

CANADA / JUDGMENT

Schweighardt v. Palamara

2003 BCSC 1149

COURT

Supreme Court of British Columbia

DECIDED

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Schweighardt v. Palamara, Haverinen and Plamondon ,

2003 BCSC 1149

Date: 20030721

Docket: S058172

Registry: New Westminster

Between:

Shelly Schweighardt

Plaintiff

And:

Nancy Palamara, Raimo Juhani Haverinen,

and Russell Plamondon

Defendants

Before: The Honourable Madam Justice Lynn Smith

Reasons for Judgment

Counsel for the Plaintiff:

M.A.M. Brunton

Counsel for the Defendants:

A. Urquhart

Date and Place of Trial:

Vancouver, B.C.

November 18 - 22, 2002

January 6 - 9, February 17, 2003

Written Submissions:

March 21, 2003

INTRODUCTION

- [1] The defendants have admitted liability for the plaintiff's damages which she suffered in a motor vehicle accident on March 24, 1999. The sole issue before me is the assessment of those damages. The major disputes at the trial concerned the causation of particular injuries and whether the plaintiff acted reasonably to mitigate her losses.

EVIDENCE AND FINDINGS OF FACT

A. The Plaintiff's Background

- [2] The plaintiff Shelly Schweighardt was born November 28, 1964. She graduated from high school in 1982, then worked in various jobs including construction labourer and waitress. She testified that she worked steadily from the age of 16, with no significant periods of unemployment. In 1996, she travelled to Central America for eight or nine months. In 1997 she passed a demanding physical test, the "Correctional Officer Physical Ability Test", required for work in Corrections. She successfully completed the training program at the Justice Institute to become a correctional officer and applied for a job in Corrections with the British Columbia government on December 7, 1997. She started work at the Burnaby Correctional Centre for Women on January 5, 1998, as an Auxiliary Security Officer. On July 30, 1998, she received a letter of commendation regarding her excellent work in a crisis. At the date of the accident on March 24, 1999, she was just short (by one shift) of the number of hours needed to receive a pay increase, increased benefits and a regular position with a schedule as opposed to "on call" status. Carolyn Druskin, a correctional officer who began work on the same day as the plaintiff, received regular officer status in April, 1999. Because the plaintiff has not returned to work since the accident, she has lost the benefit of the hours worked and would have to re-accumulate them; however, she is still an employee of B.C. Corrections.
- [3] At the time of the accident Ms. Schweighardt was 34 years of age, in excellent health, and very fit. Before the accident she had experienced no problems with her neck, shoulders, back, hips, hands or wrists, chronic pain or depression.

B. Circumstances of the Motor Vehicle Accident

- [4] The plaintiff was a front seat passenger in her own vehicle, a small 1986 Honda, at the time of the accident. She wore a seatbelt. Her friend, the defendant Russell Plamondon, was driving. They were heading west on 105th Avenue in Surrey, coming out of the Guildford Mall and intending to make a left turn onto 150th Street. They crept out into the intersection. The approaching driver, Nancy Palamara, who had the right of way, did not see the Schweighardt vehicle in time to stop. The Schweighardt vehicle was struck at the front on the passenger side by the Palamara vehicle, which was a 1988 Plymouth sedan. The plaintiff's vehicle was considered too badly damaged to be repaired. The other vehicle suffered about \$1,600 worth of damage.

C. The Plaintiff's Injuries

- [5] Ms. Schweighardt testified that immediately after the accident on March 24, 1999, she did not feel anything, thought she was fine and did not request an ambulance or medical help. Later that evening her neck and shoulder started to tighten up and she felt a sensation in the web space between the thumb and fingers of her right hand. She said that her hand did not "feel right".
- [6] She went to her family physician, Dr. Sachit Shah, the next day. By that time, everything was sore. His clinical notes show that she complained of "painful neck, back and bilateral hips and shoulders", that his physical examination showed "spinal exam normal, cns normal tender neck, paraspinal and hip muscles", that he diagnosed "acute muscular injury" and that he recommended "rest" and "physio". Ms. Schweighardt testified that he recommended hot baths and massage therapy. She also testified that she told him about problems with her hand. Dr. Shah testified that he does not necessarily record everything in his clinical notes. On cross-examination he agreed that he did not specifically examine her hand on March 25 but said that the absence of a reference to the hand in his notes did not mean that Ms. Schweighardt had failed to mention it.
- [7] On a "Doctor's Certificate" completed on April 19, 1999, Dr. Shah recorded "neck pain" and "weakness in the arm" and stated that Ms. Schweighardt was not ready for work. His primary diagnosis was "acute muscular strain" and he commented that the patient "has persistent pain".
- [8] On visits to therapists in the weeks following the accident Ms. Schweighardt complained of unexplained or sudden weakness or loss of power, control or co-ordination in the right hand causing her to drop objects such as a coffee cup, as well as irregular pain in the right hand. She described muscle spasm or shooting pain that made her lose her grip.
- [9] On May 16, 1999, Ms. Schweighardt, who is right-handed, used her right hand to squeeze an empty cardboard box before putting it into the recycling bin and experienced very sharp pain such that she "dropped to the floor", started to sweat and vomit, and almost passed out. She testified that it was the "same pain" she had been having since the day of the accident,

but 100 times more intense. I will return to the issue whether her ongoing problems with her right hand and wrist are attributable to the motor vehicle accident, but at this stage I simply note that on May 16, 1999, either an injury caused by the motor vehicle accident was worsened or there was a new injury to the right hand.

- [10] Ms. Schweighardt went to see Dr. Shah the next day about her wrist, and he sent her to Surrey Memorial Hospital for x-rays. His examination showed no swelling or bruising, but extreme tenderness. The x-rays were negative. On May 19, 1999 she saw Michelle Lowry, a registered massage therapist, who examined her hand and noted swelling, light bruising and a bluish colour, as well as that the hand was cool to the touch. Ms. Lowry, who had been treating the plaintiff since the motor vehicle accident, had not observed such symptoms previously.
- [11] The plaintiff testified that she continues to experience (unpredictably and sporadically) pain, sometime intense pain, in her right hand and arm. She said that it sometimes feels as if there is a "hot rod" stuffed into her hand. The pain occurs 10 - 15 times a day, she said.
- [12] In a "Doctor's Certificate" completed for the plaintiff on June 14, 1999 Dr. Shah noted "neck pain", "weakness in the arm" and "persistent pain".
- [13] On October 7, 1999, Dr. Shah wrote a letter in response to a request from the plaintiff's employer. In it he stated:
1. I have reviewed the attached job description and Ms. Schweighardt is unable to perform her job. Primarily she is right handed. She has a problem with her Right wrist, which does not allow her the full use of it with strength. Therefore she would not be able to fulfill any of the security functions of her job.
 2. From the job description I have reviewed she has to fulfill functions which require the use of her right wrist (her dominant hand) so clearly anything that causes her to forcibly use it will aggravate her pain and she would not be able to work.
- [14] Over the next three years the plaintiff saw ten specialists, including Dr. David Ward, a plastic surgeon, Dr. Goetz and Dr. Gropper, hand specialists, Dr. Sadowski and Dr. Mackie, neurologists, Dr. Prasad, a sports medicine specialist, Dr. Yorke and Dr. Stolar, rheumatologists, Dr. Jaworski, a physical medicine and rehabilitation specialist, and Dr. Mallavarapu, a psychiatrist. She underwent various forms of scans and tests regarding her problems with her hand, and her other soft tissue complaints.
- [15] No reports were produced from any of these physicians, although their letters to Dr. Shah were included in the defendants' documents as part of the plaintiff's clinical records.

