

CANADA / JUDGMENT

Cole v. Sandhu

2020 BCSC 709

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 709 Cole v. Sandhu

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Cole v. Sandhu,

2020 BCSC 709

Date: 20200508

Docket: M198521

Registry: New Westminster

Between:

Alexandra Cole

Plaintiff

And

Kamaljit Singh Sandhu, Delta Sunshine Taxi (1972) Ltd.,

And Kirsten Lee Buchanan

Defendants

Corrected Judgment: The front page of the judgment was corrected
on September 22, 2020.

Before: The Honourable Mr. Justice Edelmann

Reasons for Judgment

Counsel for the Plaintiff:

G.A. Smith

Counsel for the Defendants:

C. Jago

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Place and Dates of Trial:

New Westminster, B.C.

February 10-14, 18-21, 2020

Place and Date of Judgment:

New Westminster, B.C.

May 8, 2020

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I. Evidence and Factual background

- [1] This action arises out of two motor vehicle collisions that occurred on July 9, 2016 ("MVA 1") and March 23, 2017 ("MVA 2") (collectively, the "MVAs"). Liability has been admitted by the defendants with respect to both collisions.
- [2] The plaintiff, Alexandra Cole, was 25 years old at the time of MVA 1. She was 29 years old at the time of trial. She has been passionate about whales and wildlife conservation since her childhood, and her dream was to work with orcas [killer whales]. She was well on her way to realizing that dream at the time of the MVAs.
- [3] The plaintiff has a long history of working with animals and wildlife. She obtained her Bachelor of Science (Honours) in Animal Biology from the University of Guelph in 2012. The same year, she worked as an animal care intern, a role that included food preparation and distribution, cleaning enclosures, and behavioural observations of various animal species. From March 2014 to May 2016, she worked in similar capacity as an animal keeper at the Vancouver Zoo.
- [4] At the time of MVA 1, the plaintiff was employed at Prince of Whales Whale Watching Adventures as a guest services representative, a position that she hoped would lead to working as a naturalist for the company, which would involve going out on the whale-watching tours with guests.
- [5] The plaintiff was treated for her injuries from MVA 1 by her family doctor, Dr. Jenkis. She was prescribed physiotherapy and active rehabilitation. The plaintiff was involved in active rehabilitation at the time of MVA 2. She was making progress in her recovery but had lingering back pain and shoulder pain.
- [6] In October 2016, approximately three months after MVA 1, the plaintiff began a position as an assistant marine mammal trainer at the Vancouver Aquarium. She described the Vancouver Aquarium as a dream job.
- [7] In late January 2017, the plaintiff broke the little toe on her right foot. As a result, she missed time from work and had to be put on accommodated duties at the Vancouver Aquarium.
- [8] In March 2017, MVA 2 exacerbated the plaintiff's right shoulder pain. She was also put on modified duties in respect of her increased shoulder problems, but she did not miss any time from work. Following MVA 2, her contract at the Vancouver Aquarium was not extended. The plaintiff says she was told that she was no longer the enthusiastic person she had been previously. She left the Vancouver Aquarium in April 2017.
- [9] Prior to the MVAs, the plaintiff had some issues with anxiety and depression. She had suffered a brief period of depression during her time at the Vancouver Zoo related to bullying at the hands of a co-worker. She sought help from her family doctor at that time. Her depression resolved when the co-worker went on maternity leave.

- [10] In January 2017, the plaintiff applied for a Master's degree of Marine Management program at Dalhousie University in Halifax, Nova Scotia. She was accepted into the course and began her course work in August 2017. The course was 16 months long and did not require field work or a thesis. The plaintiff obtained her diploma in December 2018. She did very well, earning excellent marks and various other forms of recognition.
- [11] From May 2018 to February 2019, the plaintiff worked as a research assistant with Dr. Sean Brilliant at the Canadian Wildlife Federation, conducting qualitative analysis of the risk of entanglement of right whales in relation to certain forms of fishing. Dr. Brilliant was also her graduate project supervisor as part of her Master's program and, in February 2019, the plaintiff began working with him at the same organization as a Fisheries Management Evaluation Specialist. She was employed in this position at the time of the trial. The position primarily involves work collating data and developing computer models. The plaintiff works mainly from home and can set her own schedule.

