

FINALIZATION AND DISTRIBUTION
OF ORAL TRANSCRIPTION REQUEST

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PART III - The Court:

[To be completed by The Court only]

February 13, 2013

Khushpal S. Taunk
Sovereign Law Corporation
209 - 8556, 120th Street
Surrey, BC
V3W 3N5

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Message to the Ordering Party(ies):

Re: Atker v. Nair
New Westminster Registry No. M125447, December 6, 2011

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FINALIZATION AND DISTRIBUTION OF ORAL TRANSCRIPTION REQUEST

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[To be completed by the Transcription Company only]

Date: January 3, 2013

Christy Pratt

1010 – 925 West Georgia Street

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Phone: 604-684-4347

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Christy Pratt

B. Ordering Party(ies)

[To be completed by the Ordering Party(ies) only]

Khushpal S. Taunk

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Surrey, BC V3W 3N5

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Contact Person: Jimmisha Chhina

Required for appeal or

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**FINALIZATION AND DISTRIBUTION
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Date: 20111206
Docket: M125447
Registry: New Westminster

Between:

Amandeep Atker

Plaintiff

And

Gopalan Nair

Defendant

Before: The Honourable Madam Justice Wedge

Oral Reasons for Judgment

Counsel for Plaintiff:

K. Macauley

Counsel for Defendant:

S. Leung

Place and Date of Trial/Hearing:

New Westminster, B.C.
December 6, 2011

Place and Date of Judgment:

New Westminster, B.C.
December 6, 2011

Ordering Party Notations: *[For Ordering Party use only]*



FINALIZATION AND DISTRIBUTION OF ORAL TRANSCRIPTION REQUEST

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PART IV - Ordering Party/Transcription Company:
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Ordering Party Notations: *[For Ordering Party use only]*

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Atker v. Nair*,
2011 BCSC 1877

Date: 20111206
Docket: M125447
Registry: New Westminster

Between:

Amandeep Atker

Plaintiff

And

Gopalan Nair

Defendant

Before: The Honourable Madam Justice Wedge

Oral Reasons for Judgment

Counsel for the Plaintiff:

K. Macauley

Counsel for the Defendant:

S. Leung

Place and Date of Trial:

New Westminster, B.C.
November 22-25, 2011

Place and Date of Judgment:

New Westminster, B.C.
December 6, 2011

[1] **THE COURT:** The plaintiff, Amandeep Atker, was driving her 2001 Mazda Protégé through the parking lot of a shopping mall in Surrey, B.C., on February 25, 2008, when she was struck by a 1999 Plymouth Minivan driven by the defendant.

[2] Ms. Atker was proceeding along an aisle of the parking lot which had vehicles parked on either side of her. The defendant was attempting to reverse out of one of the parking stalls. He did so abruptly and rather quickly, striking the driver's side door of Ms. Atker's Mazda in what has been described as a "T-bone" collision.

[3] From photographs of the car, it appears that the front driver's side door of the Mazda was dented somewhat. The repairs cost in the range of \$2,000. The rear bumper of the defendant's Minivan had some scrapes. The cost of its repair was approximately \$200.

[4] As a result of the damage to Ms. Atker's car, Ms. Atker was required to exit through the passenger side door. Her six-week-old baby was in a car seat in the rear of the vehicle on the driver's side and was unhurt in the collision. A relative of Ms. Atker came to pick her up from the scene of the accident. Ms. Atker was shaken by the incident.

[5] Liability is admitted. The issue is the extent of Ms. Atker's injuries and the damages claimed by her.

[6] Ms. Atker submits that she suffered soft tissue injuries to her neck, left shoulder, left upper and lower back, left hip and leg. She says those injuries have resulted in chronic myofascial pain which she continues to suffer to some extent to the present. She seeks compensation under the following heads of damage: non-pecuniary damage; past wage loss; loss of future income earning capacity; special damages; cost of future care; in-trust claim for others; loss of domestic capacity; interest; and costs.

[7] By way of background, at the time of the incident, Ms. Atker was 30 years of age. She had given birth to a baby six weeks earlier. She was married and had two other children, age three and one and a half, at the time of the accident. Ms. Atker

was employed as a full-time light fixture assembler by a company known as Ledalite in Langley, B.C., and was on maternity leave at the time of the accident (which, as I have already noted, occurred on February 25, 2008).

