

CANADA / JUDGMENT

Forster v. Kidd

2020 BCSC 220

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Supreme Court of British Columbia

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2020 BCSC 220 Forster v. Kidd

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Forster v. Kidd,

2020 BCSC 220

Date: 20200219

Docket: M177219

Registry: Vancouver

Between:

Linda Forster

Plaintiff

And

Nicole Deborah Popper, John Watt Kidd

and City of Vancouver

Defendants

Before: The Honourable Madam Justice D. MacDonald

Reasons for Judgment

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Place and Date of Trial/Hearing:

Vancouver, BC

September 3-6, 12-13, 2019

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Vancouver, BC

February 19, 2020

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Introduction

- [1] The plaintiff, Linda Forster, seeks damages for injuries from a motor vehicle collision that occurred on April 30, 2016 at approximately 3:30 p.m. (the "Accident").
- [2] The Accident occurred on Main Street in Vancouver, BC. Ms. Forster was a front seat passenger in an unmarked police vehicle driven by Constable Ian Kaptein. As their vehicle proceeded northbound, the defendant, Nicole Popper, turned left across their path and the two vehicles collided.
- [3] Shortly after the Accident, Ms. Forster complained of tenderness in her neck and the sensation of pins and needles extending up her neck and into her face. She was transported by ambulance to Vancouver General Hospital ("VGH"). At the hospital she also complained of a burning sensation in both her hands and forearms.
- [4] Over the first six months following the Accident, the pain in Ms. Forster's hands, forearms, and face improved. However, today, she alleges she continues to have symptoms in her mouth and hands. Ms. Forster also testified she experiences some anxiety as a result of the Accident and suffers from mood issues.
- [5] The defendants admit liability for the Accident, but challenge the nature, extent, and duration of Ms. Forster's injuries and the amount of damages that flow from the Accident.

Issues

- [6] This Court must decide the following:
 - a) What injuries were caused by the Accident?
 - b) What damages are Ms. Forster entitled to as a result of the Accident?

Lay Evidence

- [7] The following is a summary of the evidence of each lay witness who testified at trial. I set out their evidence in a general way, but leave certain details for discussion under the issues I address. Although I do not detail all aspects of the evidence, I have considered the totality of the evidence in reaching my conclusions.

Linda Forster

Pre-Accident

- [8] Ms. Forster testified she was born in 1962 and was 56 years old at the time of trial. She lives in Coquitlam, BC with her husband. They have been married for 26 years and have no children.

- [9] Ms. Forster is a registered nurse with Vancouver Coastal Health. She studied psychiatric nursing at Douglas College in 1987. She obtained a general nursing diploma in 1988. She started working in psychiatry at the UBC Hospital in 1988, where she cared for people with acute mental illnesses. She worked there for 14 or 15 years.
- [10] In 2004, Ms. Forster began working in the "Car 87 program". There were two components to the Car 87 program. One component was the crisis line. She worked in an office and took calls from the community regarding individuals with mental health concerns. When an individual in crisis was identified, she reviewed their computer files and determined what kind of care was required, including whether the person should be referred to the Car 87 program. She also reviewed files of individuals who had contact with the police overnight to determine if there was a mental health component.
- [11] The second component of the Car 87 program was the car component. This is where a psychiatric nurse and a police officer would go into the community and make contact with individuals with mental health issues. She testified the learning curve was very steep. She had to learn how to assist and restrain people, and how to use handcuffs and police radios. She also had to learn about the mechanisms in police vehicles, such as the intricacies of lights and sirens.
- [12] In terms of referrals, she and the police officer would meet people at the request of mental health teams, doctors, clients, and families. Some of those individuals were not happy to see them and could get quite agitated, become medically compromised, and act in very unpredictable ways. They could be combative. She and the officer would determine whether to apprehend the individual and take them to the hospital to have a doctor assess them, or whether the individual could stay in the community.
- [13] Ms. Forster agreed in cross-examination that restraining a client was primarily the police officer's duty. She qualified this by stating the nurses would call for backup, but in the meantime there was certainly an expectation the nurse would assist. That was part of the expectation of a partnership.
- [14] Ms. Forster testified that there could be a physical encounter on any call they went out to. She could not say how often violence actually happened. She testified that it could be infrequent but if there was a history of violence, they would call for cover before going out to the call.
- [15] Ms. Forster testified she liked the job. There was a lot of responsibility and autonomy. She liked working with the police, seeing people in their own homes, and getting a better viewpoint of their lives. She really liked the idea of helping people.

- [16] Ms. Forster testified that just prior to the Accident, the job was changed by Vancouver Coastal Health. The administration laid off everyone who worked there and rehired people to work just in the car portion of the program. Ms. Forster was rehired, but her four day-time shifts were changed to two day shifts and two evening shifts. The evening shift was from 1:00 p.m. to midnight.
- [17] Ms. Forster testified the new changes simplified the job as she is now only working in the car portion of the program. She no longer had office duties, although she continued to go into the office to write reports at the end of the day.
- [18] Ms. Forster testified that at the time of the Accident, she was registered in a deferred salary leave program. She started this in 2014. Her employer reduced her pay by 20%, which allowed her to take six months off every third year with pay. On her last leave, she went to Bangladesh to teach a psychiatric nursing component in a general nursing program. She was there for almost four months and then did some travelling in the region. This was an unpaid volunteer position.
- [19] At the time of the Accident, Ms. Forster had plans to work as a psychiatric nurse in Nunavut during a paid leave. It was a paid position. She had been hired for the position prior to the Accident and it was expected to commence in the summer of 2016. Unfortunately, due to the Accident, Ms. Forster has never taken the position in Nunavut.
- [20] Ms. Forster testified regarding her physical activities prior to the Accident. She liked to run, surf, paddle board, read, hike, backpack, knit, and travel. She took up surfing in the 1990s and originally surfed once or twice a year. Then she and her husband bought a place in Ucluelet, B.C. and they started surfing a lot. She also surfed with her girlfriends, sometimes twice per day. They would surf for two to three hours at a time.
- [21] Ms. Forster has run about 15 road marathons. More recently she started trail running because it is more scenic and more endurable. She switched to predominantly trail running in about 2010. The last road marathon she did was in 2014 at Huntington Beach.
- [22] Ms. Forster testified she ran a couple races per year prior to the Accident. For example, she ran in the Diez Vista 50 km Trail Run and the Chuckanut 50km Run, one in the spring and one in the fall. She had entered a 50 km run in Utah at the beginning of April 2016. It was a trail run that she did not finish due to adverse weather conditions.
- [23] She agreed in cross-examination her recreational activities are high-intensity.

The Accident

- [24] Ms. Forster testified regarding the Accident. She was travelling northbound on Main Street, crossing 51st Avenue, in an unmarked police vehicle with Constable Kaptein. They were transporting a client to VGH. Ms. Forster was in the front passenger seat wearing a lap and shoulder belt. The vehicle had a headrest which was adjusted for her size.

- [25] The day was sunny and dry. Ms. Forster had no warning of the Accident because she was on the phone with the emergency department at VGH regarding the client they were bringing in. Suddenly there was a large bump, and the vehicle was pushed sideways and on to the curb. She was pushed forward and sideways into the door of the vehicle. After she got her bearings, she first worried about the client in the back seat. She phoned the hospital and her workplace to let them know there had been an accident.
- [26] The police and ambulance arrived. She initially thought she was okay. However, within a few minutes, she noticed a pain in her neck and a sensation of pins and needles into her scalp, mouth, and arms. The ambulance attendants suggested she go to the hospital. They put a collar on her neck, put her on a spinal board, and took her to the emergency room at VGH.
- [27] The staff attended to her very quickly. She was overwhelmed and a bit stiff, although her primary concern was the tingling in her hands and mouth. She was assessed by Dr. Kim. Dr. Kim diagnosed her with soft tissue damage and said she could go home. She was told to take ibuprofen if needed. She went back to work to finish her report and then another Car 87 program nurse drove her home in her car.

Injuries

- [28] Ms. Forster testified she had neck pain, headaches, vertigo, tinnitus, pain in her collarbone, and bruising in her hip area. She also had pins and needles and a burning sensation on her cheeks and mouth following the Accident. Ms. Forster testified her headaches, bruising, pain in her collarbone, and tinnitus all resolved within a month or two. Her shoulder pain resolved in about six weeks. Her neck is sometimes tender but this is now intermittent.
- [29] Ms. Forster testified she continues to have the sensation in her mouth. There is some fluctuation but usually the left side of her tongue has the sensation. It is about the size of a nickel or quarter. It feels like she has Listerine in her mouth or Novocain freezing from a dentist as it starts to wear off. At times this feeling goes to the back of her throat and sometimes into her lip and left cheek. At times she feels like she has been stung by bees. Drinking fizzy drinks and eating popsicles helps to alleviate the sensation.
- [30] Ms. Forster testified the back of her hands feel like they are badly sunburned. Her palms have an almost electrical kind of pain that fluctuates. Sometimes it feels like a burning poker whereas, at other times, it feels like a frozen hand heating up. It goes from her little fingers to her wrists. She feels the sensation in her hands and it goes into her forearms.
- [31] Ms. Forster's most marked improvement was in the first six months after the Accident. She improved a bit more over the next six months but, since then, there has been very little change. She has fewer flare ups than in the first six months and fewer sensations in her forearms. Her main concern today is the burning and tingling sensation in her hands, as well as some anxiety.

- [32] Using her hands at desk level or higher increases Ms. Forster's symptoms. Activities such as driving and chopping food, or where weight resistance is involved, also increase her symptoms. Ms. Forster found she was sensitive to touch after the Accident. She stopped wearing her wedding ring and other rings.

