COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Peters v. Taylor,*
2023 BCCA 391

Date: 20231012
Docket: CA48024

Between:

Michael Edward Peters

Appellant
(Defendant)

And

Patricia Jane Taylor

Respondent
(Plaintiff)

Before: The Honourable Justice Dickson
The Honourable Madam Justice Fisher
The Honourable Madam Justice Horsman

On appeal from: An order of the Supreme Court of British Columbia, dated December 15, 2021 (*Taylor v. Peters*, 2021 BCSC 2444, Victoria Docket 182166).

Oral Reasons for Judgment

Counsel for the Appellant:	M-H. Wright J.E. Fergusson
Counsel for the Respondent:	J.A.S. Legh
Place and Date of Hearing:	Victoria, British Columbia October 12, 2023
Place and Date of Judgment:	Victoria, British Columbia October 12, 2023

Summary:

The appellant challenges an award for the cost of future care, asserting that the trial judge erred in assessing awards for physiotherapy, massage therapy and the loss of housekeeping capacity. He contends the trial judge failed to consider the lack of evidence that the plaintiff required physiotherapy and massage therapy for the rest of her life, and failed to account for various contingencies. He also contends that the accident underlying the personal injury action was not the cause of the plaintiff's need for housekeeping assistance. He seeks an 80% reduction of the physiotherapy and massage therapy awards and asks that the award for loss of housekeeping capacity be set aside altogether. Held: Appeal dismissed. The trial judge applied the correct legal principles in determining awards for the cost of future care. She made findings of fact well supported in the evidence which grounded the awards made. There is no basis for appellate intervention.

[1] **FISHER J.A.**: This is an appeal by a defendant in a personal injury action challenging an award for the cost of future care.

[2] The background facts are set out in the reasons for judgment of the trial judge, indexed as 2021 BCSC 2444. The respondent, Patricia Taylor, was walking on a sidewalk on September 12, 2017, when she was hit by a vehicle operated by the appellant, Michael Peters, as he was backing out of a driveway. Ms. Taylor, then age 59, sustained injuries that included a broken left pelvis, a concussion, left knee pain, neck pain and anxiety around parked vehicles.

[3] The trial judge found that many of Ms. Taylor's symptoms had resolved within the first few months, but the injuries had caused increased right hip pain, a change in her gait, increased fatigue and anxiety around parked cars, all of which were likely permanent: at para. 40. The judge also found that the increased right hip pain, which was "at the root" of Ms. Taylor's increased fatigue, was caused by the change in her gait: at para. 38. This was significant because Ms. Taylor had pre-existing left-sided paralysis due to a stroke in 2007, after which she had re-learned how to walk by placing her weight on her right foot and swinging her left leg around in an action known as a "hip hike". The trial judge was not satisfied that Ms. Taylor would have suffered increased hip pain regardless of the accident. She found the impact of the accident had been devastating for Ms. Taylor; while she was "not of robust health"

before, she was no longer able to engage in activities that brought her joy and purpose: at paras. 52, 56.

[4] In addition to an award of $125,000 for non-pecuniary damages, the trial judge awarded Ms. Taylor $272,029 for cost of future care. The cost of future care included $165,116 for physiotherapy, $52,746 for massage therapy and $40,000 for loss of housekeeping capacity. The appellant challenges these three awards, submitting that the first two should be reduced by 80% and the last should be set aside altogether.

Cost of future care

[5] It is well settled that an assessment of damages is generally a fact-finding exercise to which this Court owes deference. An appellate court is not to alter a damage award made at trial merely because it would have come to a different conclusion. It is entitled to intervene only when the trial judge applied a wrong principle of law (taking into account or leaving out a relevant factor), made a palpable and overriding error (finding a fact with no evidentiary foundation), or made an award so inordinately high or low that results in a wholly erroneous estimate of the damage: see *Lines v. W & D Logging Co. Ltd.*, 2009 BCCA 106 at paras. 8–9 and the cases cited therein; *Warick v. Diwell*, 2018 BCCA 53 at para. 22, citing *Woelk v. Halvorson*, [1980] 2 S.C.R. 430 at 435; *Reilly v. Lynn*, 2003 BCCA 49 at para. 99, leave to appeal ref'd, [2003] S.C.C.A. No. 221.

[6] The appellant concedes that the trial judge set out the correct principles of law in relation to a claim for cost of future care but contends she erred in her assessment of these awards. Essentially, he says the judge failed to consider the lack of evidence that Ms. Taylor required treatments for the rest of her life and failed to account for various contingencies. He also says the accident was not the cause of Ms. Taylor's need for housekeeping assistance.

