
CANADA / JUDGMENT

Fazio v. Catchpoole

2007 BCSC 776

COURT

Supreme Court of British Columbia

DECIDED

31 May 2007

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2007 BCSC 776 Fazio v. Catchpoole

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Fazio v. Catchpoole,

2007 BCSC 776

Date: 20070531

Docket: M034162

Registry: Vancouver

Between:

Cynthia Anne Fazio

Plaintiff

And

Walter R. Catchpoole

Defendant

Before: The Honourable Mr. Justice McEwan

Reasons for Judgment

Counsel for the Plaintiff

W. H. Bradbrooke

Counsel for the Defendant

J. W. Burgoyne

Date and Place of Trial/Hearing:

February 19-21, 2007

Vancouver, B.C.

I

- [1] The plaintiff seeks damages for injuries she suffered in a motor vehicle accident on January 27, 2002 on Highway 1 near the Lonsdale exit in North Vancouver. Liability is admitted by the defendant.
- [2] The plaintiff's vehicle was struck from behind. The plaintiff thinks the impact spun her vehicle completely around. In the immediate aftermath, her arm hurt but she did not experience neck pain. She was quite shaken-up but her car was operable. She made her way home and by the evening her neck was very sore.
- [3] The plaintiff went to a medical clinic in North Vancouver the next day. Her complaints were recorded as pain in her neck, shoulders, and chest. It appears that a muscle relaxant was prescribed and that she was advised to apply ice to the areas where she was experiencing pain.
- [4] The plaintiff went to her own doctor on February 1, 2002. An x-ray was taken. The consultation report reads:

The normal curvature is maintained. The vertebral bodies are normally developed and aligned. No fracture or subluxation is identified. A similar normal appearance was demonstrated four years ago when the patient presented with pain in the neck and right arm with numbness and tingling.

- [5] Following this, the plaintiff attended two courses of physiotherapy and massage treatments in an attempt to attenuate her pain.
- [6] On March 1, 2002, the plaintiff had a severe episode of pain. She went to the Lions Gate Hospital emergency department. The notes of that attendance suggest pain in the plaintiff's neck and right arm following the physiotherapy. The pain was described as a "sharp, burning pain" and the plaintiff was said to be unable to move her arm or to sleep.
- [7] The plaintiff's condition as of November 25, 2002 was described by Dr. David Quirke, a physician to whom she had been referred by her own doctor:

Thank you very much for referring Cynthia whom I met at the Pacific Coast on November 25, 2002. Cynthia as you know was involved in a motor vehicle accident in January of this year and despite physiotherapy, massage therapy and acupuncture treatments, she has been left with some significant disability. Usually Cynthia is very active and fit and likes to snowboard and ride a horse etc. but she now feels that this is out of the question.

On examination she does appear quite strong, there is a significant decrease in cervical range of motion both in flexion and in rotation on the right side and dynamic palpation reveals abnormalities over right C5-6, right 0-1 and left C4-5. Also there is diffuse hypertonicity over the cervicothoracic musculature and stiffness and localized tenderness over L-5. Diagnosis is compatible with Whiplash Associated Disorder Type II and residual capsulitis of the aforementioned cervical facet joints and mechanical back pain in the low back.

I will subject her to a trial of spinal manipulation and we will have to see how it goes here. I have explained all the possible benefits and side effects she might expect from this type of treatment. Thank you very much for the referral, I do expect that she will improve.

[8] The plaintiff did not improve quite as expected and Dr. Quirke saw her again on June 12, 2003:

Cynthia informed me that after discontinuation of her therapy in December her neck symptoms slowly began to increase and currently she is in quite a bit of discomfort. Thank you for a copy of the CT scan of her spine that does show evidence of injury at the right C-6-7.

On examination today her findings are essentially as previously except quite significantly stiffer and with decreased range of motion, particularly to the right.

I think it is reasonable to subject her to a trial of gentle manipulation and I did that today with good results. Interestingly enough the lower left side of her neck was actually quite tight. I have recommended that she purchase a MEDIFLOW PILLOW and also I would like her to continue with her PILATES. She did experience a bit of a flare in her condition after the PILATES, but I think it would be reasonable to try it again. Should she not respond as expected, we could of course always consider an epidural cortisone injection.

[9] On June 8, 2003, Dr. A. Mutat reported:

Mrs. Schmitz stated that she was well and had no neck pain until she was involved in a motor vehicle accident on January 27, 2002. She was rear-ended by another car with significant damage to the back of her car. She was seat-belted and she immediately felt some neck soreness but the next day she had severe neck and right arm pain and later she had left arm pain but this was not associated with parasthesia or numbness. She describes her pain as dull, achy and throbbing in nature. This was associated with neck stiffness and decreased neck mobility. She also felt bilateral arm weakness. She stated that after the initial few months when her pain continued to worsen she started to show some improvement for about 10 months and now she feels she had plateaued.

She has been treated with analgesics, non-steroidal anti-inflammatories, muscle relaxants, physio and massage therapies and chiropractic manipulations.

She also stated that she has low back pain but no shooting leg pain, parasthesia or numbness. Her bowel and bladder functions are normal.

She has been able to continue working but she has been unable to participate in any sports.

Past Medical History:

Mrs. Schmitz's medical past is unremarkable. She denies any allergies. She is a non-smoker and a social drinker.

Physical Exam:

Mrs. Schmitz is a healthy looking woman. Her vitals were within the normal range. Her chest abdomen and cardiovascular systems were unremarkable. She has a decreased range of neck movement in all directions. She has mild paraspinal muscle spasms but no significant tenderness over the spine. Sensory, motor and reflex examinations in the upper and lower extremities were normal. She has no nerve root tension signs. Her gait is normal.

