
CANADA / JUDGMENT

Bunuan v. Serka

2020 BCSC 800

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 800 Bunuan v. Serka

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Bunuan v. Serka,

2020 BCSC 800

Date: 20200529

Docket: M171625

Registry: Vancouver

Between:

Pamela Beatrice Bunuan

Plaintiff

And

Tom Serka and Tom-Mac Shipyards Ltd.

Defendants

Before: The Honourable Madam Justice Russell

Reasons for Judgment

Counsel for the Plaintiff:

L.W. Smeets

Counsel for the Defendants:

R. Merlo

Place and Dates of Trial:

Vancouver, B.C.

November 25-28, 2019

December 2, 2019

Place and Date of Judgment:

Vancouver, B.C.

May 29, 2020

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Introduction

- [1] On March 5, 2015, the plaintiff, Ms. Bunuan, was in a 2003 Toyota Corolla driven by her friend when their car was hit from behind by a Dodge Ram pickup truck driven by the defendant, Mr. Serka, (the "Accident").

- [2] Liability is admitted by the defendants.
- [3] The extent of the damages suffered by the plaintiff are at issue in this matter.
- [4] They were hit hard enough to cause impact with the car in front of them so she suffered two impacts.
- [5] The truck that hit them swerved to try to avoid the accident and hit the right rear of the Toyota more forcefully than the driver's side.
- [6] The Toyota was written off and its owner, Ms. Bunuan's stepfather, received \$5,000 from ICBC.

The Plaintiff--pre-Accident

- [7] Ms. Bunuan is now 25 years old.
- [8] At the time of the Accident, Skoah Spa was her employer. Her job was as an esthetician doing facials and relaxation massages in their store on South Granville in Vancouver.
- [9] She was a recent graduate in esthetics from a private educational institution and began with Skoah on October 14, 2014 as a skin care trainer.
- [10] In her employment, she applied skin care products to her clients' faces and while the products worked on their skin, she would perform a gentle massage. She is not trained as a Registered Massage Therapist and the massage component of the facial appointment was meant for relaxation only.
- [11] The appointments with her clients were set for either 45 minutes or 1 hour and 15 minutes.
- [12] Her job was full time but when business was slow, she would work only four days a week.
- [13] The busiest months of the year are October, November and December. January and February are quiet months and March, April and May pick up again.
- [14] She received wages of \$12 per hour and average tips of \$35-\$40 per day. There was a tip out of 10% to the receptionist with tips computed at the end of each business day and paid the following morning.
- [15] On an exceptional day, her tips could be as high as \$50-\$70.
- [16] Although she received regular pay stubs with her cheques from Skoah, her tip income was not indicated on the stubs.
- [17] There was no documentary evidence presented of the tips she earned and she did not report this income to Canada Revenue Agency.
- [18] In addition to her wages, after the first three months of employment, she received a 10% commission on the skin care products she sold to her clients. It was an expectation of the salon that each esthetician would sell approximately \$35 of products to each client.

- [19] I note that there are commission amounts on certain pay stubs, copies of which were provided to me. However, I do not have complete payroll records for the entire period of the plaintiff's employment.
- [20] She passed her probation period. Her plan was to continue to work for Skoah and proceed up the ladder until she could enter into management.
- [21] Skoah had agreed she could take a month off in April to go on a family trip to the Philippines.
- [22] The plaintiff had a very active lifestyle. She had been a dancer in high school and continued to perform hip hop and contemporary dance three or four times a week after she left school. She went to the gym at least twice a week and on weekends she would hike with her boyfriend, Lucas Chen. At her gym, Club 16, she would do weights, the elliptical, and the treadmill.
- [23] Mr. Chen and the plaintiff would do the Grouse Grind regularly.
- [24] Her routine on weekends was to meet her friends in the evening to socialize and go out to eat.
- [25] She was slim and fit.
- [26] Her workplace evaluations comment on her positive attitude and pleasant demeanour with clients.

The Motor Vehicle Accident

- [27] When the Accident occurred, its impact was largely on the back of the car on the passenger side where the plaintiff was sitting.
- [28] She was in a Toyota Corolla, a compact car, and the vehicle that hit her was a large pickup truck, a Dodge Ram.
- [29] She was wearing her seatbelt.
- [30] The Corolla was stopped because it was rush hour and the traffic was heavy as she headed west from the Queensborough outlet malls.
- [31] She suffered two impacts: one when the truck hit her car and one when her car was driven into the taxi in front of her.
- [32] The first impact was more severe.
- [33] She recalls being pushed forward and then snapping back before she stopped moving. She noticed an alarming amount of force to her movement.
- [34] She did not suffer a loss of consciousness.
- [35] No emergency personnel attended at the scene.

