

CANADA / JUDGMENT

Frankson v. Neely

2020 BCSC 786

COURT

Supreme Court of British Columbia

DECIDED

28 May 2020

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2020 BCSC 786 Frankson v. Neely

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Frankson v. Neely,

2020 BCSC 786

Date: 20200528

Docket: M164348

Registry: Vancouver

Between:

Lindsey Frankson

Plaintiff

And

Mackenzie Neely

Defendant

Corrected Judgment: This judgment was corrected at paragraph 196 on June 5, 2020.

Before: The Honourable Mr. Justice A. Ross

Reasons for Judgment

Counsel for the Plaintiff:

A. Khanna

C. Khanna

Counsel for the Defendant:

M. Foster

G. Anderson

Place and Date of Trial/Hearing:

Vancouver, B.C.

February 10-14 & 18, 2020

Place and Date of Judgment:

Vancouver, B.C.

May 28, 2020

Table of Contents

The Plaintiff.. 3

The Plaintiff's Pre-Accident Health and Credibility. 4

The Accident and the Next Month.. 9

The Next Phase. 10

Expert Medical Reports.. 12

Dr. Sclater, Family Physician.. 12

Dr. le Nobel, Physiatrist 13

Dr. Ballard, Physiatrist 15

Summary of Medical Opinions. 19

Damages.. 19

Non-Pecuniary Damages. 19

Loss of Earning Capacity. 22

Past Loss. 22

Period One: June 2015-May 2016. 24

Period Two: May 2016-February 2019. 24

Period Three: February 2019 to Trial 29

Future Loss. 30

Cost of Future Care. 39

Special Damages. 41

Summary.. 42

- [1] This action arises from a motor vehicle accident that occurred on December 20, 2014. The plaintiff, Ms. Lindsey Frankson, was rear-ended by the defendant's vehicle. The plaintiff alleges that she suffered injuries to her neck, as well as her upper, mid and lower back. She claims that she now suffers from chronic pain that limits her ability to work. She seeks damages to compensate her for pain and suffering, loss of capacity to earn income (past and future), special damages, and future care costs.
- [2] The defendant admits liability. The defence arguments are grounded in the position that the plaintiff's pre-accident condition was more severe than she described at trial. Flowing from that position, the defendant argues that Ms. Frankson has not established that the accident was the cause of her current condition. The defendant further argues that, whatever the cause of the plaintiff's current condition, it does not limit her capacity to earn income.
- [3] I set out below the plaintiff's background, followed by the evidence regarding her pre-accident health. I then discuss the expert medical opinions before turning to the assessment of the different heads of damage.

The Plaintiff

- [4] Ms. Frankson was born in May 1984. She is 36 years old. At the time of the accident, she was 30. She lives in Pitt Meadows with her husband.
- [5] Ms. Frankson graduated from high school in 2002. She had not chosen a career path during high school. After graduation, she had a series of entry-level jobs. She also attended Douglas College where she took a variety of courses to see whether she had an interest or aptitude in any area. In 2007, she decided that she wanted to go to school to qualify as a certified dental assistant ("CDA"). When she decided on that career path, she realized that she would have to upgrade her math and science courses. She took the necessary upgrading, then she took the 10-month CDA course. She performed very well and achieved a grade point average of over 90%.
- [6] Upon graduation, Ms. Frankson obtained work at a dental office in Vancouver. However, her employer assigned her to do more receptionist work than dental assisting. She was not satisfied with that job and left after a few months. She then applied to Dr. Bortolussi's office in Pitt Meadows. Dr. Bortolussi hired her in July 2009, and she worked there until 2016. She says that she left that job due to the injuries suffered in this accident. Her reasons for leaving that position, and her future career plans, form the basis for her Loss of Capacity claim.
- [7] In 2004, Ms. Frankson met her future husband. They were married in 2011. Because it is related to her career planning, the couple's family planning is discussed below under the heading "Loss of Earning Capacity".

- [8] Before the accident, Ms. Frankson and her husband were a typical young married couple. They enjoyed activities like visiting with friends, going to movies, and taking long walks with their dog.
- [9] The plaintiff says that, before the accident, she formulated a plan to upgrade her education to qualify as a dental hygienist. A career as a hygienist would pay substantially more than working as a CDA. That issue is discussed below under the heading "Loss of Earning Capacity".

The Plaintiff's Pre-Accident Health and Credibility

- [10] The plaintiff's medical condition in the period before the accident is a significant issue in this trial.
- [11] The defendant's position is that the plaintiff suffered from a significant chronic pain condition before the accident. The defendant argues that the plaintiff downplayed that condition in her testimony. Thus, the defendant says that the plaintiff has not established that the accident caused her current condition. The defendant's arguments regarding credibility also apply to the plaintiff's alleged career goals.
- [12] For the reasons set out below, I accept the plaintiff's evidence about her condition prior to the accident and the injuries she suffered as a result of the accident. I do not accept the defendant's arguments relating to the plaintiff's credibility.
- [13] The assessment of credibility in all trials is important. There are long-established guides to assist in that process. I need not outline them here, except to note that, in this case, the plaintiff's testimony accorded with the other evidence tendered at trial, both documentary and viva voce. I do not find that any part of the evidence at trial contradicted the plaintiff's testimony. Having assessed all of the evidence, I find no reason to question the plaintiff's evidence.
- [14] The plaintiff testified over a two-day period. She presented her evidence in a fair and balanced fashion. She was cross-examined on the more contentious areas of her claim. She made appropriate concessions on some points, but held her ground in other areas. Her evidence regarding the severity of her pre-accident chronic pain accorded with the clinical records put to her. There was no portion of her examination for discovery where she provided contrary evidence.
- [15] Regarding her pre-accident health, Ms. Frankson admits that she had some longstanding chronic pain in her hip, low back, and neck. She also suffered from occasional flare-ups of that pain. On average, she would see a chiropractor six to eight times per year for "maintenance". She testified that her pre-existing pain was usually "mild" and did not interfere with her ability to do her job as a CDA. However, she did acknowledge that her work as a CDA was hard on her body.

- [16] In support of the defence argument that the plaintiff's pre-accident condition was severe, counsel points to clinical records of treatments the plaintiff received in 2013. Those records begin in March 2013. The defence argues that those records show a significant pre-accident condition. In response, the plaintiff submits that they are evidence of a flare-up.
- [17] In March and April 2013, the plaintiff started seeing a massage therapist and a chiropractor. She completed intake forms for those practitioners. In completing those forms, she described her physical condition.
- [18] On the massage clinic intake form, dated March 15, 2013, when asked to explain the nature of her condition, she wrote that:
- a) she had chronic back and tailbone pain for the past 15 years;
 - b) the pain was aggravated by her career;
 - c) a prior chiropractor suspected that she had fibromyalgia; and
 - d) she dealt with pain and tension every day, and it caused difficulty sleeping.
- [19] The plaintiff started seeing Dr. Casey, a chiropractor, on April 26, 2013. On the intake form, the plaintiff indicated that her career was "very hard" on her body. She described "chronic back (mid/lower) pain, hip soreness, tailbone pain". She ticked a box indicating that the pain was "getting worse".
- [20] These two forms, and the subsequent treatments, form the foundation of the defendant's argument that the plaintiff's pre-existing back pain was affecting, and would continue to affect, her ability to work as a CDA.
- [21] The first clinical note of the massage therapist, dated March 15, 2013, states "threw back out 6 days ago". The plaintiff then attended 10 further massage treatments between March 15 and May 31, 2013. Starting in June 2013, she tapered her appointments. She had one appointment in July and one in August 2013. After the August appointment, she had no further massage treatments until after the accident.
- [22] Similarly, Dr. Casey's notes indicate that the plaintiff's appointments were more frequent in the spring and summer of 2013. Thereafter, the frequency of her visits decreased. Dr. Casey's clinical notes after the summer of 2013 describe ongoing, mild pain.
- [23] The chiropractic notes in 2014 indicate that the plaintiff was "doing good overall", but had "general back and neck pain". She attended seven chiropractic appointments in the 12 months prior to the motor vehicle accident. Dr. Casey's note of October 21, 2014, states, "same areas/ maintenance but her left shoulder/ neck is a little more sensitive". The November 10, 2014 note, which was the last before the accident, indicates "upper back and neck still sore from work."

