
CANADA / JUDGMENT

Downey v. O'Connor

2017 BCSC 1459

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Supreme Court of British Columbia

DECIDED

18 August 2017

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2017 BCSC 1459 Downey v. O'Connor

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Downey v. O'Connor,

2017 BCSC 1459

Date: 20170818

Docket: M160557

Registry: New Westminster

Between:

Alexandra Downey

Plaintiff

And

Gary O'Connor

Defendant

Before: The Honourable Mr. Justice Jenkins

Reasons for Judgment

Counsel for the Plaintiff:

K. Stewart

N. Peterson

Counsel for the Defendant:

A. Bevan

R. Moen

Place and Date of Trial:

New Westminster, B.C.

January 23 - 27, 2017

Place and Date of Judgment:

New Westminster, B.C.

August 18, 2017

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- [1] The plaintiff seeks damages as compensation for injuries sustained in a motor vehicle accident which occurred February 17, 2012 in Abbotsford, B.C. The defendant has admitted liability for the accident. A complicating factor in this case was a previous motor vehicle accident which occurred on December 18, 2011, just over two months before the February 2012 accident. The defence submits that injuries suffered by the plaintiff in the February 2012 accident were superimposed over the injuries suffered by the plaintiff in the December 2011 accident which complicates an assessment of damages in the later accident. The plaintiff's injuries suffered in the prior accident had not all resolved prior to the February accident.
- [2] Also, the plaintiff relied on two medical experts in her case, Dr. Mark Adrian, who is a specialist in Physical Medicine and Rehabilitation and Dr. Anthony Salvian, a vascular surgeon who has diagnosed the plaintiff as suffering from thoracic outlet syndrome. The medical evidence called by the defence was that of Dr. Charalabos (Bob) Karabatsos, an orthopaedic surgeon. Ms. Downey's experts do not allege any orthopaedic injuries, hence, Dr. Karabatsos has not dealt with the injuries as reported or alleged by Dr. Salvian. There is no expert evidence from the defence challenging the opinions of Dr. Salvian in particular, who is the prime expert called by the plaintiff.

The Plaintiff Before the Accidents

- [3] Ms. Downey was 18 years old at the time of the second accident and has recently turned 24 years of age. She graduated from secondary school in June 2011. Ms. Downey is a native of Abbotsford, B.C. and from all of the evidence before me, was very active in several sports including competitive soccer, hiking, rock climbing and snowboarding. Snowboarding was a favourite activity and she testified about having been actively snowboarding up to 80 times a season which included one stretch of 14 consecutive days during a two week vacation.
- [4] Many of her activities were shared with her family which included regular camping trips involving kayaking and canoeing.
- [5] During her secondary school years, Ms. Downey had been a very successful student and upon graduation had been conditionally accepted into the Engineering Transfer Program at the University of the Fraser Valley ("UFV") and at UBC Okanagan but was also considering other options. During the fall of 2011 she had changed her mind and planned to study for a degree in education or counselling. She testified that she had a deep passion for school and education through her school years which eventually led to her deciding to pursue a career in teaching.
- [6] Upon graduation from secondary school in June 2011, Ms. Downey worked the summer at a daycare operated by her mother as she had during summers before graduation. In September 2011, Ms. Downey started part-time studies in English at the University of the Fraser Valley ("UFV") and worked part-time at a McDonald's. The reason Ms. Downey commenced studies on a part-time basis in the fall of 2011 was that she had been accepted into the Katimavik program for youth which was to commence in January 2012. The Katimavik program is a youth program over a six month term during which she would perform volunteer work, three months in a francophone community and three months in an anglophone community. She never did attend that Katimavik program due to knee pain which she suffered in the first accident and, once she recovered from that injury, the program had been cancelled.

The December 18, 2011 Accident and Symptoms

- [7] In the December accident, Ms. Downey was driving a vehicle on her way to Manning Park where she was planning to snowboard. She encountered a patch of black ice and her vehicle slid off the road and rolled over and down an embankment. On cross-examination she testified that her vehicle had rolled over three times and down over fifteen feet, coming to rest in a creek. After the accident she climbed out of her vehicle and up the hill to the road where she flagged a ride to the lodge at Manning Park. Her parents picked her up and took her to the hospital in Abbotsford. X-rays and CT scans were taken on two occasions. She testified that her knees and ribs were the most painful injuries and she also felt tightness on the right side of her neck.

- [8] Hospital records (Ex. 18, Tab 3) of a December 19, 2011 attendance at Abbotsford Regional Hospital indicate a report of neck pain and a diagnosis of neck strain. She attended on her family doctor on December 29, 2011 and described aching pain in her neck, ribs, knees and lower right arm with an emphasis on neck and upper back pain (Ex. 18, Tab 5). On a questionnaire Ms. Downey completed for her family doctor she answered that her pain was completely interfering with her general activities, walking ability, normal work and enjoyment of life.
- [9] The last medical record before the second accident was of her attendance with her family doctor on January 19, 2012 which indicates Ms. Downey was suffering from headaches, nausea, "all joints hurt", rib pain and was continuing to receive massage therapy which she indicated made a "big difference". Although before the second accident, she was "feeling so much better", she was feeling some depression and was sad. There was no mention of neck pain in the record of January 19, 2012.
- [10] Ms. Downey returned to Manning Park for a ski weekend over New Years but did not snowboard due to her knee pain but participated in snow tubing.
- [11] Ms. Downey also testified that due to her knee pain, she was not able to participate in the Katimavik program and was able to register at the last minute for only one course at UFV. She added that by the time of the second accident on February 17, 2012, in addition to attending classes for one course, she was back to working regular hours at her day care job but did not return to her part-time job at McDonald's, where she had worked prior to the December accident due to knee pain.
- [12] Also prior to the February accident, Ms. Downey described that her knees were still sore from the December accident, that she was "feeling much better overall" but had ongoing rib pain. The neck pain was no longer bothering her as it had immediately following the December accident.

The February 17, 2012 Accident and Symptoms

- [13] The second accident, which has led to this lawsuit, occurred while Ms. Downey was a passenger in a vehicle in Abbotsford when a vehicle travelling in front of her vehicle "slammed on its brakes" causing the vehicle she was in to do the same, only to have the vehicle behind them strike her vehicle from behind. In other words, the accident was a "rear-ender". Ms. Downey was seat-belted at the time and she and her companion had been driving to a local bowling alley to meet up with some friends.
- [14] The accident caused Ms. Downey's right knee to strike the inside of the vehicle, her ribs to hurt from the seatbelt pressing against her body and she testified she was in shock. Soon she felt neck and left shoulder pain. She later continued to the bowling alley and attempted to bowl but due to pain in her left shoulder and neck she decided to stop. She added that after the accident she was crying, anxious and felt panicked.

- [15] Following the February accident Ms. Downey experienced pain in her neck, left shoulder, left arm to elbow, numbness and tingling in her fingers and left hand, pain in her knee, discomfort in her jaw and headaches. She added that the the pain she was suffering affected her mood and led to significant lifestyle changes and changed her perspective on her future vocations.
- [16] During the evening following the second accident, Ms. Downey did attend at the hospital in Abbotsford and complained of right knee pain, discomfort in her ribs, neck and left shoulder pain.
- [17] Regarding the neck pain experienced after the February accident, Ms. Downey testified that the pain was on the left side of her neck to the base of her skull. Her doctor recommended massage once again and pain medication: Flexeril and either Naproxen or Emtec which relieved the pain for a "couple of hours".
- [18] Ms. Downey continued with her massage treatments and also attended physiotherapy and chiropractic treatment in the spring of 2012. Also, soon after the February accident, she expressed that she experienced numbness and tingling in the fingers of her left hand.
- [19] The knee pain continued for approximately six months. The rib and wrist pain resolved within six weeks of the February accident. The injuries which have persisted since the February accident are the ongoing chronic neck pain, daily headaches, left shoulder and forearm pain and the numbness and tingling in Ms. Downey's left hand fingers when reaching or moving her left arm forward or upward. Regarding the latter, which continues to be a significant complaint on the part of Ms. Downey, the diagnosis she has received from Dr. Anthony Salvian is of "post-traumatic thoracic outlet syndrome" which will be discussed later in these reasons.
- [20] Ms. Downey also submits she has suffered depression, she has gained considerable weight and in 2014 she was in hospital on three occasions as a result of pain which resulted in her being off work for a month.
- [21] Ms. Downey testified that during the summer of 2012 she returned to playing soccer once per week but she tended to aggravate her injuries, could not head the ball or tackle and left after games to ice sore areas and go to bed. She said she played even though it hurt because she missed playing. She added that she tried to snowboard once in the first year after the February 2012 accident which "did not go well, I hurt a lot in my neck and shoulder, ... falling hurt".
- [22] Ms. Downey testified to having jaw pain when eating which resulted in headaches in her temple area, nausea and dizziness as well as sensitivity to light. She consulted a TMJ specialist on six occasions over almost two years in 2014 and 2015. She testified that her jaw pain resolved with appliances provided by Dr. Pirani, her TMJ specialist.

