

CANADA / JUDGMENT

McColl v. Dushenko

2020 BCSC 1674

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2020 BCSC 1674 McColl v. Dushenko

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

McColl v. Dushenko,

2020 BCSC 1674

Date: 20201106

Docket: M164848

Registry: Vancouver

Between:

Cathy McColl

Plaintiff

And

Timothy Dushenko and Pierce Dushenko

Defendants

Before: The Honourable Mr. Justice Mayer

Reasons for Judgment

Counsel for the Plaintiff:

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Place and Date of Trial/Hearing:

Vancouver, B.C.

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and October 2, 2020

Place and Date of Judgment:

Vancouver, B.C.

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Introduction

- [1] On June 3, 2015 Cathy McColl was driving in the southbound slow lane of Shaughnessy Street in Port Coquitlam, approaching the intersection at Oxford Street, when her vehicle was sideswiped on the left front quarter-panel by the vehicle driven by Pierce Dushenko (the "Accident"). At the time of the Accident. Mr. Dushenko, who had been travelling in the southbound fast lane of Shaughnessy Street, was attempting to change lanes to the right, to go around a left-turning vehicle ahead of him.
- [2] Ms. McColl alleges that as a result of the Accident she sustained an injury to her mid and upper back and a serious aggravation of a 2006 workplace injury to her lower back. She also alleges psychological and emotional injuries including depression, anxiety and agoraphobia. She seeks damages for her injuries, past and future loss of income earning capacity, special damages and costs of future care.
- [3] Mr. Dushenko admits liability for the Accident. He disputes the extent of the injuries alleged by Ms. McColl and says that her current complaints relate to the 2006 workplace injury and a related prior history of anxiety and depression. As a result, he contends that Ms. McColl is not entitled to all heads of the damages she seeks, or alternatively her damages should be significantly discounted to account for her pre-Accident physical and psychological symptoms.
- [4] The issues for determination in this trial include the following:
- a) Which of Ms. McColl's injuries and the related physical and psychological symptoms were caused by the Accident?
 - b) What damages, if any, is Ms. McColl entitled to as a result of the injuries she sustained in the Accident?

Background

- [5] Ms. McColl is currently 55 years old and lives in Port Coquitlam. She is married to Gary Gregg and has two adult daughters, Tera and Lindsay. Lindsay still lives with Ms. McColl and Gary Gregg at their home in Port Coquitlam. Tera is married and lives in Aldergrove with her husband and three children, aged between 5 and 13 years old.
- [6] Ms. McColl has no post-secondary education and has worked in the retail industry most of her adult life. Aside from the time she was unable to work following her 2006 workplace injury, Ms. McColl worked at a Costco store in Port Coquitlam from 1998 to the date of the Accident. She has not worked since the Accident and currently receives monthly CPP disability benefits and a WorksafeBC pension.

Pre-Accident

- [7] By all accounts Ms. McColl was having a difficult time physically and emotionally prior to the Accident.
- [8] In 2006 she sustained the workplace injury to her lower back while lifting plants at the Costco garden center. This injury resulted in severe lower back pain which became chronic and included pain and numbness in her legs. She was unable to straighten her back and walked hunched over. She was unable to work.
- [9] Ms. McColl was prescribed opioids for pain management by her long time family doctor, Dr. Hui, including long acting OxyContin (later renamed OxyNeo due to a change in formulation) and Percocet for breakthrough pain. From 2006 to the date of the Accident Ms. McColl consumed ever-increasing doses of these opioids for pain control, which by April 2015 were at levels several times the recommended maximum dosages. The evidence at trial establishes that at the time of the Accident Ms. McColl was dependant on these drugs, had developed a tolerance for them, and was consuming quantities which for most people would have resulted in an overdose.
- [10] Ms. McColl's lower back pain resulting from her 2006 workplace injury did not resolve. For several years she battled with WorkSafeBC over disability benefits and the expectations of WorkSafeBC that she return to work. After an MRI exam in early 2007 showed a disc injury, which MRI Ms. McColl paid for with help from family, Ms. McColl underwent an L5-S1 discectomy in August, 2007. This surgery was not successful in relieving her lower back pain, although it did reduce her leg pain and numbness and allowed her to straighten up.
- [11] After the 2006 workplace injury Ms. McColl remained off for an initial period of more than two years. She was eventually able to return to work on a part-time, light-duty accommodated basis at Costco in 2008, although she continued to suffer from severe chronic lower back pain.
- [12] In April 2010 Ms. McColl developed severe depression with feelings of isolation. In May 2010 Dr. Hui recorded a primary diagnosis of depression and a secondary diagnosis of lumbar disc disease on a form submitted in support of Ms. McColl's claim for disability benefits. He also recorded subjective symptoms including frequent crying, isolation and crooked walking. In his August 2010 referral note to a psychiatrist, Dr. Jiwa, Dr. Hui noted that Ms. McColl had a long history of depression, particularly after the 2006 workplace injury that left her with disabling lower back pain.
- [13] During her cross-examination Ms. McColl denied that she had suffered from long term depression prior to 2010, but rather began to experience symptoms in or around that year. Her evidence was that Dr. Hui's comment regarding long term depression was wrong.
- [14] In his consult report made in or about September 2010, Dr. Jiwa noted that Ms. McColl had become markedly depressed by April of that year and did not want to socialize or answer the telephone. Dr. Jiwa prescribed medication for both pain and depression.

