

CANADA / JUDGMENT

Rab v. Prescott

2020 BCSC 1255

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 1255 Rab v. Prescott

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Rab v. Prescott,

2020 BCSC 1255

Date: 20200827

Docket: M186141

Registry: Vancouver

Between:

Magdalena Rab

Plaintiff

And:

Stuart Prescott

Defendant

Corrected Judgment: The front page of the judgment was corrected on October 16, 2020

Before: The Honourable Justice Branch

Reasons for Judgment

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Place and Date of Trial:

Vancouver, B.C.

June 29 - July 10, 2020

Place and Date of Judgment:

Vancouver, B.C.

August 27, 2020

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B. Loss of Earning Capacity. 23**C. Special Damages. 27****D. Costs of Future Care. 27****VII. SUMMARY. 29****VIII. TAX GROSS-UP, STATUTORY DEDUCTIONS, INTEREST, AND COSTS 29****I. INTRODUCTION**

- [1] This is a personal injury action relating to a motor vehicle accident, which occurred on April 24, 2017 on the exit from Highway 1 onto Lonsdale Avenue in North Vancouver, B.C. (the "Accident"). The plaintiff had stopped her vehicle while planning to merge onto Lonsdale Avenue when she was struck from behind by the defendant's vehicle. Liability is admitted.
- [2] As a result of the Accident, the plaintiff claims to have suffered an aggravation of certain pre-existing neck and back conditions. She also received from one physician a new diagnosis of myalgic encephalomyelitis/chronic fatigue syndrome ("ME/CFS").
- [3] The key issues in dispute are the extent to which the Accident aggravated her prior conditions, and whether the Accident caused any new condition.

II. FACTUAL BACKGROUND**A. The Plaintiff's Background**

- [4] The plaintiff is 60 years old. She grew up in Poland. After she came to Canada to visit in about 1982, she decided to stay here for further schooling. In 1986, before completing her bachelor's degree, she obtained employment with Bell Canada in Toronto. She stayed with Bell Canada for about 17 years while also earning a Masters of Business Administration degree. She worked her way up to Vice President - Business Development at Bell Canada.

- [5] The plaintiff was let go by Bell Canada around 2002 or 2003. She then took a job with Telus. She moved with her husband to Vancouver in 2004. She was then let go by Telus. Acting as an independent contractor, the plaintiff obtained work again with Bell Canada, now in Vancouver, serving as their business development liaison for their sponsorship of the 2010 Winter Olympics. This contract was terminated prior to 2008. She then worked on contract for Citizen's Bank for about a year and half, before this contract was terminated.
- [6] The plaintiff's accountant testified that during her prime consulting years the plaintiff was earning in the range of \$200,000-\$300,000.
- [7] In about 2010, the plaintiff began a new venture. She started an ATM business called Accurate Cash. It took about four years to establish this business, but by 2014, it started to yield a steady level of income with minimal effort on her part. She hired someone to run the business on a day-to-day basis. She lived, in part, off the net income from Accurate Cash, which generally varied between about \$10,000-\$30,000 annually. She satisfied the balance of her cash flow needs up to approximately \$60,000 by drawing down the savings built up during her years consulting. The last year she recorded significant income from consulting was about 2009.
- [8] In 2012, she met a Russian man who had developed an allegedly unique pheromone compound for men, which formulation he gave to the plaintiff before he passed away. Armed with this formula, she began trying to develop the scent commercially. She tried to get scientists to evaluate the product, but none were interested. She attended two short perfume-training courses in Europe in 2015. She conducted market testing in 2016 and 2017. The plaintiff's pre-Accident plan was to meet with manufacturers in China, who would hopefully provide "one stop shopping" in terms of design, bottling and packaging services.
- [9] In 2016, after a chance encounter with a contractor knowledgeable about exotic meats, the plaintiff started to investigate the possibility of selling iguana meat into China. She sourced and purchased some meat from Puerto Rico, where the iguana is not a protected species. She took a business trip to Puerto Rico in January 2017. She purchased a shipment of meat and had it delivered to Vancouver. Her plan was to attend a trade show in China in November 2017, where she was hoping to find a local distributor with proper permits.
- [10] The plaintiff was not clear about how many hours per day she was devoting to her various ventures prior to the Accident. However, I conclude that she must have been working less than full time given:
- a) the limited specific tasks reported by her in her evidence;
 - b) her admission that the Accurate Cash business did not take much of her time after the first couple of years;
 - c) the fact that the more recent ventures arose from chance encounters, rather than as part of a carefully thought out venture capital plans; and

- d) the fact that the recent ventures had not successfully launched by the time of the Accident, even though the plaintiff had been pursuing both for several years.
- [11] On the other hand, I do not agree with the defendant that the plaintiff was effectively in retirement at the time of the Accident. She had her finger in too many pies for her to be treated as a retiree without any residual income earning-passion. Her accountant confirmed that he would have organized her finances differently had she not been continuing to try to earn income.
- [12] Between her Accurate Cash earnings and the residual dividends from her earlier consulting work, her income from 2013 to 2019 has stayed within a tight band between \$62,500 and \$70,800.

