

CANADA / JUDGMENT

## Reely v. Zhu

2020 BCSC 1520

### COURT

Supreme Court of British Columbia

### DECIDED

14 October 2020

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2020 BCSC 1520 Reely v. Zhu

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Reely v. Zhu,

2020 BCSC 1520

Date: 20201014

Docket: M176801

Registry: Vancouver

Between:

Laura Michelle Reely

Plaintiff

And

Ligang Zhu, Rui Fang Zhao

Defendants

Before: The Honourable Mr. Justice Gomery

Reasons for Judgment

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Place and Dates of Trial:

Vancouver, B.C.

September 14-18 and 23, 2020

Place and Date of Judgment:

Vancouver, B.C.

October 14, 2020

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## Introduction

- [1] Ms. Reely was injured in September 2015, when the vehicle she was driving collided with the defendants' vehicle. She sues for negligence and the defendants admit liability. The trial concerns the assessment of Ms. Reely's damages.
- [2] Ms. Reely seeks damages of approximately \$926,000. The defendants propose an award of \$178,000. By far the most substantial point of difference lies in Ms. Reely's claims in respect of lost past and future earning capacity: Ms. Reely claims \$727,486 and the defendants say that she should receive \$77,566.
- [3] The issues are tightly focused. The defendants do not challenge Ms. Reely's credibility or her overall reliability. They did not call expert evidence concerning Ms. Reely's injuries and her condition in light of her injuries. They accept that Ms. Reely's injuries prevented her from carrying on in her occupation as a care aide at the time of the accident and that her ability to work in all capacities has been adversely affected. They maintain that she failed to take reasonable steps to find alternate employment to mitigate her loss until the second half of 2019. Their case is that the future financial impact of Ms. Reely's injuries is relatively muted, while Ms. Reely maintains that it is large.

## Issues

- [4] The following heads of damages are disputed:
  - a) Non-pecuniary loss;
  - b) Past loss of earning capacity;
  - c) Future loss of earning capacity; and
  - d) Cost of future care.
- [5] The parties agree that Ms. Reely has incurred special damages of \$17,555.90.

## Background prior to the accident

- [6] Ms. Reely was 29 years old at the time of the accident and about to turn 34 at the time of trial. She is a high school graduate and the single mother of a daughter, who will soon be seven years old.
- [7] During high school and following her graduation, Ms. Reely worked for a meat market. This was unsatisfying work at a relatively low hourly wage. Ms. Reely wanted a career and was interested in nursing. She decided to pursue training as a care aide. If she liked the work, she planned to pursue the academic courses and training required to qualify as a licensed practical nurse ("LPN") and eventually as a registered nurse ("RN").

- [8] In June 2006, Ms. Reely obtained a diploma from Vancouver Career College qualifying her for employment as a care aide. She found casual work as a care aide at Harold Park Lodge and subsequently at the German Canadian Care Home ("GCCH"). Ms. Reely found that she very much enjoyed working as a care aide and was confirmed in her decision to pursue a career in nursing.
- [9] Care aides at GCCH are unionized. Obtaining regularly scheduled permanent part-time or full-time work required an accumulation of seniority Ms. Reely could only achieve by making herself available on short notice for unscheduled assignments over several years. Ms. Reely continued working at the meat market while she built up seniority as a care aide.
- [10] Ms. Reely started working at GCCH in November 2008. At the end of 2012, she had acquired sufficient seniority that she was able to quit her part-time work at the meat market.
- [11] In February 2013, Ms. Reely unexpectedly learned that she was pregnant. She was living with her unborn child's father, but the relationship ended and the couple separated in June 2013. By the fall of 2013, Ms. Reely had worked sufficient hours to qualify for maternity benefits. The baby was delivered by C-section in November 2013. Ms. Reely took a year's maternity leave and returned to GCCH.
- [12] Ms. Reely had planned to pursue training to qualify as an LPN but her pregnancy forced a delay. Her revised plan was to "put my career on hold", that is, continue working as a care aide until her child was 3 years old. Her superiors at GCCH were supportive and she would be able to hold her seniority when she returned to school to take the courses necessary to qualify as an LPN.
- [13] By the time Ms. Reely returned to work in 2014, she had qualified for a permanent part-time position as a care aide at GCCH. In early 2015, her hours were increased to .76 of a full-time employee. With the accumulation of additional seniority, she expected to achieve full-time status in another two years or so.
- [14] Prior to the accident, Ms. Reely was in good health. She had no history of back or shoulder trouble. Work as a care aide at GCCH required her to physically manhandle elderly patients, some of them bed-bound and others physically resistant, into and out of slings and baths, to dress them and change their diapers. Care aides also empty laundry bins and push wheeled chairs from place to place. Ms. Rowbotham, a registered nurse of many years' experience who was the director of care at GCCH at the time, describes it as heavy work. Ms. Reely managed this work without difficulty prior to the accident.

