

CANADA / JUDGMENT

Carrasco v. Gibson

2020 BCSC 731

COURT

Supreme Court of British Columbia

DECIDED

12 May 2020

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

2020 BCSC 731 Carrasco v. Gibson

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Carrasco v. Gibson,

2020 BCSC 731

Date: 20200512

Docket: M122809

Registry: Vancouver

Between:

Rosmery Carrasco

Plaintiff

And

Rory Connal Gibson, Kenneth Poole, Cicely Poole, John Doe, Jane Doe,

and Insurance Corporation of British Columbia

Defendants

Before: The Honourable Chief Justice Hinkson

Reasons for Judgment

Counsel for the Plaintiff:

K. MacWilliam

Z. Berinstein (Articling Student)

Counsel for the Defendant Rory Connal Gibson:

J.M. Campbell

E. Swinton

N. Surkan (Articling Student)

Place and Date of Trial:

Vancouver, B.C.

February 3 - 7, 10 - 13,

and 18, 2020

Place and Date of Judgment:

Vancouver, B.C.

May 12, 2020

- [1] The plaintiff was injured in a motor vehicle accident on September 28, 2010. I will refer to this accident as "the first accident".
- [2] The defendant Rory Connal Gibson admitted liability for the collision, and the claims against the remaining named defendants are not before me.
- [3] The issues before me relate to the plaintiff's physical, emotional and psychological condition before September 28, 2010, the nature and extent of the injuries sustained by the plaintiff in the first accident, and the damages to which she is entitled as a result of that accident.

Background

- [4] The plaintiff was born on August 15, 1972 and was 38 years old at the time of the accident. At the time of trial, she was 47 years old. In 1996, she married Hugo Vasquez, a baggage agent with Air Canada. They have one son, Daniel Vasquez, who was eight years old at the time of the accident and 17 years old at the time of trial.
- [5] The plaintiff testified that she graduated with honours from the Pacific Institute of Culinary Arts. It was her evidence that after graduation, the Executive Chef of the school recommended her to the Salmon House in West Vancouver, where she began her career. She then moved on to work at one of the Fairmont Hotels until she was recruited to work at the newly opened Delta Hotel in Burnaby.
- [6] At the time of the first accident, Ms. Carrasco worked as a Second Line Cook at the Delta Hotel. By that time, she had taken a number of courses that she described as designed to prepare employees for higher roles involving the management of people.

- [7] The plaintiff's evidence was that prior to the accident, she aspired to become a sous-chef, and if successful, would then decide whether or not to work her way up in the culinary field any further.
- [8] The plaintiff did not engage in extensive outdoor activities before the first accident. While she reported doing the Grouse Grind regularly, it was when the family resided in North Vancouver some six or seven years prior to the accident. In February 2010, shortly before the first accident, the plaintiff completed a Patient Questionnaire for her chiropractor. In answer to the question "What type of exercise/sports do you participate in?" the response entered was "walking", and was described as "rarely."
- [9] The first accident occurred on Highway 1 in Burnaby, British Columbia when the plaintiff slowed to a stop on the highway and was struck from behind by the defendant's vehicle. The impact caused significant damage to both vehicles and the plaintiff's brand new vehicle was rendered a total loss.
- [10] The plaintiff does not recall the details of the first accident or the period of time in between the impact and the arrival of a police officer at the window of her vehicle. She does recall losing consciousness and recalls being taken to the hospital, by ambulance. There she was examined and released the same day.

The Plaintiff's Condition Prior to the First Accident

- [11] Counsel for the defendant argued that the plaintiff showed herself to be an inaccurate or poor historian with a tendency to overstate the effects of the first accident and downplay her pre-accident medical conditions. I agree, and find that the plaintiff's recollection of her condition prior to the first accident was regrettably quite unreliable. As I explain later in my reasons, I find much of her testimony was inconsistent with her medical records and the self-reports that she gave to health care professionals following the first accident.
- [12] The plaintiff contends that before the first accident, her body pains were mild in comparison to her condition following the first accident, and that her pre-accident headaches were much more episodic in nature than they were following the first accident. She stated that she only had headaches prior to the first accident a "couple times a month." She professed to have only irregular migraine headaches before the first accident, no dizziness, and lower back pain only once in a while, but nonetheless went for both massage therapy and chiropractic treatments. She denied fatigue or any sleep difficulties before the first accident. She also denied taking medication prior to the first accident, but her medical records show that she was receiving prescriptions for at least lidocaine.
- [13] The plaintiff did testify that she suffered from migraine headaches intermittently prior to the first accident, and that she had some pre-accident complaints of flu-like body pain symptoms that concerned her.

- [14] Although some effort was made to corroborate the plaintiff's recollection of her condition prior to the first accident by calling her son and husband, I am unable to place any reliance on the evidence of the plaintiff's son, who was only eight-years old at the time of the accident. I find that his recollection is coloured by his recollection of his mother in the years since the first accident, and that he has no reliable memory of her condition before the first accident.
- [15] While I accept that the plaintiff is not the same as she was when he first married her, I find the evidence of the plaintiff's condition prior to the first accident by her husband no more reliable than that of the plaintiff.
- [16] In the result, I find it necessary to rely upon the plaintiff's medical records, and where they are inconsistent with her evidence, and that of her husband and son, I prefer those records.
- [17] The plaintiff's documented medical diagnoses and complaints prior to the first accident included fibromyalgia, headaches, migraine headaches, back/hip pain, and numbness and tingling of her left arm and left lower face.
- [18] At trial, the plaintiff said she did not remember if she had neck pain prior to the first accident and did not remember if she had issues with her left arm prior to the first accident.
- [19] Dr. Rolfe Luongo is an expert in Rheumatology and Osteoporosis. He saw the plaintiff in June 2008. In his report of June 25, 2008 to the plaintiff's family doctor, he recorded the following history from the plaintiff:

This woman describes a long-standing history of feeling tired. She states this is long-standing. She wakes up feeling tired every day. She sleeps 7 to 8 hours per day. She states that her sleep is not of good quality. She describes diffuse aches and pains involving the hips, back as well as peripheral joints. She also describes myalgias

- [20] In August 2008, the plaintiff experienced pain involving her neck, shoulder, arms, hips, elbows, back and knees.
- [21] The plaintiff was been seen by two doctors who share the same surname: Dr. Neelam Nagaria, an endocrinologist, and Dr. Mohammed Nagaria, a neurologist.
- [22] Dr. Neelam Nagaria first diagnosed the plaintiff with fibromyalgia on August 16, 2008. In his report of that date, Dr. Nagaria stated:

On physical examination [s]he has tender points at occiput (nuchal ridge), trapezoids and supraspinatous muscle. She also has two tender points in gluteal region in neck and second ribs. Her lateral epicondyles on both elbows are tender as well. Medial aspects of the knees and greater trochanter are also painful. She doesn't appear as a chronically ill patient and looks fatigued though

I believe this patient has classical findings of Fibromyalgia. She has at least thirteen points of specific tenderness and areas which are specified for the criteria of Fibromyalgia

[23] In July 2009, the plaintiff visited Dr. Dean Foti, a neurologist, about her headache problems. The plaintiff also complained to Dr. Foti of numbness over her left arm and lower face, as well as fatigue. Under the section entitled "Impression", Dr. Foti wrote:

she does have mild persistent sensory loss in the left lower face and some fluctuating parasthesias for a few months and longstanding fatigue. She does not really have any of the typical fibromyalgia trigger zones. I am not sure of the origin of the other symptoms

[24] Dr. Foti observed that the plaintiff:

had had severe headaches and now about once every six months, usually on the right side, throbbing and associated with nausea and vomiting. There is usually no aura, but she has mild photophobia.

The reason for the current assessment was a headache starting about three weeks ago, and in fact it was not an abrupt onset but rather started with gradually feeling unwell over 15 minutes with one of her more typical headaches. However it escalated very rapidly with severe pain that was on the right side and then more diffusely. She was vomiting and felt dizzy with lightheadedness and had ear pain. She also started experiencing numbness over her left arm, which progressed up to involve her left lower face as well. She had a stiff neck, as she often does with her other migraines

[25] On February 25, 2010, the plaintiff completed a Patient Questionnaire for her Chiropractor, Dr. Cara Barkham, reporting moderate to severe body pain "all day", "all the time", with numbness and tingling, which the plaintiff described as "related to fibromyalgia".

[26] In August 2010, the plaintiff reported numbness and tingling of her left hand, fingers and forearm.

[27] On August 18, 2010, Dr. Barkham noted "lbp, [low back pain] cls, [cervical-lumbar spine] pain, L shoulder + wrist pain", suggesting pain of the lower back, cervical spine, and left shoulder and wrist at that time, shortly before the first accident.

[28] In September 2009, the plaintiff reported that she was having headaches about three times a week for mild headaches and about once every two to three weeks for more severe headaches. In August 2010, she attended at her chiropractor and reported migraine headaches once a month and regular headaches once or twice a week.

[29] When asked during cross-examination about the reports discussed above, the plaintiff accepted that she must have provided the information in the reports but generally did not have a specific recollection of those reports.