- [15] As a result of her depression and ongoing back pain Ms. McColl stopped working in April 2010 and did not return to work again until September 2012. In the meantime, she had been awarded a pension by WorkSafeBC based on an inability to work more than 25 hours per week.
- [16] Ms. McColl testified that when she returned to work in 2012 she felt stronger and was feeling better. She continued performing light-duty work including duties in the cigarette cage and gas station at Costco and gradually increased her hours up to 25 hours per week (five hours per day). She testified that although she continued to suffer constant and ongoing back pain, her pain was manageable. Further, she testified that although she was still taking opioids to manage her pain that her mood was good and she was no longer taking the anti-depressant medication that had previously been prescribed by her psychiatrist. She continued work on a light-duties basis until the car accident on June 3, 2015.
- [17] Ms. McColl's work records show that after she returned to work in 2012 she missed an increasing number of hours and days for excused and unexcused sickness. Her annual employee reviews for the years of 2012-13, 2013-14 and 2014-15 recorded concern for her attendance and tardiness. A chart contained with her annual performance review for the 2014-15 year showed that Ms. McColl missed a total of 42 days of work, in addition to 15 vacation days.
- [18] Ms. McColl testified that some of the days she was absent from work resulted from issues unrelated to her workplace injury, including pain caused by gout, issues with her teeth requiring dental surgery and dealing with her daughter Lindsay's severe depression. She did not provide evidence with respect to how much of her absenteeism was caused by these events or illnesses and how much was caused by symptoms related to her workplace injury. In this respect, I consider that Ms. McColl's testimony was vague and therefore I treat this portion of her testimony with caution. In my view, it appeared that Ms. McColl was attempting to downplay the impact of her 2006 workplace injury on her ability to work in the years leading up to the Accident.
- [19] Mr. Scott Ayton, the General Manager at the Port Coquitlam Costco where Ms. McColl worked, testified that Ms. McColl's workplace absences prior to the Accident were at the higher end of the spectrum and were of concern. Mr. Ayton testified that despite this, given that Ms. McColl had provided a medical justification for her absenteeism included in a report prepared by Dr. Hui, Costco would have sought to accommodate her and therefore she was not at risk of losing her job. Dr. Hui had reported to Costco in March 2015 that Ms. McColl's absences from work were caused by back spasms and pain and that she was capable of performing only modified duties as a cashier in the Costco cigarette cage or gas bar on a permanent basis.
- [20] Ms. McColl and members of her family, including Tera McColl and Gary Gregg, testified that prior to the Accident Ms. McColl was performing household chores, and was visiting with and babysitting her young grandchildren on a regular basis.

- [21] Tera McColl testified that she saw Ms. McColl fairly regularly after her 2006 injury, and that Ms. McColl looked after her children either at her home in Port Coquitlam or at Tera's home in Aldergrove and that they spoke regularly on the phone. In May 2015, just prior to the Accident, Tera McColl had her third child and Ms. McColl looked after her other two children while she was in the hospital. She testified that at some point, she could not specifically recall when, Ms. McColl became somewhat reclusive. She testified that this became a source of friction between her and her mother.
- [22] Of note, both Gary Gregg and Tera McColl had little to no recollection of Ms. McColl ever exhibiting symptoms of depression prior to the Accident, despite her taking more than two years off of work between April, 2010 and September, 2012. I find it surprising that they had no knowledge or recollection of Ms. McColl's pre-Accident difficulties with depression, which were clearly significant. In my view this has an impact on the reliability of their evidence concerning Ms. McColl's pre-Accident condition.
- [23] Ms. McColl testified that before the Accident she was socializing and speaking on the phone with her friends - primarily her friends and ex-coworkers Elaine Hayward and Carrie Gaucher. Ms. McColl testified that their social activities included going out for coffee and attending at birthday parties.
- [24] Ms. Hayward and Ms. Gaucher were called as witnesses at trial. Ms. Hayward testified that after Ms. McColl sustained her workplace injury in 2006 she only saw her socially a few times and rarely spoke with her. After 2012, Ms. Hayward never saw Ms. McColl after work, didn't speak with her on the phone and only rarely exchanged Facebook messages. Ms. Gaucher testified that she saw Ms. McColl infrequently after 2006 and rarely after Ms. Gaucher left Costco in 2009 to become a nurse. She had not spoken to Ms. McColl in several years before this trial.
- [25] Given their limited contact with Ms. McColl in the years prior to the Accident, I do not find the evidence of Ms. Hayward or Ms. Gaucher to be particularly helpful with respect to Ms. McColl's pre-Accident condition. At trial Ms. McColl suggested that she continued to socialize with Ms. Hayward and Ms. Gaucher prior to the Accident. This testimony is inconsistent with that of Ms. Hayward and Ms. Gaucher. I consider that Ms. McColl exaggerated the extent of her non-family social interactions prior to the Accident.

Post Accident

- [26] As I have already stated, the Accident involved a sideswipe impact to Ms. McColl's vehicle that occurred when Mr. Dushenko was changing lanes to go around a left-turning vehicle. Mr. Dushenko testified that he was travelling at a relatively low speed when the Accident occurred. The photographic evidence indicates that the impact was not significant, although Ms. McColl's vehicle, a 2000 Pontic Sunfire that had a low value, was written off.

- [27] After the Accident Ms. McColl attended at Eagle Ridge Hospital along with her daughter Lindsay. Other than her evidence that she was in shock immediately after the Accident, she did not begin to experience other physical symptoms until some time later that day, when she was waiting for Lindsay to be discharged. Her symptoms included feeling some increase in lower back pain that evening and some intermittent mid back pain beginning the next day.
- [28] Ms. McColl saw Dr. Hui a few days after the Accident. She testified that at that time she felt pain in her middle to upper back and that her lower back pain was worse. She could not recall the specific treatment recommended by Dr. Hui but believes that he prescribed massage therapy and that she received four or five treatments.
- [29] Ms. McColl testified that she continued to see Dr. Hui after the Accident as her lower and mid back pain did not resolve. She testified that her mood was fine at first and then started to get progressively worse starting towards the end of 2015 or early 2016. It was around early 2016 that she did not want to leave the house or see people and began to suffer from anxiety.
- [30] In the fall of 2015 Ms. McColl experienced a number of stressful incidents including the death of a favourite uncle in October, 2015, the death of a close family pet, and the tragic death of her long term family doctor, Dr. Hui, in November 2015. As a result of the death of Dr. Hui, Ms. McColl had difficulty finding a new GP, and related to that, difficulty obtaining prescriptions for the high doses of opioids previously prescribed to her by Dr. Hui. She was required to attend at hospital emergency departments to obtain prescriptions for opioids before she found another family doctor, Dr. Zubek.
- [31] Ms. McColl testified that throughout 2016 her symptoms got progressively worse. She did not want to leave the house or to see people and was experiencing anxiety. She stopped driving. She testified that her symptoms did not improve in 2017. She continued to suffer from financial stresses. For example, in May 2017 her insurer terminated disability benefits and for a time her only monthly income came from WorksafeBC. Things did not improve in 2018 both in terms of her ongoing physical and psychological symptoms and her financial situation. She was eventually successful in obtaining CPP disability benefits. In 2018, because she had not returned to work, she was terminated from Costco and received a small severance payment. Her circumstances did not change in 2019.

