

CANADA / JUDGMENT

Peter v. Beveridge

2020 BCSC 750

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Supreme Court of British Columbia

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2020 BCSC 750 Peter v. Beveridge

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Peter v. Beveridge,

2020 BCSC 750

Date: 20200519

Docket: M13673

Registry: Campbell River

Between:

Jennifer Peter

Plaintiff

And

Brodie Beveridge

Defendant

Before: The Honourable Madam Justice Shergill

Reasons for Judgment

Counsel for the Plaintiff:

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D.B. Boan

Place and Dates of Trial:

Campbell River, B.C.

February 18-21, 24-26, 2020

Place and Date of Judgment:

Campbell River, B.C.

May 19, 2020

Table of Contents

I. Overview... 3

II. The Plaintiff.. 3

A. Pre-Existing Conditions. 6

B. Credibility. 6

III. The Collision.. 8

A. Post Collision Condition. 9

B. Treatment 10

C. Expert Evidence. 11

1. Dr. Lynne MacKean.. 11

2. Dr. Catherine Paramonoff 14

3. Brent Armstrong. 17

4. Diana Cameron.. 20

IV. Non-Pecuniary Damages.. 24

V. Special Damages.. 26

VI. Past Income Loss.. 28

A. Background. 29

B. Positions of the Parties. 30

C. Conclusion. 32

VII. Impairment of Future Earning Capacity.. 33

A. Legal Framework. 34

B. The Evidence. 35

1. Real and Substantial Possibility. 36
2. Functional Impairment 38
3. Assessing the Loss. 39

VIII. Cost of Future Care.. 41

IX. Summary of Damages Awarded.. 44

X. Costs.. 44

I. Overview

- [1] The plaintiff, Jennifer Peter, claims damages for injuries and loss sustained as a result of a motor vehicle collision which occurred on October 18, 2016 (the "MVC"). In addition to seeking damages for pain and suffering, she claims for past wage loss, loss of opportunity, impairment of future earning capacity, cost of future care, loss of housekeeping ability, and her out-of-pocket expenses for treatment.
- [2] Liability has been admitted. Left for my determination is the amount of compensation that is payable to the claimant as a result of injuries sustained in the collision.
- [3] The central issue that divides the parties is the plaintiff's loss of opportunity claim. At the time of the MVC, the plaintiff was working part-time while upgrading her education so that she could transition into a new career. The plaintiff says that her career trajectory has been interrupted due to injuries sustained in the MVC. The defendant argues that very little has changed in the plaintiff's career trajectory, and that regardless of the collision, the plaintiff would have been a low wage earner on account of her historically poor academic performance.

II. The Plaintiff

- [4] Ms. Peter is a 33-year-old certified dental assistant. She lives in Campbell River with Colton Thompson, her boyfriend of approximately 1.5 years. Their first child was expected to be born within a few weeks of the trial date.
- [5] Ms. Peter was raised in Campbell River by her mother and grandmother. She had a difficult childhood which was marred by sexual abuse at a tender age at the hands of her stepfather. The Ministry of Children and Family Development became involved and Ms. Peter was ultimately removed from her mother's care and placed in her maternal grandmother's care. The move resulted in Ms. Peter also having to change schools. Ms. Peter had a difficult time coping with the trauma of the abuse. The transition to a new school was also difficult.

- [6] Ms. Peter started falling behind in classes and was given learning assistance. Around grade eight, her classmates came to learn about the sexual abuse. Ms. Peter became the object of relentless bullying. She began to frequently skip school and her academic performance continued to decline. The plaintiff dropped out of school at the age of 16, in 2003, midway through grade 11.
- [7] After dropping out of school, Ms. Peter worked at various jobs but without direction in her life. Her one constant was Army Cadets, which she had joined at age 12 and continued with until she was about 19 years old. Through Army Cadets she did regular rappelling, rock climbing, riflery, and also participated in a parachuting course for paratroopers. She was also involved with a competitive swim team, baseball, and boxing. Ms. Peter was very athletic, and spent a significant amount of time following recreational pursuits.
- [8] At the age of 18, Ms. Peter moved to Edmonton. She worked a variety of jobs including as a gas station attendant, waitressing, and bartending. In addition, she played baseball up to seven days a week, went horseback riding, snowboarding, and took up dirt biking.
- [9] In 2010, Ms. Peter competed in a television show called "Wipeout Canada". The show was filmed in Argentina and consisted of a difficult obstacle course designed to force the competitors to "wipe out". The obstacle course is a full body work out which involves a variety of physical requirements such as climbing, crawling, swimming, and other similar activities. Ms. Peter finished in third place among a field of approximately 25 competitors.
- [10] In 2011 Ms. Peter returned to Campbell River to be closer to family following the death of her stepfather. She worked as a bartender in various establishments, before leaving for the Lower Mainland in 2012 with her then common law partner Dexter. Ms. Peter got her flagging certificate and started work with Fast Lane Traffic Control as a flagger and traffic controller. Though the job was on an on-call basis, the company was busy and Ms. Peter was working full-time hours.
- [11] After approximately six-to-seven months, Ms. Peter joined GoTraffic Management, switching later to Universal Flagging (which was related to GoTraffic) for higher pay. The plaintiff remained with Universal Flagging until December 2014.
- [12] Ms. Peter returned to Campbell River at the end of December 2014 when Dexter got a new job. In addition, Ms. Peter's grandmother was ill and she wanted to be near her. The move to Campbell River caused Ms. Peter to be laid off from her employment with Universal Flagging. However, the proprietor of Universal Flagging asked Ms. Peter to help him expand his business and set up a branch in Campbell River. The pursuit did not come to fruition, and Ms. Peter eventually obtained employment with Western Traffic Ltd. in August 2015, where she remained working until her MVC.
- [13] In addition to work, Ms. Peter continued with her various recreational pursuits.

- [14] In 2016 Ms. Peter decided she wanted a stable career. Her initial goal was to work as a medical laboratory assistant, but eventually she decided to pursue training to be a certified dental assistant ("CDA").
- [15] Ms. Peter enrolled in North Island College and took courses to upgrade her education. Ms. Peter received a C+ in English 12. She did not complete her mathematics course and on the suggestion of her instructor, enrolled at the Robron School to take remedial mathematics in the fall of 2016. The Robron School allowed her to complete the math course at her own pace. She also enrolled in a Physical Education course and a Biology 12 course at North Island University.
- [16] Though she remained employed with Western Traffic, Ms. Peter's educational pursuits required her to decrease her work hours in 2016. At the time of the MVC the plaintiff was working part-time on weekends as a flag person, and in school full time. She intended to continue working with Western Traffic in order to fund her schooling.
- [17] Around the time of the MVC, Ms. Peter was accepted into the CDA program. She completed upgrading her prerequisites, but did not complete her math course as she did not require it.
- [18] Ms. Peter attended the CDA program at Vancouver Island University ("VIU") full-time from September 5, 2017 to June 22, 2018. She commenced work as a CDA after completing her schooling. It is during this time that she formulated the desire to become a dental hygienist. The dental hygienist position would offer her a significant increase in salary but would also require additional schooling.
- [19] Ms. Peter says that her injuries have affected her career goals in two ways: they interfere in her ability to perform her job as a CDA, and also prevent her from fulfilling all of the expected job duties for a dental hygienist.

A. Pre-Existing Conditions

- [20] The plaintiff was in good health and in excellent physical condition prior to the accident. She was highly physically active, and there is no indication that she was restricted from any activities due to pain, medical conditions, or injury. In the months prior to the accident she was regularly participating in her usual recreational pursuits, and also went to the gym regularly.
- [21] Ms. Peter had a remote history of right-sided TMJ symptoms which had fully resolved well before the MVC. In late 2015 she experienced pain in her low back region. The pain was bilateral and related to a benign fatty deposit in her low back. Further testing revealed that she was also pregnant. The back pain completely subsided after termination of the pregnancy.

