

CANADA / JUDGMENT

Chernichen v. Mundy

2022 BCSC 1704

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Supreme Court of British Columbia

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2022 BCSC 1704 Chernichen v. Mundy

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Chernichen v. Mundy,

2022 BCSC 1704

Date: 20221003

Docket: M56134

Registry: Vernon

Between:

Kyla Marie Chernichen

Plaintiff

And

Darin Keith Mundy and Darin's Plumbing Ltd.

Defendants

Before: The Honourable Madam Justice W.A. Baker

Reasons for Judgment

Counsel for Plaintiff:

M. Yawney, K.C.

Counsel for Defendants:

D. Patterson

Place and Date of Trial:

Kelowna, B.C.

June 22-24, 27, 2022

Place and Date of Judgment:

Vernon, B.C.

October 3, 2022

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I. Introduction

- [1] In 2018, Ms. Chernichen was 34 years old, the single mother of a young son, and was working at a local restaurant in Vernon, BC. On October 26, 2018 she was driving her car in Vernon when she was hit from behind by the defendant Darin Mundy, who was driving a corporate truck owned by the defendant Darin's Plumbing Ltd. Ms. Chernichen suffered a number of myofascial injuries. In this action Ms. Chernichen seeks compensation for the injuries she sustained as a result of the accident, and the impact those injuries have had on her life.

II. Issues

- [2] The only issue in dispute in this case is the quantum of damages to which Ms. Chernichen is entitled as a result of the injuries she sustained in the accident.
- [3] The defendants have admitted liability for the accident. There is no dispute on the medical evidence, or that fact that Ms. Chernichen was injured in the accident. There is no dispute that Ms. Chernichen's injuries were caused by the accident.

III. Analysis

A. What impact did the accident have on Ms. Chernichen?

1. Ms. Chernichen's abilities and health pre-accident
- [4] Ms. Chernichen is the eldest of four children. She was a caring helpful child, with no behavioral issues. She was very active in sports, and was outdoorsy. She liked to camp, hike, swim, roller blade and bike. In high school she took part in track and field, soccer, and synchronized swimming.
- [5] Ms. Chernichen began working relatively early. Her first job was as a pharmacy assistant when she was 16 years old when she was still in school. After she graduated from high school, she continued working in that job for two years. She then moved to Kelowna to work as a winery assistant, and then moved to Whistler to work in the hospitality industry for a few years. She described how she took advantage of the opportunity to ski and snowboard while she lived and worked in Whistler.
- [6] She moved to Vancouver to attend SFU in 2010. She completed a bachelor of science degree from SFU in 2017. During her years at SFU, Ms. Chernichen continued to be very active. She biked, went to the gym, skied, snowboarded, hiked, and did the Grouse grind.
- [7] In 2010 she also started working as a server at the Delta Hotel and Conference Centre in Burnaby. She continued to work at the Delta Hotel until July 2014. She began working at a Greek restaurant in Vancouver in July 2014 until February 2015.
- [8] In 2015 Ms. Chernichen became pregnant with her son, who was born in September 2015. Ms. Chernichen is the primary caregiver and sole financial support for her son.

- [9] In 2015 she moved to Quesnel to be closer to her mother while she was pregnant. She stayed in Quesnel until after her son was born, and then returned to Burnaby in 2016 to complete her degree at SFU. In addition to her schooling, she worked as a server. During this time, she was able to look after her son, work, and go to school.
- [10] In 2017 she decided to move to Vernon. Her mother had moved there, and she wanted to be closer to family. They initially lived with her mother, and then moved to a two bedroom townhouse, where she was living at the time of trial. She had no difficulty with managing household chores. She described how she was able to lift her lawn mower out of the trunk of her car by herself, and look after mowing the lawn by herself. She enjoyed shovelling snow, and looked after snow removal for her neighbours as well as herself. She was able to clean her house and had no problems mopping, vacuuming, moving furniture around, or taking furniture apart.
- [11] Ms. Chernichen did many activities with her son, including taking him out on his bike, taking him for hikes, and playing with him outside every day. She had no problems sleeping.
- [12] Ms. Chernichen began working as a server at the Temptasian Restaurant on July 28, 2017. Ms. Chernichen typically worked between 55 and 65 hours every two weeks. This was a physical job. She was required to move large tables, carry heavy trays, and carry up to three plates at a time her arms. In addition, the servers were responsible for doing all the dishes, glasses and cutlery. The restaurant had a large dish pit, with overhead racks. The dishwasher had a huge double door, and when the dishes were clean they had to be stacked on the top shelf on the kitchen line. She was energetic, and efficient.
- [13] Jade Graham, who previously worked with Ms. Chernichen at the restaurant, described Ms. Chernichen as very hard working who took care of all the different jobs in the restaurant, including working the dish pit, picking up and dumping bins of water, vacuuming, mopping, moving tables and chairs, cleaning the bathrooms, and serving customers. Ms. Graham testified that Ms. Chernichen was a hard worker than she was, made sure all the jobs were done properly, and did all the jobs very fast.
- [14] In the fall of 2018 Ms. Chernichen was starting to look for a new job, outside the hospitality industry. She was starting to look into jobs at care homes, but was finding that she would need further training for most of those kinds of jobs. She was hoping she could continue serving, even if she got a job in a care home. She testified that she loved serving, and hoped she would be able to keep doing it.
2. Ms. Chernichen's abilities and health post-accident
- a) Work and social life
- [15] On the day of the accident, Ms. Chernichen had dropped her son off with her mother and was heading home to get ready for work. She was going through an intersection when a big van in front of her stopped suddenly. She was able to stop her car before hitting the van, but the defendant, Mr. Mundy, travelling behind her was looking down and did not see she had

