

CANADA / JUDGMENT

L'Heureux v. Deegan

2022 BCSC 382

COURT

Supreme Court of British Columbia

DECIDED

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2022 BCSC 382 L'Heureux v. Deegan

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

L'Heureux v. Deegan,

2022 BCSC 382

Date: 20220310

Docket: M178340

Registry: New Westminster

Between:

Kylee Dean L'Heureux

Plaintiff

And

Ross Deegan and

Unicorn Trucking Ltd.

Defendants

Before: The Honourable Mr. Justice Ball

Reasons for Judgment

Counsel for the Plaintiff:

J. Guglielmucci

Counsel for the Defendants:

C.J. Bolan

Place and Dates of Trial:

New Westminster, B.C.

June 28-30, 2021

July 2 & 5-9, 2021

Place and Date of Judgment:

New Westminster, B.C.

March 10, 2022

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Introduction

- [1] These are reasons for judgment after a nine-day trial, which involved consideration of the plaintiff's claim for damages caused by a motor vehicle accident which occurred on Friday, June 6, 2014, at the intersection of Dewdney Trunk Road and 256th Street, Maple Ridge, B.C. ("Accident").

Background

The Accident

- [2] On June 6, 2014, the plaintiff was driving a Honda Civic motor vehicle belonging to her mother ("L'Heureux vehicle"). She testified that she had driven a friend to a high school graduation ceremony that involved a younger person. She did not attend the ceremony.
- [3] Ms. L'Heureux was driving westbound on Dewdney Trunk Road. She testified she was travelling approximately 60 km/h as she approached 256th Street and she noted the light at the 256th Street intersection was green. She was intending to proceed straight through the light. She testified that when her vehicle was very near to the entry of the intersection heading westbound, a dump truck towing a trailer, driven by the defendant, began a left-hand turn to head north on 256th Street. She testified that she had both hands on the steering wheel, applied the brakes with utmost force, her body stiffened while braking and she braced until impact with the first tires of the trailer. There was a significant collision and the tires of the trailer, pulled by the truck, compressed the hood of the L'Heureux vehicle.
- [4] The front bumper of the plaintiff's vehicle was broken off during the collision, and was reportedly in the backseat of the vehicle when it was in the wrecker's yard. That front bumper was never seen, nor analysed by any of the expert witnesses called by either party.

Witnesses Called by the Plaintiff

Plaintiff's Testimony

- [5] The plaintiff was born and raised in Maple Ridge. She is the eldest of seven siblings in a close-knit family. She attended elementary school in Maple Ridge and in 2012, graduated from Samuel Robertson Secondary School. She was active, playing softball from the age of five, together with other sports including soccer and bowling. Fastpitch softball has been her favourite activity. She became a very skilled player, continuing this sport through high school up to the date of the Accident.
- [6] At the age of 16, she began working as a cashier at McDonald's on a part-time basis, 15 to 25 hours per week, to raise money to pay for her first car. At age 18, she began working part-time at Thrifty Foods in the seafood department as a grocery clerk, and after graduating high school she began working full-time hours. She worked approximately two years for Thrifty Foods until she was 19 years old. She had not then decided on a career path.
- [7] In 2013, when she reached the age of 19, she began working as a server at The Well Restaurant in the Chances Casino in Maple Ridge. She worked 25 to 40 hours a week on shifts that varied from five to 12 hours. She earned \$10.25 per hour, together with significant gratuities. Her duties included stocking bars with alcohol in the morning hours, serving coffee and tea to customers, and arranging cutlery and cleaning in the evening hours. She worked three shifts each week, as well as on the weekend, without any physical difficulties.
- [8] The plaintiff continued to live with her parents and two younger siblings. Due to her seniority as a sibling, she took on domestic duties such as cooking dinners a couple of times per week, helping with laundry and washing dishes.
- [9] She has been in a long-term relationship since early high school with her now fiancé, Kahlil Andre, and they are presently planning to be married.
- [10] Prior to the Accident, the plaintiff had no physical limitations or pre-existing musculoskeletal complaints of any kind. She was still playing fast-pitch softball in 2014, playing first base and right field with success. In 2014, her former team was unable to recruit enough players for a team, but the team continued to play in subsequent years.
- [11] She regularly took part in team sports and enjoyed hiking with a circle of friends. She experienced some anxiety when anticipating tests in school or when she had too many work commitments. She had never sought mental health support, nor had she seen any mental health practitioner. She never took any prescription medication.
- [12] As outlined above, on June 6, 2014, the plaintiff dropped off her friend, Angela Wagner, at a graduation ceremony for one of Ms. Wagner's younger friends. Ms. L'Heureux did not attend the ceremony. The Accident occurred in the late afternoon, on the return trip.

- [13] Ms. L'Heureux testified that she was driving her mother's car westbound on Dewdney Trunk Road, near the intersection of 256th Street. She was wearing a properly fastened seatbelt. Dewdney Trunk Road has two lanes, one westbound and one eastbound. The intersection has a standard three light traffic control signal. There is a school nearby.
- [14] She was heading straight through a green light towards Maple Ridge at approximately 60 km/h, the posted speed limit on Dewdney Trunk Road to the east of 256th Street. She reported that she was looking straight west along Dewdney Trunk Road.
- [15] When she was two or three car lengths east of 256th Street, Ms. L'Heureux saw the dump truck stationary on the other side of the intersection, with a couple of vehicles in front of the dump truck in the eastbound lane. When she was at the eastern boundary of the intersection, immediately before the white line, the dump truck began turning left across her path. She slammed on her brakes and reported saying "What is this guy doing?" and veered unsuccessfully to the south to try to avoid a collision. Unfortunately, the Accident occurred. She described the impact as being very scary and very loud and that she had attempted to veer to the left to avoid the collision, but was unable to determine the distance that her vehicle moved to the left.
- [16] Immediately following the Accident, the plaintiff suffered a panic attack. With the assistance of a bystander, whose name she did not acquire, she was able to get out of her vehicle. She waited for emergency personnel near his vehicle. She did not speak to the defendant driver and he did not offer her any assistance, nor did he exchange licence or insurance information with the plaintiff. The plaintiff was able to call her mother, Darcy Kellahan, by cell phone. At the scene of the Accident, the plaintiff spoke briefly to a witness named "Len", who I conclude was Len Yalowica, a witness whose evidence is referred to later in these reasons.
- [17] The plaintiff testified that an ambulance and police vehicles arrived. She was moved into the ambulance as she was having a panic attack. Her mother arrived shortly thereafter and she joined the plaintiff in the ambulance for the ride to hospital. At no time since the Accident occurred has any police officer requested an interview of the plaintiff and the plaintiff has never refused to provide a statement to the police.
- [18] Once she began to relax in the ambulance en route to the hospital, she experienced pain in her neck, shoulders, upper back and a severe headache. After a period of examination in Maple Ridge Hospital, she was discharged in the company of her mother and spent the rest of the evening at her home in bed. Her pain symptoms continued and she took Advil and Tylenol for pain.
- [19] The day after the Accident, the plaintiff testified that her neck, shoulders and upper back continued to be painful and she experienced a bad headache. She had a swelling lump at the top of her spine which persisted for several days and then improved somewhat. That day was also the occasion of her brother's graduation from high school held at a nearby hotel where the plaintiff's family had rented a room. The plaintiff joined the family for about 20

minutes for the taking of commemorative photos, and then returned to the bed in the hotel room for the rest of that day.

- [20] Pain continued in her neck and right shoulder for some time. The plaintiff's upper back pain was at its worst for a number of weeks following the Accident.
- [21] As noted above, the Accident occurred on a Friday, and on the following Monday, June 9, 2014, the plaintiff first attended the office of her family doctor, Dr. Daniel Wong. That day, Dr. Wong examined the plaintiff and discussed the symptoms of pain in the plaintiff's neck, upper back, shoulders and headaches, as well as her anxiety. Dr. Wong prescribed medication and physiotherapy treatments which the plaintiff responded to positively.
- [22] Medical legal reports by Dr. Wong were admitted into evidence as Exhibit 4, tabs 1 and 2. Ms. L'Heureux continued to see Dr. Wong regularly thereafter until his retirement in 2019. After a brief hiatus in the medical office, his practice was taken over by Dr. Henstock, according to the testimony of Ms. L'Heureux.
- [23] The plaintiff testified that during her headaches, which began right after the Accident, pain would begin in the lower part of her head and then would migrate to the top of her head. She has continued to experience these headaches almost daily from the date of the Accident to the time of trial. The duration of the headaches experienced by the plaintiff varied from a couple of hours to a couple of days. The headache pain was reduced by taking the prescribed medication, as well as, at times, Tylenol and Advil,
- [24] The plaintiff described her upper back pain following the Accident as "a super achy pain" below the shoulders, which the plaintiff testified she experienced every day. The medication prescribed by Dr. Wong and beginning physiotherapy treatments provided some pain relief to the upper back, as long as the medication was in her system.
- [25] The plaintiff's neck pain was similar "super achy pain" and it hurts to touch both sides of her neck. This neck pain also occurred daily for a few months following the Accident.
- [26] The plaintiff experienced pain in both shoulders near the top of her shoulders and shoulder blades, which were sore to the touch; so sensitive that the plaintiff was unable to wear a proper brassiere for a very long time due to the pressure of brassiere straps. Again, this pain occurred every day.
- [27] The plaintiff described two types of anxiety which she experienced following the Accident; general anxiety and driving anxiety. With respect to the period following the Accident, the plaintiff testified that upon entering a car she had a sheer feeling of panic, where she was scanning her surrounding and other vehicles, reliving the Accident in her thoughts. She did not drive at all for months following the Accident, and was anxious every time she got into or was near a car. She also described general feelings of anxiety, but took no medications to cope.

- [28] Dr. Wong recommended that the plaintiff recuperate with a month off work and then gradually re-enter her job. As a result, the plaintiff was absent for about 20 working days at Chances Maple Ridge, for which she was not paid. That was followed by a gradual return program, which began with half-day shifts on July 15, 2014. The plaintiff resumed working full shifts at the casino at the beginning of August 2014.
- [29] The plaintiff could not perform household chores for a couple of months, could not lift dishes out of the dishwasher and thereafter reorganized her household responsibilities with the help of her siblings.
- [30] In the month following the Accident, the plaintiff began prescribed physiotherapy treatments at Westcoast Kinesiology for symptoms of neck pain, upper shoulder pain and upper back pain, as ICBC allowed for twelve treatments. The physiotherapist provided specific exercises and stretches at home which provided some relief. The continued use of prescribed pain medication caused the plaintiff to experience a foggy feeling; as a result, she restricted pain medication to Tylenol and Advil.
- [31] In 2015, the post-Accident symptoms of headaches, pain in her shoulders, neck and upper back improved but did not resolve. All symptoms except general anxiety occurred daily.
- [32] The plaintiff continued working at the casino in 2015, but was unable to perform at the same level as before the Accident; she avoided carrying heavy trays loaded with food or bus trays with used dishes. She was also unable to stock bars and load beer kegs.
- [33] The plaintiff decided to begin working a nanny position as the serving job had become too physically demanding. She had previous experience helping in her mother's daycare and felt she had some understanding of the nanny job. She took a Children and Adult Cardiopulmonary Resuscitation ("CPR") course. In September of 2015, the plaintiff began working for a family with two children, ages eight and ten at the time, on a split shift from 8:00 am to 10:00 am and 2:00 pm to 5:00 pm, five days each week. She cooked meals for the children and drove them to and from school. The amount of driving caused pain in her back, including upper back pain which had not been present when the plaintiff drove before the Accident, which required the plaintiff to seek further medical assistance. Dr. Wong prescribed a stronger form of Ibuprofen and massage therapy beginning in 2016 to assist the plaintiff in that regard.
- [34] The plaintiff also assisted on a volunteer basis at her mother's in-home daycare, but found it more demanding due to the need to pick up younger children. She did not play sports and modified housekeeping activities with the help of her siblings, reducing activities, such as vacuuming, to once a week.

