

CANADA / JUDGMENT

Smith v. Chui

2020 BCSC 745

COURT

Supreme Court of British Columbia

DECIDED

14 May 2020

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2020 BCSC 745 Smith v. Chui

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Smith v. Chui,

2020 BCSC 745

Date: 20200514

Docket: M79162

Registry: Nanaimo

Between:

Stephanie Dawn Smith

Plaintiff

And

Carl Tu Chui and

Shoreline Seafood Ltd.

Defendants

Before: The Honourable Mr. Justice Harvey

Reasons for Judgment

Counsel for the Plaintiff:

D.R. Brooks

Counsel for the Defendants:

A.J. Young

Place and Dates of Trial:

Nanaimo, B.C.

February 3-7, 2020

Place and Date of Judgment:

Nanaimo, B.C.

May 14, 2020

Introduction

- [1] Ms. Stephanie Smith (the "plaintiff") was injured in a motor vehicle accident on August 7, 2014 on Highway 19 near Hillview Road close to Nanaimo, British Columbia.
- [2] The plaintiff was travelling north on Highway 19 heading to Parksville around 8:00 am when she encountered a fish tote blocking her lane of travel as she turned a corner. She had no time to avoid colliding with the obstruction.
- [3] The defendants acknowledge liability for the accident. The personal defendant failed to secure the cargo properly. There is no issue of contributory negligence. The plaintiff was travelling within the posted speed limit and wearing a three-point seatbelt. It was not suggested she had time to take evasive action.
- [4] The plaintiff was pregnant at the time of the accident with her first born, Kingston, who is now five. While he was born uneventfully at full term, the plaintiff alleges ongoing physical symptoms creating a permanent partial disability which she says has interfered with her income earning ability, both past and prospective, as well as her ability to perform household chores consistent with her pre-accident level of productivity.

Issues

- [5] The singular issue is the assessment of the plaintiff's damages.

The Plaintiff Prior to the Accident

- [6] Currently, the plaintiff is 35. She was 29 at the time of the accident. She had no pre- accident health issues affecting either her employment or her social and recreational pursuits.
- [7] She was fit, active socially and physically and enjoyed a wide variety of recreational pursuits with her husband, Joey Smith. She regularly attended the gym after work, boated with her husband, golfed, hiked, skied and ran trails. She walked her dog daily, often over rough terrain for extended distances.

- [8] Together with her husband, she travelled on holidays and entertained friends at her and her husband's home. She was an active homemaker and assisted her husband with yard work when required. She did the majority of the cooking for the two of them.
- [9] Since graduating from Malaspina College with a diploma as a legal assistant, the plaintiff has been steadily employed. She first worked as a legal secretary at a local law firm, but after determining law was not her passion, she sought and obtained a clerical position with the City of Nanaimo.
- [10] In 2011, as a result of re-structuring, her position with the City of Nanaimo was eliminated and she obtained employment as a part-time clerk with School District 69.
- [11] Her first position with the District was part time, meaning she was subject to lay-off when school was not in session. However, in July of 2014 she obtained a full-time position with District 69 as a payroll clerk. Full time meant employment five days a week, 12 months of the year without layoffs during school holidays.
- [12] Her husband had just secured a good job and both looked forward to retirement at 55 given both were working full time and had been accruing pensions through their employment.
- [13] Although pregnant at the time of the accident, the plaintiff testified she did not envision becoming a stay-at-home mother. She planned a return to work following her year of maternity leave and remaining full time in the work force until her and her husband's retirement.
- [14] The plaintiff and her husband owned their own home at the time the accident occurred. It was on a large lot and had a large unfinished yard that required significant work.
- [15] Prior to the accident, the plaintiff was the one mainly responsible for the upkeep of the house, while Mr. Smith was more active looking after the landscaping of their yard.

The Accident and the Aftermath

- [16] On the morning of Thursday August 7, 2014, the plaintiff was travelling north on Highway 19 at approximately 85 km per hour driving a mid-size SUV. When she came to a bend in the road, she observed and then collided with a large tote in the middle of the lane. The tote was cube shaped, about 3 1/2 feet wide and weighed approximately 160 pounds.
- [17] It is acknowledged the plaintiff had no time to brake or manoeuvre so as to avoid the collision. She struck the tote head on. The force of the collision caused her airbags to deploy.

- [18] The plaintiff does not remember what happened next. Her next recall is her vehicle being stopped by the side of the road. The evidence discloses she called her husband although she had no memory of making the call. Police and paramedics arrived but did not transport her to hospital. Her husband drove from his employment to the scene of the accident and transported her to Nanaimo Regional General Hospital as she was worried about her unborn child and anxious to make sure no injuries had been caused in that regard.
- [19] She was discharged from hospital after having been reassured that the baby suffered no injuries and her pregnancy was unaffected.
- [20] Following the accident, the plaintiff complained of tenderness in her chest and stomach from the airbag and thought that her left wrist was broken. She had some lacerations on her left hand and had increasing neck pain and headache as the day went on. She sought medical treatment at the office of her family doctor, Dr. Dodo.
- [21] She returned to work the Monday following the accident but missed several half days the week following the accident to attend medical appointments. Otherwise, she worked without interruption until the commencement of her maternity leave on November 28, 2014. Her baby was due in January. She testified that she had not planned to take her maternity leave that early but her pain prompted her to begin early. She made no mention of that to Dr. Dodo when she first saw him on November 14, 2014. Neither did she seek accommodations at work to better manage her condition during the period following the accident to the commencement of her maternity leave, despite such accommodations being available through her employer.
- [22] The plaintiff's performance assessment dated October 24, 2014 was favourable. The plaintiff received a rating of 'very good' in all designations related to the quality and quantity of her work. Under the heading Evaluator's Comments, the author wrote, "Ms. Smith is able to compete a high quantity of work to a high standard in a busy setting".
- [23] In the week or two following the accident, the plaintiff said her pain magnified in intensity. Because of her pregnancy, she was limited in taking medications. She attended at her family practitioner's clinic, the Caledonian Clinic in Nanaimo, twice in August and again in November when she saw Dr. Dodo. Her reported complaints were neck pain, headaches and that her left wrist sprain continue to be painful.
- [24] Kingston was born January 5, 2015. With Kingston's birth, the plaintiff's problems continued. Because of neck and upper back pain, she struggled to pick Kingston up and experienced pain while nursing. She said that breast-feeding was so painful that she was no longer able to do so after six months or so, although she had anticipated breast-feeding Kingston for the entirety year of her maternity leave.

