
CANADA / JUDGMENT

Smusz v. Wolfe Chevrolet Ltd.

2010 BCSC 82

COURT

Supreme Court of British Columbia

DECIDED

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2010 BCSC 82 Smusz v. Wolfe Chevrolet Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Smusz v. Wolfe Chevrolet Ltd.,

2010 BCSC 82

Date: 20100125

Docket: M071139

Registry: Vancouver

Between:

Jolanta Smusz

Plaintiff

And

Wolfe Chevrolet Ltd. and Ryan Fritz Wright

Defendants

Before: The Honourable Madam Justice Loryl Russell

Reasons for Judgment

Counsel for Plaintiff:

E.P. Caissie

Counsel for Defendants:

P.W. Unruh

Place and Date of Trial:

Vancouver, B.C.

May 4-8, 2009

May 11-13, 2009

August 4-5, 2009

Place and Date of Judgment:

Vancouver, B.C.

January 25, 2010

Introduction

- [1] The plaintiff, Jolanta Smusz, was involved in a motor vehicle accident on October 8, 2006 between Bridge River and Kamloops, BC on Highway 24.
- [2] Ms. Smusz was hit by the defendant Wright's car when he was searching for his sunglasses in the glove compartment while driving at highway speed. Mr. Wright's car crossed the centre line. Ms. Smusz attempted to avoid his car by steering to her right and instead of hitting her head-on, Mr. Wright sideswiped her car, causing it to veer left across the highway into a ditch where she hit an embankment.
- [3] Both airbags in Ms. Smusz's car deployed. She was initially trapped in the driver's side of the car but was able to exit through the passenger door.
- [4] Ms. Smusz's two-year old Toyota Matrix was written off with repair costs estimated at \$17,000. The defendant's car was also a total loss after flipping down the centre of the highway.
- [5] Liability is admitted but causation and the extent of the injuries and psychological sequelae suffered by the plaintiff are at issue.
- [6] The defendants also allege a failure to mitigate by the plaintiff.

Facts

- [7] The plaintiff is a 46-year old immigrant from Poland. She arrived in Canada in 1990 with her husband, son and daughter.
- [8] In Poland, she attended public school for eight years and then a technical school for five years, specializing in agriculture. She did not work in agriculture but obtained a job as a cashier until she had her children. Her employment could be characterized as unskilled.
- [9] On arrival in Canada, she was unemployed. She looked after her children and considered herself a homemaker.

- [10] She and her husband had a difficult relationship which she found stressful. He left in 2001 but they reconciled sporadically until their divorce in 2004. She had financial difficulties following their several separations because he did not pay any support to her. In 2001, she was prescribed Ativan, an anti-anxiety medication, to assist her in dealing with her marital difficulties.
- [11] Ms. Smusz suffered low back pain in 2001 which was treated by a chiropractor for a month. Her pain resolved after this treatment.
- [12] In January 2005, Ms. Smusz complained of anxiety to Dr. Tomaszewski. Later that year she went to a walk-in clinic complaining of stress related to multiple phone calls from her ex-husband. She was prescribed one course of anti-anxiety medication but when she told her husband she would call the police for a restraining order if he continued to harass her, he stopped calling and her stress resolved. There was no evidence she renewed the prescription for the medication.
- [13] Ms. Smusz's first language is Polish. Her English skills are very limited and for the most part she has remained sequestered in her own language community.
- [14] Ms. Smusz did not go to work even after her marriage foundered because she wished to stay home with her children. Several years before the accident, she worked part-time with a friend, Mirka Konarczewski, doing housework. They talked about setting up a business which would employ other cleaners and allow them to make some profit from their work. However, Ms. Konarczewski moved to Langley, BC away from the area in which they both lived and the plan was not pursued. During the time Ms. Smusz worked with Ms. Konarczewski, she earned between \$10 and \$12 per hour.
- [15] Because Ms. Smusz was not interested in working full-time while her younger child remained in school, she took a position with a landscaping company, Acura Landscaping, for three days a week, eight hours a day. She was paid \$12 per hour. The work was steady during the spring, summer and fall but it was often the case that there would be a winter layoff for three months. In any event, Ms. Smusz would have been eligible for Employment Insurance benefits over the winter layoff.
- [16] The landscaping work was moderately heavy labour and involved raking, pulling weeds, lifting bags of garden waste and some degree of physical fitness. The heavier work was performed by the male employees.
- [17] She worked through the winter of 2005-2006 but her employer gave evidence she may have been subject to a winter layoff in 2006-2007. She worked up to the accident date of October 8, 2006 and did not return to work thereafter. In 2005, from May to December, she earned \$12,380. To the date of the accident in 2006, she earned \$10,737 commencing January 2006. I note she worked her regular 24 hours per week for each week from January 2006 to the date of the accident with no time off for vacation (Exhibit 2, Tab 7). This totals 37 weeks.

