IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Durand v. Bolt,*** 2007 BCSC 480

Date: 20070405
Docket: 0422432
Registry: Prince George

Between:

Margo Elaine Durand

Plaintiff

And

Jody Lyn Bolt and Raymond Joseph Schwing

Defendants

And

Insurance Corporation of British Columbia

Third Party

Before: The Honourable Mr. Justice Davies

Reasons for Judgment

Counsel for the Plaintiff:	D. Byl
Counsel for the Third Party:	R.M. Stewart
Dates and Place of Trial/Hearing:	September 11–15, 2006 Prince George, B.C. October 11–12, 2006 Vancouver, B.C.
Written submissions:	November 24, 2006

INTRODUCTION

[1] This judgment concerns an assessment of the damages suffered by the plaintiff, Margo Durand, as a consequence of a motor vehicle accident (the "accident") in Prince George, British Columbia on August 29, 2002.

[2] The plaintiff was injured in the accident when the defendants' vehicle went through a stop sign and "T-boned" the plaintiff's vehicle in an intersection. Although liability for the accident and the plaintiff's injuries has been admitted, the third party has denied that the accident was the cause of the plaintiff's most serious present health difficulties and opposes the amount of compensation she seeks.

[3] Important to the matters now in issue is the uncontested fact that when the plaintiff's vehicle was hit her seat belt tightened and the driver's side airbag deployed causing her left arm to go backward behind her shoulder and hit the door post. Ms. Durand, testified that: "I brought ... tried to turn around and bring my arm down. It was sort of locked behind me". She also testified that she felt instant unbearable pain in her shoulder and arm that was intense and "got worse and worse".

ISSUES

[4] The plaintiff submits that the motor vehicle accident was the cause of thoracic outlet syndrome ("TOS") from which her medical experts say she now suffers.

[5] The third party submits that Ms. Durand now suffers from work related ulnar entrapment syndrome ("UES") rather than TOS and that the shoulder related difficulties now experienced by her were not caused by the accident. In the alternative, the third party submits that if the plaintiff does suffer from TOS, it originated spontaneously before the accident, was not active at the time of the accident and spontaneously returned after Ms. Durand had fully recovered from the whiplash injuries that she suffered in the accident.

[6] The central medical and legal issues in this case are therefore:

(1) Does the plaintiff suffer from TOS?

(2) If so, was the accident the cause of TOS?

[7] The determination of those issues will obviously impact greatly upon the damage award to which the plaintiff is entitled for non-pecuniary loss, past and future wage loss and future care.

BACKGROUND AND MEDICAL HISTORY

[8] Ms. Durand was 45 years old at the time of the accident and is now 50. She was married at the time of the accident but separated from her husband in September of 2005. Her marriage to Mr. Durand was Ms. Durand's second long term relationship. Before their separation, she and Mr. Durand raised five children in a "blended family" into which she had brought two children.

[9] Ms. Durand worked as a bartender and taxi driver after leaving school but did not work outside the home after her children were born. She also did not work outside the home after her marriage to Mr. Durand until 1999. In 1999, however, she began to work as a janitor in Quesnel where the family resided. She took that job due to problems in her ongoing relationship with Mr. Durand in order to be able to financially leave the relationship if it did not improve.

[10] The janitorial work that Ms. Durand undertook in 1999 was for Ms. Connie Trudeau who has a contract for the cleaning of some of the Canfor Limited office and mill facilities in Quesnel. Ms. Trudeau has been Ms. Durand's only employer since 1999. Ms. Durand is not only Ms. Trudeau's key employee but also a good friend.

[11] Ms. Durand's medical history prior to the accident is irrelevant to the issues in this case with the exception of visits to Dr. Zradicka, a chiropractor, who saw Ms. Durand three times in late January and early February, 1998. He also saw her twice in March 2001 and once in September 2001.

[12] Those attendances are material because Dr. Zradicka's clinical records indicate that in 1998 Ms. Durand complained of soreness in the area of the mid thoracic spine, her neck and shoulders. After the three treatments in 1998 she did not return until three years later.

[13] When she did return to see Dr. Zradicka in March of 2001, she complained of her hands "going to sleep at night" and after one treatment reported "still tingling at night".

[14] She did not, however, return for further treatment until September of 2001 when she complained of a sore back at the T11 to L2 level, sore shoulders and headache.

[15] Ms. Durand did not report any of her attendances upon Dr. Zradicka to her family physician, Dr. Sears, and also did not make any complaints about "tingling" sensations to him.

[16] Ms. Durand's complaints, medical treatment and progress following the accident can be gleaned from the clinical records of those medical personnel who saw her, her work records and her own testimony. In summarizing her medical history after the accident, I will focus on those complaints that are relevant to the continuing issues in this litigation and most particularly upon evidence concerning her neck, left arm and left shoulder.

[17] The evidence establishes that:

(1) After the accident on August 29, 2002, Ms. Durand was driven from Prince George to her home in Quesnel. That evening she went to the hospital in Quesnel complaining of pain in her left arm, left shoulder and neck.

(2) On September 4, 2002, Ms. Durand saw her family physician, Dr. Sear, for the first time after the accident. Dr. Sear's notes reflect complaints of pain in her left arm and shoulder and that lateral flexion in her neck was approximately one-half of normal.

(3) On September 18, 2002, Ms. Durand again visited Dr. Sear complaining of pain in her left arm "when she uses it" as well as in her mid-upper back. Clinically Dr, Sear observed that lateral flexion in her neck was still approximately one-half of normal.

(4) On September 19, 2002, Ms. Durand attended upon her chiropractor, Dr. Zradicka, complaining of problems with, among other things, her neck and left shoulder, as well as headaches.

(5) On September 21, 2002, Ms. Durand returned to work but testified that her back was very painful. She then attended for three further chiropractic treatments by Dr. Zradicka over a one week period, complaining mostly of shoulder and back pain. Her last attendance upon Dr. Zradicka was on September 27, 2002. His clinical notes for that date record that he manipulated her back and shoulders.

(6) Ms. Durand testified that after returning to work her back was the primary focus of her pain but also testified that "My shoulder always bothered me, but it didn't hurt a lot, unless I used it".