- [23] In 2013, Ms. Downey had breast reduction surgery which she testified alleviated the sensation of "being pulled forward but did not reduce the neck or shoulder pain" she had been suffering.
- [24] I quote from paras. 35 and 36 of the plaintiff's closing submissions which best summarize her continuing pain and suffering:
- [35] Over the years, some days have been good and other days have been rated as bad or "exceedingly bad days". Good days would still be characterized by pain but tempered with medication and avoiding any activities or use that aggravated symptoms, or rest. Bad days at times involved missing work, application of ice, or lying down in a dark room due to vomiting-inducing headaches and severe pain. The really bad days led to emergency visits (e.g. the cervical plexus block - a nerve block in the neck by needle injection).
- [36] Currently, Ms. Downey testified her neck and shoulder and arm pain are constant, though they fluctuate in intensity. Her headaches occur daily but are aligned with her chronic neck pain. Her fingers go numb with simple tasks such as doing dishes, but really any time her arms are extended.
- [25] I add from the testimony of Ms. Downey that her symptoms have not improved over time and may on occasion appear to become worse.
- [26] Not surprisingly, the defence submits that Ms. Downey has downplayed the significance of injuries suffered to her neck and knees in the December accident and has exaggerated complaints from the February accident.

Work and Activity History since the February 2012 Accident

- [27] Following the February 2012 accident, Ms. Downey was off work from work at her mother's daycare for approximately one month and reduced her hours working at McDonald's through March. At the daycare, Ms. Downey testified to having to modify some methods at work including not lifting children into a car seat and picking up children only when standing below them on some stairs to avoid having to bend over and reach out to pick them up.
- [28] At McDonald's, she modified her work by avoiding lifts of heavy boxes which resulted in her working as a cashier. Also, in May 2012 Ms. Downey undertook a second job at a Denny's restaurant as a host where she continued until January 28, 2013. During this time, she testified she continued to experience pain in her left shoulder and neck which resulted in some missed time at work which amounted to 61.5 hours, although she added that there were some periods of time where she failed to track her missed time. She also spent time working with the Traditional Learning Academy within her mother's daycare on a part time basis.

- [29] Between April 2, 2013 and October 10, 2013 Ms. Downey attended a medical laboratory assistant program at West Coast College of Health Care which she entered instead of pursuing a degree in education, stating it was to be an interim step while waiting for her injuries to heal and which she felt could accommodate her symptoms. She trained to become a phlebotomist, ie. a health care professional who is trained to draw blood. While training she also worked 14 hours each week at her mother's daycare. On completion in October of 2013 Ms. Downey commenced a one month practicum in Nanaimo with LifeLabs and moved to Nanaimo with her best friend and boyfriend, Andrew Powell, who had become her roommate. She was offered a job on completion of the practicum and worked as a phlebotomist in Nanaimo and Qualicum Beach until June 2015.
- [30] Ms. Downey found the reaching requirements at LifeLabs in particular aggravated her pain. She also testified that she "hurt all the time", "worked to pay expenses", "I gave up all the things I like and was still in pain". She stopped taking anti-depressants due to their side effects, found counselling for depression was too expensive and that all her money was going to chiropractors and physiotherapy.
- [31] In her various laboratory positions, Ms. Downey testified that she was commuting during those times and was in pain at home in the evenings and could not perform basic chores, wanting to rest and avoid any more physical activity after work which forced her roommate, Andrew, to do the housework which contributed to her depression.
- [32] Ms. Downey's relationship with Andrew Powell ended. She was of the opinion that the pain from her injuries and resulting depression contributed to her breakup with Andrew.
- [33] In May of 2015, Ms. Downey was offered a position as a Casual Medical Laboratory Assistant at Royal Inland Hospital in Kamloops commencing June 15, 2015 where she found the work to be more intense than her duties at LifeLabs which included more bending and stooping which together with living alone and having household duties and pain to deal with was too much. During her time working in Kamloops Ms. Downey testified to having turned down several shifts and overtime due to her inability due to her pain to work longer hours. During a two week period in May of 2016 she was off work and she also took more time off between shifts than she wished as she was in too much pain to work any additional hours. She has not worked since August 2016.

Domestic Life

- [34] Ms. Downey testified that prior to the February 2012 accident she was self-sufficient but since the accident, household chores have aggravated her neck, shoulder and arm pain and so she was not able to perform simple household duties, especially after work. By the time she and Mr. Powell moved to Vancouver Island, she testified that she would attempt some chores on her days off from work, however, she was unable to perform any work or other activities around home after work due to pain which resulted in Mr. Powell doing all of the work.

- [35] While living on Vancouver Island in August of 2014, Ms. Downey found she was pregnant but because she was of the opinion she was in no position to take care of anyone other than herself, she terminated the pregnancy. The abortion was obviously a very difficult decision, not only for Ms. Downey, but it also affected her relationship with Mr. Powell. Mr. Powell testified about observing Ms. Downey in pain while they lived together on Vancouver Island, how she would grimace and drop items, such as dishes when she had to reach, how she became grumpy due to the pain and would remain on the couch after work. Mr. Powell added her pain got progressively worse, even when she was receiving treatment from chiropractors, physiotherapy and also self-medicating regularly with ice. As well, Mr. Powell testified that during 2014 and 2015, Ms. Downey gained considerable weight which made her more depressed, made more trips to emergency care, "her esteem plummeted", stopped going to parties due to depression and her appearance, often cried and was nauseous.
- [36] Based upon the testimony of both Ms. Downey and Mr. Powell, the relationship between them deteriorated over time due to the pain suffered by Ms. Downey which led to her depression and inability to cope with daily activities. Mr. Powell terminated their relationship shortly after Ms. Downey moved to Kamloops.
- [37] As of the date of trial in January 2017, Ms. Downey was living with her parents in Kamloops which she considered an admission of defeat in her goal to become self-sufficient, especially looking back at where she was in her life prior to the accident.
- [38] Ms. Downey testified that she is now realizing that her pain may continue indefinitely.

Treatment

- [39] Since the 2012 accident, Ms. Downey has sought out and obtained various types of treatment for her injuries including physiotherapy, massage therapy, acupuncture, chiropractic adjustments, IMS and dry-needle prolotherapy on a total of 289 occasions between February 17, 2012 and January 16, 2016. The costs of those attendances are included in the claim for special damages.
- [40] Ms. Downey also testified to having consumed pain medication including Flexeril, Naproxen, Emtec, Tylenol and Advil, however, she has not retained receipts for those medications. Currently, Ms. Downey uses over-the-counter medication and Naproxen for excess pain.
- [41] She also receives continuing chiropractic treatment, is restarting physiotherapy and is awaiting treatment for thoracic outlet syndrome, which is the diagnosis as determined by Dr. Salvian. She is also continuing with stretching therapy as recommended by Dr. Salvian.

Evidence of Silvija Downey

- [42] Silvija Downey is the plaintiff's mother. She testified firstly about her daughter's active life before the February 2012 accident, about her being outgoing, social and athletic as well as her being a determined student who had obtained straight "A"s. She then described her daughter's incapacity after the accident, which by Silvija Downey's descriptions, indicates Ms. Downey became a very different person after the 2012 accident.
- [43] Since the 2012 accident her mother described Ms. Downey as being "very stoic", "not complaining" and having "no social life, even with friends". Silvija also testified that "Alex is half full", "not doing anything, just coping", cannot sleep, often uses an ice pack for pain, that her inflammations are becoming worse and Ms. Downey is taking longer to recover. She also described for the court how Ms. Downey's home in Kamloops was "messy, she had no help vacuuming" and she could not reach dishes on the lower shelves due to her arm and shoulder pain.
- [44] Silvija Downey concluded that "in lots of ways, she has given up, she is not who she wanted to be, 23 years old and her body does not work".
- [45] Defence submissions challenge the credibility of Silvija Downey, referring to three inconsistencies between her evidence and that of her daughter. I have reviewed those inconsistencies which are not of significance. For example, Mrs. Downey testified that Ms. Downey never vacuumed her basement suite in Kamloops, whereas Ms. Downey agreed that she found vacuuming with her dominant hand "tolerable". With either version, Ms. Downey was still having problems and suffering pain while performing household chores and Mrs. Downey in any event, as she worked, would not always be around when her daughter may have performed chores. I agree that Mrs. Downey may have exaggerated her daughter's problems to some degree, however, not significantly. It is also understandable that the evidence of two witnesses may vary to some degree and that if those witnesses agree in every respect, one should be wary of that evidence.

Evidence of Andrew Powell

- [46] In addition to the statements relating to Mr. Powell referred to above, describing Ms. Downey before the 2012 accident as "cheerful, talkative, bubbly and really smart". Mr. Powell described how during the period of time they lived on Vancouver Island her pain "got progressively worse". She needed more chiropractic treatment and used more ice to relieve pain, especially after she started work at LifeLabs. He stated she gained weight, became more depressed and would talk of "if" she could get better when previously she spoke of "when" she would get better.
- [47] Mr. Powell also testified about how the pain experienced by Ms. Downey affected and essentially ended any intimacy in their relationship which, along with all of the other effects of the pain, resulted in a termination of their relationship.

