

CANADA / JUDGMENT

McCully v. Moss

2019 BCSC 81

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2019 BCSC 81 McCully v. Moss

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

McCully v. Moss,

2019 BCSC 81

Date: 20190124

Docket: M78592

Registry: Nanaimo

Between:

Catherine Mary McCully

Plaintiff

And

Lloyd Ralph Moss, Mildred May Moss

and Gary Edward Connor

Defendants

- and -

Docket: M78591

Registry: Nanaimo

Between:

Catherine Mary McCully

Plaintiff

And

Linda Bell

Defendant

Before: The Honourable Madam Justice Devlin

Reasons for Judgment

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No Appearance

Place and Date of Trial/Hearing:

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Nanaimo, B.C.

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I. INTRODUCTION

- [1] The plaintiff, Catherine Mary McCully, claims damages for injuries she sustained as a result of two motor vehicle accidents, the first which occurred on July 9, 2014 and the second which occurred on November 25, 2014.
- [2] Liability is admitted for both accidents. The issue at trial is the assessment and quantification of damages. Ms. McCully is seeking non-pecuniary damages, as well as compensation for loss of past and future earning capacity, loss of housekeeping capacity, costs of future care and special damages.
- [3] The defendants acknowledge that Ms. McCully suffered soft tissue injury from the accidents. However, they disagree about the nature, extent and impact of her injuries. They concede that Ms. McCully is entitled to some damages but primarily challenged the claims for past and future earning capacity and costs of future care.

II. BACKGROUND FACTS

Ms. McCully's Circumstances before the Accidents

- [4] Ms. McCully is 66 years-old. At the time of the first motor vehicle accident of July 9, 2014 (the "first accident"), she was 61 years-old. She was 62 years-old at the time of the November 24, 2014, accident (the "second accident", together the "accidents"). She currently lives alone in her residence in Nanaimo, BC.
- [5] Ms. McCully has two adult children who live in Sayward and in Edmonton. She is a grandmother of four grandchildren and a great-grandmother to two great-grandchildren.
- [6] Ms. McCully is a trained esthetician. In 1998 she enrolled in an esthetics course in Duncan, BC and after completion of that course she opened her own esthetic business called Beautiful Beginnings Esthetics ("Beautiful Beginnings"). Prior to training to become an esthetician she has worked in a number of different occupations throughout her life.
- [7] When she began Beautiful Beginnings, Ms. McCully worked out of her hairdresser's premises but in 2000, after she purchased her residence in Nanaimo, she relocated her business to the residence where it continues to this day. In order to accommodate her business in her residence, Ms. McCully performed substantial renovations the majority of which she did on her own. She built a "shop" area in the basement of her residence for her business and in another section of the basement she created a rental suite. Over the years, Ms. McCully continued to perform renovations on her house including doing tile work, painting and other physically demanding tasks. Ms. McCully performed much of the maintenance for her home and business including both in the residence and shop area. Other than hiring people to clean her gutters and trim the high trees, she did all her own yard maintenance including mowing the lawn, trimming bushes and gardening. In order to provide parking spots for her clients she undertook the physical task of digging up the lawn to create the spots.
- [8] Ms. McCully testified she had no immediate plans to retire, although the evidence reveals that she did have some discussions with her niece, Lisa Ogden, about assuming the business at some point but nothing specific was planned. Two years before the accidents, she chose to reduce her work week from approximately five days per week working eight to ten hours per day and the occasional weekend down to four days per week (Monday, Tuesday, Thursday, Friday) in order to make more time for her grandchildren, friends and travel. At the time of the accident she also worked Thursday evenings at the Edgewood Adult Treatment Centre providing esthetic services.
- [9] Ms. McCully was an avid bridge player, engaging in the game approximately three days per week in addition to participating in various bridge tournaments which took place on the weekends. I heard evidence from her friend and fellow bridge player Ms. Krepps, that Ms. McCully was one of the better players. Participating in bridge games was Ms. McCully's main social activity.

- [10] Ms. McCully also enjoyed walking, playing golf occasionally, socializing with her friends and spending time with her grandchildren and great-grandchildren.
- [11] Before the accidents, Ms. McCully had approximately \$10,000 in RRSPs but she did not have any other savings. She began to collect CPP when she turned 60 years-old and since August 24, 2017, and after having turned 65 years of age she began to collect Old Age Pension. She does not have a mortgage on her home. However, she loaned a sum of money to her daughter from her line of credit. This debt is secured against the title of the property and her daughter is responsible for paying it.
- [12] Ms. McCully enjoyed good health before the accidents despite having bladder surgery in 2012 which she recovered from quickly. She acknowledged that she would have the occasional stiff neck and shoulders from leaning over all day at work and did periodically attend a chiropractor, which provided her relief. She testified she had no headaches prior to the accidents and neither drank nor smoked.

The Accidents

(i) The July 9, 2014 Accident

- [13] On the morning of July 9, 2014, Ms. McCully was on her way to a fabric store to purchase fabric to recover two chairs. As she was stopped behind other cars at a red light at the intersection of Turner Road and Old Island Highway she observed in her rear view mirror a truck coming towards her at what seemed to be a fast speed. Ms. McCully testified the truck "smoked me into the pickup truck in front of me" and she heard a big "crunch". The driver of the truck that rear-ended was Mr. Moss and Ms. Moss was the registered owner. Upon impact Ms. McCully recalled that the glasses she wore on top of her head flew into the back seat and the driver from the car in front came back to check to see if she was all right. Details as to what followed immediately after the impact remain unclear. Ms. McCully was taken to Nanaimo Regional General Hospital where she was examined, x-rayed and discharged. She testified her left knee, her left elbow and head hurt.
- [14] Counsel tendered photographs of Ms. McCully's vehicle at trial. The damage to the vehicle was extensive and beyond repair. Ms. McCully received \$13,000 in compensation for her vehicle.

(ii) The November 25, 2014 Accident

- [15] On November 25, 2014, as Ms. McCully was stopped at a stop sign in the parking lot of the Country Club Mall her car was hit on the side by defendant Ms. Bell who was backing out of a parking spot. This was a minor accident which resulted in minimal damage to Ms. McCully's vehicle. Ms. McCully did not require medical attention and does not know if the second accident aggravated the injuries she sustained in the first accident.

Ms. McCully's Circumstances after the Accidents

- [16] Ms. McCully testified that immediately after the fist accident she suffered from a stiff neck, particularly on the left side, and constant headaches. Her sore knee and arm quickly resolved but the neck pain and headaches persist.
- [17] Ms. McCully was not able to provide much detail regarding the months immediately following the accident due to a "foggy" memory. She did recall purchasing black out curtains for her bedroom to block out the light as it triggered her headaches. She testified she spent a great deal of time laying flat and still and was not sure if she was working. She was not able to play bridge or attend to her yard work.
- [18] Ms. McCully did recall attending physiotherapy on the recommendation of her family physician but she did not find that the treatment improved her situation. She continues to do the stretches and exercises recommended. She also attended chiropractor sessions which did result in some benefits. She also has massage treatments but her last massage treatment was in 2017 and since that time she has used a TENS machine to manage her pain. Ms. McCully testified that she uses the TENS machine about twice a week or ten times a month depending on her level of pain depending on what she has done during her work day. Ms. McCully testified that the TENS machine is effective in managing her pain. Ms. Higgins, one of the civilian witnesses also testified that she has observed Ms. McCully frequently using the TENS machine. Ms. McCully was also prescribed the pain killer Tramadol which she continues to take to deal with her discomfort.
- [19] Ms. McCully testified that she could not recall if she was working immediately after the accident. In her examination for discovery she indicated that no one had worked with her since the first accident but after discussing the examination for discovery with her niece Lisa Ogden, she realized Ms. Ogden did come to assist her. Ms. Ogden testified that between August 2, 2014, and March 11, 2015, she lived with Ms. McCully and provided the esthetic services. Ms. Ogden said she split the proceeds of her work in a proportion of 60/40 with Ms. McCully; however records of the exact sums did not exist. Ms. McCully testified she started to return to work in December 2014, but not on a full-time basis. She testified that she often had to stop in the midst of providing a service to take medication for the pain. Ms. McCully testified that after Ms. Ogden left in March 2015, she resumed providing services three days per week for an average of three to five hours per day. She no longer held the contract for Thursday evening services at the Edgewater Treatment Center. Unfortunately, Ms. McCully did not keep any books or records for her business. All of her evidence on this point is based on her memory which she admits is "foggy" for the months following the accident. As will be discussed later in these reasons, Ms. McCully relied on her best "guesstimate" as to how much income her business generated.
- [20] I note that although Ms. McCully testified she was essentially immobile during the first few months after the accident, she was able to go on a pre-arranged cruise with her sister to Hawaii in September 2014 and was certainly able to drive her car in November 2014 at the

time of the second accident. Indeed, since the accident, Ms. McCully has been on several extended trips: a 2016 trip to New Orleans; in 2017 a 53 day "epic journey" consisting of two flights and four cruises taking her from Florida to Bermuda, Rome to Russia, Tokyo and back to Vancouver and a 38 day European cruise in April 2018. Ms. McCully testified she decided to use her \$10,000 RRSP to travel after the accident because she realized how quickly life could change. Ms. McCully testified that her pain and discomfort were significantly reduced during these extended trips. This is perhaps understandable as she was away from work and did not need to engage in repetitive movements associated with providing esthetic services.

