

CANADA / JUDGMENT

Goode v. Finer

2022 BCSC 1477

COURT

Supreme Court of British Columbia

DECIDED

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2022 BCSC 1477 Goode v. Finer

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Goode v. Finer,

2022 BCSC 1477

Date: 20220825

Docket: M185533

Registry: Victoria

Between:

Jennifer Ann Goode

Plaintiff

And

Stacy Finer and Cory Finer

Defendants

Before: The Honourable Mr. Justice G.P. Weatherill

Reasons for Judgment

Counsel for the Plaintiff:

L. Oss-cech

Counsel for the Defendants:

M.R. Waghray

D.M. Tochor

Place and Date of Trial/Hearing:

Victoria, B.C.

July 5 - 8, 11 - 13, 2022

Place and Date of Judgment:

Victoria, B.C.

August 25, 2022

Introduction

- [1] The plaintiff claims damages for injuries related to a rear-end motor vehicle collision that occurred on December 19, 2017, at the intersection of Cook Street and Caledonia Street in Victoria, B.C. ("Collision"). The plaintiff complains of ongoing physical and psychological issues since the Collision, which she says have significantly affected her personally, vocationally, recreationally and socially.
- [2] While admitting liability for the Collision and admitting that the plaintiff was injured, the defendants dispute the nature, extent and severity of her injuries and the extent to which they have limited her function and her ability to participate in her pre-Collision occupation.

The Collision

- [3] At approximately 6:00 p.m. on December 19, 2017, a dark and rainy night, the plaintiff was returning home from a painting job driving her 2006 Mercedes B200 southbound on Cook Street in Victoria, B.C. She had stopped behind traffic at a red light at the intersection of Caledonia Street. While stopped, she reached into the passenger foot well of her vehicle to retrieve some invoices when her vehicle was rear-ended by a larger SUV owned by the defendant Cory Finer and driven by the defendant Stacy Finer.
- [4] The plaintiff initially did not know what had happened. She heard a loud bang, which she initially thought was from children setting off fireworks. She then noticed that the toque she was wearing was on the dash instead of on her head. She also noticed headlights shining into her back window from a vehicle that appeared to be on her trunk. At that point, she realized her vehicle had been rear-ended. She exited and met the defendant driver, Ms. Finer, outside in the rain as they inspected what appeared to be minor damage to their respective vehicles. They then pulled their vehicles, both drivable, to the side of the road and exchanged names, insurance and other particulars. Ms. Finer explained that she had recently been in another at-fault accident and was worried that her husband, the vehicle's owner, would be upset with her. Given the apparent lack of damage to both vehicles, Ms. Finer requested they deal with matters privately and not through insurance. Other than feeling shaken up, the plaintiff felt fine at the time and given the lack of damage, she agreed

to do her best not to make an insurance claim. The two went on their way. No emergency personnel were summoned.

- [5] Ms. Finer stated that the traffic that night along Cook Street was unusually heavy, slow and stop and go. She was driving her husband's Nissan Xterra vehicle and was stopped behind the plaintiff's vehicle. She says the Xterra had standard transmission. She saw the plaintiff's vehicle move forward, she engaged the transmission and then her hand slipped off the gear-shift handle. As she looked down to see, the plaintiff's vehicle stopped. She was in first gear and estimates she was travelling under 10 kph at impact. She says she did not feel or hear any impact between the two vehicles but assumes by how close they were they must have impacted. She says they both exited their respective vehicles and inspected for damage. She says her vehicle was not damaged but that there was some indication of damage on the left rear bumper of the plaintiff's vehicle. She took a photo of it.

The Plaintiff - Pre-Collision

- [6] The plaintiff is currently age 38, is single and resides in Victoria with a roommate in a condominium she owns. She has a high school education, having graduated grade 12 with honours. She has no other formal education. At a young age, she started working for her parent's restoration company and developed a knack for and an interest in painting. After spending time travelling and working in various jobs including waitressing and bartending, she settled in Victoria in 2008 and obtained employment as a painter with Marigold Painting ("Marigold") where she honed her painting skills. In May 2017, after a year or two of frustration with her employer's ability to manage Marigold, including paying her on time, she opened her own painting business that she named Red Door Painting ("Red Door").
- [7] By this point, painting had become a passion and she prided herself in her abilities as a painter. She was in the process of developing a clientele when the Collision happened. One of her clients was Mr. Bruce Meek who she had met through prior painting contracts with Marigold and who owned/managed a series of apartment buildings and rental properties. She performed painting and wall repairs for Mr. Meek as and when required. She says she was finally starting to earn what she considered was a reasonable hourly rate of between \$30 - \$40 per hour. She says she often worked 10-14 hour days as required.
- [8] She testified that Red Door had more work than she could manage full time and that she had clients on the waitlist.
- [9] Her typical job duties included interior/exterior painting, finishing, baseboards, spraying, drywall sealing, rolling, cutting, patching, scraping, moving ladders, staining fences, refinishing and renovations. It was a job she was passionate about.
- [10] There is no evidence that the plaintiff had any pre-existing health issues that impacted her painting abilities or conditions related to her current complaints.

