IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Tritton v. Lai,*
2023 BCSC 956

Date: 20230605
Docket: M196624
Registry: Vancouver

Between:

Andrea Tritton

Plaintiff

And

Kim Piew Johnnie Lai and Mei Chan Lai

Defendants

Before: The Honourable Justice Edelmann

Reasons for Judgment

Counsel for the Plaintiff:	T. Dennis
Counsel for the Defendants:	V. Hamza N. Baharian
Place and Date of Trial/Hearing:	Vancouver, B.C. April 3–6, 2023
Place and Date of Judgment:	Vancouver, B.C. June 5, 2023

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INTRODUCTION

[1] This action arises out of a motor vehicle accident that occurred in Tsawwassen, BC on June 17, 2018 (the "MVA"). The defendant Kim Lai pulled his vehicle into the path of the plaintiff Andrea Tritton's vehicle resulting in a T-bone collision. The defendants accept that Mr. Lai's negligence was the cause of the MVA. The only issues to be decided are the extent of the injuries caused by the MVA and the damages from those injuries.

INJURIES AND CAUSATION

[2] Ms. Tritton alleges both physical and psychiatric injuries caused by the MVA. The physical injuries relate primarily to neck and shoulder pain as well as headaches. She says the physical injuries have resulted in chronic pain, sleep disturbance, anxiety, depression and alcohol abuse. The most significant challenge in this case is that Ms. Tritton suffered from many similar symptoms before the MVA and was being treated for them on an ongoing basis.

[3] Prior to the MVA, Ms. Tritton had a number of health issues, including diagnoses of fibromyalgia and irritable bowel syndrome, neck pain, headaches, tingling in her face and finger as well as severe anxiety. She was taking a number of medications, including for pain and anxiety, and receiving Botox injections for her headaches every three months or so leading up to the MVA. Despite her health issues, she had been working full-time as a medical office assistant for many years and describes an active lifestyle which included hiking, softball and regular attendance at the gym. Collateral witnesses confirm that Ms. Tritton was active and outgoing in the years prior to the MVA. While they were not aware of the details of her health issues, I find their testimony to corroborate Ms. Tritton's own description. Ms. Tritton says that although she had health issues prior to the MVA, they were not debilitating and allowed her to pursue an active lifestyle both physically and socially.

[4] There also appears to be general agreement that the situation changed significantly in the years following the MVA. Ms. Tritton went from working full-time to receiving support as a person with disabilities and working only 10–12 hours a week

by the time of trial. She is no longer physically active and her mental health detiorated to the point of suffering regular panic attacks, paranoia, alcohol abuse and suicidality. All the medical experts whose evidence is before me appear to agree that Ms. Tritton is caught in a cycle whereby her mental health issues amplify her perception of pain, which in turn exacerbates her mental health issues. There are essentially two points of disagreement between the parties. The first is whether injuries from the MVA aggravated the situation and sent Ms. Tritton into a downwards spiral. The second is how likely it was that such a spiral would have been triggered by other life stressors in any event.

[5] The defendants argue that there is no evidence the MVA caused any physical injuries at all, relying heavily on the report of Dr. Mike Berger, a physiatrist who examined Ms. Tritton in November 2022. In his view, there is no evidence to suggest that the MVA contributed to a new musculoskeletal injury. While he concedes it is "possible" that the MVA resulted in a flare of pre-existing central sensitivity syndrome, in his view it is impossible to delineate the MVA from other life stressors and mental health conditions.

[6] The fundamental problem with the defendant's position is that the Agreed Statement of Facts includes the fact that Ms. Tritton incurred $4,170.32 in expenses "treating her [MVA]-related injuries". Those expenses include numerous physiotherapy sessions beginning July 5, 2017 or some three weeks after the MVA. Those sessions are followed by chiropractic treatments, massage therapy, counselling and active rehabilitation in the ensuing months and years.

[7] Even if it was open to me to ignore the formal admission by the defendants, I would have found it highly unlikely given the timing of the treatments that they would be caused by "other life stressors". While Ms. Tritton had a history of similar medical issues, I do not accept that it was merely by coincidence that she began regular physiotherapy followed by other forms of physical rehabilitation weeks after the MVA.

[8] This is also the conclusion that was reached by Dr. Catherine Paramonoff, a physiatrist whose report was presented by the plaintiff, and who was not cross-examined. She concludes that Ms. Tritton likely suffered soft tissue injuries from the MVA, and that those physical injuries likely aggravated her existing symptoms.

