
CANADA / JUDGMENT

Laliberte v. Jarma

2019 BCSC 968

COURT

Supreme Court of British Columbia

DECIDED

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2019 BCSC 968 Laliberte v. Jarma

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Laliberte v. Jarma,

2019 BCSC 968

Date: 20190614

Docket: M82416

Registry: Nanaimo

Between:

Gwynneth Laliberte

Plaintiff

And

Paige Jarma and Alisha Kingston

Defendants

Before: The Honourable Madam Justice Russell

Reasons for Judgment

Counsel for the Plaintiff:

T. Boe

Counsel for the Defendants:

D. A. Busch

Place and Dates of Trial:

Nanaimo, B.C.

March 26-27, 2019

Place and Date of Judgment:

Nanaimo, B.C.

June 14, 2019

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Background

- [1] The plaintiff, Gwynneth Laliberte, brings this action against the defendants, Paige Jarma and Alisha Kingston.
- [2] On December 5, 2015, the plaintiff, then 18 years of age and 8 months' pregnant, was a passenger in a vehicle owned by Ms. Jarma and operated by Ms. Kingston. Ms. Kingston lost control of the vehicle, went through a fence and over a bump and landed in a field, causing injury to the plaintiff. The plaintiff, now 21, alleges she suffered a lower back injury and that the accident aggravated her depression and anxiety.
- [3] The defendants concede liability for the accident. As such, this matter is concerned solely with whether the plaintiff is entitled to various heads of damages, and if so, in what amount. The plaintiff claims:
 - a) non-pecuniary damages (pain, suffering and loss of amenities of life);
 - b) loss of capacity damages (past and future wage loss);
 - c) costs of future care; and
 - d) an in-trust award for her parents' accident-related expenses.
- [4] Further, the plaintiff claims special damages for the cost of transportation to and from medical treatments, medication and rehabilitation expenses. As the defendants accept the plaintiff's submissions on these expenses as amounting to \$550.40, the plaintiff is entitled to this amount as part of the final award.
- [5] The defendants do not deny that the plaintiff suffered injuries, nor that the injuries have caused her ongoing pain and care costs that will continue into the future. The defendants also concede that the accident caused a loss of capacity, though they dispute the amount of non-pecuniary damages sought by the plaintiff and the extent of the impact of her injury on the plaintiff's past and future earnings.
- [6] Regarding past wage loss, the defendants' position is that the plaintiff would not have been working regardless of the accident, given her disinclination for employment, the fact she had just given birth, and her gallbladder-related health issues.

- [7] As for future wage loss, the defendants base their argument on the plaintiff's educational status, work experience, and family situation as limiting her future job prospects and earning potential, thus limiting the size of an appropriate award. The defendants also dispute the cost of future care claim, as well as the in-trust award, although counsel for the defendants conceded that some amount was payable to the plaintiff's parents.

Issues

- [8] The issues to be decided are the following:
- 1) What amount of non-pecuniary damages is appropriate? There does not appear to be a separate claim for loss of housekeeping capacity and I will assume, therefore, that it is to be subsumed under the head of non-pecuniary damages.
 - 2) Is the plaintiff entitled to past and future loss of earning capacity damages? If so, what is the quantum?
 - 3) Is the plaintiff entitled to damages for the cost of future care? If so, what is the quantum?
 - 4) Are the plaintiff's parents entitled to an in-trust claim for their accident-related expenses? If so, what is the quantum?

Expert Evidence

- [9] All the experts were qualified. I accept each expert's evidence as credible, and accept their opinions and conclusions. The defendants did not contest the credentials of the experts or the expert reports.

Dr. James Francis

- [10] Dr. James Francis, a general practitioner, diagnosed the plaintiff's lower back pain as central neuropathic pain ("CNP"). Dr. Francis's opinion was that 70% of people with CNP will have pain long-term or possibly for the rest of their lives, 10% will have a gradual reduction of pain possibly leading to a full resolution of any pain symptoms, and 20% will have their pain worsen over time.
- [11] Dr. Francis's prognosis for the plaintiff is that she falls into the first category: she will have long-term pain, possibly for the rest of her life. Dr. Francis further opined that the effectiveness of the plaintiff's medication to ameliorate her pain will not erode over time. That is, the plaintiff will be able to continue taking the same medication at the same dosage and can expect the same mitigating effects regarding her pain. Dr. Francis concluded that the plaintiff will probably need to avoid occupations that require repetitive bending or lifting heavy objects.

Andrew Wong

- [12] Mr. Andrew Wong, an occupational therapist, provided a report dated November 25, 2018 based on eight hours of functional evaluation testing of the plaintiff on October 26, 2018.
- [13] In his report, he noted that the plaintiff's injuries did not prevent her from typing and writing, and that she had the full ability to reach forward as well as the ability to manipulate objects with her hands and fingers. The plaintiff could also "stoop" within a certain range, although "severe stooping" would aggravate her symptoms. The plaintiff could crouch, sit for over two hours, had no limitations regarding her standing, could lift 30 lbs. from the floor (once) and was able to perform work activity in light to medium strength categories. Mr. Wong noted that the "hair cutting simulation" was "well tolerated".
- [14] However, Mr. Wong observed that the plaintiff's functional capacity worsened in the afternoon session as compared with the morning. The plaintiff increasingly relied on external support, required more frequent pauses during tasks to recover, requested additional breaks to sit, presented with an increasingly greater degree of guarded movement, rushed behaviours to discontinue testing and presented increased pain behaviours.
- [15] Mr. Wong's findings suggested that the work activity assessed exceeded her reasonable daily work tolerances.
- [16] In Mr. Wong's opinion, the plaintiff's limitations will likely negatively impact her employability and earning capacity as a tattoo artist, her desired occupation, due to her need to shift while seated, though she was otherwise qualified for the position.
- [17] Mr. Wong noted that the plaintiff demonstrated below average dexterity with her dominant right arm, and that her performance in this regard appeared to be negatively impacted by her intolerance for an uninterrupted static sitting posture. Any forward stooping in this static sitting position would further strain her tolerance.
- [18] As for hairdressing, the plaintiff's other occupation of interest, Mr. Wong states that this would be a "suitable match" for the plaintiff's "physical capacity and limitations" as "any demand for stooping could be addressed with ergonomic solutions".
- [19] Hairdressing is a light-strength profession, which Mr. Wong states is a category of work the plaintiff is able to perform on a full-time basis. Although capable of entry-level medium-strength activities, she would likely not be able to tolerate such work on a full-time basis without aggravating her lower back symptoms.

