
CANADA / JUDGMENT

Prempeh v. Boisvert

2012 BCSC 304

COURT

Supreme Court of British Columbia

DECIDED

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2012 BCSC 304 Prempeh v. Boisvert

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Prempeh v. Boisvert,

2012 BCSC 304

Date: 20120229

Docket: M095696

Registry: Vancouver

Between:

Margaret Prempeh

Plaintiff

And

Paul Boisvert also known as Ray Boisvert and

Coast Mountain Bus Company Ltd. and

South Coast British Columbia Transportation Authority

Defendants

Before: The Honourable Madam Justice Dardi

Reasons for Judgment

Counsel for the Plaintiff:

R.D. Gibbens

K.R. Hamilton

Counsel for the Defendants:

G. Chambers

Place and Date of Trial:

Vancouver, B.C.

September 26-29, 2011

Place and Date of Judgment:

Vancouver, B.C.

February 29, 2012

Introduction

- [1] On November 24, 2007, the plaintiff Margaret Prempeh (also known as Margaret Ekye) sustained injuries when she fell while onboard a transit bus in Vancouver. When the bus stopped suddenly the plaintiff was propelled forward to the floor at the front of the bus from her standing position by the rear door. It is uncontested that the plaintiff sustained injuries in the fall and that her primary injuries were to her lower back and right wrist.
- [2] The bus was driven by the defendant Paul Boisvert, who is an employee of the defendant Coast Mountain Bus Company Ltd. The bus was owned by the defendant South Coast British Columbia Transportation Authority.
- [3] The defendants deny any responsibility for the incident. They contend that if they bear any degree of responsibility for the incident, the plaintiff was contributorily negligent.
- [4] The plaintiff claims general damages for pain and suffering, loss of past and future earning capacity, loss of housekeeping capacity, future care costs, and special damages.
- [5] The issues for determination are:
 - (i) whether the plaintiff's injuries were caused by the negligence of Mr. Boisvert and if so,
 - (ii) the quantum of damages the plaintiff should be awarded.
- [6] I will address these issues separately under the headings of "Liability" and "Damages".

Liability

- [7] For the reasons that follow, I conclude that Mr. Boisvert was negligent and that his negligence caused the plaintiff's injuries. The plaintiff was not contributorily negligent.

Facts

- [8] I find that the evidence establishes the following facts:
- [9] The incident occurred on a sunny Saturday afternoon on November 24, 2007. The plaintiff, who was a regular transit user, was taking the bus to work. At the time of the incident the trolley bus was proceeding westbound on its route down Hastings Street in downtown Vancouver. At this point on the route Hastings Street has two westbound lanes. Mr. Boisvert, who was a bus driver for approximately six years at the time of the incident, described the traffic conditions that day as "Saturday shopping traffic".
- [10] The bus passed through the intersection of Cambie Street and Hastings Street (the "Intersection") just prior to the incident. Mr. Boisvert was driving the bus in the inside or centre lane in order to negotiate the bus through the curve immediately before the Intersection. Mr. Boisvert cannot recall how far he was travelling behind the car in front of him when he crossed the Intersection. After clearing the Intersection, Mr. Boisvert intended to move into the curb lane because he was approaching the next bus stop. However, due to the traffic he was not able to move into the curb lane.
- [11] Mr. Boisvert vigorously and abruptly applied the brakes to avoid a collision with the two vehicles which had stopped ahead of him. The first car was turning left onto Hamilton Street which caused the car behind it to stop. Mr. Boisvert admitted that the second vehicle did not honk at the first vehicle, nor did he hear any screeching of brakes. In my view it is significant that Mr. Boisvert braked in response to two, rather than one vehicles having stopped in the traffic lane in front of him. Mr. Boisvert described the stop he made as a "hard stop" which he had to make more quickly "than normal". He did not warn the bus passengers that there would be a sudden stop because he himself was surprised.
- [12] The plaintiff, who routinely rode this route to work, was seated on the aisle seat of a double seat. She was seated across from the rear doors of the bus. She was wearing low-heeled shoes. After the bus had passed through the Intersection, the plaintiff stood up because she intended to disembark at the next bus stop. There were no other passengers standing on the bus. As she got up she held the metal handle on the back of the seat with her right hand in order to support herself. She was holding her purse in her left hand. After the bus braked abruptly the plaintiff found herself in the aisle near the front of the bus. She landed in a sitting position on her hands, buttocks and heels, facing the front of the bus and in close proximity to Mr. Boisvert. A fellow passenger assisted her to her feet and assisted her with disembarking from the front door of the bus.
- [13] Immediately after the application of the brakes, Mr. Boisvert heard a commotion and he realized that a passenger had fallen on his bus. Mr. Boisvert pulled into the curb lane and stopped at the bus stop. He observed the plaintiff getting up off the floor. I accept the plaintiff's evidence that after the incident some of the other bus passengers expressed anger and uttered expletives at Mr. Boisvert. There is a dispute on the evidence as to whether Mr. Boisvert spoke to the plaintiff after the incident. Mr. Boisvert says he asked the plaintiff if

she was all right. According to Mr. Boisvert she did not respond. The plaintiff testified that Mr. Boisvert never spoke to her. It is consistent with the probabilities of the situation that the plaintiff never heard Mr. Boisvert's utterance. The essential point here is that Mr. Boisvert was alerted to the possibility of the plaintiff having injured herself in the fall.

