CA46728
Supreme Court File No.: 144097
Supreme Court Registry: Victoria

COURT OF APPEAL

ON APPEAL FROM: The Order of the Honourable Madam Justice Winteringham of the Supreme Court of British Columbia and Jury, pronounced on February 4, 2020

BETWEEN:

PATRICIA DAWN ELLIOTT

RESPONDENT (PLAINTIFF)

AND

RYAN McCLIGGOT and SLEGG CONSTRUCTION MATERIALS LTD.

APPELLANTS (DEFENDANTS)

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CHRONOLOGY OF DATES RELEVANT TO THE APPEAL

November 18, 2012	Subject motor vehicle accident.
January 27, 2020	Trial of the action commences before Justice Winteringham with a jury.
February 4, 2020	Verdict rendered.
July 31, 2020	Reasons for Judgment (Costs) delivered.
July 31, 2020	Reasons for Judgment (s. 83 Deductions) delivered.
November 30, 2020	Partial stay application pending appeal before Justice Groberman (in Chambers) with oral reasons for judgment.

OPENING STATEMENT

The plaintiff was 36 years old when she sustained moderate soft tissue injuries in a motor vehicle accident on November 8, 2012.

She operated an unlicensed daycare out of her rented home at the time of the accident. She was off work for approximately four months due to her injuries, returning to the workforce in April 2013 as an office administrator and subsequently, a bookkeeper. The plaintiff's income tax returns for the years 2009 to 2012 disclose modest earnings in the years leading up to the motor vehicle accident. Her income was higher after returning to work post-accident. The plaintiff was able to continue preparing meals for her family post-accident, although she switched to using lighter stainless steel pots rather than heavier cast iron. She was able to return to her housekeeping responsibilities two to three months post-accident, pacing herself. Pre-accident she had enjoyed recreational bowling and golf with friends on an occasional basis. Post-accident she had tried bowling but found it less than optimal, so she and her friends no longer continued that pastime. Post-accident she took up swimming, which she discontinued due to unrelated psoriasis. She switched to yoga, which she was enjoying and found helpful but stopped that recreational activity also for reasons unrelated to the accident.

The plaintiff sought an award in the range of approximately $100,000 plus non-pecuniary damages and agreed upon specials of $3,885.54. Included in the $100,000 she had sought a past loss of income award of $8,865.73 and cost of future care award of $11,045. The learned trial judge utilized an abbreviated non-pecuniary damages jury instruction, lacking guidance on the application of fundamental legal principles. The jury awarded $463,385.54 to the plaintiff, including a non-pecuniary damages award of $350,000; past loss of income award of $46,500; and cost of future care award of $15,000.

The appellants submit that the wholly erroneous jury awards are palpable and overriding errors of fact and the use of the abbreviated jury charge is an error of law and principle, both of which require intervention. This Honourable Court should allow the appeal and submit the case back to the trial judge for assessment of damages.

PART 1 – STATEMENT OF FACTS

1. The plaintiff was involved in a motor vehicle accident that occurred on November 8, 2012, on Cedar Hill Road near Mount Douglas in Victoria. The plaintiff was travelling to the Gordon Head Recreation Centre for a meeting regarding treatment that her daughter was receiving due to a medical condition. The trial judge noted in the Costs decision:

> [2] Briefly, this was a personal injury action relating to a motor vehicle accident that occurred in Victoria, BC, on November 8, 2012. Liability was admitted. The parties each selected a trial by jury, where their only task was to assess damages. The trial proceeded from January 27, 2020 – February 4, 2020. The jury rendered its verdict in the evening of February 4, 2020. [Emphasis added.]

Transcript [T], p. 47, ll. 41 – 45; p. 48 ll. 9 – 17; Appeal Record [AR], p. 11

The Accident

2. The accident occurred when the vehicle driven by Mr. McCliggot, and owned by the defendant, Slegg Construction Materials Ltd., negligently reversed into the plaintiff's stopped vehicle. Fault for the accident was admitted at trial.

3. The plaintiff was driving her van and three young children were in the vehicle with her. The children were all properly fastened in five point harnesses and suffered either no or only modest injuries (T., p. 48 ll. 3-47; p. 49, l. 1; and p. 54 ll. 1 – 14).

4. The plaintiff was looking straight forward when the collision occurred. She was honking her horn. She estimated the impact speed of the defendant's vehicle at approximately 15 km/h (T., p. 49, l. 34-47; p. 50, ll. 1 – 3).

5. There were no issues of contributory negligence. The plaintiff was wearing her seatbelt. The plaintiff's vehicle was drivable after the accident, although it was ultimately towed to a repair shop for repairs when the plaintiff noticed it was leaking fluid (T. p. 49, ll. 22-23; p. 50, ll. 15 – 22).

6. Colour photographs of the plaintiff's vehicle appear to disclose minor damage to the hood of the plaintiff's vehicle (Appellants' Appeal Book [AAB], Tab 3, pp. 38 – 40).

The Plaintiff's Personal Information

7. The plaintiff was 36 years of age when the accident occurred. On the date of the trial she was 43 years old. She was born in Port Hardy, but resided in Victoria at the time of the trial. At the time of the accident she was renting a home at 990 Ambassador Avenue in Victoria, where she resided with her three children. At the time of trial, her children were age 23, 19 and 13. She was a single mom at the time. She operated an unlicensed daycare out of the Ambassador Avenue residence at the time of the accident (T., p. 51, ll. 1- 29; p. 53, l. 12-13; p. 60, ll. 40-47; p. 61, ll. 1-38).

8. The plaintiff described that all three of her children had medical and other issues. Her eldest child suffered from depression and anxiety that affected his ability to work. Her middle child had a number of medical conditions that caused her to drop out of school. She apparently suffered from polycystic ovary syndrome and also suffered with depression and anxiety. Her youngest child also had a number of medical issues including optic nerve hypoplasia and thyroid issues (T., p. 52, ll. 2 – 47; p. 53 ll. 1 – 11).

9. The plaintiff had last resided with a partner in approximately 2006. She was in a relationship with an individual at the time of the accident, but it terminated in January 2013 (T., p. 53, ll. 12 – 20, and 29-31).

