
CANADA / JUDGMENT

Duffy v. Dutt

2020 BCSC 995

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2020 BCSC 995 Duffy v. Dutt

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Duffy v. Dutt,

2020 BCSC 995

Date: 20200703

Docket: M1812117

Registry: Vancouver

Between:

Taylor Joanne Duffy

Plaintiff

And

Ravinder Dutt and Usha Rani Dutt

Defendants

Before: The Honourable Mr. Justice Macintosh

Reasons for Judgment

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Place and Dates of Trial:

Vancouver, B.C.

June 22-26, 2020

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Vancouver, B.C.

July 3, 2020

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Introduction

- [1] Taylor Duffy, who is 26, sues for damages arising from a motor vehicle accident on December 8, 2017. Liability is admitted, and there is no issue as between the Defendant driver, Ravinder Dutt, and the Defendant vehicle owner, Usha Rani Dutt.
- [2] Ms. Duffy was driving her car southwest on 10th Avenue in Burnaby. Mr. Dutt, in the Defendant vehicle, had been heading northwest on 5th Street where it intersects with 10th Avenue. He was turning left, to proceed southwest on 10th Avenue, when he hit the driver's door of Ms. Duffy's car. Ms. Duffy drove herself to work after the accident. Her car repair costs were \$3,304.48.
- [3] Ms. Duffy claims under three heads of damages.
- [4] For non-pecuniary damages, she claims in the range of \$90,000 to \$110,000.

- [5] For loss of future earning capacity, she claims two years of her present earnings, of \$54,000 per year, for a total of \$108,000. Alternatively under that head, she claims between six months and one year of her present earnings, for a range of \$27,000 to \$54,000. In the further alternative for loss of future earning capacity, Ms. Duffy filed an economist's report, presenting income multipliers, from which she submitted a claim in the range of \$75,000 to \$100,000. However, she placed little reliance on that further alternative position.
- [6] Finally, for her costs of future care, Ms. Duffy claims \$67,500.
- [7] Special damages have been agreed at \$7,001.40.
- [8] For the three heads of damages in dispute, the Defendants submit that Ms. Duffy is entitled to between \$30,000 and \$40,000 for non-pecuniary damages, but nothing under the other two heads.

Three Accidents

- [9] Ms. Duffy has been the driver in at least five car accidents, three of which caused her some injury.
- [10] In an accident on Boxing Day, probably when she was 17, she suffered some injury to her right wrist, knee and ankle. She did not sue from that accident, but she received compensation of \$2,500. She testified that she "just bounced back" from that accident. Her injuries from that accident occasionally "flare up a little", but Ms. Duffy's counsel advised that those injuries are not part of her claim now.
- [11] In the accident she sues on in this proceeding, on December 8, 2017, Ms. Duffy received soft tissue injuries, to her neck and back, and she now sometimes has headaches.
- [12] Ms. Duffy was in another accident on August 22, 2019. The passenger door of her car was hit while she was making a U-turn. She was at fault. Her car was written off. The repair costs would have been about \$5,000. Ms. Duffy had slight injuries from the 2019 accident, to which I will refer as needed, later in these reasons.

Work History Before and After the Accident in 2017

- [13] Ms. Duffy has lived all her life in the Lower Mainland. She graduated from high school in 2011 on the honour roll, with distinction. She enjoyed fine arts, in marked preference to athletics. She was raised to respect the value of working hard, and she has kept herself gainfully employed, from age 16 to now.
- [14] Ms. Duffy began working in retail sales positions, as many young people do. After high school, she enrolled at Douglas College, where she studied for three semesters in 2012-2013. She hoped to go into teaching eventually, but came to realize that teaching was not for her.