- [35] In 2016, the plaintiff was still taking Ibuprofen and Advil. An attempt to return to softball resulted in a period of disability and soreness. The plaintiff's intimacy with Kahlil Andre was less often and less vigorous than it was before the Accident. She continued to perform the exercises provided earlier by the physiotherapist, but the injuries from the Accident had not resolved. She was learning to cope with the pain; however, headaches continued unabated.
- [36] By 2017, the plaintiff had moved into a basement suite with her fiancé in his parent's home. She and her fiancé shared household chores which she was able to perform with some soreness.
- [37] In 2017, the plaintiff continued to experience pain; she attempted to return to softball, but left her first game in pain and tears. The family doctor recommended a course of kinesiology at Westcoast Kinesiology which began in Spring of 2017, for treatment twice per week. Her neck, shoulders and upper back were the focus of stretching treatment. Dr. Wong also recommended chiropractic treatment twice a week directed at alleviating headaches. The chiropractic treatment provided temporary relief to the plaintiff for headaches which unfortunately did not last for long periods of time. She continued to feel achy and stiff following any softball game; a pain response she had not experience after softball games played before the Accident. The plaintiff continued to take Advil and Ibuprofen and soak in a hot bath or use ice packs to relieve stiffness.
- [38] In September of 2017, the plaintiff changed her nanny position to a different family, the Hemeon family. The new position required the plaintiff to care for two young children, one and two years old, and lifting or otherwise assisting these children caused a shock-pain reaction in her neck, shoulders and upper back. This job did not require as much driving as the prior nanny job.
- [39] In 2018, the plaintiff's neck, shoulders and upper back continued to be painful on a daily basis; although there was improvement in the intensity of the pain and coping mechanisms used by the plaintiff in response to pain. Chiropractic treatments continued to provide temporary relief with headaches, and the relief lasted for more extended periods.
- [40] In 2018, the plaintiff was continuing with the same nanny position, but had the advantage of remaining in one home where rest was available. She continued to struggle with playing fast-pitch softball, but found that the experience of playing a game which she had grown up with and loved to play, to be positive for her mental wellbeing, despite ongoing pain symptoms. She continued to need to take Tylenol and Advil to deal with ongoing pain symptoms while playing soft ball.
- [41] In 2019, the plaintiff's headache pain was improved with regular chiropractic treatment but the other injuries and related pain were persistent without change. The most painful area was in the plaintiff's neck and shoulders, which remained tender to the touch and ached daily. She continued working as a nanny, but took breaks providing childcare when needed.

- [42] From 2017 to 2019, the improvement of pain symptoms was due to the intervention of chiropractic treatment which provided temporary relief, but of increasing duration. Otherwise, the balance of the injuries persisted to be painful on a daily basis requiring modification of working activities to ameliorate pain and the fatigue which ended a typical day working as a nanny.
- [43] In July 2019, as Ms. Hemeon was pregnant and was not attending her office, therefore, the plaintiff's assistance as a nanny was not required. The plaintiff decided to take an education program leading to a certificate as an administrative assistant. The education program began in September of 2019, for three months, with classes from 9:30 am to 3:30 pm, five days per week. The plaintiff was hoping this might lead to a career path. Unfortunately, the program's requirement of sitting at a desk, working on a computer continuously, for the length of each school day, aggravated the plaintiff's neck, shoulders and back pain symptoms.
- [44] After beginning the program, the plaintiff found it necessary to increase her chiropractic treatments to twice per week, consistently. In 2019, she also switched from fast-pitch to slow-pitch softball, which reduced the intensity of play, no longer included practices and the tournament play was limited to two tournaments per season. The plaintiff still took Tylenol and Advil after every game as she had since 2017, and stretching exercises shown by the physiotherapist several years earlier continued to be helpful.
- [45] In 2020, soreness in the plaintiff's neck, shoulders and back persisted on a daily basis. Headaches were reduced in number to approximately twice each week, with the assistance of the chiropractor.
- [46] As a result of successfully passing the education program and receiving a certificate in administrative assistance, the plaintiff obtained a new job in January, 2020, with the Port Coquitlam Community Fire Protection office as a front desk receptionist working Monday to Friday from 8:30 am to 5:30 pm; earning \$17.00 per hour. This job allowed more movement and stretching during the day while dealing by telephone and in-person with customer arrangements for fire inspections and other administrative tasks, including sending emails and faxes. However, the amount of desk time at this job continued to increase neck, shoulder and upper back pain experienced by the plaintiff. On March 17, 2020, the plaintiff lost her job at the Fire Protection office due to changes in response to the Covid-19 pandemic.

[47] Evidence of the income of earned by the plaintiff by year was as follows: (Exhibit A)

Tax Year

Income and Sources

2012

\$3,544 (McDonalds and Thrifty Foods)

2013

\$9,931 (Thrifty Foods and The Well at the Casino)

2014

\$11,397 (The Well at the Casino)

2015

\$15,429 (1st Nanny Position and the Well at the Casino and Vacation Pay)

2016

\$17,251 (1st Nanny position)

2017

\$20,878 (1st and 2nd Nanny position)

2018

Missing

2019

\$18,027 (2nd Nanny position)

2020

\$22,869 (Port Coquitlam Community Fire Prevention for approximately three months, Employment Insurance and maternity leave)

[48] On March 18, 2020, the day after the job in Port Coquitlam ended, the plaintiff was told she was pregnant. In November 2020, the plaintiff's first child was born.

[49] The plaintiff did not work during her pregnancy and her symptoms were less aggravated because of decreased activity. She had shoulder pain while breast feeding her baby and had to use a special pillow to support his weight. She has been prescribed Sertraline to cope with post-partum depression and anxiety. She did not take part in softball as a recreational activity in 2020. The plaintiff was only able to receive a couple of treatments from her chiropractor near the end of 2020, when COVID-19 restrictions were lessened, allowing in-person treatments.

[50] Evidence of special damages was led and agreed to by the parties.

[51] The plaintiff also described ongoing difficulties with pain as she has cared for her baby, who at the time of trial weighed 17 pounds, making him difficult for her to hold. The baby was described as a "clingy" baby who was upset by not being held virtually continuously. The plaintiff reported that her injuries and related pain in her neck, shoulders and upper back continued and made long periods of breast feeding and holding the baby very painful.

- [52] The plaintiff hopes to become certified to open an in-home daycare when her child is two or three years old. Certification requires completion of a 20-hour online program, a certification which she has previously held. The plaintiff believes that she could manage a five-child in-home daycare. She is concerned about lifting children in her care, but appreciates that ongoing symptoms will hinder her activity in the future.
- [53] During cross-examination, the plaintiff confirmed that following the Accident her neck at the top her spine at the shoulder level was swollen. The swelling was visible and shown by the plaintiff to Dr. Wong on the first visit to his office. The swelling was reduced within a couple of weeks. Pain was present in both shoulders, with the left shoulder less painful than the right. Back pain onset within the first week after the Accident and continued at "its worst" for several weeks after the Accident. The plaintiff confirmed that the pain caused by the injuries from the Accident was the most extreme pain she has experienced in her life.
- [54] The plaintiff was questioned about the Oswestry Disability Index for Low Back Pain, which she completed in handwriting. The plaintiff was asked to be consistent with the prior index for low back pain, but was unable to remember what a "ten" on the pain scale for low back pain was, as she had not experienced such pain before the Accident.
- [55] Then counsel attempted to have the plaintiff create a pain scale based on heat or fire, where you recoil immediately because of intense pain. She concluded that a "five" was the intensity of all of the injuries she had experienced from the Accident as a group.
- [56] Within the first month, the plaintiff reported that it was too painful to get out of bed for most of the month, and she was in bed or resting a lot. When the plaintiff returned to work, her injuries were aggravated to a three or four on the plaintiff's pain scale with pain of longer duration. There was daily pain through 2014 and she learned to better cope with pain. There was also an increase in the pain intensity level to a "five" on the pain scale.
- [57] The plaintiff agreed that she began physiotherapy treatments at Westcoast Kinesiology where she learned about stretching areas of injury.
- [58] At the time the plaintiff left work at the Well, she estimated that her pain level was a "three". She was not working before she took her first nanny position and did not have flare-ups of pain while she was not working.
- [59] The plaintiff testified that in the latter half of 2015, there was no improvement in pain; be it occurrence, intensity or duration. A primary aggravating factor for the pain and stiffness was an increase in driving in her nanny position, which included driving to the home of the children, driving the children to and from school, and taking them to and from after-school activities; including ice hockey, swimming and activities at the leisure centre.
- [60] The plaintiff confirmed that in 2016, she had massage treatments which caused her to have flu-like symptoms with vomiting. The massage therapist recommended that she drink more water to alleviate these symptoms.

- [61] She confirmed her symptoms and pain intensity level from headaches improved with chiropractic treatment beginning in October 2017. Relief from chiropractic treatment was immediate but temporary.
- [62] The plaintiff confirmed that pain has continued in one or more of the four areas of injury every day since the Accident. Headaches have continued throughout since the Accident. The plaintiff testified that her neck, shoulders and upper back are still painful every day in various combinations.
- [63] The level of pain intensity experienced each day was difficult for the plaintiff to calculate, but aggravation continued during the second nanny position with the Hemeon family, and the administrative assistance school program. Pain also increased in her neck, back and shoulders during pregnancy as the plaintiff's size increased and she was unable to stand straight up as her pregnancy proceeded towards birth.
- [64] The plaintiff agreed that she intended to open a daycare when her child was two to three years old, but that career path had not yet begun.
- [65] When cross-examined about the Accident, the plaintiff agreed she had driven past Webster's Corners about five times as a driver or passenger in a motor vehicle. The plaintiff also agreed that, unless otherwise posted, the speed limit on Dewdney Trunk Road was 60 km/h and that in a school zone the posted limit is 30 km/h. The plaintiff agreed she did not see a yellow school zone sign at the intersection of Dewdney Trunk Road and 256th Street. She also agreed that she had a clear line of sight to that intersection, and recalled that the light she was facing was green as the plaintiff drove through that intersection. She was not able to calculate the distance of the two cars stopped at the light ahead of the defendant's truck and trailer.
- [66] The plaintiff testified that when she saw the truck begin its left turn, the front bumper of her vehicle was within a few yards of the white stop line on the east side of the intersection of Dewdney Trunk Road and 256th Street. The plaintiff agreed that when she saw the defendant's truck turning, she tried to veer to the left or south, but was unable to tell the court how far to the left she was able to move her vehicle. At the same time, the plaintiff told the court she braked hard, but was unable to specify the amount by which her vehicle's speed was reduced.
- [67] She recollected that her vehicle made first contact with the front tires of the trailer shown in photo 2; however, by the end of her cross-examination, the plaintiff indicated that she could no longer remember where her vehicle made contact with the front set of tires on the trailer. The plaintiff did not accept at any time during her evidence that her vehicle made contact with any other part of the trailer, except the front wheels of the trailer. Ms. L'Heureux testified that she observed that the front of her hood was "smushed in" and the front bumper was torn off.

