

CANADA / JUDGMENT

Polson v. C. Keay Investments Ltd.

2008 BCSC 908

COURT

Supreme Court of British Columbia

DECIDED

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2008 BCSC 908 Polson v. C. Keay Investmetns Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Polson v. C. Keay Investments Ltd.,

2008 BCSC 908

Date: 20080710

Docket: 0626523

Registry: Prince George

Between:

Lennie Polson

Plaintiff

And

C. Keay Investments Ltd. doing business as Ocean Trailer Rentals Ltd.,

Driving Force Decks Int'l Ltd., and Kuljit S. Chahal

Defendants

Before: The Honourable Mr. Justice Chamberlist

Reasons for Judgment

Subject to Rule 66

Counsel for the plaintiff:

R. Tindale and K. Fisher

Counsel for the defendants:

D. McLauchlan

Date and Place of Trial/Hearing:

June 13, 14, October 23, 24, and November 30, 2007

Prince George, B.C.

INTRODUCTION

- [1] Ms. Polson was involved in a motor vehicle accident on August 3, 2004. She was a front seat passenger in a minivan that collided with the rear of the defendants' vehicle as the defendant driver failed to yield to oncoming traffic at the intersection of Highway 97 and Railway Street near the BCR Industrial Site. When the minivan was approximately 100 feet from the intersection the defendants' semi- truck turned left in front of the vehicle and, in anticipation of the impact, Ms. Polson braced herself by holding the sides of the seat and placing her feet on the dash. The plaintiff was wearing a 3-point lap and shoulder seatbelt and the airbag in the minivan deployed. Ms. Polson was aged 33 at the time of the accident and aged 36 at the time of trial.
- [2] Liability for the accident has been admitted by the defendants and the only issue is quantification of damages.
- [3] The plaintiff was transported to Prince George Regional Hospital by ambulance. At the hospital she complained of pain in her neck, chest and ankles. X-rays were taken at the hospital of her chest and ankles but disclosed no abnormalities. The plaintiff was discharged from the hospital after approximately 3 hours, was prescribed Tylenol 3 and advised to obtain crutches.
- [4] The issues in dispute are the nature, extent and severity of the injuries sustained by the plaintiff and the amount of damages to be awarded under each head of damage claimed by the plaintiff; being (a) non-pecuniary damages, (b) loss of past income from employment, and (c) loss of future earning capacity.
- [5] The plaintiff's position is that non-pecuniary damages should be awarded to the plaintiff in the \$50,000 to \$60,000 range given the conglomeration of injuries sustained by the plaintiff, and because of the fact that the medical evidence is that the injuries sustained have continued for some 3 years since the accident and must be viewed as chronic.
- [6] With respect to the past wage loss claim the plaintiff submits that the net past wage loss claim is \$31,624 less the agreed upon advances made by ICBC in the amount of \$8,319.10. With respect to past income loss and future claim loss the plaintiff filed a report from Darren Benning of Peta Consultants Ltd. to assist the court in quantifying or providing bench marks for assessing the past and future wage loss claim for the plaintiff.

- [7] With respect to the future wage loss claim or loss of earning capacity, the plaintiff submits that on the basis of various authorities, including *Pallos v. Insurance Corporation of British Columbia*, [1995] 3 W.W.R. 728, *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353, and *Palmer v. Goodall* (1991), 53 B.C.L.R. (2d) 44, and other decisions of the Court of Appeal that a loss of capacity award should be in a range of \$40,000, thus making the total award sought by the plaintiff being \$131,624 less the benefits received from ICBC in the amount of \$8,319.10.
- [8] The defendants have, through its cross-examination of the plaintiff and the plaintiff's witnesses, put the plaintiff's credibility directly in issue. The defence submits that the plaintiff has not been candid in her evidence concerning the intensity and duration of her injuries and the affect her injuries have had on her ability to work, pursue recreational pursuits and take care of her family and home. More specifically, the defendants submit that the soft tissue injuries to the plaintiff's neck, back and right knee were substantially resolved by mid-March 2005 and the soft tissue injury to the plaintiff's ankles were substantially resolved by July 2005.
- [9] With respect to the plaintiff's complaints of ongoing discomfort and fatigue relative to her employment since July 2005 when the plaintiff returned to work, the defendants have submitted that the plaintiff suffered the same symptoms prior to the accident and are not related to the accident and that those symptoms are properly attributable to the plaintiff's decision to work long hours at her place of employment.
- [10] The defendants have submitted that the plaintiff's claim for non-pecuniary damages should be in the \$20,000 range.
- [11] With respect to the past wage loss claim the defendants submit that the plaintiff's claim under this head of damages should only run to August 3, 2005, when the plaintiff first picked up a work shift she was not scheduled to work. The defendants have submitted that the plaintiff's net wage loss should be approximately \$24,000 less \$8,319.10 paid by ICBC, for a claim of some \$16,000.
- [12] With respect to the plaintiff's claim for loss of earning capacity, the defendants have submitted that the plaintiff's claim under this head of damage should be dismissed, or alternatively that any continuing problems should be found to be only a source of minor discomfort and not a significant impairment or disability on the basis that they are not permanent. In the further alternative the defendants say that if this court should find that there is a significant permanent impairment then I should find that the impairment is not of the kind that raises a substantial risk of diminished future earning capacity.
- [13] Finally, the defendants submit that if there is a finding by the court that there is a substantial risk of diminished future earning capacity then the damages should only be assessed at between \$5,000 and \$10,000.

