

PLAINTIFF'S FORCED CAREER CHANGE RESULTS IN INCREASED REMUNERATION - THE COURT AWARDS \$100,000.00 FOR FUTURE LOSS OF EARNING CAPACITY.

H v. L 2021 BCSC 1168

The Reasons for Judgment of The Honourable Mr. Justice Veenstra were given on June 15, 2021 at Victoria, BC.

The plaintiff, MH , seeks compensation for injuries she sustained in an accident that occurred on July 11, 2016. She was cycling on Yates Street in Victoria when, without warning, the defendants' vehicle cut in front of her and stopped suddenly, causing her to brake hard in order to avoid a collision. As a result, Ms. H vaulted over the handlebars of her bicycle and landed on the pavement. The defendants have admitted liability. The plaintiff alleges that the injuries she suffered in the accident required her to leave a job she loved and completely change her career trajectory, and that they continue to cause her pain, which is likely to continue on a permanent basis. The defendants argue that the plaintiff mostly recovered from her injuries by 2018 and that her claims of ongoing symptoms are exaggerated.

PRE-COLLISION

The plaintiff was 26 at the time of the accident and 30 at the time of trial. She grew up in Chemainus BC. She was very active in sports. She had part-time work beginning at the age of 13 in a local ice-cream shop and, other than a brief period following the accident, she has worked steadily since the age of 13. After high school she attended one year at the University of Calgary. She then found employment at a sales and marketing company which she enjoyed and chose not to return to university. She worked there for several years and progressed to branch manager. Ms. H also had a passion for fitness and participated in fitness competitions. She decided to follow that passion and switch career paths. In 2015 she moved to Victoria and began working at a fitness studio where she built a clientele as a personal trainer, taught boot camp and spin classes. While building her clientele she took on a second job working as a cleaner. That was short lived. Within six weeks she had developed carpal tunnel-like symptoms in her right wrist as a result of the repetitive motions, such as scrubbing. On the advice of her doctor, she left that job and her symptoms cleared up.

The plaintiff and lay witnesses gave evidence that, prior to the accident, she was extremely fit. She worked as a personal trainer and instructor, and she worked out herself once or twice a day with co-workers who did power-lifting and high intensity workouts. She regularly cycled to and from work – a 12 kilometer distance, sometimes more than once a day. She would regularly cycle from Victoria to Thetis Lake, in order to swim a mile in the lake. She enjoyed being active and was confident in herself and happy with her life. At the time of the accident her partner, Mr.H, was working long hours in the construction field. Ms. H was home more often and so she did the bulk of the housekeeping work.



POST-COLLISION

The plaintiff braked, vaulted over the handlebars of her bicycle and landed on her right side. She was taken to hospital by ambulance. A CT scan revealed a fractured trapezium in her right wrist. She was fitted with a splint on her hand and wrist. In addition, she suffered road rash and bruising as well as soft tissue injuries to her right hip, shoulders and neck. She was provided with painkillers and released. The next morning she woke up with what she described as “excruciating pain”. She went to a walk-in clinic where her hand was re-splinted and she was prescribed more painkillers. She went to the fitness studio briefly to make arrangements for her clients. Ms. H has never returned to her work as a personal trainer. The client base she had built up have all found other personal trainers.

The plaintiff’s evidence was that the superficial injuries – road rash and bruising – resolved within about two weeks of the accident. She wore a splint on her right hand for about six weeks. She has continued to experience pain and stiffness in her wrist, hip, shoulders and neck. She attended active rehabilitation with Integrated Rehab & Performance, which she testifies got her out of the “acute stage of pain” and enabled her to walk and move around normally again, but she was nowhere near her pre-accident level of fitness. She has attended hand therapy strengthening sessions, massage therapy, acupuncture and chiropractic treatment. She found work as a receptionist/administrative assistant with an accounting firm and had an occupational therapist do an assessment of her workplace. Among the recommendations were an exercise ball chair, a special ergonomic mouse and a sit/stand desk – all of which she has adopted and continue to use.

