

CANADA / JUDGMENT

Gark v. Lauzon

2024 BCSC 446

COURT

Supreme Court of British Columbia

DECIDED

18 March 2024

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2024 BCSC 446 Gark v. Lauzon IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Gark v. Lauzon, 2024 BCSC 446 Date: 20240318 Docket: M09638 Registry: Courtenay Between: Lisa Gark Plaintiff And Ashley-Marie Lauzon and Gail Lauzon Defendants Before: The Honourable Madam Justice Sharma Supplemental Reasons for Judgment Counsel for the Plaintiff: M. Chandler Counsel for the Defendants: D.B. Boan Place and Date of Trial/Hearing: Courtenay, B.C. February 13, 2024 Place and Date of Judgment: Courtenay, B.C. March 18, 2024

- [1] This judgement addresses clarification with regard to the amount awarded for cost of future care in judgement rendered November 6, 2023: Gark v. Lauzon, 2023 BCSC 1930 [RFJ]. I awarded Ms. Gark \$175,000 for cost of future care.
- [2] After judgment was released, the parties jointly requested a brief hearing seeking an explanation of that award to determine the mandatory deductions, pursuant to s. 83 of the Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231, and s. 88 of Part 7 of the Insurance (Vehicle) Regulation, B.C. Reg. 447/83, can be made.
- [3] In Johal v. Meyede, 2014 BCCA 509, the Court of Appeal referred a portion of the case back to the trial judge because of the failure to analyse each item claimed by the plaintiff for cost of future care. The trial judge awarded a global amount, so it was unknown which specific items claimed by the plaintiff were awarded, in what amounts, and for what reason.
- [4] The Court of Appeal held that failure posed three difficulties (as discussed at paras. 44-45). First, there was no analysis whether each item of care was linked in the evidence between the caregivers' assessment of pain or disability and the recommended item. Second, the trial judge did not address the real and substantial possibility that the expense will be incurred, or whether it was appropriate to apply a contingency to reflect the possibility it might not be incurred. Third, without identifying a specific amount awarded for each item claimed, it was impossible to determine the mandatory deductions under the relevant legislation.
- [5] I thank counsel for seeking clarification, and regret that the RFJ failed to provide the necessary clarity. At the post-RFJ hearing, the parties appropriately relied on their written and oral submissions made at the end of trial, and the relevant evidence. Cost of Future Care at Trial

- [6] Ms. Gark sought an award for cost of future care in the global amount of \$300,000 (RFJ at para. 207) . She relied on recommendations and costs provided by Brent Armstrong, who was qualified as an expert kinesiologist and whose cost of future care report dated October 23, 2022, was entered into evidence. The defendants relied on Dr. Jonathan Hawkeswood, who testified as a qualified physiatrist and whose report dated January 14, 2021, was entered into evidence.
- [7] Both parties relied on the report of Darren Benning (qualified as an expert economist) dated October 24, 2023, and accepted the multipliers provided by him.
- [8] I commented on this evidence in the RFJ at paras. 94-95, 121, and 213-216:
- [94] Ms. Gark submits Dr. Hawkeswood's evidence should be given no weight because he was advocating with regard to "controversial views" linking lower socio-economic status and less education to increased psychological symptomology, pain and decreased ability to cope. I did find that Dr. Hawkeswood's evidence on this topic at times had the flavour of advocating in defence of his opinion. For that reason, I placed no weight on that portion of his evidence that relied on any purported links between socio-economic status and education to experiences or vulnerabilities to pain or any other medical condition.
- [95] He was challenged during cross-examination about comments in his report of the possibility Ms. Gark had disc abnormalities prior to the Accident. He confirmed he could not say whether she had any degeneration because there was no pre-Accident imaging and she had no history of low back pain. Thus, he agreed there was no good reason to suggest she would have suffered back pain absent the Accident.
- [121] Dr. Heran and Dr. Hawkesworth were more optimistic about her future symptomology and therefore, possibly, her capability to work compared to the other experts. However, when I take into account the evidence from doctors that have treated Ms. Gark, I find their optimism should be tempered.
- [213] I note that Mr. Armstrong's report specifically identifies the source of the recommendation for each item. However, that does not mean that on the whole of the evidence, every item is reasonable and justified.
- [214] For the most part, I find the one-time costs recommended by Mr. Armstrong to be reasonable. However, I agree with the defendants that it is not appropriate to include private psychiatric assessment or occupational therapy before surgery, but I find it appropriate to include services for vocational assessment. Further, I do not agree with the defendants that clinical counselling services are not related to the Accident, and find it appropriate that any award include that.