- [25] In addition to her physical complaints, the plaintiff says the accident resulted in emotional distress. The plaintiff complained to Dr. Cameron, a physiatrist she saw later in her treatment, of anxiety attacks and feelings of depression since the accident. Those were not reported to Dr. Dodo until the spring of 2015. He prescribed her antidepressant medication and Ativan.
- [26] She continues to be a nervous driver and reports nightmares that she is involved in a car accident involving Kingston or others.
- [27] She further complained of jaw pain and tension since the accident and noticed that she clenches her teeth. Her dentist provided her with a bite guard after the accident. With that, she testified that the pain has largely resolved.
- [28] She no longer takes or needs antidepressants or anti-anxiety medication, but continues to take up to six ibuprofen daily for treatment of her headaches. Since becoming pregnant a second time (she is due in July 2020) she has been unable to take medications, exacerbating and prolonging the headaches that she experiences. Currently she has several headaches weekly.
- [29] She testified that when taking ibuprofen, the headaches are dulled but do not disappear completely.
- [30] Pain interrupts her sleep and she testified that she sometimes must get up and walk around and stretch before being able to go back to sleep.
- [31] Both she and her husband testified that her pain and anxiety have affected their relationship. In recent months they have sought marriage counselling.
- [32] Her activity level remains affected. She has stopped many of the activities that she previously enjoyed, notably skiing and hiking. Other activities she enjoyed prior to her injuries have been curtailed. Walking the dog is no longer the same walk over trails but rather more relaxed and shorter walks. She does not go out on the boat in rough water.
- [33] She still boats but not as frequently. She does not cook as much as she did before the accident and finds many of the household chores she did prior to the accident to be painful. The parties hired a housekeeping service to assist the plaintiff with some of the heavier cleaning chores. She wants that support to continue.
- [34] Following the accident, she stopped assisting her husband with the outside yard work.
- [35] Post-accident, the primary caregiver has been Dr. Dodo. She originally saw his locum(s) immediately following the accident who advised conservative treatment through massage and/or physiotherapy. Dr. Dodo continued her on that treatment throughout the end of 2014 and 2015.

- [36] She has routinely attended physiotherapy since the accident and said it provided temporary relief. One of her physiotherapists provided the plaintiff a series of at-home exercises which she continues to do. Those exercises are designed to help build strength and improve range of motion. She tries to exercise three to four times a week and stretches when her symptoms become aggravated. She underwent one session of intramuscular stimulation (IMS) but found the treatment aggravated rather than alleviated her symptoms.
- [37] She has continued massage therapy once or twice a month with massage directed primarily at her neck. Although massage provided no enduring improvement, the plaintiff said it provided temporary relief.
- [38] In 2017 she was prescribed nortriptyline for control of the headaches but found that the negative side effects outweighed the benefits. She also tried Robaxin, Robaxicet and Salonpas pain patches. The oral medications' benefits were offset by unpleasant side effects but the plaintiff testified the pain patches were helpful.
- [39] The plaintiff's pre-accident intention was to return to work in the payroll department on January 1, 2016, but approximately six months following the accident, while still on maternity leave, the plaintiff says she came to the realization that her injuries were not improving. She felt that her recovery had plateaued. At this point, she said she realized that returning to her position as a payroll clerk would be too physically demanding.
- [40] Thus, in June 2015, she successfully applied for and then accepted a position as a library clerk with School District 69. A similar position had come up three months earlier but she did not apply to it thinking that her recovery would be complete and she would be able to return to work early in 2016 in the payroll department.
- [41] She made no mention of the career change or the reasons underlying her choice to change positions to Dr. Dodo or any of the doctors she subsequently saw for investigation into her injuries.
- [42] She did communicate the decision to a supervisor at Human Resources, Joanne Shepherd, via an email on June 23, 2015. In it, she wrote:

I have decided to accept the library clerk's position at OES and leave my current position as payroll clerk due to not being able to find full time childcare for January. As I am currently on maternity leave I would like to request to continue my maternity leave and begin my new position as a library clerk in January 2016, after Christmas Break.

Thank you very much and sorry for any inconvenience this may cause for you guys!

- [43] Her maternity leave was later extended to February 1, 2016 following her request on December 9, 2015 as follows:

I would like to extend my maternity leave for the month of January and return to work on February 1, 2016. I'm having a hard time finding daycare for the hours Oceanside has asked me to work. Let me know if this is okay. Thanks very much and I hope you are doing well.

- [44] In neither communication did the plaintiff mention her injuries as the reason underlying her decision. The proffered reason of the omission of her accident symptoms was that she wanted to return to the position in payroll once able and did not want her supervisor or the person in charge of 're-hiring' to harbour doubts about her ability to do the job. The plaintiff previously obtained the position in payroll despite not having all the necessary qualifications; she thought that offering her physical impairment as the reason for resigning would hinder her ability to re-apply when physically able.
- [45] The plaintiff was cross-examined on her answer given in examination for discovery where she replied that the decision to change job was "partially" injury-related and "partially" related to caring for her son. When the question was posed to her the plaintiff qualified her answer by saying that the additional time with her son was a bonus but that the singular reason was her job-related injuries.
- [46] The plaintiff testified that her current position is much less aggravating. She is able to move about throughout the day and keeps the library in working order. She can stretch as required and is not restricted to computer work. The computer work is minimal at her current job as compared to almost the entirety of her former job.
- [47] The library clerk position was originally three days per week, five hours a day. It has now expanded to five days a week, five hours a day. There have been no reported absences associated with her accident-related symptoms.
- [48] The plaintiff has done little massage or physiotherapy since mid-2017. She resumed massage therapy after a two year hiatus in March 2019 and has been treated approximately monthly since then.
- [49] The plaintiff is once again pregnant with the parties' "last child" due in July 2020.
- [50] The plaintiff also called a friend, Callie Smith (who is unrelated to the plaintiff). Ms. Callie Smith confirmed she and the plaintiff had been friends since high school and their relationship continued to the time of trial.
- [51] She described the plaintiff as social and outgoing prior to the accident but more reserved and sedentary after the accident. Admittedly, since the accident the two do not see each other as often. When they do, Ms. Smith described the plaintiff as more subdued and less active. She walks slower and appears to be in discomfort.
- [52] The plaintiff's husband testified as to the impact of the injuries on the plaintiff's capacity in the home. She cooks less, does less of the household work and more or less ceased assisting outside after the accident occurred.

