
CANADA / JUDGMENT

Power v. Carswell,

2011 BCSC 1672

COURT

Supreme Court of British Columbia

DECIDED

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2011 BCSC 1672 Power v. Carswell

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Power v. Carswell,

2011 BCSC 1672

Date: 20111207

Docket: 41739

Registry: Kamloops

Between:

Leanne Power

Plaintiff

And

Derek Carswell and Desert City Investigations Inc.

Defendants

Before: The Honourable Madam Justice Gray

Reasons for Judgment

Counsel for the Plaintiff:

D.K. Hori and J.M. Mitchell

Counsel for the Defendants:

G. Ginter

Place and Date of Trial:

Kamloops, B.C.

June 13 - 17, 2011 and June 20, 2011

Place and Date of Judgment:

Kamloops, B.C.

December 7, 2011

INTRODUCTION

- [1] Ms. Power was injured in a motor vehicle accident in Kamloops, B.C., on November 8, 2006 ("Accident"). The Accident occurred in the intersection of Lansdowne St. and 3rd Avenue, which is controlled by traffic signals. Ms. Power was driving a Pontiac Sunfire westbound on Lansdowne when she struck the Jeep which Mr. Carswell was driving northbound on 3rd Avenue, turning left onto Lansdowne. Both liability for the accident and the quantum of damages were in issue. Ms. Power's claims proceeded to a 6-day trial.
- [2] At the time of the Accident, Ms. Power was 28 years old and working as an instructor at the Interior Academy of Hair and Esthetics ("Hairdressing School"). At the time of trial, Ms. Power had been accepted into a program at Thompson Rivers University ("TRU") which she hopes will lead to a Bachelor of Social Work and a career as a social worker.
- [3] Generally, the defence argued that Ms. Power was not entirely credible.
- [4] On the question of liability, Ms. Power argued that Mr. Carswell was wholly responsible for the Accident, while the defence argued that Ms. Power was partially responsible for it.
- [5] Ms. Power claims that the Accident has caused her continuous pain in her lower back and hips, as well as periodic pain in her left shoulder and neck. She claims that as a result of these injuries, she is no longer able to work as a hair stylist or instructor, and must retrain. She also claims that she has a reduced ability to look after herself and her family, and to enjoy herself. The defence argued that Ms. Power's symptoms were not as severe and long-lasting as she claimed.
- [6] The primary issue regarding damages was the extent to which Ms. Power's work and activities would have been restricted even if the Accident had not occurred. The defence argued that Ms. Power would have suffered restrictions because of her injuries in a December 2002 accident ("2002 Accident"), because of issues with her weight, and because of the physical strain of working as a hairdresser. The defence also argued that Ms. Power's claim for future lost earning capacity is exaggerated, and that she failed to mitigate her losses.

- [7] Ms. Power argued that the proper award would be about \$390,000, consisting of \$100,000 for non-pecuniary damages, \$31,573 for past lost income, \$201,651.40 for retraining and lost future earning capacity, \$55,292.05 for the cost of future care, and \$406.69 for special damages.
- [8] The defence argued that the proper award would be about \$60,000, consisting of \$50,000 for non-pecuniary damages, \$501 for past lost income, \$25,000 for lost future earning capacity, and \$5,000 for cost of future care, all reduced by 25% for failure to mitigate.
- [9] I am grateful to counsel for their focussed and efficient presentation of this case.

FACTS

- a) Prior to the accident on November 8, 2006
- [10] Ms. Power finished grade 12 in Valemont, B.C. in 1998, but was not able to graduate because she had not completed sufficient credits. In the courses she took in grades 11 and 12, she had an average grade of about 74%. She wanted to become a residential care aid, but when a family friend suggested she pursue work as an aesthetician, she decided to do so.
- [11] Ms. Power has struggled to reduce her weight since she became an adult.
- [12] Ms. Power moved to Kamloops in 1999. She completed a training program to be an aesthetician which lasted about six months. Following that, she completed a training program lasting about ten months at the Hairdressing School. Ms. Power received high grades at the Hairdressing School. She took a further examination and became a licensed hair stylist.
- [13] The head of the Hairdressing School was Ms. Stark, who was impressed with Ms. Power's talent as a hairdresser, and who thought Ms. Power had the potential to be an instructor at the Hairdressing School one day.
- [14] Ms. Power worked for about a year as an aesthetician and hair stylist, and then moved to a second job where she was primarily a hair stylist. When she had worked in the second job for about 6 months, Ms. Stark offered her a teaching job at the Hairdressing School and Ms. Power accepted.
- [15] Ms. Power began working at the Hairdressing School in 2002. There were essentially three roles for instructors: teaching theory, teaching practical skills, and supervising practical work. When teaching theory, the instructor would lecture using a white board and props. When teaching practical skills, the instructor would demonstrate hairstyling techniques on a mannequin head or a student. When supervising practical work, the instructor would walk around the floor where students were styling the hair of customers or each other and observe, correct, and demonstrate as appropriate.

- [16] Usually Ms. Power would be on her feet for most of her working days. Her working hours were 8:30 a.m. to 4:30 p.m. four days a week and 8:30 a.m. to 8:30 p.m. the fifth day. Class size varied from about 4 to 12 students, but when the students were doing practical work, several classes were combined and there were often about 20 students. The work which was most physically demanding for the instructor was supervising practical work, also called working "on the floor". The least physically demanding work for the instructor was working in the classroom teaching theory.
- [17] Ms. Power's plan was to work hard at the Hairdressing School, and if she stopped enjoying the work or for some other reason could not continue, to pursue a career as a residential care aid.
- [18] By December 2002, Ms. Power was working 32 hours per week for the Hairdressing School. She was considering breast reduction surgery to relieve pressure on her neck, but her doctor wanted her to lose weight before undergoing such surgery.
- [19] In the 2002 Accident, Ms. Power was in a car, wearing a seatbelt, when the car struck another vehicle in an intersection. As a result of the accident, Ms. Power had problems with her shoulders and neck, primarily on her right side, and some pain in her lower back.
- [20] It was not entirely clear how long Ms. Power stopped working after the 2002 Accident. It appears that she was off work completely for about two months. Ms. Power testified that she returned to work on a gradual basis, increasing her hours over a period of about two months. She testified that she found it difficult to stand for long periods or to hold up her arms for long periods without aggravating her right shoulder. She testified that she was still able to do the majority of her duties, but her work had to be modified, and Ms. Stark would help her from time to time over a period of about two years after the accident.
- [21] Ms. Power impressed Ms. Stark with her talent and ability to teach both theory and practical skills. Ms. Power redeveloped the teaching program. Ms. Power received very good to excellent performance evaluations in the records which were in evidence. In March 2003, her scores were very good to excellent. Starting in November 2004, all her ratings were excellent.
- [22] Ms. Power loved her work as a hairstyling instructor and was very good at it.
- [23] Ms. Power's employment income in 2003 was about \$14,700. She also received about \$2,600 in employment insurance benefits.
- [24] Ms. Power's friend, Ms. McKay, began working as an instructor at the Hairdressing School in July 2004. Ms. McKay testified that she did not observe Ms. Power being limited in performing any of the duties of instructor, although from time to time Ms. Power would complain of soreness and take ibuprofen or Tylenol.
- [25] Ms. Power's employment income in 2004 was about \$23,000.

- [26] Ms. Power testified that by about 2005 she was on track after the injuries she suffered in the 2002 Accident, and simply had occasional flare-ups from overuse. She testified that her main concern was her right shoulder blade, and that she just had a periodic dull ache in her lower back and hips. She testified that she may have modified some tasks to suit her physically.
- [27] Ms. Stark wrote a letter dated June 10, 2005, addressed "to whom it may concern." This was for a lawyer, in connection with Ms. Power's claim arising from the December 2002 accident, which settled at some point in 2005.
- [28] Ms. Stark's letter describes Ms. Power's work history and abilities. Ms. Stark wrote that "in December of 2002, [Ms. Power's] accident had left her with major back and shoulder pain." She described Ms. Power's performance on returning to work as "extremely limited", writing that she was not able to do any floor work because of pain on lifting her arms. She wrote that Ms. Power was not able to do the same workload as she had previously. Ms. Stark wrote that Ms. Power taught theory classes, but had difficulty standing or sitting for long periods of time.
- [29] Ms. Stark wrote that Ms. Power returned to practical teaching because the Hairdressing School needed that work performed, but that Ms. Power was in pain and took extra breaks and missed work as a result.

