
CANADA / JUDGMENT

Mayervich v Sadeghipour

2012 BCSC 1624

COURT

Supreme Court of British Columbia

DECIDED

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2012 BCSC 1624 Mayervich v Sadeghipour

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Mayervich v Sadeghipour,

2012 BCSC 1624

Date: 20120921

Docket: M119616

Registry: New Westminster

Between:

Elizabeth Mayervich

Plaintiff

And:

Farshad Sadeghipour and Hatav Rostami

Defendants

Before: The Honourable Mr. Justice Grauer

Oral Reasons for Judgment

Counsel for the Plaintiff:

C. Dyson

Counsel for the Defendants:

P. J. Armitage

Place and Date of Trial:

New Westminster, B.C.

September 17-21, 2012

Place and Date of Judgment:

New Westminster, B.C.

September 21, 2012

Introduction

[1] THE COURT: This is an assessment of damages sustained by Betty Mayervich as the result of a motor vehicle collision that occurred on May 17, 2007. Liability for that collision has been admitted on behalf of the defendants. At issue is the nature, extent, and effect of Mrs. Mayervich's injuries.

Background

- [2] Mrs. Mayervich is 72 years old and has been married to her husband, Allan, for just over 50 years. They live in Port Coquitlam. They have three grown children and six grandchildren. She retired from her employment with the Hudson's Bay Company when she was 55.
- [3] The accident occurred when Mrs. Mayervich was struck from behind after she had come to a stop in a line of traffic at a red light. The impact pushed her vehicle forward five or six feet into the car in front of her, causing her airbag to deploy. Mrs. Mayervich was holding onto her steering wheel at the moment of impact. She perceived a blow from behind that caused her to move backwards and then forwards in her car, followed by an explosion. That was the airbag deploying. Mrs. Mayervich briefly lost consciousness. When she came to, she thought that the car was on fire because of what appeared to be smoke. Her glasses had been knocked off her face, which, in her state of panic, she did not realize until she had managed to get herself and her granddaughter out of the car.
- [4] Photographs taken the next day demonstrate injuries to the face in the form of a scrape and contusion to Mrs. Mayervich's upper lip and swelling of her nose, significant bruising to the inner aspects of both arms -- particularly the left -- and bruising to her abdomen. There was also bruising to her chest. Mrs. Mayervich went on to develop significant and what has proved to be chronic pain in the neck and mid-back regions accompanied by depression. It is not disputed that these injuries were caused by the collision.

- [5] The issues arising with respect to the aspect of Mrs. Mayervich's injuries consisting of chronic pain and back pain and depression concern the extent of disability attributable to them as opposed to other processes including age, and the potential for improvement with appropriate treatment. In addition, the defence argues that she failed to mitigate the consequences of these injuries by not starting to take anti-depressant medication until some seven-and-a-half months after it was first recommended.
- [6] Mrs. Mayervich also went on to develop breathing problems due to a deviated septum that was corrected by surgical treatment, and bilateral carpal tunnel syndrome which was also resolved by surgical intervention. She maintains that these conditions were the result of the documented trauma to her arms and face caused by the impact and by the airbag deployment in the collision. The defendants accept that Mrs. Mayervich sustained injuries to her face and forearms in the accident, but say that these resolved and that the deviated septum and carpal tunnel syndrome are unrelated to them.
- [7] Finally, Mrs. Mayervich complains of reduced cognitive functioning since the accident, particularly in terms of memory impairment. The defendants dispute that these difficulties, to the extent they exist, have any causal relationship to the collision.
- [8] I will now review the evidence concerning these conditions.

Chronic Neck and Back Pain, Depression, and Cognitive Dysfunction

- [9] Mrs. Mayervich testified that her neck and back started hurting significantly about two days after the accident. It was painful for her just to hold her head up, and she suffered throbbing pain at the base of her skull, headache, and throbbing across the middle of her back. This pain worsened over the next couple of months and by six months after the accident continued to be significant on a constant basis. Physiotherapy helped, but not to the point of allowing normal activity. As a result, by a year after the accident the pain in her neck and back was less unbearable, but still significant. Little has changed since.
- [10] Mrs. Mayervich testified that she is never pain-free in her neck except for brief periods when she is lying down with her neck supported by a pillow. Her back is less problematic if she is inactive, but she pays a price if she does anything.
- [11] Mrs. Mayervich described her mood problems, her feelings of helplessness and frustration, increased irritability and anger, and memory and concentration lapses. These were confirmed by her husband and daughters, all of whom found Mrs. Mayervich to have changed significantly in terms of her personality and cognitive functioning since the accident.
- [12] Mrs. Mayervich was initially treated by her family physician, Dr. Peter Shih. He referred her to Dr. Andrew Dawson, a specialist in physical medicine and rehabilitation, whom Mrs. Mayervich saw on December 18, 2008. She was seen for ongoing neck, shoulder, and upper back pain. Dr. Dawson diagnosed chronic myofascial pain with a significant mood or affect

