

CANADA / JUDGMENT

Ploskon-Ciesla v. Brophy

2020 BCSC 1873

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Supreme Court of British Columbia

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2020 BCSC 1873 Ploskon-Ciesla v. Brophy

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Ploskon-Ciesla v. Brophy,

2020 BCSC 1873

Date: 20201201

Docket: M202992

Registry: New Westminster

Between:

Anna Maria Ploskon-Ciesla

Plaintiff

And

Marianne Brophy

Defendant

Before: The Honourable Mr. Justice Ball

Reasons for Judgment

Counsel for Plaintiff:

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J. Dhaliwal

D. Framingham

Place and Date of Trial:

New Westminster, B.C.

February 26 - 28, 2020

Place and Date of Judgment:

New Westminster, B.C.

December 1, 2020

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Introduction

- [1] In this case, the plaintiff seeks damages for injuries sustained in a motor vehicle accident which occurred on June 1, 2017 (the "first accident"), in particular: soft tissue injuries to the plaintiff's neck, shoulders, back, hips and arms, along with associated headaches. The plaintiff also claims damages for driving anxiety. The plaintiff claims non-pecuniary damages for pain and suffering, the loss of enjoyment of life, and permanent physical disability. The plaintiff also claims loss of earnings, loss of future earning capacity, and special damages.
- [2] The defendant admitted in her Response to Civil Claim that she was liable in negligence for the first accident, but initially denied that the plaintiff had suffered any damages or losses for which the defendant was liable to compensate the plaintiff. In her closing submissions, the defendant stated that she "accepts and concedes that the plaintiff has suffered soft tissue injuries to her neck, shoulder and lower back along with associated headaches as a result of" the first accident. The state of the evidence, according to the defendant, was clear and the plaintiff was entitled to compensation "by way of reasonable awards of damages for non-pecuniary and special damages". The defendant disputes the plaintiff's claim for past income loss and further disputes that the plaintiff has proven entitlement for loss of housekeeping capacity or loss of future earning capacity. The parties did not agree on the quantum of non-pecuniary damages, but did agree ultimately on the quantum of special damages.
- [3] The defendant also asserts that the plaintiff was the at-fault driver in a subsequent accident which occurred on January 10, 2019 (the "second accident"), in which she suffered injuries. The plaintiff admits this.
- [4] The primary issue before the Court is the quantification of the plaintiff's damages and apportionment, if any, of such damages between the first accident and the second accident. The defendant asserts that the provisions of the Negligence Act, R.S.B.C. 1996, c. 333 apply to this case.
- [5] The Agreed Statement of Facts contain the following statements:
1. The motor vehicle accident which is the subject of this action occurred on June 1, 2017 ("the Accident").
 2. The Accident occurred at or near the intersection of St. Georges Street and East 21st Avenue in North Vancouver, B.C.
 3. The Accident was caused as a result of the Defendant's negligence.
 4. At the time of the Accident, the Plaintiff was the driver of a 2008 Nissan Altima (the "Plaintiff's Vehicle").
 5. The Plaintiff's Vehicle was owned by the Plaintiff's husband, Rafal Ciesla.

6. At the time of the Accident, the Defendant was driving a 2009 Subaru Forester X Limited Wagon (the "Defendant's Vehicle").
7. The cost of repair of the Defendant's Vehicle was \$7,497.59.

Factual Background of the Plaintiff

- [6] The plaintiff is in her mid-thirties and is the mother of three children. In 1984, she was born in Debica, Poland, and was raised there.
- [7] In 2007, the plaintiff met her husband, Rafal Ciesla, in her mother's restaurant in Poland, where she worked as a server. She used her serving skills later in life as will be discussed below. The plaintiff was a competitive dancer and skier, and also enjoyed outdoor pursuits, including running and hiking.
- [8] She moved to Canada with her husband. The plaintiff holds a Masters degree in counselling from the Jesuit University Ignatianum in Kraków, which she obtained in 2009. She also obtained a diploma in massage therapy from the Kraków School of Therapeutic Massage in 2009. After a practicum in a prison setting, following the completion of her counselling degree, she concluded that counselling was not a positive career choice for her.
- [9] In January 2010, the plaintiff and Mr. Ciesla got married. In September 2010, they moved to Canada. The massage therapist qualifications of the plaintiff were not readily transferrable to Canada, so she began working in White Rock, B.C. as a server in an ABC Country Restaurant on a full-time basis.
- [10] After about six months in Canada, she began working full-time at a green house arranging tropical plants for shipping. Mr. Ciesla was working in construction applying stucco surfaces.
- [11] In September 2011, the couple left the plaintiff's grandparents' home in Surrey, B.C., where they had been living, and moved into an apartment in Burnaby, B.C.
- [12] On February 25, 2013, the plaintiff gave birth to her first child, K.C. Following the end of her maternity leave, she began to work in three different part-time employment positions, including: as a massage therapist; as a server at an ABC Country Restaurant; and doing data entry and bookkeeping at Master Stucco Ltd., the company where her husband was employed. She found that the massage therapy work required too much work for insufficient pay and so she left the massage therapy position after a few months.
- [13] The plaintiff became pregnant in 2015 and her second child, A.C., was born on February 5, 2016.

