
CANADA / JUDGMENT

McGahan v. Selock

2020 BCSC 973

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2020 BCSC 973 McGahan v. Selock

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

McGahan v. Selock,

2020 BCSC 973

Date: 20200630

Docket: S42973

Registry: Penticton

Between:

Daina McGahan

Plaintiff

And

Alicia Selock

Defendant

Before: The Honourable Justice Branch

Reasons for Judgment

Counsel for Plaintiff:

E. Lund

Counsel for Defendant:

R. Goldstone

Place and Date of Trial:

Penticton, B.C.

June 9-12, 2020

Place and Date of Judgment:

Penticton, B.C.

June 30, 2020

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I. INTRODUCTION

- [1] This is a fast-track personal injury action relating to a motor vehicle accident which occurred on August 24, 2016 on Government Street in Penticton (the "Accident"). The plaintiff stopped her vehicle at a pedestrian crossing, at which point she was rear-ended by the defendant's vehicle. Liability is admitted.
- [2] As a result of the Accident, the plaintiff claims to have suffered soft tissue injuries, as well as headaches. She alleges that she suffers from chronic, mild myofascial pain syndrome, particularly in her lower back.
- [3] The key issue in dispute is the extent to which the Accident has interfered with the plaintiff's ability to pursue a legal career in Canada. She last practiced law in Australia in 2007, before the birth of her child in 2010.

II. FACTUAL BACKGROUND

A. The Plaintiff's Background

- [4] The plaintiff is 52 years old. She grew up in Brisbane, Australia. She decided she wanted to be a lawyer in high school. She did not meet the grade requirements for admittance to law school directly out of high school, so she took a Bachelor of Arts program for two years. She was then able to transfer to a six-year co-op type program that allowed her to article during the day and study law in the evenings.
- [5] The plaintiff met her husband, Philip McGahan, while they were both in the same program of study.
- [6] After securing her law degree, the plaintiff worked in a number of positions as a lawyer over the next 14 years. She performed well, although she suffered the misfortune of having two of her preferred practice areas being essentially legislated out of existence. She earned in the range of \$100,000 AUD per year.
- [7] Her husband also qualified as a lawyer, but did not enjoy the practice of law. He worked in legal publishing for a period, but then began to pursue a new career in winemaking.

- [8] After the plaintiff lost her last position as a lawyer in 2007 (through no fault of her own), the McGahans decided to move to the Sonoma region of California so that Mr. McGahan could further pursue his career in winemaking. While Mr. McGahan was working for a California winery, the plaintiff studied for the California Bar Examination, while also working in various paralegal and retail jobs. She also wrote case summaries for an Australian legal publisher on a contract basis.
- [9] The plaintiff narrowly missed passing the California Bar Examination twice. Given her age and inability to work as a lawyer, the McGahans decided the time was right to have a child. Their son was born in June 2010. As Mr. McGahan's job was very demanding, the plaintiff focused on raising their son and managing the home over the next few years. She stopped writing case summaries.
- [10] In 2013, Mr. McGahan was recruited by BC's Mark Anthony Group ("Mark Anthony") to work in a senior position at a new winery near Oliver. The McGahans moved to Summerland in July 2013, and to Penticton in summer 2014. As part of the process of moving to Canada, the plaintiff asked Mark Anthony what it would take to qualify as a Canadian lawyer. She was told she would only need to take a couple of courses.
- [11] Mr. McGahan's winery has been quite successful. He now earns in the range of \$250,000 annually, including bonuses. The family has been able to purchase an investment property. Their net worth has been increasing.
- [12] Mr. McGahan's work continued to be very time consuming however. He works 50-60 hours per week in the off-season, and more during harvest and bottling season. He has to go on sales trips and do other out of town travel. As such, the plaintiff continued to be primarily responsible for childcare and housekeeping after their move to BC.
- [13] In fall 2015, their son entered kindergarten.
- [14] In March 2016, the plaintiff began to do some administrative work for the winery, earning \$1,000 per month for approximately 50 hours of work. The balance of her time was spent caring for their son and their home. This included playing sports with their son outside, and playing with toy trains on their floor inside. The plaintiff also enjoyed gourmet cooking, hosting dinner parties, taking long walks on the Kettle Valley Rail Trail with her dog, and reading.
- [15] The plaintiff says (and her husband confirms) that from the time she arrived in Canada, she was contemplating a return to work as a lawyer. She says that being a lawyer was and is a large part of her identity. Mr. McGahan says he also contemplated that the plaintiff would return to work as a lawyer at some point, and that this prospect did come up regularly.