- [53] He confirmed the impact of her injuries on their social and recreational activities.
- [54] Both the plaintiff and her husband denied that Kingston's birth had led to many of the changes they reported in their day-to-day lives.
- [55] Mr. Smith was injured in a motor vehicle accident in 2017 and has ongoing injuries that have limited him.

The Medical Evidence

Dr. Dodo

- [56] Dr. Dodo was and is the plaintiff's family doctor. He works with a group of doctors in a clinic setting. He did not see the plaintiff on her first two visits following the accident (August 8 and 10, 2014) but oversaw treatment of her injuries thereafter.
- [57] Dr. Dodo was not overseeing the plaintiff's pregnancy. She was under the care of a midwife. He did not see the plaintiff following the accident until November 14, 2014. She did not seek medical attention from August 10 to November 14. She was, by then, 33 weeks pregnant and reported her pregnancy was going well. She reported she was experiencing post-concussion headaches and shoulder pain, and was under the care of a massage therapist.
- [58] Neither the plaintiff's evidence nor Dr. Dodo's records reflect any report by the plaintiff to Dr. Dodo as to the impact of her symptoms on her ability to perform her duties at work in the months following the accident or at any time in advance of her decision to resign the position in payroll.
- [59] He saw her again later in November and continued physical therapy comprised of physiotherapy, massage and chiropractic manipulation. He was hopeful for long-term resolution of her complaints.
- [60] When seen next, March 3, 2015, the plaintiff's narrative as recorded by Dr. Dodo, focused entirely on the delivery of Kingston and her interaction with him thereafter. She reported that she was exclusively breastfeeding him and bonding well. Kingston was sleeping well. There were no recorded complaints associated with increased pain while breastfeeding. Nor was there reference to the extent to which the plaintiff was receiving ongoing treatment.
- [61] There is no record on her chart detailing ongoing complaints arising from the accident until April 10, 2015 when the plaintiff attended for two purposes: to receive the results from her pap smear and to report her ongoing symptoms from the accident. Those included reports of left wrist pain, ongoing headaches and neck/back pain. The plaintiff apparently queried whether her neck was "out of alignment" and questioned whether a chiropractor might help.
- [62] Dr. Dodo made no record of doing a physical examination or taking a further history, but referred the plaintiff for physiotherapy and x-rays of her spine. Nothing was revealed as a result.

- [63] Dr. Dodo ultimately prepared three separate medical reports. The first January 30, 2016; the second July 10, 2017; and his final report dated August 25, 2018.
- [64] In the first of his three reports, Dr. Dodo noted the two attendances by colleagues in August 2014, the chart entries from Nanaimo hospital ER and the chart entries from the physiotherapist. Relying in part on those commentaries and his own involvement with the plaintiff, he diagnosed her as having suffered a left wrist sprain, soft tissue injury to the neck, post-concussion headaches and soreness in the shoulder area. He was optimistic as to her recovery in the fullness of time but noted the risk for chronic pain problems and chronic post-concussion headaches.
- [65] The diagnosis of concussion and resulting headaches seems founded on the observations of his colleague, Dr. Pillay, on August 10, 2014. There is nothing in the plaintiff's chart or the doctor's evidence indicating he took a history from her as to the circumstances of the accident other than it "was serious" and that the airbags deployed.
- [66] Dr. Dodo made no mention in his report of the March 2015 visit, confirming, by implication, the plaintiff did not discuss her accident-related symptoms at that visit.
- [67] On June 4 and 19, 2015, the plaintiff attended Dr. Dodo to fill an ICBC form, a CL 19, but no discussion of her symptoms is referenced in the chart. In the Certificate of Earnings prepared by Dr. Dodo but based on the plaintiff's report, it notes the time off work as a result of the accident was August 7 until August 15, 2014. Two of the days were partial sick days for medical appointments.
- [68] Dr. Dodo did not reference the plaintiff's visit of June 29, 2015 when she attended for "anxiety" "stomach hurting and nausea". On that visit, Dr. Dodo administered a screening test for anxiety on which the plaintiff achieved a score high enough to warrant prescribing her Paxil and Ativan.
- [69] Neither the plaintiff nor Dr. Dodo's chart for that date reveal any discussion of her change in employment with the school district despite her having advised the school district days before.
- [70] Her employment was apparently not discussed in any of the visits in 2015. There is no mention in the plaintiff's chart or in Dr. Dodo's first report of difficulties experienced by the plaintiff in performing her duties as a payroll clerk following her return to work in August of 2014, nor is there mention in either the chart or Dr. Dodo's initial report about the plaintiff's decision to change employment within School District 69.
- [71] Dr. Dodo's initial report made no causal link between the accident and the plaintiff's complaint's of anxiety.
- [72] The plaintiff's next recorded visit to Dr. Dodo was September 8, 2015 where her reported complaints were of ongoing depression. She refilled her prescriptions for anti-depressive medication.

