CANADA / JUDGMENT

Zachariuk v. Vancouver Taxi Ltd.

2024 BCSC 295

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2024 BCSC 295 Zachariuk v. Vancouver Taxi Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Zachariuk v. Vancouver Taxi Ltd.,

2024 BCSC 295

Date: 20240221

Docket: M43921

Registry: Penticton

Between:

Lorie Mae Zachariuk

Plaintiff

And

Vancouver Taxi Ltd. and Mbanya Jethro Dube

Defendants

Before: The Honourable Mr. Justice Milman

Reasons for Judgment

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Place and Dates of Trial:

Penticton, B.C.

December 7-8 and 11-14, 2023

Place and Date of Judgment:

Penticton, B.C.

February 21, 2024

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I. Introduction

[1] On October 1, 2018, the plaintiff, Lorie Mae Zachariuk, was injured while riding as a passenger in the front seat of a Hyundai Ioniq sedan driven by her sister-in-law. They were stopped behind another vehicle at a traffic light when their vehicle was struck from behind by the defendants' taxicab, causing their vehicle to collide with the vehicle in front of it. Liability for the accident has been admitted. The sole issue in dispute in this action is the appropriate quantum of damages.

[2] Ms. Zachariuk says that the injuries she sustained on that occasion have drastically changed her life. She claims that they prevented her from pursuing her career of choice and left her in constant discomfort and dependent on others, particularly her son, to maintain her home, with little hope for significant improvement in the future. She seeks an award of damages totalling $756,127.

[3] The defendants do not dispute that Ms. Zachariuk was injured in the accident and that she is entitled to compensation accordingly. However, they dispute the severity of her injuries or the pessimistic prognosis upon which much of her claim rests. Rather, they say that the appropriate award would be $175,741.

[4] For the reasons follow, I have concluded that Ms. Zachariuk is entitled to damages totalling $301,233.

II. Facts

A. Before the Accident

[5] Ms. Zachariuk was born in 1964. She was 54 at the time of the accident and 59 at the time of the trial.

[6] She currently works in a full-time position at Summerland High School as a Certified Education Assistant ("CEA") with School District 67 (Okanagan Skaha). She has been employed in that capacity since January 2000. Her work involves assisting special needs students in the classroom. Prior to and after the accident, she took on various leadership roles with her union, including serving as second vice president, a shop steward, occupational health and safety representative and chair of the education and communication committees.

[7] She married her first husband when she was 19. They had three children together before he passed away in 2009. She subsequently remarried but her relationship with her second husband was, she says, an abusive one. They separated for the first time in 2009 and permanently when she moved out in November 2016. They were formally divorced in 2023.

[8] The rocky relationship with her second husband took its toll on her mental health. She experienced bouts of depression and was prescribed fluoxetine and zopiclone to help her sleep. Nevertheless, she recovered from that experience and came to focus on improving her physical and mental well-being. She joined an online organisation known as "beach

bodies" and became a coach and mentor for others seeking to improve their physical and mental health. She improved her level of fitness. She maintained an active social life and enjoyed numerous physical activities, including boating, fishing, hiking, cycling, gardening, baseball and snowshoeing, among others.

[9] Nevertheless, her ability to engage in physical activities was limited, at least to some extent, by a pre-existing condition in the form of osteoarthritis in her knees. On February 5, 2007, she went to see Dr. Justin Naude, an orthopedic surgeon, complaining of knee pain. She told him that she had been experiencing discomfort in her knees, particularly her left knee, for many years and had stopped running a year earlier because of pain and swelling in her knee.

[10] In the summer of 2009, she went to see a chiropractor complaining of tightness and soreness in her neck as well as back pain. She reported that, on some days, she was unable to lift or bend very far. She also reported experiencing dizziness and tinnitus.

[11] She saw Dr. Naude again on May 17, 2011, complaining that the knee pain had grown worse and was preventing her from being active. She reported taking ibuprofen daily for her knee pain. On August 23, 2011, Dr. Naude performed arthroscopic surgery on her left knee. Following the surgery, Dr. Naude told her that her knee condition will likely impact on the kind of work and activities she will be able to do going forward. Dr. Naude also told her to avoid heavy lifting, squatting or bending. He recommended that she consider an osteotomy. She began wearing a knee brace.