- [18] Had she been able to work all 52 weeks, she would have earned \$14,976 annually.
- [19] The evidence of the witnesses was consistent that Ms. Smusz was a vivacious, energetic "life of the party" person. She was known as someone who enjoyed socializing, dancing and entertaining. She enjoyed baking cakes for birthdays, and celebrating with her friends in the Polish community. Certainly the pre-accident pictures exhibited in this proceeding show her to be an active, positive person and this impression was substantiated by each of the witnesses who testified on her behalf.
- [20] She was not involved in any organized social activities or volunteer organizations prior to the accident.
- [21] Ms. Smusz had a relationship with her boyfriend which was satisfying to her. She lived for her children and worked at a low level job that allowed her to do all the housework and cooking for them while they did their schoolwork.
- [22] The accident occurred on Highway 24 outside Kamloops, BC. On October 8, 2006, as the defendant's car came head-on towards her, Ms. Smusz had thoughts of dying and leaving her children alone. She thought she smelled smoke and that the car was on fire post-impact. When the driver's side door would not open, she thought she was trapped inside. A passing motorist opened the passenger door and helped her out.
- [23] The weather in October was chilly at the location of the accident. When Ms. Smusz exited the car, she was cold and nauseated, with numbness in her left hand. She also felt sleepy and the witness, Jennifer Collins, who assisted her at the scene, testified that she covered Ms. Smusz with a blanket and prodded her awake as she nodded off. Ms. Collins observed that Ms. Smusz was shivering and in obvious pain.
- [24] More than 45 minutes passed before the ambulance reached Ms. Smusz. She was thoroughly chilled by that time but despite feeling very cold, the ambulance crew noted that she had an irregular pulse which fluctuated from 87 beats per minute to as high as 150 beats per minute nearly one hour after the impact. Her chief complaint, as reported to the ambulance crew, was neck pain.
- [25] The doctors at Clearwater Hospital diagnosed her with soft tissue injuries and discharged her with Ibuprofen and a prescription for Tylenol 3.
- [26] Her boyfriend took her to his place at Bridge Lake where she remained for approximately one week before her son came to drive her back to her home in Burnaby. She could not recall how long she stayed at her boyfriend's place but her family doctor, Dr. Tomaszewski, noted her son drove her home to Burnaby seven days after the accident.
- [27] Ms. Smusz found the drive home to be frightening and her son testified that she saw every oncoming car as a potential head-on collision risk. She was constantly telling him to slow down while he tried to allay her fears by driving with extreme caution. Once she was home she continued to be fearful of driving and suffered nightmares about the accident. However,

she forced herself to resume driving about three weeks after the accident and although she has been transformed into an extremely cautious driver, she is able to drive. Her nightmares have reduced in number to about one a month currently.

- [28] Ms. Smusz's daughter, Ewelina, testified that her mother was not able to teach her to drive a year and a half after the accident because Ms. Smusz was made so anxious by the process that she could not continue. Ewelina Smusz had to take professional driving lessons to learn to drive despite the fact that her mother had successfully taught her brother to drive some years before.
- [29] Ms. Smusz's son, Marek, testified that when his mother is a passenger she continues to exhibit anxiety over such matters as speed and being close to the centre line.
- [30] Ms. Smusz's evidence about the feelings she experiences when driving past the scene of the accident was somewhat confused. Certainly, shortly after the accident she found passing the accident site to be frightening. I am unclear whether this remains a problem today although if her fear persists it seems as if she has found a way to deal with this fear by closing her eyes as her boyfriend drives her past the site and she is now able to pass the site without incident.
- [31] Initially, her injuries included chest bruising, abrasions and an injury to her knee. These resolved relatively quickly, with the knee aided by a number of sessions of physiotherapy following the accident.
- [32] The most significant physical injuries from the accident were a disc herniation in her neck and continuing low back pain. The herniation has resulted in referred pain down her arm to her hand. It appears that some improvement to the pain in her arm and hand could be effected by surgery but such surgery is invasive and carries some risk. Neither the pain in her neck nor the low back pain from which she suffers would be resolved by surgery. As a single woman without resources and still responsible for the support of her daughter, she is fearful of possible surgical complications which could further impede her healing. To date, she has chosen not to have surgery. In the result, she is left with continuing pain and disability.
- [33] As well, there is some disagreement among the experts about whether she is an appropriate candidate for surgery, partly due to the fact that she is physically deconditioned. At this point, however, since her neck and arm pain are not only not improving but are worsening, surgery may be the only helping mechanism open to her despite her wishes to the contrary.
- [34] Currently, her neck injury causes dizziness if she moves her head too quickly, or remains in a static position with her head down for too long. This is an improvement, since in the first six months she was constantly dizzy and often nauseated as a result. Her insomnia has also improved with the Noritryptiline she was prescribed shortly after the accident. She still suffers from headaches about two times a month where for the first six months following the accident she had severe headaches almost daily.

- [35] To assist with her fears and nightmares following the accident, Ms. Smusz went for five sessions of psychological counselling with Dr. Chuck Jung. She was entitled to some 12 sessions which would have been paid for by ICBC and Dr. Jung called her to follow up, but she did not attend for the remaining seven sessions. She testified that she did not understand she should continue and she was concerned about paying for the sessions out of her limited resources. She was able to benefit from the sessions she did attend since she returned to driving relatively quickly.
- [36] There is also no doubt the plaintiff suffers from depression. She had had brief episodes of reactive depression surrounding the break-up of her marriage and the stress of some harassment from her husband following their final separation. However, in neither instance was the depression deep or long-lasting. The depression which has accompanied the pain of her injuries has no doubt affected her ability to recover from her injuries and her ability to follow recommendations respecting active steps to take which might have speeded her improvement.

