

CANADA / JUDGMENT

Kalaj v. Stuart

2020 BCSC 2078

COURT

Supreme Court of British Columbia

DECIDED

29 December 2020

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2020 BCSC 2078 Kalaj v. Stuart

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Kalaj v. Stuart,

2020 BCSC 2078

Date: 20201229

Docket: 182447

Registry: Victoria

Between:

Kristijana Kalaj

Plaintiff

And:

0796962 B.C. LTD. and Colin Stuart

And:

Maximum Express & Freight Ltd.

Defendants

Before: The Honourable Mr. Justice Johnston

Reasons for Judgment

Counsel for Plaintiff:

S. Missaghi

Counsel for Defendants:

T.C. Chiu

Place and Date of Trial:

Victoria, B.C.

November 23-27, 2020

Place and Date of Judgment:

Victoria, B.C.

December 29, 2020

- [1] On March 31, 2017, Ms. Kalaj was driving her car when she was struck from the rear by a truck driven by Mr. Stuart. The defendants, Stuart and his employer Maximum Express & Freight Ltd., admit liability for the collision, but deny that Ms. Kalaj suffered any injury, loss or damage as a result.
- [2] Ms. Kalaj is 29 years old. She was born in Serbia and immigrated to Canada when she was 5 or 6 years old. She grew up in southern Ontario and attended the University of Ottawa, although she dropped out without completing her first degree program, something she intends to rectify starting in January 2021.
- [3] Ms. Kalaj had a son in 2013 and for approximately three years stayed at home with him. She described living on two small farms; one in Ontario, and one outside Nelson, B.C., and her participation in farm chores for the two years between 2013 and 2015 when she moved to Victoria.
- [4] Ms. Kalaj returned to work in 2016 as a housekeeper in a Victoria hotel. Her duties included cleaning bathrooms and hotel rooms on eight hour shifts. She also started taking courses in graphic design in 2016. When she started to earn money from graphic design she quit her housekeeping job and started to work as a bartender at the same hotel. Ms. Kalaj missed several bartending shifts because of her injuries. She described the bartending job as requiring her to carry supplies from downstairs storage to the bar area, where she had to use her hands quite a bit, with a lot of lifting and pulling motions, as well as scrubbing. Additionally, she cooked what she called "bar food".
- [5] Before the accident, Ms. Kalaj described herself as actively engaging in hiking, camping, running and swimming on a frequent basis. She also practiced yoga daily, having started at age 14, and progressing to the stage where she had taken 200 hours of training in India to enable her to teach yoga.

- [6] The collision caused significant damage to the rear of Ms. Kalaj's vehicle. Ms. Kalaj said initially she was in shock and then in the hours after the collision developed pain in her right neck, shoulder and arm. Ms. Kalaj is right hand dominant. She went to a clinic on the following day, where a doctor examined her and recommended a neck brace and non-prescription pain medicine.
- [7] At the time of the accident Ms. Kalaj lived in a 1200 square foot apartment with Mr. Beattie, who was a passenger in her car when the accident occurred. Ms. Kalaj and Mr. Beattie shared their housekeeping duties roughly evenly, with Ms. Kalaj generally taking on the vacuuming, mopping, laundry and window cleaning. Ms. Kalaj's son lived with his father a three hour drive from Victoria, and she parented him every other weekend.
- [8] Ms. Kalaj's pain in the right side of her neck that extended up behind her ear, and into her shoulder persisted. She has had intermittent tingling down her right arm to her hand, seven or eight times in all. She also had some mild headaches.
- [9] She did not see a doctor again until August 2017, when she saw her usual doctor, Dr. White. Ms. Kalaj testified that she complained to Dr. White of significant pain. In the interval between doctor visits, Ms. Kalaj did her own stretching exercises. Ms. Kalaj testified that Dr. White recommended she have an X-ray and CT scan of her neck, and either on that visit or her next visit, which was in November 2017, he recommended medication and a topical pain reliever.
- [10] It was either November 2017 or February 2018 that Dr. White injected cortisone into Ms. Kalaj's right shoulder, which she found excruciatingly painful.
- [11] In February 2018 Ms. Kalaj started physiotherapy. She stopped after five treatments because she found that any benefit was transitory, not lasting beyond a day. Around the same time she had three massage treatments, which she stopped for the same reason.
- [12] She was given exercises to do at home, and testified that she did them daily.
- [13] Ms. Kalaj saw Ms. Talley, an occupational therapist, four times in 2018. She testified that Ms. Talley recommended she change office chairs, and get a new desk and footstool. She got the chair and foot stool, but not the desk as ICBC would not approve its purchase. Ms. Kalaj testified that she was having considerable pain in 2018, and Ms. Talley's recommendations helped, although her new chair is still too big.
- [14] Ms. Kalaj is small in stature, standing five feet tall.
- [15] Ms. Kalaj returned to work as a bartender, where she remained until she quit to start working for a graphic design firm. She remained there for eight months, at an annual salary of \$40,000. She quit because of a conflict with a co-worker.

