

CANADA / JUDGMENT

Allen v. Figueira

2020 BCSC 1864

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Supreme Court of British Columbia

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2020 BCSC 1864 Allen v. Figueira

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Allen v. Figueira,

2020 BCSC 1864

Date: 20201202

Docket: M113756

Registry: Kelowna

Between:

Suzen Jean Allen

Plaintiff

And

Sara Figueira

Defendant

Before: The Honourable Mr. Justice Hori

Reasons for Judgment

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Place and Date of Trial/Hearing:

Kelowna, B.C.

September 14 - 18; 21 - 24, 2020

Place and Date of Judgment:

Kelowna, B.C.

December 2, 2020

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Introduction

- [1] The plaintiff claims damages for injuries she sustained in a motor vehicle accident that occurred on January 4, 2015, in Kelowna, BC. The defendant admits liability for the accident. The plaintiff seeks compensation for non-pecuniary damages, past income loss, loss of earning capacity, future care costs and special damages.
- [2] The defendant does not dispute that the plaintiff sustained soft tissue injuries in this motor vehicle accident. However, the significance of those injuries and their impact on the plaintiff is the main focus of this case.

Background

- [3] The plaintiff is 46 years of age. She was born in Kamloops, BC, and raised on the family ranch in the Skwaam Bay Valley. The plaintiff began working on the family ranch at a young age. Her parents involved her in all aspects of ranch work.
- [4] After graduating from high school, the plaintiff enrolled in the arts program at the University of British Columbia in Vancouver for one year. After failing two of her five courses in her first year of studies, the plaintiff withdrew from university and returned home to the ranch.
- [5] In 1992, the plaintiff and her then boyfriend, Trevor Allen, began living together in Paul Lake, BC. They were married in July 1994 and moved to Brennan Creek, BC, which is a small community on Adams Lake.
- [6] The plaintiff and Mr. Allen had three children while living in Brennan Creek. Their daughter, Selena, was born in 1996. Their son, Cody, was born in 1998, and their son, Ryan, was born in 2000.
- [7] After her marriage to Mr. Allen, the plaintiff worked in Barriere and Clearwater, BC, for an insurance broker. However, after the birth of her son, Cody, the plaintiff's employer eliminated her position.
- [8] Before Cody was born, the plaintiff had trained as a bookkeeper. Therefore, when she lost her job with the insurance broker, the plaintiff started to do the books for her family's ranch.
- [9] The plaintiff was the bookkeeper for the family ranch until her family sold the ranch in 2006. By this time, the plaintiff had also established a personal bookkeeping business providing services to small clients. When the family ranch sold, the plaintiff continued her bookkeeping business and became the internal auditor and safety coordinator for Mr. Allen's logging company.

- [10] The plaintiff's children started to play minor hockey in 2003. The plaintiff's two sons continued playing hockey through the minor hockey program and eventually played junior hockey.
- [11] When her children began playing hockey, the plaintiff became highly involved in the Chase Minor Hockey Association as a volunteer. She managed the teams her sons played on, and served as both the secretary and president of the Association. After three years as president of the Association, the plaintiff joined the board of the Okanagan Mainline Amateur Hockey Association (OMAHA) in 2009.
- [12] In order to pursue his hockey aspirations, the plaintiff's son, Cody, began playing hockey in Kamloops in 2011. Because the task of driving from Brennan Creek to Kamloops for practices and games was onerous, the plaintiff found a residence in Kamloops during the hockey season. The plaintiff also decided that she should find work in Kamloops as a bookkeeper.
- [13] The plaintiff secured a full-time position as a bookkeeper in Kamloops with City Bookkeeping in February 2012. When she started at City Bookkeeping, the plaintiff transitioned all of her bookkeeping clients to her new employer and continued to provide bookkeeping services to them through City Bookkeeping.
- [14] In August 2012, the plaintiff and Mr. Allen purchased a house in Kamloops, but continued to maintain their residence in Brennan Creek.
- [15] The plaintiff's relationship with Mr. Allen began to deteriorate in the spring of 2013. By July of that year, the plaintiff and Mr. Allen agreed that they would end their marriage. They told the children of their decision in December 2013. The plaintiff testified that this was a very stressful time in her life.
- [16] The plaintiff started to build a relationship with her current husband, James Marshall, in 2014.
- [17] When the plaintiff met Mr. Marshall, she lived in Kamloops and Mr. Marshall resided in Kelowna. By March 2014, the plaintiff and Mr. Marshall began travelling between Kamloops and Kelowna on a regular basis to see each other.
- [18] Mr. Marshall is the owner of Marshall's Home Living, a furniture store in Kelowna, BC. As the relationship between the plaintiff and Mr. Marshall developed, the plaintiff arranged to assist Marshall's Home Living with its bookkeeping requirements. The plaintiff provided her bookkeeping services to Marshall's Home Living through her employer, City Bookkeeping.
- [19] By the end of 2014, the plaintiff and Mr. Marshall had started making plans for the plaintiff to move to Kelowna to be with Mr. Marshall. The plan was for the plaintiff to quit her job at City Bookkeeping and become the bookkeeper and controller for Marshall's Home Living. The plan was to make the move from Kamloops to Kelowna in June 2015, after the school year was completed.

- [20] Before the plaintiff moved to Kelowna she was involved in the motor vehicle accident of January 4, 2015.

Circumstances of the Accident

- [21] On January 4, 2015, the plaintiff was on her way from Kelowna to Armstrong to watch her son, Cody, play hockey. The plaintiff was travelling on Highway 97. It was snowing heavily and the snow was accumulating on the road.
- [22] The plaintiff stopped for a red light at the intersection of Highway 97 and Edwards Road. While stopped at the intersection, the plaintiff's vehicle was struck from behind by the defendant's vehicle.
- [23] The plaintiff testified that as a result of the collision, her head snapped forward and her glasses flew off her face. She recalled that the collision pushed her vehicle far enough into the intersection that cross traffic would have had to go around her to get by. The plaintiff testified that when her vehicle came to rest, the back end of her vehicle was past the stop line at the intersection. However, on cross-examination, the plaintiff agreed that she did not get out of her vehicle while in the intersection to see the final resting position of her vehicle.
- [24] After the collision, the parties pulled off the highway to exchange information. At the scene, the plaintiff saw no damage to her vehicle. She saw that some snow had been wiped off the bumper but saw no other physical damage. However, later inspection of the vehicle by the plaintiff revealed a small crack on her vehicle's bumper.
- [25] With respect to the defendant's vehicle, the plaintiff's evidence was that the bumper from the defendant's vehicle had fallen off after the collision.
- [26] No emergency vehicles attended and the plaintiff received no medical treatment at the scene of the accident.
- [27] After exchanging information with the defendant, the plaintiff carried on with her trip to Armstrong to watch her son's hockey team.

Pre-Existing Conditions and Other Medical Issues

- [28] Before the accident of January 4, 2015, the plaintiff had a history of headaches. She describes them as tension headaches accompanied by a tight neck. The plaintiff relates her pre-accident headaches and neck symptoms to the extensive driving required to transport her children to their hockey games and practices. The plaintiff occasionally took Tylenol medication for the headaches and occasionally sought chiropractic treatment to relieve the tension.

- [29] In 2013, when the plaintiff's marriage to Mr. Allen was coming to an end, the plaintiff experienced a significant increase in her headaches and neck pain. She attributes this increase in symptoms to the stress she was experiencing with the end of her marriage. During this period of time she sought treatment from chiropractors and massage therapists for her symptoms. The plaintiff claims that her headaches and neck pain resolved before the accident of January 4, 2015.
- [30] In the fall of 2013, the plaintiff received counselling from the Kamloops Centre for Therapy. She sought counselling to help her deal with the end of her marriage to Mr. Allen.
- [31] The plaintiff also has a history of depression. Her struggles with depression began while she was in university. She started on depression medications in her early 20s and continued on those medications until 2016. Her depression symptoms appeared to have been improving in the months before the accident. In a medical report dated May 29, 2020, the plaintiff's family physician, Dr. De Pieri, indicates that the plaintiff's depression was lifting significantly prior to the accident and that in December 2014 he was discussing tapering off the depression medication.
- [32] Before the accident of January 4, 2015, the plaintiff discovered that she had an iron deficiency problem. As a result, in late 2015 the plaintiff began receiving iron infusion therapy.
- [33] Dr. De Pieri confirms that symptoms of iron deficiency include fatigue, headaches, dizziness, and light-headedness. He also confirms that the iron deficiency continued for years after the accident and that the plaintiff received iron injection treatment multiple times from December 2015 to March 2017. It is Dr. De Pieri's evidence that during this period of time the plaintiff had general weakness, tiredness, fatigue and headaches related to her iron deficiency.
- [34] In May 2016, the plaintiff reported to her physiotherapist that she had a fall going up some stairs. The plaintiff landed on her left side on an outstretched left arm.
- [35] In June 2017, plaintiff again fell on some stairs aggravating her neck symptoms.
- [36] On May 5, 2018, the plaintiff fractured her left ankle. The fracture required her to use crutches for a period of time. The use of crutches increased her accident-related pain symptoms but did not have any impact on her work.
- [37] In February 2020, the plaintiff fractured her right foot but did not miss any time from work as a result of the fracture.