The Lay Evidence

- [37] The plaintiff called several friends and her two children to testify. Not surprisingly, all the witnesses indicated that they hoped for a good outcome from the trial for the plaintiff. The plaintiff's daughter, in particular, testified that she hoped the financial result of the trial would benefit the family since money had always been a problem.
- [38] I find nothing sinister about this evidence. I find it supports the candour and good faith of the witnesses and I would find it suspicious were they to deny that they hoped for a good outcome for the plaintiff.
- [39] The witnesses all stated that the plaintiff's former energy and positive approach to life had changed and she was no longer the optimistic person she had been before the accident.
- [40] The plaintiff's son and daughter stated that although their mother had improved since the accident, she still exhibited nervous behaviour when driving and was unable to look after them as she did before her injuries. Both the plaintiff's children testified they had tried to read the medical experts' reports to the plaintiff but they could not translate or explain the technical terms contained in the reports. There was no evidence they had been able to outline the experts' medical recommendations to the plaintiff.
- [41] Marek and Ewelina Smusz indicated that they were both required to help the plaintiff with cooking and cleaning which she had always done in the past. Marek Smusz advised that he now performs about 10 hours of housework a week.
- [42] Marek Smusz said that it seemed as if all the fun in the plaintiff's life was gone. He described her before the accident, as a regular person, smiling, happy and someone who cared about others. Now she does not go out, and she wastes time sitting at home. Where before she enjoyed a relationship with a boyfriend, now she does not care.

- [43] The plaintiff's boyfriend, Mr. Dyczkowski, testified that their relationship had been negatively affected by the plaintiff's depression, and by her lack of ability to take part in outdoor activities following the accident. Previous to the accident, they had hiked and enjoyed outdoor activities. He was candid that he had taken her to Mexico twice since the accident to try to help her morale but that the trips had not been successful on that front. With respect to driving, he noted that the plaintiff had showed some improvement since the accident but was still a "jumpy" passenger.
- [44] Mr. Dyczkowski stated that it was hard to say whether he and the plaintiff were still in a relationship. Certainly it appeared to me that the injuries which followed the accident have adversely impacted the romantic relationship which formerly existed between the plaintiff and Mr. Dyczkowski.
- [45] The lay evidence does not support the assertion that the plaintiff participated in a substantial number of activities before the accident. While there was some evidence she had participated in camping with friends, the last date on which she had camped with a group was given by Ms. Konirzewska as approximately 2002. The plaintiff was described as highly energetic by her friends and as someone who enjoyed dancing and partying and would always bake a cake for a birthday party, something she no longer does.

The Expert Evidence

- [46] A number of experts gave evidence at trial including for the plaintiff, Dr. Tomaszewski, a family practitioner; Dr. Ancill, a psychiatrist; Dr. Hudoba, a neurologist; Dr. Jung, a psychologist; Dr. Vaisler, an orthopod; Russ McNeil, an occupational therapist with a specialty in functional capacity evaluation; Dr. Pullyblank, a psychologist with expertise in the psychological and vocational assessment of residual employability, and Robert Carson, an economist.
- [47] For the defendants, the following experts were called: Dr. Arthur, an orthopod; and Dr. Davis, a psychiatrist.
- [48] Among the doctors who were called both by the plaintiff and by the defendants, it is common ground that the plaintiff suffered injury in the accident. I note that Dr. Arthur, the orthopod called by the defendants, stated as follows:

Her complaints of neck and left-sided pain have been persistent since the motor vehicle accident and thus I believe the motor vehicle accident does play a role in her ongoing complaints and may well be responsible for the C6-7 disc protrusion.

- [49] It also appears to be common ground among the doctors experienced in physical medicine, that the plaintiff is more likely than not to continue to suffer from intermittent annoying and disabling back pain from time to time for the foreseeable future.

- [50] In a recent report dated February 2, 2009, Dr. Hudoba made the following physical findings respecting Ms. Smusz's continuing symptoms: chronic musculoskeletal pain of the neck and lower back; moderate right paracentral disc herniation at C3-4 on the right side and moderate paracentral disc protrusion at C6-7 on the left causing the irritation of the left C7 root; and a possible bulging lumbar disc irritating the lumbar roots.
- [51] Dr. Hudoba concluded that the neck and left arm pain Ms. Smusz continues to suffer are a result of the injuries she sustained in the accident of October 8, 2006 and her low back pain might have been aggravated by the injuries she sustained in the October 8, 2006 accident. Dr. Hudoba was also the physician who recommended caution to Ms. Smusz in any exercise programme she undertook. She was:
- . . . to avoid any activity where there can be possibility [sic] of extensive and sudden motions of the neck or prolonged flexion or extension of the neck. The examples would be [sic] chiropractic manoeuvres on the neck, fall at skiing, [sic] fall at climbing, [sic] fall from the horse, [sic] cycling with low lying handles, swimming with neck extension and similar. At situations like these, if the neck is overly bent or twisted, the herniated disc could possibly become larger and press and injure the nerve root or even the cord.
- [52] Dr. Hudoba administered four trigger point injections into her trapezius muscles which were to be accompanied by physiotherapy to improve the strength of her core muscles. He also prescribed painkillers and anti-inflammatories.
- [53] The plaintiff found some relief from the injections but did not undertake the simultaneous physiotherapy recommended. Neither did she complete the series of injections prescribed by Dr. Hudoba. Whether this was due to her poor comprehension of English and resulting confusion over her appointments, or because she was unable to pay for the injections, was not clear. However, I do not find fault with her because I find she was unable to clearly understand much of the complicated and occasionally conflicting medical information she was receiving.
- [54] However, it remains the case that Dr. Hudoba stated that in his view, while it was somewhat speculative to say, it was likely the plaintiff's neck pain would have improved more had she finished the series of injections and attended for physiotherapy as he had recommended, but he could not say her arm pain would have improved. It should also be noted that the plaintiff had earlier attended some 35 sessions of physiotherapy with some improvement noted.
- [55] In this respect, as in some others, her language difficulties make her a thin-skulled plaintiff. As pointed out by her counsel, with respect to her failure to complete the series of injections recommended by Dr. Hudoba, I note Dr. Hudoba is of Czech origin and his English is accented and not always easy to understand. He communicated with the plaintiff in English without an interpreter present and I believe it is entirely possible that the plaintiff did not comprehend his instructions to her or the importance of completing the series of injections.

