
CANADA / JUDGMENT

Rousta v. MacKay

2017 BCSC 644

COURT

Supreme Court of British Columbia

DECIDED

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2017 BCSC 644 Rousta v. MacKay

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Rousta v. MacKay,

2017 BCSC 644

Date: 20170420

Docket: M151252

Registry: Vancouver

Between:

Yassaman Rousta

Plaintiff

And

Sabrina W. MacKay

Defendant

Before: The Honourable Mr. Justice Skolrood

Reasons for Judgment

Counsel for the Plaintiff:

F.E. Hayman

Counsel for the Defendant:

O.L. Wilson

G.K. Crouch

Place and Date of Trial/Hearing:

Vancouver, B.C.

January 9-13, 16-20, 23-27

and January 30, 2017

Place and Date of Judgment:

Vancouver, B.C.

April 20, 2017

Introduction

- [1] The plaintiff claims damages for injuries sustained in an accident that occurred on December 4, 2013 when her vehicle was struck from behind by a vehicle driven by the defendant (the "accident").
- [2] The defendant has not acknowledged liability for the accident, but did not press the issue at trial. While all of the usual heads of damage are in issue, the claims for past income loss and loss of future earning capacity are particularly contentious. These issues turn on the question of whether a cosmetics business being developed by the plaintiff would have succeeded but for the injuries she sustained in the accident.

Background

The Plaintiff Pre-Accident

- [3] The plaintiff was born in Iran in 1954 and was 59 years old at the time of the accident. She and her husband married in 1978 and moved to Canada in 1980. They have two children who are currently 33 and 26 years old.
- [4] The plaintiff went to university both in Iran and in Canada, where she attended the University of Victoria, studying economics and insurance.
- [5] Shortly after her arrival in Canada, the plaintiff became involved in the cosmetics industry, initially employed by Eatons in Victoria. She and her husband later moved to Vancouver and she got a job with the Christian Dior company ("Dior"). Between 1984 and 2003, she held a number of positions with Dior of increasing responsibility culminating in her appointment as Director of Education and Performance Management. This involved the training and management of 19 regional managers who in turn were responsible for approximately 400 consultants across Canada.

- [6] The plaintiff's principal responsibility was training and coaching managers and front line sales associates so as to maximize the sale of Dior products. Her job required her to regularly travel throughout Canada and frequently go to Paris, where Dior was headquartered.
- [7] The plaintiff was one of only three director level employees of Dior in Canada and she reported directly to the Canadian general manager.
- [8] While working for Dior, the plaintiff also developed her own side business in which she recruited and trained sales staff for various companies, including Dior, to work on special sales promotions during busy periods like Christmas and other holidays. She did this with the knowledge and approval of Dior.
- [9] In 2003, Dior began cutting back its Canadian business and moving towards centralizing its North American operations in New York. The plaintiff was offered a position in New York but she declined, and she left the company. According to the plaintiff, she was provided with approximately 20 months' severance pay. She acknowledged in cross-examination that she in fact had sued Dior and that the severance was paid as part of a settlement of that suit.
- [10] Upon leaving Dior, the plaintiff decided to develop her own line of beauty products under the name Néange Cosmétiques Inc. ("Néange"). I will discuss this business in greater detail below.
- [11] The plaintiff said that she always loved socializing. Even when she was travelling a lot for work, she loved spending time with her family and friends when she was home on weekends. She often hosted parties for holidays and other special events and she enjoyed cooking for large groups.
- [12] Numerous witnesses testified about her pre-accident health, demeanour and activity level. These included friends and acquaintances as well as the plaintiff's husband and daughter. I do not propose to go through the evidence of each of these witnesses as there was significant consistency and overlap in what they had to say. The plaintiff was uniformly described as a lively, vivacious person with a good sense of humour; someone who was well-informed, articulate and very involved and someone who loved to socialize.
- [13] Several witnesses also testified about the plaintiff's management style and general approach while at Dior. She was described as very hard working, energetic, passionate about what she did and always impeccably groomed. She was also described as having strong leadership skills and a reputation for getting things done.
- [14] The plaintiff testified that her health prior to the accident was generally good, although she experienced some difficulties in 2012 and 2013 associated with menopause. She said that in early 2013, she got an infection following a root canal which caused "flare ups" in her body in the form of swelling in her joints.

- [15] While the plaintiff tended to downplay these health issues, the defendant led evidence of the plaintiff experiencing significant pain and swelling in her left leg from the knee down in the fall of 2013 and carrying on into 2014. The plaintiff was seen on a number of occasions by a rheumatologist, Dr. Dewar, who testified that the condition caused the plaintiff considerable concern; however she was reluctant to pursue further investigations recommended by Dr. Dewar and to take the prescribed medications.
- [16] There was also evidence that the plaintiff was diagnosed with a blood disorder, known as monoclonal gammopathy of undetermined significance ("MGUS"), which was not symptomatic but in some instances can result in different forms of blood cancer.

Development of Néange Cosmétiques Inc.

- [17] As noted, following the end of her employment with Dior, the plaintiff embarked on a process of developing her own line of beauty products. Her goal, as described in her evidence, was to develop and market a niche anti-aging product using her many years of experience in the industry.
- [18] Throughout the development process, the plaintiff consulted periodically with her friend Wendy Travers. Ms. Travers was a colleague from Dior who held the position of International Training Director up until 2006. Since 2007, Ms. Travers has been a consultant to various companies in the cosmetic industry. She was based in France until she returned to Canada in 2012.
- [19] Considerable evidence was led by the plaintiff about the various steps she took to develop her business, which included the following:
- a) she incorporated Néange on July 4, 2005 under the B.C. Business Corporations Act, S.B.C. 2002, c. 57;
 - b) she determined the components she wanted and approached a number of different cosmetic laboratories about developing a formulation for her products, which initially comprised a combined day and night cream and an eye cream. Ultimately, she chose AG Cosmetics, a company based in France that specializes in cosmetic design, production and marketing;
 - c) in September 2006, she purchased over 6,000 units combined of the day and night cream and the eye cream from AG Cosmetics at a cost of over 10,000 euros. Prior to this, in May 2006, she entered into an agreement with a company called Rinaplast S.S., based in Spain, for the supply of bottles and packaging for the products;
 - d) she also ordered boxes and labels for the products, as well as a product information leaflet, from another French company, and arranged for translation of the product descriptions from English to French as she wanted both languages to appear on the packaging;
 - e) in October 2006, she obtained Health Canada approval to import the two products into Canada; and

- f) on November 29, 2007, she obtained a trademark in Canada for the name "Néange" and for the name "7R Integrite", which is the trade name for the products. In January 2010, she also obtained a U.S. trademark for "Néange".
- [20] According to Ms. Travers, throughout this developmental period, she was available to the plaintiff as a resource to discuss ideas, provide feedback on the products and liaise with suppliers like the cosmetics lab that produced the products.
- [21] Once the Néange products were developed, the plaintiff turned her attention to the issue of how to distribute them. One of the things she did was participate in a project through the University of British Columbia Sauder School of Business in which a group of students did a case study of Néange. As part of this study, the students identified Canadian drug stores as the most attractive distributions channel, specifically Shoppers Drug Mart's "Beauty Boutique" stores.
- [22] The plaintiff subsequently had some discussions with Shoppers Drug Mart but there were issues around cost and access to shelf space and so she decided not to pursue that avenue. She also had discussions with Holt Renfrew but again, that did not work out.
- [23] In the period of 2008-2010, the plaintiff pursued various approaches. For a period of time, she had a radio show in Los Angeles in which she talked about skin care and people could call in and order products. She also found a distributor in Los Angeles to help distribute the products, although that relationship ended when the distributor had difficulty making payments. In or about 2009, she attended a trade show in Las Vegas that subsequently led to discussions with television shopping channels in Toronto and Quebec, but nothing came of those discussions.
- [24] According to the plaintiff, she had no set timeline in place to develop a distribution channel for the products and she described the period of 2008-2010 as "soft selling" in the sense that she was trying different approaches. She said that she wanted to be careful about how she launched and promoted the Néange products because "you only have one chance to get it right". If a new product fails at launch, it is very difficult to recover.
- [25] In 2011, she spoke to a friend, Shahrzad Fouladvand (sometimes referred to by the plaintiff as Sheri Ebrahimi), about the concept of direct selling the products. Ms. Fouladvand and another mutual friend, Nosrat Salimian, organized a presentation at Ms. Salimian's house for 25 people at which the plaintiff described her products. According to the plaintiff, 23 of the 25 people bought products on the spot. Ms. Fouladvand also described the presentation as very successful. Ms. Fouladvand is an esthetician and she said that she has continued to sell Néange products to her clients since the 2011 seminar. According to Ms. Fouladvand, following the first seminar, she discussed possible further seminars with the plaintiff, for example at her salon, but nothing came of those discussions.
- [26] The plaintiff said that the success of the presentation convinced her that direct selling through similar seminars was the best route for selling the products.