Imaging:

A CT scan of the cervical spine performed on May 14th, 2003 revealed mild spondylotic changes at C5/C6 and C6/C7 with small osteophytes at the later level behind the C7 vertebral body. There is no focal disc herniation, nerve root or spinal cord compression.

Impression:

Mrs. Schmitz's neck and arm pain is likely due to soft tissue injury with possible elements of degenerative disc disease and facet osteoarthropathy.

I will optimize her pain management with non-steroidal anti-inflammatories and Nortriptyline. If her pain persists, she may benefit from a trial of cervical epidural Depomedrol injection.

II

[10] The plaintiff is now 42 years old. She has a grade 12 education. She has been in the workforce ever since she left school. She held a number of clerical positions with CP Rail for about 14 years. When CP Rail moved its offices to Calgary, she did not wish to transfer, so she left that employment. She then worked briefly for a container company and then obtained employment at Terminal Systems Incorporated (TSI). In 2001, after working in customer service and clerical positions, the plaintiff became a dispatcher. She has held that position ever since. In addition, she has kept a part time job contract job cleaning CP Rail trailers.

[11] The "fitness" alluded to in the medical reports was borne out by the plaintiff's active leisure pursuits which included water skiing, snowboarding, running, cycling and working out. The plaintiff was also very involved in horseback riding. She kept two horses at the time of the accident. She is the single mother of a 17-year-old daughter who is also an active rider and a talented gymnast. They are close, and have a close relationship with the plaintiff's parents as well.

[12] The plaintiff's work is stressful and challenging. It has also been highly remunerative in recent years. This is due to significant increases in the volume of shipping through the Port of Vancouver. In general terms, the plaintiff's job entails taking orders from shipping companies and other contractors for workers on the docks and communicating with the union locals where those workers assemble. It is rather more subtle in its details, and calls for a certain amount of judgment and mental agility. The evidence is that the plaintiff is very good at it, and is a valued employee. A combination of circumstances including a shortage of trained people and the temporary absence, due to illness of others, resulted in a remarkable opportunity for overtime work in 2006. The plaintiff acknowledges that she always takes on as much work as she can. To a base rate of \$60,480 in 2006, the plaintiff added \$57,373.80 in overtime, for total earnings of \$117,853.82

[13] While 2006 may not be typical, the trend in the plaintiff's earnings has been steadily upward since 2001. Her reported income from 2001-2006 is as follows:

2001

\$63,903.54

2002

\$78,906.45

2003

\$82,323.00

2004

\$84,935.22

2005

\$89,593.31

2006

\$117,853.82

[14] Despite the difficulties she has had as a result of the injuries she suffered in the motor vehicle accident, the plaintiff has not missed any work and makes no claim for income loss related to that employment. Apart from damages for pain and suffering and loss of enjoyment of life, the plaintiff's claim is for loss of opportunity. She makes this claim in quite specific terms.

- [15] The increased activity in the Port of Vancouver has resulted in an increasing need for the kind of workers the plaintiff dispatches. These are now actually called "longshorepersons" to appease some tone-deaf deity of linguistic rectitude. I refuse to commit that atrocity to writing. I will use the term "dock worker" or equivalents to describe the specific opportunity the plaintiff has described.
- [16] The plaintiff feels, subjectively, that while she is able to work long hours in her current position as a dispatcher, she was fit enough and her circumstances before the accident were such that had she not been injured, she would have qualified to work on the docks. She feels that, as a consequence of the accident, she is no longer able to participate in the athletic activities she once pursued, and that this, in a way, measures the sort of physical effort she would have needed to work on the docks. She points out that her own daughter, Hayley Schmitz, with whom she pursued her athletic activities, had no trouble passing the physical tests necessary to do that kind of work, and is now a dock worker.
- [17] There is no question that times have changed, and enough of the work on the docks has become mechanized that a reasonable degree of fitness rather than extraordinary physical strength is what the work requires. In the last ten years or so, jobs on the docks have opened up to women. This is owing, in part, to a degree of affirmative action.
- [18] In 2004, when additional workers were needed to meet demand, a lottery system was implemented to determine who, from among the applicants, would get a chance to move up a series of "boards" culminating in membership in the Union. Membership entails certain privileges such as job security and choice as to what work one will do.
- [19] The lottery drew alternately from male and female pools such that when all the selections had been made there were an equal number of men and women chosen, although the "pool" of men was many times larger than that of the women. On one view of the evidence, it appears that as many as three quarters of the female applicants were chosen in that particular draw, which included the plaintiff's daughter.
- [20] The plaintiff's evidence is that the remarkable demand for dock workers in the last few years means that such work would have been a sensible option for her. Before 2003 or so, an aspiring dock worker would take about eight years starting on what is called the "00" Board, and rise through a series of Boards labelled "T", then "C", "B", and "A" before being eligible for the Union. It is now possible to rise through the boards in three years or so, according to the evidence of Onkar Athwal, the vice president of Human Resources for the B.C. Maritime Employees' Association.
- [21] Mr. Athwal acknowledged that there had been nepotism on the docks in the past and that one of the lotteries was tainted. He says these problems have been corrected and "who you know" is no longer a factor in who will be hired.

