

CANADA / JUDGMENT

Bergeron v. Malloy

2020 BCSC 963

COURT

Supreme Court of British Columbia

DECIDED

29 June 2020

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2020 BCSC 963 Bergeron v. Malloy

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Bergeron v. Malloy,

2020 BCSC 963

Date: 20200629

Docket: M172723

Registry: Vancouver

Between:

Brigitte Bergeron

Plaintiff

And

Donald Malloy, South Coast British Columbia Transportation Authority and Coast Mountain Bus Company Ltd.

Defendants

-And-

Docket: M1710190

Registry: Vancouver

Between:

Brigitte Bergeron

Plaintiff

And

Harjan Singh Notay and Harvinder Kaur Notay

Defendants

Before: The Honourable Madam Justice Matthews

Reasons for Judgment

Counsel for the Plaintiff:

A.A. Pang

Counsel for Defendants:

S. Ali

R.S. Wallia

Place and Dates of Trial:

Vancouver, B.C.

March 2-6, 2020

Place and Date of Judgment:

Vancouver, B.C.

June 29, 2020

Introduction

- [1] Brigitte Bergeron claims damages for personal injuries suffered in two motor vehicle accidents: the first in Surrey, British Columbia on April 16, 2015, when a transit bus driven by Donald Malloy rear-ended her vehicle; and the second on April 23, 2017, also in Surrey, when her vehicle and a vehicle driven by the defendant, Harjan Singh Notay, and owned by the defendant, Harvinder Kaur Notay, collided.
- [2] Ms. Bergeron claims that she developed chronic neck and left shoulder pain, chronic headaches, thoracic outlet syndrome, left rib and back pain and driving anxiety due to the April 16, 2015 accident. She claims that the April 23, 2017 accident exacerbated her headaches and neck pain. Ms. Bergeron claims that her accident injuries have caused her loss of earning capacity as a restaurant server because she had to take time off work after each accident, and she is not able to work the amount she would be entitled to given her seniority. She also claims damages for pain, suffering and loss of enjoyment of life, loss of housekeeping capacity, cost of future care, and special damages.

- [3] Both groups of defendants have admitted liability for the accidents. The defendants argue that Ms. Bergeron suffered soft tissue injuries in the April 16, 2015 accident which caused her to miss minor amounts of work and minimally interfered with her activities of daily living and recreational pursuits. They submit that her headaches pre-existed the accidents and she does not have thoracic outlet syndrome. The defendants argue that Ms. Bergeron did not suffer any new injuries or exacerbation of her injuries in the April 23, 2017 accident.
- [4] The issues are:
- a) What injuries did Ms. Bergeron suffer in the accidents?
 - b) Are any of the symptoms Ms. Bergeron has caused by either or both accidents? Are they caused or contributed to by pre-existing health issues?
 - c) What damages flow from the above findings for:
 - i. pain, suffering and loss of enjoyment of life;
 - ii. past and future loss of earning capacity;
 - iii. loss of housekeeping capacity;
 - iv. cost of future care; and
 - v. special damages.
- [5] I will refer to the defendants in the claim about the April 16, 2015 accident as the Coast Mountain Bus defendants. I will refer to the defendants in the claim about the April 23, 2017 accident as the Notay defendants. I will refer to the defendants in both claims collectively as the defendants.
- [6] I conclude that Ms. Bergeron suffered soft tissue injuries to her back and ribs which have resolved. I conclude that Ms. Bergeron suffered soft tissues injuries that have resulted in chronic neck and shoulder pain, chronic headaches and thoracic outlet syndrome in the April 16, 2015 accident. The chronic neck and shoulder pain and headaches were exacerbated by the April 23, 2017 accident. I have concluded that Ms. Bergeron has not proven a mood disturbance caused by either accident but her pre-existing stress was exacerbated by both accidents. I award damages totalling \$143,812 before statutory deductions on the past wage loss component of the award and deductions for special damages already reimbursed.

Accident Injuries

Evidence and Findings of Fact

Credibility and Objective Evidence

- [7] The defendants submit that Ms. Bergeron's evidence should be given little weight. Although they describe the issue as a matter of reliability, they assert that she gave "inconsistent and evasive" evidence. That is a submission that she is both unreliable and untruthful. Credibility includes both the accuracy of the evidence of a witness and its truthfulness. A witness who is giving truthful evidence may not be giving reliable evidence. A witness who is not truthful is also not reliable: *Mather v. MacDonald*, 2016 BCSC 948 at para. 18, citing *R. v. Perrone*, 2014 MBCA and *R. v. Morrissey* (1995), 22 O.R. (3d) 514 (C.A.).
- [8] In *Bradshaw v. Stenner*, 2010 BCSC 1398, aff'd 2012 BCCA 296 at paras. 186-187, Madam Justice Dillon described a process of two stages to evaluate credibility. In the first stage, the trier of fact examines the witness' evidence for the ability to and opportunity to observe events, the firmness of memory, whether the witness appears able to resist the interests at play to modify his or her recollection, a comparison of the evidence against independent evidence, whether the witness changes evidence during direct examination and cross examination, motive to lie and demeanour. If the trier of fact accepts the witness's evidence as being generally credible, then in the second stage the trier of fact should compare the witness's evidence with the other evidence to determine whether it fits within the "preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place and those conditions", *Bradshaw* at paras. 186-187, citing *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.). A key consideration is whether the evidence fits with the preponderance of probabilities: *Jin v. Cheng*, 2018 BCSC 763. Demeanour is not determinative and basing credibility findings on it may introduce arbitrariness into the assessment as the Court of Appeal explained in *Faryna* at para. 356-357.
- [9] It is not necessary to accept the evidence of any witness or the accused in its entirety because when determining what fits with the preponderance of probabilities, it is reasonable for a trier of fact to accept parts of a witness's evidence and apply different weights to different parts of a witness's evidence: *R. v. D.R.*, [1996] 2 S.C.R. 291 at para. 93; *R. v. Howe* (2005), 192 C.C.C. (3d) 480 (ON CA).
- [10] The defendants submit that Ms. Bergeron's evidence should not be accepted because she did not tell every doctor she saw about an accident in January 2014; because her evidence and her family doctor's evidence about the the timing of a medical procedure is not consistent; because Ms. Bergeron is not able to say which days that she did not work after the accidents were accident-related days off work; Ms. Bergeron's reliance on documentation to recall some things and revising her evidence when the documents contradicted what she had said; and differing evidence from Ms. Bergeron and her daughter as to whether she paid her daughter to do housework.

- [11] Some of the issues on which her credibility was challenged are not significant or probative. For example, the fact that a parent characterizes money paid to a teenager for chores done around the house one way and the teenager characterizes it another way is not surprising and is not a matter on which to declare Ms. Bergeron's evidence unreliable. Whether she told a doctor she saw to have a prescription refilled about the January 2014 accident is not probative. The differing evidence about when she had the prior medical procedure may be relevant and may need to be considered in assessing the preponderance of probabilities, but it does not serve to oust Ms. Bergeron's evidence as being generally not credible.
- [12] The defendants say that because this case involves personal injuries for which there is no objective evidence, Ms. Bergeron's credibility issues are compounded and she has not met her burden of proving them through "convincing evidence" as called for in *Price v. Kostyba* (1982), 70 B.C.L.R. 397. However, in *Price*, Chief Justice McEachern's comments were made in reliance on his prior decision in *Butler v. Blaylock Estate*, [1981] B.C.J. No. 31 (S.C.), which was subsequently overturned.
- [13] While the *Price* decision continues to be followed for the propositions that a plaintiff has the burden of proof and objective evidence is helpful to finding facts, especially if there are concerns about the veracity or reliability of the plaintiff's evidence, there is no principle of law that the evidence of a plaintiff in a personal injury case should be received with a special form of skepticism or that there is a different standard for the burden of proof in a personal injury case: *Deol v. Sheikh*, 2016 BCSC 2404 and *Kallstrom v. Yip*, 2016 BCSC 829 at para. 335.
- [14] While I do not accept that Ms. Bergeron's evidence is generally unreliable and untruthful, the corollary is not that I accept it on every point. Ms. Bergeron was not able to remember some events that are relevant, including what days she was off work due to her accident injuries. Her inability to lead specific evidence, leaving her to estimate, is not satisfactory to discharge her burden of proof or establish the facts for all of the damages she seeks. This is particularly the case with regard to past income loss. I will assess her evidence with the other evidence to determine if she has proven her injuries and the bases for the damages she seeks.