- [27] Having decided this, the plaintiff said her next step was to start developing a team to do the direct selling. She had discussions with Wendy Travers, who again had been involved to some degree since the outset. Ms. Travers visited the plaintiff in Vancouver from France in 2011 and again in the spring of 2012; in the fall of that year she moved to Vancouver.
- [28] Ms. Travers testified that by 2012, she was looking to move from France because the consulting business was difficult, particularly for a non-European Union resident. She had planned to return to Canada, but was delayed by a serious illness for which she was treated in 2009 and 2010. She also noted that the plaintiff was getting closer to getting Néange going, which was also a factor in her move.
- [29] The plaintiff said that in 2012 and 2013, her time was largely spent developing a supplemental product to go with Néange's primary products, as well as sourcing an exfoliating product that could be used as a gift to purchasers when they bought Néange products, a practice that the plaintiff said is common in the cosmetics industry. She and Ms. Travers also spent considerable time preparing a detailed presentation for use at sales events. According to the plaintiff, all of these efforts were geared towards a launch of Néange in early 2014.
- [30] Ms. Travers confirmed that she worked with the plaintiff in 2013 on the presentation, although she was continuing to do some consulting work, she was renovating her home and she was still dealing with some medical issues. Ms. Travers' recollection was that work on the presentation was completed in late January or early February 2014.
- [31] The plaintiff went through the presentation in considerable detail in her direct evidence. It is about 56 pages in hard copy (although it was designed as a power point presentation) and it contains extensive information about the properties of skin, the cosmetic industry and about the Néange products.
- [32] The plaintiff said that her plan was to begin by holding six seminars in each of January and February 2014, which would be conducted by her and Ms. Travers. A third person, Sima Hirbod, had also been approached about becoming a sales associate and she was to attend the initial seminars in order to learn how to present. Thereafter, new seminar hosts and sales presenters would be recruited from attendees. The presenters would be paid a commission of 30% on all sales made at their seminars and on any repeat orders from customers they sold to at their seminars.
- [33] Ms. Travers said that she was not directly involved in planning how the seminars would work or what the financial projections were for the business. According to Ms. Travers, that was the plaintiff's part of the business, although she did comment on how clear the plaintiff was with respect to financial issues.
- [34] With respect to her own involvement going forward, Ms. Travers said that she was confident that if the plaintiff's plan worked out, or came close to working as planned, she could earn an acceptable income to supplement her existing income from her ongoing consulting

work.

[35] The financial statements for Néange were entered into evidence and they reveal the following financial results for the company for the years 2006-2014, based on a fiscal year end of June 30:

2006

Sales revenues 0.00

Operating expenses \$12,349

Net loss \$12,349

2007

Sales revenues \$4,833

Operating expenses \$45,215

Net loss \$41,215

Accumulated deficit \$53,536

2008

Sales revenues \$15,567

Operating expenses \$37,432

Net loss \$27,446

Accumulated deficit \$80,982

2009

Sales revenues \$46,418

Operating expenses \$54,540

Net loss \$15,017

Accumulated deficit \$95,999

2010

Sales revenues \$3,429

Operating expenses \$40,810

Net loss \$37,858

Accumulated deficit \$133,857

2011

Sales revenues \$3,772

Operating expenses \$42,641

Net loss \$40,693

Accumulated deficit \$174,548

2012

Sales revenues \$5,188

Operating expenses \$38,969

Net loss \$36,442

Accumulated deficit \$210,990

2013

Sales revenues \$2,432

Operating expenses \$37,176

Net loss \$36,469

Accumulated deficit \$247,459

2014

Sales revenues \$2,615

Operating expenses \$30,294

Net loss \$29,354

Accumulated deficit \$276,813

[36] The plaintiff said that she financed the development of Néange by cashing in her registered retirement savings plan funds and by using a line of credit registered against the family home. By the time of trial, the plaintiff estimated that she had invested approximately \$350,000 in the business.

The Accident

[37] The accident occurred at about 4:00 p.m. on December 4, 2013. According to the plaintiff, she was driving north on Taylor Way in West Vancouver in her 2013 BMW X3. She had been at the Park Royal shopping mall and was heading home. Traffic was heavy and she came to a stop behind vehicles that had also stopped in front of her just past the intersection of Taylor Way and Inglewood Avenue.

- [38] According to the plaintiff, her last memory before the accident is of seeing a vehicle coming up behind her and wondering if it would be able to stop. Her next memory is of someone knocking on her window and asking if she was ok.
- [39] Documents entered into evidence indicate that the plaintiff's vehicle suffered about \$5,100 in damage plus a small charge to reinstall the headrest air bag that had deployed on impact.
- [40] Paramedics came to the accident scene and the plaintiff was taken to Lions Gate Hospital. After a few hours there, she was taken home by her family.
- [41] The defendant, Sabrina Mackay, also testified about the accident. On December 4, 2013, Ms. Mackay was driving north on Taylor Way towards the upper levels highway in her Ford Explorer. She was heading home from work, after completing her shift at 3:30 p.m.
- [42] Ms. Mackay said that at the time of the accident, she was checking her rear view mirror when the light ahead changed, causing the traffic to stop in front of her. She stepped hard on her brake but was unable to stop and she struck the vehicle in front of her. Just before she did, she looked at her speedometer and she was travelling at 50 km/hr, although she thinks she may have slowed somewhat before the impact. She said that the car in front of her "jumped" somewhat when she hit it.
- [43] Ms. Mackay got out of her vehicle and tried to speak to the other driver but she said the driver was on her phone and did not talk to her. Ms. Mackay then moved her vehicle off to the side of the road. Emergency personnel attended and the other driver was taken away by ambulance.
- [44] Ms. Mackay's airbag did not deploy and she was able to drive her vehicle after the accident.

The Plaintiff's Injuries and Post-Accident Condition

- [45] Immediately following the accident, the plaintiff remained in bed for much of the time. She said she had considerable pain in her head and neck and was nauseous. When she was able to get out of bed, she experienced dizziness and balance problems, as well as ongoing pain, nausea and headaches.
- [46] According to the plaintiff, her symptoms have remained constant since the accident, and they include:
- a) post-concussion symptoms of light sensitivity, mood changes, fatigue and cognitive problems;
 - b) dizziness and balance problems;
 - c) soft tissue injuries to her neck and shoulders and injury to her right hip;
 - d) jaw pain; and
 - e) ongoing headaches.

- [47] Following the accident, in 2014 and 2015, the plaintiff received physiotherapy treatments for her neck, shoulders and pelvic/hip area. She also had four sessions of specialized vestibular physiotherapy which focussed on her issues with balance and dizziness. She had a number of massage treatments between June and August 2014, as well as sessions with a kinesiologist in October to December 2014 and some acupuncture treatments in the period of June to September 2015. She has also been attending therapeutic yoga classes since mid-2015 and has recently begun Botox treatments to try to deal with her headaches.
- [48] The friends and acquaintances of the plaintiff who testified also spoke about their observations of the plaintiff's condition after the accident. Uniformly, the witnesses described the plaintiff as slower in her movements, struggling with dizziness and balance, often in pain and generally less active and social. One described her as a "different person" after the accident.
- [49] Similar evidence was given by her husband and her daughter, who both testified about the changes they have witnessed in the plaintiff since the accident.