- [22] The plaintiff suggests that, in the lotteries for which she would have qualified if she had not been injured, it was tacitly understood that there was an advantage to being a relative of a dock worker or a person who was known, and that this, combined with her fitness and the favourable odds for women in the lotteries, add up to a probability that she would have been hired. She also suggests that her willingness to work would have led to her achieving the "A" board in less than two years.
- [23] There is no question that such a move would have cost the plaintiff in the short term. The opportunities for employment on the lower boards can be variable and the plaintiff would have taken a financial loss for the years it might have taken to achieve a comparable level of income to her earnings as a dispatcher. The advantage to pursuing this work, according to the plaintiff, would be that dock workers have much more flexibility in terms of when they will work and when they will not, and achieving a comparable level of earnings would not require the overtime the plaintiff presently has to work. The claim has an aspect of loss of enjoyment to it, inasmuch as while the plaintiff claims she would ultimately have earned more, a large part of her claim is that she would have been able to earn a comparable income working fewer hours and therefore enjoying a better way of life than she now does.

III

- [24] The defendant acknowledges that the plaintiff was injured in the motor vehicle accident but submits that the evidence only supports a modest claim for damages for pain and suffering and loss of enjoyment of life.
- [25] The defendant refers to the plaintiff's past medical records, which describe an incident of "neck pain and right arm pain" in January of 1998. The notes on the medical chart are very brief, although the injury was apparently of sufficient concern that the plaintiff was sent for x-rays. The report is also very brief and reads as follows:

CERVICAL SPINE

History - neck pain and right arm pain.

No evidence of trauma or focal disc disease. The intervertebral foramina are unremarkable.

- [26] The plaintiff says she does not recall any event precipitating this complaint. The symptoms obviously correspond generally to the complaint arising in the January, 2002 motor vehicle accident.
- [27] The CT scan taken in May of 2003 (alluded to in the report of Dr. A. Mutat excerpted in paragraph 9 above) was interpreted by the radiologist Dr. Mary F. Graham, as follows:

CT CERVICAL SPINE:

HISTORY: MVA February 2002, persistent neck pain, paresthesia in the right hand radiating from the neck.

TECHNIQUE: 3mm enhanced axial scans have been obtained from the mid portion of C4 to the superior aspect of T1.

At C4/5 the spinal canal is normal caliber. No disc herniation is identified. The neural foramina are maintained. AT C5/6, no disc herniation is identified. The neural foramina are maintained. At C6/7, there is an osteophyte present on the right posterior aspect of the body of C7, which may encroach slightly on the exiting C7 nerve root. A disc herniation is not identified. At C7/T1, no disc herniation is identified. The neural foramina are maintained.

The facets are unremarkable at all levels.

CONCLUSION: Degenerative osteophyte on the posterior aspect of C7 on the right side, which may be impinging on the exiting C7 nerve root.

[28] The defence arranged for the plaintiff to attend Dr. J. F. Schweigel for an independent medical assessment. Dr. Schweigel conducted an examination and reviewed the plaintiff's medical records including those of Dr. Hudson, Dr. Mutat and Dr. Quirke. His review of the x-rays and CT scans led him to conclude that the plaintiff suffered from degenerative processes in the cervical and lumbar spine. He set out his finding and conclusions as follows:

E. Diagnosis:

This lady sustained some soft tissue injuries to the neck and back. These soft tissue injuries would have been a strain of muscles and ligaments. She also has pre-existing disc degeneration and arthritis of the cervical spine and also of the lumbar spine.

F. Causation:

The cause of the soft tissue injuries was the MVA of January 27, 2002. The degeneration of the cervical and lumbar spine is an aging process or a degenerative process.

G. Prognosis:

The prognosis for his lady is good but slightly guarded. Patients with this type of degeneration in the neck and back can have months and even years of minimal or no pain, and then for no particular reason the pain can suddenly reappear. The events than can cause reappearance have been enumerated in "Opinion", that is, a twist, a fall, gardening, etc. She requires no further physiotherapy, massage treatment and/or chiropractic treatment. She will not develop any further degeneration and/or arthritis because of this MVA. She will not require any surgery.

H. Disability:

This lady took a few days off work because of her pain and this was appropriate. She probably didn't require more than a few days to a few weeks off work at the most. After that she should be able to do light work with some lifting of objects between 15 and 20 lbs periodically. Because of her underlying degeneration and arthritis of the cervical and lumbar spine, she should have avoided heavy work regardless of the MVA. She is capable of full time light work.

I. Opinion

This lady sustained a soft tissue injury to her neck and back. She has pre-existing disc degeneration and arthritis of the cervical spine proven by x-ray and CT scan, and also by x-ray of the lumbar spine. The MVA did not cause this degeneration and arthritis nor did it cause it to become physically worse. The MVA aggravated a pre-existing neck problem, and she had similar complaints that started quite spontaneously on June 12, 1998. At that time she had neck and right arm pain. I see no pre-existing evidence of low back pain prior to the MVA of January 27, 2002, therefore it would appear to me that the MVA of January 27, 2002 aggravated a pre-existing neck problem and precipitated the onset of symptoms in her lower back from the underlying degeneration and arthritis that was asymptomatic prior to the MVA of January 27, 2002.

Patients with degeneration of the neck and/or lumbar spine, similar to this lady, will have pain occurring periodically in their neck and back from a variety of precipitating events. These events are usually innocuous events, e.g. bending, twisting, gardening, lifting groceries, etc. Therefore, this lady was predisposed to having problems with her neck and back regardless of the MVA of January 27, 2002. The pain she would have had from these other events that can cause neck and back pain in a person that has underlying degeneration would have been similar to what she is having now and the chronicity of the pain could have been the same. By the same token, if she had not had the MVA of January 27, 2002 she may not have had any neck and/or back pain. However, more likely than not she would have had neck and back pain from one of the events mentioned above.