- [36] The damage to her car was extensive. The trunk could not be closed.
- [37] Damage to the other two vehicles was not nearly as great.
- [38] She began to feel pain the evening of the Accident. She had a stiff neck and shoulders and pain in her lower back.
- [39] By the next morning, she could barely move her neck, could not lift anything and felt pain in her entire back but worst in her lower back.
- [40] She saw her doctor, Dr. Wendy Woodfield, four days later at which point her neck was very painful and its movement restricted. She could not look down without pain.
- [41] She was unable to lie down on her back at all without pain. She used a heating pad on her back and legs to help with the pain.
- [42] She could move her upper body slowly and carefully since to move quickly caused sharp pains and lingering soreness.
- [43] The pain in her neck and back made her shoulders feel tight and at work the movement required for her to massage a client gave her pain.
- [44] Because her neck was stiff, she hunched her shoulders and this reactive movement caused them to become sore.
- [45] Her energy levels were reduced because movement made her tired. As well, because she was uncomfortable, she could not sleep soundly. She was constantly trying to find a comfortable position. She could not fall into a deep sleep.
- [46] She attempted to use melatonin as a sleep aid but found she became groggy in the mornings. CBD capsules gave her no relief.
- [47] At home, she needed help from her mother to put clothes over her head.
- [48] She could no longer dance because of the pain it caused in her back.
- [49] The long hikes she had taken with her boyfriend were no longer manageable.
- [50] She has not tried to do the Grouse Grind since the Accident.
- [51] It was not until 2017 that she went hiking again and even then she did a fairly moderate hike, again with Lucas Chen.
- [52] Her work-outs stopped in 2015 but resumed in September 2016 and continued regularly until December 2016 and then resumed until the record ends in May 2017.
- [53] When she saw Dr. Wendy Woodfield, she sent the plaintiff for imaging to determine the cause of her low back and shoulder pain.
- [54] The report that came back to the doctor stated that the plaintiff had suffered a compression fracture at C4.

- [55] The plaintiff was very frightened by the advice she received that she should avoid any abrupt neck movements, any strenuous activities, roller coasters, any exertion, or lifting any weights over five pounds.
- [56] She stopped all her activities partly to avoid any pain and partly because she was afraid she would cause the fracture to destabilize and cause her to become paraplegic.
- [57] She gave up socializing with her friends because she could not keep up with them. As well, she had gained weight since the Accident and was humiliated by her weight gain.
- [58] Her trip to the Philippines went ahead but was affected by her continuing pain and by her inability to take part in beach activities such as scuba diving, banana boating, and beach games. As she put it, she was only able to observe the fun.
- [59] She was able to manage her flights to and from the Philippines with painkillers and a neck support. She could not remain in her seat for long periods of time and got up and walked when she needed to.
- [60] She had resigned from Skoah the week before she went to the Philippines because she could not do the massage component of the facials.
- [61] She had tried to work several shifts before she left on her trip, but could not continue. The downward pressure required by massage caused her serious back pain.
- [62] She did not inquire of Skoah whether her injuries could be accommodated. It was her firm belief that she could not remain at Skoah with her injuries.
- [63] On her return, she followed her doctor's recommendations and went to physiotherapy, massage and did the exercises recommended by the physiotherapist.
- [64] The insurer covered six physiotherapy treatments but once there was no coverage, the plaintiff could not afford to continue going.
- [65] She also received six massage therapy treatments.
- [66] During this time, she had occasional numbness in her right arm. This finally disappeared in early 2018.
- [67] During the acute phase of her injuries, she took Naproxen as prescribed by Dr. Woodfield.
- [68] She also took Advil and Tylenol three times a week until December 2018. Her use of Tylenol and Advil was on the advice of her mother, a registered nurse, and she used two of each twice a day three times a week until the end of October 2018, when she would take these drugs once a day.
- [69] She states that she was able to stop taking these medications in 2018 and that her pain was fully resolved by the end of 2018.

