
CANADA / JUDGMENT

Senger v. Graham

2018 BCSC 257

COURT

Supreme Court of British Columbia

DECIDED

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2018 BCSC 257 Senger v. Graham

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Senger v. Graham,

2018 BCSC 257

Date: 20180222

Docket: M154403

Registry: Vancouver

Between:

Jamie Rose Senger

Plaintiff

And

Darren Patrick Graham

Defendant

Before: The Honourable Madam Justice Murray

Reasons for Judgment

Counsel for the plaintiff:

S. Collins

Counsel for the Defendant:

M. Hall

K. Dhaliwal

Place and Date of Trial/Hearing:

Vancouver, B.C.

December 11-15 and 18-19, 2017

Place and Date of Judgment:

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February 22, 2018

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BACKGROUND

- [1] The plaintiff claims damages for injuries she suffered in a motor vehicle accident on August 6, 2014 in Nanaimo.
- [2] Liability is admitted. Quantum of damages is in issue as the defendant takes the position that the plaintiff did not do all she could have to reduce the impact of the injuries.

THE EVIDENCE

The accident

- [3] Ms. Senger was driving along Wentworth Street in Nanaimo when the defendant came out from an intersecting street in front of her. She tried to avoid the accident but was unable to and hit the passenger side of the defendant's car head on.
- [4] The plaintiff was jolted forward then back on impact. It was not until later that night at work that she started to feel soreness in her back and neck.
- [5] She saw her family doctor, Christopher Collins, the next day. He recommended that she take time off from work and that she go to physiotherapy and massage therapy. He also prescribed pain medication.
- [6] The defendant does not contest that Ms. Senger suffered soft tissue injury to her neck and back in the accident.
- [7] She was 23 at the time of the accident and was between her first and last year of a college dental hygiene program.

School/work

- [8] At the end of August 2014, a few weeks after the accident, Ms. Senger moved to Victoria to begin her second year of dental hygiene. She graduated in April 2015, wrote her board exam and was certified as a dental hygienist in June 2015. She began working as a dental hygienist in July 2015.
- [9] Ms. Senger has two permanent part-time jobs - two days a week at each clinic - that she has had since she was certified. While she is scheduled to work a total of four days a week she has had to take a day off once or twice a month because the pain is too great. Ms. Senger's pain is worse at the end of a workday and it increases as the week progresses.
- [10] She has had opportunities to work more but has been physically unable to. In October 2017, she tried to work a five-day workweek but could not complete the fifth day due to pain. Working a four-day week is difficult as by the fourth day she finds her pain distracting and she worries that she is unable to give her patients the care that they deserve.

- [11] Her non-working days and weekends are spent resting and recuperating to get ready for the next workweek.
- [12] Ms. Senger testified that she would like to be working more. She has considerable student loans that she needs to pay off and she wants to be able to live alone.
- [13] I accept her evidence that work is hard on her physically. I also accept her evidence that she is trying to work full-time but she is physically unable.

Physical/recreational activity

- [14] Ms. Senger is trying to be active although, as she testified, her injuries have put a limit on the activities she can do. She was once an avid equestrian. She tried riding twice since the accident and it hurt. She feels that she cannot ride anymore.
- [15] She used to enjoy kayaking but again, now finds it too painful. She has limitations in the gym that she never had. As she stated "it's a hard pill to swallow. I'm so young and I've never had limitations before."
- [16] Housework is hard on her back. Even intimacy with her boyfriend is difficult.
- [17] According to Ms. Senger's father she does not seem as happy as she was before the accident.
- [18] While defendant's counsel tried to discredit her evidence by introducing photos that have been posted on the internet of Ms. Senger engaging in physical activities, I do not find that the fact that she has tried doing physical activities or travelled detracts from her evidence in the least. In fact, it makes her evidence more compelling.
- [19] Prior to the accident the plaintiff was an active young woman. She has always participated in sports. She is trying to keep active and in shape. As the majority of the activities she enjoyed prior to the accident now cause her pain she is trying others. She is to be commended for that.
- [20] Plaintiffs cannot be expected to cease living once they commence a lawsuit.