[30] Ms. Stark wrote that:

[Ms. Power] has continued to teach the theory and practical work but can only do modifies [sic] amounts at one time. She has a problem with the practical part still but struggles through it. ...

My floor supervisor recently informed me she was leaving and the position could have been [Ms. Power's]. She would be amazing in that position and it would be the last step for her to take prior to running things here at the school. Unfortunately, [Ms. Power] is not able to take this position on because it involves major hands on teaching and she is in no way physically able to take that position on. This is so unfortunate as I had to hire someone else to fill the position.

This was not only a set back to [Ms. Power's] career but it also would have meant a pay raise for her. I feel that the accident that Leanne had has been a major set back for her career. She will never be able to function the way she did before.

If [the Hairdressing School] ever closed its doors, [Ms. Power] would struggle to ever work in the industry again. ... The accident jeopardized [Ms. Power's] career as she is limited now to how she's able to perform as not only an instructor but as a stylist.

To even lift her arms cause her pain over a short period of time. She continually has to pace herself. My experience is that as we get older our bodies can't tolerate as much and this industry is hard work and I can't see [Ms. Power] doing this for any long period of time....

- [31] Ms. Power testified that in June 2005 she may have had some limitations which would have affected her ability to run the Hairdressing School, but that for the most part she had healed quite well. She agreed that a fulltime job as a hair stylist would have been very hard on her, but testified that she was able to work as an instructor with accommodations.
- [32] Ms. Stark testified that in fact she did not hire someone else for the position of floor supervisor, and that she moved Ms. Power to that position after June 2005. Ms. Stark testified that initially she had concerns about whether Ms. Power could physically handle that job, but Ms. Power surprised Ms. Stark and ended up being able to handle the position.
- [33] Ms. Power and her family moved into a townhouse in July 2005. Ms. Power painted all the upstairs walls and baseboards and changed light fixtures, although she obtained help with the wiring.
- [34] Ms. Power's employment income in 2005 was about \$25,600.
- [35] Ms. Power continued to work at the Hairdressing School as an instructor, including as a floor supervisor. She was working about 41 hours a week and earning \$15 per hour. She again worked 8:30 am to 4:30 pm for four days per week, and 8:30 am to 8:30 pm on the fifth day. Because of lunch breaks, she was paid 7.5 hours for each of the four days and 11 hours for the fifth day.
- [36] In February 2006, Ms. Power saw Dr. Howie, who was then her family doctor. He made a note that she had issues with her weight and was having difficulty doing her job as a hairdressing instructor. Ms. Power agreed that her weight in general has always played a factor in her job as a hairdressing instructor, but testified that she could not say whether her shoulder and neck were concerns at that time. She agreed that the pressure from her large breasts was an issue at that time.
- [37] Ms. Power first saw Dr. McLaren on March 1, 2006. He recorded that she had decreased mood, increased weight, poor sleep, restlessness, and worry. He did not make any notes which related to complaints about the neck, back or shoulders. Ms. Power testified that she has seasonal depression which afflicts her from time to time.
- [38] For a couple of days on four occasions in the period from May to October 2006, Ms. Power assisted a neighbour in her townhouse complex with the care of a baby and toddler, and did not have difficulty doing so.
- [39] In May 2006, Ms. Hatcher began working at the Hairdressing School in an administrative position. She shared a small office with Ms. Power and worked with her closely on a daily basis. Ms. Hatcher observed Ms. Power to be very exuberant and passionate in her work. Ms. Hatcher did not observe Ms. Power displaying any physical limitations in her work. Ms. Hatcher did not learn that Ms. Power had been injured in an accident in December 2002 until she reviewed employee files in 2010.

- [40] Ms. Power testified that, by the time of the Accident, she had rare lower back pain and occasional flaring of a knot under her right shoulder blade from overuse.
- [41] Ms. Power was an enthusiastic, bubbly individual who loved her work as a hairdressing instructor. Her friend, Ms. McKay, was still an instructor at the Hairdressing School in the first days of November 2006. Ms. McKay testified that Ms. Power was able to do everything the instructors did, including demonstrating all the techniques. Ms. McKay and Ms. Power used to go for lots of walks, and Ms. Power did not have any problem completing the walks.
- [42] Ms. Stark testified that, in the period just before the Accident, Ms. Power's physical abilities were not interfering with her work, apart from a few little things.
- b) The November 8, 2006 Accident
- [43] Ms. Power and Ms. McKay went to the Hairdressing School and did some unpaid work in the evening of Wednesday, November 8, 2006. At around 11:45 p.m., Ms. Power was driving a 2003 Pontiac Sunfire 4-door sedan in which Ms. McKay was a passenger.
- [44] There was little traffic. There was moisture on the road, but it was not raining or snowing.
- [45] Ms. Power was driving west on Lansdowne toward 3rd Avenue in Kamloops, B.C., with Ms. McKay in the front passenger seat. Ms. Power was wearing a seatbelt and the head rest was adjusted for her height. Lansdowne is a one way street west. Ms. Power was driving in the most southerly lane, being the furthest lane to her left as she drove. There is a tall building on the southeast corner, which obscured Ms. Power's view looking south on 3rd Avenue.
- [46] Mr. Carswell was working that night as a mobile security officer for Desert City Investigations Inc. He was driving his employer's black Jeep north on 3rd Avenue, approaching Lansdowne, and was planning to turn left onto Lansdowne. Mr. Carswell was driving in the most easterly lane of 3rd Avenue, being the furthest lane to his right.
- [47] On the south side of Lansdowne, 3rd Avenue is one way north. On the north side of Lansdowne, 3rd Avenue is a two way street.
- [48] The accident occurred in the intersection. The point of impact was at the front of Ms. Power's Sunfire and the rear passenger side of the Jeep.
- [49] Ms. Power testified that when she entered the intersection, her light was green, and it had turned green three or four car lengths before she reached the intersection. She testified that she was travelling less than 50 km per hour, and she saw the Jeep briefly before hitting it. She testified that when she saw the Jeep, she applied her brakes and tried to swerve to the left, but still struck the Jeep. She testified that her head hit the headrest and her shoulders hit the top of the seat. She testified that the Jeep went up on two wheels and continued left before stopping. She testified that she was not able to get out of her car until someone bent open the door for her. She testified that Mr. Carswell said that he was very sorry and he was not paying attention. She went by ambulance to hospital.

- [50] Ms. McKay testified that she checked the traffic light when the car was about two to three car lengths before 3rd Avenue and the light was green. She testified that she did not see the light turn green. Ms. McKay testified that she saw that the Jeep was not stopping, and she shouted Ms. Power's name, and at the same time Ms. Power started braking, but the vehicles collided. Ms. McKay thought that the Jeep was in the most easterly lane.
- [51] Mr. Carswell testified that his light was yellow as he approached the intersection intending to turn left. He testified that he did not see it turn from green to yellow. He testified that he was signalling a left turn. At trial, he estimated his speed at 20 or 30 km/hr, while on examination for discovery he had estimated it at 15 km/hr. He testified that he saw the Sunfire only a split second before the collision. He testified that the Sunfire struck the right rear quarter panel of the Jeep, causing the jeep to rock onto the two driver side wheels and then return to four wheels. He observed one of the Sunfire's front doors to be crumpled and stuck, so he assisted in opening it. Mr. Carswell testified that he did not see a red light, and may have said at the accident scene that he did not see a red light.
- [52] Ms. Allen was working as a security guard at the time of the accident. She had chased an intruder by foot and in her vehicle but he escaped. She then drove southbound on 3rd and stopped at the intersection with Lansdowne for a red light. She testified that she saw the collision, and that it occurred before her light changed from red to green. She estimated that the Jeep was travelling 55 or 60 km/hr, and the Sunfire about 40 km/hr. She testified that the Jeep was not displaying a left turn signal. She testified that after the accident, Mr. Carswell said that his light may have been red.
- [53] Mr. Storry was also a security guard. He was not on shift at the time of the accident, but he had just been visiting with Ms. Allen. He was standing near the corner of 3rd and Lansdowne at the time of the accident. He heard the sound of the collision and turned suddenly. He testified that the traffic light for Ms. Power's vehicle was green immediately after the collision.
- [54] On the day of the Accident, Ms. Power was 28 years old.
- c) Following the November 8, 2006 Accident
- [55] Ms. Power testified that at the accident scene she felt pressure on her chest, difficulty breathing, pain in her lower back, a lump on the back of her left shoulder and a smaller one in front, pain in her neck generally but more on the left, pain in her ankle, and pain down her arm to her wrist.
- [56] Mr. Carswell was given a violation ticket for failing to stop at a red light at an intersection. He understood that it was not an admission of guilt to pay the fine, and he paid it.
- [57] Ms. Power was examined at the hospital, including by x-rays of her chest and left arm. She was discharged with medication.