B. The Accident

- [16] On August 24, 2016 at approximately 4:00 p.m., the plaintiff was driving her vehicle southbound on Government Street in Penticton on her way to pick up her son from a day camp. As she was driving along, she noticed the defendant come out from a side street and turn into the same lane behind her. Traffic was moving at approximately 40 km/h for several blocks.
- [17] The plaintiff then stopped at a pedestrian crossing to allow a man to cross. She was watching the man when her vehicle was struck from behind by the defendant's vehicle. Although she did not see the defendant approach, she assumes that the defendant was still proceeding at approximately 40 km/h. The defendant did not testify to provide a contrary account.
- [18] The plaintiff was able to get out of the car and exchange insurance information with the defendant. She continued on to pick up her son, although her rear bumper was clearly damaged. The vehicle was eventually declared a total loss.
- [19] As noted above, liability has been admitted.

C. Post Accident

Physical Injuries

- [20] When the plaintiff arrived home, she felt pain in her neck, as well as in her upper and lower back. She had a headache. The next day she went to see her family doctor.
- [21] Within three to four months, many of her symptoms had largely resolved. However, the plaintiff continues to suffer from nearly constant low back pain. Some days are better, but she has no totally pain-free days. This back pain becomes worse sitting or standing for more than an hour or two. It gets a bit better in the afternoons.

Activities

- [22] In terms of housekeeping, the McGahans employed a housekeeper before the Accident and continue to do so now. Of the remaining work required, the plaintiff has not been able to perform up to the same level as before. Mr. McGahan has picked up the slack in this regard, but he feels the house is not maintained to the level it was previously.
- [23] The plaintiff has trouble unloading the groceries. Her pain has also made cooking more difficult, although she does continue to put on dinner parties. The meals are simpler than they were previously.
- [24] The plaintiff now has difficulty playing sports or getting down on the floor to play with her son. Reading is uncomfortable.

- [25] She is now only able to take aerobic walks up to 4 km, as compared to her previous 5 or 6 km. She has tried pushing further, but the pain will generally engage at the 4 km point. Her friend and walking companion, Beverly Witzaney, confirmed that they usually stop at this distance. The plaintiff has put on significant weight since the Accident.
- [26] Although the plaintiff has been able to take some trips since the Accident, including flights to Australia, these are very difficult for her. When the family takes long drives, they have to stop every couple of hours.
- [27] The plaintiff has difficulties sleeping. While she tries to alleviate the pain by lying on her back, that is not her natural sleeping position. Mr. McGahan confirmed the change in his wife's sleeping patterns. Given that she is now such a light sleeper; he often sleeps with their son instead. Mr. McGahan also indicated that the plaintiff is now more irritable during the day.

Treatment

- [28] The plaintiff has received physiotherapy, massage therapy and chiropractic treatment. These provide some temporary and partial relief for 1-3 days. She has also learned stretches, exercises and strategies that help her cope with her pain.
- [29] More recently, the plaintiff attempted prolotherapy. After six sessions, she was sleeping better and her pain level lessened somewhat. However, further treatments were interrupted by the COVID-19 pandemic restrictions.

Employment

- [30] As noted, at the time of the collision, the plaintiff was working about 50 hours per month for Mark Anthony. She continued with this work until December 2017. Mark Anthony wanted to convert her position to full-time at this point, but she was not interested. Although her back pain was a factor, she agreed that she would not have accepted a full-time position in any event given her continuing responsibilities at home.
- [31] In 2017, the plaintiff visited the website of the Federation of Law Societies of Canada to confirm what was necessary to qualify as a lawyer in Canada. She began to fill out the required online form. After spending about an hour on the form, she had to get up. By the time she returned, the website timed out and all her work was lost. This frustrated her, and she did not return to the effort for a couple of years.
- [32] The plaintiff did complete the required form in 2019, and received notice that she will in fact need to complete seven subjects, either by challenging the exams, or by taking the classes at an accredited law school.
- [33] Now that her son is ten years old, he no longer requires constant supervision. There is now more time that the plaintiff could devote to studies or work. Although her pain continues, she believes that her knowledge of exercises, stretches, coping strategies, and how far she

can push herself, will allow her to return to work. However, she only plans to work part-time until her son leaves home in eight years' time. At that point she would like to return to full-time work. However, she is concerned about her capacity to do so given her ongoing back pain.

[34] She has not investigated whether any ergonomic equipment or assessment could help her manage her pain.

[35] The plaintiff was clear that she will not leave Penticton to study or work.

II. TREATING PHYSICIANS AND EXPERTS

[36] The Court received evidence from the following treating physicians and experts.

A. Dr. Paisley

[37] Dr. Paisley is the plaintiff's general practitioner. After the Accident, Dr. Paisley's office locum first saw the plaintiff on August 25, 2016. Dr. Paisley's report states that "she was complaining of paravertebral cervical and lumbar back pain." She was prescribed anti-inflammatory pain medication and physiotherapy.

[38] The plaintiff has seen Dr. Paisley periodically for these injuries since the Accident. Most recently, the plaintiff saw Dr. Paisley on March 2, 2020. At that time, his report noted that "[h]er back pain continued; however, it was only worse with prolonged sitting and standing and sleeping activities."