The Daycare and the Plaintiff's Pre-Accident Earnings

10. At the time of the accident, the plaintiff was operating a daycare out of her home and generally had three to five children in attendance, not including her own three children. If she obtained a licence, she would have been able to take on seven children. An unlicensed day care is generally only allowed two children. She was hoping to get a license so she could take in more children. She had started the daycare in approximately 2007 with one child at the time (T., p. 59, ll. 29 – 38; p. 64, ll. 19-41; p. 60, ll. 35-47; p. 70, ll. 1-4; p. 145, ll. 1-22).

11. Operating the daycare allowed her to work out of her home. She leased a four-bedroom home, which allowed room for her children plus an area for the daycare (T., p. 61, ll. 5 – 24).

12. The plaintiff's income tax returns for the years 2009 to 2012 disclose modest earnings in the years leading up to the motor vehicle accident.

CRA	GROSS BUSINESS INCOME	NET BUSINESS INCOME
2009	$33,502	$6,775
2010	$28,617	$8,101
2011	$26,886	$6,153
2012	$29,565	$2,667

AAB, tabs 4 –7, pp. 41-73

13. The Statement of Business and Professional Activities attached to the T1 General Returns disclose that each year the plaintiff would write-off a portion of the rent, heat, telephone and also her motor vehicle expenses (AAB, pp. 43 – 48; 52 – 57; 63 – 65 and 69 – 73).

14. The plaintiff testified that her annual rent at the time of the accident was approximately $26,400 per year (T., p. 64, ll. 4-9).

15. The rates charged per child for daycare services varied, but tended to be approximately $700 – $750 a month per full-time spot. The plaintiff's daycare was open to the children Monday to Friday, from 7:30 AM until 5:30 PM. The plaintiff supplied morning and afternoon snacks for each of the children. The parents provided diapers, clothing and lunch (T., p. 65, ll. 1 – 16, 29-33).

16. Following the motor vehicle accident, the plaintiff's injuries prevented her from carrying on with her daycare and so she ceased operation in mid-December 2012, about one month after the accident (T., p. 69, ll. 16 – 21).

17. Without income coming in from the daycare, the plaintiff was not able to pay rent and was evicted from the rental property in early February 2013 (T., p. 69, ll. 46-47; p. 70, ll. 1 – 3).

18. In February 2013, the plaintiff moved into a new property with her three children located on Lang Street in Victoria paying $1,500 a month for rent (T., p. 70, ll. 26 – 30).

The Plaintiff's Post-Accident Earnings

19. The plaintiff testified that she was not able to work from the date of the accident until she was cleared to return to work by her family practitioner in March 2013, about four months after the accident. She found part-time employment at Bradshaw Property Management in April 2013 as an office administrator (T., p. 71, ll. 35 – 47; p. 72, ll. 1 – 17; p. 73, ll. 25-26).

20. She continued working at Bradshaw until some point in spring 2015, when she went on medical leave for clinical depression before quitting that job in fall 2015 to look for better employment (T., p. 72, ll. 23-47).

21. She was off work until December 31, 2015, when she was advised she could return to work (T., p. 72, ll. 41-47).

22. The plaintiff advised that she was not alleging the depression was caused by the accident (T. p. 73, ll. 8 – 15; Charge to Jury T., pp. 326, ll. 6 – 7).

23. At Bradshaw, she was making $15.50 an hour (T., p. 73, ll. 22 – 24).

24. The plaintiff testified that as a result of her complaints she would average about one day to one and ½ days per month off work. Some of those were partial days. She estimated that approximately 25% of the time off was due to medical appointments and the balance due to inability to work (T., p. 74, 10 – 46).

25. After completing her medical leave for depression, she found employment at Craftsman Collision (T., pp. 77, ll. 24-34).

26. She worked at Craftsman Collision from January 2016 until September 2019. Performance reviews confirmed that the employer was happy with her work. She received pay raises starting at $19 an hour ultimately going to $21 an hour (T. p. 78, ll. 6 – 47).

27. She quit her job at Craftsman in September 2019. During her time at Craftsman, she worked at several different stores. She received, generally favourable performance appraisals at Craftsman on an annual basis. She estimated she continued to miss one to 1.5 days a month over that employment (T., p. 79, ll. 1-3; p. 80, ll. 43-47; p. 81, ll. 1 – 47).

28. She described generally good relationships with her supervisors, although, she said that one of the managers acted inappropriately towards her. When she left her job at Craftsman, she did an exit interview indicating, among other things, that the wage rate was too low and that was a reason for leaving. She also indicated that she was having problems from a subsequent car accident on May 22, 2019, and also wanted to move to a job that did not require customer involvement (AAB, p. 103 – 105; T., p. 86, ll. 11-47; p. 87, 1-46; p. 88, ll. 1-46; p. 89, ll. 1-46; p. 90, ll. 1-46; p. 91, ll. 1-46; p. 92, ll. 1-11).

29. The plaintiff agreed that she never suggested to Craftsman that the November 2012 accident was a factor in her decision to leave that job in 2019 (T., p. 157, ll. 28 – 32).

30. After leaving Craftsman, she found a new job at Harbour Doors as a bookkeeper starting on October 1, 2019, working 9:00 AM – 5:00 PM for five days a week, at $25 an hour, which had risen to $26 an hour by the time of trial (T., p. 92, ll. 12 – 32).

31. The plaintiff's post–accident income tax returns disclose the following:

2013 Notice of Assessment	Net Income	$23,072
2014 Notice of Assessment	Net Income	$24,128
2015 Notice of Assessment	Net Income	$19,667
2016 Notice of Assessment	Net Income	$38,424
2017 Notice of Assessment	Net Income	$41,645
2018 T4 Statement by Craftsman		$44,808

AAB, pp. 79, 82, 85, 90, 94 and 97

32. The plaintiff was involved in a subsequent motor vehicle accident, which occurred on November 3, 2018. The plaintiff testified that she had injuries which recovered in 48

hours (T., p. 95, l. 47; 96, ll. 1 – 23).

33. The plaintiff was involved in another accident on May 22, 2019, which resulted in approximately three weeks off work from her job at Craftsman due to a hand and forearm injury before returning on a graduated return-to-work program (T., p. 96, ll. 44-47; p. 97, ll. 1 – 9).

