

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Popove v. Attisha*,
2019 BCSC 1587

Date: 20190919
Docket: M167029
Registry: Vancouver

Between:

Gisele Josephine Popove

Plaintiff

And

Cole Attisha and Melissa Attisha

Defendants

Corrected Judgment: The text of the judgment was corrected on the first page on
November 5, 2019.

Before: The Honourable Madam Justice Burke

Reasons for Judgment

Counsel for Plaintiff:

Pierre R. Bisbicus
Robert N. Bisbicus
Esra Yacout (A/S)

Counsel for Defendants:

Nicole Tam
Shauna Toor

Place and Date of Trial:

Vancouver, B.C.
April 29-30, 2019
May 1-3, 2019

Place and Date of Judgment:

Vancouver, B.C.
September 19, 2019

I. INTRODUCTION

[1] On the evening of August 25, 2015, Ms. Gisele Josephiene Popove was a passenger in a 2013 Chrysler Town & Country minivan vehicle involved in a motor vehicle accident on Marine Drive in West Vancouver, British Columbia. Ms. Popove was seated behind the driver. The minivan was hit by a 2005 Subaru Legacy driven by Mr. Cole Attisha, owned by Ms. Melissa Attisha, which was careening around a curve just prior to the impact. The crash was sufficient for the airbags to deploy. Each of the vehicles suffered over \$13,000 worth of damage.

[2] The defendants admit liability for the accident. They dispute, however, the damages as claimed by Ms. Popove.

II. ISSUES

[3] The issues in this matter are:

1. What are the nature, extent and duration of the injuries Ms. Popove suffered in the accident?
2. What is the appropriate award of non-pecuniary damages for pain and suffering?
3. What amount, if any, should be awarded for cost of future care?
4. What amount, if any, should be awarded for the loss of housekeeping capacity?
5. What amount, if any, should be awarded as an in-trust claim on behalf of the plaintiff's husband for his housekeeping efforts?

III. BACKGROUND

[4] Ms. Popove is 72 years old and lives in West Vancouver with her husband, Mr. Jon Popove, and their long time friend, Mr. Ronald Sidow. Ms. Popove was 68 years old and retired at the time of the accident.

[5] Prior to the accident, she and her husband regularly partook in a number of sports, hobbies and activities. She was active and had a fulfilling retirement. She

regularly jogged with her dog and had a passion for riding and training horses. Just prior to the accident, she was travelling to Kamloops from West Vancouver every second week to train, groom, and spend time with her horses. Though she initially had three horses, her beloved event horse Romeo died in 2012. As a result, she has done significantly less riding since that time.

[6] In addition, Ms. Popove regularly participated in a number of art-related hobbies including knitting, sketching, painting watercolours, and doll-making.

IV. THE ACCIDENT

[7] On the date of the accident, Ms. Popove and her friends were returning home from dinner in Caulfield, West Vancouver around 10:00 p.m. in Mr. Sidow's minivan. Ms. Popove was a backseat passenger on the driver's side and was wearing a seatbelt. I accept Mr. Sidow's evidence that the minivan was travelling in the right lane when the Attisha vehicle turned a sharp corner on two wheels, causing it to fishtail. The Attisha vehicle hit the minivan's driver side at the front wheel and collided with it again behind the left passenger wheel before ultimately hitting it again a third time. The blows caused the side airbags to deploy, hitting both the driver and Ms. Popove.

[8] Ms. Shirley Paradis, the front seat passenger, testified that she had never heard such an intense or loud sound. She observed Ms. Popove to be essentially slumped over the right armrest of her seat after the airbags deployed. Upon exiting the vehicle, Ms. Paradis described very significant damage to the left side of the minivan.

[9] Ms. Popove described the deployment of the airbags as a "forceful punch" in the left side of her neck and shoulder. She says that her body was forced over the right armrest and caused her to hurt her ribs. Ms. Popove said when she "came to her senses," she was dazed and confused and noted the terrible smell attributable to the airbags combusting. The side doors of the vehicle were open and a gentleman assisted her out of the vehicle. Though paramedics and police attended the

accident, Ms. Popove did not attend at hospital. Rather, her husband came to the scene and picked her and the other passengers up and drove them home.

