
CANADA / JUDGMENT

McAuley v. Goodrich

2020 BCSC 2014

COURT

Supreme Court of British Columbia

DECIDED

17 December 2020

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2020 BCSC 2014 McAuley v. Goodrich

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

McAuley v. Goodrich,

2020 BCSC 2014

Date: 20201217

Docket: M31640

Registry: Chilliwack

Between:

Charmaine Marie McAuley

Plaintiff

And

Nicholas Ian Goodrich

Defendant

Before: The Honourable Madam Justice Horsman

Reasons for Judgment

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Place and Date of Trial:

New Westminster, B.C.

September 8-11, 14-15,17,

October 16 and November 2, 2020

Place and Date of Judgment:

Chilliwack, B.C.

December 17, 2020

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INTRODUCTION

- [1] The plaintiff seeks damages for injuries she suffered in a motor vehicle accident in Abbotsford, British Columbia on October 17, 2014 (the "Accident"). The defendant admits liability for the Accident.

- [2] The plaintiff is 54 years old. At the time of the Accident, she was employed as a part-time switchboard operator. She has not worked since. The plaintiff says she suffers from fibromyalgia as a result of the Accident, which in turn has led to a sequelae of other conditions. The defendant does not contest that the plaintiff suffered compensable injuries as a result of the Accident. However, the defendant says that the plaintiff has exaggerated the extent of the injuries and their impact on her personal life and employment capacity.
- [3] The parties' dispute focusses on two heads of damages: loss of future earning capacity and loss of housekeeping capacity. The plaintiff seeks an award of damages for loss of future earning capacity on the premise that she is, and will remain, functionally disabled from all employment. The defendant argues that the plaintiff retains a residual earning capacity. The plaintiff also seeks a substantial separate award of damages for loss of housekeeping capacity. The defendant says that any compensation for the plaintiff's restricted ability to perform household chores should be subsumed within an award for non-pecuniary damages.
- [4] The parties agree on an award of \$3,242.63, in special damages.

EVIDENCE OF THE PLAINTIFF'S LAY WITNESSES

- [5] The plaintiff testified at trial about the circumstances of the Accident, and the impact her injuries have had on her quality of life. The plaintiff also led evidence from a number of collateral witnesses: her husband, daughter, sister, and sister-in-law, as well as two family friends and a former co-worker.
- [6] As I have indicated, it is not in dispute that the plaintiff has suffered injuries as a result of the Accident. The diagnosis of fibromyalgia is, in particular, not disputed. The defendant argues that the plaintiff has exaggerated some of the impacts of her injuries, a point that I will address later in this judgment. Beyond that, I did not understand the defendant to challenge the credibility of the plaintiff or her collateral witnesses in recounting the basic circumstances of the plaintiff's life before and after the Accident.

The plaintiff's Pre-Accident circumstances

- [7] At the time of the Accident, the plaintiff lived in Yarrow, British Columbia with her husband, John, and daughter, Emily. The plaintiff has been married to John since 1997. He has worked full-time as the manager of water supply for the City of Abbotsford since 1984. He also works part-time as chair and operator of the Yarrow Waterworks District. Emily was born in 2000.
- [8] The plaintiff grew up in Abbotsford. She describes having a close relationship with her mother and her three sisters. The plaintiff says her father struggled with alcoholism, and her mother was the protector and provider. The plaintiff hoped to emulate her mother's love and nurturing in raising Emily.

- [9] The plaintiff graduated from high school in 1984. She then worked as a nanny for several years before enrolling in the Early Childhood Education ("ECE") program at the University of the Fraser Valley ("UFV"). After obtaining her ECE diploma, the plaintiff worked full-time at a day care facility at the UFV from 1994 to 2003.
- [10] The plaintiff changed jobs in 2003 when the day care centre shut down. The plaintiff accepted UFV's offer of alternative employment as a switchboard operator, working a four-hour morning shift. The move to part-time suited the plaintiff as it allowed her to spend more time with Emily. The switchboard job went from September 1 to June 30, with summers off. However, the plaintiff received a salary throughout the year on a prorated basis. The plaintiff used a cordless headset for answering the phone, and could stand up from her chair if she wished to. The plaintiff says she was very happy working as a part-time switchboard operator for UFV. She stayed in that position from 2003 until the time of the Accident.
- [11] Prior to the Accident, the plaintiff was physically active. She enjoyed bike riding, swimming, and walking. Emily would often join her in these activities. During the family's traditional summer vacation to Powell River, the plaintiff, John, and Emily would all kayak together.
- [12] The plaintiff also had an active social life. She hosted large family gatherings at her home, with 20-30 people in attendance. The plaintiff did all of the baking and cooking for these gatherings, as well as the clean up. She would not let anyone else pitch in to help. She estimates that these events took place about every two to three months. She spent about 20 hours preparing for each event.
- [13] Prior to the Accident, the plaintiff was responsible, by choice as I understand her evidence, for all of the household chores, including vacuuming, laundry, cooking, and washing the dishes. She estimates that she spent three hours per day on household chores prior to the Accident. John worked two jobs during the week. On the weekends, he and Emily would provide some assistance with chores. However, the plaintiff estimates that she still spent two to three hours a day on housework on the weekends. The plaintiff took pride in having a clean house.
- [14] The plaintiff also spent, by her estimation, 10 hours per week on yard work prior to the Accident. The family home is on a half-acre property with an orchard consisting of apple, pear, and plum trees, along with berry bushes. The plaintiff mowed the lawn, weeded, and picked fruit in the orchard for canning. John was responsible for pruning the trees and the hedges.
- [15] The plaintiff faced some health issues prior to the Accident. She was diagnosed with stage 2 Hodgkin's Lymphoma in 1989. She underwent cancer treatments that included chemotherapy, radiation, and experimental drug treatments. In 2006, the plaintiff underwent a hysterectomy as a result of her cancer treatments.

- [16] At the time of the Accident, the plaintiff was being treated for hypertension, diabetes, hypercholesterolemia, and hyperthyroidism. She was given cortisone shots for a right frozen shoulder in January and February, 2014. She says this condition had resolved by the time of the Accident.

The Accident and its aftermath

- [17] The Accident occurred on October 17, 2014, as the plaintiff was driving home along Highway 11 in Abbotsford. The plaintiff slowed as she approached an intersection, and was struck from behind by a vehicle driven by the defendant. The plaintiff saw vehicle lights approaching in her rear view mirror and she braced herself for the impact. The Accident did not cause the airbags in the plaintiff's vehicle to deploy. No emergency services attended the Accident scene.
- [18] The plaintiff says was in shock at the time of the Accident, but recalls getting out of her vehicle and exchanging information with the defendant. The plaintiff felt nauseous and had a headache. She drove to a police station, where she was advised to contact ICBC. She then drove herself to the hospital. The plaintiff was examined by a physician in the hospital emergency room. He prescribed her Tylenol 3 and told her to visit her family doctor if her symptoms continued.
- [19] The plaintiff called her husband from the hospital and he came and drove her home. That evening she began to feel pain from the nape of her neck to her lower back, and up both arms to her shoulder area. The plaintiff estimates that the pain started around six hours after the Accident. The pain continued the next morning.
- [20] The plaintiff first saw her family doctor, Dr. David Henderson, about her injuries on October 22, 2016. She reported her pain symptoms, including a burning sensation on her skin and a sharp pain in her lower back. Dr. Henderson prescribed Tylenol 3 and Flexeril. The plaintiff continued to see Dr. Henderson every three weeks. He eventually recommended that the plaintiff receive physiotherapy treatment.

The plaintiff's post-Accident circumstances

- [21] The plaintiff says she has consistently experienced pain since the Accident. She describes it as running from the nape of her neck down to her middle back. The pain is different in her upper and lower back. The plaintiff describes her upper back pain as consisting of a burning sensation and dull pain. There is no burning sensation in her lower back, but she experiences sharp pain in that area and feels as if her back is compressing. The plaintiff says the pain has not improved since the Accident, but it does fluctuate from day to day. Certain activities, such as vacuuming, aggravate her pain symptoms. Tylenol 3 and CBD oil assist in alleviating the plaintiff's pain during periods of flare-up.