The Plaintiff - Post Collision

- [11] Following the Collision, the plaintiff carried on home. She did not feel injured initially and thought she was fine. Within a short time, she started shaking, noticed that her heart was racing, her neck, shoulders and back started to stiffen and she had a headache. She started to cry. She picked up her roommate as planned and went home expecting that with some Tylenol and Advil and sleep, she would feel better in the morning. At that point, she had a severe headache, and neck and shoulder pain. Her roommate suggested she go to the hospital but she declined. She has been shaken up in the past playing sports and had always recovered. She felt dizzy, stiff and sore but she expected this would be the same. She went right to bed.
- [12] The following morning, she felt horrible and could barely get out of bed. She was stiff and sore in her neck, mid-back and shoulder regions and her balance was off. She went to a nearby walk-in clinic. The attending doctor assessed her for a very short time and told her she had significant whiplash. He prescribed medications, physiotherapy and kinesiology.
- [13] Since then, and despite extensive treatment modalities that have included physiotherapy, kinesiology, massage therapy, acupuncture and pain injection therapy, her symptoms have not resolved. Although she says these treatments helped improve her symptoms, they were short lived and her symptoms returned. She noted swelling and extreme soreness in her neck and back, extreme light sensitivity and balance issues. She bumped into things and felt uncoordinated. She could not sleep on her stomach describing the pain if she did as feeling like her rib-cage was split. She had sharp pain on her left side with breathing. She had difficulty sitting, standing or lying down. Her normal daily activities and daily routine were curtailed. She was anxious and began to experience psychological issues.
- [14] She has had extensive counselling that has helped her continue on. She struggled with being unable to function at home or at work. Her financial resources soon ran out and she has had to resort to borrowing money to survive. She is extremely frustrated with what has happened to her and has not been coping well.
- [15] The plaintiff's treatments over the years since the Collision have been frequent and multiple and have involved attending walk-in clinics as required, acupuncture treatments, physiotherapy sessions and kinesiology sessions that have been beneficial and have provided short-term relief. She has also had the benefit of occupational therapy assistance directed at coordinating her care and helping her with a return-to-work plan. She has taken and continues to take prescription medications for anxiety, pain management, sleep and mood symptoms. She has undergone ultrasound-guided injections that initially caused flare-ups in her pain but then helped overall. Lastly, she received psychological counselling which she finds very helpful.

- [16] At trial, she stated that her ongoing symptoms include regular headaches, relentless pain in her neck, shoulders and upper/mid back, frequent migraines, light and noise sensitivity, trouble with reading and/or writing for more than 15 minutes and difficulties performing domestic activities such as cooking and cleaning. She has a maximum functional tolerance of three hours per day before she needs to rest. She says there is never a day that she is without pain. She feels dyslexic and extremely clumsy.
- [17] Save for three unsuccessful, and short, attempts at returning to work as a painter, the plaintiff has been unable to work since the Collision. She has struggled with being able to pay living expenses. She has recently volunteered at a women's used clothing center helping with sorting and tagging new inventory. She stated she was able to last about three hours before she had to rest.
- [18] She testified that the last four years have taken a significant toll on her. The COVID-19 pandemic did not help matters because she was unable to fully participate in the treatment modalities prescribed for her. Since the Collision, she has struggled with every aspect of her life. She has had trouble controlling her weight and, despite her best efforts, continues to be over her pre-Collision weight, which she attributes to being unable to perform her job. She continues to be unemployed, is not very active and is not enjoying life.
- [19] To make matters worse, soon after the Collision she developed a driving anxiety and hasn't driven since February 2018, when she took her vehicle off the road.

The Medical and other Expert Evidence

- [20] The medical evidence consisted of medical/legal reports authored by Dr. Corrie Graboski, a physiatrist, Cheryl Black, an occupational therapist and Mr. Robert Wickson, an economist, all retained by the plaintiff, and Dr. Caroline Quartly, a physiatrist retained by the defence. In addition to their reports being admitted into evidence, all four experts were cross-examined on them.

Dr. Corrie Graboski

- [21] Dr. Graboski is a specialist in physical medicine and rehabilitation and was qualified as such. She is also licenced in clinical neurophysiology (nerve conduction studies and electromyography). She has been board-certified by the American Academy of Physical Medicine and Rehabilitation since 2008. She has impressive credentials and presented as an impressive witness. She gave her evidence in a straight-forward and unbiased manner, answering all questions in cross-examination fairly and in conformity with her duty to the court as an expert.

- [22] She took a history from the plaintiff by telephone on July 26, 2021, and conducted what is known as a doxy.me video physical examination on August 9, 2021. Because of COVID-19 restrictions, she was unable to conduct an in-person physical assessment. She explained in some detail how a doxy.me examination works and she was satisfied that she could adequately assess the plaintiff for the purposes of preparing her comprehensive medical/legal opinion/report dated August 10, 2021.
- [23] She noted that the plaintiff was distraught and crying during most of her assessments. She noted that the plaintiff appeared frustrated and upset when talking about the Collision and the effects it had on her to the point that Dr. Graboski was concerned for her mental health. The plaintiff complained of extreme and ongoing neck, shoulder girdle and mid-back pain, headaches and face pain, mood symptoms and balance/eye issues.
- [24] Dr. Graboski diagnosed the plaintiff as suffering from the following, all directly related to the Collision:
- a) Musculoligamentous strain of the cervical spine (chronic whiplash) with probable facet involvement;
 - b) Myofascial pain of the right shoulder girdles;
 - c) Headache attributed to whiplash;
 - d) Musculoligamentous strain of the thoracic spine with probable costotransverse injury; and
 - e) Mood dysfunction.
- [25] Respecting the plaintiff's failure to recover from her chronic whiplash condition, Dr. Graboski explained that chronic pain can develop in a small percentage of the population (perhaps twenty to thirty percent) after even a minor trauma. She stated the pain typically waxes and wanes over time and that simple day-to-day events such as hitting a pot-hole while driving or even sneezing can cause symptoms to flare up. She noted that pain can be experienced even with light touch. Chronic pain sufferers have pain receptors that act abnormally and amplify the feeling of pain. She stated that the medical profession is starting to better understand chronic pain and now believes it is not a symptom but a disease of its own. The current understanding is that areas of the brain responsible for pain are expanded. Once a patient becomes entrenched in a chronic pain cycle it becomes frustrating and disheartening for both the doctor and the patient.
- [26] Explaining why some whiplash patients do not recover, Dr. Graboski writes:
- There is no way to know why most people recover fully from trauma while others develop chronic pain. In layman's terms, chronic pain occurs when patients develop "pain memory". For instance, when you are a school-age child memorizing your multiplication tables, you form a neural pathway that becomes stronger and stronger with each repetition. Conversely, if you have to "cram" some information for an exam and then stop accessing that information immediately afterwards, those neural networks soon degrade. Pain works in a similar way. Pain begets pain

and the pain pathways become pathologically strong with repeated attention and fail to degrade even with the original injuries resolve.

