

CANADA / JUDGMENT

Findlay v. Sun

2020 BCSC 1330

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 1330 Findlay v. Sun

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Findlay v. Sun,

2020 BCSC 1330

Date: 20200909

Docket: M193958

Registry: New Westminster

Between:

Kristen Heather Findlay

Plaintiff

And

Jun Amy Sun

Defendant

Before: The Honourable Chief Justice Hinkson

Reasons for Judgment

Counsel for the Plaintiff:

N.J. Hopewell

D.T. Brown

Counsel for Defendant:

M.G. Bolda

B. Buna

Place and Date of Trial:

New Westminster, B.C.

July 20 - 22, 24 and 27, 2020

Place and Date of Judgment:

New Westminster, B.C.

September 9, 2020

- [1] The plaintiff and the defendant were involved in a motor vehicle accident on Tuesday, August 9, 2016 at the intersection of East 8th Avenue and Richmond Street in New Westminster, B.C. ("the Accident").
- [2] Liability for the Accident was admitted by the defendant, and her allegations of contributory negligence on the part of the plaintiff were abandoned.
- [3] In the result, these reasons for judgment will address only the injuries sustained by the plaintiff in the Accident, and the quantification of her damages.

Background

- [4] The plaintiff was born on October 2, 1988 and is now 31 years old. During her later high school years, she worked part-time at London Drugs, had an occasional job with the City of New Westminster helping in a community parks program, and from time to time worked with her brother in his construction business.
- [5] After graduating from high school, the plaintiff continued with her City of New Westminster job, and increased her hours to full-time with London Drugs. In 2008, she began working at the Loughheed Laser Clinic ("LLC"). She progressed over the months from reception duties to training on the LLC's machines, and became a laser technician by 2010.
- [6] Prior to the Accident, the plaintiff travelled extensively, both locally and abroad. She visited Thailand in 2008 and 2009. She lived in Denmark, working as an au pair for most of 2010. In 2014, the plaintiff took another trip to Denmark, and travelled to the Philippines in 2015, and to Hawaii in 2016. The trips to Thailand, Denmark and the Philippines involved carrying her belongings in a backpack weighing some 40 lbs. On all of these trips she pursued the same kind of activities; hiking, snorkeling and boating, without any difficulties.

- [7] After her time in Denmark, the plaintiff returned to LLC, working full-time as a technician on the entire variety of machinery at the LLC, performing all of the services that the LLC offered to its patients, which included HydraFacials, photo rejuvenation, skin tightening, laser hair removal, cool sculpting, and fraxel laser treatments.
- [8] Between her return from Denmark and the Accident, the plaintiff spent her leisure time with friends, often taking trips to such places as Tofino, Whistler and the Okanagan. She would usually drive, as she considered that of all her friends, she was the most competent driver. She had no physical disabilities and was able to partake in all group activities such as dancing, visiting wineries, playing tennis, hiking, surfing, boating, swimming, snorkeling, and walking. She also attended movies and concerts.
- [9] In 2013, the plaintiff acquired a dog that then weighed 20 pounds, but grew to 80 pounds by 2016. Until the Accident, she walked him regularly and took him on hikes.
- [10] Prior to the Accident, the plaintiff spent considerable time with her niece and nephew, picking them up regularly and engaging in activities such as colouring with sidewalk chalk, taking them to the park, and playing tag.
- [11] At the time of the Accident, the plaintiff lived with her parents, while the apartment she had purchased was cleaned and renovated.

The Accident

- [12] The Accident involving the parties occurred when the defendant's northbound vehicle attempted to execute a left turn from Richmond Street onto East 8th Avenue, and struck the plaintiff's vehicle as it proceeded south on Richmond Street.
- [13] The defendant's vehicle sustained relatively modest damage, but the plaintiff's vehicle sustained considerable damage, from a force of impact sufficient to cause its airbags to inflate.

Post Accident

- [14] Later on the day of the Accident, the plaintiff attended the Emergency Department at Royal Columbian Hospital where she was examined. X-rays were taken of her chest, left clavicle, and right hand. These x-rays were interpreted as negative for bony injuries, and she was discharged from the hospital that day.
- [15] The plaintiff attended her family doctor's clinic for complaints that she related to the Accident on August 11, 2016, February 17, 2017, October 12, 2017, December 14, 2017, and September 3, 2019.

- [16] On Thursday, August 11, 2016, Dr. Curtis, one of the doctors at the clinic, made observations concerning the plaintiff's Accident-related injuries. He concluded that as a result of the Accident, the plaintiff's range of motion ("ROM") in her neck was limited in all directions except for extension, but that the ROM in her shoulders was normal.
- [17] The plaintiff had bruising/abrasion on the left base of her neck and bruising and swelling across her anterior/mid chest, moderate bruising of the medial aspect of her right breast, a small bruise on her left lower abdomen, a small abrasion on her right patella, swelling of both hands, more prominent on the right hand, an abrasion over 3rd MCP joint of right hand with some bruising, and bruising on the dorsal aspect of the left hand, medially, by the 2nd metacarpal.
- [18] Dr. Curtis recommended that the plaintiff use ice, heat, medication as needed and topical medication. He concluded that the plaintiff was probably okay to return to work the following Monday.
- [19] The plaintiff did return to work as advised. In her first week back at work, she did not perform any treatments. Instead, she worked reception and did miscellaneous paperwork. For the rest of August and the first week of September 2016, her employer accommodated her condition by allowing her to work shortened shifts.
- [20] During the first month or so after the Accident, the plaintiff's interactions with her niece and nephew changed, as the children had to be careful around her due to her injuries.
- [21] In late September 2016, the plaintiff took a trip to the Okanagan with friends. This was similar to many trips she had taken previously; however, following a boat ride, she was sore and had to return to the place she was staying.
- [22] In November 2016, the plaintiff went to Mexico; however, because of her injuries, she avoided some activities, such as zip-lining.
- [23] In December of 2016, the plaintiff went to Tofino with her friend, Ms. Brooke Hannela. The plaintiff watched rather than participated in surfing and she gave evidence that she found the driving portion of the trip to be particularly stressful.
- [24] The plaintiff gave evidence that she did not seek massage or physiotherapy treatment for the first six months following the Accident; waiting to see how she did without it.
- [25] After August 11, 2016, the plaintiff sought no further medical advice or treatment until February 17, 2017, when she met with her regular family doctor, Dr. Rahnema. On that visit, Dr. Rahnema noted that all of the plaintiff's symptoms had improved except her right-sided lateral neck pain, which manifested itself especially in the morning and at the end of a workday. Dr. Rahnema found that the plaintiff had palpatory tenderness of her right cervical spine, tenderness over her right sternocleidomastoid muscle, but normal ROM of her neck.