- [68] She recalled seeing the wheels of the front bogie on the trailer going over the hood of her car and depressing the front of her car in such a way that the car rebounded to the east. This evidence is clearly inconsistent with any suggestion that the plaintiff's vehicle contacted the rear of the trailer or any part thereof. The evidence of Mr. Yalowica noted below, which is accepted by this court, is also consistent with a collision between the front of the plaintiff's vehicle and the front bogie of the trailer. She identified the post-collision photos of her mother's Honda motor vehicle, which was an obvious total loss.
- [69] The plaintiff was asked if the rear wheels of the trailer ran over the hood of her car, in relation to a telephone statement she had given to ICBC. She stated that she was not aware what an extension trailer was, which was referred to in the statement prepared by an ICBC employee. The plaintiff had never seen the statement prepared by ICBC and had not used or knew the meaning of the phrase "extension trailer" used in the statement, and the statement was incorrect in relation to that usage.
- [70] Then, the defendant's counsel presented photographs to the witness, taken from Exhibit 3, tab 4, which at best were "something like" the trailer in the Accident, but did not put to the witness photos of the actual trailer in the Accident. The plaintiff's counsel had objected to the use of these photographs during the examination for discovery. This device of using photographs that were not the actual trailer involved in the accident did not provide a ready basis for the plaintiff to identify the trailer when asked where exactly her vehicle contacted the trailer. She expressed her belief that it was the front set of wheels of the trailer that her vehicle contacted. She did not know if her vehicle contacted the front two wheels or the second set of two wheels in the first set of four wheels.
- [71] Some of the questions put to her from the examination for discovery were very difficult to follow:

Question 361: ..Do you know if the point of impact was between the front of your vehicle and the truck that was ahead of the trailer or was it with the trailer?

Answer: It was with the trailer.

Question 362: Okay. And are you able at all to say, either in relation to the picture, or just from your memory, or whatever visual you have, yes, it was more like at the front part of the trailer before the box or towards the end; do you know?

Answer: I don't remember.

- [72] Apart from the obvious grammatical error in question 362, no questions had been put to the plaintiff about the location of the collision in relation to the "box" on the trailer, and that "box" in relation to the wheels on the trailer. The questions put to the plaintiff during her cross-examination in the trial made no reference to the box of the trailer, but all were related to the tires and axels of the trailer.

- [73] During cross-examination, the plaintiff could not remember if her vehicle skidded prior to the Accident. Her evidence on examination for discovery was that her vehicle skidded before the Accident and she agreed she did testify that her vehicle skidded before the Accident.

Leonard Yalowica

- [74] Leonard Yalowica was called as a witness by the plaintiff. He is a 76-year-old, retired power engineer and a resident of Mission, B.C. He has lived in that area for 38 years.
- [75] Mr. Yalowica was an independent witness to the Accident. He was stopped at a red light on Dewdney Trunk Road, west of 256th Street. He testified that the dump truck was stopped at the front of a line of vehicles and was positioned approximately 6 to 8 feet to the right of the painted midline of Dewdney Trunk Road. It was followed by a delivery van, and Mr. Yalowica was stopped behind the delivery van. The van was approximately 5 feet to the right of the centre line, and Mr. Yalowica testified that he was positioned just right of the centre line, giving him an unobstructed view of the traffic lights and westbound traffic.
- [76] Mr. Yalowica's evidence was that he was stopped at the red light for approximately 10 to 15 seconds before that light turned to green. He testified that when the light turned green the dump truck did not move forward immediately. Mr. Yalowica could see the plaintiff's vehicle travelling westbound towards the intersection. Mr. Yalowica testified that the plaintiff's vehicle was the only vehicle in the westbound lane and he considered that vehicle was travelling at a "normal speed". Mr. Yalowica testified that he thought that the dump truck had not moved to allow the plaintiff to proceed. He was surprised when the dump truck, driven by Mr. Deegan, turned left in front of the plaintiff.
- [77] He was repeatedly asked both in chief and in cross-examination how close the plaintiff was to the intersection and he repeated "she was way too close for that truck to go" and that "the truck cut her off". He testified that he knew instinctively there was going to be an accident. Mr. Yalowica testified that he felt the truck attempted to turn the corner quickly, but because the truck was pulling a trailer "he should not have went". Mr. Yalowica's evidence was that the plaintiff's vehicle hit the trailer's front tires and went "tiddlywinks" backwards. He testified that the front tires of the trailer had run over the hood of the plaintiff's vehicle. Following the Accident, Mr. Yalowica saw another man help the plaintiff out of her vehicle and take her to the side of the road. He described the plaintiff as shaking and appearing to be "in shock". He repeated, when questioned, that the dump truck "should have never went; not in one million years".
- [78] In cross-examination, Mr. Yalowica testified that the plaintiff's vehicle was 50 feet or less from the white signal stop line on the east side of the intersection when the truck began to turn left. He agreed that he had not measured the distance, but he did not resile from that evidence, despite repeated questions, which produced virtually the same answer. He stated that he saw the truck too close to the plaintiff's vehicle when truck began the left turn. Mr.

Yalowica was surprised that the plaintiff's vehicle did not collide with the body of the truck itself, but saw her vehicle skidding and inferred that Ms. L'Heureux was braking, when the collision occurred between the plaintiff's vehicle and the front of the trailer. From the physical location where Mr. Yalowica was located, he was able to see the collision through the space between the truck and the trailer, a space created by the long pintle hitch which attached the trailer to the dump truck.

- [79] Given the consistency of Mr. Yalowica's evidence, and his unique location to observe the Accident, which provided a clear view of the collision, I accept his evidence as both credible and reliable.
- [80] Mr. Yalowica testified that after the Accident, Mr. Deegan asked him if he saw the plaintiff speeding. Mr. Yalowica did not agree that the plaintiff was speeding. When Mr. Deegan gave evidence, he reported that he spoke to a gentleman at the scene who was argumentative and Mr. Deegan simply walked away from the man. Mr. Deegan was never asked by his own counsel if he had spoken those words or any particular words to Mr. Yalowica. I accept that Mr. Deegan asked Mr. Yalowica if he had seen the plaintiff speeding. Regardless of Mr. Yalowica's answer to that question, if the defendant believed the plaintiff was speeding, he should never have left his location of safety at the intersection until the plaintiff's vehicle had moved past him. Clearly, to attempt to turn left across the path of a vehicle Mr. Deegan observed speeding was unsafe.

Darcy Kellahan

- [81] Darcy Kellahan is the mother of the plaintiff and now resides in Penticton, B.C., where she operates a daycare. She noted that her daughter had been a keen athlete and had been involved in softball, soccer and bowling during her youth, but that fast-pitch softball was her most significant sport. The softball season ran from March to July each year and the plaintiff played between 30 and 40 games during the season. Ms. Kellahan spoke of her daughter as a good student, although not at the top of her class. She was grateful her daughter had assumed household chores, including cleaning, vacuuming and cooking at least two dinners a week, which was a great help to her mother who, at material times, was a single mom.
- [82] Ms. Kellahan was called to the Accident scene shortly after the Accident occurred. When she arrived, she found her daughter was hysterical and in the throes of a panic attack.
- [83] Mr. Yalowica approached her and gave her his phone number.
- [84] When the ambulance arrived, Ms. Kellahan rode in the ambulance with her daughter. She noted her daughter calmed significantly on the ride to Ridge Meadows Hospital where she reported pain in her neck and back. Later that evening, the plaintiff was released to her mother and spent that night and the next day in bed with a sore back and neck.

- [85] The following day, the plaintiff attended her brother's graduation ceremony. She went to the ceremony for 20 minutes, had pictures taken and then went to bed. Her mother reported that the plaintiff said her head was pounding and felt like it had 500 pounds of weight on it. Her mother noted that when her daughter had a headache, she would squint because of pain.
- [86] Following the Accident, Ms. Kellahan took her daughter to various medical appointments and to physiotherapy, chiropractic and massage appointments. Her daughter was very concerned about driving. Her mother described her looking nonstop in mirrors as a passenger, looking around her. After approximately a month, the plaintiff began driving again and took lessons at a driving school.
- [87] Ms. Kellahan testified that the plaintiff attempted to play softball the next spring, but could not do so. When she did return to play some softball, she moved to slow-pitch, a slower game, where pitches are thrown with a visible arc so that batting is a more relaxed activity. When she attempted to play fast-pitch softball, she would leave the game crying because she could not swing a bat without wincing. When she did play and reached a base after she hit, she would then leave the field to allow someone else to run for her.
- [88] Ms. Kellahan testified that her daughter attempted to return to work at the casino, but found carrying and lifting dish trays too hard on her back and she eventually obtained a job as a nanny, which allowed her more flexibility. As the children were older in her first nanny position, she was not required to pick them up. In her second position, she had to pick the children up and she found that more difficult and painful.
- [89] Prior to the Accident, Ms. Kellahan had run a daycare with young children and the plaintiff had assisted her. Following the Accident, her assistance was diminished as she could not pick up children to change diapers or to comfort them. She was just "too sore". Ms. Kellahan gave evidence that her daughter had completed the responsible adults training for daycare and a first-aid CPR course.
- [90] Ms. Kellahan testified that her daughter gets significant headaches and is sore at the top of her neck and shoulders. At times, the plaintiff's muscles appear to bulge out and she squints. In cross-examination Ms. Kellahan noted that her daughter had anxiety prior to school tests, but that once the test was finished, the anxiety would disappear. After the Accident, her daughter continued to be in a state of anxiety regularly about matters she cannot control and about driving.

Kahlil Andre

- [91] The next witness called by the plaintiff was Kahlil Andre, the plaintiff's fiancé. He has worked in the scaffolding business for approximately nine years. Mr. Andre and the plaintiff met in high school. They enjoyed activities together, such as walking with the dogs, hiking, going to the beach and watching movies. Mr. Andre reported that the plaintiff was able to outrun him prior to the Accident and he was not aware of her having any physical injuries.

After the Accident, Mr. Andre testified that the plaintiff could no longer hold the leash when hiking with the dogs, and their activities became less active.

- [92] Mr. Andre indicated that he received a text from Ms. Kellahan informing him of the Accident while he was driving with friends. He re-routed and arrived at the hospital before the ambulance. He was aware the plaintiff had been admitted to hospital, was tested in various ways by doctors and ultimately discharged crying and upset. He saw her the next day and she was "shaken up, sad, very sore and timid". He reported that she did not want to be approached by other people, and was just laying in bed. He became her "fetch person" and frequently applied RUB A535 cream to her back and neck.
- [93] Mr. Andre testified that since the Accident, their intimate relationship was severely affected and "our adventurous side was kind of dead". He reported that she has continuously been sore as a result of the Accident, and that presented challenges during her subsequent pregnancy. She continues to have pain when lifting their child. He testified that since the Accident, he has taken over many of the household chores, especially the physical activities involving reaching and putting things away. He noted that all it took was one little strain and the plaintiff would be on the couch. They hope to have another child in the future.
- [94] Mr. Andre described the plaintiff as an overly cautious and anxious driver following the Accident.

