
CANADA / JUDGMENT

Lightfoot v. Lindsay

2021 BCSC 1288

COURT

Supreme Court of British Columbia

DECIDED

30 June 2021

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

2021 BCSC 1288 Lightfoot v. Lindsay

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Lightfoot v. Lindsay,

2021 BCSC 1288

Date: 20210630

Docket: COU-S-M-09413

Registry: Courtenay

Between:

Tailynn Nichole Lightfoot

Plaintiff

And

Ian Robert Lindsay

Defendant

Before: The Honourable Mr. Justice A. Saunders

Reasons for Judgment

Counsel for the Plaintiff:

S. Allardice

A. Broadley

Counsel for Defendant:

S. Finn

Z. Marler

M. Campbell

Place and Date of Trial:

Victoria, B.C.

December 7-11, 14-18, 2020

Place and Date of Judgment:

Courtenay, B.C.

June 30, 2021

Introduction

- [1] The plaintiff, Ms. Lightfoot, was injured on June 18, 2015, when a pickup truck in which she was a passenger, driven by a friend, the defendant, left the road and collided with a concrete fence post and a tree (the "Collision"). Ms. Lightfoot was then 24 years old, and a recent graduate of the Bachelor of Education (or "B.Ed.") program at Vancouver Island University, with certification in early childhood education. She intended to pursue a career in teaching and hoped to secure an entry-level position as an on-call teacher (or "Teacher on Call" or "TOC") in the Comox Valley.
- [2] That evening, Ms. Lightfoot had been at a small social gathering of friends at the defendant's home; Ms. Lightfoot ate a meal and drank two beers. At one point, the defendant offered to drive several of the friends who had gathered, including Ms. Lightfoot, to a store. Ms. Lightfoot was sitting in the front middle seat of his truck when the defendant lost control while making a turn. Ms. Lightfoot described how she "flew" from side to side, forward and back, and how the seat belt tightened around her hips. Shortly afterwards she began to feel sore in her neck and back - and, she testified, her hip - and felt "out of it".
- [3] They all returned to the defendant's house. The other guests departed; Ms. Lightfoot and the defendant watched a movie, she drank two more beers - she does not recall if she finished the second - and she fell asleep on the couch.
- [4] At about 5:00 a.m., nine or 10 hours after the Collision, she awoke from sleep, feeling excruciating pain in her left shoulder and neck, and nausea. She got up to make her way to the bathroom. She "blacked out", and came to lying on the floor. She got up and continued to make her way to a bathroom, where she fainted again; her face impacted the toilet as she fell, as a result of which she sustained extensive dental and facial injuries.

- [5] Ms. Lightfoot alleges that she continues to be disabled from full-time employment, due to her neck/shoulder and hip/low back injuries. She also alleges that she suffers from significant anxiety and post-traumatic stress disorder ("PTSD"). She has not worked as a public school teacher; she is employed - now half-time, 20 hours a week - as a preschool teacher.
- [6] The defendant admits liability for the Collision, but denies that some of Ms. Lightfoot's injuries are causally related to the Collision - in other words, the defendant submits that the plaintiff has not proven that the subsequent fainting episode and resultant injuries she suffered were caused by the defendant's negligence. The defendant further concedes that Ms. Lightfoot suffers from neck and shoulder pain, PTSD, and insomnia as a consequence of the Collision, but says that the Collision has not been shown to be a cause of her hip and low back symptoms. Generally, the main contention of the defendant is that Ms. Lightfoot's current issues reflect a fairly recent deterioration in her emotional state, and that physically she is capable of full-time employment.

Background

- [7] Prior to the Collision Ms. Lightfoot was physically active and fit. She had engaged in a wide variety of recreational activities since her childhood, including deer hunting with a compound bow, target shooting, camping, hiking and trail building, canoeing, horseback riding, and fishing. She did many of these activities with her father, and they had an especially close bond. Her father was a karate instructor; she learned martial arts through him, and she assisted in instructing his students when she was still young. She started horseback riding when she was eight years old; she learned English riding and participated in gymkhanas when she was in high school, and then learned Western style and did rodeo events and barrel racing. She also volunteered in therapeutic riding. She played in organized sports, including soccer and swimming. In grades 11 and 12 she danced, and taught choreography. Through this all, she maintained focus on academics throughout her high school years, and graduated as an honour roll student.
- [8] After high school Ms. Lightfoot attended North Island College, doing three years of pre-B.Ed. studies. She had wanted to be a teacher since she was very young. She was accepted into the Vancouver Island University B.Ed. program in 2012, completed the required course work and two practicums, and graduated in the spring of 2015. Her involvement in physical activities was much reduced in those years - as she put it, life and school got in the way - but she would work out in a gym or at home, six or seven days a week.

Injuries and Recovery

- [9] Ms. Lightfoot suffered dramatic dental and facial injuries when she fainted and fell. Her top two front teeth were broken, her right eyetooth was fractured in three segments, and she suffered significant bruising. Initially, when she attended at the hospital the day following the Collision, teeth fragments were removed from her lip, and the lip was sutured; under

anesthetic, two teeth were extracted, and one front incisor was re-implanted. (It should be noted that the hospital records are also reported as recording Ms. Lightfoot complaining of pain in her back, neck, shoulder, and jaw.) Eventually, the re-implantation failed, that tooth was extracted, and Ms. Lightfoot underwent a lengthy series of painful procedures including bone grafting, affixing of a partial denture, and then implantation of two posts, with a three-unit bridge fixed to the implants. She attended Bayview Dental and Implant Centre in Qualicum Beach, B.C. 16 times from June 23, 2015 to December 20, 2019.

- [10] At present Ms. Lightfoot's teeth and jaw continue to hurt, and she suffers from what her dentist has described to her as "phantom pain" equivalent to the sensation experienced by amputees. The pain becomes especially pronounced when anxiety or panic leads to jaw clenching, and her gums can swell. She also described, and I accept, that cold, and sinus pressure, lead to the sensation of the implant posts vibrating. There are times when, because of her tooth and jaw pain, she goes for days without being able to eat properly.
- [11] The defendant's position regarding causation of these injuries is discussed below.
- [12] In the weeks following the Collision Ms. Lightfoot spent much time on bed rest, with her mother assisting her with personal care. I accept her evidence that she was very sore, anxious, and depressed; that she lost approximately 20 lbs in body weight; that she experienced post-concussive-like symptoms of feeling dizzy and not fully aware; and that she had repeated "flashbacks" and nightmares. Her speech was affected both by the loss of her teeth and by nerve damage, and she had to relearn how to enunciate.
- [13] The defendant testified that within weeks of the Collision he and Ms. Lightfoot went on a trip together to Oyster River, and that they also met with friends at Comox Lake for a walk. The timing of those events was not clear, but that evidence was possibly at odds with Ms. Lightfoot's testimony that she did not begin venturing into town alone to see friends until about two months after the Collision. Coupled with Ms. Lightfoot's own evidence of also having attended at the defendant's home within days of the Collision, when she took photos of the bathroom where she fainted, the defendant says that those incidents of the plaintiff socializing and interacting with others relatively soon after the Collision raise concern that her evidence of a post-Collision recovery period of extended bed rest was exaggerated and unreliable.
- [14] However, those two incidents the defendant testified to were not put to Ms. Lightfoot in cross-examination, and they are therefore not of sufficient weight to seriously undermine Ms. Lightfoot's evidence. In any event, Ms. Lightfoot did not say she was "bedridden", which would have suggested a much greater degree of disability. I accept that she underwent a long, painful, and difficult recovery period in the weeks following the Collision.
- [15] I found Ms. Lightfoot testified in a straightforward manner, without embellishing or exaggerating her symptoms. The defence did identify minor inconsistencies in her evidence: inconsistencies between, on the one hand, her trial testimony, and on the other, evidence given by her on examination for discovery, and the evidence of her treating

physicians. But those inconsistencies were, on the whole, of the nature and extent that one would expect in dealing with events that have unfolded over the course of more than five years, and that have involved such difficult circumstances. Any issues with the reliability of particular pieces of Ms. Lightfoot's testimony did not give rise to a general concern with her testimony overall. I found her to be entirely genuine, and sympathetic.

