

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Villing v. Husseni*,
2016 BCCA 422

Date: 20161031
Docket: CA42921

Between:

Jasmine Villing

Respondent
(Plaintiff)

And

Jennifer Subnam Husseni

Appellant
(Defendant)

Before: The Honourable Madam Justice Saunders
The Honourable Madam Justice Bennett
The Honourable Mr. Justice Savage

On appeal from: An order of the Supreme Court of British Columbia,
dated June 9, 2015 (*Villing v. Husseni*, 2015 BCSC 1604,
New Westminster Registry M139347).

Counsel for the Appellant: M.-H. Wright

Counsel for the Respondent: T.J. Delaney

Place and Date of Hearing: Vancouver, British Columbia
September 7, 2016

Place and Date of Judgment: Vancouver, British Columbia
October 31, 2016

Written Reasons by:
The Honourable Mr. Justice Savage

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

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**COURT OF APPEAL
REGISTRY**

Summary:

The appellant disputes the assessment of damages for loss of future income earning capacity and non-pecuniary loss. She argues that the trial judge misconstrued the evidence as to the respondent's prognosis for recovery and the effect of the respondent's injuries on her income and function. Held: appeal dismissed. The awards were generous but not outside the range of what was appropriate, given the evidence at trial.

Reasons for Judgment of the Honourable Mr. Justice Savage:

[1] This appeal concerns the assessment of damages for personal injury arising from two motor vehicle accidents. The case appealed from is indexed as *Villing v. Husseni*, 2015 BCSC 1604. The appeal focuses on: (1) the assessment of damages for loss of future income earning capacity, and (2) the assessment of damages for non-pecuniary loss. The appellant argues that the awards of damages under these heads are inordinately high.

Background

[2] Jasmine Villing was a 17-year-old grade 12 student at the time she was injured in a motor vehicle accident on 2 January 2010. Jennifer Husseni admitted liability for the accident. By the time the matter came to trial some five years had passed and Ms. Villing was 23 years old.

[3] Ms. Villing's main and continuing injury is low back pain, although she also suffered neck and shoulder pain. The neck and shoulder pain subsided with physiotherapy treatment administered from January to March 2010. Ms. Villing was further injured in an accident in October 2010, but this only resulted in a temporary aggravation of her symptoms.

[4] The trial judge found that Ms. Villing is "bothered daily by lower back pain that comes on during periods of prolonged sitting or standing and that interrupts her sleep every night". The trial judge found her to be a credible witness and accepted her evidence that she has had to endure back pain on a daily and nightly basis.

[5] Ms. Villing tried various treatments. In addition to physiotherapy she underwent structured exercise rehabilitation and chiropractic treatments. She has taken anti-inflammatory medication. She has been followed and treated by a physiatrist, Dr. Hershler.

[6] Prior to the accident, Ms. Villing had been an enthusiastic participant in a competitive bhangra dance team. She would practice a couple of times a week and during competitions would practice daily. She gave up competitive dancing as a result of her injuries and gained about 50 pounds.

[7] At the time of the accident, while attending high school, Ms. Villing had a part-time job working 5-10 hours a week as a clerk at a retail clothing store. She stopped working at that job due to her injuries. She completed high school in June 2010. From 2010 to 2013 she worked at a variety of different part-time jobs. In 2011, she enrolled in courses at Douglas College and then in 2012 she commenced a Bachelor of Legal Studies paralegal program at Capilano University.

[8] In 2014, Ms. Villing worked part-time as a legal assistant and paralegal for about three months. She experienced some difficulty with this work because of her injuries. Although Ms. Villing has aspirations to take the LSAT and apply to law school, her immediate goal was to obtain a legal assistant or paralegal position. One week before trial she began working full time, albeit at an administrative support position in a legal firm.

