
CANADA / JUDGMENT

Hutton v. Breitkreutz

2015 BCSC 1164

COURT

Supreme Court of British Columbia

DECIDED

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2015 BCSC 1164 Hutton v. Breitkreutz

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Hutton v. Breitkreutz,

2015 BCSC 1164

Date: 20150116

Docket: M89556

Registry: Kelowna

Between:

Kelsey Hutton

Plaintiff

And

Tracy Breitkreutz

Defendant

Before: The Honourable Madam Justice Fenlon

Oral Reasons for Judgment

Counsel for the Plaintiff:

S.T. Pihl

Counsel for the Defendant

(appearing via teleconference):

J.E. Silvester

Place and Date of Trial:

Kelowna, B.C.

January 5-9,12-14, 2015

Place and Date of Judgment:

Kelowna, B.C.

January 16, 2015

- [1] THE COURT: This case arises out of a motor vehicle accident that occurred on December 27, 2008. The basic facts of the accident are not in dispute, although liability is.
- [2] The plaintiff, Kelsey Hutton, was a passenger in a truck being driven by her father. Her mother and brother were also in the vehicle. The family had been to see relatives in Alberta over Christmas and were heading home to Kelowna, westbound on Highway 1. About 30 kilometres west of Revelstoke, an SUV driven by the defendant, Tracy Breitreutz, was heading home eastbound after a Christmas visit with her older son in Penticton. As the defendant moved through a curve on the highway, her vehicle slid across the centreline into the westbound lane and collided head-on with the Hutton vehicle.
- [3] The first question I must address is liability. Who is at fault for the accident? Although the defendant pleaded contributory negligence on the part of Mr. Hutton, there is no evidence to support that claim and the defendant no longer asserts such to be the case. That is a sensible concession, given that the defendant herself and a third-party witness confirmed there was nothing Mr. Hutton could have done to avoid colliding with the defendant's car once it crossed into his lane.
- [4] The real issue in this case is whether the defendant caused the accident through her negligence. On the facts of this case, the plaintiff says that there is clear evidence of negligence, because a prudent and reasonable driver stays in her own lane and does not cross into the lane of oncoming traffic. The defendant pleads that this is a case of inevitable accident. She says that she hit a patch of black ice that caused her to lose traction and slide into oncoming traffic, a result that could not have been avoided and for which, therefore, she should not bear responsibility.
- [5] In the alternative to the defence of inevitable accident, the defendant submits that the plaintiff has failed to prove that the defendant was negligent and that the negligence caused the accident.
- [6] Having considered all of the evidence, I conclude that the plaintiff has proved that Ms. Breitreutz is liable for the accident. It follows, of course, that I do not find that the defendant has established that the accident was unavoidable.

- [7] I make these findings for the following reasons.
- [8] First, although Ms. Breitzkreutz suggested black ice as an explanation for the accident, she did not at trial report seeing ice at the accident scene despite leaving her vehicle immediately to run back to her 13-year-old son, who was lying on the highway, having been ejected from the car on impact. He was lying on the roadway, about 30 feet behind her vehicle, according to Ms. Breitzkreutz.
- [9] Nor did the other witnesses, notably Constable Yadernuk and Gary Fontaine, notice that the road was icy at the scene of the accident. Mr. Fontaine had been travelling in the car behind the Hutton vehicle and he spent about three hours walking about the accident site, assisting the injured and speaking to police officers and others. Constable Yadernuk was at the scene for a considerable period of time as well, taking photographs of the scene and making observations about the site of the accident. Neither man experienced slipping or observed others slipping on ice, black or otherwise.
- [10] Second, I find there was a steady stream of eastbound vehicles ahead of the defendant that had passed over the same roadway and none of those vehicles had lost control, as would be expected if there was black ice on the road. In short, this was not a situation in which no other vehicles had been along that stretch of highway for some time. The highway had been closed for a few hours for avalanche control, creating a long line of vehicles at the stop points to the east and west of the accident site. The Huttons had stopped in Revelstoke to wait out the closure. When they heard the road had reopened, they resumed their trip and found the lineup of traffic just starting to move. The long line of cars that had built up during the closure travelled convoy-fashion in a westbound direction.
- [11] As would be expected, Mr. Hutton observed that when they first started travelling, there were no cars coming from the opposite direction toward them, but at some point well before the accident the gap ended and Mr. Hutton saw a similar eastbound convoy of vehicles coming towards them and passing them in a steady stream.
- [12] Ms. Breitzkreutz said she did not see anyone ahead of her on the road, but she did not say that she was the first car through after the closure, and I do not accept that to be the case.
- [13] Third, three of the tires on the defendant's vehicle were in poor condition. The two front tires were worn and the rear passenger tire can only be described as bald. None of the vehicle's tires were snow tires. All of the witnesses who were professional drivers, including Constable Yadernuk and Mr. Fontaine, and mechanics who testified, agreed that the rear passenger tire in particular was in very bad shape. Constable Yadernuk measured the tread and found it to be less than 1.5 millimetres and worn below the wear bars. Constable Yadernuk was an experienced highway traffic officer. He said the rear passenger tire was not fit for summer driving, let alone driving in winter conditions, because the tire had no traction. The defendant herself testified that she thinks her tires "were a lot of the reason for the accident."

