

CANADA / JUDGMENT

Lewis v. Worth

2020 BCSC 57

COURT

Supreme Court of British Columbia

DECIDED

17 January 2020

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2020 BCSC 57 Lewis v. Worth

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Lewis v. Worth,

2020 BCSC 57

Date: 20200117

Docket: M182441

Registry: Victoria

Between:

Jane Louise Lewis

Plaintiff

And:

Kyle Lane Worth and

Harmoni Excavating & Contracting Ltd.

Defendants

Before: The Honourable Mr. Justice Johnston

Reasons for Judgment

Counsel for the Plaintiff:

S. Missaghi

Counsel for Defendants:

G. Black

A. Yen

Place and Dates of Trial:

Victoria, B.C.

December 16-19, 2019

Place and Date of Judgment:

Victoria, B.C.

January 17, 2020

INTRODUCTION

- [1] This is an assessment of damages flowing from a rear-end collision on October 17, 2017.
- [2] The plaintiff, Ms. Lewis, was stopped in her car at a red light at the intersection of Tyee Road and Esquimalt Road, in Victoria, British Columbia, when she was struck from behind by a pickup truck owned by the corporate defendant, Harmoni Excavating & Contracting Ltd., and operated by the individual defendant, Kyle Worth.
- [3] The defendants admit that the collision was caused by Mr. Worth's breach of the duty of care he owed to Ms. Lewis.
- [4] Ms. Lewis was born in 1938, so she was 79 when the accident happened, and is now 81 years old.
- [5] She has been married to Peter Lewis for nearly 51 years. Mr. Lewis was born in 1929, and is now 90 years old. They have two children of their own, and three children from Mr. Lewis's previous marriage. They have grandchildren, including the sons of their daughter Pamela, who lives in Victoria.
- [6] Ms. Lewis and her husband moved to Victoria from southern Ontario in the early 1980s. They still have family and friends in Ontario, and each summer they travel to southern Ontario where they rent a cottage in the Thousand Islands region.
- [7] Ms. Lewis described her involvement in swimming and canoeing at this cottage, as well as water activities in the swimming pool at their daughter's home in Toronto, dwelling on the summers of 2016 and 2017, prior to the accident. During these summers she also took trips with her grandsons to Parksville, where she walked on the beach, played mini golf and rode bumper cars with the grandchildren.
- [8] Prior to the accident Ms. Lewis was a member of a women's walking group that socialized after walking. She was also active in her church.

- [9] By her own account, Ms. Lewis has been active and athletic most of her life, with swimming, tennis, skiing and walking her main activities. She stopped skiing after breaking her left shoulder in a 1999 skiing accident. At some time in the past, Ms. Lewis played tennis four times a week, but stopped playing 15 or 16 years ago.
- [10] Ms. Lewis has had some left knee pain in the past that she attributes to playing tennis.
- [11] Ms. Lewis has one leg shorter than the other, and this causes her some lower back discomfort. She wears a small lift in her shoe to compensate for the length discrepancy.
- [12] She was diagnosed before the accident as having fibromyalgia, osteoarthritis, osteoporosis, depression, and atrial fibrillation.
- [13] The fibromyalgia diagnosis was made by a rheumatologist in 1997. What Ms. Lewis described as "aches and pains" that took her to the rheumatologist in the first place was more bothersome at some times than at others, but she said these aches and pains generally did not slow her down before the accident.
- [14] She did not see a rheumatologist again for her fibromyalgia until she had a flare-up of symptoms in the summer of 2015. She attributes this flare-up to a particularly active month in Ontario. She saw a rheumatologist in 2015, and testified that the next two to two and a half years were the best she had for being pain free in years. Dr. Jollymore, Ms. Lewis's family physician, reports that the rheumatologist confirmed a diagnosis of fibromyalgia in 2015 that this condition was minimized through exercise in the two years before the accident, and that Ms. Lewis did not see him during that period for fibromyalgia symptoms.
- [15] She testified that her atrial fibrillation has been well controlled. She takes blood thinners for this condition.
- [16] To manage her osteoarthritis, she takes Tylenol.
- [17] Her osteoporosis is treated by an injection she receives every three to four years.
- [18] Ms. Lewis has experienced depression, and takes antidepressant medication to control this condition.
- [19] Mr. and Ms. Lewis live in a condominium owned by and rented from their daughter. Before the accident they divided the household labour so that Mr. Lewis shopped for groceries and did the cooking, while Ms. Lewis did all of the housework such as vacuuming, dusting, laundry, cleaning two bathrooms, and mopping the hardwood floors.
- [20] She also did things that required a ladder, such as changing light bulbs and getting things like the artificial Christmas tree and decorations down from higher shelves in their storage locker.

