
CANADA / JUDGMENT

McMillan v. Lal

2020 BCSC 847

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 847 McMillan v. Lal

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

McMillan v. Lal,

2020 BCSC 847

Date: 20200608

Docket: M192786

Registry: New Westminster

Between:

Petria Catherina McMillan

Plaintiff

And

Shori Lal

Defendant

Correction notice: The front page of the judgment was corrected on June 18, 2020

Before: The Honourable Mr. Justice Brundrett

Reasons for Judgment

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Place and Date of Trial/Hearing:

New Westminster, B.C.

January 13,14,16,17, 20

and 21, 2020

Place and Date of Judgment:

New Westminster, B.C.

June 8, 2020

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Introduction

- [1] These reasons address the appropriate quantum of damages in a personal injury action. The plaintiff was involved in a motor vehicle collision on November 18, 2016. She was a passenger in the front seat of a vehicle that was hit by a van driven by the defendant Shori Lal that was reversing out of its parking spot in Abbotsford. Liability is admitted. The extent of the plaintiff's resulting injuries is strongly denied.
- [2] The plaintiff was 70 years old at the time of her accident. She alleged that her accident-related injuries included three fractured ribs and an injured left forearm. She argued that her injuries led to trouble sleeping, emotional disruption, aggravation of her breathing problems, and lost income. She claims non-pecuniary damages, past loss of income and diminished future earning capacity, past and future care, and loss of homemaking capacity. The plaintiff called lay witnesses to corroborate her evidence of injuries and loss of capacity but did not tender expert evidence in support of her claims. The defendant called a respirologist who acknowledged that the accident resulted in soft tissue pain, discomfort, rib fractures, and exacerbation of the plaintiff's underlying lung disease, but the defendant argued that these effects were merely of short-term duration.
- [3] The parties are far apart in their positions as to appropriate awards under the usual heads of damages. The plaintiff seeks a total of \$145,000 for the sum of damage awards. The defendant's position is that only a claim of \$25,000 to \$35,000 for non-pecuniary damages has been made out.
- [4] The defendant accepts that the plaintiff was injured to a modest extent in the 2016 accident but is otherwise critical of the plaintiff's case. He asks me to draw an adverse inference from the plaintiff's decision not to call the plaintiff's long-standing family physician as a witness. He suggests that the cause of some of the plaintiff's complaints is not due to her motor vehicle accident and that her pre-accident health was poor. The defendant submits other than a modest award for non-pecuniary damages, no other award for damages is warranted.

Background

- [5] The plaintiff was born on October 14, 1946, in Yorkshire, England. She is the youngest of five siblings. She worked in the United Kingdom from ages 16 to 22, then immigrated to Canada in 1968 with her husband and four children. She worked in Toronto as a health care aid and dental assistant. In 1993, she separated from her husband. The plaintiff was awarded custody of her granddaughter, Alika Kinley, after the plaintiff's daughter ran into difficulties in life. The plaintiff then moved to B.C. with her daughter and granddaughter, who was then six months old. The family settled in Abbotsford.

- [6] In 2000, the plaintiff was awarded custody of her daughter's second child, Ethan Kinley. The plaintiff provided for both grandchildren throughout their lives, and successfully home-schooled both children. The plaintiff did casual work cleaning houses, worked in daycare, and worked at a car wash. The family also received some child support.
- [7] At present, both grandchildren are employed and still live with the plaintiff. Both testified before me and impressed me as responsible, caring, and hard-working young adults. Their success in life is no doubt due in large measure to the plaintiff's dedication to raising them. All three now cooperatively contribute to the household's financial expenses, with the plaintiff's financial contribution mostly comprising her old age pension and CPP.

Assessment of the Evidence

Credibility of the Plaintiff's Evidence

- [8] In assessing the plaintiff's credibility, I have had regard to the well-known factors summarized by Justice Dillon in *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, *aff'd* 2012 BCCA 296.
- [9] I found the plaintiff to be generally credible though her evidence has weaknesses in some areas. She was logical and direct in her answers. She admitted flaws in her evidence on some points where appropriate. She did not exaggerate her injuries or embellish her evidence, though she had opportunities to do so. I found the plaintiff argumentative at times in cross-examination, but I do not find that she was being deliberately deceptive. There were also some inconsistencies between her evidence at trial and her discovery evidence, and she appeared to have memory problems on certain points. I will take all those factors into account in assessing her evidence and making factual findings.
- [10] The plaintiff was cross-examined at length about the date she quit smoking. Despite some contrary indicators, her evidence that she quit smoking in October of 2013 was corroborated by other witnesses whose evidence I accept. I found on all the evidence that she was credible on this issue. There are additional issues related to the causation of her injuries that I deal with below.

