

CANADA / JUDGMENT

Brass v. Von Chudentiz

2020 BCSC 343

COURT

Supreme Court of British Columbia

DECIDED

10 March 2020

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2020 BCSC 343 Brass v. Von Chudentiz

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Brass v. Von Chudentiz,

2020 BCSC 343

Date: 20200310

Docket: M118197

Registry: Kelowna

Between:

Rebecca Brass

Plaintiff

And

Jacqueline Czernin Von Chudentiz and Simon Luc Dallaire

Defendants

Corrected Judgment: The text of the judgment was amended on the face page where changes were made on March 12, 2020

Before: The Honourable Mr. Justice Betton

Reasons for Judgment

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Place and Dates of Trial/Hearing:

Kelowna, B.C.

December 2-6, 2019

Place and Date of Judgment:

Kelowna, B.C.

March 10, 2020

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Introduction

- [1] The plaintiff seeks an assessment for injuries received in a motor vehicle collision that occurred on June 7, 2016 ("MVC"). The defendants have admitted liability for the collision.
- [2] The plaintiff received injuries to her neck, left shoulder and upper back. The severity of the ongoing symptoms, their impact on her employability, together with the assertion that she has failed to mitigate her damages, are the key issues in dispute.

Background

- [3] The plaintiff was born May 23, 1996. She is single and lives in her parents' home in Lake Country, British Columbia.
- [4] The plaintiff graduated from high school in 2014. She undertook some further education in 2016, which included some upgrading of high school courses and some university-level arts courses. None of her academic record is in evidence before me.
- [5] She worked in entry-level and/or hospitality industry jobs up to the time of the motor vehicle collision. She served and hosted in restaurants, and was a barista and performed various front-line tasks at a local coffee shop. At the time of the MVC she was working part-time at a local marina earning \$10.45 per hour. Her tax return information shows earnings for the years 2014, 2015 and 2016 as \$6,231; \$10,886; and \$4,931 respectively.
- [6] Prior to the MVC she had enrolled in training to learn to do eyelash extensions. She attended and completed that program in the fall of 2016 after the MVC. It was approximately three weeks in length and she attended classes in the evenings twice per week. I did not receive any evidence that she acquired any specific certification or designation.
- [7] After the completion of that training she began the development of her own business. Initially her efforts were in practicing the process and honing the skills that she had learned, somewhat informally. As she increased her confidence and her clientele, her business evolved. She has continued in that occupation since and has gradually increased her clientele and hours. With that growth she moved to a storefront and shares the lease of a modest commercial space with a friend who operates a compatible business as a nail technician. Their shared space is rented for total of approximately \$660 per month. Very recently she has been trained in an additional service known as microblading.
- [8] There is little evidence as to her income-earning history since the commencement of her business, or as to her ongoing monthly income or expenses. In a report that is referenced below, Dr. Rajasekaran recorded that "[a]t her previous assessment on April 17, 2018, she was working approximately 2 hours per day, 5 days per week, doing eye lash extensions and micro-blading. Since the summer of 2018, she has increased her workload to 8 hours per day." There is some evidence as to her fees for her different services. Tax return information indicates 2017 earnings of \$1.00 and gross and net business income of \$10,866 for 2018. The latter was not explained. The plaintiff testified that she is in the process of refileing for 2017

and 2018, but there is no evidence as to what the specific reason for that is or what other income information there might be. She did testify that she had not claimed her cash receipts as income. There are no business records entered into evidence. The only documents placed into evidence are calendar pages for March to October 2018, but they were never explained and I can only speculate as to the content. It appears on its face to be names and times which I assume are appointments with clients.