stopped. Ms. Chernichen testified she could see him in her mirror, and could see he wasn't going to stop. She braced herself and honked her horn, but was struck from behind. She felt her head go forward and snap back. She said it felt like someone had kicked her. Her head struck the headrest.

- [16] She was able to drive home, but was in shock. She called her mother, who came to take her to the hospital. At the hospital the bright lights affected Ms. Chernichen, and gave her a pounding headache. The doctor told her that her cervical spine had shifted. She was dizzy. After about two hours, she returned to her mother's house. Her back started to hurt, she was dizzy, and she had a headache. She was prescribed two kinds of pain killers by the doctor at the hospital.
- [17] Ms. Chernichen lay on the couch at her mother's house for two days, alternating ice and heat. She felt spasms down her neck to her left arm, down her back, and had a shooting pain in her left leg.
- [18] Ms. Chernichen tried to return to work, but the owners sent her home. Ms. Chernichen had to take a month off of work. She did rehabilitation and starting looking into other kinds of jobs because she could not bend, reach or carry things. Even bending to get tea out of a drawer caused her back to seize up.
- [19] When she began a graduated return to work, she was only able to do hostess work and, at first, could only work for a couple of hours at a time. She was able to answer the telephone, but had to be careful not bend her neck. She couldn't do the dishes or serve. Reaching around the tables was a challenge.
- [20] Eventually Ms. Chernichen was able to return to serving, but her employers continued to accommodate her. She was not the same energetic, highly efficient worker that she was before the accident. Ms. Graham confirmed that Ms. Chernichen was not the same capable server that she had been before the accident.
- [21] Ms. Chernichen attended physiotherapy and massage following the accident. However, she found she was unable to do much more than stretching and resting. She would get sore even from walking. She needed help in the house because she couldn't move properly, couldn't pick up toys, prepare food without pain, or do laundry.
- [22] Once Ms. Chernichen reached her new baseline, which she said was about halfway below where she was when she felt her best, she stopped going to physiotherapy. She has continued to go to massage therapy about every five weeks for pain management. She stopped taking pain killers in September 2019 because she felt they made her groggy and she was worried she would not be able to care for her son if there was an emergency.
- [23] She continues to have pain in her neck, mid back, upper back and lower back. She also continues to get headaches and had to get glasses because her vision was blurred.

- [24] Ms. Chernichen testified that the pain in her neck and lower back affect her the most. Her driving is still affected, and the pain in her back impacts her ability to clean the house. She can no longer mop the floors, and cannot bend over repeatedly. When she tries to do yard work, she has to kneel down as she cannot bend as she used to. She no longer experiences restful sleep, even though she is exhausted.
- [25] Ms. Chernichen uses an ObusForme seat for driving and when sitting at a table or desk. She uses it every day, and it helps her to manager her symptoms.
- [26] Ms. Chernichen testified that her activities with her son are greatly changed. She said she relies on the iPad to keep him occupied, as she needs to rest. She can no longer be as active as she used to be with him. Ms. Chernichen's mother, Ms. Logan, testified that she watches her daughter struggle since the accident. Ms. Logan stated she saw Ms. Chernichen struggle with physically managing the demands of her son, and pushing on even while in pain.
- [27] Ms. Chernichen also testified about the impact of the accident on her romantic life. She has not had the energy to pursue a romantic relationship since the accident. While she has dated some men, she feels that she did not have the energy to be with them, and her activities are so limited because of her pain that she "feels sorry for them". This is a significant impact on Ms. Chernichen's life.
- [28] Samantha Lougheed, Ms. Chernichen's sister, testified as to the changes she has seen in her sister since the accident. Ms. Lougheed is a licenced practical nurse, working in the Penticton hospital. She described Ms. Chernichen before the accident as an active, bubbly person with a strong personality. She saw Ms. Chernichen being very active with her son. After the accident, including very recently, Ms. Lougheed has seen a big change in her sister. Ms. Lougheed helps with Ms. Chernichen's son, taking him swimming because Ms. Chernichen has pain in her neck and can not do it herself. Ms. Lougheed testified that after the accident, Ms. Chernichen would call her crying with pain and would tell her that she was exhausted and had to place cold compresses on her back after work. Ms. Lougheed testified that Ms. Chernichen's son asks her why his mom is always so tired. Ms. Lougheed testified that, as a nurse, she often sees people in pain and she can see from the expression on Ms. Chernichen's face that she is often in pain. Ms. Lougheed confirmed that they were brought up to be stoic and not complain, so when Ms. Chernichen does cry or describe her pain, she knows Ms. Chernichen is experiencing bad pain.
- [29] In 2019 Ms. Chernichen felt that her capacity to work as a server was not at an acceptable level. She knew she would continue to struggle, was in constant pain, and was not able to do dishes any more. She looked at different options for a career, and settled on becoming a therapist assistant. She had considered becoming a care aid, but rejected that as it required lifting which she was not able to do.

