

CANADA / JUDGMENT

Mallier v. Falcomer

2021 BCSC 1827

COURT

Supreme Court of British Columbia

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2021 BCSC 1827 Mallier v. Falcomer

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Mallier v. Falcomer,

2021 BCSC 1827

Date: 20210920

Docket: M204273

Registry: New Westminster

Between:

Christine May Mallier

Plaintiff

And

Dillon Guerrino Falcomer

Defendant

Corrected Reasons: The first sentence in para. 105

of the Reasons was corrected on January 25, 2022

Before: The Honourable Madam Justice Marzari

Reasons for Judgment

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Place and Date of Trial:

New Westminister, B.C.

March 1-5, 2021

March 11, 2021

Place and Date of Judgment:

New Westminister, B.C.

September 20, 2021

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INTRODUCTION

- [1] The plaintiff, Mrs. Mallier, claims for damages arising from a motor vehicle accident on July 30, 2016, in which her vehicle was struck from behind by the defendant's vehicle while waiting at a red light. Mrs. Mallier's vehicle was pushed into the vehicle in front of hers. She was removed from the vehicle by the fire department and was taken to hospital via ambulance. She was discharged home, and was unable to work for approximately three months. Mrs. Mallier was 46 years old at the time, and 50 years old at the time of trial.
- [2] It is generally uncontested that Mrs. Mallier suffered various soft tissue injuries as a result of the accident, which manifested as neck pain, headaches, right shoulder and arm pain, nausea and dizziness, photophobia and phonophobia, back stiffness and pain in her right foot. She also suffered some initial emotional and psychiatric symptoms, including emotional shakiness and an inability to drive for a number of months.
- [3] Over time, many of Mrs. Mallier's injuries improved. Mrs. Mallier's more acute injuries to her foot and back, and her headaches, dizziness, nausea and photophobia were largely resolved after about three months, though her phonophobia has not entirely resolved and background noise remains agitating and distracting to her.
- [4] What remained was significant pain in her shoulder girdle, extending into her neck and right arm, an area of pre-existing injury for her. While this pain improved in the first six months after the accident, she has not seen significant improvement to this area since January or February 2017. Her main ongoing complaints at the time of trial are chronic shoulder and arm pain, cognitive complaints, and depression and anxiety.
- [5] Mrs. Mallier says that these injuries have affected her life in significant ways, including her upward trajectory at work, which has stalled and she now considers to be at risk. She says that her injuries have had a significant impact on her volunteer work, and her active recreational pursuits. Those active recreational pursuits were the foundation of her recent marriage just prior to the accident, and she says her inability to participate in the activities that formed the basis of her relationship has also put her marriage at risk.
- [6] She claims non-pecuniary damages, past wage loss, future diminished earning capacity, future cost of care, special damages and costs.
- [7] The defendant admits liability, special damages in the amount of \$11,992.69, and gross past wage loss in the amount of \$18,385.12 for the approximately three months Mrs. Mallier was not able to work immediately after the accident. The defendant contests the extent of Mrs. Mallier's claimed injuries and damages with respect to the remaining heads of damages.

- [8] A key issue in this trial was the extent of Mrs. Mallier's previous, non-tortious injury to her right shoulder and arm, which she was still receiving treatment for at the time of the accident. The defendants say that when Mrs. Mallier reached her plateau in 2017, that this was essentially a return to her pre-accident baseline injury and functionality.
- [9] Another key issue is the extent of Mrs. Mallier's cognitive and psychological injuries and their effect, if any, on her prognosis and recovery.
- [10] Finally, I must determine the extent of damages Mrs. Mallier is entitled to with respect to her losses, as a result of the injuries she establishes were caused by the July 2016 accident.

FACTUAL FINDINGS

Credibility and Reliability

- [11] As noted above, the parties have been able to agree on a number of key facts. The factual issues in contention, in particular the extent of Mrs. Mallier's pre-existing right arm injury, and the extent to which her current injuries exceed that pre-existing injury and affect her functionality, turn on the reliability of Mrs. Mallier's evidence. The defendant does not directly challenge Mrs. Mallier's credibility, but he does challenge her reliability.
- [12] The law regarding the assessment of credibility and reliability has been well stated in cases such as *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.), *R. v. H.C.*, 2009 ONCA 56, *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, *aff'd* 2012 BCCA 296; and *Pacheco v. Antunovich*, 2015 BCCA 100. In *Karim v. Li*, 2015 BCSC 498 at para. 89, Justice Abrioux (as he then was) set out additional principles to be taken into consideration when assessing credibility, of which the following are particularly pertinent:

it is the doctor's function to take the patient's complaints at face value and offer an opinion based on them and it is for the court to assess credibility. If there is a medical or other reason for the doctor to suspect the plaintiff's complaints are not genuine, are inconsistent with the clinical picture or are inconsistent with the known course of such an injury, the court must be told of that. But it is not the doctor's job to conduct an investigation beyond the confines of the examining room: *Edmondson v. Payer*, 2011 BCSC 118 at para. 77, *aff'd* 2012 BCCA 114; and

in the absence of objective signs of injury, the court's reliance on the medical profession must proceed from the facts it finds, and must seek congruence between those facts and the advice offered by the medical witnesses as to the possible medical consequences and the potential duration of the injuries: *Fan (Guardian ad litem of) v. Chana*, 2009 BCSC 1127 at para. 73, *aff'd* 2011 BCCA 516.

- [13] Mrs. Mallier's reliability as an historian of her pain was at issue in this trial. Much was made of the discrepancy between Mrs. Mallier's evidence at trial of the increased severity of her pain, particularly her right arm and shoulder girdle pain, and her clinical records before and after the accident.

