
CANADA / JUDGMENT

Smith v. Basker

2019 BCSC 1459

COURT

Supreme Court of British Columbia

DECIDED

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2019 BCSC 1459 Smith v. Basker

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Smith v. Basker,

2019 BCSC 1459

Date: 20190828

Docket: M77905

Registry: Nanaimo

Between:

Laurie Smith

Plaintiff

And:

Brent Basker

Defendant

Before: The Honourable Mr. Justice G.C. Weatherill

Reasons for Judgment

Counsel for the Plaintiff:

G.R. Phillips

Counsel for the Defendant:

S. Rotto

Place and Dates of Trial:

Nanaimo, B.C.

July 15-19, 2019

Place and Date of Judgment:

Nanaimo, B.C.

August 28, 2019

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Introduction

- [1] On February 18, 2015, the plaintiff was injured in a motor vehicle accident (the "MVA"). She was driving her 2002 Dodge Grand Caravan eastbound on Northfield Road in Nanaimo when the defendant's westbound 2012 Chevrolet Sonic crossed the center line and collided almost head on with the plaintiff's oncoming vehicle. The plaintiff's vehicle was severely damaged and was written off.
- [2] The defendant has admitted liability for the injuries that the plaintiff suffered in the MVA. The issue to be determined is the quantum of damages to be awarded to the plaintiff for those injuries.

Evidence Presented at Trial on Behalf of the Plaintiff

The Plaintiff

- [3] The plaintiff was born on August 21, 1967 and is currently 51 years of age. She grew up on a farm in Northern Ontario. She became pregnant with her first child, Ashley, and left school in 1984 after Grade 11. She married Ashley's father (the "first husband"). She had a second child, Rebecca, in 1988 with the same man. She left her first husband and moved with her children to Vancouver Island in 1993 at the age of 26. She had her third child, William, that same year with her second husband (the "second husband"). She survived on social assistance from 1994 to 2001. She currently has four grandchildren.
- [4] The plaintiff's pre-MVA employment history did not meaningfully begin until 2004 when she was 37 years old. It comprises of jobs requiring physical labour, including working in a pub, as a cleaner in a motel, in an industrial laundry, as a painter, in a plant nursery, and at a bottle depot.
- [5] The plaintiff testified that, prior to the MVA, she carried on a physically active lifestyle. She enjoyed hiking, gardening, yard work and working out in the gym.
- [6] From July 2005 to June 2013, the plaintiff was regularly treated by a chiropractor, Dr. Jessica Reed. The records show that the vast majority of her dozens of treatments over that time period were focused on her thoracic spine.
- [7] In approximately 2005, the plaintiff began experiencing symptoms of osteoarthritis--the joints in her hands and knees were swelling up. The plaintiff's mother had suffered from both osteoarthritis and osteoporosis. The plaintiff also had a right shoulder injury that persisted for several years. She testified that she followed the recommendations of her physicians and took prescribed medications but she did not find them to be effective.
- [8] The plaintiff testified that she has smoked marihuana regularly since she was 18 because it relieves her pain, anxiety and depression symptoms, and helps her with sleep. On cross-examination, she admitted smoking several marihuana cigarettes each day but denied that any pre-MVA pain she had was chronic.

- [9] The plaintiff testified that sometime prior to 2006, she stopped smoking tobacco cigarettes. The resulting weight gain inspired her to change her diet and start an "all natural" body-building program. In 2007, she competed and came third in a body-building competition. Thereafter, she continued to work out in a gym with weights in order to maintain her strength and flexibility. She testified that she had only minor limitations due to her osteoarthritis and shoulder issues.
- [10] In 2008 and again in 2010, the plaintiff quit her jobs as a cleaner for "medical reasons". There is no evidence as to what those reasons were.
- [11] The plaintiff testified that, in approximately 2010, she began using "natural remedies" for her osteoarthritis. She testified that she changed her diet and took various forms of vitamins including calcium. She testified that the swelling and pain in her joints went away and she has not experienced any problems in that regard since.
- [12] Although the plaintiff testified that, in 2008, she suffered a suspected broken rib while working in the bottle depot, it became clear from the medical records put to her on cross-examination that the injury had in fact occurred on February 3, 2010, and that she had advised WorkSafeBC at the time that she was taking calcium supplements because she had an allergy to dairy products. She testified that her rib injury eventually healed and she returned to work.
- [13] On cross-examination, the plaintiff's clinical records of her visits to her general practitioner, Dr. Derek Poteryko, and a Rheumatologist, Dr. Nicole Baur, were put to her.
- [14] Those records show that during the period from October 2010 to March 2014, the plaintiff complained of, inter alia, ongoing right shoulder pain, nausea and vomiting (which she attributed to migraine headaches) as well as pain and swelling in her left knee, which prompted her to request a note supporting a claim to employment insurance ("EI") that she be retrained for sedentary work. The plaintiff steadfastly denied that she had ever advised Dr. Poteryko of pain in her knee. She also denied the accuracy of Dr. Baur's clinical record of her having advised that she suffered from "chronic neck and lower back pain which she sees a chiropractor for".
- [15] The plaintiff agreed on cross-examination that, after she quit her painting job in 2012, she applied for disability. Although she admitted having experienced swelling in her knees during her painting job, she denied that the disability application had anything to do with her being disabled.
- [16] On cross-examination, the plaintiff admitted that, prior to the MVA, she had been diagnosed with adjustment disorder and depression.
- [17] In June 2013, the plaintiff began work in Nanaimo at a company called Johnston Drug Wholesale Ltd. ("JDW"). The job was physical in nature, entailing "picking and packing" various goods for delivery to retail customers. The plaintiff testified that she was required to lift up to 50 pounds. She was paid \$12 per hour and worked 40 hours per week. She testified

that she had no difficulty performing the work. However, on an intake form completed by the plaintiff for a chiropractor on June 27, 2013, she described her perceived physical health as 2 on a scale of 1 to 10, where 1 was "very poor". She was treated by a chiropractor, Dr. Michael Stochmal, 31 times between April 2013 and February 6, 2015. A significant number of those treatments focused on the plaintiff's thoracic spine.

