

CANADA / JUDGMENT

Kingston v. Mann

2020 BCSC 1889

COURT

Supreme Court of British Columbia

DECIDED

2 December 2020

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

2020 BCSC 1889 Kingston v. Mann

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Kingston v. Mann,

2020 BCSC 1889

Date: 20201202

Docket: M175443

Registry: Vancouver

Between:

Marion Ashley Kingston also known as Ashley Kingston

Plaintiff

And

Vijay Mann, VC Wide Towing Ltd. and Quick-Fixx Autobody & Glass Ltd.

Defendants

Before: The Honourable Madam Justice Duncan

Reasons for Judgment

Counsel for the Plaintiff:

M. Holroyd

J. Foster

Counsel for the Defendants:

J.W. Burgoyne

A. Spence

Place and Dates of Trial:

Vancouver, B.C.

July 13-17, 20-24, 27 & 29-31, 2020

Place and Date of Judgment:

Vancouver, B.C.

December 2, 2020

Table of Contents

Introduction. 4

Liability. 4

The plaintiff 4

Civilian witnesses. 5

Dr. Heather Slater 5

Tony Guang. 6

Katrina Huberman. 7

The defendant 8

Kanny Chow, transportation engineer for the City of New Westminster 10

The position of the parties on liability. 11

The plaintiff 11

The defendant 11

Conclusion on liability. 12

Contributory Negligence. 13

Damages. 14

The plaintiff before the collision. 14

Family background and school 15

Work history. 16

Condition since the collision and history of treatment 17

Physical injuries.	17
Psychological injuries.	19
Interpersonal relationships.	20
Dr. Robin Wilson - plaintiff's family physician.	21
The second collision in October 2019.	22
Plaintiff's training and employment efforts.	23
The defendant's lay witness on the plaintiff's training..	24
The plaintiff's current physical condition.	25
The expert evidence.	26
Dr. Ansel Chu - the plaintiff's treating physiatrist	27
Dr. Zeesham Waseem, physiatrist	28
Psychological injuries.	28
Dr. Shaohua Lu, plaintiff's psychiatrist	29
Dr. Derryck Smith - defence expert psychiatrist	30
Dr. Pullyblank, the plaintiff's vocational psychologist	31
Dr. Douglas Cohen, the plaintiff's neuropsychologist	32
Tori Rutledge - the plaintiff's occupational therapist (OT)	33
Dr. Christopher Cooke - defence vocational consultant.	34
Credibility and reliability.	35
Non-pecuniary damages.	35
Analytical framework.	35
Positions of the parties.	36
Analysis.	37
Past wage loss.	39
Loss of future earning capacity.	40
Analytical framework.	40
Positions of the parties.	41
Cost of future care.	44

Medication, including Botox. 45

Therapies. 46

Services. 47

Ergonomic equipment 47

Multidisciplinary pain clinic/pain management program.. 48

Household assistance post-knee surgery. 48

Total 48

Loss of housekeeping capacity. 48

Special damages. 48

The subsequent collision. 49

Summary of damages. 50

Costs and other post-judgment issues. 50

Introduction

- [1] In the early morning hours of August 29, 2015 the plaintiff, Marion Ashley Kingston, was driving her Chevrolet Cavalier westbound on 8th Avenue towards McBride Avenue in New Westminster (the "Intersection"). The defendant, Vijay Mann, was travelling northbound on McBride Avenue towards the Intersection in a flat-bed tow truck with two vehicles on the bed, one above the cab and one in tow. There are actually three defendants (Mr. Mann and two corporate entities) but I shall refer to them in the singular as they were all defended by the same counsel.
- [2] The plaintiff and defendant collided in the Intersection. The plaintiff's vehicle was badly damaged. Emergency personnel had to use the "jaws of life" to extract her from her vehicle. The plaintiff was seriously injured, with fractures to her right wrist and left knee. She suffers from ongoing chronic soft tissue pain and psychological harm, including PTSD, anxiety and depression as a result of the collision.
- [3] The plaintiff says the defendant is solely at fault for the collision and that the injuries she suffered have rendered her competitively unemployable and cause difficulty in her day-to-day and leisure activities.
- [4] The defendant maintains that the plaintiff is solely at fault for the collision, or in the alternative was contributorily negligent. While the defendant acknowledges the plaintiff was injured in the collision, his counsel take the position that she will be able to work full-time after a further period of recovery and her loss of future earnings is thus limited. The defendant also argues that the plaintiff's subsequent collision in the fall of 2019 exacerbated some of her difficulties and any damages from the earlier collision should be discounted

accordingly.

Liability

The plaintiff

- [5] In the hours leading up to the collision the plaintiff, then 23 years of age, consumed up to seven alcoholic beverages, one while having dinner with her family and the rest while visiting with her cousin in Langley. The plaintiff received a call from her ex-boyfriend, asking her to pick him up from a detox centre in Vancouver.
- [6] The plaintiff left Langley in her Cavalier and proceeded westbound on Highway 1 towards Vancouver to pick him up. While she was en route, she received a call from her ex-boyfriend to say that he did not need a ride after all. The plaintiff took the Brunette exit from the highway, intending to return to Langley. She became lost.
- [7] As the plaintiff approached the Intersection, she decided to turn left to head back towards Langley. She maintained that she had a green light and stopped to see if there was oncoming traffic but she does not recall the subsequent collision. She cannot recall anything until the paramedics told her she had been in a collision.
- [8] On cross-examination, the plaintiff acknowledged that she was a weekend binge drinker at the time of the collision. She had the "N" designation on her licence and she knew she was not supposed to consume any alcohol before driving. The plaintiff insisted she felt sober enough to drive, but was ashamed at her decision to drive that night. She also agreed that she was attempting to piece together what had happened before the collision.

Civilian witnesses

- [9] The plaintiff called three civilian witnesses who were present at the Intersection and witnessed the collision and/or its immediate aftermath.

Dr. Heather Slater

- [10] Dr. Slater was driving northbound on McBride Avenue, in the curb lane, just south of the Intersection. She noticed that the light for her direction of travel had turned yellow. She stopped her vehicle, then glanced away to check the time. She heard a crash in front of her and a woman screaming.
- [11] Dr. Slater is hearing impaired and could not tell what direction the screaming was coming from. A truck was in the Intersection and she presumed it had hit something. Dr. Slater had not seen the truck before she stopped, did not see it pass her and had no idea where it had come from. There were no vehicles in the lane to her left.

- [12] After she realized the truck had hit a car in the Intersection, Dr. Slater proceeded to the gas station on the north side of the Intersection and called 911. The plaintiff was screaming and upset. Someone tried to open the door of the car to assist her, but could not get it open.
- [13] Dr. Slater spoke to two police officers after the collision, a male and a female, Cst. Leaver. Dr. Slater agreed she told Cst. Leaver that the tow truck was ahead of her, but clarified in her evidence that she meant it was ahead of her after the collision. She was not sure if it was in front of her before that.
- [14] A year after the collision an ICBC investigator asked Dr. Slater for a statement. She met with him at a coffee shop and told him what she remembered. Dr. Slater signed the statement on the investigator's computer, but was not given a copy of the final version. She agreed that she told the investigator the light was red and she stopped and immediately after saw the crash, but at trial she was firm in her recollection that she stopped, glanced away and then heard the crash.
- [15] Dr. Slater also agreed that she told the investigator that the tow truck was trying to get through the Intersection on a yellow light and she was not sure if it was red, but said this was one of the sentences she wanted to correct in the statement. She did not know what the tow truck was doing and could not say what colour the light was when the tow truck went through the Intersection.

Tony Guang

- [16] Mr. Guang was eastbound on 8th Avenue. He pulled up to the Intersection behind another car in the northbound left turn lane and waited for the light he was facing to turn green. When the light for traffic on 8th Avenue turned green Mr. Guang noticed the defendant's tow truck for the first time. It was not yet in the Intersection. He saw the plaintiff's oncoming vehicle coming westbound on 8th Avenue towards the Intersection, cruising along at a consistent speed. He thought the tow truck was going quite fast and was worried it would not stop in time and then the collision occurred.
- [17] Mr. Guang got out of his car, called 911 and tried to keep the plaintiff awake. She seemed to be having trouble staying awake. The ambulance came five to ten minutes later.
- [18] On cross-examination, Mr. Guang clarified the sequence of what occurred. He stopped for a red light on 8th in the northbound left turn lane. He noticed the McBride light sequence had turned yellow. His light turned green and he inched forward and then saw the tow truck about five or six metres before the Intersection. He panicked, because he thought if the tow truck did not brake it would not stop before the Intersection.

- [19] Mr. Guang first saw the plaintiff's vehicle about ten car lengths from the Intersection in the middle lane, near the Chevron station. The plaintiff appeared to be going straight, not intending to turn left from the left hand turn lane, and he did not see a turn signal displayed on her vehicle. The light turned green for 8th Avenue and the plaintiff crossed the crosswalk lines to enter the Intersection. The moment the plaintiff's vehicle crossed the crosswalk, the tow truck was about five or six metres away travelling about 70 to 80 kilometres.

Katrina Huberman

- [20] Ms. Huberman was on 8th Avenue preparing to turn left or northbound onto McBride. There was a car in front of her. Ms. Huberman saw either a green left turn arrow or a solid green light for her lane of travel. The car in front of her turned left but Ms. Huberman saw the plaintiff's vehicle approaching the Intersection and decided she did not have the right-of-way, so she did not proceed to turn. A tow truck came from the Pattullo Bridge side of McBride and struck the plaintiff's vehicle.
- [21] Ms. Huberman said the tow truck could not have stopped and then started again because it came out of nowhere and then suddenly it was over the line into the Intersection. Ms. Huberman was in a panic after the impact but believes the signal was red for McBride traffic when the collision occurred.
- [22] Ms. Huberman called 911 and approached the plaintiff's vehicle. The driver's door was severely damaged, the plaintiff was screaming and there was already someone there with her. Sometimes the plaintiff would stop screaming, which scared Ms. Huberman.
- [23] On cross-examination, Ms. Huberman confirmed that she cannot recall for certain whether she had a solid green light or a green left turn arrow, but the car in front of her had turned left before the collision. She did not move into the Intersection because she was concerned about the plaintiff's oncoming vehicle, which was about two to three car lengths back from the Intersection. The first time she saw the tow truck it was over the white lines of the crosswalk on the south side of 8th Avenue, and then the collision occurred.

