
CANADA / JUDGMENT

Rea v. Law

2021 BCSC 969

COURT

Supreme Court of British Columbia

DECIDED

20 May 2021

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2021 BCSC 969 Rea v. Law

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Rea v. Law,

2021 BCSC 969

Date: 20210520

Docket: M198629

Registry: New Westminster

Between:

Phoenix Rea

Plaintiff

And

Daniel Law and United Concrete & Gravel Ltd.

Defendants

Before: The Honourable Mr. Justice Jenkins

Reasons for Judgment

Counsel for the Plaintiff:

S. Wittman

Counsel for the Defendants:

S.A. Leong

Place and Dates of Trial/Hearing:

New Westminster, B.C.

November 23-27, 2020

Place and Date of Judgment:

New Westminster, B.C.

May 20, 2021

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INTRODUCTION

- [1] The plaintiff, Ms. Phoenix Rea, was a 23-year-old traffic flagger working in Quesnel, B.C. when she was struck by a vehicle during her work day, on September 18, 2016. Considering the evidence of Ms. Rea at trial, the driver of a pick-up truck deliberately accelerated into her while she was holding a stop sign. Faced with this evidence, the defence has admitted liability.
- [2] As of the date of trial, Ms. Rea was 27 years old.

THE ACCIDENT

- [3] On the afternoon of Sunday, September 18, 2016, Ms. Rea was directing traffic during a long shift when her supervisor told her she needed to stop a vehicle coming too fast into the construction zone, which she did by holding up her "Stop" paddle. The vehicle, a pick-up truck, had driven through an area of the construction zone that was not open to traffic.
- [4] Ms. Rea testified that the pick-up truck did stop, but when a co-worker approached the pick-up truck to take a picture of the license plate, the driver of the vehicle "lunged his truck towards me, there were children on the sidewalk beside us and I said 'you don't move until I tell you to move'". She stated she was in front of the driver's side of the pick-up and the next thing she knew, the pick-up hit the right side of her body with the front driver's side of the vehicle.
- [5] Ms. Rea stated she recalls lifting her feet so she would not get pulled under the truck, she went up onto the hood and was wrenched to her left, fell off the hood such that her right arm hit the side view mirror and "jarred her neck", and she fell to the ground. Ms. Rea stated she fell to the ground "like road kill". She added that she did not hit her head.
- [6] The driver of the pick-up truck drove away from the scene quickly.

PLAINTIFF'S EVIDENCE

The Plaintiff Prior to the Accident

- [7] Ms. Rea was raised and educated in Quesnel, B.C., describing herself as an "average student". She graduated from secondary school in 2011 and briefly attended college, before working as a bartender and at a Dairy Queen. She then obtained a "flagging" or traffic control certificate. She continued to work as a bartender and in a liquor store at a local hotel, to put herself through school while earning her traffic control certificate. She even worked in the local coroner's office for a short period of time, "lifting and moving bodies". She had been a

"flagger" for two years, prior to the accident.

- [8] Ms. Rea testified to having a happy childhood. She was cross-examined at length regarding her relationship with her father, for which she received some counselling, and about disputes between her parents, which were ultimately resolved.
- [9] Ms. Rea's mother, Ms. Tara Rea, testified describing Ms. Rea as an active child and she referred to the bullying endured by Ms. Rea from other students. She described Ms. Rea during her childhood as happy, bubbly and positive.
- [10] Ms. Rea testified as to having "body image issues" while in secondary school, but last saw a counsellor regarding the same prior to the accident. Ms. Rea also recalled having been bullied by friends because of her weight. She decided that she wished to overcome her body image issues and became active physically.
- [11] After secondary school, Ms. Rea became active in dancing, worked out at the gym seven days a week, lifting weights, and was active in physical training. She became an active runner, running up to 10 km at a time.
- [12] Ms. Rea's determination to improve her image resulted in her losing considerable weight, as noted in photos in Exhibit 4, Tab 16 which depicted her in October of 2015. She stated that by 2016, she was very thin and that was important to her as a young woman.
- [13] As a flagger, Ms. Rea testified as to working seven days per week at times, being required to lift items including signs over 50 lbs, and working year round. She would work up to 18 hours per day if there was a storm, but usual shifts were six to eight hours.
- [14] Prior to the accident, Ms. Rea had continued with her physical activity, having obtained a second level black belt in judo and had also developed proficiency in tae kwon do. Also respecting activities, Ms. Rea was active in running, swimming and soccer, as well as dance. She testified to not having any physical health problems during her high school years that were similar to the injuries suffered in the accident.
- [15] As for her outlook into the future before the accident, Ms. Rea testified she was uncertain, knew she did not want to be a flagger as her career, considered returning to school, likely business school, and considered a possible career in the construction industry.
- [16] Mr. Greg Nelson is Ms. Rea's common-law partner. Mr. Nelson testified that he and Ms. Rea met in July 2016. Mr. Nelson is a qualified red seal electrician who has been employed by B.C. Hydro on the power line crew. He testified that he was attracted to Ms. Rea while she was working as a flagger on B.C. Hydro projects, and they flirted. He came to appreciate Ms. Rea as an "excellent flagger", "she knew when to hold traffic" and he trusted her.
- [17] Mr. Nelson testified that Ms. Rea was fun, had a great sense of humour, and had "drive", in that she was working at three jobs concurrently. They began to date in January 2017, after the accident.