- [70] Her exercise regime evolved to the stretches suggested by the physiotherapist, and hot yoga. When she could not make her yoga sessions, she would do her poses at home.
- [71] Her fear of the future was finally alleviated when she had a consultation with a neurologist that she believes took place in January 2018. She was not correct about the timing of this visit as the consultation note indicates it took place in September, 2018. Before this consultation, she had been afraid she could never have a pregnancy and would have to continue to restrict her activities due to the compression fracture.
- [72] The report from the neurologist was that she had no nerve damage and her results were normal. The relief this result brought her was substantial.
- [73] Before this appointment, she had suffered from depression because she thought her active, enjoyable life was permanently over. She foresaw a future where her parents would have to take care of her. Finding she had no lasting neural damage meant she could go back to her former activities and her anxiety about the future ended.
- [74] Her mood elevated and except for her substantial weight gain, she was able to look at her life positively.
- [75] During the course of her depression, she consulted a psychiatrist, Dr. Deborah Scheinbaum.
- [76] Dr. Scheinbaum wrote an expert report that was admitted in the trial. She found that Ms. Bunuan was suffering from moderate to severe depression. However, in a second report, while she emphasized once again that the depression stemmed from the Accident, she found that the depression had completely resolved following the positive report from the neurologist.
- [77] The defendant's psychiatrist, Dr. Latimer, examined the plaintiff after she had seen the neurologist and concluded she did not suffer from any of the indicia of depression.
- [78] When she decided she could not continue with her Skoah job, she looked for another job in the beauty industry that she could perform.
- [79] Her very supportive parents lent her the cost of a training course in Seattle through which she could learn to apply eyelashes. This two-day course costs \$2,385.00 USD.
- [80] She practiced the skills for six months on family and friends. Then she took a second course to allow her to apply more than one lash extension per lash. This technique means that the lashes look even fuller.
- [81] The cost of the second course (again in Seattle) was \$1,299.00 USD.
- [82] Once again, her parents funded this undertaking.

- [83] The application of lashes is a remunerative business after the operator gains experience. The plaintiff began by charging \$30 per session to cover the cost of supplies when she was newly qualified. She spent many hours practicing so she could become faster at the job and could be smoother with her techniques. She was able to raise her prices to \$100 for a full set of lashes and \$220 for the application of a full set of enhanced volume lashes.
- [84] She marketed her services on Instagram and her mother sent her relatives as customers. Her clientele began to grow.
- [85] The Pampered Lash Bar was the name of the new business that she commenced in September 2016. She opened her doors as a sole proprietor on October 1, 2016.
- [86] At the beginning, she had no employees but rented a bed to another stylist doing eyebrow tattooing.
- [87] She hired another lash extension stylist in November 2019. She no longer does facials or massage work. The eyebrow tattooist has remained a tenant in the salon.
- [88] She has not had any problems working as a lash extension stylist as she is able to schedule her work with breaks between appointments. Whenever she had a bad night, she would use a heating pad while she worked. This remedy seemed to help her with any back discomfort.
- [89] She uses a "saddle stool" recommended by other stylists. She finds it keeps her posture straight as she leans over to apply lashes to a client.
- [90] It is clear that applying lashes requires bending over the client and the plaintiff's back gets fatigued. She simply schedules breaks for herself between appointments but has chosen to diversify her income-earning activities.
- [91] She has not suggested in evidence that she is unable to do the lash applications due to her injuries from the Accident.
- [92] The space she leased required renovations that amounted to \$26,000 before she opened. Once again, her generous parents helped.
- [93] For the taxation year of 2014, her line 150 income was initially \$11,091 but she was reassessed and her income was upped to \$19,700. This amount included income from Skoah and Roots Canada.
- [94] She did not include any tip income in her declaration.
- [95] Her business suffered losses in 2015 and 2016 due to the substantial cost of renovations. However, her revenues have continued to grow and she is now operating at a profit.
- [96] In 2017, she had net sales of \$22,779.19. In 2018, following intensive efforts to market her services, her net sales increased to \$69,978.
- [97] Quite properly, she does not claim any income loss for 2018 and forward.

- [98] She is continuing with her lash business and also has begun selling financial services to the Filipino community. She appears to be doing well financially.
- [99] Her evidence indicates that she suffered pain from the Accident during the period of 2015 to the end of 2018. By the end of 2018, she ceased taking her prescribed medications.
- [100] She states quite unequivocally that she no longer suffers pain from the Accident.
- [101] She does not claim any loss of future earning capacity and confines her claim to non-pecuniary damages, past income loss and special damages.
- [102] I found the plaintiff to be candid and forthright in her evidence.

Witnesses

Lay witnesses:

A. Phong Do

- [103] Mr. Do is the plaintiff's stepfather but has known her and participated in raising her since she was three years old.
- [104] He and the plaintiff's mother have given the plaintiff not only emotional support through her treatment and her depression, they have also financed her retraining and the renovations to her store. He is also the co-lessor for her premises.
- [105] The retraining to allow her to apply eyelashes cost \$2,385.00 USD in May, 2015 and the advanced course of studies cost \$1,299.00 USD on September 25, 2015.
- [106] The plaintiff claims for the costs of retraining as special damages but not for the cost of the renovations to her store.
- [107] Mr. Do noticed the change in the plaintiff's social attitudes after the Accident. He said that she became much quieter and did not seem to want to go out with her friends as she had previously.
- [108] He also noticed that she appeared to have difficulty moving around and she seemed to be in pain. Her previous active lifestyle stopped and her emotional fitness declined as her physical fitness declined.
- [109] He stated that she was no longer as lively and happy as she had been. He also noticed a dramatic weight gain as her activity slowed.
- [110] Mr. Do saw that she stayed in her room alone much more than she had before the Accident.
- [111] Once she started her own business with his and his wife's help, he said Ms. Bunuan became happier because she was once again productive.
- [112] In cross-examination, he noted that she had taken a trip to California in August of 2016 with some blogger friends and to London, in July 2018 with her mother.

