
CANADA / JUDGMENT

Skibeness v. Northway

2020 BCSC 1825

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 1825 Skibeness v. Northway

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Skibeness v. Northway,

2020 BCSC 1825

Date: 20201125

Docket: M54840

Registry: Vernon

Between:

Kylie Marie Skibeness

Plaintiff

And:

Calham Jackson Northway

Defendant

Before: The Honourable Mr. Justice G C. Weatherill

Reasons for Judgment

Counsel for the Plaintiff:

M.J. Yawney, Q.C.

Counsel for the Defendant:

B.P. Austring

Place and Dates of Trial:

Kelowna, B.C.

November 2-5, 2020

Place and Date of Judgment:

Kelowna, B.C.

November 25, 2020

Introduction

- [1] The now 24-year-old plaintiff claims damages for personal injuries suffered on June 20, 2017 during a motor vehicle accident (the "Accident"). She was the front-seat passenger in a 1994 Mazda pick-up truck owned and being operated by the defendant as he lost control of the vehicle when it was rounding a corner on gravel mountain road. The vehicle rolled several times and came to rest partway over a steep embankment.
- [2] Liability for the Accident has been admitted.

Evidence at Trial Tendered by the Plaintiff**The Plaintiff**

- [3] The plaintiff was born and raised near Seattle, Washington. She has been passionate about the outdoors since she was young. During her school years, she engaged in various athletic activities such as gymnastics, soccer, track, volleyball and skiing, excelling at most if not all of them. However, due to "growing pains" she experienced in her ankles, knees, hips, and eventually her back and neck, she gave up competitive sports in the 9th Grade. During high school, she consulted her family doctor about depression and was given anti-depressant medication.
- [4] In 2014, while in high school, the plaintiff was involved in two rear-end collisions within three months of each other. In the first she suffered whiplash. In the second her whiplash injury was aggravated. She attended physiotherapy and massage therapy. She testified that, by the time she graduated high school in June 2015, her whiplash injury had resolved to the point where she was no longer physically limited by it, with the exception of occasional flare ups.
- [5] In September 2015, the plaintiff enrolled in a Bachelor of Arts program at the University of British Columbia Okanagan in Kelowna ("UBCO") with a major in geography and a minor in psychology. She worked part-time during the school year and full-time during the summer months. She continued many of her outdoor activities including skiing at an advanced level, as well as hiking. She regularly worked out at a gym. She testified that she was in good shape both physically and mentally. Although she continued to see a chiropractor for her previous whiplash injury, she testified that her primary reason for doing so was "maintenance" and

because UBCO provided the treatments to her at no cost.

- [6] On cross-examination, the plaintiff agreed that from the spring of 2016 to the date of the Accident, she regularly suffered from headaches, including migraines. She also reported having ongoing neck and upper back pain which was aggravated by over-activity and/or "jarring movements" such as one experiences during aggressive skiing. She agreed that she also suffered from cycles of depression which she attributed to changes in the seasons. However, she insisted that in the weeks leading up to the Accident, her pain symptoms had improved such that she felt better than she had felt for a long time.
- [7] During her second year at UBCO, the plaintiff applied for an exchange program at a university in Australia for which she was accepted on the condition that she improve her UBCO grades.
- [8] The plaintiff testified that, during the Accident, her shoulder hit the side of the vehicle, she hit her head, and she was jarred forwards and backwards. She sustained minor cuts and abrasions from broken glass. She emerged from the vehicle in shock.
- [9] The plaintiff testified that the morning after the Accident she awoke with stiffness and pain in her right shoulder, upper back and neck, as well as with headaches. She described having symptoms of a concussion including nausea, dizziness and sensitivity to light. She attended a walk-in clinic where she was prescribed muscle relaxants. A few days later she saw her family doctor who prescribed physiotherapy and massage therapy treatments for her. She attempted to return to her summer job but stopped after one day because of pain. As time went on, she felt anxious and depressed. She isolated herself socially. She was prescribed anti-depressants and sleeping pills.
- [10] On cross-examination, the plaintiff testified that the Accident significantly aggravated the pain symptoms she had experienced prior to the Accident. Compared to the period before the Accident, her symptoms were more intense, more frequent and more immediately felt after an activity.
- [11] The plaintiff's third year at UBCO began in September 2017. She testified that she was particularly motivated to improve her grades in order to go on the Australia exchange. However, she struggled both physically and emotionally due to her Accident-related injuries. She had difficulty taking notes due to constant headaches and intense pain symptoms. She missed several classes. UBCO provided a "peer note taker" who took notes for her during her classes. She studied with a friend and classmate, Taryn, who helped her with notes and to focus on her grades. UBCO provided extra time during exams for her to take breaks and stretch. She attended a kinesiologist who provided her with some exercises to do at home. Ultimately, the grades she achieved enabled her to go on the Australia exchange from mid-January 2018 to mid-June 2018.