- [21] Somewhere between twenty and twenty-five years ago, when her daughters went off to university, Ms. Lewis obtained her license to act as a realtor. At the time of the accident, she was working through Pemberton Holmes.
- [22] Real estate did not generate a substantial income for Ms. Lewis, but she testified that she enjoyed the contact with her fellow realtors and with her clients. She attended meetings with fellow Pemberton Holmes realtors, and took her turn as duty or on-call realtor.
- [23] Her tax summaries show that Ms. Lewis earned \$12,988.50 in commission income in 2014, and paid \$9,738.48 in employment expenses.
- [24] In 2015, the commission income was \$7,118.95, and employment expenses were \$5,553.35.
- [25] In 2016, the last full year before the accident, Ms. Lewis earned \$8,390 in commission, and paid \$7,813.65 in expenses.
- [26] After the accident Ms. Lewis experienced immediate pain in her neck and head. She declined to go to the hospital, and instead called her husband who came and drove her home. She went to bed and remained there until she could see Dr. Jollymore, on October 19, 2017. During this visit two days after the accident, Dr. Jollymore detected "trapezius spasm and secondary scalp muscle spasm with decreased ROM of neck in right rotation." He prescribed rest, and Ms. Lewis went home, where her pain increased over the following days.
- [27] Following the accident Ms. Lewis also had pain in both of her shoulders, more in her left than her right. She experienced pain mid way down her back.
- [28] Within days her hips and lower back began to hurt. Ms. Lewis experienced dizziness and general pain in her head, neck, shoulders, arms and ribs.
- [29] Ms. Lewis now experiences headaches, neck pain, shoulder pain, and pain and stiffness in her back. She says her fibromyalgia is currently the worst it has been since she first began to experience it. Ms. Lewis testified she has no days when she is free of pain.
- [30] She can no longer do all her own housework, and keenly regrets that Mr. Lewis, who is in his early 90's, is having to take care of her, when it should be the other way around.
- [31] Mr. and Ms. Lewis now have housecleaning assistance every two weeks, which Ms. Lewis has testified the Insurance Corporation of British Columbia ("ICBC") pays for.
- [32] Ms. Lewis has curtailed her social activities since the accident because of her injuries. She and Mr. Lewis still go out socially, but not to the same extent as they had before the accident. Mr. Lewis testified that he and Ms. Lewis have essentially stopped going out to dinners and movies with friends.

