

CANADA / JUDGMENT

# Wark v. Kang

2020 BCSC 196

## COURT

Supreme Court of British Columbia

## DECIDED

14 February 2020

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2020 BCSC 196 Wark v. Kang IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Wark v. Kang, 2020 BCSC 196 Date: 20200214 Docket: M158986 Registry: Vancouver Between: Gillian Wark Plaintiff And Won Bin Kang and Jay Hyuk Kang Defendants Before: The Honourable Madam Justice Forth Reasons for Judgment on Post Trial Issues Counsel for the Plaintiff: V.J. LeBlanc Counsel for the Defendants: R.W. Parsons N.K. Petersen Place and Date of Trial/Hearing: Vancouver, B.C. May 21, 31 and August 21 - 22, 2019 Place and Date of Judgment: Vancouver, B.C. February 14, 2020 Table of Contents Introduction.. 3 Net Income Loss. 4 Special Damages Award. 4 Outstanding Matters. 5 Future Care Issue. 5 Background. 5 Positions of the Parties. 6 Position of the Defendants. 6 Position of the Plaintiff 8 Legislation. 9 Legal Principles. 13 Analysis. 14 Management Fees Issue. 17 Positions of Parties. 17 Position of the Plaintiff 17 Position of the Defendants. 17 Legal Principles. 19 Relevant Background. 20 Analysis. 20 Conclusion.. 21

## Introduction

- [1] The plaintiff was injured in a motor vehicle accident on August 31, 2014 (the "Accident"). This action proceeded in front of a judge and jury over four weeks in September 2018. On September 29, 2018, the jury returned a verdict awarding the following damages to the plaintiff: (i) Non-Pecuniary Damages: \$300,000.00 (ii) Past Income Loss: \$61,000.00 (iii) Loss of Future Earning Capacity: \$358,000.00 (iv) Past Loss of House-keeping Capacity: \$8,300.00 (v) Special Damages: \$20,300.00 (vi) Costs of Future Care: \$78,000.00 Total \$825,600.00
- [2] At the conclusion of the jury's verdict, the parties requested that the entry of the judgment be delayed to permit certain issues to be addressed. The issues were:
- the application of ss. 83, 95 and 98 of the Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231 [Act];
  - the application of provisions of Part 7 of the Insurance (Vehicle) Regulation, B.C. Reg. 447/83 [Regulation]; and
  - any award of interest, tax gross-up, and management fee.

- [3] The parties returned before me on August 21 and 22, 2019 to argue the outstanding matters that had not been agreed upon. The parties were able to agree on the net income loss and special damages to be awarded after the appropriate deductions had been made. The parties further agreed that no tax gross-up should be awarded. Net Income Loss
- [4] The jury awarded the sum of \$61,000 for the plaintiff's past wage loss.
- [5] The parties agree that the following deductions should be made in relation to the past wage loss award:
- a. \$14,590 to take into account income tax under s. 98 of the Act;
  - b. \$25,460 under s. 80(1) of the Regulation in respect of temporary total disability ("TTD") benefits paid to the plaintiff by ICBC in respect of the first 104-week period of disability after the Accident;
  - c. \$4,697 in pre-trial advances paid to the plaintiff under an agreement that such sum would be applied to the judgment against the award of past wage loss; and
  - d. \$4,556 under s. 86 of the Regulation to take into account TTD benefits paid by ICBC to the plaintiff between August 31 and December 31, 2016.
- [6] The amount of net income loss awarded to the plaintiff is \$11,697. Special Damages Award
- [7] The jury awarded the sum of \$20,300 for expenses from August 31, 2014 to September 29, 2018.
- [8] The parties have agreed that the sum of \$7,675.13 should be deducted from the special damages award under s. 88 of the Regulation for medical and rehabilitation benefits paid by ICBC.
- [9] The net amount of special damages awarded to the plaintiff is \$12,624.87. Outstanding Matters
- [10] The parties were not able to agree on the following matters:
- a. the appropriate deductions to make from the jury's \$78,000 assessment of cost of future care for medical and rehabilitation benefits payable by ICBC under s. 88 of the Regulation (the "Future Care Issue"); and
  - b. if any award should be made for management fees, and if so, the amount (the "Management Fees Issue"). Future Care Issue

