

CANADA / JUDGMENT

Pinkney v. Bigg

2020 BCSC 848

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 848 Pinkney v. Bigg

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Pinkney v. Bigg,

2020 BCSC 848

Date: 20200608

Docket: M113380

Registry: Kelowna

Between:

Aaron Pinkney

Plaintiff

And

Robert Graham Bigg, John Doe, and John Doe Inc.

Defendants

Corrected Judgment: the text of the judgment was corrected
at paragraph 133d on June 22, 2020

Before: The Honourable Madam Justice W.A. Baker

Reasons for Judgment

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No other appearances

Place and Date of Trial:

Kelowna, B.C.

October 22-25 and

28-30, 2019

Place and Date of Judgment:

Kelowna, B.C.

June 8, 2020

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I. Introduction

- [1] Aaron Pinkney was injured in a car accident on December 13, 2014, and was further injured in another car accident on August 26, 2016. Liability for the accidents is admitted, but issues remain around the severity of her injuries. Ms. Pinkney says she suffered injuries to her neck, mid-back and jaw that have resulted in chronic pain and ongoing headaches. She says she also suffered from a mild traumatic brain injury, lower back pain, and a hand injury - all of which had resolved by the date of trial.
- [2] In the first accident, Ms. Pinkney was driving her car when she was rear-ended as she waited to merge onto Benvoulin in Kelowna. She was hit hard enough that she lost consciousness for a short time. She was taken by ambulance to the emergency department, where she spent 5-6 hours and had x-rays taken of her neck, back and thumb. Her husband, Ron Pinkney, was called to the scene and recalls her being very shaky and in pain.
- [3] The second accident happened on the Coquihalla highway between Merritt and Vancouver. This was a more minor rear-end collision. She was a passenger when the family car was struck from behind while they were stopped on the highway because of an accident ahead of them. The impact was strong enough to knock her phone and some papers out of her hand, but the family was able to continue driving to Vancouver for the weekend. Ms. Pinkney described the impact as feeling like an electrical shock going through her system, that "woke up" her symptoms, and eroded the improvements she had made to the injuries she suffered in the first accident. She was in bed for most of the weekend following the second accident.

II. Issues

- [4] This case raises the following issues:
- a) Did the accidents cause or exacerbate Ms. Pinkney's injuries?
 - b) What is Ms. Pinkney's prognosis?
 - c) Is Ms. Pinkney entitled to any damages?

III. Analysis

A. Did the accidents cause or exacerbate Ms. Pinkney's injuries?

1. Ms. Pinkney's abilities and health pre-accident

- [5] Ms. Pinkney and her husband work together in business and are parents to six adult children. Three of her sons no longer live at home. Ms. Pinkney and her husband presently live with two of their sons, and their daughter and her boyfriend.
- [6] Ms. Pinkney had some training after high school. She completed a course in office administration at the local college, and took some bookkeeping courses in 2010 and 2016. She worked at a variety of jobs, such as: bookkeeping and receptionist duties at a hair salon and working at a photolab. She had her six children between 1990 and 1999.
- [7] By 2006 she and her husband had started a pool maintenance company in Kelowna. They started doing pool construction, and then moved into pool maintenance for strata corporations and personal properties. They are 50% owners in the business, and employ their children and their daughter's boyfriend.
- [8] In the summer of 2014, before the first accident, Ms. Pinkney had a number of responsibilities in the pool business. She assisted on service calls and went to the different stratas to look after their pools. She vacuumed the pools, did the pool chemistry, did janitorial work at the pools, hand scrubbed the tiles around the pools, cleaned the skimmer baskets, and cleaned the filter systems. Each week she completed approximately 3-4 shifts of 4-5 hours each. In addition to her work on the sites, she did the paper work and banking for the business.
- [9] In addition to the pool business, the couple had a small farm where they grew apples. Ms. Pinkney described herself as a farmer's daughter, and clearly gains a great deal of pleasure from farming. From 2005-2017 they ran a certified organic apple farm with 1000 trees. The farm was certified organic in 2008. Ms. Pinkney was very involved in the farm. She would assist with spring pruning, hand thinning, watering, harvesting, sorting, boxing, and making apple juice, apple pies, and dried apples for sale. Many of these activities required strength and endurance, such as picking apples into 20lb bags.
- [10] In addition to the apples, Ms. Pinkney had approximately 100 chickens, a project she and her husband began in 2014 to expand their farm business. Ms. Pinkney was responsible to look after the chickens, clean out the barn, and collect the eggs. They would sell the eggs at farmers' markets along with their apple products.
- [11] The farmers' markets they attended included two days in Kelowna and two days in Vernon in the summer, and one day in each of Kelowna and Vernon in the winter. The farmers' markets were important to Ms. Pinkney not only for sales, but also for the community and friends she had there.
- [12] Ms. Pinkney and her husband dreamed of diversifying the farm to earn more income from it. After retirement from the pool business, their plan was to live and work on the farm for their income and their way of life.