[39] Dr. Paisley provided the following opinion:

Mrs. McGahan was involved in an MVA where she was rear-ended at proximally 40 km an hour. As a result of this, she suffered prolonged cervical whiplash grade 1 and lumbar mechanical back pain which resulted in ligament injury and laxity. As a result of this, she required prolonged physiotherapy, prolotherapy and chiropractic manipulation. Although he [sic] did not cause a big change in her functionality, it did impact her quality of life significantly and required physiotherapy, prolotherapy to control the discomfort. She continues to suffer from lower back pain, her cervical pain appears to have now resolved.

B. Dr. Gross

[40] Dr. E. Lyle Gross is a specialist in Physical Medicine and Rehabilitation. He previously worked at the Mayo Clinic, where he served as Medical Director for the Impairment and Work Rehabilitation Center. He has conducted thousands of independent medical assessments, equally divided between plaintiffs and defendants.

[41] Dr. Gross examined the plaintiff on June 9, 2017. He identified decreased range of motion in both the plaintiff's neck and lower back. He also noted muscle spasms and tightness to the right side of her neck, and a positive Kemp test for lumbar facet anomaly to both the right and left side.

- [42] Dr. Gross diagnosed the plaintiff with "permanent loss to the neck and back related to the reduced range of motion of the cervical and lumbar spine". He concludes that "[f]rom a medical point of view, the restrictions include reduced sitting tolerance ... of 2 to 3 hours" beyond which "she must get up and move around and stretch." Dr. Gross concluded that she has chronic pain.
- [43] In terms of recommendations, he concluded that an ergonomic assessment should be considered, and that the plaintiff requires a proper desk and work environment. In addition, he said that it was reasonable to recommend a psychological assessment, and some anger management training.

C. Peter Sheldon

- [44] Mr. Sheldon is an economist who prepared a report analyzing income loss using Statistics Canada data for the earnings pattern of BC female lawyers and paralegals. For example, if the court were to conclude that the plaintiff has completely lost her ability to work as a part-time lawyer effectively treated as a ten-year call, the present value of that lost stream (incorporating standard "risk and choice" contingencies) would be \$600,900. He also provided an economic analysis of the value of any lost housekeeping capacity.

III. CAUSATION

- [45] The plaintiff must prove on a balance of probabilities that her injuries would not have occurred "but for" the Accident: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 14. The Accident does not need to be the only cause of the plaintiff's injuries but they must be a causal factor beyond the "de minimis" range: *Athey* at para. 15. I find that causation is established. The defendant did not argue otherwise.

IV. CREDIBILITY AND RELIABILITY

- [46] I found the plaintiff and other witnesses to be generally forthright. The defendant did not suggest otherwise.

V. DAMAGES

A. Non-Pecuniary Damages

1. Generally

- [47] Non-pecuniary damages are awarded to compensate the plaintiff for pain, suffering, loss of enjoyment of life and loss of amenities caused by a tortious act. The compensation awarded should be fair and reasonable to both parties: *Trites v. Penner*, 2010 BCSC 882 at para. 188. Fairness is measured in part against awards made in comparable cases: *Beaton v. Perkes*, 2016 BCSC 2276 at para. 51. That said, other cases are helpful but serve only as a rough guide. Each case still depends on its own facts: *Trites* at para. 189.

[48] In *Stapley v. Hejslet*, 2006 BCCA 34, leave to appeal ref'd [2006] S.C.C.A. No. 100, the Court of Appeal outlined certain factors to be considered when assessing non-pecuniary damages at para. 46:

The inexhaustive list of common factors cited in *Boyd v. Harris*, 2004 BCCA 146] that influence an award of non-pecuniary damages includes:

- (a) age of the plaintiff;
- (b) nature of the injury;
- (c) severity and duration of pain;
- (d) disability;
- (e) emotional suffering; and
- (f) loss or impairment of life;

I would add the following factors, although they may arguably be subsumed in the above list:

- (g) impairment of family, marital and social relationships;
- (h) impairment of physical and mental abilities;
- (i) loss of lifestyle; and
- (j) the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff: *Giang v. Clayton*, 2005 BCCA 54).

2. Key Factors

[49] I find the following factors particularly germane to the determination of the proper non-pecuniary award:

1. The plaintiff sustained soft tissue injuries to her neck and back in the Accident.
2. Her neck pain and headaches largely resolved in a few months.
3. She continues to suffer from low back pain, three years after the Accident. She has pain of varying degrees throughout each day.
4. The plaintiff was still able to continue to work part-time after the Accident.
5. Her recreational and household activities have been impacted. She was unable to play as actively with her son. Her walks were reduced to 4 kilometres a day. It is difficult to cook for long periods.
6. There is some room for optimism that prolotherapy may reduce her symptoms. The plaintiff was seeing good results from same prior to the COVID-19 crisis interfering with her treatment.