- [22] The plaintiff says she has also experienced headaches since the Accident. The headaches have decreased in frequency over the past couple of years, but increased in severity. The headaches now last for two to three hours, and the plaintiff has to go into her bedroom and shut the lights off. The plaintiff also believes that her headaches are triggered by physical activity.
- [23] The pain disrupts the plaintiff's sleep. She will often get up for two or three hours in the middle of the night when the pain becomes too intense. This pattern of sleep disruption has left the plaintiff feeling chronically fatigued. The combination of pain and fatigue has also left the plaintiff with a depressed mood. The evidence of the plaintiff's collateral witnesses confirms that she is not the joyful and optimistic person that she was before the Accident.
- [24] The plaintiff says she has learned to manage her pain by limiting her activities. If she pushes herself too much, she pays for it the next day. She no longer rides her bicycle or swims. The plaintiff tries to walk 20 minutes per day, but cannot walk the distances she could before the Accident. She also does stretching exercises at home suggested by her kinesiologist. The plaintiff tried to kayak at the family's summer vacation in Powell River in 2018, but could not manage it due to the pain in her upper back.
- [25] The plaintiff has not attempted to return to her job as a switchboard operator since the Accident due to her pain symptoms. The clinical notes of the plaintiff's family doctor, Dr. Henderson, indicate that he suggested to her in April 2015 that she attempt a return to work on a reduced schedule of two hours per day. The plaintiff cannot recall what led to her decision not to attempt a return to work. Instead, she went on short-term and then long-term disability. She is currently receiving Canada Pension Plan Disability Benefits. The plaintiff believes the switchboard job is no longer available to her, and that she would require more education to transfer to any other position at the UFV.
- [26] The plaintiff says that her Accident-related injuries have also impaired her ability to engage in social activities. She cannot host elaborate family gatherings in the way she once did. She estimates that she has hosted about one event per year since the Accident. The events are now potluck-style and the plaintiff's contribution is limited to purchasing pre-made food such as frozen lasagne.
- [27] The plaintiff is not able to perform household chores in the manner she did before the Accident as certain motions, such as vacuuming, aggravate her pain. She does not cook as much because she finds it difficult to carry heavy pots and pans, and stirring motions cause her pain. She cooks easy meals, or starts a meal that Emily will then finish. The plaintiff says that she can still perform most household chores, but not at the same pace as before. What previously took her an hour to complete now takes three hours. The plaintiff estimates that she can manage about six to nine hours per week of household chores. John and Emily have taken over the chores that the plaintiff cannot complete. The plaintiff says that her house is not as clean as it used to be and some chores simply do not get done.

- [28] The plaintiff is also restricted in her ability to do yard work. She says she cannot mow the lawn or weed the garden. She is limited in the amount of work she can do on the orchard on the property. She cannot pick fruit from the trees and instead is limited to picking berries at chest level. John and Emily have also had to take over the responsibility for yard work that the plaintiff cannot perform. The plaintiff says the appearance of the yard has also suffered.
- [29] As a result of the plaintiff's injuries, Emily and John have had to take over more responsibilities around the house. Emily assists with the cooking, laundry, and yard work. John helps with the housework, particularly the yard work, on the weekends when he is not working.
- [30] The plaintiff agrees, as depicted in surveillance video tendered in evidence by the defendant, that she is capable of activities such as driving and shopping. The video, for example, shows the plaintiff on shopping trips to the mall with Emily, picking up Emily from school and driving her to her boyfriend's house, shopping at a supermarket and loading shopping bags into her car, and washing her car at a self-wash station. However, the plaintiff says that although she is capable of driving, and by necessity must drive when John is at work, she is anxious about driving since the Accident and cannot drive for long periods due to pain. She also says that carrying out the level of activity shown on the video leaves her feeling depleted the next day.
- [31] The plaintiff's relationship with John has also suffered. She can no longer do activities they used to enjoy together, such as going to his hockey games and chopping firewood. Her pain interferes with their intimate relationship. The plaintiff worries about John leaving her.
- [32] The plaintiff has tried to address her pain by engaging in physiotherapy and kinesiology sessions, and seeing a physiatrist. In 2016, the plaintiff's physiatrist referred her to Dr. Robert Offer, a rheumatologist. The plaintiff saw Dr. Offer in September 2016, and then for the purpose of preparing a medical-legal report in June 2017. It appears from Dr. Offer's report that he had further treatment sessions planned with the plaintiff after June 2017, although no updated report is in evidence.

THE EXPERT EVIDENCE

- [33] The plaintiff tendered reports from five expert witnesses: Dr. Offer, the plaintiff's treating rheumatologist; Dr. Tony Giantomaso, a physiatrist; Dr. Christopher Watt, a sports medicine physician; John Lawless, a vocational consultant; and, Darren Benning, an economist. The defendant tendered an expert report from Dr. John Watterson, a rheumatologist, and a rebuttal report from Shannon Smith, an occupational therapist. All of the expert witnesses testified at trial.
- [34] I will briefly summarize the opinions of the experts, specifically as they relate to the contentious issues of the plaintiff's employment and functional capacity.

The plaintiff's experts

Dr. Robert Offer - rheumatologist

[35] As noted, Dr. Offer first saw the plaintiff in September 2016. He prepared a report for the litigation dated June 24, 2017. At the time that the plaintiff began to see Dr. Offer, her complaints related to mid-back pain, headaches, dizziness, nausea, palpitations, and generalized pain. Dr. Offer diagnosed the plaintiff with fibromyalgia. He explains the diagnosis as follows in his report:

Her presentation is quite typical with non-restorative sleep, chronic headaches, irritable bowel and bladder, difficulties with memory. The physical examination findings of guarding, pain behaviour such as grimacing, and typical tender points are confirmatory. She fulfills both the 1990 and the 2010 American College of Rheumatology criteria for fibromyalgia.

[36] In terms of prognosis, Dr. Offer explains that once fibromyalgia is established, it never resolves. There is no cure. The long-term goals of treatment are to maintain the patient's functionality and quality of life through stress management techniques, physical fitness, improvement of sleep abnormalities, and the development of coping skills. Dr. Offer opines that the plaintiff will continue to suffer at her current level of discomfort indefinitely.

[37] Dr. Offer's view of the plaintiff's employability is as follows:

While rheumatologists commonly make every effort to keep patients with fibromyalgia in the workforce ("You can be painful at home or painful at work."), it is not realistic to expect patients in certain occupations to maintain productive employment. These occupations in particular are those which require constant repetitive motions, such as assembly lines, activities requiring frequent bending or non-physiological positions such as vacuuming or making beds, or occupations which are completely sedentary. Patients do best when they work in a stress-free environment, without time pressure, without being cold, with activities which vary minute-to-minute, such as frequent sitting or getting up to a counter, and do not require heavy lifting or prolonged posturing. It is highly unlikely that Charmaine McAuley will improve significantly from her current functional status. However, it is also highly unlikely that she will worsen significantly. There may be considerable day-to-day variability, however, which also makes some occupations unsuitable. Freedom to work at home and vary activities, and avoidance of shiftwork or early mornings, may allow for at least some part-time work.

[38] In terms of the plaintiff's future care needs, Dr. Offer suggests that it would be a long-term benefit for the plaintiff to have a housekeeper for vacuuming and heavy cleaning, given that such activities can aggravate her pain. He also recommends that she engage in a regular exercise program, with the occasional supervision of a kinesiologist or physiotherapist. Dr. Offer does not recommend that passive therapy treatments, such as massage therapy, form part of the plaintiff's long-term treatment plan. Finally, he notes that marijuana derivatives may help the plaintiff, particularly in relation to her sleep issues.

- [39] In cross-examination, Dr. Offer agreed that he would not recommend a multi-disciplinary pain clinic for the plaintiff as, in his experience, such clinics have not been helpful in treating fibromyalgia patients. He believes that educating patients, and getting them walking and exercising, achieves 90% of what a pain clinic would.

Dr. Tony Giantomaso - physiatrist

- [40] Dr. Giantomaso assessed the plaintiff on May 8, 2020, and prepared a report dated May 14, 2020. Dr. Giantomaso opines that the plaintiff suffered post-traumatic injuries to the cervical, thoracic, and lumbar spine and post-traumatic headaches as a result of the Accident, which progressed to fibromyalgia syndrome. In his view, the plaintiff is likely to experience some degree of chronic pain on a permanent basis, but her pain may improve by following treatment recommendations.
- [41] Dr. Giantomaso's main treatment recommendation is that of exercise, which he describes as the "cornerstone of management for fibromyalgia". He recommends that the plaintiff engage in some form of aerobic exercise and resistance training five times per week for at least 30 minutes, with the assistance of a kinesiologist or certified personal trainer. Dr. Giantomaso suggests that referral to a multi-disciplinary chronic pain clinic "could be helpful", although his report does not detail the treatment that such a clinic would provide.
- [42] In terms of the plaintiff's employment future, Dr. Giantomaso opines that she is "unlikely to be competitively employable" on either a full-time or part-time basis given her physical limitations. He notes that it is possible she could work part-time in a sedentary position where she is able to change position and take breaks where necessary. However, he notes that such vocational positions are rare and require an understanding employer.