B. The Plaintiff's Pre-Accident Condition

- [13] As the plaintiff herself acknowledged, she has always been accident-prone. In about 1986, she had a bad landing after skydiving, which threw her entire body "out of alignment". She had subsequent snowboarding accidents. She also had a trip and fall that caused a left knee injury.
- [14] The plaintiff agreed that prior to the Accident, she suffered from pain in her neck, shoulder, back, and knee, and that she suffered from migraines. She says her body was generally misaligned. That said, there is little evidence of the plaintiff receiving active treatment in the months leading up to the Accident. Her last appointment with her general practitioner prior to the Accident was on February 28, 2017, when she reported certain balance problems, as well as migraines. The plaintiff seemed to be otherwise coping with any residual pre-Accident pain on her own.
- [15] The plaintiff started major renovations to her house in 2016. These renovations did not go well, and she suffered flooding in her home as a result. Prior to the Accident, she told the contractor that her life had "been turned upside down" by the construction failings. She suggested that this statement was largely "positioning". She wanted to put her best foot forward so that the contractor would "do the right thing" for her. Although she obtained compensation from her own insurer, she remained sufficiently concerned about the contractor's conduct that when the contractor sued her for the balance owing in November 2017, she counterclaimed for losses she says she sustained. At trial, she confirmed that she was only advancing a monetary claim against the contractor, and not a claim for personal injuries.

C. The Accident

- [16] On April 24, 2017, at approximately 4 p.m., the plaintiff was on her way to a medical appointment. She was driving her vehicle along Highway 1 in North Vancouver, and went onto the exit for Lonsdale Avenue. While she was waiting for southbound traffic to clear on Lonsdale Avenue when she was struck from behind. She suffered pain in her head and face when the airbags deployed.
- [17] The plaintiff read in discovery evidence from the defendant indicating that he was going no more than 10 km/h at the moment of impact, although he was not looking at the speedometer.
- [18] The plaintiff was well enough to continue to her appointment. She did not attend the hospital until prompted to do so by others in the days after the Accident.

D. Post Accident

Injuries

- [19] The plaintiff has complained primarily of increased fatigue since the Accident. She says she has to put her head down and rest after only a few hours of computer work, which was not the case before the Accident.
- [20] She complained of ongoing back and neck pain, but it was difficult to determine precisely how much her pain level differed from her pre-accident situation. She also complained of increased migraines.

Business Activities

- [21] The plaintiff continued to receive dividends from her Accurate Cash business after the accident. After her manager left, she tried to sell the business. However, the best offer she received was from a company who wanted her to stay on to manage, which she did not feel physically able to do. This business may now be in serious trouble given the move away from cash transactions as a result of the pandemic. The demand for cash from ATM machines has decreased.
- [22] The plaintiff continued to take steps to advance the perfume and iguana meat ventures post-Accident. However, she has faced challenges in bringing the products to market.
- [23] In terms of the iguana meat venture, she says she was not well enough to attend the November 2017 trade show in China. This left her having to assess if the product could be marketed here in Canada. By running a marketing campaign through the Chinese language parallel to Twitter, the plaintiff determined that there was insufficient interest in Canada. As such, she has still not been able to sell the meat, and she is no longer confident that she will be able to do so.

[24] The inability to travel to China also hampered her efforts to bring her perfume to market. She had to deal with Chinese manufacturers over the internet, which slowed down her progress. She did obtain packaging designs by December 2018, boxes and bottles by August 2019, and a supply of the required alcohol ingredient by April 2020. She testified that she hopes to bring the perfume to market over the next few months, a delay of 2.5 years from her original plan.

Other Activities

[25] The plaintiff has reduced her social activities and networking because of her ongoing pain. She used to have people over to her house quite regularly.

[26] One of her friends, Janet Love-Morrison, came to stay with her after the Accident for a conference. Ms. Love-Morrison found that the plaintiff was far less engaged than she was prior to the Accident, rarely coming out of her room. Her accountant also noticed a reduced energy level post-accident, although he only met with her for a couple of hours per year.

[27] The plaintiff says she is limited in terms of the housework, painting, and gardening she can perform on her own.

[28] The plaintiff has taken a few long flights, but has difficulties by the end of these trips.

Treatment

[29] The plaintiff has taken little in the way of pain medication, as she says that it is not her "usual practice" to take such drugs.

[30] While she took physiotherapy and massage therapy initially after the Accident, in 2019 and 2020 she only sought acupuncture.

[31] She was referred to specialists, but none found any objective explanation for her pain.

II. TREATING PHYSICIANS AND EXPERTS

[32] The Court received evidence from the following treating physicians and experts.

A. Dr. Helen Karimirad

[33] Dr. Karimirad is the plaintiff's general practitioner. She was put forward as a fact witness only. Dr. Karimirad observed that after the Accident, the plaintiff had headaches, as well as neck, back and shoulder pain. She observed that the plaintiff's thought patterns were not as coherent. The plaintiff also seemed more fatigued.

[34] Notwithstanding a reasonably broad array of complaints made to her in the years leading up to the Accident, Dr. Karimirad claimed that the plaintiff was a healthy person prior to the Accident.

[35] Dr. Karimirad's evidence was scattered and difficult to follow. It is difficult to ascribe substantial weight to her evidence. Furthermore, it was clear that Dr. Karimirad was attempting to do all she could to assist her patient. I find that there was a lack of objectivity. While perhaps understandable given her position as the plaintiff's family doctor, this tendency also made it difficult to ascribe as much weight to her observations.

B. Dr. Richard Arseneau

[36] Dr. Richard Arseneau is a specialist in internal medicine. He saw the plaintiff on one occasion for the purposes of a medico-legal assessment requested by the plaintiff.

[37] Dr. Arseneau concluded that the plaintiff suffered the following as a result of the Accident:

- a) aggravation of myofascial pain syndrome ("MPS") of the neck, shoulders, and upper back;
- b) aggravation of fibromyalgia ("FM");
- c) myalgic encephalomyelitis/chronic fatigue syndrome ("ME/CFS");
- d) aggravation of irritable bowel syndrome ("IBS"); and
- e) aggravation of pelvic pain syndrome.