Evidence of Sarah Foreman

- [48] Ms. Foreman and Ms. Downey worked together at the Qualicum Beach LifeLabs location in 2014 and 2015, performing the same role as phlebotomists.
- [49] Ms. Foreman testified about observing Ms. Downey's physical limitations and discomfort through her neck and shoulders, her headaches and tightness in her neck for which Ms. Downey took Advil and applied ice as well as adapted a brace which she used to ease the pain. Ms. Foreman also testified regarding Ms. Downey missing work some days, which she understood was due to Ms. Downey's pain.

Medical Evidence of the Plaintiff

Dr. Mark Adrian

- [50] Dr. Adrian was qualified as a physiatrist doctor qualified to give opinion evidence in the field of physical medicine and rehabilitation. He testified that he has specialized in particular muscular-skeletal problems to the neck, back and shoulder areas.
- [51] Dr. Adrian assessed Ms. Downey on August 22, 2016 with a physical examination. He also reviewed documentation including clinical records of several treating physicians who had attended upon Ms. Downey and obtained a history from Ms. Downey.
- [52] Dr. Adrian submitted a medical-legal report regarding Ms. Downey's injuries dated October 7, 2016. Dr. Adrian opined in his report that Ms. Downey had "suffered physical forces to the tissues of her neck and left shoulder girdle during the course of the [February 2012] accident resulting in injury and a diagnosis of mechanical neck pain and left shoulder girdle soft tissue pain. He continued at pp. 10-11:

Discussion and Causation

Ms. Downey was involved in a motor vehicle accident in February 2012. She developed physically limiting and regularly occurring pain affecting her neck and left shoulder girdle region shortly following the impact. She experiences persistent pain involving her neck and left shoulder girdle since the accident. Objective physical loading tests of the tissues of her neck and left shoulder girdle reproduce her pain symptoms. These clinical features are consistent with Ms. Downey suffering physical forces to the tissues of her neck and left shoulder girdle during the course of the accident resulting in an injury and diagnosis of mechanical neck pain and left shoulder girdle soft tissue pain.

In Ms. Downey's situation, she describes a pattern of neck pain consistent with suffering an injury to the spinal tissues described above. The physical examination findings are consistent with the symptoms that Ms. Downey experiences; the injuries suffered in the accident; and the diagnosis of mechanical neck pain.

[53] Regarding the relationship between the December 2011 and February 2012 accidents, Dr. Adrian stated, at p. 11:

Ms. Downey experienced pre-accident symptoms involving her neck. The symptoms developed following a December 2011 motor vehicle accident. The symptoms were not of a physically limiting nature. Due to her history of neck pain, Ms. Downey's neck was probably vulnerable to injury at the time of the February 2012 motor vehicle accident. It is unlikely that Ms. Downey's] pre-accident symptoms involving her neck would have spontaneously become more intense and physically limiting had it not been for the February 2012 accident.

I note as well that Ms. Downey testified that the neck pain had almost resolved before the February 2012 accident.

[54] Regarding the left shoulder girdle pain, Dr. Adrian's report included the following opinions at p. 11:

Ms. Downey experiences left shoulder girdle pain located over the region of the left base of the neck, shoulder blade area and shoulder-cap region. The symptoms are triggered by activities that place physical forces onto the soft tissue structures (muscles, tendons, ligaments and connective tissues) of the left shoulder girdle. When I perform physical examination maneuvers that physically stress the left shoulder girdle, her symptoms are reproduced. In addition to referred pain from her neck injury described above, Ms. Downey's left shoulder girdle pain symptoms are also in part soft tissue in nature.

Ms. Downey developed pain involving her left shoulder girdle shortly following the accident. She probably suffered physical forces to the soft tissue structures involving her left shoulder girdle during the course of the accident resulting in an injury and diagnosis of left shoulder girdle soft tissue pain.

Ms. Downey did not experience pre-accident problems affecting her left shoulder girdle. She does not recall injury to her left shoulder girdle since the accident that has worsened her condition. In my opinion, Ms. Downey's left shoulder girdle pain symptoms are causally related to the motor vehicle accident.

[55] Regarding the sensations of numbness and tingling in her left hand, Dr. Adrian's report stated, at pp. 11-12:

Ms. Downey experiences numbness and tingling sensations involving her left hand. Neurologic examination did not show abnormality. The most likely source for the numbness and tingling is referred sensations from the painful and injured structures involving her neck. The pathophysiology (mechanism) of referred sensations is not well-understood. Other possible sources for the left upper extremity symptoms is a subtle injury to the peripheral, spinal or brachial plexus of nerves. I understand that nerve conduction studies and MRI of the neck are pending, which, in my opinion, are suitable for the evaluation of her left upper extremity symptoms. If the results become available, I could review this information and provide an updated report.

[56] Dr. Adrian's prognosis for Ms. Downey's injuries is very poor, as he states at p. 11:

In general, individuals suffering from mechanical neck pain and soft tissue pain following an injury experience improvement over time. Some individuals, however, experience persistent pain despite the passage of time. In other words, not all individuals recover from these types of injuries. In my experience, individuals suffering symptoms beyond two years from the injury date are unlikely to experience further meaningful improvement.

In Ms. Downey's situation, several years have elapsed since the accident. The prognosis for further recovery of her neck and left shoulder girdle injury into the future is poor.

Ms. Downey will probably continue to experience flares of her symptoms during which time the symptoms will temporarily become more intense.

It is unlikely the injuries suffered in the accident will undergo progressive deterioration over time. Due to the injuries suffered to Ms. Downey's neck and left shoulder girdle, these areas are vulnerable to injury in the future.

[57] Dr. Adrian also concluded that Ms. Downey is permanently partially disabled as a result of her injuries which are not likely to improve in the future. He stated, at pp.12-13 of his report:

Ms. Downey will probably continue to experience difficulty performing activities that place physical forces onto the painful and injured structures involving her neck and left shoulder girdle. Specifically, she will probably continue to experience difficulty performing scholastic, employment, household and recreational activities that require prolonged static or awkward neck positioning; prolonged stooping; prolonged sitting; repetitive or awkward neck positioning; repetitive or prolonged left upper extremity reaching; forceful pushing or pulling; or jarring activities. These limitations are unlikely to improve into the future. In my opinion, Ms. Downey is permanently partially disabled due to injuries suffered in the accident.

[58] Dr. Adrian concluded his report with a recommendation that Ms. Downey be assessed by an occupational therapist to evaluate the possible aid of workplace modifications that may be able to accommodate her injuries.

[59] Under cross-examination, Dr. Adrian was questioned regarding his finding at p. 11 of his report that "It is unlikely that Ms. Downey's pre-accident symptoms involving her neck would have spontaneously become more intense and physically limiting had it not been for the February 2012 accident". Counsel suggested that this opinion was mere speculation. Dr. Adrian responded that he "had no reason to expect that [the injury suffered in the December 2011 accident] would have become worse from the second accident ... there was no medical reason why the injury suffered in the first accident would have become worse two months later". He also opined that he would not have expected the neck injuries from the first accident to deteriorate over time.

- [60] Also on cross-examination, Dr. Adrian agreed that often pain can lead to psychological problems and that Ms. Downey had told Dr. Adrian of pain affecting her moods, energy levels and anxiety.
- [61] Dr. Adrian also agreed on cross-examination that if someone was inactive over time it is possible that his or her functioning could decline, that he usually urges patients to find a way to exercise to prevent deconditioning to body parts that are not injured and that exercise can stress injured areas. It was suggested that Ms. Downey did not follow instructions to exercise and had not completely finished a kinesiology program.
- [62] Generally, I found that Dr. Adrian's findings were not seriously challenged under cross-examination and his responses were credible and reliable.

Dr. Anthony Salvian

- [63] Dr. Salvian is a vascular surgeon with a sub-specialty in thoracic outlet syndrome ("TOS"). His qualifications were not opposed by the defence. The text of his report entered into evidence was 52 pages with another 80 pages of articles, excerpts from texts and his resume. His report included a statement that he has "seen more than 2,000 patients with whiplash type injury of the neck and upper back". He examined and took a history from Ms. Downey on July 6, 2016 and his report was dated October 24, 2016.
- [64] I found Dr. Salvian to be most credible and that his opinions were not seriously challenged on cross-examination. He opined on two general areas of complaint made by Ms. Downey, firstly, of ongoing headaches and left neck and shoulder pain and, secondly, of ongoing numbness, tingling and pain radiating from the left shoulder down the arm, forearm and into the third, fourth and fifth fingers of her left hand.
- [65] At pp. 30-31 of his report, Dr. Salvian commenced his diagnoses as follows:
1. Ms. Downey complains of ongoing headache and left neck and shoulder pain.

.
It is my opinion, based on my experience, my review of the literature and my examination of Ms. Downey, that her left sided neck and upper back and shoulder pain is due to myofascial injury of the muscles and ligaments of the neck and upper back , particularly the trapezius muscles, the rhomboids, scalenes and pectoralis minor.