- [13] In 2013, after her children were older, Ms. Pinkney decided she wanted to return to work outside the home. She was hired at London Drugs in the photolab in the fall of 2013, and began working regular shifts in January 2014. She worked approximately 9 hours a week at London Drugs, which were hours on top of the work she did for the pool business and the farm. The extra money she could earn at London Drugs supplemented the family's earnings, particularly in the winter season when the pool business slowed down. At London Drugs, Ms. Pinkney's duties included: dealing with orders, using the photo print machines, data entry, restocking paper and inks in the print room, and dealing with garbage and recycling. Ms. Pinkney described herself as a people person, and enjoyed working with customers.
- [14] Ms. Pinkney was very active with her family. The whole family held memberships at the local gym. Ms. Pinkney would lift weights at the gym two to three times a week, and would go to yoga five times a week. She mountain biked, downhill skied, swam, hiked, and participated in other outdoor activities.
- [15] Ms. Pinkney was responsible for most of the housekeeping. She did the laundry, vacuumed, and cleaned the house including washing walls and cleaning bathrooms, mowed the lawn, did the gardening, shopped, and made meals.
- [16] Before the accident, Ms. Pinkney had some intermittent pain in her neck and upper back for which she attended periodic massage therapy. In 2012 she had treatment for pain in her right shoulder and mid-thoracic region, which was aggravated by pool cleaning. This pain resolved and did not prevent her from working. Again, at the start of the summer season in 2014, Ms. Pinkney attended massage therapy for sore muscles associated with the commencement of pool cleaning. She also had periodic headaches.
- [17] Between the first and second accidents, Ms. Pinkney had one incident where she slipped on ice on the farm and landed on her tail bone. This fall caused her pain and "woke up her neck and jaw". This resolved after four to six months.
2. Ms. Pinkney's abilities and health post-accident
- a) Injuries
- [18] Ron Pinkney went with Ms. Pinkney to the hospital following the first accident. He observed her to be in obvious pain. She appeared tense, and to be experiencing considerable discomfort with limited ability to move her back and neck. By Christmas, two weeks after the accident, Ron Pinkney observed that Ms. Pinkney was still in bed much of the time, taking pain killers for headaches and pain in her neck and back.
- [19] Following the accident, Ms. Pinkney had flare ups of pain in her jaw. This happened particularly when she had soreness in her mid-back and the soreness then moved to her neck and jaw. For many months after the accident, Ron Pinkney observed Ms. Pinkney constantly rubbing her jaw, and wanting to eat only soft food so she didn't have to chew. Today Ms. Pinkney still avoids certain foods, like steak and apples, as they aggravate her jaw.

- [20] Ms. Pinkney has experienced ongoing neck pain and back pain from the accident. This has diminished somewhat, but remains a constant source of discomfort which she must manage with exercises, rest, and pain killers. Ron Pinkney observes Ms. Pinkney struggling to get out chairs, and having stiffness in her neck that requires her to turn her whole body rather than just her head. When Ms. Pinkney asked Ron Pinkney to rub her back, he could feel knotted muscles.
- [21] After the first accident, Ms. Pinkney began to experience ongoing mild to severe headaches, which affected her mood and her sleep. Ron Pinkney observed that it took almost eight months for the constant headaches to begin to subside. She still frequently experiences headaches, but they are not as severe.
- [22] Ms. Pinkney experienced a strain in her left thumb and hand, which has since resolved.
- [23] Following the accident, Ms. Pinkney experienced severe neck and back pain. She would be forced to lie on her back for parts of the day, and take Tylenol to try to manage the pain. Her pain was triggered by coughing, lifting anything heavy, bending over, vacuuming or doing any task in the position she would hold while vacuuming. While the intensity of the pain has lessened, it continues to affect her daily life.
- [24] Ms. Pinkney continues to experience pain while sitting for extended periods of time, and now uses a sit-stand desk to avoid sitting while working. Ron Pinkney observes Ms. Pinkney taking two extra strength Advil, two to three times a day. Ron Pinkney observes that Ms. Pinkney can only work in short bursts, and then needs to rest to recover. He says she has changed from the bubbly energetic person she was before the accident, and now he feels that she is depressed and anxious. He says that she now has difficulty sleeping and is up a couple of times in the night.
- [25] Restrictions in Ms. Pinkney's movement were also noted by her friend Heather Cross. Ms. Cross has been friends with Ms. Pinkney since 1998, and observed that before the accidents Ms. Pinkney was much more active. In the past they were cub scout leaders together and undertook many activities such as camping, canoeing, skiing, biking, hiking, and windsurfing. Now Ms. Pinkney is often tired, and their activities together are limited to going for walks. Ms. Cross observes Ms. Pinkney having to move her torso to turn, and not just her head, and observes considerable stiffness in Ms. Pinkney. She also observes physical changes in Ms. Pinkney's face when she experiences headaches, which is often.
- [26] Ms. Pinkney's son, Jake Pinkney, testified that he sees his mother moving stiffly, turning her whole body rather than just her neck. He also testified that his mother seems more tired now and does not do as much as she used to.
- [27] The observations of Ron Pinkney, Jake Pinkney, and Heather Cross were also corroborated by a long time friend of Ms. Pinkney - Pam Kirby. Ms. Kirby observed changes in Ms. Pinkney, who used to be a strong, vibrant woman, and now cannot turn her neck, lift heavy loads, walk distances, or get through a day without lying down and napping.

- [28] Ms. Pinkney continues to experience an achy pain in her right jaw, which flares up when she undertakes certain activities. Her jaw pain then triggers headaches which require her to lie down. She finds many things can trigger headaches, including vacuuming, household chores, working on the farm, and maintaining pools as part of their business. Before the accidents she was an avid reader, but now finds that reading gives her headaches.
- [29] Ms. Pinkney has experienced a great deal of stress arising from the accidents. She and her husband used to work as a team in their farm business and pool maintenance business. She is no longer able to help him in the way she did previously. This causes her anxiety as the burdens of the business now fall on him disproportionately. Her contributions are now very modest.
- [30] Ms. Pinkney is no longer able to do all the housekeeping. She needs help with vacuuming and washing walls and floors. She can no longer clean the whole house in one day as she requires breaks. She cannot carry heavy loads of laundry. She can use a riding lawn mover, but it exacerbates her pain.
- [31] She experienced significant weight gain following the accidents, but in the last year has been able to bring that under control. She had no difficulties sleeping before the accidents, but now wakes up in the night and has difficulty obtaining a restful sleep.
- [32] Ms. Pinkney attended physiotherapy with a number of practitioners beginning in 2014, and continuing to the present. Beginning in April 2015 she began seeing Glenda Hart, who she continues to see every two to three weeks. Ms. Hart focuses on Ms. Pinkney's neck, back and jaw. Ms. Pinkney feels that this ongoing physiotherapy allows her to continue with the activities she is able to do, and without it she would have more bad days.
- [33] Ms. Pinkney tried strength training with a personal trainer, but stopped seeing him because his exercises caused her symptoms to flare up. She also sees a massage therapist regularly - two to three days a month. She says the massage calms her symptoms in her back, neck and jaw. She says the massage relaxes the muscles which are constantly tense.
- [34] In addition, Ms. Pinkney has attended chiropractors and acupuncturists to relieve her ongoing body pain. None of these practitioners have cured her, but they do allow her to manage her pain so that she can better participate in her daily life.
- [35] She has attended Feldenkrais therapy to learn how to adapt her movement to avoid triggering her pain. She practices this therapy three to four times a week.
- [36] She is no longer able to participate in many of her pre-accident sports activities. While she attends a yoga class two times a week, it is a modified program to accommodate her injuries. She no longer mountain bikes, but has a cruiser style bike that she periodically uses. She has tried to go on a longer ride on the cruiser bike, such as along the Kettle Valley trails, but this resulted in a flare up of her symptoms.