- [58] Ms. Power testified that the morning following the Accident, she had a lot of pain and stiffness and restricted movement. She did not go to work. Her doctor, Dr. McLaren, was fully booked with appointments, so she did not go to see him until November 10, 2006.
- [59] On November 10, 2006, Ms. Power did not go to work. Ms. Power reported to Dr. McLaren that she had pain, more on her left side including her left shoulder, arm, and along the arm into her wrist, and problems with her left hip. She reported difficulty breathing and bruises on her chest. Dr. McLaren prescribed medication, which Ms. Power purchased and used.
- [60] The lump on Ms. Power's left shoulder discoloured after a period of time and then went away.
- [61] Ms. Power's Sunfire was repaired at a cost of about \$7,300. The driver side of the front bumper had fallen off and the front end was crumpled. Desert City's Jeep had a dented rear right side bumper and was repaired at a cost of about \$1,300.
- [62] Ms. Power returned to work on the Monday following the Accident, which was November 13, 2006. The time she took off before returning to work resulted in a loss of \$510 in gross pay. She did not believe that she could afford to take more time off work. She also thought that Ms. Stark would allow her to modify her day to enable her to work.
- [63] In fact, Ms. Stark took over some of Ms. Power's duties to give her relief. Ms. Power had difficulty standing for long periods and holding her hands up in one position for extended periods. Ms. Stark and the two other instructors shifted the work so that Ms. Power would spend less time on her feet and less time with her arms at or above chest level.
- [64] Ms. Stark completed a certificate of earnings dated November 29, 2006, in which she certified that Ms. Power had lost \$510 in gross income to that date. She included an explanatory letter in which she described the loss of 11 hours of work on November 9 and 16, of 7.5 hours on November 10, 2 hours on November 14, and 2.5 hours on November 22.
- [65] In addition, Ms. Power frequently took days off work. The time she took off work was not documented.
- [66] Ms. Power became less active. She had difficulty walking. She did not do much apart from work and then go home.
- [67] Ms. Power had three physiotherapy treatments in November 2006, and then one in each of December 2006 and January 2007.
- [68] Ms. Power saw Dr. McLaren again on November 20, 2006. She felt a bit better compared to how she had felt initially. She noticed that her left hand was starting to swell, and that she had mild pain going down her left leg. These were new symptoms and concerned Ms. Power. Dr. McLaren recommended that Ms. Power work half days for one to two weeks, but Ms. Power worked full time.

- [69] Ms. Power took some of the pain medication prescribed for her. She also used prescription medications which had been prescribed to friends or family. She did so to avoid paying for prescription medications and because she got relief from the medications provided by others.
- [70] Ms. Power's employment income in 2006 was about \$28,200.
- [71] In January 2007, Ms. Power reported to Dr. McLaren that she was suffering significant hip pain which continued even with medication and that seemed to be getting worse. She reported continuous pain in the centre of her lower back, and that the pain would increase depending on activity and would travel into her hip and buttocks and sometimes past her knee. She reported that her left knee was always painful, but other problems had subsided.
- [72] Dr. McLaren referred Ms. Power to Dr. Navratil, a rheumatologist. Dr. McLaren also referred her for further physiotherapy, but Ms. Power did not believe it was assisting her and stopped going. She did not want to take the time off work or pay the user fee for the treatment when she thought it was not helping her.
- [73] Dr. McLaren also prescribed pain medication for Ms. Power. She did not fill this prescription or a number of later prescriptions, and did not tell that to Dr. McLaren. She also lied to experts who examined her in connection with this litigation, telling them that she was taking the prescribed medication. She told them the correct amount that she was taking, but not the correct drug. She did that because she was using drugs which had been prescribed to other people, and she did not want to cause the people who gave her drugs to get into trouble. One person had provided her with morphine tablets.
- [74] Dr. McLaren again recommended to Ms. Power in January 2007 that she work part time, but she resumed fulltime work in February 2007.
- [75] Ms. Power saw Dr. McLaren in March 2007 and told him that she was not pursuing physiotherapy, and he said he would look further into other treatment. Dr. McLaren recommended that Ms. Power obtain a personal trainer and start using a gym. She did not pursue this option until early 2008.
- [76] Dr. Navratil saw Ms. Power on April 3, 2007. He diagnosed her with "chronic myofascial pain in low back, buttocks and hips". He recommended cortisone injections and that she reduce her weight.
- [77] Dr. Navratil injected cortisone into both of Ms. Power's hips by a procedure in hospital in April 2007. Ms. Power found the injection painful during the 15 minute procedure and for about a day afterwards. The injection reduced the pain from the injury for a couple of weeks. It did not completely relieve the pain, and after a couple of weeks, she reported that the pain was back at the pre-injection level or worse.
- [78] Dr. Navratil also ordered a CT scan. The scan was conducted on July 17, 2007, and showed that Ms. Power had an L4-5 disc herniation which had not compromised the ligament.

- [79] Ms. Power had cortisone injections a second time in July 2007, and suffered pain as she had following the first injection. This time the relief lasted days or a week, and then the pain returned to the previous level or worse.
- [80] Ms. Power testified that she was also still suffering pain in her left arm and her neck more on the left side than the right, but that the greatest pain was from her hips and lower back.
- [81] Ms. Power worked as school manager until August 16, 2007. Ms. Stark considered that Ms. Power did very well handling the management responsibilities.
- [82] Ms. Power resigned from her position as school manager on August 16, 2007, and asked to return to the position of instructor. In her letter of resignation as manager, she stated that there were many reasons, but the foremost reason was that she felt she was not leading the school in the direction that it needed to go. Ms. Power testified that giving up the school manager role meant a reduction in some paperwork duties, but did not substantially change her duties, and did not change her remuneration.
- [83] Ms. Power worked as one of three instructors. She still loved the work at the Hairdressing School, but found the work painful, even though the other instructors were often able to assist her and give her breaks.
- [84] Dr. McLaren's notes of Ms. Power's visit on September 19, 2007 refer to left and right shoulder pain with prolonged haircutting. They do not refer to lower back pain. Ms. Power testified that the back pain may not have been predominant at that point, but that the problem with her hips and lower back was a continuing problem and Dr. McLaren was already aware of it. She also testified that having pain in her left shoulder was much worse than she had felt before and that is why she raised it with her doctor.
- [85] Ms. Power left the Hairdressing School in October 2007 and began working as a sales representative for a beauty products firm known as "Oasis". She hoped that the work as a sales representative would be better for her physically and permit more breaks.
- [86] Ms. Power's duties as a sales representative required her to drive to client premises and to deliver and receive smaller shipments of products.
- [87] Ms. Power was paid on a commission basis, and she earned more working for Oasis than she had working for the Hairdressing School. She also received two holiday trips.
- [88] Ms. Power testified that she found that the work as a sales representative was not good for her physically. She reported difficulty carrying products to and from her car. She testified that she had trouble spending long periods in the car travelling to client premises in locations like Salmon Arm, Merritt, Revelstoke, and Princeton. She testified that she felt that her pain was increasing.
- [89] Ms. Power's employment income in 2007 was about \$36,100.