This type of myofascial or fibroligamentous injury is a common sequelae of whiplash type trauma where there is a sudden stretching of the muscles with micro-hemorrhage, scarring and spasm.

Typically, this myofascial injury will recover in the first 12-24 months following whiplash trauma. However, in about 10 - 15% of patients it does not recover and it goes on to develop a more significant chronic myofascial pain syndrome. It is my opinion that this is the case in Ms. Downey. This disruption and spasm of the muscles of the neck and upper back leads to

malfunction of the agonist / antagonist muscles and may lead to pain around the area of the shoulder, particularly into the scapular region. Patients often describe this as being "shoulder pain". In this case, however, there is unlikely to be any actual shoulder joint problem. It is more the issue of the injury of the muscles around the shoulder.

Furthermore, it is my experience that secondary tension or muscular headache is a common sequelae of the myofascial injury of the neck and upper back. It is my opinion that this is the case in Ms. Downey.

2. Ms. Downey complains of ongoing numbness, tingling and pain which radiates from the left shoulder, down the arm, forearm and into the third, fourth and fifth fingers of the left hand.

It is my opinion that these symptoms are related to a combination of issues. It is my opinion that Ms. Downey suffers from brachial plexus irritation at the level of the scalene muscles in the thoracic outlet. This is referred to as post traumatic thoracic outlet syndrome.

...

I have included a monograph which I have written on thoracic outlet syndrome, but basically it is that condition where there is intermittent compression or irritation of the structures which pass from the chest cavity over the first rib and into the arm. The subclavian artery (the main artery to the arm) and the nerves of the brachial plexus (the nerves to the arm) pass between the anterior and middle scalene muscle as they exit over the first rib.

When there is injury and spasm of the scalene muscles there may be secondary "soft tissue" irritation or compression of the components of the brachial plexus or the subclavian artery or a combination of both.

- [66] Following in Dr. Salvian's report are facts and assumptions on which he based his opinions which I will not reproduce but include the history garnered from Ms. Downey regarding her prior symptoms or lack thereof, her return to work following the December 2011 accident and the nature of the 2011 accident as a "roll over" accident and her recovery from that accident. Dr. Salvian continued at p. 33:

It is my opinion that the motor vehicle accident of December 18, 2011 was a roll over motor vehicle accident causing some right neck and arm symptoms. However, the motor vehicle accident of February 17, 2012 was a rear end collision with enough flexion / extension or whiplash trauma to have caused the scalene muscle injury and onset of brachial plexus irritation as described by Dr. Ide in his article.

Reviewing the history as described by Dr. Salvian I do not note any significant deviation from the evidence of Ms. Downey at trial.

- [67] Dr. Salvian continues in his report by considering three possible causes when faced with a patient complaining of "numbness, tingling and paresthesias radiating down the arm and into the fingers of the hand", and finds two of the possible causes not to be applicable in the case of Ms. Downey and that the third possible cause, ie. post-traumatic thoracic outlet

syndrome is a likely cause. After exploring two possible causes of a patient complaining of numbness, tingling and paresthesias radiating down the arm and into the fingers of one hand, he concludes his diagnosis at pp. 34-35 by describing the possibility of post-TOS and then provides a summary:

iii) Post-Traumatic Thoracic Outlet Syndrome

With respect to thoracic outlet syndrome, Ms. Downey has a history typical of a patient developing brachial plexus injury following whiplash trauma. That is, she was involved in a whiplash type motor vehicle accident; she complained of the onset of neck pain and had evidence of paraspinal neck muscle spasm, particularly in the area of the trapezius, scalene and pectoralis minor muscles; Ms. Downey gradually began to develop the numbness and tingling and paresthesias into the fingers.

I would agree that Ms. Downey's reporting of these symptoms were somewhat delayed in onset. However, it is my opinion that this is because she had ongoing pain in the left neck and chest and arm and was really not using the arm to full capacity until she began to work again. It is as she began to work that she began to notice the paresthesias into the arm.

It is my opinion that a delay in onset of the paresthesias following whiplash trauma is not uncommon as it takes time for the muscles to scar and shorten and further alter the anatomy of the thoracic outlet.

Ms. Downey's examination at this time shows evidence of markedly positive thoracic outlet testing with the reproduction of her symptoms with minimal to moderate elevation of the arm to only about 60 degrees with evidence of spasm of the left sided paraspinal muscles, particularly the trapezius and scalene muscles with a positive Tinel's sign over these muscles. (Palpitation of the muscles reproducing the symptoms radiating to her arm and neck.)

In summary then, it is my opinion that Ms. Downey has a chronic myofascial pain syndrome involving the muscles and ligaments of the left more than right neck and upper back. Ms. Downey also has a secondary post traumatic thoracic outlet syndrome involving the lower nerves of the brachial plexus (C8-T1). Ms. Downey may have associated "double crush" syndrome with irritation of the ulnar nerve at the level of the elbow.

[68] Dr. Salvian also recommended Ms. Downey undergo a MRI of the thoracic outlet but stated that a "negative" MRI could still not be determinative of thoracic outlet syndrome.

[69] Regarding treatment, Dr. Salvian recommended a gym pass and retaining a personal trainer or kinesiologist to develop an exercise program which could improve her conditioning with care to avoid further irritation. He added "The most important component, however, of treatment of the thoracic outlet syndrome is aimed at "good ergonomics". That is, one needs to avoid those activities which cause further compression and irritation of the nerves. He also recommended assistance with any heavy arm lifting and assistance with seasonal housework.

[70] Dr. Salvian also recommended a functional capacity assessment and a vocational assessment, which have been performed and will be referred to below.

[71] Regarding a prognosis for Ms. Downey, Dr. Salvian stated, at p. 38;

It is my experience that once patients develop significant post traumatic thoracic outlet syndrome then they are never "cured" by conservative therapy. They may, in fact, be able to lead a reasonable quality of life and work to some degree if they are allowed to follow the behaviour modifications outlined. If, however, they are forced into a position where they must do repetitive activities or heavy lifting with the arm, then they will eventually fail with increase in pain and be unable to cope.

Dr. Salvian discouraged prolonged driving or typing or sleeping in the wrong position or sudden jerking movements and recommended acupuncture, massage, chiropractic or medication for muscle relaxation in the case of "flare ups" but noted those treatments are not curative.

[72] Finally, Dr. Salvian opined on causation in connection with the two accidents at pp. 42 - 43 of his report:

In summary then, it is my opinion that Ms. Downey had some right sided neck and right arm symptoms following the motor vehicle accident of December 18, 2011. However, it is my opinion that it was whiplash injury suffered at the time of the February 17, 2012 motor vehicle accident that resulted in significant left sided neck and shoulder myofascial injury.

It is of course not possible to know for sure, the outcome of the first accident as the second motor vehicle accident occurred two months later.

Because of these injuries to the paraspinal muscles, and the muscles in the thoracic outlet (the anterior scalene muscle) Ms. Downey had gone on to develop secondary post traumatic thoracic outlet syndrome possibly with a component of a double crush syndrome.

It is my opinion that Ms. Downey would not have developed these significant symptoms of myofascial pain syndrome or secondary post traumatic thoracic syndrome had she not been involved in the motor vehicle accident of February 17, 2012 as she appeared to be recovering from the December 18, 2011 motor vehicle accident and has never had any left sided shoulder or arm symptoms.

I acknowledge that Ms. Downey had a snowboarding incident in 2011 which had resulted in some low back pain and rib pain but no significant left neck or shoulder pain or left arm pain.

[73] On cross-examination, none of Dr. Salvian's opinions were eroded in any significant manner. He did agree that because of the proximity of the two accidents, he could not say with certainty just what relationship there may be between the two accidents and Ms. Downey's injuries. However, he did testify that as there were no notable signs of left side trauma after the December 2011 accident it is more likely that the February accident was the cause of the diagnosis reported by Dr. Salvian.

Defence Medical Evidence**Dr. Charalaos (Bob) Karabatsos**

[74] Dr. Karabatsos was qualified as an expert in orthopaedic surgery. He assessed Ms. Downey on August 9, 2016 and issued a report on October 11, 2016. On cross-examination he stated that a large portion of his practice relates to knee and lower body injuries and surgery.

[75] Dr. Karabatsos' diagnosed Ms. Downey's injuries at p. 8 of his report:

DIAGNOSIS

Based on this assessment and from an orthopaedic perspective, Ms. Downey primarily sustained uncomplicated soft tissue injuries to her cerviothoracic spine and her rib cage as a result of the motor vehicle accident that took place on February 17, 2012.

She may have also had some soft tissue injury of her lumbar spine and right knee. Her injuries likely aggravated similar ones that she sustained in a prior automobile accident on December 18, 2011.

Based upon the medical records, Ms. Downey also sustained injury to her jaw/temporomandibular joint in the subject accident.

She reports no pain now in her ribs, lumbar spine, knees or jaw.

[76] Ms. Downey was suffering from knee pain following the 2011 accident and briefly after the February 2012 accident, however, any knee problems have not been the subject of any recent complaints. Rib pain was reported following the December 2011 accident but was not long-lasting and was not related to the February 2012 accident.