- [18] On January 9, 2014, the plaintiff fractured one of her ribs while at work at JDW simply by reaching for a package. She was off work until February 11, 2014.
- [19] It was determined that the plaintiff's bone density was decreasing. She, like her mother had been before her, was diagnosed with osteoporosis. On August 20, 2014, she cracked another rib while leaning into her car to retrieve an item from the center console.
- [20] On September 3, 2014, the plaintiff received a medical marijuana certificate entitling her to possess and consume five grams of dried marijuana per day.
- [21] While off work for her August 20, 2014 rib injury, the plaintiff drove with her daughters to Ontario to visit her first husband (and their father) who was ill. On October 21, 2014, while still in Ontario, she suffered a compression fracture to her T11 vertebrae while attempting to lift her first husband off the ground. She remained off work and, in November 2014, her EI benefits were extended.
- [22] On January 23, 2015, she suffered another rib injury during a chiropractic treatment. Her EI benefits were extended further. In all, she was off work due to these injuries from mid-August 2014 to February 16, 2015, two days prior to the MVA.
- [23] At that time the plaintiff was in the midst of divorce proceedings from her second husband and was living with a friend in Port Alberni. When she separated from her second husband she withdrew \$27,000 from their joint line of credit.
- [24] The plaintiff testified that, despite the rib fractures and T11 injury, she maintained her lifestyle activities in order to keep her osteoarthritis and osteoporosis from worsening. She testified that she attended regular sessions with both Dr. Stochmal and a massage therapist, Ian Cook, taking advantage of the coverage provided for both by her JDW medical plan. She testified that she was pain free and had no physical limitations when she returned to work on February 16, 2015. On cross-examination, she denied that the chiropractic treatments she had been receiving were painful.
- [25] On the morning of the MVA, the plaintiff smoked a marijuana cigarette at 6 a.m. The MVA occurred while she was commuting from her friend's residence in Port Alberni to her work at JDW in Nanaimo. The plaintiff testified that, immediately upon impact, she felt "excruciating" pain in her chest. She testified that this pain was unrelated to her previous rib fractures. She also felt pain in her nose as a result of the airbag deploying. Surprisingly, given her osteoporosis, she did not suffer any bone fractures. She was transported to the hospital by ambulance and discharged the following day. For three weeks she stayed with her daughter Ashley, who at the time lived in Nanaimo, in order to convalesce.

- [26] The plaintiff testified that over the course of the days and weeks following the MVA, her nose and chest pain resolved. However, as her chest pain began to subside, she felt "excruciating" pain in the T6 region of her spine. She described the pain as 10 on a scale of 1 to 10. She testified that the use of medical marihuana reduced the pain to 6 out of 10. With continued use of marihuana, her pain has reduced to its current level of 4 out of 10. The pain, which she described as "stabbing" and "burning", flares up with bending, lifting above the waist and twisting. She testified that she has no pain-free days.
- [27] The plaintiff admitted on cross-examination that JDW held her job open for her for one year after the MVA and that her extended health benefits continued to be available to her. She testified that she did not avail herself of that coverage because, in her words, "I was a mess. I couldn't see straight".
- [28] In April 2015, the plaintiff again drove with one of her daughters to Ontario to see her first husband who was by then very ill. Unfortunately, he died while they were enroute. Also in April 2015, the plaintiff received \$40,000 from her share of the division of family property from her divorce of her second husband.
- [29] In July 2015, the plaintiff attempted to return to her job at JDW but testified that she was unable to work for more than five hours due to increased pain. She was paid \$60 for her work that day. She did not attempt to return to work at JDW again.
- [30] In October 2015, the plaintiff again travelled to Ontario where she began a romantic relationship with a man named Dave Swiston. Mr. Swiston was suffering from Chronic Obstructive Pulmonary Disease. In December 2015, Mr. Swiston moved to Vancouver Island. He and the plaintiff moved in together into a trailer in Coombs, British Columbia, where she assisted him with his application for Canada Pension Plan ("CPP") permanent disability benefits.
- [31] In April 2016, the plaintiff's daughter, Rebecca, gave birth to a child. The plaintiff testified that she was unable to attend the rehabilitation sessions that had been arranged for her by ICBC because she had to help Rebecca with the baby as there was no one else to assist, and because her daughter's needs were a higher priority. The plaintiff took care of the cooking, housekeeping as well as caring for the baby.
- [32] Commencing August 1, 2016, the plaintiff became the manager of the trailer park where she and Mr. Swiston lived. In exchange for free rent, she collected rent from other tenants, mowed the grass and assisted in yard work and tree trimming.
- [33] On August 2, 2016, the plaintiff advised ICBC that she was not going to continue with the vocational rehabilitation program that had been put in place for her until she was re-trained for a job, likely as a server in the food service industry. She requested funding from ICBC for a laptop (in order to update her resume and send applications) and clothing (for job interviews). ICBC immediately approved \$700 for those items but the funding was summarily rejected by the plaintiff when she learned that it was to be by way of an advance

on her claim for damages arising from the MVA.

- [34] Shortly thereafter, the plaintiff obtained part-time employment at a laundromat in Parksville. She was paid \$10.85 per hour. She testified that the work was much less physically demanding than was her job at JDW. She advised ICBC that she did not wish to pursue the retraining she had earlier requested. The records indicate that the plaintiff worked approximately 20 hours per week at the laundromat until March 2017 when she increased to approximately 25 hours per week. In May 2015, her wage was increased to \$11.25 per hour. She agreed on cross-examination that the job required her to be on her feet for most of her shifts.
- [35] On March 1, 2017 the plaintiff ended her relationship with Mr. Swiston and moved out of the trailer's park. Since that time she has been living in Ladysmith with her daughter (Ashley) and her son-in-law in their basement suite. She agreed to pay Ashley rent of \$800 per month but until recently she has not paid anything. She says she owes Ashley approximately \$20,000 in rental arrears.
- [36] During the move from the trailer park to Ashley's home, the plaintiff suffered a compression fracture to her L1 vertebrae while loading the fourth of four tires into her car. She attributes this injury entirely to the lack of proper nutrition and exercise caused by the MVA. She missed two to three weeks work at the laundromat as a result. She testified that this injury did not significantly affect her ability to function. Rather she testified that she is only limited by pain due to the injury to her T6 vertebrae which she says was caused by the MVA.
- [37] At various times after the death of her first husband, the plaintiff took in three of his other children, each of whom caused her difficulty and stress.
- [38] After the MVA, the plaintiff attended numerous sessions of kinesiology, massage therapy, and physiotherapy that had been arranged for her by ICBC. She also attended a pain clinic and was seen by a physiatrist. She claims that the exercises recommended by the kinesiologist and the pain clinic were not only unhelpful in managing her pain symptoms, but made them worse. She testified that she found the massage and physiotherapy treatments helpful. She testified that she discontinued chiropractic treatments because they caused her pain. On cross-examination the plaintiff admitted that she missed many of her scheduled rehabilitation sessions arranged by ICBC but insisted that she did so because they caused her to vomit and have headaches. She denied that the vomiting and headaches episodes were similar to those that she had regularly experienced prior to the MVA. The plaintiff agreed on cross-examination that she did not complete either of the two active reconditioning programs that had been offered to her by ICBC.
- [39] In June 2017, the plaintiff quit her job at the laundromat after ICBC stopped paying for her physiotherapy and massage therapy treatments. She testified that she did so because she was unable to afford the treatments herself and, as a result, her headaches and other pain increased. The plaintiff testified that she believes yoga, chiropractic, massage and physiotherapy treatments would benefit her but she is unable to afford them. However, on

cross-examination, she agreed that the invoices for her physiotherapy that were not paid by ICBC were financed by her lawyer.