- [37] She has also learned a number of different techniques to manage pain from various clinics she has attended. She describes these techniques as her "toolkit". Her toolkit includes exercise, rest, ice, heat, medications, and therapists.
- [38] Ms. Pinkney's general practitioner, Dr. Livingston, testified. He confirmed that he had no records of injuries to her neck, back, head, or jaw prior to the first accident. He diagnosed Ms. Pinkney with a muscular tenderness whiplash like injury of her neck, upper back, shoulders, head, and jaw resulting from the accidents. He also confirmed that Ms. Pinkney had received treatment for her injuries, but her symptoms remained and continued to limit her activity. He was of the opinion that she required ongoing massage, acupuncture, and physiotherapy to manage her symptoms. Dr. Livingston was of the view that Ms. Pinkney's symptoms had plateaued and she was unlikely to see further significant improvement.
- [39] Ms. Pinkney was also examined by Dr. Flaschner, a physiatrist. Dr. Flaschner was of the opinion that Ms. Pinkney suffered musculoligamentous sprains in the cervical, thoracic, and lumbar regions, headaches, and a left hand contusion which has resolved. He also noted that Ms. Pinkney may have a temporomandibular disorder which would have to be evaluated by a dental professional.
- [40] Ms. Pinkney was examined by an independent physiatrist retained by the defence, Dr. Laidlow. Dr. Laidlow confirmed the presence of musculoligamentous strain of the neck and back, resulting in myofascial pain. He also confirmed that she now suffers posttraumatic headaches related to her neck strain, and referred pain in her jaw also resulting from her neck pain.
- b) Work and social life
- [41] Ms. Pinkney's injuries have substantially changed her ability to participate in the family businesses.
- [42] Ms. Pinkney is no longer able to assist in the pool business as she did before the accidents. She cannot service the pools anymore. Her days consist of reviewing emails, organizing the routes for the maintenance crews and organizing the keys and materials they require for the work, going to the bank, and driving her son to his work locations. This work lasts for no more than one hour at a time. After each hour she must take a break, lie down, and do some exercises, so that she does not get to the point where she can't function.
- [43] Ms. Pinkney's ability to assist on the farm is severely affected by the injuries she suffered. She is no longer able to prune, move heavy loads, and care for the farm. They tried hiring people to assist, but ultimately it was no longer economic.
- [44] Ron Pinkney was not able to manage both the pool business and the farm without Ms. Pinkney's help. In an attempt to minimize his stress and the stress on the family from Ms. Pinkney's injuries, Ron Pinkney limited the pool business to strata clients only, and limited the farm.

- [45] Ms. Pinkney and her husband removed all the apple trees from their farm, as they could no longer manage the orchard. They reduced the chickens to 40 birds. They no longer go to the farmers' markets. Now, their farming is limited to the chickens and the sale of eggs at the farmgate and to friends and family. They are considering putting in hay, but this would require them to hire someone to cut the hay and share the production 50% with the person cutting the hay.
- [46] The impact of Ms. Pinkney's injuries on the family has been substantial. Her injuries have created a lot of stress in her relationship with her husband. Over their long relationship they had worked as partners in all aspects of their lives. Suddenly, her husband was left shouldering the responsibilities of the pool business and the farm without the considerable assistance of Ms. Pinkney. In 2018 Ron Pinkney was having such difficulty managing his stress that he left the family home and lived on his own for a number of months. He has since returned home, and the couple are attempting to work things out together. However, this does not minimize the stress the couple has experienced.
- [47] The couple had planned to travel in their future, but this is now difficult for them as flying causes pain to Ms. Pinkney and her mobility is limited.

3. Causation

- [48] In this case there is no dispute between the medical experts that the accidents caused injuries to Ms. Pinkney. All agree that the accidents caused injuries to her neck and mid back, with associated headaches and jaw pain. The defence in its submissions agrees that the accidents caused Ms. Pinkney soft tissue, or myofascial pain, in her neck and upper back, with referred pain in her right shoulder and jaw. As such, I have no difficulty finding on a balance of probabilities that the first accident caused the injuries complained of, and the second accident aggravated those same injuries.

B. What is Ms. Pinkney's prognosis?

- [49] Ms. Pinkney continues to suffer ongoing complaints in her upper neck and mid back, which tends to radiate to her shoulder and jaw and brings on headaches.
- [50] Dr. Flaschner, a physiatrist, opined that Ms. Pinkney's recovery had plateaued, and her function will remain limited. In his opinion, Ms. Pinkney suffered from persistent symptoms that were expected to represent a permanent impairment.
- [51] Dr. Livingston treated Ms. Pinkney throughout her recovery and was her regular family doctor for eight years before the first accident. I found his evidence to be credible and persuasive. He followed Ms. Pinkney throughout all of the treatments and exercise programs she has used in her attempt to regain function and in his report summarized these as follows:

Aaron has engaged the help of massage therapists, physiotherapists, chiropractor, acupuncturist, occupational therapist, kinesiologist, pain specialists and physiatrists. She has made use of Tylenol, Ibuprofen, muscle relaxants and central pain mediators in an effort to recover and regain her function. She has done daily exercise programs, attended yoga classes, occupational rehab and work conditioning programs. She has gone to meditation classes, used TENS machines and tried mouth guards. She has tried return to work programs on reduced hours.