Post-Accident Physical and Mental Abilities

- [33] After the Accident, Ms. Forster testified the largest change is the constant sensation in her hands and face. This limits her spontaneity; she has to plan everything and must consider the potential outcomes. She limits her activities because often the consequence will not be worth it.
- [34] Ms. Forster testified regarding some of the modifications she made after the Accident. She buys pre-packaged vegetables and salads and simplifies her cooking. She cooks big batches and freezes the remainder for bad days. Before the Accident, her meals were more intricate; she enjoyed baking and making desserts. Today, she can no longer roll pastry because it is too labour intensive.
- [35] In terms of cleaning, Ms. Forster tends to pace herself and Mr. Forster does the vacuuming and washes the floors. Ms. Forster divides up her cleaning tasks rather than doing them all at once. They hired a person to clean their recreational property in Ucluelet. If they do not need to clean, the extra time allows her to enjoy the activities that she likes to do.
- [36] Ms. Forster still surfs but it aggravates her symptoms and she cannot go into the water for as long as she used to. She goes in for about an hour and must be selective regarding the wave conditions. She cannot carry her surf board and she knows that she will pay for surfing afterwards. She can sometimes surf two days in a row and then needs a break. After surfing, she may spend a day on the couch or in bed with an ice pack and an audio book.
- [37] Ms. Forster continues to run more times per week but less distance than before the Accident. Her treatment team initially said she should not do high impact activities; once she got the okay she began running again. She testified she cannot do long trail runs anymore as they are too technical.
- [38] Ms. Forster testified she has not done any backpacking since the Accident. She has done some day hiking but she cannot use hiking poles due to her hands.
- [39] Ms. Forster still travels, but her travel consists of staying in hotels and going to places that are less remote. Her travel is more comfortable but less adventurous than before the Accident. Ms. Forster testified she went to the Galápagos Islands with a friend and surfed a couple of times but found it difficult because the conditions were rough. She admitted in cross-examination they had to carry their surfboards for a long time so she determined that it was not worth it for her to surf. As a result she mostly hiked and snorkelled.

- [40] Ms. Forster testified she does not knit anymore because it aggravates her symptoms. She cannot knit for long enough to get anything accomplished. Reading is also hard because she can only hold a book for approximately 30 minutes. She does have an e-reader and she listens to audio books.
- [41] In terms of her mood, Ms. Forster testified her sleep was not great before the Accident, but now it is even harder to get back to sleep. She used sleep medication prior to the Accident. Ms. Forster testified her post-Accident mood is lower overall, and she is more irritable. She agreed in cross-examination her passenger anxiety is not significant.
- [42] Ms. Forster testified she has lost her sense of humour about things. She does not enjoy things the way she did in the past. She is coming to terms with her new reality. She is not hopeful that her situation will improve.
- [43] Ms. Forster agreed in cross-examination that she had seen Dr. Kim, a chiropractor, a number of times pre-Accident. She stated that she often had stiffness or straining due to training and saw Dr. Kim to ensure that she was moving as smoothly as possible.

Ability to Return to Work

- [44] Ms. Forster testified that prior to the Accident she planned to work until 2021, at which point she was eligible for an unreduced pension. She planned to retire at that time but to continue working part-time in a contract position such as in Nunavut. Ms. Forster agreed in cross-examination that Nunavut was an experiment and there was a possibility it would not have worked out. She agreed her retirement benefits are sufficient without the necessity of a part-time job.
- [45] Ms. Forster used her banked sick time for the first four months she was off work. Then she transitioned to long-term disability, which she remains on today.
- [46] After the Accident, Ms. Forster met with her union and a workability worker. She testified they concluded she could not return to work and her job would be posted. They turned their minds to other types of work but no position was available within Vancouver Coastal Health in terms of what she could do. Ms. Forster testified she has not considered other work that would be available outside of Vancouver Coastal Health.
- [47] Andrew Hosking undertook a function capacity evaluation of Ms. Forster. When the section of his report indicating she could work was put to her, she denied she could do the jobs he suggested. She denied she could work for an insurance company because they must drive from place to place, do physical examinations, and write reports. In terms of outpatient hospital facilities, she understood the job would entail assessments and a lot of report writing. In terms of a consultant in a home care company, she testified the further you get away from patient care, the more documentation you are doing. She is not sure she could do that. Ms. Forster agreed in cross-examination she has not thought about what else she might be able to do, nor has she made any effort to figure out what kind of work she could do.

- [48] Ms. Forster has not returned to work in the Car 87 program and remains on long-term disability. She testified she has been unable to return to the duties that she did before the Accident. Ms. Forster admitted in cross-examination she has continued with most of her usual lifestyle activities with some modifications and pacing. She also admitted in cross-examination that she is aware of ergonomic programs that can address many things, including programs that can prevent or reduce the amount of typing. She agreed she has not spoken to a workability worker in a couple of years.
- [49] Ms. Forster admitted in cross-examination that she was unhappy with the administrative actions that changed the job description of the Car 87 program. She was concerned about doing shift work, although her concern was short-lived because the shift turned out to be 1:00 p.m. to midnight so it was not as problematic as hospital shifts.
- [50] In cross-examination, Ms. Forster was taken to the clinical notes of her general practitioner, Dr. Peggy Brown. She told Dr. Brown she was still having problems with the transition to shift work on April 27, 2016, three days before the Accident. Ms. Forster did not remember making the statement but agreed that the record was true. However, she testified she was not thinking of leaving her job.

Advice from Medical Professionals

- [51] Ms. Forster saw Dr. Brown a few days after the Accident. Dr. Brown has been her doctor for approximately 25 years. Dr. Brown made recommendations to seek treatment from other healthcare professionals. She saw a chiropractor, a massage therapist, and physiotherapists. She participated in an active rehabilitation program through the Eagle Ridge Aquatic Centre Physiotherapy Clinic ("Eagle Ridge"). The physiotherapist had her do a number of strengthening exercises. However, the exercises aggravated her symptoms. She continued seeing them for a year.
- [52] Ms. Forster also attended Treloar Physiotherapy Clinic in Vancouver. She saw Curtis Wong and Carol Kennedy because she was not getting better at Eagle Ridge. This was purely for an assessment to provide recommendations for Eagle Ridge. She saw a new physiotherapist at Eagle Ridge who tried cranial sacral manipulation. The physiotherapist tried to realign her face but this only made her symptoms worse. Ms. Kennedy suggested that Ms. Forster take a break from physiotherapy. Ms. Forster returned to massage therapy which made her symptoms worse.
- [53] Ms. Forster also saw Dr. Nagraeff. He conducted a head-to-toe examination with a fork to determine sensation of cold. He placed the fork on various parts of her body while her eyes were closed. He also tested using pinpricks and vibrations, and tested her reflexes. Dr. Nagraeff suggested intra-muscular stimulation.

- [54] Dr. Brown suggested Ms. Forster see Connie Keene, a physiotherapist, who did various assessments and conducted intramuscular stimulation three or four times. Ms. Forster found this painful and not helpful. She stopped these treatments.
- [55] Ms. Forster saw Dr. Sherry Wang, a physiatrist. Ms. Forster agreed in cross-examination that Dr. Wang could not find anything to substantiate her claims.[1] She suggested the medication Lyrica. When Ms. Forster took this prescription, she became sedated, lethargic, and disinterested. She could have laid in bed all day. Since the prescription did not help her symptoms, she stopped taking it after about two months.
- [56] Ms. Forster saw Dr. Johal, a neurologist, who conducted a nerve study. He advised her the study was normal. He could not account for the symptoms she was having.
- [57] Ms. Forster saw Dr. Nagraeff a second time. He suggested she try Cymbalta, which is used to treat nerve pain. When she tried it she became lethargic and nauseous. She took it for about one month and then discontinued it. She had no positive effects from the medication.
- [58] Dr. Negraeff also suggested she have a brain MRI, which she did. He also suggested a topical cream for her hands. It contained a number of different medications in a compound. When Ms. Forster used it on her hands, it reduced the sensation on the back of her hands, but her skin began peeling. She stopped using the cream. She stated in cross-examination that the cream was of minimal efficacy, which she agreed was better than nothing. Dr. Negraeff suggested that she try cannabinoids, which she is not interested in trying due to her work in mental health.
- [59] Ms. Forster was referred to Dr. Berger, a neurologist at VGH. He did a nerve conduction study. He put electrodes on different parts of her body. This caused stimulation and he tested how fast she reacted. He also did a physical examination of Ms. Forster. He prescribed nortriptyline, a sleep medication. She took it for about two weeks but it had the opposite effect so she stopped taking this medication.
- [60] Ms. Forster also saw Dr. Wazeem at the request of Great-West Life Assurance Company to re-evaluate her long-term disability claim. Dr. Wazeem suggested wrist splints, thinking she had carpal tunnel syndrome. Ms. Forster purchased the splints but found them quite uncomfortable.
- [61] Ms. Forster testified that she saw Dr. Joseph Wong, a defence expert in the area of anesthesiology, for approximately 25 minutes on May 13, 2019. She testified he was running late. He did a short physical examination that, according to Ms. Forster, lasted approximately five minutes. Dr. Wong testified the examination took longer. In cross-examination, Ms. Forster agreed Dr. Wong did not find anything to substantiate her claims.

[62] Ms. Forster was referred to an occupational therapist who discussed meditation and mindfulness with her. The occupational therapist also discussed strategies like having her groceries delivered and getting a robotic vacuum cleaner. She also discussed the requirements of Ms. Forster's job. According to Ms. Forster, the occupational therapist believed she would not be able to return to her job.

[63] In the end Ms. Forster had three MRIs.

Gary Forster

[64] Gary Forster, Ms. Forster's husband, testified at trial. He testified Ms. Forster is very outdoorsy and she got him involved with running, hiking, cycling, and other outdoor activities. They have travelled to Chile, Africa, Austria, the Canadian Rockies, and Vancouver Island together. They have done backpacking, hiking, and marathons on these trips. Before the Accident, she was easy-going--nothing bothered her too much--and she was very physically active.

[65] Since the Accident, Ms. Forster has difficulties with anything that involves her hands. Surfing is tough because one needs to paddle hard to catch a wave. Paddle boarding is also tough. If she does these activities, she pays for it in the evening. She used to surf every day, but now when she surfs she cannot go out for very long and will not be able to do it again for several days. Sometimes she does not go out due to the wave conditions. In cross-examination, Mr. Forster stated Ms. Forster usually has to take one day off after surfing. Running is not as problematic because she does not need to use her hands. She runs three or four days per week.

[66] Mr. and Ms. Forster have travelled since the Accident but it is a typically visiting family rather than strenuous backpacking trips. They recently visited Haida Gwaii.

