Causation must be established on a balance of probabilities before damages are assessed. As McLachlin, C.J.C. stated in *Blackwater v. Plint*, 2005 SCC 58 at para. 78:

Even though there may be several tortious and non-tortious causes of injury, so long as the defendant's act is a cause of the plaintiff's damage, the defendant is fully liable for that damage. The rules of damages then consider what the original position of the plaintiff would have been. The governing principle is that the defendant need not put the plaintiff in a better position than his original position and should not compensate the plaintiff for any damages he would have suffered anyway: *Athey*.

[21] The most basic principle of tort law is that a plaintiff must be placed in the position they would have been in if not for the defendant's negligence, no better or worse. Tortfeasors must take their victims as they find them, even if the plaintiff's injuries are more severe than they would be for a normal person (the thin skull rule). However, the defendant need not compensate a plaintiff for any debilitating effects of a pre-existing condition which the plaintiff would have experienced anyway (the crumbling skull rule): *Athey* at paras. 32-35.

[22] During her examination in chief, Ms. Dhami testified that prior to the First Accident she was in good health and had no ongoing issues with headaches, neck pain or back pain and only began to experience these symptoms afterwards. She said that after the First Accident she began to experience increased anxiety, particularly while driving. She said that she also experienced difficulty concentrating which resulted in additional anxiety concerning her ability to succeed in her studies.

[23] Ms. Dhami testified that her symptoms of pain and anxiety had begun to improve somewhat after the First Accident, but returned after the Second Accident. She testified that at this time she still experiences neck pain and headaches, of varying severity, every day which gets worse towards the end of the day. She said that her back pain symptoms have improved and are not as significant as her neck pain. She said that she experiences anxiety every day.

- [24] The extent to which Ms. Dhami was suffering from similar symptoms prior to the Accidents is relevant to the issue of whether the Accident caused her alleged injuries and related symptoms.
- [25] During her cross-examination Ms. Dhami was taken to clinical records of her family Doctor, Dr. Manga, made prior to the First Accident. Dr. Manga was not called as a witness at trial but his clinical records, including any observations and subjective reporting, were admitted at trial pursuant to a document agreement between the parties.
- [26] Dr. Manga's clinical note for May 6, 2014 describes Ms. Dhami's chief complaint at that time as being a headache, which she described as feeling like a vice around her head. He noted his clinical note that she had suffered from fatigue for approximately two months, was experiencing neck pain and problems with memory. She advised Dr. Manga that she was working seven days a week and that this was probably overwhelming. Dr. Manga diagnosed Ms. Dhami with depression.
- [27] In his clinical note made August 1, 2014, Dr. Manga noted that Ms. Dhami's subjective complaints included sleep disturbance, daily sadness, fatigue throughout the day and forgetfulness. He repeated his earlier diagnosis of depression in this clinical note and again in a later clinical note made October 2, 2014. In his clinical note made October 20, 2014, Dr. Manga recorded that Ms. Dhami was experiencing sudden anxiety and panic spells and diagnosed her with an anxiety disorder. On October 31, 2014, Dr. Manga again noted Ms. Dhami's complaints of anxiety and a racing heart.
- [28] In his clinical note made November 14, 2014, Dr. Manga noted Ms. Dhami's subjective complaint of acute neck stiffness once per week and recorded that her depression was improving. His assessment lists "neck strain/sprain/injury" and a diagnosis of soft tissue injury. In a later clinical note made December 30, 2014, the last before the First Accident, he recorded low back and neck pain for three to four days. His assessment made that day included, once again, "neck strain/sprain/injury" and repeated the diagnosis of a soft tissue injury.
- [29] During cross-examination, when taken to the pre-First Accident clinical records made in the last few months of 2014, Ms. Dhami was unable to recall making the specific complaints contained within them. In my view, this contrasts unfavourably with her ability to describe the symptoms which arose after the First Accident in February 2015.
- [30] I find it noteworthy that it was only during cross-examination that Ms. Dhami confirmed that she had been involved in a motor vehicle accident in December 2014 - only two months before the First Accident. In response to a question during cross-examination, whether she continued to experience any residual symptoms from the December 2014 accident at the time of the First Accident in February 2015, Ms. Dhami testified that she could not recall. This of course conflicts with her evidence during direct examination when she testified that was not experiencing any such symptoms.

