
CANADA / JUDGMENT

McLeod v. Picard

2020 BCSC 451

COURT

Supreme Court of British Columbia

DECIDED

27 March 2020

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2020 BCSC 451 McLeod v. Picard

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

McLeod v. Picard,

2020 BCSC 451

Date: 20200327

Docket: M54618

Registry: Vernon

Between:

Rebekah McLeod

Plaintiff

And

Caroline Picard

Defendant

Corrected Judgment: The text of the judgment was corrected on the face page and at paragraphs [16] and [77] on September 11, 2020.

Before: The Honourable Mr. Justice Betton

Reasons for Judgment

Counsel for the Plaintiff:

M. Yawney

A. Jaquish

Counsel for the Defendant:

C. Lencovic

Place and Date of Trial/Hearing:

Vernon, B.C.

December 16, 18 - 20, 2019

Place and Date of Judgment:

Vernon, B.C.

March 27, 2020

Introduction

- [1] The plaintiff seeks an assessment of damages for injuries received in a motor vehicle collision that occurred on August 23, 2016 (the "MVC"). The defendant admits liability for the MVC.

Background

- [2] The plaintiff was born in September 1988. She was 27 at the date of the MVC. The MVC occurred as the plaintiff was turning left off Highway 6 in the Roseberry area of the Kootenays, in the BC Interior. The defendant tried to overtake the plaintiff on the left and struck the left front corner of the plaintiff's vehicle. At the time, the plaintiff and her partner Matthew Kieller were in the area to camp and canoe. They were living in Revelstoke. After the MVC, they decided to return home rather than continue with their camping.
- [3] The plaintiff received injuries that caused pain in her neck, shoulders and back as well as headaches. Her back pain is the lasting complaint. The plaintiff saw a general practitioner the next day in Revelstoke. She has followed up with general practitioners since. She has undertaken a course of physiotherapy that began approximately one week after the MVC. That evolved so that by the fall of 2019 she was attending approximately once per month. The plaintiff has also had chiropractic and massage treatment as well as injection therapy with a pain specialist, Dr. Etheridge.
- [4] The plaintiff has a long-standing interest in outdoor activities. That interest led to her decision to live in Revelstoke, her choice of post-secondary education and her employment objectives. She obtained a bachelor of arts in environmental studies. She has had employment with provincial and now federal parks' operations.

- [5] She first began working with Parks Canada in 2013 when she obtained seasonal temporary work. The next year she was able to obtain a seasonal but permanent .42 FTE position and has continued since then in roughly the same role. She is a visitor attendant. Her specific work assignments are somewhat variable and are carried out in both Revelstoke and Glacier National Parks. Her employment season runs roughly from May to October each year. The exact start and end dates vary but the total time worked is fixed at the .42 FTE equivalent.
- [6] Prior to the MVC, she worked the off-seasons, that is to say the winter months, in the hospitality industry. In the fall of 2016, after the MVC, she undertook training as an education assistant. She graduated from that program in June 2017. Since then, she has worked in an on-call capacity as an education assistant with School District 19 in Revelstoke during the school year. With gains in seniority, opportunities for permanent positions are likely to arise. The timing of any such opportunity is very much unknown as there are a limited number of permanent positions in School District 19.
- [7] After the MVC, the plaintiff missed some time from her work with Parks Canada. The total time away in 2016 was approximately 17 days. She then remained at work to the end of her work season.
- [8] The plaintiff's supervisor throughout her employment with Parks Canada has been Shannon Bollefer. Ms. Bollefer describes the plaintiff as a very good employee both before and after the MVC. After the MVC, she has made some accommodations for the plaintiff by avoiding assigning the plaintiff some of the most physical tasks within her job description.
- [9] At the time of the MVC, the plaintiff and Mr. Kieller were living together. They generally shared household tasks and responsibilities. Mr. Kieller has a similar education background and interest in the outdoors. In the fall of 2016, after the MVC, he was scheduled to and did proceed to complete his teaching qualifications. He is now employed as a teacher in School District 19.
- [10] The plaintiff and Mr. Kieller had a child in August 2019 and the plaintiff was on maternity leave at the time of trial. Given the timing of the birth of their child and her maternity leave, she intends to return to work with Parks Canada in the spring of 2021.
- [11] The plaintiff's complaints with neck and shoulder pain have largely resolved but the low back pain persists.
- [12] In support of her claim, the plaintiff obtained two expert opinions.
- [13] The first is from Dr. Etheridge. He is a general practitioner with additional training as a "GP/ Anaesthetist with interventional pain management training". He prepared a report dated February 20, 2018, in the capacity of an independent medical examiner.