- [14] After the end of her maternity leave following the birth of the second child, in April or May 2016, she began working full-time for the stucco company. Her husband took paternity leave, and due to the nature of her work, she was able to perform work from her home. She continued this working arrangement until February 2017, when her husband returned to work applying stucco. The plaintiff wanted to spend more time with her children, but continued to work on an on-call basis for the stucco company.
- [15] The plaintiff was involved in regular physical activity with weekly running, gym workouts, and yoga once or twice each week. The Ploskon-Ciesla family was active, hiking in local mountains and near Whistler and Pemberton.
- [16] The plaintiff had worked as a registered massage therapist in Poland and as an unregistered massage therapist in Burnaby following the birth of her first child. Her qualifications required upgrading before she could work as a registered massage therapist in British Columbia. She had planned to begin that upgrading process, but was delayed by the first accident and by the birth of her third child in July 2019.

The First Accident

- [17] Leading up to the first accident, the plaintiff was driving on St. Georges Avenue towards 21st Street in North Vancouver when her vehicle was struck on the rear passenger side by a vehicle driven by the defendant travelling eastbound. The impact of the collision caused the plaintiff's vehicle to spin approximately 180 degrees, so that it came to a stop facing the opposite direction of its original line of travel.
- [18] Although emergency health services responded to the accident scene, the plaintiff did not attend hospital because she testified that she had to look after her son; a passenger in her car at the time of the accident.
- [19] As a result of the first accident, the plaintiff sustained injuries, resulting in ongoing neck, right shoulder, lower back and right buttock pain, as well as headaches.
- [20] She was upset at her home and tried to sleep. She testified that she felt pain all over her body. Eventually, she went to the Royal Columbian Hospital complaining of pain in her neck and the right side of her head, as well as in her lower back.
- [21] On July 3, 2017, the plaintiff returned to Poland with her children to seek peace and quiet and support from members of her family, and to allow her husband to work longer hours in the stucco trade. The plaintiff remained in Poland with her children for approximately two months. She apparently received physiotherapy treatments in Poland, but did not produce records of those treatments. Upon her return to Canada, family members came with her from Poland and remained for almost two months to assist the Ploskon-Ciesla family with child care, cooking, and house cleaning.

- [22] Because the plaintiff was breastfeeding her second child, she was concerned about taking pain medication, but did end up taking a small amount of pain relievers and muscle relaxants prescribed by a doctor. She found that the experience of breastfeeding while sitting up-right caused considerable shoulder pain. To alleviate the pain and make the breastfeeding successful, the plaintiff found she had to lay down - a further inconvenient necessity. She found that she was unable to drive a car because the act of performing a shoulder-check caused sharp pains in her neck. She obtained physical treatments for her pain and the stiffness symptoms in her neck and back, including physiotherapy, chiropractic treatment, massage therapy, and dry needling, all of which she found helpful in a "hoped for" reduction of symptoms.
- [23] The plaintiff described the process of dry needling as very painful but, when coupled with stretching and exercises, was of at least temporary assistance.
- [24] The plaintiff testified she had ongoing symptoms including: an inability to turn her shoulders beyond 90 degrees; clicking noises in her shoulder; pain in her lower back/right buttock; and regular headaches. The symptoms varied from day-to-day, but the symptoms made it difficult to: clean her home; play with her children and clean-up after the children's activities; and breast feed while sitting upright. She was also otherwise restricted from taking part in any of her former recreational activities.
- [25] Ms. Ploskon-Ciesla testified that she became short-tempered, with an impatient anxious mood, resulting in an inability to control emotions. She discussed these psychological issues with a friend of hers who was a psychologist, but she did not seek any professional psychological or psychiatric treatment.
- [26] The plaintiff testified that she was receiving housekeeping assistance for a number of months because she was unable to perform housekeeping tasks in her home as she had quite ably done before the first accident, because of pain and stiffness. The plaintiff claims a portion of housekeeping assistance costs in the amount of \$5,446.25, which has been partially paid, leaving an outstanding amount of \$2,866.58.
- [27] In or about early November 2018, the plaintiff became pregnant with her third child who was ultimately born on July 19, 2019.

The Second Accident

- [28] On or about January 10, 2019, the plaintiff was involved in a second motor vehicle accident. The plaintiff has admitted that she was at fault for the second accident.
- [29] The plaintiff testified that her vehicle was struck on the left side by another vehicle which she was not able to identify from a photograph. The plaintiff testified that she had increased symptoms from the second accident for a period of time, but eventually the background pain and stiffness returned to the level which she was experiencing before the second accident. As she noted in cross-examination, she had headaches after the first accident and

the headaches became worse after the second accident, but within a period of time the headaches returned in intensity and frequency similar to that of before the second accident.