34. The plaintiff testified that following the accident she took up swimming, but had to discontinue it in 2018 due to the development of psoriasis. At that time, she switched to yoga exercises, which she found helpful (T., p. 114, ll. 34-47; p. 115, ll. 5-29).

35. Before the accident she would do ten pin bowling, which she tried a couple of times after the accident but found it to be less than optimal. She and her friends have since discontinued bowling (T., p. 115, ll. 40-47; p. 116, ll. 8 – 41).

36. Prior to the accident, the plaintiff used to go golfing for special events one or two times a year. She continues golfing, although apparently less frequently with a restricted range of motion (T. p. 117, ll. 19 – 47; p. 118, ll. 1-47; p. 119, ll. 1-5).

37. Initially, the plaintiff restricted her house cleaning activities for 2 to 3 months and then gradually resumed activities, although she tended to pace herself. She finds she is a bit messier now (T. p. 119, l.40-47; p. 120, ll. 1 – 35).

38. She continues to prepare meals, although she avoids using heavy cast iron pots and uses stainless steel instead (T., p. 121, ll. 15 – 35).

39. The plaintiff's friend, Nadine Dalzell, testified that she had been a friend of the plaintiff's for approximately 16 years prior to the accident (T., p. 191, ll. 1 – 3). She testified that for a period of time right after the accident the plaintiff became withdrawn, although she had definitely opened up a bit in recent years (T., p. 192, ll. 3-12, 23-33. They continue to spend time together at things like movie nights at the theatre or visiting each other's residences. They would go for walks and do yoga together, although they discontinued their bowling activities (T., p. 192, ll. 34 – 44).

40. Initially, Ms. Dalzell assisted the plaintiff with activities such as shopping right after the accident, although in recent years, that had not been as prevalent (T. p. 194, ll. 28 – 35).

41. The plaintiff's adult son, Tristen Clark, testified that he helped out more around the house following the accident. He observed his mother to have discomfort and she would avoid picking up heavy weights. When he was working he would contribute to the household expenses. He was residing with his mother at the time of trial, having moved back home one month prior (T., pp. 197 – 199).

The Medical Evidence

42. The plaintiff relied on two medical reports at trial. The first was the report of Dr. Zeeshan Waseem, dated September 22, 2018 (AAB, pp. 4-27). Dr. Waseem saw the plaintiff on August 31, 2018, for medical legal purposes at the request of plaintiff counsel. Dr. Waseem is a physiatrist. The plaintiff also relied on the opinion of Dr. Bassam Masri, an orthopedic surgeon, who saw the plaintiff at the request of defendants (AAB, pp. 28-37). Dr. Masri saw the plaintiff on October 22, 2019.

43. Dr. Waseem was produced for cross-examination. The report of Dr. Masri was filed, but he did not attend for cross-examination.

44. In his medical legal report, Dr. Waseem offered the following opinion:

1. Based on the history obtained and review of provided medical records, Ms. Elliott appears to have initially sustained sprain/strain soft tissue injuries predominantly of the cervical and thoracic spines and developed headaches as a result of the subject motor vehicle accident.

2. The injuries noted above have resulted in chronic myofascial pain of the affected regions, cervicogenic headaches and generalized deconditioning.

3. The prognosis for a full symptomatic recovery is poor given the long-standing nature of her symptoms that have persisted for over 5 years post-accident despite appropriate conservative measures and medical attention. She continues to have objective signs of injury on her examination suggesting her course will remain refractory to medical management. While some further improvement with the outlined treatment recommendations is possible, she will continue to experience pain. Her physical condition would be considered chronic and unremitting and, therefore, permanent.

4. The injuries prevented her from returning to her pre-accident occupation, upended her expressed plans to expand her home daycare business and prompted her to transition to working in a sedentary capacity.

5. The injuries have caused, and will continue to cause, her to perform her usual housekeeping activities in a diminished and altered capacity while depriving her from her previously enjoyed recreational activities.

6. There is no evidence of any relevant pre-existing injuries or conditions.

7. Ms. Elliott is not at increased risk of developing degenerative changes as a result of her injuries.

8. My recommendations for future treatments include returning to swimming for cardiovascular exercise when medically cleared, use of over-the-counter analgesics as per her current regimen for pain management and intermittent access to physiotherapy and massage therapy 4-6 times per year for the purposes of combating symptom exacerbation.

AAB, p. 14 – 15

45. Dr. Masri offered the following opinion:

1. **Injuries from MVA #1**: As a result of MVA #1, Ms. Elliott suffered from Whiplash Associated Disorder Type II affecting her neck leading to myofascial pain affecting the neck, trapezius muscles, upper and mid back to the level of the shoulder blades, with associated cervicogenic headaches. This stabilized quite a few years ago, and gives her a mild ache on an ongoing basis, with moderate chronic pain aggravations with repetitive use and with prolonged sitting. The spasm as well as her postural maladaptation (shoulder forward posture) has resulted in very mild post-traumatic neurogenic thoracic outlet syndrome affecting the right upper extremity but only causing mild numbness and tingling symptoms every 2-3 months without pain. She had to take a few months off work after MVA #1 and resumed work in early April 2013

   ….

4. **Prognosis:** As it has been many years since The Accident, I do not believe that her symptoms will change over time. They will not necessarily significantly improve nor will they worsen over time. She is not at risk of developing any degenerative conditions. She is not at risk of requiring any surgery

   ….

6. **Impairment:** She has a slight impairment in terms of housework and yard work in that she requires assistance with seasonal work from her best friend. As long as her friend is willing to help, she does not require any specific professional assistance. If her friend is unable to help, then she may require some assistance with seasonal housework. Also, she does not have to do any yard work at the present time, and therefore, no assistance is required. However, if she had to do yard work, she might require assistance in that regard. Finally, if she were to move again, I do not believe that she will be able to move the furniture on her

own and she will need to hire movers.

7. **Work**: I would recommend that she be provided with a sit/stand desk to make her work more comfortable. As long she works in a sedentary capacity, I do not believe that she will have difficulties with work in the future. She is not suited to work in a daycare due to the more physical nature of the work in a daycare.

AAB pp. 36 – 37

The Plaintiff's Closing Submissions to the Jury

46. With respect to past loss of income, the plaintiff summarized the plaintiff's claim in the following terms:

> If you flip the page, you'll see that the gross total loss of earnings, Part 1 and 2, totals $11,000. I then suggest a deduction for income tax, and the total requested by Mrs. Elliott for her past loss of earning capacity is $8,865.

