

CANADA / JUDGMENT

Park v. Shephard

2022 BCSC 795

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Supreme Court of British Columbia

DECIDED

25 February 2022

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2022 BCSC 795 Park v. Shephard

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Park v. Shephard,

2022 BCSC 795

Date: 20220225

Docket: M166904

Registry: Vancouver

Between:

Mijeong Park

Plaintiff

And

William Shephard

Defendant

Before: The Honourable Justice Branch

Oral Reasons for Judgment

Counsel for the Plaintiff appearing by videoconference:

M.J. Bauer

Counsel for the Defendant appearing by videoconference:

E. Tahanha

Place and Date of Trial:

Vancouver, B.C.

February 14-18, 2022

Place and Date of Judgment:

Vancouver, B.C.

February 25, 2022

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I. INTRODUCTION

[1] The plaintiff seeks compensation for injuries sustained in a motor vehicle accident on May 14, 2015 (the "Accident"). Liability has been admitted.

II. FACTUAL BACKGROUND

A. The Plaintiff

[2] The plaintiff was born April 10, 1970, in South Korea.

[3] The plaintiff graduated from high school in South Korea. She then took a one-year hairdressing course. She worked as a hair dresser for about 20 years, including in a salon that she operated.

[4] She moved to Canada in approximately 2012, when she was 42 years old.

[5] Her English is not strong, but she is now generally able to make her way through daily life, although she did testify through an interpreter.

[6] The plaintiff was able to find work as a hairdresser at a salon called Chatters after arriving in Canada. She was working about 37-38 hours a week at the time of the Accident, earning about \$14.50 per hour.

[7] Prior to the Accident, the plaintiff had an intention to leave Chatters at some point. She was considering starting her own salon. The plaintiff did have some low back pain prior to the Accident, which she associated with the demands of her hairdressing position. She also had occasional headaches.

[8] Prior to the Accident, the plaintiff did all the yard work at her home. She also did about 90% of the housework, with her children doing the balance. The plaintiff is divorced. The plaintiff used to exercise by going for runs with her children.

[9] The plaintiff attended a Korean church regularly prior to the Accident, and used to help out preparing lunch. She would spend about 3-4 hours at church on Sundays.

B. The Accident

- [10] The Accident occurred at the intersection of Vedder Road and Luckakuck Way in Chilliwack, B.C. The plaintiff was on her way to a meeting at the Chilliwack Community Centre with her daughter. She had stopped at a red light when she was rear-ended by the defendant's pick-up truck. She was startled by the impact, which caused a loud bang. Her heart started racing. She believes her vehicle was pushed forward about 30 cm.
- [11] Following the Accident, the plaintiff was able to get out of her vehicle on her own. After the parties exchanged information, she continued on to the community centre. She went home that evening without attending the hospital or seeking other medical treatment.
- [12] The Accident caused about \$1,300 in damage to the plaintiff's vehicle.

C. Post-Accident

- [13] About three days after the Accident, the plaintiff started to notice symptoms. She began to suffer from headaches, as well as pain in her neck and shoulders, particularly on the right side. She also began to have pain in her left index finger. She was anxious when driving. Her sleep was disturbed.
- [14] The plaintiff tried to see her family physician after the Accident, but could not get an appointment until May 29, 2015.
- [15] She received some massage therapy after the Accident. She did not take any time off work, even though her family physician suggested that she only work four days a week.
- [16] The plaintiff took an extended trip to South Korea from June to August 2015, which had been planned prior to the Accident. While in Korea, she received treatment including physiotherapy, acupuncture, and injections. Upon her return to Canada, she underwent further physiotherapy, acupuncture, injections, and chiropractic treatment. She returned to Chatters and worked the same hours she had previously. Although she had difficulty performing certain tasks, she felt that she needed to keep working to support her family. Her left-hand index finger pain made it difficult to cut long hair.
- [17] More than a year after the Accident, she started to develop right arm numbness and tingling.
- [18] The plaintiff's physiotherapy, chiropractic, and massage treatments generally offered only temporary relief. She was referred for massage therapy by her family doctor in October 2015, but she did not go. She stopped going to her physiotherapy treatment in December 2015, even though she had not been discharged from same. She has not attended any type of treatment since late 2020. In November 2020, she received physiotherapy for right elbow pain she had been having for a few years. She says that she is intending to pursue more treatment in the future, specifically chiropractic.