Rehabilitation

- [21] Following the accident, the plaintiff went to physiotherapy twice in Nanaimo. As she was moving to Victoria she was released from the care of that clinic but she was given exercises that she did on her own.
- [22] School started in September. She took a full course load plus the clinical work that was part of the program. It was difficult for the plaintiff as she was in "lots of pain", especially in the clinic when she worked on patients. She had never suffered from pain before and found it exhausting.

- [23] She continued to do the exercises the physiotherapist recommended and went to four massage therapy sessions. The exercises helped somewhat. The pain in the low back resolved but the pain in her mid back and neck persist. Massage therapy gave her only temporary relief; she needed to take medication to manage the pain.
- [24] In April 2015 when she graduated from Camosun College the plaintiff moved back to Nanaimo. She then resumed registered massage therapy sporadically throughout 2015 and 2016.
- [25] In February 2017 ICBC assigned her an occupational therapist who recommended that she attend physiotherapy for intramuscular stimulation (IMS) and a kinesiologist for an active exercise program. She began physiotherapy regularly in March 2017 and sessions with the kinesiologist in May 2017.
- [26] Ms. Senger has found that the massage and IMS gives her short-term relief. The kinesiologist directed exercise program helps her with strengthening but has not helped with the pain.
- [27] Since the accident, the plaintiff started martial arts, modifying exercises that cause her pain. While practicing martial arts makes her feel stronger and does not exacerbate her injuries, it has not relieved them.
- [28] There has been no improvement in her mid back and neck since the accident. To the contrary, she reports them getting worse as she tries to work more.

Dr. Nairn Stewart

- [29] Dr. Nairn Stewart specializes in physical medicine and rehabilitation. Dr. Stewart takes a holistic approach and considers all aspects of the patient's life from work to pleasure. She is considered an expert in soft tissue injuries.
- [30] Regarding dental hygiene as a long-term career for Ms. Senger, it is Dr. Stewart's opinion that it is not sustainable as it is too hard on her body. Moreover, Dr. Stewart opines that the plaintiff's symptoms will plague her in any job so she will never be able to work full-time.
- [31] With respect to treatment going forward, Dr. Stewart does not expect that treatment at this point would change the plaintiff's pain levels, however, she recommends physiotherapy and massage to give Ms. Senger temporary relief from her pain.
- [32] Dr. Stewart's evidence makes sense. It fits with all the other evidence. As such, I accept it in its entirety.

Dr. John Thompson

- [33] The defence expert Dr. John Thompson, is a retired orthopaedic surgeon. He is more optimistic about the plaintiff's prognosis and treatment than the other experts.

- [34] I found Dr. Thompson's evidence to be lacking. He based his opinions on incomplete or erroneous facts. For example he did not think it was important to note that she had to take a day off work every week or two as she was physically unable to perform her tasks.
- [35] He also did not note or take into account the activities/exercises she was doing for rehabilitation between the time of the accident and 2016. Nor did he note that she has pain on a daily basis and wakes up at night because of it, as "those are subjective reports".
- [36] He chose not to consider the results of tests performed by other professionals, explaining that he wants to assess the patient "with an open mind".
- [37] I find that Dr. Thompson's view that Ms. Senger can relieve her symptoms at work by adjusting her position periodically ignores the realities of being a dental hygienist. According to the evidence, holding contorted positions for long periods is a well-accepted danger of the job.
- [38] I find further that his opinion that she is physically able to continue with all of the physical activities she enjoys because "if someone likes to do something they can put up with pain" unrealistic.
- [39] Finally, I find that his opinion that the plaintiff should resume her usual activities - work, recreational and household - on a graduated basis and she will improve as she acclimatizes to resumption of activity ignores all of her efforts to date.
- [40] Dr. Thompson's evidence does not fit with the rest of the evidence, nor does it accord with common sense. Overall, I do not accept it.