Rafal Ciesla

- [30] Rafal Ciesla was born in 1984 and has worked as a construction worker. He met the plaintiff in 2007 at her mother's restaurant in Poland. He thought she was a very attractive woman.
- [31] He had previously visited Canada where some of his relatives lived. He and the plaintiff discussed the potential of moving to Canada, and visited Canada together in 2008. Eventually, they were married and moved to Canada.
- [32] Upon arrival in Canada, Mr. Ciesla began working at a construction company named Master Stucco Ltd., and the plaintiff began working as a server in a restaurant in a suburb of Vancouver. Ms. Ploskon-Ciesla, according to Mr. Ciesla, had become familiar with the owners of Master Stucco Ltd. and their need for help with bookkeeping. The plaintiff had worked in her father's business in Poland and became self-taught in bookkeeping and accounting. The owners of Master Stucco Ltd. hired the plaintiff originally on a part-time basis to provide bookkeeping and accounting services for their business. She also took classes in English to make her more employable in Canada.
- [33] Prior to the first accident, the Ploskon-Ciesla family enjoyed many recreational activities including hiking: in the Pemberton Valley; near Joffre Lakes; at Cyprus Bowl; and in the Fraser Valley near Chilliwack. Often, these were full day hikes with children carried in back packs. Mr. Ciesla described himself and his wife as "nature people" who enjoyed the outdoors, barbecues, and outdoor sports such as cycling, swimming, tennis and playing soccer. He noted that the plaintiff practices yoga regularly alone and attends at least one group class a week.
- [34] The family has also travelled to Banff, Tofino, and spent ten days camping in a tent in Utah.
- [35] He reported that the plaintiff took maternity leaves after the birth of each of the first two children. Mr. Ciesla took a paternity leave as well to allow his wife to rest, free from childcare needs. He described his wife's childcare capacity as very good. The children laughed frequently, and she took the children to the park daily, and continued to do so once they began school. She taught her husband to be calm and patient with the children, according to his evidence.
- [36] Before the first accident, the plaintiff did the cooking and housekeeping and had no physical issues with completing all household tasks.
- [37] Mr. Ciesla testified that immediately after the first accident, his wife was unable to lift the children or take part in their usual daily activities, such as visits to the park. He stayed at home with her for two to three weeks. He immediately began to take over the housekeeping, cleaning, and cooking duties. His wife complained steadily of her pain and discomfort, and that she was nervous and emotionally upset on occasion, crying without apparent reason.

This behaviour lasted for a number of months, but complaints about pain have continued until the trial date.

- [38] In order to assist herself and permit Mr. Ciesla to continue working, she travelled with the children to Poland where she was able to live with relatives who provided considerable assistance with childcare and promoted her recovery. She attended some physiotherapy treatments while in Poland, according to Mr. Ciesla.
- [39] Mr. Ciesla testified that, when she returned to Canada, his aunt and her grandmother also helped with the children.
- [40] Since the birth of the third child, Mr. Ciesla has stayed home to help his wife with the three children and he has applied for parental leave.
- [41] The couple's physical and intimate relationship has declined since the first accident.
- [42] In cross-examination, Mr. Ciesla was briefly asked questions about the second accident. He was asked about the accident scene, where he observed his wife and child crying. He noted his car was damaged. When asked if his wife was injured in the accident, he answered "no". That answer was not challenged.

Boguslaw Dubosz

- [43] Ms. Dubosz is the aunt of the plaintiff's husband who has known the plaintiff since the summer of 2008. When the plaintiff and her husband moved to Canada, they lived in a home shared by the plaintiff's grandparents, her husband and children, and Ms. Dubosz. Approximately one year later, the plaintiff and her family moved to Burnaby.
- [44] Ms. Dubosz testified that the plaintiff had begun to work as a server and helped with record keeping at the stucco company which employed Mr. Ciesla. Ms. Dubosz also testified that the plaintiff was the primary caregiver for her children and kept a tidy house.
- [45] After the first accident, Ms. Dubosz found the plaintiff was emotional and upset, complaining of neck and lower back pain. Ms. Dubosz had assisted her niece with household chores and cleaning following the accident. Since the first accident, she took the children for overnight visits to give the plaintiff overnight respite from childcare. However, Ms. Dubosz could not recall an overnight experience with the two older children after the third child was born.
- [46] Ms. Dubosz was aware of the second accident, but was unsure of which year it occurred. Ms. Dubosz was aware the plaintiff was upset by the second accident, but was unaware if the plaintiff suffered any injuries or other adverse consequences from that accident.

Expert Evidence

- [47] The only medical opinion evidence tendered in this case was an independent medical report dated October 6, 2019 of Dr. Helper, a physical medicine and rehabilitation specialist; a physiatrist.
- [48] Dr. Helper examined and assessed the plaintiff on September 24, 2019. In his report, he presented his findings with a leading diagnosis of soft tissue injuries to the neck, right shoulder blade, low back, and right buttock caused by the first accident on June 1, 2017. That accident involved a right lateral impact collision.
- [49] Dr. Helper opined that because the plaintiff's previous history was negative for neck or shoulder blade pain, the accident of June 1, 2017 was the primary cause of the complaint of neck and shoulder blade pain. The low back pain and right buttock pain also have their origins in the muscular structures of the lumbar spine and pelvis. More specifically, accidents can cause rotation of the hemi and suboptimal posture predisposes the individual to asymmetric loads on soft tissue and mechanical structures of the lumbar spine, pelvis and hips.
- [50] Dr. Helper also expressed an opinion about the left lateral impact suffered by the plaintiff in the second accident on September 27, 2019. In brief, Dr. Helper expressed that the second accident had an unknown influence on the established symptoms.
- [51] With respect to prognosis of the neck and right shoulder blade pain, Dr. Helper opined that spontaneous resolution of the residual neck and shoulder pain was poor. However, a prognosis of experiencing a greater than 80% improvement of her neck and shoulder blade symptoms with appropriate rehabilitation was good, though a prognosis for complete recovery was poor.
- [52] A number of issues were raised concerning the form of the medical legal opinion prepared by Dr. Helper, in that the facts and assumptions upon which he relied are placed in an unusual format not in compliance with the Supreme Court Civil Rules, B.C. Reg. 168/2009. That said, Dr. Helper's report was admitted into evidence as an exhibit without objection, and the report presents his opinion in an understandable format.
- [53] There is considerable discussion of the report below, and to avoid repetition in these reasons, I have not provided a detailed recitation of all matters in that report here.

