IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Aulakh v. Singh,*
2023 BCSC 862

Date: 20230523
Docket: M197800
Registry: Vancouver

Between:

Harjinder Kaur Aulakh

Plaintiff

And

Gurjot Sing and Paramvir Singh

Defendants

Before: The Honourable Justice Michael Thomas

Reasons for Judgment

Counsel for the Plaintiff:	M.S. Randhawa
Counsel for the Defendants:	A. Rafuse
Place and Dates of Trial:	Vancouver, B.C. April 24-28, 2023
Place and Date of Judgment:	Vancouver, B.C. May 23, 2023

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Issues for Resolution

[1] Mrs. Aulakh was injured in a car accident on August 10, 2017. Liability has been admitted by the defendants.

[2] The parties agree on the majority of the facts and issues including the amount of past wage loss. There is a minor dispute over special damages and cost of care. The main dispute is over loss of future earning capacity; specifically whether Mrs. Aulakh's injuries will force her to an early retirement.

Injuries Suffered

[3] Mrs. Aulakh suffered injuries to her neck, upper, lower back and left hip. She has pains that shoot down her arm and leg. Her pain causes headaches, impacts her mood and impairs her sleep. She suffers from anxiety while driving.

[4] Initially her pain was disabling but it gradually abated. It currently fluctuates throughout the day ranging from a three to eight. Her pain worsens towards the end of the day and after vigorous activity.

[5] All parties agreed that pain is subjective and dependent on the individual. Dr. Adrian opined that her injuries were permanent, unlikely to change and soft tissue in nature. Dr. Herschler opined that her injuries had a structural component such that her symptoms might worsen as she ages. I prefer Dr. Adrian's view of the cause of her injuries. He had more expertise with respect to the treatment of structural issues and treated them as part of his practice; whereas Dr. Herschler lacked this experience and would defer to Dr. Adrian with respect to the efficacy of treatment of structural injuries in this area.

Impact of Injuries

[6] Mrs. Aulakh has limitations with standing, sitting, bending and lifting. Her overall ability to function is in light levels of strength, modified to medium levels such that she can occasionally lift up to 25 lbs. She is able to work at a competitive and sustainable level on a part time basis less than five days a week. She is currently

working four full time days a week. This is stable and unlikely to increase or decrease.

[7] She has difficulty with heavy housework such as mopping, dusting and cleaning bathrooms. She is unable to sit for long periods such that she can no longer go to the movie theatre with her husband. She cannot sit on the floor which impacts her ability to go to her temple. She no longer feels like socializing which has restricted her visits with friends and family. She has few other recreational activities.

Special Damages

[8] Mrs. Aulakh has regularly followed her family doctors advise with respect to treatment and rehabilitation. She attends physiotherapy, chiropractic treatment, active rehabilitation and massage therapy.

[9] She obtains perhaps one hour of pain abatement following her treatments. Her active rehabilitation is not vigorous and consists mainly of low impact weights, cardio and stretching. She is comfortable doing exercises on her own and stretches approximately twice a day.

[10] She avoids prescription medication and relies on over the counter Tylenol for relief. She takes several Tylenol daily adjusting the dosage to her level of pain. She does not have receipts for this medication.

[11] The defendant argues that Tylenol is not compensable because receipts have not been produced such that there is no direct evidence that Mrs. Aulakh takes the medication. I reject this argument. There is direct evidence from Mrs. Aulakh and her husband that Tylenol is purchased in this quantity and taken by Mrs. Aulakh. She has discussed her consumption of Tylenol with her general practitioner whom indicated this was appropriate. Mrs. Aulakh purchased Tylenol with numerous other items. One would not normally expect a person to keep receipts simply for Tylenol over such a long period of time.

[12] The defendant argues that brand name Tylenol is not compensable because generic brands are available for less than half the price at Walmart. Mrs. Aulakh has always used Tylenol, was recommended by her physician to take it, and has found it a useful replacement to prescription mediation. In my view, for these reasons and the relative modest cost, it is reasonable for her to use Tylenol.

[13] The parties agree on special damages of $21,916.58. In addition, I award an additional $500 for her past use of Tylenol. Mrs. Aulakh is entitled to pre-judgment interest on her special damages. If counsel are unable to agree on the interest they may appear before me to resolve any dispute.

Past Wage Loss

[14] Mrs. Aulakh was born on December 20, 1974 in India. She received a Grade 8 education and worked on the family farm. She immigrated to Surrey, British Columbia in 1995 and worked as a seasonal blueberry worker.

[15] In 1997 she began working at Punjab Sweet House as a kitchen assistant. The work is light work with occasional medium strength requirements. She worked full time with the exception of a year maternity leave in 2013 to 2014.