- [18] Ms. Amanda Janzen, who was Ms. Rea's flagging partner at Alliance Traffic, also testified as to them working long hours. She said that Ms. Rea was "upbeat", often worked out at a gym or went for runs after an eight-hour shift at work, and she described Ms. Rea as charismatic and easy to get along with. She also discussed Ms. Rea's consideration of seeking work on the safety side of the construction industry but that Ms. Rea was uncertain as to her work future.

The Plaintiff After the Accident

- [19] After the accident, Ms. Rea made the short drive to Ms. Janzen's home. She was then driven to the hospital by Ms. Janzen where Ms. Rea's mother met them. Ms. Rea was discharged from hospital that evening, went home with her mother and laid down. She said her whole body hurt, especially her right shoulder, neck, hip, and ribs.
- [20] Within a day to a few days after the accident, Ms. Rea attended her family physician, Dr. Tudhope, who recommended physiotherapy and gave her a letter recommending she stay off work, which she did. She returned to work on a date in October, which was not clear at trial. Pay stubs indicate her hours of work decreased in the weeks after the accident, when she tried to return to work but she stated she continued to suffer anxiety.
- [21] During the year following the accident, Ms. Rea testified as to being cared for by Dr. Tudhope. She testified that she continued to suffer pain, especially in her shoulder, and physiotherapy was not particularly helpful. She also suffered nightmares, had trouble sleeping, experienced flashbacks to the accident and suffered from panic attacks. She further suffered from anxiety, which was continuing up to the time of trial.
- [22] In the first year after the accident, Ms. Rea attended on a psychiatrist, Dr. Agbodji, who prescribed medicine, although she could not recall what type of prescription. She continued to see Dr. Agbodji on eight occasions, until the summer of 2018. She stated at the time of the accident she was not taking any medication.
- [23] Ms. Rea testified that during the first year after the accident, the flashbacks were horrible and had occurred when she was crossing a street; she imagined vehicles driving towards her, and would recall the accident and the defendant driving away, like he "hit a deer on the road". Her nightmares also included fears of being hit again.
- [24] As for sleeping habits, Ms. Rea stated she has not slept as well as she had before the accident. She described how she could not get comfortable due to her injuries, which included in particular her hip which became worse, as well as shoulder and neck pain. She was referred to an orthopaedic surgeon who confirmed there were no broken bones, gave her cortisone which did not help and arranged for an MRI for her shoulder.
- [25] A few months after the accident, she suffered from headaches, which she described as migraines, saying that during the first year after the accident her shoulder pain and the migraine headaches were "the worst".

- [26] Beginning September 2017, Ms. Rea stopped working at Alliance Traffic and attended a Business Administrative Assistant program at the College of New Caledonia. She completed the eight-month program and graduated in May 2018. She testified to having suffered pain, anxiety, poor sleep and headaches throughout the time she was in the Business program. While attending the program she worked part-time at a liquor store.
- [27] Ms. Rea and Mr. Nelson continued their relationship and began to live together in the spring of 2017, in Quesnel. In August of 2018, they moved to Port Alberni, as Mr. Nelson was assigned to work on Vancouver Island. While in Port Alberni, Ms. Rea was unable to obtain employment and testified to becoming more depressed, but she did find a new doctor and attended physiotherapy. She did not return to working out at a gym or running, however, as she had prior to the accident.
- [28] In December 2018, Mr. Nelson was transferred to Prince George where Mr. Nelson purchased a house in which he and Ms. Rea continue to live. Responsibility for house chores was primarily left with Ms. Rea, whereas Mr. Nelson undertook the more physical outdoor maintenance. Ms. Rea testified that she performed light work at home, that her work pace was slower than before the accident, that her hip would be sore after vacuuming, and she was relying more on her left arm and hand than before the accident.
- [29] In January 2019, Ms. Rea obtained an office position at the Northern Regional Construction Association (NRCA), working as a project coordinator before "moving up" in July 2019, to a position as manager of member relations. The change in her job resulted in an increase in her income from \$45,000 to \$48,000. She added that the change in her position resulted in additional stress, as did the work environment, which resulted in her leaving her job on May 29, 2020. She stated that her injuries compounded the resulting anxiety from work pressures, which resulted in her leaving. She did testify that she continued to suffer from pain and anxiety, especially when she was in the more senior position.
- [30] In Prince George, Ms. Rea secured a new family doctor, Dr. Butler, and received a referral for continuing with physiotherapy and counselling. She attended counselling with Ms. Tracy Larson. She also began to see a chiropractor, Dr. Krell, and attended with Dr. Krell on several occasions, commencing in July 2019 to the date of trial.
- [31] Ms. Rea testified to having problems sleeping, with anxiety, headaches and nightmares, after the move to Prince George. She added that she continues to deal with pain, which she treats with cannabis in various forms.
- [32] Ms. Rea testified to having gone into a downward spiral early in 2020, after experiencing a migraine headache that lasted for a week. She had difficulty keeping up with her work, her anxiety worsened, she slept less and she continued to suffer pain. Once COVID-19 began to change habits for everyone, she testified that she continued to fall behind at work and became more depressed, which resulted in her seeking help from Dr. Butler and her counsellor, Ms. Larson. She stated she was advised to leave her job due to the struggles she was encountering and left on medical leave for her stress and anxiety. She left her work at

NRCA in May 2020.