- [33] Her friend, Ms. Lastiwka, described Ms. Lewis as vivacious, outgoing, lots of fun and a good friend, who she would see socially every couple of weeks before the accident. They would mostly go for walks and for coffee.
- [34] Ms. Lewis has not joined Ms. Lastiwka for a walk since the accident, and the frequency of their meeting for coffee has declined, although they still see each other about every two weeks.
- [35] Ms. Lewis went on a cruise of the Baltic in 2018. She says she would not have otherwise gone except for the fact that her daughters had paid for her non-refundable ticket. She enjoyed the cruise, but largely took taxis instead of walking when the ship was in port.
- [36] Mr. and Ms. Lewis continue to travel to Ontario in the summers, but Ms. Lewis is not as active as she was before the accident.
- [37] Ms. Lewis testified that she elected not to renew her real estate license in June 2018 because the effects of her injuries made it too difficult for her to reliably attend meetings and deal with clients' business. She testified that it was a difficult decision because she had very much enjoyed the people she worked with, both other realtors and clients. Mr. Lewis described it as a difficult and emotional decision for Ms. Lewis to make.
- [38] Ms. Lewis had a small number of clients when she stopped working; she has referred those to a fellow realtor, Mr. Paul Cooper. Their arrangement is that Mr. Cooper will share with Ms. Lewis 25% of any commissions he receives from the referred clients. So far, there have been no referral fees paid. Ms. Lewis is convinced that the prospects of earning commissions, if she had not been injured, were quite good, that she would have renewed her license for two years until 2020, and, given her age, might have renewed once more if there was a good chance of a reasonable commission in the offing. !Ms. Lewis saw Dr. Rhonda Shuckett, a rheumatologist, in January 2019, who found palpable spasm in her neck and shoulder girdle on examination.
- [39] Dr. Shuckett considered it significant that there were no documented fibromyalgia symptoms in the two years before the accident, and her opinion includes this:

In general, one cannot quantitatively measure the relative degree of pre-existing fibromyalgia before or after an injury. However, her medical records and the patient's own history do strongly suggest that her symptoms from this condition significantly exacerbated after the MVA and were not limiting her appreciably leading to the MVA.

- [40] Ms. Lewis has had more trouble sleeping since the accident, requiring an increase in the dosage of medication she has taken to deal with both her pre-existing depression and her sleep problems. The sleep problems in turn contribute to the exacerbation of her fibromyalgia.
- [41] Dr. Jollymore estimates that half of her current symptoms are caused or contributed to by her accident injuries.

- [42] Counsel for the defendants have argued that Ms. Lewis was not a particularly good witness because her answers to some questions concerning the length of pre-accident fibromyalgia flare-ups, whether she has quit smoking, and whether she has ever had counselling were not responsive. I disagree.
- [43] The duration of pre-accident fibromyalgia episodes was not something one would reasonably expect a witness to recall with precision, given that those flare-ups were years before the accident, and more years before the trial.
- [44] Ms. Lewis's answers about smoking gave every indication of embarrassment at being unable to say that she had finally quit.
- [45] Her evidence related to counselling was that she had been referred to a cognitive therapy group for anger management problems, but it was not available to her because of her age.
- [46] The defendants criticize Ms. Lewis for exaggerating her headaches, because she testified that her headaches were getting much worse, but agreed that she told Dr. Shuckett in early 2019, that her headaches were not as prevalent as they had been immediately after the accident, and they now occur when she feels achier in the neck and shoulder girdle region.
- [47] Given that Ms. Lewis did not regularly suffer headaches before the accident, any inconsistency surrounding the headaches can be attributed to the time between Dr. Shuckett's examination and trial. I accordingly do not find that Ms. Lewis's credibility or reliability is significantly affected.
- [48] Ms. Lewis might have been inclined to view her pre-accident history and abilities through rose-tinted glasses, but I do not find that she exaggerated either her pre-accident condition or her post-accident symptoms.
- [49] I find that the accident caused a whiplash-type soft tissue injury to Ms. Lewis's neck, shoulders, and back, severe enough to cause spasm palpable to Dr. Jollymore two days after the accident and to Dr. Shuckett fifteen months later.
- [50] As well, the accident caused an exacerbation of Ms. Lewis's pre-existing fibromyalgia, which had been largely quiescent in the two years or more before the accident.
- [51] The injuries sustained in the accident have caused interrupted sleep because of pain, and have exacerbated Ms. Lewis's tendency toward depression.
- [52] The accident and injuries have caused Ms. Lewis to be short tempered, to the point that Dr. Jollymore tried to refer her for group counselling, which she was too old for. Her short temper has been noticed not only by Ms. Lewis but by her husband and daughter Pamela.
- [53] It is more likely than not that these conditions are chronic. I recognize that while Ms. Lewis's conditions might improve in the future, they might also worsen.

