

CANADA / JUDGMENT

Thaker v. Bhatti

2022 BCSC 401

COURT

Supreme Court of British Columbia

DECIDED

11 March 2022

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2022 BCSC 401 Thaker v. Bhatti

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Thaker v. Bhatti,

2022 BCSC 401

Date: 20220311

Docket: M188339

Registry: Vancouver

Between:

Manjit Thaker

Plaintiff

And

Rajinder Singh Bhatti, Maclure's Cabs (1984) Ltd., Steven Thaker, Heather Beatty and Bryce Beatty

Defendants

Before: The Honourable Madam Justice W.A. Baker

Reasons for Judgment

Counsel for Plaintiff:

W.A. MacLeod

Counsel for Defendants:

K. So

Place and Date of Trial:

Vancouver, B.C.

January 24-27, 2022

Place and Date of Judgment:

Vancouver, B.C.

March 11, 2022

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I. Introduction

- [1] In 2016 Ms. Thaker was 56 years old and was the owner of a small but successful catering business. She was married with four adult children. On July 23, 2016 she was a passenger in a car driven by her son, when they were in a collision with a taxi operated by the defendant Mr. Bhatti. Ms. Thaker suffered a number of injuries. Seven months later, on March 4, 2017, Ms. Thaker was in another collision. In the second collision she was a passenger in a car driven by her husband, when they were rear ended at a traffic light by a car driven by the defendant Ms. Beatty.
- [2] The defendants have admitted liability for the second accident, but did not admit liability for the first accident. In this action Ms. Thaker seeks compensation for her injuries sustained as a result of the accidents, and the impact those injuries have had on her life.

II. Issues

- [3] This case raises the following issues:
- a) Are the Defendants liable for the first accident as alleged by Ms. Thaker?
 - b) Did the accidents cause or exacerbate Ms. Thaker's injuries?
 - c) Is Ms. Thaker entitled to any damages?

III. Analysis

A. Are the Defendants liable for the first accident as alleged by Ms. Thaker?

- [4] At the opening of trial, counsel for the defence confirmed that he did not have instruction to admit liability with respect to the first accident. Nevertheless, the defence called no evidence on liability and made no arguments in relation to liability. It is not at all clear why liability in relation to the first accident was not admitted prior to trial.
- [5] In the first accident, Ms. Thaker was a back seat passenger in the family car. She and her family were driving from their home in Richmond, north over the Arthur Laing Bridge on a sunny, clear day. Traffic began to cluster before the off ramp to Granville Street. The taxi driven by Mr. Bhatti stopped suddenly, and the car driven by Mr. Thaker drove into the taxi with such force that the car was pushed partially under the rear end of the taxi. The Thakers' car had to be towed away, and was written off. It is clear that the defendant Mr. Bhatti had a duty of care to Ms. Thaker to drive in a safe manner, and that duty of care was breached, resulting in injuries to Ms. Thaker. The defendant Maclure's Cabs (1984) Ltd. is liable for the negligent acts of its employee. The defence presented with no theory by which liability could be challenged.
- [6] I find the defendants liable to Ms. Thaker for the injuries she sustained in and as a result of the first accident.

B. Did the accidents cause or exacerbate Ms. Thaker's injuries?

1. Ms. Thaker's abilities and health pre-accident
- [7] The evidence of Ms. Thaker, her husband Mr. Surinder Thaker, and her daughter Renee Sahota, was consistent to the effect that, before the first accident, Ms. Thaker was a hard working, energetic woman who enjoyed her work and spending time with her family.
- [8] Mr. Thaker described his wife before the accident as very happy and easy going. She was a multi-tasker. In addition to her work, she took care of the children and Mr. Thaker's father who had a disability. He testified that the care of the children and his father fell disproportionately on Ms. Thaker. Ms. Sahota similarly described her mother as having a lot of energy and being very social, bubbly and fun to be around.
- [9] Ms. Thaker married her husband when she was 18 years old. They have four children, currently ranging in age from 40 to 29 years old. In 1981, when her first child was about 8 weeks old, she began working full time at the White Spot restaurant. Her second daughter was born two years after her first. She and her husband organized their working shifts to provide childcare, along with the help of her in laws. She continued working at White Spot until 1983.
- [10] In 1987 Ms. Thaker began working at London Drugs, where she worked full time hours. She worked there until about 1998. During that time, Ms. Thaker and her husband had two other businesses which they operated outside their regular work hours. They ran a clothing import business for three years, in which they imported clothing from Britain in bulk, then packaged and distributed the clothing to local stores. They supplied about 50 stores. They also had a wedding photography business which they ran from about 1982 until 2000.
- [11] In May 1999 Ms. Thaker and her husband opened a Quizno's franchise, which they operated through a holding company called J.R.R.S. Holdings Ltd. ("JRRS"). Ms. Thaker worked long hours, up to 12-14 hours a day. She prepared food, served food, and did the ordering. The business was very successful. After about 4 years they decided they would like to have their own, non-franchise restaurant. In 2003 they sold the Quizno's franchise and opened a fish and chips restaurant called "Pisces". Ms. Thaker worked at this restaurant daily from 8 a.m. to 10:30 p.m. They operated Pisces for five years, after which they sold it due to Mr. Thaker's deteriorating health. Mr. Thaker had his hip replaced three times, and his health did not allow him to continue helping out in the restaurant. At the end of 2008 they sold the restaurant.
- [12] In 2010, Ms. Thaker opened her own catering business called "Thyme Catering", which she operated through JRRS. She was responsible for all the operations, including taking orders, preparing food, delivering food, and buying food supplies. Her customers were corporations, where she would provide lunches, and sometimes breakfasts, for in-house meetings. Her customers were all over the lower mainland, including downtown Vancouver, Surrey, Richmond, Burnaby, Coquitlam, Langley and even as far out as Maple Ridge. She supplied meals to a wide variety of businesses, including YVR, TD Waterhouse, TD bank, The Keg corporate office, Boston Pizza corporate office, Honda Canada, Subaru Canada,

