

CANADA / JUDGMENT

Thomas v. Foscett

2020 BCCA 322

COURT

British Columbia Court of Appeal

DECIDED

20 November 2020

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2020 BCCA 322 Thomas v. Foscett

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Thomas v. Foscett,

2020 BCCA 322

Date: 20201120

Docket: CA45752

Between:

Renee Thomas

Appellant

(Plaintiff)

And

Eric Foscett and Toyota Credit Canada Inc.

Respondents

(Defendants)

Before:

The Honourable Madam Justice Saunders

The Honourable Madam Justice Bennett

The Honourable Madam Justice DeWitt-Van Oosten

On appeal from: An order of the Supreme Court of British Columbia, dated September 12, 2018 (Thomas v. Foskett, Vancouver Docket M152607) and November 23, 2018 (Thomas v. Foskett, 2018 BCSC 2369, Vancouver Docket M152607).

Counsel for the Appellant:

A. Leoni

Counsel for the Respondents:

A.M. Gunn, Q.C.

F. Lin

Place and Date of Hearing:

Vancouver, British Columbia

September 16, 2020

Place and Date of Judgment:

Vancouver, British Columbia

November 20, 2020

Written Reasons by:

The Honourable Madam Justice DeWitt-Van Oosten

Concurred in by:

The Honourable Madam Justice Saunders

The Honourable Madam Justice Bennett

Summary:

The appellant was injured in a motor vehicle collision. Liability was admitted. A jury assessed damages. The appellant appeals the jury's verdict, alleging misdirection in the charge to the jury, unreasonable awards for special and non-pecuniary damages, and erroneous dismissal of her application for a retrial. Held: Appeal allowed. The awards for special and non-pecuniary damages are set aside. The special damages award reflected palpable error. The award for non-pecuniary loss was plainly unreasonable and unjust given the nature of the appellant's injuries and their impact. Rather than order a new trial, the Court exercises its discretion to substitute awards for special and non-pecuniary damages in the amounts of \$2,045 and \$60,000, respectively.

Reasons for Judgment of the Honourable Madam Justice DeWitt-Van Oosten:

Introduction

- [1] The appellant sustained injuries in a motor vehicle collision. She sued for damages. A jury awarded her an aggregate \$53,239.
- [2] The appellant seeks to overturn the jury's verdict and obtain a new trial. Alternatively, she asks that this Court set aside the awards for special and non-pecuniary damages and substitute awards for greater amounts.
- [3] The appellant says her trial was unfair and the jury's assessment of damages was palpably flawed, resulting in a plainly unreasonable and unjust outcome.
- [4] For the reasons that follow, I would allow the appeal, set aside the awards for special and non-pecuniary damages, and substitute awards for them in the amount of \$2,045 and \$60,000, respectively.

Background

- [5] The collision occurred in April 2013 in Vancouver. The appellant was then 43 years old. She is a single mother of three children and worked two jobs: as a cashier and receptionist at a community centre and as a bookkeeper. Following the accident, the appellant developed neck pain, upper back pain and right shoulder pain. Over time, much of the soft tissue pain subsided. However, at the time of trial, the appellant continued to experience pain and dysfunction in her right shoulder. An MRI of the shoulder in September 2015 showed a superior labral tear. There were also indications of tendinosis, bursitis and joint arthrosis.
- [6] The appellant worked continuously from the date of the collision to trial, missing only two days of work. She changed jobs prior to trial and, in 2018, when the jury heard her claim, she was working full time as a bookkeeper. She also worked two evenings per week as a cashier at a community centre.
- [7] The respondents admitted liability for the collision. Damages were determined following a seven-day trial in September 2018. A significant issue before the jury was whether the appellant's ongoing shoulder pain and related physical limitations were attributable to the collision. The respondents acknowledged that the appellant sustained soft tissue injuries in the collision; however, they said she had not proved that the labral tear to her shoulder arose from the collision. As such, to the extent that her ongoing pain resulted from that tear, responsibility did not lie with the respondents. If they were wrong about that, the respondents submitted that the appellant's injuries did not affect her as severely as she claimed. They challenged the credibility of her complaints about ongoing pain, as well as the extent of her disability. At trial, appellant's counsel told the judge that in light of the appellant's condition, non-pecuniary damages for her injuries would typically fall somewhere around \$125,000. The respondents suggested that the appropriate range was more in the nature of \$60,000 to \$80,000.

- [8] The jury awarded the appellant an aggregate \$53,239 in damages: \$15,000 for non-pecuniary damages; \$200 in past income loss (an agreed-upon amount); \$16,308 for loss of future income earning capacity; \$20,336 for costs of future care; and \$1,395 in special damages.
- [9] Following the verdict, neither party moved for judgment. In October 2018, the appellant filed a notice of appeal to this Court. She subsequently appeared before the trial judge and applied for a retrial under R. 12-6(7) of the Supreme Court Civil Rules, B.C. Reg. 168/2009, on grounds that the damages awards were conflicting. The respondents opposed the application. In November 2018, the trial judge dismissed the application for a retrial and formally entered judgment on the terms set by the jury. The appellant filed a second notice of appeal. By consent, the second notice was amended to consolidate the relief sought in both appeals.

Issues on Appeal

- [10] The appellant raises four issues. She says: (1) the trial was unfair; (2) the award for special damages reflects palpable error; (3) the award for non-pecuniary damages is inconsistent with the other awards, and, in any event, wholly disproportionate; and (4) the judge should have ordered a retrial because parts of the jury's verdict were clearly wrong.

Discussion

Was the Appellant's Trial Unfair?

