

CANADA / JUDGMENT

Carleton v. Warner

2020 BCSC 436

COURT

Supreme Court of British Columbia

DECIDED

25 March 2020

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2020 BCSC 436 Carleton v. Warner

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Carleton v. Warner,

2020 BCSC 436

Date: 20200325

Docket: M191015

Registry: New Westminster

Between:

Hailey Dorothea Carleton

Plaintiff

And

Irene Mae Warner

Defendant

Before: The Honourable Mr. Justice Verhoeven

Reasons for Judgment

Counsel for the Plaintiff:

S.T. Cope

Counsel for the Defendant:

T. Moon

Place and Dates of Trial:

New Westminster, B.C.

February 11-14, 2020

Place and Date of Judgment:

New Westminster, B.C.

March 25, 2020

Table of Contents

I. Introduction. 3

II. Background. 3

A. The Plaintiff 3

B. The MVA. 5

C. Trip to Europe and Return to Work. 6

D. The Plaintiff's Injuries. 7

E. Effects of the Plaintiff's Injuries. 9

III. Medical and Occupational Therapist Evidence. 12

A. Dr. Alex S. Marazzi - Family Physician. 12

B. Dr. Zeeshan Waseem - Psychiatrist 14

C. Mr. Jeff Padvaiskas - Occupational Therapist 16

IV. Assessment of Damages. 17

A. Legal Principles - Loss of Earnings or Earnings Capacity. 17

B. Past Loss of Earning Capacity. 21

C. Future Loss of Earning Capacity. 25

D. Non-Pecuniary Loss. 28

E. Future Cost of Care. 29

F. Special Damages. 30

G. Costs. 30

I. Introduction

- [1] The plaintiff claims damages as a result of personal injuries sustained in a motor vehicle accident that occurred July 22, 2016 (which I will refer to as "the accident" or "the MVA"), when she was travelling as a passenger in a motor vehicle that was rear-ended by a truck operated by the defendant. The defendant admits liability.
- [2] The plaintiff was 26 years of age at the time of the MVA. She was working as a dental assistant at a dental clinic in Maple Ridge, called Mellow Family Dental Care ("Mellow Dental"). She is a Certified Dental Assistant ("CDA"). She was working part-time, four days a week.
- [3] She is now 29 years of age. She continues to work as a dental assistant. She now works at a clinic in Mission, where she grew up and currently resides. She continues to work four days a week.
- [4] She claims for past and future loss of earning capacity, non-pecuniary loss, future care costs, and special damages.
- [5] The defence contends that the plaintiff initially sustained soft tissue injuries in the lower back, and in the upper back and shoulder area, but that her ongoing injuries are attributable to an accident that occurred 15 or 16 months after the MVA, on November 7, 2017, when the plaintiff was driving a car that hit a bear. The defence contends that the plaintiff suffered no loss of past or future earning capacity, and that no award should be made for future care costs.

II. Background

A. The Plaintiff

- [6] The plaintiff graduated from high school in Mission in 2008. After graduating she worked with her father in his roofing business. In 2011 she attended Vancouver Community College ("VCC") on Pender Street in downtown Vancouver. She commuted to VCC via the West Coast Express commuter train from Mission. She achieved her CDA designation upon completing a 10-month program. She worked for brief periods of time at dental clinics in Abbotsford and Maple Ridge. In August 2014 she began working at Mellow Dental, located on Lougheed Highway in Maple Ridge, near Pitt Meadows. Mellow Dental is operated by Dr. Sabrina Makhani.
- [7] The plaintiff is not married and has no children. She is the youngest of three sisters. The eldest is Carrie-Anne, who is five years older than the plaintiff. Another sister, Corina, is three years older than the plaintiff. In 2013 or 2014, not long before the plaintiff started working at Mellow Dental, she and Carrie-Anne moved out of their parents' family home in Mission, together. They moved to a townhouse in Maple Ridge. The plaintiff has continued to reside with her sister at all times. They have moved residences several times since 2014.

- [8] When the plaintiff began working at Mellow Dental in August 2014, the clinic was not very busy because it had only begun operating in November 2013, and Dr. Makhani was building the practice from scratch. Initially, the plaintiff worked three days per week. There were three persons working at the clinic: Dr. Makhani, the plaintiff, and a receptionist. As time went on, more staff were hired, including a dental hygienist. The plaintiff began working four days per week. She worked as a receptionist on Mondays, and worked as a dental assistant on Tuesdays, Wednesdays and Thursdays. Mellow Dental has always been closed on Fridays.
- [9] The plaintiff is a member of the Jehovah's Witness religion. In 2015 and 2016 she was a "regular pioneer" with the church. This meant that she was obliged to spend at least 70 hours per month doing evangelical or proselytizing activities, which she described as volunteer work. She was content to work part-time in order to allow her the time for this activity.
- [10] She had no health problems prior to the MVA.
- [11] The plaintiff, Carrie-Anne, and two other friends, Rebecca Munz and Hannah Schurko, had been planning a trip to Europe for one to two years before the accident occurred. All four women were regular pioneers with the church. The trip to Europe was primarily for the purpose of church activities.
- [12] They planned to leave in late August 2016, to be away for three months, returning in late November 2016. Despite her MVA injuries, the plaintiff and her companions were able to complete the trip and activities, more or less as planned.

B. The MVA

- [13] The MVA occurred on July 22, 2016. The plaintiff was not working that day, as it was a Friday. She was seated in the rear passenger seat of a 2002 Honda Civic being driven by her friend Rebecca Munz. Her sister Carrie-Anne was seated in the front passenger seat.
- [14] All three young women were planning to spend the day engaging in church activities.
- [15] Their vehicle was stopped at a red light on Dewdney Trunk Road, Maple Ridge, when it was struck from behind by the defendant's pickup truck, a 2011 GMC Sierra. After the collision, and when the light turned green, the drivers drove to a nearby parking lot, where information was exchanged. They spent five or ten minutes at the parking lot. While there, the plaintiff exited the vehicle. She noticed damage to the rear of the Honda. Photographs show minor to moderate damage to the trunk and rear bumper of the Honda.
- [16] The plaintiff testified that the jolt from the impact caused the coffee in her travel mug to be thrown up onto the ceiling of the vehicle and also spill onto her shirt and skirt. She noticed back pain immediately. The driver, Ms. Munz, testified that the impact felt strong.
- [17] All three occupants of the Honda sustained soft tissue injuries.