Pre-Accident

- [15] Ms. Bergeron was born on July 22, 1965. She was 49 years old at the time of the April 16, 2015 accident and 51 years old at the time of the April 23, 2017 accident.
- [16] Ms. Bergeron testified that prior to the April 16, 2015 accident, she saw her doctor for menopausal symptoms, for immunizations, and about issues relating to her children's health. She testified that she was in good health but had significant stressors in her life. Dr. Elizabeth Laifer, Ms. Bergeron's family doctor, testified that prior to the April 16, 2015 accident, Ms. Bergeron had hormonal imbalances and thyroid problems which were not significant. Ms. Bergeron testified that she had a hysterectomy in 2014 which caused her to go into menopause. Dr. Laifer testified that the hysterectomy was before Dr. Laifer became

her doctor, which was in 2012. This is the inconsistent evidence about the medical procedure referred to above. On both the evidence of Ms. Bergeron and Dr. Laifer, Ms. Bergeron's menopause symptoms commenced prior to the April 16, 2015 accident, so the discrepancy is not problematic for finding facts. Nor is it the type of discrepancy that causes me to lose faith in either of their evidence on other matters.

- [17] During cross examination, Ms. Bergeron agreed that she experienced migraine headaches before the April 16, 2015 accident for which she was prescribed Tylenol #2. The defendants submit that Ms. Bergeron's failure to describe these migraines in her evidence in chief is a reason to find her evidence to be evasive or at least incomplete. However, on cross examination, she testified that these migraines were part of her menopausal symptoms, about which she had testified in chief, and that they were different from the headaches she had after the April 16, 2015 accident. Dr. Ansel Chu, physical medicine and rehabilitation specialist, testified that after the April 16, 2015 accident, Ms. Beregeron had headaches associated with soft tissue injuries to her neck. The defendants did not challenge this opinion in cross examination or raise the pre-April 16, 2015 accident migraines with him. I do not accept that Ms. Bergeron was being evasive or incomplete when she testified about her pre-accident physical health.
- [18] Ms. Bergeron testified that she has four children. Her oldest child is her daughter, Breanna, who was born in 1993. She testified that she lost custody of Breanna in 1996. Ms. Bergeron and Breanna's father still have outstanding litigation relating to the breakdown of their relationship. Ms. Bergeron feels like she let Breanna down. Ms. Bergeron testified that she and Breanna now have a very good relationship. Ms. Bergeron's evidence about this aspect of her life and her health before the April 16, 2015 accident was not challenged. I accept it.
- [19] Ms. Bergeron was cross-examined on the stress in her life in the period prior to the April 16, 2015 accident. In 2014, she applied to the Ministry of Social Development and Social Innovation to be considered a person who faced persistent barriers. That application form noted that her primary medical condition was stress and her secondary medical condition was a depressed mood. Ms. Bergeron testified that she was stressed and sad, but she would not describe it as being depressed. She testified that she received counselling, mainly from the pastor at her church.
- [20] In addition to the stress relating to her ongoing litigation with Breanna's father and her relationship with Breanna, Ms. Bergeron testified that she experienced financial stress as a single parent raising three children. At the time of the trial, her twin sons, Benjamin and Zachary, were 21 and her younger daughter, Hannah, was 18. They have lived with Ms. Bergeron since her relationship with their father broke down. Ms. Bergeron also testified that Hannah experienced bullying at school and was undergoing counselling.
- [21] I find that prior to the April 16, 2015 accident, Ms. Bergeron experienced significant ongoing stress from these sources which caused her mood disturbance and caused her to seek counselling.

- [22] In January 2014, Ms. Bergeron was involved in a motor vehicle accident. She was driving and she was distracted by some unusual behaviour by her son. She entered an intersection on a yellow light which turned red while she was in the intersection and she collided with a car coming from the direction of the green light. She admitted that she was at fault for the accident. She testified that she was not injured in the accident and did not see a doctor afterward. I accept that she did not suffer any injuries in the January 2014 accident.
- [23] It is not disputed that in 2014, Ms. Bergeron began working for Delta Hotels at its Burnaby hotel as a server. Her first position was working at banquets which involved setting up and tearing down the dining area and serving at the meals. Ms. Bergeron testified that in April 2015, before the April 16, 2015 accident, she obtained a serving position at the restaurant in the hotel. That restaurant is now called Atlas Steak and Fish. At present, she works as a server at Atlas Steak and Fish.

Between the April 16, 2015 Accident and the April 23, 2017 Accident

- [24] The April 16, 2015 accident took place at the intersection of King George Highway and 102 Avenue in Surrey, BC. The parties agree that Ms. Bergeron was on King George Highway, stopped at the intersection when an articulated bus driven by Mr. Malloy collided with her vehicle, a 1993 Chevrolet Venture, from behind. Ms. Bergeron testified that her ankle twisted during the impact, her body went forward, and her neck came up. Ms. Bergeron testified that she got out of her vehicle and spoke to Mr. Malloy. She told him that her ankle was sore. Ms. Bergeron and Ms. Malloy removed their vehicles from the roadway and exchanged information. Ms. Bergeron testified that at the scene, the only pain she felt was to her ankle. She agreed that she told Mr. Malloy that she was okay except her ankle.
- [25] Mr. Malloy testified that he stopped the bus he was driving behind Ms. Bergeron's vehicle but an alarm in his vehicle went off as he was stopped and as he tried to turn it off, his foot slipped off the brake causing the bus to move forward and nudge Ms. Bergeron's vehicle. He described minor damage to her bumper. The agreed facts are that Ms. Bergeron's vehicle was declared a total loss and the repairs totalled \$310.41.
- [26] I do not need to decide the severity of the impact because the Coast Mountain Bus Company does not argue that the April 16, 2015 accident could not have caused the injuries Ms. Bergeron claims but, rather, that the headaches were pre-existing, she does not have thoracic outlet syndrome and her soft tissues injuries are mostly resolved.
- [27] Ms. Bergeron testified that during the evening of April 16, 2015, she developed a headache and stiffness in her neck. She testified that the ankle pain went away after five days. She had intermittent headaches over the next several days and the left-sided neck stiffness and pain became prominent. She testified that she also developed numbness in her left arm and over time she developed numbness in her left baby finger and left ring finger. She testified that she had pain in her left rib cage and in her left arm, shoulder, and upper back. The pain in her neck and her headaches were so intense that she felt that could not turn her neck.

- [28] Ms. Bergeron testified that for several months after the April 16, 2015 accident, she had pain on the left side of her neck where it meets her head. She missed work for the rest of April and May 2015 and returned to work in June 2015 on a gradual basis. She returned to full-time duties in October 2015. She testified that she was stressed about income reduction and felt like her graduated return to work happened too quickly but she had no choice.
- [29] Ms. Bergeron testified that in 2016, she was feeling better and was able to be active through walking. I infer from her evidence that her pain and intermittent headaches persisted but their intensity and frequency decreased such that she was able to move without intense pain and that her rib and back pain resolved. She testified that in early 2017, she started to notice improvement to her neck and shoulder pain and her headaches with the physiotherapy course she underwent. However, she continued to experience these symptoms from time to time as well as tingling and numbness in her left arm and outer two fingers on her left hand up to the time of the April 23, 2017 accident.
- [30] The Coast Mountain Bus defendants did not cross examine Ms. Bergeron on her description of her pain and headaches after the April 16, 2015 accident, except whether the pain and headaches started on the day of the accident and to confirm that she saw her family doctor four or five days after the April 16, 2015 accident. I accept Ms. Bergeron's evidence about her symptoms and their progression.
- [31] Ms. Bergeron testified that after the April 16, 2015 accident, her patience has decreased, she needs more rest and she socializes less. Ms. Bergeron also testified that the April 16, 2015 accident caused her stress about whether she could keep working to her physical job and how she would earn a living to support her children and herself if she cannot work.