- [56] Dr. Vaisler, an orthopaedic surgeon, saw the plaintiff for an independent medical examination on October 23, 2008. His findings are very similar to those of Dr. Hudoba but his recommendations differed somewhat. Dr. Vaisler believes the plaintiff would be assisted by a "regular programme of neck strengthening and postural exercises ... and would benefit from attending a neck and back education programme to teach her how to minimize the pain she is experiencing and how to avoid acute exacerbations of pain."
- [57] Once again, I note the conflict between this advice and that given by Dr. Hudoba which I have quoted above.
- [58] Dr. Vaisler also suggested that a cervical fusion at C6-7 could possibly give the plaintiff significant relief from the pain radiating down her left upper arm, the spasm on the left side of her neck and left trapezius muscle and the sensory abnormalities in her left hand. However, he also noted that even with surgery, it is more likely than not that Ms. Smusz would continue to experience intermittent annoying neck pain which would likely not be significantly improved by neck surgery.
- [59] Dr. Vaisler also opined in cross-examination that he believed the plaintiff was capable of some light work which would include a combination of sitting and standing. It was his view that, if the plaintiff were to follow his recommendations for exercise, she would possibly be able to return to work. He did not suggest any actual job to which she could return and, of course, it was not within his field of endeavour to actually define employment which Ms. Smusz could perform with her existing limitations. He was clear that the plaintiff could not return to landscaping due to her low back symptoms.
- [60] Dr. Vaisler did not discuss his or any treatment recommendations with the plaintiff in the course of his examination. This was unfortunate as an interpreter was present who could have assisted the plaintiff in understanding Dr. Vaisler's recommendations.
- [61] Dr. Arthur, an orthopaedic surgeon, testified for the defence. Despite his view that exercise was the answer for the plaintiff, he also opined that a surgical outcome would likely assist with the symptoms in the plaintiff's arm and hand. However, he agreed with Dr. Vaisler that the neck pain would not be significantly relieved by surgery, nor would the dizziness and low back pain suffered by the plaintiff. Dr. Arthur was of the view that the plaintiff was not a good candidate for surgery because she had not followed the recommendations for conservative treatment options.
- [62] Dr. Arthur did state that the injuries suffered by the plaintiff in the motor vehicle accident of October 8, 2006 "played a role in" her pain and disability. I take this to mean that Dr. Arthur finds the motor vehicle accident is the most likely cause of the C6-7 disc protrusion, the major factor in her neck and arm pain.

- [63] Dr. Ancill was retained by the plaintiff as a psychiatrist with a special interest in trauma. He has both written and taught on the psychiatric consequences of trauma including Post Traumatic Stress Disorder ("PTSD") and chronic pain syndromes. He has also treated patients suffering from psychiatric consequences of trauma for over 20 years.
- [64] In his first report of August 8, 2007, Dr. Ancill found that the plaintiff met and exceeded the DSM-IV-TR criteria for PTSD and also suffers from a related major depression of moderate severity. Both of these conditions resulted from the October 8, 2006 accident. In addition to the medical conditions from which the plaintiff suffers, he also found that she had developed a pain disorder associated with psychological factors. The headaches from which the plaintiff continues to suffer, he viewed as a consequence of the trauma and stated that such headaches were difficult to treat. Those diagnoses were confirmed in his subsequent report of September 2, 2008.
- [65] Dr. Ancill did note some improvement in the plaintiff's PTSD and in her depression over the two years in which he examined her. He felt that she would benefit from further psychiatric assessment and from psychological counselling and was surprised to learn that the plaintiff had not completed her series of treatments with the psychologist, Dr. Jung.
- [66] The diagnoses of PTSD and of depression were based on Dr. Ancill's considerable experience in the field and his clinical observations of the plaintiff along with the use of diagnostic tools such as the Hamilton Depression Scale to measure the severity of the depression and the criteria set out in DSM-IV-TR. He was clear that he did not use either of those tools as a "shopping list", but performed an independent assessment of the plaintiff. Dr. Ancill examined her on two occasions and reached his conclusions by taking a clinical history and making a mental state examination. He also conducted interviews of two collateral witnesses: her son, Marek and her boyfriend, Mr. Dyckowski.
- [67] I found Dr. Ancill to be a helpful and reasonable witness. While he was confident about the reliability of his opinion, he was also open to suggestions on cross-examination that the plaintiff's failure to follow up on more psychiatric assistance and to complete her counselling sessions with Dr. Jung could have slowed her recovery and avoided "entrenched behavioural patterns".
- [68] Dr. Jung was consulted by the plaintiff and was qualified as an expert psychologist with particular interest in cognitive behavioural therapy. His reports were dated February 27, 2008 and February 24, 2009.
- [69] Dr. Jung recommended the plaintiff attend 12 sessions with him. However, she did not continue after she had completed five sessions. In cross-examination, he stated that her PTSD would have improved and she would have been better able to cope with her pain had she completed her sessions. He indicated that he knew finances were a concern for her but he was not aware of how her sessions were paid for.