- [26] In her notes from this visit, Dr. Rahnema noted that the plaintiff had not yet attended either physiotherapy or massage treatments and recommended both, one to two times per week.
- [27] Since the Accident, the plaintiff has attended Absolute PhysioCare & Sports Rehab for physiotherapy on: March 11, 18, and 25; April 1, 8, 13, and 22; June 24; July 4, and 25; August 1, 8, and 22; September 12; October 24; and December 2, 2017; and, January 20; April 7 and 21, 2018.
- [28] In the summer of 2017, the plaintiff went to the Okanagan and again went boating, but experienced a significant flare-up in her neck and back pain after the boating expedition.
- [29] On October 12, 2017, the plaintiff returned to her family doctor's clinic and again met with Dr. Rahnema. At this visit, Dr. Rahnema detected no abnormalities, noting, in particular, no spinal tenderness, but mild tenderness over the sternocleidomastoid and trapezius muscles on her right side, more than on the left. Dr. Rahnema considered that the plaintiff's ROM of her neck was within normal limits.
- [30] On this visit, Dr. Rahnema recommended an injection of 100 cc of a transdermal analgesic, for the plaintiff's back and recommended that she continue with exercise and physiotherapy. She recommended a referral to a sports medicine doctor to consider a trigger point injection, and a visit with a counsellor to address situational anxiety.
- [31] The plaintiff attended Absolute PhysioCare & Sports Rehab for massage therapy on August 4 and 28, 2017.
- [32] On December 14, 2017, the plaintiff returned to her family doctor's clinic and on that occasion saw Dr. A. Raza, a resident. Dr. Raza examined the plaintiff and noted that she had a full ROM of her neck, no tenderness to palpation of the paraspinal or trapezius muscles and normal sensation to gross touch in upper extremities. He recommended that the plaintiff continue physiotherapy treatment and exercises to build up her muscles.
- [33] Dr. Rahnema recommended that the plaintiff use up to 250 milligrams of gel up to three times a day, and referred the plaintiff to Dr. Carl Shearer, a sports medicine physician.
- [34] Dr. Shearer saw the plaintiff on April 10, 2018 and May 30, 2018. Although he was asked by Dr. Rahnema to consider trigger point injections, when he saw the plaintiff on April 10, 2018, Dr. Shearer did not see any tenderness in her muscles and did not think that trigger point injections or cervical injections would be helpful.
- [35] The plaintiff attended the New West Sports Medicine Physiotherapy, on April 16, April 25, and May 2, 2018.
- [36] In May 2019, the plaintiff began taking courses at Douglas College, with a long-term goal of becoming a Registered Nurse. Her enrolment at Douglas College led to a reduction in her hours at LLC. She said that she had trouble adjusting to being a student again. She hopes to be in a position to apply to nursing school in 2021.

- [37] After December of 2017, the plaintiff did not return to her family doctor's clinic until September 3, 2019. She met with Dr. Rahnema on that visit and the doctor noted that the plaintiff had a normal ROM of her neck, and no point tenderness.

Causation

- [38] The plaintiff must establish on a balance of probabilities that her alleged damage, loss, or injury would not have occurred "but for" the negligence of the defendant. The defendant's negligence need not be the sole cause of the plaintiff's injury. Liability will be established if the plaintiff can prove the accident caused or materially contributed to her injury beyond the de minimus range: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at paras. 13-17; *Farrant v. Laktin*, 2011 BCCA 336 at paras. 9-11.
- [39] However, the defendant is not required to put the plaintiff in a better position than she would have been in absent the Accident (the plaintiff's so-called "original position"): *Athey* at para. 32.
- [40] The defendant concedes that the plaintiff was injured in the Accident and accepts that, in general, the plaintiff was a credible witness. However, the defendant takes issue with certain aspects of causation, specifically in terms of events that were likely to occur even if she had not been involved in the Accident and the impact this will have on assessing an appropriate quantum of damages.
- [41] I find that the plaintiff was without any limitations or physical or mental restrictions or degenerative conditions prior to the Accident.
- [42] I further find that the plaintiff suffered bruising to both of her knees, her chest and right wrist, as well as soft-tissue injuries to her neck and upper back as a result of the Accident.
- [43] The plaintiff made an expectedly quick recovery from her knee, chest and right wrist injuries.
- [44] While the plaintiff gave evidence that she now experiences significant driving-related anxiety, she has not pursued any counselling, despite the recommendation to do so by Dr. Rahnema. Given her failure to seek recommended treatment for this anxiety, I find that it is not significant, nor impeding the plaintiff's activities.
- [45] The real issues before me are the extent to which the plaintiff's injuries have impacted her work and social life, and whether she would have had at least some of the difficulties about which she presently complains, in the absence of the Accident.
- (a) Lay Witnesses