The defendant

- [24] The defendant was transporting four salvage vehicles from his office on 80th Avenue in Surrey to a couple of locations on Imperial Street in Burnaby. He had no specific schedule. He drove from Surrey over the Pattullo Bridge, which becomes McBride Avenue at the New Westminster end.
- [25] The defendant said he was in the right lane as he approached the Intersection. The light for his direction of travel was green but "right away" turned orange. He estimated that he was about five or ten feet past the crosswalk on the south side of McBride when the light changed. His vehicle was about 54 feet long and about 22 feet of it was in the Intersection when the light changed. He was looking ahead at the light and could not say if there was other traffic headed in the same direction he was going. He could not recall any traffic on 8th

Avenue in either direction, although at examination for discovery he said there was a car to his left, waiting to turn left from McBride onto 8th Avenue.

- [26] The defendant could not say when he noticed the plaintiff's vehicle although he saw lights "quite far away" and he "knew" he would be able to get through the Intersection. The collision happened quickly and he tried to change lanes to the left to avoid getting hit. He was going "kind of slow" because his truck was quite heavy. The plaintiff's car hit him when he was going across the crosswalk on the north side of the Intersection.
- [27] On cross-examination, the defendant said it was not unusual to deliver cars in the middle of the night and he was not in a hurry. He explained that salvage cars sometimes do not have suspension so he had to be careful towing them, by which I infer he meant that he was not driving quickly.
- [28] The defendant initially went into the left lane when he came off the Pattullo Bridge because the right lane was the turn off for Coquitlam. After he passed the turn off he got into the right lane because of his slow speed.
- [29] There are two lights on McBride after the Coquitlam exit, and then a third one at the Intersection. The defendant was travelling at about 30-40 km/h and passed through the first and second set of lights, which turned green as he approached them. He could see the light at the Intersection had been green for a long time so he slowed down to between 20 and 30 km/h, but not less than 20 km/h. He thought the light at the Intersection might turn red and he needed to be able to brake without damaging the cars he was transporting.
- [30] On examination for discovery, the defendant said he had been going as slow as 15-20 km/h between the second light and the Intersection.
- [31] The defendant thought the light was green when he entered the Intersection. He denied that he saw it turn yellow, then said he saw the light turn yellow when he crossed the second lane of eastbound traffic on 8th Avenue. The defendant attributed his inconsistent answers to a misunderstanding of the question.
- [32] The defendant could not see the colour of the traffic control light at impact because of the canopy that hung over the cab of his truck. He denied that it obstructed the view of the light over the Intersection as he approached.
- [33] The defendant could not say how far away the plaintiff's car was when he noticed it, just that he was pretty sure that he would be through the Intersection before it arrived at the Intersection. He saw the light turn yellow, saw the car coming, and focussed on moving through the Intersection. He tried to "race a little" but the truck was slow to accelerate.

Kanny Chow, transportation engineer for the City of New Westminster

- [34] Part of Mr. Chow's role as a transportation engineer for the City of New Westminster is to look after the timing of traffic signals. Mr. Chow said that at the time of this collision, between midnight and 1:00 a.m., the light sequence at the Intersection would be highly dependent on the order in which vehicles arrived at the Intersection. There are left turn advance arrows which are activated by sensors. When the sensors detect vehicles waiting at the left turn lanes, a left turn advance arrow phase will result. For example, if there were cars eastbound at 8th Avenue in the left turn lane and no cars westbound, the eastbound left turn on to McBride would get an advance green and eastbound through traffic would get a solid green. Westbound traffic would face a red signal.
- [35] Mr. Chow agreed that it was possible the sensors could malfunction or perhaps be affected by rainy conditions, although the maintenance of the sensors was not part of his job. Mr. Chow agreed that if there was traffic in the left turn lane from eastbound onto McBride northbound and westbound onto McBride south, the two opposing through lanes would be red but the two turn lanes would have an advance green. Any form of green signal for 8th Avenue would mean a red light for traffic on McBride. One would need to know the flow of traffic and waiting vehicles to determine the precise light cycle at the time the collision occurred.
- [36] Mr. Chow said the yellow light northbound on McBride lasts 3.6 seconds. It is followed by an all red phase for 2.5 seconds for all directions in the Intersection. There is a total of 6.1 seconds between a yellow light northbound on McBride and an eastbound 8th Avenue green light. The delay is designed to clear vehicles that enter the Intersection on yellow.

The position of the parties on liability

The plaintiff

- [37] Mr. Holroyd, counsel for the plaintiff, maintains that Ms. Kingston was executing a legal left hand turn with the right-of-way when she was struck by the defendant, who had failed to yield to a red light for his direction of travel. He points to the evidence of Dr. Slater, Ms. Huberman and Mr. Guang as supportive of the fact that the northbound light was red and the east/west lanes of travel had green lights.

The defendant

- [38] Mr. Spence, counsel for the defendant, maintains that Dr. Slater's evidence was unreliable, insofar as it supported the plaintiff's case. He maintains that the version she initially told police in which she said she stopped when she stopped for the red light and then right away heard the crash is more likely what she actually saw.

- [39] In that scenario, the defendant must have entered the Intersection on a stale green or more likely a fresh yellow light and thus had the right-of-way vis-à-vis the plaintiff, who by implication must have entered the Intersection against a red light. Mr. Spence says that the observations of the other civilian witnesses support the assertion that the defendant entered the Intersection on a stale green or a fresh yellow light and had the right-of-way.
- [40] Mr. Spence notes that the traffic control cycles in the Intersection have a 6.1 second window between a yellow light northbound on McBride and a green light westbound on 8th Avenue. If the defendant's version of events is believed, he entered the intersection on a yellow light and the plaintiff did not yield to a red light for her direction of travel. Since the collision occurred in the northern half of the Intersection, the defendant was the dominant vehicle and the plaintiff should have yielded. He maintains the plaintiff is either entirely liable or at least 75% contributorily negligent for the collision.

Conclusion on liability

- [41] The civilian witnesses were all careful not to overstate their recollection of a collision that had occurred nearly five years earlier, but I found the recollections of Mr. Guang and Ms. Huberman to be particularly cogent and helpful in determining how the collision occurred.
- [42] I conclude that Ms. Huberman was driving the car in front of Mr. Guang at the Intersection, where both were waiting to turn left onto McBride northbound. The car in front of Ms. Huberman turned left immediately upon a solid green, not a green arrow. I find it was a solid green light because Ms. Huberman paused, thinking she did not have the right-of-way, rather than immediately following the vehicle ahead of her on a green left turn arrow.
- [43] Mr. Guang also believed the eastbound traffic light was a solid green. His reaction to Ms. Huberman pausing was not one of a driver expecting traffic to proceed on a green left turn arrow (e.g. honking or becoming irritated at the delay), but of someone waiting for the vehicle ahead of him to execute a left turn safely.
- [44] The plaintiff testified that she was intending to turn left at the Intersection to head back to Langley, but agreed that she was trying to piece together what had happened just before the collision. I cannot find the plaintiff was signalling to turn left before she reached the Intersection, in the face of the evidence of Mr. Guang and Ms. Huberman. While the plaintiff might have decided at the last second that she was going to turn left, I am satisfied that she appeared, to vehicles facing her in the Intersection, to be intending to continue westbound rather than turn left southbound.
- [45] As Ms. Huberman paused to make a safe left turn, Mr. Guang noticed the defendant's vehicle approaching the Intersection, travelling too fast to stop for the red light for northbound traffic. The defendant hit the plaintiff's vehicle as the plaintiff entered the Intersection on a solid green.

- [46] The defendant's evidence of his speed leading up to the intersection was inconsistent and unreliable. I am satisfied that he saw the green light at the Intersection from a distance away and saw it turn yellow well before he entered the Intersection and in time to make a safe stop. I conclude that rather than coming to a safe stop he continued driving, hoping to make it across the Intersection despite the red light before any cross traffic entered. The car ahead of Ms. Huberman had sufficient time to turn left onto McBride on a green light, which fortifies my conclusion that the light was clearly red for the defendant before he entered the intersection and struck the plaintiff.
- [47] I turn now to the question of whether the plaintiff was contributorily negligent.

Contributory Negligence

- [48] Finding that the plaintiff had the right-of-way at the time of the collision is not determinative of liability and, in particular, does not preclude a finding that the plaintiff was negligent and that her negligence was also a cause of the collision: *Yick v. Johnson*, 2012 BCSC 1485 at para.19; *Salaam v. Abramovic*, 2010 BCCA 212 at para. 21.
- [49] A motorist with the right-of-way on a green light is entitled to proceed through and does not owe a duty of care to traffic entering the intersection in contravention of a traffic control signal, beyond the duty that arises once she sees such traffic, to take all reasonable steps to avoid a collision: *Strul v. Mondares*, 2015 BCSC 284 at para. 23; *Wong v. West*, 1959 CanLII 634 (BCCA), [1959] B.C.J. No. 45 (C.A.).
- [50] In other words, the plaintiff's duty in the circumstances was to take all reasonable steps to avoid a collision if, in fact, she saw the defendant's vehicle: *Ceperkovic v. MacDonald*, 2016 BCSC 939 at para. 21.
- [51] In order to make out the causation element of the defence of contributory negligence, the onus rests with the defendant to prove two things: (1) that the plaintiff's failure to take reasonable care of her own interests was a factual cause of the loss; and (2) that her conduct was a proximate cause of the loss and that the injuries she suffered were reasonably foreseeable: *Ackley v. Audette*, 2017 BCCA 283 at para. 24. The second component of the test obliges the defendant to prove that the plaintiff's conduct was, in law, a contributing cause of her loss.
- [52] The reasoning of the Court of Appeal in *Ackley* makes it clear that the test is an objective one, that of a reasonable and prudent person, and suggests that while the reasonable person must take into account the possibility of others being careless, they are not required to take into account the possibility of others being flagrant and deliberately reckless: *MacKenzie v. John Doe*, 2018 BCSC 104 at para. 82.