- [52] Notwithstanding the efforts made by Ms. Pinkney over the past five years, Dr. Livingston is of the opinion that Ms. Pinkney's symptoms continue to limit her. She requires ongoing support with massage, physiotherapy, and acupuncture. She can only undertake very light work, cannot bend or stoop, lift or carry, and needs frequent rest, stretches, and change of posture. Dr. Livingston determined that Ms. Pinkney's level of function has plateaued and further significant improvement in function is not likely.
- [53] Dr. Laidlow opined that Ms. Pinkney had room for further improvement if she adopted a more active rehabilitation program. He was critical of Ms. Pinkney's current rehabilitation program, as he said it was passive, relying on things like massage and physiotherapy to manage her pain rather than gaining flexibility and strength through an active program. Dr. Laidlow was of the view that while Ms. Pinkney's symptoms could be expected to continue, she could improve her strength, flexibility, and function if she engaged in a more active rehabilitation program.
- [54] I prefer the opinions of Dr. Livingston and Dr. Flaschner over that of Dr. Laidlow. In particular, I am satisfied that Ms. Pinkney has complied with all the recommendations of Dr. Livingston who treated her before and after the accidents. Dr. Livingston is best able to comment on Ms. Pinkney's state of recovery given his close involvement with her over so many years. I accept that Ms. Pinkney has plateaued in her recovery, and find that she is unlikely to experience any significant improvement in her function over time. The injuries Ms. Pinkney experienced in the accidents are now permanent.

C. Is Ms. Pinkney entitled to damages?

- [55] The plaintiff claims non-pecuniary damages, and the following pecuniary damages: loss of income earning capacity (past and future), cost of future care and loss of housekeeping capacity, and special damages.
1. Non-pecuniary damages;
- [56] Non-pecuniary damages are awarded to compensate a plaintiff for pain, suffering, loss of enjoyment of life, and loss of amenities. As stated by our Court of Appeal in *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46:
- [46] The inexhaustive list of common factors cited in *Boyd* [*Boyd v. Harris*, 2004 BCCA 146] that influence an award of non-pecuniary damages includes:
- (a) age of the plaintiff;

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

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

- (g) impairment of family, marital and social relationships;
- (h) impairment of physical and mental abilities;
- (i) loss of lifestyle; and
- (j) the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff: *Giang v. Clayton*, [2005] B.C.J. No. 163 (QL), 2005 BCCA 54).

[57] Ms. Pinkney seeks \$150,000 in non-pecuniary damages. The defence agrees some non-pecuniary damages are properly awarded, but submits the correct award is \$75,000.

[58] Ms. Pinkney relies on *Alafianpour-Esfahani v. Jolliffe*, 2017 BCSC 701, *Biefeld v. Neetz*, 2016 BCSC 689, *Pololos v. Cinnamon-Lopez*, 2016 BCSC 81, and *Stapley v. Hejslet*, where awards ranged from \$115,000 to \$180,000 for plaintiffs suffering soft tissue injuries to the back and neck, headaches, and associated chronic pain.

[59] The defence relies on *Suc v. Skelton*, 2019 BCSC 1975, *Sangha v. Read*, 2019 BCSC 1761 and *Petrovic v. Stetsko*, 2017 BCSC 741, where awards ranged from \$60,000 to \$75,000 for non-pecuniary damages in cases with a range of soft tissue injuries.

[60] The defence argues that Ms. Pinkney had pre-existing sporadic pain in her neck, mid-thoracic area, and right shoulder, along with occasional headaches, and that Ms. Pinkney's baseline health condition must be considered in light of these complaints which pre-date the accidents. The defence argues that Ms. Pinkney is likely to have continued to be subject to these recurring pains in the absence of the accidents.

[61] None of Ms. Pinkney's pre-accident complaints were chronic or debilitating. At no time before the accidents did Ms. Pinkney seek medical attention from her family doctor for these complaints. I find that these earlier complaints were nothing more than the average stiffness and muscle fatigue that people get when they engage in new exercises or restart work after the winter season. It is hardly uncommon for people in their 40s to get stiff from physical activity, and it is not uncommon for people to seek out massage therapy to relieve their periodic stiffness. I find that the Ms. Pinkney's complaints prior to the accidents are not evidence of a pre-existing injury or condition which would have resulted in the disabilities she has experienced as a result of the accidents.

- [62] Each case is unique. Non-pecuniary damages must be assessed taking into account the unique factors arising in each case.
- [63] In the case before me, Ms. Pinkney was 49 years old at the time of the first accident. Ms. Pinkney and her husband had an active partnership, where they worked together at two physical vocations - pool cleaning and farming. She is a mother to six children, and was primarily responsible for all of the housekeeping that goes along with a large family. Ms. Pinkney and her husband enjoyed their community at two different farmers' markets. Ms. Pinkney was an active sporty woman, engaging in all kinds of sports and activities. She had a vibrant, energetic and bubbly personality. Even though her continued pain was obvious during her testimony, glimpses of her positive personality could be seen. She has clearly persevered in the face of ongoing pain and restricted movement. However, the impact of the accident has been significant.
- [64] Ms. Pinkney has suffered from a significant change in her lifestyle as a result of the accidents. She has lost the ability to continue to farm in the way she did before. Farming gave her a great deal of joy and satisfaction. That is now gone, and has been replaced with pain and stress. No longer can she enjoy the farmers' market community. No longer can she be the same partner to her husband in the pool business. She cannot maintain their home as she did before. She cannot get through a day without medication and taking breaks to lay on her back.
- [65] The change in Ms. Pinkney created a great deal of stress on her marriage, to the point that her husband moved out for almost a year. They are back together, which is commendable, but this does not minimize the impact of the accidents on their relationship. Her husband noted that her upbeat, bubbly personality has changed because of the pain. She can no longer participate in all the sports and activities she did previously.
- [66] Her injuries are very serious and have had a significant impact on her life. As a result of the accidents, every day she continues to suffer from back pain, neck pain, jaw pain and headaches. I find that an award of \$110,000 is appropriate for non-pecuniary damages.