## Background

- [11] At trial, the plaintiff put forward a claim for future care costs on a low-cost estimate of \$102,190 and a high-cost estimate of \$152,810. The plaintiff relied on a Cost of Future Care Analysis report prepared by Phil Towsley, an occupational therapist, dated June 10, 2018 (the "Towsley Report"), varied by his oral testimony. The corrected chart relied on by Mr. Towsley

provided: Item Start and End Time Replacement Time Cost Pain clinic services Immediate One-time cost \$0 to \$30,000 Therapy Immediate Annual cost \$2,400 to \$3,000 Kinesiology Immediate One-time cost \$1,800 Gym membership Immediate Annual cost \$450 to \$600 Vestibular physiotherapy Immediate One-time cost \$1,000 to \$1,500 Counselling Immediate One-time cost \$2,400 to \$20,800 Vocational counselling Immediate One-time cost \$1,000 to \$1,500 Neuropsychological assessment To be determined One-time cost \$3,000 to \$4,000 Occupational therapy in home assessment Immediate One-time cost \$1,540 to \$1,760 Occupational therapy follow-up Immediate One-time cost \$880

- [12] Mr. Towsley did not provide any estimate of the plaintiff's medication needs, and that cost of \$36,228 was added to the plaintiff's future care claim.
- [13] The defendants' position was that there was no medical justification for the ongoing care and treatments sought by the plaintiff in addition to the publicly available treatments she was already receiving. With respect to pain clinic services, the issue was whether she would attend a publicly funded pain clinic (as she was doing at the time of trial), at no cost, or a private clinic. The defendants also emphasized to the jury evidence before it from two doctors on the lack of benefit of passive therapies, such as massage therapy and acupuncture. The plaintiff gave evidence that certain therapies, including acupuncture, had not been beneficial to her in the past. Positions of the Parties Position of the Defendants
- [14] The defendants submit that the sum of \$47,612.65 (present-valued) should be deducted from the jury's \$78,000 assessment of future care costs for medical and rehabilitation expenses payable by ICBC under s. 88 of the Regulation. These benefits are referred to as "Part 7 benefits" as they are administered by ICBC under Part 7 of the Regulation. This would result in a final award of \$30,387.35 for future care costs.
- [15] The defendants submit that s. 83(5) of the Act requires that after the assessment of the plaintiff's tort damages, the amount of the Part 7 benefits paid or payable to the plaintiff must be disclosed to the court and taken into account. The plaintiff is only entitled to judgement for the balance after the Part 7 benefits have been deducted.
- [16] The defendants submit that the following costs claimed by the plaintiff are benefits payable under ss. 88(1) and 88(2) of the Part 7 of the Regulation:
- a) \$1800 claimed for 24 kinesiology sessions - \$1,872 is payable (24 treatments x \$78/treatment) as a mandatory medical and rehabilitation benefit under s. 88(1);
  - b) \$1,000-\$1,500 for vestibular physiotherapy - \$1,185 is payable (15 treatments x \$79/treatment) as a mandatory medical and rehabilitation benefit under s. 88(1);
  - c) \$2,400-\$20,800 for counselling - \$6,240 is payable (52 treatments x \$120/treatment) as a mandatory medical and rehabilitation benefit under s. 88(1);
  - d) \$1,000-\$1,500 for vocational counselling - \$1,885 is payable (13 sessions x \$145/session) as a permissive medical and rehabilitation benefit under s. 88(2)(e);