Status of Néange after the accident

- [50] As noted above, the plaintiff was immobilized for a period of time after the accident, during which she was unable to focus on Néange. Because of her vestibular issues, she was unable to work on the computer, which delayed completion of the Néange presentation.
- [51] In March 2014 Ms. Travers took a job with another cosmetic company, managing a retail store. The plaintiff considered this to be a real blow to her plans for developing Néange, given the key role that Ms. Travers was intended to play.
- [52] According to Ms. Travers, she had limited contact with the plaintiff immediately after the accident. When they did get together to discuss Néange, Ms. Travers said that the plaintiff had trouble with simple things like sitting in a chair or working on the computer. Ms. Travers said that in light of the plaintiff's condition, she felt she needed to look for other work. She also said that she was neither able to nor interested in doing anything more with Néange than she had already been doing.
- [53] Very little happened with Néange in the years 2014 and 2015 other than some sales to existing customers. The financial statements for Néange for the years ending June 30, 2015 and 2016 show the following results:

2015

Sales revenues \$6,454

Operating expenses \$27,224

Net loss \$23,048

Accumulated loss \$299,861

2016

Sales revenues \$10,130

Operating expenses \$32,792

Net loss \$24,988

Accumulated loss \$324,849

- [54] In 2016, three test sales seminars were organized by Dr. Tim Silk, a marketing professor from UBC who was retained by the plaintiff as an expert for the purposes of this litigation.
- [55] The first seminar was held on August 14, 2016 at the plaintiff's home. The attendees were friends of the plaintiff and friends of friends. The plaintiff did her presentation which she said went "beautifully" and that everyone in attendance loved her products.
- [56] The second seminar was held a week later, again at the plaintiff's home and again the attendees were friends and acquaintances. Rather than the plaintiff doing the presentation however, it was done by Fraser Roland, a friend of hers. The plaintiff spent considerable time training Mr. Roland to do the presentation. Mr. Roland said he spent probably 15-20 hours preparing and that he found it an interesting process. Again, both he and the plaintiff said that the presentation was well received.
- [57] The third seminar was done at the home of a colleague of Dr. Silk on September 20, 2016. While the plaintiff did the presentation, the attendees at this seminar had been recruited by a market research firm and had no relationship to the plaintiff. The plaintiff again described a positive response, although fewer people made purchases than at the first two seminars.
- [58] I will deal with these seminars in greater detail below when discussing Dr. Silk's evidence.

Medical Evidence

- [59] Numerous medical specialists testified, some as expert witnesses and some in their capacity as treating practitioners of the plaintiff. Rather than review their evidence individually, I will summarize the relevant medical evidence in respect to each of the plaintiff's principal complaints.

Neck, shoulder, low back and hip pain

- [60] The plaintiff has consistently complained of neck, shoulder and right hip/pelvis pain since the accident. Dr. Pamela Squire, a specialist in pain medicine, diagnosed the plaintiff as suffering from a "soft tissue injury to the cervical spine, upper back and shoulders including muscles, fascia, ligaments or tendons" together with "central sensitization affecting the left shoulder and neck area," intermittent cerviogenic headaches relating to her neck pain and chronic right hip pain.

- [61] Dr. Nairn Stewart, a specialist in the area of physical medicine and rehabilitation (physiatrist) who examined the plaintiff at the request of her counsel on April 22, 2015, similarly diagnosed the plaintiff as suffering from soft tissue injuries to her neck and low back. She suggested that her hip pain, which she first complained about a year after the accident, likely resulted from her rehabilitation for the injuries sustained in the accident. Given the plaintiff's ongoing symptoms two and a half years after the accident, it is Dr. Stewart's opinion that she will continue to experience symptoms and limitations from her injuries in the future.
- [62] As noted above, the plaintiff had some massage therapy, some acupuncture and some physiotherapy for her pain issues. She also had some sessions with a kinesiologist. The massage, acupuncture and kinesiology treatments were quite limited in number but she has received extensive physiotherapy since the accident, as reflected in her list of special damages. The numerous treating practitioners who testified all generally said that their treatments focussed on the plaintiff's neck, shoulders, upper back and hip/pelvis area. Since April 2015, she has also participated regularly in classes involving therapeutic yoga and an exercise ball.

Dizziness, nausea and headaches

- [63] Dr. Neil Longridge is a specialist in the field of otolaryngology who examined the plaintiff at her counsel's request on March 26, 2014 with respect to her complaints of dizziness and heightened sensitivity to noise, bright lights and sudden movement. The results of testing conducted by Dr. Longridge led him to conclude that the plaintiff's balance problems were probably caused by a malfunction in her balance system, most likely her inner ear. He was also of the view that she was experiencing visual vestibular mismatch, which is a form of visually induced dizziness brought on by bright lights, busy patterns on things like carpets and nearby movement.
- [64] Dr. Jason Barton is a neurologist and neuro-ophthalmologist who similarly diagnosed the plaintiff as experiencing visuo-vestibular mismatch, or dizziness caused by visual stimuli. In his view these symptoms, along with her complaints of headache and cognitive impairment, are likely the result of a mild traumatic brain injury ("MTBI") suffered in the accident.
- [65] Dr. Donald Cameron is a neurologist who originally saw the plaintiff at the request of her family doctor on April 16, 2014. He subsequently saw her a number of times in the role of treating neurologist. Based on his treatments of her and his review of relevant medical records, Dr. Cameron's opinion is that the plaintiff suffered an MTBI in the accident and that she has continued to experience symptoms of post traumatic brain injury syndrome.
- [66] As of September 16, 2016, the date of his expert report, Dr. Cameron was starting a trial of Botox injections to treat her headaches.

[67] Dr. Rehan Dost is a neurologist who assessed the plaintiff on July 14, 2016 at the request of the defendant. He prepared an expert report dated July 21, 2016. It is Dr. Dost's opinion that the plaintiff did not suffer a brain injury of any severity. He bases this opinion in part on a review of post-accident records, which did not reveal key indicators of an MTBI like loss of consciousness, amnesia, disorientation and confusion. In his view, her complaints of headache and cognitive difficulties are related to her soft tissue injuries and likely overuse of non-prescription medications.

Jaw pain

[68] Dr. Bruce Blasberg is an expert in oral medicine, which is an area of speciality in dentistry dealing with the diagnosis and treatment of complex mouth and jaw related conditions. Dr. Blasberg examined the plaintiff on May 21, 2015 at the request of her counsel.

[69] Dr. Blasberg diagnosed the plaintiff as suffering from myalgia of the masticatory muscles, which in lay terms means jaw pain, left temporomandibular joint (TMJ) pain and related headaches. In his view, these conditions were likely caused by the accident. Dr. Blasberg recommended the use of an oral appliance to address her symptoms. A similar recommendation was made by Dr. Samson Ng, another oral medicine specialist who saw the plaintiff in October 2015.

Economic Evidence

[70] The plaintiff relies on the expert opinion evidence of Professor Tim Silk. As noted, Dr. Silk designed and facilitated the three test seminars held in 2016, with the assistance of Ms. Booth, the principal of Lux Insights. I will review Dr. Silk's evidence generally now and will return to it in more detail below when considering the plaintiff's income loss claims.

[71] In his October 20, 2016 report, Dr. Silk describes the methodology used in these terms:

The most accurate and appropriate methodology to assess the market potential of a new product is to conduct a concept test and develop a sales forecast using the results of the concept test. The purpose of the concept test is to develop a predictive test of how the product will perform in the market. To be predictive, the concept test must be based on careful measurement and established models of consumer response.