Lay Witness Testimony

- [31] Ms. Dhami called evidence from two friends, Anjalie Parmar and Dania Khader, both nurses, and her older brother Guraman Dhami.
- [32] Ms. Parmar, who did not know Ms. Dhami before the First Accident, testified that Ms. Dhami appeared more anxious after the Second Accident than she did before.
- [33] Mr. Dhami's evidence was somewhat different than Ms. Parmar's. He testified that Ms. Dhami developed significant anxiety, particularly around driving, after the First Accident. He testified that Ms. Dhami did not appear to have any neck pain, back pain, headaches, anxiety, fatigue or memory issues prior to the First Accident. He testified that she struggled with apparent pain during a long flight to India in February 2018 and during a flight to the U.K. later that year.
- [34] Ms. Khader described herself as Ms. Dhami's best friend and had studied and worked with Ms. Dhami before and after the First Accident through until approximately the late summer or fall of 2017. She testified that after the Accidents Ms. Dhami appeared to have difficulty with activities at work involving lifting, including lifting patients and moving boxes in a storeroom. She testified that after the Accidents Ms. Dhami appeared to be experiencing neck pain and would move her head around. She also testified that Ms. Dhami displayed signs of anxiety when driving and was not as social as she had been in the past.

The Expert Medical Evidence

Headaches

- [35] Ms. Dhami called expert evidence from a neurologist Dr. Cheung. Dr. Cheung assessed Ms. Dhami in 2018 at the request of her family doctor and saw her for an independent medical exam in November 2019. Dr. Cheung was qualified to provide opinion evidence regarding the diagnosis and prognosis for individuals suffering from headaches arising from trauma and pain caused by musculoskeletal injuries.
- [36] In her expert report Dr. Cheung stated that in her opinion, Ms. Dhami did not sustain any significant neurologic injuries as a result of the Accidents including post-concussive syndrome. She stated that Ms. Dhami's headaches were likely cervicogenic - that is, her headaches were secondary headaches caused by an underlying neck injury which had been caused by the Accidents.
- [37] During her cross-examination Dr. Cheung was taken to the pre-accident clinical records of Dr. Manga. She agreed that the symptoms relied upon by her in coming to the conclusion on the cause of Ms. Dhami's headaches set out in her report were similar to the pre-Accidents symptoms reported by Ms. Dhami to Dr. Manga before the First Accident. In light of this additional information she agreed that she could not say whether, on a balance of probabilities, Ms. Dhami's headaches were caused by the Accidents.

- [38] In addition, Dr. Cheung agreed during cross-examination that it was unlikely that the Accidents caused Ms. Dhami's anxiety symptoms given the existence of these symptoms beforehand, although she testified that she would defer to a psychiatrist in this respect.