- [14] Throughout her evidence in chief, Mrs. Mallier called her pre-accident pain "discomfort" or "mild." However, the clinical notes from her family doctor, massage, and physiotherapy at that time record much more serious complaints of pain at up to 8.5/10 on the pain scale. This pre-accident right arm pain was also objectively severe enough to warrant two X-rays, a CT scan, prescriptions for Tylenol 3 and Tramadol, regular massage therapy and up to eight or nine physiotherapy appointments per month for many months in 2015, with less frequent appointments continuing into the summer of 2016 when the accident occurred.
- [15] The defendant also points to the evidence of Dr. Lu, a psychiatrist called by Mrs. Mallier, that Mrs. Mallier's "subjective distress does not reflect of her true capacity" and that "a person with SSD perceives daily facets from a negative perspective." Dr. Lu diagnoses Mrs. Mallier with major depression with features of somatic symptom disorder.
- [16] The defendant says that while I should accept these statements of the limits of Mrs. Mallier's reliability related to her psychological injury, I should not necessarily accept that she has a psychological injury. Rather, he suggests that Mrs. Mallier is consciously or unconsciously motivated to understate her pre-accident pain, and overstate her post-accident pain. He notes that Mrs. Mallier's present recollection of her pain is different from her previous reports in a way that helps her case for damages in this litigation. He argues that her reports of injury and treatment after the accident increased after speaking with ICBC in early 2017, and notes her incongruous evidence that she specifically told the firefighters at the scene of the accident just how much she had recovered from her neck and shoulder pain ("95%"). He also notes that Mrs. Mallier's family doctor, Dr. Perry, would have been in the best position to determine what psychological changes Mrs. Mallier has experienced, and that Dr. Perry was not called.
- [17] Mrs. Mallier, of course, says that her evidence, and the evidence of the other lay witnesses, should be accepted as both credible and reliable. She says the defendant has ignored the change in Mrs. Mallier's function since the accident and cherry picked helpful entries in her cross-examination on the clinical records while ignoring unhelpful entries.
- [18] She relies upon *Edmondson v. Payer*, 2011 BCSC 118, aff'd 2012 BCCA 114, as an expression of the limitations of clinical records:
- [34] The difficulty with statements in clinical records is that, because they are only a brief summary or paraphrase, there is no record of anything else that may have been said and which might in some way explain, expand upon or qualify a particular doctor's note. The plaintiff will usually have no specific recollection of what was said and, when shown the record on cross-examination, can rarely do more than agree that he or she must have said what the doctor wrote.
- .

- [36] While the content of a clinical record may be evidence for some purposes, the absence of a record is not, in itself, evidence of anything. For example, the absence of reference to a symptom in a doctor's notes of a particular visit cannot be the sole basis for any inference about the existence or non-existence of that symptom. At most, it indicates only that it was not the focus of discussion on that occasion.
- [37] The same applies to a complete absence of a clinical record. Except in severe or catastrophic cases, the injury at issue is not the only thing of consequence in the plaintiff's life. There certainly may be cases where a plaintiff's description of her or her symptoms is clearly inconsistent with a failure to seek medical attention, permitting the court to draw adverse conclusions about the plaintiff's credibility. But a plaintiff whose condition neither deteriorates nor improves is not obliged to constantly bother busy doctors with reports that nothing has changed, particularly if the plaintiff has no reason to expect the doctors will be able to offer any new or different treatment. Similarly, a plaintiff who seeks medical attention for unrelated conditions is not obliged to recount the history of the accident and resulting injury to a doctor who is not being asked to treat that injury and has no reason to be interested in it.
- [19] Notwithstanding the limitations on clinical records expressed in Edmondson, I agree with the defendant that the evidence as a whole establishes that by the time of trial, Mrs. Mallier was no longer accurately remembering her pre-accident arm pain and the extent of the various treatments that she was receiving for it (including the severity and quality of that pain, and her use of medications and other treatments at the time). This is not a case of brief paraphrased clinical notations or reliance on the absence of a notation in clinical records, but an extensive record of a significant previous injury and its treatment.
- [20] I also agree with the defendant that Mrs. Mallier's focus on her current pain to the exclusion of her pre-existing arm and shoulder pain is problematic. I differ, however, from the defendant as to the reason for this, and find that Mrs. Mallier's reliability in terms of reporting her current pain, its differences from her previous arm and shoulder pain, and her functional limitations as a result of this pain, is limited by her psychological injuries.

Medical Evidence

- [21] Dr. Chen, a medical doctor with a specialization in physical medicine and rehabilitation and pain medicine, examined Mrs. Mallier in November 2020. She diagnosed Mrs. Mallier with chronic mechanical neck pain, right shoulder girdle strain and myofascial imbalance, chronic myofascial pain syndrome, persistent cognitive symptoms, anxiety symptoms, depression symptoms, and central sensitization syndrome (CSS) symptoms. Screening tests indicated Mrs. Mallier's anxiety and depression symptoms may be severe, and Dr. Chen recommended examination by a psychiatrist with pain expertise in relation to those symptoms.