## The accident

- [15] The accident occurred on September 21, 2015. Ms. Reely was driving her Pontiac Sunbird southbound on Smith Street in Burnaby. Approaching the intersection with Moscrop Street, the light was green and Ms. Reely had the right of way. The defendants' Honda Odyssey entered the intersection from Moscrop Street on a red light and Ms. Reely was unable to avoid a collision.
- [16] The front of Ms. Reely's vehicle struck the passenger side of the defendants' vehicle. Airbags deployed in both vehicles. Emergency workers attended. Her vehicle was badly damaged and was written off by the insurer.

## Findings and analysis

### A. Non-pecuniary loss

- [17] Ms. Reely seeks non-pecuniary damages of \$135,000. The defendants maintain that an award of \$75,000 is appropriate.

## Legal framework

- [18] Non-pecuniary damages are awarded as compensation for past and future pain, suffering, disability, and loss of enjoyment of life. The Court must take into account both the seriousness of the injury and the ability of the award to ameliorate the condition or offer solace to the victim: *Stapley v. Hejslet*, 2006 BCCA 34 at para. 45, leave to appeal ref'd, [2006] S.C.C.A. No. 100. In *Stapley* at para. 46, the Court noted a non-exhaustive list of factors to be considered: age of the plaintiff; nature of the injury; severity and duration of pain; disability; emotional suffering; loss or impairment of life; impairment of family, marital, and social relationships; impairment of physical and mental abilities; loss of lifestyle; and stoicism, a factor that should not, generally speaking, penalize the plaintiff.
- [19] An award must be fair and reasonable, and fairness is measured against the awards made in comparable cases, recognizing that other cases provide only a rough guide. Each case must be decided on its own facts: *Trites v. Penner*, 2010 BCSC 882 at para. 189.

## Ms. Reely's injuries and the evolution of her condition

- [20] In the immediate aftermath of the accident, Ms. Reely's only reported injury was a complaint that her right wrist hurt. She was taken to the hospital in an ambulance and discharged that day. That evening, she began experiencing a headache and pain in her left elbow, shoulder, and lower back. She kept reliving the accident and was unable to get to sleep. She returned to the hospital emergency department the next day and was prescribed Tylenol 3 for the pain.

- [21] In the months and years that followed, it became clear that Ms. Reely had suffered persistent, debilitating soft tissue injuries. As I have already noted, the expert opinion evidence concerning Ms. Reely's injuries is uncontroverted. It is largely grounded in Ms. Reely's own description of her symptoms and difficulties.
- [22] I agree with the parties that Ms. Reely is a credible and generally reliable witness. She gave her evidence matter-of-factly. She is not an extravagant personality. In giving evidence, she was not prone to exaggerate or speculate. Nor was she argumentative. Her accounts of her symptoms and difficulties have been generally consistent over time. So far as they were reflected in behaviour or objective symptoms that could be observed by others, they are corroborated by independent witnesses.
- [23] I find that Ms. Reely suffered the following symptoms and difficulties, all because of the accident.
- [24] Ms. Reely suffered a strain of her right wrist, and a burn on the wrist as the airbag deployed. These injuries resolved without incident.
- [25] Ms. Reely suffered recurring visions of the accident that interfered with her getting to sleep. She stopped driving and was anxious riding in motor vehicles, especially in the front seats. Dr. Parhar, a family physician, describes some of this as a post traumatic stress disorder. These symptoms have abated. Ms. Reely attended five sessions of counselling made available through GCCH. She bought a replacement vehicle and resumed driving in July 2016. She was a nervous driver at first, especially while approaching intersections. For the most part, now she is better.
- [26] Ms. Reely suffered an injury to her left elbow that involved an injury to the common extensor tendon. The injury interfered with her ability to dress and engage in other activities that required her to bend her elbow. Her former family physician, Dr. Zack, treated this injury with two injections in 2016. She received symptomatic relief from the second injection but the injury was aggravated again when she banged the elbow in 2016. The elbow bothered her through the summer of 2017 and has since gotten better. It is no longer symptomatic.
- [27] Ms. Reely suffered injuries to her lower back, left shoulder, and neck that persists to this day. These injuries have contributed to chronic sleeplessness. While Ms. Reely has recovered her ability to get to sleep since the accident with the help of medication, she continues to battle sleeplessness. Her current sleeping pattern is that she falls asleep for a time, lies awake for a couple of hours, and then sleeps again. She estimates that she sleeps a total of 4-5 hours a night, as compared to 7-8 hours before the accident.
- [28] On October 2, 2018, she offered the following description of her symptoms and difficulties to an expert conducting an assessment of her physical capacity and work tolerance, Mr. Hunt. She confirmed its accuracy in cross-examination:

33. Ms. Reely reported back and limb pain, headaches and intimacy difficulties the past month and other symptoms of headaches, low energy, disrupted sleep, feeling tired, and eating out of control. She rated her overall health as fair with chronic low back and left shoulder pain and ongoing disrupted unrefreshing sleep as her worst concurrent health problems. She reported anxiety and emotional stress from employment uncertainty and financial strain. Her parents have been supporting her financially, which is very distressing to her.
- [29] Ms. Reely locates her shoulder pain in the front of the left shoulder, near the clavicle, where the seatbelt would have made contact with her shoulder. This pain bothered her every day at first, and now bothers her almost every day. She rates this pain at 7 out of 10 at its worst, and 3 to 4 at its best.
- [30] Ms. Reely suffers pain on the left and right sides of the neck. This pain bothered her every day at first, and now bothers her once or twice a week, when she has been working for long periods at a desk or computer, or driving from Coquitlam to Vancouver. She rated it as ranging from 4 to 7 out of 10 at first. Now she rates it at 4 out of 10 at worst.
- [31] Ms. Reely describes her lower back pain as deep, achy pain, at the beltline, 2 to 3 inches from the mid-line. It is always in the same place and it bothers her all day, every day. At its worst, she rates it at 7 out of 10 on a pain scale. It is important, however, that there has been an improvement in her back pain that is not fully reflected in the expert reports, which were prepared in 2016, 2017, and 2018.
- [32] On October 2, 2018, Mr. Hunt observed that Ms. Reely's back pain was interfering with her ability to carry on with the assessment. He showed her an exercise that reduced the pain that day from a 6 to a 2 out of 10.
- [33] By this point, three years after the accident, Ms. Reely had received hundreds of hours of physiotherapy, massage therapy, exercise therapy, and so on. Her therapists had not equipped her with tools to manage her back pain. Mr. Hunt reported:

Ms. Reely had limited comprehension regarding her back injury and independent means to manage back pain safely without recurrent pain reactivation despite having three years of active and passive physio therapy, chiropractic mobilization, massage and exercise therapy.

Ms. Reely has participated in extensive physiotherapy and active exercise prescription. She presented with poor/limited spine and lumbopelvic proprioception and had little knowledge regarding posture and means to manage back pain. Therapeutic instruction included stretching the spine, bending, tipping and rotating through the trunk. She was provided little in the way of appropriate spine/truncal/core activation and lumbopelvic strengthening/durability exercise or education during the extended physiotherapy and active rehabilitation program.

- [34] Mr. Hunt recommended that Ms. Reely undertake a program of spine education with a qualified therapist. Ms. Reely acted on the recommendation by embarking upon a course of back education with a kinesiologist, Mr. Sim. The course began in July 2019 and was continuing in March 2020, when it was interrupted by the Covid pandemic. Mr. Sim observed good effort from Ms. Reely and that she really wanted to get better.
- [35] The results have been positive for Mr. Reely. Through 2018, her back pain interfered with her ability to focus for prolonged periods. In cross-examination concerning the possibility that she might take a certain on-line course in human anatomy, she said that she would not have been able to manage the course in 2018, but she could now. Ms. Reely's mother, who sees her almost every day, observes that her ability to move around is a lot better than it was, though not 100%.
- [36] Beginning in September 2019, Ms. Reely has tolerated classroom training and subsequent work as a customer sales representative at FortisBC for 30 hours or more a week at a sit-stand desk. She says that her condition is slowly improving.
- [37] The improvements recently achieved by Ms. Reely, through a program of spinal education, lead me to reject expert opinions formulated in 2017 and 2018 that Ms. Reely's condition had plateaued, was not likely to improve, and may well deteriorate. In his report dated July 23, 2017, Dr. Parhar opined that Ms. Reely's musculoligamentous injuries had reached maximal medical improvement and were unlikely to resolve in the future. In his report dated September 4, 2018, Dr. Chow offered an equivalent opinion and added that "she likely will experience worsening of her symptoms with deterioration of functional ability with passage of time and ageing process".
- [38] Dr. Chow's 2018 forecast of likely deterioration was in any event problematic. In cross-examination concerning this aspect of his opinion, Dr. Chow relied upon an article (B. Squires, M.F. Gargan & G.C. Bannister, "Soft-Tissue Injuries of the Cervical Spine: 15-year Follow-Up", (1996) 78-B:6 Journal of Bone and Joint Surgery) that does not support his assertion. The article reviewed the results of a study of 40 patients in England 15 years after a whiplash injury. Of the 40 patients, only 28 (70%) still had symptoms. Of the 28, 7 (18%) had improved, 10 had stayed the same (25%), and 11 (28%) had deteriorated. To the extent that any conclusion at all can be drawn from the study, given the small sample size, it is not that deterioration is likely.
- [39] While the improvement Ms. Reely has achieved is important, I accept that there is only so much a program of spinal education and exercise can achieve. I find that Ms. Reely is likely to continue to suffer continuous back pain, frequent shoulder pain, intermittent neck pain, and chronic sleeplessness for the indefinite future.

- [40] I find that Ms. Reely's injuries have prevented her from returning to work as a care aide and will prevent her from returning to that occupation or any work presenting similar physical demands in the future. The evidence is that the work of an LPN presents such demands. That possible career is now foreclosed to Ms. Reely.