- [16] Ms. Kalaj had been trying to establish her own business, so when she quit her job in April 2018 she turned full attention to that business, Evokativ Branding. She testified the business engaged in developing strategies for, and advising clients on, their brand development; including designing web sites, logos, brochures, cards and other things by which a business can develop or maintain its brand.
- [17] Ms. Kalaj testified that she meets with clients, and after some consultation develops a marketing or branding strategy for them. The actual work to implement the strategy is often done by sub-contractors hired by Ms. Kalaj. She says her income from this has been quite modest so far; about \$19,000 since June 2018.
- [18] Ms. Kalaj described her present condition as involving constant pain. Her sleep is interrupted by pain around 3 a.m., and she may not get back to sleep or, if she does, it will take some time. When she gets up in the morning she says her pain level will be around 1 or 2 out of 10 and, depending on the type and level of her activity during the day, will rise to 4 or 5. She has no pain-free days.
- [19] In spite of the pain, Ms. Kalaj testified she has returned to most of her pre-accident activities, with some restrictions. For example, she continues to hike but finds a backpack containing anything more than a water bottle and sweater too uncomfortable on her shoulder. She experiences pain if a hike requires her to use her right arm to climb stairs or steep slopes. She continues to swim outdoors in the warmer weather, but rests in mid-swim, and swims mostly on her back. She has gone camping with Mr. Beattie and with girl friends since the accident, but cannot carry heavier items any distance. She continues to do yoga, but is unable to achieve all of the positions she could before the accident; poses requiring her to support herself on her hands, or requiring her shoulders are now beyond her capability because of pain.
- [20] After the accident Mr. Beattie took on more of the household chores, including more of the cleaning and vacuuming. He testified that Ms. Kalaj helped. He confirmed Ms. Kalaj's evidence that she was less able to carry heavier items when they went camping after the accident, or tolerate a backpack with any significant weight. The relationship between Ms. Kalaj and Mr. Beattie ended in September or October 2019, he said because Ms. Kalaj was focused on developing her business, and he was less interested in supporting that use of her time.
- [21] Ms. Kalaj's son started to live full-time with Ms. Kalaj in May 2020. He brought with him a large golden retriever dog, and the two arrivals have meant there is a greater need for cleaning, and more frequent cleaning, particularly because the dog sheds a lot of hair.
- [22] Ms. Forde has been Ms. Kalaj's friend since they met in university. They lived in different places after university, but reconnected in Victoria. Ms. Forde described Ms. Kalaj as physically adventurous and fit before the accident, but seems less adventurous now. To Ms. Forde, Ms. Kalaj seems less physically ambitious, less willing to pick up her son, and more careful now. Ms. Forde has noticed Ms. Kalaj grimacing slightly when her dog tugs on its

leash, and Ms. Forde has observed that Ms. Kalaj's right shoulder is lower than her left shoulder. Ms. Forde and Ms. Kalaj continue to see each other weekly and to walk together, but they do not spend as much time swimming at Thetis Lake as before. Ms. Forde confirms that where, before the accident, Ms. Kalaj would swim to an island and back, she now needs to rest on the island before returning to shore.

