COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Crimeni v. Chandra,*
2015 BCCA 131

Date: 20150420
Docket: CA041720

Between:

Darlene Crimeni

Respondent
(Plaintiff)

And

Daniel Subhas Chandra and Lauren Collier

Appellants
(Defendants)

Before: The Honourable Madam Justice Newbury
The Honourable Madam Justice Saunders
The Honourable Mr. Justice Willcock

On appeal from: An order of the Supreme Court of British Columbia,
dated March 19, 2014 (*J.D. v. Chandra*, 2014 BCSC 466,
Vancouver Dockets M094259 & M110495).

Counsel for the Appellants:	L.G. Harris, Q.C.
Counsel for the Respondent:	T.J. Delaney & P.G. Kent-Snowsell
Place and Date of Hearing:	Vancouver, British Columbia February 17, 2015
Place and Date of Judgment:	Vancouver, British Columbia April 20, 2015

Written Reasons by:
The Honourable Mr. Justice Willcock

Concurred in by:
The Honourable Madam Justice Newbury
The Honourable Madam Justice Saunders

Summary:

The appeal is from an award of damages for injuries sustained by the respondent for two motor vehicle accidents. The appellants contend the award for loss of future earning capacity is excessive on the basis the trial judge failed to consider negative contingencies in estimating the respondent's pre-injury earning capacity and failed to consider the positive contingencies and the expert evidence in assessing the respondent's degree of impairment. The appellants also submit there was insufficient evidence to justify an award for loss of housekeeping capacity. Held: appeal dismissed. The estimate of the respondent's pre-injury earning capacity was clearly founded on the evidence and contemplated non-participation, unemployment and part-time work. The judge did not misapprehend the evidence in assessing the respondent's impairment and it was open to her to conclude the respondent suffers from chronic pain and limited tolerance. There was an evidentiary foundation for an award for loss of housekeeping capacity.

Reasons for Judgment of the Honourable Mr. Justice Willcock:

[1] Daniel Chandra and Lauren Collier appeal from an award of damages in a personal injury claim, the reasons for which are indexed at 2014 BCSC 466. The plaintiff (respondent) was injured in two motor vehicle accidents: the first on February 18, 2006, when she was 17 years old; and the second on March 26, 2010, when she was in her fourth year of university. Liability for both was admitted and the damages were assessed cumulatively.

[2] The plaintiff injured her back, neck and right shoulder. She had surgery on her shoulder but was left with continuing symptoms. The trial judge held, at para. 114:

> [114] I accept the plaintiff's evidence that she continues to have pain in her back and right shoulder and sometimes her neck if she sits or stands for any extended length of time, and that she must continually shift and move around and stretch to try to limit the negative effects of sitting or standing. I find that this is likely to continue into the future. I find that, but for the accidents, she would not be suffering from this chronic pain.

[3] Those findings underlie the assessment of the damages for loss of future earning capacity. The trial judge accepted that the plaintiff was less capable of working in her planned legal career than she would have been had she not been injured and that she would not have the same work tolerance.

[4] The trial judge found the plaintiff to be highly competitive and academically capable but rejected arguments that the plaintiff might have been accepted as a candidate to study medicine. She found the claim made for loss of earning capacity related to that speculative prospect had not been proven, holding, at para. 159:

> [159] I conclude that there is not a real or substantial possibility that the plaintiff's injuries caused her to suffer a loss of future earning capacity by preventing her from qualifying for medical school.

[5] Similarly, she rejected the argument the plaintiff had suffered a loss of earning capacity as result of delay in completing her education. She held at para. 171:

> [171] In short, I am not persuaded that there is a real possibility that the plaintiff would have embarked on a post-university income-earning career earlier than she will do, but for the accidents.