- [33] After leaving her job, Ms. Rea was taking prescribed medicine for her mood. She concluded her direct examination by stating that in the months before trial, she continued to experience pain and headaches, although less often, and continues to be anxious.
- [34] Regarding employment, Ms. Rea testified to having been applying for jobs without success. There is no clear career path for Ms. Rea but she believes the continuing anxiety and other injuries suffered in the accident reduces the type of employment for which she is capable. She stated that she never intended to continue in a career as a traffic flagger, she wants to return to the workforce, and she is hoping to be a mother in the future.
- [35] She has gained considerable weight since the accident and continues to be concerned about her emotional state.
- [36] On cross-examination, Ms. Rea was questioned about her health prior to the accident. She spoke of irritable bowel syndrome ("IBS") and counselling as early as her kindergarten years, being bullied by other children due to her weight, her awareness of the difficulties her parents had in their relationship and in Ms. Rea's relationship with her father, none of which appear to bear on the injuries or her conduct post-accident.
- [37] Her credibility was not seriously challenged other than to attempt to emphasize her pre-existing cognitive issues related to family problems, however, any emotional suffering of Ms. Rea was, according to her and her mother, resolved by the time of the accident, which I accept based upon their testimony of how Ms. Rea was in excellent health and at a good place in life immediately before the accident.

LAY WITNESSES

Testimony of Mr. Greg Nelson

- [38] Ms. Rea's life partner described her pre-accident character as positive, driven, as she held three jobs at once, having a good sense of humour, and an excellent flagger who "knew when to hold traffic". Mr. Nelson testified that Ms. Rea told him she did not want to be a flagger forever.
- [39] After they began to live together in April 2017, Mr. Nelson noticed her poor sleep, pain in her hip, shoulder, and neck, and believed she was not totally forthcoming with him as to her injuries at the time they first got together.
- [40] While the couple were living in Port Alberni, he described Ms. Rea as anxious, stressed, "couldn't contribute", had trouble sleeping and noted she was in more and more pain.

- [41] When they moved to Prince George, he would work out of town during the week, and be home on weekends. He noted how Ms. Rea had difficulty with household chores and eventually "started to fall apart", and the division of chores stopped. If she tried to mow the lawn, she would be in pain for two days and it would hurt her to carry a laundry hamper. Eventually, they hired a contractor to mow the lawn and care for the outside areas of the home.
- [42] In Prince George, Mr. Nelson noticed "she would mention pain in passing", and was going to counsellors to "get past the accident"; eventually at the start of 2020 she "spiralled downwards", she was concerned regarding her work, she shut down, they would argue, on occasion she would not talk, and she missed some work. He noted that she performed exercises recommended by her physiotherapist, continued on prescriptions for pain, would go in the hot tub most nights to relieve pain, and she was also consuming THC or cannabis products for pain relief.
- [43] Mr. Nelson also testified to Ms. Rea reporting continued headaches, some of which are migraine headaches, nightmares and pain. He also testified about how her weight gain has affected their relationship. He emphasized he had no intention of leaving Ms. Rea and they are hoping to have a family together.

Testimony of Ms. Amanda Janzen

- [44] Ms. Janzen was Ms. Rea's work partner at the Alliance Traffic Group and has been a flagger for 20 years. They became friends while working together and Ms. Janzen described Ms. Rea before the accident as "bubbly, outgoing, charismatic, easy to get along with, honest and willing to do anything at work".
- [45] Ms. Janzen received a phone call from Ms. Rea soon after the accident and Ms. Rea appeared at Ms. Janzen's house soon after that. Ms. Janzen said that Ms. Rea "appeared to be in shock" and she took her to the hospital.
- [46] Continuing, she described Ms. Rea on her attempted return to work after the accident, that she would "flinch" if cars approached fast, could no longer help Ms. Janzen in placing heavier signage she had moved previously, and spoke of pain and would "wince" with pain when she tried to keep working.
- [47] Ms. Janzen described how Ms. Rea quit as a flagger after an incident where a truck travelled too fast towards Ms. Rea, and she began to hyperventilate, had tears, and was shaking and crying. After 20 minutes, Ms. Janzen sent Ms. Rea home.
- [48] Ms. Janzen testified how Ms. Rea and she had reconnected recently and that Ms. Rea was struggling with anxiety, lack of sleep, had "retreated", was no longer "bubbly and outgoing", and no longer had been running as she had prior to the accident.

Testimony of Ms. Tara Rea

- [49] Ms. Rea's mother, Ms. Tara Rea, testified regarding her daughter's childhood and activities prior to the accident including ballet, hip hop, swimming, tae kwon do and soccer, her bubbly personality, and that as an adolescent she had no physical problems. Ms. Tara Rea testified how her daughter was bullied at school due to her weight and early development. She emphasized that her daughter's weight was a "big issue" and that, in her early 20s, her daughter was very active, in good shape, positive and "in a good place".
- [50] After the accident, she testified as to how Ms. Rea was in pain, shock and tried to work a few days after the accident but was terrified she would be hit again. She said that Ms. Rea was in pain "all the time", was frustrated by her limitations, and noticed significant pain by how Ms. Rea would "carry herself", her body language. Also after the accident, Ms. Tara Rea described how Ms. Rea's social life "definitely diminished"; she had nightmares, head aches, anxiety and "pain all the time".
- [51] Ms. Tara Rea concluded regarding her concern for her daughter's future, that her daughter "worries about everything", is not the happy person she used to be, and that she wants to expand her education.
- [52] On cross-examination, Ms. Tara Rea spoke of how the "toxicity" at the NRCA "amplified her inability to cope".