[14] The second report is from an occupational therapist, Nadia Hudon. She assessed the plaintiff on June 24, 2019, but did not complete a functional capacity evaluation. As the assessment was carried out shortly before the birth of the plaintiff's daughter, Ms. Hudon considered full capacity testing inappropriate.

Issues and positions of the parties

[15] There is no question that the plaintiff was injured in the MVC or that she continues to have symptoms. She has limited her recreational activities and/or the intensity of her participation in those activities, but the parties disagree on how the evidence in that regard should be interpreted and how it translates into the assessment of appropriate monetary awards.

[16] The plaintiff and defendant disagree on the extent to which the plaintiff's ongoing symptoms have, and more significantly will impact both her personal and employment paths. Ultimately, that is translated into positions on the damage claim being advanced. The chart below contains the parties' positions regarding the various heads of damage at issue:

Plaintiff's position

Defendant's position

Non-pecuniary:

\$110,000.00

\$50,000.00

to \$60,000.00

Past Wage Loss:

20,000.00

6,861.76

Loss of Future Earning Capacity:

350,000.00

60,000.00

Cost of Future Care:

328,539.00

4,056.16

Loss of Housekeeping Capacity:

20,000.00

0.00

Special Damages:

7,376.20

7,376.20

Total:

\$835,915.20

\$128,294.12 - \$138,294.12

- [17] The plaintiff argues that the injuries are particularly damaging to her given her interests, age, and that she is a new parent. They say she will live with functionally-limiting chronic pain for the rest of her life which will have a negative effect on her long-term career and lead to income loss.
- [18] These limits were specifically assessed by Ms. Hudon based on the plaintiff's subjective reporting. Based on those and a review of Dr. Etheridge's report, she provided costs for various treatments, medications and services. Those were in turn valued in the plaintiff's economist's report to have a range of \$184,176 to \$382,275.
- [19] Their arguments regarding loss of earning capacity are founded on the assertion that her career trajectory has been limited and her future earnings will be reduced. More specifically, the plaintiff argues that it is more likely than not, that she will need to reduce her full-time hours to three-quarter time or part-time to manage her injuries caused by the MVC.
- [20] The defendant argues that there is no clear prognosis for the plaintiff's future in evidence and the availability of additional treatments and education may generate reduced symptoms and/or increased coping and pain management skills.
- [21] The defendant says the report of Ms. Hudon must be viewed cautiously. The absence of objective functional testing together with identified errors in her report and the absence of any clear prognosis all contribute to her opinions being entitled to limited weight.
- [22] The defendant says that the fact of the plaintiff continuing to work and receive positive reviews supports only a modest loss of earning capacity award.

Analysis

- [23] Prior to the MVC the plaintiff was a healthy, active, young woman. Given her priorities and interests, she had positioned herself ideally. Living in Revelstoke allowed her to pursue the employment and recreation that she had always wanted. She was in a healthy relationship.