Present Condition

- [32] Ms. McColl testified that at this time she still has difficulty leaving the house and does not want to see anyone. At the advice of her psychologist she has started to make some outings to reduce anxiety including, for example, going for walks or sitting in the car. She testified that her back is still about the same, although it seizes up and she has pain more often. She no longer holds a driver's licence and does not drive - although she has investigated renewing her driver's licence. When she drives with Gary Gregg or takes a cab she brings something to read to distract her from the road.

- [33] Ms. McColl testified that her relationship with her daughter Tera is nonexistent and she has not seen her grandchildren for several years.
- [34] Ms. McColl testified that Gary Gregg now does the shopping and he and Lindsay try to clean the house - although they do a poor job. Ms. McColl does minimal housework including trying to do the dishes and laundry, which she does slowly and with difficulty. She no longer cooks and they mainly eat food purchased at fast food restaurants or on occasion, Lindsay cooks.
- [35] At this time Ms. McColl has no plans to return to work.

Evidence of Medical Experts

Lower and Mid to Upper Back Injury

- [36] Ms. McColl called evidence from Dr. Koo who was qualified to provide evidence as an expert physiatrist at trial. Dr. Koo diagnosed Ms. McColl with soft tissue injuries to her neck and upper back that are chronic but intermittent and an aggravation of her pre-existing low back injury. He concluded that the Accident caused these injuries based on his assumption that Ms. McColl was unable to work afterwards.
- [37] In addition, Ms. McColl called evidence from her family Doctor since January of 2016, Dr. Zubek. Dr. Zubek was qualified to provide opinion evidence on, inter alia, family medicine, pain and addiction management. Dr. Zubek's opinion is that Ms. McColl has chronic lower back pain caused by her 2006 workplace injury, which had stabilized before the Accident and at that time was not limiting her life. In addition, Dr. Zubek's opinion is that Ms. McColl's upper back pain was caused by the Accident and that this pain impacted her ability to walk and lift.
- [38] Mr. Dushenko called evidence from Dr. Rickards who was qualified to provide evidence as an expert orthopaedic surgeon. His opinion was that Ms. McColl's on-going lower back pain resulted from her 2006 workplace injury and significant degenerative disc disease. He testified that in the absence of the Accident Ms. McColl's lower back pain would likely have increased over time as her disc continued to deteriorate. He did not provide a timeline for such deterioration. He did not consider the Accident to have contributed significantly to her lower back pain and considered that the complaints of intermittent mid back pain were not functionally limiting.
- [39] Finally, Mr. Dushenko called evidence from Robert Gander, an occupational therapist who completed a functional capacity examination of Ms. McColl. Robert Gander was qualified to provide evidence as an expert OT. Although he was unable to complete all of the functional tests intended as a result of Ms. McColl's cardiovascular risk factors, on the basis of the testing she did complete, his opinion is that Ms. McColl is physically able to work part time at Costco.

Depression, Anxiety, Agoraphobia and Opioid Use Disorder

- [40] Ms. McColl called evidence from Dr. Smith who was qualified to provide evidence as an expert forensic psychiatrist at trial. Dr. Smith diagnosed Ms. McColl with major depression of moderate severity, generalized anxiety disorder and agoraphobia.
- [41] In Dr. Smith's opinion, based in part on her assumption that Ms. McColl's psychological symptoms developed between late 2015 and 2016, is that these symptoms were caused or contributed to by the Accident. In her expert report she indicated that one of the basis for her finding that the Accident caused these symptoms was her conclusion that Dr. Hui's clinical records showed that Ms. McColl's symptoms of depression and anxiety were established by August 2015.
- [42] Dr. Smith agreed during her cross-examination that there were no notes in Dr. Hui's clinical records suggesting that Ms. McColl began to suffer from depression or anxiety immediately after the Accident. She agreed that these symptoms would usually build over time. She also agreed that from August 2015 until the time of his death in November 2015 that Dr. Hui did not record any such symptoms in his clinical notes.
- [43] Dr. Smith also agreed during her cross-examination that Ms. McColl's pre-Accident depression, resulting in two years off work, was significant and would make her more vulnerable to future stresses. She did not agree that despite Ms. McColl's pre-Accident history of depression that the stressors in the fall of 2015, unrelated to the Accident, could have caused or contributed to Ms. McColl's post-Accident depression.
- [44] Dr. Smith also acknowledged during her cross-examination that she was not aware of some complaints made by Ms. McColl prior to the Accident which were consistent with symptoms of agoraphobia. During cross-examination Dr. Smith was referred to complaints including the reference in Dr. Hui's clinical notes of frequent crying and self-isolation and in Dr. Jiwa's consultation report that Ms. McColl did not want to socialize or answer the telephone. Dr. Smith's evidence was that these symptoms could be indicative of agoraphobia or depression and that it is possible that these pre-Accident symptoms could have developed into agoraphobia, even if the Accident had never occurred.
- [45] Mr. Dushenko called evidence from Dr. Riar who was qualified to provide evidence as an expert psychiatrist. Dr. Riar diagnosed Ms. McColl with somatic symptom disorder (which used to be called chronic pain syndrome), depression and a generalized anxiety disorder. He concluded that Ms. McColl's driving anxiety was caused by the Accident but that the somatic symptom disorder, generalized anxiety disorder and depression were pre-existing and complicated by Ms. McColl's excessive opioid use.
- [46] Although she did not include a diagnosis of somatic symptom disorder in her first report, Dr. Smith agreed with Dr. Riar's conclusion that Ms. McColl likely suffered from this disorder prior to the Accident.