2. Pre-trial loss of earning capacity

- [67] Ms. Pinkney claims loss of earning capacity, both past and future. Loss of past earning capacity is a claim for the loss of the value of work that the plaintiff was unable to perform as a result of her injuries: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 [*Rowe v. Bobell*] at para. 30. This loss can be measured in different ways, including the value of actual earnings the plaintiff would have earned, the replacement cost evaluation of tasks the plaintiff is no longer able to perform, the value of lost company profits, and the loss of secondary income such as family income: *Rowe v. Bobell* at para. 31.

- [68] With respect to past income loss, to the extent the assessment relies on past facts, those facts must be proven on the balance of probabilities. However, hypothetical facts, whether past or future, must be assessed if there is a real and substantial possibility of such hypothetical occurring, and the court must weigh those accepted hypotheticals according to their relative likelihood.
- [69] At the time of the first accident, Ms. Pinkney was working at London Drugs part time, along with her work on the farm and in the pool business.
- [70] The defence agrees with Ms. Pinkney's wage loss claim for London Drugs for 2014 and 2015. However, the defence argues that she could have returned to work at London Drugs in 2016 and no damages in this respect have been established after 2016.
- [71] In late 2015 Ms. Pinkney attended a gradual return to work program with Lifemark Health Centre ("Lifemark"). Ms. Pinkney's participation in the return to work program was challenged by the defence. The discharge notes from Lifemark states that Ms. Pinkney completed her full 20 session work conditioning program, but in the second half of the program she consistently left early and did not complete the required number of hours each day. Ms. Pinkney stated in evidence that she had to drive her son in the afternoon due to a lack of bus service in their area, and also had appointments with other therapists in the afternoon. Both of these obligations conflicted with the hours of the work conditioning program. In any event, the fact that she missed some hours of the program did not appear to impact her completion of the program. The discharge notes state that by the end of the program Ms. Pinkney had demonstrated the ability to complete all of her job duties at London Drugs, with the exception of floor to waist lifting. A gradual return to work was recommended.
- [72] In December 2015 Ms. Pinkney attempted a return to work at London Drugs, on a reduced four hour shift. Ms. Pinkney was unable to complete this first four hour shift. She began to suffer from a headache which prevented her working, and her back flared up. She went to her supervisor, told him she was in too much pain to continue, and called her husband to pick her up.
- [73] In consultation with Dr. Livingston, Ms. Pinkney began a return to work in January with even shorter, two hour shifts. She completed seven shifts, approximately two shifts per week in January 2016. However, Ms. Pinkney found that she was not able to continue in the position. The work was too much for her, and exacerbated her symptoms.
- [74] Ms. Peters, an occupational therapist, prepared a functional assessment of Ms. Pinkney and testified at trial. Under cross examination, she did not agree that Ms. Pinkney was capable of returning to her job at London Drugs. While she agreed that Ms. Pinkney met certain isolated strength tests, she was of the opinion that Ms. Pinkney did not have the necessary tolerance for maintaining certain positions, like sitting, standing and reaching. Ms. Pinkney's symptoms required her to take frequent breaks and lie down. The restrictions on her actions would significantly interfere with her ability to do the work at London Drugs.

- [75] I do not accept the defence's argument that if Ms. Pinkney had fully completed all hours of the return to work program, she would have been able to return to her job. I find the extent of her participation in the Lifemark program to be reasonable. There is no evidence that, had she attended the additional hours each day, she would have had any different recovery. Ms. Pinkney attempted to return to work over one whole month, but found it to be intolerable. The assessment by Ms. Peters is consistent with the experience reported by Ms. Pinkney. I find that Ms. Pinkney acted reasonably in her efforts to return to work, and she did not fail to do anything which would have reduced or eliminated her loss: *Preston v. Kontzamanis*, 2015 BCSC 2219 at para. 106-107.
- [76] I accept the past wage loss from Ms. Pinkney's job at London Drugs as calculated by the economist. Mr. Benning at table 2 of his report dated July 22, 2019.
- [77] Ms. Pinkney has not advanced a past loss of income claim in relation to the farm.
- [78] Ms. Pinkney is advancing a past loss of income claim in relation to the pool business.
- [79] Ms. Pinkney and Ron Pinkney are equal owners in the pool business. Both received wages from the business, although Ms. Pinkney received earnings slightly less than half of what Ron Pinkney earned. Ms. Pinkney explained this was done by agreement between them because Ron Pinkney needed a higher income to support the mortgage over their farm in the name of Ron Pinkney and his mother.
- [80] The leak detection business, known as Sherlock Leak Detection ("Sherlock"), was primarily run by their son, Jake Pinkney, although Ron Pinkney also was trained in leak detection. The leak detection business got underway for the 2016 season. It was a successful add on to the pool business. Unfortunately, in 2019 Sherlock was discontinued because Jake decided to move on.
- [81] Ron Pinkney testified that he had to wind up Sherlock because, without his son, he was not able to run both the pool maintenance and the leak detection sides of the business. Ms. Pinkney testified that, if she did not have the injuries from the accidents, she would have been able run the pool maintenance side of the business, including doing the required pool maintenance and physical work she can no longer do. This would have freed up Ron Pinkney to continue Sherlock.
- [82] Both the pool maintenance business and Sherlock are components of the one company. Therefore the expenses and revenues of the company reflect both sides of the business.
- [83] In a closely held company like this pool business, the wages the owners pay themselves is not always an accurate reflection of their true earnings or earning capacity. The owners are entitled to dividends, and can make decisions to reinvest profit in the company to grow the business. As such, I find that the true loss to Ms. Pinkney is an amount which reflects her lost wage income, along with lost growth in the company to which she would have been entitled as an owner: *Rowe v. Bobell*.