[54] The accident has taken Ms. Lewis from an active and engaged woman in her late 70's to a less active woman in her 80's with chronic pain.

DAMAGES

NON-PECUNIARY DAMAGES

[55] Ms. Lewis suggests damages for pain, suffering, loss of amenities and enjoyment of life in a range between \$110,000 to \$120,000, citing decisions she says correspond to her and to her injuries. Ms. Lewis submits that the awards for non-pecuniary damages in cases involving primarily soft-tissue injuries with some emotional problems such as sleep disruption, nervousness or depression fall between \$46,000 and \$167,000, based on a range suggested by the Court of Appeal in *Unger v. Singh*, 2000 BCCA 94, and adjusting for inflation, as was done in *Derksen v. Nicholson*, 2015 BCSC 1268.

[56] The defendants suggest the range should be \$60,000 to \$70,000, based on decisions such as *Iwanik v. Hayes*, 2011 BCSC 812 and *Chouhan v. Allemeersch*, 2014 BCSC 1415, the former involving a non-pecuniary damages award of \$50,000, and the latter involving an award of \$90,000 including loss of homemaking capacity.

[57] It has become custom to compare a plaintiff's injuries to the broad framework set out by the Court of Appeal in its decision in *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46. I note the factors that influence an award of non-pecuniary damages as cited by the Court are non-exhaustive and consist of the following:

- (a) age of the plaintiff;
- (b) nature of the injury;
- (c) severity and duration of pain;
- (d) disability;
- (e) emotional suffering; and
- (f) loss or impairment of life;
- (g) impairment of family, marital and social relationships;
- (h) impairment of physical and mental abilities;
- (i) loss of lifestyle; and
- (j) the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff)

[58] Of these, the first and third factors directly raise the question of Ms. Lewis's age, and its effect on to the quantum of her damages. On one hand, chronic pain takes on a greater significance when the sufferer is relatively young, with a longer time to suffer the pain. On the other hand, an older person, with less time remaining in which to suffer the pain, may have fewer ways to compensate for the pain because age has made some options unrealistic.

Secondly, an older person may feel the impact of pain more acutely than a younger person. This was described in *Fata v. Heinonen*, 2010 BCSC 385 at para. 88:

The retirement years are special years for they are at a time in a person's life when he realizes his own mortality. When someone who has always been physically active loses his physical function in these years, the enjoyment of retirement can be severely diminished, with less opportunity to replace these activities with other interests in life. Further, what may be a small loss of function to a younger person who is active in many other ways may be a larger loss to an older person whose activities are already constrained by age. The impact an injury can have on someone who is elderly was recognized in *Giles v. Canada (Attorney General)*, [1994] B.C.J. No. 3212 (S.C.), rev'd on other grounds (1996), 21 B.C.L.R. (3d) 190 (C.A.).

- [59] Some authorities such as *Johal v. Radek*, 2016 BCSC 454 [Johal] and *Basic v. Barjaktarovic*, 2019 BCSC 142 appear to have elevated the second line of reasoning to the status of doctrine (the "Golden Years" doctrine). Other decisions appear to have been uncomfortable with the suggestion that advanced age somehow enhances the value of being able to live out the balance of life without injury or disability caused by tort, and have concluded that the so-called "Golden Years" doctrine and its counter-argument of the plaintiff's advanced age in effect cancel each other out. See for instance *Johal* at para. 52.
- [60] It is not necessary to treat a line of reasoning as dogma, or as embodying a codification of principles in order to recognize the logic it represents. Each case is decided on its own merits: the plaintiff in this case is entitled to be considered on her strengths as well as her weaknesses, and to have her damages assessed based on her history and the impact of her injuries on the life she was living, and could have reasonably expected to continue, if the accident had not happened.
- [61] In arriving at an award for non-pecuniary damages that is fair to both the plaintiff and the defendants, I bear in mind that one of the losses the plaintiff has suffered, as a result of the accident, is the ability to care for her home and husband as she did before the accident. Some of the housework she used to be able to do herself, and enjoy, is now done by hired help, paid for by ICBC, which I infer is done through its no-fault accident benefits coverage.
- [62] I accept that Ms. Lewis would much prefer to be doing and be able to do the housework herself, instead of relying on the decisions of others as to how much help she needs, how often she needs it, and how long it will continue.
- [63] After reviewing the arguments of counsel, and the authorities they rely on, I conclude that a fair award for non-pecuniary damages, including an allowance for loss of housekeeping capacity, is \$105,000.