- [24] There is no question the injuries she received have had an impact on all facets of her life. Assessing what the future holds is always a difficult task and this case presents its own unique challenges. One significant challenge has been the fact of her pregnancy and then her responsibilities and the demands of being a new parent. Those have impacted the physical and emotional demands on her at a critical juncture relative to the assessment of claims. In addition, she has not been able to pursue some treatment. It also prevented a full objective functional capacity evaluation. The result is an increased level of uncertainty.
- [25] The medical prognosis contained in the report of Dr. Etheridge is by no means definitive. He diagnosed mechanical low back pain and myofascial pain with trigger points in her right paraspinal and gluteal muscles. At the time of his report, he did not feel the plaintiff had reached maximum medical improvement and would benefit from further therapies including injection therapy. As a result, he deferred any long-term prognosis pending those treatments. His recommendations for treatment and care included pain education, active rehabilitation and injections.
- [26] Since that report, Dr. Etheridge did see the plaintiff on three occasions for injection therapy. The last was in November 2018. The plaintiff did not pursue further injection therapies due to her pregnancy and as of the date of trial had not returned for follow-up treatment. She did have relief from them for, as she described it, "a decent amount of time" but indicated the symptoms returned after a few months.
- [27] In cross-examination, Dr. Etheridge offered that, given their duration, the plaintiff's baseline symptoms would remain steady with periodic improvement and aggravation. He stated that, in the absence of change even by the time of his last treatment in the fall of 2018, he would not expect her pain to really change a great deal in the future. His evidence did not make clear how the period of time between his February 2018 report and his last visit with her in November 2018 altered his ability to make a prognosis. He did not specifically say it was the passage of time alone nor did he explain why treatments at the time of trial would not change her baseline where they had the prospect of doing so at the time of his report. He did not know her status at the time of trial.
- [28] The plaintiff testified that there has been no meaningful change in her symptoms since her last injections. Clearly the plaintiff's pregnancy and then the demands of being a new mother have constrained her ability to focus on recovery and rehabilitation. She has not engaged in active rehabilitation, continued with the injections or undergone pain education.
- [29] In the result, I must view Dr. Etheridge's comments in cross-examination to be the most pessimistic outcome. Based on the whole of the evidence, I am not prepared to conclude it is the only outcome. There is nothing to support a conclusion that she will fully recover but there is at least a prospect of some improvement in her baseline.

[30] Whether or not her baseline does improve, there remains the question of how successful the recommended interventions might be in assisting the plaintiff to cope with her symptoms and/or maximize her periods of relief. Dr. Etheridge did not offer any specific opinion on that and his report suggests he would defer such conclusions pending the knowledge of the outcome of the interventions. I do not have that luxury.

Non-Pecuniary Damages

[31] The process of assessing non-pecuniary damages is unique to every individual. The decision in *Stapley v. Hejslet*, 2006 BCCA 34, is the most oft-cited case for its non-exhaustive list of relevant considerations for carrying out those assessments:

- (a) age of the plaintiff;
- (b) nature of the injury;
- (c) severity and duration of pain;
- (d) disability;
- (e) emotional suffering;
- (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. . .

[32] These serve to provide consistent foundation for the analysis of the infinitely variable factual circumstances.

[33] Ms. McLeod's engagement with the outdoors really defines who she is. It is how she was raised. It has influenced the direction of every aspect of her life including her residence, her partner, her education, her career, her recreation and her social engagement. Her injuries have taken a toll on all of these.

[34] She is a stoic individual and her claim should not be reduced as a consequence of that. At the same time, I am satisfied that she will pursue the recommendations of Dr. Etheridge. She is likely to maximize the benefit of education. She has experienced gains with the injections and the evolution of her parenting will allow her to pursue those. Her interest in activity and her motivation are well suited to a focussed supervised rehabilitation program. All of this suggests a meaningful prospect of increased ability to enjoy the things that give her satisfaction.

- [35] I deal with costs of care below but take into account that my award there will also serve to mitigate the ongoing impact of her injuries.
- [36] In my view, it is appropriate to address the claim for loss of housekeeping capacity here and not as a separate head of damage as argued by the plaintiff. As discussed in *Kim v. Lin*, 2018 BCCA 77, proceeding in this manner is an exercise of discretion focussed on whether a plaintiff is unable to perform such tasks or whether she does so with increased pain or at a slower pace. The evidence is clear here that, in respect of housekeeping tasks, Ms. McLeod is in the latter category. Mr. Kieller has taken on a greater role in the outdoor and heavier tasks. This is also addressed, at least in part, by the awards for future care set out below.
- [37] Counsel have referred to a number of authorities, all of which are useful for their guidance. I will refer to only two of them.
- [38] The plaintiff provided *Klingler v. Lau*, 2019 BCSC 1776. The 30-year-old plaintiff was very active. She suffered with chronic pain after the MVC and that slowed her work pace as an occupational therapist and limited the frequency and intensity of her recreational pursuits. The court awarded \$95,000 in non-pecuniary damages.
- [39] The defence referenced the decision in *Poulin v. Armstrong*, 2019 BCSC 926. There the plaintiff was injured when she was 14, but the matter came before the court when she was 20. She had been a high achiever both academically and physically active. The court found that, "While the plaintiff has carried on with most of her recreational activities . . . she is no longer able to perform optimally across the spectrum of physical activities that make her life satisfying and enjoyable." She was awarded \$65,000 in non-pecuniary damages.
- [40] My review of *Poulin* leaves me with the impression that the impact of the injuries on the plaintiff there was less than for Ms. McLeod. I consider an appropriate award here to be \$90,000.

