

CANADA / JUDGMENT

## A.J.G. v. Mann

2020 BCSC 180

COURT

Supreme Court of British Columbia

DECIDED

18 February 2020

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2020 BCSC 180 A.J.G. v. Mann

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

A.J.G. v. Mann,

2020 BCSC 180

Date: 20200218

Docket: M80816

Registry: Nanaimo

Between:

A.J.G.

Plaintiff

And

James Alfie Morris Mann

Defendant

Corrected Judgment: The text of the judgment was corrected on the front page on February 21, 2020.

Before: The Honourable Mr. Justice Baird

Reasons for Judgment

Counsel for the Plaintiff:

P. Giroday

B. Blanaru (A/S)

Counsel for the Insurance Corporation of British Columbia, as Intervenor:

K. Hornquist

Place and Dates of Trial:

Nanaimo, B.C.

November 28 - 29, 2019

December 2 - 5, 2019

Place and Date of Judgment:

Nanaimo, B.C.

February 18, 2020

## INTRODUCTION

- [1] This is a motor vehicle accident case. On October 25, 2015 the plaintiff was rear-ended by the defendant as she was turning into her driveway on Turner Road in Nanaimo, B.C. The defendant was an uninsured driver. The defence has been conducted by counsel engaged by the public insurer.
- [2] The defendant's fault was neither admitted nor disputed at trial. The defendant did not testify. In my view it is clear that the defendant was wholly responsible for the collision. He was following the plaintiff too closely and was not keeping a proper lookout. The plaintiff was not contributorily negligent.
- [3] As a result of the collision the plaintiff suffered soft tissue injuries to her neck, back and left shoulder, with related headaches, anxiety and fatigue. She is seeking damages for non-pecuniary loss, loss of past and future income earning capacity, out of pocket expenses, and loss of housekeeping capacity.

## BACKGROUND

- [4] The plaintiff is 28 years old, born September 25, 1991. She is married without children. She works for School District 68 as a teacher. Her particular interest is in assisting students who have special needs. She has a Bachelor of Education degree (2016) and a Master of Special Education (2018) from Vancouver Island University. She is trained for no other career.
- [5] The plaintiff's entitlement to non-pecuniary damages was conceded subject to the usual to and fro about quantum. I intend to incorporate a modest amount for loss of housekeeping capacity under this heading. There is no question that an award for past income loss is also in order, with the dispute between the parties amounting to a difference of only several thousand dollars.

- [6] The main point of contention is the extent to which the plaintiff's accident-related deficits may have reduced her future capacity to earn income as a teacher. The plaintiff is claiming, in essence, that because of the collision she is now physically disabled to such a degree that she will be limited to a 3.5 or 4 day work week until she is 65 years old. Defence counsel concedes that an award for lost income earning capacity is due to the plaintiff but not of anything like the magnitude demanded.

## PLAINTIFF'S PRE-ACCIDENT HEALTH

- [7] In the spring of 2015 the plaintiff was diagnosed with fibromyalgia, a condition described in evidence as generalised and unexplained soft tissue pain that can migrate through the body and wax and wane for no verifiable reason. The plaintiff testified that she had likely been suffering from fibromyalgia symptoms for several years pre-diagnosis, manifested in her case by oversensitivity to touch in the upper arms and legs, lower back ache, and a pattern of interrupted, non-restorative sleep.
- [8] Eventually the plaintiff's mother - who suffers from the same condition - encouraged her to seek referral to a rheumatologist for evaluation. The plaintiff followed this advice and came under the care of Dr. Tenenbaum, now sadly deceased, who recommended that she should exercise, maintain a healthy diet, and develop better sleeping habits. The plaintiff testified without contradiction that she did all of these things.
- [9] I am drawn to the conclusion, therefore, that the plaintiff's fibromyalgia symptoms, which in any event had never been debilitating, were well under control before the accident. She never missed work or school because of this pre-existing condition, required no accommodations in her daily activities, including housework, was not inhibited in her social or recreational pursuits, and was not taking medication.
- [10] Before the accident, moreover, the plaintiff had no history of middle and upper back soreness, pain or restricted movement in her neck or left shoulder, or any problems with anxiety or persistent low moods. She suffered from occasional migraines but did not experience daily tension headaches as she does now. If not for the accident, she says, she would have continued to enjoy her customary lifestyle free from any of these physical limitations.

