
CANADA / JUDGMENT

Fisher v. Stone

2008 BCSC 430

COURT

Supreme Court of British Columbia

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2008 BCSC 430 Fisher v. Stone

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Fisher v. Stone,

2008 BCSC 430

Date: 20080411

Docket: S064174

Registry: Vancouver

Between:

Angela Fisher

Plaintiff

And

Ian Stone

Defendant

Before: The Honourable Madam Justice Griffin

Reasons for Judgment

Counsel for Plaintiff

D.W. Kolb &

J. Cameron

Counsel for Defendant

K. Grady &

T. Tsang

Date and Place of Trial:

March 10-14, March 17 & 18, 2008

Vancouver, B.C.

INTRODUCTION

- [1] On July 3, 2004, Angela Fisher was involved in a car accident. She was driving west on East 12th Avenue in Vancouver, British Columbia, and had stopped behind one car at the red light at the Kingsway intersection when her vehicle was rear-ended by a Jeep driven by the Defendant, Ian Stone. The Defendant admits liability for the accident. The central issues which occupied this trial were whether the accident caused Ms. Fisher's injuries and, if so, what is the quantum of damages to which she is entitled as a result of the injuries she suffered.
- [2] Complicating the issues are two prior accidents in which Ms. Fisher was involved. She was in a motor vehicle accident on December 17, 2003. As well, on May 3, 2004, two months prior to the accident that is the subject of this proceeding, Ms. Fisher had an incident at her work as a veterinary assistant when a large dog lunged at her. Both prior accidents motivated her to seek chiropractic treatment which continued up to the time of the July 2004 car accident.
- [3] Some time after all three accidents, Ms. Fisher passed the strenuous physical tests necessary to become a police officer. Today she is a highly regarded member of the Port Moody police force. She does not claim that she is unable to perform her regular police duties due to the accident. Rather, her claim for damages is based in part on her allegation that, but for the July 2004 accident she would be able to work more overtime as a police officer and that, consequently, the accident has caused her a loss of earning capacity. In addition, Ms. Fisher claims non-pecuniary damages for loss of enjoyment of life, damages for past wage loss, damages for the cost of future care and also some special damages.

ACCIDENT OF JULY 2004

- [4] Ms. Fisher says that when the July 2004 accident occurred, she had her foot on the brake of her 1997 Ford Escort and her car was stopped. The light changed from red to green and the car ahead had turned out of the way when, suddenly, her car was hit from behind by the Jeep driven by Mr. Stone. The force on impact pushed her car forward.
- [5] Dorothy Danielle McCallum, a long-time friend of Ms. Fisher, was in Ms. Fisher's car at the time of the July 2004 accident. She was sitting in the back seat behind the driver, Ms. Fisher. She described the impact as solid with a metal on metal noise, causing her to lurch forward and backward in her seat.

- [6] The accident caused damage to the rear of Ms. Fisher's car, including the trunk which could not be closed post-accident. The cost of repairs to her car was approximately \$2,550.

PRIOR ACCIDENTS

- [7] Ms. Fisher was in an earlier car accident on December 17, 2003. She was driving a 1990 Volkswagen Jetta south on Knight Street in Vancouver, British Columbia, when another driver pulled out from a gas station. His Mercedes collided with the front passenger wheel well of her car and then slid into the rear passenger side of her car. This caused approximately \$400 worth of damage to Ms. Fisher's car. After the December 2003 car accident, Ms. Fisher felt some stiffness in her neck and back. Although she continued on her journey to work that day, she left work early because she felt stiff and sore. She did not miss any other time off work.
- [8] On May 3, 2004, Ms. Fisher was working at the Kerrisdale Veterinary Hospital where she had worked since 1999. She was handling a large dog on a leash when it lunged at her aggressively. She had to jerk it away by its leash. She immediately felt a twinge in her lower back, although she carried on with her duties and did not take time off work.

THE INJURIES

- [9] Ms. Fisher suffered injuries from all three accidents. On a review of the totality of evidence, including the observations of her boyfriend and her roommate, the medical evidence and Ms. Fisher's own testimony, I conclude that her injuries from the December 2003 car accident and the May 2004 dog incident were less significant than the injuries suffered in the July 2004 accident and that they were substantially, if not totally, resolved by the time of the July 2004 accident.
- [10] Angela Fisher was a 26-year old woman at the time of the accidents. In 2000, she decided she wanted to become a police officer. In 2002, she enrolled in the Criminal Justice Program at Langara College. Prior to the accidents, she had no serious health problems and was very fit and active. She had been employed in physically demanding jobs, such as working with racehorses and working as a veterinary assistant. She was an avid hiker, used her bicycle as a mode of transport to and from work and school, lifted weights and frequently went running. She watched her diet and took pride in her physical fitness.
- [11] The December 2003 car accident caused her to feel some stiffness in her neck, shoulders and back as well as some pain in both hips which was, perhaps, from the seatbelt. Her chief concern was her neck and her upper back area, although she initially felt some lower back pain as well. She was treated by her chiropractor, Dr. Mann, and within one month of the accident she felt she had returned to her normal capacity. She still had some soreness in her neck and upper back which would resolve after stretching and was not physically limiting. Her neck primarily bothered her after long periods of studying.