[30] I do not accept the plaintiff's submission that there is no evidence of any psychological issues prior to the first accident. I find that while she persevered with pain for several years prior to the first accident, the lack of a psychiatric or psychological diagnosis before the first accident does not preclude her having such issues.

The Plaintiff's Condition Following the First Accident

- [31] The plaintiff contends that the first accident has had a profound impact on her over the past several years. She argues that not only has her physical pain been widespread and unrelenting, but that she has also suffered significant psychological distress and mild cognitive deficits as a result of the first accident.
- [32] She maintains every aspect of her life has been affected, from when she wakes up in the morning until she goes to sleep. She says that she has stubbornly held onto her employment, albeit through much pain and discomfort. I will deal with her employment below, but pause to say that I find she has not been stubborn about hanging onto her employment.
- [33] I do not accept her evidence that because she has pushed herself to struggle through each day at work, she has essentially drained herself of all of her energy, and is barely able to participate in life outside of her employment. I reject her contention that she faced no such difficulties before the first accident, and as I will discuss below, this is simply untrue.
- [34] The plaintiff's immediate complaints following the first accident included body pain, headache, dizziness, vomiting, and disorientation.
- [35] Following the first accident, the plaintiff's husband and son had to do more around the house in terms of cooking and cleaning. The plaintiff testified that prior to the first accident she did approximately 70 percent of the housework, and her husband did the other approximately 30 percent, and that immediately following the accident, Mr. Vasquez began doing approximately 90 percent of the housework.
- [36] Slowly, as she made some improvement, the plaintiff was able to regain the ability to keep up with the housework and now she and her husband each perform approximately half of the household duties, with their son helping as well.
- [37] While I accept that her family life and marriage and her social relationships have suffered, I do not accept that the first accident is the sole cause of these difficulties.
- [38] The plaintiff contends that since the first accident, she has suffered and continues to suffer from a constellation of symptoms affecting every aspect of her person; physical, emotional, and cognitive, and that she has been worn down and continues to diminish over time. She gave evidence that her work takes a toll on her both physically and emotionally and that by the time she gets home from work, she quite literally has nothing left.
- [39] She asserts that she has lost all sources of joy in her life and no longer has the ability or the desire to go after anything more than a miserable day-to-day existence.
- [40] The plaintiff contends that her marriage and the state of her family reflect the dysfunction present in all aspects of her life due to the first accident.

- [41] On November 26, 2017, the plaintiff took an overdose of Tylenol 3 pills after an argument with her husband, and was admitted to the Burnaby General Hospital. Her actions were described in the hospital record as "suicidal ideation". She said that by that time, she was unable to meet anyone's expectations, including her own, and was unable to make anyone happy, even herself.
- [42] The unreliability of the plaintiff's account of her health prior to the first accident was not limited just to her evidence at trial, but affected the opinions that she relied upon from physicians whose reports and viva voce evidence underlie her claim for damages.
- [43] The plaintiff alleged that she may have suffered a concussion in the first accident. Dr. George Medvedev is a neurologist. His diagnoses were:
- (a) concussion and post-concussive syndrome, and
 - (b) soft tissue injury of the neck and back.
- [44] I reject Dr. Medvedev's opinion with respect to concussion, as regrettably, that opinion is based on an inaccurate history of the plaintiff's pre-existing condition. While he accepted that the plaintiff did not lose consciousness but was briefly disoriented, he based his diagnosis in the incorrect assumption that the plaintiff experienced a whiplash-like movement in the neck and probably hit the headrest in the first accident.
- [45] There are other bases of Dr. Medvedev's opinions that are incorrect. He assumed that it was not until shortly after the first accident that the plaintiff "was investigated and diagnosed with fibromyalgia", which is incorrect.
- [46] Dr. Medvedev also assumed that the pain in the plaintiff's neck developed after the accident and that "apparently she has no pre-existing history of substantial neck pain; The neck pain is closely associated with headaches." This too is incorrect.
- [47] Dr. Medvedev also incorrectly assumed that the pain in the plaintiff's left shoulder and left arm as well as a sensation of numbness developed after the first accident.
- [48] Dr. Rehan Dost is also a specialist in neurology. I found him to be a good witness. He disagreed with Dr. Medvedev's diagnosis of concussion, noting that the plaintiff did not experience loss of consciousness, amnesia, disorientation, or confusion, one of which would be required for a diagnosis of concussion.
- [49] When pressed on cross-examination, he conceded that based on her reporting, she might have suffered any one of those criteria, and that if any one of the four criteria were met, by definition there had been a mild traumatic brain injury. I find that it was appropriate for Dr. Dost to make those concessions in the abstract, but despite those concessions, I understand that Dr. Dost maintained his opinion that the plaintiff did not suffer from concussion, and I find that she did not.

- [50] Dr. Dost agreed that the symptoms of post-concussive syndrome overlap with those related to chronic pain and that it is difficult to disentangle the symptoms from the cause. He also agreed that the cognitive effects from chronic pain can be equivalent in severity to what one would experience with a moderate to severe traumatic brain injury.
- [51] In his June 24, 2014 report, Dr. Dost concluded the first accident "resulted in increase of her pre-existing migrainous disorder with perpetuating factors of psychological duress and sleep alteration contributing." But Dr. Dost expressed his opinion that the plaintiff's reported symptoms are more likely explained by "chronic pain, sleep alteration and psychological issues" than by a brain injury.
- [52] Dr. G.M. McKenzie, the plaintiff's treating orthopedic surgeon, prepared a report dated January 31, 2014. He reviewed the MRI reports of the plaintiff's neck and shoulder performed on November 14, 2013 and stated:
- With regard to the neck, it shows some minor degenerative changes at C5/6 and C4/5. In my opinion, that is consistent with her age and is not related to trauma.
- In the shoulder, they report some "tendinosis" without any significant tearing. They suspected enthesopathy. In my opinion, that is also age related and not related to trauma. When I examined this lady she had no particular problems with regard to her shoulder and, in my opinion, her problems were confined to her axial skeleton [spine].
- [53] Dr. John P. Wade is a specialist in rheumatology. He too was a good witness. He found the plaintiff had sustained "a probable moderate musculoligamentous injury of the cervical and lumbar spine " At the time of Dr. Wade's assessment in November 25, 2015, he identified her symptoms as "mild mechanical cervical, thoracic and lumbar spine pain." He noted that the plaintiff reported a global improvement of about 40% from the first accident to the time of his 2015 assessment.
- [54] Dr. Wade recommended the plaintiff embark upon a "global cardiopulmonary fitness exercise program." He concluded that he saw "no limitations for her returning to previous similar employment doing light to light moderate heavy work activity."
- [55] Dr. Wade indicated that with her issues prior to the first accident, the plaintiff would be more challenged to get back to baseline. However, he was unsure which of the plaintiff's current physical complaints had anything to do with the first accident. Instead, he saw a continuation of her pre-accident fibromyalgia progression and noted that it would be a challenge to say with any confidence that the accident has made her a lot worse.
- [56] Dr. Wade concluded that it is difficult to attribute the plaintiff's continued complaints of pain, now almost 10 years later, to the first accident, and distinguish the cause of these complaints from her pre-existing fibromyalgia.

[57] Dr. Rhonda Shuckett is a specialist in internal medicine and in rheumatology. In her report of May 25, 2017, she diagnosed the plaintiff with fibromyalgia and opined that she had likely attained maximum medical improvement at that time. Dr. Shuckett stated:

I could not rule out some decreased effort with certain activities like forward flexion of the low back. With this, I believe that she may have one positive Waddell's test for non-organic pain signs out of eight tested

[58] Dr. Shuckett also stated in her report that "it sounds like she had exacerbation of pre-existing migraine headaches. There are probably also some headaches related to cervicogenic muscular injury, so called cervicogenic, or post-traumatic, headaches, from the MVA." However, she deferred "further opinion on the headaches, as far as diagnosis, management and prognosis to the neurologist treating her."

[59] Dr. Ansel Chu is a specialist in physical medicine and rehabilitation. I found him to be a good witness. In his report dated March 5, 2016, he similarly noted that, by the time he saw her, the plaintiff presented with widespread pain involving diffuse pain in the neck and into the upper shoulders and upper back and arms. The plaintiff also had pain in her mid and lower back radiating into her legs. He diagnosed the plaintiff with chronic pain syndrome, with features of myofascial pain syndrome and fibromyalgia syndrome. He notes that his diagnostic impression had not changed over the many months that he had seen her.

[60] Dr. Richard Arseneau is a specialist in internal medicine. I have reservations about his evidence. He had an apparently ready answer for each of the plaintiff's complaints, when other physicians were more cautious and less willing to be absolute.

[61] Dr. Arseneau diagnosed the plaintiff with aggravation of her pre-existing fibromyalgia; myofascial pain syndrome of the neck, shoulders, and upper back; myalgic encephalomyelitis/chronic fatigue syndrome ("ME/CFS"); aggravation of pre-existing migraines; and tension-type headaches. In terms of improvement, he noted that she had had symptoms for almost nine years at the time of his evaluation and, although she had made some improvements, she remained symptomatic. In his opinion, the plaintiff's treatments at the time were helping to control her symptoms but were not contributing towards recovery of the underlying conditions.

