

CANADA / JUDGMENT

Jones v. Rossner

2020 BCSC 2056

COURT

Supreme Court of British Columbia

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2020 BCSC 2056 Jones v. Rossner

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Jones v. Rossner,

2020 BCSC 2056

Date: 20201223

Docket: M146122

Registry: Vancouver

Between:

Nancy Beckman Hanna Jones

Plaintiff

And

Alysha Rossner

Defendant

Before: The Honourable Mr. Justice Basran

Reasons for Judgment

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Place and Date of Trial/Hearing:

Vancouver, B.C.

October 19-23, 26-29, 2020

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December 23, 2020

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INTRODUCTION

- [1] On February 5, 2013, Nancy Beckman was driving to work when she was rear-ended by the defendant, Alysha Rossner (the "Accident"). The defendant admits liability for the Accident. Prior to the Accident, Ms. Beckman was in good health. The Accident caused headaches, anxiety, depression symptoms, cognitive problems that she describes as "brain fog", and pain in the left side of her neck and left shoulder. She later developed pain in her left elbow and upper left extremities, but the Accident did not cause those injuries.

- [2] Ms. Beckman seeks damages for her pain and suffering, loss of future income earning capacity, cost of future care, and loss of homemaking capacity. She also seeks special damages.
- [3] For the reasons that follow, I have concluded that Ms. Beckman is entitled to:
- a) \$150,000 for non-pecuniary damages;
 - b) \$19,850 for cost of future care; and
 - c) \$8,692 for special damages.
- [4] Ms. Beckman is not entitled to damages for loss of future income earning capacity and loss of homemaking capacity.

BACKGROUND FACTS

- [5] Ms. Beckman was born on January 7, 1971. She was 42 years old on the date of the Accident and 49 years old at the time of trial. Prior to the Accident, she was in good health physically, mentally, and emotionally. Her work, leisure, and recreational activities were unrestricted.

The Accident

- [6] On February 5, 2013, Ms. Beckman was driving to a trade show in Vancouver, B.C. She was on Canada Way when she stopped for traffic ahead. A bus was pulling out of a bus stop and a car ahead of Ms. Beckman stopped to allow the bus into traffic. She had just taken her foot off the brake to proceed forward when the vehicle driven by the Defendant rear-ended her. Ms. Beckman had no warning of the impending impact.
- [7] After impact, Ms. Beckman's body accelerated forward, then back, and her head struck the headrest. Ms. Beckman immediately experienced a headache, nausea, and anxiety. She also felt shaky and confused. She remained in her lane of traffic for several minutes without moving. Eventually, the other driver approached her vehicle. Ms. Beckman asked her what they should do. The parties pulled into the bus stop and exchanged the necessary information. Afterwards, Ms. Beckman proceeded to work at a trade show, but she missed the First Avenue exit that she usually took. On Hastings Street, she had to pull over to vomit.
- [8] When Ms. Beckman arrived at the trade show, her thinking was slow, she felt disoriented, and her headache worsened. Her husband, Christopher Jones, had to remind her to call ICBC to report the Accident. Ms. Beckman worked at the trade show for the remainder of that day. Mr. Jones and another person assisted her. That evening, Ms. Beckman was supposed to go for dinner with Mr. Jones and some of his clients but she was unable to join them. Instead, she went home around 5:00 p.m. and went to bed.

- [9] Ms. Beckman's evidence regarding the Accident, immediate onset of headache, nausea and anxiety, and her difficulty working at the trade show were consistent with her reports to the physicians who examined her and testified: Drs. Cameron, Nagaria, Waseem, Woolfenden, and Boyle.

CREDIBILITY ASSESSMENT

- [10] The defendant submits that Ms. Beckman's evidence was not credible. She points to gaps between Ms. Beckman's visits with her family physician, Dr. Menzies, as well as purported gaps in treatment between 2014 and 2017. Ms. Beckman did not tell Dr. Woolfenden that she was unable to work on a computer for more than 30 minutes. Her evidence varied on when she first experienced issues with her left elbow and left upper extremities. She told Dr. Waseem that these symptoms arose a few weeks after the Accident but testified that the first time she noticed this problem was after a bike ride in the summer of 2013. On this basis, the defendant asserts that Ms. Beckman's pain symptoms were not continuous or frequent and were of a low level of intensity. She submits that the inconsistencies in Ms. Beckman's evidence should give rise to an adverse finding on her credibility.
- [11] Ms. Beckman explained that she did not visit Dr. Menzies more frequently because there was no change in her condition and she was continuing to follow his advice to rest and avoid strenuous activities. I accept this evidence and reject the assertion that frequent visits to a physician are necessary to support the existence of legitimate pain symptoms. This behaviour may instead be an indication of hypochondria.
- [12] Ms. Beckman sought treatment from a chiropractor in 2014 and from a physiotherapist in 2015. She also received massage therapy in 2015 and acupuncture in 2016 and 2017. I reject the assertion that Ms. Beckman had unexplained gaps in treatment from 2014 to 2017.
- [13] Ms. Beckman may not have specifically mentioned difficulty working on a computer to Dr. Woolfenden. However, he knew that using a computer made her nauseous and interrupted her ability to work because Dr. Menzies described this, and the details of Ms. Beckman's other cognitive and neurological symptoms, in the referral letter to Dr. Woolfenden. These symptoms included anxiety attacks, low energy, sleep difficulty, headaches, memory issues, and problems with numbers. Ms. Beckman may not have mentioned each of her cognitive or neurological difficulties to Dr. Woolfenden but, given her symptoms, this is not surprising. I do not accept that failing to mention one of her many symptoms to Dr. Woolfenden is a reflection on Ms. Beckman's credibility.
- [14] I agree that Ms. Beckman's evidence on the onset of pain in her left elbow and upper left extremities varied. I accept her evidence that these symptoms arose in the summer of 2013, several months after the Accident. I am therefore not satisfied that the Accident caused these symptoms.

- [15] However, her description of these symptoms arising "weeks" after the Accident to Dr. Waseem, whom she saw over five years after the Accident, is not sufficient to warrant a finding that that her evidence is not generally credible. She may have simply made an error in recounting the timing by referring to weeks instead of months. If there had been several unexplained inconsistencies in Ms. Beckman's evidence that demonstrated a tendency to slant events in her favour, there would be a reasonable basis to question her credibility because of a cumulative effect of these types of misstatements. However, one example of the relatively minor inconsistency, where her sworn evidence at trial conflicts with what she told a physician several years ago, does not justify an adverse credibility finding. She was consistent in describing her symptoms to her health care providers and none of them questioned her veracity.
- [16] I am satisfied that the evidence of Ms. Beckman and Mr. Jones was credible. They testified clearly and their evidence was generally consistent. Their evidence differed on who did the weeding of their garden but, in my view, this was neither significant nor intended to mislead. Both recounted that Ms. Beckman was energetic, outgoing, and active prior to the Accident. She managed a wide array of home and work responsibilities and she was primarily responsible for the childcare of their daughters.
- [17] The Accident significantly changed her circumstances. Ms. Beckman and Mr. Jones described the notable changes in her outlook and abilities after the Accident. She is no longer the energetic and highly capable person that she was prior to the Accident. The details of these changes were specific, consistent, and clearly described by Ms. Beckman and Mr. Jones. They did not exaggerate or embellish their evidence to accentuate Ms. Beckman's symptoms or its effects. I accept the evidence of Ms. Beckman and Mr. Jones.

ADVERSE INFERENCE

Positions of the Parties on Drawing an Adverse Inference

- [18] The defendant asks the Court to draw an adverse inference from Ms. Beckman's failure to call three of the health care providers who treated her. They are Dr. Ley, her treating psychologist; Dr. Menzies, her family doctor; and Dr. Woolfenden, a neurologist who examined her on three occasions from 2014 to 2016.
- [19] The Defendant asks the Court to infer that if these three treating health care providers had testified, their evidence would not have supported Ms. Beckman's claim that her symptoms and impairments resulted from the Accident. In particular, it would not have supported her evidence that she sustained a concussion with post-concussive syndrome.
- [20] Prior to the Accident, Ms. Beckman sought treatment from Dr. Ley in respect of issues involving her blended family. She continued to see him after the Accident for these issues as well as her post-Accident mental health issues, such as anxiety and depression.