- [16] Mr. Urquhart for the defendants argued that I should draw an adverse inference from the plaintiff's failure to lead evidence from any of these ten treating physicians. However, Ms. Brunton said that the plaintiff did not dispute that none of the specialists was able to explain her problem with her right hand/wrist. She submitted that it was open to the defendants to call the physicians if they wished to.
- [17] The burden is on the plaintiff to prove on a balance of probabilities that the accident caused the injuries of which she complains, and I will take into account, in assessing whether she has discharged that burden, the undisputed fact that the plaintiff saw a number of specialists with reference to the hand/wrist complaints, who were unable to make any objective findings that would explain the pain she described. There is no evidence from any of them supporting or disagreeing with the plaintiff's theory that the motor vehicle accident caused these problems. The defendants have had the clinical records and were aware of the reports of these specialists. As in *Keller v. Cole*, 2001 BCCA 550, I do not find that an adverse inference is appropriate in these circumstances.
- [18] In addition to all of the above treating physicians, Ms. Schweighardt also saw Dr. Lu, a psychiatrist, upon her counsel's request, as well as Dr. Favero, an orthopaedic surgeon and Dr. Holden, a psychiatrist, for independent medical examinations at the defendants' request.
- [19] Before I review the medical evidence, I will complete the review of the events following the accident.
- [20] Through the Insurance Corporation of British Columbia Ms. Schweighardt was referred to the Drake-Medox Clinic where she went for an assessment on December 3, 1999 and then for a six-week work-conditioning program from December 3, 1999 to January 26, 2000. A "Functional Capacity Evaluation" of the plaintiff was performed by the Clinic on February 22 and February 23, 2000. I made a ruling at the outset of trial regarding the report submitted by the defendants from Drake Medox Health Services, co-signed by Sean McBeth and Andrew Sumner. My ruling was that that report failed to comply with Rule 40A. As Mr. Justice Henderson held in *Heiderbrecht v. Fraser-Burrard Hospital Society*, (1995) 15 B.C.L.R. (3d) 189, I concluded that our rules make no provision for the entry in evidence of joint or corporate opinions and that an opinion must be that of an individual expert within the scope of that person's own expertise. However, the matters canvassed in the report were to a large extent questions of observations rather than opinion and two of the persons involved in delivering the Drake Medox program (one of whom, Sean McBeth, was a co-author of the report) were called as witnesses. Counsel for the plaintiff did not object to their evidence and cross-examined them about their observations and the conclusions they drew from those observations regarding the plaintiff's ability to return to work. They made some reference to the report in their testimony, basically as a record of those observations. I refer to the report only insofar as it sets out observations of the plaintiff's physical capabilities at a particular time.

[21] Susan Castell-Brown, physiotherapist, testified about the program and the plaintiff's physical examination on her discharge, which showed full functional range of motion in the neck, 85%, 100% and 90% in aspects of mid-back range of motion, and full range of motion for the lower back in all directions. Sean McBeth testified that the plaintiff seemed able to perform all of the tests with a full range of motion. He reported that he found no "symptom magnification" during the tests. He agreed on cross-examination that he did not have direct knowledge of what the correctional officer job required and relied on the written job description and on information provided by Denise Dolnik, the I.C.B.C. case co-ordinator, who visited the Burnaby Correctional Centre for Women on February 1, 2000 to review the job requirements.

[22] The Functional Capacity Evaluation report states that in the course of that evaluation Ms. Schweighardt demonstrated the requirements necessary to return to her normal work duties as a correctional officer. The authors also wrote:

Ms. Schweighardt's primary area of apprehension regarding resuming work relates to her right wrist symptoms. The client reports that these symptoms do not follow a consistent pattern of onset or intensity. More specifically, she expressed concern regarding the right wrist "giving way" during unpredictable emergency situations (e.g. physical restraint of an inmate). It should be noted that the client did not report such a sensation over the two days of FCE testing.

Taking these concerns into consideration, it is recommended that the client initially return to work on night shift. The job site visit completed by the referral source revealed that there is a reduced risk of "physical involvement" (i.e. inmate restraints) during the evening shift due to the lockdown of inmates. This is a temporary strategy (two to four week maximum) aimed at maximizing the likelihood of a successful and durable return to work. Having said this, it is important to note that there were no objective physical findings on FCE testing which would contraindicate a resumption of normal work duties.

[23] The plaintiff testified that when she saw Dr. Prasad, the sports medicine specialist, on February 17, 2000, he recommended that she return to work with a wrist splint. Ms. Schweighardt declined to do so. She expressed concern that, as a correctional officer, by wearing a wrist splint she would be signalling vulnerability to the inmates and she would be at danger herself and unable adequately to assist her co-workers in the event of need. Dr. Shah supported her in that decision.

[24] Ms. Schweighardt did not believe that the Functional Capacity Evaluation had provided reliable information because she did not consider that the tests bore a realistic relationship to the actual job requirements of a correctional officer. For example, she said, there was nothing like a real test of her ability to restrain or handcuff an uncooperative inmate. Sean McBeth agreed that during those tests he did not offer resistance to Ms. Schweighardt.

[25] The plaintiff did not attempt a return to work. Asked why on direct examination, she testified that her neck, shoulders, back, middle back and hips were still hurting "24/7". She said that she was having incredible losses of control and pain in her right hand, leading her

to drop things. She also expressed concerns to Denise Dolnik, the I.C.B.C. case co-ordinator, about her hips and her ability to handle stairs. Her evidence was that she felt it was unsafe for herself and for others for her to go back to work because if she had had to respond to a critical incident she would have been incapable of doing the job.

[26] Dr. Shah did not recommend a return to work. In his letter of June 26, 2000, after describing the plaintiff's March 25, 1999 visit following the motor vehicle accident and then her May 17 visit following the severe pain experienced when crushing the box, he wrote:

I made arrangements to refer the patient to a hand specialist by the name of Dr. Goetz. He felt initially that a possible nerve problem was the issue. Nerve conduction studies were normal. He then referred patient to Dr. Stolar a rheumatologist.

Both Dr. Stolar and Dr. Goetz have come back as saying that Ms. Schweighardt does indeed have pain in the wrist but unfortunately the diagnosis has not been apparent. Ms. Schweighardt did indeed have a MRI of the right wrist, which did not reveal any diagnosis. Since then she has a physical medicine specialist by the name of Dr. Jaworski who feels that the patient has a problem with chronic non-malignant pain syndrome .

It is my opinion that the Functional Evaluation Capacity report is quite fair in its statement of the patient's capacity. However, I believe there is one important point that needs to be clarified: Ms. Schweighardt has related to me that in her job there is always a threat of violence with the prisoners and that she would have to be physically able to deal with it any given time. With her inability to use her wrist effectively she would be putting herself and her colleagues at risk. Because of that issue, I do not believe Ms. Schweighardt can work at her job as a Security Office (sic). I do not see any difference in the Night or Day shift as related to me by Ms. Schweighardt, as the risk of violence is present at any time .

I can not recommend any other forms of treatment. I believe we have exhausted all specialist reviews and clearly Ms. Schweighardt has a problem with chronic pain and weakness in the right wrist which does not allow her to function in a quick response required of her job as described to me by the patient.

It is my opinion that she will have to look at alternative careers, which do not require the use of her wrist in such a forceful manner as Corrections work.

It is my opinion that the other muscular injuries that were suffered by Ms. Schweighardt are at a plateau, which means that I do not see any further improvement.

[27] The plaintiff was cut off from further I.C.B.C. benefits as of March 2000. Between then and the summer of 2000, she became depressed. She went onto social assistance in the summer of 2000 and was assaulted in a food bank lineup in July, 2000. She testified that being in those circumstances has been very difficult for her.

