

CANADA / JUDGMENT

Dhugga v. Poirier

2020 BCSC 914

COURT

Supreme Court of British Columbia

DECIDED

19 June 2020

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2020 BCSC 914 Dhugga v. Poirier

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Dhugga v. Poirier,

2020 BCSC 914

Date: 20200619

Docket: M176020

Registry: New Westminster

Between:

Kiranvir Dhugga

Plaintiff

And

Ronald Poirier and Kory Poirier

Defendants

-and-

Docket: M193616

Registry: New Westminster

Between:

Kiranvir Dhugga

Plaintiff

And

Satish Prasad and Deepika Prasad

Defendants

Before: The Honourable Mr. Justice Jenkins

Reasons for Judgment

Counsel for the Plaintiff:

K. Barron

Counsel for the Defendants:

R.K. Nagel

Place and Date of Trial:

New Westminster, B.C.

November 18-21, 2019

February 21, 2020

Place and Date of Judgment:

New Westminster, B.C.

June 19, 2020

- [1] The plaintiff, Ms. Dhugga, claims damages for injuries suffered in two motor vehicle accidents which occurred on October 15, 2014 ("the 2014 MVA") and on April 30, 2016 ("the 2016 MVA").
- [2] The 2014 MVA occurred when the vehicle Ms. Dhugga was driving was "rear-ended" near the intersection of 88 Avenue and 140 Street in Surrey, B.C. Liability has been admitted by the defendants, Ronald and Kory Poirier. Ms. Dhugga was driving her Honda sedan when she was rear-ended by the defendants' Ford F-150 pickup. Ms. Dhugga testified that she had been unable to brace for a collision as she had not seen the Poirier vehicle prior to the accident and that her vehicle was "bumped" to the right so that her right rear tire was on the curb. Following the 2014 MVA, Ms. Dhugga exited her vehicle and exchanged information with the defendant driver, Ronald Poirier, then continued on her way home. She did not seek medical care on the day of the 2014 accident. The cost of repairs to the plaintiff's vehicle as a result of the 2014 MVA was \$4,827.
- [3] The 2016 MVA occurred on Nordel Way near 84 Avenue in Delta, B.C. Ms. Dhugga was a passenger in a vehicle being driven by her husband when it collided with the vehicle of the Prasad defendants. This accident involved the defendants' vehicle "side-swiping" the plaintiff's husband's Audi during a lane change. Damage to the Dhugga vehicle was limited to

the rear passenger side between the back door and the rear wheel. Liability for the 2016 MVA, was denied, only to be admitted by the defendant upon the closing of evidence in this trial. Ms. Dhugga agrees that she suffered minor injuries in the 2016 MVA compared to those she suffered in the 2014 MVA. The cost of repairing damage to the Dhugga vehicle amounted to \$1,524.

- [4] At the time of the 2016 MVA, Ms. Dhugga was being driven to a treatment for her injuries suffered in the 2014 MVA.

The Plaintiff before the Accidents

- [5] Ms. Dhugga is currently a 41 year old mother of three children and is a full-time employee of a medical clinic where she has worked as a medical office assistant for over eight years. She was born in India and has been in Canada for approximately 30 years. She lives in a detached home with her husband, three children and her husband's parents.
- [6] In addition to her employment, prior to the 2014 MVA, Ms. Dhugga was actively performing most household chores in her home, was very involved in the lives of her children including driving them to school and other activities, played tennis regularly, gardened, enjoyed bicycle rides with her family and travelled with her family including trips to India. Ms. Dhugga's home also welcomed various family gatherings for which she would cook, bake and otherwise prepare her home for gatherings of many people. She was also active in events at her Sikh temple.
- [7] Regarding her health prior to the accidents, Ms. Dhugga had suffered from a degenerative disc condition since birth which she testified was "not a lot of problem" stating it would result in pain once or twice per month and would "flare up" once or twice a year for which she would take Tylenol and perform stretching. On one occasion in 2013 her doctor had advised her to stop lifting heavy items at work. If the pain persisted she would attend her family doctor who advised her to "take it easy".
- [8] Ms. Dhugga's physician and employer, Dr. Omelchenko, testified at trial and was referred to his clinical notes of an appointment (Ex. 7, Tab 3) with Ms. Dhugga on April 17, 2013, which included the following statements (reproduced without changes):

Kiran complain of the worsening of the pains in the posterior aspect of the neck spreading to the both upper aspect of trapezoid muscles. These pains are chronic for quite a few years but recently get exacerbated, pains are present all the time, worse when she's in the same position for longer periods of time. She didn't notice any swelling or any bumps under the skin.

....

She feels significant crepitations on the range of movements in both shoulders which is more prominent at the trapezoid muscle area in the middle of the muscle belly.

....

She has multiple degenerative changes in the neck which are contributing to the chronic pains.

. . . .

Reduction in weight bearing, frequent repetitive lifting pulling or pushing would be beneficial

. . . .

Occasional courses of physiotherapy also quite useful.

[9] On June 14, 2014, approximately four months before the 2014 MVA, the clinical note of Dr. Omelchenko noted (Ex. 7, Tab 5):

-chronic back pain, with intermittent radiation to [arms], no numbness or weakness in her arms, hands, O, tend back lat of the neck, mobility painful

[10] Ms. Dhugga had also suffered from juvenile dermatomyositis which would cause pain in her hands and wrists but had not been a problem for several years prior to the 2014 MVA.