- [9] The plaintiff moved with her family from the Lower Mainland in 2010. To that point she had been active riding horses, including competing in dressage and jumping. She continued riding after the family moved to Lake Country, but was not involved in competition. She owned a horse and did trail rides in Lake Country. She was responsible for the care of her horse. She also enjoyed hiking and snowboarding. She had played soccer in school and afterwards. In the time leading up to the MVC, however, her principle activity was going to the gym. She indicated that she attended six to seven days per week and was considering entering fitness competitions.
- [10] There is no indication of relevant pre-existing health conditions.
- [11] The MVC involved a left-turning vehicle striking the driver's side of the plaintiff's vehicle. Her vehicle was a total loss, although no evidence was introduced as to the value of her vehicle and there were no post-collision photographs. Emergency personnel attended. The plaintiff did not attend at hospital.
- [12] The plaintiff attended upon her family physician, Dr. Loucks, the next day, June 8, 2016. Dr. Loucks prepared a report dated November 22, 2018. In that report she summarized the notes of the seven visits by the plaintiff to her office in the intervening period. Two of those visits were with locums at Dr. Loucks' office. On April 20, 2017 Dr. Loucks recorded that the plaintiff continued to experience pain on the left side of her neck and upper back. Dr. Loucks recommended that the plaintiff start working with a kinesiologist and try to return to the gym. At the next visit, on December 7, 2017, the plaintiff indicated that she was approximately 50% recovered and was attending at the gym. On November 13, 2018, the notes recorded that the plaintiff was working full-time in her current position doing eyelash extensions, but found that the body position required for her work aggravated her symptoms.
- [13] In her report, Dr. Loucks noted that there may be benefit from intermittent physiotherapy and again noted the plaintiff would "likely benefit by working with a Kinesiologist". She made the following conclusory statements:

The injuries Ms. Brass experienced causes her discomfort when she is working in her vocation. She has continued to work full time, despite her symptoms. These injuries have interfered with her enjoyment of extracurricular activities which are outlined above.

As Ms. Brass has not shown much improvement in her symptoms since the time of the accident, I predict she will experience some ongoing problems with neck and upper back pain.

- [14] It was not referenced in Dr. Louck's report, but the plaintiff broke her right foot in early 2017. She testified that she was in a cast for four months and wore a "robo boot" for a further four months. She was unable to drive for at least a portion of that time.
- [15] The plaintiff has been involved in two subsequent motor vehicle collisions, one in August of 2019 and another in October of 2019. As a result of one or both of those incidents she is entitled to rehabilitation through ICBC coverage and as part of its new scheme for dealing with "minor injury" claims.
- [16] The plaintiff attended physiotherapy seven times, beginning on November 7, 2016 and ending March 1, 2018. She began attending physiotherapy again after her August 2019 motor vehicle collision and, in the short time prior to the trial, made arrangements to attend with the physiotherapy recommended by Dr. Rajasekaran.
- [17] The plaintiff has received prescriptions. The special damage claim for them is \$170.73.
- [18] The plaintiff uses marijuana and CBD oil. There is no special damage claim advanced for this. She has never received a prescription for the marijuana or related products. She testified that she spends as much as \$500 per month on them, but there are no records presented in support.
- [19] The plaintiff saw two physiatrists for independent medical examinations. Dr. Rajasekaran was retained by plaintiff's counsel. He prepared two reports, dated May 9, 2018 and July 29, 2019. Dr. Nowak prepared a report for the defendants dated April 16, 2019.
- [20] In Dr. Rajasekaran's first report he diagnosed a "Left Whiplash Associated Disorder Grade 2 - affecting the left trapezius muscle". He recorded that the plaintiff was working "10 am to 3 pm, 5 days a week." He provided the following opinions:

I do not foresee Ms. Brass having a residual disability as a result of the injury sustained in this MVA, as I think her symptoms would be responsive to active therapy.

Her symptoms are primarily myofascial, and I would expect them to improve with compliance to an appropriate active therapy program for at least 2-3 months' time. At that point, reducing the amount of sessions to once a month for monitoring and titration is recommended.

I do not think she will require retraining.

[21] In his July 29, 2019 report his diagnosis was noted as:

1. Chronic posttraumatic pain (whiplash associated disorder grade II affecting the left upper trapezius muscle).
- a. Secondary to this, she has developed thoracic paraspinal myofascial pain and cervicogenic headaches.

[22] He modified his previous opinions as follows:

The majority of my answers are unchanged from my previous report. She does have worsened pain now with working more, in that her pain now encompasses the thoracic paraspinal muscles and has prominent cervicogenic headaches. As her symptoms have worsened, her prognosis is certainly poor, also taking the chronicity of her symptoms into consideration.