- [21] On February 14, 2013, nine days after the Accident, Ms. Beckman saw her family physician, Dr. Menzies, regarding her injuries. He diagnosed her with a concussion. He recommended that she "take it easy" and avoid strenuous activity to avoid getting another concussion. Ms. Beckman next visited Dr. Menzies on February 19, 2014. According to Ms. Beckman, she did not see him or any other physician during the intervening year because her symptoms had not changed and she was continuing to follow his advice. She disclosed his clinical records. The experts retained by the defendant, Dr. Nagaria and Dr. Boyle, received copies.
- [22] On April 16, 2014, Dr. Menzies referred Ms. Beckman to Dr. Woolfenden for a neurological assessment. In the referral letter sent to Dr. Woolfenden, Dr. Menzies described several of Ms. Beckman's symptoms including daily headaches, anxiety attacks, driving anxiety, fatigue, low energy, memory and cognitive problems, and nausea caused by computer work. Dr. Menzies described his diagnosis of Ms. Beckman as concussion with residual effects and whiplash associated disorder with headaches and neck pain.
- [23] Dr. Woolfenden treated Ms. Beckman on October 7, 2014, March 2, 2015, and October 31, 2016. During these appointments, she consistently described having no physical or cognitive limitations before the Accident. She also reported most of the symptoms described by Dr. Menzies in his referral letter as arising after the Accident. Dr. Woolfenden reported the results of these examinations to Dr. Menzies. The defendant received these reporting letters along with Dr. Woolfenden's records of his examinations of Ms. Beckman, and provided them to the experts she retained, Drs. Nagaria and Boyle.
- [24] Dr. Woolfenden testified as a fact witness for the defendant but did not provide opinion evidence because the defendant did not seek to qualify him as an expert. The portions of his reporting letters to Dr. Menzies that contain his opinions were therefore not before the Court.
- [25] The defendant asserts that it is not within the power of the defence to compel treating physicians to provide opinion evidence concerning the diagnosis, treatment and prognosis of Ms. Beckman's impairments but she could have elicited this evidence from Dr. Menzies and Dr. Woolfenden.
- [26] Ms. Beckman submits no adverse inference should be drawn because:
- Dr. Ley and Dr. Menzies were equally available as witnesses to the defendant as they were to her;
 - the defendant's failure to subpoena Dr. Ley does not warrant an adverse inference;
 - the defendant had the clinical records of Drs. Menzies and Woolfenden and provided them to the medical experts she retained; and
 - Ms. Beckman elicited opinion evidence from two neurologists, Drs. Cameron and Nagaria, and did not require a third neurologist, Dr. Woolfenden, to provide opinion evidence on her behalf.

Relevant Legal Principles

[27] In *Tayner v. Brard*, 2016 BCSC 1738, Justice Armstrong at para. 128 discussed the question of adverse inferences as addressed in *The Law of Evidence in Canada*. He observed:

[128] The question of adverse inferences is addressed in J. Sopinka, S.N. Lederman and A.W. Bryant., *The Law of Evidence in Canada*, 2d ed. (Toronto: Butterworths, 2009) where the authors state at 377:

In civil cases, an unfavourable inference can be drawn when, in the absence of an explanation, a party litigant does not testify, or fails to provide affidavit evidence on an application, or fails to call a witness who would have knowledge of the facts and would be assumed to be willing to assist that party. In the same vein, an adverse inference may be drawn against a party who does not call a material witness over whom he or she has exclusive control and does not explain it away. Such failure amounts to an implied admission that the evidence of the absent witness would be contrary to the party's case, or at least would not support it.

[28] In *Andrews v. Mainster*, 2014 BCSC 541, Justice Pearlman at para. 176 summarized the factors from *Buksh v. Miles*, 2008 BCCA 318, to be considered on the question of whether an adverse inference can be drawn because a witness has not been called to give evidence. He said:

[176] In *Buksh* at para. 35, the Court of Appeal identified the following factors for consideration on the question of whether the trier of fact can reasonably draw an inference that the witness not called by a party would have given evidence detrimental to that party's case:

- a. the evidence before the court;
- b. the explanations offered for not calling the witness;
- c. the nature of the evidence that could be provided by the witness;
- d. the extent of disclosure of the physicians' clinical notes; and
- e. the circumstances of the trial, for example, an initial agreement to introduce clinical records that works contrary to the inference, or incorporation of the witness' views or observation in the report of a witness called by the other side.

[29] Justice Pearlman also observed that "[g]enerally, an adverse interest cannot be fairly drawn except from the failure to call witnesses whose testimony would be superior to the evidence already adduced in respect of the fact to be proved.": *Andrews* at para. 175, referring to *Buksh* at para. 30.

[30] A court is not required to draw an adverse inference where a party fails to call a witness. The question of whether to draw such an inference depends on whether:

- There is a legitimate explanation for the failure to call the witness;

- The witness is within the "exclusive control" of the party, and is not "equally available to both parties"; and
- The witness has material evidence to provide; and
- The witness is the only person or the best person who can provide the evidence.

Singh v. Reddy, 2019 BCCA 79 at para. 9, referring to A.W. Mewett and P.J. Sankoff, Witnesses (Toronto: Thomson Reuters) (loose-leaf updated 2013) at 2-23 to 2-24.

Factual Findings and Analysis on Adverse Inference

[31] For the reasons discussed below, I am not convinced that an adverse inference should be drawn against the plaintiff. The defence has not established that the treatment providers the plaintiff chose not to call as witnesses, would have offered material evidence beyond what was already established.

Dr. Ley

[32] Dr. Ley provided psychological treatment to Ms. Beckman before and after the Accident.

[33] Ms. Beckman reasonably explained that she discussed her post-Accident mental health issues with Dr. Ley, the psychologist she had been working with prior to the Accident. I am satisfied that Ms. Beckman saw no need to call Dr. Ley to testify because there was no serious dispute that she suffers from anxiety and some level of sadness or depression as a result of the Accident. There is no evidence that she suffered from any of these symptoms prior to the Accident.

[34] At the outset of the trial, counsel for the defendant included Dr. Ley on their witness list. During the second week of trial, counsel advised the Court that they would not be calling Dr. Ley because they were unable to subpoena him. The defendant did not provide any details or explain their attempts to subpoena Dr. Ley. In particular, it is unclear if they asked him to provide fact and/or opinion evidence and what response they received from him, if any. The defendant also did not seek the assistance of the Court to ensure service of a subpoena. There is no evidence to suggest that he was within Ms. Beckman's exclusive control.

[35] The defendant has not established that Dr. Ley had material evidence to provide. Although Dr. Ley's records were not disclosed, there was no evidence that they were sought by the defendant and disclosure was refused. The defendant has not established that an adverse inference should be drawn in respect of Ms. Beckman's decision not to call Dr. Ley as a witness.

Dr. Menzies

[36] Dr. Menzies was Ms. Beckman's family physician before and after the Accident. His clinical records were disclosed to the defendant and provided to Drs. Nagaria and Boyle, the defendant's medical experts.

- [37] Ms. Beckman explained that after the Accident, she did not visit Dr. Menzies for over a year between her first and second appointments because her symptoms did not change and she was continuing to follow his advice. I accept this explanation. In the absence of a change in condition, a plaintiff is not required to visit a treating physician monthly, quarterly or semi-annually merely to establish a record of appointments. Doing so would be wasteful and unnecessary.
- [38] There was no evidence suggesting that Dr. Menzies was not available to the defendant or that he uniquely could have provided evidence that was missing and material. Ms. Beckman disclosed his records and the defendant provided them to the experts they retained. Dr. Menzies examined Ms. Beckman shortly after the Accident and again a year later. These examinations were much closer in time to the Accident than the examinations conducted by Drs. Cameron, Nagaria, Waseem, and Boyle. However, this fact alone does not justify drawing an adverse inference from Ms. Beckman's failure to call Dr. Menzies as a witness because there is no indication that he had any further material evidence beyond what was contained in his clinical records.

