

CANADA / JUDGMENT

St Denis v. Turner

2020 BCSC 603

COURT

Supreme Court of British Columbia

DECIDED

21 April 2020

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

St Denis v. Turner,

2020 BCSC 603

Date: 20200421

Docket: M185362

Registry: New Westminster

Between:

Mary St Denis

Plaintiff

And

Ryan James Turner

Defendant

Before: The Honourable Mr. Justice Funt

Reasons for Judgment

Counsel for the Plaintiff:

D. Sliman

S.S. Sohi

P. Padda, Articled Student

Counsel for the Defendant:

M.G. Carter

C.E. Cassidy

Place and Dates of Trial:

New Westminster, B.C.

June 17-28, August 12 and 16, 2019

Place and Date of Judgment:

New Westminster, B.C.

April 21, 2020

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1. introduction

[1] In this motor vehicle action, the plaintiff seeks damages for a November 27, 2015 accident (the "Accident") for which she says the defendant caused and was wholly at fault.

[2] Liability and quantum are both in dispute.

[3] The plaintiff says that as a result of the Accident, she suffered various injuries including injuries to her head, neck, shoulders, left arm, left thumb, sternum, back, and left buttock. She also says she has tinnitus, cognitive difficulties, and emotional upset.

[4] The plaintiff seeks the following damages:

a) non-pecuniary:

\$200,000

b) past loss of earning capacity:

\$77,000

c) future loss of earning capacity:

\$800,000

d) future care:

\$24,000

e) housekeeping and yard maintenance:

\$21,000

f) special damages:

\$5,342

Total:

\$1,127,342

[5] For the reasons that follow, I find that the plaintiff's total damages are:

a) non-pecuniary:

\$200,000

b) past loss of earning capacity:

\$60,375

c) future loss of earning capacity:

\$155,250

d) future care:

\$21,200

e) housekeeping and yard maintenance:

\$0

f) special damages:

\$3,374

Total:

\$440,199

[6] I also find that the plaintiff and the defendant were contributorily negligent, 40% and 60% respectively. Accordingly, the plaintiff is awarded \$264,120.

2. background

[7] The plaintiff was 59 years old at the time of trial. She lives with her husband, Steven St Denis, on a 5 acre property in Langley, BC.

[8] The plaintiff is the eighth oldest child of seventeen children. After finishing Grade 8, she left school to help her mother with the care of her younger siblings.

[9] The plaintiff obtained a fitness instructor certificate when she was 19. She worked full-time for the YMCA and then at another gymnasium teaching pre-school gymnastics. She also worked for some time as a dietary aid at a care facility.

[10] When the plaintiff was 25 years old, she met her husband at a ski hill. They married three weeks later. Their first child was born the following year. They have enjoyed a happy and good marriage.

- [11] The plaintiff and her husband have four adult children, three sons and one daughter. The three sons, David, Adam, and Paul, two of whom are married, live in independent suites or in a coach house on the 5 acre Langley property with their children. The daughter, Arlene Walker, resides with her husband in Surrey.
- [12] The plaintiff and her husband are equal shareholders in Woodcraft Concrete Forming Ltd. and Premium Woodcraft Homes Ltd. These corporations undertake the businesses their names describe. The plaintiff was the bookkeeper for each of these corporations and undertook the day-to-day administrative tasks for each corporation. In recent years, Woodcraft Concrete Forming Ltd. has become relatively inactive.
- [13] The plaintiff's three sons each work for the two corporations in their building and construction activities.
- [14] At the time of the Accident, Arlene was working at a retail store. She took a two-month leave of absence in order to help her mother generally and specifically with administrative duties. She then returned to her employer. Approximately nine months before trial, the plaintiff's daughter started to work for her parents' corporations with the goal of assuming the plaintiff's duties, many of which had been assumed by the plaintiff's husband. During these months, Arlene has assumed many of the administrative tasks and the plaintiff has been familiarizing her with the keeping of the corporations' books. Arlene consults her father when she does not understand a particular matter. She describes the plaintiff as losing "track of thoughts" and with her "brain not retaining".
- [15] The plaintiff testified that she also dealt with the corporations' customers, helped find customers, and was involved with interior design aspects. She says her compensation for these tasks was "sweat equity". She and her husband wished to keep funds within the corporations to acquire equipment and reduce related financing costs.
- [16] The plaintiff was also involved in multi-level marketing selling health products for Usana Nutrition Inc. ("Usana"). She would host food classes in her home as part of a natural wellness approach to life, consistent with her multi-level marketing. Shortly before the Accident, the plaintiff says she became involved with another multi-level marketing company, Jeunesse Global Holdings LLC. ("Jeunesse"). As part of her Jeunesse activities, the plaintiff, with two women from China, had planned to distribute Jeunesse's products in China. Before the Accident, the plaintiff had also planned to travel to China to help establish the business there. As a result of the Accident, the plaintiff did not go to China and the venture was abandoned.
- [17] The plaintiff testified that, before the Accident, she earned in the range of \$500 to \$700 per month from her multi-level marketing activities. In examination-in-chief, she testified that she did not report this income for income tax purposes.
- [18] The parties have agreed that the plaintiff's income tax returns show the plaintiff as reporting the following income:

Year

Total Earnings (T4)

EI earnings

Taxable Capital gains

Taxable Dividends (Actual)

Interest and Investment Income

Total Income

2010

\$18,000.00

\$5,343.00

\$23,343.00

2011

\$18,000.00

\$18,000.00

2012

\$13,500.00

\$13,500.00

2013

\$ 7,500.00

\$7,500.00

2014

\$19,500.00

\$24,780.00

\$113.00

\$44,393.00

2015

\$34,000.00

\$22,420.00

\$56,420.00

2016

\$79,560.00

\$768.50

\$80,328.50

2017

\$2,169.93

\$58,500.00

\$60,669.93

2018

\$17.00

\$69,600.00

\$ 26.89

\$69,643.89

3. proof

[19] In *F.H. v. McDougall*, 2008 SCC 53, Justice Rothstein, writing for the Supreme Court of Canada, stated that "evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test" (para. 46).

4. the accident

a) The Scene

[20] The Accident occurred at around 4 p.m. on November 27, 2015 at the intersection at 200th Street and 62 Avenue in Surrey, BC. The intersection is not controlled by traffic lights. The plaintiff was driving a mid-size car and the defendant was driving a 4-door hatchback sedan, battery-powered car. The weather was unremarkable and it was still light.

[21] An overview photo of the intersection is attached as Schedule "A".

[22] The intersection is designed to facilitate left turns to 62 Avenue by southbound 200th Street drivers who must cross the three northbound lanes of 200th Street. 62 Avenue leads to a shopping mall. There is no crosswalk at the intersection across the three northbound lanes.

[23] At the time of the Accident, the plaintiff was driving northbound on 200th Street in the curb lane as she approached 62 Avenue.

[24] Prior to the Accident, the defendant had been driving southbound on 200th Street and was in the process of completing a left turn onto 62 Avenue to travel east.

[25] The parties, in an agreed statement of facts, have agreed:

There are three through lanes of travel northbound and traffic was stopped in the left and middle lanes. At the time of the collision, the Plaintiff was travelling in the curb lane. The Defendant proceeded across the two northbound lanes and the collision between the Plaintiff and the Defendant occurred in the curb lane.

[26] The posted speed limit was 60 km/h. There was no evidence that the plaintiff was exceeding the speed limit before the Accident. The plaintiff was familiar with the intersection.

[27] The plaintiff testified that her last memory prior to the Accident was changing from the middle lane into the curb lane (northbound on 200th Street). As a result of the Accident, the plaintiff lost consciousness for a brief period.

[28] The collision occurred with the plaintiff's car at speed. It was a "T-bone" collision. The plaintiff's car suffered extensive damage across its front end, losing its front bumper and grill. Damage extended into the engine area. The plaintiff's driver's side airbag deployed. The passenger's side of the defendant's car was significantly damaged in the area of the side doors. Airbags in the defendant's car also deployed. The plaintiff's car and the defendant's car were both write-offs.

[29] There was no evidence that the plaintiff's car's right turn signal was activated as it travelled northbound in the curb lane approaching 62 Avenue.

b) Witnesses

[30] Mr. J. Pettalano, Mr. D. Smith, and Mr. J. Shepherd were each unrelated witnesses to the Accident.

i. Mr. J. Pettalano

[31] Mr. J. Pettalano was driving his car northbound on 200th Street in the curb lane behind the plaintiff's car with one car between them. He testified that the left and middle northbound lanes were backed-up to the south from the 200th Street and 62 Avenue intersection with certainly more than several vehicles in each lane. Mr. Pettalano had entered the curb lane near Highway 10 some distance from the intersection. He testified that the plaintiff had entered the curb lane shortly before he had.