[8] Ms. Atker testified that she "did not feel too badly" immediately after the accident other than being shaken and shocked by it, but gradually began feeling worse in the hours after the accident. She was less than two months postpartum and was still actively breastfeeding her infant daughter. She attended at her doctor's office the following morning, February 26.

[9] Her family doctor, Dr. Daljit Claire, noted that Ms. Atker complained of left-sided neck pain, shoulder pain and arm pain, particularly around the elbow. The neck pain radiated down the left side of the shoulder and upper back area. Dr. Claire gave a preliminary diagnosis of soft tissue injuries to those areas and contusion to the left arm. He prescribed Extra-Strength Tylenol and a topical anti-inflammatory, Diclofenac. He could not prescribe any other medications because Ms. Atker was breastfeeding her infant at the time.

[10] Ms. Atker's domestic circumstances at the time of the accident were as follows. She lives in a large home in the Surrey area with her extended family consisting of her husband and three children, her sister, her father-in-law, mother-in-law, sister-in-law, brother-in-law and their two young children. In all, there were 11 members living in the home. Five of them were very young children at the time. The domestic duties were shared equally by Ms. Atker and her sister-in-law, with some babysitting assistance provided by Ms. Atker's mother-in-law.

[11] Ms. Atker and her sister-in-law achieved this division of domestic duties by working at different times outside the home. Ms. Atker worked from 3:15 to 11:15 p.m. Monday to Friday at Ledalite, and her sister-in-law worked at her job from approximately 6:30 a.m. to 3:30 p.m. Accordingly, Ms. Atker got the five children up each morning, prepared breakfast, packed lunch for her husband, did the requisite cleaning, and took the school-aged children to school. She then prepared lunches for those at home and did the remaining household duties until she went to work

mid-afternoon. Her mother-in-law minded the children until other adults arrived home. As I have already noted, Ms. Atker was on maternity leave when the accident occurred and was not due back to work until November 17, 2008.

[12] Following the accident, Ms. Atker continued to experience pain in her neck and her shoulder on the left side and her left arm. She continued breastfeeding her infant for another six weeks or, so but found she could not continue due to the pain she experienced while sitting and attempting to breastfeed. Once she stopped breastfeeding, Dr. Claire prescribed other analgesics to address her discomfort.

[13] In the first two to three months after the accident, Ms. Atker was in quite acute pain from her soft tissue injuries. The pain was no doubt exacerbated by the fact that initially she could only take over-the-counter medications. During those first two to three months, she relied heavily on her sister-in-law to perform all of the domestic duties for the family rather than sharing them. In other words, Ms. Atker's sister-in-law was performing child care for five children and managing the cleaning and cooking responsibilities for a household of 11 people. Ms. Atker testified that gradually after the first two to three months she was able to once again take on some of the domestic duties, although the more physically intense ones such as mopping the floor, and preparing some of the foods became problematic for her, and accordingly her sister-in-law continued to perform all of those tasks.

[14] Ms. Atker attended at Dr. Claire's office regularly every one to two weeks after the accident, and his medical report describes her ongoing condition. While Ms. Atker reported some alleviation of her symptoms, for the most part they persisted, to the extent that Dr. Claire made referrals to a neurologist and a physiatrist. There were x-rays and MRI scans performed. The neurologist ultimately concluded there were no neurological injuries and that the injuries appeared to be to the soft tissues of neck, shoulder and back.

[15] In early November 2008, shortly before Ms. Atker's maternity leave ended, Ms. Atker visited Dr. Claire. He reported that Ms. Atker said she still had problems with neck and shoulder pain and had been doing a limited amount of grocery

shopping and housework. Dr. Claire recommended that she seek a graduated return to work with light duties. However, Ms. Atker's employment circumstances were such that she was required to return to full-time work. In her department at Ledalite, there was no opportunity for lighter duties or less hours.

[16] Ms. Atker returned to work for less than a day on November 17, 2008. She left after five hours, complaining of severe pain. Her employer advised her she should remain off work until she was fully able to return for an eight-hour a day job in the assembly department.

