
CANADA / JUDGMENT

Sears v. Olsen

2020 BCSC 1289

COURT

Supreme Court of British Columbia

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2020 BCSC 1289 Sears v. Olsen

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Sears v. Olsen,

2020 BCSC 1289

Date: 20200831

Docket: M55193

Registry: Kamloops

Between:

Lisa Marie Sears

Plaintiff

And

Cyndy Olsen

Defendant

Before: The Honourable Mr. Justice Milman

Reasons for Judgment

Counsel for the Plaintiff:

S.A. Besanger

Counsel for the Defendant:

D.J.E. Bilkey, Q.C.

C. Manning

Place and Dates of Trial:

Kamloops, B.C.

August 5-7 and 10-11

Place and Date of Judgment:

Kamloops, B.C.

August 31, 2020

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I. Introduction

- [1] On November 12, 2015, the plaintiff, Lisa Marie Sears, was injured in a motor vehicle accident that occurred along Highway 5 near the T'Kemlups gas station in Kamloops, British Columbia, when the vehicle she was driving was struck by another vehicle driven by the defendant, Ms. Olsen. Liability for the accident has been admitted. At issue between the parties is the amount of damages that will suffice to compensate Ms. Sears for the injuries and losses she has suffered.
- [2] Ms. Sears claims that she sustained soft tissue injuries, primarily to her back and neck, which have led to chronic pain and migraine headaches. Although she acknowledges that there has been some improvement in her symptoms since the accident, she says that she is now unlikely to recover fully and that she has been left with a permanent partial disability that has altered the course of her life, particularly her career as an elementary school teacher.
- [3] Ms. Sears seeks an award of damages lying somewhere within a range of between \$1,897,502 and \$2,167,514, comprised of the following:

Non-Pecuniary Damages:

\$175,000

Cost of Future Care:

\$271,119.50

Past Wage Loss:

\$26,878

Future Wage Loss:

\$1,396,073 - \$1,666,085

Special Damages:

\$28,431.49

- [4] While acknowledging that Ms. Sears is entitled to some compensation for the injuries she sustained in the accident, the defendant says that any award of damages must be adjusted to account for certain pre-existing conditions that were present before. The defendant contends that most of her symptoms have now either resolved completely or can be managed with medication and that she has not suffered any loss of past or future earnings.

On that basis, the defendant submits that the appropriate award lies somewhere within a range of between \$77,360 and \$97,360, calculated as follows:

Non-Pecuniary Damages:

\$50,000 - \$70,000

Cost of Future Care:

\$5,000

Special Damages:

\$22,360

[5] For the reasons that follow, I have concluded that Ms. Sears is entitled to damages totalling \$269,144.55.

II. The Background Facts

A. Ms. Sears' Life Prior to the Accident

[6] Ms. Sears is currently 38 years old. She is married and has three daughters, aged eight, six and two. She has been an elementary school teacher for 14 years.

[7] At the time of the accident, she was 33 and had two daughters. Both before and after the accident, she did most of the housework in the home herself. Her husband is an electrician with the British Columbia Hydro and Power Authority. His work requires him to travel frequently, to the point that he is at home, on average, only two of every 12 days.

[8] Ms. Sears began working outside the home at an early age. While still in school, she found part-time work in restaurants and hotels, where she worked as a chambermaid or at the front desk. She also worked outdoors as a traffic controller. After graduating from high school in 2000, she put herself through university without any financial help from her parents. She earned two degrees from what is now Thompson Rivers University, a Bachelor of Science degree in 2003 and a Bachelor of Education degree in 2006. During her post-secondary years and for several years after graduating, she spent the summers working as a lifeguard.

[9] Since her graduation in 2006, she has been employed as an elementary school teacher. She has experience teaching at every grade level but particularly enjoys teaching younger children in Kindergarten and Grade One. She began her teaching career as a teacher-on-call but aspired from the beginning to work full-time. She was able to secure her first full-time position in her third year, but the position was only a temporary one. After that, she had to work at three different schools at once in order to maintain full-time status. That situation persisted until she had sufficient seniority to secure a permanent full-time position at a single school.

- [10] Her first daughter was born in April 2012. She returned to work from maternity leave in September 2013, but only for three days per week. It is not entirely clear why she did not return to a full-time schedule immediately at that time. On the one hand, she testified that she did not yet have enough seniority to insist on a full-time position, and therefore had had to take whatever work was offered to her, but on the other hand, she also testified that she made that choice because her husband had just started in his new job and she wanted to be at home more. In any event she was, by September 2013, already pregnant with her second daughter, who was born in February 2014. She did not go back to work on a full-time basis again until after the conclusion of her second maternity leave, in January 2015. She continued working full-time from then until the accident the following November.
- [11] She testified that before the accident, she had enjoyed numerous physical activities, including baseball, basketball, volleyball, soccer, wrestling, badminton, swimming, horseback riding, waterskiing, hiking and track and field. In her first years as a teacher, she enjoyed coaching extracurricular sports teams.
- [12] In 2007, while working as a lifeguard, Ms. Sears first began to experience migraine headaches, which she attributes to dehydration. They became so serious that at times she saw auras and had to vomit. They were also triggered when she was pregnant with and nursing her second child in early 2014. She testified that she is able to discern a difference between the headaches before and after the accident: those before originated from the front of her head whereas those after originated from her neck and back.
- [13] There is also evidence that, prior to the accident, Ms. Sears experienced neck, shoulder and back pain that was bothersome enough to induce her to seek treatment. In particular, from December 2013 to November 7, 2015 (five days before the accident) she attended periodically at the Claybank Massage clinic to address pain she was experiencing intermittently in her shoulders, neck, low back, left sacroiliac joint, left hip and knees. She attributed those symptoms to her history of participating in sports. She testified that she had dislocated her shoulder earlier in life and sometimes felt muscular strain in her shoulder while nursing or carrying her daughters.