- [24] As noted, the plaintiff's testimony was that she was seeing her chiropractor, Dr. Casey, for "maintenance" before the accident. In this Court, we often hear pre-accident chiropractic treatments described as "maintenance". Dr. Casey's clinical note from October 21, 2014, actually uses that term. Dr. Casey testified at trial. His explanation of his clinical records did not contradict the plaintiff's testimony.
- [25] When the plaintiff first saw Dr. Casey after the accident, on an "Auto Accident Questionnaire", she wrote that her pre-accident condition consisted of "work related on/off stiffness, every 4 weeks chiro for Maintenance".
- [26] Further, after seeing him for seven appointments in 2014, the plaintiff saw Dr. Casey 28 times in the year after the accident. That increase in treatments suggests that her condition was worse after the accident. The defendant argues that the increase in visits might have been because ICBC was paying for the treatments after the accident. There is no evidence to support that argument.
- [27] In addition to chiropractic and massage treatments, Ms. Frankson also saw her family physician, Dr. Sclater, on May 31, 2013. I discuss Dr. Sclater's evidence and his expert report in more detail below. However, the visit of May 31, 2013, related to low back pain caused by her work as a CDA. He ordered an x-ray of her lumbar spine, which was negative. She did not see Dr. Sclater again until after the subject accident. Again, these records do not suggest that Ms. Frankson's pain was severe before the accident. Instead, it suggests that she had an increase in her pain in the period from March to June 2013.
- [28] In addition, other witnesses testified about the plaintiff's pre- and post-accident condition. Although their recollections were less precise than hers, the plaintiff's mother, husband, and a co-worker corroborated her description of her pre-accident health. The plaintiff's co-worker recalled that, before the accident, the plaintiff was a diligent worker with a bubbly personality. She was not limited in her ability to work as a CDA.
- [29] The defendant called Dr. Bortolussi, the plaintiff's former employer and Mrs. Bortolussi, the office manager. They both testified that in the period before the accident the plaintiff was a good worker. They were not aware of the plaintiff having any pre-existing neck or back problems. Their evidence did not contradict the plaintiff's evidence on this issue.
- [30] I note that, although the defendant argues that the plaintiff's pre-accident condition was more serious than the plaintiff admitted, the defendant concedes that she did not lose any time from work because of neck or back pain before the accident.
- [31] Based on the clinical records from the pre-accident period, and the testimony of the plaintiff and the other witnesses, I find that the plaintiff did have chronic back pain that was affected by her work as a CDA. That pain was bothersome but did not interfere with her ability to work. Her condition was subject to "flare-ups" such as the one that occurred in the spring of 2013. However, that incident was treated, and her pain reverted to its chronic, relatively mild, condition. The plaintiff's visits to the chiropractor in the months before the accident

were for "maintenance" of her chronic mild condition.

- [32] It follows that I do not accept the defence argument that the plaintiff's pre-accident condition continued at the level described in the intake forms completed in March and April 2013.
- [33] Despite these intermittent pains in the period before the accident, Ms. Frankson was generally healthy. She was largely unrestricted in her activities. She would regularly go on long walks with her husband and their dog. She had an active social life involving a group of friends and her family.
- [34] I discuss the second and third aspects of the defence arguments below. Those arguments relate to whether the plaintiff has established that the accident caused her current condition and whether she has suffered a loss of capacity to earn income.

The Accident and the Next Month

- [35] The accident occurred on December 20, 2014. Ms. Frankson was driving her Kia Rio on an off-ramp from Park Road, planning to travel eastbound on Lougheed Highway in Pitt Meadows. She stopped to yield to traffic when her vehicle was struck from behind by the defendant's vehicle. Photographs of the damage to her Kia were tendered in evidence.
- [36] Ms. Frankson exchanged information with the other driver. No emergency vehicles were called. Ms. Frankson continued to two banking appointments she had scheduled for that morning.
- [37] Dr. Bortolussi's office was closed for the holidays. It did not re-open until January 5, 2015. Ms. Frankson testified that she relaxed for the period after the accident until the office opened in January. She had a regular chiropractor appointment booked for December 30. She saw her chiropractor, Dr. Casey, and informed him of the accident.
- [38] When Dr. Bortolussi's office opened again on January 5, 2015, Ms. Frankson returned to her regular hours and duties. She testified that her condition improved in January 2015, but then deteriorated in February. She says that her pain made her work difficult. She arranged with a co-worker, another CDA, to divide the work so that the plaintiff would do the less physically demanding work. Dr. Bortolussi was not aware of this arrangement.
- [39] The plaintiff saw her family physician, Dr. Sclater, on January 9, 2015. The clinical record of that visit does not record any discussion of the accident. At the January 9, 2015 appointment, the plaintiff reported a needle prick at work. Dr. Sclater's clinical note recorded the visit as a "wcb" ("Workers' Compensation Board") appointment. It is understandable that, for this doctor's visit, dealing with an urgent health issue, Ms. Frankson did not discuss the motor vehicle accident.

The Next Phase

- [40] Despite the increased pain in the spring of 2015, Ms. Frankson continued working through the pain and sought treatments from her chiropractor, Dr. Casey. When her symptoms persisted, Dr. Casey recommended that she take some time off work to allow her injuries to heal.
- [41] The plaintiff saw her family physician, Dr. Sclater, on April 7, 2015, to discuss her injuries. She complained of pain in her low back, but her main focus was on the ongoing pain in her neck, shoulder, and mid-back (both sides). She saw him again on May 8, 2015, at which point Dr. Sclater recommended that she take six weeks off work and participate in an active rehabilitation program.
- [42] At the beginning of June 2015, she began her six-week rehab absence. During that period, she participated in an active rehabilitation program three days per week.
- [43] The plaintiff commenced a graduated return to work on July 20, 2015, while she continued with active rehabilitation sessions once per week. Her graduated return to work started with four-hour shifts, two days per week. Despite the limited hours, the return to work caused increased pain.
- [44] Despite her ongoing pain, in September 2015 the plaintiff increased her work to four-hour shifts, three days per week. This increase in hours further aggravated the pain in her neck and shoulders. As her problems persisted, Dr. Bortolussi allowed her to work one shift per week in the role of receptionist. She received the same salary. The receptionist work involved less time in static, flexed positions. In short, it was easier on her body. In addition, her co-worker continued to perform the more physically taxing duties.
- [45] The plaintiff continued in those roles, and at that pace, for the next nine months. She continued to have pain in her mid and upper back. It was sufficiently severe that it affected her ability to sleep. She continued with chiropractic treatments from Dr. Casey.
- [46] The plaintiff was not able to increase her hours of work beyond 12 hours per week. She continued to work for Dr. Bortolussi until May 2016, when she quit. The plaintiff actually gave her notice to Dr. Bortolussi in February 2016, but he requested that she remain to train her replacement. That process took until May. The plaintiff's reasons for leaving Dr. Bortolussi's office are discussed in more detail below under the heading Loss of Earning Capacity. In short, she felt inadequate, and she had little energy left for any other activities.
- [47] Of note, the plaintiff had not lined up another job before leaving Dr. Bortolussi's office. To some extent, she was again looking for a new career direction. She was hoping that further time off would assist in reducing her pain levels. She started filling her time by doing some writing in the subject area of her husband's business. She wrote some social media posts. She was not paid for any of this work although the couple split the income for tax purposes.

- [48] The plaintiff acknowledges that her pain improved after she left work and during the period of time that she did not work in a dental office. For treatment, she continued working with a kinesiologist as well as doing self-directed exercises.
- [49] In 2018, the plaintiff attempted to earn a living with her own crafting business. That business did not turn any profit.
- [50] In February 2019, Ms. Frankson decided to return to work as a receptionist in a dental practice. She was hired by Simply Wellness Dental in Burnaby, and she continues to work there as of the date of trial. The office accommodated her by providing an ergonomic workspace. She says that her symptoms, especially in her low back, have increased over the last few months. She says that she is not sure whether she will be able to continue with that job.
- [51] At present, she continues to complain of pain in her neck, shoulders, mid and low back. Although there is some effect on her mood, she has not been diagnosed with depression or a mood disorder. She has not received any psychological treatment.

Expert Medical Reports

- [52] The plaintiff relies on two medical-legal reports, one functional capacity evaluation, and one economic report. The defendant relies on one medical-legal report.