[17] Dr. Claire referred Ms. Atker to a physiatrist in December 2008, but the appointment was not until May of 2009. In the interim, Dr. Claire could only suggest that Ms. Atker try to find alternate part-time work with a different employer.

[18] Ms. Atker continued to see Dr. Claire regularly during the first six months of 2009. She complained of ongoing neck and shoulder pain and episodic back pain. She experienced flare-ups in her pain when she tried to increase her activities in the home. Dr. Claire prescribed analgesics and anti-inflammatories as well as therapies such as massage therapy. He also advised her to undertake an exercise program.

[19] Ms. Atker saw the physiatrist Dr. Jaworski on May 27, 2009. He concluded she was suffering from myofascial pain, that is, pain from her soft tissue injuries, and mechanical back pain, that is, back pain related to physical activity commonly triggered by trauma such as the motor vehicle accident in which Ms. Atker was involved.

[20] Dr. Jaworski recommended a number of therapeutic measures, such as regular exercise, and for flare-ups or for pain, anti-inflammatories and massage. Dr. Jaworski was of the opinion that Ms. Atker was able to return to work with these modalities in place.

[21] Ms. Atker did return to work full-time in June 2009 and has remained at work since that time with intermittent brief absences due to flare-ups of her neck and

shoulder. Ms. Atker testified she works full-time but uses Advil regularly to deal with the discomfort.

[22] One of Ms. Atker's co-workers who worked closely with her during the first year of Ms. Atker's return to work testified that she often appeared to be suffering from pain in her shoulder and upper back. The co-worker said she often helped Ms. Atker with the heavier light fixtures, which weighed between 40 and 60 pounds, and frequently massaged Ms. Atker's shoulder or provided pressure to her upper back to help relieve the pain.

[23] Dr. Jaworski provided a medical opinion and testified in the proceeding. He documented four visits by Ms. Atker between May 27 and August 21, 2009. After the initial May 27 visit to which I have already referred, Ms. Atker saw Dr. Jaworski again on July 22. Ms. Atker reported that she had been back at work since June 9. She reported having fewer aches and pains, and overall Dr. Jaworski thought she appeared to be managing fairly well. There were no new findings on physical examination. Dr. Jaworski suggested an hour of brisk walking.

[24] In her next visit of August 19, 2009, Ms. Atker reported increased shoulder pain and there was tenderness as well as some trigger points in the left trapezius muscle. Dr. Jaworski concluded she was experiencing a flare-up of her myofascial pain. He told Ms. Atker she should continue to consider the possibility of having trigger point injection therapy. During her last visit two days later, Ms. Atker advised she was nervous of the injection therapy and afraid of needling procedures and their potential side-effects. She wanted an MRI conducted on her neck instead, but Dr. Jaworski told her there was little likelihood of any significant findings in an MRI of the neck, and further that any findings would not likely change the recommendations for pain management.

[25] In his report and in oral evidence, Dr. Jaworski expressed the view that in the absence of other factors, Ms. Atker's myofascial pain and mechanical back pain was likely or probably caused by the MVA and that her pain was now chronic in nature and may flare up intermittently. Dr. Jaworski opined that further management should

consist of encouragement to lead a physically active lifestyle despite lingering pain. Trigger point injection therapy would be an option for the left shoulder trapezius pain. Other modalities indicated were over-the-counter analgesics and anti-inflammatories and massage therapy. Dr. Jaworski saw no contraindication for Ms. Atker continuing in her work as a light fixture assembler at Ledalite.

[26] Ms. Atker did eventually decide to follow up with the trigger point injections. She had several flare-ups of her neck and trapezius pain in 2010. She saw Dr. Claire on November 24, 2010, with an acute flare-up. He advised her to take analgesics as needed and to take one to three days off work.

[27] Ms. Atker attended the Surrey Memorial Pain Clinic in May 2011 for assistance from a Dr. Twist. According to Dr. Claire (I refer to his medical report at page 9), he saw Ms. Atker on July 11, 2011, with an acute flare-up of her neck and trapezius area, having been off work for a couple of days with the pain. Shortly after that Ms. Atker saw Dr. Twist again, and this time received a series of block injections with Marcaine, a local anaesthetic, and Kenalog, an anti-inflammatory. She reported to Dr. Claire approximately two weeks later that the injections had been helpful in relieving the pain.