Dr. Christopher Watt - sports medicine physician

- [43] Dr. Watt assessed the plaintiff in May 2020, and his report is dated June 3, 2020. For the purpose of preparing his report, Dr. Watt assessed the plaintiff in-person, and also reviewed functional test data that was prepared by Darla Walsh, a kinesiologist. The functional testing is designed to assess the plaintiff's physical ability to perform work in a specific occupation and her general functional abilities. Ms. Walsh's test data is an appendix to Dr. Watt's report.
- [44] Dr. Watt interprets the functional test results to show that the plaintiff has marked restrictions on her whole body range of motion (reaching, stooping, kneeling, crouching), dynamic lifting, carrying, and static strength. She is moderately restricted in her range of motion, and mildly restricted in her tolerance for walking, balancing, and manual dexterity. The functional test results suggested "no restrictions" on her tolerance for sitting and standing. Dr. Watt notes that during his 90-minute examination of the plaintiff, she was able to tolerate sitting and did not need to stand for pain relief, although she did shift position every five to ten minutes. Dr. Watt interprets the functional test data to show that the plaintiff demonstrated a "generally consistent and valid effort" during functional testing,

and therefore the test results are an accurate measure of her current abilities and limitations.

- [45] Dr. Watt diagnoses the plaintiff with post-traumatic myofascial pain syndrome, which he opines is causally related to the Accident. He believes she is at maximal medical improvement. In terms of her employability, Dr. Watt believes that the plaintiff is likely not fit to return to work as a switchboard operator. He states:

.Although this is a sedentary job, the primary requirement is for prolonged sitting which does exacerbate her pain. She does have a poor sitting tolerance. It is conceivable that if she were provided with a sit-stand desk and allowed to alter her body position at will that she might have a modest possibility of returning to work. Against this, however, is her high level of self-reported pain and its likely negative impact on her ability to concentrate and focus. Furthermore, given the persistence of her pain symptoms and limited physical abilities, it is likely that she would have a significant level of absenteeism. From an employer's perspective, these accommodations would probably prove excessively onerous.

- [46] In terms of the plaintiff's future treatment, Dr. Watt's only recommendation is that the plaintiff participate in a progressive exercise program. He suggests that the program begin with the plaintiff attending a pool-based program three times a week for four to six months to improve her physical condition to the point that she could participate in a land-based program. Assuming the plaintiff's condition has sufficiently improved, she should then progress to three weekly sessions of a land-based exercise program for six months with the assistance of a certified trainer. Dr. Watt then recommends that the plaintiff should be encouraged to continue to exercise on her own three to four times per week.

John Lawless - vocational consultant

- [47] Mr. Lawless prepared a vocational assessment of the plaintiff. He received a Master of Education (Counselling Psychology) from McGill University in 1992. Since 2007, he has operated his own vocational consulting business. For the purpose of his report, Mr. Lawless interviewed the plaintiff via video and had her complete various vocational tests.
- [48] As I understand his report, dated June 5, 2020, Mr. Lawless interviewed the plaintiff and administered eight tests that formed part of a Career Ability Placement Survey. The tests related to such things as mechanical and verbal reasoning, spatial relations, numerical ability, language usage and word knowledge, perception speed, and manual speed and dexterity. The plaintiff's scores on these tests predicted her success in the "career clusters" of clerical, service/skilled, and business/skilled. He also gauged the plaintiff's vocational interests by administering something called a Strong Interest Inventory, which suggested the "occupational themes" for her of artistic and social. Mr. Lawless then considered the plaintiff's pre-Accident vocational prospects based on the National Occupational Classification (NOC) system, which classifies occupations based on the type of work performed.

- [49] Mr. Lawless opines that had the Accident not occurred, the plaintiff's vocational profile suggested that she could successfully have continued in the career of switchboard operator or another clerical, service, or childcare occupation. In cross-examination, Mr. Lawless agreed that prior to the Accident the plaintiff could have successfully performed hundreds of jobs in the NOC, including switchboard operator. The issue is whether her injuries prevented her from doing so after the Accident.
- [50] Based on a review of the information available to him, including the reports of the medical experts, Mr. Lawless opines that the plaintiff is competitively unemployable as there is no occupation she could manage with her "chronic pain and limited function". Mr. Lawless acknowledges that Drs. Offer and Giantomaso both suggest the possibility that the plaintiff may be capable of part-time work with a sympathetic employer. However, Mr. Lawless disagrees and asserts that "it is much more probable that she will remain as she has been since her accident, unemployed".
- [51] It is not clear to me what specific expertise Mr. Lawless possesses that grounds this opinion. I will return to this point in assessing the plaintiff's claim for loss of future earning capacity.

Darren Benning - economist

- [52] Mr. Benning provided a report calculating the present value of the plaintiff's past and future loss of employment income based on certain assumptions provided to him by plaintiff's counsel. In particular, plaintiff's counsel instructed Mr. Benning to calculate income loss based on the assumptions that:
- i. Absent the Accident, the plaintiff would have continued to work part-time as a switchboard operator until February of 2019, with the exception of a six-month period in 2017 for non-Accident related surgery, and thereafter commenced full-time employment which she would continue until retirement;
 - ii. Alternatively, the plaintiff would have continued to work part-time as a switchboard until retirement, with the exception of a six-month period in 2017 for non-Accident related surgery;
 - iii. The plaintiff would have retired at the age of 70, or alternatively the age of 65;
 - iv. As a result of the Accident, the plaintiff is now permanently unemployable.
- [53] Mr. Benning estimates the present value of the plaintiff's past and future loss of pre-retirement employment income, accounting for a number of negative contingencies. The negative contingencies include such things as labour market participation (the propensity of individuals to be in the labour force), unemployment, and premature death. While the defendant disputes the validity of the assumptions that were given to Mr. Benning, I did not understand him to take significant issue with Mr. Benning's methodology.

The defendant's experts

Dr. John Watterson - rheumatologist

- [54] Dr. Watterson assessed the plaintiff on December 13, 2019, and prepared a report that is also dated December 13, 2019.
- [55] Dr. Watterson opines that the plaintiff suffered a musculotendinous strain of her neck and back in the Accident. He notes that while a majority of such individuals would show gradual improvement and resolution of symptoms in a manner of weeks to months, the plaintiff continued to have chronic and persistent pain at the time of the assessment five years later. He agrees with Dr. Offer that the plaintiff currently meets the classification criteria for fibromyalgia. Dr. Watterson notes that the plaintiff did not appear to be suffering from fibromyalgia prior to the Accident. I take this to mean that he also agrees with Dr. Offer that the Accident is one cause, even if not the only cause, of the plaintiff's current condition.
- [56] Dr. Watterson also opines that the plaintiff has features of bilateral adhesive capsulitis - familiarly known as "frozen shoulder" - which is a problem commonly associated with diabetes. Dr. Watterson believes the problem pre-existed the Accident. He cannot determine whether there has been a significant acceleration or change of characteristics of the condition since the Accident given the limited medical history he had on the plaintiff that related to this condition. In Dr. Watterson's view, the plaintiff's poorly controlled diabetes could be contributing to her musculoskeletal complaints, including the frozen shoulder.
- [57] Dr. Watterson opines that in light of the plaintiff's current symptoms and self-described limitations, she is "not employable in her current state". However, he believes that with appropriate interventions, the plaintiff may experience some recovery. The appropriate interventions recommended by Dr. Watterson include an active rehabilitation program and psychological counselling. The latter recommendation is premised on Dr. Watterson's view that the plaintiff demonstrates pain behaviours that could indicate a psychological overlay to her complaints. He recommends that the plaintiff be reassessed within six to twelve months of the start of such interventions.