- [11] The appellant says the judge erred in his instructions to the jury. The respondents' trial counsel (not counsel on the appeal) also made unduly prejudicial comments to the jury. The appellant contends that the cumulative effect of these errors was an unfair trial.
- [12] The alleged errors in the instructions are four-fold. First, counsel provided the judge with a witness list at the start of the trial. In his opening instructions, the judge told the jury of the anticipated witnesses. This included a physiotherapist, Louise Craig, who would opine on the appellant's functional capacity and future care. When referring to Ms. Craig's anticipated testimony, the judge said:

There is also going to be a physiotherapist who is apparently going to give evidence about Ms. Thomas' present functional capacity, and the idea is that the case that she's going to make for you, or attempt to make for you, and it's for you to decide whether she succeeded or not. And bearing in mind that you're not obligated to accept an expert's opinion hook, line and sinker, that's probably the kind of evidence that the witness is poised to give and you'll have to decide whether you buy it or not; okay?

[Emphasis added.]

- [13] The appellant says these instructions wrongly positioned Ms. Craig as an advocate for the appellant and their "pejorative" nature unfairly undercut the value of her testimony. Ms. Craig was a key witness for the appellant.

- [14] The second alleged error arises from the judge telling the jurors in his opening remarks that they were free to discuss the case with "whoever" they wanted:

When you have the case, when I finish charging you, you'll be invited to retire and to begin your deliberations, as I said. Bear in mind the jury deliberations are private. They're not for public consumption. You can talk about the evidence with whoever you like. What happens in this courtroom, by all means. But the confidentiality of the jury room is sacrosanct .

[Emphasis added.]

- [15] The appellant says this instruction was clearly wrong at law. Jurors must decide the case based on the evidence in the courtroom, not information they gather elsewhere.

- [16] On the day following the opening instructions, appellant's trial counsel (not counsel on the appeal) applied for a mistrial based on these aspects of the judge's remarks. The judge dismissed the application and declined to ask the jurors whether they had spoken to anyone about the case overnight. However, he agreed to provide corrective instructions. (The refusal to grant a mistrial is not under appeal.)

- [17] Specific to Ms. Craig's testimony, the judge told the jurors that if he had said something that caused them to "pre-judge" Ms. Craig's evidence, that was not his intention:

This is a professional expert witness who's going to come and testify. I haven't got the slightest idea what she's going to say, and it's entirely up to you to evaluate her evidence on precisely the same principles that I've already described for you, and you can accept all of her evidence, part of her evidence, or none of her evidence, but you're to approach her with the same sort of dispassion and objectivity that I'm asking you to accord to every witness.

You'll decide. You'll hear the witness. You'll decide the extent to which you accept her evidence. And I want you to keep an open mind about it and to apply the same sort of principles to your evaluation of her evidence, as with any other witness.

[Emphasis added.]

- [18] The judge also clarified that the jury was obliged to "judge [the] case solely and only on the evidence [it heard] in [the] courtroom". Furthermore, the jury's deliberations were to "be kept totally confidential" and, during the trial, the jurors "should not discuss the evidence with anybody". If they had spoken with anyone about the trial overnight, they should "disabuse" their minds of that discussion:

During the course of the trial, you should not discuss the trial with anyone who's not on the jury with you. You shouldn't write or speak to either party, any witness, or counsel at this trial outside of this courtroom.

To the extent that you may have discussed what you heard yesterday with anybody, and of course the trial has only just begun and we've heard a portion of the evidence of a general practitioner, but to the extent that you may have discussed the evidence so far with anybody, I direct you to disabuse your mind of any such discussion. I'll repeat what I said to you yesterday, that you're to decide this case only on the evidence that you hear in this courtroom, entirely uninfluenced by any external source of information or advice.

[Emphasis added.]

[19] The third alleged misdirection arises out of the final instructions on special damages. The appellant's claim for special damages consisted of an agreed-upon amount of \$650 for chiropractic and physiotherapy services, the cost of an MRI and its associated injection fee, and a gym membership. The judge explained the claim for special damages this way:

So special damages, ladies and gentlemen. And these are referred to in tab 9 of Exhibit 1. You've seen that list. The parties here are agreed that the plaintiff is entitled to be compensated for all out-of-pocket expenses listed in that exhibit -- or in that tab up to November 27th, 2013, an amount of \$650. Counsel have agreed that expenses other than these came up before that date but they were settled by agreement.

The defendant denies responsibility to pay for the other items on that list. In the case of the September 23rd, 2015 MRI cost, he denies that he caused the labrum tear revealed by the test, and even if he did, he says the evidence has not satisfactorily established that it is causing the plaintiff's ongoing debilitating [pain].

In the case of the gym membership, he says that the evidence shows that this was an expense that the plaintiff would have incurred even without the accident. These are questions of fact for you to decide on the balance of probabilities.

[20] The appellant says the second passage of this instruction wrongly focused on the existence of a causal link between the labral tear, identified in the MRI, and the ongoing shoulder pain. Instead, the only question for the jury to answer in awarding the MRI expenses was whether the appellant's shoulder pain was related to the collision. The actual medical cause of that pain was irrelevant.

[21] The fourth alleged misdirection centres on the judge's explanation about future loss of earning capacity. He told the jury that any amount awarded for this loss was intended to "provide a future stream of payments covering the gap between what the plaintiff earned before the accident and what she's likely to earn now that she's injured" (emphasis added). The appellant says this is wrong in law. The appellant was not required to prove on a balance of probabilities that she would have earned more money but for her injuries; only that there was a real and substantial possibility of one or more future events that would result in a loss.