[67] In terms of household duties, Ms. Forster still likes to cook and bake but it will affect her the next day. She still does the majority of the cooking. Vacuuming and taking out the garbage affect her hands. They have hired somebody to clean their property in Ucluelet. Even reading a book bothers her. Today she can only play the piano for about 15 or 20 minutes and then she has to stop.

[68] Mr. Forster has noticed Ms. Forster gets frustrated and annoyed more frequently since the Accident. She is anxious as a passenger in a vehicle. She was fine as a passenger prior to the Accident.

Other Lay Witnesses

- [69] Joanne Salamon testified for the plaintiff. She is a friend of Ms. Forster's and has known her for approximately 15 years. Their husbands are also friends. They have done backpacking trips together and Ms. Forster introduced her to trail running and surfing. They have also skied, gone out for tea, attended craft fairs, canned, and baked together. Before the Accident, they regularly ran together and entered 50 km trail runs. Ms. Salamon completed three; Ms. Forster completed two.
- [70] Since the Accident, the two of them continue to run together and also walk Ms. Salamon's dog. The running is not as intense but Ms. Forster tries to keep her fitness up. They now paddle board in calm lakes. Ms. Forster does not paddle board on the ocean anymore.
- [71] Ms. Salamon testified that one day, approximately two years after the Accident, Ms. Forster and Ms. Salamon went to do a craft class together. The craft was painting a paddle. Ms. Forster was unable to finish her paddle and the instructor had to finish it for her.
- [72] Ms. Salamon noticed Ms. Forster is more emotional and more vulnerable since the Accident. She is struggling with the fact that she cannot do things at the level she used to. She is struggling with how to redefine herself.
- [73] Michelle Sevigny testified for the plaintiff. They first met in 2002 when Ms. Sevigny was a constable with the Vancouver Police Department. They were partners in the Car 87 program. Ms. Sevigny left the Car 87 program in 2006. She went on an educational leave to study canine behaviour and then left the Vancouver Police Department in 2008. She and Ms. Forster have remained friends.
- [74] Ms. Sevigny testified about the Car 87 program. As partners, Ms. Sevigny and Ms. Forster attended calls in the community related to mental health. They worked together for approximately four years. Ms. Forster did the individual's assessment and then they would determine the best course of action together. If the person could be left in the community, they would do so. They might ask for a physician to do a further assessment, or they might apprehend the individual and transport them to the hospital.
- [75] Ms. Sevigny testified that because she was working with someone who is not a police officer, safety was paramount. The situation could go from calm to serious extremely quickly. Both she and the nurse wore Kevlar vests. Ms. Sevigny testified it was her job to ensure that the nurse and the individuals in the community were safe. In cross-examination, Ms. Sevigny agreed she would never rely on a nurse to assist her when restraining a person as that is not their role. She might call for cover. Ms. Sevigny testified that the physical interaction with the patient is the police officer's role, but there is an expectation that the nurse is physically and mentally capable and ready to do their job.

- [76] Ms. Sevigny qualified her testimony, stating she could not always determine the risk ahead of time. If she was unable to help the nurse, the nurse would be on their own and would have to keep themselves safe.
- [77] Ms. Sevigny and Ms. Forster trained for their past five ultramarathons (marathons that are longer than 42 km) together. It was seven and a half to nine hours of trail running. Ms. Forster was unable to complete the third run due to an injury.
- [78] Ms. Sevigny moved in 2014 and now she only sees Ms. Forster occasionally; however, they Skype or talk on the phone every couple of weeks. They still run together occasionally. Ms. Sevigny testified that Ms. Forster used to inspire her, however, since the Accident, Ms. Forster is unable to train for anything.
- [79] Although there was initial frustration due to her physical changes, after three years, they do not talk much about the Accident. Ms. Sevigny testified that Ms. Forster is not as spontaneous, enthusiastic, or fun as she was before the Accident.
- [80] Don Getz testified for the plaintiff. He is a registered nurse who has known Ms. Forster for 18 years. He trained her in the Car 87 program. Mr. Getz testified it is a complicated position and the interactions in the community could be unpredictable. He testified he has seen knives, chains, and hand fights. It could get very physical and on one occasion, they needed paramedics to assist. On another occasion, a client was killed.
- [81] Mr. Getz testified they all loved working in the Car 87 program, including Ms. Forster. However, they all commiserated about the reorganization of the program by Vancouver Coastal Health. They thought it would affect patient care delivery. They also lost eight staff members.
- [82] Mr. Getz testified he remains friends with Ms. Forster and they run long distances together. He goes to her house for dinners, "which are amazing". After the Accident, Ms. Forster did not do as much, but she has started hiking, surfing, and running again in the last year. He has hiked with her but at most for 30 minutes since the Accident. Prior to the Accident, they did multi-day backpacking trips.
- [83] Mr. Getz testified that Ms. Forster was upbeat, positive, and happy-go-lucky before the Accident. Ms. Forster's mood change dramatically after the Accident. She had a flat affect and looked depressed. She told him she was depressed and that she would see her doctor. He does not know if she followed through with seeing her doctor.
- [84] Patti Van Ham testified for the plaintiff. She has been a friend of Ms. Forster's since they worked together as relatively new psychiatry nurses at the UBC Hospital. This was approximately 22 years ago. They worked together until Ms. Forster went to the Car 87 program. She testified Ms. Forster was reliable, conscientious, and a good team member.

- [85] Prior to the Accident, they did some running together but Ms. Van Ham was not as much of a runner as Ms. Forster. They also camped and surfed together. They have gone on trips together, and Ms. Van Ham has been to the Forster's place in Ucluelet.
- [86] Ms. Van Ham testified that Ms. Forster could paddle past the break and catch the bigger waves prior to the Accident. They could surf a couple of sessions a day.
- [87] After the Accident, Ms. Forster did not surf at all. She has started to surf again more recently. However, she stays on the inside of the break. If the surf is big, she will not go in at all. She usually surfs for about an hour, depending on the conditions. Ms. Forster is also running again since the Accident, but not long runs like she used to do.
- [88] Ms. Van Ham and Ms. Forster went to the Galápagos Islands together. Ms. Van Ham did a lot of surfing but Ms. Forster did more sightseeing and snorkelling as the surf was too big for her. She surfed one day but had to stay in bed the next day. They did some hiking together. She testified that Ms. Forster is more subdued since the Accident.
- [89] In cross-examination, Ms. Van Ham testified that Mr. Forster helps with meal preparation. Ms. Van Ham also helps when she is there. Ms. Van Ham denied ever hearing Ms. Forster considered leaving her job prior to the Accident due to the changes imposed by the administration. In terms of past mental health issues, she testified Ms. Forster was emotional when her father passed away, but nothing out of the ordinary. Ms. Van Ham denied that Ms. Forster was decreasing her training prior to the Accident due to age and menopause. She did not notice any difference in Ms. Forster the year before the Accident.
- [90] Twyla Will testified for the plaintiff. She is a colleague and friend of Ms. Forster's. Ms. Will met Ms. Forster in 2007 through the Car 87 program. Ms. Will went back to emergency nursing in 2014. Ms. Will gave a similar testimony as the other lay witnesses regarding the role of the nurse in the Car 87 program. Ms. Will testified it is Vancouver Coastal Health policy that nurses do not get physically involved with the clients. However, she also testified the nurse would not stand by and watch their partner get hurt. She testified that, on one occasion, things did not go well and she ended up rolling around on the floor with the client for three or four minutes until cover arrived.
- [91] Ms. Will testified Ms. Forster was very fit prior to the Accident. They started running together and did a bit of hiking prior to the Accident. She testified Ms. Forster is a very caring and competent nurse. She is thorough and very good at her job. She was good to learn from.
- [92] Since the Accident, they try to see each other approximately once per month. Ms. Will testified Ms. Forster is quieter and more withdrawn since the Accident. She remains physically active even though it causes her pain because that is who she is; being physically active is part of her identity. Ms. Will testified Ms. Forster is now somewhat bitter, which makes Ms. Will sad. She testified that many nurses can be cynical but Ms. Forster never had that edge to her prior to the Accident.

- [93] In cross-examination regarding the administrative changes to the Car 87 program, Ms. Will testified there was a lot of generalized talk amongst staff, everyone was worried, there was a lot of turmoil, and it was stressful. Ms. Will testified Ms. Forster was frustrated with the administrative changes but she never expressed a desire to work anywhere else. She explained Ms. Forster worked full-time hours but made a part-time salary so that she can take time off. She was planning to go to Nunavut which Ms. Will understood was a one-off thing. Ms. Forster saw it as an adventure.
- [94] In terms of job options, Ms. Will agreed that there are a number of internal postings in Vancouver Coastal Health but stated Ms. Forster would need to stay in psychiatry unless she had further upgrading or training. She testified her own move from emergency to psychiatric nursing was very hard. It would be similarly difficult to go from psychiatric nursing to a medical role.
- [95] Maria Bishop testified for the plaintiff. She is a registered psychiatric nurse who has known Ms. Forster since 1982. They met in nursing school and Ms. Forster introduced Ms. Bishop to her husband. They have remained very good friends over the years.
- [96] Ms. Bishop testified she is currently the faculty and program coordinator at Douglas College in psychiatric nursing. She also works intake at Lions Gate Hospital and sits on the Board of Directors of the College of Nurse Professionals.
- [97] Ms. Bishop echoed many of the comments of other lay witnesses. She worked with Ms. Forster in the Car 87 program. They also started running together about 24 years ago.
- [98] Ms. Bishop testified about her wedding in Desolation Sound in August 2016. She found Ms. Forster to be negative and sad despite trying hard to enjoy the weekend. In the past, she would have been in her element. However, she was distressed and her mood was low.
- [99] Ms. Bishop acknowledged Ms. Forster has improved a bit. She has started running again. However, she has resigned herself to not getting better. Ms. Bishop testified that over the course of three years, it has been similar to a terrible grieving process for Ms. Forster. She has now come to a place of acceptance that her life is different. Ms. Bishop finds this very sad.
- [100] Ms. Bishop agreed in cross-examination that if there was an escalation with a client in the Car 87 program, it was the nurse's choice whether to get involved. However, Ms. Bishop testified the nurse needs to be prepared to deal with the unpredictable. She agreed that there are ways to switch positions within the Vancouver Coastal Health system. She denied that Ms. Forster would be able to teach at Douglas College because she does not have a master's degree.