NON-PECUNIARY DAMAGES

- [41] An award of non-pecuniary damages does not depend upon the seriousness of the injury, but on its ability to ameliorate the condition of the victim considering his or her particular situation. The gravity of the injury alone is not determinative. An appreciation of the individual's loss is the key. There is no "tariff". An award will vary in each case to meet the specific circumstances of the individual case: *Lindal v. Lindal*, [1981] 2 S.C.R. 629 at 637.
- [42] In *Gohringer v. Hernando-Lazo et al.*, 2009 BCSC 420, Russell, J. outlined the factors to be considered by the Court in assessing non-pecuniary damages:
- [81] The purpose of non-pecuniary damage awards is to compensate the plaintiff for "pain, suffering, loss of enjoyment of life and loss of amenities": *Jackson v. Lai*, 2007 BCSC 1023, B.C.J. No. 1535 at para. 134; see also *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229; *Kuskis v. Tin*, 2008 BCSC 862, B.C.J. No. 1248. While each award must be made with reference to the particular circumstances and facts of the case, other cases may serve as a guide to assist the court in arriving at an award that is just and fair to both parties: *Kuskis* at para. 136.

[82] There are a number of factors that courts must take into account when assessing this type of claim. Justice Kirkpatrick, writing for the majority, in *Stapley v. Hejslet*, 2006 BCCA 34, 263 D.L.R. (4th) 19, outlines the factors to consider, at para. 46:

The inexhaustive list of common factors cited in *Boyd* [*Boyd v. Harris*, 2004 BCCA 146] that influence an award of non-pecuniary damages includes:

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

I would add the following factors, although they may arguably be subsumed in the above list:

- (g) impairment of family, marital and social relationships;
- (h) impairment of physical and mental abilities;
- (i) loss of lifestyle; and
- (j) the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff: *Giang v. Clayton*, [2005] B.C.J. No. 163, 2005 BCCA 54 (B.C. C.A.)).

[43] Taking into account all of the evidence I find the following:

- i. The injuries suffered in the accident have interfered with Ms. Senger's schooling, work, household and recreational activities and will continue to do so;
- ii. She is limited in her capacity to work as a dental hygienist and will not be able to sustain a career in that field;
- iii. Ms. Senger will likely never be able to work full-time;
- iv. Her injuries will continue to plague her for the rest of her life. It is unlikely that she will ever be pain free;
- v. She has reached her maximum rehabilitation;
- vi. Ms. Senger will always require assistance with housekeeping and yard work; and
- vii. She will never be able to engage in many of the activities she previously enjoyed.

[44] The plaintiff seeks \$80,000 under this heading, while the defendants submit the appropriate range is \$60,000 to \$70,000.

- [45] The plaintiff relied on *Cleeve v. Gregerson et al*, 2007 BCSC 1112 [Cleeve], and *Knight v. Belton*, 2010 BCSC 1305 [Knight] in support of her position. The defendant cited *Dosangh v. Xie*, 2017 BCSC 1937, *Lal. v. Le*, 2016 BCSC 1324, *Hinder v. Yellow Cab Co.*, 2015 BCSC 2069, and *Welch v. Tietge*, 2017 BCSC 395.
- [46] While I have considered the cases cited by both parties, I prefer the plaintiff's cases as they are factually closer to the case at bar.
- [47] In *Cleeve*, the plaintiff was 21 at the time of the motor vehicle accident and worked as a dental assistant. Her plan was to become a dental hygienist. Injuries suffered in the accident left her with persistent symptoms including headaches, neck pain and periodic pain that radiated into her upper back and along her right shoulder - symptoms similar to Ms. Senger's. At the time of trial, Ms. Cleeve was working four days per week but her future was uncertain. The court found that it was unlikely that the plaintiff could go on to become a dental hygienist and that it was unlikely that another dentist, after her current employer retired, would accommodate her injuries. Finding that the injuries prevented the plaintiff from pursuing dental hygiene and limited her participation in sports and leisure activities that she enjoyed, the court awarded her \$85,000 in non-pecuniary damages. The present value of that award is approximately \$97,000.
- [48] In *Knight*, the 40-year old plaintiff was a dental hygienist who suffered a grade 2 strain of her thoracic spine and was suffering chronic pain in a car accident. Like Ms. Senger, Ms. Knight's symptoms were exacerbated by work. The court held that because of her chronic pain she likely would be unable to work more than two days per week, and could no longer engage in activities she enjoyed. The court awarded her \$75,000 in non-pecuniary damages, which has a present value of approximately \$83,000.
- [49] Considering the case law and all of the circumstances, I am satisfied that an award of \$80,000 for non-pecuniary damages is appropriate.

