

CANADA / JUDGMENT

Lumanlan v. Sadler

2008 BCSC 1554

COURT

Supreme Court of British Columbia

DECIDED

13 November 2008

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2008 BCSC 1554err1 Lumanian v. Sadler

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Lumanlan v. Sadler,

2008 BCSC 1554

Date: 20081113

Docket: M064654

Registry: Vancouver

Between:

Maria Katrina Lumanlan

Plaintiff

And

Quinn Paul Sadler

Defendant

And

Insurance Corporation of British Columbia

Third Party

Before: The Honourable Madam Justice Humphries

Reasons for Judgment

Counsel for the Plaintiff:

C. McTavish

Counsel for the Defendants:

No appearance

Counsel for the Third Party:

N. Wilhelm-Morden

G.S. Hoff

Date and Place of Trial/Hearing:

October 20, 21, 23, 24 and 27, 2008

Vancouver, B.C.

Introduction

- [1] The plaintiff sues for damages for injuries sustained as a passenger in a motor vehicle which flipped over onto its roof while being driving by the defendant Quinn Paul Sadler on September 10, 2006. The defendant pled guilty on April 24, 2008 to dangerous driving causing bodily harm and received a conditional sentence. He did not appear at the trial and took no part in the proceedings. The defence was conducted by the third party, ICBC.
- [2] Liability is admitted with the qualification that the third party raises an issue of contributory negligence. It claims that the plaintiff did not take reasonable care for her safety by accepting a ride with a person who was obviously drunk.

Background: The Accident

- [3] The plaintiff was working as a front desk clerk at Blackcomb Lodge in Whistler, B.C. at the time of the accident. She went to a pub after work with some friends. The plaintiff had four drinks of hard liquor while at the pub. Her attention was drawn to the defendant, whom she did not know, who was sitting at a nearby table sharing a pitcher of beer with a friend.
- [4] The plaintiff and the defendant left the pub to go to another bar. The plaintiff noticed that the defendant was laughing loudly and yelling. She agreed on cross-examination that she took this to be an indication that he was feeling the alcohol he had consumed. Once at the bar, the plaintiff and defendant each had four or five drinks; the last one was a shooter. The bar closed at 2:00 a.m., and patrons had to leave by 2:30 a.m.
- [5] The plaintiff said they were both drunk when they left the bar, but she was drunker than the defendant was.
- [6] Outside the bar, they had a cigarette, and discussed how the plaintiff would get to the staff housing where she lived, at the top of Glacier Drive at the Base 2 parking lot. She had no money for a cab and did not want to walk in the dark. She assumed it was too late for buses.

- [7] The plaintiff testified she either asked the defendant for a ride, or he offered one. They walked to the parking lot, a five or ten minute walk. The plaintiff testified she was staggering as she walked. She said the defendant was also staggering, and agreed it was partly from helping her and partly from the effects of the alcohol.
- [8] The plaintiff did not recall the drive to the Base 2 parking lot. She thought the accident occurred in the parking lot where the truck was parked. However, it is clear that the defendant drove the plaintiff to the Base 2 parking lot.
- [9] The evidence surrounding the actual accident is very vague. The plaintiff recalls the defendant saying "check this out!" and beginning to spin doughnuts in the parking lot. All the plaintiff remembers is holding onto the window and screaming. The truck flipped over onto its roof, which was completely crushed.
- [10] Another worker who was going home from his shift testified that he heard the truck engine revving, and waited behind a parked bus because he was aware that people often drove foolishly in the parking lot. He then heard the crash. He ran out, saw the defendant getting out of the truck, and assisted him in getting the plaintiff out. From the pictures of the vehicle, it appears that the only area in which it was possible to get out of the cab was through what remained of the driver's window. The witness yelled to some friends to call 911.
- [11] The plaintiff does not recall if she had her seat belt on. From the consistent information given to the ambulance attendant, and later to the hospital workers, it appears that she did not. The witness who assisted in getting her out of the truck did not mention having to detach the seat belt. I find it to be more probable than not that she did not have it on, but the issue is not of great significance. The third party does not allege that the failure to wear a seatbelt contributed to the plaintiff's injuries, but it does say it is further evidence of her failure to take reasonable care for her own safety.
- [12] Cst. McMillan was called out at 3:05 a.m. and attended the scene two or three minutes later. He noted the defendant to be swaying, slurring his speech, red-eyed, and presenting a strong odour of liquor. Cst. McMillan testified that he formed his grounds for arrest, and took the defendant to the police station. Once at the station, and after the appropriate observation period, readings were obtained of .120 milligrams of alcohol in 100 millilitres of blood at 4:42 a.m.
- [13] Mr. Shajani, a blood alcohol technician, calculated the amount of blood alcohol back to the time of the accident at 3:00 a.m. to be .146. An issue arose as to the validity of that number because of the failure of the third party to establish when the defendant had had his last drink, having relied only on the hearsay statements of the defendant to Cst. McMillan. As counsel for the third party pointed out in argument, however, all that was necessary for Mr. Shajani to calculate accurately the blood alcohol level at the time of the accident was for the defendant not to have had a drink in the half hour prior to 3:00 a.m., and given the time frames described by the plaintiff, that would be extremely unlikely.