[12] The knee condition was aggravated by a workplace accident that occurred on September 11, 2012, when a child ran into her in the playground and irritated her left knee, causing it to swell and leaving her limping. As a result of that incident, she took the rest of the semester off. After seeing Dr. Naude again on several occasions following that incident in 2012, she did not see him again until after the accident in 2020.

[13] About a year or two before the accident, she began contemplating a change in careers. She became aware that a new correctional facility, to be known as the Okanagan Correctional Centre ("OCC"), was opening in Oliver and actively recruiting future staff. One of her friends had applied for a position there and encouraged her to do so as well. Her then husband was dismissive of the idea and so she did not pursue it at the time.

[14] Her interest in a career change was rekindled following her separation in 2016. She had experienced a steep drop in her standard of living with the loss of her husband's higher income. In their settlement, she had given up her claim for spousal support so that she could retain her pension. She was also able to buy out his interest in the family home, but this required her to take on a $200,000 mortgage. All of this made the prospect of a position at OCC, and the higher salary that it offered, that much more attractive to her.

[15] Following her separation, she was taken on a tour of OCC by another friend who was then in the process of applying for a position there. During the tour, she met the warden and was encouraged to apply, which she did.

[16] After submitting her application, the next step in the hiring process required her to pass the Correctional Officer Physical Abilities Test ("COPAT"). On the advice of others who had been through the process, she began to train for it. Among other things, she set up an obstacle course in her backyard so that she could practice.

[17] She tried the COPAT on August 17, 2017, but was unsuccessful. She testified that she had knocked over a hurdle without realising it and, as a result, failed to complete the rest of the stations on time. She testified at her examination for discovery on March 3, 2022, that she set up the obstacle course in her backyard after failing the COPAT because she had been told by the officers there that she was "so close" but just "needed to work on [her] endurance".

[18] Her understanding was that, despite having failed the COPAT once, she could still proceed with her application if she successfully passed it within a year of her failed attempt. In the end, however, she did not try the COPAT again. She was unable to do so that summer, she says, because poor air quality from the local forest fires made training problematic for her. She testified that she was planning to try again the following summer but that plan fell through because the COPAT was not offered then, for want of a sufficient number of candidates in that cohort. Because of this, she says, she was told that an exception would be made so that she could try the COPAT again in the fall of 2018, even though this was more than a year after her first attempt.

[19] It appears that another reason she did not resume training for the COPAT in 2018 was that her knee problems had resurfaced. On January 22, 2018, she had been involved in another workplace accident when she lost her footing on a staircase because a student had been following too close behind her. She resumed physiotherapy on her knees from January to May 2018 and began taking naproxen again to deal with the swelling. She returned to see the chiropractor for a number of sessions in June 2018.

B. The Accident

[20] On October 1, 2018, Ms. Zachariuk's brother was in a coma at Royal Columbian Hospital in New Westminster. She had travelled to the Lower Mainland to be with him and was planning to collect her sister at the airport and to head from there directly to the hospital. Her sister-in-law was driving her to the airport and she was riding in the front passenger seat. While they were stopped at a red light, their vehicle was struck from behind by the defendants' taxicab and thrust into the vehicle in front of them.

[21] She remembers feeling dazed in the immediate aftermath of the accident. She does not recall if she lost consciousness. She felt her head hit the headrest, causing her glasses to fall from her face. She recalls sitting by the side of the road and having to remove her glasses because she was unable to focus her vision. She remembers her head throbbing as she was waiting for the paramedics to arrive.

[22] Although the attending paramedics offered to take her to a hospital in Richmond, she and her sister-in-law decided to continue on to see her brother. He died on the following day. While they were at the hospital, she was examined briefly and released.

C. After the Accident

[23] Ms. Zachariuk remained off work for the rest of 2018. She began a gradual return to work in January 2019, working four hours per day through to September 30, 2019. On January 28, 2019, she applied for short-term disability benefits through her extended health provider and her application was approved. In that application, she described her symptoms flowing from the accident as follows:

Due to whiplash, unable to move head while [sic] daily activities. Stiff lower back, unable to bend normally. Due to concussion, frequent headaches, light and noise sensitivity constant ringing in ears, affects sleep.