- [18] Immediately after the collision all three occupants of the Honda went to a nearby medical clinic, the Cottonwood Clinic, for assessment, and were seen by a doctor there. The plaintiff testified that she was having pain in her lower back, and shoulders. The doctor advised her to use ice, take Advil, and rest. She returned home and rested for the remainder of the day.
- [19] The next day she found she was in a little more pain, and her pain increased as the following week went on. The pain was in her neck, shoulders, and back. She continued to work during the week. She returned to the medical clinic one week after the accident. The doctor recommended massage therapy and physiotherapy, and that she see her family doctor. The plaintiff underwent three or four therapy treatments before departing for the trip to Europe at the end of August 2016. She found that during this period of time her lower back, upper back and shoulder pain was increasing.
- [20] She first saw her own doctor, Dr. Marazzi, whose practice is in Mission, on November 25, 2016, after her return from Europe.

C. Trip to Europe and Return to Work

- [21] As noted the plaintiff, Carrie-Anne, and Rebecca Munz all sustained soft tissue injuries in the accident, however they were able to carry on with the trip to Europe. They flew to London, then spent time in various other European locations (such as Paris and Rome) before reaching a small town in southwestern Spain, El Puerto de Santa Maria (near Cádiz), where they remained for the final two months of the trip, and where they planned to carry out church activities.
- [22] Unfortunately while they were in Spain the plaintiff and her sister received news that their father had been diagnosed with cancer. After they returned to British Columbia they both went to reside with their parents in Mission, to help take care of him. Sadly, he died a few months later, on March 1, 2017.
- [23] In order to take the trip to Europe, the plaintiff was forced to quit her job at Mellow Dental. Dr. Makhani could not afford to have the plaintiff away from work for three months.
- [24] After returning from Europe, the plaintiff worked for three weeks in January 2017 on a "trial basis" with a clinic called Precision Endodontics in downtown Vancouver. For a number of reasons the plaintiff did not continue at Precision Endodontics. She testified that she and the dentist agreed after three weeks that she was "not a great fit".
- [25] She returned to work at Mellow Dental in early February 2017. Dr. Makhani was happy to have her back. Her work hours increased somewhat as compared with her work hours prior to the accident. She now worked four full days per week, and in addition, six hours every second Saturday.
- [26] At the time she was still living in Mission. In May 2018 she moved with her sister Carrie-Anne and their mother to a rented apartment in Port Coquitlam.

- [27] During 2019, the plaintiff was planning to move back to Mission. She found a better paying job at a Mission dental clinic, Gateway Dental, where she began working October 15, 2019. She had been earning \$25 per hour at Mellow Dental. At the new clinic, she earned \$28 per hour.
- [28] The plaintiff works four days a week at Gateway Dental. She turned down Gateway Dental's offer of five days per week. She plans to remain at Gateway Dental for the foreseeable future.
- [29] The plaintiff, Carrie-Anne and their mother moved from Port Coquitlam to Mission in December 2019. They resided and continue to reside in a rented townhouse. However they plan to move into a new home in Mission that is presently being constructed. They will reside with Corina, and her husband and child, in separate suites. The plaintiff and Carrie-Anne will have ownership interests in the residence.

D. The Plaintiff's Injuries

- [30] As reflected in the plaintiff's evidence at trial and in the medical reports of Dr. Marazzi, family physician, and Dr. Waseem, physiatrist, the plaintiff's primary complaints are of lower back pain, as well as neck, upper back and mid-back pain. Her upper back pain also extends into her shoulders.
- [31] Aggravation of pain brings on headaches. She suffers from some sleep disturbance. The effect on her sleep is relatively minor.
- [32] As noted, the defence argues that an accident involving her vehicle and a collision with a bear on November 7, 2017 is an intervening event, and is the cause of her ongoing complaints. The evidence does not support the defence position on this.
- [33] The collision with the bear seems to have been a relatively minor event, at least for the plaintiff. The plaintiff was driving her car when a bear ran out and hit the vehicle. The bear then ran away. She testified that the damage to her vehicle was modest. The vehicle remained drivable, and was repaired. From this I infer that (hopefully, at least) the bear was not gravely injured.
- [34] The plaintiff testified that when she saw her family doctor the next day, November 8, 2017, she complained of right wrist, right elbow and upper back pain. These pains continued for about two weeks, she testified. This generally aligns with the report and opinion of Dr. Marazzi. He noted right elbow, right wrist, and right jaw pain. He noted continuation of some of the effects of the November 7, 2017 "bear" accident on subsequent examinations on December 15, 2017 and January 19, 2018, however her condition was improving.

- [35] When Dr. Marazzi saw the plaintiff again a year later on January 11, 2019, he diagnosed cervical spine strain and lumbar spine strain. His opinion is that these strains occurred as a result of the MVA. I accept that opinion. I found Dr. Marazzi to be a credible and reliable witness. He was in a good position to assess whether the ongoing injuries were caused by the MVA, or the bear accident.
- [36] When the plaintiff saw Dr. Waseem in 2019 she told him about the bear accident. She said that the injury was to her right wrist and forearm, and that the injuries had resolved. At trial, the plaintiff testified that the bear accident caused some increase in symptoms to her upper back. I accept that she may have forgotten to tell Dr. Waseem that the bear accident also caused some exacerbation of her upper back symptoms.
- [37] Both doctors and the occupational therapist had no reason to doubt her veracity.
- [38] I consider the plaintiff's testimony about the effects of the bear accident to be credible. Taking that evidence together with the medical evidence, I conclude that her ongoing injuries are as a result of the MVA. The bear accident caused temporary exacerbation of her MVA injuries and also some discrete strain injuries to her right shoulder and elbow.