- [53] I am not satisfied the defendant has discharged the burden of proving the plaintiff was contributorily negligent. The plaintiff had a green light. The defendant's vehicle entered the intersection against a red light and collided with the plaintiff. The appearance of the defendant's vehicle in the intersection was an unforeseen event. To find that the plaintiff was contributorily negligent would have the effect of legitimizing the practice of running red lights and reduce the responsibility of those who take the risk, like the defendant.
- [54] I also observe that the defendant led no expert evidence to extrapolate the blood alcohol readings taken from the plaintiff at Royal Columbian Hospital after the collision back to the time of the collision, nor any expert evidence about the effect of a blood alcohol content approximately three times the legal limit on an individual like the plaintiff, who was an admitted binge drinker.
- [55] In conclusion, I find the plaintiff has proven on a balance of probabilities that the defendant's negligence was the sole cause of the collision.

Damages

The plaintiff before the collision

- [56] I turn now to the background of the plaintiff, her injuries and prognosis.
- [57] The plaintiff testified as did her mother, Stacy Smith, her sister, Desiree Kingston, her common law partner, Kris Jacob, her former supervisor, Chris Desrochers, and former co-worker, Thea Zosiak. I will discuss the evidence of the plaintiff and her lay witnesses before I deal with the evidence of the experts.

Family background and school

- [58] Ms. Kingston is 28 years of age. She has two younger sisters, Desiree and Keysha. Ms. Kingston was born in Campbell River and lived there until she was about seven. Her father was abusive and the plaintiff's mother moved to Langley with her three daughters when the plaintiff was about seven years of age. They lived with Ms. Smith's mother and boyfriend in Langley for several months. The home was chaotic.
- [59] The plaintiff's mother worked three jobs and relied on the plaintiff to look after her younger sisters. If the plaintiff did not meet expectations, her mother would ground her or take her belongings away or throw them out. There was also a lot of yelling in the house.
- [60] When the plaintiff was entering Grade 8, her mother met Chris, who is her current husband. The plaintiff said this was a difficult transition. She initially lived with her grandmother, at her mother's request, and for a time stayed in the empty home her mother had recently vacated. Ultimately, the plaintiff moved in with the rest of the family at Chris's house.

- [61] After Grade 8, the plaintiff's mother ended her relationship with Chris and moved with her three daughters to a remote part of south Langley. The plaintiff moved from D.W. Poppy School, where she had attended Grade 8, to Brookwood, for Grades 9 and 10. The plaintiff's mother reunited with Chris when the plaintiff entered Grade 11 and she returned to D.W. Poppy to finish high school.
- [62] The plaintiff acknowledged that she was not a particularly good student in high school. She received a range of grades, the highest being an A in carving, and a smattering of C- marks in more academic courses.
- [63] Ms. Smith was concerned about the plaintiff's alcohol consumption after she finished high school. The plaintiff did not drink every day but she would drink and "screw up" and feel remorse and then not drink for months. Ms. Smith was worried that the plaintiff was turning out like her father.
- [64] Outside of work, the plaintiff was close to her younger sisters and spent time with them on the weekends involved in outdoor activities such as camping, quadding and boating. They attended music events and went berry picking together every year. The plaintiff had no physical limitations before the collision.

Work history

- [65] The plaintiff started working at McDonald's as a cashier when she was 14 and worked her way up to supervisor. She worked three evening shifts plus weekends through grades 10, 11 and 12. The plaintiff supervised her sister, Desiree. Desiree said her sister was a strict supervisor who took her job very seriously.
- [66] The plaintiff also worked at Blue Planet, a plastic recycling company, while still in high school. She reduced her shifts at McDonald's as she was given more hours at Blue Planet, where the pay was better.
- [67] The plaintiff began at Blue Planet as a labourer, sorting plastic, then learned how to operator a grinder, a bailer and a counterbalance forklift. The plaintiff began working full time at Blue Planet in June of 2010, after she finished high school. She worked full-time there until October 2013, when she started work at Apex Aluminum Extrusions in Langley. She continued to work as a forklift operator but received training in other types of lift equipment, including a boom lift. She worked 12 hour shifts at \$15.50 per hour and overtime at \$23.25.
- [68] Chris Desrochers and Thea Zosiak knew the plaintiff from working with her at Apex. Both testified that she was a hard worker and was one of the only women they knew who worked as a forklift operator. Mr. Desrochers left Apex but subsequently returned and said he would hire the plaintiff back without hesitation if she was physically able to do the job.

- [69] The plaintiff's employment at Apex was terminated in April 2015. The defence suggested that her termination was for cause, due to attendance issues, but the plaintiff maintained she was having difficulties with management due to her gender. Her requests for salary increases were turned down, while new hires who were male made more money than she did. Ms. Zosiak confirmed there were such difficulties in the workplace at that time for female forklift operators.
- [70] Within a week of leaving Apex, the plaintiff secured a new job at BE Pressure as a forklift operator. Her starting hourly wage was \$16.52 per hour. She worked Monday through Friday, 8:00 a.m. to 5:00 p.m. The plaintiff received training on a reach truck to expand the repertoire of equipment she was capable of operating. She described it as her favourite piece of equipment, more fun than the other equipment she was trained on. The plaintiff was working at BE Pressure when the collision occurred.

Condition since the collision and history of treatment

- [71] The plaintiff does not recall seeing the defendant's tow truck before the collision. After the collision she recalled being in her car with paramedics talking to her. She said she was in and out of consciousness, in excruciating pain, asking the paramedics to let her die. She does not recall the ambulance ride. The plaintiff recalled being in the hospital in a neck brace with her arm and leg weighed down, unable to move. She said she was covered in glass and in and out of consciousness all night.
- [72] The plaintiff had little recollection of the three or four days after the collision. She was in pain and on medication. She had surgery but does not recall being taken into the operating room.

Physical injuries

- [73] Dr. Viskontas is an orthopedic surgeon with particular expertise in orthopedic trauma and lower extremity reconstruction. He saw the plaintiff at Royal Columbian Hospital in the hours following the collision and diagnosed a fracture dislocation of her left knee and a radial styloid fracture of her right wrist. The plaintiff's tibia was fractured and her knee displaced in the collision. He could not push the knee back together to heal because of displaced soft tissue, the medial cruciate ligament (MCL) and the medial meniscus. He performed an open reduction and internal fixation of the plaintiff's left knee, suturing soft tissue to bone and fixing the fracture with a plate and screws. Dr. Viskontas also wired the plaintiff's broken right wrist. The wire was removed in December 2015.
- [74] Following the surgery, the plaintiff was transferred to a hospital in Langley to recover, but had to use a wheelchair to get around. The medication she was taking, hydromorphone, caused her to fall asleep. The plaintiff had pain in her head, neck, shoulders, wrist, lower back and knee.

- [75] While in hospital in Langley, the plaintiff had light physiotherapy treatments and took a few steps, but it was very painful. She had headaches and a sore neck as well as pain in her shoulders, back, knee and wrist. She had a cut across her chin and had glass coming out of her arm and scalp for some time after the collision.
- [76] On September 9, 2015, the plaintiff was discharged from the hospital in Langley to her parents' home, a single level rancher. The plaintiff could not access her basement suite because she could not go up and down stairs. She was still on hydromorphone as well as Gabapentin and blood thinners. Both her left leg and right wrist were non weight-bearing. Her neck and shoulders hurt and she had constant headaches which continue to the present.
- [77] A physiotherapist and an occupational therapist made home visits, the latter to set up bathroom equipment to assist with her access to the toilet and shower.
- [78] Six weeks after her release from hospital, the plaintiff returned to her own home. She did not feel ready to be on her own but she was not getting along with her mother and had nowhere else to go. She had to use crutches to get down the stairs to her suite and avoid putting any weight on her left leg or right wrist. A kinesiologist came to help her with exercises to strengthen her left leg.
- [79] The plaintiff had one visit with a physiotherapist in November 2015. She felt it was not suited to her, but in 2016 she began going to Glover physiotherapy and continued there for quite some time. She also tried aquatherapy in 2016 and had assistance from an occupational therapist, Akemi Job.
- [80] By the end of 2016, the plaintiff was still experiencing sharp, constant burning pain in her left leg. She was still using crutches. She found it difficult to sleep. She worked on range of motion exercises for her wrist, which was stiff. Her knee and neck were the source of the worst pain.

Psychological injuries

- [81] Following the collision, the plaintiff was depressed and anxious. The anxiety was brought on by being a passenger in a car when family members took her to medical appointments or to buy medication.
- [82] By the end of 2015, the plaintiff was still relying on a wheelchair to get around. She was depressed and anxious. She had constant headaches and difficulties with her memory. She had nightmares about the collision a couple of times a week which began right after the collision and lasted for about two years.

- [83] The plaintiff drank alcohol to help with the pain and to forget about things for a while. Some events would trigger an increase in consumption. As an example, at the end of 2016 the plaintiff and her vocational therapist, Ms. Job, made a site visit to BE Pressure to see if the plaintiff could return to work there. It was clear fairly quickly that the plaintiff could not operate the machinery she had used before the accident. As a result of this visit and reaction to her restrictions, her drinking increased.
- [84] In March 2019, after a year of sobriety, the plaintiff began drinking in response to feeling depressed about her situation, in particular her failure to secure employment. She damaged her belongings and ended up in Peace Arch hospital under psychiatric care due to suicidal thoughts. The doctor prescribed her Seroquel, which helped the plaintiff and which she still takes. She feels it stabilizes her mood, though she is still depressed. The plaintiff has not consumed alcohol since the incident in 2019.