The April 23, 2017 Accident to Trial

- [32] The parties agree that on April 23, 2017, Ms. Bergeron was stopped at a red light at 140th Avenue and 100th Street in Surrey, BC. She was hit from behind by the vehicle driven by Mr. Notay. Ms. Bergeron testified that the impact was hard. The cost of repairing her vehicle was \$490.80. The Notay defendants did not lead any evidence to contradict this evidence and I accept it.
- [33] Ms. Bergeron testified that she felt her neck jolt during the April 23, 2017 accident and she felt pain in her neck immediately after. She developed a headache that evening. She testified that after the April 23, 2017 accident, her headaches came back "with full vengeance". In the several days following the April 23, 2017 accident, she could not move her neck and she had pain in her rib cage, both shoulders, left arm, and back. After this accident, she had pain on both sides. The right-side pain subsided reasonably quickly but her left-side pain was worse for several weeks, including pain where her neck meets her head and in her left arm.

- [34] Dr. Laifer testified that after the April 23, 2017 accident, she wrote a note indicating that Ms. Bergeron would be off work from April 24, 2017 to May 15, 2017 to recover from her injuries. On May 1, 2017, she wrote a note stating that Ms. Bergeron could return to work two shifts per week. Ms. Bergeron did not testify as to what full shifts she missed due to the April 23, 2017 accident, when her graduated return to work commenced, and when she returned to full duties.
- [35] Ms. Bergeron testified that for the balance of 2017 she continued to have pain in her upper back, neck, left arm, and she has headaches. She testified that she continues to have these symptoms and certain activities cause flare-ups. She described flare-ups when she attended her sons' graduation ceremony and sat with her head at an angle and after a drive to Osoyoos for a wedding. She testified that heat and showers help her back and she takes Tylenol #2 and Extra Strength Tylenol to take the edge of the pain. She attends physiotherapy and uses a Theracane, a cane with a ball on the end, to massage her sore soft tissues. She testified that walking stretching and resting also help.
- [36] I infer from her descriptions that her symptoms have improved and she has longer periods of reduced pain and longer periods without headaches than in the periods after each of the accidents.
- [37] The Notay defendants did not cross-examine Ms. Bergeron on her description of her pain and headaches after the April 23, 2017 accident but they challenge her evidence that most of her missed days at work are due to her accident injuries. I will address this further below.

Medical Evidence

Use of clinical records

- [38] During the trial, counsel for the defendants objected to Ms. Bergeron tendering the the clinical records of Dr. Laifer as an exhibit but did not have submissions supported by legal authority prepared to support the objection. I allowed them to be introduced into evidence and advised counsel I would hear submissions on the use to which they could be put as part of closing submissions.
- [39] In *Cunningham v. Slubowski*, 2003 BCSC 1854, Madam Justice MacKenzie discussed the use of clinical records in personal injury trials. Citing *McTavish v. MacGillivray* (1997), 38 B.C.L.R. (3d) 306 (S.C.) at para. 10, she noted that if they are to be admitted into evidence for the proof of their contents, they must qualify as business records under the Evidence Act, R.S.B.C. 1996, c.124. The requirements are that they were made contemporaneously by someone having personal knowledge of the things being recorded having a duty to make the notes as a part of the usual and ordinary course of business. If they meet such requirements, a statement that a diagnosis was made is admissible, as are recorded observations. However, the opinions of consulting doctors or others that may be included in the bundle of clinical records are not admissible for the proof of their contents unless they are independently admissible as business records and the party seeking to rely on them has given notice of any

opinions. If the records are not admitted as business records, they can be used to cross examine the plaintiff (on credibility or to establish an admission against interest) or the maker of the records. The maker of the records can also use them to refresh his or her memory at trial.

- [40] In *Seaman v. Crook*, 2003 BCSC 464, Mr. Justice Metzger added that the records can be used to cross examine a medical expert called by either party to establish that the expert relied on a statement made by the plaintiff or disregarded or failed to consider a statement made by the plaintiff. In addition to the uses for cross examination, Metzger J. confirmed that per s.42(2) of the Evidence Act and cases interpreting it, factual observations, recommendations for treatment and diagnoses recorded in clinical records are admissible for proof that they were made but any opinions are not admissible for their truth. Clinical records cannot be used to bypass the requirements for giving notice of expert opinion and tendering that opinion evidence in the form prescribed by the rules of court.
- [41] The records cannot be used by the party making a statement to a medical care provider to prove that the statements were made or were true absent demonstrated need for the declarant to rely on the records such as "impaired memory caused by the passage of time or some other legitimate excuse": *Samuel v. Chrysler Credit Canada Ltd.*, 2007 BCCA 431. In *Samuel*, the Court also considered and affirmed the principles set out in *Seaman*.
- [42] The defendants assert that the clinical records should not have been submitted to the court. They assert that the court can rely on the evidence from their cross examination of the plaintiff on the records without the records in evidence as the questions asked and the answers given are the evidence. That is a correct statement, but it bears mentioning that unless a transcript of the evidence is provided to the trier of fact at the conclusion of the trial, the ability for that evidence to be meaningful is limited unless the records on which the oral examination has been conducted are marked as an exhibit for identification.
- [43] In addition, clinical records are routinely provided to expert witnesses for review at the time they prepare their reports setting out their opinions. That does not make them admissible other than in accordance with the principles set out above, but it does mean that care must be taken by the party tendering the report to prove the facts that they seek to rely on that are set out in the clinical records, either through permissible uses of clinical records or otherwise, see: *Sandhu v. Braich* (1991), 61 B.C.L.R. (2d) 273 (C.A.) at para. 49.
- [44] In this case, the records were tendered during the evidence of Dr. Laifer who testified as fact witness about Ms. Bergeron's medical history and her treatment for the injuries she asserts she sustained in the April 16, 2015 accident and the April 23, 2017 accident. Ms. Bergeron did not seek to prove her case through the clinical records other than in accordance with the permissible uses as outlined above and I will only use them in accordance with the permissible uses outlined above.

Weight to be given to Dr. Chu's report

- [45] Ms. Bergeron led the evidence of Dr. Chu who prepared a report and attended court for cross examination. The defendants did not object to his qualifications to give the opinion evidence tendered or to the admissibility of his report. The cross examination focussed on the form of the report and, in particular, that Dr. Chu did not clearly delineate the facts that he received from Ms. Bergeron, the facts that he observed on his physical examination, the facts that he gleaned from his review of the documents, and the opinions that he gave. The report does contain sections that delineate between these matters and, in particular, appendices that set out what she told him under the headings pre MVA history, post-MVA history, present complaints, tests and treatments and medications, an appendix that describes the physical examination, and an appendix that lists the documents reviewed. During cross examination, Dr. Chu agreed that the main part of his report co-mingled some of what Ms. Bergeron told him with his observations and opinions.
- [46] The defendants assert that for this reason, Dr. Chu's report should be given little or no weight relying on *Maras v. Seemore Entertainment Ltd.*, 2014 BCSC 1109, in which Mr. Justice Abrioux, then of this court, addressed the admissibility of several expert reports in an upcoming civil jury trial. Mr. Justice Abrioux explained that the rule regarding the format of expert reports requires delineation between facts and opinions and criticized the use of appendices instead of putting all facts that are relevant to the opinion in the body of the report. In this regard, Abrioux J. differentiated between types of appendices, some of which he described as useful. He also decried long appendices that doubled or tripled the length of the report. Mr. Justice Abrioux ruled that some reports were inadmissible, he required some to be rewritten and ruled that others were admissible in their current form.
- [47] In this case, the report has seven pages of text followed by five pages of appendices. Dr. Chu concluded the report on page 12, where his signature appears after the last appendix. Accordingly, the report does not raise the concern that arises when the report is divided into a report and appendices, but the appendices are not part of the report that the expert has signed. Nor are these appendices unduly long compared to the report. The format of this report is simply that the description of some of the matters is under headings that include the label of an appendix and contain more detail on what has been summarized in other sections of the report.
- [48] The defendants do have a valid complaint that in some places, in the facts and assumptions section, Dr. Chu, also gives his opinion. For example:

There are also some secondary headaches into the left occiput or back of the head. I think that is a secondary problem to the neck pain . I think the tightness in the muscles probably are irritating the big nerve that passes through that area called the greater occipital nerve and that is probably triggering migraine headaches.