[24] In answer to the question, "Do you require help when performing routine household chores?" she wrote as follows: "Outdoor chores such as shovelling snow I need help with (my son helps)."

[25] When those benefits ran out, she applied for long-term disability benefits, but that application was refused. In June 2019, she told one of her physiotherapists that returning to work had not aggravated her symptoms.

[26] She returned to full-time duties on October 1, 2019, although with some accommodations. In particular, she has been permitted to remain in one classroom with her students, rather than having to move with them between classes. She uses a cane at work and now takes the elevator rather than the stairs. She avoids bright lights. Sensitivity to light at times prevents her from driving.

[27] Since the accident, she has received the following treatments:

a) Physiotherapy;

b) Chiropractic;

c) Vision therapy, including prescription eyeglasses; and

d) Tinnitus retraining and counselling.

[28] She has been prescribed the following medications:

a) Fluoxetine (an antidepressant);

b) Naproxen (a non-steroidal anti-inflammatory);

c) Trazodone (antidepressant/sleep aid);

d) Betahistine (anti-vertigo);

e) Cyclobenzaprine (muscle relaxant);

f) Lorazepam (anti-anxiety);

g) Zopiclone (sleep aid); and

h) Ach-fluoxetine (antidepressant).

[29] Despite those treatments and medications, many of her symptoms have persisted. She testified that tinnitus remains a constant presence in her life. She says that it interferes with her sleep, leaving her with, at most, six hours of sleep on a good night. However, it appears that she reported to her family physician on May 22, 2020, that her episodes of tinnitus were, at that point, only "occasional".

[30] She testified that she continues to experience dizziness and headaches. She described the dizziness sensation as akin to being on a boat or a rollercoaster. She reported to Dr. Anton that she experiences a spinning sensation once or twice a week. That symptom improved after she began a course of vestibular therapy approximately one year ago. Nevertheless, she still reports the occasional flare-up, which manifests itself as a feeling of imbalance, as if she were on a boat.

[31] She testified at trial that she continues to experience occasional low back pain, although on her examination for discovery she testified that she was, at that time, no longer experiencing low back pain. She also testified that she continues to have neck pain and headaches approximately twice per week. She remains sensitive to light and sound.

[32] All of this has severely reduced the amount of physical activity she engages in. Because she is unable to work out, she has become deconditioned and gained weight. She also reports difficulty with her short-term memory, which manifests itself as an inability to find the right words and a tendency to lose her train of thought mid-sentence or to repeat herself. She no longer socialises as she did before. She sees her grandchildren only rarely. She is prone to bouts of depression.

[33] In the spring of 2019, her son, Mr. Lozeau moved back in with her. At trial, she testified that Mr. Lozeau did all of the cooking and cleaning, but she reported to Dr. Anton, one of the forensic experts in this case, that she does the cooking, cleaning and laundry and that her son does some cooking because he is a trained chef, and that he also helps with general maintenance and does various light chores. On her examination for discovery, she testified that Mr. Lozeau helps her with light duties and driving. In March 2022, she sold her house and moved, with Mr. Lozeau, into a duplex that requires less outdoor work.

III. The Medical Evidence

A. Dr. Vance Tsai (Otolaryngologist)

[34] Dr. Vance interviewed Ms. Zachariuk on October 4, 2021. In his report dated November 17, 2021, he concluded that the accident was the most likely cause of her tinnitus and balance complaints.

[35] Dr. Tsai believes that her symptoms are consistent with benign paroxysmal positional vertigo ("BPPV"), a condition caused by debris dislodged in the inner ear as a result of trauma. He recommends that she undergo vestibular physiotherapy to deal with this condition, at a cost of $1,000 to $1,500. He notes that the treatment has been shown to have a 95% success rate, and, in those cases where it is not successful, surgical intervention has a 96% success rate. Nevertheless, he notes that 30% of patients with BPPV experience a recurrence after successful treatment.