## PLAINTIFF'S POST-ACCIDENT HEALTH

- [11] The plaintiff testified that while some of her accident-related complaints have abated somewhat, she continues to experience generalised pain and stiffness in her back. She says that the middle and upper back symptoms are new since the accident, while the lower back discomfort that was a pre-accident symptom of her fibromyalgia has worsened. In the four year interval since the accident the plaintiff has attempted to rehabilitate herself through exercise and physiotherapy and other passive treatments, such as intra-muscular injections, with limited improvement.

- [12] Additionally, the plaintiff continues to suffer from previously unknown and persistent neck pain, mostly on the right side, and left shoulder pain with limited range of movement and related numbness, tingling and weakness in her left arm and hand. She claims to have experienced daily tension headaches and a reduction in cognitive acuity including short-term memory loss and reduced ability to concentrate. She suffers from anxiety, particularly when it comes to driving or being a passenger in a motor vehicle.

## PLAINTIFF'S CREDIBILITY

- [13] Defence counsel urged me to be sceptical about the plaintiff's testimony in a general sense. He suggested that the plaintiff is attributing all of her problems in life to the accident when, in actual fact, her own genetic inheritance including fibromyalgia is a major contributing factor to her present difficulties. Questions were raised, as well, about her appetite for sustained hard work. I was referred to the plaintiff's below average high school and early university marks and her somewhat patchy employment history. I was encouraged to infer that her natural inclination is to take things easy and coast through life.
- [14] It may be that there are aspects of the plaintiff's history that give rise to such questions. On the other hand, the plaintiff's approach to life and work since finding her niche as a special needs teacher seems to have been more disciplined and methodical and by all accounts her career in that field is well-launched. I have no particular reason to question the basic credibility of the plaintiff's claims of ongoing accident-related partial disability, especially since her evidence to this effect was corroborated in important particulars by her mother, husband, mother-in-law, and a former co-worker. The whole of the evidence portrays a young woman who enjoyed reasonably good health before the accident who, afterwards, has been diminished in overall fitness and functionality.
- [15] Assessing what the plaintiff's life might have amounted to in the absence of the accident is a matter, by no means precise, of considering her personal, educational and vocational history and measuring how far her fitness, capacities and enjoyment of life appear genuinely to have been reduced by the defendant's fault. For the following reasons, I have concluded that the plaintiff is entitled to a solid award for her losses, but in my view her damages demand is too high.

## MEDICAL EVIDENCE

### Dr. Jonathan Hawkeswood

- [16] Dr. Hawkeswood is a psychiatrist retained by plaintiff's counsel. He examined the plaintiff her on May 23, 2019. He diagnosed her as having grade 2 whiplash-associated disorder affecting the cervical, thoracic and lumbar spine; left shoulder pain in keeping with an impingement pattern, and likely a component of pain inhibition as well; chronic tension headaches with episodic migraines; and moderate anxiety and mild depression. He observed abnormal recruitment and restricted range of motion of the plaintiff's left

shoulder. He attributed the plaintiff's cognitive complaints following the accident to secondary factors such as sleep disruption, pain and stress.

- [17] On cross-examination, Dr. Hawkeswood denied the suggestion that the plaintiff's soft tissue injuries might have resolved and that her ongoing complaints are from fibromyalgia. He referred in particular to the left shoulder injury, which came on immediately after the accident and of which there was no pre-morbid history. He called this the plaintiff's "focal injury", by which I understood him to mean her most serious and enduring deficit. Other than this he offered the opinion that the accident likely caused a whiplash injury to the plaintiff's cervical, thoracic and lumbar spine, worsening her pre-existing fibromyalgia-related lumbar pain and causing the upper body axial symptoms. He raised the issue that she would likely have experienced similar back pain or pain elsewhere in her body because of her fibromyalgia absent the accident; however, he could not predict when this might have happened or the severity of it. His opinion in any event was that the plaintiff suffers substantially more pain because of the accident.
- [18] Dr. Hawkeswood reported that he expected the plaintiff would experience chronic soft tissue pain in relation to her injuries and pre-existing fibromyalgia on a fluctuant course for the "foreseeable future". In his court testimony, he specified that he meant by this "the remainder of her adult life". He did not expect her to regain full functionality or resolution of the pain in her left shoulder; however, he reported that over the long-term her symptoms might improve with treatment, rehabilitation, and exercise. He expected that her limitations doing household chores would improve with time. He predicted that in the future she will have to miss work occasionally because of pain. In his view no other long-term disability is probable.