Expert Evidence

Expert Opinion Evidence

Dr. Michael Negraeff

[101] Dr. Michael Negraeff was qualified as an expert in anesthesiology and pain. There was a dispute regarding whether Dr. Negraeff needed a Canadian certificate in pain management before expressing opinions on the diagnosis, treatment, and prognosis of spinal cord trauma causing neuropathic pain. His certificate in pain management is from Australia and New Zealand. I will address the issue regarding his qualifications under causation.

[102] Ms. Forster had an MRI on October 19, 2016. The report from the MRI stated:

There is a tiny 1 mm transverse and AP diameter hyperintense focus at C5/C6 level measuring 8 mm in craniocaudal dimension affecting the posterior spinal cord may represent a tiny syrinx.

[103] Dr. Negraeff described this MRI in his report as follows:

There is evidence on her MRI of a T2 hyperintensity signal in her spinal cord at the C4-6 level which is consistent with syrinx or myelomalacia (atrophy of the spinal cord).

[104] According to Dr. Negraeff, a syrinx is a fluid-filled cavity within the spinal cord. If there has been some trauma, a cavity forms where the neurons have died or atrophied. The cavity gets filled up with fluid, causing the appearance of a syrinx. Dr. Negraeff reviewed the actual MRI and determined a syrinx was present.

[105] Dr. Negraeff testified that after he observed the syrinx in Ms. Forster's neck on the first MRI he reviewed the literature regarding mild spinal cord injuries in the cervical spine area. By "mild", he meant not enough injury to cause motor or sensory impairment. This literature indicated such injuries could cause neuropathic pain in the hands and fingers. Dr. Negraeff testified that neuropathic pain is the most common type of pain you have where there is an injury to the spinal cord in the neck that is not enough to cause full-blown paralysis.

[106] Dr. Negraeff diagnosed Ms. Forster with neuropathic pain. He described this as unpleasant and abnormal. He testified that the burning, stinging, and the sensation of pins and needles she reported to him were similar to symptoms he had heard many times from hundreds of other patients with spinal cord injuries.

[107] It was put to Dr. Negraeff in cross-examination that Dr. Nikolakis, a neurosurgeon, reviewed the first MRI and concluded there was no sign of cord compression, nerve root compression, or mechanical instability at any level. He did not recommend surgery for Ms. Forster as a result. Dr. Negraeff responded that a spinal cord compression is not the same as a tissue spinal cord injury (which is what he diagnosed Ms. Forster with). A nerve root compression is not in the spinal cord--the nerve root comes off the spinal cord and goes out to the arms or legs lower down. Dr. Negraeff agreed that Ms. Forster does not have an injury significant enough to cause instability of the spine or compression of the spinal cord and spinal nerve roots. He opined that Dr. Nikolakis was not commenting upon a tissue injury inside the spinal cord because he would not offer surgery for a tissue injury.

- [108] Dr. Negraeff testified he would defer to a functional capacity evaluator regarding whether Ms. Forster can return to work.

Dr. Joseph Wong

- [109] Dr. Joseph Wong was qualified as an expert in physical medicine and rehabilitation. He saw Ms. Forster for an independent medical examination on May 13, 2019. He reported: "Ms. Forster says she had no pain at all but has a constant tingling and numbness sensation involving her hands, bilaterally and the left side of her tongue." He also reported she had "a constant numbness sensation and a pins and needles sensation diffusely in her hands in the ring, dorsal and palmar aspects. The pain sometimes radiates to the wrist area. She says that she has no pain, but a constant abnormal sensation".
- [110] When questioned, Dr. Wong testified he remembered Ms. Forster stating she was not in pain when he queried why she was not taking any pain medication. Although not painful, he understood she has abnormal burning, tingling, and numbness sensations. Dr. Wong also reported Ms. Forster had insomnia problems both before and after the Accident.
- [111] The issue of the syrinx was put to Dr. Wong in cross-examination. He stated he is not a neurologist but he examined the MRI and found no syrinx problem. He did not believe it explained Ms. Forster's numbness. He later explained the first MRI showed a tiny amount of fluid (the syrinx) but it was not present on the later MRI.
- [112] Dr. Wong's medical examination was normal with respect to muscles, bones, and neurological deficits in Ms. Forster's arms. The alignment of her cervical spine was normal, as was the sensory testing. There were no objective findings of anything abnormal. Dr. Wong did not observe any accident-related impairments on his examination.
- [113] In cross-examination, Dr. Wong agreed he did not refer to Ms. Forster's burning sensation in his report. Plaintiff's counsel suggested he was minimizing Ms. Forster's symptoms. Dr. Wong agreed that he did not test for sensitivity to heat or cold, he did not conduct a pinprick test, and he did not undertake a vibration test. Dr. Negraeff conducted pinpricking and light touch examinations which were normal. Ms. Forster did respond to Dr. Negraeff's cold sensory testing but this testing was not repeated on her second visit to Dr. Negraeff.
- [114] Dr. Wong concluded Ms. Forster can perform her psychiatric nursing job from a musculoskeletal point of view. In his opinion, her prognosis is good. However, Dr. Wong ultimately agreed Ms. Forster has neuropathic pain, which is why he opined that she should be seen by a neurologist.
- [115] Dr. Wong testified Ms. Forster engaged in numerous physical activities post-Accident such as surfing, paddle boarding, and running. Given her ability to participate in these activities, he did not understand why Ms. Forster could not return to work. Dr. Wong's concerns were echoed by Ms. Winni Chou, an occupational therapist who assessed Ms. Forster on October 24, 2017.

Andrew Hosking

- [116] Andrew Hosking of Health First Health Care Solutions was qualified as an expert in physiotherapy and is certified as a work capacity evaluator. He conducted a functional capacity evaluation of Ms. Forster and wrote a report dated February 24, 2019. Mr. Hosking noted that Ms. Forster is fortunate to be in a profession with a wide scope of possible duties.
- [117] Mr. Hosking found Ms. Forster did not demonstrate the capacity to meet the physical demands of her job as a registered nurse. Mr. Hosking did not believe Ms. Forster had sufficient agility, speed, or coordination of her upper body to work safely in a situation where she was required to protect herself from an uncooperative client. He noted she had a mild limitation for repeated and prolonged postures of neck flexion while reading, writing, and sitting. She also had some limitations when looking down while using her hands at a flat surface and when standing. However her accuracy and coordination--her fine and medium dexterity--did not appear to change or deteriorate with repetition or over time.
- [118] Mr. Hosking reported that Ms. Forster should do exercises to strengthen the antagonistic muscles in her overactive interior neck and pectoral muscles to improve postural control. He recommended a further eight to ten sessions with a physiotherapist. He opined that Ms. Forster's focus should be on acquisition of control of the spinal postural muscles (her core). The long-term outcome of an exercise regime is for some improvement in durability for physical activity in occupational, domestic, and recreational activities. However, based on Ms. Forster's prognosis, exercise is not anticipated to be curative measure.
- [119] At the end of his conclusions, Mr. Hosking stated Ms. Forster provided variable physical effort during his evaluation. While Ms. Forster showed clear competitive effort in some tests, she exhibited variability, suggestive of less than full effort, in others.
- [120] Mr. Hosking opined that Ms. Forster can do work other than in her mental health position for Vancouver Coast Health. She would need to pace herself.

Kevin Turnball

- [121] Kevin Turnball was qualified as an expert in economics. He accepted the assumptions provided to him by counsel for the plaintiff, one of which was that Ms. Forster cannot work in the future. He assumed she would have worked in Nunavut in 2016 but for the Accident. He also assumed Ms. Forster would have continued to work four months per year, post retirement, until the age of 65.
- [122] Mr. Turnball agreed in cross-examination that if Ms. Forster is capable of working, his calculations of her loss of income would be reduced.

Fact Evidence

Dr. Sherry Wang

- [123] Dr. Sherry Wang saw Ms. Forster on July 20, 2017. She stated that apart from possibly having carpal tunnel syndrome, she does not "have a good explanation for her presenting symptoms as her neurological examination is normal and her [musculoskeletal] examination is unremarkable. There is no objective focal finding to concern the tiny possible syrinx in her cervical spine that showed on her MRI." This testimony borders on opinion evidence.
- [124] Dr. Negraeff disagreed with Dr. Wang because he did not think she did a thorough sensory examination. He did not believe she looked for cold sensation which is the only finding that he found abnormal, apart from brisk reflexes, on his physical examination of Ms. Forster.

Dr. Michael Berger

- [125] Dr. Michael Berger is a physical medicine and rehabilitation specialist. He did not testify at trial. In his report dated March 6, 2019, he found no evidence of carpal tunnel syndrome. The only abnormality on his examination of Ms. Forster were some brisk reflexes which he felt could be physiologic but could also be related to the small syrinx seen on her 2016 MRI. He therefore reordered the MRI to make sure the syrinx had not expanded. The MRI dated May 23, 2019 found no evidence of the syrinx. The 2019 MRI did not show an expansion of the cord. It did show degenerative changes of the cervical spine.

Sheila Branscombe

- [126] Sheila Branscombe, an occupational therapist with a degree in rehabilitation medicine, wrote a responsive report to Mr. Hosking's report. She was not required for cross-examination so she did not testify at the hearing. In her report, Ms. Branscombe noted the focus of nursing care in the Car 87 program is primarily nonviolent crisis intervention. Force is used judiciously and infrequently. She also emphasized that although Mr. Hosking's report discussed upper extremity function testing in functional tasks such as writing and typing, no concerns were noted in his report with respect to those tasks.
- [127] Ms. Branscombe highlighted the contradiction that, while Ms. Forster reported being able to run and walk for one and a half hours at a time, her speed on the 50 feet walk for Mr. Hosking was slower than average and deteriorated over the course of the day. Conversely, her speed with repeat standing from sitting improved, as did her ability to hold a plank position, over the course of the day. Ms. Branscombe states:

Page 27 [of Mr. Hosking's report] notes that Ms. Forster can only sit for 40 minutes when the reports [sic] states that she sat for 2 hours consecutively and for 4 hours and 35 minutes cumulatively. There is no indication as to why Ms. Forster is restricted in her ability to tolerate a seated position.