T., p. 281, ll. 39 – 43

47. The "page" being referred to by plaintiff counsel in the closing is the written summary of plaintiff's submissions on damages, which was marked as Exhibit C for identification (AAB p. 134 and 135).

48. With respect of the claim by the plaintiff for cost of future care, the plaintiff claimed as follows in closing submissions: "I go on or the summary goes on to discuss cost of future care. You'll see that the total claimed is $11,045." (T., p. 283, ll. 6 – 9). The summary referenced by counsel again is Exhibit C for identification wherein the total claim for cost of future care is articulated in the amount of $11,045 (AAB p. 135).

The Defendant's Closing Submissions

49. In the defendant's closing submissions, the amount claimed for past loss of income was said to be restricted to the period of time off work from the accident in November 2012 until April 2013, when she found more remunerative employment (T., p. 293, ll. 1 – 47; T., p. 294, ll. 27 – 33).

50. In the defendant's closing submissions, the plaintiff's claim for cost of future care in the amount of $11,045 was challenged on the basis that it was primarily speculative evidence without any actual proof of cost (T., p. 298, ll. 5 – 25).

The Judge's Charge to the Jury

Non-pecuniary damages

51. The judge's charge to the jury on non-pecuniary damages was very brief and lacked much of the content found in the full Model CIVJI charge (T., pp. 332 and 333).

Loss of income to date of trial

52. The judge's charge on loss of income to the date of trial included the following:

> Taking account all of these factors, it is for you to decide whether Ms. Elliott has proven on a balance of probabilities that she suffered a loss of income as a result of the injuries sustained in the accident in the period from the date of the accident to the date of trial.
>
> Ms. Elliott submits that an award of $8,865.73 is reasonable under this head. That number is based on: Her initial loss from her daycare from the time of the accident until her return to the workforce in April 2013; after April 2013 her evidence that she missed one to one and a half days per month, and as agreed between counsel that there be a reduction for tax of 22.7 percent.
>
> The defendants submit that there could be an award of damages for past income loss from the date of the accident until Ms. Elliott's return to work in April 2013, but that she has not met the evidentiary burden on her to prove this loss.
>
> T., p. 334, ll. 13 – 31

Cost of future care

53. The judge's charge to the jury on cost of future care included the following:

> The costs of future care being pursued by Ms. Elliott are her costs of physiotherapy and medications.
>
> In terms of ongoing treatment recommendations and requirements, there is evidence from Ms. Elliott and Dr. Waseem that she will need further physiotherapy, approximately four to six times per year, for pain management and the use of over-the-counter analgesics as per her current regime for pain management. If you find that there is a real possibility that this will occur, you should award Ms. Elliott a reasonable amount to compensate her for future physiotherapy expenses and over-the-counter medications.

T., p. 337 ll. 35 – 47, p. 338, l. 1

The Verdict

54. After deliberations the jury returned with the following verdict:

> [3] At trial, the plaintiff sought an award in the range of approximately $100,000 plus non-pecuniary damages and agreed upon special damages of $3,885.54. The jury awarded $463,385.54, distributed across the relevant heads of damages as follows:
>
> a) Special damages: $3,885.54;
>
> b) Past loss of income earning capacity: $46,500;
>
> c) Loss of future income earning capacity: $45,000;
>
> d) Cost of future care: $15,000;
>
> e) Loss of housekeeping capacity: $3,000; and
>
> f) Non-pecuniary damages: $350,000.

Reasons for Judgment on Costs, AR, p. 11

PART 2 – ERRORS IN JUDGMENT

55. It is respectfully submitted that the jury assessments of:

i. Non-pecuniary damages;
ii. loss of income to the date of trial; and
iii. cost of future care

were inordinately high and wholly erroneous assessments of those damages, such as to warrant interference by this Court and reassessment.

56. It is respectfully submitted that the learned trial judge erred in providing an abbreviated and inadequate charge as to the law relating to the assessment of non-pecuniary damages.

PART 3 – ARGUMENT

I. Standard of Review

57. The appellants submit the amount of damages is a question of fact, which an appellate court cannot set aside absent "palpable and overriding error" (*M.B. v. British Columbia*, 2003 SCC 53 at para. 54).

58. In the decision of *Boyd v. Harris*, 2004 BCCA 146, at para. 6, this court states:

> [6] The basic principles that support a deferential standard of review for factual findings made by trial judges are the restriction of the number, length, and cost of appeals; the promotion of the autonomy and integrity of the trial proceedings; and the recognition of the expertise of the trial judge and his or her advantageous position: *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235 (S.C.C.) at para. 34. These principles apply equally to civil jury trials.

59. At para. 11 of *Boyd*, this court continues:

> [11] …while great deference must be afforded to jury awards, appellate courts have a responsibility to moderate clearly anomalous awards in order to promote a reasonable degree of fairness and uniformity in the treatment of similarly-situated plaintiffs. As well, outlier awards, if not adjusted, could lead to a perception that the judicial system operates like a lottery and to a consequent undermining of public confidence in the courts.

60. The lack of guidance provided to the jury on fundamental legal principles required for the assessment of non-pecuniary damages was an error of law reviewable on the standard of correctness. The appellants submit the decision of *Knauf v. Chao*, 2009 BCCA 605 at paras. 37-38, stands for the proposition that in the event of a non-direction by the trial judge resulting in a substantial wrong or miscarriage of justice, there is an error of law and the remedy is a new trial.

II. The Jury Assessments are “Wholly out of all Proportion” Requiring Interference

a. Error in Assessing Non-Pecuniary Damages Award

61. In *Stapley v. Hejslet,* 2006 BCCA 34 at para. 39, Kirkpatrick J.A. observed that in the process of the appellate review of jury awards of damages, “this court should not interfere with the jury award of damages unless the award falls substantially beyond the upper or lower range of awards of damages set by trial judges in the same class of case” (emphasis in *Stapley*), quoting from the decision of *Boyd v. Harris,* 2004 BCCA 146 at para. 5.