Interpersonal relationships

- [85] The plaintiff's post-collision condition also affected her interpersonal relationships. Her mother and sister, Desiree, both testified about the change in the plaintiff's mood after the collision. They walked around on eggshells because the plaintiff was very moody and quick to anger. This has not improved to the date of trial.
- [86] In 2016, the plaintiff began a relationship with Kris Jacob. They met online before the collision but did not meet in person until 2016. They moved in together in the summer of 2016.
- [87] The plaintiff's grandfather and aunt passed away in February 2017 and her father passed away in July. She was sad about losing them, but it did not make her more depressed than she already was from the collision.
- [88] In March 2017, the plaintiff was drinking with Kris. They had an argument and he locked himself in the bathroom. The plaintiff used a knife to unlock the door and Kris called 911. The plaintiff was arrested. She has very little memory of the incident but is ashamed of what happened.
- [89] The plaintiff was charged with assault but it appears that alternate measures were used by the prosecution, as there was never a trial or conviction. The plaintiff agreed not to drink and to have no contact with Kris. She also went to addiction counselling and started volunteer work. The relationship with Kris was later revived, but the plaintiff ended it again when she began a course in early 2018.
- [90] In June 2019, the plaintiff reunited with Kris and moved to Tappen, a small community near Salmon Arm. She finds it quiet and peaceful there. The plaintiff can access physiotherapy and kinesiology in Salmon Arm and there is a pain specialist there as well. She has to travel to Kamloops for Botox injections.

- [91] Currently the plaintiff looks after the home she shares with Kris. He understands her physical limitations and the pain she suffers from. She takes care of as much housework as she can as well as grocery shopping. Kris's seven year-old daughter spends alternate weekends with them and while the plaintiff would like to be involved in family activities, she struggles with pain. She has tried kayaking and finds getting in and out is difficult. She can paddle for about 35 minutes. The plaintiff has tried fishing but finds standing and casting are difficult.
- [92] The plaintiff thought she wanted children and tried for a few months to get pregnant, but now feels that she lives her life day-by-day and cannot imagine carrying a child or raising a child because of her constant pain. She was also concerned about the effect her medication would have on fetal development and was advised to taper off her Gabapentin and Seroquel consumption before becoming pregnant.

Dr. Robin Wilson - plaintiff's family physician

- [93] Dr. Wilson only met the plaintiff once, in 2009, before he began treating her in the aftermath of the 2015 collision. The first time he saw her post-collision she presented with a surgically repaired fracture of her left knee as well as a torn knee ligament and a right wrist fracture. She was on gabapentin for neuropathic pain and hydromorphone, an opioid analgesic.
- [94] In 2016, the plaintiff's mobility began to improve, although she still complained of knee pain, headaches and lower back pain. She was also having adjustment issues and Dr. Wilson prescribed her anti-depressants.
- [95] In 2018, Dr. Wilson referred the plaintiff to a physiatrist because of her ongoing issues with headaches and neck pain. The plaintiff had not improved by this point and Dr. Wilson wanted to ensure he was not missing anything. Physiatrists can also administer nerve blocks and other pain management injections. Dr. Wilson also made a referral to a psychiatrist because he thought the plaintiff had significant anxiety and depression.
- [96] Dr. Wilson agreed that the plaintiff was on a lot of medication for different conditions. He observed that she had gained a significant amount of weight after the collision, some due to inactivity but some possibly due to medications. He said managing medication is always a balance and he has discussed a reduction in the amount of oxycodone she takes. Dr. Wilson does not change the medications prescribed by other specialists unless they are clearly not beneficial to the patient.
- [97] On cross-examination, Dr. Wilson agreed that the plaintiff had significant stresses in her life in 2017 which may have contributed to her depressed mood. He did not know from her directly that she tried to get pregnant but was aware of this from her medical records from a clinic in Salmon Arm. He agreed that trouble with conceiving could be a stressor, depending on how important it was to the plaintiff.

- [98] Dr. Wilson agreed that ideally, the plaintiff's reliance on medications should be reduced. He also agreed that she should exercise, as deconditioning can also cause weight gain.

The second collision in October 2019

- [99] On October 4, 2019, the plaintiff was in a collision while driving home from Kamloops. She struck a cow and totalled her vehicle. The collision did not cause new injuries but aggravated her pre-existing ones. She had increased pain in her neck, lower back and knee for a couple of months.
- [100] On cross-examination, the plaintiff denied spending any time in hospital after the October 2019 collision. She told hospital personnel who examined her that she had pre-existing injuries. She reported a burning sensation in her upper back and was put in a neck collar. The collision was frightening but the plaintiff denied that it increased her anxiety considerably. She avoids driving to Kamloops at night now.
- [101] The plaintiff denied that the October 2019 collision substantially affected her recovery from the earlier collision. She felt the effects for a couple of months but no longer. She temporarily increased her pain medication to five doses per day but by the time of trial was down to three or four doses per day. The plaintiff did not take oxycodone when she testified at trial. She felt alert and cogent but she was in pain.

Plaintiff's training and employment efforts

- [102] As a result of working with a vocational counsellor, the plaintiff signed up for the health unit clerk program at Sprott-Shaw College. The program started in January 2018 and lasted most of the year.
- [103] The plaintiff had neck and back pain through the entire program. It was hard for her to keep her head up and do four hours in class on top of the commute from her home in Cloverdale to the course in Abbotsford. She began experiencing migraines as well as headaches, which were triggered by looking at the computer and from light and noise. Her knee still hurt and the typing aggravated her wrist. The plaintiff also had memory issues and occasional nightmares, as well as anxiety. She was diagnosed with PTSD around this time because if she was driving in rain or in the dark or if a truck merged beside her she would break down and cry.
- [104] During the course, the plaintiff awoke around 5:00 a.m. in pain, studied for a little while then left for school at 11:30 a.m. Classes lasted about four hours, with a break partway through. The plaintiff got up and walked around to alleviate her discomfort. Her vocational counsellor helped her obtain an ergonomic chair, laptop and mouse as well as a cushion for back pain, a bag on wheels, a wrist brace and a knee brace. The equipment helped the plaintiff a little bit. On occasion, she would attend classes virtually if she was not able to attend in person.

- [105] The plaintiff employed a variety of study habits to manage the workload at the course. She used flash cards, read out loud and played classical music to retain information.
- [106] At the end of the day, after the commute and class work and homework, the plaintiff was exhausted. She usually went to bed at around 9:00 p.m. She was taking oxycodone, arthritis Tylenol and Advil, which helped her pain but affected her concentration. She also took medication to fall asleep. She slept for about five hours and was awakened by her neck pain, which usually became worse by the end of the day. Her left hip and knee bothered her when she woke up.
- [107] The plaintiff felt happier at school in spite of the pain. She wanted to finish the program and get a career and add meaning to her life.
- [108] The study techniques paid off for the plaintiff. She finished the course with an average of 88%.
- [109] The plaintiff began to look for work as she was finishing the program in late 2018 and applied for positions at Abbotsford, Lions Gate and Eagle Ridge hospitals in early 2019. She was honest in her applications about her physical limitations and her need for an ergonomic workspace. She was embarrassed about disclosing that she could not meet the physical demands of the job but followed the advice of a career counsellor at Sprott-Shaw that she should be candid about her limitations. The plaintiff did not secure any of the handful of jobs she applied for.
- [110] On cross-examination, the plaintiff agreed that she did not ask for assistance from Sprott-Shaw with her search for work after completing the course. She thought they would not help her because she was looking for a job in Vancouver Coastal Health not Fraser Health. She sent out 15 resumes but did not register with an employment agency. She did not think a full-time job would be less onerous than the course she took and she focussed her efforts on trying to find part-time work.
- [111] The plaintiff has looked for jobs in the Interior Health region for which she might be qualified. Some are in Vernon and the rest are in Kelowna, both too far for her to drive on a daily basis.

The defendant's lay witness on the plaintiff's training

- [112] The defendant called Amandeep Sanghera, an employment services specialist at the Abbotsford location of Sprott-Shaw College. Her job is to assist students with job placement after program completion, assist with resume building, job searches and practicums. The plaintiff asked Ms. Sanghera to provide a letter of recommendation, and Ms. Sanghera obliged. She uses a form letter but adds in the individual student's grade point average.

- [113] At the time Ms. Sanghera wrote the letter, on January 16, 2019, she had only been at Sprott-Shaw for about six months and had little contact with the plaintiff, so she reached out and got some feedback on her. Ms. Sanghera did not see what, if any, accommodations the plaintiff had or how she functioned in the classroom.
- [114] Ms. Sanghera said that over 90% of graduates find employment on graduation, although the statistics are lower currently due to the COVID-19 pandemic. Ms. Sanghera helped the plaintiff with her resume and sent her some job postings. She did not arrange interviews, but the plaintiff mentioned she had a few lined up.
- [115] Ms. Sanghera confirmed that the plaintiff attended 86% of her total class hours. The plaintiff reached out to her in early January 2019, right after completing the program. She wanted to know if she should disclose her physical limitations and Ms. Sanghera advised her that she should.

The plaintiff's current physical condition

- [116] At the time of trial, the plaintiff said she still has pain in her left hip when she wakes up. She struggles with walking and has knee pain all across the front and down to her ankle. She feels a pinch at the base of her neck and the pain goes up the left side. Noise and light trigger migraines.
- [117] The plaintiff's lower back is stiff and painful. She takes medications to get to sleep but neck pain wakes her up after about five or six hours.
- [118] The plaintiff has undergone physiotherapy treatments since the collision and would continue with physiotherapy if she could afford it. She has had occupational therapy, psychological counselling and kinesiology assistance. She would try a pain management program or anything else that might help her condition.
- [119] In follow-up examinations of the plaintiff, Dr. Viskontas noted that her MCL was stable and the ligaments were functioning well. However, the plaintiff has started to show signs of post-traumatic osteoarthritis. Dr. Viskontas said she needs to lose weight to reduce stress on the joint and slow the progression of the osteoarthritis.
- [120] Dr. Viskontas could not say if the plaintiff was still symptomatic from the October 2019 collision when he saw her in February of this year. She reported a couple of falls due to snow and ice before the February appointment. He agreed she needs to become more active and not rely so much on passive therapy.

