

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Mariano v. Campbell,***  
2009 BCSC 98

Date: 20090202  
Docket: M111075  
Registry: New Westminster

Between:

Angeline Castaneto Mariano

Plaintiff

And

Deborah Marie Campbell

Defendant

Corrected Judgment: On the front page "Subject to Rule 66" has been added.

Before: The Honourable Madam Justice Loo

Reasons for Judgment

Subject to Rule 66

Counsel for Plaintiff

D. Wilkinson

Counsel for Defendant

T. H. Pettit and J. H. Bryant

Date and Place of Trial:

November 6-7, New Westminster, B.C.  
December 8-9, 2008  
Vancouver, B.C.

[1] Angeline Mariano was a front seat passenger in her 2005 Ford Escape when the vehicle was rear-ended by a 2000 Honda Civic driven by Deborah Campbell. The accident occurred in Surrey around noon on February 11, 2006. Liability is admitted. The only issue is damages, including whether Ms. Mariano is entitled to the cost of re-training to become a licensed practical nurse ("LPN").

[2] Ms. Mariano is 44 years old. She immigrated from the Philippines in 1995 and has been employed as a health care aide since 1999. She has two young sons who are now 6 and 11 years old.

[3] At the moment of impact, Ms. Mariano's head was turned to the left as she was talking to her husband who was driving. Her head struck the head rest and she immediately felt pain in her neck and shoulder. After the accident Ms. Mariano attended a walk-in clinic. In addition to her right neck and shoulder pain, she had a headache, felt dizzy, nauseous, tingling in the fingers of her right hand, and shock.

[4] On February 14, 2006 Ms. Mariano saw Dr. Larry Darby, complaining of neck pain, especially in the right side, extending into her shoulder. He diagnosed a cervical strain injury, prescribed Flexeril and Tramacet,

stretching and strengthening exercises at home, and recommended that she be off work for a least one week.

[5] Ms. Mariano saw her regular family physician Dr. Niamh Darby on February 22, March 9, and April 5, 2006. She complained of pain in her right neck, migraine headaches, and pain radiating down her right arm. Dr. Darby prescribed muscle relaxants and anti-inflammatory medication, recommended physiotherapy and that she stay off work until March 6, 2006.

[6] Ms. Mariano attended physiotherapy on three occasions up to March 6, 2006. She decided she felt better and that she did not need any more physiotherapy but she carried on with her exercises at home. On her doctor's advice she purchased a gym membership and also works out at the gym.

[7] Ms. Mariano was anxious to return to work. My impression of Ms. Mariano is that she considers one of the main purposes in her life is to work in order to provide for her family. She repeated several times that she *must* "work, work, work", and work she does. Her work schedule by any reasonable person's standards is a long one; she has little, if any, time for herself.

#### Ms. Mariano's Work and Return to Work as a Care Aide

[8] Since 1999 and up to the time of the accident, except when she gave birth to her younger son, Ms. Mariano worked up to 75 hours a week at three jobs. She worked 40 hours a week at North Delta Home for Arcus Community Services ("Arcus"). In addition, she worked regular scheduled hours and on an "as needed" basis at Chrysallis, a 20-bed mental health care facility. She also worked on an as needed basis at CRESST, a Fraser Health Authority mental health emergency short stay residential home facility in Surrey.

[9] North Delta Home is one of about 15 group homes operated by Arcus. Each home has 4 wheelchair-bound handicapped patients who are unable to attend to their daily living needs. A care aide is responsible for looking after the needs of two patients including housekeeping, grocery shopping, cooking, feeding, bathing, and lifting the patient between the bed and the wheelchair or to a walker for exercise.

[10] Sometimes lifting or moving a patient must be done manually. At other times a portable lift may be used, but the lift weighs 18 pounds and must be attached to a ceiling hook. Changing diapers is physically challenging because the patients are like "dead weight". Ms. Mariano who is 5 feet 2 inches tall must lift or roll over from side to side patients who weigh as much as 150 pounds.