B. The Accident and its Aftermath

- [14] When the accident occurred on the morning of November 12, 2015, Ms. Sears had just dropped off her two daughters at daycare. Her route to work took her along Highway 5. She was driving in the right-hand lane at approximately 90km/hour. The defendant was driving in the same direction in the left-hand lane. Ahead of the defendant, a semi-truck was slowing down. The defendant tried to avoid it by veering into Ms. Sears' lane, not realising that Ms. Sears' vehicle was there. Ms. Sears saw the defendant's vehicle swerve toward her. She steered to the right in an effort to avoid a collision but was unsuccessful. The right-hand side of the defendant's vehicle struck the left-hand side of Ms. Sears' vehicle.

- [15] They both pulled over to the side of the road in a controlled manner. After exchanging information and taking photographs, Ms. Sears was able to drive away. The damage to her vehicle was relatively minor. The air bags did not deploy and no emergency personnel attended.
- [16] Nevertheless, Ms. Sears recalls feeling pain in her neck, back and shoulders immediately after the accident. When she arrived at work she was feeling unwell. She was pale. After arranging for a substitute, she left work and went to a drop-in medical clinic. She was told to rest at home for the rest of that day and to return to work on the following day, which she did.
- [17] At first, she continued working on a full-time basis as before, although she testified that her discomfort at work took a toll on her, and she paid for it in the evenings. She tried to alleviate her symptoms with hot baths and a heating pad. She took Tylenol, Ibuprofen and Robaxacet and used Rub-A535 and Voltaren.
- [18] She saw her family physician, Dr. Chahal, for the first time after the accident on November 24, 2015. On that occasion, she reported that although she had returned to work full-time, she was unable to bend over, kneel, pick up the kids, shovel her driveway or go to the gym. Dr. Chahal noted that she had a restricted range of motion in her neck and back. There was extreme tenderness to light touch at the mid back and cervical spine as well as some tenderness to the upper trapezius. Dr. Chahal initially prescribed Naproxen (an anti-inflammatory) and Cyclobenzaprine (a muscle relaxant). She later referred Ms. Sears to Dr. Faridi, a neurosurgeon and Dr. Raghavan, a Physical Medicine and Rehabilitation specialist.
- [19] Her more recent experience with migraine headaches appears to have begun several months after the accident. It was not until February 5, 2016 that she first recorded a headache in the pain journal that she was advised to maintain. In 2016 and 2017, Dr. Chahal prescribed various medications seeking to manage her headaches. Those prescriptions began on May 18, 2016 with Sumatriptan. On October 18, 2016, she was prescribed Gabapentin and on January 19, 2017, Rizatriptan. She continued taking Sumatriptan or Rizatriptan until March 2017 when she became pregnant with her third daughter. Although Dr. Chahal testified that she still may take Sumatriptan or Rizatriptan, just not regularly, Ms. Sears herself testified that she has ceased taking those medications altogether since she has had more success with Amitriptyline, which Dr. Chahal first prescribed for her on February 20, 2020. She testified that since she began taking that medication, her headaches have become noticeably less severe: they are now said to be more like an "annoying headache" as opposed to a "full-on migraine" and she is able to sleep better.

- [20] Ms. Sears testified that her pain symptoms were at their worst in the first year after the accident. She acknowledged that there has been at least some improvement since then. She is reported to have told one of her doctors in 2018 that her symptoms had "plateaued" in September 2017. Dr. Raghavan made a note indicating that on February 1, 2017, she told him that she "no longer experiences pain over the lumbar areas or SI joint areas" although in her testimony at trial she denied having made that statement.
- [21] Other evidence confirms that her symptoms, although improved, have not resolved entirely. For example, Dr. Chahal's notes from a telephone consultation that took place on March 19, 2020 show that Ms. Sears was still complaining at that stage of daily bilateral mid to lower back pain and occasional radiation of the pain to her legs. She was still experiencing migraines two to three times per week (that report appears to have led to an increase in the prescribed dosage of Amitriptyline from 10 to 25 mg). She was seeing a chiropractor weekly and receiving massage therapy every other week. She reported to Dr. Chahal that she was able to do routine household chores although she was no longer coaching cross country, basketball and volleyball. She also reported being able to exercise by walking and working out on an elliptical machine.
- [22] In her testimony at trial, she reported that she has recently resumed cycling near her home, which she can do in moderation as long as she avoids long trips and steep hills. She can no longer run on concrete, as she used to, but must go for walks instead. She has been able to participate in at least some physical activities with the children at work, including a "parachute" game, basketball and short hikes. Neither her principal nor her co-workers, at least those who testified at trial, have noticed any impairment in her performance at work since the accident.
- [23] After the accident, she remained at work on a full-time basis for nearly two years, until September 2017. At that time, she reduced her schedule to four days per week because she was by then pregnant with her third daughter and the pregnancy was turning out to be a particularly difficult one. Her third daughter was born prematurely at the end of that month, on September 28, 2017. She had gone into work earlier that day but had to leave for the hospital on an emergency basis. She remained on maternity leave for the next 18 months.
- [24] When she returned to work in March 2019, it was initially on a full-time basis but that arrangement lasted only until the end of the school year.
- [25] When school resumed in September 2019, she chose to reduce her schedule yet again, this time to three days per week. The only rationale that she gave to her principal and co-workers for that decision was that she wanted to spend more time with her family. At trial, she testified that that was not the real reason, which had more to do with her pain symptoms. She explained that she had not been entirely candid with her co-workers in that regard because she did not want to be perceived at work as being less than fully capable of working. If that is so, it does not explain why she later told Dr. Laidlow, a physiatrist who interviewed her in preparing a report for the defence, that her decision to work three days

per week was driven by the need to spend more time with her family as well as her pain symptoms.