- [12] The plaintiff testified that she was in pain and depressed for the first several weeks in Australia. However, both conditions improved over the next several months such that by June 2018, she was in a "good place" both physically and emotionally, with the exception that she experienced intense anxiety whenever she was a passenger in a vehicle. She and a friend travelled in southeast Asia until early August 2018, when she returned to the Kelowna area.
- [13] Upon her return, the plaintiff worked part-time in a coffee shop. She was able to do the job without physical limitations except for occasional pain flare-ups.
- [14] In September 2018, the plaintiff began her fourth year at UBCO. She testified that the pain symptoms that had subsided over the previous six months returned. She found sitting in school and note-taking for long hours physically challenging. Her neck and back pain returned, as did her headaches. Her friends and fellow students continued to support her with note-taking. Regular physiotherapy and some massages provided pain relief, as did stretching during yoga classes and swimming.
- [15] In March 2019, while still at UBCO, the plaintiff started working full-time as a server at a winery. She enjoyed the work but found she was sore and fatigued at the end of her shifts.
- [16] In June 2019, the plaintiff obtained her degree from UBCO.
- [17] In July 2019, the plaintiff stopped taking her anti-depressant and sleeping medications "cold turkey".
- [18] In October 2019, the plaintiff moved from the Okanagan to Nanaimo to pursue an employment lead as a timber cruiser. Although not sure whether she would be able to endure the physical demands of the job, she was willing to give it a try. However, before she was hired, the COVID-19 pandemic intervened and that job opportunity was thwarted. She did not work while in Nanaimo due in part to having broken her wrist in November 2019 and in part due to the pandemic shutdown. She ultimately obtained work as a special needs caregiver for two months during the summer of 2020.
- [19] On September 1, 2020, the plaintiff moved from Nanaimo to Vancouver, where she is currently working as a server in a sports bar. She testified that she typically starts to feel pain symptoms within one hour of starting her shift and feels pain at the end of her work day. Other than having attended two massage therapy and two physiotherapy sessions, she had not engaged in any treatment or rehabilitation modalities since moving to Nanaimo in October 2019.
- [20] The plaintiff testified that she is actively seeking employment in the field of environmental and wildlife protection but that her quest is taking much longer than anticipated, most likely because of the current COVID-19 pandemic. She testified that, regardless of the career path she ultimately follows, she is concerned she will be affected by ongoing Accident-related pain and will not be able to excel to the extent she feels she would have but for the Accident. However, on cross-examination, she was unable to identify any specific job or duty she felt she would not be able to perform due to her Accident-related injuries.

- [21] After the Accident, the plaintiff attended a total of 26 physiotherapy and 15 massage therapy appointments. At the recommendation of a pain specialist, Dr. John-Paul Etheridge, she underwent a lumbar facet joint block injection in November 2017, but the procedure resulted in only temporary pain relief.
- [22] In November 2019, the plaintiff's functional capacity was assessed by Lindsey Townsend, an occupational therapist. Ms. Townsend opined that the plaintiff will likely benefit from ongoing physiotherapy, massage therapy, yoga and psychological counselling. The plaintiff testified that she intends to pursue each of those treatment modalities. She agreed on cross-examination that an ergonomic assessment and touch-typing training may also be of assistance to her.
- [23] The plaintiff testified that she now generally feels good both physically and mentally, but still suffers headaches and upper back, right shoulder and neck pain flare-ups after physical activity. She described her day-to-day mood as variable and inconsistent. She does her best to maintain her physical strength. Recreationally, she continues to ski but much more cautiously than she did before the Accident. She also does some hiking and occasionally attends a gym in order to improve her conditioning, however, her physical activities are limited both in terms of duration and strenuousness as compared to pre-Accident. She testified that she is always aware of her neck, shoulder, and back pain and is guarded in her movements. She takes Aleve and Excedrin to help relieve her pain symptoms. Her social activities are also much more constrained than they were before the Accident. She continues to experience anxiety whenever she is riding in a vehicle as a passenger. She has occasional feelings of depression, but agreed on cross-examination that such episodes are similar to those that she experienced before the Accident.

Monika Skibeness ("Monika")

- [24] Monika is the plaintiff's mother.
- [25] Monika described the plaintiff as having been an active, outgoing, socially involved and generally happy child who love the outdoors. She said that the plaintiff was a skilled skier. She said that the plaintiff was the type of child who had to "work hard" for her grades in school. She had no significant physical or psychological issues other than those typically experienced by teenage girls such as growing pains.
- [26] Monika confirmed that the plaintiff was injured in two rear-end collisions in 2014, but testified that the injuries improved over time and, by the time the plaintiff left the Washington State to attend UBCO in September 2015, she was not displaying any overt physical or psychological limitations. She described the plaintiff at the time as being in a "good place".
- [27] Monika testified that, when she saw the plaintiff within days of the Accident, the plaintiff was in obvious pain and was "freaked out" over the Accident and the thought of having almost gone over a steep embankment.

[28] Monika testified that she has seen the plaintiff many times since the Accident both in British Columbia and in the Washington State, often for weeks at a time. She testified that the plaintiff still exhibits stiffness and obvious pain symptoms and tends to "baby herself".

[29] Monika confirmed the plaintiff's anxiety while riding as a passenger in a vehicle.

Taryn White ("Taryn")

[30] Taryn met the plaintiff in the fall of 2016 while attending UBCO. Thereafter, the majority of their classes were taken together and they became close friends.

[31] Taryn described the plaintiff as having been, before the Accident, an outgoing, free-spirited person who enjoyed outdoor activities and socializing. She testified that the plaintiff did not exhibit any physical or psychological limitations prior to the Accident.