[11] Ms. Mariano pushes the patients in their wheelchairs and drives them in a van to their activities and appointments. She must bend over to pull and tighten the tie downs onto the floor of the van so that the wheelchairs remain stable during transit.

[12] At Chrysallis Ms. Mariano does the cooking, laundry, and washing the floors. She lifts garbage bags, groceries, big pots and pans, and does yard work. There is no lighter work available except during night shift when there is not as much lifting to do. The work at CRESST is similar, and includes making the beds and doing the laundry.

[13] Ms. Mariano gradually returned to work on March 12, 2006 starting with the night shift (from midnight to 8:00 a.m.) at Chrysallis. She chose the night shift because it is lighter work; the residents sleep until 7:00 a.m. when she gives them their medication. Ms. Mariano did not return to work at North Delta Home until March 19, 2006 after using 18 shifts of sick time and 6 days of vacation in order to remain off work because of her injuries. She also returned to work at CRESST on March 19, 2006. There is no evidence that she could have returned to work earlier.

[14] On her return to work Ms. Mariano struggled. She struggled with the large built-in industrial vacuum, large mops, carrying bags of groceries up the stairs, changing the beds, lifting and moving the patients, pushing the wheelchairs, and fastening the tie downs in the van. The work caused pain and continues to cause her pain in her right neck and shoulder.

[15] Angeles Perez is a care aide employed by Arcus. She has been Ms. Mariano's supervisor since 2001 and

also works with Ms. Mariano one or two days a week when their shifts overlap.

[16] After the accident Ms. Perez noticed a change in Ms. Mariano. She was often tired and not going the “extra mile” with additional chores. She was not like that before the accident. Ms. Perez also noticed that Ms. Mariano gave up trading shifts and was often rubbing her neck which she did not do before the accident.

[17] Ms. Perez corroborated Ms. Mariano’s evidence that the work as a care aide is physically demanding. After the accident Ms. Mariano often complained to Ms. Perez about being in pain which she never did before the accident. She continues to complain of being in pain.

[18] In early 2007 Ms. Mariano mentioned to Ms. Perez that she might train to become an LPN because the work does not require as much upper body strength.

[19] Ms. Mariano never asked Ms. Perez for lighter duties, but Ms. Perez testified that there is no point in asking because there are no lighter duties: you either can or cannot take care of the patients; there is no middle ground.

[20] Maria Tuazon has worked with Ms. Mariano at Arcus since January 2000. Ms. Tuazon noticed a difference in Ms. Mariano after the accident. She now complains about headaches and pain in the back of her neck which is not something she ever did before the accident. Ms. Mariano once asked her if she had Advil or Aspirin because she forgot to bring some to work with her. Ms. Mariano frequently takes over-the-counter ibuprofen to deal with the pain.

[21] Ms. Tuazon also noticed a difference in the way Ms. Mariano works. She used to work fast; now she works slower. She never asked for help before the accident; now she asks for help for some of the physically challenging work such as the lift.

[22] Before the accident Ms. Mariano never spoke to Ms. Tuazon about becoming an LPN.

[23] Rupinder Dhaliwal is Ms. Mariano’s supervisor at Chrysallis. Ms. Dhaliwal described Ms. Mariano before the accident as a dependable, “very accountable hardworking employee”. Ms. Dhaliwal gave Ms. Mariano priority over others for work because she never turned down a shift. However, Ms. Dhaliwal noticed a change after the accident: Ms. Mariano began turning down shifts. Ms. Dhaliwal also noticed that Ms. Mariano was different: she was “not comfortable”; there was “discomfort” on her face; she always looked tired; and she saw that it was hard for Ms. Mariano to do the work.

[24] It was only after the accident that Ms. Mariano asked Ms. Dhaliwal about the job description for an LPN and the possibility of becoming an LPN. Ms. Dhaliwal told her that an LPN did not do much lifting, unless assigned to work in extended care.