- [14] Fourth, the defendant was travelling too quickly for the conditions of the road and the condition of her vehicle. Snow was falling at the time of the accident. There was compact snow and bare sections on the road. Mr. Hutton and Mr. Fontaine said the westbound lane of traffic was moving at 60 kilometres per hour. The Hutton and Fontaine vehicles had winter tires, and the drivers found the road safe at that speed.
- [15] Ms. Breitreutz was travelling at 65 kilometres per hour as she entered the curve, driving a vehicle without snow tires and without any tread at all left on at least one tire. She had not tested her traction at that speed by braking at any point, despite saying that she saw ice earlier on her travels and felt her vehicle slide a number of times earlier before the accident.
- [16] While 65 kilometres per hour when the posted speed limit is 90 kilometres may seem like a modest rate of speed, speed cannot be assessed without considering both the condition of the road and the condition of the vehicle. I find the defendant was travelling too fast, given the state of her tires and the condition of the road.
- [17] Fifth, the defendant was unaware of the condition of her tires and had not taken reasonable care to determine whether they were roadworthy. The defendant was forthright in acknowledging at trial that her front tires were in poor condition and that the rear passenger one was very bad. Ms. Breitreutz had purchased the 1999 Ford Explorer about three weeks earlier from a friend of a friend for about \$2,000. Her focus was on the body of the car and the condition of the interior. She said she never looked at the tires at any time prior to the accident, and never asked anyone about them.
- [18] Ms. Breitreutz stopped by a service station operated by Mr. Mike Soboleski in her home town of Big Valley, Alberta, before her trip. She asked him to check the fluid levels and her tire pressure, and I find he did that. The defendant agrees she did not ask Mr. Soboleski to check her tire treads. She said she just assumed, without looking at them, that they were fine. She did not think about whether they were snow tires or whether they were roadworthy.
- [19] There was some suggestion by Ms. Breitreutz that the defendant's vehicle had a safety inspection completed at the time she purchased insurance for the car. That was raised for the first time at trial and no such document, that is the inspection form, was produced in these proceedings. Ms. Breitreutz said you have to get an inspection certificate to get insurance if your vehicle is more than 10 years old. In cross-examination, she agreed her vehicle was not more than 10 years old at the time in question. In any event, whether such a document existed or not, the defendant admitted she never looked at it or read it. She does not know what it says or said about the tires.
- [20] In summary, the defendant did not take steps to determine whether her tires were safe. A reasonable and prudent driver would know the condition of her tires before setting out on a winter road trip.