- [21] Ms. McCully also testified that immediately after the accidents she was unable to perform the usual household chores she had prior to the accidents and was dependant on family members to cook, clean and generally maintain the household. Her niece Ms. Ogden assisted her at first and eventually her nephew Brian Carlo moved into the residence. In exchange for his assistance around the house, Ms. McCully did not charge him rent. Mr. Carlo's girlfriend Ms. Higgins testified at trial and described the type of assistance she and Mr. Carlow continue to provide to Ms. McCully. Over time, Ms. McCully's condition has improved and she has resumed performing some household chores and has even done some painting and pressure washing although she continues to have discomfort and is often assisted by her nephew and Ms. Higgins.
- [22] Immediately after the accidents, Ms. McCully was unable to play bridge. However, she has now resumed playing bridge and even attended weekend tournaments although she testified that she takes Tramadol to deal with the pain. Ms. Krepps testified that while Ms. McCully has resumed playing bridge she is not as good as she once was.
- [23] In addition to hearing from Ms. Krepps, I also heard from Ms. Mailbach who is another long-time friend of Ms. McCully. I also heard from her niece Ms. Ogden and from Ms. Higgins. Other than Ms. Higgins, all these civilian witnesses were able to describe the changes Ms. McCully experienced since the accidents. Ms. Ogden, Ms. Krepps and Ms. Mailbach all agree that Ms. McCully's condition has improved since the period immediately following the accident although she is not as active or social as she once was. Ms. Higgins' evidence was of limited assistance as she only met Ms. McCully after the accidents but her evidence did align with that of the other civilians' regarding certain limitations on Ms. McCully's activities. I have no reason to disbelieve the evidence of these four civilian witnesses; however, I am left with the impression that their description of Ms. McCully's present condition was influenced by the sympathy and genuine concern they have over her well-being.

III. EXPERT EVIDENCE

- [24] Ms. McCully tendered the expert reports of Dr. Gordon Robinson, a neurologist, and Ms. Mair Edwards, an occupational therapist, and they were both cross-examined. The expert reports of Dr. Jonathan Hawkeswood, a physiatrist, and Mr. Darren Benning, an economist, were admitted on consent without the necessity of cross-examination.
- [25] The defendants tendered the expert reports of Dr. George Medvedev, a neurologist, and Mr. Timothy Winter, an occupational therapist. Both were cross-examined.
- [26] I will detail the key findings and opinions of the medical experts in this section and deal with the other experts later in these reasons.

Dr. Gordon Robinson

- [27] Dr. Robinson is a neurologist and was qualified to provide expert opinion evidence in the diagnosis and treatment of headaches.
- [28] Dr. Robinson bases his opinion on a single assessment of Ms. McCully which took place on January 25, 2018, as well as on his review of the clinical records regarding both her pre- and post- accident events.
- [29] Dr. Robinson opined that Ms. McCully sustained a soft tissue injury to her neck and shoulders as a result of the first accident and the second accident did not result in any change in her condition. Dr. Robinson diagnosed Ms. McCully with persistent posttraumatic headache which is related to "whiplash injury". He also noted that cervical x-ray and CT imaging have shown degenerative changes in her cervical spine which predates the accidents and in his opinion is probably asymptomatic. However, he also stated that her underlying cervical spine condition may make her "at risk for more prolonged recovery from her neck injury."
- [30] In his report, Dr. Robinson explained the difficulties treating chronic headache as follows:
- The treatment of chronic headache related to head and neck trauma is usually difficult. Research is limited despite the frequency and burden of these injuries to individuals and society. As yet there is no physical therapy that has been found to be curative. At most patients will experience temporary benefit and on occasion the headaches may be more severe following such therapy.
- [31] Dr. Robinson recommends that Ms. McCully maintain an active lifestyle stating "[r]egular exercise directed to improving general fitness may increase the sense of well-being and ability to cope with pain." He also acknowledges that Ms. McCully reported to have experienced temporary benefit with massage and chiropractic treatments.
- [32] With respect to medications, Dr. Robinson states "[m]edications are often unhelpful in treating chronic posttraumatic headache." With respect to Ms. McCully, Dr. Robinson did not make any recommendations regarding medications but did recommend that she continue to use the TENS machine as it will probably benefit her indefinitely.

- [33] In his report, Dr. Robinson stated that Ms. McCully had chosen to continue to work part-time despite the improvements in her condition. During his testimony he clarified that Ms. McCully could increase her work hours, but if she did, it would result in discomfort and pain by the end of her workday.
- [34] Dr. Robinson also explained that the assessment of headaches, which include diagnosis and impact, can only be determined by self-report.

Dr. Jonathan Hawkeswood

- [35] Dr. Hawkeswood is a physiatrist who examined Ms. McCully on June 4, 2018, and provided an expert report which was filed as an exhibit at trial by consent. Dr. Hawkeswood did not testify at trial.
- [36] Dr. Hawkeswood based his opinion on his single assessment of Ms. McCully as well as on a review of the clinical records regarding both her pre- and post- accident events. As with Dr. Robinson, Dr. Hawkeswood also relied on Ms. McCully's subjective reports.
- [37] Dr. Hawkeswood's report states that from his review of the clinical records, including those from Atlas Chiropractic and the history provided to him by Ms. McCully, she had consistent neck pain predating the accident which he also described as "aches and pains". Although, I note that Ms. McCully denies she mentioned neck pain to Dr. Hawkeswood, I consider this as an example of her poor memory. Dr. Hawkeswood opines that Ms. McCully's current neck pain "represents a substantial worsening of a pre-morbid condition". However, he also notes that the Atlas Chiropractic records make no mention of any headaches; this is consistent with Ms. McCully's self-report.
- [38] Dr. Hawkeswood concludes that Ms. McCully's headaches were triggered by the first accident. If Ms. McCully did suffer from a concussion following the first accident, which was not Dr. Robinson's view, she has recovered. Dr. Hawkeswood deferred to Dr. Robinson with respect to the finding on Ms. McCully's headaches.
- [39] Dr. Hawkeswood also recommended that Ms. McCully maintain an active-lifestyle. While recommending an activity-based routine consisting of stretches, stability exercises and non-impact aerobic activity such as swimming for most days of the week, he suggested this should be done in a gradual and cautious manner. Dr. Hawkeswood also recommended 10-15 sessions with a kinesiologist to assist with implementation of the exercise program. In addition, he states "[o]ngoing, occasional access to allied health treatments would be reasonable" however his report did not provide any explanation as to what he meant by reference to "allied health treatments".
- [40] Dr. Hawkeswood had no recommendations for medications other than those already listed in her records. He concurs with Dr. Robinson's opinion that the continued use of the TENS machine is reasonable.

- [41] While Dr. Hawkeswood states that Ms. McCully may experience a reduction in neck pain and frequency of headaches if she follows his recommended treatment plan, his prognosis for her condition is that "a complete recovery from the first subject accident has a low probability". He also states that he "expects that she will continue to experience more neck pain than she did prior to the first MVA on an ongoing and indefinite basis".
- [42] In terms of Ms. McCully's functional prognosis, Dr. Hawkeswood noted there were no specific self-care limitations but did identify some activity which may aggravate her condition. Specifically he stated:

Heavier household chores such as carrying laundry, vacuuming etc., are likely to aggravate Ms. McCully's neck pains, especially with lengthy periods of exertion, although not contra-indicated in absolute terms.

- [43] Dr. Hawkeswood also stated Ms. McCully should avoid overhead work which involves prolonged neck extension as well as golf. However, with respect to other physical and social activities he states:

I encourage Ms. McCully to engage in bridge and other physical activities that promote physical wellness and are unlikely to worsen her physical condition. The same applies for social activities.

- [44] With respect to her employment, Dr. Hawkeswood opines that he doubts that Ms. McCully will ever return to full-time employment but he recommends that she consider working Monday/Tuesday and a Thursday/Friday schedule instead of working for three days in a row. He further opines that her current neck pain "probably represents a permanent partial impairment from full-time employment in the setting of esthetics work. Furthermore, a return to any moderate or heavy-duty labour is likely to be poorly tolerated". Finally, with respect to her retirement, Dr. Hawkeswood concludes that Ms. McCully will likely retire earlier than would otherwise be expected.
- [45] I note that while Ms. McCully testified that two years prior to the accidents she reduced her work from five days to four, Dr. Hawkeswood's reference to full-time work does not detract from the weight of his opinion, contrary to what the defendants' counsel suggests. According to his report, Ms. McCully stated she was working 40 hours per week prior to the first accident. As stated earlier, this is simply another example of Ms. McCully's lack of precision when recounting details related to her employment. It was clear from his report that Dr. Hawkeswood understood that Ms. McCully had reduced her hours post-accident.

Dr. George Medvedev

- [46] Dr. Medvedev is a neurologist who provided an expert opinion report on behalf of the defendants and he was cross-examined at trial.

[47] Dr. Medvedev bases his opinion on a single assessment of Ms. McCully on June 28, 2018, as well as on a review of the clinical records regarding both pre- and post- accident events. Based on his review of the records, Dr. Medvedev concluded that Ms. McCully had no history of "neurological conditions, specifically no history of headaches or significant documented neck pain".

[48] Dr. Medvedev agreed with both Dr. Robinson and Dr. Hawkeswood that Ms. McCully's current symptoms are "related to soft tissue-related pain in the neck - myofascial pain". He also agrees that the headaches are "likely cervicogenic in nature" although he could not exclude a component of tension headache. As with Dr. Hawkeswood he was of the opinion that Ms. McCully likely had a concussion following the first accident but opines that she has since recovered.

[49] With respect to Ms. McCully's neck pain, Dr. Medvedev opines as follows:

I believe that the active complaints of headaches are related to her neck more than to the events of the motor vehicle accident directly. Identified fairly extensive changes of spondylosis and arthritis in the neck could be the main sources of her symptoms, and it is likely that even without the accident she would eventually be in a similar degree of discomfort. It is possible that the accident accelerated the development of such symptoms and led to their aggravation.