- e) \$1,540-\$1,760 for occupational therapy in-home assessments - \$448 is payable (4 hours x \$112/hour) as a mandatory medical and rehabilitation benefit under s. 88(1);
  - f) \$36,228 for medications - \$36,228 is payable as a mandatory medical and rehabilitation benefit under s. 88(1).
- [17] ICBC does not dispute that these future care treatments are necessary and that the associated expenses are reasonable and therefore are payable under s. 88(1) of the Regulation. It also does not dispute that these future care treatments are likely to promote the plaintiff's rehabilitation, and specifically that the vocational training sought by the plaintiff is consistent with the plaintiff's pre-injury occupation and her post-injury skills and abilities, and may return the plaintiff as nearly as practicable to her pre-injury status or improve her post-injury earning capacity and level of independence, and therefore is payable under s. 88(2) of the Regulation.
- [18] ICBC has also agreed to waive the need for continued certification under subsection 88(1.01) of the Regulation. This means that the plaintiff does not need to obtain from ICBC's medical advisor or her medical practitioner a certificate that the treatment is necessary.
- [19] ICBC has agreed to pay, under Part 7, the plaintiff's claims for kinesiology, vestibular therapy, counselling, vocational counselling, an occupational therapy assessment, and medications for her Accident-related injuries in the amounts listed as payable at para. 16. This amount totals \$47,858.
- [20] The defendants submit that the present value of these future costs (with the exception of the medications, the cost of which was already brought to the present value) amount to \$47,612.65 using the multiplier provided in the report of Sergiy Piveneko dated May 11, 2018.
- [21] The defendants submit that the plaintiff is only entitled to judgment for the balance, being the jury award of \$78,000 minus the present value of the future care benefits payable under Part 7 of \$47,612.65, for a balance of \$30,387.35. Position of the Plaintiff
- [22] The plaintiff's position is that the claim made to the jury for future care was as follows:
- a) Pain clinic services: \$30,000;
  - b) Kinesiology: \$1,800;
  - c) Vestibular physiotherapy: \$1,000-\$1,500;
  - d) Counselling: \$2,400-\$20,800;
  - e) Vocational counselling: \$1,000-\$1,500;
  - f) Neuropsychological assessment: \$3,000-\$4,000;
  - g) Occupational therapy in-home assessment: \$1,540-\$1,760;
  - h) Occupational therapy follow-up: \$880;

- i) Massage and acupuncture therapies: \$54,342; and
- j) Medications: \$36,228.

[23] The portion of the future care costs that ICBC is proposing to pay as Part 7 benefits fails to cover the claims for pain clinic services, massage and acupuncture therapies, neuropsychological assessment, and occupational therapy follow-up, in the amounts listed above. These amounts total \$89,222 (using the higher figure for the neuropsychological assessment).

[24] The plaintiff submits that the deductions ought to be made after an itemized examination of each of the claims in order to arrive at an appropriate estimate for the deduction, relying on *Boota v. Dhaliwal*, 2009 BCCA 586 at paras. 81-86.

[25] The plaintiff submits that it would be reasonable to exclude from consideration for deduction the maximum amount claimed at trial for the uncovered categories. Since the uncovered categories amount to \$89,222, this would cover the entirety of the jury award of \$78,000. As a result, nothing should be deducted from the cost of future care as any uncertainty should be resolved in the plaintiff's favour.

[26] Finally, the plaintiff argues that the defendants have failed to adduce any evidence that the treatments it proposes to cover are both reasonable and necessary, which is required in order for the mandatory deduction to be made under s. 88(1) of the Regulation. Legislation

[27] The key legislative provisions are s. 83 of the Act and s. 88 of the Regulation. Section 83 of the Act, as it read at the relevant time, provides: 83 (1) In this section and in section 84, "benefits" means benefits

(a) within the definition of section 1.1, or

(b) that are similar to those within the definition of section 1.1, provided under vehicle insurance wherever issued and in effect, but does not include a payment made pursuant to third party liability insurance coverage.

(2) A person who has a claim for damages and who receives or is entitled to receive benefits respecting the loss on which the claim is based, is deemed to have released the claim to the extent of the benefits.

(3) Nothing in this section precludes the insurer from demanding from the person referred to in subsection (2), as a condition precedent to payment, a release to the extent of the payment.

(4) In an action in respect of bodily injury or death caused by a vehicle or the use or operation of a vehicle, the amount of benefits paid, or to which the person referred to in subsection (2) is or would have been entitled, must not be referred to or disclosed to the court or jury until the court has assessed the award of damages.