component that he attributed to the motor vehicle accident. His opinion was that with appropriate treatment and an active slowly progressive stretching and strengthening program as well as ongoing support for her mood changes, she was likely to show ongoing progressive recovery. He nevertheless noted the possibility that she would be left with some lingering myofascial-like symptoms. His recommendations included an SNRI (serotonin neorepinephrine reuptake inhibitor) medication, a form of anti-depressant medication that in his experience is more beneficial for patients in pain than an SSRI (selective serotonin reuptake inhibitor).

- [13] The first anti-depressant medication that Mrs. Mayervich took was an SSRI, Cipralex, that was prescribed by Dr. Shih in August of 2009.
- [14] In his report dated April 24, 2010, Dr. Shih expressed the view that Mrs. Mayervich would eventually recover fully from her myofascial pain, but could not predict how long this would take. By the time of his later report dated May 24, 2012, his view that she would recover fully had been downgraded from an opinion to a hope, now considered unlikely in view of the chronicity of her conditions. He felt that she would benefit from a focused exercise program supervised by a kinesiologist in order to maximize her functional recovery.
- [15] An expert report was admitted into evidence from Dr. Raymond Ancill, a psychiatrist with a special interest in trauma, to whom Mrs. Mayervich was referred by her family physician. The defendants did not require Dr. Ancill to be produced for cross-examination on his report. Dr. Ancill began seeing Mrs. Mayervich in January of 2011.
- [16] Among other things, Dr. Ancill continued the Cipralex originally prescribed by Dr. Shih and twice increased the dosage.
- [17] Dr. Ancill was of the view that Mrs. Mayervich may have suffered a mild concussion in the accident but does not suffer from post-concussion syndrome or the residual effects of any mild traumatic brain injury. He also stated that she does not have a dementing disorder to account for her post-accident cognitive complaints. This is because dementia would lead to a progressive worsening over time whereas Mrs. Mayervich's cognitive complaints have lessened somewhat as first her depression remitted, and later as her pain improved.
- [18] He noted that Mrs. Mayervich developed a major depressive episode which he treated with an anti-depressant. He felt that she was currently in partial remission and was close to full remission. In the meantime, it was his opinion that she suffers from chronic pain which frequently co-exists with clinical depression. In her case the pain arose directly from the accident with the depression arising later. But for the accident it was his view that she would not have become depressed and would not have had chronic pain. He observed that she remains partially disabled.
- [19] Dr. Allan Posthuma saw Mrs. Mayervich for a neuropsychological assessment in May of 2011 and also submitted a report. He was not required to attend for cross-examination and I find his opinion to be persuasive. He stated that his test results were counter-indicative of a brain

related problem whether arising from the motor vehicle accident or resulting from a disease such as Alzheimer's. The testing did indicate, however, difficulties in concentration and memory that are significant for her, and it was his view that they were more probably a function of emotional and pain-related problems. As he explained it:

As previously indicated the validity measures of the MMPI-2 RF indicate that Mrs. Mayervich's responses are likely to be a reliable and valid indication of her emotional functioning. She is likely to be very self-critical and guilt prone. She is likely to be stress reactive and prone to both worry and anger. She is likely to have a low tolerance for frustration and low threshold for irritability. She is likely to obsess about her perceived problems. She complains of specific problems with headache and other pain but testing indicates that she is likely to react to emotional stress through somatic complaints rather than identify the source of the problem as emotional.

These results are fairly consistent with how she presents in an interview and with the observations of her husband. What the results indicate is that any successful treatment will have to address both her somatic and emotional functioning. Fortunately, Mrs. Mayervich sees herself as someone who has overcome and coped with considerable adversity in her childhood and managed a successful active life up to the time of her motor vehicle accident in 2007. That is, a successful therapeutic endeavor is likely if it can tap into these earlier coping skills.

...

