IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Peckham v. Singh,*
2025 BCSC 263

Date: 20250219
Docket: M186412
Registry: Vancouver

Between:

Makayla Peckham

Plaintiff

And

Mangal Singh and Simrin Singh

Defendants

Before: The Honourable Justice Latimer

Reasons for Judgment

Counsel for the Plaintiff:	J.M. Green
Counsel for the Defendants:	R.C. Brun, K.C. R. Monty
Place and Date Hearing:	Vancouver, B.C. February 3, 2025
Place and Date of Judgment:	Vancouver, B.C. February 19, 2025

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Introduction

[1] The plaintiff applies for a mistrial.

[2] This application arises in an action for personal injuries arising from a motor vehicle accident. The defendants are represented by common counsel. Liability was admitted at trial. Causation of some injuries was also admitted at trial. The issues were the extent of the injuries caused by the accident and the quantum of the plaintiff's losses. The trial proceeded before a jury over 28 days from August 26, 2024 to October 4, 2024.

[3] The charge was read to the jury on October 3, 2024.

[4] A summary of the plaintiff's position, which the plaintiff approved for inclusion with the jury charge, was as follows:

> Fair and reasonable non-pecuniary damages
>
> Past Loss of Income Earning Capacity: $493,484
>
> Future Loss of Income Earning Capacity: $3,603,632
>
> Loss of Housekeeping Capacity: Past: $41,000 / Future: $508,378
>
> Loss of Childcare Capacity: $54,700
>
> Cost of Future Care: $442,649 (which includes sums for medications, occupational therapy, psychology services/counselling, occupational therapy, vocational services, functional capacity evaluation, kinesiology, gym pass/ pool, and an amount for assisting Ms. Peckham following future surgery)
>
> In-Trust Damages: $5,000 for Jennifer Peckham
>
> Special Damages: $7,551
>
> Management Fee: 10-15% of the cost of future care and future loss of income earning capacity

[5] A summary of the defendants' position, which the defendants approved for inclusion with the jury charge, was as follows:

> Fair and reasonable non-pecuniary damages for minor soft tissue injuries to her neck and low back if the jury finds that the accident did not cause the L5/S1 radiculopathy. In the alternative, an amount less a contingency deduction percentage of the assessment for pre-existing condition, if the jury finds the L5/S1 pain was caused by the accident.
>
> Past Loss of Income Earning Capacity: $0 unless causation to L5/S1 in which case a percentage of $68,369.

> Future Loss of Income-Earning Capacity: $0 unless causation to L5/S1 in which case a percentage of $1,434,584 and less earning capacity.
>
> Loss of Housekeeping Capacity: $0 or a percentage of $35,000.
>
> Loss of Childcare Capacity: $0 or a percentage of $25,000.
>
> Cost of Future Care: $0 or a percentage of $83,000 (which includes sums for medications, occupational therapy, psychology services, vocational services, rehabilitation services and equipment, and future assistance).
>
> In-Trust Damages: $0 or a percentage of $5,000.
>
> Special Damages: A percentage of $7,551 unless causation to L5/S1 in which case $7,551.
>
> Management Fee: $5,000 less contingency so as to obtain appropriate investment advice.

[6] On October 4, 2024, the jury returned its verdict. In answer to the questions posed to the jury, the jury awarded to the plaintiff total damages of $300,051 broken down as follows:

> a. For non-pecuniary loss: pain, injury, physical and mental suffering, and loss of enjoyment of life: $32,000
>
> b. Past loss of Income from June 21, 2015 until date of trial: $0
>
> c. Loss of future earning capacity: $215,000
>
> d. Cost of Future care: $44,000 broken down as follows:
>
> i. Medical specialists: $0
>
> ii. Medications: $30,700
>
> iii. Occupational Therapy: $1,500
>
> iv. Psychologist Sessions: $1,800
>
> v. Vocational Consultant: $4,000
>
> vi. Rehabilitation Support Services and Equipment: $6,000
>
> vii. Future Assistance: $0
>
> e. Loss of Housekeeping Capacity: $0
>
> f. Loss of Child Care Capacity: $0
>
> g. “In Trust” Claim: $1,500
>
> h. Special Damages Claim: $7,551
>
> i. Management Fee: $0

[7] After the jury was dismissed, on October 4, 2024, the plaintiff applied for an order that a mistrial be declared. On October 4, 2024, the plaintiff’s submission was

that the verdict was perverse, that the jury failed to understand the law, and that the verdict was incongruous and internally inconsistent. The application was adjourned to permit the exchange of written arguments.