Dr. Sclater, Family Physician

- [53] Dr. Sclater, the plaintiff's family physician, has been treating her for more than 25 years. His first report, dated September 21, 2018, contains his opinion that the plaintiff's pre-accident chronic pain problems were "minor" and primarily in her low back. I note that the plaintiff testified that she primarily sought treatment for her neck and back pain from her chiropractor. Dr. Sclater's clinical records do not show any significant number of entries relating to pre-accident pain complaints. Hence, the evidence indicates that the plaintiff did not seek much treatment from Dr. Sclater before the accident. For that reason, I place little weight on Dr. Sclater's description of her pre-accident condition, other than to note that it accords with the plaintiff's testimony.
- [54] Dr. Sclater's first report contains narrative regarding her treatment in the period after the accident. Dr. Sclater confirms that he recommended that she take six weeks off work in the summer of 2015 and that he directed her gradual return to work. He also describes the discussions that led to the plaintiff deciding to quit her work as a CDA in early 2016 due to her ongoing symptoms. All of the information in the report accords with the plaintiff's description of events. He opines that, as of September 2018, she was disabled from working as a CDA.
- [55] In Dr. Sclater's second report, dated August 10, 2019, he summarized his opinion as follows:

As a result of the subject accident, Ms. Frankson sustained soft tissue injuries of her neck, upper back and lower back. Her ongoing symptoms can be classified as chronic pain arising from myofascial injury to the soft tissues of her neck, upper back and lower back. After stopping work as a dental assistant [due to ongoing upper back pain aggravated by this work] she has now resumed full time employment as a dental receptionist. Her main area of ongoing discomfort is her upper and mid back - with some left lower neck pain associated with the positional stresses of her new job. Approaching four years following the subject accident, Ms. Frankson will not likely experience any further improvement. She shall remain totally disabled over the long term from her regular pre-accident work as a dental assistant as it not reasonable to continue work that so significantly aggravates her back pain. She has now found alternative employment as a dental office receptionist that aggravates her back pain in a manner that is tolerable compared to her previous work. She will continue to have some intolerance for doing prolonged housework or yardwork and will have some difficulty with prolonged sitting and traveling. The prognosis for ongoing improvement of her physical symptoms is now "poor" as plateau of recovery has now continued for more than three years She has been encouraged to continue to be physically active to maintain fitness and conditioning of her back so that she can tolerate the positional stresses associated with sedentary and light activities.

[56] Dr. Sclater's evidence was supportive of the plaintiff's claims relating to her pre- and post-accident condition and the symptoms caused by the subject accident. He says that she is disabled from working as a CDA and her prognosis for future improvement is poor.

Dr. le Nobel, Physiatrist

[57] Dr. John le Nobel is a physiatrist. He conducted two independent medical examinations ("IMEs") in 2016 and 2019 and wrote two reports, dated September 12, 2016, and November 18, 2018. The two reports follow the same format, setting out his opinion on diagnosis, causation, impairment, disability, recommendations, and prognosis.

[58] There is no significant difference in the opinions expressed by Dr. le Nobel's between the two reports, with one notable exception: the issue of causation (discussed below).

[59] With respect to diagnosis, Dr. le Nobel says that, since the subject accident, the plaintiff has suffered chronic cervical, thoracic, lumbar spinal, and para-spinal pain; and buttock and hip pain. She has myofascial tissue injuries. Based on her pre-existing history, Dr. le Nobel says that she was at increased risk for worse consequences from the accident.

[60] Turning to the issue of impairment and disability, Dr. le Nobel says that if the accident had not occurred, Ms. Frankson would not have been limited in her ability to work as a CDA. In other words, her pre-existing chronic pain would not have caused any difficulty with her work as a CDA.

[61] As noted, Dr. le Nobel altered his opinion on causation between the two reports. In his second report, Dr. le Nobel addressed the issue of causation as follows:

Based on pre-collision history Lindsey Frankson was likely at increased risk for worse consequences from the December 20, 2014 motor vehicle trauma. Absent the December 20, 2014 collision Lindsey Frankson would not have experienced the increased symptoms and functional deterioration as has been the case.

[62] Notably, the last sentence of this paragraph constituted an amendment of a similar sentence in his first report. In his first report, Dr. le Nobel stated, "Absent the December 20, 2014 accident she would less likely have had the increased symptoms and functional deterioration as was the case" (emphasis added).

[63] Dr. le Nobel's opinion on the causation of the plaintiff's increased symptoms clearly moved from "less likely" to "but for". When asked about why he made that change, Dr. le Nobel stated that his opinion changed because of the persistence of Ms. Frankson's symptoms. However, it was my impression that his answer at trial did not address the question. My opinion is that he changed the wording between the two reports to comport with the development of the common law in relation to the application of the "but for" test for causation in negligence cases.

Dr. Ballard, Physiatrist

[64] The defendant relies on the reports of Dr. Tonya Ballard, a physiatrist, dated July 4, 2019, and December 11, 2019. Dr. Ballard saw the plaintiff on June 14, 2019. As of that date, the plaintiff had returned to workforce. She had been working as a dental receptionist since February 2019.

[65] The defendant obtained and tendered Dr. Ballard's second report under unusual circumstances. Dr. Ballard only saw Ms. Frankson on one occasion, June 14, 2019. She then wrote the July 4, 2019 report (discussed below). As counsel was reviewing the file in preparation for an earlier trial date, he noted that Dr. Ballard's report did not address the "intake" documents from Dr. Casey and the massage therapist from the Spring of 2013. As noted above, the defendant's argument puts significant weight on those documents.

[66] To be clear, Dr. Ballard had those intake documents and the pre-accident clinical records, but failed to review them before deriving her opinion and writing her first report.

[67] At counsel's request, Dr. Ballard took a fresh look at the plaintiff's pre-accident record. She then wrote a second report with a revised opinion regarding the causation of the plaintiff's current condition. Her initial opinion was that the accident caused soft tissue injuries to her neck, mid-back, and low back. Her second report opines that the thoracolumbar pain was an exacerbation of a pre-existing injury.

[68] I note that, taken in isolation, the second opinion (i.e., exacerbation) is generally consistent with the opinion of Dr. le Nobel.

[69] With respect to the status of the plaintiff's chronic pain, Dr. Ballard added to her second report, "Whether or not she has returned to her baseline level of pain is difficult to determine with any degree of certainty." She continued:

It is possible that she has recovered from her accident-related soft tissue injuries and has returned to her baseline level of chronic pain, although this is difficult to determine as the pre-existing pain was not reported by Ms. Frankson.

[70] I find that sentence troubling. My read of the sentence is that it appears Dr. Ballard was attempting to blame the plaintiff for failing to provide information about her pre-accident health status. However, Dr. Ballard was in possession of the pre-accident clinical notes of Dr. Sclater, Dr. Casey, and the massage therapist. Her first report noted Dr. Sclater's indication that there was a pre-existing chronic pain issue. The plaintiff testified that she answered all of the questions put to her at the IME. Hence, the procedure for that IME was reviewed in cross-examination.

[71] In cross-examination, Dr. Ballard advised that, when she comes to Vancouver to conduct IMEs she meets five to seven individuals per day. Ms. Frankson's assessment took 82 minutes, although Dr. Ballard was only with the plaintiff for 20-30 minutes. Dr. Ballard used an independent assessor who pre-interviewed the plaintiff. That assessor completed a checklist of questions. Dr. Ballard then interviewed the plaintiff and asked her about the relevant portions in the assessor's notes. The assessor's notes relating to the pre-accident history are not clear. The notes do not indicate that the plaintiff was asked about any pre-accident conditions. The independent assessor did not testify. Hence, there is no evidence to contradict the plaintiff's testimony that she answered all of the questions put to her.

[72] I further note that, by the time she saw Dr. Ballard, the plaintiff had seen Dr. le Nobel on two occasions. The plaintiff disclosed to Dr. le Nobel her full pre-accident health picture. Thus, it would make little sense for her to attempt to hide that situation from Dr. Ballard.

[73] Although I allowed defence counsel to enter Dr. Ballard's second report into evidence, I give it little weight. As noted, the finding that the plaintiff's current condition constitutes an exacerbation of her pre-accident chronic pain is not a particularly controversial finding. However, Dr. Ballard's follow-on opinion that the plaintiff's current condition might be the same as her pre-accident baseline does not hold water.