[50] In cross-examination, Dr. Medvedev clarified the above-noted statement by explaining that such changes could manifest when she was 80 or 90 years' old and acknowledged that the degree of change that occurred in Ms. McCully's neck was greater than he expected. He also acknowledged that people with degenerative changes can remain asymptomatic and one does not suddenly experience neck pain. Further, this portion of his opinion is based solely on his review of the x-ray and CT findings and there was nothing in Ms. McCully's history to support his opinion.

[51] Dr. Medvedev acknowledged that the accidents did contribute to Ms. McCully's chronic condition and his prognosis is as follows:

It is impossible to disentangle her neck pain and headaches from identified changes of spondylosis and arthrosis in her neck. It is likely that even if not for the accident she would be experiencing a degree of such discomfort in any case, and therefore it is likely that her symptoms are to continue into the future.

[52] In cross-examination Dr. Medvedev acknowledged that Ms. McCully has chronic neck pain and that chronic neck pain and headaches can be physically limiting and affect one's ability to work. Dr. Medvedev provided no recommendations for future treatment.

- [53] In summary, the medical experts concur that Ms. McCully developed chronic neck pain and headaches as a result of the accidents. While Dr. Medvedev's report suggests that Ms. McCully would have developed this problem in any event, in cross-examination he essentially came to the same conclusion of Dr. Robinson who found that Ms. McCully was asymptomatic at the time of the accident.

Adverse Inference - Failure to call Dr. Olivier, Family Physician

- [54] The defendants urge me to draw an adverse inference with respect to Ms. McCully's failure to call her family doctor, a general practitioner Dr. Olivier who was the treating practitioner for Ms. McCully before and after the subject accidents. The defendants submit that Dr. Olivier filled out a "CL19 - Medical Report" which was admitted into evidence on consent (Exhibit 2, Tab 1). The report indicates that Ms. McCully had chronic neck pain and a chiropractor referral before the accidents. The defence submits that Ms. McCully's failure to call Dr. Olivier as a witness who may be described as "best evidence" or superior evidence in relation to the contested fact of whether she did suffer pre-accident chronic neck pain, gives rise to an adverse inference that his evidence would have been inimical to her position, namely that she did suffer pre-existing neck pain.
- [55] In support of their submission, the defence relies on *Andrews v. Mainster*, 2014 BCSC 541 [Andrews], and *Mohamud v. Yu*, 2016 BCSC 1138 [Mohamud].
- [56] The plaintiff replies that the defendants received her clinical records which dated back to four years before the first accident and had ample time to investigate those records, and had the ability to request a report from Dr. Olivier. Additionally, she argues that the defendants could have examined Dr. Olivier before trial, they could have requested him to appear for cross-examination once they learned that the CL-19 Medical Report would be tendered into evidence. Finally, she suggests that the defendants were at liberty to subpoena Dr. Olivier for trial.
- [57] In support of her arguments, Ms. McCully cites two decisions as examples of where the courts have refrained from drawing adverse inferences: *Kallstrom v. Yip*, 2016 BCSC 829 [Kallstrom]; and *Thomasson v. Moeller*, 2016 BCCA 14 [Thomasson].

The Legal Principles

- [58] In *Andrews*, the Court states succinctly at para. 175: "Generally, an adverse interest cannot be fairly drawn except from the failure to call witnesses whose testimony would be superior to the evidence already adduced in respect of the fact to be proved", citing *Buksh v. Miles*, 2008 BCCA 318.

- [59] The factors that inform whether it is appropriate to draw an adverse inference from the failure of a party to call a witness include consideration of: the evidence before the court; explanations the non-calling party offers for not calling the witness; the nature of the evidence that the witness could have offered; the extent of disclosure of the physician's clinical notes; and the circumstances of the trial (Andrews at para. 176; Mohamud at para. 36).
- [60] A judge is not bound to draw an adverse inference from the failure of a party to call a witness: Thomasson at para. 34.
- [61] As Mr. Justice Voith succinctly noted at para. 149 of *Zawadzki v. Calimoso*, 2011 BCSC 45:
- [149] An adverse inference may be drawn against a party if, without sufficient explanation, that party fails to call a witness who might be expected to provide important supporting evidence if their case was sound: *Jones v. Trudel*, 2000 BCCA 298 (B.C. C.A.) at para. 32. The inference is not to be drawn if the witness is equally available to both parties and unless a prima facie case is established: *Cranewood Financial Corp. v. Norisawa*, 2001 BCSC 1126 (B.C. S.C.) at para. 127; *Lambert v. Quinn* (1994), 110 D.L.R. (4th) 284 (Ont. C.A.), at 287.

Discussion

- [62] The bare fact that Ms. McCully did not call Dr. Olivier does not on its own justify the drawing of an adverse inference from her failure to call him as a witness. The CL-19 Medical Report is in evidence which the defendants received and agreed to tender at trial. There is no property in a witness and it was clear that the defendants had ample opportunity to choose to call Dr. Olivier if they so wished. They did not do so. It is their onus to show Ms. McCully's pre-existing injuries in support of their position. Mr. Justice Kent in *Kallstrom* declined to draw an adverse inference against the plaintiff since the defendants were well aware even before trial of which witnesses the plaintiff intended to call and there was no indication why they could not themselves call that witness. For substantially the same reasons, I decline to draw an adverse inference against Ms. McCully.

IV. CREDIBILITY AND RELIABILITY

The Legal Principles

- [63] The Court must carefully assess the credibility and reliability of the testimonial evidence in order to find the facts. In this case this involves a careful consideration of the trustworthiness of Ms. McCully's testimony, based on the veracity and sincerity of the witness and the accuracy of the evidence she provides: *Bradshaw v. Stenner*, 2010 BCSC 1398, *aff'd* 2012 BCCA 296, leave to appeal *ref'd*, [2012] SCCA No. 392 [Bradshaw]. In the trial decision of *Bradshaw*, Dillon J. noted that credibility is an assessment of the trustworthiness of a witness' testimony. This assessment is informed by that witness' veracity, sincerity and accuracy in the evidence that they provide.

- [64] Additionally, trial judges are to examine the following factors in assessing such testimony: the witness' ability and opportunity to observe events; firmness of their memory; ability to resist the influence of interest to modify their recollection; whether the witness' evidence harmonizes with independent evidence that is accepted; whether the witness changes their testimony in direct and cross-examination; whether the witness' evidence is unreasonable, impossible or unlikely; whether a witness has a motive to lie; and the witness' demeanour generally.
- [65] Such an assessment of the validity of the evidence is aimed at considering whether the evidence is "consistent with the probabilities affecting the case as a whole and shown to be in existence at the time": *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.) at 356 [*Faryna*].
- [66] The Court of Appeal in *Faryna* confirmed the careful assessment that must be made of credibility in determining the facts of a case. In *Gichuru v. Smith*, 2013 BCSC 895, *aff'd* 2014 BCCA 414, leave to appeal *ref'd* [2014] SCCA no. 547, the Court quoted from *Bradshaw* and then summarized as follows:
- [130] The real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those circumstances.
- [67] The Court in *Hardychuk v. Johnstone*, 2012 BCSC 1359, explained that the starting point in a credibility assessment is to presume truthfulness, but this presumption may be displaced: at para. 10.
- [68] Moreover, credibility and reliability are not the same. Credibility is concerned with the veracity of the witness and assessment of reliability involves consideration of the accuracy of the witness' testimony; accuracy engages the ability of the witness to observe, recall and recount: *R. v. Khan*, 2015 BCCA 320, leave to appeal *ref'd* [2015] S.C.C.A. No. 374 at para. 44.

Discussion

- [69] Applying these principles to the present case and based on my review of all the evidence, I am most troubled by two areas of Ms. McCully's evidence: her financial situation and her pre-accident work hours. Accordingly, I must approach her evidence as it relates to her claim for loss of earning capacity with a great deal of caution.
- [70] I agree with the defendants that there is ample reason to be concerned with Ms. McCully's evidence in this regard. Firstly, Ms. McCully has acknowledged that her income tax returns are based on her "guesstimate" as to what her income and expenses were rather than reliance on actual business records. In fact, she testified that she never kept any records of any kind other than a handwritten appointment book which she disposes of at the end of the year. Her bank records, which she tendered at trial, do not assist in determining the true state of her financial affairs. She explained that most of her clients pay by cash some of which she uses to pay for items in her day and other amounts she deposits in her bank

account along with whatever cheques she receives from clients. However, when she was cross-examined about the contents of her bank records she was unable to account for several substantial deposits into her account. When pressed for an explanation she said she simply could not recall or did not know. She also provided a vague explanation about lending family members money or her credit card in the past which might account for some of the large deposits in her account but there was no evidence to connect these large deposits to the repayment of those loans. Overall, her testimony does not harmonize with the independent evidence, if any, that was tendered in support of it. That disjointedness between her testimony and what the bank records and defective income tax returns show undermines the trustworthiness of her evidence.