The most accurate method for conducting a concept test is conducting a simulated test market. A simulated test market attempts to replicate the actual purchase context and is conducted with participants who are sampled from the intended target market population. Consumers are exposed to the product in a manner that is similar to what would happen in the market and given an opportunity to purchase the product. Trial purchase is measured by observing the number and percentage of participants who purchase the product. Repeat purchase is measured in a subsequent telephone follow-up with trial purchasers using a validated scale of purchase intention. Long-run sales are then estimated using the rate of both trial and repeat purchase.

- [72] Dr. Silk goes on to explain that the tests conducted for the purpose of his report follow the methodology used in the "BASES" and "ASSESSOR" forecast models. While there is minimal description in his report about how these models function, in his testimony, Dr. Silk explained that both models involve exposing consumers to a product and then measuring the level of their intention to purchase. The BASES model is limited to assessing intention in that it is based on the use of questionnaires that ask how likely someone is to purchase.
- [73] In contrast, the ASSESSOR model tests actual purchase behaviour in that consumers are put into an environment as close as possible to the environment in which the product is intended to be sold, and are given the opportunity to buy the product. The likelihood of repeat purchases is then assessed through follow up conversations with the people who purchased initially.
- [74] The three test seminars conducted by Dr. Silk can be described in general terms as follows:
1. The first seminar took place on August 14, 2016 at the plaintiff's home. Attendees consisted of 12 friends and acquaintances of the plaintiff. The plaintiff did her presentation and at the end of the seminar, people could purchase Néange products. As people left the seminar, they were asked by Dr. Silk to complete a questionnaire. According to Dr. Silk, this seminar was intended to replicate the first couple months of the business when the plaintiff would be delivering the seminar presentation.
 2. The second test seminar took place on August 21, 2016, again at the plaintiff's home. It was similar to the first seminar in that the 12 attendees invited were friends and acquaintances of the plaintiff. The one main difference is that the presentation was made by Mr. Roland, a friend of the plaintiff's, who she had trained. This seminar was intended to replicate how the business would operate as it progresses with sales associates trained by the plaintiff doing the sales presentations.
 3. The third seminar took place on September 20, 2016 at the home of a colleague of Dr. Silk. This seminar differed significantly from the first two seminars in that the 13 attendees were recruited by a research recruiting firm, had no connection to the plaintiff and they were each paid \$100 for attending. The third seminar was intended to replicate the business further out in time when seminar participants would have no direct relationship with the plaintiff.
- [75] Dr. Silk used the results from the three test seminars as the basis for forecasting the likely future sales revenues and profits from the plaintiff's business if it progressed as she planned. In his expert report dated October 20, 2016, he describes this scenario as the "base case". He says the following about the base case scenario:

The base case is considered to have a reasonable probability of occurrence and is the starting point at which to estimate profits. The assumptions that make up the base case are scrutinized and compared to other industry examples to ensure the assumptions are realistic and that there is a reasonable probability that the base case will accurately forecast what will be observed in reality. To be clear, the base case is not an optimistic estimate, but rather a realistic estimate.

Due to the negative consequences associated with over-estimating demand in industry (such as the cost of a failed product launch), it is a best practice in forecasting to take a conservative approach whenever possible and err on the side of caution. Consequently, it is a common practice to apply the known error rate to the base-case forecast to determine a range of possible values that may occur due to forecast error. The ASSESSOR model predictive error rate of +/- 11.59% is therefore applied to the base case to account for the error rate of the model. When applied to the base case 10-year forecast for Ms. Rousta's line of cosmetics, the error rate of +/- 12% results in a range of values from \$8,595,637.18 to \$10,939,901.86. Thus in my opinion, there is a reasonable probability that Ms. Rousta's business would have generated a profit within the range reported in the table above. This range of values represents a realistic estimate and take the known error rate of the model into account.

- [76] Having assessed the base case, Dr. Silk goes on to estimate worst case scenarios, which account for circumstances that would negatively affect performance of the business, such as fewer salespeople, fewer home seminars, lower attendance rates and lower purchase rates. According to Dr. Silk, one such negative occurrence would result in a 20% reduction to his base case scenario and two occurrences would result in a 44% reduction. This results in a ten year operating profit in the range of about \$5.5 million to about \$7.8 million. Dr. Silk also notes that if performance exceeds what is contemplated in the base case, operating profits could exceed \$20 million.
- [77] The defendant relies on an expert report prepared by an economist, Mr. Mark Szekely. Mr. Szekely does not provide his own opinion about the operating profits that might be realized by the plaintiff's business, but rather takes issue with some of the assumptions used by Dr. Silk. Mr. Szekely then provides a set of multipliers that may be used to assess the current value of future economic losses.
- [78] With respect to Dr. Silk's assumptions, Mr. Szekely makes the following points:
- a) Dr. Silk's analysis makes use of unrealistic growth assumptions. For example, his projections for 2014 represent 13.5 times the gross profit reported for Néange in its best year ever, and the projected increase from 2014 to 2015 is a further 129%;
 - b) Dr. Silk underestimates the compounding effect of reductions to profit resulting from his worst case scenarios. In his opinion, profits over four years would be reduced from the base case by a cumulative 59% under Dr. Silk's first worst case scenario, in which one negative factor applied, and by cumulative 83.2% in his second worst case scenarios in which there were two negative factors;

- c) Dr. Silk's assumption about the plaintiff's ability to hire and retain sales associates is unrealistic and fails to account for staff attrition rates;
- d) Dr. Silk's analysis fails to account for failure rates for new businesses; and
- e) Dr. Silk fails to properly explain how he arrives at his figures for annual fixed costs.

[79] In a reply report dated December 9, 2016, Dr. Silk responded to Ms. Szekely's points as follows:

- a) the growth projections differ from, and do not consider, Néange's past performance because the plaintiff had not established a method of distribution prior to 2014;
- b) Mr. Szekely errs in suggesting that compounding would occur each year in terms of the impact of the negative factors. He stands by his calculations underlying his two worst case scenarios;
- c) the plaintiff's ability to retain sales associates is factored into his worst case scenarios and, in any event, her projections of sales associate numbers are reasonable;
- d) the models used to arrive at Dr. Silk's projections account for the likelihood of the business failing by measuring anticipated consumer behaviour; and
- e) his estimates of fixed costs are based on publically available annual reports of direct selling organizations.

Findings of Fact as to the Plaintiff's Condition

[80] The evidence establishes that the plaintiff suffered soft tissue injuries to her neck, shoulders and back as well as an injury to her right hip as a result of the accident. I accept her evidence that she still experiences pain in these areas, although I note the evidence of both Dr. Cameron and Dr. Dost that when they examined her, both in the summer of 2016, she had a full range of motion in her neck and back. A fair assessment is that these injuries will continue to cause her some pain and discomfort but are not by themselves disabling.

[81] The evidence also establishes that the plaintiff suffered an inner ear injury with resulting visual vestibular mismatch which continues to cause her difficulty, although not to the same degree as shortly following the accident. Again referring to Dr. Cameron's and Dr. Dost's examinations of the plaintiff in mid-2016, both indicated normal balance and coordination.

[82] The plaintiff has also experienced consistent headaches since the accident, and I am satisfied that they still continue to bother her, although Dr. Cameron and Dr. Barton are optimistic about improvement with better management.

[83] It is a point of contention between the parties as to whether the plaintiff suffered an MTBI in the accident. On balance, I accept the evidence of the plaintiff's experts that she did. That said, in my view, little turns on this diagnosis. I agree with the following statement from Dr. Stewart where she states at para. 15 of her report:

there is no indication that she sustained any lasting injury to her brain. Her reported problems with memory and concentration since the collision are likely due to other factors including pain, sleep disturbance, dizziness, medication effect and anxiety.