Angela Wagner

- [95] Angela Wagner, who works as a vocational counsellor, testified as a long-term friend of the plaintiff. The two women met in Grade 8 at Garibaldi Secondary School, and then moved together to Samuel Robertson Secondary School and graduated in 2012. Ms. Wagner described her friend in high school as personable, friendly, and outgoing "with a large group of friends". They played softball together from Grades 9 to 12. She noted that Ms. L'Heureux was a strong hitter who played first base and right field, and was popular with her teammates.
- [96] The two women remained in close contact after graduation. Ms. Wagner testified that before the Accident, Ms. L'Heureux was physically active with softball, hiking, long walks, going to the beach and was in very good physical condition. They saw one another two or three times a week. They frequently socialized and attended movies together.
- [97] Ms. Wagner was a frequent passenger in a Malibu car driven by the plaintiff to school or work at McDonalds. Ms. Wagner described the plaintiff as a relaxed, comfortable and capable driver.
- [98] On the day of the Accident, Ms. L'Heureux volunteered to drive Ms. Wagner to a graduation ceremony for her boyfriend's sister. After the ceremony, a friend told her that she had seen a vehicle like the plaintiff's vehicle, which had been involved in an accident. Ms. Wagner contacted the plaintiff's mother and her mother confirmed that it was Ms. L'Heureux. Ms.

Wagner first saw the plaintiff two to four weeks later at the plaintiff's home, where she appeared in an injured state, particularly touching her left trapezius. Ms. Wagner continued contact with the plaintiff, but only at her home. The plaintiff was anxious about driving and in a lot of pain. Thereafter, the two women continued contact, usually every second week, until Covid-19 restrictions were introduced, which reduced their contact.

- [99] After the plaintiff began to drive again, Ms. Wagner testified that she was constantly scanning the traffic and seemed very anxious while driving.
- [100] On occasion, following the Accident, after Ms. Wagner obtained a driver's licence, Ms. L'Heureux was a passenger in Ms. Wagner's vehicle. Ms. Wagner noticed her anxiously hanging onto the passenger door handle and scanning traffic in an anxious manner. The women have remained in contact, but the plaintiff has often or usually remained in her home. Ms. Wagner has observed the plaintiff having difficulty carrying or handling her baby and resorting to the frequent use of a stroller or a "Jolly Jumper" to hold her baby.

Shanna Hemeon

- [101] Shanna Hemeon is Vice-President of Commercial Insurance at Schill Insurance Ltd. Ms. Hemeon hired Ms. L'Heureux in September 2017, as a nanny for her two children who, at that time of hiring, were one and three. The plaintiff's regular working hours were from 7:30 am to 5:30 pm from Monday to Friday, with additional hours required to fit with the irregular schedules of Mr. and Ms. Hemeon. Ms. L'Heureux continued as the nanny for the Hemeon family for approximately two years, until Ms. Hemeon became pregnant with her third child and no longer required a nanny.
- [102] Ms. Hemeon described the relationship between her children and Ms. L'Heureux as "amazing" and that she was honest, reliable and trustworthy in her dealings with the Hemeon family. Ms. L'Heureux formed a very strong bond with the children, such that she would remain at the Hemeon home after her working hours ended to play with the children. Ms. Hemeon testified that the plaintiff's duties included daily care of the children, preparing the children for school, meal preparation, driving the children to and from activities and some light housekeeping tasks.
- [103] Ms. L'Heureux told Ms. Hemeon that she had been involved in a motor vehicle accident in 2014. Ms. Hemeon testified there were times when the plaintiff was unable to pick up the children or complete household chores due to pain, but Ms. Hemeon overlooked those problems because she was otherwise happy with how the plaintiff cared for the children. Ms. Hemeon also testified that there were times when she would see the plaintiff massaging her neck or grimacing in pain, and also times when she had to tell the children to take it easy on the plaintiff due to her pain. Ms. Hemeon expressed appreciation that Ms. L'Heureux would schedule chiropractic appointments and other medical treatments so that she did not interfere with her duties as a nanny.

Expert Medical Witnesses

- [104] The plaintiff called expert testimony from three medical doctors: (a) Dr. Daniel Wong, a general practitioner, who prepared two reports dated December 16, 2016 and December 18, 2018; (b) Dr. Cecil Hershler, a physiatrist who prepared a medical legal report dated September 27, 2018; and (c) Dr. Zeeshan Waseem, a physiatrist who prepared a report dated April 1, 2021.
- [105] All three of these doctors testified in this trial. The defendants did not call any expert medical evidence.
- [106] The medical legal reports of Dr. Wong, Dr. Hershler and Dr. Waseem were filed collectively as Exhibit 4, with Dr. Wong's reports filed as Tabs 1 and 2, Dr. Hershler's report at Tab 3 and Dr. Waseem's report at Tab 5 of that Exhibit.

Dr. Daniel Wong

- [107] Dr. Wong was the plaintiff's family physician. He saw the plaintiff three days after the Accident. Dr. Wong described what the plaintiff told him on June 9, 2014 about the Accident. She reported a panic attack had occurred as she was taken to the emergency ward at Ridge Meadows Hospital.
- [108] She also reported that her neck had become swollen on June 8, 2016 and the swelling continued to be painful. Dr. Wong observed on palpation examination of the plaintiff that her neck was quite rigid and there were obvious muscle spasms in the plaintiff's neck. He prescribed pain relief and anti-inflammatory medication.
- [109] In Dr. Wong's follow-up examination on June 19, 2014, the plaintiff reported feeling better, but still experiencing pain in her upper back and neck. Dr. Wong noted continuing symptoms of rigidity and mild muscle spasms with limited left lateral flexion of the neck. As he found the plaintiff continued to be symptomatic, he recommended that she not attempt to return to work to avoid aggravation of the muscles in her upper neck and back. Dr. Wong prescribed physiotherapy treatment. At a further examination on August 21, 2014, Dr. Wong found continuing stiffness on the left side of the plaintiff's neck.
- [110] At a follow-up appointment on October 8, 2014, Dr. Wong noted that despite ongoing twice per week physiotherapy appointments, she had found neck pain persisting at the end of a work day, and the doctor found the plaintiff's neck muscles were not tender to touch on palpation, but tighter than normal, which he detected on palpation.

Dr. Cecil Hershler

- [111] Dr. Hershler, a physiatrist, prepared a medical legal report dated September 27, 2018, after he had examined the plaintiff on September 26, 2018. Dr. Hershler's report described the plaintiff as a 24-year-old right-handed nanny/caregiver, and gave an overview of the circumstances of the Accident and the plaintiff's attendance in hospital, where she was

examined and discharged the same day. She had experienced a panic attack while being taken to the hospital and was treated for that using breathing techniques in the emergency room.

- [112] Dr. Hershler reviewed records of the plaintiff's attendance with Dr. Wong, including the reference to swelling at the back of her neck and guarding during neck movement. She was sent for an x-ray of her cervical spine on June 11, 2014, which did not provide evidence of any fractures.
- [113] During a physical examination, Dr. Hershler noticed a loss of range of motion with extension of the head that appeared to be due to muscle tightness. He was able to objectively feel the tightness when attempting passive movements of the head where he was providing the force behind movement.
- [114] He recorded that palpation or touching of muscle structures on both sides of the neck, across the shoulders and between the shoulder blades, revealed a number of muscle tender points, which were revealed by the plaintiff's instinctive or involuntary withdrawal from pressure and verbal indication of pain. This was distinguishable from the low back and other muscle groups in the arms and the legs where the plaintiff had no similar pain response.
- [115] At the time of examining the plaintiff, she had a four-year and three-month history of persistent pain and tightness in her neck, shoulders and upper back, as well as daily headaches, which tracked up over the head. The symptoms arose on the date of the Accident on June 6, 2014.
- [116] Dr. Hershler diagnosed myofascial pain, with evidence of residual tightness in the neck muscles, mainly at the ends of ranges of motion. The myofascial pain and associated muscle tightness accounted for headaches, which were thus cervicogenic in origin.
- [117] Dr. Hershler opined that the plaintiff's current symptoms and development of myofascial pain and headaches were caused by the Accident. He also noted there was no evidence of her having similar symptoms prior to the Accident.
- [118] With respect to prognosis, Dr. Hershler stated that despite the passage of four years since the Accident and the fact Ms. L'Heureux continues to be symptomatic, she is generally able to tolerate her symptoms reasonably well. She experiences increased pain symptoms after heavy physical effort.
- [119] Dr. Hershler related that in his own practice, 80% of his patients with similar types of injuries take three years to recover, while another 10% take five years and 10% will have permanent symptoms. By "recovery", he meant that symptoms diminish to tolerable levels within a fluctuating pattern and do not affect function. Based on the model described, Dr. Hershler expressed the view in his report that Ms. L'Heureux would likely remain symptomatic for at least one to two more years, if not longer. At trial, however, Dr. Hershler testified that when a patient has experienced pain for five years with no change, the patient

is deemed to have chronic pain and the symptoms are likely to continue indefinitely. This prognosis applied to the situation of the plaintiff in the case at bar.

- [120] Dr. Hershler recommended the use of topical anti-inflammatory cream, such as ketoprofen with cyclobenzaprine and a regular stretching exercise to obtain temporal pain relief.

Dr. Zeeshan Waseem

- [121] Dr. Waseem was qualified as an expert witness in physical medicine and rehabilitation or physiatry. He conducted an examination of the plaintiff on March 18, 2021 and prepared a report filed as an exhibit on April 1, 2021.
- [122] He noted Ms. L'Heureux was employed full-time as a server at the time of the Accident, responsible for taking customer orders, serving food and beverages and then clearing and cleaning tables. The job demands of a server include standing, walking, overhead reaching, forward reaching, below waist reaching, twisting, bending, stooping, squatting, kneeling, handling gripping and fine motor tasks. She had previously worked at a McDonald's and in a grocery store seafood department.
- [123] Dr. Waseem noted the ambulance report, as well as the records of Ridge Meadows Hospital, all on June 6, 2014 and followed with a review of the file of Daniel Wong, the general practitioner, who provided care to the plaintiff. Dr. Waseem noted that the plaintiff had become pregnant and found that she had some lower back pain, which is ongoing. She also suffered from post-partum depression and was taking medication for that condition. Her child was born in November 2020.
- [124] Dr. Waseem reviewed her rehabilitation program, as well as treatments of physiotherapy, chiropractic adjustments, massage treatments and active rehabilitation program. On examination of the thoracic spine, he noted pain on palpation of the thoracic multifidus and paraspinal muscles bilaterally. These problems were observable through muscle stiffness, increased muscle tone spasms, taught bands and trigger points. The lumbar spine on examination revealed no pain.
- [125] Based on his examination of Ms. L'Heureux, it was the doctor's opinion that she appeared to have initially sustained sprain-strain soft tissue injuries to her cervical and thoracic spines and developed headaches as a result of the Accident.
- [126] The noted injuries have resulted, in his opinion, in chronic myofascial pain of the affected regions with associated cervicogenic headaches. He considered her prognosis to be fair.
- [127] Given the length of time she has experienced the same complaints, Dr. Waseem opined the plaintiff is unlikely to fully recover from the Accident-related injuries and more likely than not will continue to experience pain and headaches. Dr. Waseem opined that the plaintiff's symptoms are much improved and she does not appear to have any negative prognostic indicators.

[128] He opined that on a balance of probabilities, the presenting physical complaints were attributable to the Accident as there were no reported or documented history of similar complaints before the Accident. Dr. Waseem also noted that the plaintiff's symptoms were documented within a reasonable timeframe following the Accident. The injuries are biologically plausible given the described mechanism of injury. He noted the symptoms have persisted continuously since the Accident.

