

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Padgham v. Ram*,
2025 BCCA 100

Date: 20250331
Docket: CA49622

Between:

Cheyenne Ashley Padgham

Appellant/Respondent on Cross Appeal
(Plaintiff)

And

**Jagat Ram, South Coast BC Transportation Authority dba Translink
and Coast Mountain Bus Company Ltd.**

Respondents/Appellants on Cross Appeal
(Defendants)

Before: The Honourable Madam Justice DeWitt-Van Oosten
The Honourable Justice Iyer
The Honourable Justice Edelmann

On appeal from: An order of the Supreme Court of British Columbia, dated
January 16, 2024 (*Padgham v. Ram*, 2024 BCSC 72, Vancouver Docket M184778).

Counsel for the Appellant/Respondent on
Cross Appeal:

M.L. Elliott
G. Cameron

Counsel for the Respondents/Appellants on
Cross Appeal:

R.C. Brun, K.C.
J.J.L. Brun, K.C.
C. Winiarski

Place and Date of Hearing:

Vancouver, British Columbia
November 12, 2024

Place and Date of Judgment:

Vancouver, British Columbia
March 31, 2025

Written Reasons by:

The Honourable Justice Edelmann

Concurred in by:

The Honourable Madam Justice DeWitt-Van Oosten
The Honourable Justice Iyer

Summary:

This appeal arises from an assessment of damages following a motor vehicle accident for which the respondents admitted liability. The appellant suffers from ongoing injuries, which reduce her past and future income earning capacity. At trial, the trial judge reduced several heads of damage by 70% because he found the appellant failed to mitigate her losses by not pursuing available pharmaceutical treatments. The appellant argues that the trial judge failed to apply the correct test for mitigation, misapprehended evidence, and improperly assessed witness credibility. The respondents cross appeal, arguing the trial judge erred by accepting the appellant's testimony regarding her income loss and earning capacity. The respondents concede that the trial judge erred in reducing the special damages award by 70%, as those damages would have been necessary even if the appellant had pursued pharmaceutical treatments.

Held: Appeal dismissed, except as it relates to the reduction in special damages; cross appeal dismissed. The trial judge applied the correct test for mitigation and his conclusion that the pharmaceutical treatments would have improved the appellant's condition was supported by the evidence as a whole. The appellant has not demonstrated that the trial judge made an error when assessing the amount of reduction to the contested parts of the damages award. The trial judge did not misapprehend the evidence of the expert witnesses; he was entitled to prefer one doctor's evidence over others. The trial judge did not make a palpable and overriding error when assessing the appellant's credibility. Respecting the cross appeal, the trial judge was entitled to accept portions of the appellant's evidence despite concerns about her credibility.

Reasons for Judgment of the Honourable Justice Edlmann:

[1] This appeal arises from a personal injury damages award. The appellant (plaintiff) challenges the award on the grounds that the trial judge failed to apply the correct test for mitigation, misapprehended evidence, and improperly assessed the credibility of witnesses. The respondents (defendants) cross appeal, challenging the award on the ground that the trial judge erred in accepting the appellant's testimony regarding past and future income loss and earning capacity.

[2] The appellant was injured in October 2016 when a TransLink bus driven by the respondent Jagat Ram collided with her car at an intersection. The respondents admitted liability and causation, and the trial focused solely on the issue of damages.

[3] The parties largely agreed on the nature of the injuries that were caused by the collision, which were described by the trial judge in the following terms:

[3] The plaintiff experienced a double whiplash motion. She broke her C4 vertebra, which healed successfully after a few months. Pain in her jaw, hips, and knee soon resolved. Seven years after the collision, however, she still suffers from neck and upper back pain. More profoundly, she suffers from near-daily low-grade headaches. She also suffers from throbbing migraine-type headaches, sometimes accompanied by light sensitivity and nausea, several times a month.

[4] The appellant worked two jobs at the time of the collision, as a bank teller and restaurant server. In 2019, she began working as a tattoo artist and left her job at the bank in 2020 to pursue tattooing. The appellant claimed her ability to work as a tattoo artist is negatively impacted by her persistent injuries, as the physical nature of the work exacerbates her symptoms and limits her hours of work.