- [12] In the Spring of 2004, Ms. Fisher was engaged in a number of physical activities, including training for a 24-hour relay run, weight lifting and taking a YMCA preparation course for the Police Office Physical Ability Test (POPAT). She completed trial runs of the POPAT well within the required time of 4 minutes and 15 seconds.
- [13] Ms. Fisher was working towards her goal of becoming a police officer when the dog incident occurred at her place of employment on May 3, 2004. Following the dog incident, her main area of complaint was her lower back. She wanted to be in better condition as quickly as possible and so followed an intensive course of therapy as prescribed by her chiropractor, Dr. Mann. As well, she adjusted her responsibilities at the veterinary clinic, relying on co-workers to fulfill the more physically demanding duties for a while.
- [14] By the latter part of June 2004, Ms. Fisher was working to full capacity at the veterinary clinic and was able to lift animals and heavy objects. She was riding her bike to and from work and school and had begun running again. She felt her physical strength was back to almost 80-90% of her top fitness level and she was working to regain her full fitness level. Her neck still bothered her to some extent when she studied for long periods. She felt no limitations in her back and had no concerns about her hips.
- [15] Ms. Fisher described the sensations she felt immediately after the July 2004 accident as being very different from what she experienced after the previous accidents. When she got out of her car to exchange information with Mr. Stone, she immediately felt a sharp pain in her hip and back area at an intensity and depth she had not felt previously. She also felt nauseous. Her entire back hurt, although her lower back was worse. She felt a sharp pain running from her lower back area to her buttock and hip.
- [16] In the days and weeks that followed the July 2004 accident, Ms. Fisher felt very sore and stiff, and had pain in her hip radiating from her lower back. She found that sitting, standing or sleeping for any extended length of time aggravated her pain. She often felt intense spasms in her hip and back which would cause her to cry out in pain. She tried to adjust her activities. She did not exercise for a while and she would often lie on the floor to stretch her back.
- [17] Ms. Fisher also sought out lighter duties at work and avoided heavy lifting. She resigned from her job at the veterinary clinic during the Winter of 2004 and took a position as a "loss prevention officer" which involved monitoring shoppers at a department store. Eventually she was able to exercise again, although not quite to the same extent as before.
- [18] Ms. Fisher continued with the pursuit of her career and was accepted into the Port Moody Police Department in April 2006. She had to pass the POPAT before being accepted. She failed twice, in contrast to her prior test runs in the Spring of 2004. On a third try, taken 45 minutes after her last attempt, she succeeded in passing the POPAT.

- [19] The Port Moody Police Department required Ms. Fisher to submit to a medical examination in March 2006. Part of the medical examination involved her reporting her own medical history. By that time she was feeling quite good about her health. Despite specific questions on the medical form regarding a history of back pains, joint stiffness and numbness, she did not admit to any of these problems. She felt that she was strong enough to be a police officer.
- [20] Subsequently, during her training at the Justice Institute of B.C. in the Summer and Fall of 2006 and during her actual duties as a working police officer, Ms. Fisher realized she still had physical limitations. She now realizes that the pain from her injuries comes and goes and is affected by the physical demands of her job.
- [21] For example, Ms. Fisher found during her training that she was well below the class average in her abilities and was struggling with many of the sudden force techniques. Given her level of fitness before the July 2004 accident, this was extremely disappointing to her. Also, during her on-patrol training she found that riding in a police car with the computer off to one side for reports and wearing a duty belt, left her with a very sore and stiff back and hip after her four day shift, sometimes causing her to suffer spasms. She also felt numbness travelling down her left thigh.
- [22] Nevertheless, Ms. Fisher persevered and graduated on December 15, 2006. She has been working as a general patrol officer since then.
- [23] Ms. McCallum and Ms. Fisher were roommates from August 2000 to June 2005. Mr. Patel is Ms. Fisher's long-term boyfriend, having met her approximately seven years ago. He is currently a constable with the Vancouver Police Department. Both witnesses had the opportunity to observe Ms. Fisher's behaviour before and after the July 2004 accident, as well as before and after the earlier December 17, 2003 accident and the workplace incident which occurred in May 2004. Their observations were consistent with Ms. Fisher's evidence.

MEDICAL EVIDENCE

- [24] There were several physicians called as witnesses. The Plaintiff called as witnesses two family physicians that treated Ms. Fisher, Dr. Koelink and Dr. Iriarte. The Plaintiff also called Dr. Mann, a chiropractor, who is the only medical witness to have treated Ms. Fisher before and after the three accidents. In addition, the Plaintiff called medical expert opinion evidence from both Drs. Watt and Adrian. The Defendant tendered the medical expert opinion evidence of Dr. Piper.

A. Dr. Koelink

- [25] Dr. Koelink was Ms. Fisher's general physician prior to the accident. Dr. Koelink described Ms. Fisher as being a tall, fit, trim and healthy looking patient who, prior to the accident, had no back or neck complaints. Generally, she had very few health issues prior to the accident. He saw her on July 8, 2004, four days after the car accident. He found her range of motion in both her neck and back to be somewhat restricted and he recorded that she had left hip tenderness.
- [26] Ms. Fisher did not complain of back or neck pain to Dr. Koelink prior to her visit to his practice on July 8, 2004.