[7] The judge did, indeed, set out the correct principles applicable to determining awards for the cost of future care, as summarized in *Warick v. Diwell*, 2017 BCSC 68 at paras. 203–209, aff'd 2018 BCCA 53:

> [203] Claims made for future care must be both medically justified and reasonable. An award "should reflect what the evidence establishes is reasonably necessary to preserve the plaintiff's health": *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.) at paras. 199 and 201; aff'd (1987), 49 B.C.L.R (2d) 99 (C.A.).
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> [204] This requirement of medical justification, as opposed to medical necessity "requires only some evidence that the expense claimed is directly related to the disability arising out of the accident, and is incurred with a view toward ameliorating its impact": *Harrington v. Sangha*, 2011 BCSC 1035, at para. 151.
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> [205] The question has often been framed as being whether a reasonably-minded person of ample means would be ready to incur a particular expense: *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229 at p. 245.
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> [206] The evidence with respect to the specific care required does not need to be provided by a medical doctor: *Jacobsen v. Nike Canada Ltd.* (1996), 19 B.C.L.R. (3d) 63, (S.C.) at para. 182. However, there must be some evidentiary link drawn between the physician's assessment of pain, disability, and recommended treatment and the care recommended by a qualified health care professional: *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 39.
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> [207] Damages for the cost of future care are assessed, not mathematically calculated: *Uhrovic v. Masjhuri*, 2008 BCCA 462 at paras. 28-31. There is an inherent degree of uncertainty and discretion in making such awards. Because awards are made "once and for all" at the time of trial, judges must "peer into the future" and fix the damages "as best they can". This includes allowing contingencies for the possibility that the future may differ from what the evidence at trial indicates: *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9, at para. 21.
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> [208] While no award should be made in relation to an expense that the plaintiff will not actually incur (*Izony v. Weidlich*, 2006 BCSC 1315 at para. 74), the focus of inquiry when a justified item or service was previously unused, is whether it is "likely to be incurred on a going forward basis": *Gilbert v. Bottle*, 2011 BCSC 1389 at para. 251.
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> [209] A plaintiff is not entitled to an award for that portion of their costs of future care that will be publicly funded. However, the risk that access to public funds may be lost in future is a proper basis to provide a contingency in the award: *Boren v. Vancouver Resource Society for the Physically Disabled*, 2003 BCCA 388 at para. 25.
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> [Emphasis added by trial judge.]

[8] As I will explain, it is my view that the trial judge not only applied the correct legal principles but also made findings of fact well supported in the evidence, and there is no basis on which this Court can intervene.

Physiotherapy

[9] The trial judge found medical support for ongoing physiotherapy treatments, augmented by the use of a specialized machine known as a Lokomat. The judge was satisfied that the need for specialized physiotherapy was directly related to the injuries suffered in the accident and was required to ameliorate Ms. Taylor's symptoms. She accepted the evidence of Ms. Taylor's family doctor and treating physiatrist, who concurred with Cecile Petra, an occupational therapist, that this specialized active physiotherapy was required to manage Ms. Taylor's symptoms. She accepted Ms. Petra's recommendation for weekly sessions using the Lokomat at $180 per session, or $8,640 per year. The judge assessed the projected cost at $165,116, applying present value calculations contained in an actuarial report.

[10] The appellant raises numerous criticisms of the judge's reasons, arguing that the award

> … assumes with 100% certainty that [Ms. Taylor] will need physiotherapy every week for the rest of her life because of the accident and for no other reason, that she will use that physiotherapy every week, and that the Lokomat machine is available for use each and every week.

[11] He says the judge failed to make allowance for the contingency that the cost might not be incurred. He points to evidence of Ms. Taylor's pre-existing conditions and "a heightened risk that she will need physiotherapy in the future in any event", as well as a risk that she would not utilize physiotherapy in the long term given her history of ceasing treatment. He also points to evidence that the Lokomat was not always available on a weekly basis and an absence of medical opinion that Ms. Taylor required physiotherapy for the remainder of her life.

[12] On this basis, the appellant submits that Ms. Taylor did not prove that she required physiotherapy for the rest of her life as a result of the accident, and a reasonable period of treatment "may be a further four years from the date of trial". He therefore seeks an 80% reduction of the award for physiotherapy.

[13] I would not accede to this ground of appeal. The evidence amply supports the trial judge's findings based on medical evidence that Ms. Taylor's right hip pain was

likely permanent, was caused by the accident, would not have occurred in any event, and required ongoing specialized physiotherapy that Ms. Taylor would utilize. The appellant's submissions seek to have this Court draw factual inferences the trial judge could have, but did not make, and that is not our role.