Credibility of the Other Witnesses

- [11] Generally, I accept the credibility of the collateral witnesses including the following: Sharon Parker, the owner of the National Training Centre where the plaintiff did cleaning work; the plaintiff's sister, Pamela Strong; the plaintiff's grandson, Mr. Kinley; the plaintiff's granddaughter, Ms. Kinley; and Ms. Kinley's friend, Ashlyn Hill, for whom the plaintiff babysat. While I find that the plaintiff's witnesses were truthful, I would be cautious with some of these witnesses as all attempted to be helpful to the plaintiff's case, and some had memory issues that affect the reliability of their evidence, particularly with respect to time and dates.

- [12] I also largely accept the evidence from the defendant's respirologist, Dr. Tharwat Fera, as credible. Dr. Fera has considerable experience in chronic obstructive lung disease. He appeared to be a well-intentioned expert intending to be helpful to the court. There are issues with assumptions behind some of his opinions which impact the reliability of some of his conclusions. I deal with these issues with more specificity below.

Adverse Inference

- [13] The defendant submits that the facts of this case call out for an adverse inference from the failure to call Dr. Burns, the plaintiff's family physician, as a witness. He argues that Dr. Burns was a long-serving family physician who would have been capable of putting the alleged injuries from the accidents into the context of a complex medical history. The defendant also points to the fact that Dr. Burns was on the list and scheduled to testify on January 16, 2020. Following the cross-examination of the plaintiff, he was cancelled. No explanation for not calling Dr. Burns was provided. The defendant submits that the cancellation of Dr. Burns' appearance was inextricably linked to the plaintiff's testimony that he could undermine. The defendant submits that I should draw an adverse inference respecting the long-term effects of the accident.
- [14] The plaintiff submits that no adverse inference ought to be drawn here. She points out that Dr. Burns' notes were disclosed prior to trial. Some of those notes are the subject of a document agreement between the parties that allowed for the filing of some of the medical records at trial. The plaintiff says the defendant had the option of asking for further disclosure, speaking with Dr. Burns, or calling the physician himself as a witness. In this regard, the plaintiff cites the decision in *Konnert v. Buonassisi*, 2019 BCSC 1648; and *Picco v. British Columbia (Attorney General)*, 2015 BCSC 1904.
- [15] In *Buksh v. Miles*, 2008 BCCA 318, the Court of Appeal explained the general principle as follows:
- [31] The general proposition long applied in British Columbia, stated by Mr. Justice Davey in *Barker v. McQuahe* (1964), 49 W.W.R. 685 (BCCA), is that an inference adverse to a litigant may be drawn if, without sufficient explanation, that litigant fails to call a witness who might be expected to give supporting evidence. Further, said Mr. Justice Davey at 689, a plaintiff seeking damages for personal injuries "ought to call all doctors who attended him in respect of any important aspect of the matters that are in dispute, or explain why he does not do so".
- [16] However, the court also moved away from the idea that an adverse inference will be invariably appropriate. The court explained as follows:
- [34] Taking the admonition of Mr. Justice Davey to the extreme in today's patchwork of medical services raises the likelihood of increased litigation costs attendant upon more medical reports from physicians or additional attendances of physicians at court, with little added to the trial process but time and expense, and nothing added to the knowledge of counsel. Perhaps the idea that an adverse inference may be sought, on the authority of *Barker*, for the

reason that every walk-in clinic physician was not called fits within the description of "punctilio" that is no longer to bind us, referred to by Mr. Justice Dickson in *R. v. Sault Ste. Marie*, [1978] 2 S.C.R. 1299, 3 C.R. (3d) 30, in a different context.

- [17] More recently, the Court in *Singh v. Reddy*, 2019 BCCA 79 explained the principles relevant to the drawing of an adverse inference as follows:

The Adverse Inference Principle

- [8] The principle is described by authors S.N. Lederman, A.W. Bryant and M.K. Fuerst in *The Law of Evidence in Canada* (2018, 5th ed.) as follows:

§6.471 In civil cases, an unfavorable inference can be drawn when, in the absence of an explanation, a party litigant does not testify, or fails to provide affidavit evidence on an application, or fails to call a witness who would have knowledge of the facts and would be assumed to be willing to assist that party. In the same vein, an adverse inference may be drawn against a party who does not call a material witness over whom he or she has exclusive control and does not explain it away. The inference should only be drawn in circumstances where the evidence of the person who was not called would have been superior to other similar evidence. The failure to call a material witness amounts to an implied admission that the evidence of the absent witness would be contrary to the party's case, or at least would not support it. [Emphasis added.]