B. Credibility

- [22] As often occurs with cases of this nature, many aspects of Ms. Peter's claim are impacted by the degree to which I find her evidence to be credible and reliable.
- [23] According to the defendant, the plaintiff lacks credibility and is motivated by secondary gain. The defendant makes the following assertions to support the argument for secondary gain:
- a) The plaintiff misrepresented to the government that she had been laid off when in fact she had quit her job in order to qualify for Employment Insurance ("EI") benefits in early 2015.
 - b) She received six months' worth of EI benefits, and told EI that she was looking for work when in fact she was not.
 - c) She did not declare her income to EI or the Canada Revenue Agency ("CRA") for paid work that she had started during her time on EI.
 - d) She has previously been required to pay back monies to EI for failure to report her earnings.
- [24] In addition, the defendant submits that the plaintiff is not credible because:
- a) there is inconsistency between the plaintiff's complaints of total disability from employment, the findings of a work assessment, and her statements made to Brent Armstrong during a functional capacity evaluation (FCE); and
 - b) there is inconsistency between the plaintiff's level of activity and the complaints of continuing pain.
- [25] The plaintiff was cross-examined extensively on her application for EI benefits. The plaintiff acknowledged that the move from Vancouver to Campbell River at the end of 2014 was precipitated by personal reasons. She explained that her employer offered to give her a layoff notice rather than terminating her employment, as he wanted her to help him expand his flagging business to Campbell River. I found this explanation convincing. The fact that her employer was prepared to give her a layoff notice despite the events that had motivated her to leave her job, supports her contention that she had a genuine intention to try to set up a flagging business for her employer in Campbell River. Indeed, the company did eventually expand to Vancouver Island. I do not find that the plaintiff was misleading EI in this respect.
- [26] Similarly, I accept the plaintiff's explanation about why she did not look for other work, though she knew of her obligation to do so in order to continue receiving EI benefits. The goal was for her to source business opportunities for her previous employer in Campbell River, and then ultimately work in the same business. It was only when her former employer told her that it would take some time to set things up in Campbell River that she decided to look for work elsewhere.

- [27] However, I do agree with the defendant that the plaintiff's failure to report some of her income to EI raises questions about her credibility. Though it is not conclusive proof that she is motivated by secondary gain, I have considered these actions when determining how much weight to give the plaintiff's evidence.
- [28] There were also other aspects of Ms. Peter's testimony that were brought into question during cross-examination. Rather than making a global statement about the plaintiff's credibility or reliability as a witness, I have addressed specific concerns about the plaintiff's evidence as they arise. Where there are contradictions between her evidence and that of other witnesses or documents, I have carefully assessed each before concluding which to prefer.

III. The Collision

- [29] On October 18, 2016, the plaintiff was the owner and operator of a 2010 Honda Civic motor vehicle (the "plaintiff's vehicle"), when a 1990 Ford Ranger vehicle owned and negligently operated by the defendant, Brodie Beveridge, struck the plaintiff's vehicle from behind. The collision occurred near the intersection of Dogwood Street and 7th Avenue in Campbell River, British Columbia.
- [30] At the time of the collision, the plaintiff was stopped at the intersection, behind a vehicle that was waiting to turn left. The plaintiff was properly restrained by her seatbelt, and there are no allegations of the plaintiff being contributorily negligent.
- [31] Ms. Peter was immediately in shock, and does not recall the movement of her body inside her vehicle. She exited the vehicle and exchanged information with the other driver. She called her then boyfriend, Rob, who came to the scene and together they drove her car to an auto body shop. At the suggestion of a family member she later attended at a walk-in medical clinic.

A. Post Collision Condition

- [32] Over the next week she continued to experience pain in her back and neck, similar to how she would feel after going to the gym. In addition, she was having headaches. She saw her GP Dr. Dieter De Bruin the week following. Dr. De Bruin gave her a medical note and recommended she stay off work, which she did.
- [33] The back pain, neck pain and headaches interfered with her sleep and restricted her from participating in recreational activities. On medical advice, Ms. Peter did not partake in her usual winter activities such as snowboarding, hiking and going to the gym. However, though she was in constant pain, she continued with her studies.
- [34] By May 2017 the plaintiff was still not recovered and had not returned to work. She experienced constant pain in her back, and felt that her neck pain had worsened.

- [35] Ms. Peter participated in a work conditioning program through CBI Rehabilitation in Motion ("CBI") in the summer of 2017. They performed a Job Demand Analysis on two occasions and she was noted on testing to have fulfilled the job demands for work as a flagger. However, Ms. Peter did not return to work, stating that the testing simulation did not account for the heavier aspects of her job duties. In addition to the back and neck pain, Ms. Peter testified that sleep problems prevented her from returning to work.
- [36] On her doctor's advice, she tried returning to her regular activities. She attempted dirt biking a few times in 2017. Because biking was primarily leg and arm dependent, rather than neck and back, she was able to physically do it, though at reduced capacity. The following day she would feel increased pain in her neck and back. In order to manage her pain, she started scheduling massage therapy appointments for the morning before or the day after she would go dirt biking. Ms. Peter has only been able to go dirt biking approximately five-to-ten times in a year, which is significantly less than she did prior to the MVC. Her speed and endurance have also decreased.
- [37] Ms. Peter testified that she did not go on any extended hikes in 2017. Rather, she would go on short walks as recommended by her physiotherapist. By the summer of 2019, Ms. Peter had resumed her regular walking, but was restricted to shorter 30-45 minute walks on flat surfaces. When she attempted certain hikes, she was unable to complete them due to pain.
- [38] She is also no longer able to participate in quadding, side-by-siding, or wake-boarding. She tried wake-boarding in 2019, but once she got up on the water, she felt pain in the left side of her lower back. She switched over to wake-surfing, which she says puts less strain on her body.
- [39] Ms. Peter testified that over the last year, her neck pain has improved, although she still has difficulty looking to the left. She continues to get infrequent frontal headaches which impair her ability to focus. Her back pain has not shown any improvement and has become chronic. The plaintiff says that the back pain continues to prevent her from returning to her normal activities and has reduced the quality of her life.
- [40] Ms. Peter became pregnant around June 2019. Her due date was March 6, 2020. With advancing pregnancy, her back pain began to get progressively worse. The pregnancy also impacted her ability to participate in her recreational activities.

B. Treatment

- [41] Ms. Peter has tried various forms of treatment. She attended physiotherapy from January to September 2017. She commenced massage therapy in January 2017, initially at the rate of two times per week. However, she decreased the frequency during the time that she was enrolled in the CDA program. She resumed massage therapy twice weekly on Dr. De Bruin's recommendation in April 2018, after her CDA program had concluded.

- [42] Ms. Peter also underwent kinesiology, acupuncture, and pool therapy. She found the treatments were beneficial overall, although there were times when they temporarily aggravated her symptoms.
- [43] Ms. Peter was seen by an anesthesiologist in 2018 who performed some nerve block tests. The results of the tests were promising, and in January 2019, she had the nerves in her back cauterized. Unfortunately, the procedure was not successful. She has been advised by the anesthesiologist that a further rhizotomy can be performed, but the chances of it succeeding are significantly reduced. She may have a rhizotomy of her neck done post partum.
- [44] The plaintiff currently attends massage therapy about twice per week. She also uses a TENS machine to manage her pain. The pain relief is temporary.

C. Expert Evidence

- [45] A total of four experts testified at trial: one physiatrist for each party, a work capacity evaluator for the plaintiff, and a vocational rehabilitation consultant for the defendant.
- [46] Both physiatrists agree that Ms. Peter suffered soft tissue injuries to her neck and back from the MVC. They differ on her recovery, impact on her work and recreational activities, and her future prognosis.
1. Dr. Lynne MacKean
- [47] Dr. MacKean is a physiatrist retained by the plaintiff. She prepared an opinion report dated October 16, 2018, based on her assessment of the plaintiff the same day. She also prepared an addendum report dated November 7, 2019.
- [48] Dr. MacKean opined that as a result of the MVC, Ms. Peter is suffering from:
- a) a grade 2 whiplash associated disorder of the neck and left side of the upper back; and
 - b) mechanical low back pain with facet joint mediated pain in the left lower lumbar spine.
- [49] As of October 2018, Dr. MacKean did not believe that the plaintiff had reached maximum medical improvement. She recommended the following:
- a) that Ms. Peter continue with the recommendations from the Pain Clinic regarding injections for her spine;
 - b) she go to the gym two times per week, increasing to three times per week, and progressing her activities and exercises as tolerated;
 - c) decrease the frequency of massage therapy treatments such that she would be attending no more than once per month; and
 - d) that an ergonomic assessment of her work station be conducted.