[11] A review of the testimony of Ms. Dhugga and Dr. Omelchenko reflects Ms. Dhugga was suffering chronic pain and ailments in several cases similar to those she complained of post accidents. Whether the pain and difficulties experienced as a result of the accidents was exacerbated by the accidents and to what extent is a live issue in this case.

The Plaintiff after the 2014 MVA

Testimony of the Plaintiff

[12] After describing the 2014 MVA, Ms. Dhugga testified that she felt "shaky", that her car was a "write off" and that after calling her husband who came to pick her up, she was in tears and hours later felt pain in her neck, back, left and right shoulders, "tingling, more in her left hand" and a headache. She attended on her family doctor the next day and was continuing to experience the same injuries.

[13] In the first month after the 2014 MVA, she testified she felt "severe pain" in her neck, back and shoulders - was not able to do her housework, drive her children to school or bathe and wash her children's hair, who, being Sikhs, was very long and required her help. She stated she was unable to lift any heavy boxes at work, i.e., to put boxes up on to, or off of, a shelf in the supply room, needed breaks from sitting or standing at work and at home was unable to vacuum, doing the laundry was difficult and she was only able to tolerate sitting or standing for approximately 15 minutes.

[14] She also described suffering headaches, "pressure in my eyes", "migraine type" and a "needle type of pain in my head" and minor headaches two or three times a week. She continued and stated she had severe pain in her shoulders, "7 or 8" on a scale of 10. As for treatment, she had prescription medicine, physiotherapy, massage, active rehabilitation and acupuncture. Prescriptions were for pain and an ointment for inflammation. She described how she received only temporary relief from treatment and her prescriptions and that she was

generally unable to participate in most of her former activities in her home, with her children and at work.

[15] On October 21, 2014, Ms. Dhugga visited Dr. Omelchenko who recorded in his clinical notes for that day (Ex. 7, Tab 8):

-later noted pains at the neck and shoulders both sides more on the L side and later about 2-3 days ago developed low back pains

-Now pains are at the occipital area of the neck, shoulders and post neck and headaches (no nausea / vomiting). No sharp shooting pains but pains worse on reaching, doing anything above the head, turning neck particularly to the R side.

-no numbness / tingling in the arms / hands

[16] The clinical record of Dr. Omelchenko for November 10, 2014, on which Dr. Omelchenko was questioned, stated:

-persistent pains at the posterior aspect of the neck and both upper trapezoid muscles. Pains are not too bad but bothering every day and waking up from sleep. Physiotherapy was found to be useful and she already took about 4 sessions (currently doing 1 twice a week).

. . . She however was completely pain free for at least a year and a half preceding this accident . . . she is not in any distress.

-pains are at the posterior aspect of the neck and both upper traps.

-no numbness or tingling in the extremities and neurologically completely stable

[17] Although Ms. Dhugga testified on her cross-examination that she could not sit at work for more than fifteen minutes without getting up, she was posed with her testimony on her examination for discovery when she answered "no" as to whether there were any limitations as to how long she could sit.

[18] Regarding her mood and anxiety issues, Ms. Dhugga agreed that the same had improved significantly since the second accident.

[19] Regarding the clinical records generally, where Dr. Omelchenko has testified as to what was said to him by Ms. Dhugga and his observations, that evidence is admissible and relevant. Counsel for the defence's submission that there were many occasions when complaints of pain were not recorded by the physician assumes there was no such pain on those days. A physician cannot be expected to record all of a conversation with a patient in his or her clinical notes and cases have often found that the absence of a record does not indicate the complaint of the patient has resolved.

[20] When asked about her condition a month before the 2016 MVA, the plaintiff's description of the pain she was experiencing was similar to that shortly after the accident, still suffering from neck pain, her shoulder pain had improved to a "4 or 5" but some days were worse. Her

back was "getting better" and was not a "major concern", her headaches were not as often but were "severe", her arms and elbows were still numb, tingling, and mostly she experienced left arm pain. She also described feeling ulnar nerve pain after the 2014 MVA and had seen Dr. Waspe, a physiatrist, for treatment.

- [21] After the 2014 MVA, Ms. Dhugga attended for physiotherapy, massage, intramuscular stimulation, acupuncture, stretching exercise and was prescribed Flexeril, Gabapentin, Vimovo and Diclofenac and also continued with non-prescription painkillers.