Shannon Smith - occupational therapist

- [58] Ms. Smith is a registered occupational therapist, and since 2002 has worked as a Senior Occupational Therapy Consultant with Progressive Rehab OrionHealth. Ms. Smith did not assess the plaintiff in-person, but rather provided a responsive opinion to that of Dr. Watt in relation to the interpretation of the functional test data gathered by Ms. Walsh. In her report dated July 13, 2020, Ms. Smith defines her task as focussing on "the methodology, testing, and conclusions" in Dr. Watt's report.
- [59] Ms. Smith opines that the testing data does not support Dr. Watt's conclusion that the plaintiff showed "valid effort" on the functional capacity testing. She notes that the plaintiff declined to perform tests requiring overhead reaching and low-level work postures, stooping, kneeling, crouching, lifting, dexterity, dynamic lifting, and pushing/pulling. Other tests, such as carrying tests, were terminated due to the plaintiff's self-reported pain. In Ms.

Smith's view, someone who declines to participate in a range of activities cannot be said to be participating with "valid effort". At best, their effort is undetermined. Ms. Smith also found the plaintiff's minimal increase in heart rate during testing to be inconsistent with a moderate or high effort on the functional tests.

- [60] Ms. Smith opines that the plaintiff's capacity for household chores is undetermined, as the functional testing did not evaluate her capacity for basic household chores. The functional testing also did not test the plaintiff's capacity to perform the specific work demands of a switchboard operator, or her cognitive capacity. In the absence of such specific functional testing, Ms. Smith opines that the plaintiff's current capacity to perform the job of switchboard operator is also undetermined.
- [61] In cross-examination, Ms. Smith agreed that the fact that the plaintiff's heart rate did not increase during testing could be explained by the fact that the plaintiff was taking a beta blocker. Ms. Smith acknowledged that it was an oversight on her part not to have noted this in the plaintiff's medical records. She agreed that heart rate cannot be relied on as a measure of effort for someone taking a beta blocker.
- [62] Ms. Smith also agreed in cross-examination that she would defer to a medical doctor on issues such as diagnosis and prognosis. She did not agree that she would defer to a physician in interpreting functional test data as this is directly within her area of expertise. Whether a patient has a medical restriction that would prevent them from participating in a certain function in the future is a medical question for a doctor to answer. However, Ms. Smith believes she has the expertise required to interpret how a patient was functioning on the day of testing.

THE PLAINTIFF'S CREDIBILITY

- [63] The defendant says that the plaintiff's evidence should be approached with caution because she demonstrated a tendency to emphasize her perception of her own disability and to minimize the level of function she is capable of. The plaintiff was mistaken in certain aspects of her evidence, and the mistakes consistently went to strengthening the plaintiff's case. The defendant does not, as I understand his position, suggest that the plaintiff was deliberately untruthful in her evidence. Instead, he argues that the plaintiff's objectivity is lacking and her evidence should, therefore, be viewed with suspicion when uncorroborated.
- [64] I agree with the defendant that there is cause for concern about the reliability of the plaintiff's evidence. She was not careful in confirming details that later turned out to be demonstrably false. For example, the plaintiff testified in her direct evidence that she weighed 180 pounds at the time of the Accident and then gained 20-30 pounds after the Accident due to her inability to be physically active. In cross-examination, when confronted with the records of her family doctor, the plaintiff agreed that, in fact, it appears that the opposite is true. That is, the medical records suggest that the plaintiff weighed 207 pounds at the time of the Accident and has since lost 20-30 pounds.

- [65] A further example is the plaintiff's evidence regarding the surveillance video tendered by the defendant. The plaintiff was filmed on the morning of October 8, 2019, grocery shopping on her own. She can be seen lifting frozen turkeys into her shopping cart without apparent difficulty, and rapidly unloading the groceries into her car. The plaintiff testified to having a specific recollection of being "down" the rest of the day due to the shock of that level of activity. In cross-examination, when confronted with the fact that her medical records indicated that she had a physiotherapy appointment on the afternoon of October 8, 2019, the plaintiff conceded that she must have been mistaken in her recollection of being down for the day.
- [66] The plaintiff's evidence was, at times, internally inconsistent. For example, the plaintiff testified in her direct evidence that she was incapable of swimming after the Accident due to the pain levels in her arms. For this reason, she declined to participate in a pool program that was recommended to her by her physiotherapist in 2016. At the same time, the plaintiff's claim for future care costs includes the cost of the pool program and active rehabilitation recommended by the medical experts. She testified in her direct evidence that she would participate in such programs if she had funding for them. In cross-examination, the plaintiff explained that it was not that her pain levels had decreased but that she was now better able to manage them. This was the first acknowledgement in the plaintiff's evidence that her capacity to participate in physical activities may have improved over time.
- [67] The plaintiff's evidence was also inconsistent in some respects with the evidence of the medical experts regarding her self-reports of functional limitations. For example, the plaintiff testified that she is unable to bathe independently because taking a shower is too painful and she cannot get out of the bathtub without calling on Emily or John for assistance. The plaintiff says Emily also has to apply her make-up and assist her in getting dressed. It does not appear that the plaintiff reported to any of the experts assessing her that she is reliant on others for her self-care. On the contrary, the experts on both sides are consistent in recording the plaintiff's advice that she does not require assistance with daily living tasks. The experts state that the plaintiff is "independent to self-care" (Dr. Watterson), "independent [in] her basic and instrumental activities of daily living" (Dr. Giantomaso), "independent for all of her activities of daily living", including bathing/showering, dressing and personal hygiene (Dr. Watt), and that she should be encouraged to "continue doing all self-care" (Dr. Offer).
- [68] In cross-examination, the plaintiff testified that she was not sure whether she told Dr. Watt, in particular, about her difficulties with personal care tasks, such as bathing. She says they were discussing so many things that it may not have come up. I did not find this to be a plausible explanation for the inconsistency between the plaintiff's evidence at trial and the information she provided to the experts, in particular to the expert that she knew was assessing her functional capacity. It is not that the expert reports are silent about the plaintiff's capacity to perform daily living tasks, rather they uniformly reported that the plaintiff said she was independent in performing daily living tasks.

- [69] Finally, the plaintiff had a tendency, at times, to speak in dramatic terms in recounting the history of the Accident and its impacts. An example of this is the plaintiff's description of the impact of her Accident-related injuries on Emily. Emily was 14 years old at the time of the Accident. The evidence suggests that Emily had limited responsibility for household chores prior to the Accident, but after the Accident was required to assist with such tasks as cleaning, cooking, and mowing the lawn. Emily is now 20 and lives rent-free at her parents' house while attending school full-time. She has a boyfriend. The plaintiff acts as occasional chauffeur for Emily, who only has an "L" driver's licence. Much of the surveillance video in evidence captures the plaintiff driving Emily to and from school and her boyfriend's house, and to the mall for shopping trips. The plaintiff's evidence that Emily "hasn't had a childhood" as a result of the Accident appears incongruous, to say the least, with her actual circumstances as they were disclosed in the evidence.
- [70] In noting these concerns, I do not intend to suggest that the plaintiff has completely overstated her complaints. It seems clear on the evidence, and the defendant does not dispute, that the plaintiff suffers from chronic pain and a number of related conditions due to the Accident. I accept that the Accident has had significant impacts on the plaintiff's personal life and employment capacity. However, I agree with the defendant that the plaintiff, at times, lacked objectivity in describing those impacts. She has a tendency to exaggerate her injuries and their effects, on herself and others, while minimizing any hopeful signs of function or improvement.
- [71] For these reasons, I will approach the plaintiff's evidence with caution where it is not corroborated by other more objective and reliable evidence.

ASSESSMENT OF INJURIES CAUSED BY THE ACCIDENT

- [72] The onus is on the plaintiff to prove on a balance of probabilities that the defendant caused or contributed to the injuries for which she seeks compensation. The general test for causation is the "but for" test, which requires a plaintiff to show that the injury for which they seek compensation would not have occurred but for the defendant's tortious act: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at paras. 13-14.
- [73] The causation issue in the present case is simplified to some extent by the defendant's concession that the plaintiff suffered compensable injuries as a result of the Accident. While the plaintiff suffered from a number of pre-existing health conditions, the defendant did not argue that the plaintiff's damages should be reduced to account for any pre-existing condition.
- [74] I conclude that the plaintiff suffered a whiplash type of injury in the Accident that has evolved into fibromyalgia. The evidence of Drs. Offer and Watterson support this diagnosis. The diagnosis of fibromyalgia also explains a number of the plaintiff's other clinical symptoms, including headaches, chronic pain, sleep disruption, fatigue, and reduced mood. All of these conditions are causally related to the Accident.