Dr. Woolfenden

- [39] The defendant called Dr. Woolfenden as a fact witness. This treating neurologist testified in respect of the three occasions on which he examined Ms. Beckman. The defendant alleges that Ms. Beckman did not specifically report some of her neurological and psychological symptoms to Dr. Woolfenden because the details of these symptoms are not contained in his reporting letters to Dr. Menzies. However, Dr. Woolfenden confirmed that he was aware she suffered from these specific symptoms, including nausea caused by computer work, because Dr. Menzies described them in detail in the referral letter to him.
- [40] Ms. Beckman disclosed Dr. Woolfenden's clinical records to the defendant who provided them to their medical experts.
- [41] Ms. Beckman's counsel objected to the inclusion of the opinion evidence contained in Dr. Woolfenden's reporting letters to Dr. Menzies because the defendant did not seek to comply with the Supreme Court Civil Rules for the introduction of opinion evidence. I declined to admit this evidence.
- [42] The defendant seeks an adverse inference because Dr. Woolfenden was Ms. Beckman's treating neurologist and he examined her three times in the three years after the Accident. As the treating neurologist, he may have provided material opinion evidence. I decline to draw an adverse inference in these circumstances because I am not satisfied that his opinion evidence was necessary. Each party retained a neurologist, Dr. Cameron and Dr. Nagaria, to examine and provide an expert report on Ms. Beckman's condition. I qualified both of them as experts in neurology and accepted their reports as evidence in this trial. It is possible that Dr. Woolfenden reached different conclusions than Drs. Cameron and Nagaria in respect of their diagnoses of mild traumatic brain injury ("MTBI") symptoms and MTBI

syndrome. However, Dr. Woolfenden's failure to make these diagnoses may be because he did not adequately consider the details of Ms. Beckman's symptoms reported to him by Dr. Menzies. I am therefore not convinced that Ms. Beckman "suppressed" Dr. Woolfenden's opinion evidence by not calling him as a witness and that an adverse inference should be drawn.

QUANTUM OF DAMAGES FOR PAIN AND SUFFERING

Relevant Legal Principles

[43] Ms. Beckman must prove that the Accident caused her injuries. She need not establish that the defendant's negligence was the sole cause of her injuries, but she must demonstrate a substantial connection between the Accident and her physical and psychological injuries: *Thompson v. Helgeson*, 2017 BCSC 927 at paras. 28-30.

[44] Some of the relevant factors in assessing non-pecuniary damages include:

- a) Age of plaintiff;
- b) Nature of the injury;
- c) Severity and duration of the pain;
- d) Disability;
- e) Emotional suffering;
- f) Loss or impairment of life;
- g) Impairment of family, marital, and social relationships;
- h) Impairment of physical and mental abilities;
- i) Loss of lifestyle; and
- j) The plaintiff's stoicism (as a factor that should not penalize the plaintiff).

Stapley v. Hejslet, 2006 BCCA 34 at para. 46.

[45] Once the plaintiff establishes causation, the burden shifts to the defendant to prove that the plaintiff failed to mitigate some of her loss or injury. If a plaintiff has not pursued a recommended course of medical treatment, the defendant must prove that the plaintiff acted unreasonably in declining the medical treatment and must prove the extent, if any, by which the plaintiff's damages would have been reduced had she pursued that treatment: *Chiu v. Chiu*, 2002 BCCA 618 at para. 57.

[46] The question of whether a person has been reasonable in refusing recommended treatment is one for the trier of fact to decide based on the circumstances of the case, taking into account the degree of risk from the treatment, the gravity of the consequences for refusing it, and the potential benefit to be derived from it: *Janiak v. Ippolito*, [1985] 1 S.C.R. 146.

- [47] Mitigation is a subjective/objective test: *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 56. The first part of the test asks whether the reasonable patient, having all the information at hand that the plaintiff possessed, ought to have undergone the treatment. The second part asks the extent, if any, to which the plaintiff's damages would have been reduced by that treatment. The fact that a treatment may have afforded some relief is not sufficient to satisfy the second part of the test: *Rhodes v. Surrey (City)*, 2018 BCCA 281 at para. 66.

Plaintiff's Position on Non-Pecuniary Damages

- [48] Ms. Beckman submits that the injuries she suffered in the Accident significantly affected her ability to work, perform household chores, and enjoy recreational activities.
- [49] In terms of her work, Ms. Beckman described feeling overwhelmed by large tasks, such as completing her tax returns. She has trouble starting and finishing this type of task without taking multiple breaks. Prior to the Accident, she had no difficulty with these kinds of tasks.
- [50] Ms. Beckman also has difficulty concentrating on her work. She must check and re-check her work and reread information to properly understand and retain it. She is unable to work on a computer for more than thirty minutes because the light from the screen induces headaches, nausea, and "brain fog", which she describes as a series of cognitive symptoms including fatigue, slow thinking, memory lapses, lack of concentration, light and sound sensitivity, depressed mood, tearfulness, dizziness, and feeling overwhelmed. Ms. Beckman describes herself as forgetful and less efficient in doing her work and frequently exhausted by it.
- [51] Ms. Beckman and Mr. Jones also reported examples of her frustration, tearfulness, and irritability.
- [52] In respect of household chores, Ms. Beckman relies on her family to do many of the tasks she used to perform. She can still do most of these tasks but at a slower pace and with frequent breaks. On balance, she is not able to meet the housekeeping standards she adhered to prior to the Accident. Ms. Beckman is disappointed that she is no longer able to prepare elaborate meals or bake for her family. She recalls that she used to do some weeding and attend to exterior planters but she can no longer perform these tasks because of the injuries she sustained in the Accident.
- [53] Ms. Beckman's recreational activities are significantly restricted. Prior to the Accident, she regularly attended a gym and worked with a personal trainer. Ms. Beckman also enjoyed bike riding and playing golf. In 2006, she and her family joined the Richmond Golf and Country Club. She introduced Mr. Jones to golf and, along with her two daughters, the four of them played this sport regularly in the summer. She and Mr. Jones also travelled annually to Palm Springs for golf vacations.

- [54] After the Accident, Ms. Beckman tried exercising and playing golf but she was unable to continue doing these activities because they worsened her brain fog and made her feel ill. For the same reason, she is unable to ride a bike for more than 30 minutes whereas prior to the Accident, she regularly performed this activity for several hours at a time.
- [55] Prior to the Accident, Ms. Beckman enjoyed several sedentary activities such as watching television, knitting, and doing needlepoint. She also read 12-15 books per year. After the Accident, she is unable to watch television for more than an hour because the light from the screen causes headaches and she is unable to knit, do needlepoint, or read regularly because she cannot concentrate on these activities.
- [56] Ms. Beckman described suffering from severe, unremitting headaches for two weeks after the Accident. After six months, the severity of the headaches lessened but she continued to experience them daily. Now, she has headaches several times per week. She also suffered from anxiety for approximately two years after the Accident. After this subsided, she developed frequent sleep interruptions that now occur two to three times per night. As a result, she does not receive proper rest and this affects her ability to function effectively during the day. Ms. Beckman and Mr. Jones also described examples of Ms. Beckman's driving anxiety.
- [57] Ms. Beckman reports ongoing pain on the left side of her neck and upper shoulder that sometimes radiates to her head and face, causing a headache and pain in her face and jaw.
- [58] Ms. Beckman submits that in applying the factors set out in Stapley, the Court must consider that she is 49 years old and has several injuries including frequent headaches and pain in her neck and shoulder. She also experiences cognitive brain fog, anxiety and symptoms of depression. Her prognosis is poor/guarded and her symptoms have been ongoing for almost eight years.
- [59] The change in Ms. Beckman's physical and psychological condition is significant from her pre-Accident state. Prior to the Accident, she had no health issues relating to headaches or pain in her neck or shoulder, her physical ability was unrestricted, and she had no psychological issues. Now, she suffers from headaches, intermittent pain, depression, anxiety, irritability, emotional fragility, and some impairment of her family, marital, and social relationships. She also perceives a reduction in her cognitive abilities.
- [60] Ms. Beckman submits that the following cases provide guidance in assessing the amount that should be awarded for her pain and suffering:
- a) In *Fletcher v. Biu*, 2020 BCSC 1304, the plaintiff was a 33-year-old female with significant ongoing mental health and physical difficulties almost four years after the accident. She was no longer involved in sports and her recreational, social, and work life had changed. The plaintiff was frequently "sad, teary, and tired, irritable, anxious, and frustrated by things that she would previously have taken in stride, and generally less engaged in life." (para. 65). She suffered from a profound, progressive and traumatic spinal injury, with a poor prognosis.