The Plaintiff Following the 2016 MVA

- [22] Generally, Ms. Dhugga complains that her pre-existing injuries have been aggravated by the 2016 MVA, i.e., headaches, shoulder, neck and back pain but her back pain was not significantly increased. She described how her shoulder pain was worse, in the range of seven-to-eight on a scale of 10 as opposed to four-to-five before the 2016 MVA. She testified to having arm pain every day and to experiencing anxiety, especially when in a vehicle. She was referred for counselling to treat her anxiety which she testified did help and she felt better and was "now willing to move on".
- [23] Also, after the 2016 MVA, Ms. Dhugga continued to take the same medicine as after the 2014 MVA, she said that physiotherapy helped but the pain would return in a few days and that massage also temporarily helped. She also testified how active rehabilitation has helped which includes home stretching exercises she had been taught.
- [24] Ms. Dhugga testified that there has not been a significant change in her condition as of the date of trial and she continues to suffer pain in her neck, moderate to severe pain in her left shoulder and occasionally suffers from numbness and that her back had significantly improved.
- [25] Regarding treatment since the 2016 MVA, Ms. Dhugga continued with physiotherapy but only once or twice per month. In 2019 she ceased physiotherapy as she was unable to continue to afford treatment.
- [26] Regarding her lifestyle, Ms. Dhugga testified that if she were to host extended family events, rather than preparing food as she did before the accidents, she will order prepared foods. She no longer plays tennis due to arm and shoulder pain and is less often involved in activities with her children. Regarding her home, she testifies to not being able to clean the house as she had previously which causes her embarrassment and said she relies on her husband to perform tasks she had previously performed.

The Plaintiff at Work

- [27] Evidence of the plaintiff's work performance, capacity to work, accommodations and problems at work following the accidents was included in the evidence of Ms. Dhugga, Dr. Omelchenko and Luda Omelchenko, the wife of Dr. Omelchenko and the office manager of the clinic where Ms. Dhugga has worked for approximately eight years.
- [28] Ms. Dhugga does not advance a claim for past loss of income, missing work only two days after the 2014 MVA and none after the 2016 MVA.

Luda Omelchenko

- [29] Ms. Omelchenko testified as to Ms. Dhugga's job description which involved answering the phone, filing, paperwork, arranging referrals and at times cleaning small instruments. She described Ms. Dhugga's performance as organized, honest and responsible, testifying that she generally performed well and that she wanted to remain a full-time employee.
- [30] She testified that following the 2014 MVA, Ms. Dhugga would leave work on occasion to go to medical appointments, that she occasionally complained of pain and that Ms. Dhugga had often mentioned a desire to work fewer hours following the 2016 MVA.
- [31] Regarding Ms. Dhugga possibly working part-time in the future, Ms. Omelchenko stated she preferred full-time workers as the clinic is busy.

Dr. Victor Omelchenko

- [32] In his report (Ex. 3, p. 88) Dr. Omelchenko stated:

Effect on Employability

- 1) Ms. Dhugga is currently being accommodated at work. Absent these concessions, she would not be able to perform all of the tasks required of her position.
 - 2) Should she lose her present position, Ms. Dhugga would not be competitively employable as a medical office assistant.
- [33] At trial, Dr. Omelchenko testified as to the "intense workload" for the assistants, that Ms. Dhugga was not doing any lifting of heavy objects and was allowed flexible hours to attend appointments. He recalled discussion of ergonomic accommodations for Ms. Dhugga but none were implemented.

Ms. Dhugga

- [34] Regarding the effect of her injuries on her work, Ms. Dhugga testified to having "lots of pain" after work, that she struggles if sitting for long spells at a desk and she has to sit for long periods, often on the phone. As a result, she stated she takes extra breaks and pain medicine and that two or three times each month she gets "flare ups" and takes a break.

[35] Ms. Dhugga also testified to wanting part-time work but it was not available at the clinic.

[36] On cross-examination, Ms. Dhugga was referred to her examination for discovery of November 3, 2016, and questions regarding pain in her mid and lower back for which she had two sessions of active rehabilitation:

280 Q- No. Other than the limitations with your sitting, do you have any other problems arising with this mid low back pain?

A - No

281 Q- And you said that when you're sitting in a chair you -do you have any limitations with how long you can sit?

A - No

[37] Ms. Dhugga testified that she wished to reduce her work hours due to the continuing pain she is suffering.

Medical Evidence

Dr. Victor Omelchenko

[38] As stated previously in these reasons, Dr. Omelchenko is an employer of Ms. Dhugga and has acted as her physician. He was qualified as an expert in the field of family medicine at trial, his expert opinion was tendered and accepted and he was called upon to testify at trial.

[39] On cross-examination, the defence challenged Dr. Omelchenko's testimony on the basis that he could be bias in favour of Ms. Dhugga in that she is not only an employee of his clinic but he has also acted as her physician in the past. Counsel put to Dr. Omelchenko the Practice Standard of the College of Physicians and Surgeons of B.C. (Ex. 5) on the topics of "Conflict of Interest, Boundary Violations in the Patient-Physician Relationship". One of the conclusions in the Practice Standard states:

Physicians must exercise sound professional judgement and avoid treating anyone with whom they have another relationship, which may affect the objectivity of the medical care they provide.

[40] Dr. Omelchenko testified that outside of Ms. Dhugga being an employee, he has no personal friendship or relationship with her, that when appropriate he would refer her to other physicians and he had never attended lunches or other social events with Ms. Dhugga.

[41] I have carefully reviewed the report and testimony of Dr. Omelchenko and found that his evidence did not appear to be biased in any way, was uncontroversial and found that he answered questions frankly and honestly. In coming to that conclusion, I have in mind the Practice Standard and the boundaries of physician relationships with employees and others as patients and have considered the possibility of bias which I dismiss.

[42] At page 5 of his report dated December 16, 2018 (Ex. 3, p. 88), Dr. Omelchenko summarized Ms. Dhugga's Pre-existing History, stating, in part:

Prior to the [2014] accident, Ms. K. Dhugga had episodic neck pain in the order of once or twice a year. This had been ongoing for many years. The duration of the episodes were anywhere from a week to several weeks followed by long asymptomatic periods. During the episodes, the neck pain would sometimes radiate to the arms. . . . She remained entirely functional during these episodes both at home and at work. . . .