In March 2018 she saw Dr. Cheng, plastic surgeon, for consultation with respect to her right wrist pain. Dr. Cheng did not recommend surgery and sent her to another hand therapist. In April 2018 the plaintiff obtained a permanent position as a financial services representative with the Ministry of Finance. Beginning April 3, 2018 she began another series of hand therapy appointments. Her evidence was that by this point in time, her discomfort in the wrist would be triggered by specific activities. She was able to slice soft vegetables but could not cut something like sweet potato. She could deal with smaller items of laundry, but not big items like sheets.

From January – to April 2019 the plaintiff took a college course funded by her employer and in June 2019 obtained a new government position as a project coordinator for the Ministry of Social Development and Poverty Reduction. She was continuing in that position at the time of trial. In October 2019 Ms. H started physiotherapy again to deal with her hip and shoulder pain.

At the time of trial Ms. H gave evidence that she does not have pain in her hand and wrist when she is not using it. However, when she is typing or mousing with the computer (which is a big part of her work day), when she is housekeeping, or doing exercises that involve her hand, it is painful. The plaintiff is right-hand dominate so having reduced use of that hand creates particular challenges for her. She continues to have hip pain when standing or sitting too long and she has trouble sleeping through the night because it becomes painful if she sleeps on one side for too long. Neck and shoulder pain are exacerbated if she is carrying anything. She suffers with headaches regularly. She requires frequent breaks at work and finds that she is exhausted by the end of the work day and sore in both her hip and hand.

THE PLAINTIFF’S MEDICAL EXPERTS

Dr. Alan Richardson is an Orthopaedic Surgeon. Dr. Richardson has been a medical doctor since 1979 and has been a specialist in orthopaedic surgery since 1983. He has a Diploma in Sports Medicine and a certification in disability and impairment rating from the International Academy of Medical Evaluators. He was in private practice from 1984 to 2011. Since 2011 his practice has mainly been comprised of medical-legal work. Dr. Richardson performed an independent medical examination of Ms. H on July 24, 2019. His evidence for trial was taken by way of a deposition on November 30, 2020.



[54] His physical examination indicated tenderness to palpation in the areas of the cervical spine and tightness in the left parascapular muscles. He also found decreased active range of motion of the neck compared to passive. He found tenderness to palpation in the right wrist, but no instability. In the hip, he found tenderness and tightness over the right gluteus medius muscle.

[55] Dr. Richardson identified the injuries suffered by the plaintiff as follows:

- a) A fracture of the right wrist carpal bone, i.e., the trapezium;*
- b) Soft tissue to the neck and upper back including probably the left parascapular muscles; and*
- c) Soft tissue injuries of the right hip.*

[56] He gave the following “current” diagnosis as of June 2019:

- a) Residual intermittent neck pain – probably myofascial pain condition post cervical strain.*
- b) Left sided parascapular muscle tightness.*
- c) Fractured right wrist, i.e., trapezium.*
- d) Residual findings in the right lateral hip from direct muscle contusion at the time of the MVA.*
- e) Subjective sensory changes in the right upper extremity with weakness in right thumb abductor and extensor.*

[57] Dr. Richardson specifically tested for carpal tunnel syndrome, concluding that there were no current symptoms or current clinical findings indicating carpal tunnel syndrome.

[58] He made a variety of treatment suggestions, including possible referral to an interventional pain specialist, referral to physiotherapy for intramuscular stimulation (“IMS”) or to the pain clinic for trigger point injection with respect to the parascapular muscle and the right hip, and the possibility of a further CT scan of the wrist.