Audi parts department, and others.

- [13] It was clear from her evidence that Ms. Thaker greatly enjoyed her work. She got a lot of pleasure and satisfaction from her personal interactions with her customers, who were always pleased with the food she provided. She testified that she had no physical or psychological restrictions in doing her work. Over the years, the business kept growing.
- [14] In her home life, Ms. Thaker and her husband shared many of the household chores, although she did all the cooking. She testified that the family always tried to set aside time on Sunday to spend time together. She would cook large meals for the extended family on Sundays, and enjoyed the time they spent together, including after her older children had moved out of the home. She was physically active, enjoyed going for walks, swimming, and working out in their home gym.

2. Ms. Thaker's abilities and health post-accident

- [15] In the first accident, Ms. Thaker suffered a number of myofascial injuries to her neck, shoulder, low back, left leg and left ankle. She testified that she felt in shock after the impact, and her whole body was hurting. She said she could not put weight on her left foot.
- [16] Importantly, after the impact, her husband could not get out of the car. His car door was damaged in the accident and he could not open it. Ms. Thaker testified that there was a lot of smoke coming out of the car. She later learned it was related to the radiator, but at the time she thought the car was on fire, and she was terrified that her husband was going to be stuck in a burning car and die. This had a very significant psychological impact on her.
- [17] The day after the accident was a Sunday. Ms. Thaker was very sore over her whole body. She was able to get an appointment with her doctor on the following Tuesday. She testified that her whole body was really stiff, but more so on her left side. She said she felt she could not move her neck. She did not get much sleep in the days following the accident because of the pain.
- [18] Her doctor, Dr. McKenzie, referred her to massage therapy and physiotherapy, and prescribed her muscle relaxants and pain killers.
- [19] In the weeks following the accident, Ms. Thaker continued to experience pain in her neck and shoulder, and her lower back and leg. She found it painful to walk, and had swelling around her left foot and ankle. She began experiencing headaches which were severe enough to wake her up in the middle of the night. She took Tylenol 3s and extra strength Tylenol to manage her pain.
- [20] Ms. Thaker had such difficulty sleeping that Dr. McKenzie prescribed her with sedatives, which she began taking in August 2016.

- [21] Ms. Thaker found massage to be helpful, but it did not provide sustained relief. She also tried acupuncture, but found that it did not help and so stopped. Ms. Thaker found physiotherapy to be helpful, and she learned a number of stretching exercises which helped her to relax her muscles at home.
- [22] Ms. Thaker continued to drive with her work, but right away began feeling very nervous and anxious in the car. If she was a passenger, she would tell the driver to stop and she would hold onto the dashboard or her seat because she was so afraid of being in another accident. She was unable to control her anxiety. If she was a driver, she became extremely stressed and exhausted. Seeing the brake lights of cars in front of her, or having a car change lanes in front of her, was very stressful for her.
- [23] Ms. Thaker also began experiencing a sensation she described as a "buzzing" in her arms and legs when she was having a panic attack. She testified that she felt all shaky, but it felt like the shaking was inside of her. She testified she started to get these panicky feelings every day.
- [24] Ms. Thaker described her psychological complaints to Dr. McKenzie who assessed her with anxiety and depression in early 2017. Dr. McKenzie prescribed Ms. Thaker an antidepressant, which she continues to take.
- [25] Dr. McKenzie referred her to a psychologist, Dr. McVicar. Her first appointment was scheduled towards the end of March 2017.
- [26] Before her first appointment with Dr. McVicar, Ms. Thaker was in the second accident. In the second accident, Ms. Thaker had been visiting her mother in Ladner with her husband. It was important to Ms. Thaker that she visit her mother, who is elderly and in poor health. Mr. Thaker was driving the car, and was stopped at the light at Highway 17A. They were rear-ended by the defendant Ms. Beatty.
- [27] While Ms. Thaker's injuries from the first accident had begun to improve, they were re-aggravated by the second accident. Her myofascial injuries flared up again, and her psychological injuries worsened.
- [28] Between the first and second accident, Ms. Thaker continued to work as she had previously. The summers are slow months for catering, but by the fall she was back working the same hours she had previously. She testified that they needed the money, and she needed to work. However, the joy she found previously from her work was gone. The spark was gone, and she just did the work for the money.
- [29] At the end of her work day, she would come home exhausted. She testified that she felt totally different than she had before the first accident. When she drove to her customers, she panicked in the car. She found the driving extremely stressful. She was in pain, but she kept going.