Collision Experts: Mr. Bradley Heinrichs and Mr. Darrin Richards

[129] Each of the parties called an expert witness who gave evidence and prepared an expert report, which was tendered in evidence.

[130] The expert called by the plaintiff was Mr. Bradley Heinrichs. The defence expert was Mr. Darrin Richards. Both experts were qualified in mechanical collision reconstruction. Both experts used the same computer simulation software known as PC Crash. Each provided an analysis using slightly different assumptions as to the speed of vehicles and location of vehicles.

[131] Mr. Richards was instructed to assume the first contact between the Honda driven by Ms. L'Heureux and the trailer pulled behind the truck driven by Mr. Deegan was at the third axle of the trailer. Mr. Heinrichs, on the other hand, was instructed that the contact between the Honda and the trailer took place at the first axle of the trailer, and that contact was with the trailer tire as opposed to the trailer frame or suspension contact.

[132] The difficulty presented by Mr. Richards' instructions is that they are contrary to the evidence of Mr. Yalowica and the plaintiff in two respects. Firstly, Mr. Yalowica testified as to the exact location of the first contact between the Honda and the trailer at the first axle, not the third axle as Mr. Richards' report assumes. Mr. Yalowica testified that if the contact had been at any point behind the first axle, he would not have been able to see the contact. This evidence was never challenged nor contradicted by any witness at the scene of the Accident. As indicated above, I have found Mr. Yalowica a credible and reliable witness in this regard, particularly as his evidence coincided with the physical evidence presented as to sightlines from his location behind the truck and trailer.

[133] Mr. Richards and Mr. Heinrichs' modelling also differed in terms of the speed that they calculated Mr. Deegan to be driving when he made his left-hand turn. Mr. Richards assumed a speed of 15 km/h, and Mr. Heinrichs assumed a speed of 25 km/h. The speed of Mr. Deegan's truck is a factor in assessing the plaintiff's response time upon seeing Mr. Deegan's truck in the intersection, and whether she could have reasonably avoided the collision. In a responsive report to Mr. Heinrichs' report, Mr. Richards commented that "Mr. Heinrichs is correct to point out that [response time] is dependant on the speed of the 2007 International Dump Truck. If the truck was travelling at 25 km/h as it negotiated the left turn, it leaves Ms. L'Heureux less time to avoid the collision."

- [134] At trial, Mr. Richards noted that if Mr. Deegan were travelling through the intersection at 15 km/h, as Mr. Richards assumed in his model, the plaintiff would have had 5.6 seconds from the time the truck crossed into the intersection to perceive and react. Based on his modelling, Mr. Richards opined this was enough time for Ms. L'Heureux to stop prior to entering the intersection if she had been driving at 60 km/h.
- [135] Mr. Richards testified that if Mr. Deegan were travelling through the intersection at 25 km/h, as Mr. Heinrichs assumed in his model, the plaintiff would have had 3.3 seconds to perceive and react to the hazard. Mr. Heinrich's report calculated that the plaintiff would have had 2.3 seconds to react, and he opined that the damage on the vehicle the plaintiff was driving indicated that the plaintiff had slowed substantially before impact, suggesting she had been braking to avoid the collision. Regardless of these differences, Mr. Richards agreed that if the truck had been driving at 25 km/h, the plaintiff would have been able to slow her vehicle, but she would not have been able to bring her vehicle to a complete stop. He stated that there may have been enough time to slow sufficiently to allow the truck to pass, though he had not done these calculations to confirm that, but also agreed with counsel on cross-examination that the plaintiff's response time would have been normal.
- [136] Lastly, I note that as shown in the photographs attached to the expert reports, the entire front bumper cover and impact absorber (behind the bumper) had been torn off of the L'Heureux vehicle in the Accident. These parts were not analysed as to damage caused by the Accident except to point out they were missing. One must assume that the front bumper cover and impact absorber were available for analysis and represented the first point of contact between the Honda and the trailer. The lack of that analysis makes any opinion in these reports concerning the Accident less reliable.

Witnesses Called by the Defendant

Ross Deegan

- [137] Ross Deegan, the driver of the defendant vehicle, is a truck driver with a long career driving different varieties of big-rig commercial trucks. On June 6, 2014, he was at the end of a shift driving eastbound on Dewdney Trunk Road towards the trucking depot of the defendant company located on 256th Street in Maple Ridge, B.C. He planned to turn left to head northbound at that intersection ("Intersection").
- [138] According to the report of Mr. Richards, Mr. Deegan was driving a 2007 International 5900i dump truck that was hauling a single 1991 Brentwood Steered Trailer, which Mr. Deegan estimated was 78 feet long.
- [139] Mr. Deegan testified that as he approached the Intersection, the traffic control light for eastbound traffic on Dewdney Trunk Road was red. He testified that there were two vehicles already stopped in the centre lane ahead of him and that he also stopped for a couple of minutes behind those two vehicles.

- [140] Eventually, the traffic control light turned green for eastbound traffic on Dewdney Trunk Road. He testified the two vehicles ahead of him proceeded straight eastbound through the intersection. Mr. Deegan testified he would have to shift into a drive gear and then begin driving into the left turn, checking in mirrors. Mr. Deegan testified that he made this turn at 25 km/h.
- [141] In the expert report of Mr. Richards, it was assumed that the truck and trailer made the left turn at 15 km/h (at para. 16). Mr. Richards calculated that at 15 km/h it would have taken the truck and trailer "approximately 5.6 seconds from the point of obvious leftward movement to reach the point of impact depicted in Figure 7". If Mr. Deegan is correct about the speed he was driving, then the Accident occurred at a different point of impact than that depicted in Figure 7, which is the third axle of the trailer. This inconsistency causes the defendants' submissions to be less than reliable.
- [142] Mr. Deegan, near the end of his examination in chief, was questioned about where the truck and trailer was struck by the L'Heureux vehicle. Seemingly out of the blue, he offered an opinion that if the L'Heureux vehicle had made contact with the connecting bars of the trailer hitch or the first wheels of the trailer, such contact would have caused the truck and trailer to "jackknife". This was clearly an opinion, because it was not based on any factual occurrence in the experience of Mr. Deegan--or if it was from his experience, it was not described in his evidence. Further, it was not an opinion put to or given by either of the expert accident reconstruction witnesses who testified.
- [143] The court has a specific set of laws and rules about the presentation of expert evidence. Opinions requiring a qualified expert that are proffered in breach of these requirements are not admissible. This is trite law. Mr. Deegan's opinion about the location of the contact between the vehicles based on the potential for a "jackknife" is not admissible and will be disregarded.
- [144] Mr. Deegan also stated he did not see the point of contact between the two vehicles. Mr. Deegan was asked, both in chief and in cross-examination, about when he first observed the L'Heureux vehicle. His answers to that question were inconsistent. He testified that before he started making his left turn, he estimated the L'Heureux vehicle was more than 100 metres away. During his examination for discovery, Mr. Deegan stated that he first saw the L'Heureux vehicle when he was in the intersection actually making his turn. He acknowledged that his answer was given under oath and he did not resile from that answer. In other words, the plaintiff was not more than 100 meters away.
- [145] Mr. Deegan was asked the location of the school zone speed sign on Dewdney Trunk Road, east of 256th Street. Mr. Deegan's answer was "about a block". Counsel asked "How long is a block?". Mr. Deegan was unable provide an estimate in feet or metres. He was then asked if he could provide an estimate using a reference to a football field or a baseball diamond. Mr. Deegan's answer was "three quarters of a football field". During cross-examination, Mr. Deegan advised the court that he did not know how long a football field was in feet or yards,

and only begrudgingly accepted the plaintiff's counsel's advice about the actual length of 3/4 of a football field.

- [146] Mr. Deegan was asked if he had estimated the speed of the L'Heureux vehicle. He repeatedly told the Court that he did not estimate the speed of that vehicle. Notwithstanding that failure, he concluded that he could make the left turn safely.
- [147] After the Accident occurred, Mr. Deegan stated he stopped and parked his truck on 256th Street. He exited his truck and walked back to check on the plaintiff. He said he observed her speaking on a cell phone, but he did not speak to her. When asked if he spoke to any other witnesses at the scene, he said he did not speak to anyone. However, he also testified that one of those witnesses was argumentative with him, but he did not speak to that person. Mr. Deegan must have spoken to the witness to make the determination the witness was argumentative. The argumentative aspect of the witness is consistent with Mr. Yalowica's evidence, noted above, where Mr. Yalowica told Mr. Deegan, in effect, that he had made a left turn when it was unsafe to do so and caused the Accident. Mr. Deegan's statement that he did not talk to anyone at the scene was deliberately not true and false.
- [148] Mr. Deegan was asked to identify the truck and trailer he was driving from an array of photos which were placed before him in the witness stand. It was clear from counsel for the plaintiff's questions that he picked out similar vehicles, but the licence plate in those photos revealed the chosen photographs were not of the truck and trailer Mr. Deegan was driving. The evidence of Mr. Tupper of the defendant company also confirmed that Mr. Deegan's identification of the truck and trailer he was driving was incorrect. In this instance, Mr. Deegan was not careful or thoughtful in giving evidence, rendering that evidence unreliable.
- [149] Mr. Deegan testified, at trial, to damage to the tires and rims of the trailer, but was never shown any photograph of such damage. Mr. Deegan testified that as a result of the Accident, there were scuff marks on certain tires at the rear of the trailer. On examination for discovery, Mr. Deegan had been asked if there was any damage to the dump truck or the trailer. His answer was "no", an answer inconsistent with his answers at trial.
- [150] Mr. Deegan provided two statements about the Accident, one in his handwriting apparently for the insurer; the second recorded by his employer, who also gave evidence in the trial. In his first statement, Mr. Deegan wrote that the truck and trailer were 75% through the left-hand turn when the Accident occurred. In his second statement, Mr. Deegan claimed the truck and trailer had completed 99% of the turn when the Accident occurred. This obvious discrepancy was put to Mr. Deegan in cross-examination. His explanation was that the difference between 75% of the turn and 99% of the turn was only a couple of feet and did not make much difference. Mr. Deegan's answer, it must be remembered, was about a truck and trailer 78 feet long, travelling at 25 km/h according to his evidence. This answer was again clearly incorrect and further demonstrated his lack of veracity as a witness.

[151] I find that Mr. Deegan, for the reasons recited above, was not a reliable, nor truthful witness.

Lloyd Tupper

[152] Lloyd Tupper, the owner of the defendant corporation, testified briefly at the end the defence case, but he was not a witness to the Accident. His evidence was heard, but it is not necessary to record it here.

The Positions of the Parties

[153] The plaintiff claimed damages under headings of: (a) non-pecuniary damages in the amount of \$120,000.00; (b) past wage loss of \$2,415.21; (c) loss of future earning capacity in the amount of \$250,000.00; and (d) cost of future care in the amount of \$34,267.02 for chiropractic treatment, together with \$1,695.00 for cost of medications paid by the plaintiff as set forth in Exhibits at trial.

[154] The defendants made submissions for over two and a half hours on July 9, 2021. The defendants took the position that no damages were payable because the plaintiff was 100% responsible for the Accident, and made no alternative arguments if this Court were to find the defendants liable. The defendants made no mention of any specific heads of damage; the quantum of damages; nor any potential for a finding of contributory negligence.