Review of her physiotherapy program again revealed minimal focus on exercise, and a primary focus on modalities. I recommended she consider seeing a Physiotherapist at 360 Physiotherapy who could work with her to formulate a specific exercise program for her that she could do at the gym.

Certainly, the physical nature of her job has exacerbated her symptoms, and looking at opportunities for job retraining into something sedentary where she has the opportunity to change positions as needed would be optimal.

[23] Dr. Nowak, for the defendants, questioned whether the plaintiff had received a whiplash injury at all, but acknowledged the subjective complaints of pain. He concluded, "[f]rom a functional standpoint, Ms. Brass did not give the clinical impression of being in any way physically impaired or disabled; rather it appeared that she is physically capable of performing unlimited activities."

[24] The witnesses at trial consisted of the plaintiff; doctors Loucks, Rajasekaran and Nowak; the plaintiff's mother, Jan Stark; and the plaintiff's friend and co-worker Ms. Swails.

Issues and Positions of the Parties

[25] I will first summarize the parties' general characterizations of the plaintiff's claims and then address their more specific positions in relation to each head of damage.

[26] The plaintiff argues that she was an active, healthy 20-year-old at the time of the MVC. She says that despite her efforts, she is left with chronic pain which significantly impacts her personal life and her employment. While she has been able to build a business, she finds that working full-time leaves her with an intolerable degree of discomfort at the end of the work day. That in turn prevents her from engaging in a happy and normal social life.

[27] The plaintiff testified that the subsequent motor vehicle collisions caused a temporary aggravation in her symptoms. She was not challenged on this and neither party suggested anything to the contrary. I have proceeded on that basis.

[28] She says that she did not attend an active program with a kinesiologist as a result of a combination of circumstances. These included her broken foot which limited her activity for a significant period of time. She also had limited financial means to fund such a program. She testified that she had little appreciable benefit from the physiotherapy that she did attend. Finally, she says that she did not have a full appreciation of the specific recommendations made by Dr. Rajasekaran, stressing that he was not a treating physician. She says that in all of these circumstances there should be no finding of a failure to mitigate on her part.

- [29] The plaintiff argues there is no basis to expect any meaningful improvement in her symptoms going forward and that this results in a loss of capacity to earn income in the future.
- [30] The defendants acknowledge that the plaintiff was injured, but say the injuries were minor. They say that physical examinations by Dr. Rajasekaran and Dr. Nowak are essentially the same and reveal no objective evidence of ongoing injury.
- [31] In addition, the defendants argue that the plaintiff has failed to mitigate her losses by failing to attend conscientiously to the types of treatments recommended by her doctor and Dr. Rajasekaran, specifically an active rehabilitation program designed by a kinesiologist to her specific needs.
- [32] In the context of the whole of the evidence, the defendants argue that these factors, in combination with the plaintiff's general lack of credibility, should result in modest awards under all applicable heads of damage.
- [33] Each of the parties presented positions on the various heads of damages being claimed, which serve to provide perspective their assessments of the evidence and issues. I will set out the monetary positions in table form and then summarize the foundation each party argued in support.

Damages

Plaintiff's Position

Defendants' Position

Non-pecuniary damages

\$70,000 to \$115,000

\$35,000 to \$45,000

Mitigation reduction

0%

10-20%

Past wage loss

\$10,000

\$147

Loss of future earning capacity

\$100,000 (\$80,000 + \$20,000 retraining)

\$0 to \$10,000

Loss of housekeeping capacity

\$15,000

\$0

Cost of future care

\$3,000

\$0

Special damages

\$678.93

\$546.50

Total

\$198,678.93 to \$243,678.93

\$28,693.50 to \$51,193.50

Non-Pecuniary Damages

[34] In their articulation of the foundation for their arguments on the value of the non-pecuniary damages, each of the parties referenced various authorities while acknowledging that each case is unique. The central difference in their quantification is, as noted above, based on their views of the severity of symptoms and the prospect of benefit from engagement in an active rehabilitation program.