- [30] Ms. Chernichen enrolled in the Therapy Assistant program at Okanagan College. This was a two year program, which she began in the fall of 2019. The classes started in person, but migrated to on line work once the pandemic hit. Ms. Chernichen continued to work at the restaurant part time until February 2020. This was very challenging for her, as she worked weekends, lunch shifts, or late night short shifts. Ms. Chernichen completed the therapy assistant program in the summer of 2021.
- b) Dr. Paul Etheridge
- [31] Dr. Etheridge was qualified as a medical doctor with specialty training and expertise in the assessment, diagnosis, causation, prognosis, and treatment of chronic pain conditions.
- [32] Dr. Etheridge examined Ms. Chernichen in September 2019. He diagnosed Ms. Chernichen with soft tissue injuries to her neck, thoracic, lumbar and gluteal muscles as a result of the accident. In addition, he diagnosed her with injuries to her left C5-7 facet joints, and injuries to her neck, shoulder, and upper back muscles which have resulted in ongoing myofascial pain, all as a result of the accident. Finally, he diagnosed here with muscle tension headaches associated with her neck pain.
- [33] Dr. Etheridge continues to treat Ms. Chernichen with injections, and he and Ms. Chernichen are considering administering rhizotomy surgery in 2022.
- c) Dr. Zeeshan Waseem
- [34] Dr. Waseem was qualified as a medical expert qualified to give opinion evidence in the area of physical medicine and rehabilitation on the subject areas of diagnosis, causation, prognosis, future treatment, and rehabilitative and return to work programs of neurologic and musculoskeletal injuries, chronic pain, and other related injuries and disorders.
- [35] Dr. Waseem examined Ms. Chernichen on March 8, 2022. Dr. Waseem was of the opinion that, as a result of the accident, Ms. Chernichen initially sustained sprain/strain soft tissue injuries of the cervical, thoracic and lumbar spines, and developed headaches.
- d) Wendi Wright
- [36] Ms. Wright is an occupational therapist who provided expert evidence in the area of functional capacity assessments, as well as recommendations for and costs of future care.
- [37] Ms. Wright observed that Ms. Chernichen downplayed or ignored the impact of her pain. She was of the view that Ms. Chernichen did not currently meet the requirements of her job. Ms. Wright was of the view that Ms. Chernichen required ongoing accommodations in order to complete her work day.
3. What is Ms. Chernichen's prognosis?

[38] Dr. Etheridge described natural history of chronic neck pain as being a chronic condition that fluctuates and recurs over time, characterized by improvement and then exacerbations. When he wrote his report in October 2019, Dr. Etheridge was of the opinion that if her myofascial pain persisted for more than 12 months, the prognosis for recovery was poor. He noted that interventional treatments, such as nerve blocks, can provide temporary relief but they do not usually change the long term natural history of neck pain.

[39] Dr. Waseem was of the opinion that some improvement of her condition was possible if she undertook his treatment recommendations; however, given the prolonged nature of her symptoms, Ms. Chernichen's prognosis with respect to complete symptomatic recovery was poor.

4. Conclusion on injuries

[40] I am satisfied that Ms. Chernichen has proven on a balance of probabilities that, as a result of the accident, she suffered injuries to her neck, her shoulder, upper back and gluteal muscles, and her left C5-7 facet joints. These injuries have resulted in ongoing myofascial pain and stiffness. In addition, the accident resulted in muscle tension headaches associated with her neck pain.

[41] This pain is chronic and aggravated by activity, leaving Ms. Chernichen less functional in her work and personal life. I find that these injuries are permanent and are unlikely to improve significantly with the passage of time.