- [21] Ms. Breitzkreutz, of course, did not intend to cause an accident that day or to cause harm to the Hutton family, but that is not the measure of liability in a case such as this. Ms. Breitzkreutz owed a duty of care to others on the roadway to exercise the care of a reasonable and prudent driver in the circumstances. I find she breached that duty of care for the reasons I have just given, and I find that her negligence caused the accident.
- [22] I turn now to the issue of damages. I begin by identifying the extent of the plaintiff's injuries.
- [23] Ms. Hutton was a healthy 17-year-old at the time of the accident. There was no suggestion that the injuries in issue were not caused by the accident. Common sense and the medical evidence confirms causation in this case.
- [24] Ms. Hutton was in the back seat, reading a book with her head down. She described the impact of the collision to be like hitting a brick wall. The air bags in the truck deployed. She felt immediate pain and realized her collarbone was broken. Like the rest of her family, she was taken to hospital by ambulance, where it was discovered that she had a perforated bowel that required emergency surgery and nine days in hospital.
- [25] Ms. Hutton experienced pain in her abdomen for about a month. That problem was fully resolved by the end of February 2009. However, the surgery left her with a long vertical scar over her abdomen. The plaintiff underwent further surgery to reduce the prominence of the scar, which was successful, but scarring remains clearly visible.
- [26] Ms. Hutton experienced pain in her neck and back due to soft tissue injuries. I find that resolved within about six months and did not bother her after that. Although the fractured clavicle resolved within a few months, a related injury to her right shoulder remains symptomatic. Numerous experts' reports were filed by both sides from physiatrists, orthopedic surgeons, occupational therapists, and vocational rehabilitation counsellors. This evidence is remarkable for its general consistency. Although using different descriptors, the medical doctors agree that Ms. Hutton has a multi-faceted chronic shoulder injury that involves: first, pain down the front of the right arm due to impingement of the bicep tendon, and second, chronic pain around the right shoulder joint and around the right scapula, which wings out now and does not sit properly because of the clavicle fracture and soft tissue injuries to the muscles around it.
- [27] As recommended by Dr. Regan, the plaintiff plans to undergo surgery for the bicep tendinopathy in about nine months. She is on a waiting list for that surgery. There is an 85% chance that her pain will improve and a smaller chance that the pain will be eliminated, that is the pain down the front of her arm due to the tendon impingement. There is a 4% chance of complications from the surgery.
- [28] It is common ground among the experts that the shoulder injury involving the joint and scapula is permanent, although it may improve with strengthening of the muscles around the joint.

- [29] I find the plaintiff's symptoms from the shoulder injury are aggravated by repetitive actions involving pressure and elevation of the arms.
- [30] Having described the plaintiff's injuries resulting from the accident, I now turn to non-pecuniary damages.
- [31] An award of non-pecuniary damages compensates the plaintiff for loss of amenities, for pain and suffering, and for loss of enjoyment of life. The factors to be considered are set out in *Stapley v. Hejslet*, 2006 BCCA 34. I will not read those factors here, but they form part of these reasons.
- [32] The plaintiff seeks \$125,000 under this head of damages. The defendant argues an award in the range of \$55,000 to \$70,000 is appropriate.
- [33] Awards of damages in other cases provide a guideline only. I have reviewed the cases provided to me by both parties and I consider them, but of course I must apply the factors in *Stapley v. Hejslet* to the particular circumstances of Ms. Hutton.
- [34] At the time of the accident, Kelsey Hutton was in Grade 12 and midway through a hairdressing course offered by her high school. Hairdressing was a passion of hers and had been since she was a young girl. The course was designed to give students basic hairdressing skills, and about 500 hours of the 1500 hours of "hands-on-head" required to become a certified stylist.
- [35] Ms. Hutton had completed one term of the two-term course when the accident happened. She missed several weeks of classes while recuperating from her abdominal surgery and clavicle fracture. When she returned to class, she was unable to do the hands-on work and had to switch to other academic credits in order to graduate in June 2009 with her classmates.
- [36] From September 2010 to November 2012, she tried to pursue her dream of becoming a stylist, taking in-salon training at Oxygen Hair Academy, and then working as a junior stylist at Untouchable Salon. The limitations and pain in her shoulder proved to her, in a practical way, what the functional capacity evaluations demonstrated in a clinical way. The plaintiff's injuries preclude her from working as a full-time competitive stylist. There is simply too much arms-up repetitive work required in cutting, colouring, and blow drying hair six to eight hours a day.
- [37] Ms. Hutton sank into a depression after leaving Untouchables. I accept that she was devastated by the loss of this career, the only work she had ever wanted to do.