### **Dr. Rhonda Shuckett**

- [19] Dr. Shuckett is a rheumatologist engaged by the plaintiff for an examination on May 10, 2019. In her opinion the plaintiff suffered the following injuries as a result of the accident: cervicogenic muscular tension headaches; musculoligamentous and facet related pain in her neck, with myofascial pain of the neck and shoulder girdle regions; rotator cuff tendinosis of the left shoulder with impingement; left sided thoracic outlet syndrome related to the myofascial pain in her left neck and shoulder girdle region; mechanical upper, mid and low back pain with bilateral sacroiliac strain; and increased pain related to her fibromyalgia.
- [20] On examination, Dr. Shuckett observed a global decrease in all ranges of motion of the plaintiff's left shoulder, as well as decreased grip strength in the plaintiff's left hand. The plaintiff also reported tingling in her left arm and hand. Dr. Shuckett observed palpable muscle spasms in the plaintiff's neck and shoulder girdle regions.

- [21] Dr. Shuckett agreed with Dr. Hawkeswood that the plaintiff was probably at greater risk for pain in her upper, mid and lower back by virtue of her pre-accident history of fibromyalgia, but the trauma of the accident caused her immediate symptoms with the fibromyalgia likely prolonging and exacerbating her pain. She noted the difficulty of assessing the relative degrees of fibromyalgia before and after a motor vehicle accident.
- [22] In Dr. Shuckett's opinion the plaintiff's prognosis is poor for any appreciable improvement in overall functionality. In cross-examination, however, she testified that with the assistance of a kinesiologist, in combination with additional physiotherapy, the plaintiff might be able to improve her physical strength and conditioning.
- [23] Dr. Shuckett reported that the plaintiff had found it necessary to restrict her working hours to part-time, though she was unsure how many hours a week the plaintiff was working at the time of the examination. In Dr. Shuckett's opinion, the plaintiff will probably have to "continue with her restricted employment schedule". I note that Dr. Shuckett examined the plaintiff before she decided to reduce her work hours to just over half time as she has done this present school year.

### Dr. John Wade

- [24] Dr. Wade is a rheumatologist retained by the defence to examine the plaintiff on May 31, 2019. He referred to the plaintiff's pre-existing fibromyalgia and raised the possibility - not shared by other clinicians - that she might suffer from co-existing mild inflammatory arthritis. In his view the accident probably caused a mild to moderate musculoligamentous injury of the cervical and thoracic spine and possibly the lumbar spine. He thought it possible, as well, that the plaintiff suffered a soft tissue injury of the left shoulder, although he considered it possible that this might be referred pain from the cervical spine.
- [25] Dr. Wade conceded that the plaintiff's fibromyalgia "may well have been aggravated by the motor vehicle accident", but he observed that with time, physiotherapy and exercise, there has been a limited but clinically significant improvement of her reported symptoms. He agreed with Dr. Shuckett that the plaintiff may suffer from mild left thoracic outlet syndrome, and suggested that this may or may not be related to the accident, but he did not identify any alternative cause and agreed that there was no sign of it in the plaintiff's pre-morbid medical history. Although the plaintiff reported her daily headaches to Dr. Wade he offered no opinion concerning their etiology.
- [26] Dr. Wade suggested further investigations of the plaintiff's left shoulder as well as physiotherapy to improve range of motion. He provided limited comment on the plaintiff's prognosis beyond his expectation that she may be able to reduce her symptoms and further improve her functioning and quality of life with further assessment and treatment.