Further, under the headings of Diagnosis and Causation:

Diagnosis

1. The post-accident complaints of bilateral neck pain, posterior upper back and shoulder pain, right sided pain in the thoracolumbar area and bilateral hand numbness are soft tissue in nature, i.e. the symptoms are the result of injuries to the muscles, ligaments and tendons of the neck, back and related regions.
2. Since Ms. Dhugga continues to complain of significant pain in these areas of injury, it can be said that she now has chronic pain.
3. The driving anxiety represents a specific phobia.

Causation

1. Ms. Dhugga had episodic pain prior to the MVA in the areas injured in the MVA that did not significantly affect her function. But for the MVA, she would have likely continued to experience these infrequent episodes indefinitely. . . both MVAs (mainly the first one) has caused an alteration in this pattern in that she now has significant frequent pain in these areas that does significantly affect function. It is my impression but for the MVA, she would have likely continued to experience these infrequent episodes indefinitely. . . . both MVAs (mainly the first one) has caused an alteration in this pattern in that she now has significant frequent pain in these areas and does significantly affect function. It is my impression that [the] MVAs are entirely responsible for her current presentation.
2. MVAs are also entirely responsible for the driving anxiety symptoms.

[43] Also at page 88, Dr. Omelchenko opined on Ms. Dhugga's employment concerns which were reproduced in para. 32 above in these reasons.

[44] On cross-examination, Dr. Omelchenko agreed with counsel that Ms. Dhugga's degenerative condition which she had long experienced could have become worse had she not been involved in the accidents. In re-direct, Dr. Omelchenko testified that in the absence of the MVAs, her degenerative condition would not likely have worsened, the difference being Ms. Dhugga's pre-existing condition "could" have worsened but for the accidents, but "would not likely have worsened".

Dr. Robin Rickards

[45] Dr. Rickards is an orthopaedic surgeon who was qualified to opine in that area of medicine and prepared two reports for Ms. Dhugga dated February 6, 2019 and June 19, 2019.

[46] At page 116 of his February 6, 2019 report, Dr. Rickards presented his Clinical Diagnosis:

CLINICAL DIAGNOSIS

1. Congenital Cervical Ankylosis-Degenerative Joint Disease Cervical Spine
2. Probable Facet Joint Syndrome Cervical and Lumbar Spines
3. Instability Ulnar Nerve the Left Elbow [Cubital Tunnel]

[47] At page 117, Dr. Rickards discusses causation of the above three diagnoses and concludes there is a cause-effect relationship between the two accidents with the probable facet joint syndrome and instability of the ulnar nerve in the left elbow, however, Ms. Dhugga has likely lived with the first since birth. Regarding the facet joint syndrome, Dr. Rickards recommended treatment of medication and "manipulative treatments such as chiropractic, massage and physical therapy" and an exercise program. He added, at page 118:

In the case of persistent, ongoing and disabling symptoms suggestive of facet joint irritation, spinal intervention treatments . . . will usually resolve symptoms at least on a long-term if not permanent basis.

[48] Finally, Dr. Rickards concluded, also at page 118, that the degenerative disease has "unlikely been altered by the motor vehicle accidents" and that the injuries caused by the accidents would have interfered with the ability to carry out normal work routine and carry out household activities which has been a complaint of Ms. Dhugga.

[49] Dr. Rickards performed a second examination of Ms. Dhugga on June 13, 2019, and issued a second report on June 19, 2019. Summarizing, Dr. Rickards noted some improvement from the first examination.

[50] Dr. Rickards also opined on his prognosis for Ms. Dhugga, stating at page 118, regarding her degenerative joint disease that "the natural history of the underlying degenerative disease is that of progression with or without increasing symptoms of pain and / or neurological changes. This has unlikely been altered by the motor vehicle accidents".

[51] Regarding a prognosis for Ms. Dhugga's facet joint syndrome, cervical and lumbar spines, Dr. Rickards opined:

With appropriate treatment as outlined above, symptoms can likely be improved. MBB/RF [i.e. medial branch blocks and radio frequency ablation] can provide long-term but not usually permanent pain relief. MBB / RF can be repeated on an ongoing basis dependent on severity of recurrent symptoms.

[52] Regarding the injury to her ulnar nerve in the left elbow, Dr. Rickards opined "surgical treatment will likely be needed".

Dr. Timothy McDowell

[53] Dr. McDowell is a neurologist who prepared reports for the defence. He was not asked to attend trial for cross-examination.

[54] In his initial report dated December 1, 2018, Dr. McDowell essentially made two findings within his area of expertise:

- Ms. Dhugga suffered from Post Traumatic headaches-whiplash subtype, and
- Left arm symptoms, not yet diagnosed between ulnar neuropathy and cervical radiculopathy.

[55] Regarding Ms. Dhugga's pre-existing degenerative condition, Dr. McDowell stated at page 6 of his initial report, (Ex. 3, p. 65) "[i]t is possible that the accident exacerbated pre-existing degenerative changes in her cervical spine and made them symptomatic".