- [28] On March 6, 2001 Ms. Schweighardt attended a meeting with John Pastorek, the Director of Operations of the Burnaby Correctional Centre for Women. Also in attendance were a member of the personnel department and a representative of her union. It was agreed that the plaintiff could re-enter into a position as an Auxiliary Security Officer at Burnaby Correctional Centre for Women with the permission of her doctor, with 2277.55 previously earned hours, and she could be placed on the call-board according to the seniority flowing from those hours. No letter of termination would be issued and there would be no hard and fast time frame for re-entry. She would have to start over, however, and work another 1827 hours before she would be eligible for all benefits. Mr. Pastorek testified that certain kinds of accommodation could be attempted should she still have physical problems, though I concluded from his evidence that the range of such options was limited.
- [29] Mr. Pastorek testified that Ms. Schweighardt's status as of the date of trial is a little less certain than it was in March, 2001, because time has passed and the Burnaby facility has been targeted for closure.
- [30] Dr. Shah recommended that she attempt some kind of different work where use of the wrist would not be crucial. In his report of June 26, 2000, he said that he did not see her ever returning to her job as a correctional officer because of the risk of violence and her feeling that there is weakness in her wrist. He said, "it is my opinion that she will have to look at alternative careers, which do not require the use of her wrist in such a forceful manner as Corrections work". In his report of November 2, 2002, he opines that she is unable to perform her job as corrections officer as "she feels that she would be unsafe in that position in terms of her being able to perform in potentially violent situations". He added:
- I would also consider her unable to work in terms of her depression and anxiety, which presently are causing her problems. It is my opinion that until the depression and anxiety are sorted out for this lady in terms of counselling, she will probably not be successful at any job. However, she may be able to perform in a sedentary low-tech capacity provided she was getting some kind of help in terms of counselling.
- [31] Ms. Schweighardt has never attempted a return to work. At trial, she testified that her physical health is still the same as it was within days of the accident. She swore that she still gets headaches, her neck hurts, and the top of her shoulders and middle of back and shoulder blades "drive me nuts". Her lower back hurts all the time, she said. She said, "Everything hurts all the time". She swore that her right hand and wrist have become worse, and that she is in a really serious depression.
- [32] I turn now to the medical opinion evidence.
- [33] Dr. Shah wrote reports summarizing his opinion regarding Ms. Schweighardt's injuries. In his first report (June 26, 2000) after setting out Ms. Schweighardt's description of the motor vehicle accident he stated that:

She had no direct injury but complained immediately of neck, back, bilateral hips and shoulders pain.

Examination revealed normal central nervous system and bony spinal exam. However she had intensely tender neck, paraspinal and hip muscles. She appeared stiff and had restricted range of movement in the neck and the bilateral shoulders.

As set out above, he proceeded to comment that the Functional Capacity Evaluation report seemed quite fair, but that Ms. Schweighardt's inability to use her wrist effectively meant that she could not return to her job.

[34] In his second report, dated February 10, 2002, Dr. Shah described three problems: persistent hand and wrist pain; persistent neck and back pain and depression. He wrote that Ms. Schweighardt "has complained of persistent right hand and wrist pain". He referred to multiple investigations by specialists and stated, "Nothing significant has been found and she has on examination got reasonable grip strength and is neurologically intact". He said that he was unable to provide a prognosis with respect to this pain of unknown cause because of the absence of any objective clinical signs. Dr. Shah wrote that Ms. Schweighardt had complained of neck and upper back pain since the accident, despite multiple series of manual therapy. He described trigger points in the cervical paraspinal muscles and in the bilateral trapezius muscles and stated, "I suspect that she will need to keep stretching and strengthening her muscles permanently." As for the depression, Dr. Shah stated that he had diagnosed it, confirmed by Dr. Mallavarapu (a psychiatrist) and that despite trying various medications Ms. Schweighardt was not improving as well as she could. He wrote:

Cognitively she is quite significantly improved and it is my opinion that prior to the accident she was well. But since the accident she has deteriorated as well. She has had chronic pain and she has poor financial well-being and an inability to work. By this I meant that Ms. Schweighardt did not feel she could return to the Corrections Canada but she would have better off returning to a different from (sic) sedentary work and would not have had the issues of worrying about her wrist. She also has poor functioning skills. All these have contributed to her depression. I think it is fair to say that the accident probably was one of the causative factors in her depression.

[35] As for prognosis, Dr. Shah wrote:

In terms of depression, I think this lady needs to have Cognitive counselling with a Registered Psychologist and she needs to relearn some skills to get back into functioning with work.

It is my opinion that after some counselling such as described above (perhaps 8-10 sessions) she should be able to return to full time sedentary work.

I do not believe any more that a referral to a pain clinic will serve any useful purpose. I believe she has had sufficient multi disciplinary input from the various referrals we have organized that most of the work will be duplicated.

- [36] In his third report, on November 7, 2002, Dr. Shah stated that Ms. Schweighardt had seen Dr. Mallavarapu, had attended the Surrey Memorial Psychiatric Day Hospital, and had seen a counsellor once. He stated the opinion that although Ms. Schweighardt had been taking medication for depression she will not really recover from it "until she has dealt with the issues of loss of her work, loss of her independence, going on Welfare support was devastating for her and caused her to lose a great deal of self esteem and confidence." He then opined that "her depression will settle down as long as she takes her medication and does receive the benefit from individual counselling that has been recommended". As for right hand and wrist problems, Dr. Shah wrote that "although a clear diagnosis has not been made, it is probably correct to state that right hand and wrist pain is related to the Motor Vehicle Accident".
- [37] He stated that the depression caused Ms. Schweighardt to withdraw from any kind of activity and that she has then found that there is no improvement to the neck and back pain; thus, he foresaw no improvement to the neck and back until the depression improved.
- [38] Dr. Shah wrote that Ms. Schweighardt has suffered from anxiety on a chronic basis since the accident, that it worsened in 2000 and stated, "Until this lady has her financial problems and thus her ability to work sorted this will be constant source of her anxiety".
- [39] In his concluding comments, Dr. Shah wrote that:
- In terms of her job as a corrections officer, Ms. Schweighardt is clearly unable to perform her job as she feels that she would be unsafe in that position in terms of her being able to perform in potentially violent situations.
- I would also consider her unable to work in terms of her depression and anxiety, which presently are causing her problems.
- It is my opinion that until the depression and anxiety are sorted out for this lady in terms of counselling she will probably not be successful at any job. However, she may be able to perform in a sedentary low-tech capacity providing she was getting some kind of help in terms of counselling.
- [40] Dr. Shah's was the only report from a treating physician. In addition there were reports from Dr. Lu, psychiatrist, tendered by the plaintiff, and from Dr. Holden, psychiatrist, and Dr. Favero, orthopaedic surgeon, tendered by the defendants.
- [41] Dr. Lu, who saw her on August 16, 2002, stated in his report dated September 16, 2002 that Ms. Schweighardt suffers from major depression at a level that would be considered moderate. He found no indication from her history that there were predisposing factors such as a family history of depression or her own prior depressive illness. He saw no indication of psychopathology prior to the motor vehicle accident. He referred to the importance of the correctional officer job to Ms. Schweighardt's future plans, and stated:

While she has a great deal of pain from her wrist, in my opinion I do not think the pain in and of itself is the major factor in precipitating her depression. Rather, her pain limits her capacity to work, limits her capacity to be confident in her conduct in her job. As a result, she does not feel she can be a confident and fit officer. Given her strong work and moral ethics, this certainly is a blow to her sense of self-esteem.

Later, he wrote:

She feels ICBC is treating her as a liar and a malingerer. she feels a lack of control and being unfairly treated. I believe, in this context, her chronic pain becomes an exacerbating factor. I believe that, if her physical symptoms had been taken seriously and a realistic evaluation had been performed, Ms. Schweighardt would be the type of individual who would persevere with physiotherapy to gain full recovery.

[42] In conclusion on this topic, he stated:

In combination with significant financial instability, dependency on others, and requirement for welfare support, Ms. Schweighardt's self-esteem was adversely affected. Based on the above information, I believe the motor vehicle accident that took place on March 24, 1999 has been a contributing factor in the precipitation of her depression.

[43] Dr. Lu's opinion is that Ms. Schweighardt is clearly unable to return to her previous occupation at the present time and that ongoing treatment for her depression is imperative, which treatment would have to include psychotherapy for about a year as well as medication. As well, referral to the St. Paul's Hospital Complex Pain Clinic might be an option, he said. He stated that, given Ms. Schweighardt's excellent working history in the past and her motivation to get better, with proper treatment of her depression, she should be able to return to full-time work in an alternative, more sedentary occupation. With appropriate help, he wrote, she will probably recover from her depression within a year at which point she would likely be able to return to work on a full-time basis.