Motor Vehicle Accident Injuries

- [38] After the motor vehicle accident, the plaintiff drove from Kelowna to Armstrong to attend her son's hockey game. She watched the game, visited with her son briefly after the game and then drove home to Kamloops. During the hockey game the plaintiff developed a mild headache so she took a Tylenol.
- [39] The plaintiff reported to work the next day at City Bookkeeping. As she worked through the day on her computer, the pain in her neck and shoulder area intensified. The left side of her neck became progressively more stiff and sore. She developed a nagging, burning pain at the base of her neck on the left side of her spine. Through the course of the day, she developed a headache and became nauseous. As a result, the plaintiff took Tylenol and Advil to relieve her symptoms.
- [40] Over the two weeks immediately following the accident, the plaintiff's symptoms progressively got worse. She had daily nausea to the point that she could not eat properly which resulted in her losing eight pounds in six weeks. In February 2015, the plaintiff discovered that taking Gravol eased her nausea.
- [41] The pain in the plaintiff's neck area also worsened over the first two weeks. She described a burning pain approximately one inch above her left ear and wrapping around the back of the ear. She also had an aching pain and sensitivity in the muscles from her left jaw line down the front of her neck to her collarbone. She also had aching in the trapezius muscle on the left side and significant headaches.
- [42] In the first two weeks the plaintiff developed a sense of pins and needles in her left pinky finger that radiated across her hand as her pain worsened. She also testified that the burning pain at the base of her neck on the left side of her spine intensified to the point that it felt like a hot poker pressed against that area.

Evidence of Dr. De Pieri

- [43] The only expert to provide opinion evidence in this case is the plaintiff's family physician, Dr. De Pieri. He became the plaintiff's family physician shortly before the motor vehicle accident. His first consultation with the plaintiff was October 8, 2014. His only other consultation with the plaintiff before the accident was on December 17, 2014. The plaintiff continues to be under the care of Dr. De Pieri as of the date of trial.
- [44] Dr. De Pieri first assessed the plaintiff following the motor vehicle accident on January 7, 2015. At that time Dr. De Pieri prescribed Tramadol.

- [45] The initial diagnosis of the plaintiff's injuries by Dr. De Pieri was that the plaintiff sustained a soft tissue injury to the neck with symptoms of mild concussion. Over time and after the course of treatments undertaken by the plaintiff, Dr. De Pieri's diagnosis evolved into chronic myofascial pain syndrome, thoracic outlet syndrome and post-concussion syndrome. Dr. De Pieri describes these three conditions under the general label of chronic post-traumatic pain syndrome.
- [46] The defendant did not seriously challenge Dr. De Pieri's diagnosis of chronic myofascial pain syndrome and thoracic outlet syndrome. However, the defence cross examined Dr. De Pieri extensively on his diagnosis of post-concussion syndrome.
- [47] On cross-examination, Dr. De Pieri testified that loss of consciousness is no longer a requirement for the diagnosis of concussion. However, he agreed that where there is no loss of consciousness, the initial indicators of a concussion include an altered mental state such as confusion and cognitive deficits such as impairment of memory. Dr. De Pieri agreed on cross-examination that following the motor vehicle accident of January 4, 2015, the plaintiff had no loss of consciousness, reported no confusion and had a good recall of the entire motor vehicle accident.
- [48] Dr. De Pieri testified that he based his diagnosis of a mild concussion upon the plaintiff's reports of headache, nausea and lack of mental clarity or focus. On further cross-examination, Dr. De Pieri agreed that the plaintiff suffered from headaches before the accident and that headaches can also be a symptom or side effect of neck pain. Accordingly, Dr. De Pieri agreed that headaches are not diagnostically conclusive of a concussion.
- [49] Dr. De Pieri agreed on cross-examination that pain, headaches and an iron deficiency could be the cause of nausea. Therefore, Dr. De Pieri agreed that nausea is not, on its own, diagnostic of a concussion.
- [50] Finally, Dr. De Pieri agreed that a loss of mental clarity or focus can be the result of depression, fatigue, pain or headaches.
- [51] When pressed further on cross-examination, Dr. De Pieri maintained his diagnosis of mild concussion based on the constellation of symptoms reported by the plaintiff in the context of having sustained a whiplash-type injury. Dr. De Pieri explained that "usually when there is that constellation of symptoms in the context of a whiplash type injury we usually consider them to have been concussed".
- [52] I am not satisfied that the plaintiff sustained a concussion in the motor vehicle accident. Dr. De Pieri bases his concussion diagnosis on symptoms that can be explained by diagnoses other than concussion. Dr. De Pieri's explanation, that he usually diagnoses patients with a whiplash-type injury who display the symptoms reported by the plaintiff as being concussed, is not adequate as it does not account for the potential that the symptoms had another cause.

- [53] Since I have concluded that the plaintiff has not proven that she was concussed in the motor vehicle accident, I am not prepared to accept that the plaintiff suffers from post-concussion syndrome.
- [54] I am prepared to accept that the plaintiff's injuries have developed into chronic myofascial pain syndrome and thoracic outlet syndrome, as diagnosed by Dr. De Pieri.

Treatment

Massage Therapy

- [55] The plaintiff received extensive massage therapy treatments from the date of the motor vehicle accident. The massage therapy continues to date, although at a lesser frequency from September 2018.
- [56] Massage therapy started in Kamloops with the massage therapist, Jennifer Laviolette. The plaintiff continued receiving treatments from Ms. Laviolette until the plaintiff moved to Kelowna in June 2015.
- [57] When the plaintiff moved to Kelowna she continued massage therapy with Ben Work.
- [58] The plaintiff testified that Dr. De Pieri referred her to massage. Dr. De Pieri testified at the trial but neither party asked him whether he referred the plaintiff to massage therapy treatments.
- [59] The plaintiff claims that massage therapy makes her feel better but the duration of the relief depends on her activities following the treatment.

Physiotherapy

- [60] The plaintiff began physiotherapy treatments in March 2015, with Janice Fraser in Kamloops. The plaintiff continued attending physiotherapy in Kelowna with Glenda Hart. Both Ms. Fraser and Ms. Hart testified for the plaintiff at the trial.
- [61] The plaintiff testified that Dr. De Pieri referred her to physiotherapy. However, neither party asked Dr. De Pieri whether he did so.
- [62] The plaintiff received extensive and frequent physiotherapy treatments until March 2018. The frequency of her physiotherapy treatments lessened from April 2018 to February 2019. Since March 2019, the plaintiff has received only seven physiotherapy treatments to the date of the trial.
- [63] The plaintiff testified that the reduction in her physiotherapy treatments was a response to the direction she received from her physician to wean herself off passive therapies such as physiotherapy and move toward a more active therapeutic approach.
- [64] On her first physiotherapy assessment of the plaintiff, Ms. Fraser observed the following:

- a) the plaintiff's ability to move her chin toward her chest was approximately two-thirds of normal;
- b) the plaintiff's rotation of her head (cervical rotation) to the right was approximately two-thirds of normal, as was her rotation to the left;
- c) the plaintiff's ability to move her right ear to her right shoulder was approximately 50% of normal before she experienced pain on the left side of her neck, and the same movement to the left side was approximately two-thirds of normal;
- d) the plaintiff was able to fully raise her arms over her head without pain;
- e) there was pain in the plaintiff's left hand at the end of the range of movement in neural dynamic testing; and
- f) the plaintiff had increased tone and tenderness in the muscles of her neck and upper shoulders, with the left side being worse than the right.

[65] By the time the plaintiff left the care of Ms. Fraser, her range of motion had improved as follows:

- a) her left cervical rotation had increased from 66% to 90% of normal;
- b) her right cervical rotation had increased from 66% to 75% of normal;
- c) the plaintiff continued to have restricted extension in the neck with the left worse than the right; and
- d) the plaintiff continued to have increased tone in the suboccipital muscles and the scalene muscles.

Intra-Muscular Stimulation ("IMS")

[66] Ms. Fraser also has experience with IMS therapy. She testified that she uses IMS therapy in combination with other treatments. The IMS process relaxes the muscles, which provides an opportunity to perform other treatments with less pain for the patient.

[67] Ms. Fraser testified that after a few IMS treatments she can tell whether or not the treatments are likely to be effective based on the patient's response. If Ms. Fraser does not see any improvement after a few treatments, she may discontinue the treatment but return to it at a later date. If there is no change in the patient's condition after two or three attempts, then she will often discontinue the IMS treatment.

[68] Ms. Fraser testified that the plaintiff moved to Kelowna at a time when she needed more treatment for her injuries. Therefore, she recommended that the plaintiff seek treatment with IMS in Kelowna.

- [69] The plaintiff commenced IMS treatment with Cory Garman in Kelowna. She commenced the IMS treatment in June 2015. She received 51 treatments to August 2016. The plaintiff discontinued IMS treatments in the summer of 2016 because the benefit she received from the treatment was not worth the pain that it caused her.
- [70] However, the plaintiff claims that by March 2017 her symptoms were aggravated to the point where she was willing to try IMS once again. She carried on with IMS from March 2017 to July 2018. The plaintiff discontinued IMS treatments because she had a rhizotomy in February 2018, which improved her symptoms to the point where IMS treatment was no longer necessary.