[28] Dr. Claire, like Dr. Jaworski, was of the opinion that Ms. Atker suffered soft tissue injuries to her neck, left shoulder and upper back in the trapezius region in the motor vehicle accident. It was his opinion that her ongoing episodic pain in those areas were myofascial pain relating to the accident. He, too, was of the view that Ms. Atker could continue with her current line of work. His recommendations for ongoing management were very similar to those of Dr. Jaworski. Like Dr. Jaworski, Dr. Claire was of the view that Ms. Atker may continue to have episodic exacerbation of her neck and upper back pain during times of heavy activity.

[29] It was suggested by the defendant in argument that Ms. Atker suffered from shoulder and lower back pain prior to the accident and that this pre-existing condition was likely a cause of Ms. Atker's complaints after the accident. The

defendant relies on two documents in Dr. Claire's clinical records which indicate investigative measures taken with respect to back and shoulder pain.

[30] I do not accept the defendant's argument. First, according to Dr. Claire, Ms. Atker had not seen him for over two years before the accident. He saw her in December 2006 for an unrelated arm rash. Secondly, Ms. Atker was a good employee who missed no work before her accident. She had been working in her job full-time since March of 2007. Her work requires her to be on her feet for an eight hour shift, moving along a 12-foot table while performing the final assembly of light fixtures. Third, Ms. Atker was carrying a significant domestic load in her home with young children and extended family members without any difficulty. Her spouse, Mr. Sahota, testified that Ms. Atker was extremely active and did all of the family's domestic chores before the accident and shared others with her sister-in-law. His evidence was not challenged. I found him to be a credible witness, and I accept his evidence in that regard.

[31] I found Ms. Atker's evidence to be credible as well. Her complaints of pain were clearly taken at face value by both Dr. Claire and Dr. Jaworski. Neither suggested that she was exaggerating or that she was displaying any pain magnification behaviours. It was undisputed that only recently Ms. Atker attended the pain clinic for trigger point injections to alleviate her shoulder and upper back discomfort despite her fear of that kind of therapy. It also appears that the injections provided her with some relief.

[32] I will now turn to the various heads of damage claimed by Ms. Atker. The first of those is the claim for non-pecuniary damage. Ms. Atker advanced a number of decisions of this Court in support of her argument that the appropriate range of damages is in the \$50,000 to \$70,000 range. The defendant argued that the non-pecuniary damages in Ms. Atker's circumstances would be at most \$25,000, or more likely in the \$11,000 to \$23,000 range.

[33] The cases cited by Ms. Atker included *Brock v. King*, 2009 BCSC 1179; *Lakhani v. Elliott*, 2009 BCSC 1058; *Patel v. Ling*, 2007 BCSC 1570; and *Shearsmith v. Houdek*, 2008 BCSC 997.

[34] The cases cited by the defendant in support of his range of damages included *Huynh v. Vo*, 2006 BCSC 1736; *Kain v. Kirkman*, 2006 BCSC 1770; *Lopez v. VW Credit Canada Inc.*, 2008 BCSC 320; *Rochon v. Mott*, 2009 BCSC 247; *Thomas v. Wormsley*, 2009 BCSC 919; and *Job v. Van Blankers*, 2009 BCSC 230.

[35] As I have indicated, Ms. Atker was on maternity leave at the time of her accident. She was barely six weeks postpartum. Her spouse, whose evidence I accept, spoke to the change in Ms. Atker from an attentive mother and spouse to someone who was irritable and short-tempered due to the pain she suffered in the first year after the accident. Ms. Atker attempted to continue breastfeeding her infant but was precluded from doing so because of the pain and inability to take the medication that would alleviate the pain.

[36] Her first attempt to return to work was unsuccessful. When she did return, she was in significant pain for some time thereafter. Her symptoms have gradually resolved, but she continues to take over-the-counter anti-inflammatories to help deal with the physical demands of her job as a production line worker.

[37] While Ms. Atker returned to work full-time successfully, she does continue to experience intermittent flare-ups. The evidence suggests that her neck and shoulder pain, while much less than it was initially, will occasionally flare up and cause problems in the future.