[14] The judge was aware that damages for the cost of future care "are assessed, not mathematically calculated" and that she could allow for contingencies to account for the possibility that the future may turn out differently than the evidence at trial indicates: see *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at para. 21, cited in the *Warick* trial decision at para. 207 (reproduced above). However, judges are not required to adjust for contingencies and whether they are appropriate and to what extent depends on the facts.

[15] Judges should be explicit in explaining what contingencies, if any, justify an adjustment. In this case, the judge did not expressly decline to make an adjustment, but it is evident from her reasons that she did not consider a reduction of this award to be necessary in the circumstances. Moreover, the risks asserted by the appellant are inconsistent with the judge's key findings, which focused on specialized physiotherapy designed to ameliorate Ms. Taylor's right hip pain, and in my view, the evidence was wholly inadequate to support the rather drastic reduction suggested by the appellant.

Massage therapy

[16] The trial judge accepted the opinion of Ms. Petra, with whom Ms. Taylor's family doctor and treating physiatrist concurred, that Ms. Taylor benefits from massage therapy. She found that massage helps with pain management, which in turn increases Ms. Taylor's energy and ability to engage in activities, thus increasing her quality of life: at paras. 69, 71. She found this to be a reasonable expense but was not satisfied that weekly massage, as recommended by Ms. Petra, was reasonable in light of the "burden of treatment" given the travel time required and potential down time after treatment. She considered massage therapy every

two weeks to be reasonable and appropriate and assessed the projected cost at $52,746.36, which was 50% of the amount calculated in the actuarial report.

[17] The appellant makes the same submission as above, contending that there was no medical opinion evidence that Ms. Taylor required massage therapy for the rest of her life as a result of the accident, and similar contingencies as discussed above should apply to this award. He seeks a similar reduction of 80%.

[18] Again, the appellant's argument fails to consider the trial judge's key factual findings, which in my view support the limited award she made for massage therapy. I see no basis to interfere with this award.

Housekeeping

[19] A claim for loss of housekeeping capacity is for the loss of the value of work which would have been done by the plaintiff but which she can no longer do because of her injuries. This differs from a claim for the cost of future care which is for the value of services that must now be provided to the plaintiff*: O'Connell v. Yung,* 2012 BCCA 57 at para. 65, citing Professor Cooper-Stephenson in *Personal Injury Damages in Canada*, 2nd ed. (Scarborough: Carswell, 1996) at 315.

[20] The trial judge awarded $40,000 for loss of housekeeping capacity. She found that housekeeping was "much more taxing" on Ms. Taylor since the accident as everyday tasks take longer and require more effort and it followed that "some housekeeping help" would ameliorate the impact of the injuries "by helping Ms. Taylor preserve her energy for things that she enjoys": at para. 80.

[21] The amount awarded was based on housekeeping assistance of six to ten hours per month to assist Ms. Taylor either with heavy work she could not do herself or work that consumes a lot of her energy.

[22] The appellant submits that the trial judge erred in making this award because the actual cause for Ms. Taylor's need for housekeeping was not her injuries but the fact that she and her husband separated in December 2019 and she no longer had

his assistance. He refers to evidence that Mr. Taylor did the heavier housekeeping tasks and Ms. Taylor resumed her regular household tasks and was functioning normally around the house about one year after the accident.

[23] I would not accede to this ground of appeal. There is ample evidence about Ms. Taylor's increased level of fatigue resulting from her injuries, which the trial judge accepted and which grounds her loss of housekeeping capacity. The award is not simply to provide help with the heavy work formerly done by Mr. Taylor but rather to provide some help to ameliorate the impact of Ms. Taylor's increased fatigue due to a loss of capacity.

[24] As this Court noted in *Kim v. Lin*, 2018 BCCA 77 at para. 34, an assessment of a loss of housekeeping capacity is fact-driven, and an award for this loss and any deduction to that award must be "tied to the actual loss of capacity which justifies the award in the first place". I see no error in the trial judge's award in this case, or in her conclusion that the $40,000 was both modest and appropriate.

Conclusion

[25] Overall, I consider the awards for physiotherapy, massage therapy and loss of housekeeping capacity to be reasonable. I would therefore, dismiss the appeal.

[26] **DICKSON J.A.**: I agree.

[27] **HORSMAN J.A.**: I agree.

[28] **DICKSON J.A.**: The appeal is dismissed.

"The Honourable Madam Justice Fisher"