[56] The subsequent and very brief reports of Dr. McDowell do not add to his opinions in any significant manner but he did comment, in his report of March 11, 2019, that:

. . . I think it is more likely than not that she will have periodic absenteeism on a monthly basis for approximately the next six months, one to two days per month. Once she starts using triptan medication, . . . I think there is room for improvement in the disability / absenteeism aspect of her migraine headaches. . .

Dr. Paul Marks

[57] Dr. Marks is an orthopaedic surgeon who prepared a report for the defence dated March 8, 2017, and an addendum report dated March 6, 2019. He appeared for cross-examination at trial by way of video conference.

[58] Dr. Marks' reports and testimony in this case, and previously in this Court, has raised considerable controversy and allegations of opining in areas outside his expertise and that his evidence suggests he is acting more as an advocate for his client, as opposed to providing an unbiased report and testimony as is required of expert witnesses.

[59] The report prepared by Dr. Marks of March 8, 2017 (Ex. 3, Tab 1, p. 9) concludes with the following summary:

As such, I have not been able to identify any specific accident-related orthopaedic impairment, injury or disability related to the October 14, 2014 incident. It is clear that Ms. Dhugga did have pre-accident issues with regards to her spine. Imaging has essentially revealed congenital abnormalities and these are not attributable to the accident. I have not identified any superimposed accident-related orthopaedic impairment, injury or disability. It is my opinion that irrespective of this accident, Ms. Dhugga was going to continue with intermittent and occasional complaints with regards to her spine. The trajectory of this was not materially altered by the

accident of October 15, 2014. There is no indication for further formal therapy. Any further formal therapy may serve only to reinforce her perception of disability. There is no indication nor literature support for additional passive therapy. There are no specific medical restrictions applied to her circumstances or activities of daily living, self-care, household chores nor her vocational responsibilities. There is no indication for further consultations or investigations.

- [60] Dr. Marks was particularly concerned that Ms. Dhugga had not disclosed to him her pre-existing degenerative condition during their assessment, saying the dermatomyositis could become "symptomatic at any moment" and, presumably could have been an explanation for the back pain she was enduring. Ms. Dhugga had disclosed having seen her family physician for neck and low back pain but had not mentioned the dermatomyositis. Prior to preparing his report and his testimony, Dr. Marks had the benefit of reviewing the clinical records of Dr. Omelchenko which had clearly referenced Ms. Dhugga's "history of dermatomyositis, which has been in remission for many years" (Ex. 3, p. 12). The documents referred to by Dr. Marks had included opinions by two rheumatologists who had concluded that the back pain experienced by Ms. Dhugga was not related to her back pain following the accidents and that her dermatomyositis had been dormant for approximately 15 years. Whether or not Ms. Dhugga had specifically mentioned the dermatomyositis, Dr. Marks disregarded the records of Dr. Omelchenko and the rheumatologists who had examined her. Those records indicated the dermatomyositis had been dormant for approximately 15 years, implying that, as it had been dormant for such a lengthy time, it would not have been a source of the back pain she was experiencing after the accidents.
- [61] I have reviewed the reports of Dr. Marks and listened to his testimony under cross-examination that he disagreed with the other professionals that Ms. Dhugga's dermatomyositis was not a cause of the back pain she suffered following the accident. I find as well that having been dormant for approximately 15 years, it is very likely her dermatomyositis condition was not a cause, nor did it contribute to, her back pain after the accidents.
- [62] Returning to the suggestion that Dr. Marks was attempting to be an advocate for the defence as opposed to an independent, unbiased expert, I find that throughout his cross-examination he continually avoided answering simple questions and/or attempted to avoid answering by stating that the circumstances of Ms. Dhugga were very complex without explanation.
- [63] Dr. Marks was also cross-examined on the issue of whether he, as an orthopaedic surgeon, could offer an opinion on chronic pain in relation to the circumstances of a patient. His answer was that "chronic pain is in my expertise", that he "trains physiatrists" and "never defers to a physiatrist on an issue of chronic pain". That testimony conflicts with the findings of Justice Greyell in *Flores v. Burrows*, 2018 BCSC 334, the reasons for judgment of which were put to Dr. Marks, specifically para. 76, in which Justice Greyell stated:

In cross-examination, Dr. Marks agreed that the majority of his lectures were in the area of knee injuries but said knees were representative of joint study and that, in any event, his medical practice included all types of soft tissue injuries, including hips. He agreed that he could not offer an opinion on the issue of chronic pain as that was not within his area of expertise but rather in the expertise of a physiatrist.

- [64] It would be unrealistic to assume that Mr. Justice Greyell would have been mistaken in concluding Dr. Marks "agreed that he could not offer an opinion on the issue of chronic pain as that was not within his area of expertise but rather in the expertise of a physiatrist". It is not reasonable to suggest Dr. Marks' expertise has shifted in the less than two years since that judgment was released. That finding conflicts directly with the testimony of Dr. Marks under cross-examination in this trial in which he stated "chronic pain is in my area of expertise" and he never defers to a physiatrist on an issue of chronic pain.
- [65] For the above reasons I do not accept the opinions of Dr. Marks that the pain suffered by Ms. Dhugga was not related to the motor vehicle accidents.