- [22] Under this first ground of appeal, the appellant also points to comments made by respondents' trial counsel in his closing submissions. More than once, he raised the absence of certain witnesses as a reason for finding that the appellant had not met her burden of proof to show ongoing disability. He suggested that not calling these witnesses left the appellant's case with "holes all the way through".
- [23] The trial judge sought to rectify those comments in his final instructions, telling the jurors that the appellant "wasn't obliged to call every witness under the sun, only such of those witnesses whom [she] thought would be useful in assisting [the jury] in fulfilling [its] tasks". He also pointed out that the witnesses who did testify about the impact of the appellant's injuries on her daily life "weren't challenged with any great enthusiasm, and their evidence was not seriously contested". As a result, any alleged failure to call witnesses, as highlighted by the defence, was not "something that should detain [the jury] over much in [its] deliberations".
- [24] The appellant says the judge's corrective instructions were insufficient. Citing *Buksh v. Miles*, 2008 BCCA 318 at para. 35, she submits it is not proper for jurors to draw an adverse inference from the failure to call witnesses unless the trial judge has first made a threshold determination on the propriety of that inference, after considering multiple factors and receiving submissions from counsel. No such threshold enquiry took place.
- [25] Appellate intervention in a jury verdict on grounds of trial unfairness, whether real or apparent, is only available where a reasonable person, informed of what took place, would be apprehensive that the complaining party did not receive a fair hearing: *Mazur v. Lucas*, 2014 BCCA 19 at para. 85.
- [26] Where a fairness complaint is grounded in alleged misdirection (an error of law), the appellate court is obliged to "consider the entire charge to the jury, the whole of the evidence, and the positions of counsel as taken from their addresses to the jury" before interfering on that basis: *Lennox v. New Westminster (City)*, 2011 BCCA 182 at para. 25; *Mazur* at paras. 27, 31. Misdirection will not result in a new trial unless it has occasioned a substantial wrong: *Arland v. Taylor*, [1955] O.R. 131, [1955] 3 D.L.R. 358 (C.A.), cited with approval in *Mazur v. Lucas*, 2010 BCCA 473 at para. 42.
- [27] After considering the appellant's fairness complaints, in the context of the totality of the record, I would not accede to this ground of appeal.
- [28] First, the judge corrected the problematic comments in the opening instructions the next morning and he used strong language in doing so. He emphasized the importance of the jury keeping an "open mind" to the appellant's expert witnesses. He also made it clear that the jurors were not to discuss the case with third parties, and, if they had spoken to anyone overnight, they were to ignore that information. At this point, the appellant's first witness was still in the witness box, and Ms. Craig had not yet testified. Although the appellant had sought a mistrial, after the judge delivered the corrective remarks, the appellant did not seek additional clarification for the jury or redirection or make further complaint about these

issues.

- [29] The judge further ameliorated any related prejudice in his final instructions. There, he properly instructed the jury on expert evidence. This included telling the jury it was not bound to follow any opinion the judge may have expressed about the evidence of a particular expert (which would include Ms. Craig). Instead, it was up to the jurors to decide "how much or little [they believed] or [relied] upon the testimony of any witness", and, to the extent their views were different from views expressed by the judge, the jurors were to "stand by [their] own views and opinions and ignore [his]". The judge also reminded the jurors that their findings had to "be based only on the evidence which [they] heard in [the] courtroom and on no other source".
- [30] Coupled with the corrective remarks on the second day of evidence, I consider the final instructions to have effectively remedied the appellant's concerns.
- [31] On the second of the fairness complaints, I do not interpret the impugned instructions on special damages the same way as the appellant. The judge told the jury the parties agreed that the appellant was entitled to all out-of-pocket expenses listed on the schedule of special damages up to November 27, 2013. For the remaining expenses, the MRI and gym membership, the judge said the respondents denied responsibility for those costs. The judge explained the asserted bases for the denial. First, the collision did not cause the labral tear in the appellant's shoulder, and, even if such was the case, that injury was not the cause of her ongoing pain (which is what led to the MRI). Second, the appellant would have incurred the gym expense "even without the accident". The thrust of the instruction is that both expenses were disputed on grounds that the appellant did not prove they arose from (or were related to) the collision.
- [32] This instruction was consistent with the closing submissions of the parties. Trial counsel for the appellant told the jury that if it was "satisfied that the [MRI] expense was reasonable and related to the injuries caused by the car crash [it] should allow the expense" (emphasis added). The defence said there was "not enough evidence to show that [the MRI expense is] related to the accident or that the pain is coming from the tear itself" (emphasis added). Further in the defence submissions, counsel said: "Special damages . It's relatively simple. Up to November it's around \$700, I think it's 650, 700, something like that. That's fine. We reasonably dispute the MRI scan. There's just not enough there to show it relates to the accident" (emphasis added).
- [33] The appellant says a proper instruction on special damages required the judge to make clear to the jurors that the appellant was entitled to the MRI expense if they were satisfied that it arose because of the tortious event. In my view, that is what the judge did, through his explanation of the defence position. His comments focused on a link between the collision, ongoing injury to the appellant's shoulder (whatever the medical cause might be), and the MRI. When the final charge is considered in the context of the record, including counsels' submissions, this jury would have understood that the appellant was entitled to her

expenses for the MRI and gym membership if those expenses were reasonable and related to the collision.