Causation

[62] The plaintiff bears the onus of establishing on a balance of probabilities that her injuries would not have occurred "but for" the defendant's negligence: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 14.

[63] To satisfy the standard of "but for" causation, the plaintiff does not need to prove that the defendant's negligence was the sole cause of her injuries. If the defendant's negligence contributed to the plaintiff's injuries beyond the de minimis range, then the defendant will be fully liable for the injuries: *Athey* at para. 15.

[64] The fundamental principle in assessing tort damages is that the award of damages should place the plaintiff back to her "original position", i.e., the position she would have been in absent the defendant's negligence: *Athey* at para. 32

[65] If there is a measurable risk that the plaintiff had a pre-existing condition that would have detrimentally affected her in the future, regardless of the defendant's negligence, then that risk can be taken into account in reducing the damage award. Any such pre-existing condition would have been inherent in the plaintiff's original position: *Athey* at para. 35. This is often referred to as the "crumbling skull" rule.

a) Fibromyalgia

[66] In her evidence in chief, the plaintiff claimed that she did not give much credit to Dr. Neelam Nagaria's diagnosis of fibromyalgia because she said that Dr. Neelam Nagaria just asked her some questions and did not perform an examination. When the report section detailing the examination was brought to the plaintiff's attention, she modified her explanation saying that Dr. Neelam Nagaria just asked her which areas hurt.

[67] I find that the plaintiff's evidence concerning her visits to Dr. Neelam Nagaria is incorrect. In his report of August 16, 2008, Dr. Neelam Nagaria described the physical examination she conducted on the plaintiff and the findings that resulted from that examination.

[68] In addition, the report of Dr. Foti dated July 9, 2009 states: "She has been diagnosed with fibromyalgia " I am satisfied that he reached this conclusion based upon information he received from the plaintiff.

[69] In the February 25, 2010, 'Patient Questionnaire' for Dr. Barkham, beside the heading "Describe problem:" the plaintiff entered "body aches related to fibromyalgia." Beside "What do you think is the cause of your problem?", she entered "fibromyalgia."

[70] In cross-examination, following a review of that Questionnaire, she said that it was in her mind that she "believed" she had fibromyalgia.

[71] In August 2010, when the plaintiff visited her, Dr. Barkham, noted:

Fibromyalgia, LBP, C/S pain, L shoulder & wrist pain

Fibro 2-3 years

[72] I find that the plaintiff provided that history to Dr. Barkham.

[73] On the day of the first accident, the Patient Care Report from the BC Ambulance Service notes "fibromyalgia" beside "Medical/Surgical History", and the emergency clinical record from Burnaby Hospital on the same date also notes a patient history of fibromyalgia.

[74] The insurance claim application form to the ICBC completed and signed by the plaintiff on September 29, 2010 describes fibromyalgia as a pre-existing injury.

[75] The plaintiff's current position that she did not actually have fibromyalgia before the first accident is contradicted by her medical records, and by her repeated reporting to her medical practitioners that she believed she had fibromyalgia. I find that the plaintiff was correctly diagnosed with fibromyalgia long before the first accident and that she understood and believed that she suffered from that condition. Her attempt to undermine the diagnosis by Dr. Neelam Nagaria raises concern about the plaintiff's reliability on this and other matters in issue.

[76] That said, I accept that her fibromyalgia was exacerbated by the first accident for some period of time.

b) Headaches

[77] Dr. Arseneau relied on the plaintiff's report to him that her headaches only occurred three to four times per year prior to the first accident, but as I have already discussed she had reported headaches one to two times per week in 2009 and monthly in 2010.

[78] Dr. Chu was unaware of the plaintiff's history of headaches prior to the first accident, and he confirmed that that additional information changed his opinion "as to causation" for her headaches.

[79] I find that the plaintiff suffered from significant migraine and other headaches well before the first accident, which affected many aspects of her physical condition and her enjoyment of life. I accept that her headaches were exacerbated by the first accident for a period of time after that accident.

[80] The plaintiff's evidence was that fortunately, her headaches have improved with Botox, which has been the most effective treatment she has received. She has been obtaining these shots every two to three months since 2013 or 2014 and finds that they alleviate 80 to 90 percent of her headache pain.

[81] In summary, I accept the plaintiff suffered an aggravation of her pre-existing headaches and migraines. By the time of trial, her headaches were controlled by regular Botox treatments and are currently less of a problem for the plaintiff than they were prior to the accident.

c) Body Pains

[82] The plaintiff testified that she has reached a plateau with regard to her body pain. She gave evidence that she continues to have periodic "crises of pain" as she described them, and she also has constant pain every day that she has to live with. This includes pain in her neck, back, left arm, and feet; as well as pain in her right ear that she associates with her headaches. In addition to the overall aches and pains, she describes a constant burning sensation in her left arm that is worse after repetitive movements.

- [83] In his report of August 27, 2019, Dr. Arseneau diagnosed the plaintiff with ME/CFS. He attributed the plaintiff's cognitive symptoms to ME/CFS and fibromyalgia, as opposed to head trauma. Dr. Arseneau opines that the plaintiff pushes herself beyond her "energy envelope" and experiences "post-exertional malaise". He opines that this syndrome was precipitated by the first accident.
- [84] Regrettably, Dr. Arseneau relied on inaccurate assumed facts to form his opinion.
- [85] Dr. Arseneau relied on the plaintiff's report that she took one year off after leaving the Delta Burnaby in 2017, whereas the evidence before me is that she took approximately five to six months off work and began looking for work during the fifth month.
- [86] Dr. Arseneau relied on the plaintiff's report that prior to the first accident her pre-existing back pain did not require medication, but the evidence before me discloses that prior to the first accident, the plaintiff took Advil and was recommended to have Lidocaine injections for her back pain.
- [87] As one of the bases for his report, Dr. Arseneau incorrectly accepted that the plaintiff did not feel physically and emotionally better during her time off work, and that her mood was at an all-time low when she attempted suicide during her multiple month break between jobs.
- [88] Given the inaccuracies in the facts relied upon by Dr. Arseneau, I am unable to place any real weight on the opinions that he expressed.
- [89] I prefer the opinions of Dr. Shuckett, Dr. Chu and Dr. Wade with respect to the plaintiff's level of disability and lack of a diagnosis of ME/CFS.
- [90] Dr. Shuckett did not reach a firm conclusion on the cause of the plaintiff's left shoulder pain, but noted that she would need to more thoroughly review the records relating to this condition. She did note that "tendinopathy in the shoulders can occur with normal aging" and agreed with Dr. McKenzie, that this could be incidental, or unrelated to the first accident.
- [91] Dr. Shuckett concluded that the cause of the plaintiff's neck pain was myofascial pain or soft tissue musculoligamentous injury and myofascial injury, and that probably related chiefly to the first accident.
- [92] In his report of March 5, 2016, Dr. Chu stated:

This chronic pain syndrome is a complicated chronic pain disorder. It is not a simple straightforward mechanical chronic pain. This is a chronic pain syndrome with significant psychological and emotional overlay to the pain presentation. Along with the widespread pain when I palpate there is also some non-organic signs that clouds the picture and makes it difficult to interpret the physical findings. These non-organic signs included some giveaway weakness in the left arm and leg and decreased light touch throughout much of the left arm and leg crossing different dermatomes and peripheral nerve distributions. These are some of the so-called Waddell signs, which is an indication of some degree of psychosocial factors contributing to the

pain and disability.

- [93] Dr. Chu's expressed opinion was that the initiating event for the plaintiff's chronic pain syndrome was the first accident; however, he did so without having reviewed the plaintiff's medical records. He was unaware of her diagnosis of fibromyalgia prior to the first accident and during cross-examination, confirmed that that diagnosis changed his opinion that the initiating event was the first accident.
- [94] Dr. Chu agreed with Dr. McKenzie's diagnoses that the plaintiff's neck and shoulder conditions in November 2013 were "consistent with her age and not related to trauma."
- [95] Mr. Gary Worthington-White is an occupational therapist. I found his evidence to be fair and balanced. In his report of September 30, 2015, he stated:

Results of the MTAP [Multidimensional Task Ability Profile] did identify that Ms. Carrasco underrated her abilities. While there were no positive findings on non-organic testing, on distraction, there were observations of reductions in pain behaviours as well as improved fluidity of movement

- [96] Mr. Worthington-White did not differentiate between the noted limitations related to the first accident as opposed to other causes. He identified two limitations related to issues with the plaintiff's left shoulder, being restrictions on forward reaching and reaching overhead, but did not consider the views of Drs. McKenzie and Dr. Chu that these issues could relate to the plaintiff's left shoulder tendinopathy due to aging.
- [97] As I will explain below, I am satisfied that the body pains complained of by the plaintiff predated the first accident, but were exacerbated by that accident for a period of time.

d) Cognitive Impairment

- [98] The plaintiff contended that she suffers from significant psychological distress as a result of the first accident. Dr. Vijayakumar Seethapathy, a psychiatrist, diagnosed the plaintiff with major depressive disorder, anxiety, and somatic symptom disorder. He notes that she has low energy, difficulty concentrating, muscle tension, low mood, loss of pleasure/interest (anhedonia), decreased appetite, insomnia, hopelessness, somatic pain symptoms, generalized anxiety, and at times feelings of impending doom.
- [99] The plaintiff also complains of ongoing excessive anxiety and worries. The plaintiff's evidence was that she was feeling as though she did not want to be here. She wanted to end it as she was exhausted between the demands of work and home. She felt as though she was not meeting anyone's expectations. She felt like a failure who was unable to make anyone happy, even herself.
- [100] Dr. Shuckett conceded in her May 25, 2017 report, that:

Whether or not her cognitive challenges are related to mild traumatic brain injury, or whether they are related to being in chronic pain and on medications for chronic pain, and being depressed and having poor sleep, is something I will have to leave to the expertise of the neurologist.