- [19] In July 2016, the plaintiff decided to leave Chatters and purchase a mall sandwich shop. Although the plaintiff accepted in final argument that there was a plan to leave prior to the Accident, she suggests that the Accident still played a role in her decision to change positions. She accepted that she told Dr. Le Nobel (one of the expert witnesses retained by the plaintiff) that she would have made the change regardless.
- [20] The plaintiff decided to purchase the sandwich shop, in part, because of her daughter's advice. In particular, her daughter had been working at the shop and suggested to the plaintiff that the work may be less physically demanding than hairdressing. The plaintiff says that she did not start her own salon because she was worried about her capacity to do all the necessary tasks on her own. Her shoulder and neck pain had improved by this point, but it was not completely resolved and she continued to have flare-ups.
- [21] The plaintiff has continued to operate her sandwich shop since that time. She works at the store 50 hours or more per week. She says that it turned out that the sandwich store had greater physical demands than operating as a hairdresser. She occasionally struggles physically, particularly when she has to use her shoulder to cut meat. She suggested that she would work even longer hours absent the pain from the Accident.
- [22] The plaintiff was diagnosed with arthritis in March 2021. She has a family history of arthritis. She started to experience symptoms in about December 2020. She had difficulties with her knees and hands. She also suffers from pain in the joint area between her right shoulder and arm. The arthritis makes it more difficult for her to stand at work, and causes stiffness in her fingers. She reports that her arthritis symptoms have improved. She claims that her Accident symptoms affect her more at work currently than her arthritis symptoms.
- [23] The plaintiff has had a left eye problem that affects her night vision. The plaintiff also testified that she is pre-diabetic but she has not noticed any symptoms.
- [24] The plaintiff's neck pain reduced after the first six months or so. It is more in the nature of a periodic discomfort at this point. Her shoulder pain was her main concern thereafter, particularly on the right side. She stated that it has been quite constant, particularly when driving and when her work demands are particularly heavy. She still has tingling and numbness in her right arm. She associates her arm problems with flare-ups in her shoulder. Her finger pain has largely resolved. The plaintiff's headaches have reduced but she still has about 5-6 per month. Her sleep problems have improved but still occur, particularly when she is stressed.
- [25] The plaintiff's minor low back pain still occurs if she has to lift something heavy. She did not associate this pain with the Accident. It will last 2-3 days "once in a while".
- [26] The plaintiff is now able to drive long distances, but she risks a flare-up of her symptoms when she does. A flare-up can last 2-3 weeks. She is no longer anxious when driving generally, unless a traffic light changes just as she approaches an intersection.

- [27] She continues to do exercises and stretching at home, although she is no longer able to run as she did prior to the Accident. She also uses an inversion table on the suggestion of an acquaintance, although it does not offer much improvement. She takes over-the-counter pain medication.
- [28] The plaintiff's percentage of the housework has fallen from 90% to 60%. She no longer does the yard work, as that is now the responsibility of her tenant.
- [29] The plaintiff no longer prepares meals at the church, and she has been going to church less regularly, given that she needs to work at the sandwich shop. She says she is too tired to prepare the church meals.
- [30] The defendant performed surveillance on the plaintiff on February 25-26 and 29, 2019. Video was entered into evidence that showed the plaintiff driving to work, working at the sandwich shop, carrying a bag of groceries, and taking out the garbage--all with little apparent difficulty.
- [31] The plaintiff says that the physical demands of running a sandwich shop are greater than she expected. She still hopes to open her own hair salon, but she is concerned that the physical demands will be too high given her ongoing symptoms.

D. The Plaintiff's Earnings

- [32] The plaintiff's reported earnings pre and post accident are as follows:

Year

Earnings

2013

\$25,393

2014

\$30,112

2015

\$24,677

2016

\$1,123

2017

\$16,450

2018

\$5,960

2019

\$13,248

2020

\$18,255

III. EXPERT AND INVESTIGATOR EVIDENCE

A. Dr. Le Nobel, Physiatrist

[33] Dr. Le Nobel examined the plaintiff at plaintiff's counsel request on January 8, 2019. His diagnoses included the following:

- a) chronic post-traumatic headache;
- b) myofascial tissue injuries in her neck and upper back; and
- c) referred pain into her shoulder.