[5] At trial, the assessment of the appellant's loss of income earning capacity was challenging as she testified that tattooing is a cash business and much of her income was not declared on her tax returns in the years preceding the trial. Despite concerns around the appellant's credibility, the trial judge ultimately found that her income earning capacity in both the past and the future had been reduced as a

result of her injuries. Both the appellant and the respondents challenge aspects of the credibility findings and assessment of losses.

[6] The appellant pursued some treatment for her injuries in the years after the collision. However, she did not try various available pharmaceutical treatments, until trying one round of Botox shortly before trial. The trial judge found she had acted unreasonably in failing to mitigate her losses from the collision and reduced various heads of damage by 70% as a result. The appellant challenges this decision on several grounds. The respondents concede that the award for special damages should not have been subject to a deduction.

[7] For the reasons below, I would allow the appeal on the issue of special damages, but dismiss all other grounds of appeal. I would also dismiss the cross appeal. In the following sections I will set out the issues on the appeal and cross appeal before turning to address each of them in turn.

Issues

[8] The issues on appeal are whether the trial judge erred in:

1. failing to apply the correct test for mitigation;
2. misapprehending the evidence relative to the assessment of damages;
and
3. assessing the credibility of the appellant and the lay witnesses called by the appellant.

[9] The cross appeal raises the issue of whether the trial judge erred in accepting the appellant’s testimony regarding past and future loss of income and earning capacity.

Discussion

Standard of review

[10] The standard of review for damages awards is highly deferential. An appeal court may not alter a damages award made at trial merely because, on its view of the evidence, it would have come to a different conclusion. An appeal court may intervene only where there was no evidence upon which the trial judge could have reached their conclusion, proceeded upon a mistaken or wrong principle, or where the result at trial was so inordinately high or low that it must be a wholly erroneous estimate of the damage (*Deegan v. L'Heureux*, 2023 BCCA 159 at para. 40, citing *Woelk v. Halvorson*, [1980] 2 S.C.R. 430, 1980 CanLII 17 at 435–436).

[11] The standard of review for findings of fact, including inferences drawn from those facts, and findings of mixed fact and law is palpable and overriding error (*Housen v. Nikolaisen*, 2002 SCC 33 at paras. 19–23).

Did the trial judge err in applying the test for mitigation?

[12] The appellant raises a number of concerns with the manner in which the trial judge approached the test for mitigation, both on an evidentiary level and in terms of the application of the legal test.

[13] The test for a reduction in a damages award as a result of a plaintiff's failure to mitigate is well established. A defendant must prove: (1) that the plaintiff acted unreasonably in eschewing the recommended treatment, and (2) the extent, if any, to which the plaintiff's damages would have been reduced had they acted reasonably (*Chiu v. Chiu*, 2002 BCCA 618 at para. 57). The evidentiary burden at the second stage of the test was recently clarified in *Haug v. Funk*, 2023 BCCA 110:

[61] [...] [T]he second branch of the *Chiu* test [...] require[s] the defendant to prove on a balance of probabilities that the plaintiff's injuries *would have* been reduced to some degree had they acted reasonably. Only once this is established does the Court go on to assess the reduction to the damages award based on *the extent* to which the injuries would have been avoided, which is the true hypothetical. [Italics in original.]

[14] Reading the reasons as a whole, I am not persuaded the trial judge misunderstood or misapplied the test for mitigation. Although the appellant challenges the basis for doing so, the trial judge found that the appellant acted unreasonably in eschewing available pharmaceutical treatments. In addition to seeing her family doctor, the appellant was examined by several medical experts who prepared contemporaneous reports for litigation purposes. In June 2019, August 2021, and May 2023, the appellant saw a neurologist specializing in the treatment of headaches, Dr. Gordon Robinson who became her treating physician in 2023 and administered one round of Botox treatment shortly before trial. In August 2019, July 2021, and June and October 2023, she saw a physiatrist, Dr. Lisa Caillier. In May and September 2021, and October 2023, she saw Dr. Navraj Heran, a neurosurgeon. In almost every report, the medical experts recommended various forms of pharmaceutical treatment for the appellant's injuries.