- [38] Ms. Hutton, though, is young, bright, and personable. She is trying and will no doubt find another line of work, but the loss of this dream has been a real blow to her that has and will continue to affect her enjoyment of life. It appears to have been the work most suited to her, in terms of her talent, her temperament, and her interest. Her high school teacher, Ms. Currie, and Kenn Graf, her instructor at Oxygen Academy, described Ms. Hutton as very naturally talented with a successful career ahead of her.
- [39] At the time of the accident, Ms. Hutton described her recreational activities as hanging out with friends. In the past she had been involved in dance, studied piano for many years, and played on a competitive softball league for a few years. She had also obtained her gun licence and enjoyed quadding, wakeboarding, and tubing occasionally. Because of her shoulder injuries, it is now hard to play piano for any length of time. She cannot wakeboard or quad without pain, and most significantly cannot play softball, something I accept she very much enjoys and wanted to continue doing recreationally as a young adult.
- [40] Shooting is restricted to .22 calibre or lighter. I did not have a sense of how frequently Ms. Hutton engaged in that kind of activity, but I accept it has had some impact on her ability to do the things she chooses to do.
- [41] In the words of Mr. Kerr, who conducted a functional capacity evaluation for the defendant, Ms. Hutton is strongly right-handed. She is therefore strongly affected by the right shoulder injury.
- [42] In summary, the plaintiff is a young woman who, from the age of 17 on, has had to and will continue to have to contend with chronic pain and limitations in her work, her daily living, and recreational activities. She also has a large scar on her abdomen, the appearance of which bothers her, especially in summer when her abdomen is exposed. She has undergone two abdominal surgeries and is on a waiting list for a surgery to her shoulder to correct a bicep tendon impingement.
- [43] In all the circumstances of this case, I find \$100,000 to be an appropriate award for pain and suffering and loss of enjoyment of life.
- [44] I come now to past wage loss. The plaintiff claims past loss of income of \$140,565, the difference between actual earnings and what she would have earned had she moved right from her high school hairstyling course into an apprenticeship position at a salon. That figure assumes thereafter that she would have moved along on a full-time trajectory as a stylist, gradually increasing her clientele and earnings from \$12,000 as an apprentice to \$50,000 a year by 2012 and up to trial.
- [45] The standard of proof in assessing what the plaintiff would have earned, but for her injuries, is not on a balance of probabilities, at which point a fact is treated as a certainty. Rather, the standard of proof is straight chance; the real and substantial possibility that something would have occurred.

