
CANADA / JUDGMENT

Matheos v. Scott

2019 BCSC 1738

COURT

Supreme Court of British Columbia

DECIDED

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2019 BCSC 1738 Matheos v. Scott

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Matheos v. Scott,

2019 BCSC 1738

Date: 20191010

Docket: M185231

Registry: New Westminster

Between:

Erica Dianne Matheos

Plaintiff

And

Katelynn Scott and Maxine Dudek

Defendants

Corrected Judgment: The text of the judgment was corrected at paragraphs 1, 5 and 6 on October 17, 2019.

Before: The Honourable Madam Justice Murray

Reasons for Judgment

Counsel for the Plaintiff:

J. C. Moulton

Counsel for the Defendants:

H. Frost

Place and Date of Trial:

New Westminster, B.C.

June 17-21, 2019

Place and Date of Judgment:

New Westminster, B.C.

October 10, 2019

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INTRODUCTION

- [1] The plaintiff Ms. Matheos claims damages for injuries suffered in a motor vehicle accident on November 17, 2014 in Langley in which she was rear-ended by a vehicle that had been struck from behind.
- [2] I will refer to this accident as the MVA throughout these reasons. This is to be distinguished from other accidents that I will refer to as motor vehicle accidents.
- [3] Within hours of the MVA Ms. Matheos started to feel pain in her head, neck and upper back/shoulder blade area. The pain was centered on her right side. She continues to suffer.
- [4] The defendant, Katelynn Scott (the "defendant") admits liability for the collision. The action has been discontinued as against Maxine Dudek.
- [5] The defendant argues that Ms. Matheos' injuries were pre-existing and were aggravated by subsequent motor vehicle accidents and other life events that occurred after the MVA. She does however concede that the MVA exacerbated Ms. Matheos' pre-existing injuries. The extent to which they were aggravated is in issue.
- [6] With respect to previous injuries, Ms. Matheos was involved in a number of motor vehicle accidents which occurred in 2003, 2008 and 2010. After the 2008 accident Ms. Matheos started suffering from migraine like headaches and stiffness in her neck.
- [7] Before the MVA Ms. Matheos was able to control her headaches and pain. They were not affecting her ability to work or her enjoyment of life.
- [8] After the MVA Ms. Matheos had two motor vehicle accidents, both of which were her fault. She was not injured in either.
- [9] There were two other post MVA events that affected Ms. Matheos. In late 2017 Ms. Matheos was diagnosed with cancer and underwent surgery. Shortly after she had recuperated, in 2018 her father, with whom she was extremely close, fell ill and passed away.

ISSUES

- [10] This court must determine what if any monetary amount should be awarded to Ms. Matheos under the following heads of damage:
 - (1) non-pecuniary damages;
 - (2) loss of past income;
 - (3) loss of earning capacity;
 - (4) cost of future care; and
 - (5) loss of housekeeping capacity.

[11] Central to all of these issues is the credibility of Ms. Matheos, her family members and her friends.

[12] I will begin by considering that issue.

CREDIBILITY

[13] The defendant takes the position that Ms. Matheos was not a credible witness. She also questions the evidence of Ms. Matheos' husband, mother, sister and friend arguing that they are bias.

[14] With respect to Ms. Matheos the defendant relies on the following factors:

- a) She did not tell any of her three treating doctors about the two 2015 motor vehicle accidents that were her fault;
- b) She had settled two claims for her previous motor vehicle accidents by that time so she was familiar with the claims process;
- c) She made statements under oath at her examination for discovery that were not true including:
 - (1) That she had not had any motor vehicle accidents after the MVA when in fact she had had the two that were her fault;
 - (2) That she did not cycle after the MVA when in fact she had participated in a fundraising ride to conquer cancer;
 - (3) That she did not do wedding photography after the MVA when in fact she had;
 - (4) That after the MVA she had only run one half marathon in 2016 when in fact she had run one in 2015 which she finished with a better time than she achieved in 2014 pre-MVA.
- d) She made statements at discovery or to her doctors that were different with her evidence at trial:
 - (1) At trial she testified that stress was only a trigger after the MVA but in 2011 she told her neurologist Dr. Robinson that stress was a trigger;
 - (2) At trial she testified that her right arm continues to be numb but she told her general practitioner Dr. Daniel that the numbness had resolved shortly after the MVA;
 - (3) At trial Ms. Matheos testified that she has had a drop in mood since the MVA but at discovery she testified that she did not think the MVA had added to her depression; and
 - (4) At trial Ms. Matheos testified that she still is sleeping poorly since the MVA but at discovery she testified that she was sleeping well.