[8] After the exchange of written materials, the application was heard on February 3, 2025. The plaintiff's arguments were refined to focus on the jury's verdict of $0 for past wage loss, and $215,000 for loss of future earning capacity. Specifically, the plaintiff argued that:

a) The jury's verdict of $0 in respect of past wage loss conflicts with the award of any damages for loss of future income earning capacity, cost of future care, and special damages.

b) The jury's verdict of $0 in respect of past wage loss must reflect a contingency deduction which conflicts with the jury's order of the full amount claimed for special damages.

c) The jury's verdict of $0 in respect of past wage loss is unsupported by any evidence.

d) The jury's verdict of $215,000 for loss of future earning capacity is unsupported by any evidence.

[9] The defendants argued that:

a) There is no conflict in awarding $0 in respect of past wage loss and awarding any damages under loss of future income earning capacity, cost of future care and special damages. In particular, the $0 award for past wage loss may reflect deductions made by the jury to account for income earned and wage replacement through social assistance benefits.

b) Even if the jury applied a contingency deduction to the past wage loss award, there is no conflict in applying a contingency deduction in respect of past wage loss and not applying a contingency deduction in respect of special damages.

c) The jury's verdict of $0 in respect of past wage loss was supported by evidence.

d) The jury's verdict of $215,000 for loss of future earning capacity was supported by evidence.

Issues

[10] For reasons I will explain, the application is dismissed as I have concluded:

a) There is no conflict in awarding $0 in respect of past wage loss while at the same time awarding damages for loss of future income earning capacity, cost of future care and special damages.

b) There is no conflict in awarding $0 in respect of past wage loss while at the same time awarding the full amount of special damages claimed.

c) There is evidence to support the verdict in respect of both past wage loss and loss of future earning capacity.

Analysis

General principles

[11] Rule 12-6 *Supreme Court Civil Rules*, B.C. Reg. 168/2009 [*Rules*] provides in relevant part:

> Judgment impossible on jury findings
>
> (7) If, after any redirection the court considers appropriate, a jury answers some but not all of the questions directed to it, or if the answers are conflicting, so that judgment cannot be pronounced on the findings, the action must be retried.

[12] A trial judge has limited jurisdiction to refuse to enter judgment in accordance with the jury's verdict. In *Leblanc v. Penticton (City),* [1981] W.W.R. 289 (B.C.C.A.) the Court of Appeal held that the jurisdiction arises in three scenarios:

a) When there is no evidence to support the verdict;

b) Where the fault found does not constitute a fault at law;

c) Where the provisions of Rule 12-6 apply.

[13] A trial judge does not have jurisdiction to vary a jury verdict on the grounds that the verdict is perverse or that the jury did not act judicially: *LeBlanc* at para.15.

Is there a conflict between ordering $0 for past loss of income and awarding any damages for loss of future income earning capacity, cost of future care, and special damages?

[14] In arguing that there is a conflict between ordering $0 for past loss of income and awarding damages for loss of future income earning capacity, cost of future care, and special damages, the plaintiff relies on cases, such as *Harder v. Poettcker*, 2016 BCCA 477 and *Kalsi v. Gill*, 2014 BCSC 1833, where the courts have concluded that there is a conflict in jury decisions that make an award for special damages and past loss of income, but fail to award any non-pecuniary damages.

[15] In *Harder* at para. 3, the Court of Appeal explained the inconsistency as follows:

> [3] The jury's answers were clearly conflicting in the sense described by Justice Mackenzie in *Balla v. I.C.B.C.*, 2001 BCCA 62 at para. 12, in these terms:
>
> > [12] …It is illogical to conclude that a plaintiff was injured and suffered out of pocket expenses but did not sustain any pain, suffering and loss of enjoyment, however transitory, as a result of the injury. The finding of injury and the award for special damages cannot be reconciled. Without any award for non-pecuniary damages, the answers present a clear conflict.

[16] However, for reasons I will explain, an award of $0 for past income loss, coupled with an award for loss of future income earning capacity, cost of future care, and special damages does not give rise to an analogous conflict.

[17] In this case, the jury was presented with conflicting expert evidence about what Ms. Peckham's past income would likely have been absent the accident. Part of the dispute was what Ms. Peckham's career trajectory would likely have been, given that she was 16 years old at the time of the accident. The jury had expert

evidence from Mr. Peever, a witness presented by the plaintiff and qualified as an expert in economics. Mr. Peever estimated the plaintiff's loss of employment income and non-wage benefits, assuming that the plaintiff had become a firefighter.