Dr. Pieter Van den Berg

- [20] Dr. Pieter Van den Berg undertook a vocational assessment of the plaintiff and prepared a report dated December 12, 2018. While the defendants claim that Dr. Van den Berg's report contained several errors, I do not find that any of these alleged errors materially affected the conclusions drawn in the report.
- [21] The primary focus of Dr. Van den Berg's report was the plaintiff's job prospects. He opined that women without a high school diploma make less money than their female peers with a high school diploma, averaging \$15.24/hour (or \$3.03/hour less than women with a high school diploma) and \$31,709/year (or \$6,296/year less than women with a high school diploma).
- [22] Dr. Van den Berg cites the plaintiff's "average" intellectual abilities and capacity for a two-year college diploma as positive evidence of her ability to earn a higher wage in the future. However, he also notes that the plaintiff had a "general disinclination towards post-secondary education" and that she would have likely limited herself to a "one-year vocational certificate program, short vocational training, training on-the-job, or a short workplace apprenticeship program especially considering the occupations and likely educational achievements of her parents".
- [23] Dr. Van den Berg concluded that the accident likely caused a "mild reduction in her overall vocational capacity and range of job options". The plaintiff's aptitude testing indicated the plaintiff had very low manual dexterity for quickly and accurately coordinating hand and eye movements. Overall, Dr. Van den Berg found that the plaintiff had limited transferrable skills outside of being a cashier at a gas station. Overall, he expected her earnings would likely be less compared to someone with a two-year college diploma. He also noted that chronic pain can impact cognitive functioning and affect academic performance, and that this was likely the case with the plaintiff.
- [24] As for the hairdressing career path, he set the income range at \$12.65 to \$19.83/hour, with a median of \$14.50/hour. In Dr. Van den Berg's opinion the plaintiff would have completed high school and likely gone on to finish the hairdressing program two years sooner but for the accident and that the plaintiff continued to suffer ongoing low back pain.
- [25] Dr. Van den Berg cautioned that the plaintiff's functional limitations, which would require ergonomic accommodation, would reduce the range of jobs she could perform and should she lose her job she would likely be at risk for short periods of vocational instability - that is, the plaintiff would be at a greater risk of not being hired and potentially being laid off due to her accident-related injuries. The same is said for her job prospects as a tattoo artist.

[26] To increase the plaintiff's job prospects, Dr. Van den Berg recommended she undertake formal training, such as an Applied Business Technology diploma program, or a full-time Medical Office Assistant Certificate. Dr. Van den Berg was also of the view that the plaintiff would benefit from psychological counselling, at the cost of approximately \$200/hour, and would likely require 18-20 treatment sessions, as well as vocational rehabilitation counselling, at a cost of \$100-\$125/hour for 15-20 sessions.

Analysis

[27] At the outset, I note that there are no credibility or reliability issues with the plaintiff, nor with any other witness called at trial.

1) Non-Pecuniary Damages

Facts

[28] The parties agree that the plaintiff suffered soft tissue injuries to her lower back, and was diagnosed with CNP. The parties also agree that the plaintiff's prognosis for this injury is ongoing chronic pain. The plaintiff continues to suffer symptoms daily, although they are now at a tolerable level when the plaintiff is on medication.

[29] The plaintiff described her pain at trial as "more of an irritation". She testified that the medication she takes, Topiramate, reduces her pain by 80-90%. However, if she runs out of Topiramate, her serious symptoms immediately resume and she runs the risk of being bedridden with pain.

[30] The plaintiff's position is that she will require medication for her symptoms long term and possibly for the rest of her life, and that she faces the possibility of aggravating her injury by engaging in moderate or heavy physical activities regardless of how effective the medication may be.

[31] The plaintiff's evidence was that she had suffered some episodes of depression and anxiety as a teen, and had taken some medication for this but had discontinued use prior to the accident. After the accident, the plaintiff was referred to a counsellor by her family physician but did not attend any such counselling sessions or seek any other help concerning her psychological symptoms.

[32] The plaintiff had no prior history of low back pain. She described suffering low back pain starting the day after the accident. I note that the plaintiff went into labour three days after the accident. Her mother had to help her into the shower and off the toilet, and she could not climb stairs without significant pain. Prior to the accident, the plaintiff enjoyed longboarding, drawing and art, and played basketball in high school. The plaintiff testified that her level of activity has increased since the date of the accident and she is now at a similar level than she was pre-accident, although she engages at a less intense level.

Defendants' Position

[33] The defendants state that the appropriate range for non-pecuniary damages in this case is \$75,000-\$80,000, based upon the following cases:

Domijan v. Jeon, 2018 BCSC 1988

Villing v. Husseni, 2015 BCSC 1604, aff'd 2016 BCCA 422

Wiebe v. Wiebe, 2017 BCSC 898

[34] I find Villing and Wiebe to be the most on point.

[35] In Villing, the plaintiff, 17 years old at the time of her accident, suffered neck and shoulder pain, which subsided after a few months, and low back pain which persisted up to the date of trial. Her back pain bothered her daily and would come on during periods of prolonged sitting or standing. The pain would also interrupt her sleep every night. After considering that the plaintiff would probably face a lifetime of some degree of chronic back pain, and a need to manage her lifestyle and constantly be watchful, but also the possibility of long-term and perhaps permanent abatement of her pain, Saunders J. awarded the plaintiff \$85,000.