Neck and Back Pain

- [39] Ms. Dhami called expert evidence from Dr. Anton, a physiatrist, who assessed Ms. Dhami on two occasions, first in February 2018 and then in October 2019. Dr. Anton was qualified as an expert in assessing and treating individuals with chronic pain.
- [40] In his expert report Dr. Anton set out his opinion that Ms. Dhami sustained soft tissue injuries to her neck, low back and shoulder girdle in the First Accident and likely sustained additional soft tissue injuries to her neck in the Second Accident. In his opinion the pain arising from these injuries was chronic and likely exacerbated by her activities as an ER nurse and by psychological stressors.
- [41] During cross-examination Dr. Anton confirmed that he had not been provided with information regarding Ms. Dhami's December 2014 accident and was not aware of Dr. Manga's clinical note made in December 2014 referencing a soft tissue injury. He agreed on cross-examination that if Ms. Dhami had sustained a soft tissue injury to her back or neck before the Accidents that this might change his opinion with respect to the cause of the back and neck pain she experienced afterwards. Dr. Anton stated that a relevant consideration would be whether or not Ms. Dhami had received any therapy or missed any work after the December 2014 accident.
- [42] He agreed that it is possible to experience soft tissue (myofascial) pain without trauma including as a result of repetitive overloading from the activities of daily life or work - including for example, the rigours of nursing. He agreed that nurses are at particular risk of suffering from musculoskeletal problems including myofascial pain and mechanical back pain.
- [43] The defendants tendered an expert report from Dr. Zabielauskas, a physiatrist. Dr. Zabielauskas was qualified to provide opinion evidence with respect to the diagnosis, management, prognosis and treatment of patients with musculoskeletal injuries and chronic pain.
- [44] Dr. Zabielauskas' opinion was that Ms. Dhami sustained uncomplicated soft tissue injuries as a result of the Accidents. In his opinion she sustained a cervical strain (WAD-II) injury and a lumbosacral strain but did not conclude whether this resulted from the First or Second Accident. He considered that any residual symptoms of pain more likely arose as a result of the physical requirements of Ms. Dhami's job as an ER nurse. In his opinion, Ms. Dhami did not suffer from chronic pain. As was the case with Drs. Cheung and Anton, Dr. Zabielauskas was not aware that Ms. Dhami had been in a motor vehicle accident in December 2014.

Conclusion Regarding Causation

- [45] I find Ms. Dhami's evidence with respect to her injuries and symptoms before the First Accident to be unreliable. In this respect, Ms. Dhami was a poor historian.
- [46] Although Ms. Parmar, Mr. Khadi and Ms. Khader provided some evidence which suggest that Ms. Dhami began to suffer from neck and back pain and anxiety after the Accidents, the clinical records of Dr. Manga indicate that most of these symptoms existed earlier.
- [47] To the extent that Ms. Dhami's evidence and that of the lay witnesses regarding Ms. Dhami's condition before the First Accident is inconsistent with the record of her symptoms contained within the clinical notes of Dr. Manga or other medical doctors, I find the clinical notes to be more reliable.

Anxiety, Forgetfulness, Reduced Concentration, Fatigue and Sleeplessness

- [48] None of the medical experts called at trial provided an opinion with respect to the cause of Ms. Dhami's anxiety, forgetfulness, concentration issues, fatigue or sleeplessness.
- [49] The clinical records of Dr. Manga indicate that Ms. Dhami was suffering from anxiety and depression before the Accidents occurred. With respect to her symptoms of anxiety, Dr. Manga assessed Ms. Dhami as having a general anxiety disorder in October 2014 and he prescribed Xanax, which Ms. Dhami took to manage this condition. In addition, his clinical notes reference pre-existing fatigue, memory issues, interrupted sleep, and forgetfulness. Based on the existence of these pre-accident symptoms I am not convinced that, to the extent they existed after the Accidents, they were caused by them.
- [50] Ms. Dhami says that she began to experience driving related anxiety after the Accidents occurred. The evidence suggests that the Accidents were relatively minor low speed accidents. I acknowledge that it is possible that someone may suffer from driving related anxiety after a minor accident. Although, I am somewhat skeptical that the Accidents resulted in significant driving related anxiety I accept that Ms. Dhami is more nervous driving after the Accidents.

Headaches

- [51] In light of Ms. Dhami's pre-accident reports of headache, neck and back pain, Dr. Cheung could not say whether the Accidents caused Ms. Dhami's post-accident headaches. I do not find that there is a sufficient evidentiary basis on which I can conclude, on a balance of probabilities, that the Accidents caused Ms. Dhami's on-going headaches.