[44] Dr. Holden, who saw Ms. Schweighardt on November 14, 2002, for an independent medical examination, reached findings which he said were quite consistent with those of Dr. Lu. He agreed that Ms. Schweighardt continues to show signs of a moderately severe major depressive disorder. He wrote:

In summary it can be seen that a sequential review of the history, from the time of the index MVA to the date of the assessment, is fully consistent with the development of a major depressive disorder complicating pain and stiffness predominantly affecting the upper body, neck and right hand. The treatment interventions attempted along the way appear to have been theoretically appropriate, but generally unsuccessful.

Dr. Holden described his findings on examination as follows:

The presentation was consistent with major depression of at least a moderate severity. Her emotional expression was fully consistent with the underlying mood state and there were no features of psychosis or neurologically-derived cognitive impairment. Speech was normal in form and content and at no time did she appear to be factitiously elaborating or minimizing subjective symptomatology. It was my opinion that she was describing both her physical and mental symptoms exactly as they were being subjectively experienced.

He wrote:

In all probability, the index MVA was the precipitant for the soft tissue injury leading to the pain in the upper back and neck regions. Whether or not the subsequent pain that developed in the right wrist was also caused by this accident is beyond my own area of expertise. Be that as it may, there is little doubt that the pain in this area subsequently became a significant focus for Ms. Schweighardt, to a degree that superceded the pain and discomfort consequent upon the mild injury to her upper body.

The depression, he says, seems to have developed somewhere from six to nine months after the accident as a direct result of her failure to improve at the rate which she had originally anticipated. Dr. Holden wrote that the psychiatric aspects of the case are straightforward:

Ms. Schweighardt continues to show moderately severe agitated depression which, despite appropriate attempts at treatment, has now become linked by classical psychodynamic mechanisms to the various pains she experiences, particularly that in her right hand. It would be ingenuous to ignore the possible contribution played by the ongoing medicolegal case, particularly as regards any claims that the pain and dysfunction in the right hand are the result of the index MVA. It is worth reiterating yet again that the chronic pain syndrome affecting the right hand has developed irrespective of the cause of "something going crack in my wrist".

Dr. Holden stated "there seems little doubt that Ms. Schweighardt cannot function as a correctional officer in her current state". However, he considers that she is likely to experience a full psychiatric recovery. He states that the degree of any underlying physical pathology will become evident once the emotional factors overlaying the physical pathology have been removed. Concluding that "[d]epression has become inextricably linked with subjective pain in the upper body and wrist, by virtue of fairly straightforward psychosomatic mechanisms", he opined that "[f]urther aggressive treatment of the depressive component, through the use of alternate antidepressant medications and appropriate psychotherapeutic counselling, should lead to significant improvement within three to six months".

[45] In an addendum dated November 16, 2002 Dr. Holden responded to a question from counsel: "Would Ms. Schweighardt have gone on to develop a significant depressive illness had she not injured her right wrist approximately seven weeks after the index motor vehicle accident?" The question, of course, assumes that the motor vehicle accident did not cause an injury to the wrist - a fact very much in dispute. Dr. Holden's response, then, must be considered with that important caveat. On the premise that the injury to the wrist did not occur in the motor vehicle accident but instead almost seven weeks later, he wrote:

Ms. Schweighardt initially expected that she would recover from the soft tissue injuries within two to three months of the index accident. Medical evidence shows that she appeared to have what could be described as a realistic appreciation of the nature of her injuries, immediately following the accident. By her own account, she was aware that the pain and inflammation should have been expected to steadily resolve with standard treatment.

Prior to the accident, Ms. Schweighardt was emotionally sound, physically fit and motivated to complete the practical training necessary for her to become a fully qualified correctional officer. It is my opinion, based upon a review of the documentation, as well as her own statements at interview, in the initial stages at least, that there were no complicating psychological factors.

Unfortunately the slow steady improvement, noted in the family physician's record, was abruptly interrupted by the injury to her wrist. A complicating physical, and subsequently psychological, component was introduced. By her own account, supported by a review of the documentation, the pain and impairment due to the wrist problem became the increasing focus of concern.

It should be noted that there are no specific references to depression complicating the overall picture until some time later in 1999 when she was becoming increasingly involved in the investigation and treatment of the wrist problem. There are no references to an abnormal mood state prior to the wrist injury.

A: Putting all of these factors into perspective leads to the conclusion that Ms. Schweighardt would not have gone on to develop a major depressive disorder were it not for the additional impact of the wrist injury.

[46] Dr. Favero saw the plaintiff for an independent medical examination. His 21-page report, dated October 25, 2002, was objected to by counsel for the plaintiff on several grounds: that it states opinions outside the doctor's expertise; that it regurgitates the opinions of other medical people who were not called to give evidence; and that it includes improper generalizations and postulations. Ms. Brunton cited *Sebastian v. Neufeld*, [1995] B.C.J. No. 1684 (S.C.), *Hennessy v. Rothman*, [1988] B.C.J. No. 350 (S.C.) and *Hughes v. Haberlin*, [1997] B.C.J. No. 2872 (S.C.) as authorities showing that such evidence is inadmissible. Dr. Favero examined the plaintiff in person, and there was no objection to his evidence regarding his findings on that examination. However, in his detailed review of the clinical records, which includes a summary of the reporting letters from the numerous specialists to whom Dr. Shah referred the plaintiff, he repeats out-of-court statements of opinion by the other physicians, or statements of fact which have not otherwise been proved in evidence. I disregard those portions of his report. As well, I disregard his statement of opinion about the amount of force present in the impact, being a matter beyond his expertise as an orthopaedic surgeon, and I give his evidence regarding the plaintiff's psychological state lesser weight than the evidence of the psychiatric witnesses.

[47] Dr. Favero states the opinion that as a result of the motor vehicle accident:

Ms. Schweighardt probably suffered mild to moderate soft tissue injuries to her neck/upper back, low back and shoulder girdles. It is my opinion, based on my review of Ms. Schweighardt's exhaustive clinical records, that there is no reasonable evidence that she suffered any specific injury to her right wrist, either directly or indirectly, as a result of her March 24, 1999 MVA.

Insofar as he is stating his conclusion about the inference to be drawn from the clinical records, I disregard that opinion because all of the contents of those clinical records have not themselves been proved in evidence (specifically, the opinions of various treating specialists who were not called).

[48] However, I will consider Dr. Favero's evidence regarding his findings on his own examination of the plaintiff. His report states:

It is my opinion that at the time that I assessed Ms. Schweighardt, on October 25, 2002, she did not have any significant nor specific orthopaedic or neurologic findings regarding her neck, back, shoulder girdle or hip girdle complaints. Specifically, her neurologic examination in her upper extremities was unremarkable for any problem with a cervical radiculopathy, a thoracic outlet syndrome, or a peripheral neuropathy. My clinical examination excluded all of these disorders as being possible causes of Ms. Schweighardt's persistent upper extremity non-specific sensory and pain symptoms.

[49] He states that, based on his experience in assessing and treating soft tissue injuries, he would have expected Ms. Schweighardt's symptoms from the mild to moderate soft tissue injuries to have significantly improved over the first six to eight weeks after the accident and to have essentially resolved after twelve weeks, such that there would be no ongoing significant limitation or restriction in her usual work, recreational or homemaker activities. In his opinion it would have been "reasonable" for her to miss four to six weeks' work as a correctional officer, then to return on a graduated basis over an additional four weeks. Appropriate treatment would have included some form of physiotherapy or manual therapy for the first six weeks.

[50] Although Dr. Favero states the opinion that the plaintiff does not require any further investigations for her soft tissue pain complaints, he also states that he would not be surprised if her "non-specific multiple soft tissue pain complaints" persist due to "significant non-physical/psychosocial factors".

[51] With respect to the hand and wrist, Dr. Favero noted:

Regarding Ms. Schweighardt's complaints in her right hand and wrist, her clinical examination of October 25, 2002 demonstrated that she had well developed calluses in her right palm (i.e. this finding was also noted by Dr. Jaworski), which, together with her normal grip strength, would suggest that she uses her right hand in a regular and strenuous manner, in spite of her subjective pain complaints.