Although Mrs. Mayervich does complain of cognitive difficulties, and particular, significant memory problems, the neuropsychological test results would indicate that this is likely a function of her emotional problems, mainly anxiety and lack of confidence in her abilities, as well as the effects of pain and the medication for pain. This would be a common complaint with other chronic pain patients and something that a chronic pain clinic would be able to address.

[20] Dr. Posthuma concluded that Mrs. Mayervich has a chronic pain problem that is interfering with both her emotional and cognitive functioning. He felt that she would likely benefit from both a chronic pain program and working with a trainer who has specialized knowledge in her particular medical condition and who would assist her in building up her tolerance level and enjoyment of her previous avocational interests. In his view, the most appropriate chronic pain program for Mrs. Mayervich would be an intensive daily one-month program which would also involve her spouse. In the absence of such a program, he felt that her problems would continue to be chronic and likely exacerbate over time.

[21] At the request of the defendants, Mrs. Mayervich was seen by Dr. Thomas Goetz, a specialist in orthopaedic surgery with a special interest in trauma, upper extremity, and micro-vascular surgery. On the question of her neck and back pain, Dr. Goetz thought the prognosis was "poor and likely to be static at present and not likely to improve greatly with time". He noted that her psychological problems had obviously caused her significant disability and deferred to a psychiatrist with respect to the actual diagnosis and prognosis.

- [22] On the basis of the evidence of Mrs. Mayervich, whom I found to be a very credible, though not inerrant, witness, and the expert evidence, I am satisfied that the motor vehicle collision in question has left Mrs. Mayervich suffering from a condition of chronic myofascial pain in her neck and back that continues to cause significant disability. I am also satisfied that as a result of the injuries caused by the accident and bound up with the ensuing pain and emotional consequences, Mrs. Mayervich has suffered and continues to suffer a major depressive episode and cognitive difficulties including difficulty in concentration and loss of memory. On the basis of the evidence of Dr. Ancill and the testing of Dr. Posthuma, I am satisfied that these cognitive difficulties are due neither to any brain injury nor to any process of dementia or normal aging.
- [23] Mrs. Mayervich's daughters, both of whom were credible witnesses, testified about the severity of her personality change and the extent of her cognitive problems. They described how she was unfocused, prone to significant memory lapses and non-sequiturs, and lacking in the coherent and organized patterns of thought which were typical before the accident. They have not observed any improvement over the last year or two. Mr. Mayervich observed some improvement when her medication was increased but only to a limited degree. On the other hand, I did not observe any lack of coherence, focus, or clarity in her evidence when she testified, and her physician and her psychiatrist both observed improvement. This apparent disparity is, in my view, consistent with Dr. Posthuma's findings and opinions particularly concerning the change in Mrs. Mayervich's cognitive functioning when she is not in pain and is not threatened or anxious about her performance.
- [24] It follows that I accept Dr. Posthuma's opinion, supported by that of Dr. Dawson, that there is a real potential for improvement through appropriate programs which I find would include an intensive daily one month chronic pain program that would also involve Mr. Mayervich, followed (to the extent recommended by the chronic pain program) by an ongoing and focused exercise program supervised and directed by a person with the appropriate expertise.
- [25] These programs should also help bring Mrs. Mayervich's depression from a state of partial remission to a state of full remission as discussed by Dr. Ancill. I also find, however, that there remains a real and significant possibility that such treatment will not be entirely successful and that Mrs. Mayervich will be left in a chronic state of pain and accompanying depression as discussed by several experts including Dr. Goetz.

Thoracic and Abdominal Injuries

- [26] These caused Mrs. Mayervich real discomfort following the accident and have since resolved. The abdominal injuries causing recurring abdominal pain resolved by late 2007.