[16] Prior to the August 10, 2017 accident she worked 160 hours per month and received a salary of $1,890.00 per month. She was unable to work until April 2018. It is agreed that this amounted to a gross past loss of income of $9,099.33 for 2017 and $5,896.80 in 2018 until her return to work.

[17] When she returned to work her hourly rate increased to $16.50. If she were able to work 160 hours per month she would have earned $2,745.60 inclusive of vacation pay per month. She had a gradual return work and worked on average three days a week until the sweet shop closed due to COVID-19 in 2020.

[18] It is agreed her gross past loss of income for the rest of 2018 is $20,210.50; for 2019 is $10,404.20; and for 2020 for three months of $2,601.00.

[19] She resumed working at the sweet shop in November 2021 but increased her hours to approximately four days a week. Her gross loss of income for 2021 was $1,645.00; for 2022 was $6,653.09 and for 2023 up to the date of trial was $2,709.75.

[20] Mrs. Aulakh is entitled to a net loss of income for past wage loss and pre-judgment interest. If counsel are unable to agree on this calculation they may appear before me.

Cost of Future Care

[21] The “test” for future care awards are that there must be a medical justification for an item; and the award must be reasonable.

Physiotherapy / Massage / Chiropractic treatments

[22] The treatment that Mrs. Aulakh received under these heads of damages was passive and not curative. The medical justification is based on the amount of pain relief provided to support her current activities. However, Mrs. Aulakh testified that she only received minimal temporary pain relief from these treatments. In my view ongoing treatment from these modalities is not reasonable given their limited efficacy.

Gym Membership

[23] Dr. Adrian was supportive of a gym membership instead of ongoing kinesiology or active rehabilitation. I agree that a gym membership would be appropriate to keep Mrs. Aulakh motivated in maintaining her fitness and provide greater benefit then the active rehabilitation program and kinesiology treatment she currently receives. I agree.

[24] I award $10,000 under this head of damage. This utilizes multipliers adjusted for mortality; and a reduction in cost at age 60 to utilize a seniors rate at the gym.

Tylenol

[25] Mrs. Aulakh's use of Tylenol has been relatively constant since her symptoms plateaued. I see no reason why her use would change. The present value for Tylenol until age 80 using multipliers adjusted for mortality is $2,958.81. Allowing for some contingencies for a reduction in her usage after she retires from work. I award $2,500 for Tylenol usage.

Loss of Earning Capacity

[26] Three recent decisions of the Court of Appeal, address the proper approach to assessing damages for loss of future earning capacity and the current test for determining the impact of contingencies: *Dornan v. Silva*, 2021 BCCA 228; *Rab v. Prescott*, 2021 BCCA 345 [*Rab*]; and *Lo v. Vos*, 2021 BCCA 421.

[27] In *Gregory v. Insurance Corporation of British Columbia,* 2011 BCCA 144 at para. 32, the Court described a claim for loss of earning capacity in these terms:

> [32] … An award for future loss of earning capacity thus represents compensation for a pecuniary loss. It is true that the award is an assessment, not a mathematical calculation. Nevertheless, the award involves a comparison between the likely future of the plaintiff if the accident had not happened and the plaintiff's likely future after the accident has happened: *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 11; *Ryder v. Paquette*, [1995] B.C.J. No. 644 (C.A.) at para. 8…

[28] Mrs. Aulakh need not establish earnings loss on a balance of probabilities, since predictions regarding future losses are essentially hypothetical. As stated in *Smith v. Knudsen*, 2004 BCCA 613 at para. 29:

> … What would have happened in the past but for the injury is no more "knowable" than what will happen in the future and therefore it is appropriate to assess the likelihood of hypothetical and future events rather than applying the balance of probabilities test that is applied with respect to past actual events.

[29] A hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation: *Athey v. Leonati,* [1996] 3 S.C.R. 458 at para. 27; *Morlan v. Barrett*, 2012 BCCA 66 at para. 38.

[30] As set out in *Rab* at para. 47, the three steps for assessing claims for loss of future earning capacity are as follows:

> [47] … 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.

[31] Justice Grauer commented on and clarified how this three-step process will apply in *Steinlauf v. Deol*, 2022 BCCA 96 at paras. 52–56 [*Steinlauf*]. He emphasised the test was designed particularly with a view to dealing with cases "where the evidence indicates no loss of income at the time of trial". He noted, most often, the initial evidentiary step is "a given" because "the event giving rise to a future loss is manifest and continuing at the time of trial". Where, as here, a plaintiff has sustained injuries that are ongoing and have impaired their capacity to earn income, the first step will be satisfied.