### Other Stapley considerations

- [41] Ms. Reely is 34 years old. Her daughter is six years old and, in light of her back pain, Ms. Reely does not believe she will undertake another pregnancy. Her injuries have limited her ability to play with her daughter, and have diminished her enjoyment of her time spent with her daughter. She does not join her daughter in physical play, and does not readily lift or carry her daughter. Her friend, Ms. Short, who has known Ms. Reely since before the accident, observes that she is now less patient with her daughter. Ms. Reely and her mother observe that she is short-tempered when her daughter jumps on her or attempts to rough-house.
- [42] Before the accident, Ms. Reely weighed 130 pounds. Her recreational pursuits included physically vigorous activities such as occasional hiking, bowling, skating, and skiing. She attended Aquafit classes five or six times a month. She enjoyed her physically demanding work as a care aide.
- [43] Because of her injuries suffered in the accident, Ms. Reely is no longer able to work as a care aide. She no longer engages in physically vigorous recreational activities. Her weight has increased to 168 pounds and she is unhappy about that.
- [44] In the first years after the accident, Ms. Reely relied on her mother's help almost daily to deal with childcare, grocery shopping, and the housework in the two-bedroom apartment she shares with her daughter. With the improvement in her back since 2018, she is now able to attend to most household chores. Her mother still does the laundry for her and sometimes helps with the vacuuming.
- [45] As I will discuss further below, Ms. Reely's injuries resulted in her losing her work as a care aide and her prospects for a career as an LPN. This was a career she had invested herself in between 2006 and the accident in 2015. She does not enjoy the work she has found since as a customer service representative for FortisBC. Her loss of the career she had hoped to pursue is a significant blow.

### Comparable cases

- [46] Ms. Reely relies upon *Kim v. Sodhi*, 2019 BCSC 1823, *Crookall v. Hibgy*, 2018 BCSC 1200, *Flomo v. Hanna*, 2019 BCSC 2024, and *Williams v. Sekhon*, 2019 BCSC 1511. The non-pecuniary awards in these cases range between \$120,000 and \$175,000.

- [47] While these cases involved similarly aged plaintiffs who suffered superficially similar physical injuries to those suffered by Ms. Reely, in each case, the injuries and their consequences were more serious. The plaintiffs in Kim, Flomo, and Williams suffered psychological injuries unlike those suffered by Ms. Reely.
- [48] In Kim at paras. 29-32 and 40, the plaintiff suffered a chronic pain condition that was heavily influenced by psychological factors. He was awarded \$120,000.
- [49] In Flomo at paras. 55, 60, and 65, the plaintiff's injuries resulting from the accident included a somatic symptom disorder with pain, a major depressive disorder, chronic pain condition with fibromyalgia, anxiety, disc bulges and an annular tear to a disc, and nerve root compression. She was permanently disabled and functioning at a very low level. She was awarded \$175,000.
- [50] In Williams at paras. 80, 110-112, and 119-121, the plaintiff's injuries included anxiety and depression causing a loss of confidence and a loss of focus. He was awarded \$135,000.
- [51] Crookall was not a case of psychological injury, but, in contrast to Ms. Reely, the plaintiff's pain was such that she was unlikely ever to be able to work full-time, even in a relatively sedentary position; paras. 167-168 and 188. Ms. Crookall was awarded \$125,000.
- [52] The defendants rely upon Jiang v. Pappas, 2016 BCSC 1015, Abraha v. Suri, 2019 BCSC 1855, and Stapleton v. Andrew, 2019 BCSC 678, placing the greatest emphasis on Stapleton. In these cases, the court awarded damages of \$70,000 or \$75,000.
- [53] Abraha is unhelpful. The plaintiff was 52 years old at the time of trial and her injuries had a prominent psychological component.
- [54] Like Abraha, Jiang involved a plaintiff who was substantially older than Ms. Reely. Mr. Jiang was 54 years old at the time of trial. The accident left him with chronic neck and back pain similar to Ms. Reely's, though having a lesser effect on his recreational activities. Mr. Jiang was awarded \$75,000 (equivalent to approximately \$80,000 in 2020).
- [55] In Stapleton at paras. 59-61 and 67-68, the plaintiff was engaged in very physical work as a chef. She suffered similar physical injuries to Ms. Reely, without the disruption to her sleep. She suffered less serious interference with her recreational activities and was able to complete a half-marathon after the accident, albeit experiencing pain, discomfort, and stiffness. In awarding the plaintiff \$75,000, Justice Skolrood emphasized her relative youth, commenting that "she is likely to experience the adverse effects of the Accident for a considerable period of time", and the devastating effect on her of the potential loss of her career as a chef.
- [56] The plaintiffs in Jiang and Stapleton suffered nothing comparable to the adverse effects suffered by Ms. Reely in her relationship with her daughter.