[101] One question to be determined is the cause of the plaintiff's somatic symptom disorder ("SSD"). I find that it was caused by her pain condition, poor sleep, and depression, and would have arisen whether the first accident had occurred or not.

[102] Dr. Seethapathy stated that the combination of the plaintiff's symptoms has significantly impacted her functioning socially, vocationally, and in other important areas of overall functioning, and he concluded that her prognosis for recovery is poor, given that her mood and anxiety symptoms have been chronic in nature since the first accident, and further precipitated by the ongoing physical impairment and chronic pain symptoms.

[103] In his report of October 29, 2019, Dr. Seethapathy stated:

it appears that her chronic pain symptoms are consistent with functional illness rather than organic in nature, evidenced by evaluation and diagnostic opinion by neurologists and psychiatrists.

[104] The plaintiff also reported significant memory issues shortly after the first accident, although these have improved. She also reported various long-term memory issues following the first accident, including forgetting the name of her son, dog and co-workers; forgetting how to cook certain simple dishes and having to re-learn how to cook them; and forgetting ingredients for meals while at work.

[105] She gave evidence that she still has some minor issues with her short term memory that require her to make lists.

[106] The recent assessment by Dr. Seethapathy did not reveal any cognitive deficit on screening and no neuropsychological assessment has been presented as evidence in this action. The cause of the plaintiff's memory complaints is unclear and could be a by-product of her pain condition, poor sleep, depression or post-concussive symptoms. As with all of her ongoing complaints, it must also be considered in light of his diagnosis of SSD, which I accept.

[107] It is noteworthy that neither Dr. Dost nor Dr. Medvedev, neurologists whom the plaintiff visited, described neurological compromise on the part of the plaintiff. No neuropsychological evidence has been presented. Meanwhile, Dr. Seethapathy gave evidence that the plaintiff had "normal" test results for cognitive functioning.

[108] Dr. Seethapathy agreed that chronic pain conditions are often associated with increased risk of both depression and anxiety. He also agreed that, assuming chronic pain existed prior to the first accident, the plaintiff was pre-disposed to developing depression and anxiety in any event.

[109] The plaintiff has recently been assessed as suffering from depression, anxiety and SSD. Some of her symptoms can fairly be attributed to the difficulties that were caused by the first accident, but only some. I find that she would have faced at least some of this constellation of symptoms even if the first accident had not occurred. The plaintiff has not received proper treatment for these conditions, but Dr. Seethapathy is "cautiously optimistic" that with treatment these conditions will improve, and I accept his opinion in the regard.

e) Subsequent Trauma

[110] On March 1, 2018, the plaintiff was involved in a second motor vehicle accident (the "second accident"). The plaintiff was struck from the side at an intersection. This second accident resulted in her air bags deploying and her vehicle was rendered a write-off.

[111] By this time, the plaintiff had secured employment as a private chef.

[112] The plaintiff reported exacerbation of her headache, neck and left arm symptoms as a result of the second accident. The defendant contends that the injuries attributable to the second accident must be excluded from consideration in the present case.

[113] On April 24, 2018 the plaintiff attended at her family doctor's office at which time it was noted: "MVA injuries ongoing - they have improved - she has started work again."

[114] I must consider the point at which the effect of the plaintiff's first accident was overwhelmed by her condition prior to the first accident.

[115] As no medical witness offered any opinion as to the length of time the plaintiff suffered from the effects of this second accident, I am left to determine the effect and duration of this accident on the plaintiff's condition thereafter without such evidence.

[116] Overall, the plaintiff seems to have returned to the condition she was experiencing before the second accident relatively soon thereafter. I am prepared to accept that this accident compromised the plaintiff's abilities over and above the compromises she was experiencing for a period of three months, with a reducing effect for an additional three months thereafter.

Conclusion on Causation

[117] At trial, Dr. C.H. du Plessis, the plaintiff's family doctor, gave evidence that she had the impression that the plaintiff's pre-existing condition was exacerbated by the first accident. She did not explain the extent of that exacerbation or whether the plaintiff's present condition is worse, the same as, or better than her condition prior to the first accident.

[118] Notwithstanding the lack of specificity of the extent of the exacerbation, I accept that the first accident did exacerbate the plaintiff's headaches, fibromyalgia and general body pain.

[119] Adopting the somewhat insensitive modifiers discussed by Mr. Justice Major in *Athey* at paras. 34-35, I find that the crumbling skull descriptor best applies to the plaintiff at the time of the first accident. As Major J. explained at para. 35:

35 The so-called "crumbling skull" rule simply recognizes that the pre-existing condition was inherent in the plaintiff's "original position". The defendant need not put the plaintiff in a position better than his or her original position. The defendant is liable for the injuries caused, even if they are extreme, but need not compensate the plaintiff for any debilitating effects of the pre-existing condition which the plaintiff would have experienced anyway. The defendant is liable for the additional damage but not the pre-existing damage: *Cooper-Stephenson*, supra, at pp. 779-780 and *John Munkman, Damages for Personal Injuries and Death* (9th ed. 1993), at pp. 39-40. Likewise, if there is a measurable risk that the pre-existing condition would have detrimentally affected the plaintiff in the future, regardless of the defendant's negligence, then this can be taken into account in reducing the overall award: *Graham v. Rourke*, 74 D.L.R. (4th) 1; *Malec v. J. C. Hutton Proprietary Ltd.*, 169 C.L.R. 638; *Cooper-Stephenson*, supra, at pp. 851-852. This is consistent with the general rule that the plaintiff must be returned to the position he would have been in, with all of its attendant risks and shortcomings, and not a better position.

[120] Not only would the plaintiff's fatigue, body aches, fibromyalgia, depression and headaches have occurred without the first accident, they had already manifested themselves and compromised the plaintiff's abilities prior to that accident.

[121] It is Dr. Chu's view that overall, the plaintiff is functioning, albeit with pain, and able to meet her demands of work and non-work activities. He expressed his opinion that her level of disability is on the low side; that she is able to work at her job as a cook and do her household chores although her husband does a lot of the chores just to take some of the strain off of her.

[122] Dr. Chu said that the plaintiff's prognosis is good, and that she will continue to be able to perform her work and non-work activities as she has been doing for the past number of years.

[123] Applying a "but for" analysis, I must therefore determine which parts of the plaintiff's condition following the first accident can be attributed to that accident, and the extent to which her difficulties would have existed had the first accident not occurred.

[124] I find that the plaintiff was significantly disabled from her injuries in the first accident for a period of three years, partially disabled from those injuries for a further period of another year. But for her income earning ability, which I will discuss below, I find that the plaintiff was back to the condition that she would have been in, but for the first accident, four years after it occurred.

[125] Despite the evidence of the plaintiff, her husband and son, I am not prepared to find that the family dynamics have changed as a result of the first accident. I accept that, for a time, the home situation was strained while the plaintiff was recovering from the effects of that

accident, but as it only served to exacerbate her pre-accident condition, and her crumbling skull status would have seen her experience the difficulties that she has experienced later rather than sooner, I find that the difficulties in the family dynamics would have come about in any event of the first accident.

Assessment of Damages

a) Non-Pecuniary Damages

[126] In *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46, Madam Justice Kirkpatrick set out a non-exhaustive list of the factors to consider in assessing an award of non-pecuniary damages:

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

[127] The plaintiff submits that an appropriate award to compensate for her pain, suffering, and loss of enjoyment of life would be in the range of \$200,000 to \$225,000, based on the following cases:

(a) *Scoates v. Dermott*, 2012 BCSC 485

The plaintiff, who was 38 at the time of trial, sustained horrific orthopedic injuries in a motor vehicle accident, followed by three subsequent accidents which exacerbated his condition. He was left with severe and permanent injuries, chronic pain, a mild traumatic brain injury, and cognitive impairments. His injuries prevented him from continuing work as a paramedic. Mr. Justice N. Smith awarded \$250,000 in non-pecuniary damages.

(b) *Gabert v. Krist*, 2018 BCSC 2109

The 71-year-old plaintiff suffered from "crushing skull pain", headaches, tinnitus, arm pain, numbness of her feet and chronic fatigue syndrome as a result of a motor vehicle accident. Her conditions were "chronic, persistent and debilitating" many years after the accident, and her prognosis was poor. Madam Justice Devlin awarded \$160,000 in non-pecuniary damages based on the severity of the plaintiff's symptoms, the bleak prognosis provided by her doctors, and her emotional suffering.