- [73] When next seen on February 4, 2016, she reported she had stopped breast feeding, albeit there is no mention of why. She was referred or it was suggested she attend a "new" physiotherapist as she reported her progress had stalled.
- [74] She attended again in March and then in July for accident-related complaints, mainly headache. When seen in October 2016, her complaints centred on gastrointestinal issues unrelated to the accident.
- [75] Throughout 2017, the plaintiff intermittently attended Dr. Dodo. Her chief complaint was that of headaches. On November 27, 2017 she mentioned, seemingly for the first time, that she had switched jobs "as it was making it worse".
- [76] Thereafter, it is unclear how frequently she saw Dr. Dodo. He did refer her to Dr. Eardley in respect of her continued complaint of headaches. Dr. Eardley, in his consultation report of August 21, 2018, reported her complaints as paracervical headaches "occurring about twice a week" that reliably improve by 80% with Ibuprofen.
- [77] The other headache complained of by the plaintiff occurred weekly and was throbbing in nature and made worse by exertion. Once a month it was "particularly troublesome". Ibuprofen brought about resolution within a reasonable time approximately 80% of the time. Dr. Eardley did not recommend any change in treatment and advised the plaintiff on lifestyle modification and relaxation.
- [78] In his second report, Dr. Dodo noted the plaintiff was still suffering from the same symptoms. Her complaints were bilateral shoulder pain radiating into the neck and back with headaches three times weekly and ongoing left wrist pain. Those headaches persisted through the summer of 2016 and when he saw her again on January 24, 2017, she noted she was having two different types of headaches, bi-temporal and occipital, related to neck pain due to her motor vehicle accident. She carried on with physiotherapy and massage.
- [79] Since it had been almost three years since the accident, Dr. Dodo expressed the concern that her recovery had "maxed out" and that her condition had become chronic and "most unlikely to resolve completely in my opinion".
- [80] His final report details the ongoing attendances by Ms. Smith. On November 27, 2017, she continued to complain of headaches and ongoing sharp left wrist pains. A new complaint of jaw pain had arisen. He noted the plaintiff had "switched jobs as her previous job was making her symptoms worse". Dr. Dodo referred her to her neurologist.
- [81] Dr. Dodo concluded with the following:

Given her history of MVA accident in 2014, in my opinion it would not be unreasonable to assume that some of her physical symptoms are related to her motor vehicle accident. I am unsure what to make of her headaches and will defer that to the neurologist for his opinion as to causality. I am unsure about her future prognosis given that [sic] it is now four years since her MVA.

[82] He recommended her assessment by a physical rehabilitation specialist, but no such referral was made. Instead, plaintiff's counsel referred the plaintiff to Dr. Cameron, a neurologist, for an assessment and medical legal report.

Dr. Cameron

[83] Dr. Cameron saw the plaintiff once in February of 2019. Dr. Cameron took an extensive history of her post-accident condition, including her failure to recollect certain events immediately following the accident, one of which was her failure to recall phoning her husband or recalling the drive home. He was seemingly unaware of her occupation/job description prior to the accident and seemed unaware that she "switched jobs as her previous job was making her symptoms worse".

[84] She reported to him that she suffered waves of depression and anxiety "all of which have improved". The report of those symptoms was not specific to the time of the accident. Rather, it appears they occurred much later.

[85] In commenting on the anxiety and feelings of depression since the accident, he noted her history of taking anti-depressant medications but no counselling. She reported to him the symptoms have improved "but have not resolved completely". He recommended assessment by a psychologist.

[86] As to her employment, Dr. Cameron simply notes that prior to the accident she switched jobs to work for human resources for School District 69. She went back to work after the accident after remaining off for a few days. He reports her maternity leave and a return to work in a part-time position originally 15 hours per week then increasing to 20.

[87] He notes the continuing headaches "a few times per week". He reviewed the consultation report from Dr. Eardley, noting that Dr. Eardley did not change her medication.

[88] She reported to him that she finds massage therapy helps the headaches.

[89] Dr. Cameron noted:

She has no problems with work. She does have intermittent dizziness with movement. She complains of occasional blurred vision. She stated that her memory has been decreased since the accident but was not a significant problem. She has to write things down on occasion.

[90] Under the heading Opinion, Dr. Cameron noted that the plaintiff probably suffered "an altered state of consciousness or loss of consciousness" at the time of the accident, thus providing a basis for his opinion that she likely sustained a mild traumatic brain injury, although she did not go on to develop symptoms of post-traumatic brain injury syndrome following the accident.

- [91] Dr. Cameron agreed with the diagnosis of Dr. Eardley that the plaintiff developed post-traumatic musculoskeletal headaches and post-traumatic common migraine headaches. Dr. Cameron opined that they are as a result of the soft tissue injury she suffered to her head and neck as a result of the accident.
- [92] He carried on to report based on the frequency of her headaches "she is a candidate for prophylactic daily medication including gabapentin, lyrica, amitriptyline, nortriptyline or topiramate". Given his role as an assessor, not the plaintiff's treating physician, Dr. Cameron made only recommendations. The plaintiff took no steps to pursue those recommendations through Dr. Dodo.
- [93] He noted the passive rehabilitation therapy she had undergone and that she was continuing with an exercise regime at home. The treatments seemingly helped her pain and the post-traumatic headaches following the accident. He opined that she may experience further improvement with a supervised active and passive rehabilitation program but would defer to a physiatrist in that regard.
- [94] Finally, and most importantly, Dr. Cameron noted the plaintiff was rendered:
completely disabled for a period of several days following the accident of August 7, 2014. She subsequently has remained chronically partially disabled due to ongoing pain and discomfort and associated post-traumatic headache. She has not been able to resume the previously enjoyed recreational activities because of her ongoing chronic pain and associated post-traumatic headaches; all present as a result of the injuries that she has sustained at the time of the accident on August 7, 2014. This ongoing partial disability is probably permanent in my opinion.
- [95] He did not relate that opinion to her capacity to work, but rather the reasonably physically demanding recreational activities she described as routine before the accident.