- [46] Ms. Tawni Beyer is a receptionist at LLC, and books the appointments for the laser technicians there. In booking appointments for the plaintiff, she avoids booking the Venus Legacy treatment, as she understands that this treatment causes the plaintiff discomfort. She recalled being directed to not book such appointments for the plaintiff. She does not restrict the bookings for any of the other laser technicians.
- [47] Ms. Beyer gave evidence that she has observed the plaintiff to be in what appears to be discomfort on a daily basis. Ms. Beyer gave evidence that she has seen the plaintiff using a heat pad in the back room, and frequently touching her shoulder, neck and back.
- [48] Ms. Beyer sees the plaintiff and other laser technicians at work and gave evidence that she has not noticed any of the signs in the other laser technicians of the symptoms she notices in the plaintiff.
- [49] Ms. Kathy Stoddart is the office manager at LLC. She coordinated the plaintiff's absence and then her return to work the week after the Accident. According to her evidence, the plaintiff's return to work was a slow progression, which started with work on reception. The plaintiff then slowly worked into laser technician duties over a period of six months, after which time the plaintiff was able to perform all her pre-Accident treatments, albeit that certain treatments were booked with a frequency for the plaintiff which differed from her pre-Accident frequency, in order to accommodate the plaintiff's injuries. According to Ms. Stoddart, a degree of accommodation has continued to this day.
- [50] Ms. Stoddart stated that at present, although the plaintiff is "on" with the client, after a client leaves, the plaintiff "deflates" and looks "fatigued and weary". Ms. Stoddart also confirmed the plaintiff's use of heat pads at work.
- [51] Ms. Hannela gave evidence in relation to the plaintiff's trip to the Okanagan in the summer immediately following the Accident. She said that they went on a boat in calm waters, but later that evening the plaintiff laid on the floor and asked Ms. Hannela to rub her neck. She gave evidence that this request was most unusual, as the plaintiff had never asked anything like that before, but that the plaintiff has made similar requests since that trip. Ms. Hannela stated that in general, the plaintiff did not participate much in that trip and removed herself from the group.
- [52] Ms. Hannela has continued to see the plaintiff regularly since the Accident, but gave evidence that their interactions differ from how they were pre-Accident. According to Ms. Hannela, since the Accident, the plaintiff has asked to go on shorter walks and hikes, and is generally less open to trying new things. Their group of friends is supportive of the plaintiff and modifies their activities to accommodate her. She expressed her view that the plaintiff has not returned to where she was before the Accident and is more anxious, confiding that she is always in pain both at work and at school.

[53] She gave evidence that due to the condition of her neck and back, she currently sleeps with a hot water bottle, and does not get on her hands and knees to wash floors as she did pre-Accident.

(b) Medical Evidence

[54] The parties each called one expert witness. Dr. Zeeshan Waseem, a physiatrist, was called by the plaintiff, and Dr. Peter Kokan, a specialist in orthopedics, was called by the defendant.

[55] Dr. Waseem saw the plaintiff at her counsel's request on January 27, 2020. On that visit the plaintiff told him that she had experienced chest wall, right clavicle, right wrist, neck and back pain following the Accident. With regard to both her neck and upper back symptoms, he said that the plaintiff advised him that her symptoms have been present continuously since onset.

[56] Specifically, she told Dr. Waseem that her symptoms at that time were neck pain, which was "[n]ext day onset" and "[f]elt 3-4 times per week at the end of her workday mostly at mild-moderate intensity slightly improved since onset and stable for at least the past several months." The plaintiff also told Dr. Waseem that her neck pain worsened with stooping and sustained forward reaching.

[57] With respect to her back pain, Dr. Waseem recorded that the plaintiff told him that she experienced mid back pain which was "[n]ext day onset" and "[f]elt intermittently usually at end of work mostly at mild-moderate intensity Much improved since onset and stable for at least the past several months." He recorded that the plaintiff advised him that her injuries were not preventing her from working her full duties, full-time. She advised Dr. Waseem that she had returned to walking her dog "normally".

[58] On physical examination Dr. Waseem noted:

On examination of the cervical spine, no pain was noted to palpation of the suboccipital, cervical paraspinal, upper fibers of the trapezius, levator scapula, sternocleidomastoid, scalene and splenius capitis/cervicis muscles bilaterally. In these areas, muscle stiffness, increased muscle tone, spasms, taut bands and trigger points were not notable. Cervical spine range of motion (flexion, extension, bilateral lateral bending and bilateral rotation) was within normal limits and symmetric. There was no crepitus noted during range of motion testing. Cervical spine movements (bilateral rotation and lateral bending) increased her neck pain. Kemp's test was negative bilaterally Spurling's test was negative bilaterally. Special tests for lesser occipital and greater occipital neuralgia were negative bilaterally. Tinel's sign over the posterior auricular nerve was absent bilaterally.

[59] Dr. Waseem expressed his opinion that:

On the balance of probabilities, the presenting physical complaints are attributable to the subject accident. There is no reported or documented history of similar complaints pre-dating the subject accident. The onset of symptoms is reported and documented to be within a reasonable time frame of the accident. The injuries are biologically plausible given the described mechanism of injury. The symptoms have persisted continuously since. There is no evidence of a subsequent event or injury to more plausibly explain the current physical presentation.

