
CANADA / JUDGMENT

Singh v. Bevan

2016 BCSC 1412

COURT

Supreme Court of British Columbia

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2016 BCSC 1412 Singh v. Bevan

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Singh v. Bevan,

2016 BCSC 1412

Date: 20160728

Docket: M122287

Registry: Vancouver

Between:

Elisha Singh

Plaintiff

And

Steven Alfred Bevan and Shanti Kumarie Singh

Defendants

Before: The Honourable Madam Justice Sharma

Reasons for Judgment

Counsel for the Plaintiff:

E.A. Thomas,

S. Herra

Counsel for the Defendants:

D. Framingham

Place and Date of Trial:

Vancouver, B.C.

April 25-29, 2016

and May 2, 2016

Place and Date of Judgment:

Vancouver, B.C.

July 28, 2016

Table of Contents

I. FACTS. 3

The Accident 3

Before the Accident 4

After the Accident 5

The Impact of the Anxiety. 10

Current Circumstances. 12

Credibility. 13

Evidence about Elisha's Mental State. 14

II. ISSUE. 18

III. NON-PECUNIARY DAMAGES. 18

IV. FUTURE INCOME LOSS. 21

V. COST OF FUTURE CARE. 24

VI. CONCLUSION. 25

- [1] The plaintiff's claim is for damages that she says resulted from a motor vehicle accident in which she was injured. That accident took place on December 27, 2009, in Surrey. Liability has been admitted. The plaintiff, Elisha Singh, seeks compensation under all heads of damage. The defendant admits the plaintiff was injured in the accident but disputes the nature and extent of her injuries. The defendant also claims the plaintiff failed to mitigate her losses.

I. FACTS

- [2] The defendant only called one witness whose testimony I found supported the plaintiff's case. The testimony from the plaintiff's witnesses was remarkably consistent about Elisha Singh's behaviour, reports of pain and the impact her anxiety has had on her life. Unless facts are identified as being in dispute, the following narrative constitutes the facts that I find on a balance of probabilities based on the evidence at trial.

The Accident

- [3] Elisha Singh was a rear seat passenger in a car driven by her mother, Shanti Singh, at the time of the accident (to avoid confusion, in these reasons I refer to the plaintiff by her first name). Elisha's father, Meteshwar Singh, was sitting in the front passenger seat and Elisha was seated directly behind him.
- [4] Ms. Singh was driving westbound on 92nd Avenue, in Surrey, and she stopped at its intersection with 152nd Street. It was a foggy night and she checked for traffic and started to proceed through the intersection. At the last minute, the defendant's car came from the left and collided with Ms. Singh's car. Ms. Singh's vehicle spun around a few times and ended up facing a different direction.
- [5] The family had spent the evening of Boxing Day with friends, and were returning home very early the next morning. The plaintiff was asleep in the back seat. She was abruptly awoken by the loud crash and spinning motion of the car. Elisha screamed. Once the car stopped spinning, Elisha was fearful for her parents' condition. Mr. Singh had some difficulty breathing and his chest hurt. Her mother reassured her and Mr. Singh, even though Ms. Singh's chest also hurt. Immediately after impact, Ms. Singh engaged the parking brake. Ms. Singh went into shock and she felt frozen in place. She gripped the steering wheel and did not let go; the paramedics had to pry her fingers before helping her out of the car.
- [6] Mr. Singh and his daughter remained in the vehicle until the paramedics arrived, which took about 15 minutes. They were both able to exit the vehicle without help and were taken to wait in the ambulance. It took about another 15 to 20 minutes to get Ms. Singh out of the vehicle because the driver's door was damaged. Ms. Singh was placed on a stretcher with a neck brace and taken to Surrey Memorial Hospital in the same ambulance as her husband and daughter.
- [7] During this time, Elisha was distraught, fearful and crying. At the hospital, Mr. and Ms. Singh had x-rays of their chests taken but no other significant treatment. The family was discharged from the hospital at about 7:00 a.m. and a friend drove them home. Elisha was "freaking out" about having to get into the friend's car but was eventually convinced to do so.