- [34] I note that after the judge delivered his instructions on special damages, trial counsel had an opportunity to raise issues for which further clarification might be required. The appellant did not complain about this aspect of the charge. A failure to object is a "significant consideration" in deciding whether an alleged impropriety warrants a new trial: *Brophy v. Hutchinson*, 2003 BCCA 21 at para. 50. It provides an indication of the prejudicial effect of the impugned remarks, as perceived and assessed by counsel intimately familiar with the case.
- [35] Finally, as will be discussed later, I am satisfied that the special damages awarded by the jury included the MRI expense. As such, even if the judge's instruction on this aspect of the case was problematic, it did not give rise to a substantial wrong.
- [36] That brings me to the third alleged misdirection, involving the instructions on future loss of earnings. Assessing a plaintiff's future earning capacity requires that a jury consider hypothetical events (such as a reduction in work hours necessitated by the injuries). A plaintiff is not required to prove those events on a balance of probabilities. Instead, they are to be considered as long as the plaintiff establishes that the future events are a real and substantial possibility. Where a plaintiff meets that threshold, the trier of fact must then proceed to determine the measure of damages by assessing the likelihood of the "real and substantial possibilities" occurring: *Grewal v. Naumann*, 2017 BCCA 158, per Goepel J.A. dissenting (not on this point) at para. 48. See also *Gao v. Dietrich*, 2018 BCCA 372 at paras. 36-37.
- [37] I am satisfied that in the final instructions, the jury received the proper analytical tools for assessing the appellant's future loss of earning capacity. Before the judge delivered the impugned instruction (para. 21, above), appellant's trial counsel told the jury in his opening statement that he would call witnesses to testify that the appellant's injuries had not "completely healed" and that she would "continue to suffer from her injuries permanently or for some time into the future". He explained that if the jury accepted that evidence, the appellant was entitled to compensation for loss of future earning capacity. To obtain this compensation, the appellant "need only show that there's a real and substantial possibility of a future loss" (emphasis added).
- [38] At the start of his instructions on future loss, the judge reiterated the point made by appellant's counsel, namely, that to succeed on this aspect of her claim, the appellant "must prove that there is a real and substantial possibility of a future event leading to an income loss" (emphasis added). He subsequently put the appellant's position before the jury, that "because of an accident-related decrease in [her] functional capacity, [the appellant] will suffer a loss". He explained that the defence disputed this aspect of the appellant's claim. The defence argued that the evidence (including the fact that the appellant only missed two shifts post-collision, worked continuously to trial, and experienced growth in her income)

did not establish a "real and substantial possibility of a future event leading to an income loss" (emphasis added). The judge told the jurors it was "entirely for [them] to determine whether there's a real and substantial possibility of [that event] occurring" (emphasis added). He then explained that if they answered the question in the affirmative, the jurors had to "go on to assess the likelihood of its occurrence". If they found the likelihood of occurrence was 10, 50 or 90 percent, they were obliged to award the appellant 10, 50 or 90 percent of the compensation she would be entitled to "if it were certain that the loss would occur".

- [39] In light of the many references to a "real and substantial possibility" (not all have been captured here), I am satisfied that the instructions on future loss of earning capacity, considered as a whole, accord with the proper legal test as confirmed in *Grewal*. Appellant's trial counsel did not raise concerns with this aspect of the charge after its delivery.
- [40] Finally, I agree with the respondents that in his closing submissions, their trial counsel did not invite the jury to draw an adverse inference against the appellant based on a failure to call certain witnesses. Instead, as I read the relevant portions of the closing submissions, he simply argued that the appellant's evidence was not sufficient to make out all aspects of her claim. In any event, as noted, the judge provided the jury with a final instruction specific to this point, making it clear that the appellant was not obliged to "call every witness under the sun". Importantly, he also drew the jurors' attention to the fact that the witnesses who did testify about the impact of the injuries on the appellant were not "seriously contested".
- [41] There were aspects of this trial that did not reflect best practices. This included the inelegant language in the opening remarks, as well as the judge telling the jurors who was likely to testify and, in respect of those witnesses, the nature of their evidence. That is a matter best left to counsel in their opening statements. Counsel control the presentation of their cases, are better positioned to accurately summarize the anticipated evidence, and they may change their witness list for tactical reasons, or otherwise, as the trial unfolds. In this case, for example, the trial judge told the jury that he expected the respondent driver would testify. As it turned out, the defence did not call oral testimony; rather, its case consisted of two expert reports. Trial judges must be careful to avoid prejudicial effect arising from flagged evidence that is then not brought forward by one of the parties, or turns out to be different from the description provided by the judge.
- [42] The judge also failed to mark a copy of the written final instructions as an exhibit. This Court has made it clear that written charges, as well as any drafts discussed with counsel, should be marked as exhibits: *R. v. Moir*, 2013 BCCA 36 at paras. 13-14. Depending on the circumstances, not doing so can prevent meaningful appellate review.
- [43] However, for the reasons provided, I am not persuaded that a reasonable person, informed of the entirety of what took place at this trial, including the corrective instructions, would be apprehensive the appellant did not receive a fair hearing. The appellant has not established errors of law or procedure that occasioned a substantial wrong. When assessing trial

fairness, the Court assumes that juries act judicially and responsibly and that the instructions provided to them have been followed unless it is clear from the record that such was not the case: *Paskall v. Scheithauer*, 2014 BCCA 26 at para. 37, citing *Hovianseian v. Hovianseian*, 2005 BCCA 61 at para. 25.

[44] I would not accede to this ground of appeal.

Does the Award for Special Damages Reflect Palpable Error?

[45] Damages awards are case-specific and fact-intensive. As a result, they are subject to a deferential standard of review: *Pearson v. Savage*, 2020 BCCA 133 at para. 51; *Moskaleva v. Laurie*, 2009 BCCA 260 at paras. 125-128.