[77] Ms. Downey's jaw pain, which appears to have been caused by the February 2012 accident resolved well before she was attended upon by Drs. Salvian and Karabatsos in the summer of 2016.

[78] The major complaints of Ms. Downey arising from the February 2012 accident were neck and shoulder pain, tingling and numbness in the fingers of her left hand and arm and headaches. Dr. Karabatsos made no diagnosis in connection with those complaints. It almost appears as though Dr. Karabatsos was reporting on a person other than the person examined by Drs. Salvian and Adrian.

[79] In the second paragraph of these reasons for judgment I mentioned how the primary experts for the plaintiff, Drs. Adrian and Salvian, and for the defence, Dr. Karabatsos, have addressed Ms. Downey's condition from two completely different approaches. The inevitable result is that the opinions of Dr. Karabatsos are of little if any assistance in assessing the opinions of Drs. Adrian and Salvian. The opinions of Dr. Salvian therefore go unchallenged unless his opinions are not accepted and/or discounted as a result of cross-examination.

[80] At p. 2 of his report, Dr. Karabatsos stated:

The purpose of the assessment was to examine Ms. Downey from an orthopaedic perspective and to address a number of specific issues [in his letter of instruction from counsel].

and in at least four other portions of his report (pp. 8, 11 and 12 on two occasions) again referred to his report being an assessment from an "orthopaedic perspective". As is the case in assessing the evidence of Dr. Karabatsos, Drs. Adrian and Salvian did not opine on orthopaedic issues.

[81] Dr. Karabatsos agreed he was not an expert in thoracic outlet syndrome but had been trained in the diagnosis of TOS, which was a major diagnosis made by Dr. Salvian regarding the injuries of Ms. Downey. Dr. Karabatsos stated on cross-examination that "orthopaedic surgeons do not deal with neurological TOS - some others deal with it and usually only with displaced clavicle fracture" which is not present in this case. Dr. Karabatsos also testified that in cases of vascular TOS where the artery is compressed one usually goes to a vascular surgeon.

[82] I conclude that the evidence of Dr. Karabatsos is of little assistance in assessing and opining on the symptoms described by Ms. Downey who admitted he is not an expert in vascular TOS. I find that the diagnosis of Dr. Salvian and his prognosis is to be preferred in light of Dr. Salvian's qualifications as a vascular surgeon

[83] The situation facing the court in this case is not unlike that faced by Saunders J. in *Khudabux v. McClary*, 2016 BCSC 1886]:

[91] The expert medical evidence presented at this trial brought into focus a difficulty that not infrequently arises when a defendant pursues the strategy of tendering the opinion of an orthopaedic surgeon to rebut allegations of soft tissue injury. Of course, there may be situations in which such a specialist feels able to offer opinion evidence that sheds light on the nature and scope of such complaints. But it is also the case that a clash between experts pitting an orthopaedic surgeon against a physiatrist, specializing in rehabilitation medicine - or even, as in the present case, against a family physician - can possibly leave counsel in the position of the hoodlum in the film *The Untouchables*, at the point of when he realizes too late that he has brought a knife to a gunfight.

[92] There is a tendency common to many orthopaedic surgeons who provide expert opinion reports in soft tissue injury cases before this court to express their opinions without qualification - specifically, without acknowledging the extent to which their opinions are shaped by or restricted to the narrow field of their own expertise. In the result, many such reports come before this court that, in substance, say "I have examined this patient, and nothing is wrong with them," when what is really meant is, "I have examined this patient, and I am unable to diagnose any orthopaedic injury". Expert witnesses who provide opinions in such stark terms without explicitly stating the limitations of their opinion may, if their opinions contrast with complaints of pain and suffering that are found to be genuine, and are at odds with contrary opinion evidence from another medical expert, risk creating

confusion. They may also leave themselves vulnerable to a finding of bias if the unstated limitations of the opinions are not drawn out at trial.

Assessment of Medical Evidence

- [84] Having carefully reviewed the opinions and viva voce evidence of Drs. Adrian, Salvian and Karabatsos, I find the opinions of the experts called for the plaintiff are essentially uncontradicted and are based upon assumptions which have been supported by the evidence. Also, both Dr. Salvian and Dr. Adrian were frank and straightforward in their answers under cross-examination and were routinely able to point to evidence to support their conclusions.
- [85] In his written opinion, Dr. Salvian found the nature of the December 2011 accident, being a "roll over", caused some right neck and arm symptoms. He also found the February 2012 accident, being a rear end accident, would cause "enough flexion/extension or whiplash trauma to have caused the scalene muscle injury and onset of brachial plexus irritation as described by Dr. Ide in his article", a portion of which was summarized by Dr. Salvian (Dr. Salvian Report at p. 33)
- [86] Dr. Karabatsos opined that the soft tissue injuries he diagnosed were improving or had reached an apex which is contrary to the evidence of Ms. Downey who testified that over time while she was working, the neck and left shoulder pain as well as the tingling and numbness sensations worsened. Only Dr. Salvian had an explanation as to why the pain experienced by Ms. Downey did not improve over time with his explanation of post traumatic thoracic outlet syndrome as never "cured" by conservative therapy but rather only managed as he described.
- [87] The primary complaints of Ms. Downey are her neck and left shoulder pain and the tingling and numbness in the fingers of her left hand as well as pain which she suffers down her arm. Those complaints worsened over the time when she was working full time as a phlebotomist. In her evidence, she typically has needed time to recover after work, is unable to cope with household chores at the end of a work day and whenever she has attempted activities involving lifting, holding out or raising her arms, bending and similar activities, needs a rest for her to be able to manage and reduce the pain and the tingling and numbness in her left hand. The injuries diagnosed by Dr. Salvian in particular reflect the types of pain and suffering described by Ms. Downey.
- [88] I also agree entirely with statement the following paragraph from the written submissions of the plaintiff:
- [145] Finally, on cross-examination Dr. Salvian was unmoved in his opinion on causation, and while restating what he wrote in his report that he cannot be certain as to the relationship between the December 2011 MVA and the February 2012 collision and Ms. Downey's symptoms, it is his medical opinion that, on balance, given the absence of any notable left-sided trauma after the December 2011 MVA, it is more likely the February 2012 collision

was causative. Certainty is not and has never been the legal standard. Nor does the law require a sole cause. Dr. Salvian aligns his diagnoses with the February 2012 collision.

- [89] In saying I accept the evidence of the plaintiff's medical experts over that of Dr. Karabatsos, I am not doubting the credibility of Dr. Karabatsos, only that his opinions of soft tissue injuries is not consistent with the evidence and he was not able to rebut the testimony of Dr. Salvian, primarily because he was not qualified to challenge the diagnosis of Dr. Salvian.
- [90] I conclude that the injuries suffered by Ms. Downey are as described by Dr. Salvian and that Ms. Downey has a partial permanent disability which limits her activities and occupation options permanently.

Damages

Non-Pecuniary Damages

- [91] Prior to the 2012 accident, Ms. Downey was a very successful student. She at first planned on a post-secondary education and then changed her mind and intended to progress towards a career in teaching or counselling, largely based upon her part-time work assisting in the daycare and her interest in children. With her marks, her active lifestyle and family support, Ms. Downey had every reason to expect a fulfilling career and a continuation of her love for the outdoors and other active recreation. Snowboarding on 80 occasions during a winter season was evidence of her very active lifestyle. The 2012 accident has had a huge impact on all aspects of her life. The career options available to Ms. Downey as a result of the accident are very limited and she is unable to engage in the type of activities she experienced before the 2012 accident without experiencing significant pain. The prognosis for any improvement is not an optimistic forecast.
- [92] It is also apparent that the effects of her injuries have had a significant impact on Ms. Downey's emotional well-being as almost constant pain has led to depression and was a contributing factor in the end of her relationship with Mr. Powell.
- [93] It is also apparent on the evidence that Ms. Downey has made many attempts to work through the pain but over time, the realization that the pain will not significantly improve has affected her outlook for the future.
- [94] Almost all decisions in which non-pecuniary damages are assessed include reference to the factors for consideration as described by Kirkpatrick J.A. in *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46 which are:
- 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), 2015 BCCA 54).

[95] Almost of the above factors, to some degree, have come into play in the case of Ms. Downey.

[96] The plaintiff referred to four cases in which the court has awarded non-pecuniary damages ranging between \$85,000 and \$115,000 where the circumstances of plaintiffs were similar to those faced by Ms. Downey and traumatic thoracic outlet syndrome has been diagnosed. Those cases are:

- *Gillam v. Weibe*, 2013 BCSC 565;
- *Johal v. Meyede*, 2013 BCSC 2381;
- *English v. Jao*, 2016 BCSC 1975; and
- *Biefeld v. Neetz*, 2016 BCSC 689

[97] Ms. Downey was younger at the time of the accident than each of the plaintiffs in the above cases and based upon my review of those cases, it would appear as though the injuries have had a much greater effect on Ms. Downey's marital and social relationships than was the case in the comparables which leads me to conclude that an award of non-pecuniary damages in Ms. Downey's case should fall towards the upper end of the above range. In this respect I also consider the decision of Ms. Downey to have an abortion due to her physical pain and concern over whether she would be able to care for a baby due to her injuries, among other factors, was a major reason she terminated the pregnancy and is one factor in the assessment of non-pecuniary damages.