[10] After the accident, Ms. Popove experienced stiffness in her neck and shoulders with her left side hurting more than her right. She saw Dr. Torshizi who examined her and indicated that she had suffered soft tissue damage. Ms. Popove said that in the first month after the accident, her neck and shoulders were stiff, particularly on the left side and it was difficult to turn left or right. She also experienced shooting pains between her shoulder blades down from her neck. That feeling continued below her shoulder blades and radiated into her left hip and leg. Ms. Popove also experienced numbness in the fingertips of her middle three fingers on both hands.

[11] In the months following the accident, Ms. Popove felt dizzy getting out of bed and suffered from periodic headaches along with low back pain. This adversely affected her sleep when she would turn to find a comfortable sleeping position, she experienced stiffness and pain in her low back pain that radiated down her leg.

[12] Ms. Popove says she hurts all the time and her symptoms since January 2019 are the same or worse. She still experiences neck, shoulder, back, and leg pain as described above and has periodic headaches two to three times a month. The low grade pain in these areas is constant with occasional flare-ups. She also has right elbow pain, which she says resulted from her elbow hitting the right armrest during the accident. She still experiences sleep disturbances due to the pain. Her right rib pain, however, has resolved.

[13] Ms. Popove has attended 97 physiotherapy treatments since the accident. She had also engaged in acupuncture, intramuscular stimulation therapy, interferential treatment, cranial adjustment treatment, traction therapy, and deep tissue massage. Ms. Popove regularly undertakes physiotherapy exercises using a Thera Band for 20–30 minutes daily.

[14] Ms. Popove also says she is more emotional. She tears easily and is short-tempered and impatient.

V. CREDIBILITY ANALYSIS

[15] The defendants rely on *Price v. Kostryba*, [1982] B.C.J. No. 1518 (S.C.), where the Court advises at para. 4 the importance of exercising caution in determining whether to accept a plaintiff's subjective reports of pain, particularly where that pain persists for periods extending beyond the normal or usual recovery. The defendants argue that Ms. Popove is both an unreliable witness and an inaccurate historian, as can be seen by several alleged inconsistencies between her evidence in direct examination, cross-examination, and discovery. Thus, they argue, her evidence cannot be trusted.

[16] The defendants outline the various consistencies that, in their submission, make her evidence unreliable. Namely, that she initially testified that her lower back and leg symptoms have been constant since September 2015, but later in cross-examination, she clarified that they wax and wane. Further, she testified in direct that her husband does most of the vacuuming, but later her occupational therapist testified that Ms. Popove had purchased a lightweight Dyson vacuum so that she could continue the vacuuming. Moreover, she testified that she had tingling in her hands within one month of the accident, but that there is no mention of her having such tingling sensations in the medical reports. Ms. Popove's therapist also testified that Ms. Popove told her that she helped her mother with her walker, but in cross-examination, Ms. Popove indicated that she did not, in fact, help her mother with her walker.

[17] I disagree with the defendants' characterization of the plaintiff's credibility and reliability. Firstly, I found the arguable inconsistencies relating to what she told her occupational therapist to be inconsequential. I do not find these arguable inconsistencies to be bases for findings of unreliability.

[18] With respect to the defendants' concerns about inconsistencies with Ms. Popove's evidence and the medical reports, I also find these to be inconsequential. As Smith J. said in *Edmondson v. Payer*, 2011 BCSC 118:

[34] The difficulty with statements in clinical records is that, because they are only a brief summary or paraphrase, there is no record of anything else that may have been said and which might in some way explain, expand upon or qualify a particular doctor's note. The plaintiff will usually have no specific recollection of what was said and, when shown the record on cross-examination, can rarely do more than agree that he or she must have said what the doctor wrote.

[35] Further difficulties arise when a number of clinical records made over a lengthy period are being considered. Inconsistencies are almost inevitable because few people, when asked to describe their condition on numerous occasions, will use exactly the same words or emphasis each time. ...