[6] On the other hand, the judge accepted that chronic pain due to her injuries would adversely affect the plaintiff's income earning capacity. She made the following critical findings with respect to the claim for loss of income earning capacity:

> [175] I found the plaintiff to be entirely credible in describing how her pain affects her concentration and affects her sitting and standing tolerance.
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> [176] The medical evidence agreed that the injuries would not prevent the plaintiff from sedentary work but would require her to move around. It was not directed to the question of how chronic pain might affect someone who otherwise would plan on working very long hours in a sedentary job, often at a computer.
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> ...
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> [180] The plaintiff is a highly competitive person. I have no doubt that absent the injuries caused by the accident she would want to pursue a law career that would be highly demanding and competitive.
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> [181] For a lawyer at the top of her field the work hours are often intense. Lawyers in a competitive work environment can regularly be required to work in very long continuous stretches up to ten or 12 or more hours per day on end, often continuing into the weekends and evenings. These working hours often involving considerable stress, for example, as urgent legal research is needed, or documents need to be negotiated and drafted for the impending closing of a corporate transaction, or preparation for direct or cross-examination of witnesses is needed each night and weekend prior to and during a trial.

> [182] Physical stamina is an asset and the lack of good health a hindrance to a highly competitive legal career.
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> [183] As a matter of logical deduction and common sense of how the real world works, I find that the chronic pain suffered by the plaintiff and likely to continue to be suffered by her will not prevent her from a legal career, but there is a real and substantial possibility that it will make her less competitive in such a career path: that her pain will take a toll on her and make her less able to endure the long days, nights and weekends of intense concentration that is often required of a lawyer.
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> [184] There is a real and substantial possibility that the plaintiff's chronic pain and limited tolerances for extended periods of work even in sedentary positions will lead her to hold back from extra activities or taking on work that might advance her legal career, as she will not have the energy to do what other young lawyers could do, because of her pain. There is a real and substantial possibility that this reticence would lead to her being overlooked by her superiors for work assignments or business development activities, and would inhibit her ability to advance as quickly or to the same salary level as her peers.
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> [185] I conclude therefore that the plaintiff has suffered a loss of future earning capacity in her future career as a lawyer.

[7] The trial judge then engaged in what she acknowledged was a difficult task: assessing the impairment of the plaintiff's income earning capacity. She used as a baseline for that assessment an estimate of the discounted net present value of the stream of lifetime earnings of women with law degrees entering the workforce in 2015, provided by the expert witness, Mr. Carson: $1,864,800. She considered that amount to be a conservative estimate of the net present value of the plaintiff's pre-accident earning potential for two reasons: first, because it is derived from an average of incomes of women holding law degrees in all fields and all locations in British Columbia and, second, because that is an average of the income of females only.

[8] The trial judge found that the plaintiff's limited capacity to work and the fact she might need to take time off work as a result of her injuries would reduce her income earning capacity by 20%. She then applied this percentage to the conservative baseline valuation of the pre-injury stream of earnings, amounting to a loss of income earning capacity of $372,960.

[9] The trial judge found that working diligently to maximize her post-injury earning capacity would have an effect on the plaintiff's residual capacity to perform

housekeeping tasks. She was satisfied, in part by the evidence of Ms. Kassam, an occupational therapist, that the plaintiff was no longer capable of regularly performing some rigorous, regular household tasks, such as those requiring extended bending, reaching or scrubbing. On that basis, the trial judge awarded $15,000 to the plaintiff for loss of housekeeping capacity.

Grounds of Appeal

[10] The appellants acknowledge that the damage award should not be varied on appeal simply because this Court might come to a conclusion different from that of the trial judge. The appellants acknowledge they bear the onus of establishing that the judge applied a wrong principle of law or the award was so inordinately high that it amounts to a wholly erroneous estimate of damages.

[11] The appellants say the award for loss of future earning capacity was excessive and wholly erroneous.

[12] The appellants further say there was insufficient evidence to justify an award of $15,000 for loss of housekeeping capacity.

Analysis

[13] In my view, there is no merit in the appeal. The award for loss of future earning capacity cannot be said to have been a wholly erroneous assessment of the quantum of damages under this head. There was an evidentiary foundation for an award for loss of housekeeping capacity.