[84] In terms of those complaints, I accept that the plaintiff has experienced some sleep disturbance and resulting fatigue, however her evidence of cognitive problems was vague. Moreover, it was belied by the evidence of how well she did in her presentations at the first and third seminars arranged by Dr. Silk and by her testimony at trial, during which she exhibited a near encyclopedic knowledge of the cosmetic industry and the history and development of her products.

[85] The other contentious issue between the parties is whether the plaintiff's jaw issues were caused by the accident. The plaintiff says yes and the defendant, no. The defendant's position rests largely on the fact that, she says, the plaintiff did not report any facial or jaw pain until over a year after the accident which calls into question the causal relationship to the accident. The defendant notes that the plaintiff saw her own dentist, Dr. Kearney, a number of times after the accident and he specifically noted no TMJ issues. There is also the fact that the plaintiff had a long standing, pre-accident history of clenching and grinding her teeth, for which she wore an appliance at night.

[86] On this issue, I accept the opinion of Dr. Blasberg that the jaw issues were likely caused by the accident. There was evidence that the plaintiff complained of facial pain sooner than suggested by the defendant, although she may not have associated it with jaw pain. I also agree with the plaintiff that there is no expert medical evidence countering Dr. Blasberg's opinion.

[87] While the plaintiff's condition has improved in the three plus years since the accident, I accept that the symptoms complained of continue to cause her difficulty. Moreover, I am satisfied that the cumulative effect of her various injuries has had a significant, negative impact on her enjoyment of life. As discussed previously, there was extensive and uniform evidence given by her friends and family about the changes that they have observed in the plaintiff since the accident. They describe her as uncertain on her feet, often in pain, less active and less social than she was previously and I accept this as an accurate description.

[88] I am also satisfied that her injuries have affected her ability to work at the same capacity as prior to the accident. Dr. Stewart suggests that she will be limited to part-time work in the future, and this is consistent with Dr. Squires' opinion. Dr. Cameron is more negative in his opinion but, in my view, the evidence does not establish that the plaintiff is totally disabled.

Liability

- [89] I will say a brief word about liability, which was never formally conceded by the defendant. However, the defendant did not address liability in her closing submissions and, on the basis of the evidence adduced at trial, I am satisfied that the defendant is 100% liable.

Damages

Non-Pecuniary Damages

- [90] The factors that the court must consider when assessing non-pecuniary damages are well known and have been set out in a number of cases, including by the Court of Appeal in *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46. I have taken those factors into consideration.
- [91] Awards of non-pecuniary damages in other cases provide a useful guide to the court, however the specific circumstances of each individual plaintiff must be considered. This is because any award of damages is intended to compensate for the pain and suffering experienced by that specific plaintiff. Moreover, the compensation award must be fair and reasonable to both parties; see *Trites v. Penner*, 2010 BCSC 882 at paras. 188-89; *Miller v. Lawlor*, 2012 BCSC 387 at para. 109 citing *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229.
- [92] The plaintiff submits that an award of non-pecuniary damages in the range of \$90,000-\$120,000 is warranted. She cites *Hill v. Murray*, 2014 BCSC 1528; *Phoutharath v. Moscrop*, 2002 BCSC 686 and *Moukhine v. Collins*, 2012 BCSC 118 in support of her position.
- [93] The defendant does not differ significantly from the plaintiff on this issue and submits that an award of \$90,000 is appropriate, citing *Rollheiser v. Rollheiser*, 2012 BCSC 1512; *Gillespie v. Yellow Cab Company Ltd.*, 2014 BCSC 1745 and *Reimer v. Bischoff*, 2015 BCSC 1876 in support.
- [94] Considering the impacts of the accident on the plaintiff, the principles emanating from *Stapley* and the case authorities cited, I find that a reasonable award of non-pecuniary damages is \$110,000.

Past Wage Loss and Loss of Future Earning Capacity

- [95] I will deal with the claims for past and future income loss together because both involve consideration of the extent to which the accident, and the plaintiff's resulting injuries, impeded her ability to further develop and successfully grow the Néange business. As noted at the outset of these Reasons, these are the most contentious issues between the parties.

[96] With respect to the claim for past loss, in many cases, the analysis focusses on actual income foregone as a result of injuries sustained in an accident. The analysis does not end there however, because the claim for lost income, both past and future, is a claim for loss of capacity. The Court of Appeal made this point in *Ibbitson v. Cooper*, 2012 BCCA 249 at para. 19, citing its earlier decision in *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141:

While in many cases the actual lost income will be the most reliable measure of the value of the loss of capacity to earn income, this is not necessarily so. A hard and fast rule that actual lost income is the only measure would result in the erosion of the distinction made by this Court in *Rowe*: it is not the actual lost income which is compensable but the lost capacity i.e. the damage to the asset. The measure may vary where the circumstances require; evidence of the value of the loss may take many forms (see *Rowe*). As was held in *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 11, 84 B.C.L.R. (3d) 158, the overall fairness and reasonableness of the award must be considered taking into account all the evidence. An award for loss of earning capacity requires the assessment of damages, not calculation according to some mathematical formula.

[97] With respect to the claim for future loss, the Court of Appeal has discussed the governing principles in numerous cases. In *Morgan v. Galbraith*, 2013 BCCA 305 [Morgan], the court, citing its earlier decision in *Perren v. Lalari*, 2010 BCCA 140 [Perren], described the approach to be taken by the trial judge as follows at para. 53:

in *Perren*, this Court held that a trial judge must first address the question of whether the plaintiff had proven a real and substantial possibility that his earning capacity had been impaired. If the plaintiff discharges that burden of proof, then the judge must turn to the assessment of damages. The assessment may be based on an earnings approach or the capital asset approach,

[Emphasis in original.]

[98] The earnings approach is generally appropriate where the plaintiff has some earnings history and where the court can reasonably estimate what his or her likely future earning capacity will be. This approach typically involves an assessment of the plaintiff's estimated annual income loss multiplied by the remaining years of work and then discounted to reflect current value, or alternatively, awarding the plaintiff's entire annual income for a year or two: *Pallos v. Insurance Corp. of British Columbia* (1995), 100 B.C.L.R. (2d) 260 at para. 43 [Pallos]; *Gilbert v. Bottle*, 2011 BCSC 1389 at para. 233 [Gilbert]. While there is a more mathematical component to this approach, the assessment of damages is still a matter of judgment, not mere calculation.

[99] The capital asset approach, which is typically used in cases in which the plaintiff has no clear earnings history, involves consideration of a number of factors such as whether the plaintiff:

- i. has been rendered less capable overall of earning income from all types of employment;
- ii. is less marketable or attractive as a potential employee;

iii. has lost the ability to take advantage of all job opportunities that might otherwise have been open; and

iv. is less valuable to him or herself as a person capable of earning income in a competitive labour market.

(See *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 at para. 8 (S.C.) [Brown] and Gilbert at para. 233).

[100] Where an injured plaintiff derives his or her income through a business, the court must consider the likely performance of that business had the accident not occurred.

[101] In *Proving Economic Loss*, loose-leaf (consolidated on 12 October 2017) (Toronto: Thomson and Carswell, 2006), ch. 5 at 4-19 Mark Berenblut makes the following observations about determining future business income:

In order to determine expected future income had the accident not occurred, income projections must be prepared. In preparing such projections, past business performance is only one possible indicator of future potential. Care must be taken to ensure that projections of future earnings are consistent with expectations for the economy and industry as a whole. In the event that the projections deviate from general expectations, the basis for the deviation should be explored and substantiated.

It may be a valid exercise to postulate on future expansion and resulting increased earning capacity. However, this should only be done when some or all of the following criteria are present:

- (a) The future business expansion was actually envisaged at the time of the accident or could reasonably have been envisaged in the future.
- (b) The particular industry in which the business operates can absorb the increase in production of the business.
- (c) All the negative factors acting against successful expansion are evaluated and taken into account.
- (d) A market exists for the business' product. This is relevant if a new product for manufacture was envisaged.