[15] In his reasons, the trial judge attributed knowledge of the recommendations in the reports to the appellant through the law of agency. During closing submissions, the trial judge asked counsel for the appellant whether he could infer, "either as a matter of fact or as a matter of agency law" that the appellant would have had the benefit of the 2019 reports around the time they were received by the law firm. Counsel told the trial judge that the appellant was not taking issue with her knowledge of the recommendations at the relevant time, but with the fact that they did not come from a treating practitioner, an argument she also pursues in this Court. This was consistent with the evidence of Dr. Robinson, who testified he had recommended Botox to the appellant in 2019 but she was not prepared to take it at that time.

[16] Given the evidence and the concession from the appellant's trial counsel, it was not necessary for the trial judge to attribute knowledge to the appellant through the law of agency. While I have concerns about the applicability of agency law in the circumstances, I do not find the issue determinative of this appeal and a more detailed discussion of that issue is appropriately left to another day. However, these

reasons should not be understood as endorsing the approach taken by the trial judge.

[17] The trial judge found that if the appellant had tried any of the recommended pharmaceutical treatments her condition would have been considerably better by the time of trial. This conclusion was supported by the evidence before him, in particular the report of Dr. Heran, which he specifically cites. He then turned to an assessment of the reduction in damages, finding a reduction of 70% was warranted.

[18] The appellant alleges that the trial judge erred in finding that she ought to have acted on recommendations made by non-treating expert witnesses who had examined her. The appellant points to the statement from this Court in *Murphy v. Snippa*, 2024 BCCA 30 that a physician retained by a plaintiff's counsel to provide a medical-legal report is not a treating physician whose recommendations a plaintiff can be said to have been obliged to follow (at para. 109, citing *Thomasson v. Moeller*, 2016 BCCA 14 at para. 39).

[19] I do not read the Court's statement in *Murphy* to preclude any consideration of findings or recommendations by medical experts other than a treating physician in the context of a mitigation analysis. As a general proposition, there is a meaningful distinction to be made between a physician preparing a medical-legal report and a treating physician. The ultimate question, however, is whether it was unreasonable for a plaintiff to eschew recommended treatment that would likely have improved their condition. This is a question best left to the trier of fact (*Janiak v. Ippolito*, 1985 CanLII 62 (SCC) at para. 7, [1985] 1 S.C.R. 146).

[20] The finding in the case before us is not that the appellant was obliged to follow a recommendation from a particular expert medical examiner, or even the expert medical examiners as a group. The recommendations from the expert medical examiners aligned with that of her treating physicians, who had recommended and prescribed pharmaceutical treatments. As noted by the trial judge:

[58] In 2019, four doctors indicated the potential efficacy of Botox injections to the plaintiff. Her family doctor referred her to Dr Hussein specifically to assess her suitability for Botox injections. Dr Hussein discussed that treatment with her. He did not prescribe it at that time, not because it was unsuitable, but because he wanted the plaintiff to start with a trial of Lyrica, along with other supplements. As she never tried the condition precedent of Lyrica, nor followed up with Dr Hussein, the plaintiff neither explored nor was prescribed Botox.

[21] The appellant provided no explanation for her decision not to pursue pharmaceutical treatments other than a preference to try other options first. As noted by the trial judge, this was not a circumstance in which she was pursuing other courses of treatment and they promised to be effective. To the contrary, during several years it would appear the appellant sought no medical treatment for her injuries at all. With the exception of a single Botox treatment shortly before trial, she eschewed all the pharmaceutical treatments available to her in the years since she was injured. In the context of all the evidence before him, I am not persuaded the trial judge erred in concluding the appellant had failed to mitigate the impact of her injuries.

[22] Finally, the appellant submits that the trial judge erred in assessing the amount of the reduction to the damages award. The appellant chose not to pursue available treatment until the eve of trial, and the experts provided their prognoses based on her situation at the time of trial. The trial judge assessed the amount of the reduction in the context of the whole of the evidence before him. While the appellant may disagree with the result, she has not demonstrated an error in principle, nor was the assessment unmoored from the evidence.

[23] I would not accede to this ground of appeal.