- [60] Dr. Waseem expressed his view that the plaintiff's injuries from the Accident have resulted in chronic mechanical pain of the cervical and thoracic spines, caused by the Accident, but aggravated by her job.
- [61] Dr. Waseem acknowledged that the plaintiff has experienced more pain associated with performing her work tasks, particularly circumduction of her arms with sustained forward reaching.
- [62] Dr. Waseem also expressed his view that the plaintiff's prognosis for a full symptomatic recovery is poor for the following reasons: her symptoms have been long-standing in nature persisting for over three years despite appropriate conservative measures and medical attention; his opinion that she has hit a plateau in her recovery; she continues to have objective physical findings on examination suggesting her recovery will probably be refractory to medical management; and the physical demands of her occupation make her physical condition worse.
- [63] Dr. Waseem was of the opinion that while some further improvement is possible, the plaintiff's condition would be considered chronic and therefore permanent, and that she will continue to experience pain. He commented that apart from missing three days and working in a reduced capacity for a few weeks thereafter, the plaintiff's injuries have not impaired her ability to work as a laser technologist, nor have they had an impact on her recreational activities. He expressed his view that in the future, should she proceed to a career in nursing, his general advice would be for her to seek out a position that she can tolerate and which would allow her injuries to be accommodated.
- [64] The defendant called Dr. Kokan, who was qualified as an orthopedic surgeon. The defendant submitted that, based on Dr. Kokan's reports filed in evidence and his viva voce evidence, the pain from injuries similar to those sustained by the plaintiff lasting more than six months to a year suggests that there is another event that could provide an alternate, and more accurate, explanation of the true cause. The defendant contends that the plaintiff's current complaints are attributable, at least in part, to her work situation.
- [65] Dr. Kokan prepared two reports: an independent orthopedic assessment dated May 15, 2018, and a report dated May 28, 2020 in rebuttal to Dr. Waseem's report.
- [66] In his May 15, 2018 report, Dr. Kokan stated that:

Given her age it is unlikely that she has underlying degenerative conditions and therefore persistence of pain at this time which in her history is linked to work appears to be caused by the work predominantly.

In essence the writer accepts that symptoms came on in the soft tissues from the accident but they are maintained at this point due to the plaintiff's work.

[67] Dr. Kokan also wrote that:

In essence the writer finds that the plaintiff did have soft tissue abrasions and strain injuries from the accident that have since resolved but her current symptoms are felt to be caused primarily by her occupation.

It is quite possible that the plaintiff would not be having symptoms at this time had the accident not occurred. On the other hand it is also very possible that the plaintiff could have developed these symptoms independent of the accident given the type of work that she does. On the balance of probabilities the accident may have triggered or accelerated some of these latent soft tissue symptoms, however without question the plaintiff would probably have started to develop symptoms at some time or other independent of the accident.

[68] In his rebuttal report to that of Dr. Waseem, Dr. Kokan wrote:

Dr. Waseem then also reports on line 360 that on the balance of probabilities that the current symptoms were caused by the accident. This might indeed appear to be a link, however based on the fact that the plaintiff was diagnosed with a sprain and given the fact that sprain injuries resolve within 6-12 weeks, the only other reasonable explanation would be that the plaintiff's job is aggravating those symptoms at this point in time.

The primary aggravating cause of the symptoms are work as Dr. Waseem's history states. Yet Dr. Waseem hasn't addressed the evident link between the plaintiff's work and her symptoms.

It is therefore likely that the plaintiff's symptoms would have come on independent of the accident given the nature of her job and given the association with neck and back sprain in jobs like the plaintiff's in which the body position is bent forward and stooped for several hours every day.

[69] I am unable to accept Dr. Kokan's opinion that the plaintiff's injuries from the Accident resolved but were replaced by similar complaints attributable to an intervening event or exclusively due to the stresses and strains of her work. Dr. Kokan noted that the plaintiff had worked for 12 years prior to the Accident at LLC.

[70] In cross-examination, Dr. Kokan agreed that the plaintiff's Accident-related symptoms "never completely went away".

[71] There is no evidence of any intervening event, and there has been no interruption in the plaintiff's symptoms.

- [72] There is no evidence that any other laser technician at LLC has developed the symptoms complained of by the plaintiff, and no empirical study relied upon by Dr. Kokan to suggest that laser technicians are susceptible to the development of such symptomatology. In the absence of such evidence, his reference to dental technicians and hairdressers experiencing such symptoms does not persuade me that his views can be relied upon. In cross-examination, Dr. Kokan agreed that not every office worker, nurse, hairdresser, and dental hygienist would develop neck pain from their job and he also agreed it was possible for people in those jobs to retire without ever having had any neck pain.
- [73] Indeed, in his report, Dr. Kokan accepted that the plaintiff's neck and back complaints persisted at the time of his examination, "caused by the work predominantly" and "came on in the soft tissues from the accident but they are maintained due to work" and are "aggravated by her job."
- [74] Dr. Kokan testified that although therapies such as physiotherapy and massage did not appear indicated, it would not be unreasonable for occasional resort to over-the-counter pain medications such as Tylenol and Advil, as well as exercise.
- [75] The defendant contends, and I agree, that the history given by the plaintiff to Dr. Waseem contrasts starkly with her evidence at trial. At trial, the plaintiff's evidence was that for the period of Spring 2018, her neck was still sore on a daily basis, and has continued to hurt every day with no change in frequency. She also testified that, since the Accident, her mid-back is also sore on a daily basis.
- [76] Counsel for the defendant correctly observed that during her day-long testimony, where she was seated, the plaintiff did not appear to be in discomfort, nor did she stand occasionally to relieve sore muscles. Counsel for the defendant further submitted that her body language and facial expressions in general were more consistent with a person who was not in any great pain than someone who was.
- [77] I accept the view expressed by Dr. Kokan that he found no malingering or attempt at secondary gain by the plaintiff, but place limited weight on the observations of the plaintiff whilst in the witness box. I found the plaintiff to be forthright. I accept that she is somewhat stoic, but also accept that her evidence was given in a way that emphasized her difficulties, while in fact, she carries on with her work and leisure activities in the face of those difficulties, albeit with some discomfort.
- [78] The defendant contends that at some point the plaintiff made a complete recovery from her Accident-related injuries, or that pre-existing factors ought also to be taken into account. I disagree. I find that the plaintiff continues to suffer from neck and back pain as a result of the Accident, and reject the submission that the evidence supports any pre-existing factors to explain her ongoing pain.