[32] Taryn saw the plaintiff within a few days of the Accident. She testified that the plaintiff was unusually quiet and wanted to keep to herself. Over the ensuing summer months, the plaintiff continually expressed a desire to stay in her home.

[33] Taryn testified that during the fall 2017 UBCO semester, the plaintiff was obviously struggling with pain and "looked miserable". She missed classes and Taryn provided her with class notes.

[34] Taryn testified that she and the plaintiff were together for the first month of the Australia Student Exchange and, during that time, the plaintiff was in obvious discomfort and was anxious when riding as a passenger in a vehicle.

[35] Taryn testified that by the fall 2018 UBCO semester, the plaintiff exhibited some improvement in her physical and psychological condition but was not as social as she had been before the Accident and was still not herself.

[36] Taryn testified that since graduation in April 2019, the plaintiff has exhibited greater improvement. She seems happier and "more herself".

Dr. John-Paul Etheridge

[37] Dr. Etheridge is a physician and expert in the field of pain medicine. He assessed the plaintiff on November 7, 2017 and again on November 26, 2019. His reports are dated November 7, 2017 and December 9, 2019, respectively, and were introduced in evidence without debate or the need for Dr. Etheridge to be called as a witness.

[38] On examination, Dr. Etheridge found that the plaintiff had a moderately protracted right shoulder. Her neck range of motion was mildly restricted with pain increasing when she combined rotation and extension to the right. She experienced increased pain to pinprick stimulation and was noted to exhibit signs of hypersensitivity, also known as central sensitization on the right side of her neck and her shoulder region. Additionally, she was tender over her right C2-4 facet joints with facet loading increasing her pain. Dr. Etheridge

also noted trigger points in the right anterior deltoid muscle along with tenderness in the mid back, right paraspinal muscles and mid to lower trapezius and rhomboid muscles. The plaintiff also had tenderness in her right trapezius, right sternocleidomastoid muscle and levator scapula muscle in the neck as well as the muscles around her right shoulder.

[39] Dr. Etheridge opined that as a result of the Accident, the plaintiff sustained:

- a) soft tissue injuries to her neck, right shoulder and upper back;
- b) C2-4 facet-joint generated pain;
- c) myofascial pain affecting her right upper trapezius muscle, right sternocleidomastoid muscle and levator scapula muscle in the neck, as well as the right infraspinatus and teres minor muscles, right anterior deltoid and pectoralis muscles around her shoulder;
- d) myofascial pain affecting the right paraspinal muscles and mid to lower trapezius and rhomboid muscles in the mid-upper back;
- e) central nervous system hypersensitivity in the neck and right shoulder region; and
- f) probable mild traumatic brain injury.

[40] Dr. Etheridge also opined that the plaintiff's reported headaches are likely caused by the soft tissue injuries to her neck.

[41] Dr. Etheridge opined that the plaintiff's neck and back pain is a chronic condition that will likely be characterized by exacerbations and then improvements over time. In his November 7, 2017 report, Dr. Etheridge opined that the plaintiff's prognosis for recovery vis-à-vis the myofascial pain was good if her condition resolved within six to nine months.

[42] Dr. Etheridge recommended, inter alia, a kinesiologist-directed cervical scapular exercise program for the plaintiff.

Lindsey Townsend

[43] Ms. Townsend is an occupational therapist who conducted a functional capacity evaluation of the plaintiff on November 6, 2019. Her report setting out her findings as well as a cost of future care assessment is dated December 30, 2019. Ms. Townsend's report was introduced in evidence without debate or the need for her to be called as a witness.

[44] Ms. Townsend opined that the plaintiff's self-reports of function and functional limitation symptoms were consistent with her clinical measures of functional abilities and limitations. Ms. Townsend's uncontroverted opinions are that the plaintiff:

- a) is able to perform jobs that require reaching, handling, fingering and/or feeling and upper limb coordination skills except that:
 - i. she has limitations for sustained neck extension and sustained overhead work, particularly with her right hand;

- ii. she is limited from longer periods of sustained neck flexion postures and should avoid such movements for periods exceeding 5 minutes; and
 - iii. she is not suited to highly repetitive right arm reaching, particularly to end range and in combination with neck flexion;
- b) would benefit from learning to touch type and from an ergonomic review and education, as well as from the use of a slant board for desk work to reduce the degree of sustained neck flexion;
 - c) is functional for tasks requiring balance including stair climbing and incidental ladder use;
 - d) is capable of mild- to moderate-degree stooping without specific limitations, however will likely experience neck symptom aggravation if she sustains this posture for periods of time exceeding 5 minutes;
 - e) is functional for kneeling and crouching although she will likely experience neck and upper back symptom aggravation;
 - f) is functional for at least incidental crawling;
 - g) is capable of work activity in the sedentary, light and medium strength categories requiring up to medium strength. She would not likely be durable for more than incidental heavy strength demands. Sustained strength activity will likely aggravate her symptoms;
 - h) has a reasonable sitting tolerance but will require opportunities to stretch and would benefit from ergonomic supports to reduce neck flexion;
 - i) has no limitations standing and is capable of walking and hiking moderate terrain; and
 - j) is able to perform full-time work in jobs that meet the foregoing limitations such as restaurant serving.
- [45] Ms. Townsend opined that the plaintiff is likely able to perform the basic demands of work in her chosen field of resource management, although there will likely be times when she experiences symptom aggravation necessitating use of various management strategies (such as treatments, active symptom management, task/rotation/pacing and ergonomic supports).
- [46] Relying in part on Dr. Etheridge's opinion, Ms. Townsend opined that the plaintiff would benefit from the following treatments and rehabilitation:
- a) interventional treatments such as facet nerve blocks and/or rhizotomies;
 - b) physiotherapy;
 - c) massage therapy;
 - d) exercise/yoga;
 - e) occupational therapy/ergonomic assessment; and

f) psychological counselling;