Diagnosis and Prognosis

[9] Both parties commissioned expert reports on the nature of Ms. Villing's injuries. Dr. Pankaj Dhawan, a physiatrist, testified at trial for Ms. Villing. Dr. Robin Rickards, an orthopaedic surgeon, testified for the defendant, Ms. Husseni. Both experts diagnosed lumbar facet syndrome. A patient with lumbar facet syndrome will often have pain triggered by rotation, lateral flexion, and extension of the involved spinal segment. Ms. Villing experiences this type of chronic back pain.

[10] Dr. Rickards recommended that she try medial branch blocks and radio frequency facet rhizotomy. Medial branch blocks inject local anesthetic to temporarily freeze the nerve affecting the involved facet. A rhizotomy involves the insertion of needle-like electrodes into the bases of the nerves of the involved facet, and the application of heat to destroy the subject nerves. The rhizotomy would be performed if the medial branch blocks were successful. These procedures would be performed under a local anesthetic in an outpatient department. These procedures carry a high expectation of success, although success does not entail total and continuing relief.

[11] A medial branch block requires no time off work. A rhizotomy can be more uncomfortable and may result in increased back pain for 7-10 days. Time off work or work modification may be required. In most cases, significant relief is experienced four to six weeks following treatment and the patient is expected to then return to full work duties and activities.

[12] The trial judge awarded \$14,800 for the cost of future care, which allowed for a medial branch block and two rhizotomy procedures. This would allow Ms. Villing to have these procedures performed at a private clinic, avoiding the long waiting periods incumbent in access to the public medical system.

First Ground of Appeal: Loss of Future Earning Capacity

The Trial Decision

[13] At the time of trial, Ms. Villing was working in a law firm in an administrative support position. She earned a salary of \$36,000 per annum. There was evidence before the Court that in 2010/2011 paralegals in British Columbia earned an average of \$59,622 per annum for full-time employment with the median wages and salaries being \$54,645 per annum.

[14] The doctors agreed and the trial judge found that Ms. Villing may require multiple rhizotomy treatments over her lifetime. These treatments are not a cure, as the nerves causing the pain grow back. The treatment provides a “window of opportunity” where a patient can undergo rehabilitation and undertake more rigorous

exercise and improve conditioning: “[w]eight loss, core strengthening and postural education could then be expected to lessen the back pain and break the cycle of spasm and fatigue, possibly obviating the need for further rhizotomies.”

[15] With each rhizotomy procedure there is an initial period of time where the pain actually worsens before it improves. The trial judge found that this temporary worsening may limit the plaintiff from working for a period of 4-6 weeks each time the procedure is performed. The trial judge also accepted Dr. Dhawan’s evidence that there is some possibility that Ms. Villing will need extended maternity leave in the event she raises a family.

[16] The trial judge went on to assess and quantify the loss of income attendant to those findings, taking account of probability and negative contingencies. The trial judge awarded \$100,000 for loss of future earning capacity. He said:

[42] If the plaintiff undergoes suitable rehabilitation following rhizotomies, educates herself as to the need to manage her back and becoming accepting of her condition and the need to seek and accept accommodations, it may reasonably be expected – with suitable accommodations being made – that she will be able to undertake the responsibilities of paralegal. Dr. Dhawan’s opinion supports this conclusion. But that does not mean that there will be no loss of capacity. I find there is a real and substantial possibility that plaintiff will not have the capacity to assume some employment positions or some employment responsibilities due to chronic back pain – for example, positions where there might be an expectation of long overtime hours being put in to be responsive to the needs of her employer’s clients. That risk, while still relatively small, is real and substantial, and is therefore compensable.

[43] There are further compensable losses in respect of the likely need to be absent from work for extended periods to recover from procedures. I cannot on the evidence make an assessment premised on the assumption that the plaintiff will likely undergo rhizotomies every year or every other year for the rest of her life, or even that there is a substantial possibility of a loss of the magnitude that would entail. The plaintiff’s young age and health, the absence of any underlying degenerative arthritis and her strong motivation to overcome her back pain all point to the likelihood of the back pain becoming manageable with the intervention of a few rhizotomy treatments coupled with education and rehabilitation. There is a possibility of more extended treatments being necessary, but it is one to which negative contingencies attach. I approach the quantification of the plaintiff’s loss on the basis that there is a near-certainty of a future loss of income, as she recovers from these treatments, in the range of \$5,000 to \$10,000, in the near-term; a very high probability of further treatments resulting in cumulative losses totalling in the range of a further \$35,000 to \$50,000; and lower probabilities of further losses entailed by further treatments.