[50] According to Dr. MacKean, Ms. Peter's ability to do higher level physical activities such as snowboarding, wake-boarding, dirt-biking, and tubing have been permanently impacted. Her injuries have also impacted her ability to do her job as a CDA, because of the increased pain in her neck and back, and her need to frequently adjust her position and move around. Though she opined that Ms. Peter can continue to work as a CDA, this would be subject to her employer continuing to accommodate her needs. Dr. MacKean concluded that at the time of her assessment, due to her neck, upper back, and low back pain:

[Ms. Peter] would not be able to work in a job position where she was doing heavier physical work such as heavier lifting, heavier pushing or pulling activities, or a job where she was doing a lot of bending or twisting with the spine.

[51] Dr. MacKean prepared an addendum dated November 7, 2019, based on an assessment the same day. At the time, Ms. Peter was 23 weeks pregnant. She reported increased back pain on the left side, and pain in the sacral area and tailbone as her pain is progressing. At the time, the plaintiff was still attending massage therapy, two times per week. According to Dr. MacKean, the worsening of pain in the low back and sacral area and tailbone pain was due to the pregnancy advancing. She anticipated that this pain would continue to get worse as the pregnancy progressed. She opined that post partum the plaintiff would have aggravation of low back pain, neck and upper back pain, due to the bending, lifting and carrying involved with a small child.

[52] Dr. MacKean believes that Ms. Peter has reached maximum medical improvement, and recommends the following:

- a) Ms. Peter continue with massage therapy two times per week for the duration of her pregnancy;
- b) after recovering from child birth, she should start going back to the gym two-to-three times per week; and
- c) she get help for housecleaning, yard work and gardening on an ongoing basis.

[53] According to Dr. MacKean, Ms. Peter should be able to return to her job as a CDA once her maternity leave is finished, albeit with the restrictions noted above. However, she felt that Ms. Peter is not competitively employable as a dental hygienist, as that job involves more sitting and holding sustained postures, which increase her back pain. She says that the plaintiff should avoid heavier physical work such as heavy lifting, carrying or heavier pushing or pulling on an ongoing basis.

[54] The defence argues that Dr. MacKean's opinion should be given little weight because it is largely dependent on the results of the FCEs conducted by Mr. Armstrong, which they consider to be unreliable.

- [55] Dr. MacKean agreed that in arriving at her opinion, she relied on the FCE performed by Mr. Armstrong. However, she credibly explained that this was only part of the considerations in the formulation of her opinion, as she also based it on her physical examination of the plaintiff, review of the medical records, and the history provided to her by the plaintiff.
- [56] I found Dr. MacKean to be a credible and reliable witness and I have given considerable weight to her opinion. She was knowledgeable, careful and thorough. I conclude that any concerns that I may have with some of Mr. Armstrong's findings do not undermine the strength of Dr. MacKean's opinion. Dr. MacKean's evidence and position on Ms. Peter's condition was not shaken and did not change in cross-examination. She relied on sound medical reasoning.
- [57] However, for reasons outlined below, on the question of whether Ms. Peter has achieved maximum medical recovery, the benefit of an active exercise program, and her future prognosis, I have preferred the opinion of Dr. Paramonoff.
2. Dr. Catherine Paramonoff
- [58] Dr. Paramonoff is a physiatrist who testified for the defence. Her medical opinion report is dated November 15, 2019, and based on her assessment of the plaintiff dated September 16, 2019. At the time of her assessment, Ms. Peter was 15 weeks pregnant.
- [59] Dr. Paramonoff diagnoses Ms. Peter with multifactorial headaches with cervicogenic and muscle tension sources; and musculoligamentous injuries at the neck and back, both of which she believes are related to the MVC. She says that the following may also have contributed to Ms. Peter's symptoms:
- a) pain limitation and decreased activity after the MVC resulting in post-MVC muscle imbalance/deconditioning and associated myofascial sources;
 - b) underlying increased soft tissue flexibility; and
 - c) pre-existing mild degenerative changes at the lower back which have become symptomatic due to the soft tissue injuries.
- [60] Dr. Paramonoff opines that mood symptoms/psychological issues and decreased sleep may also be affecting the plaintiff's experience of pain and contribute to its chronicity. Ms. Peter's pregnancy is also contributing to her experience of pain and prolonging her symptoms. This has resulted in increased low back pain and some increase in neck pain.
- [61] Dr. Paramonoff believes that Ms. Peter would have been at risk of increasing pain and discomfort with advancing pregnancy regardless of the accident. Nevertheless, because of the accident Dr. Paramonoff maintains that post partum, the plaintiff will be at risk of increased symptoms when caring for her infant, likely for the first two-to-three years.

- [62] According to Dr. Paramonoff, Ms. Peter has not reached maximum medical improvement. Though Ms. Peter will have a prolonged course of recovery because of the cumulative effects of all of the above, and will likely never have complete recovery from her symptoms, her prognosis for recovery remains favourable, as long as she:
- a) implements an ongoing independent exercise program and management of her confounding factors;
 - b) takes micro-breaks while at work;
 - c) paces and prioritizes activities, and breaks larger/heavier tasks into smaller portions; and
 - d) ensures optimal ergonomics and mechanics of movement.
- [63] With respect to homemaking assistance, Dr. Paramonoff opines that while it is reasonable for her to have had some regular homemaking assistance, over the long term she will not require assistance if she adheres to the above recommendations. However, it is reasonable for Ms. Peter to require some assistance with heavier/seasonal cleaning for the next three years.
- [64] Dr. Paramonoff opined that the MVC-related injuries have impacted Ms. Peter's ability to earn an income, as follows:
- a) it was medically reasonable for her to miss several months from work post-MVC with a gradual return to work;
 - b) her lack of success in the gradual return to work in 2017 is consistent with the confounding factors which have prolonged her disability; and
 - c) it was medically reasonable for her to decrease static prolonged positioning and to adapt her activities to improve comfort due to the MVC injuries.
- [65] Dr. Paramonoff notes that once the plaintiff has improved her optimal strength and conditioning and is no longer pregnant, an FCE would be warranted to determine her residual disabilities. However, even with further improvement, it was Dr. Paramonoff's view that Ms. Peter would never fully recover and would have residual chronic pain. In addition, she agreed under cross-examination that it was possible that the unmasking of Ms. Peter's mild degenerative changes in her back may continue to contribute to her symptoms on an ongoing basis and her condition could possibly worsen over time if the independent exercise program does not improve her symptoms.
- [66] The plaintiff only takes issue with Dr. Paramonoff's opinion in relation to her more favourable prognosis view that Ms. Peter has not yet reached maximum medical improvement, and that she will benefit from an active rehabilitation program.
- [67] While I recognize the limitations of Dr. Paramonoff's opinion given that she saw the patient only on one occasion, I found her opinion to be consistent with the preponderance of probability, medically sound and supported by the other evidence. Dr. Paramonoff was not

shaken in her cross-examination, and I found her conclusions about Ms. Peter's future prognosis logical and also consistent with the other evidence in this case. Thus, I have preferred Dr. Paramonoff's opinion to that of Dr. MacKean on the question of whether Ms. Peter has reached maximum medical improvement, if she will benefit from an active rehabilitation program, and her prognosis for further recovery.

3. Brent Armstrong

- [68] Mr. Armstrong is an occupational therapist and certified work capacity evaluator. He testified on behalf of the plaintiff. He has prepared two functional capacity evaluation reports. The first, dated July 12, 2017, is based on an assessment on July 12, 2017 (the "first FCE"). The second opinion is dated March 13, 2019. It is based on an assessment performed on March 6, 2019 (the "second FCE").
- [69] Mr. Armstrong's first FCE report was not prepared for medical legal purposes; rather, it was prepared for the North Island Employment Foundation Society ("NIEFS") in determining if Ms. Peter would be able to work as a CDA in the event that NIEFS agreed to fund her attendance at the CDA program. In preparing the first report, Mr. Armstrong was asked to determine the extent of Ms. Peter's functional abilities and limitations as they relate to training and work as a CDA. Ms. Peter underwent a one-day FCE with Mr. Armstrong and performed a wide ranging FCE test battery of 15 different tests, some on a repetitive basis throughout the day.
- [70] Though Mr. Armstrong opined that his testing revealed a reasonable estimate of Ms. Peter's current abilities, he found some isolated occasions during the first FCE assessment where he believed she was not making full effort for lifting and carrying. However, she demonstrated a strong willingness to work through her discomfort.
- [71] Mr. Armstrong concluded in his first FCE that the plaintiff met all the job demands of a CDA, but that there were restrictions on her sustained forward bending and neck extension tolerance, and she would need to change her positions frequently and maintain her activity and fitness.
- [72] In the second FCE, Mr. Armstrong found good level of effort in testing, and that noted that the plaintiff's reported abilities matched her demonstrated abilities. He found her physical abilities to be restricted as follows:
- a) sitting for periods exceeding 40-45 minutes on multiple occasions through the workday would be very difficult and likely detract from ability to perform detail oriented tasks;
 - b) standing tolerance of 90 minutes, with limitations with stationary standing and need to stretch and shift weight;
 - c) limitations in static "looking down" neck positions for sustained periods;
 - d) decreased tolerance for sustained stooping activity; and

e) heavier tasks for short periods only.