Neck and Back Pain

- [52] There is no dispute amongst the medical experts that Ms. Dhimi sustained soft tissue injuries as a result of the Accidents and their opinions are consistent with the symptoms noted in Ms. Dhimi's post-accident clinical records.
- [53] Ms. Dhimi missed two months of work after the First Accident. She received physiotherapy treatments after the First Accident between March and June 2015. The clinical records of Dr. Manga reference headaches, but not neck and back pain after April 2015 until May 25, 2016 when he recorded that Ms. Dhimi reported that her neck and back bothered her during prolonged periods of standing and being on her feet during her nursing practicum, and that she otherwise felt fine. Most of Dr. Manga's entries after approximately May 2016 appear to relate to psychological or psychiatric symptoms.
- [54] There is some indication that Ms. Dhimi experienced neck and back pain after May 2016. Ms. Dhimi was referred to a neurologist, Dr. Nagaria who noted in a series of consult reports made between June 2015 and March 2016 that Ms. Dhimi had reported neck pain and headaches.
- [55] After the Second Accident in August 2016, Ms. Dhimi missed two weeks of work. Dr. Manga's clinical notes reference neck and back pain on a generally consistent basis through until April 2019 when he noted that Ms. Dhimi reported that she was doing well and voiced no complaints. As was the case prior to the Second Accident many of Dr. Manga's clinical notes for the period following August 2016 refer largely to psychological/psychiatric symptoms. Ms. Dhimi's kinesiology records for the months of July, September and October 2018 record that Ms. Dhimi reported she was feeling generally okay with decreased pain.
- [56] I conclude that Ms. Dhimi sustained soft tissue injuries to her neck, shoulder girdle and lower back after the First Accident resulting in pain in her neck and back. Although her symptoms improved she continued to experience associated pain to these parts of her body through until the Second Accident. I also conclude that Ms. Dhimi continued to experience, primarily, neck pain and to a lesser extent, back pain after the Second Accident. I accept the finding of Dr. Anton that Ms. Dhimi's pain has become chronic although the level of pain seems to have improved over the last couple of years.

Non-Pecuniary Damages

- [57] Non-pecuniary damages are awarded to compensate the plaintiff for pain, suffering, loss of enjoyment of life and loss of amenities. The compensation awarded should be fair to all parties, and fairness is measured against awards made in comparable cases. Comparable cases, though helpful, serve only as a rough guide. Each case depends on its own unique facts: *Benavides v. Doe*, 2015 BCSC 1831 at para. 94; *aff'd by Benavides v. Insurance Corporation of British Columbia*, 2017 BCCA 15.

- [58] The effect of the injuries on a plaintiff's particular circumstances must be taken into consideration. Factors to be considered in assessing non-pecuniary damages include the age of the plaintiff, nature of the injury, severity and duration of pain, disability, emotional suffering, loss or impairment of life, impairment of family, marital and social relationships, impairment of physical and mental abilities and loss of lifestyle: *Stapley v. Hejslet*, 2006 BCCA 34, at para. 45 [Stapley].
- [59] The correct approach to assessing injuries which depend on subjective reports of pain was discussed in *Price v. Kostyba* (1982), 70 B.C.L.R. 397 (S.C.) by McEachern C.J. (quoted with approval in *Edmondson v. Payer*, 2012 BCCA 114 at para. 2). In *Price*, the court explained that evaluating a plaintiff's subjective complaints about injury, pain and loss into compensatory damages is never simple.

Discussion and Conclusion on Non-Pecuniary Damages

- [60] Ms. Dhami seeks non-pecuniary damages of \$150,000, which includes damages for loss of housekeeping capacity. She relies upon the following authorities:

a)

Verjee v. Dunbrak, 2019 BCSC 1696

[\$150,000]

b)

Gill v. Lai, 2018 BCSC 101

[\$140,000]

c)

Crookall v. Higby, 2018 BCSC 1200

[\$125,000]

- [61] The defendants submit that an appropriate range of non-pecuniary damages arising from chronic neck and back pain is between \$60,000 and \$70,000. They deny that Ms. Dhami has suffered a compensable loss of housekeeping capacity. The defendants rely on the following authorities:

a)

Lin v. Yim, 2019 BCSC 1071

[\$60,000]

b)

Glass v. Dhaliwal, 2020 BCSC 186

[\$65,000]

c)

Richmond v. Osztovits, 2019 BCSC 1984

[\$70,000]