[44] There is also some possibility of a need for extended maternity leave in the event that the plaintiff does become pregnant in the future.

[45] The alleged loss of an opportunity to teach bhangra is, in my view, entirely hypothetical, and I make no allowance for such loss.

[46] Bearing in mind that capacity claims are matters of assessment, not calculation, and that such awards must on the evidence be fair to both parties, and taking into account all of these hypothetical outcomes, I assess the present value of the plaintiff's loss under this head at \$100,000.

Legal Principles Governing an Award for Loss of Earning Capacity

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

[18] Using the capital asset approach does not mean the assessment is unstructured. I agree with Garson J.A.'s observations in *Morgan v. Galbraith*, 2013 BCCA 305:

[56] If the assessment is still to be based on the capital asset approach the judge must consider the four questions in *Brown* in the context of the facts of this case and make findings of fact as to the nature and extent of the plaintiff's loss of capacity and how that loss may impact the plaintiff's ability to earn income. Adopting the capital asset approach does not mean that the assessment is entirely at large without the necessity to explain the factual basis of the award: *Morris v. Rose Estate* (1996), 23 B.C.L.R. (3d) 256 at para. 24, 75 B.C.A.C. 263; *Mulholland (Guardian ad litem of) v. Riley Estate* (1995), 12 B.C.L.R. (3d) 248 at para. 43, 63 B.C.A.C. 145.

[Emphasis added.]

[19] In every case where the capital asset approach is adopted, the four questions in *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 at para. 8 (S.C.), form the basis of the assessment. The questions are whether:

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

- (2) The plaintiff is less marketable or attractive as an employee to potential employers;
- (3) The plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to him, had he not been injured; and
- (4) The plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market.

[20] The considerations in *Brown* are not intended to be exhaustive: *Sinnott v. Boggs*, 2007 BCCA 267 at para. 9, per Mackenzie J.A.

Discussion

[21] In this case the trial judge treated as probabilities, correctly in my view, that one medial block and two rhizotomies would be performed. Indeed, that was allowed for in the cost of future care and the appellant takes no issue with that analysis. The evidence also supported the proposition that, with pregnancy, an extended maternity leave or earlier time off work in the later stages of pregnancy may be required.

Time off work attendant to rhizotomies

[22] One question that arises in this appeal is whether, on the evidence, a period of 4-6 weeks off work would probably follow a rhizotomy. The appellant argues that on a fair reading of the expert reports, only 7-10 days off work is probable. Thus she argues the trial judge made a palpable and overriding error in finding that 4-6 weeks off work would be required following a rhizotomy.

[23] Dr. Rickards' report says:

4. MBBs require no time off work other than for the few hours needed for the appointment. RFs can be more uncomfortable and may result in increased back pain for 7-10 days, in which case time off work or work modification may be required. In most circumstances significant pain relief is experienced at the 4-6 week mark following the RF procedure with expected return to full work duties and activities.

[Emphasis added.]

[24] The matter was addressed in his cross-examination thus:

Q You say that:

If a rhizotomy is performed it will result in increased back pain for seven to ten days, in which case spinal [indiscernible] modification may be applied. In most circumstances significant pain relief is experienced at the four to six week level.

So, to achieve 70 percent or more of pain relief it may take four to six weeks; correct?

A Correct.

Q And that's what the measure of the successful treatment is, if 70 percent or more of pain relief is achieved, it means the procedure was successful; correct?

A You would prefer to see at least one to two years' pain relief, if not more.