[47] Ms. Townsend opined that the plaintiff will also benefit from various prescription pain medications and ergonomic equipment.

Sergiy Pivnenko

[48] Mr. Pivnenko is an economist who prepared two reports dated January 8, 2020 in respect of the plaintiff's income loss multipliers and the present value of Ms. Townsend's recommended cost of future care. He was qualified without debate in his field and his reports were put in evidence without the need for cross-examination.

[49] Mr. Pivnenko provided the court with multipliers that can be used to calculate the present value of future income.

[50] Mr. Pivnenko also calculated the present value of the range the plaintiff's treatment modalities recommended by Ms. Townsend over her working life from a low of \$83,598 to a high of \$142,024.

Evidence at Trial Tendered by the Defendant

Dr. William Craig

[51] Dr. Craig is a physiatrist who was qualified without debate in that specialty. He assessed the plaintiff on October 15, 2019 and his report is dated that same day. He also prepared a supplemental report dated February 5, 2020. Dr. Craig's opinions were introduced in evidence without debate or the need for him to be called as a witness.

[52] Dr. Craig's findings regarding the plaintiff's Accident-related injuries do not significantly differ from those of Dr. Etheridge. He opined that the plaintiff likely suffered a mild acquired brain injury as a result of the Accident in respect of which she has now fully recovered. He also opined that she likely suffered a moderate soft tissue injury to her neck and right shoulder girdle as well as a right upper cervical facet joint injury which aggravated a pre-existing neck and headache condition.

[53] Dr. Craig opined that the plaintiff has had moderate improvement in her symptoms but has not yet reached her point of maximal medical improvement. He opined that the plaintiff will likely be able to work in her chosen profession and recommended an ergonomic assessment in order for her to better tolerate any associated office work.

Mark Szekely

[54] Mr. Szekely is an economist who prepared a report dated January 31, 2020 responding to Mr. Pivnenko's income loss multipliers report. He too was qualified without debate in his field and his report was put in evidence without the need for cross-examination.

[55] Mr. Szekely reviewed the multipliers used by Mr. Pivnenko for calculating the present value of the plaintiff's future income, pointed out that they do not consider labour market contingencies and opined that they should therefore only be applied to an income stream that:

- a) is defined for a period extending no later than the age at which the plaintiff would have retired; and
- b) is set at a level that accounts for any applicable underemployment during the same period.

[56] Mr. Szekely provided multipliers that can be used for both an actuarial calculation (before labour market contingencies) or on an economic calculation (after labour market contingencies).

Credibility

[57] As is generally the case in personal injury actions, the most important witness is the plaintiff herself. Once an assessment of the credibility and reliability of the plaintiff's evidence has been made, the court is generally in a position to determine causation, usually with the assistance of opinion evidence from qualified medical experts.

[58] A plaintiff who accurately describes her symptoms and circumstances before and after the collision without minimizing or embellishing them can reasonably anticipate that the court will find her evidence to have been credible and reliable.

[59] Counsel for the defendant submitted that the plaintiff was neither a credible nor a reliable witness and that her evidence regarding the extent and impact of her Accident-related injuries should be given no weight.

[60] He points to the plaintiff's evidence regarding having misunderstood the 1 to 10 pain scale that was explained to her by Ms. Townsend and her re-rating of her pain level, as well as the records of her pre-Accident pain complaints and what defendant's counsel submitted was the plaintiff's attempt to downplay them. I do not agree.

[61] I found that the plaintiff to have been a sincere, forthright, and genuine witness whose evidence was consistent throughout her testimony. She readily agreed on cross-examination to having headaches and other pain symptoms prior to the Accident. She did not attempt to embellish her injuries or symptoms or downplay her previous whiplash injury or pain conditions. I have no difficulty accepting her evidence in its entirety.

[62] I also found both Monika and Taryn to have been sincere and honest witnesses. Despite a mother's and best friend's natural inclination to protect and be an advocate for a daughter/friend, they limited their respective testimony to personal knowledge and observations. Neither was cross-examined. I have no difficulty accepting their evidence in its entirety.