Testimony of Ms. Cassidy Thomas

- [53] Ms. Cassidy Thomas is a friend of Ms. Rea, who previously worked with her at the NRCA. She testified as to how Ms. Rea's role change at work and increased responsibility led to her anxiety and to complaints of Ms. Rea's work. Ms. Thomas described Ms. Rea as honest and thoughtful, but complained of the workload. Ms. Thomas also noted how they spoke of Ms. Rea's pain, lack of sleep and anxiety which was affecting her work.
- [54] On cross-examination, Ms. Thomas spoke of the problem for Ms. Rea at work, which was her workload and the forgetfulness of the Association's manager. She added that the work was "too much" for her, and it was taking longer to get tasks done after Ms. Rea took on the new and more responsible position.

MEDICAL EVIDENCE

- [55] The medical evidence in this case was not as extensive as in many other motor vehicle cases involving serious injuries.

Dr. Tina Krell

[56] Dr. Krell is a chiropractor who was qualified to opine on chiropractic injuries with an ability to diagnose cervicogenic headaches. Dr. Krell prepared a report dated February 13, 2020 and testified at trial by video connection for cross-examination. She had been treating Ms. Rea since July 2019.

[57] Dr. Krell completed a physical examination of Ms. Rea on July 5, 2019 among other tests as described in her report. Her diagnosis and prognosis stated:

1. Chronic cervicalgia with radiculopathy and myofascial pain syndrome.

Diagnosis is based on positive Maximal Cervical Compression Test, palpatory tenderness over cervical paraspinals, decreased cervical range of motion.

2 Costovertebral dysfunction at T3/4/5 Right with associated myalgia of the right upper traps, rhomboids and levator scapulae.

3. Chronic migraine headaches.

Diagnosis is based on subjective findings of sensitivity to light and sound, pain level ranging from 6-10/10.

Ms. Rea's injuries are chronic in nature and ongoing for 4 years since the MVA on September 18, 2016. Her injuries appear to be permanent in nature and she gets temporary relief with a multimodal approach. Her injuries and chronic pain with migraines have caused Ms. Rea to miss work on multiple occasions which indicates she is unable to do her job when her pain is at its worst. It is my recommendation that Ms. Rea try reduced hours (4 hours) of work per day to see if her symptoms decrease with reduced work stress.

[58] On cross-examination, Dr. Krell was asked about cervical lordosis, or abnormal curvature of the spine, as to whether it could cause pain and headaches, to which she agreed that abnormal curvature of the spine could be brought on by trauma. This finding by Dr. Krell is consistent with a similar finding by Dr. Butler.

Dr. Eric Butler

[59] Dr. Butler has been Ms. Rea's family doctor since January 2019. He was qualified as an expert in family medicine and the management of treatment for patients with chronic pain. He provided a brief report dated July 28, 2020. He also appeared by video link from Prince George.

[60] Dr. Butler's report included the following statements:

With regard to her right shoulder injury, my diagnosis currently is chronic post-traumatic right shoulder and neck pain with a neuropathic character.

I can see in her online file that Ms. Rea did not have any imaging tests of her shoulder prior to her MVA in 2016, and since that time has had multiple tests done annually for her shoulder pains. The clinical course of chronic pain present for this duration is that it is unlikely to ever fully resolve. I see no evidence in the information I have access to that this pain existed prior to her MVA.

She experiences frequent migraine headaches which appear to be complicated by flares of her muscular pain in the neck; this would be consistent with her presentation and history. On clinical exam she experiences paraesthesias in abduction of her right shoulder and has cervical spinal tenderness, as well as loss of cervical lordosis on neck X-ray. The latter finding is consistent with ongoing muscular spasm due to chronic neck pain.

Ms. Rea has also described extensive anxiety symptoms consistent with mild post traumatic stress disorder since the accident. These are characterised as flashbacks, nightmares, sleep disturbance, hypervigilance, and an exaggerated startle response, as well as decreased positive emotions and persistent negative state. These symptoms are likely to persist in some amount as well and are not expected to completely resolve.

Although Ms. Rea does deal with a significant burden of symptoms that impact her daily quality of life I do not believe she is disabled as a result; however, it is difficult to accurately state what the ramifications of a long-term diagnosis of chronic pain and PTSD will be. It is likely that many aspects of her life will be permanently adversely affected by these changes. She will likely require ongoing physiotherapy and counselling for some time.

- [61] Dr. Butler testified regarding the multiple medications he had prescribed for Ms. Rea for pain, sleep, headaches, anxiety and depression. He also testified that he approved of Ms. Rea's continuing use of cannabis as a second line of medications for patients that do not respond to more common prescription medicine.
- [62] It is noted that Dr. Butler was not cross-examined and his opinions were obviously not challenged by the defence.

Ms. Tracy Larson

- [63] Ms. Larson is Ms. Rea's treating counsellor. She was qualified as an expert in clinical counselling and to administer cognitive behavioural therapy for depression and anxiety. Ms. Larson has earned a Master of Arts degree in Counselling Psychology and is a Registered Clinical Counsellor with the British Columbia Association of Clinical Counsellors.
- [64] Ms. Larson explained that she does not make diagnoses but uses her assessment tools in planning her sessions with clients. She stated that between May 2019 and July 2020, she had roughly 30 sessions with Ms. Rea.
- [65] Ms. Larson administered several self-reporting assessments of Ms. Rea, which were referred to in her report. Regarding the same, she noted, at p. 2 of her report:

Over the course of 30 sessions I worked with Ms. Rea using Cognitive Behavioural Therapy (CBT) tools to help her gain strategies to improve her functioning, to learn methods to reframe negative thoughts, and to engage in pleasant and relaxing activities. Ms. Rea's report of her symptoms has fluctuated over time; however, she has never reported symptoms in the mild category. The chart above shows the results of Ms. Rea's report of mood, sleep, post-traumatic stress symptoms and pain since October 4, 2019. Ms. Rea's mood symptoms have fluctuated and are currently severe to extreme. Ms. Rea's report of severe insomnia continues. Ms. Rea's post-traumatic stress symptoms have only improved slightly since the first assessment and her report of pain remains in the severe to extreme category.