Apportionment

- [54] The defendant has submitted that the second accident, where the plaintiff has admitted fault, makes the Negligence Act apply to the assessment of damages for the first accident.
- [55] The facts of this case are that the plaintiff was injured in the first accident, without any negligence on her part. Her injuries were persistent from June 1, 2017 to January 10, 2019 and beyond. The question which this Court must answer is whether the additional or

aggravating injuries caused by the second accident were sufficient to alter the course of recovery from the first accident. The evidence here supports a finding that the plaintiff had injuries from the first accident, which were reported as right side dominant by Dr. Helper. These injuries were persistent and formed a background of pain and discomfort, with which the plaintiff coped, and were present when the second accident occurred.

- [56] After the second accident in 2019, which caused pain on the left side of the neck of the plaintiff, the symptoms from that accident resolved substantially within several weeks or months, and the plaintiff returned to the background state of pain and discomfort caused by the first accident. Dr. Helper was of the view that the established symptoms from the first accident were only related or affected to "a small degree" by the second accident. He also noted that there was no description of new right side dominant symptoms following the second accident. Dr. Helper opined that the right buttock pain suffered by the plaintiff was primarily related to the muscle imbalance across the pelvis, and asymmetric loads to the mechanical and soft tissue of the region. Dr. Helper described the development of the bilateral pelvic pain following the first accident in 2017 as medically plausible and that there was no record that would have allowed the conclusion that the bilateral pain was caused by the second accident.
- [57] The submission by the defendant, that the plaintiff should be considered unreliable because she may not have been accurate concerning the exact length of time that she experienced symptoms of pain caused by the second accident, lacks merit and has little substance.
- [58] The submission that the Negligence Act applies in this case is confusing. The defendant has submitted that a finding or admission of "fault" in the second accident relates to the assessment of the quantum of damages for "injury" caused by the second accident. The defendant submits that because it is difficult to sort out the injuries caused by the first and second accidents, and that "it is not possible to establish different degrees of fault, the liability must be apportioned equally": Negligence Act, section 1(2).
- [59] The defendant then draws the attention of the Court to the statement of Dr. Helper that he had difficulty dividing the injuries sustained by the plaintiff into percentages, and cites the following statement from his report at Exhibit 17, page 9, line 280: "[t]he MVC of February 2019 has had an unknown influence on her established symptoms, but it could be related to a small degree."
- [60] This submission by the defendant conflates, on the one hand, the concept of apportionment of fault among tortfeasors in a single event to determine degrees of fault, and on the other hand, the assessment of the cause of injuries from two successive motor vehicle accidents. In the case at bar, there is no factual connection to assessing degrees of fault between the accident in 2017 and the accident in 2019. The defendant in the 2017 accident is wholly liable for negligence. The plaintiff has admitted that she was at fault for the second accident.

- [61] Therefore, the concept that this Court should embark, between those two events, on an assessment of degrees of fault has no place and cannot result in a 50% reduction of the plaintiff's injury-caused damages, as submitted by the defendant.
- [62] Counsel for the defendant initially suggested that the role of an expert medical doctor as a witness somehow included establishing different degrees of fault which would attract the provisions of the Negligence Act. With some reluctance, defence counsel agreed that assigning fault in a motor vehicle accident was not a task performed by a medical expert such as Dr. Helper.
- [63] Counsel for the defendant submitted that because the task of sorting symptoms from evidence was difficult and to some extent uncertain or imprecise, a significant reduction in damages is appropriate. Assessment of damages is never easy or precise, nor is precision a feature of the assessment of damages for personal injuries. A recent authority demonstrating this point is *Sears v. Olsen*, 2020 BCSC 1289, where Milman J. stated at para. 43: "[t]urning to the authorities, it is axiomatic that each case turns on its own facts and that assessing damages is more art than science".
- [64] The second accident is an intervening circumstance that must be taken into account to assess damages in the normal course to ensure that the defendant in this action only pays compensation to the plaintiff for the result of the first accident and its relevant sequelae. The Negligence Act has no application on these facts.

Adverse Inferences

- [65] Upon rejecting the defence's submissions above, I turn to the submissions made by both parties concerning the drawing of adverse inferences.
- [66] The plaintiff submits that an adverse inference should be drawn against the defendant because the defence obtained an independent medical examination of the plaintiff from an expert physician, Dr. Abdul-Wahab Khan, on October 30, 2019, but then did not produce nor rely upon a report or other evidence from that physician. No explanation was given by the defendant for the failure to call Dr. Khan or produce his opinion.
- [67] The defendant submits that there should be an adverse inference drawn against the plaintiff on the basis that the plaintiff did not call a particular physician, Dr. Dasanjh, to the stand. The defendant has asserted that Dr. Dasanjh was the treating physician of the plaintiff, however, evidence on that specific point is not entirely clear. In the CL-19 form completed by Dr. Dasanjh, in response to which the parties made reference in the course of the trial and submissions, the doctor summarized that he was not the plaintiff's regular physician and the plaintiff was seen as a walk-in patient in relation to the first accident.
- [68] To be clear, neither party called Dr. Dasanjh as a witness in this trial.