[50] In sum, I conclude that she is suffering from chronic pain that is now likely to be permanent, but there is some prospect for a reduced pain level in the future.

3. Plaintiff's Authorities

[51] The plaintiff presented several authorities to the Court, of which I found the following the most germane:

- 1) *Broomfield v. Lof*, 2019 BCSC 1155: The plaintiff was a 42-year-old special education assistant. Prior to the 2014 collision, the plaintiff was active in long distance cycling, hiking, stand-up paddle boarding and some snow boarding, as well as other activities. She was active with crafts and hobbies and frequently organized parties. She was a fastidious housekeeper. After the accident, she was off work for 14 months before beginning a gradual return to work in March 2015. After a few more attempts she returned to 80% of her duties in November 2018. For the first three months after the accident, the plaintiff suffered constant headaches, severe neck and jaw pain into her shoulders and arms, and back pain from the bottom of her neck to the top of her hips. She had improvements of 50% to 80% depending on the symptom. The plaintiff became irritable and lost the ability to perform most of her activities. She had an unwillingness to drive. She was diagnosed with major depression and chronic somatic symptom disorder (which were not diagnosed in the present case). The court awarded \$130,000.
- 2) *Lewis v. Wang*, 2020 BCSC 16: The 39-year-old plaintiff was injured in a low impact accident. After the accident she suffered from a neck injury which became chronic. The accident also aggravated pre-existing problems in her right shoulder and back. She suffered some headaches, anxiety and sleep disruption at a lesser level. She had been terminated as a sales associate shortly before the accident. The court accepted that she reasonably stayed out of the work force for 4.5 months, whereas the plaintiff here was able to keep up with her part-time work. The court awarded \$90,000.
- 3) *MacAulay v. Field*, 2014 BCSC 937: The 51-year-old plaintiff was an executive assistant. She was quite active prior to the accident. At trial, four years post-accident, the plaintiff had ongoing neck and back pain, as well as one or two headaches per month. The plaintiff was able to continue working, but her recreational activities were restricted. She had difficulty travelling. She gained weight, and her personality was dimmed. There was some prospect of improvement, but not recovery. The court awarded \$75,000, which included a component for lost housekeeping capacity.
- 4) *Dueck v. Lee*, 2019 BCSC 1936: The 55-year-old female plaintiff was a self-employed piano teacher and caterer. She suffered thumb numbness, knee pain, and wrist pain which all resolved prior to trial. At trial, three years post-accident, the plaintiff continued to experience a stiff neck every morning. She also suffered lower back pain after sitting for any prolonged period, as well as in the evenings. The back pain caused sleep issues. She continued to have tightness in her left shoulder and arm, as well as headaches several times per month. Although she was able to continue working, she needed more help. Her

household work diminished, as did her hosting of meals in her home. The court found that her prognosis was poor. The court awarded \$75,000.

- 5) *Lluncor v. Anderson*, 2020 BCSC 767: The plaintiff worked in sales. In the past, he had enjoyed swimming and hiking although just prior to the accident, he was out of shape and not exercising. His job required frequent travel and long hours. He performed 40% of the household chores prior to the accident. The accident did not cause substantial damage to his vehicle. There was no interruption of his employment. The court did express concerns about the plaintiff's reliability. The court found that his neck and shoulder issues actually resolved shortly after the collision. However, the court accepted that he continued to suffer intermittent but regular low back pain. His sleep was interrupted. His ability to swim, hike, perform chores, and engage in intimate relations were compromised. He was emotionally downcast as a result of his injuries. The court found that there was a likelihood of his symptoms diminishing or resolving if he followed a recommended treatment plan, but there was no real estimate of the timing for that recovery. The court awarded non-pecuniary damages of \$72,500, which included a component for reduced housekeeping capacity.

[52] The plaintiff suggests that an appropriate award for non-pecuniary damages would be \$120,000. The plaintiff also sought an additional award for loss of housekeeping capacity in the amount of \$20,000.

[53] The evidence underlying this housekeeping capacity claim left something to be desired. There was no specific time estimate provided for the amount of extra work Mr. McGahan has had to perform. The plaintiff was not particularly specific as to the tasks she is unable to perform. Finally, the entire analysis of this claim is complicated by the fact that the parties had paid homemaking assistance both before and after the Accident.

[54] The plaintiff did offer an economist's evaluation of the present value of a lost capacity to perform housework. However, the report merely provided a method for calculating value once an appropriate reduction in housekeeping capacity was established as a finding of fact. Given the weak evidentiary basis, I am unable to make a sufficiently certain finding as to the plaintiff's reduction in housekeeping capacity to insert into the proposed methodology, and can thus place little weight on Mr. Sheldon's housekeeping analysis.

