

CANADA / JUDGMENT

Galdamez v. Brar

2024 BCSC 650

COURT

Supreme Court of British Columbia

DECIDED

22 April 2024

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2024 BCSC 650 Galdamez v. Brar

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Galdamez v. Brar,

2024 BCSC 650

Date: 20240422

Docket: M170815

Registry: Vancouver

Between:

Nancy Elizabeth Galdamez

Plaintiff

And

Lakhwinder Singh Brar and Baljinder Kaur Brar

Defendants

Before: The Honourable Justice Edelmann

Reasons for Judgment

Counsel for the Plaintiff:

G. Mouzourakis

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C.E. Cassidy

J. Xu

Place and Dates of Trial:

Vancouver, B.C.

March 4-8, 11-12, 2024

Place and Date of Judgment:

Vancouver, B.C.

April 22, 2024

Introduction

- [1] This action arises out of a motor vehicle accident that occurred in Abbotsford on February 6, 2016 (the "MVA"). A sport utility vehicle driven by the defendant Lakhwinder Singh Brar ran a red light at the intersection of Old Yale and Clearbrook Roads striking the car driven by the plaintiff Nancy Galdamez just behind the driver's side door. The defendants accept that Mr. Brar's negligence was the cause of the MVA. The only issues to be decided are the extent of the injuries caused by the MVA and the damages arising from those injuries.

Injuries and Causation

- [2] Ms. Galdamez was taken to hospital by ambulance and released the same day. The parties largely agree that, as a result of the MVA, Ms. Galdamez suffered soft tissue injuries to her neck and back; a contusion or strain to her left knee; a mild traumatic brain injury and tinnitus.
- [3] During the initial weeks after the MVA, Ms. Galdamez was in physical pain, suffered from vertigo, nausea, headaches, as well as sensitivity to both noise and light. Members of her family and church assisted her with homemaking and childcare during the months following the collision. Ms. Galdamez began physiotherapy treatments in February 2016, was assessed by an occupational therapist and attended a concussion clinic in March 2016. By 2018, the tinnitus, headaches, nausea, light sensitivity and dizziness were either resolved or significantly reduced.
- [4] Expert evidence relevant to Ms. Galdamez's injuries was presented from two physiatrists, a neurologist, an otolaryngologist, an occupational therapist and her family doctor. I find Ms. Galdamez suffered a facet joint injury to the right C3-4 joint, and right L5-S1 joint due to the MVA, causing chronic pain, along with headaches. The right C3-4 point has significantly improved, but Ms. Galdamez now has pain at C6-7 and in her coccyx which are not related to the MVA. Her neck and back pain have been successfully reduced for periods of time in the past using cortisone injections. While there is the ongoing possibility of improvement, the prognosis for full recovery of the MVA-related neck and back pain is guarded. Although the injury to Ms. Galdamez's knee continues to bother her at times, I find that it has largely

resolved.

- [5] Contrary to the submissions of the defendants, I find that Ms. Galdamez continues to suffer from the effects of the traumatic brain injury caused by the MVA.
- [6] I heard testimony from two of Ms. Galdamez's friends who knew her both before and after the MVA as well as her current common law partner. They described her as highly social, articulate and an accomplished musician. She was able to carry on multiple conversations at once. She was an active participant in her church community, organizing music performances, youth groups and assisting in various other capacities. After the MVA, she has had trouble following a conversation and finds herself unable to find words. She has trouble organizing and remembering things. She is more socially withdrawn and does not engage with larger groups.
- [7] Observing her over the course of a day and a half of testimony, it was clear to me that Ms. Galdamez continues to have issues with her memory and concentration. While at times her testimony was less than straightforward, I found that on several occasions she struggled to find words even when the word she was seeking was evident to others in the room. I did not find those instances to be simulated and they are consistent with the descriptions of the lay witnesses.
- [8] The defendants suggest other causes for the memory and concentration issues reported by Ms. Galdamez, including the emotional impact of her divorce and heightened anxiety. Although they did not pursue the point in oral argument, the defendants also submitted that the plaintiff's difficulties with memory and concentration could be linked to her use of cannabis. From 2018 to 2022, her treating physiatrist, Dr. Chu had authorized the medical use of cannabis products. Ms. Galdamez continued to consume relatively high dosages of CBD and THC orally up to the time of trial. In cross examination, Dr. Chu accepted that ongoing, long-term use of cannabis products can produce memory difficulties, difficulty concentrating and difficulty with executive functioning. However, Dr. Chu was not asked about the impact on Ms. Galdamez and whether her issues with memory, concentration and executive functioning are linked to cannabis use.
- [9] More importantly, I do not find the defendants' theory to be consistent with timeline established in the evidence before me. The evidence from both Ms. Galdamez and from the collateral witnesses is that, while her cognitive issues were much more significant shortly after the MVA, she has consistently had the same issues since the time of the MVA. There is no indication of a change in Ms. Galdamez's cognitive issues after her divorce or after she began using cannabis. I find the MVA to be the primary cause of Ms. Galdamez's ongoing cognitive issues.