E. Effects of the Plaintiff's Injuries

- [39] I accept the plaintiff's evidence that her health was very good prior to the motor vehicle accident. There is no evidence of any material prior injuries or prior health conditions of any sort.
- [40] Before the accident, she and her sister Carrie-Anne were preparing for the trip to Europe by exercising regularly at the gym, three times per week. The exercise was quite vigorous. The plaintiff enjoyed moderate hiking in local parks, and canoeing. She did not provide details as to the canoeing. She enjoyed cooking for the family, particularly baking, and was active socially with family and friends. She enjoyed visiting with friends, and restaurant meals.
- [41] As noted, she was a "regular pioneer" and spent a considerable amount of time in church evangelical activities. That was the activity planned for the day of the accident, in fact.
- [42] The plaintiff continued to work after the accident. She did not lose time from work. She explained that she did not want to leave Dr. Makhani in the lurch. The accident occurred on a Friday, and so I infer that her next actual date of work would have been three days later, on Monday.
- [43] Dr. Makhani testified that she took a two-week vacation at the end of July and the beginning of August. The plaintiff testified that she was off work for one week while Dr. Makhani was away. However the plaintiff also testified that when Dr. Makhani was away on vacation, she would sometimes work at other dental clinics. The details of her schedule from the date of the accident to the end of August 2016 when she left for Europe are not in evidence.

- [44] The long plane ride to Europe was uncomfortable, but the plaintiff and her sister Carrie-Anne and her friend Rebecca Munz managed to make the best of it.
- [45] The three months in Europe went more or less as planned. The group decided against participating in some of the more physically strenuous activities that they had planned, such as going zip lining in Portugal. However they carried on with the evangelical work as planned. They managed to do quite a lot of sightseeing as well. They took some fairly lengthy day trips, to the nearby city of Cádiz, to Seville, to Gibraltar, and to Tangiers, Morocco, by car and ferry. They used a rented car for transportation in Spain. Cádiz was only 10 to 15 minutes away but the other trips were much longer. The plaintiff was uncomfortable on longer trips, and suffered from lower back and upper back pain, and headaches.
- [46] When she returned to Canada and saw Dr. Marazzi on November 25, 2016, she complained of lower back and upper back pain, and that it was difficult for her to sit or stand for longer than 20 minutes at a time.
- [47] Her return to work was delayed because after she returned to Canada she and her sister Carrie-Anne moved to Mission to help their parents cope with their father's illness.
- [48] She worked for Precision Endodontics in downtown Vancouver for three weeks in January 2017. She found the train ride from Mission to downtown Vancouver difficult due to prolonged sitting. As noted, the job trial there did not work out and she returned to Mellow Dental in February 2017.
- [49] Her hours of work increased as compared with before the accident. Dr. Makhani required her to work, in effect, four and a half days a week, rather than four days per week as before. She worked Monday through Thursday, and also every second Saturday, from 9:00 a.m. to 3:00 p.m.
- [50] The plaintiff testified that she was able to tolerate the work at Mellow Dental because the pace of work was somewhat slower than at other dental clinics. She explained that Dr. Makhani prefers not to do longer procedures such as root canals and extractions. Dr. Makhani confirmed the accuracy of this. The practice was still growing, and there were some gaps in the schedule that allowed the plaintiff to stretch and move around. Also, Dr. Makhani's manner of working reduced the plaintiff's need to remain in fixed or static body positions for extended lengths of time.
- [51] In October 2019, a few months prior to trial, the plaintiff accepted the position at Gateway Dental Clinic in Mission, where as noted she works four days a week. It is a busier practice than Mellow Dental. I accept her evidence that she is very tired at the end of the working day and that she is finding that keeping up with the work is more difficult than it was previously. She has less energy at the end of the day and finds it difficult to go to the gym regularly after work as she previously was able to do.

- [52] I accept her evidence that she now avoids more strenuous physical activities. She continues to run on a treadmill, but at a slower speed than she did previously. She is able to carry out domestic activities but avoids heavier tasks. She continues to enjoy cooking. Sitting for more than half an hour and standing for long periods of time causes pain. She is less able to participate in social activities than previously.
- [53] During 2017 and 2018, she continued to participate in similar recreational activities as she had previously, including walks, and canoeing. She testified that she had less energy than before.
- [54] She has utilized physiotherapy, massage therapy, and the assistance of a kinesiologist to manage her symptoms and to maintain her functionality.
- [55] Her friend Hannah Schurko noticed the plaintiff's discomfort when they were together in Spain. Ms. Schurko continues to see the plaintiff fairly regularly and notices that she continues to be uncomfortable at times. When they get together for board games she notices the plaintiff is stretching and is uncomfortable. She will get up and walk around.
- [56] In summary, since the motor vehicle accident the plaintiff has suffered from chronic upper back and lower back pain. Her pain has been somewhat limiting with respect to her pre-accident activities. In the main she has carried on with her work and her activities as before, with some impairment of her abilities. When she returned to work at Mellow Dental, her work hours increased as compared with prior to the accident.

III. Medical and Occupational Therapist Evidence

A. Dr. Alex S. Marazzi - Family Physician

- [57] Dr. Marazzi has seen the plaintiff relatively infrequently. He first saw her November 25, 2016, several months after the MVA. The plaintiff explained that she did not see her doctor immediately after the accident because at the time she was living in Maple Ridge. After returning from Europe, she again resided in Mission, where Dr. Marazzi's practice is located.
- [58] She reported to Dr. Marazzi that she had lower back soreness as well as pain in the muscles of the upper back (trapezii). She explained that she had attended approximately three or four physiotherapy treatments and three or four massage therapy treatments by then. She complained that it was difficult for her to stand or sit for longer than 20 minutes at a time as this exacerbated her trapezii and lower back pain. She was in no acute distress. She was tender in the cervical spine and bilateral trapezii. She was tender in the lumbar spine area. Dr. Marazzi's impression was of lumbar and cervical spine strain and bilateral trapezii strain. She was advised to pursue physiotherapy and massage therapy.
- [59] She did not see Dr. Marazzi again until almost a year later, on November 8, 2017. The plaintiff told Dr. Marazzi that she had been involved in a second motor vehicle accident the previous day, November 7, 2017. She was the driver of a vehicle when a bear appeared and struck the right side of her car. She had complaints of right elbow pain and increased

tenderness of both trapezii, which had been previously injured in the MVA. Dr. Marazzi concluded that she had sustained a right shoulder strain, a right elbow strain, and exacerbation of her cervical spine strain.