- [15] In 2013, Ms. Duffy had tired of retail sales work, and began employment at a dog daycare business, where she stayed for four years. She was the manager of the business by the fourth year, having earned steady promotions in the course of looking after every aspect of the dogs' lives.
- [16] While Ms. Duffy was still working at the dog daycare, she secured employment with Para Space Landscaping Inc. ("Para Space"). Para Space is a successful, 41-year-old, family-run business, with its office in Burnaby. Its main work is maintaining the garden and lawn areas of residential strata properties. It services about 350 maintenance contracts. Para Space employs eight people in office administration, 17 managers, who handle the strata maintenance contracts, and employs about 150 people full-time.
- [17] Ms. Duffy described Para Space as a "more grown-up job" after the dog daycare work. She began her employment at Para Space on November 29, 2016, starting at the bottom rung among the office staff, at \$17 an hour, working eight hours a day, Monday to Friday. Her starting work included tidying tables after meetings, putting dishes in the dishwasher, working at reception, answering phones and emails, and performing some accounts payable work. Her principal workstation was a desk with two monitors. The company paid for an accounting course Ms. Duffy took at BCIT.
- [18] Ms. Duffy's testimony, and that of the Para Space office manager, Adam Taylor, demonstrate that Ms. Duffy is in an employment setting ideally suited to her needs and capacities. She takes pride in her work. She finds Para Space to be a good employer. She has no plans to seek work elsewhere. She has received three promotions, and four or five pay raises, more of those after the accident in 2017 than before, and she usually receives glowing reports about her work from the company. She has been offered extensive overtime work, and has never turned that work down. The one negative work review Ms. Duffy received was in March 2018. But after meeting for that review, with Mr. Taylor and his boss, Ms. Duffy corrected the problems, and since then, has consistently earned very favourable reviews, including two that were placed in evidence, from January 2019 and July 2019, both of which concluded with the words, "Congratulations, and keep up the great work!!" The July 2019 review included the following:

Strengths and Success:

- Demonstrate willingness to learn through thoughtful engagement in project tasks (specifically spreadsheet creation)
- Exhibit great attendance and reliability, great attitude and energy around the office
- Great reception skills both in-person and over the phone
- Great organization and engagement shown when sorting out Ridgeway situation
- Strong ability to develop and implement procedures from scratch

- Improving speed and efficiency have been evident; congrats on the efficiency award!
- Planning and organization skills have continued to develop, one of the best in the building!
- Enhanced ability to monitor/set up MODS staff, keep it up
- You have taken on more in the department in the last 6 months (great knowledge and ownership of masterco, PCL/Site list)

Taylor, you are a crucial member of the Office Admin Team! At this time, we would like to recognize your ongoing development increased contribution with a raise to \$22.50/hr (7%) effective July 17th, 2019. Going forward your reviews will be on an annual basis, with the next being in January 2020.

- [19] The evidence of Ms. Duffy and Mr. Taylor, in essence, was that these tributes remain applicable to this day. Mr. Taylor testified that Ms. Duffy needs to improve in mathematics and leadership, but added that, "absolutely" the company wants to keep her, and that she is being groomed for administrative leadership.
- [20] It is probably the case that after the accident in 2017, Ms. Duffy found it harder to perform the more menial tasks she had been assigned when she began at Para Space. However, the company accommodated her by having others generally perform those tasks, such as loading the dishwasher, and moving office supplies. Equally important, the menial work is now more in Ms. Duffy's rear-view mirror anyway, as her work is increasingly above that grade, at more of an administrative level, although not yet at the level of regular management. During her current work, Mr. Taylor testified that he sometimes sees her using a heating pad to manage pain, and she has an improved office chair.
- [21] At present, Ms. Duffy is earning \$26 an hour, plus overtime. To this day, she has not missed a day of work as a result of the accident in 2017, apart from taking time to attend medical or treatment appointments.
- [22] In summary, it would be difficult to find a healthier working relationship than the one Ms. Duffy has found and developed with Para Space. From her work background, and education level, it appears that she is in an ideal work setting. She enjoys the work, is good at it, and is appreciated by her employer, a long-established, stable and locally-owned business that recognizes Ms. Duffy's strengths.
- [23] Ms. Duffy testified that she had some interest in eventually opening a dog daycare business of her own, but felt that her injuries would preclude that. However, I observe that she left the dog daycare business on her own initiative before the 2017 accident. I find that her idea of opening a dog daycare business sometime in the future was only vaguely formed, at most, as teaching had been for her at an earlier stage. In any event, no evidence was presented to suggest that a dog daycare business would have been as profitable for her as continuing at Para Space.