THE PLAINTIFF

- [14] As previously indicated the plaintiff is presently aged 36. The injuries complained of as a result of the motor vehicle accident include bilateral ankle sprains and bone contusions, soft tissue injury to the neck, soft tissue injury to the upper back, secondary soft tissue injury to the lower back, injury to the right knee, jaw pain, secondary depression and nightmares and difficulty sleeping.
- [15] Following her attendance at Prince George Regional Hospital on the day of the accident, Ms. Polson was unable to walk and it was necessary to receive assistance from her commonlaw husband for some three weeks following the accident, including her use of the washroom. During the three week period Ms. Polson was compelled to crawl or have her commonlaw husband assist her.
- [16] Immediately following the accident, her commonlaw husband took the children on a long planned family trip which was shortened from some two weeks to four days because of her accident and during which time Ms. Polson remained at home by herself and without any other assistance. Her commonlaw husband, Howard Wright, testified on behalf of the plaintiff with respect to her inability to walk, her inability to do housework and her efforts at attempting to walk on her own and doing exercises that had been prescribed to her.
- [17] Ms. Polson was, at the time of the accident and subsequent to the accident, a customer service agent with West Jet in Prince George where she had been employed since August 2002. The accident itself occurred when she and a co-worker, the driver of the vehicle she was a passenger in, were on their way to work. Ms. Polson described the accident in some detail, primarily dealing with her actions in anticipating the collision. She had braced herself by holding onto the side of her seat and placed both her feet upon the dash. She testified that the speed of the vehicle she was a passenger in was about 60 kilometres per hour and that the airbags were deployed in the minivan on impact. She described how immediately after the impact her ankles were sore and throbbing.
- [18] Upon her attendance at hospital she testified to having told the attending physician in emergency that her ankles were injured, that her neck and chest were sore, and that she had trouble breathing and was feeling dizzy. X-rays were taken of her ankles and chest but no objective injuries were found.
- [19] Ms. Polson initially attended at her family physician's office on August 5th, some two days after the accident. She was noted to be having difficulty standing and walking due to pain in both her ankles and on examination she was found to have slightly decreased lateral flexion and rotation of her neck, tenderness over both trapezius muscles and mild muscle spasm.
- [20] The evidence of Dr. Peter J. Gorman, her family physician, was that, at that time, the plaintiff had full passive range of motion of both ankles but pain in the lateral aspect of both ankles "at extremes of range of movement". No obvious swelling or bruising was noted and the diagnosis given by the doctor was one of bilateral ankle sprains and neck strain. In

addition to Tylenol with codeine, which had been given to her at the emergency room two days prior, Ms. Polson was prescribed Naprosyn and advised to obtain crutches and use them for the next several days.

- [21] On August 17, 2004 she was again seen at Dr. Gorman's office. Dr. Gorman noted significant improvement at that time but that Ms. Polson was still experiencing significant pain affecting her right upper trapezius muscle and bilateral ankle pain. At that time Ms. Polson was noted to have a swelling over the lateral malleolus of her left ankle and to a lesser extent to her right ankle. Dr. Gorman referred her to physiotherapy.
- [22] Ms. Polson commenced attending the Phoenix Physiotherapy Clinic on August 17th and continued with physiotherapy until December 16, 2004. In her self-reporting patient form, dated August 18, 2004, she referred to her main problems, at that time, being neck pain, ankle pain, knee pain, and back pain.
- [23] The clinical records of the Phoenix Physiotherapy Clinic tendered by the plaintiff include a reference to December 16, 2004, where the Phoenix Physiotherapy Clinic noted only occasional pain in Ms. Polson's ankles and in her right knee. A progress report of December 8, 2004 from the Phoenix Physiotherapy Clinic to Dr. Gorman indicates that the plaintiff was going to the gym for the last two weeks and that the plaintiff was feeling quite good generally except for flare-ups. In the meantime, while attending the Phoenix Physiotherapy Clinic on a two to three times per week basis, Ms. Polson continued to be seen by her family physician. At this time at physiotherapy she complained primarily of right knee pain and Dr. Gorman's examination revealed a little tenderness over the lateral joint line of her right knee. Dr. Gorman advised her to continue with anti-inflammatories.
- [24] On September 1st Dr. Gorman referred Ms. Polson to Dr. Janet Ames, Sports Medicine Physician. In her medical report of September 23, 2004, Dr. Ames noted that Ms. Polson's left ankle was worse than the right. In her report she stated:

On the left side the pain is over the anterior aspect of the ankle and the achilles.

- [25] With respect to the physical findings, Dr. Ames, at p. 2 of her report, under the heading Pertinent Physical Findings, reported as follows:

Lennie stands with neutral alignment and has very minimal functional knee valgus. The gait appeared quite neutral. She found it difficult to flex more than 30 degrees mainly related to bilateral ankle pain. On examination of the right knee there was no effusion or soft tissue swelling. The knee was stable with respect to the cruciate and collateral ligaments and there was no evidence of meniscal injury. She did have some tenderness posteromedial in the knee and it seemed to be related mostly to the medial hamstring. There was also discomfort with stressing the proximal tibia. The pain was reproduced by resistance to hamstring contraction. The left knee examination was normal. There was a full pain free range of motion of both hips.

On examination of the ankles there was no swelling or effusion. There was a full passive range of motion of the ankles with discomfort in the area of the Achilles with forced dorsiflexion. Inversion and eversion stress did not specifically bring on pain consistent with ligament injury. The anterior drawer sign was negative. There was tenderness to palpation in both retrocalcaneal areas but not on the tendon. There was no thickening of the tendon or swelling. Resisted motions of the ankles did not reproduce the pain.

[26] Under the heading Impressions, in the same letter, Dr. Ames reported as follows:

The mechanism of injury is quite unusual. The ankles were likely forced into dorsi flexion and the knee into tight flexion. There may have been some twisting force. The place to start with further investigation is a bone scan. This will rule out an osteochondral fracture of the ankles and any significant bony injury of the right knee. The right knee has not been x-rayed but since I'm going to do the bone scan for the ankles anyways I will order x-rays of the right knee if the bone scan is hot. If the bone scan is cold for the right knee an MRI may be necessary. The force could have resulted in a posteromedial meniscal tear. While awaiting the bone scan I suggested she consider a break from physiotherapy if it is not helping right now and we will wait to see the results of the tests. If she decides to stop therapy for the time being I did encourage her to remain as active as possible and gave her some guidelines.