[79] I find that while the plaintiff has made a considerable recovery from the injuries that she sustained in the Accident, she has not and will not fully return to her pre-Accident condition. I find that she will continue to experience flare-ups of her neck and back pain after exerting herself, and must thus avoid certain activities that pre-dispose her to such flare-ups. On the whole, however, if she avoids those activities, I find that she will be able to enjoy most of the activities, socially, housekeeping and vocationally that she enjoyed before the Accident

Damages

[80] The plaintiff seeks non-pecuniary damages as well as damages for loss of past earnings, loss of future earning capacity, cost of future care, as well as special damages.

(a) Non-Pecuniary Damages

[81] The factors to be considered in the assessment of non-pecuniary damages are well known, and were summarized by Madam Justice Kirkpatrick in *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46.

[82] The plaintiff contends that the awards in the cases of *Duda v. Sekhon*, 2015 BCSC 2393 [Duda], *Watkins v. Harder*, 2016 BCSC 2078 [Watkins], *Stapleton v. Andrew*, 2019 BCSC 678 [Stapleton] and *Walks v. Cody*, 2019 BCSC 1371 [Walks] are examples of non-pecuniary damage awards for plaintiffs whose injuries and their effect are similar to the injuries of the plaintiff and the effect of those injuries upon her.

[83] In *Duda*, the plaintiff was 25 years old at the time of two accidents that took place months apart. As a result of the accidents, she suffered soft tissue injuries. By the time of the trial, over three years later, she had not fully healed from those injuries and had only achieved about 75 per cent of her pre-accident physical state. She continued to suffer two types of whiplash injuries, which were exacerbated by heavy workloads and she was unable to work full-time. Mr. Justice Ball awarded her \$80,000 for non-pecuniary damages.

[84] In *Watkins*, a 38-year-old female plaintiff was injured when her vehicle was struck from behind by a truck. She experienced neck, arm, shoulder, back, leg and dental pain, and headaches following the accident. She underwent physiotherapy, massage, work-hardening rehabilitation, nerve block injections, radio frequency lesioning. The plaintiff was active and social prior to the accident, but had difficulty sleeping since, and her ability to engage in activities such as hiking had lessened. She missed six months of work and then returned to the same position, but experienced pain and tiredness and, by the time of trial, had voluntarily restricted her shifts to four per week.

- [85] The medical evidence established that Ms. Watkins' soft tissue injuries were caused by the accident. Most of her symptoms resolved within six to 12 months, but she continued to experience chronic neck and mid-back pain for which the prognosis was guarded. The plaintiff's injuries were significant, impacted her activities, and made it difficult to sleep. Mr. Justice Gaul awarded her \$100,000 for non-pecuniary damages.
- [86] In Stapleton, a 24-year-old female plaintiff, was involved in a motor vehicle accident that caused "soft tissue injuries to her neck and shoulder blade area and her mid and lower back, primarily on the right side", which persisted for the four years after the accident.
- [87] Mr. Justice Skolrood found that the plaintiff's injuries impeded her ability to work in her chosen profession as a chef and also had some impact on the plaintiff's personal and recreational activities. He concluded that she was likely to experience the adverse effects of the accident for a considerable period of time, and that the potential loss of her career as a chef was devastating to her. Her claim for loss of housekeeping capacity was considered as a claim for loss of amenities and the non-pecuniary damages of \$75,000 awarded by Skolrood J. encompassed compensation for that claim.
- [88] In Walks, a 26-year-old female plaintiff was a passenger in a truck that was struck from behind by a semi tractor trailer. She suffered back, shoulder and neck injuries, anxiety and depression. These injuries resulted in headaches and shock, and subsequently in anxiety and depression. I found that she would not fully recover from her back, shoulder and neck injuries, and that her pain would vary but would improve if she strengthened her core, neck and back. By the trial, Ms. Walks was well on her way to a full recovery from the depression and I found that while her anxiety and depression were improved, she might always have some driving anxiety. I awarded her \$90,000 for non-pecuniary damages under this head as a consequence of her ongoing neck, shoulder, and upper back pain, and her mood issues.
- [89] The defendant contends that the awards in the cases of *Sandher v. Hogg*, 2010 BCSC 1152 [Sander], *Hunter v. Yuan*, 2010 BCSC 1526 [Hunter], *Fiorda v. Say*, 2011 BCSC 1293 [Fiorda], and *Leong v. Besic*, 2015 BCSC 2256 [Leong] are examples of non-pecuniary damage awards for plaintiffs whose injuries and their effect are similar to the injuries of the plaintiff and the effect of those injuries upon her.
- [90] In *Sandher*, the plaintiff was a 23-year-old laser hair removal technician at the time of the accident. As a result of the accident, she sustained soft tissue injuries to her shoulder and upper and lower back, which caused her pain and suffering and a loss of enjoyment of life that was likely to continue for an uncertain period of time.
- [91] Four years later, at the time of the trial, she continued to experience ongoing low back and shoulder pain, from which there was found to be a realistic prospect she may never regain pre-accident health. Madam Justice Dardi awarded her non-pecuniary damages of \$40,000.