62. At paras. 40-41 of *Stapley*, again referencing *Boyd*, Kirkpatrick JA, wrote:

> [40] Smith J.A. acknowledged that "[t]he difficult problem is how to identify the extent of permissible deviation from the conventional range of awards" (at para. 12). He took guidance from the decision in *Foreman v. Foster* (2001), 84 B.C.L.R. (3d) 184 at para. 32, 2001 BCCA 26 at para. 32, where Lambert J.A., speaking for the majority, said:
>
> > [32] This Court cannot interfere with a jury award merely because it is inordinately high or inordinately low, but only where it is "wholly out of all proportion" in that "the disparity between the figure at which they have arrived, and any figure at which could properly have arrived must ... be even wider than when the figure has been assessed by a judge sitting alone." (See *Nance v. B.C. Electric Railway Co*., [1951] A.C. 601 at 613-4, per Viscount Simon.) Among the reasons for this Court's reluctance to interfere with a jury award, perhaps the most important, is that we do not know the findings of credibility or of other facts which the jury may have reached on the way to their assessment. So the fact that the award may seem to this Court to be very much too high or very much too low will not be sufficient for this Court to change an award made by a jury even where it might be sufficient to change an award made by a judge alone. So it would be a rare case, indeed, where a jury award could be successfully appealed to this Court in order to make it consistent with awards in like cases. (See *Johns v. Thompson Horse Van Lines* (1984), 58 B.C.L.R. 273 (B.C.C.A.).
>
> [41] However, deference to the jury must be balanced against the need for predictability. As Smith J.A. held in *Boyd*, at para. 11:

> [11] On the other hand, while great deference must be afforded to jury awards, appellate courts have a responsibility to moderate clearly anomalous awards in order to promote a reasonable degree of fairness and uniformity in the treatment of similarly-situated plaintiffs. As well, outlier awards, if not adjusted, could lead to a perception that the judicial system operates like a lottery and to a consequent undermining of public confidence in the courts.
> [Emphasis added]

63. In *Stapley,* the majority concluded the first task of the court in the "'horizontal' comparative approach" outlined in *Boyd* is to determine if the authorities relied on by the appellant were reasonably comparable to the case at bar so as to constitute a range of acceptable awards. The next step is to determine whether the award under review from the jury is within the range and, if not, if it falls so substantially outside the range that it must be adjusted (*Stapley*, para. 44). We are obliged to consider the plaintiff's case in the most favourable light reasonably possible (*Stapley*, para. 106). The court then set out the now often repeated list of factors to be considered in assessing non-pecuniary damages at para. 46:

> [46] The inexhaustive list of common factors cited in *Boyd* that influence an award of non-pecuniary damages includes:
>
> (a) age of the plaintiff;
>
> (b) nature of the injury;
>
> (c) severity and duration of pain;
>
> (d) disability;
>
> (e) emotional suffering; and
>
> (f) loss or impairment of life;
>
> I would add the following factors, although they may arguably be subsumed in the above list:
>
> (g) impairment of family, marital and social relationships;
>
> (h) impairment of physical and mental abilities;
>
> (i) loss of lifestyle; and
>
> (j) the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff: *Giang v. Clayton*, [2005] B.C.J. No. 163 (QL), 2005 BCCA 54).

64. In the case at bar it is apparent the jury accepted the plaintiff sustained injuries in the accident continuing to affect her at the date of trial, which would likely continue to bother her indefinitely. That said, the evidence confirms she had been able to return to gainful employment within four months of the accident and had been able to work more or less continuously thereafter to the date of trial in a more lucrative position than pre-accident, save and except for missing 1 to 1.5 days per month from work due to her complaints or her need for medical treatment.

65. The medical evidence from two experts is brief and generally consistent. The plaintiff suffered from soft tissue injuries that had not recovered, although there had been some moderate improvement over the years. The medical evidence confirmed the plaintiff's own evidence that she generally suffered from mild pain with occasional moderate flare-ups. The plaintiff confirmed she was generally able to resume her recreational activities albeit with limited restrictions. For example, she found ten pin bowling would aggravate her condition so she and her friends discontinued that activity.

66. Given the size of the jury's award it is obvious they accepted the plaintiff's description of her injuries and resulting limitations as being credible. On that basis, the appellant says the following cases establish the high-end range for awards of nonpecuniary damages made by trial judges in cases comparable to the case at bar:

a) ***Oberholtzer v. Tocher*, 2018 BCSC 1089**

Plaintiff, a 58-year-old bank employee, suffered soft tissue injuries as a result of a severe collision between her vehicle and defendant's vehicle, which had gone through a red light. **She suffered soft tissue injuries to her neck, upper back, shoulder area, arms, and thumbs, with headaches. She suffered prominent pain in her upper back, shoulders, and arms, as well as painful headaches for a number of years.** She also had pain and reduced functionality in her thumbs. Her ability to work was impacted, and she worked reduced hours with modified duties. She found ways to adapt to her current level of pain, but the pain persisted and was exacerbated by certain activities and by her work. She was not expected to

significantly improve in the future, and could expect to have flare-ups of pain throughout the rest of her life. While she was stoic and continued with activities in her life, it was clear from her evidence and from the evidence of her husband that these injuries took a toll on their relationship and on her lifestyle. **The injuries suffered in the accident resulted in chronic myofascial pain and thoracic outlet syndrome, with long-term impairment in her quality of life.** The plaintiff's failure to comply with treatment recommendations delayed improvement in her condition, and amounted to a failure to mitigate her damages. After reducing by 5% for plaintiff's failure to mitigate, **Baker J. awarded plaintiff general damages in the amount of $90,250**, as well as loss of future earning capacity to be calculated, and cost of future care of $38,399 plus a further present value amount to be calculated.