- [69] With respect to the plaintiff's request that an adverse inference be drawn for failing to call the doctor, plaintiff's counsel relied upon the following cases: *Brooks v. Habib*, 2019 BCSC 1398 at paras. 109-117, where no adverse inference was drawn; and *Chekoy Sr. v. Hall*, 2013 BCSC 790 at paras. 67 and 85-86, where the Court drew an adverse inference, in part, because the defendant reneged on an agreement to provide the expert report to the plaintiff.
- [70] With respect to the defendant's request to draw an adverse inference for the failure of the plaintiff to call Dr. Dasanjh, both parties had pre-trial access to the clinical records of this doctor from 2017 forward. The defendant clearly had an opportunity to speak to Dr. Dasanjh if she wished to do so. The defendant was critical of Dr. Helper because of his failure to read the CL-19 report prepared by Dr. Dasanjh.
- [71] The law is clear that an adverse inference is not to be drawn where a witness is available to both parties: *Thomasson v. Moeller*, 2016 BCCA 14 at para. 35; *Singh v. Reddy*, 2019 BCCA 79 at para. 27. It is also appropriate to decline an adverse inference on the sole basis that a witness is available to both parties: *Singh v. Chand*, 2019 BCSC 932 at para. 83. The plaintiff's counsel provided clinical records prepared by Dr. Dasanjh to the defendant and nothing prevented the defendant from contacting or calling Dr. Dasanjh as a witness. Relying on the cited cases, I am not persuaded, in all the circumstances, to draw an adverse inference against the plaintiff for not calling Dr. Dasanjh as a witness.
- [72] The defendant relies upon *Briggs v. Guliker*, 2019 BCSC 1441 at para. 93 for the proposition that an adverse inference should generally only be drawn against a party who bears the onus of proof.
- [73] Upon review of the submissions of both parties concerning the drawing of adverse inferences and upon considering the cases cited by counsel, I respectfully dismiss both applications as I found neither was well-founded.

Non-pecuniary Damages

- [74] Damages for non-pecuniary losses are an attempt at restitution for pain and suffering, loss of enjoyment of life and loss of amenities suffered by the plaintiff and caused by the conduct of the defendant.
- [75] In assessing non-pecuniary damages, the leading case is *Stapley v. Hejslet*, 2006 BCCA 34:
- [45] Before embarking on that task, I think it is instructive to reiterate the underlying purpose of non-pecuniary damages. Much, of course, has been said about this topic. However, given the not-infrequent inclination by lawyers and judges to compare only injuries, the following passage from *Lindal v. Lindal*, *supra*, at 637 is a helpful reminder:

Thus the amount of an award for non-pecuniary damage should not depend alone upon the seriousness of the injury but upon its ability to ameliorate the condition of the victim considering his or her particular situation. It therefore will not follow that in considering what part of the maximum should be awarded the gravity of the injury alone will be determinative. An

appreciation of the individual's loss is the key and the "need for solace will not necessarily correlate with the seriousness of the injury" (Cooper-Stephenson and Saunders, *Personal Injury Damages in Canada* (1981), at p. 373). In dealing with an award of this nature it will be impossible to develop a "tariff". An award will vary in each case "to meet the specific circumstances of the individual case" (Thornton at p. 284 of S.C.R.).

[Emphasis removed.]

- [76] In other words, in assessing non-pecuniary damages, it is not only a matter of comparing the injuries suffered, but also the effect of those injuries on the lifestyle and personality of each person.
- [77] In *Clark v. Kouba*, 2012 BCSC 1607, aff'd 2014 BCCA 50, the Court stated the following with respect to the law of non-pecuniary damage assessments:
- [71] In *Hartnett v. Leischner*, 2008 BCSC 1589, [2008] B.C.J. 2242, Russell J. provides a helpful summary of the law with respect to general or non-pecuniary damages:
- [80] The purpose of non-pecuniary damage awards is to compensate the plaintiff for "pain, suffering, loss of enjoyment of life and loss of amenities": *Jackson v. Lai*, 2007 BCSC 1023, [2007] B.C.J. No. 1535 at para. 134; see also *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229; *Kuskis v. Tin*, 2008 BCSC 862, [2008] B.C.J. No. 1248. While each award must be made with reference to the particular circumstances and facts of the case, other cases may serve as a guide to assist the court in arriving at an award that is just and fair to both parties: *Kuskis* at para. 136.
- [81] There are a number of factors that courts must take into account when assessing this type of claim. Justice Kirkpatrick, writing for the majority, in *Stapley v. Hejslet*, 2006 BCCA 34, 263 D.L.R. (4th) 19, outlines the factors to consider, at para. 46:

The inexhaustive list of common factors cited in *Boyd* [*Boyd v. Harris*, 2004 BCCA 146] that influence an award of non-pecuniary damages includes:

- a) age of the plaintiff;
- b) nature of the injury;
- c) severity and duration of pain;
- d) disability;
- e) emotional suffering; and
- f) loss or impairment of life.

I would add the following factors, although they may arguably be subsumed in the above list:

- g) impairment of family, marital and social relationships;

- h) impairment of physical and mental abilities;
 - i) loss of lifestyle; and
 - j) the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff: *Giang v. Clayton*, [2005] B.C.J. No. 163, 2005 BCCA 54 (B.C.C.A.)).
- [78] The plaintiff submits that she is entitled to non-pecuniary damages for pain and suffering and loss of enjoyment of life. The defendants agree that the plaintiff suffered: soft tissue injuries; pain in her neck, upper back, and shoulders; and anxiety.
- [79] The combined effect of the plaintiff's physical injuries is significant. She is either unable or has a significantly reduced capacity to enjoy most of the activities she enjoyed pre-accident.
- [80] The plaintiff submitted that she has, as a result of the first accident, sustained ongoing right shoulder pain, lower back pain, buttock pain, headaches, mood changes, and anxiety. The plaintiff submits the effect of the injuries suffered by her as a result of the accident have had a significant impact on her life.
- [81] That impact includes the inability to return to recreational activities such as hiking, yoga, and running. Though, she still goes for walks with her family.
- [82] The plaintiff states that she has had difficulty breast feeding due to shoulder blade and neck pain, and otherwise has had physical difficulties with respect to her children.
- [83] Each party submitted a selection of cases which provided some assistance in determining the quantum of non-pecuniary damages.
- [84] Having taken those authorities into account, including the submissions of counsel and the cases referred to directly therein, as well as the unique evidence heard in this trial, I conclude the appropriate award of non-pecuniary damages in this case is \$90,000.