- [26] She testified that for the coming school year (2020/2021), she has arranged to increase her schedule again, this time from three to four days per week. That increase was, she said, driven by the exigencies of arranging daycare for her daughters, rather than any improvement in her symptoms.
- [27] Since returning to work in March 2019, she has also had discussions with her principal about becoming a principal or vice-principal herself. In order to do so, she would first have to be working full-time, with extra committee work outside school hours, and complete a two-year graduate degree. She would also have to complete a two-year leadership course given by the school district.

C. The Medical Evidence

i. Dr. Maziar Badii

- [28] Dr. Badii is a specialist in Rheumatology and Spine Medicine. He examined Ms. Sears on November 20, 2018. His conclusion was that, as a result of the accident, Ms. Sears sustained soft tissue injuries to her neck and back, including injuries at the ligamentous attachments to the spinous process, particularly in the mid back. Those injuries include, according to Dr. Badii, spinal enthesopathy (damage to the areas where ligaments attach to the bone) and have now become chronic.
- [29] Dr. Badii believes that Ms. Sears had, by the time he saw her, already reached the point of maximal medical improvement. He believes she will continue to have pain in her mid and lower back for the foreseeable future. Although Dr. Badii does not believe that her symptoms will lead to further time loss from work in the future, he does expect that they will continue to interfere with her productivity at work and at home, her enjoyment of recreational activities and her quality of life.

ii. Dr. Donald Cameron

- [30] Dr. Cameron is a neurologist. He examined Ms. Sears on November 21, 2018. His opinion was that, as a result of the accident, Ms. Sears suffered a whiplash-type injury, and soft tissue and musculoskeletal injuries in her lower back area. Later, he says, she developed a chronic pain condition, musculoskeletal or cervicogenic headaches, and intermixed post-traumatic chronic migraine headaches, also attributable to the accident. As a result, she is now left, in his view, with a permanent partial disability consisting of chronic pain and associated post-traumatic headaches.

iii. Sheila Branscombe

[31] Ms. Branscombe is an occupational therapist. She conducted an assessment of Ms. Sears on September 22 and 23, 2018. She also visited Ms. Sears' workplace and home. Ms. Branscombe's functional capacity evaluation ("FCE") report contains the following findings, among others:

- a) Ms. Sears generally demonstrated "high effort" during testing;
- b) On one test, she "demonstrated a somewhat inaccurate perception of her abilities when compared to her FCE tested findings";
- c) Although Ms. Sears was "found to be overall reliable in her reports of pain and/or disability" such that "equal weight was given to objective findings and subjective reports in formulating conclusions," the report also noted, somewhat incongruously, that "she was found to have an elevated level of catastrophic thinking and a heightened fear of movement and re-injury as well as a tendency to choose more extreme words to describe her pain" and so that fact "was taken into account when considering her self-reports of pain and disability";
- d) Ms. Sears "experiences functionally limiting low pain with standing combined with stooping and with sustained crouching";
- e) she is "not able to squat with an upright torso";
- f) she "[r]eports functionally limiting headache pain after the FCE but does not demonstrate any apparent functional limitations as a result of this pain";
- g) she "[h]as elevated levels in perception of pain and catastrophic thinking";
- h) she "demonstrated increased pain from the previous day's activities and return to functional levels only when combined with limited evening activity";
- i) she is "able to perform everyday tasks within the light capacity demand level";
- j) she "has limitations for sustained positions involving her lower back" including "standing with stooping, crouching, squatting, and kneeling with stooping", although, "[o]verall, she is able to tolerate shorter durations of activities"; and
- k) she is "not able to meet all of the demands of her pre-accident occupation" in particular, she "has limitations for positions that place strain on her mid and low back", including "stooping, bending, squatting, crouching and combined positions such as kneeling and stooping".

[32] Ms. Branscombe's report also includes a discussion of the cost of Ms. Sears' future care needs.

iv. Dr. Duncan Laidlow

[33] Dr. Laidlow is a Physical Medicine and Rehabilitation specialist. He was the only medical expert to provide opinion evidence as part of the defence case. Unlike those who testified as part of Ms. Sears' case, Dr. Laidlow did not have the opportunity to examine her in person,

although he did have the advantage of interviewing her by videoconference and preparing his report more recently than they did, with the consequent benefit of more recent information as to her progress, particularly over the last year. He was also alone among the medical experts in that he did not testify during the trial because his report was accepted into evidence without cross-examination.

[34] Dr. Laidlow agreed with Dr. Cameron and Dr. Badii that Ms. Sears' neck pain, mid back pain, and the aggravation of her headaches are all attributable to the accident, although he does not agree that Ms. Sears requires any further treatment for those symptoms, other than continuing with the Amitriptyline and her home exercise program. He does not believe she requires any homemaking support. In his view, "while she will experience discomfort in the course of being a teacher, it is my opinion that she is capable of full-time work as an elementary teacher into the future."

[35] His report concludes as follows:

She has noticed an improvement in her conditions since an improvement was made in her sleep pattern and it is certainly possible that she will continue to improve as the improvement in sleep pattern is maintained.

The fact that she has had symptoms this long makes it likely that she will continue to have symptoms in the future. The most common pattern is that people experienced good and bad days. If she continues to exercise and continues [sic] have an improved sleep pattern, she could expect that the bad days will become less frequent and less severe in the future.

III. Discussion

A. Non-Pecuniary Damages

[36] General damages are intended to compensate a plaintiff for pain and suffering and the loss of enjoyment of life and its amenities. The factors to be considered in assessing damages were set out by Kirkpatrick J.A., writing for the Court, in *Stapley v. Hejslet*, 2006 BCCA 34. She listed the following factors as relevant to the analysis:

- (a) age of the plaintiff;
- (b) nature of the injury;
- (c) severity and duration of pain;
- (d) extent of the disability;
- (e) emotional suffering;
- (f) loss or impairment of life;
- (g) impairment of family, marital and social relationships;
- (h) impairment of physical and mental abilities; and

(i) loss of lifestyle.