### Assessment of non-pecuniary damages

- [57] As is often the case, neither side's cases hit the nail on the head. Ms. Reely's non-pecuniary injuries are more serious than those featured in the defendants' cases, and less serious than those featured in the plaintiff's cases.
- [58] The particular features of this case that I find most significant to the assessment of Ms. Reely's non-pecuniary loss are:
- a) The presence of chronic pain that is now a feature of Ms. Reely's life, and is unlikely to abate much further;
  - b) Ms. Reely's relatively young age; as in Stapleton, she is likely to continue to experience the effects of the accident for a long time to come;
  - c) The loss of work Ms. Reely enjoyed as a care aide and her hopes for a career in nursing;
  - d) Ms. Reely is injured, but not disabled; she can work;
  - e) Disruption to Ms. Reely's enjoyment of her time with her daughter and her relationship with her daughter;
  - f) Likely loss of the prospect of having further children;
  - g) Loss of recreational opportunities formerly open to Ms. Reely and a relatively relaxed lifestyle as a young parent; and
  - h) The absence of sustained psychological injuries.
- [59] Taking these matters into account as best I can, I award Ms. Reely non-pecuniary damages of \$100,000.

#### B. Past loss of earning capacity

### Analytical framework

- [60] An award for past loss of earning capacity compensates the plaintiff for the income that she should have earned up to the date of trial, by comparison to what she actually earned.
- [61] The question of what should have occurred is hypothetical. The assessment of hypothetical events - whether past or future - does not take place on a balance of probabilities. Hypothetical events are taken into account as long as they are a real and substantial possibility, and not a mere speculation. The court determines the measure of damages by assessing the likelihood of the event; *Grewal v. Naumann*, 2017 BCCA 158 at para. 48.
- [62] The assessment of income loss - again whether past or future - is a matter of judgment, not mathematical calculation; *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 18.

- [63] The plaintiff bears the burden of establishing that any hypothetical events upon which she maintains her claim - in this case, Ms. Reely hypothesizes that she would have undertaken and successfully completed training as an LPN - were real and substantial possibilities. If that threshold is achieved, I must assess the relative likelihood of Ms. Reely's having achieved LPN status or not, and how much she would have earned under each scenario.
- [64] The defendants' main defence to this part of the claim is a claim that Ms. Reely failed to mitigate her damages by seeking out alternative employment. They submit that, acting reasonably, she should have started looking for work in late 2016 and, had she done so, she could have been employed at FortisBC or in equivalent employment by the beginning of 2017. Accordingly, the defendants say that Ms. Reely should be taken as having earned more money than she actually earned in the years after 2016.
- [65] The onus of proof that a plaintiff failed to take reasonable steps to avoid or mitigate her loss lies on the defendants. The defendants must prove both that Ms. Reely acted unreasonably and the extent to which her damages would have been reduced had she acted reasonably; *Chiu v. Chiu*, 2002 BCCA 618 at para. 57. To the extent that the defendants' argument engages hypotheses, such as the hypothesis that Ms. Reely would have found alternative employment equivalent to that she eventually obtained at FortisBC, the defendants bear the burden of showing that the hypotheses were real and substantial possibilities, at which point the question again becomes one of the assessments of the relative likelihood of events. However, the Court may address a failure to mitigate by discounting the damages that would otherwise be awarded by an appropriate percentage; *Morgan v. Galbraith*, 2013 BCCA 305 at paras. 70-80.
- [66] Applying this legal framework, I begin with the period from the accident in September 2015 to the end of 2016, during which neither of the arguments I have described is engaged. Second, I turn to the question of what Ms. Reely would have earned, but for the accident, since January 2017. Third, I address the question of what Ms. Reely actually earned and must be taken to have earned, in light of the defendants' argument that she failed to mitigate.
1. Loss in the period from the accident to the end of 2016
- [67] Following the accident, Ms. Reely was off work until May 24, 2016. She returned to GCCH on a graduated return to work, funded by ICBC. While the graduated return to work was taking place, Ms. Reely had only light duties. Her family physician, Dr. Zack, directed that she not assume heavier duties. ICBC ceased funding the graduated return to work at the end of July 2016, at which point GCCH placed her on an unpaid leave of absence, because it did not have work for her as a care aide that involved only light duties. Ms. Reely was off work from August 2, 2016 through the end of 2016.