[27] On November 4, 2004, some six weeks later, Dr. Ames rechecked Ms. Polson. Again Ms. Polson reported that her right knee had not improved and it seemed somewhat worse, that her hamstrings generally hurt with any resisted exercises, and in terms of her ankles there had been no change overall with the left ankle remaining worse than the right. With respect to physical examination Dr. Ames stated:

On examination of the right knee there was a full range of motion with no effusion or soft tissue swelling. The knee was stable with respect to the cruciate and collateral ligaments and there were no definite meniscal findings. She did have mild tenderness over the posteromedial joint line and mild discomfort with resistance to hamstring contraction.

[28] In the same letter to Dr. Gorman, Dr. Ames reviewed bone scan results from October 28, 2004, which she had ordered subsequent to the September 23, 2004 appointment. She states:

I reviewed the bone scan results from October 28, 2004. Dr. Leighton reports, "There is increased uptake noted in the region of the distal tibia and dome of the talus bilaterally. The talar domes show minor increased uptake, both medially and laterally. Uptake is perhaps minimally more evident on the left than the right. The findings conceivably could relate to bone contusion but review of a previous x-ray obtained the third of August 04 shows no evidence of osteochondral injury in these regions. The plain films could be repeated to completely exclude underlying occult osteochondral injury but I don't really think this is the case. Otherwise, the axial and appendicular skeleton demonstrates no evident abnormal uptake. The knees appear unremarkable."

I suspect the ankle pain is related to bone contusion of the talar dome. For completeness sake I ordered a repeat x-ray of both ankles.

- [29] Dr. Gorman, in his medical/legal report of August 25, 2006, referred to an assessment he did on October 10th where again subjective complaints were made of ongoing right knee and bilateral ankle pain, especially on the right side, consistent with her complaints made at physiotherapy.
- [30] Dr. Gorman noted on October 10th that Ms. Polson's neck and back symptoms were improved "nicely".
- [31] Dr. Ames ordered an MRI which revealed bilateral increased uptake on the bone scan which suggested bone bruising in both ankles. In Dr. Gorman's medical/legal report he noted that at that time, some three months post-accident, that Ms. Polson was walking very carefully and with a slight limp.
- [32] Following November 2004 Ms. Polson complained of increased pain in her right knee and left ankle. In January of 2005 she was enrolled in a gym program plus pool exercises until April 2005 and then commenced a formal work conditioning program in April 2005 under the direction of Dr. Ames.
- [33] In July 2005 Ms. Polson returned to her employment with West Jet as a customer service agent.
- [34] From a review of Dr. Gorman's medical/legal report and his clinical notes it would appear that Ms. Polson did not regularly appear at his offices with complaints directly related to the accident after returning to work until August 24, 2006 when his medical/legal report had been requested by Ms. Polson's counsel.

[35] I note that, at that time, Dr. Gorman's report on that date as being:

... She was complaining of rather non specific musculoskeletal pains. She was having some low back pain and pain in her right knee, hip, and ankle areas. These problems have persisted since the motor vehicle accident and she relates the onset of the symptoms to the MVA. Examination did not reveal any localized redness or swelling of either knee joint. She was able to do 10 deep knee bends but did experience right knee pain with same. She was able to do 6 lady push ups without any difficulty. She did experience low back pain with back extension but was able to touch her toes.

It would seem that Lenny continues to experience soft tissue pain as a result of the motor vehicle accident. The pain is less specific and less severe than previous. The only treatment modalities available would include a regular exercise program and optimizing her sleep pattern. I have not recommended any medications, nor specific therapy at the present time. It would not be unreasonable to reinstitute some form of physical therapy, massage therapy and/or a membership in the gym at some future point should her symptoms continue and not resolve with a home exercise program.

In summary Lenny was involved in a motor vehicle accident and sustained significant injuries, primarily involving both ankles and right knee but also involving her low back and neck. She remains symptomatic in all of these areas despite it now being 2 years from the time of the motor vehicle accident. Due to the fact that she should now have achieved a maximum recovery, I now anticipate that she will continue to experience pain in her ankles, knee, low back and neck, as a result of the motor vehicle accident. Her quality of life has been, and will continue to be, adversely effected by these injuries although, at the present time, she is able to function normally at work.

[36] Ms. Polson, in her evidence, disagreed with his conclusion that she is able to function normally at work, and Dr. Gorman stated at trial that the reference to Ms. Polson's low back in his concluding paragraph be deleted from his report.

[37] Ms. Polson's testimony at trial fairly well conformed with the medical evidence provided by Dr. Gorman and the records of the Physiotherapy Clinic up to the early portion of 2005. At trial she testified that she did not return to work following the accident until July 2005 because she was unable to perform the work due to her ankles, back and neck pain. The four-week back to work program was for four hours per day/five days per week and that, together with her exercises, allowed her to recommence employment in July 2005. She testified that, at that time, her neck pains were getting better and not hurting as much, and although her balance was better she still had pain from time-to-time in her ankles.

[38] At the request of counsel for the plaintiff, Ms. Polson was seen by Dr. G.M. McKenzie, Orthopaedic Surgeon, specializing in arthroscopic surgery of shoulders and knees. Dr. McKenzie first saw the plaintiff on November 23, 2005 and again on March 21, 2007. In his report of November 27, 2005, he opined, under the heading of Assessment/Opinion:

This lady was essentially normal from a musculoskeletal point of view prior to a high energy motor vehicle accident just over a year ago. In my opinion in the accident she injured her neck, her mid back area, both ankles and her right knee.

Since then she has gone on to develop some lower back discomfort. In my opinion low back was not directly injured in the accident and the discomfort that she experienced with her return to work is likely secondary to deconditioning and weight gain. In my opinion if she engaged in a CORE exercise program and was able to regain her previous level of fitness then it is unlikely that she will have any long term problems in the lower back as a result of the accident.

With regard to her neck and mid back, she has not yet reached maximum medical improvement. The discomfort in these areas is likely myofascial in nature. She would benefit by ongoing stretching/strengthening exercise programs for these areas. In my opinion she will reach maximum medical improvement at the 2 - 2½ year mark. In my opinion any discomfort that she has in these 2 areas following this time frame is likely to be there for the foreseeable future and perhaps permanently. In my opinion the causation of these areas of discomfort is her motor vehicle accident.