[55] Given the evidentiary presentation, I find that it is more appropriate to simply incorporate the reality of the plaintiff's reduced housekeeping capacity into the determination of the general damages award, as was done in *MacAuley and Lluncor*.

4. Defendant's Authorities

[56] The defendant put forward the following authorities:

- 1) *Thorson v. Vandop*, 2016 BCSC 221: The female plaintiff was 38 years old at the time of trial. As a result of a rear-end collision on May 7, 2013, she alleged injury to her neck, back, and headaches. The plaintiff worked as a Clinical Addictions Counsellor and later as a Mental Health Liaison and Case Manager. She was able to continue to work full-time after the

accident. Unlike the present case, her pain was described as "intermittent" (para. 67) and her sleep disruption was "occasional" (para. 12). The plaintiff continued to do the majority of chores after the accident, but was more frequently reliant on her husband. The court awarded \$50,000.

- 2) Jones v. McLerie, 2016 BCSC 763: The male plaintiff was 36 years old at the time of trial. He was in a rear-end collision in 2011 resulting in injury to his neck and back. His primary complaint at the time of trial was low back pain that would go up to his mid-back and down to his legs with flare-ups. He continued to work as a forklift and equipment repair technician and sales representative, but had to modify his duties. He acknowledged occasional pain-free days, which is not the case in the present matter. He did experience severe incapacitating spasms on a weekly basis. The court awarded \$45,000.
- 3) Kelly v. Kotz, 2014 BCSC 244: The female plaintiff was 46 years old at the time of trial. She was in a T-bone collision on April 15, 2009. The plaintiff was employed as a legal assistant. The plaintiff suffered injury to the neck, upper back and headaches. Unlike the case here, there were days where she felt "normal" (para. 105). The court found that the plaintiff's symptoms would continue to improve. The court awarded \$45,000.
- 4) Fiorda v. Say, 2011 BCSC 1293: The female plaintiff was 56 years old at the time of trial and worked as a costume designer. She was in two accidents, the first on April 20, 2008 and the second on August 2, 2009. The plaintiff described pain in her neck, upper back and shoulders, as well as her mid and lower back. Her recreational activities continued after the accident. The court found that the plaintiff had suffered \$40,000 in non-pecuniary damages, or about \$45,000 in today's dollars (which was reduced for a failure to mitigate).

[57] The defendant suggested an appropriate figure for non-pecuniary damages of \$45,000.

5. Determination of non-pecuniary damages

[58] Applying the relevant factors identified above, and with guidance from the case law, I find that the appropriate amount for non-pecuniary damages is \$75,000. Although each case must be decided on its own facts, I find that the MacAulay and Dueck decisions provide very helpful guidance. Indeed, neither counsel was able to offer any notable distinguishing characteristics from these fact patterns to the present case. I find that this figure properly reflects the plaintiff's pain and suffering caused by the Accident.

B. Past Loss of Earning Capacity

[59] The plaintiff reasonably accepted that there should not be a separate award for loss of past capacity. Even absent this concession, I would have concluded that there was insufficient evidence to find that there was a real and substantial possibility that the plaintiff would have been in a position to work as a lawyer prior to trial. This conclusion was driven by the fact that: she had heavy childcare responsibilities between the Accident and trial; she had little support from her husband given his time-consuming employment; she had many

requirements to meet before she could qualify as a Canadian lawyer; and she was able to work part-time during this period in any event.

C. Loss of Future Earning Capacity

- [60] Justice Goepel canvassed the proper assessment of future earning capacity in *Grewal v. Naumann*, 2017 BCCA 158. While he dissented in the outcome, the majority agreed with the following summary of the relevant principles (see para. 66):
- [48] In summary, an assessment of loss of both past and future earning capacity involves a consideration of hypothetical events. The plaintiff is not required to prove these hypothetical events on a balance of probabilities. A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation. If the plaintiff establishes a real and substantial possibility, the Court must then determine the measure of damages by assessing the likelihood of the event. Depending on the facts of the case, a loss may be quantified either on an earnings approach or on a capital asset approach: *Perren v. Lalari*, 2010 BCCA 140 at para. 32.
- [49] The assessment of past or future loss requires the court to estimate a pecuniary loss by weighing possibilities and probabilities of hypothetical events. The use of economic and statistical evidence does not turn the assessment into a calculation but can be a helpful tool in determining what is fair and reasonable in the circumstances: *Dunbar v. Mendez*, 2016 BCCA 211 at para. 21.
- [61] An assessment of the loss for both past and future earning capacity involves a consideration of hypothetical events. The plaintiff is not required to prove these hypothetical events on a balance of probabilities. The future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation: *Athey* at para. 27; *Gao v. Dietrich*, 2018 BCCA 372 at paras 34-40.
- [62] The legal principles relevant to determining future loss of earning capacity were also neatly summarized by Justice Voith in *Pololos v. Cinnamon-Lopez*, 2016 BCSC 81 at para. 133:
- a) To the extent possible, a plaintiff should be put in the position he/she would have been in, but for the injuries caused by the defendant's negligence; *Lines v. W & D Logging Co. Ltd.*, 2009 BCCA 106 at para. 185, leave to appeal ref'd [2009] S.C.C.A. No. 197;
 - b) The central task of the Court is to compare the likely future of the plaintiff's working life if the Accident had not occurred with the plaintiff's likely future working life after the Accident; *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 32;
 - c) The assessment of loss must be based on the evidence, but requires an exercise of judgment and is not a mathematical calculation; *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 18;