PAST WAGE LOSS

- [50] Compensation for past wage loss or past loss of earning capacity is based on what a plaintiff would have, not could have, earned but for the injury that the plaintiff sustained: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30.
- [51] The assessment of past wage loss involves a consideration of the loss of earning capacity and not the loss of income itself. In *Rowe*, the court considered claims for past income loss:
- [30] Thus, in my view, a claim for what is often described as "past loss of income" is actually a claim for loss of earning capacity; that is, a claim for the loss of the value of the work that the injured plaintiff would have performed but was unable to perform because of the injury.
- [31] Evidence of this value may take many forms. As was said by Kenneth D. Cooper-Stephenson in *Personal Injury Damages in Canada*, 2nd ed. (Scarborough, Ont.: Carswell, 1996) at 205-06,

The essence of the task under this head of damages is to award compensation for any pecuniary loss which will result from an inability to work. "Loss of the value of work" is the substance of the claim - loss of the value of any work the plaintiff would have done but for the accident but now will be unable to do. The loss framed in this way may be measured in different ways. Sometimes it will be measured by reference to the actual earnings the plaintiff would have received; sometimes by a replacement cost evaluation of tasks which the plaintiff will now be unable to perform; sometimes by an assessment of reduced company profits; and sometimes by the amount of secondary income lost, such as shared family income.

[Emphasis added.]

[52] There are three parts to this calculation:

- i. The income lost immediately after the accident;
- ii. The income lost from not being able to work part-time during the second year of college; and
- iii. The income lost as a dental hygienist.

[53] I will deal with each separately.

Immediately after the accident

[54] The plaintiff was working at Western Forest Products at the time of the accident. Because of her injuries she lost two days' work for a wage loss of \$400.

Part-time work during second year

[55] The evidence is clear that Ms. Senger had always worked part-time during school. Following the pattern of past years, I am satisfied that but for the accident she would have worked at least weekends during the school year, for an average of 15 hours per week from October 1, 2014 to April 1, 2015. Factoring in one month off for Christmas and holidays, and a wage close to what she had made in her previous part-time jobs, \$10 per hour, the lost income for that period is \$3,900.

Dental Hygienist

[56] The evidence is clear that the plaintiff enjoyed working as a dental hygienist; it was to be a life long career for her. Her goal was to work 5 to 6 days per week.

[57] According to her employers, she is an excellent hygienist. She could work more hours at the Arbutus Dental Clinic if she was physically able.

[58] According to the information provided by economist Kevin Turnbull she was earning a wage in the 65% range for dental hygienists in British Columbia.

[59] From the evidence I conclude that but for the accident it is reasonably likely that:

- (1) The plaintiff would have worked 5-6 days per week as a dental hygienist;
- (2) She would have no difficulty finding work; and
- (3) She would have earned a wage in the 65% range for dental hygienists in BC.

[60] Taking into consideration the law and all of the evidence, I find Ms. Senger's gross lost wages as a dental hygienist to be \$52,000 being the difference between the hours that she would have been working but for the accident and the hours she was able to work.