The Court awarded \$200,000.00 in non-pecuniary damages.

- b) In *Jantzi v. Moore*, 2020 BCSC 1489, the female plaintiff was 42 at the time of the accident. Prior to the accident, she was healthy and active. Her accident related symptoms included a brain injury, neurocognitive disorder, dizziness, decreased balance, irritability, decreased concentration, weight gain, and suicidal ideation. She could no longer handle finances, manage a credit card, or effectively parent her children. She also suffered chronic soft tissue injuries to her neck, back, and shoulders. She had vomit-inducing headaches and tinnitus. Her psychological injuries included depression, guilt, angry outbursts, and driving anxiety. The evidence indicated that the plaintiff's prognosis for a full recovery was poor. She no longer enjoyed running with her friends, power walking, hiking, skiing, Pilates, and all the high-energy exercise and sporting activities she used to do. The plaintiff was a perfectionist. Her limitations frustrated her immensely. Her ability to maintain the household was limited. The prognosis for her post-concussion syndrome and cognitive difficulties was poor. The Plaintiff was awarded \$185,000.00 in non-pecuniary damages.
 - c) In *Raedwulf v. Kelly*, 2020 BCSC 915, the plaintiff suffered chronic pain, cognitive difficulties, anxiety, dizziness, and headaches. She was also fatigued, emotionally unstable, withdrawn, sensitive to lights and noise, and unable to read or plan her day. Walking was painful, she was unable to participate in the physical activities she previously enjoyed, and her relationships were impaired. The Court concluded that the plaintiff's injuries had a devastating impact and although there may be some improvement with treatment, these injuries were permanent. The Court awarded \$175,000.00 in non-pecuniary damages.
 - d) In *Ranahan v. Ocegüera*, 2019 BCSC 228, the plaintiff experienced pressure and pain in her head and neck along with headache immediately after the accident. She felt emotionally wrecked and suffered from fatigue, cognitive difficulties, and sound and light sensitivity. Her ongoing symptoms at the time of trial included daily neck pain, upper back pain, and intermittent pain in her right hip and jaw, headaches two to three times per week, tinnitus, sleep difficulties, and balance issues. The Plaintiff received \$160,000.00 in non-pecuniary damages.
- [61] Based on these cases, Ms. Beckman submits that she should be awarded \$200,000 in non-pecuniary damages.

Defendant's Position on Non-Pecuniary Damages

- [62] The defendant submits that because of the Accident, Ms. Beckman suffered a strain injury to her cervical spine, cervicogenic headaches, anxiety and depression, but the Court should infer that these symptoms are not continuous or frequent, or that they are of a low level of intensity. She further relies on Dr. Boyle's finding that it is unlikely that Ms. Beckman will develop degenerative changes to her cervical spine.

- [63] The defendant asks this Court to draw an adverse inference against Ms. Beckman's credibility based on inconsistencies in her statements. She asserts that Ms. Beckman's subjective descriptions of the pain and discomfort she suffers from her soft tissue injuries should be assessed in light of this adverse finding.
- [64] In respect of Ms. Beckman's symptoms of anxiety and depression, the defendant submits that the evidence does not demonstrate a severe impairment of her family, marital, and social relationships.
- [65] The defendant relies on the following cases with respect to the quantum of Ms. Beckman's non-pecuniary damages:
- a) In *Eaton v. Riddell*, 2020 BCSC 734, the 43-year-old plaintiff was found to have musculoligamentous injuries to his neck and upper back, which were ongoing at the time of trial. He also had headaches, mild cognitive impairment, and psychological injury, including depression, fatigue, and irritability. He received \$75,000 in non-pecuniary damages.
 - b) In *Lu v. Huang*, 2016 BCSC 1146, the plaintiff was in her forties and was found to suffer from ongoing constant cervical and lumbar pain, occasional numbness in her fingers and legs, near-constant headaches, problems with mood, and less restful sleep. She was awarded \$90,000 in non-pecuniary damages.
 - c) In *Reimer v. Bischoff*, 2015 BCSC 1876, the 55-year-old plaintiff had headaches, chronic dizziness and imbalance, pain down the left side of her body, trouble concentrating, and chronic neck pain. She experienced low mood and anxiety as a result of the accident. She had to work longer hours to keep her business going, which was compensated as part of the award for non-pecuniary damages. She was awarded \$100,000 in non-pecuniary damages.
 - d) In *Hill v. Murray*, 2014 BCSC 1528, the plaintiff was in her mid - to late 30s at the time of the accident. The Court found that she had sustained a soft tissue injury to her left neck and shoulder, resulting in chronic intermittent pain at the time of trial. She also had cervicogenic headaches, numbness and tingling down her left arm, migraines, resolved PTSD, adjustment disorder (largely in remission), and MTBI or post-concussive syndrome resulting in ongoing fatigue and problems with concentration and balance. She was awarded \$120,000 in non-pecuniary damages.
- [66] Based on these cases, the defendant submits that Ms. Beckman should be awarded between \$75,000 and \$120,000 in non-pecuniary damages.

Findings of Fact on Non-Pecuniary Damages

- [67] I accept that Ms. Beckman was in good health physically, mentally, and emotionally prior to the Accident. She managed a wide array of responsibilities concurrently. She worked full time, was primarily responsible for the childcare of her two daughters, and did most of the housekeeping and cooking for her family. Ms. Beckman was also quite active prior to the Accident. She exercised regularly both at a gym and with a trainer, played golf, and

frequently rode her bike. She enjoyed baking, entertaining large groups of family and colleagues, and she was an avid reader. She was sharp, energetic, and high functioning.

- [68] After the Accident, Ms. Beckman's life changed significantly. She lacks confidence in her abilities and struggles to maintain her daily responsibilities. She suffers from frequent headaches, anxiety, sleep interruptions, and cognitive symptoms that she describes as brain fog. She also has ongoing pain in her upper shoulder and the left side of her neck.
- [69] Her work takes longer because she needs frequent breaks. She avoids complex tasks such as completing tax returns. In the period following the Accident, Mr. Jones described Ms. Beckman's failure to complete expense reports in a timely manner. She had no difficulty with this type of task prior to the Accident.
- [70] Ms. Beckman now relies significantly on her family to assist with many of the household tasks she previously performed on her own but this work is no longer completed to her previous standards. She is able to do most household tasks but with pacing and at a lower level of intensity than before the Accident.
- [71] Ms. Beckman and Mr. Jones rarely entertain, she no longer bakes, and is unable to concentrate on reading. She is unable to exercise because doing so induces headaches and the symptoms she describes as brain fog. It also exasperates the pain in the left side of her neck and left shoulder. Ms. Beckman is also no longer able to play golf, a sport she thoroughly enjoyed and played often with her family. The ongoing symptoms caused by the Accident have significantly affected Ms. Beckman's work, household and recreational activities. In general, her outlook and confidence have deteriorated.