[113] He stated that she had never been a big contributor to housecleaning but what she could not do while she was injured, she could now perform. He described her activities post recovery as walking and working with a personal trainer.

B. Lucas Chen

[114] Mr. Chen was driving with the plaintiff at the time of the Accident.

[115] He described his experience of the impact as quite heavy and post-Accident, he communicated with the driver who hit them. He said the plaintiff appeared shocked and just remained beside the car.

[116] He, too, saw her exhibit signs of pain and the abrupt decline in her level of physical activity.

[117] The two of them had done a great deal of outdoor activities together such as jogging, beach hikes, and workouts at their gym. They enjoyed climbing the Grouse Grind two to three times a week. For variety, they would occasionally do the Deep Cove trail.

[118] He said that there were no more hikes after the Accident or lifting weights at the gym.

[119] He noticed the diminution in her self-confidence as she gained weight. From being a person with a lot of friends attending parties and events, she cancelled dates with him and stayed home and watched TV.

C. Saniyah Jamal

[120] Ms. Jamal was called by the defendants. She is acquainted with the plaintiff and has her eyelashes done by Ms. Bunuan.

[121] Ms. Jamal has been employed by Skoah since October 2014. She has worked her way up and now holds a management position with Skoah but she began as a receptionist.

[122] Ms. Jamal agreed with the estimate of tips of \$35 per day by the plaintiff but added that the receptionist takes 10% of any tips over \$20.00. Skoah would cash out the tips at the end of each business day as calculated by the receptionist and she would take her 10% at that time.

[123] There was no documentation of the tips.

[124] She also testified to the existence of a Skoah policy to accommodate injured workers. These policies included a graduated return to work, a job with light duties and modifications to the schedule.

[125] Ms. Jamal did not receive any request from the plaintiff for accommodation of her injuries.

Expert Witnesses and Medical Records

[126] There were only three expert witnesses called in this case.

[127] The plaintiff called a psychiatrist, Dr. Sheinbaum, and the defendants called a responsive psychiatrist, Dr. Latimer, and an orthopedic surgeon, Dr. Hummel.

[128] The plaintiff's treating physician, Dr. Wendy Woodfield, was not called as an expert and only provided her observations of the plaintiff as a fact witness. In addition, Dr. Woodfield's clinical records were marked, and their admissibility is governed by section 42(2) of the Evidence Act, R.S.B.C. 1996, c. 124:

- (2) In proceedings in which direct oral evidence of a fact would be admissible, a statement of a fact in a document is admissible as evidence of the fact if
- (a) the document was made or kept in the usual and ordinary course of business, and
 - (b) it was in the usual and ordinary course of the business to record in that document a statement of the fact at the time it occurred or within a reasonable time after that.

[129] The application of s. 42 to clinical records was discussed in *Edmondson v. Payer*, 2011 BCSC 118, aff'd 2012 BCCA 114:

[25] In *Olynyk v. Yeo* (1988), 55 D.L.R. (4th) 294, 33 B.C.L.R. (2d) 247 [Olynyk cited to D.L.R.], the Court of Appeal said at 300:

The words "to record in that document a statement of the fact" mean, in our opinion, that the fact occurred within the observation of someone who has a duty himself to record it or to communicate it to someone else to record as part of the usual and ordinary course of business.

[26] Section 42 of the Evidence Act therefore makes records admissible to prove such things as a doctor's direct observations of the patient's medical condition, the results of tests performed or ordered by the doctor, and the medical advice given. It eliminates the need for doctors to give oral evidence of those facts, of which they are unlikely to have independent recollection. But as the court noted in *Olynyk*, this "does not make everything in a document admissible just because the document is one which for some purposes falls within the section.": at 301.