- [128] Ms. Branscombe concluded that there were no indications that Ms. Forster's mouth, hand, or neck pain are functionally limiting.

Credibility

Legal Principles

- [129] The defendants argue Ms. Forster suffers from burning, numbness, and tingling in her hands, as well as mental health issues, but there is little to no objective evidence to support her ongoing pain.
- [130] Ms. Forster's injuries involve nerve damage that is not discernible through medical imaging. She also has mental health complaints. Ms. Forster's credibility is an important consideration when evaluating the nature of her injuries because the medical experts relied largely, although not exclusively, on her subjective reports. The plaintiff does not disagree that I must carefully consider the credibility of all witnesses.
- [131] The leading authority on credibility is *Bradshaw v. Stenner*, 2010 BCSC 1398, aff'd 2012 BCCA 296. Justice Dillon summarized the key elements as follows:
- [186] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis*, [1926] 31 O.W.N. 202 (Ont.H.C.); *Farnya v. Chorny*, [1952] 2 D.L.R. 152 (B.C.C.A.) [*Farnya*]; *R. v. S.(R.D.)*, [1997] 3 S.C.R. 484 at para.128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (*Farnya* at para. 356).
- [187] It has been suggested that a methodology to adopt is to first consider the testimony of a witness on a 'stand alone' basis, followed by an analysis of whether the witness' story is inherently believable. Then, if the witness testimony has survived relatively intact, the testimony should be evaluated based upon the consistency with other witnesses and with documentary evidence. The testimony of non-party, disinterested witnesses may provide a reliable yardstick for comparison. Finally, the court should determine which version of events is the most consistent with the "preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions" (*Overseas Investments (1986) Ltd. v. Cornwall Developments Ltd.* (1993), 12 Alta. L.R. (3d) 298 at para. 13 (Alta. Q.B.)). I have found this approach useful.

[132] The court in *Sandhu v. Braich* (1991), 61 B.C.L.R. (2d) 273 (C.A.), adopted more recently in *Samuel v. Chrysler Credit Canada Ltd.*, 2007 BCCA 431, addressed the principles to apply when medical experts rely on the subjective complaints of a plaintiff:

49 It is trite law - although I note that what is trite law is frequently brushed aside - that in order for an expert to give an opinion the facts upon which he gives that opinion must be proven by the person who has personal knowledge of them: see *Enge v. Trerise*, (1960), 33 W.W.R. 577, 26 D.L.R. (2d) 529 (B.C.C.A.) and *Lenoard v. British Columbia Hydro & Power Authority* (1964), 50 W.W.R. 546, 49 D.L.R. (2d) 422 (Wilson, C.J.S.C.), in which that most distinguished judge said (at p. 548 [W.W.R.]):

I now enter into an area in which I must consider subjective as well as objective evidence because both were placed before me without objection by counsel. All physicians must I think, rely to some extent on what their patients tell them. If, for instance, a patient had a pain in his neck and went to a doctor, mum, challenging him to find what, if anything, was the matter with him, then I think that doctor would be in almost as difficult a position as a lawyer would be if all his client told him was that he wanted to sue Tom Jones, and condescended to no further detail. When the doctor relates in court what his patient told him, he may be stating hearsay, but common sense in the courts has long ago rejected the idea that this evidence may not be heard and has accepted the idea that it should be listened to, not because it proves by itself the truth of the thing stated by the patient to the doctor, but because it defines to an extent his area of exploration and, if confirmed by the doctor's objective observations and by the patient's evidence given at the trial, may be convincing. I see no other approach to medical evidence. It is closely allied to the hypothetical question often put to other expert witnesses where the witness is asked: "Well, granting the existence of such and such facts, what is your opinion?" The doctor says he accepted some statements made by his patient as facts and formed an opinion thereon. Such an opinion, I think, is subject to criticism if the patient does not appear as a witness and corroborate the existence at the time of the symptoms alleged to have been described to the doctor. Such an opinion, in so far as it relies on the credibility of the patient, is subject to ejection by a judge or jury who, having heard the patient, do not find him credible. I do not think they are bound by the doctor's opinion as to credibility but they must pay a considerable regard to it, particularly if it is related to associated objective evidence, such, for instance, as evidence of spasm. But I do not see any reason why a judge or jury, having heard the expert and the patient, should not, in a proper case, reject the evidence of the expert on the ground that the patient is not a credible witness and that, therefore, the hypothesis on which the expert gave his opinion is not established, having, of course, the fullest regard to the expertise of the doctor and to any objective evidence he has propounded. If this were not so then judges and juries would be completely bound by the opinions of experts as to credibility, and this cannot be.

[133] In *Andrusko v. Alexander*, 2013 BCSC 985, Justice Fitzpatrick made a similar point:

[49] If the plaintiff's account of his or her change in physical, mental, or emotional state as a result of the accident is not convincing, then the hypothesis upon which any expert opinions rest will be undermined: *Samuel v. Chrysler Credit Canada Ltd.*, 2007 BCCA 431 at paras. 15, 49-50.

[134] I am applying the principles expounded in these authorities when assessing the expert opinion evidence tendered in this case.

Analysis

[135] Ms. Forster was a good historian. Her credibility was not seriously challenged during a lengthy cross-examination. She presented in a straightforward manner. Ms. Forster's testimony was consistent and in accordance with the other witnesses.

[136] Ms. Forster's husband and friends think highly of Ms. Forster and want to support her. They were consistent in their testimony and made admissions where appropriate. They testified regarding Ms. Forster's diminished health post-Accident.

[137] I take these factors into account when assessing the evidence.

Adverse Inference

[138] The defendants ask that I draw an adverse inference because Ms. Forster did not call Dr. Peggy Brown, her general practitioner, or Jasdeep Shergill, an employee records and benefits associate with the Provincial Health Authority. The defendants rely on *Buksh v. Miles*, 2008 BCCA 318 at paras. 30 and 35, and *Mohamud v. Yu*, 2016 BCSC 1138 at paras. 35, 40, and 42, to establish that a party should present their best evidence. This typically includes the plaintiff's family doctor.

[139] The plaintiff argues that there is a discretion by the trial judge regarding whether to draw an adverse inference. I agree. As set out in *Singh v. Reddy*, 2019 BCCA 79:

[8] The principle is described by authors S.N. Lederman, A.W. Bryant and M.K. Fuerst in *The Law of Evidence in Canada* (2018, 5th ed.) as follows:

§6.471 In civil cases, an unfavorable inference can be drawn when, in the absence of an explanation, a party litigant does not testify, or fails to provide affidavit evidence on an application, or fails to call a witness who would have knowledge of the facts and would be assumed to be willing to assist that party. In the same vein, an adverse inference may be drawn against a party who does not call a material witness over whom he or she has exclusive control and does not explain it away. The inference should only be drawn in circumstances where the evidence of the person who was not called would have been superior to other similar evidence. The failure to call a material witness amounts to an implied admission that the evidence of the absent witness would be contrary to the party's case, or at least would not support it. [Emphasis added.]

In *Thomasson v. Moeller* 2016 BCCA 14, this court summarized the principle in similar terms:

An adverse inference may be drawn against a party, if without sufficient explanation, that party fails to call a witness who might be expected to provide important supporting evidence if their case was sound: *Jones v. Trudel*, 2000 BCCA 298 at para. 32. The inference is not to be drawn if the witness is equally available to both parties and unless a *prima facie* case is established: *Cranewood Financial v. Norisawa*, 2001 BCSC 1126 at para. 127; *Lambert v. Quinn* (1994) 110 D.L.R. (4th) 284 (Ont. C.A.) at 287.

[9] . Essentially, the decision to draw an adverse inference is discretionary and premised on the likelihood that the witness would have given harmful testimony to the party who failed to call him or her. In a case before a jury, where there are circumstances that support the drawing of such an inference, the trial judge should charge the jury that it is "appropriate for a jury to infer, although [jurors] are not obliged to do so, that the failure to call material evidence which was particularly and uniquely available to [a party] was an indication that such evidence would not have been favourable to [that party]."

[140] Based on the best evidence rule and the authorities cited above, Ms. Jasdeep should have been called at trial. I am prepared to draw an adverse inference from Ms. Forster's failure to call Ms. Shergill because, in addition to not calling this witness, the plaintiff did not provide any records from the workability department. There was no ability for the defendants to assess the evidence.

[141] The plaintiff did provide Dr. Brown's clinical records. Since the defendants had a chance to review those records, and could have called Dr. Brown themselves, I am not prepared to draw an adverse inference against the plaintiff for not calling Dr. Brown. However, by not calling Dr. Brown there is a lack of medical evidence regarding any mental health issues Ms. Forster suffered as a result of the Accident. I make further comments regarding this under causation.

Causation

Legal Principles

[142] Before assessing damages, the "plaintiff must establish a causal connection between the defendant's negligence and [the plaintiff's] pain": *Farrant v. Laktin*, 2011 BCCA 336 at para. 8 [Farrant].

[143] The accepted test for causation is the "but for" test: *Resurfice Corp. v. Hanke*, 2007 SCC 7 at paras. 21-22. Causation is a factual determination. The plaintiff bears the onus of proving on a balance of probabilities that but for the defendant's negligent act or omission, the injury would not have occurred: *Athey v. Leonati*, [1996] 3 S.C.R. 458 [Athey]; *Blackwater v. Plint*, 2005 SCC 58. Causation is found if the injury would not have occurred without the defendant's negligence: *Clements v. Clements*, 2012 SCC 32 at para. 8 [Clements].

[144] In the seminal decision of *Snell v. Farrell*, [1990] 2 S.C.R. 311 at 324 [Snell], the Supreme Court of Canada set out the test for causation, the hallmark of which is "a robust and pragmatic approach to the facts to enable an inference of negligence to be drawn even though medical or scientific expertise cannot arrive at a definitive conclusion." The causation test does not demand scientific precision and should not be applied too rigidly. While proof of causation will often require expert evidence, common sense applies: *Athey* at para. 16; *Clements* at paras. 8-9.