(7) On October 22, 2002, Ms. Durand again visited Dr. Sears complaining of lower back pain and was referred to physiotherapy.

(8) Ms. Durand testified that in October and November of 2002 her shoulder would ache and her arm would feel heavy and her fingers started tingling.

(9) After completing physiotherapy for her back, in December 2002, Ms. Durand went on a holiday in Mexico where she went "boogey-boarding", rode a horse and went shopping and generally enjoyed herself. She returned to Quesnel just before Christmas that year and then went back to work again in January of 2003. She testified that when she came back to Canada her back pain was gone and she thought that everything was fine. She also testified, however, that after returning to work she would continue to have pain in her shoulder after a days' work but on her off days she would be fine if she did not do anything strenuous.

(10) On January 22, 2003, Dr. Sears signed an ICBC form CL19 that reported: Ms. Durand's last visit had been October 22, 2002 when she had "postural back ache"; she was "now asymptiomatic- moves well and is pain free-had 12 plus physio visits"; she was "back to work September 22, 2002"; and had "no present problems performing actions of work

(janitorial) and daily living."

(11) Ms. Durand testified that between January and June 2003, she experienced gradually worsening symptoms in her left shoulder and arm that were aggravated by such actions as reaching overhead, wiping, sweeping and mopping. She testified that she did not return to Dr. Sears because she "kept thinking it was going to go away".

(12) On June 2, 2003, Ms. Durand again went to see Dr. Sears. His notes of that date state that she complained that she had had pain in her left arm since the accident that was aggravated by work that goes away when she has a day off. Dr. Sears prescribed massage therapy.

(13) The notes of Ms. Erika Lynds, the massage therapist who then began working with Ms. Durand, show that Ms. Durand attended 27 massage therapy sessions between June 10, 2003 and January 29, 2004. Almost all of those notes related to Ms. Lynds' efforts to relieve pain in Ms. Durand's left arm and shoulder. Ms. Lynds' notes also indicate that on the first visit she was concerned about possible "scalene anticus syndrome" and on September 8, 2003, and January 29, 2004 she noted the possibility of "brachial plexus syndrome", both of which syndromes are associated with TOS. On January 29, 2004, Ms. Lynds suggested discontinuation of massage treatment until a more in depth assessment of Ms. Durand's cervical spine could be performed.

(14) On February 4, 2004, Ms. Durand first saw legal counsel about her health concerns related to the aftermath of the accident.

(15) Since then she has been seen not only by Dr. Sears who continues to treat her as her family doctor, but also by: Dr. Rhonda Shuckett, a specialist in Rheumatology (seen April 23, 2004) Dr. Anthony Salvian, a specialist in Vascular Surgery, (seen July 7, 2004); and Dr. Andrew Travlos, a specialist in Physical Medicine and Rehabilitation Medicine (seen May 21, 2005), all of whom have diagnosed Ms. Durand as suffering from TOS. She has also had: an MRI (April 23, 2004); a CT Scan (September 9, 2004); physiotherapy treatments; and, a botox injection by Dr. Daly (April 18, 2006) that did not relieve her shoulder pain as hoped and that was itself extremely painful.

(16) In addition, Ms. Durand was also seen by Dr. Ian Munro, a specialist in Thoracic and Cardiac Surgery (seen April 5, 2006) for an independent medical examination at the instance of the third party. Dr. Munro has opined that Ms. Durand suffers from work related UES, not TOS caused by the accident.

[18] Ms. Durand's symptoms continue. She testified:

Q I would like you to take a few moments here to describe to the court your present condition. And by present, maybe not at this exact second, but in or about the last month or two, how have things been for you?

A I'm uncomfortable all the time. I have nagging headaches, this pinching that I feel my neck is stiff, like it's just —-

Q Yes.

A -- I feel like there's a clamp on there, and my shoulder always aching.

Q And is it something that is affected by the types of activities that you do?

A Yes.

Q What are the types -- types of activities that seem to you to be the worst for it?

A Working. What I do at work.

Q I --

A Only because that's when I'm using my arm the most.

Q Yes. Can you describe for the court what a good day would be and a bad day would be? Let's start with a good day here in the past few months, what's a good day?

A Well, I don't really have a good day. I'll -- I'm always uncomfortable. I just now live with it.

Q Yes.

A So, I – it's, you know, bearable is a good day.

Q Okay. And –

A A bad day would be the days when I have to break down and take a painkiller, because I'm in an awful lot of pain.

Q Yes. And is that pain always in the same area of your body?

A Yes.

Q Okay. Do you still get, as of today, as of now, this – this tingling sensation that you've –

A Yes.

Q -- already described?

[19] In cross-examination she stated:

Q And if I recall your answer, you said, "It's hard to imagine working at this or at any job for any length of time." Do you remember saying that?

A Yes.

Q But is it not true that you've worked pretty well non-stop, after a brief period off work, since the accident, for close to four years?

A Yes, because I -- I have to. I don't have a choice.

Q So, is it that hard to imagine to carry on working, for you?

A Yes, it is. It's definitely, because my injury is getting worse. The pain I'm feeling is a lot worse now than it was a year ago, and it's definitely a lot worse than it was two years ago, or right -- or four years ago after the accident.

Q Well, if the --

A It's getting worse. It's not getting better.

Q Well, ma'am, if the pain is continuing to worsen, how can you increase your hours over the same –

A I don't –

Q -- period of time?

A I don't have a choice. I have to -- I have a son to support, and I don't want to live --'stay in a unhappy marriage just because I can't afford to live on my own.

Q What is -- has there been a significant change in the last year? And if so,

how?

A Change in what?

Q In your -- would you like a moment?

A No, I'm fine.

Q Okay. Has there been a significant change in your -- in your symptoms, your pain, the discomfort you're feeling, in -- within the last year?

A Yes. And after I work all these hours, I go home and I put heat on, I take painkillers, and I suffer. I'm not going out and swimming or playing ball or doing -- or golfing or anything else that would be fun. I don't do that. I go home and I suffer because I've worked these hours.