(c) Flomo v. Hanna, 2019 BCSC 2024

In this case, the plaintiff, who was 29 years old at the time of the accident, sustained injuries to her neck, upper back, lower back, shoulders and hips, due to a motor vehicle accident. She was diagnosed as suffering from fibromyalgia. All experts agreed that her injuries were chronic and the prognosis for her pain was permanent, leaving her with a life time of pain and suffering ahead of her. In addition, she was found to have suffered from a major depressive disorder as a result of the accident. Mr. Justice Burnyeat awarded \$175,000 in non-pecuniary damages.

(d) Gill v. Apeldoorn, 2019 BCSC 798

The male plaintiff in this case was 49 years old at the date of trial and by then had been suffering from his injuries for almost four years. He sustained psychological difficulties that would not be cured. He was isolated from his peers, and his ambition and drive towards his career goals dissipated. He lost his own sense of self-worth and confidence and his degree of emotional suffering was extreme, reflecting a lonely, frustrated, and frightened individual. His family, marital and social relationships were directly impaired, as were his physical and mental abilities. He completely lost his pre-accident lifestyle and was unable to bear his loss stoically. Madam Justice Gropper awarded \$200,000 in non-pecuniary damages.

(e) Felix v. Hearne, 2011 BCSC 1236

In this case, a 44-year old woman received multiple injuries, including injuries to her neck and back; her left shoulder, elbow and wrist; her pelvis; her left knee and ankle; and a concussion. During the course of the subsequent treatment, ligament tears were noted in the area of her left rotator cuff and her left ankle, along with an injury to the cartilage in her left wrist and to her ulnar nerve. She was left with neck and back pain, headaches, and loss of function in her left wrist. She also suffered from Post Traumatic Stress Disorder ("PTSD") and depression as a result of the accident. She was prescribed anti-depressant medication and received ongoing psychological therapy. Her injuries were found to be chronic. Mr. Justice Grist awarded \$200,000 in non-pecuniary damages.

(f) Tan v. Mintzler and Miller, 2016 BCSC 1183

In this case, the plaintiff, 56 years old at the time of trial, was struck by the defendant's vehicle. She hit her head and suffered a sore back. She was diagnosed with mechanical neck and mid and lower back pain, as well as Temporomandibular Joint ("TMJ") pain, a mild or moderated traumatic brain injury, PTSD, depression and anxiety. She had persistent low-grade pain that was physically limiting. Her prognosis was poor and she was vulnerable to future injuries. Mr. Justice Groves awarded \$210,000.

(g) Kim v. Lin, 2016 BCSC 2405

In this case, the plaintiff, 27 years old at the time of the accident, suffered soft tissue injuries, including a debilitating injury to the ligaments and tendons surrounding her sacroiliac joints that led to fibromyalgia and chronic pain syndrome as a result of a motor vehicle accident. She also suffered psychological symptoms and somatic disorders, substantially connected to the injury, and her injuries significantly impaired her ability to care for her two children and take care of her home. It was more probable than not that she would continue to suffer from the injuries for the foreseeable future. Mr. Justice Sewell awarded \$175,000 in non-pecuniary damages.

(h) Pololos v. Cinnamon-Lopez, 2016 BCSC 81

In this case, a 41-year-old plaintiff suffered injuries in a multi-vehicle rear-end collision. He lost consciousness briefly and suffered soft-tissue injuries to his neck, back, shoulder and elbow. By the time of trial, he suffered from chronic pain, a sleep disorder, anxiety, and depression. He had received a facet-block injection to abate his pain as well as physiotherapy, chiropractic treatments, massage therapy, and acupuncture. Most of his physical injuries had worsened since the accident, and prognosis was poor. Mr. Justice Voith awarded \$180,000.

[128] These cases all involve individuals whose injuries were far more serious and longstanding than those that I find were experienced by the plaintiff as a result of the first accident.

[129] The defendant concedes that the plaintiff's various problems have undoubtedly had a negative impact on her enjoyment of life, but contends that her difficulties since the first accident are not significantly different from the period of time before that accident. They contend that an appropriate award for the plaintiff's non-pecuniary damages should be \$70,000, based on the following cases:

(a) Chouhan v. Allemeersch, 2014 BCSC 1415

In this case, the 31-year old woman was injured when her vehicle was sideswiped. Although she suffered from depression and fibromyalgia before the accident, she said that the collision exacerbated those conditions, causing fibromyalgia and PTSD, and that she had been unable to work for four years after the accident. Mr. Justice Dley found that before the collision, and in spite of depressive and mild fibromyalgia symptoms, the plaintiff was active and able to care for her household and child. He found that the consequences of the collision were devastating, as the plaintiff had difficulty caring for her children and required constant assistance from her husband and family. She had difficulty getting out of bed and often slept until the early afternoon. Ms. Chouhan has become irritable and unhappy. Her relationship with her husband has become

strained. Her social activities have been significantly curtailed. Mr. Justice Dley awarded non-pecuniary damages of \$90,000.

(b) *Chamberlain v. Giles*, 2008 BCSC 171

In this case, the female plaintiff, age 31, suffered soft tissue injuries to her neck and back that aggravated earlier injuries. Her initial injuries resolved within weeks, but she contended the injuries suffered in the accident triggered fibromyalgia and depression. She never returned to her employment. Madam Justice Sinclair Prowse found that the evidence proved that the plaintiff's fibromyalgia was latent until triggered by the accident, and that 60 per cent of her symptoms at trial were attributable to the accident, while the remaining 40 per cent were attributable to unrelated pre-existing injuries. She awarded the plaintiff \$50,000 for non-pecuniary damages.

(c) *Schnurr v. Insurance Corporation of British Columbia*, 2015 BCSC 1630

In this case a 50-year old woman who had been diagnosed with chronic pain in 2007 and considered unable to work as a nurse, experienced an exacerbation of her low back pain, migraines, TMJ issues, and cognitive issues as a result of three motor vehicle accidents. She continued to experience low back pain, periodic headaches, ongoing cognitive issues, and TMJ issues at trial. Mr. Justice Skolrood found that the plaintiff's injuries resulting from earlier accidents had already become a chronic condition when the first of the three subject accidents occurred, and were likely to be of a long-term, ongoing nature. He categorized the plaintiff as a crumbling skull case, and awarded her \$70,000 for non-pecuniary damages for the exacerbation of her chronic pain condition, depression and cognitive issues, headaches and TMJ problems arising from the accidents.

(d) *Mayervich v. Sadeghipour*, 2012 BCSC 1624

In this case a 72-year old woman suffered a constellation of injuries, most significantly to her neck and back, as a result of an accident. Her injuries resulted in chronic pain, depression and cognitive difficulties and had a significant impact on her quality of life, interfering with her daily living, recreation and personal interactions with family. By the time of her trial, she had experienced the effects of the injuries for five and a half years. Full recovery was found to be unlikely, but it was found that she would likely improve if she undertook a treatment program that was recommended by one of the experts. Mr. Justice Grauer awarded her non-pecuniary damages in the amount of \$85,000.

[130] I find that the authorities relied upon by the defendant more closely align with the scope, severity, and duration of the injuries that I find the plaintiff has experienced as a result of the first accident, although the award in *Chamberlain* is rather dated. I award the plaintiff \$90,000 for non-pecuniary damages.

b) Loss of Past Income

- [131] The plaintiff was employed full time as a Chef at the Delta Burnaby Hotel ("the Delta") from 2008 through August 2017. I accept that the plaintiff's symptoms kept her fully disabled from work for several weeks, and it took her over three months to return to her regular full-time hours.
- [132] The parties agreed that between the first accident and her return to full time hours on January 11, 2011, the plaintiff worked only 116 hours (or the approximate equivalent of less than three weeks).
- [133] She returned to full time employment in January 2011, and her income loss up to that date was agreed upon at \$8,064 less income tax.
- [134] The Agreed Statement of Facts lists the plaintiff's T4 income for 2009 as \$38,128.91 and only \$30,998 in 2010, the year of the first accident.
- [135] In terms of her past income loss, the plaintiff submits that, absent the first accident, she would likely have continued to earn upwards of \$50,000 per year in her position at the Delta.
- [136] The plaintiff had worked full-time for the Delta until August 2017 at which time she quit. She testified that she had quit her job at the Delta a few months prior to the suicide attempt, feeling overwhelmed and frustrated. She had initially intended to take some time off, but soon realized that it was not a good financial decision, and that she had to return to work. She felt that she had too much on her plate to deal with, and took some time to go visit her parents in Peru. It was shortly after her return from Peru when she took an overdose of Tylenol 3.
- [137] However, the plaintiff's account of the reason why she quit this job is, at best, incomplete. Dr. Wade's notes from his assessment of the plaintiff recorded her reasons for quitting her employment at the Delta as pain, depression and change of chef. However, he also noted that she had chronic pain for many years prior to the time she quit so the triggering factor was likely the change of chef.
- [138] At trial, the plaintiff confirmed that it was due to a conflict with a new supervising chef, who would not afford her the accommodations that his predecessors did, that she quit. She confirmed the accuracy of the following answers from her examination for discovery:

1195Q When did you quit?