- [92] In *Hunter*, a 32-year-old office administrative worker's car was struck from the rear by a taxi cab. Although the damage to the two vehicles was not extensive, the plaintiff was found to have experienced stiffness in her neck and upper back, and had a headache following the accident. Less than two years later, she felt she was 85% recovered. Shortly after, at trial, she testified that at that time, she experienced frequent flare-ups, sometimes once every week or two, or more often, if she did certain activities. The flare-ups resulted in tension and muscle knots between her shoulder blades, particularly toward her right shoulder and neck area, and headaches. She had sleep disruptions, difficulty getting to sleep, and voluntarily avoided some activities that she enjoyed prior to the accident rather than put herself in a position where pain or a flare-up will occur.
- [93] By the time of trial, Ms. *Hunter* took Tylenol and Cyclobenzaprine on occasion, and she found that she had to remain active and exercise, as inactivity would make her symptoms worse. Madam Justice Morrison concluded that the plaintiff's pain was not chronic or continuous, but that she suffered pain with certain kinds of exertion, and continued to have pain in her shoulders, particularly her upper right back, and neck. Ordinary daily activities such as carrying groceries, doing the laundry, vacuuming, and certain types of cleaning caused flare-ups, which resulted in pain. Morrison J. found that four years since the accident occurred, the plaintiff's condition recovery had plateaued, and awarded her \$35,000 for non-pecuniary damages.
- [94] In *Fiorda*, a 56-year-old costume designer working in the film industry was involved in accidents in 2008 and 2009. In the first accident, Ms. *Fiorda* suffered a headache, pain to her neck, upper back, and mid back, and pinching in the left shoulder area. The parties agreed that Ms. *Fiorda*'s injuries from that accident had almost completely resolved by the time of the second accident which caused more serious injuries. After the second accident, the plaintiff experienced headaches, pain and tightness in her neck and back, and discomfort and some pain in her left shoulder, chest, wrists, biceps, and left knee.
- [95] Madam Justice Holmes, as she then was, found that the plaintiff was stoic, a factor that she concluded should not generally penalize a plaintiff. She awarded non-pecuniary damages of \$40,000, which she reduced by 20% due to what she found to be a failure on the part of that plaintiff to mitigate her damages by pursuing an active rehabilitation program as recommended by her treating doctor as soon as she concluded the plaintiff should have.
- [96] In *Leong*, the plaintiff was a 19-year-old university student at the time she was rear-ended in a 2011 accident. She claimed that she suffered soft tissue injuries to her neck and back and headaches as a result of the accident and because of her injuries, she had been required to undergo numerous treatments, including physiotherapy, a rehabilitation clinic, and pain medication. She claimed that her injuries caused her a one-year delay in completing her university studies and a future loss of earning capacity.

[97] This plaintiff graduated in 2015 after five, rather than four, years. She testified that she found it difficult to take so many courses, sitting in lectures for so many hours, and sitting in exams, plus sitting at the computer, so she eventually decided to take less courses in a semester. Madam Justice Griffin, then of this Court, found that the evidence did not establish that the plaintiff's university graduation was delayed as a result of the accident or that she suffered a future loss of earning capacity. Griffin J. accepted that the plaintiff felt some mild pain and stiffness after long hours of sitting, but this was insufficient to establish that she was unable to complete university in four years had she wanted to do so. This plaintiff was awarded non-pecuniary damages of \$40,000.

[98] In my view, in the cases on which Ms. Findlay relies, the plaintiffs' injuries had more effect on them than Ms. Findlay's injuries have had on her. I find that the effects on the plaintiffs in these authorities were more severe than Ms. Findlay's were on her. Conversely, however, I also find that the cases on which the defendant relies on are rather dated, and appear to have involved less significant effects on those plaintiffs than Ms. Findlay has suffered.

[99] I find that the plaintiff is entitled to non-pecuniary damages of \$55,000.

(b) Loss of Income to the Date of Trial

[100] At the time of the Accident the plaintiff was working full-time (approximately 36 hours per week over a 5-day week or 7.2 hours per day) at an hourly wage of \$27.00.

[101] In May 2019, the plaintiff began attending Douglas College in Coquitlam to take prerequisite courses that would allow her to pursue a career in nursing.

[102] The parties have agreed that the net amount of the plaintiff's past wage loss is \$1,444.94, which I award to her.

(c) Loss of Future Earning Capacity

[103] In *Parker v. Lemmon*, 2012 BCSC 27, at para. 42, Mr. Justice Savage gave a useful summary of the principles to be applied to a claim for loss of earning capacity:

42 The approach to such claims is well set out in the decision of Garson J.A. in *Perren v. Lalari*, 2010 BCCA 140 at paras. 25-32, which I summarize as follows:

- (1) A plaintiff must first prove there is a real and substantial possibility of a future event leading to an income loss before the Court will embark on an assessment of the loss;
- (2) A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation;
- (3) A plaintiff may be able to prove that there is a substantial possibility of a future income loss despite having returned to his or her employment;
- (4) An inability to perform an occupation that is not a realistic alternative occupation is not proof of a future loss;

- (5) It is not the loss of earnings but rather the loss of earning capacity for which compensation must be made;
- (6) If the plaintiff discharges the burden of proof, then there must be quantification of that loss;
- (7) Two available methods of quantifying the loss are (a) an earnings approach or (b) a capital asset approach;
- (8) An earnings approach will be more useful when the loss is more easily measurable;
- (9) The capital asset approach will be more useful when the loss is not easily measurable.

[104] In this case, the plaintiff contends that the loss of a capital asset approach is applicable. Where that approach is applied, the court must consider the four questions in *Brown v. Golaui* (1985), 26 B.C.L.R. (3d) 353 [Brown] at para. 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.

[105] However, for *Brown* to apply, there must be cogent evidence to support such an award: *Marcelino v. Francesutti & Others*, 2002 BCSC 1711 at para. 57. Ongoing symptoms alone do not justify an award for loss of earning capacity: *Williams v. Nekrasoff*, 2008 BCSC 1520 at para. 32.

[106] In *Andres v. Leslie & Swackhamer*, 2005 BCSC 1096, a case relied upon by the plaintiff, a 23-year-old woman was injured in a motor vehicle accident. At the time of the accident she was working full-time as an esthetician performing duties similar to those performed by the plaintiff at LLC.

[107] In dealing with her claim for loss of earning capacity, Mr. Justice Lander found, at paras. 37 and 48-49 that:

[37] The witnesses I have referred to have confirmed what Ms. Andres stated in all of her testimony. That she is a hard worker, is dedicated to recovery, and that she is not a passive person but is stoic. She is, I find, working to resolve her problems but after 3 1/2 years of post accident complete recovery, I find is not reasonably foreseeable.