With regard to the right knee joint, in my opinion she has some patellofemoral discomfort. She would benefit by an ongoing quadriceps/hamstring exercise program. She will reach maximum medical improvement in this area again at the 2 - 2½ year mark.

With regard to the ankle joints she likely has contused the ankle areas due to forced dorsiflexion i.e. compression. She will reach maximum medical improvement over the next year or so. She would benefit by some peroneal exercises to help give her a better sense of stability. In the meantime I would not recommend any other treatment or investigations for this area.

In essence then, this lady still has another year or so to go before she reaches maximum medical improvement. I would recommend some strengthening/stretching exercises for her knee, lower back, midback and neck. She will reach maximum medical improvement in approximately a year's time.

[39] Ms. Polson was again seen by Dr. McKenzie on March 21, 2007, some months before the commencement of this action. At that time, Dr. McKenzie noted from his physical examination of her that Ms. Polson had lost more weight and was down to 136 lbs., and with respect to his physical examination of her noted as follows:

Her gait including heel toe gait was normal.

Cervical spine showed full range of motion. She had pain with flexion and left sided tilt. This is slightly different than before. She is tender in the midline and over the paraspinals from C2 to C7 and over both trapezius muscles. This is unchanged from my previous exam.

Thoracolumbar spine shows tenderness in the midline of T5 and T8 but not between. This is somewhat changed from my previous examination.

Upper extremity examination was completely normal. This is unchanged.

Thoracolumbar examination shows full range of motion. She had discomfort with flexion and extension. With rotation she had pain in the mid thoracic area which is consistent. She is tender at L4 to S1 in the midline. This was mild. She had no paraspinal or SI joint tenderness.

The right knee showed some ongoing patellofemoral discomfort with compression. Otherwise both knees were normal. Her right ankle today examined normally. The left ankle shows some tenderness over the anterolateral aspect, otherwise it was normal.

[40] Under his assessment he opined as follows:

This lady is now 2½ years from the time of her motor vehicle accident. She has reached maximum medical improvement. She is continuing to have some ongoing problems despite the passage of time and treatment. She has some ongoing neck discomfort. It remains my opinion that this is likely myofascial discomfort. As it has been 2½ years from the time of the accident in my opinion she is likely to have some ongoing persistent discomfort for the foreseeable future and likely permanently as a result of the accident. The same applies to the mild back pain.

With regard to the right knee joint it remains my opinion that she has patellofemoral discomfort. She has good quadriceps power now. As it has been 2½ years from the time of the accident she is likely to have some ongoing persistent discomfort in that knee as she has now. In my opinion the causation is her motor vehicle accident.

She has minimal right ankle pain now. She has ongoing discomfort in the left ankle however. This is non-specific ankle discomfort. She did have increased uptake in her bone scans indicating some bone bruising. The residual discomfort is either on the basis of soft tissue discomfort in the ankle area or due to the joint itself. As it has been 2½ years from the time of the accident her persistent discomfort is likely to be there for the foreseeable future and likely permanently. In my opinion the causation is her motor vehicle accident.

She is having some persistent lower back pain. Today's examination shows minimal tenderness. As I indicated in my previous report it was likely secondary to deconditioning rather than a primary injury. Today she lists it as the least of her complaints. It remains my opinion that this is likely a secondary problem rather than a primary problem from the motor vehicle accident.

In essence then this lady is having some ongoing problems in various areas. She has now reached maximum medical improvement. In my opinion she is likely to have ongoing persistent discomfort in these areas with the attendant work and recreational difficulties as she describes. In my opinion the causation is her motor vehicle accident.

I would not recommend any further treatment or investigations.

...

[Emphasis added]

- [41] With respect to her present condition on a scale of 1 to 10, with zero being no pain and 10 being excruciating pain, Ms. Polson described her neck pain as having reduced from 10 at the time of the accident as being an 8; while her back pain was at 10 immediately following the accident, it had reduced to 5 but was now in the 7 or 8 range. With respect to her knee she described it being at 10 for an extended time, and then the pain being at zero. When it does flare up now, it flares to 9. With respect to her ankle pain she described the pain as being at 10 immediately following the accident, and staying at 10 for some time, and that now when she does experience ankle pain now it will extend to an 8 especially if she rolls her ankle. She also described lower back pain starting after she returned to work in July 2005, and that that too bothers her every day and extending to the duration of the day. She described her jaw pain as having lasted for four months on a consistent basis, but now only experiences flare-ups, perhaps on a monthly basis.
- [42] The plaintiff has included in her damages a claim for depression, however, a review of her clinical records to date clearly shows treatment for depression prior to the accident and there is no evidence to indicate a causal connection between the depression described by Ms. Polson as being directly or indirectly related to this motor vehicle accident.

[43] With respect to the plaintiff's injuries the defendants submit that soft tissue injuries to the plaintiff's neck, back and right knee were substantially resolved by mid-March 2005, with the soft tissue injury to the plaintiff's ankles having been resolved by July 2005 when she returned to full time employment with West Jet. Relative to the plaintiff's complaints of ongoing discomfort and fatigue since having commenced work, the defendants simply say that the plaintiff had suffered the same symptoms prior to the accident as evidenced by the clinical records of Dr. Gorman, and that these symptoms are not causally connected to the accident.

[44] The defendants also point to the clinical notes of Dr. Gorman and the physiotherapy notes, in particular Dr. Gorman's note of August 27, 2004 where Dr. Gorman noted that she was making "slow but sure progress" and the physiotherapy clinical records concluding with the September 29, 2004 notation "Neck doing well. Knee-same. Burning in neck almost gone". In particular the defence notes the physiotherapist's report to Dr. Gorman, dated September 30, 2004, where this note appears:

Lennie's neck is progressing very well. She no longer has headaches and the burning sensation is almost gone. She has full ROM [range of motion] of the neck with mild left discomfort on left side flexion and thoracic discomfort on full flexion. The levator scapulae tightness is improving. Mobilization of the thoracic spine still produces "cracking" but she has started strengthening to increase the stability of this area.