- [71] In addition, she also admitted that she did not include the income generated from her rental suite in her tax records. She justified this failure to do so in her examination for discovery by stating, "because I wouldn't be able to live". She also testified that she deliberately estimated her expenses to be roughly equal to her income so that they would "balance" out and not attract the attention of the tax officials.
- [72] Counsel for Ms. McCully submits that Ms. McCully was not intentionally engaged in tax evasion or deception in her tax records as suggested by the defendants. Rather, he submits Ms. McCully is a simple esthetician who is not particularly sophisticated and incapable of engaging in an elaborate scheme of deceit and deception as suggested by the defendants. Counsel for Ms. McCully acknowledges that her lack of proper business records will influence the overall outcome of this matter but it should not impact on her credibility.
- [73] I do not accept the explanation proposed by counsel for Ms. McCully. She acknowledged that the income she reported on her income tax returns was a "guesstimate" and did not include rental income, yet she invites me to find that these admittedly false tax returns establish that she has suffered a loss of capacity as a result of the accidents.
- [74] Axiomatically, Ms. McCully's credibility and reliability in relation to her evidence regarding her loss of income earning capacity is integral to the assessment of that claim. The assessment of her credibility cannot be teased out from that process and disregarded. Regardless of her intention in completing her tax records, the burden rests with Ms. McCully to prove on a balance of probabilities the extent of her injuries that flow from the defendants' admitted liability. If in her attempt to discharge that burden she tenders income tax records that are based on unreliable information and reported figures, those defects undermine the trustworthiness of the records, and in turn casts doubt on the veracity of her testimony on this aspect. This thread of unreliability does not satisfy me that her testimony accords with the preponderance of the probabilities presented by her bank records; a preponderance that is rendered even more unreliable by her inaccurate income tax documentation.

- [75] Even more troubling is her suggestion that I should accept that she actually made more income pre-accident such that her loss is even greater than what is reflected in her own records. I cannot speculate as to what she made. As will be discussed again later in these reasons, I find Ms. McCully's evidence neither credible nor reliable on these central points.
- [76] Similarly, I am troubled with Ms. McCully's evidence regarding her hours of work. It appears Ms. McCully's hours of work differ significantly depending on whom she is speaking with. For example, at trial her evidence was in the two years prior to the accident (2012, 2013) she reduced her workweek to four days for six to eight hours per day. Dr. Robinson's report indicates she reported to him that she was working Monday to Saturday for seven to ten hours per day before the first accident. In contrast, Dr. Hawkeswood's report indicates she reported to him that she was working 40 hours per week, and in Ms. Edwards' report, she indicates that Ms. McCully reported she was working four to five days per week. In addition, at her examination for discovery, Ms. McCully said she was working five days per week, between six and eight hours per day. Compounding all of this was Ms. McCully's denial in examination for discovery that she had anyone working with her after the accident which was contradicted by Ms. Ogden testifying to moving in with Ms. McCully in July 2014 until March 2015, to assist Ms. McCully with the business. At trial, Ms. McCully explained that she had completely forgotten that Ms. Ogden had come to stay with her until after her examination for discovery.
- [77] Ms. McCully has no documentation to substantiate her evidence regarding her hours of work, the income generated and the costs she incurred. The lack of an objective, reliable foundation to shore up her testimony and to ultimately establish a link between the injuries she suffers and the income earning capacity losses she claims flows from them, significantly undermines her claim.
- [78] However, it does not follow that because I find that Ms. McCully is neither credible nor reliable on one aspect of her evidence that I must also reject all of her evidence. I agree that where a plaintiff's case relies on subjective symptoms with little or no objective evidence of continuing injury, the court must be exceedingly careful in examining and assessing credibility: *Price v. Kostyba* (1982), 70 B.C.L.R. 397 (S.C.) [Price]. There is no dispute that Ms. McCully suffers from chronic neck pain and headaches which impacts on all aspects of her life. Given the opinion of Dr. Robinson and Dr. Hawkeswood, I have no reason to doubt Ms. McCully's subjective account of her pain, is credible. While I agree with the defendant that Ms. McCully is a poor historian in many aspects of her evidence, I do not find that she exaggerated in her description of her post-accident condition.

V. CAUSATION

The Legal Principles

- [79] The burden is on Ms. McCully to establish on a balance of probabilities that, "but for" the two accidents in respect of which the defendants have admitted liability, she would not have suffered the injuries which form the basis of her damages claim. 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 minimis: *Athey v. Leonati*, [1996] 3 S.C.R. 458, 140 D.L.R. (4th) 235 (S.C.C.) [*Athey*] at paras. 13-17; *Farrant v. Laktin*, 2011 BCCA 336 at para. 9.
- [80] The Supreme Court of Canada's decision in *Clements v. Clements*, 2012 SCC 32 [*Clements*], revisited the causation test. The Court affirmed the predominance of the "but for" causation test, which is a factual determination that is to be applied in a robust common sense fashion. There is no need for scientific evidence of the precise contribution the defendant's negligence made to the injury: at para. 9.
- [81] *Athey's* "material contribution" test is appropriate without showing factual "but for" causation only in cases where it is otherwise impossible to determine which of multiple negligence acts flowing from multiple factors in fact caused the injury: *Clements* at para. 13.
- [82] Additionally, the plaintiff is not required to establish that the defendant's negligence was the sole cause of his or her injuries. As long as the defendant is part of the cause of the injury, the defendant is liable, even if his or her act alone was not enough to create the injury: *Athey* at paras. 17-20; see also *Mirsaeidi v. Coleman*, 2014 BCSC 415 at para. 49, 50.

Position of the Parties

- [83] Ms. McCully's position is that the first accident has caused her injuries and the second accident potentially exacerbated those injuries. Prior to the accidents, she was a healthy, active, hard working and independent woman who planned to continue working albeit at reduced hours for the foreseeable future. Ms. McCully relies on the medical evidence including that of Dr. Medvedev to support her position that but for the accidents she would not have suffered the neck pain and headaches.
- [84] The defendants concede that Ms. McCully suffers neck pain and headaches as a result of the accidents but that due to her pre-existing neck pain any damages should be reduced. The defendants rely on Dr. Medvedev's opinion that Ms. McCully had a pre-existing degenerative changes in her neck as well as Dr. Hawkeswood's observations of pre-existing neck pain together with the comments of Dr. Olivier in the C-19 report which notes that she had "chronic neck pain".

Discussion

- [85] All of the medical experts agree that as a result of the accidents Ms. McCully suffers from chronic neck pain and headaches. As Dr. Hawkeswood's report notes there is some indication that Ms. McCully had experienced neck pain in the past but neither Dr.

Hawkeswood nor Dr. Robinson found anything in the clinical records to suggest that Ms. McCully had a pre-existing chronic condition. With respect to the significance of the degenerative changes in Ms. McCully's cervical spine, I note that Dr. Medvedev acknowledged in cross-examination that Ms. McCully may have remained asymptomatic until her 80s or 90s. This view is consistent with the opinion of Dr. Robinson that "the degenerative changes in her cervical spine predates the motor vehicle accident and is probably asymptomatic". As I have previously stated, I have some concerns regarding Ms. McCully's reliability particularly given her cavalier approach to record keeping. While Ms. McCully may be a poor historian regarding her financial circumstances, that does not detract from the body of evidence which establishes on a balance of probabilities that Ms. McCully's chronic neck pain and headaches resulted from the motor vehicle accidents.

- [86] The "but for" inquiry is not intended to pedantically itemize all the potential causes of Ms. McCully's injuries with scientific precision. Instead, this inquiry is focused on whether the plaintiff would have incurred her injuries but for the defendants' liability on a balance of probabilities. The balance of the medical expert opinion indicate that any pre-existing degenerative neck issues would have remained asymptomatic. Accordingly, I am satisfied that but for the liability of the defendants, her neck issues would not have otherwise manifested to the same degree of pain that Ms. McCully now experiences. I now turn to the assessment of the extent of the defendants' liability for any of Ms. McCully's damages.

VI. ASSESSMENT OF DAMAGES

A. NON-PECUNIARY DAMAGES

The Legal Principles

- [87] Non-pecuniary damages are awarded to compensate the plaintiff for pain, suffering, loss of enjoyment of life and loss of amenities. Compensation should be fair to all parties which is measured against awards made in comparable cases. Such cases, though helpful, serve only as a rough guide. Each case depends on its own unique facts: *Trites v. Penner*, 2010 BCSC 882, *Benavides v. Doe*, 2015 BCSC 1831 at para. 94; *aff'd* 2017 BCCA 15.
- [88] The appropriate amount of compensation is not merely a function of the seriousness of the plaintiff's injuries viewed in isolation. As outlined by Kirkpatrick J.A. in *Stapley v. Hejslet*, 2006 BCCA 34 at paras. 45, 46, leave to appeal *ref'd* [2006] SCCA No. 100, courts must consider the effect of the injuries on the plaintiff's particular circumstances, taking into account factors such as the plaintiff's age, the nature of the injury, the severity and duration of the plaintiff's pain, the extent of any disability, the effect on family and social relationships, impairment of the plaintiff's mental and physical abilities, and the impact on the plaintiff's lifestyle. It is therefore necessary for the court to have an "appreciation of the individual's loss": at para. 45.

- [89] I previously mentioned Price. That decision discussed the correct approach to assessing injuries that depend on subjective reports of pain. The Court explained that translating an individual plaintiff's subjective complaints about injury, pain, and loss into compensatory damages is never a simple matter. The task is particularly challenging in cases of soft tissue injury involving subjective reports of pain, with "little or no objective evidence of continuing injury", and where "complaints of pain persist for long periods": at 397, 399; see also *Redmond v. Krider*, 2015 BCSC 178 at para. 137.
- [90] The assessment of non-pecuniary damages is also influenced by each plaintiff's personal experiences in dealing with her injuries and their consequences, and the plaintiff's ability to articulate that experience: *Dilello v. Montgomery*, 2005 BCCA 56 at para. 25. Equally important is the trier of fact's subjective appreciation of the evidence describing those injuries, the pain, suffering, loss of amenities and disability and their consequences on the plaintiff's personal and economic future: at para. 25.
- [91] Ultimately, the Court must make an award of damages for pain and suffering and loss of enjoyment of life that is tailored to the specific circumstances of this plaintiff.