[74] I find that the facts of the case tend to disprove Dr. Ballard's suggestion that the accident related injuries might have resolved. As noted, although she had pre-accident chronic pain, Ms. Frankson was fully active and had not missed any time from work. She then had the accident and attempted to work. She was not able to continue working, so she took time to rehabilitate. Following that period, she was not able to return to work on a full-time basis. She then left dentistry. When she returned, she did so as a receptionist.

- [75] I start from the proposition that Ms. Frankson enjoyed her job as a CDA. All of the evidence supports that proposition. She did that job until the accident. If not for the increased pain caused by the accident, what reason would she have leaving her job as a full-time CDA and later returning to dentistry as a receptionist? Examined through this lens, Dr. Ballard's opinion defies common sense.
- [76] I outlined above my finding that the plaintiff had a flare-up of pain in March 2013. I also found that it is clear from the clinical records that Ms. Frankson's pain decreased with treatment. However, Dr. Ballard's opinion proceeds from the position that the intake forms constitute evidence of the status of Ms. Frankson's pre-accident condition on a consistent basis before the accident. In my opinion, the pre-accident records cannot be interpreted that way. They do not support the conclusion that the plaintiff's condition continued at the same level until the accident. To be frank, as discussed above, the records lead to a different conclusion.
- [77] I further note the relatively obvious point that the defendant required Dr. Ballard to write a second report because, due to either speed or inattention, she failed to review the pre-accident clinical records before writing her report. Those are the very documents that, according to the defendant's submission, are critical to the assessment of this case. Again, I find this aspect of Dr. Ballard's involvement in this case to be troubling. Missing those documents does not evince a level of thoroughness in Dr. Ballard's assessment of Ms. Frankson's case. While a specialist may be performing multiple IMEs on a given day, each one of those plaintiffs is likely to have significant damages at stake. Each plaintiff is entitled to have his or her case assessed on the basis of well-considered medical opinions. It does not assist either party, or the Court, when opinions are provided with less than full examination of the underlying facts.
- [78] For the reasons set out above, I do not accept the opinion provided in Dr. Ballard's second report.
- [79] As a result, the defendant is left with the opinions expressed in Dr. Ballard's first report. On the issue of causation, that report was not particularly well considered because, as noted, Dr. Ballard did not integrate the documents disclosing the extent of the plaintiff's pre-accident condition. In that respect, her first report may understate the plaintiff's pre-accident condition.
- [80] However, other aspects of Dr. Ballard's opinion can be considered. With respect to the plaintiff's level of disability as of June 2019, Dr. Ballard stated:

Currently she does not have a disability in regard to the sedentary position as a dental receptionist. However, it is felt that she would have partial disability with the static postures required of her pre-accident position as a Dental Assistant.

- [81] Regarding the prognosis for the plaintiff's condition, Dr. Ballard stated:

Given the chronicity of Mrs. Frankson's accident related symptoms at this point in time, approximately 4½ years post accident, she is likely to have ongoing intermittent myofascial neck and back pain. Although there is no current disability with respect to housekeeping, recreational or employment tasks, she would have partial disability were she to resume her pre-accident position as a dental assistant, which requires prolonged static postures, or were she to pursue a heavy labour type position. It is felt that her injuries have not caused any susceptibility for any future injury or illness.

- [82] With respect to future care, Dr. Ballard indicated that there was no need for "continued manipulation". She recommended a course of physiotherapy along with continued active independent strengthening.
- [83] Dr. Ballard's opinion establishes that, at a minimum, the plaintiff will suffer a partial disability from her work as a CDA. I discuss below the plaintiff's allegation that she planned to become a dental hygienist. Dr. Ballard does not express an opinion regarding the plaintiff's ability to work in that field.

Summary of Medical Opinions

- [84] In summary, the medical opinions that I accept indicate that the plaintiff's pre-accident condition, although chronic, would not have interfered with her career aspirations.
- [85] The opinions (that I accept) agree that the accident caused an increase in the plaintiff's chronic pain in her neck, shoulders, and mid and lower back. All of the IME doctors, including Dr. Ballard, agree that her present condition prevents her from working as a CDA on a full-time basis. The prognosis for improvement is poor.

Damages

- [86] The plaintiff seeks non-pecuniary damages as well as damages to compensate her for her past income loss and her loss of capacity to earn income in the future. She also claims for out-of-pocket expenses and future care costs.

Non-Pecuniary Damages

- [87] The plaintiff seeks an award of \$130,000 for non-pecuniary damages. She says that the range of analogous cases is between \$125,000 and \$140,000.
- [88] In terms of the effect on her life, the plaintiff points to the fact that before the accident, she was employed on a full-time basis and was very active. She loved her job, although it occasionally caused flares of pain. As of the date of trial, she continues to be restricted by neck and upper back pain. She says that this pain makes it difficult for her to maintain her job as a receptionist. The plaintiff's submissions note that she is discouraged and concerned about her future. However, there is no suggestion that the plaintiff has suffered from depression or a mood disorder.

- [89] Although I accept the plaintiff's submissions regarding the changes in her life, I note that many aspects of her life continue as they were before the accident. She continues to be married to a committed husband. She continues to be somewhat active, although her long walks are reduced to shorter walks. The major change is that she has been forced to leave her chosen occupation. Further, she lives with increased chronic pain and will continue with that problem for the indefinite future.
- [90] The plaintiff submits that the damage awards in the following cases are analogous:
- a) *Quezada v. Quezada*, 2019 BCSC 1732, in which the court awarded \$125,000 in non-pecuniary damages. She had pre-existing back problems, including a compression fracture of L2 in 2010, but described herself as in generally good health pre-accident. She missed work for six weeks post-accident, then gradually returned to a position as a registered nurse. Similar to Ms. Frankson's claim, Ms. Quezada suffered chronic pain that limited her ability to work. However, in addition to her chronic pain, Ms. Quezada suffered a concussion, depression and anxiety. Those aspects of the claim substantially increase the non-pecuniary damages. Hence, her injuries were more severe than Ms. Frankson's.
 - b) *MacLeod v. Whittemore*, 2018 BCSC 1082, in which the court awarded \$135,000 in non-pecuniary damages. She was a young CDA who suffered chronic pain due to thoracic outlet syndrome and myofascial pain syndrome caused by the accident. Although Ms. MacLeod's age and occupation are similar to Ms. Frankson's, Ms. MacLeod's injuries appear to have been more severe. Ms. MacLeod was not able to return to work in any capacity between the accident and the trial (although a pregnancy and maternity leave intervened during that period). Further, her injuries were so severe that the court awarded damages for future childcare due to her inability take on that task.
 - c) *Gill v. Lai*, 2018 BCSC 101, in which the court awarded non-pecuniary damages of \$140,000. The trial judgment was appealed but not in respect of that award. Ms. Gill was involved in two accidents. She worked as a pharmacist. At the time of the first accident, she was on maternity leave. She was diagnosed with chronic myofascial pain of the neck, shoulder, and upper back. Due to her injuries, she worked reduced hours for more than two years. She then worked full time for three years before asking to be re-assigned to a part-time position due to her ongoing pain. Overall, Ms. Gill's injuries appear to be more severe than Ms. Frankson's.
- [91] The defendant submits that the non-pecuniary damage award should be in the range of \$20,000-\$50,000.
- [92] I note that the defence submissions provided different damage awards based on different possible fact "scenarios", at which I might arrive. I consider this type of submission extremely helpful.
- [93] The defendant relies on the following cases:

- a) *Anderson v. Dwyer*, 2010 BCSC 526: This case represents the defence submission relating to the scenario where the plaintiff's injuries resolved within a year after the accident. In 2010, the court awarded \$20,000. My findings are not analogous.
- b) *Parker v. Shah*, 2013 BCSC 1599: The plaintiff worked a number of jobs, including as a dental assistant. She was injured in an accident and claimed that she had ongoing chronic pain. The distinguishing feature of *Parker*, however, is Justice Watchuk's finding that the plaintiff was not credible. The award of \$50,000 for non-pecuniary damages accepted that the plaintiff would have only mild ongoing pain caused by the accident. In that regard, I do not find the case analogous.
- c) *McLean v. Kraft*, 2015 BCSC 2212: The plaintiff was a dental hygienist. She suffered soft-tissue injuries. She missed work for five months before returning on a part-time basis. Justice Gaul found that she could have returned to full-time work by 2011, but chose not to. He felt that she had suffered some loss of future earning capacity, and awarded \$15,000 under that head. He awarded non-pecuniary damages of \$50,000.
- [94] As noted, my review of the cases submitted by the plaintiff suggests that each of those plaintiffs suffered injuries that were more severe and consequential than the injuries suffered by Ms. Frankson.
- [95] Similarly, the cases submitted by the defence discuss less severe injuries. They are also somewhat dated.
- [96] Taking all of the factors into consideration, I award \$90,000 in non-pecuniary damages.