A I quit I think sometime August 20 - something on two thousand - we are in '19, right?

1196Q Yes.

A 17 probably.

1197Q All right. And you quit because of Chef -

A of him.

1198Q -- Billy's behaviour?

A Yeah. I quit - I walked way from my job. I - just right on the spot.

1200Q What happened?

A [indiscernible] you know, I call it work harassment -

1201Q Yeah.

A -- in that way.

1205Q Okay.

A I got enough. So, I told him if this continue I'm going to quit. I verbally told him that. And he answered me back, "Well, nobody is necessary in this kitchen. You can walk away any minute you want." So, I did

[139] The plaintiff returned to full-time work as a private chef in late February 2018. Due to unrelated events she quit that job within one to two months.

[140] The defendant argues that the plaintiff chose to take several months off work following her departure from the Delta. She had considered taking a full year sabbatical but could not afford to do so.

[141] I am prepared to accept that the injuries that the plaintiff sustained in the first accident and their effect left her marginally less able to deal with the stresses and strains upon her at work, particularly with a less than sympathetic head chef. If the reason for quitting the Delta is taken at face value, she could arguably have resisted what she termed the harassment at the hotel, but at the end of the day, she was perceived by even her sympathetic co-workers as less capable than she had been before the first accident. Unsympathetic or not, the head chef may have had legitimate reasons for his criticisms of her.

[142] I find that in addition to her income loss immediately after the first accident, the plaintiff should also receive the equivalent of four months' income for a portion of the time she was off work after quitting her job at the Delta, to find a replacement position. The fact that it took her some six or seven months to do so was in part due to her choice to visit with her parents in Peru, and I find that it is not due to the injuries that she sustained in the first accident.

[143] I assess this part of her loss of past income at \$14,000.

[144] I therefore award the plaintiff a total of \$22,064, without deduction for income tax for her loss of past income.

c) Housekeeping Services

[145] As I have indicated above, following the first accident, the plaintiff's husband and son performed more of the household duties than they had prior to that accident, as the plaintiff was unable to do so.

[146] In *Liu v. Bains*, 2016 BCCA 374, Madam Justice Neilson commented at para. 25 that:

[25] Since the decision in *Kroeker*, it has been well-established in this province that domestic services have value and an injured party may justifiably claim for loss of housekeeping capacity, even if these services are provided gratuitously by family members: *McTavish v. McGillivray*, 2000 BCCA 164 at para. 63.

[147] While the plaintiff sought an award of \$40,000 under this head of damages, her justification for that figure was based on an ongoing entitlement to services as a result of the first accident, which I find is unjustified. I have already determined that the plaintiff reached the condition that she would have been in over the four years that followed that accident. I find that she required household services to a decreasing degree over that four-year period, and award her \$15,000 for the household services necessitated by the first accident.

d) Loss of Future Earning Capacity

[148] The first issue to determine in considering whether an award of a loss of future earning capacity is appropriate is whether the plaintiff has established a "real and substantial possibility of a future event leading to an income loss". If this is not established, the inquiry ends. Any loss established is to be assessed based on the probability of the occurrence of such a future event: *Perren v. Lalari*, 2010 BCCA 140 at para. 32.

[149] If the plaintiff is able to establish a loss of future income earning capacity, then the loss must be quantified. The quantification of a loss of earning capacity may be assessed either by way of a "real possibility" approach (also known as the "earnings approach") or by way of a "capital asset" approach. The former may be more appropriate where a demonstrated pecuniary loss is quantifiable in a measurable way, while the latter is more appropriate where the loss is not measurable in a pecuniary way: *Perren* at para. 12.

[150] In *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 (S.C.) at para. 8, Mr. Justice Finch, as he then was, commented that when applying the capital asset approach, the principles to be considered are:

- (a) The plaintiff has been rendered less capable overall from earning income from all types of employment;
- (b) The plaintiff is less marketable or attractive as an employee to potential employers;
- (c) The plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to her, had she not been injured; and
- (d) The plaintiff is less valuable to herself as a person capable of earning income in a competitive labour market.

[151] The defendant argued that plaintiff's employment history, as well as her significant pre-existing and unrelated issues, make it impossible to apply the "earnings approach" in this case. The defendant submitted that if an award is provided, it should be issued on the basis of the capital asset approach.

[152] I agree. The plaintiff did not present evidence to establish a quantifiable loss of future income to allow the use of the earnings approach in this case. The plaintiff seemed to concede that there is a level of uncertainty regarding her future earning capacity that makes it difficult to measure the loss in a pecuniary way.

[153] I find that as the plaintiff is somewhat limited in her advancement at work due to the first accident, a capital asset approach is the best means by which to assess her future loss of earning capacity.

[154] I then turn to assess the value of the loss of future earning capacity.

[155] Both the plaintiff and the defendant cited several cases in support of their positions on the quantification of loss. In *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144, the Court discussed the usefulness of comparative cases in assessing loss of earning capacity at paras. 32-33:

32 In my view comparator cases are of limited utility in the assessment of awards for future losses, generally. It is well settled that an individual's earning capacity is a capital asset: *Parypa v. Wickware*, 1999 BCCA 88 at para. 63. An award for future loss of earning capacity thus represents compensation for a pecuniary loss. It is true that the award is an assessment, not a mathematical calculation. Nevertheless, the award involves a comparison between the likely future of the plaintiff if the accident had not happened and the plaintiff's likely future after the accident has happened: *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 11; *Ryder v. Paquette*, [1995] B.C.J. No. 644 (C.A.) at para. 8. The degree of impairment to the plaintiff's earning capacity depends upon the type and severity of the plaintiff's injuries and the nature of the anticipated employment at issue.

33 In valuing the award, the judge must consider the likely duration of the plaintiff's prospective working life and must account for negative and positive contingencies which are unique to each case. The final award must be fair and reasonable in all the circumstances. [...]

[156] Although I have considered the cases cited by the parties, I find the cases are of limited utility in my assessment of the plaintiff's loss of future earning capacity.

[157] The defendant says that the evidence supports a finding that the plaintiff is capable of and encouraged to continue with full-time employment. He argues that cases where the court has found a loss of a capital asset, quantification of the loss "usually involves some multiple or fraction of the plaintiff's annual income": *Preece v. Leonard*, 2014 BCSC 173 at para. 70.

[158] I find that there is a chance that but for the first accident the plaintiff could have been promoted at the Delta. Given her crumbling skull condition, I find that the plaintiff may have been promoted to chef du partie, however, not as quickly as the year 2014. But for the

first accident, I find that the plaintiff may have been promoted to chef du partie by 2018. Although, I find that the chances of further promotion to either junior sous chef and then to sous chef are sufficiently unlikely that they ought not to be the basis for any award for loss of future earning capacity.

- [159] Mr. Worthington-White found the plaintiff capable of her job demands with only some soft tissue symptom aggravation due to potentially related and unrelated issues. Overall, he found only a few limitations to her ability to work generally. He found her to be capable of "full-time LIMITED and LIGHT strength work and some MEDIUM activity provided the physical demands are in keeping with the restrictions noted in this report." He also noted that she had "sitting tolerance compatible with many jobs in most office/administration type settings."
- [160] In her opinion with respect to prognosis, Dr. Shuckett said that she believed the plaintiff had reached the maximum of medical improvement as of April 21, 2017, but encouraged the plaintiff to continue working, stating: "I would strongly, strongly encourage her to continue at the workplace. Disability begets disability so I would be very leery for her to go on disability "
- [161] Dr. Arseneau recommended that the plaintiff "reduce her current work hours by half" or "go on complete disability". This opinion is based on the plaintiff's inaccurate reporting. It also drastically deviates from the opinions of Dr. Shuckett, Dr. Chu and Dr. Wade. In the result, I reject Dr. Arseneau's opinion that the plaintiff should reduce her current work hours.
- [162] That does not entirely rule out the plaintiff's claim for the ability to earn future income, if her present hours are fewer than she worked prior to the first accident.
- [163] Following her return to full-time work, the plaintiff has continued to work full-time, except for a brief period when she testified that she reduced her hours to four days per week in order to manage her pain.
- [164] Following her work as a private chef, and to the date of trial, the plaintiff has been working as a chef with Centerplate at the Vancouver Convention Center. In this position, she has worked full and over-time hours consistently when she has chosen to do so. She has taken blocks of time off from this position, including six months from July 2018 to January 2019, and July 2019 to August 2019. No evidence has been presented to show that these extended breaks from work were medically necessary. There is no expert or lay witness evidence to support any benefit from the plaintiff's recent pattern of working regular and over-time hours for months at a time followed by multiple months off work.
- [165] At trial the plaintiff confirmed the following answer at her examination for discovery:
- 897Q By and large do you think they're happy with your work at the Vancouver Convention Centre?