- d) The two possible approaches to assessment of loss of future earning capacity are the "earnings approach" and the "capital asset approach"; *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 at para. 7 (S.C.); and *Perren v. Lalari*, 2010 BCCA 140 at paras. 11-12;
 - e) Under either approach, the plaintiff must prove that there is a "real and substantial possibility" of various future events leading to an income loss; *Perren* at para. 33;
 - f) The earnings approach will be more appropriate when the loss is more easily measurable; *Westbroek v. Brizuela*, 2014 BCCA 48 at para. 64. Furthermore, while assessing an award for future loss of income is not a purely mathematical exercise, the Court should endeavour to use factual mathematical anchors as a starting foundation to quantify such loss; *Jurczak v. Mauro*, 2013 BCCA 507 at paras. 36-37.
 - g) When relying on an "earnings approach", the Court must nevertheless always consider the overall fairness and reasonableness of the award, taking into account all of the evidence; *Rosvold* at para. 11.
- [63] The parties were furthest apart on this head of damage.
- [64] The plaintiff proposed an award of \$331,500, calculated by seeking 20% of Mr. Sheldon's present value determination of \$1,657,500 for a full-time ten-year-called lawyer's future income stream, with a reduced scope of negative contingencies. Alternatively, the plaintiff suggested that two years' income using the top lifetime annual earnings identified by Mr. Sheldon would equate to an award of \$283,200.
- [65] The defendant argued that there should be no award at all under this head of damages, as there was no real and substantial possibility that the plaintiff would have qualified for and pursued a legal career in Canada. The defendant is particularly critical of the absence of any vocational or occupational therapy expert report showing how the plaintiff's ongoing restrictions actually impact the ability to perform the daily functions of a lawyer.
- [66] As a first step, I must determine whether the plaintiff has proven that there is a real and substantial possibility of a future event leading to an income loss.
- [67] The most challenging aspect of this case is assessing what the plaintiff was most likely to have done absent the Accident, and what the plaintiff is now still able to do despite the Accident.
- [68] I find the following evidence most relevant to this analysis:
- a) The plaintiff has not worked as a lawyer since 2007;
 - b) The plaintiff did make efforts to become called to the bar in California indicating that she maintained an intention to practice after her move to North America. She was unsuccessful in two attempts to pass the required exams, but the evidence illustrated that these exams are very difficult for out-of-state lawyers;

- c) In 2010, the plaintiff abandoned her effort to return to paid work after these failures, and rather pursued new responsibilities as a mother;
- d) The plaintiff did make inquiries through her husband's employer about her ability to work in Canada as a lawyer at the time of their move to Canada. That said, she did not follow up on this option even after being told that it would only require a couple of courses. Weighing against this failure is the fact that she was obviously busy caring for her young child during this period;
- e) At the time of the Accident, the plaintiff was working for her husband's company and was able to continue to perform that part-time work after the Accident. She only stopped that work when the position changed to full-time. She accepts that she would not have accepted a full-time position even absent the Accident, given her ongoing childcare responsibilities.
- f) At the time of the Accident, the plaintiff's son was less than a year away from an age when he would be at school full-time, which would at least open the door to more time to take on additional study and employment challenges;
- g) At the time of the Accident, the plaintiff had not yet taken any concrete steps towards qualification as a lawyer in Canada. Qualification would likely have taken several years, particularly given the plaintiff's reluctance to pursue a full-time residential program away from Penticton;
- h) The plaintiff made little effort prior to trial to investigate other possible employment that might accommodate her restrictions. For example, the plaintiff did not investigate whether she might be able to do the case summary work that she did previously. The plaintiff does think she would be physically capable of doing such work even in her present condition.
- i) The plaintiff made little effort to investigate how her home or work environment might be improved, for example with standing desks or reading pillows;
- j) The plaintiff's husband's annual income is substantial. This level of income reduces the economic necessity of her earning additional income: *Dial v. Grewal*, 2010 BCSC 759 at para. 236. That said, Mr. McGahan was quite clear that he expected the plaintiff to return to work once their child was old enough to go to school full-time. The plaintiff also expressed this intention quite clearly. This evidence was not shaken on cross-examination; and
- k) The plaintiff agreed that even absent the Accident she would only have been looking for part-time legal work in Penticton initially, with a possible return towards full-time work when her son left for college (at which point she would be approximately 60 years old).