- [30] She did the minimum amount of housework she could, and no longer cared about things beyond the basics. Her pain was aggravated by standing too long. Her work involved a lot of kitchen preparation work, and this aggravated her injuries. She would have to take breaks to sit and stretch while she was working. She would feel pain begin in her neck, and then feel it move down her into leg. She testified that she experienced this every day in the period between the accidents. She was also taking sleeping pills and pain killers every day.
- [31] Following the second accident, Ms. Thaker's symptoms worsened. The panic attacks and buzzing sensation worsened. She was very tense and anxious.
- [32] At her visit to Dr. McVicar, Ms. Thaker was very skeptical that he could help her. However, she was surprised to find that he could help her. Ms. Thaker has continued to see Dr. McVicar on a regular basis since that first visit. Dr. McVicar recommended that Ms. Thaker try to reduce her number of customers, and eliminate those the required the most driving, in an attempt to manage her symptoms and health.
- [33] Ms. Thaker began to reduce her hours, and eliminate certain customers, in an attempt to manage her health. Her symptoms continued, however. She also began to experience an odd smell, which she describes as a burning rubber smell. This comes and goes, and is not experienced by any people around her.
- [34] Work was a struggle, although she did maintain it up until March 2020. In March 2020 the pandemic hit, and her business had to stop. After a couple of months of stopping her business due to the pandemic, Ms. Thaker began to recognize the impact work had been taking on her health. She decided that her health was more important than her business, and she decided to close the business permanently.
- [35] Since that time, Ms. Thaker has been able to develop an intense self care routine, which has allowed her to manage many of her physical symptoms. Her routine each day takes approximately 4 hours. She wakes up with a lot of pain and stiffness. She begins her stretching routine to try to loosen up her tight muscles. She then goes for a 30 minute walk with her husband. She returns and does more exercises and stretches. She and her husband then go to the pool, where she does walking and exercises in the water. She finds her activities in the pool provide her with considerable relief. By the time they return from the pool, it is lunch time. This routine is followed every day except Sundays. On Sundays they do not go to the pool, but Ms. Thaker does her stretches and exercises at home, and walks.
- [36] Every 10 days she receives a kind of treatment described as "cupping", which gives her relief for approximately five to six days. Ms. Thaker still requires sleep aids from time to time, and cannot sit or stand for extended periods of time without experiencing pain. She continues to take antidepressants, and maintains her sessions with Dr. McVicar.
- [37] With this extensive regime, Ms. Thaker is able to get through her day without constant pain. However, Ms. Thaker still suffers from significant driving anxiety, and does not have the same energy or enjoy social interactions as she had before the accidents. She testified that

when her extended family comes to her home on Sundays, while she is glad to see them, she is also exhausted by their visit and after a couple of hours she is ready for them to go home. In the past, she testified that they would be together for a good stretch of the day, playing games, going to shows, and eating together. She is no longer able to do this.

- [38] She can drive a car, but when she does so she is very anxious. She developed such anxiety about driving to see her mother in Ladner, that it took her over four years of intensive therapy to get to the point that she was able to make her first trip in January 2022. She has found some coping mechanisms to try to minimize her anxiety, but she no longer feels comfortable driving and usually has other people drive her. Ms. Sahota testified that since the accident, she has not been in a car with her mother as the driver. Her mother always asks her to drive. Ms. Sahota lives in Surrey and her mother will ask Ms. Sahota to drive all the way into Richmond to pick her up, rather than driving herself to Ms. Sahota.

a) Dr. McKenzie

- [39] Dr. McKenzie is Ms. Thaker's family doctor, and has been so since 2004. He was qualified as an expert in family medicine, able to provide expert opinion evidence on the diagnosis, prognosis and treatment of physical and psychological injuries.
- [40] Dr. McKenzie confirmed that Ms. Thaker had no prior history of health complaints related to her musculoskeletal system, and no history of anxiety, depression or panic prior to the first accident.
- [41] Dr. McKenzie diagnosed Ms. Thaker with soft tissue injuries in her cervical and lumbar areas as a result of the accidents. These injuries have left her with chronic pain in her neck and back. When she initially presented after the first accident, she also had pain and bruising in her left leg and ankle.
- [42] More significantly, Dr. McKenzie diagnosed Ms. Thaker with major depression in February 2017. He referred Ms. Thaker to Dr. McVicar, a treating psychologist, in March 2017. In October 2017 Dr. McKenzie referred Ms. Thaker to a psychiatrist for assessment and recommendations for medication. As a result of this visit, Ms. Thaker began taking antidepressants in October 2017.
- [43] Dr. McKenzie was of the opinion that Ms. Thaker suffered psychological trauma as a direct result of the accidents, which includes diagnoses of major depressive disorder and generalized anxiety disorder with panic. Dr. McKenzie was of the opinion that Ms. Thaker's psychological injuries were more disabling than her physical injuries.
- [44] Dr. McKenzie did not draw any conclusions with respect to her odd sensations of smell, and increased sensitivity to smell. He recommended that she have an assessment by an ENT surgeon, and may possibly require a neurological opinion.