- [15] How much her answers at discovery were impacted by her father's declining health is unknown. Ms. Matheos' father was ill at the time and passed away two weeks after the discovery. She testified that she was preoccupied at the time and was "not in a good head space". There is no doubt that testifying at an examination for discovery did not command her full attention when her beloved father was dying. Accordingly, I do not find the inconsistencies at the discovery to be determinative of her credibility.
- [16] I have no doubt that some of the understatements and failures to report to her medical professionals are due to Ms. Matheos' stoicism and her tendency to downplay her issues. Her family and friend testified that she is stoic. I observed same when she testified. I accept Ms. Matheos' explanation that she did not tell her doctors of the other car accident because she was not injured in them and that she did not always report everything to them. That makes sense to me especially as Ms. Matheos has had so much to deal with with her own health issues and her father passing away.
- [17] Overall I found Ms. Matheos to be an honest, credible witness. I do not accept that she overstated her symptoms or difficulties, rather I found her to be self-deprecating and genuine, and if anything she understated them. Significantly her evidence does not stand alone. It is corroborated in all material ways by her husband, mother, sister and friend. In fact they gave more evidence regarding how Ms. Matheos has been impacted than she did. Her evidence is also corroborated by her treating physicians.
- [18] Neither do I find that Ms. Matheos painted an exaggerated picture of her business. I found her evidence on that topic to be fair and realistic.
- [19] I have no hesitation accepting Ms. Matheos' evidence.
- [20] I also accept the evidence of Ms. Matheos' family and her friend. I found them to be honest and straight-forward witnesses.
- [21] I will now outline the relevant evidence.

THE EVIDENCE

The Accident

- [22] On the afternoon of November 17, 2014 Ms. Matheos was driving her mother's 1999 Jeep Grand Cherokee on 198 Street in Langley. She stopped to make a left turn onto Willowbrook Road and was rear-ended by a vehicle that had been pushed into her by the defendant's car. At the time she was struck Ms. Matheos' body was turned to the left preparing to make the turn.
- [23] On impact Ms. Matheos was jarred forward. Her seat belt locked. She felt the impact in her neck.

- [24] Within a short time of the accident Ms. Matheos' neck felt stiff, she had a light headache and numbness in her right arm. When she saw her family doctor, Dr. Daniel a few days later she complained of headaches (migraines), neck pain, loss of range of motion in her neck and pain in the right arm/upper back. These issues persist today.

Health pre-accident

- [25] As mentioned above Ms. Matheos had been involved in a number of motor vehicle accidents prior to the MVA: 2003, 2008 and 2010. She was not at fault in any of these accidents.
- [26] The 2008 accident in which Ms. Matheos was rear-ended was the most serious. It was that accident that caused the onset of migraine like headaches and neck pain.
- [27] She was also diagnosed with soft tissue injuries to her neck and back as well as headaches following the 2010 motor vehicle accident.
- [28] Since February 2011 Ms. Matheos has been seeing Dr. Robinson, a neurologist who specialises in headaches. Dr. Robinson diagnosed Ms. Matheos with post traumatic headaches. These are headaches that are caused by a traumatic event and have migraine like symptoms including nausea and light sensitivity. According to Dr. Robinson, Ms. Matheos' headaches were caused by her neck pain.
- [29] Before the MVA Dr. Robinson was treating Ms. Matheos with Botox injections which he administered every three months. In addition to the Botox, Ms. Matheos used analgesics to manage her headaches. Ms. Matheos testified that she was managing the headaches well prior to the MVA using this regime. That is corroborated by her doctors, her family and her friend.
- [30] Ms. Matheos suffered post partum depression following the birth of her two children in 2010 and 2012. She was taking anti-depressant medication at the time of the MVA.
- [31] By all accounts pre-MVA Ms. Matheos was unfettered in her activities and able to function at a high level. She was working long hours, raising two young children, maintaining an immaculate home, entertaining and socialising regularly and enjoying regular physical exercise - running and cycling and skiing/snowboarding.
- [32] Ms. Matheos was a good athlete and a fierce competitor. She was an outstanding skier/snowboarder. She participated in half marathons and long bike races including the Whistler and Penticton Gran Fondos. It was clear from the evidence that being physically active was and is very important to her.