Consequences of the 2017 Accident

- [24] Ms. Duffy testified that she was generally well before the 2017 accident. The right wrist, knee and ankle injuries from the earlier accident might have flared up a little from time to time, but they were largely in her past. Before the 2017 accident, Ms. Duffy had none of her present complaints, neck pain, back pain or headaches.
- [25] As seen above, the 2017 accident does not appear to have interfered in any way with Ms. Duffy being promoted and receiving pay increases at work. The company easily accommodated her wanting to avoid relatively physical work, like loading the dishwasher, and accommodated her need for using a heating pad at times.
- [26] Ms. Duffy described her reactions on the day of the accident as frustration, annoyance, anger, and being sweaty and nervous. Soon after arriving at work on the morning of the accident, she felt neck pain and pain in her mid and upper back.
- [27] She went to a clinic the next day, where she saw a Dr. Mistry. He recorded soft tissue injury in the neck and upper back. He prescribed a painkiller and asked her to return in a week, which she did. On December 16, he observed no tenderness in the neck, a normal range of motion, and recorded that Ms. Duffy had neck strain. He recommended 10 massage sessions.
- [28] Ms. Duffy stayed with Dr. Mistry as her doctor for about a year. However, by her testimony, he seemed to get frustrated and was not helpful.
- [29] Dr. Mistry testified.
- [30] He said that on the December 16 visit, he found Ms. Duffy much better than before, close to normal.
- [31] Dr. Mistry and Ms. Duffy had a disagreement in the spring of 2018. He noted her as being a "Demanding patient" on May 28. Ms. Duffy had requested from Dr. Mistry on April 6 a note for her work, which he gave her, calling for light duty for four weeks. Light duty was to be six hours instead of eight hours working at her desk. When Ms. Duffy saw Dr. Mistry on May 28, she said she wanted to stay on light duty until she recovered completely. Dr. Mistry disagreed, he thought she should try full duty. She insisted on continuing with light duty, but Dr. Mistry would not give her a new note for that purpose. In his notes for May 28, Dr. Mistry also recorded that Ms. Duffy still complained of neck and upper and lower back pain. He recorded that her flexion was "mildly restricted". He assessed "neck/mid and lumbar strain". His plan notes on May 28 included:

P: Cont Massage 5 sessions; She is doing desk job which does not involve any heavy lifting - advised to start normal duty - as she recovered; she refused to give trial for full duty as she feels that this will aggravate her back pain.

She [is] insisting to continue light duty for next few months

[32] Dr. Mistry's last session with Ms. Duffy was on August 3, 2018. His notes for that day read as follows:

Documentation Date: 03-Aug-2018

[03-Aug-2018 : x-ray result]

S: follow up Xray results; neck / mid back pain - no red flags

O: Xray - Dextroscoliosis / T12-L1 spondylosis

A: Degenerative changes

P: continue physio / discussed warnings s/s RTC or ER if condition worsens

[Signed on 06-Aug-2018 22:01 by Dr. Bharat Mistry]

The Plaintiff does not allege that the 2017 accident caused or was in any way linked to the dextroscoliosis or spondylosis, or the degenerative changes noted on August 3, 2018.

[33] Ms. Duffy changed doctors. She transferred her care to Dr. David Richardson, her family doctor, who first saw her in connection with the 2017 accident on September 5, 2018. Dr. Richardson testified, based largely on his clinical records to refresh his memory. He saw Ms. Duffy 10 times in relation to this matter. He noted that, on January 28, 2020, "She is still symptomatic from her injuries but overall she continues to improve."