The physical examination of this lady was essentially normal except she did have slightly decreased neck motion. The loss of motion she had was probably due to the underlying arthritis she has in the neck. She had no spasm, no deformity and no neurological deficit. The lumbar spine exam was completely normal. In my opinion these soft tissue injuries have healed and the pain she is having in the neck and back is due to the underlying degeneration.

[29] These conclusions differ from those of Dr. Mark Adrian, a specialist in physical medicine and rehabilitation, who assessed the plaintiff's condition on September 11, 2006. He outlined his findings as follows:

Conclusions

Diagnosis:

1. Musculoligamentous strain/sprain injury to the cervical spine.

2. Musculoligamentous strain/sprain injury to the lumbar spine
3. Cervicogenic (related to the neck) headaches

Discussion/Causation:

Ms. Fazio was involved in a motor vehicle accident January 27, 2002. She was the driver wearing a seatbelt. Her vehicle was struck over the rear aspect. She experienced immediate pain involving her right upper extremity. Ms. Fazio developed neck and low back pain symptoms within two days of the accident.

Ms. Fazio required modification of her work, recreational and household activities due to her symptoms.

Ms. Fazio has experienced a degree of improvement in her low back symptoms. She experiences persistent neck pain symptoms associated with physical limitations. Ms. Fazio participated with physiotherapy, chiropracting and massage therapy treatments.

Neck Pain:

In my opinion, Ms. Fazio suffered a physical injury to the musculoligamentous structures of her cervical spine as a result of the motor vehicle accident.

The musculoligamentous structures potentially injured as a result of the accident, that are capable of causing Ms. Fazio's persistent mechanical neck pain symptoms are the cervical spinal facet joints, the intervertebral discs and soft tissue structures (muscles, ligaments and connective tissues.)

Ms. Fazio experiences mechanical neck pain. Mechanical neck pain implies that her neck pain symptoms are increased when physical forces are applied to the musculoligamentous structures (mentioned above) of her cervical spine, as occurs with prolonged awkward neck positioning; lifting with the upper extremities; or prolonged carrying.

When I performed physical examination maneuvers that placed physical forces across the musculoligamentous structures (mentioned above) Ms. Fazio experienced neck pain symptoms. There were no physical exam findings of spinal cord, spinal nerve or peripheral nerve injury.

In my opinion, Ms. Fazio's current neck pain symptoms are causally related to the motor vehicle accident.

Ms. Fazio experiences headaches, present over the back, frontal and temporal regions.

In my opinion, Ms. Fazio's headaches are probably cervicogenic (related to the neck). Ms. Fazio's headaches represent referred pain from the neck. Referred pain is pain that is experienced at a site distant from the injury, but not due to injured nerves. Referred pain, from the neck to the head following a musculoligamentous strain/sprain injury is a well recognized medical phenomenon.

In my opinion, Ms. Fazio's headaches are causally related to the accident.

Ms. Fazio does not recall physically limiting neck pain symptoms until the 2002 motor vehicle accident.

Reviewing the medical records, there is a notation in the records of her family physician, Dr. Hudon, dated January 12, 1998, regarding neck pain. There was an X-report of Ms. Fazio's cervical spine x dated January, 1998 that did not reveal abnormality.

There is no further mention of neck pain symptoms in the available medical records until the 2002 motor vehicle accident.

Ms. Fazio does not recall that episode of neck pain symptoms. She does not recall undergoing specific treatments or requiring physical limitations at that time.

In my opinion, Ms. Fazio probably suffered an isolated, brief, self-limiting episode of neck pain symptoms in 1998, that resolved prior to the 2002 motor vehicle accident. It is unlikely that the episode of neck pain that occurred in 1998, contributed to the development of her current neck pain symptoms.

Ms. Fazio has imaging findings (CT scan) of her cervical spine of minor degenerative changes. In my opinion, these minor degenerative changes probably predated the motor vehicle accident, and were not causing symptoms or functional limitations. In my opinion, it is unlikely that these minor radiologic findings would have spontaneously become symptomatic had it not been for the motor vehicle accident.

Low Back Pain:

In my opinion, Ms. Fazio suffered a physical injury to the musculoligamentous structures involving the lumbar spine as a result of the accident.

The musculoligamentous structures potentially injured as a result of the accident, that are capable of causing Ms. Fazio's persistent mechanical low back pain symptoms are the lumbar spinal facet joints, the intervertebral discs and soft tissue structures (muscles, ligaments and connective tissues).

Ms. Fazio experiences mechanical low back pain symptoms. Mechanical low back pain implies that the low back pain symptoms are increased when physical forces are applied to the musculoligamentous structures (mentioned above) of the lumbar spine, as occurs with prolonged standing and sitting.

When I performed physical examination maneuvers that placed physical forces across the musculoligamentous structures of her lumbar spine, Ms. Fazio reported low back pain symptoms.

In my opinion, Ms. Fazio's low back pain symptoms are causally related to the motor vehicle accident.

Ms. Fazio underwent x-rays involving the lumbar spine that demonstrated mild degenerative changes. Ms. Fazio does not recall physically limiting low back pain symptoms until the motor vehicle accident.

In my opinion, the mild degenerative changes noted on imaging studies probably predated the motor vehicle accident and were not causing symptoms. In my opinion, it is unlikely that Ms. Fazio would have spontaneously developed physically limiting low back pain symptoms had it not been for the motor vehicle accident.

Prognosis:

Over four years has elapsed since the motor vehicle accident date. Ms. Fazio has experienced persistent neck and low back pain symptoms. She has participated with physiotherapy, chiropractic and massage therapy treatments.

In my opinion, the data mentioned above indicates a poor prognosis for further symptomatic or functional recovery. In my opinion, it is unlikely that the injuries suffered in the motor vehicle accident will undergo progressive deterioration over time.