Injuries to the Arm and Hands and Bilateral Carpal Tunnel Syndrome

- [27] It is not disputed that Mrs. Mayervich suffered significant contusions to the interior aspects of both arms caused by the impact of the airbag while she was holding onto the steering wheel. The principal issue is whether this impact, together with the initial rear end impact, also caused the bilateral carpal tunnel syndrome with which she was later diagnosed and for which she was successfully treated surgically.
- [28] The test to be applied for causation is the "but for" test. But for this accident, would Mrs. Mayervich have developed the bilateral carpal tunnel syndrome diagnosed in July of 2008? As the Supreme Court of Canada was at pains to remind me in its most recent revelation of the law in this area, the "but for" causation test must be applied in a robust common sense fashion, and it is an error to insist on scientific precision in the evidence as a condition of finding but for causation: *Clements v. Clements*, 2012 SCC 32 at paras. 10 and 49.
- [29] The principal hurdle to connecting the obvious trauma caused to Mrs. Mayervich's arms and hands in the accident to the subsequently diagnosed carpal tunnel syndrome is the question of the timing of its onset.
- [30] According to Dr. Shih, it was in July of 2008 when Mrs. Mayervich developed an acute onset of numbness and pain in both her hands. He noted no such complaints before this time. Dr. Shih requisitioned nerve conduction studies. These tests revealed severe bilateral carpal tunnel syndrome, worse on the left than the right. He referred her to a hand surgeon, Dr. Perey, who performed a right carpal tunnel release on November 18, 2008 and a left carpal tunnel release on December 2, 2008.
- [31] According to Dr. Goetz, review of the literature does not suggest that motor vehicle accidents are associated with delayed onset of carpal tunnel syndrome but does suggest that carpal tunnel syndrome is associated with hypothyroidism, a condition which Mrs. Mayervich has exhibited for many years. On the basis that the onset of Mrs. Mayervich's carpal tunnel symptoms did not occur until more than a year after the accident, Dr. Goetz expressed the opinion that the symptoms were not related whatsoever to the motor vehicle accident. While he accepted that motor vehicle accidents can cause carpal tunnel syndrome, it was his understanding that the symptoms would most commonly present within a week of the trauma. Onset following an accident may be delayed, but a delay of this magnitude would in his view be unexpected and exceedingly unusual.
- [32] Dr. Oxley, a specialist in plastic and reconstructive surgery who focuses on trauma and cancer reconstruction, and who has treated many patients for carpal tunnel syndrome, thought that Mrs. Mayervich's bilateral carpal tunnel syndrome did have a temporal etiology related to the motor vehicle accident. Given that the nerve studies conducted in July of 2008 showed a severe carpal tunnel syndrome, he noted that there was no evidence of any additional acute injury that could explain the onset of so severe a condition. He concluded that her symptoms had simply reached a point where they were no longer tolerable, hence the acute appearance of the presentation. He accordingly believed that the accident was the

causative factor.

- [33] According to Mrs. Mayervich, the symptoms including tingling in her fingers and weakness in her hands had been bothering her for quite some time before July of 2008. The problem that arose in the summer of 2008 was an inability to grasp a handlebar of a bicycle and increased pain, tingling, and numbness. She agreed that she did not complain of these symptoms before but maintained that this was because of all her other problems, not because they did not exist.
- [34] Weighing all of the evidence and applying the "but for" test in a robust common sense fashion, I conclude on a balance of probabilities that the motor vehicle accident was indeed the causative factor and I prefer the opinion of Dr. Oxley to that of Dr. Goetz in this regard.
- [35] I note that Dr. Oxley's opinion was based on his considerable experience with patients with the same condition, whereas Dr. Goetz based his opinion essentially on a review of literature as to the authoritativeness of which he was somewhat ambivalent. Moreover, Dr. Oxley's opinion is supported by the common sense of the situation including the following factors:
- as a result of the accident it was clear that Mrs. Mayervich suffered traumatic injury to her arms, and the mechanics of the accident were of a kind commonly associated with the development of carpal tunnel syndrome;
 - when the nerve conduction studies were conducted in July of 2008, they demonstrated severe carpal tunnel syndrome, suggesting a process that had been developing over a period of time, not one that had suddenly manifested itself without any associated trauma consistent, with Dr. Oxley's opinion. I reject the defence contention that given her memory lapses, Mrs. Mayervich may simply have forgotten a recent undocumented trauma that could have caused the symptoms to develop acutely in July of 2008, or that the bicycle trip that month was the cause. Nothing in the evidence supports either proposition;
 - the conduction studies demonstrated that the carpal tunnel syndrome was worse on the left than on the right, consistent with the bruising injuries suffered by Mrs. Mayervich in the accident which were clearly worse on the left than on the right;
 - There is no evidence of any carpal tunnel syndrome-like problem of any kind before the accident;
 - There is no evidence of any other cause of the carpal tunnel syndrome. Although Dr. Goetz noted an association in the literature between hypothyroidism among other things and carpal tunnel syndrome, neither he nor any other expert opined that in Mrs. Mayervich's case, her long-standing hypothyroidism was what caused her carpal tunnel syndrome;

· In any event, I accept Mrs. Mayervich's evidence concerning symptoms occurring before July of 2008. Other aspects of her injuries were dominating her attention. Her evidence was also supported by that of her husband who had to cut her meat for her, and who described her inability to grasp the steering wheel of her car requiring him to drive her well before July of 2008. Accordingly, I find that a delay in onset of symptoms for more than a year, on which Dr. Goetz founded his opinion, is not what happened.