Positions of the Parties

- [92] Ms. McCully submits that an award of \$110,000 is appropriate under this head of damage. She takes the position her life has been significantly and permanently changed due to the first accident and contributed to by the second accident. She relies on three decisions in support of her position:

- *Leach v. Jesson*, 2017 BCSC 577 [Leach] (\$110,000);
- *Thomson v. Thiessen*, 2018 BCSC 1353 [Thomson] (\$95,000); and
- *Petrovic v. Stetsko*, 2017 BCSC 741 [Petrovic] (\$75,000).

- [93] The defendants submit that a range of \$40,000 to \$60,000 is adequate to compensate Ms. McCully for her non-pecuniary losses. They rely on the following decisions:

- *Buckle v. Raworth*, 2015 BCSC 989 [Buckle] (\$65,000);
- *Coutakis v. Lean*, 2012 BCSC 970 [Coutakis] (\$45,000); and
- *Singh v. Shergill*, 2010 BCSC 323 [Singh] (\$40,000).

- [94] The Leach decision involved substantially different injuries and the impact of the plaintiff's injuries in that case resulted in a "physically changed" man. I am not satisfied that the impact of Ms. McCully's injuries on her quality of life attract a similarly high award. Additionally, the impact of the injuries on the enjoyment of the plaintiff's life in Thomson is more severe than in Ms. McCully's case. The duration and severity of the plaintiff's headaches in Thomson, though temporarily relievable with medication, justified a higher award. Ms. McCully does not suffer a similarly debilitating and disruptive condition.

- [95] Equally though, I find that the lower range of the authorities the defendants rely on are also inadequate to arriving at a fair compensation award for the losses Ms. McCully faces in her personal and economic future. For example, in *Singh*, the plaintiff was awarded a moderate \$40,000 in part for pre-existing degenerative changes in his spine which would have caused him pain regardless of the accident. The advanced age of the plaintiff in *Coutakis* and the \$45,000 he received in compensation for his bleak prospects for a pain-free remainder of his life are not particularly instructive for Ms. McCully's case.
- [96] I note that every non-pecuniary damage award is to be assessed by the unique facts that inform it. Although not perfectly on-point, I do find that the impact of the plaintiffs' injuries which resulted in the awards made in *Petrovic* and in *Buckle* bear similarities with the impact of Ms. McCully's injuries on her enjoyment of life.
- [97] In *Petrovic*, the plaintiff faced a guarded prognosis in respect of his injuries that barred him from engaging in his pre-accident seniors' competitive dragon boating, hiking and canoeing. It was clear to the Court that the plaintiff derived great personal satisfaction and identity from his work and from his recreational pursuits. For this he was awarded \$75,000 in non-pecuniary damages.
- [98] In *Buckle*, the 63 year-old plaintiff was actively engaged in church, family and domestic life. She was unrestricted from her daily living before the accident. The accident caused her significant pain to her right arm and other soft tissue injuries to her neck, upper right arm and shoulder. She experienced migraine headaches that prevented her from extending her arms to their full extension. She could no longer attend to her pre-accident activities with the same energy levels or ability that she had before. Most unfortunately, she could not give time and energy to her grandchildren in the manner she did before the accident. She was awarded \$65,000 in non-pecuniary damages.

Discussion

- [99] Ms. McCully is 66 years-old and she suffers some limitation and restriction as a result of her persistent neck pain and headaches caused by the accidents. However, I do not agree that the injuries have a profound or life altering affect on Ms. McCully. I do find that she continues and will continue to experience some pain and discomfort and the medical experts confirm this. Although the medical evidence does not foreclose the possibility that she can increase her work hours or certain activity levels, I find that even where she does attempt these pre-accident activities, her injuries would increase her discomfort and pain.
- [100] While she is able to continue to work as an esthetician, she does experience discomfort if she exceeds working for a comfortable amount of time. Fortunately for her, her schedule is flexible and ultimately she is the one who will determine when she will work and for how long. While she may resort to the use of the TENS machine at the end of a long day to deal with the discomfort in her neck, she appears to be pleased to be able to continue to work for and service her clients.

- [101] I note that she has also returned to playing bridge a few times per week and has participated in a bridge tournament over the weekend albeit with the assistance of her pain medication. Participating in these bridge games is particularly important for Ms. McCully as it provides her an opportunity to engage socially. She continues to engage with her family and while she does not take her grandchildren to the pool she does babysit them at her residence. In a similar vein as Buckle, I note that Ms. McCully's injuries restrict her from engaging in her domestic and work activities with the same energy and ability she had before the accidents. However, as I discussed earlier, despite having the chronic neck pain and headaches she continues to travel and has done so since shortly after the accidents.
- [102] In the following reasons, I will specifically address the parties' arguments in relation to a segregated loss of housekeeping capacity damages. However, as I will re-state below, the impact of Ms. McCully's injuries on her ability to perform household tasks informs my assessment of her non-pecuniary damages. I note also that she keeps a fairly large 2,900 sq. ft. house on a 12,000 sq. ft. lot. Overtime I find that Ms. McCully has been able to do some light housekeeping although she cannot do some of the more physically demanding tasks. Additionally, it is clear that she is more limited in performing yard maintenance.
- [103] There is no doubt that her neck pain and headaches have and will continue to have an impact on Ms. McCully in every aspect of her life to varying degrees. I am satisfied that Ms. McCully is entitled to compensation for the impact the injuries have had on her general well-being.
- [104] Having reviewed the cases provided by both parties, I assess Ms. McCully's non-pecuniary damages at \$85,000.

B. LOSS OF HOUSEKEEPING CAPACITY

The Legal Principles

- [105] A plaintiff's claim for loss of housekeeping capacity may be compensated by a pecuniary or a non-pecuniary award: *Kim v. Lin*, 2018 BCCA 77 [Kim] at para. 28.
- [106] Trial judges are guided by consideration of whether to address such a claim as part of the non-pecuniary head of damages or a segregated pecuniary damage by referring to whether the plaintiff may still perform household tasks with difficulty or decides they need not be done; if so, a non-pecuniary award is appropriate. Otherwise, remuneration as a segregated pecuniary damage is preferable where "family members gratuitously perform the lost services, thereby avoiding necessary replacement costs." (*Liu v. Bains*, 2016 BCCA 374 at para. 26; see also *Kim*).

Position of the Parties

[107] Ms. McCully seeks an award in the amount of \$20,000 for her loss of housekeeping capacity. In the alternative, she submits that sum should be considered when determining the amount of the award for non-pecuniary damages.

[108] The defendants submit that the evidence does not support such a claim.

Discussion

[109] While I accept that since the accident Ms. McCully has enlisted some of her family members to assist her with the household chores, I am not persuaded on the evidence that the adjustment is sufficiently significant such that it justifies a discrete award of damages. I have already considered Ms. McCully's challenges and the discomfort that she faces in performing household tasks as one factor in assessing her non-pecuniary damages as I set out above.

[110] Accordingly, I make no segregated award for the loss of housekeeping capacity.

C. LOSS OF INCOME EARNING CAPACITY

(i) Past Loss of Earning Capacity

The Legal Principles

[111] Section 98 of the IVA prescribes the recovery for loss of income. It states that a person who suffers loss of income as a result of the accident is entitled to recover from the designated defendants as damages for loss of income suffered after the accident but before the first day of trial, not more than the net income loss that the person suffered in that period as a result of the accident. "Net income loss" is defined by s. 95.

[112] I refer also to *Andrews*, where Mr. Justice Pearlman states:

[231] Pursuant to s. 98 of the Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231, a plaintiff is entitled to recover damages for only his or her past net income loss. This means that in the ordinary course the court must deduct the amount of income tax payable from lost gross earnings: *Hudniuk v. Warkentin*, 2003 BCSC 62 (CanLII); *Lines v. Gordon*, 2009 BCCA 106 (CanLII).

[Emphasis added.]

[113] In light of this and contrary to the submissions by Ms. McCully, any assessment of Ms. McCully's income losses will be with reference to her net income loss, that is, the income left over after any tax payable under any applicable income tax legislation, is deducted.

[114] An award for past loss of income earning capacity is intended to compensate the plaintiff for the loss of an asset that is the capacity to earn: *Ibbitson v. Cooper*, 2012 BCCA 249 [Ibbitson] at para. 18 citing to *B.(M.) v. British Columbia*, 2003 SCC 53.

- [115] Damages under this head are quantified based on what the plaintiff would have earned, had the injury not occurred. In other words, the value of the plaintiff's capacity to earn is equivalent to the value of the earnings that she or he would have received over time but for the tort: Ibbitson at para. 18.
- [116] A claim for what is often described as "past loss of income" is actually a claim for loss of earning capacity, or a claim for the loss of the value of the work that the injured plaintiff would have performed but cannot do so now because of injury: Ibbitson at para. 18. [Emphasis added].
- [117] The value of such loss of work or capacity can be measured in many different ways. The measurement of the value may be accomplished by reference to the plaintiff's actual earnings that she or he would have received; replacement cost evaluation of tasks which the plaintiff cannot now perform, reduced company profits if applicable; and secondary income lost such as shared family income: Ibbitson at para. 18.
- [118] The plaintiff's burden of proof related to actual past events must meet the standard of a balance of probabilities. Assessing the loss of both past and future earning capacity involves a consideration of hypothetical events; the plaintiff is not required to prove these to the standard of a balance of probabilities. Instead, the future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation. These will be given weight according to their relative likelihood: Athey at paras. 27, 28.