[27] Respecting the plaintiff's on-going issue with headaches, Dr. Graboski writes:

Post-traumatic headache can adopt many phenotypes, including tension, cervicogenic (related to the neck), and migraine-like. Migraines are characterized by a pounding or throbbing pain that is usually one-sided. The head aches are typically moderate-to-severe and associated with sensitivity to light and noise and nausea or vomiting. Tension headaches are usually characterized by a dull pain that can involve the entire head. They are mild-to-moderate, not as incapacitating as migraines, and not associated with light or noise sensitivity or gastrointestinal upset .

Headaches attributed to trauma are often related to neck pain and indeed headache is a common symptom after injury to the neck. Such headaches can occur soon after the accident or can develop in subsequent weeks to months thereafter .In motor vehicle collisions, a patient's head can be subjected to significant forces that can irritate the upper cervical facet joints and myofascial tissues. The C2-3 facet is often injured and can be a significant contributor to headaches.

[28] Going forward, Dr. Graboski recommends that the plaintiff have access to further kinesiologist sessions to strengthen her home exercise program, an active rehab program, a pool therapy program, a yearly gym membership and some basic home equipment. Further, she suggests passive therapies continue provided they are progressively beneficial and are used in conjunction with an active rehab program in the form of stretching, strengthening and aerobic exercise. She also recommends ongoing image-guided injections into the facet joints using her current pain specialist in order to provide a therapeutic window for advancing her active rehabilitation program. She also provided various options for treating the plaintiff's on-going headache issues, including medications, Botox injections and pain blockers.

[29] Respecting the plaintiff's mental health issues, Dr. Graboski recommends continued counselling and medications such as Cymbalta, and an assessment by a psychiatrist.

[30] Lastly, Dr. Graboski recommends that the plaintiff partake in a multidisciplinary pain clinic.

[31] Dr. Graboski's prognosis for a full recovery is not optimistic, given the time that has past since the Collision. She writes:

Most soft-tissue injuries resolve within the first two years of a trauma. Some patients, however, continue to experience persistent pain. Peer-reviewed literature over the past 20 years indicates that 20-30 percent of whiplash patients develop a chronic whiplash syndrome; the same literature suggests that the two-year mark is a fairly accurate average time interval for patients with [Whiplash Associated Disorder] to reach maximum medical improvement.

Ms. Goode has made slow progress, but several myofascial pain complaints persist. Most likely, she will be left with a number of subjective pain issues that could impair her higher-level recreation, her ability to function well at work, and her overall quality of life.

In all likelihood, Ms. Goode will continue to suffer from neck and shoulder girdle pain after engaging in physical activity that involves her arms or that requires her to maintain a static position for a prolonged period of time. Repetitive activities such as lifting and carrying are likely to exacerbate her symptoms, as are strenuous physical activity and using her arms at, or above, her head.

Her ability to function will likely be highest early in the day and will then taper off rapidly as her muscles fatigue. Excessive physical activity that aggravates her pain may lead to significantly reduced function for hours or even days. This will continue to affect her vocation and recreation. It is highly unlikely that she will be able to resume the same level of physical activity or workplace productivity that she was able to manage prior to the MVA.

With further management of her pain, there is opportunity to increase her recreation and work tolerance. Even so, such increases are likely to be small and recovery will most likely remain incomplete.

Patients who have a history of chronic pain are at risk for further complaints in the future. Often, seemingly small incidents can exacerbate their pain. Many patients' coping mechanisms and tolerance for injury can also decline.

Cheryl Black - Occupational Therapist

- [32] Cheryl Black is a consultant occupational therapist and certified functional capacity evaluator who assessed the plaintiff on March 2 and 3, 2022. She was accepted as an expert qualified to give opinion evidence in the field of occupational therapy, including the assessment of an individual's functional and work capacity and to provide recommendations for future care.
- [33] She prepared a functional/work capacity evaluation ("FCE") and cost of future care analysis ("CFC") report dated March 25, 2022. Both her qualifications and report were admitted without debate.
- [34] At the time of the FCE, the plaintiff was attempting to return to painting and was working substantially reduced hours for Marigold, who was accommodating her by allowing her to work three hour shifts painting trims only. The FCE disclosed that the plaintiff's then level of function and limitations precluded her from meeting the full scope of physical demands associated with being a painter. Testing suggested that her strength capacity fell well below the medium strength level required to be a painter. Accordingly, Ms. Black's opinion was that the plaintiff is unable to safely and durably manage the full scope of strength demands, reaching demands or postural demands to work as a painter. Nevertheless, Ms. Black anticipated that she could continue to manage the physical demands of limited part-time

work as a painter, provided she would be able to work short shifts, pace her work and incorporated stretching breaks as required to manage her pain. Ms. Black opined that the plaintiff would not be durably able to manage the physical demands of a painting career in a more structured work setting where she is not afforded flexibility or where there were stringent requirements for productivity. Ms. Black's opinion was:

Given her presentation during testing, it is my opinion that in the course of working substantially reduced hours and performing a limited scope of duties as a painter, Ms. Goode, more likely than not, experiences neck, right shoulder and upper back/upper trapezius region pain increase. She is currently working with an employer that she described as sympathetic and accommodating. I anticipate that she will be able to continue to manage the physical demands of limited part time work in this position only as long as the current conditions remain in place. Specifically, given her observed and reported difficulty with reaching and non-neutral neck postures, Ms. Goode will require the ability to work shorter shifts, pace her work and incorporate stretching breaks when necessary to manage her pain. I am of the opinion that she would not be durably able to manage the physical demands of such work in a more structured work setting where she is not afforded such flexibility or where there are more stringent requirements for productivity. In addition, it is my opinion that her use of symptom management breaks and postural adjustments will, more likely than not limit her productivity and this constrains her ability to be productive and competitive in this field, even when working a limited number of hours. It is also my opinion that she is not able to manage this category of work on a full time basis.