Loss of Earning Capacity

Past Loss

- [97] The plaintiff seeks an award for the reduction in her capacity to earn income from the accident to the date of trial. She bases that claim on the difference between her actual earnings and the amount that she would have earned if she had continued at her pre-accident earnings with Dr. Bortolussi. She says that her loss began in June 2015 and has not ceased since that time. Based on the report of Mr. Peter Sheldon, a labour market economist, the plaintiff seeks an award for net past income loss of \$122,413.
- [98] The basis of the plaintiff's claim is that if the accident had not occurred, she would have had earnings of \$39,100 in 2015, rising to \$44,500 in 2019. The total (backwards projected) earnings, according to the report, would have been \$209,800. During the years 2015 to 2019, Ms. Frankson had actual gross income of \$60,901. That leaves a drop in gross income of \$148,899. The net loss is calculated at \$122,413.
- [99] I note that Ms. Frankson's actual pre-accident income topped-out at approximately \$35,000. Hence, any consideration of the economist's calculation must be reduced to factor in her actual earnings.

- [100] There is another element to the plaintiff's claim for past income loss. She says that she had a plan to return to school to upgrade her education and become a certified dental hygienist. That certification, and the subsequent career, would have increased her earnings significantly.
- [101] However, in order to obtain the certification, Ms. Frankson would have to go back to school, first to upgrade some of her existing courses, and second, to take the hygienist training.
- [102] As a result, in assessing her past losses, the plaintiff submits that I should take into account the possibility that she would have decided to return to school during the period before the trial. The timing of that schooling would affect both past and future income projections.
- [103] As explained below, I do not accept that the evidence at trial supports the prospect that the plaintiff would have returned to school prior to the date of trial. In short, she testified that she planned to obtain her pre-requisite courses while on maternity leave. The plaintiff and her husband have not yet had a child, although they are planning for one. The accident did not influence or affect that situation. Hence, regardless of the occurrence of the accident, Ms. Frankson would not yet have triggered the beginning of her training toward becoming a hygienist.
- [104] Because of that finding, I have assessed the past income loss on the basis that the plaintiff would not have left work to return to school. In other words, but for the accident, the plaintiff would have continued working as a CDA on a full-time basis.
- [105] The defendant's first position on past income loss is that none was suffered. She argues that the plaintiff was capable of working on a full-time basis, as well as working some overtime hours, from the date of the accident until June 2015. In doing so, the defendant says the plaintiff demonstrated that she was capable of working those hours.
- [106] The defendant back-stops that first position by submitting that if the Court accepts that there was some income loss, then it should be limited to the difference between her pre-accident income, and her actual income to the end of November 2015. The defendant calculates that figure at \$13,654.45. The defendant submits that the claim for past income loss ends at that point.
- [107] I do not accept the positions of either the plaintiff or the defendant. I find that the loss falls somewhere in the middle. There were, in my opinion, three distinct periods of loss:
- a) June 2015 to May 2016, while the plaintiff was working at Dr. Bortolussi's office, but at reduced hours;
 - b) May 2016 to February 2019, while the plaintiff was not working; and
 - c) February 2019 to present, while the plaintiff has been working as a receptionist at a lower hourly wage.

Period One: June 2015-May 2016

- [108] As noted above, the plaintiff's career as a CDA began in 2007. From 2009 to the date of the accident, she worked at Dr. Bortolussi's office. Her earnings were in the range of \$31,000 to \$35,000. In 2015, the year immediately following the accident, her income decreased to \$24,086. In 2016, she had employment income of \$5,716 prior to departing Dr. Bortolussi's office.
- [109] Sylvia Bortolussi, Dr. Bortolussi's office manager, provided a document outlining the amount of the income loss suffered by the plaintiff up to the point of her departure in May 2016. That document calculated the gross loss at \$28,828.97. I accept that figure as the gross income loss up to May 2016.

Period Two: May 2016-February 2019

- [110] For the period from May 2016 to February 2019, the plaintiff claims, as past income loss damages, the difference between her prior income as a full-time CDA and her actual employment income (which was zero).
- [111] The defendant disputes any income loss claimed after May 31, 2016, submitting that the plaintiff was not totally disabled at that point in time. Alternatively, she was not disabled by her accident-related injuries. The defendant contends that the plaintiff quit her job with a plan to go and work for her husband's consulting company.
- [112] The defendant relies, in part, on Sylvia Bortolussi's testimony. Ms. Bortolussi recalls the plaintiff saying, in the Spring of 2016, that she was going to work for her husband in a secretarial role. There was room in her husband's budget for her to do clerical work.
- [113] However, a wage loss questionnaire completed for plaintiff's counsel by Ms. Bortolussi in 2018 states:

Part-time July 20, 2015. She had was not able to return full-time + later had to resign as she was not able to continue working on a part-time basis due to injuries.

- [114] Ms. Bortolussi testified that she wrote that statement based upon what she was told by the plaintiff at the time she left. The wage loss questionnaire supports the plaintiff's position.
- [115] As noted above, after leaving Dr. Bortolussi's office, the plaintiff did not obtain work until 2019. The structure of her husband's business allowed the couple to split income. The plaintiff and her husband acknowledge that she did write some social media posts and blogs in the subject area of his work (environmentalism) in 2016. However, they deny that she earned any money doing those tasks.
- [116] The plaintiff received dividends of \$65,000 in 2016, \$40,000 in 2017, and \$41,000 in 2018. The dividend payments did not derive from any work performed by the plaintiff, and they are not considered in my assessment of her past income loss. The dividend payments were a tax efficient method of distributing Mr. Frankson's business income. However, it must be

noted that the plaintiff and her husband were able to arrange their financial affairs in a manner such that the overall income tax on his income decreased because the plaintiff was not working. Thus, it may have influenced her decision to leave work in May 2016 or to remain unemployed until 2019.

- [117] The plaintiff testified that in 2018, she attempted to commence a crafting business. Although she worked on that business for the entire year, she did not earn any profit. She declared no income on her tax returns from this venture.
- [118] Starting in February 2019, the plaintiff took a job at a newly opened dentistry office. She now works full time as a receptionist.
- [119] The economist report of Mr. Sheldon, attempts to calculate the plaintiff's past income loss based on certain assumptions. He estimates the plaintiff's past net income loss at \$122,413 from the accident to the trial.
- [120] The basis of Mr. Sheldon's calculation is that the plaintiff had total income of \$5,716 in 2016, and zero income in 2017 and 2018. Hence, Mr. Sheldon's calculations are based on the plaintiff being totally disabled during the period from May 2016 to February 2019. In order to conclude that the plaintiff suffered a total loss of income during the period after she left Dr. Bortolussi, I would have to find that she was totally disabled during that period. That is not my finding.
- [121] Although the plaintiff left employment with Dr. Bortolussi, there is no indication in the medical evidence that she was totally disabled from working at that time. The narrative report of Dr. Sclater (September 28, 2018) reviews the discussions that he had with the plaintiff from January through May 2016. In those appointments, they discussed her problems with continued work as a CDA. However, there is no indication in his report that Dr. Sclater recommended or endorsed a departure from all work at that time. Instead, he endorsed a change in careers because the plaintiff was having difficulty continuing her work as a CDA. The context of the report indicates that Dr. Sclater endorsed a switch from working as a CDA to receptionist.
- [122] Ms. Frankson did ultimately obtain work as a receptionist in February 2019. However, she did not work for the 33 months in between.
- [123] Based on these facts, the question to address is: What is the appropriate method of assessing the plaintiff's past loss during this period of unemployment?
- [124] The evidence establishes that the plaintiff was not capable of working on a full-time basis as a CDA as of May 2016. She was working approximately 12 hours per week, although that level of work was causing difficulties for her. I find that she voluntarily left her employment as a CDA because she was having difficulty performing the requirements of that job. However, she was not totally disabled from all employment at that time.