- [14] What is more important however, is whether the plaintiff knew the defendant was under the influence of alcohol to the extent of being impaired, and it is obvious from her evidence that she did.

Contributory Negligence

- [15] The essential consideration on the issue of contributory negligence is whether the plaintiff took reasonable care for her safety by agreeing to become a passenger in a car driven by a person she knew to be intoxicated. There are many cases that stand for the proposition that contributory negligence is established when a person becomes the willing passenger of a drunk driver, and the proportions of fault vary with the circumstances. See: *Earnshaw v. Despina* (1990), 45 B.C.L.R. (2d) 380 (C.A.); *Nielson v. Brunet Estate (Public Trustee of)* (1994), 95 B.C.L.R. (2d) 303, 48 B.C.A.C. 316; *Shaw v. Storey* (1991), 53 B.C.L.R. (2d) 257 (C.A.); *Mushta v. Best*, [1998] B.C.J. No. 1346 (S.C.); *Neufeld v. Foster*, [1999] B.C.J. No. 764 (S.C.).
- [16] The third party submits that the plaintiff should be found 40% contributorily negligent. The plaintiff says she should not be found contributorily negligent because she did not have an appreciation of the defendant's ability to drive before she got into the truck and she had no opportunity to get out of the vehicle once she realized he was driving unsafely. See: *Reekie v. Messervey* (1986), 4 B.C.L.R. (2d) 194 (S.C.), *aff'd* (1989) 59 D.L.R. (4th) 481, 36 B.C.L.R. (2d) 316 (C.A.).
- [17] In this case, the evidence establishes that the plaintiff must indeed assume some of the responsibility for her injuries. The plaintiff knew the defendant was drunk before she got into the truck. Although she was so drunk she was staggering and she does not recall the drive to the parking lot, she does recall the defendant's behaviour and testified that she knew he was drunk when they left the bar. She needed a ride home and either asked him for one or voluntarily accepted one from him.
- [18] However, fault must be apportioned on the basis of the nature and extent of the departure from the respective standards of care: *Cempel v. Harrison Hot Springs Hotel Ltd.* (1997), 43 B.C.L.R. (3d) 219, 100 B.C.A.C. 212 at para. 24. On that basis, much more of the fault belongs to the defendant. He was clearly negligent. Not only was he impaired, but he chose to spin doughnuts, causing the truck to flip over. He had apparently driven without incident to the parking lot, and it was his decision to drive, while impaired, in such a dangerous fashion in the lot itself that led to the accident. While his behaviour was fuelled by alcohol, and the plaintiff should have foreseen that a drunk driver could put her in a position of danger, she was exposed to a greater degree of danger by his reckless antics. His departure from the applicable standard of care was much greater than the plaintiff's. I find the appropriate percentage of contributory negligence in all these circumstances to be 25%.