- [75] The plaintiff also invites me to conclude that the Accident caused her to suffer from depression. In my view, the evidence does not support such a finding. The plaintiff did not tender any expert evidence from a psychiatrist in this case. I accept that the plaintiff suffers from low mood as a result of her injuries. I do not need expert evidence to reach that conclusion; it is evident in the evidence of the plaintiff and her collateral witnesses. However, in my view expert evidence would be necessary to support a psychiatric diagnosis of depression.
- [76] The plaintiff's Accident-related injuries have placed limitations on her social, personal, and employment activities. I will more specifically review some of these limitations in addressing the various heads of damages claimed by the plaintiff. By way of summary, I make the following findings about the plaintiff's condition and limitations as a result of the Accident:
- i. The plaintiff has suffered chronic and persistent pain since the Accident, which has not markedly improved over time, primarily to her upper and lower back.
 - ii. As a result of the chronic pain, the plaintiff has a disrupted sleep pattern. This leaves her feeling fatigued during the day and can affect her ability to concentrate. However, the evidence does not support a finding that the plaintiff has cognitive impairments as a result of the Accident.
 - iii. The plaintiff also suffers headaches that have become less frequent but more intense in recent years.
 - iv. The plaintiff cannot engage in as much physical activity as she could prior to the Accident, although she still manages to walk daily and perform stretching exercises. She can no longer ride a bicycle, go for long hikes, or kayak. She has improved her ability to manage pain to the point that she believes she is capable of participating in the pool program recommended by Dr. Watt.
 - v. The plaintiff has experienced limitations in her ability to perform household chores and yard work. Repetitive motions, such as vacuuming, and heavy cleaning or yard work causes her pain to flare-up. She can do most light household chores, although at a much slower pace than before. John and Emily have had to take up many of the household tasks previously performed by the plaintiff.
 - vi. The plaintiff can drive and shop independently. Although the plaintiff testified that she experiences anxiety while driving, she also testified that she drives an average of four times per week.
 - vii. The plaintiff can independently carry out tasks of daily living, such as bathing, dressing, and personal hygiene. To the extent that the plaintiff gave contrary evidence at trial, I do not accept her evidence for the reasons I have already stated.

viii. The plaintiff has been unable to return to her job as a switchboard operator since the Accident. Although the defendant argues that the plaintiff has a residual future earning capacity, he does not dispute that the plaintiff has, thus far, been unable to work due to her Accident-related injuries.

ix. The plaintiff's injuries have impacted her social life, and her relationships with her husband and daughter, as well as friends and family. The plaintiff's relationship with her husband has, in particular, suffered. She worries about their future.

x. The impact of her injuries have left the plaintiff with a depressed mood. She is not as happy or optimistic as she was before the Accident.

xi. Fibromyalgia cannot be cured. However, the expert evidence suggests that the plaintiff may improve her functioning and pain management by following the treatment recommendations. A central component of the recommended treatment plan is that the plaintiff engage in a program of active rehabilitation.

ASSESSMENT OF DAMAGES

Non-pecuniary damages

Legal framework

[77] The purpose of non-pecuniary damages is to compensate the plaintiff for pain, suffering, disability, and loss of enjoyment of life. Non-pecuniary loss must be assessed for both losses suffered by the plaintiff to the date of trial and those he will likely suffer in the future: *Tisalona v. Easton*, 2017 BCCA 272 [*Tisalona*] at para. 39.

[78] In *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46, leave to appeal ref'd [2006] S.C.C.A. No. 100 [*Stapley*], the Court of Appeal listed common factors influencing an award of non-pecuniary damages. They include: the plaintiff's age; the nature of the injury; the severity and duration of pain; level of disability; emotional suffering; loss or impairment of life; impairment of family, marital and social relationships; impairment of physical and mental abilities; and loss of lifestyle. Generally, stoicism should not penalize the plaintiff

[79] An award of non-pecuniary damages must be fair and reasonable to each party. Fairness is measured in part against awards made in comparable cases. However, other cases only serve as a rough guide as each case must be decided on its own facts: *Trites v. Penner*, 2010 BCSC 882 at para. 189. The amount of the award does not depend only on the seriousness of the injury, but rather also on the loss in the context of the specific plaintiff's circumstances: *Tisalona* at para. 39.

Discussion

- [80] The plaintiff seeks an award of non-pecuniary damages in the range of \$160,000-\$180,000. The plaintiff relies on the following cases to establish this range: *Kim v. Lin*, 2016 BCSC 2405 [Kim BCSC], *aff'd* 2018 BCCA 77 [Kim BCCA] (\$175,000, or \$186,005 when adjusted for inflation); *Flomo v. Hanna*, 2019 BCSC 2024 (\$175,000) [Flomo]; *Gabert v. Kris*, 2018 BCSC 2109 (\$160,000) [Gabert]; and, *Redmond v. Krider*, 2015 BCSC 178 (\$150,000, or \$161,566 when adjusted for inflation) [Redmond].
- [81] The defendant says that \$75,000 is an appropriate award of non-pecuniary damages in this case. He says the following cases are comparable, each of which involved an award of \$75,000 for non-pecuniary damages: *Dueck v. Lee*, 2019 BCSC 1936; *Anderson v. Gagnon*, 2018 BCSC 98; *Cox v. Acapulco*, 2020 BCSC 1135; and *McGahan v. Selock*, 2020 BCSC 973.
- [82] I do not agree with the range of damages proposed by either party. In the cases cited by the plaintiff, the injuries and/or impacts were more severe. In *Kim BCSC*, the plaintiff suffered physical and psychological injuries that left her effectively bedridden and unable to care for her children or her home. In both *Flomo* and *Redmond*, the plaintiff injuries were psychiatric as well as physical. In *Gabert*, the plaintiff was found to suffer from "relentless tinnitus and headaches" as a result of the Accident, in addition to fibromyalgia. The plaintiff's injuries had a debilitating effect, leaving her completely dependent on her husband.
- [83] The cases cited by the defendant all involve plaintiffs who suffered mild to moderate soft tissue injuries that led to some functional limitations that were not as severe as the plaintiff has experienced in the present case. Among other things, the plaintiffs in each of the cases cited by the defendant had the capacity to continue working on either a part-time or full-time basis.
- [84] Having regard to the factors listed in *Stapley*, I conclude that \$120,000 is a fair and reasonable award of damages to compensate the plaintiff for her non-pecuniary loss.

Past loss of earning capacity

Legal framework

- [85] An award of damages for loss of earning capacity, whether in the past or the future, compensates for a plaintiff's pecuniary loss. Compensation for past loss of earnings is based on what a plaintiff would have, not could have, earned but for the accident-related injuries: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30.
- [86] The burden of proof of actual past events is a balance of probabilities. However, an assessment of both past and future earning capacity involves consideration of hypothetical events. An award for past loss of earning capacity requires the court to assess how a plaintiff's life would have unfolded in the pre-trial period absent the injury. Such hypothetical events need not be proven on a balance of probabilities. They are given weight

according to their relative likelihood, and will be taken into consideration as long as the hypothetical event is a real and substantial possibility and not mere speculation: *Athey* at para. 27; *Grewal v. Naumann*, 2017 BCCA 158 at paras. 44, 48-49.