[34] In terms of her finger problem, Dr. Le Nobel attributes this to the myofascial tissue injuries.

[35] In terms of the plaintiff's right arm symptoms, Dr. Le Nobel's report concluded:

Based on the temporal sequence, I did not establish a direct connection between the motor vehicle collision and Mi Jeong Park's right upper limb sensory symptoms.[1]

[36] In terms of the plaintiff's prognosis, Dr. Le Nobel described it as guarded. He concluded "[b]ased on the time since the collision and on her account of ongoing neck and upper back and shoulder girdle pain, I anticipate her symptoms in these areas continuing for the foreseeable future most likely for the next several years and possibly longer".

[37] From the answers provided in cross-examination, I conclude Dr. Le Nobel's opinions were based on assumptions about the plaintiff's condition that were more severe than those provided at trial, such as the evidence that her neck pain was largely resolved within six months to a year. This somewhat reduces the weight that can be applied to his report.

[38] In terms of treatment, Dr. Le Nobel concluded that attending a kinesiologist would reduce the plaintiff's deconditioning. He felt that it was important that this be supervised by a professional to reduce the prospect of symptom aggravation. This treatment could result in improvement in the plaintiff's condition. He suggested that this assistance should be provided for 12-24 months.

[39] In terms of future work capacity, Dr. Le Nobel stated that he did not anticipate future sustained absences from work as a result of the Accident. If Ms. Park were relying more on driving for employment, the Accident could lead to a restriction in her capacity for such work.

B. Dr. Ancill, Psychiatrist

- [40] Dr. Ancill diagnosed the plaintiff with chronic pain and an adjustment disorder.
- [41] I admit Dr. Ancill's chronic pain diagnosis but place little weight on it. He did not perform a physical examination of his own and the diagnosis does not fall within the core of Dr. Ancill's expertise as a psychiatrist.
- [42] In relation to the adjustment disorder diagnosis, it is important to note that the basis for this finding was largely based on the plaintiff's real, but limited, driving anxiety.
- [43] On prognosis, Dr. Ancill stated that he "would expect that with successful treatment for anxiety and pain, which has not happened to date, that there would be symptomatic improvement".
- [44] In terms of treatment, Dr. Ancill stated that:
- Antidepressants medications include SSRI antidepressants are often of some benefit but minor tranquilizers such as alprazolam, lorazepam and clonazepam, apart from short-term "as necessary" use are not.
- Psychological intervention is a major component of treating post-trauma anxiety and current therapies are Mindfulness and Cognitive Behaviour Therapy, often in combination
- [45] In examination-in-chief, Dr. Ancill clarified that his opinion was that medication and psychological intervention in combination would be best.

C. Mair Edwards, Occupational Therapist

- [46] Ms. Edwards prepared a report at the plaintiff's request, but did not examine the plaintiff directly. The defendant challenged the admissibility of her report, but I find that it is admissible. Ms. Edwards is able to speak to the costing of treatments recommended by the physicians.
- [47] Based on Dr. Ancill and Dr. Le Nobel's opinions, Ms. Edwards costed:
- Individual counselling at 12 sessions annually for three years, then six sessions annually for three years, at \$200 per session. While I accept the individual session cost estimate, Dr. Ancill did not provide a specific recommendation for the amount of treatment at the level proposed by Ms. Edwards. Ms. Edwards described it, however, as a typical course of therapy.
 - Medication at \$300 per year annually.
- [48] Ms. Edwards also costed:
- 12 sessions of kinesiology at \$190 per session for three years; and
 - 12 sessions of physiotherapy at \$190 per session for two years, then six sessions annually for three years.

[49] Although Ms. Edwards costed both types of physical treatment, she agreed that Dr. Le Nobel framed them as alternatives. Ms. Edwards suggested under cross-examination that her own opinion was that concurrent treatment was preferable.

[50] Ms. Edwards also provided information on the cost of household and yard services. However, I place little weight on this information given that no medical practitioner recommended such assistance.