- [90] Ms. Power first saw Dr. Singh, a neurosurgeon, on January 9, 2008, on referral from Dr. McLaren. By that time, Ms. Power reported that she was still having pain on the left side of her neck and into her shoulder, which would radiate into her left arm, but her hips and lower back were causing her the worst pain. Dr. Singh examined her, and found that her range of motion was slightly restricted bending both forwards and backwards. Dr. Singh recommended that she try epidural cortisone injections, which could reduce the inflammation around the nerve root. He referred her to Dr. Diehl, anesthetist, for such injections. Dr. Singh also recommended that Ms. Power lose weight.
- [91] Ms. Power first saw Ms. Carter, a personal trainer, in January 2008. They worked together for a few months and developed a gym program for Ms. Power.
- [92] Ms. Power had a repeat CT scan on February 10, 2008 which did not show any change to the disc bulge.
- [93] Ms. Power resigned from her position as an Oasis sales representative in about September 2008. She did so because she felt that she could not keep up with the demands of the job because of her injuries.
- [94] Ms. Power told Ms. Stark that she was resigning as a sales representative. Coincidentally, one of the Hairdressing School instructors was leaving, and Ms. Stark hired Ms. Power to return to the Hairdressing School as an instructor. Ms. Power was paid the same salary as when she had left, \$17 per hour, and received the benefits and vacation credit that she had at the time she left the Hairdressing School.
- [95] Ms. Power saw Dr. Singh again on September 17, 2008. Again, he found that she had a mildly restricted range of motion in the back. He found a slight improvement in her ability to raise her leg straight.
- [96] Ms. Power testified that she found it physically difficult to resume her position as instructor. She was now one of only two instructors. Ms. Stark stepped back from the business and there was a school manager who handled the day to day matters. There was a greater turnover of instructors.
- [97] Ms. Power testified that, after a period, her pain level reduced slightly and then stabilized. She reported that she continued to have pain on a daily basis.
- [98] Ms. Power's staff performance evaluation of October 20, 2008 consisted entirely of excellent scores, as did the evaluations of January and November 2009.
- [99] Ms. Power had three epidural cortisone injections. The first was in November 2008 and required a half-day stay in hospital. She testified that she found them extremely painful and had trouble walking afterwards and stayed in bed for about one and one-half days. She testified that the first injection helped her significantly once she had healed from the injection. She testified that she could sleep properly and felt some hope of a resolution of her pain. However, she testified that the pain relief lasted only about five weeks, and then

the pain returned.

- [100] Around late 2008, Ms. Power went on the "Atkins" diet. She lost about 17 pounds, but stopped the program and regained the weight.
- [101] Ms. Power had a second epidural cortisone injection in December 2008. She testified that the pain of the procedure was a little less, and that this injection reduced her pain for a few weeks.
- [102] Ms. Power's employment income in 2008 was about \$39,900, inclusive of commission income. She claimed about \$9,200 in employment expenses for the purposes of income tax reporting.
- [103] Ms. Power had the third epidural cortisone injection in January 2009. She testified that, like the second injection, the pain was not too severe and did not last as long as the first. She testified that this injection reduced the pain from her accident for a week or two.
- [104] Ms. Burden, occupational therapist, examined Ms. Power in June 2009 for one day in Ms. Burden's office, and visited Ms. Power in her home. Ms. Power reported that after doing the physical tasks, she was exhausted, and was in enough pain in her neck and shoulder and lower back and hips that she stayed in bed for about one and one-half days.
- [105] In June 2009, Ms. Power's job at the Hairdressing School was changed so that she received Fridays off with pay because of her physical difficulties. Ms. Stark had offered Ms. Power a raise, but Ms. Power wanted more time off instead. These hours did not work out for the Hairdressing School and Ms. Power returned to working five days a week, but at \$18 per hour.
- [106] Around late 2009, Ms. Power attended the Weight Watchers program in an effort to lose weight. She lost about 15 pounds but did not find it easy to stay on the plan.
- [107] Ms. Power's employment income in 2009 was about \$33,300.
- [108] By 2010, Ms. Power was struggling with her work at the Hairdressing School. There was a new group of instructors who were learning their own jobs and were not able to assist Ms. Power by taking over much of her work.
- [109] Ms. Power left her position at the Hairdressing School on June 17, 2010. She was earning \$18 per hour at the time. She was planning to resign because she felt that she was continually struggling on a physical level and did not have adequate support from management or the other staff. She did not have another position to go to. There were also changes at the Hairdressing School, and as a result Ms. Stark laid off Ms. Power from work.
- [110] Ms. Power started collecting unemployment insurance benefits.
- [111] Ms. Power ran a very small salon in a retirement home over the period from about August 2010 to January 2011. She worked one or two days a week, with two to five clients per day. Her clients were the elderly residents of the retirement home. Despite the small workload,

Ms. Power testified that she found working as a stylist to be physically difficult. She testified that her back pain increased, apparently from working on a concrete floor with a small low sink in a small area. She testified that the clientele could have difficult physical problems, such as requiring a wheelchair, which required Ms. Power to assume difficult postures. Ms. Power testified that she had increased pain in her left shoulder.

- [112] In September 2010, Ms. Power saw Dr. McLaren and complained of right heel pain. He prescribed a pain reliever, which she took, and which helped all her symptoms. Dr. McLaren also recommended that Ms. Power look into orthotics, and try to get more rest.
- [113] Ms. Power investigated her options and concluded that she would pursue a program leading to a Bachelor of Social Work degree. She followed the steps necessary to obtain admission to the human services diploma program at TRU. She would like to complete the full bachelor program, because she thinks it would enhance her job opportunities.
- [114] Ms. Power was examined on November 8, 2010, by Dr. Padilla, a neurosurgeon, at the request of the defence.
- [115] Ms. Power's employment income in 2010 was about \$17,100. She also received about \$9,800 in employment insurance benefits. Her income tax return includes a page entitled "record of employment and earnings, August 31, 2010 to January 19, 2011", which relates to her work at the retirement home. It states that her last day of work was January 19, 2011, due to lack of work.
- [116] Ms. Power has requested and received gifts from family members of items like a massaging heat mat for her car and bed and a contour pillow. It was her position that desiring such gifts demonstrates that she had continuing pain.
- [117] Ms. Power stopped working in the retirement home in January 2011. There were several reasons, including the physical difficulty she had with the work.
- [118] There were further renovations to the Power's townhouse following the Accident, primarily involving the basement, but Ms. Power did not do any of the work because of her limitations.
- [119] In February 2011, Ms. Power told Dr. McLaren that she had not been taking the drugs prescribed to her and instead had been using drugs prescribed to others.
- [120] In February 2011, Ms. Power and her common law spouse, Mr. Whittingstall, started a new eating plan. By the time of trial, Ms. Power had lost about 50 pounds and Mr. Whittingstall had lost almost 60 pounds. Ms. Power would like to lose more than a further 50 pounds. She has not noticed any changes in her symptoms resulting from the weight loss.

d) At trial

- [121] At the time of trial, Ms. Power was 33 years old. She lived in a townhouse in Kamloops with Mr. Whittingstall and her 14 year old daughter. She regularly does exercises suggested by Ms. Carter, and uses her own set of weights and exercise balls. She walks at least every other day. She can walk for about 45 minutes before she needs a break or risks pain the following day, but she seldom walks on inclined surfaces. She uses a computer fitness program for stretching and weights.
- [122] Ms. Power will now occasionally style a friend's hair, but only on a day that she is feeling up to it, and by taking many breaks. She has trouble sitting for extended periods in one position. She uses pillows, medications, and frequent breaks on long drives. She has stopped bowling. She has significantly reduced the time she dances and socializes.
- [123] The lower level of Ms. Power's home has the laundry facilities, her daughter's bedroom, and a second living room. The strata corporation cares for the common property and looks after snow removal, although individual owners shovel a path to their cars while awaiting the snow removal. The townhouse has a garden area in the front and back. Mr. Whittingstall filled two small backyard plots with gravel recently, because Ms. Power did not want to maintain the gardens there because of the pain of working at ground level. She is maintaining some vegetable and flower plants in pots.
- [124] Ms. Power testified that she has had difficulty with home chores since the Accident. In particular, she complains of pain in her lower back from leaning over a sink, loading and unloading a dishwasher, folding and carrying laundry and carrying laundry soap, moving heavy items into and out of the oven, carrying groceries, ironing, cleaning, and vacuuming. She complains of pain in her left shoulder from moving wet laundry between the washer and dryer. She no longer cleans the bathrooms and relies on Mr. Whittingstall or her daughter to do it and also to carry laundry and laundry soap up and downstairs. As well, she has had to modify how she does some of the chores, such as by using a rolling chair to access cupboards and spreading out cleaning work over a period of days.
- [125] Ms. Power testified that she has difficulty with personal care chores like blowdrying her hair and applying makeup and that she has modified her hairstyle and her postures to do those things. She testified that she has also stopped wearing stylish shoes, because wearing high heels causes her lower back pain.
- [126] Ms. Power reported that she sleeps on a king size bed with a memory foam topper, and that without the memory foam, her hip and back pain are increased. She reported that she no longer takes baths, instead showering, sometimes twice a day.
- [127] Ms. Power is less active with family events than she was before the Accident. She testified that she cannot go up and down water slides without pain or walk long distances on uneven surfaces. She stopped camping with a mattress and now travels with her family in a tent trailer. She testified that she has trouble sitting on firm chairs for extended periods, or sleeping in unfamiliar beds. She travels with at least two pillows.