THE COURT: You would prefer to see ...

THE WITNESS: At least one to two years or more longer pain relief. The first six-week mark is where you would hope that the patient has gotten better -- it generally gets back after that even, but generally I'm telling patients four to six weeks, don't expect to be doing very much.

MR. GAUTAM:

Q So after a rhizotomy treatment the patient could be in pain for another period of four to -- maybe six to eight weeks?

A Yes. Yes, that's right.

Q And that will require time off work, I take it?

A Probably.

THE COURT: Probably yes?

THE WITNESS: Probably yes.

[Emphasis added.]

[25] Based on this evidence, I am unable to conclude that the trial judge made a palpable and overriding error concerning the amount of time that would be required to be taken off work following a rhizotomy procedure.

Number of rhizotomies

[26] The trial judge also had to consider whether more than two rhizotomies would be necessary. I do not agree with the appellant's position that the medical reports rule out that possibility. The trial judge said there was "a very high probability of further treatments resulting in cumulative losses totalling in the range of a further

\$35,000 to \$50,000." While the medical reports do not address this finding, there was cross-examination going to the issue.

[27] Dr. Rickards' report says that with a young individual with no pre-existing arthritic change these procedures allow "a full, rapid and complete recovery with return to pre-injury level of activity". However, Dr. Rickards' evidence in cross-examination substantially qualifies that statement. A "complete recovery" may be pain relief of only 70%. The period of "complete recovery" may be from 6 to 46 months:

MR. GAUTAM:

Q So you'll agree with me that MBBs may not work on this plaintiff. That's a possibility; correct?

A That is always a possibility, correct.

Q And if the MBBs do work, and she does get some pain relief -- and you have already agreed that to be a successful MBB a pain relief of 70 percent or higher --

A Correct.

Q It's possible that the pain relief may not be 100 percent; correct?

A Correct.

Q But if pain relief of 70 percent or higher is received, she will definitely be a candidate for a rhizotomy; correct?

A Correct.

Q And after that rhizotomy you'll agree with me that the pain relief would still not be 100 percent; it would still be 70 percent or more; correct?

A That could be, yes.

Q And the pre-treatment, or pre-procedure pain, may return, you say by latest 46 months; correct?

A Correct.

Q And as early as six months; correct?

A Correct.

Q If it returns under six months there is no point in doing another rhizotomy because it will be considered a fail; correct?

A Probably that's correct.

Q But if it's anywhere between six to the 46-month mark, then the patient could be a candidate for further rhizotomy; correct?

A Correct.

- Q After the 46-month mark, the pain returns and the patient does not undergo a further rhizotomy, the options that the patient has to manage that pain will be through stretching and rehabilitation exercises; correct?
- A Correct.
- Q And strengthening of the core and the muscles surrounding in the low back; correct?
- A That's correct.
- Q And that can [indiscernible] for several years to come; correct?
- A Yes. A lifestyle change, yes.
- Q So it would change [indiscernible]. And if rhizotomy does work and has to be repeated, how many times -- is there a limit to how many times you can have rhizotomy?
- A That is a good question and the answer to that I think is unknown. And generally when these rhizotomies are repeated and done on a repetitive basis, it's an older patient, and there is no limit. They have been done three, four, five, six times, on a yearly basis, for instance.
- Q It can happen on a yearly basis too?
- A Sure.
- Q If it's working; correct?
- A Yes.
- Q And the time off work after each rhizotomy will remain the same as the first one; right?
- A Probably.
- [Emphasis added.]

[28] The import of this and other evidence from Dr. Rickards is that, with a patient who responds well to medial branch blocks, a rhizotomy procedure is recommended. If the patient does not respond well to medial branch blocks a rhizotomy procedure would not be undertaken and the patient is left with pain. If a rhizotomy is performed it is considered a success if it provides pain relief of 70% or more for six months or more. A successful rhizotomy procedure together with a rehabilitation program can provide relief for as long as 46 months:

- Q So you'll agree with me that the rhizotomy itself is not a cure for the issue, but it's basically allowing the patient to become pain free for a duration of time to rehabilitate the muscles herself or himself; correct?
- A That's correct.
- Q And rehabilitation varies from patient to patient; correct?