[32] Loss of earning capacity will not always result in an actual loss of income; if an accident causes a loss of ability to perform work in a field the plaintiff is not, and will not become, involved in, the second element of the test will not be made out. The Court in *Steinlauf* also noted the second and third elements too may be "superfluous" by the time of trial:

> [53] The second step, which in practical terms may prove to be the first, is whether, on that evidence, the plaintiff has established entitlement by demonstrating that there is a real and substantial possibility of an event giving rise to a future loss: see, for instance, *Perren v Lalari*, 2010 BCCA 140 at para 32. As this Court explained in *Rab* at para 29, establishing that threshold question, too, is less challenging in some cases than others:
>
> > … In cases where, for instance, the evidence establishes that the accident caused significant and lasting injury that left the plaintiff unable to work at the time of the trial and for the foreseeable future, the existence of a real and substantial possibility of an event giving rise to future loss may be obvious and the assessment of its relative likelihood superfluous. Yet it may still be necessary to assess the possibility and likelihood of future hypothetical events occurring that

> may affect the quantification of the loss, such as potential positive or negative contingencies. *Dornan* [*v Silva,* 2021 BCCA 228] was such a case.

[33] In this case the parties agree:

a) Mrs. Aulakh has suffered a significant and lasting injury that impairs her ability to work;

b) Her ability to work has plateaued and is not expected to increase or decrease in the foreseeable future; and

c) Her loss current base loss of annual income due to her injuries is $6,650 gross per year.

[34] They disagree on:

a) Appropriate contingencies;

b) How long Mrs. Aulakh would have worked but for the injury; and

c) If her injuries will cause her to retire earlier then she not been injured.

But For Accident Retirement

[35] The defendant says Mrs. Aulakh would have been unlikely to work past age 72 had the accident not occurred because:

a) Her husband will be 80 by the time she turns 65, and 85 by the time she turns 70;

b) Her daughter will likely have moved out of the home as she turns 26 when Mrs. Aulakh turns 65 and 31 when she turns 70; and

c) The mortgage on their house will be paid off such that, even with their humble earnings, there would be little financial need to continue working; and

[36] These considerations must be balanced against the fact that Mr. and Mrs. Aulakh are hard working people who have made the most of their limited skills and education. They give back to the community and are involved in charity work. They intend to financially support their daughter so that she can obtain opportunities that were not available to them.

[37] In my view Mrs. Aulakh would have continued to work until age 70 had the accident not occurred.

Earlier retirement due to injuries suffered in the accident

[38] Dr. Herschler opines that Mrs. Aulakh will be unable to sustain her current employment past age 65 as "one's ability to tolerate pain decreases with age." Dr. Adrian opined Mrs. Aulakh's "ability to continue at her current level will depend on her ability to tolerate her pain."

[39] Dr. Adrian was cross examined on this issue. He noted that with respect to function Mrs. Aulakh is stable and that her aging process is unlikely to impact her loss of function caused by the injuries sustained in the accident. He opined that he could not speculate on whether her tolerance to pain would change; but he was confident there would be no physical reason for a change in her function as she ages.

[40] Although Dr. Herschler was not cross examined on his opinion, I prefer Dr. Adrian's evidence. I accept that there will be no physical change to the plaintiff due to her injuries. I am unable to accept a discrete period of earlier retirement without more cogent evidence. In my view, a reduction in pain tolerance is best treated as a contingency.

Additional contingencies

[41] The defendant argues that a 20 percent general contingency is appropriate in this case to account for general labour market contingencies. However, he notes that in *Gray v. Lanz*, 2021 BCSC 2218 that 20 percent typically applies to younger

plaintiffs that are more susceptible to future disability or earlier retirement and that 10 percent may be more appropriate.

[42] I agree that a 10 percent contingency is appropriate for use with the multipliers in this case, which only account for mortality rates. However, this 10 percent contingency is offset by a potential reduction in Mrs. Aulakh's ability to tolerate pain in the future.

Conclusions on future earning capacity

[43] In my view Mrs. Aulakh is entitled to the present value of $6,650 per year up to her 70th birthday. In this case the general labour market contingencies are offset by the possibility of a reduction in her ability to tolerate pain.

[44] If counsel are unable to agree on the appropriate calculations they may apply to appear before me.

Housekeeping Services

[45] The parties agree the evidence supports a separate pecuniary loss for loss of housekeeping services. They disagree about the appropriate quantum.

[46] Mrs. Aulakh lives with her husband and nine-year-old daughter in a house that has two kitchens, two living rooms, six bedrooms and three bathrooms.

[47] The defendants say the house is larger than necessary for the size of the family and that they should only be responsible for the amount of assistance needed to clean a smaller house. This is not an appropriate consideration. Mrs. Aulakh has provided housekeeping in her house for the last 23 years. Her compensation for the loss of housekeeping services is based on the loss that she is no longer able to perform. If she lived in a small apartment she would not be able to argue for a larger award based on the size of house an average family lived in.

[48] However, the defendants are entitled to contingencies to account for the possibility that Mrs. Aulakh may move to a smaller house once her daughter leaves home and she and her husband age. They are also entitled to a contingency to

reflect the reality that as she ages she would have been unable to provide housekeeping activities for non-accident related reasons.