[34] In his final note, recording a telephone call between his resident doctor and Ms. Duffy, on April 28, 2020, Dr. Richardson noted Ms. Duffy reporting "ongoing neck strain and back pain."

[35] The only medical witness who gave opinion evidence was Dr. Raphael Chow, a physiatrist called by the Plaintiff. Dr. Chow is based primarily in Toronto, but also, since at least 2015, has professional affiliations in this province.

[36] Dr. Chow's opinion, which I accept on this point, was that the 2017 accident caused Ms. Duffy's neck pain and back pain, and her occasional headaches, which Ms. Duffy said may come once or twice a month, and can be severe when they do come. (The Plaintiff, correctly in my view, advances no claim based on a worsening of her right wrist, knee and ankle injuries from her earlier accident.) Ms. Duffy testified that her neck and back pain are constant, or at least occur daily. In Dr. Chow's written opinion, "Her prognosis is poor. Her recovery has plateaued. She likely has reached maximum medical recovery. She has chronic neck and back pain "

[37] Ms. Duffy's neck and back pain have lessened since the 2017 accident, but I accept Dr. Chow's prognosis, at least to the extent that I find Ms. Duffy is likely to always have at least some neck and back pain as a result of the 2017 accident. The Defendants argued that because one clinical record from early 2020 notes that Ms. Duffy continues to improve, I should reject Dr. Chow's opinion that her condition has plateaued. However, it has been 2 ½

years now since the accident, and the continuing pain at this stage is supportive of Dr. Chow's prognosis. The neck and back pain were probably aggravated slightly by the 2019 accident, but the principal injury stems from the 2017 accident which gives rise to this proceeding.

- [38] The parties disagree as to whether Ms. Duffy's back pain includes pain in her lower back, and on the question of whether the accident in 2019 aggravated the neck and back pain.
- [39] On the question of lower back pain, the Defendants relied on Ms. Duffy not having complained of lower back pain soon enough after the 2017 accident. The main argument about the impact of the 2019 accident was not whether it aggravated Ms. Duffy's existing pain, but instead whether that aggravation was only short-lived.
- [40] With respect to lower back pain, I find that Ms. Duffy's pain from the 2017 accident probably extended to her lower back. Although she did not complain of lower back pain until relatively late in the day, there was no other cause, apart from the 2017 accident, to explain the lower back pain when she did refer to it. Ms. Duffy testified that she has had pain in her lower back since the 2017 accident, not every day but frequently. It comes mostly when she stands for long periods or when sitting in some types of chairs.
- [41] As noted above, I also find that the 2019 accident slightly aggravated Ms. Duffy's neck and back pain from the 2017 accident.
- [42] Ms. Duffy has undertaken several treatments since the accident in 2017.
- [43] From December 28, 2017 to March 8, 2018, she had 20 physiotherapy sessions. From March 19, 2018 to June 17, 2020, she has had 55 massage therapy sessions, and wants to continue with them. As will be seen below, in her cost of future care claim, she seeks compensation for the cost of ongoing massage therapy. From October 17, 2018 to August 21, 2019, she had 35 active rehabilitation sessions.
- [44] Ms. Duffy called two witnesses who testified about her reduced enjoyment of life resulting from the 2017 accident.
- [45] Her stepsister, Samantha Steuernol, testified. On a road trip, in June 2019, she and Ms. Duffy were seated in the back seat of a car when Ms. Duffy asked that they switch sides in the backseat, in order to continue talking with one another, because Ms. Duffy's neck became sore from always having to face in one direction.
- [46] Ms. Duffy's long-time boyfriend, Ryan Degan, testified that on their pre-accident vacations to Mexico, or at least on one such vacation, they swam with dolphins. They planned to rent all-terrain vehicles for their first post-accident Mexican vacation, but Ms. Duffy's neck and back condition relegated them to snorkelling from a guide boat instead. He described the first day of that trip as "write-off" because they could only sit around the hotel pool. During the celebratory dinner for their fifth anniversary as girlfriend and boyfriend, Ms. Duffy was in pain such that she wanted to return to their hotel room from where they had been dining.