[73] Mr. Armstrong concludes that Ms. Peter is competitively employable as a CDA, but will continue to need to be accommodated at work in the form of rest breaks and postural changes through the day. In the event that she moves to another dental practice, she "may be at a competitive disadvantage with an employer less accommodating".

[74] Mr. Armstrong opines that Ms. Peter is competitively unemployable as a dental hygienist, due to the job demands and her physical restrictions. Dental hygienists are often required to sit in the same position for upwards of an hour at a time with eight patients during the day, which postures could not be sustained by Ms. Peter due to her observed physical limitations.

[75] Mr. Armstrong concludes that:

- a) she is restricted in her ability to work as a flagger due to the aggravation of her low back symptoms from prolonged standing;
- b) she should avoid occupations that require sustained, repetitive bending or bending combined with lifting, and avoid sustained or repetitive reaching over shoulder level; and
- c) while she is capable of most household chores she will experience some limitations in heavier tasks such as scrubbing floors or other surfaces such as bathtubs; yard work such as weeding; and heavier landscaping/digging work.

[76] Counsel for the defendant argues that Mr. Armstrong's opinion suffers from a number of weaknesses, such as:

- a) it is at odds with his reported observations that Ms. Peter was able to complete many of the tests with good results, and in some cases improve on test results throughout the day;
- b) some tests indicate low effort had been exerted bringing into question whether Ms. Peter has actually provided reliable and consistent evidence; and
- c) Mr. Armstrong has not adequately considered the potential impact of secondary gain motivations on Ms. Peter's presentation during the testing.

[77] Mr. Armstrong was able to credibly refute most of the criticisms raised about his testing methods and resultant opinion. For example, he noted the competitive behaviour shown by Ms. Peter during the testing, her performance during distraction testing, and the consistency in her test results, which all supported his view that the results were an accurate reflection of her abilities. Further, he explained that he is concerned with determining what activities Ms. Peter will be able to sustain in the long term, rather than what she can accomplish in a single day.

- [78] I also discount concerns that Mr. Armstrong did not perform enough trials for grip strength testing, or that he failed to report the number of times he looked at the plaintiff's competitive test performance during the FCEs. I accept that Mr. Armstrong has used his expertise to determine how much testing was necessary or how often to look at the competitive test performance.
- [79] There were some minor discrepancies in Mr. Armstrong's report which he was not able to satisfactorily address but which do not ultimately impact the weight I have placed on his opinion. For example, some of his graph plotting was inaccurate, and it seems he read too much into the results of the Repetitive Movement Screening test.
- [80] However, there are other discrepancies which do affect the weight that I can place on Mr. Armstrong's opinion about Ms. Peter's functional limitations as they apply to the dental hygienist job. For example, Mr. Armstrong did not adequately allow for the fact that the plaintiff's performance could have been affected from fatigue due to being "over-tested" during the lift, carry and push parts of the testing. In addition, Mr. Armstrong did not conduct a job site analysis and did not observe the plaintiff in her working environment. This would have been beneficial in determining the true impact of her injuries on her work. For example, Ms. Bergeron testified that the plaintiff assisted in root canals and surgeries probably once per week sitting continuously at the patient's side for up to two hours. Had Mr. Armstrong attended at the plaintiff's workplace, he could have considered what impact this may have had on his conclusion that Ms. Peter is unable to perform the job duties of a dental hygienist. Thus, I have carefully weighed Mr. Armstrong's conclusions and considered them in the context of the other evidence in this case.

4. Diana Cameron

- [81] Ms. Cameron is a vocational rehabilitation consultant retained by the defendant. She prepared a report dated November 21, 2019, based on an assessment dated September 30, 2019. It is on her evidence that the defendant relies most heavily to dispute the loss of earning capacity claim. The plaintiff submits that other than reciting commonly available information such as the average wage for dental hygienists and dental assistants, the Ms. Cameron's opinion should be disregarded and assigned no weight.
- [82] Ms. Cameron performed a battery of tests aimed at measuring Ms. Peter's intelligence. Ms. Cameron concluded that Ms. Peter was of low average intelligence, similar to persons who pursue direct entry work or complete up to one year post secondary programs. She felt that Ms. Peter is better suited for applied training programs emphasizing non verbal skills, noting that her math comprehension is in the very low range.
- [83] She arrives at the following conclusions about Ms. Peter's vocational prospects absent accident:

- a) She would have likely continued as a casual traffic flagger over the short to medium term, and remained vulnerable to periods of unemployment. Her pre-accident earnings are the best indication of her earning potential in this work.
- b) She likely would have completed the CDA training at some point, and would have likely chosen this program over the medical lab assistant program because of her previous difficulties completing correspondence courses.
- c) She would not have been suitable for the dental hygienist program due to:
 - i. her longstanding academic challenges which likely have rendered her unsuited to successfully completing a rigorous theory-based program;
 - ii. the highly competitive nature of dental hygienist program, making it difficult to get into;
 - iii. the higher grade point average required to get into the program; and
 - iv. the courses in the program being more academically challenging, and of relatively longer duration and intensity.

[84] Although Ms. Cameron agrees that there are three dental hygienist programs in Toronto which have less stringent admissions standards than others, and that it may have been possible for the plaintiff to complete her training there, she does not believe she has sufficient information to determine that this would be the likely outcome. Further, she notes that Ms. Peter would need significant tutorial support and academic accommodations such as reduced course level in order for her to successfully complete the training.

[85] Ms. Cameron goes on to note that:

- a) the plaintiff has positive vocational signs such as favourable reviews from her employer;
- b) CDAs are at risk for musculoskeletal pain;
- c) the plaintiff reported test anxiety making it less likely that she would have pursued the prolonged dental hygienist training program;
- d) given her vocational test results and educational history the orthodontic assistant training module offered at UBC would be a suitable option; and
- e) with sufficient experience as a CDA she may be able to advance into a treatment coordinator position, which would be less physically demanding than the CDA job.

[86] I note that neither the orthodontic assistant nor treatment coordinator position options were put to Ms. Peter during her testimony. Nor is there any evidence about the income stream for either of those jobs.

[87] Ms. Cameron makes the following vocational recommendations:

- a) she get a job coach to develop strategies to limit symptom aggravation at work;

- b) she have an ergonomic workstation evaluation;
 - c) she receive vocational rehabilitation counsellor assistance for about 8-13 hours at \$100-\$150 per session, in the event she decides to pursue a career change in the future; and
 - d) she undertake a ten week Progressive Goal Attainment Program ("PGAP") costing \$2,000, which focusses on activity resumption rather than symptom reduction, and would help address her various elevated psychosocial risk factors for prolonged disability.
- [88] Ms. Cameron's opinion that Ms. Peter was never suited for the dental hygienist position is based on her interpretation of test results showing a low aptitude for this job, along with Ms. Peter's education history which she says demonstrates long-standing challenges to her success in this field. However, under cross-examination Ms. Cameron acknowledged that Ms. Peter's pain symptoms may have negatively affected her test results.
- [89] I place little weight on Ms. Cameron's conclusions from the aptitude testing. The results are unreliable given the potential impact of Ms. Peter's pain symptoms. Even taken at face value, the results show a person with average scores in most areas except mathematics. Thus, I find that Ms. Peter's potential for success in the dental hygienist program cannot be assessed on the basis of the test results.
- [90] Similarly, I am not swayed that Ms. Peter's poor educational history is determinative of her ability to succeed in the dental hygienist program. It is clear that Ms. Peter's marks in high school were very low. But when considered in the context of her childhood, they cannot be taken at face value. Ms. Peter is a far different person today than she was during her high school years. In my view, Ms. Peter's drive, intellectual ability and general capability to do well in school are reflected in her strong performance in the CDA program. Ms. Peter's recent and demonstrated success in her CDA program indicates that she is capable of accomplishing far more than her high school grades would suggest.