- [49] Dr. Chu repeats the substance of this opinion in his opinion section which is headed "Diagnostic Impression."
- [50] In my view, the reader of the report can understand what Dr. Chu proffers as opinion, what he records as facts that he was told by Ms. Bergeron, what facts he observed and what facts came from his review of records. He did not place every sentence under the correct heading, and there is some duplication of facts that should have been avoided by setting out all of the facts, organized by their source, in one section with subheadings. Given the minor nature of those drafting infractions, I am not persuaded to limit the weight I give to his opinions.

Neck, Back and Rib Pain

- [51] Dr. Chu opined that Ms. Bergeron suffered an injury to the left C2-3 facet joint in her neck which has caused chronic pain that radiates from the left side of her neck into her left shoulder and left arm. He based that finding on her description of her pain and his examination of her which included palpating over the C2-3 facet joint and jamming the area with hyperextension movements and rotation movements, both of which recreated the pain. He is of the opinion that due to the injury to this joint, the muscles nearby tense to guard the area of the injury and overtime that pain has spread to cause chronic myofascial pain syndrome in the areas of her left neck and shoulder girdle. He is also of the view that the headaches she has are from pain in her neck radiating into her head on the left side.
- [52] Dr. Jonathan Hummel, an orthopedic surgeon, examined Ms. Bergeron at the request of the defendants. He had Dr. Chu's report when he did so. Dr. Hummel opined that Ms. Bergeron suffered soft tissue injuries to her neck and that she appears to have a shoulder impingement on the left side which needs to be investigated (he did not say how nor did he say why he did not attempt to diagnose it). He did not comment on Dr. Chu's diagnosis of a C2-3 facet joint injury as the source of neck pain. He did not comment on whether Ms. Bergeron's pain is chronic or give an opinion as to whether it will resolve. He anticipates flare-ups.
- [53] With regard to the source of the ongoing neck pain, I prefer the opinion of Dr. Chu because he states the reason he has formed the opinion, i.e., that he was able to recreate the pain when he jammed the joint. I accept Dr. Chu's opinion that this mechanical injury has in turn caused chronic myofascial pain in Ms. Bergeron's left neck and shoulder girdle and headaches.
- [54] Dr. Chu also opined that Ms. Bergeron suffered a facet joint injury to her L5-S1 joint which causes pain in her low back radiating into her left hip, but which is much less painful and less functionally disruptive than her neck pain.

- [55] Ms. Bergeron did not testify at trial about low back pain or hip pain. She testified about upper back pain and occasionally referred to her back pain without a location descriptor, for example, she testified that walking helped with her back pain. I inferred she was talking about her upper back because she did not specifically mention pain anywhere else in her back.
- [56] The defendants assert this is an issue with the credibility of Ms. Bergeron's evidence or the persuasiveness of Dr. Chu's opinion. I do not accept that it raises a credibility issue with Ms. Bergeron because she testified that she had back pain even though she testified about upper back pain. I also do not accept that it puts a cloud over Dr. Chu's report. He gave his opinion based on the information he was given and the examination he conducted. Neither Ms. Bergeron nor Dr. Chu were questioned about the difference between what she told Dr. Chu and what she testified about at trial so if there is an explanation for this mismatched evidence, it was not provided.
- [57] However, Dr. Chu's opinion is, in part, based on assumed facts that have not been proven, i.e.: that she developed low back and hip pain following the April 16, 2015 accident. For that reason, I do not accept his opinion that she has low back pain caused by the April 16, 2015 accident or the April 23, 2017 accident. I conclude that Ms. Bergeron had pain in her upper back and ribs caused by the April 16, 2016 accident which resolved before the April 23, 2017 accident. She suffered a new onset of similar symptoms after the April 23, 2017 accident which resolved within a few months of that accident.

Thoracic Outlet Syndrome

- [58] Dr. Chu and Dr. Hummel both described thoracic outlet syndrome as a condition in which there is compression or irritation of parts of the brachial plexus, a bundle of blood vessels and nerves that run down the arm. The compression occurs in an area called the scalene triangle, where the scalene muscles supporting the neck adjoin the first rib. The compression occurs because the muscles are tight. They both testified that there are two main types, the first where there is nerve compression (neurogenic) and the second where there is artery or vein compression (arterial). Neurogenic is the most common and in most neurogenic cases, the compression of the nerves is not constant and the symptoms come and go. Dr. Hummel testified that this can make the diagnosis difficult and contentious because sometimes it cannot be reproduced in the clinical setting. He called these "disputed" diagnoses.
- [59] Dr. Chu testified that there are no laboratory or radiological tests that assist in diagnosing neurogenic thoracic outlet syndrome. Dr. Hummel testified that where the compression of the nerve is constant, which is rare, the diagnosis can include the appearance of the hand and arm because it changes appearance when the nerve is constantly compressed. They both testified that in cases where the compression is not constant, the diagnosis is based on manipulating the arms to try to reproduce the symptoms. Dr. Chu also testified that the location of the symptoms is important because if the numbness and tingling is in the fifth

and/or fourth fingers, thoracic outlet syndrome is more likely to be the culprit than another source of nerve compression due to the positions of the scalene muscles and the brachial plexus.

- [60] Dr. Chu testified that he conducted thoracic outlet impingement tests and could reproduce symptoms on the left side including pain in the left arm and sensory changes in the fourth and fifth fingers of Ms. Bergeron's left hand. He testified that he used the elevated arm test and Addison's test. Using these tests, he produced symptoms in Ms. Bergeron's left arm and hand but not her right. That, combined with the fact that the symptoms were predominantly in her fourth and fifth fingers, are the bases for his diagnosis of thoracic outlet syndrome.
- [61] Dr. Hummel testified that he examined Ms. Bergeron for thoracic outlet syndrome. He testified that there are several tests, and he did one during which Ms. Bergeron held her arms above her head and clenched and unclenched her fists to see if the symptoms of thoracic outlet syndrome appeared. They did not. Because of the disputed nature of thoracic outlet diagnosis, Dr. Hummel testified that while he could not reproduce the symptoms of thoracic outlet syndrome, he did not rule it out.
- [62] Based on the evidence of both Dr. Chu and Dr. Hummel, in particular that Dr. Chu reproduced symptoms of thoracic outlet syndrome and those symptoms are more likely caused by thoracic outlet syndrome than anything else, I conclude that Ms. Bergeron's symptoms of pain and tingling in her left arm and fourth and fifth fingers of her left hand are caused by thoracic outlet syndrome.
- [63] Ms. Bergeron's evidence about the frequency and effect of these symptoms was not extensive. She did not provide any examples of activities of daily living, work, recreational pursuits or social pursuits that are impacted by these symptoms. Viewed as part of her evidence as whole, these symptoms are not as significant as the pain and headaches associated with the left side of her neck.

Mood Changes and Driving Anxiety

- [64] Ms. Bergeron testified that after both accidents, she is hyper-alert when driving, especially at stop signs. She testified that she drives less. She did not give any examples of things she had not done due to driving anxiety. Her evidence was that she drives to work and back and drives for shopping, but her sons help her out if she needs things.
- [65] The defendants argue that Ms. Bergeron's driving anxiety began with the January 2014 accident, not the April 16, 2015 accident. Ms. Bergeron disputes that. She testified that she had no driving anxiety before the April 16, 2015 accident. She testified that the January 2014 collision was extremely light such that a baby in a car seat in the back of the other car did not awaken. She said her reaction to that accident was about her son's behaviour leading up to it because it was so out of character for him. She explained that she was not hurt in that accident so it did not cause her anxiety. Although that makes some logical sense, she did not testify as to when her driving anxiety came on in relation to the April 16, 2015 accident or

the April 23, 2017 accident. She just used the phrase "after the accidents".