Positions of the Parties

- [119] Ms. McCully argues that she has suffered past loss of income earning capacity. She submits that \$40,000 is a reasonable figure to compensate her for this loss. She submits that she has not worked or done very little work in her business approximately six months after the accident. She produces documentation for her pre-2014 income tax returns from 2010 to 2013 and her tax returns from 2014 to 2017 to show her gross income. She did not produce an income tax return for 2018. Additionally, she testified that the income claimed was based on her "guesstimation" of her past income and she testified, somewhat reluctantly that she deliberately declared it to be lower to avoid tax consequences. In addition, she did not claim income on her rental suite.
- [120] Nevertheless, she submits that she has suffered a loss of income earning capacity and that she has actually suffered this as a real and substantial possibility. She submits that when considering her gross income for the years immediately preceding the accident an award of \$40,000 in net income loss is an appropriate award after adjusting for contingencies and uncertainties associated with her business records and income tax returns.

- [121] The defendants submit that Ms. McCully should not be awarded any amount greater than \$2,000 under this head of damages. They submit that damages for past loss is still hypothetical and is guided by the consideration of the plaintiff's history and actual earning prior to the accident. They further submit that section 95 - 98 of the Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231 [IVA], applies to them as "designated defendants" as defined in s. 95 of the Act.
- [122] They argue that the only evidence of her business earnings are through her tax returns. Additionally, they point to the fact that she has neither tendered any evidence to substantiate her claim for her tax returns nor has she produced evidence that shows what her actual income was. The defendants submit that only her 2014 post-accident net business earnings were significantly different than her earnings in 2013.

Discussion

- [123] An assessment of past loss of income earning capacity attracts the standard of a real and substantial possibility. Accordingly, the issue under this head of damages is to ask whether Ms. McCully has demonstrated that her injuries have as a real and substantial possibility reduced her capacity to earn income working as an esthetician and in operating her business? While I accept that her injuries have caused her some limitations, I am not satisfied that Ms. McCully has suffered losses under this head of damage to the extent that she claims her evidence demonstrates.
- [124] The medical evidence shows that Ms. McCully was not able to take up her full-time hours working four days per week as an esthetician after the accidents. She testified she eventually returned to work three days per week but was working less hours than she did before the accidents. However, as I have already stated, I approach the reliability of her evidence on this point with great caution. In addition, I must consider the fact that Ms. McCully has travelled extensively since the accident which would have resulted in her working even less hours.
- [125] It is clear that compensation under this head of damages is for the loss of an asset, or the capacity to earn income and the valuation of that loss may be measured by reference to, where appropriate, actual earnings or business records (Ibbitson at para. 18). Here, Ms. McCully tendered her income tax returns for the years between 2011 and 2017 to assist in the quantification of the value of her loss of income earning capacity. She neither produced documentation in relation to her rental suite income nor did she declare income tax on it.
- [126] As I previously mentioned, her primary sources of income come from her operation of Beautiful Beginnings and her rental suite. She testified that she has no other income source except for some RRSPs and the receipt of CPP and Old Age pension. Ms. McCully testified that she kept no records of her business operations. She produced no ledgers or records of payment. She produced nothing of substance. She further admitted that she only guesses as to what her past income is and defends her deliberate underreporting of income with

suggesting that she would not otherwise be able to live. She also appears to ignore the fact that she travelled extensively since the accident sometimes for multiple weeks at a time which would have reduced her earnings independent of the injuries suffered from the accident.

- [127] In any other circumstance, a plaintiff who makes a claim for lost wages in circumstances where he or she has not declared income on income tax returns as required by law invites a strong inference against him or her, but it would not be an impossible burden to discharge: *Stein v. Kline*, 2012 BCSC 573 at para. 37; see also *Carlson v. GMAC Leaseco Ltd.*, 2003 BCSC 1567. However, the failure to declare income tax for tax purposes does not bar a claim unless the circumstances persuade the court that the claim is false or has not been proven: *Colliar v. Tolksdorff* (1992), 74 B.C.L.R. (2d) 145 [Colliar] at para. 26.
- [128] Most problematically, is Ms. McCully's admission that she has a history of underreporting and filing incomplete tax returns. I agree with the defendants that she essentially admits to engaging in tax evasion over an extended period of time. Despite this, she invites me to infer from the tax returns that she does produce that she in fact suffered a loss of income after the accident. I cannot endorse this kind of consistent and deliberate underreporting on income tax returns that exhibit aspects of criminality. She should not expect that the Court would condone deliberate underreporting by awarding her a loss of income earning capacity predicated on this kind of intentional activity. While it is not the Court's role to attempt to calculate the income tax that parties ought to pay, this Court must consider the "substantial unfairness to the Canadian people who meet their income tax and GST obligations from those who do not": *Wong v. Li*, 2018 BCSC 745 at para. 145.
- [129] Having said that, I recognize that strictly speaking, her tax evasion does not per se preclude recovery of proper compensation for injuries she suffered that caused her income earning capacity losses. However, what this admission reveals in this instant case, is that her income tax return declarations are not bona fides. As I previously mentioned, in any other circumstance her failure to produce business records or reliable income tax returns may not preclude her from recovering for a loss of past income earning capacity. But as *Colliar* makes clear, these are circumstances that persuade this Court that Ms. McCully's claim for past loss of income earning capacity is predicated on false, unreliable and incomplete material such that it does impede her claim for loss of income earning capacity. The material she does tender is defective for the very reason that they are inaccurate and false and undermines the legitimacy of her claim under this head of damage.
- [130] As stated earlier, her admission to consistently underreporting her income undermines both her credibility and reliability. If she is deliberately willing to refrain from declaring certain income to avoid tax consequences, it casts doubt on her ability to resist the influence of any other interest that would otherwise modify her recollection (see *Bradshaw* at para. 146; *Nicolle v. Legg*, 1994 CarswellBC 2775 (B.C.S.C.) at para. 14). I note that *Kean v. Porter*, 2008 BCSC 1594 at paras. 91-93, illustrates that the failure to accurately report one's income impacts on the reliability of the inferences a party invites a court to draw.

[131] Additionally, the evidence establishes that she was travelling for weeks at a time which would have presumably reduced the amount of income she would have generated due to her absence. So while she argues that her accident injuries are linked to her reduction in income due to her reduced hours post-accident, she seems to overlook the fact that traveling necessarily means absence from work and thus fewer hours worked which in turn impact those figures. Not only is her evidence unreliable and discreditable on this aspect of her claim for all the reasons I have previously discussed, her selective focus on all other explanations but her own admission to travelling extensively to explain the reduction in her work hours further detracts from the validity of her testimony. I cannot ignore the fact that she was traveling for some periods of time which contradict her position that any reduction in her post-accident working hours flowed solely from her injuries.

[132] Moreover, even if she made bona fides income tax returns, her pre- and post-accident income is virtually the same. She claims that she made higher pre-accident income. However, looking at her net income from her pre-accident income tax returns (2011 - 2013) as compared with her post-accident income tax returns (2014 - 2017), the difference is marginal which is even more puzzling when one considers that she was working five days per week in 2010 and 2011 travelling for extended periods over the years following the accidents. Her total income from each year of her assessments (rounded up) are as follows:

- 2010= \$8,730;
- 2011= \$5,989;
- 2012= \$5,938;
- 2013= \$3,662;
- 2014= \$1,740;
- 2015= \$3,499;
- 2016= \$3,721; and
- 2017= \$4,104.

[133] There are a number of concerns that arise from my review of the evidence and these tax returns. Firstly, Ms. McCully testified that in the two years prior to the accident (2012 & 2013) she reduced her work week from five days to four days per week, working approximately six to eight hours per day. However, I note that her net income in 2012 is almost identical to her net income for 2011. Based on her own evidence this makes no sense. The decrease in her net income between 2013 and 2014 is a difference of \$1,922 which supports Ms. McCully's evidence that she did not work for several months after the accident since she had bladder surgery in August 2014 resulting in a two week recovery period, and since she went to Hawaii with her sister on a pre-arranged vacation. The defendants take the generous position that \$2,000 represents an appropriate award to acknowledge some of Ms. McCully's net income loss in the 2014 year. However, when I

consider the fact that Ms. McCully was on vacation for a period of time and recovering from bladder surgery I question the basis for any award.

- [134] The subsequent years after the accident, 2015 and 2016, are commensurate to the earnings that she made before the accident year of 2014. Furthermore, 2017 shows an increase of net business income in an amount of \$383 from 2016. Of interest there is little change in Ms. McCully's net income despite the fact she claims to be working one less day at reduced hours and went on a vacation in May 2015. Again, this reflects the fact that Ms. McCully's "guesstimate" of her net income is unreliable. Indeed, as I previously mentioned, her admission to tax evasion and deliberate and consistent underreporting undermines her position on the proper valuation of her loss of capacity. Her "guesstimations" as to her past income, her acknowledgement that she underreports her income collectively undermine her credibility and testimony as to her pre-accident income earnings.
- [135] I note that this is not to suggest that Ms. McCully was deliberately lying to the Court in her testimony. However, her admission to keeping inaccurate, incomplete and otherwise defective records engage the caution in Colliar. That is, in these circumstances this Court is persuaded that Ms. McCully's claim for past loss of income earning capacity is predicated on unreliable and incomplete material such that her claim for loss of income earning capacity is rendered tenuous. It is not the role of the Court to extend largesse to compensate the plaintiff in circumstances where the evidence to substantiate a claim of loss of income earning capacity is dubious and fraught with inaccuracies, no matter how well-meaning the plaintiff is.
- [136] In short, Ms. McCully cannot establish through her own weakened testimony or records, all of which lack reliability and cogency, that her injuries have, as a real and substantial possibility, diminished her income earning capacity from the accident to the date of trial to the extent that she claims. She has weakened the strength of her claim under this head of damage by her own hand.
- [137] I find the quote that the defendants cite to from Madam Justice Southin's (as she then was) decision in *Le v. Milburn*, [1987] CarswellBC 2936, instructive and equally germane to Ms. McCully's case and her credibility:
- [1] When a litigant practises to deceive, whether by deliberate falsehood or gross exaggeration, the court has much difficulty in disentangling the truth from the web of deceit and exaggeration. If, in the course of the disentangling of the web, the court casts aside as untrue something that was indeed true, the litigant has only himself or herself to blame. In this case there has been some deliberate falsehood and some exaggeration.