- [37] Ms. Sears' argues that her most significant injury is the chronic pain that she experiences in her mid back. She also has chronic pain in her low back and neck, although it is not as severe. She continues to experience headaches and intermittent numbness and tingling in her hands and legs. The pain is aggravated by prolonged sitting and standing, and other activities such as bending, twisting, lifting, and repetitive motions, which she must do as part of her work. Her symptoms have improved since the accident but they have not resolved. As a result, she has been left with a permanent partial disability that impairs her capacity to work in her chosen career, to carry out routine household chores and to engage in the various recreational activities that she previously enjoyed.
- [38] She seeks an award of \$175,000, relying on the following authorities: *Culver v. Skrypnik*, 2019 BCSC 807; *Murphy v. Hofer*, 2018 BCSC 869; and *Pearson v. Savage*, 2017 BCSC 1435.
- [39] According to the defendant, Ms. Sears' injuries are "entirely subjective in nature." It is argued that Ms. Sears' neck injury has since resolved completely and her back injury, although not completely resolved, has improved to the point that her functional capacity is no longer significantly impaired. The defendant argues that the authorities that Ms. Sears relies upon involved plaintiffs with injuries that were more severe than hers. The defendant refers instead to the following authorities to support a suggested range of between \$50,000-\$70,000: *Bove v. Wilson*, 2016 BCSC 1620; *Wolford v Shlakoff*, 2017 BCSC 2043; and *Richmond v Osztovits*, 2019 BCSC 1984.
- [40] The evidence demonstrates that as a result of the accident, Ms. Sears sustained soft tissue injuries to her back and neck, and related headaches. With respect to the duration of her symptoms, it is not disputed that Ms. Sears had her worst year immediately after the accident and that she has seen some improvement since then. It is also not disputed that some of her symptoms are likely to be permanent. The parties disagree primarily about the likelihood that she may, in the future, see some additional improvement, if not a full recovery.
- [41] In that regard, I prefer the opinion of Dr. Laidlow that at least some continued improvement is likely. Although Dr. Laidlow did not have the opportunity to examine Ms. Sears in person, I have no basis to conclude that such an examination would have rendered his opinion any more reliable. Dr. Laidlow himself was not cross-examined on that or indeed any other issue, and none of the other physicians who did testify were asked about it. What I find more persuasive is the fact that Ms. Sears has indeed seen some improvement in her symptoms more recently, particularly since she began taking Amitriptyline. Although Dr. Cameron and Dr. Badii are of the view that she had already reached the point of maximal medical improvement by the time they saw her in November 2018, that was before she began taking Amitriptyline.

- [42] Despite the prospect of some continued improvement, Ms. Sears was 33 when she was injured and has had to endure considerable pain and discomfort, particularly in the first year after the accident and, to a lesser degree and on an intermittent basis, ever since then. Although she has been able to give the impression to others that she was functioning at full capacity while at work, I accept that her workdays have at times been very difficult for her, and that they have often left her in considerable discomfort in the evenings. She should not see her damages reduced because of her stoicism: Stapley at para. 46. It also appears that she will also have to manage at least some pain and discomfort on an intermittent basis for the rest of her life. I accept that it has limited her ability to do certain physical tasks at work and in the home and to engage to the same degree in the kind of athletic hobbies that she was used to before. I heard no evidence of any adverse impacts on her relationships with friends or family, however.
- [43] Turning to the authorities, it is axiomatic that each case turns on its own facts and that assessing damages is more art than science. While I accept that the cases cited by Ms. Sears show many features in common with this one, they also dealt with injuries and losses that were, in some respects, more extensive than those that have been demonstrated here.
- [44] In Culver, the plaintiff was found to be "far less socially active and his relationship with [his partner] has suffered. His mental condition is fragile and he has great difficulty with sleep" (at para. 154). In addition, he had a pre-existing learning disability that he had overcome in his career by pursuing physically demanding work, an option that was no longer available to him due to his injuries.
- [45] In Murphy, the plaintiff, unlike Ms. Sears, required surgery after the injury (in that case, to his shoulder). Justice Sewell found that his life had changed profoundly as a result. He had fewer friends and took less pride in his work. He was diagnosed with PTSD and "moderately severe psychiatric illness" (at para. 130). His prognosis was said to be "poor to guarded" (at para. 131).
- [46] In Pearson, the plaintiff's injuries were said (at para. 163) to include the following, among others:
- sustained psychological injuries and depression and anxiety, symptoms of PTSD and major depressive disorder which are in partial remission, physical deconditioning, symptoms of cognitive dysfunction, altered sleep, somatic symptom disorder
- [47] In addition, the plaintiff was said to be isolating herself and spending much of her time in bed, with associated negative impacts on her relationships with friends and family (at para. 166). Her overall prognosis was said (at para. 164) to be "poor, or at best, guarded."
- [48] I find the cases cited by the defendant to be more similar to this one, although they are not entirely analogous either.