- [70] The sessions with Dr. Jung were \$160.00 each. I inferred from Dr. Jung's evidence that he believed the plaintiff's concerns about money prevented her from completing the 12 sessions.
- [71] He found that the plaintiff met the diagnosis of PTSD, although in his later report he described the PTSD as mild to moderate. In that later report, he noted that her depression (earlier described as mild) was increasing. He stated, too, that the PTSD and depression were interfering with her ability to cope with her pain and it was his view she had developed a pain disorder.
- [72] It is Dr. Jung's view that the plaintiff requires further psychiatric follow-up with a view to determining whether anti-depressants would assist her. He also recommended 25 additional counselling appointments and referral to a multidisciplinary pain clinic.
- [73] Dr. Pullyblank, a psychologist, saw the plaintiff for psychological and vocational assessment. His particular interest is residual employability.
- [74] In his report dated March 3, 2009, Dr. Pullyblank opined that the plaintiff continues to suffer from PTSD and mild to moderate depression with her symptoms exacerbated by a high debt load and uncertain financial future. He found that she was concerned about the medical issues surrounding any surgical resolution of her symptoms and that these concerns were complicated by any delay of the resolution of her financial situation if she were to have surgery.
- [75] It was Dr. Pullyblank's conclusion that the plaintiff is unemployable at her present level of physical, psychological and cognitive functioning.
- [76] Among the physical barriers, he noted her generalized pain disorder which caused her perception of pain to be heightened which, coupled with her pain avoidance behaviour, limited her activity. Finally, the dizziness and nausea which occur when she moves her head, further limit her movement.
- [77] Dr. Pullyblank opined that the plaintiff's emotional functioning is impaired by PTSD, an anxiety disorder. The presence of such anxiety would likely interfere with the usual coping skills required to maintain performance and composure when meeting day-to-day challenges in a job.
- [78] He stated that the cognitive difficulties facing the plaintiff result from PTSD and chronic pain. He finds the plaintiff to be in a high state of arousal which complicates her ability to concentrate and remember. If she were to attempt a non-physical job, he points out the additional challenges of trying to learn new working procedures in English, a language in which she has only rudimentary skills and about which she feels she is not capable of improvement. Any training for jobs which would interest her cannot commence until and unless she has resolved the physical and emotional problems she is currently experiencing.

- [79] Dr. Pullyblank endorses the plaintiff's needs for further sessions with Dr. Jung and recommends consulting a physiotherapist or kinesiologist to assist in developing an exercise programme consistent with the plaintiff's physical condition.
- [80] Dr. Davis is a psychiatrist who prepared a medical-legal report for the defendants and was called for cross-examination at trial.
- [81] Dr. Davis' report differed substantially from those of all other experts. It is his opinion that none of the plaintiff's current emotional difficulties stems from the motor vehicle accident. He is firmly of the view that her depression is solely attributable to her financial problems, her lack of a supporting husband and her limited skills in English.
- [82] To support his position, Dr. Davis pointed to the two reactive depressions which had affected the plaintiff before the accident as establishing an "ongoing depression" and therefore her current symptoms were not causally related to the motor vehicle accident of October 2006.
- [83] I note that when he wrote his report, Dr. Davis had not reviewed Dr. Tomaszewski's notes of appointments with the plaintiff one week following the accident which recorded the occurrence of nightmares and acute anxiety. Dr. Davis stated that these symptoms were important but appeared to minimize them by indicating they would only be a problem caused by the accident in the first six months or so, at the same time as her soft tissue injuries should have been resolving.
- [84] I have reviewed Dr. Davis' testimony and find it to be argumentative, unyielding and seriously at odds with what I view to be the preponderance of other and more credible medical evidence. I do not accept his findings.

Non-Pecuniary Damages

- [85] The purpose of non-pecuniary damage awards is to compensate the plaintiff for "pain, suffering, loss of enjoyment of life and loss of amenities": *Jackson v. Lai*, 2007 BCSC 1023 at para. 134; see also *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229, 83 D.L.R. (3d) 452; and *Kuskis v. Tin*, 2008 BCSC 862 [Kuskis]. While each award must be made with reference to the particular circumstances and facts of the case, other cases may serve as a guide to assist the court in arriving at an award that is just and fair to both parties: *Kuskis*, at para. 136.
- [86] There are a number of factors that courts must take into account when assessing this type of claim. Madam Justice Kirkpatrick, writing for the majority, in *Stapley v. Hejslet*, 2006 BCCA 34, 263 D.L.R. (4th) 19, outlines the factors to consider, at para. 46:
- [46] The inexhaustive list of common factors cited in *Boyd* [*Boyd v. Harris*, 2004 BCCA 146] that influence an award of non-pecuniary damages includes:
- (a) age of the plaintiff;

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

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

- (g) impairment of family, marital and social relationships;
- (h) impairment of physical and mental abilities;
- (i) loss of lifestyle; and
- (j) the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff: *Giang v. Clayton, Liang and Zheng*, 2005 BCCA 54).