[35] Ms. Black presented as an unbiased and objective witness and helpfully explained the various tests used in the FCE, how she assessed the plaintiff's function in her clinic and at home and how she arrived at her opinions.

Mr. Robert Wickson - Economist

[36] Mr. Wickson, an economist, prepared a report dated April 5, 2022, providing his opinions on the value of the plaintiff's past and future earning losses and his opinion on the valuation of Ms. Black's future care recommendations for the plaintiff ("Wickson Report"). The Wickson Report was admitted without debate and he was cross-examined on it.

Dr. Caroline Quartly

[37] Dr. Quartly was called at the behest of the defence. Like Dr. Graboski, she is a physiatrist with impressive credentials. She assessed the plaintiff on April 8, 2022, and authored a report dated May 24, 2022, that was filed in evidence.

[38] Based on her assessment and review of multiple medical records, her impression is that the plaintiff suffered soft tissue injuries to her neck, mid and lower back, headaches and insomnia mood disruption as a result of the Collision. Her diagnosis is that the plaintiff is suffering:

- a) Chronic musculoligamentous strain/sprain of the cervical and thoracic spine. She noted a significant loss of range of forward flexion at the neck as well as side flexion to either side;
 - b) Chronic musculoligamentous injury of the lower thoracic spine (with residual evidence of spontaneous right-sided paravertebral spasm);
 - c) Mechanical dysfunction of the cervicothoracic junction;
 - d) Cervicogenic headaches;
 - e) Cervical brachialgia (pain referred to the shoulder girdle and arm from the neck; and
 - f) Evidence of irritation of the brachial plexus, with findings consistent with a mild variation of thoracic inlet/thoracic outlet syndrome.
- [39] She could not rule out concomitant median nerve compression at the level of carpal tunnel. She noted that the plaintiff was probably at risk for a well-entrenched chronic pain disorder. She also noted that the plaintiff's presentation was one of anxiety and severe sleep deprivation. Her self report was consistent with severe depression and emotional dysregulation.
- [40] Without a psychiatric evaluation, Dr. Quartly was unable to provide a prognosis. She opined that the plaintiff's sleep disturbance and emotional dysregulation (meaning her inability to have control over her emotions) significantly interferes with her ability to respond to treatment intervention and therefore has a profound impact on her overall prognosis. With a psychiatric consultation she would better be able to recommend whether or not the plaintiff would be a candidate for a chronic pain program and/or a cognitive behavioural therapy program. Dr. Quartly strongly recommends that the plaintiff participate in a graduated conditioning program.
- [41] In Dr. Quartly's opinion, the plaintiff's ongoing complaints and symptoms are likely causally connected to the Collision and if the Collision had not occurred, she would not be complaining of these issues.

Discussion

- [42] This case requires an assessment of the plaintiff's Collision-related injuries and resultant damages.
- [43] There is no debate that the Collision involved a low velocity impact. However, there is also no debate, and the defence does not suggest, that minimal damage to the vehicles involved equates to minimal damage to the plaintiff. Lest there be any doubt, while it might be tempting to draw a direct comparison between the two, it would be wrong to suggest that because the vehicles involved in the Collision sustained minimal to no damage, the plaintiff could not have been injured with long-lasting sequelae.

- [44] The plaintiff's diagnosis made by both Drs. Graboski and Quartly are remarkably similar. Both doctors agree that the Collision was the probable cause of her symptoms. While Dr. Quartly was unable to give a prognosis for her recovering because she felt that further investigation was required, Dr. Graboski's opinion is that the plaintiff has reached maximal medical improvement and will continue to suffer chronic pain indefinitely.
- [45] The defendants do not accept that the Collision is the proximate cause of her psychological issues and anxiety.
- [46] Respecting causation, I accept that the Collision caused the plaintiff's injuries, loss and damage. The injuries the defendants admit to causing are set out in Dr. Quartly's report and include chronic musculoligamentous strain/sprain/injury of her neck and mid-back, mechanical dysfunction of the junction of her neck and mid-back, cervicogenic headaches, referred neck pain to the shoulder girdle, irritation of the brachial plexus with mild thoracic inlet/outlet syndrome and being at risk of a well-entrenched chronic pain disorder.
- [47] The plaintiff contends that she suffered soft-tissue injuries to her neck, shoulder and mid-back that, for reasons that cannot be explained, have not resolved. I accept that she is now one of the twenty to thirty percent of the population of soft-tissue injury sufferers that do not recover and that she has gone on to suffer from chronic pain.
- [48] Because pain by its nature is subjective, the nature and extent of the plaintiff's injuries caused by the Collision must be determined to a large extent on her credibility. That is, whether she is believable when describing her pain and how that pain has affected her life.
- [49] The plaintiff presented as a happy-go-lucky, enthusiastic, talkative and likeable individual, with somewhat scattered thinking at times. She found it difficult to find the words she was looking for to express what she wanted to. She sometimes was tangential with her answers and had trouble finishing her thoughts and sentences. At times she rambled and had to be reminded to focus on the question being asked. She was frequently emotional during her testimony. Nevertheless, she appeared to do her best to explain the circumstances of the Collision and the consequences it had on her. In the end, I found her to be frank and credible and I believed her evidence regarding the pain she feels and how it has affected her day to day function.
- [50] The lay witnesses that were called, including the plaintiff's mother, Michelle Russell, Mr. Ernest Hunter, a friend, and Mr. Meek all knew her before and after the Collision and all confirmed significant deterioration in the plaintiff's physical and emotional state since the Collision. They all stated that she has changed since the Collision from being fully functional in all aspects of her life without restriction to being dysfunctional and struggling.