[45] Under cross examination Dr. McKenzie was challenged that he had not reassessed her mental health recently and, therefore, Ms. Thaker was not as restricted as he suggests. Dr. McKenzie was unshaken in his view that Dr. McVicar was a medical specialist addressing Ms. Thaker's trauma and anxiety, and that Ms. Thaker was adequately treated with medication and her continuing psychological counselling. He did not agree that his assessment of Ms. Thaker's mental health was inaccurate.

b) Dr. McVicar

[46] Dr. McVicar is a registered counselling psychologist, who began treating Ms. Thaker in 2017. He was qualified as an expert in psychology, capable of providing expert opinion evidence in the diagnosis, prognosis and treatment of psychological conditions.

[47] Dr. McVicar diagnosed Ms. Thaker with a moderate level of depression and posttraumatic stress disorder. Dr. McVicar outlined the diagnostic criteria for posttraumatic stress disorder, as they related to Ms. Thaker's condition. He described posttraumatic stress disorder as an anxiety disorder, characterized by hypervigilance triggered by stimuli.

[48] Dr. McVicar noted that in Ms. Thaker's case, her disorder is focussed on her perceptions of harm arising from the two accidents. She was terrified by the accidents, and by the thought that her husband was going to be trapped in a burning car. She continues to be distressed when driving, and has a physical reaction to this distress as she reports tension and tingling in her hands, arms and legs. She reports the smell of burning.

[49] Dr. McVicar described Ms. Thaker's avoidance behaviours, including reducing her own driving and avoiding driving in areas she associates with the accidents, including the Arthur Laing Bridge and Ladner.

[50] Dr. McVicar described Ms. Thaker's sleep and mood disturbances and intrusive thoughts. He notes that she describes difficulties concentrating, and an inability to control her worry and anxiety. She has difficulty calming herself, and is more irritable and impatient with her family.

[51] Dr. McVicar described how Ms. Thaker has internalized a belief that she cannot do it anymore, and is "broken". She demonstrates deep levels of sadness. She has a diminished interest in social engagements, and gets anxious around large groups of people.

[52] Dr. McVicar is of the opinion that Ms. Thaker is at high risk and vulnerability to psychological injury if she is in another car accident.

[53] Dr. McVicar confirmed under cross examination that Ms. Thaker's chronic pain is also impacting her psychological health.

3. Credibility

[54] The defence challenged the credibility of Ms. Thaker, suggesting that she gave inconsistent evidence at trial and on discovery and when reporting to the government in her application for disability benefits. I find Ms. Thaker's testimony gave rise to no credibility concerns. I adopt the statement of the court in *Edmondson v Payer*, 2011 BCSC 118 at para 31:

In *Diack v. Bardsley* (1983), 1983 CanLII 541 (BC SC), 46 B.C.L.R. 240, 25 C.C.L.T. 159 (S.C.) [cited to B.C.L.R.], aff'd (1984), 31 C.C.L.T. 308 (C.A.), McEachern C.J.S.C., as he then was, referred to differences between the evidence of a party at trial and what was said by that party on examination for discovery, at 247:

... I wish to say that I place absolutely no reliance upon the minor variations between the defendant's discovery and his evidence. Lawyers tend to pounce upon these semantical differences but their usefulness is limited because witnesses seldom speak with much precision at discovery, and they are understandably surprised when they find lawyers placing so much stress on precise words spoken on previous occasions.

[55] The defence pointed out that Ms. Thaker did not recall striking her head on the dashboard in the second accident, but at trial said she did. This is not an important point in this case. There is no suggestion of any kind of head injury. The difference in her testimony on this unimportant point is immaterial.

[56] In her Disability Tax Credit application Ms. Thaker stated she had a marked restriction in walking. The defence pointed out that Ms. Thaker testified she walked every day and argued this was an inconsistency. Ms. Thaker testified that her statement reflected the fact that she gets panic attacks when walking. I accept Ms. Thaker's evidence that her panic attacks do represent a restriction in walking.

[57] In her CPP application, Ms. Thaker stated that she cannot complete simple household tasks. On discovery she said she could do routine tasks with difficulty. I see no meaningful discrepancy between these two statements. She clearly has a disability and can no longer complete simple household tasks without difficulty.

[58] In her CPP application Ms. Thaker stated she stopped working because of a medical condition, and her last day of work was March 3, 2020 at the start of the pandemic. The defence tried to argue that Ms. Thaker is not working solely because of the pandemic. However, no evidence was called by the defence to challenge Ms. Thaker's testimony that, while she initially stopped working because of the pandemic, once she stopped working she was able to appreciate the physical toll her injuries were taking on her health. She has not returned to work because of the impact of the injuries on her health. This evidence was uncontroverted.