Past loss of Income or opportunity

- [41] The parties agree (within \$100) as to the plaintiff's gross loss from her employment with Parks Canada. I fix that at the defendant's calculation of \$3,168.00.
- [42] The parties also agree that the plaintiff is entitled to recover her lost income from the health food store she was scheduled to work at during the winter following the MVC. The only discrepancy is in the selection of the hourly rate. The plaintiff testified her rate would vary between \$13 and \$15 per hour. The plaintiff suggests using \$14/hr and the defendant argues I should use \$13/hr. I agree that \$14/hr is appropriate. The gross loss is therefore \$5,600.

- [43] In respect of her work with the School District, the plaintiff argues there is both a past loss of income and a past loss of opportunity. The distinction between proof of past actual events and past hypothetical events was discussed in *Gao v. Dietrich*, 2018 BCCA 372. If the plaintiff establishes a real and substantial possibility of a hypothetical event, then the court must weigh that hypothetical event according to its relative likelihood. Past actual events must be proved on a balance of probabilities, and once proved they are treated as certainties.
- [44] The loss of income is based on the plaintiff's evidence that she turned down ten to fifteen shifts when she was called. She has no records of these but it is an estimate based on her recollection. The defendant says that in the absence of affirmative evidence from either the plaintiff or the School District, I should reject the claim.
- [45] I accept the plaintiff's evidence but given her uncertainty, adopt the lower end of the range. On that basis, I award the equivalent of ten shifts at the hourly rate of \$19.57 for a gross loss of \$3,131.20.
- [46] The defence has suggested a tax rate of 18% should be applied to past loss claims. Unless the plaintiff wishes to argue the issue, I accept that as appropriate. The result is that the total past income loss claim of \$11,899.20 (3,168 + 5,600 + 3,131.20) would result in a net award of \$9,757.34.
- [47] The plaintiff's argument regarding a past loss of opportunity is stated as follows:
- She has been deprived of putting forth her full ability to jump start this career. Building her reputation, skills, and relationships within the School District as an EA has been made more difficult because of the Collision and her injuries. The plaintiff submits this loss of capacity is compensable
- [48] While the logic of the proposition is understandable, there is no evidence upon which to base its applicability to the plaintiff's circumstances. No evidence from any representative of the School District was called to explain how turning down ten shifts may impact a new on-call education assistant's future prospects. I have no evidence that her job performance while at work was negatively affected. I simply do not have sufficient evidence to support this aspect of the claim.

Loss of Earning Capacity

- [49] The applicable legal principles for assessing this claim are well established. The task is to determine if there is a real and substantial possibility of a loss of earnings and, if so, to determine the loss by assessing the likelihood of it (*Grewal v. Naumann*, 2017 BCCA 158 paras. 48 and 49; *Tsalamandris v. McLeod*, 2012 BCCA 239 at para. 31).
- [50] I have accepted that the plaintiff will have a level of chronic pain in her back indefinitely. The plaintiff argues that that pain will require part-time work. Her position is summarized in this extract from her written argument:

In our submission, the future possibilities for Ms. McLeod's working life are now filled with negative contingencies. This is not a case with significant positive contingencies in her favour. Given her age, the extent of her ongoing symptoms, the permanent nature of her chronic pain, the negative contingencies at play in this case, and the applicable legal principles, Ms. McLeod's loss is substantial. The plaintiff submits that Ms. McLeod's most likely future now involves her working part-time, with a loss of over \$15,000.00 per year going forward.