(I disregard the reference to a finding by Dr. Jaworski, who was not called.)

As far as I can determine it would appear that her more specific right wrist pain/catching complaints began following the episode on May 17, 1999 in which she was crushing a box with her right hand. This might explain the cause of any symptomatic mid carpal laxity/instability that Ms. Schweighardt might now experience in the right wrist.

Those patients that I have seen with symptomatic mid carpal laxity/instability following injury usually have a clear history of having suffered a specific injury to their wrist in their accident, generally consisting of a forced extension or dorsiflexion injury to their wrist. In these cases their pain and instability symptoms generally present almost immediately.

Assuming that Ms. Schweighardt does have some mild symptomatic right wrist mid carpal laxity/instability, it is my opinion that this would not account for her more diffuse pain/sensory complaints affecting the entire hand/forearm, her reported disability regarding use of the right upper extremity, or her reported inability to have returned to her previous employment and most of her normal recreational activities. It is my opinion that all of these findings, that cannot be explained on a biologic or clinical basis, suggest that non-physical or psychosocial factors are influencing the subjective severity of Ms. Schweighardt's complaints, and her self-perception of ongoing disability.

[52] Dr. Favero recommended no treatment for the right wrist complaints other than the occasional use of a wrist brace.

[53] On cross-examination, Dr. Favero agreed that the plaintiff could be mobile yet still in pain.

ISSUES

[54] The issues I must decide are:

- (1) What physical injuries did the plaintiff suffer as a result of the motor vehicle accident on March 24, 1999?
- (2) Did injuries suffered in the motor vehicle accident cause the plaintiff to develop depression, chronic pain syndrome and anxiety?
- (3) Have the plaintiff's injuries and psychological issues resolved, or if not, when are they likely to resolve?
- (4) What losses did the plaintiff experience as a result of the injuries and what award of damages is fair and reasonable to compensate her for them?
- (5) Has the plaintiff failed to mitigate her losses?

(1) What physical injuries did the plaintiff suffer as a result of the motor vehicle accident on March 24, 1999?

[55] I will comment at this juncture on some issues of credibility.

- [56] With respect to Dr. Shah, the defendants' position was that I should give his opinion little weight because he had taken on an advocacy role. I do not accept that suggestion, and will give his opinion the weight appropriate to his qualifications and to the subject-matter. Dr. Shah's evidence was not always favourable to the plaintiff, and he defended his opinions appropriately.
- [57] I had some concerns about exaggeration and evasiveness on the part of the plaintiff. At the outset of her cross-examination, she was asked about the accident. Counsel for the defendants suggested that the impact was not too hard, and she replied that she would say it was, that it was a "big jolt". She agreed that her vehicle was stopped. She was asked whether the other car was starting to slow down, and said that it did not look that way to her. However, her statement to the I.C.B.C. adjuster on March 29, 1999 was put to her, and she agreed that she had said then that "the impact was not too hard, she was maybe starting to slow when the impact occurred. It was more like a jolt". On the important issue whether she braced her hand on the dashboard in the accident, she expressed certainty at trial that she had done so, yet agreed that on earlier occasions she had not mentioned this or had not been certain. When cross-examined about what she had said to Dr. Ward, the first specialist whom she consulted about the right hand/wrist, she was evasive and it took considerable time for her to admit that she had told Dr. Ward that only her neck was injured in the motor vehicle accident. On another matter, her evidence about the amount of time she had worked at the Surrey Inn, although supported by Arnold Nociar, was not borne out by the records of that establishment.
- [58] As well, I had the opportunity to view in court, and to review later, two surveillance videos of the plaintiff taken in December 2001 and November 2002. They show her in her garden and on her back deck, as well as standing and chatting for a lengthy period of time with her father and a friend. Her movements do not seem to be restricted. She does move somewhat deliberately. I could not see any rubbing of the neck or shoulder. In court, the plaintiff seemed often to be stretching or rubbing those areas.
- [59] The videotape evidence was not consistent with the plaintiff's evidence at trial that "everything hurts all the time" and that the pain is still the same as it was within days of the accident. She did not testify that her pain somehow worsened after May, 2002. I find that she was exaggerating when she made those statements although on the whole I accept her evidence regarding the pain experienced in the period following the accident, and I accept that the soft tissue injuries still cause her some discomfort.
- [60] I am satisfied on the evidence that Ms. Schweighardt until the motor vehicle accident was an energetic person who was keen on her new career in corrections, that she had no history of physical or mental problems in any of the areas she now complains of, and no history of avoiding work. Therefore, I accept on the evidence as a whole that Ms. Schweighardt suffered mild to moderate soft tissue injuries in the accident, which caused her significant pain for a time. I will address later my conclusion about the time at which the soft tissue injuries had by and large resolved.

- [61] I turn now to the question of causation. The defendants did not dispute that Ms. Schweighardt suffered soft tissue injuries to her back, shoulders and neck and hips although counsel suggested that the impact was not severe and submitted that the injuries were mild. As stated above, I have concluded on the evidence that the plaintiff did suffer mild to moderate soft tissue injuries to those areas. The defendants' position, however, is that the motor vehicle accident did not cause any problem she is experiencing with her right wrist and hand, did not cause her failure to return to work, and did not cause her depression.
- [62] In deciding questions of causation, the test to be applied is set out in *Athey v. Leonati*, [1996] 3 S.C.R. 458. Major J. wrote at 466-67:

Causation is established where the plaintiff proves to the civil standard on a balance of probabilities that the defendant caused or contributed to the injury....

The general, but not conclusive, test for causation is the "but for" test, which requires the plaintiff to show that the injury would not have occurred but for the negligence of the defendant .

The "but for" test is unworkable in some circumstances, so the courts have recognized that causation is established where the defendant's negligence "materially contributed" to the occurrence of the injury .

In *Snell v. Farrell*, *supra*, this Court recently confirmed that the plaintiff must prove that the defendant's ortuous conduct caused or contributed to the plaintiff's injury. The causation test is not to be applied too rigidly. Causation need not be determined by scientific precision , it is "essentially a practical question of fact which can best be answered by ordinary common sense". Although the burden of proof remains with the plaintiff, in some circumstances an inference of causation may be drawn from the evidence without positive scientific proof.

It is not now necessary, nor has it ever been, for the plaintiff to establish that the defendant's negligence was the sole cause of the injury. There will frequently be a myriad of other background events which were necessary preconditions to the injury occurring . As long as a defendant is part of the cause of an injury, the defendant is liable, even though his act alone was not enough to create the injury. There is no basis for a reduction of liability because of the existence of other preconditions: defendants remain liable for all injuries caused or contributed to by their negligence.

The Court made it clear that a contributing factor is material if it falls outside the *de minimis* range.

- [63] The plaintiff must establish on a balance of probabilities that the accident was a material cause of the injuries of which she complains.
- [64] Has the plaintiff established on a balance of probabilities that the accident caused an injury to her right hand and wrist?