[36] On the other hand, Dr. Tsai sees less chance of improvement in her tinnitus symptoms after so much time. To deal with this, he recommends counselling (5-10 sessions at a cost of $100/200 per session) and a tinnitus blocker (at a cost of $5,000 to $6,000, and $300 per year for maintenance), which, he says, will help manage the condition, but not cure it.

[37] Dr. Tsai believes there is a strong chance that her susceptibility to dizziness will impact on her concentration and higher-level processing. As a result, he believes, she may have to retire earlier than she would have otherwise.

B. Dr. H.A. Anton (Physiatrist)

[38] Dr. Anton assessed Ms. Zachariuk on August 30, 2022, and prepared his report later that day. He diagnosed her with the following:

a) Concussion, at the milder end of the range;

b) Soft tissue injuries to neck, shoulder girdle and lower back; and

c) A possible vestibular injury.

[39] He notes that the worst symptoms reported are imbalance and tinnitus, along with episodic dizziness with features of vertigo. He believes that the vertigo symptoms are likely attributable to a vestibular issue, such as BPPV.

[40] He believes that her neck pain is probably myofascial (i.e., regional soft tissue pain arising from the muscles).

[41] He is unable to say if she would have passed COPAT but for the accident.

[42] He believes that it is possible that her symptoms could improve with time, but he believes it unlikely that she will ever return to her pre-accident baseline.

[43] His opinion is that she will require further treatment for depression and anxiety. He recommends increasing her prescription for fluoxetine or finding another more suitable medication. He recommends that she see a psychologist for cognitive behavioural therapy ("CBT"), and if there is no improvement, that she sees a psychiatrist. He recommends 24 supervised sessions with a kinesiologist to help her get exercising again and that she see a dietitian.

[44] In his view, physiotherapy is not likely to lead to any improvement. However, he recommends 12 sessions per year in order to reduce the severity of any flare-ups.

[45] His prognosis is that while there is a possibility of improvement in her symptoms, it is likely that even in a best-case scenario, she will be subject to permanent restrictions.

C. Dr. Steven Dommann (Neurologist)

[46] Dr. Dommann was originally retained by the defendants to provide an independent medical opinion. He met with Ms. Zachariuk and assessed her on June 6, 2023. His report, dated June 29, 2023, was adduced in evidence at trial by Ms. Zachariuk.

[47] Dr. Dommann diagnosed her with a concussion, which in turn led to migraine headache disorder. In his view, the migraines may be basilar in nature, in which case potential treatments have not yet been explored adequately. For that reason, he found it difficult to offer a prognosis. He believes her condition may improve over the next two years with proper treatment.

IV. Discussion

A. Non-Pecuniary Damages

[48] General or non-pecuniary damages are intended to compensate a plaintiff for pain and suffering, and the loss of enjoyment of life and its amenities. The factors to be considered in assessing damages in this category were set out by Kirkpatrick J.A., writing for the Court, in Stapley v. Hejslet, 2006 BCCA 34. At para 46, she listed the following factors as relevant to the analysis:

(a) age of the plaintiff;

(b) nature of the injury;

(c) severity and duration of pain;

(d) extent of the disability;

(e) emotional suffering;

(f) loss or impairment of life;

(g) impairment of family, marital and social relationships;

(h) impairment of physical and mental abilities; and

(i) loss of lifestyle.

[49] It is not disputed that, as a result of the injuries sustained in the accident, Ms. Zachariuk has experienced symptoms that include tinnitus, noise and light sensitivity, headaches, distorted vision, dizziness, low mood, sleep impairment, and neck and low back pain.

[50] Although Ms. Zachariuk claims that she continues to suffer from all of these, the defendants say that many of them, particularly the headaches, neck pain, back pain, dizziness, and vision issues, have diminished in both frequency and intensity over time. In addition, they note that at least some of the treatments recommended by Dr. Dommann and Dr. Tsai are said to have very high success rates.