[20] Ms. Durand was not further cross-examined as to the extent of her injuries or her present condition. Instead, cross-examination focused on: the reports of Dr. Zradica concerning her treatments in 1998 and 2001; her enjoyment of her trip to Mexico three months after the accident and her ability to undertake and enjoy various physical activities there; her return to work within three and one-half weeks of the accident; her having undertaken more work since the accident than before; and, the statements attributed to her by Dr. Munro that the "pinching" or "clamping" that she feels in her neck started "several months" after the accident and that the pain in her left shoulder started "at least months" after the accident .

ANALYSIS AND DISCUSSION

[21] As I have stated, the central medical and legal issues in this case are:

(1) Does the plaintiff suffer from TOS? and

(2) If so, was the accident the cause of TOS?

ISSUE 1: Does the plaintiff suffer from TOS?

[22] Drs. Shuckett, Salvian and Travlos have all diagnosed Ms. Durand as suffering from TOS while, as noted, it is Dr. Munro's opinion that she suffers from work related UES.

[23] In her testimony, Dr. Shuckett described TOS as follows:

> ...Thoracic outlet syndrome, the thoracic outlet is basically in the trapezius, on the top of the shoulder between the neck and the shoulder, and in that area there is an outflow of the subclavian artery, which is the main artery to the arm and hand, as well as the brachial plexus, which is a network of nerves, and there is an upper and a lower trunk of the brachial plexus. And thoracic outlet syndrome either due to muscle spasm, which is the commonest cause, or due to fibromuscular bands, which are like elastic bands that form in the scalene anticus muscle, you actually get impingement and compression of the brachial plexus or the nerves to the arm, and less often to the artery to the arm.
>
> And the most common presentation is proximal or shoulder girdle area pain, arm pain, and numbness. Most classically, the numbness is in the lower plexus, in the ulnar nerve distribution, affecting the ring and pinkie fingers of the hand, sometimes the middle finger, sometimes all fingers, and sometimes you'll get atypical involvement of the upper plexus. But the patient basically complains of upper extremity or arm and hand pain, fatigability, and tingling or numbness in, classically but not always, the ulnar nerve distribution.

[24] That evidence was not cross-examined upon and is, in my view, consistent with the evidence of

Dr. Travlos and Dr Salvian but not with that of Dr. Munro.

[25] Dr. Munro stated in his report and maintained in his testimony that Ms. Durand suffered only from UES. In his report he stated:

> The fourth test, the hold up test, gave tingling in the tips of the little, ring and middle fingers. The involvement of the middle finger is not seen in TOS but may occur in 10 – 20% of people who have ulnar entrapment syndrome and it should be noted that the elevated bent elbow position and hold up test is not specific for TOS but may reproduce the symptoms in cases of ulnar entrapment syndrome.

[26] In reply, Dr. Salvian opined that:

> This statement by Dr. Munro is incorrect.
>
> (a) It is my experience with hundreds of patients with thoracic outlet syndrome that many complain of symptoms into the third as well as the fourth and fifth fingers. The lower aspect of the brachial plexus (C8-T1), in my experience, is most frequently experienced in thoracic outlet syndrome but the C7 nerve root is in such close approximation in the brachial plexus that it is not uncommon for the patient to complain of compression partially of this nerve as well into the third finger.
>
> (b) The ulnar nerve never involves the tip of the third finger. I have included plate 84 and plate 85 "*Distribution of Cutaneous Nerves to the Palm and Dorsum of the Hand*" showing variations in pattern of cutaneous nerves to the dorsum of the hand from Grant's Textbook of Anatomy. As you can see, the classic distribution of ulnar sensation in the hand is the small finger plus the medial half of the fourth finger and occasionally into the proximal base of the third fingers but never under any of these diagrams is the tip of the third finger involved.
>
> (c) Dr. Munro has placed great emphasis on the fact that the third finger is involved. He states that this categorically rules out thoracic outlet syndrome. In fact, experienced neurologists will tell you that there is significant overlap and that patients often have a little difficulty describing exactly where their symptoms are. The important fact here is that Ms. Durand had negative testing for ulnar entrapment syndrome by Dr. Munro's own physical examination and had positive testing for thoracic outlet syndrome (the elevated arm stress test). Furthermore, she had negative nerve conduction studies for ulnar entrapment syndrome.
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> [Emphasis in original]

[27] Dr. Travlos also testified that there should be no middle finger involvement in the case of UES.

[28] When confronted in cross-examination with the proposition there is no involvement of the tip of the third finger in cases of UES, Dr. Munro gave no evidence to either satisfactorily explain or contradict Dr. Salvian's or Dr. Travlos' opinions.

[29] I have concluded that where the expert opinions of Dr. Munro are contrary to those of Drs. Schuckett, Travlos or Salvian, I must prefer their opinions. I reach that conclusion not only because of the consistency of the medical opinions of Drs. Schuckett, Travlos and Salvian, but also because of Dr. Munro

(1) was combative and evasive in answering questions on cross-examination;

(2) has performed four or five thoracic outlet decompression surgeries as compared to Dr. Salvian who has undertaken approximately 180 such surgeries; and

(3) offered no independent source of authority for his opinions and relied only upon his own experience for some of his most contentious conclusions.

[30] After considering the entirety of the evidence in this case, I have determined that the plaintiff has established that she now suffers from TOS.

ISSUE 2: Was the accident the cause of the plaintiff's TOS and other injuries from which she still suffers?

[31] In her report Dr. Schuckett stated:

> I have discussed the causal relationship between my diagnoses and the MVA in the section above. All of the diagnoses 1-4 are highly in keeping with causality stemming from the 2002 MVA. These are the sorts of injuries which are encountered in the setting of an MVA. Unilateral neck strain, or cervical strain, shoulder pain and limitation and thoracic outlet syndrome, or brachial plexus injury, are well-described as an aftermath of automobile accidents.
>
> There were no other antecedent symptoms to suggest any predisposing risk to development of these problems. There is no other historical evidence of an underlying cause of the diagnoses which I have made.