Special damages

[24] I understand the respondents to concede that the trial judge erred in deducting 70% of the special damages for failure to mitigate. The evidence at trial was that the special damages incurred would have been necessary even if the

appellant had pursued recommended pharmaceutical treatments and were therefore unaffected by the failure to mitigate. I would therefore allow the appeal to that extent.

Misapprehension of evidence

[25] The appellant alleges that the trial judge misapprehended the evidence in preferring the prognosis of Dr. Heran over that of other experts. There are two aspects to the argument.

[26] First, the appellant takes issue with the manner in which Dr. Heran was qualified. Dr. Heran is a neurosurgeon and was qualified by the trial judge as an expert in "trauma-related injuries as they relate to the brain and spinal cord and the assessment, diagnosis, and treatment of [same]." The main issue raised by the appellant's counsel at trial was on the question of whether Dr. Heran was qualified to give opinion evidence about treatment. The trial judge dealt with this issue in the following terms:

[25] First, they note that he is a neurosurgeon, specialising in surgical treatments of neurological conditions, in contrast to Dr Robinson, a neurologist specialising in the treatment of headaches through a variety of means. I am satisfied that Dr Heran's surgical subspecialty does not disqualify him from opining on the causes and treatments of neurological conditions of headaches and pain, which he must understand, study, and diagnose as part of his medical specialty. [...]

[27] In my view, this conclusion was open to the trial judge on the evidence, both from Dr. Heran's report and in his oral testimony. There was no question Dr. Heran was qualified as a neurosurgeon. Among other things, Dr. Heran testified that understanding the availability and efficacy of non-surgical treatments was essential to deciding when and how surgical intervention was needed.

[28] Secondly, the appellant suggests that the trial judge failed to consider that Dr. Heran was relying on the opinion of Dr. Robinson in opining on the appellant's prognosis. The relevant passage from the decision is the following:

[70] Ultimately, the Court adopts the prognosis of Dr Heran:
It is my interpretation, and hence my opinion, that Dr. Robinson clearly believes that her work capacity and functional abilities would

be improved after optimization of her headache management. It is my opinion therefore, that I too disagree with the opinion that Dr. Caillier has outlined that she would be capable of only 20 to 25 hours of work in a week with optimization of her care. ***It is my opinion that she will likely be able to work a near full 40 hour work week if she were amenable to taking medications and using Botox, if warranted. Generally, in individuals who are able to function to work part-time, marked improvements are typically established through optimization of headache care through the medications as described. Being reluctant to take the medications, as has been described, fails to mitigate the potential benefits that could be established through such approaches.*** Refraining from taking the medications prescribed to her, as well as the free given samples, has also been addressed by myself in my reporting....

[Emphasis added by the trial judge.]

[29] Dr. Robinson testified that the interpretation of his opinion in Dr. Heran's report was inaccurate. The appellant argues that Dr. Heran was not qualified to give the opinion directly, and his inaccurate summary of Dr. Robinson's opinion could therefore not be relied on for a prognosis. While I accept that the manner in which the passage is cited in the trial judge's decision might lend itself to such an interpretation, reviewing the passage in the context of Dr. Heran's reports and his testimony as a whole, it was evident he did not defer to Dr. Robinson's opinions in relation to treatment. In cross examination, he directly disagreed with Dr. Robinson and opined that, in contrast to post-traumatic headaches of the type patients with concussions might have, "cervicogenic-type post-traumatic headaches are typically amenable to treatment, and with a very high likelihood of some degree of benefit". This testimony was consistent with his evidence as a whole, and it was open to the trial judge to prefer Dr. Heran's opinion to that of Dr. Robinson or Dr. Caillier.

[30] I would not accede to this ground of appeal.

Assessment of credibility

[31] The appellant takes issue with the trial judge's assessment of her credibility. While I accept that some of the language used by the trial judge could have been more neutral, I am not persuaded that the appellant has demonstrated a palpable and overriding error on this issue.

[32] The trial judge raised two primary concerns with the appellant's credibility. First, she admitted to having submitted false tax returns, undoubtedly to her financial benefit. As pointed out by the respondents, she did so in the years leading up to a trial in which she was going to allege a much higher income in the hopes of being compensated for the proportional loss of that income. There is no question it was open to the trial judge to approach her evidence with caution.