## DISCUSSION

- [27] I turn first to the issue of causation. The plaintiff must show on a balance of probabilities that "but for" the defendant's negligent act, the injuries from which she is suffering would not have occurred: *Clements v. Clements*, 2012 SCC 32 at para. 8. The plaintiff need not establish that the defendant's negligence was the sole cause of injury; rather, it is sufficient if the defendant's negligence was a cause of the harm suffered: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at paras. 17-19. The plaintiff need only establish a "substantial connection" between the injury and the defendant's negligence in order to find the defendant liable: *Sam v. Wilson*, 2007 BCCA 622 at para. 109. A substantial connection is something beyond the de minimus range: *Farrant v. Laktin*, 2011 BCCA 336 at paras. 9, 11.
- [28] Based on the plaintiff's pre-existing fibromyalgia, the defence suggests the "crumbling skull" rule applies, which provides that a defendant need not compensate the plaintiff for any debilitating effects of pre-existing conditions which the plaintiff would have suffered anyway: *Athey* at para. 35. The BC Court of Appeal in *Zacharias v. Leys*, 2005 BCCA 560 discussed the application of this rule:
- [16] The crumbling skull rule is difficult to apply when there is a chance, but not a certainty, that the plaintiff would have suffered the harm but for the defendants' conduct. Major J. addressed this issue in *Athey* when he wrote, at paragraph 35, that damages should be adjusted only when there is a "measurable risk that the preexisting condition would have detrimentally affected the plaintiff in the future, regardless of the defendant's negligence." Such a risk of harm need not be proved on a balance of probabilities, which is the appropriate standard for determining past events but not future ones. Future or hypothetical events should simply be given weight according to the probability of their occurrence. At paragraph 27, Major J. wrote that "if there is a 30 percent chance that the plaintiff's injuries will worsen, then the damage award may be increased by 30 percent of the anticipated extra damages to reflect that risk." In the same paragraph, he went on to say that a future event should be taken into account as long as it is a "real and substantial possibility and not mere speculation."
- [29] The plaintiff relies on *Bouchard v. Brown Bros. Motor Lease Canada Ltd.*, 2012 BCCA 331 for the proposition that any discounting of damages on this basis must reflect the likely timing and trajectory of a degenerative condition.
- [30] I am satisfied on all of the evidence that the plaintiff's pre-existing fibromyalgia was only mildly symptomatic before the accident and did not interfere with her everyday functioning. In my view the accident has served to exacerbate these symptoms to the point where they are now debilitating to a not insignificant degree. I am not persuaded on all of the evidence that the plaintiff suffered from pre-existing inflammatory arthritis, a theory espoused by Dr. Wade alone in terms that I found unconvincing.

- [31] I conclude that the accident caused soft tissue injury to the plaintiff's lower and upper back, and that while it may be that her fibromyalgia would have affected these areas absent the accident, the pain that she experiences to this part of her anatomy has become chronic, in part at least because the soft tissue injury has interacted negatively with her fibromyalgia in a continuous and persistent cycle that would likely not have occurred but for the accident. In my view the plaintiff's daily tension headaches are related to her neck pain, and her mild cognitive problems are likely the result of accident-related fatigue and insomnia.
- [32] In the absence of any other causal explanation, finally, I conclude that the plaintiff's neck and left shoulder injuries, which I would identify as her predominant residual deficits, are a direct result of the accident. The plaintiff had no pre-morbid history of either injury, and I note that Dr. Shuckett observed muscle spasms on palpation in both areas, an objective symptom that cannot be feigned. The expert medical evidence in its totality suggests that the plaintiff's left shoulder complaint is probably the result of thoracic outlet syndrome with intermittent brachial plexus impingement, which would explain the numbness and tingling in her left arm and hand.
- [33] I am prepared to accept that with so much time having elapsed after the accident without full recovery, especially considering the plaintiff's reasonably diligent efforts towards rehabilitation, the plaintiff's optimal functioning has been lastingly damaged. There is no doubt that the accident has negatively impacted the plaintiff's enjoyment of life and caused a diminution of physical capacity resulting in a real and substantial possibility of future pecuniary loss. In attempting to be fair to both sides of this dispute the question, as usual, becomes one of degree.
- [34] I repeat that, in the main, I accept the plaintiff's evidence concerning the nature and extent of her injuries. I am satisfied, as well, that she has made meaningful attempts to return to her pre-accident fitness but has fallen short of it despite reasonable efforts. Where I part company with her is in the evaluation of the likely impact that her injuries will have on her life, especially her working life.
- [35] In my view, in particular, it was not reasonable or necessary for the plaintiff to voluntarily and unilaterally reduce her work schedule by almost 50 percent as she has done in this present school year. Dr. Hawkeswood paid particular attention to the impact of the plaintiff's injuries on her capacity to work and dedicated a section of his report to "Vocational Abilities and Limitations". I accept Dr. Hawkeswood's nuanced and considered opinion that the plaintiff will have to miss work only occasionally and that no other long-term disability is likely. Dr. Shuckett's discussion on this issue was limited to a non-specific opinion that a restricted work schedule may be necessary.