Past Loss of Income

[35] The plaintiff acknowledges there is very limited evidence of any specific loss of income. At the time of the MVC she was about to conclude her seasonal work with the marina and lost no more than a few days of work there. The plaintiff argues, however, that more recently she has had to cancel appointments with her clients equivalent to about one day of work every two weeks. In written argument the plaintiff suggested an award of \$10,000. In oral argument the plaintiff used an estimate of \$320 income per day and extrapolated over 50 weeks in 2019 to suggest that an award of \$8,000 would be appropriate. The claim is in the form of a past wage loss of opportunity to earn that income.

[36] The defendants argue that the plaintiff's claim should be limited to the minimal time lost from the marina.

Loss of Future Earning Capacity

[37] The plaintiff relies upon the opinion of Dr. Rajasekaran that suggests retraining to a more sedentary position with greater flexibility would assist the plaintiff in reducing her symptoms. She says this supports a finding of a loss of a capital asset. In her written argument she stated:

The possibility of late career problems due to chronic pain cannot be ruled out; that is, Ms. Brass may need to slow down or even retire sooner than she would have, absent the accident.

It is submitted that a reasonable amount under this head of damage is [\$]50,000 to account for retraining.

[38] In oral argument, specifically in reply, the plaintiff suggested a different approach. Carrying forward the past loss hypothetical and assuming a 40-year working life, the gross loss would be \$320,000. Based on that the plaintiff suggests an award of \$80,000 for loss of earnings plus an additional \$20,000 for retraining, for a total of \$100,000.

[39] The defendants point out that there is no functional capacity evaluation. The plaintiff has been able to build and expand her business and was working full-time at the time of trial. In all of these circumstances, the defendants say the evidence does not support the finding of a real and substantial possibility of a future loss. Alternatively, they argue any loss of capital asset should be limited to \$10,000.

Loss of Housekeeping Capacity

[40] The plaintiff says that she has lost capacity to perform housekeeping duties. She relies on the evidence of her mother who testified that she is not assigning chores to the plaintiff at home because the plaintiff is so tired and in pain after work. Ms. Stark does not feel that it is appropriate to ask her daughter to do chores. The plaintiff says that she struggles to be able to do any activity after work because she is so fatigued and sore.

[41] The defendants point out that there is no specific evidence with respect to a loss of an ability to perform household activities, and to the extent that such activities cause her additional pain any compensation is appropriately captured under the non-pecuniary damages.

Cost of Future Care

[42] The plaintiff says she should be entitled to costs of future care in the amount of \$3,000. This is essentially presented as a general award to assist with the costs of her ongoing use of marijuana or related products to manage her symptoms.

[43] The plaintiff acknowledges that costs of the active rehabilitation program through 360 Physiotherapy are being covered by benefits available to her from the subsequent motor vehicle collision(s).

- [44] The defendants argue that there is no proper basis for an award for her use of marijuana and it is unlikely that the plaintiff will make use of any other treatments. Accordingly, they say no award should be made.

Special Damages

- [45] The claim is obviously modest. The difference in the parties' positions relates to two medications and a portion of the mileage claimed to attend physiotherapy.

Analysis

- [46] The plaintiff was, at the time of the MVC, a healthy and active 20-year-old. She was working and had a plan going forward. Her primary activity was going to the gym.
- [47] Both parties agree that in the MVC the plaintiff suffered injury to her upper back and left shoulder. That resulted in pain to those areas, as well as headaches. There is no dispute that the plaintiff continues to experience symptoms. The contentious issues are the severity of the ongoing symptoms and the longer-term prospects of recovery.
- [48] Generally, I did not find Dr. Nowak's opinion to be helpful. A considerable portion of his report was dedicated to a review of a Quebec Task Force study. Dr. Nowak appears to have relied on that study as a basis to conclude that the plaintiff could not have ongoing symptoms from the MVC. The essence of his opinion is that statistically she should not have symptoms from the MVC and therefore there must be another cause. He then proceeds to hypothesize alternative, benign (from the defence perspective), explanations for her complaints. He offers that 85% of the population may develop myofascial pain without a particular event or injury.
- [49] The foundation for his opinion as to causation is simply insufficient for me to be able to attach any weight to it. Given the plaintiff's onset of and continual symptoms since the MVC I reject his opinions on causation.
- [50] Although Dr. Nowak found no objective signs of ongoing injury, he did not suggest she is not having symptoms.
- [51] I conclude that the source of the plaintiff's ongoing symptoms is in fact the MVC, as indicated by both Dr. Loucks and Dr. Rajasekaran. I also accept that engaging in her work activities aggravates these symptoms.
- [52] On the evidence before me it is my conclusion that the plaintiff continues to experience pain in her neck, shoulder and upper back and has headaches. All of this is attributable to the MVC. Placing the significance of those symptoms in context and in the spectrum of severity is the principal issue in this trial.

