

COURT AWARDS \$350,000 TO FOOD SERVICE WORKER FOR FUTURE LOSS OF INCOME.

P vs. U

2020 BCSC 1798

The Reasons for Judgment of The Honourable Madam Justice W. A. Baker were given on November 23rd, 2020, at Victoria, British Columbia.

On May 16, 2016, 32-year-old Ms. P was driving her vehicle on Peatt Road in Langford, BC. She was stopped at a red light when her vehicle was struck from behind. Ms. P suffered a number of myofascial injuries as a result of the accident. The defendant has admitted liability.

Ms. P was born in India, into a traditional Sikh family. She commenced a post-secondary arts degree in India but decided to leave her undergraduate studies in favour of a nanny training program that would allow her to obtain a work permit in Canada. She moved to Canada in 2006. She met her future husband in Surrey. They married in April 2007 and moved to Victoria the same year. Ms. P was a nanny when she first moved to Victoria and later took a job at a Subway restaurant. In 2008 she began working at the Tim Hortons restaurant at the Victoria General Hospital. She continued in this position through two pregnancies, and right up until the accident in 2016. Ms. P was a member of the Hospital Employees Union and received wages in accordance with the collective agreement for that union. She also received benefits, including extended health benefits, sick days and vacation days. At the time of the accident, she was a full-time employee, working Monday to Friday, 6 a.m. to 2:00 p.m.

Ms. P's job was quite physically demanding. It involved carrying stock from a lower floor, deep cleaning, reaching up to stock shelves, working the cash machine and covering for other staff members. She was generally healthy and energetic. Her physical and emotional health was good and she loved her job. In the home Ms. P was responsible for 90 percent of the household chores. Her husband worked the worked afternoon/evening shift, so she was also responsible for the children after school and in the evenings. The P's have two children who were 5 and 6 years old at the time of the accident. Ms. P was the primary caregiver. Because she worked the early shift, she was home for the children after school.



She was very involved in her children’s lives, helping with homework, doing sports with them, taking them swimming and to the park. She was very demonstrative in her affection with lots of hugging and cuddling, and she enjoyed reading to them at bedtime. Ms. P also enjoyed a warm and loving relationship with her husband. She described being “really connected emotionally” to her husband. By all accounts Ms. P was a very bubbly social person, hosting large parties of up to 50 people, and doing traditional cooking.

Ms. P had a workplace injury in October 2015 when she twisted her back resulting in pain in her buttock and left leg. She had three and a half weeks off work and received trigger point injection therapy and physiotherapy. The injury resolved quickly and by November 2015 she had no residual impairment from this injury. She did admit though that at times her back was achy if she overworked it. She had a one-time incident of left chest pain in March 2015. This too resolved quickly and there has been no recurrence. Otherwise, at the time of the accident, Ms. P was healthy. She had no problems with her neck, shoulder or upper back. She had no migraines, problems with vision, sleep, ears, anxiety or depression.

After the accident Ms. P continued on her way to pick up her son from pre-school. When she got there she was shaken up and the teacher asked her to sit down, gave her some water and recommended she go to the doctor. Ms. P went to a walk-in clinic. She was lightheaded, in shock and her left neck and upper shoulder felt hot and achy. Over the next few days the pain continued and she started to get headaches. After about a week, her neck, shoulder and head pain were getting worse. Her sleep and mood were affected, and she was experiencing tingling and numbness in her left arm, down into her fingers. Her family doctor recommended time off work and physiotherapy. Madam Justice Baker commented

[17] “Ms. P has undergone physiotherapy, chiropractic treatments, massage therapy, acupuncture treatments, trigger point injections, dry needling, and painful Botox treatments. She has seen specialists, including an inner ear and eye specialist, a psychiatrist, doctors at the CBI pain clinic, and a kinesiologist. She has been prescribed, and has taken, more than 20 different pain medications, and medications related to her psychological injuries.

[18] I am satisfied that Ms. P has done all she could to recover from her injuries. She complied fully with all recommendations, and has approached all therapies with a good faith attempt to recover from her injuries. Ms. P did not fail to mitigate her damages. Notwithstanding Ms. P’s efforts, she continues to suffer from her injuries.”



Ms. P obtained independent medical assessments from Dr. Donald Cameron, an expert in neurology, Dr. Aindrias O’Breasail, an expert in psychiatry, and Dr. John Armstrong, an expert in chronic pain with a neurologic foundation.

Dr. Cameron was qualified to give his expert opinion in relation to thoracic outlet syndrome (“TOS”), musculoskeletal injuries, headaches, and traumatic brain injuries. He examined Ms. P in December 2018.

[46] In his opinion, Ms. P developed chronic pain in her neck, head, shoulders and upper back area, particularly on her left side, as a result of the musculoskeletal injuries she suffered in the accident. Further, he found that Ms. P acquired a mild case of TOS as a result of the injuries she suffered to the left side of her neck and to her left shoulder. He stated that TOS can be acquired as a result of muscle spasm in the scalene muscle and upper fibres of the trapezius muscle and alternate lateral cervical paraspinal muscles. Dr. Cameron was of the opinion that Ms. P suffers from cervicogenic headaches and post-traumatic common migraine headaches.