[59] With respect to prognosis, Dr. Richardson stated:

- a) The prognosis for the cervical spine is moderate. There is no increased risk of osteoarthritis or surgery being required. This includes the upper back and the parascapular muscles.*
- b) The prognosis for the right hip is moderate. Soft tissue injury alone does not increase the risk of osteoarthritis or surgery.*
- c) The prognosis for the right wrist is moderate, however the plaintiff is currently plateaued and unlikely to improve further. There may be a slight increased risk of osteoarthritis depending on whether there was an interarticular extension of the fracture, although this is not mentioned, and the fracture was undisplaced.*

[60] Dr. Richardson explained that his use of the term “moderate” in respect of his diagnoses was intended to indicate that he saw no need for surgery but that the patient would continue to be symptomatic.



[61] On cross-examination, Dr. Richardson:

- a) Confirmed that he characterized the decrease in range of motion of the wrist as mild;
- b) Described the risk of osteoarthritis in the thumb as “low” but “possible”;
- c) Confirmed that the tenderness when he examined her hand was directly over where the fracture was (which is not where you would see it in cases of carpal tunnel);
- d) With respect to the right hip, commented that the plaintiff will probably continue to be symptomatic because she still has tightness and stiffness and some pain in the right hip, with ongoing restriction of range of motion;
- e) With respect to the ongoing treatment by physiotherapy, commented that “the trouble with the physio, you have to keep doing it”;
- f) With respect to the plaintiff’s ability to carry on her current work, suggested it will be “dependent on how long she can tolerate any symptoms that are arising”; and
- g) When asked about causation, commented that if the plaintiff hadn’t been in the Accident, she would not have had these symptoms, and that the aggravations she has experienced over time are secondary aggravations arising from activities of work and daily living.

Dr. Parham Daneshvar, is also an Orthopaedic Surgeon who was called to give evidence with specific focus on her right hand and wrist. As a result of the Covid-19 pandemic his interview and assessment of the plaintiff were done virtually on May 4th, 2020 and he provided a report dated May 2020. He provided a supplementary report on August 27, 2020 after reviewing the June 17, 2020 CT of the plaintiff’s wrist. He opined that it was unlikely that surgery would be of any benefit. He noted that the radiologist who performed the most recent CT scan had identified minor arthritic changes.

Dr. Gillian Simonett, is a Physiatrist. She performed an independent medical examination of the plaintiff on July 11, 2020 and provided a report dated August 18, 2020. Dr. Simonett concluded “*Ms. H continues to have ongoing pain over four years following the MVC despite appropriate interventions and maintaining an active lifestyle. Spontaneous recovery has likely plateaued. She has elevated risk for at least intermittent pain for the foreseeable future. Recent imaging has demonstrated arthritic changes, which is less common for her age. Therefore, there is the potential that she will have further worsening of her right wrist symptoms.*”

THE DEFENDANTS’ MEDICAL EXPERT

Dr. Perey, is an orthopaedic surgeon. He performed an independent medical examination of the plaintiff, limited to her right hand and wrist, on December 6, 2019 and provided a report dated December 17, 2019. He prepared a supplementary report dated October 23, 2020 commending briefly on the reports of Dr. Daneshvar and reviewing in more depth the June 17, 2020 CT scan of the plaintiff’s wrist. He suggested reconstruction of the volar beak ligament and opined “*Ultimately, I believe that all of Ms. H’s pain can be resolved with intervention if indeed she is symptomatic enough to wish to proceed with intervention.*” With respect to the risk of arthritis, he simply stated “*I do not believe that Ms. H has any evidence of arthritis or joint instability. I believe that her pain was emanating from the volar beak ligament or from the bony fragment seen on previous radiographs*”

The Court also heard evidence from Rehabilitation Consultant, Barbara Phillips who performed a physical and functional assessment of the plaintiff on December 21, 2019, including a review of her home, and provided reports with her recommendations and associated costs dated January 2, 2020 and September 2, 2020. The plaintiff tendered an economic expert report of Nicholas Coleman, providing calculations of present values for future costs of care and related costs from Ms. Phillips’ report, calculating a present value of \$162,700.00 in connection with those costs.