IV. Non-Pecuniary Damages

- [91] A non-pecuniary damages award is intended to compensate a plaintiff for her pain, suffering, loss of enjoyment of life, and loss of amenities: *Pololos v. Cinnamon-Lopez*, 2016 BCSC 81 at para. 105. The award is to be fair to both parties and fairness is measured against awards in comparable cases. However, each case depends on its own unique facts: *Olson v. Farran*, 2016 BCSC 1255 at para. 156.
- [92] In *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46, the Court set out a non-exhaustive list of factors to be considered in assessing non-pecuniary damages. These include the plaintiff's age; nature of the injury; severity and duration of pain; disability; emotional suffering; loss or impairment of life; impairment of family, marital and social relationships; impairment of physical and mental abilities; and loss of lifestyle. The plaintiff's stoicism should not, generally speaking, penalize the plaintiff: *Giang v. Clayton, Liang and Zheng*, 2005 BCCA 54 at paras. 54-55.

- [93] Through no fault of her own, this 33-year-old plaintiff was involved in a significant car accident approximately 3.5 years ago. Prior to the accident, the plaintiff was in excellent health. She was physically active, involved in a number of recreational activities, and on a trajectory to transition into a new career. As a result of the accident, the plaintiff suffered soft tissue injuries to her back and neck, headaches, and was impaired in her sleep. In addition, the accident aggravated and rendered symptomatic, pre-existing mild degenerative changes in her lower back.
- [94] Despite the passage of time and undertaking various forms of treatment, she continues to suffer from ongoing chronic back pain, intermittent and ongoing headaches, and sporadic neck pain. Though there is a potential for her condition to still improve with appropriate treatment, the medical evidence supports a finding that she will never fully recover and will be left with residual chronic pain. In addition, she faces the real possibility that further treatment will not improve her symptoms and that her low back pain will worsen over time. In addition, the injuries have made Ms. Peter's pregnancy more difficult than it would have been absent accident, and are also likely to affect her post partum for about two-to-three years.
- [95] The injuries have affected most aspects of Ms. Peter's life, including her work and recreational pursuits. The pain affects Ms. Peter in her job as a CDA, and requires her to adjust how she works in order to manage her pain. The injuries also restrict her ability to pursue a more lucrative career trajectory as a dental hygienist.
- [96] A number of witnesses also attested to the fact that since the MVC, Ms. Peter has been less socially active and engaged. Her loss of ability to participate in many of the extreme sports that she was involved in prior to the accident, has affected her deeply. Over time she has been able to return to dirt biking, but at decreased frequency and intensity since the accident. She is no longer able to wake-board, go quadding, side-by-siding, or participate in long hikes.
- [97] The injuries also affect the plaintiff's ability to perform housekeeping duties, which are made difficult and take her longer. This causes her frustration and requires her to get regular assistance from Mr. Thompson. Further, experts for both the plaintiff and defendant anticipate that Ms. Peter will be required to continue to obtain assistance with heavier/season cleaning and yard work as a result of her MVC-related injuries.
- [98] The plaintiff submits that an appropriate range for her non-pecuniary damages is from \$80,000 to \$100,000, and relies on the following case authorities in support of her position: *Sekihara v. Gill*, 2013 BCSC 1387; *Hawkins v. Espiloy*, 2014 BCSC 1804; *Dhaliwal v. Meerdink*, 2014 BCSC 2418; *Dickenson v. Passero*, 2015 BCSC 908; *Renaerts v. Renaerts*, 2015 BCSC 1028; and *O'Brien v. Cernovec*, 2016 BCSC 1881.

- [99] The defendant submits that, if her evidence of continuing pain is accepted in some measure, low end chronic pain cases in the \$60,000 to \$70,000 range are comparable. He relies on the following authorities: *Rogalsky v. Harrett*, 2014 BCSC 1255; *Michael v. Bayfield*, 2014 BCSC 1602; *O'Brien; Mills v. Graham*, 2019 BCSC 641; and *Poulin v. Armstrong*, 2019 BCSC 926.
- [100] Loss of housekeeping capacity may be compensated by a pecuniary or non-pecuniary award. The non-pecuniary approach may be preferred where the plaintiff is limited, but not unable, to do household tasks for physical or psychological reasons. A pecuniary award may be more appropriate where replacement services are hired or family members provide gratuitous support: *Kim v. Lin*, 2018 BCCA 77 at para. 28.
- [101] In this case, the plaintiff submits that an award of \$5,000.00 to \$10,000.00 should be incorporated into the Court's evaluation of general damages in order to account for any housekeeping capacity loss.
- [102] Bearing in mind that no two cases are the same, I find that \$85,000 fairly compensates Ms. Peter for her non-pecuniary losses, including her loss of housekeeping capacity.

V. Special Damages

- [103] An out-of-pocket expense incurred by the plaintiff is compensable if it is proven to have been reasonably and medically necessary as a result of the defendant's negligence: *Wright v. Mistry*, 2017 BCSC 239 at paras. 81-82.
- [104] The plaintiff seeks reimbursement for \$21,323.45 which she says she has paid out of pocket in order to treat her accident-related injuries. The defendant accepts that \$15,575.85 was reasonably incurred due to the accident. Of that amount, it is argued that \$15,035.85 remains owing as \$540 was previously reimbursed to the plaintiff.
- [105] At issue is the defendant's obligation for treatments that were undertaken by the plaintiff after October 13, 2018. Out of the \$6,287.60 remaining in dispute, \$1,350 is for chiropractic treatments and \$4,937.85 is for massage therapy. The massage therapy treatments include some charges for infrared sauna treatment.
- [106] The defendant submits that chiropractic treatment and the sauna expense are not medically supported. In addition, the defendant submits the plaintiff should have tapered her massage therapy treatments over the course of three months, in accordance with the recommendation made by Dr. MacKean in her October 2018 report, i.e., from once per week in the first month, to bi-weekly in the second month, and once monthly in the third month. By the end of that period, the plaintiff should only have been undertaking massage therapy treatment with more serious exacerbations of her pain complaints.

- [107] The plaintiff testified that her family physician did not recommend chiropractic treatment to her because "he did not believe in it". However, she says the chiropractic treatments helped her manage her pain. These treatments have continued since her pregnancy.
- [108] The plaintiff testified that she got the infrared sauna treatment in conjunction with the massage therapy, on the recommendation of her massage therapist. Ms. Peter testified that massage therapy is the only thing that gets her through the work week. She has tried going for a week or two without massage therapy at a variety of points in her recovery and found it difficult to manage. In general, it allows her to be effective in her employment.
- [109] Both Dr. Paramonoff and Dr. MacKean were of the view that beyond two years after the accident, passive modalities such as massage and chiropractic treatment would have no curative benefit. Dr. Paramonoff noted that Ms. Peter needs to engage in an active rehabilitation or exercise program rather than relying upon an external locus of control over her pain.
- [110] However, simply because treatment does not have a curative effect, does not mean that it is not compensable. In *Redl v. Sellin*, 2013 BCSC 581 at para. 55, the Court noted that evidence of medical justification for an expense incurred in relation to treatment aimed at promotion of a plaintiff's well-being is a factor in determining reasonableness. The absence of that evidence does not mean that the claim has not been proven.
- [111] There is evidence from the plaintiff that she was deriving some short-term pain relief from the massage therapy (including the infrared sauna) and chiropractic treatments. In large part, these treatments enabled her to continue working, thus mitigating her wage loss claim. The expert evidence supports the plaintiff getting further passive treatments as needed to manage exacerbations of her pain after the initial tapering off.
- [112] Based on the evidence, I conclude that it was reasonable for the plaintiff to continue to incur massage therapy and chiropractic expenses from October 2018 to the date of trial. However, I am unable to conclude that the frequency with which the plaintiff continued these passive treatments was reasonable. Further, there is evidence that with the plaintiff's advancing pregnancy, at least some of her treatments were aimed at controlling pain related to the pregnancy, which would have occurred absent accident.
- [113] I am unable to determine this aspect of the claim with any mathematical precision. The costs of each treatment vary, and it is unclear whether the disputed figure of \$6,287.60 accounts for a tapering off and subsequent management of exacerbations. Doing the best that I can with the evidence I have, of the \$6,287.60 remaining in dispute, I conclude that \$3,000 of it was reasonably incurred by the plaintiff to promote or maintain her physical health.
- [114] The plaintiff is entitled to special damages in the amount of \$18,576.