Discussion

- [87] The defendant concedes that the plaintiff was unable to continue working as switchboard operator between the time of the Accident and the time of trial due to her injuries. The defendant says that Mr. Benning's estimate of \$103,424 as the plaintiff's gross past wage loss, assuming the plaintiff continued in her part-time employment at UVF to the time of trial, is a fair assessment of her past loss of earning capacity. Mr. Benning's calculation omits the six-month period of time that the plaintiff was off work in 2017 following her cancer surgery. With a reduction of approximately 15% for income tax, as required by s. 98 of the Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231, the defendant says an award of \$88,000 for net past loss of earning capacity is appropriate.
- [88] The plaintiff seeks an award of past wage loss on the premise that the plaintiff would have worked part-time at UFV until March 1, 2019, and thereafter full-time. The plaintiff says that such an award is supported by the evidence of the plaintiff and her husband that, prior to the Accident, they had discussed the prospect of the plaintiff moving to full-time employment while Emily was in university so they could assist with her tuition. Mr. Benning estimates the plaintiff's gross past wage loss as \$121,966, on the assumption that the plaintiff would have moved to full-time in March 2019. As I understand the plaintiff's argument, she agrees that some reduction from this amount may be appropriate to account for the possibility that there could have been a delay in the plaintiff securing full-time employment.
- [89] The plaintiff's position on past loss of earning capacity is complicated by the fact that she provided a global calculation of her proposed award for loss of earning capacity without distinction between past and future wage loss. A key issue in dispute, as it relates to both past and future wage loss, is whether the evidence supports a finding that there is a real and substantial possibility that the plaintiff would have worked full-time during Emily's enrollment in university. The plaintiff says the period of full-time work would have been six to seven years, starting in 2019. This is an argument that is relevant to the assessment of both past and future loss of earning capacity.
- [90] The only evidence I have to support the plaintiff's intention to move to full-time work is the testimony of the plaintiff and her husband John. For the reasons that follow, I do not find that their evidence, in itself, establishes a real and substantial possibility that the plaintiff would have been employed full-time as of March 2019 but for the Accident.
- [91] The evidence of the plaintiff and her husband was, on its face, vague in nature and lacking in specifics. The plaintiff said she planned to take on more hours to assist with the cost associated with Emily's school, but she had no specific plan as to how that would be achieved. There is no evidence that she made even preliminary inquiries of UFV about the

possibility of increasing her hours in the future. Mr. McAuley's evidence was simply that the plaintiff hoped to get full-time work at the switchboard when Emily was in school. It is not surprising that their plans were inchoate given that Emily was 14 at the time of the Accident and at least four years away from any post-secondary program, assuming she ever enrolled in one.

- [92] The plaintiff's evidence that she would have worked full-time for a period of six to seven years is also inconsistent with her evidence about the recreational and home-based activities she enjoyed and would have continued to participate in absent the Accident. The plaintiff estimates that prior to the Accident she spent four to five hours a day on house and yard work, swam daily, hiked and rode her bicycle several times a week, and had an active social life. Her social life included frequent shopping trips, attending hockey games with John, and hosting family gatherings every two to three months that required 20 hours of preparatory work. It is difficult to reconcile the plaintiff's evidence that she found enjoyment in this level of activity and would have continued it absent the Accident with her evidence that she simultaneously intended to move from part-time to full-time employment.
- [93] Finally, I note that the plaintiff suffers from a number of significant health problems, quite apart from the injuries caused by the Accident. These include diabetes, hypertension, hypercholesterolemia, and hyperthyroidism. The plaintiff was diagnosed with breast cancer in 2017, and underwent a double mastectomy. It seems implausible that the plaintiff would be motivated to double her hours at work in such circumstances after 16 years of part-time employment. There is no evidence before me that the family's financial circumstances necessitated such a drastic step.
- [94] I conclude that the plaintiff's evidence that, but for the Accident, she would have worked full-time as of March 2019 does not rise above the realm of speculation. It is self-serving evidence that is not plausible when viewed in the context of the evidence as a whole.
- [95] I therefore find that no additional award of damages for past loss of earning capacity is warranted beyond the sum that the defendant has agreed is reasonable: that is, compensation for the plaintiff's net pre-trial loss of wages in her part-time position at UFV. I conclude that \$88,000 is a fair and reasonable award of damages for the plaintiff's past net loss of earning capacity.

Loss of future earning capacity

Legal framework

- [96] A claim for future loss of earning capacity requires the court to compare the likely future of the plaintiff's working life had the accident not happened with the plaintiff's likely future working life after its occurrence, accounting for negative and positive contingencies: *Gregory v. Insurance Corp. of British Columbia*, 2011 BCCA 144 at para. 33.

[97] The principles governing the assessment of damages for loss of future earning capacity were summarized by the Court in *Reilly v. Lynn*, 2003 BCCA 49 at para. 101:

The standard of proof in relation to future events is simple probability, not the balance of probabilities, and hypothetical events are to be given weight according to their relative likelihood: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 27. A plaintiff is entitled to compensation for real and substantial possibilities of loss, which are to be quantified by estimating the chance of the loss occurring: *Athey v. Leonati*, *supra*, at para. 27, *Steenblok v. Funk* (1990), 46 B.C.L.R. (2d) 133 at 135 (C.A.). The valuation of the loss of earning capacity may involve a comparison of what the plaintiff would probably have earned but for the accident with what he will probably earn in his injured condition: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 at 93 (S.C.). However, that is not the end of the inquiry; the overall fairness and reasonableness of the award must be considered: *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 11; *Ryder v. Paquette*, [1995] B.C.J. No. 644 (C.A.) (Q.L.). Moreover, the task of the Court is to assess the losses, not to calculate them mathematically: *Mulholland (Guardian ad litem of) v. Riley Estate* (1995), 12 B.C.L.R. (3d) 248 (C.A.). Finally, since the course of future events is unknown, allowance must be made for the contingency that the assumptions upon which the award is based may prove to be wrong: *Milina v. Bartsch*, *supra*, at 79.

[98] There are two possible approaches to loss of future earning capacity: the "earnings approach" and the "capital asset approach". Both approaches are correct and will be more or less appropriate depending on whether the loss in question, though proven, can be quantified in a pecuniary way: *Perren v. Lalari*, 2010 BCCA 140 at paras. 12 and 32.

[99] The earnings approach involves a math based formula whereby the court crafts an award based on the plaintiff's past income, perhaps by awarding a minimum annual income loss for the remainder of the plaintiff's working life, or awarding the plaintiff's entire annual income for a period of time: *Pallos v. Insurance Corp. of British Columbia* (1995), 100 B.C.L.R. (2d) 260 (C.A.) at 271.

[100] 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 herself as a person capable of earning income in a competitive labour market: *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 (S.C.) at 356; *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 10.

Discussion

[101] The plaintiff says that the earnings approach is the appropriate method for calculating her future loss of earning capacity in the circumstances of this case. She says the evidence establishes that she is permanently unemployable. The plaintiff seeks an award of damages equal to the amount she would have earned at UFV from the time of trial to her retirement

at age 70, supplemented by the additional full-time employment that she says she would have taken up for a period of six to seven years while Emily was in school. As I understand the plaintiff's calculation, she seeks an award for future loss of earning capacity in the approximate amount of \$360,000. This consists of Mr. Benning's estimate of the present value of the plaintiff's future wage loss assuming the plaintiff worked part-time at UFV to a retirement age of 70 (\$310,867), plus an additional sum to represent the real and substantial possibility that the plaintiff would have worked full-time while Emily remained enrolled in university.

- [102] The defendant says the evidence does not support a finding that the plaintiff is permanently unemployable, but rather supports that she has a residual earning capacity. He also says that it is reasonable to assume that the plaintiff would have retired at the age of 65 rather than 70. The defendant says that, given the difficulties of calculating the plaintiff's future earning loss, the capital asset method is appropriate. He says an award of \$60,000, representing three years of the plaintiff's net salary, is fair and reasonable.
- [103] This case presents particular difficulties in assessing the plaintiff's future loss of earning capacity. The plaintiff did not attempt to return to work, even on a graduated basis, when her family doctor recommended she do so because she considered herself unable to work. She did not fully participate in functional testing because of her self-reports of pain. The functional testing did not, in any event, test the plaintiff's capacity to perform the specific tasks involved in her job as a switchboard operator. In sum, the plaintiff's claim that she is permanently unemployable depends almost exclusively on her own perception of her pain.
- [104] At the same time, there is a substantial body of expert evidence that supports the conclusion that the plaintiff is, at the very least, significantly restricted in her current ability to work, whether or not those restrictions have, as Dr. Watterson framed it, a psychological overlay. Although I have found that the plaintiff's evidence was at times exaggerated and lacking in objectivity, there is no question that she has suffered a great deal since the Accident. The evidence persuades me that, as matters stand, the plaintiff cannot perform even part-time work as a switchboard operator. Indeed, most of the experts, including the defendant's expert Dr. Watterson, believe that the plaintiff is currently unemployable.
- [105] At the same time, all of the experts, with the exception of Mr. Lawless, express some measure of optimism that the plaintiff might improve her functioning and pain management with appropriate treatment. Dr. Offer and Dr. Giantomaso both opine that the plaintiff may be capable of engaging in part-time work with a sympathetic employer. Dr. Watt similarly expresses the view that there is a possibility that the plaintiff could return to work if she was provided with a sit-stand desk and allowed to move around during her shift. Dr. Watterson believes that the plaintiff is currently unemployable, but that her condition may improve with appropriate treatment interventions.