Medical Expert Evidence

Dr. Cameron -- Neurologist

- [72] On July 2, 2020, Dr. Cameron, a neurologist, assessed Ms. Beckman. In his expert report dated July 12, 2020, he found that Ms. Beckman sustained a MTBI caused by the Accident. He reached this conclusion because she suffered a brief altered state of consciousness or loss of consciousness at the time of the Accident. Her confusion, vomiting shortly after the Accident, and her incomplete and segmented recall of the events immediately after the Accident also informed his conclusion. He explained that vomiting is associated with a MTBI but not with soft tissue whiplash injuries. He also observed that Ms. Beckman's cognitive issues were apparent immediately after the Accident so although her pain symptoms may have aggravated her cognitive issues, the pain symptoms did not cause them. The Accident caused her cognitive issues.
- [73] Dr. Cameron also concluded that Ms. Beckman developed symptoms of post-traumatic MTBI syndrome because she exhibited many of its symptoms. These include: decreased memory, concentration, and attention span; decreased interest in socializing; photophobia; phonophobia; irritability; mood swings; anger outbursts; disturbed sleep pattern; inability

to concentrate on the computer; generalized slowness of thinking; decreased ability to make decisions; multitasking difficulties; being overwhelmed in certain environments; decreased libido; decreased self-confidence; decreased self-esteem; and symptoms of anxiety. Dr. Cameron explained that approximately 10-20% of those who sustain a MTBI subsequently develop post-traumatic MTBI syndrome. He noted that although some of Ms. Beckman's symptoms improved over time, they had not resolved and were still present as of the date of his assessment of Ms. Beckman.

- [74] Dr. Cameron believes that Ms. Beckman also suffered pain, discomfort, and post-traumatic cervicogenic headaches because of the soft tissue and musculoskeletal injuries, principally the whiplash injury, that she sustained in the Accident. He also identified symptoms of anxiety and depression.
- [75] Dr. Cameron found that the residual adverse effects of the mild traumatic brain injury sustained by Ms. Beckman contributed to her ongoing cognitive complaints.
- [76] Dr. Cameron concludes that Ms. Beckman is partially disabled due to the ongoing residual effects of the physical injuries she sustained in the Accident and this partial disability will interfere with her work-related activities, household chores, and recreational activities. He notes that the recommended treatment may potentially improve her post-traumatic headaches and associated pain symptoms but will probably not resolve them because patients generally improve in the two years following an injury. He assessed her approximately seven and a half years after the Accident.

Dr. Nagaria -- Neurologist

- [77] The defendant also retained a neurologist, Dr. Nagaria, to assess Ms. Beckman but chose not to call him as a witness. Counsel for Ms. Beckman called Dr. Nagaria to testify and relied on the expert report he prepared.
- [78] Dr. Nagaria found that Ms. Beckman most likely developed the symptoms of headaches, sensitivity to light, concentration and memory difficulty, mood problems, and sleeping difficulty because of the impact of trauma to her head during the Accident. He also noted left-sided neck and shoulder pain, left-sided back pain, and left hip pain. He concluded that Ms. Beckman suffered a concussion as a result of the Accident.
- [79] Confusingly, in his expert report, Dr. Nagaria diagnosed "post-traumatic concussion headache" but during the hearing he agreed with the suggestion of counsel for the plaintiff that Ms. Beckman had post-concussion syndrome based on symptoms similar to those described by Dr. Cameron.
- [80] Dr. Nagaria described Ms. Beckman's prognosis for recovery as guarded.

Dr. Waseem -- Psychiatrist

- [81] Dr. Waseem, a psychiatrist, assessed Ms. Beckman on October 19, 2018 and July 6, 2020. He prepared expert reports dated November 6, 2018, and July 10, 2020, respectively.
- [82] Based on the histories provided by Ms. Beckman and his review of her medical records, Dr. Waseem concluded that she sustained a MTBI and soft tissue injuries of the cervical spine and left elbow because of the Accident. He thinks whiplash caused the soft tissue neck injury and soft tissue elbow injury. He based his diagnosis on Ms. Beckman's incorrect description of this latter symptom as arising within weeks of the Accident. At trial, she testified that the symptoms in her left elbow and upper left extremities arose in the summer of 2013, several months after the Accident.
- [83] Dr. Waseem observed that Ms. Beckman is able to do her regular employment duties, despite her symptoms, because of the flexibility of her job. She can physically tolerate the demands of her employment and her physical symptoms will not negatively affect her employability. He found that her work limitations are post-concussive complaints, not physical.
- [84] In both of his reports, Dr. Waseem described Ms. Beckman's prognosis for recovery from her post-concussive symptoms and physical symptoms as poor given that these symptoms have persisted for over five years post-Accident. Although some improvement in her condition is possible, he concluded that she will continue to experience pain that is chronic and unrelenting, and therefore permanent.

Dr. Boyle -- Orthopedic Surgeon

- [85] Dr. Boyle, an orthopedic surgeon, examined Ms. Beckman on July 17, 2018 and completed an expert report on the following day. From a musculoskeletal point of view, he concluded that there was no disability from the soft tissue injuries sustained by Ms. Beckman. Although he found some tenderness in Ms. Beckman's left paraspinal musculature, he believed that her physical symptoms should have improved within six to nine months such that she should be fully active in work, leisure, and household activities. Dr. Boyle's view is inconsistent with Ms. Beckman's presentation because she can no longer do these activities without restrictions. Dr. Boyle's opinion is of little assistance because it is limited to a musculoskeletal assessment. Her symptoms are primarily headaches, the cognitive effects of MTBI Syndrome, and some soft tissue pain in her neck and shoulder.

Analysis of Non-Pecuniary Damages

- [86] I am satisfied that the Accident caused Ms. Beckman's injuries to her neck and back, as well as her headaches, cognitive, and psychological symptoms. However, her testimony does not support a finding that the Accident caused the pain in her left elbow and upper left extremities.

- [87] I accept Dr. Cameron's diagnosis that Ms. Beckman suffers from MTBI syndrome because she exhibits a large number of its symptoms. Almost eight years post-accident, her headaches, cognitive problems, and soft tissue injuries continue to restrict her activities. I agree with the conclusions of Drs. Cameron, Nagaria, and Waseem that Ms. Beckman is permanently partially disabled and her symptoms may improve but probably will not completely resolve.
- [88] Ms. Beckman mitigated her damages by following the advice of medical professionals. She received physiotherapy, massage therapy, acupuncture, and began active rehabilitation on two occasions. Aside from craniosacral therapy, a form of massage therapy, Ms. Beckman generally found these therapies to be unhelpful because they either aggravated her symptoms or failed to alleviate them.
- [89] Each case turns on its own facts. I have considered all of the relevant cases referred to by the parties. The first three cases cited by the plaintiff, Fletcher, Jantzi, and Raedwulf, generally involved more serious injuries than those sustained by Ms. Beckman. The first three cases cited by the defendant, Eaton, Lu, and Reimer, involved notably less significant injuries than those experienced by Ms. Beckman. The circumstances in Hill are somewhat similar to those in this case but the injuries sustained by Ms. Beckman are more serious because she suffers from ongoing anxiety and depression, in addition to her physical and cognitive symptoms. In my view, the circumstances of the plaintiff in Ranahan most closely approximate those of Ms. Beckman. Considering Ms. Beckman's circumstances and prognosis, I conclude that she is entitled to \$150,000 in damages for pain and suffering.

ENTITLEMENT TO DAMAGES FOR FUTURE LOSS OF WORKING CAPACITY

Relevant Legal Principles

[90] The principles applicable to the assessment of future loss of working capacity are:

- To the extent possible, a plaintiff should be put in the position she would have been in absent the accident.
- The court should compare the plaintiff's likely future working life absent the accident to what is likely to occur with the accident having happened.
- The assessment must be based on evidence, but is not a mathematical calculation.
- The court can employ the "earnings approach" or the "capital asset" approach in assessing the loss.
- The plaintiff must prove that there is a "real and substantial possibility" of various future events leading to an income loss.
- The earnings approach is more appropriate when the loss is easily measureable.