- [128] Ms. Power testified that she now has constant pain, which is like a toothache rather than a dull ache. She is less energetic than she was before the November 8, 2006 accident, and becomes frustrated more easily. She is less physically active.
- [129] At trial, Ms. Power was using extra strength ibuprofen and Tylenol every four to six hours during the day, and taking stronger medications in the evening three to five times a week, depending on her pain level. She sometimes takes Robaxacet. She limits the use of stronger medications to the evening so that she will be more alert during the day, but will sleep better at night. She testified that her predominant pain is in her lower back and hips, and generally her left hip. She testified that she also has a lot of problems with her left shoulder and at least twice a week suffers pain radiating to her knee. She testified that she occasionally has problems with her neck.
- [130] Ms. Power was accepted into the human services diploma program at TRU for the fall of 2011. This is a two-year degree program, which can then be followed by a further two years leading to a Bachelor of Social Work degree. The tuition cost is estimated to be \$4,500 for each of the four years. The cost of books and supplies is estimated to be \$1,300 for each of the four years.
- [131] Ms. Power would like to pursue counselling and reinstate her gym membership. She would like to use thermal wraps for sleeping. She purchased a memory foam topper for the bed, and testified she believes it has helped her sleep since the accident. She would like a digital voice recorder to record lectures so that she does not have to sit and make notes continually. She would also like an ergonomic work station and a wheeled book bag. She would like assistance for heavy cleaning.

Medical evidence

- [132] Ms. Power relied on the evidence of her family physician, Dr. McLaren; her treating neurosurgeon, Dr. Singh; an occupational therapist, Ms. Burden; and an economist, Mr. Carson. The defence relied on the evidence of Dr. Padilla, a neurosurgeon.
- a) Dr. McLaren, family physician
- [133] Dr. McLaren was accepted as able to give opinion evidence in the field of family medicine. His opinion was based on his examinations of Ms. Power, including taking her history, and consultation reports from other treatment providers.
- [134] Dr. McLaren diagnosed Ms. Power with moderate soft tissue injuries to her chest, left neck, back, left shoulder, lower back, and left leg. He also diagnosed her with a subligamentous L4-5 disc rupture resulting in chronic back pain. Dr. McLaren suspects that her back pain will be permanent, that she will struggle to find gainful employment which will not aggravate her back, and that she will have problems with housework and lifting items. In his opinion, her back pain may decrease if she is successful in losing significant weight.

[135] In Dr. McLaren's opinion, the L4-5 disc herniation is more likely than not to have been a result of the Accident.

[136] Dr. McLaren prescribed medication for Ms. Power which she did not take. He also recommended physiotherapy, but she attended only a few sessions. He recommended that she see a personal trainer about a year before she saw a personal trainer. He recommended that she lose weight.

[137] Ms. Power did not present to Dr. McLaren any problems arising from the 2002 Accident, although she began seeing him about eight months prior to the Accident.

b) Dr. Singh, treating neurosurgeon

[138] Dr. Singh was accepted as qualified to give opinion evidence as a neurosurgeon. He first saw Ms. Power on January 9, 2008, on referral from Dr. McLaren. Dr. Singh saw Ms. Power again on September 17, 2008, at the request of Ms. Power's counsel. Dr. Singh wrote reports dated October 24, 2008, March 7, 2011, and March 24, 2011. He based his opinion on the history he received from Ms. Power, his two examinations of her, and his review of medical records including a CT scan.

[139] Dr. Singh diagnosed Ms. Power with a subligamentous disc herniation at L4-L5. Dr. Singh wrote that the central disc bulge at L4-L5 may be responsible for a lot of Ms. Power's symptoms, but the result of an operation is unpredictable, with the chance of success less than 50% and with a chance that the symptoms will get worse. Dr. Singh does not recommend surgery at this time, and does not anticipate recommending surgery unless Ms. Power develops critical nerve root signs. In his opinion, the chance of that happening is perhaps less than 20%.

[140] In Dr. Singh's view, Ms. Power will probably have to live with the disability that she has. In his opinion, she will be compromised in her ability to do a job requiring a lot of sitting, lifting of heavy objects, or being in awkward postures for prolonged periods of time. He recommended that she exercise and try to lose weight. In his opinion she might be limited in doing heavy physical work or vacuuming at home, but could probably manage it if she took her time and changed positions frequently.

[141] In Dr. Singh's opinion, the most likely cause of Ms. Power's disc herniation, as well as the subsequent back strain and myofascial pain, is the Accident. In his view the shoulder area discomfort is most likely related to the seatbelt, with some muscular ligament injury.

[142] In Dr. Singh's opinion, if Ms. Power were to lose weight, there is a very good chance that she can be more active at home and work. He also testified that sitting was one of the worst positions for a person with a disc bulge to be in, because the disc has a tendency to bulge out more when a person is seated.

c) Dr. Padillo, examining neurosurgeon

- [143] Dr. Padillo testified at the request of the defence. He examined Ms. Power on November 8, 2010, and prepared a report dated January 19, 2011, based on his examination and interview of Ms. Power and his review of medical records.
- [144] Dr. Padillo concluded that Ms. Power had chronic myofacial pain related to her back, buttocks, and hip from the 2002 Accident. He based this on correspondence from Dr. Howie in May and June 2004, which was not in evidence. Dr. Padillo did not have any information other than Ms. Power's history about her condition between June 2004 and the Accident.
- [145] In Dr. Padillo's opinion, the Accident may have temporarily aggravated the pre-existing chronic myofacial pain, but did not cause any present problems or residual disabilities. As a result, he concluded that the Accident will not affect Ms. Power's ability to work in the future.
- [146] Dr. Padillo agreed at trial that on November 8, 2010, Ms. Power was suffering aggravation of injuries she received in 2002.
- [147] In Dr. Padillo's opinion, it is likely that Ms. Power will continue to have chronic neck and back pain with a secondary chronic pain syndrome that might aggravate her ongoing pre-existing issues of back pain and headaches. In his opinion, there is no good surgical alternative and passive modalities of pain control will have limited if any success. He recommends aggressive weight reduction, modification of life style, and treatment for depression and chronic pain syndrome.
- [148] Dr. Padillo testified that about 60% of people over the age of 50 will have asymptomatic disc herniations.
- d) Carol Burden, examining occupational therapist
- [149] Ms. Burden was accepted as qualified to give opinion evidence as an expert in occupational therapy, life care planning with respect to functional capacity, and cost of future care. She provided three reports, dated June 9, 2009, July 8, 2009, and March 10, 2011. Her first report was a functional capacity evaluation, her second report was a cost of future care analysis, and her third report was a revision to the earlier reports based on new information.
- i) Functional Capacity Evaluation
- [150] Ms. Burden conducted functional capacity testing of Ms. Power on June 5, 2009. Ms. Burden also saw Ms. Power on February 8, 2011, at her clinic, and on February 16, 2011, at Ms. Power's home. Ms. Burden also met with Ms. Power on February 8 and 16, 2011, and administered assessment questionnaires.

[151] Ms. Burden wrote that the overall test findings, in combination with clinical observations, suggested the presence of good physical effort on Ms. Power's part. She wrote that Ms. Power's overall heart rate analysis suggests good effort, and that she displayed abundant examples of competitive test performance, like asking to repeat a slow trial. There were some findings which were inconsistent with that conclusion, but overall the findings suggested good effort.

[152] Ms. Burden's report includes the following:

- a) Ms. Power was able to sit for periods of two hours, but benefited from being able to shift position and stand;
- b) Ms. Power was able to stand for periods of 60 to 90 minutes, but benefitted from short seated breaks;
- c) Ms. Power was able to walk one mile at a slow to moderate pace, but was not suited for fast paced walking;
- d) Ms. Power was not suited for bending, stooping, crouching or squatting;
- e) Ms. Power was not suited for repetitive reach below shoulder level, or for repetitive or sustained reach at or above shoulder level;
- f) Ms. Power was able to manage stairs on an occasional basis;
- g) Ms. Power was able to carry 10 pounds a distance of 50 feet on an occasional basis;
- h) Ms. Power was not suited for frequent lifting at any level, and was best suited for work with limited (sedentary) lifting demand.

[153] At the end of the testing day, Ms. Power reported increased pain in her lower back and left shoulder. Ms. Power reported a significant migraine on the day following the testing, as well as significant increases in pain, and that she slept much of the day following the testing. Ms. Burden wrote that it is apparent that Ms. Power worked beyond a sustainable level during the testing on June 5, 2009.