[155] During final submissions, counsel for the defendants advanced a submission that based on the wording of R. 15-1 of the Supreme Court Civil Rules, B.C. Reg 168/2009, the fast track actions rule, that the Court should not grant damages in excess of \$100,000. Further, counsel assured the court that there were no decided cases on this point.

[156] In *Rakic v. Stolz*, 2019 BCSC 2300 [Rakic], at para. 8, Master Harper states "if the trial judge determines that quantum should be greater than \$100,000, such an outcome is well known to be within the purview of a trial judge on a R. 15-1 trial."

[157] In the earlier case of *Lensu v. Victorio*, 2019 BCSC 59 [Lensu]--where Mr. Bolan was counsel for the defendant--Madam Justice DeWitt-Van Osten stated at para. 5, "[t]his is a "fast track" case and subject to Rule 15-1 of the Supreme Court Civil Rules, B.C. Reg. 168/2009. Under Rule 15-1(3), the Court is not precluded from awarding damages in excess of \$100,000 if proved." The Court in *Lensu* granted damages of \$270,741.06. *Lensu* has been cited and followed on a number of occasions in this Court since it was decided.

[158] The submission that there are no cases which were known to Mr. Bolan concerning R. 15-1 is simply incorrect.

Analysis

[159] Section 174 of the Motor Vehicle Act, R.S.B.C. 1996, c 318 [MVA], provides:

Yielding right of way on left turn

174 When a vehicle is in an intersection and its driver intends to turn left, the driver must yield the right of way to traffic approaching from the opposite direction that is in the intersection or so close as to constitute an immediate hazard, but having yielded and given a signal as required by sections 171 and 172, the driver may turn the vehicle to the left, and traffic approaching the intersection from the opposite direction must yield the right of way to the vehicle making the left turn.

[160] The case of *Cooper v. Garrett*, 2009 BCSC 35 [Cooper], is a helpful decision in determining liability in the case at bar. Both Cooper and the case at bar involve a collision at an intersection where the driver proceeding straight through was driving above the posted speed limit, and the other driver was making a left-hand turn. In Cooper, Mr. Naeem was speeding westbound on Southwest Marine Drive in Vancouver, B.C. Mr. Garret failed to yield the right of way when making a left turn from Marine Drive onto north-bound Oak Street, and was struck by the taxi driven by Mr. Naeem. At the time of collision, the impact speed of the Naeem vehicle was likely 85 km/h. The collision was virtually head on.

[161] The Court began its liability analysis at para. 36 by quoting *Raie v. Thorpe* (1963), 43 W.W.R. 405, 1963 CanLII 885 (B.C.C.A.), which provides guidance on the meaning of an "immediate hazard" in s. 174 of the MVA in similar circumstances involving left-hand turns:

[18] . . . if an approaching car is so close to the intersection when a driver attempts to make a left turn that a collision threatens unless there be some violent or sudden avoiding action on the part of the driver of the approaching car, the approaching car is an "immediate hazard" within the meaning of sec. 164 [now s. 174].

[162] The Court then found Mr. Garrett fully at fault for the accident based on the following:

37 Mr. Naeem was entitled to assume that all other drivers would observe the rules of the road. He was not required by law to slow down as he approached the intersection. The existence of the eastbound left turn lane did not cast a duty on Mr. Naeem to take extra care: Pacheco at para. 15.

38 Mr. Garrett never saw the taxi before the collision so that those cases where a left-turning driver wrongly estimates the speed of the approaching vehicle are not of assistance.

39 Mr. Garrett, if he exercised reasonable care, should have been able to see the taxi coming east past Fremlin Street more than a block away [.]

40 Mr. Garrett would have seen the taxi if he had been looking. He saw the two westbound vehicles turn right onto the Oak Street on-ramp. He saw the right turn signal of one of those vehicles. He may have been so focussed on the right-turning vehicles that he did not see Mr. Naeem, but that does not absolve him from liability. The law required him to yield the right of way to the westbound vehicles.

41 If Mr. Garrett seeks to cast any blame onto Mr. Naeem for the collision, he must establish that after Mr. Naeem became aware, or by the exercise of reasonable care should have become aware, of Mr. Garrett's disregard of the law, he had sufficient opportunity to avoid the accident: *Walker v. Brownlee*, at 461 .

42 Travelling over the speed limit will only constitute negligence if the speed prevented the driver from taking reasonable measure to avoid the collision. However, the experts agree that the moment that Mr. Garrett encroached onto the westbound lane, it was impossible for Mr. Naeem to avoid the collision.

43 The next issue is whether the collision could have been avoided if Mr. Naeem drove at a lower speed or at the speed limit. The speed of a vehicle and the location of the vehicle are related. It is impossible for Mr. Naeem to have been travelling at about 85 kilometres per hour along Marine Drive and then instantly change to the posted speed limit 40 metres from where the collision occurred. As Mr. Naeem argues, if he had kept to 30 kilometres per hour from the outset, he would have been back in Burnaby when Mr. Garrett ploughed across oncoming traffic that morning. If he sped along at 120 kilometres per hour he would have cleared the area well before Mr. Garrett made his left-hand turn.

44 While it seems attractive to attribute blame based on the speed of the dominant driver and hypothesize on what would have happened if Mr. Naeem kept to the speed limit, the fact is that Mr. Naeem drove at the speed he did and there was nothing he could have done, driving at the speed he did, to avoid the collision. When Mr. Garrett decided to proceed with his left-hand turn, Mr. Naeem was approximately 40 metres away. He was an immediate hazard and Mr. Garrett should have yielded to him.

[163] In *McMullin v. Trelenberg*, 2020 BCSC 49 [McMullin], the Court was faced with circumstances where it was argued that liability was an all-or-nothing proposition, and neither party provided submissions with respect to apportioning liability. The Court reviewed the test set out in s. 1 of the Negligence Act, R.S.B.C. 1996, c. 333, as well as the case of *Alberta Wheat Pool v. Northwest Pile*, 2000 BCCA 505 [Alberta Wheat Pool], and quoted paras. 45-46 for the proposition that in considering contributory negligence, the court must consider the blameworthiness of the parties. Paras. 45-46 of *Alberta Wheat Pool* state:

45 In my view, the test to be applied here is that expressed by Lambert, J.A. in *Cempel*, *supra*, and the court's task is to assess the respective blameworthiness of the parties, rather than the extent to which the loss may be said to have been caused by the conduct of each.

46 Fault or blameworthiness evaluates the parties' conduct in the circumstances, and the extent or degree to which it may be said to depart from the standard of reasonable care. Fault may vary from extremely careless conduct, by which the party shows a reckless indifference or disregard for the safety of person or property, whether his own or others, down to a momentary or minor lapse of care in conduct which, nevertheless, carries with it the risk of foreseeable harm.

[164] The Court in McMullin at para. 118, noted that the truck driver in that case could have waited to make his left turn, rather than turning when he could not see a potential hazard. The Court held this was a lapse of care in conduct which attracted liability, which the Court then apportioned at 50% liability since the other driver involved in the collision also had a lapse of care.

[165] *Salaam v. Abramovic*, 2010 BCCA 212 [Salaam] at para. 21, offers further guidance on determining the apportionment of liability:

21 In the end, a court must determine whether, and to what extent, each of the players in an accident met their common law duties of care to other users of the road. In making that determination, a court will be informed by the rules of the road, but those rules do not eliminate the need to consider the reasonableness of the actions of the parties. This is both because the rules of the road cannot comprehensively cover all possible scenarios, and because users of the road are expected to exercise reasonable care, even when others have failed to respect their right of way. While s. 175 of the Motor Vehicle Act and other rules of the road are important in determining whether the standard of care was met, they are not the exclusive measures of that standard.

[166] In the case at bar, the defendant driver told Mr. Yalowica that: (a) he could see the plaintiff's oncoming vehicle; and (b) that vehicle was speeding. Mr. Deegan had stopped for a red light according to the evidence of Mr. Yalowica, and turned in front of the L'Heureux vehicle. The fact is that turning in the face of what Mr. Deegan considered was a speeding vehicle places a high degree of fault on the defendant driver, who left a place of safety to enter the path of the speeding vehicle.

[167] At the same time, Ms. L'Heureux acknowledged that she was driving at or about the posted speed limit to the east of 256th Street on Dewdney Trunk Road, but had not slowed to the school zone speed limit of 30 km/h. The evidence at trial was not clear that signs noting the reduced school zone speed limits were posted east of the Intersection at the time of the Accident.

[168] To quote the reasons in McMullin at para. 117, both of the drivers "made mistakes that many drivers commit every day, in most cases without consequences." Their actions fall closer to the "momentary or minor lapse of care in conduct" pole of misconduct referred to in *Alberta Wheat Pool*. The difficulty in this case is that Mr. Deegan had the opportunity to stay in a place of safety by waiting for a very brief period of time with his large vehicle until he could safely make his left without consequences of the sort visited upon Ms. L'Heureux. A very brief pause by Mr. Deegan to allow the L'Heureux vehicle, which then had the right of way facing a green traffic light, to pass through the intersection would have prevented the Accident.

[169] That said, the plaintiff acknowledged that when she entered the intersection she was travelling over the speed limit, which changed near that point to become a school zone.

[170] In those circumstances, I find that the plaintiff is responsible for 10% of the Accident, and the defendants are responsible for 90% of the Accident.

[171] I also accept the expert medical evidence heard at trial that the Accident caused the injuries to the plaintiff's neck, back, shoulders and cervicogenic headaches, as well as anxiety and driving anxiety, a mental injury, which because of the passage of time are categorized as "chronic" and unlikely to resolve in the foreseeable future.

Damages

[172] The plaintiff submits that the following awards of damages should be made:

Non-pecuniary Damages

\$120,000.00

Past Wage Loss

\$2,415.21

Loss of Future Earning Capacity

\$250,000.00

Cost of Future Care

\$34,267.02

Special Damages

\$1,600.95

TOTAL

\$408,283.18

[173] Apart from a submission about the purported effect of R. 15-1, counsel for the defendants made no submissions dealing with specific heads of damages, or submissions on the authorities advanced by counsel for the plaintiff.

[174] Notwithstanding the fact that defence counsel neglected to make submissions either for or against case authorities, a party is entitled to determine how to define the issues in dispute, and to present evidence and argument as they see fit. As Robert Sharpe stated in *Good Judgment: Making Judicial Decisions*, (Toronto: University of Toronto Press, 2018) at 135, "[if] a litigant decides not to advance an issue or an argument, judges almost always respect the litigant's choice, even if the judge would have presented the case differently."

[175] In the case at bar, damages were clearly a live issue in dispute for which the parties both sought a ruling. Opportunity was provided to both parties to present oral and written submissions on the issue of damages.