- [16] Ms. Lightfoot testified, and I accept, that as her dental injuries began to heal, and as she became more mobile, she became more aware of her neck, shoulder, back, and hip pain. She testified in direct that she experienced left-side soreness immediately following the Collision, and, as I have noted, she woke early the next morning, before her fainting episodes, feeling what she described as excruciating neck and shoulder pain.
- [17] On cross-examination she endorsed the evidence she had given on examination for discovery, which was that her first clear memory of when she started to have pain in her low back or left hip was a week after the Collision; she did concede that it may have been after more than a week or two. The first record of Ms. Lightfoot having treatment of her hip is the clinical record of her physiotherapist dated September 1, 2015, in which it is noted that the previous treatment - on August 29, which would have been just over 10 weeks post-Collision - "really helped the hip".
- [18] The defence says that this evidence is insufficient to establish, on a balance of probabilities, a causal connection between the Collision and Ms. Lightfoot's back and hip issues. I do not agree. The plaintiff's psychiatry expert Dr. James Filbey testified that he would expect to see a soft tissue strain injury emerge within one to four weeks; if only emerging four to 12 weeks later, he would start to consider other causes; a delay in onset of six months would be a "hard sell" in terms of establishing causation. Although the medical records only prove initial treatment at the 10-week mark, it was not put to Ms. Lightfoot that that 10-week gap is inconsistent with her having first felt pain or discomfort in her hip at a much earlier date, and I do not find that is a reasonable inference. I find it likely that her hip first became symptomatic within approximately four weeks of the Collision, and I am satisfied that causation is established with respect to both her back and hip injuries.
- [19] In respect of her neck/shoulder and hip/back injuries, Ms. Lightfoot has undergone a great deal of therapy, and has attempted rehabilitation through exercise. She underwent physiotherapy 73 times from June 30, 2015 to November 17, 2017; massage therapy 103 times from August 18, 2015 to March 14, 2020; chiropractic 10 times from September 15, 2016 to March 2, 2018; and exercising with a kinesiologist 61 times from September 28, 2015 to June 17, 2020.
- [20] Ms. Lightfoot has also undergone treatment focused on pain management. She saw Dr. Barbara Fehlau 23 times from March 20, 2017 to February 19, 2018, for trigger point injections and prolotherapy. She has also attended the Nanaimo Regional General Hospital Pain Program, which consisted of a pain orientation and a consultation and assessment with Dr. Karl Alexis Muendel.

- [21] During her initial recovery period Ms. Lightfoot also began to feel a great deal of worry and anxiety in contemplating her future. She was not confident she would be able to work as a Teacher on Call, and felt teaching would be hard on her body. She began having panic attacks, and was prone to feelings of anger, which harmed her relationship with her parents. As she began driving again she felt a great deal of anxiety around driving. She began to undergo counselling with a social worker, Mr. David Owen, and he helped her try to work through her anxiety and emotional upset through meditation, breathing exercises, and visualization. Ms. Lightfoot testified that she still has panic attacks - difficulty breathing, and feelings of nausea - every week or two. She has had several while at work, and her educational assistant has had to take over her class. In early 2019, her family physician Dr. Alsoon Brine referred her to Comox Valley Mental Health and Substance Use, and she attended counselling there on three dates in February and March 2019. At the time of trial she had just begun seeing a psychologist, after being on a six-month waitlist.
- [22] Ms. Lightfoot was physically unable to work through the summer and fall of 2015 and did not apply to school districts for entry-level TOC teaching positions. In February 2016 she felt well enough to return to work, and found a position with a daycare. She worked eight-hour days. The job involved feeding and toileting young children and supervising their outdoor play.
- [23] By May 2016, after about three months on the job, she was describing her pain to her then family physician, Dr. Donald Curtis, as intermittent. However, as time went on, her pain and discomfort increased. She testified that she struggled on the job; working aggravated her shoulder, back, and hip, and she was often in a lot of pain and left feeling exhausted. She said she felt like she was an emotional mess. Her co-workers would help her out. Some days she "floated", worked in the kitchen, or did lighter work. At the end of a working week she would feel exhausted and in a lot of pain. She would rest all weekend to recover. She had no social life. Dr. Curtis' impression, which I accept as an accurate generalization of Ms. Lightfoot's condition at this time, was that in everyday situations, if no demands or loads were being placed on her, Ms. Lightfoot was doing well; but under loads such as work or stress, she was having difficulty.
- [24] Over the summer of 2017 Ms. Lightfoot worked part-time at two different preschools, caring mostly for four- and five-year-old children. That September she began working for Inglis Professional Tutoring as a tutor, teaching math and literacy skills mostly to students from kindergarten to grade 7, but also with some adult learners working on their GED. She was a contract employee in that position, earning \$20 an hour. She would see, on average, five to six students a day, sometimes up to eight.
- [25] In the spring of 2018 the principal of that tutoring company, Ms. Jenny Inglis, opened a preschool. Ms. Lightfoot was hired on contract to work with a special needs child in the preschool in the mornings, and she would continue to tutor in the afternoons. In May 2019 Ms. Inglis hired her to work full time as a preschool teacher, with her own class of two- to five-year-olds, at a rate of \$23 per hour.

- [26] Ms. Lightfoot testified, and I accept, that over the course of approximately two years, from 2018 until the summer of 2020, she worked full time despite continuing to suffer extreme pain in her hip, back, and neck, as well as headaches. In particular, she struggled with the physical aspects of teaching: getting down to the level of her students through a lot of bending or crouching, and standing for lengthy periods of time. She would be exhausted at the end of every day, and, in her words, "done" at the end of the week. She would rest all weekend to recharge for the next week. She lived with her boyfriend, but beyond that had no social life. She could no longer participate in any of the sports and outdoor activities she used to enjoy. She was angry, depressed, frustrated, and short-tempered, and testified that she would take her anger out on her family and her boyfriend. There was no real intimacy between her and her boyfriend.
- [27] Ms. Lightfoot testified that she did not have severe headaches in the first few months following the Collision. Since then her headaches have gotten worse; she testified that they became more intense and frequent over the year leading up to trial. She now experiences headaches every day, in the form of a pinching from her neck, and pain behind her eyes. Her headaches are exacerbated by prolonged talking, standing, or looking down at a computer screen; movement of her neck; and certain lights. Additionally, she has recently experienced increased frequency of migraine-like headaches, where she has light sensitivity, feels nauseated, and has difficulty focusing. Her headaches can last for a few hours at a time; she has also experienced migraine and headache fluctuating for up to a week-and-a-half straight. She finds that she has to limit the amount of reading she does, as reading will bring on headache. If her headaches last for more than a few hours, she finds that they blur her thought processes.
- [28] Ms. Lightfoot was asked in her direct evidence whether she has considered going on to do a Master's degree in education. She said that with her headache issues and sensitivity to reading, she does not think that would be practical. She said that she is now "struggling" with completing a recertification course for her early childhood education credential, through on-line courses; she finds she can only work on the material for a maximum of a half-hour at a time, and can only do a few hours of coursework every week.
- [29] There is no evidence before me of any medical assessment of Ms. Lightfoot's headaches. Ms. Tania Percy, an occupational therapist who conducted a functional capacity evaluation of Ms. Lightfoot at the request of the defendant in August 2020, noted in her opinion that Ms. Lightfoot should see a headache specialist for pharmacological and prophylactic management. The report of Dr. Scott Paquette, a medical doctor called by the defence with an expertise in neurology and neurosurgery, discusses her musculoskeletal injuries - chronic neck pain, shoulder pain, and hip pain - but remarkably, given his field of expertise, there is no mention in his report of Ms. Lightfoot's post-Collision history of headache. Why that condition was apparently not reviewed by Dr. Paquette was not raised with either Dr. Paquette or Ms. Lightfoot during their testimony.