[154] In Ms. Burden's opinion, Ms. Power does not meet the full range of occupational demands for a hairdressing teacher, and in particular, does not meet the demand for upper limb coordination (which refers to reaching below, at, or above shoulder level).

[155] In Ms. Burden's opinion, Ms. Power is best suited for work with limited (sedentary) lifting demand.

ii) Cost of Future Care analysis

[156] Ms. Burden's March 10, 2011, report essentially superseded the June 9, 2009, report with respect to the costs.

[157] Ms. Burden recommended about \$17,500 in initial future care costs and about \$3,300 in ongoing future care costs. That consisted of the following future care items:

- a) about \$690 for counselling for depression;
 - b) about \$1,250 for a supported weight loss program;
 - c) about \$23,200 for tuition and books for retraining as a social worker, about \$100 for a digital recorder, about \$150 for the extra cost of a wheeled book bag compared to a back pack, and about \$450 for an alternate computer station and chair for home;
 - d) about \$650 starting in 2015 plus annual amounts of about \$650 for access to a pool and gym;
 - e) about \$700 per year for periodic treatments of chiropractic manipulation, physiotherapy, massage therapy;
 - f) about \$1,650 annually for assistance with household chores;
 - g) about \$200 every 5 to 10 years starting in 2008 for replacement of the memory foam mattress topper;
 - h) about \$250 per year for medication consisting of amitriptyline, Excedrin Migraine, and Extra Strength Tylenol; and
 - i) about \$60 per year for reusable hot and cold packs and disposable thermal wraps.
- e) Robert Carson, economist

[158] Ms. Power's counsel provided a letter from Mr. Carson, which included a set of tables of present value multipliers and tax gross-up.

ANALYSIS

a) Liability

[159] Ms. Power's counsel argued that Mr. Carswell was wholly responsible for the Accident. The defence argued that Ms. Power was 10% or 15% at fault. The defence argued that Mr. Carswell went through the intersection toward the end of an amber light, and that Ms. Power ought to have seen the Jeep and slowed down enough to avoid the collision.

[160] The most compelling evidence on the question of liability was the evidence of Ms. Allen. She was independent of the parties. She was driving a car southbound on 3rd Avenue, waiting for her light to turn green before she proceeded. Her evidence was that the Jeep entered the intersection while her light was still red. Her evidence is consistent with that of all the other witnesses except Mr. Carswell.

[161] Mr. Carswell entered the intersection when the light facing him was red. Ms. Power's view of the Jeep was blocked by the large building on the southeast corner of the intersection. She took immediate action to brake and swerve to the left when she saw the Jeep. There was nothing more that she could have reasonably done to avoid the collision.

[162] Mr. Carswell was wholly responsible for the Accident. His employer, Desert City Investigations, consented to Mr. Carswell's use of the Jeep for work. Desert City Investigations is vicariously liable for Mr. Carswell's negligence.

b) Quantum of Damages

i) Generally

[163] Ms. Power's complaints are predominantly subjective complaints of pain.

[164] The case of *Price v. Kostryba* (1982), 70 B.C.L.R. 397 (S.C.), is often cited as a reminder of the approach the court must take when assessing injuries which depend on subjective reports of pain. At 397-399 of the reasons for judgment, then Chief Justice McEachern wrote:

The assessment of damages in a moderate or moderately severe whiplash injury is always difficult because plaintiffs, as in this case, are usually genuine, decent people who honestly try to be as objective and as factual as they can. Unfortunately, every injured person has a different understanding of his own complaints and injuries, and it falls to judges to translate injuries to damages.

...

Perhaps no injury has been the subject of so much judicial consideration as the whiplash. Human experience tells us that these injuries normally resolve themselves within six months to a year or so. Yet every physician knows some patients whose complaint continues for years, and some apparently never recover. For this reason, it is necessary for a court to exercise caution and to examine all the evidence carefully so as to arrive at a fair and reasonable compensation. Previously decided cases are some help (but not much, because obviously every case is different).

...

In *Butler v. Blaylock*, decided 7th October 1981, Vancouver No. B781505 (unreported), I referred to counsel's argument that a defendant is often at the mercy of a plaintiff in actions for damages for personal injuries because complaints of pain cannot easily be disproved. I then said:

I am not stating any new principle when I say that the court should be exceedingly careful when there is little or no objective evidence of continuing injury and when complaints of pain persist for long periods extending beyond the normal or usual recovery.

An injured person is entitled to be fully and properly compensated for any injury or disability caused by a wrongdoer. But no one can expect his fellow citizen or citizens to compensate him in the absence of convincing evidence, -- which could be just his own evidence if the surrounding circumstances are consistent - that his complaints of pain are true reflections of a continuing injury.

- [165] The defendants are only responsible for any increased aggravation of Ms. Power's pre-existing problems. That is because Ms. Power is only entitled to an award of damages which will theoretically restore her to her condition prior to the Accident. She is not entitled to recover a sum which represents a complete recovery, because she was not a completely healthy person at the time of the Accident.
- [166] The defence argued that Ms. Power has exaggerated her symptoms, and that her lies about what medication she was taking puts all of her evidence in question.
- [167] Ms. Stark's letter of June 10, 2005, was troubling in its suggestion that Ms. Power had not recovered from her injuries in the 2002 Accident. However, both Ms. Stark and Ms. Power testified that Ms. Power's condition improved significantly following the date of that letter.
- [168] The most persuasive evidence was that of Ms. Hatcher. She worked closely with Ms. Power in the six months prior to the Accident, but did not observe any physical limitations, and did not even know until years later that Ms. Power had been injured in an accident in December 2002.
- [169] It was troubling that Ms. Power took medication prescribed to others and was not forthright with the doctors about what medication she was taking. She should not have taken any prescription drugs that were not prescribed for her.
- [170] However, the fact that Ms. Power did these things does not cause me to disbelieve her evidence. She lied about what she was taking because she knew it was wrong to take medication prescribed to someone else, but she did not appear to understand that it may have been important for the experts to know exactly what pain medication she was taking. There was no evidence that the experts would have changed their treatment plan if they had been told accurately what medication she was taking.
- [171] The defence also argued that the consistently perfect scores Ms. Power achieved in her evaluations at the Hairstyling School demonstrated that she was not suffering physical limitations following the Accident. However, Ms. Stark completed these evaluations, and it was apparent that Ms. Stark was assessing Ms. Power's performance in the context of her physical limitations, not comparing her performance to the expected performance of an individual without such limitations.

- [172] Ms. Power's evidence about the extent of her injuries was generally reliable. It was supported by several other witnesses including Ms. Hatcher, Ms. Stark, Ms. Loucks, Ms. Liebrecht, and Mr. Whittingstall. Ms. Power loved her job at the Hairstyling School, but found that she could not continue without others taking over more of her duties. She tried the sales job, but found it also triggered pain.
- [173] Dr. Padilla's opinion was principally based on his assumption that Ms. Power had substantial lower back and shoulder pain at the time of the Accident, which I have rejected. Where his opinion conflicts with Dr. Singh's, I prefer the evidence of Dr. Singh.
- [174] The defence argued that Dr. McLaren was an advocate for Ms. Power and that his opinions ought to be given little weight. The defence also argued that there were surprising omissions in Dr. McLaren's records and that his written report omitted aspects of his clinical records.
- [175] Dr. McLaren's opinions were based on the information provided by Ms. Power, which I have substantially accepted. His clinical records were generally consistent with his evidence, considered in the context of a busy family medicine practice. I accept Dr. McLaren's evidence, except where it conflicts with Dr. Singh's, in which cases I prefer the evidence of Dr. Singh owing to his qualifications as a neurosurgeon.
- [176] By the time of the Accident, Ms. Power had substantially recovered from the 2002 Accident and was able to perform all her teaching duties at the Hairstyling School. She was susceptible to periodic flare-ups of pain from overuse, but these did not interfere with her work or other regular activities.
- [177] At the time of the Accident, Ms. Power was an enthusiastic, energetic, and talented hairstyling teacher who loved her job. The job required her to spend most of her work day standing, much of it with her hands above her head cutting hair.
- [178] Ms. Power suffered moderate soft tissue injuries to her chest, left neck, left shoulder, and lower back in the Accident. The Accident caused a subligamentous disc herniation at L4-L5 which has caused her significant pain in her lower back. Despite painful treatment by cortisone injections into her hips and epidurally, her pain persists.
- [179] Ms. Power now experiences hip and lower back pain which limits her ability to sit, stand, walk, and bend. She also experiences shoulder pain which limits her ability to hold her hands near or above shoulder level. As a result of these limitations, she can no longer work as a hairstyling teacher. Ms. Power made significant efforts following the Accident to continue in that line of work, but even with significant modifications, she was not able to do so on a prolonged basis. She has made the reasonable decision to pursue a different career which will more likely suit her physical capacity.
- [180] As a result of her injuries, Ms. Power is also less able to care for herself and her family. For example, she has difficulty styling her own hair and doing laundry and other chores.