- [40] Since quitting her job at the laundromat, the plaintiff has made no attempt to return to the work force.
- [41] The plaintiff testified that she has been an "emotional wreck" since the MVA, that she has lost her dignity because she has been unable to work as she had previously, that she has been forced to have to live with her daughter. She also testified that she has had to sell her possessions in order to sustain life. She claims she now weigh only 108 pounds, having lost 27 pounds since the MVA, and has started to smoke cigarettes again. She claims to have had suicidal ideations. She testified that, but for the MVA, she would have used the \$40,000 she received from the division of family property together with the continuing income she was earning at JDW to qualify for a mortgage to purchase a \$200,000 to \$300,000 house, and that she would not have had to sell her car and other belongings.
- [42] On cross-examination, the plaintiff conceded that from the date of the MVA to January 2017, she had only lost 8 pounds.
- [43] The plaintiff testified that, as a further result of the MVA, she has trouble sitting and standing for long periods and that her current exercise regime is limited to walking, some modest gardening and a few home exercises. She is not as active with her grandchildren as she would like. She is able to perform all of the housekeeping duties she performed prior to the MVA but has had to spread them out over a number of days rather than doing them all at once. On cross-examination, she agreed with the following assessment of her functional capacity as of October 15, 2015, as written by ICBC's occupational therapist, Chanace Vanderheide:

Functionally, her symptoms impact activities that involve twisting and turning, bending, reaching overhead and lifting over 10 lb. She reports managing most aspects of her life, including instrumental activities of daily living (meal preparation, home making, grocery shopping), productivity (managing finances, driving, managing appointments) and leisure activities (walking), but she experiences pain with most activity.

- [44] The plaintiff testified that despite the strong recommendations of her general practitioners against it, she has used and continues to use marihuana multiple times each day in order to function. Whereas she was consuming five grams per day before the MVA, she has increased her consumption to seven grams per day as of January 2016. She testified that her monthly cost in this regard has been reduced from \$800 to \$300 due to her having switched to using cannabis oils.
- [45] The plaintiff conceded on cross-examination that she has not taken the medication recommended by her doctors for her osteoporosis. She testified that she has done her own research and has determined that the recommended medications are harmful.

- [46] The plaintiff testified that she recently tried to earn money by way of online marketing of water machines and multivitamins for an entity called "Enagic". She testified that she spent over \$3,000 on this endeavour, including for a coaching program, products, a laptop computer, website and domain names and advertising. The venture proved to be unsuccessful. The plaintiff conceded on cross-examination that, of the \$3,028.21 in Enagic start up costs, \$2,251.20 was for the purchase of 3000 multivitamin pills that she has and is continuing to consume herself without ever having had the intention of doing so otherwise.
- [47] After the Enagic venture, the plaintiff became involved in her current endeavour, the sale of CBD Hemp Oil and related products. She testified that so far she has earned only \$88.
- [48] The plaintiff received Temporary Total Disability ("TTD") benefits through ICBC in 2015, 2016, and 2017, totalling \$28,395.44.
- [49] On November 28, 2018, the plaintiff applied for Canada Pension Plan disability benefits. She wrote in her application that she was disabled due to her history of arthritis.
- [50] The plaintiff conceded on cross-examination that she has not been to see any doctor for the past six months.
- [51] The plaintiff's income and other benefits received for the period 2010 to 2018 was as follows:

Year

Employment

EI

WCB

Child Care

Benefits

TTD

Total

2010

\$13,825

\$7,665

\$710

\$22,200

2011

\$8,393

\$10,730

\$1,171

\$20,294

2012

\$6,765

\$1,854

\$8,619

2013

\$18,508

\$802

\$19,310

2014

\$13,689

\$4,215

\$1,706

\$19,610

2015

\$252

\$360

\$688

\$12,600

\$13,900

2016

\$4,302

\$120

14,317.87

\$18,739.87

2017

\$6,152

\$2,095

\$1,477.57

\$9,724.57

Rebecca Rose ("Rebecca")

[52] Rebecca is the plaintiff's second child. She is presently 31 years old.

[53] Rebecca described the plaintiff prior to the MVA as having been an active, athletic, outdoors person who she never observed having struggles or limitations in her physical activities. She testified that her mother managed her arthritis through her diet and was able to return to work and all of her previous activities once her rib injuries sustained in January 2014 and August 2014 had healed. She testified that the plaintiff had no difficulties or physical limitations during the three-to-four-days drive to Ontario in the fall of 2014 to visit her ill father. She testified that, when the plaintiff returned home from Ontario, she resumed all of her regular activities, including babysitting and playing with her grandchildren.

[54] Rebecca testified that, since the MVA, the plaintiff "can't do anything, pretty much". She is unable to play and spend time with her grandchildren as she had before the MVA and, on her "bad days", needs help with house cleaning chores.

[55] Rebecca testified that the plaintiff's mental health has also deteriorated since the MVA, denying on cross-examination that there was any other reasons for her mother's mental distress despite the sexual abuse her mother experienced as a child and the various relationship breakups her mother went through.

[56] On cross-examination, Rebecca conceded that, with the exception of arthritic pain in her hands, she was unaware of her mother having had any injuries or pain complaints prior to January 2014 when she injured her rib. She also agreed that, upon the birth of her daughter in April 2016, the plaintiff helped her from mid-April to mid-May, 2016, with various chores, including laundry.

Suzanne Vautour

[57] Ms. Vautour has been a close friend of the plaintiff's for 20 to 25 years. She described their relationship as being like sisters and "sown at the hips".