In *Thomasson v. Moeller* 2016 BCCA 14, this court summarized the principle in similar terms:

An adverse inference may be drawn against a party, if without sufficient explanation, that party fails to call a witness who might be expected to provide important supporting evidence if their case was sound: *Jones v. Trudel*, 2000 BCCA 298 at para. 32. The inference is not to be drawn if the witness is equally available to both parties and unless a prima facie case is established: *Cranewood Financial v. Norisawa*, 2001 BCSC 1126 at para. 127; *Lambert v. Quinn* (1994), 110 D.L.R. (4th) 284 (Ont. C.A.) at 287. [At para. 35; emphasis added.]

(See also *Rohl v. British Columbia (Superintendent of Motor Vehicles)* 2018 BCCA 316 at paras. 1-5.)

- [9] As noted in *Rohl*, it is now generally accepted that the court is not required as a matter of law to draw an adverse inference where a party fails to call a witness. Thus in *Witnesses* (looseleaf), A.W. Mewett and P.J. Sankoff write:

A considerable number of cases now reinforce the view that there is no such thing as a "mandatory adverse inference" to be drawn where a party fails to call a witness. Rather, the question of whether to make such an inference seems to depend upon the specific circumstances, in particular whether:

- There is a legitimate explanation for the failure to call the witness;

- The witness is within the "exclusive control" of the party, and is not "equally available to both parties"; and
- The witness has material evidence to provide; and
- The witness is the only person or the best person who can provide the evidence.

Essentially, the decision to draw an adverse inference is discretionary and premised on the likelihood that the witness would have given harmful testimony to the party who failed to call him or her. In a case before a jury, where there are circumstances that support the drawing of such an inference, the trial judge should charge the jury that it is "appropriate for a jury to infer, although [jurors] are not obliged to do so, that the failure to call material evidence which was particularly and uniquely available to [a party] was an indication that such evidence would not have been favourable to [that party]. [At 2-23 to 2-24; emphasis added.]

[Underlined and italic emphasis in original.]

[18] In *Buksh* at para. 35, the Court of Appeal set out a number of factors to consider as to whether an adverse inference ought to be drawn:

whether, given the evidence before the court, given the explanations proffered for not calling the witness, given the nature of the evidence that could be provided by the witness, given the extent of disclosure of that physician's clinical notes, and given the circumstances of the trial (e.g., an initial agreement to introduce clinical records that work contrary to the inference, or incorporation of that witness's views or observations in the report of a witness called by the other side) a juror could reasonably draw the inference that the witness not called would have given evidence detrimental to the party's case.

(See also, *Andrews v. Mainster*, 2014 BCSC 541 at para. 176).

[19] In support of its arguments, the defendant cited examples of cases where the courts have drawn adverse inferences from the failure to call treatment providers: *Andrews*; *Mohamud v. Yu*, 2016 BCSC 1138; *Tayner v. Brard*, 2016 BCSC 1738; and *Chavez-Salinas v. Tower*, 2017 BCSC 2068. On the other hand, the courts have declined to draw an adverse inference in other cases: *Kallstrom v. Yip*, 2016 BCSC 829; *Thomasson v. Moeller*, 2016 BCCA 14; *McCully v. Moss*, 2019 BCSC 81; *Ranahan v. Ocegüera*, 2019 BCSC 228.

[20] Considering the factors outlined in *Buksh*, I decline to exercise my discretion to draw an adverse inference against the plaintiff in the present case for the failure to call her family physician. I recognize the defendant's submissions including the points that Dr. Burns was in the best position to testify as to the plaintiff's injuries, no explanation was offered for the failure to call the witness, and he was belatedly cancelled after the trial was underway.

[21] However, Dr. Burns was not scheduled to be an expert witness. Hence, the defendant could not have been under the impression that Dr. Burns would provide an opinion as to the permanency of the plaintiff's accident-related injuries or to comment on the plaintiff's pre-existing chronic obstructive pulmonary disease ("COPD") condition. The plaintiff had him

scheduled to testify as to facts within his personal knowledge, which would likely have been simply a recitation and expansion upon his notes, many of which are already in evidence pursuant to a document agreement between the parties. Those notes were canvassed during the cross-examination of the plaintiff and were touched upon indirectly through the evidence of Dr. Fera.

- [22] Further, in this case there is no other expert opinion evidence in the plaintiff's case to support the long-term chronicity of the plaintiff's injuries or to better attribute the cause of the plaintiff's breathing problems. Dr. Fera ascribed some effect of the accident upon the plaintiff's chronic obstructive lung disease, but his evidence did not support projection of the long-term effects of the plaintiff's injuries well into the future. The plaintiff's failure to call any medical evidence from Dr. Burns or another expert will already be at her peril on the evidence impacting causation and the assessment of non-pecuniary damages and future earning capacity. Beyond this, I have difficulty determining what adverse inferences ought to follow from the failure of the plaintiff to call her family physician.
- [23] Given the limited anticipated testimony of Dr. Burns, the fact that his medical records have been made available, and the nature of the plaintiff's case including its total absence of expert evidence, I decline to draw an adverse inference against the plaintiff for failing to call Dr. Burns as a witness.