- A Correct.
- Q And it basically depends on the overall conditioning of the particular patient as to how receptive they will be to rehabilitation; correct?
- A Age, general condition, motivation.
- Q And rhizotomy is not a permanent pain relief because the nerves that you kill do grow back again; right?
- A They do grow back.

[29] Even a successful rhizotomy procedure will generally not provide permanent pain relief, and the length of pain-free or pain-reduced time is patient specific.

Dr. Dhawan testified:

- Q So how much time does it take for the nerve to re -- grow back again?
- A The clinical experience suggests that about 10 to 12 months. So 11 months is very common number. So approximately a year. The sensory nerves do tend to grow back and re-ennervate the joint and the symptoms may come back. And that's our experience. Sometimes that's requiring repeated rhizotomies. Probably on a yearly basis.

[30] In my opinion, the trial judge made no palpable and overriding error in allowing for further rhizotomies beyond two based on this and other evidence.

Loss of future earning capacity

[31] The appellant asserts that the trial judge made factual errors when he concluded as follows:

[42] With all due respect to the submissions of the plaintiff's counsel I do not find that the evidence supports a future earning capacity claim anywhere close to that contended for. If the plaintiff undergoes suitable rehabilitation following rhizotomies, educates herself as to the need to manage her back and becoming accepting of her condition and the need to seek and accept accommodations, it may reasonably be expected – with suitable accommodations being made – that she will be able to undertake the responsibilities of paralegal. Dr. Dhawan's opinion supports this conclusion. But that does not mean that there will be no loss of capacity. I find there is a real and substantial possibility that plaintiff will not have the capacity to assume some employment positions or some employment responsibilities due to chronic back pain – for example, positions where there might be an expectation of long overtime hours being put in to be responsive to the needs of her employer's clients. That risk, while still relatively small, is real and substantial, and is therefore compensable.

[Emphasis added.]

[32] The trial judge found the respondent credible and accepted her evidence. He said she was "honest and forthright in her testimony." The trial judge found that she is "bothered daily by lower back pain that comes on during periods of prolonged sitting or standing and that interrupts her sleep every night." There was evidence that her back pain affected her endurance at work and at school. Ms. Villing, for example, references the following evidence:

Q Have you applied for a paralegal positions?

A I did work as a legal assistant at Gautam & Associates, at your firm, but I had to quit my job 'cause I was not able to sit through and I wasn't able to stay seated and finish my assignments. And that, obviously, affects my productivity. And I understand the sensitivity of when documents have deadlines and when things need to be done. So it affected my ability to do that.

THE COURT: Sorry, the job you were doing was reviewing document production.

A As a legal assistant -- it was a hybrid between legal assistant and paralegal. So I could do lists of documents and court files, most civil claim response and typing up -- you know, just pretty much litigation document work. So that was what hard to do sitting down.

THE COURT: And the difficulty you had was in sitting still for lengthy periods of time.

A Yes.

MR. GAUTAM:

Q Could you not have just stood up and moved around and then come back and resume?

A Yeah, that's what I did do for that. That would, obviously, distract other employees or often employees would look at me and wonder, and students even in my class have wondered why I leave class so often or why I have to go for a walk or why I'm stretching. And Anit Mahal is now my friend, but she also thought I had ADD, and I couldn't sit down because I was restless because of my injury. And I don't speak too much about it, but I do -- I don't want to be looked at as disabled or injured, but it does affect my ability in the sense that ... [indiscernible -- voice trailing off].

Q So do you think today that you could work as a paralegal in the legal setting?