B. Is Ms. Chernichen entitled to damages?

[42] The plaintiff claims non-pecuniary damages, and the following pecuniary damages: loss of income and earning capacity (past and future), cost of future care, loss of housekeeping capacity, and special damages. The defendants do not dispute that Ms. Chernichen is entitled to compensation under all these heads of damage, except loss of housekeeping capacity. It is simply the quantum of damages which is in dispute.

1. Non-pecuniary damages

[43] Non-pecuniary damages are awarded to compensate a plaintiff for pain, suffering, loss of enjoyment of life, and loss of amenities. As stated by our Court of Appeal in *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46:

[46] The inexhaustive list of common factors cited in *Boyd* [*Boyd v. Harris*, 2004 BCCA 146] that influence an award of non-pecuniary damages includes:

- (a) age of the plaintiff;
- (b) nature of the injury;
- (c) severity and duration of pain;
- (d) disability;

- (e) emotional suffering; and
- (f) loss or impairment of life;

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

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

[44] Ms. Chernichen seeks \$130,000 in non-pecuniary damages. The defence agrees some non-pecuniary damages are properly awarded, but submits the correct award is \$80,000.

[45] Ms. Chernichen relies on *Bellaisac v. Mara*, 2015 BCSC 1247; *Klingler v. Lau*, 2019 BCSC 1776; *Staff v. Moore*, 2020 BCSC 284; *Clayton v. Barefoot*, 2018 BCSC 239; and *Wong. V. Hemmings*, 2012 BCSC 907, where awards ranged from \$95,000 to \$140,000 for plaintiffs suffering chronic pain with resulting psychological injuries.

[46] The defence relies on *Peter v. Beveridge*, 2020 BCSC 750; *Matei v. Wu*, 2022 BCSC 107; and *Parmar v. Stokes*, 2022 BCSC 252 where awards ranged from \$75,000 to \$90,000 for non-pecuniary damages in cases with where the primary injuries were back pain.

[47] Each case is unique. Non-pecuniary damages must be assessed taking into account the unique factors arising in the case at bar. Of the cases noted above, I found *Klinger v. Lau* to be the most useful comparator.

[48] Ms. Chernichen was a young, active, energetic mother at the time of the accident. She presented to the court as a very stoic person, who is trying hard not to let her injuries overwhelm her. This was confirmed by a number of the other witnesses at trial. I found her to be a credible and reliable witness, who is coming to terms with the limitations presented by her injuries.

[49] It is clear that Ms. Chernichen can no longer work at the same pace she did before. Her mobility has been seriously impacted. She cannot enjoy in the same the many recreational activities she pursued before the accident. Ms. Chernichen's energy is focussed on getting through her work day, and providing care to her young son. She is often exhausted as a result of her injuries, and falls asleep while her young son is still awake. It is clear that her ability to parent her child as she did before, and as she would like to do, has been negatively impacted by the accident.

[50] While Ms. Chernichen can complete most routine household tasks, she must modify these tasks and pace herself. She will have to use adaptive tools, such as long handled tools so she can avoid stooping. She has difficulty with performing outside chores which she previously did with ease.

[51] Ms. Chernichen will suffer from pain and limitation from her injuries for the rest of her life.

[52] I find that an award of \$110,000 is appropriate for non-pecuniary damages.

2. Loss of earning capacity

[53] The purpose of an award for loss of earning capacity is to restore the plaintiff, as best as possible, to the position she would have been in had the accident not occurred. The plaintiff must establish an impairment in her earning capacity, and that there is a real and substantial possibility that the diminishment in earning capacity will result in a pecuniary loss: *Perren v. Lalari*, 2010 BCCA 140.

[54] The court in *Brown v. Golaiy* (1985), 26 BCLR (3d) 353 (SC) at para. 8 set out the factors to consider in assessing a loss of earning capacity, using the loss of a capital asset approach:

The means by which the value of the lost, or impaired, asset is to be assessed varies of course from case to case. Some of the considerations to take into account in making that assessment include 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.

[55] Both past and future loss of earning capacity address the same loss. However, there are differences in how this loss is assessed before trial and after trial. To the extent past loss of capacity relies on facts which are capable of proof, those facts must be proven on the balance of probabilities. To the extent past loss of capacity relies on hypothetical facts, the court must be satisfied that there is a real and substantial possibility of such facts occurring. The court may assess the likelihood of such hypothetical facts occurring, and discount or increase an award to reflect such contingencies. Future losses are almost always based on hypothetical facts, and are assessed on the standard of real and substantial possibility with consideration of relevant contingencies: *Rousta v. MacKay*, 2018 BCCA 29 at para. 14.