Injuries

- [19] The plaintiff was unemotional on the stand and appeared almost uninvolved in her testimony. She was pleasant but without affect, and although she answered the questions put to her in a straightforward manner, she did not seem to be interested in conveying any details or a sense of the impact of this accident on her life. Whether this is the effect of her pre-existing and ongoing depression, or whether she is simply stoic and accepting, the court is left mainly with the reports of her surgeon and the third party's expert, as well as the work capacity evaluator's results, in order to understand the effects of her injuries.
- [20] The plaintiff, who is right-handed, suffered serious injuries to her left hand. All the skin was removed from the back of her hand, and the tendons were exposed. Her middle finger was fractured.
- [21] She has had seven surgeries, during which the tendons have been repaired, the middle joint of the third finger has been fused, and a graft of skin from the inside of her thigh has been applied to the back of her hand. This skin graft was quite thick and has been reduced in stages.
- [22] The plaintiff does not have pain or numbness in her hand, but has stiffness in the metacarpal phalangeal joints - that is, the joints that connect the finger to the hand itself - on her index, middle and ring fingers, with pronounced stiffness in the middle joint of her index finger. The fusing of the middle joint of her third finger means it will not bend. She has signs of early osteoarthritis in the middle and ring fingers. Her micro-surgeon/hand specialist, Dr. Hill, is of the opinion that she has the potential to develop arthritis in all the joints of her left hand. The third party's specialist, Dr. Gropper, does not share that latter view, but apart from that his opinions did not differ from Dr. Hill's. Arthritis could raise the possibility of joint replacement in the future, but the doctors did little more than mention this without elaboration.
- [23] The plaintiff has weakened grip strength and some reduction in her tolerance for use of her left hand while doing various household chores like laundry and dishes. She said her hand becomes tired and painful after about three hours of the housekeeping tasks that comprise part of her present employment. Her left hand gets weak and tired quickly when she is driving. Her fused middle finger gets caught on things. She testified that she can no longer play the guitar and finds playing the piano difficult. No evidence was led to as to how well or often she played either of these instruments before the accident, or whether this loss impacts her in any significant way.
- [24] At present, the plaintiff has scarring on her wrists and fingers, a hand different in texture and function than the other, and a long thin scar on her inner thigh from the graft procedure. She also has small scars on her elbows and on her right knee. The back of her hand is still somewhat puffy and smooth. She wears a sleeve over it to forestall questions, as the difference in its appearance is noticeable and she imagines that people will stare at it.

- [25] The plaintiff's family doctor did not add anything of substance to the reports of the specialists, and in any event, I did not find his general comments to be helpful. He had not seen the plaintiff for some months when he wrote his report and she had had surgery in the interim. He did not mention any of her past medical history with drugs, alcohol or depression, even though he had treated her for them, describing her as "an active, healthy and confident individual with no previous physical impairment" and "no previous medical concerns." He opined that the accident had had a severe emotional impact on the plaintiff, but nothing of the sort appears in any of his notes. He testified that he relied on his general knowledge of the family, and of course one would expect some emotional disruption from such an accident and seven surgeries, but there is no support for the notion that the accident had a severe emotional impact on the plaintiff.
- [26] The plaintiff herself did not mention a severe emotional impact from the accident. She did mention that she became depressed immediately after the accident and is still anxious in cars and planes. However, she has decided not to take medication or to go for counselling.
- [27] A further operation to improve the appearance of the hand, which Dr. Hill said may result in a small improvement in function as well, was scheduled in June of 2008, but the plaintiff cancelled it. It appears that she may have plans to reschedule it in the future, but the third party contends that insofar as damages are awarded based on any current compromised appearance or function of the hand, they should be reduced by 10% for failure to mitigate.