- [87] The plaintiff was 43 years old at the time of this accident. She suffered injuries which, although not requiring more than a brief visit to the hospital, were nonetheless significant. The medical evidence was mostly consistent: her physical injuries include moderate right paracentral disc herniation at C3-4 on the right side and moderate paracentral disc protrusion at C6-7 on the left causing irritation of the left C7 root; and a bulging lumbar disc irritating the lumbar roots, all of which result in chronic left-sided neck, arm and low back pain, dizziness and headaches. She suffered from PTSD, now substantially resolved, but still suffers from insomnia, occasional nightmares, depression and chronic pain some three years after the accident.
- [88] The chronic pain caused by the injuries received in the accident has resulted in depression, no doubt complicated by her difficult financial situation, but the plaintiff was happy and energetic before the accident notwithstanding the fact that she had very little money.
- [89] She was able to work in a job which did not require great skill and which did not pay well but in which she could have continued for the indefinite future. It gave her some income and gave her the sense of participating in her family's finances.
- [90] The evidence of her friends and family support the substantial change she has undergone as a result of the accident. From a positive, lively person who enjoyed participating in her community, she has become somewhat reclusive and quiet and it appears she may even lose her romantic relationship because her physical limitations interfere with the activities she used to enjoy with her boyfriend.

- [91] While she had suffered brief episodes of depression in the past, I am satisfied they were reactive depressions and were fully resolved at the time of the accident. I have no doubt that because she has suffered depression in the past, she was vulnerable to depression, but she is the thin-skulled plaintiff here rather than a crumbling skull plaintiff. However, I find that the depression which followed the accident and her chronic pain means that she is at risk of developing an even more severe depression in the future.
- [92] Immediately following the accident, the plaintiff also had chest bruising and abrasions which resolved quickly. Her knee injury troubled her for about six months but is now resolved.
- [93] There is a possibility she will require surgery in the future to address the herniation at C6-7 since the conservative treatment measures employed so far have not provided the plaintiff with any relief. She has resisted this surgery because, even if it is successful, she will be left with continuing neck pain so resort to surgery would only be a desperate measure if she begins to suffer nerve damage which follows from the herniation or if her chronic pain worsens.
- [94] The plaintiff's anxiety is worsened by the possibility she will need surgery in the future.
- [95] The plaintiff is also less able to perform her household work than she was and has received assistance from her children. When she does do her housework, she does it more slowly and with some pain. This is a substantial change from the enthusiastic homemaker she was before the accident.
- [96] I have considered the plaintiff's loss of housekeeping capacity and the help she has been given and will continue to receive from her children under this head of damages and would assess the loss at \$10,000.
- [97] Considering the factors listed above, and upon reviewing the case law provided by both counsel, I find that an appropriate award of non-pecuniary damages is \$100,000.00, including the loss of housekeeping capacity.

Past Wage Loss

- [98] Ms. Smusz would likely have continued working for Acura Landscaping but for the accident. At that job she earned \$12.00 per hour.
- [99] I accept the defendants' analysis that the plaintiff's gross past wage loss over the two years and 10 months preceding trial would amount to \$28,500.00, adjusted for seasonal lay-offs. However, the plaintiff would also have qualified for Employment Insurance benefits of approximately \$2,000 for each of the three seasonal layoffs she would have experienced.
- [100] These benefits would add an additional \$6,000.00 to her earnings for a total of \$34,500.00 gross earnings.

- [101] On the basis of *Lines v. W & D Logging Co. Ltd*, 2009 BCCA 106, 90 B.C.L.R. (4th) 203, I order that the past wage loss be attributed to the year in which it was earned for the purposes of calculating the net wage loss as required by the Insurance (Motor Vehicle) Act. I note that this approach has been followed by Madam Justice Boyd in *Wittenberg v. Ellis*, 2009 BCSC 1561.
- [102] Given the minimal income earned by the plaintiff, her personal deduction and her ability to take an "equivalent to married" deduction for her daughter, I assume that there will be almost no tax deducted from the series of annual wage losses awarded to the plaintiff. However, as suggested by counsel, I will leave the net income figure for past wage loss to be agreed upon. Failing agreement, counsel may apply.

Loss of Earning Capacity

- [103] In *Hooper v. Nair*, 2009 BCSC 862, I set out the elements to be proved to demonstrate a loss of capacity as follows, at paras. 119-125:
- [119] In order to be successful under this head of damages, the plaintiff must prove a substantial possibility of future income loss: see *Parypa v. Wickware*, 1999 BCCA 88, 169 D.L.R. (4th) 661; *Steenblok v. Funk* (1990), 46 B.C.L.R. (2d) 133, [1990] B.C.J. No. 1158 (C.A.); *Steward v. Berezan*, 2007 BCCA 150, 64 B.C.L.R. (4th) 152.
- [120] The purpose of this damage award is to compensate the party for the loss of earning capacity as a capital asset, not to compensate for the lost earnings themselves: see *Palmer v. Goodall* (1991), 53 B.C.L.R. (2d) 44 at 59, [1991] B.C.J. No. 16 (C.A.); *Parypa* at para. 63.
- [121] In considering this claim, a court must determine the extent of the future loss of income-earning capacity by taking into account all substantial possibilities and assessing the likelihood of their occurrence, based on the evidence: *Parypa* at para. 67; *Steward* at para. 17.
- [122] There are, of course, inherent difficulties in assessing such damages which were recognized by Justice Dickson (as he then was) in *Andrews*, where he stated at 251:

We must now gaze more deeply into the crystal ball. What sort of career would the accident victim have had? What were his prospects and potential prior to the accident? It is not loss of earnings, but, rather, loss of earning capacity for which compensation must be made: A capital asset has been lost: what was its value?