b) ***Klingler v. Lau*, 2019 BCSC 1776**

Plaintiff, a 36-year-old pediatric occupational therapist, suffered injuries when the defendant's vehicle pulled into her path, with the plaintiff unable to avoid a collision, the plaintiff's vehicle was then struck from behind by the trailing vehicle. Plaintiff described this as two hard and sudden impacts. **After the collision she complained of soft tissue pain in her neck, shoulder area, upper back, and lower back, with headaches.** Plaintiff was a credible witness. **While her soft tissue injuries improved over time, they did not resolve, and she was left suffering from myofascial pain syndrome in her neck and upper back. Her headaches were cervicogenic in nature, but with migraine-like characteristics. Her headaches were persistent, and continued on a chronic basis.** Prior to the collision, the plaintiff had used physical activity to manage her pre-existing anxiety disorder. As a result of her injuries and inability to return to her prior physically active lifestyle with the same intensity she enjoyed prior to the collision, her prior anxiety and mood difficulties were aggravated. Her ongoing chronic pain was aggravated by activity. While there was some potential for improvement, the prognosis for cure or elimination of her

ongoing pain was extremely poor. Her ability to work in her physically and mentally demanding job was and would continue to be impacted. The inability to provide consistent delivery of therapy impacted her effectiveness as a pediatric occupational therapist, and would impact her ability to attract or retain clients. Her symptoms were not expected to resolve. **Adair J. awarded plaintiff general damages in the amount of $95,000**, as well as $300,000 for loss of future earning capacity, and $85,548 for cost of future care.

c) ***Montgomery v. Williamson*, 2015 BCSC 792**

Plaintiff, a self-employed salesman, suffered injuries when his vehicle was struck from behind at high speed. **He complained of immediate pain in his neck, upper back, and shoulder area, as well as headaches. While the plaintiff's symptoms improved over time, they did not resolve. He was left suffering from chronic, ongoing myofascial pain.** His pre-existing degenerative shoulder problems were aggravated, and as a result of the injuries suffered in the accident he required shoulder surgery some 5-10 years earlier than otherwise would have been the case. He suffered pain and limitation; became socially withdrawn and irritable; and suffered fatigue, reduced energy, and symptoms of depression. While his symptoms were expected to improve, it was likely that they would never fully resolve. The plaintiff's ability to work as many hours as he had prior to the accident was reduced due to his pain and fatigue. **Crawford J. awarded plaintiff general damages in the amount of $95,000**, as well as $75,000 for loss of future earning capacity, $40,000 for cost of future care, $7,500 for past loss of housekeeping capacity, and $5,000 for loss of future housekeeping capacity.

d) ***Merko v. Plummer*, 2016 BCSC 1403**

Plaintiff, age 46, suffered injuries as a result of two motor vehicle accidents. Since the accidents her pain was significant and had at times radiated into her right arm. **She was diagnosed as suffering from chronic myofascial**

pain or pain syndrome in her neck, upper back, and shoulder area, and complained of ongoing headaches. The accident aggravated her pre-existing headache condition. Despite undergoing therapy, exercise programs, injections, and prescription and over the counter medication, the plaintiff's chronic pain symptoms continued. While the plaintiff suffered from headaches prior to the accidents, she said that after the accidents her headaches were much worse and said that her neck pain triggered her headaches. Her symptoms impacted her ability to work but she tried to work through her pain, and her pain was elevated by the time she came home from work on most days. Her chronic pain was expected to continue into the future. As a result of her ongoing pain there was a chance that the plaintiff would not be able to sustain full-time work as long as she would have but for the accidents, and she might need to reduce her hours of work in the future. **Griffin J. awarded plaintiff general damages in the amount of $95,000**, as well as $100,000 for loss of future earning capacity, $7,308 for cost of future care, and $28,000 for loss of housekeeping capacity.

e) ***Olson v. Ironside*, 2012 BCSC 546**

Plaintiff, a 19-year-old cook, suffered injuries when her vehicle was struck from behind and pushed into the vehicle in front of hers. **She was diagnosed as having suffered Grade 2 whiplash-type injuries to her neck, upper back, and lower back, with related headaches.** She suffered nightmares and sometimes awoke in tears. She had migraine headaches that were worse than her pre-accident headaches, were aggravated by physiotherapy, and could be triggered by light, smell, or sound. After the accident the plaintiff took approximately three months off work and then returned to lighter duties. She developed a painful jaw disorder that required extremely painful treatment. She continued to miss time from work due to her injuries, causing her problems with her employer. The plaintiff's emotional condition worsened in the years after the accident. She was diagnosed with depression and suffered panic attacks and nightmares. **At the time of trial the plaintiff was left suffering from**

chronic soft tissue injuries with myofascial pain in her neck, upper back, and lower back, chronic daily cervicogenic headaches, exacerbation of her pre-existing migraine headaches, post-traumatic thoracic outlet syndrome bilaterally, chronic sleep disruption, major depressive disorder in remission at the time of trial, post-traumatic stress disorder in partial remission at the time of trial, and permanent right TMJ dysfunction. It was unlikely that the plaintiff would fully recover from her injuries. **Josephson J. awarded plaintiff general damages in the amount of $100,000**, as well as $450,000 for loss of future earning capacity, and $75,000 for cost of future care.

f) ***Evans v. Keill*, 2018 BCSC 1651:**

Plaintiff, a 34-year-old grocery store produce manager, suffered injuries when her vehicle was struck from behind. **She suffered soft tissue injuries to her neck, trapezius, upper back, mid-back, and lower back areas. She suffered headaches and her sleep was impacted**. Her work aggravated her pain. Her social and recreational life was impacted. She also began drinking alcohol heavily. She became depressed as a result of her injuries, her loss of self-esteem due to not being able to do a job she had previously been very good at and derived a lot of self-worth from, her inability to engage in strenuous and challenging physical activity, her associated weight gain; and her inability to become and remain pain-free and headache-free. Her psychological issues led to two suicide attempts. She was diagnosed as suffering from mild somatic symptom disorder, major depressive disorder in partial remission, and social anxiety disorder. **Pain in her mid-back and lower back resolved, but she was left with chronic myofascial pain affecting her neck, shoulders, and upper back, with cervicogenic headaches, as well as migraine headaches featuring severe pain, sensitivity to light, nausea and vomiting. Her symptoms and headaches improved over time but did not resolve.** Plaintiff's pain and loss of enjoyment of life would continue into the foreseeable future, and she was unlikely to ever fully recover. She had experienced approximately

60% improvement, but her pain had plateaued and was permanent and unlikely to improve. Plaintiff failed to act reasonably in mitigating her employment losses, and her damages were reduced accordingly. **Matthews J. awarded plaintiff general damages in the amount of $110,000**, as well as $510,000 for loss of future earning capacity, $140,000 for loss of pension, $20,000 for cost of retraining, and $71,299 for cost of future care.