[25] There was no lighter work that Ms. Dhaliwal could give Ms. Mariano although there was less lifting during the night shift. Sometimes when she cannot find someone to work a shift, Ms. Dhaliwal asks Ms. Mariano to work but informs her that she does not have to do any work requiring lifting, such as the laundry. However as Ms. Dhaliwal pointed out, she cannot arrange that for every shift Ms. Mariano works because it results in additional uncompleted work for the next shift.

[26] None of the witnesses who work with Ms. Mariano and observed her before and after the accident were challenged on their credibility. They all gave their evidence in a straightforward manner.

[27] The defendant called Linda Blythe who was the team leader at North Delta Home until the end of October 2006. Ms. Blythe completed Ms. Mariano’s performance evaluation for the period January 2005 to May 2006. She gave Ms. Mariano an excellent performance evaluation and considered her a very good worker. Otherwise, Ms. Blythe said that because it was so long ago, she can no longer recall whether Ms. Mariano participated in a return to work program, complained about her injuries or pain, or asked for help.

[28] The defendant also called Tannis Knutson, Ms. Mariano’s supervisor at CRESST. In July 2006 Ms. Mariano

applied for the position of night care aide but the position was given to another person with more seniority. The night shift is more physically strenuous than before because it now includes washing the floors and doing the laundry.

### Ms. Mariano Re-Trains as a Licensed Practical Nurse

[29] Around the end of 2006 Ms. Mariano was struggling with her work as a care aide and decided to re-train to become an LPN because she understood the work would not be as physically strenuous. On March 7, 2007 she applied for online practical nursing courses at the College of the Rockies. She completed the courses between June and December 2007 but not without physical discomfort. Sitting in front of a computer for several hours caused pain in her neck, upper back, right shoulder, and tingling in her fingers. She later attended Vancouver Career College and the hours of sitting caused similar pain. She was unable to carry her textbooks and had to have someone carry them for her. Throughout her re-training she continued to work at her three places of work, albeit with some reduced hours.

[30] The defendant argues that there is no proof that Ms. Mariano cannot do her work as a care aide and that becoming an LPN is simply a logical career progression for her.

[31] I find that Ms. Mariano only considered becoming an LPN when she found she could not work as a care aide without pain because of the physical demands of the work. Ms. Mariano freely testified that she is not physically disabled or unable to work. She can work as a care aide but not without pain. I conclude that the re-training she chose is reasonable and causally connected to her accident injuries.

### Disability Insurance Exclusion as a Result of the Accident

[32] Before the accident Ms. Mariano had disability insurance coverage on her mortgage. The insurance was provided by Canadian Premier Life Insurance Company (now known as Life Investors Insurance Co. of America) and had no specific exclusions and no spinal exclusion. In February 2007 Ms. Mariano reapplied for disability insurance coverage and it was provided, but subject to a spinal exclusion as a result of the accident. Ms. Mariano is understandably upset because in her view the accident injured her neck and shoulder and not her spine.

### Defence: Low Velocity Impact Claim Should Result in Minimal Damage

[33] The defendant says the accident was a low velocity impact claim. The cost of repair for the Ms. Mariano's 2005 Ford Escape was \$1,712.96. The cost of repair to Ms. Campbell's 2000 Honda Civic was \$3,714.07.

[34] The defendant argues that Ms. Mariano's injuries should be consistent with a modest low impact accident and anything more than modest injuries from the accident are an unreasonable consequence. Relying on ***Mustapha v. Culligan of Canada Ltd.***, 2008 SCC 27 at paras. 11-18, the defence argues that the injuries alleged are not a reasonably foreseeable consequence of the minor motor vehicle accident.

[35] Ms. Campbell was called by the defence presumably to testify that the collision was only a minor one. However even Ms. Campbell admitted to sustaining whiplash injuries.