- [14] The plaintiff telephoned to report the incident to the bus company within the next few days. Shortly thereafter Mr. Boisvert completed an Employee Incident Report. In the report he did not draw any diagrams nor did he recount in any comprehensive way the details of what had transpired that day.

Legal Framework

- [15] The principles that govern the disposition of this case are uncontroversial. The reasonable foreseeability test informs the analysis of liability. The standard of care owed to a plaintiff passenger by a defendant bus driver is the conduct or behaviour that would be expected of a reasonably prudent bus driver in the circumstances. This is an objective test that takes into consideration both the experience of the average bus driver and anything the defendant driver knew or should have known: *Wang v. Horrod* (1998), 48 B.C.L.R. (3d) 199 at para. 39 (C.A.); *Patoma v. Clarke*, 2009 BCSC 1069 at para. 6.
- [16] It is well-settled on the authorities that the standard of care imposed on a public carrier is a high one. However the principle to be derived from the authorities is that the standard to be applied to the bus driver is not one of perfection nor is a defendant bus driver effectively to be an insurer for every fall or mishap that occurs on a bus: *Patoma* at para. 7.
- [17] *Day v. Toronto Transportation Commission*, [1940] S.C.R. 433, is the seminal case dealing with the liability of public carriers. The plaintiff, a passenger in a street car owned by the defendant, while standing and picking up a parcel in preparation to disembark, was thrown to the floor and injured by the sudden application of the emergency brake. The articulation of the standard of care was stated as follows by Hudson J. at 441:

Although the carrier of passengers is not an insurer, yet if an accident occurs and the passenger is injured, there is a heavy burden on the defendant carrier to establish that he had used all due, proper and reasonable care and skill to avoid or prevent injury to the passenger. The care required is of a very high degree: 4 Hals., p. 60, paras. 92 and 95. In an old case of *Jackson v. Tollett* (1817) 2 Starkie 37, the rule was stated by Lord Ellenborough, at p. 38, as follows:

Every person who contracts for conveyance of others, is bound to use the utmost care and skill, and if, through any erroneous judgment on his part, any mischief is occasioned, he must answer for the consequences.

- [18] The principles articulated in *Day* have been interpreted by the courts in this province as endorsing the following analytical approach - once a passenger on a public carrier has been injured in an accident a *prima facie* case of negligence is raised and it is for the public carrier to establish that the passenger's injuries were occasioned without negligence on the

part of the defendant or that it resulted from a cause for which the carrier was not responsible: *Planidin v. Dykes*, [1984] B.C.J. No. 907 (Q.L.)(S.C.); *Visanji v. Eaton and Coast Mountain Bus Co. Ltd.*, 2006 BCSC 656 at para. 26.

[19] However it must be noted that in *Fontaine v. British Columbia (Official Administrator)*, [1998] 1 S.C.R. 424, 46 B.C.L.R. (3d) 1, Major J. in discussing the doctrine of *res ipsa loquitur* in the context of a single car accident, observed as follows:

27 It would appear that the law would be better served if the maxim was treated as expired and no longer used as a separate component in negligence actions. After all, it was nothing more than an attempt to deal with circumstantial evidence. That evidence is more sensibly dealt with by the trier of fact, who should weigh the circumstantial evidence with the direct evidence, if any, to determine whether the plaintiff has established on a balance of probabilities a *prima facie* case of negligence against the defendant. Once the plaintiff has done so, the defendant must present evidence negating that of the plaintiff or necessarily the plaintiff will succeed.

[20] In *Visanji*, the court after canvassing the pertinent authorities provides the following helpful formulation of the principles which govern the determination of negligence against a public carrier:

[29] Whether the burden upon a public carrier in cases of injury or accident sustained by a passenger can be referred to as the shifting of the burden as in *Day*, or a matter of inferences to be drawn from the evidence once the plaintiff has established a *prima facie* case of negligence against the defendant carrier as articulated in *Fontaine*, it is for the defendant to present evidence to answer, or be found negligent: *Nice v. Calgary (City)* (2000), 83 Alta. L.R. (3d) 1, 2000 A.B.C.A. 221, at ¶46, leave to appeal to S.C.C. ref'd, [2000] S.C.C.A. No. 483 (S.C.C. Mar. 29, 2001).