- [30] In giving her evidence, Ms. Lightfoot seemed to associate her headaches, to at least some extent, with her ongoing dental injuries. That would seem to be one possible cause. Another cause suggested by the evidence is that the headaches might be cervicogenic, i.e. originating from the soft tissue injuries to her neck/shoulder complex. There is no evidence relating her headache to the concussion she suffered in the bathroom fall. I assess her headache, in terms of its prognosis, as possibly being permanent to the extent it is related to the dental injuries, but as possibly being amenable to treatment if her issues with pain and dysfunction arising out of her musculoskeletal injuries can be addressed.
- [31] Notwithstanding the pain she was in, Ms. Lightfoot persisted with full-time employment through two years until the summer of 2020, when she asked her doctor for a note. Asked in her direct evidence why she put herself through this for two years, she said - and I accept - that she wanted to push herself, and that she has a hard time giving up.
- [32] Dr. Brine wrote a letter dated August 25, 2020, confirming that Ms. Lightfoot was no longer able to work full time, and needed to reduce her hours by 50%, which would apply for the next four months, and possibly longer. Dr. Brine testified, and I accept, that this note was not dictated to her by Ms. Lightfoot, and did not reflect what she had been told by Ms. Lightfoot about comments or recommendations made to her by other specialists who had assessed her, but rather reflected Dr. Brine's own medical judgment. Ms. Lightfoot presented that note to Ms. Inglis; they discussed options, and Ms. Inglis was able to hire a teacher to share the classroom.
- [33] Ms. Lightfoot now works Mondays and Tuesdays, and Wednesday mornings. She said that she is still in pain and exhausted after 2½ days, but now feels more able to do some housework, and to have something of a social life. She is still not able to do any recreational activities; she particularly mourns the loss of the close relationship she and her father enjoyed through doing activities together, and she feels that she and he no longer have anything in common. She currently lives at the home of her boyfriend's father. She helps with the cooking, cleaning, and shopping, but finds it challenging. As she described it, she feels that she is at her maximum capacity working half-time; after 2½ days she is drained and in a lot of pain, but with the additional time off she can recover, rest, and do more with her life than just work and sleep.
- [34] She still has frequent panic attacks. She testified that she feels her panic and anxiety increased over the summer and fall of 2019. She is scared and anxious as to what the future holds.
- [35] She had formerly hoped to eventually have two children; she now worries that she will never be able to have children of her own. She had also dreamed of living on a property with a garden and horses, but she now thinks these would be beyond her capabilities.

- [36] Sleep has been an issue for Ms. Lightfoot since the Collision; her teeth throb, and she feels a lot of pain moving around in bed. She testified that she usually sleeps four to six hours, on and off, but sometimes has as little as two hours of sleep. Now that she is working half-time she feels better rested, but testified that most mornings she still feels groggy and fatigued.
- [37] The defendant submits that Ms. Lightfoot was able to work full time until recently and that it was only a worsening of her psychological symptoms that ultimately overwhelmed her. I do not accept that framework for analyzing the plaintiff's loss and prognosis. I find Ms. Lightfoot suffered considerable physical pain and discomfort through her last two years of full-time employment, and that her decision to curtail her employment to 2½ days a week was entirely reasonable.

Collateral Witnesses

- [38] Ms. Lightfoot's testimony as to her fatigue and to changes in her lifestyle was corroborated through testimony from her parents and from Ms. Sarah Scroggie, an educational assistant who worked with Ms. Lightfoot in the classroom.
- [39] Ms. Scroggie testified that she worked with Ms. Lightfoot daily from February 2019 to March 2020. She described vividly the physical demands inherent in preschool teaching, and that testimony is a factor I weigh in determining the reasonableness of Ms. Lightfoot now having gone to part-time work. She also testified that she has seen Ms. Lightfoot go through what appeared to have been a panic attack, and that there were other occasions at work when Ms. Lightfoot seemed exhausted and nauseated.
- [40] Ms. Lightfoot's mother, Myra, testified. Her testimony confirmed the degree to which her daughter was dependent on her during the initial stages of Ms. Lightfoot's recovery, as well as Ms. Lightfoot's demonstrations of anger, panic, and anxiety. Myra and her husband, Ms. Lightfoot's father, Darrell, have frequently driven their daughter to various appointments, and Myra has observed Ms. Lightfoot seeming nervous as they drive, constantly looking around, asking to slow down, and rolling the window down due to nausea. Since Ms. Lightfoot began working part time in August 2020, she has come by her parents' house more often, but she often has a headache and complains of a stiff shoulder, and does not tend to stay long. Myra said that her daughter is now a completely different person.
- [41] Ms. Lightfoot's father, Darrell, had similar evidence with respect to Ms. Lightfoot's initial recovery, and her subsequent years of treatments, anxiety, and panic attacks. He gave very moving, persuasive testimony as to the closeness of the relationship he had with his daughter, through their outdoor pursuits. Now, their relationship is gone; they hardly communicate.
- [42] Ms. Lightfoot's current boyfriend, Wyatt, also testified. He did not know Ms. Lightfoot prior to the Collision; they only began dating in 2016. He testified as to their limited social life, and as to the frequency of Ms. Lightfoot waking with nightmares.

Expert Evidence as to the Plaintiff's Injuries

Dr. Sujay Mehta

[43] Ms. Lightfoot's dental injuries were assessed by an independent dental expert, Dr. Sujay Mehta, in March 2020. Dr. Mehta has specialized expertise in dental pain. His résumé is impressive. He diagnosed muscular pain to the jaw closing muscles, jaw joint pain, and neuropathic - nerve injury - pain, which account for the throbbing sensation Ms. Lightfoot reports. He recommended that she come under the care of a dentist who has had formal residency training with orofacial pain, in order to assist her with pain management; he noted that there are only a few such individuals in British Columbia. He opined that her bridge prosthesis will likely require replacement every 10 to 15 years, and that as she ages she may require additional procedures, such as soft tissue and bone tissue grafting, to maintain aesthetics.

Dr. Scott Paquette

[44] The defendant had Ms. Lightfoot assessed by a neurologist, Dr. Scott Paquette, in August 2020. Dr. Paquette took a history from Ms. Lightfoot, examined her, and reviewed her medical records. He is of the opinion that Ms. Lightfoot probably suffered a mild concussion when her head struck the toilet.

Dr. James Filbey

[45] Dr. Filbey was qualified as an expert in physiatry. Ms. Lightfoot's left shoulder/neck, and lower back/left hip injuries were assessed by Dr. Filbey on two independent medical examinations, the first in December 2017, the second in September 2020. As I will discuss further below, he also provided a report dated February 8, 2019 wherein he provided his opinion as to the causal connection between the injuries the plaintiff suffered in the Collision and the subsequent fainting episodes and resultant injuries.

[46] At the time of the first assessment, Ms. Lightfoot reported that what Dr. Filbey referred to as her "cervicospinal" pain was feeling 60-70% better about half the time, but that on other days it felt like it had not improved at all. Her lower back and left hip symptoms had a similar pattern. She was undergoing prolotherapy treatment, and pursuing a gym program with a personal trainer. Dr. Filbey's examination revealed objective evidence of decreased strength and range of motion in her left shoulder, and testing elicited complaints of discomfort in the sacroiliac joint and the hip area. His diagnoses on that first assessment were tentative, as he felt further investigations were required. He found her to have multidirectional instability of the shoulder, with the possibility of a labral tear to be investigated through MRI imaging. As to her hip and low back, he questioned whether there was "intrinsic hip pathology" vs. joint-related pain at the sacroiliac ("SI") joint. He also found her to have cervicospinal myofascial pain.

- [47] As to treatment recommendations, in addition to imaging, Dr. Filbey recommended that she discontinue prolotherapy until her condition was clarified. He found no evidence that any modality-based treatments had produced any progressive or long-lasting benefit. He advised that she should be seen by a kinesiologist and that she should continue with her exercise program.
- [48] He concluded that Ms. Lightfoot was reaching the point of being near maximal medical recovery.
- [49] Subsequently, MRI arthrograms of Ms. Lightfoot's left shoulder and left hip/SI joints taken in April 2019 were normal.
- [50] On the second assessment, in September 2020, Dr. Filbey diagnosed Ms. Lightfoot as having multidirectional instability of the shoulder; left hip capsular strain and SI joint strain; and cervicospinal myofascial pain syndrome, greater on the left than the right side. He felt that her shoulder, hip, and SI joint had reached the point of maximal medical improvement. Dr. Filbey made note of Ms. Lightfoot's psychological issues and the reports of the psychiatrists Dr. Atkins and Dr. Smith, which are summarized below. In respect of her vocational abilities, he wrote:

It is important to note that the combination of her physical and psychological symptoms will have a greater impact on her functional [sic] than they would if either were present alone. It is likely that she will have greater tolerance with <1.0 FTE work. In other words, she would likely have a greater tolerance and durability with 0.5 FTE than she would with 0.75 and 1.0 FTE work.