[102] In *Bricker v. Danyk*, 2015 BCSC 2404, I considered a similar claim for loss of income based on a projected expansion of a business that the plaintiff alleged would have occurred but for the accident and suggested a number of factors that the court may consider, at paras. 150-51:

[150] The question then becomes, what evidence must be led by a plaintiff to establish, on a balance of probabilities, that but for an accident, a new business would have continued to grow and increase its revenues? While each case will necessarily turn on its own facts, where the operation and success of the business is inextricably tied to the injured plaintiff, there are a number of factors that the court may consider when assessing the strength of the plaintiff's claim, including:

- a) the plaintiff's education and training as it relates to the business in issue;
- b) the plaintiff's employment history;
- c) the plaintiff's earning history, both before the creation of the business and through the business;
- d) the existence (or absence) of a business plan setting out how the plaintiff intended to develop the business;
- e) actual steps taken to implement the business plan;
- f) the performance of similar businesses;
- g) market conditions that might impact the business, both positively and negatively, and
- h) existing and anticipated clients.

[151] This is by no means an exhaustive list and the presence or absence of one or more factors will not be determinative. The point is that the court must assess the evidence as a whole to determine whether the plaintiff has met his or her burden.

[103] In *Ostrikoff v. Oliveira*, 2015 BCCA 351 [Ostrikoff], the Court of Appeal considered claims for past and future income loss based on projected earnings from a business formed shortly before the accident.

[104] In dealing with the past income claim, Madam Justice Saunders said at para. 21:

it remains true that it is for the plaintiff to prove a claim for past loss of earning capacity on a balance of probabilities, and that an award must keep in touch with the evidence before the court. It seems to me that the judge himself, in saying a projection of increased income would be speculation, recognized that past income capacity loss predicated on increasing earnings was not proved to the requisite standard.

[105] Madam Justice Saunders took a similar view of the award of damages for loss of future earning capacity. In her view, that award could not be sustained given that it was based on an entirely speculative projected future income stream. In addition, Madam Justice Saunders held that the trial judge did not adequately consider the contingencies, both positive and negative, that might impact on the plaintiff's capacity to earn income.

- [106] As Justice Saunders makes clear, claims for lost earning capacity, both past and future, based on earnings projections must be firmly rooted in the evidence and must go beyond mere speculation.
- [107] In the present case, the plaintiff points to a number of factors in support of her contention that her business would have succeeded but for the accident. These include the following:
- a) the plaintiff has extensive experience in the cosmetics industry, including experience recruiting and training sales associates;
 - b) she was working closely with Ms. Travers, who also has extensive experience;
 - c) she had a well thought out plan for launching and growing the business; and
 - d) she had taken concrete steps to develop the business, including incorporating Néange, obtaining trademarks and finding suppliers for the products and the packaging.
- [108] She also relies heavily on Dr. Silk's report, which she submits reflects a reasonable, if somewhat conservative, assessment of likely earnings.
- [109] In my respectful view, Dr. Silk's projections do not rise above the level of speculation. I reach this conclusion for a number of reasons.
- [110] It is apparent that a fundamental assumption relied on by Dr. Silk is that the plaintiff's business model would have succeeded as anticipated by the plaintiff, however there are a number of flaws in this assumption which emerged in the evidence. Most notable is the assumption that the plaintiff would have recruited the projected number of sales associates and seminar hosts and would have held the number of seminars that underpin Dr. Silk's analysis.
- [111] The plaintiff's plan to recruit seminar hosts and to recruit and retain sales associates was vague and, in my view, unrealistic. To get a sense of how unrealistic the plan was, it is useful to review Dr. Silk's projections of the number of seminars to be held, and number of attendees, over the first four years. The number of seminars, on a cumulative basis, was projected to be: 462 by the end of year one; 1,650 by the end of year two; 3,702 by the end of year three; and 6,618 by the end of year four. Projected attendance over the course of those years was projected to be: 5,544 by the end of year one; 19,800 by the end of year two; 44,424 by the end of year three; and 79,416 by the end of year four. This despite there only having ever previously been one informally organized seminar in 2011 (leaving aside the three test seminars in 2016 done for the purposes of this case).
- [112] It is also useful to note that while the plaintiff said that she intended to launch Néange with seminars beginning in January 2014, as of the date of the accident in December 2013, no seminars had been scheduled and no hosts had been recruited.

- [113] One of the linchpins in the plaintiff's plan was the involvement of Ms. Travers. However, the plaintiff in her evidence overstated the role to be played by Ms. Travers, who testified that she assisted with the development of the presentation largely as a favour to the plaintiff. Ms. Travers testified further that if things worked out as the plaintiff hoped, she might earn some income from Néange to supplement her other sources of income. Ms. Travers' evidence fell far short of establishing that she was working to build the business alongside the plaintiff, which is how the plaintiff portrayed her involvement. Ms. Travers' level of commitment to the business is well illustrated by the fact that she left to find other employment within three months of the accident.
- [114] The plaintiff similarly overstated the role to be played by Simi Hirbod, who supposedly was to begin giving seminars in March 2014. In her evidence, Ms. Hirbod appeared to know little about the products and she showed minimal interest in hosting or presenting at seminars.
- [115] Even if the business was able to hold the number of projected seminars, no evidence was led as to how the plaintiff, or Néange, would be able to support the hosts and sales associates, for example, how the products would be distributed to the hosts to show at the seminars. Additionally, there was no evidence about how Néange would manage and distribute the products purchased at the seminars, or even if it had the capacity to provide the expected volume of products.
- [116] During his testimony, Dr. Silk stated that his projections contemplated growth of the business beyond the lower mainland of British Columbia as the network of seminar hosts expanded. Again however, there was no evidence about how products would be distributed throughout that expanded network.
- [117] On this point, the evidence was that in 2006 the plaintiff had initially purchased quantities of the face cream and the eye cream that were stored and distributed out of her garage. Given the large and rapid projected expansion of the business, alternative arrangements would presumably have to be made, but there was no evidence of any such arrangements being considered. There was similarly no evidence that the plaintiff had been in contact with the supplier in recent years to determine if it could or would supply the anticipated increased volumes.
- [118] In addition to these flaws in the assumptions relied on by Dr. Silk, I also have a number of concerns about his analysis. I note that during the trial, the defendant objected to the admissibility of Dr. Silk's report on a number of grounds. After a voir dire, I determined that it was admissible in accordance with the test established by the Supreme Court of Canada in the leading cases of *R. v. Mohan*, [1994] 2 S.C.R. 9 and *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23. However, admissibility is a different question from how much weight, if any, should be attached to an expert report.

- [119] The first concern is with the use of the ASSESSOR and BASES models. The defendant submits that there are no known cases in which these models have been accepted by a court and that special scrutiny should apply to such "novel science" (Pitcher v. Brown, 2015 BCSC 1019 at paras. 23-25).
- [120] Dr. Silk testified that these models are the "gold standard" for testing pre-market viability of new products and I have no reason to dispute this. However, on Dr. Silk's own evidence, the models are used by companies at the initial development stage when considering whether to launch a new product, rather than to assess the actual financial performance of the product. This is likely one reason that the models have not been used by the courts in cases involving claims of economic loss.
- [121] Put another way, companies will use models such as these to decide whether to invest time and money into the product in the form of marketing, supply, distribution channels etc. It is the implementation of these measures that determines the ultimate success of the product, not the initial market projections. As set out above, the evidence does not satisfy me that the proposed implementation of the plaintiff's plans in this case would lead to success of the magnitude claimed.
- [122] During the course of his testimony, I raised with Dr. Silk that nowhere in his report does it clearly identify the number of product units that will be sold. He acknowledged that point and spent a few minutes trying to extrapolate those figures from the data that is contained in his report, but was unable to do so on the spot in the witness stand. To my mind, this further illustrates the point that the models used by Dr. Silk may at best predict market potential but not actual financial results. Without an understanding of how many units of product are projected to be sold, how can there be any reasonable assessment of whether the revenue projections are realistic and whether there are adequate systems in place to get those products into the hands of purchasers?
- [123] A second concern with Dr. Silk's report is that it ignores that past earnings performance of Néange which, as noted previously, had accumulated losses of about \$250,000 by June 30, 2013, the last fiscal year before the accident. Dr. Silk's explanation for not considering past performance was that the plaintiff had not previously identified a preferred sales methodology. That may be so, but it is difficult to accept that past performance is wholly irrelevant to future success.
- [124] In *Canadian Faces Inc. v. Cosmetic Manufacturing Inc.*, 2011 ONSC 6171 Justice Allen dealt with a very similar issue at para. 49:

Courts have grappled with quantifying damages where there is no expert evidence and where limited or no historical economic data is available to the court. The Ontario Court of Justice, General Division, drawing on U.S. jurisprudence, addresses the issue of proof of loss of future profits for a new enterprise:

In assessing the reliability of projected future profits, a record of past earnings will obviously increase the certainty of such a prediction. However, a lack of evidence of past earnings does not automatically preclude a new business from recovering for lost profits. Rather, a new business must be allowed to prove lost profits to a reasonable level of certainty by expert testimony, by evidence of actual profits of similar businesses, by evidence of proven managerial experience and expertise, and by evidence of subsequent earnings if such evidence is available. Nevertheless, damages should not be awarded for lost profits which are entirely speculative and uncertain. See *Al Edwards v. Container Craft Carton and Paper Supply Company*, 327 P. 2d 622 (Calif. Dist. Ctr. App. 1958) and *Cooke Associates Inc. v. Warnick et al*, 664 P. 2d 1161 (Utah Sup. Ct.1983).

- [125] While evidence of part performance is not an absolute requirement, this decision underscores Justice Saunders' point in *Ostrikoff* that claims for future loss must be based on evidence that goes beyond mere speculation.
- [126] A third concern is the absence of any analysis of the cosmetics market, including competitive conditions that would militate both in favour and against the success of Néange. Factors like who Néange's principal competitors would be, price comparisons and success and failure rates for similar recent start-ups would all impact on Néange's likelihood of success, or failure, and yet there is no consideration of them.
- [127] When I consider these issues alongside the absence of evidence establishing that there was a realistic plan in place to grow the business, I find that I am unable to place any weight on Dr. Silk's opinion.
- [128] Two other factors undermine the plaintiff's income loss claims as presented. First, it is apparent on the evidence that she did not work full-time on developing Néange since leaving Dior in 2004. While there was clearly considerable time spent initially developing the products and sourcing suppliers, subsequent efforts to market and sell the products were somewhat sporadic. That is particularly so in the years since 2009, which was the year that sales revenues peaked at approximately \$46,000. The following year, sales revenues fell precipitously to \$3,429, which the plaintiff attributed to the recession and to the loss of her U.S. distributor. However, apart from attending one trade show and talking to two shopping channels, the plaintiff appears to have taken minimal steps to build the business or recapture the market that she had developed in the U.S.
- [129] Further, the plaintiff did not adequately explain why, after the successful 2011 seminar that led her to focus on a direct sales model, she did not do more to pursue that model immediately; for example, she did not explain why her home seminar presentation was not completed until early 2014. The clear impression is that it is because she was not in fact working on Néange full-time. This calls into question her commitment to spending the time and effort necessary to build the business to the degree contemplated by Dr. Silk's projections.

- [130] Second, the plaintiff's claim is premised on her being totally disabled from operating Néange, a premise that is not born out by the evidence. As noted previously, I accept that her injuries impede her ability to work to the same level that she did before the accident, but she is not totally disabled. Rather, I find that she has some residual capacity that would enable her to operate Néange to some degree.
- [131] Perhaps the best evidence of this is how well her presentation was received by attendees at the first and third seminars organized by Dr. Silk. For example, one of the attendees at the first seminar, Mr. Turfus, who is an experienced businessman, described both the content of the power point and the plaintiff's presentation in very positive terms. Similarly, during her testimony in court, the plaintiff presented as extremely knowledgeable about the cosmetics industry, very engaged in her products and capable and articulate about describing them. She also successfully trained Mr. Roland to give the presentation at the second seminar, which again was well received.
- [132] I accept the plaintiff's evidence that these seminars took a great deal of effort on her part, as did her testimony in court, and that she is incapable of doing all that was proposed in her initial plan. However, I do not accept that she cannot do anything to develop the business, which is what has essentially happened since the accident.
- [133] Where does this leave the court in terms of assessing the plaintiff's claims for loss of past and future earning capacity? With respect to the past loss claim, the evidence does not satisfy me that Néange would have become a profitable business in the time period between the date of the accident and the date of trial. I do not accept that the business was ready to launch in January 2014, given that no seminars had been scheduled and, according to Ms. Travers, the presentation was not completed until late January or February. I do accept that at some point in 2014, the plaintiff would have held some additional seminars but the evidence simply does not support a finding that the business would have become profitable by the end of 2016. I therefore decline to make any award for past loss of earning capacity.
- [134] With respect to the claim for future loss, I have found that the plaintiff is unable to work to the same degree as before the accident and, as such, her capacity to earn income is diminished. However, I have also found that I am unable to place any weight on Dr. Silk's opinion concerning the value of that diminution.
- [135] In the circumstances, I adopt the approach taken in *Gojevic v. Philpott*, 2001 BCSC 748, aff'd 2002 BCCA 483. There, the plaintiff advanced a claim for loss of future earning capacity based on her inability to pursue and build her business of selling women's clothing through a direct home sales model, similar to the plaintiff's model for Néange, due to her injuries suffered in the accident. There, as in this case, the plaintiff had made no money from the business prior to the accident. The evidence in that case was that the plaintiff also worked as a nurse but saw the clothing business as something in the future she could build into a viable business.

[136] The trial judge awarded her \$100,000 for loss of future earning capacity, which he characterized as a diminishment of a capital asset, that being her entrepreneurial spirit. He said at para. 7:

Third - and of greatest significance - is the fact that the plaintiff has in my opinion lost the capacity that was hers to apply her energy and will and persistence to whatever might catch her eye as an entrepreneur. Few individuals have the royal jelly. I am convinced that she had it. Now she does not. What she is about now by way of being an entrepreneur is so half-hearted it speaks volumes. The fact her forays into the world of being an entrepreneur had not produced a profit by November 1996 is determinative of nothing. She has lost the capacity to be an entrepreneur. And with that she has lost the belief that she had - perhaps - a ticket out of the world of nursing. I assess damages for loss of or diminution of a capital asset that was the plaintiff's at \$100,000.

[137] The Court of Appeal upheld the award. Madam Justice Huddart said at paras. 13-16:

[13] And she has lost the opportunity to look to entrepreneurial activities as a substitute career. Before the accident, she had been working to establish a profitable business. Her sales were increasing. There is no evidence to suggest she was not laying the base for a successful entrepreneurial endeavour and gaining experience for another should the first have proved unsuccessful. The trial judge was persuaded she had what it takes to be successful in some entrepreneurial endeavour at some point. On the best prognosis, the respondent has been set back more than ten years in any such undertaking. On the worst prognosis, she has lost that opportunity entirely.

[14] In *Ayles v. Talastasin*, 2000 BCCA 87, [2000] B.C.J. No. 245 (Q.L.), this Court increased an award for diminished earning capacity from \$40,000.00 to \$150,000.00 to fully compensate a young man for the effect of migraine headaches on his earning capacity the trial judge had not reflected in her award. From the opinion of Mr. Justice Donald, it is apparent there was no "economic evidence" of the effect of those headaches. Yet, he concluded "I think that the evidence establishes beyond question that the plaintiff will be less marketable or attractive as an employee with this ailment and consequently less valuable to himself as an income earner." The fact Mr. Ayles had developed coping skills that permitted him to continue his studies and engage in sports despite the headaches was not seen as having "wiped out any prospect of adequate compensation" (at para. 22). The same can be said of the respondent. Mr. Ayles suffered more pain than the respondent, and would suffer longer given his youth. But there was no proof of any special attribute having been lost comparable to respondent's "royal jelly."