[98] The defence submits that a fair range of non-pecuniary damages in this case is between \$70,000 to \$85,000 less a deduction of 30% for a failure to mitigate. The three cases referred to the court for consideration were:

- *Mowat v. Orza*, 2003 BCSC 373;
- *Jawanda v. Samra*, 2013 BCSC 138; and
- *Durand v. Bolt*, 2007 BCSC 480

[99] Of the three cases, non-pecuniary damages for traumatic TOS in the latter two were assessed at \$75,000 and the other was for \$50,000. The plaintiffs were considerably older in those cases and the impact of the injuries on the plaintiffs, although not minor, did not have nearly as great an impact on the plaintiff's lifestyle as is the case with Ms. Downey.

[100] As well, the defence submits that a further deduction should reflect "the negative contingency that the plaintiff could have gone on to develop thoracic outlet syndrome as a result of the first accident, even had the second accident not occurred - as was acknowledged by Dr. Salvian". Dr. Salvian's response to that suggestion in cross-examination was firstly:

I can't say for sure. She had no left arm or significant symptoms on the left side after the first accident. That's the only proviso I can make.

Dr. Salvian was then referred to p. 35 of his report where he stated:

It is my opinion that a delay in onset of the paresthesias following whiplash trauma is not uncommon as it takes time for the muscles to scar and shorten and further alter the anatomy of the thoracic outlet.

and then the exchange with counsel concluded:

Q: Had not the second accident happened it may have taken time for the muscles to scar and shorten to bring and to produce the numbness and tingling that is the hallmark of thoracic outlet, correct?

A. That's correct.

Upon reviewing the above evidence, I conclude that Dr. Salvian agreed only that it may have taken time for the onset of TOS. However, previously Dr. Salvian, when asked whether there was a whiplash neck injury following the accident of December 2011, stated "I only agreed she suffered a neck injury", ie. not whiplash. Dr. Salvian agreed there may have been a later onset of symptoms of TOS, not that it was likely and did not agree that she suffered a whiplash injury in the December 2011 accident. In any event, this submission of the defendant relates to the issue of causation, not mitigation and causation has been established as arising from the February 2012 accident. Accordingly I reject this submission by the defence.

[101] Considering the extent of Ms. Downey's injuries and the impact those injuries have had on all aspects of her life and also keeping in mind how a bright, active young woman has seen her career and personal opportunities drastically minimized by the injuries, I find an adequate award for non-pecuniary damages is \$110,000.

[102] Regarding mitigation, the burden is on the defence to prove Ms. Downey could have avoided all or a portion of her loss. As stated earlier in these reasons, Ms. Downey has attended for physiotherapy, chiropractic treatments, massage and other treatment on 289 occasions. In some circumstances, she found that treatment was not helping her pain. She also testified to having attempted snowboarding on at least two occasions which left her in

pain as did an effort at volleyball. She has also returned to playing soccer and appears to be better able to cope. Ms. Downey has also had difficulty with her weight however and her depression. Overall, she has made efforts to mitigate and any failures to continue on with her activities and treatment can be attributed to continuing pain and depression.

- [103] The defence submits Ms. Downey is not undertaking any active program of rehabilitation as recommended by her treating rehabilitation therapist, Dr. Waspe. The recommendations of Dr. Waspe made in 2014 were reviewed during Ms. Downey's cross-examination and she agreed that she was "keen" to engage in an active rehabilitation program including isometric strengthening and stretching and a home exercise program as well as pool exercises. Ms. Downey last saw Dr. Waspe, who was located in Delta, B.C., in the fall of 2014.
- [104] Ms. Downey replies that activity has caused pain since the 2012 accident and also that she was not able to pursue pool exercises as in the communities in which she has been living, salt water pools are not available and she has sensitive skin conditions that are exacerbated when swimming in chlorinated pools. She also has testified as to not being able to afford a gym membership.
- [105] The defence seeks a deduction of 30% for the plaintiff's failure to mitigate.
- [106] In reply on the issue of mitigation, I have been referred by the plaintiff to the case of Chiu v. Chiu, 2002 BCCA 618 where the court stated:
- [57] The onus is on the defendant to prove that the plaintiff could have avoided all or a portion of his loss. 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. These principles are found in Janiak v. Ippolito, [1985] 1 S.C.R. (S.C.C.).
- [107] I was also referred to the decision of Parrett J. in Myatt v. Holicza, 2000 BCSC 1149, in which the learned judge stated:
- [96] It is not sufficient to prove that a particular plaintiff was a difficult patient, or that he or she refused certain treatment. They must go further and prove, on a balance of probabilities, that the plaintiff should reasonably have pursued that treatment and that it would have reduced the loss.
- [Emphasis added.]
- [108] In the circumstances, considering the many treatments received by Ms. Downey, her attempts at physical activity and the resulting pain, even if her failure to pursue a more aggressive strengthening program as suggested by Dr. Waspe was unreasonable, which I find it was not, the defence has not proven on a balance of probabilities that the treatment would have reduced the plaintiff's damages. It was not sufficient for the defendant to show

that an exercise program could have been of benefit, but that on a balance of probabilities the program would have reduced her damages.

Past Loss of Income Earning Capacity

- [109] What could the plaintiff have earned in the time since the 2012 accident and the date of trial but for that accident? Once proven on a balance of probabilities that an accident has had an effect on the plaintiff's ability to earn income, a court must consider the likelihood of past hypothetical events affecting the plaintiff's ability to earn income: *Smith v. Knudsen*, 2004 BCCA 613.
- [110] The evidence of Ms. Downey's work experiences since the February 2012 accident reveals days and hours of work missed at her jobs at McDonald's, Denny's, LifeLabs and Royal Inland Hospital as well as days missed due to reasons not connected to the 2012 accident. Also considered was that the plaintiff could have made significantly more money at Denny's as a waiter than as a receptionist which was an opportunity she was not able to pursue due to the limitations imposed by her injuries.
- [111] In support of this claim the plaintiff has submitted a report of Kevin Turnbull, a chartered accountant and labour market economist. In his report, he calculated a gross past loss of earnings of \$29,473, which he calculated to result in a net loss after tax income between 2012 and January 2017 of \$23,346.
- [112] In written submissions, counsel for the plaintiff submits a total of \$39,593 is an appropriate estimate of the gross past loss of earnings. A significant amount of the difference between the gross values estimated by Mr. Turnbull and counsel's submission relate to counsel including \$7,400 loss due to the differential pay for a waiter compared to that of a receptionist compared to Mr. Turnbull's estimate of \$1,110 under the same head.
- [113] There are additional differences in the amounts claimed in submissions under this head compared to Mr. Turnbull's calculation included in his report. In total, counsel submits that the that total gross loss she has calculated of \$39,593 plus an additional \$5,000 for a total nearing \$45,000 compared to Mr. Turnbull's gross estimate of \$29,473.
- [114] The defence said this head of damage should be limited to \$25,000 gross less a modest deduction for failure to mitigate. The defendant's position is that the plaintiff's decision to stop working ran counter to her family doctor's advice and created a "self-directed" disability. In written submissions, the defence stated "the defendant does not take serious issue with the figure provided by Mr. Turnbull in his Loss of Earnings Report" but adds that a modest discount should be considered for the plaintiff's failure to mitigate by reducing hours at Royal Inland Hospital to ease her pain and that there is no evidence that the plaintiff sought out a job which would include lighter work.

[115] Considering all of the evidence on this issue, I find that the total claimed as a differential for the waiter job with tips at Denny's is high and I accept that the plaintiff has not provided evidence supporting possible work since she left Royal Inland Hospital in July of 2016. As a result, I assess the gross loss of income, considering the real possibilities that were included in the evidence would result in a loss of \$35,000 less taxes.

Future Loss of Capacity to Earn Income

[116] The authority most often quoted under this head of damages is that of *Perren v. Lalari*, 2010 BCCA 140 in which Garson J.A. stated, for the court:

[30] Having reviewed all of these cases, I conclude that none of them are inconsistent with the basic principles articulated in *Athey v. Leonati*, [1996] 3 S.C.R. 458, and *Andrews v. Grand & Toy Alberta Ltd.* [1978] 2 S.C.R. 229. These principles are:

1. A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation [*Athey* at para. 27], and
2. It is not loss of earnings, but, rather, loss of earning capacity for which compensation must be made [*Andrews* at 251].

[32] A plaintiff must always prove, as was noted by Donald, J.A. in *Steward*, by Bauman, J. in *Chang*, and by Tysoe J. in *Romanchych*, that there is a real and substantial possibility of a future event leading to an income loss. If the plaintiff discharges that burden of proof, then depending upon the facts of the case, the plaintiff may prove the quantification of that loss of earning capacity, either on an earnings approach, as in *Steenblock*, or a capital asset approach, as in *Brown*. The former approach will be more useful when the loss is more easily measurable, as it was in *Steenblock*. The latter approach will be more useful when the loss is not as easily measurable, as in *Pallos* and *Romanchych*. .