[30] Dr. Schweigel reiterated his conclusions after he had reviewed Dr. Adrian's report and the Functional Capacity Evaluation prepared for the plaintiff by Edgar Emnacen, an occupational therapist. That report concluded:

Regarding opinion for fitness for work:

The physical demands required of dispatcher work as well as her anticipated work as a longshoreman were determined through Ms. Fazio's reports, my own clinical experience, and review of the Dictionary of Occupational Titles (DOT) and National Occupational Classification (NOC) Handbook.

Ms. Fazio presents with limited tolerance for sustained neck flexion/extension postures, sustained stooping postures and for sustained right sided overhead reaching. She also presents with the ability to manage strength demands within the light and select aspects of medium strength capacity. Given her presentation in functional settings and guarded prognosis of Dr. Hudon (stated later in the Recommendations for Future Costs section), she will likely continue to experience neck and back aggravation with exposure to the above noted functional stressors, or with tasks requiring sustained neck flexion/extension and stooping postures, sustained right sided reaching and strength demands beyond the light strength capacity level.

Ms. Fazio is currently working as a dispatcher. She reported she is able to manage the majority of her work demands with postural breaks while sitting and doing work (i.e., prolonged neck flexion postures) and for tasks requiring sustained overhead reaching (e.g., writing on a white board). Functional findings of this evaluation support her reported difficulties with her current work. Ms. Fazio should be encouraged to continue with the pacing and pain management strategies she is already employing. She may also benefit from an ergonomic analysis of her work station to determine if there are other strategies she can employ to assist in further managing her neck and

back symptom reactivity.

Ms. Fazio indicated her work goal was to become a long shore worker, or longshoreman. Functional findings cross-correlated with the known job demands indicate she does not meet the medium to heavy strength capacity requirements, sustained reaching requirements and postural tolerances for certain activities e.g., looking overhead and lifting a pole to unleash trailers. Her limited neck range of motion and flexion/extension tolerance will also affect her ability to operate machinery, e.g., using a crane and looking downwards to view the load, or frequency to constantly shoulder checking (neck rotation) while driving a forklift/backing up equipment.

[31] Dr. Schweigel's February 5, 2007 report deal directly with Dr. Adrian's summary:

Comment on Dr. Adrian's September 11, 2006 letter:

Dr. Adrian feels this lady has mechanical neck pain (page 10). Mechanical neck pain is a term used that means the pain is coming from some structure within the neck area (bone, ligament, or disc). I agree with that diagnosis. More likely than not it is coming from the underlying degenerative arthritis at C6/7. One also has to remember that this degenerative arthritis is a progressive condition. It progresses due to the natural history of the disease and not because of any trauma.

Again on page 10 Dr. Adrian stated that "it was unlikely that she would have developed this pain if not for the MVA." I cannot agree with that statement. She was predisposed to having problems similar to what she currently has. Patients who have degenerative of the cervical spine and/or lumbar spine more likely than not will have onset of pain from events that they do on a daily basis e.g.:

- A lifting episode.
- A jolt.
- A slip.
- A fall.
- Gardening etc.

On page 11 Dr. Adrian states that his lady has mild degeneration. I agree with that statement. However what Dr. Adrian does not say is that she has mild degeneration of four of the five discs in the lumbar spine. She has mild degeneration of L2/3, mild degeneration of L3/4, mild degeneration of L5/S1, moderate degeneration of L4/5. Therefore it is obvious that if she had only one disc that was involved the chance of her having difficulty would be much less. The fact that she has four of the five discs involved with degeneration, all of them mild and one moderate supports my opinion that she would have had problems regardless of that MVA of 2002, with respect to her lower back from one of the events mentioned above.

Again on page 11 Dr. Adrian states the prognosis for this lady is poor. I agree, in part, with that statement. If she had to do heavy work, or impact type activities she would have difficulty doing that. She is capable of doing housework, but on a more structured basis. For example she can vacuum clean, but she may not be able to vacuum clean the whole house in one day. She can vacuum clean one or two rooms and then would have to do the remaining rooms on another day. She would not be capable of being a long-shore person. However she was not capable, in my opinion of being a long-shore person regardless of this MVA. The degeneration of the cervical spine would have limited her ability to extend her neck for long periods of time and elevate her arms for long periods of time. The diffuse degeneration of the lumbar spine would have prevented her from doing heavy lifting, bending, impact type activities, driving vehicles over rough terrain. These degenerative conditions were present prior to the MVA of 2002.

[32] Dr. Schweigel added the following with respect to the Functional Capacity Evaluation:

Comment on the Functional Capacity Evaluation - November 15/06:

Many of the comments I have made in addressing Dr. Adrian's letter have already been answered with respect to the functional capacity evaluation report. The functional capacity evaluation suggests further:

- Physiotherapy.
- Massage Therapy.
- Ergonomics.
- Housekeeping help.

This lady does not require any further physiotherapy and definitely does not require any massage treatment. Massage treatment is a passive form of treatment and does not change the natural history of the condition. An ergonomic chair and desk for working would be appropriate.

[33] Dr. N.K. Reebye examined the plaintiff on December 1, 2006. He summarized his view on December 19, 2006 as follows:

My answers to your questions and requests of November 27, 2006 are as follows:

1. The nature and extent of Ms. Fazio's injuries arising from the accident.

The diagnosis to consider is that of mild to moderate soft tissue injuries as a result of acceleration and deceleration type of forces to which her body was subjected in the motor vehicle accident of January 27, 2002.

There is no evidence of history, initial clinical examination and present examination to suggest the presence of more severe injuries like torn muscles, damage to ligaments, intervertebral discs, nerves, or nerve roots.