Dr. Winston

- [96] Dr. Winston is a physiatrist. He examined the plaintiff once at the behest of the defendants on or near the date of his report, October 28, 2019.
- [97] At the commencement of the trial, the plaintiff, through counsel, objected to the admission of Dr. Winston's report, arguing that the report lack objectivity to such a degree that the report rose to the level of advocacy on behalf of the defendants. The plaintiff also argued the report made improper references to the plaintiff's character and, by inference, her credibility.
- [98] I allowed the report into evidence after redacting portions of it that were, in my view, straddling the line between legitimate opinion based on the doctor's expertise and findings and assuming the role of advocate through the use of charged language, suggesting that Dr. Winston felt the degree of medical investigation into the plaintiff's complaints was inconsistent with her stated concerns.

- [99] In describing the history she relayed, he said it was "vague and difficult to characterize".
- [100] He was dismissive of the conclusion of the doctor to whom she originally reported her symptoms that she had suffered a concussion in the accident.
- [101] Dr. Winston found no objective symptoms giving rise to her ongoing complaints of headache. He saw no need for future medical intervention. He described her wrist injury as a sprain which, in his opinion, ought to have healed uneventfully following the accident.
- [102] He noted the complaint and subsequent treatment for depression in the summer and fall of 2015 but noted there was no record as to its etiology.
- [103] He referred to the investigation by Dr. Eardley and agreed that the headaches as described to both himself and Dr. Eardley did not warrant a departure from the conservative treatment recommended by Dr. Dodo.
- [104] Her chief complaints to Dr. Winston were headache, shoulder and neck pain. There was no improvement to her symptoms following the first year after the accident. Her depressive symptoms seemed to have resolved.
- [105] She reported avoiding all of the heavy housekeeping she did before the accident but still did the family grocery shopping and most of the cooking for the family.
- [106] As to work, Dr. Winston reported:
- Ms. Smith is able to maintain her work. She did not identify any barriers from her workplace. It is a five hour shift in the library.
- [107] As to recreational activity, she acknowledged she was able to work out with light weights but no longer did any of the heavy weight-lifting she was able to do prior to the accident:
- Physical examination revealed no abnormalities. She was able to fully move her neck without signs of impairment or visible pain on observation but she was 'slow and guarded' in her movements when Dr. Winston performed range of motion testing on her.
- [108] She demonstrated 5/5 power and had symmetrical reflexes. She could bend her lower back and touch her toes.
- [109] Given the lack of physical findings, Dr. Winston offered the following as to her neck and shoulder pain:
- I, therefore diagnose her with subjective self-reports of pain in the shoulders and head without any objective evidence to support that.
- [110] He noted such injuries usually resolve within months.
- [111] As to the report of continuing headaches, she described the intensity to Dr. Winston as 8/9 on a scale of 10, yet noted they usually responded to two ibuprofen.

- [112] He opined there seemed to be a "disconnect" between significance of the plaintiff's complaints and her level of function at work and in her home. He opined her subjective complaint of headaches seemed well controlled by the treatment prescribed by Dr. Dodo and endorsed by both neurologists.
- [113] He opined her symptoms did not lend themselves to further assessment or treatment, save the taking of supplements recommended by Dr. Eardley. Because of the frequency of her headaches, she did not meet the criteria for chronic headaches (15 or more a month with a migraine on at least eight of those days).
- [114] He saw no benefit from continued use of passive therapies and saw no signs of permanent disability based on his understanding she had not missed work as a result of the accident.
- [115] The plaintiff was never assessed by a functional capacity evaluator, nor did she undergo vocational testing to see what her vocational options were if a career shift was warranted.

Position of the Parties

- [116] The plaintiff argues the plaintiff's pain is causally connected to the defendants' admitted negligence and has left her chronically impaired in all facets of her life, including her ongoing capacity to work full time as a payroll clerk. Her pain, predominantly headaches and neck pain, preclude many of the recreational activities she previously enjoyed, caused her to give up her full time employment with School District 69 and replace it with less remunerative part-time work, and required housekeeping assistance for tasks she previously was capable of doing.
- [117] She argues that she has suffered a loss of income, from the accident to trial, of \$75,000 net of tax and that her future loss by virtue of the fewer hours she now works, if calculated purely mathematically, would range from \$323,000 to \$482,000 depending on the contingencies applied. With that said, the plaintiff suggests an award of \$250,000 for loss of future income earning capacity.
- [118] She also seeks special damages of \$20,000 of the originally submitted \$26,370 as well as \$75,000 for the cost of future care which includes an allowance for further treatment by way of massage, patches and an allowance for ongoing housekeeping expense.
- [119] The defendant suggests \$14,000 for special damages and a nominal award for the cost of future care. They suggest that no award be made for loss of housekeeping capacity.
- [120] The defendants argue that the plaintiff has proven no economic loss other than for the two days following the accident together with two half-days the week following.
- [121] Thereafter, the defendant argues the decision to change jobs was unjustified in view of the medical evidence and the lack of a functional capacity assessment or a vocational assessment weighing in on the issue of whether, if disabled, the plaintiff's capacity to earn goes beyond the part-time work she chose.

- [122] The defendants agree \$12,216.59 of the special damages claimed have been proven, but oppose payment of expenses for housekeeping where no receipts have been provided despite the evidence of the plaintiff and her husband that the money was paid but the provider did not provide receipts despite their request.
- [123] Each of the plaintiff and defendant submitted economists' reports opining on the present value of future losses.