[117] In *Loeppky v. Insurance Corporation of British Columbia*, 2012 BCSC 7, Gray J. stated:

[92] The factors relevant for assessing the value of lost future earning capacity are set out in *Brown v. Golaiy*, (1985), 26 B.C.L.R. (3d) 353 at para. 8:

- 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.

- [118] I have also been reminded of authorities which emphasize the impact of ongoing pain on a future income loss claim, including *Morlan v. Barrett*, 2012 BCCA 66 at para. 41.
- [119] Chief Justice Hinkson also noted the difficulty in assessing a future income loss in *Walker v. Leung*, 2014 BCSC 1623 [Walker] in which he stated:
- [137] Given that I have found that the plaintiff will continue to experience neck, back and pelvic pain in the future, I conclude that there is a real and substantial possibility that this will lead to some income loss. What that loss will be involves what has been described by Mr. Justice Dickson, as he then was, in *Andrews v. Grand & Toy Alberta Ltd.*, 1978 CanLII 1 (SCC), [1978] 2 S.C.R. 229 at 251, 83 D.L.R. (3d) 452, as gazing deeply into the crystal ball, as the plaintiff has not proven what income she might expect but for her motor vehicle related difficulties, not what income she might now reasonably expect.

Evidence Regarding Earning Capacity

Dr. Mark Adrian

[120] Commencing at p. 12 of his report, Dr. Adrian opined:

the prognosis for further recovery of her neck and left shoulder girdle injury into the future is poor.

Ms. Downey will probably continue to experience flares of her symptoms during which time the symptoms will temporarily become more intense.

[121] Regarding Ms. Downey's functional capacity, Dr. Adrian stated:

Ms. Downey will probably continue to experience difficulty performing activities that place physical forces onto the painful and injured structures involving her neck and left shoulder girdle. Specifically, she will probably continue to experience difficulty performing scholastic, employment, household and recreational activities that require prolonged static or awkward neck positioning; prolonged stooping; prolonged sitting; repetitive or awkward neck positioning, repetitive or prolonged left upper extremity reaching; forceful pushing or pulling; or jarring activities. These limitations are unlikely to improve into the future. In my opinion, Ms. Downey is permanently partially disabled due to injuries suffered in the accident. Dr. Adrian concluded by recommending the involvement of an occupational therapist to assess Ms. Downey and her workplace for potential modifications to accommodate her injuries.

Dr. Anthony Salvian

[122] Dr. Salvian testified that persons with TOS can perform some functions, however, not repetitively, in tasks such as tying or computer keyboarding, writing, reaching and similar activities. He added that Ms. Downey's prognosis is poor and that the limitations she has experienced in her work as a phlebotomist or medical lab assistant are likely to continue and that she is "permanently partially disabled due to the injuries suffered in the accident" (p. 13).

[123] At pp. 37 and 38, Dr. Salvian wrote:

Ms. Downey has found that doing the hospital ward blood work is more difficult and poorly tolerated. She must do repetitive blood taking in difficult positions. This tends to exacerbate her symptoms.

In my opinion she will be limited in this sort of work and would require ergonomic modification or an opportunity to have frequent breaks where she can stretch and change positions.

Repetitive activities will tend to exacerbate the neck and arm symptoms.

It is my opinion that Ms. Downey will have difficulty trying to retrain because of the difficulty she would have with prolonged computer work. These patients often have difficulty with static positions, i.e. sitting in front of a computer with the neck in a difficult position. They have difficulty with prolonged repetitive activities as would be required with prolonged typing or keyboarding or data entry.

If, however, they are forced into a position where they must do repetitive activities or heavy lifting with the arm, then they will eventually fail with increase in pain and be unable to cope.

In my opinion, Ms. Downey is at risk of exacerbating her symptoms of thoracic outlet syndrome should she have further muscle spasm. This may occur with further trauma but may also occur with simple things such as prolonged driving or typing or sleeping in the wrong position or sudden jerking physical movements as maybe required, for example to move furniture at home.

Nicholas Altieri

[124] Mr. Altieri was qualified as an expert in occupational therapy and as a functional capacity evaluator and performed a functional capacity evaluation of Ms. Downey on August 23, 2016, after she had left her part-time position at Royal Inland Hospital. His report of October 25, 2016 was filed as an exhibit at trial.

[125] Mr. Altieri found that Ms. Downey had significant limitations for any job, not just that of phlebotomist and that his testing, including distraction testing, led him to conclude that Ms. Downey's reports of pain correlate with the test findings and Mr. Altieri's observations of Ms. Downey.

[126] A review of the evidence of Mr. Altieri and his testing of Ms. Downey's capabilities in reaching, handling, fingering, upper limb coordination, general mobility, lifting, carrying, pushing, pulling, sitting, standing, walking and work endurance leads to findings that Ms. Downey has significant limitations for any type of work. His findings do not deviate in any significant way from those of Dr. Salvian in that she will likely never be free of the pain caused by the TOS but the pain suffered can be managed through behavioural modifications.

John Lawless

[127] Mr. Lawless conducted a vocational assessment of Ms. Downey in September of 2016 and provided a report dated October 31, 2016 which was exhibited at trial. In addition to his testing of Ms. Downey, included in his review were medical expert reports from Drs. Salvian and Adrian, Ms. Downey's employment records and tax records between 2011 and 2015.

[128] Mr. Lawless found upon reviewing his vocational testing of Ms. Downey that her intellectual functioning was in the "High Average" range, with strength in verbal processing. This supports her aspiration of becoming a teacher and perhaps a counsellor as well which were her intended aspirations in or around the time of the January 2012 accident. Ms. Downey's academic record through secondary school also reflected academic strength.

[129] Mr. Lawless acknowledged that the position of laboratory technician or phlebotomist had not been a career goal of Ms. Downey as opposed to a way to financially assist her in ultimately obtaining a college or university education and that Ms. Downey "is not well suited for her work as a medical laboratory Technician" due to the emphasis on rapid and repetitive reaching and handling in that occupation. He added, at p. 9, "while clearly able, this semi-skilled occupation is beneath her potential and the work is not strongly supported by her Strong Interest Inventory ("SII") test results either.

[130] Testing Ms. Downey's interest scales, Mr. Lawless found and reported at page 8:

Further results for Ms. Downey from the SII indicate her strongest basic interest scale scores are for Teaching & Education, Athletics, Science, Counselling & Helping, and Mechanics and Construction. Her interests are most similar to people who work in the occupations of Psychologist, Elementary School Teacher, Secondary School Teacher, Speech Pathologist and Recreation Therapist. Her personal style scales indicate that she prefers working with people, enjoys formal and academic education, and likes to take risks. This supports Ms. Downey's aspiration for a professional career in education. Her recent work in health technology is not strongly underlined, although that may reflect her feelings that this work is not as tenable.

[131] At p. 11 of his report, Mr. Lawless described a post injury profile for Ms. Downey considering her limitations relating to lifting, bending, stooping, kneeling, reaching, handling and even sitting and concluded:

With all that taken together, Ms. Downey has lost 594 job titles, which is to say she may be restricted from or limited in 87% of her pre-injury profile. What this means plainly is that of all the occupations Ms. Downey might have accessed before her accident, she would at least have trouble with nine-tenths of them now. From a vocational rehabilitation perspective, this represents a serious loss of opportunity, especially for someone just at the start of her working life who hadn't yet chosen a direction.

[132] Finally, Mr. Lawless concluded at p. 12:

My final concern for Ms. Downey is that her difficulties put her at greater risk of further unemployment and underemployment. Indeed she has been unemployed for several months already due to her injuries. It's impossible to accurately quantify anyone's risk for this, although it has been well established in research that disabled persons on a whole are less attached to the workforce. Education helps, which beho[oves] her to go to university and go as far as she can. Even so, research has found that disabled people at all educational levels are disadvantaged in the labour force compared to similarly educated peers. Research has also found that disabled persons tend to have less education too, which raises the possibility that Ms. Downey might not go as far because of her injuries.

[133] The prognosis for Ms. Downey's future income capabilities is certainly not positive but also hinges on many uncertainties. It is not possible in this case, as it is in many others, to have a benchmark occupation and income against which losses of income can be measured. Ms. Downey has not had the opportunity to date to proceed with an education and vocation of her choice. Like the situation facing Chief Justice Hinkson in Walker, the court in this case is faced with looking into a crystal ball to assess what Ms. Downey may be able to earn since the 2012 accident compared to what she could have earned but for the 2012 accident.

[134] The evidence does establish a real and substantial possibility of a future income loss and the options available to her are definitely limited due to her injuries and the conclusions reached by Mr. Lawless in particular. The evidence does establish that prior to the 2012 she had the aptitude, intelligence and desire to successfully pursue a career in teaching and/or counselling. Also significant in this decision was her desire to work with children as she had in the past when assisting at the daycare.

