

CANADA / JUDGMENT

Nguyen v. O'Neil

2020 BCSC 2036

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 2036 Nguyen v. O'Neil

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Nguyen v. O'Neil,

2020 BCSC 2036

Date: 20201221

Docket: M186247

Registry: Vancouver

Between:

Kim Thien Nguyen

Plaintiff

And

Brendan O'Neil and Imperial Paddock Pools Ltd.

Defendants

Before: The Honourable Mr. Justice Gomery

Reasons for Judgment

Counsel for the Plaintiff:

D.V. Abreu

N. Nowbahari

Counsel for the Defendants:

V.E. Munn

Place and Dates of Trial:

Vancouver, B.C.

November 30, December 1-4, 2020

Place and Date of Judgment:

Vancouver, B.C.

December 21, 2020

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Introduction

- [1] Kim Nguyen was a passenger in the front seat of a car when it was struck from behind by the defendants' vehicle while stopped at a stop sign. Ms. Nguyen suffered soft tissue injuries. She seeks damages and the defendants concede that they are liable. The issue is the amount required to compensate Ms. Nguyen for her loss.
- [2] At the time of the accident, Ms. Nguyen was 20 years old. She was working as a sales associate at a cell phone store. This was a placeholder job while she settled on a career. Her interests lay in competitive cheerleading and volunteer emergency services organized by the City of Vancouver. Her thinking was that she would like to pursue a career as a coordinator of volunteer emergency services.
- [3] Ms. Nguyen's injuries were not so severe that they caused her to take time off from work. However, they are persistent. They have put an end to her cheerleading and her pursuit of a career in volunteer emergency services. Three years after the accident, Ms. Nguyen has returned to school and is now pursuing a diploma program in the department of business administration at the British Columbia Institute of Technology. She is carrying a full course-load, spending as much as 12 or 14 hours a day studying and working on her computer. Her plan is to obtain a bachelor's degree following her business diploma and then pursue a career in marketing.
- [4] Ms. Nguyen claims damages totalling more than \$600,000. The defendants say that she should recover approximately \$72,000. They contest the cause, severity, and duration of Ms. Nguyen's injuries, their effect on her life generally, and specifically on her capacity to work and perform activities such as household duties.
- [5] As often occurs, this is a case in which both side's positions are overstated.

Credibility and reliability

- [6] The defendants submit that "there is some degree of exaggeration" in Ms. Nguyen's evidence concerning her injuries, pointing to inconsistencies between her evidence and complaints attributed to her in clinical notes. For the reasons discussed by Justice N. Smith in *Edmondson v. Payer*, 2011 BCSC 118 at paras. 29-37, *aff'd* 2012 BCCA 114, a certain level of inconsistency is natural and probably inevitable.
- [7] Ms. Nguyen was an articulate witness. She made admissions against interest and was neither defensive nor combative in cross-examination. She sometimes exhibited a human tendency to dwell on difficulties she attributes to the accident. Her memory is imperfect. For the most part, I consider her a credible and generally a reliable witness.

History

Prior to the accident

- [8] Ms. Nguyen was born in late 1996. She was born and raised in Vancouver, and still lives with her parents in a house located near the corner of Hastings Street and Boundary Road. She has one sibling, a sister, Ann Nguyen, who is four years younger. Ms. Nguyen is close to her mother and her sister, and a little distant from her father.
- [9] Ms. Nguyen was physically active in high school and afterwards. She played sports and did gymnastics. The gymnastics led her into competitive cheerleading. She continued cheerleading following her high school graduation. By 2016, she was on three cheerleading teams, and it was a big part of her life. In early 2017, she had taken a break from cheerleading, and was intending to return to it.
- [10] Ms. Nguyen was a good student in high school, but her marks tailed off to mostly Cs and Bs in Grade 12. She graduated in June 2014. She attended Langara College for two terms, taking a health sciences program. The program was not to her liking and she dropped it.
- [11] In August 2015, she found work as a retail sales clerk, earning minimum wage. She left that job in May 2016.
- [12] In October 2016, she found another job in retail sales, this time with Rogers Communications at a Fido store.
- [13] In the meantime, in addition to cheerleading, she was an active volunteer. She helped take elderly patients to Mass at St. Joseph's Hospital. In 2015, she became involved as a volunteer with an emergency services program run by the City of Vancouver. Through the program, she was trained in first aid and disaster response. The training included exercises in rescuing injured people from automobiles and ruined structures. Some of the training led to course credit through the Justice Institute of British Columbia.
- [14] Ms. Nguyen developed an ambition to work in municipal government as an emergency services coordinator taking an active role in fieldwork. The first step would be to go back to school to obtain a degree in Emergency Management. As of May 2017, she had not applied for admission to that degree program.
- [15] Prior to the accident, Ms. Nguyen suffered some sports injuries. In high school, she injured a knee injury playing soccer. In 2014, she suffered a concussion while cheerleading. In 2016, she told a doctor that she had aches and pains from cheerleading. The doctor made a note of "intermittent chronic low back pain". Nevertheless, just prior to the accident in May 2017, she was fit and in good health overall. She jogged and played badminton with friends.