[48] As to Ms. Andres loss of earning capacity. Common sense dictates as Ms. Andres advances in age, the chronic condition that she now suffers will play a more important role in her working capacity and as a result of the chronic neck and back pain she may not be competitively marketable. She perhaps would have to retire early from the job she now does so well and as she states, "I love it."

[49] I set the loss of earning capacity at \$175,000.

[108] Although Lander J. referred to Brown, it is unclear just how he arrived at his award for loss of future earning capacity. He found that the plaintiff had suffered a significant impairment and preferred the medical evidence that there would be no further improvement over the medical evidence that suggested the plaintiff could make a full recovery. He concluded complete recovery was not reasonably foreseeable. However, there is nothing in the reasons to indicate how he assessed the quantum of the award. Two years prior to the trial, the plaintiff was apparently earning \$10.00 per hour. Assuming a workweek of 40 hours and entitlement to compensation for 52 weeks per year, her annual income would have been roughly \$21,000 per year.

[109] As I am unable to understand how the plaintiff in that case received an award of roughly 8.3 years' annual income, I decline to rely upon that aspect of the award in this case.

[110] In *Hu v. Tan*, 2016 BCSC 908, a 38-year-old woman was involved in a motor vehicle accident, and sustained a soft tissue injury that caused ongoing neck, shoulder and back pain with migraine headaches. She was in pain most days of the week. Madam Justice Burke found that the plaintiff was a determined and stoic individual who persisted in her work despite chronic pain.

[111] At paras. 90 - 91, Burke J. concluded that:

90 Ms. Hu, presently 41 years old, has been very stoical about the increase in her pain at work. She testified she loved working and had planned to work until age 67 but for the collision. In my view, the defendant is using Ms. Hu's stoicism in continuing to work to penalize her.

91 I find therefore Ms. Hu would not have considered retiring early, had it not been for the collision. I conclude it is reasonable to find Ms. Hu will lose the last three years of her work life, for a present day value of \$81,240.

[112] In *De Groot v. Heller*, 2018 BCSC 14, the plaintiff was a 32-year-old woman, who suffered soft tissue injuries to her lower back and hip in a motor vehicle accident, which were found by Mr. Justice Greyell to have aggravated her underlying arthritic condition in her left hip. There was no evidence connecting her prior back complaints with back complaints brought on by the accident. Five years after the accident, the plaintiff continued to suffer from pain in her lower back and hip, which prevented her from enjoying the activities she enjoyed prior to the accident. She worked in a soil remediation firm, and while she had not missed time from work, she had difficulty sitting for long periods.

[113] At paras. 159 and 161 - 162, Greyell J. found:

[159] I am of the view that Ms. De Groot is able to work full time, subject to an employer accommodating her need to get up and stretch from time to time. Her work tolerance may improve once she has had the opportunity to take further physiotherapy as provided for in this award, but she will likely remain limited in the range of positions open to her.

[161] I am of the view that any award for lost earning capacity must be modest. Assessing her possible loss is difficult for several reasons. First, Ms. De Groot may remain in her present position without any change in her status. Second, with the future care to be provided to her, it is to be hoped that her condition will improve or at least be tolerated better. Third, I cannot ignore and must take into consideration the fact that Ms. De Groot had ongoing back issues for which she had been seeking treatment and had degenerative arthritis in her hip, which was aggravated by the Accident, but would likely have given her some degree of difficulty at some stage in her life, even if she had not been involved in the Accident.

[162] Ms. De Groot has suffered some loss of income earning ability and is accordingly entitled to some assessment of compensation, however imperfect such an assessment may be. Taking the factors outlined above into account, I award damages for loss of future earning capacity of \$50,000, roughly equivalent to a two year salary in present day dollars.

[114] In Walks, Ms. Archer, the lead teacher of an early childhood education program, testified that in assigning tasks she would take some of the load off the plaintiff, who had started that career after her accident, by offering to do lunch clean-up as it is the most difficult. She would also allow the plaintiff to start off in the nap room, which was less busy.

[115] She said that the plaintiff often complained of headaches and pain in her back from stacking chairs, cleaning tables, and bending to clean the floor and so Ms. Archer would offer to do those tasks. There was no evidence that the plaintiff had any difficulty with anything other than the cleaning work.

[116] To accommodate Ms. Walks, the lead teacher would also help the plaintiff's children get dressed in rain clothes while the plaintiff cleaned up activities. The plaintiff was permitted to lay on the floor, and was assigned duties to accommodate her pain. The plaintiff would call in sick once or twice per month, which was more than the other educators. This would cause disruption in the class as a substitute would have to replace her. Further, the routine would change if the plaintiff left early as she often did.

[117] I discussed her claim for loss of future income earning capacity at paras. 166 - 168 as follows:

166 the correct approach to the assessment of the plaintiff's claim for loss of future earning capacity is the capital asset approach. This approach will take into account the likelihood that the plaintiff will continue in her present employment while also recognizing that the plaintiff has been rendered less capable overall from earning income from all types of employment, and may be minimally less marketable or attractive as an employee to potential employers.

167 The plaintiff acknowledged that the market for early childhood educators is presently a strong one. I am not persuaded that the plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to her, had she not been injured. I find that with her present employment, she is more valuable to herself as a person.

168 The plaintiff can now expect to earn roughly \$38,000 per year. On the basis of all the evidence, I conclude that it would be fair and reasonable to assess her claim for loss of future earning capacity at two times that amount, which is \$76,000.

[118] In this case, the plaintiff has decided not to pursue ongoing employment with LLC once she completes her nursing training. For the present, albeit with some associated pain, she is able to perform her duties part-time while attending school. I am not persuaded that she cannot do so during the period of her studies to obtain her certification as a nurse.

