

DESPITE INCREASED EARNINGS POST-COLLISION, COURT FINDS PLAINTIFF HAS SUFFERED LOSS OF CAPACITY.

**KHAKH V JOSOL,
2020 BCSC 286**

The Reasons for Judgment of Mr. Justice E.M. Meyers were given at Vancouver, BC on March 2, 2020.

Ms. Kulwinder Kaur Khakh was 46 years old at the time of the trial of this matter. She was involved in two motor vehicle collisions, the first on March 6, 2015 and the second on October 17, 2015. Ms. Khakh claims she has suffered soft tissue injuries and is presenting a claim for general damages, past income loss, future loss of income, loss of housekeeping capacity and cost of future care.

The defendants have admitted liability for the first collision but have denied liability for the second collision. They state that several of the injuries Ms. Khakh complains of existed before the accident and, at most, the accident exacerbated them. Also, they claim that intervening events took place after the accident, breaking the chain of causation. The defendants deny all of the claims except for general damages. They further claim that Ms. Khakh failed to mitigate her losses.

Ms. Khakh is married and has two children. She was born in India. Before moving to Canada in 1997 she obtained a Bachelor of Commerce and Master of Arts in Economics in India as well as a diploma in Business management. In Canada she earned a certificate for Early Childhood Education. She was hired by the YMCA for a childcare position and subsequently at the Boys and Girls Club and the Delta School District.

At the time of the collisions, she was working for a number of different early childhood education or childcare programmes, for different shifts in any given week. Her employment included working as a facilitator for Delta School District, the Boys and Girls Club and, on an on-call basis, for Brilliant Butterflies Learning Centre, a daycare centre. Ms. Khakh was also considering opening a daycare with one of her co-workers. Several of her co-workers and her supervisor testified that Ms. Khakh was a hard-working, cheery and dedicated worker before the accidents. They said that after the accidents she was



noticeably in pain when doing certain physical demands of childcare work and required assistance from her co-workers. Around the end of 2015 Ms. Khakh applied to G4S Secure Solutions for a job as a security screener at Vancouver International Airport. She heard positive things about the work, including better pay. She was accepted in March 2016 and she continues to work there.

MARCH 6, 2015 – Ms. Khakh was on her way to pick up her children from school when she was rear-ended. She recalled being in shock after the accident. An ambulance attended at the scene and she was noted to have very high blood pressure. She declined to go to the hospital with the ambulance. After making some arrangements to have her children picked up, she then went to her family doctor. She complained of neck, back and shoulder pain. Dr. Singh found her to have tenderness in the right trapezius and cervical spine muscles, and tenderness in the lumbar spine and lumbar spinal musculature bilaterally, chest pain and high blood pressure. Over the next few months, Ms. Khakh testified that she struggled with right shoulder pain at work and that it hurt to reach up. She stated that it was hard to keep up with her duties at work and at home with her injuries. She was also having difficulty driving her children to school, which was a forty-five minute trip each way.

OCTOBER 17, 2015 – Ms. Khakh was parked and waiting in her car for her son's lesson at Kumon to end. She had her seat fully reclined so she was in a lying down position. She said she heard a noise; somebody had "pushed hard on my vehicle". She did not see the accident. The defendant, Ms. Naebkhil was parked beside Ms. Khakh. She said that she was in a tight parking space and wanted to move to another spot because the next car's door (Ms. Khakh's vehicle) would not be able to open enough to let the driver in. While Ms. Naebkhil admits the accident occurred, she says that Ms. Khakh was not in the vehicle at the time of the incident and denies liability.

WITH RESPECT TO LIABILITY FOR THE SECOND ACCIDENT, MR. JUSTICE MEYERS FOUND:

"[30] Dealing with liability for the Second Accident, as I noted above, Ms. Naebkhil's evidence was contradictory. I do not find it to be reliable. I do not say she intentionally misrepresented the evidence; rather I think she was confused.

[34] I find Ms. Naebkhil liable for the Second Accident..."

He further stated that he found "Ms. Khakh to have been generally credible and reliable."



INJURIES AND MEDICAL EVIDENCE

Mr. Justice Meyers notes that Ms. Khakh did have pre-existing injuries, as emphasized by the defendants. In 2014 she fell on a staircase and hurt her back. She received chiropractic treatment and Dr. Singh noted in his records that she “struggles with exercise due to back pain”. She also had pre-existing shoulder pain. On January 7, 2015 Dr. Singh noted that she reported two weeks of right shoulder pain without having experienced any trauma.