The accident

- [16] The motor vehicle accident occurred in the afternoon on May 11, 2017. Ms. Nguyen was seated in the front passenger seat of a car stopped at a red light. The defendants' vehicle struck Ms. Nguyen's car from behind. Ms. Nguyen was pushed forward and then pulled back by her seat belt. The car in which Ms. Nguyen was seated suffered approximately \$2,700 worth of damage and was written off.

Diagnosis and treatment to January 2019

- [17] After the accident, Ms. Nguyen felt terrible, but expected that she would get better. She went to a medical clinic on May 16, 2017, and saw Dr. Ho. This was the first of 11 visits by Ms. Nguyen to Dr. Ho in connection with accident-related injuries. The most recent was on August 25, 2020.
- [18] At the first visit on May 16, 2017, Ms. Nguyen was experiencing stiffness in her neck, upper and lower back, and headaches. Dr. Ho observed spasm and tenderness in Ms. Nguyen's paracervical, trapezius, rhomboid, and paralumbar muscles, and a limited range of motion in her neck. He diagnosed a "grade 2" whiplash associated disorder, recommended that she take analgesics, and referred her for physiotherapy.
- [19] Beginning on May 23 until mid-September, 2017, Ms. Nguyen attended weekly appointments with a chiropractor, Dr. Jang. In examining Ms. Nguyen, he consistently noted spasming in the paraspinal and trapezius muscles, and the muscles of the shoulder. Dr. Jang concurred in the diagnosis of a grade 2 whiplash associated disorder. Dr. Jang treated Ms. Nguyen with heat, mobilizations, and a program of stretches and exercises for her to perform daily.
- [20] After September 2017, Ms. Nguyen stopped seeing Dr. Jang and began active rehabilitation with a kinesiologist, Mr. Chung. She saw Mr. Chung nine times in 2017 and 15 times in 2018. She also saw a registered massage therapist, Mr. Bailey, seven times for massage treatments between March 28 and July 25, 2018. Beginning in August 2018, she began seeing a naturopathic doctor, Dr. Nguyen-Jang, for acupuncture. She attended 16 acupuncture sessions through January 4, 2019.
- [21] Through 2018, Ms. Nguyen continued to experience neck, back, and shoulder pain, particularly in the left shoulder. She found that her various treatments--active rehabilitation, massage, and acupuncture--gave her symptomatic relief that did not last. In 2018, a new symptom emerged and she began to experience numbness and tingling in her left arm.
- [22] Dr. Ho continued to observe muscle spasm and a limited range of motion in Ms. Nguyen's neck, shoulders, and back. In September 2018, he prescribed a topical analgesic cream, which she found helpful and continues to take today. She did not take any other prescription medicines.

[23] Through 2018, Ms. Nguyen continued to experience headaches. The frequency seems to have declined over time. By the end of the year, she was getting headaches a couple times a week.

[24] Ms. Nguyen's symptoms and complaints were not disabling. In the period following the accident, she continued to work full-time, without interruption, at the Fido store.

January 2019 concussion

[25] In January 2019, Ms. Nguyen suffered a blow to the head while working at the Fido store. She was concussed, took time off work to recover, and submitted a claim for workers' compensation. The concussion was serious enough that Ms. Nguyen was off work for six months. Her symptoms included headaches, intolerance of light and noise (photophobia and sonophobia), nausea, neck pain, and cognitive difficulties (memory and concentration). The neck pain was an exacerbation of a symptom from the car accident that is the subject of this action.

[26] Ms. Nguyen was admitted into a treatment program administered by WorkSafeBC. It developed a graduated return to work plan for her that was implemented beginning June 10, 2019. Ms. Nguyen successfully completed the graduated return to work plan and was working full-time at the Fido store from July 14, 2019. By this point she was largely free of symptoms from the concussion. She continued to experience neck, shoulder, and back pain as she had since the accident. I do not think that that the concussion injury made a lasting contribution to her neck pain.

[27] Ms. Nguyen says, and I accept, that the headaches she suffered from the concussion were different from the headaches she began to suffer in 2017 in the aftermath of the accident.

History since July 2019

[28] In August 2019, Ms. Nguyen quit her job at the Fido store, following a dispute with her manager.

[29] Ms. Nguyen continued to experience neck, back, and shoulder pain, and occasional headaches. In August and October 2019, she attended further massage treatments with Mr. Bailey and active rehabilitation therapy with Mr. Chung.