- When applying the earnings approach, the Court must consider the overall fairness and reasonableness of the award based on all of the evidence.
- Comparison to other cases is generally of limited utility, though other cases can provide some guidance.

See: Thompson at para. 119; Gregory at paras. 32 and 33.

- [91] Ms. Beckman's own perception that she has a diminished capacity to earn income in the future is insufficient. She must show that there "is a realistic possibility [that] she will be less able to compete in the marketplace--with economic consequences, not merely psychological ones": Kim v. Morier, 2014 BCCA 63 at para. 8.

Plaintiff's Position on Future Loss of Working Capacity

- [92] Mr. Jones has a wide range of experience in the clothing industry dating back to 1973 when he began working in menswear retailing. In 2003, Ms. Beckman began assisting him with the logistical and administrative aspects of running his business. Her work included planning and helping him prepare for business travel, entering orders, following up with customers, and arranging and organizing tradeshow.
- [93] In 2011, Throat Threads, a clothing wholesaler based in Ontario, hired Mr. Jones and Ms. Beckman. Mr. Jones' responsibilities consisted primarily of selling Throat Threads' men's clothing lines to retail outlets. Ms. Beckman continued to manage the administrative and logistical aspects of his work. In early 2013, Throat Threads, gave Ms. Beckman a line of women's clothing to sell. With the experience of supporting Mr. Jones' sales efforts over the past decade and access to his existing clients, she was optimistic about her prospects.
- [94] The Accident took place on the day Ms. Beckman began selling the line of women's clothing. Over the ensuing 12-18 months, she effectively leveraged Mr. Jones' existing clients to sell this line of clothing. She recalled that it was easier to make initial sales of new clothing lines because retailers were usually open to trying new products from trusted vendors. However, after they bought two or three seasons of a new line, each major season being six months apart, the challenge was maintaining or increasing sales because after this initial trial period, retailers knew how well these product lines were actually selling.
- [95] Ms. Beckman believes that the injuries she sustained in the Accident prevented her from fulfilling her potential. She claims she did not have the energy to push her clients to buy more, nor was she able to expand the number of stores that carried her line of clothing.
- [96] A review of Ms. Beckman's income tax returns reveals the changes in her income from 2011 to 2019:

Year

Employment Income

2011

\$52,811

2012

\$52,590

2013

\$55,128 including commissions of \$19,200

2014

\$70,063 including commissions of \$29,593

2015

\$78,627 including commissions of \$32,360

2016

\$77,778 including commissions of \$31,427

2017

\$78,887 including commissions of \$29,530

2018

\$76,721 including commissions of \$27,045

2019

\$70,251 including commissions of \$21,823

[97] On June 23, 2020, Ms. Beckman received a letter from Throat Threads confirming that her employment contract will expire on April 1, 2021. She believes that the impending termination of her employment is because of her relatively poor sales performance as compared to her peers. She testified that Throat Threads did not terminate employees whose sales were higher than hers were.

[98] Ms. Beckman and Mr. Jones do not believe that she will obtain similar employment because of her accident related limitations. In particular, they emphasized that in her current role, she works from home and has adapted to her limitations without a significant decrease in her productivity. If her next position requires office attendance, she will not have the flexibility to take frequent breaks from using a computer or recover from sleep disruptions. She will also need to commute which could aggravate her driving anxiety.

[99] Mr. Jones believes that the clothing industry is transitioning to a younger workforce that is paid hourly instead of on commissions so even if Ms. Beckman obtains similar employment, she will earn less income than in prior years.

[100] Ms. Beckman submits that as of April 1, 2021, she will probably earn 50% of her current income and after five years, she will no longer be able to work. Based on multipliers provided by an expert economist, she concludes that the present value of her five years of reduced income is \$180,520. Similarly, the present value of 10 years of lost income, to the age of 65, is \$633,087. She therefore claims a loss of future income earning capacity of \$813,067. She believes this amount is understated because before the accident, she intended to work indefinitely, not retire at 65.

Defendant's Position on Future Loss of Working Capacity

[101] The defendant submits that Ms. Beckman has not established that there is a real and substantial possibility that she will lose income in the future. In particular, she notes that Ms. Beckman has been working full-time since the date of the Accident and her income increased steadily from the date of the accident until 2017, at which point it plateaued before declining in 2019.

[102] The defendant asserts that there is no corroborating evidence to support the contention that Ms. Beckman's employment contract is being terminated due to reduced sales performance. She points out that that on March 25, 2020, Throat Threads laid off Ms. Beckman due to the "COVID-19 crisis" so it is likely that Ms. Beckman's employment contract was terminated for the same reason. She notes that there is no independent evidence that the contract termination is due to anything other than the COVID-19 crisis.

[103] On cross examination, Ms. Beckman confirmed that her contract with Throat Threads may be renewed in April 2021. Therefore, the defendant argues that Ms. Beckman has failed to establish that she will lose her job with Throat Threads and if she does, that the loss is related to the Accident.

[104] Alternatively, if the Court concludes that Ms. Beckman established a real and substantial possibility of a future loss of earning capacity, her loss is not significant and should be limited to one year of her average annual salary over the past two years: \$73,486.

Factual Findings and Analysis on Future Loss of Working Capacity

[105] Ms. Beckman's income grew substantially after the Accident from \$55,128 in 2013 to \$70,063 in 2014 and \$78,627 in 2015. From 2015 to 2018, her income remained relatively stable. It then declined by approximately 8.4% in 2019. Her success in selling a women's line of clothing persisted for at least six years, well beyond two or three initial, six-month seasons. Her sales success was undoubtedly a result of her efforts and determination. When Mr. Jones retired from Throat Threads in 2018, Ms. Beckman took over one of his lines of men's clothing. I expect she did so because she was buoyed by her success and wished to continue expanding her sales. For reasons that are unclear, her income subsequently dropped in 2019. It will probably be even lower in 2020 because of the COVID-19 crisis but the evidence does not support the assertion that these decreases are due to Ms. Beckman's accident

related injuries.

- [106] I am also not satisfied that the termination of Ms. Beckman's contract is due to reduced sales performance because of the Accident. As outlined above, she demonstrably increased and maintained a higher level of income after the Accident than before it. In the absence of direct and independent evidence to the contrary, I conclude that if Throat Threads terminates her employment, which is by no means certain, it will probably be because of the widespread impact of the COVID-19 crisis as opposed to any factor unique to Ms. Beckman, let alone attributable to the Accident.
- [107] Ms. Beckman's concern that she may lose income in the future as a result of the Accident is largely a product of her own perception. The evidence does not support this contention. As the Court held in *Kim*, subjective concerns are insufficient to establish a claim for loss of future income earning capacity.
- [108] Any transition in the clothing industry towards hiring younger or fewer workers, earning hourly wages as opposed to commissions, is unrelated to the Accident and any effect on Ms. Beckman is not compensable.
- [109] In my view, Ms. Beckman has not proven that there will be a real and substantial possibility of any economic consequences of the Accident on her future income earning capacity. Accordingly, she is not entitled to damages for future loss of working capacity.

QUANTUM OF DAMAGES FOR COST OF FUTURE CARE

Relevant Legal Principles

- [110] The principles applicable to the assessment of costs of future care are:

Providing adequate damages for future care for an injured plaintiff is of paramount importance. The purpose of such an award is to provide for assistance directly related to the injuries caused by the accident. The test for determining an appropriate award is an objective one based on medical evidence. The focus should be on the plaintiff's injuries with fairness to the other party being achieved by ensuring that the expenses are legitimate and justifiable. The plaintiff needs to show: (a) a medical justification for the items claimed; and (b) that the amount claimed is reasonable. "Medical justification" is broader than "medically necessary". Specific items of future care need not be expressly approved by medical experts; it is sufficient if the totality of the evidence supports the award for specific items. Common sense should be employed in this assessment. No award should be included for items that would be incurred in the absence of the accident.