- [106] Mr. Lawless is more pessimistic than the medical experts. His view is that it is much more probable that the plaintiff will remain unemployed. As I alluded to in my review of his evidence, I am unclear as to what expertise Mr. Lawless possesses that provides necessary assistance to me in drawing inferences about the plaintiff's future earning capacity. The question of whether the plaintiff has a residual future earning capacity turns, to large extent, on an assessment of the nature and extent of her disability and the likelihood that her functioning may improve with the recommended treatment. Mr. Lawless cannot assist me with these questions because he is not a medical doctor. To the extent that Mr. Lawless bases his opinion of the likelihood of the plaintiff returning to work on statistical averages, as he appears to at page 9 of his report, I also do not find this to be helpful in reaching conclusions about the plaintiff's particular circumstances.
- [107] To the extent that there is a conflict between the opinion of Mr. Lawless and the opinion of the medical experts on the issue of the plaintiff's residual earning capacity, I prefer the evidence of the medical experts. In my view, the expert evidence establishes that there is a real and substantial possibility that the plaintiff may be capable of performing part-time work in the future in a sedentary job, provided that she has some accommodation. The assessment of her damages for loss of future earning capacity must account for that real and substantial possibility.
- [108] The final issue of contention in relation to the plaintiff's claim for loss of future earning capacity is her anticipated retirement date. The plaintiff says that she would have retired at the age 70, and she seeks compensation for loss of future income to that age. For the reasons that follow, I conclude that it is not fair or reasonable on the evidence to assess the plaintiff's damages for loss of future earning capacity on the basis of an assumed retirement age of 70.
- [109] I have already stated my reasons for concluding that the plaintiff's evidence, particularly self-serving evidence of this nature, must be viewed with some suspicion to the extent it is not corroborated by other objective and credible evidence. The plaintiff's evidence on this point does not withstand testing against other evidence. In cross-examination, the plaintiff says she did not know when her pension vested. I find it unlikely that the plaintiff would have made a decision about a future retirement date without ascertaining basic relevant financial information like her pension vesting date. I also do not accept the plaintiff's evidence that she planned to continue working even after John retired because she wanted a retirement job for her own enjoyment. This is particularly implausible to me in light of the plaintiff's health issues and her professed enjoyment of significant social, recreational, and home-based activities.
- [110] In my view, the reasonable assumption that arises on the evidence is that the plaintiff would have retired at the age of 65, or possibly even earlier. Accordingly, I conclude that damages for the plaintiff's loss of future earning capacity can most fairly be assessed by using as a starting point Mr. Benning's calculation of the present value of the plaintiff's future earning loss to age 65 (\$223,439), then applying a deduction to account for the plaintiff's residual

earning capacity and the possibility of voluntary early retirement. In my view, \$180,000, is a fair and reasonable assessment of the plaintiff's future earning capacity. This reflects a reduction of approximately 20% to Mr. Benning's calculations to account for the contingencies I have identified.

Future care costs

Legal framework

- [111] The purpose of an award for future care costs is to restore the plaintiff to his pre-Accident condition, to the extent that is possible with a monetary award: *Gignac v. Insurance Corp. of British Columbia*, 2012 BCCA 351 at para. 29. The award is based on what is reasonably necessary on the medical evidence to preserve and promote the plaintiff's mental and physical health: *Hardychuk v. Johnstone*, 2012 BCSC 1359 at paras. 210-211 [Hardychuk].
- [112] The test for determining the appropriate award under the cost of future care heading is objective and based on medical evidence. An award of future care costs requires: (1) a medical justification for the claim, and (2) that the claims are reasonable: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.) at 35.
- [113] Future care costs must be justified both because they are medically necessary and they are likely to be incurred by the plaintiff. The award of damages for cost of future care predicts what will happen in the future, and thus is not a precise accounting exercise: *Hardychuk* at paras. 212-214.

Discussion

- [114] The plaintiff seeks an award in the amount of \$75,000-\$100,000 in future care costs, consisting of the costs of attendance at a pain clinic, psychological counselling, active rehabilitation therapy costs, and medications. The plaintiff advances a separate claim for damages for loss of housekeeping capacity. Therefore, she has not included housekeeping services in her assessment of future care costs. I note that the plaintiff did not tender an expert report on future care costs. The evidence she relies on in support of the amounts claimed is primarily her own estimates, for example of her medication costs, and the cross-examination of the defendant's occupational therapist, Ms. Smith.
- [115] The defendant's submissions on future care costs were less than helpful. The defendant submits that there is limited evidence quantifying future care costs, and that a conservative and measured approach is warranted. He also suggests that "in fairness to the Defendant", any award for future care costs should be broken down into itemized amounts. The defendant does not provide any guidance to the Court as to what he believes a fair itemization of costs might look like, nor does he attempt to quantify a reasonable range of damages.

[116] I am, therefore, left to assess the various heads of future care costs claimed by the plaintiff without any assistance from the defendant.

Pain clinic

[117] The plaintiff seeks an award of \$13,000, to cover the costs of a multi-disciplinary pain clinic. In support of this award, she relies on Dr. Giantomaso's observation that a pain clinic "may be helpful", and his estimate that a private clinic could charge in the tens of thousands of dollars.

[118] Dr. Giantomaso's report does not elaborate on the nature of the treatment a pain clinic would provide to the plaintiff or what it would cost. It is not clear to me from the evidence whether, in any event, this type of treatment program might also be available through the public health system. Dr. Offer specifically opines that a multi-disciplinary pain clinic is unlikely to provide assistance to fibromyalgia patients such as the plaintiff beyond what a program of active rehabilitation would provide. Throughout this trial, the plaintiff has consistently emphasized Dr. Offer's superior expertise in the treatment of fibromyalgia.

[119] In light of the tenuous nature of the evidence, I find that the plaintiff has not established that an award to cover the costs of a multi-disciplinary pain clinic is medically justified, that such costs are likely to be incurred by the plaintiff, or what the costs would be.

Exercise/active rehabilitation

[120] The plaintiff seeks an award for the present value of \$2,400 per year over the next 21 years (to age 75), to cover the costs of physiotherapy, pool therapy, and psychological counselling. It appears to me from the plaintiff's calculations that she may have double counted the costs of a psychologist as this is a separate line item in the plaintiff's table of estimates.

[121] The experts in this case are consistent in their opinion that an exercise program is key to any future improvement in the plaintiff's functioning and pain management. Dr. Offer opines that the plaintiff would benefit from the "occasional supervision" of a kinesiologist or physiotherapist. Dr. Watt suggested a more structured and graduated program, starting with four to six months of pool therapy and then moving to six months of land-based physical therapy with a certified trainer. None of the experts have opined that the plaintiff requires the assistance of a physiotherapist, kinesiologist, or certified trainer for the next 21 years. Instead, the expectation is that the plaintiff will establish her own exercise regime. In her direct evidence at trial, the plaintiff said she would participate in a structured exercise program and attend a gym if she had funding to do so.

[122] In my view, the evidence establishes that an award of damages for the plaintiff's physical rehabilitation costs is medically justified. The evidence is not as clear on the issue of cost. There is no evidence to show the cost of the pool therapy program or the certified trainer that Dr. Watt recommends. There is no evidence to show the average hourly cost of a physiotherapist. There is evidence that the plaintiff paid \$65 per session in the

physiotherapy therapy treatment she received prior to trial. In the absence of any more precise calculation of costs, I will use \$65 per hour as the hourly cost of any professionally-assisted physical therapy.

- [123] The evidence supports an award to the plaintiff to cover the costs of engaging the assistance of a physiotherapist, kinesiologist, or personal trainer on a twice-weekly basis for the next 12 months, for a total cost of approximately \$6,700. Thereafter, the evidence justifies an award for the cost of an annual gym pass for the plaintiff until she reaches the age of 70 is medically justified and a cost she is likely to incur. Ms. Smith estimates that a gym pass costs between \$450 and \$550 per year. The present value of this future cost is approximately \$7,000.

Psychological counselling

- [124] The recommendation that the plaintiff participate in psychological counselling is most forcefully set out in the report of the defendant's expert, Dr. Watterson. As I understand his report, Dr. Watterson suggests that counselling may provide two benefits to the plaintiff. First, treatment that is focussed on cognitive behavioural therapy and mindfulness can be helpful to individuals with chronic pain conditions. Second, psychological counselling may also be of assistance to the plaintiff in getting to the source of her pain symptoms, which, as noted, Dr. Watterson believes may have a psychological overlay. Once again, the plaintiff indicates that she would participate in psychological counselling if funding was available.
- [125] I find that some award of future care costs to cover psychological counselling is medically justified for the reasons highlighted by Dr. Watterson. Ms. Smith estimates that private cognitive behavioural therapists charge from \$200-\$275 per hour. The plaintiff seeks an award of \$2,400, to cover the costs of 12 counselling sessions in total. In my view, such an award is reasonably justified on the evidence.