[59] Similarly, the defence tried to challenge Ms. Thaker's testimony that she is not retired by suggesting her husband's evidence supported a conclusion that she is not working because she retired, i.e. not because of her injuries. None of the evidence referred to by the defence overcomes the assessment I have already made, namely that the pandemic forced her to

stop working, and only then was she able to assess the immense impact her injuries were having on her health. She might have continued working for a period of time if the pandemic had not forced a break, but I am satisfied she would have further sacrificed her health to do so. I find that the injuries suffered by Ms. Thaker in the accidents fundamentally impaired her ability to continue working in the manner she did before the first accident.

- [60] The defence also cross examined Ms. Thaker on statements she allegedly made to a doctor, who was not a witness. Ms. Thaker disagreed with the recording of her statements made by the doctor. There is no weight that I can put on the statement in the doctor's notes, which is denied by Ms. Thaker.
- [61] The defence invited the court to doubt the reliability of the witnesses for Ms. Thaker, simply because they were family members. There is absolutely no basis for such a submission. The witnesses were forthright and nothing in the cross examination of these witness would provide a foundation to challenge their honesty or reliability in the manner submitted by the defence.
- [62] The defence also argued that Dr. McKenzie was more of an advocate than a medical professional. Again, there is no substance to this submission. The defence referred to the statement as to Ms. Thaker's walking ability contained in her application for the Disability Tax Credit Certificate, which I have already addressed. The statement by Dr. McKenzie was appropriate and does not veer into advocacy.
- [63] Dr. McKenzie noted on the application for the Disability Tax Credit Certificate that Ms. Thaker is markedly restricted for mental functions necessary for every day life. The defence argued that Dr. McKenzie has only made one referral to investigate such difficulties and therefore is overstating Ms. Thaker's difficulties. However, Dr. McKenzie made one referral, to Dr. Vicar, and that referral resulted in a continued therapeutic relationship. It is entirely unclear why Dr. McKenzie would be required to make an additional referral if he was satisfied with the existing therapeutic relationship, as he clearly stated he was. No expert evidence was called by the defence to support the submission that Dr. McKenzie's treatment plan was inadequate in any way. In the absence of such evidence, it is not appropriate for the defence to invite the court to find that "it would be reasonable to assume there would be more complaints and more counselling focussed on mental impairments and restrictions."
- [64] The defence was also critical of various statements made by Dr. McKenzie under cross examination regarding what work would have been available to Ms. Thaker in her catering business during the pandemic. Counsel for the defence invited Dr. McKenzie to speculate on areas outside his knowledge, and then made the submission that the answers provided were evidence of Dr. McKenzie being an advocate. I cannot accept this submission.

4. Causation

- [65] Mr. Justice Kent, in *Kallstrom v Yip*, 2016 BCSC 829, summarized the law of causation:

[318] The basic legal principles respecting causation are found in the seminal case of *Athey v. Leonati*, 1996 CanLII 183 (SCC), [1996] 3 S.C.R. 458, repeated many times since, and which include:

1. the general, but not necessarily conclusive test for causation is the "but for" test requiring the plaintiff show his injury and loss would not have occurred but for the negligence of the defendant;
2. this causation test must not be applied too rigidly. Causation need not be determined by scientific precision as it is essentially a practical question of fact best answered by ordinary common sense;
3. it is not necessary for the plaintiff to establish that the defendant's negligence was the sole cause of the injury and damage. As long as it is it is part of the cause of an injury, the defendant is liable; and
4. apportionment does not lie between tortious causes and non-tortious causes of the injury or loss. The law does not excuse the defendant from liability merely because causal factors for which he is not responsible also helped to produce the harm.

[66] The defence in this case did not seriously challenge the fact that Ms. Thaker's injuries stemmed from the accidents. Indeed, there was no evidence before the court to suggest that any of Ms. Thaker's current symptoms pre-dated the accident. I am satisfied, on a balance of probabilities that Ms. Thaker would not have suffered her present physical symptoms or psychological conditions if she had not been involved in the two accidents. I am satisfied that the accidents are the cause of Ms. Thaker's injuries and any resulting losses she has suffered.

5. What is Ms. Thaker's prognosis?

[67] Dr. McKenzie was of the opinion that Ms. Thaker's physical complaints will be ongoing and permanent. He acknowledged that her physical injuries have improved over time, and are managed with her dedication to her daily exercise routine. He notes that she will likely have periodic flare ups of pain, which should be treated with physiotherapy and massage therapy.

[68] With respect to her psychological injuries, Dr. McKenzie was of the opinion that Ms. Thaker will require medication into the foreseeable future and a future psychiatric referral to review her medication needs. He was not optimistic that her driving anxiety would fully resolve, and stressed the need for her continued access to a psychologist.

[69] Dr. McVicar described how Ms. Thaker's focus on self care has improved her mental health. Doing the exercises she does each day, including yoga, stretches, walking and going to the pool all serve to improve her mood for the day. However, he testified that it was his opinion that Ms. Thaker would not fully recover her pre-accident psychological health.