- [51] Ms. Russell described her growing up as an easy going, good natured and independent person who was interested in learning new things. She learned painting through her restoration business, had a passion for painting and had a good work ethic with lots of energy. She described that she felt the Collision has taken away the plaintiff's identity and that she has become an angry and frustrated person having lost her financial independence and career.
- [52] Mr. Hunter's evidence was similar. He has been a general purpose contractor for over 45 years and met the plaintiff in the 2007 timeframe. They have stayed in touch since. He stated that prior to the Collision, the plaintiff had no restrictions and that it was obvious to him that she enjoyed and took pride in her job as a painter. It is also obvious to him that she is now struggling with pain and is deteriorating. He calls her when he is in town to try to encourage her. He has lent her money to help her pay her living expenses. He describes her as being extremely discouraged at what has happened to her.
- [53] I accept that the plaintiff has had a difficult time since the Collision. She has done everything that has been recommended to her to reduce her pain including what Dr. Graboski described as seeing top pain specialists and undergoing extremely painful injections and nerve abrasions that burnt her nerves.
- [54] I conclude the plaintiff has had a very challenging life since the Collision. Her chronic pain has changed her from being an active person with a strong work ethic to one who is in nearly constant pain with symptoms waxing and waning depending on the day. Essentially, the Collision sent her into a tail-spin. I accept that she wants to be a productive member of society and lead a productive life, whether it be painting or another endeavour. I accept that she enjoyed painting and it gave her purpose. She looked forward to it as a physical outlet to manage stress.
- [55] I accept that her chronic pain and inability to recover is the cause of her mental health issues and a major source of her disability. While she is able to manage many daily activities such as self-care, she does so in pain. There are days that are relatively good, and days that are far worse. Unfortunately for the plaintiff, I conclude that this condition is likely going to persist into the foreseeable future. I accept that her condition will wax and wane over time and that she will be vulnerable to her symptoms being aggravated by everyday routines.
- [56] In short, I accept Dr. Graboski's opinions and diagnosis of the plaintiff's injuries, the prognosis for recovery and that the Collision was the cause.
- [57] Therefore, I find that the plaintiff is suffering from chronic pain, the levels of which wax and wane depending on her activities. She is restricted from performing the level of function at work and home she was able to perform pre-Collision. Her symptoms will fluctuate. Treatments (such as cryoablation injections in her neck) will reduce her symptoms but will be short lived. She will continue to have good days and bad days.

General Damages

- [58] It is trite that the plaintiff is to be placed in the position that she would have been in but for Ms. Finer's negligence, no better and no worse. The defendants must take the plaintiff as they found her, even if her injuries are more severe than they perhaps might have been for another person: *Verjee v. Dunbrak*, 2019 BCSC 1696 at para. 86.
- [59] The factors to be considered in assessing general damages are well known. The amount to be awarded does not depend on the seriousness of the injury, but on its ability to ameliorate the condition of the plaintiff and an appreciation of her loss. General damages are aimed at meeting the specific circumstances of each case: *Stapley v. Hejslet*, 2006 BCCA 34 at paras. 45-46. General damages focus on the overall effect the injuries have had on the plaintiff's life.
- [60] At the time of the Collision, the plaintiff was age 32, in excellent health, fully functional recreationally, socially and vocationally. At the age of 38, she suffers from chronic pain that has significantly curtailed every aspect of her life.
- [61] The plaintiff submits that the range of general damages appropriate in this case is in the \$160,000 range. She refers to the following cases in support wherein the sums of \$130,000, \$125,000, \$150,000 and \$165,000 respectively were awarded: *Gurung v. Trampleasure*, 2020 BCSC 1643; *Quezada v. Quezada*, 2019 BCSC 1732; *Risling v. Riches-Glazema*, 2016 BCSC 2423; and *Bieling v. Morris*, 2021 BCSC 1905.
- [62] In response, the defendants submit that the range of general damages appropriate in this case is between \$90,000 and \$105,000. They refer to the following cases in support wherein the sums of \$85,000, \$85,000, \$90,000, \$90,000 and \$95,000 respectively were awarded: *Chalmers v. Morris*, 2021 BCSC 2004; *Peter v. Beveridge*, 2020 BCSC 750; *Barre v. Dupasquier*, 2020 BCSC 524, *Khakh v. Josal*, 2020 BCSC 286; and *Cummings v. Tellier*, 2019 BCSC 2067.
- [63] These cases are helpful guides but damage awards are determined by each case's unique facts. It is the effect of the particular injuries to a particular plaintiff and their circumstances that must be taken into consideration. Compensation awards must be fair to all parties: *McColl v. Dushenko*, 2020 BCSC 1674 at paras. 72-73.
- [64] I have already concluded that the Collision has had a significant negative impact on the plaintiff's life. She experiences chronic pain in her neck, shoulders and back on a daily basis. Depending on her activities, she continues to experience frequent headaches ranging from mild intensity to severe. She suffers from depression and other psychological dysfunction not only related to her frustration of not having recovered from the physical and emotional effects of the Collision, but to the economic consequences of being unable to work and earn a living. It is evident that, for the short term at least, her chronic pain will prevent her from returning to her profession as a painter, a job she enjoyed.