Dinner was eventually had in their room.

- [47] Those events, tendered in evidence by the Plaintiff as instances of pain and suffering, are not to be ignored, but they indicate that the Plaintiff's circumstances in life, though somewhat impaired, are something less than calamitous.

The Claim for Non-Pecuniary Damages

- [48] Ms. Duffy seeks between \$90,000 and \$110,000 as non-pecuniary damages. The Defendants submit that she is entitled to between \$30,000 and \$40,000 under this head. I am awarding her \$55,000.
- [49] The Plaintiff cited my decision in *Lewis v. Wang*, 2020 BCSC 16, in which I awarded Ms. Lewis \$90,000 for non-pecuniary damages. The reason for the lower award to Ms. Duffy is that the evidence in this case leads me to conclude that, although she has some pain on a daily basis in her neck and back, and headaches once or twice a month, she does not suffer pain to nearly the same degree as Ms. Lewis, for whom two witnesses testified as to her degree of pain at work. Ms. Lewis was not well enough to begin looking for new work in the first 4 ½ months after the accident. From the accident, Ms. Lewis sustained a neck injury, which became chronic, and aggravated pre-existing problems in her right shoulder and back. Distinguishing Ms. Duffy's claim from that of Ms. Lewis serves to demonstrate why, in my view, \$55,000 is the appropriate award for non-pecuniary damages in this case.
- [50] Each side of course cited decisions of this Court in support of their respective submissions on quantum for non-pecuniary damages, purporting to align their positions with the authorities cited. A review of the cases makes clear that the judicial task in determining non-pecuniary damages is uniquely fact-driven. The facts in the cases cited by the Defendants, *Randhawa v. Chiang*, 2014 BCSC 631; *Cegielka v. Grace*, 2020 BCSC 115, which I decided; and *Brass v. Von Chudentiz*, 2020 BCSC 343, are closer to the Plaintiff's facts before me than are the facts in the cases cited by the Plaintiff, including, *Clayton v. Barefoot*, 2018 BCSC 239; *Severud v. Smit*, 2016 BCSC 1021; *Lewis v. Wang*, referred to earlier; and additional cases the Plaintiff also cited.

The Claim for Loss of Future Earning Capacity

- [51] Ms. Lewis in this part of her claim must demonstrate a real and substantial possibility that a diminishment in her future earning capacity will result in a pecuniary loss, see *Perren v. LalariI*, 2010 BCCA 140. As Garson J. wrote, in these well-known passages from *Perren*:
- [30] Having reviewed all of these cases, I conclude that none of them are inconsistent with the basic principles articulated in *Athey v. Leonati*, [1996] 3 S.C.R. 458, and *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229. These principles are:
1. A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation [*Athey* at para. 27], and