Chiropractic Treatment

- [71] From August 2015 to July 2017, the plaintiff received chiropractic treatments from two different chiropractors. Neither of the chiropractors testified or provided reports on the plaintiff's injuries or her treatment. There is no evidence of any referral for chiropractic treatment for the plaintiff's injuries from the motor vehicle accident. There is also no evidence about the nature of the chiropractic treatments received by the plaintiff.

Pilates

- [72] In the late fall of 2015, the plaintiff began working with a physiotherapist, Danette Christophe, to strengthen her muscles. Ms. Christophe worked with the plaintiff from the fall of 2015 until October 2016.
- [73] At the recommendation of Ms. Christophe, the plaintiff began pilates. She attended pilates two times per week until the pilates studio closed down. The sessions with Ms. Christophe and the pilates exercises were the first active rehabilitation treatments undertaken by the plaintiff.
- [74] The plaintiff resumed pilates in the summer of 2020. She could not resume pilates sooner because she fractured her right foot in February 2020 and the Covid-19 pandemic shut down the pilates studio in March 2020.

Nerve Blocks and Rhizotomy

- [75] The plaintiff received a referral from Dr. De Pieri to a pain clinic. The plaintiff saw Dr. Nelms at the pain clinic on March 3, 2017. The first visit to see Dr. Nelms was not a positive experience for the plaintiff. The plaintiff described the injections that she received from Dr. Nelms as exceptionally painful. They caused her temporary balance issues and severe nausea. The plaintiff testified that the difficulties she had following the first treatment from Dr. Nelms was so overwhelming that she had to go home and sleep for the rest of the day.

- [76] Dr. Nelms passed away before her next treatment at the pain clinic. Therefore, Dr. Etheridge took over the plaintiff's care. The plaintiff saw Dr. Etheridge on June 14, 2017, for nerve block injections. She saw him a second time on September 12, 2017, for another set of nerve block injections. Ultimately, on February 5, 2018, Dr. Etheridge performed a rhizotomy on the plaintiff's neck.
- [77] Dr. Etheridge testified at the trial. His evidence was limited to non-opinion evidence as the plaintiff tendered no medical report from Dr. Etheridge. Dr. Etheridge testified that his treatments targeted the nerves at the C2/C3 and C3/C4 joints. The nerve block injections sought to freeze the nerves at these locations. Dr. Etheridge indicated that the plaintiff reported a decrease in her pain after the nerve block injections but that she did not get long-term relief.
- [78] On February 5, 2018, Dr. Etheridge performed a rhizotomy. The rhizotomy procedure cauterizes the nerves in the area of the target joints. After performing the rhizotomy, Dr. Etheridge's involvement in the plaintiff's case ended.
- [79] The plaintiff testified that the treatment she received from Dr. Etheridge improved her condition in the following ways:
- a) her nausea lessened;
 - b) her headaches became less frequent and less intense to the point where her headaches are now very mild; and
 - c) the painful burning sensation at the base of her neck on the left side of the spine resolved.

Feldenkrais

- [80] In April 2018, the plaintiff began a program called "Feldenkrais" on the recommendation of her physiotherapist, Glenda Hart. The plaintiff continues to participate in the Feldenkrais program as of the date of trial.
- [81] The plaintiff presented no medical evidence with respect to the Feldenkrais program. The plaintiff tendered no authoritative evidence to explain the process or theories behind the Feldenkrais program or to explain why the plaintiff requires this program to treat her injuries.
- [82] The only evidence about Feldenkrais is the evidence of the plaintiff who described Feldenkrais as getting her to focus on her body movements. She testified that Feldenkrais brings down her stress levels and helps her deal with the pain on an emotional level. She testified that the program has allowed her to enjoy more gardening than she has in the last five years.

Kinesiology

[83] From March 2019, the plaintiff has had the assistance of a kinesiologist. The plaintiff testified that her physiatrist, Dr. McCann, referred her to the kinesiologist at her request. Although Dr. McCann did not testify or prepare a medical report, the plaintiff suggests that the referral to a kinesiologist was her attempt to move away from more passive therapies to a more active therapeutic program.

Vision Therapy

[84] The plaintiff's kinesiologist referred her to Dr. Rollett for vision therapy. She received treatment from Dr. Rollett from April to September 2019. Dr. Rollett is an optometrist. He works with patients who struggle with eye tracking and eye coordination skills.

[85] After testing, Dr. Rollett determined that the plaintiff required new glasses with different prescriptions. He also determined that the plaintiff required training sessions once per week to strengthen the coordination of her eye movements.

[86] The plaintiff did not present Dr. Rollett as an expert witness. However, Dr. Rollett explained that the nerves originating primarily in the midbrain at the base of the skull control eye tracking skills. The plaintiff tendered no medical evidence to establish that the injuries sustained by the plaintiff in the motor vehicle accident compromised her vision.

[87] The only evidence that relates the plaintiff's vision issues to her injuries is her own testimony. The plaintiff testified that her nausea and headaches increased initially following vision treatment but by the end of the sessions both her nausea and her headaches had improved significantly.

Breast Reduction Surgery

[88] The plaintiff also undertook breast reduction surgery on December 20, 2019. Dr. De Pieri testified that the breast reduction surgery was to see if the surgery would reduce the plaintiff's complaints of back and neck pain.

[89] The plaintiff testified that the decision to undergo breast reduction surgery was not an easy one. She was concerned that the surgery would have undesirable consequences including the loss of feeling in the breast area. However, she elected to undergo the surgery in the hopes that the surgery would reduce the levels of pain she was experiencing.

[90] The plaintiff testified that the surgery did result in a loss of feeling in her breasts which has affected her intimate relations with her husband.

Credibility and Reliability of the Plaintiff

[91] The plaintiff's credibility is of particular importance in the assessment of damages when the complaints of pain and disability are, for the most part subjective, and where they persist past the usual or normal recovery period. Since the decision of *Price v. Kostryba* (1982), 70 B.C.L.R. 397, 13 A.C.W.S. (2d) 318 (S.C.), the court has exercised caution in examining the evidence and assessing credibility in cases like this one.

[92] In *Hardychuk v. Johnstone*, 2012 BCSC 1359, Madam Justice Dickson described the assessment of credibility in this way:

10 The typical starting point in a credibility assessment is to presume truthfulness: Halteren. Truthfulness and reliability are not, however, necessarily the same. A witness may sincerely attempt to be truthful but lack the perceptive, recall or narrative capacity to provide reliable testimony. Alternatively, he or she may unconsciously indulge in the human tendency to reconstruct and distort history in a manner that favours a desired outcome. There is, of course, also the possibility that a witness may choose, consciously and deliberately, to lie out of perceived self-interest or for some other reason. Accordingly, when a witness's evidence is demonstrably inaccurate the challenge from an assessment perspective is to identify the likely reason for the inaccuracy in a cautious, balanced and contextually sensitive way.

[93] I interpret the comments of Dickson J. to mean that the assessment of credibility involves two questions. The first question is whether the witness is being truthful, in the sense that the witness is not being deliberately deceitful. If a deliberate falsehood is established, then it may be difficult to disentangle truth from deceit and some truthful aspects of the witness' testimony may lose their force. However, an allegation that a witness is being deliberately deceitful under oath is a serious attack on an individual's integrity, which requires more than just speculation or innuendo to prove (*Hardychuk* at para. 9).

[94] The second question in the credibility assessment is whether the evidence of the witness is reliable. The assessment of the reliability of a witness' testimony involves the examination of factors outlined by Madam Justice Dillon in *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, including:

- a) the ability and opportunity of the witness to observe events;
- b) the firmness of the witness' memory;
- c) the ability of the witness to resist the influence of interest to modify recollection;
- d) whether the witness' evidence is in harmony with independent evidence;
- e) whether the witness' evidence changes during direct and cross-examination;
- f) whether the witness' evidence seems unreasonable, impossible, or unlikely;
- g) whether the witness has a motive to lie; and

- h) whether the witness' evidence is consistent with the probabilities affecting the case as a whole.

Defence Submissions on Credibility and Reliability

- [95] The defendant in this case accepts that the plaintiff is a truthful witness, but submits that the plaintiff's evidence is not reliable. The defendant challenges the plaintiff's reliability as a witness based on numerous instances where the defence submits that the plaintiff's evidence was inconsistent, not corroborated or misleading. Most of the instances relied upon by the defendant to challenge the reliability of the plaintiff's evidence are not significant or consequential.
- [96] However, I will consider the following issues raised by the defence in my assessment of credibility:
- a) while the plaintiff described significant nausea during the first six weeks after the accident, her physiotherapist in Kamloops testified that the plaintiff had nausea-free days in February 2015 and her physiotherapist in Kelowna made no notation of nausea;
 - b) in her direct examination, the plaintiff spoke of having headaches that were at their worst in the first two weeks after the accident, and that the headaches continued daily until the end of April, but in cross-examination the plaintiff agreed that she had headache-free days during this period;
 - c) the plaintiff testified that following the accident she had difficulty reading, in that she could only read for short periods of time and had difficulty holding the book she was reading. However, when completing a questionnaire for her physiotherapist, she endorsed the statement that she could read as much as she wanted to with light pain in her neck; and
 - d) the plaintiff testified that Dr. De Pieri would not allow her to participate in physical activities such as going to the gym or snowmobiling. However, Dr. De Pieri testified that he encouraged the plaintiff to be active and to live her life. In particular, Dr. De Pieri testified that he did not see snowmobiling on trails to be a problem for the plaintiff.
- [97] The defence submits that the plaintiff's evidence is not reliable because it is internally inconsistent, inconsistent with other witness testimony and misleading.