- [84] In 2014 Ms. Pinkney received \$7,104 in wages from the company, and Ron Pinkney received \$21,000 in wages. In 2015 and 2016 Ms. Pinkney did not receive a wage from the company, although she did receive a dividend in 2015. In 2015 and 2016 Ron Pinkney took \$25,300 and \$27,640, respectively out of the company in wages. In 2017 the company paid \$7,144 in wages to Ms. Pinkney, and \$49,180 in wages to Ron Pinkney. In 2018 the company paid \$31,092 in wages to Ms. Pinkney, and \$78,190 to Ron Pinkney.
- [85] In 2015 the company's work was limited to pool maintenance. In 2016 Sherlock began operations, although Jake Pinkney testified that it was not very profitable in the first year it was in operation. In 2017 and 2018 Sherlock did well, and this is reflected in the higher wages paid to Ron Pinkney in 2017 and 2018, and the higher wage paid to Ms. Pinkney in 2018. In 2016 and 2017 wages for employees other than Ms. Pinkney and Ron Pinkney increased. This is to be expected as during these years Sherlock was in full swing and employee costs would have increased to reflect the additional work.
- [86] Ms. Pinkney argues that her loss can be measured most appropriately with reference to the increased labour costs of the company in the years following the accident. In 2015 the company paid salaries net of those paid to Ms. Pinkney and Ron Pinkney in the amount of \$30,525, or \$32,652 more than such salaries in the previous year (2014). The increase from 2014 is higher than the actual amount paid out because in 2014 the company showed a negative amount paid to other employees.
- [87] Ms. Pinkney submits \$32,652/year is an appropriate proxy for her loss because she says it represents the additional staff costs of the company in the first year after the accident. I am not satisfied that all of the \$32,652 paid in "extra" wages in 2015 can be attributed to the inability of Ms. Pinkney to work in the company. The negative amount in 2014 appears to be an anomaly as in 2013 the company paid \$18,383 to other employees, and in 2012 the company paid other employees \$13,385. In other words, the company typically paid around \$15,000 to other employees regardless of the injuries to Ms. Pinkney.
- [88] Mr. Benning, an economist for the plaintiff, calculated Ms. Pinkney would have received an annual wage in the pool business of \$21,433/year, assuming she worked 30 hours per week. Ms. Pinkney continued to do the books and office administration for the company in 2015 and 2016, even though she did not receive a wage. While it is clear that the company had to hire additional labour to replace Ms. Pinkney, this replacement labour related to the work on the pool sites which was historically only a portion of the work Ms. Pinkney performed for the company. After her accident, Ms. Pinkney continued to work approximately 10 hours per week on administrative matters.
- [89] I agree that the company had to increase its expenses to pay for replacement labour because of Ms. Pinkney's injuries. But for Ms. Pinkney's injuries, these expenses would have been paid to Ms. Pinkney as wages or would have been retained in the company as profits. I am satisfied that Ms. Pinkney is entitled to damages for past loss of earning capacity which reflects her lost wages and/or the lost profit in the company.

- [90] I find that the Ms. Pinkney's past loss of earning capacity in relation to the pool business, inclusive of wages and company profit, in the years 2015 - 2018 to be \$14,000/year. In 2014 Ms. Pinkney's loss was nominal and I accept the figure of \$550 as set out in Mr. Benning's report.
- [91] While Sherlock was developing into a profitable operation for the company, it was more than Ron Pinkney could handle without Ms. Pinkney taking over the pool maintenance business. I find that there is a real likelihood that the business would have increased through Sherlock if Ms. Pinkney's injuries had not prevented her from participating in the business as she had before the accidents. The track record for Sherlock is quite small, with only a couple of years to refer to. Nevertheless, I find that there is a real possibility that it would have increased the profitability of the company.
- [92] For the year 2019, I find an upwards contingency of 20% should be applied to the past loss of earnings claim of Ms. Pinkney to reflect the loss of Sherlock. In the result, I find the loss for 2019 to be \$17,000.
- [93] Taking into account all of the above, and bearing in mind that the role of the court is to assess damages, which assessment goes beyond simple mathematics, I find Ms. Pinkney is entitled to damages for past loss of earning capacity in the total amount of \$100,000.

3. Loss of future earning capacity

- [94] The purpose of an award for loss of future earning capacity is to restore the plaintiff, as best as possible, to the position she would have been in had the accident not occurred. The court in *Brown v. Golaiv* (1985), 26 BCLR (3d) 353 (SC) [*Brown v. Golaiv*] at para. 8 set out the factors to consider in assessing a loss of earning capacity:

The means by which the value of the lost, or impaired, asset is to be assessed varies of course from case to case. Some of the considerations to take into account in making that assessment include whether:

1. the plaintiff has been rendered less capable overall from earning income from all types of employment;
2. the plaintiff is less marketable or attractive as an employee to potential employers;
3. the plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to him, had he not been injured; and
4. the plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market.