- [60] Dr. Marazzi saw her again on four other occasions: (1) December 15, 2017; (2) January 19, 2018; (3) January 11, 2019; and (4) August 26, 2019.
- [61] Dr. Marazzi provided a report dated August 29, 2019, and testified at the trial.
- [62] On her last visit, the plaintiff stated that sitting or standing for prolonged periods of time caused headaches. She reported that she was continuing to experience upper and lower back pain, with upper back pain being worse. In her work as a dental assistant, when she was assisting a patient with a procedure that lasted over an hour, she experienced an exacerbation of her lower back and neck pain.
- [63] Dr. Marazzi's diagnosis was that the plaintiff had sustained a cervical spine and lumbar spine strain in the MVA, and that she continued to be symptomatic as of the date of his report, approximately three years post-accident. In Dr. Marazzi's opinion, the prognosis for full recovery from her injuries is "guarded", as she continues to experience lumbar and cervical spine strain three years post-accident. At trial, he explained that "guarded" means that she is unlikely to improve. Therefore in his opinion her condition is likely to continue indefinitely.
- [64] Dr. Marazzi has referred her to a physiatrist, Dr. Azadi, for evaluation of her musculoskeletal injuries. As the wait time to see Dr. Azadi is one to two years, the plaintiff has not yet seen Dr. Azadi.
- [65] Dr. Marazzi is in favour of the plaintiff continuing with physiotherapy and massage therapy, and suggests that she may benefit from the services of a personal trainer or kinesiologist.
- [66] Dr. Marazzi does not say that the plaintiff cannot continue to work full-time. He advises that she is able to continue with her work duties. He states that she has been advised to maintain optimal posture as well as to pursue core-strengthening exercises.
- [67] Some of the facts Dr. Marazzi relied on in forming his opinion are not supported by the evidence. He states that the vehicle that rear-ended the plaintiff's vehicle was travelling at approximately 30 to 40 km/h, and that the plaintiff's vehicle was written off. In fact, there was minor to moderate damage to the bumper and trunk area of the Honda Civic, and it is very unlikely that the defendant's pickup truck was moving at 30 to 40 km/h at impact. At trial the plaintiff did not testify as to the speed of the defendant's vehicle at impact, and of course this is not something she would be likely to know. Dr. Marazzi stated that the plaintiff was prevented from continuing in her activities of surfing and snowboarding. At trial, the plaintiff explained that she had never engaged in these activities, but would have wanted to try them.
- [68] In my view, these factual discrepancies are relatively minor and do not substantially affect the weight I give to Dr. Marazzi's opinions, which I accept.

B. Dr. Zeeshan Waseem - Psychiatrist

- [69] At the request of the defence, the plaintiff saw Dr. Waseem, a physiatrist (a specialist in physical medicine and rehabilitation) for an independent medical examination, on September 25, 2019. Dr. Waseem provided a report, and testified at the trial.
- [70] At the time of his assessment, the plaintiff's symptoms, in order of severity, were: (1) lower back pain; mostly constant, worsened with prolonged sitting, slightly improved since onset and stable for at least the past several months; and (2) neck/upper back/mid back pain; mostly constant, worsened with reaching and sustained postures, slightly improved since onset, and stable for at least the past several months.
- [71] The plaintiff told Dr. Waseem that her symptoms were alleviated by massage therapy, physiotherapy, application of heat, and exercise (jogging). She did not have symptoms of mood disturbance or generalized anxiety.
- [72] Dr. Waseem noted pain in the upper back, together with muscle stiffness, increased muscle tone and trigger points. Similar results on examination were noted in the thoracic and lumbar spine. His examination of her upper and lower extremities were normal. Neurological examination was normal. She exhibited no pain behaviours.
- [73] Dr. Waseem diagnosed sprain or strain of soft tissue injuries of the cervical, thoracic and lumbar spines as a result of a motor vehicle accident. The injuries have resulted in chronic myofascial pain.
- [74] Dr. Waseem provides the following definition for chronic myofascial pain:

A form of chronic pain that emanates from muscle and the overhang fascial structures and is local, contiguous and/or regional with the area of injury. The pain persists long after the clinical resolution of the injury, is characterized by objective abnormal findings (increased muscle tone, muscle stiffness, spasms, taut bands and trigger points) detected by digital pressure during examination by the clinician and heralds a sensitized state in which the pain itself is the impairment.

- [75] Dr. Waseem states that her prognosis is fair. The chronicity of her complaints and her history indicates that she is unlikely to fully recover and, more likely than not, will continue to experience pain. However, Dr. Waseem adds that she does not appear to have any negative prognostic indicators and despite the pain, has demonstrated resilience by largely resuming most of her normal activities. In his opinion, her condition is unlikely to deteriorate in the future.
- [76] In Dr. Waseem's opinion, there will not be a permanent disability. She is capable of working as she did prior to the accident and she has resumed her normal activities of daily living.

- [77] At trial, Dr. Waseem explained that by "disability" he meant a substantial restriction in her daily function. However he acknowledged that there was some impairment in her abilities. Certain activities such as prolonged procedures and long days at work exacerbate her symptoms, discomfort, and pain. Her tolerance for prolonged standing and sitting is reduced.
- [78] He was not prepared to agree with the opinion of Mr. Padvaiskas, the occupational therapist, that she was better suited to part-time work. Dr. Waseem noted that the plaintiff is young, her pain is chronic, but manageable, and over time she has increased her work hours. He added that if he were seeing her as a patient, he would encourage her to continue to work full-time, to her limit of tolerance. He acknowledged there was a possibility that she might be "better suited" to work somewhat less than full-time, as Mr. Padvaiskas suggests.