- [33] Ms. Matheos did not return to her job as an administrative assistant after the birth of her second child. Instead, in early 2014 she started her own photography business, LouRoo Photography. She and her husband renovated their coach house into a photography studio. It was Ms. Matheos' dream. She loved photography and being self-employed with the studio at her home gave her the flexibility she wanted for her young family. Her plan was to work while her children were at school and in the evenings and on weekends.
- [34] The start up of her business was an exciting time for Ms. Matheos. She was working long hours building her business and was unhampered in her ability to do so.
- [35] As she was just months into her business, Ms. Matheos' earnings were small before the MVA.

After the MVA

- [36] Within hours of the November 17, 2014 MVA Ms. Matheos started feeling stiff and sore in her neck/upper back and she had a headache. The headache was different than the headaches she suffered pre-MVA as the pain was focussed on her right side from her head to her right scapula.
- [37] Ms. Matheos' headaches increased in frequency and severity following the MVA. Pre-MVA she averaged one migraine a month; post-MVA she had headaches daily. About twice a month they were debilitating.
- [38] According to Dr. Robinson the pain in Ms. Matheos' neck/upper back triggered the headaches. As a result he increased the frequency as well as the number of Botox injections, changing the "map" of the injections to include the pain extending from the neck to the right shoulder and into the inside right scapula.
- [39] Ms. Matheos continued to work at her business with difficulty. She had to defer some clients but she tried to keep the commitments that she had booked. She did not take on new clients for a few months as her headaches were unpredictable and she felt overwhelmed.
- [40] Ms. Matheos began taking on new clients in January 2015 but found that she was unable to work as she had been before the MVA. She had trouble sitting at her desk for the long hours that were required to edit her photos. In addition she found lugging her equipment around difficult and she was physically unable to put in long working days as she would be in pain and invariably get a headache. She had to stop doing weddings, the most lucrative type of work, as it was too taxing.
- [41] She did not take on all new clients that called post MVA. Nor was she able to blog after each session she did as she had originally planned to do to grow her business.

The 2015 Car Accidents

- [42] In 2015 Ms. Matheos was involved in two more car accidents, both of which were her fault.

- [43] In February 2015 Ms. Matheos pulled into a parking spot and hit the open door of a car that was in the adjacent parking space.
- [44] In June 2015 Ms. Matheos, distracted by her young child, rear-ended a vehicle that stopped in front of her.
- [45] Ms. Matheos testified that she was not hurt in either of these accidents.
- [46] Ms. Matheos claims that she did not report these accidents to her doctors as she did not suffer any injuries.
- [47] Ms. Matheos pushed through her pain and headaches to work at her photography. Ms. Matheos estimates that she was working at about 60% of her capacity.
- [48] Ms. Matheos was referred to physiatrist Dr. Hui in the spring of 2016. She still sees him every 2 to 3 months for trigger point injections in her neck.
- [49] In 2017 according to Ms. Matheos, she "started to crack". Nothing was getting better and she was not able to keep up with her work.
- [50] In late 2017 Ms. Matheos was diagnosed with cancer. She had surgery in February 2018. It took her approximately six months to recuperate.
- [51] In early 2018 Ms. Matheos' father became ill. He passed away in March 2018 approximately two weeks after her examination for discovery. His death was devastating for Ms. Matheos.
- [52] As a result of everything that was going on in her life Ms. Matheos earned very little income in 2018 and she decided to take a step back from her business. That decision was a result of a combination of the headaches, neck/shoulder pain, cancer and her father's passing. She testified however that she does not believe that she would have closed her business but for the MVA.
- [53] This year Ms. Matheos started working about 5 to 6 hours a week at her business. She is now hoping to get her business up and running again.

Ms. Matheos' Health Today

- [54] Despite the increased Botox regime Ms. Matheos has been unable to manage her headaches and needs Ketorolac and in her words an "alarming amount" of Advil. She has recently been prescribed a new drug. According to Dr. Robinson the prognosis for this medication is guarded as no improvement has been noted after two injections.
- [55] Ms. Matheos still suffers pain in her neck and upper back/right shoulder blade area. She plans to continue with the pressure point injections from physiatrist Dr. Hui, which have improved the range of motion in her neck.