[53] Pain is a subjective experience and is difficult to quantify. It is just as difficult to assess how it limits an individual's functioning, particularly in the absence of objective tests of functional capacity.

[54] All of this heightens the importance of the assessment of the plaintiff's credibility.

Credibility of the Plaintiff

[55] The credibility of the plaintiff involves a consideration of her testimony in the context of the whole of the evidence.

[56] In *Bartch v. Bartch*, 2019 BCSC 1643, Young J. provided this statement at para. 79 regarding assessing credibility:

[79] In *Gichuru v. Smith*, 2013 BCSC 895 at para. 129, aff'd 2014 BCCA 414, Justice Adair explained that the art of assessing credibility involves an examination of many factors including, "the witness's ability and opportunity to observe events; the firmness of the witness's memory; the witness's ability to resist the influence of interest to modify his or her recollection; whether the witness's evidence harmonizes with independent evidence that has been accepted; whether the witness changes his or her testimony during direct and cross-examination; whether the witness's testimony seems unreasonable, impossible, or unlikely; whether a witness has a motive to lie; and the demeanour of a witness generally". Relying on *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.), Justice Adair stated at para. 130, "[t]he real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those circumstances".

[57] There are features of the plaintiff's presentation and the evidence that bolster her credibility. First the evidence of the plaintiff is consistent with the observations of her work colleague, Ms. Swails, and her mother, Ms. Stark. It is also consistent with what she reported to Dr. Rajasekaran and Dr. Loucks. The defendants correctly point out that the evidence of the other witnesses is also largely dependent on the self-report by the plaintiff; however, I note that none of the doctors ever suggest any symptom magnification behaviours or specific inconsistencies between their observations and what the plaintiff reported to them. This includes Dr. Nowak, for the defendants.

[58] Also, despite her pain complaints, the plaintiff completed her eyelash extension training and developed her business. These are not markers of an individual who is intent on magnifying her symptoms and trying to demonstrate limitations that do not exist. In saying this I also recognize that this evidence also demonstrates that she has the ability and desire to do the work and build her business.

[59] There are also features of her evidence that detract from her credibility or perhaps more specifically her reliability.

- [60] Overall, I was left with the impression that the lack of direct or objective evidence on certain subjects resulted in generalizations on those subjects by the plaintiff that were favourable to the plaintiff. An example is the frequency or number of cancelled appointments in her business. In her direct evidence she did not suggest that she had been cancelling appointments. In fact she described working full-time Monday to Friday, three to four clients per day, at two hours each. This is consistent with what Dr. Rajasekaran recorded that she told him and with her evidence in cross-examination. In re-direct, however, she described cancelling appointments and/or going home early because of her symptoms. No specifics were offered in support.
- [61] Another is in reference to a self report to Dr. Loucks that she was 50% improved. Dr. Loucks was clear that she understood the plaintiff to be describing this is to be a general state of recovery. The plaintiff in testimony however suggested she "probably" felt 50% better that day. I did not find her response to be compelling.
- [62] In a similar vein, her explanation for not having engaged in an active physiotherapy program was less than compelling. Dr. Loucks' report indicates that the first referral to physiotherapy was in June of 2016, and then in April 2017 she had recommended the plaintiff start working with a kinesiologist and try to return to the gym. The first physiotherapist attendance was in fact in November 2017 and the plaintiff offered as an explanation that "I probably just thought that the pain would go away." She testified at one point that she could not actually recall if Dr. Loucks actually recommended physiotherapy only to then confirm that she was referred back to physiotherapy in December 2017. She offered, as an explanation for not in fact returning until March 2018, that the doctor had told her just go if it was helping. The plaintiff testified that the guidance she had from Dr. Loucks was that if physiotherapy was not noticeably beneficial she should not bother. In July 2019 Dr. Rajasekaran recommended a specific physiotherapist clinic, but the plaintiff testified she was unaware of that. On the whole of the evidence it is my conclusion that she was endeavouring to colour the evidence regarding her efforts in a way to respond to the mitigation argument being advanced by the defendants rather than trying to be precise or entirely forthright.