- [62] In my view the relevant factors set out in Stapley to be applied in this case include the following: the nature of the injury and the severity and duration of associated pain; the extent of any on-going disability; the level of emotional suffering; the loss or impairment of life and impairment of social relationships.
- [63] I do not find that Ms. Dhami's accident-related injuries and symptoms to be severe. This does not mean that they have not resulted in compensable impacts. Despite her injuries and related symptoms Ms. Dhami was able to successfully complete her RN and commence work as an ER nurse and continues to work part-time teaching other nurses.
- [64] I do find that Ms. Dhami's neck and back pain is ongoing and has impacted her ability and therefore sense of self-worth as an ER nurse. In particular, she has had to rely on the support of other staff members to help her perform some of the duties of her job, including those involving lifting and moving patients.
- [65] I find that Ms. Dhami's symptoms have to a small extent impaired her social life and in particular, her ability to spend time as much with her friends as she did before the Accidents. In addition, although her symptoms made it more difficult for her to travel to India and England in 2018, they did not prevent her from making these trips. Finally, Ms. Dhami experiences some anxiety driving or being a passenger, but she is still able to travel by car. I would describe these impairments as being of low to moderate severity.
- [66] It is likely that Ms. Dhami's pre-existing symptoms of depression, anxiety, fatigue, memory issues, interrupted sleep and forgetfulness substantially contributed to the level of emotional suffering and impairment to her work and social life that she experienced after the Accidents. I have taken these pre-existing symptoms into consideration in assessing her non-pecuniary damages.
- [67] In my view, given Ms. Dhami's pre-existing and unrelated symptoms, an appropriate award for non-pecuniary damages is \$60,000.

Loss of Past Income Earning Capacity

- [68] Ms. Dhimi seeks damages for loss of past income earning capacity in the amount of \$43,163. This is based on the loss of two months of regular pay from her work as a private care nurse after the First Collision (\$6,776), the loss of two weeks of regular pay in a medical clinic after the Second Collision (\$720), a wage differential between working as an RN in a medical clinic and at a hospital for a six-month period (\$3,000); and, the loss of potential overtime pay as an ER nurse (\$32,665).
- [69] The defendant concedes that Ms. Dhimi is entitled to damages for past wage loss occurring after the Accidents and submits that an award of \$3,479, after deduction of 15% for tax, should be made for the First Accident and \$956, again after deduction of 15% for tax, should be made for the Second Accident. They deny that Ms. Dhimi should receive any additional amount for past loss of income earning capacity.
- [70] Compensation for loss of past and future income earning capacity is to be based on what the plaintiff would have, not could have, earned but for the injury that was sustained: *Ibbitson v. Cooper*, 2012 BCCA 249 at para. 19; *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30; *M.B. v. British Columbia*, 2003 SCC 53 at para. 49.
- [71] A claim for past income loss is actually a claim for past loss of earning capacity. That is, a claim for the loss of the value of the work that the injured party would have performed but was unable to perform because of the injury. Loss of earning capacity rather than the loss of actual income is to be considered, although loss of income may provide some basis in determining the value of loss of capacity: *Mojahedi v. Friesen*, 2016 BCSC 1225 at para. 73 referring to *Rowe* at para. 30.
- [72] The burden of proof of actual past events is proof on a balance of probabilities. An assessment of loss of both past and future earning capacity involves consideration of hypothetical events. A plaintiff is not required to prove these hypothetical events on a balance of probabilities. A hypothetical possibility can be considered so long as there is a real and substantial possibility that it would have occurred, or will occur, and is not mere speculation: *Athey* at para. 27; *Morlan v. Barrett*, 2012 BCCA 66 at para. 38; *Grewal v. Naumann*, 2017 BCCA 158 at paras. 48 - 49
- [73] The amount of past or future income loss may be proven using the "earnings approach" or the "capital asset" approach. The former will be more useful when a loss is more easily measureable - for example where a plaintiff's income is not expected to fluctuate, up or down, over time. The latter is more useful when the loss is not easily measured: *Perren v. Lalari*, 2010 BCCA 140 at para. 32.