[145] There is a difference between medical and legal causation. In *Snell* at 330, the Court articulated this point as follows:

It is not therefore essential that the medical experts provide a firm opinion supporting the plaintiff's theory of causation. Medical experts ordinarily determine causation in terms of certainties whereas a lesser standard is demanded by the law.

[146] The plaintiff must establish a substantial connection between the tortious conduct and the injury: *Farrant* at para. 11. However, a robust and pragmatic approach to the "but for" test allows for there to be more than one cause of an injury. Where there is more than one cause of an injury, resulting in an indivisible injury, the plaintiff need only show that the accident contributed to the injury beyond the *de minimis* range: *Farrant* at paras. 9, 50-51.

Analysis

[147] There were a number of medical and other expert opinions before me. Dr. Negraeff opined that Ms. Forster likely suffers from a minor cervical spinal cord injury resulting in a syrinx, which in turn caused Ms. Forster's neurological pain.

[148] The defendants challenged this finding, which arose from Dr. Negraeff's literature review, as being unique, inconclusive, and without the benefit of the later MRI which showed no evidence of a syrinx. The first MRI showed an objective sign of injury--a syrinx--but the later MRI did not. Dr. Negraeff did not believe the later MRI invalidated the first MRI. In his opinion, the fact that the syrinx did not expand did not mean that the syrinx is not explaining Ms. Forster's current pathology. He conceded in cross-examination that the syrinx seen on the first MRI could be incidental and could have been present prior to the Accident. Despite this concession, Dr. Negraeff maintained his opinion that the Accident "is more likely than not the cause of her persistent burning pain in the hands and left tongue."

[149] Dr. Negraeff testified that Ms. Forster's injury is permanent because nerve cells do not recover. He opined that Ms. Forster has likely made a maximal recovery and will continue to have ongoing flare-ups and exacerbations associated with her injuries.

[150] Dr. Wong accepted that Ms. Forster has her reported symptoms but could not explain why. He opined that from a musculoskeletal point of view, Ms. Forster is fine. He suggested that she see a neurologist, which Ms. Forster did.

[151] Dr. Wong found it striking that Ms. Forster reported no pain because she also reported that she was unable to work. He contrasted this with the number of recreational activities that Ms. Forster still participates in, albeit at a reduced level.

[152] Mr. Hosking's report was put to Ms. Forster in cross-examination. It states:

Comment on reliability of reports of pain and disability: Ms. Forster demonstrates a tendency to overstate her level of pain and disability in response to some written questionnaires. She demonstrates intermittent kinesiphobic behaviours. Associated with this, her verbal reports of capacity only intermittently match her actual observed abilities. More frequently than not, she appears to have greater capacity than she estimates. Overall, her reports of pain and disability are considered only marginally reliable. Accordingly, conclusions in this report are based primarily on observed abilities, with little weight given to subjective reports.

[153] Ms. Forster simply stated this was Mr. Hosking's opinion. She offered no explanation regarding the inconsistencies between her reported pain levels and her observed abilities.

[154] Mr. Hosking noted that Ms. Forster is suited to working with patients who are not physically dependent. I agree with the defendants that Mr. Hosking went beyond the scope of his qualifications when he opined on the type of positions Ms. Forster is suited for. Mr. Hosking was qualified as an expert in functional capacity evaluation. He assesses physical functionality; he was not qualified as a vocational consultant. I disregard his opinion in this area.

[155] I accept the medical evidence establishes Ms. Forster sustained cervical spinal cord trauma which likely caused neuropathic pain. I also accept, given the timing of her tingling, burning, and numbness, Ms. Forster's symptoms are caused by the Accident.

[156] I also accept Ms. Forster has had some anxiety and mood issues since the Accident. I have determined they are minor based on the lack of medical evidence as well as her ability to socialize, engage in many physical activities, and travel post-Accident. She did not provide evidence she has serious mental health issues and did not call her family doctor to testify at trial.

[157] In terms of the dispute regarding a need for Dr. Negraeff to have a certificate to express opinions on the diagnosis, treatment, and prognosis of spinal cord trauma causing neuropathic pain, I find it makes little difference. Even if Ms. Forster does not suffer from the type of neuropathic pain Dr. Negraeff diagnosed, I accept Ms. Forster's symptoms are real and caused by some type of neuropathic pain. Dr. Wong, the defendant's expert, agreed in cross-examination that Ms. Forster has neuropathic pain. He testified that is why he suggested she should see a neurologist.

[158] Based on the totality of the evidence, I find Ms. Forster tends to overstate her pain and her limitations. Given her physical abilities and the functional capacity testing which found no limitations regarding Ms. Forster's ability to write, type, or sit for prolonged periods of time, there is a disconnect between Ms. Forster's reporting of her pain and limitations and her actual post-Accident abilities and lifestyle. As stated by Ms. Winni Chou, Ms. Forster "perceives a high degree of disability that is out of proportion to her presentation".

[159] Despite attempting a number of medical treatments, Ms. Forster's symptom recovery plateaued and she has now reached maximal spontaneous recovery.

Damages

[160] A fundamental principle of tort law is that, to the extent a monetary award can accomplish it, a plaintiff should be placed in the same position they would have been in had the accident not occurred. The plaintiff should not be placed in a better position: *Parypa v. Wickware*, 1999 BCCA 88 at para. 29 [Parypa].

Mitigation

[161] The defendants argue Ms. Forster failed to mitigate her damages because she refused to take, or continue to take, medications prescribed to her that likely would have reduced her symptoms and increased her function: *Janiak v. Ippolito* [1985] 1 S.C.R. 146. The defendants also argue Ms. Forster made no attempt to try any type of work post-Accident--even part-time work with accommodations. They argue her overall award should be reduced by 20% for her failure and, if I decide to award her damages for loss of future earning capacity, the award should be reduced by 40% for her projected ability to work approximately 50% of her pre-accident hours.

Legal Principles

[162] A plaintiff must take reasonable steps to mitigate their loss: *British Columbia v. Canadian Forest Products Ltd.*, 2004 SCC 38 at para. 106. This includes undergoing treatment to reduce their damages: *Danicek v. Alexander Holburn Beaudin & Lang*, 2010 BCSC 1111 at para. 234. The defendant bears the onus of demonstrating the plaintiff failed to mitigate. The onus on the defendant is heavy: *Preston v. Kontzamanis*, 2015 BCSC 2219 at para. 106.

[163] Based on the jurisprudence, there is a two-part test. As stated by Justice Low in *Chiu v. Chiu*, 2002 BCCA 618 [Chiu]:

- [157] The onus is on the defendant to prove that the plaintiff could have avoided all or a portion of his loss. In a personal injury case in which the plaintiff has not pursued a course of medical treatment recommended to him by doctors, the defendant must prove two things: (1) that the plaintiff acted unreasonably in eschewing the recommended treatment, and (2) the extent, if any, to which the plaintiff's damages would have been reduced had he acted reasonably. These principles are found in *Janiak v. Ippolito*, [1985] 1 S.C.R. 146.
- [164] Thus, the defendants must demonstrate Ms. Forster acted unreasonably in failing to follow medical advice and, had she followed the advice, she would have fully or partially recovered. *Chiu* remains a guiding authority on the issue of mitigation.

Analysis

- [165] I agree with plaintiff counsel that Ms. Forster followed the medical advice provided to her. She tried all the medications prescribed, apart from cannabis for which she had a reasonable explanation. She also tried numerous other modalities of treatment. However, Ms. Forster did not continue with these treatments and did not consult with her physicians before stopping many of the prescribed medications. That said, the defendants have not established the extent, if any, that Ms. Forster's damages would have been reduced had she continued her treatments. The defendants have not met their onus in this regard.
- [166] My concern in terms of a failure to mitigate is Ms. Forster's ability to participate in cooking, running (including trail running), hiking, surfing, paddle boarding, and traveling following the Accident. Notwithstanding this level of activity, she claims she cannot work, even part-time. I agree with a number of the experts that this seems improbable, especially if she were provided some accommodations and a reduced schedule.
- [167] There was credible evidence Ms. Forster can no longer work in the acute mental health Car 87 program. I understand none of the lay witnesses could say how often there was a physical confrontation between a client and the police officer and nurse in the Car 87 program. However, all the witnesses testified they could go a month or more without any problems, but then have a number of incidents arise within a short period of time.
- [168] I accept Ms. Forster cannot work in the Car 87 program given the unpredictable nature of the work and the risk of physical encounters with the individuals whom she would be treating. It is a fast-paced job requiring quick decisions and physical strength. Given the evidence, Ms. Forster is compromised in her ability to respond to physical confrontations.
- [169] I also accept Ms. Forster cannot go back to physical nursing given her limitations. Yet, there was no compelling evidence before me that Ms. Forster is unable to work in less physical aspects of nursing with some accommodations, or outside of nursing, on a part-time basis. There was no objective evidence before me that Ms. Forster cannot write or type. Moreover, it is unclear why she cannot sit or stand for extended periods of time.

[170] Ms. Forster agreed in cross-examination that the occupational therapist, Ms. Winni Chou, stated in her report:

[A]ccording to the DASH and COPM self-reports, client perceives high degree of disability that is out of proportion to her presentation. This is specifically related to her work as she reported extremely low capability and satisfaction in her ability to perform her nursing duties where she scored a max 100/100 level of disability in job-related tasks. Additionally, she reports little hope of returning to her pre-MVI levels of function.

Client further presents as being uncomfortable with the use of adaptive aids. Upon brief discussion, client was hesitant to utilize adaptive aids to decrease her symptoms during reading and declined a reading stand, which may imply low readiness for change.

[171] Ms. Forster disagreed that this was a sign that she simply did not want to return to work. No further explanation was offered.

[172] Mr. Hosking concluded Ms. Forster would "likely have the capacity for part-time work of an accommodative nature. She would be suited to work which requires intermittent use of her hands, and for variation a body position between sitting and standing". He stated that her shifts would likely be limited to four to six hours on two consecutive days. For example, she could work a four-day week, with one day off between her two sets of consecutive day shifts.