g) ***Daleh v. Schroeder*, 2019 BCSC 1179**

Plaintiff, a 24-year-old student, suffered injuries as a result of two motor vehicle collisions. In the first collision the plaintiff's vehicle was rear-ended and pushed into the car in front of hers. **She complained of pain in her neck, upper back, and headaches.** She missed two weeks of full-time work after the collision. She took medical leave from her post-secondary program, returning to school only one semester later. In the second collision 27 months after the first, plaintiff was struck by a vehicle while walking across a crosswalk. **The first collision caused soft tissue injuries that led to myofascial pain syndrome. This pain syndrome had been improving at the time of the second collision, but the second accident reactivated her pain back to its earlier levels.** The second collision also caused injuries to her right knee and hip. However, these were no longer as symptomatic as they once were. **She had some ongoing mild periodic swelling in her neck region, but had near full range of motion in her neck, shoulder, and upper back area, despite some continuing pain and sleep difficulties.** It was accepted that she suffered from major depressive disorder and some mild anxiety, both triggered by the collision. With proper strength training, treatment, and encouragement there was a reasonable potential for her to eventually be able to return to full-time work. **Branch J. awarded plaintiff general damages in the amount of $117,000 (after reducing by 10% for plaintiff's failure to mitigate her general damages)**, as well as $200,000 for loss of future earning capacity, and $150,000 for cost of future care.

67. The appellants say that each of the above cases involve injuries that are more serious than those suffered by Ms. Elliott. A comparison of her complaints and medical prognosis with these cases support a conclusion that a reasonable upper limit award for non-pecuniary damages by a trial judge would have been in the range of $80,000 to $90,000. In the case at bar, the plaintiff was off work for less than four months and then returned to part-time employment that shortly increased to full-time employment. She has been able to maintain full-time employment with promotions since her return to work.

68. At the time of this verdict, the rough upper limit for non-pecuniary damages was approximately $388,177 *(McCormick v. Plambeck*, 2020 BCSC 881, para. 314).

69. The jury award for non-pecuniary damages was $350,000, which clearly falls outside of the range for similar cases in judge alone trials. Indeed, it is four times the anticipated upper limit for damages in a judge alone trial of this nature. It is a palpable and overriding error, wholly out of all proportion and requires interference.

b. Error in Assessing Past Loss of Income

70. The jury awarded the plaintiff $46,000 for past loss of income in circumstances where plaintiff counsel quantified the claim in closing submissions to be approximately $8,865.73 after deduction of income tax. The jury was informed in the charge that the award should be net of income tax at 22.7%, so presumably the gross award would have been in the range of approximately $56,000 after taking into account the applicable deduction.

71. In the judge's final jury instructions, it was stated at AAB, p. 160, para. 99:

> [99] Ms. Elliott submits that an award of $8,865.73 is reasonable under this head. That number is based on: **(1)** her initial loss from her daycare from the time of the accident until her return to the workforce in April 2013; (2) after April 2013, her evidence that she missed 1 to 1 ½ days per month; and (3) as agreed between counsel, that there be a reduction for tax of 22.7%.

72. It must be recalled that the plaintiff's earnings prior to the accident were extremely modest, even if one accepts that some of the expenses used to reduce her taxable income were applied towards the family's rent, heat, light, and telephone bills. A review of the plaintiff's income tax returns show that her earnings immediately increased following her return to work and by the date of trial were dramatically higher than her pre-accident earnings. There is no principled basis in the evidence to support a past loss of income award of $46,000 net of income tax.

73. In light of the plaintiff's submissions, that the past loss of income should be assessed $8,865 on a net basis, the jury award is approximately five times the amount sought by plaintiff counsel.

74. The appellants say that on the evidence before the jury, the aware for loss of income to the date of trial cannot be sustained.

c. Error in Assessing Cost of Future Care Award

75. In closing argument, plaintiff counsel asserted a claim for cost of future care in the range of $11,045. The basis of the calculation was for over-the-counter medication expenses that had been guessed at by the plaintiff at about $30 per month and also for physiotherapy expenses at $25 a treatment, for six sessions per year, for a period of 22 years.

76. The jury awarded $15,000 for cost of future care. This is approximately 35% higher than the amount requested by plaintiff counsel in closing submissions.

77. The appellants say that on the evidence before the jury, the award for cost of future care cannot be sustained.

III. The Abbreviated Non-Pecuniary Damages Jury Instructions Lacked Required Guidance on Legal Principles

78. There are indications in the discussions between counsel and the court that there was a general acceptance that the plaintiff's injuries were relatively minor in the scheme of things. There were discussions about whether the abbreviated charge instructions from CIVJI should be used (T.. p. 175, ll. 7 – 16; p. 166, ll. 21 – 47; and p. 167, ll. 1 – 3).

79. Ultimately, the court charged the jury on non-pecuniary damages in an abbreviated fashion with limited modification. A comparison of the abbreviated charge given in this case to the usual model charge in CIVJI, confirms that the jury, unfortunately, were given little guidance as to how to assess non-pecuniary loss. The normal references to the underlying principles of quantification were either omitted or not fully expounded (see CIVJI 12.03, 12.04, and 12.06). This may in part explain the grossly excessive assessment of non-pecuniary damages.

80. In CIVJI, the restricted use of the abbreviated model charge is discussed at paragraph 3.01A with a footnoted reference to the caution of this court in *Knauf v. Chao*, 2009 BCCA 605 at para. 33, where this court states judges should be "very cautious" using CIVJI's Abbreviated Instructions.

81. A review of the charge found at paras. 88 to 94 of the final instruction to the jury, demonstrates that the jury was told little more than to "pick a number". The result was to award an amount close to the upper limit for catastrophic injuries, to a person who at most had suffered moderate soft tissue injuries.

82. While neither counsel took objection to the abbreviated charge on non-pecuniary damages, this does not detract from the fact that the inadequacy of the charge may explain the result. The use of an abbreviated charge may in fact have complicated the entire process. The lack of guidance provided to the jury on fundamental legal principles required for the assessment of non-pecuniary damages was an error of law reviewable on the standard of correctness.