[30] In December 2019, following a recommendation by Dr. Ho in April, Ms. Nguyen began a course of trigger point injections in her neck and shoulder with Drs. Yang and Khalfan. These continued until June 2020, and were followed by a further course of trigger point injections administered by Dr. Viem Nguyen in August and September, 2020. Ms. Nguyen found that the trigger point injections offered symptomatic relief.

- [31] Ms. Nguyen decided that her neck, shoulder, and back pain disqualified her from pursuing a career in emergency services. She applied for admission to a diploma program in marketing at BCIT. She intended to find work in the meantime, but those plans were disrupted by the COVID-19 pandemic and she was unemployed until she started at BCIT in September 2020.
- [32] Ms. Nguyen started classes in September and testified at trial on November 30 and December 1, 2020. She is fully engaged with her studies, with 23 hours of classes each week. Anything in excess of 12 hours a week is considered full-time attendance. Sometimes she is studying for 12 or 14 hours a day. She is doing well, getting As in all but one of her courses.
- [33] Ms. Nguyen experiences stiffness in her low back, neck, and particularly pain in her left shoulder when she has been studying in one position for a long time. Ms. Nguyen shares a bedroom with her sister, Ann Nguyen, who testifies that Ms. Nguyen interrupts her studying with regular breaks to stretch and walk around. She sets a timer to remind herself to stretch. Ms. Nguyen testifies that she takes Extra Strength Tylenol or regular Advil for the pain, and to manage her headaches.
- [34] Ms. Nguyen continues to experience numbness and tingling in her left arm several times a week.
- [35] Ms. Nguyen reports, and Ann Nguyen confirms, that she is woken up by pain at night and has to get up, walk around, and stretch, before she can get back to sleep. This has been a part of her life since the accident.

Expert evidence

- [36] Ms. Nguyen was examined by Dr. Chow, a physiatrist retained by the plaintiff, on August 20, 2020, and by Dr. Baker, a physiatrist retained by the defendants, on September 2, 2020. She was also seen by Mr. McNeil, an occupational therapist retained by the plaintiff, for a functional capacity evaluation on August 31, 2020.
- [37] The two physiatrists obtained equivalent histories from Ms. Nguyen and recorded similar observations during their physical examinations. They express their findings somewhat differently.
- [38] Significantly, both physiatrists observed tenderness on palpation of the muscles in areas where Ms. Nguyen reports pain and stiffness, and bands of taut or knotted muscles in spasm. Dr. Chow found trigger points, that is, places where pressing the knotted muscle resulted in referred pain, and Dr. Baker did not.
- [39] Dr. Chow found that Ms. Nguyen did not exhibit "pain behaviour". Dr. Baker thought that some of Ms. Nguyen's reactions to light touch in affected areas demonstrated "extra sensitivity to somatic cues". He did not suggest that she was intentionally misreporting her symptoms.

- [40] Dr. Baker testifies that, "histopathologically", Ms. Nguyen has recovered from her injuries suffered in the accident. By that, he means that she is not suffering the ongoing effects of structural changes caused by traumatic force. He accepts that she continues to experience chronic pain evidenced by the muscle spasm he observed. It is, he says, an "epiphenomenon" or indirect consequence of the injury she sustained in the accident.
- [41] Dr. Chow says much the same thing in different words. He concludes that, as a result of the accident, Ms. Nguyen suffers from "myofascial pain syndrome", a condition "characterized by taut or hard band within the muscle that can strongly modulate the central nervous system functions with tenderness and referred pain associated with the central and peripheral sensitization process".
- [42] Both physiatrists note Ms. Nguyen's complaint of numbness and tingling in her left arm. Dr. Baker does not offer a diagnosis. Dr. Chow does. He says that the numbness and tingling are most likely thoracic outlet syndrome, a condition resulting from a compression or traction injury in the brachial plexus, that is, the network of nerves that exits the spine into the shoulders. I accept Dr. Chow's opinion that this is an injury resulting from the accident.
- [43] Dr. Chow believes that Ms. Nguyen has reached maximum medical recovery and her prognosis is poor. Referring to the persistence of her symptoms over three years, he expects that she will continue to experience chronic pain for the indefinite future.
- [44] Dr. Chow cautions that certain studies have shown that up to 30% of accident-related cases have worsening of symptoms 3-15 years later. I am not persuaded by Dr. Chow's reference to what these studies have shown. The converse would be that at least 70% of the patients in these studies realised improvement or remained stable. As in *Reely v. Zhu*, 2020 BCSC 1520 at para. 38, I place no weight on what the studies are said to have shown.
- [45] The defendants point to modest improvements in Ms. Nguyen's range of motion in her neck recorded by Dr. Chow by comparison to the measurements recorded by Dr. Baker nine days earlier to suggest that Ms. Nguyen's complaints have not plateaued. I agree with Dr. Chow that the differences are more likely attributable to fluctuation and different observers than to recent improvements in her condition of a lasting nature.
- [46] It is plausible that Ms. Nguyen will continue to suffer symptoms of pain associated with muscle spasm indefinitely and I accept that the prognosis is poor for a complete or substantial recovery. Dr. Baker has not given an opinion to the contrary.
- [47] Mr. McNeil concludes that, based on testing he administered over the course of a day, Ms. Nguyen is capable of working in occupations where the physical demands are sedentary. She would be limited in her ability to perform some occupations requiring light physical work, and would not be capable of managing the demands of medium or heavy physical work. For example, she could work in retail sales, possibly with some accommodations, but not as a stock person or a cleaner.