- [56] Ms. Chernichen is a young woman, at the start of her career. As will be discussed below, her career options have been limited by her injuries. I am satisfied that the capital asset approach of assessment is appropriate in the case before me.
- a) Pre-trial loss of income and loss of earning capacity
- [57] Ms. Chernichen seeks damages assessed both as pre-trial loss of income, and as pre-trial loss of earning capacity.
- [58] Before the accident, while working at Temptasian, Ms. Chernichen typically worked between 55 and 65 hours every two weeks. She earned a minimum wage of \$11.40 per hour at the time of the accident, which increased to \$12.70 per hour as of June 1, 2019. In addition to her wages, she received 4% holiday pay and an average of \$250-500/week in tips.
- [59] After the accident, Ms. Chernichen was off work for two pay periods - from October 27, 2018 to November 23, 2018. She gradually returned to work, working reduced hours for 12 weeks. During her gradual return to work, following the initial four weeks when she was completely off work, Ms. Chernichen lost 210 hours.
- [60] Ms. Chernichen submits that, as a result of the accident, she lost 120 hours over the two week she was off work after the accident (average of 60 hours per week) and 210 hours during her gradual return to work which, including 4% vacation pay, amounts to a wage loss of \$3,912.48. In addition, Ms. Chernichen submits she lost tip income in the amount of \$2,062, based on \$750 in tips earned during an average, pre-accident, month. The defence does not dispute that Ms. suffered a loss of income related to the hours of work she missed. I find that Ms. Chernichen has suffered a loss of income in the amount of \$6,000 in the two pay periods immediately after the accident and during her gradual return to work.
- [61] With respect to her earnings following her gradual return to work, Ms. Chernichen submits a claim for loss of earning capacity. In essence, Ms. Chernichen claims that she was not able to work to the same ability as she did before the accident. This reflects a loss of earning capacity for which Ms. Chernichen is entitled to be compensated. During the pre-trial period, loss of capacity must be examined during the period she continued to work at Temptasian, during the time she attended school, and after she qualified for work at IHA.
- [62] In February 2019 Ms. Chernichen returned to full time work at Temptasian. She worked some split shifts and some evenings, as she had before the accident. Ms. Chernichen testified that she could not work at the same speed and volume as she had before the accident. She couldn't carry as many dishes at one time which made her slower, so her sections were smaller. With smaller sections, she had fewer guests, less food and, consequently, fewer tips. Ms. Chernichen estimates that her tip income dropped by half. Ms. Chernichen continued to work at Temptasian full time until September 2019, and part time until February 2020.

- [63] Ms. Chernichen submits that a conservative estimate of her wage loss from Temptasian is \$2,500, plus tips of \$500. The defence submits that Ms. Chernichen was working at 75% during the one year before she returned to school in September 2019, and estimates Ms. Chernichen's loss due to her reduced work load to be \$6,662.50. I find that a reasonable assessment of income Ms. Chernichen lost up to February 2020 as a result of her injuries is \$6,000.
- [64] Ms. Chernichen argues that she would have continued working through the pandemic at Temptasian while she was in school. I find this proposition to be speculative given the many variables at play during the pandemic, including what hours the restaurant was open, and what shifts would have been made available to her, if any, assisting the restaurant with take out orders. I decline to award any loss of income for the period between February and May 2020, when Ms. Chernichen began working at Creekside Landing, as discussed below.
- [65] In September 2019 Ms. Chernichen began taking courses at Okanagan College. She completed her program in the summer of 2021, and received very high marks graduating with a "notable" designation, which she described as equivalent to honours.
- [66] During her schooling, Ms. Chernichen did a practicum with an occupational therapist at a hospital, and a practicum with physical therapist at a care home.
- [67] She worked as a casual activity aid at Creekside Landing Ltd., from May 11, 2020 until September 3, 2020, when she returned to school. Her hourly wage was \$19.18/hour, which increased to \$24.54/hour in July 2020.
- [68] Beginning in July 2021 Ms. Chernichen began working at Interior Health Authority, where she continued to work at the date of trial. She initially worked at Kelowna General Hospital, and then transferred to Vernon on September 27, 2021, where she now works as a casual employee, covering different positions as required. Ms. Chernichen typically works between 5.5 and 7.5 hours per shift. Her hourly wage is \$27/hour.
- [69] Ms. Chernichen testified that it will likely take between two to five years to transition from a casual worker to a permanent position. She stated that there are more full time opportunities at Kelowna General Hospital than in Vernon. However, Ms. Chernichen testified that she struggles doing certain kinds of work required in a hospital setting, like at Kelowna General Hospital. For example, at the Kelowna General Hospital at times she would be required to work in the mattress room, moving heavy mattresses off shelves and onto carts to be delivered to rooms. On the occasions she was required to move mattresses, her back seized up and she had to rest the entire next two days with ice and heat on her back. She also suffered from pain doing the drive from Vernon to Kelowna, and did not want to move from Vernon as she relies on her family in Vernon to help her with her son.