[15] Valuation of lost earning capacity is not a mathematical calculation. Nor is it a question of law where precedent is binding. To the extent authorities might be thought to provide guidance for a trial judge faced with a valuation task, the award is not, in my view, so inordinate as to be out of proportion to comparable awards for comparable injuries to serve comparable purposes.

[16] At the end of the day, a trial judge must assess the loss and make an award to compensate for its loss as best he can on the facts he finds from the evidence before him. The appellant has not been able to persuade me the trial judge made any manifest error, ignored conclusive or relevant evidence, misunderstood any evidence, or drew any erroneous conclusions from any evidence. These are the bases on which the Supreme Court of Canada has said an appellate court may intervene with a finding of fact. On the facts the trial judge found, I can find no reason to interfere with his award of \$100,000.00 for loss of earning capacity. I would not interfere with it.

[Emphasis in original.]

[138] In my view, this approach fairly captures the nature of the plaintiff's loss in this case. Her capital asset, being her entrepreneurial spirit and drive to perhaps make Néange a profitable business one day, or alternatively, to use her cosmetic industry experience in another way, similar to what Ms. Travers has done, has been impaired.

[139] Gojevic was decided at the trial level in 2001, and the passage of time might support a larger award at today's date. On the other hand, the plaintiff in Gojevic was 34 at the time of the accident, and had a much longer working life ahead of her than does the plaintiff here, who was 59 at the time of the accident. Taking account of all of the relevant circumstances, I conclude that an award of \$100,000 is reasonable for the plaintiff's loss of future earning capacity.

Cost of Future Care

[140] The plaintiff relies on a cost of future care report prepared by Megan Stacey, an occupational therapist, as well as economic multipliers supplied by an economist, Robert Carson. Ms. Stacey's care recommendations are based on her review of pertinent medical records and her own assessment of the plaintiff. Based on Ms. Stacey's report, the plaintiff claims damages for the cost of future care in the amount of \$176,533.

[141] The defendant takes issue with a number of the care items claimed by the plaintiff, including any costs related to her jaw issues as the defendant disputes that the jaw issues were caused by the accident. I have found that the plaintiff's jaw problems were caused by the accident and it follows that the cost of future treatments for these problems is properly recoverable. The other principal area of dispute is the plaintiff's claim for housekeeping services, the need for which the defendant submits has not been made out on the evidence. I will return to this below.

[142] The items on which there is common ground include the following:

- a) vestibular rehabilitation;
- b) intramuscular stimulation;
- c) yoga;

- d) kinesiology;
- e) occupational therapy;
- f) ergonomic assessment;
- g) psychology;
- h) psychiatry;
- i) mobility aids;
- j) some medications; and
- k) Botox injections.

[143] The total cost of these items, excluding the Botox injections is \$52,450. In my respectful view, certain of the amounts claimed are excessive. For example, the claim includes almost \$20,000 for the cost of yoga, on the basis that the plaintiff will continue yoga treatments for the balance of her life. There is also a claim for almost \$5,000 for occupational therapy consultation which, while recommended by Ms. Stacy, is not supported on the evidence, at least not to the extent proposed. I would therefore reduce the value of all of the items listed above to \$35,000.

[144] The cost of the Botox is not included because the duration of the treatments is unknown. The plaintiff submits that \$22,314 should be added to the total, which reflects a further ten years of Botox treatments, although halved in year six. The evidence does not support ongoing treatments of that duration. Dr. Cameron, the neurologist administering the treatments, is of the opinion that they may help the plaintiff with her headaches but are unlikely to resolve them. In my view, it is unlikely that the treatments will continue if they prove to be unhelpful. There is also some indication in the evidence that the headaches are related to her soft tissue injuries and jaw issues. To the extent that those injuries improve with treatment, her headaches are likely to improve as well. In the circumstances, I find that \$5,000 is a reasonable amount to award for the Botox treatments.

[145] Care items claimed for treatment of the plaintiff's jaw problems include physiotherapy, behavioural therapy, an oral appliance and some other related costs. These items total about \$24,000. However, that amount includes physiotherapy for an indefinite period of time, which is not supported by the evidence, and as noted by Ms. Stacey, there is an overlap between the psychology treatments referred to in item (g) above and the behavioural therapy proposed for the jaw problems. With the appropriate adjustments, I find that an additional \$15,000 is reasonable to treat the plaintiff's jaw problems.

[146] The plaintiff's claim includes approximately \$75,000 for additional weekly housekeeping services and annual seasonal cleaning. The defendant submits that the need for these services was not established on the evidence.

- [147] The plaintiff testified that prior to the accident, she had housekeeping help every second week for four hours, at a cost of \$72 each time, based on \$18 per hour. Since the accident, she has had weekly help for more hours. While she did not specify how much help she now has, Ms. Stacey in her report indicates that a housekeeper works eight to ten hours one week and three to four the next, with occasional longer hours for heavier cleaning tasks. The plaintiff said that she is unable to do much of any cleaning or household laundry as she gets dizzy and the necessary reaching and bending cause her pain.
- [148] Ms. Stacey's recommendation is for four hours per week plus an annual amount for seasonal cleaning. This can be contrasted with Dr. Squire's observation in her report that the plaintiff "is able to manage all of her own activities of daily living and household tasks".
- [149] I accept that the plaintiff's injuries limit her ability to do housework to some degree, although not to the extent claimed. I am also of the view that awarding damages for additional housekeeping costs for the duration of the plaintiff's life is unwarranted. The principal limitations on the plaintiff's ability to do housework stem from her vestibular problems and her soft tissue injuries, both of which are likely to improve with treatment. Further, it is speculative to assume that the plaintiff will live in the same large house for the balance of her life and will continue to need the same degree of housekeeping help.
- [150] I therefore find that some degree of additional household help is warranted, but less than recommended by Ms. Stacey and for a shorter duration. I consider \$30,000 to be a reasonable award under this head. This results in a total award for cost of future care of \$85,000.

Special Damages

- [151] The plaintiff claims special damages in the amount of \$24,399.27 which comprise the numerous treatments that she has undergone, medications and a significant amount (\$11,720.50) in additional housekeeping costs.
- [152] The defendant again submits that any amounts claimed in respect of the plaintiff's jaw problems are not recoverable, however I have rejected the defendant's position on the cause of those problems.
- [153] Accepting those costs as valid, the contentious issue again concerns the claim for housekeeping services. The defendant submits that the plaintiff's evidence was vague about why she increased the number of housekeeping hours and how many more hours she used than prior to the accident.
- [154] The plaintiff arrives at the amount claimed by adding up all that she paid to her housekeepers between December 4, 2013 and December 31, 2016 (\$17,480.50) and subtracting what she would have paid based on the \$72 for four hours every second week prior to the accident (\$5,760).

[155] I have found that some additional housekeeping services are warranted under the cost of future care heading and I also accept that the plaintiff required additional help in the period between the accident and the date of the trial. That was particularly so in the early days and weeks following the accident. However, I agree with the defendant that the plaintiff's evidence about the payments forming the basis for the special damages claim was vague and that there were periods before trial when her unrelated medical issues appeared to be interfering with her ability to maintain activities of daily living. I would therefore reduce the claim for housekeeping cost to \$6,000, resulting in a total special damages claim in the amount of \$18,678.77.

Conclusion

[156] In summary, the plaintiff is awarded the following:

- a) Non-pecuniary damages \$110,000
- b) Past loss of earning capacity \$0
- c) Future loss of earning capacity \$100,000
- d) Cost of future care \$85,000
- e) Special damages \$18,678.77

Total: \$313,678.77

[157] If the parties are unable to agree on costs, they may make arrangements to speak to the matter.

"Skolrood J."

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