VI. Past Income Loss

[115] The plaintiff seeks net past income loss of \$26,647.50 from October 18, 2016 to June 2018. The defendant does not deny that the plaintiff has suffered some income loss, but argues that that it is significantly lower than what is claimed. The defendant says that past income loss is payable only for the period from the MVC to August 31, 2017. He concedes a net past wage loss claim of \$13,905.76.

A. Background

[116] At the time of the MVC, the plaintiff was 29 years old. She was employed by Island Traffic as a traffic flagger, and working part-time on weekends. Ms. Peter did not return to her job at Island Traffic after the accident, and in fact did not return to work at all until after the completion of her studies.

[117] While working part-time, Ms. Peter was enrolled in school and upgrading her academic requirements to gain admission into the CDA program. She successfully finished her English course in the summer of 2016, and was enrolled in Biology 12 which required in-class attendance two days per week, as well as three hours per week of lab work. Mathematics and PE were both taken online.

[118] Though Ms. Peter did not return to work in the immediate aftermath of the collision, she did continue with her schooling. Her conditional acceptance into the VIU CDA program required her to get a minimum of a C in Biology. As such, she testified that she had to continue going to school despite being in pain.

[119] Ms. Peter obtained the requisite mark in her Biology course, and got her full acceptance letter for the CDA program on November 22, 2016. She was not required to complete the math course as a prerequisite and dropped out of it shortly after the accident. Though the PE course was self-paced, Ms. Peter dropped out of the PE course around June 2017.

[120] Ms. Peter received medical EI for the allotted 15 weeks after the MVC. She was also in receipt of total temporary disability benefits. To assist in paying for her CDA program Ms. Peter sought and obtained funding through NIEFS. The grant did not have to be repaid, though she had to declare it. The grant was for about \$29,000, of which only \$9,000 went to tuition, books and incidentals. As part of the condition for receiving the NIEFS grant, she was required to obtain a student loan amounting to \$13,760. Ms. Peter submits that she would not have had to take out the loan absent accident.

[121] The plaintiff was in full-time studies for the CDA program, from September 5, 2017 to June 22, 2018. The program ran four days per week, Monday to Thursday. Ms. Peter would return to Campbell River after class on Thursday and return to Nanaimo for class on Monday morning. The program itself included a variety of education methods including lectures, laboratory time, and clinic time. They also had peer learning time as well as an hour of homework each evening. Each class had a textbook which required studying and an exam

associated with that class. Ms. Peter gave evidence that it was a fast-paced and difficult program. One could fall behind very quickly if class time was missed.

- [122] Ms. Peter completed the CDA program in June of 2018 with a 4.0 GPA. She passed the board exam on June 22, 2018. She commenced work as a CDA following the completion of her schooling. Ms. Peter worked as a full-time CDA at Downtown Dental until the summer of 2019, when she briefly transferred to Braidwood Dental. Around September 2019 she then changed employment to Campbell River Dental. She worked there until December 2019 when she took EI related to her pregnancy.

B. Positions of the Parties

- [123] The plaintiff says that she has suffered \$31,350 of total gross past wage loss, of which \$19,950 is gross income loss from October 18, 2016 until August 31, 2017; and a further \$11,400 gross past wage loss from September 2017 to July 2018. She submits that but for the accident, she would have earned \$1,900 per month in the 10.5 month period leading up to the commencement of the CDA program. This base figure is taken from a monthly average of her 2016 pre-accident T4 earnings of \$19,943. The \$1,900 per month figure is also consistent with her gross monthly average earnings from 2013 to 2015, after factoring in the period between January 2015 and August 2015 when she was on EI benefits.
- [124] For the ten months that she was enrolled in the CDA program, she says she would have continued to work on weekends. Thus, she lost 60% of what she would have earned when she was not in school, i.e., \$1,140 per month rather than \$1,900 per month.
- [125] To arrive at the net figure of \$26,647.50 the plaintiff applies a 15% reduction for income tax.
- [126] The defendant argues that but for the accident, Ms. Peter would have worked fewer hours than claimed, and justifies the gross past wage loss figure of \$16,723.75 as follows:
- a) She was finding her coursework difficult and had started decreasing her work hours by October 2016. This is supported by the plaintiff's own evidence, as she acknowledged that she was struggling to keep up her schooling and her work, and had slowed down from work because of school.
 - b) The plaintiff had an irregular, on-call position, with no guarantee of hours. This is supported by the employer's records and the plaintiff's evidence. Further, Ms. Peter conceded she had a special contract in the winter of 2015-2016, and there is no evidence that she had one for the winter 2016-2017.

- c) Absent accident the plaintiff would likely have increased her work hours from early 2017 until August 2017, given that most of her upgrading had been completed. However, absent accident, the plaintiff would not have worked from September 2017 until June 2018, as she was focussed on her CDA program. To the extent she had free time after classes and homework absent accident, her time would have been focussed on relationships and recreational activities, rather than finding remunerative employment.

[127] In addition, it is argued that the plaintiff failed to mitigate her loss, as she was medically cleared to work after the first FCE conducted by Mr. Armstrong but chose not to. While the plaintiff may have been restricted by pain from doing flagging work, she could have taken other work. She chose not to because she was not motivated to seek work as she was getting an education grant from NIEFS which she did not have to pay back and which was funding her schooling.

C. Conclusion

[128] The standard of proof for past hypothetical events is proof of a real and substantial possibility that the events would have occurred: *Hawkins* at para. 42, citing *Smith v. Knudsen*, 2004 BCCA 613 at paras. 27-29.

[129] To determine compensation for past wage loss the Court must consider what the plaintiff likely would have earned, not what they could have earned, if the injury had not been sustained: *Faizi v. Thandi*, 2019 BCSC 434 at para. 165, citing *Rowe v. Bobell Express Ltd*, 2005 BCCA 141 at para. 30.

[130] Having regard to various contingencies such as availability of work and the competing demands from her schooling, I find that there is a real and substantial possibility that absent accident, the plaintiff would have continued working from October 2016 until June 2018. However, given that she had irregular on-call hours, had no guaranteed contract for the 2016/2017 winter months, and was focussed on her schooling, it is unlikely that she would have worked three days per week as asserted by the plaintiff. Rather, I find that at most she would have worked one to two days during the 2016/2017 winter months. In addition, while I agree that absent accident there is a real and substantial possibility that the plaintiff would have continued working through her CDA program, given that her focus was to perform well at school, it is unlikely that she would have worked more than a few days per month.

[131] I do not accede to the defendant's assertion that despite her injuries, the plaintiff was capable of working at some form of light employment from July 2017 to June 2018. Ms. Peter would return to Campbell River after class on Thursday and return to Nanaimo for class on Monday morning. The drives were long and caused her pain and discomfort. It was difficult for her to manage during class hours, and she was often fidgeting in her chair and needed to frequently get up and move around. When Ms. Peter returned from her CDA program on Thursday evenings, she would be exhausted and in pain. She described her "free days" as

filled with rehabilitation and trying to prepare herself physically for the next week of the CDA program. She described Mondays and Thursdays as the most difficult and she required a hot bath after driving and the use of her TENS machine.

- [132] When pressed in cross-examination about whether she could have worked while attending school, Ms. Peter was firm in her evidence that she did not have the physical capacity as a result of her MVC-related injuries to work on her days off and that "but for" the MVC, she would have had the ability to do so. I found her evidence on this issue credible, and discount the CBI assessment which found her capable of working at the flagger job. I accept Ms. Peter's contention that the CBI assessment did not simulate the heavier aspects of her job, and as such do not rely on it.
- [133] Having regard to the totality of the evidence, and bearing in mind that this is an assessment and not a precise mathematical calculation, I find that \$20,000 is a fair and reasonable sum to compensate the plaintiff for her past net income loss.