[47] Dr. Riar testified during his cross-examination that:

- a) he did not diagnose Ms. McColl with agoraphobia resulting from the Accident because in his view, she suffered from a generalized anxiety disorder, with comparable symptoms, before the Accident occurred;
- b) he agreed it appeared that Ms. McColl was functioning at home and at work prior to the Accident;
- c) he agreed that her back pain, depression and anxiety likely worsened after the Accident;
- d) in his opinion Ms. McColl's generalized anxiety disorder was likely debilitating but her agoraphobia was not;
- e) that in the absence of the Accident Ms. McColl may not have experienced an increase in the severity of her pre-existing depression and anxiety, but that he considered that her opioid use, and its potential to create problems in the future, may well have made these symptoms worse;
- f) that Ms. McColl's use of opioids satisfied the diagnostic criteria for opioid use disorder (this finding was not challenged by Dr. Smith); and that
- g) chronic use of opioids can cause anxiety and depression.

[48] Dr. Zubek testified that when Ms. McColl became her patient and she learned of her high opioid use (Ms. McColl's historical dosages had actually been significantly higher than Dr. Zubek thought they were at that time) that she began a process of reducing her intake of opioids. She agreed during her cross-examination that the quantity of opioids consumed by Ms. McColl prior to Dr. Hui's death suggested that her chronic lower back pain was not under control before the Accident. She also agreed during her cross-examination that before the Accident Ms. McColl was physically dependent on opioids and that she exhibited symptoms of opioid withdrawal on her first visit in January 2016.

[49] During cross-examination Dr. Zubek was unable to say whether if the Accident had never occurred, and given the reduction in Ms. McColl's opioid intake after Dr. Hui's death, Ms. McColl would be non-functional in the workplace now. She testified that in her experience similar patients have been able to function after a reduction in their opioid use by adding other drugs such as Cymbalta, Pristique or cannabinoids.

[50] In her expert report Dr. Zubek stated that she had no reason to believe that Ms. McColl would not have been able to continue to work if the Accident had not occurred. She did not provide a compelling evidentiary basis for this finding in her report or at trial. During her cross-examination Dr. Zubek confirmed that she had not seen the clinical records of Dr. Hui until after she completed her expert report and therefore it appears that she was not aware of Ms. McColl's pre-Accident symptoms of anxiety and depression.

- [51] During her cross-examination Dr. Zubek did not agree that but for the Accident, that Ms. McColl would likely have become unable to function at home or at work as a result of the reduction in her opioid dosages after Dr. Hui's death in late 2015. To a certain extent, this conflicts with the other evidence from Dr. Zubek on cross-examination that she could not say whether it was the Accident or a decrease in opioid dosages after the death of Dr. Hui that resulted in an increase in Ms. McColl's pain symptoms.
- [52] In Dr. Zubek's opinion, at this time the biggest problems Ms. McColl faces are her symptoms of agoraphobia and anxiety.

Causation

- [53] A plaintiff must establish on a balance of probabilities that the defendant's negligence caused or materially contributed to an injury. The defendant's negligence need not be the sole cause of the injury so long as it is part of the cause beyond the range of de minimus. Causation need not be determined by scientific precision: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at paras. 13-17 [*Athey*]; *Farrant v. Laktin*, 2011 BCCA 336 at para. 9.
- [54] The primary test for causation asks: but-for the defendant's negligence, would the plaintiff have suffered the injury? The "but-for" test recognizes that compensation for negligent conduct should only be made where a substantial connection between the injury and the defendant's conduct is present. A defendant is not liable for a plaintiff's injuries where they arise from events unconnected to the defendant: *Resurface Corp. v. Hanke*, 2007 SCC 7 at paras. 21-23.
- [55] In *Clements v. Clements*, 2012 SCC 32 at para. 9 the Supreme Court of Canada revisited the causation test. The Supreme Court affirmed the "but-for" causation test, which is a factual determination that is to be applied in a common sense fashion. There is no need for scientific evidence of the precise contribution the defendant's negligence made to the injuries sustained by the plaintiff.
- [56] Causation must be established on a balance of probabilities before damages are assessed. As McLachlin, C.J.C. stated in *Blackwater v. Plint*, 2005 SCC 58 at para. 78:

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

- [57] The most basic principle of tort law is that the plaintiff must be placed in the position he or she would have been if not for the defendant's negligence, no better or worse. Tortfeasors must take their victims as they find them, even if the plaintiff's injuries are more severe than they would be for a normal person. However, the defendant need not compensate a plaintiff for any debilitating effects of a pre-existing condition which the plaintiff would have experienced anyway: *Athey* at paras. 32-35.
- [58] There is no dispute that as a result of the Accident Ms. McColl sustained a soft tissue injury to her mid and upper back. I find this to be the case.
- [59] I accept the opinion Dr. Koo that the soft tissue injury to Ms. McColl's neck and mid and upper back are chronic but intermittent. I also accept the opinion of Dr. Rickards that Ms. McColl's complaints of intermittent mid back pain were not functionally limiting.
- [60] There is significant dispute between the parties as to whether the Accident caused a serious aggravation of Ms. McColl's pre-existing lower back pain symptoms. In my view the evidence does not establish that this is the case.
- [61] First, it is clear that Ms. McColl continued to experience significant and on-going back pain after her back surgery in 2007 and until the time of the Accident. I find that prior to the Accident her lower back was not getting better. This finding is supported by the evidence that she continued to consume high dosages of opioids prior to the Accident and afterwards, until Dr. Hui's death in late 2015. In addition, although Ms. McColl was working at Costco prior to the Accident in an accommodated position, the extent of her absenteeism from work prior to the Accident suggests that she continued to experience back pain.
- [62] In my view, given his experience and qualifications as an orthopaedic surgeon, Dr. Rickards opinion regarding the cause of Ms. McColl's lower back pain is deserving of more weight than the opinions of Dr. Koo or Dr. Zubek. I accept Dr. Rickard's opinion the Accident did not significantly contribute to Ms. McColl's pre-Accident lower back pain. I also accept Dr. Rickard's opinion that in the absence of the Accident Ms. McColl's lower back pain would likely have increased over time as her disc continued to deteriorate.
- [63] Ms. McColl's evidence, which has not been contradicted, is that she experienced some additional back pain symptoms immediately after the Accident. She saw Dr. Hui a few days afterwards because of her lower and mid/upper back pain and underwent a short course of massage therapy and continued to see him for this pain in the months which followed. There is insufficient evidence to allow me to conclude, on a balance of probabilities, that the Accident caused a serious aggravation of Ms. McColl's pre-Accident lower back pain. I find that as a result of the Accident Ms. McColl experienced a minor aggravation of the significant and ongoing lower back pain symptoms which was caused by her 2006 workplace injury.