LOSS OF EARNING CAPACITY

- [64] Ms. Lewis's earnings history in the three years immediately before the accident would not support an award of any significance.

- [65] However, she has called evidence of three of her clients who have uniformly declared their loyalty to her as their preferred realtor: Ms. Goodfellow, Ms. Lindgren, and Ms. Lastiwka.
- [66] Of those, Ms. Goodfellow represents the most likely source of commission income if Ms. Lewis were still working as a realtor. Ms. Goodfellow is in the process of separating from her husband, and that requires that she divide the equity in her home with him. She has elected to move rather than to buy her husband's interest in their current home. Ms. Lewis acted as Ms. Goodfellow's realtor when she and her husband bought their current home in 2014, and I accept that if Ms. Lewis were still working, Ms. Goodfellow would have engaged her to list and sell her home and subsequently purchase her new home.
- [67] Ms. Goodfellow's home was ultimately listed in July 2019, but the house was temporarily removed from the market as there was a problem with sewage backup and drainage that was ultimately resolved. Ms. Goodfellow is quite unimpressed by the realtors she has contracted with so far, leading her to discharge one, but is confident that she will be able to sell the current home for somewhere close to the listing price of \$1,100,000. Ms. Goodfellow hopes to buy a home she has already found, which is listed at about the same price. She is prepared to finance the purchase of the new home until her current home sells if she must to keep the new home out of the hands of a developer.
- [68] The standard real estate commission in Victoria is 6% of the first \$100,000, and 3% of the balance.
- [69] If Ms. Goodfellow's current home sells at \$1,100,000 the listing commission will be \$36,000. That will be split equally between Ms. Goodfellow's listing realtor and the realtor acting for the buyer.
- [70] If Ms. Lewis were acting as Ms. Goodfellow's realtor, Ms. Lewis would expect a commission of \$18,000 as her share. From that Ms. Lewis would have to pay the costs of listing and advertising Ms. Goodfellow's home.
- [71] Ms. Lewis could have expected a similar amount of commission on Ms. Goodfellow's purchase of her new home, without the corresponding deductions for listing and advertising.
- [72] I consider it highly likely that if not injured in the accident, Ms. Lewis would have renewed her license in 2018, and remained licensed into 2020. She enjoyed the work, and the contact with fellow realtors and clients enough that I accept that she would probably have renewed her real estate license in June 2018. I accept that the likelihood that Ms. Lewis would have earned a commission from the sale of Ms. Goodfellow's current home and the purchase of Ms. Goodfellow's replacement home to be reasonably high.
- [73] I accept that the prospects of commissions from Ms. Goodfellow's real estate dealings would have persuaded Ms. Lewis to renew her real estate license in June 2020, if Ms. Goodfellow's transactions had not yet completed.