B. Dr. Iriarte

- [27] Dr. Iriarte became Ms. Fisher's family physician in September 2005. Dr. Iriarte appeared to be a very thorough and caring family physician, exploring a variety of treatments and possible reasons for Ms. Fisher's discomfort, including referring her for an MRI. She noted Ms. Fisher's complaints of back and hip pain, and found these to be consistent with her physical examinations of Ms. Fisher on Ms. Fisher's various visits to her office. It is her opinion that Ms. Fisher remains vulnerable to aggravated symptoms with physical activity, but advocates that Ms. Fisher continue to maintain an active approach to her injuries with exercises.

C. Dr. Mann

- [28] Dr. Mann is a chiropractor who had just started his practice prior to Ms. Fisher becoming his patient in January 2002. Dr. Mann's clinical records indicate that Ms. Fisher had some prior history of back pain. For example, in the case history form prepared on her initial visit to him in January 2002, it is recorded that she had neck and upper back issues, and experienced pain which she described as in the range of 9-10 on a scale of 0 (no pain) to 10 (severe pain). However, this part of his intake form was never put to Ms. Fisher in cross-examination. Dr. Mann was a newly practicing chiropractor and given that this degree of pain is inconsistent with other evidence as to Ms. Fisher's health prior to the accidents, it is likely that he made an error in recording her pain history. The same form also indicates that the condition was becoming better.
- [29] Dr. Mann treated Ms. Fisher several times after the December 2003 car accident and several more times after the May 3, 2004 dog incident. Indeed, Ms. Fisher saw Dr. Mann sixteen times in the period after the dog incident, from May 27, 2004 to July 5, 2004. In my view, the number of treatments does not necessarily correlate directly to the seriousness of her injuries. The number of treatments after the May 3, 2004 dog incident was influenced by two things: first, there was WCB coverage due to the dog incident having occurred in the workplace and, second, Ms. Fisher wanted aggressive treatment in order to be able to return to her prior level of physical fitness as soon as possible.

- [30] In his chiropractor's report to WCB on May 27, 2004 following the dog incident, Dr. Mann reported his diagnosis that Ms. Fisher had suffered "severe lumbar sprain/strain (sacral)" and that, following the dog attack, she had experienced severe low back pain, stiffness, had 50% of the expected range of motion in her lower back and that her back was taut and tender on a scale of 4 out of 4 (severe). He recommended an aggressive course of treatment, including "IMS" (intramuscular stimulation), heat, ice, exercises and several chiropractic adjustments each week. In Dr. Mann's view, Ms. Fisher was not then capable of working her regular duties and he recommended light duties only. Ms. Fisher followed his recommended treatment.
- [31] Dr. Mann wrote a report to WCB on June 25, 2004 concluding that Ms. Fisher had "improved significantly". He reported that she was now fully capable of performing her prior work duties. He recommended a shorter and lighter course of treatment from before, this time to strengthen her muscles, including some further visits to the chiropractor, manipulation, low back stabilization exercises and stretching.
- [32] Dr. Mann's report that Ms. Fisher had "improved significantly" was not influenced by any knowledge of potential litigation. It is consistent with the evidence of Ms. Fisher as to her abilities prior to the July 3, 2004 accident and also the observations of her friends, Ms. McCallum and Mr. Patel. No medical evidence was tendered on behalf of Mr. Stone which contradicted the observations that Ms. Fisher was significantly improved prior to the July 3, 2004 accident.
- [33] The Plaintiff originally intended to tender an expert opinion from Dr. Mann, presumably in relation to the July 3, 2004 accident. However, the Defendant objected to the admissibility of the opinion evidence and the Plaintiff reconsidered. Dr. Mann's clinical records identify that Ms. Fisher's first visit to Dr. Mann after the July 2004 accident was on July 5, 2004. As this was the last scheduled visit in relation to her WCB claim, Dr. Mann did not assess her in relation to any new injuries and instead referred her to her physician, Dr. Koelink. She returned to consult with Dr. Mann on August 6, 2004 and on subsequent dates. His clinical records noted her decreased range of motion, lumbar and cervical pain, stiffness, and tautness and tenderness ranging from 3 on a scale of 4 (moderate to severe), later decreasing to 2 on a scale of 4 (moderate) with occasional flare-ups giving rise to tautness and tenderness of 3 out of 4.

D. Dr. Watt

- [34] Dr. Christopher Watt is an occupational and sports medicine physician. He provided a report dated March 27, 2007 and a supplemental report dated May 22, 2007 based on Ms. Fisher's history, medical records and his own assessment.
- [35] Dr. Watt noted that Ms. Fisher co-operated fully throughout the assessment and she did not evidence any exaggerated non-organic pain behaviour, nor did she over-emphasize her complaints. His assessment identified symptoms of fluctuating low and mid-back pain,

stiffness and weakness compatible with a diagnosis of post-traumatic myofascial pain syndrome and a differential diagnosis of mechanical low back pain. He also identified symptoms of left hip pain compatible with a diagnosis of soft tissue injury and a differential diagnosis of post-traumatic osteo-arthritis and/or labral tear. However, by the time of his second report dated May 22, 2007, he noted she had attended for an x-ray of her hip which showed no evidence of osteo-arthritis and he felt it was less likely that she had a tear of the acetabular labrum.

[36] Dr. Watt identified Ms. Fisher as having two pathological conditions:

- Posttraumatic Myofascial Pain Syndrome (defined as a regional soft tissue pain syndrome associated with the presence of a trigger point in the involved muscle); and
- Mechanical Low Back Pain.