Mitigation

- [63] I agree with the defendants that the plaintiff has not pursued rehabilitation adequately. Her efforts to actively engage in rehabilitation were somewhat tepid.
- [64] At the same time, there may have been some lack of precision in the guidance that she was given in the early stages. In addition the fact of her broken foot and limited finances impacted the ability to fully engage for at least a portion of the time prior to trial.
- [65] It is also my conclusion that she may still benefit from rehabilitation efforts. The plaintiff argued that the opinion of Dr. Rajasekaran says otherwise, but I do not agree completely. I interpret his evidence to be that the duration of the symptoms suggests a degree of

permanence that he had not originally projected, not that focussed effective rehabilitation will not benefit. Dr. Rajasekaran clearly accepts the plaintiff's description of her symptoms and finds nothing inconsistent in her presentation. His second report confirms that nothing has really changed since his first report except the duration of the symptoms. He says that active programs that are not tailored to the individual and monitored and adapted by a physiotherapist and/or kinesiologist often fail to produce results. That is the situation for this plaintiff. Prospective benefit from diligently following the treatment plan remains for her.

- [66] An element of a successful argument of failure to mitigate is proof that the symptoms are worse than they would have been as a result of the failure to take reasonable steps to mitigate. Here the plaintiff may have delayed her optimal recovery to some extent, but I am unable to conclude that she will not achieve that recovery.
- [67] Given the circumstances impacting that delay, I do not find this to be an appropriate case to reduce her award on the basis of a failure to mitigate.

Non-Pecuniary Damages

- [68] My general conclusions are that the plaintiff has and will continue to have symptoms of the nature in which she currently experiences. It is my view, however, that with a focused and well-managed active rehabilitation, those symptoms will likely be reduced in severity or intensity and will be more manageable. I must, however, allow for the possibility that she will not see that benefit.
- [69] The plaintiff is young and the injuries impact all aspects of her life. The evidence indicates that she is less engaged socially and restricts her recreational activity.
- [70] Numerous authorities were referenced by both parties and, as acknowledged by the parties, this serves only to inform the ranges on damages that may be appropriate.
- [71] The cases that were cited by the plaintiff include *Rizzolo v. Brett*, 2010 BCCA 398, for the proposition at para. 37 that "trial judges have assessed non-pecuniary damages at well over \$100,000 where there is an element of significant ongoing pain and, particularly, where the plaintiff had previously enjoyed an active lifestyle or a physical vocation." That is an entirely fair statement. Examples of such cases includes *Poirier v. Aubrey*, 2010 BCCA 266, where the impact of the injuries is captured this way:
- [6] Ms. Poirier described the debilitating pain she has experienced in various parts of her body since the accident as being at times "excruciating". The worst is in the front of her neck, around her sternum and collar bones, in her arms, her upper back, and across her shoulder blades. She said she is in pain every day and has always to take care not to exacerbate her condition.
- [72] The trial award of \$60,000 was raised to \$100,000.