A. Lay Witnesses' Evidence

- [12] The plaintiff testified in some detail about her life and life plans before the MVAs. She and her partner, Sean Cheetham, had an active lifestyle that involved regular trips outdoors hiking, riding quads or motorbikes, and camping. She described in some detail her passion for wildlife and whales in particular. She has dreamed about becoming a "whale doctor" since she was a young child.
- [13] The plaintiff testified that since the MVAs, she has had to adapt to a new reality of pain and physical incapacity. She testified that she has also suffered from significant psychological issues which are deeply interconnected with her physical symptoms. The details of the diagnoses will be discussed below, but I note that the plaintiff's description of her experience is consistent with the observations and conclusions of various medical professionals who testified. I found the plaintiff to be overall a credible and reliable witness, and I accept her evidence about the significant impact that the MVAs have had on her life.
- [14] The plaintiff's testimony was largely corroborated by her partner Sean Cheetham, who confirmed the active lifestyle he shared with her prior to the MVAs and the significant challenges she has faced in their aftermath. They both describe the spiral of pain, anxiety and depression into which she regularly descends and how it has impacted everything from their previous activities and social interactions with others to their intimate relationship and life around the home.
- [15] The plaintiff's current as well as her former employers testified. Both of them described the plaintiff as a bright, motivated employee, and neither of them were aware of the scope of the physical or psychological challenges she was facing following the MVAs.

B. Expert Evidence

[16] Several experts from various fields gave testimony relating to the plaintiff's physical and mental health. Neither party took issue with the qualification of the experts in their respective fields or their ability to give relevant opinion evidence.

[17] The plaintiff presented four experts:

- Dr. Kimberly Jenkis (the plaintiff's family doctor);
- Dr. Keith Krull (a psychologist);
- Russell McNeil (an occupational therapist); and
- Dr. Steven Helper (a psychiatrist).

[18] The defence presented two experts:

- Dr. Eugene Okorie (a psychiatrist); and
- Dr. Gillian Simonett (a psychiatrist).

[19] The following sections will provide an overview of the relevant aspects of the expert testimony.

1. Physical Symptoms

[20] Dr. Helper was qualified as an expert in the area of physical medicine and rehabilitation. He conducted an independent medical examination of the plaintiff on January 19, 2017, following MVA 1 and reassessed her on June 9, 2017, following MVA 2. A final examination took place on May 23, 2019. Dr. Helper prepared an initial report in 2017 and two updated reports, one in 2017 and the other in 2019.

[21] Dr. Simonett was also qualified as an expert in the area of physical medicine and rehabilitation. She examined the plaintiff on September 6, 2019 and prepared a report.

[22] Dr. Helper's leading diagnosis is that the plaintiff's complaints of right-sided mid-back pain and shoulder blade region pain is soft tissue-mediated pain, otherwise known as myofascial pain. Dr. Helper's leading diagnosis remained stable throughout the three reports and was consistent with both physical observations, background information, and his experience with patients presenting with similar types of back problems. Dr. Simonett's primary diagnosis was consistent with that of Dr. Helper in concluding that the plaintiff was suffering from myofascial pain.

[23] In his first two reports, Dr. Helper opined that the plaintiff had a fair to good prognosis for achieving a full or near full resolution of her primary symptoms with continued rehabilitation guided by a physical therapist with experience treating individuals with malaligned posture and suboptimal movement patterns. In Dr. Helper's 2019 report, the prognosis for recovery was less optimistic, and he opined that it was more likely than not

that the plaintiff would have persistent symptoms of right-sided mid-back pain and shoulder blade region pain for the foreseeable future. Although he maintained a degree of optimism that additional treatment options might bear fruit, the lack of improvement in the three years since MVA 2 was a negative indicator.