Before the Accident

- [8] Elisha was a happy and carefree girl prior to the accident. She was bubbly and talkative. She was in grade 11, and 16 years old in December 2009. She enjoyed school and got good grades. She was in very good physical and mental health. She played volleyball, basketball and floor hockey.
- [9] She had a wide circle of friends, although her best friend was Harpreet Athwal, whom I will refer to, as the witnesses did, as "Preet". They enjoyed spending time together in the typical way that teenagers do: going to movies, hanging out at their houses, going to the beach, going to Playland or going shopping at a mall. Elisha did attend some parties but she never drank alcohol.
- [10] Elisha worked part time (about 20 hours a week but more during holidays) as a crew trainer at McDonald's while going to school. She had been doing that job for about a year and a half by December 2009. Prior to that she also had a newspaper route for about two years. She also volunteered her time at the Surrey Art Centre and Surrey Museum. She was a leader for children's day camps and she really enjoyed working with young children.
- [11] In August 2009, she got her "L" license. She was excited and testified her ultimate wish was to own a pink Volkswagen Beetle. She practised driving with her mother about three or four times a week for about an hour each time. They would arrive early at Mr. Singh's workplace so Elisha could practice driving in the parking lot. Because Mr. Singh does not have a driver's license and does not drive, it was always Ms. Singh who accompanied Elisha for driving practice. Elisha had no accidents, mishaps or "close calls" while driving. She was a confident and comfortable driver.
- [12] This comfort existed despite the fact that in June 2009, a friend of hers died as a result of a motor vehicle accident. He had gotten into a car with an impaired driver who got into an accident. The accident did not make Elisha reluctant to get her license but it did reinforce for her the importance of making good decisions about whom she got into a car with.

After the Accident

- [13] Upon returning home from the hospital, Elisha went to bed and slept until the next day. She was very upset and exhausted during the first few days after the accident. She had difficulty falling asleep because she would think about what happened and worry about it happening again. She would feel the bed spinning as the car did during the accident. She was scared about it happening again.
- [14] She had pain and stiffness in her right neck and shoulder and pain in her right lower back near the hip. Because it was the Christmas holidays, she did not see her doctor immediately, but she did go to a walk-in clinic about her pain and anxiety. Her neck pain was very bad for the first two weeks, and she felt it every day for about the first month. Although the pain was not constant (it would come and go), sitting too long or having stress would make the pain

worse. During this time she said nothing would eliminate the pain, although lying down reduced it a bit. With regard to her low back and hip, she said they were sensitive to touch or pressure.

- [15] When she saw her family doctor, Dr. McGrath, she got a prescription for pain relief. Dr. McGrath recommended Elisha go to physiotherapy, which Elisha did, attending Sungod Physio. She received heat treatment and was taught exercises to help with her muscle stiffness. But she found the physiotherapy sessions difficult because she was fearful that she would get re-injured or make the pain worse by doing the exercises. She was even apprehensive about the physiotherapist touching her. She admitted these fears and anxieties led to her not following up with her treatment at home even though she attended about 18 sessions.
- [16] She was scheduled to work at McDonald's over the holidays but she did not return to work for about six months. She missed school for two weeks. Her anxiety about getting re-injured had not abated when she returned to school. She would walk down hallways with a friend on each side of her acting as a shield from being bumped or jostled by other students. She did not participate in sports because of her pain. Although her physical symptoms did improve, she was still having pain every day through to the end of her grade 11 school year. The frequency of pain remained the same but the intensity diminished.
- [17] Elisha had difficulty sleeping. Her mind would race and she would think about the accident. She had nightmares almost every night. The nightmares would wake her up and she would have difficulty falling asleep again because she was so upset and crying. She would be re-living the accident. Often her mother would stay in the room and provide comfort until Elisha fell asleep again, which could take an hour. The frequency of her nightmares did decrease and by the end of grade 11 she only had them a couple of times a week, but they did not disappear completely.
- [18] These sleep issues made her physically exhausted, and emotionally drained. She had difficulty paying attention at school because of her lack of sleep. She was crying every day. Even a report on the news or a depiction in a movie about a car accident would upset her. She felt like this happened on a daily basis.
- [19] Elisha was very anxious about her family's safety. She was unable to fall asleep if any of her family members were out of the house at night. She was worried about them getting hurt. She felt if she was awake then she could check on them to reassure herself. She did not want to be asleep if something happened and, in her mind at the time, her being asleep was connected to the accident.