[32] Dr. Travlos opined:

> The focus of Ms. Durand's symptoms today is around the left side of her neck and shoulder. The physical examination shows that she has a number of entities, all of which are contributing to her symptoms. Firstly, she definitely has evidence of mechanical neck pain, such that loading of the posterior elements of the neck definitely brings on her symptoms. Coupled with this is evidence of soft tissue pain in the neck in that stretching of the left side of the neck aggravates all her symptoms.
>
> Ms. Durand did have an MRT scan of her neck done at MRI Vancouver on April 23, 2004. This showed the presence of degenerative disease at the C5-6 level, with neural foraminal narrowing on both sides. Such changes take many years to develop and are not a result of the accident. Findings such as this are a commonplace phenomenon as patients grow older and are not unexpected or surprising. The complete absence of any symptoms in this area in the past would indicate that this was not a symptomatic area of concern. It is my opinion that Ms. Durand's neck symptoms arose following the accident in an area of underlying susceptibility to injury. It is improbable and unlikely that these symptoms would have arisen in the absence of the accident and the subsequent need for treatments. I say the latter because it seems that the neck symptoms did improve and were not a major concern for a while until the middle of her massage therapy treatments, at which point the neck symptoms became an increasing concern.
>
> Ms. Durand also has symptoms consistent with thoracic outlet obstruction and physical findings to go along with this. It is clear that she injured the left shoulder and upper extremity with the accident. It is my opinion that the symptoms in the arm are a direct result of the accident of August 29, 2002.
>
> The main focus in the arm only arose once all the other symptoms had settled down. On completion of her physiotherapy in December of 2002 she was indeed doing well, but did not return back to work right away. It was on her return to work that the symptoms became more noticeable once again, which is typically the pattern of presentation with this problem. The ongoing nature of the radiating hand symptoms and the shoulder pains are intrinsically tied in to the thoracic outlet symptoms.
>
> The last area of contribution of symptoms to the shoulder is the shoulder itself. Ms. Durand definitely has evidence of a rotator cuff and bicipital tendonitis that is ongoing. The MRI scan done on April 23, 2004 of the shoulder did show some subacromial bursal fluid, which is in keeping with this diagnosis. One does not have to have a complete rupture of the tendon or other such abnormality to have symptoms in the area. Certainly the clinical diagnosis is apparent and the MRI confirms this. It is my opinion (and I am in

> agreement with Dr. Shuckett) that the shoulder impingement symptoms are a direct result of the accident, specifically given the fact that she was doing her usual job and activities prior to the accident and did not have any such symptoms. Although the MRI scan does show hypertrophy of the acromioclavicular joint, there are no associated symptoms to go along with this and this was not an entity in the pains that that she has today, nor was she symptomatic on stressing of this joint.
>
> [My emphasis]

[33] In his report of July 7, 2006, Dr. Salvian stated:

> ... The findings of Dr. Travlos and Dr. Munro confirm my opinion that this patient has secondary post traumatic thoracic syndrome related to the motor vehicle accident of August 29, 2002.

[34] As I have noted above, however, In addition to those opinions, and of some significance to the question of causation in this case are the clinical records of Ms. Durand's chiropractor, Dr. Zradicka, who saw her three times in late January and early February 1998 as well as twice in March 2001 and once in September 2001.

[35] Those attendances are material because Dr. Zradicka's records indicate that Ms. Durand complained of soreness in the area of the mid thoracic spine, her neck and shoulders. As I have previously noted, after three treatments in 1998 she did not return until three years later. When she returned in March of 2001 she complained of her hands "going to sleep at night" and after one treatment still complained "still tingling at night".

[36] The third party relies on those visits to Dr. Zradicka as evidentiary support for the proposition that Ms. Durand suffered a spontaneous occurrence of TOS before the accident. It submits that the failure of Ms. Durand to complain to Dr. Sears between January and June of 2003 about shoulder or arm pain also support that conclusion. In addition, it relies upon Ms. Durand's self-reports to Dr. Munro on April 25, 2006 that she thought that the "pinching pain" at the base of her neck started "several months" after the accident and that the pain in the front of her left shoulder started "at least months" after the accident. The third party accordingly submits that the evidence establishes that Ms. Durand suffered from pre-existing spontaneous TOS that again arose spontaneously well after the accident and that causation has not been established.

[37] Dr. Schuckett testified under cross-examination that TOS had occurred spontaneously (that is, without precipitating trauma) in perhaps 20% of the cases she had treated.

[38] In addition, in his report of August 10, 2004, Dr. Salvian suggested that Ms. Durand "may have had some degree of previous thoracic outlet syndrome of a spontaneous onset, which had resolved for 2-3 years prior to the motor vehicle accident" and also said that she "may have had some underlying tendency to develop the condition".

[39] Dr. Travlos also testified that TOS could appear spontaneously and that if both arms fell to sleep at night it could be indicative of the existence of TOS. Most significantly, however, he also testified that:

> The – the description in the records there of hands falling asleep is extremely unusual for a patient of thoracic outlet syndrome to complain of. If they complain of numbness, they are much more specific. They talk about numbness in, you know, one or two fingers, or two or three fingers. It's extremely rare for them to say, "I only complain 'cause my hands fall asleep'."

[40] In ***Athey v. Leonati***, [1996] 3 S.C.R. 458, the Supreme Court of Canada stated at p. 466:

> 13 Causation is established where the plaintiff proves to the civil standard on a balance of probabilities that the defendant caused or contributed to the injury: *Snell v. Farrell*, [1990] 2 S.C.R. 311; *McGhee v. National Coal Board*, [1972] 3 All E.R. 1008 (H.L.).

14 The general, but not conclusive, test for causation is the "but for" test, which requires the plaintiff to show that the injury would not have occurred but for the negligence of the defendant: *Horsley v. MacLaren*, [1972] S.C.R. 441.

15 The "but for" test is unworkable in some circumstances, so the courts have recognized that causation is established where the defendant's negligence "materially contributed" to the occurrence of the injury: *Myers v. Peel County Board of Education*, [1981] 2 S.C.R. 21, *Bonnington Castings Ltd. v. Wardlaw*, [1956] 1 All E.R. 615 (H.L.), *McGhee v. National Coal Board, supra.* A contributing factor is material if it falls outside the *de minimis* range: *Bonnington Castings Ltd. v. Wardlaw, supra*; see also *R. v. Pinske* (1988), 30 B.C.L.R. (2d) 114 (B.C.C.A.), aff'd [1989] 2 S.C.R. 979.