Causation

- [63] The legal test for causation is the "but-for" test--the plaintiff must prove on a balance of probabilities that, but for the defendant's negligence, he or she would not have suffered her injuries. The defendant's negligence must have been a necessary cause of the injury. This test was summarized and affirmed by the Supreme Court of Canada in *Clements v. Clements*, 2012 SCC 32 at paras. 8-10; *Ediger v. Johnston*, 2013 SCC 18 at paras. 28-29; and *Resurface Corp. v. Hanke*, 2007 SCC 7 at paras. 21-23.
- [64] The classic statement of the law of causation was stated by Mr. Justice Sopinka in *Snell v. Farrell*, [1990] 2 S.C.R. 311 at 328: " causation need not be determined by scientific precision ". It is a practical question of fact that can often be answered by ordinary common sense. The plaintiff needs to establish only a "substantial connection between the injury and the defendant's conduct" in order to establish causation: *Snell* at 327. A substantial connection is something beyond the de minimus range: *Farrant v. Laktin*, 2011 BCCA 336 at paras. 9-11.
- [65] Dr. Etheridge based his reports on the following factual assumptions that the plaintiff testified were not accurate:
- a) the plaintiff had a "longstanding history of headaches (migraines)"--she testified that her migraines did not begin until the fall of 2016 and that they had dissipated by the time of the Accident;
 - b) in November 2019 the plaintiff was currently getting physiotherapy and massage therapy every 2 weeks--she was not; and
 - c) the plaintiff was working as a server at a Nanaimo restaurant--she was not.
- [66] Dr. Craig based his report on the following factual assumptions that the plaintiff testified were not accurate:
- a) the plaintiff "had a long-standing history of migraines" and had "suffered with migraine headaches since childhood"--she testified that her migraines did not begin until the fall of 2016 and that they had dissipated by the time of the Accident;
 - b) the plaintiff "had neck and back pain that predated motor vehicle accidents in 2014 and 2015"--she testified that the neck and back pain from these accidents had substantially resolved other than occasional flare ups;
 - c) the plaintiff "is not tolerating high impact activities due to the jarring motion, which aggravates her neck symptoms"--she testified that she no longer participates in high impact activities; and
 - d) the plaintiff "had two previous motor vehicle accidents with similar injuries"--she testified that she suffered whiplash injuries in the previous accidents but that they were nothing like those she suffered in the Accident.

- [67] The plaintiff was not cross-examined in respect of her evidence regarding the factual errors in the medical expert reports.
- [68] An expert's opinion is of probative value only if the assumed facts upon which it is based have been proven. To the extent that Drs. Etheridge and Craig based their respective opinions on unproven or disproven facts, they carry little weight.
- [69] In this case, little is needed beyond the application of ordinary common sense to determine causation. The evidence is clear that the Accident, at the very least, caused a significant aggravation to the plaintiff's pre-existing depressive condition as well as to her upper back pain, neck pain, and headaches. The Accident also caused her to suffer a myofascial injury to her right shoulder.
- [70] An aggravation of a pre-existing injury is not qualitatively different from an indivisible injury for which the tortfeasor is liable: *Bradley v. Groves*, 2010 BCCA 361 at para. 37.
- [71] I find that the Accident-caused aggravation to the plaintiff's pre-existing injury, as well as the Accident itself, caused a deterioration in the plaintiff's physical and psychological health, her ability to function, and her outlook on life. I find that, although the plaintiff has not yet fully recovered from her Accident-related injuries, they have resolved to a significant degree.
- [72] In addition to the foregoing, the Accident caused the plaintiff to suffer from anxiety as a passenger in a vehicle. That condition has not abated since the Accident and will likely continue for many years.

Damages

Non-Pecuniary Damages

- [73] The assessment of non-pecuniary damages takes into account the well-established factors from *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46. An award under this head is intended to compensate the plaintiff for pain, suffering, loss of enjoyment of life, and loss of amenities. Factors commonly taken into account include the age of the plaintiff, nature of the injury, severity and duration of pain, extent of any disability, extent of emotional suffering and impairments to the plaintiff's life, including impairments to family, marital, and social relationships, physical and mental abilities, and loss of lifestyle.
- [74] Each plaintiff must be assessed individually, although reference to previous similar cases can be helpful: *Zamora v. Lapointe*, 2019 BCSC 1053 at para. 56.

- [75] Prior to the Accident, the plaintiff was generally a healthy, active, outgoing and socially engaged person, although she did have some pain flare-ups and headaches from her previous injuries. She also had occasional mild symptoms of depression. Nevertheless, her love of the outdoors and passion for outdoor activities, as well as for the environment, was profound. A career involving outdoor work for the environment was extremely important to her.
- [76] The impact of the Accident-related injuries on her day-to-day living and, in particular, her ability to function at school, at work, and at her recreational activities was significant, as least for approximately two years post-Accident.
- [77] I find that as a result of her Accident-related injuries, for approximately two years the plaintiff was unable to enjoy the pleasures of life as she did prior to the Accidents, such as skiing, hiking and socializing. While her passion for life is no longer curtailed, and she is now able to function as she did pre-Accident, she nevertheless continues to be affected by the Accident due to activity-related pain flare ups in her neck and right shoulder area, with occasional associated headaches. She also continues to experience anxiety when riding in a vehicle as a passenger.
- [78] Counsel for the plaintiff seeks a non-pecuniary award of \$95,000, relying on the decisions of this court in *Sen-Laurenz v. Napoli*, 2019 BCSC 1379; *Cummings v. Tellier*, 2019 BCSC 2067; and *Klingler v. Lau*, 2019 BCSC 1776:

- in *Sen-Laurenz*, a 25-year-old plaintiff who suffered ongoing pain from chronic soft tissue injuries to her neck and back, headaches and loss of focus and concentration issues, disturbed sleep and persistent functional limitations who had reached the point of maximum medical recovery was awarded \$90,000 in non-pecuniary damages;

- in *Cummings*, an active, exceptionally hard-working and stoic 27-year-old plaintiff with pre-existing lower back issues that had a minimal impact on her working and personal life was awarded \$95,000 in non-pecuniary damages. The court found that, while she did not miss much work, her accident-related injuries resulted in her barely being able to do anything beyond working and caring for her family. The court also found that her recreational activities had been severely curtailed and her ability to exercise for her physical and emotional wellness had been impacted;

- in *Klingler*, a 35-year-old plaintiff who, before the accident, had been happy and had excelled in many sports, suffered chronic myofascial pain syndrome in her neck and upper back as well as persistent post-traumatic headaches, all of which were aggravated by activity, rendering her less functional in her work and personal life. Her pain symptoms also had a negative effect on her anxiety and mood. The prognosis for improvement was guarded and for a complete recovery was extremely poor. She was awarded \$95,000 in non-pecuniary damages.

- [79] The defendant submits that only a minimal award in the range of \$1 to \$5,000 is warranted in this case on the basis that virtually all of the plaintiff's complaints were pre-existing and all Accident-related injuries were fully resolved by the plaintiff's return from Australia on August 1, 2018. He maintains that the plaintiff simply was not credible when she suggested otherwise. As stated above, I disagree with the defendant's assessment of the plaintiff's credibility and do not accept his submissions that she ought not to be believed.
- [80] After considering the factors set out in *Stapley*, the evidence as a whole, the submissions of counsel, as well as the case authorities provided to me, I conclude that an appropriate award of non-pecuniary damages in this case is \$75,000. The award includes an allowance for the plaintiff's loss of capacity to perform housekeeping tasks.

Past Wage Loss

- [81] The parties are in agreement that the plaintiff suffered a past wage loss of \$7,500, of which \$2,700.42 has been paid as temporary total disability payments.
- [82] Accordingly, the plaintiff is entitled to an award for past wage loss of \$4,799.58.

Loss of Future Earning Capacity

- [83] An award for loss of future earning capacity recognizes that a plaintiff's capacity to earn income is an asset that has been taken away. If a plaintiff's permanent injury limits her capacity to perform certain activities and consequently impairs her income-earning capacity, she is entitled to compensation: *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 8. The plaintiff must demonstrate both impairment to her earning capacity and a real and substantial possibility that the impairment will result in a pecuniary loss. The standard of proof is simple probability, not the balance of probabilities: *Reilly v. Lynn*, 2003 BCCA 49 at para. 101, citing *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 27.
- [84] Once that threshold is met, the plaintiff may prove the amount of loss by one of two calculation approaches, as set out by the British Columbia Court of Appeal in *Perren v. Lalari*, 2010 BCCA 140 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*. A plaintiff may indeed be able to prove that there is a substantial possibility of a future loss of income despite having returned to his or her usual employment. That was the case in both *Pallos* and *Parypa*. But, as Donald J.A. said in *Steward*, an inability to perform an occupation that is not a realistic

alternative occupation is not proof of a future loss.

[Emphasis in original.]

See also *Mills v. Graham*, 2019 BCSC 641 at para. 87.

[85] The task of the court is to assess the loss of future income-earning capacity, not to provide a calculation according to some mathematical formula. Since the course of the future events is unknown, allowance must be made for the contingency that the assumptions upon which the award is based may prove to be wrong. The proper deduction (usually a percentage) will depend on the facts of each case, including the plaintiff's occupation, but, generally, it will be small: *Brewster v. Li*, 2013 BCSC 774 at para. 142, quoting *Reilly* at para. 101.

[86] Where an award of damages based upon the permanency of an injury or functional incapacity is sought, it is incumbent upon the plaintiff to demonstrate the permanency of her injuries with cogent evidence. The court is entitled to rely on common sense to determine if there is a real and substantial possibility of future loss of income, per *Morlan v. Barrett*, 2012 BCCA 66:

[41] In my view, it was open to the trial judge to find--essentially as a matter of common sense--that constant and continuous pain takes its toll and that, over time, such pain will have a detrimental effect on a person's ability to work, regardless of what accommodations an employer is prepared to make.

[87] These principles were applied by this court in *Merko v. Plummer*, 2016 BCSC 1403:

[99] When I consider the totality of the evidence, the fact that Mrs. Merko's pain is chronic and as severe as it is, and the fact that her job is as intense as it is, I conclude that there is a real and substantial possibility her injuries will lead to her having to reduce the hours or years that she works in the future. This is so even though to date she has carried on full-time. This has been based on pure force of will, but there is a real possibility that will diminish as she ages and as the cost to the rest of her personal life becomes more and more pronounced.

[88] The plaintiff bears the burden of proving that:

- a) her accident-related injuries have impaired her capacity to earn income;
- b) those injuries are likely to persist into the future; and
- c) there is a real and substantial possibility she will suffer a loss of income as a result.

[89] There is no evidence that the plaintiff was impaired from an employment perspective by virtue of her pre-Accident injuries. I find that there is a real and substantial possibility she will be impaired, to some degree, as a direct result of the Accident.