[46] Appellate courts cannot interfere with a damages award simply because they would have reached a different conclusion: *Pearson* at para. 51. Instead, to intervene, a court must be satisfied that the impugned award reflects a mistaken or wrong principle of law, there was no evidence on which the trier of fact could have reached a particular conclusion, or the result was a wholly erroneous estimate of damages: *Pearson* at para. 51, citing *Woelk v. Halvorson*, [1980] 2 S.C.R. 430 at 435-436. See also *Paskall* at paras. 98-99.

[47] A jury's verdict on damages will "not be set aside unless it is so plainly unreasonable and unjust as to satisfy the court that no jury reviewing the evidence as a whole and acting judicially could have reached it": *Lennox* at para. 21; *Desharnais v. Parkhurst and Romanowski*, 2013 BCCA 113 at para. 64; *Boota v. Dhaliwal*, 2009 BCCA 586 at para. 11. It is not enough to show that the impugned award was inordinately high or inordinately low; rather, appellate intervention will be justified only if the award was wholly out of all proportion: *Moskaleva* at para. 127.

[48] At trial, the parties reached an agreement on the appellant's entitlement to her chiropractic and physiotherapy expenses from April 2013 to November 2013. Those costs totalled \$650.

[49] A schedule of special damages was put before the jury. It contained the chiropractic and physiotherapy costs. When the schedule was produced, the jury was told that special damages are "in the nature of out-of-pocket expenses". It was also told that the defence agreed the appellant's expenses up to and including November 27, 2013, were compensable, and, as a result, the only costs in issue involved the MRI and gym membership:

In other words, those expenses are not in issue and you don't have to worry about those.

It seems that the out-of-pocket expenses or special damages being claimed, the only ones that are in issue are for the magnetic imaging, you heard evidence about how Ms. Thomas underwent a private MRI. That is referred to, I think, in item E. And then there's a gym membership referred to, and that's also in dispute. But none of the other expenses, I'm advised, are in dispute.

[Emphasis added.]

- [50] In his final instructions on special damages, the judge reminded the jury that the parties had "agreed that the [appellant] is entitled to be compensated for all out-of-pocket expenses listed in [the] exhibit up to November 27th, 2013, an amount of \$650". He then focused on the disputed amounts for the MRI and gym membership, saying those were "questions of fact for [the jury] to decide on the balance of probabilities".
- [51] The MRI expenses amounted to \$1,395. The gym membership cost \$73.50. For special damages, the jury awarded \$1,395--the precise cost of the MRI.
- [52] In my view, it is obvious from the special damages award that the jury failed to appreciate that although the parties had agreed the appellant was entitled to \$650 for her chiropractic and physiotherapy expenses, that amount had to form part of the verdict in order for the appellant to collect. The jury was told it did not have to "worry about" those expenses and that the "only ones that [were] in issue" were the costs of the MRI and gym membership (emphasis added). It was also told that the question to decide on special damages was whether the latter two sets of expenses related to the collision. Based on the information laid out for them, it is reasonable to infer that the jurors mistakenly thought the chiropractic and physiotherapy expenses were not something they needed to address. The question sheet provided to them for recording their verdict did not break down the "special damages" to distinguish between the claimed expenses.
- [53] On appeal, the respondents "do not oppose a minor adjustment to the award of special damages" (respondents' factum at para. 6). This is a reasonable concession, in light of the record. Accordingly, I would accede to this ground of appeal on the basis that the special damages award reflects palpable error in not including the \$650.

Is the Award for Non-Pecuniary Damages Plainly Unreasonable?

- [54] The appellant says \$15,000 for non-pecuniary damages makes no sense in light of the jury's awards for special damages, costs of future care and future loss of earning capacity.
- [55] The jury granted the MRI expenses, which means it must have found that the appellant's struggles with her shoulder more than two years after the collision, necessitating the MRI, were attributable to the collision.
- [56] The jury also awarded \$20,336 for costs of future care, which the appellant says further evinces an accepted causal link between the collision and ongoing challenges with her shoulder. Louise Craig, who evaluated the appellant's functional capacity in 2018, found the appellant is "limited for sustained stooped/head forward posture and for work completed in low-level postures such as kneeling due to the demands for leaning forward unsupported and the strain that this position places on her neck, upper back and right shoulder" (emphasis added). She also found that the appellant is "limited for heavier activities and repetitive activities based on the presentation that [Ms. Craig] saw during the weakness of that shoulder and the restricted movement and the presentation of that injury" (emphasis added). The future care recommendations responded to those findings

and the jury awarded the appellant her costs of future care, at least in part.