Ms. Khakh called Dr. Najam Mian, a specialist in physical medicine and rehabilitation and pain medicine. The defendants called Dr. Osama Gharsaa, an orthopaedic surgeon.

Dr. Mian prepared two reports. His second report addressed an MRI of Ms. Khakh’s lumbar spine done in October, 2019. The Court found that what Ms. Khakh told Dr. Mian, with respect to the functional impact of her complaints, was largely consistent with her direct evidence.

[43] Dr. Mian concluded that the following were due to both accidents:

- a. Cervical sprain/strain with persistent, chronic, mechanical cervical pain. Potential pain generators include the myofascial structures, facet joints, ligaments and intervertebral discs;
- b. Thoracolumbar sprain/strain with persistent, chronic, mechanical thoracolumbar pain. Potential pain generators include the facet joints, ligaments, intervertebral discs and overlying myofascial structures;
- c. Right subacromial impingement with features of subacromial subdeltoid bursitis;
- d. Chronic insomnia disorder;
- e. Mood disturbance; and
- f. He could not rule out lumbosacral radiculopathy. A subsequent MRI is relevant to this and I will return to it later.

[44] Dr. Mian said that he expected Ms. Khakh to experience some degree of chronic pain for the remainder of her life, with some partial improvements with recommended treatments.

[45] With respect to the impact on her work he opined:

In my opinion, she can continue in her occupations as an airport screening officer as well as a school program facilitator but would encounter difficulties in more physically demanding tasks. Tasks that

may be difficult due to her right shoulder rotator cuff syndrome include overhead activities, as well as lifting or pushing/pulling. Due to her chronic cervical/thoracic/lumbar pain, tasks such as prolonged standing, sitting, or repetitive movements of the neck, back, and low back can be difficult. She would require more frequent breaks during work and/ or assistance from her co-workers. During flares of pain, she may require days off work. At some point, a functional capacities evaluation (FCE) through an occupational therapist may help quantify her limitations in terms of lifting and positioning. I do not expect any cognitive limitations. Her sleep disturbance may result in fatigue that may contribute to reduced workplace productivity.

[46] He recommended:

- a. Ultrasound guided injections for the shoulder;
- b. Tricyclic anti-depressant;
- c. Six months active rehabilitation; and
- d. Referral to a chronic pain psychologist.

Dr. Gharsaa examined Ms. Khakh on behalf of the defendants. He noted that the symptoms Ms. Khakh reported were soft tissue injury type which typically resolve “within three months”.

[49] With respect to Ms. Khakh’s shoulder, Dr. Gharsaa said:

... Ms. Khakh had an MRI done of her right shoulder which showed signs of chronic changes including tendinopathy and a small rotator cuff tear. In my opinion, this tear is not related to the subject motor vehicle accident given the mechanism of injury and her clinical presentation. It seems that she did have some right shoulder pain just a few months prior to the subject motor vehicle accident that may have been exacerbated by the subject motor vehicle accident.

[Emphasis added.] [Emphasis added by the Court]

[52] While he did not discount that Ms. Khakh suffered some residual pain, he thought she should be reassured that it was not due any ongoing impairment or physical disability resulting from the accident. He recommended that she undertake a self-directed exercise programme and that se [sic] be educated in the difference between pain that hurts versus pain that harms.

[53] In cross-examination, Dr. Gharsaa acknowledged that he was not a specialist in pain management. He did, however, agree that people who do not recover from their pain within three months go on to develop chronic pain syndrome.



Dr. Mian prepared a supplementary report in October 2019.

[55] Dr. Mian prepared a further report to address the MRI of Ms. Khakh’s lumbar spine and Dr. Gharsaa’s report.

[56] I noted above that in his initial report, Dr. Mian stated that he could not rule out lumbosacral radiculopathy. In his supplemental report he opined that the MRI confirmed symptomatic left L5 radiculopathy. He wrote that “her clinical symptoms, physical examination maneuvers, and MRI imaging all suggest she has an active, symptomatic left L5 radiculopathy”. He explained that radiculopathy occurs when there is compression or irritation of the nerve root as it exits the spine and can cause both motor symptoms, such as weakness, and sensory symptoms, such as pain.

[57] Dr. Mian went on to state that in his opinion:

... it is more likely than not that the current imaging findings are either a direct result of MVA #1 and MVA #2, or that the current imaging findings are due to an exacerbation of previous asymptomatic spinal pathology.