- [64] Both Dr. Riar and Dr. Smith agree that Ms. McColl currently suffers from depression which became worse after the Accident. They disagree whether the Accident caused or contributed to her depression. For the reasons set out below I prefer the opinion of Dr. Riar and find on a balance of probabilities that Ms. McColl's depression was pre-existing and was not caused by the Accident. In addition, I am not satisfied on a balance of probabilities that the Accident exacerbated Ms. McColl's depression.
- [65] In my view Dr. Smith failed to adequately consider Ms. McColl's significant pre-Accident depression and related issues arising from her pre-existing somatic symptom disorder. In addition, Dr. Smith acknowledged during cross-examination that her opinion was based, at least in part, on a misinterpretation of the clinical records of Dr. Hui regarding a post-Accident on-set of depressive symptoms.
- [66] The evidence of Ms. McColl, which is corroborated by the evidence of Mr. Gregg, is that Ms. McColl's symptoms of anxiety and depression did not manifest until the later part of 2015 or early 2016 - some six months after the Accident. Prior to the manifestation of these symptoms Ms. McColl had experienced other stressors, which are unrelated to the Accident, including the death of her uncle and a beloved pet and difficulties obtaining prescriptions for opioids after the death of Dr. Hui. Given Ms. McColl's fragile psychological state prior to the Accident, I do not accept Dr. Smith's contention during cross-examination that these stressors could not have contributed to the onset of depression. In addition, I note Dr. Riar's opinion that chronic use of opioids (which in Ms. McColl's case occurred prior to and after the Accident) can cause anxiety and depression. This opinion was not challenged by either Dr. Smith or Dr. Zubek.
- [67] As I have stated above both Dr. Smith and Dr. Riar agree that Ms. McColl suffers from a generalized anxiety disorder which includes a specific anxiety preventing her from driving at this time. Dr. Riar considered that the diagnosis of agoraphobia made by Dr. Smith and Dr. Zubek essentially fell within the broader diagnosis of generalized anxiety disorder. It is not necessary for me to parse these specific diagnosis and I choose instead to evaluate the effect of the Accident on Ms. McColl's functioning and in particular her level of anxiety.
- [68] I note that prior to the Accident Ms. McColl was able to work at Costco, drive and to socialize with members of her family. All of these activities required a level of social interaction and her ability to carry them out is not consistent with a pre-existing, debilitating level of anxiety. Since the Accident Ms. McColl has been unable to carry out these type of work and social activities. Although I accept that it is likely that Ms. McColl was suffering from some anxiety symptoms prior to the Accident, certainly back in 2010 when she was referred to Dr. Jiwa and through until 2012 when she returned to work, they were not preventing her from carrying out the activities of daily life at the time of the Accident.

- [69] I am satisfied, on the evidence, that the Accident contributed towards an escalation of Ms. McColl's pre-existing symptoms of anxiety and has to date resulted in a specific driving anxiety, preventing her from driving or being a passenger in a vehicle driven by others without difficulty.
- [70] I am not satisfied, as Mr. Dushenko contends, that the reduction in the quantity of opioids prescribed to Ms. McColl after the death of Dr. Hui has resulted in on-going symptoms of anxiety and agoraphobia. I accept the evidence of Dr. Zubek, which in essence is that the initial reduction in the amount of opioids prescribed to Ms. McColl may have resulted in initial but not on-going withdrawal symptoms.
- [71] In summary, I find that as a result of the Accident Ms. McColl sustained injuries including a soft tissue injury to her mid/upper back, a mild exacerbation of pre-existing lower back pain symptoms and an exacerbation of pre-existing symptoms of anxiety resulting in increased social isolation and an inability to drive.

Non-Pecuniary Damages

- [72] Non-pecuniary damages are awarded to compensate the plaintiff for pain, suffering, loss of enjoyment of life and loss of amenities. The compensation awarded should be fair to all parties, and fairness is measured against awards made in comparable cases. Comparable cases, though helpful, serve only as a rough guide. Each case depends on its own unique facts: *Benavides v. Doe*, 2015 BCSC 1831 at para. 94; *aff'd by Benavides v. Insurance Corporation of British Columbia*, 2017 BCCA 15.
- [73] The effect of the injuries on a plaintiff's particular circumstances must be taken into consideration. Factors to be considered in assessing non-pecuniary damages include the age of the plaintiff, nature of the injury, severity and duration of pain, 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: *Stapley v. Hejslet*, 2006 BCCA 34, at para. 45 [Stapley].
- [74] In this case Ms. McColl's physical injuries include injury to her mid and upper back and a mild exacerbation of significant pre-existing lower back pain.
- [75] I do not find that Ms. McColl's accident related physical injuries and related symptoms to be severe. As I already stated the pain arising from the soft tissue injury to Ms. McColl's upper and mid back, although chronic pain, is intermittent and not functionally limiting. In addition, although Ms. McColl continues to suffer from severe lower back pain, the Accident did not result in a material increase in her pre-Accident level of this pain.
- [76] The most significant impacts of the Accident result from an increase in Ms. McColl's psychological symptoms - in particular anxiety. I find that as a result of increased symptoms of anxiety resulting from the Accident Ms. McColl no longer socializes in a meaningful way with her daughter Tera and her grandchildren. I do not accept that Ms. McColl's reduced

social interaction with her friends, results from the Accident. I do find that Ms. McColl's increased anxiety has impacted her ability to work at a job that she liked, due to her reluctance to leave the house and inability to drive, and that this has likely had an impact on her sense of self worth and general enjoyment of life.