[19] Ms. Popove's references to her pain coming and going is consistent with the expert evidence. Due to the nature of Ms. Popove's soft tissue injuries, I have carefully considered her credibility as per the jurisprudence in *Price*. Having considered the totality of the evidence, I find the plaintiff to be a forthright, honest, and credible witness.

VI. DAMAGES ANALYSIS

1. What are the nature, extent and duration of the injuries Ms. Popove suffered in the accident?

[20] Ms. Popove must prove on a balance of probabilities that "but for" the accident, she would not have suffered the injuries she now complains of. As per *Athey v. Leonati*, [1996] 3 S.C.R. 458, the Court must ascertain whether the accident is the cause of her current issues or whether there were pre-existing injuries and therefore "a measurable risk that the pre-existing condition would have detrimentally affected the plaintiff in the future, regardless of the defendant's negligence." A plaintiff is only entitled to be restored to her original condition.

[21] Dr. H.A. Anton, a medical practitioner specializing in physical medicine, provided a medical legal opinion in this case. He based his opinion on the history as provided by Ms. Popove and on medical records. He ultimately opined in his report

that Ms. Popove probably sustained injuries to soft tissue structures in her left neck, upper back and lower back in the accident. He opined that Ms. Popove's current pain is probably, at least in part, due to a myofascial pain syndrome arising from a pre-existing but asymptomatic degenerative disc disease. He further opined that Ms. Popove possibly sustained a specific injury to a cervical zygapophyseal (Z) joint in the accident, also called the facet joint. Dr. Anton believed that Ms. Popove's mechanical neck pain likely arises from the left C4-5 joint, which could have been caused by this facet joint injury or could have been caused by the soft tissue injuries that caused her previously asymptomatic degenerative arthritis to become symptomatic.

[22] Dr. M. Hudon also provided evidence in this matter. Dr. Hudon is Ms. Popove's family doctor and has seen her 20 times since her accident. He diagnosed Ms. Popove with soft tissue injuries including bilateral facet dysfunction and muscle tightness in her upper back bilaterally. In Dr. Hudon's medical legal report, he also noted that Ms. Popove was seen by Dr. Craig, a physiatrist, on September 13, 2017 and was diagnosed with cervical facet arthropathy and myofascial pain. Dr. Hudon last saw Ms. Popove on November 1, 2018 at which time she continued to experience left neck and upper back pain that was exacerbated by activity including housework.

[23] Dr. Hudon concluded that Ms. Popove's prognosis was poor due to her recurrent neck and upper back pain. As he notes, her symptoms have remained consistent and are being treated with conservative management. He opined that Ms. Popove was rendered partially disabled following this accident and continues to be limited in her daily activities. Dr. Hudon was asked by the defendants whether he advocated for his patient and Dr. Hudon indicated that he had. The defendants argued on this basis that Dr. Hudon's evidence should be given little weight. I disagree. His comment in this regard was forthright in the sense that as Ms. Popove's family doctor, he is a medical advocate for his patient. I do not take that statement to be an admission that his evidence would be slanted or biased in the manner disapproved of by the courts.

[24] The defendants further argued that Dr. Hudon’s clinical notes do not reflect any of Ms. Popove’s persistent symptoms. Again, I disagree. Though Dr. Hudon did not review the symptoms in detail on each visit, many of his clinical notes indicate there is “no change” or that there will be follow-up. I take this to mean that there is no change in Ms. Popove’s symptoms that are earlier described in his records, those being that Ms. Popove experiences recurring pain in her neck and back.

[25] The defendants further point out that Dr. Anton, in his report, noted that Ms. Popove’s left lower back and leg symptoms likely resolved six months after the accident and that any benefits she derived from her weekly physiotherapy sessions only lasted for one day. Dr. Anton said he did not however obtain this information from Ms. Popove in his interview and examination but rather from a review of the medical records. In addition, Ms. Popove made clear in her testimony that there were periods when she did not suffer from these symptoms but they did flare up and had done so since January 2019.