Findings on Credibility and Reliability

- [98] There is no doubt that the plaintiff is a truthful witness. While there are instances where the plaintiff's evidence is inconsistent, I did not find that any of it was misleading. Any inconsistencies in the plaintiff's testimony are relatively minor and of minimal consequence to the overall body of evidence.

- [99] The evidence from the collateral witnesses such as the plaintiff's friends and family support the plaintiff's claim that the injuries she sustained have had a significant and long lasting impact on her life. The evidence of the collateral witnesses was based upon their observations of the plaintiff's demeanor and her level of activity after the accident as compared to their experiences with the plaintiff before the accident.
- [100] I find that the plaintiff is a credible witness who gave reliable evidence about her injuries and the effect of those injuries on her. While she may have overstated the pain she experienced and the impact of her injuries on her activities to some degree, she did not do so to the extent that she was not a credible witness. Therefore, I am sufficiently confident in the plaintiff's credibility to rely upon her evidence.

Past Income Loss

- [101] At the time of the motor vehicle accident of January 4, 2015, the plaintiff was working as a bookkeeper with City Bookkeeping in Kamloops. Her hourly wage was \$19 per hour. The plaintiff generally worked eight hours per day or 40 hours per week.
- [102] After the motor vehicle accident, the plaintiff continued working full-time hours. She took time away from her work mainly to attend treatment appointments. The plaintiff continued to work full time after the accident until April 30, 2015. The plaintiff stopped working on April 30, 2015, because Dr. De Pieri recommended that she take time off to recover from her injuries.
- [103] In March 2015, the plaintiff gave notice to City Bookkeeping that effective in June 2015, she would be leaving her job and moving to Kelowna. However, before she moved to Kelowna, the plaintiff went off work at the recommendation of Dr. De Pieri. The plaintiff remained off work from April 30, 2015 until June 15, 2015, when she commenced work at Marshall's Home Living.
- [104] The plaintiff testified that when she decided to move to Kelowna, the plan was to move on a weekend and start working at the Marshall's Home Living business on the Monday. She testified that when she planned her move to Kelowna she did not anticipate working full-time hours because she did not think it was an eight hour per day job. The plan was for her to work around six to eight hours per day.
- [105] The plaintiff started work at Marshall's Home Living on a graduated return to work program. The evidence does not disclose when that program came to an end. However, the plaintiff's time records from Marshall's Home Living indicate that until March 1, 2016, the plaintiff took significant hours off work every week. It was not until March 1, 2016, that the plaintiff commenced working six hours per day on a consistent basis.
- [106] When the plaintiff commenced work with Marshall's Home Living she earned \$20 per hour. Her pay structure changed from an hourly rate to a monthly salary effective April 1, 2018.

- [107] In September 2016, the plaintiff became involved in a multilevel marketing program with Le-Vel. After a year with Le-Vel, the plaintiff left that company and became involved with Modere, another multilevel marketing business, commencing in October 2017.
- [108] Both of these multilevel marketing programs involved online marketing through social media platforms. They also required the plaintiff to take part in various training programs. Some programs involved the plaintiff receiving training, and other programs involved the plaintiff training her downline marketers. From time to time the plaintiff also participated in sales and marketing events where she and her team promoted and sold their products in person.
- [109] The plaintiff testified in direct examination that generally she would spend three to five hours per week on her multilevel marketing activities. On cross-examination, her evidence was that the hours she spent on her multilevel marketing activities in the last three years varied between 4 to 5 hours per week and 10 to 15 hours per week.
- [110] The plaintiff's claim for past income loss covers three distinct periods of time. Those periods are as follows:
- a) from January 4, 2015 to April 30, 2015, while the plaintiff was working full-time at City Bookkeeping but taking periods of time out of the workday to attend medical and rehabilitation appointments;
 - b) from May 1, 2015 to June 12, 2015, being the period of time that the plaintiff intended to continue working at City Bookkeeping but was off work on Dr. Di Pieri's recommendation; and
 - c) from June 15, 2015 to March 31, 2018, being the period which includes:
 - i. the period when the plaintiff would have worked for Marshall's Home Living but did not do so because she was off work to recover from her injuries; and
 - ii. the period from August 24, 2015, when the plaintiff commenced work with Marshall's Home Living on a graduated return to work program to March 31, 2018, when the plaintiff's pay structure changed from an hourly rate to a monthly salary.
- [111] The defendant concedes that it was reasonable for the plaintiff to take some time off work or to reduce her work schedule to accommodate her injuries and her recovery in 2015. However, the defendant submits that the evidence does not support any ongoing loss of earnings beyond 2015. Accordingly, the defendant submits that the plaintiff's past income loss is limited to the difference between what she earned in taxable income in 2014 (\$41,063) and what she earned in T4 income in 2015 (\$20,262). The defendant submits that the gross amount of the difference is approximately \$20,000 and that, after deducting 14% for taxes, the net past income loss should be \$17,200.

- [112] I do not accept the defendant's approach to the past income loss claim because it does not consider the reduced hours that the plaintiff worked through February 2016. The plaintiff anticipated that she would work in the Marshall's Home Living business six to eight hours per day. The plaintiff did not return to working six hours per day on a consistent basis until March 1, 2016.
- [113] Neither the plaintiff nor the defendant asked Dr. De Pieri about the graduated return to work schedule. Dr. De Pieri did not specify how long the plaintiff's ability to work full time was restricted. Therefore, the only evidence relating to the plaintiff's reduced hours is the evidence of the plaintiff and her time records from Marshall's Home Living. The time records indicate that the plaintiff's work hours were less than six hours per day on a consistent basis through February 2016.

Income Loss from January 4, 2015 to April 30, 2015

- [114] The claim for income loss from January 4, 2015 to April 30, 2015, is the plaintiff's loss of wages for the time that she took off from work in order to attend medical and rehabilitation appointments. The plaintiff recorded the number of hours she was away from work due to her injuries each day from January 9, 2015 to April 15, 2015. She claims compensation for those hours at her hourly rate of \$19 per hour. On that basis, the plaintiff submits that she is entitled to income loss for this period of time in the gross amount of \$598.50.
- [115] City Bookkeeping did not pay the plaintiff for time she did not work. Therefore, I am satisfied that the plaintiff is entitled to income loss for this period as claimed.
- [116] The plaintiff's income tax information for 2014 shows that she paid approximately 13% of her total earnings for taxes. Therefore, I have deducted 13% from the gross income loss for taxes.
- [117] Accordingly, the net loss of earnings for the period between January 4, 2015 and April 30, 2015, is \$520.70.

Income Loss from May 1, 2015 to June 12, 2015

- [118] Dr. De Pieri testified that he advised the plaintiff to take time off work in the months following the motor vehicle accident due to the acuteness of her injuries. The plaintiff's evidence that she stopped working on April 30, 2015, due to her injuries is unchallenged. Therefore, I find that the plaintiff was off work due to her injuries between May 1, 2015 and June 12, 2015.
- [119] Had it not been for her injuries, the plaintiff would have worked at City Bookkeeping during this period of time. In order to establish her loss, the plaintiff compares her earnings from City Bookkeeping for the same period of time in the years 2013 and 2014.

[120] The plaintiff's net earnings from May 1, 2013 to June 15, 2013, were \$3,607.59 at \$18 per hour. At her 2015 rate of \$19 per hour, the net earnings for this period in 2013 would have been \$3,808.01.

[121] The plaintiff's net earnings from May 1, 2014 to June 15, 2014, were \$3,910.45.

[122] The plaintiff's average earnings in this period of time for 2013 and 2014 at \$19 per hour would be \$3,859.23 net after taxes. Therefore, the plaintiff is entitled to recover her loss of earnings between May 1, 2015 and June 12, 2015, in the net amount of \$3,859.23.

Income Loss from June 15, 2015 to March 31, 2018

[123] Starting on June 15, 2015, the plaintiff would have worked for Marshall's Home Living had it not been for the accident.

[124] From June 15, 2015 to August 21, 2015, the plaintiff did not work due to her injuries. On August 24, 2015, the plaintiff started work at Marshall's Home Living on a graduated return to work schedule.

[125] The plaintiff claims that she would have worked eight hours per day at Marshall's Home Living earning an hourly rate of \$20 per hour had it not been for the motor vehicle accident. She claims a loss of income based on this pay structure from June 15, 2015 to March 31, 2018.

[126] The plaintiff's pay structure changed on March 31, 2018, when she transitioned from an hourly rate employee to a salaried employee. The plaintiff makes no claim for past income loss after March 31, 2018.

[127] The plaintiff claims that had it not been for the motor vehicle accident she would have worked 40 hours per week from June 15, 2015 to March 31, 2018. At 40 hours per week, the plaintiff would have worked 5,032 hours during this period. The plaintiff claims that due to her injuries, her working hours for Marshall's Home Living were restricted to six hours per day. The plaintiff's time records from Marshall's Home Living show that she recorded 3,373.5 hours during this period of time. The difference between the hours she would have worked (at 40 hours per week) and the hours she actually worked is 1,658.50 hours. The plaintiff claims the difference in hours at the rate of \$20 per hour as her gross loss of earnings between June 15, 2015 and March 31, 2018. Therefore, the plaintiff claims \$33,170 as her gross income loss for this period.