[37] In his report dated March 27, 2007, Dr. Watt provided the following opinion:

Cause of Current Complaints and/or Impairment

1. It is my opinion that the first motor vehicle accident of December 17, 2003 directly caused her current complaints of mid and low back pain and that the second motor vehicle accident of July 3, 2004 aggravated her symptoms.
2. It is my opinion that the second motor vehicle accident directly caused her current complaints of left hip pain.

[38] In Dr. Watt's supplementary report dated May 22, 2007, he provided the following additional opinions:

It is my opinion that she is probably now at maximum medical improvement. As a direct result of the motor vehicle accidents (especially the second motor vehicle accident of July 3, 2004) it is my opinion that she now has a permanent impairment of her mid back and low back. Although I think she is going to experience episodic acute exacerbation of back pain I do not believe that this will prove to be a degenerative condition.

Therefore it is my opinion that her competitive employability as a police officer has been adversely affected as a direct result of these accidents. As a result of her back injury she is going to experience limitations with heavy or repetitive lifting and bending. I believe she is fit to perform regular duties as a police officer. However, I think she is going to continue to be limited in her ability to perform certain types of overtime work and specifically any [sic] require repetitive or heavy lifting (such as removing marijuana plants from grow-ops).

E. Dr. Adrian

[39] The Plaintiff also consulted Dr. Mark Adrian, a specialist in physical medicine and rehabilitation. Dr. Adrian assessed Ms. Fisher at the request of Plaintiff's counsel on February 5, 2007 and produced a report of the same date. His assessment took one and one-half to two hours and included a review of Ms. Fisher's medical history as she described it to him, a review of her medical records and his own physical assessment and observations of her.

[40] In his physical examination of Ms. Fisher, Dr. Adrian noted the following:

Spine:

Ms. Fisher has neutral alignment involving her neck, thoracic and lumbar spine.

Ms. Fisher has full range of motion of the neck. During end range extension and rotation, she reports pain involving the base of her neck and mid back area (between the shoulder blades).

There is tenderness to palpation, involving the mid and lower cervical spinal segments, and over the base of the neck.

Ms. Fisher has full and pain-free range of motion of the thoracic spine.

Ms. Fisher has full range of motion of the lumbar spine. She reports pain symptoms involving the low back area at end range flexion and extension. There is tenderness involving the lower three lumbar spinal segments, and over the region of the left sacroiliac joint.

[41] Dr. Adrian also noted that Ms. Fisher had full and pain-free range of motion of the shoulders and shoulder girdles, elbows, wrists and digits. She also had full and pain-free range of motion of the hips, knees and ankles with the exception of mild discomfort over the lateral hip at the end range left hip internal rotation.

[42] Dr. Adrian diagnosed Ms. Fisher as having mechanical low back pain and mechanical neck pain. In discussing causation, it was his opinion that Ms. Fisher probably suffered an injury to the musculoskeletal structures of the lumbar spine as a result of the first accident. Then, in his opinion Ms. Fisher suffered a temporary exacerbation of her mechanical low back pain symptoms that had been present since the first motor vehicle accident and also as a result of the altercation with the dog. According to Dr. Adrian, this likely rendered her low back vulnerable to re-injury.

[43] Dr. Adrian stated that in his opinion Ms. Fisher suffered worsening of her lower back pain symptoms following the second car accident. It was also his opinion that she probably suffered an injury to the musculoskeletal structures of the lumbar spine during the second car accident which resulted in a permanent aggravation of the mechanical lower back pain symptoms that were present as a result of the first accident. Thus, in his opinion her current low back pain symptoms are causally related to both motor vehicle accidents. As for the numbness in Ms. Fisher's left leg, Dr. Adrian was of the opinion that this was likely caused

by her police belt compressing the lateral cutaneous femoral nerve as it exits the pelvis and that it is not likely related to the car accidents.

- [44] Dr. Adrian also felt that Ms. Fisher's back pain symptoms were referred pain from the painful and injured structures involving her cervical spine, also caused by the first and second motor vehicle accidents.
- [45] Dr. Adrian is of the opinion that Ms. Fisher's current physical limitations will continue indefinitely. She is likely to continue to experience difficulty performing activities that require prolonged standing or sitting. She will probably continue to experience difficulty performing activities requiring heavy or repetitive lifting, impact activities such as running, forceful pushing or pulling and prolonged carrying. From time to time she is likely to have flare-ups of her mechanical neck and low back pain symptoms which will require temporary modification of her work activities.

F. Dr. Piper

- [46] Dr. Piper is an orthopaedic surgeon practicing in that field since 1974. He examined Ms. Fisher on behalf of the Defendant on May 17, 2007 and provided a report dated the same date together with a supplementary report dated May 30, 2007. He interviewed Ms. Fisher, reviewed her medical records and conducted a physical examination of her.
- [47] Dr. Piper noted in his May 17, 2007 report that Ms. Fisher had a moderately limited range of motion in her back compared to what one would expect for a normal woman of her age. The range of motion in her hips was normal, although she complained of discomfort at the extremes of flexion and rotation on the left side. She had 70 degrees of straight leg-raising on the right and 65 on the left. She had a mild paravertebral muscle spasm in the lower cervical spine region and a moderate degree of muscle spasm in the trapezius/levator scapulae region, particularly in the left side.
- [48] Dr. Piper also wondered whether her thigh numbness might be meralgia paraesthetica, a condition where the lateral cutaneous nerve of the thigh can be irritated when it passes over the brim of the pelvis. He thought there was a possibility this was caused by her duty belt and that it might be resolved if there was a modification to her belt. He agreed in cross-examination that a common cause of this condition is seatbelt injury from a motor vehicle accident. Dr. Piper further agreed that, given Ms. Fisher had not worn a duty belt before the accident and complained of numbness after the accident, the accident could be a possible cause of the numbness.
- [49] Dr. Piper concluded in his May 17, 2007 report that Ms. Fisher had a resolving cervical sprain. He stated that he believed the complaints were minimal, that they would resolve with the passage of time and a continuing exercise program.