[90] The plaintiff continues to be a stoic individual with a strong desire to enter the workforce in her chosen field. Although she will likely have periods of pain symptom improvement followed by periods of setback, I find that she will ultimately achieve her career goals once

the COVID-19 pandemic has been controlled and the economy returns to its pre-pandemic normalcy. I agree with Dr. Craig's expectation that, in the long-term, the plaintiff should be able to work in her chosen profession. However, I also find that there is a real and substantial possibility that she will be limited in her capacity to perform some employment-related activities and that, consequently, reduces her attractiveness and marketability as a prospective employee. In my view, the plaintiff is entitled to a relatively modest award for the impairment of her earning capacity as a capital asset. The task is to fairly and reasonably value that impairment, taking into account the evidence as a whole.

- [91] In my view, the present value multipliers to be used must not only allow for discounting and mortality (as both Mr. Pivnenko's and Mr. Szekely's do) but also consider average labour market contingencies for British Columbia females with a university degree (which Mr. Pivnenko's do not but Mr. Szekely's do). Accordingly, I prefer the multipliers provided by Mr. Szekely over those provided by Mr. Pivnenko.
- [92] Taking into consideration the foregoing as well as the evidence as a whole in this case, I assess the plaintiff's loss of future earning capacity at \$5,000 per year. Using the appropriate multiplier provided by Mr. Szekely of \$20,228, the plaintiff's loss of future earning capacity to age 65 is $\$5,000/\$1,000 \times \$20,228 = \$101,140$.
- [93] I assess the plaintiff's loss of future earning capacity at \$100,000.

Cost of Future Care

- [94] The purpose of an award for cost of future care is to restore, as best as possible with a monetary award, the plaintiff to the position she would have been in had the Accidents not occurred: *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at para. 29. Any award should reflect the reasonable or normal expectations of what the plaintiff will require: *Spehar (Guardian ad litem of) v. Beazley*, 2004 BCCA 290 at para. 19, quoting *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at para. 22; *Peters v. Ortner*, 2013 BCSC 1861 at paras. 141-144.
- [95] The plaintiff must demonstrate an evidentiary link between her pain symptoms and the recommended treatment and care: *Gregory v. Insurance Corp. of British Columbia*, 2011 BCCA 144 at paras. 38-40, 44-47.
- [96] Both Drs. Etheridge and Craig recommend that the plaintiff continue active rehabilitation therapy. Ms. Townsend detailed her recommended care items for the plaintiff in her Cost of Future Care Report. Her opinions were unchallenged. Accordingly, the required evidentiary link has been established in this case.
- [97] The plaintiff submits that the following categories of future care cost are justified in this case:

- a) **Physiotherapy:** Ms. Townsend recommends 26 physiotherapist visits per year over the next two to three years while the plaintiff enters the workforce. She also recommends ongoing physiotherapy of 6 to 12 visits per year over the long term related to more specific flare-ups, if her symptoms are assumed to settle to some degree. Ms. Townsend provides the initial annual cost of physiotherapy for the first two to three years of \$1,820 to \$1,900 followed by an annual cost of 6 to 12 physiotherapy treatments of \$440 to \$920. Mr. Pivnenko calculates the present value of physiotherapy over the plaintiff's lifetime to be a low of \$18,168 to a high of \$35,329;
 - b) **Massage therapy:** Dr. Etheridge supports ongoing massage therapy every two weeks on an ongoing basis for symptom management. The plaintiff testified that she will continue to pursue ongoing massage therapy while she enters the workforce. Ms. Townsend recommends that the frequency then be reduced to 6 to 12 visits per year for symptom management. Ms. Townsend provides the cost of massage therapy treatments to be \$2,730 to \$2,990 annually for two to three years plus GST, and every two weeks annually after two to three years to be \$630 to \$1,380 plus GST for 6 to 12 visits per year. Mr. Pivnenko calculates the present value of massage therapy over the plaintiff's lifetime to be between a low of \$27,569 and a high of \$55,841, inclusive of taxes;
 - c) **Yoga:** Ms. Townsend supports the plaintiff's continued attendance in yoga as a symptom management strategy to assist in self-management of her injuries. She recommends funding yoga on an annual basis to be cost effective at \$900 to \$1,200 plus tax per year. The plaintiff testified that she utilized yoga on a regular basis for pain management, and also before and after engaging in an activity (such as her limited hiking) to assist in reducing the effects of pain from that activity. Mr. Pivnenko calculates the present value of yoga over the plaintiff's lifetime ranges from a low of \$33,208 to a high of \$44,278, inclusive of taxes;
 - d) **Occupational therapy/ergonomic assessment:** Both Dr. Craig and Ms. Townsend recommend an ergonomic assessment for the plaintiff to address work postures and work station setup. The plaintiff's evidence was that she had not obtained work that required office duties, however, she did note that any employment obtained in her field would require paperwork done in the office and indicated that she would pursue an ergonomic assessment in the future. Ms. Townsend indicates the cost of a one-time ergonomic assessment will be \$472.
 - e) **Psychological counselling:** In Gignac the court noted, at paras. 53-54:
- [53] There is evidence that Mr. Gignac may not (as opposed to will not) use some of the services he has been awarded, such as the psychological counselling.