D. Kevin Turnbull, Economist

[51] Mr. Turnbull prepared a future care costs estimate, based on Ms. Edwards' analysis.

E. Dr. Bentley, Physical Medicine & Rehabilitation

[52] Dr. Bentley prepared a report at the request of the defendant. Dr. Bentley examined the plaintiff on November 28, 2019. In this examination, the plaintiff reported neck pain at a 6-7 out of 10 level, and right arm pain rated at 3 out of 10. She reported an overall 60% recovery from the effects of the Accident.

[53] Dr. Bentley diagnosed a Whiplash Associated Disorder Type II and a thoracic spine sprain/strain. In terms of a prognosis, he found that it was "excellent given that she has no current disability in any domain". He found good range of motion.

[54] With respect to the plaintiff's capacity to work, Dr. Bentley found that she "does not have any significant musculoskeletal impairment that would necessitate any formal physical limitations in the workplace, and therefore, it is not anticipated that the conditions resulting from the date of loss will affect her employability now or in the future." He saw no need for additional treatment.

F. Richard Timothy Bowles, Private Investigator

[55] Mr. Bowles was retained by the defence to monitor the plaintiff over the course of three days. He testified that he did not see any indication of pain restriction as the plaintiff went about her daily work driving to the sandwich shop and dealing with customers. Video was entered into evidence that showed the plaintiff moving quite freely and easily at work, including reaching overhead, bringing in an empty garbage can, and transporting bags. However, the weight of this evidence was tempered by the fact that:

- a) the monitoring only took place in the morning, while the plaintiff indicated that she feels worse at the end of the day; and
- b) there were certain unexplained gaps in the video.

IV. CREDIBILITY AND RELIABILITY

- [56] The defendant challenges the plaintiff's credibility and reliability. However, I find that she was generally credible. Indeed, she was extremely willing to accept defence counsel's suggestions in cross-examination, even where such evidence hurt her case. Any inconsistencies between her testimony-in-chief or cross, or between her testimony and the medical records, can largely be attributed to translation issues in the Court's view. As discussed below, the plaintiff's challenge is not the credibility of her testimony, but the effect of her testimony.
- [57] The defendant relied on the investigative video evidence to impugn the plaintiff's credibility. It is true that the plaintiff was shown performing her work and outside home tasks with relative ease, but that is not particularly inconsistent with her own testimony, which did not identify much in the way of specific tasks that she could not perform. Rather, she suggests that she is more easily tired and suffers pain if she does too much, particularly at the end of the day. As noted above, the surveillance video was taken in the morning.

V. CAUSATION

- [58] The defendant did not contest that causation is established. The real question is the extent of damage caused by the Accident.

VI. DAMAGES

A. Mitigation

- [59] The defendant seeks a 20% mitigation discount based on the fact that:
- a) the plaintiff was referred for massage therapy by her family doctor in October 2015, but did not go;
 - b) she stopped going to her physiotherapy treatment in December 2015, even though she had not been discharged from same; and
 - c) she did not take steps to see a kinesiologist, even though Dr. Le Nobel's opinion was that improvement could be expected from same.
- [60] In *Chiu v. Chiu*, 2002 BCCA 618, the Court of Appeal summarized the principle of mitigation as follows:
- [57] The onus is on the defendant to prove that the plaintiff could have avoided all or a portion of his loss. In a personal injury case in which the plaintiff has not pursued a course of medical treatment recommended to him by doctors, the defendant must prove two things: (1) that the plaintiff acted unreasonably in eschewing recommended treatment, and (2) the extent, if any, to which the plaintiff's damages would have been reduced had he acted reasonably

- [61] In *Forghani-Esfahani v. Lester*, 2019 BCSC 332, the court clarified that the consideration of whether the damages would have been reduced is a "hypothetical event", and therefore the standard of proof is not a balance of probabilities: para. 60. Rather, the defendant must only prove that there was a "real and substantial possibility" that any part of the losses could have been avoided:
- [69] If that is established, the court will assess the degree of probability that the loss or some part thereof would have been avoided, and assess damages accordingly.
- [62] In *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144, the court stated:
- [56] I would describe the mitigation test as a subjective/objective test. That is whether the reasonable patient, having all the information at hand that the plaintiff possessed, ought reasonably to have undergone the recommended treatment. The second aspect of the test is "the extent, if any to which the plaintiff's damages would have been reduced" by that treatment

[Emphasis in original.]