[128] I am not prepared to accept the plaintiff's submission that due to her injuries she was incapable of working eight hours per day throughout this entire period of time for the following reasons:

- a) the plaintiff testified that she found a happy balance with work by being able to move around at her desk during the days when she worked the full day;

- b) Dr. De Pieri testified that the only restriction he placed on the plaintiff relating to work was during the acute stage in the early months following the motor vehicle accident;
- c) in his report of May 29, 2020, Dr. De Pieri stated that in terms of disability, the plaintiff "has been able to return to almost full work duties". On cross-examination, Dr. De Pieri confirmed that he would consider working at Marshall's Home Living and at her multilevel marketing business for a combined total of 40 hours per week to be full-time work;
- d) the plaintiff's involvement in her multilevel marketing business over the last three years has involved between four to five hours a week at times, and 10 to 15 hours per week at other times; and
- e) Mr. Marshall testified that working in his business, the plaintiff has the autonomy to organize her work and structure her work time. He testified that the plaintiff can work from home and that she can get up from behind the computer screen when it is required that she do so.

[129] Based on the foregoing evidence I conclude that by the time the plaintiff commenced work in the multilevel marketing business in September 2016, she had recovered from her injuries to the extent that she was capable of working and earning income at a full-time level.

[130] Therefore, I conclude that the plaintiff's loss of earnings from Marshall's Home Living ended in September 2016 when she commenced her work with Le-Vel.

[131] From the spreadsheet produced by the plaintiff, the total number of hours that the plaintiff would have worked from June 15, 2015 to September 1, 2016, is 2,296 hours. The actual hours worked by the plaintiff in the same period of time were 1,168.5 hours. The difference between the hours she would have worked and the hours the plaintiff actually worked is 1,127.5 hours. At the pay rate of \$20 per hour, the total gross income loss for this period of time is \$22,550.

[132] Based on the plaintiff's 2014 tax return, an appropriate deduction for income tax on this earnings' figure is 13%. Therefore, the net income loss for this period of time is \$19,618.50.

Net Past Income Loss

[133] In summary, the plaintiff's net past income loss is:

Time period of net loss

Amount

January 4, 2015 to April 30, 2015:

\$520.70

May 1, 2015 to June 12, 2015:

\$3,859.23

June 15, 2015 to September 1, 2016:

\$19,618.50

Total net past loss of earnings:

\$23,998.43

Loss of Future Earning Capacity

[134] The onus is on the plaintiff to establish that she is entitled to an award for loss of earning capacity. The plaintiff must first establish that there is a real and substantial possibility that her injuries will result in a future loss of earnings. If the plaintiff satisfies the first step in the analysis, then the plaintiff must quantify the loss. In *Perren v. Lalari*, 2010 BCCA 140, Madam Justice Garson described the plaintiff's onus at para. 32 as follows:

[32] A plaintiff must always prove, as was noted by Donald J.A. in *Steward*, by Bauman J. in *Chang*, and by Tysoe J.A. in *Romanchych*, that there is a real and substantial possibility of a future event leading to an income loss. If the plaintiff discharges that burden of proof, then depending upon the facts of the case, the plaintiff may prove the quantification of that loss of earning capacity, either on an earnings approach, as in *Steenblok*, or a capital asset approach, as in *Brown*. The former approach will be more useful when the loss is more easily measurable, as it was in *Steenblok*. The latter approach will be more useful when the loss is not as easily measurable, as in *Pallos* and *Romanchych*. A plaintiff may indeed be able to prove that there is a substantial possibility of a future loss of income despite having returned to his or her usual employment. That was the case in both *Pallos* and *Parypa*. But, as Donald J.A. said in *Steward*, an inability to perform an occupation that is not a realistic alternative occupation is not proof of a future loss.

[Emphasis in original.]

[135] In *Dzumhur v. Davoody*, 2015 BCSC 2316, Mr. Justice Kent, citing *Schenker v. Scott*, 2014 BCCA 203, outlined the reasoning process adopted by the court in assessing the loss of future earning capacity at para. 212:

- the findings of fact in the case should be expressly related to the actual assessment of damages;
- the court should undertake a "clear analysis of whether [the plaintiff] proved a substantial possibility of future income loss derived from [his/her] diminished marketability [or other components of any loss of earning capacity]";
- "[m]athematical, statistical or economic evidence, where available, may be of assistance in assessing damages";

- the court should provide an "explicit analysis of the general level of earnings [the plaintiff] would have realistically achieved, but for the accident, taking into account [his/her] intentions and the probabilities of achieving them";
- this should be followed by a "projection of [the plaintiff's] likely future earnings taking into account [the] injuries and other relevant contingencies";
- as part of this last step, if the court concludes that the plaintiff may have to accept less than full-time work in the future as a result of her his or her injuries, the court must assess the probability of that occurring and the extent to which the plaintiff will be restricted to such part-time work; and
- if parties provided the court with expert evidence from economists to assist in the valuation of lost capacity, the court should explain its relevance and what use, if any, the court ultimately makes of it.

[136] I must first decide whether there is a real and substantial possibility of a future event leading to an income loss for the plaintiff.

The Plaintiff's Bed-and-Breakfast Business

- [137] The plaintiff submits that James Marshall plans to sell or liquidate Marshall's Home Living, which will eliminate her bookkeeping position with that business. In anticipation of closing the Marshall's Home Living business, the plaintiff and Mr. Marshall have purchased a property where they have opened a bed-and-breakfast. The plaintiff submits that the bed-and-breakfast business is uncertain and that her involvement with that business will depend on her ongoing relationship with Mr. Marshall. Therefore, the plaintiff claims that there is a real and substantial possibility that she will be required to return to her work as a bookkeeper in a capacity that is limited by her injuries.
- [138] The plaintiff has presented no evidence about the risks associated with the bed-and-breakfast business. The only evidence about the bed-and-breakfast is that it opened for business on July 1, 2020, with two of the four planned rooms open for occupancy. The plaintiff testified that it was a very good business so far and that it appeared to be a lucrative endeavor. There is no evidence before me on which I can determine whether the business will succeed or not. Therefore, I cannot conclude that there is a real and substantial possibility that the bed-and-breakfast will fail.
- [139] Similarly, the only evidence about the strength of the relationship between the plaintiff and Mr. Marshall is that it is a close, loving and supporting relationship. There is no evidence upon which I can conclude that there is a real and substantial possibility that the relationship will end.

[140] I recognize that, in general, some businesses fail and some relationships end. However, in this case I must determine whether there is a real and substantial risk that the plaintiff's specific business will fail or that her relationship with Mr. Marshall will end. The evidence in this case does not convince me that there is a real and substantial possibility that either of those two events will occur.

[141] Therefore, I do not accept the plaintiff's submission that there is a real and substantial possibility that the plaintiff's involvement with the bed-and-breakfast will come to an end in the future and cause the plaintiff to return to her work as a bookkeeper.

The Plaintiff's Reduced Capacity to Work from Ongoing Therapy

[142] The plaintiff also suggests that her future earning capacity is reduced because:

- a) her capacity to work as a bookkeeper has been diminished by her injuries; and
- b) her injuries have limited her ability to clean the rooms at the bed-and-breakfast between guests.

[143] The evidence of Dr. De Pieri relating to the plaintiff's capacity to work is internally inconsistent to some degree. In his medical report of May 29, 2020, Dr. De Pieri writes:

It is clear that the injuries/conditions that Suzen has suffered have had a significant impact on her ability to work. Postconcussion syndrome affects general ability to engage in prolonged periods of concentration and thinking, while myofascial pain affects general ability to sit or stand for prolonged periods, or engage in repetitive activities. As such, I do not see vocational rehabilitation or a career change that would make her able to work full-time time without risk of worsening her symptoms.

[144] However, when re-examined by plaintiff's counsel at trial, Dr. De Pieri testified that the plaintiff can pursue her full work activities if she is able to access her therapies during the week.

[145] I interpret Dr. De Pieri's evidence to be that if the plaintiff has access to physical therapies to manage her symptoms, she is capable of performing her work activities to full capacity.

[146] Therefore, the plaintiff has established a real and substantial possibility that if she continues to work full-time she will require time off work to attend physical therapy treatments. However, in my view, that is the extent of the loss of earning capacity successfully proven by the plaintiff.

[147] Having accepted that there is a real and substantial possibility of a future loss, I must quantify that loss.