16 In *Snell v. Farell, supra*, this Court recently confirmed that the plaintiff must prove that the defendant's tortious conduct caused or contributed to the plaintiff's injury. The causation test is not to be applied too rigidly. Causation need not be determined by scientific precision; as Lord Salmon stated in *Alphacell Ltd. v. Woodward*, [1972] 2 All E.R. 475 at 490 (H.L.), and as was quoted by Sopinka J. at p. 328, it is "essentially a practical question of fact which can best be answered by ordinary common sense". Although the burden of proof remains with the plaintiff, in some circumstances an inference of causation may be drawn from the evidence without positive scientific proof.

[41] More recently in ***Resurfice Corp. v. Hanke***, 2007 SCC 7, [2007] S.C.J. No. 7 (QL), the Supreme Court of Canada revisited the issue of causation and stated at ¶ 19 to 29:

19 The Court of Appeal erred in suggesting that, where there is more than one potential cause of an injury, the "material contribution" test must be used. To accept this conclusion is to do away with the "but for" test altogether, given that there is more than one potential cause in virtually all litigated cases of negligence. If the Court of Appeal's reasons in this regard are endorsed, the only conclusion that could be drawn is that the default test for cause-in-fact is now the material contribution test. This is inconsistent with this Court's judgments in *Snell v. Farrell*, [1990] 2 S.C.R. 311, *Athey v. Leonati*, at para. 14, *Walker Estate v. York-Finch General Hospital*, [2001] 1 S.C.R. 647, 2001 SCC 23 at paras. 87- 88, and *Blackwater v. Plint*, [2005] 3 S.C.R. 3, 2005 SCC 58, at para. 78.

20 Much judicial and academic ink has been spilled over the proper test for causation in cases of negligence. It is neither necessary nor helpful to catalogue the various debates. It suffices at this juncture to simply assert the general principles that emerge from the cases.

21 First, the basic test for determining causation remains the "but for" test. This applies to multi-cause injuries. The plaintiff bears the burden of showing that "but for" the negligent act or omission of each defendant, the injury would not have occurred. Having done this, contributory negligence may be apportioned, as permitted by statute.

22 This fundamental rule has never been displaced and remains the primary test for causation in negligence actions. As stated in *Athey v. Leonati*, at para. 14, *per* Major J., "[t]he general, but not conclusive, test for causation is the 'but for' test, which requires the plaintiff to show that the injury would not have occurred but for the negligence of the defendant." Similarly, as I noted in *Blackwater v. Plint*, at para. 78, "[t]he rules of causation consider generally whether 'but for' the defendant's acts, the plaintiff's damages would have been incurred on a balance of probabilities."

23 The "but for" test recognizes that compensation for negligent conduct should only be made "where a substantial connection between the injury and defendant's conduct" is present. It ensures that a defendant will not be held liable for the plaintiff's injuries where they "may very well be due to factors unconnected to the defendant and not the fault of anyone": *Snell v. Farrell*, at p. 327, *per* Sopinka J.

> 24 However, in special circumstances, the law has recognized exceptions to the basic "but for" test, and applied a "material contribution" test. Broadly speaking, the cases in which the "material contribution" test is properly applied involve two requirements.
>
> 25 First, it must be impossible for the plaintiff to prove that the defendant's negligence caused the plaintiff's injury using the "but for" test. The impossibility must be due to factors that are outside of the plaintiff's control; for example, current limits of scientific knowledge. Second, it must be clear that the defendant breached a duty of care owed to the plaintiff, thereby exposing the plaintiff to an unreasonable risk of injury, and the plaintiff must have suffered that form of injury. In other words, the plaintiff's injury must fall within the ambit of the risk created by the defendant's breach. In those exceptional cases where these two requirements are satisfied, liability may be imposed, even though the "but for" test is not satisfied, because it would offend basic notions of fairness and justice to deny liability by applying a "but for" approach.
>
> 26 These two requirements are helpful in defining the situations in which an exception to the "but for" approach ought to be permitted. Without dealing exhaustively with the jurisprudence, a few examples may assist in demonstrating the twin principles just asserted.
>
> 27 One situation requiring an exception to the "but for" test is the situation where it is impossible to say which of two tortious sources caused the injury, as where two shots are carelessly fired at the victim, but it is impossible to say which shot injured him: *Cook v. Lewis*, [1951] S.C.R. 830. Provided that it is established that each of the defendants carelessly or negligently created an unreasonable risk of that type of injury that the plaintiff in fact suffered (i.e. carelessly or negligently fired a shot that could have caused the injury), a material contribution test may be appropriately applied.
>
> 28 A second situation requiring an exception to the "but for" test may be where it is impossible to prove what a particular person in the causal chain would have done had the defendant not committed a negligent act or omission, thus breaking the "but for" chain of causation. For example, although there was no need to rely on the "material contribution" test in *Walker Estate v. York-Finch General Hospital*, this Court indicated that it could be used where it was impossible to prove that the donor whose tainted blood infected the plaintiff would not have given blood if the defendant had properly warned him against donating blood. Once again, the impossibility of establishing causation and the element of injury-related risk created by the defendant are central.
>
> 29 In this case, the Court of Appeal erred in failing to recognize that the basic test for causation remains the "but for" test. It further erred in applying the material contribution test in circumstances where its use was neither necessary nor justified.

[42] This is not a case where the "but for test" must be displaced by the "material contribution test". The evidence must establish on a balance probabilities that the plaintiff's injuries (and in this case, more specifically, her present suffering from TOS) would not have occurred but for the defendant's negligence. As established in ***Snell v. Farrell*** (1990), 2 S.C.R. 311, causation need not be determined with scientific precision.

[43] I am satisfied that the evidence of Drs. Shuckett, Salvian and Travlos under cross-examination raises only the possibility that Ms. Durand may have suffered a spontaneous pre-accident onset of TOS since all of those doctors testified that the symptoms reported by Dr. Zradicka are too vague to form the basis of a diagnosis of either pre-existing or spontaneous TOS.