- [48] The experts all met with Ms. Nguyen and prepared their reports before Ms. Nguyen began her classes at BCIT. In the course of their testimony, Dr. Chow and Mr. McNeil were invited to comment on Ms. Nguyen's report that she is studying for as much as 14 hours a day.
- [49] Dr. Chow expressed concern that she may be overdoing it. He said that there is a risk that she will trigger a further sensitization of her nervous system, leading to a permanent aggravation of her symptoms. On the other hand, he said that if she can work to that extent without aggravating her symptoms, she should go ahead.
- [50] Mr. McNeil responded that, if he were treating Ms. Nguyen and were told that she was studying 10 to 14 hours per day, he would encourage her to find better ways to remain productive while managing her pain. He expressed a concern that she will do too much, and crash. A difficulty with Mr. McNeil's response is that he states, in his report, that it is outside the scope of his expertise, as an occupational therapist, to provide a prognosis.
- [51] I am satisfied from the evidence of Ms. Nguyen and her sister that, notwithstanding the long hours she is working, she is paying attention to her symptoms and taking care not to aggravate her condition. I find that she is likely to be able to continue with and complete her course of studies without getting worse. There is a risk that her condition will deteriorate, and a possibility that it will improve. Overall, she is unlikely to get better.

Issues

- [52] Ms. Nguyen claims damages under the following heads:
- a) Non-pecuniary damages;
 - b) Loss of future income-earning capacity;
 - c) Cost of future care; and
 - d) Loss of housekeeping capacity.
- [53] Ms. Nguyen does not claim that she has suffered an income loss to date. Special damages of \$3,353.05 are agreed.

Non-pecuniary damages

- [54] Ms. Nguyen claims non-pecuniary damages of \$125,000. The defendants submit that an award of \$55,000 is appropriate.

Legal framework

- [55] Non-pecuniary damages are awarded as compensation for past and future pain, suffering, disability, and loss of enjoyment of life. The court must take into account both the seriousness of the injury and the ability of the award to ameliorate the condition or offer solace to the victim; *Stapley v. Hejslet*, 2006 BCCA 34 at para. 45, leave to appeal ref'd, [2006] S.C.C.A. No. 100 [Stapley]. In *Stapley*, at para. 46, the Court noted a non-exhaustive list of

factors to be considered: age of the plaintiff; nature of the injury; severity and duration of pain; disability; emotional suffering; loss or impairment of life; impairment of family, marital and social relationships; impairment of physical and mental abilities; loss of lifestyle; and stoicism as a factor that should not, generally speaking, penalize the plaintiff.

- [56] An award must be fair and reasonable, and fairness is measured against the awards made in comparable cases, recognizing that other cases provide only a rough guide. Each case must be decided on its own facts; *Trites v. Penner*, 2010 BCSC 882 at para. 189.

Stapley considerations

- [57] As noted above, Ms. Nguyen was a 20-year-old sales clerk at the time of the accident. She suffered soft tissue injuries to her neck, shoulders, and upper and lower back that have persisted over the three and one-half years since the accident. These injuries are reflected in painful muscle spasming. Ms. Nguyen also suffers numbness and tingling in her left arm associated with thoracic outlet syndrome. Her sleep is disturbed and she suffers headaches two or three times a week. Ms. Nguyen is likely to continue to experience these symptoms for the foreseeable future.
- [58] Ms. Nguyen is not disabled. She is able to manage her pain with over-the-counter analgesics, stretches, and movement. Her discomfort does not prevent her from holding down a full post-secondary program, studying for as much as 12 or 14 hours per day, and taking in what she has learned to achieve first class results.
- [59] While Ms. Nguyen has a history of treatment for clinical depression, she does not claim that she has suffered any emotional disorder in consequence of the accident. There is only the unhappiness and emotional suffering that is naturally associated with the experience of chronic pain.
- [60] Ms. Nguyen's relationship with her family has not suffered in consequence of her injuries. She has not suffered harm to an intimate relationship.
- [61] Ms. Nguyen is suffering an ongoing impairment of her physical abilities. She was an athletic young woman, and now she is someone who lives with pain, cannot take on moderate or heavy physical tasks, and must be careful to manage her physical condition on a daily basis. These are limitations that come to many people in old age or late-middle age. They came to Ms. Nguyen suddenly and prematurely, soon after she had become an adult.
- [62] Ms. Nguyen's injuries have dealt a blow to her activities and aspirations. She is no longer able to pursue competitive cheerleading. This was an activity that consumed as many as 30 hours a week, and she was associated with a team that attended international competitions. She is no longer able to pursue her ambition of a career in emergency management. Involvement with emergency services was something she enjoyed for the physicality of the work, her involvement as a member of a team, and her well-justified belief in the importance of the work. She is not at all confident that she will find another career that will

suit her as well as she believes this career would have suited her, and she feels a sense of loss in this regard.