- [68] It is common ground that, but for the accident, Ms. Reely would have continued working as a care aide at least until the end of 2016. There is no dispute that she suffered a loss of income of \$37,566 in respect of this period.
2. What would Ms. Reely have earned, but for the accident, since 2016?
- [69] I find that there is a real and substantial probability that Ms. Reely would have returned to school in 2017 to take the courses necessary to qualify as an LPN and completed the course successfully. This was her longstanding plan. It was encouraged by her superiors, Ms. Rowbotham and Ms. Reefe. Ms. Rowbotham viewed Ms. Reely as particularly well-suited to a career in nursing, describing her as compassionate, genuinely caring, calm, and intuitive of the needs of her patients. Ms. Reely's parents were prepared to support her financially during her return to school. She could retain her seniority at GCCH. Vocational testing performed by an expert witness, Mr. Nordin, indicates that Ms. Reely likely had the academic ability to complete the academic coursework required of an LPN. The defendants' expert, Ms. Gallagher, agrees.
- [70] I assess the probability that Ms. Reely would have taken and successfully completed LPN training in 2017 and 2018 at 80%.
- [71] Ms. Reely's proposed calculation of her income loss allows two years for LPN training. The evidence is that the course only requires 13 months, if undertaken full time, but her studies would have been delayed by her treatment in 2018 for endometriosis unrelated to the accident. I assume that, had Ms. Reely trained as an LPN, she would have been without income for two years. The endometriosis would also have affected Ms. Reely's income on the alternative scenario that she continued work as a care aide, but the income loss would have been mitigated by EI benefits.
- [72] Accordingly, I assess past wage loss on the footing of an 80% probability that she would have been without income for 2017 and 2018, and then returned to work at GCCH as an LPN in January 2019, and a 20% probability that she would have continued working at GCCH as a care aide.
- [73] Under the main scenario, I find that Ms. Reely would have earned income as an LPN as follows: \$54,340 in 2019 and \$41,867 in the first 9 months of 2020. The total is \$96,207. Discounting to 80%, this scenario contributes \$76,966 to Ms. Reely's claim.
- [74] Under the scenario that Ms. Reely continued work as a care aide, the evidence is that her seniority would have qualified her for full-time status in 2017. On that basis, I accept Mr. Turnbull's evidence that she would have earned a net income of \$45,257 in 2017 and \$40,033 in 2018. Mr. Turnbull's report (Ex. 9) does not provide precise figures for 2019 and the first 9 months of 2020 but I infer them from Table 6 to be approximately \$42,000 for 2019 and \$30,000 for 2020. The total is \$157,290. Discounting for the relatively low probability of this scenario (20%), it contributes \$31,458 to Ms. Reely's claim.

[75] Combining both scenarios and rounding in recognition of the inexact nature of these assessments, I conclude that Ms. Reely would have earned \$108,000, but for the accident, since 2016.

3. What must Ms. Reely be taken to have earned since 2016?

[76] Ms. Reely had no employment income in 2017, 2018, and the first nine months of 2019. On September 9, 2019, she started work with FortisBC, earning \$19.75 per hour for 30 hours per week until March 2020, when her pay increased to \$20.04 per hour. She receives an extra \$2 per hour for night shift work. All in, she is earning less than she was as a care aide. The 2020 hourly wage of a care aide at GCCH is \$25.33.

[77] The defendants accept that Ms. Reely's injuries in 2017 and at present render her incapable of the heavy duties required of a care aide. Their case is that she should have realized this and sought work in some other capacity far sooner than she did.

[78] It is necessary to review Ms. Reely's actions, the state of her health, and the advice she received from medical professionals.

[79] In 2016, Ms. Reely was under the care of Dr. Zack, who had been her physician since birth. He wrote notes in connection with her graduated return to work. In July 2016, his note stated:

I recommend to continue working 6 hrs each day at "modified" duties. She remains very vulnerable for reinjury. Modified duties for indefinite time.

[Underlining in original]

[80] Dr. Zack followed Ms. Reely through the end of 2016. He continued to write notes indicating that she could perform light duties but was not ready to return to her former work. The last of these notes was dated December 9, 2016. Dr. Zack retired at the end of 2016.

[81] In my view, as of the end of 2016, it was not unreasonable for Ms. Reely to hope that she might be able to return to work as a care aide at GCCH in a unionized position in which she had built up substantial seniority.

[82] The defendants submit that, by the end of 2016, Ms. Reely should have sought out alternate employment at a less strenuous job while holding her position at GCCH in the hope that she would eventually be able to return to work as a care aide. I am not persuaded that Ms. Reely's failure to look for alternate employment at this point was unreasonable. The defendants bear the onus of proof on this point, and they did not raise the point with Ms. Reely in cross-examination. She was not obliged to anticipate it in her evidence in chief.

[83] With Dr. Zack's retirement, Ms. Reely went into the care of Dr. Parhar. On July 23, 2017, he wrote Ms. Reely's counsel a letter providing his opinion that Ms. Reely's injuries to the lower back, shoulder, and neck were likely permanent. I infer that this letter came to Ms. Reely's attention at the time. Dr. Parhar wrote that:

I would be of the opinion that Laura is unlikely to be able to meet the physical demands of a care aide and thus, she is unlikely to be able to return to work as a care aide as a result of the motor vehicle collision injuries sustained on September 21, 2015.