[18] They also had expert evidence from Mr. Szekely, a witness presented by the defendants and qualified as an expert in labour economics with expertise in estimating economic damages with personal injury and fatality claims. Mr. Szekely assumed more modest career trajectories for the plaintiff and opined:

> 23. Average earnings are projected to be as follows:
>
> > (a) Average earnings for high school graduates are projected to have a net value of $160,715 for the past period and are projected to have a present value of $1,152,535 for the future.
> >
> > (b) Average earnings for graduates of 3-to-12-month college programs are projected to have a net value of $178,310 for the past period and are projected to have a present value of $1,298,667 for the future.
> >
> > (c) Average earnings for graduates of 1-to-2-year college programs are projected to have a net value of $161,321 for the past period and are projected to have a present value of $1,434,584 for the future.
>
> 24. An assessment of past income loss will need to consider actual amounts earned with the accident. Deducting only the $8,769 in residual earnings consider by Mr. Peever results in past losses of $151,946 with earnings for high school graduates, $169,541 with earnings for graduates of 3-to-12-month college programs, and $152,552 with earnings for graduates of 1-to-2-year college programs.
>
> 25. The above estimates do not account for Social Assistance payments. If the Plaintiff received payments totaling $89,747 to the end of 2023, and if she continues to receive $1,463.50 in monthly payments, the value of benefits received up to the trial date will have been $89,747 + (1,463.50 x 7 25/31) = $101,172. Deducting this amount results in past losses of $50,774 with earnings for high school graduates, $68,369 with earnings for graduates of 3-to-12-month college programs, and $51,380 with earnings for graduates of 1-to-2-year college programs.

[19] The jury was instructed about how to approach the expert evidence by considering the qualifications and impartiality of the witnesses, examining the facts and assumptions upon which the opinions were based, and examining the opinion as a whole. The jury was instructed:

> It is for you to decide how much weight you will give to the opinion of one expert compared to that of another. In this case there is some conflict among the expert opinions. Where the opinions of expert witnesses are in conflict,

> you must resolve that conflict as best you can. You should find in favour of the expert witness whose evidence you believe is entitled to the greater weight.
>
> Just as in the case of any other witness, you may choose to accept all, part, or none of the evidence of an expert witness, including the opinions provided.

[20] The jury was also directed that they were not constrained to order the dollar figures suggested by the experts because they had to determine the likelihood of any particular opportunity materializing, to account for contingencies, to account for income actually earned by the plaintiff, and to deduct social assistance benefits received by her.

[21] Specifically, with regard to past loss of income, the jury was directed, in part, as follows:

> 281. If you are satisfied that the injuries Ms. Peckham suffered in the accident impaired her ability to earn income, given your view of the facts and the relative likelihood of the past hypothetical events, then it is up to you to assess a reasonable dollar figure for the value of the lost opportunity. The award must be fair and reasonable taking into account all of the evidence. Any award should reflect the relative likelihood of the lost opportunity to earn income in the past. If you were to conclude that the loss was a virtual certainty, you would award the full value of the loss. If you decide the loss had only a 50% chance of occurring, then you would award 50% of its value, and so on.
>
> 280. Common events of life, or contingencies, must also be considered. People sometimes lose pay because of sickness, layoffs, or injuries. You may consider whether Ms. Peckham's pre-existing back condition pre-disposed her to such contingencies. In addition, employees sometimes gain extra pay because of extra overtime, raises, or promotions. These, too, are hypothetical events and, if you find that any of them was a real and substantial possibility, then you should consider whether the value of Ms. Peckham's loss of income-earning ability should be decreased or increased according to how likely you find it is that such events would have occurred.
>
> 283. You may consider evidence about Ms. Peckham's income before and after the accident in assessing past loss of opportunity to earn income.
>
> 284. I observed that Ms. Peckham had a limited ability to give evidence about her income beyond identifying that she receives approximately $1400 a month in disability assistance. She gave evidence that she has not reported her babysitting income, some of which was received in cash. She testified that it has been fairly minimal.
>
> 285. The defendant argues that the plaintiff's income loss was not as great as claimed because she received other benefits that made up part of the loss. These benefits are the social assistance payments she has received since 2018. Mr. Peever reports that by the end of 2023, Ms. Peckham had received