[58] Ms. Vautour moved from the Nanaimo area to Quesnel approximately ten years ago but claimed that she and the plaintiff continued thereafter to stay in touch on almost a daily basis. In addition, Ms. Vautour testified that she travelled to the Nanaimo area approximately two to three times each year at which times she and the plaintiff saw each other every day. She testified that, prior to the MVA, she and the plaintiff and their respective children engaged in outdoor activities and that she never noticed the plaintiff to

struggle physically at anything, other than on one occasion when the plaintiff's hands were "a little arthritic". She testified that the plaintiff's arthritis resolved through a change in her diet.

- [59] Ms. Vautour testified that, in the late summer of 2014, she and the plaintiff and their children went camping and engaged in other outdoor activities such as gardening. She testified that she did not see the plaintiff struggle physically other than that she complained of the occasional headache. She had no recollection of the plaintiff having had any injury at that time.
- [60] Ms. Vautour next saw the plaintiff in June 2015 after the MVA. She testified that the plaintiff "couldn't barely do anything" and was too sore to do much of anything. She testified that even riding in a car caused the plaintiff to be in pain.
- [61] Ms Vautour testified that when she saw the plaintiff four years later in June 2019, the plaintiff had lost a great deal of weight and was in a poor mood due to her pain.
- [62] Ms. Vautour confirmed that she and the plaintiff are currently involved together in a business venture selling cannabis oil and other natural health products but they have not yet had much success.

Brandon Butt

- [63] Mr. Butt is a physiotherapist. He or another physiotherapist in his clinic treated the plaintiff before the MVA in respect of the following reported complaints:
- a) January 15 to February 12, 2009 (six treatments): severe swelling, shoulder and wrist pain as well as neck and thoracic spine pain which the plaintiff advised she had had over the past 5 years. The plaintiff continued to report pain at the end of the treatments but was trending toward improvement;
 - b) March 10 to April 9, 2010 (six treatments): for left rib pain;
 - c) July 7 to November 3, 2011 (15 treatments): for knee pain reportedly resulting from hiking;
 - d) March 26 to June 7, 2012 (five treatments): for knee and hip pain. The plaintiff showed signs of improved ability to perform exercises; and
 - e) December 18, 2013 (one treatment): for left shoulder pain after pushing a car.
- [64] After the MVA, from May 28, 2015 to May 24, 2017, the plaintiff attended 47 treatments by Mr. Butt or others at his clinic. The treatments focused on the plaintiff's thoracic and lumbar spine pain and reduced range of motion in the area of her left ribs. Mr. Butt testified that the treatments were primarily passive because, although the plaintiff was able to adapt to and make slow progress by undertaking exercises prescribed to reduce her osteoporosis-related pain with the aim to reduce pressure on the front of her thoracic spine, she appeared unable to tolerate upper extremity exercises that increased loads on her thoracic spine, due to her

history of fractures in that area.

Ian Cook

- [65] Mr. Cook is a registered massage therapist who saw the plaintiff before the MVA on eight occasions between June 9 and August 12, 2014. During those sessions, the plaintiff complained of having headaches at least three to four times per week as well as upper back tension that she said had been chronic for several years. She also complained of left shoulder and pelvic pain. Mr. Cook described the plaintiff as having been in a lot of pain during the first visit. His focus during his treatments was on the plaintiff's back, shoulder, pelvis, and the rigidity of the tissues in those areas. He testified that she seemed to be "doing much better" at the time of her last pre-MVA treatment on August 13, 2014. He agreed on cross-examination that by "doing much better" he meant at the time of the visit.
- [66] He testified that he was unaware of the plaintiff's diagnosis of osteoporosis prior to the MVA.
- [67] Mr. Cook testified that he also treated the plaintiff on at least 27 occasions after the MVA between February 26, 2015 and September 27, 2016. The plaintiff failed to attend at least three of the appointments. The primary areas of focus during his post-MVA treatments was the plaintiff's chest, neck, and back.
- [68] Mr. Cook's clinical records, upon which he relied almost entirely for his evidence, demonstrate that from and after November 2015, the plaintiff's complaints of pain were primarily related to her T6 and T11 thoracic spine and her ribs. He testified that, from his observations, the plaintiff seemed to be making slow progress.
- [69] Mr. Cook recommended to the plaintiff that she engage in at-home strengthening exercises.

Dr. Fadi Tarazi

- [70] Dr. Tarazi is an orthopaedic surgeon who was qualified without objection as an expert in the field of orthopaedic surgery and orthopaedic trauma medicine including trauma caused by osteoporosis.
- [71] Dr. Tarazi interviewed and conducted a physical examination of the plaintiff on January 30, 2018. He also reviewed extensive clinical records relating to the plaintiff's medical history, although he agreed on cross-examination that, other than the radiology records, he did not review them in any depth. His expert report is dated April 20, 2018.
- [72] Dr. Tarazi opined that the MVA likely caused the plaintiff to suffer cervical and thoracolumbar myofascial soft tissue strains that affected her muscles, ligaments, and facet joint capsules. The result was neck and mid-back pain, which in turn resulted in decreased physical activity and corresponding gradual deconditioning and loss of weight. He opined that the plaintiff's L1 fracture in 2017 was caused by her osteoporosis. However, he opined that the plaintiff's MVA-related injuries likely accelerated the degenerative osteoporosis process and made her more vulnerable to such fractures. He acknowledged on cross-

examination that the plaintiff's bone scans showed a significant decrease in density between 2010 and 2014 and that a bone scan in 2017 showed a further decrease of 17.8%. He opined, however, that the plaintiff's rate of degeneration likely accelerated after the MVA because of her deconditioning.