Injuries of the type sustained heal within a few weeks, however, aches and pains can be experienced for longer periods.

2. Causal connection between the motor vehicle accident and the various injuries alleged.

They were a direct result of the motor vehicle accident

3. Details of functional limitations

- a) Impact, if any, on her ability to function as a dispatcher.

She has continued working as a dispatcher and she is working long hours at the present.

She has some difficulties doing certain activities.

Work station modifications and equipment like the headset, a step stool to be able to write at shoulder level, [rather than having to life arm up for writing over long periods], optimal seating and frequent changes of activities during her workday will be helpful to increase her comfort at work.

- b) Impact, if any, on her ability to work as a cleaner.

She states that she still has difficulties washing the floor and vacuuming and she has therefore given the job up to her mother and daughter.

In my opinion, she has the potential ability of doing that job and she could return to it by adopting appropriate strategies.

She will initially experience more aches and pains but I anticipate that she will become more and more comfortable over time doing the specific job activities as she develop endurance to them.

She is working very long hours at her job as a dispatcher and it will be a matter of personal choice to have an optimal balance the activities she prefers to do.

- c) Impact, if any, on her ability to perform household tasks.

She is still somewhat limited in activities such as vacuuming, washing the floor and cutting the lawn. She could gradually try to do them after she has followed a period of exercises and reconditioning.

It will be difficult for her to get back to horseback riding at present, as it is a more strenuous activity. In the long run, there are no contraindications for her to try to go back to horseback riding as far as the soft tissue injuries are concerned.

- d) Impact, if any, on her ability to exercise and engage in recreational activities.

She avoids certain exercises and recreational activities. There are no physical contraindications for her to gradually increase the activities depending upon her symptoms and her endurance. It will be a matter of time and appropriate techniques for her to be able to participate in more of those activities in future.

- e) Impact, if any, on overall employability currently and into the future.

There are no clinical impairments to limit her continuing with her present employability and she will be able to do similar types of jobs in the future.

[34] On February 9, 2007, Dr. Reebye, having reviewed the Functional Capacity Evaluation and a Vocational Consulting Report, added the following:

In my opinion, the soft tissue injuries sustained by Ms. Fazio in the accident of January 27, 2002 will not, in the long run, prevent her from doing any job that she was able to do previously.

The degenerative changes with osteophytes and impingement, in her neck and the degenerative changes in her lumbar spine are potential causes that could limit her from doing heavier physical activities like becoming a longshoreperson in the long run.

X-rays of her neck did not demonstrate degenerative changes but CT scan revealed degenerative changes. It is not uncommon that x-rays can be normal in the presence of degenerative changes that show up in a CT scan. It sometimes takes several years for changes seen on a CT scan to show up on x-rays.

In my opinion, degenerative changes were pre-existing and they will gradually worsen over time, irrespective of the motor vehicle accident.

The type of injury sustained by Ms. Fazio is not a cause for onset of degenerative changes or hastening of degenerative changes.

I have read Dr. Schweigel's report and I am in agreement with views expressed in his report.

Ability to work as a longshore person:

Ms. Fazio has never worked as a longshoreperson previously and it is difficult to state if she could have previously worked as a longshoreperson. In my opinion, the soft tissue injuries sustained by her in the accident of January 27, 2002 will not be a barrier for her to work as a longshoreperson if she had previous potential of doing so.

IV

[35] On the issue of causation, the court is left to sift through this evidence in order to assess the damages attributable to the negligence of the defendant.

[36] The plaintiff's position is that the accident has permanently disqualified her from her rather strenuous pastimes and has left her unable to take advantage of an employment opportunity that would eventually have paid her more with more job flexibility and shorter hours. Her history of similar symptoms to those she suffered in the accident, arising some four years before, was, by her account, so trivial that she has forgotten what precipitated them.

- [37] The defendant's submission is essentially that the injuries suffered by the plaintiff in the accident were of a nature that should not have resulted in long term disability, and any ongoing complaints are due to an ongoing degenerative condition which has simply caught up with the plaintiff.
- [38] It is not possible to reconcile the conflicts in the medical evidence. None of the authors of the medical reports testified, and I have no basis upon which to prefer any particular opinion over another. I regard them as essentially educated guesses as to what might have happened. I accept that the plaintiff was not symptomatic before the accident, and that whatever precipitated the complaint in 1998, it was relatively transient. I accept that she has been symptomatic since the accident and that this may be merely coincidental, that is, that her ongoing degenerative condition may have become symptomatic independent of the injuries suffered in the motor vehicle accident. It may, on the other hand, mark a change brought about by the injuries suffered in the motor vehicle accident, which might never have become symptomatic during the plaintiff's working years, barring the contingency of another or similar event.
- [39] Taking the evidence all together, I incline to the view that the plaintiff had some susceptibility of which the incident in 1998 may have been a harbinger, but that she was able to carry on a very active way of life quite untroubled by significant pain until the motor vehicle accident. Having seen and heard the plaintiff, I think she is a person who placed a significant value on her physical abilities, and that she may be more acutely aware of the changes she has experienced than a less active person might be. Whether this has resulted in some heightening of her perception of her past abilities or of her present incapacity is hard to gauge. Dr. Schweigel opined in his February 5, 2007 report that:

She was not capable, in my opinion of being a longshoreperson regardless of the MVA. The degeneration of the cervical spine would have limited her ability to extend her neck for long periods of time and elevate her arms for long periods of time. The diffuse degeneration of the lumbar spine would have prevented her from doing heavy lifting, bending, impact type activities, driving vehicles over rough terrain. These degenerative conditions were present prior to the MVA of 2002.