- [63] I am unable to conclude that the defendant has met their burden to establish that a mitigation discount is appropriate here. The defendant failed to establish that the physiotherapy or massage treatment would have resulted in a different outcome. The plaintiff testified that the treatment modalities only provided temporary relief. In terms of the failure to implement Dr. Le Nobel's treatment recommendations, the court will be slow to fault a plaintiff for not implementing recommendations contained in an expert report prepared for the court's benefit, as compared to recommendations directly from the plaintiff's treating physicians: *Long v. Thanas*, 2019 BCSC 2255 at para. 120; *Bilanik v. Ferman*, 2014 BCSC 732 at paras. 184-187; *Brundige v. Bolton*, 2018 BCSC 1843 at para. 141. There is no evidence the plaintiff had been recommended treatment from a kinesiologist prior to Dr. Le Nobel's report, which was only produced on January 8, 2019.

B. Non-Pecuniary Damages

1. Generally

- [64] Non-pecuniary damages are awarded to compensate the plaintiff for pain, suffering, loss of enjoyment of life, and loss of amenities. The compensation awarded should be fair 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: *Trites* at para. 189. That said, other cases serve only as a rough guide. Each case still depends on its own facts: *Trites* at para. 189.
- [65] In *Stapley v. Hejslet*, 2006 BCCA 34, the Court of Appeal outlined certain factors to be considered when assessing non-pecuniary damages:

[46] The inexhaustive list of common factors cited in Boyd 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] B.C.J. No. 163 (QL), 2005 BCCA 54).

2. Authorities

[66] The plaintiff proposes that the Court award non-pecuniary damages of \$90,000. She relies on the following authorities:

- a) *Achan v. Jin*, 2020 BCSC 1430: The court awarded \$90,000 to a 42-year-old female plaintiff who suffered soft tissue injuries to her neck and back that resulted in significant pain and frequent headaches. Her symptoms improved but did not resolve over time. She was still having headaches twice a week at trial. She estimated the extent of her recovery at 50%. Her pain was no longer constant or severe, but remained ongoing. The court found that the plaintiff suffered from an adjustment disorder and a driving anxiety disorder, and concluded that her chronic pain was likely to continue over the long-term. She also limited her social activities.
- b) *Beaton v. Perkes*, 2016 BCSC 2276: The court awarded \$110,000 to a 56-year-old female plaintiff. The plaintiff had pre-existing lower back problems, but these were found to have improved significantly prior to the accident. At trial, the plaintiff had significant and ongoing pain in her neck, and upper and mid back four years post-accident. She was found to have chronic pain syndrome and chronic headaches. She suffered from serious and persistent low mood and depression. She had severe sleep disruption. She was off work for eight months after the accident, and was not yet working full time by the time of trial.

- c) *Nadeau v. Toulmin*, 2020 BCSC 866: The court awarded \$110,000 to a 49-year-old female plaintiff. Five years post-accident, the plaintiff was still suffering from chronic low back pain and periodic neck and groin pain. Her sleep and mood were impaired. She had headaches that resolved over time. She was unable to drive or ride as a passenger in a motor vehicle without experiencing significant anxiety. She was found to have an adjustment disorder which might improve but which was not likely to resolve. She could not work full time. The court found that the injuries had "significantly impacted her quality of life": *Nadeau* at para. 175.
- [67] The defendant proposed an award of \$30,000 to \$40,000, based in part on the following authorities:
- a) *Deng v. Malhotra*, 2022 BCSC 101: The court awarded \$40,000 to a male plaintiff who was 50 years old at the time of the accident. The plaintiff was able to continue working as a chef post-accident, although he required assistance moving heavier supplies. There were no material pre-accident injuries. The court accepted that the plaintiff suffered soft tissue injuries to his neck, back, and shoulders, that his sleep pattern was affected, and that he experienced anxiety when driving. Five years post-accident, his neck, shoulders and low back issues persisted, but they were 80% improved.
- b) *Erwin v. Buhler*, 2017 BCSC 362: The court awarded \$40,000 to a 53-year-old journeyman. One year post-accident, the plaintiff reported that most of his pain was gone, except for the development of some right hip pain after prolonged sitting. The court found that the plaintiff was unable to establish on a balance of probabilities that his right hip bursitis was caused by the accident. Save for attendance at medical appointments, the plaintiff was able to continue his physically demanding work after the accident, but did have intermittent back, neck, and shoulder problems six years post-accident.
- c) *Pond v. Bucsis*, 2013 BCSC 2001: The court awarded \$30,000 to a 51-year-old plaintiff. The court found that she sustained a mild soft-tissue injury to her neck, but the pain she experienced was neither severe nor constant. That said, the pain was expected to be chronic and permanent. The effect on the plaintiff's recreational activities was modest. The plaintiff was able to continue working.
- d) *Chapman v. Zilm*, 2020 BCSC 695: The 36-year-old plaintiff was awarded \$30,000. He suffered from neck pain which was marginally incapacitating. The court found that although there was some possibility for improvement though exercise and treatment, it was more likely that the symptoms would persist indefinitely. There were pre-existing injuries that were found to be more debilitating than his accident injuries. The court found that the majority of the difficulties were wholly unrelated to the accident: *Chapman* at para. 23.