- [50] The notion of the complaints resolving with time and exercise was challenged in the cross-examination of Dr. Piper. Dr. Piper agreed that he noted Ms. Fisher was already exercising when he saw her and her excellent physical condition was contributing to her recovery. He agreed that the chance of spontaneous recovery is less with the passage of time. He also agreed that his examination of Ms. Fisher took place three years after the accident, this trial taking place approximately one year later and, therefore, if Ms. Fisher was still suffering from the same problems there would be less likelihood of these problems resolving themselves in the future.

G. Comments on Medical Evidence

- [51] I conclude that it is now unlikely that Ms. Fisher will recover completely from her injuries. She has recovered considerably due to her dedication to getting better through fitness and she copes well, not letting the injuries impact upon her daily life for the most part. However, she is likely to have flare-ups of her symptoms from time to time which may require her to temporarily modify her work by seeking out less overtime opportunities.
- [52] Proof of the type of injuries suffered by Ms. Fisher often turns, to some degree, on the credibility of the Plaintiff as each of the medical professionals must rely in part on the patient's self-reported history, as must the court. Naturally, this can lead to attempts to challenge that credibility and to defence arguments which seek to interpret evidence in a way that suggests fundamental inconsistencies in the Plaintiff's story. I find that Ms. Fisher was a straightforward witness. Her evidence as to her symptoms was consistent with her conduct, the observations of friends and co-workers, and also the objective clinical tests and observations of the medical witnesses. Any points on which the Defendant focussed to suggest inconsistency in her evidence was, in my view, reasonably explained by Ms. Fisher.

CAUSATION

- [53] The legal test for causation of the injuries at issue must be considered as a distinct issue, separate from the issue of assessment of damages. The applicable test for causation in this case is the "but for" test, as set out by the Supreme Court of Canada in *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 14; and in *Resurfice Corp v. Hanke*, 2007 SCC 7, [2007] 1 S.C.R. 333 at para. 21. I find that the Plaintiff has shown on a balance of probabilities that, but for the second accident, the back and hip injuries of which Ms. Fisher now complains would not have occurred.
- [54] In reaching this conclusion on causation, I have considered the totality of the evidence, including the medical opinion evidence of the Plaintiff's experts, Dr. Watt and Dr. Adrian, who both attributed the cause of some of Ms. Fisher's current complaints to the two motor vehicle accidents, i.e. the December 2003 accident and the July 2004 accident. However, what medical experts attribute as "cause" may not be the same as the legal test for cause, especially in a case where there are multiple accidents and where earlier accidents created a vulnerability that manifested after the later accident. Medical professionals do not

necessarily distinguish between causation, the assessment of damages and what the legal authorities have come to describe as the "crumbling skull" or the "thin skull": *Athey v. Leonati*, *supra*, at paras. 34-36.

- [55] If the first accident made Ms. Fisher vulnerable to injury, but would not have led to her current permanent injuries but for the second accident, then at law only the second accident is the "cause" of the injuries. This is what I have concluded. I find that the above comments by the medical experts, in the context of the whole of the evidence, support the conclusion that Ms. Fisher was a "thin skull". Since a tortfeasor must take his victim as he finds her, the fact that Ms. Fisher was vulnerable due to her prior accidents does not displace the finding that the July 2004 accident caused her injuries.
- [56] The medical experts are agreed that Ms. Fisher had a susceptibility to injury prior to the July 2004 accident. However, no medical expert offered the opinion that her prior accidents created a material risk that Ms. Fisher would suffer the permanent injuries and physical limitations of which she now complains, even if the second accident had not occurred. Rather, I am persuaded on the evidence that Ms. Fisher had substantially recovered from any prior injuries and physical limitations by the date of the July 2004 accident.
- [57] In my view, the totality of the medical evidence and the observations of those who knew Ms. Fisher throughout the period of time before and after all three accidents does not support a conclusion that she had a pre-existing condition that would detrimentally affect her in the future, regardless of Mr. Stone's negligence.
- [58] To put it another way, I am satisfied on consideration of all the medical evidence that the July 2004 accident caused Ms. Fisher to suffer injuries to her back and hip which will likely continue to plague her to some degree in the future and that, but for the July 2004 accident, she would not have suffered these injuries. As such, Mr. Stone is liable to compensate Ms. Fisher for those injuries.
- [59] In reaching my conclusion on causation, I have considered the evidence regarding Ms. Fisher's fall down some stairs after the July 2004 accident. There is insufficient evidence for me to conclude that the fall in any way contributed to her injuries. I find that the fall was caused by a spasm or muscle weakness as a direct result of the July 2004 accident and, in any event, it would not be an intervening cause of injury.