- [66] Ms. Bergeron testified that she is less happy than prior to the accidents and that she is less patient around her children. Her daughter, Hannah Karlberg-Bergeron, testified that her mother's patience has diminished, but she did not provide details of a marked change. I consider this evidence against the evidence that Ms. Bergeron made the application for social assistance as a person facing persistent barriers one year prior to the April 16, 2015 accident based on primary diagnosis of stress, and a secondary diagnosis of depressed mood, ongoing for 18 years. She has not had any treatment subsequent to the April 16, 2015 accident or the April 23, 2017 accident for anxiety, specifically driving anxiety, or any new treatment for stress or for a depressed mood.
- [67] I find that Ms. Bergeron de-emphasizes the prevalence of the stressors in her life other than the April 16, 2015 and April 23, 2017 accidents. Her submission that she had "just the stressors of being a single mom as well as menopause" does not fully account for the stress she was reporting to her doctors about her younger daughter's social issues and the ongoing litigation with her older daughter's father. I consider Ms. Bergeron's inaccurate de-emphasis to be "natural and excusable" as described by Mr. Justice Voith in *Sevinski v. Vance*, 2011 BCSC 892 at para. 42.
- [68] There is no medical evidence about mood disturbance. Ms. Bergeron points out that medical evidence is not required for the trier of fact, on the basis of all of the evidence, to find a mental injury: *Saadati v. Moorhead*, 2017 SCC 28 at paras. 37-38. In *Saadati*, the Supreme Court of Canada explained that the plaintiff must show that the "disturbance suffered by the claimant is 'serious and prolonged and rise[s] above the ordinary annoyances, anxieties and fears' that come with living in civil society", citing its earlier decision in *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27, [2008] 2 S.C.R. 114. Ms. Bergeron's evidence that she is less patient, has driving anxiety and less happy is not sufficient to prove a mood disturbance that is serious and prolonged.
- [69] I find that Ms. Bergeron has not proved that she has experienced mood changes since the April 16, 2015 accident including anxiety around driving. Instead I conclude that the driving symptoms are a manifestation of stress and pain. She finds driving painful due to her ongoing chronic pain and she must drive a significant distance to and from work four or five days a week. Since the accidents she has increased stress, specifically missing work, which is connected to her physical injuries and is connected to driving.

Causation

- [70] In a personal injury case, the plaintiff must establish on a balance of probabilities that the defendant's negligence caused or materially contributed to an injury: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 13. The primary test for causation is the "but-for" test: but for the defendant's negligence, would the plaintiff have suffered the injury: *Athey* at para. 14; *Resurfice Corp. v. Hanke*, 2007 SCC 7 at paras. 21-23.

- [71] Where there are both tortious and non-tortious causes of injury, the defendant is liable so long as the defendant's conduct is a cause of the plaintiff's damage. The plaintiff must establish such causation on a balance of probabilities before damages are assessed: *Blackwater v. Plint*, 2005 SCC 58 at para. 78. There must be a substantial connection between the injury and the defendant's conduct, however, the defendant's negligence need not be the sole cause of the injury, provided that the plaintiff proves the accident was a cause of the injuries beyond the de minimus range: *Athey*, at paras. 17-20; *Farrant v. Laktin*, 2011 BCCA 336 at para. 9.
- [72] The defendants do not address causation directly. They jointly submit that Ms. Bergeron has suffered soft tissue injuries as a result of the April 15, 2015 accident and that she did not sustain any "new" injuries in the April 23, 2017 accident. It is unclear whether the submission that she did not suffer any new injuries in the April 23, 2017 accident is a denial that the April 23, 2017 accident is a cause of the soft tissue injuries they concede. They state that Ms. Bergeron missed some work from both accidents. This appears to be a concession that both accidents were but-for causes of injuries that resulted in past wage loss. They do not make any specific submissions about causation in relation to thoracic outlet syndrome.
- [73] Despite the the lack of clarity around the defendants' positions on causation, it is Ms. Bergeron's burden so I will address it as though causation is in issue.
- [74] The defendants have conceded that Ms. Bergeron suffered soft tissue injuries in the April 16, 2015 accident. I conclude that the accidents caused soft tissue injuries to her neck, shoulder, upper back and ribs. The upper back and rib injuries resolved. I conclude the neck soft tissue injuries have become chronic myofascial pain and developed due to a facet injury to her C5-6 neck joint which also caused secondary headaches. I conclude that Ms. Bergeron has proved that the April 16, 2015 accident was a but-for cause of these injuries. Based on Ms. Bergeron's evidence that the symptoms associated with these injuries worsened for a period of time after the April 23, 2017 accident, which evidence I accept, and the concession that she missed work from both accidents, I conclude that Ms. Bergeron has proved that the April 23, 2017 accident aggravated her neck injury, her chronic myofascial pain and her headaches which are secondary to the neck injury. I conclude that the April 23, 2017 accident is more than a de minimus cause of Ms. Bergeron's ongoing injuries.
- [75] With regard to stress, I find that prior to the April 16, 2015 accident Ms. Bergeron had substantial longstanding stress. Ms. Bergeron testified that when her relationship with Breanna was re-established when Breanna was 17 (in 2010), she felt less stress. However, in 2014, her doctor reported a primary diagnosis of stress and a secondary diagnosis of depressed mood that had been prevalent since 1996. The ongoing and outstanding litigation with Breanna's father was and is a significant source of stress. She had ongoing significant financial pressures. For these reasons, I do not accept that Ms. Bergeron's pre-existing stress had dissipated prior to the April 16, 2015 accident.

- [76] I find that the April 16, 2015 accident exacerbated stress, particularly in the financial sense, as it made Ms. Bergeron feel more financially vulnerable because her injuries affect her ability. Ms. Bergeron testified and I accept, that after the April 23, 2017 accident, her stress was very acute because she felt a lot of uncertainty around her future working life due to the aggravation of her injuries.

Damages

- [77] The fundamental principle of compensation in personal injury cases is that a plaintiff should receive full and fair compensation, calculated to place him or her in the same position had the tort not been committed, insofar as this can be achieved by a monetary award: *Lines v. Gordon*, 2009 BCCA 106 at para. 167, citing *Ratych v. Bloomer*, [1990] 1 S.C.R. 940 at 962-63.
- [78] This principle is accomplished by awarding damages for pecuniary loss in the amount reasonably required to permit a standard of living and day-to-day functionality that, to the extent possible, approximates what the plaintiff would have experienced but for the wrong they were subjected to. Non-pecuniary damages are assessed to compensate for pain, suffering, and loss of enjoyment of life prior to trial and for the future having ensured that the pecuniary losses are appropriately compensated and will not erode the non-pecuniary damages.

Non-pecuniary damages

- [79] Ms. Bergeron submits that the award for pain, suffering and loss of enjoyment of life should be in the range of \$85,000 to \$100,000 to address her soft tissue injuries, headaches, chronic pain and thoracic outlet syndrome.
- [80] The defendants submit that the soft tissue injuries have resulted in minor interruptions and limits on Ms. Bergeron's functionality and recreational pursuits. They submit that an award between \$48,000 and \$65,000 is appropriate.
- [81] In *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46, the Court of Appeal set out a non-exhaustive list of factors to consider when assessing non-pecuniary damages: age of the plaintiff; nature of the injury; severity and duration of pain; disability; emotional suffering; loss or impairment of life; impairment of family, marital and social relationships; impairment of physical and mental abilities; loss of lifestyle; and the plaintiff's stoicism.
- [82] It is typical for courts to consider cases in which the plaintiff suffered similar injuries. Such cases guide the assessment, but should not be used to develop a "tariff" for injuries of a certain type because similar injuries may not have similar consequences for the injured person: *Lindal v. Lindal*, [1981] 2 S.C.R. 629 at 637.