- [95] Derek Nordin, a counselling psychologist, prepared a vocational assessment of Ms. Pinkney. Mr. Nordin was of the opinion that she was unlikely able to return to the competitive workforce. He indicated that, in his experience, a family business would provide the best workplace accommodations required to support Ms. Pinkney's need for pacing and body positioning. Mr. Nordin did not view retraining as realistic for Ms. Pinkney given her symptoms and limitations, and also her age.
- [96] Mr. Nordin was of the opinion that she was well suited for her current work as a bookkeeper, in the family businesses.
- [97] The considerations in *Brown v. Golaiy* are all met in the case at bar. Ms. Pinkney is no longer competitively employable, and is less capable overall from earning income from employment.
- [98] There is no indication that the family pool business will not continue, or that Ms. Pinkney will not be able to continue supporting the family business on the administrative side into the future. Nevertheless, Ms. Pinkney has suffered a future loss claim in relation to the family business, which I find to be consistent on an annual basis with the loss suffered by Ms. Pinkney in 2019, namely \$17,000.
- [99] Ms. Pinkney will no longer be in a position to work outside the home at London Drugs or a similar employer. As such, she will suffer an additional loss of \$5,652/year, as calculated by Mr. Benning.
- [100] Ms. Pinkney has indicated that she is interested in doing bookkeeping on a part time basis for other family businesses in the area. This would be work she could do at home, at her own pace. I find that there is a real possibility that Ms. Pinkney will continue her training as a bookkeeper and take on some work, in addition to her work in the family business. Her future loss claim will be reduced by 5% to reflect this contingency.
- a) Present value
- [101] Any award for loss of future earning capacity must be assessed as a lump sum, which takes into account the present value of the plaintiff's future loss. By calculating the present value of the future loss, the court accounts for the fact that money received today will be invested and produce the appropriate income stream for the plaintiff's expected earning life.
- [102] Mr. Benning's report sets out two present value tables which calculate present value multipliers accounting for labour market contingencies in the following ways: calculations which reflect statistics for premature death (actuarial multipliers), and calculations which reflect statistics for premature death, non-participation, unemployment and part-time/part-year employment (economic multipliers).

[103] Mr. Benning provided one table which included all labour market contingencies, and which he says is appropriate to assess the present value of employment income from external employers, like London Drugs. The second table removed unemployment and part year contingencies, and he said this table was appropriate for self-employment earnings. I accept that Ms. Pinkney is expected to work until age 65, which is the retirement age used by Mr. Benning in his calculations.

[104] I find it is appropriate to use economic multipliers to determine the present value of Ms. Pinkney's loss, which are 7.524 for external employment and 7.644 for self-employment.

[105] I assess the present value of Ms. Pinkney's future loss of earning capacity to be \$165,000.

4. Cost of future care

[106] Any claim for cost of future care must be medically justified, and must be reasonable to both parties: *Milina v. Bartsch*, (1985) 29 B.C.L.R. (2d) 33. The plaintiff is entitled to services, medications and other items of care that are reasonably necessary to preserve and promote her mental and physical health, and which she is likely to access in the future: *Sendher v. Wong*, 2014 BCSC 140, para 192-195.

[107] The defence agrees that Ms. Pinkney has established her claim for costs of future care generally, but takes issue with respect to the quantum of certain claims, and whether Ms. Pinkney has established that all costs claimed are reasonable and likely to be accessed.

[108] Christina Peters prepared a cost of future care analysis which sets out the costs of the recommendations which were made to restore Ms. Pinkney to as close to her pre-injury level of function as is reasonably possible, to maximize her functional independence and participation in activities of daily living, as well as minimizing deterioration of her condition over time. Ms. Peters based her report on her review of the medical opinions, as well as her own functional assessment of Ms. Pinkney.

[109] Ms. Peters provided costing for annual sessions until age 60 of the following: 25 sessions of physiotherapy, 9-12 sessions of massage therapy, and 4 sessions of chiropractic treatment. The defence argues that 12 sessions of physiotherapy, 8 massage sessions, and 3 chiropractic sessions per year to age 60 are reasonable. Both Ms. Peters and the defence agree that 6 combined sessions a year following age 60 are reasonable. In final argument, Ms. Pinkney argued that the more frequent sessions should be extended to age 65, to reflect the fact that Ms. Pinkney is likely to work past age 60. She argues an additional \$13,342 should be added to these costs.

[110] Ms. Pinkney has been an active and regular user of these therapies, and her consulting and treating physicians agreed with her use of the therapies. Dr. Laidlow was of the opinion that Ms. Pinkney was over using passive therapies and recommended a more active program. His opinion is contradicted by Dr. Livingston and Dr. Flaschner, whose opinions I prefer, as discussed earlier. Further, I accept the evidence of Ms. Pinkney that she has diligently tried to exercise to the extent she can, but that she is vulnerable to increased pain and symptoms

if she over does things. She testified that she gets great relief from the passive therapies and they allow her to continue to participate in as many activities as she can. I am satisfied that the passive therapies are reasonable and will be used by Ms. Pinkney to alleviate her symptoms.

- [111] I accept that Ms. Pinkney is likely to work past age 60. As such, I agree that an adjustment will be made to the costing prepared by Ms. Peters. I award a total of \$29,000 for all costs of physiotherapy, massage therapy, and chiropractic treatments.
- [112] Ms. Peters sets out costs for psychological counselling. While a medical opinion is not required to establish a claim for counselling costs, and both Ms. Pinkney and her husband note her low mood and changes since the accident, I am not satisfied on the evidence before me that Ms. Pinkney has established that psychological counselling is necessary.
- [113] Dr. Livingston provided an opinion and testified at trial. He has been her family physician since 2006. However, Dr. Livingston did not include a psychological recommendation in his opinion. Dr. Flaschner notes in his 2019 report that Ms. Pinkney "has accepted her current state as her new normal and has not required psychological counselling or medications for mood."
- [114] On all of the evidence, I am not persuaded that psychological counselling is necessary as a result of the injuries Ms. Pinkney suffered in the accidents.
- [115] Separate from Ms. Pinkney's claim for psychological counselling, she claims for the costs of a comprehensive pain management program. Dr. Livingston identified that Ms. Pinkney would benefit from attending a pain clinic or a comprehensive pain management program. Dr. Flaschner also recommends that Ms. Pinkney participate in a chronic pain management program.
- [116] Ms. Pinkney has attended two pain management programs, which provided her with certain "tools" to manage her pain. However, Ms. Peters clarified in her report that the programs Ms. Pinkney has used to date are not consistent with the recommendations of Dr. Flaschner and Dr. Livingston.
- [117] The defence argues that it is unlikely Ms. Pinkney would participate in a pain management program given that she has had Dr. Flaschner's recommendation since 2017 and has not yet begun such a comprehensive program.
- [118] Ms. Peters provided costing for an individually tailored chronic pain management program offered by CBI Kelowna. The cost for CBI Kelowna ranges from \$3,535-\$8,325 depending on the length of the program chosen.