[51] The evidence supports the defendants' contention that there has been a reduction in the intensity and severity of some symptoms and further, that there is some prospect of further improvement, at least with respect to some symptoms. However, the evidence also shows that she is unlikely to recover completely and that she will likely have to live with many of her symptoms to some extent for the foreseeable future. Although she is reported to have told her family doctor in 2020 that she was suffering from tinnitus only occasionally at that time, I accept her testimony at trial that it is currently a constant problem for her. It was not disputed that Ms. Zachariuk was an honest witness, even if her memory of past events proved, in some cases, to be less than entirely reliable.

[52] Overall, I accept that the injuries she sustained in the accident have diminished her ability to enjoy many of the amenities of life, including her work, her social life and the recreational activities she used to enjoy. Friends, family and co-workers have noticed a pronounced change in her personality.

[53] Ms. Zachariuk seeks an award of $200,000, relying on the following authorities: Colgrove v. Sandberg, 2022 BCSC 671 ($180,000); Jantzi v. Moore, 2020 BCSC 1489 ($185,000) and Mickelson v. Sodomsky, 2019 BCSC 806 ($200,000).

[54] The defendants suggest that a more appropriate award would be $110,000, relying on the following authorities: Ingram v. Munroe, 2019 BCSC 234 ($110,000); Waddel v. Johal, 2019 BCSC 1230 ($100,000) and Dai v. Grose, 2023 BCSC 717 ($110,000).

[55] I agree with the defendants that their cases display closer parallels to this one. In the cases cited by Ms. Zachariuk, the plaintiffs appear to have been more severely impacted, such as by being permanently disabled from paid employment, suffering from diagnosed mood disorders or being without the same hope of further improvement through as yet untried therapeutic interventions.

[56] On that basis, I am awarding Ms. Zachariuk damages of $110,000 under this head.

B. Past Loss of Earning Capacity

[57] Ms. Zachariuk is entitled to be compensated for past loss of earning capacity measured as the difference between the amount that she would have earned, had she not been injured, from the date of the accident until the date of the trial, and what she actually earned during that same period.

[58] The legal principles to be applied in assessing damages for that aspect of her loss were conveniently summarised by Goepel J.A. in Grewal v. Naumann, 2017 BCCA 158, as follows:

[48] In summary, an assessment of loss of both past and future earning capacity involves a consideration of hypothetical events. The plaintiff is not required to prove these hypothetical events on a balance of probabilities. A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation. If the plaintiff establishes a real and substantial possibility, the Court must then determine the measure of damages by assessing the likelihood of the event. Depending on the facts of the case, a loss may be quantified either on an earnings approach or on a capital asset approach: Perren v. Lalari, 2010 BCCA 140 at para. 32.

[49] The assessment of past or future loss requires the court to estimate a pecuniary loss by weighing possibilities and probabilities of hypothetical events. The use of economic and statistical evidence does not turn the assessment into a calculation but can be a helpful tool in determining what is fair and reasonable in the circumstances: Dunbar v. Mendez, 2016 BCCA 211 at para. 21.

[59] Ms. Zachariuk does not seek to be compensated for the loss of income flowing from her post-accident absences from work as a CEA, for which she has already been compensated by other means. Instead, she seeks an award of $100,000, or $20,000 per year, reflecting the additional income that she says she would likely have received over the five years between the accident and the trial, had she successfully transitioned to a higher-paying career as a corrections officer at OCC in January 2019.

[60] The defendants argue that no such award should be made, on the basis that it is unlikely that she would have succeeded in becoming a corrections officer, even if she had not been injured in the accident.

[61] I am satisfied that Ms. Zachariuk has demonstrated a real and substantial possibility that she would have succeeded in becoming a corrections officer but for the accident. She was highly motivated to do so and had taken concrete steps to that end. She had friends and colleagues who had made the transition and were encouraging her to follow suit. However, for a number of reasons, I am not persuaded that the likelihood of such a career change would have been 75%, as she claims. Her friends Shannon White and Lisa Dowson, both of whom passed the COPAT after one or more failed attempts, retook the test soon after failing it. They did not wait more than a year to do so, as Ms. Zachariuk did. Moreover, her knee condition became symptomatic again in 2018, rendering a successful career transition by

the end of that year that much less likely. There was evidence that, following the COPAT, candidates also had to submit to a behavioural event interview screening, which itself had a failure rate of more than 50%. In view of all that, I have concluded that the likelihood of a successful career transition would have been no greater than 30%.