- [22] Dr. Lu is just such an experienced psychiatrist who examined Mrs. Mallier later that same month. Dr. Lu diagnosed Mrs. Mallier with major depression with features of somatic symptom disorder (SSD), and a likely mild traumatic brain injury (MTBI), with current cognitive symptoms that may relate to that MTBI, but are equally explainable, as a result of her chronic pain and mental injuries.
- [23] I find that Dr. Chen's diagnoses are supported by the evidence in this trial, including Mrs. Mallier's medical history and clinical records.
- [24] I also accept Dr. Lu's diagnosis of major depression and somatic symptom disorder. Although part of the foundation of Dr. Lu's opinion was an erroneous understanding that Mrs. Mallier's headaches have persisted since the accident, I find that the other aspects of Mrs. Mallier's chronic pain are established, and support these diagnoses. Overall, I find that Mrs. Mallier is currently is experiencing major depression with features of somatic symptom disorder, which diagnosis also includes the depression and anxiety symptoms noted by Dr. Chen.
- [25] I understood from Dr. Lu's evidence that, although Mrs. Mallier is not intentionally exaggerating her pain symptoms, her subjective experience of pain is exaggerated as a result of her psychological injury. Dr. Chen's evidence is that Mrs. Mallier's experience of pain is more sensitized than for others, in part due to psychological factors.
- [26] As a result of these diagnoses and opinions, I agree with the defendant that Mrs. Mallier's testimony regarding her subjective experience of pain does not fully reflect her true physical capacity. In this unique situation, I find Mrs. Mallier's contemporaneous medical notations have a greater reliability about her past condition than her evidence at trial.
- [27] With respect to Dr. Lu's diagnosis of an MTBI, this diagnosis differs from Dr. Chen, and is based on an ambiguous record (and ambiguity in his own notes) as to whether Mrs. Mallier experienced any loss of consciousness or memory after the accident.
- [28] On balance, I find that Mrs. Mallier likely did experience an MTBI at the time of the accident. Despite the lack of clear evidence of a gap in her consciousness in her examinations by Dr. Lu and Dr. Chen four years after the accident, the contemporary medical records document symptoms of headaches, nausea, dizziness, phonophobia and photophobia that Dr. Lu identifies as most consistent with her family doctor's initial diagnosis of a concussion. That contemporary diagnosis is not admissible for its truth, but I find that it reliably indicates the presence of these symptoms at that time. Together with some evidence of gaps in Mrs. Mallier's memory at the time of the accident, I find that Mrs. Mallier has established that she suffered an MTBI that is relevant to her condition in the months after the accident.
- [29] The MTBI is less relevant to her current condition or prognosis. The evidence establishes that her ongoing cognitive difficulties, mostly around memory, focus and concentration, are equally explainable by the combination of her chronic pain and psychological injuries.

[30] With respect to Mrs. Mallier's prognosis, I find that the evidence establishes that her physical pain symptoms are amenable to improvement with appropriate therapy. Complicating Mrs. Mallier's prognosis is the interaction of her chronic pain and pain sensitivity with her depression, which both Dr. Chen and Dr. Lu opine result in a guarded prognosis. Nevertheless, both doctors provide recommendations in terms of therapies, medications, and cognitive behavioural therapy, which have the possibility of improving both Mrs. Mallier's physical and psychological injury and improving her function. I find that treatment of Mrs. Mallier's depression is key to this recovery, and if she is able to obtain appropriate supports in this regard, her prognosis will improve, although ongoing management will likely be required.

CAUSATION

- [31] Mrs. Mallier must establish on a balance of probabilities that the defendant's negligence caused or materially contributed to her injury. The defendant's negligence need not be the sole cause of the injury so long as it is part of the cause beyond the *de minimis* range. Causation need not be determined by scientific precision: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at paras. 13-17; *Farrant v. Laktin*, 2011 BCCA 336 at para. 9.
- [32] The primary test for causation asks: but for the defendant's negligence, would the plaintiff have suffered the injury? The "but for" test recognizes that compensation for negligent conduct should only be made where a substantial connection between the injury and the defendant's conduct is present: *Resurface Corp. v. Hanke*, 2007 SCC 7 at paras. 21-23.
- [33] The plaintiff need not establish that the defendant's negligence was the sole cause of the injury: *Athey* at para. 17. In *Karim, Abrioux J.* (as he then was) addressed non-tortious contributing causes to personal injuries:
- [92] A defendant is liable for any injuries caused or contributed to by her or her negligence. If the defendant's conduct is found to be a cause of the injury, the presence of other non-tortious contributing causes does not reduce the extent of the defendant's liability. However, if the defendants did not cause an injury, the defendants will not be liable for any losses or damages flowing from that injury: *Brewster v. Li*, 2013 BCSC 774 at para. 78; *Blackwater v. Plint*, 2005 SCC 58 at para. 78.
- [34] Causation must be established on a balance of probabilities before damages are assessed. As Chief Justice McLachlin stated in *Blackwater v. Plint*, 2005 SCC 58 at para. 78:

Even though there may be several tortious and non-tortious causes of injury, so long as the defendant's act is a cause of the plaintiff's damage, the defendant is fully liable for that damage. The rules of damages then consider what the original position of the plaintiff would have been. The governing principle is that the defendant need not put the plaintiff in a better position than her original position and should not compensate the plaintiff for any damages he would have suffered anyway: *Athey*.

[35] The plaintiff must be placed in the position that they would have been in if not for the defendant's negligence, no better or worse. Tortfeasors must take their victims as they find them, even if the plaintiff's injuries are more severe than they would be for the average person (also known as the "thin skull" rule). However, the defendant need not compensate the plaintiff for any debilitating effects of a pre-existing condition that they would have experienced anyway (also known as the "crumbling skull" rule): *Athey* at paras. 32-35. The Supreme Court of Canada articulated the "crumbling skull" rule in *Athey*, at para. 35 as follows:

The so-called "crumbling skull" rule simply recognizes that the pre-existing condition was inherent in the plaintiff's "original position". The defendant need not put the plaintiff in a position better than her or her original position. The defendant is liable for the injuries caused, even if they are extreme, but need not compensate the plaintiff for any debilitating effects of the pre-existing condition which the plaintiff would have experienced anyway. The defendant is liable for the additional damage but not the pre-existing damage. Likewise, if there is a measurable risk that the pre-existing condition would have detrimentally affected the plaintiff in the future, regardless of the defendant's negligence, then this can be taken into account in reducing the overall award. This is consistent with the general rule that the plaintiff must be returned to the position he would have been in, with all of its attendant risks and shortcomings, and not a better position.

[Emphasis in original.]

[36] The "crumbling skull" factor may be addressed in a number of ways, including as a percentage reduction on damages awards, which reflects the likelihood that a pre-existing injury or condition would result in similar losses: see, for example, *Booth v. Gartner*, 2010 BCSC 471; and *Beardwood v. Sheppard*, 2016 BCSC 100.