[26] The defendants also argued that Ms. Popove’s injuries have substantially improved since the accident and that any lingering effects are likely due to her degenerative condition which would, in the ordinary course, have become symptomatic with age regardless of the accident. This, however, is not consistent with the medical evidence. Both Dr. Anton and Dr. Hudon noted that the degenerative condition reflected in the imaging was asymptomatic before the accident and there was only a possibility—not a probability—that it would become symptomatic.

[27] Though there is a note in the clinical records that indicate that Ms. Popove reported 80% improvement to Dr. Torshizi, whom she saw instead of Dr. Hudson on December 14, 2015, Ms. Popove says this must have been a mistake in the records. The overall evidence, both medical and collateral, corroborates this reality. Furthermore, as argued by the plaintiff, the defendants did not call Dr. Torshizi to rebut this note which appears, on the evidence, to be an anomaly in the records.

[28] Ultimately, I conclude as reflected by both Dr. Hudon and Dr. Anton that Ms. Popove sustained injuries to soft tissue structures in the left neck, upper back and the lower back in the accident on August 25, 2015. As confirmed by the medical evidence, her prognosis is poor and she continues to experience recurrent neck and upper back pain. While there is some possibility of improvement, her symptoms have remained consistent. I accept that Ms. Popove has been rendered partially disabled and continues to be limited in her daily activities up until this time.

[29] The defendants argue that Ms. Popove did not mitigate her damages appropriately due to the fact that she did not undertake the trigger injections advised by Dr. Craig. I do not agree. As noted earlier, Ms. Popove has attended 97 physiotherapy treatments and numerous other suggested treatments. Furthermore, while Ms. Popove initially expressed some understandable reservations about injections in her neck, she has indicated she will consider this option.

2. What is the appropriate award of non-pecuniary damages for pain and suffering?

[30] The plaintiff seeks an award in the range of \$140,000 to \$180,000 in non-pecuniary damages, arguing that Ms. Popove's previously active lifestyle coupled with the "golden years" doctrine (as articulated in *Fata v. Heinonen*, 2010 BCSC 385) fall within the scope and severity of the injuries set out in the following cases: *Gabert v. Krist*, 2018 BCSC 2109; *Lynn v. Pearson*, [1997] B.C.J. No. 539 (S.C.), *aff'd Lynn v. Pearson*, [1998] B.C.J. No. 1855; *Lensu v. Victorio*, 2019 BCSC 59.

[31] In contrast, the defendants submit that an award in the range of \$40,000 to \$50,000 is appropriate given that Ms. Popove has experienced substantial improvement since the accident and that her soft tissue injuries are not debilitating. The defendants also seek a 25% reduction of the non-pecuniary award to account for the plaintiff's pre-existing back injury and failure to mitigate. The defendants rely on the following cases: *Zaruk v. Simpson et al.*, 2003 BCSC 1748; *Niitamo v. Insurance Corporation of British Columbia*, 2003 BCSC 608.

[32] The leading case on the assessment of non-pecuniary damages is *Stapley v. Hejslet*, 2006 BCCA 34. In that case, the Court of Appeal outlined a number of factors to consider including age, nature of injury, severity and duration of pain, impairment of life, impairment of family and social relationships, and impairment of physical and mental abilities, amongst others. The Court of Appeal also noted that the plaintiff's stoicism should not penalize the plaintiff.

[33] Since the motor vehicle accident, Ms. Popove's activities have been significantly curtailed. She experiences constant pain in her neck and shoulders and the pain ranges from mid to high. A significant problem is her inability to bend her head down for any length of time.

[34] She no longer jogs, knits, or sews. She has difficulty reading because she cannot bend her head for long periods of time. She is no longer able to swim lengths doing the breaststroke, backstroke, or crawl because she is unable to lift her arms above her head. As a result, she mainly floats when in the pool. She still attends her doll-making group, but she no longer participates in the actual making of the dolls. Ms. Popove also has difficulty shoulder checking when driving due to the pain in her neck when she turns.