## NON-PECUNIARY DAMAGES

- [36] Non-pecuniary damages are awarded to compensate the injured party for pain, suffering, loss of enjoyment of life, and loss of amenities. The compensation awarded should be fair to all parties. Fairness is measured against awards made in comparable cases. Though helpful, similar cases serve only as a rough guide, as each case depends on its own unique facts: *Trites v. Penner*, 2010 BCSC 882 at paras. 188-189. The process is one of assessment and not mathematical precision: *Suthakar v. Humble*, 2016 BCSC 155 at para. 116.
- [37] The Court of Appeal outlined the proper approach to the assessment of non-pecuniary damages in *Stapley v. Hejslet*, 2006 BCCA 34 at paras. 45-46. The factors to be considered include the age of the plaintiff, the nature of her injuries, the severity and duration of her pain, disability, emotional suffering, loss or impairment of life, the impairment of family and social relationships, the impairment of physical and mental abilities, and loss of lifestyle. A stoic nature ought not to result in a lesser award.
- [38] A claim for loss of housekeeping capacity may be included under this heading rather than as a separate pecuniary award. This distinction is discussed in *Kim v. Lin*, 2018 BCCA 77:
- [33] Therefore, where a plaintiff suffers an injury which would make a reasonable person in the plaintiff's circumstances unable to perform usual and necessary household work -- i.e., where the plaintiff has suffered a true loss of capacity -- that loss may be compensated by a pecuniary damages award. Where the plaintiff suffers a loss that is more in keeping with a loss of amenities, or increased pain and suffering, that loss may instead be compensated by a non-pecuniary damages award. However, I do not wish to create an inflexible rule for courts addressing these awards, and as this Court said in *Liu*, "it lies in the trial judge's discretion whether to address such a claim as part of the non-pecuniary loss or as a segregated pecuniary head of damage": at para. 26.
- [34] Whichever option a court chooses, when valuing these different types of awards, courts should pay heed to the differing rationales behind them. In particular, when valuing the pecuniary damages for the loss of capacity suffered by a plaintiff, courts may look to the cost of hiring replacement services, but they should ensure that any award for that loss, and any deduction to that award, is tied to the actual loss of capacity which justifies the award in the first place.
- [39] The plaintiff seeks an award of \$125,000 under this heading based on the following cases:
1. *Mattson v. Spady*, 2019 BCSC 1144: \$150,000 award. The plaintiff suffered chronic pain involving her neck, upper trapezius, shoulder, and scapula and headaches. Before the accident she led an "extremely active lifestyle" as an "avid and serious runner" who participated in marathons, team sports, and outdoor activities. She was unable to return to any of these activities after the accident. Her work hours as a kinesiologist were reduced due to her pain and mobility issues. She struggled with household chores and her interactions with her children were impeded. Her injuries were described as "unrelenting and

unremitting" and the Court noted the "impact of her injuries on the life she knew has been devastating" (at para. 46). She was 30 years old at the time of the accident.

2. *Daleh v. Schroeder*, 2019 BCSC 1179: \$130,000 award (reduced to \$117,000 based on failure to mitigate her psychiatric injuries). The plaintiff was injured in two separate motor vehicle accidents in 2014 and 2016. She suffered pain in her neck, shoulder, back, knee, and hip, headaches, mild anxiety, and Major Depressive Disorder. Her recreational activities were limited post-accident, though she had never been particularly active. She was able to return to full-time work and/or part-time studies after each accident but reduced her own hours to 60%. Her prognosis was that there was "no remaining orthopedic explanation for her pain" and with proper care there was reasonable potential for her to be able to return to full-time work (at para. 120). She was 24 years old at the time of the first accident.
3. *Faizi v. Thandi*, 2019 BCSC 434: \$125,000 award. The plaintiff was injured in two separate motor vehicle accidents in 2013 and 2014. She suffered neck, back, jaw, hip, and knee pain, headaches, and tinnitus, but had some similar symptoms prior to the accidents. The accidents exacerbated her pre-existing depression and anxiety for a period of time which caused emotional suffering after the accidents. She was able to attend school, work, and the gym post-accident, though she had to stop running due to knee pain. Her injuries were not severe, but she was expected to experience pain in her neck, low back, and knee pain in the future. She was 19 years old at the time of the first accident, so the "period of time over which she will experience this pain is significant" (at para. 162).
4. *Crookall v. Higby*, 2018 BCSC 1200: \$125,000 award. The plaintiff was injured in two separate motor vehicle accidents in 2012 and 2013. She suffered moderate to severe thoracic back pain that had persisted over five years. Her prognosis for full recovery was poor. She was unable to participate in any physical activities or sports which had been a significant part of her life before the accident. She suffered emotionally, as the pain affected her self-confidence and body image. She also suffered from depression and anxiety and her symptoms affected her mood and relationships with her family and friends. She was unable to return to work as a result of her injuries. She was 20 years old at the time of the first accident.