C. Mr. Jeff Padvaiskas - Occupational Therapist

- [79] Mr. Jeff Padvaiskas is a consultant occupational therapist. He conducted a work capacity evaluation. He assessed the plaintiff on two occasions, October 11, 2019, and November 5, 2019. The latter occasion was at her then new workplace, Gateway Dental. He provided a report dated November 12, 2019, and testified at the trial.
- [80] Mr. Padvaiskas opined as follows:
- The plaintiff is able to perform work requiring reaching, handling, and manual dexterity and manipulation. She develops neck and upper back pain with static and awkward positioning for sustained periods of time. Sustained reaching would bring on upper back pain, and should be limited.
 - She has no problems with stairclimbing or balance.
 - In relation to strength for lifting, carrying, pushing and pulling, she is best suited to work in sedentary, light or medium strength occupations or tasks.
 - She has a sitting tolerance of up to two hours if she is able to move and stretch. She is susceptible to pain if she is required to sit in fixed positions or awkward positions.
 - She has a standing tolerance of up to two hours with opportunities for periodic movement.
 - She has no difficulty walking.
 - She is able to work full-time, with limitations.
 - While the plaintiff is able to do the basic demands of her occupation, "depending upon the task demands she is not suited to full-time work demands (i.e. five day full-time equivalent). She is best suited to work activities between 60 and 80% of full-time (3 to 4 days per week)".

[81] According to Mr. Padvaiskas, much depends on the extent to which her work requires sustained positioning, or allows for movement. In her position, this is variable. If she is involved in assisting in shorter procedures, she is able to move more frequently; less so, if she is in assisting in longer procedures.

IV. Assessment of Damages

A. Legal Principles - Loss of Earnings or Earnings Capacity

[82] I adopt my summary of the applicable legal principles set out in *Sendher v. Wong*, 2014 BCSC 140, at paras. 158-163 (pre-trial loss) and 171-177 (future loss) [*Sendher*]:

[158] The award for past loss of earning capacity is based on the value of the work that the plaintiff would have performed but for her accident injuries. The award is properly characterized as a loss of earning capacity: *Bradley v. Bath*, 2010 BCCA 10 (CanLII) at paras. 31-32; *Lines v. W & D Logging Co. Ltd.*, 2009 BCCA 106 (CanLII), at para. 153; *X. v. Y.*, 2011 BCSC 944 (CanLII), at para. 185.

[159] The plaintiff need not establish the actual loss of earnings on a balance of probabilities. What would have happened prior to the trial but for the accident injuries is hypothetical, just the same as what may happen in the future, after the trial.

[160] In *Smith v. Knudsen*, 2004 BCCA 613 (CanLII), at para. 29, Rowles J.A. stated:

What would have happened in the past but for the injury is no more "knowable" than what will happen in the future and therefore it is appropriate to assess the likelihood of hypothetical and future events rather than applying the balance of probabilities test that is applied with respect to past actual events.

[161] However the plaintiff must establish on a balance of probabilities that there is a causal connection between the accident injuries and the pecuniary loss claimed; mere speculation is insufficient: *Smith v. Knudsen* para. 36; *Athey*, at para. 27; *Perren v. Lalari*, 2010 BCCA 140 (CanLII), at para. 32; *Falati v. Smith*, 2010 BCSC 465 (CanLII), at para. 41, *aff'd* 2011 BCCA 45 (CanLII).

[162] Just as in the case of the assessment of future loss of earning capacity, in the case of past loss of earning capacity, if the plaintiff establishes a real and substantial likelihood of the pecuniary loss asserted, the assessment of damages to be awarded as compensation depends upon an assessment of the degree of likelihood of the particular loss, combined with an assessment of the value of the loss.

[163] In cases where it is appropriate to proceed with an assessment of the value of the loss, s. 98 of the Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231, stipulates that a person who suffers loss of income is only entitled to recover the net income amount as damages: *X. v. Y.*, at para. 187; *Lines*, at paras. 152-186.

...

- [171] The Court's essential task is to compare the likely future of the plaintiff's working life if the accident had not happened with the plaintiff's likely future working life after the accident: Gregory, at para. 32. Insofar as possible, the plaintiff should be put in the position he or she would have been in but for the injuries caused by the defendant's negligence: Lines, at para. 185. [Emphasis added].
- [172] The appropriate means of assessment will vary from case to case: Brown v. Golaiy (1985), 1985 CanLII 149 (BC SC), 26 B.C.L.R. (3d) 353; Pallos v. Insurance Corp. of British Columbia (1995), 1995 CanLII 2871 (BC CA), 100 B.C.L.R. (2d) 260; Pett v. Pett, 2009 BCCA 232 (CanLII).
- [173] The assessment of damages is a matter of judgment, not calculation: Rosvold v. Dunlop, 2001 BCCA 1 (CanLII), at para. 18.
- [174] There are two possible approaches to assessment of loss of future earning capacity: the "earnings approach" from Pallos and the "capital asset approach" in Brown. Both approaches are correct and will be more or less appropriate depending on whether the loss in question can be quantified in a measurable way: Perren v. Lalari, 2010 BCCA 140 (CanLII), at para. 12.
- [175] The earnings approach involves a form of math-oriented methodology such as: (i) postulating a minimum annual income loss for the plaintiff's remaining years of work, multiplying the annual projected loss by the number of remaining years and calculating a present value; or (ii) awarding the plaintiff's entire annual income for a year or two: Pallos; Gilbert, [2011] B.C.J. No. 1931] at para. 233.
- [176] The capital asset approach involves considering factors such as whether the plaintiff (i) has been rendered less capable overall of earning income from all types of employment; (ii) is less marketable or attractive as a potential employee; (iii) has lost the ability to take advantage of all job opportunities that might otherwise have been open; and (iv) is less valuable to herself as a person capable of earning income in a competitive labour market: Brown; Gilbert, at para. 233.
- [177] The principles that apply in assessing loss of future earning capacity were summarized by Low J.A. in Reilly v. Lynn, 2003 BCCA 49 (CanLII), at para. 101:
- [101] The relevant principles may be briefly summarized. The standard of proof in relation to future events is simple probability, not the balance of probabilities, and hypothetical events are to be given weight according to their relative likelihood: Athey v. Leonati, 1996 CanLII 183 (SCC), [1996] 3 S.C.R. 458 at para. 27. A plaintiff is entitled to compensation for real and substantial possibilities of loss, which are to be quantified by estimating the chance of the loss occurring: Athey v. Leonati, supra, at para. 27, Steenblok v. Funk (1990), 46 B.C.L.R. (2d) 133 at 135 (C.A.). The valuation of the loss of earning capacity may involve a comparison of what the plaintiff would probably have earned but for the accident with what he will probably earn in his injured condition: Milina v. Bartsch (1985), 1985 CanLII 179 (BC SC), 49