> a total of $89,747 in social assistance payments. She continues to receive a monthly social assistance payment of $1,463.50 in 2024.
>
> 286. Social assistance benefits are a form of wage replacement and therefore should be deducted from an award for past loss or earning capacity. Retention of them would amount to double recovery. (Emphasis Added)

[22] While it is not for this Court to justify precisely how the jury arrived at an award of $0 for past income loss, it was open to them to arrive at an award of $0 by, for example, concluding that there was a past loss of opportunity to earn income (which would then have been valued up to but not necessarily including 100% of whatever they concluded the plaintiff's likely past income would have been), and then by making deductions to account for either or all of: life contingencies including but not limited to the plaintiff's pre-existing back condition, the plaintiff's reported earned income, the plaintiff's unreported earned income, and social assistance received by the plaintiff.

[23] Thus, it is not illogical to conclude that a plaintiff was injured and suffered out-of-pocket expenses, and will suffer loss of future income earning capacity and future costs of care but is not entitled to any damages for past loss of income. The finding of injury and the award for past loss of income can be reconciled. There is no conflict.

Is there an inconsistency in awarding $0 for past loss income and the full amount of special damages claimed?

[24] As set out above, the defendants' position as summarized to the jury was, in relevant part:

a) Past Loss of Income Earning Capacity: $0 unless causation to L5/S1 in which case a percentage of $68,369.

b) Special Damages: A percentage of $7,551 unless causation to L5/S1 in which case $7,551

[25] The plaintiff argues that it is therefore inconsistent that the jury awarded $0 for past loss of income and $7,551 in special damages. It is argued that the special damages award reflects that the jury accepted that the plaintiff proved causation to

the L5/S1 which mandated that the jury award a percentage of $68,369 for past loss of income earning capacity.

[26] I reject this argument.

[27] The jury's verdicts in respect of past loss of income and special damages may simply reflect that they rejected defendants' counsel's arguments.

[28] The jury is not obliged to accept the arguments or numbers proposed by counsel (or the Court in summarizing counsel's submissions) in closing submissions: *McCliggot v. Elliott*, 2022 BCCA 315 at paras. 112-122; *Baas v. Jellema*, 2000 BCCA 24 at paras. 57-58.

[29] If the jury found there was causation to L5/S1, they were not bound to award a percentage of $68,369. That figure appears to have been drawn by the defendants from paragraph 25 of Mr. Szekely's report which is reproduced above. That figure was the highest of three options put forward by Mr. Szekely, and it was reached by:

a) projecting the average earnings for high school graduates, the average earnings for graduates of 3-to-12-month college programs, and the average earnings for graduates of 1-to-2-year college programs, respectively; then

b) deducting from each of those figures only the $8,769 in residual earnings considered by Mr. Peever; then

c) deducting from each of those figures $101,172 for social assistance payments.

[30] The jury was not bound to use that figure as a starting point. Even if they did so, they may not have accepted that it was a virtual certainty that, absent the accident, the plaintiff would have earned wages equivalent to the average earnings of graduates of 3-to-12-month college programs. As I have outlined above, the jury may have also deducted the plaintiff's unreported income and found that common life contingencies needed to be considered and factored in.

[31] Again, the awards for past loss of income and special damages can be reconciled. There is no conflict.

Was the jury's verdict of $0 in respect of past loss of income unsupported by any evidence?

[32] The plaintiff argues that there was no figure put forward by any expert that would reduce to $0 if you deducted the approximately $100,000 in social assistance payments received by the plaintiff from that figure. The plaintiff argues that there was no evidence before the jury upon which they could make an award of less than $68,269. However, this submission depends on the view that the jury was somehow required to accept the projected earnings figures put forward by the experts as a 100% likelihood and to make no deductions except the plaintiff's reported income and the social assistance payments she received.

[33] As I have explained above, I do not accept that submission. The jury was specifically charged that it was open to them to accept all, part, or none of the evidence of any expert. They were also specifically charged that they were to determine the relative likelihood of the lost opportunity to earn income and adjust its value accordingly. They were also instructed that they could consider common events of life or contingencies, including but not limited to the plaintiff's pre-existing back condition. They were also instructed that they could apply deductions to those figures. The permissible deductions included approximately $101,172 in social assistance payments. It also included the plaintiff's reported and unreported income. While the plaintiff's evidence was that her unreported income was "fairly minimal", the jury was not bound to accept that evidence.