Parties' Positions

[37] The defendant concedes that Mrs. Mallier suffered soft tissue injuries in the motor vehicle accident, and that the accident re-aggravated her previous arm and shoulder injury. However, it is the defendant's position that these physical injuries improved and reached what the plaintiff and her husband called a "plateau" by the summer of 2017 that was no worse than what she had experienced before the accident. The defendant points to evidence that he says indicates that by the summer of 2017, Mrs. Mallier had regained significant functional capacity, including:

- a) The plaintiff reduced the frequency of physiotherapy treatment in April 2017, and there was a three-month gap in her physiotherapy visits from the end of August 2017 to December 2017 (then, starting in December she continued with sessions twice per month until June 2018);
- b) The plaintiff's reports to her family doctor in May and August 2017 that her "dull pain" is "not aggravated by activity and she is still physically active and not limited functioning";
- c) She and her husband purchased kayaks in the summer of 2017;

- d) She purchased her Reiki table in October 2017; and
 - e) In 2018, the plaintiff earned the most she has since working at her current job, and received her best rating to date from her employer on her performance review for the year starting April 2017 to April 2018.
- [38] The defendant says that it was only after that time that Mrs. Mallier's psychological deterioration began, and the defendant says this psychological injury would have occurred regardless of the accident, pointing to the loss of her father and a good friend in the summer of 2018. He also points to Dr. Lu's evidence that 50% of those with chronic pain would go on to have some depressive symptoms and approximately a quarter will go on to develop depression. He says that I should find that Mrs. Mallier's psychological injury was caused by her pre-existing injury, because Mrs. Mallier was already suffering from chronic pain in her arm and shoulder before the accident.
- [39] The defendant argues that he is not responsible for putting Mrs. Mallier in a better position than she would have been but for the accident, and that her pre-existing injuries and independently arising psychological burdens are the cause of her current condition and disability.
- [40] Mrs. Mallier responds that the evidence establishes that her arm and shoulder injury were improving at the time of the accident and had not settled into a plateau of chronic pain at that time. With respect to her psychological injury, she says that the defendant has not led any evidence to establish an intervening event since the accident that contributed to or caused her depression and SSD symptoms. She also says the evidence establishes that her function has not improved since the accident.

Determination

- [41] Based on my factual findings above, I find that Mrs. Mallier has proven that the defendant caused her current injuries, and in particular, caused a change in quality of her right arm and shoulder pain from an improving condition to a chronic one.
- [42] Mrs. Mallier testified that her pain experience in 2015 was nothing in comparison to her post-accident pain in her right arm, and that she had almost fully recovered from that pain at the time of the accident, but I am unable to accept this evidence. I find that Mrs. Mallier's pain in her right arm prior to the accident was significant, and while it had improved significantly prior to the accident, it had not fully recovered, even to the 95% recovery she says she reported to the first responders at the accident scene.
- [43] However, I also find that the evidence establishes that Mrs. Mallier's right arm pain was significantly re-aggravated as a result of the accident. This re-aggravation of her arm and shoulder pain, and many of her other injuries, significantly improved in the six months after the accident. However, I find that Mrs. Mallier's right arm and shoulder pain did not continue to improve beyond the spring of 2017, and has not improved to the functionality

she had prior to the July 2016 accident. This loss of functionality is connected partly to the severity of the pain, but more significantly to the chronicity of this pain.

[44] I find that the defendant's theory that Mrs. Mallier's depression and SSD symptoms would have evolved regardless as a result of either her previous arm injury, the loss of her loved ones in 2018, or some combination of these two factors, lacks evidentiary support. On the evidence before me, Mrs. Mallier has proven that her psychological injury, which I find is the primary limitation on her function, was caused by the accident.

[45] Overall, I find that Mrs. Mallier has proven that, but for the accident, her right arm and shoulder pain would not have risen to the level of chronic pain that she currently experiences, and she likely would not have developed CSS or major depression. However, in assessing her damages caused by the accident, I must also take into consideration that she had a pre-existing injury that was not fully resolved at the time of the accident, and may have caused her an ongoing, but lesser, level of pain.

NON-PECUNIARY DAMAGES

[46] Non-pecuniary damages are awarded to compensate the plaintiff for pain, suffering, loss of enjoyment of life, and loss of amenities. The compensation awarded should be fair to all parties, and fairness is measured against awards made in comparable cases. Such cases, though helpful, serve only as a rough guide. Each case depends on its own unique facts: *Trites v. Penner*, 2010 BCSC 882 at paras. 188-189.

[47] In *Stapley v. Hejslet*, 2006 BCCA 34, the Court of Appeal outlined the factors to be considered when assessing non-pecuniary damages at para. 46:

The inexhaustive list of common factors cited in [*Boyd v. Harris*, 2004 BCCA 146] 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 BCCA 54).

[48] The assessment of non-pecuniary damages is necessarily influenced by the individual plaintiff's personal experiences in dealing with her or her injuries and their consequences: *Dilello v. Montgomery*, 2005 BCCA 56 at para. 25.

Parties' Positions

[49] Mrs. Mallier is seeking a non-pecuniary damages award in the range of \$130,000 to \$160,000.

[50] Mrs. Mallier says that much of her identity was centred on her love for recreational physical activity, and that she has had to give up many of the things she loves because of the accident. The accident has damaged her sense of self. For example, she isn't able to contribute as much in her role as a volunteer at a cat shelter, a role she valued deeply. The accident has also seriously impacted her relationship with her husband and the recreational activities that they previously engaged in together. The physical limitations of her injuries means she cannot enjoy many of the activities she did before the accident, such as hiking, running, kayaking and swimming. When she tries to do these activities, she is limited by her pain.

[51] The plaintiff also says that the award of non-pecuniary damages should include compensation for loss of housekeeping capacity. She says she is unable to contribute equally to the division of household labour with her partner because her injuries prevent her from doing some household chores.