- [215] I do agree with the defendants that there would be considerable overlap for awarding annual costs to age 65 for gym membership, physiotherapy, massage therapy as well as short term costs for kinesiology and occupational therapy. I also find the frequency relied upon by Ms. Gark to be unreasonable, for the long term.
- [216] Taking into account all these factors, in light of the evidence and my findings, I find an award of \$175,000 is justified and reasonable.
- [9] I note that in their final submissions regarding to the one-time costs identified in Mr. Armstrong's report, the defendants agreed that it would be appropriate to award an amount for physiotherapy, massage therapy, kinesiology, occupational therapy, aids for independent functioning and to maximize work capacity, housekeeping and care aides post surgery. However, with the exception of physiotherapy and massage therapy, the parties' positions varied widely on what frequency, duration, and cost was appropriate for each of the items. In addition, the defendants did not agree that it was appropriate to award amounts for vocational assessment or clinical counselling.
- [10] With regard to ongoing costs, the defendants in their final submissions agreed that the evidence established it was appropriate to award an amount for physiotherapy, massage therapy, kinesiology, housekeeping, and transportation to attend physiotherapy and massage therapy.
- [11] I confirm that I found the evidence at trial did establish a link between a caregiver's assessment of Ms. Gark's pain and disability and the items agreed upon by the parties to be included in the claim. Additionally, I was persuaded that the necessary evidentiary links existed for the other items I awarded.
- [12] Despite their agreement on what should be included, the parties disagreed about the quantum of each item. Without being critical of counsel, I also note that neither party specifically identified in their written submissions their position on what contingency, if any, was appropriate to apply to any award made. However, I am able to infer their position on that issue from their submissions as a whole.
- [13] The assessment was further complicated because both parties and Mr. Armstrong suggested different amounts (in frequency and cost) for three different time periods, the length of which differed amongst them: leading up to surgery, post-surgery recovery, and services past the recovery period until close to end of life. Thus, despite the significant degree of agreement on what should be included in the award, the parties differed on what the items were worth. Cost of Future Care in the RFJ
- [14] I awarded Ms. Gark \$175,000 for cost of future care. For convenience I reproduce from the RFJ the paragraphs analyzing the claim for cost of future care:

- [205] Mr. Armstrong complete a cost of future care award dated October 23, 2022, and Mr. Benning's October 24, 2023 report provided a table of multipliers to estimate the present value of various amounts according to Ms. Gark's age.
- [206] The parties agreed on the applicable legal test, helpfully summarized in *Dzumhur v. Davoody*, 2015 BCSC 2316 at para. 244:
- [244] The principles applicable to the assessment of claims and awards for the cost of future care might be summarized as follows: · the purpose of any award is to provide physical arrangement for assistance, equipment and facilities directly related to the injuries; · the focus is on the injuries of the innocent party... Fairness to the other party is achieved by ensuring that the items claimed are legitimate and justifiable; · the test for determining the appropriate award is an objective one based on medical evidence; · there must be: (1) a medical justification for the items claimed; and (2) the claim must be reasonable; · the concept of "medical justification" is not the same or as narrow as "medically necessary"; · admissible evidence from medical professionals (doctors, nurses, occupational therapists, et cetera) can be taken into account to determine future care needs; · however, specific items of future care need not be expressly approved by medical experts..... It is sufficient that the whole of the evidence supports the award for specific items; · still, particularly in non-catastrophic cases, a little common sense should inform the analysis despite however much particular items might be recommended by experts in the field; and · no award is appropriate for expenses that the plaintiff would have incurred in any event. See *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229; *Krangle v. Brisco*, 2002 SCC 9; *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.), *aff'd* (1987), 49 B.C.L.R. (2d) 99 (C.A.); *Aberdeen v. Langley Township*, 2008 BCCA 420; *Gregory v. ICBC*, 2011 BCCA 144; *Jacobsen v. Nike Canada Ltd.* (1996), 19 B.C.L.R. (3d) 63 (S.C.); *Penner v. ICBC*, 2011 BCCA 135; *Shapiro v. Dailey*, 2012 BCCA 128.
- [207] Based on the experts reports, and the whole of the evidence, Ms. Gark seeks an award assessed as a global amount of \$300,000.
- [208] Mr. Armstrong recommended the following one-time cost items, which total between about \$36,720 and \$37,770:
- a) Private psychiatry evaluations: \$1,500-\$2,000;
 - b) Physiotherapy for once a week for eight months: \$2,400, and post surgery twice a week for three months: \$1,800;
 - c) Massage therapy once a week for eight months: \$2,880; post-surgery once a week for eight months: \$2,880;
 - d) Kinesiology sessions post-surgery, twice a month for about 20 sessions: \$1,080;
 - e) Occupational therapy twice a month for six months: \$1,440; and post-surgery, twice a month for eight months: \$1,920;

- f) Equipment and items for health and strength maintenance: \$2,376;
- g) Pilates classes for three years post surgery, 30 sessions per year: \$2,376;
- h) Aides for independent function to maximize work capacity: \$1,016;
- i) Vocational assessment and services: \$3,550 to \$4,100;
- j) Orthopedic equipment: \$690;
- k) Housekeeping once a week for seven months: \$2,380;
- l) Post surgery housekeeping two hours twice a week for eight weeks: \$2,720;
- m) Care-aide post-surgery, two hours daily for eight weeks: \$5,712.