- [65] By all accounts, the plaintiff was fully functional in the years leading up to the Collision. She stated that she could often work at her painting contracts 10-12 hours per day without difficulty. On occasion, she noted her knee would get sore, but she had no other issues, physically or psychologically, and was not on any medications.
- [66] She was hyper-active prior to the Collision and enjoyed all manner of outdoor physical activities including hiking, beach walking, swimming, and general goofing around with her friends. Post-Collision, her activities came to a grinding halt and she hasn't been able to do much of anything. Activities she has tried caused shooting pains in her neck and migraines. Her social and family life has been effectively non-existent since the Collision. She feels that because she looks normal to the casual observer, they wonder why she hasn't been able to resume her previous activities and she feels humiliated.
- [67] Activities that aggravate her pain include day-to-day household cleaning and cooking, grocery shopping, reading and sitting for too long. Hot pillows, hot tubs, heating blankets and pain medications help alleviate her symptoms. Her current medications include Gabapentin for pain and sleep.
- [68] In sum, at age 38, the plaintiff has a plethora of Collision-related injuries that have become chronic. She has a severe mood dysfunction and her prognosis is bleak. Having reviewed the defendants' authorities, I conclude that they are distinguishable on their facts because their plaintiffs had pre-existing related conditions and continued to be able to work and otherwise function post-accidents.
- [69] Using the plaintiff's authorities as a guide, I assess the plaintiff's general damage claim at \$140,000.

Special Damages

- [70] During the trial, an agreement was reached on the amount of Collision-related expenses the plaintiff has incurred that remain outstanding. The plaintiff is awarded the agreed sum of \$6,267.70 as special damages.

Past Loss of Earnings/Earning Capacity

- [71] The plaintiff's claim for past loss of earnings/opportunity to earn income requires an assessment of what, hypothetically, she would have earned but for the Collision compared to what she actually did earn. The standard of proof is that of a "real and substantial possibility": *Gao v. Dietrich*, 2018 BCCA 372.

- [72] In May 2017, the plaintiff started Red Door. At that point in her life, she had been painting for others off and on for about 10 years, was ready to settle down and she felt she had the confidence and expertise to go out on her own. She had decided that painting was a job she loved and it was going to be her career in the foreseeable future. She described, and I accept, that, although she was in the early stages of growing her business, she was gradually picking up steam and had some loyal clients.
- [73] Mr. Meek's evidence, which I also accept, is that the plaintiff was a very reliable painter which he said was a valuable commodity in Victoria. He owns and manages approximately 60 rental units in the Victoria area, mostly heritage/character buildings with somewhat intricate designs. He has known the plaintiff since she started with Marigold and watched her develop into an excellent painter. He observed that she appeared to like painting, was proficient at it and appeared to get satisfaction from painting. He stated that she normally worked for him through Marigold but that he also hired her directly on smaller jobs. He noted that in February 2022, the plaintiff tried to return to painting through Marigold. He knew that she had some functional issues, and let her do whatever she felt capable of doing. He noted that she did some cutting-in of indoor moulding, which tends to be tricky and although she did a good job, her pace was slow and she could not keep up.
- [74] The plaintiff has effectively been unemployed and unable to work since the Collision. I conclude this inability is directly attributable to the injuries she sustained as a result of the Collision. Attempts at a graduated return to work through painting and volunteering at a woman's used clothing store organizing clothes, proved unsuccessful. The plaintiff continues to have trouble reading more than fifteen minutes at a time and therefore has not been able to pursue education or training for an alternate career.
- [75] Using 2016 census data (adjusted for inflation), Mr. Wickson provided estimates for average earnings of British Columbians in two earning groups over the approximate five-and-a-half year time frame from the date of the Collision to the date of trial: first, \$214,093 representing the average British Columbia earner of the plaintiff's age with a high school diploma working full-time, full-year; and second, \$191,261 representing earners under the NOC 7294 category of "Painters and Decorators (except interior decorators). Net of income tax, the amounts are \$162,000 and \$148,800 respectively.
- [76] The plaintiff seeks an award for gross past loss of earnings of \$191,261, the lower of the two. She translates that into an average gross monthly loss earnings of \$3,542 based on being paid \$40 per hour for an 88.5-hour work month.
- [77] I am not prepared to accept that, but for the Collision, the plaintiff would have made average gross earnings of \$3,542 per month. Firstly, her history of earnings in the years leading up to the Collision do not support that amount. For example, her line 150 income in the years 2015, 2016 and 2017 was \$12,084 (\$1,000 per month), \$9,765 (\$813 per month) and \$14,853 (\$1,237 per month) respectively. Secondly, she had just recently started Red Door and was in the process of building her clientele. Her 2017 tax return shows net earnings from Red Door

of \$11,662 over approximately six months, or approximately \$2,000 per month. I conclude that she was in the process of, but had not yet achieved earnings of \$3,500 per month in gross earnings.

- [78] I am mindful of Mr. Meeks' evidence, which I accept, that the plaintiff was not working for him directly as much as the plaintiff suggests. His evidence was that he had only hired her directly a few times and for the most part, she worked for him indirectly through Marigold. I also note Mr. Meeks' evidence that good quality painters in the Victoria area could realistically expect to be paid an hourly rate of \$45 on average, and that there is currently a shortage of good painters (indeed all trades) in the Victoria region.
- [79] I conclude that but for the Collision, there was a real and substantial possibility that the plaintiff would have continued her work as a painter with Red Door. Based on her past history of working, I am not persuaded that she would have worked that job full-time, but rather would have taken jobs as they came along. It is clear that she had settled down from her prior history of travelling. She owns a condominium and has a mortgage and other financial commitments to meet. Over the 54 months since the Collision, I conclude she had the potential of earning an average of \$3,000 per month.
- [80] Accordingly, I assess her gross past loss of earning capacity at \$162,000 (\$3,000 per month x 54 months) before contingencies. Allowing for contingencies (such as part-time employment, possibility of unemployment and probability of participation in the workforce) of 10%, I assess her past loss of earnings at \$145,800.
- [81] From that sum, income tax must be deducted. Using Mr. Wickson's report as a guide, and for simplicity, I conclude her average tax rate would be 15% since the Collision, reducing her net past loss of earnings to \$123,930.
- [82] From this sum, \$24,675 in wage loss benefits ("TTDs") the plaintiff received from ICBC must be deducted. Her past loss of earnings is therefore assessed at \$99,255 net of income tax and TTD benefits paid. Because this is an assessment, not a calculation, I conclude this award should be rounded to \$100,000, net of tax and TTDs.