See: *Thompson* at para. 149.

Expert Reports on Cost of Future Care

Cost of Future Care Report -- Shannon Smith

- [111] Shannon Smith is an occupational therapist. On July 31, 2020, she interviewed Ms. Beckman and assessed her functional abilities. This evaluation took place in Ms. Beckman's home. Ms. Smith completed a cost of future care report dated August 7, 2020. It includes her opinion of Ms. Beckman's functional abilities and limitations.
- [112] In respect of housekeeping, Ms. Smith found that Ms. Beckman is physically able to perform routine household chores including vacuuming, sweeping, surface cleaning, bathroom cleaning, laundry, and cooking by using a paced approach. However, she cannot do prolonged mopping or seasonal cleaning activities that require repetitive, forceful bilateral forward and/or overhead reaching. These activities include cleaning window coverings, cabinetry, and fixtures as well as moving furniture and shampooing rugs. Ms. Smith observed that Ms. Beckman was anxious and repeatedly reported feeling overwhelmed by difficult or complex tasks so she avoided them in favour of simpler ones.
- [113] Ms. Smith believes that Ms. Beckman needs to develop adaptive skills to manage her pain and develop functionality. She recommends a coordinated approach to address her anxiety, pain, and cognitive difficulties. It should include an active exercise program as opposed to solely relying on passive therapies, but Ms. Smith believes that some access to passive therapies is still necessary.
- [114] Based on the recommendations of Drs. Cameron and Nagaria, Ms. Smith calculated the cost of an initial trial of Botox injections at \$400 to \$1,600 and if this proved to be effective, the annual cost of this treatment would be \$1,200 to \$3,200 annually.
- [115] Ms. Smith recommended a multidisciplinary community based rehabilitation program consisting of occupational therapy, psychological counselling, and an active exercise program. She recommended 10-12 hours of occupational therapy at a cost of \$1,456 to \$1,747; 12 sessions of psychological counselling for \$2,400 to \$2,700; and 12-18 sessions with a kinesiologist at a cost of \$900 to \$1,710 combined with a one-year gym membership for \$495 to facilitate these sessions. She also recommended a one time expenditure of \$300 to \$600 for home exercise equipment.
- [116] Ms. Smith also recommended housekeeping services to fill the gaps between what Ms. Beckman used to do and what she can do now. She assumed some level of improvement because of the active rehabilitation program so she suggested a higher level of these services for 6-12 months followed by 10-12 hours of housekeeping per year on an ongoing basis. At a cost of \$435 to \$580, Ms. Smith included 15 to 20 hours of housekeeping services for the period during which Ms. Beckman is doing the rehabilitation program. After this period, she recommended annual housekeeping support of 10-12 hours for \$290 to \$348.
- [117] Similarly, Ms. Smith included 12-24 hours of yard maintenance during the rehabilitation phase at a cost of \$360 to \$1,080 and an annual amount of \$300 to \$810 for this work post-rehabilitation.

- [118] Based primarily on the recommendation of Dr. Nagaria, Ms. Smith suggested some allotment of funds for 6-12 sessions per year of adjunctive therapy for symptom management. Ms. Beckman may choose these treatments based on her needs. The estimated annual cost of this treatment is \$450 to \$1,380.

Response to Cost of Future Care Report -- Shannon Beattie

- [119] Joanne Beattie, an occupational therapist, completed a response to Ms. Smith's cost of future care report, dated September 4, 2020. Ms. Beattie did not assess Ms. Beckman. Her opinion is based on a detailed review of Ms. Beckman's medical records and her own professional experience.
- [120] Ms. Beattie agrees with Ms. Smith's recommendations regarding Botox injections and occupational therapy. She questions the recommendation for further psychological counselling because Ms. Smith did not consult Ms. Beckman's psychologist to determine if the recommended counselling was directly related to the Accident or pre-existing issues. Ms. Beattie noted that Ms. Beckman received psychological counselling prior to the Accident.
- [121] Ms. Beattie noted that Ms. Beckman attended a gym and worked with a personal trainer prior to the Accident. Ms. Beckman also attended some active rehabilitation treatments so Ms. Beattie believes a refresher program of 4-6 sessions with a kinesiologist or supervised by an occupational therapist is reasonable instead of a complete active rehabilitation program.
- [122] On adjunctive/passive therapies, Ms. Beattie noted the differing opinions in the medical reports. Dr. Boyle said these therapies were not necessary whereas Dr. Waseem felt they would be beneficial. Ms. Beckman told Dr. Cameron and Dr. Boyle that these treatments were not generally beneficial, aside from massage therapy, which temporarily alleviated some of her brain fog symptoms. Ms. Beattie notes that Ms. Smith included amounts for passive therapies despite Ms. Beckman's reported lack of benefit from these treatments.
- [123] Ms. Beattie cautioned against awarding amounts in respect of housekeeping and yard maintenance without first determining the extent of support she received in respect of these activities prior to the Accident.

Positions of the Parties on Cost of Future Care

- [124] Ms. Beckman seeks an award of \$50,000 for the cost of her future care based on the recommendations of Ms. Smith, as set out in her cost of future care report, combined with the recommendations of Drs. Cameron, Nagaria, and Waseem. In particular, she relies on Dr. Nagaria's recommendation that she continue to receive psychological counselling and Ms. Smith's opinion that adjunctive treatments such as physiotherapy, massage therapy, and acupuncture will assist with pain flare ups. Ms. Beckman wants access to a complete program of active rehabilitation because she was unable to complete this type of program

on two prior occasions. She had to stop this treatment before completing it in 2017 because of the death of her mother. She next began this treatment in late 2019 but had to stop before completing it because of the March 2020 COVID-19 shutdown.

- [125] The defendant submits that no award should be made for passive/adjunctive therapies because according to Ms. Beckman, they have not generally improved her condition. These therapies were also not recommended by Dr. Boyle. Based on the recommendation of Dr. Waseem, the defendant recommends four to six sessions of neck focused active rehabilitation but not a complete active rehabilitation program because Ms. Beckman has already had some of this treatment.
- [126] The defendant opposes an award for psychological counselling because Ms. Beckman's treating psychologist did not testify that this was necessary. Furthermore, Ms. Beckman received this therapy for approximately ten years prior to the Accident so she suggests that the Accident did not cause the need for ongoing counselling.
- [127] The defendant agrees that Botox trial injections should be provided. She opposes compensation for further Botox treatment because the evidence does not establish on a balance of probabilities that this treatment will be effective or continued beyond the initial trial injections. She makes a similar submission in respect of an initial visual assessment and ongoing visual rehabilitation treatment.
- [128] The defendant opposes an award for hand therapy or temporarily increased housekeeping services after hand surgery because the Accident did not cause this injury and the evidence does not establish that hand surgery will be necessary.
- [129] The defence submits that Ms. Beckman should be awarded between \$2,871 and \$4,932 in future care costs.

Factual Findings and Analysis on Costs of Future Care

- [130] Based on the recommendations of both occupational therapists and the two neurologists who examined Ms. Beckman, I am satisfied that Botox injection therapy is medically justified. I accept that almost eight years after the Accident, Ms. Beckman continues to suffer from headaches several times per week because of it. The outcome of this treatment is uncertain. I note that Dr. Nagaria recommended this treatment more than two years ago but Ms. Beckman has not yet tried it.
- [131] Taking into account the medical evidence, the reasonableness of the expense, and the likelihood that Ms. Beckman will undergo this treatment, I find that \$3,000 is an appropriate award for Botox treatment.
- [132] I accept Ms. Smith's recommendation that Ms. Beckman undergo a multidisciplinary rehabilitation program consisting of occupational therapy, active exercise, psychological counselling, and some adjunctive/passive therapy.