[40] The defence argues, meanwhile, that a lesser award in the range of \$70,000 is in order, referring to:

1. *Stapleton v. Andrew*, 2019 BCSC 678: \$75,000 award. The plaintiff suffered pain in her shoulder, lower back, and neck. Her prognosis for full resolution was poor. There was some interference with her recreational activities post-accident, though these activities were never central to her. After the accident she was able to join a gym and workout successfully as well as complete a half marathon, though with pain, stiffness, and discomfort. She previously worked as a chef, but her ability to continue in this profession was impeded by her injuries which prevented her from lifting heavy objects or performing sustained activities common to food preparation without experiencing pain. The Court noted, "[g]iven

her relative youth, she is likely to experience the adverse effects of the Accident for a considerable period of time" (at para. 67). She was 24 years old at the time of the accident.

2. *Kagrimanyan v. Weir*, 2018 BCSC 1458: \$75,000 award. The plaintiff suffered chronic lower back pain, as well as neck and upper back pain and headaches which had largely resolved over time. She was unable to engage in some recreational pursuits she used to enjoy and found socializing and housework more difficult than they used to be. She was able to continue working as an administrative assistant but experienced pain and discomfort throughout the day. Medical evidence described her as being left with "a mild form of disability" (at para. 57). She was not expected to achieve full recovery, though with improved physical fitness her discomfort and limitations could be managed. She was 35 years old at the time of the accident.
  3. *Richmond v. Osztovits*, 2019 BCSC 1984: \$70,000 award. The 37-year-old plaintiff suffered chronic neck, upper back, and shoulder pain and headaches. It was unlikely her symptoms would resolve in her lifetime. Before the accident, she led an active lifestyle including running, walking, skiing, and mountain biking. After the accident, she could no longer run or hike and could only go for short walks. She continued working as a teacher with some modifications to her classroom, but suffered from fatigue and found herself unable to take on additional work. She also suffered impairment of her family and social relationships, including her interactions with her two children.
- [41] In my view the best comparator of these is *Richmond*, subject to my view that the present plaintiff is entitled to a higher award because her injuries are arguably more incapacitating and were inflicted upon her at an earlier age.
- [42] The plaintiff has continued to suffer pain and impairment of her physical abilities since the accident in 2015. Her participation in recreational pursuits she once enjoyed has been impeded, although my overall impression is that she was only a moderately active person before the accident. While she may see some improvement in her condition with treatment and rehabilitation, it is unlikely she will regain full function of her left shoulder, and she will probably continue to experience neck pain. She is able to continue to work, but she is less physically capable and experiences pain while doing so. She is young - 24 years old at the time of the accident - and is likely to suffer the adverse effects of her injuries indefinitely.
- [43] I am satisfied the plaintiff's ability to perform household chores has been impeded by her injuries and that her husband has taken on a larger share of this work as a result. In my view this properly constitutes a loss of amenities compensable under this heading. Dr. Hawkeswood was optimistic that her capacity in this regard would improve with time, and there was no evidence the plaintiff would need to hire any outside housekeeping assistance.
- [44] Taking these factors into account, including consideration of the plaintiff's loss of housekeeping capacity, I assess damages under this heading at \$90,000.