- [24] Dr. Simonett's prognosis was consistent with that of Dr. Helper insofar as she expressed optimism that further treatment could lead to improvement in the plaintiff's symptoms. In her written report, this optimism was more strongly worded, but in oral testimony, she acknowledged that around 80% of patients suffering myofascial pain due to injury would recover within six months, and individuals outside that group have a higher risk for prolonged symptoms.
- [25] Both Dr. Helper and Dr. Simonett echoed the opinions of the mental health experts Dr. Krull and Dr. Okorie in underlining that chronic pain and mental health issues like depression and anxiety are highly correlated. They noted that it is common for patients suffering from chronic pain to also have an associated mood disorder. In Dr. Simonett's view, this is in part because mental health issues can interfere with motivation or ability to pursue an exercise or physical rehabilitation regime and can have direct consequences for the persistence and level of physical pain.
- [26] Mr. McNeil is a registered occupational therapist who performed a functional capacity evaluation of the plaintiff on August 1, 2017. He found the plaintiff's reported levels of pain and restrictions to largely be consistent with the test results, including mechanisms in place to verify levels of effort. Overall, he found the plaintiff, at that time, had the capacity to perform activity that requires light level strength. There were measurable restrictions in her capacity for various forms of reaching, bending, carrying, lifting, and her tolerance for standing. Mr. McNeil assessed the standard reported requirements for an assistant marine mammal trainer, finding that the plaintiff could likely perform the light aspects of the work on a part-time basis but would not be capable of all physical demands of the work on a full-time basis at a competitively employable work pace.

2. Psychological Symptoms

- [27] Dr. Krull is a registered psychologist who assessed the plaintiff on May 26, 2017 and again on May 22, 2019.
- [28] In Dr. Krull's opinion, the plaintiff suffered three broad categories of psychological injuries as a result of the MVAs--depression, anxiety, and pain. He explained that pain is both a physical and an emotional experience and that all three issues are mutually reinforcing. He further opined that each issue exacerbates the others and is exacerbated by the others, and that all three worsened between the time of his first and second assessments of the plaintiff.

- [29] Dr. Okorie is a doctor of psychiatry who reviewed clinical records and assessed the plaintiff on September 7, 2019. He diagnosed her with persistent depressive disorder with anxious distress and a specific (driving) phobia, which was largely consistent with the conclusions of Dr. Krull. He concluded that the driving phobia was caused by the MVAs.
- [30] Dr. Okorie, much like Drs. Krull, Simonett, and Helper, recognized a well-established correlation between chronic pain and mood disorders like depression and anxiety.
- [31] The most problematic aspect of Dr. Okorie's opinion was with respect to the causation of the plaintiff's depressive disorder. In his report, Dr. Okorie opined that the plaintiff's depression and anxiety were not caused by the MVAs but were caused by the accommodations provided to her at Vancouver Aquarium following her broken toe.
- [32] It became clear in cross-examination that there were a number of indicators of psychological issues following the MVA 1 (but prior to the fractured toe) of which Dr. Okorie was either unaware or had not considered. These included sleep disturbance, nightmares, anxiety, and significant weight gain. Dr. Okorie became argumentative and clearly defensive of his conclusion on causation, leaving the clear impression that he was advocating for a particular result rather than seeking to assist the Court in a neutral fashion. I, therefore, give Dr. Okorie's opinion on the overall causation of the depressive and anxiety disorders limited weight.
- [33] While I accept that the accommodations provided to the plaintiff at the Vancouver Aquarium following her broken toe may have negatively impacted the plaintiff's mental health and were possibly the point in time when her mental health crossed the threshold into a clinically defined disorder, I do not accept that the broken toe was the primary cause of her ongoing problems with depression and anxiety.