- [83] The neck pain and headaches that Ms. Bergeron has endured and continues to endure have affected her most significantly in her ability to work and the associated financial stress. She testified, and I accept, that after the April 16, 2015 accident she went back to work on a graduated basis before she felt ready because she could not afford to stay off work. She testified, and I accept, that after her graduated return to work, she left shifts without completing the hours she was scheduled to work on occasions when the restaurant was not busy and the shift supervisor asked someone to volunteer to go home. She did not have to do this, and has the seniority to refuse to be the person to go home early, but she would volunteer because she was often in increasing pain during her shifts. She testified, and I accept, that after she exhausted her sick days in a given year, she used vacation days to take time off, or had other workers cover her shift in which case she was not paid for the shift.
- [84] Ms. Bergeron testified that her focus was on raising her children and her interest in assisting other parents who need to have supervised visits with their children, which I understand to be related to her experience with Breanna. She testified about the support she receives from her pastor, and I understand that religion is an important part of her life. She testified that she would jog and take long walks, and while she is able to walk her dog now, and walking improves some of her symptoms, she is not able to jog. Ms. Bergeron testified that before the accidents, she enjoyed visiting with family members such as her aunt and uncle which she does not do as often now because of the pain she experiences when driving and sitting in one place. She testified that she does not socialize as much with her co-workers as she used to. They will often gather for a meal or a drink after work but she does not join in as much because she is worn out from the pain or because she leaves her shifts early due to the pain. She testified that there was a bowling event recently that she did not attend because she knew that bowling would cause a potential flare-up of her symptoms. She has attended the Atlas Steak and Fish Christmas party each year.
- [85] Marina Sokoloskaia is a friend and co-worker of Ms. Bergeron. She testified that Ms. Bergeron was a crazy, outgoing and funny prior to the accidents but she is not the same, and does not appear to be as happy as she was. She testified that she and Ms. Bergeron walked their dogs together four or five times per week before the April 16, 2015 accident for about an hour at a time. She testified that they have not done so since the accidents. Ms. Sokoloskaia's daughter was married in Osoyoos in July 2019. Ms. Bergeron testified that the drive to Osoyoos caused a significant flare-up because of the time driving with her head at a fixed angle to avoid the glare of the sun. Ms. Sokoloskaia testified that it was obvious that Ms. Bergeron was not able to enjoy herself in Osoyoos and did not, for example, participate in the wine tastings organized as part of the wedding weekend. Ms. Sokoloskaia also testified that while Ms. Bergeron is working, she holds her body differently and appears in pain. She testified that Ms. Bergeron does not socialize with others after her shifts as she used to.
- [86] Mr. Michael Leschied is a co-worker and the server with the most seniority at Ms. Bergeron's workplace. He testified that he met Ms. Bergeron when she started working for Delta Hotels and he found her to be a bubbly and outgoing person. Mr. Leschied testified that after the

April 16, 2015 accident, Ms. Bergeron seemed to have good days and bad days. On bad days, her personality was different. He described her as less outgoing. After the April 16, 2015 accident, she held her body stiffly and turned her whole body when she moved. He also testified that she needs help doing some of their usual duties involving bending, lifting and carrying.

- [87] Hannah Karlberg-Bergeron testified that before the April 16, 2015 accident, her mother was positive and happy. She testified that after the April 16, 2015 accident, her mother had trouble getting comfortable when sitting and she lost a bit of her patience with Hannah and her brothers. She testified that she observed her mother being very uncomfortable after the April 23, 2017 accident. She observed her mother moving between the couch and her bed, trying to find a comfortable position. She testified that Ms. Bergeron used to keep their house sparkling clean but cannot do much housework and so Hannah does more.
- [88] I find as follows in relation to the Stapley factors. At the time of the April 16, 2015 accident, Ms. Bergeron was 49 years old; she was 51 years old at the time of the April 23, 2017 accident. She was a vibrant, busy single mother, with many years of work ahead of her. Her chronic pain is a significant injury and the headaches she suffered were debilitating when they were at their most intense. She has pain regularly, it increases with activity and it increases while she works. She has to work because of her tight finances. She does not work as many shifts as she is scheduled to work, and has used vacation time to take days off so her pain is manageable. She cannot avoid some activities that make the pain worse. The injuries have significantly interfered with her household duties in which she took pride. The pain makes it difficult for her to be comfortable and has made her less patient with her children. The pain has moderately interfered with her socialization and modestly interfered with recreational pursuits. Ms. Bergeron's thoracic outlet syndrome symptoms do not affect to her functionality the way her chronic pain and recurring headaches do, nevertheless they are an aspect of her chronic injuries that are deserving of compensation.
- [89] Ms. Bergeron has spent a significant amount of time seeking and receiving treatment for her chronic pain and headaches. She had several visits with her family doctor, 162 physiotherapy sessions, a handful of massage therapy sessions, active rehabilitation sessions and trigger point injections.
- [90] Ms. Bergeron relies on *Clark v. Kouba*, 2012 BCSC 1607; *Hrnic v. Bero Investments Ltd.*, 2018 BCSC 1880; *Gillam v. Wiebe*, 2013 BCSC 565; and *Sharma v. MacDonald*, 2017 BCSC 2121.
- [91] In some of these cases, such as *Sharma* and *Hrnic*, the plaintiffs had psychiatric conditions that were the subject of medical evidence at trial and that were more serious than the exacerbation of pre-existing stress that Ms. Bergeron suffered due to the accidents. Some of Ms. Bergeron's cases seem to be about more severe chronic pain than that which Ms. Bergeron has proven. For example, in *Sharma*, the plaintiff was a 23 year old who could not work as a registered nurse due to her chronic pain.

- [92] The defendants rely on *Nagra v. Stapleton*, 2017 BCSC 2225; *Clubine v. Paniagua*, 2018 BCSC 146; *Young v. Shao*, 2018 BCSC 2017; *Dhaliwal v. Randhawa*, 2016 BCSC 2005; and *Ohri v. Aminie*, 2020 BCSC 270.
- [93] The defendants' cases generally describe less serious injuries than those proven by Ms. Bergeron. For example, in *Nagra*, while the plaintiff's physiatrist, Dr. Waseem, diagnosed chronic myofascial pain, Mr. Justice Cole tempered that opinion because he did not believe the plaintiff's evidence. He found the plaintiff's injuries were mild to moderate, did not interfere with his work, and were temporary. In *Clubine*, the plaintiff based his inability to work due to his accident injuries on the fact that no doctor had told him that he could work. This affected Madam Justice Watchuk's assessment of how serious his ongoing injuries were. In *Ohri*, the sole injury that persisted was a shoulder injury.
- [94] The cases that are the most similar are *Clark* (\$96,000 adjusted for inflation) and *Dhaliwal* (\$70,000 adjusted for inflation).
- [95] Having considered the *Stapley* factors and the caselaw, I assess non-pecuniary damages at \$85,000.

Loss of Earning Capacity

- [96] As described above, about a year prior to the April 16, 2015 accident, Ms. Bergeron began working for Delta Hotels first as a server at banquets, and then, shortly before the April 16, 2015 accident, as a server in the hotel restaurant.
- [97] As a banquet server, the hosts paid the gratuity as part of the booking fee and the servers' salary included the gratuity. In the restaurant, the gratuity is at the option of the guest and is collected by the server who shares it with other staff. The issue of the quantum of tips she earned is disputed and I will address it below.
- [98] I accept Ms. Bergeron's evidence that just prior to the April 16, 2015 accident, she was offered a position as a full-time server in the restaurant. Although the human relations manager, Nicole Mascardo, testified that after the April 2015 accident Ms. Bergeron was a part time employee, I accept that was because Ms. Bergeron was unable to fill the full time position she had accepted because of the April 16, 2015 accident. Ms. Bergeron was off work until June 2015. When she returned, she worked part-time evening shifts in the restaurant. By 2016, Ms. Bergeron was second in seniority in the restaurant and was able to choose what shifts she would work and work full time if she chose.
- [99] Ms. Mascardo testified that a full-time employee works a minimum of 28 hours per week. Shifts can often be shorter than 8 hours, and perhaps 5 hours, if the restaurant is not busy. Ms. Mascardo has reviewed the records and estimated that in 2015, during Ms. Bergeron's gradual return to work she missed 80-100 hours of work. She estimates that in 2017 Ms. Bergeron missed 25 hours of work in the period following the April 23, 2017 accident including her graduated return to work.

[100] Ms. Bergeron testified that the job is physical in that it requires the server to be on her feet all shift, sometimes moving tables and chairs and lifting pallets of glasses, boxes of food and carrying large platters containing drinks or plates loaded with food. Her co-workers and fellow servers, Ms. Sokoloskaia and Mr. Leschied testified that the work is very physical and requires constant lifting, carrying and walking. Mr. Leschied testified that Ms. Bergeron asks for help lifting trays or racks of glasses and with polishing cutlery.

Past

[101] It is not disputed that Ms. Bergeron took time off work followed by a graduated return to work due to her injuries after both accidents. Ms. Bergeron testified that she also left shifts without completing the hours she was scheduled to work on occasions when the restaurant was not busy and the shift supervisor asked someone to volunteer to go home. She had the seniority to refuse to be the person to go home early, but she volunteered to leave early because she was often in increasing pain during her shifts. She testified that after she exhausted her sick days in a given year, she used vacation days to take time off, or had other workers cover her shift which she was permitted to do, but would not be paid for the shift. I accept this evidence.