- [20] In June 2010 she started going to Three Peaks Health for physiotherapy. At that clinic they started her treatment gently with stretching and then gradually moved towards light weights. She was still scared about re-injury but because of the gradual progress, she found the treatment helpful. She was able to work out independently at home, and this reduced her anxiety about re-injuring herself while exercising. She went to the clinic for a few months and continued some exercises at home. Her pain was improving.
- [21] She went back to work at McDonald's in June 2010, but she only stayed there for a few months. She could do the tasks physically but she was still fearful of hurting herself. She felt as if she had fallen behind her friends who had been promoted while she had been off work. The other workers referred to her as "the accident girl"; she felt like they treated her as if she was extremely fragile. She did not enjoy working there anymore. In October 2010, Elisha left McDonald's. At about the same time or shortly thereafter, she started working at White Spot as a hostess, and eventually as a food runner. By June 2012, she returned to McDonald's, and for a time held both jobs. She has performed well and is now being trained to become a manager at McDonald's.
- [22] She did not return to her volunteer work until 2015. She loved the volunteering, but the centre was far away from her home and she did not want to have to be a passenger in the car for the length of time it took to drive there. She was also scared about the kids bumping into her and her getting re-injured.
- [23] She became withdrawn. She did not communicate with her family very much. Her mother had an apt description: Ms. Singh felt as if she had lost her little girl. Elisha had been close to her brother but their relationship has suffered and they do not talk much now. Her father finds a marked difference in that Elisha rarely starts a conversation. If she is asked a question her answers are brief and Elisha is not really engaged in the conversation.
- [24] She was no longer excited about going into grade 12 and graduation. Since the other students were often talking about grad activities, this increased the discomfort Elisha had about attending school. She felt isolated and this contributed to her decision to take an online course so she could graduate early. By February 2011, she fulfilled all the requirements for her high school diploma. She did not attend her prom or take part in any graduation activities. This was a marked difference in her attitude compared to the time before the accident. Previously, she was very excited about graduation and all the festivities. She had dreamt about picking out the perfect "princess dress" and matching shoes.
- [25] Elisha's mother would drive her daughter to and from school and to and from work. Elisha was scared about walking on the street because of the possibility of being hit by a car. At this point, her life involved school, work, and working out. She had few social outings. The only friend she spent time with was Preet. She spent almost all her time at home. She never took the bus or skytrain in grade 12 and she was still fearful about being jostled or hit.

- [26] By June 2011, Elisha was feeling better physically. Although she still had some neck pain (about three times a week), it would only last about 15 minutes and she could address it by doing some stretching.
- [27] She testified that her low back and hip pain improved slowly but that she was still sensitive up until as late as 2013. At another point in her testimony, however, she said she was unsure if she was still experiencing pain in her low back and hip area in 2011. The defendant disputes how long her lower back and hip pain lasted by referring to her examination for discovery evidence from April 2013. At the discovery Elisha stated that her lower back pain had resolved about six months after the accident, and that she had not been in pain for about three years (meaning it resolved in 2010). I also note there is no reference to lower back pain in Dr. O'Connor's expert report. He is a physiatrist who examined her on May 10, 2012. He did a thorough examination.
- [28] The defendants also referred to a questionnaire Elisha completed in June 2010 at Three Peaks Health, where it mentions just her neck injury as the reason she was seeking treatment. However, there are other notes from Three Peaks that record Elisha complaining of pain in her hip in February 2011.
- [29] I am not persuaded this evidence impairs her credibility, but it does tend to show that her trial testimony may not be accurate in terms of the length of time she experienced pain in her lower back and hip area. During the trial, I find Elisha was trying her best to be honest, but she was often unsure of the exact dates or times of her symptoms. This is hardly surprising since the trial took place over six years after the accident. I agree with the defendants that her low back and hip pain did not cause her symptoms until as late as 2013. Considering all of the evidence, I find that her lower back and hip pain had resolved to the point that it was no longer bothering her by May 2012. Her neck and shoulder pain subsisted until sometime in 2014.
- [30] These improvements were limited to her physical symptoms. While her sleeping habits had improved somewhat, she was still having nightmares, but only about three times a month. The nightmares were as intense as previously, just less frequent. She still could not fall asleep if any family member was out, and she would contact family members to see if they were okay and if they were going to get home on time.
- [31] Elisha says that by the end of 2012 her nightmares had almost disappeared but she still had difficulty falling asleep. Sometimes she would awaken in the middle of the night and check on her family members, occasionally waking up her mother. Her anxiety about her family members' safety remained and she would still stay up if a family member was not at home at night.
- [32] Elisha did report her anxiety to Dr. McGrath but the physician's advice was simply that time would heal it. It was not until Elisha saw a physiatrist in May 2012 that any medical professional recommended that she seek counselling. Upon receiving Dr. O'Connor's report, her family doctor referred Elisha to a psychiatrist, Dr. Gandhi. Elisha was apprehensive

about going to counselling because she was worried that she would be asked to describe the accident, causing her to re-live it. This only increased her anxiety. She did attend a few sessions with Dr. Gandhi but those did not help.