[33] Secondly, he found that the appellant's failure to mitigate the impact of her injuries undermined her claims about the severity of those injuries. In circumstances where the severity of injuries relies almost entirely on the appellant's own reports, it is open to a judge to consider the appellant's actions in seeking treatment when assessing the credibility of those reports.

[34] As I have noted elsewhere in these reasons, the trial judge did not wholly reject the appellant's testimony. In my view, it was perfectly reasonable for him to approach the appellant's testimony with caution, and it was clearly open to him to accept some, all, or none of her evidence. In the circumstances, he did accept much of her evidence and largely made findings in her favour. The primary finding that was to her detriment, on the failure to mitigate, was not dependent on a negative credibility finding, but on her failure to provide any reasonable explanation for eschewing treatment.

[35] I would not accede to this ground of appeal.

Cross appeal: loss of income earning capacity

[36] The respondents (appellants on cross appeal) allege that the trial judge erred in accepting the appellant's testimony about her past and future loss of income earning capacity, in light of her admission that she misrepresented her past income in her tax returns. I do not accept that he erred in the manner alleged.

[37] There are two interrelated manners in which the false underreporting of past income to tax authorities may impact the calculation of past and future loss of earning capacity.

[38] First, the underreporting of income to tax authorities may be a consideration when assessing a plaintiff's credibility, both generally and with respect to income in particular. The trial judge was clearly alive to that question, explicitly citing *Firman v. Asadi*, 2019 BCSC 270 at para. 170 and *Kan v. McGill*, 2021 BCSC 843 at para. 37. In effect, he explicitly found that what he described as "deliberate tax fraud" undermined the appellant's credibility (at para. 18).

[39] Secondly, past failure to file accurate tax returns may present evidentiary challenges for a plaintiff. The issue was addressed by this Court in *Iannone v. Hoogenraad*, 1992 CanLII 1630 (BC CA) in the following terms:

This plaintiff, like others in similar circumstances, had the burden of leading evidence of past accident wages losses. That will be a difficult burden to discharge where there is no corroborating evidence such as income tax returns, but it is not an impossible burden to discharge. Here the trial judge was satisfied on the evidence that the injuries sustained by the plaintiff prevented him from earning income which he would otherwise have earned. The burden of proof was therefore discharged. The loss was proven. It is not, in my opinion, open to the defendant to avoid compensating for that loss on the ground that unreported income was taken into account in computing it.

[40] The respondents accept that the trial judge correctly articulated the law regarding past and future income earning capacity. They allege the trial judge erred in relying on the *viva voce* evidence of the appellant that directly contradicted her income tax returns and the limited underlying financial data that she provided to her tax return preparer. Although in their written factum they sought to frame the issue as an error of principle, they are in effect asking this Court to revisit findings of fact made by the trial judge. As noted earlier in these reasons, the standard of review for findings of fact or mixed fact and law is that of palpable and overriding error.

[41] I am not persuaded the trial judge erred in the manner alleged. He was clearly alive to the weaknesses in the appellant's evidence, but despite serious concerns around her credibility he remained entitled to accept some, all, or none of her evidence. The evidence about her past employment, levels of work, and likely income was supplemented by documentary evidence of the demand for her work along with testimony from multiple witnesses, including coworkers and customers.

The medical evidence was consistent with the appellant’s testimony that her ability to work in a crouched position while tattooing was restricted due to her injuries. In my view, it was open to the trial judge to conclude, as he did, that the appellant had established a loss of ten hours per week during the relevant period due to her injuries. I would note that this was half of the 20 hours’ loss per week that the appellant sought to establish at trial. I am also satisfied that the assessment of the loss using the appellant’s hourly rates was open to the trial judge on the evidence before him.

[42] I would therefore dismiss the cross appeal.

Conclusion

[43] I would allow the appeal with respect to the reduction in special damages and dismiss the remainder of the grounds. I would dismiss the cross appeal. As there has been mixed success on the appeal and cross appeal, I would order that each party bear their own costs in this Court.

“The Honourable Justice Edlmann”

I AGREE:

“The Honourable Justice DeWitt-Van Oosten”

I AGREE:

“The Honourable Justice Iyer”