Loss of Housekeeping Capacity

- [85] In the case at bar, there is evidence that, because of the incapacity of the plaintiff caused by the first accident, her ability to perform housekeeping tasks has been reduced and that incapacity has resulted in the payment of actual expenditures. The plaintiff has made claims for both past and future losses of housekeeping capacity.
- [86] After the first accident, the plaintiff was immediately unable to perform housekeeping duties which she had ably performed pre-accident in partnership with her husband. For a period of time post-accident, she was suffering acute back and shoulder pain, particularly on her right side, which prevented her from lifting her children. Her husband took some time away from work to look after the household and children.

- [87] The plaintiff could not cope with the childcare and housekeeping duties while her husband was working full time, so she travelled to Poland for seven or eight weeks to obtain the assistance of relatives with childcare and to have an opportunity to heal, while obtaining physiotherapy treatments.
- [88] As noted above, recreational activities ceased for the plaintiff. Upon return from Poland, she pursued physiotherapy and active rehabilitation, but was still unable to perform housekeeping duties due to pain caused by myofascial or soft tissue injuries.
- [89] The defendant submits that the plaintiff is able to perform housekeeping duties with the assistance of her husband and relatives and therefore she has not demonstrated a loss. There is no positive obligation for the plaintiff to rely on the free assistance from relatives. She has faced a substantial loss in her ability to perform housekeeping duties. She is entitled to be compensated for that loss.
- [90] The defendant has acknowledged that the plaintiff properly required the services of a housekeeper from January 26, 2018 until October 17, 2018 after the first accident. These services were paid or agreed to be paid by the insurer. The cost per week was \$143.33. I am satisfied that the plaintiff has needed to similarly rely on housekeeping assistance for the remaining time until the trial date but could not afford the expense. If extrapolated, the time from the first accident to the trial date is approximately 142 weeks and that amount totals \$20,352.86 with a reduction for housekeeping costs in the amount of \$2,579.94, equalling \$17,772.92 for past loss.
- [91] The damages for future loss of housekeeping capacity, which I find persists with the chronic pain suffered by the plaintiff, is explained in *Broomfield v. Lof*, 2019 BCSC 1155 at paras. 114 and 115. The plaintiff submits that this loss, calculated for approximately 29 years applying multipliers provided in the Law and Equity Act, R.S.B.C. 1996, c. 253, s. 56(2)(b) and Reg. 352/81, amounts to approximately \$162,740. The plaintiff, in keeping with expectations set out by Dr. Helper of improvement following treatment and the common sense likelihood that her children will become of more assistance as they mature, the plaintiff submits that the past and future loss of housekeeping capacity would be reasonably assessed at \$75,000. The plaintiff seeks that award for future loss of housekeeping capacity.
- [92] The allocation of loss of housekeeping capacity has been discussed in the case of *Riley v. Ritsco*, 2018 BCCA 366. In that case, the Court of Appeal discussed the treatment of a claim for loss of housekeeping capacity as follows:
- [98] There was no evidence that any incapacity on the part of Mr. Riley would result in actual expenditures, or of family members or friends routinely undertaking functions that would otherwise have to be paid for. If it existed, such evidence could have supported a segregated award of pecuniary damages on the basis of *Kroeker v. Jansen* (1995), 123 D.L.R. (4th) 652; (1995) 4 B.C.L.R. (3d) 178 (C.A.).

- [99] In *Kroeker* the Court briefly considered the question of whether a segregated award of non-pecuniary damages could have been made. Justice Gibbs said:
- [27] Having found no error in classification it is not necessary to decide whether it is open to a trial judge to segregate non-pecuniary awards into separate heads, although there would appear to be no reason why that should not be done if the special facts of a case warrant it.
- [100] In *Liu v. Bains*, 2016 BCCA 374, the Court again upheld a claim for pecuniary damages for loss of housekeeping capacity. It said:
- [25] Since the decision in *Kroeker*, it has been well-established in this province that domestic services have value and an injured party may justifiably claim for loss of housekeeping capacity, even if these services are provided gratuitously by family members: *McTavish v. MacGillivray*, 2000 BCCA 164 at para. 63.
- [26] It lies in the trial judge's discretion whether to address such a claim as part of the non-pecuniary loss or as a segregated pecuniary head of damage. In *McTavish* at paras. 68-69, the Court suggested that treating loss of housekeeping capacity as non-pecuniary loss may be best suited to cases in which the plaintiff is still able to perform household tasks with difficulty or decides they need not be done, while remuneration in pecuniary terms is preferable where family members gratuitously perform the lost services, thereby avoiding necessary replacement costs.
- [101] It is now well-established that where a plaintiff's injuries lead to a requirement that they pay for housekeeping services, or where the services are routinely performed for them gratuitously by family members or friends, a pecuniary award is appropriate. Where the situation does not meet the requirements for a pecuniary award, a judge may take the incapacity into account in assessing the award for non-pecuniary damages.
- [102] I acknowledge what was said in *Kroeker* about segregated non-pecuniary awards "where the special facts of a case" warrant them. In my view, however, segregated non-pecuniary awards should be avoided in the absence of special circumstances. There is no reason to slice up a general damages award into individual components addressed to particular aspects of a plaintiff's lifestyle. While such an award might give an illusion of precision, or suggest that the court has been fastidious in searching out heads of damages, it serves no real purpose. An assessment of non-pecuniary damages involves a global assessment of the pain and suffering, loss of amenities, and loss of enjoyment of life suffered by a plaintiff. By its nature, it is a rough assessment and not a mathematical exercise.
- [103] The \$85,000 figure that I have proposed for non-pecuniary loss takes into account all of the general damages the plaintiff has suffered and will suffer. It should not be augmented by a segregated award for loss of housekeeping capacity.