[70] Dr. McVicar was of the view that Ms. Thaker would continue to improve with ongoing psychological therapy. However, he was of the view that she was unlikely to regain the ability to regularly drive in high traffic situations again. He pointed to the fact that it took her years of focussed therapy to gain the ability to drive herself to Ladner to visit her mother, an achievement she met in January 2022. He described how Ms. Thaker was highly motivated to reach this goal, given her mother's age and poor health. Even with such high motivation, it was a significant amount of work to get her to that point.

[71] Dr. McVicar was of the opinion that Ms. Thaker is at high risk and vulnerability to psychological injury should she experience another accident.

6. Conclusion on injuries

[72] I am satisfied on the balance of probabilities that Ms. Thaker suffered soft tissue injuries in her cervical and lumbar areas in the accidents. Her injuries have resulted in chronic pain. I am also satisfied that Ms. Thaker suffers from depression and posttraumatic stress disorder as a result of the trauma she experienced in the accidents. I am further satisfied that it is likely that Ms. Thaker will continue to suffer from chronic pain, depression, and posttraumatic stress disorder for the rest of her life. While she may make some modest improvements, particularly if maintains her intensive self care regime, I find that it is most likely that she will continue to suffer ongoing impairments, as compared to her pre-accident status.

C. Is Ms. Thaker entitled to damages?

[73] The plaintiff claims non-pecuniary damages, and the following pecuniary damages: loss of income earning capacity (past and future), cost of future care and special damages.

1. Non-pecuniary damages

[74] Non-pecuniary damages are awarded to compensate a plaintiff for pain, suffering, loss of enjoyment of life, and loss of amenities. As stated by our Court of Appeal in *Stapley v. Hejslet*, 2006 BCCA 34 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*, [2005] B.C.J. No. 163 (QL), 2005 BCCA 54).

[75] Ms. Thaker seeks \$160,000 in non-pecuniary damages. The defence agrees some non-pecuniary damages are properly awarded, but submits the correct award is \$45,000 to \$55,000.

[76] Ms. Thaker relies on *Vo v. Navarro*, 2021 BCSC 1534, *Zwinge v. Neylan*, 2017 BCSC 1861, *McHollister v. Ma*, 2021 BCSC 1667, *Smith v. Law*, 2021 BCSC 1789, *Lal v. Singh*, 2021 BCSC 2378 and *Theobald v. Coffey-Lewis*, 2021 BCSC 2491 where awards ranged from \$150,000 to \$175,000 for plaintiffs suffering chronic pain with resulting psychological injuries.

[77] The defence relies on *Brass v. Von Chudentiz*, 2020 BCSC 343, *Findlay v. Sun*, 2020 BCSC 1330, and *Jansson v. Malone*, 2021 BCSC 585 where awards ranged from \$50,000 to \$55,000 for non-pecuniary damages in cases with a soft tissue injuries. While the plaintiff in *Jansson* suffered from driving anxiety as a result of the accident, this was not the case in the other two decisions referred to by the defence. Given the significance of Ms. Thaker's psychological injuries, I do not find *Brass* and *Findlay* to be of assistance in assessing the appropriate award for non-pecuniary damages in this case.

[78] In the case of *Jansson*, the driving anxiety suffered by the plaintiff was substantially less than that suffered by Ms. Thaker. Her anxiety did not limit her ability to work in the same way Ms. Thaker's anxieties have limited Ms. Thaker. Further, the plaintiff in *Jansson* did not suffer from the additional severe psychological conditions that have been visited on Ms. Thaker as a result of the injuries she suffered in the accidents.

[79] Each case is unique. Non-pecuniary damages must be assessed taking into account the unique factors arising in the case at bar. Of the cases noted above, I find *Zwinge* and *McHollister* to be useful comparators.

[80] Ms. Thaker was 56 years old at the time of the accident. Her injuries have had a significant impact on her life. As a result of the accidents, she suffers from chronic pain which requires four hours of intense physical therapy each day to manage. She has suffered significant psychological injuries, changing her personality and relationships with friends and family. She is no longer the energetic fun centre of the family. She has lost much of her independence and will not work again. She will need to take medications for the rest of her life to manage her psychological injuries.

[81] On the other hand, Ms. Thaker has been able to travel since the accidents, and has found a routine which does allow her to manage her pain to some extent. Her regime takes up a large part of her day, which is of itself limiting. But if she sticks to her regime, while she cannot eliminate her pain, she is able to manage her pain. I find that an award of \$120,000 is a fair and reasonable award of non-pecuniary damages.

2. Loss of earning capacity

[82] The purpose of an award for loss of earning capacity is to restore the plaintiff, as best as possible, to the position she would have been in had the accident not occurred. The plaintiff must establish an impairment in her earning capacity, and that there is a real and substantial possibility that the diminishment in earning capacity will result in a pecuniary loss: *Perren v. Lalari*, 2010 BCCA 140.