[119] The plaintiff gave evidence that attending lectures can be difficult, as her neck and upper back start to hurt after about 20 minutes. Although lectures have moved online this year, due to COVID-19, the plaintiff gave evidence that computer work at home causes her pain, but that working at home is easier than attending in-person lectures as she can take breaks and stretch more easily at home.

[120] The plaintiff's sister-in-law, Pamela Findlay, is a registered nurse, and has helped the plaintiff with her school work since the plaintiff's entrance to Douglas College. During the handful of in-person study sessions they have had together, Ms. Findlay has noticed that plaintiff moves around while studying, and takes frequent breaks, to accommodate her neck and back discomfort.

[121] It is her sister-in-law's view that the plaintiff's general condition improved until last year, but since then, she has remained the same, and is still not back to where she was before the Accident.

[122] The plaintiff contends that she has provided evidence of a real and substantial possibility of a future event leading to an income loss. It is her position that regardless of the Accident, she was likely not going to remain as a laser technician for her entire working life, and so would have been looking at future careers. She concedes that she would have been in a similar position to the one she is in now (likely transitioning away from LLC), but contends that certain avenues are now closed to her, due to her ongoing neck and back injuries.

[123] In the plaintiff's last year of full-time work at LLC, she earned \$57,865.19. There is a reasonable possibility that she will become a registered nurse, and earn more than she does at LLC. Her sister-in-law gave evidence that she earns \$39 per hour, or \$66,000 per year, working .77 of full-time, and in addition receives unspecified pension benefits. The plaintiff also led evidence that the median income for nurses in British Columbia is \$40 per hour.

[124] Dr. Kokan wrote in his May 15, 2018 report: " given the fact that she has to go back to work on a regular basis she will simply continue to experience the symptoms because of the nature of what she does." In his rebuttal report, Dr. Kokan further concluded: "The best way for the plaintiff to feel better would be to work fewer hours, take longer breaks at work or switch to a different job that doesn't place as much stress on the plaintiff's neck and upper back".

[125] Dr. Kokan also wrote in his rebuttal report that:

In the writer's opinion any job that the plaintiff takes could have its own inherent risks. For example nursing, particularly bedside nursing involving elderly patients for example has a high rate in itself of low back injuries and shoulder injuries from lifting these types of patients and caring for them. In other words should the plaintiff develop any injuries in nursing that would be an entirely independent matter unrelated to this accident.

[126] There is a possibility that, in the event the plaintiff becomes a registered nurse, certain types of nursing will be unavailable to her due to her injuries. As Dr. Kokan explained in his rebuttal report, there are types of nursing, for example bedside nursing of elderly patients, that have high rates of low back and shoulder injuries, but:

There are several other specific job options available to a nurse ranging from operating room nursing to paediatrics to other areas that do not require the plaintiff to have her head and upper back in a forward flexed position for several hours a day and in fact the plaintiff would probably feel better than she does now with those kind of jobs should she ever decide to change her career. Such a change would be to take the plaintiff into a job with a different type of stress and strain pattern on her body and this need would be directly related to the job description and not an MVA related change in occupation.

[127] As the plaintiff is yet to start her studies or training as a nurse, she should be able to focus her studies on the areas of nursing that will not create the sort of stresses on her back and neck that her present employment does. In that eventuality, the prospect of a loss of future income earning capacity is less likely, and does not rise to the level of a substantial possibility.

[128] If the plaintiff is unsuccessful in the completion of her nursing training and is forced to continue her work as a laser technician, or seek other work entirely, the likelihood of a loss of future income earning capacity looms larger, and does rise to the level of a substantial possibility.

[129] In my view, a fair award to compensate the plaintiff for loss of future income earning capacity requires me to apply the approach set out in Brown. I find that the plaintiff meets the four criteria discussed in that case by Mr. Justice Finch, as he then was, and award the plaintiff the equivalent to one year of her full-time employment income as a laser technician; which I will round up to \$60,000.

(d) Cost of Future Care

[130] The plaintiff seeks an award of \$2,500 for this head of damages for over-the-counter pain medication and heating pads. She did not lead any evidence of the amounts or costs of such items.

[131] I accept Dr. Kokan's evidence that the plaintiff will likely require over-the-counter analgesics to deal with the flare-ups she will experience in the future. I find that an award of \$500 under this head of damages will be sufficient to address this head of damages.

(e) Special Damages

[132] The statement of agreed facts in this case sets out the various expenses that the plaintiff contends that she suffered as a result of the Accident as follows:

a)

Absolute PhysioCare & Sports Rehab, March 11, 2017 to April 21, 2018

\$1,444.60

b)

Good Life Fitness, December 28, 2018 to January 24, 2020

\$403.46

c)

New West Sports Medicine, April 16, 2018 to May 2, 2018

\$100.00

d)

Telus cellphone replacement, August 14, 2016

\$580.00

e)

Taxi receipt, August 9, 2016

\$9.40

Total:

\$2,537.46

[133] The plaintiff conceded that her claim for Good Life Fitness was not made out, so I will reduce the claim under this head of damages to the sum of \$2,134.00, and award the plaintiff that sum for her claim for special damages.

Conclusion

[134] I award the following damages to the plaintiff:

a)

Non-Pecuniary damages

\$55,000.00

b)

Past wage loss

\$1,444.94

c)

Loss of future income earning capacity

\$60,000.00

d)

Cost of future care

\$500.00

e)

Special damages

\$2,134.00

Total:

\$119,078.94

[135] The parties may file written submissions with respect to costs if they cannot agree. If they are unable to reach an agreement with respect to costs, the plaintiff must file written submissions within two weeks of the date of these reasons for judgment, the defendant to respond thereto no later than two weeks after receipt of the plaintiff's submissions, and the plaintiff to file a reply, if any, no later than one week after receipt of the defendant's written submissions.

"The Honourable Chief Justice Hinkson"

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