- [51] As I have noted, by that point in time Ms. Lightfoot had already cut back to half-time work, on the advice of Dr. Brine.

Tania Percy

- [52] In August 2020 Ms. Lightfoot underwent a functional capacity evaluation at the request of the defendant, conducted by an occupational therapist, Ms. Tania Percy. The plaintiff, however, tendered Ms. Percy's expert opinion, as to functional capacity.
- [53] Ms. Percy found that Ms. Lightfoot participated in the work capacity testing "with high levels of effort in the context of chronic pain". Ms. Lightfoot's performance on the tests was limited at times by functionally disabling pain, consistent with her self-report, and her self-reported description of pain was therefore considered reliable by Ms. Percy.
- [54] Ms. Percy concluded that Ms. Lightfoot is capable of full-time employment, although with a number of significant restrictions in terms of strength, capacity, and positional tolerances that she identified. Ms. Percy added one important caveat; she wrote:

It is my opinion, however, that increased pain complaints and associated fatigue contribute to reduced activity tolerance, such that she has little in the way of energy or physical reserve for other activities of daily living, including social and active recreation.

That opinion supports my conclusion as to the reasonableness of Ms. Lightfoot's recent decision to undertake part-time employment.

[55] Ms. Percy was of the opinion that Ms. Lightfoot's then-current employment - i.e. full-time employment as a preschool teacher - might be appropriate over the long term, if Ms. Lightfoot were to have some resolution of her headaches and migraines, pain, fatigue, and/or psycho-emotional issues. If those symptoms were not to resolve to the point that Ms. Lightfoot's functional activity were to improve, Ms. Percy felt Ms. Lightfoot was better suited to a 0.8 position (four days a week) as a preschool teacher, or alternatively to part-time preschool teaching and part-time tutoring.

Dr. Mark Atkins

[56] Ms. Lightfoot underwent psychiatric assessments by Dr. Mark Atkins, a psychiatrist, arranged by her counsel, in November 2019 and again in August 2020. Dr. Atkins first assessed Ms. Lightfoot as suffering from Unspecified Anxiety Disorder with features of generalized anxiety, depressed mood, traumatic stress, and driving-related anxiety. The treatment plan he recommended was, ideally, cognitive behavioural therapy (or "CBT"), ongoing counselling, and possibly SSRI or SNRI antidepressants. He described the positive prognostic factors as her positive attitude and willingness to move forward; the negative factors included the duration of her symptoms, and co-morbidities such as physical pain, losses, and other stressors. He concluded that "time will reveal Ms. Lightfoot's true illness course".

[57] At the time Dr. Atkins re-assessed Ms. Lightfoot in August 2020, she was reported to have been taking fluoxetine and trazodone for one month, and was seeing a counsellor every two weeks. Dr. Atkins confirmed his previous diagnosis. He continued to view her prognosis as guarded, given the co-morbidities, and he felt it likely she would continue to suffer from psychiatric symptoms. He opined that the complexity of her condition "will make recovery more challenging, as time goes forward". He recommended that she continue with psychotropic medications and counselling, and that she be referred to a community psychiatrist.

Dr. Derryck Smith

[58] The defendant arranged for Ms. Lightfoot to undergo a psychiatric assessment by Dr. Derryck Smith, a psychiatrist, which was done in May 2020. Dr. Smith said that he would defer to other experts in respect of the plaintiff's ongoing functional limitations due to pain and injuries from her left shoulder, left hip, neck, and back. As to Ms. Lightfoot's psychiatric state, Dr. Smith diagnosed her as suffering from Posttraumatic Stress Disorder ("PTSD"); Adjustment Disorder with Depressed Mood; and Insomnia Disorder. He recommended that she be treated with trials of fluoxetine or sertraline, both of which can show good results in treating PTSD, or alternatively duloxetine. He further stated that she was not going to recover until her sleep problems had been addressed, and he recommended use of a

sedating antidepressant. He recommended that she be referred to a PhD-level psychologist for treatment, and that she be referred to a course of active rehabilitation under the direction of a kinesiologist, since vigorous exercise, as Dr. Smith pointed out, "is a potent treatment for symptoms of anxiety, depression, insomnia and pain".

[59] As to Ms. Lightfoot's prognosis, he wrote:

Although Ms. Lightfoot is currently symptomatic her symptoms have not interfered with her ability to work full-time. This indicates that the prognosis is more favourable than it would be if she were unable to work or only able to work part-time.

The only treatment she has received is counselling, the efficacy of which is uncertain. I am confident that if she is able to implement the treatment program I have recommended there will be a significant improvement in her functioning within the next six months.

[60] The defendant submits that Dr. Smith's unchallenged opinion as to Ms. Lightfoot's prognosis is to be preferred to that of Dr. Atkins, given: (a) Dr. Smith's superior qualifications, (b) the greater detail in Dr. Smith's report, leading to his conclusions having a more sound foundation, and (c) the vagueness of Dr. Atkins' prognosis. While no one would take issue with the strength of Dr. Smith's qualifications and his well-deserved reputation in the field of forensic psychiatry, I am unable to find that his characterization of Ms. Lightfoot's symptoms as not interfering with her ability to work full time, which is foundational to his favourable prognosis, accurately reflects in any way the extent of her disability. In his report, he made note of a comment found in the June 18, 2018 clinical records of Dr. Brine, Ms. Lightfoot's family physician at the time, that she was having trouble working a full day. In his own notes of his clinical interview of Ms. Lightfoot, Dr. Smith recorded that she was having panic attacks once or twice a week; that she had low energy and motivation, and had a hard time getting through the day; and that she napped most days, and on coming home from work at 4:30 p.m. every day would sleep for one to two hours. Yet, there was seemingly no exploration with Ms. Lightfoot as to how her pain and other symptoms impacted her ability to work, how she felt during the work day, and whether the demands placed on her were truly within her physical and emotional capacities.

[61] Moreover, even if Dr. Smith's assumption as to Ms. Lightfoot's ability to work full time, in a clinically meaningful sense with respect to her prognosis, was then correct, it was no longer correct as of late August 2020 in the judgment of Ms. Lightfoot's treating physician Dr. Brine, and did not reflect her condition as of the date of trial.

[62] Furthermore, Ms. Lightfoot has undertaken aspects of Dr. Smith's recommended treatment program, with little or no result. As noted above, she worked out with a kinesiologist during 61 sessions between September 2015 and June 2020. These sessions included vigorous exercise, with the guidance of a kinesiologist. Dr. Smith does not appear to have discussed that with Ms. Lightfoot. Ms. Lightfoot testified that she gave up those sessions, as they were not providing her with any pain relief, and she struggled to get through the sessions, on account of her fatigue. As to Dr. Smith's recommendations regarding medications, Ms.

Lightfoot testified that she had tried three of the five medications to which Dr. Smith referred. On the advice of Dr. Brine she tried medications one at a time, for a month each. Some made her extremely nauseated, or she would lose weight or gain weight; some made her feel fuzzy and not really present, and she felt they were masking her symptoms rather than really helping her. She testified that she intended to have further discussions with Dr. Brine as to medications she could try, or other treatment alternatives.

[63] For these reasons, I do not give weight to Dr. Smith's optimistic opinion as to Ms. Lightfoot's prognosis.

Causation Respecting the Facial/Dental Injuries

[64] As noted above, the physiatrist Dr. Filbey also opined, in a report dated February 8, 2019, as to the causal connection between Ms. Lightfoot's physical injuries suffered in the Collision, and the subsequent fainting episodes that resulted in the facial and dental injuries. Given the temporal relationship to the Collision, the extreme pain she awoke with, and the lack of a clear or identifiable alternative explanation, he found it plausible that the severe pain related to her injuries caused vasovagal syncope. Given the absence of evidence of any alternative explanation - alcohol or drug intake, dehydration, infection, pre-existing history, or any previously unknown, undiagnosed seizure condition or medical condition - he was of the opinion that the Collision was the most likely cause of the syncopal event.