[62] Further, Ms. Zachariuk's calculation assumes that she would have reached the highest pay level in her new role after only two-and-a-half years on the job, when the evidence was that it would generally take six years to reach that level.

[63] Taking all of those factors into account, I am awarding her $27,000 for past loss of earning capacity.

C. Future Loss of Earning Capacity

[64] In Honeybourn v. Aghdasidehaji, 2022 BCSC 258, Blok J. conveniently summarised the test to be applied in assessing damages for future loss of earning capacity, stating as follows:

[129] The law applicable to loss of future earning capacity was summarized as follows in Villing v. Husseni, 2016 BCCA 422:

[17] In order to receive an award for loss of earning capacity, a plaintiff must prove a real and substantial possibility that his or her earning capacity has been impaired: Perren v. Lalari, 2010 BCCA 140 at paras. 30-32 [Perren]. If the plaintiff has discharged the burden of proof, then the judge must turn to an assessment of damages. The assessment may be based on an earnings approach or a capital asset approach: Perren at para. 32. An earnings approach is most appropriate where the loss is more easily quantifiable. In general, a party may be forced to default to a capital asset approach where the loss is not easily quantifiable.

[130] In a trilogy of cases, the Court of Appeal recently clarified the law relating to the assessment of future losses of earning capacity: Dornan v. Silva, 2021 BCCA 228 [Dornan]; Rab v. Prescott, 2021 BCCA 345 [Rab]; and Lo v. Vos, 2021 BCCA 421. In Rab, the court articulated a three-step process:

[47] From these cases, a three-step process emerges for considering claims for loss of future earning capacity, particularly where the evidence indicates no loss of income at the time of trial. The first is evidentiary: whether the evidence discloses a potential future event that could lead to a loss of capacity (e.g., chronic injury, future surgery or risk of arthritis, giving rise to the sort of considerations discussed in Brown). The second is whether, on the evidence, there is a real and substantial possibility that the future event in question will cause a pecuniary loss. If such a real and substantial possibility exists, the third step is to assess the value of that possible future loss, which step must include assessing the relative likelihood of the possibility occurring - see the discussion in Dornan at paras 93-95.

[131] Rab states that the first step (i.e. the evidentiary inquiry) gives rise to the four considerations set out in Brown v. Golaiy (1985), 26 B.C.L.R. (3d) 353 at para. 8 (S.C.) [Brown]. The questions are whether:

1) The plaintiff has been rendered less capable overall from earning income from all types of employment;

2) The plaintiff is less marketable or attractive as an employee to potential employers;

3) The plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to her, had she not been injured; and

4) The plaintiff is less valuable to herself as a person capable of earning income in a competitive labour market.

[132] In considering the second and third steps set out in Rab, hypothetical events are given weight according to their relative likelihood. A hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation: Turner v. Dionne, 2017 BCSC 1905 at para. 316, citing Athey v. Leonati, [1996] 3 S.C.R. 458 at para. 27. See also Dornan at paras. 93-94.

[65] Ms. Zachariuk seeks an award measured as the difference between her projected average annual salary as a corrections officer ($85,000) and her current salary as a CEA (an average of $37,000), or $48,000 annually. Assuming she would have retired at age 67, or seven years from now, she projects a gross loss of $48,000 x 6.5982 (the prescribed multiplier for seven years), yielding a gross award of $336,000 (however, the correct figure using those assumptions would in fact be $316,713). After applying a 25% contingency reduction to that sum to account for the possibility that she might not have made the career change to become a corrections officer, she arrives at a net award of $250,000.

[66] The defendants' proposed award rests on a different set of assumptions. They urge me to assume that she would have continued in her current role as a CEA until she became eligible for a full pension at 65, and that she will still do so even in her injured state. Nevertheless, they acknowledge that she should still be compensated for the loss of a capital asset, insofar as her injuries are likely to have a deleterious impact on her earning capacity in the future. They propose an award measured as one year's salary, or $45,000.