Non-Pecuniary Damages

- [28] Both counsel advised the court that cases dealing only with hand injuries are not plentiful, but each was able to provide some assistance. The plaintiff relied on *Star v. Ellis*, 2007 BCSC 512 (\$55,000 for injury to wrist and hand, with a fracture to a joint which was "not very debilitating) which in turn referred to *Lowe v. Larue* (1998), 58 Alta. L.R. (3d) 142, 245 A.R. 201 (\$65,000, for hand and wrist injury with psychological and emotional impact, adjusted for inflation to \$80,000). The plaintiff seeks non-pecuniary damages in the range of \$80,000 to \$95,000.
- [29] The third party refers to *Narayan (Guardian ad litem of) v. Djurickovic*, 2003 BCSC 1144 (amputation of ring and middle fingers, with skin grafts and weakened grip strength, \$33,000); *Jahangiri-Bojani v. Brudderer*, 2001 BCSC 1371 (partial amputation, four surgeries, permanent impairment of two fingers on non-dominant hand, \$27,000); *Wright v. Wright* (1992), 124 N.B.R. (3d) 1 (N.B.Q.B.) (right forearm and part of right hand damaged, three surgeries, scarring, limitations in sensation and movement and loss of grip strength, \$56,000 adjusted for inflation); *Wilcot (litigation guardian of) v. Ellis*, 2001 SKQB 219, [2001] 10 W.W.R. 550. (a plaintiff who was described as extremely left-hand dominant suffered restricted range of motion in left wrist and all fingers of left hand and reduced grip strength; \$55,000). The Third Party submits that an appropriate award of non-pecuniary damages would be \$50,000.

- [30] In summary, as a result of the accident, the plaintiff was required to have seven surgeries on her left hand. She is left with a non-dominant hand that is obviously different in appearance and function, regardless of the remaining surgery that will give some further amelioration in those respects. She is left with stiffness in three fingers, one of them fused, but does not suffer pain or numbness. She keeps her hand covered to avoid embarrassment. She has scarring, reduced grip strength, and reduced tolerance for repetitive activities involving her left hand.
- [31] Based on the evidence before the court, the effect on her daily life and activities is not extensive. She finds some household chores difficult, and her left hand becomes tired when driving. She does face the prospect of advancing arthritis, particularly in the two presently affected joints.
- [32] Considering all of the evidence, I am of the view that the amount proposed by the third party is reasonable. I award \$50,000 for non-pecuniary damages.
- [33] In respect of the claim for failure to mitigate, I am unable to say that the amount of the award would differ if Ms. Lumanlan had gone through the eighth surgery. While that surgery is expected to improve the appearance and perhaps the function of her hand in some small measure, the inconvenience and effect on her life of both a further medical procedure and the time necessary to recover from it would offset any small amount by which the award might be reduced.

Work History: Loss of Income

- [34] The plaintiff is 27. She did not complete Grade 12. She has a child who is being raised by her mother in her home town in the north of the province. The plaintiff presently works in her hometown as a front desk clerk and housekeeper at a local lodge. She lives with her parents.
- [35] After leaving school in 2000, the plaintiff worked for a short time in 2001 at a hotel in Whistler as a part-time housekeeper. She quit that job as she found it physically demanding and the pay was not good. In the intervening period before her next job, her child was born. Her next job was in 2004 as a cashier at A & W, and lasted less than a month. Her next job was in 2006. This was a front desk clerk job which she left after a month when she was told the hotel was not going to keep her on because she was missing too much work.
- [36] The plaintiff began the front desk job at Blackcomb at the end of August, 2006, and held it until the accident occurred shortly thereafter in September of 2006. She was earning \$12.50 an hour during the three month probationary period, and would have received \$13.50 an hour once completed the probation.
- [37] The plaintiff moved back and forth between her home town and Vancouver during the two years after the accident, while having her surgeries and undergoing physiotherapy.