[38] He found that the plaintiff suffered from the "Central Sensitivity Syndromes" or "CSSs" including the above conditions, as well as migraines (pre-existing, but worse since the Accident), and restless leg syndrome (new since the Accident).

[39] Dr. Arseneau described CSS as follows:

CSS comprise a family of syndromes that don't have abnormalities that can be seen with a microscope or picked up by usual medical tests. They share the common mechanism of "central sensitization." Central means the problem is at the level of the brain and spinal cord. The neurons (brain and spinal cord cells) are "hyperexcitable" or sensitized because of changes in the way the cells communicate chemically and through other mechanisms. The sensitized cells amplify, or make stronger, messages that we get from our senses - for example touch can feel like pain, normal light or sound can be experienced as uncomfortable...

[40] Dr. Arseneau accepted in cross-examination that he has previously attributed CSS to chemical exposure or to exposure to electrical companies' "Smart Meters", but he acknowledged that he failed to consider whether these possible explanations were relevant to the plaintiff's case.

[41] Dr. Arseneau also asserted that the plaintiff was suffering from "post exertional malaise", whereby her capacity to function is reduced dramatically after over-exertion.

[42] In terms of prognosis, he concluded that:

ME/CFS and FM are chronic diseases and future treatment is unlikely to bring about significant functional improvement. The goal of future treatments is halting any further deterioration, symptom reduction, and improvement in quality of life...

My opinion is that [the plaintiff] is disabled from work indefinitely. She is unlikely to recover to the point where she could handle the workload she did prior to the subject MVA. I think it is unlikely that she will be able to handle even half the workload.

[43] In terms of recommendations, he advanced the following:

- a) 10-15 initial sessions with an occupational therapist and another 5 sessions every 2-3 years;
- b) a battery of supplements and natural preparations;
- c) 10-12 sessions with a naturopath;
- d) 5-10 sessions with a dietician
- e) 20-30 session with a cognitive behavioural specialist;
- f) 20-30 sessions of Acceptance and Commitment Therapy ("ACT");
- g) 10-15 initial sessions with a physical therapist and another 5 sessions every 2-3 years;
- h) 6-12 sessions per year of Trigger Point Injections;
- i) weekly acupuncture;
- j) 11-21 sessions of neurofeedback treatment;
- k) 10-15 sessions of transcranial stimulation;
- l) 30 initial sessions of Hyperbaric Oxygen Treatment, and 5-10 session per year thereafter; and
- m) house cleaning and seasonal cleaning help.

[44] Dr. Arseneau stated that such treatments were unlikely to cure the plaintiff's conditions, but rather would hopefully provide some symptom relief. He conceded that he did not know if any of the treatments would work at all.

[45] I find that I can place little weight on Dr. Arsenault's opinion for the following reasons.

[46] The first problem is the extent of his reliance on the plaintiff's own subjective reporting. Dr. Arsenault admitted that all of his diagnoses were based on the plaintiff's subjective reports alone. He did not note any objective findings that supported the diagnoses. In particular:

- a) he himself did not note any symptoms of "brain fog" during his examination, notwithstanding the subjective report of same;
- b) his diagnosis of post-exertional malaise was based solely on the plaintiff's self-reporting of the amount of time she was able to work each day.

- [47] The fact that Dr. Arseneau relied upon the plaintiff's subjective reports without question and without successfully cross-checking the complaints against objective evidence, means that his report is undercut by the finding below regarding the reliability of the plaintiff's evidence.
- [48] Second, Dr. Arseneau's novel opinions about CSS were not established as being generally accepted by the medical community. He was not able to point to any published peer-reviewed journal articles accepting his theories. Indeed, he asserted that many physicians simply do not read enough to accept his perspective. He asserted that it is often necessary for a generation of physicians to die off before new ideas like his own are accepted. Applying the special scrutiny required in such situations, I am not satisfied that his opinions as they relate to CSS are sufficiently reliable to justify their acceptance: *R. v. Mohan*, [1994] 2 S.C.R. 9, [1994] CarswellOnt 66 at para. 32.
- [49] Third, while Dr. Arseneau argued that there could be delayed onset of symptoms, he did nothing to pin down when the plaintiff's symptoms started to reveal themselves. One would have expected the extent of the delay to be key to attributing causation, particularly where there has been a delay.
- [50] Fourth, Dr. Arseneau's objectivity was questionable. He admitted that he has only testified on behalf of plaintiffs. He also seemed unnecessarily eager to defend the position of plaintiffs, for example by volunteering his view that plaintiffs are too often improperly treated as malingerers.
- [51] Next, the plaintiff did not report symptoms of restless leg syndrome or an aggravation of pelvic pain syndrome or irritable bowel syndrome at trial, notwithstanding that these were three of Dr. Arseneau's diagnoses.
- [52] Finally, Dr. Arseneau did not canvass other stressors in the plaintiff's life, such as the problematic renovation, even though he acknowledged that the diagnoses could be affected by such stressors.
- [53] Collectively, these concerns cause me to greatly reduce the weight that can be placed on Dr. Arseneau's opinions. Put more precisely, his opinion adds little beyond the weight of the plaintiff's own evidence, given that his opinion about her functional limitations is almost exclusively tied to the plaintiff's evidence.

C. Ms. Christiane Clark

- [54] Ms. Clarke is an economist who prepared a report providing various cost of future care multipliers, and determining the net present value of Dr. Arseneau's future treatment recommendations.