[83] The court in *Brown v. Golaiy* (1985), 26 BCLR (3d) 353 (SC) at para. 8 set out the factors to consider in assessing a loss of earning capacity:

The means by which the value of the lost, or impaired, asset is to be assessed varies of course from case to case. Some of the considerations to take into account in making that assessment include whether:

1. the plaintiff has been rendered less capable overall from earning income from all types of employment;
2. the plaintiff is less marketable or attractive as an employee to potential employers;
3. the plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to him, had he not been injured; and
4. the plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market.

[84] Both past and future loss of earning capacity address the same loss. However, there are differences in how this loss is assessed before trial and after trial. To the extent past loss of capacity relies on facts which are capable of proof, those facts must be proven on the balance of probabilities. To the extent past loss of capacity relies on hypothetical facts, the court must be satisfied that there is a real and substantial possibility of such facts occurring. The court may assess the likelihood of such hypothetical facts occurring, and discount or increase an award to reflect such contingencies. Future losses are almost always based on hypothetical facts, and are assessed on the standard of real and substantial possibility with consideration of relevant contingencies: *Rousta v. MacKay*, 2018 BCCA 29 at para. 14.

[85] Dr. McKenzie was of the opinion that Ms. Thaker's pain, fatigue, and driving anxiety prevented her from continuing her work as a caterer. Dr. McKenzie was of the opinion that Ms. Thaker's anxiety and physical pain with increased activity precludes her ability to return to work in the future.

- [86] Dr. McVicar stated that in 2018 and 2019 he strongly recommended that Ms. Thaker cut back on work, as it was having a negative effect on her mental health. He described how cutting down her hours was one of the things she could do to control her stress. He noted how driving downtown was causing increased tension and exhaustion for Ms. Thaker. Dr. McVicar also noted that while she was working, her concentration was affected; she was finding it harder and harder to manage all the things she had to do for all her customers.
- [87] Under cross examination, Dr. McVicar's conclusion that she could not work was challenged, and counsel pointed out that she had worked for a number of years after the accident. Dr. McVicar was unshaken under this cross examination. He agreed that she did work after the accidents, but pointed out that it became harder and harder for her to do so, both emotionally and physically. He did not believe she would improve to the point she could drive downtown on a regular basis again. Ultimately, Dr. McVicar testified that she worked at the expense of her psychological health.
- [88] Dr. McVicar was asked by defence counsel if it was his opinion that Ms. Thaker could not work in any capacity. Dr. McVicar replied to the effect that he was not willing to make that absolute statement, but before she could work in some capacity again she would have to make some improvements, and he was not confident Ms. Thaker will get there. He clarified that Ms. Thaker would have to achieve better physical health and develop an increase sense of self confidence through therapy. At present, Dr. McVicar was not of the view that she was able to achieve this.
- a) Pre-trial loss of earning capacity
- [89] Thyme Catering was operated by JRRS. All management bonuses, dividends, and wages and benefits recorded in the financial statements of JRRS were received by Ms. Thaker.
- [90] The fiscal year end for JRRS is April 30. The statements of income and retained earnings in the financial statements from 2013 to 2021 show the following:

Year

Income from operations before taxes

Management bonus

Wages and benefits

Dividends

2013

\$21,843

\$10,000

0

\$15,000

2014

\$28,876

\$15,000

\$743

\$25,000

2015

\$38,274

\$12,000

\$1,188

\$25,000

2016

\$28,177

\$13,989

\$22,654

\$25,000

2017

\$56,831

0

\$22,971

\$25,000

2018

\$67,896

\$20,000

\$25,000

2019

\$66,427

\$22,883

0

2020

\$69,130

0

0

\$25,000

2021

\$3,720

0

0

\$25,000

[91] Because JRRS operated as a kind of sole proprietorship, Ms. Thaker was able to determine how much money she would take out of the company as dividends, and how much as bonuses or wages. There is a different tax treatment depending on how the money is received, and Ms. Thaker had the ability to structure her receipt of income in a tax advantageous way. As a result, in determining past income loss, it is not as simple as simply looking at the wages and bonuses paid to the Ms. Thaker. Adding in her dividends does not really answer the question, as dividends are paid from retained earnings in the company. Ms. Thaker left excess earnings in the company each year, and did not issue dividends to capture all of the company's earnings each year. Therefore, the dividends are not a measure of her earning capacity in any given year.

[92] To assess the past income of Ms. Thaker for the purposes of assessing any loss flowing from her injuries, the before tax income of the company, with the addition of management bonuses and wages and benefits paid directly to Ms. Thaker, is the best proxy for Ms. Thaker's true past income.