Discussion

- [124] It is trite to say that the plaintiff bears the burden of establishing a nexus between the plaintiff's physical and emotional complaints and the accident. Once established, the plaintiff bears the burden, as described below, of establishing the causal link between the proven injuries and the economic loss she alleges.
- [125] Here, I accept the plaintiff has proven that she sustained soft tissue injuries as a result of the accident on August 7, 2014. However, I find the evidence demonstrates the proven injuries are soft tissue injuries to her neck and shoulders with resultant ongoing headaches. She injured her left wrist but, for the most part, that is resolved and it is no longer an impairment either to her social activities, her housekeeping abilities or, most importantly, her employment.
- [126] Nothing in the evidence leads me to conclude on a balance of probabilities that any of the emotional distress experienced by the plaintiff in the spring and fall of 2015 is related to the accident. Dr. Dodo, who took the history of her complaints, offered no opinion that those complaints found their origin in her ongoing physical difficulties. Dr. Cameron worked on the erroneous assumption that the emotional upset was temporally connected to the accident date. It was not. Her complaints regarding her mood followed the birth of Kingston and, in any event, do not seem to be of long term impact.
- [127] Her complaints of nightmares or nervousness as a driver have not resulted in her seeking counselling or any other form of treatment to address them. Hence, I can only conclude that they are, in the general scheme of her complaints, a minor consideration. They are not debilitating or impairing either in her recreational activities or her occupation.
- [128] Similarly, her jaw pain and teeth grinding cannot be causally related to the accident absent the onset of those symptoms in close proximity to the accident and/or an opinion from a qualified expert there is a mechanism by which the accident could have caused the problem she complained of.
- [129] While I accept the plaintiff's evidence to some degree, supported as it is by collateral witnesses, her husband and friend, I have some doubts as to the described intensity of her pain and its impact upon her continued employment as a payroll clerk.

- [130] The plaintiff reported headaches with a pain threshold of 8 or 9 out of 10 to Dr. Winston but, save for the several days following the accident, she reported no loss of work in the payroll department following the accident, nor lower productivity. There is no evidence of further time from away work after the accident, either when working in the payroll department or once she began working in the library. In the main, she has used non-prescriptive analgesics such as ibuprofen to control the pain from the headaches. The headaches are substantially relieved by the early use of ibuprofen 80% of the time. Such does not support a conclusion that her pain, even on occasion, is of a level described by the plaintiff to Dr. Winston.
- [131] Her description to Dr. Eardley of the frequency and intensity of the headaches is at odds with her description to Dr. Winston as to the magnitude of them. Reading Dr. Eardley's consultation report, in particular the history given him by the plaintiff, makes it impossible to reconcile the different degrees of impairment described to each of the two neurologists.
- [132] With the exception of the infrequent migraine-like headaches, which I conclude are related to the accident, the majority of her headaches are well controlled with over-the-counter treatments.
- [133] I do agree with the plaintiff that I should afford the opinion of Dr. Winston less weight than it might otherwise be entitled to based on Dr. Winston's propensity to stray into advocacy or, dare I say, incredulity, over the disconnect he found between the stated symptoms in his physical findings. He strayed from dispassionate observer to advocate in both his report and his answers on cross-examination.
- [134] That said, his view of the objective signs of impairment differed little from those of Dr. Cameron. The major difference between the two was their divergent opinions as to whether the plaintiff sustained a concussion in the collision.
- [135] As to plaintiff's counsel's criticism of Dr. Winston that he made no further investigation into the work the plaintiff was doing at the time of the accident, such is disingenuous given neither Dr. Dodo nor Dr. Cameron were made aware of a principal feature of this lawsuit; namely the plaintiff's suggestion that her change in occupation was occasioned by accident symptoms as opposed to other considerations, notably the birth of Kingston.
- [136] The plaintiff's explanation as to the email sent to the human resources supervisor, Ms. Shepherd, when coupled with the lack of objective symptomology, the absence of a functional capacity report, and her answers to questions posed at examination for discovery as to her leaving her employment do not, in my view, sustain a finding that she has demonstrated her change in career is as a result of accident-related injuries.

- [137] The plaintiff worked in a protected union environment such that accommodations could have been provided to her upon presentation of proper medical evidence indicating the necessity for same. Her employer showed a willingness to extend her maternity leave to accommodate the plaintiff's inability to obtain daycare even after she changed positions. She suffered no further time off work following August 2014. Finally, she demonstrated the ability to perform her job duties in payroll to a high standard after the accident occurred.
- [138] As to the latter, I refer to the plaintiff's performance review from October 24, 2014. The bulk of the time under review was after her injury; not before. Her productivity and enthusiasm and performance are well documented in the report submitted by her counsel on her behalf.
- [139] The failure to mention her pain symptoms as the cause of her change in employment to her family doctor at the time the decision was taken, and never raising it with Drs. Cameron, Winston and Eardley, further supports my view that the plaintiff, only retrospectively, sees her accident symptoms as the primary cause of her change in job.
- [140] No functional capacity assessment was performed such that I could determine whether or not the plaintiff is incapacitated from the day-to-day work of a payroll clerk. The evidence of Ms. Torgenson, who currently works in the payroll department, but did not work with the plaintiff, establishes that it is primarily computer-related work entailing data entry. However, with the advent of stand-up desks, the entitlement to accommodations such as periodic rest breaks, and absent a functional capacity report, the view that such work is beyond the scope of the plaintiff's present ability is in my view unwarranted.
- [141] I accept that the impairments to her neck and shoulders have restricted her recreational activities and, in some measure, her ability to maintain her household. Similarly, I accept her complaints that her ability to breast-feed Kingston was impaired by the pain she was suffering as a result of the accident.
- [142] It is in that light that I go on to assess her general damages and to consider her claim for economic loss and future care.

General Damages

- [143] The assessment of non-pecuniary/general damages is informed by the Court of Appeal decision in *Stapley v. Hejslet*, 2006 BCCA 34 [Stapley]. Stapley sets out the non-exhaustive factors to be considered in making a determination with respect to an award for pain and suffering. Those factors include:

Age of the plaintiff;

nature of the injury;

severity and duration of pain;

disability;

emotional suffering; and

loss or impairment of life.

[144] I have detailed above what I consider the extent of the plaintiff's injuries. I accept that they are ongoing and unlikely to change from those she described to Dr. Cameron. They impact the more strenuous aspects of her recreational life and, to some extent, impact her capacity to do heavier domestic chores.

[145] Given her youth, she will experience the symptoms over a long period. The pain, as described to Dr. Cameron and Dr. Dodo, is for the most part controlled by over-the-counter analgesics. Other modalities of treatment are available but, as yet, untried by the plaintiff.

[146] I accept she will periodically obtain relief from passive treatment and allow for the inconvenience that will result in the future.