- (5) After assessing the award of damages under subsection (4), the amount of benefits referred to in that subsection must be disclosed to the court, and taken into account, or, if the amount of benefits has not been ascertained, the court must estimate it and take the estimate into account, and the person referred to in subsection (2) is entitled to enter judgment for the balance only.
- (6) If, for the purpose of this section or section 84, it is necessary to estimate the value of future payments that the corporation or the insurer is authorized or required to make under the plan or an optional insurance contract, the value must be estimated according to the value on the date of the estimate of a deferred benefit, calculated for the period for which the future payments are authorized or required to be made.
- [28] The Regulation was recently amended. Under the transitional provisions, the previous version of the Regulation applies to treatment received before April 1, 2019, while the new version applies to treatment received afterwards.
- [29] Between the date of the accident and April 1, 2019, Section 88 of the Regulation provided (in part): 88 (1) Where an insured is injured in an accident for which benefits are provided under this Part, the corporation shall, subject to subsections (5) and (6), pay as benefits all reasonable expenses incurred by the insured as a result of the injury for necessary medical, surgical, dental, hospital, ambulance or professional nursing services, or for necessary physical therapy, chiropractic treatment, occupational therapy or speech therapy or for prosthesis or orthosis.
- (2) Where, in the opinion of the corporation's medical adviser, provision of any one or more of the following is likely to promote the rehabilitation of an insured who is injured in an accident for which benefits are provided under this Part, the corporation may provide any one or more of the following:
- (e) funds to the insured for vocational or other training that
  - (i) is consistent with the insured's pre-injury occupation and his post-injury skills and abilities, and (ii) may return the insured as nearly as practicable to his pre-injury status or improve the post-injury earning capacity and level of independence of the insured;
  - (f) funds for any other costs the corporation in its sole discretion agrees to pay.
- (3) Before incurring an expense or obligation under subsection (2) for which the insured intends to request payment by the corporation, the insured shall obtain written approval from the corporation and the corporation may, before giving its approval, require the insured to submit such information as it considers necessary to assist it in making a decision.
- (5) The amount by which the liability of the corporation under this section is limited is the amount set out in section 3 of Schedule 3.

- (6) The corporation is not liable for any expenses paid or payable to or recoverable by the insured under a medical, surgical, dental or hospital plan or law, or paid or payable by another insurer.
  - (7) The maximum amount payable by the corporation under this section for medical, surgical, dental, nursing or physical therapy services or for chiropractic treatment, occupational therapy or speech therapy listed in the payment schedules established by the Medical Services Commission under the Medicare Protection Act is the amount listed in the payment schedules for that service, treatment or therapy.
  - (8) The corporation is not liable to pay for more than 12 physical therapy treatments for an insured for each accident unless, before any additional treatment is given, the corporation's medical advisor or the insured's medical practitioner certifies to the corporation in writing that, in his opinion, the treatment is necessary for the insured.
- [30] Since April 1, 2019, the applicable parts of s. 88 of the Regulation reads:
- (1) If an insured is injured in an accident for which benefits are provided under this Part, the corporation must, subject to this section, pay as benefits all reasonable expenses incurred by the insured as a result of the injury for necessary
    - (a) health care services listed in Column A of Table 1 or Table 2, as applicable, of Schedule 3.1 and provided by the applicable health care practitioner,
    - (b) occupational therapy provided by an occupational therapist, and
    - (c) dental, hospital, ambulance and professional nursing services, speech therapy, medication, prostheses and orthoses. (1.01) For the purposes of subsection (1) (a), a treatment
      - (a) that is in addition to the number of treatments listed in Column D of Table 1 of Schedule 3.1 corresponding to that health care service, or
      - (b) that is provided more than 12 weeks after the date of the accident is not a necessary health care service unless the corporation's medical advisor or the insured's physician certifies to the corporation in writing that, in the opinion of the medical advisor or physician, the treatment is necessary for the insured. (1.2) Subject to subsection (1.3), the benefits paid under subsection (1) must not,
        - (a) for each health care service referred to in subsection (1) (a), exceed the fee limit set out in Column B or C, as applicable, of Table 1 of Schedule 3.1 corresponding to that health care service,
        - (b) for occupational therapy, exceed the fee limit of \$112 per hour, and
        - (c) for each health care service referred to in subsection (1) (a) that is provided by a physician, exceed the fee limit set out in Column B of Table 2 of Schedule 3.1.