- [123] To assist in this assessment, there are four considerations which are often cited in determining the value of the loss and are set out in the decision of *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353, [1985] B.C.J. No. 31 at para. 8 (S.C.) [Golaiy]:
1. The plaintiff has been rendered less capable overall from earning income from all types of employment;
 2. The plaintiff is less marketable or attractive as an employee to potential employers;

3. The plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to him, had he not been injured; and
4. The plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market.

[124] While a first step in this determination may involve some element of mathematical calculation, "the law is clear that in these cases the task of the court is to assess damages, not to calculate them on some mathematical formula": *Mulholland (Guardian ad litem of) v. Riley Estate* (1995), 12 B.C.L.R. (3d) 248, [1995] B.C.J. No. 1823 at para. 43 (C.A.).

[125] A court must consider all of the evidence that is reasonable in the circumstances in assessing such an award; reference to projections, calculations and formula may be useful insofar as determining what is "fair and reasonable": *Parypa* at para. 70. It is important for courts to "look at all relevant factors, especially general incapacity, before fixing an amount": *Morris v. Rose Estate* (1996), 23 B.C.L.R. (3d) 256, 75 B.C.A.C. 263 at para. 24. A court should also be guided, to some extent, by the claimant's actual earnings prior to the accident: *Smith v. Knudsen*, 2004 BCCA 613, 247 D.L.R. (4th) 256 at para. 34 [Knudsen].

[104] In the circumstances of this case, the plaintiff argues that she is no longer competitively employable even at a sedentary level of work. While Dr. Vaisler and Dr. Arthur opine that she can do some level of light work, they did not make any specific suggestion of jobs which she could do.

[105] The defendants suggest she could babysit for older children and point out that the plaintiff agreed she might be able to work for her boyfriend in some office capacity.

[106] I do not consider the plaintiff to be competitively employable for either job. As a babysitter, she must be reliable on a day-to-day basis, physically and emotionally able to cope with sudden emergencies in the home, and stable in temperament. With her recurrent headaches and chronic pain, I do not see how she could be sufficiently reliable to meet a family's ongoing babysitting needs. As well, were she to have to do such tasks as physically separate children who were quarrelling, her physical limitations would prevent her from acting quickly. Her difficulties with depression could result in a level of irritability not acceptable for a babysitter. Finally, she is on medication which could delay her reactions in an emergency.

[107] As for working in her boyfriend's office, at this point if he were to offer her a job, it would be an act of charity, not the offer of a job at which she would be competitively employable.

[108] It is also very clear that the plaintiff's command of English is limited and would interfere with her employability. She is also lacking in education and training, so she could only do a very low level job within her Polish language community.

- [109] The plaintiff has suffered the loss of a capital asset as a result of her injuries. Her previous employment as a landscaper is no longer available to her due to her physical limitations. We can, however, consider her future earning capacity by looking at that past employment.
- [110] The plaintiff contends that she would have gone to work full-time once her daughter graduated from high school. I consider that contention to be unsupported by any evidence other than the plaintiff's bare assertion. At the time of the accident, she appeared to be content with her three-day a week schedule at Acura Landscaping.
- [111] She was paid \$12 per hour at that job. The wage rate reflected the expertise and level of training required.
- [112] Since the past wage earning capacity of a plaintiff is a factor to guide the assessment of future wage loss: Knudsen, I consider that the plaintiff's loss of future capacity should be assessed on that basis.
- [113] The plaintiff argues that I should award a loss of future capacity based on the possibility that she would have gone into the housekeeping business full-time with her friend and would have become an owner sending others out to work for her or have gone back to work full time earning wages of approximately \$30,000 per year. I consider these arguments to be speculative and not sufficiently grounded in the evidence.
- [114] With her younger child in high school and close to the end of her public schooling, had Ms. Smusz wanted to work longer hours she could have looked for other employment. Her rationale that she needed to be available for her daughter is not one I accept as having prevented her from working more.
- [115] I accept that it is unlikely Ms. Smusz will be able to work again. She may however, with continuing treatment, improve sufficiently to find some minimal part-time work and I must reflect that contingency in a deduction from the award for loss of capacity, but there is also the possibility she will not improve or will require surgery with a less than successful outcome in the matter of pain resolution. I find that on the evidence she is not marketable, she is less valuable not only to herself but to employers, and is unable to take advantage of all job opportunities which would have been available to her but for the accident: Golaiy.
- [116] I accept Mr. Carson's net present value of an annual sum of \$1,000 from the trial date to the plaintiff's 65th birthday is \$14, 920.
- [117] I find that the plaintiff would likely have earned in the range of \$15,000 to \$18,000 per year but for the accident.
- [118] Therefore, I assess her loss of future capacity at \$239,000, subject to a 10% deduction for such contingencies as periods of unemployment or illness.

[119] The defendants argue that the plaintiff failed to mitigate her damages and should be subject to a substantial reduction. I will deal with that issue following my assessment of the cost of future care.

Cost of Future Care

[120] I will begin with the medications the plaintiff is currently taking. They are as follows: Apo-Naproxen and Ratio-Cyclobenzaprine for pain; Mirtazapine for sleep and depression; Tylenol 3 for pain; and Diffusimax, a topical pain killer used by the plaintiff for her shoulder pain.

[121] The net present value of the cost of these medications over the plaintiff's life expectancy is \$20,625. Her counsel cautions that the cost of medication increases over time. But I am satisfied that her needs for medication may decrease with treatment and over time. I will award her \$15,000 for medication.