[173] There is no explanation as to why Ms. Forster cannot sit for extended lengths of time. She sat through her testimony without any obvious limitations. Ms. Forster is willing to try participating in her leisure activities, but not any work, post-Accident. I appreciate Ms. Forster has not been required to return to work by her employer and is in receipt of long-term disability benefits. However, to the extent that Ms. Forster can work, the defendants are only to compensate her for the decrease in wages.

[174] While Ms. Forster worked with an occupational therapist with the view of returning to work, she was reluctant to try different accommodations and was unwilling to wear splints because she found them to be uncomfortable. She did not consider new dictation systems which can substantially minimize typing and she was unwilling to consider other forms of accommodation. She did not make a serious attempt to go back to work of any kind.

[175] I am not persuaded Ms. Forster cannot do any work following the Accident. She has managed to continue to pursue leisure activities such as surfing, paddle boarding, and running. I note one witness testified that one has to paddle hard to catch waves. Paddling requires the use of one's hands. Ms. Forster is also able to travel. There was evidence that Ms. Forster continues to play the piano. She also cooks, which also uses her hands. While all of these activities are on a more limited basis than in the past, the point is she continues to do them. Had Ms. Forster returned to work part-time, she would have reduced her damages.

[176] While I accept that Ms. Forster was totally disabled in the first year following the Accident, since that time, I believe she is capable of working approximately four days per week of four-hour shifts. This would likely require some physical accommodations.

[177] By not attempting to return to work, Ms. Forster failed to mitigate her damages. I find that she likely can work approximately 40% of her pre-Accident hours based on Mr. Hosking's opinion that she can work four, four-hour shifts per week with a break after two days.

[178] I accept that Ms. Forster will need a part-time position with accommodations, which may not be easy to find so I account for this in the award. As a result of her failure to mitigate, damages for loss of earning capacity, after the first year post-Accident, will be reduced by 25%.

Non-Pecuniary Damages

Legal Principles

[179] Non-pecuniary damages are awarded to compensate the plaintiff for "pain, suffering, loss of enjoyment of life and loss of amenities": *Trites v. Penner*, 2010 BCSC 882 at para. 188 [Trites]; *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46, leave to appeal ref'd [2006] S.C.C.A. No. 100 [Stapley]. Non-pecuniary damages must be fair to all parties; fairness is measured against awards made in comparable cases.

[180] As set out in *Stapley* at para. 46, common factors that influence an award of non-pecuniary damages include:

- a) age of the plaintiff;
- b) nature of the injury;
- c) severity and duration of pain;
- d) disability;
- e) emotional suffering;
- f) loss or impairment of life;
- g) impairment of family, marital, and social relationships;
- h) impairment of physical and mental abilities;
- i) loss of lifestyle; and
- j) the plaintiff's stoicism.

[181] In *Lindal v. Lindal*, [1981] 2 S.C.R. 629 at 637 [Lindal], Justice Dickson (as he then was) stated that an award for non-pecuniary damages does not depend only on the seriousness of the injury, it also depends on the seriousness of the individual's loss:

the amount of an award for non-pecuniary damage should not depend alone upon the seriousness of the injury but upon its ability to ameliorate the condition of the victim considering his or her particular situation. It therefore will not follow that in considering what part of the maximum should be awarded the gravity of the injury alone will be determinative. An appreciation of the individual's loss is the key and the "need for solace will not necessarily correlate with the seriousness of the injury" (Cooper-Stephenson and Saunders, *Personal Injury Damages in Canada* (1981), at p. 373). In dealing with an award of this nature it will be impossible to develop a "tariff". An award will vary in each case "to meet the specific circumstances of the individual case"

[182] A fundamental principle of tort law is, to the extent a monetary award can accomplish it, a plaintiff should be placed in the same position they would have been in had the accident not occurred. The plaintiff should not be placed in a better position: *Parypa* at para. 29.

[183] In *Lindal* at 639-640, Dickson J. held that because non-pecuniary damages do not fulfill the function of compensation, the award under this head of damages should be moderate:

The purpose of making the award is to substitute other amenities for those that have been lost, not to compensate for the loss of something with a money value. Since the primary function of the law of damages is compensation, it is reasonable that awards for non-pecuniary loss, which do not fulfill this function, should be moderate.

[184] The parties took me to a number of cases regarding quantum of non-pecuniary damages. I have reviewed the cases and paid particular attention to: *Schulze v. Tull*, 2017 BCSC 781, and *Kwong v. Leonard*, 2012 BCSC 1818. The cases to which the parties referred provide helpful guidance, but each case turns on its own particular circumstances: *Trites* at paras. 188-189.

Analysis

[185] Ms. Forster was in excellent health prior to the Accident. She was fit and active. She competed in marathons and trail running. Her mood, apart from some anxiety, was good. Despite a suggestion by defence counsel, there was no evidence Ms. Forster's activity levels were reduced prior to the Accident.

[186] Ms. Forster presented consistent evidence regarding her ongoing injuries. She initially had acute soft tissue injuries and headaches that resolved within a month of the Accident. Her shoulder pain resolved in about six weeks. She continues to have some tenderness in her neck but this is intermittent. It is the persistent tingling, numbness, and burning sensation in her hands and mouth that most bothers her today.

[187] In the first year post-Accident, Ms. Forster could not do much in the way of physical activities. Once she was given the go-ahead from her physician, she began to participate in her recreational activities.

- [188] As stated above, Ms. Forster's main concern today is her constant numbness and tingling in her hands with occasional flare-ups. Ms. Forster's mood has also been mildly affected. She suffers from some anxiety although she had some anxiety prior to the Accident.
- [189] Ms. Forster has been off-work since the Accident.
- [190] Ms. Forster continues with most of her domestic, recreational, and leisure activities but she is restricted in the duration and frequency of these activities. She limits her activities because the consequences "will not be worth it". Ms. Forster continues to do her household chores, except vacuuming which her husband now does. They have hired a cleaner for their place in Ucluelet but testimony established this was to free up more leisure time.
- [191] Ms. Forster is able to do most of her previous recreational activities. She is able to run about one-and-a-half hours on the trails and continues to surf and paddle board. However, she can no longer paddle board on the ocean and her surfing is limited to the inner waves on calmer days. She continues to travel but it is not as adventurous as it was in the past. She manages her daily living activities with assistance.
- [192] I find that Ms. Forster's life has been affected by the Accident but not to the extent claimed. I award her \$85,000. This amount is not to be reduced for Ms. Forster's failure to mitigate.

Past Loss of Earning Capacity

Legal Principles

- [193] The legal principles with respect to loss of income were helpfully explained by Justice Goepel in *Grewal v. Naumann*, 2017 BCCA 158[2]:
- [45] The governing authority in this Court is *Smith v. Knudsen*, 2004 BCCA 613. In *Smith*, this Court, after an extensive review of the authorities, rejected the proposition that a claim for past loss of opportunity had to be established on a balance of probabilities
- [46] Rowles J.A. then went on to discuss the assessment of damages. She noted that the same test applies regardless of whether you are assessing past or future loss of earning capacity. In both situations the judge is considering hypothetical events. She reasoned:
- [29] What would have happened in the past but for the injury is no more "knowable" than what will happen in the future and therefore it is appropriate to assess the likelihood of hypothetical and future events rather than applying the balance of probabilities test that is applied with respect to past actual events.
- [48] In summary, an assessment of loss of both past and future earning capacity involves a consideration of hypothetical events. The plaintiff is not required to prove these hypothetical events on a balance of probabilities. A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation. If the plaintiff establishes a real and substantial possibility, the Court must then determine the measure of damages by assessing the likelihood of the event. Depending on

the facts of the case, a loss may be quantified either on an earnings approach or on a capital asset approach: *Perren v. Lalari*, 2010 BCCA 140 at para. 32.

- [49] The assessment of past or future loss requires the court to estimate a pecuniary loss by weighing possibilities and probabilities of hypothetical events. The use of economic and statistical evidence does not turn the assessment into a calculation but can be a helpful tool in determining what is fair and reasonable in the circumstances: *Dunbar v. Mendez*, 2016 BCCA 211 at para. 21.
- [194] In *Falati v. Smith*, 2010 BCSC 465, aff'd 2011 BCCA 45, Justice Saunders provided a useful discussion of the fundamental principles to take into account when assessing loss of past earning capacity:
- [40] The full assessment of damages for such losses may involve, at least to some extent, consideration of hypothetical situations and contingencies - what might have happened, or what might yet happen, had the accident not occurred, as distinct from what actually has happened. However, particularly where the claimed losses are derived from something other than a measurable, conventional income stream, the determination of a plaintiff's prospective post-accident, pre-trial losses can involve considering many of the same contingencies as govern the assessment of a loss of future earning capacity: "The only difference is that knowledge of events occurring before trial takes the place of prediction" - Prof. Waddams, *The Law of Damages*, Looseleaf Ed. (2008) para. 3.360. When considering hypotheticals and contingencies in the context of a pre-trial loss, the same general principles which govern the assessment of lost future earning capacity may be equally applicable -- Waddams, *ibid*. As stated by Rowles J.A. in *Smith v. Knudsen*, 2004 BCCA 613, at para. 29,
- "What would have happened in the past but for the injury is no more 'knowable' than what will happen in the future and therefore it is appropriate to assess the likelihood of hypothetical and future events rather than applying the balance of probabilities test that is applied with respect to past actual events."
- [195] These are the principles that I apply to both past and future loss of earning capacity.

Analysis

- [196] At the time of the Accident, Ms. Forster was working as a registered nurse in mental health emergency services. She was part of the team in the Car 87 program at Vancouver Coastal Health. She had been in her position for approximately 16 years.
- [197] Prior to the Accident, Ms. Forster was registered in a wage deferral program which enabled her to participate in leaves from work while continuing to receive income. She took one deferred leave when she volunteered to teach psychiatric nursing in Bangladesh.
- [198] At the time of the Accident, Ms. Forster's hourly wage was \$42.45.