[14] As Saunders J.A. for the Court noted in *Campbell v. Banman*, 2009 BCCA 484, where challenges similar to those advanced by the appellants in this appeal were advanced:

> [9] The determination of damages is a finding of fact and thus the appeal is, fundamentally, an appeal on a question of fact. ...[S]pecific challenges are made to the conclusions drawn by the trial judge on the capacity of Ms. Campbell to perform certain housekeeping functions, the value of the diminishment of that capacity as found by the trial judge, the weight accorded certain evidence adduced by Ms. Campbell, and the treatment by the trial judge of evidence Ms. Campbell suffered from the ailments and was in a stressful employment situation.

> [10] All of these challenges must be viewed in the context of this Court's role. Our task is not to retry the case. As has been repeatedly stated, this Court, for good reason, must accord the trial judge a high degree of deference in factual matters, both in the findings of fact and the inferences to be drawn from them. I need only refer to *Housen v. Nikolaisen* [2002] 2 S.C.R. 235, 2002 SCC 33 in support of that proposition. Absent an error in principle, a finding of fact based upon a body of evidence will sustain appellate scrutiny.

The award for loss of earning capacity

[15] An award for loss of income earning capacity is intended to put the plaintiff in the position she would have occupied had she not been injured. It must be founded upon a real and substantial loss and must be measured by seeking to approximate the actual economic loss the plaintiff has suffered. The quantum of damages under this head has not been set or limited by convention, such as the non-economic heads of damages discussed by Dickson J. in *Thornton v. School District No. 57 (Prince George) et al.*, [1978] 2 S.C.R. 267, at 284.

[16] Whether the award is a wholly erroneous assessment of the claim cannot be addressed by asking whether it is simply "too large". Such an award cannot be said to be excessive in the absence of a misapprehension of evidence or an error in principle. An award for the loss of the capacity to earn income can only be said to be "wholly erroneous" if it cannot have been arrived at on any reasonable view of the evidence, such as might be the case where there has been an error in the estimation of the pre-injury stream of earnings or the effect of the injury on earning capacity.

[17] The appellants argue the award is excessive because it amounts to an award of $14,000 per annum for every year of the plaintiff's work life to age 65. That is not an argument that the award is excessive or founded upon an error in principle. A moderate limitation in a lucrative occupation may lead to substantial award.

[18] The estimate of the plaintiff's pre-injury earning capacity was clearly founded on the evidence. The appellants argue the number used for the baseline assessment of pre-accident earning capacity is too high, because the data includes law professors and business persons and might not accurately reflect the income of lawyers alone. That argument might have been made out if Mr. Carson on cross-

examination gave evidence supportive of the defendant's position, but he did not. The argument now is entirely speculative.

[19] Similarly, the appellants say the income figures used for the baseline calculation ought not to have been grossed up to account for benefits. Again, that is an argument that might have been made if cross-examination on the point had been fruitful on this issue. In my view, the trial judge was entitled to treat the evidence as an unchallenged description of comparable average incomes.

[20] The appellants say the trial judge failed to give appropriate weight to negative contingencies, other than the standard negative contingencies that were taken into account by the expert, Mr. Carson. In considering this argument, it should be borne in mind that the baseline estimate of the present value of the plaintiff's potential stream of earnings had been adjusted downward by Mr. Carson to account for negative contingencies, including the average statistical probability of non-participation in the labour force, unemployment and engaging in only part-time work. These contingencies reduced the present value of the estimate of earnings by approximately 15%.

[21] The appellants did not adduce evidence of other significant negative contingencies not accounted for by the economist. The appellants now argue the plaintiff might have changed her mind about her career plans and might not have sought employment as a corporate lawyer in downtown Vancouver (as she testified), or may not be hired as a salaried associate. However the trial judge's assessment of the plaintiff's loss of future earning capacity is not based upon that career path. It is, rather, founded upon an estimate of the loss of 20% of the value of the average earning capacity of all women with law degrees entering the work force.

[22] The appellants are critical of the trial judge's view that the use of female income statistics resulted in a conservative award, because such statistics reflect "historical discrimination". The appellants submit at para. 89 of their factum:

> Unfortunately there is no evidence, in this case or any other, that the gaps between male and female lawyers' incomes are decreasing.