- [56] I noted that Ms. Matheos could barely turn her stiff neck while she was testifying. By the second day of her evidence her neck was clearly stiffer and Ms. Matheos appeared to be tired and uncomfortable.
- [57] Mr. Matheos testified that his wife is less patient with him and the children. Ms. Matheos agreed that she is now short with her family and is quick to anger. She described that she is "just getting the job done" at home.
- [58] Her close friend testified that Ms. Matheos has withdrawn socially since the MVA. Before the MVA she was a "giver" to their group of friends and frequently hosted social events. Since the MVA she rarely takes part in any gatherings "because of the unpredictability" of how she will be feeling.
- [59] Ms. Matheos is unable to do the sports/activities she so enjoyed. She tried to continue running and cycling but was unable to because of the pain. Last year she returned to skiing but just on the beginner runs with her children - not the black diamond runs she once enjoyed. It is unlikely that she will be able to return to her pre-MVA activity level.
- [60] With those facts in mind I now turn to consider the issues starting with non-pecuniary damages.

NON-PECUNIARY DAMAGES

The Law

- [61] An award of non-pecuniary damages does not depend upon the seriousness of the injury, but on its ability to ameliorate the condition of the victim considering his or her particular situation. The gravity of the injury alone is not determinative. An appreciation of the individual's loss is the key. There is no "tariff". An award will vary in each case to meet the specific circumstances of the individual case: *Lindal v. Lindal*, [1981] 2 S.C.R. 629 at 637.
- [62] In *Gohringer v. Hernando-Lazo et al.*, 2009 BCSC 420, Russell, J. outlined the factors to be considered by the Court in assessing non-pecuniary damages:
- [81] The purpose of non-pecuniary damage awards is to compensate the plaintiff for "pain, suffering, loss of enjoyment of life and loss of amenities": *Jackson v. Lai*, 2007 BCSC 1023, B.C.J. No. 1535 at para. 134; see also *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229; *Kuskis v. Tin*, 2008 BCSC 862, B.C.J. No. 1248. While each award must be made with reference to the particular circumstances and facts of the case, other cases may serve as a guide to assist the court in arriving at an award that is just and fair to both parties: *Kuskis* at para. 136.
- [82] There are a number of factors that courts must take into account when assessing this type of claim. Justice Kirkpatrick, writing for the majority, in *Stapley v. Hejslet*, 2006 BCCA 34, 263 D.L.R. (4th) 19, outlines the factors to consider, at para. 46:

The inexhaustive list of common factors cited in Boyd [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] B.C.J. No. 163, 2005 BCCA 54 (B.C.C.A.)).

[63] As stated at the outset, the defendant concedes that the MVA exacerbated Ms. Matheos' pre-existing injuries to some extent. The extent to which they were aggravated is in issue.

[64] Causation is established when the plaintiff proves on a balance of probabilities that the defendant caused or contributed to his or her injury. This is the "but for" test as set out by the Supreme Court of Canada in the seminal decision *Athey v. Leonati*, [1996] 3 S.C.R. 458 [Athey].

[65] As stated at para. 17 of *Athey*, the plaintiff does not have to establish that the defendant's negligence was the sole cause of the injury:

There will frequently be a myriad of other background events which were necessary preconditions to the injury occurring. ... As long as a defendant is part of the cause of an injury, the defendant is liable, even though his act alone was not enough to create the injury. There is no basis for a reduction of liability because of the existence of other preconditions: defendants remain liable for all injuries caused or contributed to by their negligence.

[66] The defendant's contribution must be material in that there is a substantial connection between the accident and the injury beyond a de minimus range: *Farrant v. Laktin*, 2011 BCCA 336 at paras. 9-11. If the injury is divisible, a plaintiff can recover from the defendant only the damages attributable to the injury caused or contributed to by that defendant. If the injury is indivisible, a plaintiff can recover from the defendant 100% of the damages attributable to the injury caused or contributed to by that defendant regardless of the contribution to the injury by others: *Athey*, at para. 24.

[67] The general rule is that the plaintiff is to be restored to his or her original position and not to a better position: *Blackwater v. Plint*, 2005 SCC 58 at para. 78.