III. EVIDENTIARY ISSUES

- [55] The parties failed to arrive at a document agreement, which resulted in the need to consider an array of evidentiary issues during the trial. Two key disputes remained at the close of the trial.
- [56] The defendant sought to introduce the following documents for the truth of their contents, specifically as they related to what the plaintiff was reporting to her medical practitioners after the Accident:
- a) Chiropractic clinical records (Tabs 2 and 7 of Exhibit 4);
 - b) Alan McGavin Sport Medicine Clinic records (Tab 4 of Exhibit 4);
 - c) Physiotherapy clinical records (Tabs 5 and 6 of Exhibit 4);
 - d) Wholesome Wellness Centre clinical records (Tabs 8 and 10 of Exhibit 4); and
 - e) Dr. Virginia Devonshire's clinical records (Tab 12 of Exhibit 4).
- [57] The plaintiff conceded that the basic procedural requirements of s. 42 of the Evidence Act, R.S.B.C. 1996, c. 124 were met in relation to these documents. The plaintiff also conceded that the documents could at least be admitted for the purpose of considering credibility. However, the plaintiff argued that these documents should not be admitted for the truth of their contents because the defendant could not establish that the statements relied upon were in fact made by the plaintiff.
- [58] In *Firman v. Asadi*, 2018 BCSC 2437, the court outlined the test for admission of statements made in clinical records for proof of their content:
- [29] I apply the following:
1. With respect to clinical records, if I am satisfied that the plaintiff made a statement, and if I am satisfied that it proves an admission against her interest, or the plaintiff adopts as true the statement at this trial, then the statement can be admitted for proof of its contents;
 2. Observations of the treating professional on examination of the plaintiff, that is, observations directly made by that person as recorded with the requisite degree of clarity and reliability, can be taken as proof of the facts of those observations. Also, the fact of an opinion, but not the opinion, can be admitted if it is otherwise relevant to an issue in the case. So for example, if there is a diagnosis made or a treatment recommendation made, and the fact that treatment was sought on a certain occasion, to the extent that those facts are relevant, those facts, but not those opinions, may be admissible.
- [Emphasis added.]
- [59] I agree with the plaintiff that the defendant failed to establish that the statements in the records noted above were made by the plaintiff. The plaintiff did not agree that she made the statements on which the defendant seeks to rely: *Cunningham v. Slubowski*, 2003 BCSC 1854

at paras. 14, 15. Dr. Karimirad noted that practitioners often only record those points in their subjective findings that are necessary to support their final diagnosis. They do not write down everything that a patient says to them. The combination of the plaintiff's and Dr. Karimirad's evidence offers little support for the proposition that the statements were in fact made by the plaintiff.

- [60] The plaintiff also notes certain procedural concerns with the records, in that several appear to have been recorded well after the relevant appointment took place, while others appear to have been recorded scant moments after the appointment commenced. For other records, the identity of the author is unclear. Each of these concerns casts further doubt on the accuracy of the alleged reports.
- [61] The defendant could have taken steps to call the persons who created the records and, as with Dr. Karimirad, confirmed with these witnesses whether the plaintiff said the words noted in the record: *Firman* at para. 25 *Cunningham* at para. 16.
- [62] However, absent such evidence, I find that I do not have sufficient information to conclude that the plaintiff in fact said the comments noted in these records, and hence I do not admit them for the truth of their contents.
- [63] The plaintiff sought to introduce the following documents for the truth of their contents, to which the defendant objected:
- a) Email correspondence from the plaintiff to her friend Janet Love-Morrison dated September 8, 2017 (Tab 22 of Exhibit 3); and
 - b) A CL-19 and a CL-22 report provided by Dr. Karimirad to the Insurance Corporation of British Columbia dated July 4, 2017 and May 2, 2017 respectively (Tabs 36 and 21 of Exhibit 3).
- [64] I find that the September 8, 2017 email cannot be admitted for the truth of its contents. It simply contains an assessment by the plaintiff of her own condition. There was nothing preventing the plaintiff from giving this same evidence in chief. She did not claim a lack of recollection of her condition, which could have created a need to receive evidence in another form: *Samuel v. Chrysler Credit Canada Ltd.*, 2007 BCCA 431 at para. 37.
- [65] Where a plaintiff's prior statements are consistent with the plaintiff's testimony at trial, they are generally inadmissible self-serving hearsay, which would improperly enhance the credibility of the plaintiff: *Cunningham* at para. 8; *Samuel* at para. 47. There was no argument by the defendant that the plaintiff's evidence as to her condition was a recent fabrication, which would have entitled the plaintiff to seek to rebut the suggestion: *Smith v. Wirachowsky*, 2009 BCSC 1434 at paras. 22 and 26.

- [66] Furthermore, the email provides no helpful or necessary narrative framework, and it does not qualify as a natural expression of spontaneous and contemporaneous physical condition, Samuel at para. 36. The comments are more in the nature of a "statement of past pain": Samuel at para. 23.
- [67] I also conclude that the CL-19 and CL-22 reports cannot be used for their truth. To the extent that it is expert opinion, it was not supported by an expert report from Dr. Karimirad: Cunningham at para. 13. To the extent that they simply reflect her observations at the time, Dr. Karimirad could conceivably have given this evidence after refreshing her memory from the documents. There is no necessary purpose served in having the documents themselves admitted.

IV. CAUSATION

- [68] The plaintiff must prove on a balance of probabilities that her injuries would not have occurred "but for" the Accident: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 14. The Accident does not need to be the only cause of the plaintiff's injuries but it must be a causal factor beyond the "de minimis" range: *Athey* at para. 15. I find that causation is established, at least in relation to the aggravation of her past conditions and her increased fatigue.