[147] I do not attribute any of the psychological impairment described by Drs. Dodo or Cameron to the accident. Nor do I accept that her jaw clenching problem is causally related to the accident.

[148] I assess her condition as chronic pain that mildly impacts function at the outer extremes of physical activity. Primarily, this has impacted her social and recreational pursuits.

[149] In *Woelders v. Gaudette*, 2016 BCSC 1066 [Woelders], a 31-year-old plaintiff suffered injuries of similar scope and duration as I have determined Ms. Smith has endured. The award in *Woelders* was \$85,000.

[150] In *Hollows v. Wood*, 2013 BCSC 1991, a 36-year-old plaintiff sustained like physical injuries with the additional feature of depression, which is not the case here. The plaintiff was awarded \$90,000.

[151] In my view, the authorities relied upon by the defendant are not sufficiently close to the findings I have made to warrant consideration in the assessment of a proper award.

[152] Given the absence of any psychological issues related to the accident and ongoing physical complaints of headache and neck and shoulder pain, I find the loss suffered by Ms. Smith to be similar to that of the plaintiff in *Woelders*. I award \$85,000 for non-pecuniary loss.

Past Economic Loss

- [153] Compensation for past loss of earning capacity is based upon what the plaintiff would have, not could have, earned but for the injuries for which the defendants are liable: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141, at para. 28. Pursuant to s. 98 of the Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231, the plaintiff is only entitled to recover damages for their net past income loss. Hence, in determining the loss suffered, I am obliged to determine the net loss of income after an allowance for income tax.
- [154] An assessment of both past and future loss of earning capacity involves consideration of hypothetical events, not actual events.
- [155] The plaintiff must demonstrate the hypothetical possibility of lost income, either past or prospective, is a real and substantial possibility and not mere speculation: *Athey v. Leonati*, [1996] 3 S.C.R. 458, at para. 27.
- [156] Here the plaintiff must establish that the injuries she sustained caused an impairment of earning capacity. Once established, the Court is required to assess the plaintiff's loss.
- [157] Here the plaintiff argues that but for the accident, she would have carried on as a payroll clerk working full time for the schoolboard. Instead, she switched jobs to work in the library resulting in a loss of hours and layoffs during periods when schools were closed.
- [158] With respect, I disagree.
- [159] For the reasons listed above, I find the plaintiff has failed to establish that her change in positions within School Board 69 was as a result of her medical condition.
- [160] Her assertion she could not reasonably carry on is not borne out by the totality of the available information, including her continuation in her payroll job until the commencement of maternity leave; her demonstrated high performance within the job; the paucity of medical treatment from August 2014 until she decided to resign; her failure to consult with or notify her treating physician about her job change; her failure to seek out accommodations at her workplace; and her self-report to her supervisors on two separate occasions that the resignation and delayed return were as a result of child care issues.
- [161] Thus, I conclude her loss of income from the accident date until trial is, subject to deduction for tax, the amount set out on the earlier referenced CL-19; \$546.56.

Future Economic Loss/Loss of Capacity

- [162] In *Rosvold v. Dunlop*, 2001 BCCA 1, the Court of Appeal described the task of the trial judge as follows:

[10] The trial judge's task is to assess the loss on a judgmental basis, taking into consideration all the relevant factors arising from the evidence: *Mazzuca v. Alexakis*, [1994] B.C.J. No. 2128 (S.C.) at para. 121, *aff'd* [1997] B.C.J. No. 2178 (C.A.). Guidance as to what factors may be relevant can be found in *Parypa v. Wickware*, *supra*, at para. 31; *Kwei v. Boisclair* (1991), 60 B.C.L.R. (2d) 126 (C.A.); and *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 (S.C.) per Finch J. They include:

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

[11] The task of the court is to assess damages, not to calculate them according to some mathematical formula: *Mulholland (Guardian ad litem of) v. Riley Estate* (1995), 12 B.C.L.R. (3d) 248 (C.A.). Once impairment of a plaintiff's earning capacity as a capital asset has been established, that impairment must be valued. The valuation may involve a comparison of the likely future of the plaintiff if the accident had not happened with the plaintiff's likely future after the accident has happened. As a starting point, a trial judge may determine the present value of the difference between the amounts earned under those two scenarios. But if this is done, it is not to be the end of the inquiry: *Ryder (Guardian ad litem of) v. Jubbal*, [1995] B.C.J. No. 644 (C.A.) (Q.L.); *Parypa v. Wickware*, *supra*. The overall fairness and reasonableness of the award must be considered taking into account all the evidence.

[163] In *Perren v. Lalari*, 2010 BCCA 140, Garson J.A. stated the following:

[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.

- [164] In *Kim v. Morier*, 2014 BCCA 63, at para. 8, the Court of Appeal noted it was insufficient to show that the plaintiff "may" be less capable in certain aspects of his or her employment as the word may is essentially speculative and does not equate to a finding of a real possibility. Further, the plaintiff's own perception of limitations on his or her ability should not be equated to the loss of the capital asset.
- [165] In *Tisalona v. Easton*, 2015 BCSC 565, at paras. 102-105, aff'd 2017 BCCA 272, Madam Justice Wedge found that the plaintiff had failed to prove a real and substantial possibility of a future event leading to income loss. She considered: the plaintiff's failure to lead evidence that the accident-related injuries interfered with her ability to perform her job duties; consistent salaries in the years following the accident; positive performance reviews from her supervisor; that the plaintiff had not sought and received accommodations following the accident; and the absence of a functional capacity evaluation to establish whether certain occupations were foreclosed to the plaintiff. Similar considerations apply in the case at bar.
- [166] For the same reasons I have determined the plaintiff has not proven any economic loss beyond the days missed in August 2014, I conclude she has not proved a substantial possibility that her income-earning capacity has been diminished prospectively.
- [167] While there may be jobs for which the plaintiff is ill suited as a result of her lingering complaints, those vocations are not, on the evidence before me, occupations that she would have pursued in any event but for the accident.