Cost of Future Care

- [23] Dr. Graboski is a specialist in physical medicine and rehabilitation. She examined Ms. Kalaj in person on January 17, 2020, after a partial video examination two days earlier. Ms. Kalaj was referred by her lawyer.
- [24] Dr. Graboski examined Ms. Kalaj and prepared a written opinion in which she diagnosed "musculoligamentous strain of the cervical spine with secondary myofascial pain of the right shoulder girdle" caused by the accident. Dr. Graboski's report says the literature is clear that there is a poor prognosis for further improvement, and in her opinion Ms. Kalaj has made a "good recovery in terms of her symptoms despite the persistence of some mild myofascial pain issues. These will most likely persist and could impair her ability to enjoy higher-level recreation and decrease her workplace productivity over the course of long hours." Dr. Graboski clarified that although Ms. Kalaj has made a good recovery, she has not made a complete recovery
- [25] Dr. Graboski testified that sometimes one cannot change one's pain, but can change one's environment and by doing so achieve an improvement in the pain. She said that some passive treatments such as massage or physiotherapy might ease pain and allow more active treatments to improve function. She felt that intramuscular stimulation ("IMS"), performed by a physiotherapist, might act in this way and allow Ms. Kalaj to advance to more active rehabilitation in the form of specialized Pilates classes. IMS involves inserting a needle into a sore spot or trigger point. The passive therapies alone are not going to achieve lasting improvement according to Dr. Graboski.
- [26] Dr. Graboski said she was pleased that Ms. Kalaj did yoga, but she needed more strengthening than she could get from yoga.
- [27] According to Dr. Graboski, Ms. Kalaj has an extremely poor chance of getting better, but the recommended IMS and specialized Pilates will allow her to achieve and maintain maximum function.
- [28] Ms. Kalaj saw Ms. Walker, a second occupational therapist, who prepared a written opinion on cost of future care. There was no explanation for the change from Ms. Talley.
- [29] Ms. Walker reviewed medical information, including Dr. Graboski's opinion, observed Ms. Kalaj in her home, and administered some questionnaires. She did not conduct a functional capacity evaluation, but did some assessment of Ms. Kalaj's function. She agreed that her opinion relied on what Ms. Kalaj told her and how Ms. Kalaj perceived herself.

- [30] Ms. Walker has recommended that Ms. Kalaj have 13 sessions with a kinesiologist, costing from \$60 to \$80 per session. The kinesiologist is needed in order to direct Ms. Kalaj's exercise program to achieve maximum benefit in terms of her injuries. Exercise alone, if unguided or lacking direction, is less likely to result in the kind of benefit Dr. Graboski had in mind when she recommended specialized Pilates classes. Ms. Walker also points out that advice and direction from a kinesiologist will reduce the chances of injury. The mid point of estimated cost of kinesiology is \$910.00.
- [31] Ms. Walker recommends five years of gym and pool membership. While Ms. Kalaj's swimming has so far been in local lakes in warmer weather, this seems reasonable as an exercise to maintain shoulder and neck function. The cost is \$400 per year, \$2,000 in total.
- [32] Ms. Walker has recommended 6 to 12 massage or physiotherapy treatments per year for 75 years. Ms. Kalaj did not find such treatments worthwhile when she tried them, although she testified that if she had unlimited money she would take these treatments again. I do not find medical justification for that number of treatments over that length of time on the evidence. Instead, the IMS that Dr. Graboski suggested might be helpful is justified in an attempt to get Ms. Kalaj through the specialized Pilates and to an improved level of function. Therefore, 13 sessions with a physiotherapist for the intramuscular injections is medically justified at a cost of \$90 each, or \$1,170.
- [33] So far, these expenses do not require present value calculations, as they are all relatively immediate.
- [34] Ms. Walker recommends a robotic vacuum cleaner and an ObusForme back support. Ms. Kalaj finds the push/pull motion required to vacuum with her right arm painful. There is no suggestion in the evidence that using her left arm will cause Ms. Kalaj pain. Ms. Walker's view is that Ms. Kalaj, as a right-handed person, will automatically default to vacuuming with her right arm. Ms. Kalaj impressed me as an intelligent individual who is perfectly capable of figuring this out for herself, and changing hands to avoid discomfort. I do not find a medical justification for a robotic vacuum cleaner.
- [35] As for the ObusForme back support, Ms. Walker's report relies on Ms. Kalaj having told her she develops pain if she drives more than two hours. Ms. Kalaj testified that she does not need her car because she lives close to downtown Victoria so she has taken it off the road; by which I understand her to mean she has canceled the licence and insurance on the car. It is reasonable to assume that this will not always be the case, and that Ms. Kalaj will again drive. I have little or no evidence of her driving habits before the accident from which to assess the likelihood that she will drive more than two hours, or how often that might happen. The suggested ObusForme is not supported by the evidence in this case.