[36] The defendants state that while the plaintiff also suffered daily pain, it is less severe than Ms. Villing's pain, and as the Court of Appeal called Justice Saunders' award a "generous one" - though not so "inordinately high as to be wholly erroneous" - even a comparable amount of pain favours an amount in the \$75,000-\$80,000 range.

[37] In Wiebe, the plaintiff, an esthetician, was 27 at the time of the first of two accidents she suffered. The plaintiff was virtually couch bound with back pain for a number of weeks after the first accident, developed anxiety, and gained a considerable amount of weight, all of which had an impact on her daily life for a number of months after the first accident. The plaintiff's anxiety eventually subsided, and she eventually lost the added weight; as of the time of trial the plaintiff was physically active and able to run on a regular basis. Justice Tindale accepted that the plaintiff still suffered from mid-back pain though there had been significant improvement in her condition since the accident. Tindale J. awarded the plaintiff \$85,000 in non-pecuniary damages.

[38] While positing that Wiebe is an appropriate comparator case, the defendants argue that the plaintiff's injuries are slightly less severe than those of Ms. Wiebe, and that an appropriate award in this case should thus be slightly lower than \$85,000.

Plaintiff's Position

[39] After the accident, the plaintiff's neck was painful for about a month. Her mid-back was sore for about a year and a half and still flares up from time to time. The low back injury amounts to a feeling of sharp jabbing, and spreads out into her hips. Her evidence is that it feels like sharp and dull pain at the same time, and did not improve with medication or physiotherapy, until Dr. Francis diagnosed her with a nerve injury and prescribed her

Topiramate in January 2018. While she is relatively pain free on this medication, putting her pain at a 2.5 to 3 out of 10, when the pain flares up while off medication she rates her pain at an 8 or 9 out of 10. She testified that she has had no pain-free days since the accident.

- [40] The plaintiff reports that she suffers pain when running, bending, walking uphill, or undertaking household tasks that strain her back. The pain is most acute at the end of the workday, and can arise while she is sleeping such that the pain will cause her to awaken. There are also negative side effects of her medication, which include an increased inability to fall asleep, tingling in her hands and feet, and memory loss.
- [41] Further, after the birth of her son, the plaintiff's evidence was that she could not hold her baby or breastfeed for more than five minutes without pain. She could not carry her infant upstairs to the nursery or put him in or out of a car seat. This caused her emotional distress as she did not feel she could be the kind of mother she wanted to be. She moved out of her parents' house and left her baby with them for three months due to her depression and her need to try and "get out of that state of mind". She also is "frightened" by the prospect of having any additional children as this would likely require her to discontinue her use of Topiramate during her pregnancy, which would lead her to experience acute nerve pain.
- [42] The plaintiff argues that an appropriate range of non-pecuniary damages is \$85,000-\$100,000, citing the following cases:

Majer v. Beaudry et. al., 2002 BCSC 746

MacKenzie v. Rogalasky, 2011 BCSC 54

Dickenson v. Passero, 2015 BCSC 908

McLatchie v. Guineau, 2017 BCSC 1950

Tathgur v. Dobson, 2018 BCSC 1384

Lewis v. Rubboli, 2018 BCSC 17

Shipley v. Bye, 2014 BCSC 201

Dorosh v. John, 2013 BCSC 1442

Snidal v. Spires, 2015 BCSC 446

[43] Amongst these cases, I find that Dorosh and Snidal are most on point.

[44] In Dorosh, a 30-year-old coffee barista suffered injuries in a motor vehicle accident. Prior to the accident, the plaintiff had pre-existing health problems including depression and anxiety. Most of her symptoms improved over time, but she complained of ongoing soft tissue pain in her right shoulder, ongoing neck pain, and headaches. As of the time of trial, five years after the accident, she continued to suffer from chronic pain in her shoulder, and her prognosis for recovery was "guarded". She could not work as a coffee barista, which caused her to re-train to become a Licenced Practical Nurse. Madam Justice Power held that

the injuries would continue to have some impact on her future earning capacity and that they impaired her relationship with her youngest daughter during the critical years of the daughter's development (the daughter was 8 years old at the time of the accident and 13 at the time of the trial). The plaintiff was awarded \$90,000.

- [45] In *SnidaI*, a 20-year-old lifeguard suffered soft tissue injuries to her neck, back and right shoulder, and experienced headaches due to a motor vehicle accident. Her constant upper back pain persisted, which disrupted her sleep. She also became more withdrawn, and suffered a major depressive disorder. She lost her ability to work full-time hours on a consistent and sustained basis as a lifeguard. Her job prospects were reduced to sedentary or light-duty work, though the impact was somewhat attenuated given that the plaintiff was found not to be a career-oriented person. By the time of trial, approximately five years after the accident, her depression, while not fully resolved, was manageable and she was working 27 hours per week as a cashier. The plaintiff was awarded \$85,000 in non-pecuniary damages.