[44] The totality of the medical evidence as well as the evidence of Ms. Durand at trial also convinces me that there was no long delay in the onset of shoulder and arm pain. In that regard I note that Ms. Durand complained of or was treated for either left arm or left shoulder pain, or both, on August 29, 2002, September 4, 2002, September 18, 2002, September 19, 2002, September 24, 2002 and September 27, 2002. I also accept Ms. Durand's evidence that between January and June 2003

she experienced gradually worsening symptoms in her left shoulder and arm that were aggravated by such actions as reaching overhead, wiping, sweeping and mopping. I further accept her testimony that she did not return to Dr. Sears until June 2, 2003 because she "kept thinking it was going to go away".

[45] I find on a balance of probabilities that Ms. Durand's present injuries were caused by the accident.

ISSUE 3: What award of damages will appropriately compensate the plaintiff for the injuries caused by the accident?

[46] As I have noted above, Ms. Durand seeks damages for her non-pecuniary loss arising from her past and future pain and suffering, damages for her past and future wage loss and damages for the costs of her future care resulting from the defendants' admitted negligence in causing the accident.

Non-Pecuniary Loss

[47] Counsel for Ms. Durand has submitted that an appropriate award for the pain, suffering and loss of enjoyment of life that Ms. Durand has suffered and will continue to suffer is in the range of $80,000 to $100,000. In making that submission he relies upon the following cases:

(1) ***Dembowski v. Streliev***, (4 July 1998), Rossland 4479 (B.C.S.C.) (Williamson J.) in which the plaintiff suffered from thoracic outlet syndrome that was of a "moderate to mild form" as well as a fractured lumbar vertebra and was awarded non-pecuniary damages of $60,000.00.

(2) ***Heartt v. Royal***, 2000 BCSC 1122 (Dorgan J.) in which the plaintiff was initially diagnosed with a minor concussion and whiplash but then also developed a sensation of numbness and tingling in her right arm and fingers, low back pain and decreased tolerance for lifting and standing for prolonged periods of time. She was awarded $60,000.00.

(3) ***Schellack v. Barr***, 2001 BCSC 1323 (Martinson J.) in which the plaintiff sustained injuries in two motor vehicle accidents. The injuries were soft tissue in nature but she also suffered from post traumatic stress disorder and developed a chronic pain complex syndrome. Martinson J. awarded $80,000 for non-pecuniary damages.

(4) ***Brown v. Ryan***, 2000 BCSC 680 (Quijano J.) in which the plaintiff sustained soft tissue injuries but continued to have, pain and muscle spasms in her mid and low back on an ongoing basis. She also developed fibromyalgia. Quijano J. awarded non-pecuniary damages of $80,000.

(5) ***Foran v. Nguyen***, 2006 BCSC 605 (Sinclair Prowse J.) in which the plaintiff sustained multiple soft tissue injuries, particularly in the area of her cervical spine. She also developed chronic headaches, chronic neck pain and upper back and right side pain and had difficulty dealing with regular housekeeping duties and was awarded $90,000 for pain and suffering.

(6) ***Kuhne v. Minifie***, 2001 BCSC 46 (Loo J.) in which the plaintiff sustained soft tissue injuries in a "T-bone" type impact. She missed six months of work and suffered from chronic pain which developed into fibromyalgia. Loo J. awarded $91,000 for pain and suffering.

(7) ***Jones v. Barnes,*** 2000 BCSC 878 (Ralph J.) in which the plaintiff sustained multiple soft tissue injuries in a motor vehicle accident. He also suffered from severe headaches, muscle pain and chronic pain. Ralph J. awarded $100,000 for pain and suffering.

[48] Mr. Byl also submits that those awards (except the recent award in ***Foran v. Nguyen***) should be adjusted upwards by approximately 10 to 15 per cent to account for inflation from the time the older awards were made.

[49] Counsel for the third party has submitted that Ms. Durand should, at most, be awarded from $10,000 to $25,000 for her non-pecuniary losses. He relies primarily upon:

(1) ***Coles v. Tung***, 2004 BCSC 1714 (Goepel J.) in which the plaintiff was awarded $10,000 in non-pecuniary damages for injuries to his back and shoulder attributable to the negligence of the defendant that lasted approximately one year. Goepel J. also determined that the plaintiff's suffering was primarily the consequence of pre-existing conditions.

(2) ***Manering v. Imanian***, 2006 BCSC 323 (Martinson J.) in which the plaintiff was awarded $22,000 for non-pecuniary damages to her neck, shoulders and upper back as well as pain in her right upper arm and headaches. She also suffered from significant pre-accident health issues and failed to disclose relevant health issues both at examination for discovery and in her examination in chief.

[50] Mr. Stewart also submitted on behalf of the third party that any award of damages which is based upon a finding that Ms. Durand suffers from TOS should result in an award in a range of no more than $50,000 to $60,000 that should also be reduced by one half to reflect Ms. Durand's pre-existing conditions.

[51] I have previously concluded that Ms. Durand suffers from TOS, not UES, and that the TOS from which she suffers was caused by the accident. I have also concluded that there was no long delay in the onset of her shoulder and arm pain. Further, I also do not find that her present condition is the result of the exacerbation of pre-existing conditions unrelated to the accident that should result in any significant diminution of her damages.

[52] While I am satisfied that while Ms. Durand did suffer to some extent from neck and shoulder soreness before the accident that related to the type of work she did and the stresses in her life, it did not remotely approach the debilitating level of pain and suffering which she now endures as a consequence of the TOS caused by the accident and the past, present and future effect that TOS has had and will continue to have upon her lifestyle and ability to work.

[53] In those circumstances, the cases relied upon by the third party are of little assistance.

[54] In assessing the appropriate award for Ms. Durand's pain and suffering and loss of enjoyment of life, it must, as counsel for the third party stressed, be noted that notwithstanding her injuries and the pain caused by them Ms. Durand has not only been able to continue to work but has in fact increased the number of hours which she now works as compared to her pre-accident work schedule.

[55] It must, however, be noted that during the period of time between the accident and the trial Ms. Durand's socio-economic circumstances were in flux. Her marriage was troubled to the point that she had determined that she had to leave the relationship notwithstanding its financial security and her fear that she would have difficulty in obtaining spousal support. It is not surprising in those circumstances that Ms. Durand availed herself of as much work as she could physically endure to build her financial resources to become as financially independent as possible. I am satisfied that had she been able to undertake even more work she would have done so. She was, however, prevented by the disabling effects of her injuries from pursuing more or different employment. Ms. Durand was, in fact, fortunate to have an understanding employer in Ms. Trudeau who would allow her to work shifts and hours and do types of work that other employers would not likely have accommodated.