II. Causation

- [34] A plaintiff must establish on a balance of probabilities that the defendant's negligence caused or materially contributed to an injury. The defendant's negligence need not be the sole cause of the injury so long as it is part of the cause, beyond the range of *de minimus*. Causation need not be determined by scientific precision: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at paras. 13-17; *Farrant v. Laktin*, 2011 BCCA 336 at para. 9.
- [35] The primary test for causation asks: but for the defendant's negligence, would the plaintiff have suffered the injury? The "but for" test recognizes that compensation for negligent conduct should only be made where a substantial connection between the injury and the defendant's conduct is present: *Resurface Corp. v. Hanke*, 2007 SCC 7 at paras. 21-23.
- [36] In special circumstances, the "but for" test proves unworkable, and the law has applied a "material contribution" test. As Chief Justice McLachlin wrote in *Clements v. Clements*, 2012 SCC 32 at para. 46:

[46]

- (2) Exceptionally, a plaintiff may succeed by showing that the defendant's conduct materially contributed to risk of the plaintiff's injury, where (a) the plaintiff has established that her loss would not have occurred "but for" the negligence of two or more tortfeasors, each possibly in fact responsible for the loss; and (b) the plaintiff, through no fault of her own, is unable to show that any one of the possible tortfeasors in fact was the necessary or "but for" cause of her injury, because each can point to one another as the possible "but for" cause of the injury, defeating a finding of causation on a balance of probabilities against anyone.

[37] Causation must be established on a balance of probabilities before damages are assessed. As McLachlin C.J.C. stated in *Blackwater v. Plint*, 2005 SCC 58 at para. 78:

Even though there may be several tortious and non-tortious causes of injury, so long as the defendant's act is a cause of the plaintiff's damage, the defendant is fully liable for that damage. The rules of damages then consider what the original position of the plaintiff would have been. The governing principle is that the defendant need not put the plaintiff in a better position than his original position and should not compensate the plaintiff for any damages he would have suffered anyway: *Athey*.

[38] Justice Lambert summarized the principles to be applied in assessing claims of psychological injury in *Yoshikawa v. Yu* (1996), 21 B.C.L.R. (3d) 318 (C.A.) at paras. 12-13.

[39] The defendants in the case at bar accept, and I find on the evidence before me, that the plaintiff sustained the following injuries as a result of the MVAs:

- a) ongoing right shoulder and upper back pain;
- b) increased headaches; and
- c) driving phobia and depression arising out of chronic pain.

[40] However, the defendants submit that the plaintiff's initial onset of depression arose from non-tortious sources, specifically, the perceived problems with co-workers at the Vancouver Aquarium and its decision not to extend her contract there. The defendants rely primarily on Dr. Okorie's report in support of this theory, and I have addressed my view of the conclusions in Dr. Okorie's report above. I find that even if the broken toe played a role in the onset of the depression, that issue resolved itself quite rapidly, and the cycle of depression, anxiety, and chronic pain in which the plaintiff currently finds herself is a direct consequence of the MVAs.

III. Duty to Mitigate

[41] The defendants say that the plaintiff unreasonably failed to mitigate her damages primarily in two ways:

- a) She failed to seek out treatment from practitioners recommended to her by Dr. Helper in his two 2017 reports, specifically from Gillian McCormick, a physiotherapist; and
- b) She failed to seek out the psychological treatments recommended to her by Dr. Krull in his reports of June 9, 2017 and June 25, 2019.

[42] A plaintiff has an obligation to take all reasonable measures to reduce his or her damages, including undergoing treatment to alleviate or cure injuries: *Danicek v. Alexander Holburn Beaudin & Lang*, 2010 BCSC 1111 at para. 234.

[43] Once a plaintiff has proved the defendant's liability for his or her injuries, the defendant must prove that the plaintiff acted unreasonably and that reasonable conduct would have reduced or eliminated the loss. Whether the plaintiff acted reasonably is a factual question and involves a consideration of all of the circumstances: *Gilbert v. Bottle*, 2011 BCSC 1389 at para. 202.

[44] *Chiu v. Chiu*, 2002 BCCA 618 at para. 57 sets out the test for failure to mitigate by not pursuing recommended treatment:

[57] In a personal injury case in which the plaintiff has not pursued a course of medical treatment recommended to him by doctors, the defendant must prove two things: (1) that the plaintiff acted unreasonably in eschewing the recommended treatment, and (2) the extent, if any, to which the plaintiff's damages would have been reduced had he acted reasonably.

See also *Wahl v. Sidhu*, 2012 BCCA 111 at para. 32; *Morgan v. Galbraith*, 2013 BCCA 305 at para. 78.