B.C.L.R. (2d) 33 at 93 (S.C.). However, that is not the end of the inquiry; the overall fairness and reasonableness of the award must be considered: *Rosvold v. Dunlop*, 2001 BCCA 1 (CanLII) at para. 11; *Ryder v. Paquette*, [1995] B.C.J. No. 644 (C.A.) (Q.L.). Moreover, the task of the Court is to assess the losses, not to calculate them mathematically: *Mulholland (Guardian ad litem of) v. Riley Estate* (1995), 1995 CanLII 1971 (BC CA), 12 B.C.L.R. (3d) 248 (C.A.). Finally, since the course of future events is unknown, allowance must be made for the contingency that the assumptions upon which the award is based may prove to be wrong: *Milina v. Bartsch*, *supra*, at 79. ...

[Emphasis added.]

[83] In *Bhatti (Litigation Guardian of) v. Ethier*, 2018 BCSC 1779, I added:

[54] The use of economic and statistical evidence does not turn the assessment into a calculation, but can be a helpful tool in determining what is fair and reasonable in the circumstances: *Grewal v. Naumann*, 2017 BCCA 158 at para. 49, citing *Dunbar v. Mendez*, 2016 BCCA 211 at para. 21.

[55] As I will explain, in this case the capital asset approach is applicable. The following comments of Savage J.A. in *Villing v. Husseni*, 2016 BCCA 422 are relevant:

[18] Using the capital asset approach does not mean the assessment is unstructured. I agree with Garson J.A.'s observations in *Morgan v. Galbraith*, 2013 BCCA 305:

[56] If the assessment is still to be based on the capital asset approach the judge must consider the four questions in *Brown* in the context of the facts of this case and make findings of fact as to the nature and extent of the plaintiff's loss of capacity and how that loss may impact the plaintiff's ability to earn income. Adopting the capital asset approach does not mean that the assessment is entirely at large without the necessity to explain the factual basis of the award: *Morris v. Rose Estate* (1996), 23 B.C.L.R. (3d) 256 at para. 24, 75 B.C.A.C. 263; *Mulholland (Guardian ad litem of) v. Riley Estate* (1995), 12 B.C.L.R. (3d) 248 at para. 43, 63 B.C.A.C. 145.

[Emphasis added.]

[19] In every case where the capital asset approach is adopted, the four questions in *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 at para. 8 (S.C.), form the basis of the assessment. The questions are whether:

- (1) The plaintiff has been rendered less capable overall from earning income from all types of employment;
- (2) The plaintiff is less marketable or attractive as an employee to potential employers;
- (3) The plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to him, had he not been injured; and

- (4) The plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market.
- [20] The considerations in *Brown* are not intended to be exhaustive: *Sinnott v. Boggs*, 2007 BCCA 267 at para. 9, per Mackenzie J.A.

B. Past Loss of Earning Capacity

- [84] The plaintiff must establish a real and substantial possibility of a set of facts leading to an income loss. I am not persuaded that the plaintiff has established this. The plaintiff's income has in fact steadily increased since the accident. She has not suffered an actual loss of income attributable to her injuries. She has not been unable to work at any time.
- [85] The plaintiff contends that but for the accident injuries she would have obtained work that would have paid her a higher income, rather than returning to work at Mellow Dental.
- [86] There are three aspects to this claim: (1) due to her accident injuries she was unable to pursue higher-paying work; (2) higher paying work was available; and (3) she would have obtained such higher paying work.
- [87] As noted, the plaintiff contends that the pace of the work at Mellow Dental was slower than at other clinics, with more opportunity for movement and breaks, and that Dr. Makhani's scope of practice and methods allowed the plaintiff to sustain the work better there than she could elsewhere. This may be so but the evidence does not go so far as to establish that the plaintiff could not sustain work at other clinics.
- [88] The job with Precision Endodontics ended after three weeks primarily for reasons unconnected with the accident injuries. As the plaintiff testified, she and the dentist agreed that she was not a good fit for the job. The plaintiff was also unhappy with other aspects of the position. The other dental assistant was doing the work, rather than teaching her how to do the work. No evidence is available as to the amount of pay the plaintiff received or would have earned long term with Precision Endodontics.
- [89] The plaintiff contends that her accident injuries prevented her from taking employment with a Kitsilano medical dental clinic, Westcoast Smile Dental Studio ("Westcoast Dental"). Her claim rests primarily on this scenario of loss. She did not provide evidence as to other positions she would have sought.
- [90] In early April 2019 the plaintiff responded to an advertisement placed by Westcoast Dental offering a position for a full-time dental assistant, with an advertised pay range of \$27-\$34 an hour. She interviewed with the office manager, Ms. Danielle Nott. The interview went well, and she was invited to return the following week for a "working interview" with the dentist, Dr. J. Norden. She did very well on the working interview, which lasted several hours, working alongside Dr. Norden, and she was offered the position. However, the plaintiff decided not to take the job.