- [36] Ms. Walker has recommended a suite of domestic services that include 3 hours a week of housecleaning for 10 years and 3 hours every 4 weeks from year 10 ending 85 years from now. The change at the end of 10 years is based on Ms. Kalaj's son reaching age 17. In Ms. Walker's opinion, "[c]ompleting heavier tasks on a regular basis such as vacuuming, mopping and cleaning bathrooms is outside her safe limitations."
- [37] Ms. Walker did not evaluate Ms. Kalaj's functional capacity as if she were ascertaining her ability to return to work. Ms. Walker testified that she needed to know what a person's limitations were, and she got that information from medical reports, from Ms. Kalaj's self-report, and from watching Ms. Kalaj moving about her apartment and dealing with her son. Thus there was some assessment of Ms. Kalaj's function in order that Ms. Walker could give her opinion on future care needs and costs. Ms. Walker also said that she looked at Ms. Kalaj's bathroom and shower area, and it appeared very dirty to her, unlike the rest of the apartment, which she described as tidy.
- [38] The defendants arranged for Ms. Branscombe, an occupational therapist, to review Ms. Walker's report and comment on it. Ms. Branscombe is critical of what she considers to be inadequate physical testing of Ms. Kalaj by Ms. Walker and her apparent reliance on Ms. Kalaj's statements as basis for her opinions. Some of Ms. Branscombe's observations appear to be as much argument as opinion.
- [39] Ms. Kalaj described her pain and limitations to Dr. Graboski in much the same way she testified at trial, including that her pain was 90% improved from what it had been shortly after the accident, that her pain is aggravated by using a computer and mouse, and that her pain was worsened by heavy lifting and repetitive tasks such as scrubbing and vacuuming. Dr. Graboski's opinion includes the following:

She is independent in her basic activities of daily living and I do not foresee difficulties in this area.

Work: She has been able to continue her work as a graphic designer though she initially developed pain as a result of long hours and extended mousing. She reports that she is working without restrictions of any kind. I would recommend regular stretching mini-breaks. I also recommend that she continue with a proper ergonomic setup, as this will help her maintain productivity over the long term.

She has been able to resume her housework without difficulty. Initially, her old, heavy vacuum cleaner caused her pain, but she has since installed hardwood floors.

In my opinion, she will be able to continue with her recreation.

She has not tried IMS. Her pain is quite focal, with several trigger points that might be amenable to this type of therapy. Shelbourne Physio could be a great fit for her as they offer IMS and specialized Pilates classes. 16 to 20 visits would be a reasonable start.

- [40] Counsel for the defendants cross-examined Ms. Kalaj on two videos she had posted on social media. The videos were replayed in court. One of these showed Ms. Kalaj picking up a sizable round of firewood, putting it on a chopping block, then swinging an axe over her right shoulder and embedding it in the round, which did not split. Ms. Kalaj then swung the axe and round together behind her back then over her right shoulder, reversing them so axe and round landed on the chopping block axe first, which split the round. Ms. Kalaj explained her ability to perform this feat by saying the round was cedar, a relatively light wood, and she was trying to impress her son.
- [41] This may be, but it was no insignificant feat for a woman five feet tall weighing 100 pounds. More important, it demonstrated a good range of right arm and shoulder movement.
- [42] The second video showed Ms. Kalaj climbing a large tree with no apparent difficulty. She said this was in Australia, and she used more leg strength than arm strength in the endeavour.
- [43] Both videos showed single episodes of activity, not repetitive activities.
- [44] Mindful that future care claims must be medically justified, but are not required to be medically necessary, Ms. Kalaj has established a reasonable basis for an award to compensate her for attendance on a physiotherapist for IMS as recommended by Dr. Graboski. Ms. Walker has recommended both physiotherapy and kinesiology, with the latter giving advice and direction for active rehabilitation. It is not clear that both are justifiable, and it seems that there may be some duplication there. As well, I bear in mind that Ms. Kalaj discontinued physiotherapy and massage because it was not accomplishing much beyond short-term relief, that Ms. Walker speculates that Ms. Kalaj might not have had the right physiotherapist and that Ms. Kalaj testified that if money were no object, she would resume physiotherapy. Damages must be reasonable, and it is not reasonable on this evidence to require the defendants to pay for the recommended lifetime of physiotherapy or massage for an injured plaintiff whose injuries do not lead her to take pain-killing medications.
- [45] With the guidance of the present value tables in evidence, I award \$900 as the average of kinesiology costs, and \$1,921 for gym membership.
- [46] Both Ms. Walker and Dr. Graboski recommend ergonomic office chair and desk. I am troubled that the chair Ms. Walker says is ergonomically unsuitable was recommended by Ms. Talley according to Ms. Kalaj, and Ms. Kalaj seems to have abandoned an ergonomic desk, also recommended by Ms. Talley in her former office. In spite of those concerns - and I may have misunderstood the evidence, I award \$6,300 for replacement office furniture and \$500 for occupational therapy advice on what to buy and how to set it up and use it.