- [84] On receipt of this advice, I find that Ms. Reely was no longer in a position to reasonably anticipate that she would be able to return to work as a care aide at GCCH or elsewhere. She should reasonably have taken steps to find alternate employment consistent with her capacities in light of her injuries.
- [85] The next question is whether there is a real and substantial possibility that, had Ms. Reely begun looking for work in the summer of 2017, she would have found work equivalent to the work she eventually obtained with FortisBC, but sooner. It is helpful to look at what happened when she did start looking for work.
- [86] Ms. Reely eventually concluded that she would be unlikely to find work as a care aide in the fall of 2018, as her daughter was entering kindergarten. She prepared a resume looking for work as a community health care worker.
- [87] On October 2, 2018, Ms. Reely received a vocational and work capacity assessment from Mr. Hunt. He concluded that she was presently suited to sedentary work and some entry light occupations. As I have already noted, he recommended a program of spinal education to give Ms. Reely the tools to cope with her condition. Mr. Hunt noted that Ms. Reely would require ergonomic accommodations in an office workspace and that she had few transferrable skills to an office environment. For example, she was not familiar with common office computer programs, and was only a hunt and peck typist. Mr. Hunt recommended career counselling for Ms. Reely.
- [88] On November 7, 2018, Ms. Reely met with Mr. Nordin for a vocational assessment. Although trained as a vocational counsellor, Mr. Nordin was retained to prepare a report for use in court and he did not counsel Ms. Reely. In his report dated December 27, 2018, Mr. Nordin was pessimistic as to Ms. Reely's prospects to obtain competitive employment.
- [89] On March 13, 2019, Ms. Reely was assessed by an occupational therapist for ICBC accident benefits. They discussed Ms. Reely's goal of returning to meaningful employment and the therapist recommended vocational counselling.
- [90] On July 31, 2019, Ms. Reely had her first appointment with Mr. Sim to begin a program of spinal education. As I have already indicated, Ms. Reely achieved positive results through this program and her back pain is now better than it was in 2018. Her ability to concentrate is improved.
- [91] On August 20, 2019, Dr. Parhar noted that Ms. Reely was looking for light desk work. The defendants emphasize that Ms. Reely was seeing Dr. Parhar monthly in 2019 and this is his first note that she was looking for work. They ask me to infer that she was not actively looking for work before this.

- [92] On September 9, 2019, Ms. Reely began work with FortisBC.
- [93] The defendants submit that Ms. Reely only began seriously looking for work in the summer of 2019 and found it quickly once she started. They ask me to conclude that she would have found work quickly, had she begun looking seriously earlier than she did.
- [94] I do not accept the defendants' submission. Slightly more than a year passed between Ms. Reely's initial preparation of a resume and the beginning of her employment with FortisBC. While the evidence is thin as to the efforts Ms. Reely was making in this period, the delay must be evaluated in light of her background, training, the challenges noted by Mr. Hunt and Mr. Nordin, and the improvement in her physical condition in 2019 as she began working with Mr. Sim. Ms. Reely was not in a position to find work quickly in the summer of 2018. She was hampered by chronic pain and not trained for work in an office environment. She badly needed vocational counselling. I am not persuaded that Ms. Reely took longer to find alternative employment that was reasonably to be expected in this period.
- [95] The effect of Ms. Reely's failure to begin looking for employment on receipt of Dr. Parhar's letter in late July 2017, was a delay of at least one year in the commencement of her search for alternate employment. Given her physical condition in 2018, while it is not certain that Ms. Reely would have succeeded in finding and maintaining employment with FortisBC or equivalent employment before she began her work with Mr. Sim, it is a real and substantial possibility.
- [96] Ms. Reely's actual net earnings from FortisBC in 2019 through the first 9 months of 2020 are \$38,562. The effect of starting work at FortisBC a year earlier, if she were able to do that, would be that Ms. Reely would have earned an additional \$26,364. (I arrive at this figure by multiplying Ms. Reely's bi-weekly net take-home pay in June 2020 by 26.) I discount this by 50% to reflect the uncertainty that Ms. Reely would have obtained employment in light of her physical condition in 2018. Adding the actual net earnings (\$38,562) and the discounted additional earnings (\$13,182), Ms. Reely's actual net earnings for the period since 2017 through to the trial should be taken to be approximately \$51,700.

### Conclusion as to loss of earning capacity

- [97] Ms. Reely's past wage loss is her loss through the end of 2016 (\$37,566) plus what she would have earned, but for the accident, since 2016 (\$108,000), less what she should be taken as having earned, given her failure to mitigate, since 2016 (\$51,700). The total is \$93,866.
- [98] I note that this award exceeds the past wage loss claim put forward by Ms. Reely's counsel in final argument. Counsel approached the claim as one involving a choice between competing hypothetical scenarios and claimed the amount owing under the scenario deemed most likely. This is analytically incorrect. I agree with counsel that the most likely scenario is that Ms. Reely would have qualified as an LPN, but the amount owing under that scenario must be discounted, and one must also consider the discounted value of the income she might have earned otherwise as a care aide. Counsel's calculation overlooked these complexities.