- [50] It is submitted that in assessing Ms. McLeod's overall reduction in earning capacity, keeping in mind that this head of damage is to be assessed not calculated, the plaintiff submits that an award of \$350,000.00 is fair and reasonable for the impairment of her future earning capacity . She is a relatively young person with a long working life ahead of her.
- [51] Despite her pain, the plaintiff has, to date, demonstrated an ability to continue her employment with Parks Canada. She has enhanced her employability by qualifying as an education assistant and has begun her career in that field. Her highest earnings year was 2018 with \$33,529 in T4 income and \$8,333 from employment insurance. Her employment income was \$23,549 from Parks Canada and \$9,979 from the School District. In the year prior to the MVC, she earned \$27,380 with Parks Canada and approximately \$4,000 from her winter employment.
- [52] It is very clear that the plaintiff is doing exactly the type of work that she wants to do. I have no evidence of any consideration by her of a change in employment. She is clearly well suited to her work with Parks Canada. There is no reason to expect she will not be a capable education assistant. Her chosen fields of employment generate modest incomes.
- [53] I agree with the defendant that there is no evidence the plaintiff's condition will decline. With the benefits of the care provided for in this decision, both in treatment and services, her overall capacity to remain fully employed will be maximized. All of this serves to moderate the prospect of her reducing her work to part-time.
- [54] The plaintiff's economist's report provides a multiplier of 26.064 for each \$1,000 of income lost to age 65. The plaintiff's proposed valuation of her loss of earnings capacity of \$350,000 represents approximately \$13,500 annually.
- [55] Given all of the evidence, it is my view that the plaintiff's earnings capacity has been impaired but not to the degree suggested by the plaintiff. The appropriate valuation is \$130,000.

Costs of Future Care

- [56] The defendant argues that Ms. Hudon's report is flawed in a number of ways. I group them into two categories.
- [57] The first is in the source information relied upon. They stress that her report did not incorporate any objective assessment of the plaintiff's capacities or a home visit. In addition, Ms. Hudon's report contains some calculation and reporting errors.

- [58] The second is in respect of the various care recommendations made. The defendant argues that Ms. Hudon goes beyond anything recommended by Dr. Etheridge and proposes care items for which there is no medical justification.
- [59] In dealing with the former, it is my conclusion that the plaintiff's self-report to Ms. Hudon is consistent with the evidence at trial. I found the plaintiff to be a credible and reliable witness. As a result, I do not find it necessary to address the specific issues raised by the defendant which are directed at challenging the plaintiff's capacity. I must, however, factor in my conclusions regarding the prospects for recovery and/or improved symptom management. Understandably, this was not done by Ms. Hudon.
- [60] I turn then to the specific recommendations.
- [61] Pain education is appropriate. Given Ms. McLeod's residence in Revelstoke, options are limited. Multidisciplinary clinics are not available in her area and would have associated travel and accommodation costs. Ms. Hudon identified a program where costs would total approximately \$24,000. There is a local "Chronic Pain Self-Management Program" through UVic and the Ministry of Health with no associated cost. Ms. Hudon recommended the former. The defendant argues the latter is more realistic and more likely to be used by the plaintiff.
- [62] While I agree any pain education would be valuable, the plaintiff is a bright and motivated person who is likely to benefit from an intensive program. Giving her the best opportunity to navigate her persistent pain will maximize her enjoyment of life and her earning capacity. From the economist report, the specific award is \$22,820.
- [63] Dr. Etheridge specifically recommended a program of three to four sessions through a kinesiologist with follow-ups every one to two years to adjust the program and ensure Ms. McLeod is doing exercises correctly. The recommendations of Ms. Hudon go well beyond that. She suggests 20 - 24 sessions with two to three annual sessions thereafter. In my view, an initial allowance for four sessions followed by two sessions annually for four years and then three sessions every other year is appropriate. The economist's report provides the tools to calculate this but, to avoid error, I will leave this amount to be calculated by counsel for inclusion in the final order. They have liberty to apply if they cannot agree.
- [64] Ms. Hudon also recommended an allowance for lifetime gym membership. There is no indication that a home based exercise program is not sufficient. Dr. Etheridge acknowledged that Ms. McLeod was doing home based exercise and voiced no concern about the adequacy of that. I make no award for this.
- [65] Ms. Hudon provided costs for injections. Dr. Etheridge specifically recommends these. Ms. McLeod has benefited from them and these costs are appropriate. They are covered by BC Medical so no award is required.