- [47] As for domestic services, the claim as presented is unreasonably high, given Dr. Graboski's opinion. As well some of the domestic services recommendations appear inconsistent with the activities shown on the videos. On the other hand, I find that Ms. Kalaj's injuries have made the heavier chores involving repetitive right arm movements like scrubbing sufficiently painful that some assistance is medically justified. An allowance of \$1,000 per year, discounted according to Mr. Coleman's tables, results in an award of \$31,000.
- [48] She recommends assistance in moving every 5 years for the next 75 years, additional housecleaning for 6 years if Ms. Kalaj has more children, and yard maintenance if Ms. Kalaj moves to a house with a yard. Presently, Ms. Kalaj rents a ground floor suite and has no yard maintenance. She would eventually like to move to a small acreage, but perhaps that ambition has been tempered by her injury. If Ms. Kalaj has more children, there is a possibility that the father of these children will be available to do some of work involved in raising them, or tending to a larger home or its yard. These recommendations are too speculative to warrant awards of damages.
- [49] The recommendations for robotic vacuums and ObusForme supports I do not accept as medically justified. Dr. Graboski sees no impairment of ability to perform most household tasks, and the expectation that an active rehabilitation and IMS treatments should maintain Ms. Kalaj's current levels of functioning make an ObusForme unnecessary in my view. Ms. Walker was too dismissive of the suggestion that if vacuuming with the right arm is painful, one could use the left arm with less or no pain.

Non-pecuniary damages

- [50] Ms. Kalaj was injured over three years ago. She improved initially but her injuries continue to cause her pain on a daily basis. Dr. Graboski considers the likelihood of further significant improvement extremely poor. Ms. Kalaj can do what she needs to do on a daily basis, and can also do what she wants to do, socially and recreationally.
- [51] But living her life normally comes at a cost to Ms. Kalaj in increased discomfort, and inevitably she has to trade off one activity for another. In this case that will impact on Ms. Kalaj's earning capacity.
- [52] Ms. Kalaj has not exaggerated her injuries in her evidence at trial.
- [53] In short, her enjoyment of life is impaired by her injuries.
- [54] Counsel have presented many authorities, while conceding that they are at best a rough guide in matters touching on non-pecuniary damages. The plaintiff's authorities range from \$85,000 to \$96,000.
- [55] The defendants cite authorities ranging from \$50,000 to \$65,000.

Loss of earning capacity

- [56] Ms. Kalaj was trying to develop her business when the accident intervened. The business requires that she be able to sit before a computer for long stretches, but enables her to stand up and move around to relieve discomfort caused by long sitting. As well, Ms. Kalaj's business model involves subcontracting out some aspects of the job requiring intensive computer use.
- [57] I accept that Ms. Kalaj has shown a real and substantial possibility that her injuries have and will continue to impact on both her ability and desire to put maximum effort into her business while at the same time raising her son, keeping house, and maintaining her social and recreational activities.
- [58] The effect of this on future earnings cannot be quantified in the absence of evidence showing what Ms. Kalaj might reasonably have expected to earn if not injured, and how much her residual injury might reduce her lifetime earnings. Her earnings have been modest so far, but she has an ambition to succeed. Her ambition will help her to ameliorate the effects of her injury on her chosen career.
- [59] A global sum of \$50,000 would fairly compensate Ms. Kalaj for the impairment of her earning capacity.
- [60] For non-pecuniary damages for pain, suffering, and loss of enjoyment of life, I award Ms. Kalaj \$75,000.
- [61] For out-of-pocket expenses caused by the accident, I award Ms. Kalaj \$810.

Summary

- [62] The defendants shall pay Ms. Kalaj:

Kinesiology

\$900

Gym and pool membership

\$1,921

Intramuscular injections

\$1,170

Furniture

\$6,300

Occupational therapy

\$500

Domestic services/housekeeping

\$31,000

Lost earning capacity

\$50,000

Non-pecuniary damages

\$75,000

Out-of-pocket expenses

\$810

Total

\$167,601

[63] Counsel may speak to costs if needed.

"R.T.C. Johnston J."

The Honourable Mr. Justice Johnston

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/20/20/2020BCSC2078.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/kalaj-v-stuart-2020>

Prepared on 26 October 2026 · Esheria