- [65] The plaintiff's evidence at trial was that she braced her hand against the dashboard when, seeing the other car approaching, she anticipated the accident. However, I find that this was essentially a reconstruction on her part. She did not report at the time any blow or even contact between her hand and the vehicle. Dr. Shah did not record any injury to the hand or wrist when he saw the plaintiff on March 25, 1999. Her statement to the adjuster on March 29, 1999 does not mention any problem with her right hand or wrist. Her claim form signed that day mentions only back, shoulder and head pain. She agreed that when she saw Dr. Ward on October 5, 1999, she denied that her hand was injured in the motor vehicle accident and said that only her neck was injured. (She did, however, tell him that she felt that her problem was related to the motor vehicle accident.)
- [66] She now feels that she "must have" braced her hand because of the problems she has since experienced with it. She described to therapists something "not right in her hand" after the accident and some experience of pain and loss of coordination or power in the hand, but she did not report symptoms comparable to those reported after May 16th. There is no record of her mentioning a problem with her hand or wrist (although she did mention weakness in her arm) to Dr. Shah until May 17, 1999, when she went in on an urgent basis after the box crushing incident. Three witnesses (her friend Vicky Whittaker, her father Frank Schweighardt and her brother Darcy Schweighardt) testified that they recalled the plaintiff rubbing her wrist or (Darcy Schweighardt) dropping a coffee cup from her right hand in the weeks following the accident. That evidence is further support that the plaintiff felt something "not right" and experienced loss of power in the hand, but it is not evidence of dramatic shooting pains.
- [67] The severe symptoms in her hand and wrist only began on May 16, 1999 when she squeezed the cardboard box.
- [68] The sudden pain and loss of power in the right wrist of which the plaintiff complains, and which she said occurs with some frequency, has never manifested itself during a visit to a physician; nor did it do so during the work rehabilitation program with the Drake-Medox clinic nor during the Functional Capacity Evaluation tests. None of the doctors, neither the specialists nor Dr. Shah, has been able to find any physical cause of the symptoms which the plaintiff reports relating to her wrist and hand. None of the medical reports states an opinion that the motor vehicle accident on March 24, 1999 caused an injury to her wrist or hand. Notably, on cross examination, Dr. Shah agreed that when he was sent a draft affidavit by the plaintiff's counsel on November 6, 2000, that stated, "on 26 May 1999, Ms. Schweighardt attended at my office with continuing complaints of pain in the right wrist and I diagnosed it as a wrist sprain caused by the motor vehicle accident on 24 March 1999", he declined to swear to the truth of that statement. In his November 7, 2002 report, Dr. Shah wrote as follows:

Shelly has since the accident complained persistently about the pain in the right hand and the wrist as well. She has seen a multiple number of physicians regarding her wrist and hand pain. She has had various radiological studies done. Nothing significant has been located by any of those physicians.

Shelly has complained of pain on a persistent basis in the right hand since her motor vehicle accident. I do accept that although a clear diagnosis has not been made, it is probably correct to state that right hand and wrist pain is related to the Motor Vehicle Accident.

That is not a statement of opinion that the accident caused the injury.

- [69] The plaintiff's position is that she did not suffer any problems with this hand or wrist before the accident and that, because these problems began after the accident, and because it is implausible that squeezing a small cardboard box could cause such an injury, I should accept that the accident caused them.
- [70] In the absence of any medical evidence to support the inference that the motor vehicle accident caused or contributed to the problems with the hand (aside from Dr. Shah's very qualified statement); in the absence of evidence, or even a clear contemporaneous report, of a mechanism whereby such injury could have occurred; in the absence of any objective findings to support the existence of a physical problem in the right wrist/hand; and in the light of the evidence that the severe shooting pains of which the plaintiff complains only began after the independent event of the cardboard box crushing, I do not find that the plaintiff has met the burden of establishing on the balance of probabilities that the motor vehicle accident caused or contributed to this injury beyond a minimal level.
- [71] While it may be implausible that the box crushing motion caused a wrist/hand problem, it is also implausible that an accident not directly involving the hand or arm would cause such problems in those areas to appear some seven weeks later. The plaintiff has the burden of proof and I find that she has not met it in this regard.

(2) Did injuries suffered in the motor vehicle accident cause the plaintiff to develop depression, chronic pain syndrome or anxiety?

- [72] Did the defendants' negligence materially contribute to the plaintiff's development of depression, chronic pain syndrome and anxiety? (I will refer to these together as the "psychological issues".) The defendants' position is that it did not. Rather, Mr. Urquhart argued, the psychological issues flowed from the plaintiff's absence from the work force and her poverty, and those states were not caused by the physical injuries - they were caused by the plaintiff's perception that her wrist/hand problem prevented her from returning to work and her consequential failure to return to work. On the other hand, counsel for the plaintiff argued that the injuries suffered in the motor vehicle accident, and the plaintiff's frustration as she failed to recover from them and as she felt that she was disbelieved by the insurance corporation, were materially contributing causes of the psychological issues.

- [73] Dr. Holden's opinion in the addendum to his report was that Ms. Schweighardt would not have gone on to develop a major depressive disorder were it not for the additional factor of the wrist injury. However, he also stated in his original report that "[d]epression has become inextricably linked with subjective pain in the upper body and wrist by virtue of fairly straightforward psychosomatic mechanisms". Dr. Shah stated the opinion that the accident was one of the causative factors in the depression. Dr. Lu's opinion is the same.
- [74] I conclude that the plaintiff has met the burden to establish on the balance of probabilities that the motor vehicle accident was a material cause of the psychological issues. The medical evidence on the whole supports that conclusion. The contrast between Ms. Schweighardt before the accident (active, energetic, strong, fit and confident) and after the accident (passive, lethargic, negative in outlook and consumed by the accident and its aftermath) was strongly drawn by such witnesses as Stephen Andreasen, Deborah Blaney, Arnold Nociar, Frank Schweighardt, Darcy Schweighardt, Vicky Whittaker and the plaintiff herself. While other matters, including the wrist or hand injury, have certainly made a major contribution, so did the soft tissue injuries. In other words, I think that both were material causes. Despite the plaintiff's emphasis (and this is confirmed in Dr. Shah's reports) on the wrist/hand problems, and even though the pain from the soft tissue injuries to the neck, shoulders, back and hips has plateaued, I note that the plaintiff consistently complained of pain in those areas and that it is that pain that she says has kept her from vigorous physical activity. Dr. Lu testified about the link between a lack of physical activity and the psychological issues. I conclude that the soft tissue injuries are more than a de minimis contributing cause of the psychological issues.
- (3) Have the plaintiff's injuries and psychological issues resolved, or if not, when are they likely to resolve?
- [75] The defendants' position is that the plaintiff should have been able to return to work within eight weeks of the accident, or, in the alternative, at the very latest by the end of February 2000. Because of my conclusion that the plaintiff has not proved that the accident caused her acute hand/wrist problems, I must do my best to determine how long she would have continued to suffer pain and psychological issues as a result of the accident if those hand/wrist problems had not developed. In particular, the evidence suggests that being off work has been a key factor in the development of the psychological issues. How long would the plaintiff have been off work if her only physical problems had been the soft tissue injuries suffered in the accident (including the problems with weakness in her arm that she reported prior to May 16, 1999)?
- [76] The Functional Capacity Evaluation report concluded that as of the end of February, 2000, the plaintiff was able to return to work as a correctional officer, even with the wrist/arm issues. Although the plaintiff's position is that the report was not sufficiently informed by the realities of the plaintiff's job requirements to be helpful, I find that it was based on careful observations and physical testing. At a minimum, it provides clear evidence that Ms. Schweighardt was ready to resume some form of work as of March 1, 2000. A report was

tendered by the plaintiff, prepared by Mr. Carl Chase, a vocational rehabilitation consultant, who had interviewed Ms. Schweighardt and had administered some tests. He summarized his opinion as follows:

In conclusion, Ms. Schweighardt is no longer capable of working as a Correctional Service Officer as a result of her injuries. Since the accident, she has also developed Major Depression that would likely need to be treated prior to workforce re-entry. Following successful treatment, she would be employable full-time in sedentary occupations, such as office work. Residual physical limitations would need to be clarified, however, and she will likely require some form of job placement assistance. Ms. Schweighardt also presented as a good candidate for vocational retraining. Completion of a two year diploma program in Marketing or Human Resources would be advantageous, not only in providing her with sedentary employment, but also allowing her to return to an earning capacity more comparable to her pre-injury status.

[77] Mr. Chase was called to testify, and on cross-examination he agreed that his conclusion that she was no longer capable of working as a correctional officer was based largely on her wrist/hand problems. He said that Ms. Schweighardt could have returned to work in some field as of February 2000. He testified that there were some missed opportunities for her to return to the work force, in some more sedentary field, prior to the onset of the depression and chronic pain syndrome.

[78] I find that March 1, 2000, is the date at which the plaintiff's injuries from the motor vehicle accident had sufficiently resolved that she could have attempted to return to work at the Burnaby Correctional Centre for Women or to find another job.