The Impact of the Anxiety

- [33] Elisha's anxiety has resulted in a continuing fear of driving and being a passenger. For the first two weeks after the accident, being a passenger in a car was extremely upsetting and very difficult for Elisha. Her father testified that in the beginning even going over a pothole would cause her to scream. For about three months she only travelled by car with her mother to attend medical appointments.
- [34] For a long time, Elisha was uncomfortable getting into a vehicle driven by anyone other than her mother. Even now, she is only comfortable if her mother, brother or boyfriend is driving, but even this remains an ordeal. She recalled only two times she went into a car driven by someone other than her mother in the first years after the accident. Once she went with a friend named Karen, but Elisha was very nervous and felt Karen was driving too fast and had the music too loud. Elisha perceived Karen was annoyed with Elisha's reaction. The other time was with a former boyfriend whose driving Elisha also expressed concerns about. He did not like that and did not drive her again.
- [35] Her mother still drives her to and from work, although occasionally her brother may do so if her mother is busy. Both described Elisha as very anxious and nervous as a passenger. Her brother described that in the time after the accident, Elisha would cry out whenever there was a loud noise. She would poke or tug at him if there was a car in their vicinity or she thought he was driving too fast. According to him, this behaviour has improved somewhat, although it is a function of her controlling it rather than the anxiety diminishing. He says this because he notices that her hands still move to poke or tug at him but she stops herself. Her father described very similar behaviour.
- [36] Her learner's license lapsed because she simply could not bring herself to drive a car in the two years after the accident. In fact she did not return to driving until recently. With her family's and boyfriend's encouragement, Elisha got her learner's license again in January 2015, but that was only a written test. Upon getting that license, she avoided practicing driving for about three months because she still felt fearful. She did eventually practice driving with her mother. They went back to the parking lot of her father's worksite. Elisha was extremely nervous and could not turn the vehicle at first. She was apprehensive about applying the accelerator. She was extremely anxious and easily became very frustrated which tended to cause her to do something wrong, thus compounding the initial anxiety. She has only practiced driving with her mother a few times.

- [37] Elisha's mother arranged for some driving lessons with Mr. Malhi, which took place in March, April and June 2015. He testified at trial that he owns his own company and has been teaching new drivers for about 12 years. He teaches about 100 students every year, working seven days a week and teaching five to six lessons each day. The car used in those lessons has a dual control system such that there is a brake, accelerator and rear view mirror on the passenger side of the vehicle to allow him to control the speed of the vehicle if needed.
- [38] Mr. Malhi testified for the defendant and was defensive during cross-examination. He gave the impression that he believed he was being blamed for Elisha not earning her driver's license. He admitted that he does not remember any details of the lessons with Elisha and his testimony was based on what he assumed happened rather than specific recollections. I find his only true recollections about Elisha are that he taught her, he had to call to arrange subsequent lessons which were far apart and he had difficulty getting paid. No other aspect of his testimony was reliable. In particular, I discount entirely his testimony in chief where he claimed Elisha was "like any other driver" or was a confident driver. During his cross-examination he admitted he made no effort to notice if a student was nervous and it was "silly" of counsel to ask whether he did.
- [39] I find the reliable portion of Mr. Malhi's testimony supports the plaintiff's case. It buttresses her testimony that even though she had her "L" license, she remained anxious and fearful of driving. That would explain why the lessons were so far apart and why Mr. Malhi had to follow up to arrange them.
- [40] The anxiety surrounding driving and being in vehicles has had a negative impact on Elisha's social life. When she returned to school in grade 11 and 12, many of her friends were getting their drivers' licenses. They would drive with each other to events. Elisha's anxiety about being a passenger prevented her from joining in. Not only was she missing out on activities, her friends treated her differently and were no longer interested in spending time with her. Even her friendship with Preet suffered after Preet got her driver's license. They have not seen each other for about three years.
- [41] Elisha has a boyfriend that she started seeing in January 2015. He has a vehicle and she has gone driving with him. She feels this is a serious relationship and she trusts him, but says she still cries when she is a passenger with him because of her anxiety. They do not go out a lot so she does not go driving with him very often. Primarily they spend time at her house or at his house. Since the accident, she recalls being outside of the Surrey/Burnaby area only one time; her boyfriend drove her to Vancouver. She found that a stressful experience.

Current Circumstances

- [42] Since June 2015, Elisha has been an assistant to the manager at McDonald's. Her job involves ensuring the store has sufficient inventory. To do that, on occasion she has to pick up product from another store. Because she does not drive, she either has to do that with her mother on her way to work, or if the need arises during her work day, she has to see if her mother is available or ask another employee. She is embarrassed by her reliance on someone else to help her with her job duties.
- [43] She wants to leave McDonald's because she feels like she has outgrown that job and wants to try something else. She is hoping to get a job in an administrative field or as a receptionist because she feels that would allow her to make about the same amount of money without spending so much time at work. However, she feels restricted because she does not want to have a job that is too far away since she feels dependent on her mother driving her to and from work. She has been diligent in searching for work but has not yet found something suitable.
- [44] Elisha buries herself in her work as a way to avoid addressing her anxiety. She typically works up to 10 or 12 hours a day, five days a week. She does not really do anything outside of work. She tends to stay home and read. She simply stays at home on her vacation days. Only very rarely in the years after the accident has she gone to the mall.
- [45] She still suffers anxiety about sleeping and has difficulty if her family members are not at home. She does not have nightmares, although occasionally she will have unsettling dreams. They do not wake her up during her sleep; instead, she will be upset in the morning. Her anxiety about being a passenger in a car and about her family's safety when they are out of the house at night has not changed since the accident, although it has diminished.