- [125] On those facts, it would not be appropriate to assess damages on the basis that the accident caused the plaintiff to suffer a complete loss of earnings for 33 months. The defendant is not responsible to pay the plaintiff for her life choices. The defendant is responsible to pay the plaintiff for damages that arise from the accident. The plaintiff was capable of working in some capacity as of May 2016.
- [126] There are certain personal injury cases where a plaintiff is partially disabled but chooses not to work at all. In those situations, it is often improper to award any income loss damages. The defendant should not be responsible for income loss where a plaintiff can work but chooses not to. In certain cases, the absence of work is a choice that was not occasioned by the negligence of the defendant.
- [127] This case is slightly different. The plaintiff spent several months in 2015 and 2016 trying to increase her work hours in her occupation. Ultimately, she determined that she could not continue as a CDA. She wanted to take some time off work to allow her body to recover. She also testified that she did not feel that she was able to do her job to the standard required by her employer. She felt that she had let him down. I note that Dr. Bortolussi testified that he did not consider that her performance had dropped below an acceptable standard. He felt that she continued to be a good employee, albeit at decreased hours. Regardless, she left her job in May 2016, and decided not to work until February 2019 when she started work as a dental receptionist. She now works on a full-time basis in that new position.
- [128] Given the pain problems she was suffering in early 2016, I find that it was reasonable for the plaintiff leave her CDA job in May 2016. This is not a situation where a plaintiff simply left work without a valid reason. Although Ms. Frankson was capable of working part-time hours as a CDA, she chose to leave work in an attempt to achieve improvement in, or possible resolution of, her symptoms. It was reasonable for her to explore whether that improvement would allow her to return to her old job. If she did not achieve sufficient recovery, then she would consider other less taxing occupations. Those were reasonable decisions for which the defendant is liable.
- [129] However, the causal connection of the plaintiff's unemployment to the accident decreases over time. At some point between May 2016 and February 2019, she was capable of returning to work, but chose not to. As noted, the plaintiff attempted to create a crafting business in 2018. That business earned no income. If she had put her efforts toward remunerative employment, then her loss would have been lower because her income would have been higher. The defendant is not responsible for a loss suffered by the plaintiff while attempting a business that ultimately failed.
- [130] When the plaintiff later returned to work as a receptionist, she was able to work on a full-time basis. In her new job, she is capable of earning income similar to, but slightly lower than, her pre-accident hourly wage.

- [131] As a result, I assess the plaintiff's past loss of earning capacity on the basis that she made a reasonable decision to leave work in May 2016, but she could have returned to work at some point before February 2019. I recognize, however, that she was not capable of working on a full-time basis for that entire period.
- [132] Before the accident, the plaintiff earned approximately \$35,000 per year, working full-time hours. In the period from September 2015 to May 2016, she worked approximately 12 hours per week. That level of work is equivalent to annualized earnings of \$14,500.
- [133] Taking into account the time that the plaintiff could reasonably have taken to focus on recovery, the benefit to the couple of the income-splitting, and her efforts at starting her own business in 2018, I assess her gross past loss of capacity to earn income during the period from May 2016 to February 2019 at \$60,000. That figure represents approximately 60% of the amount that she would have earned working full time as a CDA. I assess that figure as a reasonable approximation of the loss occasioned by the accident.

Period Three: February 2019 to Trial

- [134] From February 2019 to the present, the plaintiff has been working full time as a receptionist. She earns \$20 per hour. That is a lower hourly wage than her prior employment as a CDA.
- [135] The defendant says that there is no evidence of a loss because both Mr. and Mrs. Bortolussi testified that they would rehire Ms. Frankson at her prior wage to work as a receptionist. They testified that their receptionists earn the same hourly wage as their CDAs. However, there are a number of factors that go into the choices that a person makes regarding her employment. A person may choose long-term job security over a higher hourly income. For example, Dr. Bortolussi recently sold his practice. The plaintiff's position with the purchaser might not have been secure. Hence, a higher-paying position might be less secure.
- [136] As a result, I accept that the plaintiff has continued to suffer a loss due to lower income since February 2019. I assess that loss at \$5,000.
- [137] In the result, I assess the past loss of earning capacity in the following amounts:
- a) June 2015-May, 2016 \$28,828
 - b) June, 2016-February 2019 \$60,000
 - c) February 2019-Date of trial \$5,000
- Total \$93,828 (gross)

Future Loss

- [138] The plaintiff claims that her injuries have caused a loss of her capacity to earn income for the rest of her career. Her claim can be described as follows: She had formulated a plan to return to school to qualify as a certified dental hygienist. The career earnings for that occupation are significantly higher than the career earnings for a CDA or a dental receptionist. Hence, she has suffered a loss.
- [139] As set out above, in the discussion of the plaintiff's financial losses to the date of trial, it is implicit that, even without proceeding to hygienist school, she has suffered a loss because she is not able to work on a full-time basis as a CDA.
- [140] The defence position is that the evidence does not meet the threshold of establishing a "real and substantial possibility" that the plaintiff would have become a hygienist. Further, the defence argues that the hourly income for a receptionist is the same as that of a CDA. Hence, there is no future loss. The defence submissions on this issue are discussed below.
- [141] For the reasons set out below, I find that there had been a loss of capacity to earn income, but the basis of that loss is grounded in the plaintiff's prior occupation as a CDA and not her proposed occupation as a dental hygienist. I do not find that there is a real and substantial possibility that, absent the accident, the plaintiff would have gone back to school to become a dental hygienist.
- [142] The standard of proof in assessing future hypothetical events is simple probability, not the balance of probabilities. The plaintiff is entitled to compensation for real and substantial possibilities of loss: *Reilly v. Lynn*, 2003 BCCA 49.
- [143] The cases recognize that this assessment requires some element of "crystal ball gazing" to determine fair compensation for impairment of future earning capacity. As Justice Cumming said in *Parypa v. Wickware*, 1999 BCCA 88 at para. 62:
- [62] It is clear that this determination is not a precise or mechanical exercise. The difficult and inherently uncertain task of predicting the future is described in the following oft quoted passage by Dickson J, in *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229 at 251:
- We must now gaze more deeply into the crystal ball. What sort of career would the accident victim have had? What were his prospects and potential prior to the accident? It is not loss of earnings but, rather, loss of earning capacity for which compensation must be made: *The Queen v. Jennings*, supra. A capital asset has been lost: what was its value?
- [144] The role of the court is not to calculate, but to assess, the amount of the loss. In *Rosvold v. Dunlop*, 2001 BCCA 1, the Court of Appeal summarized the proper approach:
- [8] The most basic of those principles is that a plaintiff is entitled to be put into the position he would have been in but for the accident so far as money can do that. An award for loss of earning capacity is based on the recognition that a plaintiff's capacity to earn income is an asset which has been taken away: *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229;

Parypa v. Wickware (1999), 65 B.C.L.R. (3d) 155 (C.A.). Where a plaintiff's permanent injury limits him in his capacity to perform certain activities and consequently impairs his income earning capacity, he is entitled to compensation. What is being compensated is not lost projected future earnings but the loss or impairment of earning capacity as a capital asset. In some cases, projections from past earnings may be a useful factor to consider in valuing the loss but past earnings are not the only factor to consider.