[9] While both Dr. Paramanoff and Dr. Berger deferred to a psychologist or psychiatrist to opine on the mental health issues, it appears to be common ground that the perception of pain is deeply intertwined with mental health. Deteriorating mental health can contribute to heightened pain perception which in turn has a negative impact on mental health by negatively affecting sleep or increasing anxiety. The psychiatrist called by the defendants, Dr. Garth Kroeker, described the situation in the following terms:

> [I]t is probable that the [MVA], by most likely adding to her pain symptoms, led to worsened sleep, worsened concentration, and an overall worsening of the severity of mood and anxiety symptoms followed by a reduced ability to tolerate work shifts or enjoy recreational activities, leading to a vicious cycle of declining mood and function […]

[10] Dr. Kroeker deferred to a physiatrist as to whether the MVA caused a physical injury that would have triggered the downwards spiral. As noted above, I conclude that the MVA did cause soft tissue injuries which exacerbated Ms. Tritton's existing physical and mental health issues sending her into the downward spiral in which she has found herself in the subsequent years.

[11] The medical experts largely agree that Ms. Tritton's prognosis is not good given the duration of the chronic pain and the complexity of her mental health issues. It would appear Ms. Tritton could see some improvement in symptom management through exercise and engagement with the underlying mental health issues. However, Dr. Paramanoff is of the view that such strategies will not eliminate the symptoms, and that Ms. Tritton will likely have residual symptoms above the pre-MVA baseline indefinitely. Even aside from the fact that her evidence was not challenged in cross-examination, I accept Dr. Paramanoff's prognosis on the basis of the evidence before me. I therefore conclude that it is likely that Ms. Tritton will find herself in a debilitating cycle of chronic pain and mental health challenges for

the foreseeable future. While I accept that given her vulnerable situation there was some risk that other life stressors would have triggered a similar spiral, it was the MVA which was in fact the trigger. The relative likelihood that she would have found herself in the same circumstances had Mr. Lai not injured her will be addressed in the context of negative contingencies below.

DAMAGES

[12] The plaintiff seeks damages under a number of headings, including past loss of income, loss of income earning capacity, non-pecuniary damages and special damages. I will address each of the heads of damages in the following sections.

Past Loss of Income Earning Capacity

[13] The principles applicable to a claim of past lost earning capacity are the same as the principles applicable to a claim of future lost earning capacity. The plaintiff must establish an impairment of earning capacity and a real and substantial possibility of an event resulting in a loss (*Grewal v. Naumann*, 2017 BCCA 158). While in many cases the actual lost income will be the most reliable measure of the loss, it is not the actual lost income but the lost capacity which is compensable (see *Ibbitson v. Cooper,* 2012 BCCA 249 at para. 19). That being said, compensation for past loss of earning capacity is to be based on what the plaintiff would have, not could have, earned but for the injury that was sustained (*Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30; *M.B. v. British Columbia*, 2003 SCC 53 at para. 49).

[14] Ms. Tritton worked at View Medical Inc. (“View Medical”) from 2009 to July 15, 2017 as a medical office assistant. View Medical was acquired by View Laser in 2017, and she began working as a client care coordinator in the laser clinic. Her income remained relatively stable in the years leading up to 2019, ranging between $33,316 (2013) and $36,338 (2015). Ms. Tritton took a week off from work after the MVA, her employer calculated the 29 lost hours as equating to $536.50. Her income dipped slightly in 2019 to $32,705. View medical had gone to a 4-day week from

mid-2018 to mid-2019. Ms. Tritton says she did not go back to a 5-day week because of her symptoms.

[15] Ms. Tritton continued working for View Laser until August, 2020. In 2020, she reported employment income of $15,569 as well as EI and other benefits of $14,000 for a total income of $29,569.

[16] Ms. Tritton worked for Ginger Agency Inc. as a virtual assistant from July 6, 2021 to February 4, 2022. In 2021, she reported employment income of $7,859; EI and other benefits of $2,000; and Social Assistance payments of $16,572 for a total income of $26,431.

[17] In late 2021, Ms. Tritton qualified for persons with disability ("PWD") benefits and receives about $1,965 per month. In addition to her PWD benefits, Ms. Tritton said she can make either $15,000 or $17,000 per year without the benefits being reduced. Any amounts she makes above that threshold would be deducted from her benefits.

[18] Starting in March 2022, Ms. Tritton has worked as a personal assistant for her partner's company Nelson Rv Park and Marina Ltd., earning $11,159.20 in 2022. She reported a total income of $33,741 in 2022, of which $12,895 was taxable income.