[93] Based on the company year end in April, for the purposes of past income loss assessment, Ms. Thaker's past income during the years 2013-2021 was as follows:

Year End April

Total Income

2013

\$31,843

2014

\$44,619

2015

\$51,462

2016

\$64,820

2017

\$79,802

2018

\$87,896

2019

\$89,310

2020

\$69,130

2021

\$3,720

- [94] The financial statements of the company demonstrate a steady increase in Ms. Thaker's income available through the business each year until 2020. The 2020 company fiscal year included one month when the business was closed due to the pandemic. In 2019, Ms. Thaker's average monthly income available through the business can be calculated at \$7,442. If Ms. Thaker had been earning as much in 2020 as she did in 2019, the income from the company, less the one month the company was closed, can be assessed at \$81,868.
- [95] I am satisfied that due to her injuries, Ms. Thaker did reduce her work load and this resulted in a loss of income leading up to March 2020. Past wage loss is an assessment, not a calculation. I am not satisfied Ms. Thaker has proven past wage loss in the period up to the company's year end April 2019. However, I find that \$89,000 is a fair assessment of Ms. Thaker's past annual earning capacity, and that she did suffer a loss from her injuries in the fiscal year ending April 2020 in the amount of \$7,000.
- [96] Beginning in March 2020, Ms. Thaker stopped working because of the pandemic. Ms. Thaker argues that she would have started working again in July 2020 had she not been injured. The Ms. Thaker called no evidence to establish when catering businesses were allowed to resume following the initial shut down period. However, I do take judicial notice of the fact that food service industries did resume operations at reduced levels following the initial shut down. For example, pursuant to the Food Service Establishment and Liquor Services Order made May 22, 2020, food service establishments were required to operate at

50% capacity. This restriction extended until February 16, 2022.

[97] But for the pandemic, if Ms. Thaker had not been injured, I am satisfied there was a real possibility that Ms. Thaker would have continued to operate her business at full capacity, and her income would have been \$89,000/year. Over the 18 months from July 2020 to trial, this loss would be calculated at \$133,500. However, I am satisfied that a significant contingency reduction of 50% ought to be made to account for the fact that food services business suffered significant reductions in their business throughout the pandemic.

[98] I award a total of \$73,750 for past loss of earning capacity.

[99] Pursuant to s. 98 of the Insurance (Vehicle) Act, R.S.B.C. 1996, c. 234 income tax must be deducted from this award. If the parties are unable to agree on the appropriate deduction, they may appear before the Registrar to settle the deductions.

b) Future loss of earning capacity

[100] Ms. Thaker has established a continued loss of earning capacity. I am satisfied that, but for the accident, there was a real and substantial possibility that Ms. Thaker would continue working until retirement at age 65. As a result of the accidents, Ms. Thaker will not be able to work again. Ms. Thaker is entitled to damages for future loss of earning capacity. As with respect to her pre-trial loss of earning capacity, I assess her future loss of earning capacity at \$89,000/year. At the date of trial, Ms. Thaker was 61, turning 62 on May 13, 2022. Her future income loss claim is for 3.25 years, to age 65.

[101] I assess Ms. Thaker's total damages for future loss of earning capacity at \$289,250. I decline to make any deductions for contingencies related to the pandemic, as I am not satisfied that there is a real likelihood that Ms. Thaker's food service business would continue to be working at a reduced rate into the future.

3. Cost of future care

[102] Any claim for cost of future care must be medically justified, and must be reasonable to both parties: *Milina v. Bartsch*, (1985) 29 B.C.L.R. (2d) 33. The plaintiff is entitled to services, medications and other items of care that are reasonably necessary to preserve and promote her mental and physical health, and which she is likely to access in the future: *Sendher v. Wong*, 2014 BCSC 140, para 192-195.

[103] Ms. Thaker seeks total medication costs of \$6,500, based on her 2021 expenditure of \$326, until age 81. I am satisfied, based on the evidence of Dr. McKenzie, that Ms. Thaker will require medications throughout her life. I allow medication costs of \$6,500.

[104] Dr. McKenzie recommends Ms. Thaker have access to physiotherapy and massage therapy as needed. Ms. Thaker seeks 30 sessions of physiotherapy (six sessions per year for five years), for a total cost of \$2,430 at \$81/session. I agree that this is a reasonable cost justified on the evidence. I allow physiotherapy in the amount of \$2,430.

[105] Ms. Thaker seeks 60 sessions of massage therapy (one per month for five years). While Ms. Thaker is anxious about attending massage therapy, I am satisfied that she will attend massage in the future and that these sessions will benefit her. I allow \$7,500 for massage therapy (60 sessions at \$125/session).

[106] Dr. McKenzie recommends continued psychological counselling. Dr. McVicar recommended counselling twice a month, for 6 to 8 months. I agree that such counselling is necessary and will be undertaken by Ms. Thaker. I allow \$3,680 for psychological counselling (16 sessions at \$230/session).

4. Special damages

[107] The parties agree on special damages in the amount of \$14,656.75.

IV. Conclusion

[108] Ms. Thaker is awarded the following damages against the defendants, jointly:

Non-pecuniary damages

\$120,000

Past loss of earning capacity

\$73,750

Loss of future earning capacity

\$289,250

Cost of future care

\$20,110

Special damages

\$14,656.75

Total

\$517,766.75

[109] If the parties wish to make submissions on costs, they may do so in writing within 30 days of this judgment. If I receive no submissions on costs, I award costs to Ms. Thaker at Scale B.

"W.A. Baker J."

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Prepared on 29 October 2026 · Esheria