3. Key Factors and Findings

- [68] The following findings and factors are most germane to the determination of the appropriate non-pecuniary award in this case:

- a) The plaintiff was suffering active low back pain prior to the Accident.
- b) The Accident caused the plaintiff headaches, neck, finger, and right shoulder pain, but these problems were most intense during the first six months post-Accident, and have reduced thereafter.
- c) The plaintiff has not established that the Accident caused her right arm problems. On the evidence before me, there is a long gap between the Accident and the onset of these symptoms, making it difficult to draw the necessary connection.
- d) The plaintiff had active arthritis symptoms develop after the Accident that were not causally linked to the Accident.
- e) I accept that the Accident and its aftermath have caused the plaintiff an adjustment disorder with mixed anxiety and depression, with ongoing symptoms, including limited driving anxiety.
- f) The plaintiff's ongoing symptoms have made it somewhat more difficult for her to perform housework, and has made it somewhat more difficult for her to spend the amount of time at her church that she previously had.
- g) I do not accept that the plaintiff has established that her capacity to perform yard work has been reduced, as that responsibility has been allocated to her tenant, given his use of the yard. There was no evidence that the tenant would have paid additional rent absent this responsibility.
- h) The plaintiff's current difficulties will likely continue for a period of time. However, as accepted by Dr. Ancill, there is a realistic prospect of improvement.

4. Determination of non-pecuniary damages

- [69] If all of the plaintiff's pain and suffering could be causally connected to the Accident, I would have awarded the \$90,000 requested.
- [70] However, I find that a 20% deduction is necessary in order to account for the pre-existing low back pain, the subsequent arthritis pain, and to ensure that the defendant is not made responsible for any pain or tiredness attributable to her unassociated right arm difficulties.
- [71] The application of these negative contingencies yields a final award under this head of \$72,000.

E. Loss of Earning Capacity

- [72] The plaintiff seeks an award for loss of income earning capacity in the amount of \$240,000. This figure was derived by applying an eight times multiplier to the plaintiff's earnings from her last full year of full-time work as a hairdresser, which was \$30,112 in 2014. The plaintiff proposed to attribute $\frac{1}{2}$ of this claim to the past, and $\frac{1}{2}$ to the future.

[73] In terms of past loss of capacity, I find that that evidence simply does not support such a claim. Perhaps to her detriment, the plaintiff has been able to work more than 50 hours per week for several years at her sandwich shop. She may have paid a physical price for that, but I do not accept that she could have worked longer or harder absent the injuries from the Accident. She is already working more hours than she has since she came to Canada. Although her earnings at the sandwich shop have been less than she earned at the Chatters hair salon, the business was new to her, and she had the misfortune of running headlong into the effects of the COVID-19 pandemic once those start up years were complete. I also find that the plaintiff had the intention of leaving Chatters in any event, making it difficult to attribute any past lost income to the Accident, although the Accident symptoms may have somewhat accelerated her plans in this regard.