V. CREDIBILITY AND RELIABILITY

- [69] In *Dorsey v. Bhindi*, 2016 BCSC 499, the court introduced its consideration of the plaintiff's credibility with a helpful summary of principles germane to the present case:
- [10] To the extent that Ms. Dorsey's claim involves subjective complaints of pain, it is particularly important to exercise caution about and examine her evidence carefully: *Price v. Kostyba* (1982), 70 B.C.L.R. 397 at 399 (S.C.). Among other things, if her account is not convincing, the hypothesis upon which her medical evidence rests may be undermined: *Samuel v. Chrysler Credit Canada Ltd.*, 2007 BCCA 431 at paras. 15, 43-44.
- [11] The factors to be considered when assessing credibility were summarized in *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, *aff'd* 2012 BCCA 296, leave to appeal *ref'd* [2012] SCCA No. 392. They include the firmness of the witness's memory, the ability of the witness to resist the influence of interest in modifying her recollection, whether the witness's evidence harmonizes with independent evidence that has been accepted, whether the witness changes her evidence during direct examination and cross-examination (or between examination for discovery and trial) or is otherwise inconsistent in her recollections, the witness's demeanor, and whether the witness's evidence seems generally unreasonable, impossible, or unlikely.
- [70] As in *Dorsey*, a consideration of these factors leaves me with serious concerns about the plaintiff's reliability, if not her credibility. She testified in only very general terms about the symptoms she has experienced since the Accident. She could not recall how she was feeling at key points after the Accident, even when guided by available clinical records: *Dorsey* at

para. 13. On virtually every occasion when the plaintiff was confronted with questions where the answers could damage her case, she claimed to have no memory. Notably, her recall dramatically improved when her answers could improve the strength of her case, such as regarding the state and likelihood of success of her various business ventures.

[71] Plaintiff's counsel suggested that the plaintiff's memory problems could be a symptom of her conditions. However, the evidence as a whole did not establish this as the likely explanation for her lack of reliability.

[72] This all said, I do not find that the plaintiff was intentionally trying to mislead the court. However, the nearly complete absence of detail regarding the effects of the Accident creates a reliability concern, and reduces the weight of her evidence.

VI. DAMAGES

A. Non-Pecuniary Damages

1. Generally

[73] Non-pecuniary damages are awarded to compensate the plaintiff for pain, suffering, loss of enjoyment of life and loss of amenities caused by a tortious act. The compensation awarded should be fair and reasonable to both parties: *Trites v. Penner*, 2010 BCSC 882 at para. 188. Fairness is measured in part against awards made in comparable cases: *Beaton v. Perkes*, 2016 BCSC 2276 at para. 51. That said, other cases are helpful but serve only as a rough guide. Each case still depends on its own facts: *Trites* at para. 189.

[74] In *Stapley v. Hejslet*, 2006 BCCA 34, leave to appeal ref'd [2006] S.C.C.A. No. 100, the Court of Appeal outlined certain factors to be considered when assessing non-pecuniary damages at para. 46:

The inexhaustive list of common factors cited in *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 BCCA 54).

2. Key Factors

[75] I find the following factors and findings germane to the determination of the proper non-pecuniary award in this case:

1. The plaintiff had pain in her neck and back prior to the Accident, but she was largely able to manage the pain on her own.
2. The plaintiff suffered an aggravation to the underlying pain in her neck and back as a result of the Accident, as well as increased migraines.
3. The plaintiff has not suffered a new syndrome as a result of the Accident. What has happened is a material aggravation of her pain mechanisms.
4. The plaintiff's energy level has also been reduced as a result of the Accident. That said, the plaintiff was still able to continue work on her businesses for at least a few hours a day after the Accident.
5. The plaintiff's treatment has been narrow and sporadic, largely confined to acupuncture. It is difficult to know for sure whether more comprehensive and intentional pain management treatment could assist on a going forward basis, but I find that there is a material chance that it could.

3. Plaintiff's Authorities

[76] The plaintiff presented the following authorities to help guide the Court's assessment of her non-pecuniary damages:

· *Flomo v. Hanna*, 2019 BCSC 2024: The 29-year-old plaintiff sustained injuries to her neck, upper back, lower back, shoulders and hips, due to a motor vehicle accident. She was diagnosed as suffering from fibromyalgia. All experts agreed that her injuries were chronic and the prognosis for her pain was permanent, leaving her with a lifetime of pain and suffering. In addition, she was found to have suffered from a major depressive disorder as a result of the accident. The court awarded \$175,000.

· *Gabert v. Krist*, 2018 BCSC 2109: The 71-year-old plaintiff suffered from "crushing skull pain", headaches, tinnitus, arm pain, numbness of her feet and chronic fatigue syndrome as a result of a motor vehicle accident. Her conditions were "chronic, persistent and debilitating" many years after the accident, and her prognosis was poor. The court awarded \$160,000.

· *Bruno v. Diamzon*, 2014 BCSC 1270: The plaintiff was a 49-year-old claims manager who was injured as a result of a motor vehicle accident. The plaintiff suffered mechanical neck and back pain, fibromyalgia or a fibromyalgia-like condition, chronic pain disorder associated with sleep

disorder and psychological factors, anxiety and depression, a major depressive disorder, post-traumatic stress disorder, and panic disorder with agoraphobia. The plaintiff continued to work for a number of years after the accident, but eventually took time off work to address his issues. His employment was subsequently terminated. All the injuries were found to be caused by the defendants' wrongful conduct. The physical, psychological and emotional consequences of the accident negatively affected all aspects of the plaintiff's life. He was in constant pain. The functionality of his back was impaired. His sleep was impaired and he suffered from chronic fatigue. He required medication and therapy to deal with his anxiety, panic attacks, depression and agoraphobia. Ordinary activities of daily living became a struggle. The court found that his condition, with appropriate treatment and medication, was not likely to deteriorate further, but his prognosis for substantial improvement was poor. The court awarded \$120,000.