[45] In *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144, Justice Garson further discussed the nature of the test as follows:

[56] I would describe the mitigation test as a subjective/objective test. That is whether the reasonable patient, having all the information at hand that the plaintiff possessed, ought reasonably to have undergone the recommended treatment. The second aspect of the test is "the extent, if any to which the plaintiff's damages would have been reduced" by that treatment. The *Turner* case, on which the trial judge relies, uses slightly different language than this Court's judgment in *Chiu*: "there is some likelihood that he or she would have received substantial benefit from it ...".

[Emphasis in original.]

[46] The defendants in the case at bar have not satisfied me that the plaintiff failed to mitigate her damages. She was examined in detail about the decisions she made with respect to treatment, and she has pursued a number of treatment regimes. The primary problem with the issues raised by the defendants is that the experts who testified were essentially unanimous about how the plaintiff's chronic pain, anxiety, and depression were deeply

interconnected. It was clear that addressing the pain could help the psychological issues and that addressing the psychological issues could help in treating the pain. The cycle was described as presenting a bit of a "chicken and egg" problem, and the plaintiff followed the advice of her general practitioners in deciding to pursue physical rehabilitation in the hope that successful rehabilitation would alleviate her psychological issues. This was not an unreasonable course of action, and she is now pursuing psychological counselling given the reality that chronic pain is likely to be part of her life for the foreseeable future.

- [47] With respect to the referrals by Dr. Helper in his initial and updated reports of 2017, I would note that the plaintiff was engaged in active rehabilitation at the time of the MVA 2, which was less than two months after Dr. Helper's initial report was written. At the time of the 2017 updated report, the plaintiff was in the process of planning a move to Halifax, where she moved in August 2017. Upon her arrival in Halifax, she diligently pursued finding a new general practitioner and followed her new doctor's recommendation for physiotherapy.
- [48] In the end, the plaintiff presented as someone who genuinely wants to get better, and she has made reasonable efforts in that direction. The issue of mitigation cannot be considered by looking back over a treatment plan with the benefit of hindsight, but should consider whether the conduct was reasonable given the information that was available to the plaintiff at the time. I find that the defendants have not made out a failure to mitigate.

IV. Damages

A. Non-Pecuniary Damages

- [49] Non-pecuniary damages are awarded to compensate the plaintiff for pain, suffering, loss of enjoyment of life, and loss of amenities. The compensation awarded should be fair to all parties, and fairness is measured against awards made in comparable cases. Such cases, though helpful, serve only as a rough guide. Each case depends on its own unique facts: *Trites v. Penner*, 2010 BCSC 882 at paras. 188-189.
- [50] In *Stapley v. Hejslet*, 2006 BCCA 34, the Court of Appeal outlined the factors to be considered when assessing non-pecuniary damages at para. 46:
- [46] The inexhaustive list of common factors cited in *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).

[51] The assessment of non-pecuniary damages is necessarily influenced by the individual plaintiff's personal experiences in dealing with his or her injuries and their consequences and the plaintiff's ability to articulate that experience: *Dilello v. Montgomery*, 2005 BCCA 56 at para. 25.

[52] Counsel for the plaintiff submits that an award of \$175,000 is appropriate and referred me to *Hawkins v. Kumar*, 2019 BCSC 1896; *Felix v. Hearne*, 2011 BCSC 1236; *Shoghi v. Lin*, 2019 BCSC 1818; and *Watts v. Lindsay*, 2019 BCSC 2239, cases in which awards for general damages ranged from \$140,000 to \$200,000.

[53] Counsel for the defendants submit that the plaintiff is entitled to an award in the order of \$70,000 to \$100,000. The defendants have referred me to *Lu v. Huang*, 2016 BCSC 1146; *Tourand v. Charette*, 2015 BCSC 2165; and *Dosangh v. Xie*, 2017 BCSC 1937 to support their position.