[102] However, Ms. Bergeron did not testify as to how many unduly short shifts she worked, what days she took off as sick days and what days she took off as vacation days due to her accident injuries. She was unable to recall and she did not track those missed shifts or shortened shifts when they occurred. Ms. Bergeron estimated that 90% of her sick days and vacation days were due to her injuries.

[103] Ms. Bergeron submits that her past income loss should be assessed based on the pay she received in the years following the accident compared to the average pay she received prior to the accident, plus tips for 90% of her sick days. Ms. Bergeron uses \$75 per sick day for the tips she lost, on the basis of evidence from Mr. Leschied that tips range between \$100 on a slow day to \$300 on busy days, less the amount that the servers "tip out" to other staff. Based on this approach, Ms. Bergeron seeks an award of \$29,125 to \$44,125.

[104] The Coast Mountain Bus Company defendants and the Notay defendants agree that Ms. Bergeron had time off work due to her injuries from both accidents but they also submit that she has not proven that the sick days she used were due to her accident injuries and that the use of vacation days is not compensable. They submit that her past loss compensable damages are between \$1,738.14 and \$2,161.14, including tips calculated at 10-15% of gross earnings, and before statutory deductions. These amounts are calculated based on Ms. Mascardo's evidence as to the hours Ms. Bergeron missed during her absence from work and graduated returns to work after both accidents.

[105] As with all personal injury compensatory damages, past loss of earning capacity is intended to restore the plaintiff to the position she would have been in but for the defendant's negligence. For past loss, the question is what the plaintiff could have earned based on real

and substantial possibility: *Hardychuk v. Johnstone*, 2012 BCSC 1359 at para. 175 citing *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141; *M.B. v. British Columbia*, 2003 SCC 53; *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144. The damages are assessed, not calculated.

- [106] The burden of proof regarding actual past events is the balance of probabilities. However, some of the facts pertaining to past loss of earning capacity may be actual and others may be hypothetical. For example, what the plaintiff earned between the accident and trial is an actual fact subject to proof on the balance of probabilities while what the plaintiff could have earned absent the accident is a hypothetical fact that can be established based on demonstrating real and substantial possibility: *Hardychuk* at para. 177, citing *Athey*; *Falati v. Smith*, 2010 BCSC 465; *aff'd* 2011 BCCA 45. Allowances for contingencies should be made and the award must be fair and reasonable taking into account all of the circumstances: *Falati*.
- [107] The method proposed by Ms. Bergeron is consistent with the principle that the court assesses damages for past loss of capacity and does not calculate them mathematically. However, for past loss of earning capacity, Ms. Bergeron's approach sidesteps the shortcomings in her evidence in relation to her burden of proof. She should have been in a position to testify as to what days she took as sick days, vacations days, or switched shifts due to her accident injuries. It is not a difficult matter to track what days are lost due to injuries. By the time of the April 23, 2017 accident, Ms. Bergeron had commenced this claim (at the time of commencement it only related to the April 16, 2015) accident, and should have been alive to the fact that she was claiming for past wage losses and by then at least it should have been obvious that she needed to record them. Instead, she testified that she estimates that at least 90% of her sick days and vacation days were due to her accident injuries. On cross examination, she was asked about certain vacation days and sick days and conceded that they were not accident-related, undermining the confidence the Court can have in her estimate.
- [108] An additional problem with regard to sick days and vacation days is that Ms. Bergeron has not addressed the evidentiary threshold necessary to recover them. Where an employer pays an employee's wages when they are on sick days, the employee must prove that the employer is subrogated or that the employee has suffered a loss by using the sick days and vacation days. The defendants argue that vacation days that are taken as sick days are not compensable if the employee has been paid because there is no proven loss: *McCartney v. McArthur*, 2014 BCSC 2164 citing *Roberts v. Earthy*, 1995 Carswell BC 1800 (B.C.S.C.). The evidence of Ms. Mascardo is that each employee gets five sick days that reset each year. In other words, once the five sick days have been used, the employee is not paid for time off work and if the employee does not use all five in a year, they are not carried over to the next year.

- [109] The treatment of the use of sick days and vacation days in this court has varied. In *McCartney*, Mr. Justice Bowden declined to compensate for vacation days lost due to accident injuries on the basis that since the plaintiff was paid, there is no loss. In *Chingcuangco v. Herback*, 2013 BCSC 268 at para. 213, Mr. Justice Weatherill ordered compensation for depleted vacation days, on the basis that use of them for recovering from illness instead of for vacation is a loss. In doing so, he adopted the view of a loss described by Madam Justice Ballance in *Bjarnason v. Parks*, 2009 BCSC 48 at paras. 63-66.
- [110] Ms. Bergeron has led evidence, including from Ms. Mascardo, that proves that at certain times she was off work due to her accident injuries and the hourly rates she was earning as follows:
- a) 80-100 hours after the April 16, 2015 accident when she was off for four weeks due to her accident injuries and due to a reduction in hours during the period of her gradual return to work between June and October 2015, in accordance with the evidence of Ms. Mascardo which I accept, at which time she was earning \$15.04 per hour;
 - b) 25 hours due to the reduction in hours over her gradual return to work after the April 23, 2017 accident, in accordance with the evidence of Ms. Masacrdo which I accept, at which time she was earning \$15.80 per hour; and
 - c) a period in September 2019 after Ms. Bergeron went to Osoyoos for Ms. Sokoloskaia's daughter's wedding and suffered an exacerbation in her symptoms as a result of which she took vacation days in the weeks following so she could shorten her work week and rest. She took eight vacation days for that reason between late July 2019 and October 2019 amounting to 64 hours. Ms. Bergeron used all of her sick days in 2019, so I am satisfied that she has proven a loss in the sense that she was not able to use her vacation days for vacation but had to use them to address her accident injuries. In this regard, I adopt the articulation of loss described in *Chingcuangco* and *Bjarnason*. As of March 1, 2019, Ms. Bergeron was earning \$16.12 per hour.
- [111] The total that Ms. Bergeron has proven she lost due to her accident injuries is \$2,650-\$2,950 gross pay. In addition, Ms. Bergeron would have earned tips working those hours. Based on the evidence that she reported tips totalling 12%, 15%, 21.6% and 24.8% of her reported income on her 2015, 2016, 2017 and 2018 income tax returns respectively, I assess an additional 20% for tips, for a total of \$3,400 in pre-trial loss of earning capacity before statutory deductions.

Future

- [112] Ms. Bergeron submits that she will continue to have to take days off in excess of her allowed sick days and she has not been able to take advantage of the job opportunities which might otherwise have been available to her. Ms. Bergeron submits that an award in the range of \$20,000 - \$50,000 for future loss of earning capacity is appropriate.

- [113] The defendants submit that Ms. Bergeron has not discharged her burden to prove a real and substantial possibility of future income loss due to the accidents. In the alternative, they submit that if she has met her burden, her future income would be limited by other factors, such as meeting a spouse who would provide financial support. They submit that the award should be based on six months of gross income plus 10-15% for tips, amounting to \$12,000.
- [114] Assessing an award for loss of future earning capacity involves a comparison between the likely future of the plaintiff if the accident had not happened and the plaintiff's likely future after the accident has happened. The assessment requires a very fact-intensive, case-specific inquiry; comparator cases are of limited assistance: Gregory, at paras. 32-33.
- [115] There are two approaches used to quantify loss of future earning capacity, the earnings approach and the capital asset approach. The defining distinction between the approaches is the extent to which the loss is measureable: Hoy v. Williams, 2014 BCSC 234 at paras. 156-59. If there is little or no evidence of what the plaintiff's post-accident earnings will be, the earnings approach may not be appropriate. Although the earnings approach is more mathematical, both approaches are a matter of judgment, not "mere calculation": Hosseinzadeh v. Leung, 2014 BCSC 2260 at para. 126.
- [116] Both approaches involve a two-step process. First, the plaintiff must prove a real and substantial possibility that his or her earning capacity has been impaired: Perren v. Lalari, 2010 BCCA 140 at para. 32. Second, if the plaintiff discharges his or her burden of proof, the court turns to an assessment of damages. Allowances must be made for the contingencies that the assumptions upon which an award is based may prove to be wrong and the overall goal of the assessment is to be fair and reasonable: Falati.
- [117] With regard to the certainty around her working future, while Ms. Bergeron has ideas of other work she might do in the future, she also testified that she loves her job. Her financial situation requires her to work. There is no evidence that causes me to conclude that her financial situation will improve such that she will be able to pursue her other ideas. I do not agree with the defendants' argument that I should decline to make an award or apply a negative contingency because she may find a new partner that relieves her of the financial impetus to work. I find that it is likely she will continue working as a server until she retires. I find it likely that she will continue to take time off work to shorten her workweek when she has flare-ups.
- [118] The earnings approach is appropriate in this case because Ms. Bergeron has an established earnings pattern in a position in which she is likely to remain. Ms. Bergeron has proven a real and substantial possibility of future loss because both doctors opine that she is likely to continue to experience pain and/or flare-ups and because the evidence demonstrates that these flare-ups have caused her to miss work in the past. I accept that Ms. Bergeron has taken time off, even though she has not recorded it, to reduce her work weeks so that she can manage her pain, especially when she experiences a flare-up as she did in 2019. Based on the evidence in 2019, I conclude her loss will be in the range of \$1,500-\$2,500 per year

after tips, from now until her retirement. Given her financial circumstances, an award that assumes retirement at age 65 is reasonable. I assess her loss at \$20,000 prior to reduction for contingencies and the discount rate.