[67] I have already found that that there was a 30% chance that Ms. Zachariuk would have successfully changed careers in the five years following the accident. Applying a contingency reduction of 70% to that scenario instead of the 25% she proposes yields a gross award of $95,014. In addition, it is appropriate to reduce the award further to account for the possibility that, even if she successfully made the transition, she might not have persevered in the new career through to retirement, given the evidence presented at trial about the many challenges that corrections officers face in their work, beyond those faced by CEAs.

[68] On the other hand, it is also possible that, even in her current role as a CEA, she might have to retire earlier than she otherwise would have as a result of her accident-related injuries. However, the weight of that consideration is limited by the prospect of her entitlement to short and long-term disability benefits under her collective agreement, a factor properly considered in this context for the same reasons it was considered in Klimek v. Lockhart, 2023 BCSC 582.

[69] Having regard to those considerations, I am awarding her $85,000 in this category.

D. Cost of Future Care

[70] The principles to be applied in assessing damages for the cost of future care were set out in Pang v. Nowakowski, 2021 BCCA 478 as follows:

[56] The legal framework that is relevant to a future cost of care award is well-established. Recently in Quigley, this Court said:

[43] The purpose of the award for costs of future care is to restore the injured party to the position she would have been in had the accident not occurred: Andrews v. Grand & Toy Alberta Ltd. (1978), 83 D.L.R. (3d) 452 (S.C.C.) at p. 462; Gignac v. Insurance Corporation of British Columbia, 2012 BCCA 351 at para. 29. This is based on what is reasonably necessary on the medical evidence to promote the mental and physical health of the plaintiff: Milina v. Bartsch (1985), 49 B.C.L.R. (2d) 33, adopted in Aberdeen v. Zanatta, 2008 BCCA 420 at para. 41.

[44] It is not necessary that a physician testify to the medical necessity of each item of care for which a claim is advanced. However, an award for future care must have medical justification and be reasonable: Aberdeen at para. 42; Gao at para. 69.

[57] Several additional principles are relevant:

i) The court must be satisfied the plaintiff would, in fact, make use of the particular care item: Gignac v. Insurance Corporation of British Columbia, 2012 BCCA 351 at paras. 40 and 54; Hans v. Volvo Trucks North America Inc., 2018 BCCA 410 at paras. 86-87.

ii) The court must be satisfied that the care item is one that was made necessary by the injury in question and that it is not an expense the plaintiff would, in any event, have incurred: Shapiro v. Dailey, 2012 BCCA 128 at paras. 54-55;

iii) The court must be satisfied that there is no significant overlap in the various care items being sought: Johal v. Meyede, 2015 BCSC 1070 at para. 9(f); Brodeur v. Provincial Health Services Authority, 2016 BCSC 968 at para. 356; Myers v. Gallo, 2017 BCSC 2291 at para. 231.

[58] Assessing damages for future care has an element of prediction and prophecy. It is not a precise accounting exercise; rather, it is an assessment: Krangle (Guardian ad litem of) v. Brisco, 2002 SCC 9 at para. 21; O'Connell v. Yung, 2012 BCCA 57 at para. 55. Nevertheless, the award should reflect a reasonable expectation of what the injured person would require to

put them in the position they would have been in but for the incident. This is an objective assessment based on the evidence and must be fair to both parties: Shapiro at para. 51; Krangle at paras. 21-22. Once the plaintiff establishes a real and substantial risk of future pecuniary loss, they must also prove the value of that loss: Perren at para. 32; Rizzolo v. Brett, 2010 BCCA 398 at para. 49. See also Andrews v. Grand & Toy Alberta Ltd., [1978] 2 S.C.R. 229 at 245-248, 1978 CanLII 1.