- [46] I agree with the defendant's submission that the plaintiff's claim is overstated reflecting, as it does, a 100% chance of full-time, continuous employment as a hairstylist, but for the accident. The actual events pre-trial are informative. When Ms. Hutton found herself training in a full-time salon setting at Oxygen Academy, she did not have the self-discipline to show up every day and to adhere to salon rules. Indeed, despite numerous warnings, she was ultimately expelled; the only student in the history of the salon to warrant that step. I find this absenteeism and indifference to abiding by the rules had nothing to do with Ms. Hutton's injuries and everything to do with a lack of maturity.
- [47] In addition, Ms. Hutton took several months to travel with two friends to Australia the fall after graduation, something there is a real and substantial possibility she would have done even if she had not been injured.
- [48] The plaintiff's youth and character lead me to conclude that there is a real and substantial possibility of close to 100% that she would not have successfully settled into hairdressing immediately full-time from the date of her high school graduation to trial.
- [49] Nonetheless, I accept that her injuries have caused some loss of earnings, if for no other reason than that they have resulted in her returning to college to try to take courses to train for another vocation, such as construction management, and because they have made it more difficult for her to work at and stay with entry-level physical jobs. However, the past income loss cannot be assessed with the mathematical precision proposed by counsel for the plaintiff.
- [50] I estimate the past loss of income in this case at \$45,000 and I award that sum.
- [51] I come now to future loss of earning capacity. I have already found that the plaintiff's shoulder injury has affected her ability to perform some types of work such as hairdressing. The real issue in this case under this head of damages is whether the plaintiff's functional limitations are going to cause her pecuniary loss in future. Ms. Hutton did not have an established career or working history at the time of the accident. Although she is precluded from a hairdressing career, she is young and academic enough to find an alternative career that might pay just as well in the future, in the long term.
- [52] Since accepting in November 2012 that a career in hairdressing was no longer an option, Ms. Hutton has struggled to find her career path. She has tried a number of jobs. After graduating from high school, she worked at Panago Pizza, where she found kneading and rolling out dough caused her pain. In April 2010, she worked at Golf Depot in sales for a few months. After leaving Untouchables in the fall of 2012, she worked briefly running an earth-packing machine, but the need to shift levers with her right hand caused pain. She tried promotional work and, for the six months before trial and through trial, worked full-time as a server in a sushi restaurant. The carrying at that job is apparently light, but she still finds the setting of tables, the wiping of tables, and mopping of floors aggravates her shoulder.

- [53] I conclude that Ms. Hutton is not physically well suited to the kind of entry-level jobs she has fallen back on in the five years before trial. While she can do the work, it causes pain and might not be sustainable over the long term. Also, she needs to pace herself and rest between tasks. In these types of jobs which many people fall back on, at least between jobs in their chosen field, Ms. Hutton is less valuable in a competitive job market. Keyboarding and desk work pose challenges because of the shoulder injuries, and these activities are part of many light jobs, even those which involve administration or management.
- [54] I also take into account the real and substantial possibility that Ms. Hutton might need to retrain for one or two years at college in order to move into a new vocation, years during which she will not be earning income. She is also not going to be able to work for six weeks after her shoulder surgery. I am satisfied that the factors identified by Mr. Justice Finch (as he then was) in *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 (S.C.) apply in this case and that the plaintiff has established a loss of future earning capacity.
- [55] Both parties agree that the capital asset approach to assessing damages is appropriate in this case. The plaintiff argues that an award of \$250,000 to \$300,000 is appropriate, based loosely on five years' earnings as a hairstylist. The defendant submits that if there is to be any award, it should be \$20,000 to \$50,000.
- [56] In a case of this kind, the Court cannot mathematically calculate loss. The Court is required, nonetheless, to assess the quantum of damages. The plaintiff has many positive attributes which make her an attractive and competitive employee within a narrow range of occupations. Taking into account all of the negative and positive contingencies, I conclude that an award of \$80,000 is an appropriate estimate of loss in this case.
- [57] The plaintiff claims \$20,000 under the head of damages for loss of housekeeping capacity. I find she can do most housework if she paces herself. The inconvenience and pain experienced doing this work is compensated under the head of non-pecuniary damages. I am satisfied that some heavy work, such as vacuuming, is difficult at this point, although it may become easier after the upcoming surgery and after she engages in strengthening. I find Ms. Hutton avoids vacuuming and leaves it to her boyfriend to undertake that task.
- [58] There was no specific evidence led to support the \$20,000 figure. I award a nominal sum of \$2,500 to reflect both past and future loss of housekeeping capacity.
- [59] I come now to future care costs.
- [60] In order to recover damages under this head, the plaintiff must prove that there is a real and substantial possibility that she will incur future care costs as a result of the injuries sustained in the accident. Those future expenses do not have to be a medical necessity, but they must be medically justified and reasonable: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.).