- (2) Where, in the opinion of the corporation's medical advisor, provision of any one or more of the following is likely to promote the rehabilitation of an insured who is injured in an accident for which benefits are provided under this Part, the corporation may provide any one or more of the following:
- (e) funds to the insured for vocational or other training that
  - (i) is consistent with the insured's pre-injury occupation and post-injury skills and abilities, and
  - (ii) may return the insured as nearly as practicable to the insured's pre-injury status or improve the post-injury earning capacity and level of independence of the insured;
  - (f) funds for any other costs the corporation in its sole discretion agrees to pay.
- (3) Before incurring an expense or obligation under subsection (2) for which the insured intends to request payment by the corporation, the insured shall obtain written approval from the corporation and the corporation may, before giving its approval, require the insured to submit such information as it considers necessary to assist it in making a decision.
- (5) The amount by which the liability of the corporation under this section is limited is the amount set out in section 3 of Schedule 3.
- (6) The corporation is not liable for any expenses paid or payable to or recoverable by the insured under a medical, surgical, dental or hospital plan or law, or paid or payable by another insurer, except expenses referred to in subsection (1) (a) and (b).
- (7) The maximum amount payable by the corporation under this section for health care services, except for the health care services listed in Column A of Table 1 or Table 2 of Schedule 3.1, is the amount set out in a payment schedule for that service established by the Medical Services Commission under section 26 of the Medicare Protection Act, as that schedule is amended from time to time, for that service.
- [31] Schedule 3.1 of the Regulation provides fee limits for an assessment visit and report, fee limits for standard treatments, and the number of pre-authorized treatments for: acupuncture, chiropractic, counselling, kinesiology, massage therapy, physiotherapy, and psychology. Legal Principles
- [32] The purpose of s. 88 is set out in *Fisher v. Wabischewich* (1978), 5 B.C.L.R. 335 (C.A.) at 336, when describing the former section: ... The clear purpose of the legislation is to discontinue lump sum awards for future care and to supply future benefits as and when required provided application is made within the time prescribed by the Regulations. . . . Accordingly (broadly speaking) it provides that where a plaintiff, who is entitled to the benefits provided under the Act, has brought an action for damages suffered as the result of a motor-car accident, his damages shall be assessed and that following the assessment the Judge shall deduct from his award the amount that the plaintiff will receive by way of benefits for future care. The purpose of the deduction is two-fold:

- (1) It is to determine the sum that the plaintiff shall receive at the time of the judgment. It is not to fix the amount of the future benefits. The amount of benefits that the plaintiff will receive in the future is determined by the provisions of the Act. These may well be in excess of the amount estimated by the trial Judge in his award. However, by deducting the amount that the trial Judge has estimated, the amount that is immediately payable to the plaintiff is determined; and
- (2) It is to prevent the plaintiff from being compensated twice. He cannot receive a lump sum in respect of future benefits and also receive the benefits.
- [33] The court is obliged to estimate the value of the future payments, being Part 7 benefits, that the plaintiff "is or would have been entitled to", and deduct the present value of the award: *Sovani v. Jin*, 2005 BCSC 1285 at para. 19. The defendants bear the onus of proving that the plaintiff is entitled to the benefits that the defendants seek to deduct: *Sangha v. Inverter Technologies Ltd.*, 2019 BCSC 1174 at para. 8.
- [34] In carrying out this exercise, there is no obligation on the defendants to establish a "match" between the specific heads of damage in a tort award and the specific heads of damage under the contract or benefits scheme under which the benefits are payable before a deduction from the tort award is appropriately made: *Gurniak v. Nordquist*, 2003 SCC 59 at para. 47.
- [35] Courts must be cautious in their approach to making the estimation since it results in a lessening of the award in the tort action: *Uhrovic v. Masjhuri*, 2007 BCSC 1096 at para. 9. Any uncertainty as to whether a Part 7 benefit will be paid must be resolved in favour of the plaintiff: *Uhrovic* at para. 10.

## Analysis

- [36] The central question I must determine is whether the plaintiff is a person who "is or would have been entitled" to Part 7 benefits. There is no question that she is.
- [37] In this case, ICBC acknowledges the plaintiff's entitlement to some of the future care costs. The sworn evidence of Anita Kunzer, Operations Manager, Claims with ICBC, has removed the uncertainty of payment. She states:
14. In the circumstances, and having regard to the care items and costs claimed by the plaintiff, the following future care treatments of or medications for the plaintiff are necessary and the associated expenses are reasonable and therefore are payable if incurred, and up to the amounts below, under subsection 88(1) of the Regulation:
- (a) kinesiology: up to \$1,872, being 24 treatments at \$78/treatment;
  - (b) vestibular physiotherapy: up to \$1,185, being 15 treatments at \$79/treatment;
  - (c) counselling: up to \$6,240, being 52 treatments at \$120/treatment; and