VII. Impairment of Future Earning Capacity

- [134] The plaintiff seeks an award for future loss of earning capacity of \$312,000 based on an earnings approach. Alternatively, she seeks an award of between \$200,000 and \$300,000 if a loss of capital asset approach is employed. This claim is based on the plaintiff's assertion that as a result of the accident she is no longer able to fulfill her career goal of being a dental hygienist.
- [135] The defendant submits that no loss of earning capacity claim has been proven because it is unlikely that Ms. Peter would have pursued or succeeded at this goal. Alternatively, the defendant submits that the medical and other evidence does not support that the plaintiff is currently disabled from working as a dental hygienist.

A. Legal Framework

- [136] Damages for loss of earning capacity are awarded to provide a plaintiff with full compensation for all her pecuniary losses: *Thomson v. Thiessen*, 2018 BCSC 1353 at para. 55.
- [137] In *Audet v. Chan*, 2018 BCSC 1123 at para. 90, the Court held that in determining whether a plaintiff is entitled to an award for loss of earning capacity, the court must answer two key questions. The first is whether the plaintiff's earning capacity has been impaired by her injuries. The second is what compensation should be awarded for the resulting harm that will accrue over time.
- [138] In *Pololos* at para. 133, the court summarized the applicable principles for assessment of loss of capacity:

- 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.
- [139] The claimant bears the onus of proving a substantial possibility of a future event leading to an income loss. The court must then award compensation on an estimation of the chance that the event will occur: *Steward v. Berezan*, 2007 BCCA 150 at para. 17.
- [140] The court must consider both positive and negative contingencies when conducting this analysis: *Kellett v. Stam*, 2018 BCSC 1127 at para. 77.
- [141] The capital asset approach was explained by Justice Marzari in *Ferguson v. Watt*, 2018 BCSC 1587 at para. 122:

The capital asset approach involves considering factors such as i) whether the plaintiff has been rendered less capable overall of earning income from all types of employment; ii) whether the plaintiff is less marketable or attractive as a potential employee; iii) whether the plaintiff has lost the ability to take advantage of all job opportunities that might otherwise have been open; and iv) whether the plaintiff is less valuable to herself as a person capable of earning income in a competitive labour market: *Brown*; *Gilbert* at para. 233; and *Morgan v. Galbraith*, 2013 BCCA 305 at paras. 53 and 56 [*Morgan*].

[142] The law with respect to future capacity loss is succinctly cited in *Palmer v. Ansari-Hamedani*, 2019 BCSC 114 at paras. 95 - 97. The plaintiff is obligated to demonstrate that there is a real and substantial possibility of a future event leading to an income loss. If the plaintiff is able to establish this loss then the plaintiff may prove the quantification of this loss either on an earnings approach or a capital asset approach. An earnings approach is more appropriate when the loss is more easily measurable. Regardless, it is incumbent upon the plaintiff in order to prove hypothetical or future possibilities so long as they are real and substantial and not mere speculation.

B. The Evidence

[143] Ms. Peter commenced her job with Campbell River Dental on July 20, 2019. She is currently on medical EI which will turn into maternity leave. She started this position at \$24 per hour, working Monday to Friday with some Saturdays. She has missed time off work from her current position as well as Downtown Dental Centre and Braidwood Dental Centre in order to attend rehabilitation appointments as well as appointments related to her pregnancy. Ms. Peter finds her job at Campbell River Dental more difficult as the clinic is bigger and the pace is much faster. She sees more patients in a day and has to assist with longer procedures more frequently.

[144] Ms. Peter says that she is only able to continue with her current job without time loss because she has an understanding employer. Further, she says that but for the accident she would have pursued a dental hygienist position, but is unable to fulfill the requirements of that position due to her injuries.

1. Real and Substantial Possibility

[145] The defendant argues that there is no real and substantial possibility that the plaintiff would have gone on to become a dental hygienist because:

- a) she would not have been accepted into a dental hygiene program whether in BC or in Ontario;
- b) she would not have pursued such a program in Ontario; and
- c) she would not have succeeded in a dental hygiene program.

[146] I turn first to the question of whether Ms. Peter had formulated the necessary intention to pursue the dental hygiene program.

[147] Ms. Peter testified that it was during her CDA program that she set her intention on becoming a dental hygienist in the future. Prior to the MVC, she knew she wanted to work in the dental industry but did not know the difference between a CDA and dental hygienist. It was not until Ms. Peter began talking to dental hygienists during her schooling, and learned how their program and job was different than her own, that she realized that dental hygiene is what she wanted to pursue after gaining some experience working as a CDA. Her

primary reasons for wanting to become a dental hygienist were financially focused, given that dental hygienists earn nearly double what CDAs do, but also because dental hygienists work more independent and effectively as their own boss.

- [148] Although the specific intention was formulated after the accident, her general intention to have a stable career that she could grow in was exhibited prior to the accident. In my view, having regard to all the evidence, dental hygiene was a natural progression from that general intention.
- [149] Ms. Sonia Bergeron is the chief operations officer of the dental clinic in which Ms. Peter works. She oversees the staff and is their direct supervisor. Ms. Bergeron presented as a credible and impartial witness. She provided her evidence in a forthright manner. She described Ms. Peter as smart and capable. She testified that there have been a number of CDAs who have left their office in order to pursue dental hygiene school as it was a very common path for many CDAs. She was also familiar with people going to Ontario as the program there is shorter and easier to get into.
- [150] There are numerous factors which suggest that Ms. Peter was finally positioned in life to pursue this career. Despite her poor secondary school marks, she had recently demonstrated strong academic success in the CDA program. This reflects a broader skill set which suggests that she could succeed in post-secondary education generally. She was also focused on school, as evidenced by the lay witnesses who commented on her dedication to studying. Further, she was highly motivated to better her life and pursue career advancement.
- [151] I find that there is a real and substantial possibility that the plaintiff would have pursued the program in Ontario. Ms. Peter was familiar with other people who had attended college in Toronto; she knew what the program entailed; she knew that she could earn substantially more money by getting the requisite qualification; and she had a stable relationship with a partner who was supportive of her going to Toronto. Though he admitted that it would be difficult given that they had a baby on the way, Mr. Thompson testified that the financial incentive to pursue the dental hygienist program was huge for their family. As he stated, it would be "short-term pain for long-term gain." I found Mr. Thompson to be a credible witness - he provided his evidence in a fair and forthright manner, was not shaken in cross-examination, and though he clearly cares deeply for the plaintiff, his testimony was presented without bias.
- [152] Despite the competitive nature of the dental hygiene program, I am satisfied that there is a real and substantial possibility that the plaintiff would have been accepted into the program in Toronto. The Toronto program had lower entrance requirements than programs in BC; she met the entrance requirements for the Toronto program; and there was no further upgrading required for her to gain admission. While it is true that she had difficulty with math, there is no evidence that math was a prerequisite for the dental hygienist program.

[153] Finally, I find that there is a real and substantial possibility that the plaintiff would have succeeded in the dental hygienist program in Toronto. Even Ms. Cameron allows for that possibility. While the coursework in the dental hygienist program is more difficult and academically oriented, I find that Ms. Peter is highly motivated to better herself and there is a substantial likelihood that she would have succeeded, though it is likely that she would have required significant tutorial assistance.

[154] I conclude that there is a real and substantial possibility of the plaintiff becoming a dental hygienist absent accident.

2. Functional Impairment

[155] There is substantial medical evidence supporting the contention that Ms. Peter has lost residual function due to the accident. While there are some discrepancies with the FCE which affect how much weight I can place on Mr. Armstrong's opinion, when it is coupled with the other medical and witness evidence, I am satisfied that Ms. Peter has proven on a balance of probabilities that she has permanent impairment which will affect her ability to work. Though there is evidence that she may benefit from an active rehabilitation program, this is better addressed as a positive contingency.

[156] As a result of her persistent and chronic low back pain, I conclude that the plaintiff is at a competitive disadvantage in all forms of employment. Sitting tolerances as outlined in Brent Armstrong's report apply to both more physical jobs such as a flagger and more sedentary jobs where consistent sitting is required. I also note the impact on her extra-curricular activities, housekeeping activities and her way of life. The evidence supports a finding that she is less marketable to potential employers, unable to take advantage of all job opportunities, and less valuable to herself as a person capable of earning an income in a competitive labour market.