- [9] Because damage awards are made as lump sums, an award for loss of future earning capacity must deal to some extent with the unknowable. The standard of proof to be applied when evaluating hypothetical events that may affect an award is simple probability, not the balance of probabilities: *Athey v. Leonati*, [1996] 3 S.C.R. 458. Possibilities and probabilities, chances, opportunities, and risks must all be considered, so long as they are a real and substantial possibility and not mere speculation. These possibilities are to be given weight according to the percentage chance they would have happened or will happen.
- [10] The trial judge's task is to assess the loss on a judgmental basis, taking into consideration all the relevant factors arising from the evidence: *Mazzuca v. Alexakis*, [1994] B.C.J. No. 2128 (S.C.) (Q.L.) at para. 121, *aff'd* [1997] B.C.J. No. 2178 (C.A.) (Q.L.). Guidance as to what factors may be relevant can be found in *Parypa v. Wickware*, *supra*, at para. 31; *Kwei v. Boisclair* (1991), 60 B.C.L.R. (2d) 126 (C.A.); and *Brown v. Golaïy* (1985), 26 B.C.L.R. (3d) 353 (S.C.) per Finch J. They include:
- [1] whether the plaintiff has been rendered less capable overall from earning income from all types of employment;
 - [2] whether the plaintiff is less marketable or attractive as an employee to potential employers;
 - [3] whether the plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to him, had he not been injured; and
 - [4] whether the plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market.
- [11] The task of the court is to assess damages, not to calculate them according to some mathematical formula: *Mulholland (Guardian ad litem of) v. Riley Estate* (1995), 12 B.C.L.R. (3d) 248 (C.A.). Once impairment of a plaintiff's earning capacity as a capital asset has been established, that impairment must be valued. The valuation may involve a comparison of the likely future of the plaintiff if the accident had not happened with the plaintiff's likely future after the accident has happened. As a starting point, a trial judge may determine the present value of the difference between the amounts earned under those two scenarios. But if this is done, it is not to be the end of the inquiry: *Ryder (Guardian ad litem of) v. Jubbal*, [1995] B.C.J. No. 644 (C.A.) (Q.L.); *Parypa v. Wickware*, *supra*. The overall fairness and reasonableness of the award must be considered taking into account all the evidence.

- [145] In my analysis below, I have incorporated the factors set out above. I deal first with the prospect that the plaintiff would have pursued additional schooling to become a dental hygienist.
- [146] The facts of this case fall in a category of cases where a relatively young plaintiff had chosen, and was pursuing, one career path. However, she says that she contemplated further schooling to pursue a related, and higher-paying, career path. The accident then intervened. The question is: If the accident had not occurred, what would the plaintiff's career path have looked like? In assessing those prospects, the question is whether there is a real and substantial possibility that the plaintiff would have pursued the other career path.
- [147] As set out above, prior to the accident, Ms. Frankson says that she had the goal of going back to school to train as a dental hygienist. She and her husband testified about the steps that she had taken to research the necessary schooling to achieve that goal. She testified that her desire to achieve this goal was "very firm".
- [148] There were, however, obstacles in her path. She says they were speed bumps. The defendant says they were roadblocks.
- [149] Ms. Frankson had researched the hygienist schools in Canada. She was considering two schools, one in Ontario and one in Vancouver. She favoured the school in Ontario because it required fewer pre-requisite courses.
- [150] To become eligible to gain entry to dental hygienist school in Ontario, she is required to upgrade her math and science courses. Those courses are considered high school level. Obtaining those pre-requisites would have taken her a year. Thereafter, the hygienist training in Ontario would have taken 18 months and cost \$30,000. Hence, pursuing the shorter training option would have required 30 months of schooling. Of course, admission to the school would depend on qualifying grades and availability of spaces. The 30 months of schooling would not be sequential. The plaintiff would not be able to work while in school.
- [151] The hygienist school in Vancouver had higher entry requirements with more pre-requisite courses. It required her to do the high school math and science upgrades and then complete some first year university credits in biology and chemistry. She could not do the university courses until she had completed the math and science upgrades. Hence, there would have been an extra six to 12 months of school before she satisfied the pre-requisites for entry. Again, there would have been gaps between each year of schooling. Thus, the schooling plus gaps would have meant that the entire process, in Vancouver, would have taken 36-42 months.
- [152] The plaintiff and her husband testified that they had discussed the plan. They say they were willing to move to Ontario for the necessary period of time.

- [153] The defendant argues that the facts do not support a real and substantial possibility that the plaintiff would have pursued this schooling. They point to the following factors that suggest the plaintiff did not intend to pursue a career change:
- a) The pre-requisite courses included Grade 11 math and science. The plaintiff had not taken those courses despite multiple years at Douglas College.
 - b) The pre-requisite courses were basic science courses that would be available at night school. The plaintiff took no steps to upgrade her education between 2009 and the date of the accident.
 - c) The plaintiff did not inform her employer of her plans, despite the fact that another CDA in the office pursued this transition to hygienist.
- [154] I accept the first two points. They constitute evidence tending to show that, whatever Ms. Frankson may have planned to do, there was nothing preventing her from taking the first steps toward this schooling before the accident. The third point, informing her employer, I do not accept. There may be any number of reasons that a person does not inform her employer about career or education plans.
- [155] Another factor I consider is the couple's family planning. Ms. Frankson and her husband are a young couple making their way in the world. Their careers constitute one aspect of their planning. Another area is parenthood. In that area, the couple has hit a snag, and they are pursuing medical treatment. That is a medical issue unrelated to the accident. The plaintiff testified that their family planning is a high priority for the couple.
- [156] That being the case, I have to consider the plaintiff's life choices if the accident had not occurred. Based on her evidence, I find that she and her husband, like most couples who intend to have children, would have prioritized parenthood over career at this stage in their lives. Put another way, absent the accident, she would not have committed to any schooling until she knew the status and timing of her attempts to become pregnant.
- [157] The plaintiff says that according to their pre-accident plan, if she became pregnant, she would undertake her prerequisite courses while on maternity leave. Hence, the triggering date for commencing her schooling for her new career would be dependant upon having a child. The plaintiff also testified that if it was later determined that the couple could not have children, she would reconsider the timing. However, as of the date of trial, the couple continues to plan for a family.
- [158] As a result, I am required to consider the reasonableness of the plaintiff completing the pre-requisite courses while on maternity leave. While that is a possibility, for the reasons set out below, I consider that it would be difficult, in both the planning and execution.

- [159] While the plaintiff may have planned to take those courses while on maternity leave, I have to take into account the fact that she did not take those courses before the accident. If she planned to move ahead with becoming a hygienist, she had the period from 2009 through 2014, while she worked at Dr. Bortolussi's office, to obtain the pre-requisite courses. As noted, those courses were basic and would be available at night school. Further, it is difficult to predict what a person will be able to accomplish while on parental leave.
- [160] The next issue is whether it is reasonable to expect that the plaintiff would pursue a career change (from CDA to hygienist) after having one or more children. There is, of course, nothing preventing a parent from pursuing further education and career opportunities at any point in his or her career. However, being a parent does present a hurdle to further schooling.
- [161] Further, the faster route to becoming a hygienist required a move to Ontario. Although the plaintiff and her husband both testified that they were willing to make that move, I find that prospect unlikely. The plaintiff and her husband have a support network in the Lower Mainland. Both sets of parents live in the area and could provide some amount of childcare. In my opinion, that fact reduces the likelihood that the plaintiff would have chosen to attend any school outside of the Lower Mainland. Hence, there is a higher likelihood that if she was to proceed, the plaintiff would have planned her education proceeding at the Vancouver-based school.
- [162] In addition, as set out above, before the accident, the plaintiff was aware that her work as a CDA was a source of chronic pain in her neck and upper back pain. The work of a hygienist would not have improved those problems and may aggravate them. Hence, as she looked toward the remainder of her career, she faced the prospect that she might invest significant time in school, only to find the work difficult to pursue.
- [163] Finally, I consider the finances of the proposed career change. The plaintiff is currently 36 years old. Training to become a hygienist (in Vancouver) would require her to forego income for approximately three years (after her initial studies during her maternity leave).
- [164] I have reviewed the report of Mr. Sheldon relating to the possible income loss damage scenarios. In this part of my assessment, I am considering Mr. Sheldon's projections to determine whether it is realistic to think that Ms. Frankson, absent the accident, would have made the decision to pursue additional schooling.
- [165] Mr. Sheldon's report uses average CDA earnings of \$45,300 per year. That figure exceeds the plaintiff's actual earnings prior to the accident. Further he adjusted, or "time lagged", the average earnings for hygienists, to account for the fact that, if Ms. Frankson entered that occupation, she would enter it later than the average worker who make up the statistics.
- [166] According to Mr. Sheldon's projections, Ms. Frankson's remaining career earnings from the trial to age 65, considering the present value of money, choice, and risk factors, would be:

- a) as a CDA, \$1,019,477;
- b) as a hygienist, \$1,462,149.