- [119] As an alternative to CBI Kelowna, Ms. Peters refers to CHANGE Together Program, an online program which involves self-education which can be done at Ms. Pinkney's own schedule, but includes no one-on-one therapies. The cost of this option is \$555. The defence argues that if a pain management program is ordered, it should be the CHANGE Together option.
- [120] I am satisfied that Ms. Pinkney will benefit from an individualized pain management program. I am also satisfied that she would benefit more from the CBI Kelowna program than from the online CHANGE Pain option. I find \$5,325, which represents the 3 hour program at CBI Kelowna, is an appropriate amount for a comprehensive pain management program. A small deduction from the allowance for physiotherapy and massage therapy will be made to account for the overlap between the two programs. The deduction reflects that three fewer physiotherapy sessions, and one fewer massage therapy session will be required.
- [121] Dr. Flaschner recommended that botox injections may assist Ms. Pinkney if other therapies were not effective. This recommendation was made in 2017, but Ms. Pinkney has not tried it. When testifying, Ms. Pinkney was very hesitant about the use of botox, while she acknowledged that she may try it. On the evidence, including the general reluctance of Ms. Pinkney in evidence and her lack of take up since the recommendation was made in 2017, I am not satisfied that botox is a therapy that she is likely to pursue. As such, I decline to make any award for botox in the future.
- [122] Ms. Pinkney identified bookkeeping as something which she can do on a part time basis, which will accommodate her physical limitations. Ms. Pinkney seeks an allowance for training to allow her to pursue this vocation. The cost of an accounting/bookkeeping certificate at Okanagan College is \$1,408. This is a reasonable cost which will allow Ms. Pinkney to increase her self-employment earnings beyond the family business.
- [123] Ms. Pinkney advances a claim for both non-prescription (Advil) and prescription drugs, and a topical cream. The evidence of Ms. Pinkney at trial was that she did not like taking prescription drugs, and did not tolerate them well. She has not, to date, used prescription drugs to manage her pain. Ms. Pinkney has not used a topical cream, as recommended by Dr. Flaschner. The defence objects to any award for prescription medication or the topical cream on the basis that Ms. Pinkney has not established a likelihood that she will actually use them. I agree. I award Ms. Pinkney costs of non-prescription drugs, in the annual amount of \$52.
- [124] Ms. Pinkney seeks the costs of a number of pieces of equipment or adapted aids, including an automatic vacuum, long handled cleaning aids, raised garden planters, long handled light weight garden tools, ergonomic chair, and washer and dryer pedestals. Following her functional evaluation of Ms. Pinkney, Dr. Peters recommends these adapted tools to allow Ms. Pinkney to participate in her household activities without aggravating her symptoms. I agree and accept the costs of the equipment and adapted aids as presented.

[125] Ms. Pinkney claims cost of home support services. The defence does not disagree with the hours proposed by Ms. Peters, but suggests the hourly rate presented, at \$33.50/hour, is too high and an hourly rate of \$20 is more appropriate. In final argument, Ms. Pinkney argued that the home support calculation done by Ms. Peters should be increased to reflect the fact that they now intend to stay on the family farm and not move to a smaller house as assumed by Ms. Peters. Notwithstanding the views of Ms. Pinkney and Ron Pinkney expressed at trial, I find there remains a real possibility that they will move from the farm to a smaller house and property in the future. As such, I am not prepared to make any adjustment to the hours for home support presented by Ms. Peters.

[126] Ms. Peters estimated the hourly rate for home support services following a review of four different providers. I am satisfied that the hourly rate presented by Ms. Peters is accurate, and I allow home support services in the amount presented.

[127] Mr. Benning, an economist, prepared present value calculations for the cost of future care. Using the calculations presented by Mr. Benning, I find the present value of the costs of future care I have allowed are:

a) Physiotherapy, massage, chiropractic

\$29,000

b) Pain management program

\$5,325

c) Vocational training

\$1,408

d) Medication

\$1,002

e) Equipment/adapted aids

\$7,232

f) Home support services

\$16,598

[128] In summary, I award \$60,500 for costs of future care.

5. Loss of homemaking capacity

[129] In this case I am satisfied that the awards for non-pecuniary damages and cost of future care adequately compensate Ms. Pinkney for any loss or impairment of homemaking capacity she has suffered as a result of the accidents. I decline to make an award under this head of damage.

6. Special damages.

[130] Ms. Pinkney seeks \$11,072.23 for special damages incurred prior to trial. Of these costs, \$3,991 relate to dental expenses which she says were incurred in relation to her jaw injury. The defence accepts all special damages with the exception of the dental expenses.

[131] While there is no issue that Ms. Pinkney suffered jaw pain from her injuries resulting from the accident, there was no opinion from a dental specialist which would allow me to conclude that the dental procedures she claims were medically necessary to address the injuries she suffered in the accidents. The medical record of Dr. Livingston notes that she suffered jaw pain following dental work for a crown. Without a medical opinion, I cannot conclude that the dental procedures result from the accidents, and not the dental crown.

[132] I find that the Ms. Pinkney has not established that the dental expenses are as a result of her injuries suffered in the accidents. I award Ms. Pinkney \$7,100, which represents all special damages incurred to the date of trial, with the exception of the dental expenses.

IV. Conclusion

[133] Ms. Pinkney is awarded the following damages against the defendants, jointly:

a) Non-pecuniary damages

\$110,000

b) Past loss of income

\$100,000

c) Loss of future earning capacity

\$165,000

d) Cost of future care

\$60,500

e) Special damages

\$7,100

[134] The total damages are awarded in the amount of \$442,600.

[135] If the parties wish to make submissions on costs, they may do so in writing within 30 days of this judgment. If I receive no submissions on costs, I award costs to Ms. Pinkney at Scale B.

"Baker J."

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