[54] Each of these cases has been of some help in making the assessment, but, naturally, each has important distinguishing features. I accept that the MVAs have thrown the plaintiff into an indefinite cycle of chronic pain, anxiety, and depression that has impacted all aspects of her life. As I will note below, although the injuries may have a more limited impact on the economic aspect of her future employment, she has dedicated her life to her ambition working with whales in the ocean. She was well on the way to realizing her ambition and still speaks passionately about it. There is little reason to doubt that her inability to pursue that ambition, aside from presenting a loss on its own, is contributing to the cycle of anxiety and depression in which she finds herself. Making an individualized assessment after reviewing all of the evidence and the authorities referred to me, I find that an award of \$175,000 is appropriate given the impact of these injuries on the life of a formerly active and social young woman.

B. Loss of Income Earning Capacity

[55] The legal principles applicable to the assessment of lost earning capacity were summarized by Justice Voith in *Pololos v. Cinnamon-Lopez*, 2016 BCSC 81 at para. 133:

[133] The relevant legal principles are well-established:

- a) To the extent possible, a plaintiff should be put in the position he/she would have been in, but for the injuries caused by the defendant's negligence; *Lines v. W & D Logging Co. Ltd.*, 2009 BCCA 106 at para. 185, leave to appeal ref'd [2009] S.C.C.A. No. 197;
 - b) The central task of the Court is to compare the likely future of the plaintiff's working life if the Accident had not occurred with the plaintiff's likely future working life after the Accident; *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 32;
 - c) The assessment of loss must be based on the evidence, but requires an exercise of judgment and is not a mathematical calculation; *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 18;
 - d) The two possible approaches to assessment of loss of future earning capacity are the "earnings approach" and the "capital asset approach"; *Brown v. Golaïy* (1985), 26 B.C.L.R. (3d) 353 at para. 7 (S.C.); and *Perren v. Lalari*, 2010 BCCA 140 at paras. 11-12;
 - e) Under either approach, the plaintiff must prove that there is a "real and substantial possibility" of various future events leading to an income loss; *Perren* at para. 33;
 - f) The earnings approach will be more appropriate when the loss is more easily measurable; *Westbroek v. Brizuela*, 2014 BCCA 48 at para. 64. Furthermore, while assessing an award for future loss of income is not a purely mathematical exercise, the Court should endeavour to use factual mathematical anchors as a starting foundation to quantify such loss; *Jurczak v. Mauro*, 2013 BCCA 507 at paras. 36-37.
 - g) When relying on an "earnings approach", the Court must nevertheless always consider the overall fairness and reasonableness of the award, taking into account all of the evidence; *Rosvold* at para. 11.
- [56] Relevant factors in applying the capital asset approach were summarized by Justice Finch, as he then was, in *Brown v. Golaïy* (1985), 26 B.C.L.R. (3d) 353 (S.C.) and have been widely adopted in this Court:
- [8] 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.

See also *Perren v. Lalari*, 2010 BCCA 140 at para. 11 and *Morgan* at para. 53.

- [57] Counsel for the plaintiff submits that the plaintiff's loss of earning capacity should be assessed using the capital asset approach and that damages should be in the range of \$300,000 to \$500,000. In support of this position, I was taken to a number of calculations comparing the income that the plaintiff is earning in her current position with the income that would be earned in a number of other positions she says she would have applied for but for her injuries.
- [58] Counsel for the defendants submit that the plaintiff is entitled to no damages on the basis that her loss of earning capacity is speculative in nature and does not meet the threshold test of a real and substantial possibility. In the alternative, the defendants submit that it must be assessed as a loss of capital asset and should be valued at \$25,000 to \$50,000--being six months to a year of the plaintiff's salary. This valuation is based on the plaintiff showing that she has a permanent, partially disabling condition that limits the type of jobs she would otherwise be capable of doing--specifically, jobs requiring rigorous field work.
- [59] During the trial and in submissions, there was some focus by both parties on field work, which is part of the work with whales to which the plaintiff had aspired for many years. I accept that many of the positions that were presented are positions that were consistent with the plaintiff's dreams and ambitions prior to her injuries. The significant obstacles her injuries present in pursuing her dreams are devastating and merit compensation. However, this is properly compensated in the context of non-pecuniary damages, and I have taken this into consideration in assessing those damages.
- [60] With respect to the loss of income, it is not clear that the employment profiles that were presented are an accurate representation of the plaintiff's employment prospects generally rather than a reflection of areas of employment consistent with her previous ambitions. I accept that her physical injuries will limit to some extent the types of more rigorous field work to which she aspired, and this will limit some subset of job opportunities. However, I am not satisfied the plaintiff has established these limitations will result in the scale of economic loss being argued. As argued by the defence, it is likely there are a number of other positions in similar salary ranges not requiring rigorous field work that have not been included in the selection. I, therefore, give little weight to the salary tables and calculations supporting the plaintiff's position.
- [61] I do, however, accept that both the psychological and the physical injuries suffered by the plaintiff will have an ongoing impact on her earning capacity in any form of employment she would be likely to pursue in the future. The connection between her chronic pain and psychological symptoms will affect the type of work she will be able to take on in the future. The fact that she has not needed to disclose her disabilities to her current employer does not change the reality that she now struggles to have the mental and physical energy to accomplish the same tasks she would have accomplished much more easily prior to the MVAs. This will affect the nature and scope of her work and be reflected in loss of income and opportunities over the foreseeable future of her career.