- [93] In the case at bar, having reviewed the cited authorities and the applicable evidence, the past and future loss of housekeeping capacity which required the payment of expenses for housekeeping services is assessed at \$60,000 (taking into account the amounts paid by the insurer).

Past Income Loss

- [94] The parties have both made submissions with respect to the quantum of past income loss. The plaintiff submitted that there was insufficient evidence to support a past income claim in this case. As a result of that submission, there is no further need to consider this head of damages.

Loss of Future Earning Capacity

- [95] In relation to damages to compensate the plaintiff for the loss of future earning capacity, the parties agreed that the "capital asset approach" should be applied. Such damages are to be assessed as opposed to being based on a mathematical calculation, particularly in the case of a young person who has not yet established a specific career path. The test to be applied to future hypothetical events is stated in *Rousta v. MacKay*, 2018 BCCA 29 at para. 17:

As can be seen from the above, the standard for the proof for hypothetical past events, like hypothetical future events, is the lesser "real and substantial possibility" threshold. This standard can be contrasted with the standard of proof for past events, which is on the ordinary civil balance of probabilities standard, and alleged events which do not rise to the "real and substantial possibility" standard because they constitute mere speculation.

- [96] The evidence in this case, as provided by Dr. Helper, supports a finding that the plaintiff has suffered injuries that will cause sustained postures to be difficult and, without further recovery, would not allow the plaintiff to work more than 20 hours per week without escalating pain responses during a full work day (Report of Dr. Helper at line 645). That said, according to Dr. Helper, if the plaintiff participated in a new course of rehabilitation, she may experience moderate improvements, though not to the level of full-time employment, but rather to a level of approximately 32 hours per week if "accommodated by an ergonomic setup with sit/stand desk" (Report of Dr. Helper at lines 660-662). Dr. Helper found that a return by the plaintiff to consistent work as a massage therapist would be highly speculative and the results would be, at best, unpredictable.
- [97] Dr. Helper, testifying for the plaintiff as an expert witness, has confirmed continuing symptoms which will impair and impede her future employability. However, Dr. Helper expects, with a course of rehabilitative therapy, that she can be expected to be capable of performing desk work at 80% of full time hours each day, five days a week.
- [98] The parties made passing reference to the leading cases in this area, including: *Jorgensen v. Coonce*, 2013 BCSC 158; *Perren v. Lalari*, 2010 BCCA 140, *Athey v. Leonati*, [1996] 3 S.C.R. 458; *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229; *Crimeni v. Chandra*, 2015 BCCA

131; and *Penvidic Contracting Co. v. International Nickel Co. of Canada*, [1976] 1 S.C.R. 267 at page 297, where the Court notes the difficulty in assessing damages does not relieve the wrongdoer from the necessity of paying damages and courts must do the best they can to estimate them.

[99] It is clear from the review of the medical report cited above that the plaintiff will have grave difficulty entering into any, except a limited number of, sedentary work situations. Many employment options, including the potential occupation as a massage therapist, have apparently been foreclosed as speculative.

[100] While the defence did not make extensive submissions on this point, the plaintiff's submissions were drawn on the case of *Andrews*, cited above. Contingencies, both negative and positive, are to be based on evidence, as noted by Mr. Justice Willcock in *Smith v. Fremlin*, 2014 BCCA 253 at para. 28. The court should be careful, of course, not to reduce an award based on standard labour market contingencies and then erroneously include another deduction based on other contingencies which are a repetition of the first deduction. Other contingencies typically include:

1. Unemployment, approximately 4% per year (*Corey v. Kruger Products L.P.*, 2018 BCSC 1510);
2. Participation rate; and
3. Part-time employment.

[101] Positive contingencies, which increase losses, include the possibility that the plaintiff: would have worked beyond the normal age of retirement; would have worked greater than full-time hours; or may have supplemented her income by other activities such as a second job. Another contingency which may reduce the plaintiff's residual earning capacity is the possibility that the plaintiff may take time off to raise children.

[102] I am satisfied that the reduced earning capacity of the plaintiff, taking into account the nature of the work being done by the plaintiff, is appropriate in this case and that the plaintiff's loss of earning capacity, with contingencies applied, will be awarded in the amount of \$255,000.

Cost of Future Care

[103] The plaintiff is entitled to compensation for the cost of future care based on what is reasonably necessary to restore her to her pre-accident condition insofar as that is possible. When full restoration cannot be achieved, the court must strive to assure full compensation through the provision of adequate future care. The award is to be 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.); *Gignac v. Rozylo*, 2012 BCCA 351 at paras. 29-30.