[45] The plaintiff was also completing Sun Life Financial Long Term Disability forms and I refer specifically to the application form completed by the plaintiff on November 10, 2004, where the plaintiff described her "present illness or injury" and how it prevented her from working in these terms:

Bruised bones in both ankles, sore knee (rt), unable to push wheelchairs especially in winter conditions, lift bags up to 70 lbs., stand for very long period of time, carry on or off guests with disabilities.

[46] In the same form, the plaintiff noted the following with respect to her injuries and how they limit her normal daily activities as follows:

Unable to lift heavy items (children), slow going up/down stairs

[47] In addition, the defence points to the physiotherapist's clinical note for November 19, 2004, which states:

Neck feels quite strong now. Able to bring back to neutral from extended position without problem.

[48] Again, with respect to the Sun Life documents, entered as Exhibits in these proceedings, the defendants point to the notation of the Sun Life case manager's comments relating to a telephone call record between Ms. Polson and Sun Life, which appears to indicate greater concern with her ankle and uncertainty as to whether or not she will require surgery for one

of her ankles along with an indication by Ms. Polson that she had indicated to the Sun Life representative that her knee problem was "settling down" and that "her situation is improving gradually".

- [49] Ms. Polson, under cross-examination, was also referred to a rehabilitation interview report contained within the Sun Life documents, which report referenced a meeting with Warren Ramage, Rehab Consultant, with Sun Life. In that report Mr. Ramage noted that Ms. Polson had reported to him that her pain levels had decreased significantly but that she still had problems with severe sharp pain occurring in her left ankle, although her ankle did not give out, and that although her balance was fine except for occasions when they [her ankles] were under strain, she would experience sharp pain and fatigue.
- [50] Overall, the defendants submit that at this point in time and primarily prior to returning to work that the plaintiff's neck and shoulders were operating within normal limits and point specifically to the fact that at this time it would appear that her only ongoing complaints were with respect to her ankles and the burning pain in the back of her right knee from time-to-time.

CREDIBILITY ISSUES RAISED BY THE DEFENDANTS

- [51] This trial was theoretically to take under two days because of the election to have it proceed under R. 66. Regretfully, the trial was adjourned because, although the defendant had requested of the plaintiff particulars relating to her hours of work, etc. with West Jet, those documents were not forthcoming from the plaintiff and as a result were obtained by the defence directly from West Jet personnel. The employment records were only received on the second day of trial, and as a result, the trial was adjourned. Ms. Polson was therefore not confronted with the employment records when under cross-examination by defence counsel.
- [52] However, in direct evidence, Ms. Polson testified that prior to the accident she was working between 40 and 45 hours, although she was only guaranteed 25 hours per week. She testified with respect to these hours:

If somebody was on holidays or if somebody requested days off or if we were short staffed due to a short-term/long-term disability, we would be automatically scheduled in for more than our 25 hours. There is also - amongst the team we can pick up shifts from each other. If somebody doesn't want to work a Saturday, you can pick up that Saturday from them, above and beyond the hours that you are scheduled.

- [53] Ms. Polson also, while under direct examination, testified that when she returned to work after the accident she was on a graduated program that restricted her to 25 hours per week on this program although after a two week period there were no further restrictions imposed by her employer, West Jet. Most importantly, on direct examination, Ms. Polson testified that since the accident she had been working only an average of about 36 hours since the graduated return to work had ended. Further in direct examination of Ms. Polson,

taken from the transcript of proceedings of day one of trial, p. 45 to 47, commencing a line 41, these questions and answers appear:

41

Q

Now, in terms of picking up shifts you talked about from other agents. Have you been doing that?

44

A

If I have picked up a shift from an agent because they have a doctor's appointment or absolutely can't work, I give a shift away. So I would help somebody but I would get rid of another shift in order to balance that out.

2

Q

Okay.

3

A

I would trade with them, basically. But, no, I don't pick up shifts.

5

Q

Okay. You were doing that prior to the motor vehicle accident?

7

A

Picking up shifts?

8

Q

Yes?

9

A

Yes.

10

Q

Was that a regular thing for you?

11

A

Yes.

12

Q

Why aren't you doing that now?

13

A

Because I can't work as much as I did willingly. My body just gets very tired and sore and I'm very tired at the end of the day if I work too much.

...

44

Q

Okay. So the fact that you're working 36 hours a week on average now, I think you said earlier that you'd - - what you'd like to do is 30 hours a week. Is that right?

1

A

Yes.

2

Q

And that's because why?

3

A

Because my - - I can't do anything after working too many hours. I can't go home and have a family life with my kids because I'm too tired and I'm sore. So my preference would be not to work as much as I'm able to have a family life and not be sore.

9

Q

Okay. And if you weren't sore, can you give us an estimate of hours you'd be able to work?

11

A

I would work as many as were available.

12

Q

But can you give me an estimate of what that would be?

14

A

It could be anything from 40 hours to 50 hours a week.

16

Q

Prior to the accident you said you were averaging about 45 hours a week?

18

A

Yes.

19

Q

Is that something you would have pushed to maintain?

21

A

Yes.

[54] On cross-examination regarding her wage loss claim, Ms. Polson agreed that she would like to reduce the number of hours she worked per week to around 30 hours because working more than 30 hours accelerates the discomfort that she gets and reduces her quality of life, and she conceded that as a result she was not picking up the same amount of shifts that she had picked up prior to the accident.

[55] Commencing at line 35 on p. 13 and continuing on p. 14 of the transcript of the second day of trial, this exchange appears during her cross-examination:

35

Q

Ms. Polson, it's your evidence, then, that you're working significantly fewer hours in 2007 than you were, say, in 2003?

38

A

In 2007 I'm working what I've been scheduled to work.

40

Q

Okay. Ms. Polson, the question was, are you working significantly fewer hours in 2007 than you were in 2003?

43

A

Fewer hours, yes.