[62] In my view, given the plaintiff's age and the overall circumstances of indefinite disability, a capital asset approach is the most appropriate mechanism for assessing the impact of her injuries on her income-earning capacity. I find that \$100,000 provides an adequate approximation of the current value of the plaintiff's loss of income-earning capacity in the circumstances.

C. Costs of Future Care

[63] In *Gao v. Dietrich*, 2018 BCCA 372, the Court summarized the law regarding cost of future care in the following terms:

[68] An award for damages for cost of future care is based on the principle of restitution. In *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229 at 241-242, Dickson J., as he then was, explained the purpose of an award for cost of future care:

In theory a claim for the cost of future care is a pecuniary claim for the amount which may reasonably be expected to be expended in putting the injured party in a position where he would have been in had he not sustained the injury. Obviously a plaintiff who has been gravely and permanently impaired can never be put in the position he would have been in if the tort had not been committed. To this extent, "restitutio in integrum" is not possible. Money is a barren substitute for health and personal happiness but to the extent, within reason, that money can be used to sustain or improve the mental or physical health of the injured person it may properly form part of the claim.

[69] An award for cost of future care is based on what is reasonably necessary, on medical evidence, to promote the mental and physical health of the claimant: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.) at 78, aff'd (1987), 49 B.C.L.R. (2d) 99 (C.A.); *Aberdeen v. Zanatta*, 2008 BCCA 420 at para. 41; *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at para. 30. An award for future care must (1) have medical justification, and (2) be reasonable: *Milina* at 84; *Aberdeen* at para. 42.

[70] In *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144, this Court clarified that the medical necessity of future care costs may be established by a health care professional other than a physician, such as an occupational therapist, if there is a link between a physician's assessment of pain, disability, and recommended treatment, and the health care professional's recommended care item (at para. 39).

[64] The parties are largely in agreement that further treatment has been recommended by various medical professionals, including physical therapy, exercise, and psychological therapy. The parties are in some disagreement about the costs that should be allocated to these various forms of treatment, and neither party has provided a detailed costing. I note that an assessment of damages for cost of future care is not a precise accounting exercise: *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at para. 21. The plaintiff estimates the cost of future care at \$10,000 and the defendants at \$5,000.

[65] In light of my findings in relation to the probability that the effects of the psychological and physical injuries will continue into the foreseeable future, I find that an award of \$10,000 for future care is appropriate.

D. Special Damages

[66] The defendants accept that the plaintiff suffered special damages in the amount of \$6,864.35.

V. Summary

[67] In summary, I award damages as follows:

a) Non-pecuniary damages:

\$175,000.00

b) Loss of income earning capacity:

\$100,000.00

c) Costs of future care:

\$10,000.00

d) Special damages:

\$6,864.35

Total:

\$291,864.35

VI. costs

[68] If the parties are unable to agree on costs, they may arrange to make submissions on the matter.

"Edelmann J."

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