Total lost past wages

[61] I assess Ms. Senger's total past income loss at \$56,300.

DIMINISHED EARNING CAPACITY

[62] In *Pololos v. Cinnamon-Lopez*, 2016 BCSC 81, Voith, J. described the legal principles that pertain to this head of damage as follows:

[133] The relevant legal principles are well-established:

- a) To the extent possible, a plaintiff should be put in the position he/she would have been in, but for the injuries caused by the defendant's negligence; *Lines v. W & D Logging Co. Ltd.*, 2009 BCCA 106 at para. 185, leave to appeal ref'd [2009] S.C.C.A. No. 197;
- b) The central task of the Court is to compare the likely future of the plaintiff's working life if the Accident had not occurred with the plaintiff's likely future working life after the Accident; *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 32;
- c) The assessment of loss must be based on the evidence, but requires an exercise of judgment and is not a mathematical calculation; *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 18;
- d) The two possible approaches to assessment of loss of future earning capacity are the "earnings approach" and the "capital asset approach"; *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 at para. 7 (S.C.); and *Perren v. Lalari*, 2010 BCCA 140 at paras. 11-12;
- e) Under either approach, the plaintiff must prove that there is a "real and substantial possibility" of various future events leading to an income loss; *Perren* at para. 33;
- f) The earnings approach will be more appropriate when the loss is more easily measurable; *Westbroek v. Brizuela*, 2014 BCCA 48 at para. 64. Furthermore, while assessing an award for future loss of income is not a purely mathematical exercise, the Court should endeavour to use factual mathematical anchors as a starting foundation to quantify such loss; *Jurczak v. Mauro*, 2013 BCCA 507 at paras. 36-37.
- g) When relying on an "earnings approach", the Court must nevertheless always consider the overall fairness and reasonableness of the award, taking into account all of the evidence; *Rosvold* at para. 11.

- [63] Counsel agree that the earnings approach is appropriate in this case.
- [64] Hypothetical events such as how the plaintiff's life would have proceeded need not be proven on a balance of probabilities. Rather they are simply given weight according to their relative likelihood. A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 27.
- [65] I heard conflicting views as to whether Ms. Senger will be able to sustain a career as a dental hygienist. Dr. Stewart says that she will not. Dr. Thompson says she will.
- [66] For the reasons set out above, I prefer the evidence of Dr. Stewart to that of Dr. Thompson.
- [67] Accordingly I find that because of the injuries suffered in this accident a career as a dental hygienist is likely not sustainable for the plaintiff. She will have to find another career.
- [68] Ms. Senger is young and hard working. The evidence is clear that she has always worked and is most enterprising. I conclude from that evidence that she will be able to find work.
- [69] What that work will be is unknown however based on all of the evidence I find there to be a real and substantial possibility of the following:
- (1) But for the accident Ms. Senger would have worked as a dental hygienist until she was 65;
 - (2) She would not have had trouble finding work;
 - (3) She would have earned a wage in the average range for dental hygienists in BC;
 - (4) Ms. Senger will not be able to continue to work in her chosen field and will have to switch careers;
 - (5) She will only be able to work 70% or 7 of 10 days; and
 - (6) Her income will be approximately 45% less than what she would have earned working as a dental hygienist.
- [70] Considering all of the evidence and all of the circumstances, I find that a fair and reasonable award for loss of future earning capacity is \$700,000.

COST OF FUTURE CARE

- [71] The test for cost of future care is set out in *Bouchard v. Brown Bros. Motor Lease Canada Ltd.*, 2011 BCSC 762:
- [182] There must be a medical justification for claims for cost of future care, and those claims must be reasonable and fair to both parties. The court must determine the services, medications, and aids that are reasonably necessary to promote the health of the plaintiff and assess the likelihood that he will use them in the future.