- *Bivadi v. Coggans*, 2017 BCSC 656: The court found that the 23-year-old plaintiff's pain, associated psychological problems, and the effects of prescription medication combined to be significantly disabling for about a year after the accident. After that, there was a process of slow improvement, with symptoms still present at trial two and a half years after the accident. The medical prognosis was for continued improvement, but with complete recovery from pain unlikely. The plaintiff appeared to have acquired some skills to manage the pain, with a resulting improvement in his mental state. The court noted that the plaintiff was at risk for developing pain at some point in the future in any event from a pre-existing degenerative condition. The court assessed non-pecuniary damages at \$110,000.

- *Moldonado v. Mooney*, 2016 BCSC 558: The plaintiff experienced significant back pain following a motor vehicle accident. The plaintiff's injury caused headache, soreness in his neck and shoulder and between his shoulder blades, as well as low back pain. The plaintiff continued to work for the same employer after his injuries but his injuries prevented him from receiving wage increases and from working additional hours. It was likely that the plaintiff's significant back pain would continue for the rest of his life, with increased vulnerability to future injury (at para. 60). As well, there was a diagnosed depression that was causally related to the accident. The court awarded \$110,000.

- *Carrasco v. Gibson*, 2020 BCSC 731: The plaintiff was involved in two motor vehicle accidents but this trial only addressed the first. The plaintiff was 38 years old at the time of the first accident, and 47 years old at trial. Prior to the first accident the plaintiff had suffered from fibromyalgia, migraines, back/hip pain, and numbness and tingling of her left arm and left lower face. The court accepted that the first accident did exacerbate the plaintiff's headaches, fibromyalgia and general body pain. The court found that the plaintiff was significantly disabled from her injuries in the first accident for a period of three years, and partially disabled from those injuries for a further period of another year. The court found that the plaintiff was back to the condition that she would have been in, but for the first accident, four years after it occurred. The court awarded \$90,000.

[77] The plaintiff suggests that an appropriate award for non-pecuniary damages would be between \$100,000 and \$140,000. The plaintiff did not seek a separate award for housekeeping, accepting that it should simply be considered part of the general damages award.

4. Defendant's Authorities

[78] The defendant put forward the following authorities:

- Ben-Yosef v. Dasanjh, 2016 BCSC 360: The plaintiff suffered an aggravation of a pre-existing chronic pain syndrome. Prior to the accident the plaintiff was not at work because of neck pain and migraines. I note that in the present case, the plaintiff was able to work on her various businesses prior to the Accident. The court in Ben-Yosey awarded \$30,000.
- Dorsey v. Bhindi, 2016 BCSC 499: The plaintiff was 49 years old at the time of the motor vehicle accident. She had just returned to full-time duties following a workplace injury. She continued to work for 18 months after the accident, but then stopped working completely. The court had grave concerns about the plaintiff's credibility. Unlike in Dorsey, the plaintiff here was not shown to be giving evidence materially inconsistent with earlier evidence at her examination for discovery. Nor do I find that the plaintiff intentionally attempted to mislead the court (Dorsey at paras. 22-27). Rather the plaintiff here simply asserted a lack of recall. In Dorsey, the court found that the plaintiff remained symptomatic from the workplace injury at the time of the accident, and that she could only sit for short durations, and was sore by mid-day. The court accepted that the plaintiff experienced worsened pain in her neck and back and some tingling in her limbs as a result of the accident. The court found that after 18 months she returned to her pre-accident position, and that the exacerbation did not materially interfere with her ability to work. There was very little evidence of any material impairment to her lifestyle. The court awarded damages of \$25,000.
- Anderson v. Dwyer, 2010 BCSC 526: The plaintiff was 50 years old at the time of trial. She had experienced a previous accident and was still suffering residual pain at the time of the new accident. The court found that the plaintiff had not met her burden of showing that the new accident caused her ongoing symptoms beyond the one year period conceded by the defendant. The court awarded \$20,000.
- Hough v. Wyatt, 2011 BCSC 910: The 49-year-old plaintiff suffered from superimposed injuries on pre-existing neck, shoulder, and back problems, aggravating them to a minor degree. The only new injury was to the right wrist, which continued to bother him at trial, two years post-accident. The court awarded \$15,000.

[79] The defendant suggested an appropriate figure for non-pecuniary damages would be \$20,000-\$30,000.

5. Other Authorities

[80] Given the parties' failure to provide authorities that reasonably paralleled the present fact pattern, I also had regard to the following:

- *Lewis v. Wang*, 2020 BCSC 16: The 39-year-old plaintiff was injured in a low-impact accident. The accident aggravated pre-existing problems in her right shoulder and back. After the accident, she suffered a neck injury which became chronic. She suffered headaches, anxiety and sleep disruption at a lesser level. She had been terminated as a sales associate shortly before the accident but the court accepted that she reasonably stayed out of the work force for 4.5 months after the accident. The court awarded \$90,000.

- *Frankson v. Neely*, 2020 BCSC 786: The 36-year-old plaintiff was injured in a rear-end motor vehicle collision. The plaintiff admitted that before the accident she had suffered from longstanding chronic pain in her hip, low back and neck. However, this pain was usually mild and did not interfere with her job as a dental assistant. After the accident the pain became more severe and required more frequent treatment. She lived with increased chronic pain as a result of the accident and there was little likelihood that her condition would improve with time. She had to take time off work and modify her work duties. The court accepted that her condition prevented her from working as a dental assistant on a full-time basis. However other aspects of her life including her personal relationships and leisure activities were not materially changed. The court awarded \$90,000.