[122] I accept that the plaintiff still requires some psychological counselling to assist her in dealing with her pain and her fear of pain. I am prepared to award her \$10,000 towards the cost of attending an interdisciplinary pain clinic at which I am informed she will receive psychological counselling as part of the programme.

[123] That there should be a place for exercise in the plaintiff's life is clear, but she has not made any effort to participate in exercise, other than to attend physiotherapy, since the accident. In fact, she did not attend any organized exercise before the accident. I am not convinced that a monthly pass to a community centre would be of use to her given her inability to venture outside her own language group. As well, I have found that there remains some uncertainty about her ability to perform some kinds of exercise. Therefore, I award the sum of \$500 for the plaintiff to consult a kinesiologist to work out an exercise programme which will be tailored to her physical limitations and which she can perform at home.

[124] I was not given the cost for an Obus Forme back support insert. However, since counsel for the defendants does not take issue with this recommendation, I will award \$100 for its purchase.

[125] The total award for cost of future care is \$25,600.00.

In Trust Claim/Loss of Housekeeping Capacity

[126] Following *McTavish v. MacGillivray et al.*, 2000 BCCA 164, 74 B.C.L.R. (3d) 281, the general approach in BC is to compensate for the loss of housekeeping capacity but to do so under the head of "general damages assessed in pecuniary terms" and I have considered this loss in the award for non-pecuniary damages.

[127] Had the plaintiff or members of her family incurred a monetary liability, I would award that liability. There is no evidence of any cost incurred.

[128] There was no evidence presented that the plaintiff will be forced to hire someone in the future to assist with housekeeping.

[129] There will be no separate award for loss of housekeeping capacity.

Special Damages

[130] Special damages are conceded at \$1,582.96.

Failure to Mitigate

[131] The defendants allege the plaintiff failed to take steps both pre and post trial which would have speeded her improvement and reduced her pain.

[132] They point out that several doctors recommended she undertake an exercise programme and she failed to do so. They point out, as well, that the plaintiff only attended 5 of 12 sessions with Dr. Jung in May 2008, despite her continuing depression and the effects of her PTSD. Dr. Ancill also recommended she undertake psychiatric treatment, a recommendation not followed by the plaintiff.

[133] I am aware she did not complete her sessions with Dr. Hudoba and did not accompany the trigger point injections with physiotherapy as he suggested.

[134] The plaintiff responds that she did not understand many of the recommendations of the doctors, nor could her children translate the reports for her. Her family doctor's evidence was somewhat confused on what he had advised the plaintiff but it is safe to say that he did not spend time going through the medical reports with her. He was the only medical expert who spoke Polish.

[135] While Beatta Stepniewski testified she read and explained Dr. Hudoba's report to the plaintiff, this was the one report which cautioned against the plaintiff doing exercises which would cause her to flex and extend her neck. If the plaintiff understood this report, it would increase her fear of movement.

[136] I note that the plaintiff was in sorely impecunious circumstances throughout the pre-trial period. The plaintiff was concerned about the costs she would incur for various treatments. Although the costs of the sessions with Dr. Jung were paid by ICBC, I did not hear evidence from the defendants that the costs of psychiatric consultation would have been paid for.

[137] There is no doubt that the plaintiff's lack of facility in English, and her impecuniosity have hampered and possibly delayed her recovery. I consider those handicaps to be part of the way the defendants found the plaintiff and they must take her as they find her.

[138] The plaintiff should have taken a less passive approach to her injuries than she did. However, she did go to her Polish-speaking doctor frequently and relied on him to direct her to proper therapies.

- [139] She attended a substantial number of physiotherapy appointments, 35 in all.
- [140] She attended at Dr. Jung's office for five sessions and was able to drive again. However, her depression has continued and there is some evidence that she may have had greater improvement of the emotional component of her injuries had she completed her treatment with Dr. Jung.
- [141] Dr. Vaisler testified that he did not explain his recommendations, which included exercise, to the plaintiff, although there was an interpreter present for his examination.
- [142] Surgery was not a unanimous recommendation by the experts the plaintiff consulted and Dr. Tomaszewski testified that he did not urge the plaintiff to undergo surgery as he considers it a last resort. Surgery would not relieve the plaintiff of her persistent neck pain, even if the surgery were to be 100% successful so that this treatment would not have reliably reduced or eliminated the effect of the injury she had suffered.
- [143] While the plaintiff did not take all the steps she should have taken, I am satisfied that her inherent characteristics interfered with her ability to mitigate. However, I believe she could have sought help from the interpreter she had met when she saw Dr. Vaisler to at least gain a basic understanding of the treatment recommendations made by the medical experts she consulted.
- [144] In the result, I will reduce her total damages by 10% for failure to mitigate.

Conclusion

- [145] The plaintiff is awarded the following:

Non-pecuniary damages

\$100,000.000

Past wage loss

34,500.00

(gross, subject to agreement on net amount)

Future loss of capacity

215,100.00

(\$239,000.00 less 10% deduction for contingencies)

Cost of future care

25,600.00

Special damages

1,582.00

TOTAL:

\$339,104.00

(\$376,782.00 less a 10% deduction for failure to mitigate of \$37,678.00)

[146] I leave any present value or tax calculations that I have not made, to counsel.

[147] Subject to the submissions of the parties, the plaintiff will have her costs plus interest under the Court Order Interest Act, R.S.B.C. 1996, c. 79.

"L.D. Russell J."

The Honourable Madam Justice Loryl D. Russell

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