Special Damages

- [168] Special damages are claimed in the amount of \$20,000. The defendant acknowledges \$12,216.59 has been proven but objects to the inclusion of housekeeping expenses for the period from December 2015 to January 2018 where no receipts were produced. Such accounts for \$4,851 of the difference between the amount claimed and the defendants' position.
- [169] The defendants argue that without receipts or evidence of payment, the amount is unwarranted. They submit \$14,000 would fairly compensate the plaintiff for her proven out-of-pocket expenses, as well as expenses the plaintiff may reasonably have incurred but where receipts were not provided.
- [170] The bulk of the remaining difference is comprised of payments for yard work to Just the Two of Us. While the total amount paid is in excess of \$12,000, the plaintiff seeks one half of that given Mr. Smith would have performed some of the work absent his accident and the resultant injuries that precluded his further involvement in yard work.
- [171] I note Just the Two of Us was not engaged until after Mr. Smith's injury. No landscaping or yard work costs were claimed from before his injury.

[172] While I accept the plaintiff may have incurred some housekeeping expense for which receipts were not provided, it is the plaintiff's obligation to prove the expense was incurred. The failure of the service provider to provide receipts did not preclude the plaintiff from requiring the principal of Habitat Natural to attend trial to prove the expense. Further, there is the legitimate observation that some housekeeping would likely follow the birth of Kingston upon the plaintiff's return to work, regardless of the accident and its consequences.

[173] In the result, I find the defendants' suggested compromise of \$14,000 a fair reflection of the plaintiff's special damages and accordingly I award that sum.

Cost of Future Care

[174] Claims for cost of future care need to be medically justified and reasonable: *Milina v. Bartsch*, (1985) 49 B.C.L.R. (2d) 33 (S.C.) [Milina], at para. 211.

[175] Recently, in *Gao v. Dietrich*, 2018 BCCA 372, Justice Savage summarized the applicable principles governing the determination of future care costs:

68 An award for damages for cost of future care is based on the principle of restitution. In *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229 (S.C.C.) at 241-242, Dickson J., as he then was, explained the purpose of an award for cost of future care:

In theory a claim for the cost of future care is a pecuniary claim for the amount which may reasonably be expected to be expended in putting the injured party in a position where he would have been in had he not sustained the injury. Obviously a plaintiff who has been gravely and permanently impaired can never be put in the position he would have been in if the tort had not been committed. To this extent, "restitutio in integrum" is not possible. Money is a barren substitute for health and personal happiness but to the extent, within reason, that money can be used to sustain or improve the mental or physical health of the injured person it may properly form part of the claim.

69 An award for cost of future care is based on what is reasonably necessary, on medical evidence, to promote the mental and physical health of the claimant: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (B.C. S.C.) at 78, aff'd (1987), 49 B.C.L.R. (2d) 99 (B.C. C.A.); *Aberdeen v. Langley (Township)*, 2008 BCCA 420 (B.C. C.A.) at para. 41; *Gignac v. Rozylo*, 2012 BCCA 351 (B.C. C.A.) at para. 30. An award for future care must (1) have medical justification, and (2) be reasonable: *Milina* at 84; *Aberdeen* at para. 42.

70 In *Gregory v. Insurance Corp. of British Columbia*, 2011 BCCA 144 (B.C. C.A.), this Court clarified that the medical necessity of future care costs may be established by a health care professional other than a physician, such as an occupational therapist, if there is a link between a physician's assessment of pain, disability, and recommended treatment, and the health care professional's recommended care item (at para. 39).

- [176] It is not necessary for a physician to provide opinion on the medical necessity of the future care items claimed, but there must be an evidentiary basis for the connection: *Warick v. Diwell*, 2017 BCSC 68, at para. 206.
- [177] Damages representing the costs of future care are assessed, not mathematically calculated: *Uhrovic v. Masjhuri*, 2008 BCCA 462, at paras. 28-31.
- [178] There is an inherent degree of uncertainty and discretion in making such awards. Because awards are made "once and for all" at the time of trial, judges must "peer into the future" and fix the damages "as best they can". This includes allowing contingencies for the possibility that the future may differ from what the evidence at trial indicates: *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9, at para. 21.
- [179] The plaintiff seeks \$75,000 to provide funds for ongoing housekeeping service, medications and patches (\$780 annually according to the plaintiff), massage and physiotherapy.
- [180] With respect, neither Drs. Cameron nor Dodo endorse the need for continued passive treatment in the form of massage or physiotherapy. Dr. Winston emphatically rejected the need for such treatment.
- [181] I consider the findings I made regarding the plaintiff's ongoing treatment and the reasonableness of treating same with analgesics together with the use of pain patches as providing the necessary evidentiary foundation to provide an allowance for ongoing use of those modalities of treatment together with a contingency for exploration of the use of prescriptive medication to cover the more aggressive headaches. I include the potential use of botulinum toxin (Bo-tox) as noted in the report of Dr. Cameron.
- [182] Recognizing this is an assessment and not a mathematical calculation given the uncertainty as to the period over which the plaintiff will require ongoing medication, particularly pain patches, I assess the cost of future care, other than housekeeping, at \$10,000.
- [183] As to housekeeping, the plaintiff, based on the findings I have made as to the extent of her physical impairment, will require some additional housekeeping services beyond what might otherwise have been reasonably anticipated given the situation of two working parents with two young children and a sizeable home to maintain.
- [184] I assess the loss at \$12,500 to provide periodic assistance with heavier housecleaning chores.

Summary of Damages

[185] I award the plaintiff the following damages:

Non-Pecuniary Damages:

\$85,000

Past Economic Loss:

\$546.56

Special Damages:

\$14,000

Cost of Future Care:

\$22,500

Total:

\$122,046.56

[186] The plaintiff is also entitled to interest in accordance with the Court Order Interest Act, R.S.B.C. 1996, c. 79.

Costs

[187] Unless there have been offers that might affect the entitlement to costs, the plaintiff is entitled to her costs of this proceeding at Scale B.

"Harvey J."

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