Analysis

[21] There can be no dispute that Mr Boisvert owed the plaintiff a duty of care. This case turns on whether Mr. Boisvert breached the standard of care he owed to the plaintiff. The plaintiff alleges that Mr. Boisvert did not meet the standard of care in the following respects:

- (i) failure to provide appropriate distance or a safe cushion between the vehicles ahead;
- (ii) defective brakes; and
- (iii) failure to warn the passengers of the hard stop.

Did Mr. Boisvert breach the standard of care by failing to keep an appropriate distance or safe cushion between the vehicles ahead?

[22] Mr. Boisvert was required to brake hard to avoid hitting the two vehicles that had stopped on the roadway in front of the bus he was operating. The first of the vehicles had stopped to turn left on Hamilton Street. The second car stopped behind the left-turning vehicle without a collision and without accompanying honking or screeching of brakes. It can reasonably be

inferred that this occurred within a time frame that should have permitted a reasonably prudent user of the road driving behind those vehicles an opportunity to react and brake without incident. The application of the brakes was not a reaction to an emergency or unexpected hazard.

- [23] Moreover, Mr. Boisvert properly conceded that, regardless of an abrupt or unexpected stop of a vehicle ahead, in order to prevent accidents prudence mandates that at all times a bus driver drive defensively and maintain a safe cushion or certain distance from a vehicle travelling in front of the bus. This is precisely to be able to stop safely in the event of an unexpected manoeuvre by that vehicle.
- [24] I cannot find with precision whether the sudden and hard application of the brakes occurred because Mr. Boisvert was travelling too rapidly, not maintaining a diligent look-out or because he failed to maintain a safe distance from the vehicle in front of him. However, in weighing all of the evidence I have concluded that Mr. Boisvert's sudden and vigorous application of the brakes, in the context of all the circumstances in this case, establishes a prima facie case of negligence against Mr. Boisvert. It is not conduct attributable to a reasonably prudent bus driver.
- [25] Having found a prima facie case of negligence the onus is upon the defendants to establish that Mr. Boisvert was not negligent or that the incident was attributable to some specific cause consistent with the absence of negligence on his part.
- [26] I note that Mr. Boisvert's assertion at his examination for discovery that he could have stopped smoothly but the bus brakes on the new trolley bus "grabbed" and caused a "hard stop" is no answer to this claim.
- [27] Mr. Boisvert was an experienced bus driver. The plaintiff was entitled to expect that he would operate the bus in a safe, proper and prudent manner. The plaintiff cannot be expected to assume any risk associated with the operation of the vehicle which could not reasonably be anticipated by a passenger. The usual braking of a driver as he moves through traffic would not cause a passenger to be thrown to the floor so violently. Moreover it is well established on the authorities that the responsibility of a public carrier extends to ensuring that its modes of conveyance permit the bus to be operated in a safe and proper manner: Visanji at para. 32.
- [28] I have considered all of the authorities provided by both parties. Though useful as providing guidance on the governing principles, each case turns on its own facts. I note that unlike the circumstances in *Lalani v. Wilson*, [1988] B.C.J. No. 2408 (Q.L.) (S.C.), upon which the defendant relies, the bus driver here was aware that the plaintiff had fallen - the possibility of injury was self-evident. Mr. Boisvert's attention was drawn to such a possibility at the time of the incident and in compliance with the bus operator training manual he should have recorded all pertinent information regarding the incident. While the court in *Lalani* found it would have been unfair to shift the burden, this is not so in this case.

[29] On balance I am not satisfied that the defendants have shown that Mr. Boisvert conducted himself in a reasonable and careful manner consistent with the high duty of care imposed on those engaged in public transit. In the result, I conclude that Mr. Boisvert, however fleetingly, breached the standard of care of a reasonably prudent bus driver. I find the defendants negligent.

[30] Given my conclusions it is not necessary to make any findings with respect to the plaintiff's allegations of negligence regarding the failure to warn and the defective brakes.

Was the plaintiff contributorily negligent?

[31] The defendants assert that the plaintiff was contributorily negligent.

[32] The essential inquiry is whether the plaintiff failed to take reasonable care for her own safety and whether the failure was one of the causes of the incident: *Bradley v. Bath*, 2010 BCCA 10 at para. 27.

[33] The defendants submit that if the plaintiff had been holding on or seated at the time of the incident, the unfortunate incident could have been avoided. I accept the plaintiff's evidence that at the time of the incident she was holding the metal handle on the back of her seat. I agree with plaintiff's counsel that this is a critical fact. The defendants were unable to point to any authority where a plaintiff was found contributorily negligent in circumstances where the plaintiff was holding a support or stanchion on the bus at the time of the incident.

[34] In my view the plaintiff acted reasonably in the circumstances. I reject the defendants' submissions that the plaintiff's grip on the support was inadequate or not secure enough. Contrary to the defendants' contention, this was not the usual braking of a bus driver as he moves through traffic. As I stated earlier the movement of the bus that caused the plaintiff to fall was not within the normal range of movement that passengers reasonably ought to expect on buses. On Mr. Boisvert's own evidence it was a "hard stop" and he "had to make a stop quicker than normal".