[119] I accept that the BC Civil Jury Instructions multiplier applicable to her age 65, a 1.5% discount, is appropriate. With regard to contingencies, the most obvious is that the 2019 experience either overstates or understates her future flare-ups and need to take time off, that she would not work to age 65 due to other health problems or would need to take time off work, above her allowed 5 sick days per year. In my view, given her age and her good health prior to the accident, a discount of 5% is appropriate.

[120] Taking all of this into account, I award \$19,000 for future loss of earning capacity.

Loss of Housekeeping Capacity

[121] Ms. Bergeron submits that before the April 16, 2015 accident, she was a particular and immaculate housekeeper. She submits that she is not able to do this work to the standard she previously did because it exacerbates her symptoms and because she needs the time between employment shifts to recover. She testified that her children have taken over her role to a certain extent. Hannah Karlberg-Bergeron testified that her brothers do not do much housework but she does a full house clean once per week, including the bathrooms, vacuuming and dusting. Ms. Bergeron testified that she gave Hannah extra spending money to compensate her for the extra work. Ms. Karlberg-Bergeron agreed on cross examination that her mother gives her extra spending money because her needs have increased. I do not consider this to be a significant discrepancy in evidence.

[122] Ms. Bergeron claims \$30,000-\$50,000 based on the evidence that this work takes about seven hours per week and is valued at about \$15 per hour.

[123] The defendants did not make any submissions on loss of housekeeping capacity, except to submit that Ms. Bergeron has been able to continue her housekeeping tasks with assistance from family members.

[124] In *Liu v. Bains*, 2016 BCCA 374 at paras. 25-29, the Court of Appeal considered the governing principles to this head of damage. The Court explained that like other loss of capacity claims, it is a matter of assessment, not mathematical calculation. The court may consider labour force information regarding the value of replacement services as guidance in determining the appropriate quantum. It can be treated as an aspect of pain, suffering and loss of enjoyment of life, or it can be assessed separately. In *Kim v. Lin*, 2018 BCCA 77 at para. 33, the Court of Appeal explained that a pecuniary award is appropriate in cases where the plaintiff has suffered a true loss of capacity. Where the loss is "more in keeping with loss of amenities, or increased pain and suffering", the award should be an aspect of non-pecuniary damages.

- [125] The functional approach to compensating pecuniary loss is applicable to loss of housekeeping capacity. In *McTavish v. MacGillivray*, 2000 BCCA 164 at paras. 67-68, the Court of Appeal held that a plaintiff whose ability to perform housekeeping is diminished should be compensated, including for work that other family members have gratuitously assisted with after the accident. Although *Westbroek v. Brizuela*, 2014 BCCA 48 at para. 76, discusses a conservative approach to loss of household capacity, the Court in *Liu*, at para. 29, held that the jurisprudence does not support an approach that provides less than full compensation for a proven loss.
- [126] Ms. Bergeron has proven a loss of capacity. It is not an answer for the defendants to say that her daughter has taken over the task for her, regardless of whether she has paid her daughter through her allowance or otherwise. A pecuniary award is appropriate. I accept that \$15 per hour is reasonable and that seven hours per week is reasonable. I accept that this will continue to be a loss until Ms. Bergeron retires, at which time she will likely be able to recommence doing the work herself given that she will not be trying to do it on top of the physical work she does outside of her home. However, I do not view it as reasonable that the defendants should compensate for the portion of housework necessary to provide a clean home for Ms. Bergeron's adult children who can be expected to clean up after themselves.
- [127] Taking all of this into account, I award loss of housekeeping capacity of \$25,000.

Cost of Future Care

- [128] Ms. Bergeron relies on the report of Dr. Chu who recommends massage, anesthetic blocks, cortisone injections, needle probing and an exercise program. Based on her evidence that she looked into the costs of these treatments, she seeks an award of \$5,000-\$6,000 for the cost of future care.
- [129] The defendants concede that the evidence shows that Ms. Bergeron will have occasional flare-ups of pain but they submit that Ms. Bergeron has not demonstrated that the recommended modes of treatment are appropriate, what the cost will be and that they are not covered by the Medical Service Plan.
- [130] Awards of cost of future care must be objectively supported by medical evidence, the claims must be reasonable, and if the plaintiff will not use the services, the awards ought not be made: *Milina v. Bartsch*, (1985), 49 B.C.L.R. (2d) 33 (S.C.); *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at para. 21; and *Izony v. Weidlich*, 2006 BCSC 1315 at para. 74.

[131] Based on the evidence of Dr. Chu, these expenses are medically supported and are reasonable. I accept Ms. Bergeron's evidence of the likely costs. The defendants did not lead any evidence or cross examine the plaintiff on whether these expenses are covered by the Medical Services Plan. They are of the type that are regularly included in cost of future care awards. I do not accept that she must disprove coverage under the Medical Services Plan. The defendants did not cite any authority for this proposition.

[132] I award \$5,000 for future cost of care.

Special Damages

[133] Ms. Bergeron claims \$6,142.00 in special damages based on a list of expenses she has incurred. The defendants do not dispute the list, but they submit that an award in that amount will result in double compensation because the defendants have already paid for some of those costs.

[134] I award \$6,142.00 in special damages, less amounts already paid to Ms. Bergeron by the defendants as reimbursement for the amounts claimed in Ms. Bergeron's list of special expenses.

Apportionment of Damages Between Tortious and Non-Tortious Causes

[135] I have found that the physical injuries sustained by Ms. Bergeron were caused solely by the April 16, 2015 accident and the April 23, 2017 accident. Her pre-existing stress was caused by non-tortious causes and exacerbated by the April 16, 2015 accident and the April 23, 2017 accident.

[136] While a plaintiff is entitled to be compensated for his or her loss caused by tortious conduct even if the tortious conduct is not the only cause as a matter of liability, the assessment of damages requires the court to ensure that the tortfeasor pay only for the damage he or she caused and not for damage that the plaintiff would have suffered in any event, *Blackwater* at para. 78, citing *Athey* at para. 32.

[137] This issue is only relevant to her non-pecuniary damages as her stress, including her pre-existing stress, is not relevant to the assessment of damages for loss of earning capacity, loss of housekeeping capacity, special damages or cost of future care. Stress is one element of her non-pecuniary damages, and not the most significant one, given that there was no evidence of a psychological or psychiatric condition. I have assessed those damages to compensate for the aggravation in stress, and not the pre-existing stress. In my view that is the most feasible approach in these circumstances.

Allocation between the two accidents

[138] No party made submissions on this issue.

Summary of Damages and Costs

[139] The damages are:

Non pecuniary damages:

\$85,000

Past loss of earning capacity:

\$3,400 before statutory deductions

Future loss of earning capacity:

\$19,000;

Loss of housekeeping capacity:

\$25,000;

Cost of future care:

\$5,000

Special damages:

\$6,412 before deductions for amounts reimbursed

[140] The total is \$143,812 before statutory deductions on past loss of earning capacity and deductions for reimbursed special expenses. I leave it to the parties to agree on the deductions.

[141] Subject to any matters of which I am not aware relating to costs, I award Ms. Bergeron costs at Scale B.

"Matthews J."

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