Credibility

- [46] The defendant submits I should be cautious in accepting Elisha's evidence because of certain inconsistencies. The defendant questions Elisha's statement that she buries herself in her work as a way to avoid driving. He pointed to some discovery evidence and cross-examination testimony where she said to others that she did not have time to go driving. The defendant's position is that her "decision" to work long hours is what is holding her back from learning to drive.
- [47] This submission is based on a fundamental misunderstanding of anxiety disorder. As confirmed by Dr. Patton, avoidance is a classic symptom of anxiety. While it is true she "decided" or voluntarily worked longer hours than she needed to, that led to her exhaustion and limited the time she had when she felt comfortable practicing her driving (she did not want to practice or have a lesson on a day she was working). This avoidance behaviour is a manifestation of her anxiety.

- [48] The defendant also points out that she took a trip to Edmonton as part of her training at McDonald's, which involved her being a passenger in a vehicle driven by someone she did not know because she took a cab from the airport. The defendant submitted her "ability" to do that meant that she is simply avoiding exposing herself to situations which could lead to her improvement.
- [49] This too is based on a misperception about anxiety. That training session was not something that she had a choice about if she wanted to get a promotion. Therefore she had to endure it, but she did so with considerable anxiety. Again, Dr. Patton explained that people avoid anxiety-inducing activities as much as they can but they are not physically incapable of doing those things. If anything, I find the fact that Elisha did not avoid the trip despite her existing anxiety about being a passenger to be a positive signal of her genuine attempt to mitigate her losses by doing things to improve her employment.
- [50] The defendant's position implicitly argues that if Elisha just tried harder, her anxiety would have improved sooner. These submissions are premised on a fundamental misunderstanding of anxiety disorder as was explained in, among other places, Dr. Patton's evidence. Avoidance behaviour in this context is not a signal that a patient is malingering or exaggerating. It is a behavioural consequence of having anxiety disorder. Rather than exaggerating, both Dr. Klubben and Dr. Koch were of the view that Elisha under-estimates her anxiety.

Evidence about Elisha's Mental State

- [51] There was abundant evidence that Elisha suffers from anxiety caused by the accident that has had a profoundly negative impact on her life. In addition to the evidence above, four expert reports were accepted into evidence:
- a) a May 10, 2012 report from Dr. Russell O'Connor, a specialist in physical medicine and rehabilitation;
 - b) a January 11, 2013 report from Dr. Sheila Patton, a psychiatrist;
 - c) an October 30, 2015 follow-up report from Dr. Patton; and
 - d) a January 28, 2016 report from Dr. William Koch, a psychologist.
- [52] An issue about the admissibility of some of the expert evidence was resolved before the trial started in a brief oral ruling I delivered. I found all experts qualified to give the opinions they expressed; they were reliable witnesses. Dr. Klubben, who is a psychologist currently treating Elisha, also testified but not as an expert witness.
- [53] Dr. Patton's opinion is that Elisha meets the clinical criteria for Anxiety Disorder NOS. She explains that is "a disorder where symptoms of mood and anxiety are present and accompanied by functional impairment, but do not meet another specific psychiatric diagnosis." She also diagnosed Elisha with Pain Disorder with psychological factors. This is a

disorder where "despite the presence of an injury that could generate pain, the pain is seen to be in excess of what one would expect given the injury." The degree of pain is affected by present psychological factors. This was manifested, as an example, by Elisha's initial fear of touch and avoidance of active rehabilitation because of a fear of re-injury or worsening of pain.

- [54] During her testimony, Dr. Patton explained her opinion that Elisha has certain traits or vulnerabilities that make her more predisposed than someone else to developing psychiatric conditions. She lacks the psychological maturity expected of someone her age. She is more dependent upon her family members with the result that she has less independence than people her age typically do. The significance of these vulnerabilities is that traumatic events will have a bigger impact on her than they would on someone without those vulnerabilities.
- [55] Dr. Koch's observations and conclusions are consistent with Dr. Patton's, but his report is based in part on his assessment conducted recently (December 2015). I find his evidence helpful and supportive of the plaintiff's position about the degree to which Elisha has found the anxiety debilitating. Notably, Dr. Koch comments that Elisha had a "pronounced positive impression management bias suggesting that she under-represents her psychological distress on self-report tests." He opined that she had some pre-existing specific phobias which he attributed in part to her immaturity, a trait consistent with Dr. Patton's description of Elisha. He also agreed that Elisha was pre-disposed to develop fears based on her likely having a generalized anxiety disorder pre-accident. However, he clarified that condition did not result in functional impairments. I find this to be consistent with Dr. Patton's opinion that Elisha was pre-disposed to react more dramatically than others to a traumatic event.