[36] Ms. Campbell was stopped in gridlocked traffic waiting for the traffic light to change. When she saw the light turn green and traffic ahead of her starting to move, Ms. Campbell starting moving her vehicle. When Ms. Mariano's vehicle suddenly stopped, Ms. Campbell did not apply her brakes before she rear-ended the Ford. When she got out of her vehicle, Ms. Campbell saw a stalled vehicle, one or two vehicles in front of her.

[37] Ms. Campbell could not estimate the speed of her vehicle at the time of impact but defence relies on her evidence that another car could not have fitted in between her vehicle and Ms. Mariano's vehicle. However, Ms. Campbell said that on the impact, she immediately felt pain in her neck, the middle of her back, and her right arm. She went into shock and her whiplash injuries took three months to resolve.

[38] The defendant tried unsuccessfully to attack Ms. Mariano's credibility and argues that because of the

minimal impact, Ms. Mariano can only have suffered minimal injuries. However I find Ms. Mariano a very credible witness. She continues to work despite her symptoms. The pain in her neck and shoulders prevents her from working the way she used to work, and from doing the things she used to enjoy doing. She was unable to buy her sons a big pumpkin for Halloween as she had always done before because she is now unable to carry a big pumpkin. Ms. Mariano became quite visibly distressed when she described the activities she can no longer participate in with her children because of her injuries or because she is now simply too tired at the end of the work day to do anything else.

[39] The defendant points to Ms. Mariano's application for mortgage life and disability insurance where she filled in "March 2006" as the "date of the last episode" of neck pain and that Dr. Darby wrote a note to the insurance company indicating that Ms. Mariano had fully recovered from the accident with no complications or sequelae.

[40] The statements may not have been entirely accurate but it was understandable. Ms. Mariano tried to put herself in the best light she could so that she could obtain, as she did before the accident, mortgage disability insurance with no exclusions. The defendant's negligence caused the insurance company to dramatically limit the mortgage disability insurance available to Ms. Mariano through no fault of her own. The defendant should not be heard to be complaining too loudly.

[41] Terry Watson, an estimator for the Insurance Corporation of British Columbia, testified that neither Ms. Mariano's vehicle nor Ms. Campbell's vehicle sustained structural damage. However, the hood of Ms. Campbell's vehicle collapsed and slid under the Ford Escape, striking the spare tire underneath. Mr. Watson agreed that the impact of the collision was likely not absorbed by the bumpers.

### The Medical Evidence

[42] According to Dr. Darby, Ms. Mariano suffered a soft tissue injury to her neck, back, and right shoulder, and she has pain radiating from her upper back. Her long term prognosis is good, but she requires ongoing therapy, such as nerve-block therapy and physical therapy. Dr. Darby has referred Ms. Mariano to a physiatrist, Dr. Jaworski.

[43] The defendant made much of the fact that Dr. Darby's clinical records do not note Ms. Mariano complaining about neck or shoulder pain on each of her visits, including the date of her annual physical examination on March 10, 2007. However, Dr. Darby encourages a patient to discuss only one problem at a time and she does not note the complaint if the complaint or findings are unchanged. If Ms. Mariano raised a complaint about her neck during the physical examination, Dr. Darby would have told Ms. Mariano to book another appointment and not have noted her complaint.

[44] Ms. Mariano was seen by a physiatrist, Dr. Maryana Apel on June 20, 2008. According to Dr. Apel, as a result of the accident, Ms. Mariano suffers from chronic regional myofascial pain syndrome "affecting the upper quadrant on the right side" and cervicogenic headaches. She recommends that Ms. Mariano undergo active rehabilitation, C2-3 facet injections, passive therapy from active release therapy, and an exercise program recommended by a kinesiologist. Dr. Apel said that among the many patients she sees, Ms. Mariano was memorable because of an answer she gave. Dr. Apel asked her if she was depressed. Ms. Mariano replied, "I have no time for such nonsense."