[181] As a further result of her injuries, Ms. Power suffers pain and is less able to enjoy recreational activities. For example, she is less able to go on long walks, to dance, and to sit for long drives or movies.

ii) Non-pecuniary damages

[182] The purpose of an award of non-pecuniary damages is to provide solace to Ms. Power for such things as pain, suffering, inconvenience, and loss of enjoyment of life. Non-pecuniary losses are the personal injury losses that have not required an actual outlay of money. One purpose of an award of damages for non-pecuniary losses is to substitute other amenities for those that Ms. Power has lost. The award must address losses Ms. Power suffered not only to the date of trial, but also those that she will suffer in the future.

[183] Non-pecuniary losses have no objective ascertainable value, because there is no market in health and happiness. It is generally not possible to put a claimant back in the position she would have been in had the injury not occurred, and this is especially true of non-pecuniary loss. The Court must fix a sum that is tailored to Ms. Power, and that is moderate but fair and reasonable to both parties, keeping in mind that Ms. Power will be fully compensated for her future care needs and other pecuniary losses. The Court does not try to assess a sum for which Ms. Power would have voluntarily chosen to suffer such pain, inconvenience, and loss of enjoyment of life.

[184] Awards in other cases can provide some assistance, but each case varies depending on its facts.

[185] Mr. Hori argued on behalf of Ms. Power that an appropriate award for non-pecuniary damages would be \$100,000. He relied on these cases: *Ayoub v. Campbell*, 2009 BCSC 317; *Knickle v. Filipovic*, 2006 BCSC 1693; *Jackson v. Lai*, 2007 BCSC 1023; and *Smail v. Williams*, 2010 BCSC 73.

[186] Ms. Ginter argued on behalf of the defence that an appropriate award for non-pecuniary damages would be \$50,000, before consideration of any possible reduction for failure to mitigate. Ms. Ginter relied on these cases: *Antoniali v. Massey*, 2008 BCSC 1085; *Morrison v. Gauthier*, 2009 BCSC 1271; and *Leung v. Foo*, 2009 BCSC 747.

[187] I also considered these cases: *Driscoll v. Desharnais*, 2009 BCSC 306; *Bove v. Lauritzen*, 2009 BCSC 1698; *Burton v. Bouwman*, 2010 BCSC 371; and *Knight v. Belton*, 2010 BCSC 1305.

[188] In all the circumstances, an appropriate award for Ms. Power's non-pecuniary losses is \$70,000.

iii) Past Lost Income

- [189] Ms. Power claims \$31,573.00 for past income lost from the Accident to the June 2011 commencement of the trial. The defence did not dispute her claim for the initial loss of \$510 in wages, but argued that she was not entitled to anything else for past wage loss. The defence argued that Ms. Power did not adequately seek less physically demanding work.
- [190] Following the accident, Ms. Power missed 34 hours of work. As the defence accepted, Ms. Power is entitled to the \$510 in wages she would have earned in that period.
- [191] The evidence did not clearly establish how much work Ms. Power missed in the period of about three and one-half years until June 2010. She was regularly absent. She did not, however, make a claim for that period.
- [192] Ms. Power left her job at the Hairstyling School in June 2010. She claims income for the period of about one year that she remained off work after that, less her earnings at the retirement home. The position of the defence was that Ms. Power ought to have remained working at the Hairstyling School.
- [193] It was reasonable for Ms. Power to leave her job in June 2010. She loved the work and had tried very hard to continue it, but finally concluded that she could not do so. The evidence of Ms. Burden and of Dr. Singh is consistent with the conclusion that Ms. Power was not able to continue in that job.
- [194] A couple of months after leaving the Hairstyling School for the final time, Ms. Power started working part-time as a hair stylist at the retirement home. She did this work for about six months, but it created too much pain for her to continue. In light of Ms. Power's training and physical limitations, it was reasonable for her to try that work on a part-time basis, and it was reasonable for her to give up that work after six months.
- [195] Ms. Power did not work in the period of about four and one-half months between leaving the part-time job at the retirement home and the trial. However, in that period, she took steps to qualify for the program at TRU. It was reasonable for her to consider what employment would suit her physical limitations, and to take steps to pursue it. There was no evidence that there were any jobs available to Ms. Power which would have been suitable for a person with Ms. Power's physical limitations and level of training. Common sedentary work, such as clerical or administrative work, may have required too much sitting or bending for Ms. Power, and would likely have required Ms. Power to pursue further training.
- [196] Ms. Power is entitled to compensation for the period commencing June 2010 until the trial in June 2011.

[197] Ms. Power's income in 2009 was about \$33,350 and she paid about \$1,800 in income tax, for a net receipt of about \$31,550. In the period between June 2010 and June 2011, Ms. Power earned about \$900 gross from working at the retirement home. Deducting \$900 from \$31,350 results in \$30,450. Together with the \$510 lost wages for the period before she returned to work, and with modest rounding of figures, Ms. Power is entitled to \$31,000 net.

iv) Lost Future Earning Capacity and Retraining

[198] Mr. Hori argued on behalf of Ms. Power that she should recover \$201,651.40 for future wage loss and retraining. That consists of \$21,651.40 for the cost of retraining, \$100,000 for lost earnings during four years of retraining, and \$80,000 for lost earning capacity. The defence argued that a fair award regarding future earning capacity would be \$25,000.

[199] The factors relevant for assessing the value of lost future earning capacity are set out in *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 at para 8:

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.

[200] In *Reilly v. Lynn*, 2003 BCCA 49 at paras. 100-101, Low and Smith JJ.A. summarized the approach to assessing lost earning capacity as follows:

[100] An award for loss of earning capacity presents particular difficulties. As Dickson J. (as he then was) said, in *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229 at 251:

We must now gaze more deeply into the crystal ball. What sort of a career would the accident victim have had? What were his prospects and potential prior to the accident? It is not loss of earnings but, rather, loss of earning capacity for which compensation must be made: *The Queen v. Jennings*, *supra*. A capital asset has been lost: what was its value?

[101] The relevant principles may be briefly summarized. The standard of proof in relation to future events is simple probability, not the balance of probabilities, and hypothetical events are to be given weight according to their relative likelihood: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 27. A plaintiff is entitled to compensation for real and substantial possibilities of loss, which are to be quantified by estimating the chance of the loss occurring: *Athey v. Leonati*, *supra*, at para. 27, *Steenblok v. Funk* (1990), 46 B.C.L.R. (2d) 133 at 135 (C.A.). The valuation of the loss of earning capacity may involve a comparison of what the plaintiff would probably have earned but for the accident with what he will probably earn in his injured condition: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 at 93 (S.C.). However, that is

not the end of the inquiry; the overall fairness and reasonableness of the award must be considered: *Rosvold v. Dunlop* (2001), 84 B.C.L.R. (3d) 158, 2001 BCCA 1 at para. 11; *Ryder v. Paquette*, [1995] B.C.J. No. 644 (C.A.) (Q.L.). Moreover, the task of the Court is to assess the losses, not to calculate them mathematically: *Mulholland (Guardian ad litem of) v. Riley Estate* (1995), 12 B.C.L.R. (3d) 248 (C.A.). Finally, since the course of future events is unknown, allowance must be made for the contingency that the assumptions upon which the award is based may prove to be wrong: *Milina v. Bartsch*, *supra*, at 79. In adjusting for contingencies, the remarks of Dickson J. in *Andrews v. Grand & Toy Alberta Ltd.*, *supra*, at 253, are a useful guide:

First, in many respects, these contingencies implicitly are already contained in an assessment of the projected average level of earnings of the injured person, for one must assume that this figure is a projection with respect to the real world of work, vicissitudes and all. Second, not all contingencies are adverse ... Finally, in modern society there are many public and private schemes which cushion the individual against adverse contingencies. Clearly, the percentage deduction which is proper will depend on the facts of the individual case, particularly the nature of the plaintiff's occupation, but generally it will be small...