Medications

- [126] The plaintiff seeks, finally, an award to cover her medication costs on an annual basis to the age of 80 (26 years). This includes the annual costs of Gabapentin (\$200 per month), Tylenol (\$15 per month), and marijuana derivatives such as CBD oil, gummies, and salves (\$85 per month).
- [127] The evidence is unclear, at best, as to the medical justification for the plaintiff's Gabapentin costs. Other than the fact that the plaintiff is taking Gabapentin, there is no evidence this medication has been of assistance to the plaintiff in managing her pain. The only medical expert who mentions Gabapentin in their discussion of recommended treatments is Dr. Giantomaso. He only mentions Gabapentin in observing that no medications, including Gabapentin, have assisted the plaintiff with her pain symptoms. Indeed, it is not even clear to me on the evidence that the plaintiff's use of Gabapentin has been specific to her fibromyalgia. Dr. Offer's report refers to the plaintiff taking Gabapentin "for sharp pains in

the feet and legs attributed to diabetic neuropathy".

[128] There is medical justification in the evidence for the plaintiff's use of Tylenol and medical derivatives for pain relief and as sleep aids. The plaintiff has testified that these medications alleviate her pain during periods of flare-up. Drs. Offer and Giantomaso both support the use of marijuana derivatives to manage the plaintiff's pain symptoms. The evidence establishes that the costs of these medications are likely to be incurred by the plaintiff. In the absence of any objection from the defendant, I assume the plaintiff's estimate that she spends a combined total of \$100 per month on Tylenol and marijuana derivatives to be a reasonable estimate of her costs.

[129] I conclude, therefore, that an award of damages to cover the plaintiff's future costs of Tylenol and marijuana derivatives is medically justified, but her Gabapentin costs are not. In my view, an award of damages to cover the present value of the future costs of these medications to age 70, approximately \$16,300, is fair and reasonable. This accounts for the contingency that the plaintiff may not need the medications longer than that if her functionality and pain management improves with the other treatments.

Summary

[130] In summary, I conclude that an award of future care costs in the amount of \$32,400 is justified on the evidence. This award comprises the plaintiff's exercise and active rehabilitation costs (\$13,700), psychological counselling (\$2,400), and medications (\$16,300).

Loss of housekeeping capacity

Legal framework

[131] A claim for loss of housekeeping capacity relates to the loss of the value of work that a plaintiff would have performed but which they can no longer perform because of injuries suffered in the accident. As it is the loss of capacity - which is an asset - that is compensated, an award of damages is not dependent on whether replacement housekeeping costs are actually incurred: Kim BCCA at para. 30. A plaintiff may be entitled to compensation even if the services are provided gratuitously by family members: Kim BCCA at para. 52.

[132] At the same time, where housekeeping services are provided by other family members, the court should approach a claim for a pecuniary award with some caution. As stated by Dickson J., as she then was, in *Hardychuk*:

[168] When housekeeping services have been provided by other household members a claim for compensation must be scrutinised carefully. Although grievous injury need not be established, the court should ask whether the services went above and beyond the ordinary give and take to be expected in a home and were required by the plaintiff's injuries or would have been performed in any event. A relatively minor adjustment of duties within a

household will not justify a discrete award under this head of damages: Dykeman, Campbell v. Banman, 2009 BCCA 484.

- [133] A loss of housekeeping capacity may be compensated by a pecuniary or a non-pecuniary award. In Kim BCCA, the Court of Appeal provides the following guidance as to when a pecuniary or non-pecuniary award may be appropriate:
- [33] . [W]here a plaintiff suffers an injury which would make a reasonable person in the plaintiff's circumstances unable to perform usual and necessary household work -- i.e., where the plaintiff has suffered a true loss of capacity -- that loss may be compensated by a pecuniary damages award. Where the plaintiff suffers a loss that is more in keeping with a loss of amenities, or increased pain and suffering, that loss may instead be compensated by a non-pecuniary damages award. However, I do not wish to create an inflexible rule for courts addressing these awards, and as this Court said in Liu, "it lies in the trial judge's discretion whether to address such a claim as part of the non-pecuniary loss or as a segregated pecuniary head of damage": at para. 26.
- [134] In cases where the plaintiff is not catastrophically injured, awards for loss of housekeeping capacity are typically modest, particularly where the plaintiff requires assistance with household tasks but is not completely incapacitated: Sidhu v. Alton, 2020 BCSC 1802 at para. 247.

Discussion

- [135] The plaintiff seeks the extraordinary sum of \$450,000-\$605,000, for past and future loss of housekeeping capacity. The plaintiff's theory, as I understand it, is that she should receive compensation equivalent to the hourly rate of paying a housekeeper for the 17-23 hours of house and yard work per week that the plaintiff previously performed and now longer can perform.
- [136] I find the plaintiff's proposed award to be out of all proportion to her actual loss of capacity. The evidence shows that the plaintiff can still perform most household chores, albeit at a slower rate, and that John and Emily have had to cover tasks that the plaintiff previously performed. She is restricted in the heavy yard work she can carry out, and has had to delegate tasks such as mowing the lawn and weeding to John and Emily. The evidence does not persuade me that their contributions went significantly above the give-and-take to be expected in a family home. John continues to work two jobs and Emily is a full-time student with an apparently active social life.
- [137] The present circumstances are wholly distinguishable from Kim BCSC, a case upon which the plaintiff places significant reliance. In that case, the Court found that the plaintiff was entirely incapable of taking care of her young children from the time of the accident and was forced to incur the significant daycare costs. She was unable to perform any domestic chores and barely left her room. The plaintiff's husband also had disabilities and the family was forced to move in with his mother for a period time, who provided all of the

housekeeping and daycare services. Even after the family moved out of the mother-in-law's home, she had to visit them once a month in order to clean the entire house and stock their freezer with prepared meals.

[138] In *Kim BCSC*, the Court awarded a total of \$418,000 for past and future loss of housekeeping capacity, a significant component of which was the children's daycare costs. On appeal, the Court of Appeal noted that the amount awarded at trial for loss of housekeeping capacity was substantial and that it exceeded by a significant amount awards made in other cases: *Kim BCCA* at para. 38. However, the Court of Appeal upheld the award on the basis that there was no cap on damages for loss of housekeeping capacity and the plaintiff's loss of capacity was significant: *Kim BCCA* at paras. 54-55.

[139] In my view, the present case is not analogous to *Kim BCSC*. In this case, the plaintiff's loss is more in the nature of a loss of amenities, for which she has already been compensated in the award of non-pecuniary damages, rather than a loss of capacity. The only exception is the plaintiff's loss of a capacity to vacuum, at least without serious aggravation of her pain symptoms, and to carry out heavy cleaning chores that require lifting. Dr. Offer recommends that it would be of long-term benefit to the plaintiff if she received some assistance with those tasks. He is the only expert to recommend that the plaintiff receive assistance with house or yard work.

[140] I conclude that an award of \$35,000 is appropriate to compensate the plaintiff for a loss of capacity, past and future, in this more limited sense identified in Dr. Offer's report. This award roughly equates to the present value of two hours per week of housekeeping services at an hourly rate of \$25 starting at the time of the Accident and continuing for eight to ten years in the future. In my view, such an award appropriately balances the negative contingencies in this case, including the possibility that the plaintiff's functioning may improve to the point that she regains the capacity to perform these tasks in the future.

SUMMARY

[141] In summary, I assess the plaintiff's damages as follows:

Non-pecuniary damages

\$120,000

Past loss of earning capacity (net)

\$88,000

Future loss of earning capacity

\$180,000

Future care costs

\$32,400

Loss of housekeeping capacity

(Past and future)

\$35,000

Special damages

\$3,242.63

Total:

\$458,642.63

[142] Unless there are circumstances of which I am unaware, the plaintiff is entitled to her costs of this action at scale B. If either party seeks a further hearing on costs, they should arrange for a further hearing through Supreme Court Scheduling within 30 days of this judgment.

"Horsman J."

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Prepared on 24 October 2026 · Esheria