- (d) occupational therapy in-home assessment: up to \$448, being 4 hours of assessment at \$112/hour; and
  - (e) medications: up to \$36,228, being the present valued amount as set out in Exhibit C.
15. In the circumstances, and having regard to the cost of future care claim the plaintiff put to the jury, ICBC accepts that the vocational counselling sought by the plaintiff satisfies the criteria set out in paragraph 88(2)(e) of the Regulation. The funds required for such vocational counselling are therefore payable under subsection 88(2) of the Regulation, up to \$1,885, being 13 sessions at \$145/session.
16. I am authorized on behalf of ICBC to waive the need for continued certification under section 88(1.01) of the Regulation.
17. I am authorized on behalf of ICBC to advise that ICBC will irrevocably, unequivocally, and unconditionally agree to pay, under Part 7, for the plaintiff's kinesiology, vestibular therapy, counselling, vocational counselling, an occupational therapy assessment, and medications for her Accident-related injuries, up to the amounts set out above in paragraphs 14 and 15, as the services or medications (or both) are used and the related expenses incurred.
- [38] I see no risk that ICBC will dishonor this commitment. ICBC is an agent of the government and, as noted in other cases, the Court can presume that the future conduct of ICBC will be honourable and this commitment will be met: *Norris v. Burgess*, 2016 BCSC 1452 at para. 35. As in *Sovani*, at paras. 46-50, I am not convinced that I should be assessing the relationship between the plaintiff and ICBC on the delivery of the future services, particularly given the fact that Ms. Kunzer has "irrevocably, unequivocally, and unconditionally" agreed on behalf of ICBC to pay the Part 7 benefits.
- [39] I must now endeavor to make the estimation required by s. 88 of the Act, guided by the principle that I am not required to engage in a "matching process" between the services and the jury's award: *Sovani* at para. 62.
- [40] The claim put forward by the plaintiff to the jury was a range of \$102,190 to \$152,810. On this application, the defendants categorized all of the future care costs listed in para. 16 as mandatory. A correction was made during oral submissions that the vocational counselling was not mandatory, but a discretionary benefit under s. 88(2).
- [41] The plaintiff submits that, since the value of all of the items it claimed as future care costs that are not covered by ICBC exceeds the amount of the jury's award for future care costs, there should be no deductions made. I disagree that this is the correct approach.
- [42] Although I am mindful of the direction in *Sovani*, at para. 62, that I should not speculate as to the content of the jury's award, it is clear that the jury found that some of the amounts the plaintiff claimed for future care were unnecessary, as they awarded approximately 50% of the high-cost award and 75% of the low-cost award sought.

- [43] The Court of Appeal in *Boota* clarified that the evidence and positions of the parties at trial should be considered in determining the proper estimate for deductions: para. 83. In this case, a reasonable inference is that the publicly available pain treatment clinic, which was accessible without cost to the plaintiff, and the evidence about the lack of benefit of passive treatments, such as massage and acupuncture therapies, were considered by the jury in making its award.
- [44] While any uncertainty as to whether a benefit will be paid must be resolved in favour of the plaintiff, this is not a case in which there is uncertainty about whether the Part 7 benefits will be paid as the amounts listed by the defendants are either mandatory benefits or ICBC has unequivocally and irrevocably promised to pay them. I am satisfied that these benefits should be deducted from the jury award to prevent double recovery.
- [45] I also give little weight to the plaintiff's concern that the legislation could change and adversely impact the plaintiff. It does appear that the government has recently announced some sweeping changes to the structure of the auto insurance scheme in British Columbia, I do not view that those changes will adversely impact this plaintiff since it appears there may be more funding available for rehabilitation expenses in the future. This argument is too speculative and, since most of the expenses will be incurred in the near future, there is little risk of a change in legislation that will adversely impact this plaintiff.
- [46] Based on the current state of the law, the evidence of Ms. Kunzer, and my review of the coverage for the future care benefits under Part 7, I do not see any appreciable risk that the plaintiff will be denied any of the benefits that are set out at para. 16.
- [47] I am of the view that the deductions proposed by the defendants are appropriate. The total value of the items covered by ss. 88(1) and (2) of Part 7 has a present value of \$47,612.65. This leaves the sum of \$30,387.35 to cover other future care expenses that this plaintiff may have. Management Fees Issue Positions of Parties Position of the Plaintiff
- [48] The plaintiff's position is that she is entitled to management fees to assist her in ensuring the award she received at trial lasts into the future because she lacks knowledge on how to invest funds. She has never taken a course in finances or investment. She has only managed basic things like a bank account and bill payments. She describes herself as "financially ignorant".
- [49] The plaintiff submits that in the comprehensive neuropsychological assessment, Dr. Cohen found concerns consistent with executive dysfunction, personality functioning, difficulty with emotional regulating, and changes in social engagement. The plaintiff claims that she continues to experience chronic and unremitting pain and difficulties with long-term planning. These symptoms create a significant impediment to her ability to manage complex and significant financial decisions.
- [50] The plaintiff seeks an award of \$110,000 for management fees. Position of the Defendants