- [61] Occupational therapist Jodi Fischer recommended that the plaintiff engage in a shoulder strengthening program under the direction of a physiotherapist. If that program is successful, Ms. Fischer recommended progressing to receiving services from a kinesiologist in a gym setting. Exercise was clearly recommended by all medical experts. The difficulty with the \$4,868 figure claimed by the plaintiff is that Ms. Fischer does not set out how long the program should last or what it would cost.
- [62] Dr. Laidlow recommended a six-month course of exercise for strengthening and stretching. He said there should be six initial sessions with a trainer or physiotherapist and one further session a month for three months as follow-up to reinforce the program.
- [63] Dr. Monteleone recommended two to three times a week for strength training, as well as daily stretching.
- [64] I find, on the facts of the case as a whole, that the plaintiff will need some assistance in order to stay on track with such a program.
- [65] In terms of the cost of the program, I have evidence before me that the physiotherapist Ms. Hutton was seeing prior to trial at some point charged \$55 for a physiotherapy session. I am therefore going to use that figure and accept that two sessions per week for six months would be an appropriate future care cost in this case. At \$110 a week for 24 weeks, that comes to \$2,640.
- [66] A gym membership would not be necessary while working with a physiotherapist or kinesiologist. There is no evidentiary basis for a one-year gym membership and I do not award that sum.
- [67] Next, the plaintiff seeks future care costs related to the upcoming surgery. Dr. Regan states that physiotherapy will be required after the bicep tenodesis for three to four months. Again, physiotherapy at \$55 per session once a week for 16 weeks is \$880. I award that sum.
- [68] I award compensation for the cost of mileage to undertake that physiotherapy at \$120 and parking at \$34.
- [69] The plaintiff also claims lost wages for the six weeks she will be required to stay off work recuperating, but I have included this loss in the award of loss of future earning capacity and so I do not award any sum under this future care cost head.
- [70] Next, the plaintiff seeks compensation for \$1,000 for vocational counselling, as recommended by Dr. Wallace. That counselling is intended to assist her with exploring the residual occupational options she has and what she will be most suited to. I award that sum of \$1,000.
- [71] Dr. Wallace also recommended that Ms. Hutton complete a post-secondary program of study in order to secure a financially viable career. He gave evidence that the cost of such a program would range from \$4,500 to \$6,500 per year. The plaintiff seeks \$10,500 for tuition and books and supplies for a two-year program and lost income for two years. I have

addressed the latter in the award for loss of future earnings capacity. It is not a certainty that Ms. Hutton will return to school for a two-year program. She may take a one-year program or she may train on the job.

- [72] I set the chance of Ms. Hutton actually incurring this two-year college cost at 50% and award \$5,250 under this claim.

SPECIAL DAMAGES

- [73] The plaintiff received healthcare relating to her surgery and hospitalization following the accident. Under the Health Care Costs Recovery Act, S.B.C. 2008, c. 27, the Minister of Health presented a certificate of costs for those health services amounting to \$18,245.94. In accordance with s. 20 of the Act, I designate that sum as payable to the Province by the defendant.
- [74] As for the other special expenses, the plaintiff claims \$18,841.41 in expenses as a result of the injuries sustained in the accident. Counsel agree on items totalling \$778; \$17,706 remains in dispute. I begin then by awarding the plaintiff the items agreed to of \$778.
- [75] As for the items in dispute, I will deal with each in turn. First, \$144 claimed to replace Ms. Hutton's camera lost in the accident. The defendant argues that she should not have to pay for new memory cards which cost \$44, since the plaintiff could have retrieved those from the camera. The plaintiff said in her evidence that in the aftermath of the accident, it did not occur to her to retrieve the memory cards. I do not find that to be unreasonable in the circumstances. I find, therefore, that the entire sum is payable.
- [76] Second, \$1,465 for IMS physio treatments. The defendant disputes this cost on the basis that Dr. Laidlow advised the plaintiff to stop undergoing these treatments as of December 2011. The plaintiff continued with some treatments into 2012. From the invoice, it appears four visits to Mr. Garman occurred after December 2011. I therefore deduct four visits at \$55 each for a total of \$220 from the sum claimed, leaving \$1,245 payable for physiotherapy.
- [77] Next, the plaintiff claims for the cost of the Oxygen hairdressing course. The full cost of that course was \$14,284. The plaintiff says this course was necessary, because the plaintiff's injuries prevented her from completing the high school course. The defendant submits that this claim should not be allowed, because Ms. Hutton did not complete the Oxygen Academy course for reasons unrelated to her injuries. The plaintiff says that the expulsion 10 months into the 12-month course should not matter, because she still learned enough to get a job at Untouchables.
- [78] The plaintiff did learn and improve significantly at Oxygen Academy. However, she missed many hours and days of the course, to the point of being expelled from the program. She did not fully commit to the course and still had to begin at Untouchables as less than a full stylist. Even if that would have been the case to some extent, she was farther behind than she would have been had she applied herself fully to the course she enrolled in.