Loss of Future Earning Capacity

- [83] An award for future loss of earning capacity requires an assessment of, and a comparison between, the plaintiff's likely future earnings if the Collision had not happened, and the plaintiff's likely future earnings given her ongoing Collision-related issues: *Dornan v. Silva*, 2021 BCCA 228 at para. 156 [Dornan]. Because the assessment deals with the unknown future, it involves the consideration of hypothetical events: *Rab v. Prescott*, 2021 BCCA 345 at para. 28 [Rab].
- [84] It is a three-step process: (i) whether the evidence discloses a potential future event that could lead to a loss of capacity; (ii) whether the evidence discloses a real and substantial possibility of a future loss of earnings; and if so, (iii) an assessment of the value of that

possible future loss, which includes an assessment of the relative likelihood of that possibility occurring: Rab, at para. 47. Once the assessment has been made, the court must then determine if the proposed award for damages is fair and reasonable: Lo v. Vos, 2021 BCCA 421 at para. 117 [Lo].

- [85] The evidentiary standard of proof for a future loss of earnings capacity claim requires proof of a real and substantial possibility that there will be a loss of income/earnings in the future. Once that has been established, the quantification of that loss can either be on an earnings approach, or on a loss of capital asset approach: Perrin v. Lalari, 2010 BCCA 140 at paras. 30-32.
- [86] Ultimately, the assessment of loss of a future earning capacity award must be based on what is reasonable in the circumstances. Projections, calculations and formulas, while useful, are only guidelines in determining what is fair and reasonable: Grewal v. Naumann, 2017 BCCA 158 at para. 49.
- [87] Factors to consider in this case include the plaintiff's intention to keep working as a painter; her inability due to her Collision-related injuries to devote the same energy or hours to painting; her pre-Collision work history; her medical condition; and the plaintiff's intentions concerning her future lifestyle and the risk inherent in those plans: Rab, at paras. 42-44, 60; Dornan, at paras. 119, 122, 130; Lo, at para. 97.
- [88] Given my earlier findings, I conclude that, other than being able to perform part-time, short-duration work as a painter, the plaintiff is realistically barred from continuing her aspirations to function as a painter. For the foreseeable future, her productivity will be limited by her physical constraints and therefore she will not be competitive in the painting field.
- [89] Respecting alternate careers, given the plaintiff's current level of functioning, which is not expected to improve to any degree in the short term, her options are limited. The FCE demonstrated limited overall tolerance for work requiring prolonged or repetitive reaching, neck movements or strength demands. The FCE suggests that her overall strength fell below sedentary. That, combined with her demonstrated distress levels, suggests she will have difficulty finding employment in a sedentary work setting.
- [90] As I have already stated, I accept the medical opinions of both Drs. Graboski and Quartly (which are similar) that the plaintiff has a chronic pain condition that affects her physically and psychologically. The evidence establishes, and I have concluded, that it is unlikely she will be able to realistically return to work as a painter for the foreseeable future. For example, Dr. Graboski opines:

Her ability to function will likely be highest early in the day and will then taper off rapidly as her muscles fatigue. Excessive physical activity that aggravates her pain may lead to significantly reduced function for hours or even days. This will continue to affect her vocation and recreation. It is highly unlikely that she will be able to resume the same level of physical activity or workplace productivity that she was able to manage prior to the MVA.

[91] As to other available employment options, following the FCE, Ms. Black had this to say:

With respect to alternate work, it is my opinion that Ms. Goode's current demonstrated functional limitations substantially limit her vocational options. Specifically, during the FCE, she demonstrated limited overall tolerance for activities requiring non-neutral neck postures, reaching and strength demands. As such, she is not well suited to work requiring prolonged or repetitive exposure to these physical demands.

[92] In contrast, Dr. Quartly opines:

My impression is that her mental health is probably more relevant to her missed time from work than musculoskeletal injuries sustained in the subject accident. Absent the mental health issues, I do believe that the Plaintiff has the potential to make an extremely good recovery from her musculoskeletal symptoms and be able to work at her former occupation at her pre-accident levels, given further time for reconditioning.

[93] The defendants argue that once the plaintiff's psychological health is addressed, which they agree will take time, the plaintiff's function will improve to the point of her pre-Collision function. They propose that a period of five years should be set aside to allow the plaintiff to focus solely on her recovery and reconditioning. They suggest that after five years, she will be able to function at her pre-Collision level. Using the plaintiff's average pre-Collision earnings through Red Door of \$1,812 per month as a guide, they submit her future loss of earnings over the five-year recovery period can be calculated at \$108,720. From that they say, present value discount factors of 1.5% per year should be deducted. The defendants argue that this calculation should be preferred over Mr. Wickson's statistical averages because they are based on the plaintiff's actual pre-Collision earnings.

[94] In my view, the defendants' approach is flawed because it plucks the five-year period of proposed recovery out of the air. There is no medical evidence that the plaintiff will fully recover to her pre-Collision level of function in that time-frame or ever. Further, their approach fails to consider that the plaintiff had just started Red Door seven months before the Collision and its business was growing. The average of \$1,812 per month does not account for increased earnings Red Door would have likely enjoyed based on the shortage of skilled painters in the Victoria area and the average earnings of approximately \$40 per hour she could have expected to receive.

[95] In contrast, the plaintiff submits that, but for the Collision, Red Door would have continued to grow and earn the average per year earnings of painters in British Columbia. She urges an award of \$646,400 for her future loss of capacity to earn income is appropriate. This figure is

based on Mr. Wickson's report that sets out the present value of the future average earnings of BC individuals of the plaintiff's age working as painters and decorators, according to the 2016 census data. This number also assumes the plaintiff would be unable to earn any income from any occupation, even working part-time.