[54] Contingencies have been taken into consideration already for general age-related dysfunction. There was no error in not applying an additional reduction for general contingencies. In my view, however, the evidence supports a specific contingency reduction for the psychological counselling as Mr. Gignac is only "considering" going to counselling, despite the fact the evidence is clear that it would be of considerable assistance to him. I would apply a 20% reduction to this award only, reducing it to \$2,670.

[Emphasis added.]

The plaintiff's evidence was that she had attended counselling in the past but she provided no evidence beyond that in respect of counselling. I am not satisfied that a sufficient evidentiary link has been established to warrant an award in respect of psychological counselling;

- f) Prescription medications: I am not satisfied that a sufficient evidentiary link has been established to warrant an award in respect of prescription medications;
- g) Non-prescription medications: Dr. Etheridge recommended that the plaintiff take over-the-counter medication on an as-needed basis over the long term. The plaintiff's evidence was that she used Aleve regularly and Excedrin when needed. Ms. Townsend provided a cost of \$20 to \$30 annually for medication. Mr. Pivnenko's net present value calculation of this cost is ranges from a low of \$738 to a high of \$1,107, inclusive of taxes;
- h) Ergonomic equipment: Ms. Townsend recommends that the plaintiff have some ergonomic equipment to assist in her computer setup and pain management, as one-time costs, with an additional one-time lifetime cost for the replacement of keyboard and mouse in five to ten years. Mr. Pivnenko's present value calculation for the cost of this equipment, including a slant board, external keyboard and mouse, laptop stand and the one-time equipment replacement is from a low of \$1,469 to a high of \$2,774, inclusive of taxes.

[98] The present value of these care costs, including taxes, as calculated by Mr. Pivnenko over the plaintiff's estimated remaining lifetime ranges between \$83,598 and \$142,024.

[99] In my view, there is a real and substantial possibility that the plaintiff will require the above-noted care modalities and will incur the costs associated with them. Future care costs are justified on the basis of the evidence. However, I find that the claim for cost of future care should be reduced on the basis of the contingent possibility that the plaintiff's symptoms will improve once she begins earnest, active rehabilitation. In my view, a reduction of 25% of the mid-range present value future care costs $[(\$83,598 + \$142,024) / 2] = \$112,811 \times 0.75 = \$84,608$, rounded to \$85,000 is warranted.

[100] I assess the plaintiff's entitlement for the cost of future care at \$85,000.

Loss of Housekeeping Capacity

- [101] Where a plaintiff suffers an injury which would make a reasonable person in the plaintiff's circumstances unable to perform usual and necessary household work--i.e., where the plaintiff has suffered a true loss of capacity--that loss may be compensated by a pecuniary damages award. Where the plaintiff suffers a loss that is more in keeping with a loss of amenities, or increased pain and suffering, that loss may instead be compensated by a non-pecuniary damages award. It lies in the trial judge's discretion whether to address the claim as a part of the non-pecuniary loss or as a segregated pecuniary head of damages: *Kim v. Lin*, 2018 BCCA 77 at para. 33.
- [102] Whichever option is chosen, when valuing the different types of awards, courts should pay heed to the differing rationales behind them. In particular, when valuing the pecuniary damages for the loss of capacity suffered by the plaintiff, courts may look to the cost of hiring replacement services, but they should ensure that any award for that loss, and any deduction to that award, is tied to the actual loss of capacity which justifies the award in the first place: *Kim* at para. 34.
- [103] In my view, a separate award under this head of damages is not justified in this case but rather should be included in the award for non-pecuniary damages. Accordingly, I have done so.

Special Damages

- [104] The parties are in agreement that the plaintiff is entitled to an award of \$4,345.13 for special damages.

Pre-Existing Injuries

- [105] The overall assessment of damages can be reduced if there is a measurable risk that a plaintiff's pre-existing condition would have detrimentally affected her in the future regardless of the Accidents: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at 473-74.
- [106] The defendant submits that the plaintiff's pre-existing whiplash injuries, headaches, and depressed mood should be taken into consideration in this case. I agree. While I accept the plaintiff's evidence that those injuries had largely resolved at the time of the Accident and that they did not limit her ability to function as an employee, she also admitted that they continued to have a residual impact on her ability to enjoy her life, albeit to a relatively minor degree.
- [107] While I find that the vast majority of the symptoms and limitations that have and will continue to limit the plaintiff's ability to function are entirely attributable to the Accident, I also find that my assessment of her non-pecuniary damages and cost of future care must be reduced on the basis of a pre-existing condition. I conclude that a reduction of 15% is appropriate in this case.

Conclusion

[108] The plaintiff is entitled to judgment against the defendant in the following amounts:

a) Non-pecuniary damages (reduced by 15%):

\$63,750.00

b) Past loss of earning capacity:

\$4,799.58

c) Loss of future earning capacity:

\$100,000.00

d) Cost of future care (reduced by 15%):

\$72,250.00

e) Loss of housekeeping capacity:

\$0.00

f) Special damages:

\$4,345.13

Total:

\$245,144.71

costs

[109] Subject to any submissions the parties wish to make, the plaintiff is entitled to her costs of this action at Scale B.

"G.C. Weatherill J."

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