[32] Mr. Pettalano did not see the Accident at the actual moment of collision. He testified that the speed of the traffic in the northbound curb lane was "slightly under" the 60 km/h posted speed limit. He testified that the plaintiff did not slow down as she approached the intersection. Mr. Pettalano also testified that he saw the first six to eight inches of the bumper of the defendant's car as he approached the intersection. He acquiesced to defendant's counsel's description that the defendant was "nosing" into the northbound curb

lane "4 to 5 seconds" prior to the Accident.

ii. Mr. D. Smith

- [33] Mr. D. Smith had a better view of the Accident than Mr. Pettalano. Mr. Smith had been driving southbound on 200th Street and was planning to turn left onto 62 Avenue. He was in the car immediately behind the defendant's car. Mr. Smith had stopped in the pull-off lane for a left-hand turn as he waited for the defendant to make his turn onto 62 Avenue by crossing the three northbound lanes of 200th Street. Mr. Smith was talking on a hands-free device to his employer.
- [34] Mr. Smith testified that the left and the middle northbound lanes of 200th Street were "backed-up" with a "gap" left for cars turning left to 62 Avenue from the southbound pull-off lane of 200th Street.
- [35] Mr. Smith had an unobstructed view of the defendant's car. Mr. Smith testified that the speed of the defendant's car in the first two lanes (the left and middle northbound lanes of 200th Street) was the same as the speed in the third lane (the northbound curb lane).
- [36] Mr. Smith testified that the defendant did not stop in the middle northbound lane as he made his left turn to 62 Avenue. Mr. Smith testified that the defendant did not "stop and creep and look over", but travelled at "8 to 10 km/h" as he crossed the left and middle northbound lanes of 200th Street into the northbound curb lane.
- [37] Mr. Smith saw the plaintiff's car only briefly, starting three or four meters before impact.

iii. Mr. J. Shepherd

- [38] Mr. J. Shepherd testified that the car he was driving was stopped in the middle northbound lane of 200th Street behind one car stopped just before the 200th Street and 62 Avenue intersection. He testified that there were no vehicles stopped behind his car.
- [39] Mr. Shepherd testified that he saw the plaintiff's car in his rear view mirror approach his car in the middle northbound lane, move into the northbound curb lane approximately two car lengths behind him, and then proceed to the 200th Street and 62 Avenue intersection at speed and without braking. He testified that it was difficult for him to see the defendant's car but he saw it "slowly proceed" across the left and middle northbound lanes of 200th Street and then accelerate into the northbound curb lane to 5 to 10 km/h.

iv. The Defendant

- [40] The defendant testified that the traffic south of 62 Avenue in the left and middle northbound lanes of 200th Street was bumper to bumper with five to seven cars in the middle lane.
- [41] The defendant testified that he did not see the plaintiff's car before the Accident. He knew that 200th Street and 62 Avenue was a dangerous intersection.

[42] The defendant testified that he travelled across the left and middle northbound lanes of 200th Street with the drivers of the cars in each lane stopped before the gap waving him through. He said that in the middle lane he was travelling at 2 to 3 km/h and that he then accelerated to 10 to 15 km/h prior to impact. He noted that, unlike a car powered by an internal combustion engine, an electric vehicle has "zero lag" when the "gas pedal" is pressed. He acknowledged that the gist of what he told the police after the Accident was:

That I had two cars wave me through and that I went and then I got hit.

5. findings

[43] I find that the defendant did not stop in the middle northbound lane to determine whether there was a vehicle in the northbound curb lane approaching the intersection. I find that, while "waved on", he maintained a slow speed (2 to 3 km/h) as he travelled across the middle northbound lane of 200th Street and then accelerated quickly into the northbound curb lane as he attempted to complete his left turn onto 62 Avenue. I find that he did not "nose" or "inch" in the middle lane or into curb lane.

[44] I find that the middle northbound lane of 200th Street was backed-up south of 62 Avenue for at least five to seven cars consistent with the testimony of the defendant and Mr. Pettalano. I reject Mr. Shepherd's description that there were no vehicles behind his car. The testimony of the other witnesses supports my finding that there were a number of vehicles in the middle northbound lane behind Mr. Shepherd's car.

[45] I find that without a clear view of the northbound curb lane, the defendant accelerated quickly into the northbound curb lane. He did not see the plaintiff's car before impact.

[46] I find that the plaintiff's last memory prior to the Accident was changing from the middle lane into the curb lane. I find that the plaintiff entered, without braking, the intersection at speed which is so evident from the damage to her car. I find that she was travelling at or a little below the posted speed limit of 60 km/h. I also find, as described by Mr. Pettalano, that the plaintiff had been in the curb lane for some time. The plaintiff did not change lanes to the curb lane close to the intersection.