- [69] Considering all these factors, I conclude that there was a real and substantial possibility that the plaintiff would have returned to work as a lawyer in Canada at some point. I can reach this conclusion based on the evidence, without the need for further expert reports. The plaintiff has worked very hard her entire life, whether at university, as a lawyer, preparing for the California Bar Examination, or caring for her child. There is little prospect that she would have now suddenly decided to adopt a life of leisure.
- [70] I also conclude that as a result of her constant back pain, the plaintiff has become "less valuable to [her]self as a person capable of earning income in a competitive labour market": *Perren v. Lalari*, 2010 BCCA 140 at para. 11 citing *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 (S.C.).
- [71] The next step is to determine whether I should use the earnings or capital asset approach in quantifying any loss. The plaintiff suggested that the capital asset approach should be used. I agree that this method is more appropriate here given that the loss is not easily measurable as a result of the fact that:
- a) The plaintiff had not established herself in a legal career in Canada at the time of the Accident; and
 - b) The plaintiff was able to continue to earn some income after the Accident, albeit outside the legal area.

See *Perren* at para. 32; *Jorgensen v. Coonce*, 2013 BCSC 158 at paras. 108-109.

- [72] In terms of assessing the appropriate capital loss however, there are a number of negative contingencies that must be incorporated into the analysis, including:
- a) The prospect that the plaintiff would not have been able to pass the Canadian course work or law society exams in any event. I rate this risk as low;
 - b) The potential for her Canadian qualification to have been delayed beyond the trial date in any event. This factor does support a moderate negative contingency, given her stated restriction to Penticton, and her ongoing childcare responsibilities up until at least her son's graduation from high school;
 - c) The risk that the plaintiff would have only engaged in part-time work irrespective of the Accident. I rate this risk as high, at least up to the projected date of her son's graduation, but I find it continues to be moderate thereafter. This assessment is supported by the combination of her husband's heavy workload and high compensation, which collectively depress the need for the plaintiff to engage in extraordinary efforts to earn additional funds for the family;

- d) The likelihood that she would not have been able to find work where she is prepared to work and live. As noted, the plaintiff restricts her employment area to Penticton. The Province's pending move to no-fault for motor vehicle claims will undoubtedly restrict the number of available positions: Bill 11, Attorney General Statutes (Vehicle Insurance) Amendment Act, 2020, 5th Sess, 41st Parl, British Columbia, 2020; *Jenkins v. Irving*, 2020 BCSC 391 at para. 224. I rate this negative contingency as moderate;
 - e) The likelihood that the plaintiff will still be able to find work, even with her present limitations. I rate this contingency as high, particularly when coupled with the strong likelihood that she would only ever have pursued part-time work. The plaintiff may only be able to sit or stand for an hour or so at a time, but this limitation should be able to be accommodated in most modern offices. That said, there may be some intense work that is foreclosed to her, such as long trials or drafting time-pressured solicitor's documentation. There may be employers unwilling to accommodate such restrictions.
- [73] If the ability to assess the likely course of events either pre- or post-Accident is particularly challenging, the court may invoke the rougher and ready "Pallos Approach" of awarding one or two years' income: *Rozendaal v. Landingin*, 2013 BCSC 24; *Daleh v Schroeder*, 2019 BCSC 1179 at para. 146.
- [74] Considering the factors above and all of the challenges here, I find that an appropriate award is \$120,000. As a cross check on the reasonableness of this figure:
- a) It represents one-and-a-half years average income for a part-time BC lawyer under the Pallos approach, assuming that the plaintiff is treated as approximately a ten-year-call upon her Canadian qualification[1];
 - b) Looking to the more detailed analysis performed by Mr. Sheldon, he provided a present value of \$600,900 for the future stream of income for a part-time lawyer given ten years' credit for past work, and incorporating standard "risk and choice" contingencies. I find that it is far more likely that the plaintiff would have pursued part-time rather than full-time work. The key additional negative contingency that must be applied is driven by my determination that there is in the range of a 70% chance that the plaintiff will still be able to perform part-time legal work even with her present limitations. If one applies a further 10% negative contingency for her heightened risk of unemployment given her restriction to Penticton and the challenging legal employment environment, this results in a total negative contingency of 80%. This cross-check analysis also supports an assessment of approximately \$120,000.[2] I note that the plaintiff herself applied an 80% contingency to her higher full-time starting point.

D. Special Damages

- [75] The parties agreed on an award of \$9,142.73 under this head, generally representing the cost of the various treatment modalities that the plaintiff has pursued, including physiotherapy, prolotherapy, and massage therapy. These were prescribed by her physician, and she says that these treatments have reduced her pain levels, at least on a temporary basis.