Analysis

- [46] The purpose of a non-pecuniary damage award is to compensate the plaintiff for "pain, suffering, loss of enjoyment of life and loss of amenities": *Jackson v. Lai*, 2007 BCSC 1023 at para. 134.
- [47] In *Stapley v. Hejslet*, 2006 BCCA 34, leave to appeal ref'd [2006] SCCA No. 100, at para. 46, Madam Justice Kirkpatrick outlined the following factors to be considered in awarding 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, 2005 BCCA 54.
- [48] The plaintiff's young age, the potentially lifelong duration of her injury and its impact on her physical ability, the severity of her pain before she went on medication, the emotional suffering caused by her aggravated depression, the impact her pain and depression had on her ability to raise and bond with her newborn son in the crucial months immediately following his birth (as well as the increased pain during the birth itself), and the strain her injuries put on her relationship with her parents, all stand in favour of a higher award.
- [49] I consider the loss of her ability to cradle her baby in her arms and to breastfeed without pain to be serious losses.
- [50] Should she wish to have more children, she faces a difficult choice: to go off her medication for the duration of the pregnancy and suffer serious pain, or to deny herself the opportunity to bear more children. As a corollary of this issue, she must not allow herself to become pregnant again without carefully considering the consequences.
- [51] On the other hand, the plaintiff's ongoing injury is not a disabling injury because its effects can be managed through the use of medication, the injury is limited to her lower back, and the injury has not caused a substantially material loss or impairment of her life or lifestyle as compared with her level of activity, recreational pursuits and social inclinations before the accident.
- [52] I also find that her injuries have not necessarily caused any marked impairment of her mental abilities - so long as she is on medication controlling her chronic pain, her academic performance does not stand to be affected. These factors favour a more limited award.
- [53] I turn now to the cases cited by the parties.
- [54] I find both *Villing* and *Wiebe* comparable in terms of the type of injury suffered, the severity and symptoms of the injury, the ongoing effects on the lives of the plaintiffs, and the young age of the plaintiffs. Each case awarded \$85,000. While I note that *Villing* was cited as being a "generous" award by the Court of Appeal, given inflation over the past four years, I find it likely that the award would be within the acceptable award range in today's figures. This is borne out to some degree by the fact that *Snidal* also awarded \$85,000 for similar injuries to a plaintiff in a similar situation. As for *Dorosh*, the plaintiff was not forced out of her occupation due to her injuries, but I accept that there was a similar negative effect on her ability to work certain jobs and her relationship with her daughter. While the plaintiff's child is younger than the plaintiff's child in *Dorosh*, I find that the severity and nature of the impact to the parent-child relationship are comparable but even more acute in the present case due to the importance to both the mother and the baby of immediate bonding. I have no medical evidence on the long-term effect of an interruption in the bonding process but I infer that it must have some detrimental effect on the mother-son relationship.

[55] Given these cases, I find the range of awards is \$85,000-\$95,000. I find that it is appropriate in this case to award the plaintiff \$100,000 given the added pain, suffering, and loss of enjoyment of life the plaintiff went through with the injury's impact on her birthing process, and ability to care for her son immediately thereafter. I accept that it is probable the pain of the birth was heightened by the pre-existing injury, and that the plaintiff's ability to care for her son after birth was diminished due to her accident-related injuries, both physical and psychological. While childbirth and the first weeks and months of child rearing are undoubtedly stressful, I find that this stress was exacerbated by the plaintiff's injuries, which led to increased suffering and loss of enjoyment, thus favouring a higher non-pecuniary award as compared with the other cases cited by the parties.

Conclusion

[56] Having regard to the Stapley factors, and the relevant cases cited by the parties, I award the plaintiff \$100,000 in non-pecuniary damages.

2) Past & Future Wage Loss

Facts

[57] The plaintiff's work history before the accident consisted of a series of short-term, minimum wage jobs, including busing at a pizza restaurant, working at a fast food restaurant (where she worked 32-40 hours a week), and working at a store as a cashier and clerk. She currently works full-time at the Mid Island Co-op gas station, working 32-40 hours/week, earning \$12.65/hour. The plaintiff is two chapters of a math course short of her high school diploma. She is, as noted, a single mother of a young child. The plaintiff also suffered acute gallbladder attacks in late 2016 into 2017, which culminated in surgery in the summer of 2017.

[58] The plaintiff's career aspiration is to become a hairdresser or a tattoo artist. The former requires that she take a 10-month post-secondary program, which requires the plaintiff to have a high school diploma. While the evidence indicates that being a tattoo artist does not require any formal training, this line of work may never be possible for the plaintiff due to her ongoing symptoms as they preclude her from being able to operate an ink gun for sustained periods of time or maintain a stooped position for long periods of time to apply her designs.

Defendants' Position

[59] Regarding the plaintiff's past loss of earning capacity claim, the defendants argue that the plaintiff's status as a single mother and her gall bladder issues affect her wage loss claim given that, notwithstanding the accident, she would not have been able to work after the accident, at least not in the year after the plaintiff gave birth and during the time she was having gall bladder issues. Even into 2018, the defendants argue that despite the plaintiff

having a 80-90% reduction in her pain, her focus remained on spending time with her son and pursuing her education, rather than her employment. It was not until the fall of 2018 that the plaintiff began looking for work and found full-time employment at a liquor store, and later at the Mid Island Co-op gas station.

- [60] Further, without a high school diploma, it is unlikely the plaintiff would have obtained better employment. The defendants point to Dr. Van den Berg's report noting the plaintiff's "general disinclination towards post-secondary education". They cite the plaintiff's high school grades as proof that the impact of the accident on the plaintiff's schooling was limited at best. The defendants categorized these grades as being in the "lower bottom third". In grade 9, the plaintiff's grades were 1 A, 1 B, 1 C+, 1 C, 4 C- and 2 W's. In grade 10, she fared much worse, getting 1 C- (this being a 50% grade), 3 W's and 3 F's. She was absent 76 days in 2016. Yet, when she returned to school in 2017, she got 4 Bs and 1 C+ despite her injuries and suffering debilitating gall bladder attacks which required surgery during this year. Thus, the defendants posit, the accident was not a contributing cause to her academic struggles and cannot be linked to any failure on the plaintiff's part to complete her high school, and thus cannot be linked to any wage loss, either past or future.
- [61] The defendants argue that there should not be an award for the plaintiff's delayed entry into the workforce as this was not caused by the accident, and is wholly attributable to the non-accident factors of being a single mother, her gallbladder attacks, and her "academic disinclination". As of the date of trial, the plaintiff has not pursued either of her stated career goals of hairdressing or being a tattoo artist.
- [62] For these reasons, the defendants argue the plaintiff is not entitled to any award for past loss of earnings.
- [63] Additionally, for the claim for loss of future earning capacity, the defendants argue there is no impediment to the plaintiff becoming a hairdresser other than her non-accident related disinclination to finish the requisite schooling required.
- [64] The defendants argue her delay in pursuing post-secondary education would have occurred regardless of the accident. In the alternative, the defendants state that the delay should be reduced to five months (this being the period after the gallbladder attacks ceased until the plaintiff was prescribed Topiramate). Citing the statistics above regarding median wages for women without a high school diploma, the defendants' position is that an appropriate award for future loss of earning capacity is in the range of \$20,000.