[52] She relies on the following cases that she says are comparable:

- a) *Verjee v. Dunbrak*, 2019 BCSC 1696, which involved a 59 year old plaintiff at the time of the accident and 69 years old at the time of the trial. Her injuries included chronic neck, shoulder and upper back pain. She was diagnosed with major depressive disorder of mild severity that was in partial remission at the time of the trial as well as SSD. The plaintiff was awarded \$150,000 in non-pecuniary damages.
- b) *Ranahan v. Ocegüera*, 2019 BCSC 228, which involved a 45 year old plaintiff at the time of the accident and 51 at the time of the trial. The court found the plaintiff sustained a "mild traumatic brain injury and soft tissue injuries to her spine that developed into chronic neck pain, upper back pain, post-concussion syndrome, cognitive problems with memory and focus, imbalance, tiredness, fatigue, tinnitus, eye strain, sleep disturbance and chronic headaches". Her injuries significantly impacted her recreational and social pursuits. The court awarded \$160,000 in non-pecuniary damages.

- c) *Morena v. Dhillon*, 2014 BCSC 141, which involved a 47 year old plaintiff at the time of trial. The court found the plaintiff suffered soft tissue injuries to her neck, shoulders, arms, lower back and legs that resulted in chronic myofascial pain syndrome in her neck, shoulders and upper back, recurring mechanical low back pain, a form of chronic pain syndrome, chronic sleep disruption, posttraumatic stress disorder, and major depression. The court awarded \$130,000 in non-pecuniary damages.
- [53] The defendant's position is that \$35,000 to \$45,000, and in any event no more than \$50,000, is an appropriate award for non-pecuniary damages considering the plaintiff's pre-existing condition and the likelihood of improvement with psychological treatment. He says that comparable cases to the one at bar include:
- a) *Ryan v. Klakowich*, 2011 BCSC 835, which involved a plaintiff who was 54 years old at trial. Ms. Ryan had severe pre-existing scoliosis, osteoporosis, and had been injured in numerous other tortious and non-tortious accidents. She was also diagnosed with diabetes after the accident. The plaintiff's pre-existing scoliosis in Ryan was well-controlled with treatment but symptomatic, which the defendant says is similar to Mrs. Mallier's pre-existing neck, shoulder and arm pain that was well-controlled with treatment prior to the accident but not resolved. The court accepted that the plaintiff suffered mild to moderate soft tissue injuries to her neck and shoulder girdle, but found that the effect upon the plaintiff's activities and enjoyment of living from these injuries had been exaggerated. The court awarded \$25,000 in non-pecuniary damages.
- b) *Dennis v. Fothergill*, 2012 BCSC 1510, which involved a 42 year old plaintiff who was in a significant accident similar to Mrs. Mallier's. In Dennis, the court found that the plaintiff's accident-related complaints resolved within 12 months of the accident, and that the plaintiff's psychological complaints were not caused by the accident but rather her pre-accident injuries. She was awarded \$40,000 in non-pecuniary damages.
- c) *Ricci v. Mann*, 2003 BCSC 65, which involved a more severe collision and a younger plaintiff who was 31 years old. Ms. Ricci had been a dancer and fitness enthusiast before the accident. As a result of the accident, she suffered from neck pain and numbness in her hands, arms and feet. The court awarded \$45,000 in non-pecuniary damages.

Determination

- [54] Had I come to the factual findings that the defendant had urged upon me, the Dennis case would indeed have been of assistance. However, on the facts as I have found them in this case, I find that the plaintiff's cases are more comparable.
- [55] The most significant factor in my view affecting Mrs. Mallier's non-pecuniary damages is the emotional impact the accident has had on her sense of self worth, in her social and volunteer activities, at work, and most significantly, in her marriage. This stems from her perception of pain and the physical limitations it puts on her, and her perception of her cognitive losses. While these impairments are objectively not significantly disabling, the

guilt and loss of self esteem that accompany her major depression, together with her SSD and anxiety features, I find are psychologically disabling and significantly impair Mrs. Mallier's enjoyment of life.

- [56] Taking into account these impairments on Mrs. Mallier's psychological integrity, her marriage, and her social and recreational activity, but also factoring in that some physical limitations and pain pre-existed the accident that would have caused some (but a lesser) impairment of her physical activities, I award Mrs. Mallier \$120,000 in non-pecuniary damages.

PAST LOSS OF EARNINGS

- [57] The parties are agreed that Mrs. Mallier lost \$18,385.12 in gross wages as a result of her absence from her position at Petcurean in the months following the accident in 2016.
- [58] The parties are not agreed as to what her net loss is after income taxes are considered under the Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231, s. 98. The defendant is agreeable to an assumed 25% reduction for taxes, but Mrs. Mallier suggests that this reduction should either be 20% or settled as between the parties.
- [59] I have no evidence upon which to consider what the appropriate reduction for taxes is in this case. If the parties cannot agree, I direct that this matter be set before the Registrar to determine and certify the result.

DIMINISHMENT OF FUTURE EARNING CAPACITY

- [60] A claim for loss of future earning capacity requires an answer to two key questions: 1) has the plaintiff's earning capacity been impaired by her injuries; and, if so, 2) what compensation should be awarded for the resulting financial harm that will accrue over time?
- [61] The assessment of loss must be based on the evidence and not an application of a purely mathematical calculation. The appropriate means of assessment will vary from case to case: *Brown v. Gola* (1985), 26 B.C.L.R. (2d) 353 (S.C.); *Pallos v. Insurance Corp. of British Columbia* (1995), 100 B.C.L.R. (2d) 260 (C.A.); and *Pett v. Pett*, 2009 BCCA 232. The plaintiff must establish that there is a real and substantial possibility of a future event leading to an income loss: *Perren v. Lalari*, 2010 BCCA 140 at para. 32.
- [62] The assessment of damages is a matter of judgment, not calculation: *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 18.