Deviated Septum

- [36] On my view of the evidence there is no reasonable explanation for this injury other than the blow sustained by Mrs. Mayervich to her face when the airbag deployed in the collision. The defence points to the delay from the time of the accident to when the deviated septum was treated, arguing that I should infer from this that the accident did not cause the injury and that if it had, there would have been more serious symptoms at the time. This was unsupported by any expert opinion evidence. Moreover, Dr. Shih indicated in his report that Mrs. Mayervich complained of "persistent nasal blockage since her MVA" on August 17, 2007. He did not doubt that her "contused nose with deviated nasal septum" resulted from the accident and he was not cross-examined on that point.
- [37] Dr. Oxley also had no doubt that the deviated septum was the result of the airbag deployment in the accident and he, too, was not cross-examined on that aspect of his opinion. No contrary opinion was offered by the defence.
- [38] I accept the opinion evidence of Dr. Shih and Dr. Oxley and moreover I accept the evidence of Mrs. Mayervich that clearly links her breathing problem as reported in August of 2007 to the accident. It is a matter of common sense. Indeed, given the state of the evidence, I find it astonishing that the cause of her deviated septum was contested.

Impact of Injuries to Date

- [39] Mrs. Mayervich has had a very difficult five years. Progress has been limited and to the extent it has occurred, very slow. All aspects of her life have been affected. Her injuries have had a significant impact on her ability to participate in her pre-accident activities, particularly interaction with her grandchildren, golf, bowling, cooking and housekeeping and that impact continues. On the evidence, all of these activities were very important to Mrs. Mayervich who by all accounts was a very active woman who took great delight in her sports and her family. In the reverse of the transformative process pursued by alchemists, her golden years have turned to lead.
- [40] Before the accident, Mr. and Mrs. Mayervich were avid golfers and golf was one of her chief activities. She attempted to keep it up after the accident but found herself unable to continue. It is not clear whether she finally abandoned the sport in late 2010 or the summer of 2011. It is clear, however, that she was unable to play it to her previous level and that it caused her considerable pain. I say this notwithstanding the apparent similarity in her golf

handicap. On her description, the effect of the injuries on the manner in which she was able to play the game and the price she had to pay for doing so is well established.

- [41] She has continued with another of her activities, ten pin bowling, but suffers exacerbated pain for doing so and has had to change her technique. Physical intimacy with her husband has been impossible since the accident because, she testified, she can no longer participate. Before the accident, her husband noted, "it was good enough to keep me around for 50 years".
- [42] Initially unable to perform any domestic chores, Mrs. Mayervich has resumed some cooking and cleaning but still depends upon her husband and daughters for assistance. The family dinners she used to host and prepare are now less frequent and require a good deal of work from the rest of the family.
- [43] But what Mrs. Mayervich perhaps misses most is the interaction with her grandchildren that she used to enjoy. A softball pitcher herself when she played the sport into her fifties, she was looking forward to coaching and working with two of her granddaughters who have become pitchers as well. She cannot now do so. Nor has she been able to lift her grandchildren or run around with them as she used to. The overnights she used to host for all her six grandchildren have become much less frequent and now depend upon the older grandchildren looking after the younger ones. All of this has been very frustrating to Mrs. Mayervich, compounding her depression and emotional state, thereby impacting her cognitive function as described by Dr. Posthuma.

Impact of Injuries - Other Factors

- [44] Not surprisingly, given that she is now her seventies, Mrs. Mayervich has had to contend with physical problems other than those attributable to her motor vehicle accident. These are the inevitable indignities of aging, and have included bursitis in the hip, tendonitis in the shoulders, pain in the shoulders, low back pain, a fracture of the left wrist due to a fall in October of 2011, and a ligamentous strain to the right knee, possibly a torn meniscus, that occurred in April of 2012.
- [45] These various injuries and conditions would all have had an impact on Mrs. Mayervich's activities. In particular, I accept that her fractured wrist and probably the hip and knee problems would have interfered with her ability to play golf, even in the absence of her neck and back injuries. Their effect, however, would on the evidence have been temporary. There is no evidence that any of them has had any lasting impact. Accordingly, I find that their effect would have been of relatively short duration and not disabling. It is a matter to be taken into account but not of great consequence.