44

Q

Significantly fewer hours, Ms. Polson?

45

A

I don't know. I haven't sat down and worked them out.

47

Q

Well, you wouldn't know just by your own experience whether or not you're picking up fewer hours in 2007 than you were in 2003?

3

A

I don't pick up any hours.

4

Q

Okay. Then you don't know from your personal experience whether you're working significantly fewer hours in 2007 than you were in 2003?

6

A

I am scheduled what I work, and if I'm scheduled the hours, then I will work those hours, and I believe they are higher in 2007.

10

Q

Than 2003? They're higher - - you're working more scheduled hours in 2007 than you worked whether scheduled or not in 2003; correct?

13

A

No.

14

Q

Is it about the same?

15

A

It's probably close to the same.

16

Q

Well, why would you work those extra hours if it's causing you so much pain, Ms. Polson?

18

A

As I just said to you, I'm scheduled. I get a schedule, and depending on if there's somebody on leave or holidays or we're short-staffed, I have to work what I was - - when I'm scheduled.

22

Q

Okay. So you can't go [to] your manager at WestJet and say, "This is cause - - this is wrecking havoc with my life. I don't want to work these many hours." Is that what you're saying?

26

A

That's correct.

27

Q

Okay. So you couldn't go to your doctor and get a note and say, "This is wrecking havoc with my life. I don't want to work these hours. I want to work down to 30 hours a week"; is that what you're saying?

32

A

I don't know if I could do that or not.

33

Q

Well, why won't you try?

34

A

I don't know.

[56] Following the adjournment of the trial to October, it became clear from the evidence led by the defence from West Jet's representatives and employment records that the plaintiff's position on picking up shifts was not true. In fact, the employment records in evidence confirm that the plaintiff began picking up more work than she was scheduled within a month of returning to regular hours of employment in July of 2005. From the evidence of the West Jet supervisor the plaintiff could routinely work 30 hours a week or less simply by working the hours that she was scheduled but it is clear from the employment records she chose to work more than 40 hours per week by picking up shifts from fellow agents following her return to work in July 2005 and commencing in August 2005.

- [57] From a review of her employment records relating to her employment before the accident it became crystal clear that since she began working at West Jet Ms. Polson has routinely lobbied her fellow agents for more work as evidenced from commentary in work reviews directed to her in 2005 and 2006.
- [58] Primarily relative to these inconsistencies relating to her employment following the accident, I have, regretfully, come to the conclusion that the plaintiff, in her direct evidence, led the court to believe that she was unable to work additional hours that she had worked prior to the accident and wanted fewer hours of employment because of the pain working additional hours caused her when, in fact, she volunteered for and obtained additional hours notwithstanding the additional pain she asserts.
- [59] Likewise, with respect to the medical evidence and her contention that the pain levels at the time of trial were in the ranges she described, this level of pain is inconsistent with her attendances at her treating physician's office. As indicated previously, following her return to work in July 2005 I can count, from the clinical records, only one occasion prior to her attendance for a medical/legal report to be provided by Dr. Gorman some 13 months after returning to work. While there are complaints of depression, as already indicated, there is ample clinical notations to indicate pre-existing problems with depression and fatigue which cannot be causally connected to this motor vehicle accident without more.
- [60] Although the plaintiff testified that she routinely suffers from pain in her neck at a 7 out of 10 pain level when at work, and frequently rubs her neck as a result, only one witness testified that she had seen the plaintiff sometimes stretching her neck, perhaps once a week, and only occasionally sitting on an exercise ball provided by her employer. With respect to rolling her ankle at work and the resulting limp thereby occasioned, Ms. Polson described herself rolling her ankle frequently at work and limping frequently at work for approximately 3 or 4 times a day, but no witness testified to having seen Ms. Polson limping or rubbing her ankle. While her co-worker Amanda Fraser-Doyle testified that Ms. Polson had slowed down since the accident, this would be inconsistent with the actual hours worked and voluntarily picked up by Ms. Polson after returning to work.
- [61] One other matter of evidence also needs to be dealt with. Tricia Spencer, the administrative assistant for West Jet at the Prince George operations, testified to having observed the plaintiff at the Christmas party in December 2006 where she described the plaintiff as "enjoying herself on the dance floor for a relatively substantial time and was unable to notice any pain behaviour while she was dancing". While Ms. Spencer agreed that she did not have much casual conversation with the plaintiff at this time, she maintained her observations of the plaintiff's abilities on the dance floor.

DISCUSSION

- [62] With these findings in mind, I now turn to the discussion and determination of the various damages sought by the plaintiff with respect to the accident of August 3, 2004.

Non-Pecuniary Damages

- [63] I agree with the plaintiff that this is a difficult case to quantify given the injuries sustained by the plaintiff, particularly the bilateral ankle bone contusions and the plaintiff's right knee problems.
- [64] I am satisfied on the medical reports provided that these injuries represent the most serious aspects of her pain and suffering and I accept that all other soft tissue injuries to the plaintiff's neck and back were substantially resolved by July 2005 when she returned to work. Notwithstanding the plaintiff's testimony with respect to level of pain experienced by her relative to these issues after she returned to work, I do not accept that the pain is for the duration or at the intensity described by her. One would think that a person experiencing pain at that level would attend on her family physician for medical relief but this did not occur following her return to work. I do accept that there are flare-ups involving her knee and certainly involving her ankles but not to the extent and duration described by the plaintiff.
- [65] I do accept that for the period immediately following the accident she was in tremendous pain and was unable to attend to even the most personal of matters including trips to the washroom, but within six months of the accident was able to generally perform her normal daily routine although perhaps with not the same quickness that she was able to perform them prior to the accident. I also accept that certainly for the period of time up to her return to work she was not able to take part in recreational pursuits that she had enjoyed prior to the accident, such as racket ball and golf.
- [66] She has been physically examined by Dr. Gorman, Dr. Ames and Dr. McKenzie. The concerns of all three doctors have been well documented.
- [67] It is notable however that she advised Dr. McKenzie and she advised the court that she had decreased her number of work hours following her return to work but in fact she was seeking out additional work.
- [68] The communications to Dr. McKenzie with respect to her working less time continued up to her visit of March 22, 2007, where again she stated to him that although she is guaranteed 25 hours per week she was averaging 30 to 35 hours per week although her work activities aggravated her pain. Of course, the evidence from her employment records would indicate that she is certainly working more than those hours by picking up additional hours of work.
- [69] Notwithstanding what I believe is the exaggeration of Ms. Polson with respect to her ongoing complaints, there is no doubt that the injuries to her ankles and her right knee are well documented and are, as I believe Dr. Ames commented, very unique.
- [70] In this case there is a conglomeration of soft tissue injuries including the plaintiff's neck, back, and to some extent her jaw, which had all effectively cleared up within some 6 to 7 months after the accident, and her ankles and knee which have progressed to the point where she could return to work in July 2005. I accept that difficulties with her ankles,