Discussion and Decision on Injuries Suffered by Ms. Dhugga in the Accidents

- [66] Before the accidents, Ms. Dhugga had experienced prior episodic pain which was not affecting her functioning at that point and would have likely continued to experience infrequent pain in her back. She also suffered an injury to the ulnar nerve in her right arm which has fully resolved.
- [67] But for the accidents, her degenerative condition could have worsened, but was, on a balance of probabilities, aggravated and worsened by the accidents.
- [68] The evidence establishes Ms. Dhugga would have experienced some pain from her degenerative condition in any event of the accidents, however, the accidents have increased the level and extent of pain which she has suffered and will continue to suffer. The following comments from *Barnes v. Richardson et al.*, 2008 BCSC 1349, are instructive in the circumstances:
- [17] Determining the cause of loss and damage must be kept separate from the assessment of damages to compensate for that loss and damage, since different principles govern the two questions: *A. (T. W. N.) v. Clarke*, 2003 BCCA 670, 22 B.C.L.R. (4th) 1 at para. 16. Causation concerns whether the accident caused the pre-existing condition to be activated or aggravated. The assessment of damages considers whether there was a measurable risk that the pre-existing condition would have detrimentally affected the plaintiff in the future, regardless of the defendant's negligence: *Hosak v. Hirst*, 2003 BCCA 42, 9 B.C.L.R. (4th) 203 at para. 10.

- [69] I have determined on a balance of probabilities the accidents caused Ms. Dhugga's pre-existing conditions to be aggravated. I will discuss whether a deduction should be made for the risk her conditions would have had a detrimental effect regardless of the accidents in the following sections.
- [70] Ms. Dhugga suffered soft tissue injuries in her neck, upper back, shoulder and ulnar nerve in the accidents as well as headaches. It is likely her pain will continue and possible surgical treatment could provide some relief, however, not permanent relief. Her condition is chronic, however, she has shown signs of improvement since the 2016 MVA. Her physical injuries have also shown signs of improvement over time after the accidents.
- [71] She has also suffered from headaches, on occasion comparable to migraine headaches, as a result of the accidents as well as driving related anxiety for which she has sought counselling which has been of assistance.

Damages

Non - Pecuniary Damages

- [72] Ms. Dhugga submits an appropriate award of non-pecuniary damages in this matter would be \$100,000.
- [73] In support of this claim, Ms. Dhugga relies upon four decisions of this Court, *Watkins v. Harder*, 2016 BCSC 2078, *Jawanda v. Samra*, 2013 BCSC 138, *Ahonen v. Thauli*, 2013 BCSC 1607 and *Chong v. Lee*, 2014 BCSC 2258, particularly relying upon the decision of Mr. Justice Gaul in *Watkins*. The facts in all four of those decisions bear resemblance to the situation in which Ms. Dhugga finds herself, but, of course, the circumstances of each plaintiff differ.
- [74] In *Watkins*, the plaintiff was awarded \$100,000 in non-pecuniary damages. The plaintiff was off work for six months following the accident which would indicate more serious physical impairment than was the case with Ms. Dhugga, received an award of \$20,000 for past loss of income and a \$75,000 award for loss of future income earning capacity.
- [75] I have reviewed and considered the non-exhaustive list of common factors listed by the Court of Appeal in *Stapley v. Hejslet*, 2006 BCCA 34 at para. 34 which have been repeated in multiple judgments in this Court while considering an assessment of non-pecuniary damages, especially "the severity and duration of pain", "emotional suffering", "impairment of family, marital and social relationships", "impairment of physical abilities", "loss of lifestyle" and "stoicism". The factor of "disability" which is often prominent in these cases is significant but I would not go so far as to say Ms. Dhugga is disabled.
- [76] Ms. Dhugga has been able to work full-time since the accidents, albeit with pain and she is at a point now where she would prefer to be able to work part-time due to her pain. Dr. Omelchenko has commented that Ms. Dhugga:

is currently being accommodated at work. Absent these concessions, she would not be able to perform all of the tasks required of her position.

On the evidence before me, the accommodations made are to allow Ms. Dhugga to leave work early, take extra breaks and other time off for medical appointments and treatments in particular, however, her working conditions have not changed, save that she once very briefly had a headset to use for the phone, which are not particularly significant changes to her workplace.

- [77] I also note Dr. Rickards' opinion that Ms. Dhugga's symptoms can be improved with medial branch blocks and radio frequency ablation, however, improvement would not be permanent.
- [78] The defence submits an appropriate award would be in the range of \$35,000 to \$48,000. To support that submission, the defence relies upon the decisions in *Gupta v. Doe*, 2015 BCSC 608 (award of \$30,000 in a case in which the plaintiff was found to have considerable credibility concerns, unlike Ms. Dhugga), *Hsu v. Williams*, 2011 BCSC 1412 (award of \$30,000, prior to a reduction for a failure to mitigate, where the plaintiff had pre-existing soft tissue injuries and was found to have exaggerated her injuries) and *Muhamud v. Yu*, 2016 BCSC 1138 (award of \$48,000 where the plaintiff was found to be a poor historian, some pre-accident injuries and an exaggeration of her anxiety).
- [79] Per the finding above, I have taken into account the fact that Ms. Dhugga would have experienced occasional pain regardless of the accidents.
- [80] Considering all factors and the many authorities submitted by counsel, I find an appropriate award for non-pecuniary damages is in the amount of \$65,000.