- [133] Ms. Beckman has not received occupational therapy treatment. This therapy is recommended by both occupational therapists based on Ms. Beckman's functional limitations and the objectives of improving her daily functioning, coping strategies, and confidence in her ability to manage her symptoms. I am satisfied that Ms. Beckman will undergo this medically justified and reasonable therapy. She is entitled to \$1,750 for the cost of occupational therapy.
- [134] Ms. Beckman received psychological treatment from Dr. Ley before and after the Accident. I am satisfied that the Accident caused her ongoing difficulties with anxiety and low mood/depression. I accept Dr. Nagaria's recommendation, as supported by Ms. Smith that she receive an amount for 12 sessions of psychological counselling to manage her sadness and anxiety and cope with her cognitive challenges. Ms. Beckman is entitled to \$2,700 for psychological treatment.
- [135] Drs. Nagaria and Waseem, and Ms. Smith, recommend an active exercise program. Ms. Beckman twice tried to do an active rehabilitation program but was unable to complete it because of circumstances beyond her control: the death of her mother and the COVID-19 shutdown. Ms. Beckman continues to suffer from pain symptoms in her left shoulder and the left side of her neck caused by the Accident. I am satisfied that she will receive the maximum benefit of this type of program if given an opportunity to do all of it systematically, from beginning to end. In my view, \$2,800 for active rehabilitation, a one-year gym membership to facilitate this treatment, and the purchase of exercise equipment, is medically justified and reasonable.
- [136] Ms. Beckman has not obtained much benefit from adjunctive/passive therapies. She has tried physiotherapy, massage therapy, including craniosacral therapy, and acupuncture. Craniosacral therapy provided some temporary relief from her symptoms of brain fog. She found the other therapies unhelpful or only temporarily effective. Ms. Beckman continues to suffer pain symptoms caused by the Accident and should have periodic access to this type of therapy to alleviate her symptoms. In my view, she should have access to her choice of six of these sessions per year at a total cost of \$9,000.
- [137] Based on Ms. Smith's observations and findings, Ms. Beckman is able to do most routine housekeeping tasks in a paced manner but she has difficulty with more rigorous seasonal cleaning. Ms. Beckman retained housekeeping services before and after the Accident. The extent to which these services are used for deep cleaning is unclear. I am satisfied that Ms. Beckman will need temporary housekeeping assistance during the period when she is doing the active rehabilitation program because she will probably be unable to do these tasks while participating in this program. She is entitled to \$600 for temporary housekeeping services during her participation in the active rehabilitation program.

[138] I am not convinced that Ms. Beckman is entitled to the cost of housekeeping services over an extended period. Before the Accident, Ms. Beckman retained housekeeping assistance for two hours, bi-weekly to do some of the more onerous housekeeping tasks. I am not satisfied that Ms. Beckman's need for seasonal cleaning assistance is related to the Accident because she was paying for housekeeping assistance for these types of tasks before it.

[139] Ms. Smith recommended some yard work assistance based on Ms. Beckman's evidence that she used to do work on the planters, weeding, weed whacking, and helped with seasonal cleanup. However, Mr. Jones testified that he does the majority of the yard work in their mature garden. This work includes mowing the lawn, trimming trees, and weeding. I am not satisfied on the evidence that Ms. Beckman is entitled to any amount in respect of yard maintenance.

[140] Ms. Beckman is entitled to \$19,850 for the costs of future care.

QUANTUM OF DAMAGES FOR LOSS OF HOMEMAKING CAPACITY

Relevant Legal Principles

[141] The principles applicable to the loss of homemaking capacity are:

- Loss of housekeeping capacity may be treated as a pecuniary or non-pecuniary award. This is a question of discretion for the trial judge.
- A plaintiff who has suffered an injury that would make a reasonable person in her circumstances unable to perform usual and necessary household work is entitled to compensation for that loss by way of pecuniary damages.
- Where the loss is more in keeping with a loss of amenities or increased pain and suffering while performing household work, the loss may instead be compensated by a non-pecuniary damages award.
- As the award is intended to reflect the loss of a capacity, the plaintiff is entitled to compensation whether or not replacement services are actually purchased.
- Evidence of the loss of homemaking capacity is provided by the work being performed by others, even if done gratuitously.

See: *McTavish v. MacGillivray*, 2000 BCCA 164 at para. 63; and *Kim v. Lin*, 2018 BCCA 77 at paras. 28-34.

The Parties' Positions on Loss of Homemaking Capacity

[142] Ms. Beckman submits that her ability to perform and complete housekeeping tasks has been diminished by the injuries she suffered in the Accident and that it is unlikely that she will be able to return to her former capacity to do these activities. She was very involved in cooking and cleaning prior to the Accident. Although she has subsequently resumed these tasks, at a reduced frequency, slower pace, with breaks and associated pain, she relies on

her husband and daughters to assist with some of them including grocery shopping, cooking, laundry, cleaning bathrooms, and changing linens. She seeks \$90,000 under this head of damages.

- [143] The defendant points out that prior to the Accident, Ms. Beckman retained a housecleaner to dust, clean floors, vacuum, and clean the bathrooms. This individual assisted more frequently for several months after the Accident, then returned to the previous schedule. Ms. Smith's evidence and expert report confirm that Ms. Beckman is physically capable of doing all of the same household tasks that she did prior to the Accident, with pacing.
- [144] The defendant submits that the two other adults and one teenager in Ms. Beckman's home should contribute to maintaining the household. The defence asserts that non-pecuniary damages will compensate Ms. Beckman for the pain and discomfort she suffers while completing substantially all of the household tasks she performed prior to the Accident.

Factual Findings and Analysis on Loss of Homemaking Capacity

- [145] This is not a case where Ms. Beckman has suffered an injury that would make a reasonable person in her circumstances unable to perform usual and necessary household work. By her own evidence, that of Mr. Jones, and the observations of Ms. Smith, Ms. Beckman is able to do virtually all of the household tasks she performed prior to the Accident with pacing. She regularly cooks for her family and does most routine housecleaning tasks. The evidence does not support a finding that Ms. Beckman has suffered a loss of capacity to perform household tasks.
- [146] Prior to the Accident, she hired a housecleaner bi-weekly for two hours to do some of the rigorous housekeeping tasks such as vacuuming, mopping, and bathroom cleaning. Although the evidence suggests that Ms. Beckman is not able to perform these types of tasks, it is not clear that she regularly performed them prior to the Accident or that the Accident precipitated a change in how this work was completed. Although there was some general evidence that this frequency increased for a few months after the Accident, before returning to the pre-accident schedule, no specifics were provided in respect of the extent of the increased frequency, over what period this occurred, and at what cost.
- [147] Mr. Jones' evidence was that he does most of the outdoor tasks, some barbequing, and occasionally prepares a meal. I conclude that Ms. Beckman does most of the indoor tasks with some reasonably expected assistance from her children, given their relative ages.
- [148] In my view, Ms. Beckman's ability to do virtually all routine household tasks, with pacing, is in keeping with a loss of amenities or increased pain and suffering that should be compensated by a non-pecuniary damages award. In the circumstances of this case, I am not satisfied that she is entitled to an award in respect of the loss of housekeeping capacity.

QUANTUM OF SPECIAL DAMAGES

[149] The parties agree that Ms. Beckman is entitled to special damages in the amount of \$8,692.

CONCLUSION

[150] Ms. Beckman is entitled to:

- a) \$150,000 for non-pecuniary damages;
- b) \$19,850 for cost of future care; and
- c) \$8,692 for special damages.

[151] Ms. Beckman is not entitled to damages for loss of future income earning capacity or loss of homemaking capacity.

COSTS

If the parties wish to make submissions on costs, they may be filed within 30 days of the date of this judgment. If there are no submissions, the plaintiff will have her costs at Scale B.

"Basran J."

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