- [73] Dr. Tarazi opined that the plaintiff's pain condition is likely chronic and permanent and that she should avoid heavy lifting, repetitive bending, squatting, kneeling and impact activities such as running and jumping.
- [74] Dr. Tarazi recommended that the plaintiff engage in an active exercise program directed by a physiotherapist or kinesiologist on a weekly basis for one year. He also recommended that she attend a gym on a regular basis to improve her body conditioning and muscle endurance.
- [75] On cross-examination, Dr. Tarazi agreed that he assumed for the purpose of his opinion that the plaintiff had no pre-existing neck pain symptoms. When clinical records of such symptoms were put to him, he responded that they must have been manageable and not very severe because she was working prior to the MVA.
- [76] Based upon the plaintiff having been able to return to work at JDW after her rib and vertebrae fractures, Dr. Tarazi opined that she would likely have been in good physical condition and would have been able to work had the MVA not occurred. However, on cross-examination, he agreed that he had assumed the plaintiff had been working at JDW up until the MVA except for a brief period in early 2015 when she was off work as a result of her rib injury during a chiropractic treatment. Dr. Tarazi was unaware that the plaintiff had in fact been off work since her August 20, 2014 rib injury, was unaware of her T11 injury in October 2014 and had only returned to work two days prior to the MVA. Once apprised of this evidence, he stood by his opinion on the basis that, if the plaintiff had been able to work at full capacity for two days before the MVA, her pain must have improved sufficiently to enable her to do so.
- [77] On cross-examination, Dr. Tarazi agreed that he was unaware of the plaintiff's long-standing vomiting problem and that she had been under stress after the MVA for reasons unrelated to the MVA, such as her relationships and the children from her first husband she was caring for. He also agreed that he had no understanding of the rehabilitation programs that had been provided to the plaintiff after the MVA or of her poor attendance record at them. He agreed that the more deconditioned the plaintiff had become, the less muscular support she had and the greater her risk of further injury became. He also agreed that the more rehabilitation the plaintiff undertook, the greater her chance of recovery was.
- [78] Dr. Tarazi also conceded that the plaintiff's tobacco and marihuana smoking likely adversely affects her bone density and that the fragility of her pre-MVA physical condition would inevitably have affected her ability to work.

Evidence Presented at Trial on Behalf of the Defendant

Dr. Bassam Masri

- [79] Dr. Masri is an orthopaedic surgeon who was qualified without objection to give opinion evidence in his area of expertise.
- [80] Dr. Masri's first report is dated April 16, 2019. He also provided a second report dated May 7, 2019 responding to Dr. Tarazi's report.
- [81] Dr. Masri conducted an independent medical examination ("IME") of the plaintiff on April 2, 2019. At the time of his examination the plaintiff weighed 116 pounds.
- [82] Dr. Masri noted that a January 9, 2014 X-Ray of the plaintiff's spine showed that she had sustained an approximate 20% T6 wedge compression fracture at some time earlier in her life.
- [83] Dr. Masri opined that the MVA aggravated the plaintiff's pre-existing thoracic spine fractures and that her current condition is the result of a combination of the two circumstances. He opined that the plaintiff's subsequent L1 fracture in late February 2017 was unrelated to the MVA and added to any incapacity she now has, as is evidenced by her fragility and the precarious nature of her spine.
- [84] Dr. Masri opined that, absent the MVA, the plaintiff would have developed a disability related to her low back that would have prevented her from working in a physical capacity.
- [85] Dr. Masri opined that the plaintiff is not currently suited for work that involves repetitive lifting and bending or twisting. However, he went on to opine that her L1 fracture would have resulted in her being unsuitable for this type of work regardless of the MVA. He opined that the plaintiff is suited for work in a sedentary capacity.
- [86] Dr. Masri noted on his examination of the plaintiff that she displayed signs of kinesiophobia (fear of movement to avoid pain aggravation). Dr. Masri opined that the plaintiff's kinesiophobia will prolong and aggravate her pain symptoms and she will be difficult to treat unless she embraces an appropriate exercise regime. He opined that she would benefit from psychological support as well as cognitive behavioral therapy, but only if she is receptive to it. Dr. Masri opined that the plaintiff's treatments for osteoporosis need to be based on conventional medical therapy rather than the alternative therapy she prefers. He confirmed that the plaintiff's smoking is an additional risk factor.
- [87] In his second report, Dr. Masri noted his disagreement with Dr. Tarazi's opinion that the pain associated with the plaintiff's MVA-related injuries increased the risk of her osteoporosis worsening. He opined that "soft tissue injuries do not increase the risk of osteoarthritis" and that "osteoporosis without a fracture will not increase the risk of osteoarthritis with the spine, or within any other joint".

- [88] Dr. Tarazi acknowledged Dr. Masri's expertise as an orthopaedic surgeon who specializes in hip and knee reconstruction but did not agree with his opinions regarding the plaintiff's prognosis because Dr. Masri does not specialize, as Dr. Tarazi said he does, in orthopaedic trauma medicine which includes dealing with patients with osteoporosis.

Dr. David Kendler

- [89] Dr. Kendler is an endocrinologist who was qualified without objection to give opinion evidence in response to that of Dr. Tarazi regarding whether the natural progression of the plaintiff's osteoporosis was accelerated by the MVA.
- [90] Dr. Kendler's report is dated May 25, 2019. He did not conduct an IME of the plaintiff.
- [91] Dr. Kendler described the plaintiff's decrease in bone mass density since 2010 as "significant". Although he was not aware of the plaintiff's menopausal status, he testified that the average age at which a woman experiences menopause is 51.
- [92] Dr. Kendler disagreed with Dr. Tarazi's opinion that the plaintiff's MVA-related pain caused and will continue to cause her osteoporosis to worsen. Dr. Kendler opined that osteoporosis is a chronic condition that worsens over time in postmenopausal women, especially those with additional risks. He opined that the role of exercise in bone mass density is limited to the development of a mature skeleton up to age 25 and the prevention of falls in older people. Dr. Kendler opined that there were medications that could have been taken by the plaintiff to reduce the risk of future fractures but that they were not taken by her. Finally, he opined that the plaintiff's menopausal status, her cigarette smoking and her weight loss were the major contributors to the decline in the plaintiff's bone mass density and occurrence of additional fractures.
- [93] Dr. Tarazi acknowledged that Dr. Kendler's expertise in endocrinology, enzymes and metabolic research is superior to his own and that he would defer to Dr. Kendler in these areas. Dr. Tarazi's primary disagreement with Dr. Kendler's opinion is that he, Dr. Tarazi, is of the view that the plaintiff's decreased physical activity resulting from the injuries and pain caused by the MVA increased her risk of osteoporosis-related fractures. Dr. Kendler opined that, while diet and exercise are important to bone health, they are not the predominant factors.

Credibility and Reliability

- [94] Each of Mr. Cook and Mr. Butt was an impressive witness who I found to be forthright, factual and non-partisan in his testimony. I have no difficulty accepting their evidence in its entirety.
- [95] Generally, I found Rebecca to be a sincere witness regarding her observations of the plaintiff. However, as is natural for a daughter, she was somewhat of an advocate for her mother and many of her answers overly dramatic and sweeping as to the plaintiff's lack of

physical limitation prior to the MVA and extensive physical limitations afterwards. Rebecca's evidence that the plaintiff resumed an active and pain-free lifestyle when she returned from Ontario in late 2014 is inconsistent with the plaintiff having required an extension to her EI claim due to her being unable to return to work. As well, her evidence that the plaintiff could almost do nothing after the MVA is inconsistent with the plaintiff's return to work at the laundromat. Rebecca was overly anxious to support her mother's case. I give her evidence little weight.