E. Costs of Future Care

- [76] In *Peters v. Ortner*, 2013 BCSC 1861, Justice Harris outlined the general principles to consider when assessing a plaintiff's cost of future care:
- [141] The plaintiff is entitled to compensation for the cost of future care based on what is reasonably necessary to restore him to his pre-accident condition in so far as that is possible. The award is to be based on what is reasonably necessary on the medical evidence to preserve and promote the plaintiff's mental and physical health: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.); *Williams v. Low*, 2000 BCSC 345; *Spehar v. Beazley*, 2002 BCSC 1104; *Gignac v. Rozylo*, 2012 BCCA 351.
- [142] The test for determining the appropriate award under the heading of cost of future care is an objective one based on the medical evidence. For an award of future care: there must be a medical justification for claims for cost of future care and the claims must be reasonable: *Milina*; *Tsalamandris v. McLeod*, 2012 BCCA 239 at paras. 62-63.
- [143] Future care costs are "justified" if they are both medically necessary and likely to be incurred by the plaintiff. The award of damages is thus a matter of prediction as to what will happen in the future. If a plaintiff has not used a particular item or service in the past it may be inappropriate to include its cost in a future care award. However, if the evidence shows that previously rejected services will not be or be able to be, rejected in the future, the plaintiff can recover for such services: *Izony v. Weidlich*, 2006 BCSC 1315 at para. 74; *O'Connell v. Yung*, 2012 BCCA 57 at paras. 55, 60, 68-70.
- [144] The extent, if any, to which a future care costs award should be adjusted for contingencies depends on the specific care needs of the plaintiff. In some cases negative contingencies are offset by positive contingencies and, therefore, a contingency adjustment is not required. In other cases, however, the award is reduced based on the prospect of improvement in the plaintiff's condition or increased based on the prospect that additional care will be required. Each case falls to be determined on its particular facts: *Gilbert v. Bottle*, 2011 BCSC 1389 at para. 253.
- [77] An assessment of damages for cost of future care is not a precise accounting exercise: *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at para. 21.
- [78] The plaintiff proposed \$10,000 under this head of damage, essentially suggesting that she is likely to incur the same amount for treatment in the future as she has spent in the past, represented by her accepted special damages claim. She confirmed that the treatment she

has received does provide her with pain relief, which relief I have incorporated into my assessment of her ability to work in the future. It is only fair that she be awarded something to allow her to continue such treatment given that it has been considered as part of a negative contingency under the future capacity head of damage.

- [79] The defendant says that the plaintiff should not receive any award under this head because no health care professional specifically recommended any future care items. The defendant relied on the following statement from *Gregory v. ICBC*, 2011 BCCA 144:
- [39] I do not consider it necessary, in order for a plaintiff to successfully advance a future cost of care claim, that a physician testify to the medical necessity of each and every item of care that is claimed. But there must be some evidentiary link drawn between the physician's assessment of pain, disability, and recommended treatment and the care recommended by a qualified health care professional.
- [80] I accept that the evidence on this head of damage was somewhat lacking. But I adopt the summary of the effect of the *Gregory* decision adopted by the court in *Poulin v. Armstrong*, 2019 BCSC 926.
- [31] In determining whether an item or service is medically required or justified I may consider the recommendations of doctors and other professionals and may order compensation as long as I am satisfied that there is some evidentiary link between the item and the treatment of the plaintiff's accident-related pain or disability: *Gregory* at paras. 38 and 39.
- [81] The plaintiff is actively obtaining treatments under Dr. Paisley's guidance. It is reasonable to infer that his recommendation continues. He was not cross-examined on this point, so as to undermine this inference. Further, the award I have made below can also be supported using Dr. Gross's recommendation for ergonomic and psychological assessments. Finally, as a matter of proportionality, the court again notes that this was a five-day fast-track trial. To require additional expert reports to support a modest future care award would be disproportionate. I find that there is enough evidence here to support a moderate award of \$5000.

VI. SUMMARY

- [82] In summary, damages are awarded as follows:

General Damages

\$75,000.00

Future Loss of Capacity

\$120,000.00

Future Cost of Care

\$5,000.00

Special Damages

\$9,142.73

TOTAL:

\$209,142.73

VII. TAX GROSS-UP, STATUTORY DEDUCTIONS, INTEREST, AND COSTS

[83] I leave it to the parties to consider the results of this judgment and address any costs, tax gross-up, statutory deductions, and interest implications accordingly. If they are unable to agree on these matters, they are at liberty to make further submissions, with the plaintiff providing written submissions to the Court within 30 days of this judgment, and the defendant responding 30 days thereafter.

"The Honourable Mr. Justice Branch"

[1] Sheldon Report, p.11 (\$78,800 X 1.5=\$118,200)

[2] \$600,900 X 20%= \$120,180.

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