[157] As noted by Ms. Bergeron, the CDA's job, which Ms. Peter is currently capable of doing albeit with pain, is less physically strenuous than the dental hygienist job. Ms. Bergeron testified that the dental hygienists at her clinic usually complain of pain in their lower back and hips due to the position they are required to hold, while CDAs do not complain as much as they are more mobile and not required to sit for long periods of time.

[158] Having regard to all of the evidence, I am satisfied that Ms. Peter is less marketable overall as an employee due to her accident-related injuries.

3. Assessing the Loss

[159] I find that the earnings approach is the best way to measure the plaintiff's impairment of her future earning capacity. Ms. Peter is in a position similar to the plaintiffs in *Hawkins, Cleeve v. Gregerson et al*, 2007 BCSC 1112, and *Palmer*, where the difference between two potential scenarios was readily quantifiable by the Court.

- [160] In *Palmer*, the Court considered the fact that the plaintiff had not actually applied to become a dental hygienist and had not placed her name on a waitlist. However the Court accepted that the plaintiff had researched being a dental hygienist as a vocational possibility, considered it and formed an intention to become a hygienist: *Palmer* at para. 101. The Court outlined the present values of earnings as a dental hygienist versus post-accident earnings as a dental assistant. The Court determined that after applying a number of negative contingencies, the appropriate discount rate to be applied to the future capacity loss claim was 50% and awarded the plaintiff \$303,000 for future earning capacity: *Palmer* at para. 118.
- [161] In *Cleeve*, the plaintiff became interested in becoming a dental hygienist approximately two years before the accident. However, she decided to enroll in the dental assistant program which was only ten months long with an overall plan to work as a dental assistant for a couple of years and if she liked it to acquire the credentials to become a dental hygienist. The plaintiff had only been enrolled in the dental assistant program for approximately four months when the motor vehicle accident occurred. The Court found the accident hampered the plaintiff's future income-earning capacity.
- [162] The Court found there was a real and substantial possibility that the plaintiff would have been a dental hygienist had she not been injured. The Court found that her injuries would limit her in any line of work and concluded that the plaintiff would earn \$30,000 a year less than she otherwise would have earned had she not been injured, resulting in an award of \$414,126: *Cleeve* at para. 138.
- [163] In *Hawkins*, the plaintiff was a licensed practical nurse prior to the motor vehicle accident. She was enrolled in a four-year nursing degree in Victoria and had almost completed the first term of the program when she was involved in an MVC. After the MVC the plaintiff continued her schooling and tried working full-time for 17 months. Eventually she transitioned to part-time work. The Court found that the mathematical earnings approach was appropriate because the sums payable for full-time work and part-time work were easily determined.
- [164] Ms. Cameron testified that CDAs make on average \$26 per hour, whereas the median income for a dental hygienist is \$41 per hour. Though Ms. Peter is currently earning \$24 per hour, I have used the more conservative figure employed by the plaintiff of an earning differential of \$15 per hour based on the average earnings for a CDA. This more conservative figure is appropriate given the plaintiff is in the early stages of her career and did not intend to go to dental hygiene school until several years down the road.
- [165] This results in an annual loss of approximately \$30,000 over the plaintiff's working life to an anticipated average retirement age of 62 for dental hygienists, as reported by Diana Cameron. The plaintiff submits, and I accept, that a realistic start date for this earnings approach is four years from the date of trial. The present value of 25 years of earnings at \$30,000 per year, using the discount rate of 1.5%, is \$621,588.24.

[166] The plaintiff submits that a negative contingency of 50% should be applied in the Court's evaluation of this loss, as was done by the court in *Palmer*. These negative contingencies include such things as having a subsequent child, early retirement, inability to complete the program, and improvement in her health condition. As a result, the plaintiff says that an appropriate award for loss of capacity based on earnings approach is \$312,000, representing roughly half of the present value of this stream of income.

[167] In my view, given Dr. Paramonoff's evidence that Ms. Peter's condition has not yet reached maximum medical improvement, I find that a 60% negative contingency should be applied. Thus, I find that a fair and reasonable award for Ms. Peter's future loss of earning capacity is \$250,000.

VIII. Cost of Future Care

[168] A future care cost award is based on what is reasonably necessary on the medical evidence to preserve and promote the plaintiff's mental and physical health. A claim for future care is established if there is medical justification for the claim, the claim is reasonable, and the expense is likely to be incurred by the plaintiff: *Audet* at paras. 114 and 115; and *Peters v. Ortner*, 2013 BCSC 1861 at paras. 142 and 143.

[169] The test for determining the appropriate award under this head of damages is an objective one based on medical evidence: *Fuchser v. Wilson*, 2012 BCSC 176 at para. 213.

[170] If a plaintiff has not used a particular item or service in the past, it may not be appropriate to include those costs in a future care award: *Izony v. Weidlich*, 2006 BCSC 1315 at para. 74.

[171] Future care costs must also be adjusted for future contingencies: *Fuscher* at para. 215. Each case is fact-specific. The extent to which a future care costs award should be adjusted for contingencies will depend on the care needs of the plaintiff. A contingency adjustment is not required where negative contingencies are offset by positive contingencies. Where there is a prospect of improvement in the plaintiff's condition, the award should be adjusted accordingly: *Peters* at para. 144.

[172] The plaintiff seeks an award of \$40,000.00 for future care for the services recommended by Dr. Paramonoff and the anticipated cost of massage therapy. At a cost of \$110 per month, the anticipated cost for massage therapy over 30 years is \$40,000.

[173] The plaintiff submits that she likely would utilize massage therapy treatment into the future, and that Dr. MacKean's report confirms that the use of this treatment on a once-a-month basis is appropriate.

[174] Dr. Paramonoff provides the following recommendations for future care:

- a) Regular independent exercise program for strength and conditioning;
- b) Physiotherapy and active rehabilitation to instruct her on exercises;

- c) She should build up to exercising five days per week with one hour each session in addition to stretching;
- d) Further 12-18 sessions with a kinesiologist or physiotherapist over one-to-two years;
- e) Use of home equipment or gym;
- f) Time-limited passive treatment for pain relief to decrease over time, for 12 treatments over the next 2 years;
- g) Short term medication once no longer pregnant, nortriptyline;
- h) Over the counter anti-inflammatories or analgesics for pain flare-ups;
- i) Referral to an occupational therapist for one-to-two sessions to review activities, equipment, and ergonomic assessment; and
- j) Psychology for non-medical pain management strategies.

[175] The defendant relies upon the opinion of Dr. Paramonoff that the plaintiff should have reduced treatment by massage therapy to at most six times per year (for severe exacerbations only) and that this should be phased out over the next two years. The defendant does not oppose the future care costs contemplated by Dr. Paramonoff such as 12 to 18 sessions with a kinesiologist or physiotherapist and a course of nortriptyline. The defendant also does not oppose a referral to an occupational therapist for one-to-two sessions to review activities and develop strategies to help optimize functioning.

[176] I find that there is medical justification for a claim for future care costs as recommended by Dr. Paramonoff. In addition, I find that the plaintiff should be compensated for future massage therapy treatments to help manage her pain, at a frequency of six sessions per year for a total of ten years. These treatments are medically justified and likely to be incurred.

[177] Bearing in mind that the quantification of damages under this head is an "assessment and not a precise accounting" (Midgley v. Nguyen, 2013 BCSC 693 at para. 337), I find that a future care cost award of \$20,000 is fair and reasonable. This figure includes consideration of negative and positive contingencies, such as improvement, worsening or stagnation of the plaintiff's condition despite appropriate treatment and exercise.

IX. Summary of Damages Awarded

[178] The plaintiff's damages are summarized below:

Non-Pecuniary Damages:

\$85,000

Special Damages:

\$18,576

Net Past Loss of Income:

\$20,000

Loss of Future Earning Capacity:

\$250,000

Costs of Future Care:

\$20,000

Total Loss

\$393,576

[179] The plaintiff is entitled to interest in accordance with the Court Order Interest Act, R.S.B.C. 1996, c. 79.

X. Costs

[180] As costs follow the result, the plaintiff is entitled to her costs at Scale B, subject to any offers or other matters that I have not been made aware of.

[181] In the event that a party wishes to make submissions on the issue of costs, they may do so in writing up to a maximum of five pages in length. These should be submitted through Supreme Court Scheduling within 21 days of the release of these Reasons. Any responding submissions are to be provided within seven days of receipt of the opposing party's submissions on costs.

"Shergill J."

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