Plaintiff's Position

- [65] The plaintiff submits that the approach in Lewis at paras. 107-108, 123-124, should be followed in assessing the plaintiff's past and future loss of capacity damages. Based on this approach, the plaintiff submits she has suffered approximately a 20% reduction in her future earning capacity taking her likely pre-accident income of \$38,000/year (this being the average annual income of a woman with a high school diploma). This represents a loss of

\$7,600 per year over her working life. Applying the multipliers set out in the report by Mr. Robert Carson, an expert in the field of economics whose report was not challenged by the defendants, the loss totals approximately \$238,000-\$256,000, depending on when she retires. Applying reasonable negative contingencies, and using the capital assessment approach, the plaintiff submits that \$150,000 is an appropriate overall award (which is the amount awarded in *Lewis* for future wage loss), as further supported by the following authorities:

MacKenzie v. Rogalasky, 2011 BCSC 54

Tathgur v. Dobson, 2018 BCSC 1384

Tarasevich v. Samsam, 2013 BCSC 1914

J.J. v. Barton, 2017 BCSC 1196

Shipley v. Bye, 2014 BCSC 201

Dorosh v. John, 2013 BCSC 1442

Snidal v. Spires, 2015 BCSC 446

- [66] The plaintiff's submissions also make the point that the plaintiff's entry into the workforce has been delayed by two years due to the accident. She could have pursued her interests as a hairdresser or a tattoo artist, both of which were achievable, but for the accident which has led to the real possibility of her being unable to pursue these vocational avenues.
- [67] As the plaintiff made clear in her testimony, she had no pre-existing plan before the accident to take a year off from her studies after the birth of her son. Further, the evidence of the plaintiff's mother is that the drop in her grades between grades 9 and 10 was the result of bullying and related upheaval in the plaintiff's schooling and not due to any academic disinclination or lack of aptitude. Therefore, she was ready, willing and able to complete her high school diploma and pursue post-secondary education but for the accident which delayed these plans.

Analysis

- [68] In *Hoy v. Williams*, 2014 BCSC 234, Justice Kent summed up the law regarding past loss of earning capacity as follows:
- [141] Compensation for past loss of earning capacity is to be based on what the plaintiff would have, not could have, earned but for the injury that was sustained: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30; *M.B. v. British Columbia*, 2003 SCC 53 at para. 49. The burden of proof of actual past events is a balance of probabilities. An assessment of loss of both past and future earning capacity involves consideration of hypothetical events. The plaintiff is not required to prove these hypothetical events on a balance of probabilities. The future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation: *Athey v. Leonati* at para. 27; *Morlan v.*

Barrett, 2012 BCCA 66 at para. 38.

- [69] The parties have agreed that the plaintiff's future wage loss of earning capacity should be quantified on the capital asset approach. I agree. Baird J. in *J.J. v. Barton*, 2017 BCSC 1196 summarizes this approach as follows:
- [58] In the recent case of *Knapp v. O'Neill*, 2017 YKCA 10 at paras. 17-19, it was emphasised that when the capital asset approach is used, the analysis must be grounded as much as possible by factual and mathematical anchors. It is not, to use the language of other cases, an assessment "at large": see, for example, *Lally v. He*, 2016 BCSC 2187 at para. 120. I will therefore consider the possibilities indicated by the economic evidence produced, as well the plaintiff's pre-accident employment history, training, personality, work ethic, and attitude.
- [59] The factors to consider in assessing the value of the plaintiff's loss of income earning capacity as a capital asset are well known: see *Brown v. Golaiv* (1985), 26 B.C.L.R. (3d) 353 (S.C.) at para. 8; and *Kwei v. Boisclair* (1991), 60 B.C.L.R. (2d) 393 (C.A.). They include whether the plaintiff has been rendered less capable overall from earning income from all types of employment; is less marketable or attractive as an employee to potential employers; has lost the ability to take advantage of all job opportunities that might otherwise have been open; and is less valuable to herself as a person capable of earning income in a competitive labour market. The plaintiff here meets all of these descriptions.
- [60] Other principles that come into an assessment of loss of earning capacity include the following:
- 1) A plaintiff is entitled to compensation for real and substantial possibilities of loss, which are to be quantified by estimating the chance of the loss occurring. The standard of proof in relation to hypothetical or future events is simple probability, not the balance of probabilities: *Reilly v. Lynn*, 2003 BCCA 49 at para. 101.
 - 2) Hypothetical events are to be given weight according to their relative likelihood: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 27.
 - 3) Allowances must be made for the contingency that the assumptions upon which an award is based may prove to be wrong: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.) at 79, *aff'd* (1987), 49 B.C.L.R. (2d) 99 (C.A.);
 - 4) Evidence which supports a contingency must show a "realistic as opposed to a speculative possibility": *Graham v. Rourke* (1990), 75 O.R. (2d) 622 at 636 (C.A.).
 - 5) Relevant contingencies can include such things as the potential for improvements in health, opportunities for advancement, decline in the economy and loss of employment, as well as the usual chances and hazards of life: *Trites v. Penner*, 2010 BCSC 882 at para. 228

- 6) The court must assess damages for loss of earning capacity and not calculate them mathematically; the overall fairness and reasonableness of the award must be considered: *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 11.
- [61] The assessment must be based on the totality of the evidence and take into account all positive and negative contingencies. The essential task is to compare the likely future of the plaintiff if the accident had not happened against the likely future of the plaintiff after the accident has happened: *Gregory v. Insurance Corp. of British Columbia*, 2011 BCCA 144 at para. 32. It is the difference between these two positions that constitutes the plaintiff's loss. I bear in mind particularly that no loss is proven where incapacity relates to performance of an occupation that is not a realistic alternative for the plaintiff: *Perren v. Lalari*, 2010 BCCA 140 at para. 32.
- [70] As Dickson J. (as he then was) describes the Court's task in assessing loss of future earning capacity under the capital asset approach in *Andrews v. Grand & Toy Alberta Ltd*, [1978] 2 S.C.R. 229 (S.C.C.) at 251:

We must now gaze more deeply into the crystal ball. What sort of a career would the accident victim have had? What were his prospects and potential prior to the accident? It is not loss of earnings but, rather, loss of earning capacity for which compensation must be made: [citations omitted]. A capital asset has been lost: what was its value?