[79] Not surprisingly, it is unclear exactly when the depression began. The first visit to a psychiatrist was on July 11, 2000. I will take that as a realistic signpost of the onset of serious psychological issues. Both the psychiatrist retained by the defendants and the psychiatrist retained by the plaintiff concluded that she requires counselling for a period, after which they both considered she will make a full recovery from the depression and other psychological issues. Dr. Lu said that that period is about a year; Dr. Holden said that it is about six months. I find that eight months is the most reasonable assessment of the period.

(4) What losses did the plaintiff experience as a result of the injuries and what award of damages is fair and reasonable to compensate her for them?

(a) Non-pecuniary damages

[80] The plaintiff experienced significant pain from soft tissue injuries for some months, and continues to experience some pain (now due to the "psychological overlay"). She pursued various forms of physical therapy for one and a half years and stopped when she could no longer pay for the treatments. She continues to experience depression and anxiety. She has been unable to resume her previous physical activities, which included hiking, bicycling and jogging. The evidence suggests that the reasons are as much psychological as physical. She has not returned to work and is living in poverty. She has borrowed something like

\$30,000 from her family. Her enjoyment of life is much reduced from what it was before the accident. Although as I have said I do not accept the plaintiff's evidence that the pain is still as bad as it was in the period immediately after the accident, and I have found that she could have returned to work, at the latest, on March 1, 2000, I do accept her evidence that the soft tissue injuries continue to affect her to some extent. The prognosis of both Dr. Lu and Dr. Holden is that the plaintiff should recover from the psychological issues, and be able to return to work, once she has received proper treatment for the depression.

[81] Ms. Brunton for the plaintiff provided cases and submitted that the appropriate range of general damages was \$80,000 to \$100,000. She relied upon the following authorities: *Schellak v. Barr*, 2003 BCCA 5; *Brown v. Ryan*, 2002 BCCA 83; *Yoshikawa v. Yu*, [1996] B.C.J. No. 623 (C.A.); and *Demedeiros v. Heinrichs*, 2001 BCSC 1475. Mr. Urquhart for the defendants provided other cases (*Tuchscherer v. McMaster*, 2001 BCSC 1340; *Vezmarovic v. Kamal*, [1998] B.C.J. No. 530 (S.C.); *Dhillon v. Zarek*, 2001 BCSC 271; *Brar v. Johal*, 2002 BCSC 150; *Pierce v. Pandhi*, 2002 BCSC 791; and *Kokoszka v. Insurance Corp. of British Columbia*, [1991] B.C.J. No. 2940 (S.C.) in which damages in the range of \$10,000 to \$35,000 were awarded. His submission was that even if I conclude that the motor vehicle accident was causative of the psychological issues, the maximum award would be in the range of \$30,000.

[82] I am mindful of the Court of Appeal's comments in *Maslen v. Robenstein*, [1993] B.C.J. No. 1813 (C.A.) regarding the basic principles applicable in cases where there are psychological complications following soft tissue injuries. The court wrote at ¶ 11:

Where the court finds that psychological injury has been suffered as a result of unlawful conduct of the defendant which the plaintiff has not the ability to overcome by his or her own inherent resources, the court must then, if mitigation issues are raised, decide whether the defendant has established that by following advice which the plaintiff received or ought to have obtained, the plaintiff could have overcome the problem, or could in future overcome it. The advice might, for instance, be to eliminate treatment, make 'lifestyle changes' or adopt some psychotherapy, physiotherapy or exercise regimen. Where appropriate remedial measures would resolve the problem, damages can, of course, be awarded only in respect of the period up to the date when, in the estimation of the fact-finder, the problem ought to have been resolved, or ought to be resolved.

And at ¶ 16:

With respect to the evidence required in order to meet the onus lying on a plaintiff in such cases, Chief Justice McEachern (then sitting as a trial judge) in *Price v. Kostryba* (1982), 70 B.C.L.R. 397 (S.C.), . Put it thus:

I am not stating any new principle when I say that the court should be exceedingly careful when there is little or no objective evidence of continuing injury and when complaints of pain persist for long periods extending beyond the normal or usual recovery.

An injured person is entitled to be fully and properly compensated for any injury or disability caused by a wrong-doer. But no one can expect his fellow citizen or citizens to compensate him in the absence of convincing evidence - which could be just his own evidence if the surrounding circumstances are consistent that his complaints of pain are true reflections of a continuing injury.

So there must be evidence of a "convincing" nature to overcome the improbability that pain will continue, in the absence of objective symptoms, well beyond the normal recovery period, but the plaintiff's own evidence, if consistent with the surrounding circumstances, may nevertheless suffice for the purpose.

[83] I will state later my conclusions about failure to mitigate. At this stage, taking into account all of the evidence, including Dr. Lu's, Dr. Shah's and the plaintiff's own, I find that there is evidence of a convincing nature supporting an assessment of general damages at \$40,000.

(b) Loss of income to the date of trial

[84] The plaintiff's claim for lost income to the date of trial is \$147,274 plus \$8,612.63 in Court Order interest. Because I conclude that the plaintiff was sufficiently recovered from the soft tissue injuries that she could have returned to work on March 1, 2000, I find that she is entitled to lost income for the period March 24, 1999 to March 1, 2000. The evidence of John Pastorek, Carolynn Druskin and Lori Strom supports the conclusion that the plaintiff was doing well as an auxiliary correctional officer, and had she remained on the job, she would have achieved status as a regular correctional officer and the corresponding benefits at least as soon as Ms. Druskin did and would have been able to continue with B.C Corrections as Ms. Druskin has done.

[85] I find that the plaintiff is entitled again to lost income from July 1, 2000, when the depression began, to the date of trial. In addition, the plaintiff will receive \$6,000 for lost benefits to the date of trial.

[86] I ask counsel to agree on the correct amount to cover those two periods of lost income (March 24, 1999 - March 1, 2000 and July 1, 2000 to the date of trial), and on the adjustments necessary to take into account the provisions of sections 52 - 56 of the Insurance (Motor Vehicle) Act, R.S.B.C. 1996, c. 231. In the absence of agreement of counsel, the question will be referred to the Registrar for an assessment.

I Lost future earning capacity

[87] The plaintiff seeks compensation for lost future earning capacity. The principles to be followed in assessing such awards, which are essentially for the loss of a capital asset, are set out in *Earnshaw v. Despina* (1990), 45 B.C.L.R. (2d) 380 (C.A.), *D'Onofrio v. Ralko*, [1992] B.C.J. No. 2627 (C.A.) and *Pallos v. Insurance Corp. of British Columbia* (1995), 100 B.C.L.R. (2d) 260 (C.A.). As stated in *Rosvold v. Dunlop* (2001), 84 B.C.L.R. (3d) 158 (C.A.), assessment of damages for lost earning capacity is a matter of judgment, not calculation. The

considerations may include (as stated in *Brown v. Golaiy*, [1985] B.C.J. No. 31 (S.C.)): (1) has the plaintiff been rendered less capable overall from earning income from all types of employment? (2) is the plaintiff less marketable or attractive as an employee to potential employers? (3) has the plaintiff lost the ability to take advantage of all job opportunities which might otherwise have been open to her? (4) is the plaintiff less valuable to herself as a person capable of earning income in a competitive labour market?