- [63] Prior to the accident, Ms. Nguyen's social life mostly involved people she knew through cheerleading and badminton. She is no longer a part of those social circles and feels relatively isolated as a result. I expect that she will overcome this in time.

Comparable cases

- [64] Ms. Nguyen tenders nine cases said to be comparable to the case at bar. I pass by three of them involving plaintiffs who were at least 15 years older than Ms. Nguyen at the time of her accident. The others are: *Parhar v. Clarke*, 2017 BCSC 550 [Parhar]; *Winick v. Goddard*, 2020 BCSC 4 [Winick]; *Wahid v. Caporusso*, 2016 BCSC 1743 [Wahid]; *Audet v. Chan*, 2018 BCSC 1123 [Audet]; *Harris v. Kraus*, 2017 BCSC 640 [Harris]; and *Kuras v. Repo*, 2014 BCSC 1634 [Kuras].
- [65] While all of these cases feature plaintiffs who suffered soft tissue injuries in the neck, shoulders, and back, they feature other injuries as well. For example, the plaintiff in *Parhar* suffered tinnitus, injury to her temporomandibular joint, a major depressive disorder, a chronic pain disorder, and had experienced significant emotional suffering. While she was awarded non-pecuniary damages of \$110,000, these are cumulatively much more serious injuries than those suffered by Ms. Nguyen.
- [66] While *Parhar* is an extreme example, I find that all but one of the cases presented on Ms. Nguyen's behalf involve somewhat more serious injuries. In *Winick*, the plaintiff was suffering radiating pain to her legs and hips six years following the accident. In *Wahid*, the plaintiff's injuries caused her to take seven months off work and she was diagnosed with chronic pain syndrome. In *Audet*, 12 years following the accident, the plaintiff was suffering daily headaches. In *Harris*, the plaintiff was experiencing constant pain that had affected her ability to nurse her infant child.
- [67] Of these cases, *Kuras* is the closest to the case at bar. Justice Holmes (now A.C.J.S.C.) stressed the importance of the constraints imposed by the plaintiff's symptoms on her daily life. While the effects were more serious than those experienced by Ms. Nguyen, there is some similarity to Ms. Nguyen's loss of cheerleading and a vocation in emergency services. The plaintiff in *Kuras* was awarded non-pecuniary damages of \$80,000 (equivalent to approximately \$88,000 in 2020). Justice Holmes stated:
- [47] Ms. Kuras's symptoms are not dissimilar to those of the plaintiff in *Rozendaal*, where the award was \$40,000. However, the consequences of those symptoms on Ms. Kuras's enjoyment of life supports a higher award. Like Ms. *Rozendaal*, Ms. Kuras is now restricted in her enjoyment of many aspects of her daily life, and will likely continue to be constrained by her symptoms, which intrude with varying frequency and intensity. But in addition, Ms. Kuras can no longer engage in activities (running, long-distance cycling, and serious hiking) which she not only enjoyed but also relied on for her emotional well-being. Moreover, some

of those activities were key elements of her family life with Mr. Patterson, including vacations.

[Emphasis added.]

- [68] The defendants tender seven cases that they submit are comparable to the case at bar. As with Ms. Nguyen's cases, I discard from consideration three cases involving plaintiffs at least 15 years older than Ms. Nguyen at the time of her accident. That leaves for consideration: *Duffy v. Dutt*, 2020 BCSC 995 [Duffy]; *Anderson v. Rizzardo*, 2015 BCSC 2349 [Anderson]; *Lal v. Le*, 2016 BCSC 1324 [Lal]; and *Smith v. Evashkevich*, 2016 BCSC 1228 [Smith].
- [69] As with Ms. Nguyen's cases, all of these cases feature plaintiffs who suffered soft tissue injuries to the neck, shoulders, and back. None of them features a complaint of numbness and tingling in the arm attributable to thoracic outlet syndrome.
- [70] I find Smith a difficult comparator, because the plaintiff's condition included complaints of anxiety, depression, and inability to cope at work that were mostly but not entirely unrelated to the accident.
- [71] In Lal, the plaintiff was awarded non-pecuniary damages of \$50,000 (equivalent to about \$53,000 today). While the plaintiff was experiencing pain and that was expected to continue indefinitely, it was important that "his activities, favourite pastimes, hobbies, relationships - all things that contribute to the enjoyment of life - appear to be mostly unaffected " (at para. 109).
- [72] In Duffy, the plaintiff was awarded non-pecuniary damages of \$55,000. Her symptoms included headaches, but only once or twice a month, as compared to Ms. Nguyen's headaches two or three times a week. Justice Macintosh reviewed evidence of her loss of enjoyment of life and commented that, while her pain and suffering had affected her life, the effects were "something less than calamitous" (at para. 47).
- [73] Anderson provides an interesting comparison to the case at bar. The plaintiff, a 29-year-old businessman, was awarded non-pecuniary damages of \$60,000 (equivalent to about \$65,000 today). His injuries did not affect his ability to do housework or participate in leisure activities, including even physically intensive sports like ice hockey and snow skiing. However, Justice Ballance emphasized that they had a devastating effect in compromising his ability to perform his dream job in a company in which he had invested time, talent, and a sense of self-worth (at paras. 200-201).