ASSESSMENT OF DAMAGES

- [60] This Court's task in considering damages is to award damages which reflect the difference between Ms. Fisher's pre-July 3, 2004 status and her post-July 3, 2004 position. If her pre-July 3, 2004 status was such that she had a measurable risk of being detrimentally affected in the future by her injuries suffered from the prior accidents, I should take this contingency into account in assessing damages: *Athey v. Leonati*, *supra*, at paras. 27 and 35; *Kumar v. Canada Post Corp.*, 2006 BCSC 54, at paras. 60-62 and 69. Ms. Fisher is not entitled in her claim against Mr. Stone to be compensated for any condition or measurable risk existing prior to

the July 2004 accident.

CONTINGENCIES

- [61] There was a measurable risk prior to the July 2004 accident that Ms. Fisher would suffer other injuries which would limit her ability to work overtime in the future. Her job is very physically demanding. She suffered a groin injury in training and also an ankle injury during her first year as a police officer which required her to take time off work. She was head-butted on one occasion, although this did not require her to take time off work. There was a measurable risk that Ms. Fisher's police belt would have eventually caused Ms. Fisher to have some thigh numbness, which could affect her ability to work as much overtime as she would otherwise wish to work.
- [62] Because Ms. Fisher had a vulnerability to back injury due to her earlier accidents, there was a measurable risk prior to the July 2004 accident that if Ms. Fisher was to suffer a work injury in her position as a police officer the effects would be serious. On the other hand, Ms. Fisher is stoic about any physical injury, has proven dedication to attempt rehabilitation through exercise and has a strong work ethic.
- [63] Accordingly, I will discount her claim for non-pecuniary damages and loss of earning capacity by 25% for the likelihood there would have been some restrictions in her future abilities, regardless of the July 2004 accident.

NON-PECUNIARY DAMAGES

- [64] Ms. Fisher is naturally competitive and would normally take pleasure in the feeling that she is excelling at work and pulling her weight equally alongside her colleagues. She would ordinarily pursue physically demanding recreational activities. I find that due to her injuries caused by the July 2004 accident she is unable to excel physically in the way she would otherwise be able to and, consequently, she has suffered some loss of enjoyment and satisfaction from her work and leisure activities. Nevertheless, the change in her activities prior to and after the accident is not of the same magnitude as that suffered by the Plaintiff in *Wery v. Toulouse et al*, 2006 BCSC 823, a case cited by Ms. Fisher's counsel.
- [65] In *Wery*, supra, \$45,000 was awarded for non-pecuniary damages. Not only were the injuries of a greater magnitude in that case, but also a significant factor was the post-accident restriction in the Plaintiff's ability to enjoy activities with her children. In comparison, Ms. Fisher's boyfriend testified that he and Ms. Fisher do not hike any more, but he explained that the reason for this is that he does not like to hike. Nevertheless, I accept Mr. Patel and Ms. Fisher's evidence that Ms. Fisher is unable to be the same companion she used to be in terms of jogging with Mr. Patel and participating to the same extent as she used to in other outdoor and gym activities. I assess non-pecuniary damages at \$30,000, less a 25% discount for contingencies, with the result being \$22,500.

LOSS OF EARNING CAPACITY

- [66] An award of damages for loss of earning capacity is based on the notion that a Plaintiff's earning capacity is a capital asset and that any impairment of that asset by a tortfeasor entitles the Plaintiff to compensation: *Rosvold v. Dunlop*, 2001 BCCA 1, 84 B.C.L.R. (3d) 158 at paras. 8-11. The standard of proof to be applied when considering future events is that of real and substantial possibility, not the balance of probabilities, with the possibilities to be given weight according to the possibility they would have happened: *Athey v. Leonati*, *supra*, at para. 27.
- [67] Ms. Fisher testified that she felt she could perform her regular duties as a police officer, but that her injuries caused by the July 2004 accident have limited the overtime opportunities she would have otherwise taken. Police officers work four days on and then have four days off. They supplement their incomes by working overtime on their days off. Ms. Fisher's evidence is that the physical demands of her regular police duties are such that she needs her days off to recoup so that she can be physically fit and ready for her next regular shift. If she took all the overtime opportunities she is interested in, she would likely suffer a flare-up of her pain and attendant limitations of functional capacity which could impact her ability to report for regular duties. As well, some overtime opportunities are too physically demanding for her, such as dismantling a marijuana grow-operation which requires considerable repetitive heavy lifting.
- [68] I accept the medical evidence that Ms. Fisher's injuries are permanent and thus will cause some restrictions on her ability to work overtime. Ms. Fisher has been rendered less capable of earning income as a result of her injuries and she has lost the ability to take advantage of all income earning opportunities that would have been available to her had she not been injured. These are factors the court can take into account in assessing loss of earning capacity: *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 (S.C.), as cited in *Rosvold v. Dunlop*, *supra*. I therefore find there is a substantial possibility that the injuries Ms. Fisher suffered as a result of the July 2004 accident will affect her future earning capacity.
- [69] The quantum of damages for loss of earning capacity is an assessment, not a precise mathematical calculation: *Rosvold v. Dunlop*, *supra*, citing *Mulholland (Guardian ad litem of) v. Riley Estate* (1995), 12 B.C.L.R. (3d) 248 (C.A.).
- [70] In some cases, a useful starting point may be the present value of the difference between the plaintiff's likely future earnings had the accident in question not occurred and her likely future earnings given her injuries caused by the accident: *Rosvold v. Dunlop*, *supra*.
- [71] There was evidence called from two of Ms. Fisher's colleagues as to the type of overtime opportunities and the amount of overtime available to a patrol member and, also, to the range of overtime pay that some members of the police force earn annually.