[66] Regarding the future, Ms. Larson stated, at p. 3:

Post-trauma symptoms may resolve with psychological support; however, Ms. Rea reports minimal improvement in her symptoms which leads the writer to believe that she may be dealing with these issues in the long-term.

[67] On cross-examination, Ms. Larson was asked about Ms. Rea's prior family issues, especially concerning her father, which resulted in difficult emotions for Ms. Rea. Ms. Larson said that Ms. Rea had reported that many of the family issues had resolved prior to the accident.

Dr. Mitchell Spivak

[68] Dr. Spivak was qualified to opine on psychiatric issues and was the only witness called by the defence. Dr. Spivak interviewed Ms. Rea via video on July 20, 2020 due to the COVID-19 pandemic and also appeared at trial by video link.

[69] In his report dated July 21, 2020, Dr. Spivak stated, under the heading of "Causation":

Ms. Rea's issues with dysphoria arise out of her ongoing experience of her physical limitations. To the extent that her pain and her physical limitations are attributable to the indexed accident, one would commensurately see her dysphoria as relating to the accident as well. The trauma related symptoms that she describes correlate directly with the accident. There is also a logical and temporal association between the onset of her symptoms and the indexed accident. Recently, Ms. Rea has experienced a recurrence in anxiety that does not relate to the accident. Nonetheless, the symptoms that pertain to motor vehicles seemingly relate to the indexed accident, as there are no other explanations for them.

[70] I conclude in reading the above paragraph that Dr. Spivak has concluded there is no other explanation for Ms. Rea's psychiatric diagnosis, i.e. other than the accident. In cross-examination, in spite of his statement in his report that the recent recurrence in anxiety does not relate to the accident, he agreed that Ms. Rea's most recent mental health issues were materially contributed to by the accident.

- [71] Dr. Spivak described Ms. Rea's prognosis as "fair", that "It is unclear whether she requires more psychotherapy that addresses her challenges stemming from the indexed accident". Dr. Spivak also stated that Ms. Rea's symptoms "may have somewhat improved over the past few months with the addition of an antidepressant but that he did not believe she would derive significant benefit from a new antidepressant.
- [72] Dr. Spivak also agreed on cross-examination that the reference in his report to Ms. Rea being in a "toxic" work environment were words which he considered to be his, not Ms. Rea's description, and he did not recall any specific description of stress at the NRCA workplace by Ms. Rea.
- [73] I note that on cross-examination, Dr. Spivak agreed that more counselling would be beneficial, as Ms. Rea has an increased likelihood of relapse.

FINDINGS ON INJURIES AND CAUSATION

- [74] Considering the nature of the accident and the highly traumatic circumstances which resulted in Ms. Rea being struck by a fast-moving pick-up truck and thrown into up onto the hood of the truck before landing on the ground, without minimizing the extent of her injuries, Ms. Rea was fortunate that her injuries were not more serious. She has suffered bruising and pain through the right side of her body including her neck, right shoulder and right hip, which continued to the date of trial. She has also continued to suffer headaches.
- [75] In addition to her physical injuries, Ms. Rea has suffered with nightmares, panic attacks, anxiety and post-traumatic stress symptoms. She continues to have difficulty sleeping. Overall, her injuries and psychological injuries have been affecting her personal relationships, her ability to work, and her ability to generally enjoy life.
- [76] In assessing the impact of the accident on the health and psychological well-being of Ms. Rea, one must consider her life before the accident, particularly how she was bullied and embarrassed by her peers at a young age due to her weight. Ms. Rea determined that she would help herself and went to great lengths to physically and mentally overcome her issues with weight and, as she is reported to have told Dr. Spivak, which was included in his report at p. 5:

She describes having stability for a period of a few years preceding the indexed accident. She describes herself as having been at a point in her life where she was happy, and she was as physically fit as she had ever been before.

- [77] Ms. Rea was determined to improve herself and her lifestyle, and she did so. I find, based upon a review of her testimony and that of others regarding her past and present self, she wants to return to the place she was in before the accident and has not malingered in any way. She is determined to do whatever possible to return as much as possible to the person she was at the time of the accident.

[78] Since the accident, Ms. Rea has continued to experience pain, serious cognitive issues, a resultant weight gain, and has suffered a significant loss of self-confidence and lifestyle.

DAMAGES

Non-Pecuniary Damages

[79] There have been hundreds of judgments of this court referencing the list of non-exhaustive factors to consider when assessing an award for non-pecuniary damages as set out in *Stapley v. Helsjet*, 2006 BCCA 34, which are:

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

[80] Ms. Rea's circumstances include all of the factors referenced in *Stapley* and it is likely, based upon all of the expert testimony, she will continue to suffer with most of these factors for many years. Of particular note in Ms. Rea's case are: her young age, the very traumatic experience of the accident, i.e. being struck by a fast-moving vehicle while attempting to manage traffic, the effects of her injuries which have completely altered her lifestyle and opportunities to plan her future, and her stoicism. Her future is very uncertain and depends to a large degree on being able to cope with and manage her emotions.