[65] The defendant says that there are any number of possible causes of vasovagal syncope, and that this inference drawn by Dr. Filbey is classic fallacious reasoning, in respect of inferring causation from a temporal relationship, and in confusing the absence of evidence with evidence of absence.

[66] Mr. Justice Ehrcke, who is himself a published philosopher in the field of logical reasoning, commented on the validity of drawing a causal connection from temporal proximity, in *White v. Stonestreet*, 2006 BCSC 801:

[73] Dr. Matishak's answers reveal that his approach to the question of causation is a very simple one. He sees a temporal relationship between events and then infers that there is a causal connection.

[74] The inference from a temporal sequence to a causal connection, however, is not always reliable. In fact, this form of reasoning so often results in false conclusions that logicians have given it a Latin name. It is sometimes referred to as the fallacy of *post hoc ergo propter hoc*: "after this therefore because of this."

[75] In searching for causes, a temporal connection is sometimes the only thing to go on. But if a mere temporal connection is going to form the basis for a conclusion about the cause of an event, then it is important to examine that temporal connection carefully. Just how close are the events in time? Were there other events happening around the same time, or even closer in time, that would provide an alternate, and more accurate, explanation of the true cause?

[67] Adopting that reasoning, I find that the close temporal proximity between the Collision and the fainting episode, and Ms. Lightfoot's concurrent experience of severe pain, make it more probable than not that but for her injuries she would not have fainted. One cannot rule out the possibility of other factors - perhaps fatigue or tiredness, possible dehydration, and possible low levels of blood alcohol - also having played a contributing role; but, in the absence of any history of Ms. Lightfoot having suffered similar fainting episodes in the past, a but-for causal link to the Collision - sufficient to lead to the defendant being liable under the law of negligence - is established.

[68] I therefore find the defendant liable for Ms. Lightfoot's facial and dental injuries.

Damages

Non-Pecuniary Damages

[69] Ms. Lightfoot's injuries - both her ongoing physical injuries, and her anxiety, and panic and related emotional symptoms - have had a devastating impact. She is a young woman who had a promising future as being a vibrant member of her community, with a lot to give. She now faces great uncertainty as to what her future holds. There is a good prospect of her psychological and emotional issues being addressed successfully, and if that comes to pass it might fairly be anticipated that with a decrease in her level of anxiety, that her perception of pain and her ability to cope would also improve. But physically, her recovery has plateaued, and many of her symptoms will be permanent.

[70] In *Tisalona v. Easton*, 2015 BCSC 565 Madam Justice Wedge gave the following overview (approved of on appeal, 2017 BCCA 272 at para. 39) of the principles that guide the Court in assessing non-pecuniary damages:

[80] The purpose of an award for non-pecuniary loss is to compensate the plaintiff for pain, suffering, disability and loss of enjoyment of life.

[81] Non-pecuniary loss must be assessed for both losses suffered by the plaintiff to the date of trial and for those she will suffer in the future. The award of a sum of money is to permit the plaintiff to substitute other amenities of life for those she has lost.

[82] In *Stapley v. Hejslet*, 2006 BCCA 34, Kirkpatrick J.A., writing for a majority of the Court, quoted at para. 45 *Lindal v. Lindal*, [1981] 2 S.C.R. 629 at 637, with respect to the underlying rationale for non-pecuniary damages and the considerations that should guide a court in awarding such damages. In *Lindal*, the Court emphasized that the amount of an award for non-pecuniary damages should not depend only on the seriousness of the injury. Rather, the amount of the award must depend as well on its ability to ameliorate the condition of the injured plaintiff considering his or her particular situation. For that reason, the gravity of the injury will not, of itself, be determinative of the amount of the award. An appreciation of the loss in the context of the specific plaintiff's circumstances is the key, and "the need for solace will not necessarily correlate with the seriousness of the injury."

[83] The factors to be considered in determining the amount of an award for non-pecuniary loss, as outlined in *Stapley*, are now well established. They include the following:

- the age of the plaintiff;
- the nature of the injury;
- the severity and duration of pain;
- level of disability;
- emotional suffering;
- impairment of family, marital and social relationships;
- impairment of physical and mental abilities;
- the plaintiff's stoicism (a factor that should not penalize the plaintiff).

[71] To that summary, I would respectfully add that assessments of non-pecuniary damages all turn on their facts. The aim is to arrive at an award that holistically captures degrees of disability and impairment of functioning and that, for the sake of fairness, is as consistent as possible with those in similar cases. Ultimately, as observed in *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229 [Andrews] at 261, the award must of necessity be arbitrary, and no amount of money can provide true restitution. Inevitably, each case provided as a comparator will have distinguishing features that differentiate the basis for the non-pecuniary damages claim; as noted by Mr. Justice Gomery in *Siu v. Clapper*, 2020 BCSC 944 at para. 15, other cases provide only a rough guide.

[72] Ms. Lightfoot submits that her non-pecuniary damages, compensating her for past and prospective pain, suffering, and loss of enjoyment of life, may be fairly assessed in the range of \$160,000 - \$185,000. As comparators, she cites *Dubitz v. Knoebel*, 2019 BCSC 1706; *Pearson v. Savage*, 2017 BCSC 1435, aff'd 2020 BCCA 133; and *Lim v. Busha*, 2019 BCSC 1223, which are all within that range. The plaintiff's counsel aptly summarizes those three decisions as each involving a young woman who had been socially and physically active, but who suffered significant injuries that had become chronic and would lead to ongoing issues.

[73] Ms. Lightfoot's extensive dental injuries add a further element of pain and suffering that may be seen as taking her case beyond those three cited decisions. On the other hand, Ms. Lightfoot has only recently begun psychological therapy, which gives real reason for hope that there may be substantial improvement in her symptoms, over time.

[74] The defendant contends that the award is more appropriately placed in the range of \$80,000 - \$110,000, although those submissions were premised on my accepting the lack of any causal connection to Ms. Lightfoot's facial/dental injuries. I have found such a connection. The cases relied upon by the defence are *Andreas v. Vu*, 2020 BCSC 1144 [Andreas]; *Layes v. Stevens*, 2017 BCSC 895 [Layes], aff'd 2018 BCCA 415; *Burke v. Artz*, 2011 BCSC 850 [Burke]; *Karim v. Li*, 2015 BCSC 498 [Karim]; *Parhar v. Clarke*, 2017 BCSC 550 [Parhar]; and *Olson v.*

Ironside, 2012 BCSC 546 [Olson].

[75] The decisions in Olson and Burke may be considered stale-dated, being from nine and 10 years ago, and the plaintiff in Burke also had a significant pre-accident history of depression and anxiety. In Karim, the court found the plaintiff was much less disabled than he perceived. In the remaining three cases cited by the defendant, which resulted in non-pecuniary damage awards ranging from \$80,000 to \$110,000, the circumstances of the plaintiffs have some similarity to Ms. Lightfoot's situation, apart from her dental injuries. The plaintiff in Andreas, however, had a significant pre-accident medical history, and despite the subject injuries was still described by the court as having been able to "flourish" in her chosen career; likewise, the plaintiff in Parhar was able to complete her studies and obtain her degree following her accidents, and resumed her work as a bank teller, returning to full-time employment after a year of a graduated return to work program. In Layes the plaintiff was still able to complete her degree in journalism; her loss of capacity claim related to her inability to do jobs with more physical aspects, such as in retail, or being a care aide. The impact of the injuries on the plaintiffs in those three cases was significantly less profound than in the present case.

[76] I assess Ms. Lightfoot's damages under this head at \$160,000.

Loss of Earning Capacity

[77] The principles that guide the Court in assessing loss of earning capacity are not controversial. A plaintiff who has suffered loss and damage due to a defendant's negligence is entitled to be restored to the position she or he would have been in but for that negligence. Assessing the loss therefore requires considering and comparing the ranges of all outcomes that had, have, or would have had a real and substantial possibility of occurring, weighing each outcome according to its degree of probability, and determining the difference in value of the cumulative without-accident and with-accident scenarios, subject to appropriate applicable contingencies, both positive and negative. As stated by Madam Justice Huddart in Rosvold v. Dunlop, 2001 BCCA 1 at para. 9 [Rosvold], "[p]ossibilities and probabilities, chances, opportunities, and risks must all be considered, so long as they are a real and substantial possibility and not mere speculation".