Impact of Injuries - The Future

- [46] On the basis of the expert evidence, I find that Mrs. Mayervich faces two possible scenarios. First, with the benefit of appropriate treatment programs, Mrs. Mayervich will experience real improvement in her level of function and her depression and cognitive symptoms will largely resolve, particularly with the continuation of medication. No one, however, has suggested that she will recover completely.
- [47] The flip side of this scenario, and part of it, is that without the benefit of appropriate treatment programs, Mrs. Mayervich is unlikely to recover at all and may indeed get worse.
- [48] As noted above, I accept this scenario as probable and I accordingly accept Dr. Posthuma's recommendations concerning the appropriate treatment programs.
- [49] The second scenario is that even with appropriate treatment, recovery will at best be limited. As stated, I do not consider this second scenario to be probable, but I find it to be a real possibility that must be taken into account.

Mitigation

- [50] Relying on Dr. Dawson's opinion, based on his examination in December of 2008, that with appropriate treatment Mrs. Mayervich would show ongoing progressive recovery, the defendants argue that her failure to commence the SNRI medication that he recommended at the time was a failure to mitigate. As noted, she did not start anti-depressant medication until Dr. Shih prescribed an SSRI some seven-and-a-half months later.
- [51] The onus, of course, is on the defendants to establish a failure to mitigate, by which is meant a failure on the part of the plaintiff to take reasonable steps to mitigate her losses. That onus has not been met in this case. First, Dr. Dawson was not directly treating Mrs. Mayervich. He was a specialist to whom her family doctor had referred her and who, accordingly, made such recommendations as he considered appropriate back to the family physician. It would then have been incumbent upon Dr. Shih to treat Mrs. Mayervich in accordance with those recommendations or not. There is no evidence that Dr. Shih recommended to Mrs. Mayervich or prescribed for her anti-depressant medication at that time. Had he done so, and had she refused to take it, then the defendants would have a point, but that is not what the evidence shows. Indeed when he did prescribe an anti-depressant, it was not what Dr. Dawson recommended.
- [52] Second, there is no evidence concerning what difference it would have made to Mrs. Mayervich's outcome had anti-depressant medication been commenced several months earlier than it was.
- [53] Accordingly, the plea of failure to mitigate fails.

Assessment

[54] At issue are non-pecuniary damages, future care costs, and special damages.

1. Non-Pecuniary Damages

[55] Plaintiff's counsel relies on a number of cases considering chronic pain and depression situations to support his submission that an appropriate non-pecuniary award would be \$100,000. These cases include *Mohan v. Khan*, 2012 BCSC 436 (\$100,000), *Roberts v. Scribner*, 2009 BCSC 1761 (\$95,000), *Rizzolo v. Brett*, 2010 BCCA 398, 322 D.L.R. (4th) 633 (\$125,000); *Poirier v. Aubrey*, 2010 BCCA 266, 4 B.C.L.R. (5th) 173 (\$100,000), *Bergman v. Standen*, 2010 BCSC 1692 (\$75,000), and *Prince-Wright v. Copeman*, 2005 BCSC 1306 (\$100,000).

[56] Counsel for the defendants relied on three cases to support on his submission that the appropriate range in this case is \$30,000 to \$45,000: *Hsu v. Williams*, 2011 BCSC 1412 (\$30,000), *Amberiadis and Kiza v. Groves*, 2005 BCSC 1270 (\$40,000 and \$45,000), and *Hadland v. Thompson*, 2002 BCSC 380 (\$45,000).

[57] In my mind, the significant features of this case are these:

- As a result of the accident, Mrs. Mayervich suffered a constellation of injuries, the most significant of which has been myofascial injury in the neck and back resulting in a chronic pain condition accompanied by a major depressive order and cognitive difficulties.
- Included the constellation were a deviated septum (broken nose), and injuries to the arms and hands that culminated in bilateral carpal tunnel syndrome. Both of these conditions required surgical intervention and both have resolved. There was additional discomfort from injuries to the abdomen and chest.
- These injuries have had a significant impact on Mrs. Mayervich's quality of life. The myofascial injuries in particular continue to interfere with her activities of daily living and recreation and have impaired her ability to interact with her husband, her daughters, and her grandchildren.
- Mrs. Mayervich has already experienced nearly 5½ years of physical pain, depression, emotional upheaval and cognitive difficulty as a result of the accident.
- It is likely Mrs. Mayervich will experience real improvement if she undertakes a program such as that recommended by Dr. Posthuma; full recovery however is unlikely, and a real possibility remains that she will experience no significant recovery.