primarily her left ankle, were cleared up sufficiently for her to return to work in July 2005, but that she still has difficulties and will likely have ongoing difficulties with primarily her left ankle from time-to-time into the future.

- [71] Counsel for the plaintiff has referred me to various decisions including *Jackson v. Gow*, 2001 BCSC 54, *Ching v. McCabe*, 2006 BCSC 1589, *Cawston v. Alexander*, 2006 BCSC 1906, *Schrauwen v. Slater*, 2001 BCSC 987, *Holder v. MacLean*, 2001 BCSC 1474, and *Bedwell v. McGill*, 2006 BCSC 369. In these cases damages ranged from \$40,000 to \$85,000.
- [72] The facts in the *Jackson* case are somewhat similar to the facts here. In that case a 35 year old female sustained soft tissue injuries to her neck, upper and middle back and some aggravation to a pre-existing low back condition in a motor vehicle accident that occurred 32 months prior to the trial. She continued to have ongoing pain although improvement had been noted. As in this case, the plaintiff in that case was off work for some 10 months. An award of \$40,000 was given at that time for non-pecuniary damages.
- [73] As far as similar type injuries are concerned, the case of *Holder v. MacLean* involved injury to the neck, shoulders, left knee and left ankle with the ankle injury being the most serious of the injuries and, as in this case, had not resolved by the date of trial. In that case however the plaintiff had undergone three steroid injection treatments for the ankle injury which did not cure it and the prognosis was that the subtalar joint may continue to deteriorate into the future requiring surgery at some later date.
- [74] In the case of *Bedwell v. McGill*, an award of \$85,000 was given for non-pecuniary damages. That case I find to be far more serious than the case before me as it involved a broken left outer side of the left ankle as well as related muscle/ligament injuries to both the lower legs.
- [75] The defendant has referred me to various cases including *Asere v. Whelton and Transportation Lease Systems Inc.*, 2006 BCSC 1617, *Bohnke v. Venderveldt et al*, 2006 BCSC 75, *Krogh v. Swann*, 2005 BCSC 761, *Marcelino v. Francesutti & Others*, 2002 BCSC 1711, *Moore v. Cabral et al*, 2006 BCSC 920, *Nicholson v. Pham and Nguyen*, 2005 BCSC 1527, *Pierce v. Pandhi and others*, 2002 BCSC 791, and *Shore v. Bierens*, 2005 BCSC 259.
- [76] In the cases referred to me by defence counsel non-pecuniary damages are in a range up to \$35,000.
- [77] Ranges are certainly helpful but each personal injury case that comes before the court must be determined on their own facts. The injuries to the plaintiff, save and except for her knee and ankles, had fairly well resolved by the time of her return to work, but I do accept that there has been lingering problems with respect to her knee and ankle as evidenced by Dr. McKenzie's report and his evidence given at trial. While I believe the plaintiff has exaggerated her ongoing pain, the fact remains that she does have a chronic problem with respect to her ankle. Although future surgical intervention is not forecast, she will have continuing pain from time-to-time of more likely on a diminishing basis. The chronic nature of her problem must be recognized by an adequate award for damages. I assess non-

pecuniary damages at \$40,000.

Past Wage Loss Claim

- [78] The plaintiff was unable to work from the period August 3, 2004 to July 1, 2005 and after returning to work the plaintiff was on a modified schedule of hours for some two weeks.
- [79] The plaintiff submits that with respect to the past income loss covering the period from the date of the accident until Ms. Polson's return to work should include a review of her work schedules from 2002 to the date of trial, while the defence position is that the plaintiff's past wage loss from the date of accident should only run to August 13, 2005, being the date when the plaintiff first picked up a shift she was not scheduled to work.
- [80] I have decided, based on all of the evidence including the records of West Jet, that the assessment of past wage loss should not be extended to time of trial but rather only to the August 13, 2005 date. Of course, it is difficult to ascertain what additional hours would be worked by the plaintiff over this time frame, but I accept the defendant's submission that the utilization of a 40 hour week would be fair and just in the circumstances. Thus, the amount of the past wage loss up to August 13, 2005 can be calculated at 52 weeks at 40 hours per week, equalling 2,080 hours. Multiplying this by the plaintiff's wage scale at the time of \$13.55 per hour equals \$28,184.
- [81] That net figure can be reduced by 18.5% for income tax, or \$5,214.04, equalling net wage loss of \$22,969.96. In addition, the plaintiff would have been entitled to a 5% bonus on the gross amount of pay which calculates to \$1,409.20, equalling \$24,379.16 total net wage loss. Thus I find the plaintiff's total past wage loss claimed to be \$24,379.16 less the \$8,319.10 advanced by ICBC, equalling \$16,060.06.