- [74] There is also the possibility of commission income from Mr. and Ms. Lindgren, clients who now live in Nanoose Bay, but want to move to the Sidney area.
- [75] Ms. Lewis has referred the Lindgrens to a fellow realtor, Mr. Cooper, who will pay Ms. Lewis 25% of any commission he earns through the referral. The Lindgrens initially listed their house in Nanoose Bay through a real estate firm they later became dissatisfied with. They have since contracted with a branch of Pemberton Holmes on Mr. Cooper's recommendation.
- [76] Mr. Cooper will get a 30% referral fee if the Lindgrens' new realtor sells their Nanoose Bay home. It is reasonable to infer that the Lindgrens would have sought Ms. Lewis's recommendation for a realtor in the Nanoose Bay area, and that Ms. Lewis would be in a position to receive the referral fee. Ms. Lindgren says the Nanoose Bay property was first listed for \$966,000, then at \$899,000, and is now listed at \$879,000. The Lindgrens will not buy a new home unless and until their Nanoose Bay property sells.
- [77] Ms. Lindgren testified that she and her husband hope to find a townhouse in the Sidney area in the \$660,000 to \$700,000 range. Mr. Cooper thinks the Lindgrens are looking in the mid-\$700,000 to \$800,000 range, which he described as a "tough market." Mr. Cooper described the market as slow in mid-December, and said it should pick up in February or March.
- [78] Other possible sources of real estate commission income that may have materialized if Ms. Lewis had renewed her real estate license in 2018 include Ms. Lastiwka, who knows Ms. Lewis as her realtor and her friend.
- [79] Ms. Lewis acted as Ms. Lastiwka's realtor when she and her husband bought their current home in 2013, and Ms. Lastiwka says they would like to purchase a two bedroom home in the same area, and would move if they found one. Ms. Lastiwka testified that her and her husband would have engaged Ms. Lewis as their realtor if they began to actively look for another home.
- [80] There are other former clients and potential future clients named by either Ms. Lewis or Mr. Cooper, but the possibilities that any of these would have resulted in a commission for Ms. Lewis either before June 2020, or at the latest June 2022 if Ms. Lewis had renewed her license yet again, is so remote as to be speculative. In this list of speculative possibilities I include Mr. Peter Bolt, who has apparently told Ms. Lewis that he wants her to sell his home when he dies.
- [81] On the other hand, I find it a real and substantial possibility that if she had not been involved in the accident, Ms. Lewis would have earned commission income from Ms. Goodfellow and Mr. and Ms. Lindgren, either before June 2020, when her real estate license would require further renewal, or shortly thereafter. I find that Ms. Lewis would probably have renewed her real estate license in June 2020, in order to realize the probable commissions from both Ms. Goodfellow and the Lindgrens.

- [82] It is difficult to assess the value of that loss, as its measurement depends on how much each client will pay for property they purchase, and in Ms. Goodfellow's case, how much Ms. Lewis might have spent marketing the current home. Those expenses, in addition to listing fees and Multiple Listing Service costs, are expenses Ms. Lewis would have had to bear, in addition to the ongoing costs of maintaining her association with Pemberton Holmes. That last, according to a sample invoice from May 2018, was \$449 per month. That would add up to \$10,776 for the two years between June 2018 and June 2020. There would be other costs as well, such as the ones listed on the May 2018 invoice for paging, and others described as "VREB," which I am going to assume relate to ongoing charges levied by the Victoria Real Estate Board.
- [83] Balancing the probabilities, and taking into consideration the estimated size of the loss, I conclude that a fair award for loss of earning capacity is \$25,000.

COST OF FUTURE CARE

- [84] Ms. Lewis seeks an award for the cost of future care in the amount of \$5,000, based on the recommendations of Dr. Jollymore and Dr. Shuckett. The defendants submit that Ms. Lewis should not be awarded any damages under cost of future care.
- [85] In Dr. Jollymore's written report, he said Ms. Lewis would more likely than not require episodic massage and physiotherapy as well as psychological counselling.
- [86] Dr. Shuckett recommended one-on-one instruction by an exercise therapist or kinesiologist in a warm pool.
- [87] I accept these recommendations are medically justified as a result of the accident. However, there is no evidence on which the cost of these recommendations can be assessed.
- [88] The plaintiff points out that she was restricted in the number of expert reports she was permitted to tender by operation of Rule 11-8 of the Supreme Court Civil Rules, B.C. Reg. 168/2009. Portions of Rule 11-8 were held to be unconstitutional in late October 2019 in *Crowder v. British Columbia (Attorney General)*, 2019 BCSC 1824. The plaintiff argues that was too near trial to allow her to obtain and serve an opinion quantifying the doctors' recommendations.
- [89] Leaving aside whether the cost of services such as massage, physiotherapy or psychological counselling is properly a matter of opinion at all, the problem experienced by the plaintiff as a result of Rule 11-8 might have been addressed through a notice to admit, based upon rates paid by ICBC according to their published Recovery and Treatment Payment Guide.
- [90] That guide outlines a maximum per treatment amount for the following services: \$80 for massage treatments, \$79 for physiotherapy treatments, \$195 for psychologist treatments, and \$120 for treatments with a registered clinical counsellor.