- [73] In my view the cases that support an award in the order of magnitude sought by the plaintiff involve more serious ongoing problems. This is based on the impression left by the whole of the evidence.
- [74] I have also considered the authorities presented by the defence, and generally find the facts of those cases to be closer in line with my assessment of the evidence here.
- [75] In my view it is appropriate to address the claim for loss of housekeeping capacity here and not as a separate head of damage as argued by the plaintiff. As discussed in *Kim v. Lin*, 2018 BCCA 77, proceeding in this manner is an exercise of discretion focussed on whether a plaintiff is unable to perform such tasks or whether she does so with increased pain or at a slower pace.
- [76] Here, as a result of the plaintiff's complaints, Ms. Stark no longer assigns the tasks to the plaintiff. None of the medical reports suggest that the plaintiff must avoid these types of tasks. Dr. Rajasekaran testified it is the relative static position of her work that aggravates the plaintiff's pain. In her living situation the plaintiff is able to avoid such tasks, but I am not satisfied she could not do them even if at a reduced intensity. To the extent that these tasks will be an increased burden on the plaintiff, it is my view that is properly captured within the non-pecuniary damage award.
- [77] Every case is unique. In my view an appropriate award under this category of damages is \$50,000.

Past Loss of Income

- [78] The plaintiff acknowledges a minimal loss from her work at the marina.
- [79] The difficulty with her claim for loss of income from her business is that it is really an assertion of a specific loss. She says she cancelled appointments from time to time, not that she could have booked more clients, or had to forgo another opportunity.
- [80] The distinction between proof of past actual events and past hypothetical events was discussed in *Gao v. Dietrich*, 2018 BCCA 372. If the plaintiff establishes a real and substantial possibility of a hypothetical event, then the court must weigh that hypothetical event according to its relative likelihood. Past actual events must be proved on a balance of probabilities, and once proved they are treated as certainties.
- [81] Here the plaintiff indicates that she cancelled appointments when she was not feeling well enough. She kept no records and offers only a generalization as to frequency. It is a claim requiring proof on a balance of probabilities and she has not met that standard.
- [82] She is entitled only to the loss from her employment at the marina in the amount of \$147.

Loss of Future Earning Capacity

- [83] On the evidence before me, the plaintiff's career plan prior to the MVC was to work as she now is. She enrolled in the training program prior to the collision and since the MVC she has completed that program. She has gone a step further and expanded the scope of her skills and services to include microblading. She has had success developing her own business.
- [84] The plaintiff did not testify that she intends to terminate her business or that she will retrain. She gave very limited evidence as to alternative work or career aspirations, indicating only that she had casually considered becoming a dental hygienist. According to the evidence of Ms. Swails, based on her conversations with the plaintiff, she believes the plaintiff intends to carry on her business indefinitely.
- [85] In his most recent report, Dr. Rajasekaran transitions from his previous opinion that "I do not think she will require retraining" to saying "looking at opportunities for job retraining into something sedentary where she has the opportunity to change positions as needed would be optimal". The latter comment raises many interpretative questions which were not fully addressed in his report or testimony. Most importantly can she continue in her current employment situation? What does "optimal" mean in that context? It is a significant change in opinion on its face. At one level the proposition is understandable given the longevity of her symptoms, but to interpret this as saying a change is necessary without having undergone the very rehabilitation that is most effective goes too far. Further, there is no evidence to assess how she might adapt her work schedule or ergonomic environment to alleviate the problems.
- [86] The British Columbia Court of Appeal stated in *Perren*, 2010 BCCA 140 at para. 32, that where the plaintiff's earnings after an accident are unchanged but the plaintiff claims a loss of earning capacity, the onus is on the plaintiff to prove that there is a substantial possibility of an event occurring, which will result in a loss of earnings:

A plaintiff must always prove, as was noted by Donald J.A. in *Steward* [*Steward v. Berezan*, 2007 BCCA 150], by Bauman J. in *Chang* [*Chang v. Feng*, 2008 BCSC 49], and by Tysoe J.A. in *Romanchych* [*Romanchych v. Vallianatos*, 2010 BCCA 20], 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* [*Steenblok v. Fung* (1990), 46 B.C.L.R. (2d) 133 (C.A.)], or a capital asset approach, as in *Brown* [*Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 (S.C.)]. 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* [*Pallos v. Insurance Corporation of British Columbia* (1995), 100 B.C.L.R. (2d) 260 (C.A.)] 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* [*Parypa v. Wickware*, 1999 BCCA 88]. 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]