[58] In my view, these features bring Mrs. Mayervich's situation closer to the cases cited by counsel by the plaintiff than those cited by counsel for the defendants. The award of \$125,000 approved by the Court of Appeal in the *Rizzolo* case was to a considerably younger man who had suffered debilitating chronic pain affecting all aspects of his life but who had been able to return to his pre-accident employment. In *Hsu*, on the other hand, the most recent of the three cases relied on by the defence where the award was \$30,000, the plaintiff suffered from chronic neck and back myofascial disorder but this was an aggravation of pre-existing soft tissue conditions from a previous accident that had already given rise to chronic pain.

[59] Each case must of course be decided upon its own facts. Considering all of the facts discussed above, I assess Mrs. Mayervich's non-pecuniary damages at \$85,000.

2. Special Damages

[60] This claim consists of \$934.24 for prescriptions, \$820.83 in mileage costs for attending medical appointments, and \$1,611.90 for the cost of Advil. These total \$3,366.97.

[61] The defendants suggest that the amount allowed for Advil should be reduced to take into account the lower cost of generic or in-house brands of ibuprofen. There is, however, no evidence of the costs of these brands nor is there any evidence to suggest that it is unreasonable for Mrs. Mayervich to take Advil instead. I make no reduction on that account. I do, however, make a reduction in the mileage expenses to take into account other errands run by Mrs. Mayervich at the same time as some of the trips in question. I allow special damages at \$3,000. This award must be reduced to credit advances totalling \$1,065, leaving a claim of \$1,935.

3. Future Care Costs

[62] These consist of the ongoing costs of Advil and Cipralelex as well as the cost of the treatment program recommended by Dr. Posthuma.

[63] With respect to the treatment program, the cost of two different programs are in evidence, one by Lifemark at a total cost of \$14,896, and one by Orion at a total cost of \$16,116.80. Dr. Posthuma indicated that in his view both are suitable, but he would recommend the Orion program as it is fixed in duration and provides follow-up. He considered both to be important considerations in designing treatment programs; I agree.

[64] I also allow the ongoing cost of Advil and Cipralelex for five further years at an annual cost of \$1,335. In calculating this I rely on the receipt that indicates a two-month supply of Cipralelex costs \$168.77. Understandably, given the principles of proportionality, neither side tendered expert actuarial evidence concerning present values. I therefore rely on Appendix E to CivJI, of which I am an author, to obtain a present value of \$6,027.66.

Conclusion

[65] I award Mrs. Mayervich damages as follows:

Non-pecuniary Damages

\$85,000.00

Special Damages

1,935.00

Future Care Costs

22,144.46

TOTAL:

\$109,079.46

[66] The parties may make submissions as to costs.

[SUBMISSIONS BY COUNSEL RE COSTS]

[67] THE COURT: Thank you. You may have time to make submissions, Mr. Armitage, but let me say just this, that Rule 9-1 provides a number of factors that the Court must take into account before making an award. Rule 9-1(5)(b) allows the award of double costs after the date of delivery of an offer to settle, but Rule 9-1(6) sets forth four matters which the Court must take into account, so in that respect it is not a slam dunk, just because an offer was made that happens to be below the amount awarded. The Court must take into account whether it was one that ought reasonably to have been accepted, the relation between the terms of settlement offered and the final judgment, the relative financial circumstances of the parties, and any other factor the Court considers appropriate.

[68] Just in case it may assist you in formulating your position, it seems to me that given that there were two significant experts, Dr. Posthuma and Dr. Ancill, who were not required for cross-examination, and given that your own expert had a pessimistic opinion concerning the back and neck injuries, it is arguable that the plaintiff's offer was one that ought reasonably to have been accepted, which seems to me the only concern one would have a close look at in the circumstances of this case. But those are my preliminary views; I give them because it might assist you in reaching an agreement in this matter.

[69] If you are unable to reach an agreement after you have had an opportunity to look into it, you are welcome to make written submissions to me. All right? So that will be all for today. Thank you.

"GRAUER, J."

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