[19] At the end of December 2022, Ms. Tritton began working as an independent contractor earning $25 per hour with Evolve Medical as a virtual office assistant and continues in that position.

[20] She says she is not able to work more than 10 or 15 hours per week without her symptoms flaring up. I note that working an average of 12.5 hours per week at $25 per hour would bring her over a $15,000 maximum she could earn as without reducing her PWD benefits. Ms. Tritton accepts that PWD benefits are deductible from past and future income loss awards (see *Sidhu v Hiebert*, 2022 BCSC 1024).

[21] Counsel for Ms. Tritton calculated past wage losses assuming that she would have been earning around $35,000 and came to total of $18,547. I accept that a substantial portion of those losses are attributable to the aggravation of Ms. Tritton's injuries following the MVA. Taking into consideration other factors such as the COVID-19 pandemic and the possibility of Ms. Tritton's existing injuries flaring up even without the MVA, I find that Ms. Tritton has established $15,000 in past loss of earning capacity, subject to the relevant deductions.

Loss of Future Earning Capacity

[22] An assessment of loss of future earning capacity involves consideration of hypothetical events. The plaintiff is not required to prove these hypothetical events on a balance of probabilities. The future or 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. The Court of Appeal has set out a three-part step process to assess damages for future loss of earning capacity (*Rab v. Prescott*, 2021 BCCA 345).

i. Does the evidence disclose a potential future event that could give rise to a loss of capacity?

ii. Is there a real and substantial possibility that the future event will cause a pecuniary loss to the plaintiff? and

iii. What is the value of that possible future loss, given the relative likelihood of it occurring?

[23] Given my findings on causation and prognosis, there is little question that the MVA has caused a loss of income earning capacity for Ms. Tritton. She had a long history of working full-time prior to the MVA, and is now working a fraction of that amount. Given the complications in her psychological profile, those issues are likely to continue into the indefinite future.

[24] Counsel for Ms. Tritton has urged me to take an earnings approach to calculate Ms. Tritton's loss of income earning capacity. He starts with an assumption that she would have earned $52,000 per year working full-time in her current contracting position, presumably based on 40 hours work per week, 52 weeks per year. I see a number of issues with this projection for future earnings. The evidence shows that when Ms. Tritton's full-time position at Laser View began in 2017 it required 37 hours per week and included vacation time. There is little reason to believe the terms at View Medical would have been substantially different. I would also note that there is no evidence before me as to the availability, reliability or consistency of the contract work, Ms. Tritton is currently doing. Ms. Tritton's established income history was in the range of $35,000 which presumably would have gradually increased with time. I do not find that the likelihood of a significant jump in salary can be inferred on the basis of two or three months of contract work for a few hours a week. I find it reasonable to infer that by the time of trial Ms. Tritton would have been earning in the range of $37,000 or $38,000 per year.

[25] The issue of pecuniary loss is somewhat complicated by Ms. Tritton's receipt of PWD benefits. As noted earlier, the defendants are not liable for the amounts that Ms. Tritton will receive in benefits. On their face, the benefits would appear to cover the bulk of any potential loss. If Ms. Tritton is able to earn $15,000 annually in addition to her PWD benefits, her annual income would be within the range of where her salary presumably would have been had she continued working at View Laser and received gradual increases.

[26] After trial, plaintiff's counsel brought to my attention s. 10 of the *Employment and Assistance for Persons with Disabilities Regulation*, B.C. Reg. 265/2002 which would disentitle Ms. Tritton from PWD benefits if she has assets of $100,000 or more. Given the awards I am making in this case, it is likely that Ms. Tritton will have assets of $100,000 once the award in question is paid. This issue and the applicable principles were set out in *Shongu v. Jing*, 2016 BCSC 901. The defendants accept that *Shongu* is an accurate statement of the law, and that should Ms. Tritton have assets of more than $100,000 once the award is paid out, she will no longer meet

the eligibility criteria to collect PWD benefits. The defendants argue that Ms. Tritton may become eligible for PWD benefits at some point in the future. They say that I should apply a contingency to any award for future loss of earning capacity to account for that eventuality. Given the amount of the total award in this case, I find it to be reasonable to assume that Ms. Tritton is likely to have assets over $100,000 for some time to come, if not indefinitely. I will include the possibility that she will once again become eligible for PWD benefits as part of a general negative contingency. As noted in *Shongu*, the award should be reduced to account for the benefits Ms. Tritton receives between the date of trial and the date the proceeds of this judgement are paid to her.