[35] In busy urban traffic the defendants reasonably expect passengers to be at the doors when the doors open at the designated bus stop; otherwise city buses would be delayed. One is expected to stand in a bus which is precisely why the buses are equipped with supports including those handles behind the seat. The plaintiff in this case held onto the metal handle on the back of her seat and through no fault of her own was thrown forward when the bus driver abruptly and vigorously braked.

[36] In short on this issue I find nothing in the plaintiff's conduct which departed from that conduct expected of a reasonably prudent able-bodied passenger.

[37] Accordingly, I conclude that the plaintiff was not contributorily negligent. The defendants are wholly liable for the plaintiff's damages.

Damages

[38] The plaintiff is entitled to damages as a result of the injuries she sustained in the incident.

[39] Before addressing the damages analysis, I turn to the pertinent facts established on the evidence.

Prior to the incident

[40] The plaintiff, who is 49 years old, immigrated to Canada from Ghana in 1988. She is a single mother with three children ages 15, 19 and 22.

[41] She has been working full-time as a residential care aide at a multi-level care facility in Vancouver for over 17 years. She works eight hours per day five shifts per week on a rotational basis. The plaintiff's patient case load varies depending on the time of the shift she works - for the day shift she is responsible for up to 13 residents, on the evening shift up to 25 residents, and on the night shift up to 36 residents. There is a "floater" available for assistance on the day and evening shifts, but not on the night shift.

[42] The residents are primarily males; some have addiction or mental health problems and are very aggressive. As a residential care aide she assists residents with the activities of daily living including dressing, bathing, feeding and personal care. She changes their bed linens. Her duties include lifting, transferring, and ambulating patients as required. Residents who vary in size and weight are required to be pushed in their wheelchairs. For some residents the use of a mechanical lift is required for transfers. The evidence supports a finding that this is a physically demanding job.

[43] The plaintiff sustained a workplace injury to her neck and lower back on May 19, 2004, when she transferred a resident from a wheelchair to a bed. She was diagnosed with mechanical low back pain. She was off work from May 20, 2004, and after a graduated return to work which commenced on July 20, 2004, she returned to full-time duties on September 24, 2004. As a result of this injury she attended physiotherapy from June 3, 2004 to July 9, 2004.

[44] The plaintiff also injured her lower back at work on November 12, 2005; she was diagnosed with low back strain. She was off work from November 13, 2005, and after a graduated return to work which commenced on December 13, 2005, she returned to full-time duties on February 17, 2006. As a result of this injury she attended physiotherapy from November 29, 2005 to January 16, 2006.

[45] At the time of the incident the plaintiff had fully recovered from her prior injuries and she was free from any residual back pain symptoms. Prior to the incident her last report of back pain to her family doctor was on February 14, 2006.

Incident and post incident circumstances

[46] The defendants do not dispute that the plaintiff was injured when she fell on the bus because of the sudden and forceful application of the brakes.

- [47] Immediately after the subject incident, the plaintiff disembarked from the bus at her usual bus stop and walked a short distance - a half-city block - to the care facility where she was employed. She described herself as being in shock. That evening she had difficulty working her full shift as a residential care aide. She was very tired and her whole body ached. She was not able to go to work the next day. She went to see Dr. David her family doctor at the beginning of the week. On her doctor's recommendation she took time off work to recover from her injuries.
- [48] She experienced pain in her lower back, neck, heels and right wrist. The predominant injuries were to her lower back and her right wrist. She described her back pain as severe.
- [49] She rested and underwent 38 sessions of physiotherapy which she found beneficial.
- [50] She remained off work until February 21, 2008, at which time she commenced her graduated return to work program. In March 2008, she purchased a lumbar corset to wear at work. By April 28, 2008, she was back to full-time hours but not full-time duties. She was put under the care of an occupational therapist who designed an eight week return to work schedule. In August 2008, upon the completion of the eight week return to work program, she was able to return to her full-time duties and full-time hours as a residential care aide.
- [51] During her recovery period the plaintiff found that she had less energy for socializing. She found the isolation difficult.
- [52] By August 2008, her heel pain had substantially resolved. She continues to experience some residual pain in her heels if she walks long distances.
- [53] The injury to her right wrist had not completely recovered by August 2008, but the pain had somewhat subsided. She experienced an aggravation of her wrist injury in December 2010, when she banged her wrist. Her family doctor referred her to a hand clinic where she underwent therapy until June 2011. She was prescribed a splint which she continues to utilize at work.
- [54] Her low back pain persisted. From August 2008 to March 2009, she attended a local swimming pool and did the recommended aquatic exercise program. She discontinued this in March 2009, when she moved residence.