Future Loss of Earning Capacity or Diminished Capacity

- [82] The most current and succinct statement which I have found on the issue of loss of future earning capacity is to be found in *Moore v. Cabral et al*, 2006 BCSC 920. In that decision Madam Justice MacKenzie succinctly stated the law to be applied in paras. 67 to 71 of that decision. I set those paragraphs out in their entirety:
- [67] The law on loss of future earning capacity is based on the principles set out in: *Brown v. Golaïy* (1985), 26 B.C.L.R. (3d) 353 (S.C.); *Kwei v. Boisclair* (1991), 60 B.C.L.R. (2d) 393, 6 B.C.A.C. 313 (C.A.); *Palmer v. Goodall* (1991), 53 B.C.L.R. (2d) 44 (C.A.); *Pallos v. Insurance Corp.* (1995), 100 B.C.L.R. (2d) 260, 53 B.C.A.C. 310 (C.A.); *Rosvold v. Dunlop* (2000), 84 B.C.L.R. (3d) 158, 2001 B.C.C.A. 1; and *Paller v. Paller*, 2004 B.C.S.C. 977. These principles were also succinctly applied in *Wiebe v. Neal*, 2004 B.C.S.C. 984 and *Tobin v. Monkman*, 2004 B.C.S.C. 839.

[68] In *Pallos*, Finch, J.A. for the court, confirmed that the plaintiff must prove that the future loss is a real possibility, and that there is a reasonable chance such loss will occur, but he also added that a consideration of the issue should not be limited to this test and added the following at ¶29:

The plaintiff's claim in this case, properly considered, is that he has a permanent injury, and permanent pain, which limit him in his capacity to perform certain activities and which, therefore, impair his income earning capacity. The loss of capacity has been suffered even though he is still employed by his pre-accident employer, and may continue to be so employed indefinitely.

[69] Finch, J.A. also noted at ¶43, that various actuarial or arithmetic approaches may be taken in assessing an award for loss of earning capacity, all of which are arbitrary and ultimately, the duty of the court is to make a "fair assessment of damages."

[70] Furthermore, Huddart, J.A. provided a useful review of the principles relating to an award for loss of earning capacity in *Rosvold v. Dunlop* at ¶8-12, which were subsequently applied in *Paller* at ¶50. Those principles can be summarized as follows:

1. The plaintiff is entitled to be put into the position he would have been in but for the accident so far as money can do that.
2. Where a plaintiff's permanent injury limits him in his capacity to perform certain activities and consequently impairs his income earning capacity, he is entitled to compensation. What is being compensated is not lost projected future earnings but the loss or impairment of earning capacity as a capital asset. In some cases, projections from past earnings may be a useful factor to consider in valuing the loss but past earnings are not the only factor to consider.
3. The standard of proof to be applied when evaluating hypothetical events that may affect an award is simple probability, not the balance of probabilities. Possibilities and probabilities, chances, opportunities, and risks must all be considered, so long as they are a real and substantial possibility and not mere speculation. These possibilities are to be given weight according to the percentage chance they would have happened or will happen.
4. The trial judge's task is to assess the loss on a judgmental basis, taking into consideration all the relevant factors arising from the evidence.
5. Once impairment of a plaintiff's earning capacity as a capital asset has been established, that impairment must be valued. The valuation may involve a comparison of the likely future of the plaintiff if the accident had not happened with the plaintiff's likely future after the accident has happened. As a starting point, a trial judge may determine the present value of the difference between the amounts earned under those two scenarios. But if this is done, it is not to be the end of the inquiry, the overall fairness and reasonableness of the award must be considered taking into account all the evidence.

6. Even if a plaintiff is able to earn the same amount of income from alternative employment, he would still be entitled to compensation for loss if occupations previously available were closed to him.
- [71] Finally, in considering the relevant factors, the case law has consistently applied those factors set out in *Brown v. Golaiy*, being whether:
1. the plaintiff has been rendered less capable overall from earning income from all types of employment;
 2. the plaintiff is less marketable or attractive as an employee to potential employers;
 3. the plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to him, had he not been injured; and,
 4. the plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market.
- [83] On the evidence in this case, there is very little evidence to indicate that the plaintiff is less productive or less able to perform her work. While Ms. Polson has submitted that she is easily fatigued I do not find that that flows from or is secondary to the accident but rather is a condition she suffered from before the accident. There is however before me a body of evidence which discloses chronic problems with her ankles.
- [84] I accept that from time-to-time, but perhaps not as regularly as Ms. Polson indicates, that her ankles do roll while she is at work and that she does have problems at times in assisting travellers who are wheelchair bound and also has difficulty in lifting heavier luggage. She is an employee of West Jet who must regularly attend to these types of assistance. The chronic nature of her ankle problems must, I have determined, be recognized as being a limitation on her capacity to perform these activities and which could impair her income earning capacity. In this case however because of my findings of exaggeration regarding Ms. Polson's evidence I would decline to use actuarial or arithmetic approaches to assess an award for potential loss of earning capacity, but would merely assess on the basis of a fair assessment of her damages.
- [85] I have concluded that this is not a case where Ms. Polson has occupations closed to her but I find that her condition has the possibility to make her less productive or less able to perform her work with West Jet. I find that the incapacity is not permanent, but rather is merely chronic and certainly does not justify an arithmetic calculation based on the calculations done by Darren Benning of Peta Consultants Ltd. I would merely award an all encompassing award of \$15,000 under the loss of capacity head of damage.
- [86] With respect to the totality of the words given here and my rationale for them I would merely restate what was said in *Le v. Milburn*, (1987) B.C.J. No. 2690 (15 December 1987), Vancouver Registry No. B81193 (B.C.S.C.), where Southin J., as she then was, stated at p. 2:

When a litigant practises to deceive, whether by deliberate falsehood or gross exaggeration, the court has much difficulty in disentangling the truth from the web of deceit and exaggeration. If, in the course of the disentangling of the web, the court casts aside as untrue something that was indeed true, the litigant has only himself or herself to blame . . .

SUMMARY

[87] In summary, Ms. Polson shall have judgment as follows:

Non-Pecuniary Damages

\$40,000.00

Past Income Loss

16,060.06

Loss of Earning Capacity

15,000.00

Total

\$71,060.06

[88] Unless the parties otherwise wish to address the issue of costs, as this trial proceeded under Rule 66, the plaintiff will have her costs under R. 66(20)(b).

The Honourable Mr. Justice Chamberlist

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