[35] Ms. Popove is no longer able to ride horses and cannot train horses like she used to. She is too sore to brush the horses vigorously and cannot use her upper body to lift the halter. Though Ms. Popove has not done much riding since 2012 when she lost her horse Romeo, both she and her husband indicate she would have "absolutely" returned to riding and was even training a young horse for dressage.

[36] Ms. Popove rarely gardens anymore and is only able to do light pruning and deadheading of the flowers. Previously, she would garden for a couple of hours each day and undertake heavier tasks such as digging and planting. On the weekends, she would spend entire days in the garden. Her husband, Mr. Popove, now maintains the gardens. He estimates spending at least 12 hours per month during gardening months. He will also do cleanup in the yard after a storm.

[37] Ms. Popove has difficulty with many housekeeping chores. She has difficulty lifting the mattress when she makes the bed. She struggles with lifting heavy pots when cooking. Ms. Popove is a fastidious housekeeper with one dog and four cats—as she indicates, vacuuming and Swiffering is essential on most days. Mr. Popove has taken over the majority of the housekeeping tasks, which he estimates take him at least 20 hours per month.

[38] The defendants maintain that Ms. Popove is still doing the same activities and chores she did before, just on a modified basis. The defendants argue that she was not credible and that there were a number of inconsistencies in her evidence. An example of these inconsistencies: Ms. Popove allegedly told her occupational therapist that she was responsible for the laundry, but in Ms. Popove’s direct testimony, she said her husband did most of the laundry. In my view, these differences reflect Ms. Popove’s commitment to maintaining a clean house. She is attempting to do as much as she can, albeit in a modified and incremental way. It is clear on the evidence that the bulk of the domestic work is done by Mr. Popove.

[39] As I indicated, I found Ms. Popove to be credible. She gave her testimony in a straightforward manner. She did not unnecessarily embellish. Her description of her chronic neck and shoulder pain, along with its effect on her daily activities, was believable and supported by the other witnesses. I accept her evidence.

[40] Based on these findings, I award \$120,000 in non-pecuniary damages. I decline to accede to the defendants’ argument that her award should be reduced by 25%. Regarding her pre-existing degenerative back condition, I accept Dr. Anton’s evidence that “[a]bsent the trauma of the accident, Ms. Popove could have remained asymptomatic indefinitely.” Further, there is no merit to the mitigation argument. The plaintiff has attended for 97 physiotherapy sessions with six different modalities. It is clear that she has put effort into rehabilitating herself.

3. What amount, if any, should be awarded for cost of future care?

[41] The test to establish an award for future care is objective. For an award of future care, firstly, there must be medical justification for the claim, and, secondly,

the claim must be reasonable: *Simmavong v. Haddock*, 2012 BCSC 473 at para. 126. In *Penner v. Insurance Corporation of British Columbia*, 2011 BCCA 135 at para. 13, the Court noted that common sense should always inform awards for future care.

[42] With regard to adjustments for contingencies, the Court in *Gilbert v. Bottle*, 2011 BCSC 1389 stated as follows at para. 253:

[253] The extent, if any, to which a future care costs award should be adjusted for contingencies depends on the specific care needs of the plaintiff. In some cases negative contingencies are offset by positive contingencies and, therefore, a contingency adjustment is not required... In other cases, however, the award is reduced based on the prospect of improvement in the plaintiff's condition or increased based on the prospect that additional care will be required... Each case falls to be determined on its particular facts.

[43] Further, an assessment of damages for cost of future care is not a precise accounting exercise. Damages for cost of future care are a matter of prediction: *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at para. 21.

[44] Ms. Pamela Russell, an occupational therapist, assessed Ms. Popove on October 17, 2018 and provided a cost of future care report in this matter dated November 28, 2018. In that report, Ms. Russell drew conclusions from her own assessment of Ms. Popove along with the clinical reports she was provided by the various medical professionals involved in this matter. She recommends as follows:

- Medical pain management procedures including trigger point injections (as recommended by Dr. Anton) at a frequency and duration to be determined by medical experts. As these services are provided through the public system, there are no costs for them and accordingly, Ms. Popove does not claim for them.
- Strengthening therapy, specifically physiotherapy and kinesiology, to strengthen the shoulder girdle and deep muscles of the neck (as recommended by Dr. Anton). As Ms. Russell notes, Ms. Popove has been attending for physiotherapy but the focus of the therapy has been

predominantly on symptom management. Ms. Russell recommends that independent strengthening of the muscles will promote longer term benefits to her function and pain.