- [121] In Dr. Viskontas's opinion, the plaintiff's knee injury and post-traumatic osteoarthritis make it quite likely that she will require knee replacement surgery in her late forties or fifties. She would require one surgery to remove the hardware that Dr. Viskontas used to stabilize the bone after the collision, then three to six months to heal from that before the knee replacement surgery could take place. Given the soft tissue pain that the plaintiff has around her knee, it is unlikely she would be pain free after joint replacement.
- [122] The plaintiff takes gabapentin, Seroquel, zopiclone, baclofen, lorazepam, oxycontin, naproxen, rixotryptin, duloxetine and several other medications. If she had her choice, she would be off medication entirely. She tried stopping the pain medication but her pain increased.
- [123] It is very difficult for the plaintiff to accept her physical condition. She used to be able to have fun with friends and family but now she is anxious and unhappy most of the time and limited in what she can do.

The expert evidence

- [124] There was very little disagreement between the experts for both sides concerning the plaintiff's injuries, with the exception of whether or not she suffered a mild traumatic brain injury (MTBI or concussion) as a result of the collision.

Dr. Ansel Chu - the plaintiff's treating physiatrist

- [125] Dr. Chu found the plaintiff had multiple areas of tenderness and trigger points in the right more than left neck and shoulder girdle. He thought there might be mechanical pain in the neck and tried an anesthetic block in an effort to isolate the painful area. The plaintiff reported about a 20% improvement from the block, which Dr. Chu did not find particularly significant. He then tried trigger point injections with freezing into the neck, shoulder and intrascapular muscles, which dropped the pain down considerably for a period of several weeks. It did not alleviate the migraines.
- [126] Dr. Chu decided to try Botox injections for the migraines. The plaintiff said this reduced the frequency of the migraines quite a bit, from nearly every day to about twice per week. When she did get migraines they were as intense as before Botox but did not last as long.
- [127] Dr. Chu gave the plaintiff Botox injections shortly before the October 2019 collision but she could not recall if it helped in the short time between the administration of the injections and the collision. The plaintiff was supposed to return for more Botox but she could not get funding for it.
- [128] Dr. Chu observed that some aspects of the plaintiff's condition were straightforward, such as the knee pain and the MTBI, which in his view led to post-concussive headaches, cognitive problems and sleep disturbance. The neck and shoulder pain was less straightforward, as it was sore on palpation but not necessarily mechanical, since the

anesthetic block did not provide much relief. The cognitive problems were likely related to sleep disturbance, fatigue, depression, anxiety and chronic pain rather than the ongoing effects of the MTBI.

- [129] Dr. Chu recommended continuation of Botox every three months. He also recommended an exercise program with the assistance of a kinesiologist as well as medication for her depression, anxiety, chronic pain and sleep disturbance. He also recommended trigger point injections for the myofascial pain in the neck and shoulder girdle. Dr. Chu said the plaintiff's prognosis for resolution of the chronic pain was poor.

Dr. Zeesham Waseem, physiatrist

- [130] Dr. Waseem was retained by the defendant to provide an expert opinion in physiatry, but called as a witness by the plaintiff. He assessed the plaintiff in May 2019. He agreed with Dr. Lu's MTBI diagnosis. Dr. Waseem said the plaintiff has chronic myofascial pain in her neck, muscle wasting in her left leg and post-fracture pain in her right wrist. She has been experiencing pain for four years post-collision and is unlikely to make a full recovery. The plaintiff also has issues with sleep. People who do not get restorative sleep have a hard time making a full recovery.
- [131] Dr. Waseem does not prescribe narcotics to patients for chronic pain. He recommended that the plaintiff discontinue narcotic medications and try hyaluronic injections to alleviate knee pain, in addition to losing weight. He did not recommend further passive treatment. He suggested she try beta blockers before Botox injections for her headaches.

Psychological injuries

- [132] The plaintiff struggles with memory, focus and concentration. She keeps notes on her phone and in a planner. She is easily distracted and tends to make impulsive decisions. One example was her decision, six weeks before trial, to move from Tappen back to Langley for no real reason. She returned to Tappen, where she still lives. Her psychiatrist adjusted her medication and suggested behavioural therapy.
- [133] The plaintiff also has depressive symptoms. Some days she can go out and grocery shop but other days she says her front door seems like a brick wall.
- [134] The plaintiff still suffers from anxiety attacks while driving. Occasionally, she has to pull off the road to compose herself. The symptoms include chest pains, shaky hands and numbness in her fingertips and face. She still has nightmares, although not as frequently as before.

Dr. Shaohua Lu, plaintiff's psychiatrist

- [135] Dr. Lu is a psychiatrist with an expertise in addiction and forensic psychiatry. He works frequently with patients injured in motor vehicle collisions or other traumatic events.

- [136] In Dr. Lu's opinion, the plaintiff meets the criteria for a complicated MTBI. Her memory disturbance after the collision was significant to the formulation of this opinion. The residual impacts of MTBI include physical, cognitive and psychological symptoms including: reduced multi-tasking capacity, anxiety, mood changes, reduced adaptability, decreased mental flexibility, decreased tolerance to external stimuli, decreased frustration tolerance, emotional dysregulation and anger.
- [137] Dr. Lu said it was clinically difficult to separate the relative contributions from MTBI, PTSD and chronic pain. Medication side effects also contribute. Dr. Lu felt at the time of his assessment that the plaintiff had not undergone a sufficient assessment of her MTBI and should see a neuropsychologist.
- [138] Dr. Lu said the plaintiff meets the DSM-5 criteria for PTSD, which is directly related to the collision. As part of the PTSD she has negative mood and persistent worry for the future. It is sufficient to meet the diagnostic criteria for major depression.
- [139] Dr. Lu acknowledged the plaintiff had pre-existing psychiatric vulnerability because she was a binge drinker. Notwithstanding that issue, she was able to keep working and maintain interpersonal relationships. PTSD is a major independent risk factor for alcohol addiction.
- [140] Dr. Lu was concerned about the plaintiff's opioid use and the risk of opioid-induced hyperalgesia (OIH). It presents as progressive pain sensitivities despite long-term stable opioid treatment. It is a brain receptor tolerance issue and it leads to a vicious cycle of pain, increased opioid use and reduced function.
- [141] On the positive side, the plaintiff has benefited from counselling and psychiatric treatment and medication, but overall her prognosis is guarded. The longer she has PTSD, the greater the chance she will have persistent symptoms. She has an elevated lifelong risk for major depression.
- [142] On cross-examination, Dr. Lu agreed that the plaintiff's blood alcohol content after the collision, 47 mmol, translated to .275, which is three times the legal limit of .08. The plaintiff would have been impaired, but he could not say how much because alcohol affects everyone differently.
- [143] Dr. Lu did not place significance on the fact that ambulance attendants recorded the plaintiff's Glasgow Coma Score of 15/15 in relation to whether or not the plaintiff had lost consciousness after the collision or had sustained MTBI. He was satisfied that she had memory disturbances after the collision. Dr. Lu said the entries in her pain diary reflect some details about pain and confusion, which is normal for someone with MTBI. A diagnosis of MTBI does not require that a patient exhibit global amnesia.

[144] Dr. Lu was concerned to learn that the plaintiff's opioid use had increased as a result of the October 2019 collision. He thought the success in her course was an indicator that she may be able to return to work and regain her productivity, which in turn could ameliorate the symptoms of PTSD. Dr. Lu said the plaintiff needs someone to manage her drug regime and she should see a counsellor. He agreed that a return to some form of work would be beneficial to the plaintiff.

Dr. Derryck Smith - defence expert psychiatrist

[145] In Dr. Smith's opinion, the plaintiff did not suffer any kind of concussion or MTBI from the collision because there was no observed period of unconsciousness. The ambulance attendants did not note any loss of consciousness and scored her at 15/15 on the Glasgow Coma Score.

[146] Dr. Smith disagreed with Dr. Lu's reliance on the plaintiff's lengthy memory disturbance after the collision as a basis for the MTBI diagnosis. Dr. Smith would attribute this to PTSD, since loss of memory for the traumatic event is one of the diagnostic criteria for PTSD. He also noted that Dr. Lu failed to take the plaintiff's significant level of intoxication at the time of the collision into account as a possible alternative explanation for the apparent memory gaps.

[147] Dr. Smith said that a diagnosis of MTBI is an area of great concern and controversy. The bar for the diagnosis is low with some of the textbook definitions but it is higher with the DSM-5, which is what he uses as the basis for his opinion.

[148] Dr. Smith diagnosed the plaintiff with major depressive disorder, PTSD, insomnia disorder, alcohol use disorder and possible learning disorder in mathematics. In his opinion, the plaintiff continues to be seriously ill from depression and PTSD and there needs to be a rethinking of her psychiatric management. Dr. Smith recommended that she be weaned off oxycodone, because it is not meant for long-term pain management and can lead to issues of addiction and abuse. There is a family history of alcohol abuse.

[149] Dr. Smith suggested a change in the time at which the plaintiff should be taking her sleep medication and the type of medication she should try. He also suggested that if medication does not normalize her sleep, she should be referred to a sleep lab. He also recommended vigorous exercise and perhaps a nutritional consultant to help her lose weight. Dr. Smith recommended that the plaintiff stay abstinent from alcohol.