[27] Since the MVA, Ms. Tritton has had some years that were better than others, and the impact of the COVID-19 pandemic on the pattern during some of those years is difficult to assess. I find it likely that she will, as in the past, have ups and downs in the coming years. It is evident that she has been able to secure more flexible types of employment, both as a virtual assistant and working in the administration of her partner's campground. While it is likely she will find ways to earn income from similar forms flexible employment in the future, I find she is unlikely to recover her pre-MVA levels of earning capacity, and that she has established a substantial possibility of a loss of 50% of her pre-MVA earning capacity indefinitely.

[28] For the reasons set out above, I find it reasonable to project Ms. Tritton's salary from a present value of $37,500. Ms. Tritton will turn 65 in 24 years, for which the present value multiplier is 20.304. A loss of 50% of her earning capacity would therefore have a present-day value of $22,500 x 20.304 = $456,840. Given the seriousness and chronic nature of Ms. Tritton's pre-existing condition, I find that a negative contingency of 20% is appropriate to account for the likelihood she would have found herself in a similar situation even without the MVA. Given Ms. Tritton's relative youth and length of time being considered, I also find that a general negative contingency of 10% is appropriate, also taking into consideration the PWD issue set out above. I will therefore award $319,788 in future loss of earning capacity.

Loss of Housekeeping Capacity

[29] Ms. Tritton seeks an award for loss of housekeeping capacity as she says she requires assistance to accomplish the housekeeping she was able to do before the MVA. In particular, she seeks payment for two hours per week to age 75. In my view, she has not made out a loss of that magnitude. In 2020, Dr. Paramanoff opined that Ms. Tritton is able to carry out regular homemaking activities but may need assistance with heavier seasonal cleaning in the short term. This is consistent with the testimony of Ms. Tritton's niece, who moved in with her in 2019. While she remembers a few times she helped getting things from storage, her overall description was that housekeeping tasks were shared between the two of them. Therefore, while I accept that some housekeeping tasks may be more difficult than they would otherwise have been but for the MVA, I find the issue is more appropriately addressed in the context of non-pecuniary damages.

Non-Pecuniary Damages

[30] 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: *Trites v. Penner*, 2010 BCSC 882 at paras. 188–189. Factors to be considered include the age of the plaintiff; nature of the injury; severity and duration of pain; impairment of physical, mental abilities as well as the impact on lifestyle and personal relationships (*Stapley v. Hejslet*, 2006 BCCA 34).

[31] The plaintiff submits that $205,000 is an appropriate award for non-pecuniary damages for Ms. Tritton, conceding that a 20% reduction for her pre-existing condition would be appropriate. Counsel points to *Khosa v. Kalamatimaleki*, 2014 BCSC 2060 ($140,000); *Grabovac v. Fazio*, 2021 BCSC 2362 ($350,000); *Hans v. Volvo Trucks North America Inc.*, 2016 BCSC 1155 ($265,000); *Sebaa v. Ricci*, 2015 BCSC 1492, ($180,000). He concedes that the circumstances in *Hans*

and *Sebaa* are substantially different from those before, involving individuals who find themselves almost completely cut off from their former lives.

[32] Counsel for the defendants has taken me to *Lehtonen v. Johnston*, 2009 BCSC 1364 ($40,000); *Miller v. Dent*, 2017 BCSC 1177 ($70,000); and *Ayles v. Vanderkooi*, 2021 BCSC 838 ($70,000). I do not find any of these cases reflect the scope of injuries I have found in Ms. Tritton's case, in particular the spiral of chronic pain and mental health issues in which she finds herself.

[33] While no two cases are identical, I find that the circumstances in *Khosa* and *Grabovac* (setting aside the issue of the inability to bear children) more closely approximate the situation in the case before me. Taking into consideration that the award in *Khosa* would represent just over $175,000 in 2023 dollars, and that Ms. Tritton's situation is measurably worse, I find that $190,000 for non-pecuniary damages would be warranted in the circumstances. I agree that the award should be reduced by 20% given Ms. Tritton's pre-existing condition, and I therefore award $152,000 in non-pecuniary damages.

Costs of Future Care

[34] The test for an award of future care is whether a reasonably-minded person of sufficient means would be ready to incur the expense (see *Bystedt v. Hay*, 2001 BCSC 1735, aff'd 2004 BCCA 124). The services and items must be justified as reasonable in the sense of being medically required or justified, and in the sense that the plaintiff will be likely to incur them based on the evidence. (*Fontaine v. Van Kampen,* 2013 BCSC 1702, paras. 155 and 157; *Gregory v. Insurance Corporation of British Columbia,* 2011 BCCA 144, paras. 38–39).