[68] Under the "crumbling skull" doctrine, the defendant is not liable for debilitating effects of pre-existing conditions that the plaintiff would have experienced without the MVA. This was discussed by the Supreme Court of Canada in *Athey* at p. 473:

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 his 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: *Cooper-Stephenson*, supra. 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: *Graham v. Rourke*, supra; *Malec v. J. C. Hutton Proprietary Ltd.*, supra; *Cooper-Stephenson*, supra, at pp. 851-852. [Emphasis added.]

[69] Hypothetical and future events - how the plaintiff's life would have gone without the tortious injury - need not be proven on a balance of probabilities. They are given weight according to their relative likelihood, or the probability of their occurrence. A future or hypothetical possibility is to be taken into account "as long as it is a real and substantial possibility and not mere speculation": *Athey*, at para. 27.

[70] I will now apply that law to the facts.

Analysis

[71] After considering all of the evidence I find the following:

- (1) As a result of the MVA Ms. Matheos' pre-existing injuries and headaches were significantly exacerbated. Before the MVA Ms. Matheos was able to manage her pain and headaches. Her condition was stable. She was able to lead a busy active life. Since the MVA she has not been able to manage her pain or her headaches;
- (2) Ms. Matheos suffered a new injury in the MVA to the upper back/right shoulder which causes her constant pain;
- (3) The injuries suffered in the MVA have interfered with Ms. Matheos' parenting, work, household and recreational activities and will continue to do so;
- (4) Her mood has been affected since the MVA which has impacted her relationships with her children, her husband and her friends. She has withdrawn from gatherings and social events that she formerly enjoyed. Her enjoyment of life has been significantly impacted;

- (5) She is limited in her capacity to work in her chosen field and to run her own business. It is unlikely that she will be able to work at the level required to build her business to what she hoped;
- (6) Ms. Matheos' injuries will continue to impede her for the rest of her life. It is unlikely that she will ever be pain or headache free; and
- (7) She will likely never be able to engage in the strenuous activities she so enjoyed - skiing, snowboarding, cycling, and running like she once could.
- [72] Ms. Matheos seeks an award of \$80,000 under this heading.
- [73] The defendant takes the position that the crumbling skull doctrine applies and that Ms. Matheos' injuries are indivisible from injuries suffered in other motor vehicle accidents. It is the defendant's position that \$30,000 is the appropriate award for non-pecuniary damages.
- [74] In advancing this position the defendant argues that Ms. Matheos' soft-tissue injuries resolved to baseline 3 to 6 months post MVA. The defendant makes three alternate arguments regarding what caused Ms. Matheos' increase in headaches and issues with treating same. First the defendant says that the headaches were caused by the subsequent motor vehicle accidents; second that they were caused by her being overwhelmed by work and third that they were caused by the stress of her cancer diagnosis.
- [75] I disagree. As stated above, I accept the evidence of Ms. Matheos and Dr. Robinson and find that the MVA caused the escalation in headaches and the new pain in the upper right side.
- [76] I have reviewed the various cases provided by counsel regarding the appropriate range for non-pecuniary damages. The defendant's cases are based on the arguments that Ms. Matheos' injuries are less serious and more transitory than I have found them to be and that Ms. Matheos is able to do more than I have found. As such I do not find them helpful.
- [77] In my opinion, the cases of *Mladjo v. Etheridge*, 2019 BCSC 950 and *Willet v. Rose*, 2017 BCSC 627 are closest factually to the present case. The general damage awards in *Mladjo* was \$80,000 and *Willet* \$90,000.
- [78] Having considered the extent of the injuries, the fact that the symptoms have been ongoing for four years with little improvement, the guarded prognosis for full recovery, the impact the injuries have had on Ms. Matheos' life and will likely continue to have, as well as the authorities, I am of the view that the appropriate award for non-pecuniary damages is \$80,000.

DIMINISHED EARNING CAPACITY

- [79] Diminished earning capacity encompasses two heads of damage: past loss of earning capacity and future earning capacity.