[23] Experts are frequently asked to estimate the income losses by using gender-specific historical income figures. Such figures may be useful where they can fairly be said to be the most accurate predictor of the lost stream of earnings. However, there is authority for the proposition that the use of female earning statistics may incorporate gender bias into the assessment of damages. There is also authority for taking judicial notice of convergence in gender incomes: *Steinebach v. O'Brien*, 2011 BCCA 302.

[24] It is certainly not an error, in my view, for a trial judge to recognize that the use of historical data can reflect such bias and, to the extent the circumstances giving rise to the bias may be expected to diminish, to view the evidence as conservative.

[25] I can see no error in the judge's consideration of the plaintiff's pre-injury earning potential.

[26] Neither, in my view, does there appear to be an error in the estimation of the impairment resulting from the injury. The appellants argue the trial judge's conclusion on impairment is consistent with permanent pain and suffering, and enduring, prolonged financial loss arising out of such a permanent condition. The consensus of the expert evidence at trial, the appellants submit, does not justify such a conclusion. The appellants argue such a conclusion must be sustained on expert opinion evidence and not the subjective concerns of the plaintiff.

[27] I can see no misapprehension of the evidence that would undermine the trial judge's conclusion that the plaintiff suffers from chronic pain and limited tolerance for extended periods of work. There is no misapprehension of the evidence or error in principle at the root of the trial judge's conclusion that, as a result of such pain, advancement in her career might be slowed, opportunities foreclosed to her and income lost.

[28] The medical evidence was consistent with the plaintiff's own evidence that she continued to suffer from significant pain and limitations.

[29] Dr. Regan, an orthopedic surgeon who saw the plaintiff on September 2, 2011, almost 2 ½ years before the trial, concluded that the plaintiff's back symptoms would probably "settle" with time, but also concluded:

> [T]here is an element of pain that is chronic in nature and may be recalcitrant to any conventional treatment algorithms and as a result, she may be left with an element of chronic pain affecting her spine. I place the percentage of this at 15% given that she still experiences pain at almost five years following her initial index accident of 5 ½ years after her February 19, 2006 accident.

[30] He also thought the right shoulder pain would settle with ongoing stretching and strengthening and that surgery would not be required. In the event the shoulder pain did not resolve, Dr. Regan thought it would limit her ability to do physically demanding jobs and household activities requiring the use of the right upper extremity. He concluded: "There is a possibility that there will be a permanent restriction in her ability to do these activities due to her right shoulder pain."

[31] An occupational therapist, Ms. Kassam, saw the plaintiff in March 2012. At that time she observed:

> In terms of the future Ms. Crimeni is currently in the process of applying to law school at various schools in Canada, while still working part time,... Based on the assessment findings, she will likely have difficulties with the sustained sitting related to being in school full time and related to her study demands outside of school. It is recommended that she alternate between sitting and standing when she is able. ...
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> Based on Dr. Hirsch's and Dr. Regan's reports, I make the assumption that Ms. Crimeni's spinal symptoms will settle, although she will likely have chronic pain. With respect to her right shoulder, I make the assumption that her prognosis is guarded and that she may require right shoulder surgery in the future. I assume that if she does need shoulder surgery, she will experience a reduction in her abilities prior to undergoing right shoulder surgery.
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> [Emphasis added.]

[32] Dr. Gilbart, an orthopedic surgeon in a November 12, 2013 report, written after the plaintiff had undergone shoulder surgery, described the disability and prognosis as follows:

> Ms. Crimeni developed right shoulder pain following the March 26, 2010 motor vehicle accident. She has noticed approximately a 50% improvement in her right shoulder pain following the right shoulder surgery on July 17, 2012. It is unlikely that she will notice a significant further improvement in her

> symptoms of pain. It is probable that her SLAP tear and subacromial bursitis was accounting for some of her pain, but she continues to have some ongoing soft tissue right shoulder pain.
>
> The prognosis for further significant clinical improvement is guarded. Ms. Crimeni is at an increased risk of ongoing pain in the future.
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> [Emphasis added.]