[78] Ms. Lightfoot's claims for loss of past and future earning capacity were advanced on the premise that her injuries have deprived her of opportunities to work as a teacher in the public school system. Absent her Collision-related injuries, it is submitted, Ms. Lightfoot's career would likely have followed a trajectory similar to that of her friend and classmate from her B.Ed. program, Ms. Paige Sutton, who testified. Ms. Sutton was able to obtain employment as an on-call teacher with School District #71 (Comox Valley) (or "District #71") the fall after her convocation. She then received a full-time, temporary contract teaching at École Robb Road Elementary in Comox. Ms. Sutton supplemented her teaching income during summers by working in a retail position; Ms. Lightfoot, it is submitted, would likely have earned comparable supplemental income through working as a personal trainer, or in

a daycare or preschool setting. The plaintiff submits that Ms. Sutton's earnings, up to the date of trial, can serve as a realistic proxy for what Ms. Lightfoot's earnings would have been, had the Collision not occurred. The difference between those earnings, and Ms. Lightfoot's actual pre-trial earnings, is approximately \$114,000.

- [79] In the same vein, Ms. Lightfoot submits that her future earning capacity in the absence of the Collision should be assessed on the basis of the present value of the projected earnings of a British Columbia elementary school or kindergarten teacher of Ms. Lightfoot's age. To retirement at age 69, and subject to the negative contingencies of allowance for part-time employment, possibility of unemployment, and removal from participation in the workforce, the plaintiff's economics expert Mr. Robert Wickson puts that present value at approximately \$1,506,000. Applying similar contingencies to her present condition, but without making allowance for any probability of her injuries becoming worse and leading to total disability, the present value of her expected future continuing employment as a preschool teacher if she continues to work at a 0.5 full-time equivalent ("FTE") level is \$457,000; if she were to increase her employment to four days a week, 0.8 FTE, the present value is \$731,223.
- [80] The difference between the without-accident and with-accident present values yields a future loss of capacity measured in the range of \$775,640 - \$1,049,864.
- [81] Is there a real and substantial possibility that but for the Collision, Ms. Lightfoot would have gone on to a career as a public school teacher? Answering that question requires a close review of the evidence, because the Court's determination must be based on the evidence, and not mere conjecture or supposition.
- [82] The plaintiff did tender an expert opinion report of a psychologist, Dr. John Pullyblank, styled as a "Psychological, Vocational & Residual Employability Assessment & Opinion". Dr. Pullyblank was of the opinion that absent the Collision, there were "no obvious factors that would have impaired Ms. Lightfoot advancing through the pay grid as a Teacher in a School District, including eventually obtaining a Master's degree to further her earnings and potentially give her access to administrative positions". However, Dr. Pullyblank had no knowledge of the selection process and hiring criteria for District #71. Nor did he have any real understanding of what efforts Ms. Lightfoot had made to apply for teaching positions; he was aware that she had made "some efforts", but did not know the details.
- [83] As noted above, Ms. Lightfoot began working at a daycare in February 2016. By August 2016 she felt she was ready to try to advance her teaching career through applying for TOC positions. Her plan was to get on the TOC list with a school district, and then hopefully progress to a permanent position. She testified to her understanding that teachers usually start out by being on-call for several years, and that it can take up to five to 10 years to obtain a full-time position.

- [84] At the end of August and the beginning of September 2016 she made four separate applications to District #71, three for temporary primary or early primary teaching positions, and one as an on-call teacher. She said that though there is a lot of competition for positions with District #71, and that she did consider applying to school districts in Campbell River or Parksville, that she did not want to relocate away from the Comox Valley area, as her family is there. She also said she thought driving long distances to jobs in those locations would be a problem for her, but that evidence came across as an afterthought. She did not hear back from District #71; she was not even called for an interview, which would normally be the first step in the hiring process. Dr. Pulleyblank was not aware of that fact; when it was put to him in cross-examination, he sounded very surprised.
- [85] Ms. Lightfoot applied to District #71 for TOC positions again in March 2017, and in September 2017. She was not called for an interview either time. She had the same result in applying in November 2019.
- [86] District #71's apparent lack of interest in Ms. Lightfoot as a candidate is unconnected to the Collision and her injuries, at least with respect to her six applications she made in 2016 and 2017, as there is no evidence that anyone with District #71 was aware of her circumstances. Ms. Lightfoot testified that sometime after July 2019 she did call District #71 to ask about the possibility of accommodations for an on-call teacher, and whether they had heard about her "situation". She was told that it is difficult to make accommodations for on-call teachers. Aside from that, there is no basis for concluding that the lack of any positive response to her 2019 application was related to her injuries, either.
- [87] Is there any reason to conclude that Ms. Lightfoot may not have been considered an attractive candidate for employment, apart from her injuries? I find that there is. Ms. Lightfoot's academic transcripts from North Island College, where she was enrolled prior to undertaking her B.Ed. studies - which were submitted to District #71 as part of her application package - show that she failed six out of the 27 courses she took. In another 12 courses her grade was a "C" or lower. She had no "A" grades.
- [88] Dr. Pulleyblank conceded in cross-examination that Ms. Lightfoot's grades would have been an issue for prospective employers, making it more difficult for her to get a teaching job.
- [89] Ms. Lightfoot's poor undergraduate grades distinguish her from Ms. Sutton. So, too, does the fact that Ms. Sutton was bilingual, enabling her to obtain a full-time, although temporary, position in her first year, in a French immersion setting, without even having to undergo an interview. I cannot treat Ms. Sutton as a comparator.
- [90] Given this evidence of Ms. Lightfoot's poor academic performance; the absence of any evidence from District #71 explaining why Ms. Lightfoot's application did not result in her being hired, or where she may have been situated amongst other applicants relative to the cut-off for even being offered an interview; and the absence of any evidence of the minimal qualifications of accepted candidates for employment with B.C. school districts, the possibility of Ms. Lightfoot obtaining employment in this field but for the Collision is solely a

matter of conjecture.

- [91] Further, even if Ms. Lightfoot's transcripts would not have been a factor, I have no evidence of the number of applicants every year vs. the number of positions available. Absent the Collision, Ms. Lightfoot would have been fit to apply in 2015; but given that she was not successful in 2016 and 2017, there is no reason to believe that there was any real and substantial possibility of obtaining employment in 2015, had she then applied. And it stands to reason that with each passing year that Ms. Lightfoot would apply, she would be competing for positions against both any other graduates from her own cohort who were still seeking positions, and each year's new crop of graduates; if there are typically more graduates than there are positions available, her chances of employment could therefore very well diminish each passing year.
- [92] The only real and substantial possibility I find on the evidence is that but for the Collision Ms. Lightfoot would have continued to seek employment in the Comox Valley that was similar to teaching - her longstanding career preference. This - again, on the evidence available - points to her continuing as she has in fact done, working in a preschool setting, possibly with her income supplemented through tutoring.

Past Loss of Earning Capacity

- [93] Ms. Lightfoot was unable to work, due to her injuries, from June 2015 to February 2016.
- [94] However, at the time of the Collision she had not made any arrangements or plans to work over the summer of 2015. Her only evidence in this regard is that she was intending to apply for, and hoping to secure a position with, District #71 for September 2015.
- [95] If the Collision had not occurred, and if - as I have found to be the only real and substantial possibility - she would not have been hired by District #71, there is no evidence as to when Ms. Lightfoot would have begun looking for other work, or what work would have been available.
- [96] The defendant submits that Ms. Lightfoot has failed to meet her evidentiary burden of establishing a loss of opportunity to earn income during that time period.
- [97] I find, however, that the fact that Ms. Lightfoot was able to secure employment in a daycare in February 2016 is some evidence from which I may infer that such employment might have been available in September 2015. Dr. Pulleyblank's report discloses that the average wage rate for "Early Childhood Educators and Assistants - Preschool" is \$15 to \$28 per hour, with a median of \$17. Given Ms. Lightfoot's lack of experience, it is reasonable to conclude that her wage would initially have been in the \$15 to \$17 per hour range. On a 40-hour week, that would roughly amount to a range of earnings of approximately \$2,500 - \$2,900 per month. Over five months - September to December 2015, and January 2016 - assuming Ms. Lightfoot would have worked during those months and that work was available - those figures would cap her loss during that period at approximately \$11,900 to \$14,620. I find a fair and reasonable assessment of Ms. Lightfoot's loss of earning capacity over that period is

\$10,000.