Future Loss of Income Earning Capacity

- [81] The most-quoted decision under this head of claim is the Court of Appeal decision in *Perren v. Lalari*, 2010 BCCA 140, and that decision makes clear that to be entitled to an award for loss of earning capacity a plaintiff must prove "there is a real and substantial possibility of a future event leading to an income loss" (para. 32). If the plaintiff proves this, then the plaintiff may prove the quantum of the claim on a capital asset approach or an earnings approach, an income approach being more useful when the loss is more easily measurable.
- [82] Is there a real and substantial possibility of a future event leading to an income loss?
- [83] Dr. Omelchenko has testified that Ms. Dhugga would not be able to perform all of the tasks required of her position without accommodations in the future.
- [84] Dr. McDowell opined that "I think it is more likely than not that she will have periodical absenteeism on a monthly basis for approximately the next six months, one or two days per month. Once she starts using tripton medication . . . I think there is room for improvement in the disability / absenteeism aspect of her migraine headaches".

- [85] Dr. Rickards opined "spinal intervention treatments will usually resolve symptoms at least on a long term if not a permanent basis".
- [86] Ms. Dhugga seeks to be able to work part-time in her circumstances, however, her employer indicated they needed full-time, not part-time employees. It is clear that Ms. Dhugga enjoys her work at the clinic and would like to continue in that capacity for the foreseeable future. It is also likely that she is "less marketable or attractive as an employee to potential employers" should she leave her current employment.
- [87] Ms. Dhugga's income between 2012 and 2018 has trended slightly upwards. In the first full year after the first accident, 2015, she earned slightly less, almost \$300 less, than the previous year and since the accident her income has increased another \$2000 from the first year after the accident to 2018.
- [88] I find there is a real and substantial possibility that Ms. Dhugga will incur a future event leading to an income loss. It is likely she may not be able to continue full-time in her employment or similar employment at some point in the future. When she is likely to reach that condition is very uncertain. It is also likely that if the accidents had not occurred Ms. Dhugga would not have advanced to a more senior position with her employer or other employers and that she would most likely continue with the type of employment skill sets she now enjoys.
- [89] The decision of *Brown v. Gola* (1985), 25 B.C.L.R. (3d) 353 (S.C.), is the most-quoted case when considering the factors relevant to a loss of earning capacity award, which are:

The means by which the value of the lost, or impaired, asset is to be assessed varies of course from case to case. Some of the considerations to take into account in making that assessment include 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;
4. The plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market.

In this case, the plaintiff's future outlook, uncertain as it may be, ought to be reflected in an award for loss of capacity to earn income in the future. He is effectively precluded from pursuing some lines of work he has engaged in previously, namely logging and trucking.

- [90] Ms. Dhugga's counsel, in written submissions submitted Ms. Dhugga "is between 10-20% disabled from her capacity to earn income in the future". In the circumstances I have described, I find that it is likely Ms. Dhugga will be able to continue in her present position,

however, at some point in time she is likely to move to a part-time position or may retire earlier than age 65 (and may well have retired before that age for other reasons), which is a reasonable age at which she may normally have retired. Counsel further submits that a "modest award" in this case would be appropriate, and submits that Ms. Dhugga would have 23 working years to age 65, considering her 2018 earnings of \$35,127 and the 23 year value of the CIVJI jury instructions at 1.5% present value, complete disability would entitle her to an award of \$679,036, 10% of which would amount to \$67,036 and 20% of which would amount to \$135,807.

- [91] I find that there is a substantial likelihood that Ms. Dhugga will be forced to work part-time at some point in the future and may even retire prior to the age of 65 or may not be able to continue. Selecting an appropriate value of this claim is clearly an example of gazing into a crystal ball or a "shot in the dark" but there is a likelihood of a future loss. In that case, I find that a reasonable award for loss of capacity to earn future income in this case is \$40,000. In calculating this figure, and in making an award less than that advanced by the plaintiff, I have taken into account several contingencies. These include the real and substantial possibility Ms. Dhugga would have retired early even but for the accident and the related finding that she would have experienced intermittent pain, which could have had a small but measurable impact on her earning capacity even absent the accident.

Future Cost of Care

- [92] At page 7 of his report, Dr. Omelchenko stated "Treatment should be focused on pain management". He stated pain could be controlled with over-the-counter medication, taken indefinitely, she requires daily stretching exercises monitored by a kinesiologist indefinitely and passive care, i.e., massage or physiotherapy when she is more symptomatic. Dr. Omelchenko's evidence is medical justification for the items claimed and entitles the plaintiff to reasonable compensation for the same.
- [93] The evidence before me regarding the costs of future care is very slim. There is evidence of Ms. Dhugga having paid \$70 per session for physiotherapy. Occasional passive therapy when Ms. Dhugga is symptomatic, considering some of that care could be required due to her pre-existing degenerative problems, could be required some years and not in others. In her submissions on damages, Ms. Dhugga seeks substantial costs amounting to \$76,800 which would cover multiple sessions per month for physiotherapy which is much more than had been recommended by Dr. Omelchenko based upon \$70 per session for approximately 40 years.
- [94] Considering periodic physiotherapy, the cost of over-the-counter medicine and occasional kinesiology assessments, a total award of \$20,000 is reasonable for the future.