IV. Conclusion and Remedy: Allow the Appeal and Remit to the Trial Judge for Assessment of Damages

83. It is respectfully submitted that the award for non-pecuniary damages cannot stand. Additionally, it is the position of the appellants that the awards for past loss of income and future care costs are clearly erroneous and not based on the evidence before the jury. Particularly as regards the award for loss of income to the date of trial, the amount awarded cannot be rationally supported by the evidence. The appeal must be allowed.

84. As to remedy, there are three options: The appellants say the case should be remitted to the trial judge to assess damages. Alternatively, a new trial on the issue of damages could be directed or this court could substitute an assessment of damages for the jury's erroneous verdict.

85. In *White v. Gait*, 2004 BCCA 517, Thackray J.A., in dissent, would have directed a new trial rather than to reduce the award for non-pecuniary damages from $197,000 down to $115,000 as proposed by the majority. At para. 83 of the judgment, he noted the reasons of Madam Justice Southin in *Johnson v. Laing,* 2004 BCCA 364.

> [83] There is one other avenue open in the case at bar as illustrated in ***Johnson v. Laing,*** 2004 BCCA 364, [2004] B.C.J. No. 1313 (Q.L.). In that case the plaintiff suffered injuries when thrown off his bicycle when struck by a car. The plaintiff asserted a serious injury to his spine but the jury awarded only $2,250 non-pecuniary damages. The trial judge did not consider the injuries to be trivial and transitory and his charge to the jury reflected this. On appeal no exception was taken to the charge. Madam Justice Southin, writing for a unanimous Court, held that the trial judge did not have the jurisdiction to substitute his decision for that of the jury. She asked as follows, at para. 17:
>
> > ...
> > 2. On an appeal, where the court is faced with a jury verdict that contains an error of law, and the trial judge has declined to remedy the error or has erred in applying a remedy, what steps may the court of appeal take to remedy the situation? May the court:

> a. remedy the apparent error by substitution of an assessment of damages for the jury's verdict;
>
> b. remit the matter to the trial judge for reconsideration and assessment of damages in accordance with directions; or
>
> c. order a new trial on a limited issue (for example, assessment of damages)?

[84] Madam Justice Southin, at para. 152, concluded that the jury's verdict, apparently being that there was no permanent spine damage caused by the accident, "was unreasonable." This being so she concluded that the jury's verdict was "legally unreasonable" that is, an error of law.

[85] Madam Justice Southin then noted (at para. 153 and following) that the parties agreed that this Court could assess the damages but that they disagreed as to whether the case could be remitted to the trial judge to assess the damages. Her conclusion was as follows:

> [157] I have concluded, although not without some hesitation, that s.9(1)(c) does empower this Court to remit a cause to the trial judge to assess the damages on the evidence at the trial before him in circumstances such as these, and that, in this case, the Court should do so. The learned trial judge has the great advantage of having seen the witnesses, especially the appellant.
>
> [158] Important though the right of trial by jury in civil cases is thought to be, the Court must be mindful not only of the cost of a new trial by jury but also both of the inconvenience to the witnesses, both expert and lay, and the reproach the administration of justice rightly suffers from delays its procedures inflict on litigants. It is now some seven years since the accident and five years since this action was brought and the sooner it is ended the better.

86. In *White,* Justice Thackray concluded that the judgment under review was manifestly unreasonable and therefore perverse. In the result, he felt a new trial was preferable to simply substituting the court's figure for that of the jury (*White*, paras. 100 – 101).

87. In *Toor v. Toor,* 2007 BCCA 354, in a case where credibility apparently played a role in a jury's decision to make an inordinately low award of non-pecuniary damages, a new trial was directed. Prowse J.A. declined a request to refer the matter back to the trial

judge, in part because the trial judge had been advised of an offer to settle. The court also noted that *Johnson* had been distinguished by another judgment of this Court in *Fast v. Moss* (2005), 2005 BCCA 571, 47 BCLR (4th) 44, which considered the litigant's right to a jury trial that would be lost if the matter was referred back to the trial judge. In the case at bar, however, civil juries are currently not sitting in the province of British Columbia so arguably this reasoning is distinguishable on that basis.

88. In *Harder v. Poettcker*, 2016 BCCA 477, this court remitted the assessment of damages to the trial judge allowing the jury verdict on liability to stand. In *Harder,* the parties consented to the new trial being before the trial judge and waving the right to a jury.

89. The appellants say that the jury awards for non-pecuniary damages, loss of income to the date of trial, and cost of future care are manifestly unreasonable and therefore perverse. They should be set aside.

90. In the circumstances the appellant says the matter should be returned to the Supreme Court of British Columbia for a new trial, or alternatively, for a new assessment of damages under all heads by the trial judge. While it cannot be said that the award for loss of capacity and household services are perverse in the sense that the other heads of damages are, it would be inappropriate for the trial judge to be bound by some findings of the jury on damages when considering other heads of loss. Consequently, the trial judge should be free to assess all of the plaintiff's losses. In the further alternative, this court should assess the Plaintiff's losses for non-pecuniary damages, past loss of income and cost of future care.

91. The within accident was nine years ago. In the words of Madam Justice Southin: "…the sooner it is ended the better." Due to the COVID-19 suspension of civil jury trials, a jury will not be available in British Columbia until at least October and it is possible the suspension will be extended. Further, the learned trial judge has the advantage over this Honourable Court of having seen the witnesses testify, particularly the plaintiff. As a

result, the appellants submit it is preferable to remit this case back to the trial judge to assess damages.

PART 4 – NATURE OF ORDERS SOUGHT

92. The appellants seek the following orders:

a) an order setting aside the jury's verdict on all heads of damage;

b) in the alternative, an order setting aside the jury's verdict on non-pecuniary damages, loss of income to the date of trial, and cost of future care;

c) an order remitting the assessment of damages in whole or in part to either the trial judge or to the Supreme Court of British Columbia;

d) in the alternative, that this Court assess the plaintiff's non-pecuniary damages, loss of income to the date of trial, and cost of future care; and

e) costs of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 8th day of February 2021 at Vancouver British Columbia.

"Robert C. Brun"	"Jennifer J.L. Brun"
Robert C. Brun, Q.C.	Jennifer J.L. Brun
Counsel for the Appellant	Counsel for the Appellant

LIST OF AUTHORITIES

Cases — Para(s)

Secondary Sources