A I'm - I'm happy. Actually, I like the environment and I do like actually the - the contract that I signed with them because gave me flexibility

[166] The defendant points to the fact that the plaintiff continued full-time employment in her pre-accident job from January 2011 until August 2017, at which point she chose to quit. Since then she has worked full-time and over-time hours at Centerplate, with her weekly hours exceeding a 40-hour work week in 15 of the weeks recorded, with the highest week reaching 56.5 hours in September 2019.

[167] The defendant contended that an appropriate award, if one is deemed appropriate, would be in the range of one year's salary.

[168] I find that although the plaintiff has returned to the condition that she found herself in prior to the first accident, the difficulties that she faced for the four years that followed undermined her confidence, and that as a result she became somewhat less resilient and accommodating in her employment. This loss of confidence and resilience has diminished her earning capacity and I award her \$50,000 for this head of damages, as it is the rough equivalent of one year's income as a chef du partie.

e) Cost of Care to Date

[169] In a Statement of Agreed Facts, the parties agreed that:

1. Between October 10, 2010 and October 28, 2016, the Plaintiff attended chiropractic treatments at Langley Sports Medicine Clinic, incurring a total in treatment costs of \$2,840.35.
2. Between March 31, 2015 and March 3, 2016, the Plaintiff attended physiotherapy treatments at Pure Form Physiotherapy, incurring a total in treatment costs of \$1,026.40.
3. Between December 7, 2010 and July 30, 2013, the Plaintiff attended physiotherapy treatments at Langley Sports Medicine Clinic, incurring a total in treatment costs of \$6,706.80.
4. Between May 24, 2017 to July 7, 2017, the Plaintiff attended massage therapy treatments at Moveo Sport & Rehabilitation Centre, incurring a total in treatment costs of \$199.50.
5. Between March 3, 2015 and November 3, 2016, the Plaintiff attended massage therapy at Pure Form Physiotherapy, incurring a total in treatment costs of \$2,410.00.
6. Between July 11, 2011 and January 28, 2013, the Plaintiff attended massage therapy at Coastal Sports Massage Therapy, incurring a total in treatment costs of \$1,290.00.
7. Between October 5, 2010 and January 9, 2014, the Plaintiff attended massage therapy at Langley Sports Medicine Clinic, incurring a total in treatment costs of \$1,611.80.
8. On January 13, 2012, the Plaintiff purchased a theraband at Langley Sports Medicine Clinic. This item cost \$5.60.

9. Between February 3, 2011 and November 1, 2011, the Plaintiff attended massage therapy at Glover Road Chiropractic and Sports, incurring a total in treatment costs of \$570.00.
10. Between January 31, 2014 and December 5, 2014, the Plaintiff attended massage therapy at Lifelong Health, incurring a total in treatment costs of \$2,226.00.
11. On November 28, 2014, the Plaintiff underwent a "blood analysis" at Lifelong Health. The cost of the analysis was \$156.45.
12. Between November 28, 2014 and December 5, 2014, the Plaintiff attended acupuncture at Lifelong Health, incurring a total in treatment costs of \$63.00.
13. Between October 1, 2010 and November 28, 2015, the Plaintiff paid for doctor's notes that were required by her employer and by ICBC. The cost of this was \$140.00.
14. On April 1, 2015, the Plaintiff purchased an SI belt at SportMed Retail Group to help with back pain. The cost of the SI belt was \$89.25.
15. Between July 24, 2013 and November 25, 2019, the Plaintiff underwent botox injections at Rejuva for management of the accident related migraine headaches, incurring a cost of \$1,600.00.
16. Between September 28, 2010 to present, the Plaintiff purchased Vimovo, Tramadol, Venlafaxine, Botox and over the counter pain medication as prescribed by her doctors, incurring a cost of \$2,060.11.
17. Between 2010 and 2013, the Plaintiff attended Bikram Yoga. The cost of the yoga membership was \$508.94.
18. Between April 17, 2018 and October 21, 2019, the Plaintiff attended massage therapy with Lisa St. Laurent, RMT, incurring a total in treatment costs of \$1,080.00.
19. On November 17, 2017, the Plaintiff attended massage therapy at Los Andes, incurring a total cost of \$200.21.
20. On July 27, 2013, the Plaintiff purchased a pillow. The cost of this item was \$156.89.
21. Between September 28, 2010 to present, the Plaintiff paid for parking to attend appointments, incurring a cost of \$134.62.
22. On January 15, 2011, the Plaintiff attended chiropractic treatment with Dr. Jussa, incurring a cost of \$45.00.
23. Between January 28, 2018 and February 5, 2018, the Plaintiff purchased cannabis oil. The cost of this was \$227.00.
24. On March 23, 2019, the Plaintiff attended massage therapy and chiropractic treatments at Northview Health & Wellness Centre, incurring a cost of \$70.00.

25. The Plaintiff incurred mileage costs in the amount of \$1,377.66, in transporting herself to all the aforementioned treatments
- [170] The total of these out of pocket expenses is \$26,795.58. The plaintiff claims these costs as special damages.
- [171] The defendant contends, and I agree, that not all of these expenses are attributable to the first accident. Even before the first accident the plaintiff relied upon massage and chiropractic therapy. While I accept that first accident increased her need for some of these treatments, I am unable to accept that they were necessitated only by the first accident.
- [172] Other of these expenses post date the period for which I have found that the plaintiff was disabled due to the first accident.
- [173] I find that item 13 is not recoverable as an element of special damages, and if recoverable, will have to be addressed when costs and disbursements are addressed.
- [174] I find that items 1, 5, 7, 21 and 25 extend, in part, beyond the period of the plaintiff's disability due to the first accident, and award only one half of those items in the amount of \$4,187.22.
- [175] I find that items 2, 4, 10, 18, 19, 20, 23 and 24 did not arise from the injuries sustained by the plaintiff in the first accident and will not allow the claim for those amounts.
- [176] I find that items 3, 6, 8, 9, 11, 12, 14, 15, 16, 17, and 22 all arise from the plaintiff's injuries in the first accident, and are thus recoverable in the amount of \$13,095.15.
- [177] I therefore award the plaintiff \$17,282.37 for cost of care to date.

f) Future Care Costs

- [178] An award for future care costs is based on what is reasonably necessary to restore the plaintiff to her pre-accident condition in so far as that is possible. The award must reflect what is reasonably necessary on the medical evidence to preserve and promote the plaintiff's mental and physical health: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.).
- [179] The future care award must be reasonable and medically justified. Future care costs are justified if they are medically necessary and likely to be incurred. The award thus involves a prediction of what will happen in the future: *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at para. 21. The plaintiff bears the onus of proving the costs that might reasonably be expected to be required for future care. Where the costs claimed are not of absolute necessity, the plaintiff cannot assume the court will simply accept the recommendations of health care professionals and medical practitioners: *Lo v. Matsumoto*, 2015 BCCA 84 at para. 20.

[180] On the basis of his incorrect factual assumptions, Dr. Arseneau proposed a wide range of potential treatments in his report. During his testimony, Dr. Arseneau clarified that the treatments in his report consisted of anything that could possibly assist the plaintiff, not necessarily treatments which will likely assist her. Such a concession is inconsistent with the duty of an expert witness set out in Rule 11-2(1) of the Supreme Court Civil Rules, B.C. Reg. 168/2009, a rule that Dr. Arseneau professed he had complied with in his report.

[181] However, the defendant contends that the cost of future care figures relied on by the plaintiff come from Mr. Worthington-White's report.

[182] Mr. Worthington-White noted that many of the treatment recommendations for the plaintiff would be related to the plaintiff's conditions prior to the first accident.

[183] The total for one-time-only costs claimed by the plaintiff is set out below:

- (a) Kinesiology: \$650 - \$890;
- (b) Neurofeedback Therapy: \$2,500;
- (c) Psychological Intervention: \$2,000 - \$6,000;
- (d) Acceptance and Commitment Therapy: \$4,000 - \$6,000;
- (e) Transcranial Stimulation Therapy: \$1,000 - \$3,000;
- (f) Vocational Consulting: \$5,150;
- (g) Dietician: \$500-\$1000;

TOTAL: \$15,800 - \$24,540

[184] The total for ongoing costs is set out below:

- (a) Gym pass: \$400 - \$600, annual until age 75 (27 years), total cost $\$400 \times 20.7069 = \$8,682.76$ - $\$12,424.14$;
- (b) Physiotherapy and supportive treatment: \$2,600, annual to age 75 (27 years) $\$2,600 \times 20.7069 = \$53,837.94$;
- (c) Ergonomic Equipment: \$100, every five years to age 65 (three times) $\$100 \times 2.8839 = \$288.39$;
- (d) Massage Therapy: \$800 - \$1,300, annual to age 75 (27 years) $\$800 \times 20.7069 = \$16,565.52$, $\$1,300 \times 20.769 = \$20,918.97$, $\$16,565.52 - \$20,918.97$;
- (e) Hyperbaric Therapy: initial cost of \$7,500 + \$1,250 - \$2,500, annually to age 75 (27 years) $\$7,500 + (1,250 \times 20.7069) = \$33,383.625$, $\$7,500 + (2,500 \times 20.7069) = \$59,267.25$, $\$33,383.625 - \$59,267.25$;
- (f) Occupational Therapy: \$1,500 - \$2,250 + recurring \$750, every two to three years to age 75 (nine times) $\$1,500 + (750 \times 8.1622) = \$7,621.65$, $\$2,250 + (750 \times 8.1622) = \$8,371.65$, $\$7,621.65 - \$8,371.65$;