Damages

[10] The plaintiff seeks non-pecuniary damages as well as damages for loss of future earning capacity and future cost of care. I will address each head of damages in the following sections.

Loss of Future Earning Capacity

- [11] An assessment of loss of future earning capacity involves consideration of hypothetical events. The plaintiff is not required to prove these hypothetical events on a balance of probabilities. The future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility, and not mere speculation: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 27; *Morlan v. Barrett*, 2012 BCCA 66 at para. 38. The Court of Appeal has set out a three-part step process to assess damages for future loss of earning capacity (*Rab v. Prescott*, 2021 BCCA 345). The first question is whether the evidence discloses a potential future event that could give rise to a loss of capacity. Secondly, whether there is a real and substantial possibility that the future event will cause a pecuniary loss to the plaintiff. Finally, an assessment of the value of that possible future loss, given the relative likelihood of it occurring.
- [12] Ms. Galdamez was 32 years old at the time of the MVA and 40 at the time of trial. She graduated from high school in 2002 and subsequently completed a one-year certificate in bible studies. When she was in high school, she had considered becoming a flight attendant but the impact of the terrorist attacks in 2001 on the travel industry made that less viable. Her sister became a flight attendant and continues to work in that capacity. Ms. Galdamez had not taken any action to pursue such a career prior to the MVA, and I do not find there to be a real and substantial possibility she was going to pursue such a career later in life.
- [13] Ms. Galdamez worked in a variety of part-time jobs including in art framing, laser hair removal and as a receptionist and bank teller. In the time prior to the collision, she was primarily a homemaker while working part-time as a receptionist. Ms. Galdamez has limited recollection of the hours she worked or her rate of pay in her various jobs. The only documentation relating to her pre-MVA earnings are tax returns from 2014 and 2015, years in which her T4 earnings were \$5,343 and \$1,394 respectively, indicating she was working a rather limited number of hours. She was primarily a homemaker, responsible for most of the household tasks such as cooking, cleaning and parenting her daughter. She has not had any employment-related income since the MVA.
- [14] In April 2018, Ms. Galdamez gave birth to her second child. Shortly thereafter, she separated from her husband. Their divorce proceedings were finalized in 2020. Since May 2020, Ms. Galdamez has been in a common law relationship with her current partner Dan Richardson. They have a blended family where they co-parent her two biological children, now aged 6 and 13 years old, together with one of Mr. Richardson's biological children, aged 17, who lives with them part-time.

- [15] Based on the expert reports in evidence, Ms. Galdamez's physical injuries would have a limited impact on her ability to work. She would have little to no restrictions working in sedentary or light work such as a receptionist or office worker. Dr. Chu opined that she would even be able to work as a flight attendant with some accommodations. There is no indication that she would have sought out more physically demanding work in the future even without her injuries.
- [16] While I accept that ongoing issues with chronic pain could have some impact on her stamina and ability to sustain full-time work, I find that Ms. Galdamez's cognitive issues are more likely to limit some of the types of employment that she might otherwise have been well suited to undertake, or her level of success in such employment. Notably, Ms. Galdamez does not seek compensation for past loss of income earning capacity as she apparently concedes she would not have sought employment outside the home during the period since the MVA. I accept that as her children become older it is likely that, but for her injuries, Ms. Galdamez would have sought employment outside the home, in particular once support payments from her ex-husband are reduced or terminated. While her earnings history is limited, I find that there is a real and substantial possibility that her injuries will have some impact on her earnings.
- [17] However, given the uncertainty of the timeline in which she would work and the limited nature of her past employment, I agree with the defendants that the monetary value of the loss she has established on the evidence before me is quite limited. In my view, an award of \$15,000 provides an adequate approximation on a capital asset basis of the loss to Ms. Galdamez's future income earning capacity.

Non-Pecuniary Damages

- [18] Non-pecuniary damages are awarded to compensate the plaintiff for pain, suffering, loss of enjoyment of life, and loss of amenities. The compensation awarded should be fair to all parties, and fairness is measured against awards made in comparable cases. Such cases, though helpful, serve only as a rough guide. Each case depends on its own unique facts: *Trites v. Penner*, 2010 BCSC 882 at paras. 188-189. Factors to be considered include the age of the plaintiff; nature of the injury; severity and duration of pain; impairment of physical and mental abilities as well as the impact on lifestyle and personal relationships (*Stapley v. Hejslet*, 2006 BCCA 34).
- [19] There is little question that the injuries had a significant impact on Ms. Galdamez in the weeks and months following the MVA. She suffered from debilitating symptoms and pain for many weeks during which she spent much of her time in bed or on the couch. Although many of her symptoms have improved, she continues to suffer from chronic pain which I find she is likely to have to manage in some capacity for the rest of her life. I also find that the changes in her cognitive capacities are not likely to improve much further given the amount of time that has passed since the MVA.