[47] Under cross-examination, Dr. Cameron testified that psychological injuries often occur later in the recovery process, when the patient realizes that progress is not happening in the way they hoped. This can lead to depression, anxiety, frustration, and can develop into serious psychological issues. These psychological issues make the patient experience the pain more severely.

Dr. Cameron opined that Ms. P probably did suffer a mild traumatic brain injury in the accident. With respect to prognosis, it is Dr. Cameron’s opinion that Ms. P’s chronic pain will probably result in a permanent partial disability. She continues to suffer from TOS, which might be alleviated with Botox treatments. She has ongoing intermittent headaches which arise from her soft tissue injuries. He was of the view that her ongoing psychological problems, including anxiety, anxiety attacks and depression, are prolonging her recovery from her chronic pain, and are significantly contributing to her inability to return to competitive work. He found that her psychological problems caused irritability, mood swings, anger outbursts, difficulty making decisions, and decreased self-confidence. These problems, coupled with her ongoing chronic pain and secondary sleep disorder due to chronic pain, have rendered Ms. P incapable of returning to work in a competitive fashion at a job similar to the one she held at the time of the accident.

Dr. Cameron was rigorously cross-examined, but his opinions did not change. Madam Justice Baker accepted Dr. Cameron’s opinion. She also relied on his opinion on a number of occasions when discussing assessment of an award for cost of future care.



Dr. Aindrias O’Breasil, Psychiatrist, was of the opinion that Ms. P experienced anxiety and post-traumatic stress following the accident, which developed into a major depressive disorder. Her anxiety increases in crowded areas or certain social situations. She experiences sleep disturbance, low energy and fatigue. She avoids talking about the accident and experiences stress from driving. She has become detached for her children and her husband, and has feelings of hopelessness. Dr. O’Breasil characterized Ms. P’s anxiety as severe. He opined that her depression, anxiety and PTSD all interact with her ongoing pain.

Dr. Armstrong prepared an opinion in which he states that the plaintiff is suffering from spinal pelvic ring dysfunction (“SPRD”) and malalignment syndrome, which has caused or contributed to ongoing chronic pain in her neck and shoulders, as well as her hips and pelvic girdle. The defence objected to Dr. Armstrong’s report on the basis that these diagnoses are not scientifically valid or accepted and they “represent novel science and should not be admitted by the court”. The Court concluded that it was satisfied that SPRD and malalignment syndrome have been recognized since 2002, have been the subject of an international medical publication and have been the subject of a peer-reviewed article. Dr. Armstrong’s opinion was deemed admissible in this trial. Dr. Armstrong further diagnosed Ms. P with a chronic left-sided, upper axial and para-axial myofascial disorder – a condition known as persistent postural-perceptual dizziness, as well as post-traumatic headache disorder and sacroiliac joint dysfunction. He opined that Ms. P had not been properly diagnosed to date, and therefore had not received treatments which would address these disorders. He was of the opinion that appropriate treatment would assist with further recovery, although his prognosis for full recovery was guarded.

The defendant raised a number of credibility challenges, none of which persuaded the Court that Ms. P was “anything other than forthright and honest in her testimony. I am satisfied that Ms. P’s pain asserted in this action does not arise from any desire for secondary gain, such as care, sympathy or compensation”.

In her assessment of non-pecuniary damages Madam Justice Baker commented,

[113] Ms. P was 32 years old at the time of the accident. As a result of the accident, she suffers from chronic pain in her shoulders, back, neck and head, and suffers from serious and ongoing headaches. In addition, the persistence of her injuries over the past four years has created her anxiety, stress, and depression. Her relationships with her husband and children have been seriously affected. She cannot be physically affectionate with them, she is short tempered with her children, and she is restricted in what she can do. Her sleep is seriously impacted. She used to gain considerable pleasure from her work, and that is now lost to her. She used to enjoy social gatherings and entertaining people; these activities are also severely impacted by her injuries.



However, the medical opinions suggest there is room for optimism and as such an award of \$80,000.00 was found to be appropriate under this head of damage.

In discussing future loss of earning capacity, Madam Justice Baker found that “While Ms. P has proven on a balance of probabilities that she is presently totally vocationally disabled, the future may not be so bleak. Ms. P has established that there is a real and substantial possibility that her disability will continue into the future. There is no question that this disability represents a substantial impairment of her future earning capacity.” However, the experts have made a number of recommendations for treatment that suggest there could be some improvement of Ms. P’s condition in the future. The medical evidence suggests that with appropriate treatment “...Ms. P will recover some of her function, and may be able to learn to manage her psychological conditions, improving her ability to return to the work force.”

CONCLUSION

Ms. P is awarded the following damages against the defendant:

Non-pecuniary damages	\$80,000.00
Past loss of earning capacity	\$117,800.00
Loss of future earning capacity	\$350,000.00
Cost of future care	\$65,400.00
Loss of housekeeping capacity	\$20,000.00
Special damages	\$12,884.00
TOTAL	\$646,084.00

The full Reasons for Judgment of The Honourable Madam Justice W. A. Baker [CAN BE FOUND HERE](#)

WRITTEN BY STELLA GOWANS, PARALEGAL

**IF YOU WOULD LIKE TO BOOK AN ASSESSMENT WITH DR. DONALD CAMERON, NEUROLOGIST,
PLEASE CONTACT US AT INTEGRA**