[45] Dr. Apel concluded, as do I, that Ms. Mariano is not a complainer and does not exaggerate her symptoms. She cannot be faulted if she did not complain to her doctor about her symptoms. Her complaints of pain and her reduced ability to work are corroborated by her co-workers.

[46] Neither Dr. Darby nor Dr. Apel was seriously challenged on cross-examination.

[47] At the request of counsel for the defendant, Ms. Mariano was seen by an orthopaedic surgeon, Dr. J. F. Schweigel on July 29, 2008. In his report of July 29, 2008, Dr. Schweigel diagnosed soft tissue injuries to the right shoulder, upper back, mid-back area, and neck. In his report of September 19, 2008, Dr. Schweigel states that Ms. Mariano:

...is not disabled because of this MVA and the soft tissue injuries she sustained. She may have problems in the future but it is not because of the MVA but because she has disc degeneration and arthritis of the cervical spine that preceded this MVA by at least 10 to 15 years. She will have ongoing problems with the neck from events that we do [on] a daily basis.

[48] On cross-examination Dr. Schweigel said that Ms. Mariano's neck symptoms are not related to the soft tissue injury but to her underlying degeneration of arthritis of the neck. However, her underlying arthritis was asymptomatic before the accident and was rendered symptomatic because of the accident.

[49] There is no evidence that Ms. Mariano's underlying arthritis would have become symptomatic but for the accident.

[50] I find that Ms. Mariano's complaints of pain and her continued difficulty in working as a care aide without pain are a result of the accident.

### Damages

[51] The defendant relies on **Mustapha** to argue that Ms. Mariano's injuries were not a reasonably foreseeable consequence of the "minor" or "modest" motor vehicle accident and that Ms. Mariano was substantially recovered by the spring of 2006 and fully recovered within one year.

[52] However, in my view the argument that Ms. Mariano fully recovered within one year is not supported by the evidence and **Mustapha** does not assist the defendant.

[53] In **Mustapha** the plaintiff suffered a major depressive disorder and related anxiety and phobia as a result of seeing dead flies in bottled water. The case deals with mental injury or psychiatric harm as opposed to physical injury, and the issue was whether the defendant's breach caused the plaintiff's damages at law or whether they were too remote or unrelated to warrant recovery. The Supreme Court of Canada referred to **White v. Chief Constable of South Yorkshire Police**, [1998] 3 W.L.R. 1509 (H.L.). In that case Lord Griffiths stated at 1512:

There is a further requirement in the bystander case and that is that psychiatric injury was reasonably foreseeable as a likely consequence of exposure to the trauma of the accident or its immediate aftermath. The law expects reasonable fortitude and robustness of its citizens and will not impose liability for the exceptional frailty of certain individuals. This is not to be confused with the "eggshell skull" situation, where as a result of a breach of duty the damage inflicted proves to be more serious than expected. It is a threshold test of breach of duty; before a defendant will be held in breach of duty to a bystander he must have exposed them to a situation in which it is reasonably foreseeable that a person of reasonable robustness and fortitude would be likely to suffer psychiatric injury.

[54] In **Mustapha**, the Supreme Court of Canada stated at para. 16:

[16] ...Once a plaintiff establishes the foreseeability that a mental injury would occur in a person of ordinary fortitude, by contrast, the defendant must take the plaintiff as it finds him for purposes of damages. As stated in **White**, at p. 1512, focusing on the person of ordinary fortitude for the purposes of determining foreseeability "is not to be confused with the 'eggshell skull' situation, where as a result of a breach of duty the damage inflicted proves to be more serious than expected". Rather, it is a threshold test for establishing compensability of damages at law.

[55] Ms. Mariano is not claiming for psychiatric injury and I do not find **Mustapha** applicable in the circumstances of this case.