- [20] Prior to the MVA, Ms. Galdamez was both socially and physically active. She enjoyed camping and backpacking. She was very involved in music, church activities and in her daughter's life. The defendants concede there has been a reduction in her recreational activities as a result of MVA-related injuries. They also accept that pain would have resulted in a reduction in her social life.
- [21] The parties agree that I should consider the reduction in Ms. Galdamez's housekeeping capacity as part of the non-pecuniary damages. Based on the expert reports, Ms. Galdamez is now physically able to do most housekeeping with pain and pacing strategies. She currently does engage in a number of homemaking activities, including assisting her children preparing breakfast and lunches, doing light cleaning and laundry. She reports that certain physical tasks that involve bending or lifting, such as carrying laundry baskets or unloading the dishwasher, aggravate her pain. As a result, Mr. Richardson has taken on a large portion of the housekeeping in their home and prepares most family meals.
- [22] The plaintiff submits that \$100,000 to \$150,000 is an appropriate award for non-pecuniary damages, pointing to a large number of cases with varying degrees of similarity to the case before me: *Morena v. Dhillon*, 2014 BCSC 141 (\$130,000); *Hawkins v. Kumar*, 2019 BCSC 1896 (\$140,000); *Afework v. Correa*, 2019 BCSC 1672 (\$90,000); *MacKenzie v. Rogalasky*, 2011 BCSC 54 (\$100,000); *Evans v. Keill*, 2018 BCSC 1651 (\$110,000); *McMullen v. Trelenberg*, 2020 BCSC 49 (\$150,000); *Mattson v. Spady*, 2019 BCSC 1144 (\$150,000).
- [23] Counsel for the defendants suggest an award in the range of \$70,000 to \$100,000 and have taken me to *Thabrakay v. Cecchin*, 2021 BCSC 1413 (\$70,000); *Eaton v. Riddell*, 2020 BCSC 734 (\$75,000); *Dhudwal v. Davis*, 2021 BCSC 374 (\$100,000) and *Gill v. McChesney*, 2016 BCSC 1416 (\$80,000).
- [24] While no two cases are identical, I find that the circumstances in *Dhudwal v. Davis*, 2021 BCSC 374 are most closely analogous to many of the factors before me. In that case, the plaintiff was 32 years old and had an active lifestyle before the accident that included hiking, sports and travelling. She sustained soft tissue injuries to her neck and shoulder. While there was not a finding that she suffered a brain injury, she did have concussion-like symptoms including headaches, nausea, dizziness and cognitive difficulties. *Milman J.* awarded \$100,000, which would be around \$115,00 when adjusted for inflation. While the award in *Dhudwal* provides some guidance, Ms. Galdamez's ongoing cognitive issues and the impact on housekeeping capacity for someone who was primarily a homemaker in the years prior to the MVA warrant a somewhat higher award. I will therefore award \$135,000 in non-pecuniary damages.

Costs of Future Care

- [25] The test for an award of future care is whether a reasonably-minded person of sufficient means would be ready to incur the expense (see *Bystedt v. Hay*, 2001 BCSC 1735, aff'd 2004 BCCA 124). The services and items must be justified as reasonable in the sense of being medically required or justified, and in the sense that the plaintiff will be likely to incur them based on the evidence. (*Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144, paras. 38-39).
- [26] The parties agree that kinesiology support to update Ms. Galdamez's exercise programme is justified based on the reports before me. I agree with the defendants that \$2,000 is a reasonable estimate of the cost for kinesiology.
- [27] Ms. Galdamez has used a variety of medications to manage her pain since the MVA, including Gabapentin, marijuana and various over-the-counter medications. The defendants say that neither the use of marijuana nor Gabapentin is justified on an ongoing basis. While that may well be the case, I find that given the prognosis for her injuries, Ms. Galdamez will continue to use pain management medications of one type or another well into the future. I find a cost of \$150 per year to be a reasonable approximation on the evidence before me. Using the current value multiplier (based on the Law and Equity Act, RSBC, 1996, c. 253, s. 56) to age 70 of 22.3965, I will therefore award \$3,359.47 for the cost of medication to treat pain from the MVA-related injuries. While Ms. Galdamez may also benefit from cortisone injections or a neurotomy, it is common ground that those are covered by MSP.
- [28] Ms. Galdamez has sought physiotherapy, massage and chiropractic treatments throughout much of the time since the MVA. The defendants suggest that such treatments are not medically required based on the opinion of Dr. Hirsch which states that passive treatments will not improve the underlying injuries. Even if passive treatments are unlikely to resolve the underlying injuries, I accept Ms. Galdamez's testimony that they relieve her pain and increase her functionality. I therefore find that an award for chiropractic treatments, massage and physiotherapy is justified in the circumstances. Ms. Galdamez seeks \$2000 per year based on her use of such services in the past two years. However, a significant portion of her recent use, in particular of chiropractic treatments, has been related to the more recent neck pain in C6-7 which is not related to the MVA. I will therefore award \$1000 per year for physiotherapy, massage and chiropractic care. Using the present value multiplier of 22.3965, I will award \$22,396.50

Costs

- [29] If the parties are unable to agree on costs and the form of the order, they may arrange to make submissions on the matter within 30 days of the issuance of these reasons.

"The Honourable Justice Edelmann"

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