Quantification of Future Loss of Earning Capacity

- [148] In *Perren*, Garson J.A. approved two alternate methods that can be used to quantify the loss of earning capacity. The first is the "earnings approach" which Garson J.A. suggests is more useful when the future loss is more easily measurable or where the plaintiff can demonstrate a future pecuniary loss. The second is the "capital asset" approach which may be more useful when the loss is not as easily measurable.
- [149] The "capital asset" approach considers the factors established by Mr. Justice Finch in *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353, 35 A.C.W.S. (2d) 96. Those factors are whether:
- a) the plaintiff has been rendered less capable overall from earning income from all types of employment;
 - b) the plaintiff is less marketable or attractive as an employee to potential employers;
 - c) the plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to her, had she not been injured; and
 - d) the plaintiff is less valuable to herself as a person capable of earning income in a competitive labour market.
- [150] It is my view that aspects of both methods described by Garson J.A. in *Perren* have application to the assessment of the plaintiff's loss of future earning capacity. In this case, the loss of future earning capacity is the potential loss of future earnings due to the plaintiff having to leave work to attend therapy treatments. The loss includes the loss of earnings that the plaintiff may sustain because she leaves work to attend her treatments, and the potential loss associated with her being less marketable or attractive to potential employers due to her having to be absent from work.
- [151] The earnings approach is better suited for the loss of earnings related to leaving work for treatments. However, the capital asset approach is better suited for the loss associated with being less marketable in the workforce.
- [152] The general principles applicable to the quantification of the loss of future earning capacity are:
- a) plaintiffs are entitled to be put into the position they would have been in but for the accident, so far as money can do so (*Rosvold v. Dunlop*, 2001 BCCA 1 at para. 8);
 - b) what is being compensated is the loss or impairment of earning capacity as a capital asset, and not projected future earnings (*Rosvold* at para. 8);
 - c) the task of the court is to assess damages, not to calculate them according to some mathematical formula (*Rosvold* at para. 11); and

- d) quantification of the loss may be aided by some mathematical calculation, but there is no particular formula to apply and ultimately the court must base its decision on what is reasonable in all of the circumstances (*Jurczak v. Mauro*, 2013 BCCA 507 at paras. 35-36).
- [153] Dr. De Pieri suggests that the plaintiff should continue passive forms of therapy to help keep her pain manageable and maintain her functional status. Unfortunately, Dr. De Pieri does not indicate how frequent those therapies should be used and for what length of time.
- [154] As an illustration of what a loss of future earnings for treatment purposes might be, if the plaintiff takes two hours per month for treatment during work hours, she would be either losing two hours of income per month or losing two hours of her contribution to the bed-and-breakfast business. The present value of that loss based on the plaintiff's most recent hourly rate of \$20 per hour is \$7,938.62 to age 65.
- [155] Any loss contemplated by this method of assessment must consider negative and positive contingencies. Negative contingencies include the potential that the plaintiff will not require two hours per month for treatment, that she will not continue working to age 65, and that, at some point, she will voluntarily reduce her working hours so that ongoing therapy is no longer necessary. Positive contingencies include the potential that the plaintiff will require more than two hours per month for treatment either because it is insufficient to allow her to continue working on a full-time basis or because her condition worsens over time.
- [156] There is no evidence from which I can conclude whether the plaintiff's treatment needs will increase or decrease as time goes by. However, the plaintiff has worked all of her adult life even while engaged in significant volunteer activities with her children. After the motor vehicle accident, she became involved in multi-level marketing endeavours while continuing to work for Marshall's Home Living. Therefore, it is not likely that the plaintiff will reduce her work activities early.
- [157] In addition, I must consider the potential loss to the plaintiff as a result of being less marketable in the workforce. It is my view that the plaintiff's need to leave work from time to time for treatment may make her less marketable as an employee, but will have only a minor effect on her future earnings. I reach this conclusion on the basis that the plaintiff is and will continue to be motivated to succeed. She will find ways to minimize the effect of her injuries on her employability.
- [158] Considering all of the forgoing factors, I have concluded that an award for loss of future earning capacity in the amount of \$40,000 is appropriate.

Non-Pecuniary Damages

- [159] Before the motor vehicle accident of January 4, 2015, the plaintiff was a highly active person. She worked as a bookkeeper while caring for her three children and still found the time and energy to participate in numerous volunteer activities.

- [160] When her children began playing hockey, she drove her children to and from hockey practices and games which, in the later years, involved driving significant distances. She also managed the hockey teams that her two boys played on, and volunteered as a board member and then executive officer of the Chase Minor Hockey Association. When an opportunity arose for her to join the Board of OMAHA she did so and embraced that responsibility with her usual energy.
- [161] After the accident, the plaintiff continued to drive relatively long distances to attend hockey games in which her children and Mr. Marshall's son were playing. In addition, before moving to Kelowna the plaintiff drove to and from Kelowna once every week to assist with the bookkeeping at Marshall's Home Living.
- [162] The plaintiff also travelled often after the accident on business trips related to her multi-level marketing business and on vacations with Mr. Marshall.
- [163] While she continued to travel after the accident, the trips were more difficult to endure due to her injuries and she was unable to enjoy the same level of activity on those trips as she would have had it not been for her injuries.
- [164] The plaintiff's friends describe her as a person with high energy who never said no and always wanted to be the leader before the motor vehicle accident. When she attended her sons' hockey games before the accident, the plaintiff was very loud and boisterous.
- [165] After the accident, the plaintiff's friends describe her as low energy, low-key and looking exhausted. Her demeanour at hockey games became more subdued, more controlled and much quieter.
- [166] After the motor vehicle accident, the plaintiff curtailed her activities even though Dr. De Pieri recommended that the plaintiff be active and that she live her life. The plaintiff does not participate in some activities such as kayaking and snowmobiling because they cause her pain or she is afraid that they will cause her pain.
- [167] The plaintiff continues to participate in other activities such as golf, because she and Mr. Marshall enjoy the activity. However, the plaintiff takes pain medication both before and after her participation.
- [168] The plaintiff also enjoyed and participated vigorously in dancing prior to the motor vehicle accident. However, after the accident the plaintiff limits her dancing due to pain. She does not dance as frequently, and is limited in the type of dancing in which she participates. The plaintiff now limits herself to dancing only a few slow dances at a time.
- [169] The plaintiff elected to undergo breast reduction surgery to see if it would reduce her pain symptoms. There is no evidence that the surgery had the desired effect on the plaintiff's pain. However, the plaintiff testified that the surgery left her with a loss of sensitivity in that area. The loss of sensitivity in her breasts and her neck pain have affected her intimate relations with Mr. Marshall.

- [170] The plaintiff has sought out and received numerous forms of other treatment in an effort to reduce or control her symptoms. Most of the treatment received by the plaintiff has been passive rather than active treatment. Some treatments such as breast reduction surgery and the rhizotomy have been invasive.
- [171] With the exception of the nerve blocks and rhizotomy, the treatments that the plaintiff has received have not been successful in any significant way.
- [172] The initial physiotherapy treatments that the plaintiff received from Janice Fraser in Kamloops helped to improve the plaintiff's range of motion in her neck. However, at the end of those treatments, the plaintiff continued to have restricted range of motion and increased tone in her neck muscles. As described above, the rhizotomy that Dr. Etheridge performed on the plaintiff in 2018 improved her symptoms significantly. However, after the rhizotomy the plaintiff continued to experience a deep ache inside her trapezius and a burning pain around her left ear. She testified that she continues to experience these symptoms as of the trial date.
- [173] The defendant concedes that the plaintiff suffered a soft tissue injury to her neck in the motor vehicle accident. I have accepted Dr. De Pieri's opinion that the plaintiff suffers from a chronic myofascial pain syndrome and thoracic outlet syndrome as a result of the motor vehicle accident.
- [174] It is a well-established principle that the purpose of an award for non-pecuniary damages is to compensate the plaintiff for pain, suffering, loss of enjoyment of life and the loss of amenities.
- [175] In *Stapley v. Hejslet*, 2006 BCCA 34, Madam Justice Kirkpatrick at para. 45 cited the following passage from *Lindal v. Lindal*, [1981] 2 S.C.R. 629, 129 D.L.R. (3d) 263 at 637:
- Thus the amount of an award for non-pecuniary damage should not depend alone upon the seriousness of the injury but upon its ability to ameliorate the condition of the victim considering his or her particular situation. It therefore will not follow that in considering what part of the maximum should be awarded the gravity of the injury alone will be determinative. An appreciation of the individual's loss is the key and the "need for solace will not necessarily correlate with the seriousness of the injury" (Cooper-Stephenson and Saunders, *Personal Injury Damages in Canada* (1981), at p. 373). In dealing with an award of this nature it will be impossible to develop a "tariff". An award will vary in each case "to meet the specific circumstances of the individual case" (Thornton at p. 284 of S.C.R.).
- [176] After citing the passage from *Lindal*, Kirkpatrick J.A. provided the following in-exhaustive list of common factors that influence an award of nonpecuniary damages at para. 46:
- (a) age of the plaintiff;
 - (b) nature of the injury;

- (c) severity and duration of pain;
- (d) disability;
- (e) emotional suffering; and
- (f) loss or impairment of life;
- ...
- (g) impairment of family, marital and social relationships;
- (h) impairment of physical and mental abilities;
- (i) loss of lifestyle; and
- (j) the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff).

[177] In this case, the nature of the plaintiff's injury is a soft tissue injury to the left side of her neck. In the wide spectrum of injuries sustained in motor vehicle accidents, the severity of the plaintiff's injury is on the less serious end. However, the effect of the injury on the plaintiff, including the severity and duration of the pain, the emotional suffering experienced by the plaintiff and the impairment that the injury has caused to the plaintiff's life in general has been significant.

[178] The plaintiff is not the high-energy, boisterous person she was before the accident. The injuries have affected her relationship with Mr. Marshall and her family. She takes pain medication to participate in activities that she enjoys and she has sought out and participated in numerous treatments to relieve her pain.