[96] In assessing the plaintiff's claim for loss of future earning capacity, I consider the following factors relevant:

- a) It is unlikely she will be able to return to her job as a painter working full-time in the foreseeable future. I conclude that the Collision caused a significant and lasting injury that has left her unable to work competitively for the foreseeable future;
- b) But for the Collision, she would likely have continued working well into her 50's because of financial need;
- c) At some point in the future, given the future care costs I am awarding, the plaintiff will become gainfully employed in some capacity and will be capable of earning income (probably working part-time hours, perhaps two to three days per week at reduced hours). Her income earnings potential will therefore increase in the years to come;
- d) Without the Collision, Red Door's business would have continued to grow, and would have had steady painting jobs that would have allowed the plaintiff to earn in the \$40,000 to \$60,000 range annually. Based on her work history, she would not likely have worked a steady 40-hour week all year but would have taken painting jobs as they came along and probably taken off time between painting contracts to do other things she enjoyed; and
- e) With the Collision, she will be limited to working very part-time and only if she has a flexible work schedule that permits her to rest and recuperate as needed.

[97] In sum, I am not persuaded that the plaintiff will be totally unemployable in the future, but I am persuaded that she will be limited to part-time work, working part-time hours and will require either an accommodating employer or a job (perhaps painting) where she can work her own hours as her body allows.

[98] Considering both the positive and negative contingencies associated with the prediction of future loss of earnings and recognizing that it is an exercise in crystal ball gazing, I assess the plaintiff's loss of future earning capacity at \$300,000.

Cost of Future Care

[99] Future care costs must be justified both because they are medically necessary and because they are likely to be incurred by the plaintiff going forward. It is not a precise accounting exercise: *Milina v. Bartsch*, 1985 CanLII 179; *Hardychuk v. Johnstone*, 2012 BCSC 1359 at paras. 212-214.

- [100] Mr. Wickson provided present value calculations for the future care recommendations made by Dr. Graboski and Ms. Black that included health care, rehabilitation, therapies, replacement services and home support. The present value of these recommendations ranges from a minimum of \$107,015 including sales tax, to a maximum of \$165,008 including sales tax. The plaintiff claims a future care cost award of \$136,000, which is the middle ground.
- [101] The defendants say that the plaintiff's future care costs should be limited to \$11,200. While they agree that certain portions of the plaintiff's future care costs are reasonable, they assert there is no evidence to support the rest. They argue that what the plaintiff needs is active rehabilitation rather than passive rehabilitation, including limited kinesiology sessions. They assert that the plaintiff could be prescribed exercises for her to do on her own and return periodically to the kinesiologist for updates. They say that she should be given a yearly pass to a recreational center, driving lessons to address her driving anxiety, counselling, periodic cryoneurotomy/cryoablation treatments and medications.
- [102] I accept that the plaintiff's pain-limited tolerance to perform activities of daily living and homemaking chores will be dependent on whether she is having a good day or bad day. I accept that although she can perform most homemaking tasks, she will be unable to do so effectively for those that require repetitive reaching and exposure to non-neutral neck postures, reaching and stooping. It isn't that she cannot perform these activities, but rather if she does them, her symptoms will increase. She finds the treatments she has received so far beneficial. Continued treatments as recommended should be made available to her.
- [103] Ms. Black's report makes a series of recommendations and also costed out recommendations made by Dr. Graboski. She also recommended physiotherapy for symptom management to improve symptoms to allow her to engage in work or domestic activities. Given the strong recommendations by both Drs. Graboski and Quartly, I accept these recommendations as medically justified and reasonable and award the future care costs as valued by Mr. Wickson. In some cases, Ms. Black was able to give the cost, but not the timing of the future care requirements and deferred the duration and treatment to the plaintiff's medical advisors. In those cases, I have estimated what I consider to be reasonable amounts. I accept the plaintiff will need some treatments for managing flare-ups on an annual basis. She will also require pain specialists and pain injections from time to time. In some cases, I have rounded Mr. Wickson's valuations to numbers I consider reasonable.

[104] The following future care costs are awarded:

a)

Physiotherapy:

\$10,000

b)

Cryoneurotomy:

\$1,600

c)

Trigger Point Injections: (covered by MSP):

Nil

d)

Botox Injections: \$600 - \$800 per cycle:

\$10,000

e)

Psychological Counselling:

\$13,500

f)

Occupational Therapy:

\$2,000

g)

Medications:

i. Headache pain medications:

ii. Calcium Magnesium:

iii. Extra Strength Tylenol:

iv. Cyclobenzaprine:

v. Aleve:

vi. Duloxetine:

vii. Apo-Lorazepam:

viii. Clonazepam:

ix. Diclofenac Cream:

\$3,000

\$2,000

\$1,500

\$2,500

\$2,000

\$4,000

\$300

\$100

\$200

h)

Pain education - Vision Assessment initial assessment:

\$230

i)

Exercise Instruction/Active Rehabilitation:

i. Fitness Pass:

ii. Physiotherapy:

iii. Kinesiologist (initial and subsequent assessments):

iv. Kinesiologist (additional sessions):

v. Driving Lessons:

\$5,000

\$250

\$1,700

\$800

\$500

j)

Replacement Services/Home Support:

i. House Cleaning:

ii. Home Maintenance:

\$15,000

\$7,500

TOTAL:

\$83,680

[105] To summarize, I award the sum of \$83,680 for costs of future care.

Summary

[106] In sum, the plaintiff is awarded damages against the defendants, jointly and severally in the amount of \$629,947.70 as follows:

a)

General Damages:

\$140,000.00

b)

Special Damages:

\$6,267.70

c)

Past loss of Earnings:

\$100,000.00

d)

Future Loss of Earning Capacity:

\$300,000.00

e)

Cost of Future Care:

\$83,680.00

TOTAL:

\$629,947.70

[107] No submissions were made on gross-up or interest. The parties have liberty to apply should they be unable to reach an agreement on those issues.

Costs

[108] Subject to matters of which I am unaware, the plaintiff is entitled to Scale B costs.

"G.P. Weatherill J."

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