- [72] I heard evidence from a number of sources regarding Ms. Senger's future care. All agree that she would benefit from some massage therapy, physiotherapy, a physical fitness regime and help with home care. The amount and duration of the various therapies and assistance varies.
- [73] With respect to future home and yard care, the defendant submits that the plaintiff will likely have a partner that can take care of those chores.
- [74] Whether future care costs should be reduced because services can or will be provided by others was considered by Madam Justice Fisher, as she then was, in *O'Connell v. Yung*, 2010 BCSC 1764:
- [124] I do not accept the defendants' submission that an award for the cost of future personal care must be reduced to take into account the role Mr. O'Connell plays in providing supervision and guidance to Ms. O'Connell. Ms. O'Connell is entitled to be compensated for the cost of care that is medically required. As Groves J. held in *Cojocaru*, the law does not permit the defendants to pass off their responsibility to provide appropriate future care by suggesting that Ms. O'Connell can and should rely on her husband to take care of her. A husband is not expected to care for his injured wife on a gratuitous basis: see *Andrews* at p. 243.
- [125] The same principle was expressed in *Vana v. Tosta*, [1968] S.C.R. 71, where one of the issues involved an award for the cost of future housekeeping services. The majority of the court stated at p. 75:

It is trite law that a wrongdoer cannot claim the benefit of services donated to the injured party. In the present case it amounts in my judgment to conscripting the mother and mother-in-law to the services of the appellant and his children for the benefit of the tortfeasor and any reduction of the award on this basis is and was an error in principle.

- [75] Having considered all of the recommendations along with the rest of the evidence, I prefer the evidence of Claudia Walker, Occupational Therapist and Life Care Planner as her plan is designed to assist the plaintiff throughout the course of her life. Her analysis is forward thinking and geared toward addressing all aspects of Ms. Senger's life - not just work.
- [76] I accept the following recommendations as being necessary to maximise Ms. Senger's future management of the injuries suffered in the accident:
- i. Gym and pool membership until age 75 - \$476 per year until age 60 then \$360 per year;
 - ii. Kinesiologist for directed exercise programs - 3 sessions a year until age 60: \$200 per year;
 - iii. Remedial massage therapy for relief of symptoms - 6 to 12 sessions per year until age 70: \$450 - \$1,200 per year;
 - iv. Physiotherapy - 6 to 12 sessions per year: \$420 - \$1,140 per year;

v. Vocational rehabilitation to identify an appropriate vocational goal, identify training required and support: \$2,000 - \$2,500;

vi. Home based office furniture: \$4,000;

vii. House cleaning 3 hours every 2 weeks until age 85: \$1,800 - \$2,000 per year; and

viii. Yard work.

[77] Accepting the evidence of Mr. Turnbull with respect to the future cost of these benefits, I award the plaintiff \$140,982 under this heading.

[78] This amount needs to be grossed up to offset any income taxes that will be incurred on the investment income earned on it. If the parties are unable to agree on the amount required to accomplish this, Mr. Turnbull should be retained to assist.

MITIGATION

[79] The defendant takes the position that had the plaintiff engaged in active therapy following the accident as was recommended by her doctor, her injuries would be much less severe. As such, they argue that the ultimate award should be reduced.

[80] When a failure to mitigate is alleged, the defendant has the burden of proving not only that the plaintiff acted unreasonably in not attending recommended treatment but also the extent, if any, to which the plaintiff's damages would have been reduced had she received the recommended treatment: *Chiu v. Chiu*, 2002 BCCA 618 at para. 57.

[81] The duty to mitigate was discussed by Dickson, J. as she then was, in *Gilbert v. Bottle*, 2011 BCSC 1389 as follows:

[201] The plaintiff has a positive duty to mitigate by taking all reasonable measures to reduce loss and damages caused by the defendant's negligence. This duty includes an obligation to undertake reasonably available treatment that would assist in alleviating or curing his or her injuries. The principle of mitigation is based on the general proposition that a defendant should not be held liable for loss and damages the plaintiff could have reasonably avoided: *Janiak v. Ippolito*, [1985] 1 S.C.R. 146; *Danicek v. Alexander Holburn Beaudin & Lang*, 2010 BCSC 1111.