- *Safdari v. Buckland*, 2020 BCSC 769: The plaintiff was about 36 years old at the time of the accident. He was already suffering from substantial and pre-existing low back pain and psychological impairment at the time of the accident. The court found that as a result of the accident he suffered soft tissue injuries to his neck and upper left shoulder, cervicogenic headaches, and aggravation of pre-existing low back pain, anxiety, insomnia, depression, and chronic pain syndrome. The court accepted that the plaintiff had at least some restriction in his day-to-day activities and employment capacity although the court found that he tended to overstate his injuries. The court concluded that the plaintiff had suffered damages worth \$90,000, but adjusted the award downwards by 25% to \$67,500 to account for the plaintiff's pre-existing injuries.

6. Determination of non-pecuniary damages

[81] None of plaintiff's cases had a sufficiently strong overlay of pre-existing problems to serve as a helpful guide. The defendant's cases involved situations where the pre-accident conditions were more active and debilitating at the time of the accident than the plaintiff's were in this case. Applying the factors identified above, and with guidance from the case law, I find that the appropriate award for non-pecuniary damages is \$70,000. The recent decision in *Safdari* is of particular assistance given that the court faced a similar level of pre-existing difficulties coupled with comparable functional impacts after the accident.

B. Loss of Earning Capacity

- [82] Justice Goepel canvassed the proper assessment of future earning capacity in *Grewal v. Naumann*, 2017 BCCA 158. While he dissented in the outcome, the majority agreed with the following summary of the principles (see para. 66):
- [48] In summary, an assessment of loss of both past and future earning capacity involves a consideration of hypothetical events. The plaintiff is not required to prove these hypothetical events on a balance of probabilities. A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation. If the plaintiff establishes a real and substantial possibility, the Court must then determine the measure of damages by assessing the likelihood of the event. Depending on the facts of the case, a loss may be quantified either on an earnings approach or on a capital asset approach: *Perren v. Lalari*, 2010 BCCA 140 at para. 32.
- [49] The assessment of past or future loss requires the court to estimate a pecuniary loss by weighing possibilities and probabilities of hypothetical events. The use of economic and statistical evidence does not turn the assessment into a calculation but can be a helpful tool in determining what is fair and reasonable in the circumstances: *Dunbar v. Mendez*, 2016 BCCA 211 at para. 21.
- [83] An assessment of the loss for both past and future earning capacity involves a consideration of hypothetical events. The plaintiff is not required to prove these hypothetical events on a balance of probabilities. The future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation: *Athey* at para. 27; *Gao v. Dietrich*, 2018 BCCA 372 at paras. 34 to 40.
- [84] The legal principles relevant to determining future loss of earning capacity were also neatly summarized by Justice Voith in *Pololos v. Cinnamon-Lopez*, 2016 BCSC 81 at para. 133:
- a) To the extent possible, a plaintiff should be put in the position he/she would have been in, but for the injuries caused by the defendant's negligence; *Lines v. W & D Logging Co. Ltd.*, 2009 BCCA 106 at para. 185, leave to appeal ref'd [2009] S.C.C.A. No. 197;
 - b) The central task of the Court is to compare the likely future of the plaintiff's working life if the Accident had not occurred with the plaintiff's likely future working life after the Accident; *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 32;
 - c) The assessment of loss must be based on the evidence, but requires an exercise of judgment and is not a mathematical calculation; *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 18;
 - d) The two possible approaches to assessment of loss of future earning capacity are the "earnings approach" and the "capital asset approach"; *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 at para. 7 (S.C.); and *Perren v. Lalari*, 2010 BCCA 140 at paras. 11-12;

- e) Under either approach, the plaintiff must prove that there is a "real and substantial possibility" of various future events leading to an income loss; Perren at para. 33;
 - f) The earnings approach will be more appropriate when the loss is more easily measurable; Westbroek v. Brizuela, 2014 BCCA 48 at para. 64. Furthermore, while assessing an award for future loss of income is not a purely mathematical exercise, the Court should endeavour to use factual mathematical anchors as a starting foundation to quantify such loss; Jurczak v. Mauro, 2013 BCCA 507 at paras. 36-37.
 - g) When relying on an "earnings approach", the Court must nevertheless always consider the overall fairness and reasonableness of the award, taking into account all of the evidence; Rosvold at para. 11.
- [85] The plaintiff did not seek to advance any claim for past loss of earnings or earnings capacity. The plaintiff acknowledged that it would have been difficult to establish that either of her two new ventures would have been yielding income as of the date of trial absent the Accident.
- [86] The plaintiff did seek an award for loss of future earning capacity. She simplified her presentation under this head of damage by asking simply that a capital asset award be made that roughly parallels one year of her prior consulting income, rather than trying to project the likely future course of her ventures.
- [87] The defendant argued that there should be no award at all under this head. He noted that there was no functional capacity evaluation showing the court what the plaintiff could and could not do from an employment perspective.
- [88] As a first step, I must determine whether the plaintiff has proven that there is a real and substantial possibility of a future event leading to an income loss.
- [89] I conclude that, as a result of the aggravation of her pain, increased migraines, and reduced energy, the plaintiff has become "less valuable to [her]self as a person capable of earning income in a competitive labour market": Perren v. Lalari, 2010 BCCA 140 at para. 11 citing Brown v. Golaiy (1985), 26 B.C.L.R. (3d) 353 (S.C.). It is not necessary that there be a functional capacity evaluation in order to reach this conclusion. It can be reached based on the plaintiff's evidence alone.
- [90] The next step is to determine whether I should use the earnings or capital asset approach in quantifying any loss. As noted, the plaintiff suggested that the capital asset approach be used. I agree that this method is more appropriate here given that the loss is not easily quantifiable because:
- a) the plaintiff had ceased working as a full-time consultant prior to the Accident, deciding to pursue riskier venture capital type pursuits on her own account;
 - b) the plaintiff does not appear to have been working at a full-time level prior to the Accident;

- c) the plaintiff continued to pursue all of her business ventures following the Accident;
- d) the potential earnings from her various businesses are largely speculative; and
- e) the plaintiff's prospects for physical recovery are uncertain.