Causation

- [24] In civil cases, the plaintiff proves on a balance of probabilities that the defendant's negligence caused or materially contributed to an injury. The defendant's negligence need not be the sole cause of the injury so long as it is part of the cause beyond the range of *de minimis*. However, causation need not be determined by scientific precision: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at paras. 13-17; *Fullowka v. Pinkerton's of Canada Ltd.*, 2010 SCC 5 at para. 93; *Farrant v. Laktin*, 2011 BCCA 336 at paras. 8-9.
- [25] The primary test for causation asks, but for the defendant's negligence, would the plaintiff have suffered the injury? The "but-for" test recognizes that compensation for negligent conduct should only be made where a substantial connection between the injury and the defendant's conduct is present: *Resurface Corp. v. Hanke*, 2007 SCC 7 at paras. 21-23; *Ediger v. Johnston*, 2013 SCC 18 at para. 28.
- [26] In special circumstances, the "but-for" test proves unworkable, and the law has applied a "material contribution" test: *Clements v. Clements*, 2012 SCC 32 at para. 46. In *Clements* the Court also commented at para. 9 that while the "but for" causation test must be applied in a robust and common sense fashion, "[t]here is no need for scientific evidence of the precise contribution the defendant's negligence made to the injury."
- [27] The test for causation is distinct from the rules for assessing damages once causation is established. *McLachlin C.J.C.* stated as follows in *Blackwater v. Plint*, 2005 SCC 58 at para. 78:

It is important to distinguish between causation as the source of the loss and the rules of damage assessment in tort. The rules of causation consider generally whether "but for" the defendant's acts, the plaintiff's damages would have been incurred on a balance of probabilities. Even though there may be several tortious and non-tortious causes of injury, so long as the defendant's act is a cause of the plaintiff's damage, the defendant is fully liable for that damage. The rules of damages then consider what the original position of the plaintiff would have been. The governing principle is that the defendant need not put the plaintiff in a better position than his original position and should not compensate the plaintiff for any damages he would have suffered anyway: [Athey v. Leonati].

[28] The most basic principle of tort law is that the plaintiff must be placed in the position he or she would have been if not for the defendant's negligence, no better or worse. Tortfeasors must take their victims as they find them, even if the plaintiff's injuries are more severe than they would be for a normal person (the thin skull rule). However, the defendant need not compensate the plaintiff for any debilitating effects of a pre-existing condition which the plaintiff would have experienced anyway (the crumbling skull rule): Athey at paras. 32-35.

Pre-Accident Health of the Plaintiff

[29] Historically, with certain exceptions, I find that the plaintiff was relatively physically active for her age and overall health in the years leading up to 2016. Prior to her motor vehicle accident, she was by all accounts a lively, outgoing and energetic individual. Sharon Parker, the training centre owner who participated in martial arts with her, did not observe the plaintiff to have any obvious physical difficulties. The plaintiff enjoyed going for long walks, hiking, shopping and thrift shopping, babysitting, playing with children and grandchildren, and putting on family dinners. Her grandchildren, sister, and family friend Ashlyn Hill all testified as to the plaintiff's initiative, stamina and determination. She was an energetic babysitter, the backbone of the household, and had the majority of responsibility for cooking, cleaning, laundry, and doing chores.

[30] The plaintiff was diagnosed with COPD, an obstructive lung disease associated with breathing difficulty, in 1997. She appears to have had symptoms of the condition as far back as 1993. It was common ground that COPD is a progressive disease, meaning that it usually gets worse over time. The plaintiff has taken various medications for the condition, one of which is the steroid prednisone that has a side effect of osteoporosis. Dr. Fera indicated that the use of prednisone is a reflection of the severity of her COPD, though on the overall evidence of her pre-accident functioning, I would not make a finding that she was in the advanced stages of COPD prior to her 2016 accident.

[31] The plaintiff had several bouts of pneumonia from 2012 onward, once or twice a year on average. She was occasionally admitted to the hospital for the condition, which would wear off after two weeks. At her doctor's insistence, she was assessed in February 2015 for temporary home oxygen assistance after having pneumonia but did not qualify for it, which is an indication of her functioning at least moderately well at the time. The plaintiff obtained

a handicapped parking pass in the spring of 2016. I accept her testimony that she planned to use it only occasionally if her pneumonia flared up and that she was still typically capable of walking long distances.