## PAST LOSS OF EARNING CAPACITY

- [45] A claim for what is often described as "past loss of income" is actually a claim for loss of earning capacity; that is, a claim for the loss of the value of the work that the injured plaintiff would have performed but was unable to perform because of the injury: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30.
- [46] The question of what would have happened in the past but for the plaintiff's injury requires an assessment of hypothetical events. A hypothetical or future event will be taken into consideration as long as it is a real and substantial possibility and not mere speculation. This means that any employment loss must be shown to be realistic, having regard to what the plaintiff's circumstances would have been absent the injury. There must be an evidentiary foundation to the plaintiff's claim: *Gao v. Dietrich*, 2018 BCCA 372 at para. 36.
- [47] The plaintiff must first establish, on a balance of probabilities, that the injuries sustained in the accident impaired her ability to earn income; that is, there must be a causal connection. Once she has done this, the hypothetical pecuniary loss must be assessed on the basis of relative likelihood: *Smith v. Knudsen*, 2004 BCCA 613 at paras. 36-37; *Athey* at para. 27.
- [48] An award for loss of earning capacity, whether past or future, requires an assessment that considers the overall fairness and reasonableness of the award, taking into account all positive and negative contingencies. Mathematical, statistical, or economic evidence may be of assistance where available; however, it is not a calculation according to a particular formula: *Abbott v. Gerges*, 2014 BCSC 1329 at para. 165; *Schenker v. Scott*, 2014 BCCA 203 at paras. 50, 53.
- [49] In this case it was agreed that after the accident the plaintiff lost 87 hours of work at a restaurant at a rate of \$10.45 per hour. I am prepared to accept, as well, that she would have earned a small amount of additional income from tips, and that she missed a number of hours working in a daycare facility during the summer of 2019.
- [50] Finally, while I have already said that the plaintiff's decision to cut back her working hours to almost half time was unreasonable and unnecessary, I think it likely that she would have missed some days of teaching during this present school year for accident-related reasons.
- [51] In my view a fair measure of compensation under this heading would be \$6,000.

## LOSS OF FUTURE EARNING CAPACITY

- [52] In *Pololos v. Cinnamon-Lopez*, 2016 BCSC 81 at para. 133, the court summarized the following principles for determining loss of future earning capacity:
- a) To the extent possible, a plaintiff should be put in the position he/she would have been in, but for the injuries caused by the defendant's negligence; *Lines v. W & D Logging Co. Ltd.*, 2009 BCCA 106 at para. 185, leave to appeal ref'd [2009] S.C.C.A. No. 197;

- b) The central task of the Court is to compare the likely future of the plaintiff's working life if the Accident had not occurred with the plaintiff's likely future working life after the Accident; *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 32;
  - c) The assessment of loss must be based on the evidence, but requires an exercise of judgment and is not a mathematical calculation; *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 18;
  - d) The two possible approaches to assessment of loss of future earning capacity are the "earnings approach" and the "capital asset approach"; *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 at para. 7 (S.C.); and *Perren v. Lalari*, 2010 BCCA 140 at paras. 11-12;
  - e) Under either approach, the plaintiff must prove that there is a "real and substantial possibility" of various future events leading to an income loss; *Perren* at para. 33;
  - f) The earnings approach will be more appropriate when the loss is more easily measurable; *Westbroek v. Brizuela*, 2014 BCCA 48 at para. 64. Furthermore, while assessing an award for future loss of income is not a purely mathematical exercise, the Court should endeavour to use factual mathematical anchors as a starting foundation to quantify such loss; *Jurczak v. Mauro*, 2013 BCCA 507 at paras. 36-37.
  - g) When relying on an "earnings approach", the Court must nevertheless always consider the overall fairness and reasonableness of the award, taking into account all of the evidence; *Rosvold* at para. 11.
- [53] The "earnings approach" will generally be more useful when the loss is easily measurable, while the "capital asset approach" is more appropriate where the loss "is not measurable in a pecuniary way": *Perren v. Lalari*, 2010 BCCA 140 at paras. 12, 32. Either way, hypothetical future events must be weighed according to their relative likelihood and need not be proven on a balance of probabilities: *Athey* at para. 27.
- [54] Defence counsel concedes that the plaintiff has established a real and substantial possibility of future wage loss. Both parties submit that the earnings approach is appropriate. My role then is to assess the plaintiff's damages with consideration of the overall fairness and reasonableness of the award, taking into account all of the evidence and contingencies that may arise: *Westbroek v. Brizuela*, 2014 BCCA 48 at para. 65. The plaintiff is seeking an award of \$650,000 under this head. Defence counsel submits that it should be in the range of \$25,000 to \$40,000.
- [55] After the accident, until the beginning of the present school year, at any rate, the plaintiff was either at school or working full time. She takes the position that she was only able to do this by avoiding most of the other activities that she enjoys and make her life worth living. She claims to have had no residual capacity for recreational and social activities or for work around the house.