CREDIBILITY

The defendants challenged the credibility of all three lay witnesses, particularly the Plaintiff. The Court found that the plaintiff answered questions in a direct and thoughtful manner. Her evidence as to her symptoms was generally consistent with the medical evidence and that of the other lay witnesses. *“As a result, despite the careful submissions advanced by the defendants, I found the plaintiff to be a credible witness.”* Further, the Court found Mr. Hagedorn (the plaintiff’s partner) to be a credible and reliable witness and with respect to Ms. Wickham (the plaintiff’s mother) *“...I had no concerns with her credibility.”*

Mr. Justice Veenstra, in discussing Dr. Perey’s evidence, pointed out that Dr. Perey contradicted himself with respect to what surgeries he might recommend. Dr. Perey opined there was no evidence of arthritis but Mr. Justice Veenstra found that in light of the medical evidence *“I consider that there is a real and substantial risk of arthritis in the plaintiff’s right wrist”*.

The defendants argued that a contingency should be applied to reflect the risk that the plaintiff would have suffered loss of function in her wrist as a result of carpal tunnel syndrome, given the problems she had in 2015. However, the Court noted *“...Dr. Richardson specifically tested for carpal tunnel syndrome and his tests were negative. I conclude from his report that there is no ongoing issue of carpal tunnel syndrome, and I would not find any substantial risk of ongoing carpal tunnel syndrome affecting the plaintiff.”*

With respect to right hip pain, the Court stated *“I accept the prognosis of Drs. Richardson and Simonett that this pain is likely to be ongoing indefinitely.”* With respect to shoulder, neck and headaches, *“...I accept the opinions of Drs. Richardson and Simonett that it was causally related to the Accident. The plaintiff is required to adapt to this pain at work and to modify her recreational and housekeeping activities. And finally,*

[113] I accept the opinions of Drs. Richardson and Simonett that the plaintiff’s recovery has plateaued and that she is likely to suffer at least intermittent pain for the foreseeable future.

[114] The plaintiff also suffers intermittent headaches that are causally related to the Accident. While the frequency and intensity of these headaches has decreased, they continue to be an issue four years post-Accident.

NON-PECUNIARY DAMAGES

The plaintiff gave evidence that her confidence and self-esteem are now much different than before the accident. She feels that she is a totally different person now. Fitness was a huge part of her life and she was in excellent physical condition. Now she is unable to exercise to anywhere near the same degree, her conditioning is much reduced, and she has gained weight. Both the plaintiff and Mr. Hagedorn reported changes in their relationship and in intimacy since the accident, and both reported that the plaintiff is more prone to irritation and anger. The accident has necessitated that the plaintiff completely rethink her career path and while her current career path may be ultimately more remunerative, it is much different in terms of the plaintiff’s personal satisfaction and independence.

The Court noted *“My sense is that the plaintiff is the sort of person who will excel at whatever she does, but her current work was thrust upon her by the accident rather than by choice. A person’s employment is an essential component of their sense of identity, self-worth and emotional well-being, and even if a change in career has led to increased remuneration, the loss of those intangibles is appropriately reflected in an award of non-pecuniary damages...”* An award of \$115,000.00 was made for non-pecuniary damages.

FUTURE LOSS OF EARNING CAPACITY

The Court found that the plaintiff has established a real and substantial possibility that she has suffered a loss of earning capacity and assessed that loss at \$100,000.00 based on approximately two and a half years’ income.

H.V.L



SUMMARY

Non-pecuniary damages	\$115,000.00
Past wage loss (as agreed)	\$8,406.00
Future loss of earning capacity	\$100,000.00
Cost of future care	\$100,400.00
Special damages	\$4,528.11
Total	<u>\$328,334.11</u>

The full Reasons for Judgment of The Honourable Mr. Justice Veenstra [can be found here:](#)

WRITTEN BY STELLA GOWANS, PARALEGAL

If you would like to book an assessment with Dr. Alan Richardson, Orthopaedic Surgeon, please contact us at Integra integraconnects.com