- [66] Dr. Etheridge also suggested acupuncture, IMS or trigger point injections. Ms. Hudon did not specifically cost those but did include six to twelve physiotherapy treatments annually. Some physiotherapists provide some of the recommended care but I have no specific information as to those costs or how frequently the recommended treatment would be undertaken. In the circumstances, allowing for six treatments annually is appropriate. Again, I will leave the present value calculation of this for counsel.
- [67] Ms. Hudon goes on to make other recommendations for treatment not specifically made by Dr. Etheridge. One item is massage therapy. Ms. Hudon acknowledges a diminished need if Ms. McLeod attends a pain clinic but still suggests ten to twelve sessions annually. This is not a form of treatment that is justified.
- [68] An ergonomic assessment of Ms. McLeod's workplaces and vehicle is again something that can serve to minimize symptom aggravation. While the defence argues that five hours each is excessive, it is without any specific basis. Ms. Hudon knows what is involved and I allow this item. Again, based on the economist report, I fix this amount at \$1,485.
- [69] Sleep restoration education and support through an occupational therapist is not, in my view, justified. The pain clinic is, as I understand the evidence, to be a widely focussed intensive program.
- [70] Ms. Hudon recommends occupational therapist guidance regarding child care issues. I agree this is reasonable but limit the amount to the bottom end of the five to ten hours suggested at \$495.
- [71] Associated with the occupational therapist services recommended, are travel expenses. There are services available in Revelstoke and those should be used unless particular qualifications or services from outside the area are required. I admit to some confusion as to what may be required for travel to facilitate the services I have allowed. As a result, I invite counsel to work to settle that component with liberty to appear before me if this proves unsuccessful.
- [72] Ms. Hudon goes on to deal with various recommendations for services.
- [73] I have addressed traditional housekeeping in my comments on non-pecuniary damages. There will be no allowance for those under this head of damage.
- [74] In respect of home maintenance, Ms. McLeod had always shared these duties with Mr. Kieller. While he has picked up her slack, it is reasonable to allow for a component of these to be done by outside services in conjunction with other yard maintenance and snow removal. Ms. Hudon has separated them and given ranges. They are generous. Given the benefits of ongoing treatment and care and the variable ranges, I adopt the low end of her ranges. Again I direct that counsel attempt these calculations but give them liberty to appear failing a consensus.

[75] Ms. Hudon makes allowances for medications but there are no existing prescriptions and Dr. Etheridge does not make any such recommendations. I make no such award.

Special Damages

[76] These have been agreed at \$7,376.20.

Conclusion

[77] Ultimately the goal of the damage award I make is to, as best as money can accomplish it, put Ms. McLeod in the same position that she would have been but for the MVC. The awards made are set out in the table below:

Plaintiff's position

Defendant's position

Award

Non-pecuniary:

\$110,000.00

\$50,000.00

to 60,000.00

\$90,000.00

Past Wage Loss:

20,000.00

6,861.76

9,757.34

Loss of Future Earning Capacity:

350,000.00

60,000.00

130,000.00

Cost of Future Care:

328,539.00

4,056.16

Pain Ed.: 22,820.00

Kinesiology: TBD*

Acu./IMS: TBD*

Ergo Assmt.: 1,485.00

OT: 495.00

OT Travel: TBD*

Home Maint.: TBD*

Loss of Housekeeping Capacity:

20,000.00

0.00

0.00

Special Damages:

7,376.20

7,376.20

7,376.20

Total:

\$835,915.20

\$128,294.12

to \$138,294.12

\$261,933.54,

Plus Costs of Future Care as calculated

*Present values to be calculated by counsel based on these reasons.

"Betton J."

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