- [98] It would, again, be a matter of conjecture to find that Ms. Lightfoot's without-accident earnings from February 2016 to August 2020 would have been substantially different than her actual historical, with-accident earnings.
- [99] For the months of September to December 2020, leading up to the date of trial, Ms. Lightfoot lost 50% of her earnings. A loss of 20 hours per week, at \$23 per hour, over 14 weeks amounts to \$6,440.
- [100] I assess Ms. Lightfoot's past loss of earning capacity, on a gross basis, at \$16,440.

Future Loss of Earning Capacity

- [101] Given the uncertainty as to Ms. Lightfoot's prognosis, determining the various possible paths her earnings will take, and the nature and relative weight of positive and negative contingencies, becomes very much a matter of what Mr. Justice Dickson, as he then was, referred to in *Andrews* as gazing deeply into the crystal ball.
- [102] There are, generally, two approaches to assessing future loss: the "earnings approach", as in *Pallos v. Insurance Corp. of British Columbia* (1995), 100 B.C.L.R. (2d) 260 (C.A.), and the "capital asset approach", as in *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 (S.C.) [Brown]. Under the earnings approach, the loss is assessed on the basis of a fixed dollar amount of income lost for each year of employment, factoring in fluctuations that may occur as the extent of the disability improves or worsens. That approach is most suited to situations where a plaintiff has a fixed career and a track record of earnings, enabling projections as to "real and substantial possibilities" of loss grounded in the evidence. Alternatively, the capital asset approach is more appropriate in the case of younger plaintiffs, or those who have not had a consistent earnings history; in such cases, the loss of capacity may be valued, often through what courts refer to as a "rough and ready" approach, in terms of a lump sum representing a number of years of annual earnings. These are not mutually exclusive methods; in all cases, courts must be aware of the various ways in which impairment of earning capacity may be manifested, as so memorably described by Mr. Justice Finch, as he then was, in *Brown*:

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

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

4. The plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market.
- [103] Where the Court can be satisfied that the only real and substantial possibility of loss is a fixed proportion of a predictable income stream, the earnings approach may serve to capture all of the compensable loss caused by an injury. Where the evidence discloses other real and substantial possibilities, to which positive and negative contingencies may attach in varying amounts, such that the loss is not as easily measurable in a pecuniary manner, the capital asset approach can be more useful. Under either approach, damages are assessed and not calculated: *Harvey v. Robin*, 2021 BCSC 640 at para. 180, citing *Grewal v. Naumann*, 2017 BCCA 158 at para. 49 and *Rosvold* at para. 18.
- [104] In the present case, the assessment of Ms. Lightfoot's future loss must begin with a finding of the degree to which her current earning capacity is impaired, relative to her probable without-accident capacity. The latter is best represented, I find, by the earnings tables provided by Mr. Wickson for "Other Instructors" with "Bachelor's Degree" or "University Certificate Above Bachelor Level". Allowing for contingencies, the present value of the cumulative total of without-accident earnings for an employee of Ms. Lightfoot's age, to age 69, is \$914,029. So, a 50% impairment of such an employee's earnings would be half that amount, \$457,015.
- [105] I find it is reasonable to assess Ms. Lightfoot's short-term future loss of earnings as reflecting, first, a likely continuation of half-time employment for a limited time period. Hypothetically, over 2½ years, on Mr. Wickson's tables, the present value of the cumulative loss would amount to \$40,692.
- [106] Beyond that initial period of time, it is reasonable to hypothesize a medium-length period of time wherein there is a probability of Ms. Lightfoot's work capacity increasing to 80%. If we were to calculate a further period (beyond the initial 2½ years) of five years during which there was an equal probability of Ms. Lightfoot being at 50% or 80% capacity, the present value of the loss over that time period, again subject to the contingencies set out by Mr. Wickson, would be \$59,047.
- [107] If there were, thereafter, a period of employment up to retirement at age 69 wherein the probable range of earnings averaged out to 80% of full-time - i.e., wherein the probability of returning to full-time employment balances out the probability of income remaining at the 50% level - the present value of that loss would amount to a further \$132,788. The total loss of future earning capacity, under those hypotheticals, would thus be \$232,527.
- [108] Those hypotheticals, I find, are useful for comparison purpose, but would overstate Ms. Lightfoot's probable losses, given the possibility of substantial improvement through pursuing CBT and other recommended therapies. As the Court of Appeal in *Reilly v. Lynn*, 2003 BCCA 49 instructs at para. 101, I must also consider the overall fairness and reasonableness of the award.

[109] Therefore, considering the whole of the evidence, and being mindful that the award must be both fair and reasonable, I assess her future loss of earning capacity at \$200,000.

Cost of Future Care

[110] The test for recoverability of future care costs as damages is set out in *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.) at 84, aff'd 49 B.C.L.R. (2d) 99 (C.A.): the items claimed must be both medically justified, and reasonable. It is not necessary that a medical expert testify to the medical necessity of each and every item of care that is claimed; however, there must be some evidentiary link between a medical expert's assessment of disability and the care for which the costs are being claimed: *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 39, citing *Aberdeen v. Zanatta*, 2008 BCCA 420 at paras. 43, 63.

[111] Each party tendered expert opinion evidence as to the cost of future care. The plaintiff's expert was Mr. Brent Armstrong. He is a trained kinesiologist, with practical experience, in the context of being an owner/manager of rehabilitation centres and managing occupational therapists, in case management and needs assessments for disabled persons. Mr. Armstrong conducted an assessment of Ms. Lightfoot's function and on the basis of his findings prepared a care plan. His report is very much a "shopping list" of potential therapies and care aides, totalling a present value of \$99,800, with respect to items with a fixed start and end date; and further additional costs with no set start or end date, submitted to have a potential value in excess of a further \$700,000.

[112] The defendant elicited rebuttal opinion evidence from Ms. Percy as to the cost of future care, during cross-examination. Ms. Percy is an occupational therapist, with certification in cost of future care assessment and life care planning. I consider Ms. Percy's experience and credentials superior to those of Mr. Armstrong, and I was impressed by her testimony. Where there were conflicts between her and Mr. Armstrong, I prefer the evidence of Ms. Percy.

[113] Ms. Percy was critical of the functional assessment undertaken by Mr. Armstrong; in particular, that there was no formal assessment of fatigue, and that key strength indicators were missing from the evaluation. These deficiencies, too, affect the weight I give to Mr. Armstrong's opinion.

[114] Ms. Percy made provision in her report for episodic access to manual therapies such as physiotherapy and massage therapy. A claim for such expenses was not advanced by the plaintiff in closing submissions. Ms. Lightfoot testified that she had undertaken physiotherapy - as noted above, 73 sessions from June 2015 to November 2017 - to obtain temporary relief from her symptoms. The relief she obtained during those sessions could last for hours, or a few days, allowing her more opportunity to do household chores, but the treatments could also aggravate her symptoms, and overall she did not feel she obtained much benefit. Likewise, Ms. Lightfoot felt that massage therapy provided her with what she

described as "very temporary" pain relief. Ms. Lightfoot continues to undergo massage therapy periodically, but she ceased physiotherapy in November 2017 because it was not providing her with long-lasting relief, and she felt she had exhausted the treatment alternatives the physiotherapist was able to provide.

[115] As I have noted, Ms. Lightfoot's physiatry expert Dr. Filbey remarked in his first report, dated December 7, 2017, that there was no evidence that any modality-based treatments had produced any progressive or long-lasting benefit, and he made no recommendation that such treatment continue. Neither did he make any such recommendation in his second report, dated September 4, 2020.

[116] I am unable to find a medical justification for continuing manual therapies.