- [70] As a result, the Ms. Chernichen has continued to focus her work in Vernon. Working as a casual worker has allowed her to try different jobs, or "lines" within Interior Health. She has discovered that a number of lines result in too much pain or are too tiring for her. Ms. Chernichen is concerned that she will not find a full time job that she will be able to do consistently without resulting in an unsustainable level of pain.
- [71] Ms. Chernichen has considered moving from a therapy assistant to a recreation assistant, but that position is not as rewarding as her current job. The pay for a recreation assistant at Interior Health is \$2/hour less than her current position and, if she worked at a facility such as Creekside Landing Ltd., her pay would go down to \$14/hour.
- [72] Beginning in October 2021, Ms. Chernichen worked an average of 59 hours per two week pay period. If Ms. Chernichen had worked full time hours from October 2021 to the date of trial, she would have earned approximately a further \$9,000. I am satisfied that Ms. Chernichen has established that, but for her injuries, she would have been able to work more hours, whether by moving to a full-time position at the hospital or by taking more shifts in Vernon. However, this loss must be reduced by 50% to take into account a significant negative contingency that full-time work would not have been available for each of the months from October 2021 to the date of trial. As a result, I assess Ms. Chernichen's pre-trial loss of earning capacity at \$4,500.
- [73] In total, I assess Ms. Chernichen's pre-trial loss of income and loss of earning capacity at \$16,500.
- [74] Pursuant to s. 98 of the Insurance (Vehicle) Act, R.S.B.C. 1996, c. 234 income tax must be deducted from this award. If the parties are unable to agree on the appropriate deduction, they may appear back before the Registrar to settle the deductions.
- b) Future loss of earning capacity
- [75] In *Dhanda v. Thind*, 2022 BCSC 1003 the court summarized the appropriate assessment of future income loss. I adopt this reasoning, as follows:
- [54] Three recent decisions from the Court of Appeal emphasize that assessment of future financial losses should expressly adjust for the likelihood of the relevant contingencies established in the evidence: *Dornan v. Silva*, 2021 BCCA 228 paras. 160 - 161; *Rab v. Prescott*, 2021 BCCA 345, para. 47; *Lo v. Vos*, 2021 BCCA 421, paras. 74 - 74.
- [55] In *Rab* (para. 47), the Court provides a three-step process to assess these losses:
- (1) Does the evidence disclose a potential future event that could give rise to a loss of capacity?
 - (2) Is there a real and substantial possibility that the future event will cause a pecuniary loss to the plaintiff? And
 - 3) What is the value of that possible future loss, given the relative likelihood of it occurring?

- [56] As a fourth step, the court must assess whether, all things considered, the damage award is fair and reasonable to both parties, Lo, para. 117.
- [76] Since she began working for Interior Health, Ms. Chernichen has focussed on finding positions in which her injuries can be accommodated. She originally started working at the Kelowna General Hospital. Although certain tasks were manageable for her, she was faced with an obligation to work in the mattress room, which was not manageable, and severely aggravated her injuries. She also found the driving to and from Kelowna each day aggravated her injuries.
- [77] Ms. Lougheed testified that she works with therapy assistants at the Penticton hospital, and sees them doing heavy work including moving heavy beds and transferring patients. She worries that Ms. Chernichen would not be able to do this kind of work for any sustained time.
- [78] Since she has been working in Vernon, Ms. Chernichen has tried a range of positions, some of which are a problem for her, such as when she is required to move wheelchairs in and out of a vehicle. Other positions are manageable, such as working with patients doing exercises in their beds. These positions are spread between the Vernon Jubilee hospital and three long term care facilities. Working in Vernon means that she has to do less driving, which is also better for her pain management. However, Ms. Chernichen is likely to remain a casual worker longer than if she could work at the hospital in Kelowna. She does not think she is capable of working on a full time basis, and hopes to find a position that would be at approximately 0.72% of a full time position.
- [79] Ms. Chernichen was assessed by Wendi Wright, an occupational therapist on February 22, 2022. Ms. Wright is qualified to perform a functional capacity evaluation of a person, to provide a profile of a person's functional abilities.
- [80] Ms. Wright concluded that Ms. Chernichen was reliable in reporting her pain and functional tolerances, with the exception of her tendency to overestimate her reaching abilities. Ms. Wright took both subjective information and objective measures into account in preparing her opinion, and placed more weight on the objective measures.
- [81] Ms. Wright reviewed the job requirements for a therapist assistant, using both Ms. Chernichen's self report and the National Occupational Classification criteria. Ms. Wright determined the following:

Based on FCE results, Ms. Chernichen does not match the NOC criteria for body positions, due to her demonstrated limitations with bending and stooping, especially when combined with reaching and neck postures.