[56] Dr. O'Connor also commented on Elisha's mental state:

It is beyond my area of expertise to determine whether she meets the criteria for posttraumatic stress disorder or not, but regardless, she has such prominent mood and anxiety symptoms, social withdrawal and isolation [that] [t]he fear and anxiety symptoms are getting in the way of her normal development both with becoming a young adult becoming more independent with driving, normal social development, socializing with peers, as well as her independence with doing such things as getting herself to work.

It is beyond my area of expertise to determine to what degree this is disabling other than to say that it is impairing her level of function socially, recreationally and domestically.

- [57] I dismissed the defendant's objection to the admissibility of the above paragraphs based on them being outside the scope of Dr. O'Connor's expertise. I found they do not purport to represent opinions outside of his specialty, but are a medical doctor's observations of the patient's condition and factors contributing to her rehabilitation. In my view, the fact that he emphasized Elisha's anxiety symptoms is an indication of how debilitating they are for her.

- [58] Dr. O'Connor also commented that the accident had a significant impact on Elisha's quality of life by reducing her socialization with peers. This is consistent with Dr. Patton's testimony during cross-examination that absent the accident, she would not have expected Elisha to have a restricted social life because by the age of 14 or 15 people's social traits are firm. Elisha had an active social life before the accident and the dramatic change cannot be attributed to being just a change in her personality as she aged.
- [59] All experts agreed that Elisha requires psychological treatment and both Dr. Patton and Dr. Koch recommend cognitive behavioural therapy. Dr. Patton testified that in her view it was a good clinical decision to discontinue treatment with Dr. Gandhi as that treatment probably made things worse instead of better. Elisha confirmed that Dr. Gandhi did not review the accident or her driving fears with her which, under appropriate guidance, is an essential element of cognitive behavioural therapy.
- [60] Dr. Klubben has a Ph.D. in psychology and specializes in treating patients who suffer personal injury in motor vehicle accidents and suffer anxiety, PTSD and depression. This has been her practice since 2008. She was called as a treating professional, not as an expert.
- [61] She observed that Elisha tended to under-estimate her current situation which is consistent with Dr. Koch's observation. She described the treatment she has begun with Elisha, including constructing a "fear hierarchy" from which the treatment is tailored by tackling the things that cause the least amount of stress first. Exposure therapy is being employed and the goal is to expose Elisha to the "optimal" level of anxiety during the session in order to have her experience how to respond and cope with it. The therapy does not work without having the patient experience some anxiety; too little and there is no benefit, and too much and the patient will not be able to absorb the treatment.
- [62] In terms of a prognosis, Dr. Koch opined that Elisha "is guarded without treatment; generally positive if [she] receives appropriate treatment." In her first report, Dr. Patton suggested an excellent chance of full recovery. In her second report, however, she was of the opinion that Elisha "should receive significant benefit from engaging in the treatment recommendations." Dr. Patton explained what she meant by this statement during her testimony: she no longer thinks it probable Elisha will fully recover, but there should be some alleviation of symptoms or improvement of function, or both. Dr. Patton cautioned that it was more difficult to predict because Elisha had not yet had appropriate treatment, but Dr. Patton felt Elisha had some strengths that should assist with her learning to better cope with any remaining anxiety.
- [63] Dr. Klubben has had three treatment sessions with Elisha but has not yet seen any improvement, which she stated to be uncommon. She estimates Elisha will need 16 to 20 more sessions. The defendant suggested it was too early to make any conclusion about Elisha's prognosis. I disagree. Dr. Klubben's evidence suggests, consistent with the other medical evidence, that Elisha may recover or at least have alleviation of symptoms to a significant degree but that the treatment is going to be slow.

II. ISSUE

[64] The sole issue in this case is what amount of damages the defendant owes to Elisha as a result of the accident. The parties have agreed on an award for past income loss of \$3,526.92 and special damages of \$717.50.

III. NON-PECUNIARY DAMAGES

[65] The parties agreed on the factors to be examined in considering the appropriate compensation for pain, suffering, loss of enjoyment of life and loss of amenities as set out in the leading case of *Stapley v. Hejslet*, 2006 BCCA 34, which I need not repeat.

[66] As noted in the narrative that constitutes the fact findings, Elisha suffered neck and shoulder pain that did not completely resolve until sometime in 2014. I also find that she suffered milder pain in her low back and hip region but that resolved about May 2012. The defendant submits there is no medical opinion to support any injury other than to her neck and shoulder. But the defendant conceded the plaintiff suffered injuries caused by the accident. Had the defendant, as was his right, limited that concession to the neck and shoulder pain, the plaintiff may have needed medical evidence (although I am not convinced that is necessarily so), but there was no such restriction. As such the plaintiff was entitled to believe the fact of the injury was not contested, only its duration and severity. I find Elisha did suffer an injury to her low back/hip.