Discussion and Conclusion on Loss of Past Income Earning Capacity

- [74] As I have stated above, compensation for loss of past and future income earning capacity is to be based on what the plaintiff would have earned, not could have earned. In this case it is possible to apply an income approach to the assessment of Ms. Dhambi's past wage loss.
- [75] I accept Ms. Dhambi's calculation that she earned an average of \$3,388 per month, after tax, in the 12-month period prior to the First Accident. I also accept her submission that after the First Accident she missed approximately two months' work as a private nurse which resulted in the loss of earnings of \$6,776 after all relevant deductions.
- [76] I accept Ms. Dhambi's calculation that she earned an average of \$904 per week in the three-month period prior to the Second Accident. I also accept her submission that after the First Accident she missed work as a private nurse which resulted in the loss of earnings of \$720, after deductions.
- [77] I do not accept that Ms. Dhambi is entitled to the \$3,000 claimed as a wage differential, which she calculates for the period after she obtained her RN in October of 2017 until she started working as an ER nurse in White Rock in April 2018. Ms. Dhambi's calculation assumes that but for the Accidents she would have continued working as an ER nurse in a hospital right after receiving her RN and thereby earned a higher hourly salary, the difference in salary being some \$3.40 per hour. The evidence does not allow me to conclude that there is a real and substantial possibility that this would have occurred but for the Accidents. Ms. Dhambi had only completed two shifts as an ER nurse in the hospital in Surrey after obtaining her RN in October 2017. There was insufficient evidence called at trial allowing me to find that there is a real and substantial possibility that Ms. Dhambi would have obtained a full-time position as an ER nurse at the Surrey hospital at that time. As a result, the wage differential claim falls away.
- [78] With respect to Ms. Dhambi's claim for lost overtime income I accept that but for the Accidents, after Ms. Dhambi obtained a full-time position at the hospital in White Rock, that there is a real and substantial possibility that she would have worked overtime. She submits that she would have worked approximately two 11-hour overtime shifts per month. The evidence of Ms. Dhambi's friends, Ms. Parmar and Ms. Khader, who are also nurses working in the same health general region, establishes to my satisfaction that overtime shifts were generally available.
- [79] For the purposes of assessing her overtime losses I have assumed that Ms. Dhambi would have worked two 11-hour overtime shifts per month from the time that she started her job as an ER nurse in White Rock in April 2018 to the date of trial. This is equivalent to 46, eleven-hour overtime shifts. I have taken into account the real and substantial possibility that even if the Accidents had not occurred, that Ms. Dhambi's pre-existing depression, anxiety and related symptoms would have impacted her ability to take overtime shifts.

- [80] Ms. Dhimi earned \$66.80 per hour during the overtime shifts she was able to work. Accordingly, I estimate that Ms. Dhimi could have earned approximately \$33,800 in overtime income. Deducting the \$9,953 in overtime income she was able to earn results in a before tax loss of overtime income of \$23,847. After taking away 30% for statutory deductions and union dues, this results in a net overtime income loss for this period of \$16,693.
- [81] I find that but for the Accidents that Ms. Dhimi could have earned an additional \$24,000 from all sources of potential income and I assess her damages for loss of past income earning capacity at that amount.

Loss of Future Income Earning Capacity

- [82] A claim for loss of future income earning capacity raises two key questions: (1) has the plaintiff's earning capacity been impaired by his or her injuries; and, if so (2) what compensation should be awarded for the resulting financial harm that will accrue over time? The assessment of loss must be based on the evidence, and not on an application of a purely mathematical calculation. The appropriate means of assessment will vary from case to case: *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 (S.C.); *Pallos v. Insurance Corp. of British Columbia* (1995), 100 B.C.L.R. (2d) 260 (C.A.); *Pett v. Pett*, 2009 BCCA 232.
- [83] The essential task of the court is to compare the likely future of the plaintiff's working life if the accident had not happened with the plaintiff's likely future working life after the accident: *Gregory v. Insurance Corp. of British Columbia*, 2011 BCCA 144 at para. 32.
- [84] The principles that apply in assessing loss of future earning capacity were summarized by Low J.A. in *Reilly v. Lynn*, 2003 BCCA 49 at para. 101:

The relevant principles may be briefly summarized. The standard of proof in relation to future events is simple probability, not the balance of probabilities, and hypothetical events are to be given weight according to their relative likelihood: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 27. A plaintiff is entitled to compensation for real and substantial possibilities of loss, which are to be quantified by estimating the chance of the loss occurring: *Athey v. Leonati*, *supra*, at para. 27, *Steenblok v. Funk* (1990), 46 B.C.L.R. (2d) 133 at 135 (C.A.). The valuation of the loss of earning capacity may involve a comparison of what the plaintiff would probably have earned but for the accident with what he will probably earn in his injured condition: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 at 93 (S.C.). However, that is not the end of the inquiry; the overall fairness and reasonableness of the award must be considered: *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 11; *Ryder v. Paquette*, [1995] B.C.J. No. 644 (C.A.) (Q.L.). Moreover, the task of the Court is to assess the losses, not to calculate them mathematically: *Mulholland (Guardian ad litem of) v. Riley Estate* (1995), 12 B.C.L.R. (3d) 248 (C.A.). Finally, since the course of future events is unknown, allowance must be made for the contingency that the assumptions upon which the award is based may prove to be wrong: *Milina v. Bartsch*, *supra*, at 79.

Discussion and Conclusion on Loss of Future Income Earning Capacity

- [85] Ms. Dhimi submits that a fair and reasonable way to assess her loss of future income earning capacity is to assume that she would have obtained her nurse practitioner credentials ten years from the date of trial and to assess her losses to this date. She further submits that it would be fair to assume that during this period she would have been able to work three overtime shifts per month prior to obtaining her credentials as a nurse practitioner. In response to a question from the court during closing submissions counsel for Ms. Dhimi confirmed that in her submission, any claim for loss of overtime earnings would fall away after Ms. Dhimi becomes a nurse practitioner.
- [86] Ms. Dhimi submits, based on three eleven-hour overtime shifts per month at \$75 per hour, this results in gross income loss of \$2,475 per month, or \$29,700 per year. She relies on the present value multipliers provided by Mr. Curtis Peever, who was qualified as an expert economist at trial, and submits that the present value of her loss of future income earning capacity over ten years is \$295,959.
- [87] The defendants submit that Ms. Dhimi has not established causation for any functionally disabling injuries arising from the Accidents and therefore has not proven a loss of future income earning capacity. Alternatively, the defendants submit that if the court accepts that Ms. Dhimi has ongoing pain in her neck and back which result in limitations, that she has still not proven an actual event in the past leading to an income loss or a real and substantial event in the future leading to such loss. In particular, with respect to the loss of capacity to work overtime shifts the Defendants submit that there is insufficient evidence establishing that but for the Accident Ms. Dhimi would have worked even two overtime shifts per month.
- [88] In the further alternative, the defendants submit that if the court finds that a future loss of earning capacity has been proven that the evidence is insufficient to establish a loss on an earnings approach and that damages should be determined based on a loss of capital asset analysis. The defendants say that under this analysis deductions should be made, factoring in positive contingencies including, for example, the possibility that Ms. Dhimi will obtain her nurse practitioners credentials earlier rather than later or that her employer may provide her with accommodation - which I assume means that she will be able to work overtime with such accommodation. In addition, the defendants submit that negative contingencies should be considered including the possibility that Ms. Dhimi would have experienced debilitating symptoms, unrelated to the Accidents, in any case.
- [89] The defendants submit that an award of between \$78,000 and \$156,000 to reflect damages for loss of income earning capacity both past and prospective over a one or two-year period is appropriate.
- [90] I have already found that Ms. Dhimi suffered a loss of income earning capacity to trial, consisting of a reduction in her ability work as much overtime as she would like, as a result of her neck and shoulder pain symptoms.