- [167] For the purpose of this exercise, I am simply considering whether it is reasonable for a person in his or her mid-30's to look at his or her remaining career years, and say: I will give up approximately three years of income now (approximately \$135,900 on Mr. Sheldon's figures), plus pay tuition of \$30,000, in exchange for an increase in my career earnings of \$450,000 over the next 30 years.
- [168] I use that analysis, because, as noted, the plaintiff and her husband are currently planning to have a family. Hence, if the accident had not occurred, using the plaintiff's scenario, she would still be working as a CDA, but would be planning to pursue the hygienist training commencing when she goes on maternity leave. Each year that passes makes the change of career less financially appealing.
- [169] Of course, absent the accident, the plaintiff would not have retained an economist to assess the financial implications of a career change. However, the finances are generally clear. While the income of a hygienist constitutes an increase over a CDA, it is not a life-changing increase, especially when balanced against a long period of no income and \$30,000 in tuition.
- [170] Considering all of the factors set out above, I find that the limited financial upside further diminishes the plaintiff's ability to establish that it was a real and substantial possibility that she would pursue a hygienist career.
- [171] In stating this analysis, I do not suggest that the plaintiff meant to mislead or that she manufactured the idea of pursuing a career as a hygienist. I accept that she considered it and wanted to pursue it. However, many people consider career changes but do not pursue them.
- [172] Returning to the test for establishing a claim for loss of future earning capacity, I am not satisfied that there was a real and substantial possibility that the plaintiff would have become a dental hygienist. Although it is feasible that she could have achieved that goal, in my opinion, there were too many obstacles in her way. If she had been keen on pursuing that career, she could have started the process earlier by attending night school. By putting off the decision to begin extra schooling until after she had children, she further reduced the chance that she would make this financial and career decision. As a result, the plaintiff has not met the threshold test of establishing that a career as a dental hygienist was a real and substantial possibility. Hence, I cannot assess her future damages on the basis of those career earnings.

- [173] With that being said, I find that it is clear that the plaintiff has suffered a loss of capacity to earn income. Although I have found that she would not likely have become a hygienist, it is clear that the plaintiff has lost the ability to work full time in her pre-accident occupation as a CDA.
- [174] There is consensus among the physicians who assessed Ms. Frankson that her ability to work as a CDA has been compromised.
- [175] At present, Ms. Frankson is employed as a dental receptionist. Her salary is \$20 per hour. The evidence at trial was that, generally, dental receptionists earn the same hourly rate as CDA's. Dr. and Sylvia Bortolussi testified that, in their office, the pay scale is the same for both positions. Hence, when the plaintiff moved between the roles during her graduated return to work, there was no alteration in her salary.
- [176] Another aspect of this claim that must be considered is the plaintiff's evidence that she is not sure whether she can continue to work as a receptionist due to her ongoing pain. I have considered that evidence. I give it some, but not much, weight. I note that none of the experts opined on a limitation in the plaintiff's ability to work as a receptionist.
- [177] In my assessment of the plaintiff's loss of capacity claim, I consider the following:
- a) The accident caused injuries that limit her ability to work as a CDA on a full-time basis.
 - b) As a result, her career plans have been altered. She has switched from CDA to receptionist.
 - c) The evidence establishes that she is capable of working as a receptionist on a full-time basis, but she has concerns about her future.
 - d) As a result, she faces the real and substantial possibility that, in future, the slate of jobs available to her will be limited. When applying for jobs in the future, instead of being able to apply for both receptionist and CDA positions, she can only apply for the receptionist positions.
- [178] Thus, I find that the plaintiff has met the test to establish a claim of future loss of capacity to earn income. She is less valuable to herself and prospective employers. She is qualified to perform work that, as a result of the accident, she is not capable of performing.
- [179] Looking at the potential career earnings approach, I return to Mr. Sheldon's projections:
- a) The projected earnings of dental receptionist to age 65, with a delayed entry of seven years, are in the range of \$887,000 after considering labour market factors.
 - b) The projected earnings for the plaintiff as a CDA to age 65 are \$1,019,000.
- [180] Hence, based on the Mr. Sheldon's projections, Ms. Frankson will suffer a loss of approximately \$130,000.

- [181] The figure of \$130,000 constitutes the projected loss if I assume that Ms. Frankson will be able to continue to be employed without interruption. In other words, that loss is established on a balance of probabilities.
- [182] I find that a slight increase in that figure is appropriate to compensate for the real and substantial possibility that there may be fewer jobs available, or the plaintiff may have some periods of unemployment due to her chronic pain condition.
- [183] Taking all of the factors into consideration, I award \$160,000 to compensate the plaintiff for her loss of capacity to earn income in the future.

Cost of Future Care

- [184] The plaintiff submits that the test to be applied to establish a claim for future care cost was set out by the Court of Appeal in *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 as follows:
- [39] I do not consider it necessary, in order for a plaintiff to successfully advance a future cost of care claim, that a physician testify to the medical necessity of each and every item of care that is claimed. But there must be some evidentiary link drawn between the physician's assessment of pain, disability, and recommended treatment and the care recommended by a qualified health care professional: *Aberdeen* at paras. 43, 63.
- [185] The plaintiff's economist, Mr. Sheldon, provided a report outlining the present value of projected future costs. Those future costs were based upon recommendations included in the plaintiff's functional capacity evaluation and cost of future care report. The treatment recommendations in that report were, in turn, based on recommendations by the plaintiff's doctors.
- [186] The plaintiff seeks an award of \$44,000. That figure is the mid-point between the economist's high and low projections.
- [187] The defence submits that the future costs should be in the range of \$1,600. She says that many of the recommendations are outlandish. In particular, the defendant notes that the plaintiff seeks \$521 for an occupational therapist consultation so that the plaintiff can most efficiently learn how to nurse and care for her planned baby.
- [188] I agree with the defendant's submission that many of the recommendations in the cost of care report are excessive.
- [189] I note that the future care report recommends significant future chiropractic and massage treatments. The evidence establishes that the plaintiff was seeing a chiropractor regularly before the accident. Further, when her pain flared, she saw a massage therapist. The proper measure of future care damages is the difference between what was expected before the accident and the treatments that are now required because of the accident.

- [190] I note that the plaintiff's cost of care report recommends that she have a gym pass, for life. The present value of that pass, for life, is calculated at between \$5,500 and \$12,000. Although a gym pass may allow the plaintiff to pursue a path to better overall health, I am not persuaded that she could not achieve the same result without a membership. Many people achieve excellent fitness without paying membership fees. Further, gym memberships are common among uninjured members of the public. I do not consider it to be a proper damage award to make the defendant pay for the plaintiff's prospective membership in a gym, for life.
- [191] I do, however, expect that the plaintiff will have increased treatment needs as a result of the injuries she suffered in this accident. I cannot calculate those additional costs with any certainty.
- [192] I award \$10,000 toward the plaintiff's future care, earmarking those funds for increased chiropractic and massage appointments, as needed during periods of increased pain.

Special Damages

- [193] The plaintiff seeks an award of \$9,754.46, being the net amount of expenses that the plaintiff has paid. There were other expenses, but I am informed they were reimbursed by ICBC.
- [194] I accept that the plaintiff has expended the \$9,754.46. Included in that amount was the purchase of a Roomba robotic vacuum. The cost was \$428.38. I do not consider that to be an accident related expense.
- [195] I award the amount of \$9,326.08 as special damages.

Summary

- [196] In summary, I award the following amounts:

Non-Pecuniary Damages:

\$90,000

Loss of Capacity to Earn Income (Past):

\$93,828

(gross)

Loss of Capacity to Earn Income (Future):

\$160,000

Cost of Future Care:

\$10,000

Special Damages:

\$9,326.08

Total:

\$363,154.08

[197] As noted, the past income amount must be reduced down to take into account the impact of taxes. The loss was suffered over the period from 2015-2020.

[198] The plaintiff has received damages. Unless there were prior offers, she is entitled to her costs.

[199] I would like to thank all counsel for their preparation, cooperative attitudes, reasonable positions on procedure and in-depth submissions. Their work assisted in completing this trial in good time.

"A. Ross J."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/20/07/2020BCSC0786cor1.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/frankson-v-neely-2020>

Prepared on 26 October 2026 · Esheria