- [32] Prior to her accident, the plaintiff had been a smoker, though not a heavy one. As noted, there is some contradictory evidence as to the date she finally quit, but I accept that her evidence that she finally quit the habit in October 2013. This date is corroborated by collateral sources who testified as to the event and the plaintiff's annual commemoration of it. I would therefore not ascribe the plaintiff's post-accident chest pain or worsened lung functioning as being due to her ongoing smoking, though I accept that this habit may have historically been associated with her COPD and was obviously of particular concern to her family physician during her check-ups.
- [33] Before her November 2016 motor vehicle accident, the plaintiff was involved in a prior accident on November 4, 2015. She was a passenger in Ms. Kinley's vehicle when another vehicle rear-ended theirs. I find that during that incident she suffered some soft tissue injuries in the form of pain to her neck, mid and upper back, ribs, and chest. She was prescribed anti-inflammatory drugs afterward. She was able to help clean her grandchildren's fitness club after her November 2015 accident, though she took some time off from that job. The plaintiff and collateral witnesses testified, and I accept, that she substantially recovered from the November 2015 accident by late summer or fall of 2016. Overall, I find any injuries the plaintiff had in the 2015 accident were substantially resolved by the time of her November 2016 accident.
- [34] I find that the plaintiff functioned physically at a fairly high level for her age in the years prior to her accident notwithstanding her COPD, some impairment of her functioning after her 2015 accident, and her occasional bouts of pneumonia. I accept that the plaintiff historically suffered from COPD and that the condition was likely to worsen over time. Except for periods where she developed pneumonia, she seems to have managed the condition well, so much so that it went largely unnoticed by others who were close to her.

The November 2016 Collision

- [35] The plaintiff's second accident, which is the subject of this lawsuit, occurred on November 18, 2016, at a McDonald's location in Abbotsford just before 2:00 p.m. The plaintiff was the front passenger in her daughter Carolyn Carson's 2010 Audi sedan. Her great-grandchild was in the rear. As they were exiting the parking lot, Ms. Carson stopped near a garbage bin to deposit some trash. As she was doing so, the vehicle was struck by Mr. Lal's 2003 Chevrolet Venture passenger van.

Post-Accident Health of the Plaintiff

[36] As noted, it is not disputed that some injury to the plaintiff as a result of her November 2016 accident has been made out. However, the extent and duration of those injuries are strongly disputed by the defendant.

[37] In making findings as to the post-accident health of the plaintiff, I am limited by a lack of expert opinion evidence called by the plaintiff. I have some evidence in the form of the plaintiff's testimony, chart notes from her treating physician, test results, and the physical observations of others including her lack of capacity and endurance after the November 2016 accident. I also have the evidence of Dr. Fera.

[38] Dr. Tharwat Fera is a physician with a speciality in respirology who testified for the defence. Dr. Fera examined the plaintiff on August 2, 2019, and later prepared a report on August 18, 2019.

[39] With respect to the nature and extent of the plaintiff's injuries as a result of the 2016 accident, Dr. Fera's report indicates as follows:

Based on the history, clinical examination, and the documents provided to us, there is definite soft tissue injuries to her chest wall, left forearm, injuries to her ribs with subtle fractures of the fifth and sixth ribs in the posterior axilla on her x-ray on December 8. This soft tissue pain and discomfort and rib fractures gradually improved over time. It may have definitely precipitated more exacerbation of her chronic obstructive lung disease and definitely precipitated anxiety and poor-quality sleep. It is unlikely, however, that this had any long-term effect on her chronic obstructive lung disease on a long-term basis since there was no lung injuries, spinal injuries, or collapsed lung. There was no evidence of head injury, brain injury, or neck injury. The injuries to the shoulders, ribs, and lower back gradually resolved over time with pain control and regular walking.

[40] And further:

The effect of the [2015 and 2016] accidents on the patient's chronic obstructive lung disease was temporary and lasted for a few months. Subsequently there is no long-term effect on her chronic obstructive lung disease from these two car accidents.

[41] Much of Dr. Fera's report is taken up by his assessment of the plaintiff's respiratory issues including her pre-existing COPD. His conclusions are in part based upon what he understood of her smoking history, which I find to have been in error. Dr. Fera assumed plaintiff was smoking up until 2017. Having regard to all the evidence, I find that she in fact quit in 2013. As well, Dr. Fera was not able to complete lung function testing. He was also inhibited by a lack of information about the severity of the plaintiff's airway obstruction before or after the accident.