[38] Her injuries and their duration are closer in kind to some of the authorities advanced by the plaintiff, although not quite as severe. They are most similar to other cases, such as *O'Rourke v. Kenworthy*, 2009 BCSC 1277; *Cabral v. Brice*; 2010 BCSC 197; and *Fiust v. Centis*, 2005 BCSC 1067. I have concluded that an appropriate award for Ms. Atker's non-pecuniary loss is \$45,000.

[39] I turn next to loss of past income. Ms. Atker was scheduled to return to work on November 17, 2008, when her maternity leave expired. She could not stay on the job for the full shift and left after five hours. It was her understanding that she could not seek a graduated return to work with shorter shifts or lighter duties, and that understanding was confirmed by her supervisor who testified in the proceedings.

[40] Ms. Atker was simply told to return to work when she could manage the full eight hour shift and the full range of job duties, which, as I have indicated, included being on her feet eight hours a day and moving along a 12-foot-long table performing the final assembly of light fixtures. Ms. Atker saw Dr. Jaworski, the physiatrist, in late May 2008 and it was following his report to Dr. Claire that she was given clearance to return to work.

[41] The defendant argued that Ms. Atker could have sought lighter part-time work during the time that she was off work between November 17 and June 9, 2009. I do not accept that argument. Ms. Atker had permanent full-time employment with Ledalite. That employer had no light duties for her to perform, nor was it prepared to have her work shorter shifts. The defendant led no evidence to suggest what alternate work Ms. Atker could have obtained with a different employer during that time. This is really a mitigation argument. As such the onus is on the defendant to establish that such short-term alternate employment was reasonably available. There was no evidence led by the defendant on the issue.

[42] Ms. Atker testified that had the accident not occurred she would have returned to work three months before her maternity leave expired because she left work three months earlier than planned due to complications with her pregnancy. As such, she said she was actually on maternity leave without any benefits for those last three months, having exhausted her benefits by leaving work three months before she planned to do so.

[43] From the information supplied by Ms. Atker's employer, it is clear that she went on maternity leave September 17, 2007. She gave birth on December 30, 2007, approximately three and a half months later. Accordingly, Ms. Atker's benefits

would have expired three months earlier than November 17, 2008. The question, however, is whether Ms. Atker established that she was unable for medical reasons to return until July 9, 2009. I am also slightly troubled by the lack of evidence concerning the actual amount of maternity leave benefits Ms. Atker was receiving.

[44] Overall, while I am satisfied that Ms. Atker was unable to return to work in November 2008, I conclude on the basis of Dr. Claire's evidence that she was likely able to at least attempt to return to work in April of 2009. In other words, Ms. Atker's past wage loss extends from August 17, 2008, to April 5, 2009. That is a 32-week period, during which time her wage rate was \$11.35 per hour. At that rate her gross wage loss was \$14,528. That is the amount I will award for past wage loss. I will leave it to counsel to determine her net wage loss based on the appropriate income tax deductions.

[45] I turn next to Ms. Atker's claim for loss of future income earning capacity. The plaintiff must first prove that his or her earning capacity as a capital asset has been impaired. Once impairment is established it must be valued: *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 11, and *Steward v. Berezan*, 2007 BCCA 150 at para. 17.

[46] Further, as a condition precedent to an award of damages for loss of earning capacity, the plaintiff must prove a real and substantial possibility of lost future wages, rather than mere speculation concerning such loss: *Steward v. Berezan*.

[47] An individual may suffer continuing physical symptoms without suffering a loss from earning capacity: *Sinnott v. Boggs*, 2007 BCCA 267 at para. 11. Damages for future loss of earning capacity will only be awarded where the plaintiff has suffered a permanent injury.

[48] In the present case, neither Dr. Claire nor Dr. Jaworski was of the view that Ms. Atker's future light fixture assembly job would be in any way in jeopardy as a result of her injuries. Accordingly, I have concluded that the evidence, including the medical evidence, does not establish Ms. Atker's claim for future loss of earning capacity. I accordingly dismiss the claim under that head of damage.

[49] I turn then to Ms. Atker's in-trust claim. I accept the evidence of Ms. Atker and her spouse that prior to the accident, Ms. Atker was responsible for the full spectrum of child care and house care duties together with her sister-in-law and did in fact fulfill all those duties before reporting for work for an eight hour shift each day. I also accept her evidence that following the accident, Ms. Atker's sister-in-law performed all of Ms. Atker's duties for the first two to three months. I accept that Ms. Atker continued to require her sister-in-law's assistance, albeit to a lesser extent, for a further four to five months.