[117] Both these experts also made allowance for vocational consulting. I do not view this, realistically, as a reasonably justifiable expense. Given Ms. Lightfoot's lifelong attachment to the idea of teaching as her career, it is overwhelmingly likely that she will remain employed as a preschool teacher.

[118] I find the following future care costs justified and proven:

Psychological Services and Counselling

[119] Dr. Atkins and Dr. Smith were both of the opinion that referral to a psychologist is highly desirable, Dr. Atkins specifying that CBT is a preferred approach. There is no evidence as to the reasonably expected duration of such treatment. Mr. Armstrong put the annual cost at \$11,700. It is typical for courts to make provision for 10 to 15 sessions of such therapy, in chronic pain cases. The complexity of Ms. Lightfoot's symptoms suggests that more extensive therapy may likely be necessary. I award the value of two years of therapy, the present value of which is \$22,736. Mr. Armstrong made provision for counselling in addition. I largely accept Ms. Percy's opinion that making provision for both these treatments would be duplicative; however, the need for some further counselling in years hence if Ms. Percy's condition were not to improve substantially is reasonable, and I make provision for a further \$3,000 in this regard. The total is \$25,736.

Occupational Therapy

[120] Ms. Percy recommends a budget of \$3,500, covering 24 sessions of an occupational therapist co-ordinating with a family physician with respect to active rehabilitation and the scheduling of other activities, and supporting the work of the psychologist in assisting Ms. Lightfoot with identifying PTSD triggers; and a further \$1,200 to \$1,500 for an occupational therapist to provide road driving rehabilitation services. I allow \$5,000 in total for occupational therapy expenses.

Kinesiology and Physiotherapy

[121] Mr. Armstrong made provision for Ms. Lightfoot to participate in a multi-disciplinary pain management program, at a cost of \$16,000 to \$20,000. I accept Ms. Percy's opinion that in cases such as Ms. Lightfoot's, community-based provision of the various treatment modalities is preferable. Hence, I make provision for a kinesiologist and a physiotherapist providing approximately two years' worth of periodic sessions, to be co-ordinated with the assistance of the aforementioned occupational therapist. Ms. Percy put the cost of a kinesiologist at \$840 per year. On the assumption that there is a similar cost to physiotherapy services, I award the present value of two years of such services, \$3,296.

Pilates

[122] Mr. Armstrong recommended provision for the cost of both yoga and pilates, three years of each. I accept Ms. Percy's opinion that with respect to yoga, self-managed programs are superior for chronic pain sufferers. I award \$3,300 for the present value of three years of pilates instruction, and a further \$300 for Ms. Lightfoot obtaining initial yoga instruction, for a total of \$3,600.

Housekeeping

[123] Ms. Lightfoot is able to manage most housekeeping activities, although with some difficulty. I accept Ms. Percy's assessment, which was also supported by the evidence of Dr. Filbey, that some provision may reasonably be made to encompass assistance with performing heavier tasks, to the extent of two hours per week. This represents one-fifth of the housekeeping services hours Mr. Armstrong contended were necessary; one-fifth of his annual expense is \$2,162. The present value of this cost to age 65 is \$53,674, and I award that amount.

Yard Work

[124] Mr. Armstrong put the reasonable cost of yard work at \$300 annually. Ms. Percy conceded that provision for the cost of such services is in a different category than housekeeping due to the physicality of the activity. It is not clear how work was divided between her and her boyfriend. Given Ms. Lightfoot's love of the outdoors and her desire, prior to the Collision, of having a garden, it is reasonable to provide her with some compensation. I award \$3,500.

Child Care

[125] Mr. Armstrong recommended provision for at-home childcare assistance, for a period of two years, at a cost of \$14,040 per child. Ms. Percy did not dispute the calculation. Ms. Percy refrained from comment on the necessity, as she had not been provided with any medical opinion as to Ms. Lightfoot's prognosis.

[126] On the basis of Dr. Filbey's opinion that Ms. Lightfoot's physical injuries have reached the point of maximal medical improvement, I find some provision for this cost should be made. The real question is whether Ms. Lightfoot will incur such expenses. She testified that she had always wanted two children, and still did have that desire, but she was unsure of whether she would have children, given her condition.

[127] Clearly, Ms. Lightfoot's decision whether or not to have children should not be affected by financial concerns causally related to the Collision. There does have to be, however, some provision made for the possibilities that Ms. Lightfoot may not have children, or may have only one; and adjustment for present value, recognizing that this is a contingent future expense. I award \$20,000 under this heading.

Dental Implant Replacement

[128] Mr. Armstrong's report puts the cost of dental implant adjustment or replacement at \$4,497 every 10 years. Mr. Wickson's report as to present values calculates a present value, on that projection, of \$17,245; but that assumed an outlay at "Year One", the trial date, and Ms. Lightfoot already has her implants in place. Dr. Mehta opined that the range would be 10 to 15 years; at 15 years, the multiplier would be 2.739, rather than the 3.835 multiplier used for 10 years, and again that would assume an initial outlay at "Year One". Taking those factors into consideration, I award \$10,500.

Supportive Mattress

[129] Mr. Armstrong suggested provision of \$5,000 every 10 years, for life, for a new mattress; the present value is \$19,174. Ms. Percy agreed that there is some validity to this expense, but the true cost is the differential between the mattress Ms. Lightfoot would have purchased for herself, and a higher quality model that she now requires. I award approximately half the amount claimed, \$10,000.

Special Damages

[130] Special Damages are claimed in the following amounts:

- a) Vocational Consulting: \$ 3,867.75
- b) Massage Therapy: \$ 2,181.95
- c) Physiotherapy: \$ 2,077.00
- d) Kinesiology: \$ 504.00
- e) Chiropractic: \$ 228.00
- f) Trigger Point Therapy: \$ 165.00
- g) Prolotherapy: \$ 1,440.00

- h) Dental: \$11,475.29
- i) Counselling: \$ 1,300.00
- j) Prescription Drugs \$ 85.50
- k) Mileage: \$ 7,366.60
- l) Comox Valley Aquatic Centre: \$ 42.15

Total: \$30,733.24

[131] I agree with the defendant that the reasonableness of the Vocational Consulting expense is not made out on the evidence. Ms. Lightfoot testified that she worked with this consultant on résumé writing, building confidence, and interview strategies. Her need for assistance in these areas has not been demonstrated to be linked to her injuries; given how poorly her application was received by District #71, for reasons that are not shown to have been related to her medical condition, these are likely expenses she would have gone on to incur in any event, had the Collision not occurred. This expense is disallowed.

[132] Although future physiotherapy, massage therapy, and chiropractic have not been shown to be medically necessary, Ms. Lightfoot testified that her family physician encouraged her to undertake those forms of treatment in the past. Their reasonableness is therefore established on the evidence, and recovery is allowed in this regard.

[133] The defendant says, with respect to mileage costs, that as Ms. Lightfoot has lived, at various times over the past few years, at both her parents' home in Black Creek, and at her boyfriend's father's home in Courtenay, it is "not clear" that she lived far enough away from the location of her various appointments to necessitate these expenses. Ms. Lightfoot was not challenged on that basis on cross-examination. I find those expenses were reasonably incurred.

[134] With the exception of the Vocational Consulting, the special damages are allowed as claimed, with the total award being \$26,865.49.

Conclusion and Costs

[135] In summary, I assess damages as follows:

Head of Damage

Award

i. Non-Pecuniary Damages

\$160,000.00

ii. Past Loss of Earning Capacity (Gross)

\$ 16,440.00

iii. Future Loss of Earning Capacity

iv. Cost of Future Care

v. Special Damages

\$200,000.00

\$135,306.00

\$ 26,865.49

TOTAL

\$538,611.49

[136] I leave it to the parties to make the necessary calculation of the past earnings loss net of taxes and other deductions, and to calculate pre-judgment interest on the award, with liberty to apply if agreement cannot be reached

[137] Ms. Lightfoot is presumptively entitled to costs at Scale B. If there are issues as to costs I am unaware of, the parties are at liberty to make written submissions within 60 days of the issuing of these Reasons, on a mutually agreeable schedule.

"A. Saunders, J."

Source & reproduction note

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

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/21/12/2021BCSC1288.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/lightfoot-v-lindsay-2021>

Prepared on 28 October 2026 · Esheria