- [49] In *Bove*, Jenkins J. found that the plaintiff, like Ms. Sears, had suffered "soft tissue injuries in the area of her cervical and thoracic spine and post-traumatic headaches," that "she will continue to experience chronic pain to some degree permanently in the future" and that the "likelihood of a resolution of her injuries after three years is low" (at para. 37). On the other hand, her injuries were said to be "disabling to the plaintiff a few times each year (at para. 38, emphasis added). I am satisfied that Ms. Sears has been experiencing, and is likely to experience in the future, partially disabling pain more frequently than that.
- [50] In *Wolford*, I awarded the plaintiff \$65,000 in non-pecuniary damages for similar injuries and impacts, but only after finding a measurable risk that many of that plaintiff's symptoms would have appeared as they did regardless of the subject accident. Although the defendant argues that a similar adjustment is appropriate here, there was no evidence to support such a conclusion. Dr. Laidlow went the furthest among the medical experts in noting a possible connection between Ms. Sears' pre-existing conditions and her post-accident symptoms, but what he ultimately found was merely a greater susceptibility to future injury. Without better evidence of a measurable risk that the same symptoms would be present in Ms. Sears' case regardless of the accident, I am not prepared to adjust the damages downward on that basis here.
- [51] Of the authorities cited by the parties, I found the facts of *Richmond*, a very recent decision that also happens to involve an elementary school teacher and mother from Kamloops who is roughly the same age and who shares a similar career history with Ms. Sears', to be the most similar to those of this case. In that case, Mayer J. accepted as accurate the plaintiff's own description of her injuries, which he summarised as follows at paras. 11-13:
- [11] Since the Collision Ms. Richmond has continued to experience headaches on an ongoing basis although she does not experience severe headaches as frequently as she once did. She testified that the severe headaches, which she described as debilitating, are triggered by stress and occur more frequently during the work week while she is teaching and not as frequently in the summer. Although treatments including Tylenol, stretching, massage and chiropractic treatments help loosen her neck and provide some relief from headaches, the headaches never completely go away.
- [12] Ms. Richmond testified that she experiences tightness in her shoulders and soreness and occasional shooting pain in her upper back and neck. Again, the frequency of these symptoms has improved somewhat since the Collision but some level of pain is always present. In addition, she experiences hand numbness in one or both hands during or after sleep, once or twice a week. She does not feel rested when she wakes up.
- [13] Although Ms. Richmond experienced lower to mid-back pain after the Collision this pain has largely resolved. She testified that her lower back gets sore if she drives for more than one or two hours or lifts heavy objects.

- [52] In assessing non-pecuniary damages in light of those injuries, he stated as follows, at paras. 40-42:
- [40] There is no dispute that the Collision caused Ms. Richmond to suffer from neck, upper and lower back and shoulder pain and related headaches. Although her lower back pain has for the most part resolved Ms. Richmond continues to suffer from chronic neck, shoulder and upper back pain and headaches. It is unlikely that these symptoms will completely resolve in her lifetime.
- [41] The most significant symptom, occasional severe headaches, prevents her from participating in the same type or intensity of physical activities as she once did. In particular Ms. Richmond, who previously ran and hiked extensively, is now able to take only shorter walks. She has a reduced ability to engage in play activities with her children.
- [42] It is clear to me that Ms. Richmond continues to be a dedicated teacher and parent - although it is through her stoicism that she continues to function in these respects. I am satisfied that on-going chronic pain and related fatigue suffered by Ms. Richmond has resulted to a moderate impairment of her ability to participate in recreational and work activities and a low to moderate impairment in her family and social relationships. It is possible that some of her impairments may improve as a result of further medical treatment or as a result of her developing coping strategies, but the evidence establishes that it is likely she will be impacted to some extent for the foreseeable future.
- [53] On that basis, Mayer J. awarded the plaintiff \$70,000 in non-pecuniary damages. Although Ms. Sears' circumstances are similar, she has been shown to experience debilitating pain when kneeling, stooping, bending, squatting and crouching, actions she is often called upon to undertake in her work and at home. The pain, suffering and loss of enjoyment of life's amenities that she has experienced as a result of the accident therefore appear to extend moderately beyond the situation described in Richmond.
- [54] In light of the foregoing, I have concluded that an award of \$85,000 for non-pecuniary damages is appropriate in this case.

B. Past Loss of Earning Capacity

- [55] In *Noori v. Hughes*, 2018 BCSC 965, I summarized the principles to be applied in assessing damages under this head as follows at paras. 104-105:
- [104] The object of an award of damages for past loss of earning capacity is to compensate the plaintiff for what he would have (not "could have") earned but for the injury: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30.
- [105] In *Kallstrom v. Yip*, 2016 BCSC 829, Kent J. set out a two-step process that should be followed in determining a plaintiff's entitlement to such damages:

[393] There is a discrete, two-step process that is required with respect to these past and future loss of earning capacity claims:

1. the court must first determine whether, as a result of the injuries sustained in the accident(s), the plaintiff's past or future earning capacity has been or will likely be impaired, such that there has been an actual loss of income in the past and/or a real and substantial possibility of a loss of income in the future; and
- 2 if so, then the court must then determine the amount of past loss that has been incurred to the date of trial and, on a present value basis, assess the amount to be awarded for any possible future financial loss.

[56] In quantifying her claim for damages in this category, Ms. Sears relies on the expert report of Darren Benning, an economist. Mr. Benning was instructed to assume that, but for the accident, Ms. Sears would have continued to work full-time from September 1, 2019 until the trial, rather than three days per week as she actually did. Relying on that assumption, he calculated her lost earnings for the period at \$26,878, on a post-tax basis.

[57] The defendant submits that no damages should be awarded in this category because Ms. Sears' decision to reduce her schedule as of September 2019 to three days per week was not attributable to her injuries, but rather to her desire to spend more time with her family, as she told her principal at the time.

[58] I agree with the defendant that this aspect of the claim has not been substantiated. A number of considerations lead me to that conclusion.

[59] First, Ms. Sears was evidently capable of working on a full-time basis for almost two full years after the accident, even though she testified that the pain that she experienced in the first year was worse than any she has experienced since then. Her symptoms have generally improved, not worsened, since the accident. Although she reduced her schedule to four days per week for a few weeks before going on maternity leave in September 2017, that change was brought about by the difficulties she was experiencing with her pregnancy. When she came back from maternity leave in March 2019 following the birth of her third daughter, it was also on a full-time basis.

[60] Second, when she decided to reduce her schedule to three days per week the following September, she told her principal that she was doing so in order to spend more time with her family, without mentioning her pain symptoms. While I accept that she may not have wanted her principal to know that she was still experiencing pain due to a motor vehicle accident that occurred in 2015, she later provided Dr. Laidlow with the same rationale for her decision. Whatever reasons she may have had to be guarded in what she told her principal did not apply to him. On the contrary, she had an obvious incentive to tell Dr. Laidlow, consistent with her evidence at trial, that her decision was driven entirely or at least primarily by her pain symptoms, given the context of the interview. The only reason for her to tell Dr. Laidlow that her decision was driven by her desire to spend more time

with her family, however, was because that was indeed the real explanation for it.