[179] The plaintiff has endured pain symptoms since the accident, which continue to affect her as of the date of the trial. Her symptoms have improved to some degree since the accident, but her neck pain persists.

[180] On the issue of non-pecuniary damages, the plaintiff relies on *Young v. Shao*, 2018 BCSC 2017; *Clubine v. Paniagua*, 2018 BCSC 146; *Bove v. Wilson*, 2016 BCSC 1620; *Jang v. Andrade*, 2018 BCSC 1516; *Tumback v. King*, 2019 BCSC 1561; *Toevs v. Williams*, 2019 BCSC 2030; *Juelfs v. McCue*, 2019 BCSC 1195; *McGonigle v. Parada*, 2018 BCSC 1017; *Smith v. Basker*, 2019 BCSC 1459; and *Vienneau v. Dhaliwal*, 2019 BCSC 1260.

[181] The plaintiff's authorities assess non-pecuniary damages in the range of \$55,000 to \$75,000. Based on those authorities, the plaintiff submits that the award for non-pecuniary damages should be \$80,000, because those authorities do not consider the impact of her breast reduction surgery or her intimacy issues with Mr. Marshall.

- [182] On the issue of non-pecuniary damages, the defendant relies on *Cook v. Kang*, 2020 BCSC 526; *Jones v. McLerie*, 2016 BCSC 763; *Liu v. Zhang*, 2019 BCSC 778; *Lowe v. Johnson*, 2019 BCSC 1283; and *Smith v. Evashkevich*, 2016 BCSC 1228.
- [183] The range of damages established by the defence authorities is between \$45,000 and \$66,000. The defendant submits that a non-pecuniary damages award in this case should be \$50,000.
- [184] Having considered the range of damages in this case and the factors set out in *Stapley*, I have concluded that the appropriate award for non-pecuniary damages is \$60,000.
- [185] In making this award I have considered the significant and long-lasting impact that the plaintiff's injuries have had on her over the five years since the motor vehicle accident. However, I have balanced that against the evidence that the plaintiff was able to continue on with many of her activities and with her income-earning endeavours following the accident, albeit with pain.
- [186] I have also considered that the plaintiff's assessment of non-pecuniary damages includes the diagnosis of concussion and post concussion syndrome. Since I have not accepted that diagnosis, the non-pecuniary damages assessment proposed by the plaintiff must be adjusted downward.

Future Care Costs

- [187] The plaintiff claims compensation for the cost of future treatment.
- [188] The defendant resists the claim for future care costs on the basis that there is no reliable evidence to conclude that any future treatments will be required.
- [189] The medical evidence of Dr. De Pieri with respect to future care is that the plaintiff should continue seeing a physiatrist and attending the chronic pain clinic. Dr. De Pieri makes this recommendation on the basis that "further prolotherapy and possibly rhizotomies may be indicated". The plaintiff makes no claim for these costs.
- [190] Dr. De Pieri testified that after two years the chances that passive therapies such as massage, physiotherapy and Feldenkrais will resolve injury symptoms are zero. However, Dr. De Pieri's evidence is that after two years, passive therapies are beneficial from time to time to treat flare-ups in the symptoms or to help patients stay functional.
- [191] Dr. De Pieri recommends that the plaintiff continue some passive forms of therapy to help keep her pain manageable and maintain her functional status. Dr. De Pieri testified that so long as she maintains her therapies, the plaintiff will be capable of fulfilling her full work activities. Therefore, the plaintiff's ability to access treatment of this nature was a consideration in the assessment of the plaintiff's loss of future earning capacity.

Costs of Massage Therapy and Physiotherapy

- [192] The plaintiff claims the cost of one massage therapy treatment per month and one physiotherapy treatment per month for the rest of her life. The cost for massage therapy is \$105 per month. The cost of physiotherapy is \$79 per month.
- [193] While Dr. De Pieri suggests that the plaintiff should continue to access massage therapy and physiotherapy, he provides no guidance on the frequency of those treatments or the duration over which they would be required. In my view, it is not reasonable for the defendant to pay for the plaintiff's massage and physiotherapy treatments for the rest of her life. However, in order to assist the plaintiff in maintaining her full-time work activities, I am prepared to award compensation for massage and physiotherapy treatments as a future care item to age 65.
- [194] The evidence in this case does not allow me to determine whether the massage and physiotherapy treatments are likely to increase or decrease over time. Therefore, it is not possible to apply any negative or positive contingencies to this future costs.
- [195] The present value of one massage therapy treatment per month and one physiotherapy treatment per month to age 65 is \$36,104.
- [196] The plaintiff also claims six additional massage or physiotherapy treatments per year to treat flare-ups in her condition. I am not prepared to award these additional treatments in this case. In my view, the monthly massage and physiotherapy treatments should be sufficient to deal with flare-ups in the plaintiff's condition.
- [197] Therefore, the award for future massage and physiotherapy treatments is \$36,104.

Cost of Pilates

- [198] The plaintiff claims the cost of pilates for six months. Pilates is the only active therapy that the plaintiff participates in. The cost of pilates is \$277 for two months. Therefore, the six-month cost for pilates is \$831.
- [199] Since Dr. De Pieri encourages the plaintiff to be active, it is my view that the cost of pilates for six months is an appropriate future care cost.
- [200] The plaintiff is entitled to \$831 for the future cost of pilates.

Cost of Feldenkrais

- [201] The plaintiff claims the cost of attending Feldenkrais for one year as a future care cost item. I am not prepared to award compensation for Feldenkrais. There is no evidence to medically justify Feldenkrais as a treatment for the plaintiff's injuries. The evidence lacks any authoritative explanation of Feldenkrais. There is no evidence about its purpose or whether it is a recognized treatment for soft tissue injuries.

[202] In Gregory v. Insurance Corporation of British Columbia, 2011 BCCA 144 at para. 39, Madam Justice Garson held as follows:

[39] I do not consider it necessary, in order for a plaintiff to successfully advance a future cost of care claim, that a physician testify to the medical necessity of each and every item of care that is claimed. But there must be some evidentiary link drawn between the physician's assessment of pain, disability, and recommended treatment and the care recommended by a qualified health care professional: Aberdeen at paras. 43, 63.

[203] In this case, there is no medical evidence linking Feldenkrais to the plaintiff's pain or her injuries.

[204] Therefore, the future cost associated with Feldenkrais is denied.

Cost of Kinesiology

[205] The plaintiff claims 20 sessions with a kinesiologist, plus two sessions annually for five years.

[206] I am not satisfied that ongoing kinesiology sessions are reasonable or necessary. The plaintiff has already had 72 kinesiology sessions from March 2019 to September 2020. There has been no evidence presented to establish the need for ongoing kinesiology.

[207] Therefore, the future costs for kinesiology sessions is denied.

Summary of Future Care Costs

[208] The plaintiff is entitled to \$36,935 in future care costs for massage therapy, physiotherapy and pilates.

Special Damages

[209] The plaintiff's claim for special damages and my award of special damages based on the reasons that follow are summarized in the table below:

Expense

Amount Claimed

Amount

Awarded

Okanagan IMS, C. Garman - Physiotherapy

\$ 5,598.20

\$ 2,799.10

Okanagan IMS, B. Work - Massage

7,397.00

7,397.00

Lighthouse Chiropractic, Dr. G. Jenkins - Chiropractic

3,665.00

0.00

Nucca, Dr. G. Thomson - Chiropractic

855.00

0.00

Claybank Massage Therapy, J. Laviolette - Massage

2,723.00

2,723.00

Sendero Health & Beauty, B. Work - Massage

7,955.00

3,977.50

Kamloops Physiotherapy, J. Fraser - Physiotherapy

1,306.05

1,306.05

Sandra Bradshaw - Feldenkrais Practitioner

4,919.25

0.00

Rutland Physical Therapy, G. Hart - Physiotherapy

9,214.45

6,815.83

Rutland Physical Therapy, D. Christophe - Active Rehabilitation

2,322.85

2,322.85

Hillside Health, Dr. J. Davidson - Chiropractic

40.00

0.00

Kamloops Centre for Therapy, L. Moulton - Counselling

525.00

0.00

Road to Health, J. Wendland - Kinesiology

2,050.25

2,050.25

Lifemark, G. Davidson - Occupational Therapy

2,163.89

2,163.89

Okanagan Vision Therapy, Dr. P. Rollett - Vision Therapy

4,097.50

0.00

NeuroMovement Practitioner, C. Shave - Feldenkrais Practitioner

236.25

0.00

Miscellaneous Expenses Summary

8,264.51

7,569.03

Prescription Medications

1,301.62

451.04

Mileage

5,219.36

3,500.00

Totals

\$69,854.18

\$43,075.54

[210] Both the plaintiff and the defendant rely on the case of *Redl v. Sellin*, 2013 BCSC 581. Both parties cite para. 55 of the decision where Mr. Justice Saunders writes:

[55] Generally speaking, claims for special damages are subject only to the standard of reasonableness. However, as with claims for the cost of future care (see *Juraski v. Beek*, 2011 BCSC 982; *Milina v. Bartsch* (1985), 49 BCLR (2d) 33 (BCSC)), when a claimed expense has been incurred in relation to treatment aimed at promotion of a plaintiff's physical or mental well-being, evidence of the medical justification for the expense is a factor in determining reasonableness. I accept the argument expressed through Dr. Frobb, that a patient may be in the best position to assess her or his subjective need for palliative therapy. I also accept the plaintiff's counsel's argument that in the circumstances of any particular case, it may be possible for a plaintiff to establish that reasonable care equates with a very high standard of care. In the words of Prof. K. Cooper-Stephenson in *Personal Injury Damages in Canada*, (2d ed., 1996) at p. 166:

Even prior to the Supreme Court's endorsement of the restitution principle [in *Andrews v. Grand & Toy Alberta Ltd.* and *Arnold v. Teno*], in the area of special damages the courts had been prepared to allow optimum care, and damages were awarded for expenses of a character that stretched far beyond the resources of even an affluent Canadian.