[81] Ms. Rea seeks an award of non-pecuniary damages of \$125,000 and refers to the following decisions as cases involving comparable circumstances:

· *Pang v. Burns*, 2020 BCSC 356 in which the plaintiff was a 52-year-old woman who suffered similar injuries over a shorter duration than Ms. Rea, was unlikely to return to work, had a career "in its infancy", suffered aggravation of pre-existing depression, and incurred both physical and cognitive injuries including headaches and neck pain, not unlike Ms. Rea. The plaintiff in that case was awarded \$105,000 in non-pecuniary damages.

· Gill v. Huber, 2020 BCSC 519, in which the plaintiff was a 63-year-old, woman who suffered similar injuries which were slightly greater than those of Ms. Rea, a loss of her employment and chances for future employment and loss of personal activities. Ms. Gill was awarded \$145,000 in non-pecuniary damages. Of significance, however, to Ms. Rea is that she suffered her injuries in the prime of life and potentially could suffer from the same for many more years.

· Williams v. Sekhon, 2019 BCSC 1511, in which the 32-year-old plaintiff suffered both physical injuries plus anxiety and depression, however, he had his active life in sports reduced due to injuries, but not curtailed, and he suffered the loss of satisfaction from his prior employment, and being less social. He was awarded \$135,000.

· Dhadda v. Bradley, 2019 BCSC 1840 resulted in an award of \$110,000. Gomery J. found a lack of credibility on the part of the plaintiff and provided false information to examining physicians, suffered chronic neck and upper back pain, anxiety disorder caused by the pain and became unable to continue working full-time in her former employments. Also, the court found that the plaintiff had failed to mitigate her losses by failing to follow the advice of her doctor.

[82] The defendants submit an appropriate award of non-pecuniary damages would be in the range of \$55,000 to \$65,000 and referred to Stapley and six additional authorities:

· Brass v. Von Chudentiz, 2020 BCSC 343;

· Carleton v. Warner, 2020 BCSC 436;

· Dennison v. Jensen, 2019 BCSC 725;

· Dhami v. Madden, 2020 BCSC 573;

· Hay v. Benzer, 2014 BCSC 1522; and

· Lin v. Yim, 2019 BCSC 1071.

[83] I have reviewed all of the above cases and found that for the most part, the physical injuries were not as significant as were those of Ms. Rea, and more significantly, the emotional injuries including depression, anxiety and PTSD were nowhere near as significant as is the case with Ms. Rea, if the plaintiffs in those cases did suffer emotional injuries at all.

[84] In Carleton, the plaintiff was found to have endured pain for three years, that would likely be indefinite, however the plaintiff's injuries were only found to "somewhat limit" her work capacity, recreational activities and opportunities; she did not miss any work and was able to take a three-month trip to Europe.

[85] In Dhami, the court found the plaintiff's "accident-related injuries and symptoms to be severe", but that the plaintiff was able to successfully complete registered nurse training and work as an emergency room nurse with some minor physical accommodations, and was able to take trips to England and India without difficulty.

- [86] In Hay, the physical injuries suffered were similar but not as severe and the plaintiff's emotional suffering was much less than with Ms. Rea.
- [87] Finally, in Lin, the court stated "I do not accept that the plaintiff's injuries impacted her life to the extent that she claims."
- [88] Considering the authorities provided to me and the facts of this case, I find those cases submitted by Ms. Rea are far more applicable to the case before me than those submitted by the defence. I also find that Ms. Rea has been conservative in the amount claimed under this head and find that the award which would most fairly compensate her for all of the Stapley factors would be \$135,000, which I hereby order.

Past Loss of Income Capacity

- [89] It is difficult to estimate what Ms. Rea was capable of earning since the accident considering:
- a) her age at the time of the accident, i.e. 23 years;
 - b) her admission that she did not intend to continue as a traffic flagger as a career;
 - c) her academic record which was not stellar;
 - d) her determination to succeed as evidenced by her overcoming the bullying and depression of her youth, her willingness to work three jobs at a time; and
 - e) her desire to return to a college education, which she has done in graduating in the Business Administrative Assistant program at the College of New Caledonia.
- [90] Although Ms. Rea did work for part of the time since the accident, including almost 18 months at the NRCA before leaving and some part-time work, she also attended college for eight months. If not for the accident, she likely would have continued for a longer period of time as a traffic flagger, as before the accident she was healthy and enjoying her work. There was a time when she returned to work as a flagger, but due to her injuries did not continue.
- [91] Ms. Rea is not claiming loss of past income earning capacity for the time she and Mr. Nelson lived in Port Alberni.
- [92] Both past and future loss of income capacity are to be assessed according to the same legal test, that the injuries suffered have brought about an impairment of a plaintiff's ability to earn income: *Perren v. Lalari*, 2010 BCCA 140 at paras. 21, 32 and 33.
- [93] More recently, the framework established in *Perren* was summarized in the decision of *Turner v. Dionne*, 2017 BCSC 1905 at para. 318:
- [318] The plaintiff may prove the amount of the past or future loss of earning capacity using an earnings approach or a "capital asset" approach: see *Perren*, at para. 32. Both are correct. The capital asset approach is often more appropriate where the pecuniary loss is not easily measured (as is the case here). Either way, the court must endeavour to quantify the

financial harm accruing to the plaintiff over the course of her working career, taking into account relevant and realistic negative and positive contingencies. The assessment is an exercise of judgment, not a mathematical calculation. Ultimately, the court must base its decision on what is reasonable in all of the circumstances. Projections, calculations and formulas are only useful to the extent that they help determine what is fair and reasonable. See, for example, *Parypa v. Wickware*, 1999 BCCA 88, at para. 70, and *Jurczak v. Mauro*, 2013 BCCA 507, at para. 36.