- [176] The late Harvey McGregor noted that "even if the defendant fails to deny the allegations of damage or suffers default, the claimant must still prove his loss" (McGregor on Damages, (London: Thompson Reuters, 2014) at 1953-54).
- [177] In the case at bar, counsel for the plaintiff made submissions on damages in open court. Those submissions and the cited authorities must be considered to determine whether the plaintiff has met its burden. Defence counsel was present throughout the plaintiff's submissions, including the claim for damages. While defence counsel made general submissions concerning the effect of R. 15-1, counsel did not provide alternative cases or give any further submissions regarding damages or their assessment.
- [178] I do not accept defence counsel's submission that damages must be limited by R. 15-1 to \$100,000, as this Court has established in *Rakic and Lensu*. Further, R. 15-2(3) states that "[n]othing in this rule prevents a court from awarding damages to a plaintiff in a fast track action for an amount in excess of \$100,000". Defence counsel's only submissions on damages are therefore of limited assistance in determining the appropriate quantum of damages.
- [179] Case law supports the proposition that even if counsel does not take the opportunity to provide submissions on a live issue before the court, is appropriate for the presiding judge to decide the issue without soliciting further submissions. In *Cuff v. Cuff*, 2021 NLCA 31 [Cuff], the Court heard submissions on spousal support. One party's submission was that there was no entitlement to spousal support. The Court concluded that spousal support was appropriate and determined the level and commencement date of that support. An appeal was launched on the basis the court should have required a further hearing or called for further submissions on a commencement date for spousal support. The Court of Appeal upheld the trial judge as both parties had the opportunity to be heard and "[no] further hearing or submissions would have been expected or required in this context" (Cuff at paras. 62-63).
- [180] This context is similar to the case at bar, where the issue of damages was clearly before this Court. While the argument of defence counsel in the case at bar was that there was no liability, defence counsel nevertheless had the opportunity to make an argument in the alternative regarding the appropriate quantum of damages should liability and causation be established. In fact, the submission made by defence counsel that liability had to be limited by R. 15-1 to an amount not in excess of \$100,000, suggests that damages were due to the plaintiff in a sum fixed by the court.
- [181] Based on the reasons aforesaid, it is open to this Court to make awards on the quantum of damages based on the submissions of the parties.
- [182] The Court is also aware that it should avoid filling in gaps in submissions made by counsel.

Non-pecuniary Damages

[183] On the facts of this case, it is clear that the plaintiff was significantly injured as discussed above and that these injuries caused significant pain and resulted in the plaintiff's experience and enjoyment of life being significantly reduced.

[184] In the oft-cited case of *Stapley v. Hejslet*, 2006 BCCA 34 at para. 45 [Stapley], the following appears:

[45] Before embarking on that task, I think it is instructive to reiterate the underlying purpose of non-pecuniary damages. Much, of course, has been said about this topic. However, given the not-infrequent inclination by lawyers and judges to compare only injuries, the following passage from *Lindal v. Lindal*, *supra*, at 637 is a helpful reminder:

Thus the amount of an award for non-pecuniary damage should not depend alone upon the seriousness of the injury but upon its ability to ameliorate the condition of the victim considering his or her particular situation. It therefore will not follow that in considering what part of the maximum should be awarded the gravity of the injury alone will be determinative. An appreciation of the individual's loss is the key and the "need for solace will not necessarily correlate with the seriousness of the injury" (*Cooper-Stephenson and Saunders*, *Personal Injury Damages in Canada* (1981), at p. 373). In dealing with an award of this nature it will be impossible to develop a "tariff". An award will vary in each case "to meet the specific circumstances of the individual case" (*Thornton* at p. 284 of S.C.R.).

[185] In the case at bar, the plaintiff submitted that her vehicle was involved in a significant motor vehicle accident where a large truck turned left in front of her vehicle and pulled a trailer across the hood of her sedan. This was a traumatizing event and the plaintiff's family and friends who gave evidence supported her submission that "she is now a very different person" dealing with anxiety.

[186] The plaintiff further submitted that she suffered significant physical injuries which have made her less physically capable than she was prior to the Accident. Those injuries have continued to cause pain which she experiences regularly and which will continue indefinitely according to the medical evidence.

[187] In *Stapley* at para. 46, the Court set forth a list of factors to be considered in determining an award of non-pecuniary damages:

[46] The inexhaustive list of common factors cited in *Boyd* that influence an award of non-pecuniary damages includes:

- (a) age of the plaintiff;
- (b) nature of the injury;
- (c) severity and duration of pain;

- (d) disability;
- (e) emotional suffering; and
- (f) loss or impairment of life;

I would add the following factors, although they may arguably be subsumed in the above list:

- (g) impairment of family, marital and social relationships;
- (h) impairment of physical and mental abilities;
- (i) loss of lifestyle; and
- (j) the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff: *Giang v. Clayton*, [2005] B.C.J. No. 163 (QL), 2005 BCCA 54).

[188] The plaintiff submitted that the appropriate range for non-pecuniary damages in the case at bar was between \$90,000 and \$130,000, relying on the cases of *Clayton v. Barefoot*, 2018 BCSC 239 [Clayton], *Brown v. Mitchell*, 2017 BCSC 125 [Brown], *Reely v. Zhu*, 2020 BCSC 1520 [Reely], *Walks v. Cody*, 2019 BCSC 1371 [Walks] and *Saadati v. Moorhead*, 2017 SCC 28 [Saadati].

[189] In *Clayton*, the plaintiff was injured in a motor vehicle accident. She suffered soft-tissue injuries to her neck, shoulder and lower back. Her neck and back injuries had resolved, but the plaintiff was left with chronic lower back pain which medical experts opined she would suffer for the rest of her life, despite treatment. Lay witnesses testified to the degree of pain and discomfort Ms. Clayton had on an ongoing basis which the Court found was a reflection of continuing injury. Ms. Clayton's ability to work in manual labour jobs and to participate in recreational activities was significantly diminished, which medical opinion established was unlikely to resolve in the future. Non-pecuniary damages were awarded in the amount of \$130,000.

[190] In *Brown*, the Court dealt with two motor vehicle accidents which were joined by consent. Prior to the accidents, Ms. Brown had worked as a dental assistant and was a highly competitive fast-pitch baseball player excelling as a pitcher and outfielder. In winter she took part in snowboarding. Medical reports and radiographic examinations revealed a bulge and disc protrusion in her lower back. She had to stop work and all recreational activities. Long-term pain caused by these injuries was supported by lay witnesses who also testified about the depression suffered by the plaintiff. The plaintiff also suffered vision dysfunction caused by the accident, but there was a chance of improvement with the use of optical lenses containing a prism. The plaintiff sought non-pecuniary damages in the range of \$120,000 to \$140,000, while the defendant submitted a range of non-pecuniary damages should be in the range of \$65,000 to \$85,000. The Court determined the appropriate award for non-pecuniary damages was \$120,000.

- [191] In *Reely*, the plaintiff was a single mother working as a care aide. She had planned to upgrade her qualifications to become a licensed practical nurse, but her plans were delayed due to pregnancy. Prior to the accident, she was in good health with no history of back and shoulder trouble. The accident which led to her injuries involved the defendant running a red light and the plaintiff's vehicle collided with the passenger side of the defendant's vehicle. The plaintiff sought non-pecuniary damages of \$135,000 and the defendant submitted an award of \$75,000 was appropriate. The plaintiff had suffered persistent, debilitating soft tissue injuries in the motor vehicle accident. In a physical capacity report filed by an expert at trial, with which the plaintiff agreed while giving her evidence, she described chronic low back and left shoulder pain with ongoing disrupted sleep, as well as anxiety and emotional stress from employment uncertainty and financial strain. Before the accident, the plaintiff had been physically active, including hiking, bowling, skating, skiing, and taking Aquafit classes five or six times a month. She was unable to continue with those activities or to work as a care aide, which she had enjoyed. The award for nonpecuniary debt damages was assessed at \$100,000.
- [192] In *Walks*, the plaintiff was a passenger in a pickup truck which was struck from behind by a semitrailer driven by the defendant. Liability was admitted. She had an active social life and prior to the collision, the Court heard that the plaintiff performed the majority of household chores and cleaning in her family home. After high school she had worked cleaning homes. Later, she worked in other manual labour jobs on construction sites, including sweeping, cutting rebar, and taking apart floors. The principal injuries sustained in the accident were to the left side of her back, shoulder and neck which resulted in headaches, and subsequently anxiety and depression. The plaintiff sought an award for non-pecuniary damages in the amount of \$110,000. The defendants contended the award for non-pecuniary damages should be \$65,000. The plaintiff was unable to work for six months after the collision, due to pain in her left shoulder, upper back and neck. The Court did not accept that she was in constant pain at the time of trial. Following the factors listed in *Stapley*, the Court concluded that an award of \$90,000 was appropriate for non-pecuniary damages.
- [193] The *Saadati* case from the Supreme Court of Canada was put forward for the propositions contained at pp. 544 and 545 that a finding of legally compensable mental injury need not rest, in whole or in part, on the claimant proving a recognized psychiatric injury and that "the trier of fact adjudicating a claim for mental injury is not concerned with diagnosis, but with symptoms and their effect" allowing laypersons to comment on the symptoms and their effect in their evidence.
- [194] Based on my review of the evidence in this case, in particular the long-term pain suffered by the plaintiff as a result of the Accident which has no ready resolution, this Court is satisfied the appropriate award for non-pecuniary damages is \$110,000.

Past Wage Loss

- [195] As a result of her injuries from the Accident, the plaintiff missed 212.88 hours of work between June 10, 2014 and July 11, 2014. The plaintiff's hourly wage was \$10.25 per hour, for a total loss of \$2,182.02 for that period.
- [196] During the plaintiff's gradual return to work period from July 13, 2014 to August 26, 2014, the plaintiff calculated 22.75 missed hours at a wage of \$10.25 per hour, which equalled \$233.19 in wage loss for that period.
- [197] Therefore, the plaintiff's total wage loss awarded in this action is \$2,415.21.

Loss of Future Earning Capacity

- [198] Following the Accident, she returned to work as a restaurant server until 2015, when she found she was unable to continue that work. She had not intended to work in a restaurant as a long-term career.
- [199] Ms. L'Heureux then began working as a nanny. Her duties required that she drive the children to and from school and other activities. She earned \$14.25 an hour working part-time for 2 to 5 days a week. Commencing in September 2017, the plaintiff began working as a nanny for the Hemeon family caring for two children, a one-year-old and a two-year-old. She found that lifting and carrying the children aggravated her back symptoms, and Ms. Hemeon testified there were times when Ms. L'Heureux was unable to pick up the children or complete household chores.
- [200] The plaintiff also assisted looking after children at a licensed daycare operated by her mother. The plaintiff testified that she did not intend to make a nanny position her career path, but did intend, subject to her physical limitations, to open a licensed daycare.
- [201] Ms. L'Heureux worked for the Hemeon family until in September 2019, when she began taking courses at Ridge Meadows College to qualify as an administrative assistant, with a hope of obtaining a less physically demanding job. The plaintiff found sitting in a classroom from 9:00 am to 3:30 pm each day to be very aggravating for back symptoms. She was seeing a chiropractor twice a week to alleviate the symptoms.
- [202] Ms. L'Heureux completed her planned schooling and obtained a position with the community fire protection office in Port Coquitlam. Her job was to answer phone calls and schedule fire alarm action appointments. She testified that she would still get sore from having to sit, and had to schedule more frequent chiropractor visits to manage her pain. Shortly after obtaining that position, on March 17, 2020, Ms. L'Heureux was told her position had come to an end due to restrictions resulting from the Covid-19 pandemic.