- [96] I found Ms. Vautour to be a partisan witness who was also overly anxious to support the plaintiff's case. Although she testified that she was with the plaintiff on almost a daily basis in the late summer of 2014, she claimed to have no recollection of the plaintiff having had any injuries or struggles with activities. Yet, at that time, the plaintiff was actually off work with a rib fracture. Ms. Vautour claimed that in June 2015 the plaintiff could not do anything, yet, the plaintiff had made a three-to-four days driving trip to Ontario in April. I give Ms. Vautour's evidence little weight.
- [97] Each of Drs. Tarazi, Masri, and Kendler has impressive credentials and provided the court with helpful insight into the plaintiff's diagnosis and prognosis. However, I found that Dr. Tarazi tended to be somewhat of an advocate for the plaintiff's cause, declining to accept that his opinion might change if the evidence before the court proved to differ from the facts he had assumed. For example, Dr. Tarazi assumed for the purposes of his opinion that the plaintiff had had a long history of virtually uninterrupted work at JDW before the MVA. When he became apprised of the fact that she had only returned to work two days before the MVA after having been off since August 2014 for rib and vertebrae fractures, Dr. Tarazi steadfastly maintained that the two days were sufficient to demonstrate that she was fully recovered.
- [98] In comparison, Drs. Masri and Kendler were much more objective in providing their evidence. Indeed they were the epitome of how an expert witness should present his or her opinion-in an organized, articulate, forthright and objective manner. I found their opinions to be helpful and I accept their evidence over that of Dr. Tarazi to the extent that it differs.
- [99] As is the case in most actions involving claims of soft tissue injury, 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.
- [100] The court should be exceedingly careful when there is little or no objective evidence of continuing injury and when complaints of pain persist for long periods of time beyond the normal or usual recovery: *Buttar v. Brennan*, 2012 BCSC 531 at para. 24; *Tai v. De Busscher*, 2007 BCCA 371 at para. 41. Generally, a plaintiff will not receive compensation in the absence of convincing evidence that her complaints of pain are true reflections of a continuing injury: *Price v. Kostyba* (1982), 70 B.C.L.R. 397 at 399 (S.C.).

- [101] A plaintiff who accurately and forthrightly 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. A plaintiff who exaggerates her symptoms and blames the defendant's negligence for all of her physical and psychological afflictions regardless of her pre-existing afflictions must expect her evidence to be closely scrutinized. I found that the plaintiff fell squarely into the latter of those two categories.
- [102] I do not believe that the plaintiff never complained to her general practitioner about having knee pain prior to the MVA. It is clear from the medical records that she had significant and varied physical issues prior to the MVA. I do not believe her evidence that she was pain free with no physical limitations when she returned to work on February 16, 2015.
- [103] I find that the plaintiff's description of her T6 pain after the MVA to be 10 on a scale of 1 to 10 to have been overstated in the extreme. She was able to drive to Ontario less than two months after the MVA. The attribution by the plaintiff of all of her pain symptoms and virtually all of her life's woes to the MVA seriously undermined her credibility.
- [104] It was telling that the plaintiff discontinued her massage and physiotherapy treatments as soon as ICBC stopped paying for them. If, as she claims, such treatments significantly benefitted her, I find it difficult to believe that she would not have taken steps to continue them by taking advantage of the coverage that was available to her through JDW as she had done before the MVA. Moreover, the evidence shows that her counsel was prepared to advance the monies necessary to pay for any such treatments.
- [105] In the result, while there are some portions of the plaintiff's evidence that I accept, in particular, her symptoms immediately following and for the first several months after the MVA, I find that most of her post-MVA physical complaints were embellished for maximum effect at trial.

Causation

- [106] The "but for" test is the legal test for factual causation: the plaintiff must prove on a balance of probabilities that but for the defendant's negligence, 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 *Resurfice Corp. v. Hanke*, 2007 SCC 7 at paras. 21-23. The defendant is obligated to compensate the plaintiff for the debilitating effects of her MVA-related injuries but not for the debilitating effects of her pre-existing conditions that she would have suffered anyway: *T.W.N.A. v. Canada (Ministry of Indian Affairs)*, 2003 BCCA 670 at para. 27, quoting para. 35 of *Athey v. Leonati*, [1996] 3 S.C.R. 458.

- [107] 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. That said, the 'but for' test should not be relaxed to the point where it becomes nothing more than a common sense or anecdotal analysis. There must be some evidence supporting a finding of causation: *Boon v. Mann*, 2016 BCCA 242 at paras. 14-19.
- [108] The plaintiff need only establish 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.
- [109] It is clear that, prior to the MVA, the plaintiff was suffering from both osteoarthritis and osteoporosis, conditions for which she had been treated for several years. She also suffered from vomiting, neck and shoulder pain, anxiety and depression. Plainly on the evidence, those complaints had been functionally limiting at least during the year preceding the MVA.
- [110] Counsel for the plaintiff submitted that by February 16, 2015, the plaintiff had healed uneventfully from all of pre-existing injuries, including her rib and vertebral fractures. He emphasized the fact that the plaintiff's attempted return to work in July 2015 was in stark contrast to her pre-MVA work history. However, there is no established history of any ability on the part of the plaintiff to work for a prolonged period after her four bone fractures of January, August, October 2014 and January 2015. Although after having been off work for eight months before the MVA the plaintiff was able to return to work at JDW for two days, I am not persuaded that she was pain-free, fully functional, and in "good condition" immediately before the MVA, as Dr. Tarazi assumed.
- [111] As is typical in these types of cases, the medical expert opinion evidence as to the plaintiff's prognosis was largely based on a review of the clinical records and the plaintiff's own account of her symptom history.
- [112] I do not place as much weight on the opinion of Dr. Tarazi as I otherwise would because it was based almost entirely upon his assumption that the plaintiff had a long, virtually uninterrupted pre-MVA work history as well as her subjective complaints of significant ongoing pain. The former was erroneous and the latter I have found to have been embellished and exaggerated.
- [113] I accept Dr. Tarazi's opinion that pain can cause a person to reduce exercise which in turn can cause deconditioning which, in the case of a person suffering from osteoporosis, may increase the risk of bone fractures. That is common sense. However, I am not persuaded that the MVA caused the plaintiff to become disabled sooner than otherwise would have been the case.
- [114] In his report, Dr. Masri stated:

4. Causation: I believe that the motor vehicle accident aggravated her pre-existing thoracic spine condition with the T6 and T11 vertebral fractures. It is very difficult to tell whether absent the motor vehicle accident she would have been able to tolerate work at the warehouse. She was only working there for 2 days when the motor vehicle accident happened. The repetitive bending, lifting and twisting might have aggravated her thoracic spine pain and might have caused her significant difficulty with work, which is impossible to tell. Therefore, the injury from the motor vehicle accident certainly did not help, and did aggravate her pain. Since the motor vehicle accident, she had a second injury causing a fracture of the L1 vertebral body simply with lifting a tire, giving her low back pain. This is completely unrelated to the motor vehicle accident, but stresses her fragility and the precarious nature of her spine due to her underlying osteoporosis. Therefore, her current disability is related to a combination of her pre-existing condition, the motor vehicle accident, and a subsequent injury causing fracture at L1. Even absent the motor vehicle accident, she would have developed a disability with reference to her low back that would have prevented her from working in a physical capacity.
- [115] I accept Dr. Masri's foregoing opinion and assessment of the plaintiff in its entirety. Indeed, during his submissions, counsel for the plaintiff conceded there was no doubt that the plaintiff pre-existing degenerative condition would have caused her problems after the MVA.
- [116] Plaintiff's counsel submits that the plaintiff's MVA-related injuries are indivisible from her pre-existing condition such that the defendant is liable for the whole of her loss: *Peso v. Holloway*, 2012 BCSC 1763 at para. 68. I disagree. The mere fact that the plaintiff's current disabilities are a combination of her pre-existing condition, the MVA and her subsequent L1 fracture does not mean that they are indivisible each from the other. If a plaintiff has a pre-existing condition and there is, as here, a measurable risk that that condition would have resulted in a disability regardless of the MVA, then that pre-existing risk of loss is taken into account in assessing the damages flowing from the MVA. The principle is called the "crumbling skull" rule and is consistent with the general rule that the plaintiff must be returned to the position she would have in, with all the attendant risks and shortcomings, and not a better position: *Moore v. Kyba*, 2012 BCCA 361 at para. 43.
- [117] I find, on the whole of the evidence, that the MVA caused the plaintiff to suffer neck, chest and mid-back pain as well as a sore nose. I also find that the plaintiff's pre-existing osteoporosis-related pain was aggravated by the MVA. I find that for approximately two months immediately following the Collision, the plaintiff continued to suffer considerable pain and discomfort in her chest, neck, and back. I find that, while some pain and discomfort persisted thereafter, it was and is not as prevalent and debilitating as the plaintiff suggested. Rather, I find that her pain symptoms from and after late February 2017 when she fractured her L1 were and are primarily caused by her pre-existing osteoporosis.

Assessment of Damages

- [118] Once factual causation is found, liability may still be limited in the assessment of damages: *Blackwater v. Plint*, 2005 SCC 58 at paras. 78-81. It is a well-established principle of tort law that the defendant need not place the plaintiff in a better position than his or her original position and should not compensate the plaintiff for damage he or she would have suffered in any event, otherwise known as the crumbling skull rule.
- [119] The plaintiff bears the burden of proving on a balance of probabilities that her claims of injury and resulting damages are attributable to the MVA.

Non-pecuniary Damages

- [120] The assessment of non-pecuniary damages takes into the 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, the nature of the injury, the severity and duration of pain, the extent of any disability, the 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. Each plaintiff must be assessed individually, though reference to previous similar cases can be helpful: *Zamora v. Lapointe*, 2019 BCSC 1053, at paras. 54-56.
- [121] Counsel for the plaintiff seeks a non-pecuniary award of \$90,000, relying on the decisions of this court in *Peso*, *Willett v. Rose*, 2017 BCSC 627, and *Forghani-Esfahani v. Lester*, 2019 BCSC 332. Like the case before me, each of those cases involves a plaintiff who had significant pre-existing physical conditions. In my view, each of those cases turned on its own facts.
- [122] Counsel for the defendant submits that an award of non-pecuniary damages in the amount \$65,000 is appropriate in this case, relying on the decisions of this court in *Siddall v. Bencherif*, 2016 BCSC 1662 and *Vintila v. Kirkwood*, 2016 BCSC 930.
- [123] The plaintiff is 51 years old. She was 47 at the time of the MVA. I accept that, prior to the accident, she was a moderately active individual who enjoyed hiking, walking, gardening, and working out in a gym. However, I also find that her life was far from the pain-free, energetic, and active one she attempted to portray. She had many and varied pre-existing issues, including depression, anxiety disorder, shoulder pain, neck pain, back pain, nausea and vomiting issues, migraine headaches, osteoarthritis, and osteoporosis. I do not accept that these pre-existing conditions and, in particular, her osteoarthritis and osteoporosis were having no significant impact on her daily life and activities as at the time of the MVA.
- [124] I find that, since the MVA, the plaintiff has focused to a significant degree on her pain and has demonstrated a low level of enthusiasm for her own rehabilitation. Nevertheless, she has generally been able to function on a day-to-day basis albeit with pain, discomfort, and

short-lived flare-ups. Other than being less able to interact with her grandchildren than she would like, there is no evidence that the plaintiff has suffered any impairment of family, marital or social relationships. I accept that she gave up some of these activities after the MVA, but find that she did so in large part because of one or more of her pre-existing conditions.

- [125] After considering all of the evidence and the submissions of counsel, as well as the case authorities they rely upon, I conclude that an appropriate award of non-pecuniary damages in this case is \$70,000.