At trial

- [55] The evidence establishes that although her back pain has improved the plaintiff continues to experience persistent low back pain which varies in intensity. She reports and I find that she experiences episodic flare-ups of her back pain. Her back pain impacts her sleep from time to time. She continues to wear a wrist splint to work.
- [56] The plaintiff continues to work full-time. However in order to do so - and in addition to wearing the wrist splint - she requires a lumbar corset for support which she wears for the duration of her shift. According to the medical evidence this permits her to load her

muscles. She no longer works the night shift (11:00 p.m. to 7:00 a.m.) because she finds it too strenuous. When the plaintiff experiences flare-ups she takes vacation days. She estimates this at one or two days a month although she has taken up to five days at a time. The evidence supports a finding that she is reluctant to miss work and that for the most part she endures her pain and discomfort at work because she does not want to jeopardize the economic support that she provides to her family.

- [57] She no longer attends physiotherapy because of financial constraints. However she continues to do daily stretching exercises for both her back and wrist. She applies heat and liniment to her low back. She takes Tylenol for pain relief. She also runs her wrist under hot water during her work shift to alleviate her discomfort. On medical advice she removes the lumbar corset when she is not working.
- [58] The plaintiff's evidence regarding the impact of her injuries on her work life was corroborated by two witnesses - one of the plaintiff's former supervisors who is a registered nurse, and a co-worker. They both worked with the plaintiff before and after the incident and related their observations of the plaintiff's performance as a residential care aide after the incident. I found them both to be credible witnesses. The totality of the evidence establishes that because of the injuries she sustained in the incident the plaintiff takes longer and more frequent breaks than she did prior to the incident and that she is slower at her duties than prior to the incident.

Expert evidence

- [59] The plaintiff's family doctor referred her to Dr. Herschler, a medical doctor who is a specialist in physical medicine and rehabilitation. He assessed the plaintiff on May 24, 2011. Dr. Herschler also provided a medical-legal opinion and testified at trial.
- [60] On physical examination he found tightness in her back and major pain on extension. At the bottom limits of the squatting position the plaintiff experienced severe pain in the low back and fell on the floor. Examination of the right wrist revealed soft tissue tenderness and weakness in the right hand compared to the left.
- [61] On May 24, 2011, the plaintiff reported to Dr. Herschler that on the pain scale her daily pain levels were at five-six out of ten; her back pain levels were highest at the end of her work day.
- [62] It is his opinion that the plaintiff's mechanical low back pain and wrist injury were both caused by the subject incident. His prognosis is set out as follows:

Margaret Ekye [the plaintiff] continues to have chronic pain more than 3 ½ years post-accident. In my own practice 80% of individuals with this type of presentation take 3 years for the symptoms to resolve to a tolerable level which then enables them to return to full functioning. Another 10% take 5 years and 10% have permanent symptoms which limit function on a permanent basis.

Based on this model, it is likely that Margaret Ekye will continue to be symptomatic for at least another 1-2 years if not longer. I cannot be certain at this stage.

- [63] Dr. Herschler opined that there is a 50% chance that within two years the plaintiff's pain will become more tolerable and she will return to full functioning, and a 50% chance that her chronic pain will persist indefinitely without improvement.
- [64] The defence called no medical evidence to attempt to rebut Dr. Herschler's opinion.
- [65] The defendants argue that the injuries sustained in the incident are no longer as significant as the plaintiff alleges. The defendants rely on the fact that after the plaintiff's return to work in August 2008, her family doctor recorded only sporadic complaints of lower back pain - namely January 22, 2009; October 19, 2009; and December 20, 2010. This is despite the fact that she saw her doctor on a fairly regular basis throughout that time period due to other medical conditions.
- [66] The plaintiff clearly suffered an exacerbation of her back pain on the occasions that she reported it to her family doctor. I find no fault with the plaintiff for not reporting her chronic pain to her family doctor more frequently. As observed by the Court in *Crane v. Lee*, 2011 BCSC 898 at para. 25, an absence of a documentary medical record chronicling her pain does not in itself prove an absence of injury. The Court's comments in *Edmondson v. Payer*, 2011 BCSC 118 are apt in this case:
- [37] ... But a plaintiff whose condition neither deteriorates nor improves is not obliged to constantly bother busy doctors with reports that nothing has changed, particularly if the plaintiff has no reason to expect the doctors will be able to offer any new or different treatment. Similarly, a plaintiff who seeks medical attention for unrelated conditions is not obliged to recount the history of the accident and the resulting injury to a doctor who has not been asked to treat the injury and has no reason to be interested in it.
- [67] Similarly the Court in *Myers v. Leng*, 2006 BCSC 1582 observed that:
- [50] ... The purpose of seeing a doctor is not to create a chronicle of complaints for the purpose of proving that you have ongoing pain from an injury arising from a motor-vehicle accident.