[49] The defendant says that as Mrs. Aulakh's daughter ages she will perform more housekeeping tasks around the house. I do not accept that a teenager necessarily requires less housekeeping assistance than a nine-year-old. However, child caring requirements for a child will diminish once the child leaves the home. I accept that it is likely that some housekeeping requirements will diminish as well.

[50] Finally, the defendant says that if Mrs. Aulakh retires she will be less symptomatic due to her injuries and require less assistance.

[51] In my view these contingencies are offset by the possibility that Mrs. Aulakh's tolerance for pain will be reduced as she ages requiring some additional housekeeping assistance.

[52] The parties agree that three hours a week are an appropriate replacement for loss of housekeeping services.

[53] The plaintiff advances a claim of additional seasonal cleaning of 16 hours per year. I agree with the defendant that there is no evidence that this additional cleaning is necessary given the three hours of weekly assistance provided.

[54] There is a range of cost of housekeeping services ranging from $32 per hour to $35 per hour. Given the amount of earnings the plaintiff makes in my view $32 per hour is a more appropriate replacement cost.

[55] In addition, I agree with the defendants that an appropriate cut off for household assistance due to injuries suffered in the accident is age 75 as opposed to 80. In my view Mrs. Aulakh would require household assistance had the accident not occurred after age 75.

[56] Applying these findings, an appropriate award for loss of future housekeeping services is $100,000.

[57] With respect to the claim for past loss of housekeeping services the defendant says that since Mrs. Aulakh could not work during COVID-19 she would have had sufficient reserves to do her housework.

[58] Given that her pain gradually develops over the workday such that she does not have the tolerance to do housekeeping work I agree with this submission.

[59] The plaintiff is entitled to past housekeeping services of three hours per week from the date of the accident to the trial date at a rate of $32 per hour. If counsel are unable to agree on this amount they make apply to appear before me.

Non-pecuniary Damages

Legal principles

[60] The general principles applicable to non-pecuniary damages were summarized in *Jaehrlich v. Kuchler*, 2019 BCSC 1126 at para. 80:

> Non-pecuniary damages are awarded to compensate the plaintiff for pain, suffering, loss of enjoyment of life and loss of amenities. The compensation awarded should be fair to all parties and fairness is measured against awards made in comparable cases. Such cases, though helpful, serve only as a rough guide. Each case depends on its own unique facts: [citation omitted].

[61] It is neither possible nor desirable to develop a "tariff": *Dilello v. Montgomery*, 2005 BCCA 56 at paras. 39–43.

[62] The principles governing an award of non-pecuniary damages are well settled:

a) the amount of the award should not depend alone on the seriousness of the injury but upon its ability to ameliorate the condition of the victim considering his or her particular situation;

b) an appreciation of the plaintiff's loss is the key and the 'need' for solace will not necessarily correlate with the seriousness of the injury;

c) an award will vary in each case "to meet the specific circumstances of the individual case";

d) the inexhaustive list of factors that influence an award includes:

i. age;

ii. nature of the injury;

iii. severity and duration of pain;

iv. disability;

v. emotional suffering;

vi. loss or impairment of life;

vii. impairment of family and social relations;

viii. impairment of physical and mental abilities;

ix. loss of lifestyle; and

x. the plaintiff's stoicism should not, generally speaking, penalize the plaintiff.

See *Stapley v. Hejslet,* 2006 BCCA 34 at paras. 45–46.

Appropriate cases

[63] The most applicable case referred to me by the defendant was the case of *Sparks v. Keller*, 2022 BCSC 231 [*Sparks*]. In that case the plaintiff was 44 years old and suffered injuries similar to the plaintiff which had a significant impact on her life. Like Mrs. Aulakh the plaintiff in *Sparks* was not very athletic and had limited activities outside of her family. The Court awarded $125,000 in non-pecuniary damages.

[64] The most applicable case referred to me by the plaintiff was *Majer v. Beaudry*, 2002 BCSC 746 in which a 44-year-old plaintiff suffered chronic pain to his low back, hip and buttocks. He was stoic and attempted to live his life but his

recreational activities and lifestyle were adversely affected. The present value of his non-pecuniary award is $135,000.

Application

[65] Mrs. Aulakh has permanent chronic pain. It has had a significant impact on her life. As in *Sparks* it has impacted her ability to spend time with and care for her family. The few activities she enjoyed are impaired such that she no longer enjoys them. She is permanently partially disabled from work. Her pain causes headaches, impacts her sleep and disturbs her mood.

[66] In my view considering the appropriate legal principles and precedent $125,000 is an appropriate award for non-pecuniary damages.

Costs

[67] The parties may apply to appear before me if they cannot come to an agreement on costs.

"Thomas J."