[209] In terms of longer-term or ongoing costs, Mr. Armstrong recommended the following (no multipliers have been applied):

- a) Physiotherapy, twice a month to age 65, annual cost: \$1,800;
- b) Massage therapy twice a month for three years: \$6,480;
- c) Transportation for physiotherapy and massage to age 65: approximately \$1,660 per year;
- d) Kinesiology, once a month for three years: \$3,240 per year;
- e) Clinical counselor once a week: \$5,760 per year;
- f) Gym membership: \$600 per year;
- g) Cannabis oil: \$420 per year;
- h) Housekeeping two hours once a week to age 80: \$8,160.

[210] The defendants submit no award is appropriate for psychiatric assessment as she was referred to a psychiatrist by Dr. Brcic, which would not require out-of-pocket expenditure. They also contend that the need for clinical counsellor services is not because of the Accident. They submit the services of an occupational therapist is not needed before Ms. Gark has surgery given her current limitations. They also submit there is considerable overlap in Mr. Armstrong's recommendations.

[211] The defendants submit it is appropriate to award the following one-time costs, which total about \$23,457:

- a) Physiotherapy before surgery: \$2,375;
- b) Physiotherapy in the first year after surgery: \$1,800;
- c) Massage therapy before surgery: \$1,512;
- d) Massage therapy in the first year after surgery: \$3,024;

- e) Kinesiology first year after surgery: \$1,134;
- f) Occupational therapist, after surgery: \$1,920;
- g) Housekeeping for one year post-surgery: \$1,428;
- h) Care-aide post-surgery for one year: \$5,998;
- i) Gym membership for years #2 to #4 after surgery: \$2,366;
- j) Aides for independent function to maximize work capacity: about \$1,900.

[212] With regard to ongoing costs, they submit the following are appropriate (no multipliers have been applied):

- a) Physiotherapy to age 65: annual cost of \$150;
- b) Massage therapy to age 65: annual cost of \$189;
- c) Kinesiology for years 2 to 4 after surgery: annual cost \$189;
- d) Housekeeping for age 65: annual cost of \$500;
- e) Transportation costs for physiotherapy and massage to age 65: annual cost of \$138.

[213] I note that Mr. Armstrong's report specifically identifies the source of the recommendation for each item. However, that does not mean that on the whole of the evidence, every item is reasonable and justified.

[214] For the most part, I find the one-time costs recommended by Mr. Armstrong to be reasonable. However, I agree with the defendants that it is not appropriate to include private psychiatric assessment or occupational therapy before surgery, but I find it appropriate to include services for vocational assessment. Further, I do not agree with the defendants that clinical counselling services are not related to the Accident, and find it appropriate that any award include that.

[215] I do agree with the defendants that there would be considerable overlap for awarding annual costs to age 65 for gym membership, physiotherapy, massage therapy as well as short term costs for kinesiology and occupational therapy. I also find the frequency relied upon by Ms. Gark to be unreasonable, for the long term.

[216] Taking into account all these factors, in light of the evidence and my findings, I find an award of \$175,000 is justified and reasonable.

[15] I applied a negative contingency to the total award for cost of future care on the basis that it is more likely than not that Ms. Gark's condition will deteriorate in the future (see paras. 61-62, 77, 79-81, 83, 88, 122, 123(g), 193). I therefore increased the award by approximately 15 percent to account for that contingency.

- [16] With all those comments in mind, I confirm the \$175,000 award for cost of future care was based on the following. I note these amounts have already had the appropriate multiplier applied (and some have been rounded slightly for ease of calculation): Clinical counselor to age 65: \$49,000 Physiotherapy until age 65: \$30,500 Housekeeping to age 70: \$35,000 Massage therapy until age 65: \$12,500 Transportation to attend physio therapy and massage therapy to age 65: \$6,000 Cost of occupational therapy, following surgery for limited duration: \$3,300 Kinesiology following surgery, for limited duration: \$4,400 One-time cost of vocational assessment and services: \$3,500 One-time cost of equipment and aides for independent function / and to maximize work capacity): \$1,800 One-time cost of care-aide after surgery: \$6,000 Sub-total before contingency: \$152,000 15% Contingency: \$22,800 Total (rounded up): \$175,000
- [17] Should the parties require any further hearing (including on whether any amounts should be deducted from the award pursuant to the relevant legislative provisions), I would ask them to kindly inform the registry of that need no later than 30 days from the date of this judgment. "Sharma J."

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