- [79] I conclude that the defendant should cover about one-half of the cost of the course and I set that at \$7,000.
- [80] Next, the plaintiff claims prescription costs of \$105. Although this is a very small sum, I have no evidence to support it and I therefore do not award it.
- [81] Next, the plaintiff claims \$400 for the Mount Boucherie course fee which was not refunded to her when she did not complete the hairstyling course. I do not award this sum. The plaintiff would have incurred that cost had she completed her high school course and the accident had not occurred. In other words, she did not incur that expense or suffer that loss due to the defendant's negligence. Insofar as that payment was thrown away, the plaintiff has been compensated for that through damages for retraining, both past and future.
- [82] Next, there is a cost claimed for mileage, a dispute over the appropriate amount of compensation for transportation costs incurred to attend various appointments. I set the rate at 30 cents per kilometre and I discount the applicable amount by the distance attributable to four physiotherapy appointments. I cannot provide a number, because I do not have the full calculation, but I assume counsel can do that without too much difficulty.
- [83] Finally, there are the course fees claimed at the Southern Alberta Institute of Technology. I decline to award the sum of \$990 claimed. The cost of the plaintiff's retraining to find a new career is adequately compensated under the future costs attributable to this accident. This course may, in fact, be applicable to any other program the plaintiff undertakes.
- [84] I turn now to the defendant's claim that the plaintiff failed to mitigate her damages.
- [85] The onus is on the defendant to prove failure to mitigate by the plaintiff. The defendant must establish both that the plaintiff did not take the steps a reasonable person would have in the circumstances, (here following the advice of numerous medical practitioners to engage in regular stretching and strengthening of her shoulder area with help from a physiotherapist or a kinesiologist) and that her failure to follow that advice impeded her recovery.
- [86] I find the defendant has proved the first element. The plaintiff did not follow the advice of her doctors to exercise regularly, and when I say exercise regularly, I am including there the advice that a physiotherapist should help her establish a program and oversee that.
- [87] I also find that the second element is made out. Dr. Monteleone, the plaintiff's treating physical medical specialist, said clearly that the failure to exercise and to stretch negatively impacted maximal recovery from this type of injury and that it might be too late to make that up now. I may be paraphrasing slightly, but that is what I drew from his testimony and also, to some extent, from the testimony of Dr. Regan.