[138] Despite all of these concerns, I partially accept the defendants' submission that at best Ms. McCully should be awarded a nominal sum under this head of damage to address the brief period in 2014 when her earning capacity was affected as measured by a reduction in her net income figures in that year. However, I am not satisfied that the defendants' suggested award of \$2,000 is even warranted.

[139] Accordingly, I make a nominal award of \$1,000 under this head of damages.

(ii) Future Loss of Earning Capacity

The Legal Principles

[140] There are two questions that arise in the claim for loss of future income earning capacity: 1) has the plaintiff's earning capacity been impaired by his or her injuries; and if so, 2) what compensations should be awarded for the resulting financial harm that will accrue over time? The assessment of the plaintiff's losses are to be based in the evidence and is not to be an application of a purely mathematical calculation: *Hoy v. Williams*, 2014 BCSC 234 at para. 153.

[141] The essential task of the courts is to assess an award by comparing 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.

[142] The plaintiff bears the burden of establishing that as a real and substantial possibility, her income earning capacity has been impaired. If the Court is satisfied that the plaintiff has discharged her burden of proof, the Court must then assess the extent of damages: *Morgan v. Galbraith*, 2013 BCCA 305 [Morgan] at para. 53.

[143] There are two possible approaches to the assessment of loss of future earning capacity: the "earnings approach" from *Pallos v. Insurance Corp. of British Columbia* (1995), 100 B.C.L.R. (2d) 260 (B.C.C.A.), and the "capital asset approach" in *Brown v. Golaiy*, 1985 CarswellBC 830 [Brown]. Both approaches are correct.

[144] The "earnings approach" will generally be more useful when the loss is easily measurable: *Perren v. Lalari*, 2010 BCCA 140 (CanLII) [Perren] at para. 32.

[145] Where the loss is proven but "is not measurable in a pecuniary way" the "capital asset" approach is more appropriate: *Perren* at para. 39. This approach is more typically used in cases where the plaintiff has no clear earnings history: *Sirak v. Noonward*, 2015 BCSC 274 (CanLII) [Sirak] at para. 202.

- [146] The assessment is guided by the consideration that the Court is to restore, as best as is possible with a monetary award, an injured plaintiff to the same position he or she would have been had the negligence not occurred. The difference between the plaintiff's original position just before the occurrence of the negligent act or omission, and the injured position after and as a result of the act or omission, comprises the plaintiff's loss: *Grewal v. Naumann*, 2017 BCCA 158 [Grewal] at paras. 42-43 citing to *Athey*.
- [147] The assessment of past or future losses requires the courts to estimate a pecuniary loss by weighing possibilities and probabilities of hypothetical events: *Grewal* at para. 49; see also *Falati v. Smith*, 2010 BCSC 465. The plaintiff is not required to prove her loss on a balance of probabilities; however, there still needs to be some "cogent evidence" to trigger the Brown considerations.

Positions of the Parties

- [148] Ms. McCully submits that the medical evidence as a whole indicates that her injuries have diminished her future income earning capacity. She argues that she once had a good work ethic before the accidents and is now less capable of earning income in her role as an esthetician. She argues that she would have, but for the accidents, have continued to work in this position for as long as she was physically capable of doing so. She submits that in this case, this Court should adopt the capital asset approach of valuing the loss of her future income earning capacity. She submits that \$65,000 is appropriate under this head of damage.
- [149] The defendants submit that Ms. McCully's income tax returns show that she has not lost capacity to earn income and has not suffered pecuniary loss. They argue that the evidence does not support Ms. McCully's argument that she has suffered a continued impairment to earn income after the accidents. Alternatively, they argue that if the evidence shows that her injuries will as a real and substantial possibility result in a pecuniary loss that will only be in relation to the acceleration of her retirement. They argue that if there is a real and substantial possibility that Ms. McCully's injuries will lead her to suffer future pecuniary loss, the probability of that loss occurring and the likely amount of its quantum are low. Accordingly, they submit that no more than one year of Ms. McCully's approximate net business earnings should be awarded. The suggested quantum is \$3,500.

Discussion

- [150] I have already concluded that the accidents have caused Ms. McCully's injuries. The question I must now resolve is whether Ms. McCully has shown as a real and substantial possibility, that her injuries will impair her future earning capacity by causing her pecuniary or income loss in preventing her from working as an esthetician or any other position reasonably available to her? I am mindful that even if Ms. McCully is able to work alternative employment and make the same pre-accident income, she would still, if she has suffered a diminished earning capacity, be entitled to compensation.

[151] As I discussed at length, her evidence is undermined through her own admission that she underreported her business income, and engaged in tax evasion. For reasons that might be related to this observation, Ms. McCully under this head of damage submits that in the valuation of her losses, the capital asset approach is applicable since it is more appropriate for situations where a plaintiff does not have a demonstrable or clear earnings history, as Sirak states. I pause here to note that there is substantial inconsistency in her approach to the valuation of both of her income earning capacity claims; where it benefits her to claim for "past loss of income earning capacity" Ms. McCully produces her defective income tax return documents to substantiate her claim that she has in fact suffered loss of income or earnings. In contrast, where it is more advantageous for her to claim that she has no clear earnings history she is quick to distance herself from the scant records she used in support of her past income earning capacity claim. Nevertheless, I accept that Ms. McCully's inconsistent submissions are no bar to the appropriate assessment of any loss she will suffer in claiming for loss in future income earning capacity. Perren is clear that where any loss is not easily measurable in a pecuniary sense, the capital asset approach is available to assess the extent of a plaintiff's losses. Accordingly, while I do not accept her earnings history as reliable, I may still apply the capital asset approach to evaluate any losses.

[152] I must consider whether the evidence demonstrates that Ms. McCully will be, as a real and substantial possibility due to her injuries, deprived of a capacity to work as she did in her role as an esthetician operating her business. If so, the Court must assess the extent of that loss. The testimony of Ms. McCully and her witnesses suggests that she was working four days per week as an esthetician in her business in the two years prior to the accidents. The evidence showed that she worked four days per week for periods of six to eight hours a day, sometimes more, and occasionally on the weekend to accommodate her clients. She submits that due to her injuries, she has been forced to reduce her hours to three days per week working five to six hours per day.

[153] Dr. Hawkeswood opines in his report that it would otherwise have been unlikely for Ms. McCully to "drastically [reduce]" her working hours in the few years surrounding the first accident without the trauma she suffered. He further opines that Ms. McCully will now likely retire earlier than would otherwise be expected because of her injuries. Dr. Robinson states that despite Ms. McCully's improvement, she has continued to work part-time and clarified his report in cross-examination by noting that his impression was that she was working as much as she could within the limits of her physical symptoms and accordingly met her needs from a day-to-day basis. Additionally, he opined that she could increase her work hours albeit with some discomfort, if she chose to do so in future. Dr. Medvedev's opinion is that Ms. McCully has no physical findings that preclude her from pursuing any form of employment and she has demonstrated an ability to function by continuing on in her business. As I have discussed, I prefer the opinions of Dr. Robinson and Dr. Hawkeswood over that of Dr. Medvedev.

- [154] Ms. McCully invites me to find that her injuries diminished her capacity to work as an esthetician as evidenced by her reduced working hours. The law is clear that even where the plaintiff's earnings after an accident are similar to that which the plaintiff earned before the accident, if the plaintiff claims a loss of earning capacity the onus is on her to prove that there is a substantial possibility of an event occurring which will result in a loss of earnings: Morgan at para. 24.
- [155] The question at this stage is to inquire as to whether Ms. McCully has shown that there is a substantial possibility of a future loss of earnings as a result of the injuries she suffers. After considering Ms. McCully's testimony, the testimony of other witnesses and the medical evidence, I find that the evidence does support, to a real and substantial possibility, that Ms. McCully's injuries will impair her future earning capacity. I am satisfied that her injuries do cause her discomfort or some limitation. Moreover, a consideration of future loss is necessarily hypothetical. While her evidence in support of her claim for her past loss of income earning capacity is defective for all the reasons I have previously canvassed, the standard for considering a future event that leads to income loss is not a balance of probabilities to which past losses must be proved. Additionally, when assessing the extent of her future income earning capacity loss, the courts qualitatively assess that loss even for a plaintiff with no clear earnings history by considering other factors that relate to the plaintiff's capacity to work (see Sirak; Perren). Accordingly, Ms. McCully's unreliable income tax records and lack of business records do not impede an assessment of the appropriate quantum for her future income earning capacity losses.
- [156] I find on the medical evidence that her headaches and neck pain somewhat restrict her ability to perform the duties and services she did before the accident in her role as an esthetician. The assessment of any compensation is geared to restoring Ms. McCully as best as possible to the same and original position she would have been had the accidents not occurred. Any loss is captured in the difference between Ms. McCully's original position working as four days per week as an esthetician that occurred just before the accidents, and her injured position after the accidents, where she continues to work as an esthetician albeit with reduced hours. The evidence shows that the reduction in hours or that loss is a by-product of her injuries; however, just as with her past income earning capacity claim, I am not satisfied that Ms. McCully's quantification of her future loss of income earning is as high as she claims. The difference between her original pre-accident position and the position she is now and will be in after the accident is slight.
- [157] The defendants reasonably concede, as their alternative argument, that a lower amount is appropriate under this head. I agree that some damage award is appropriate here. Although she has worked reduced hours after the accident, it is not a certainty that she will have to work at this limited capacity until retirement. This award must account for the positive contingency that she may yet improve her condition by following the treatment plans recommended to her and increase her work hours. There is a possibility that she will improve. Equally, since courts are not prescient about what will unfold in a plaintiff's

future, this award must also account for the contingency that factors including Ms. McCully's age and desire to work less would bring about her retirement sooner than forecasted. At any rate, the evidence as to when she would retire was equivocal. Moreover, consideration of the possibility that she would have continued to voluntarily reduce her work hours to free up time for her grandchildren, friends and travel, must also inform the assessment of this award.