[94] Both counsel have referred me to the decision of *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 (S.C.) at para. 8, in which the court found four factors to be relevant to the assessment of a loss of earning capacity:

1. [Whether] the plaintiff has been rendered less capable overall from earning income from all types of employment;
2. [Whether] the plaintiff is less marketable or attractive as an employee to potential employers;
3. [Whether] 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. [Whether] the plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market.

[95] Considering all of the evidence respecting her ability to work in relation to all of the factors listed in *Brown*, I am satisfied that Ms. Rea has suffered a diminishment in her earning capacity. In particular, I note the findings of Dr. Krell in recommending part-time work; the continuing effect of pain upon her ability to do physical labour and lift heavy objects; the opinion of Ms. Larson respecting Ms. Rea's ongoing symptoms and her mental health; and the conclusions of Dr. Butler regarding her ongoing suffering from migraines, sleep disturbance and pain. Altogether, I am satisfied that Ms. Rea's condition at the time of trial is such that she satisfies the four factors set out in *Brown*.

[96] The defence submits an appropriate award for past wages would be \$904 based upon seven days of work missed (calculated at eight hours per day, at \$19 per hour) while working as flagger. They submit she is not entitled to any other period of time for lost wages since the accident.

[97] Ms. Rea claims for past loss of income capacity in an amount of \$25,000 net of tax, the amount of \$25,000 being an assessment of what she could have earned in the 50 months since the accident but for the accident. That assessment took into consideration the time missed immediately following the accident and all other time she was not working up to the trial, but did not include the time she was at college, the time she spent in Port Alberni, and the approximately 18 months she worked at the NRCA.

- [98] Ms. Rea submits that she could have been working as a traffic flagger for the year after the accident, which is not unreasonable. She had not intended flagging as a career but the job would have allowed her to earn money for her future education.
- [99] An assessment of past or future loss of income is always an estimate of what may likely have happened during the period in question. I accept that Ms. Rea would have continued as a traffic flagger for at least the three months following completion of her college program. She worked multiple jobs concurrently before the accident and I agree that she would have done so for the summer of 2018, if she could. I accept the plaintiff's estimate that in the summer of missed flagging, Ms. Rea would have earned an additional \$7,000 gross income.
- [100] I also find that but for her headaches, including migraine headaches and pain she was experiencing while working at the NRCA, she would likely have continued on at that job. But for the accident, she would have been better able to cope with the stresses and symptoms she was experiencing. If so, she would have earned approximately \$24,000 gross for six months.
- [101] I conclude that a fair and reasonable assessment for past loss of income earning capacity in this case is \$31,000 gross less 20% for a net loss of \$24,800.

Future Loss of Income Earning Capacity

- [102] In assessing past loss of earning capacity, I have referred to the decisions in Perren and Brown for guidance and the principles in both are also applicable when assessing a loss of future earning capacity.
- [103] In Perren at para. 32, the Court of Appeal stated:
- [32] A plaintiff must always prove, as was noted by Donald J.A. in Steward, by Bauman J. in Chang, and by Tysoe J.A. in Romanchych, that there is a real and substantial possibility of a future event leading to an income loss. If the plaintiff discharges that burden of proof, then depending upon the facts of the case, the plaintiff may prove the quantification of that loss of earning capacity, either on an earnings approach, as in Steenblok, or a capital asset approach, as in Brown. The former approach will be more useful when the loss is more easily measurable, as it was in Steenblok. The latter approach will be more useful when the loss is not as easily measurable, as in Pallos and Romanchych. A plaintiff may indeed be able to prove that there is a substantial possibility of a future loss of income despite having returned to his or her usual employment. That was the case in both Pallos and Parypa. But, as Donald J.A. said in Steward, an inability to perform an occupation that is not a realistic alternative occupation is not proof of a future loss.
- [104] Dr. Butler, whose evidence was not challenged, opined that Ms. Rea will likely continue to suffer chronic post-traumatic right shoulder pain and neck pain with neuropathic character, specifically that those symptoms will likely never fully resolve. He also opined on Ms. Rea's anxiety, post-traumatic stress disorder, flashbacks, nightmares, sleep disturbance,

hypervigilance, exaggerated startled response and generally negative state are all likely to continue and are not expected to fully resolve. Those opinions do consider there will likely be some improvement over time, however, assessing when and how much resolution there may be is largely speculative.

- [105] Dr. Butler did state in his report that "it is likely that many aspects of her professional life will be permanently adversely affected by these changes".
- [106] Ms. Larson opined Ms. Rea had not seen resolution of her symptoms of mood, insomnia severity, post-traumatic stress and pain, and she may be experiencing those symptoms over the long term.
- [107] Even Dr. Spivak, the expert witness for the defence, opined that as a result of the accident, Ms. Rea is at higher risk of detachment from the work force and at a higher risk of experiencing future mental health issues.
- [108] In written submissions, the defence has not attempted to apply the evidence regarding the likely future for Ms. Rea to the factors enumerated in the authorities, specifically, Brown. Instead the defence states "the plaintiff has failed to establish on the evidence that there is a real and substantial possibility she will suffer a loss in the future in regards to her ability or capacity to earn income, attributable to the MVA".
- [109] Based upon all of the evidence including the opinions of Dr. Butler, Ms. Larson and Dr. Spivak referred to above, I disagree with the rather dismissive submission of the defendants. Ms. Rea clearly continues to suffer from the effects of the accident in a very significant manner and the evidence establishes she is likely to continue to suffer from her injuries for a very considerable period of time into the future.
- [110] At the time of the accident, Ms. Rea had not completed any post-secondary education but she has since obtained a certificate in Business Administrative Assistant program. Other educational opportunities are possible. Her work experience had not led to a particular interest or proficiency in any field of work, however, she did have some success while working at the NRCA for 18 months under stressful conditions considering her health.
- [111] The medical evidence supports that future professional opportunities are likely diminished due to her accident-related injuries.
- [112] Ms. Rea submits that a reasonable assessment of a loss of future earnings is \$250,000. That assessment came about after considering a \$31,000 gross loss of income from the date of the accident to the date of trial. Combining the gross pre-trial loss with her actual earnings, she would have earned an income of \$101,000 pre-trial. Thus, they suggest that there was a 23.5% loss as a percentage of her earning capacity.