- [57] The jury also awarded \$16,308 for future loss of earning capacity. Ms. Craig opined that even with employer accommodation to facilitate her work as a bookkeeper or "accounting clerk", the appellant "will continue to experience pain increase that is functionally limiting to her performance and productivity and that may limit the number of work hours she can maintain. [She] is better suited to part-time work of this nature in the range of 25 to 30 hours per week". Ms. Craig further recommended that the appellant leave a part-time cashier position she holds two evenings per week to "allow for better overall management of her symptoms and limitations and to allow for greater participation in activities to help manage her symptoms ". The appellant says the award for loss of earning capacity reflects an acceptance by the jury of a real and substantial possibility of decreased functional capacity related to the shoulder injury.
- [58] Given the evidentiary foundation underlying the awards for special damages, costs of future care and future loss of earning capacity, the appellant contends that the award for non-pecuniary damages is illogical and wholly disproportionate. The only reasonable inference to draw from the \$15,000 award is that the jury insufficiently considered the chronic nature of the appellant's shoulder injury and its impact.
- [59] Pointing to judge-alone trial-level decisions involving a shoulder injury, chronic pain and related functional limitations, the appellant contends that a proportionate range for non-pecuniary damages for someone in her position is \$65,000 to \$175,000.
- [60] In opposing this ground of appeal, the respondents emphasize the deferential standard of review for damages awards. They say \$15,000 is consistent with the jury having found that the collision did not cause the shoulder tear. Instead, the jury likely determined that as a result of the collision, the appellant sustained a "minor injury" to her shoulder that resulted in "modest earning capacity impairment and care needs" (respondents' factum at para. 4).
- [61] According to the respondents, the appellant's comparable authorities do not provide a proper basis from which to infer that the \$15,000 is plainly unreasonable and unjust, and thereby meets the test for appellate intervention. Those cases involved more serious non-pecuniary loss than this one. With one exception, they also included an objectively observable injury to the shoulder that was proved to have arisen from the tortious conduct. Here, the respondents denied that the collision caused the labral tear and they challenged the credibility of the appellant's complaints about her ongoing degree of debilitation.
- [62] The respondents point out that the jury's awards for future care and future loss of earning capacity represent only a small fraction of the amounts requested by the appellant. In closing submissions, her trial counsel asked for \$152,131 and \$225,000 under those heads of damages, respectively. According to the respondents, it is reasonable to infer from the gap between the amounts sought and the amounts awarded that the jury found no causation between the collision and the labral tear. Even if wrong about that, the award for non-pecuniary damages reflects a finding that the appellant's injury to her shoulder and its

impact are not as severe as claimed. The respondents say the jury's verdict is consistent with the position advanced in their closing submissions at trial:

So we're admitting she did suffer injuries in this accident; she did. She deserves an award of non-pecuniary loss. And, again, it's not clear that the labral tear is related to the accident. It doesn't appear from the evidence there's enough to establish it on balance of probabilities. That's our position. But even if it was and if you thought that it was related, it doesn't appear to be a devastating injury that's radically altered her life.

[Emphasis added.]

[63] I agree with the appellant that to award the MRI expenses, costs of future care, and damages for future loss of earning capacity, the members of the jury must have found that the appellant sustained an injury to her right shoulder consequential to the collision. Indeed, a June 2017 orthopaedic assessment commissioned by the respondents confirmed, at the very least, a "soft tissue strain" in the right shoulder "related to the date of [the] accident". The respondents' expert, Dr. Marks, diagnosed the appellant with "cervical strain and right shoulder strain".

[64] I also agree with the appellant that the awards for costs of future care and future loss of earning capacity reflect a determination, by the jury, that the appellant's shoulder pain subsisted at the time of trial, was detrimentally affecting her functional capacity, and will continue to do so into the future. By the time of trial, the appellant's other injuries had effectively resolved themselves. She confirmed that fact in cross-examination.

[65] That was also the evidence of the appellant's treating physician, Dr. Collette. Effective spring 2016, the appellant's "right shoulder had become her primary complaint". At the time of trial, the medical prognosis for injuries sustained to her neck and upper back was "good". She had "returned to [her] normal pre-subject accident condition". However, the right shoulder continued to present problems:

it has become quite apparent that [the appellant] has been left with a chronic shoulder issue as she experiences chronic shoulder pain.

she has been left with a chronic shoulder pain issue when the upper limb is forced to stay in prolonged positioning or is used repetitively in outstretched position.

[Emphasis added.]

[66] The evidence of an orthopaedic surgeon called by the appellant, Dr. Chin, was to this same effect. He assessed the appellant in January 2017, noting that she:

initially sustained diffuse soft tissue pain within the mid-back, low back, and trapezial area including her neck immediately following the [collision]. Over time, much of the soft tissue pain subsided and has left her with residual trapezial pain on the right shoulder girdle area and right shoulder joint specific pain.

[Emphasis added.]

- [67] However, I do not agree with the appellant that this Court can also infer from the awards that the jury concluded the labral tear arose from the collision and that the appellant's functional capacity is substantially impaired because of that tear. In my view, that inference would be speculative. At trial, the defence vigorously contested causation between the collision and the labral tear, as well as any link between the tear and the appellant's ongoing shoulder pain. Resolution of those issues required the jury to make credibility findings about the medical evidence, as well as the appellant's testimony about her condition, pre- and post-collision, and the extent of her ongoing disability. In cases where credibility is a significant issue at trial, appellate courts must be particularly careful in the conclusions drawn from the quantum of damages awards, or disparity between them: *Hernandez v. Speevak*, 2002 BCCA 200.
- [68] As explained in *Dilello v. Montgomery*, 2005 BCCA 56:
- [25] non-pecuniary damages are influenced by the individual plaintiff's personal experience in dealing with his or her injuries and their consequences, and the plaintiff's ability to articulate that experience. Perhaps as important is the jury's subjective appreciation of the evidence describing the injuries, the plaintiff's pain, suffering, loss of amenities and disability, and the consequences of all those matters on the plaintiff's personal and economic future.
- [69] As such, to assist in deciding whether the \$15,000 awarded for non-pecuniary damages is plainly unreasonable, I consider it appropriate to compare that amount to cases where compensation has been awarded for non-observable injury to the shoulder. I do so recognizing that, as noted in *Dilello*:
- [49] Non-pecuniary awards are inherently arbitrary and, because of this, the jury members' subjective appreciation of the plaintiff's pain, suffering and loss of amenities is not necessarily wrong if the award does not fall into the range of awards that have been made by trial judges in similar cases.
- [70] Turning to the appellant's comparators, I agree with the respondent that many of those cases involved more serious injuries and impairment of functional capacity than this one. *Murphy v. Hofer*, 2018 BCSC 869, for example, is at the upper end of the appellant's suggested range, with a \$175,000 award for non-pecuniary damages. In that case, the judge made a definitive finding that a labral tear to the left shoulder, requiring surgery, was caused by the collision. The 43-year-old plaintiff also sustained a potential brain injury and developed psychological challenges from the collision. His life was "profoundly changed" by his injuries (at para. 128).
- [71] *Beardwood v. Sheppard*, 2016 BCSC 100, falls in the middle of the appellant's suggested range. The 40-year-old plaintiff in that case underwent two neck surgeries because of the collision. After the surgeries, he continued to experience chronic radicular pain in his neck