Special Damages

[95] I am advised the defence has agreed with the plaintiff's assessment of special damages amounting to \$8,726 and that amount is awarded to the plaintiff.

Loss of Housekeeping Capacity

[96] The law in this province relating to claims for loss of housekeeping capacity is not contentious. The decision of *Dykeman v. Porohowski*, 2010 BCCA 36 at para. 28, affirmed that where housekeeping services were gratuitously replaced by a family member, damages for loss of housekeeping capacity where a family member has stepped in to take over the plaintiff's housekeeping responsibilities may be recovered on a past and future basis even though there is no out of pocket expense. Trial judges are to be cautious in making such awards and the analytical framework is as follows:

[29] claims for gratuitous services must be carefully scrutinized, both with respect to the nature of the services - were they simply part of the usual 'give and take' between family members, or did they go 'above and beyond' that level? - and with respect to causation - were the services necessitated by the plaintiff's injuries or would they have been provided in any event? Finally, if these questions are answered affirmatively, the amount of compensation must be commensurate with the plaintiff's loss. The assessment of such loss has been the subject of several considered judgments in this province, most notably *McTavish* and *Bystedt*, both *supra*.

[Emphasis in original.]

(Also see *Amini v. Mondragaon*, 2014 BCSC 1590).

[97] This Court has also upheld a reasonable hourly rate for housekeeping services of \$25 per hour (see *Broomfield v. Lof*, 2019 BCSC 1155).

[98] Ms. Dhugga has testified as to the work she previously performed in maintaining her household and her inability to be able to maintain the standards of housekeeping she had previously maintained.

[99] Counsel for Ms. Dhugga has put forward a claim for past loss of housekeeping capacity of \$35,625 and a claim for the future cost of housekeeping expenses of \$117,000 and provided detailed calculations for the costs for 20 years into the future. Ms. Dhugga's evidence was that previous to the accidents she spent roughly 10 hours per week on household chores, which was supported by the testimony of her husband. The claim for past expenses was based upon her being unable to perform any such work for a month or four weeks after each accident and five hours per week thereafter. Future claims were asserted at five hours per week for the next eight years when her youngest child reached the age of majority and two and one-half hours there after for 20 years.

- [100] Ms. Dhugga has also testified how the instances of pain would "wax and wane" periodically and presumably the claim is based upon continual periods of significant pain in the future. As well, as her children mature, it would be expected that they would "pitch in" with household chores as part of their contribution to the family well-being, both of which factors would substantially reduce the amount of the claim advanced, but requires a very subjective estimate of how to calculate the costs.
- [101] The defence does not dispute the law entitling Ms. Dhugga to a claim for loss of housekeeping capacity but submits, in written submissions, "Ms. Dhugga has not provided enough evidence regarding a possible "in trust" claim, for additional amounts of domestic work done by relatives or friends, that would be over and above the assistance that Ms. Dhugga would have received as a function of natural love and affection of family members".
- [102] The evidence of the time spent in housekeeping is not as slim as the defence submits.
- [103] Ms. Dhugga has calculated her past loss of housekeeping capacity at approximately \$35,000. I accept that some, though not all of the work provided by Ms. Dhugga's family members meets the first part of the Dykeman test- i.e., a portion of that assistance goes beyond "the usual 'give and take' between family members". Relative to the second part of the Dykeman test, causation, I must also take into account that Ms. Dhugga would have suffered from intermittent pain that may have interfered with her housekeeping responsibilities even but for the accident. Based on Dr. Rickards' testimony, discussed in the following paragraph, I conclude this reduction should be less for past loss of housekeeping capacity than future loss. Given these factors, no precise calculation is possible, the overall award must be fair and reasonable. Based on all the evidence, I find a fair figure to be 50% of the \$35,000 claimed at \$17,500.
- [104] I turn now to an assessment of the future claim. As indicated above, there are factors that will reduce the amount of housekeeping work falling to Ms. Dhugga in the future (namely, her kids growing up). I also conclude some reduction is necessary for the real and substantial possibility Ms. Dhugga would have required some assistance even but for the accident. Dr. Rickards agreed, on cross-examination, that it was possible Ms. Dhugga would require assistance with housework even but for the accident; he agreed it might even be probable. On redirect, he indicated it was unlikely the timing of this need for assistance would have been the same had she not been in the accidents. This testimony is consistent with my finding that the accidents aggravated Ms. Dhugga's pre-existing conditions. Regarding the future claim and considering the evidence referenced above, I exercise my discretion and award damages for future housekeeping capacity of \$20,000; this award is to be reduced based upon the Present Value Table from CIVJI at a discount rate of 2.0%. I leave it to the parties to complete these calculations based on the above findings.

Costs

[105] I suspect there are factors relating to costs of which I am not aware. Accordingly, if the parties cannot agree on costs, they may set an application before me for one hour to be arranged through Supreme Court Scheduling.

Summary

[106] In summary I make the following awards:

Non-pecuniary damages: \$65,000

Loss of Future Earning Capacity: \$40,000

Cost of Future Care: \$20,000

Special Damages: \$8,726

Past Loss of Housekeeping Capacity: \$17,500

Loss of Housekeeping Capacity: \$20,000

Total: \$171,226

"Jenkins J."

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Prepared on 24 October 2026 · Esheria