[56] I have stressed this issue of Ms. Durand's work history not only because it was relied upon by the third party as evidence that all of Ms. Durand's damages claims should be assessed in light of her increasing workload but also because I am satisfied that Ms. Durand's life and her ability to enjoy that life after the accident became focused almost exclusively on her need to work and her ability to work. Other pursuits fell by the wayside as economics and the effects of work on her health came to dominate her existence and well being. That situation continues.

[57] I accept Mr. Byl's submissions that Ms. Durand should be assessed as a stoic, uncomplaining and hard working woman who has done her best to cope with the problems brought on by the accident. I find that she now has difficulty carrying grocery bags, cannot carry things with her left hand, has difficulty doing laundry because of the distances she must travel in her apartment carrying laundry, has difficulty performing small motions such as wringing things out and removing lids from jars, and that it is difficult for her to wash walls.

[58] I accept Ms. Durand's testimony that she is uncomfortable all the time, has nagging headaches and that her shoulder is always aching. I also find that her work related activities have had to be modified so that she no longer wipes surfaces in a wide arc, must sweep and mop in short motions and can do little of a strenuous nature with her arm.

[59] I also note once more, her testimony in cross-examination relating to her present situation:

> ... after I work all these hours, I go home and I put heat on, I take painkillers, and I suffer. I'm not going out and swimming or playing ball or doing -- or golfing or anything else that would be fun. I don't do that. I go home and I suffer because I've worked these hours.

[60] Further, Ms. Durand's prognosis in not good. Dr. Salvian stated:

> Prognosis: Ms. Durand has significant symptoms of neck pain and ongoing secondary thoracic outlet syndrome which has been present since the motor vehicle accident of August 29, 2002 (two years). One would like to try the conservative therapy but it is unlikely there will be significant improvement unless she can avoid repetitive use of the arm overhead or heavy lifting with the arm. She is, I think, going to be significantly disabled forever doing that type of activity. In other words, at home she is going to need to avoid doing activities such as vacuuming, washing windows or painting. At work she will not be able to do any activity that require [sic] repetitive use of the arm overhead, heavy lifting with the arm or prolonged repetitive activities such as keyboarding or driving. She is certainly at risk of further exacerbations of the thoracic outlet syndrome should she have any other injuries.

[61] After considering the totality of the evidence, the submissions of counsel and the authorities to which I have been referred, I have determined that an award of $75,000 will suitably compensate Ms. Durand for her pain, suffering and loss of enjoyment of life as a consequence of the accident.

Past Income Loss

[62] As I have discussed above, Ms. Durand has been able to earn more money since the accident than she regularly did before. While the reasons for that were, in my view, largely driven by her changing social and economic circumstances, the fact remains that in such a case the determination of the extent to which she might have earned more "but for" the accident is problematic.

[63] The evidence establishes that Ms. Durand earned the following amounts from her employment with Ms. Trudeau in the year before the accident (2001) and the years that followed:

2001 - $8,863

2002 - $10,728

2003 - $11,993

2004 - $16,382

2005 - $17,362

[64] Also, in 2006 before this trial in September she had earned $12,180 and the pattern of her work which should have continued thereafter would likely have resulted in total earnings in 2006 of

approximately $18,200.

[65] In addition, the third party relies on Ms. Trudeau's evidence that she has allowed Ms. Durand to work all possible extra hours available to Ms. Trudeau under her contract with Canfor that are not needed by Ms. Trudeau herself. Mr. Stewart submits that in those full employment circumstances Ms Durand has suffered no real loss of past income as a consequence of the accident.

[66] Mr. Stewart submits that the total proven past wage loss suffered by Ms. Durand was $646.05 based upon a loss of 65 hours of work immediately following the accident at her then pay rate of $11 per hour.

[67] Mr. Byl has submitted that the damages suffered by Ms. Durand as a consequence of the accident include a component of lost opportunity to pursue employment in addition to her work with Ms. Trudeau. He submits that such opportunity was denied to Ms. Durand due to her physical limitations caused by the accident and the tiredness which she experiences in doing her work for Ms. Trudeau, all of which preclude her from pursuing additional work or self employment as a private house cleaner.

[68] I am satisfied that there is evidentiary support for Ms. Durand's loss of opportunity claims but I am also satisfied that Mr. Byl has over-estimated both the amount of extra work she could have accomplished if she had not been hurt in the accident and the amount of money she would likely have earned from that additional work.

[69] Although Ms. Durand's evidence that there were opportunities of which she could have availed herself including private housekeeping (at a rate of $15.00 per hour) or working as a waitress was not contradicted, I am satisfied that Mr. Byl's extrapolations of a loss of 600 hours per year (based on a 40 hour week less the time spent working for Ms. Trudeau) at a rate of $15.00 per hour totalling approximately $9,000 per year do not adequately reflect the difficulty of obtaining such additional part time work while maintaining the work schedule with Ms. Trudeau. Further, I am not satisfied that, even if fully healthy, Ms. Durand would have undertaken the risk of a private housekeeping venture in place of her work with Ms. Trudeau. It is even less likely that she would have returned to working as a waitress given the length of time she had been out of that occupation. In addition, as conceded by her counsel, while she was planning to do so earlier, Ms. Durand did not leave her husband until October 1, 2005. I am not satisfied that those plans would have matured at an earlier date but for the accident.

[70] I find that the evidence as a whole establishes that a more realistic assessment of Ms. Durand's total past loss of income earning capacity in the four years between August of 2002 and the start of this trial is $7,000 inclusive of the $646.05 she lost in the first month after the accident.

Future Income Loss

[71] Many of the same considerations applicable to my assessment of Ms. Durand's past income earning capacity also bear upon the assessment of her loss of future earning capacity.

[72] I have determined that future income loss based upon an alleged lost opportunity of $9,000 per year as submitted on Ms. Durand's behalf by Mr. Byl is not wholly supported by the evidence.