and hypersensitivity and numbness/tingling in both forearms and hands. The latter condition was likely to "persist indefinitely" (at para. 84). The collision also caused a labral tear to the plaintiff's right shoulder, again necessitating surgery. Although the plaintiff regained a normal range of motion as a result of the surgery and his remaining shoulder symptoms were likely to improve, he was at risk of developing significant osteoarthritis in the shoulder over the next 10-15 years (at para. 85). In awarding the plaintiff \$120,000 for non-pecuniary damages, the court found that the plaintiff went "from a happy, forward-thinking person with a reasonable potential to succeed with his own glazing business, to an emotionally devastated and pain-ridden individual who finds it very difficult to function on a daily basis" (at para. 88).

- [72] At the bottom of the appellant's suggested range is *Riley v. Ritsco*, 2017 BCSC 925. There, the collision completely disabled the 67-year-old plaintiff from work for approximately 14 months. He gradually returned to work full-time and then voluntarily retired. He experienced pain in his neck and mid- and lower back from injury to his spinal tissue, headaches, left shoulder pain and knee pain. The trial court found that due to his ongoing pain, the plaintiff would "probably continue to experience difficulty performing employment, recreational and household activities involving prolonged sitting, standing or walking, awkward spinal positioning, heavy or repetitive lifting, stooping, repetitive neck motion, repetitive reaching, climbing or jarring activities" (at para. 42). He received \$65,000 in non-pecuniary damages.
- [73] On appeal, the award for non-pecuniary damages in *Riley* was increased to \$85,000. This Court found that the trial judge erred in principle by failing to accept the "emotional and mental manifestations of Mr. Riley's injuries as compensable": *Riley v. Ritsco*, 2018 BCCA 366 at para. 70.
- [74] The respondents say functional losses of the kind alleged by the appellant typically attract a non-pecuniary range of \$4,000 to \$25,000, and, in that context, the \$15,000 award is not wholly disproportionate. They have cited numerous trial level decisions in support of their position. I have reviewed those authorities. Generally, they are cases in which it was determined that the most serious of the injuries did not arise from the collision, the injuries were not chronic in nature, or the alleged severity of one or more of the injuries was not adequately supported by the medical evidence.
- [75] As such, I find the respondents' authorities of little assistance. From the awards for costs of future care and future loss of earning capacity, it is clear that the jurors in this case did not conclude the appellant's shoulder injury was of short duration, had resolved itself by the time of trial, or that the evidence was too weak to support a finding of chronicity or functional incapacity.
- [76] In the particular circumstances of this case, I am satisfied that the \$15,000 for non-pecuniary damages is plainly unreasonable and one that no jury reviewing the evidence as a whole and acting judicially could have reached. It represents less than 20% of the

amount awarded in Riley for chronic injuries that resulted in functional limitations not unlike the ones experienced by the appellant. This Court described the \$65,000 awarded by the trial judge in Riley as "low, considering the serious harm suffered by Mr. Riley" (at para. 67, emphasis added).

- [77] The respondents told the trial judge in this case that based on their assessment of the appellant's injuries, the appropriate range for non-pecuniary damages likely started at \$60,000. That submission was advanced in the context of the respondents also disputing any link between the labral shoulder tear and the collision. I appreciate that the stated position was not binding. However, it is informative.
- [78] In my view, a proportionate and just award for non-pecuniary damages in this case would be \$60,000. Unlike Riley, the appellant's injuries did not necessitate that she be away from work for 14 months to recover from her injuries. That is a material difference. The appellant was able to manage through her injuries. Mr. Riley also experienced psychological and cognitive symptoms associated with his injuries, and felt he was unable to cope with his work, leading to his retirement. That is not an issue in this case.
- [79] However, it is indisputable that at the time of trial, more than five years post-collision, the appellant continued to suffer from right shoulder pain. When testifying, she detailed how that injury has affected her daily life. If sitting, she must frequently move around and stretch out the shoulder to manage the pain, including possible headaches. She struggles with housekeeping and yard work. She has reduced her driving because of the need to grip the steering wheel and shift with her right arm. She cannot carry large or heavy items or pick many things up with her right arm. She cannot do some of the recreational activities she previously enjoyed.
- [80] The appellant was not shaken on this evidence in cross-examination. The limitations she described were independently confirmed by her treating physician and by Ms. Craig. The appellant's son testified that his mother is "definitely a lot different" since the collision. "It's, like, she's struggling now rather than thriving."
- [81] On this evidentiary foundation, and in light of the awards for costs of future care and loss of earning capacity, \$15,000 to compensate for the appellant's pain, suffering and loss of amenities of life is plainly unreasonable and represents one of those rare instances when interference with the award on appeal is warranted. Accordingly, I would accede to this ground of appeal.

Was the Judge Wrong to Enter Judgment?

- [82] After the jury's foreperson delivered the verdict, the jurors rose to confirm their unanimity and provided the verdict sheet with their damages awards to the court clerk. The judge thanked them for their service, discharged the jury, and then asked counsel whether there was anything further requiring his attention. He received a negative response and the case was adjourned. The transcript does not indicate that judgment was entered.