[158] I value her loss of future income earning capacity at \$15,000.

D. COSTS OF FUTURE CARE

The Legal Principles

[159] The plaintiff is entitled to compensation for the cost of future care based on what is reasonably necessary to restore her to her pre-accident condition insofar as that is possible. When full restoration cannot be achieved, courts 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 [Milina] (S.C.), aff'd (1985), 63 B.C.L.R. 122 (C.A.); *Williams (Guardian ad litem of) v. Low*, 2000 BCSC 345; *Spehar (Guardian ad litem of) v. Beazley*, 2002 BCSC 1104, aff'd 2004 BCCA 290.

[160] The test for determining the appropriate award for cost of future care is an objective one based on medical evidence. Awards for costs of future care must be both medically justified and reasonable. The award of damages must be moderate and fair to both parties: *Milina* at para. 84; *Riding-Brown v. Jenkins*, 2014 BCSC 382 at para. 47.

[161] In *Warick v. Diwell*, 2018 BCCA 53, the Court of Appeal affirmed that a cost of future care claim is only proven if a plaintiff can establish a real and substantial risk of future pecuniary loss, citing to *Graham v. Rourke* (1990), 74 D.L.R. (4th) 1 (Ont. C.A.).

[162] Damages are to be assessed, not mathematically calculated. Damages should allow for contingencies for the possibility that the future may differ from the evidence at trial: *Krangle (Guardian ad litem of) v. Briscoe*, 2002 SCC 9; *Uhrovic v. Masjhuri*, 2008 BCCA 462.

[163] An award for services not previously used should be made only where the services are likely to be incurred on a going-forward basis: *Izony v. Weidlich*, 2006 BCSC 1315; *Gilbert v. Bottle*, 2011 BCSC 1389.

Position of the Parties

[164] Ms. McCully submits that an award of \$60,000 would be appropriate. Ms. McCully relies on the Cost of Future Care and Occupational Therapy Assessment reported prepared by Ms. Edwards and the costing information provided by Darren Benning, an economist.

[165] The defendants submit that an award of \$500 less a deduction for causation due to Ms. McCully's pre-existing condition would be sufficient to address the minimal cost of future care needs. The defendants rely on the critique of Ms. Edwards' report conducted by Mr. Winter together with the lack of an evidentiary basis for the recommendations of Ms. Edwards.

Discussion

[166] Dr. Robinson and Dr. Hawkeswood concurred in their recommendation that Ms. McCully engage in an active lifestyle with regular exercise. They also agree that there is no physical therapy that will cure Ms. McCully's neck pain and headaches. Although there are some treatments that may provide temporary benefit, some will come with an attendant risk of increased discomfort according to Dr. Robinson. Dr. Medvedev provided no future care recommendations.

[167] In her report, Ms. Edwards incorporates the recommendations of Dr. Robinson and Dr. Hawkeswood and also makes recommendations based on her own assessment. While Mr. Winter takes issue with the methodology Ms. Edwards' employed he makes no recommendations of his own.

[168] For the purposes of my analysis, I will canvass the areas of future care as set out in Ms. Edwards' report.

(a) Rehabilitation Services

[169] Ms. Edwards recommends physiotherapy; massage therapy and chiropractic treatment in order to maintain gains that Ms. McCully has made to date. Ms. McCully takes the position that Dr. Hawkeswood's reference to "allied health professional" is a reference to physiotherapy, massage and chiropractic services but provides no evidentiary basis for me to make that finding. I decline to do so. However, Dr. Robinson does acknowledge that physical therapy may provide temporary relief, although he cautions that such a course of treatment may aggravate her symptoms. Dr. Hawkeswood recommended 10-15 sessions with a kinesiologist to develop an exercise program. Ms. McCully testified that she did find some relief through the chiropractic sessions, which is in my view, the only support for Ms. Edwards's reference to "maintain gains made to date". Therefore, I am satisfied that there is a basis to award chiropractic treatment for 12 sessions for two years at a cost of \$1,100.

[170] Since the medical experts recommended that Ms. McCully engage in an active lifestyle comprised of regular exercise, I award Ms. McCully an annual pool pass for five years at a cost of \$1,900.

[171] The total of both these costs is \$3,000.

(b) Household Services

[172] Ms. Edwards recommends both monthly home support and spring/fall clean up on the basis that it would remove the risk of her re-injuring herself. I agree with the defendants that there is no evidence that performing such tasks would re-injure her but I accept that certain household tasks may worsen her neck pain and on that basis I am prepared to award a total of \$4,030 in order to provide Ms. McCully with occasional home support.

[173] With respect to household maintenance services, Ms. Edwards refers to gutters as part of this service even though Ms. McCully herself stated she hires outside help with the gutters and any other task that requires one to use a ladder. I have already accounted for the assistance that Ms. McCully may need for heavier household tasks in assessing her non-pecuniary award above. As a separate cost under this head of damages, I do not see any basis for an award for household maintenance services and I deny this cost.

[174] Ms. Edwards also recommends an award for yard service every other week during summer months and spring/fall yard clean up. Just as with the claimed household maintenance services, any yard assistance she requires has informed her non-pecuniary damages. I do not see any basis for a separate costs of future care award for either of these services and I deny the cost under this head of damage.

(c) Pain Management Aids

[175] Ms. McCully testified that she finds relief from the TENS machine and both Dr. Robinson and Dr. Hawkeswood recommend that she continues to do so as frequently as required. The defendants acknowledge that the use of a TENS machine is justified but they question the need for a replacement every three years. Since the medical experts recommend Ms. McCully continue to use the TENS machine I have no hesitation in granting the cost of replacing the machine every three years at a cost of \$179 for a total award of \$800.

[176] With respect to medications, Ms. McCully has testified she continues to take Tramacet as needed to address her pain. However, there was no evidence provided with respect to the precise prescription provided to her or the cost of the use of Tramacet. Dr. Robinson opines that there are no medications that can treat chronic headaches but Dr. Hawkeswood recommends that Ms. McCully maintain her current medications, which include Tramacet and magnesium. While I am satisfied there is a basis to continue these medications, the lack of information regarding the cost to Ms. McCully causes me to question the figures suggested by Ms. Edwards. I award \$2,000 for the cost of both Tramacet and magnesium. With respect to an award for other medications, I agree with the evidence of Mr. Winter and the defendants that there is no basis to justify this award and it is denied.

[177] Finally, the last recommendation in this section is the purchase of hot/cold wraps. I agree with the defendants that no award is justified for these costs.

(d) Positional/Workplace Aids

- [178] I agree with the defendant that there is no justification for a cervical pillow and the cost is denied.
- [179] With respect to the recommendation for the purchase of a blind spot mirror/backup camera for vehicle, Ms. McCully testified that she has managed to drive her car since the first accident without any difficulty. She explained how she modified her driving habits to accommodate her stiff neck. There is no evidence that she incurs any pain or discomfort in doing so. I find the utility of these items purely speculative and I deny this award.
- [180] However, I do agree that there is a basis to justify the purchase of an adjustable height powerlift massage table and ergonomic chair. Ms. Edwards did inspect Ms. McCully's work place and as depicted in the photographs contained in her report, she shows the equipment that Ms. McCully currently uses. With respect to the defendants' position, in my view it was not necessary for Ms. Edwards to observe Ms. McCully actually using these items in order to determine that they should be replaced. However, this is supported by Dr. Robinson's acknowledgment that Ms. McCully's work can cause discomfort and hence the recommendation for the continued use of the TENS machine. I am mindful of the guidance provided in *Tabet v. Hatzis*, 2013 BCSC 1167, that is "it is unnecessary for a physician to testify that each and every item of care claimed is medically necessary"; instead, what is imperative is locating "an evidentiary link between the medical assessment and the care recommended by a qualified health care professional, such as an occupational therapist or rehabilitation consultant" (at para. 101). In line with this, I am satisfied that there is an adequate justification for these costs and I therefore award the one time cost of \$1,400 for the adjustable height powerlift massage table and \$1,000 for the ergonomic chair. The total costs of these items together is \$2,400.
- [181] In summary, I award \$12,230 for cost of future care.

E. SPECIAL DAMAGES

- [182] The parties agree that Ms. McCully should receive \$6,668 in special damages. I make an award for this amount.

VII. CONCLUSION

- [183] In summary, I award the following damages:

Head of Damage

Award

- a. Non-pecuniary damages

\$85,000

- b. Loss of Housekeeping Capacity

\$0

c (i). Past Loss of Earning Capacity

\$1,000

c (ii). Loss of Future Earning Capacity

\$15,000

d. Costs of Future Care

\$12,230

e. Special Damages

\$6,668

TOTAL

\$119,898

VIII. COSTS

[184] In the event that the parties are unable to agree on costs, they are at liberty to apply to me in writing to settle the matter within 60 days of the issuing of these reasons.

"Devlin J."

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