- (g) Botox Injections: \$3,000 - \$3,200, annually to age 75 (27 years) $\$3,000 \times 20.7069 = \$60,120.7$, $\$3,200 \times 20.7069 = \$60,320.7$, $\$60,120.7 - \$60,320.70$;
- (h) Home Exercise Equipment: \$100, every seven years to age 75 (four times), $\$100 \times 3.8077 = \$380.77$;
- (i) Medications (Advil and Voltaren): \$188.88 recurring yearly to age 75 (27 years) $\$188.88 \times 20.7069 = \$3,911.10$;
- (j) Nabilone and Naltrexone: \$2,700 - \$5,700 recurring yearly to age 75 (27 years) $\$2,700 \times 20.7069 = \$55,908.63$, $\$5,700 \times 20.7069 = \$118,029.33$, $\$55,908.63 - \$118,029.33$;
- (k) Natural Medication: \$3,396 recurring yearly to age 75 (27 years) $\$3,396 \times 20.7069 = \$70,320.60$;
- (l) Naturopath: \$1,500 - \$1,800 recurring yearly to age 75 (27 years) $1,500 \times 20.7069 = \$31,060.35$, $\$1,800 \times 20.7069 = \$37,272.42$;

TOTAL: \$342,082.03 - \$450,343.19

[185] The plaintiff calculated the present value of the future cost of care items above with a 2.0% discount rate.

[186] Dr. Arseneau recommended the plaintiff receive neurofeedback therapy, transcranial stimulation therapy, hyperbaric oxygen treatment therapy, and acceptance and commitment therapy. He also recommended the plaintiff see a naturopath, receive various natural medications, and work with a dietician. I dismiss the plaintiff's claims related to these various therapies and remedies.

[187] The defendant's position with respect to Botox was that it was the one consistent recommendation amongst the medical professionals that the plaintiff continue receiving Botox treatments every three months to treat her headaches. The plaintiff has confirmed that these treatments have made a major improvement to her headaches. Although the plaintiff had significant issues with pre-existing headaches including migraines prior to the first accident, she did not require the use of Botox.

[188] I am not persuaded that absent the first accident there was a real possibility that she would have required this treatment. I would not make any discount for the amount or cost of this medication based upon the plaintiff's pre-existing headaches and migraine headaches, and would award the plaintiff the costs of such treatment over the next 27 years, in the discounted amount of \$47,500.

[189] At trial the plaintiff confirmed the following answers from her examination for discovery:

710Q Right now who is paying for the Botox? Is it covered?

A No. Partially covered by Health Canada -

711Q Okay.

A -- half of it, and the other half is covered by my husband's insurance

- [190] The plaintiff said that she cannot reliably depend on the continuation of Health Canada paid portion of the Botox, as that is available to her only through her husband's benefits. Given the state of the plaintiff's relationship with her husband, I am unable to find with any confidence that his medical plan or the associated Health Canada benefits will be available for much longer, so I will not reduce the costs of the Botox on that basis.
- [191] Dr. Shuckett expressed her opinions that the plaintiff would be continuing with Botox injections for her headaches, that intermittent massage is probably warranted, but she did not see a long-term role of physiotherapy or chiropractic treatment. She supported the recommendation for exercise, and was of the view that the plaintiff should have treatment for her mood disorder.
- [192] Insofar as the claim for an exercise program is concerned, Dr. Shuckett recommended the plaintiff work with a kinesiologist with respect to setting an exercise program.
- [193] Dr. Chu's recommendations for the plaintiff included active exercise to maintain her conditioning and ameliorate her chronic pain syndrome. He stressed that such a program was "the most important thing the cornerstone."
- [194] The defendant contends that, although there have been recommendations for the plaintiff to continue with an exercise program, an award for such is not justified, as there is no evidence that the plaintiff would proceed with such a program. Indeed, she gave evidence that she has tried and she does not perceive it as making any difference.
- [195] As I have indicated above, the plaintiff was not actively involved in an exercise program at the date of the first accident. As I have found that her present condition is what it would have been absent the first accident, I dismiss the claim for this program. On this basis, I also dismiss her claims for the costs of a gym pass and home exercise equipment.
- [196] With respect to physiotherapy and chiropractic treatments, other than the costs to date that I have allowed above, there is no evidence to support the plaintiff continuing with physiotherapy or chiropractic treatments as a result of the first accident. Indeed, the plaintiff's assessing professionals do not believe the plaintiff would benefit from these treatments at this stage of her recovery. In the result I decline to make any award for physiotherapy and chiropractic treatments.
- [197] Some of the plaintiff's assessing professionals indicated that occasional massage therapy could be of assistance to her, however, the plaintiff was receiving routine massage treatments prior to the first accident. The defendant contends that this expense would thus have been incurred in any event.

[198] Mr. Worthington-White noted in his report that he considered the plaintiff's weekly massage and IMS treatments to be "high levels of intervention" and that:

While such high levels of intervention are common initially after an injury, it is typically accepted that there may not be any long term benefit from ongoing passive modalities. While I would defer current treatment recommendations to her treating therapists, it is typically the goal to reduce involvement and promote independence with symptom management and exercise

[199] For the same reason I have declined to make any award for physiotherapy and chiropractic treatments, I decline to make an award for massage and IMS treatments.

[200] While Mr. Worthington-White recommended vocational counselling and ergonomic equipment, I find that the need for both, if any, cannot be attributed to the first accident, and therefore dismiss the claims.

[201] The plaintiff seeks to recover future costs of medication she has been purchasing in Peru for a little over a year. This medication (Tapentadol) is an opioid. A number of the assessing practitioners have recommended against ongoing use of opiate medications for treatment of chronic pain.

[202] Nonetheless, the plaintiff seeks compensation for the Tapentadol medications she purchased in Peru, to the Canadian dollar equivalent at the time of judgment. No Canadian doctor has condoned the use of this medication to manage pain because opioids cause hyperalgesia, meaning they tend to increase sensitivity to pain over time.

[203] I accept that the use of this medication should not have been undertaken by the plaintiff in the face of the advice of her Canadian physicians, including Dr. Arseneau, and decline to award her any of the cost for this medication.

[204] In addition to Tapentadol, the plaintiff has cycled through a number of medications over the past ten years. This presents a challenge to predicting her future cost of medications. The plaintiff has also reported to her treating health professionals that she wants to limit the medications she takes.

[205] The plaintiff's ongoing use of Tapentadol for the indefinite future is neither medically advisable nor likely to occur. In the result she may require other medications.

[206] To date, excluding the Tapentadol, the plaintiff's total sought special damages for medications amounts to \$2,060.11.

[207] The defendant contends that the plaintiff has failed to prove that her ongoing medication use is due to the first accident as opposed to her pre-existing fibromyalgia. As noted by Dr. Wade, the medications she is "on-again, off-again" taking are what you would expect for someone with fibromyalgia.

[208] For the same reason that I have declined to make any award for physiotherapy and chiropractic treatments, I decline to make an award for future medications.

[209] Dr. Seethapathy recommended the plaintiff undergo 12-16 sessions of cognitive behavioural therapy treatment with a psychologist. Similarly, Mr. Worthington-White recommended 10-12 sessions at \$200/hour. Arguably the plaintiff needed, but was not referred for such therapy following the first accident.

[210] The defendant accepts that the plaintiff should undergo such treatment but submits that the plaintiff ought to be awarded \$2,000 for these sessions. I see no reason to reject the number of such treatments recommended by these two expert witnesses, but consider that the need for such treatments is more in the expertise of Dr. Seethapathy than Mr. Worthington-White. I therefore award the plaintiff the present value of \$2,800, being the costs of the median number of such treatments recommended by Dr. Seethapathy.

Conclusion

[211] In summary, I make the following awards:

- a) Non-pecuniary damages: \$90,000.00;
- b) Lost of past income: \$22,064.00;
- c) Housekeeping services: \$15,000.00;
- d) Loss of future income earning capacity: \$50,000.00;
- e) Cost of care to date: \$17,282.37;
- f) Cost of future care: \$50,300.00;

TOTAL: \$244,646.37

[212] The plaintiff is entitled to interest pursuant to the Court Order Interest Act, R.S.B.C. 1996, c. 79.

[213] The plaintiff has received a number of medical treatments and benefits that fall within the scope of the Health Care Costs Recovery Act, S.B.C. 2008, c. 27. I did not receive a certificate from the Minister setting out any subrogated claim for such amounts. In the event that a subrogated claim is being made, I will leave it to the parties to work out the amounts, which can be added to the awards set out above. If they are unable to agree, counsel for the plaintiff may make submissions with respect thereto, within three weeks of the date of my reasons for judgment; counsel for the defendant two weeks thereafter, with a right of reply to the plaintiff's counsel one week thereafter, if needed.

"The Honourable Chief Justice Hinkson"

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/20/07/2020BCSC0731.htm>

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

Prepared on 24 October 2026 · Esheria