[150] In Dr. Smith's opinion, the plaintiff is restricted from employment by her psychiatric illnesses, yet he encouraged her to seek part-time employment to resolve her psychiatric symptoms and improve her social isolation.

Dr. Pullyblank, the plaintiff's vocational psychologist

- [151] Dr. Pullyblank opined that the plaintiff's school grades and test results, both his and those of Dr. Cohen, the neuropsychologist, indicated the plaintiff was capable of comparatively basic employment with a practical emphasis. Her pre-employment work history consisted of hands-on tasks, working with materials rather than people.
- [152] The plaintiff currently presents with a complex array of physical, emotional and cognitive symptoms which present challenging barriers to employment. She was able to complete the training program at Sprott-Shaw despite those challenges, but was not able to apply the training to secure employment.
- [153] Dr. Pullyblank is of the view that the plaintiff is unemployable at her present level of functioning, but could entertain part-time work in the future if she responded positively to treatment. Overall, he found that she presented as very anxious, fragile, distressed, pain-focussed and angry, not likely appealing to potential employers.
- [154] On cross-examination, Dr. Pullyblank said he was impressed with the plaintiff's motivation to complete the Sprott-Shaw course in light of her difficulties, but felt she had to work very hard at something that is not very challenging. He agreed that some of the low cognitive results on the tests could be due to medications she took before and during the testing.

Dr. Douglas Cohen, the plaintiff's neuropsychologist

- [155] Dr. Cohen interviewed and administered tests to the plaintiff over the course of two days. He noted she seemed to be impulsive and angry and mildly antagonistic towards the process, although she warmed up over the course of testing. The plaintiff complained on the second day that she was tired and experiencing visual disturbances.
- [156] Dr. Cohen assessed the plaintiff cognitively in the low average-borderline IQ range. IQ scores are robust and tend not to change much with mild or even moderate brain injuries.
- [157] Dr. Cohen said the plaintiff's answers to a questionnaire that measured personality and emotional functioning indicates a wide range of significant mental health concerns. She reported significant levels of unhappiness and tension, a withdrawn personality, difficulty coping with problems and poor functioning in general. The plaintiff endorsed symptoms of depression, anxiety, psychological trauma and somatic preoccupations.
- [158] Dr. Cohen said in his report:

Data from the testing, interview, self-report and reviewed background information are consistent with a diagnosis of Mild Neurocognitive Disorder due to Traumatic Brain Injury for Ms. Kingston, with the DSM-5 diagnostic criteria including concern of an individual or informant regarding a mild decline in cognitive functioning, and an attendant modest decrement in cognitive performance, as detailed above, but which does not interfere with most normal activities of daily living. Ms. Kingston's residual cognitive difficulties and deficits range from mild to severe, but are

broadly based and affecting a number of cognitive systems, including most prominently mental control, attention, memory, language and visual processing. The effect of these difficulties would be most evidenced in reducing Ms. Kingston's ability to focus and attend mentally, and regulate her behavior at the same level as previously, and are consistent with her report of having to over study in her college program post-MVA. As well, her current cognitive deficits would likely interfere with any further learning programs that emphasized visual learning, or emphasized verbal output under demand conditions. Ms. Kingston's cognitive difficulties would very likely impact her ability to manage her job demands associated with being a Medical Office Assistant, given the need for attention to detail, and for sustained focus and attention, in these positions. Her prior work as a fork lift operator and working in manufacturing appear to be ruled out for her post-injury, given her physical limitations and chronic pain.

[159] On cross-examination, Dr. Cohen said the plaintiff's performance in the Sprott-Shaw course was entirely consistent with her IQ but the fact that she could manage the course did not translate into her ability to do the job she was training for.

Tori Rutledge - the plaintiff's occupational therapist (OT)

[160] Ms. Rutledge conducted testing of the plaintiff to assess her tolerance for various tasks. In her opinion, the plaintiff is currently limited in her ability to return to gainful employment because of her perception of her pain and disability (i.e. she is highly focused on her pain and disability), her poor understanding of how to appropriately manage her pain and her mood disorders. Ms. Rutledge opined that with appropriate ongoing treatment the plaintiff would potentially be capable of being employed in some form (i.e. part time, office-based work with accommodations).

[161] Ms. Rutledge also assessed the plaintiff's recreational endeavours and domestic maintenance capacity and provided cost estimates for care items recommended by medical practitioners. I will discuss the cost estimates in the cost of future care section of these reasons.

Dr. Christopher Cooke - defence vocational consultant

[162] Dr. Cooke administered a variety of physical and cognitive tests to the plaintiff. In his opinion, she could not return to work as a forklift operator, since that is at least a medium strength occupation. He found that she was capable of working in a limited strength occupation, with work activities involving lifting, carrying, pushing, pulling and handling loads up to 11 pounds, a body dexterity requirement for sitting and a requirement for upper limb coordination.

- [163] Dr. Cooke found that cognitively the plaintiff would qualify for a variety of occupations, such as a medical office assistant. He also suggested she train to be an early childhood educator or a special education assistant. He opined that her current home in Tappen isolates her from large urban centres with opportunities for stable employment, but that he located a job opportunity in Salmon Arm for a medical office assistant on a part-time casual basis.
- [164] Dr. Cooke noted that the plaintiff complained of visual difficulties during testing, as well as anxiety related to driving. He suggested cognitive behavioural testing in the form of rapid eye movement de-sensitization therapy (EMDR) to provide her with alternate strategies to help with chronic pain, anxiety and depression.
- [165] Dr. Cooke also found that ergonomic assistance, provided with the input of an occupational therapist, would assist the plaintiff.
- [166] Dr. Cooke's second report was focussed on responding to the reports of Ms. Rutledge and Dr. Pullyblank, but his opinion remained the same: the plaintiff was capable of work as a medical office assistant and could retrain as an educational assistant.

Credibility and reliability

- [167] Overall the plaintiff was a credible and reliable witness. I did not find she was overstating the difficulties caused by the collision, although I am cognizant that some of the experts were concerned with how much she is focussed on her pain and perceptions of disability.
- [168] The defendant suggested that the lay witnesses who testified on the plaintiff's behalf - her mother, sister, common law partner and former co-workers - were biased in her favour and their evidence should be given little or no weight.
- [169] I found that the plaintiff's sister, Desiree, and the plaintiff's former co-workers, Mr. Desrochers and Ms. Zosiak, provided particularly helpful insight into the person the plaintiff was before the collision, and Desiree's evidence about the impact the collision had on her sister's personality and functioning was balanced and helpful.
- [170] The defence lay witness on damages, Ms. Sanghera, gave evidence within the scope of her employment, but candidly agreed that she had little interaction with the plaintiff and could only tell the court about the plaintiff's grades, attendance and requests for assistance with looking for work.
- [171] The expert witnesses for both the plaintiff and defendant were helpful within the scope of their areas of expertise. The medical experts disagreed on the diagnosis of MTBI and the vocational experts disagreed on some aspects of the plaintiff's employability, but their opinions about the plaintiff's current condition and future prognosis were not wildly divergent.

Non-pecuniary damages

Analytical framework

- [172] The assessment of non-pecuniary damages takes into account the well-established factors from *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46. An award under this head is intended to compensate the plaintiff for pain, suffering, loss of enjoyment of life and loss of amenities.
- [173] Factors commonly considered in the assessment of non-pecuniary damages include the age of the plaintiff, the nature of the injury, the severity and duration of pain, the extent of any disability, the extent of emotional suffering and impairments to the plaintiff's life, including impairments to family, marital and social relationships, physical and mental abilities and loss of lifestyle.
- [174] Each plaintiff must be assessed individually, though reference to previous similar cases can be helpful. A plaintiff's stoicism is a factor that should not, generally speaking, penalize the plaintiff: *Giang v. Clayton*, 2005 BCCA 54.

Positions of the parties

- [175] The plaintiff seeks an award of \$250,000 for non-pecuniary damages, citing the following cases:
- *O'Mara v. ICBC*, 2019 BCSC 2222 - 38-year-old medical office assistant with MTBI, fractures to her tibia, fibula and left ulna, torn ligaments and nerve injury to her right leg and facial lacerations. The plaintiff required surgical repair to her knee. She developed major depressive disorder, PTSD and generalized anxiety disorder. The award of \$200,000 was reduced to take into account pre-existing psychological issues.
 - *Gilbert v. Bottle*, 2011 BCSC 1389 - 30-year-old plaintiff diagnosed with MTBI as a result of a motor vehicle collision. She also suffered severe and chronic pain and psychological injuries which affected her previously outgoing and empathetic nature. An award of \$200,000 resulted. The equivalent in 2020 would be \$225,000.
 - *Zacher v. Prescesky*, 2019 BCSC 500 - the plaintiff was struck by a motor vehicle and suffered a MTBI, a fractured right femur, soft tissue injuries, chronic pain, PTSD, depressive disorder and anxiety. He could only walk short distances, could not sit or stand comfortably and was unable to run or play sports. The award for non-pecuniary damages was \$300,000, which the plaintiff acknowledges is the high water mark for this particular constellation of injuries.
- [176] The defendant accepts that the plaintiff was injured in the collision, both physically and psychologically. He disputes the diagnosis of MTBI but concedes nothing much turns on the dispute. The defendant points to the plaintiff's chronic opioid usage and tendency to catastrophize as well as her reliance on passive treatment and medication instead of a more active rehabilitation as reasons why she has not made a better recovery from the collision. The defendant suggests a non-pecuniary award in the range of \$140,000 to \$150,000 is fit in this case, citing the following authorities:

- *Laureola v. Waterhouse*, [1995] BCJ No. 689 - the 52-year-old plaintiff received \$90,000 (approximately \$138,000 in 2020) for a tibial plateau fracture, post-traumatic arthritis, depression and a debilitating pain disorder.
- *Farand v. Seidel*, 2013 BCSC 323 - the 28-year-old plaintiff was awarded \$130,000 (approximately \$140,000 in 2020) when she suffered a tibial plateau fracture that would require knee replacement later in life, along with other fractures, chronic neck and back pain and mild psychological symptoms.
- *Provost v. Bolton*, 2018 BCSC 1090 - the 34-year-old plaintiff suffered an undisplaced fracture of his C7 vertebra; a fracture in his left hand; and a bicondylar tibial plateau fracture to his right knee in addition to psychological injuries including PTSD, anxiety, depression, soft tissue injuries and migraine headaches. He was eventually able to return to work as a police officer but his ability to perform the full spectrum of his duties was impacted. The non-pecuniary damage award was \$150,000.