- [77] I note that the prognosis of Dr. Riar with respect to Ms. McColl's depression and anxiety was guarded. The prognosis of Dr. Smith, which I accept, is that Ms. McColl is in a cycle of pain and psychiatric symptoms that feed each other, and that she is unlikely to recover significantly.
- [78] Ms. McColl seeks non-pecuniary damages of \$126,000, which includes a reduction of 10% to reflect the potential impacts on her well-being arising from her opioid use disorder. She cites a number of authorities in which the plaintiffs suffered similar accident related injuries and obtained non-pecuniary damages awards of between \$106,000 and \$150,000.
- [79] Mr. Dushenko submits that, taking into account Ms. McColl's pre-Accident symptoms, a non-pecuniary damages award of between \$90,000 and \$100,000 is appropriate.
- [80] Although I appreciate that Ms. McColl is having a very hard time, many of the difficulties she is currently facing do not arise from the Accident. In my view it is likely that Ms. McColl's pre-existing symptoms of depression, anxiety, severe lower back pain and opioid use disorder substantially contributed to the level of suffering and impairment to her work and social life that she experienced after the Accident. I have taken her pre-existing symptoms and opioid use disorder into consideration in assessing her non-pecuniary damages.
- [81] I do not consider it necessary to determine what percentage of Ms. McColl's current symptoms arise from pre-existing and Accident-related symptoms as was suggested by Mr. Dushenko. An assessment of non-pecuniary damages is simply that, an assessment, and not a mathematical calculation.
- [82] In all of the circumstances I consider that a fair and reasonable award for Ms. McColl's pain and suffering and her loss of enjoyment of life is \$97,500, which includes a \$7,500 award for loss of housekeeping capacity.
- [83] With respect to my award for loss of housekeeping capacity, this award is made as a result of my finding that Ms. McColl has a reduced ability to perform housekeeping tasks which has a negative impact on her quality of life. I consider that an award of \$7,500 is appropriate, based on a base award of \$15,000 minus a contingency deduction of 50% to reflect the potential that had the Accident not occurred, Ms. McColl may have become unable to perform these tasks at some point in the future.

Past Loss of Income Earning Capacity

- [84] Compensation for past and future loss of income earning capacity is to be based on what the plaintiff would have, not could have, earned but for the injury that was sustained: *Ibbitson v. Cooper*, 2012 BCCA 249 at para. 19; *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30 [Rowe]; *M.B. v. British Columbia*, 2003 SCC 53 at para. 49.
- [85] A claim for what is sometimes described as a claim for past income loss, 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 party would have performed but was unable to perform because of the injury. Loss of earning capacity rather than the loss of actual income is considered, although loss of income may provide some basis in determining the value of loss of capacity: *Mojahedi v. Friesen*, 2016 BCSC 1225 at para. 73 referring to *Rowe* at para. 30.
- [86] The burden of proof of actual past events is proof on a balance of probabilities. An assessment of loss of both past and future earning capacity involves consideration of hypothetical events. The plaintiff is not required to prove these hypothetical events on a balance of probabilities. The future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility that it would have occurred and not mere speculation: *Athey* at para. 27; *Morlan v. Barrett*, 2012 BCCA 66 at para. 38.
- [87] In *Grewal v. Naumann*, 2017 BCCA 158 the Court of Appeal summarized what constitutes a real and substantial possibility applicable to assessing loss of past and future income earning capacity:
- [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. The use of economic and statistical evidence does not turn the assessment into a calculation but can be a helpful tool in determining what is fair and reasonable in the circumstances: *Dunbar v. Mendez*, 2016 BCCA 211 at para. 21.
- [88] The amount of past or future income loss may be proven using the "earnings approach" or the "capital asset" approach. The former will be more useful when a loss is more easily measureable, for example where a plaintiff's income is not expected to fluctuate, up or down, over time. The latter is more useful when the loss is not easily measured: *Perren v. Lalari*, 2010 BCCA 140 at para. 32