- [38] Her next job was at another hotel in Vancouver which began in April of 2008. She was paid \$13.00 an hour and the job had the potential for advancement. This job only lasted a few weeks, and she was given the choice to leave or be fired. She left. Her supervisor testified that she was unreliable, missed too much work, and she would not hire her again. However, she said the plaintiff's hand had no bearing on her employability, as she could do the required keyboard work with no problems.
- [39] The plaintiff is now working in her home town at a similar job in a lodge, earning \$8.00 an hour.
- [40] While off work, the plaintiff collected social assistance payments of between \$3,000 and \$6,000 a year. Her employment income for all of these years was a little over \$300.00. In 2007, she received \$14,500 from social assistance.
- [41] Dr. Hill, who performed the surgeries on Ms. Lumanlan's hand, said she was disabled as a result of her injuries until early 2008, and I accept that evidence. The plaintiff first obtained employment after the accident in April 2008. The plaintiff claims past loss of income for that 19 month period, based on the rate of pay she had been receiving at the time of the accident. Counsel calculates this to be a gross amount of \$45,630, subject to a calculation for net loss, and subject to a deduction for disability and social assistance benefits.
- [42] The manager of the hotel in Whistler, who did not supervise the plaintiff directly, said there were no plans to lay her off. He said there was an oversupply of jobs in Whistler at that time, and an undersupply of employees. He agreed she had done few, if any, shifts on her own during her short period of employment, and there would have been no assessment of her until the end of the three month probation period. He agreed that reliability is important to maintaining a job.
- [43] The third party takes the position that it is unlikely that the plaintiff would have continued to work at Blackcomb for the period of disability. She had only had three jobs since leaving high school and had worked only one month per job. The plaintiff told several medical professionals after the accident that she was a binge drinker and her bingeing had increased since moving to Whistler. The third party takes the position that based on those circumstances, it is unlikely that the plaintiff would have worked more than a month. Her wage loss should therefore be about \$960.
- [44] The plaintiff has not established a realistic possibility that she would have continued in her job at Blackcomb, made it through her probation and worked steadily in the next two years. There is simply no basis upon which to conclude that she would have made anything near the \$45,000 projected by her counsel.

- [45] On the other hand, it is not entirely fair to judge her by her work record as a teenager, and also to fail to account for the fact that she had a child in the early 2000's. Her actual work record, in those circumstances, may not be a fair reflection of her capabilities but for the accident. Her work record since the accident has not been any better, but to some extent this is explained by having to cope with seven surgeries and related physiotherapy.
- [46] Taking all of this into account, however, there is almost no evidence upon which to base a conclusion that the plaintiff would have done much more than she had done in the past and than she has done since the accident - drift from job to job for short periods of time. It appears that the plaintiff had no difficulty obtaining employment; her problem was in maintaining a job. It is distinctly possible, even probable, that she would have had several short term jobs during the relevant period.
- [47] In the circumstances of this case, such an award can be nothing more than a rough assessment. I award \$3,000 for loss of income from the date of the accident to the date of her first employment, April 2008. I leave the issue of deductions to counsel, with liberty to apply if necessary.

Loss of Future Earning Capacity

- [48] For similar reasons, it is not profitable to embark on a calculation-based assessment of future loss, although her counsel produced an expert who provided various scenarios and present value tables, which counsel submitted supported an award in the range of \$120,000, based on the assumption that the plaintiff is unable, as a result of the injury, to become a licensed practical nurse.
- [49] The third party submits that an award of \$20,000 would be appropriate, given all the negative contingencies that exist in respect of the plaintiff's future employment prospects, including her evidence that she wishes to have more children and would take time away from work to do so. The third party also refers to the evidence from the plaintiff's family doctor that he twice sent forms to government agencies supporting the plaintiff's inability to work due to depression, unconnected to the accident.
- [50] The plaintiff said she would like to have a higher paying job than she has now, and is interested in fashion merchandising. She has audited a couple of related courses. She said she did not think her hand would interfere with employment in that field. She also testified to some vague plans to become a licensed practical nurse, but said she assumes she could no longer pursue such a career, although she said no one has told her so.
- [51] The plaintiff is able to do the work she was doing at the time of the accident without restriction, that of front desk clerk. She obtained jobs at two different hotels since the accident and was let go from both because of her unreliability, not because of any restrictions resulting from the accident. She currently holds a front desk/housekeeping position in her home town. She experiences pain in her hand after three hours of housekeeping work. She said she is able to do data entry for twenty minutes at a time. Dr.

Hill is of the view that the plaintiff's loss of dexterity will affect her ability to keyboard at an optimal level.