[61] Finally, her decision to reduce her schedule from five to three days per week in September 2019 mirrors a similar decision she made, prior to the accident, in September 2013. At that time too, she opted to reduce her schedule temporarily to three days per week after coming off maternity leave following the birth of her oldest daughter, for what I find to have been similar reasons. This reinforces the inference that the decision in September 2019 was likewise not attributable to the accident but to her desire to spend more time with her family.

[62] In summary, I am not satisfied that Ms. Sears reduced her schedule from five to three days per week in September 2019 due to her injuries. I find, rather, that the accident had no impact on her earnings prior to trial. I am therefore awarding no damages in this category.

C. Future Loss of Earning Capacity

[63] In *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 (S.C.), [Brown] the Court set out the following non-exhaustive list of factors to consider in assessing whether the plaintiff has demonstrated a loss of earning capacity:

- a) whether the plaintiff has been rendered less capable overall from earning income from all types of employment;
- b) whether the plaintiff is less marketable or attractive as an employee to potential employers;
- c) whether the plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to him or her, had she or he not been injured; and
- d) whether the plaintiff is less valuable to himself or herself as a person capable of earning income in a competitive labour market.

[64] Assuming that initial burden is met, there are two methods recognised in the jurisprudence to assess damages for future loss of earning capacity. They were summarised by the Court in *Perren v. Lalari*, 2010 BCCA 140, as follows at para. 32:

[32] A plaintiff must always prove, as was noted by Donald J.A. in *Steward*, by Bauman J. in *Chang*, and by Tysoe J.A. in *Romanchych*, that there is a real and substantial possibility of a future event leading to an income loss. If the plaintiff discharges that burden of proof, then depending upon the facts of the case, the plaintiff may prove the quantification of that loss of earning capacity, either on an earnings approach, as in *Steenblok*, or a capital asset approach, as in *Brown*. The former approach will be more useful when the loss is more easily measurable, as it was in *Steenblok*. The latter approach will be more useful when the loss is not as easily measurable, as in *Pallos* and *Romanchych*.

- [65] Ms. Sears seeks to prove such a loss relying on the "earnings approach." For this purpose too, she relies on the report of Mr. Benning, who has quantified the difference between Ms. Sears' future lifetime earnings under two different scenarios.
- [66] The first, which he calls the "without-accident" scenario, assumes that Ms. Sears would have continued working on a full-time basis as an elementary school teacher from the time of the trial until 2024, at which point she would have secured a better-paying position as a school principal and would have remained in that position until retirement at 65. The second, "with-accident" scenario assumes that Ms. Sears will remain employed in her current position as an elementary school teacher working three days per week, for the rest of her career, until retirement at age 50 or 55.
- [67] Relying on those assumptions, Mr. Benning calculated Ms. Sears' future income loss as falling within a range of between \$1,396,073 and \$1,666,085, depending on whether she retires at age 50 or 55.
- [68] The defendant argues that Mr. Benning's assumptions are unrealistic and that no loss of future earning capacity has been shown. In particular, the defendant relies on the medical evidence suggesting that Ms. Sears is unlikely to miss any time at work in the future due to her injuries.
- [69] I agree with the defendant that many of Mr. Benning's key assumptions are not realistic. For example, his assumption that, as a result of the accident, Ms. Sears will be working three days per week for the rest of her career is inconsistent with the evidence adduced at trial to the effect that, as of September 2020, her plan is to return to work at four days per week.
- [70] On the other hand, I do not accept the defendant's premise that the medical evidence demonstrates no loss in this category. Dr. Laidlow expressed the view that Ms. Sears "is capable of full-time work as an elementary teacher into the future." Dr. Badii agreed, but only in part. He concluded that Ms. Sears' symptoms were "unlikely to lead to any further time loss from work in the future." But he added that they would, nevertheless, "continue to interfere with her productivity at work" (emphasis added). Moreover, although Ms. Branscombe concluded that Ms. Sears is suited for work that allows for changed positions throughout the day (something that Ms. Sears admitted she is allowed in her work as a kindergarten teacher), she also concluded that Ms. Sears is "not able to meet all of the demands of her pre-accident occupation." In particular, she "has limitations for positions that place strain on her mid and low back", including "stooping, bending, squatting, crouching and combined positions such as kneeling and stooping."
- [71] Having regard to that evidence, while I agree with the defendant that Ms. Sears is unlikely, at least in her current job, to miss time off work in the future due to her injuries, she has nevertheless demonstrated a more subtle loss of earning capacity, due to her impaired level of "productivity" at work, as noted by Dr. Badii and particularised by Ms. Branscombe. Those more subtle impairments satisfy each of the elements of the Brown test, inasmuch as she has been rendered less capable overall of earning income from all types of employment, she

is less marketable or attractive as an employee to potential employers, she has lost the ability to take advantage of all job opportunities which might otherwise have been open to him or her had she not been injured and she is less valuable to herself as a person capable of earning income in a competitive labour market.