Summary on plaintiff's condition

- [68] I found the plaintiff to be a forthright and credible witness. She answered questions in a responsive manner and did not embellish her evidence or exaggerate her injuries. I am satisfied that she has experienced the pain and discomfort she described. She pursued physiotherapy treatments recommended by her doctor. It is clear on the evidence that she was motivated to return to work as soon as possible.
- [69] I found Dr. Herschler, who is a very experienced physiatrist, to be an objective and professional witness and I accept his opinion.

[70] In summary I find that the November 24, 2007, incident caused the plaintiff to sustain an injury to her low back and right wrist. At the time of the incident she had recovered from her previous work-related back injuries. The chronic mechanical low back pain that she currently experiences was caused by the incident. She experiences varying levels of pain and discomfort on a persistent basis and suffers episodic flare-ups. Her back pain is aggravated by lifting and prolonged sitting and standing. In order to continue working as a residential care aide she is required to wear a lumbar corset for support which, on the medical evidence, will lead to progressive weakness in her core muscles. She is also prone to episodic aggravations of the wrist injury that she sustained in the incident. The defendant remains responsible for those aggravations: *Kaleta v. McDougall* 2011 BCSC 1259 at para. 61.

Discussion

[71] The appropriate award for damages will be discussed in the following sequence:

- (i) non-pecuniary damages;
- (ii) loss of earning capacity (including past wage loss and loss of future earning capacity);
- (iii) loss of housekeeping capacity; and
- (iv) special damages.

Non-pecuniary damages

[72] The plaintiff seeks an award of \$80,000 for non-pecuniary damages. Counsel for the defence concedes that the plaintiff sustained injuries in the incident but submits that if the defendants are liable for her injuries the non-pecuniary damages should be assessed at \$40,000.

[73] Non-pecuniary damages are intended to compensate a plaintiff's pain, suffering, and loss of enjoyment of life. The award should compensate a plaintiff for those damages they have suffered up to the date of the trial and for those they will suffer in the future. The essential principle derived from the authorities is that an award for non-pecuniary damages must be fair and reasonable to both parties and should be measured by the adverse impact of the particular injuries on the individual plaintiff: *Hmaied v. Wilkinson*, 2010 BCSC 1074 at para. 55. While fairness is assessed by reference to awards made in comparable cases, it is impossible to develop a "tariff"; each case is decided on its own unique facts: *Lindal v. Lindal*, [1981] 2 S.C.R. 629 at 637; *Kuskis v. Hon Tin*, 2008 BCSC 862 at para. 136.

[74] The B.C. Court of Appeal in *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46, leave to appeal to SCC refused, 31373 (October 20, 2006), enumerated the factors to be considered in awarding non-pecuniary damages. The non-exhaustive list includes: the age of the plaintiff; the nature of the injury; the severity and duration of pain; the degree of disability; the impairment of family, marital, and social relationships; and loss of lifestyle.

- [75] The assessment of non-pecuniary damages is necessarily influenced by the individual plaintiff's personal experiences in dealing with her injuries and their consequences, and the plaintiff's ability to articulate that experience: *Dilello v. Montgomery*, 2005 BCCA 56 at para. 25.
- [76] I have concluded that the injuries the plaintiff sustained in the incident have caused her pain and suffering. Her injuries have affected her functioning. I am satisfied that her enjoyment of life including her work and family life has been significantly impacted and that she finds life more frustrating. She is less active and at times more irritable with her children. She relies on her children more than prior to the incident to manage household matters such as cooking and vacuuming. She has reduced energy levels and on account of her increased levels of fatigue is generally less sociable.
- [77] She presents as a motivated and determined individual. Despite her incident-related injuries she has persevered and maintained full-time employment. Her work-life has been rendered significantly more challenging on account of her having to manage her pain with a lumbar corset, wrist splint and Tylenol. This is no doubt stressful for her.
- [78] Based on the medical evidence there is an even likelihood that her chronic low back pain will persist indefinitely.
- [79] I have considered the following cases cited by plaintiff's counsel on the issue of quantum of non-pecuniary damages: *Whyte v. Morin*, 2007 BCSC 1329; *Charlebois v. Vandas*, 2004 BCCA 356; *Harvey v. Yanko*, 2007 BCSC 216; *Bergman v. Standen*, 2010 BCSC 1692; and *Kaletka v. MacDougall*, 2011 BCSC 1259.
- [80] I have also considered the cases cited by defence counsel: *Sylte v. Rodriguez*, 2010 BCSC 207; and *Sandher v. Hogg*, 2010 BCSC 1152.
- [81] While the authorities are instructive, I do not propose to review them in detail as they provide general guidelines only. I have reviewed all of the authorities provided by both counsel and in considering the plaintiff's particular circumstances I conclude a fair and reasonable award for non-pecuniary damages is \$60,000.