- Pain management therapy including continued physiotherapy as well as massage therapy. In terms of her pain management, Ms. Popove has had success with deep tissue massage therapy.
- Ongoing medications including extra strength Tylenol and extra strength Advil. Ms. Russell defers to medical experts to determine what dosages she will need over time. As plaintiff's counsel submitted, Ms. Popove generally tries to avoid medication because it irritates her stomach, but nonetheless, she still uses painkillers when experiencing flare-ups.
- Various tools and equipment to decrease unnecessary strain on Ms. Popove's back and neck. For example: a kneeling pad/stool as well as adaptive equipment for cleaning.
- Assistance with home and garden maintenance (two hours of household cleaning every week until age 85, three hours of gardening assistance every two weeks until age 75). This would be in addition to what her husband is assisting her with.

[45] Using the costs of the various treatments set out in Ms. Russell's report, Mr. Darren Benning, an economist who provided evidence in this matter, opined in his report that the net present value of all treatments for the plaintiff's lifetime would be \$218,849.

[46] I find that the strengthening therapy as well as the pain management therapy (physiotherapy, massage therapy, and kinesiology), which accounts for approximately 33% of the entire net present value, is justified. This therapy is recommended both by her physician, Dr. Anton, and her occupational therapist, Ms. Russell. Taking into account the various contingencies and keeping in mind that determining future care costs is not an exact calculation, I find \$70,000 is a reasonable award for these treatments.

[47] I also find it appropriate to grant an award to cover the costs of Ms. Popove's over-the-counter medication. This, too, is a reasonable expense. Mr. Benning calculates the present value of these costs at just over \$1,000. I award \$1,000 under this category of future care costs.

[48] Mr. Benning calculates the present value of the assistive aids, as recommended by Ms. Russell, at approximately \$1,000. There is insufficient evidence in this case to satisfy me that these expenses are medically justified or reasonable. I decline to grant an award under this category.

[49] Finally, Mr. Benning calculates the present value of the home support services, which are to be in addition to the support services she receives from her husband and friends, at approximately \$145,000.

[50] Ms. Russell recommends, 2 hours of housekeeping assistance weekly at the rate of \$240 to \$260 per visit and 3 hours every 2 weeks for yard maintenance assistance at the rate of \$40 to \$48 per hour. As argued by the Defendant, however, I conclude the present value of \$145,000 should be reduced. Ms. Popove flies to Australia annually to visit her mother and spends 3 to 4 months in Australia when doing so. She does not do housekeeping while she is in Australia. Although this cannot be precise, I conclude 20 percent is a useful approximation by which the present value of home support services should be reduced.

[51] Ms. Popove is therefore awarded \$116,000 as an award for future cost of housekeeping and yard/home maintenance.

4. What amount, if any, should be awarded for the loss of housekeeping capacity?

[52] Ms. Popove is advancing a claim for future loss of housekeeping in the amount of \$35,000.

[53] As the plaintiff points out, the law regarding awards for loss of housekeeping capacity was succinctly set out by Justice Adair in *Yip v. Sarah*, 2014 BCSC 1283 at para. 81:

[81] Awards for loss of housekeeping capacity may be made for either past or future losses, or both: see *Kroeker v. Jansen* (1995), 123 D.L.R. (4th) 652, 1995 CanLII 761 (B.C.C.A.), at para. 25. ... Such claims are different from a future cost of care claim in that they reflect a loss of a personal capacity and are not dependent on whether replacement housekeeping costs are actually incurred: see *O'Connell v. Yung*, 2012 BCCA 57, at para. 67. An award ordered for loss of housekeeping capacity is for the value of the work that would have been done by the plaintiff but which he or she is incapable of performing because of the injuries at issue. A claim in respect of loss of housekeeping capacity is also distinct from a claim for non-pecuniary damages. Even though the claim is not dependent on whether replacement housekeeping costs are actually incurred, it is frequently valued using a replacement cost approach.