[50] It is open to the Court to observe that it would cost approximately \$20 per hour to hire a domestic worker to perform those duties. I cannot calculate the in-trust claim with mathematical precision, but on the basis of the time frames involved, I am satisfied that an in-trust award of \$5,000 is appropriate in the circumstances.

[51] The next head of damage is future loss of housekeeping capacity. While I accept the evidence of Dr. Claire and Dr. Jaworski that Ms. Atker may suffer occasional episodic flare-ups of her neck and shoulder pain in the future, there is very little evidence on which to base anything more than a nominal amount under this head of damage. I award Ms. Atker \$500 for a future loss of domestic capacity based on the limited evidence of possible flare-ups in the future.

[52] Finally, I turn to the issue of cost of future care. Ms. Atker seeks \$10,000 under this head of damage. The defendant says there should be no award. As noted in my discussion concerning other heads of damage, there is a real possibility of occasional episodic flare-ups of Ms. Atker's myofascial pain in the future. Those flare-ups may require some treatment. The authorities establish that first there must be medical justification for such a claim, and second, the claims must be reasonable. The authorities also establish it is not necessary that specific items of cost of future care be approved by medical experts.

[53] Dr. Jaworski testified that Ms. Atker would benefit from massage therapy if her myofascial pain is exacerbated from time to time. Both Dr. Claire and Dr. Jaworski emphasized that Ms. Atker will benefit significantly from an active

physical exercise regime. I accept that such a regime would best be achieved by a gym membership. Given the domestic circumstances in Ms. Atker's home, she cannot realistically be required to embark on an exercise regimen in the home. Finally, the evidence establishes that Ms. Atker may require another series of injections for her neck and shoulder pain. Based on these factors, I would award Ms. Atker \$1,500 for cost of future care.

[54] Finally, I turn to special damages. Ms. Atker has provided a schedule of receipts in the amount of \$3,695.58 representing transportation costs, fees incurred for visits to various medical practitioners and the cost of medication and massage and other forms of therapy.

[55] Included in that special costs claim is the cost of an MRI conducted in India. As I indicated to Ms. Atker's counsel on the last day of trial, that MRI claim cannot stand as it was not ordered by either Ms. Atker's attending physician or Dr. Jaworski. Both concluded that an MRI at that stage was not indicated.

[56] Further, it appears to be a matter of agreement now between the parties that the prescription costs are properly Part 7 claims. Accordingly, both the MRI and prescription claims must be deducted from the damages claimed by Ms. Atker. I will leave it to counsel to do the math under this head of damage.

[57] If there are any disagreements between counsel concerning the final amount of special damages, they can provide their respective positions in writing and send them to me through the Vancouver registry.

[58] In summary, then, Ms. Atker is entitled to the following: \$45,000 for non-pecuniary damages; \$14,528 (gross) for past income loss, counsel to calculate the tax consequences; \$5,000 for in-trust award; \$500 for future loss of housekeeping capacity; \$1,500 for future cost of care; special damages to be calculated.

[59] Finally, subject to submissions of the parties, Ms. Atker is entitled to her costs.

[60] Any questions, counsel?

[61] MS. MACAULEY: My Lady, there was an offer to settle made by the plaintiff on October 18 and delivered to the defendant on that date and it appears – I'm just trying to do the rough calculation in my head, like the wage loss met, but it appears at this moment that this judgment may have actually exceeded that amount and if that is the case, the plaintiff would like to make submissions with regards to the offers to settle.

[62] THE COURT: Yes. That is fine. If counsel would discuss this between them, you can provide something to me in written form through the registry, and counsel for the defendant can provide argument on costs.

[63] MS. LEUNG: Yes, My Lady. Thank you.

[64] THE COURT: Very good.

[65] MS. MACAULEY: Thank you.

[66] THE COURT: Thank you.

A handwritten signature in black ink, appearing to read "C.A. Wedge". The signature is fluid and cursive, with a large initial "C" and a long, sweeping tail.

The Honourable Madam Justice C.A. Wedge