[27] The principles governing the admissibility and use of clinical records (and business records generally) were summarized by Burnyeat J. in *McTavish v. MacGillivray* (1997), 38 B.C.L.R. (3d) 306 at 311-12 (S.C.):

1. The notes taken must be made contemporaneously.
2. The notes must be made by someone having a personal knowledge of the matters being recorded.
3. The notes must be made by someone who has a duty himself or herself to record the notes or to communicate the notes to someone else to record as part of the usual and ordinary course of their business.
4. The matters which are being recorded must be of the kind that would ordinarily be recorded in the usual and ordinary course of that business.
5. A statement in the records of the fact that a certain diagnosis was made will be admissible.

6. Recorded observations, diagnosis and opinions will be admissible providing they are recorded in accordance with points 1 through 4.
7. The fact that the referring doctor relied upon another doctor's opinion to assist in coming to his or her own diagnosis and opinion is only evidence of that fact so that the other opinion does not become evidence unless it is otherwise admissible. Accordingly, it is only evidence of the fact that the referring doctor wished or required that opinion to be received before forming his or her own opinion.
8. Statements made by parties or by experts which are recorded in the usual and ordinary course of business but which lie outside the exception to the hearsay rule are hearsay and will not be admitted into evidence unless they can be brought within Section 14 of the Evidence Act which allows for the admissibility of such statements if it can be shown that they are proof of a prior inconsistent statement.

[Emphasis added.]

[130] Therefore, Dr. Woodfield's records are admissible under the clinical records exception, however their evidentiary value is only to prove that she made certain statements and not for the truth of their content.

[131] She observed that the plaintiff had decreased range of motion in her neck and back, and observed as well that she had significant discomfort in her neck and back. Her note on the ICBC CL19 states that the plaintiff suffered a Grade 2 whiplash and soft tissue injuries.

[132] Before the plaintiff went to the Philippines, she noted that she had recommended the use of heat, anti-inflammatories, a neck wrap and to avoid traumatic neck activities and neck extension. She also recommended the plaintiff attend for physiotherapy on her return.

[133] Dr. Woodfield initially prescribed Naproxen.

[134] By the time of the plaintiff's return from the Philippines, she had some improvement in her lower back but her neck pain was still problematic. By May 2016, the plaintiff reported her neck had improved but she was suffering back spasms.

[135] There was a repeat x-ray taken in May 2016.

[136] Dr. Woodfield referred the plaintiff to the EMG lab in December 2017. At that point, the plaintiff reported pain in her shoulders and an inability to lift heavy objects.

[137] Dr. Woodfield's clinical records included a report from a radiologist setting out his opinion of the images taken of the plaintiff's cervical spine shortly after the Accident. However, as stated above, those records do not prove the truth of his findings and thus, there is no admissible evidence offered by the plaintiff to prove that she suffered a compression fracture of the C4 vertebra as a consequence of the Accident.

- [138] The defendant's orthopedic surgeon, Dr. Hummel, found no evidence of such a fracture or of any substantive pathology in his examination of the plaintiff which took place in March 2019.
- [139] As a result, Dr. Hummel concludes that the only injuries suffered by the plaintiff were soft tissue injuries which, according to the plaintiff herself, were entirely resolved.
- [140] What I accept is that the plaintiff believed she suffered a compression fracture of C4 and that this uncritical acceptance influenced her emotions and her actions for a period of approximately two to three years after the Accident until her consultation with a neurologist who told her she did not have any symptoms of nerve damage. The fact that the consultation was obtained is corroborated by Dr. Woodfield's clinical records and Dr. Sheinbaum's expert report.
- [141] Dr. Sheinbaum, the psychiatrist called by the plaintiff, found that the plaintiff had suffered a major depression as a result of the Accident, such depression stemming from the plaintiff's belief that she had suffered a serious injury to her spine that would permanently restrict her activities, prevent her from living a full life and force her to rely on her parents to care for her.
- [142] Dr. Latimer, the defendant's expert psychiatrist, examined the plaintiff in June 2019. If she had suffered from a depression, when he examined her, she no longer exhibited any diagnostic criteria for a psychiatric disorder. Dr. Sheinbaum agreed in cross-examination that the plaintiff did not require any further mental health treatment and her depressive symptoms had resolved. She also agreed that if the plaintiff had had earlier access to a neurologist, it would have reduced the time required for her recovery from depression.
- [143] I conclude from my review of the expert reports that the plaintiff suffered soft tissue injuries in the Accident that completely resolved but her major medical problem was the depression that caused her serious distress. I find that hearing from the neurologist largely alleviated Ms. Bunuan's depression.
- [144] Her physical symptoms were not serious but her mental health was badly affected for a period of two to three years.

Issues:

- [145] The issues to be determined at trial are:
- a) The extent of the plaintiff's non-pecuniary damages;
 - b) Past Income loss from 2015 to 2018;
 - c) Recovery of special damages including the cost of retraining;
 - d) Disbursements;

e) Costs.