- [88] Ms. Brunton submitted that the plaintiff should be compensated, first, for lost income as a correctional officer for a period of four years from the date of trial, while she obtains therapy, rehabilitation and retraining and, second, for lost income earning capacity into the future because that and other physically demanding occupations will be closed to her. Because I have concluded that the plaintiff has not established that the motor vehicle accident caused the hand/wrist problems which are the real impediment to her returning to work as a correctional officer, I do not find a basis for the need for retraining.
- [89] The plaintiff also seeks an amount to compensate her for lost future earning capacity because she will be unable to work as a correctional officer and will likely only find employment at a lower pay level. Mr. Carl Chase (on the premise that Ms. Schweighardt is unable to return to her work as a corrections officer) stated the opinion that, following treatment for her depression, she would be employable full-time in sedentary occupations such as office work, and would require some form of job placement assistance. He also stated that because the plaintiff has already experienced prolonged unemployment she will likely remain at a greater risk for unemployment in the future. Ms. Schweighardt testified that in 1998 she earned \$38,874 including overtime. Laurie Strom testified that under the collective agreement if Ms. Schweighardt had continued in her position in Corrections, she would have earned \$38,514.57 without overtime in 2000. For 2001 the base pay would have been \$41,942.18 and as of March 31, 2002 the base pay would have been \$42,990.71 per year. Ms. Druskin testified that in 2001 in her work as a correctional officer she earned about \$47,000 including about \$8,000 overtime. Mr. Chase reported that average annual full-time/full-year earnings for female Correctional Service Officers (adjusted to 2000 dollars) were \$39,600.
- [90] The defendants' position is that the plaintiff is not entitled to any award for future wage loss or loss of earning capacity because the plaintiff's soft tissue symptoms are subjective and the depression was not caused by the soft tissue injuries. In the alternative, the defendants' position is that the depression should not be a factor after a maximum of one year and loss of future earning capacity should be assessed accordingly.
- [91] While I have found that the neck, shoulder, back and hip soft tissue injuries had resolved sufficiently that she could have attempted to return to work as a corrections officer as of March 1, 2000, the evidence also establishes that the plaintiff has a residual impairment in the form of depression and chronic pain syndrome, which should resolve within eight months after trial.

[92] Although I have not found that the plaintiff has met the burden to show that her hand/wrist problems were caused by the motor vehicle accident, I have concluded that the psychological issues, for which the accident was a material cause, led to her absence from the work force since July 1, 2000. Because of the length of that absence, she will be affected in her ability to return to a position in Corrections. She is further behind in that career than she would otherwise have been, and her options to pursue other career courses (such as police work, which she said she had considered) are more limited than they would have been if she had carried on straight ahead in Corrections without the break caused by the accident. Thus, she is less valuable to herself as a person capable of earning income in a competitive labour market. I also take into account the contingencies, including the contingency that she would have been laid off from the job at the Burnaby Correctional Centre for Women when the facility closes, or that she would have become unable to work there in any event because of her hand/wrist problems. Finally, I accept that the depression will not be a factor after eight months.

[93] I award \$50,000 for lost future income earning capacity. That amount includes compensation for lost future benefits.

(d) Cost of future care

[94] The plaintiff sought \$16,500 for the cost of future care, to cover the fees payable to an organization which would provide a comprehensive pain management rehabilitation program and job reintegration services. I assess costs of future care at \$16,500. I am assuming that this encompasses the psychological therapy which the two psychiatrists both recommended.

[95] The plaintiff sought \$6,000 for retraining costs. I find that she is not entitled to compensation in this regard because the accident has not caused her need for retraining.

(e) Special damages

[96] Special damages of \$1,007.53 are sought and will be awarded.

(5) Has the plaintiff failed to mitigate her damages through her refusal to attempt a return to work?

[97] Dr. Prasad, in February, 2000, advised the plaintiff to try wearing a wrist splint and to attempt a return to work at the prison. Dr. Shah advised her to try to find some more sedentary work. She did not follow that advice. There was no evidence that her employer would not have permitted her to attempt a return to work. Nor was there any evidence that Ms. Schweighardt was prevented, either by her employment relationship with B.C. Corrections or by her physical injuries, from taking some form of more sedentary employment as of the fall of 1999, possibly while awaiting sufficient recovery to return to her work as a correctional officer.

- [98] There were also suggestions, although they were not vigorously pursued by the defendants, that the plaintiff has failed to follow the advice of physicians to exercise more, stop smoking, and pursue treatment for the psychological issues.
- [99] Have the defendants established that the plaintiff failed to take reasonable steps to mitigate her damages? The principles to be followed in considering this question are described in *Graham v. Rogers*, 2001 BCCA 432 at ¶ 35 and in *Lemieux (Guardian ad litem of) v. Evers*, 2000 BCSC 1464, ¶ 60. The defendants bear the onus of establishing that the plaintiff failed to take steps which a reasonable and prudent person in her situation would have taken and that if she had done so those steps would have avoided or reduced her losses.
- [100] I will focus on the main issue - the refusal to return to work. Clearly, the physical demands of the job as a correctional officer are fairly high. However, I find that the plaintiff should have attempted a return to work as a correctional officer after the completion of the Functional Capacity Evaluation in February, 2000. If she had done so, she may have found that she was able to cope with the demands of the job; at a minimum, even if her attempt failed, she would have become eligible for some benefits. Alternatively, she should have sought other more sedentary work at that time. It is unknown whether the return to work would have been successful or whether she would have been able to find alternative employment and possibly avoid the onset of the depression which has since prevented her from working. However, I find that there is a real and substantial possibility that that is the case.
- [101] I have already taken my conclusion that the plaintiff should have attempted a return to work by March 1, 2000 into account in my assessment of damages for loss of past income. The question now is if, by attempting a return to work, Ms. Schweighardt could have avoided or reduced the effects of the depression and chronic pain syndrome. I find that the defendants have shown on a balance of probabilities that she could have done so. Accordingly, the award for lost income earning capacity and for cost of future care will be reduced by 20% to account for the plaintiff's failure to take reasonable steps to mitigate her losses. As well, the award for pre-trial loss of income relating to the period between July 1, 2000 and the date of trial will be reduced by 20% to account for the plaintiff's failure to take reasonable steps to mitigate. The award for non-pecuniary damages will be reduced by 10% for failure to mitigate.
- [102] I ask counsel to agree on the amounts appropriate to account for tax gross-up. If they are unable to do so, that matter may also be referred to the Registrar.
- [103] If it is necessary to speak to costs, counsel may do so at 9:00 a.m. in Vancouver on a day arranged through Trial Division.

"Lynn Smith, J."

The Honourable Madam Justice Lynn Smith

August 20, 2003 - Corrigendum to the Reasons for Judgment issued by Madam Justice Lynn Smith advising that paragraphs 20 and 21 shall read as follows:

- [20] Through the Insurance Corporation of British Columbia Ms. Schweighardt was referred to the Drake-Medox Clinic where she went for an assessment on December 3, 1999 and then for a six-week work-conditioning program from December 3, 1999 to January 26, 2000. A "Functional Capacity Evaluation" of the plaintiff was performed by the Clinic on February 22 and February 23, 2000. I made a ruling at the outset of trial regarding the report submitted by the defendants from Drake Medox Health Services, co-signed by Sean McBeth and Andrew Sumner. My ruling was that that report failed to comply with Rule 40A. As Mr. Justice Henderson held in *Heiderbrecht v. Fraser-Burrard Hospital Society*, (1995) 15 B.C.L.R. (3d) 189, I concluded that our rules make no provision for the entry in evidence of joint or corporate opinions and that an opinion must be that of an individual expert within the scope of that person's own expertise. However, the matters canvassed in the report were to a large extent questions of observations rather than opinion and two of the persons involved in delivering the Drake Medox program (one of whom, Sean McBeth, was a co-author of the report) were called as witnesses. Counsel for the plaintiff did not object to their evidence and cross-examined them about their observations and the conclusions they drew from those observations regarding the plaintiff's ability to return to work. They made some reference to the report in their testimony, basically as a record of those observations. I refer to the report only insofar as it sets out observations of the plaintiff's physical capabilities at a particular time.
- [21] Susan Castell-Brown, physiotherapist, testified about the program and the plaintiff's physical examination on her discharge, which showed full functional range of motion in the neck, 85%, 100% and 90% in aspects of mid-back range of motion, and full range of motion for the lower back in all directions. Sean McBeth testified that the plaintiff seemed able to perform all of the tests with a full range of motion. He reported that he found no "symptom magnification" during the tests. He agreed on cross-examination that he did not have direct knowledge of what the correctional officer job required and relied on the written job description and on information provided by Denise Dolnik, the I.C.B.C. case co-ordinator, who visited the Burnaby Correctional Centre for Women on February 1, 2000 to review the job requirements.

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