- [42] I do find some of Dr. Fera's comments helpful, but the extent of his opinions are impacted by certain assumptions such as the plaintiff's smoking persisting to 2017, as well as a lack of testing. His estimate of the severity of the plaintiff's pre-accident COPD is not borne out by her lack of symptoms, and is inconsistent with the universal collateral evidence before me that the plaintiff functioned well on a physical and respiratory level prior to her 2016 accident, apart from isolated periods of pneumonia. Moreover, while Dr. Fera opined from a medical perspective, the plaintiff need only establish a "substantial connection" between her injury and the accident beyond the de minimis range in order to found liability: *Sam v. Wilson*, 2007 BCCA 622 at para. 109; *Farrant v. Laktin*, 2011 BCCA 336 at paras. 9, 11. As noted in *Benhaim v. St-Germain*, 2016 SCC 48 at para. 47, scientific causation and factual causation for legal purposes are two different things.
- [43] The plaintiff's evidence at trial was lacking in detail with respect to the extent and duration of soft tissue injuries from her 2016 accident. There are indications of soft tissue injuries in the medical records along with some corroboration by other witnesses. I accept on all the evidence that the 2016 accident led to aggravation of her previous soft-tissue injuries and left forearm or wrist arising from her November 2015 accident, as indicated by Dr. Fera. However, I again accept Dr. Fera's opinion that her complaints of soft tissue injuries to her shoulders, left forearm or wrist and lower back gradually improved over time. I find that these injuries persisted for months over the near to mid-term and had certainly long resolved by the time of the plaintiff's discovery in May 2019.
- [44] Three weeks after her 2016 accident, the plaintiff's x-ray on December 8, 2016 showed subtle fractures of her fifth and sixth ribs in her posterior axilla. I find that the plaintiff suffered rib injuries in her 2016 accident, likely fractured ribs or a re-injuring of rib injuries from her 2015 accident, and pain in her chest. These injuries affected her breathing, endurance, and pain levels. They persisted over the longer term and complicated her underlying COPD. I accept that this increased pain and discomfort in her ribs and upper chest has not fully resolved.
- [45] I also accept the plaintiff's evidence that her respiratory functioning, pain level in her chest area, and physical stamina have worsened since her 2016 accident. After the accident, when the plaintiff exerted herself, she experienced a marked deterioration of her breathing which impacted her activity level and enjoyment of life. Collateral witnesses corroborate a dramatic change in the plaintiff's pre-accident and post-accident capacity.
- [46] It is apparent that the plaintiff's COPD prior to the accident was generally well-controlled, and that the accident exacerbated her COPD, precipitated anxiety and poor-quality sleep to a level where these issues interfered with her everyday functioning. Some of her chest pain was also associated with her COPD, but I accept the evidence of the plaintiff and other witnesses that there was a stark degradation of her respiratory function after the 2016 accident that persisted over the longer term.

- [47] On all the evidence, I find that the plaintiff's accident-related exacerbation of her chronic obstructive lung disease endured for a more extended period than Dr. Fera ventured, including up to the time of trial, which is just over three years after the accident. However, long-term projections beyond this period are much more difficult to make with precision. As time goes on, it is increasingly difficult to ascribe causation of her breathing problems and chest pain to the 2016 accident rather than the COPD. Dr. Fera struggled with this same difficulty.
- [48] Going forward beyond the trial date, I find it difficult to unbundle the causation issue and ascribe her impairments being due to her 2016 accident rather than her COPD, even on a material contribution level. As of the date of trial, I agree with the defendant that it is difficult to discern whether the weaknesses in the plaintiff's health are the result of the underlying COPD or whether they are related to the November 2016 accident.
- [49] As noted by the plaintiff, the presence or absence of medical evidence on the issue of causation is not determinative: *British Columbia (Workers' Compensation Appeal Tribunal) v. Fraser Health Authority*, 2016 SCC 25 at para. 38. However, this does not relieve the plaintiff of her burden to establish causation. In the absence of medical or other evidence from the plaintiff establishing a causal link between the subject accident and the bulk of her respiratory issues on a balance of probabilities beyond the trial date, I am unable to conclude that any injury persisting beyond trial can be attributed to the subject motor vehicle accident.
- [50] The plaintiff has established that she suffered physical impairments resulting from the 2016 accident to a significant degree. I find that the plaintiff's accident-related injuries impaired her ability to go up and down stairs, do laundry, perform exercise such as taking long walks, babysit children, prepare meals, and clean. These limitations were caused by her soft tissue injuries in the short term, as well as her chest and rib injuries, and her respiratory function being adversely affected by her accident-related injuries for a longer period of time. These injuries also affected her physical endurance, her mood, and her social relations with others.

Non-Pecuniary Damages

- [51] The plaintiff seeks an award for non-pecuniary damages of \$75,000. In support of this figure, the plaintiff cites the following cases: *Jacobsen v. Beaton*, 2009 BCSC 231 (\$50,000); *Larlee v. Shier*, 2008 BCSC 1610 (\$60,000); *Ufimzeff v. Brown*, 2008 BCSC 1188 (\$50,000); *Raponi v. Phaguara et al.*, 2005 BCSC 567 (\$60,000); *Pingitore v. Luk*, [1994] B.C.J. No. 1866 (\$40,000); and *Kelly v. Kalra*, 2019 BCSC 1305 (\$120,000).