- [89] There is no dispute that in this case the "capital asset" approach is preferable given that Ms. McColl's pre-Accident earnings were relatively stable and may have remained so in the future. It is possible to complete a calculation assuming that Ms. McColl would have continued working at Costco, up to 25 hours per week, earning approximately \$25 per hour.
- [90] Ms. McColl submitted the expert report of an economist, Darren Benning, whose opinion evidence I accepted at trial. In his calculation of the quantum of Ms. McColl's past wage loss Mr. Benning assumed that Ms. McColl would have continued to work at Costco, working twenty-five hours per week until the age of 67. In closing submissions counsel for Ms. McColl conceded that based on her pre-Accident work attendance record, that Ms. McColl was actually working an average of 20 hours per week. Further, counsel for Ms. McColl conceded that given there was no evidence adduced at trial with respect to Ms. McColl's retirement plans that it would not be unreasonable to assume that she would retire at 65.
- [91] Based on Mr. Benning's calculations, and assuming that if the Accident had not occurred Ms. McColl would have worked 20 hours per week, Ms. McColl submits that the value of her past wage loss from the date of the Accident to the date of trial is \$135,000 before deduction for contingencies. Ms. McColl submits that a further deduction of 20% from this amount is appropriate to reflect various negative contingencies including complications arising from her opioid use and her pre-existing injuries and related symptoms. In summary, she submits a fair award for past wage loss would be \$106,210.40.
- [92] Mr. Dushenko disputes that the Accident caused or contributed to Ms. McColl's income loss and says that her absences from work, at least after the death of Dr. Hui, was related to a combination of other stressors at that time which included the reduction in the dosages of opioids prescribed to her. In addition, Mr. Dushenko contends that there was a real and substantial possibility that if the Accident had not occurred Ms. McColl would likely not have worked after the death of Dr. Hui. On this basis Mr. Dushenko submits that a fair award for past wage loss is \$15,000.
- [93] With respect to Mr. Dushenko's first contention, I am satisfied, on a balance of probabilities, that the injuries sustained in the Accident caused Ms. McColl to stop working. There is no evidence contradicting her testimony that she began to experience low and upper and mid back pain right away and that the increasing pain symptoms prevented her from going to work. In addition, the evidence establishes that Ms. McColl's increased post-Accident anxiety symptoms which arose in either late 2015 or 2016, were contributed to by the Accident.
- [94] With respect to Mr. Dushenko's second contention, I do not find that there is sufficient evidence on which I can conclude that there is a real and substantial possibility that if the Accident had not occurred, Ms. McColl would have been completely unable to work at the time of, or even a few months after, the death of Dr. Hui. The evidence of Dr. Zubek is that although Ms. McColl was suffering from opioid withdrawal after the Accident, withdrawal symptoms generally resolve with time.

- [95] I am left considering the possibility that Ms. McColl's pre-Accident pain and psychological symptoms, coupled with the additional negative contingencies outlined above, would have had a negative impact on her earnings potential between the time of the Accident and trial.
- [96] To a certain extent, Ms. McColl's submission already takes into account the impact of her pre-Accident physical and psychological symptoms in that it includes a calculation based on a 20-hour work week, not based on her scheduled 25-hour work week. In addition, Ms. McColl's submission provides for a further 20% deduction for potential new negative contingencies.
- [97] I find that there is a real and substantial possibility that if the Accident had not occurred Ms. McColl would have experienced a further reduction in work capacity. This reduction would have arisen, in any case, as a result of the following: short to medium term opioid withdrawal impacts after her dosages were reduced when Dr. Hui died; new stressors on her life including the death of her uncle, pet and her daughter Lindsay's depression; and, a further increase in her pre-Accident pain and psychological symptoms. In my view an appropriate deduction for negative contingencies arising before trial is 30%.
- [98] I find that a reasonable assessment of Ms. McColl's past loss of income earning capacity, including a 30% deduction for contingencies, is \$93,000.

Loss of Future Income Earning Capacity

- [99] A claim for loss of future income earning capacity raises two key questions: 1) has the plaintiff's earning capacity been impaired by his or her injuries; and if so, 2) what compensation should be awarded for the resulting financial harm that will accrue over time. The assessment of loss must be based on the evidence, and not on an application of a purely mathematical calculation. The appropriate means of assessment will vary from case to case: *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 (S.C.); *Pallos v. Insurance Corp. of British Columbia* (1995), 100 B.C.L.R. (2d) 260 (C.A.); *Pett v. Pett*, 2009 BCCA 232.
- [100] The essential task of the Court is to compare the likely future of the plaintiff's working life if the accident had not happened with the plaintiff's likely future working life after the accident: *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 32.
- [101] In assessing an award for past and future loss of earning capacity, allowances should be made, the award must be fair and reasonable taking into account all of the circumstances: *Falati v. Smith*, 2010 BCSC 465, at para. 41, *aff'd* at 2011 BCCA 45.
- [102] Ms. McColl contends that as a result of the injuries sustained in the Accident that she went from a woman who was able to work, albeit in a reduced capacity, to one rendered totally and permanently disabled from all forms of employment. As a result, Ms. McColl seeks an award for future loss of income earning capacity from the date of trial. Again relying on the calculations completed by Mr. Benning, she submits that assuming Ms. McColl would likely have continued to work at Costco, 20 hours per week until the age of 65 and therefore her

gross wage loss, before deductions would be \$266,330. Ms. McColl seeks, after a deduction for contingencies, an award for future loss of income earning capacity of \$233,039.

- [103] Mr. Dushenko contends that Ms. McColl's case is complicated by her pre-existing disabilities and a corresponding likelihood that absent the Accident, she would likely have become unable to continue working at the same level. He says that additional relevant evidence includes her increasing use of opioids and her increasing pattern of absenteeism from work. He submits that in these circumstances Ms. McColl has not proven a real and substantial possibility that she will suffer an income loss in the future as a result of injuries she sustained in the Accident and therefore no award for future loss of income earning capacity should be made. In the alternative, he submits that if the court finds that there is a real and substantial possibility of income loss resulting from the Accident related injuries and symptoms, that this head of damages should be set at \$66,000 assuming that Ms. McColl would have worked for two years after trial - that is until age 57.
- [104] I am satisfied based on the evidence of Drs. Zubek, Smith and Koo that Ms. McColl will likely not work again. Although Dr. Riar considered that with additional therapy Ms. McColl's psychological symptoms may improve even he considered her prognosis to be guarded.
- [105] I am also satisfied that absent the Accident there is a real and substantial possibility that Ms. McColl would have continued to work at Costco 20 hours per week until age 65. The evidence establishes she liked her job and was before the Accident capable of performing her light-duties work. Based on the evidence of Ms. McColl and Mr. Ayton I am not satisfied that Ms. McColl was at risk of losing her job as a result of her absences from work.
- [106] I am also satisfied that there is a real and substantial possibility that absent the Accident, as a result of her pre-existing symptoms and in particular her significant on-going lower back pain, the potential for further degeneration of her disc and increased pain and potential complications arising from opioid use disorder, including increased symptoms of depression and anxiety, that Ms. McColl would not have been able to work as much or for as long as she wished.
- [107] In my view a deduction of 50% (from an estimated base of \$266,330) for post-trial contingencies is appropriate. This results in an award for future loss of income earning capacity of \$133,000, which I find is fair and reasonable in all of the circumstances.