[35] There is consensus among the experts that Ms. Tritton's mental health issues are playing a central role in the cycle of pain and anxiety in which she finds herself. Dr. Kroeker recommended cognitive-behavioural therapy ("CBT") and cognitive exercises. Given the gravity and complexity of the mental health issues faced by Ms. Tritton and their aggravation by the MVA-related injuries, I find she is likely to require significant amounts of

therapy and counselling over the course of many years. Taking into consideration the likelihood that some level of psychological support would have been required even without the MVA-related injuries, I find an award of $5,000 for cognitive therapy and psychological counselling to be reasonable in the circumstances.

[36] Physically, both Dr. Berger and Dr. Paramanoff recommend exercise as the best treatment for Ms. Tritton. Neither recommends reliance on passive treatments. In 2020, Dr. Paramanoff opined that it was reasonable for Ms. Tritton to have access to sessions of adjunctive treatment for symptom relief on a time-limited basis to help manage flares of pain. Between 2018 and 2022, Ms. Tritton reports receiving 39 sessions of either chiropractic treatment or massage therapy. Those have been addressed as part of the special damages.

[37] When she was working at View Medical and View Laser, Ms. Tritton was receiving Botox injections at no cost as an employee benefit. While some of the injections were for aesthetic purposes, Ms. Tritton says they also significantly alleviated her headaches and neck pain for a period of time. Prior to the MVA, she was receiving an injection every 2.5 to 3 months, a pattern which continued after the MVA. Since leaving her employment at View Laser, Ms. Tritton is no longer able to afford Botox injections, and has not continued with those treatments.

[38] As a result of her MVA-related injuries, Ms. Tritton has increased her use of over the counter medications, and I accept that her increased usage is likely to continue into the foreseeable future. I also accept Dr. Paramanoff's opinion that it is reasonable for her to use over-the-counter analgesic or anti-inflammatory medication from time to time for flares of pain. I will award $500 for such medication, taking into consideration her past usage as well as her likely usage even without the MVA-related injuries.

[39] Ms. Tritton would appear to be of the view that continuing with chiropractic treatments and massage therapy indefinitely would be helpful to her, and her counsel argues that a substantial award for such treatments until age 75 is

appropriate. I am not satisfied that Ms. Tritton has established that the scope of treatments she seeks are medically required or justified. I accept that some additional allowance for passive modalities is appropriate to address flares of pain in the coming years. I will therefore award $1,500 for chiropractic treatment and massage therapy. I also find that additional active rehabilitation in coordination with the mental health treatment is warranted, and I will therefore award $1,000 for active rehabilitation.

[40] Ms. Tritton also seeks funding for ongoing Botox injections. Neither Dr. Paramanoff nor Dr. Berger recommended such injections despite being aware of Ms. Tritton's history and experience with them. While Dr. Kroeker was of the view that such injections might be appropriate if recommended by a neurologist, he also was of the belief that they would be covered by MSP upon such a recommendation. Ultimately, the onus is on Ms. Tritton to establish an ongoing medical need for Botox injections related to the injuries from the MVA, and I am not satisfied she has done so on the evidence before me.

Special Damages

[41] The plaintiff has provided documentation related to $4,170.32 in out-of-pocket expenses treating her MVA-related injuries. In oral testimony, she estimated having spent approximately $200 on over-the-counter medication and $40 on a hot bag for her neck and shoulders. The defendants agree to the documented special damages with the exception of a $63 no-show fee from April 11, 2019 that they say was not adequately explained. Although Ms. Tritton was not able to remember exactly why she did not attend on that day, I do not find this surprising given the number of appointments she has attended and the passage of time. I do not find her failure to attend on that day to be part of a larger pattern of no-show fees, and I accept that her need to attend active rehabilitation was related to the MVA. I will therefore allow the fee. I also accept Ms. Tritton's testimony about the over the counter medication and the hot bag and find her estimate reasonable in the circumstances. I will therefore award $4,410.32 in special damages

Summary

[42] Damages are awarded as follows:

i. Past income loss (subject to deductions): $15,000;

ii. Loss of future earning capacity (subject to deductions): $319,788;

iii. Future cost of care: $8,000;

iv. Non-pecuniary damages: $152,000; and

v. Special damages: $4,410.32.

COSTS

[43] If the parties are unable to agree on costs and the form of the order, they may arrange to make submissions on the matter within 60 days of the issuance of these reasons.

"Edelmann J."