- [203] The evidence of the plaintiff was that she hopes to open a licensed childcare facility for up to five children in the next couple of years, assuming that her physical condition allows. There is a limit of seven children for homebased daycare, but Ms. L'Heureux testified that she did not expect to be able to care for that many children and anticipated potential difficulty with lifting children.
- [204] Relying on *Brown v. Golaiy*, (1985), 26 B.C.L.R. (3d) 353, 1985 CanLII 149 [Brown], the plaintiff seeks damages of \$250,000, using a capital asset approach to assessing loss of future earning capacity.
- [205] In the recent case of *Ehrichtiou v. Esguerra*, 2021 BCSC 39 at paras. 143-145, Forth J. provides a helpful commentary on the issue of loss of future earning capacity as follows:
- [143] A claim for loss of future earning capacity raises two key questions: (1) has the plaintiff's earning capacity been impaired by their injuries; and, if so, (2) what compensation should be awarded for the resulting harm that will accrue over time?
- [144] The decision in *Pololos v. Cinnamon-Lopez*, 2016 BCSC 81, provides an excellent summary of the applicable leading principles on the assessment of loss of future earning capacity:
- [133] The relevant legal principles are well-established:
- a) To the extent possible, a plaintiff should be put in the position he/she would have been in, but for the injuries caused by the defendant's negligence; *Lines v. W & D Logging Co. Ltd.*, 2009 BCCA 106 at para. 185, leave to appeal ref'd [2009] S.C.C.A. No. 197;
 - b) The central task of the Court is to compare the likely future of the plaintiff's working life if the Accident had not occurred with the plaintiff's likely future working life after the Accident; *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 32;
 - c) The assessment of loss must be based on the evidence, but requires an exercise of judgment and is not a mathematical calculation; *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 18;
 - d) The two possible approaches to assessment of loss of future earning capacity are the "earnings approach" and the "capital asset approach"; *Brown v. Golaiy* (1985), 1985 CanLII 149 (BC SC), 26 B.C.L.R. (3d) 353 at para. 7 (S.C.); and *Perren v. Lalari*, 2010 BCCA 140 at paras. 11-12;
 - e) Under either approach, the plaintiff must prove that there is a "real and substantial possibility" of various future events leading to an income loss; *Perren* at para. 33;
 - f) The earnings approach will be more appropriate when the loss is more easily measurable; *Westbroek v. Brizuela*, 2014 BCCA 48 at para. 64. Furthermore, while assessing an award for future loss of income is not a purely mathematical exercise, the Court should endeavour to use factual mathematical anchors as a starting foundation to quantify such loss; *Jurczak v. Mauro*, 2013 BCCA 507 at paras. 36-37.

- g) When relying on an "earnings approach", the Court must nevertheless always consider the overall fairness and reasonableness of the award, taking into account all of the evidence; Rosvold at para. 11.

[145] In *Grewal v. Naumann*, 2017 BCCA 158 at paras. 48-49, the Court of Appeal provided a summary of the assessment of loss of future earning capacity and the application of the "real and substantial possibility" standard:

[48] In summary, an assessment of loss of both past and future earning capacity involves a consideration of hypothetical events. The plaintiff is not required to prove these hypothetical events on a balance of probabilities. A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation. If the plaintiff establishes a real and substantial possibility, the Court must then determine the measure of damages by assessing the likelihood of the event. Depending on the facts of the case, a loss may be quantified either on an earnings approach or on a capital asset approach: *Perren v. Lalari*, 2010 BCCA 140 at para. 32.

[49] The assessment of past or future loss requires the court to estimate a pecuniary loss by weighing possibilities and probabilities of hypothetical events. The use of economic and statistical evidence does not turn the assessment into a calculation but can be a helpful tool in determining what is fair and reasonable in the circumstances: *Dunbar v. Mendez*, 2016 BCCA 211 at para. 21.

[206] As noted above, counsel for the defendants made no submissions with respect to the quantum of damages for loss of future earning capacity.

[207] Applying the factors for assessing loss of future earning capacity set out in *Brown*, the plaintiff submitted that as a result of the injuries caused by the Accident:

- a) she has been rendered less capable overall from earning income from all types of employment;
- b) she is less marketable or attractive as an employee to potential employers;
- c) she has lost the ability to take advantage of all job opportunities which might otherwise have been open to her, had she not been injured; and
- d) she is less valuable to herself as a person capable of earning income in a competitive labour market.

[208] The foregoing *Brown* considerations are not intended to be exhaustive: *Sinnott v. Boggs*, 2007 BCCA 267 at para. 9. In the case at bar, I find the plaintiff has proven each of the above considerations is applicable and demonstrate the loss the plaintiff has suffered.

[209] At the time of the Accident, the plaintiff was 20 years old and her career path had not been established. She would have 45 years of potential employment before retirement at 65 years of age. She attempted work at various jobs, including as a server, a nanny or daycare

worker, and as an administrative employee. Her injuries made more difficult employment which required lifting, sitting for work at a computer screen or carrying anything from heavy bus trays to children. She also found it difficult to respond to the rapid movements of children or the bending and stretching necessary to attend to the needs of children. She attempted to find employment in an administrative field, but found sitting for the hours of a regular working day was painful. The foregoing are factors to be considered in assessing, not calculating, damages for loss of future income-earning capacity.

- [210] It is very real difficulty in the case at bar to assess a loss of future earning capacity where there were no submissions of either party that addressed before the Court the opportunities of the plaintiff in an uncertain future employment setting or a selection of future employment scenarios, which might form the basis for such an assessment.
- [211] Based on the cases cited, in the present case, it is appropriate to use the capital asset approach to the assessment of damages for loss of future income-earning capacity.
- [212] In the case of *Firman v. Asadi*, 2019 BCSC 270, a 40-year-old plaintiff was injured in a motor vehicle accident. Given the uncertainty in calculating her past income and the impact of her injuries on her ability to work in the future, Verhoeven J. applied the capital asset approach. He found that a realistic positive scenario would involve the plaintiff recovering so that she would earn an income similar to her without accident income in the near or medium term, leaving her with some losses in the near term and future of approximately \$112,455, based upon the expert economist's evidence. A realistic negative scenario would involve her condition not markedly improving and the plaintiff being unable to obtain other employment until her retirement at age 65, which would leave her with losses around \$300,000 when adjusted for contingencies. Verhoeven J. found the midpoint between these two scenarios was too low as the negative scenario was more likely, and awarded \$250,000 in damages for loss of future earning capacity. I found this case instructive in the assessment of damages in circumstances where the Accident which has effected the potential future income of the plaintiff took place when she was young and there were decades to potential retirement.
- [213] In the case at bar, the income earned by the plaintiff prior to and after the Accident is set out above at para. 47.
- [214] These figures provide little assistance in measuring the impact of the Accident on the plaintiff's earning capacity. At the time of the Accident, the plaintiff was 20 years old and her career path had not yet been established. The injuries the plaintiff suffered in the Accident clearly impacted her subsequent career plans as she attempted to find a career path that was possible given her injuries. It is not clear what her earning potential could have been had she not been injured.

- [215] On the facts of the case at bar, there are a number of activities, including the childcare activities and working as a server, that have caused pain and restricted those activities. Potentially the pain caused may restrict activity and increase impairment; a future loss of capacity.
- [216] A future increase in impairment would be expected to reduce and restrict income. This is demonstrated on losses of income in the past directly related to loss of capacity caused by the Accident. Reduction in capacity of the plaintiff will, on the medical evidence, be ongoing, and may increase because of activity such as child care. Dr. Hershler's opinion was that as the plaintiff had experienced significant pain for over five years without change, she has chronic pain which will likely continue indefinitely. Dr. Waseem gave the opinion the plaintiff is unlikely to fully recover from the Accident-related injuries and more likely than not will continue to experience pain and cervicogenic headaches.
- [217] In the past, none of the plaintiff's employment has allowed for comfortable working situations, but situations where pain and stiffness in the neck, shoulders and upper back has been constant. None of the past working situations has lasted for long enough to indicate the plaintiff has a demonstrated career path. The Accident occurred when the plaintiff was 20, her age at trial was 27, and there is no obvious, nor clear, working future to a retirement at age 65 or even age 60.
- [218] The plaintiff is required to prove future negative contingencies on a "real and substantial possibility" of occurrence (*Perren v. Lalari*, 2010 BCCA 140 at para. 32), a lower threshold than a balance of probabilities, but a higher threshold than something only possible and speculative.
- [219] In the case at bar, despite the injuries caused, the plaintiff has demonstrated on the evidence, notwithstanding pain and stiffness caused by the Accident, she intends to continue working, perhaps as a childcare worker (a positive contingency). However, she will not be able to do so with the same energy, number of working hours, or potential income (negative contingencies), even if she is able to hold an employment position for a career of some decades which lay ahead.
- [220] On the evidence in the case at bar, which is articulated above, including the expert opinions of the only medical doctors called in this case that the symptoms of the injuries from the Accident will persist on chronic basis, there a clear evidentiary basis for a substantial award of damages for loss of future earning capacity. Taking the foregoing contingencies into account, I conclude that a fair and reasonable assessment for loss of future income-earning capacity, taking into account both positive and negative contingencies, is \$250,000.

Cost of Future Care

- [221] The evidence of Ms. L'Heureux was that she continues to attend chiropractic appointments that help reduce the number and severity of her headaches and manage pain levels. Her evidence was that these treatments will be necessary on an ongoing basis over the course of her working life.
- [222] The plaintiff contends that she will continue to require two chiropractic treatments each month from now until her retirement at age 65, which amounts to 38 years. The Recovery and Treatment Payment Guide published by ICBC sets out an allowable payment for each chiropractic treatment at \$54. On an annual basis, the cost of chiropractic treatment was therefore calculated in the amount of \$1,296 per annum.
- [223] Applying a 2% discount rate under s. 56 of the Law and Equity Act, R.S.B.C. 1996, c. 253, results in a multiplier of approximately of 26.4406 (see Appendix E of CIVJI: Civil Jury Instructions, 2nd ed. (Vancouver: Continuing Legal Education Society of British Columbia, 2009) (loose-leaf 2021 update)). Thus, the present value of the plaintiff's future care cost would amount to \$34,267.02.
- [224] None of the evidence given by the plaintiff relating to medical need for continued chiropractic care was challenged by the defendants in cross-examination or argument.
- [225] The cost of future care is awarded to the plaintiff payable by the defendants in the amount of \$34,267.02. Counsel for the plaintiff agreed that this award will not be included in the award of damages, but will continue to be paid on behalf of the plaintiff by ICBC, pursuant to s. 83 of the Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231 and Part 7 of the Insurance (Vehicle) Regulation, B.C. Reg. 447/83. This amount will not be included in calculation of damages below.

Special Damages

- [226] Exhibit 3, Tab 10, consists of a 37-page document entitled "Specials Schedule", which sets forth payments made by the plaintiff for physiotherapy treatments, massage therapy treatments, kinesiology treatments, chiropractic care, prescriptions, medical supplies and mileage, as well as three sets of fees to obtain medical records, all of which total \$1,600.95. That amount is awarded to the plaintiff as special damages.

Conclusion

- [227] In summary, I have assessed damages as follows:

Non-pecuniary Damages

\$110,000.00

Past Wage Loss

\$2,415.21

Loss of Future Earning Capacity

\$250,000.00

Special Damages

\$1,600.95

Total

\$364,016.16

[228] As noted above, the plaintiff is responsible for 10% of the damages. The award will therefore be reduced by \$36,401.62 to \$327,614.54.

[229] The total damages awarded against the defendants is \$327,614.54.

Costs

[230] The plaintiff was successful in this action and is therefore entitled to her costs at Scale B, as a matter of ordinary difficulty. If there is any issue as to costs of which the court is not aware, the parties have leave to apply within 21 days of the date of these reasons in an application of not more than 10 pages, double-spaced.

"Ball J."

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