Costs of Future Care

- [108] A plaintiff is entitled to compensation for the cost of future care based on what is reasonably necessary to restore her to her pre-accident condition in so far as that is possible. When full restoration cannot be achieved, the court must strive to assure full compensation through the provision of adequate future care. The award is to be based on what is reasonably necessary on the medical evidence to preserve and promote the plaintiff's mental and physical health: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.)

[Milina]; Williams v. Low, 2000 BCSC 345; Spehar v. Beazley, 2002 BCSC 1104; Gignac v. Insurance Corporation of British Columbia, 2012 BCCA 351 at paras. 29-30.

- [109] The test for determining the appropriate award under the heading of cost of future care is an objective one based on medical evidence. For an award of future care: (1) there must be a medical justification for claims for cost of future care and (2) the claims must be reasonable: Milina at 84; Tsalamandris v. McLeod, 2012 BCCA 239 at paras. 62-63.
- [110] Future care costs are "justified" if they are both medically necessary and likely to be incurred by the plaintiff. The award of damages is thus a matter of prediction as to what will happen in the future. If a plaintiff has not used a particular item or service in the past it may be inappropriate to include its cost in a future care award. However, if the evidence shows that previously rejected services will not be rejected in the future, the plaintiff can recover for such services: Izony v. Weidlich, 2006 BCSC 1315 at para. 74; O'Connell v. Yung, 2012 BCCA 57 at paras. 55, 60, & 68-70.
- [111] The extent, if any, to which a future care costs award should be adjusted for contingencies depends on the specific care needs of the plaintiff. In some cases, negative contingencies are offset by positive contingencies and, therefore, a contingency adjustment is not required. In other cases, however, the award is reduced based on the prospect of improvement in the plaintiff's condition or increased based on the prospect that additional care will be required. Each case falls to be determined on its particular facts: Gilbert v. Bottle, 2011 BCSC 1389 at para. 253.
- [112] An assessment of damages for cost of future care is not a precise accounting exercise: Krangle (Guardian ad litem of) v. Brisco, 2002 SCC 9 at para. 21.
- [113] Ms. McColl tendered the expert report of Mr. Benning on the net present value of the cost of care recommendations summarized by an Occupational Therapist, Ms. Waitham. I accepted the opinion evidence of both Mr. Benning and Ms. Waitham at trial.
- [114] Ms. McColl seeks, and Mr. Dushenko does not challenge, an award for the costs of obtaining the following: treatment from an occupational therapist; completion of a driver rehabilitation program; and an exercise program. In total Ms. McColl seeks an award for these costs in the amount of \$14,271. I find that these future costs are both medically justified and reasonable and award the amount claimed.
- [115] Ms. McColl seeks an award for the cost of obtaining antidepressants, Pristiq and Wellbutrin, going forward in the total amount of \$25,570. Mr. Dushenko submits that given Ms. McColl's history of severe depression it is likely that these medications would have been required in any case and therefore the amount claimed award should be substantially discounted.
- [116] As I have found that Ms. McColl's depression was pre-existing and was not caused by the Accident I do not consider that an award for the cost of obtaining antidepressant medications is appropriate.

- [117] Ms. McColl seeks an award for the cost of participating in an interdisciplinary pain program, including transportation to and from this program, in the total amount of \$26,139. Mr. Dushenko submits that it is unlikely that Ms. McColl will participate in a pain program in the future, given that she declined to participate in such a program in the past. He says that no award for these future care costs should be made.
- [118] As I have found above, Ms. McColl experiences intermittent, but chronic mid and upper back pain which results from the Accident. Also, as I found above, the Accident resulted in a minor increase to Ms. McColl's pre-existing lower back pain. Given that the Accident had a relatively minor impact on Ms. McColl's pain symptoms and the potential that she will not participate in an interdisciplinary pain program I assess her damages for these future costs at \$6,500.
- [119] Ms. McColl seeks an award for the cost of obtaining initial, on-going counselling from a psychologist, including transportation costs to and from counselling sessions, in the total amount of \$9,737.
- [120] I find that the costs of psychological treatment are both medically justified and reasonable. Although it is difficult to determine what portion of these costs are attributable to Accident related injuries and symptoms I assume that 50% of these costs can be traced to an increase in psychological symptoms resulting from the Accident. Accordingly, I find that an award of \$4,900 for these costs is appropriate.
- [121] Ms. McColl seeks an award for the cost of obtaining initial, on-going and ongoing seasonal housekeeping services in the total amount of \$63,335. I am not satisfied on the evidence that Ms. McColl will likely incur the cost of obtaining housekeeping services. At this time although her capability has been reduced she does perform some household tasks. Other tasks, which it is arguable Ms. McColl may be able to perform with difficulty, are being carried out by her family. In my view the claim advanced is not medically justified, is unreasonably high and is better dealt with under the non-pecuniary damages - as I have already done.
- [122] In summary, I assess Ms. McColl's damages for costs of future care in the amount of \$25,700.

Special Damages

- [123] The parties have agreed to special damages in the amount of \$7,239.49 and I award this amount.

Conclusion

- [124] I award damages to Ms. McColl for the injuries she sustained in the Accident as follows:

Non-pecuniary damages

\$ 97,500

Past loss of income earning capacity

\$ 93,000

Lost of future income earning capacity

\$ 133,300

Cost of future care

\$ 25,700

Special damages

\$ 7,235.49

TOTAL

\$356,735.49

[125] Ms. McColl is entitled to interest pursuant to the Court Order Interest Act, R.S.B.C. 1996, c. 79.

Costs

[126] Subject to any submissions the parties wish to make, Ms. McColl is entitled to her costs of the action at Scale B.

"Mayer J."

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