- [113] The plaintiff then took her earnings as an administrative assistant of \$45,000 to age 65, subject to the net present value multiplier set out in the CIVJI: Civil Jury Instructions, 2nd ed. (Vancouver: Continuing Legal Education Society of British Columbia, 2009) ("CIVJI") of 28.8051 (1.5% for 38 years). This rough calculation comes up with an amount of \$1,296,000, and from that amount the plaintiff applied a negative contingency for pre-existing psychological factors of 25%, which resulted in an income of \$1,036,000.
- [114] Using the figure of \$1,036,000 as a rough equivalent of her lifetime earnings, and applying the 23.5% loss as a percentage of her earning capacity, this would result in a loss of \$243,460. That amount was rounded to \$250,000.
- [115] The defence did not provide any calculations as to what may have been a future loss of earning capacity, simply denying there was any loss.
- [116] Any calculation of future income capacity loss is necessarily an estimate that must be based upon the evidence available to the court. Using the starting salary Ms. Rea earned at the NRCA and the CIVJI multiplier to age 65 against the loss is not unreasonable, as it would take into account the contingencies of whether or not the plaintiff would remain in the workforce to age 65.
- [117] I therefore conclude that the calculations submitted by the plaintiff are reasonable and are, as much as possible, based upon the facts in this case. As counsel has stated, the amount calculated by the plaintiff amounts to roughly 5 years' salary at the NRCA. The reduction based upon pre-existing psychological conditions was generous, and so I order a future loss of income earning capacity of \$250,000.

Cost of Future Care

- [118] Ms. Rea has provided a detailed calculation of the costs of future care which she submits amounts to \$104,000. The claim includes recommended care items for prescriptions, medical marihuana, counselling, occupational therapy, chiropractic, naturopath, physiotherapy and yard work. I accept there is an evidentiary basis for the items claimed: see *Warick v. Diwell*, 2017 BCSC 68 at para. 206; and *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 39.
- [119] The defendants have not specifically addressed the issue of cost of future care in their written submissions. However, the defendants have responded to some of the items claimed as part of the cost of future care under the heading of special damages. They object to the costs of counselling due to not being referred to counselling by Dr. Butler, however, Dr. Butler did recommend counselling. The defendants also objected to a portion of the costs for counselling in which Ms. Rea discussed family issues which were pre-existing the accident. Marihuana costs were also disputed as were the costs of some medication. Presumably, the defendants dispute those costs as part of the claim for the costs of future care. Dr. Butler did testify, however, that he recommended marihuana therapy for Ms. Rea.

- [120] The defence has admitted that the test for special damages is that of reasonableness in which medical justification is a factor. I agree although not all items claimed, either as special damages or the cost of future care, require medical justification. The test is reasonableness based upon the circumstances.
- [121] I have reviewed the authorities provided to me by counsel on this issue, which were *Dzumhur v. Davoody*, 2015 BCSC 2316 at para. 244, *Smith v. Chui*, 2020 BCSC 745 at paras. 176-178, *Carillo v. Deschutter*, 2018 BCSC 2134 for the plaintiff and *Redl v. Sellin*, 2013 BCSC 581 at para. 55, provided by the defendants.
- [122] I have reviewed all of the costs anticipated and included in the chart on p. 24 of Ms. Rea's submissions and find all of those costs reasonable and medically justified in relation to Ms. Rea's injuries. Reviewing my notes from the submissions, I understand the adjusted amount of the cost of future care is \$104,000 and not the \$209,339 originally claimed, and so I award the adjusted amount of \$104,000 as reasonable.

Special Damages

- [123] The plaintiff claims special damages amounting to \$13,572.78. The defendants accept only \$1,605 of that amount as calculated at para.16 of their written submissions.
- [124] The claims of the plaintiff include the costs of chiropractic care (net costs), the fees of Tracy Larson, prescriptions charged to Ms. Rea after submissions to Mr. Nelson's spousal benefit plan, medicinal marihuana, and \$372.75 for lawn care necessitated by Ms. Rea's inability to do heavy work while Mr. Nelson was working out of town.
- [125] As I found in the case of the other heads of damages, I find the claim for special damages by Ms. Rea to be very reasonable and supported on the evidence and award the sum of \$13,572.78 in special damages.

Summary of Damages

- [126] In conclusion, Ms. Rea will be awarded the following in damages:

Non-pecuniary loss:

\$135,000

Past loss of income capacity:

\$24,800

Future loss of income capacity:

\$250,000

Costs of future care:

\$104,000

Special damages:

\$13,573

Total:

\$527,373

COSTS

[127] Ms. Rea has been successful in all aspects of her claims which would entitle her to an award of costs. I suspect, however, there may be factors relating to costs of which I may not be aware and so should the parties not agree on costs, they may arrange a hearing for one hour through Supreme Court Scheduling to make submissions on costs.

"Jenkins J."

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