- [56] Last summer, as I have mentioned, the plaintiff and her husband decided that this state of affairs could not continue. She is now working only 0.56 of a full time teacher's position, although I was reliably informed that full-time work has been available throughout. The plaintiff justifies this trenchantly reduced work routine on the basis that it permits her to strike an appropriate balance between her personal and professional obligations. Her husband agreed with this, and said that their home and married life is much improved since the enactment of this routine.
- [57] The defendant responds that the medical evidence does not support the necessity of such a drastically reduced work schedule. No medical adviser encouraged the plaintiff to scale back her professional activities by close to 50 per cent. Dr. Hawkeswood reported, to the contrary, that other than requiring occasional sick days the plaintiff will suffer no long-term disability. He suggested, furthermore, that, even without the accident the plaintiff's fibromyalgia might very well have detrimentally affected her capacity to earn income over time.
- [58] These arguments have force, and I have brought them into the mix in assessing the real and substantial possibilities and the relative likelihood of their occurrence. In the midst of this I have considered the contingency that the plaintiff's fibromyalgia may have reduced her income earning capacity absent the accident, along with all of the other positive and negative contingencies that are usually brought to bear on these assessments.
- [59] I have concluded that the plaintiff's accident-related deficits have enduringly impaired her capacity to earn income, and in my view it is more or less certain that this will lead to future pecuniary loss. However, I do not accept that the plaintiff will require a day or more per week away from work to rest, recuperate, or take treatments. The totality of evidence in this case falls short of establishing that her capacity to earn income has been impaired to this extent. That said, I foresee that because of the defendant's negligence the plaintiff will be forced to miss work on an intermittent but reasonably consistent basis.
- [60] While I think it likely that the plaintiff will experience some improvement in her condition, at this stage in my view she is unlikely to fully recover her capacities. Accordingly, I agree that an award for future loss of earning capacity should be based on her likely retirement age of approximately 65. My outlook differs from the plaintiff's, not principally concerning the nature and extent of her injuries, but only in the likely frequency of work absences and their accompanying pecuniary losses.
- [61] I note in passing the absence of a functional capacity evaluation in this case. Such a report might have been very helpful in precisely and objectively delineating the plaintiff's physical limitations. In its absence, the plaintiff's demand for a large award under this heading is based mostly on her self-assessment of her capacities, which in my view is unduly pessimistic and only partially confirmed by the available medical evidence.
- [62] I should mention, as well, that no witness from the school district was called to confirm the plaintiff's testimony about diminished capacity and her need to be assisted or accommodated at work. The only evidence submitted from the plaintiff's employer took the

form of documentary performance evaluations showing that the plaintiff is succeeding admirably in all her professional tasks. Finally, I was referred to the plaintiff's record of absences from work while she was employed full-time, and few of these appear to have been related to accident-related incapacity.

- [63] These latter observations have nothing to do with adverse inferences. I say merely that, on the whole, the plaintiff has failed to adduce a body of evidence sufficient to persuade me that her income earning capacity has been diminished to the extent that she claims. I have also concluded that the defendant's proposed award is far too low. As I have said, there is a real and substantial possibility that because of the pain and loss of capacity caused by the defendant, the plaintiff will need to be absent from work for recuperation or treatment on a consistent but intermittent basis, perhaps as often as a day or two per month.
- [64] The plaintiff submitted that I could assess her damages on the basis of the number of days each week that I foresee she will be capable of working. This approach was followed in *Raptis v. Chalabiani*, 2017 BCSC 1548 and strikes me as a fair way of evaluating the present claim. According to the expert economic evidence based on present value calculations applied to a teacher's pay, for example, if the plaintiff were capable of working only 3.5 days per week, her loss to age 65 would be approximately \$770,000, and if 4 days per week, then \$515,000.
- [65] As in my opinion the plaintiff will be able to work full-time except perhaps for a day or two per month, a reasonable and fair award under this heading is \$200,000.

#### SPECIAL DAMAGES

- [66] The parties have agreed that the plaintiff's special damages are \$1,445.10.

#### HEALTH CARE COSTS RECOVERY ACT

- [67] Pursuant to section 16 of the Health Care Costs Recovery Act, S.B.C. 2008, c. 27 and a certificate issued thereunder, the parties have agreed to an award for past health care services in the amount of \$1,400.52.

#### CONCLUSION

- [68] I award the plaintiff the following damages:

Non-pecuniary damages:

\$90,000.00

Past loss of income earning capacity:

\$6,000.00

Future loss of income earning capacity:

\$200,000.00

Special damages:

\$1,445.10

Health Care Costs Recovery Act claim:

\$1,400.52

Total:

\$298,845.62

"Baird J."

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