- [91] With respect to her potential future losses, I note that Ms. Dhami was able to work approximately 14 overtime shifts in 2019. The evidence establishes that her condition continued to improve in 2019 and therefore it is reasonable to conclude that she will work at least that many overtime shifts per year in 2020 and the years following. This is equivalent to approximately 1.1 overtime shifts per month.
- [92] Again, in consideration of the possible future limitations arising from her pre-existing non-Accident related symptoms, I find that Ms. Dhami would likely have worked an average of two 11-hour overtime shifts per month going forward if the Accidents had not occurred.
- [93] The evidence regarding Ms. Dhami's past education and work history demonstrates that she is motivated to advance her skills and training. I consider it possible that even if the Accidents had not occurred, she would have sought to obtain her masters degree and qualify as a nurse practitioner in less than ten years. I consider it reasonable to assess her damages for loss of future earning capacity on the basis that there is a real and substantial possibility that she will obtain this credential within five years.
- [94] For the purposes of assessing her damages I assume that Ms. Dhami will be unable to work one 11-hour overtime shift per month, paid at the hourly rate of \$75, for a period of five years. This results in gross damages of \$9,900 per year over a five-year period. For ease of calculation I round this figure up to \$10,000 per year over this period. Applying the income multiplier provided by Mr. Peever results in a calculation of the present value of Ms. Dhami's future income loss of \$55,630.
- [95] In my view, a fair assessment of damages for Ms. Dhami's loss of future income earning capacity is \$55,000, inclusive of any statutory deductions.

Cost of Future Care

- [96] A plaintiff is entitled to compensation for the cost of future care based on what is reasonably necessary to restore her to her pre-Accident condition in so far as that is possible. When full restoration is not achievable, the court must strive to assure full compensation through the provision of adequate future care. The award is to be based on what is reasonably necessary on the medical evidence to preserve and promote the plaintiff's mental and physical health: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.) [*Milina*]; *Williams v. Low*, 2000 BCSC 345; *Spehar v. Beazley*, 2002 BCSC 1104; *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at paras. 29-30.
- [97] The test for determining the appropriate award under the heading of cost of future care is an objective one based on medical evidence. For an award of future care: (1) there must be a medical justification for claims for cost of future care and (2) the claims must be reasonable: *Milina* at 84; *Tsalamandris v. McLeod*, 2012 BCCA 239 at paras. 62-63.

- [98] It is not necessary for a medical expert to testify in support of each item of support that is claimed but there must be some evidentiary link between a physician's assessment of pain, disability and recommended treatment and the care recommended by a qualified health care professional: Gregory at para. 39.
- [99] An assessment of damages for cost of future care is not a precise accounting exercise: Krangle (Guardian ad litem of) v. Brisco, 2002 SCC 9 at para. 21.

Discussion and Conclusion on Cost of Future Care

- [100] Ms. Dhami seeks damages for the cost of future care in the amount of \$4,900. This includes costs of active rehabilitation therapy, psychiatric medication, cognitive behavioral therapy and headache mediation. Of the costs items listed above the only one which I find arises from injuries sustained in the Accidents is for active rehabilitation. I award Ms. Dhami costs of future care in the claimed amount, being \$1,000.

Special Damages

- [101] Ms. Dhami claims special damages in the amount of \$11,372.70 for various therapeutic treatments and prescriptions. The defendants dispute the \$71.14 claimed for prescriptions to treat vertigo, fatigue and anxiety and the \$1,150 for Botox injections to treat headaches. In my view, none of the disputed medications or the Botox treatment relate to symptoms caused by the Accidents. I award Ms. Dhami special damages in the amount of \$10,151.

Conclusion

- [102] Ms. Dhami suffered injuries and sustained damages as a result of the negligence of the defendants in the Accidents.

- [103] I award her the following damages, payable by the defendants:

(a)

Non-pecuniary damages

\$ 60,000

(b)

Past loss of earning capacity

\$ 24,000

(c)

Future loss of earning capacity

\$ 55,000

(d)

Cost of future care

\$ 1,000

(e)

Special damages

\$ 10,151

TOTAL

\$ 150,151

"Mayer, J."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/20/05/2020BCSC0573.htm>

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

Prepared on 26 October 2026 · Esheria