- [52] The plaintiff submits that Larlee and Pingitore are most similar. In Larlee, a healthcare worker who was 59 years old at the time of her accident and 62 at trial, suffered significant, ongoing, chronic and permanent left neck and shoulder pain, and continuing anxiety. Her injuries resulted in a significant loss of enjoyment of life, and her pain was chronic and ongoing. The court awarded \$60,000 for non-pecuniary damages (equivalent to \$72,000 in 2020).
- [53] Pingitore dealt with a restaurant operator who was 67 at the time of trial and in previous robust health until he was hurt in a car accident. He suffered stiffness in the neck and upper thoracic region, pain and stiffness in the posterior shoulder, and generalized headaches. The court found that Mr. Pingitore would have to cope with his injuries for a long time, if not the rest of his life. The court awarded \$45,000 for non-pecuniary damages (equivalent to \$73,000 in 2020).
- [54] The defendant suggests an award of \$25,000-\$35,000 is appropriate for non-pecuniary damages. The defendant points me to the well-known list of factors to be considered in determining the amount of an award for non-pecuniary loss set out in *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46, leave to appeal ref'd [2006] S.C.C.A. No. 100. The defendant refers to the following cases to support the award: *Vintila v. Kirkwood*, 2016 BCSC 930 (\$35,000); *Bay v. Woollard*, 2019 BCSC 1073 (\$30,000); *Tisalona v. Easton*, 2015 BCSC 565 (\$32,000); *Glendenning v. Matwychuk*, 2019 BCSC 1661 (\$35,000); *J. Williams v. Nicholson*, 2005 BCSC 910 (\$30,000). The defendant submits that the focus of the plaintiff's evidence was on her ongoing difficulty breathing, and the absence of proof that her condition is due to the motor vehicle accident mandates an award at the lower end or below the cases cited.
- [55] The fairness of the quantum of non-pecuniary damages is assessed against awards made in similar cases, which are only to be taken as a rough guide since each case depends on its own facts: *Trites v. Penner*, 2010 BCSC 882 at para. 189. As noted above, I accept that the plaintiff's injuries resulted in loss of enjoyment of life, physical and psychological pain and suffering, inconvenience, and loss of amenities. Having regard to my findings and the above decisions, and being mindful of the causation issue, I assess the plaintiff's non-pecuniary damages in the amount of \$45,000.

Past Income Loss

- [56] The plaintiff seeks an award of \$30,000 for lost income including babysitting and cleaning work. As noted, however, this is difficult to assess because the plaintiff did not file tax returns in previous years likely because she had no taxable income in the years immediately preceding her 2016 accident.

- [57] The defendant submits that there is an absence of evidence upon which the court can make an award for past income loss. He says that the plaintiff's daughter who employed her in the past was not called to testify, and there is no evidence that her previous jobs would continue. Equally, the defendant submits that the evidence of the plaintiff's past babysitting work is unreliable and questions the claimed frequency of her babysitting.
- [58] The plaintiff is entitled to recover the loss of the value of the work that she would have performed but was unable to perform because of her injury: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30. The plaintiff must show a real and substantial possibility of employment loss. This means that the loss must be shown to be realistic, having regard to what the plaintiff's circumstances would have been absent the injury: *Gao v. Dietrich*, 2018 BCCA 372 at para. 36; *Sendher v. Wong*, 2014 BCSC 140 at paras. 158-63, 171-77.
- [59] As I discussed above, the plaintiff must establish on a balance of probabilities a causal connection between the accident and the pecuniary loss claimed. If the trier of fact is satisfied that the injuries sustained as a result of the accident caused an impairment, it must go on to assess the hypothetical pecuniary loss on the basis of relative likelihood: *Smith v. Knudsen*, 2004 BCCA 613 at paras. 36-37; *Athey* at para. 27; *Morlan v. Barrett*, 2012 BCCA 66 at para. 38.
- [60] An award for loss of earning capacity, whether past or future, requires an assessment that considers the overall fairness and reasonableness of the award, taking into account all positive and negative contingencies. It is not a calculation according to a mathematical formula: *Abbott v. Gerges*, 2014 BCSC 1329 at para. 165; *Schenker v. Scott*, 2014 BCCA 203, at paras. 50, 53.
- [61] I accept the evidence that the plaintiff engaged in occasional house cleaning of homes for sale and weekly cleaning of the training centre for a half-day from 2013 to the summer of 2016 prior to her 2016 collision. The training centre cleaning offset the lesson fees for her grandchildren. It is clear that the plaintiff regularly engaged in casual babysitting prior to her 2016 accident as well.
- [62] I find that, but for her 2016 accident, the plaintiff would not have suffered a loss in the value of her babysitting and cleaning work. The plaintiff has established a real and substantial possibility of employment loss which is realistic relative to what her circumstances would have been absent injury.
- [63] However, the level of the plaintiff's loss is limited by her relatively modest working history in daycare and cleaning. Given the available evidence as to the nature and frequency of the plaintiff's pre-accident work history, putting the value of her lost income at approximately \$6,000 per year, in my opinion a fair and reasonable award for past lost of income from the 2016 to the time of trial is \$19,000.