[135] The circumstances, especially the uncertainties as to how Ms. Downey's career may have proceeded but for the accident, lead to a conclusion that the capital asset approach is the appropriate method of assessing the future income loss in her case. I refer to the decision of Jurczak v. Mauro, 2013 BCCA 507 regarding application of the capital asset approach:

- [36] This process is "an assessment rather than a calculation" and "many different contingencies must be reflected in such an award": *Barnes v. Richardson*, 2010 BCCA 116 (CanLII) at para. 18. "Ultimately, the court must base its decision on what is reasonable in all of the circumstances. Projections, calculations and formulas are only useful to the extent that they help determine what is fair and reasonable". *Parypa v. Wickware*, *supra*, at para. 70.
- [136] But how should the court assess a loss of earning capacity? The decision of *Crimeni v. Chandra*, 2015 BCCA 131, includes the following direction:
- [15] An award for loss of income earning capacity is intended to put the plaintiff in the position she would have occupied had she not been injured. It must be founded upon a real and substantial loss and must be measured by seeking to approximate the actual economic loss the plaintiff has suffered. The quantum of damages under this head has not been set or limited by convention, such as the non-economic heads of damages discussed by Dickson J. in *Thornton v. School District No. 57 (Prince George) et al*, [1978] 2 S.C.R. 267, at 284.

The Evidence of Kevin Turnbull

- [137] The plaintiff relies upon a report and testimony of Kevin Turnbull to quantify the loss of future earnings. Mr. Turnbull was qualified at trial as an expert chartered accountant and labour market economist to opine on the future income loss of the plaintiff. His report was dated November 3, 2016 and he also testified at trial.
- [138] In his report, Mr. Turnbull has calculated a future loss of earnings based upon certain contingencies and his calculations are reflected in Tables A through D of his report. Table B is based upon the assumption that Ms. Downey would have obtained a Master's degree by the summer of 2020 if the accident had not occurred. Although a Master's degree could have been within the range of possibilities for Ms. Downey, I find it unlikely on a balance of probabilities that she would have progressed to a Master's program due to many uncertainties, particularly her youth and that she does not have a university level academic record to establish that she may have likely progressed to the level of a Master's degree. I do, however, find it likely that Ms. Downey would have progressed towards a bachelor's degree, likely in education.
- [139] Mr. Turnbull's calculations on the other Tables included in his report include in Table A his estimate of the present value of Ms. Downey's absent accident future earnings after labour market contingencies to ages 70, 67 and 65 under the assumption she would have obtained a bachelor degree with no further education if the accident had not occurred. The future earnings to age 67 is calculated as \$1,230,239 and to age 65 as \$1,220,137.
- [140] Table D of Mr. Turnbull's report is described by him as follows at p. 7 of his report:

In Table D appended to this report, I have projected Ms. Downey's post-accident future earnings under the assumption that she will obtain a bachelor degree. I have assumed that this will occur as of July 1, 2021. Apart from the different starting date, this table is otherwise identical to Table A. The amounts at the foot of column (9) of Table D are \$1,144,198, \$1,131,032 and \$1,120,930, and represent the present values after labour market contingencies to ages 70, 67 and 65.

[141] In Table 6 of his report, Mr. Turnbull has provided future loss estimates based upon retirement at age 65 which incorporates a deduction for labour market contingencies of participation rates and unemployment rates among other contingencies. The amounts in Table 6 compare the average earnings of a British Columbia female with a high school diploma or a bachelor degree with levels of diminished or future earning capacity assumed at 25%, 50% or 75%. A loss based upon a 50% loss of capacity would result in a loss of \$660,000 as per Mr. Turnbull's calculations.

[142] The plaintiff submits that a fair and reasonable award of \$600,000 for loss of earning capacity is appropriate in these circumstances. The defendant submits that an award of between \$44,800 and \$89,600 represents appropriate, fair compensation under this head. As stated previously in these reasons, an award under this head must attempt to apply a calculation of the loss but in the end still involves a look into the proverbial crystal ball. As a result, I find that a fair and reasonable award in this case is in an amount of \$500,000.

Claim for Cost of Future Care

[143] Again, a claim for the cost of future care is often a matter of prediction and must take into consideration the care that is reasonably necessary to promote the mental and physical health of the plaintiff: *Milina v. Bartsch*, [1985] 49 B.C.L.R. (2d) 33 (S.C.). There must be medical justification for the expense in that "there must be some evidentiary link drawn between the physician's assessment of pain, disability, and recommended treatment and the care recommended by a qualified health care professional": *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 39.

[144] The defendant claims that the plaintiff's cost of future care claim is grossly inflated and not based on recommendations made by her treating family doctor or physiatrist. A more modest amount in the range of \$20,000 - \$25,000 for physiotherapy based on isometric strengthening, an active rehabilitation program and demedicalizing her condition, he says, would serve as reasonable compensation for the cost of future care.

[145] The plaintiff's claim rests upon the evidence of Tracy Berry, an occupational therapist, and a further report from Mr. Turnbull with calculations for the costs of future care based upon Ms. Berry's report.

[146] Upon reviewing the claims made by the plaintiff for the cost of future care, and summarized by plaintiff's counsel at p. 70 of the written submissions, I find the following amounts to be medically justified:

- Psychology assessment and sessions were recommended by Dr. Salvian and Dr. Adrian and are allowed as claimed at \$185 for assessment and \$2,050 for psychology sessions.
- Feldenkrais physiotherapy to be assessed and sessions at \$44 and \$697 as recommended by Dr. Salvian are allowed.
- Occupational therapy is allowed at \$2,257 as recommended by Dr. Adrian.
- Chiropractic care and maintenance is claimed in an amount exceeding \$22,000. Dr. Salvian stated, at p. 38 of his report " Ms. Downey will require occasional passive treatments such as acupuncture or massage or chiropractic or medications such as Flexeril for muscle relaxation or anti-inflammatories". "Occasional passive treatments" are unlikely to cost in the range as claimed. I award \$4,000 on account of chiropractic costs.
- Kinesiology was recommended by Dr. Salvian and costs of \$441 as claimed are granted.
- The costs of annual gym passes are not granted as Ms. Downey may well have incurred such costs in any event.
- Vocational counselling and educational ergonomic equipment costs are reasonable and are awarded at \$1,418 and \$2,713 as claimed however, workplace ergonomic equipment, which may well be provided by an employer is not awarded.

[147] The total future care costs above amount to \$13,805.

Loss of Housekeeping Capacity

[148] Loss of housekeeping capacity is a separate head of damage. Ms. Downey claims the following housekeeping costs:

- Ms. Downey claims \$70,000 homemaking costs. Such costs are very speculative, although some amount will be required for work which she is not able to perform regularly. I assess \$5,000 on account of homemaking costs.
- Additional homemaking of \$120,000 is claimed. I understand those costs to include child care. Although Ms. Downey wishes to have children in the future, any cost estimate of what additional child care she may need over and above what she would have needed but for the accident is extremely speculative. As well, to the extent that Ms. Downey is able to work, she will require child care costs in any event. Nevertheless, based on Ms. Berry's report, I find that Ms. Downey would likely benefit from occupational therapy consultation to review ergonomics and activity modification around parenting tasks and to assist with the selection of optimal child-related furniture and equipment as well as assistance with tasks that require certain physical skills. I assess an amount of \$12,500 for childcare costs.

· Home maintenance costs of \$14,000 are claimed and yet there is no evidence she would have normally performed such work. She will presumably be able to live in a house in the future and will likely be able to share those costs with any future partner. Ms. Berry states in her report that such costs should commence by age 28 and end "after age 47 or 48 or by age 75" but it would seem likely she would need assistance in performing these tasks in any event at some date in the future. I assess \$4,000 for future home maintenance costs.

· Yard and garden care costs of \$15,000 are claimed. Ms. Downey may or may not ever live in a home requiring yard maintenance and if she did, she might have a partner who could perform that work. Nevertheless, I assess \$5,000 for future yard and garden care costs.

· Additional homemaking and moving costs are not reasonably supported on the evidence.

[149] The total loss of housekeeping ability awards amount to \$26,500.

Special Damages

[150] Ms. Downey seeks reimbursement for the 289 rehabilitative treatments to date including mileage for a total of \$18,016. The defence acknowledges \$17,000 as a reasonable amount with no submissions as to how that amount is reasonable. Accordingly I award \$18,016 as claimed.

Summary

[151] In summary, I would award Ms. Downey \$703,321 under the following heads of damages:

- a) \$110,000 for non-pecuniary damages;
- b) \$35,000 less taxes for past loss of income earning capacity;
- c) \$500,000 for future loss of earning capacity;
- d) \$13,805 for future care costs;
- e) \$26,500 for loss of housekeeping ability; and
- f) \$18,016 for special damages.

Costs

[152] As there are likely factors relative to costs of which the court is not aware, I will receive written submissions on costs up to 40 days from the release of these reasons for judgment.

"Jenkins J."

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Prepared on 26 October 2026 · Esheria