Conclusion

- [71] Turning first to the issue of past loss of earning capacity, the central question is whether the plaintiff's injuries prevented her from working from the time of the accident, December 5, 2015, until she started to work again in the fall of 2018. I save the consideration that the accident caused a two-year delay to the plaintiff entering the workforce as a hairdresser for the future wage loss analysis.
- [72] In my view, it is helpful to separate out three distinct time periods within the overall December 5, 2015 to fall 2018 timeline for the purposes of the analysis.
- [73] The first time period is the first few months after the plaintiff gave birth. I find that it is reasonable to conclude that the plaintiff would likely not have worked in the first few months after she gave birth, regardless of whether the accident had occurred or not. In my view, it is appropriate to set this period as three months and, I accordingly, I find no wage loss for the period of December 5, 2015 - March 4, 2016.
- [74] The second time period is March 5, 2016 - January 15, 2018, the latter date being approximately when the plaintiff starting taking Topiramate. I find that given the plaintiff's pain was significantly lessened due to taking this medication, it is appropriate to consider the before and after of this moment as engaging different considerations as to whether it was the plaintiff's injuries, or some other factor, which prevented her from working.

- [75] I find that given the severe and constant nature of the plaintiff's pain before she went on Topiramate, it would not be reasonable to expect that she would have been able to work during this period. I further find that there is no evidence that the plaintiff would have been either unable or unwilling to work during this period if the accident had not occurred, especially given her parents' willingness to help her with childcare. However, I do accept that she would likely not have been working full-time, or even near full-time, given her status as a mother to a very young child and her continued pursuit of a high school diploma.
- [76] Accordingly, for this period I find it appropriate to base the plaintiff's wage loss award on a 15 hour/week schedule, at 50 weeks/year, and at the rate of pay she is currently receiving at her Co-op job, this being \$12.65 hour. This amounts to approximately \$17,700 in wage loss, subject to any time off the plaintiff may have needed to deal with her gallbladder issues. These issues were, it seems, sporadic and ceased once the plaintiff had surgery in the summer of 2017. Thus, it stands to reason that these attacks would only require a few days off here and there, and for the time required for surgery and recovery. Given the wage rates and hours of work set out, I deduct \$550 from the wage loss amount, this being approximately three weeks worth of wages. The final wage loss total for this period is \$17,150.
- [77] The third period is from January 16, 2017 until fall 2018, when the plaintiff began working again. Given the evidence that the Topiramate significantly reduced the plaintiff's pain, some 80-90%, and the fact that the plaintiff has not reported any issues with managing to work at her current job, I conclude that there was no accident-related impediment to the plaintiff's ability to work during this period, and I decline to award any wage loss during this period.
- [78] Overall, I find that the plaintiff is entitled to \$17,150 in past wage loss.
- [79] As for future wage loss, while the facts of each case will differ based on, inter alia, the occupational prospects of the plaintiff, the job market for the plaintiff's occupation(s) of choice, the limitations on the hours and/or types of work the plaintiff can perform, and the ability to accommodate the plaintiff's limitation in the workplace, I find the Lewis, Dorosh and Snidal cases instructive given that they involve plaintiffs in similar situations where the courts employed methodology that helps guide how best to calculate future loss of capacity damages.
- [80] In Lewis, Justice Adair found that the plaintiff's chronic pain, and the associated limitations, would make it more difficult for him to compete for work especially given that physical activity was a necessary part of the plaintiff's profession and such physical activity caused him pain. The accepted evidence was that before the accident the plaintiff could work more than full-time hours without difficulty, and would earn an additional \$5,000/year in doing so, but that after the accident he no longer had the capacity to work any more than full-time hours because of his chronic pain symptoms. Justice Adair awarded the plaintiff \$150,000 on the grounds it approximated about two years' income based on a reasonable estimate of his

annual income, and, equally, the present value of an annual loss of \$5,000 to age 65.

- [81] In *Dorosh*, Justice Power summarized several ways in which the plaintiff would be rendered less capable of earning income that I find are applicable here:
- [87] In considering the *Brown* factors, taking a common sense approach, I am of the view that a plaintiff such as Ms. Dorosh, who is suffering from chronic pain and modifies her duties in order to function in her employment is rendered less capable overall from earning income from all types of employment. I conclude that the injury will likely impact the balance of her working life. I conclude, for example, that she may require more sick days which may make her less reliable or desirable as an employee unless she has an understanding employer.
- [88] I am of the view that Ms. Dorosh is rendered less marketable or attractive as an employee as a result of injuries suffered in the accident. Further based on the evidence before me in this trial, it is reasonable to assume that she would have to disclose her limitations if she applied for other positions as an LPN and she may have lost the ability to take advantage of all job opportunities in that field or in other fields. I am of the view that some job opportunities are now closed to Ms. Dorosh as a result of the accident.
- [82] After considering negative contingencies - the possibility the plaintiff's employment would have been limited in the future by her pre-existing health difficulties; the plaintiff's sporadic work history and lack of demonstrated reliability in fulfilling her skills; and the chance of her condition improving with recommended therapy - Justice Power assessed the future loss of earning capacity damages at \$150,000 on the grounds that this number closely accorded to lost work in the range of three-quarters of a day per week to the age of 65.
- [83] Lastly, in *Snidal*, Fitch J. (as he then was) found that given the plaintiff's fairly limited education, skills and work history, her future job prospects would be limited by her inability to work jobs that were beyond the light-duty range given that it was likely she would have pursued positions requiring more than light-duty physical effort at some point in her career. Further, the plaintiff's physical limitations precluded her from working a full-time position.
- [84] In setting the future loss of capacity award at \$150,000, Justice Fitch focused on the plaintiff's inability to work more than 30 hours/week or in any job that was not light-duty when, but for the accident, she could have worked 40/hours a week and would not have been limited to light-duty jobs. Given the extent to which the plaintiff's evidence was that she valued raising a family, Justice Fitch found that it was likely that the plaintiff would have worked full-time hours for about 10 years of her career. 25% of the plaintiff's income of \$48,000/year over 10 years was awarded, this being \$120,000. In addition, Justice Fitch valued the plaintiff's loss of ability to compete for anything other than light-duty work at \$30,000, bringing the overall total to \$150,000.
- [85] In the present case, the plaintiff is fully capable of obtaining her Grade 12 diploma and enrolling in post-secondary education towards a career that can accommodate her ongoing limitations. Hairdressing is one such career. The expert evidence indicates this is a job she