- [63] Insofar as possible, a plaintiff should be put in the position he or she would have been in but for the injuries caused by the defendant's negligence: *Lines v. W & D Logging Co. Ltd.*, 2009 BCCA 106 at para. 185. The essential task of the court is to compare the likely future of the plaintiff's working life if the accident had not happened with the plaintiff's likely future working life after the accident: *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 32.
- [64] There are two possible approaches to assess loss of future earning capacity: the "earnings approach" and the "capital asset approach". Both approaches are correct. The "earnings approach" will generally be more useful when the loss is easily measurable: *Perren* at para. 32. Where the loss "is not measurable in a pecuniary way", the "capital asset approach" is more appropriate: *Perren* at para. 12.
- [65] The capital asset approach involves considering factors such as (i) whether the plaintiff has been rendered less capable overall of earning income from all types of employment; (ii) whether the plaintiff is less marketable or attractive as a potential employee; (iii) whether the plaintiff has lost the ability to take advantage of all job opportunities that might otherwise have been open; and (iv) whether the plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market: *Brown; Gilbert v. Bottle*, 2011 BCSC 1389 at para. 233; and *Morgan v. Galbraith*, 2013 BCCA 305 at paras. 53, 56.
- [66] Though the capital asset approach is not a "mathematical calculation", the court must still set out the factual basis of the award: *Morgan* at para. 56.
- [67] A plaintiff may still be entitled to damages for loss of future earning capacity even where he or she has not suffered an actual loss of income. What is compensable is the lost capacity, not the lost income. The British Columbia Court of Appeal discussed this principle in *Ibbitson v. Cooper*, 2012 BCCA 249.

Parties' Positions

- [68] Mrs. Mallier seeks \$200,000 to \$300,000 in loss of earning capacity for both past and future loss of earning capacity. As I understand her position, this claim includes a loss of capacity claim for pre-trial losses as well as future losses, and the settled amount of just over \$18,000 in gross wage loss is excluded from this claim. This amounts to just over two to three times her current annual income of \$92,000.
- [69] In support of this claim, Mrs. Mallier argues that the evidence establishes that:
- a) There is a real and substantial possibility that her psychological condition will deteriorate and curtail her ability to work;

- b) There is a real and substantial possibility she will lose her job at Petcurean because her job performance has slipped and she has already been demoted. She says that her position as a manager has been changed to a specialist, and that she no longer has employees reporting to her, while employees previously junior to her have been promoted over her;
 - c) There is a real and substantial possibility the energy draining effect of her injuries will reduce her working career. See: *Morlan v. Barrett*, 2012 BCCA 66 at paras. 39-41; and
 - d) There was a real and substantial possibility that Mrs. Mallier would have moved ahead with her plan to start a business teaching Reiki and that she would have earned some income from it were it not for the accident. Mrs. Mallier testified that she intended to pursue the Reiki business on a part time basis while she continued her full time job at Petcurean. While this loss is not easily measurable, she says she is entitled to some compensation for that loss.
- [70] Mrs. Mallier says that in the event she is let go from her present job, the impact on her future earnings is likely to be significant. She has applied for many jobs since the accident, but has been unsuccessful in securing alternate employment.
- [71] The defendant agrees that if Mrs. Mallier suffered any loss of her earning capacity, the capital asset approach is the more appropriate one. However, the defendant argues that there was no such loss.
- [72] The defendant argues that Mrs. Mallier has not established that her earning capacity has been impaired or that there is a real and substantial possibility of future economic loss. He says Mrs. Mallier's claims in this regard are purely speculative or theoretical and are based solely on the plaintiff's own perceived limitations and nothing more. He relies, in particular, on the expert evidence that suggests that Mrs. Mallier does not fully appreciate her true capacity, and overestimates her disabilities.
- [73] The defendant says that, although the evidence establishes that Mrs. Mallier experiences pain while she works, it also establishes that she is capable of performing her full time duties and has been able to do so since the time of the accident. He disagrees that the evidence supports a real and substantial possibility that she will not continue to be employed by Petcurean, her employer since before the accident. He says that her performance reviews varied since the accident, but were not consistently worse. He says that the only evidence that she has been demoted at work is from the plaintiff herself, which is coloured by her negative views of her own abilities. Further, Mrs. Mallier provided no evidence as to the economic consequences, if any, of her demotion. To the contrary, her income has steadily increased, and increased slightly again even after her alleged demotion.
- [74] With respect to Mrs. Mallier's claim for a loss related to her business idea of delivering Reiki workshops, the defendant challenges the admissibility of the business plan produced just before trial, and the extent to which it provides reliable evidence of future profit. The financial aspects of the plan appear to have been primarily prepared by Mr. Mallier, and the drafts appear to have changed since the accident, though never acted upon. The defendant

says Reiki was always a recreational passion for Mrs. Mallier, not a viable business opportunity.

- [75] If I do find that Mrs. Mallier has experienced a loss of earning capacity, the defendant says that her claim should be further reduced to take into account her pre-existing chronic pain which he says was likely to result in ongoing chronic pain symptoms and possibly eventual depression regardless of the accident.
- [76] The defendant says that the award under this head should be a fraction of a year's salary, at most.

Determination

- [77] As stated above, I have found on the evidence that Mrs. Mallier's psychological injury is the primary reason for her disability, and was caused by the accident.
- [78] However, I also agree that this injury causes Mrs. Mallier to undervalue her own abilities and contributions, and weakens the reliance I can put on her evidence as to her performance at work and the risk that she may lose her position. Although I accept that she considers this risk to be real, I have little objective evidence to corroborate this concern. I agree with the defendant that her performance reviews do not show a significant negative change since the accident, and her income has generally continued to increase.
- [79] However, the evidence is that her income has recently plateaued, and her change in responsibilities also tends to signal that she is not performing on the same upward trajectory at work that she was on before the accident.
- [80] I find that Mrs. Mallier has proven that her value to herself and her employer has been diminished as a result of her physical and psychological injuries, and that the full range of career options open to her has been curtailed.
- [81] One such career option included some practice of Reiki, and I find that since the accident, this pursuit has been curtailed. However, I find that the evidence before me does not establish a real and substantial possibility that this would have been a lucrative career, but more likely a small supplement to her income.
- [82] Overall, I consider it appropriate on all the evidence to award Mrs. Mallier \$140,000 for the diminishment of her future earning capacity. This is roughly equivalent to just over a year and half of her current salary, and also represents a loss of approximately 10% of that salary a year to the age of 65. This award also takes into account Mrs. Mallier's pre-existing physical injuries.
- [83] I award this amount in relation to her future loss of earning capacity, as I consider that the parties' agreement on past loss of earnings fully addresses that head of damages. It is therefore unnecessary to consider whether some portion of this amount should be reduced to account for income taxes as required for past loss of income awards.