A I feel like I have the education to do it, but I don't feel like I have the physical ability to actually do the work, unless I had my own freedom as -- in the position I have now I have that ability to move around and sit down and stand up and stretch and it doesn't affect anybody. But it's definitely not what I went to school for. So I don't know if I could really be hired by an office and not be able to sit through my entire

shift or, you know, only get up a few times, if I needed to go to the washroom and whatnot. But to be able to sit and work on a project that requires concentration, I have to focus, I have to stay and, you know, to kind of complete that, but when I'm constantly uncomfortable or aggravated, you know, and annoyed by my pain it's going to affect my ability to do my task.

Further:

Q And you said something about -- when did you leave? Which month did you leave Gautam & Associates? What year was it?

A I believe it was the end of October.

Q And I know you briefly touched on it, but what were the reasons for leaving?

A Well, I was unable to perform the tasks efficiently. I felt as if -- I wasn't able to sit for a long period of time, so I would often get up, go for breaks, stretch around. And when I did start working part time, I was only there for a limited amount of time, so I had to be very efficient and very fast in completing my tasks for the day. So, it was -- it was hard to kind of keep up because I was in so much pain, so I would often move around. So sitting down was quite a struggle, so I felt as if me being there wasn't going to be as beneficial because I wasn't as productive as I should have been and efficient. And that was my main concern. So now going forward with my degree, I feel as if -- I'm not sure if I'm going to be able to sit down and to work full-time as a paralegal for six months, and I need to do that in order to graduate with my degree. So, that's one of my concerns. And I also won't be reaching the full potential in terms of salary of how much I'd be making, since that's what I went to school for.

[33] I am not persuaded that the trial judge made a factual error when he found that there was a real and substantial possibility that the appellant's injuries would affect her capacity to assume "some employment positions or some employment responsibilities". The trial judge accepted the experts' evidence that a paralegal position was not foreclosed to Ms. Villing. Within that occupation, however, he found that she had some limitations that could affect her employment income. I cannot see how that finding was unsupported by evidence.

The quantum of the award for loss of earning capacity

[34] The appellant argues that the award should be \$5,000 or less.

[35] The standard of review for damage awards is as stated by McIntyre J. in *Woelk v. Halvorson*, [1980] 2 S.C.R. 430 at 435-36:

It is well settled that a Court of Appeal should not alter a damage award made at trial merely because, on its view of the evidence, it would have come to a different conclusion. It is only where a Court of Appeal comes to the conclusion that there was no evidence upon which a trial judge could have reached this conclusion, or where he proceeded upon a mistaken or wrong principle, or where the result reached at the trial was wholly erroneous, that a Court of Appeal is entitled to intervene. The well-known passage from the judgment of Viscount Simon in *Nance v. British Columbia Electric Railway Co. Ltd.* [[1951] A.C. 601], at p. 613,--approved and applied in this Court in *Andrews v. Grand and Toy Alberta Ltd.* [[1978] 2 S.C.R. 229]--provides ample authority for this proposition. He said:

The principles which apply under this head are not in doubt. Whether the assessment of damages be by a judge or a jury, the appellate court is not justified in substituting a figure of its own for that awarded below simply because it would have awarded a different figure if it had tried the case at first instance. Even if the tribunal of first instance was a judge sitting alone, then, before the appellate court can properly intervene, it must be satisfied either that the judge, in assessing the damages, applied a wrong principle of law (as by taking into account some irrelevant factor or leaving out of account some relevant one); or, short of this, that the amount awarded is either so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage....

This principle has long been established. An earlier example of its application in this Court in somewhat different circumstances may be found in *McCannell v. McLean* [[1937] S.C.R. 341].

[Emphasis added.]

[36] An award of \$5,000 or less in the context of this case is trifling, and thus inappropriate for two reasons. First, the threshold for awarding damages for loss of future earning capacity requires a plaintiff to prove a real and substantial possibility that her earning capacity has been impaired. That threshold is significant and in my view inconsistent with granting a trifling award. The appellant did not dispute that some award is due. Second, a trifling award is inconsistent with the trial judge's findings as to the kind of treatments proposed, the attendant loss of work, the need for increased maternity leave, and the probability that any treatment relief is impermanent.