- [72] Sgt. Rod Arruda of the Port Moody Police Department is Ms. Fisher's direct superior to whom she reports. He explained the different rankings of constables from probationary constables to fourth class, third class, second class and first class. The overtime rate for each class varies with a first class constable earning significantly more than a probationary constable, both in base salary and overtime pay. The Port Moody Police Department has four patrol teams or squads. Sgt. Arruda is the sergeant of one squad and a typical squad has one sergeant and four constables.
- [73] Sgt. Arruda explained that there are two types of overtime for constables. The first type is described as an extended tour of duty where the officer has to work one to three hours extra to finish an assignment that arose near the end of her regular shift. For extended tour of duty overtime, officers are paid at time and a-half for the first two hours and at double time after that.
- [74] The other type of overtime is described as a "call-out". This type of overtime occurs when an officer is off duty and called into work either to fill in for someone else's shift or because of some special event, such as a major crime occurrence, a movie shoot, dismantling a marijuana grow operation or an event when the police department considers they need extra manpower such as Halloween evening. For call-out overtime, the officer is paid double time. Call-out overtime tends to be full shifts or longer.
- [75] Officers can volunteer to do more call-out overtime if they wish. When Sgt. Arruda was a young officer supporting a young family, he tried to work as much overtime as possible. As the years progressed, he sought less overtime.
- [76] Sgt. Arruda gave examples of the value of overtime worked by individuals in his patrol, ranging from \$10,000 to \$15,000 to \$20,000 in 2007. It was not made clear whether any of these officers were earning similar rates of pay as Ms. Fisher or were more senior. However, the officer who earned approximately \$20,000 in 2007 due to overtime was a senior member with a considerably higher pay level. His overtime rate could be twice as much as that of a junior member of the force.
- [77] Sgt. Arruda testified that when he was a constable he could earn from \$5,000 a year in overtime to \$15,000, or even higher. Sgt. Arruda did not testify as to what in his experience is the lowest amount of overtime earned by some patrol members. His evidence did not educate me as to what would be the average stream of overtime earnings earned by a police officer from the beginning to the end of her career.
- [78] Under cross-examination by Ms. Tsang for the Defendant, Sgt. Arruda estimated he has approximately 20 to 25 call-out opportunities per year for his four squad members. If the number of call-outs per year was 25 for a four member squad and it was divided up on a per person basis, it would be just over six call-outs per member (6.25 to be precise). However, as noted, some officers seek out more overtime than others. As well, a patrol member is not restricted to receiving call-outs from her sergeant only, but rather call-out opportunities can be circulated amongst all patrol members by e-mail. Patrol members can then apply for that

particular call-out.

- [79] Cstl. Al Bewcyk also testified concerning his experience with overtime. Cstl. Bewcyk has worked approximately eight years with the Port Moody Police Department. Before that he worked with the RCMP for just over twenty-six years. He works in general patrol. He explained that he worked 20 call-outs in 2007: 15 to support other patrols when they were short staffed, 4 for traffic duties with the Integrated Road Safety Unit ("IRSU") and one as a training day. As well, in 2006 he had 15 call-outs: 8 to support patrol watches, 3 for traffic duties, 3 for movie shoots and one extra training day. Cstl. Bewcyk did not testify as to whether his amount of overtime is typical but, based on the evidence of Sgt. Arruda, it is likely that Cstl. Bewcyk works considerably more overtime than the average patrol member.
- [80] Ms. Fisher worked at least 6 call-out overtime opportunities in 2007. This was so even though she suffered an injury on September 11, 2007 when she sprained her ankle while chasing a suspect, which injury required her to take some time off work. There is no evidence to suggest she did not fulfill all overtime opportunities with respect to extended hours of duty overtime.
- [81] Sgt. Arruda did not report any concerns about Ms. Fisher's ability to perform her regular duties. He said she fulfills all of her duties and that she has a great work ethic. She is a positive person who sees the glass as half-full and she conducts herself professionally and with integrity. Sgt. Arruda has given Ms. Fisher a good appraisal and, indeed, reported that she appeared to be physically fit and was maintaining a regular fitness regime.
- [82] Ms. Fisher earned \$2,179.77 in 2007 as overtime pay. This means her 6 occasions of call-out overtime earned her something less than this as this figure included extended duty overtime. As noted above, her squad leader estimated there are approximately 25 call-outs which he makes directly available to the 4 members of his patrol squad. There may also be other call-outs available to all the Port Moody police officers. Some call-outs are available to specialized members of the police force who hold particular qualifications. I must take into account the fact that Ms. Fisher would not necessarily have chosen to compete for, or been qualified for, all call-out overtime spots available even if she had not been injured in the July 2004 accident. I also consider that Ms. Fisher's desire to take overtime opportunities might diminish naturally as she gains seniority and is paid a higher base salary, just as it did for her supervisor Sgt. Arruda.
- [83] No evidence was called as to whether an average police officer who joins the force at the age when Ms. Fisher joined the force works to age 65 or retires earlier.
- [84] I must take into account the fact that Ms. Fisher's income for overtime would have risen in the future as Ms. Fisher progresses through the ranks. As well, Ms. Fisher, with her work ethic, ambition and the high regard in which she is held by her superiors is likely to obtain additional qualifications and to pursue other opportunities to work overtime in the future which are less physically strenuous.