[71] Ms. Zachariuk also seeks to be compensated for the loss of housekeeping capacity, as part of her award for the cost of future care. In Kim v. Lin, 2018 BCCA 77, the Court of Appeal had occasion to consider the issue of when a pecuniary award for loss of housekeeping capacity should be made, stating as follows:

[33] Therefore, where a plaintiff suffers an injury which would make a reasonable person in the plaintiff's circumstances unable to perform usual and necessary household work -- i.e., where the plaintiff has suffered a true loss of capacity -- that loss may be compensated by a pecuniary damages award. Where the plaintiff suffers a loss that is more in keeping with a loss of amenities, or increased pain and suffering, that loss may instead be compensated by a non-pecuniary damages award. However, I do not wish to create an inflexible rule for courts addressing these awards, and as this Court said in Liu, "it lies in the trial judge's discretion whether to address such a claim as part of the non-pecuniary loss or as a segregated pecuniary head of damage": at para. 26.

[34] Whichever option a court chooses, when valuing these different types of awards, courts should pay heed to the differing rationales behind them. In particular, when valuing the pecuniary damages for the loss of capacity suffered by a plaintiff, courts may look to the cost of hiring replacement services, but they should ensure that any award for that loss, and any deduction to that award, is tied to the actual loss of capacity which justifies the award in the first place.

[72] More recently, Marchand J.A. (as he then was), writing for the Court in McKee v. Hicks, 2023 BCCA 109, clarified that such an award is not appropriate where the plaintiff is able to perform housekeeping tasks but with discomfort or difficulty, stating as follows:

[112] To sum up, pecuniary awards are typically made where a reasonable person in the plaintiff's circumstances would be unable to perform usual and necessary household work. In such cases, the trial judge retains the discretion to address the plaintiff's loss in the award of non-pecuniary damages. On the other hand, pecuniary awards are not appropriate where a plaintiff can perform usual and necessary household work, but with some difficulty or frustration in doing so. In such cases, non-pecuniary awards are typically augmented to properly and fully reflect the plaintiff's pain, suffering and loss of amenities.

[73] In this case, Ms. Zachariuk seeks an award of $200,000, based on the following proposed items of care:

a) Vestibular therapy ($1,000 to $1,500);

b) Tinnitus retraining therapy ($930 to $1,580);

c) Passive treatments ($22,295 to $30,585);

d) Psychological treatment - single session ($1,417 to $2,700);

e) Psychological treatment - ongoing ($11,547 to $18,297);

f) Psychiatry ($650);

g) Dietician - 20 sessions ($2,800 to $3,000);

h) Kinesiologist - single session ($2,012 to $2,394);

i) Kinesiology - ongoing ($2,715);

j) Botox ($48,877); and

k) Home care ($247,101).

[74] The defendants submit that the appropriate award would be $15,000, comprised of the following:

a) Kinesiology ($2,100);

b) Passive therapies ($6,000, comprised of $1,000/year until age 65);

c) Psychological counselling ($1,900); and

d) Medications ($5,000).

[75] The evidence does not support an award for loss of housekeeping capacity, given that Ms. Zachariuk has not been rendered incapable of performing household tasks. She has reported to others that she remains capable in that regard, even if she currently relies extensively on her son to assist her. To the extent she has suffered a loss due to the discomfort that housework causes her, she is already being compensated for that loss through the award of non-pecuniary damages.

[76] With respect to the other care items sought, I am awarding the following based on the mid-range claimed, unless otherwise specified:

a) Vestibular therapy ($1,250);

b) Tinnitus retraining therapy ($1,255);

c) Passive treatments ($26,440);

d) Psychological treatment - ongoing ($14,922);

e) Psychiatry ($650);

f) Dietitian - 1 session ($150);

g) Kinesiology - ongoing ($4,000); and

h) Botox - reduced by half to reflect contingency that the initial trial may not be successful ($24,438.50).

[77] These amounts total $73,105.50.

E. Special Damages

[78] The parties have agreed that the appropriate award for special damages is $6,127.52. I am therefore awarding that amount.

V. Summary and Conclusion

[79] I have assessed the damages owing to Ms. Zachariuk at a total of $301,233, comprised as follows:

a) $110,000 in general damages;

b) $27,000 for past loss of earning capacity;

c) $85,000 for future loss of earning capacity;

d) $73,105.50 for the cost of future care; and

e) $6,127.52 for special damages.

[80] The parties may, within the next 60 days, apply to schedule another hearing before me to address costs and any adjustments to the award that might be appropriate, if they are unable to agree on the appropriate order in light of my decision.

"Milman J."

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