- [104] Dr. Helper prescribed that the plaintiff should obtain physiotherapy treatment at the Performax rehabilitation clinic and, in particular, pursue therapy under the supervision of Mr. Dean Kotopski. Dr. Helper expressed the opinion that there is a greater than 50% probability of a moderate improvement over the next year, taking into account at least a six-month period of postpartum experience prior to the treatment beginning, as the plaintiff pursues a new course of treatment with the frequency and duration of treatment to be determined by the therapist. Dr. Helper further opined that Mr. Kotopski "is not in the habit of maintaining therapist-patient relationships where there is no clear trend towards recovery".
- [105] Dr. Helper also recommended that Ms. Ploskon-Ciesla should undergo a medical assessment to determine if there is a higher degree of medical suspicion for the involvement of the right C5-6 cervical zygapophyseal joint. That assessment would include a form of x-ray guided diagnostic injections to determine if further medical treatment would improve the pain experience of the plaintiff.
- [106] Assuming Ms. Ploskon-Ciesla demonstrates a satisfactory response to the rehabilitation alone, a gym-based/home-based long term maintenance plan would follow. It should also be clear that Dr. Helper opines that the foregoing rehabilitation plan would be paralleled by care of the low back and buttock symptoms in addition to the neck and right shoulder pain referred to above.
- [107] The defendant submitted in argument that it was not prepared to meet a claim for costs of future care because the plaintiff did not mention such a claim in the opening submissions. The plaintiff in the Notice of Claim filed herein claimed "past and future care costs" including the "past cost of health care services" and the "future cost of health care services" as defined in the Health Care Costs Recovery Act, S.B.C. 2008, c. 27. The defendant therefore had specific notice of the claim for costs of future care and was in a timely position to respond thereto. The defendant cannot complain that the claim for future health care costs took the defendant by surprise.
- [108] As the report of Dr. Helper clearly prescribed future care costs, in particular at the Performax rehabilitation clinic, I find those costs which were made necessary by the first accident are payable by the defendant.
- [109] The plaintiff, however, sought such costs until the plaintiff was 65 years of age with continuous physiotherapy treatment for approximately 29 years. The treatment prescribed involves physiotherapy and Dr. Helper indicated that after a reasonable period of time, it should be clear that if the treatment did not demonstrate a clear trend towards recovery, it would be discontinued.
- [110] That period, given the circumstances of the plaintiff and Dr. Helper's prescription, would be fixed at no more than three years. The plaintiff's claim for 29 years of such therapy is unsupported. The evidence supports a finding that individual physiotherapy treatments cost \$110.25 per session and that one session per week is reasonable in the circumstances

of this case. Therefore, the award for future care costs is calculated at \$110.25 per session, for 52 sessions every year for three years, equaling \$17,199, which is the award for future care costs.

In Trust Claim

The plaintiff's "In Trust" claim was not advanced and there will be no award under that head of damage.

Privacy Act

- [111] In her final written submissions, the plaintiff has asserted a claim for a breach of the Privacy Act, R.S.B.C. 1996, c. 373. The plaintiff asserts that this is a statutory tort actionable without proof of damage.
- [112] The difficulty which this final submission raises is that there is absolutely no mention in the Notice of Civil Claim of the Privacy Act nor any claim thereunder. No claim pursuant to the Privacy Act was stated in the Trial Brief filed by the plaintiff either. The first time that the defendant was made aware of the claim under the Privacy Act, according to submissions made, was when the plaintiff made her final submission. Apart from reference by plaintiff's counsel to a "hoped for" comment by this Court on the issue of the Privacy Act, there was no apparent remedy sought by the plaintiff in response to the final submission.
- [113] It is trite law that a party cannot advance a claim in a civil action without first pleading a cause of action in writing in a Notice of Civil Claim or by some other clear means putting the party opposite on timely notice that relief was being sought. Where a cause of action is pleaded incompletely or incorrectly, the Court may exercise a discretion to allow a party to amend the defective pleading, but failing amendment, no relief should be granted. However, where a party advances a claim in final submissions, the opponent party would be prejudiced by an adjudication of an issue not raised earlier in the pleading or otherwise particularized in a timely way with fair notice: *Xu v. Hu*, 2015 BCSC 1400 at para. 14. In such circumstances, as is present in the case at bar, the issue of the Privacy Act and an alleged breach thereof should not be adjudicated. This principle exists ultimately for the purposes of trial efficiency and fairness to the responding party when considering the Supreme Court Civil Rules: *Sahyoun v. Ho*, 2013 BCSC 1143 at paras. 17-19.

Special Damages

- [114] The Agreed Statement of Facts also included a listing of the plaintiff's claims for \$6,950.50 in special damages and, as those claims have been admitted by the defendant, it is not necessary to list all of the itemized expenses in these Reasons for Judgment. The plaintiff is awarded the sum of \$6,950.50 as special damages.

Summary of Damages Awarded

[115] Based on the above, Ms. Ploskon-Ciesla is awarded damages as follows:

Non-Pecuniary Damages

\$90,000

Past Loss of Earning Capacity

\$Nil

Future Loss of Earning Capacity

\$255,000

Future Care

\$17,199

Loss of Housekeeping Capacity

\$60,000

Special Damages

\$6,950.50

Total:

\$429,149.50

Costs and Court Order Interest

[116] The plaintiff is, unless there are circumstances of which the Court is unaware, entitled to the costs of this action on the basis of Appendix B of the Supreme Court Civil Rules forthwith after assessment.

[117] The Plaintiff is entitled to interest pursuant to the Court Order Interest Act, R.S.B.C. 1996, c. 79 on special damages, to be addressed between the parties, with leave for either party to apply for further directions should the need arise.

"Ball J."

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