[202] Once a plaintiff has established that the defendant is liable for causing his or her injuries, the burden of proof shifts to the defendant. To succeed on a mitigation defence, the defence must prove that the plaintiff acted unreasonably and reasonable conduct would have reduced or eliminated the loss. Whether the plaintiff acted reasonably is a factual question. Its answer depends on consideration of all of the surrounding circumstances: *Byron v. Larson*, 2004 ABCA 398.

- [203] A relevant circumstance in cases such as this is the plaintiff's personality and condition before and after the accident. The law does not require a plaintiff to do that which cannot be controlled, nor does it require perfection in the pursuit of rehabilitation. In addition, the defendant must take the victim as found, which may affect what is to be reasonably expected. For example, a person who has struggled with life-long obesity may not be expected to lose substantial weight to discharge the duty to mitigate, even though weight loss would assist recovery. What the law requires is that the plaintiff makes contextually reasonable and sincere efforts to limit his or her damages and loss: *Qiao v. Buckley*, 2008 BCSC 1782; *Antoniali v. Massey*, 2008 BCSC 1085.
- [82] Ms. Senger did not do more physiotherapy and massage therapy right after the accident as she had time constraints with school and managing her injuries. She also had limited funds.
- [83] I accept that explanation. While in a perfect world the plaintiff would have stopped everything and spent all her time and effort at getting as well as she could, life does not work that way. Plaintiffs cannot be expected to stop their normal lives. Life goes on. Moreover, for many people rehabilitation is often hard to navigate and beyond their budget.
- [84] Ms. Senger is clearly not a malingerer. She was trying to move forward with her life as best she could.
- [85] A number of the witnesses noted the plaintiff's positivity. Claudia Walker testified that Ms. Senger impressed her with her positive outlook. According to her self-reports the plaintiff is living a happy life with one exception - her health and the impact it is having on her.
- [86] Dr. Collins testified that the plaintiff "absolutely" wants to get better. He was "pleasantly surprised" with the level of the plaintiff's engagement with him. Ms. Senger's treating occupational therapist Sean Lloyd testified that her goal is to increase her work and decrease her pain. All agreed that she was working hard to do so.
- [87] Of note there is no definitive evidence that had she engaged in more physiotherapy that her injuries would have improved. In fact, the evidence of Dr. Stewart is to the contrary. Her opinion is that earlier rehabilitation is unlikely to have resulted in a different outcome.
- [88] I accept that.
- [89] Dr. Collins concurs with that view. In his opinion, there is a possibility that more treatment right after the accident would have resulted in an earlier increase in function but that would not have improved the eventual outcome.
- [90] I pause to note that Ms. Senger did not have the funds to engage in more treatment. Of significance, there is no evidence that ICBC offered her any assistance until early 2017.

[91] I am satisfied that Ms. Senger did the best she could with the resources available to her. Although she did not attend regular sessions with a physiotherapist, she continued to do the exercises given to her by a physiotherapist. In addition, she explored other forms of exercise to aid in her rehabilitation.

[92] Given her efforts and the opinions of Drs. Stewart and Collins, I find no failure to mitigate.

SPECIAL DAMAGES

[93] The parties agree that special damages are \$16, 531.89.

CONCLUSION

[94] In summary, Ms. Senger is awarded the following:

Non-pecuniary Damages:

\$ 80,000

Past Wage Loss:

\$ 56,300

Loss of Future earning Capacity:

\$ 700,000

Cost of Future Care:

\$ 140,982

Special Damages:

\$ 16,531.89

Total

\$993,813.89

[95] Costs were not addressed in this trial. If the parties are not able to reach an agreement, leave is granted to set down a hearing at a mutually convenient time.

"The Honourable Madam Justice Murray"

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