- [72] Because that loss is subtle and not easily measured, however, I have opted to assess Ms. Sears' damages in this category using the "capital asset" approach, rather than the "income approach" reflected in Mr. Benning's analysis. Ms. Sears' resulting loss of earning capacity cannot be measured simply by counting the number of days she will miss at work in the future due to her injuries, as Mr. Benning has done, because her injuries will probably never cause her to miss work. Nevertheless, she has, in my view, still suffered a compensable loss. What she should be compensated for is the "real and substantial possibility" of a future loss of income flowing from her moderately reduced ability to follow a more lucrative career path than the one she is now on.
- [73] Mr. Benning was instructed to assume that Ms. Sears would, but for the accident, have commenced her master's degree when her youngest daughter begins kindergarten in 2022 and then gone on to become a principal two years later, with an attendant increase in salary and benefits. While I agree with the defendant that such a scenario may yet unfold on that schedule regardless of the accident, I find that there is also a real and substantial possibility that Ms. Sears will not, due to her accident-related impairments, be able to make such a change on that schedule, or perhaps ever. The possibility of a delay appears, however, to be much greater than that of a complete loss of the opportunity, given her current abilities, interest and strong work ethic. If she is able to make the transition to principal, the physical demands on her at work will lessen.
- [74] Mr. Benning calculated the "without-accident" present value of Ms. Sears' future income to age 65, assuming she advanced to become a principal in 2024, at \$2,010,423 (earnings) + \$500,751 (pension benefits) = \$2,511,174. The defendant's economist, Mark Gosling, relying on various different assumptions that tend to lower the total, calculated the present value of Ms. Sears' future income assuming she worked to age 65 but remained as a full-time teacher, at \$1,487,404 (earnings) + \$379,503 (pension benefits) = \$1,866,907.
- [75] Most of the difference between those two sums, \$644,267, can be taken as a very rough approximation of the loss she will have incurred over the course of her career if she never becomes a principal but would have done so in 2024 but for the accident. In order to compensate her for the possibility that her advancement to become a principal may, as a result of the accident, be delayed or perhaps never occur at all, I am awarding her 15% of that amount, or \$96,640.05.

D. Cost of Future Care

i. Overview

- [76] The principles to be applied in assessing damages for the cost of future care were set out by McLachlin J. (as she then was) in *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.) as follows:
- [187] The "additional expense" approach is preferable where the plaintiff will continue to lead basically the same life as she would have led had she not been injured, with the aid of additional assistance and physical facilities. In such a case, the simplest way of calculating the loss caused by the accident is by totalling the cost of the extra assistance facilities which the plaintiff will require.
- [198] The test for determining the appropriate award under the heading of cost of future care, it may be inferred, is an objective one based on medical evidence.
- [199] These authorities establish that (1) there must be a medical justification for claims of cost of future care; and (2) that the claims must be reasonable.
- [77] Compensation for costs of future care is based on what is reasonably necessary to put the plaintiff in her pre-accident condition according to recommendations in the accepted medical evidence: *Langille v. Nguyen*, 2013 BCSC 1460 at para. 231 and *Tsalamandris v. McLeod*, 2012 BCCA 239 at paras. 62 and 63.
- [78] The amount of the compensation awarded must be based on the medical evidence and what is considered to be reasonable: *Langille* at para. 232.
- [79] The court must determine whether there is a medically substantiated link between the injuries and the recommended care: *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at para. 32.
- [80] There should also be evidence that the plaintiff is likely to use the recommended care: *Langille* at para. 233; *O'Connell v. Yung*, 2012 BCCA 57 at para. 68.
- [81] Ms. Sears seeks damages in this category totalling \$271,119.50, which is the present value, as calculated by Mr. Benning, of the future care costs enumerated by Ms. Branscombe in her report and in two letters subsequently provided to Mr. Benning.
- [82] The defendant disputes most of those items.
- [83] I will address the controversial items in the following sections.

ii. Medications

- [84] Ms. Sears claims the cost of the following medications:
- Acetaminophen/Tylenol (\$46.72 annually);
 - Robaxacet or equivalent (\$77.79 annually);
 - Sumatriptan (\$602 annually);

- d) Rizatriptan (\$730 annually);
- e) Amitriptyline (\$178 annually);
- f) Botox injections (\$1,600);
- g) Topical anti-inflammatories (\$840 annually); and
- h) Dispensing fee (\$34-\$132 annually).

[85] The defendant argues that there should be no award for Sumatriptan or Rizatriptan because, regardless of what Dr. Chahal stated about their potential use, Ms. Sears herself testified that she is no longer taking them. I agree.

[86] With respect to Acetaminophen/Tylenol and Robaxacet, although the defendant accepts that those items are warranted in principle, their annual cost is argued to be overstated because Ms. Branscombe has opted for the maximum dosage in the prescribed range, which is excessive, particularly because of the recent improvement Ms. Sears has seen with the use of Amitriptyline.

[87] With respect to Botox injections, although these were recommended by Dr. Cameron, he testified that he would defer to a physiatrist such as Dr. Laidlow on matters of rehabilitation. Dr. Laidlow concluded that such injections would not be suitable for the kind of headaches that Ms. Sears suffers from. I am not satisfied that this item has been shown to be medically justified.

[88] I have reached a similar conclusion with respect to topical anti-inflammatories recommended by Dr. Badii. The mixture of anti-inflammatories that Dr. Badii proposed includes gabapentin, which is one of the medications that Ms. Sears has ceased taking because she did not like the side effects. More recently, Dr. Laidlow recommended against her taking any anti-inflammatories because there was no evidence of inflammation on the MRI scan that he reviewed.

[89] The defendant also argues that there should be a contingency reduction to reflect the likelihood that Ms. Sears would have taken some of those medications to some degree in any event, given her pre-existing susceptibility to migraine headaches. I agree with the defendant that the claim should be reduced on those grounds.

[90] In light of those considerations, I am awarding the amount claimed for Amitriptyline and half of the amount for Acetaminophen/Tylenol and Robaxacet, plus \$20 annually for dispensing fees, for a total of \$260.26 annually.

iii. Therapies

[91] Ms. Sears claims the cost of the following therapies:

- a) Progressive Goal Attainment Program (\$2,000);

- b) Occupational Therapy (\$1,000);
- c) Kinesiology (\$958);
- d) Yoga (\$1095 annually to age 70);
- e) Chiropractic treatment (year 1: \$2,700, years 2-5: \$2,325 annually);
- f) Physiotherapy (\$900 annually); and
- g) Gym and pool pass (\$639 annually).

[92] The defendant argues that none of these items are warranted, relying primarily on the opinion of Dr. Laidlow, who saw no medical justification for them.