I. Non-Pecuniary Damages

[146] Non-pecuniary damages are intended to compensate a plaintiff for the pain, suffering and loss of enjoyment of life and of amenities experienced as a result of the defendant's negligence. They are meant to compensate for the damages suffered to the date of trial and those that the plaintiff will suffer into the future.

[147] The award should be fair and reasonable for both parties as those concepts are measured against the adverse impact of the particular injuries on the particular plaintiff: *Hunt v. Ugre*, 2012 BCSC 1704 at para. 176. While fairness is assessed by reference to awards made in comparable cases, because of the requirement for an individualized assessment each case is decided on its own unique facts. The process is one of assessment and is not amenable to mathematical precision: *Drodge v. Kozak*, 2011 BCSC 1316 at para. 148; *Lindal v. Lindal*, [1981] 2 S.C.R. 629 at 642.

[148] In *Stapley v. Hejslet*, 2006 BCCA 34, leave to appeal ref'd [2006] S.C.C.A. No. 100, at paras. 46-47, Madam Justice Kirkpatrick outlined the following factors to be considered in awarding non-pecuniary damages:

[46] The inexhaustive list of common factors cited in *Boyd* that influence an award of non-pecuniary damages includes:

- (a) age of plaintiff;
- (b) nature of the injury;
- (c) severity and duration of pain;
- (d) disability;
- (e) emotional suffering; and
- (f) loss or impairment of life;

I would add the following factors, although they may arguably be subsumed in the above list:

- (g) impairment of family, marital and social relationships;
- (h) impairment of physical and mental abilities;
- (i) loss of lifestyle; and
- (j) the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff: *Giang v. Clayton*, [2005] B.C.J. No. 163 (QL), 2005 BCCA 54).

[149] Relying on the above set of factors as a framework for the analysis of the plaintiff's entitlement to non-pecuniary damages, I make the following findings.

- [150] The plaintiff was a young woman at the time of the accident and faced the prospect that she would face a limited future due to her injuries.
- [151] The injuries she actually suffered, for which I have admissible evidence, were soft tissue injuries of the nature that they would heal entirely and as it turns out, they did.
- [152] The nature of her debilitating injury was psychological. It is unfortunate that she was unable to obtain a neurological consultation at an earlier date than she did as the psychiatric evidence was that her depression would have resolved sooner had she learned that her nervous system was intact sooner.
- [153] But during the time she honestly believed she was seriously injured, she withdrew from her former active life, hid from her friends due to her weight gain, and gave up dancing, hiking, and partying with her friends. These losses are not permanent and she is once again active but for a two to three-year period, she was solitary.
- [154] As Kirkpatrick, J.A. expressed it, she suffered a loss of lifestyle for the period of her depression. It is indeed fortunate for the plaintiff that this loss was only temporary and she has been able to maintain her relationship with Mr. Chen and her parents throughout.
- [155] As well, she suffered pain in her lower back and her neck as a consequence of the Accident. These injuries are fully resolved but she took both prescription and over the counter painkillers for a period of almost three years.
- [156] She suffered disturbances to her sleep and was unable to continue at a job she enjoyed because she could not perform the gentle massage component of the facials she administered. While it was not suggested that she was required to quit her job at Skoah after the Accident, I accept that subject to the limitation I describe to her past wage loss, she was not able to perform her regular job due to the pain she suffered from the Accident.
- [157] I have reviewed all the case law submitted by the parties.
- [158] The case law submitted by the plaintiff and set out in the argument deals with cases where chronic pain followed from the injuries suffered or the injury suffered was more severe than that suffered by the plaintiff. For example, in *Cikojevic v. Timm*, 2010 BCSC 800, the plaintiff suffered a brain injury that, among other injuries, caused her long-lasting cognitive and emotional deficits and made her completion of high school more difficult. I do not find this case apposite to the injuries suffered by Ms. Bunuan. Therefore, the amount of non-pecuniary damages awarded in *Cikojevic* is not helpful.
- [159] *Macie v. DeGuzman*, 2019 BCSC 1509, is another case where the injuries were more serious than in the instant case. However, I understand that the plaintiff puts this case forward as an example of psychological injury found by the trial judge from the evidence in the absence of a medical opinion that it was present. However, in the circumstances of Ms. Bunuan, I accept that she suffered from depression for at least two years and she has now completely recovered. This factor has an impact on the non-pecuniary damages she has

incurred but it does not sound in the kind of award that recognizes the effect of lifelong disability.