[emphasis added by Low and Smith JJ.A.]

- [201] Ms. Power had a duty to mitigate her damages by seeking a line of work that she can pursue despite her injuries, and to obtain any required education or retraining. See *Parypa v. Wick Wave*, 1999 BCCA 88 at para. 67.
- [202] The cost of reasonable retraining is a proper element of compensation: see *Palmer v. Goodall* (1991), 53 B.C.L.R. (2d) 44 at 59 (BCCA).
- [203] The defence argued that Ms. Power's choice to pursue a four-year degree exceeds what is reasonable in light of her pre-accident training and earnings history. Her training in aesthetics and hairstyling took a total of less than two years, and at the time of the accident Ms. Power was earning \$18 per hour.
- [204] There was no evidence of other jobs that would be suitable for Ms. Power's physical and other abilities with less training, nor of the income Ms. Power could likely achieve after completing a Bachelor of Social Work degree. It is notorious that jobs requiring less education and training usually require more physical ability.
- [205] The defence argued that Ms. Power should have looked for other employment that was more suited to her abilities. However, there was no evidence that such employment was available. I accept that the physical strain of hairstyling would be at least as bad as the physical strain of teaching hairstyling. Ms. Power attempted a sales position in the beauty field, but was unable to meet the demands for carrying products. She was not capable of doing the work that she had training for, and it was a reasonable decision to pursue education and retraining.

- [206] It was reasonable for Ms. Power to take steps to pursue a career which will be compatible with her physical abilities. She will be more readily employable in her injured condition following that education. There was no evidence regarding whether Ms. Power will be likely to earn more or less as a social worker than she earned as a hairstyling instructor.
- [207] Ms. Power may have pursued such retraining even if the accident had not occurred. For example, Ms. Power may have stopped working at the Hairstyling School when Ms. Stark sold it, or if it had closed. However, Ms. Power was so enthusiastic about her work that she would likely have continued teaching hairstyling or working as a hairstylist for as long as she reasonably could.
- [208] The evidence did not disclose Ms. Power's anticipated earning potential with the further educational qualifications as compared with her qualifications at the time of trial. It is likely that more opportunities will be available to her following the training which would not have been available to her without that training.
- [209] The benefits of a Bachelor of Social Work degree will largely offset the disadvantages arising from Ms. Power's physical limitations arising from the Accident. However, she will still be less valuable to herself as an employee because of her physical limitations.
- [210] Ms. Power is entitled to an award for the loss in her earning capacity which reflects both some of the costs of retraining and the remaining loss of physical capacity. The present value of the retraining costs for the four years of tuition and books is about \$21,650. Because of Ms. Powers physical limitations, it is not reasonable for her to do substantial work outside the academic program, although she may be able to perform part-time work during her studies. She was earning about \$25,000 per year, and therefore would lose about \$100,000 in earnings during the period of completing such a program.
- [211] Damages must be assessed, not calculated, and must be fair to both parties. The contingencies include the possibility that Ms. Power would have pursued the retraining even if the Accident had not occurred, that more opportunities will be available to her because of an increased level of education, and that she will experience difficulty obtaining employment and will suffer periods of unemployment as a result of her physical difficulties.
- [212] A fair award for Ms. Power's lost earning capacity is \$80,000.
- v) Cost of Future Care
- [213] Ms. Power claims \$55,292.05 for the cost of future care for most of the items discussed in Ms. Burden's report. The defence argued that \$5,000 would be a fair award for Ms. Power's future care costs arising from the Accident.
- [214] On balance, the evidence shows that as a result of the Accident, Ms. Power needs the following future care items:

- a) for aids while retraining, about \$100 for a digital recorder, about \$150 for the extra cost of a wheeled book bag compared to a back pack, and about \$450 for an alternate computer station and chair for home;
- b) about \$650 starting in 2015 plus annual amounts of about \$650 for access to a pool and gym;
- c) about \$1,000 annually for assistance with household chores;
- d) about \$200 every 5 to 10 years starting in 2008 for replacement of the memory foam mattress topper;
- e) about \$250 per year for medication consisting of amitriptyline, excedrine migraine, and extra strength tylenol; and
- f) about \$60 per year for reusable hot and cold packs and disposable thermal wraps.

[215] The evidence did not support making an award for counselling for depression, because it was not recommended by any treating physicians. Although it was mentioned by Dr. Padillo, Dr. McLaren has not referred Ms. Power for such treatment, and I did not accept the factual assumptions underlying Dr. Padillo's opinion. Ms. Power does not wish to pursue a supported weight loss program and is doing well with her own program, and so did not pursue the claim for the costs of such a program. Ms. Power did not want to pursue a claim for physical therapy costs because she did not think it improved her condition and discontinued using it. The costs of tuition and books for retraining as a social worker has been considered in connection with lost future earning capacity.

[216] The one-time costs total about \$700. The present values of the recurring costs are as follows:

- a) of the \$642 annual cost of the pool and gym pass from 2015 (using the multiplier of 19.679 provided by Mr. Carson), about \$12,600;
- b) of the \$1,000 annually for assistance with household chores, about \$23,400 (using the multiplier of 23.412);
- c) of about \$200 every 7 years for a memory foam mattress topper starting in 2015, about \$650 (using the multiplier of 3.195);
- d) of \$250 per year for medication, about \$5,850 (using the multiplier of 23.412); and
- e) of the total of \$60 per year for hot and cold packs, about \$1,400 (using the multiplier of 23.412).

The total of those figures is \$44,600 (\$700 + \$12,600 + \$23,400 + \$650 + \$5,850 + \$1,400).

[217] Ms. Power would likely have required housecleaning assistance later in life even if the Accident had not occurred. Taking into account that contingency, and the contingencies that Ms. Power may not need all these items or may have needed them even if the Accident had not occurred, Ms. Power is entitled to an award of \$40,000 for the cost of her future care arising from the accident.

vi) Special Damages

[218] Ms. Power claims \$406.69 for special damages, consisting of the cost of a gym pass and of a memory foam mattress topper. Those costs were reasonably incurred and are recoverable.

vii) Mitigation

[219] The defence argued that Ms. Power failed to mitigate her losses, and that her award should be reduced by 25% to reflect that. The defence argued that Ms. Power waited too long before using a personal trainer and before taking significant steps to reduce her weight.

[220] The defence bears a heavy burden in establishing a reduction in damages on the basis of failure to mitigate. The applicable law is well-summarized in *Fox v. Danis*, 2005 BCSC 102 at paras. 35-37, *aff'd* 2006 BCCA 324.

[35] There is no dispute that every plaintiff has a duty to mitigate his/her damages, and that the burden of proving a failure to fulfil that duty rests with the defendant, the standard of proof being the balance of probabilities: *Janiak v. Ippolito*, [1985] 1 S.C.R. 146.

[36] In this case, the Defendant submits that the Plaintiff failed to mitigate her loss in that she failed to exercise as recommended by her family doctor.

[37] To succeed in proving these submissions, the Defendants must establish, on the balance of probabilities, that the Plaintiff failed to undertake this recommended treatment; that by following the recommended treatment she could have overcome or could in the future overcome the problems; and that her refusal to take that treatment was unreasonable: *Janiak v. Ippolito*, *supra* and *Maslen v. Rubenstein* (1993), 83 B.C.L.R. (2d) 131 (C.A.).

[221] Ms. Power had a duty to mitigate her damages. She did not work with a personal trainer until more than a year after Dr. McLaren recommended that she do so. However, there was no evidence that following that recommendation would have overcome her problems.

[222] Similarly, Ms. Power did not lose weight as early as it was recommended. Weight loss is notoriously difficult. Ms. Power recently lost 50 pounds, but the weight loss has not improved her symptoms. Again, the defence failed to establish that if Ms. Power had lost weight earlier, it would have reduced her symptoms.

[223] In short, the defence has failed to establish that Ms. Power's award should be reduced for failure to mitigate.

SUMMARY

[224] In summary, Ms. Power is entitled to an award of \$221,406.69, consisting of the following:

- a) \$70,000 for non-pecuniary damages;
- b) \$31,000 for past lost income net of income tax;
- c) \$80,000 for lost future earning capacity;
- d) \$40,000 for the cost of future care; and
- e) \$406.69 for special damages.

[225] If the parties are unable to agree on the question of costs, they should provide written submissions. If they are not able to agree on a schedule for the exchange of such submissions, they should arrange a telephone hearing before me through the Registry.

"Gray J."

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