[74] In terms of the effect on her future prospects, the Court of Appeal recently released three decisions addressing the proper approach to a claim for loss of future earning capacity: *Dornan v. Silva*, 2021 BCCA 228; *Rab v. Prescott*, 2021 BCCA 345; and *Lo v. Vos*, 2021 BCCA 421. In *Dornan* at para. 156, Justice Grauer cites *Gregory* at para. 32, where the court described the proper approach in these terms:

An award for future loss of earning capacity thus represents compensation for a pecuniary loss. It is true that the award is an assessment, not a mathematical calculation. Nevertheless, the award involves a comparison between the likely future of the plaintiff if the accident had not happened and the plaintiff's likely future after the accident has happened

[75] In *Rab* at para. 47, Justice Grauer outlines a three-step framework for assessing a plaintiff's loss of future earning capacity:

1. Does the evidence disclose a potential future event that could lead to a loss of capacity? At this stage, the trial judge considers whether the plaintiff may suffer from ongoing symptoms which could have an effect on their ability to earn income.
2. Does the evidence demonstrate that there is a real and substantial possibility that this potential loss of capacity will cause pecuniary loss?
3. Having established the real and substantial likelihood of pecuniary loss stemming from the plaintiff's loss of capacity, the trial judge must assess the loss. At this stage, the trial judge should determine the relative likelihood of the future loss occurring and whether any contingencies apply. The award should be reduced to account for the relative likelihood that the future hypothetical event would not occur: *Dornan* at para. 63.

[76] I find that this claim fails at each of the first two steps. The evidence does not disclose a potential future event that could lead to a loss of capacity, nor does the evidence demonstrate a real and substantial possibility any potential loss of capacity will cause pecuniary loss. Rather:

- a) The plaintiff returned to work immediately after the Accident, and was able to work at the Chatters salon for a long period of time after the Accident.
 - b) The plaintiff has shown herself to be able to work incredibly long hours at her new position, a position that she agrees imposes more physical demands than her work as a hairdresser.
 - c) The surveillance video does help establish that the plaintiff is able to perform the duties of her position effectively, at least over the first part of the day.
 - d) The plaintiff's residual symptoms are relatively moderate compared to many of those cases that pass through this court, largely limited to tiredness at the end of the day and some shoulder pain.
 - e) There is insufficient evidence to establish that the plaintiff would be unable to open her own salon in the future, particularly when one considers the potential for improvement from the treatment funded below.
 - f) Although the plaintiff has some anxiety when driving, there is no indication from the plaintiff's history that she would have ever pursued employment requiring driving.
 - g) I accept Dr. Bentley's opinion that the plaintiff does not have any significant musculoskeletal impairment that would necessitate any formal physical limitations in the workplace, and that it is not anticipated that her conditions resulting from the date of loss will affect her employability now or in the future. I note that this opinion does not differ materially from that of Dr. Le Nobel, who also did not anticipate further sustained absences from work, so long as the plaintiff was not in a driving position.
- [77] I find that the analysis in Erwin to be particularly helpful in assessing this claim. In Erwin, the plaintiff was unsuccessful in establishing a basis for an award for loss of capacity. The court stated:
- [130] At age 53, the plaintiff says that he has no retirement plans but that flagging fatigue and pain put him at considerable risk for early retirement. He contends he will be forced to stop work well before his retirement date and that, based on the factors articulated in *Brown v. Gola*, 26 B.C.L.R. (3d) 353 (S.C.) and *Gunson*, he should receive \$150,000 representing two years' income at his current rate of pay. He argued that *Brown* limited a plaintiff's recovery to one year's income only where it was uncertain if the plaintiff would miss time from work at all. In this case the plaintiff asserts he is certain to miss income as a result of his hip injury.
- [131] The plaintiff contends that his employment at the VSB is vulnerable to budget cuts. If money is not allotted to his department for a particular year, he will be forced to return to the union hiring hall to seek a new assignment. He contends that if this occurs, he will be less employable than others because of his ongoing hip related disability.

[132] The defendant argued that the plaintiff was obliged to prove there was a real and substantial possibility he would lose income in the future. The defendant contends that it is insufficient to show that the plaintiff "may include be less capable in certain aspects of his or her employment". Such a finding is too speculative and would not equate to a finding of a real possibility. See *Kim v. Morier*, 2014 BCCA 63 at para 8.