Assessment of non-pecuniary loss

- [74] The cases underscore the essential lesson of Stapley, that it is important to attend not just to injuries and complaints, but also to the effect of the injuries on the plaintiff's experience of her life.

[75] In my view, the following features of this case warrant an award of non-pecuniary damages that is smaller than the \$88,000 (in 2020 dollars) awarded in *Kuras*, but higher than the amounts awarded in the defendants' cases:

- a) Ms. Nguyen experiences painful muscle spasming, numbness and tingling in her left arm, disturbed sleep, and headaches two or three times a week, and is likely to continue experiencing these symptoms for the foreseeable future;
- b) Ms. Nguyen's pain is not disabling and she is not experiencing unusual emotional suffering;
- c) As in *Kuras*, Ms. Nguyen's injuries constrain her physical abilities and prevent her from continuing with activities (cheerleading, volunteering in emergency services) that were an important part of her life;
- d) As in *Anderson*, Ms. Nguyen's injuries have dealt a blow to her career aspirations;
- e) While Ms. Nguyen's social life has been adversely affected, it is likely to recover and her family and intimate life has been unaffected.

[76] Taking everything into account, I award Ms. Nguyen \$75,000 as non-pecuniary damages.

Loss of future income-earning capacity

[77] Ms. Nguyen claims an award of \$290,000. The defendants submit that there should be no award under this head.

[78] An award for future loss of income-earning capacity requires the plaintiff to prove that there is a real and substantial possibility of a future event leading to an income loss. Once that hurdle is crossed, the loss may be quantified by comparing the currently expected earnings stream to that which would have been expected, but for the accident, or on the footing of the damage to a capital asset caused by the plaintiff's injuries; *Perren v. Lalari*, 2010 BCCA 140 at para. 32 [Perren].

[79] Counsel for Ms. Nguyen, Mr. Abreu, submits that an award is justified by a real and substantial possibility that, but for the accident, Ms. Nguyen would have found employment in emergency services. The premise of his argument is that Ms. Nguyen is now on track, instead, to obtain a bachelor's degree and employment in the field of marketing. He relies on labour market statistics showing that the average annual income of "other managers in public administration", a category that includes emergency management coordinators and emergency response coordinators (along with such diverse occupations as a public works superintendent and the Principal Clerk of the House of Commons), is higher than the average annual income of a woman with a bachelor's degree.

[80] I am not persuaded that there is a real and substantial possibility that, but for the accident, Ms. Nguyen would have pursued a career in emergency services. Ms. Nguyen's prospects for such a career were merely speculative. She was 20 years old. While she had been thinking about emergency services for two years and had identified a post-secondary degree program

as a prerequisite, she had not taken steps to apply for admission to that program. She was not nearly settled into a career path in emergency services, and she was not in a hurry to get there. I expect that she felt she had time.