- [91] The plaintiff never discussed wages with Westcoast Dental. However, according to Ms. Nott, the starting wage would have been \$28 an hour, and would have increased after two months to \$30 per hour, as the plaintiff proved her ability. Increases beyond \$30 an hour would depend upon the dental assistant demonstrating other valuable skills beyond just chairside dental assistance, such as treatment plan coordination, equipment maintenance and service, and administration work.
- [92] Her stated view that she did not feel she would be able to sustain longer-term work at Westcoast Dental is subjective, and unpersuasive.
- [93] The plaintiff was already working four and a half days a week, or approximately 32 hours a week, at Mellow Dental. At times she was capable of working extended hours, such as in April 2019, when she worked 156 hours. This was the same month in which she also spent a day working with Dr. Norden at Westcoast Clinic for the working interview, where she performed well. April and May 2018 were also busy months. From this I infer that when the work required it, the plaintiff was able to sustain work hours in excess of her normal average.
- [94] In general the medical and other evidence does not establish that the plaintiff could not have done the work at Westcoast Dental.
- [95] The plaintiff denies that she turned down the job offer at Westcoast Dental because of the long commute to Kitsilano. She points to the fact that she took the West Coast Express train from Mission for a number of months when she was taking her training at VCC in 2011.
- [96] When she turned down the job at Westcoast Dental in April 2019, she, her sister, and the rest of the family had already established a plan to build a home to live in Mission. The plaintiff told Westcoast Dental that the reason she decided not to take the job was because she had decided to move to Mission. She contends the real reason was her accident injuries. She contends that had she not been injured, the long commute and the nature of the work at Westcoast Dental would have been sustainable.
- [97] However, the position at Westcoast Dental was not very practical. The commute to Kitsilano would also have involved a bus ride, in addition to the train, further lengthening an already long commute. I have trouble accepting that the plaintiff would have continued with the job for long at Westcoast Dental even if she had decided to take it. The evidence is that the plaintiff valued her free time, and wanted to avoid long commutes. Dr. Makhani noted that when she started with Mellow Dental she was content to work part-time, to allow for church work. When she left in 2019, she told Dr. Makhani that she was moving to Mission, and did not want to commute from Mission to Maple Ridge. This is a far shorter commute than from Mission to Kitsilano. She also said that she did not want to continue to work Saturdays, in order to allow for more time to do volunteer work for the church. She was never keen on working on Saturdays, according to Dr. Makhani.

- [98] At or about the same time as she turned down the job at Westcoast Dental, the plaintiff received a raise in pay from Mellow Dental, to \$25 an hour. A few months later, beginning in October 2019, she obtained the work at Gateway Clinic in Mission, where she earns \$28 an hour, with no long commute.
- [99] Therefore, the evidence does not establish a significant wage disparity between the job at Westcoast Dental and other work available to the plaintiff.
- [100] The evidence is that dental assistants generally work less than what would commonly be considered full-time work. The plaintiff testified that 32 hours per week, usually four days, eight hours per day, is considered full-time work for a dental assistant.
- [101] This is also supported by the evidence of Ms. Danielle Nott, the office manager at Westcoast Dental. Ms. Nott also works as a dental consultant. She has worked in the dental industry for over 20 years. She is herself a qualified dental assistant. In their practice, full-time work is from 32 to 35 hours per week. 32 hours is a guaranteed minimum for a full-time dental assistant.
- [102] By this measure, the plaintiff has worked full time at all times after the MVA, and at times, considerably more than full time.
- [103] In summary, I am not persuaded that the accident injuries prevented the plaintiff from taking the work at Westcoast Dental. The evidence does not support that she could not do the work, and I consider it more likely that the primary reason she did not take the job was because it was not practical.
- [104] I conclude that the plaintiff has not established her claim for damages for past loss of earning capacity.

C. Future Loss of Earning Capacity

- [105] The plaintiff's theory supporting this claim of loss is that due to the accident injuries she is permanently disabled from working full-time hours.
- [106] The plaintiff argues that, on the loss of capital asset approach, a reasonable assessment of her future loss of earning capacity is in the range of \$100,000 to \$120,000.
- [107] She contends that she turned down a job offer for work of five days a week at Gateway Dental due to her lack of capacity to work longer hours. She also argues that her accident injuries put into question her ability to sustain the four-day a week work that she is presently doing.
- [108] I accept that there is a real and substantial possibility that the plaintiff may not be capable of working more hours per week than she is presently working at Gateway Dental, which is 32 hours a week, on a sustained, long term basis.

- [109] As noted, the plaintiff is very tired at the end of the working day and she finds that keeping up with the work is more difficult than it was previously. She has less energy at the end of the day.
- [110] Her mother noted that the plaintiff needs to spend more time resting and relaxing than previously. The plaintiff spends up to two hours taking a warm bath after dinner. She did not do this before.
- [111] The occupational therapist Mr. Padvaiskas states that she is "best suited" to work activities between 60% and 80% of full-time work. He suggests this is "3 to 4 days per week". She is in fact working four days per week now.
- [112] I place more weight on the opinion of Dr. Waseem about the plaintiff's work capacity than that of Mr. Padvaiskas. As a medical doctor and physiatrist, Dr. Waseem has the more relevant expertise to predict the plaintiff's capacity long term from a physical and medical perspective. Mr. Padvaiskas cannot provide a medical prognosis.
- [113] Dr. Waseem did not fully agree with Mr. Padvaiskas about the plaintiff being limited to working part-time. In his report, he states that she is unlikely to fully recover from her injuries, but he states that it is unlikely her clinical condition will deteriorate in future. She has an ongoing impairment, but not what he would describe as a "permanent disability". He states "she is capable of working as per her pre-accident status". Her pre-accident status was not full-time. Since the accident, as noted, she managed to work four and a half days a week and sometimes more than that at Mellow Dental, although the nature of the work there may have been better suited to her than at some other clinics.
- [114] Dr. Waseem testified at trial that while she has chronic pain, it is manageable. However he acknowledged that there was a "possibility" (as he put it) that she would be better suited to working something less than full-time, and as Mr. Padvaiskas states.
- [115] In summary, there is a real and substantial possibility that the plaintiff could not sustain work in excess of her present level. This is a possibility, not a probability. I accept that but for the accident injuries, she was capable working five days per week.
- [116] However, it is unlikely in my view that the plaintiff would work more hours than she presently does. She has never worked more than approximately the number of hours she is presently working. Her religious activities remain important to her. She works approximately full-time, by the standards of her occupation.
- [117] While the prognosis is generally "guarded" (as Dr. Marazzi states) or "fair" as Dr. Waseem states, there is the possibility that her condition will in fact improve. Dr. Marazzi has sent her to see a physiatrist. She has had limited medical treatment to date.