This does not account for the fact that the plaintiff was capable of riding horses and doing a number of high impact sports up to May of 2002. To the extent that Dr. Schweigel may be incorrect, however, I think I must also take account of the occupational therapist note in the December 8, 2006 report:

Ms. Fazio's disability reports were initially relatively accurate measures of her functioning, however, as the evaluation progressed, her reports indicated higher levels of perceived limitation in comparison to objective functional measures.

- [40] I think the plaintiff's pre-accident susceptibility was not as great as the defendant's doctors suggest, and that the difference between the plaintiff's pre- and post-accident condition is perceived by her to be greater than it is.
- [41] I accept Dr. Reebye's assessment that the plaintiff should be able to get back to her pre-accident levels of activity, and that her current, demanding occupation may account for some of the way she is feeling.
- [42] The defence puts considerable weight on the fact that the plaintiff had apparently reported her ambition to become a dock worker to very few people, including Dr. Adrian, and that the notion only came up on the context of the Functional Capacity Evaluation, that is, for the purposes of characterizing a loss at trial. The defence suggests that the plaintiff's substantial debt obligations and high expenses, and the security of her present position would have strongly militated against the plaintiff taking the short and/or medium term risks that would have been associated with working on the docks, even if she had been successful in obtaining a position.
- [43] The defence also submits that the plaintiff was "selective" in her evidence about how the lottery system worked and that, somehow, accepting her version of how the lottery functioned would amount to the court sanctioning behaviour that constitutes impropriety in hiring practices.
- [44] As far as it goes, I accept the plaintiff's submission that she would probably have been hired in the 2004 lottery had she put her name in. The negative contingency was about 25% in any event, but I am persuaded, on the whole of the evidence, including that of Mr. Athwal, that there was a degree of favouritism or nepotism up to that time. It is in the nature of this sort of evidence that there is not going to be hard or documented proof, but, in this regard, I think the differences between Mr. Athwal's evidence and that of the plaintiff and Mr. Griffiths illustrate differences between "policy" and "how it really works". I do not think the court sanctions such practices by recognizing them as fact, and I do not think some kind of disapproval of the plaintiff's willingness to accept the advantages of such a system can be a factor in deciding whether such an opportunity actually presented itself.
- [45] I do not think it is at all free from doubt that the plaintiff would have taken advantage of this opportunity. Nor do I consider the sacrifices she would have had to make while she worked her way up the various boards self-evidently worth the trouble.
- [46] I do not doubt that had the plaintiff made this choice she would have worked very hard and made progress up the boards as quickly as that is possible: her circumstances would have dictated it, and there is no question that she is industrious. It is, however, very difficult to place when that might have been, and in this particular I think I must prefer the evidence of Mr. Athwal over that of the plaintiff or her witnesses, which I think may be somewhat unrealistic. This evidence was to the effect that it would be a three year process to achieve the top board. In absolute terms, at that stage, the plaintiff's income would be less than it has actually been for the last few years as a dispatcher, although the base would be higher

when overtime is discounted. It is not clear when the plaintiff might have expected her income to "cross-over", if ever, since this would have entailed her achieving a position as a foreman or something equivalent. There are contingencies at every step, including that the physical labour required would, itself, drive the plaintiff out of the workplace, if and when her condition caught up with her.

- [47] These contingencies are such that it is impossible to treat this claim as a straight income loss claim. Given the three or so years that the plaintiff's earnings would lag while she worked her way up the lesser boards, the amount the plaintiff would have to work to get back to parity, and the possibility that her own physical condition or some incident could set her back or put her out of this work for good, I think it is only possible to treat her loss as a loss of capacity. In assessing the case on that basis, it is important to bear in mind that the plaintiff's base salary is relatively modest (about \$60,000) and that the relatively spectacular earnings she has achieved with overtime are themselves the product of certain conjunctions of circumstances that may not project endlessly into the future. A significant reduction in the income available in this occupation would make more physical work more attractive. The plaintiff's claim also has about it an aspect of loss of amenity, in that the plaintiff submits that she could earn more for less effort in the kind of physical occupations now foreclosed, and have more time available for more enjoyable pursuits. Of course, these have also been more limited since the accident, according to the plaintiff.
- [48] I am satisfied that the plaintiff has suffered pain and suffering and loss of enjoyment of life. She was a very active person before the motor vehicle accident and took considerable pleasure in physical and outdoor pursuits. Allowing for the possibility that she might have lost the ability to do these things in any event or some time in the future given her pre-existing condition, and the degree to which she has, or is likely to recover her abilities, according to the medical evidence, I fix the plaintiff's non-pecuniary damages at \$50,000.
- [49] The plaintiff's counsel prefaced his submissions by saying that assessing the loss of opportunity claim in this case represented "crystal ball gazing at its level best". However, that may be, I am satisfied that the plaintiff has established a diminishment in her physical abilities that reduces her earning capacity, viewed as a capital asset in accordance with the law expressed in *Parypa v. Wickware* (1999), 169 D.L.R. (4th) 661, 1999 BCCA 88:
- [63] it is not the lost earnings themselves that must be compensated, but loss of earning capacity as a capital asset that requires compensation. There are several cases in this court which confirm that the capital asset approach is correct: *Earnshaw v. Despins* (1990), 45 B.C.L.R. (2d) 380; *Palmer v. Goodall* (1991), 53 B.C.L.R. (2d) 44; and *Kwei v. Boisclair* (1991), 60 B.C.L.R. (2d) 393. The significance of compensating earning capacity as a capital asset as opposed to projected future earnings is seen in the following passage from *Palmer*, *supra*, at 59:

Because it is impairment that is being redressed, even a plaintiff who is apparently going to be able to earn as much as he could have earned if not injured or who, with retraining, on the balance of probabilities will be able to do so, is entitled to some compensation for the impairment. He is entitled to it because for the rest of his life some occupations will be closed to him and it is impossible to say that over his working life the impairment will not harm his income earning capacity.