- [199] Ms. Forster did not return to work after the Accident. In the first four months following the Accident, she received income from her sick leave bank. After that she received, and continues to receive, long-term disability benefits.
- [200] At the time of the Accident, Ms. Forster had arranged to take a leave from the Car 87 program to work as a nurse in Nunavut for four months starting in the summer of 2016.
- [201] I find that, but for the Accident, Ms. Forster would have worked for four months in Nunavut and so she is entitled to four months' wages.
- [202] The annual rate for the work in Nunavut range from \$95,882 to \$108,810. Taking the average of that salary range yields \$102,346. That figure divided by three yields approximately \$34,000. Adding this to eight months' gross income between May and December 2016 of approximately \$56,000, results in a gross loss of \$90,000 for 2016.[3] Ms. Forster is also entitled to compensation between 2017 and the date of trial of \$230,000. Therefore, the total for past loss of earning capacity is \$320,000.
- [203] I leave it to the parties to make the appropriate adjustments regarding a reduction for mitigation of 25% beginning on May 1, 2017 to reach the net figure.

Future Loss of Earning Capacity

Legal Principles

- [204] In determining a claim for future loss of earning capacity, the court must consider two questions. First, has the plaintiff's earning capacity been impaired by their injuries? To answer this question in the affirmative, there must be sufficient evidence that there is a real and substantial possibility of future income loss. If so, the second question will be, what compensation should be awarded for the resulting financial harm that will accrue over time?: *Hoy v. Williams*, 2014 BCSC 234 at para. 153 [Hoy]. To summarize, "[t]he plaintiff is required to prove a real and substantial possibility of a future event resulting in a loss in order to recover damages for loss of future earning capacity": *J.J. v. Barton*, 2017 BCSC 1196 at para. 57.
- [205] The standard of proof in relation to hypothetical or future events is simple probability, not the balance of probabilities: *Reilly v. Lynn*, 2003 BCCA 49 at para. 101. Hypothetical events are to be given weight according to their relative likelihood: *Athey* at para. 27.
- [206] In *Perren v. Lalari*, 2010 BCCA 140 at para. 32 [Perren], the Court of Appeal explained there are two possible approaches to assess loss of future earning capacity: the "earnings approach", as applied in *Steenblok v. Funk* (1990), 46 B.C.L.R. (2d) 133 (C.A.), and the "capital asset approach", as applied in *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 (S.C.). Both approaches are correct. The earnings approach is more useful when the loss is more easily measurable. The capital asset approach is more useful when the loss is not as easily measurable.

[207] The assessment must be based on the totality of the evidence and take into account both positive and negative contingencies: *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 33 [Gregory]. Evidence which supports a contingency must show a "realistic as opposed to a speculative possibility": *Graham v. Rourke* (1990), 74 D.L.R. (4th) 1 at 15 (Ont. C.A.) [Graham].

[208] In *Graham*, cited with approval in *Gignac v. Rozylo*, 2012 BCCA 351 [Gignac], Justice Doherty, for the Ontario Court of Appeal, stated at 14-15:

These cases, and those which have applied them, tell me that contingencies can be placed into two categories: general contingencies which as a matter of human experience are likely to be the common future of all of us, e.g., promotions or sickness; and "specific" contingencies, which are peculiar to a particular plaintiff, e.g., a particularly marketable skill or a poor work record. The former type of contingency is not readily susceptible to evidentiary proof and may be considered in the absence of such evidence. However, where a trial judge directs his or her mind to the existence of these general contingencies, the trial judge must remember that everyone's life has "ups" as well as "downs". A trial judge may, not must, adjust an award for future pecuniary loss to give effect to general contingencies but where the adjustment is premised only on general contingencies, it should be modest.

If a plaintiff or defendant relies on a specific contingency, positive or negative, that party must be able to point to evidence which supports an allowance for that contingency. The evidence will not prove that the potential contingency will happen or that it would have happened had the tortious event not occurred, but the evidence must be capable of supporting the conclusion that the occurrence of the contingency is a realistic as opposed to a speculative possibility: *Schrump v. Koot*, supra, at p. 559.

[209] When the court assesses damages for loss of future earning capacity, it is "a matter of judgment, not calculation": *Hoy* at para. 154.

Analysis

[210] The most contentious issue at trial was the extent to which Ms. Forster's future earning capacity was impacted by her injuries. Ms. Forster must establish there is a real and substantial possibility of a future event leading to an income loss: *Perren* at para. 32. It involves a comparison between Ms. Forster's likely future had the Accident not happened and her future after the Accident has happened: *Gregory* at para. 32.

[211] Ms. Forster seeks \$343,781 for her future loss of earning capacity. The defendants argue no compensation is appropriate under this head of damages based on the report of Dr. Wong. In the alternative, according to Mr. Hosking, she can work in the nursing profession for four to six hours per day, four days per week. Based on this view, the sum calculated by Mr. Turnbull was \$124,627. He also projected Ms. Forster would make \$219,155 for part-time work post-retirement. I assume there is a 50% chance Ms. Forster would work part-time post-retirement if she had not been injured. As a result I award \$109,578 as an estimate of

her future part-time work.

- [212] The defendants submit the amount awarded for future loss of earning capacity should be reduced by 40% based on her ability to work approximately 50% of her previous work hours. I already determined that Ms. Forster can continue to work 40% of her pre-Accident hours. In other words, Ms. Forster's future earning capacity has been compromised by approximately 60%.
- [213] Applying the earnings approach, I award \$235,000 for future loss of earning capacity. This amount should be reduced by 25% for Ms. Forster's failure to mitigate.

Loss of Housekeeping Capacity

- [214] In *Kim v. Lin*, 2018 BCCA 77, the Court of Appeal addressed the loss of housekeeping capacity. The court discussed the difference between a pecuniary award for loss of housekeeping capacity and the inclusion of damages as part of general award for non-pecuniary damages. The court's conclusion is summarized as follows:
- [33] Therefore, where a plaintiff suffers an injury which would make a reasonable person in the plaintiff's circumstances unable to perform usual and necessary household work -- i.e., where the plaintiff has suffered a true loss of capacity -- that loss may be compensated by a pecuniary damages award. Where the plaintiff suffers a loss that is more in keeping with a loss of amenities, or increased pain and suffering, that loss may instead be compensated by a non-pecuniary damages award. However, I do not wish to create an inflexible rule for courts addressing these awards, and as this Court said in *Liu*, "it lies in the trial judge's discretion whether to address such a claim as part of the non-pecuniary loss or as a segregated pecuniary head of damage": at para. 26.
- [215] Ms. Forster can do most housekeeping chores, albeit with some pain. Based on the above principles, I conclude that Ms. Forster's loss of housekeeping capacity is in keeping with a loss of amenities. I have, therefore, included her loss of housekeeping capacity in the award for non-pecuniary damages.

Cost of Future Care

- [216] A plaintiff is entitled to compensation for costs of future care for the harm caused by the defendant's negligence. Here, Ms. Forster is not making a claim for costs of future care.

Special Damages

- [217] The fundamental principle governing special damages is that of *restitutio in integrum*. The plaintiff is to be restored to the position they would have been in had the accident not occurred: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.).
- [218] In *MacIntosh v. Davison*, 2013 BCSC 2264, Justice Davies held the following applies to the analysis of special damages:

[127] Having reviewed all of the authorities to which I was referred, I have concluded that Saunders J.'s decision in Redl encapsulates the considerations which should bear upon the assessment of Mr. MacIntosh's special damages claims in this case.

[128] In summary, I am satisfied that when assessing special damages the standard is the reasonableness of the expense claimed in the context of the injuries suffered. Medical justification for any expense is a factor to be considered, but not the only one. Subjective factors can also be considered including whether the plaintiff believed the treatments were reasonably necessary.

[219] Ms. Forster must establish the costs of treatments and expenses she has incurred, and now seeks compensation for, are justified. She must establish that the money she spent was expended on reasonable treatments linked to the injuries that arose as a result of the Accident. She must also establish the price of treatments was reasonable.

[220] After reviewing the evidence, I am satisfied that the following expenses were justified:

Physiotherapy at Port Coquitlam Physiotherapy

\$890

Physiotherapy at Eagle Ridge Aquatic Centre Physiotherapy

\$3,932

Physiotherapy at Treloar Physiotherapy Clinic

\$240

Wrist splints

\$80

Massage

\$400

Medications

\$303

Occupational therapist sessions at JR Rehab Services Inc.

\$3,799

Chiropractic treatments with Dr. Kim

\$138

Mileage at \$0.50 per kilometer

\$741

Total

\$10,523

[221] Ms. Forster also claimed the cost of two private MRIs. However, when questioned in cross-examination, she offered no explanation for why these two MRIs were done privately. Ms. Forster bears the onus of establishing expenses are justified. Ms. Forster has not done so with regard to the two private MRIs.

[222] The total for special damages is \$10,523. I am not reducing these expenses for failure to mitigate.

Conclusion

[223] Ms. Forster is entitled to the following damages:

a) Non-pecuniary damages:

\$85,000

b) Past loss of earning capacity:

\$320,000

c) Future loss of earning capacity:

\$235,000

d) Special damages:

\$10,523

Total

\$650,523

[224] Both the past and future loss of earning capacity are to be reduced by 25% for Ms. Forster's failure to mitigate. I leave it to the parties to make any appropriate adjustments and to calculate pre-judgment interest on the award.

Costs

[225] Subject to relevant offers to settle, the plaintiff is entitled to costs. If the parties are unable to agree, within 45 days of this judgment either party is at liberty to file an application to determine costs.

"D. MacDonald J."

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- [1] Dr. Wang states that apart from possibly having carpal tunnel syndrome, "I do not have a good explanation for her presenting symptoms as her neurological examination is normal and her MSK examination is unremarkable. There is no objective focal finding to concern the tiny possible syrinx in her cervical spine that showed on her MRI." Dr. Michael Berger found no evidence of carpal tunnel syndrome during his assessment on March 6, 2019 and based on the electrode diagnostic evidence.
- [2] Justice Goepel wrote the dissent but his reasoning on loss of income was specifically endorsed by Justice Smith, writing for the majority: see para. 66.
- [3] I am assuming that Ms. Forster would have been on her full salary with Vancouver Coastal Health during the fall of 2016 when she would also have been working in Nunavut.
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