- [80] The essential purpose of an award for past loss of opportunity and diminished earning capacity is to provide the plaintiff with full compensation for all of his pecuniary losses, subject to rules of remoteness and mitigation: *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229. It is to restore, as best as is possible with a monetary award, an injured plaintiff to the same position he or she would have been in had the negligence not occurred. It is the difference between the plaintiff's original position just before occurrence of the negligent act or omission, and the injured position after and as a result of such act or omission, that comprises the plaintiff's loss: *Athey* at paras. 34-35.
- [81] Our Court of Appeal provided guidance as to how to assess these damages in *Grewal v. Naumann*, 2017 BCCA 158:
- [48] In summary, an assessment of loss of both past and future earning capacity involves a consideration of hypothetical events. The plaintiff is not required to prove these hypothetical events on a balance of probabilities. A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation. If the plaintiff establishes a real and substantial possibility, the Court must then determine the measure of damages by assessing the likelihood of the event. Depending on the facts of the case, a loss may be quantified either on an earnings approach or on a capital asset approach: *Perren v. Lalari*, 2010 BCCA 140 at para. 32.
- [49] The assessment of past or future loss requires the court to estimate a pecuniary loss by weighing possibilities and probabilities of hypothetical events.

Past Loss of Earning Capacity

- [82] Compensation for past wage loss or past loss of earning capacity is based on what a plaintiff would have, not could have, earned but for the injury that the plaintiff sustained: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30.
- [83] The assessment of past wage loss involves a consideration of the loss of earning capacity and not the loss of income itself. In *Rowe*, the court considered claims for past income loss:
- [30] Thus, in my view, a claim for what is often described as "past loss of income" is actually a claim for loss of earning capacity; that is, a claim for the loss of the value of the work that the injured plaintiff would have performed but was unable to perform because of the injury.
- [31] Evidence of this value may take many forms. As was said by Kenneth D. Cooper-Stephenson in *Personal Injury Damages in Canada*, 2nd ed. (Scarborough, Ont.: Carswell, 1996) at 205-06,

The essence of the task under this head of damages is to award compensation for any pecuniary loss which will result from an inability to work. "Loss of the value of work" is the substance of the claim - loss of the value of any work the plaintiff would have done but for the accident but now will be unable to do. The loss framed in this way may be measured in different ways. Sometimes it will be measured by reference to the actual earnings the plaintiff would have received;

sometimes by a replacement cost evaluation of tasks which the plaintiff will now be unable to perform; sometimes by an assessment of reduced company profits; and sometimes by the amount of secondary income lost, such as shared family income.

[84] It is difficult to assess lost earning capacity in this case. As Ms. Matheos started LouRoo Photography mere months before the MVA there is no baseline income. In fact there is no real measure of the business at all. It is unknown whether the business would have been successful and if so what success would look like in terms of earnings. It is further unknown whether Ms. Matheos could have continued working the long hours - every night and weekends - to grow and sustain the business. Overall the earning capacity for LouRoo is completely unknown.

[85] While Ms. Matheos testified that she was unable to take on new clients post MVA she was unable to provide an idea of how many people she turned away and what the value of the work they requested would be as she failed to keep records. No evidence was provided from similar businesses as to what the average earnings would be.

[86] As a result the defendant takes the position that there can be no award under this heading. Alternatively the defendant submits that \$2,000 be awarded as nominal damages for the immediate post MVA period until June 2015 when Ms. Matheos told her doctor that she was taking on a new business.

[87] Ms. Matheos seeks an award for loss of past income of \$30,000. She bases that on her evidence that had she not been in the MVA she would have been able to work 40% more. The \$30,000 represents what her income would have been had she been able to work that much more.

[88] Ms. Matheos' earnings from 2015 through 2017 were as follows:

2015

\$ 6,171

2016

\$24,169

2017

\$19,414

[89] I am unable to accept the plaintiff's calculation. There are simply too many uncertainties. Or put another way, too few certainties.

[90] I am however satisfied of the following;

a) Ms. Matheos is a hard worker and was committed to making her business a success;

- b) In the few months leading up to the MVA she was working hours that were likely not sustainable in the long run; and
 - c) She lost some income as a result of the MVA as she was not able to work to her capacity.
- [91] As stated above both Ms. Matheos' capacity and the amount of business are unknown. Following Grewal, I must determine the measure of damages by weighing possibilities and probabilities of hypothetical events.
- [92] Considering the law and the evidence I find a fair and reasonable assessment of Ms. Matheos' past loss of earning capability to be \$20,000.