[54] An award for loss of housekeeping capacity reflects the loss of a personal capacity and asset: *Suthakar v. Humble*, 2016 BCSC 155. The calculation of damages under this heading is for the loss of the asset.

[55] The plaintiff relies on the facts of the *Suthakar* case. In that case, the plaintiff was awarded \$35,000 for her loss of housekeeping capacity. The plaintiff in that case performed the majority of the household chores including laundry, cooking, and heavy cleaning. Though her injuries had not fully incapacitated her in terms of her ability to carry out the chores, she faced significant limitations with her abilities to perform the chores, either entirely or with the same efficiency she had in the past.

[56] The facts of this case are similar to those in *Suthakar*. Like the plaintiff in *Suthakar*, the loss of the housekeeping asset is of great significance to Ms. Popove, who, as I have mentioned, is a fastidious housekeeper. I conclude however, an award of \$15,000 is reasonable to reflect Ms. Popove's loss of housekeeping capacity. Ms. Popove's inability to complete household and yard tasks has largely been taken into account in the award for future cost.

5. What amount, if any, should be awarded as an in-trust claim on behalf of the plaintiff's husband for his housekeeping efforts?

[57] Claims for household duties and other services rendered by immediate family members are allowable where the plaintiff demonstrates the need for such services as a consequence of the injuries sustained. The plaintiff must satisfy the Court, on a balance of probabilities, that the family member providing the services suffered a

direct pecuniary loss (because of the time and effort put into those services) or that the family member's efforts replaced housekeeping expenses that would have otherwise have been incurred: *Star v. Ellis*, 2008 BCCA 164 at para. 17.

[58] The law of in-trust claims is governed by the principles set out in *Bystedt (Guardian ad litem of) v. Bagdan*, 2001 BCSC 1735 (B.C. S.C.) at para. 180, aff'd 2004 BCCA 124, where the Court identified the following relevant factors:

[180] ...

- a. the services provided must replace services necessary for the care of the plaintiff as a result of a plaintiff's injuries;
- b. if the services are rendered by a family member, they must be over and above what would be expected from the family relationship;
- c. the maximum value of such services is the cost of obtaining the services outside the family;
- d. where the opportunity cost to the care-giving family member is lower than the cost of obtaining the services independently, the court will award the lower amount;
- e. quantification should reflect the true and reasonable value of the services performed taking into account the time, quality, and nature of those services; and,
- f. the family members providing the services need not forgo other income and there need not be payment for the services rendered.

[59] Cases in which awards have been made for in-trust services involve care provided to seriously injured plaintiffs or support services beyond what might normally be expected in a familial relationship. In assessing the appropriateness of an in-trust claim, standard compassion and care of relatives are not to be compensated. The compensation is for the *extra* services provided by the family member at a reasonable cost.

[60] The plaintiff seeks \$18,500 as an in-trust award. The defendants take the position that the plaintiff has failed to prove on a balance of probabilities that an award is warranted and that her husband would reasonably have provided those services out of the "natural love and affection" of his wife.

[61] It is true that the family lives on a large property and that Ms. Popove is adamant about the cleanliness of her house. I expect that Mr. Popove does, in fact, go above and beyond in terms of his housekeeping efforts. That said, I find the amount as claimed by the plaintiff to be slightly excessive. The amount I have awarded for the future care costs of the home should mitigate any costs that may have been incurred for other housekeeping services. I award \$10,000.

VII. SPECIAL DAMAGES

[62] The parties have agreed on special damages of \$3,822.

VIII. CONCLUSION

[63] In summary, I have awarded the following amounts:

• Non-pecuniary damages	\$120,000.00
• Future cost of care	\$186,000.00
• Loss of housekeeping capacity	\$15,000.00
• In-trust claim	\$10,000.00
• Special damages	\$3,822.00
TOTAL	\$334,822.00