Future Loss of Earning Capacity

[64] I find that the plaintiff has not established on a balance of probabilities a real and substantial possibility that her accident injuries caused a future loss of earning capacity. In other words, from the time of trial forward, I am unable to find that the plaintiff's working life differed in any way due to her accident-related injuries from what it would have been without her 2016 accident having taken place. Accordingly, I am unable to make any award for future earning capacity.

Past and Future Care

[65] The plaintiff seeks an award of \$5,000 for each of past and future care. The plaintiff concedes that her medical expenses are hard to calculate. Before the collision, the plaintiff was on regular medication for COPD, high blood pressure, and sleep difficulties. She submits these costs increased following the collision, but have since declined. She argues that they are still at higher levels than before this collision.

[66] I accept that the plaintiff is entitled to compensation for the cost of future care based upon what is reasonably necessary to restore her to her pre-accident condition so far as possible. The award is based on what is reasonably necessary on the medical evidence to preserve and promote the plaintiff's mental and physical health: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.).

[67] With respect to past care costs, the evidence lacks specificity as to increased medical costs that the plaintiff incurred due to her accident. On all the evidence, accepting the evidence that her medications increased post-accident, I am prepared to award the plaintiff \$600 to compensate her for the cost of increased medications up to the time of trial. However, I find that the plaintiff has not justified a further award for past or for future care costs.

[68] With respect to the cost of future care, the plaintiff has not shown a medical justification for specific quantifiable expenses relevant to her future care: *Milina* at para. 84. As noted, there are also issues respecting causation going forward. Even assuming causation and medical justification were made out, I have insufficient objective evidence of what future care items might cost on a long-term basis, and I would make no award for future care costs.

Loss of Homemaking Capacity

[69] I have the discretion to award damages for loss of homemaking capacity either as part of the non-pecuniary loss, or as a separate pecuniary head of damages: *McTavish v. MacGillivray*, 2000 BCCA 164 at para. 63; *Kim v. Lin*, 2018 BCCA 77 at para. 33; *Riley v. Ritsco*, 2018 BCCA 366 at para. 100.

- [70] The plaintiff seeks an award of \$10,000 and a trust award of \$10,000 for a total of \$20,000. I accept that homemaking was a significant activity for the plaintiff prior to her 2016 accident. I agree with the plaintiff that the evidence establishes that the plaintiff's ability to do housework has been impaired, and that her grandchildren who live with her have had to pick up the plaintiff's loss of capacity and take on more than their fair share of responsibility in the household compared to what would be normally expected in the family.
- [71] The defendant submits the evidence does not support such an award. It submits that while the plaintiff's activity level has been reduced, her ability to look after the home has not been lost. I do not agree. The evidence clearly establishes that after the accident, the plaintiff's ability to perform housework, laundry, meal-preparation and other domestic activities was reduced to some extent because of her accident-related injuries. The plaintiff had previously kept a very clean and tidy home. She has lost the capacity to do so due to her accident-related injuries and has become more dependent on others.
- [72] I find it appropriate to provide for a separate award for loss of housekeeping capacity because the loss of homemaking capacity is distinct, and not merely in keeping with increased pain and suffering while performing household work. Nevertheless, given my findings with respect to the extent and duration of the effects of the 2016 accident upon the plaintiff, I find that a more modest award than that sought by the plaintiff is appropriate here. I conclude a fair and reasonable award for loss of homemaking capacity is \$5000.
- [73] I do not find it appropriate to award an in-trust award for the extra services provided by the plaintiff's grandchildren: *Frankson v. Myre*, 2008 BCSC 795 at paras. 50-53. The work that Mr. and Ms. Kinley performed as a result of the plaintiff's injuries over and above what would normally be expected from the family relationship comprised the loss of homemaking capacity, which the plaintiff is already being compensated for. In these circumstances, any additional in-trust award would overlap with and duplicate the amounts I have awarded to the plaintiff. I would therefore decline to provide an in-trust award here to compensate for those services.

Conclusion

- [74] In summary, I would make the following orders in accordance with the reasons above.

Non-pecuniary damages

\$45,000

Past loss of Income

\$19,000

Future loss of earning capacity

\$0

Past cost of care

Future Cost of care

\$600

\$0

Loss of housekeeping capacity

\$5,000

Total

\$69,600

[75] Subject to submissions, the plaintiff is entitled to costs.

"Brundrett J."

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