- [52] Although her former employer from Blackcomb said he would prefer, having seen the plaintiff's hand, to hire someone without an injured hand, her employer from a more recent job said it would have had no impact whatsoever as long as she could do the job. Obviously the latter position is the only tenable one in today's labour world where discrimination based on appearance is not tolerated. However, that evidence is some indication of the hidden restrictions to employability that the plaintiff may face.
- [53] According to the work capacity evaluator, who did only a brief screening test rather than a full evaluation, forceful gripping and repetitive handling led to some limits of tolerance. He noted over time the plaintiff became slower and needed breaks, or would shift to her right hand. She would have difficulty with jobs that required use of both hands for extended periods, but he agreed there are not too many jobs for women in that category, other than employment that requires continual keyboarding. He did not specifically test her in respect of limitations to becoming a licensed practical nurse.
- [54] The plaintiff's future plans are vague, and in my view, the accident has not affected that lack of direction one way or another. Despite leaving school in 2000, the plaintiff has not even taken the first step of completing her high school. I am not persuaded that she has established a real and substantial possibility that she would pursue any particular career path.
- [55] However, she is young, and could be expected to try to advance in some sort of career or employment field at some point, including ones that require two strong and dextrous hands. Her opportunities are limited to some extent because of the weakness in her left hand, and for someone of her limited education, the loss of a strong left hand could be significant. This loss may become more significant if her arthritis advances, and whether or not she faces the possibility of arthritis in all the joints of her left hand, with or without consequent joint replacement, both hand experts agree she already has signs of arthritis in two joints.
- [56] She therefore meets the tests in *Brown v. Gola* (1985), 26 B.C.L.R. (3d) 353 (S.C.): she is less capable of earning income from all types of employment, less valuable to herself as a person capable of earning income in a competitive labour market, and less able to take advantage of all job opportunities that might otherwise have been open to her.
- [57] Considering all the factors, including negative contingencies, I assess the impairment of the plaintiff's capital asset of her employability at \$50,000.

Cost of Future Care

- [58] The plaintiff provided calculations for the cost of obtaining various things at various future intervals as recommended by her work capacity evaluator and the doctors: exercise equipment, physiotherapy, various consultations, homemaking services, yard maintenance, appliances, and medications. Depending on the exact requirements and their frequency, the costs as set out in the tables range from \$74,000 to \$87,000.
- [59] Dr. Gropper recommended motion exercises monitored by a physiotherapist.
- [60] The plaintiff is able to take care of her personal grooming and to look after her child without problems, although her mother is the primary caregiver. She is able to do her own housework. The plaintiff is staying in her parents' house at present but has an apartment in Vancouver. The work capacity evaluator said she might require some assistance with house and yard work, if she should ever move into a house, although he did not specifically test her tolerance for using long-handled tools.
- [61] The third party points out that the plaintiff is not undergoing any treatment. She is not taking any medications. She has not received any counselling. She has not had to hire any housekeeping assistance. In fact, her present job involves housekeeping. She has not purchased any of the suggested appliances or said she needs them. There is no evidence to suggest she is contemplating any of these things or feels the lack of them.
- [62] Given the lack of evidence upon which to reach a conclusion respecting the possibility of any of the suggested services being reasonably required or used, I accept the position advanced by the third party that an assessment is appropriate, rather than a meticulous consideration of each item and its place and frequency in the tables. The requirement for exercise and physiotherapy is reasonable, and this must take into account the possibility of arthritis increasing in the future. That could well necessitate the need for some help around the home and the requirement in future for some of the helpful appliances. I assess the cost of future care at \$5,000.

Special Damages

- [63] The plaintiff lost a jacket, an iPod, and a wrist watch in the accident. She seeks compensation of \$500 for these items, and the Third Party agrees that amount is reasonable. It is so ordered.

Result

1.

Contributory negligence

No reduction for failure to mitigate

25%

2.

Non-pecuniary damages

\$50,000

3.

Past Wage Loss

\$ 3,000

4.

Loss of Earning Capacity

\$50,000

5.

Cost of Future Care

\$ 5,000

6.

Special Damages

\$ 500

Costs

[64] Unless there is a reason to speak to costs, the plaintiff will have her costs at Scale B.

"M.A. Humphries J."

The Honourable Madam Justice M.A. Humphries

January 19, 2009 - Revised Judgment

Corrigendum to the Reasons for Judgment issued advising that the last sentence in paragraph 26 will now read:

"However, she has decided not to take medication or to go for counselling."

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