[67] Both injuries were soft tissue, and of the milder variety in that they were treatable by physiotherapy and painkillers. However, as Dr. Patton's opinion confirms, because of her psychiatric pain disorder, those "mild" injuries would have been perceived as more serious to Elisha than the injury itself justified. This increased the impact the injuries had on her quality of life. It is true, however, that she is not left with any permanent injury.

[68] By far the biggest impact from the accident is her anxiety. The evidence is overwhelming that Elisha's anxiety has been damaging to her quality of life. This is not limited to her fear of driving. Instead, it has led to her changing from a happy, cheerful, socially and athletically active girl to a withdrawn young woman who has little social life outside of her work and a boyfriend with whom she does not go out much. She did not attend her high school graduation, which I accept to be a momentous occasion in any young person's life not only for the accomplishment, but because of the associated festivities. She missed out on that.

[69] She continues to have fears associated with her family being out of the house. She suffered from nightmares for years, which only resolved recently, even though she still has troubling dreams.

[70] In written submissions, the defendant listed a number of factors with respect to the psychological and emotional impact of the accident. Most of those factors are based on an inaccurate understanding of anxiety disorder, such as "she was never precluded entirely

from travelling as a passenger in motor vehicles." Elisha does not have agoraphobia (fear of being outside). She was able to travel in cars, but whenever she was a passenger she suffered the effects of her anxiety. In another instance, the defendant describes that "she is happy, motivated and interested." That is true, but not necessarily inconsistent for someone who has anxiety.

- [71] The plaintiff says her young age and the probability the psychological injury will have long-term consequences support an award in the range of \$100,000. The plaintiff relied on the following cases as providing the most helpful guidance on the quantum of damages:
- a) *Miller v. Marsden*, 2014 BCSC 2331: a 16-year-old was delayed by four years getting his driver's license and received \$105,000 in non-pecuniary damages.
 - b) *Pelkinen v. Unrau*, 2008 BCSC 375: following a motor vehicle accident the plaintiff suffered from anxiety, depression, and a panic disorder. She was awarded \$90,000 in non-pecuniary damages, less 10% for a failure to mitigate (\$81,000).
 - c) *Hollows v. Wood*, 2013 BCSC 1991: the plaintiff suffered soft tissue injuries plus anxiety disorder and received \$90,000 as general damages for both.
 - d) *Pascoa v. Xue*, 2008 BCSC 791: the plaintiff suffered physical injuries and also developed a severe driving phobia. She received \$75,000 for non-pecuniary damages.
- [72] The defendant says that an award in the range of \$40,000 to \$50,000 is appropriate. He relies on the factors referred to above, most of which I do not find have an impact one way or another on the appropriate amount of non-pecuniary damages. He also says the soft tissue injuries were mild.
- [73] He also suggests inconsistencies in the evidence (about the amount of practice driving Elisha did with her mother, and the frequency of Elisha's willingness to be a passenger in a car) tended to diminish the amount of compensation to which she is entitled.
- [74] For the most part, my fact findings do not support the defendant's position, but I do agree the soft tissue injuries were mild and not permanent, which means the compensation for that injury is on the low end. However, to the extent any other physical symptoms were exacerbated by her anxiety and pain disorder, they deserve compensation on the higher side because of her age and the negative, long-term psychological impact of the accident.
- [75] The defendant relies on:
- a) *Peck v. Peck*, 2012 BCSC 1617: a young woman suffered soft tissue injuries and moderate (in the sense of not disabling) travel anxiety. She received \$45,000 in general damages.
 - b) *Nemoto v. Phagura*, 2014 BCSC 262: plaintiff was 10 years old and suffered neck, back and shoulder injuries as well as nervous tension in traffic and nightmares; he received \$40,000.

- c) *Field v. Bains*, 2014 BCSC 1371: a seven-year-old suffered minor physical injuries, but the psychological injuries were such that she may never lead a normal life because she may be more affected by life stressors; she received \$50,000 in general damages.
- [76] Overall, I find the plaintiff's submissions about non-pecuniary damages to be more persuasive; those cases have facts that more closely parallel the facts before me. The nature and duration of her psychological injury and the impact it has had on the plaintiff justifies an award towards the higher range. I award her \$100,000 for non-pecuniary damages.