- [50] The plaintiff is able to point to a specific opportunity that may have been lost, but it is helpful primarily as an example of a realm of work requiring a level of physical ability she no longer possesses. Given the hazards of life and employment, the loss of such capacity, where it is realistic to foresee circumstances in which it might be useful to the plaintiff, is compensable. I say this having regard to the caution expressed in *Steward v. Berezan*, 2007 BCCA 150 as to the findings necessary to apply *Palmer v. Goodall* (1991), 53 B.C.L.R. (2d) 44 (C.A.) (mentioned in the case quoted in paragraph 49 of these reasons), to particular facts.
- [51] The amount awarded in this regard must, however, be modest, given the contingencies, particularly the possibility that at some point in time after the accident the plaintiff might have been unable to work in heavy physical occupations in any event. Accordingly, I fix \$80,000 under this head of damages.
- [52] The plaintiff makes a claim for the cost of future care. This is outlined in the Work Capacity Evaluation of November 25, 2006 in the following terms:

Rehabilitation/Treatment Services

1. **Episodic Physiotherapy:** It is recommended Ms. Fazio attend physiotherapy four times a year to assist with symptom management for intermittent flare ups of her neck and back pain and to review stretches/strengthening exercises for her neck and low back. The cost for one season is \$45, for a total of \$180. The cost is ongoing.
2. **Massage Therapy:** As per Dr. Hudon, massage therapy may be beneficial for recurrent episodes of neck and back pain. It is suggested she attend massage therapy three to four times a year. The cost of one session is \$35 (thirty minutes), for a total of \$140. The cost is ongoing.
3. **Ergonomic Assessment:** As previously discussed, an ergonomic evaluation of her current work site conducted by an occupational therapist or other qualified health professional may be of benefit to review her current symptom management strategies and determine any other strategies or equipment that may be of benefit for reducing neck and back symptoms, e.g., monitor riser, ergonomic office chair. It is suggested a budget of \$350 be allocated for an assessment, report, and follow up (up to three hours) and travel/mileage time. The therapist cost is \$85/hour, with travel time at half rate.

4. Pilates/home exercises: Ms. Fazio should be encouraged to continue with Pilates as tolerated following consultation with a physiotherapist, she currently follows videos at home and she previously attended classes at the gym. She may also benefit from attending classes again at her gym, should she regain her confidence.

Home care Services

1. Housekeeping services: Ms. Fazio indicated she and her daughter maintain the family home. She also indicated she paces out her cleaning activities, that is, she spreads the chores throughout the week instead of doing them all in one day. Her daughter has also reportedly assumed half of the chores. Ms. Fazio estimated cleaning the home takes up to approximately four to five hours a week. As such, with these strategies and assistance from her daughter, replacement services are not necessary at this time.

However, should her daughter move from home, Ms. Fazio will likely require assistance with cleaning her home, especially for tasks which will aggravate her e.g., vacuuming, scrubbing and overhead cleaning tasks. It is suggested when her daughter moves from the home Ms. Fazio receive three hours of cleaning assistance a week. The cost for such services is \$21.50 per hour, for a total of \$64.50/week.

2. Yard work replacement services: Ms. Fazio reportedly lives on $\frac{1}{4}$ property. She currently receives assistance from her family (brother, mother, father and ex-husband) in the upkeep of her home. However, should her family no longer be able to assist Ms. Fazio (e.g. her parents are aging), she will likely require assistance with lawn cutting and yard maintenance. The cost for such services is \$35/hour, estimate two hours per week, for seven months of the year, for a total cost of \$2100 per year.

Equipment/Supplies

1. Pillow: Both Dr. Luongo and Dr. Quirke recommended Ms. Fazio use an orthotic pillow or Mediflow pillow, respectively. The Mediflow pillow is designed to reduce neck pain and improve quality sleep (as per the website <http://www.mediflow.com>). The cost for such a pillow is \$69.95 USD. The replacement is ever two years.
2. Medications: The medical reports indicate Ms. Fazio has benefit for taking Flexeril, however, Ms. Fazio stated she only takes Robaxacet at this juncture, an estimated one to two tablets a week. The cost for the medication is \$19.99 + GST for forty tablets (Robaxacet Extra Strength at London Drugs), for a unit cost of \$.50 per tablet. The yearly cost, based on two tablets a week, is \$52.00 + GST.
3. Platform: Ms. Fazio indicated she has difficulty putting on a saddle onto a horse due to the overhead lifting range. Should she choose to own a horse again and continue with horseback riding, it is suggested she have a platform with stairs and railing that she can climb onto and stand on while putting on the saddle and for mounting and dismounting. I suggest a budget of \$300 for materials, travel and construction/installation of such platform. However, Ms.

Fazio indicated this may not be feasible as the stable she had previously put her horse at did not have the space for such a platform.

[53] These project to a rather large number if the present value calculations introduced by the plaintiff are applied to them. The difficulty with these suggestions is that they assign to the injuries suffered in the accident far more than can be demonstrated to be consequential upon it. For incidental requirements such as occasional physiotherapy treatments, orthotic pillows and other expenditures of that nature, I allow \$10,000 for the cost future care.

[54] I allow special damages, agreed at \$1,074.56, as well.

"McEwan J."

The Honourable Mr. Justice McEwan

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Prepared on 27 October 2026 · Esheria