Ms. Chernichen currently works full-time and uses task modifications and strategies, such as performing tasks she finds painful (lifting mattresses overhead to load onto a cart, moving beds, transferring patients, conducting wheelchair maintenance, performing patient walker training) in the morning, and performing lighter tasks (conducting computer work, charting, taking walks

with mobile patients) in the afternoon. She reported reduced capacity to engage in activities outside of her necessary daily tasks (cooking dinner for her son, facilitating his care and bedtime routine, and conducting light housekeeping). Based on the results of the repeat tests, as well as her seemingly not meeting the NOC requirements for strength and body positions, Ms. Chernichen's reports of pain and fatigue following completion of her workday are reasonable. Furthermore, based on observations of her during several of the FCE tests, it appears she tends to attempt to push through the pain to finish a task and downplay or ignore the functional impact of pain at times.

As discussed above, Ms. Chernichen does not meet these NOC requirements. If she chooses to continue to engage in this career avenue, I opine that her injuries would render her less competitively employable within the field. For example, her current employment allows for some flexibility in structuring her schedule to accommodate her pain management needs; however, should these accommodations change and no longer be available to her, it is quite possible her performance may be impacted, she would struggle to complete her workday, and may miss work at times due to pain exacerbation beyond what she can push through to complete her job duties.

The mismatches between her demonstrated abilities and the strength and positional requirements for work as a Therapist Assistant are likely to, in my opinion, reduce her endurance for full-time work - without accommodations; in turn, this can translate into a lower-than-expected work-life expectancy in her chosen profession.

Furthermore, should Ms. Chernichen continue to work full-time, it is expected that her occupational engagement in her full range of homemaking (including parental duties) and leisure/recreational activities will be impacted such that she will have to limit her participation to the essential tasks only during the weekday, and may have to forfeit meaningful activities on the weekend to facilitate engagement in pain management strategies.

[82] I accept the opinion of Ms. Wright.

[83] The defence conceded that the evidence discloses a potential future event that could lead to a loss of capacity. The defence also concedes that there is a real and substantial possibility that the future event will cause a pecuniary loss.

[84] The defence submits that Ms. Chernichen's loss should be assessed at an amount roughly equivalent to one to two years of the full time wage she would earn working full time at Interior Health, or between \$50,000 and \$100,000.

[85] Ms. Chernichen submits that the most likely scenario for her future is that she will either not be able to continue working at Interior Health as a therapy assistant, and will have to retrain for less demanding career, such as a recreation assistant, which pays less than her current work, or she will continue working but on a 0.72 time basis.

[86] Ms. Chernichen argues that if she keeps working and tried to maintain full time hours, her chronic pain will worsen, and she will become exhausted and unable to work at all.

- [87] Ms. Chernichen submits that over her lifetime, at a full time wage of \$50,000, plus benefits, and applying a 1.5% discount rate, her lifetime earnings without any deductions for her injuries would be \$1,136,335. This calculation does not take into account raises or the value of her benefits. If Ms. Chernichen can only work .72% of a full time position, her lifetime earnings would be \$818,000. If she worked 50% of a full time position, her lifetime earnings would be \$568,000.
- [88] Based on the evidence at trial, and in particular the assessment performed by Ms. Wright, I am satisfied that Ms. Chernichen's injuries have resulted in a loss of capacity. But for her injuries, Ms. Chernichen was a person who worked hard and would have had no difficulty maintaining full time hours in her chosen profession. I am satisfied this is no longer the case. I find that Ms. Chernichen will not be able to work full time as a therapist assistant, or an equivalent job, for the rest of her working life.
- [89] While Ms. Chernichen suggested in her testimony that her ideal position would be a 0.72% position, I am mindful of Ms. Wright's assessment that Ms. Chernichen does not have a realistic view of her own objectively measured limitations. I find that a realistic view of Ms. Chernichen's future is that her injuries will limit her to work at 60% capacity for the remainder of her working life.
- [90] I am satisfied that there is a real and substantial possibility that Ms. Chernichen will lose 40% of her lifetime earnings as a result of her injuries. Using an annual income of \$50,000 as an approximate basis to value her loss, Ms. Chernichen's loss would be calculated at \$454,534.
- [91] I find that there is a substantial likelihood of Ms. Chernichen experiencing such loss. In the result I find that an appropriate assessment of Ms. Chernichen's loss of earning capacity is \$450,000. This assessment reflects a fair and reasonable award for the loss which I have found Ms. Chernichen has a substantial likelihood of experiencing.
3. Cost of future care
- [92] Any claim for cost of future care must be medically justified, and must be reasonable to both parties: *Milina v. Bartsch*, (1985) 29 B.C.L.R. (2d) 33. The plaintiff is entitled to services, medications and other items of care that are reasonably necessary to preserve and promote her mental and physical health, and which she is likely to access in the future: *Sendher v. Wong*, 2014 BCSC 140, para 192-195. However, a medical professional is not required to testify as to the medical necessity of each and every care item claimed by a plaintiff. What is required is that there be an evidentiary link drawn between a medical assessment of pain, disability, and recommended treatment, and the care recommended by a qualified health care professional: *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at para. 31, citing *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 39.
- [93] Dr. Etheridge recommended the following treatments for Ms. Chernichen:

- a) A kinesiologist directed exercise program focussing on cervical scapular exercises,
 - b) Over the counter pain medication, to be used up to two days per week,
 - c) Diagnostic and repeat facet joint medial branch nerve blocks,
 - d) Possible cervical facet joint rhizotomies
 - e) Trigger point injections, or IMS, in combination with active rehabilitation exercises,
 - f) Each month, one session of physiotherapy and one session of massage therapy.
- [94] Dr. Waseem recommended Ms. Chernichen have intermittent access to massage therapy to combat her symptom exacerbation and flare ups, and that Ms. Chernichen continue to use analgesics as she has been doing.
- [95] Dr. Waseem also recommended that radiofrequency rhizotomy of the cervical and lumbar spines should be considered as they will provide pain relief for up to a year, and that Ms. Chernichen trial trigger point injections on her cervical and thoracic spines.
- [96] Ms. Wright provided costs for the care recommendations made by the medical professionals and her own functional care assessment.
- [97] Ms. Clark of Associated Economics Consultants (2017) Ltd. provided present value calculations for the future care items. The defence accepts the lower end of the range prepared by Ms. Clark would be appropriate for a future care award in this case. The only items the defence takes issue with are ergonomic cleaning aids, which they argue should not be double compensated for if an award for interference with homemaking capacity is made, and a snow blower, which they argue is not appropriate as it is not a real and substantial possibility that Ms. Chernichen will move to a house that requires a snow blower.
- [98] The present value reports sets a high cost estimate at \$103,489 and a low cost estimate at \$47,486.
- [99] I have not allowed any future care costs for medial nerve blocks or rhizotomy procedures because I am satisfied on the evidence that such costs will be borne by the medical services plan.
- [100] I have not awarded a future cost for a snow blower. I agree with the defence that Ms. Chernichen has not established there is a real and substantial possibility that she will live in a house that requires a snow blower.
- [101] Because I have not made a separate award for interference with homemaking capacity, I am satisfied that it is appropriate to make an award for assistive devices in relation to homemaking.

[102] Unless indicated otherwise, I am satisfied that the low cost estimates for future care items represent fair and reasonable costs of care. I award the following to be appropriate future care items:

Item

Comments

Medial nerve blocks

\$65

Occupational therapy - homemaking

\$604

Occupational therapy - Job site and job coaching

\$478

Massage therapy

\$24,840

Kinesiology

\$2,101

Seasonal housekeeping

\$18,343

Given the discrepancy between estimates of hourly costs presented by Ms. Wright, I find that it is appropriate to award a cost of 18 hours at \$40/hour, or \$720/year.

Yard maintenance

\$11,854

Given the wide discrepancy between estimates of hourly costs presented by Ms. Wright, I find that it is appropriate to award an average of \$640 as a yearly cost for yard maintenance.

ObusForme seat cushion

\$608

ObusForme cervical pillow

\$166

Ergonomic cleaning aids

\$75

Electric heating pad

\$152

Home fitness equipment

\$626

Medications

\$2,104

4. Interference with homemaking capacity

[103] A plaintiff who can no longer perform housekeeping duties as she did before the injury is to be compensated for that loss: *McTavish v. MacGillvray*, 2000 BCCA 164. This loss can be assessed as an independent head of pecuniary loss, or it can be assessed within the non-pecuniary damage claim. The latter is sometimes appropriate where the evidence does not permit a quantification of the loss: *Travelbea v. Henrie*, 2012 BCSC 1532 at para. 77-78.

[104] I find that the evidence in the case at bar does not allow me to quantify Ms. Chernichen's loss of housekeeping capacity. In making my non-pecuniary award, I have taken her loss of housekeeping capacity into account. I decline to make a separate award under this heading.

5. Special damages

[105] The parties have reached agreement on special damages, payable in the amount of \$3,600.

IV. Conclusion

[106] Ms. Chernichen is awarded the following damages against the defendants, jointly:

Non-pecuniary damages

\$110,000

Past loss of income

\$16,500

Loss of future earning capacity

\$450,000

Cost of future care

\$62,016

Special damages

\$3,600

[107] The total damages are awarded in the amount of \$642,116, subject to any required deductions for past loss of income.

[108] If the parties wish to make submissions on costs, they may do so in writing within 30 days of this judgment. If I receive no submissions on costs, I award costs to Ms. Chernichen at Scale B.

"W.A. Baker J."

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