- [83] Approximately two months after the trial, the appellant brought an application for a retrial under R. 12-6(7) of the Supreme Court Civil Rules. In the interim, she filed a notice of appeal to this Court. The appellant contended that the special damages award was clearly erroneous. She took the position that as judgment had not been entered, the judge should exercise his inherent jurisdiction to refuse to accept the verdict and order a retrial.
- [84] The respondents opposed the application. Rule 12-6(6) specifies that an "application for judgment is not necessary" unless an enactment or the Supreme Court Civil Rules requires one. There was no such requirement applicable to this case. As such, the respondents said the damages awards automatically translated into a judgment and the trial judge had no jurisdiction to "go back in time and refuse to accept the verdict": *Thomas v. Fosskett*, 2018 BCSC 2369 at para. 5 ("RFJ").
- [85] The judge agreed, holding that the "decision by the [appellant] to file an appeal was likely the only avenue for the remedy sought, namely a new trial" (RFJ at para. 5). He went on to note that, in any event, he did not accept there was a "clear error or conflict" with the special damages award such that the jury's verdict could not provide a foundation for judgment:

The jury's answer to this question is somewhat puzzling, and it may be that there was some kind of error or misunderstanding, but this alone constitutes no ground for refusing to enter the jury's verdict, in whole or part. Whether the jury misapplied the law or made a mistake are matters for the Court of Appeal, not this court, and an error in respect of one head of damages does not taint, impugn, or establish a conflict with the others.

[RFJ at para. 10.]

The judge considered himself "obliged to enter judgment for the [appellant] in accordance with the jury's verdict" and proceeded to do so (RFJ at para. 11).

- [86] The appellant says the judge was wrong in law to enter judgment and not order a retrial. The special damages award was palpably erroneous (for the reasons discussed earlier). Moreover, the fact that the jury awarded the MRI expenses was impossible to reconcile with the award for non-pecuniary damages (again, for the reasons discussed earlier). From the appellant's perspective, the fact of irreconcilability meant the jury's verdict could not provide a proper foundation for a judgment.
- [87] The respondents say it was reasonably open to the judge to decline the application for a retrial. The preconditions to R. 12-6(7) were not "triggered in this case" (respondents' factum at para. 88). The jury answered all of the questions directed to it, and the answers were not on their face conflicting.

- [88] In *Harder v. Poettcker*, 2016 BCCA 477, this Court held that R. 12-6(7) "does not require a retrial in every case where there are conflicting answers, but only in those cases where, because of the conflicting answers, judgment cannot be pronounced on the findings" (at para. 37). The parties agree that the decision to order or decline a retrial involves an exercise of discretion.
- [89] The discretionary nature of the decision means that rulings under R. 12-6(7) attract a deferential standard of review. *Harder* confirmed that such is the case, with explicit reference to para. 43 of *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71. There, LeBel J. explained that an appellate court should only intervene with a discretionary decision "where it finds that the trial judge has misdirected himself as to the applicable law or made a palpable error in his assessment of the facts" (as cited in *Harder* at para. 40).
- [90] See also *Creasey v. Sweny*, [1942] 3 W.W.R. 65 at 66, 57 B.C.R. 457 (C.A.), and *Taylor v. Vancouver General Hospital*, [1945] 3 W.W.R. 510, 62 B.C.R. 42 (C.A.), both of which are also cited in *Harder*. In the latter of these cases, intervention with a discretionary decision was said to require a "clear conclusion that the discretion has been wrongly exercised, in that no sufficient weight has been given to relevant considerations, or that on other grounds it appears that the decision may result in injustice" (at 517).
- [91] In my view, it is not necessary to decide whether the trial judge had jurisdiction to order a retrial. The interplay between R. 12-6(6) and a post-trial request for a retrial based on allegedly conflicting answers is a matter best left for another day. In this case, the judge had already discharged the jury, the application for a retrial was brought two months post-trial, and the appellant had filed a notice of appeal. Even if there was jurisdiction to order a retrial, it cannot be said the trial judge wrongly exercised his discretion to refuse the request to a sufficient degree to displace the deference owed on appeal.
- [92] In its essence, the application for a retrial took issue with the quantum of damages awarded by the jury. In *Balla v. I.C.B.C.*, 2001 BCCA 62, this Court held that when quantum or disparity between awards is the main complaint about a jury's verdict, the appropriate remedy is an appeal, rather than a pre-judgment order for a retrial (at para. 14). In dismissing the application for a retrial, the judge was alive to this principle, explicitly referring to *Balla* in his oral reasons for judgment. See also *Le v. Luz*, 2003 BCCA 640 at para. 16. I would not accede to this ground of appeal.

Disposition

- [93] For the reasons provided, I would allow the appeal from the jury's verdict on two bases: (1) the award for special damages reflects palpable error, namely, a failure to include the agreed-upon amount of \$650; and (2) the award for non-pecuniary damages is plainly unreasonable and unjust.

[94] The parties accept that in this case, it is open to the Court to engage in its own assessment of special and non-pecuniary damages rather than order a new trial and put the parties through that expense (s. 9(1) of the Court of Appeal Act, R.S.B.C. 1996, c. 77).

[95] Given the amounts involved and the interest in finality, I agree it would be appropriate to exercise that discretion. Accordingly, I would set aside the awards for special and non-pecuniary damages. I would substitute awards for \$2,045 and \$60,000 under those heads of damages, respectively, bringing the appellant's aggregate damages to \$98,889. The remainder of the jury's verdict would remain intact.

"The Honourable Madam Justice DeWitt-Van Oosten"

I AGREE:

"The Honourable Madam Justice Saunders"

I AGREE:

"The Honourable Madam Justice Bennett"

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