[73] I also, however, do not accept the third party's submissions that Ms. Durand's loss of future earning capacity should be based upon the equivalent of a loss of approximately one year's salary of approximately $18,000. Nor do I accept Mr. Stewart's analysis that Ms. Durand's loss of future capacity should be based upon an assessment of her having lost 10 percent of her capacity to work over a 10 year period resulting in a loss of approximately $20,000. The evidence does not support such limited awards.

[74] I am satisfied that the accident has caused Ms. Durand a very real loss of future earning capacity arising from her inability to now pursue other employment opportunities to supplement her ongoing income or to pursue employment opportunities with someone other than her very protective and accommodating employer Ms. Trudeau.

[75] Counsel for Ms. Durand filed expert actuarial evidence allowing for the calculation of the

present value of the loss of an income stream or annual income over varying numbers of years and in different circumstances from the date of trial until Ms. Durand reaches the age of 65.

[76] Those examples included examples of situations where Ms. Durand would suffer an income stream loss for all of the years to retirement at 65; where she would face a loss of income stream until age 60 before deciding to retire without reference to her injuries and one example of a composite loss based upon both a reduced income to age 60 and a forced early retirement due to her injuries.

[77] Mr. Byl submitted that in all of the circumstances, including the prospect that Ms. Durand will be forced into an early retirement, an appropriate award for her loss of future earning capacity would be $150,000.

[78] In ***Rosvold v. Dunlop***, (2001), 84 B.C.L.R. (3d) 158 (B.C.C.A.) [***Rosvold***] Huddart J.A. stated at p. 160:

> Because damage awards are made as lump sums, an award for loss of future earning capacity must deal to some extent with the unknowable. The standard of proof to be applied when evaluating hypothetical events that may affect an award is simple probability, not the balance of probabilities: *Athey v. Leonati*, [1996] 3 S.C.R. 458 (S.C.C.). Possibilities and probabilities, chances, opportunities, and risks must all be considered, so long as they are a real and substantial possibility and not mere speculation. These possibilities are to be given weight according to the percentage chance they would have happened or will happen.
>
> The trial judge's task is to assess the loss on a judgmental basis, taking into consideration all the relevant factors arising from the evidence: *Mazzuca v. Alexakis* (September 20, 1994), Doc. Vancouver B905414 (B.C.S.C.) at para. 121, *Mazzuca v. Alexakis* (September 24, 1997), Doc. Vancouver CA019456 (BC.C.A.). Guidance as to what factors may be relevant can be found in *Parypa v. Wickware, supra*, at para. 31; *Kwei v. Boisclair* (1991), 60 B.C.L.R. (2d) 393 (B.C.C.A.); and *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 (B.C.S.C.) *per* Finch J. They include:
>
> 1. whether the plaintiff has been rendered less capable overall from earning income from all types of employment;
> 2. whether the plaintiff is less marketable or attractive as an employee to potential employers;
> 3. whether the plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to him, had he not been injured; and
> 4. whether the plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market.
>
> The task of the court is to asses damages, not to calculate them according to some mathematical formula: *Mulholland (Guardian ad litem of) v. Riley Estate* (1995), 12 B.C.L.R. (3d) 248 (B.C.C.A.). Once impairment of a plaintiff's earning capacity as a capital asset has been established, that impairment must be valued. The valuation may involve a comparison of the likely future of the plaintiff if the accident had not happened with the plaintiff's likely future after the accident has happened. As a starting point, a trial judge may determine the present value of the difference between the amounts earned under those two scenarios. But if this is done, it is not to be the end of the inquiry: *Ryder (Guardian ad litem of) v. Jubbal* (March 6, 1995), Doc. CA018742, CA018743 (B.C.C.A.); *Parypa v. Wickware, supra*. The overall fairness and reasonableness of the award must be considered taking into account all the evidence.

[79] The evidence establishes that there is a real and substantial possibility that Ms. Durand's future income earning capacity will continue to be affected by her injuries suffered in the accident that have not resolved for now more than four years. She has, however, been working all of those years and I

find that it is unlikely, in all of the circumstances, that she will retire early. She will, however, likely continue to be unable to work more than part time and her employment opportunities remain seriously compromised when the factors in ***Brown v. Golaiy*** approved by Huddart J.A. in ***Rosvold*** are considered.

[80] Taking into account the totality of the evidence, I am satisfied that Ms. Durand will continue to suffer a loss of income of at least $6,000 per year until at least the age of 65 as a consequence of the injuries suffered by her in the accident. The present value of such a loss to age 65 would be approximately $72,000.

[81] Although such a calculation is helpful in assessing the present value of such a potential loss, it remains merely a calculation and does not also address all of the negative and positive contingencies that must be factored into an award for loss of future earning capacity as well as the considerations addressed in ***Rosvold***.

[82] Having considered all of those factors in this case, I have concluded that the appropriate award for Ms. Durand's loss of future earning capacity is $80,000.

Cost of Future Care

[83] Dr. Travlos opined in his May 12, 2005 report that Ms. Durand will require future treatment including physiotherapy and stretching and that if her symptoms persist she may require pain ablation with the use of freezing into the subacromial bursa or injections into the scalene muscles on the left side of her neck with botox.

[84] Mr. Byl has submitted that in those circumstances an appropriate award for Ms. Durand's cost of future care is $1,000.

[85] Counsel for the third party has submitted that no future care award should be made because botox injections are experimental and according to Dr. Schuckett are controversial.

[86] I am satisfied that in all of the circumstances especially given Ms. Durand's need for ongoing physiotherapy and pain management, that an award of future care costs in the amount of $1,000 is conservative.

SUMMARY

[87] Ms. Durand will be awarded the total sum of $163,000 for the injuries she has suffered as a consequence of the accident based upon the following specific awards:

(1)	Non-pecuniary damages	$75,000
(2)	Past income loss	$7,000
(3)	Future loss of earning capacity	$80,000
(4)	Cost of future care	$1,000

COSTS

[88] Unless there are matters of which I am unaware, Ms. Durand will be entitled to her costs throughout on Scale 3 of Appendix B of the *Rules of Court*, B.C. Reg. 221/90 that was in effect at all times during the conduct of this litigation.

"B.M. Davies, J."
The Honourable Mr. Justice B.M. Davies