2. It is not loss of earnings but, rather, loss of earning capacity for which compensation must be made [Andrews at 251].
- [31] Furthermore, I conclude that there is no conflict between Steward and the earlier judgment in Pallos. As mentioned earlier, Pallos is not authority for the proposition that mere speculation of future loss of earning capacity is sufficient to justify an award for damages for loss of future earning capacity.
- [32] A plaintiff must always prove, as was noted by Donald J.A. in Steward, by Bauman J. in Chang, and by Tysoe J.A. in Romanchych, that there is a real and substantial possibility of a future event leading to an income loss. If the plaintiff discharges that burden of proof, then depending upon the facts of the case, the plaintiff may prove the quantification of that loss of earning capacity, either on an earnings approach, as in Steenblok, or a capital asset approach, as in Brown. The former approach will be more useful when the loss is more easily measurable, as it was in Steenblok. The latter approach will be more useful when the loss is not as easily measurable, as in Pallos and Romanchych. A plaintiff may indeed be able to prove that there is a substantial possibility of a future loss of income despite having returned to his or her usual employment. That was the case in both Pallos and Parypa. But, as Donald J.A. said in Steward, an inability to perform an occupation that is not a realistic alternative occupation is not proof of a future loss.
- [Emphasis in the original.]
- [52] From those passages, mere speculation as to future loss of earning capacity is not sufficient to justify an award for damages under this head. The possibility of future loss of earning capacity, to support an award, must be real and substantial.
- [53] I am unable to conclude on the facts before me that there is a real and substantial possibility of a future loss of earning capacity for Ms. Duffy arising from the accident in 2017. Ms. Duffy has demonstrated from the age of 16 to this day, an outstanding work ethic. From the time of the accident in 2017, to the time of trial, she did not miss a day of work, or any overtime, as a result of pain or other incapacity from the accident. Dr. Mistry, in 2018, was prepared to give her a note whereby she would work for six hours rather than eight hours at her desk, but that was only for four weeks. He was not prepared to give a note for an extension of diminished worktime, and Ms. Duffy returned in 2018 to a full work day. There is no evidence to support a conclusion that her condition will worsen in future.
- [54] In the Cegielka case, cited above, I awarded Mr. Cegielka slightly less than one year of his annual income for loss of future earning capacity, but that was because he was working outdoors, year-round in the construction industry, not at an office desk. See paras. 40-42 in that case.

- [55] To summarize with respect to loss of future earning capacity, I would be merely speculating to say that Ms. Duffy will encounter a future event leading to a loss of earning capacity. There is of course that possibility, but it is not substantial. It cannot be enough, under this head of damages, that a plaintiff is young, has some lasting pain from an accident, and simply submits that her, or his, employment prospects down the road are therefore uncertain. All the evidence must be examined.
- [56] In reaching the conclusion I have, I do not make a finding against Ms. Duffy as to credibility. On the contrary, I found her generally to be an honest witness who did not readily overstate her case. The issue in this case, instead, is simply whether someone in her position, on the facts of this case, can satisfy the legal tests summarized in Perren, above. Even though Ms. Duffy will probably have some pain in her neck and back, and occasional headaches, in future, I am unable to conclude that there will be an impairment of her future income earning capacity as addressed in the legal tests from Perren.

The Claim for Cost of Future Care

- [57] Under this head, Ms. Duffy seeks \$65,000 to cover the cost of massage therapy for 10 years, and \$2,500 for drugs for pain management.
- [58] The threshold issue for a plaintiff advancing a cost of future care claim is to show that the proposed expenditures are medically justified and reasonable. See *Melina v Bartsch et al* (1985), 49 B.C.L.R. (2d) 33 (S.C.) at 84.
- [59] The Plaintiff's rationale for the massage therapy treatments is found in the written opinion of Dr. Chow, where he observed, at page 11, that Ms. Duffy continues with massage therapy, and that massage therapy in conjunction with exercise has been found to be beneficial. Dr. Chow added, "It is likely, however, that she will experience flare-ups of pain from time to time in the future that will require a 6 to 8-week of physical therapy, including massage for pain control during the acute phase".
- [60] I am prepared to conclude from Dr. Chow's evidence that Ms. Duffy has crossed the threshold for establishing medical necessity. However, the evidence is unsatisfactory for addressing the frequency or duration for massage therapy. The most I am prepared to award Ms. Duffy for massage therapy is \$20,000.
- [61] For future pain management, which Plaintiff's counsel described as Tylenol and naproxen, I will award Ms. Duffy \$1,500. That figure is, at best, a guesstimate. No evidence was presented for the cost of pain management.

Summary

- [62] In conclusion, I award Ms. Duffy \$55,000 as non-pecuniary damages, \$21,500 as the cost of future care, and no amount for future loss of earning capacity.

[63] As I noted at the beginning of these reasons, special damages have been agreed to in the amount of \$7,001.40.

[64] The parties did not address costs, which can be spoken to, if necessary.

"Macintosh J."

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