IV. FUTURE INCOME LOSS

- [77] The parties do not disagree on the legal principles governing an award for future income loss as articulated in *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353, quoted with acceptance by the Court of Appeal in *Kwei v. Boisclair* (1991), 60 B.C.L.R. (2d) 393 at 399-400. Importantly, the plaintiff has the onus of proving a real and substantial possibility of the loss of earning capacity in the future.
- [78] The plaintiff says she has proven a real and substantial possibility that she will never drive. I agree. This is the prediction of a future event and the evidentiary burden on the plaintiff is lower than a balance of probabilities. In my view, the evidence meets this burden. I find that possibility is directly attributed to the anxiety caused by the accident.
- [79] There was no economic, labour market statistic or vocational evidence upon which I can rely to assist in determining Elisha's post-accident position with regard to capacity to earn income as compared to her capacity before the accident. My task is to estimate the pecuniary loss by taking into consideration the possibility and probability that future events will impact the income Elisha will be capable of earning.
- [80] The defendant submits not being able to drive is not a "capital asset" that is compensable. I do not agree. Turning to the *Brown v. Golaiy* factors, I find not being able to drive will make Elisha less marketable or attractive to employers and will limit the job opportunities that might otherwise have been available to her. It also makes her less capable overall of earning income for all types of employment.
- [81] The plaintiff submits I should measure the capital asset loss based on two-three years of Elisha's current earnings. In 2015, Elisha earned \$39,973.60. The plaintiff submits an award in the range of \$75,000 to \$100,000 is appropriate, which I am assuming is simply a multiplication of her 2015 income.
- [82] The difficult issue in light of the evidence is how to quantify that loss. Whatever method of estimating the loss is appropriate, I must consider future contingencies that will impact Elisha's income stream. There was no evidence suggesting Elisha ever had any plans to attend college or university, although pre-accident her grades were good. She has stated a desire to have a receptionist or administrative type job which would generally be "office" hours and at the lower end of the income range.

- [83] Elisha expressed a desire (at trial and to experts) to have a family. I find that is likely in her case and, therefore, I also find there is a real and substantial possibility she will take time off from work when she has children. But I also note Elisha is hard working. Elisha has earned income since she was young, starting a paper route when she was only 13. She continuously worked while going to school before the accident.
- [84] Another consideration in assessing the amount of loss of future earning capacity is how long a person is likely to work. I find an inability to drive will have a greater impact on the opportunities available to Elisha when she is older. I also take account of the fact that it is not likely Elisha's mother will continue to drive her to and from work, which also suggests a diminished pool of job opportunities in the future.
- [85] I find that before the accident Elisha was destined for a future with modest paying jobs and that her income would probably be interrupted for some time by family commitments. I also find that because of her work ethic, she would have pursued opportunities for advancements and promotions unhindered by the location of the job. The possibility she will never drive does diminish her future capacity to earn income, because it restricts the geographical area in which she will apply for work. It follows that the pool of jobs for which she will be suitable will be smaller than before the accident. That negative impact will be modest.
- [86] Her income in 2015 was just under \$40,000. Although she has stated a desire to work less, she did turn down a job with fewer hours because of the pay cut. The defendant suggested turning down that job was unreasonable. The plaintiff pointed out her overall pay would have been less and she could not afford that. I agree with the plaintiff that her choice was reasonable. Had she accepted a lower paying position, she might have been met with an argument that she failed to mitigate her wage loss.
- [87] After this trial closed, the Court of Appeal issued reasons in *Dunbar v. Mendez*, 2016 BCCA 211. It does not represent any change in the law and did not justify asking for further submissions from counsel. The Court of Appeal assessed whether a trial judge's award of future income loss was reasonable. In an extensive discussion (paras. 18- 47), the court does apply, in a rough manner, some basic calculations not to measure the loss but to test whether the amount was within a reasonable range. Like this case, *Dunbar* also suffered from a lack of evidence on some key points, although I note there appeared to be some vocational evidence, and the plaintiff had been established in a career.
- [88] *Dunbar* gives me some guidance about assessing the plaintiff's suggested award. I base my assessment on an assumption of Elisha working 20 years, given her young age and strong work ethic, balanced against her likely family commitments. The plaintiff seeks between \$75,000 and \$100,000 based on a simple multiplication of her most recent annual salary. I do not find that approach to be reasonable. Over a 20 year work life, \$75,000 to \$100,000 amounts to roughly \$3,750- \$5,000 per year loss. That, in turn represents between 9% and 12% of her current income per year. I find that amount too high. Comparing her pre-

accident condition and post-accident condition, I have found the manifestation of her anxiety (an inability to drive) will have a modest negative impact on her earning capacity or between 3% and 5% of her current income capacity. I award \$40,000.

V. COST OF FUTURE CARE

[89] The plaintiff seeks between \$14,800 and \$21,000 to account for an estimated 80 sessions of psychological counselling. This is based on an estimated immediate need of between 20 and 30 hours, and a contingency of 50 hours in the future. The defendant submits the award should be based on an assumption of 25 more sessions which amounts to between \$4,625 and \$5,000. In my view, the plaintiff's submissions are more consistent with the evidence. I conclude the evidence supports an award of \$15,000.

VI. CONCLUSION

[90] I award the following:

Non-pecuniary:

\$ 100,000.00

Loss of future earning:

\$ 40,000.00

Cost of future care:

\$ 15,000.00

Past lost income (by consent):

\$ 3,526.92

Special damages (by consent):

\$ 717.50

TOTAL:

\$ 159,244.42

"Sharma J."

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