Psychological Injuries

- [160] Chronic pain and continuing psychological injuries, including major depression and generalized anxiety, all formed part of a substantial award of non-pecuniary damages in *Khosa v. Kalamatimaleki*, 2014 BCSC 2060. Once again, there is no continuing depression in Ms. Bunuan's case and she has been candid about its resolution.
- [161] Chronic pain, and the plaintiff's psychological capacity to cope with it, is featured in the cases of *Moreira v. Crichton*, 2018 BCSC 1281 and *Marois v. Pelech*, 2009 BCCA 286. In *Marois*, the accident was more serious but the plaintiff was improving at the time of trial. However, the plaintiff in *Marois* had suffered five years of depression and chronic pain and had been unemployed as a result. Again, I do not find this case particularly apposite to the facts in Ms. Bunuan's situation.
- [162] The non-pecuniary damages awarded in the remaining cases cited by the plaintiff are helpful only as a guide since the injuries involved are all more serious and chronic than those suffered by Ms. Bunuan and thus exceed what I would consider to be a fair award in this case. These cases are as follows: *Ansari v. Iborzpour*, 2019 BCSC 512, *Ali v. Padam*, 2017 BCSC 1849, and *Verjee v. Dunbrak*, 2019 BCSC 1696.
- [163] It should be clear that I accept that the plaintiff believed herself to have suffered a serious injury caused by the Accident and the fear of the consequences of that injury whether real or imagined, caused her to fall into depression for a two to three-year period. That the depression was caused by the Accident is clear. That the depression is completely gone is also clear, not only from Dr. Latimer's report, but from Dr. Scheinbaum's second report as well.
- [164] The cases cited by the defendant resemble more closely the circumstances of the plaintiff. However, they do not deal with the degree of depression found by Dr. Scheinbaum in this plaintiff. The damages awarded in *Hickey v. Pena*, 2013 BCSC 465 amount to \$60,000 in current dollars.
- [165] In *Smith v. Evashkevich*, 2016 BCSC 1228, at trial the plaintiff's injuries led to him suffering anxiety accompanying his soft tissue strain. He was awarded \$50,000 in non-pecuniary damages.
- [166] I agree with the defendant that the plaintiff has not proved she suffered a compression fracture at C4. However, it is my view that this does not address the injuries caused by the Accident. The plaintiff believed she had suffered a life-changing injury and this belief led to her severe depression. The physical injuries she suffered were those found in many accidents involving impact from behind. They caused her pain and loss of sleep and loss of her chosen employment.

- [167] But she is very quick to admit that she has recovered, can cope with any minor problems by varying her schedule, and she has progressed successfully in her career. She does not face chronic and intractable depression.
- [168] She did suffer an interruption in her lifestyle and physical injury and serious emotional injury although they were relatively short-lived.
- [169] I award her \$70,000 in non-pecuniary damages.

II. Past Income Loss

- [170] The defendant takes the position that Ms. Bunuan should not receive any compensation for income loss during the lengthy periods she did not visit her family doctor between the date of the Accident and the end of September 2018.
- [171] As noted above, the plaintiff does not claim income loss for the year 2018.
- [172] I reject the defendants' position. It is entirely sensible to me that there would be times in this period when the plaintiff did not believe she would receive any assistance from her family doctor so that there would be little benefit from an office visit.
- [173] It also seems consistent to me with her state of depression that she would simply stay home rather than venture out for a fruitless consultation with her doctor.
- [174] I accept that she did what she could to take care of her injuries at home by doing yoga and the stretching exercises she had learned from her physiotherapist.
- [175] Therefore, I find that she suffered income loss during the period from May 1, 2015 to December 31, 2017.
- [176] The amounts she was able to earn over this period must be deducted from any wage loss paid to her as mitigation of her damages.
- [177] The plaintiff sets out the income loss in her argument as follows and I have quoted from it here (with some deletions and adaptations):
118. The evidence indicates that Ms. Bunuan worked at Skoah from October 14, 2014 . . . until March 8, 2015. There are 143 days between these two dates, which works out to 20.43 weeks.
119. According to her 2014 T4 from Skoah, Ms. Bunuan earned \$3395.94 in employment income between October 14, 2014 and December 31, 2014. She did not declare any tips in 2014.
120. According to her 2015 T4 from Skoah, the plaintiff earned \$5689.99 in employment income between January 1, 2015 and March 8, 2015. She did not declare any tips in 2015. Her commission income of \$611.69 was included in the total of her employment income.