See Perren at para. 32; Jorgensen v. Coonce, 2013 BCSC 158 at paras. 108, 109.

[91] That leaves the determination of the appropriate quantum.

[92] If the ability to assess the likely course of events either pre- or post-Accident is particularly challenging, the court may invoke the rougher and readier "Pallos Approach" of awarding one or two years' income: Rozendaal v. Landingin, 2013 BCSC 24; Daleh v. Schroeder, 2019 BCSC 1179 at para. 146.

[93] The plaintiff's top full-time annual consultancy income was in the range of \$300,000, from the period before she began pursuing her own businesses. Using the Pallos Approach, the plaintiff suggested an award of \$300,000, based on one year's income.

[94] I find that a more appropriate award is \$150,000. There are negative contingencies that must be incorporated into the analysis. By 2012, the plaintiff had already been struggling to retain the high-income positions she held previously. By the time of the Accident in 2017, she was several years past her top income year as a consultant. Further, I have concluded that she was not working full time in the years leading up to the Accident. Incorporating all of these factors, I find that applying a 50% discount to the \$300,000 annual income high point results in a more appropriate figure.

C. Special Damages

[95] The parties agreed on an award of \$9,463.41 under this head.

D. Costs of Future Care

[96] In Peters v. Ortner, 2013 BCSC 1861, Justice Harris outlined the general principles to consider when assessing a plaintiff's cost of future care:

[141] The plaintiff is entitled to compensation for the cost of future care based on what is reasonably necessary to restore him to his pre-accident condition in so far as that is possible. The award is to be based on what is reasonably necessary on the medical evidence to preserve and promote the plaintiff's mental and physical health: Milina v. Bartsch (1985), 49 B.C.L.R. (2d) 33 (S.C.); Williams v. Low, 2000 BCSC 345; Spehar v. Beazley, 2002 BCSC 1104; Gignac v. Rozylo, 2012 BCCA 351.

[142] The test for determining the appropriate award under the heading of cost of future care is an objective one based on the medical evidence. For an award of future care: there must be a medical justification for claims for cost of future care and the claims must be reasonable: Milina; Tsalamandris v. McLeod, 2012 BCCA 239 at paras. 62-63.

- [143] Future care costs are "justified" if they are both medically necessary and likely to be incurred by the plaintiff. The award of damages is thus a matter of prediction as to what will happen in the future. If a plaintiff has not used a particular item or service in the past it may be inappropriate to include its cost in a future care award. However, if the evidence shows that previously rejected services will not be or be able to be, rejected in the future, the plaintiff can recover for such services: *Izony v. Weidlich*, 2006 BCSC 1315 at para. 74; *O'Connell v. Yung*, 2012 BCCA 57 at paras. 55, 60, 68-70.
- [144] The extent, if any, to which a future care costs award should be adjusted for contingencies depends on the specific care needs of the plaintiff. In some cases negative contingencies are offset by positive contingencies and, therefore, a contingency adjustment is not required. In other cases, however, the award is reduced based on the prospect of improvement in the plaintiff's condition or increased based on the prospect that additional care will be required. Each case falls to be determined on its particular facts: *Gilbert v. Bottle*, 2011 BCSC 1389 at para. 253.
- [97] An assessment of damages for cost of future care is not a precise accounting exercise: *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at para. 21.
- [98] The plaintiff proposed an award of \$183,000. She arrived at this figure by using Ms. Clark's analysis, but constraining the period of use of the various treatments to 10 years prior to the end of her life expectancy (or for a further 18 years).
- [99] The defendant accepts the recommendation for future acupuncture treatment given that the plaintiff said this helped control her pain. However, the defendant says that none of the other cost items were properly supported.
- [100] I largely agree with the defendant's critique, and reject the proposed amounts for vitamins, a naturopath, a dietician, neurofeedback, transcranial stimulation, and hyperbaric oxygen treatment. In relation to the vitamins, I note that the plaintiff was already taking vitamins before the Accident. In relation to the balance of recommended treatments, there was insufficient evidence explaining how these treatments could be expected to make a material difference to the plaintiff's situation. Indeed, Dr. Arseneau was pessimistic that they would be effective.
- [101] Relying on:
- a) the (limited) evidentiary support provided by Dr. Arseneau;
 - b) my observation of the plaintiff's emotional condition;
 - c) the fact that acupuncture therapy has helped the plaintiff in the past;
 - d) the fact that she has received trigger point therapy in the past, and she expressed interest in receiving further injections; and
 - e) the plaintiff's need for guidance on how to increase her energy level;

I am prepared to conclude that counselling, occupational therapy and trigger point injections would be useful to the plaintiff, along with the acupuncture.

[102] These findings support a global future care costs assessment of \$100,000.

VII. SUMMARY

[103] In summary, damages are awarded as follows:

General Damages

\$70,000.00

Future Loss of Capacity

\$150,000

Future Cost of Care

\$100,000

Special Damages

\$9,463.41

TOTAL:

\$329,463.41

VIII. TAX GROSS-UP, STATUTORY DEDUCTIONS, INTEREST, AND COSTS

[104] I leave it to the parties to consider the results of this judgment and address any costs, tax gross-up, statutory deductions, and interest implications accordingly. If they are unable to agree on these matters, they are at liberty to make further submissions, with the plaintiff providing written submissions to the Court within 30 days of this judgment, and the defendant responding 30 days thereafter.

"Branch. J"

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