Loss of past earning capacity and loss of future earning capacity

- [82] The plaintiff missed 155 days of work on account of her incident-related injuries, some of which days she took as unpaid leave. The parties have agreed to compensation of \$25,000 for the plaintiff's loss of earning capacity up until the date of trial.
- [83] With respect to loss of future earning capacity the plaintiff seeks an award of \$60,000. The defendants allege that there is no loss of future earning capacity. If such an award is to be made the defendants submit it should be in the \$10,000 range as the plaintiff has continued to work full-time at full duties for four years since her return to work in August 2008.

Legal Framework

- [84] An award for future loss of earning capacity represents compensation for a pecuniary loss: *Gregory v. Insurance Corp. of British Columbia*, 2011 BCCA 144 at para. 32. The legal principle that governs this assessment for loss of earning capacity is that, insofar as is possible, the plaintiff should be put in the position he or she would have been in but for the injuries caused by the defendants' negligence: *Lines v. W & D Logging Co. Ltd.*, 2009 BCCA 106 at para. 185, leave to appeal to SCC refused, 33155 (October 29, 2009). Compensation must be made for the loss of earning capacity and not for the loss of earnings: *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229 at 251; *X. v. Y.*, 2011 BCSC 944 at para. 182.
- [85] The recent jurisprudence of the B.C. Court of Appeal has affirmed that the plaintiff must demonstrate both an impairment to his or her earning capacity, and that there is a real and substantial possibility that the diminishment in earning capacity will result in a pecuniary loss. If the plaintiff discharges that requirement, he or she may prove the quantification of that loss of earning capacity either on an earnings approach or a "capital asset" approach: *Perren v. Lalari*, 2010 BCCA 140 at para. 32. Regardless of the approach, the court must endeavour to quantify the financial harm accruing to the plaintiff over the course of his or her working career: *Pett v. Pett*, 2009 BCCA 232 at para. 19; *X. v. Y.* at para. 183.
- [86] An assessment of loss of earning capacity necessitates consideration of hypothetical events which are real and substantial possibilities and not mere speculation. Hypothetical events are to be given weight according to their relative likelihood: *Athey v. Leonati* [1996] 3 S.C.R. 458 at para 27; *X. v. Y.* at para. 184.
- [87] In short, the essential task of this Court is to compare the likely future of the plaintiff's working life if the accident had not happened with the plaintiff's likely future working life after the accident: *Gregory* at para. 32; *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 11; *X. v. Y.* at para 188.

Analysis

- [88] I conclude for the reasons that follow that the plaintiff's incident-related injuries have impaired her income earning capacity and that there is a real and substantial possibility that this impairment will harm her earning capacity into the future.
- [89] The plaintiff was 49 years old as of the date of the trial. As a starting point in my analysis I note that her entire working life in Canada has been as a residential care aide.
- [90] The plaintiff has not fully recovered from the injuries she sustained in the incident. While she has continued to work full-time she wears a lumbar corset and wrist splint, takes extra and longer breaks at work and is slower at discharging her duties than before the incident. Her injuries have impacted her efficiency at the workplace. I accept the plaintiff's evidence that she now experiences increased levels of fatigue after completing her shifts. She takes one or two vacation days per month when the pain becomes too much. On account of her

condition she no longer works the night shift, which pays a shift differential.

- [91] Dr. Herschler's evidence supports a finding that because of her chronic pain and the development of associated weakness in her back the plaintiff is more vulnerable to exacerbations. The episodic flare-ups may become more frequent. In his opinion she is at risk of requiring more medical days off and if her chronic pain persists she is at risk of having a shortened work life.
- [92] On the totality of the evidence I find that the physical limitations caused by her injuries have impaired the plaintiff's employability in the physically demanding occupation in which she is engaged. On account of her accident-related injuries there is a real and substantial possibility that the plaintiff:
- (i) will need to take more time off work for medical reasons and she therefore will work fewer hours,
 - (ii) will retire from the workforce earlier than she otherwise would have; and
 - (iii) if her employment is terminated for any reason she is less likely than before the incident to find alternate employment;
- [93] In considering the factors listed in *Brown v. Golaiy* (1985) 26 B.C.L.R. (3d) 353 (S.C.) I find that the limitations caused by the plaintiff's injuries have rendered her less capable overall from earning income, rendered her a less marketable and less attractive employee, and taken from her the ability to take advantage of job opportunities that given her skills and experience might have otherwise realistically have been open to her.
- [94] I am satisfied there is a real and substantial possibility that if the plaintiff had not been injured her future earnings would have been higher than they now will be. I therefore conclude that on account of her incident-related injuries and consequent impairment of earning capacity there is a real and substantial possibility that the plaintiff will suffer a future pecuniary loss. I must therefore assess in light of all of the evidence, what is fair and reasonable compensation to the plaintiff for the pecuniary loss accruing because of her impairment.
- [95] In 2009, the plaintiff earned \$48,936 and in 2010 she earned \$47,008. She currently earns in the range of \$21.00 per hour. The night shift which she no longer works pays an extra \$0.40 per hour.
- [96] It is well recognized that unknown contingencies and uncertain factors make it impossible to calculate the loss of future earning capacity with any precision. The process of quantification is not a mathematical calculation but rather one of assessment based on the evidence: *Gray v. Fraser Health Authority*, 2009 BCSC 269 at para. 121. The evidence in this case mandates that in my assessment I take into account that there is an equal likelihood that the plaintiff's symptoms will improve and that she will return to full functioning within one-two years, or alternatively that her symptoms will be permanent. I also have factored in