Future Loss of Earning Capability

[93] In *Pololos v. Cinnamon-Lopez*, 2016 BCSC 81, Voith, J. described the legal principles that pertain to this head of loss as follows:

[133] The relevant legal principles are well-established:

- a) To the extent possible, a plaintiff should be put in the position he/she would have been in, but for the injuries caused by the defendant's negligence; *Lines v. W & D Logging Co. Ltd.*, 2009 BCCA 106 at para. 185, leave to appeal ref'd [2009] S.C.C.A. No. 197;
- b) The central task of the Court is to compare the likely future of the plaintiff's working life if the Accident had not occurred with the plaintiff's likely future working life after the Accident; *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 32;
- c) The assessment of loss must be based on the evidence, but requires an exercise of judgment and is not a mathematical calculation; *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 18;
- d) The two possible approaches to assessment of loss of future earning capacity are the "earnings approach" and the "capital asset approach"; *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 at para. 7 (S.C.); and *Perren v. Lalari*, 2010 BCCA 140 at paras. 11-12;
- e) Under either approach, the plaintiff must prove that there is a "real and substantial possibility" of various future events leading to an income loss; *Perren* at para. 33;
- f) The earnings approach will be more appropriate when the loss is more easily measurable; *Westbroek v. Brizuela*, 2014 BCCA 48 at para. 64. Furthermore, while assessing an award for future loss of income is not a purely mathematical exercise, the Court should endeavour to use factual mathematical anchors as a starting foundation to quantify such loss; *Jurczak v. Mauro*, 2013 BCCA 507 at paras. 36-37.
- g) When relying on an "earnings approach", the Court must nevertheless always consider the overall fairness and reasonableness of the award, taking into account all of the evidence; *Rosvold* at para. 11.

- [94] Hypothetical events such as how the plaintiff's life would have proceeded need not be proven on a balance of probabilities. Rather they are simply given weight according to their relative likelihood. A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation: *Athey* at para. 27.
- [95] There are challenges associated with calculating Ms. Matheos' future earning capacity.
- [96] First, there are a number of other events that occurred in Ms. Matheos' life that affected her earning capacity. Ms. Matheos continued to grow her business until 2017 when she was diagnosed with cancer. Then followed her father's illness and death. Second, given Ms. Matheos' injuries and headaches it seems probable that pursuing photography full-time will not be likely but there is no evidence before me about other options. Third, there is a duty to mitigate her loss. In this case that means if she is physically unable to work as a photographer Ms. Matheos has an obligation to mitigate her loss of income by getting a job doing something she is physically capable of. Finally Ms. Matheos chose to take a loss in income to start her own business.
- [97] While I have already concluded that Ms. Matheos will likely not be able to continue her career of choice full-time or to the degree that she had hoped, there is no evidence before me that she is incapable of working at a different type of job. Before she turned to photography Ms. Matheos had worked as an assistant to a director at Fraser Health. She testified that she left that job after six years because she and her husband needed more flexibility for child care.
- [98] The burden is on the plaintiff to prove that there is a real and substantial possibility of a future loss. Given the above, I do not find that Ms. Matheos has satisfied that onus. There is no evidence that Ms. Matheos is incapable of working. The inability to pursue your chosen field is not what is awarded under this heading of damage.
- [99] I assess no damages for loss of future earning capacity.

COST OF FUTURE CARE

- [100] The basis of the assessment of damages for cost of future care was set out by McLachlin, J. as she then was, in *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.):
198. If there was any doubt as to whether the award for cost of future care must be justified on a medical basis, it was dispelled by *MacDonald v. Alderson*, [1982] 3 W.W.R. 385, leave to appeal to the Supreme Court of Canada refused. In that case it was suggested that the plaintiff, a quadriplegic, should be awarded sufficient funds to purchase and maintain his own house on the non-medical grounds that this would give him a greater sense of " 'autonomy, privacy, financial stability and pride of ownership . . . and greater opportunities for gardening, owning a pet, and more space for hobbies' ". The Manitoba Court of Appeal rejected this evidence as "subjective theorizing" and reduced the award made at trial. The test for determining the appropriate award under the heading of cost of future care, it may

be inferred, is an objective one based on medical evidence.