- [51] The defendants submit that the plaintiff is not entitled to a management fee because she can achieve the requisite return rate without retaining a money manager. If she wants to hire a money manager to secure a greater return through diversification, the cost of that investment advice should not be borne by the defendants.
- [52] In the alternative, the plaintiff only requires "Level 1" management services. If she is entitled to a higher level of service, she is only entitled to a reasonable amount to compensate her for the cost of that service.
- [53] The defendants submit that in BC, the current rate of return set by the Law and Equity Act, R.S.B.C. 1996, c. 253, s. 56, and the Law and Equity Regulation, B.C. Reg. 352/81, is 2%. This is the real rate of return the plaintiff's investments must achieve in order to produce the future income stream necessary to meet her future care needs: *Li v. Sandhu*, 2006 BCSC 949 at para. 17. Prior to April 30, 2014, the rate of return mandated by the Law and Equity Act was 3.5%. As such, care should be given to those cases involving the former discount rate.
- [54] The defendants object to some of the paragraphs of the plaintiff's affidavit sworn in support of her claim for management fees and the exhibits attached on the basis they are hearsay. They contend that allowing evidence in this manner does not allow the adverse party to test its reliability. A further objection is made to the plaintiff's affidavit in that it is no more than a pro forma affidavit used by this plaintiff's counsel in a number of other cases and, as such, little weight should be given to it. The defendants submit that more weight should be given to the trial evidence.
- [55] The defendants rely on a report from Doug Hildebrand dated May 10, 2019 (the "Hildebrand Report") and, in particular, this statement: banks typically offer complimentary financial advisory services for individuals using their investment products. If Ms. Wark is capable of seeking advice from her financial institution and making decisions based on that advice, it is likely that she could obtain the required rate of return without incurring any fund management fees.
- [56] The Hildebrand Report summarizes historical returns on Government of Canada's marketable bonds, showing the average returns over various time periods in ten-year increments. In each case, the average real rate of return over the periods was over 2%. Mr. Hildebrand further provides rates of returns with a 60/40 split of bonds and equities for the same periods, all of which show a return higher than 2%.
- [57] The Hildebrand Report sets out the Level 1 cost at about \$3,000 to develop a straightforward investment plan sufficient to obtain a 2.0% real return. The cost associated with Level 2 would be \$11,343. Legal Principles
- [58] In order to receive an award for management services, the plaintiff must prove:
- a. that the management assistance is in fact necessary;
  - b. that investment advice is in fact necessary in the circumstances; and