[34] At base, the gravamen of this argument is that the jury must have awarded too low a quantum for past loss of income before applying the deductions and/or contingencies they were entitled to apply. However, I have not been referred to any instance in which a trial judge granted a mistrial on the basis that the award granted by a jury was too low. Without conclusively determining whether the jurisdiction of a trial judge extends that far, the Court of Appeal held in *Ciolli v. Galley*, 2011 BCCA 106:

> [30] We were not referred, however, to any instance in which a trial judge had applied *LeBlanc* to a pure question of quantum, on the theory that although there was evidence at trial to support an award, there was "no evidence" or "no reasonable evidence" to support the award actually made. This theory comes perilously close, in my view, to obliterating the line between the respective functions of judge and jury and could in practice lead to trial judges refusing to enter jury awards that are inordinately high or low. That, with respect, is the function of an appellate court. In the words of Mackenzie J.A. for the Court in *Balla v. I.C.B.C.* 2001 BCCA 62:
>
> > In my view, there are two tests for scrutiny of a jury verdict, apart from errors of law. The first is stated by Rule 41(2) of the *Rules of Court* as follows:
> >
> > > 41(2) Where, after any redirection the court thinks appropriate, a jury answers some but not all of the questions directed to it, or where the answers are conflicting, so that judgment cannot be pronounced on the findings, the action shall be retried.
> >
> > If "the answers are conflicting" the trial judge must direct a retrial.
> >
> > The second test is the *Nance* test [*Nance v. B.C. Electric Rlwy.* [1951] A.C. 601 (P.C.)], whether the sum awarded is inordinately low or inordinately high. The trial judge has jurisdiction to apply the first test, pursuant to Rule 41(2), but the only remedy available (subject to Rule 41(6)) is a retrial. The *Nance* test is a test of appellate review only and is not within the jurisdiction of the trial judge: *Leblanc v. Penticton (No. 2)* ... The trial judge may not vary the jury's award for *Nance* reasons. [At paras. 9-10; emphasis added in *Ciolli*.]
>
> I do not find it surprising, then, that the trial judge in this case dismissed the motion for mistrial, equating it with a motion to have the verdict set aside on the basis that the jury's awards were inordinately high. It would take a very courageous trial judge to do otherwise.

[35] This argument amounts to a request to have the jury's verdict set aside as inordinately low. I do not agree that my jurisdiction extends so far.

[36] The plaintiff argues that the Court of Appeal has ordered a new trial in cases such as *Evans v. Metcalfe*, 2011 BCCA 507 where the Court considered that "outlier awards" could lead to an undermining of public confidence in the courts through a perception that the judicial system operates like a lottery. However, such a correction is a matter for the Court of Appeal, not for a trial judge on a mistrial application.

Was the jury's verdict of $215,000 for loss of future earning capacity unsupported by any evidence?

[37] The plaintiff argues that the jury must have concluded that the plaintiff's career path was a 1-2-year college program, accepted Mr. Szekely's projection of $1,434,584 for her loss of future income earning capacity, and then awarded 15% of that number in order to arrive at $215,000.

[38] The plaintiff argues that such an award is inconsistent with the defendants' best evidence. The plaintiff points to the evidence of Dr. Travlos, a witness called by the defendants and qualified as an expert in physiatry, involved in the treatment and diagnosis of musculoskeletal problems and in addition, the specialty and subspecialty training in the assessment of neuromuscular diseases and disorders, including nerve root problems. Dr. Travlos opined that the plaintiff's future work capacity was between 50%-75%. The plaintiff argues therefore that the jury was bound to award 25%-50% of $1,434,584, not 15% of that figure.

[39] I do not accede to this argument.

[40] It is speculative to suggest that the jury arrived at $215,000 by awarding 15% of $1,434,584.

[41] With respect to loss of future earning capacity, the jury was instructed that they could use either the earnings approach or the capital asset approach. From the figure awarded, there is no way to know which approach was used.

[42] Even if I accepted the plaintiff's premise that the jury used the earnings approach, the evidence was not as limited as the plaintiff suggests. Mr. Szekely offered average earnings for three separate educational trajectories. There was also the report of Ms. Quee-Newell, who was qualified as an expert in vocational rehabilitation. Her report provided additional evidence upon which future income projections could have been based. The jury was also entitled to consider and factor in future contingencies.

[43] In all these circumstances, it cannot be said that there was no evidence to support the jury's verdict of $215,000. Again, this argument is an invitation to step into the role of the Court of Appeal and assess whether the sum awarded is inordinately low. This is a question outside of my jurisdiction to consider.

Conclusion

[44] The application is dismissed with costs to the defendants.

"Latimer J."