[56] Ms. Mariano claims the following:

(i)	general or non-pecuniary damages (\$40,000 to \$60,000)	\$50,000.00
(ii)	past wage loss	45,428.91
(iii)	cost of re-training	23,307.00
(iv)	special damages	574.16
(v)	cost of future care (physiotherapy)	1,045.00
(vi)	loss of insurability claim	20,000.00
(vii)	loss of earning capacity	72,655.32
		<hr/>
	Total:	\$213,010.39

[57] The defence argues the following damages are appropriate:

(i)	general or non-pecuniary damages	\$7,500
(ii)	past wage loss (1 month)	4,500
(iii)	cost of re-training	0
(iv)	loss of earning capacity	0
(v)	special damages limited to 3 physiotherapy visits or \$55 a visit	165
		<hr/>
	Total	\$12,165

### Conclusion

[58] It is almost two years since the accident and Ms. Mariano now suffers from chronic pain. Although there is no evidence she will not eventually recover with additional treatment, despite great effort on her part to continue working in the physically demanding job as a care aide, she cannot work without the work causing pain in her neck and shoulders and headaches. There is no doubt that her present occupation aggravates her symptoms and I am hopeful that her symptoms will be relieved or at least greatly improved once she finds work as an LPN.

[59] In *Hartnett v. Leischner & ICBC*, 2008 BCSC 1589, Russell J. sets out an excellent précis of the law relating to non-pecuniary damages and loss of future income earning capacity.

[60] In support of her claim for non-pecuniary or general damages ranging from \$40,000 to \$60,000 Ms. Mariano relies on *Saucedo v. Huang*, 2007 BCSC 1704 (non-pecuniary award: \$60,000); *Verhnjak v. Papa*, 2005 BCSC 1129 (non-pecuniary award: \$40,000); and *Chamberlain v. Giles*, 2008 BCSC 171 (non-pecuniary award: \$50,000).

[61] The defendant relies on two Provincial Court decisions for non-pecuniary damages: *Cavaliere v. Bott*, 2004 BCPC 403 (\$5,000 for 5 month whiplash injury); and *Ullah v. Hundal*, 2005 BCPC 584 (\$6,000 for 6 month whiplash injury).

[62] I find that the circumstances of Ms. Mariano are similar to the circumstances of the plaintiff in **Verhnjak**. In that case, the plaintiff was also a care aide and her injuries were similar except that the court concluded on the medical evidence that her injuries were permanent.

[63] I find an award of non-pecuniary damages of \$30,000 appropriate.

[64] In **Verhnjak** the award for loss of future earning capacity was \$20,000. In **Saucedo** the award under that head of damage was \$10,000. Ms. Mariano's claim for \$72,655.32 is based on a mathematical calculation of her current earnings multiplied by the 6 years she would have worked in her current three jobs to the age of 50. However, the court's task is to assess damages and not to calculation them on a mathematical formula: **Hartnett** at para. 96.

[65] I find an appropriate award for loss of future earning capacity in this case is \$15,000.

[66] Ms. Mariano has proved on a balance of probabilities from her employers her past wage loss claim of \$45,428.91.

[67] Ms. Mariano has incurred \$574.16 for prescriptions, physiotherapy, massage therapy and a gym pass. She claims \$1,045 for 19 future physiotherapy treatments at \$55 a treatment. However the evidence is not that she needs further physiotherapy treatments but other treatments according to Dr. Darby and Dr. Apel. I was not provided with the cost of those treatments but \$1,000 seems reasonable.

[68] The defendant raised no argument with respect to the cost of re-training.

[69] There is no evidence that Ms. Mariano has suffered a loss or will suffer a loss as a result of her reduced insurance coverage and I make no award for what she describes as her loss of insurability claim.

[70] In summary, Ms. Mariano is entitled to the following damages:

(i)	general or non-pecuniary damages	\$30,000.00
(ii)	past wage loss	45,428.91
(iii)	loss of earning capacity	15,000.00
(iv)	special damages	574.16
(v)	cost of future care	1,000.00
(vi)	cost of re-training	23,307.00
		<hr/>
	Total	115,310.07

[71] Ms. Mariano is also entitled to the costs of this action and court order interest.

"Loo J."