Analysis

- [177] The plaintiff was only 23 years of age when she sustained a fractured leg and wrist in a violent collision. She has ongoing issues with chronic pain in her neck, lower back and knee and suffers from headaches as well as PTSD, depression and anxiety. Her sleep is chronically poor due to pain. I am satisfied on a balance of probabilities that she also suffered a MTBI in the collision, although given the constellation of psychiatric ailments she has been diagnosed with, it makes no practical difference whether this was proven or not.
- [178] The plaintiff will more likely than not require knee replacement surgery within 20 years due to osteoarthritic changes from the collision. This actually entails two surgeries: one to remove the hardware from her knee which Dr. Viskontas placed there after the collision in 2015, followed by a three to six-month recovery period, then another to replace the joint. This surgery will not necessarily leave the plaintiff pain-free, given that at least some of her discomfort is from soft tissue injuries around her knee.
- [179] Before the collision, the plaintiff engaged in various outdoor pursuits with her younger sisters. Now the plaintiff has difficulty walking, due to knee pain, and leads a largely sedentary lifestyle. She has tried kayaking and fishing but encounters discomfort with those activities. Housework and grocery shopping are exhausting.
- [180] The plaintiff is someone who has worked consistently since she was 14. She testified that she liked to keep busy. She enjoyed her work as a forklift operator and embraced the challenge of training on new types of equipment. The plaintiff is now foreclosed from performing that type of work, or any work involving physical demands beyond office work.

[181] The authorities cited by counsel as helpful in identifying a range of non-pecuniary awards for individuals in similar circumstances to the plaintiff, but each assessment is different. In light of the plaintiff's young age, serious physical injuries that will more likely than not require further surgical intervention in the future and debilitating psychological injuries, I am satisfied that a non-pecuniary award of \$225,000 is merited, inclusive of considerations related to loss of housekeeping capacity.

Past wage loss

[182] There was no dispute that the plaintiff lost income as a result of the collision. The parties agreed on the plaintiff's income since 2011 as follows:

2011 - \$16,820

2012 - \$22,602

2013 - \$28,926

2014 - \$34,240

2015 (until the date of the collision) - \$22,464

[183] The plaintiff has not worked since the collision. Assuming the plaintiff's income remained static after the collision to the date of trial, counsel for the plaintiff calculated a net loss of \$130,505.20 based on a net income of \$73.40 per day. That calculation does not take into account raises and promotions.

[184] Based on the static income calculation with an allowance for overtime and wage increases, the plaintiff seeks a net award of \$150,000 for past wage loss.

[185] The defendant does not dispute entitlement to past wage loss to the date of trial and suggest a gross past wage loss of \$180,000 is appropriate, with a net wage loss of approximately \$130,000. The defendant suggests that the plaintiff's unstable pre-collision work history, alcohol problems and absenteeism would have affected her earnings flow.

[186] I do not agree with the defendant that the plaintiff's pre-collision work history was unstable or uncertain. To the contrary, she was able to find work quickly after she was let go from Apex and she has been continuously employed since she was 14.

[187] I also disagree with the defendant's emphasis on the plaintiff's absenteeism from work as a factor that impacts her past wage loss. While upper management at Apex cited the absenteeism in a letter to the plaintiff, her more immediate supervisors found her to be a hard worker, someone they would hire back if she was physically able. I also accept the plaintiff's evidence that she asked for wage parity with her male counterparts at Apex and was refused. I find that in an equitable working environment the plaintiff would likely have made more money.

[188] I award the plaintiff \$150,000 in net past wage loss.

Loss of future earning capacity

Analytical framework

[189] In *Tisalona v. Easton*, 2017 BCCA 272, the Court of Appeal summarized the principles applicable to assessing damages for a loss of earning capacity:

47] To establish an entitlement to damages for loss of earning capacity, a plaintiff must show a real and substantial possibility of a future event leading to an income loss by reason of the injuries: *Perrin v. Lalari*, 2010 BCCA 140 at para. 32. What this means is that "any employment said to have been lost to the plaintiff by reason of the injury must be shown to be realistic, having regard for what the plaintiff's circumstances would have been absent the injury": *Graydon v. Harris*, 2014 BCCA 412 at para. 27.

[48] The plaintiff must show that it is a realistic possibility she will be less able to compete in the marketplace: *Kim v. Morier*, 2014 BCCA 63 at para. 8. The possibility must not be mere speculation: *Grewal v. Naumann*, 2017 BCCA 158 at para. 48. An inability to perform an occupation that is not a realistic alternative occupation is not proof of a future loss: *Perrin* at para. 32.

[190] The value of the future loss is assessed by reference to the principles in *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 (S.C.), in which Finch J., as he then was, stated:

[8] The means by which the value of the lost, or impaired, asset is to be assessed varies of course from case to case. Some of the considerations to take into account in making that assessment include whether:

1. The plaintiff has been rendered less capable overall from earning income from all types of employment;
2. the plaintiff is less marketable or attractive as an employee to potential employers;
3. the plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to him, had he not been injured; and
4. The plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market.

[191] There are two approaches to assessing loss of future earning capacity: the earnings approach (*Pallos v. Insurance Corp. of British Columbia* (1995), 100 B.C.L.R. (2d) 260) and the capital asset approach (*Brown v. Golaiy*). The application of one over the other depends on whether the loss can be quantified in a measurable way: *Perren v. Lalari*, 2010 BCCA 140.

Positions of the parties

[192] The plaintiff's position is that she will continue to suffer considerable impairments from her injuries and, as a result, not be able to return to her pre-collision employment or take advantage of future job opportunities. The plaintiff maintains she is less marketable as a result of her injuries and has demonstrated a significant reduction in earning capacity, more than sufficient to meet the burden of proof of a real and substantial possibility of pecuniary loss.

[193] Counsel for the plaintiff, Mr. Holroyd, says the earnings approach is more suitable for assessing the plaintiff's loss of capacity because her pre-collision earnings are easily ascertainable and likely represent what she would have earned but for the collision. Mr. Holroyd submits that the plaintiff would have earned between \$50,000 and \$80,000 per year, based on Mr. Desrochers' evidence about the potential earnings for a forklift operator, shipping coordinator or shift supervisor.

[194] The plaintiff's economist, Mr. Pivnenko, calculated the present value of losses between \$50,000 and \$80,000 per year to age 65, 67 and 70, with the caveat that he did not factor in contingencies:

\$50,000 per year loss to age 65 = present value of \$1,329,750

To age 67 = \$1,445,450

To age 70 = \$1,520,200

\$60,000 per year loss to age 65 = \$1,671,300

To age 67 = \$1,734,540

To age 70 = \$1,824,240

\$70,000 per year loss to age 65 = \$1,949,850

To age 67 = \$2,023,630

To age 70 = \$2,128,280

\$80,000 per year loss to age 65 = \$2,228,400

To age 67 = \$2,312,720

To age 70 = \$2,432,320

[195] Mr. Holroyd submits that after factoring in positive and negative contingencies, such as promotions, overtime, temporary bouts of unemployment and such, it is reasonable to assess the plaintiff's loss of future earning capacity at the \$60,000 range to age 67, which has a current value of \$1,734,540. He acknowledged that it was possible that the plaintiff could earn some income from part-time work in the future.

- [196] Mr. Burgoyne, counsel for the defendant, accepts that the plaintiff has proven a real and substantial possibility of future income loss and that a return to the pre-collision physical employment she had done before is no longer possible. Mr. Burgoyne does not agree that the plaintiff is competitively unemployable, maintaining that she is capable of pursuing sedentary employment, although perhaps not until she benefits from active rehabilitation, mental health intervention and medication management.
- [197] The defendant points to Ms. Rutledge's evidence, where she agreed that the plaintiff had the physical capacity to work as a medical office assistant but faced barriers related to her own perceived disabilities flowing from her pain perceptions which were not necessarily consistent with Ms. Rutledge's objective observations.
- [198] Dr. Chu, Dr. Waseem and Dr. Lu all agreed that the plaintiff was capable of some form of sedentary work, with ergonomic accommodations as well as the flexibility to work at her own pace and take breaks as needed. The defendant's experts, Dr. Smith and Dr. Cooke, also expressed the opinion that the plaintiff should return to work as part of a more active engagement with the outside world.
- [199] The defendant notes that the plaintiff's pre-collision income as a forklift operator is similar to what she could earn as a medical office assistant and that the evidence of how she could advance and earn more money in her former occupation is outweighed by the fact that she was fired for absenteeism.
- [200] The defendant urges the capital asset approach to assess the plaintiff's loss of future earning capacity. Based on the report of the defendant's expert, Mark Gosling, the average annual earnings for females in BC is \$48,500. The defendant maintains a rough range of \$100,000-\$150,000 for the loss of capital asset, reflecting two to three years in earnings.
- [201] Assessing the plaintiff's loss of earning capacity is complicated because her ability to earn income in the future depends on how she overcomes a number of significant hurdles: improving her mobility and mental health and reducing her reliance on opioid medication. I accept that the plaintiff should be capable of doing some work in the future, but I am not as optimistic as the defendant about the timeline or the scope of the work she will be able to do as counsel for the defendant is.
- [202] Nor am I satisfied that the capital loss approach and an award of income for two or three years is fit in the circumstances, because it is premised on a certainty that the plaintiff will recover sufficiently to secure permanent employment in a competitive workplace on a finite timeline.
- [203] Overall, the income approach to assessing the plaintiff's loss of future capacity is better suited to her situation because her training and aptitude are consistent with an ascertainable income stream. The question then is what is a realistic assessment of what she would have earned absent the collision?