COST OF FUTURE CARE

- [84] The plaintiff is entitled to compensation for the cost of future care based on what is reasonably necessary to restore her to her pre-accident condition insofar as that is possible. When full restoration cannot be achieved, the court must strive to assure full compensation through the provision of adequate future care. The award is to be based on what is reasonably necessary on the medical evidence to preserve and promote the plaintiff's mental and physical health: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.); *Williams v. Low*, 2000 BCSC 345; *Spehar v. Beazley*, 2002 BCSC 1104 at para. 55; and *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at paras. 29-30.
- [31] The test for determining the appropriate award under the heading of cost of future care is an objective one based on medical evidence. For an award of future care: (1) there must be a medical justification for claims for cost of future care, and (2) the claims must be reasonable: *Milina* at 84; and *Tsalamandris v. McLeod*, 2012 BCCA 239 at paras. 62-63.
- [85] Future care costs are "justified" if they are both medically necessary and likely to be incurred by the plaintiff. The award of damages is thus a matter of prediction as to what will happen in the future. If a plaintiff has not used a particular item or service in the past, it may be inappropriate to include its cost in a future care award. However, if the evidence shows that services previously rejected by the plaintiff will become essential or required in the future, the plaintiff can recover for such services: *Izony v. Weidlich*, 2006 BCSC 1315 at para. 74; *O'Connell v. Yung*, 2012 BCCA 57 at paras. 55, 60, 68-70.
- [86] The extent, if any, to which a future care costs award should be adjusted for contingencies depends on the specific care needs of the plaintiff. In some cases, negative contingencies are offset by positive contingencies and, therefore, a contingency adjustment is not required. In other cases, however, the award is reduced based on the prospect of improvement in the plaintiff's condition or increased based on the prospect that additional care will be required. Each case falls to be determined on its particular facts: *Gilbert* at para. 253.
- [87] An assessment of damages for cost of future care is not a precise accounting exercise: *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at para. 21.

Parties' Positions

- [88] Both Dr. Lu and Dr. Chen provided a series of recommendations to assist Mrs. Mallier's recovery from both her physical and her psychological injuries. The cost of these recommendations were assessed and summarized by an occupational therapist, Ms. Kimberly Dimayuga. A chart of these recommendations, together with the plaintiff's position on the amount of recovery is below:

ITEM

COST

REPLACEMENT

PLAINITFF'S CLAIM

1. MEDICAL ASSESSMENT AND REHABILITATIVE TREATMENT

Psychiatric Evaluation/ Psychological Assessment & Treatment

\$2,700.00 - \$5,400.00

Deferred

\$2,700.00 - \$5,400.00

Couple's Therapy

\$816.00 - \$1,750.00

Deferred

\$816.00 - \$1,750.00

Occupational Therapy

\$2,655.00 - \$8,850.00

None

\$2,655.00 - \$8,850.00

Neuropsychological Assessment

\$2,800.00 - \$3,200.00

None

\$0.00

Pain Management Education

\$0.00 (MSP)

As Needed

\$0.00

Physiotherapy

\$938.50 - \$3,746.50

None

\$938.50 - \$3,746.50

Kinesiology/Active Rehabilitation: Initial

\$900.00 - \$3,600.00

None

\$900.00 - \$3,600.00

Kinesiology/Active Rehabilitation: Future

\$900.00 - \$1,800.00

Yearly for 3 years

\$1,800.00 - \$5,400.00

Specialist Consultation & Trigger Point Injections: Consultation

\$0

As Needed

\$0

Specialist Consultation & Trigger Point Injections: Injections

\$50.00 - \$225.00

Deferred

\$50.00 - \$225.00

Medical Branch Blocks

\$0.00 - \$3,900.00

Deferred

\$0.00 - \$3,900.00

2. SUPPLIES & EQUIPMENT

Medication:

Vortioxetine

Bupropion

Quetiapine

Trazodone

Duloxetine

Venlafaxine

Amitriptyline

Pregabalin

Nabilone

Nortriptyline

\$303.30 - \$343.90

\$27.10 - \$43.40

\$16.30 - \$65.80

\$16.30 - \$26.20

\$16.30 - \$26.20

\$19.90 - \$31.60

\$16.30 - \$27.10

\$34.30 - \$54.90

\$159.80 - \$169.30

\$42.00 - \$73.00

Every 90 days (for each)

\$326.00 - \$6,878.00

Ergonomic Equipment

\$1,328.00 - \$2,028.00

None

\$1,328.00 - \$2,028.00

3. FUTURE CONSIDERATIONS

Psychological Treatment/ Monitoring

\$1,328.00 - \$2,028.00

Yearly over 5 years

\$6,640.00 - \$10,140.00

Multidisciplinary Pain Program

\$12,500.00 - \$30,975.00

\$12,500.00 - \$30,975.00

TOTAL:

\$29,753.50 - \$82,892.50

- [89] The defendant says that, in the event the Court finds that the plaintiff's ongoing complaints are pre-existing, no cost of future care award is appropriate as these are treatments that the plaintiff would have required regardless of the accident.
- [90] In the alternative, in the event the Court finds that the plaintiff's ongoing complaints are only partially related to the accident, and given that there is a calculable risk that the plaintiff would have ended up in the position she is presently in regardless of the accident, the defendant's position is that any cost of future care award ought to be reduced to account for that risk.
- [91] With respect to the specific claims above, the defendant admits that the plaintiff suffers from psychological complaints which have yet to be treated adequately or at all. The crux of the defendant's position on this treatment is that the plaintiff's pre-2018 plateau in recovery from her physical symptoms was enough of an intervening event that the plaintiff's current psychological condition was not caused by the accident, but rather was caused by the resumption of the plaintiff's pre-existing chronic pain condition which would have occurred regardless of the accident. This same argument applies to the costs associated with future psychological treatment and medications for psychological issues and/or chronic pain including Duloxetine, Amitriptyline, and Nortriptyline.
- [92] With respect to couple's therapy, Dr. Lu has not recommended a specific amount. There is only a mention in passing by Dr. Lu in his report that couple's therapy may be necessary. It is unclear how the need for couple's therapy is related to the accident or whether it is related to the accident at all. Further, the plaintiff's evidence on this point was that her husband had some psychology credentials and prefers to treat himself. In the circumstances, the defendant says there is no evidence the plaintiff would avail herself of couple's counselling.
- [93] With respect to occupational therapy, Dr. Lu and Dr. Chen are not prescriptive of the amount of such therapy required. Ms. Dimayuga opines that 18 to 30 sessions (or 18 to 60 hours) of occupational therapy is appropriate. It is the defendant's position that this amount of occupational therapy is excessive, especially if the plaintiff also uses the services of a physiotherapist and a kinesiologist, and especially given that the plaintiff has been back at work full time since November 2016. Overall, the defendant says that less than the minimum range provided by Ms. Dimayuga is appropriate and better reflects the recommendations made by Drs. Lu and Chen. As Ms. Dimayuga notes in her report, two to three sessions would address Mrs. Mallier's ergonomic needs, which the defendant says would be a reasonable amount of sessions at a cost of \$295 to \$442.50 using Ms. Dimayuga's hourly rate.
- [94] With respect to physiotherapy and kinesiology, the defendant says there is some overlap between the two which ought to be considered when awarding these damages. With respect to physiotherapy specifically, the fact that the plaintiff's pre-existing condition included a need for four to nine physiotherapy treatments in the months leading up to the accident ought to be considered. Dr. Chen's recommendations do not exceed the plaintiff's pre-

accident pattern of four treatments in the month leading up to the accident. While the plaintiff's evidence was that she had improved to 95% at the time of the accident, that alleged improved condition still required consistent treatment at the time of the accident, and it is more likely than not, that such treatment would have continued regardless of the accident into the future.

- [95] To date, the plaintiff has not had any kinesiology treatments, however those treatments would likely have been recommended at some point in the plaintiff's future, regardless of the accident due to her pre-existing chronic pain. As a result, any award for cost of care related to kinesiology must take into account the treatments she would have required in any event of the accident.
- [96] With respect to trigger point injections and medial branch blocks, the defendant says that the low end of Ms. Dimayuga's quantum is appropriate, and that it ought to be reduced further to take into account the likelihood that the plaintiff would have required such injections regardless of the accident to treat her pre-existing chronic pain. These injections and blocks are covered by MSP with the exception of a small cost related to the "injectables" for trigger point injections.
- [97] With respect to medications, the defendant says that, at most, the plaintiff needs only one antidepressant, one pain killer and one sleeping medication at a time. Dr. Lu recommended antidepressants such as Vortioxetine and Bupropion and sleep medications such as Quetiapine or Trazodone. Dr. Chen recommended Duloxetine, Venlafaxine, Nortriptyline, Amitriptyline, Pregabalin or Nabilone to treat central sensitization and chronic pain syndrome. There is presumably some overlap in these recommendations.
- [98] With respect to ergonomic equipment, including a sit-stand desk at home and a desk chair, the defendant says that, on the evidence, the plaintiff is unlikely to use one if it is ordered. If it is, the lower end of the estimate is more appropriate. Again, the court ought to consider the probability that the plaintiff would have required such equipment regardless of the accident.
- [99] With respect to multidisciplinary pain programs, there is no evidence before the court regarding the need for such a program, as this recommendation relates to a report that was ultimately not entered into evidence, and that other, "less multidisciplinary" pain programs are available at public facilities with no cost to the plaintiff.

Determination

- [100] I agree with the defendant that I do not have a professional recommendation in evidence before me that Mrs. Mallier attend a multidisciplinary pain program. The foundation for this cost in Ms. Dimayuga's report is not established. I also agree that the evidence does not support that Mr. and Mrs. Mallier would make use of couple's therapy.

[101] However, with respect to the other recommendations made by Dr. Lu and Dr. Chen, I consider the costs estimated by Ms. Dimayuga to be reasonable. Furthermore, given that the plaintiff's claims in relation to these costs are generally limited to the amounts required for five years or less, I consider that an award closer to the upper range for many of these costs is warranted.

[102] Although many of the medications are likely duplicated, the high end of the range sought for those medications assumes reliance for no more than a few years, which I consider conservative.

[103] Overall, I award Mrs. Mallier \$35,000 for her costs of future care.

SPECIAL DAMAGES

[104] The parties have settled Mrs. Mallier's special damages at \$11,992.69, which I round to \$12,000 for the purposes of the award.

CONCLUSION AND COSTS

[105] In conclusion, Mrs. Mallier is entitled to \$307,000 in damages from the defendants as follows:

- a) Non-pecuniary Damages: \$120,000
- b) Loss of Earning Capacity: \$140,000
- c) Cost of Future Care: \$35,000
- d) Special Damages: \$12,000

Total: \$307,000

[106] In addition Mrs. Mallier is entitled to an award for past loss of earnings in the amount of \$18,385.12 less income taxes in an amount to be determined by the parties by agreement, or through an application to the Registrar if the parties cannot agree. The Registrar may make this determination and certify it with no need to remit the matter back to me.

[107] Mrs. Mallier is also entitled to her costs, subject to any offers or other matters that may require an adjustment to her costs entitlement. If the parties wish to address costs, they may make arrangements with the Registry in the next 30 days to make submissions before me for this purpose.

"Marzari J."

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