- [85] Mr. Robert Carson, an economist called as a witness by the Plaintiff, prepared a mathematical table to provide the court with multipliers to calculate the present value of annual losses in earnings from the trial date to Ms. Fisher's 65th birthday using the annual required discount rate of 2.5%. An estimate of \$3,000 per year until age 65, as the difference between Ms. Fisher's likely future earnings if the July 2004 accident had not happened and her likely future earnings with her injuries, equates to a present value of \$69,366.00. Then, taking account of a 25% risk that Ms. Fisher would suffer other injuries which, combined with her pre-existing vulnerability to back injury, would reduce Ms. Fisher's future earning capacity regardless of the July 2004 accident, the net result would be \$52,024.50. I consider this as one approach to a reasonable estimate of loss of future earning capacity.
- [86] As noted above, the analysis of the present value of projected future earnings had the accident not occurred, less the projected future earnings in light of the accident, is a starting point only.
- [87] Another approach to assigning a value to loss of earning capacity is to consider the plaintiff's annual income and to assess the loss as some factor of that income: *Pallos v. Insurance Corporation of British Columbia* (1995), 100 B.C.L.R. (2d) 260 (S.C.). In this regard, a 4th class constable earns approximately \$52,000 per year and a 1st class constable earns approximately \$70,000 per year.
- [88] Considering all the factors and the different approaches to estimating loss of future earning capacity, and taking into account negative contingencies as mentioned above, I assess Ms. Fisher's loss of earning capacity at \$52,000.

PAST INCOME LOSS

- [89] Ms. Fisher claims past income loss for some sick days she took in 2007 when her hip became particularly restricted and painful and, also, because she turned down some overtime opportunities due to her physical limitations resulting from her injuries.
- [90] Ms. Fisher did not directly suffer any loss of wages due to her sick days because she received sick leave benefits. However, her collective agreement requires her to reimburse her employer for these benefits where a claim is made against a third party to recover the benefits. She is, therefore, entitled to this claim in the amount of \$2,112.60: *Frers v. De Moulin*, 2002 BCSC 408, 1 B.C.L.R. (4th) 131.
- [91] As well, Ms. Fisher claims that she turned down overtime opportunities from the date of her employment as a police officer to the date of trial due to her injuries suffered from the July 2004 accident. I assess Ms. Fisher's past income loss in this regard at \$3,000.00. Her total past income loss is, therefore, \$5,112.60.

COST OF FUTURE CARE

- [92] Ms. Fisher is entitled to be compensated for all expenses reasonably necessary for her future medical care: see *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.). In this regard, some of the medical professionals who assessed Ms. Fisher initially recommended massage and physiotherapy. Ms. Fisher tried these therapies, but these did not assist her and she consequently ceased taking them. The physicians supported her in this decision and the Defendant did not argue that Ms. Fisher failed to mitigate by not pursuing these therapies.
- [93] Therefore, I reject the Plaintiff's argument that Ms. Fisher is entitled to damages for future massage or physiotherapy expenses.
- [94] Ms. Fisher also received a recommendation to visit a kinesiologist, but she addressed this by her visits to Dr. Mann who has a kinesiology background. I am not persuaded that future visits to a kinesiologist are reasonably necessary. As well, by all accounts Ms. Fisher copes well with her injuries and I do not believe she requires psychological counselling.
- [95] Ms. Fisher's physical limitations are going to be occasional, whenever she suffers from flare-ups of her injuries, rather than constant. I do not accept that the Plaintiff requires any other future care support outlined in the report prepared by Theresa Wong, an occupational therapist, other than Advil. The yearly cost of Advil is estimated at \$100.00. Mr. Carson has provided a table to assist the court in calculating the net present value of future annual care costs using a discount rate of 3.5% and survival probabilities for a female of Ms. Fisher's age. The net present value of \$100 per year using the discount rate would amount to \$2,391, which is the amount of damages I assess for cost of future care.

SPECIAL DAMAGES

- [96] The Plaintiff claims special damages for expenses incurred prior to trial in the amount of \$5,227.93 related to physiotherapy, massage and chiropractor fees, IMS treatments, two MRI scans and anti-inflammatory medication. I accept that these expenses were reasonably incurred as a result of Ms. Fisher's injuries sustained in the July 2004 accident. I award this amount in special damages together with pre-judgment interest.

TOTAL DAMAGES

- [97] In conclusion, I award Ms. Fisher total damages of \$87,231.53 as follows:
1. General damages of \$22,500.00
 2. Damages for past loss of income of \$5,112.60;
 3. Damages for loss of future earning capacity of \$52,000;
 4. Damages for cost of future care of \$2,391.00; and
 5. Special damages of \$5,227.93, together with prejudgment interest on the special damages.

[98] Ms. Fisher is entitled to costs on Scale 3, subject to any exchanged offers to settle which impact the issue of costs.

Madam Justice Susan A. Griffin

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