[91] That is not much help in the absence of evidence of how many of each treatment might be needed.

[92] Counsel for the plaintiff invites the Court to "ball park" the damages for future care costs, following the examples in *Flores v. Burrows*, 2018 BCSC 334 at paras. 146-147, in turn adopting *Rahimi v. Ma*, 2014 BCSC 710 at para. 161. These decisions take some comfort from the decision of the Court of Appeal in *Loewen v. Bernardi* (1994), 93 B.C.L.R. (2d) 242. (C.A.) [Loewen] where a trial judge had refused to order damages for future care costs because there was no evidence of those costs in addition to what would be available under an open claim under Part 7 of the former Revised Regulation (1984) Under the Insurance (Motor Vehicle) Act, B.C. Reg. 447/83. I note that Part 7 has been amended over the years, and although its substance remains the same, the applicable regulation is now called the Insurance (Vehicle) Regulation.

[93] The plaintiff appellant in *Loewen* was elderly. There was some medical evidence that the plaintiff's injuries might result in incapacity at some time in the future.

[94] The three judges concurred in an award of \$7,500 for the cost of future care, reversing the trial judge.

[95] Carrothers J.A. dealt with the appellant's argument that an award of \$25,000 to \$37,000 for future cost of care would be appropriate at paras. 26 to 27:

26 The answer of the respondent simply is that there was no evidence before the trial judge on which to base a claim for future care costs. The authority cited to us by the appellant exhorts the court assessing loss and which is unable to estimate damages or loss "with anything approaching mathematical accuracy" not to abandon the attempt and relieve the wrongdoer of the necessity of paying damages, but must "do the best it can".

27 The above quoted description of the future care cost loss derived from the pedestrian's permanent incapacities is fraught with uncertain assumptions and contingencies which make the estimate of the loss far too generous. Doing the best I can and taking into account these factors and the potential longevity of the elderly pedestrian in this case, I would consider damages for future care costs in the amount of \$7,500 to be appropriate.

[96] Rowles and Prowse J.J.A. said at para. 61:

61 The trial judge refused to make any award for costs of future care because "no evidence has been provided". Defendants' counsel conceded during argument that there was some medical evidence about the onset and type of incapacity the plaintiff may suffer as he gets older as a result of the knee and shoulder injuries he sustained in the accident. In the circumstances an award of \$7,500 would appear to me to be reasonable.

[97] In this case, I have somewhat more evidence than appears to have been available in *Loewen*, and that decision appears to not only allow the court to assess damages with little evidentiary basis, but to require it.

- [98] It is significant that although these treatments and services have been recommended to the plaintiff, she has had one massage treatment that she found too painful, she has sought out group counselling but was rejected because of her age, and is somewhat tepid about pool therapy.
- [99] Given the services recommended, the costs established in the ICBC document, the age of the plaintiff, and lingering questions about whether Ms. Lewis will in fact seek the treatments or services recommended to her, I consider the sum sought by Ms. Lewis to be fair and reasonable and award her \$5,000 for future care costs.

SPECIAL DAMAGES

- [100] Special damages have been agreed to by the parties at \$225.

SUMMARY

- [101] The defendants shall pay damages to Ms. Lewis of:

Non-pecuniary loss including

loss of housekeeping capacity: \$105,000

Loss of earning capacity: \$25,000

Cost of future care: \$5,000

Special damages: \$225

Total: \$135,225

- [102] If counsel are unable to agree on costs, they may speak to the matter.

"The Honourable Mr. Justice Johnston"

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