That being said, and while Dr. Frobb's paradigm of the patient becoming their own physician may have at least a superficial appeal, plaintiff's are not given carte blanche to undertake any and all therapies which they believe will make them feel good.

[211] The plaintiff emphasizes the passage which states that patients may be in the best position to assess their subjective needs and that it may be possible, in some circumstances, for plaintiffs to establish that reasonable care equates with a very high standard of care.

[212] The defence emphasizes the passage where Saunders J. states that plaintiffs are not given carte blanche to undertake any and all therapies which they believe will make them feel good.

[213] While I am mindful of the statements of the Court in *Redl*, ultimately a determination of what is an appropriate special expense must be based upon evidence that the expense is:

- a) related to the plaintiff's injuries;
- b) recognized as a treatment for the plaintiff's injuries;
- c) medically justified;
- d) recommended by a healthcare professional; and
- e) reasonable both in frequency and duration.

- [214] With respect to the issue of medical justification for passive therapies, the evidence of Dr. De Pieri is that after two years, the chances that passive therapy will resolve injury symptoms are zero. After two years, passive therapies may be necessary from time to time to treat flare-ups in the symptoms or to help patients stay functional. Passive therapies include physiotherapy, massage therapy, and Feldenkrais.
- [215] With those concepts in mind, I will comment on each of the special damages claimed by the plaintiff.

IMS

- [216] Cory Garman of Okanagan IMS treated the plaintiff with IMS on 90 occasions from June 2015 to June 2018. In my view, the number of IMS treatments received by the plaintiff is excessive. The evidence of the physiotherapist, Janice Fraser, was that after a few treatments of IMS she can tell if those treatments will continue to be effective or not. She testified that if she did not see any improvement after a few treatments she may discontinue the treatments but return to them at a later date. If there continued to be no improvement, she would discontinue the treatments.
- [217] While it is reasonable to consider reimbursement for IMS treatment from Cory Garman, the amount claimed is not reasonable. Therefore, I will allow the IMS treatment costs at 50% or \$2,799.10.

Massage Therapy

- [218] The plaintiff received massage therapy treatments from Jennifer Laviolette of Claybank Massage Therapy from January 9, 2015 to June 2015. She also received massage therapy treatments from Ben Work of Okanagan IMS from June 2015 to April 25, 2017.
- [219] The treatments performed by Ms. Laviolette and Mr. Work were in the first two years during which Dr. De Pieri suggests that passive therapy may be of some benefit. Therefore, the plaintiff is entitled to recover the cost of the massage therapy treatments by Ms. Laviolette and Mr. Work between January 2015 and April 2017. Those costs are \$2,723 for Ms. Laviolette and \$7,397 for Mr. Work.
- [220] The plaintiff continued with massage therapy treatments from Mr. Work at Sendero Health and Beauty after April 2017. She received massage therapy from Mr. Work between May 2, 2017 and June 8, 2020, which is outside the two-year time frame in which Dr. De Pieri suggests that passive therapies may be of some benefit. Since Dr. De Pieri's evidence is that patients may benefit from a low level of passive therapy to maintain their function after two years, I am prepared to award 50% of these costs to the plaintiff.
- [221] The total claim for the treatments by Mr. Work after April 2017 is \$7,955. Therefore, the reimbursement for these costs will be \$3,977.50.

Chiropractic Treatment

[222] The plaintiff is not entitled to reimbursement for chiropractic costs. The plaintiff failed to produce sufficient evidence to link the chiropractic treatments to her motor vehicle accident injuries. The plaintiff's evidence was that Dr. De Pieri neither recommended nor refused to recommend chiropractic treatment. There is no evidence to establish that the chiropractic treatments were related to the injuries sustained in the accident, medically justified or otherwise reasonable. Therefore, I am unable to conclude that the chiropractic treatments are a reasonable expense related to the injuries sustained by the plaintiff in the motor vehicle accident.

Physiotherapy

[223] The plaintiff is entitled to reimbursement for the cost of physiotherapy treatments from Janice Fraser of Kamloops Physiotherapy. The treatments by Ms. Fraser occurred within the first two years following the accident when they may have had some benefit according to Dr. De Pieri. Therefore, the plaintiff is entitled to reimbursement for these expenses in the amount of \$1,306.05.

[224] The plaintiff will recover the cost of physical therapy treatments by Danette Christophe of Rutland Physical Therapy. Ms. Christophe's treatments occurred within the two years following the accident when they would have had some benefit for the plaintiff. Those costs are \$2,322.85.

[225] The physiotherapy treatments by Glenda Hart at Rutland Physical Therapy extended past the two-year anniversary of the accident. Treatments by Ms. Hart started on September 4, 2015 and continued until January 20, 2020. The plaintiff will recover the cost of Ms. Hart's treatments for two years following the accident in their entirety. The cost of Ms. Hart's treatments for the first two years is \$4,417.20.

[226] Based on Dr. De Pieri's evidence that passive therapies after two years may be beneficial to maintain function, I am prepared to award 50% of Ms. Hart's treatment costs incurred after the two-year anniversary of the accident. After two years, the total treatment costs for Ms. Hart is \$4,797.25. Therefore, the plaintiff's 50% reimbursement for these costs is \$2,398.63.

[227] The total reimbursement for physiotherapy treatments from Ms. Hart is \$6,815.83.

Feldenkrais

[228] The plaintiff's claim for the cost of Feldenkrais is denied. The plaintiff tendered no evidence with respect to the nature and purpose of Feldenkrais or whether Feldenkrais is a recognized treatment for soft tissue injuries in the neck and shoulder area. Without such evidence, the plaintiff has failed to establish that Feldenkrais is a reasonable treatment to have undertaken. Therefore, the costs are not compensable.

Kinesiology

[229] The defendant does not dispute the plaintiff's claim for her kinesiology expenses. Therefore, I will award the sum of \$2,050.25 as reimbursement for these expenses.

Occupational Therapy

[230] The defendant concedes that the costs associated with an occupational therapist are an appropriate special expense. Therefore, the plaintiff is entitled to \$2,163.89 for her occupational therapist.

Counselling

[231] The plaintiff is not entitled to recover the cost of counselling with Kamloops Centre for Therapy. The plaintiff commenced counselling before the motor vehicle accident. There is no evidence relating the need for counselling to the accident. There is no evidence to establish that the plaintiff required counselling for any motor vehicle accident related issues.

Vision Therapy

[232] The plaintiff will not recover the costs for vision therapy, as there was no medical evidence relating the vision therapy to the injuries sustained by plaintiff in the motor vehicle accident. While the optometrist, Dr. Rollett, testified as to the treatments that he administered to the plaintiff, he was not qualified as an expert to provide opinions about the cause of the vision issues he observed in the plaintiff. Without medical evidence to tie the plaintiff's vision issues to her accident injuries, there is no basis to conclude that vision therapy was required as a result of the motor vehicle accident.

Miscellaneous Expenses

[233] The plaintiff will recover her miscellaneous expenses as claimed after deducting those expenses that the plaintiff admitted are not related to her injuries from the motor vehicle accident. The total award after deduction of the unrelated expenses is \$7,569.03.

Prescription Medications

[234] The plaintiff is entitled to recover \$451.04 in prescription costs for Tramadol. The evidence establishes that Tramadol is a pain medication that the plaintiff used for the pain she experienced from her accident-related injuries.

[235] The plaintiff also claims reimbursement for other prescription medications. However, the plaintiff tendered no evidence to establish what those medications were, why they were prescribed or whether they were related to her injuries. There is no basis upon which I can conclude that those medications are related to her injuries. Therefore, the plaintiff has failed to establish that she is entitled to recover the cost of her medications other than Tramadol.

Mileage

[236] The plaintiff claims \$5,219.36 for mileage expenses for travel to and from her medical and rehabilitation appointments. The mileage claimed includes travel to and from those treatments which I have denied or only partially recognized. Therefore, the plaintiff is not entitled to her mileage as claimed. However, I will award \$3,500 as compensation for mileage.

Summary of Damages

[237] The damages awarded to the plaintiff are as follows:

Non-Pecuniary Damages:

\$60,000.00

Past Income Loss:

\$23,998.43

Loss of Future Earning Capacity:

\$40,000.00

Future Care Costs:

\$36,935.00

Special Damages:

\$43,075.54

TOTAL:

\$204,008.97

Costs

[238] The parties have leave to make submissions on the issue of costs if they cannot agree. Arrangements to address the issue of costs must be made within 30 days following the release of these reasons.

"Hori J."

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