[33] With respect to employment prospects, he noted:

> Ms. Crimeni continues to experience pain when sitting for prolonged periods, especially at a computer. She will probably have difficulty with physical work in the future, due to her subjective right shoulder pain... It is probable that Ms. Crimeni will be able to work as a lawyer in the future. She will probably have to take frequent breaks.
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> [Emphasis added.]

[34] The evidence before the trial judge included reports written by medical experts over a seven year period, from November 17, 2006 to November 12, 2013. The last report was Dr. Gilbart's cited above, expressing the view that some of the plaintiff's pain would be chronic.

[35] The trial judge considered the reports and weighed them in light of the plaintiff's own evidence of her pain and limitations, which the trial judge found to be "entirely credible". The medical evidence was not inconsistent with the plaintiff's complaints:

> [174] The evidence is uncontradicted that the plaintiff still suffers from chronic pain due to her injuries. The likelihood is that this will continue.
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> [175] I found the plaintiff to be entirely credible in describing how her pain affects her concentration and affects her sitting and standing tolerance.
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> [176] The medical evidence agreed that the injuries would not prevent the plaintiff from sedentary work but would require her to move around. It was not directed to the question of how chronic pain might affect someone who otherwise would plan on working very long hours in a sedentary job, often at a computer.
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> [177] The defendants argue that the plaintiff's chronic pain will not cause her to suffer a loss of future income as a lawyer, because she will be able to guard against her injuries affecting her work by purchasing proper equipment and taking breaks to move around regularly.
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> [178] The defendant argues that the evidence goes no further than establishing that the plaintiff believes she is less valuable as an employer [*sic*], which is not sufficient evidence. I disagree and find that the evidence goes well beyond a mere perception by the plaintiff.

[36] The appellants' summary of the expert opinion in this case does not give appropriate weight to the fact the experts initially recognized there was a risk the plaintiff's pain would become chronic and later concluded she would probably have ongoing pain. In my view, the expert evidence coupled with the plaintiff's own testimony, accepted without reservation by the trial judge, was sufficient support for the finding that chronic pain will limit the plaintiff's capacity to work.

[37] The appellants argue that the judge erred in holding that medical experts must defer to their patients with respect to questions involving tolerance for work. In my view, there was no misapprehension on the part of the trial judge with respect to evidence of the plaintiff's work tolerance. The reasons make clear that the judge simply observed that the expert's description of tolerance was drawn from the plaintiff's own subjective descriptions of pain and limitations to her tolerance. The reasons do not reflect an error in principle in the approach to this question.

[38] The appellants also argue the trial judge failed to take into account the positive contingencies of the plaintiff in assessing the degree of impairment. They argue that, having found the plaintiff to be resilient and competitive, the trial judge erred because "there is no attempt by the trial judge to integrate ... the respondent's character traits into her award of damages or to explain how, notwithstanding these positive traits, the respondent will still suffer significant loss". The appellants point to evidence of the plaintiff's positive academic functioning, many social and leisure activities, and apparently strong intellectual functioning in support of the argument the award is inconsistent with the plaintiff's residual skills, resources and energy, which the trial judge accepted. These findings of fact, the appellants argue, are inconsistent with a greatly impaired ability to work in the future.

[39] There is no merit in that argument. The trial judge weighed the plaintiff's character traits as positive contingencies, as she was required to do. She was clearly aware of all of the plaintiff's remaining aptitudes and skills. The plaintiff's intellectual resources, her academic performance, her character, determination and energy were evidently considered by the trial judge and caused her to conclude the plaintiff would be successful in finding employment as a lawyer, would not be

delayed in her entry into the workforce and, over the course of her career, would earn 80% of the amount earned, on average, by women entering the occupation at the same time. Recognition of those positive character traits caused the trial judge to reject the plaintiff's argument that she had suffered a loss of 40% of her earning capacity.