- [81] Even if I found that a career in emergency services was both a real and a substantial possibility for Ms. Nguyen, I am not persuaded by the statistics proffered by Mr. Abreu that her economic prospects would be brighter had she pursued such a career than they are now. The occupational categories founding the argument are too broadly defined to provide a meaningful basis for comparison.
- [82] Mr. Abreu makes a second argument. He submits that Ms. Nguyen's injuries have impaired her income earning capacity by disqualifying her from future employment in occupations presenting more than sedentary physical demands. He submits that Ms. Nguyen's likely lifetime earnings as the anticipated future holder of a bachelor's degree are in the order of \$1.9 million, so that a 15% impairment in her earning capacity would equate to an award of approximately \$288,000.
- [83] I accept the first part of this argument because I find that there is a real and substantial possibility that Ms. Nguyen's physical limitations, resulting from the accident, will limit her future income-earning capacity by limiting the careers she can pursue. In the oft-quoted words of Justice Finch (as he then was) in *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 (S.C.), Ms. Nguyen's injuries make her "less valuable to [her]self as a person capable of earning income in a competitive labour market".
- [84] I do not accept that it would be just to quantify the injury to Ms. Nguyen's income-earning capacity in the manner suggested by Mr. Abreu. The choice of 15% as an impairment percentage is arbitrary. Mr. Abreu borrows it from *Khademolhosseini v. Ji*, 2019 BCSC 854 at para. 93, but that was a case in which the court assessed a future income loss on an earnings approach (see para. 85) and Mr. Abreu is applying the 15% to value the impairment of a capital asset. This is a case in which a capital asset approach is preferable, because the loss is not easily measurable; *Perren*, at para. 32.
- [85] In valuing Ms. Nguyen's loss resulting from her likely inability to pursue careers that are at all physically strenuous, I take the following matters into account:
- a) It is not likely that Ms. Nguyen's injuries will limit her capacity to complete her post-secondary studies and pursue employment in sedentary occupations;
 - b) Considering Ms. Nguyen's apparent academic abilities, her motivation, and that she is still a young person, she is likely to have a range of sedentary occupations to choose among; and
 - c) There is a risk that Ms. Nguyen's injuries will be aggravated by over-work and her condition will deteriorate, resulting in a more significant impairment of her earning capacity than presently appears likely.

[86] Balancing the contingencies as best I can, I award Ms. Nguyen \$50,000 for the injury to her future earning capacity.

Cost of future care

[87] Ms. Nguyen claims an award of \$115,000. The defendants submit that an award of \$13,500 is appropriate.

[88] The purpose of an award for the cost of future care is, so far as is possible with a monetary award, to restore the plaintiff to the position she would have been in had the accident not occurred. The award is based on what is reasonably necessary on the medical evidence to promote the mental and physical health of the plaintiff; *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 [Gignac] at paras. 29-30, citing *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.) and *Aberdeen v. Zanatta*, 2008 BCCA 420 at para. 41.

[89] Each part of the claim must be supported by the medical evidence. If the plaintiff relies on the report of an occupational therapist or rehabilitation consultant, there must be an evidentiary link between the medical evidence and the recommendations in the report; *Gignac*, at paras. 31-32. If the plaintiff has not used or sought out a service in the past, it will usually be difficult for her to justify a claim in respect of that service; *Warick v. Diwell*, 2018 BCCA 53 at para. 55.

[90] At the end of the day, an award for the cost of future care is assessed, not mathematically calculated; *Uhrovic v. Masjhuri*, 2008 BCCA 462 at paras. 28-31.

[91] Ms. Nguyen relies on future care recommendations contained in Mr. McNeil's report. Mr. McNeil formulated his recommendations only after his meeting with Ms. Nguyen. He did not discuss them with her. In giving evidence, she was not referred to Mr. McNeil's report and invited to address his recommendations. I am left with little evidence to establish that most of Mr. McNeil's recommendations are reasonably necessary to promote Ms. Nguyen's health.

[92] Some of the recommendations do not make sense. Mr. McNeil recommends an allowance for the purchase of exercise equipment that Ms. Nguyen can use at home "given the current situation limiting access to fitness centres". He lists recommended items--a stability ball, yoga mat, dumbbells, and resistance bands-- and says that they will need to be replaced every three years. If the recommendation is to address the situation while fitness centres remain closed due to the COVID-19 pandemic, it is unreasonably pessimistic to assume that replacement in three years will be an issue. There is no discernable reason why dumbbells would wear out and need to be replaced.

[93] Mr. McNeil's report lists household items such as a lightweight vacuum, steam mop, and cordless scrubber, to be replaced every five years.

[94] At present, Ms. Nguyen shares housekeeping chores with her sister. Her sister does the laundry and the vacuuming. In her evidence-in-chief, Ms. Nguyen described herself as "a bit of a neat freak" who used to clean the bathrooms and wash the kitchen floor a few times a week, and would wash the dishes twice daily. She said that she did very little now. On discovery, she gave the following evidence:

Q Were any of those household chores affected by your accident injuries?

A I don't do laundry any more.

Q Who does it now?

A My sister.

Q Anything else?

A My sister does the vacuuming too. I still wash the dishes and I still, like, clean, but I leave the heavy lifting for my sister.

[95] In cross-examination, Ms. Nguyen was shown her discovery evidence and a clinical record recording her advice, while she was being treated for the concussion suffered in January 2019, that "vacuuming was challenging due to difficulty tolerating the noise, however was completing cleaning such as wiping counters and mopping". She responded that, in that period, she was capable of tending to household chores, if she pushed herself.

[96] Ms. Nguyen has recovered from the concussion. Taking into account her evidence on cross-examination, I find that she does her share of the household chores. I am not persuaded that the household items listed in Mr. McNeil's report are reasonably necessary for her health.