199. These authorities establish (1) that there must be a medical justification for claims for cost of future care; and (2) that the claims must be reasonable. On the latter point, Dickson J. stated in *Andrews* at p. 586:

An award must be moderate, and fair to both parties . . .

[Emphasis added.]

- [101] No award is appropriate for expenses that the plaintiff would have incurred in any event: *Shapiro v. Daily*, 2012 BCCA 128.

- [102] The evidence from Dr. Robinson is that Ms. Matheos will require ongoing Botox and perhaps Aimovig. Regarding the Botox, as stated earlier, Ms. Matheos needed it before the MVA to control her migraines but she needs it more frequently since the MVA. The Botox however has been paid for by Ms. Matheos' husband's medical plan. There is a suggestion that this coverage may end at some point but the evidence regarding that possibility is too unclear and speculative to base an award on. The same applies to the evidence regarding Aimovig. Whether Ms. Matheos will continue taking it and whether the pharmaceutical company will stop paying for it are both question marks.

- [103] In order to maximize Ms. Matheos' well-being and productivity, Psychiatrist Dr. Hui recommends the following:

- a) Continued trigger point injections every 2-3 months;
- a) Physiotherapy and a gym membership; and
- b) An ergonomic assessment of her computer station at home and for devices to help her cart her heavy photographic equipment around.

- [104] Except for the physiotherapy which Ms. Matheos testified did not help I accept the recommendations of Dr. Hui as reasonable and justified.

- [105] The quantification of damages for the cost of future care is an assessment and not a precise accounting exercise: *Midgley v. Nguyen*, 2013 BCSC 693 at para. 337.

- [106] No evidence was presented regarding the cost of the above. In my view a reasonable assessment of the cost of future care including the equipment required to make her work ergonomically correct, is \$20,000.

LOSS OF HOUSEKEEPING CAPACITY

[107] An award ordered for homemaking is for the value of the work that would have been done by the plaintiff but which she is incapable of performing because of the injuries at issue. The plaintiff has lost an asset: her ability to perform household tasks that would have been of value to herself as well as others in the family unit but for the accident: *Westbroek v. Brizuela*, 2014 BCCA 48 at para. 74.

[108] In *Dykeman v. Porohowski*, 2010 BCCA 36 at para. 28, our Court of Appeal summarized the governing principles with respect to awarding damages for the loss or impairment of housekeeping capacity. Madam Justice Newbury confirmed that damages for the loss of housekeeping capacity may be awarded even though the plaintiff has not incurred any expense because housekeeping services were gratuitously replaced by a family member. Moreover, since the award recognizes the impairment of housekeeping capacity, whether a plaintiff is likely to hire such assistance in the future does not inform the analysis. The amount of compensation awarded must be commensurate with the plaintiff's loss: *Dykeman* at para. 29.

[109] In assessing damages under this head of damages, the authorities mandate that the court must carefully scrutinize the gratuitous services provided by the family member. In *Dykeman* at para. 29, Newbury J.A. cautioned that:

Instead, claims for gratuitous services must be carefully scrutinized, both with respect to the nature of the services - were they simply part of the usual 'give and take' between family members, or did they go 'above and beyond' that level? - and with respect to causation - were the services necessitated by the plaintiff's injuries or would they have been provided in any event? [Emphasis in original.]

[110] The evidence of Ms. Matheos and all of her witnesses is that her ability to perform household chores since the MVA has been significantly impacted.

[111] Mr. Matheos has had to help an extra six hours per week with the housework since the MVA. Additionally Ms. Matheos has had to hire a housekeeper for 8 to 10 hours a month at \$25 per hour to help with the housework since the MVA.

[112] I am satisfied that Ms. Matheos has established that she has lost some of her ability to perform housework as a result of the MVA. As a result the family requires Mr. Matheos' extra housework and the regular assistance of a housekeeper and will require both indefinitely.

[113] In my view a reasonable assessment of this head of damage is \$20,000.

CONCLUSION

[114] In conclusion, Ms. Matheos is entitled to the following damages:

Non-pecuniary Damages

\$ 80,000

Past Wage Loss

\$ 20,000

Cost of Future Care

\$ 20,000

Loss of Housekeeping Capacity

\$ 20,000

Total

\$140,000

[115] If the parties are unable to agree on costs they may schedule a date through trial scheduling to speak to the issue.

"The Honourable Madam Justice Murray"

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