Past Loss of Income Earning Capacity

- [126] Compensation for past loss of income is actually a claim for past loss of income earning capacity and is based on the value of the work that the plaintiff would have, not merely could have, earned but for the injury: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30; *M.B. v. British Columbia*, 2003 SCC 53 at para. 49.
- [127] An assessment of past loss of income earning capacity requires that the plaintiff demonstrate a real and substantial possibility that the income would have been earned: *Athey*, at para. 27.
- [128] At the time of the MVA, the plaintiff had only just returned to work two days earlier after having been off work due to her osteoporosis-related injuries. The plaintiff testified that, but for the MVA, she would have continued to work at JDW full-time without any further time off.
- [129] The plaintiff has failed to satisfy me that that scenario was probable. The evidence demonstrates that during the period from 2010 to 2014 the plaintiff's bone density scans showed a significant decrease in her bone density. The scan done in 2017 showed a further decrease of 17.5%. In the year preceding the MVA, the plaintiff suffered no less than four fractures (two ribs and two vertebrae), each occurring during innocuous physical activities (reaching, lifting, and chiropractic treatment). The plaintiff was unable to work after each of these events. In the 12 months immediately preceding the MVA, she was off work for six of them.
- [130] I accept the evidence of the medical experts that it is likely that the plaintiff would have had recurring issues related to her osteoporosis and, as was the case in the year immediately preceding the MVA, she would have been unable to work full time without any reoccurrence.

- [131] Counsel for the plaintiff submits that the plaintiff should be compensated for her past loss of income earning capacity on the basis that, but for the MVA and assuming she would have not worked full-time due to her pre-existing condition, she would still have earned \$20,000 per year during the four-and-a-half years since the MVA or \$90,000. Her actual employment income during that period was approximately \$10,000. Taking into account income tax that she would have paid, plaintiff's counsel submits that an award of \$60,000 is appropriate.
- [132] The defendant acknowledges that the plaintiff has suffered a past loss of income earning capacity but submits that \$20,000 is more appropriate.
- [133] On the evidence as a whole I find that, but for the MVA, there was a real and substantial possibility that the plaintiff would have continued working at JDW up to the present time but would also have continued to experience physical problems caused by her osteoporosis and other pre-existing conditions. I find that those problems would likely have resulted in her having been unable to work for 20% of the time.
- [134] However, I find on the evidence as a whole that the plaintiff did not take reasonable steps to mitigate her past wage loss. Rather, I find that the plaintiff decided, wrongly, that she would be able to parlay the MVA into a windfall such that she would not have to worry about working again. I find that she likely took the job at the laundromat so as to provide much needed cash pending the payout from this action.
- [135] Nevertheless, giving her the benefit of any doubt, I conclude that it is appropriate to award her past loss of income earning capacity of \$10,000 net of income tax, her laundromat income of \$9,730, and the TTD benefits she has received of \$28,395.44.

Loss of Future Earning Capacity

- [136] 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.
- [137] 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 [v. Berezan]*, 2007 BCCA 150], by Bauman J. in *Chang [v. Feng]*, 2008 BCSC 49], and by Tysoe J.A. in *Romanchych [v. Vallianatos]*, 2010 BCCA 20], 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 [v. Funk]* (1990), 46 B.C.L.R. (2d) 133 (C.A.), or a capital asset approach, as in *Brown [v. Golaïy]* (1985), 26 B.C.L.R. (3d) 353 (S.C.). 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 [v. Insurance Corp. of British Columbia]* (1995), 100 B.C.L.R. (2d) 260 (C.A.) 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 [v. Wickware]*, 1999 BCCA 88]. 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.]

[138] The onus is on the plaintiff to prove her case. 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. Such evidence is lacking in this case.

[139] The plaintiff's evidence was that, but for the MVA, she would have continued to work at JDW. The evidence regarding the plaintiff's post-MVA loss of income earning capacity is limited to her own self-assessment and the opinion of Dr. Tarazi that her pain has and will reduce her exercise regime which in turn will result in increased risk of osteoporosis issues. However, I accept the evidence of Dr. Masri that the MVA aggravated the plaintiff's pre-existing osteoporosis and that any incapacity she now has and will have in the future is and will be attributable to her osteoporosis. I also accept the opinion of Dr. Kendler that the plaintiff's MVA-related injuries did not cause nor will they continue to cause her osteoporosis to worsen.

[140] In the result, I am not persuaded that the plaintiff will suffer any future loss of earning capacity as a result of the MVA.

[141] I assess the plaintiff's loss of future earning capacity at \$0.00.

Cost of Future Care

[142] Counsel for the plaintiff submitted, without much vigour, that a nominal sum of \$5,000 should be awarded for the plaintiff's future costs of treatments.

[143] As I have found, the plaintiff's MVA-related injuries resolved by March 2017. In my view there is no evidentiary support for such an award.

Special Damages

[144] The plaintiff's claim of special damages totaling \$15,938.07 is comprised of:

a) Massage and physiotherapy treatments not paid by ICBC (February 2015 to April 2017):

\$4,586.03

b) Foam roller:

\$59.80

c) TENS machine:

\$65.05

d) Replacement of reading glasses broken during MVA:

\$26.23

e) Ibuprofen & Senna-Lax:

\$24.65

f) Enagic business start up:

\$3,028.21

g) Mileage to attend medical appointments (16,296.2 km @ \$0.50)

\$8,147.10

[145] Counsel for the plaintiff conceded that \$2,251.20 must be deducted from the Enagic business start up costs claim for the pills the plaintiff intended to and has chosen to consume herself. Counsel for the defendant conceded that the laptop portion of those start up costs (\$525.28) is reasonable, but otherwise objected to costs related to the Enagic business. I agree with that objection. -Those other costs were incurred well after March 2017 when the plaintiff suffered her L1 fracture. Regardless, they were not a reasonable expenditure to make in the context of attempting to earn an income.

[146] Although counsel for the defendant did not challenge it, I am not persuaded that plaintiff's claim of having had to travel 16,296.2 kilometers for the treatments she underwent as a result of the MVA is reasonable. However I am persuaded that a significant portion of the claim is justified. I award \$6,000 for her mileage claim.

[147] The balance of the plaintiff's claim for special expenses was conceded by the defendant. Accordingly I make the following award under this heading:

a) Medical treatments:

\$4,586.03

b) Island Optimal:

\$59.80

c) Ortho Canada:

\$65.05

d) Superstore:

\$26.23

e) Rexall:

\$24.65

f) Laptop:

\$525.28

g) Mileage:

\$6,000

Total Special Damages:

\$11,287.04

Conclusion

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

a) Non-pecuniary damages:

\$70,000

b) Past loss of income earning capacity:

\$10,000

c) loss of future income earning capacity:

\$0

d) Cost of future care:

\$0

e) Special damages:

\$11,287.04

TOTAL:

\$91,287.04

[149] The plaintiff is entitled to court ordered interest on the awards for past loss of income earning capacity and special damages.

Costs

[150] Subject to any submissions counsel wishes to make, the plaintiff is entitled to costs at Scale B.

"G.C. Weatherill J."

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