[40] Finally, the appellants say the judge erred in *calculating* rather than *assessing* the loss of earning capacity. They say the judge erroneously used the numbers generated by the economist not only as the starting point but as the ending point of her analysis. Referring to *Jurczak v. Mauro*, 2013 BCCA 507, and *Rosvold v. Dunlop*, 2001 BCCA 1, the appellants say quantifying a loss may be aided by some mathematical calculation, but projections are only one factor to consider. Some weight is lent to this submission by the unusually precise assessment of damages under this head: $372,960. In my view, such a precise number lends an inappropriate air of accuracy to the assessment and does suggest the award has been calculated. It would be preferable to express the award under this head in terms that do not suggest such accuracy. However, it is clear from the reasons for judgment that the award is based on consideration of all the contingencies and, because it is founded upon 20% of the economist's figure, which can only be a rough estimate of an immeasurable loss, that it is an assessment, rather than a calculation.

The award for loss of housekeeping capacity

[41] The appellants' complaint with respect to the award for loss of housekeeping capacity appears to be founded on two footings:

a) The plaintiff does not require much help; and

b) In any event, she would have relied upon some help as a busy lawyer.

[42] There was some conflict between the experts with respect to the extent to which the plaintiff might require assistance but there is no doubt that there was evidence upon which the trial judge could rely in concluding that the plaintiff would continue to require assistance for household chores in the future. The trial judge

found that if the plaintiff exerted the effort necessary to persist in her endeavours as a lawyer it would be difficult for her to also regularly perform the rigorous household tasks that she might have taken care of had she not suffered the restriction described by the physicians. She also found the plaintiff's pain limits and tolerances meant that she was no long capable of performing household tasks requiring extended bending, reaching or scrubbing. A modest award was clearly justified. Here, as this Court noted in *Campbell* at para. 20, "on the judge's findings of fact, with which in my respectful view we may not interfere, there is a basis for the award that was made".

[43] The crux of the appellants' submission on this point is that there is no evidence to support such an award. The appellants argue that the trial judge found the plaintiff would not be able to "pace herself", not that she was incapable of performing housekeeping tasks, and therefore it was an error to award her for loss of housekeeping ability. That is not the trial judge's finding. She addressed the opinion of Dr. Hirsch that the plaintiff would be able to perform the tasks if she could "pace herself". She then, in response to that opinion, concluded the plaintiff would not be able to do so. She accepted the evidence of Ms. Kassam and the plaintiff with respect to the plaintiff's pain limits and tolerances, concluding that the plaintiff would not be able to regularly perform some of the more rigorous household tasks. There was also evidence in Dr. Gilbart's November 12, 2013 report that the plaintiff will "probably continue to require assistance for heavier household chores in the future".

[44] It is not necessary, in my view, for the trial judge to identify which of the many specific expenses claimed support the lump sum award made. The cost of future care report of Ms. Kassam identified a range of heavy seasonal housekeeping tasks, any of which might have substantiated the award made by the trial judge.

[45] The appellants also argue such a loss should be compensated under the heading of non-pecuniary general damages. While it is correct to say that a minor adjustment of duties within a family may be compensated by award of non-pecuniary damages, it is not inappropriate to identify discrete losses. In *Campbell* and *McTavish v. MacGillivray*, 2000 BCCA 164, this Court reiterated the views

expressed in *Kroeker v. Jansen* (1995), 123 D.L.R. (4th) 652, 4 B.C.L.R. (3d) 178 (C.A.), that compensation for loss of housekeeping capacity may be by pecuniary or non-pecuniary damages, and if non-pecuniary, there was no reason these damages could not be segregated. The non-pecuniary award for pain and suffering and loss of the amenities of life made by the trial judge does not take into account the loss of the plaintiff's ability to perform housekeeping tasks. The appellants' reference to cases where that was done is not particularly helpful. There was evidence upon which the award could be justified; the award could properly be segregated from the general damages award.

[46] For those reasons I would dismiss the appeal.

"The Honourable Mr. Justice Willcock"

I agree:

"The Honourable Madam Justice Newbury"

I agree:

"The Honourable Madam Justice Saunders"