can do, subject to being able to take breaks from time to time and accommodation regarding her posture. That said, I agree that the plaintiff will likely face tougher job prospects than her able-bodied colleagues, both in being hired and in finding an employer willing to accommodate her. No matter which occupation she may later find herself in, I find that she will be limited in the work activities she can undertake, and will be less flexible in being able to move about in the workplace ranks.

- [86] I agree with Justice Fitch's approach in *Snidal* in valuing the loss of being able to do certain types of work, though this analysis is tempered by the reasonable prospect that the plaintiff would not have sought out or had the inclination to do heavy-duty work or full-time medium-duty work. Unlike in *Snidal*, there is no evidence that the plaintiff cannot work full-time hours into the foreseeable future and I cannot conclude that it would have been likely that the plaintiff would have taken on heavy-duty work or full-time medium-duty work in the future but for the accident given her education, skills, work history and career aspirations. Nor can I find that the plaintiff is precluded from taking on work she would have otherwise been able to do but for her injury as was the case in *Lewis*. There is no evidence the plaintiff would have worked over and above full-time hours but for the accident.
- [87] Based on the evidence, the plaintiff had exclusively worked in the service industry or as a cashier, at no more than 32-40 hours/week. The plaintiff did not disclose any desire to enter the realm of medium or heavy-duty work, and there was no indication that given the job market in and around Nanaimo that the plaintiff would effectively be forced to take a heavy-duty job or a full-time medium-duty job due to a lack of other options. It appears that the plaintiff will continue to be able to perform light-duty work, so there is no basis in my view to award separate "loss of ability to compete" damages. That said, as stated, I accept that there should be a certain "loss of ability to compete" component to the overall award given that the plaintiff stands to be less desirable as a job candidate, and as a continued employee, given her physical limitations.
- [88] Overall, I find that the most appropriate approach is that taken in *Dorosh*, where the loss was calculated as a function of hours per week lost based on considering the prospects that the plaintiff would not be hired or would not be able to take on certain jobs due to her limitations, her need to take time off work due to her injuries, as well as any other relevant contingencies. Factoring into this loss is the fact, which I accept, that the plaintiff's entry into the post-secondary workforce has been, or will be, delayed by two years due to her injuries. This is subject to the added contingency consideration that the plaintiff may not complete her high school diploma or pursue post-secondary training to become a hairdresser (or any other such post-secondary education). In my view, the chance that the plaintiff will complete high school is very high, and the chance she will complete post-secondary education is moderately high based on Dr. Van den Berg's report.

- [89] I consider it to be appropriate and reasonable to set the plaintiff's future wage loss as being on par with Dorosh, this being 3/4 of a day per week. This equates to a loss of six hours a week on a full-time schedule. I set the plaintiff's hourly wage as being a function of what she could earn full-time as a hairdresser, per the median wage of such an occupation set out in Dr. Van den Berg's report, this being \$14.50/hour. Overall, this amounts to a loss of \$4,350 over a working year, which I set as being 50 weeks.
- [90] As for the duration of the award, given the plaintiff's young age, I find that it is reasonable to expect the plaintiff to be able to work full-time for the next 30 years. There is no evidence before me that single mothers cannot work full-time. Accordingly, there is no basis to deviate from the assumption that the plaintiff will be able to work fulltime into the foreseeable future.
- [91] Given the above analysis, I find that the appropriate future loss of earning capacity award is \$130,000.

3) Cost of Future Care

- [92] The plaintiff sets her cost of future care as \$25,900, broken down as follows:

Medication (\$81.00 per month for Topiramate, indefinitely): \$20,000

Psychological Counselling (as recommended by Dr. Van den Berg): \$3,800

**Vocational Rehabilitation Counselling (as recommended by Dr. Van den Berg):
\$2,100**

- [93] The defendants take the position that the only treatment was the Topiramate prescription, which is fully paid for through her employee benefits, and would be fully covered by social services in the event she loses employment. Accordingly, there will be no future care costs for the plaintiff, and no such award should be made.

Analysis

- [94] The legal principles governing cost of future care awards are based on the medical justification standard, as summarized by Collyer v. Boon, 2008 BCSC 1745:
- [146] The claimant must demonstrate that there is medical justification for the future cost of care claim and the claim itself must be reasonable: Milina v. Bartsch (1985), 49 B.C.L.R. (2d) 33 (S.C.) at para. 211, aff'd (1987), 49 B.C.L.R. (2d) 99 (C.A.). The standard is one of reasonableness; it would be too stringent to require a plaintiff to demonstrate a claim is a medical necessity in order to succeed under this head of damage: Zapf v. Muckalt (1996), 26 B.C.L.R. (3d) 201 (C.A.) at para. 36.