[37] The trial judge allowed \$100,000 for loss of future earning capacity. The median earnings of a paralegal are \$55,000 per annum and the average earnings of a paralegal are about \$60,000 per annum. In my opinion, given the chronicity of the complaints, the kind of treatment proposed, the impact of that treatment on income, and the prospect of repeated rhizotomy treatments, which generally offer only temporary relief, the judge's allowance for loss of future earning capacity was not outside the appropriate range for such an award.

[38] It follows that I would dismiss the first ground of appeal.

Second Ground of Appeal: Non-Pecuniary Damages

[39] The appellant says that the award for non-pecuniary damages is inordinately high. The appeal on this point seems to be something of an afterthought. I say that because the appellant filed two factums in this proceeding. The first factum was prepared when the reasons for judgment had not been finalized. The appellant sought leave to file an amended factum once the reasons for judgment had been finalized and transcribed. Leave was obtained. Only when the second factum was filed did the appellant raise an issue with respect to non-pecuniary damages. That said, I would not give effect to the respondent's argument that this goes to the Court's jurisdiction. Neither the notice of appeal nor the order granting leave to file an amended factum limits the grounds of appeal.

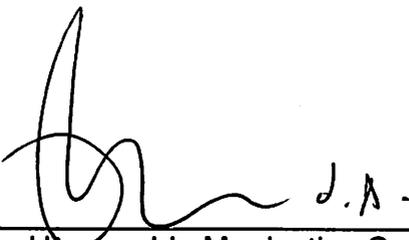
[40] The appellant referred the Court to five decisions in support of its position that the \$85,000 award for non-pecuniary damages should be reduced to \$50,000–\$60,000. Those cases were *Engqvist v. Doyle*, 2011 BCSC 1585 (\$70,000 for a 70-year-old plaintiff with similar injuries); *Perry v. Ismail*, 2012 BCSC 123 (\$42,500 where there was delayed recovery for not following the advice of a physician); *Burton v. Insurance Corporation of British Columbia*, 2011 BCSC 653 (\$35,000 for a moderate soft tissue injury, which after two-and-a-half years was expected to continue to improve); and *Sandher v. Hogg*, 2010 BCSC 1152 (\$40,000 for continued pain of uncertain duration, which was reduced for failure to adhere to a recommended exercise regime).

[41] The respondent referred the Court to cases where young plaintiffs suffer chronic back pain, such as: *Dickenson v. Passero*, 2015 BCSC 908 (\$100,000); *Pett v. Pett*, 2009 BCCA 232 (\$85,000); *Ruscheinski v. Biln*, 2011 BCSC 1263 (\$85,000); *Doho v. Melnikova*, 2011 BCSC 703 (\$80,000); *Roberts v. Scribner*, 2009 BCSC 1761 (\$95,000); and *Kirkham v. Richardson*, 2014 BCSC 1068 (\$120,000). The respondent also referred to *Engqvist v. Doyle* (\$70,000) as a case involving a similar injury, albeit a much older plaintiff.

[42] An award of damages is a fact-finding exercise and attracts a deferential standard of review: *Ostrikoff v. Oliveira*, 2015 BCCA 351 at paras. 2–3. It is not for this Court to substitute its own opinion for that of the trial judge except where it can be said that the assessment is so inordinately high as to be wholly erroneous: *Woelk v. Halvorson* at 435–36. While the award in the present case may be a generous one, I am unable to conclude that it is so inordinately high as to be wholly erroneous. I would dismiss the second ground of appeal.

Order

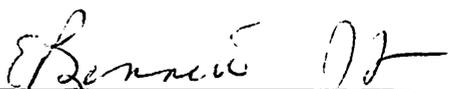
[43] In the result, I would dismiss the appeal.


The Honourable Mr. Justice Savage

I agree:


The Honourable Madam Justice Saunders

I agree:


The Honourable Madam Justice Bennett