[133] There was no evidence to suggest that his employment was at risk either due to economic uncertainty or limitations in his abilities.

[134] The plaintiff has not proven a real or substantial possibility that he might lose income in the future

[]

[136] Alternatively, he believes that his physical condition may deteriorate over time forcing him to retire from his schoolboard job earlier than he would otherwise have to had he not been involved in a MVA. Although his concerns in this regard are understandable, the evidence in this case does not rise to the level of "a real and substantial possibility of a future event leading to a loss of income". Thus, his claim would not succeed in any event.

[137] I dismiss the plaintiff's claim for damages for impaired earning capacity because the evidence advanced by him was that his future employment is compromised because of the ongoing effects of trochanter bursitis. Since I have found that his trochanter bursitis was not caused by the MVA, his claim for damages due to his impaired earning capacity cannot succeed.

[138] In the, alternative, I also conclude the plaintiff did not meet the burden of proof that there is a real and substantial possibility of loss under this head of damage and would not give him an award. His subjective fear of losing his job or of his symptoms impairing his ability to continue working does not rise to the level of proof of a real and substantial possibility of loss.

[78] I find myself in a similar position with respect to my findings above. Hence, I decline to make an award for loss of capacity.

F. Special Damages

[79] The parties agreed that special damages of \$1,906.11 should be awarded. I agree and so order.

G. Cost of Future Care

[80] The plaintiff seeks an award of \$87,000 under this head. This sum is derived from Mr. Turnbull's report, which was in turn was based on Ms. Edwards recommendations and costing.

- [81] In *Peters v. Ortner*, 2013 BCSC 1861, Justice Harris (as he then was) outlined the general principles that should be considered 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.
- [82] Medical justification, as opposed to medical necessity, "requires only some evidence that the expense claimed is directly related to the disability arising out of the accident, and is incurred with a view toward ameliorating its impact": *Harrington v. Sangha*, 2011 BCSC 1035 at para. 151.
- [83] Reasonableness is assessed in light of whether a reasonably-minded person of ample means would incur the expense: *Brewster v. Li*, 2013 BCSC 774 at para. 158.
- [84] The assessment of the cost of future care is not a precise accounting exercise: *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at para. 21.
- [85] I find that the following adjustments have to be made to Mr. Turnbull's analysis:

- a) No award should be made for household or yard services, resulting in a reduction of \$55,028. There was no medical support for this claim, and I find that it is not adequately supported by any other evidence either.
- b) I find that proposing elements for both kinesiology and physiotherapy is duplicative given Dr. Le Nobel's opinion, which I accept over Ms. Edwards' rationalization during the course of her cross-examination. Using the kinesiology amount alone supports a further reduction of \$7,625.
- [86] I do accept the amounts proposed for counselling, kinesiology, and medications, based on the evidence of Drs. Le Nobel and Ancilll, which I accept. Although Dr. Ancill's recommendations about medications are not as clear as they could have been, I still find that the reasonable inference from his report is that such medication would be helpful to the plaintiff.
- [87] I do not find that the negative contingency discussed above need to be applied to this component of the award, as the amount awarded represents what the Court has found is reasonably necessary to help the plaintiff recover from and manage the injuries sustained in the Accident alone.
- [88] These findings support a final future cost of care award of \$24,500.

VII. SUMMARY

[89] In summary, damages are assessed as follows:

Non-Pecuniary Damages

\$72,000

Past and Future Loss of Earning Capacity

\$0

Future Cost of Care

\$24,500

Special Damages

\$1,906.11

TOTAL:

\$98,406.11

VIII. TAXES, STATUTORY DEDUCTIONS, INTEREST, AND COSTS

[90] I leave it to the parties to consider the results of this judgment and address any costs, tax, gross-up, statutory deductions, or interest implications. 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, the defendant responding 30 days thereafter, and the plaintiff replying 15 days after delivery of the defendant's response.

"The Honourable Mr. Justice Branch"

[1] I note that Dr. Le Nobel sought to amend this opinion at trial, but the Court concluded in an evidentiary ruling made during trial that such new opinion could not properly be admitted given the lack of notice and the prejudice to the defendant.

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Prepared on 26 October 2026 · Esheria