- c. the costs of such services. *Mandzuk v. Insurance Corporation of British Columbia*, [1988] 2 S.C.R. 650 at 651.
- [59] An award for fund or investment management fees is not automatic: *Pestano v. Wong*, 2019 BCCA 141 at para. 10. It can be made if the plaintiff either is unable to manage his affairs or lacks the acumen to invest funds awarded for future care so as to produce the requisite rate of return: *Manszuk* at 651.
- [60] The Law Reform Commission of British Columbia published its Report on Standardized Assumptions for Calculating Income Tax Gross-up and Management Fees in Assessing Damages (Vancouver: Ministry of Attorney General, 1994) (the "LRC Report"), which recommended a four-level classification system, at 52: Level 1 - The plaintiff requires only a single session of investment advice and the preparation of an investment plan at the beginning of the period the award is to cover. Level 2 - The plaintiff will require an initial investment plan and a review of the investment plan approximately every five years throughout the duration of the award. Level 3 - The plaintiff will need management services in relation to custody of the fund and accounting for investments on a continuous basis. Level 4 - The plaintiff will require full investment management services on a continuous basis, including custody of the fund, accounting, and discretionary responsibility for making and carrying out investment decisions. Such a plaintiff is likely to be mentally incapacitated or otherwise incapable of managing personal financial affairs.
- [61] Although this classification system has never been legislated, it has been repeatedly cited with approval by the BC Courts, including very recently by the BC Court of Appeal in *Pestano*. Relevant Background
- [62] The plaintiff obtained her Bachelor of Arts in Psychology from Simon Fraser University ("SFU") in 1991. She obtained her Master of Arts in Experimental Psychology in 1992 from SFU, completing it in one year. She obtained her PhD in Experimental Psychology from SFU in 1996, completing it in three years.
- [63] After completing her PhD, she began working as a university instructor while continuing her research work. She took some time away from work to care for her children, but returned to work in 2011 or 2012. At the time of the Accident, she was doing editing work for a neuropsychologist, including editing a book and reports of 30-65 pages in length. The trial evidence did not support that the plaintiff suffered any type of brain injury as a result of the Accident.
- [64] The trial evidence supports that the Accident did not affect the plaintiff's intelligence, but that she has suffered from dizziness, problems with concentration, headaches, chronic pain, and symptoms of depressive disorder.
- [65] Since the trial, the plaintiff has consulted with a two professional advisors to seek financial advice and has achieved some limited knowledge on how investment strategies work.

## Analysis

- [66] The issue is whether this plaintiff has met the threshold in requiring any management fee award, and if so, at which level. This threshold requires that the plaintiff provide evidence on the necessity for the service, and the management services are required to prove a rate of return equal to the discount rate. In this case, the plaintiff seeks a management fee of \$110,000 in order to achieve the necessary rate of return to cover her future expenses.
- [67] I accept that the plaintiff did not suffer any type of brain injury in the Accident that affected her intelligence or pre-Accident cognitive abilities. The plaintiff has struggled since the Accident with a host of symptoms, including chronic pain, which have impacted her cognitive functioning. The trial evidence supports this, given that she could not continue her job of editing medical-legal reports due to the ongoing impact of the Accident.
- [68] I am not convinced that she is incapable of making financial decisions about her future. She is capable of arranging to meet and discuss financial issues with professionals and understanding the advice given. However, given her lack of financial knowledge, I find that she should have the assistance of a financial advisor in setting up a program for her and occasionally reviewing that program and I have based my finding on the trial evidence, rather than the plaintiff's affidavit. I do not agree with the defendants' suggestion that the plaintiff can rely on her husband to provide investment strategy advice, as there is no evidence before me to support this.
- [69] I find that the financial advice required by the plaintiff can be achieved with a modest award of \$12,000. This award is supported by the Hildebrand Report, which sets out the Level 1 cost at about \$3,000 to develop a straightforward investment plan sufficient to obtain a 2.0% real return. The cost associated with Level 2 would be \$11,343.

## Conclusion

- [70] On or about December 18, 2018, ICBC, on behalf of the defendants, paid to the plaintiff the sum of \$800,240 against the judgment.
- [71] The special damages, past wage loss, and cost of future care awarded by the jury will be reduced to the following amounts:
- a. Special damages - \$12,624.87;
  - b. Past wage loss - \$11,697;
  - c. Cost of future care - \$30,387.35.
- [72] I have found that the plaintiff is entitled to a management fee of \$12,000.

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- [73] The plaintiff is also entitled to pre-judgment interest on the special damages and past wage loss claims after the deductions have been made: *Ammerlaan v. Drummond* (1982), 37 B.C.L.R. 394 (S.C.) at 396. Counsel indicated that once the amounts had been determined, the interest payable could be calculated.
- [74] There will be an overpayment made to the plaintiff. The defendants are entitled to the return of the overpayment. I will leave it for counsel to agree on the amount of the overpayment once the interest calculation has been made.
- [75] The final issue that is outstanding is costs. No submissions were made on the issue of costs and, hopefully, the parties can work this issue out. If not, the parties can contact the registry to request leave to file written submissions. If such a request is made, a schedule can be directed. "Forth J."
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