my assessment the contingency that the plaintiff could miss work or have a shortened work life because of unrelated illness, injury or disability. I have considered that she was absent from work for a period in 2010 because of an unrelated illness.

- [97] Taking into account all of the evidence and the relevant contingencies, I assess the plaintiff's loss of future earning capacity from the date of trial as \$45,000.
- [98] I am satisfied in all the circumstances this is a fair and reasonable award.

Loss of housekeeping capacity

- [99] The plaintiff seeks an award of \$10,000 for loss of housekeeping capacity. The defence submits that the evidence does not support such a claim.
- [100] In *Dykeman v. Porohowski*, 2010 BCCA 36 at para. 28, Newbury J.A. summarized the governing principles with respect to awarding damages for the loss or impairment of housekeeping capacity. She affirmed that damages for the loss of housekeeping capacity may be awarded even though the plaintiff has not incurred any expense because housekeeping services were gratuitously replaced by a family member. Recovery may be allowed for both the future loss of the ability to perform household tasks as well as for the loss of such abilities prior to trial. The amount of compensation awarded must be commensurate with the plaintiff's loss: *Dykeman* at para. 29; *X. v. Y.* at para. 246.
- [101] I have concluded that the evidence in this case falls short of establishing an award for loss of housekeeping capacity.
- [102] The plaintiff testified that since the incident she has experienced difficulties vacuuming, washing floors, dusting and cooking. While I accept that since the incident her children have assumed greater responsibilities for these matters, I am not persuaded on the evidence that the adjustment is sufficiently significant that it justifies a discrete award of damages. I have considered the plaintiff's difficulties and discomfort in performing household tasks as a factor in the assessment of non-pecuniary damages.

Cost of future care

- [103] The plaintiff seeks compensation for the cost of future care in the range of \$10,000.
- [104] Dr. Herschler recommended 24 sessions of physiotherapy, 12 chiropractic treatments, some sessions with a fitness trainer and a gym membership.
- [105] There was no direct evidence tendered to show the cost of these recommendations.
- [106] The defendants do not take issue with these recommendations, but they submit that an amount of \$2,000 should be adequate.
- [107] The assessment 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.) at 78, aff'd (1987), 49 B.C.L.R. (2d) 99 (C.A.); *Williams v. Low*, 2000

BCSC 345 at paras. 58-62. In assessing what is reasonably necessary to promote the plaintiff's health the court should consider whether the plaintiff would likely use the items or services in the future: *Penner v. Insurance Corporation of British Columbia*, 2011 BCCA 135 at paras. 12-14.

[108] The assessment of damages for cost of future care necessarily entails the prediction of future events: *Courdin v. Meyers*, 2005 BCCA 91 at para. 34; *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9, [2002] 1 S.C.R. 205 at para. 21. The courts have long recognized that such an assessment is not a precise accounting exercise and that adjustments may be made for "the contingency that the future may differ from what the evidence at trial indicates": *Krangle* at para. 21; *X. v. Y.* at para 267. The extent, if any, to which a future care costs award should be adjusted for contingencies depends on the consideration of the specific care needs of the plaintiff and the expenditures that reasonably may be expected to be required - taking into account the prospect of any improvement in the plaintiff's condition or conversely the prospect that additional care will be required: *O'Connell v. Young*, 2012 BCCA 57 at paras. 67-68; *Gilbert v. Bottle*, 2011 BCSC 1389 at para. 253.

[109] On the evidence I am satisfied the recommended items are all reasonably necessary and that with the elimination of any obvious financial impediment the plaintiff would access the physiotherapy and chiropractic treatments and attend the gym and sessions with a fitness trainer. Taking into account all of the contingencies, I assess an award of \$3,500.

Special Damages

[110] The parties have agreed to special damages in the amount of \$779.

Conclusion

[111] The defendants are wholly liable for the plaintiff's damages.

[112] The plaintiff's damages are assessed at \$134,279 consisting of the following:

Non-Pecuniary:

\$60,000

Past Wage Loss:

25,000

Loss of Future Earning Capacity:

45,000

Future Care Costs:

3,500

Special Damages:

779

Total:

\$134,279

Costs

[113] Unless there are matters relevant to the issue of costs of which I am not aware the plaintiff is entitled to her costs at Scale B.

"Dardi J."

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