### C. Future loss of earning capacity

- [99] An award for future loss of earning capacity requires the plaintiff to prove that there is a real and substantial possibility of a future event leading to an income loss. Once that hurdle is crossed, the loss may be quantified by comparing the currently expected earnings stream to that which would have been expected, but for the accident, or on the footing of the damage to a capital asset caused by the plaintiff's injuries; *Perren v. Lalari*, 2010 BCCA 140 at para. 32.
- [100] It is obvious from what I have already said that Ms. Reely is suffering an ongoing injury to her ability to earn income. She is presently earning less at FortisBC than she would have been earning as either a care aide or an LPN. This ongoing income loss will continue into the future.
- [101] It is likely that Ms. Reely will obtain full-time hours at FortisBC in the near future. When that happens, she will still be earning less than she would have as a care aide or an LPN.
- [102] Ms. Reely's position at FortisBC is unionized. There is no reason to expect that her income at FortisBC or equivalent employment elsewhere will catch up to the earnings of a care aide or LPN. There are other positions available at FortisBC, but there is no evidence as to whether they come with significant pay raises.
- [103] Ms. Reely's counsel asks me to value her future income loss taking into account the possibility that she would have eventually have taken additional courses and qualified as an RN. I accept Ms. Gallagher's evidence that entry into the academic programs necessary to qualify as an RN is highly competitive and the programs themselves are demanding. Ms. Reely's test scores and previous academic results are those of an average student, while the RN programs select students of superior academic ability. I am not persuaded that there is a real and substantial possibility that Ms. Reely would have qualified as an RN.
- [104] Mr. Turnbull's report compares Ms. Reely's expected earnings as a full-time care aide or LPN to her expected earnings as a full-time employee of FortisBC. The care aide comparison generates a loss of \$184,000. The LPN comparison generates a loss of \$514,000. Both are real and substantial possibilities. Viewing the LPN scenario as an 80% probability and the care aide scenario at a 20% probability generates a loss of \$448,000.
- [105] In my view, this calculation probably overstates Ms. Reely's future income loss. Despite her injuries, she possesses the considerable skills with patients described by Ms. Rowbotham. It is not surprising that she dislikes her work as a customer service representative. It is all done over the telephone or by messaging, and it does not engage Ms. Reely's best qualities: her kindness, willingness to care for people in distress, and intuitive understanding of the needs of vulnerable persons in her charge. These are not entirely common qualities, and I think that there is a reasonable prospect that, with proper counselling, Ms. Reely may find a position that rewards them, but is free of the physical burdens associated with work as a care aide or an LPN.

[106] Nevertheless, Ms. Reely has suffered a substantial injury to her ability to earn income in the future. She is a long way from retirement. She is constrained by her injuries in the kinds of work she can do. She lacks academic qualifications.

[107] Taking all these matters into account, I award Ms. Reely \$300,000 for future loss of earning capacity.

#### **D. Cost of future care**

[108] Ms. Reely claims \$46,150 for the cost of future care. The major items claimed are 20 years of biweekly physiotherapy and \$15,000 for assistance with housework.

[109] The defendants concede that there should be an award of \$5,000 to cover 12 more treatments with Mr. Sim and a gym or pool membership for five years. In oral argument, they agreed that there should also be an allowance of \$2,000 for vocational counselling.

[110] The purpose of an award for the cost of future care is, so far as is possible with a monetary award, to restore the plaintiff to the position she would have been in had the accident not occurred. The award is based on what is reasonably necessary on the medical evidence to promote the mental and physical health of the plaintiff; *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at paras. 29-30, citing *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.) and *Aberdeen v. Zanatta*, 2008 BCCA 420 at para. 41.

[111] Each part of the claim must be supported by the medical evidence. If the plaintiff relies on the report of an occupational therapist or rehabilitation consultant, there must be an evidentiary link between the medical evidence and the recommendations in the report; *Gignac* at paras. 31-32. If the plaintiff has not used or sought out a service in the past, it will usually be difficult for her to justify a claim in respect of that service; *Warick v. Diwell*, 2018 BCCA 53 at para. 55.

[112] The claim for biweekly physiotherapy over 20 years is unsustainable. Drs. Parhar and Chow testified that Ms. Reely may benefit from physiotherapy or massage therapy for symptomatic relief to help her manage flare-ups or exacerbations of her pain. I allow \$5,000 for occasional physiotherapy.

[113] Ms. Reely's claim for assistance with housework is supported by Dr. Parhar's report suggesting that Ms. Reely be provided with four hours per week of assistance "given her difficulty with heavier household chores" and also six days of seasonal cleaning assistance "to help with the less frequent, but heavier household duties both inside and outside the home".

- [114] Dr. Parhar's report was prepared in July 2017. It does not reflect the recent improvement in Ms. Reely's condition. He was not asked about his housework recommendations when he gave evidence, and I am sceptical that they were carefully considered, in part because I cannot think what heavier household chores there would be outside a two-bedroom apartment.
- [115] Ms. Reely has not needed to pay for housework to this point because her mother has helped her with tasks she could not manage. This arrangement will not last forever and it is likely that because of her injuries Ms. Reely will require occasional help with heavy chores. I award her \$5,000 in this regard.
- [116] Accordingly, I award Ms. Reely \$17,000 for the cost of future care: \$7,000 conceded by the defendants, \$5,000 for occasional physiotherapy, and \$5,000 for housekeeping.

## Disposition

[117] For these reasons, I award Ms. Reely damages totalling \$528,422.90, as follows:

- a) Non-pecuniary damages of \$100,000;
- b) Past loss of earning capacity of \$93,866;
- c) Future loss of earning capacity of \$300,000;
- d) Cost of future care of \$17,000; and
- e) Special damages of 17,555.90.

[118] Unless there are matters that must be brought to my attention, Ms. Reely is entitled to her costs.

"Gomery J."

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