- [88] I do note, however, that as Dr. Regan said, exercise would help manage and potentially improve the joint and scapula issues, but not the bicep tendon impingement which caused the plaintiff most of her pain. I also consider that the plaintiff could not exercise initially due to her fracture, and that until early 2012, the plaintiff understood her physiotherapist wanted her to wait until the IMS treatments were finished before the plaintiff began exercising.
- [89] What effect does the plaintiff's failure to mitigate her losses have on the awards of damages I have made to this point?
- [90] If this were a simple case of scapular and joint pain only, the effect could be significant, but the picture is not that simple. Even with exercise, Ms. Hutton would have experienced the shoulder pain from the tendon impingement. Her scarring, fracture, and bowel perforation are, of course, unrelated to the exercise issue. Nor is it at all suggested that exercise would have completely resolved the other shoulder issues, other than the impingement. The suggestion is that it could have improved the management and symptoms relating to those problems.
- [91] I take into account in this case, as I must, the particular circumstances of the plaintiff. She was only 17 when the accident occurred. To some extent, her failure to follow through is attributable to her immaturity. The defendant seeks a reduction of 30% across all heads of damages. I conclude that a reduction of 10% should be made to the non-pecuniary damages, since the plaintiff's pain and suffering attributable to the soft tissue shoulder injuries would likely have been reduced, both in the past and into the future, if advice had been followed.
- [92] However, I do not find that the failure to improve her shoulder affects past or future wage loss, since the bicep issue was the primary problem affecting earnings and remains present, with or without exercise. There is no suggestion that Ms. Hutton could be a stylist today if she had strengthened her shoulder or that she could do heavier repetitive work if she had strengthened her shoulder as recommended. Future care costs or retraining or housekeeping or post-surgery physio and vocational counselling are thus also unaffected by the failure to exercise. The physio and kinesiology cost is also not affected, since those expenses cover the very program, that is the future expenses related to future care costs, those are the very expenses related to the very program the defendant says the plaintiff should have done earlier. The costs are not increased because of the delay in undertaking the program, on the evidence before me.
- [93] I do find it likely, however, that the number of physio treatments would have been reduced if the plaintiff had followed medical advice to stretch and strengthen earlier. I therefore reduce the award I have made for the out-of-pocket costs for that IMS, the past IMS physio, by one-half to \$625.

- [94] I am not reducing the mileage awarded for those past physio treatments and any parking that may be included, because there will be transportation and parking costs to attend the future physio program, which costs have not otherwise been compensated in the awards I have made.
- [95] I am going to summarize now the awards of damages, to the extent that that is possible:
- a) first, non-pecuniary damages which I originally assessed at \$100,000 are reduced by 10% to reflect a failure to mitigate, I therefore award \$90,000 for non-pecuniary damages;
 - b) past wage loss remains at \$45,000;
 - c) future loss of earning capacity, \$80,000;
 - d) for loss of housekeeping capacity, \$2,500;
 - e) future care costs -- physio and kinesiology, of \$2,640, post-surgery physio and related expenses of \$1,034, vocational counselling of \$1,000, retraining costs of \$5,250 -- for total future care costs of \$9,924;
 - f) for special damages -- \$778 agreed upon, camera of \$144, physio originally assessed at \$1,245 but reduced for failure to mitigate to \$625, some cost, part of the Oxygen Academy course which I award at \$7,000, plus the mileage which will have to be recalculated.
- [96] Now, I am going to give counsel a few moments just to make sure that those numbers are correct. Of course, if I have misspoken during the summary, it is what is within the body of my reasons that applies.
- [97] I will give you an opportunity to ask for clarification, but I will just add that in the normal course, and of course there may be matters I am unaware of, but in the normal course, the plaintiff would be entitled to her costs at Scale B.
- [98] Is there anything arising, counsel? Mr. Pihl?
- [99] MR. PIHL: No, My Lady, I was just hoping that we could put the matter of costs over for another time to have those assessed. One of the issues is, is that there were a number of notices to admit that went back and forth with respect to the issue of liability, and the plaintiff's position may be to seek increased costs in regards to that issue.
- [100] THE COURT: All right. Well, of course, without prejudging the issue, because I will hear you if you wish to be heard, I would ask you to consider whether it is necessary to have a further hearing carefully before you do so. If you do need to set this matter down to address costs, if you cannot agree on them, Mr. Silvester, then you have leave to set that before me at nine o'clock by telephone.

[101] I will require you to have that matter heard, no later than three months from today. Because I have had some difficulty in the past, I note that it is not open to counsel by consent between them to extend that deadline. That is a deadline that I am imposing because the issue should not go beyond those three months, and because I need to remember the case clearly in assessing the arguments about costs.

[102] MR. PIHL: Thank you, My Lady.

[103] THE COURT: Thank you. So I do make that order, Madam Clerk, in addition, that the parties have leave to set a hearing before me to address the question of costs if they are unable to agree, but that hearing must take place within three months of today's date.

The Honourable Madam Justice L.A. Fenlon

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