[93] I agree with the defendant that these items have not been shown to be medically justified or reasonable. Ms. Branscombe testified that she would not necessarily defer to the opinion of a physiatrist on a patient's future care needs, but her own justifications for including these items on her list were not persuasive. Ms. Sears herself gave no evidence as to her willingness to partake in most of these therapies if they were available to her, although she did testify about the benefit she has received from her chiropractic treatment, particularly during the earlier stages of her recovery. The only medical evidence I received pertaining to chiropractic treatment, however, was that of Dr. Laidlow, who recommended that she be weaned from it over four months.

[94] Dr. Laidlow also recommended against physiotherapy and I find his opinion more persuasive than that of Dr. Badii on this issue. In his testimony at trial, Dr. Badii stated that the purpose of recommending physiotherapy was to avoid deconditioning, but I agree with Dr. Laidlow that Ms. Sears has better means available to her to do so, particularly given that she has already completed a course of physiotherapy and saw no further benefit coming from it. I have reached the same conclusion with respect to the gym and pool pass, which was not shown to be medically justified given that she can and does exercise on her own at home.

iv. Services

[95] Ms. Sears claims the cost of the following services:

- a) Homemaking - two hours weekly (\$4,940 annually until 2035);
- b) Homemaking - one hour with three cleaners every two weeks (\$2470 annually until 2052); and
- c) Seasonal Homemaking - four times per year (\$1140 annually until 2052).

- [96] Where a plaintiff suffers an injury which would make a reasonable person in their circumstances unable to perform usual and necessary household work - that is, where the plaintiff has suffered a loss of capacity - that loss may be compensated by way of a pecuniary award: *Kin v. Lin*, 2018 BCCA 77 at para. 33.
- [97] The defendant argues that none of these items are warranted because Ms. Sears, Dr. Chahal and Dr. Laidlow all testified that that Ms. Sears is able to carry out housekeeping activities herself. Dr. Laidlow added that doing so is a form of exercise that will assist in her recovery. Further, Ms. Sears acknowledged that she receives assistance both from her husband, when he is home, and from the children, particularly as they grow older.
- [98] I disagree with the defendant that Ms. Sears is able to perform all of her household tasks as before. Ms. Branscombe's impression when she visited the home was that "Ms. Sears is currently struggling to maintain her home." Dr. Badii's report stated that he believes her symptoms "will continue to interfere with her productivity at home." Dr. Cameron expressed a similar view. Ms. Sears herself testified that she has had to relax her standards of tidiness in the home as a result of her limitations.
- [99] On the other hand, given that what is required is a supplement to ease the day-to-day burden on Ms. Sears in the home, I have concluded that one hour with three cleaners every two weeks, at an annual cost \$2,470, will suffice for that purpose. The other proposed services would overshoot the mark, in my view, given her own capabilities and the assistance she can expect from her family.

v. Equipment

[100] Ms. Sears claims the cost of the following equipment:

- a) Knee bolster (\$75, every ten years);
- b) Powered tub scrubber (\$90, every five years);
- c) Garden kneeling bench (\$36, every 5-10 years);
- d) Standing weeder (\$23, every 5-10 years);
- e) Two task chairs (\$660, every 5-10 years); and
- f) Town and Country bicycle (\$500, every 5-10 years).

[101] The defendant argues that none of these items are warranted on the evidence. Ms. Sears herself gave no evidence of her need for or interest in having any of this equipment. Dr. Laidlow's report stated that Ms. Sears already has a bolster but does not use it regularly and that she does need additional equipment at work. Although she may, according to her principal, have access to workplace accommodations, such as ergonomic equipment, she has not formally explored that option. She testified that she purchased a new chair for her classroom herself, but I received no evidence as to the cost of that chair. She has recently resumed riding her own bicycle and expressed no need or desire to purchase a different

one.

[102] I am not persuaded that any of the equipment sought is medically justified or reasonable, with the exception of an ergonomic chair for her home office (\$330, as a single rather than repeating expense).

vi. Present Value of Future Care Costs

[103] I have awarded Ms. Sears \$260.26 annually for medications, \$2,470 annually for homemaking services and \$330 for the one-time cost of an ergonomic chair for her home office. I prefer Mr. Gosling's multiplier to that of Mr. Benning because it is based on more current statistics. Using Mr. Gosling's multiplier, I have calculated the present value of the future care costs I have awarded as follows:

Medications:

$$\$260.26 \times \$30,149 / 1000 = \$7,846.58$$

Homemaking services:

$$\$2,470 \times \$30,149 / 1000 = \$74,468.03$$

Chair:

\$330

vii. Contingency Reduction

[104] I have concluded that, in addition, it is appropriate to reduce the award I am making for the present value of the homemaking services to reflect the fact that Ms. Sears:

- a) will be likely to need less homemaking assistance after the children are grown; and
- b) would likely have come to need homemaking assistance later in life regardless of the accident.

[105] In order to account for those negative contingencies, I am reducing that aspect of the award (\$74,468.03) by 25%, for a new total of \$55,851.02, yielding a total award in this category of \$64,027.60.

E. Special Damages

[106] Ms. Sears claims special damages totalling \$28,431.49, calculated as follows:

Out-of-pocket expenses:

\$22,395.10

Already paid by ICBC:

\$4,865.49

Subrogated claims:

\$1,170.90

[107] The defendant acknowledges liability for \$22,306 plus the subrogated claims (\$1,170.90), for a total of \$23,476.90.

[108] I agree that in the absence of receipts or other evidence to substantiate those expenses that are not admitted, the appropriate award is \$23,476.90.

IV. Conclusion

[109] I have assessed Ms. Sears' damages as follows:

Non-Pecuniary Damages:

\$85,000

Loss of Future Earning Capacity

\$96,640.05

Cost of Future Care:

\$64,027.60

Special Damages

\$23,476.90

Total:

\$269,144.55

[110] The parties have liberty to speak to costs if they are unable to agree on the appropriate order in light of my decision.

"Milman J."

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