121. During this period of 20.43 weeks, she declared \$9,094.93 in employment income from Skoah. Using this calculation as a base, but for the Accident had she worked the exact number of hours per week at the same rate of hourly pay and the same rate of commission as she had between October 14, 2014 and March 8, 2015, her Skoah employment income (not including tips) would be \$23,097.88 for the year 2015.
122. Ms. Bunuan's total declared income in 2015, according to her 2015 Notice of Reassessment, was \$6,652. Her net income for 2015 would be \$23,097.88 less \$6,652 for a total of \$16,445.88.
123. Ms. Bunuan's Notice of Reassessment in 2016 shows a loss of \$5,212. This loss must be added to the amount she would have earned from Skoah (\$23,097.88) but for the Accident. The total of her income for 2016 would be \$28,309.88.
124. Ms. Bunuan's total net income in 2017 according to her 2017 CRA Notice of Assessment, was \$12,166. Deducting this amount from her potential yearly employment income from Skoah of \$23,097.88 would make her income loss (not including tips) \$10,931.88.
125. . . .
126. Her total income loss for 2015, 2016 and 2017 not including tips is \$55,687.64.
127. The annual tip income is \$8,750.00 based on the estimate of \$35 per day by Ms. Bunuan and not disputed by Ms. Jamal. (5 days a week X 35.00 X 50 weeks).
128. Her loss of tip income in 2015 is \$6,021.77 (245 days/365 days X \$8750.) 245 days amounts to 35 weeks.
129. For the years 2016 and 2017, the loss of tip income comes to $\$8750 \times 2 = \$16,500$, less the deduction taken by front office staff.
- [178] The gross past income loss suffered by the plaintiff is \$79,209.41 ($\$55,687.64 + \$23,521.77$).
- [179] The deduction that would have been taken from her tip income by the front office staff is 10% of any amount over \$20.00. As the average amount of her tips was \$35.00 per day, this would amount to about \$1.50 per day (10% of \$15.00 = \$1.50 for a weekly deduction of \$7.50.) This deduction was testified to by Ms. Jamal. The deduction for the tip out is not large: about \$375.00 per year. The net amount of the deduction for the tip out is \$262.50 for 2015, and \$375 for each of the years 2016 and 2017 for a total deduction of \$1,012.50.
- [180] The revised past income loss amounts to \$75,197.00.
- [181] From this amount, I deduct 5% (\$3760.00) as the plaintiff did not inquire of Skoah before or on her return from her vacation in the Philippines whether the company would accommodate her injuries with some form of work that did not require her to do massages.
- [182] Ms. Jamal testified that Skoah had such a policy but that the plaintiff did not make any inquiries of Skoah. This amounts to a failure to mitigate.

[183] The total past income loss is \$75,197.00 - \$3,760.00 = \$71,437.00.

[184] I have not taken any deduction for income tax from this amount and leave it to the parties to calculate. Past wage loss is subject to deduction for income tax.

III. Future Income Loss

[185] The plaintiff makes no claim for loss of earning capacity or loss of future income.

IV. Special Damages

[186] The award of special damages is subject to the test of reasonableness: *X. v. Y.*, 2011 BCSC 944 at para. 281. For the most part, I find Ms. Bunuan's claim for special expenses to be reasonable. She claims as follows:

- i. Goodlife Fitness Gym Membership from September 19, 2016 to September 20, 2018: \$1,234.60;
- ii. Extreme Lashes course fee (May 5, 2015): \$3,172.58 CDN;
- iii. Barboleta course fee (September 25, 2015): \$1,727.67 CDN;
- iv. Painpro massage therapy treatments between May 28, 2015 and May 19, 2016: \$491.40;
- v. Clinica Holistica consultation fee February 8, 2017: \$90.00

[187] The total for these amounts is \$6,716.25. The defendant argues that the plaintiff should not be compensated for treatments incurred after the hiatus in her appointments with Dr. Woodfield, that is after May 2016.

[188] As I have noted, I reject the argument that this hiatus has clinical significance.

[189] I find that the plaintiff had a gym membership before the Accident and would have continued to attend the gym in any event so that I disallow her gym membership fees.

[190] Taking the lash courses in Seattle was a reasonable attempt for her to find another way to earn a living that did not cause her to suffer pain. I therefore award the costs of the Extreme Lashes course fee and the Barboleta course fee.

[191] She is also entitled to the costs of her Painpro massage therapy treatments.

[192] She consulted a naturopath at Clinica Holistica for Traditional Chinese Medicine and Acupuncture. I do not have evidence that these therapies were recommended by her doctor, so I am unable to conclude they are reasonable. I therefore disallow this expense.

[193] The plaintiff is awarded special damages in the amount of \$5,391.65.

V. Conclusion:

[194] I award the plaintiff the following amounts:

- i. Non-pecuniary damages: \$70,000.00
 - ii. Past wage loss (gross): \$71,437.00 (the net amount to be deducted for income tax to be agreed by counsel)
 - iii. Special damages: \$5,391.65
 - iv. Costs and disbursements.
- "Russell J."
-

The Honourable Madam Justice Russell

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