- [204] I find Mr. Gosling's evidence that the average income for a female BC resident is \$48,500 is closer to a realistic income for the plaintiff than the higher incomes posited by her counsel. While the plaintiff was not afraid of hard work, there is a chance that her difficulties with alcohol could hold her back from advancement into managerial positions.
- [205] Bearing in mind that the plaintiff would likely be able to earn slightly more than the average due to overtime, I am satisfied that using a baseline salary of \$50,000 from the time of trial to age 65 fairly reflects what the plaintiff could have earned, but for the collision. Mr. Pivnenko calculated that figure in present dollars to be \$1,329,750.
- [206] I find there is a 50% likelihood that the plaintiff will work part time at something in the future, most likely as a medical office assistant with a similar salary to an average female BC resident. The likelihood that she will secure employment within the next couple of years is very low as she must address her psychiatric condition, her sleep problems, her pain management and she must become more physically active.
- [207] I assess the plaintiff's loss of future earning capacity at \$650,000.

Cost of future care

- [208] Mr. Justice Verhoeven summarized the law in this area in *Sendher v. Wong*, 2014 BCSC 140:
- [192] The Plaintiff is entitled to compensation for the cost of future care based on what is reasonably necessary to restore her to her pre-collision condition in so far as that is possible. The award is to be based on what is reasonably necessary on the medical evidence to preserve and promote the Plaintiff's mental and physical health: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.).
- [193] The test for determining the appropriate award under the heading of cost of future care is an objective one based on medical evidence. For an award of future care: (1) there must be a medical justification for claims for cost of future care; and (2) the claims must be reasonable: *Milina*, at para. 84.
- [194] Future care costs must be justified both because they are medically necessary and they are likely to be incurred by the Plaintiff. If a Plaintiff has not used a particular item or service in the past it may be inappropriate to include its cost in a future care award: *Izony v. Weidlich*, 2006 BCSC 1315 at para. 74.
- [195] Each case falls to be determined on its particular facts: *Gilbert*, at para. 253. An assessment of damages for cost of future care is not a precise accounting exercise: *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at para. 21.
- [209] The plaintiff seeks just over \$600,000 for future care. The defendant seeks a much more modest amount of \$40,000-\$50,000, suggesting that the public health system and future employers could provide some aspects of the items the plaintiff seeks.
- [210] The plaintiff seeks the cost of future care for the following types of treatments:

Medication, including Botox

[211] The plaintiff is on a variety of medications, which were listed in Ms. Rutledge's report. The present value of the lifetime use of the medications, as calculated by Mr. Pivenenko, is shown beside each medication:

Botox, 150 units every 7 weeks (\$353,745)

Advil Extra Strength (400 mg) (\$47,166)

Tylenol Arthritis (\$3,066)

Rizatriptin (\$8,052)

Oxycocet (currently taking 4 tablets per day, weaning down to 3) (\$7,378)

Ativan (\$371)

Gabapentin (\$9,231)

Duloxetine (\$27,558)

Quetiapine (in two dosages - \$1,482 and \$3,706)

Zopiclone (\$2,224)

Cyclobenzaprine (\$1,853)

Metformin (the plaintiff acknowledged this was not required as a result of the collision)

[212] Based on the plaintiff's current dosages and the current schedule for Botox, Ms. Rutledge estimates that medications will cost approximately \$13,800 per year and dispensing fees range from \$300 to \$1,200, with an average of \$750 per year or \$25,268 for life. The cost estimates do not take into account Pharmacare coverage or other coverage to which the plaintiff may be entitled. The total amount is slightly over \$463,000.

[213] The defendant maintains that Botox should only be covered for a couple of years, although Botox is a treatment not a cure and the defendant advanced no rationale for cutting off the plaintiff as suggested. That said, I accept that Botox injections on a quarterly basis should be sufficient and on that basis, the estimate is about half of what Mr. Pivnenko calculated.

[214] Taking into account the recommendations that the plaintiff attempt to reduce the medication she is on and pursue more active therapies, but recognizing that Botox is both effective and expensive, I award \$200,000 for the cost of medication.

Therapies

[215] The plaintiff seeks an award for the cost of future therapies, as follows:

Physical therapy (\$3,861)

Occupational therapy (\$3,437)

Rehab assistant (\$3,564)

BC Safe Driving Course (\$94)

Psychological counselling (\$18,638)

Kinesiology (\$3,861)

Gym pass (\$16,845)

Massage therapy (\$891)

Vocational assistance and rehab (\$2,970)

Progressive Goal Attainment Program (\$1,782)

Vision therapy (\$3,564)

[216] The present value of the therapies sought is \$59,507.

[217] The experts all agree that the plaintiff should pursue active therapies, which excludes massage therapy and physiotherapy. The plaintiff complained of vision disturbances when she undertook some of the testing but the evidence is vague as to whether this was as a result of the collision. The plaintiff has had some success in obtaining psychological assistance from a doctor in Salmon Arm, through the publicly funded health system. Nevertheless, she requires assistance in addressing her psychological and psychiatric issues and in channeling her efforts into active rehabilitation.

[218] I am satisfied an award of \$25,000 for therapies is justified on the evidence.

Services

[219] Ms. Rutledge recommended the plaintiff receive some assistance with seasonal homemaking, yard work and snow removal. I have already provided for loss of housekeeping in the non-pecuniary award.

Ergonomic equipment

[220] The plaintiff seeks \$495 for ergonomic workplace equipment. The defendant asserts that an employer should provide this. I am satisfied an award for ergonomic equipment is merited. The plaintiff used a special cushion and a wrist support during her training course and I am satisfied she would use such items in her future employment. I award \$495.

Multidisciplinary pain clinic/pain management program

- [221] All the experts agreed that the plaintiff must manage her pain in a way other than by taking opioids and that a pain management program would be of assistance. Ms. Rutledge estimate the cost to range from \$6,800 to \$16,400. I award \$10,000 for a pain management program, recognizing that this may necessitate some in-patient treatment to manage issues from opioid withdrawal.
- [222] The evidence does not support the need for the plaintiff to undergo speech language assessment as a result of the collision. Similarly, a separate amount for a weight loss program is not allowed. In my view, this is part of the active rehabilitation aspect of the award.

Household assistance post-knee surgery

- [223] The plaintiff may require some household assistance as a result of future knee surgery. I am satisfied that \$1,000 is sufficient to provide assistance post-surgery.

Total

- [224] The total amount for cost of future care is \$236,495.

Loss of housekeeping capacity

- [225] I have included an award for loss of housekeeping capacity under the non-pecuniary head of damages.

Special damages

- [226] The plaintiff claims special damages in the amount of \$12,511.24, plus mileage in the amount of \$5,544.48.
- [227] The defendant's position concerning the amounts that the plaintiff says she expended is frankly puzzling. I infer that since the plaintiff did not have a present memory of everything she spent, the defendant disputes the expenditures. The plaintiff reviewed the receipts and said the monies were spent by her.
- [228] The defendant's position on the plaintiff's mileage claim is more comprehensible. The plaintiff moved to Tappen from Langley about a year prior to trial and the defendant says that her mileage claims should be attenuated to reflect that she chose to move and as a result had to drive farther to get treatment.
- [229] I am satisfied the plaintiff should recover her out-of-pocket expenses of \$12,511.25 and that her claim for mileage be reduced to \$1,000 to reflect travel from her former home in the Langley area to appointments.

The subsequent collision

- [230] The defendant argues that the plaintiff's damages should be reduced by 25% as a result of the October 2019 collision, because it caused her symptoms to worsen and increased her resort to opioids, in turn exposing her to a likelihood of a dangerous reliance on opioids.
- [231] In *Chevez-Babcock v. Peerens*, 2020 BCSC 863, Matthews J. summarized the law in this area:
- [153] In *Demidas v. Poinen*, 2012 BCSC 416 at para. 56, and *Blenkarn v. Mills*, 2016 BCSC 1976 at paras. 23-30, this court has addressed the approach to take where multiple collisions cause indivisible injuries and the plaintiff is at fault for one or more and not at fault for one or more. The goal is to apportion the damages so that the tortfeasor only pays for the portion of the harm he or she caused: *Blackwater* at para. 70; *Blenkarn* at para. 23. The approach is to assess the overall damages, then estimate the damage caused by the at-fault collision, and deduct it from the award. In practice, courts attempt to determine a percentage of the overall loss that is caused by the collision for which the plaintiff was at fault and then apply it to the dollar figure of overall damages. This is different from the apportionment of damages, which compares the degrees of departure from the standard of care as between several tortfeasors and the plaintiff if the plaintiff has been contributorily negligent.
- [232] I agree that the second collision caused a temporary worsening of the plaintiff's physical injuries and a temporary increase in the amount of opioids she used for pain, but a 25% reduction in her overall losses is grossly out of proportion given the serious physical and psychiatric injuries she was suffering from before the second collision. A reduction of 5% is fair and proportionate.

Summary of damages

Non-pecuniary: \$225,000

Past Wage Loss: \$150,000

Loss of earning capacity: \$650,000

Future Care: \$236,495

Special Damages: \$13,511.25

Total (Minus 5%): \$1,275,006.25 - minus 5% = \$1,211,255.94

Costs and other post-judgment issues

- [233] Unless there were settlement offers that the parties wish to draw to my attention, the plaintiff is entitled to her costs at Scale B. The parties agreed to defer submissions on management fees, tax gross up and s. 83 deductions until after judgment was rendered. The parties should contact Scheduling to arrange the necessary post-judgment hearings within 60 days of the release of these reasons.

"Duncan J."

Source & reproduction note

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

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/20/18/2020BCSC1889.htm>

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

Prepared on 27 October 2026 · Esheria