[58] In cross-examination, Dr. Mian said he did not notice pain exaggeration.

Mr. Justice Meyers chose to focus on injuries sustained in the first accident. While not assuming that a collision with minor vehicle damage necessarily has a minor effect on the Plaintiff, the circumstances of Ms. Khakh’s second accident amounted to little more than a “brush of a car door” causing a “scrape to the bumper” and the “speed had to be at near idol [sic],...” In fact, Ms. Khakh said that the second accident was not as severe as the first and that its main effect was to give her headaches.

Mr. Justice Meyers found that although Ms. Khakh had pre-existing back pain, there was no radiculopathy, no pain or weakness into her leg. She reported those issues to Dr. Singh after the first accident. Further, both according to her own evidence and that of her co-workers and supervisor she had no issues doing her early childhood education jobs prior to the accident.

[65] I accept Dr. Mian’s opinion in his second report: Ms. Khakh’s back issues were either the direct result of the accident or are due to an exacerbation of previous asymptomatic spinal pathology. I also accept his opinion regarding cervical sprain and strain caused by the accident.

The defendants argue that Ms. Khakh’s shoulder issues pre-existed the accident, as mentioned in Dr. Singh’s records in January 2015. In cross-examination Ms. Khakh said she could not remember if her shoulder pain had resolved by the time of the first accident. The Court found:



[67] Dr. Gharsaa, as I said above, acknowledged that pre-existing shoulder pain may have been exacerbated by the accident. The defendants, in argument, challenged that conclusion; one made by their own expert.

[68] Once again, any pre-existing shoulder condition was not interfering either with Ms. Khakh's work or home life. Any pre-existing condition was therefore exacerbated by the accident.

Mr. Justice Meyers found the defendants' arguments regarding failure to mitigate and intervening events to be without substance. His conclusions with respect to her injuries, are that although Ms. Khakh had some pre-existing conditions, they were not symptomatic at the time of the accident. The accident either caused new injury or worsened and made symptomatic her pre-existing conditions. Ms. Khakh did not have chronic pain prior to the accident. The defendants are liable for the full extent of Ms. Khakh's injuries.

GENERAL DAMAGES

In addition to having difficulties with her vocational, household and family activities, Ms. Khakh testified that she loved sewing and made Indian dresses for herself, her daughter and relatives. She can no longer do that because it requires too much concentration. She used to enjoy walking through her neighbourhood, which she no longer does. The Court awarded \$90,000. In general damages

LOSS OF PAST AND FUTURE INCOME EARNING CAPACITY.

Essentially, with Ms. Khakh working shifts at airport security, her income has gone up since the accident and the defendants say, on that basis alone she has suffered and will suffer no loss of income earning capacity.

[95] Both pre and post-trial losses may be viewed as a loss of income earning capacity: *Falati v. Smith*, 2010 BCSC 465 at para. 39. The fact that Ms. Khakh's income has increased since the accident does not in and of itself foreclose an argument for loss of earning capacity, past or future: *Ibbitson v. Cooper*, 2010 BCSC 1916 aff'd. 2012 BCCA 249; *Morlan v. Barrett*, 2012 BCCA 66; *Brown v. Bevan*, 2013 BCSC 2136; and *Watts v. Lindsay*, 2019 BCSC 2239. The issue is whether, but for the accident, Ms. Khakh would have been better able to perform in her positions. The simplest example of this would be if she would have been able to work more hours at G4S but for the accident.

[96] In my view, Ms. Khakh has suffered a loss of income earning capacity.



CONCLUSION

Mr. Justice Meyers awarded the Plaintiff \$224,012.00 plus costs.

General damages	\$ 90,000.00
Loss of past income earning capacity	\$ 21,000.00
Loss of future income earning capacity	\$ 65,000.00
Loss of housekeeping capacity	\$ 30,000.00
Cost of future care	\$ 7,500.00
Agreed special damages	\$ 10,512.00
TOTAL	\$224,012.00

The full Reasons for Judgment of the Honourable Mr. Justice E. M. Meyers [CAN BE FOUND HERE](#)

IF YOU WOULD LIKE TO BOOK ASSESSMENTS WITH DR. MIAN, PHYSIATRIST OR DR. GHARSAA, ORTHOPAEDIC SURGEON, PLEASE CONTACT US AT INTEGRA