- [87] In *Brown v. Golai* the court set out considerations in assessing a loss of earning capacity when relying on the capital asset approach. They include whether the plaintiff has been rendered less capable overall of earning income from all types of employment, is less marketable or attractive as a potential employee, has lost the ability to take advantage of all job opportunities that might otherwise have been open, and is less valuable to himself as a person capable of earning income in a competitive labour market: *Brown v. Golai* (1985), 26 B.C.L.R. (3d) 353 (S.C.). It is difficult to assess these considerations fully on the evidence before me but I am unable to agree with the defendants that no loss has been proved. Most certainly she feels less valuable to herself at this time.
- [88] It is my view that there is a substantial possibility of a reduced income, given the persistence of the symptoms.
- [89] She has a long working life ahead and even a small number of cancelled appointments annually spread over such a period can swell to a large present value number. I have very little information upon which to hypothesize, however, either in the context or her current business.
- [90] I have no evidence of what other careers may be suitable or reasonably available for her or what her earnings might be if she did transition to different employment. The only evidence is from Dr. Rajasekaran who suggested she have a sedentary job that does not involve static body positioning. I do not have meaningful information as to her pre-injury earning capacity, how much she is presently earning, the amount of income she may be foregoing as a result of her symptoms, how much benefit she may have from an active rehabilitation program, or what her pre- or post-injury long-term career plans were or are. All of this makes it very difficult to assess this aspect of the claim.
- [91] There are other moderating factors revealed by the evidence, including the prospects of further improvement. She has demonstrated what she is able to do and the absence of any indication the plaintiff has any serious plan to alter her course of employment all support a conclusion that no more than a modest award is warranted.
- [92] The task remains to make a suitable award if the evidentiary foundation for such an award has been established. Having found the basis for an award, the evidence available to me to assist in quantifying that loss is sparse. I fix that amount at \$40,000.
- [93] In reaching this conclusion, I wish to be clear that it is not my intention to limit the award because the plaintiff is particularly stoic relative to others with similar injuries. Rather, my conclusion is based on the evidence of loss as described generally in these reasons and the relative severity of the symptoms.

Costs of Future Care

[94] The plaintiff's submission is really for a somewhat arbitrary amount, based on the plaintiff's evidence that she spends a substantial amount on marijuana to help her sleep. The strongest evidence in support of this is Dr. Loucks expressing that she is not against it, but she also says the medical literature has little to offer to support its efficacy. There is nothing before me to indicate any appropriate quantity or dosage or that the plaintiff's pattern of use is appropriate. Dr. Loucks gave no evidence on the point.

[95] On the evidence before me I cannot conclude this claim is proved.

Special Damages

[96] The defendants challenge the cost of two medications. I agree that there is no evidence as to who prescribed them or the connection to her injuries. Those are Cyclobenzaprine (\$52.26) and Prednisone (\$12.97). I do not agree with the defence that the mileage claimed has been shown to be inaccurate. The plaintiff is entitled to the amount claimed less \$65.23.

Summary

[97] I have placed my findings into a revised form of the table set out above. The parties are at liberty to bring the issue of costs before me if there are issues or considerations that I am not privy to. Subject to that occurring, the plaintiff is entitled to costs.

Damages

Plaintiff's Position

Defendants' Position

Award

Non-pecuniary damages

\$70,000 to \$115,000

\$35,000 to \$45,000

\$50,000

Mitigation reduction

0%

10-20%

0%

Past wage loss

\$10,000

\$147

\$147

Loss of future earning capacity

\$100,000 (\$80,000 + \$20,000 retraining)

\$0 to \$10,000

\$40,000

Loss of housekeeping capacity

\$15,000

\$0

\$0

Cost of future care

\$3,000

\$0

\$0

Special damages

\$678.93

\$546.50

\$613.70

Total

\$198,678.93 to \$243,678.93

\$28,693.50 to \$51,193.50

\$90,760.70

"D.A. Betton J."

The Honourable Mr. Justice Betton

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