- [118] The future loss of income or earning capacity, then, is based upon of the risk that the plaintiff would not be able to work more than she does currently, should she choose to do so. She has lost the capacity to do so. The loss should be substantially discounted, because it is a possibility only, and it is not likely that the plaintiff would take and sustain such work.
- [119] With reference to the *Brown v. Gola* factors, each of factors (1) to (3) have some application. That is: (1) the plaintiff has been rendered less capable overall from earning income from all types of employment; namely, dental assistant work significantly beyond approximately her present hours, on a sustained basis; (2) the plaintiff is less marketable or attractive as an employee to potential employers. The plaintiff has less stamina and work hours flexibility than some other potential dental assistant employees; (3) the plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to her, had she not been injured. The plaintiff may not be capable of working long term at a job requiring her to work, say, 40 hours or more per week.
- [120] There is no evidence from which I can assess probabilities with any precision.
- [121] As noted, in my view the plaintiff has established a real and substantial possibility of future income loss, but it is a possibility only, and not a large one.
- [122] There is no economist or actuarial evidence. Such evidence would not likely be of much help in this case.
- [123] A loss of one day per week can be roughly equated to a 20% loss of income. If there is a 10% chance of that loss occurring for a period of ten years, that could be considered equivalent to a loss of one years' income. This could overstate the loss, as it does not reflect discounting for present values.
- [124] In my view, compensating the plaintiff for one years' worth of income is a reasonable method to assess her loss. Her 2019 income is not in evidence. In 2018 she earned \$34,252, at Mellow Dental. She has had an increase in pay since then. I assess the loss at \$35,000 to roughly reflect earnings for one year, on this basis, with some allowance for discounting the future loss. I assess that amount as fair and reasonable compensation for loss of future income earning capacity.

D. Non-Pecuniary Loss

- [125] I adopt my discussion of the legal principles regarding assessment of damages for non-pecuniary loss set out in *Gillam v. Wiebe*, 2013 BCSC 565, at paras. 68-71.
- [126] As noted, the plaintiff suffers from chronic myofascial pain in the cervical thoracic and lumbar spine areas. The prognosis is either fair or guarded, but her condition is stable. It somewhat limits her work capacity. Her condition somewhat limits her pre-accident social and recreational activities and opportunities. She has endured pain for three years, and her pain will likely continue indefinitely, to some extent.

[127] As noted, she missed no time from work. She was able to continue with the long-planned, three-month trip to Europe beginning a few weeks after the accident. The activities planned for the trip were somewhat curtailed, only.

[128] She has shown a good degree of resiliency, and has largely managed to carry on with her usual work and other activities despite pain and limitation.

[129] For purposes of assessment, the plaintiff relies upon the following authorities:

1. Luck v. Shack, 2019 BCSC 1172 [Luck], non-pecuniary loss of \$75,000;
2. Tzotzolis v. Wyman, 2019 BCSC 2026, non-pecuniary loss of \$95,000, and
3. Ahmad v. Pandher, 2017 BCSC 1732, non-pecuniary loss of \$70,000.

[130] The defence should relies upon the following authorities:

McPhail v. Ross, 2019 BCSC 21, non-pecuniary loss of \$35,000; Tisalona v. Easton, 2015 BCSC 565, non-pecuniary loss of \$32,000; McKay v. Raiwal, 2015 BCSC 220, non-pecuniary loss of \$30,000; and Lawrence v. Parr, 2014 BCSC 2004, non-pecuniary loss of \$30,000.

[131] The plaintiff contends that Luck is the most applicable decision, and contends that the non-pecuniary award in this case should be the same as Luck, \$75,000. The defence contends that the non-pecuniary award should be \$30,000 to \$40,000.

[132] While I agree Luck is somewhat similar, the injuries there seem to be somewhat more severe and the consequences more significant than in the case at bar.

[133] Having in mind that decision, and the other decisions that have been cited, in my view a reasonable and fair assessment of the non-pecuniary loss is \$60,000.

E. Future Cost of Care

[134] The plaintiff claims cost of care as follows:

Gym fees at \$50 per month for 20 years

(discounted)

\$9,800.00

Periodic supervision by Kinesiologist/Trainer,

\$80 per session

\$1,500.00

Physiotherapy and Massage

\$3,000.00

Travel allowance for care and rehabilitation,

at \$0.50 per km

\$1,000.00

Total

\$15,300.00

[135] These claims are supported by the evidence of Dr. Marazzi and Dr. Waseem, in general.

[136] The claims are relatively modest. However it is not uncommon for people who are not injured in accidents to pay for gym fees or memberships, or other physical exercise activities. I would therefore allow one-half of the gym fees claim as being necessitated by the accident injuries. But for the accident injuries, the plaintiff would have discretion about these expenses. Therefore future care costs are allowed at \$10,400.

F. Special Damages

[137] The plaintiff presents special damage claims at \$2,327.95. These are supported by the receipts. The plaintiff also paid out-of-pocket expenses for kinesiology sessions, which she has not claimed, but which would be claimable if she had presented receipts.

[138] Accordingly, the claim for special damages is reasonable and will be allowed in full.

G. Costs

[139] Subject to relevant offers to settle, the plaintiff is entitled costs.

"Verhoeven J."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/20/04/2020BCSC0436.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/carleton-v-warner-2020>

Prepared on 29 October 2026 · Esheria