[97] Mr. McNeil recommends items of furniture such as a sit-stand desk and an ergonomic chair to "allow her to manage pain while also assisting her to remain productive with minimal interruption of her work flow". Ms. Nguyen is managing a full course load and long hours of studying without such items.

[98] Mr. McNeil recommends monthly massage therapy (\$1,080 per year), physiotherapy (\$1,080 per year) and psychological counselling (\$2,400 per year). He also recommends 12 sessions of occupational therapy (\$2,760) and 12 sessions of work with a kinesiologist (\$960).

[99] These recommendations are inflated. Ms. Nguyen is under the care of a psychiatrist, and does not need additional psychological counselling. She did not pursue physiotherapy when it was recommended early on by Dr. Ho. However, she continues to go for massage with Mr. Bailey and for active rehabilitation with Mr. Chung. An allowance for future massage and kinesiology appointments is appropriate.

- [100] I accept Mr. McNeil's recommendation that Ms. Nguyen would benefit from a contoured pillow, body pillow, and heating pad to help her sleep and manage her pain. While it's not clear whether she has these items at present, in this case, I accept Mr. McNeil's evidence that they will probably have to be replaced every two years or so. The annual cost is approximately \$65.
- [101] Mr. Abreu asks for an award based on an estimate of annual costs, multiplied by 30.6731 (representing 48 years of future care, that is, to age 72, at a discount rate of 2%), discounted by roughly 18% for contingencies and to arrive at a round number. While the multiplier informs my assessment, I do not find the calculation helpful. Monthly massage therapy and kinesiology together with sleeping aids as set out above would cost \$2,105 annually, but I do not accept that Ms. Nguyen's future health requires continuous expenditure at this rate until she is 72 years old.
- [102] In my view, an award of \$30,000 for the cost of future care is reasonable in the circumstances of this case.

Loss of housekeeping capacity

- [103] The loss of housekeeping capacity may be compensated as part of an award of non-pecuniary damages, or made the subject of a separate, pecuniary award. Ms. Nguyen claims a pecuniary award of \$75,000. The defendants submit that there should be no separate award under this head.
- [104] In *Ali v. Stacey*, 2020 BCSC 465, I considered two recent considered decisions of the Court of Appeal addressing claims for loss of housekeeping capacity; *Kim v. Lin*, 2018 BCCA 77 at paras. 27-37 [Kim], and *Riley v. Ritsco*, 2018 BCCA 366 at paras. 96-103 [Riley]. I concluded:
- [67] Read together, these two judgments establish that a plaintiff's claim that she should be compensated in connection with household work she can no longer perform should be addressed as follows:
- a) The first question is whether the loss should be considered as pecuniary or non-pecuniary. This involves a discretionary assessment of the nature of the loss and how it is most fairly to be compensated; Kim at para. 33.
 - b) If the plaintiff is paying for services provided by a housekeeper, or family members or friends are providing equivalent services gratuitously, a pecuniary award is usually more appropriate; Riley at para. 101.
 - c) A pecuniary award for loss of housekeeping capacity is an award for the loss of a capital asset; Kim at para. 31. It may be entirely appropriate to value the loss holistically, and not by mathematical calculation; Kim at para. 44.
 - d) Where the loss is considered as non-pecuniary, in the absence of special circumstances, it is compensated as a part of a general award of non-pecuniary damages; Riley at para. 102.

[105] Mr. Abreu acknowledges that Ms. Nguyen has no need for housekeeping assistance as long as she continues to live at home with her parents and her sister. He proposes an award on the assumption that she will leave home at age 28 and require housekeeping assistance until she is 72 years old.

[106] There is no evidence that Ms. Nguyen plans to leave home at age 28. When she leaves home at some point, it may well be to share a home with another person, either an intimate partner or a friend, with whom Ms. Nguyen will share housekeeping responsibilities just as she does at present.

[107] I am not persuaded that there is a real and substantial possibility that Ms. Nguyen will require assistance with household chores beyond the ordinary sharing that occurs within almost all shared households. I dismiss her claim for a separate award for loss of housekeeping capacity. To the extent that Ms. Nguyen's injuries cause her pain and inconvenience while she is doing housework, that will be compensated, so far as money permits, by the non-pecuniary damages I am awarding her.

Disposition

[108] For these reasons, I award Ms. Nguyen damages totalling \$158,353.05 as follows:

a) Non-pecuniary damages:

\$75,000.00

b) Loss of future income-earning capacity:

\$50,000.00

c) Cost of future care:

\$30,000.00

d) Special damages:

\$3,353.05

Total:

\$158,353.05

[109] Unless there are matters that must be brought to my attention, Ms. Nguyen is entitled to her costs. If costs must be spoken to, counsel may make arrangements through the registry for a hearing at 9 a.m. one day, to be preceded by an exchange of written submissions not to exceed five pages each.

"Gomery J."

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