- [147] An award for future cost of care is based upon a prediction of the medical and non-medical services that will likely be in the plaintiff's best interests. As stated in *Krangle v. Brisco*, 2002 SCC 9, 1 S.C.R. 205: "No one knows the future. Yet the rule that damages must be assessed once and for all at the time of trial (subject to modification on appeal) requires courts to peer into the future and fix the damages for future care as best they can": at para. 21.
- [148] An award for future cost of care must attempt to provide the plaintiff with damages "as best as they can be ascertained", without providing the plaintiff "a windfall and [requiring] the defendant to pay more than is fair": *Krangle* at para. 22. The award must be "moderate, and fair to both parties": *Andrews* at 586.
- [95] As stated in *Hart v. Hansma*, 2014 BCSC 518 at para. 161, evidence of medical necessity is not required. The standard is one of reasonable medical justification. An evidentiary link must be drawn between a qualified medical assessment and a qualified treatment recommendation: *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 39, citing *Aberdeen v. Zanatta*, 2008 BCCA 420 at paras. 43, 63.
- [96] Germane to the present case is Justice Wong's observation in *Campbell v. Swetland*, 2012 BCSC 423 at para. 198, citing *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9, that it is important to prevent double recovery where social assistance benefits may be received in the future to cover future care costs, subject to a contingency that these benefits will cease based on a change to government policy. In my view, this approach equally holds true regarding employment benefit plans and the chance that the plan may not cover the costs in question in the future. In *Krangle*, the Supreme Court of Canada upheld a 5% contingency award given that the social security program which was covering the plaintiff's group home care "appeared to be a constant feature of Canadian social policy" and certainly so in B.C. The contingency award provided "adequate security against the possibility of change": paras. 42-43.

Conclusion

- [97] I agree with the defendants that as the evidence showed that the plaintiff's Topiramate prescription is covered through her extended health plan at work, and would be covered by social services if she were to be unemployed, she is not entitled to the costs of this medication as that would amount to double recovery.
- [98] While there is a possibility that the plaintiff will cease to work for the Co-op and that the benefit plans of future employers may not cover this medication (or the Co-op benefits will change to preclude paying for such medication), or that she may become a hairdresser where she is self-employed and her medications not covered, or that the government's policy will change such that social services will cease its coverage, I find that this scenario is somewhat unlikely. In my view, an appropriate contingency for these events occurring is 30%. Accordingly, the plaintiff is entitled to \$6,600 for her medication costs into the future, this being 30% of \$20,000.

[99] I am of the view that psychological counselling is reasonably medically justified, and that Dr. Van den Berg's report recommending such a treatment option represents a qualified medical assessment. I award the plaintiff's claim of \$3,800 for this counselling in full.

[100] As for vocational rehabilitation, I am not convinced there is a medical justification for such a measure. While it would certainly benefit the plaintiff to undergo such a program, I do not find that it is reasonably justified as there is no sufficient evidentiary link between a qualified medical assessment of the plaintiff's accident injuries and this treatment recommendation. There is no evidence that the plaintiff requires any such rehabilitation so as to properly integrate into the workplace. She appears able to fulfill her duties as a cashier at the Co-op, and there is no evidence she would reasonably need such rehabilitation in the event she becomes a hairdresser or pursues other work for which she is qualified but needs accommodation for. I decline to award costs for vocational rehabilitation.

[101] Overall, I award the plaintiff \$10,400 for her cost of future care.

4) In-Trust Claim

[102] At the end of the plaintiff's argument, I had to prompt counsel to make an argument for an in-trust award to the plaintiff's parents. Fortunately, plaintiff's counsel had included such a claim in his pleadings.

[103] I considered that such an award was clearly merited.

[104] The evidence establishes that the plaintiff's parents took on a large part of her and the baby's care after the accident, including driving the plaintiff to and from medical appointments. The plaintiff's parents also took on 100% of child-rearing responsibilities for a small baby with the usual interruptions of sleep and additional work such as laundry when the plaintiff left home to live with a friend for three months in the spring of 2016. The evidence also shows that before she left they let the plaintiff live with them for a nominal charge for room and board.

[105] While it is not entirely clear if the plaintiff's injuries were the sole cause of her moving away for several months, I accept that her depression, exacerbated by the accident, was the substantial cause of that depression and so it can properly be said that but for the accident it is probable that the plaintiff would not have moved out as she did.

[106] However, I accept that the plaintiff's parents took on 100% of the childcare for the period of time the plaintiff left her parents' home for Courtenay and that the childcare they undertook is a service of great value that merits compensation.

[107] Both of the plaintiff's parents work, her father as a taxi driver and her mother as a clerk at a 711 store and they had to juggle their shifts to accommodate the care of their grandson. I consider their care for the baby as extremely generous and well beyond what could be expected.

- [108] I note that Mrs. Laliberte, the plaintiff's mother, minimized her contribution to her daughter but the fact remains that without her, it is entirely possible the Ministry of Children and Family Development may have had to be involved or the quality of the plaintiff's care for her son, diminished.
- [109] I accept that the plaintiff's ability to care for her son was affected by the accident, and it was the plaintiff's parents who stepped in to care for the baby when the plaintiff was unable to due to injuries sustained or aggravated in the accident, be they physical pain or her depression and anxiety. As for transportation costs, the plaintiff's parents would not have incurred them were it not for the accident. The plaintiff would not have had such appointments had she not been in the accident, thus making these costs compensable.
- [110] Accordingly, I find there is an underlying basis for the in-trust claim advanced by the plaintiff on behalf of her parents. Regarding quantum, the plaintiff states that \$5,000 is appropriate. The defendants did not meaningfully challenge this amount. Had it been requested, I would have valued the in-trust award at substantially more than \$5,000. But I have not been requested to award a larger amount, reflecting what appears to me to be the oft-observed undervaluing of childcare services.
- [111] I will therefore, limit my in-trust award to \$5,000.
- [112] I have included an amount for transportation costs in this figure.

Conclusion

- [113] Overall, I award the plaintiff \$263,100.40 summarized as follows:

ITEM

AWARD

1.

Non-pecuniary damages

\$100,000.00

2.

Loss of past income earning capacity

\$17,150.00

3.

Loss of future income earning capacity

\$130,000.00

4.

Cost of future care

\$10,400.00

5.

Special damages

\$550.40

6.

In-trust award

5,000.00

TOTAL

\$263,100.40

[114] The plaintiff will have her costs.

[115] Should the parties wish to address me on the subject of costs, they may do so by notifying the Registry within 30 days of the date of release of my Reasons.

"Russell J."

The Honourable Madam Justice Russell

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