[47] With the stopped, congested traffic blocking her view, I find that the plaintiff did not see the defendant's car until an instant before impact. If she had seen the defendant's car moving at 2 to 3 km/h, without stopping, in the middle lane towards or into the curb lane, she would have braked.

[48] I find that if the plaintiff had slowed before entering the intersection in order to see the intersection, she would have seen the defendant's car as it moved towards and into her lane (the northbound curb lane), thereby enabling her to avoid the Accident.

6. The Law

[49] For the case at bar, ss. 144(1), 158 and 174 of the Motor Vehicle Act, R.S.B.C. 1996, c. 318 [MVA], provide the "rules of the road". The relevant portions of the provisions read:

144 (1) A person must not drive a motor vehicle on a highway

- (a) without due care and attention,
- (b) without reasonable consideration for other persons using the highway, or
- (c) at a speed that is excessive relative to the road, traffic, visibility or weather conditions.

158 (1) The driver of a vehicle must not cause or permit the vehicle to overtake and pass on the right of another vehicle, except ...

- (b) when on a laned roadway there is one or more than one unobstructed lane on the side of the roadway on which the driver is permitted to drive, or ...
- (2) Despite subsection (1), a driver of a vehicle must not cause the vehicle to overtake and pass another vehicle on the right
 - (a) when the movement cannot be made safely, or

...

174 When a vehicle is in an intersection and its driver intends to turn left, the driver must yield the right of way to traffic approaching from the opposite direction that is in the intersection or so close as to constitute an immediate hazard, but having yielded and given a signal as required by sections 171 and 172, the driver may turn the vehicle to the left, and traffic approaching the intersection from the opposite direction must yield the right of way to the vehicle making the left turn.

[50] In *Salaam v. Abramovich*, 2010 BCCA 212, Justice Groberman, writing for our Court of Appeal, stated:

[21] In the end, a court must determine whether, and to what extent, each of the players in an accident met their common law duties of care to other users of the road. In making that determination, a court will be informed by the rules of the road, but those rules do not eliminate the need to consider the reasonableness of the actions of the parties. This is both because the rules of the road cannot comprehensively cover all possible scenarios, and because users of the road are expected to exercise reasonable care, even when others have failed to respect their right of way. While s. 175 of the Motor Vehicle Act and other rules of the road are important in determining whether the standard of care was met, they are not the exclusive measures of that standard.

[51] In *Walker v. Brownlee*, [1952] 2 D.L.R. 450 (S.C.C.), Justice Cartwright and Justice Locke stated (at 461):

While the decision of every motor vehicle collision case must depend on its particular facts, I am of opinion that when A, the driver in the servient position, proceeds through an intersection in complete disregard of his statutory duty to yield the right-of-way and a collision results, if he seeks to cast any portion of the blame upon B, the driver having the right-of-way, A must establish that after B became aware, or by the exercise of reasonable care should have become aware of A's disregard of the law B had in fact a sufficient opportunity to avoid the accident of which a reasonably careful and skilful driver would have availed himself; and I do not think that in such circumstances any doubts should be resolved in favour of A, whose unlawful conduct was fons et origo mali.

[Emphasis added.]

[52] In *Pacheco (Guardian ad litem) v. Robinson* (1993), 75 B.C.L.R. (2d) 273 (C.A.), our Court of Appeal stated:

[10] A defendant who wishes to make a left hand turn in an intersection has an obligation to yield to on-coming traffic which is in the intersection under the provision of s. 176 of the Motor Vehicle Act.

[11] The plaintiff was not bound to guard against every conceivable eventuality but only against such eventualities as a reasonable person ought to have foreseen as being within the ordinary range of human experience. The plaintiff was entitled to proceed on the assumption that all other vehicles will do what it is their duty to do, namely observe the rules regulating traffic.

And further,

[15] In my opinion, a driver who wishes to make a left hand turn at an intersection has an obligation not to proceed unless it can be done safely. Where each party's vision of the other is blocked by traffic, the dominant driver who is proceeding through the intersection is generally entitled to continue and the servient left-turning driver must yield the right of way. The existence of a left-turning vehicle does not raise a presumption that something unexpected might happen and cast a duty on the dominant driver to take extra care. Where the defendant, as here, has totally failed to determine whether a turn can be made safely, the defendant should be held 100 percent at fault for a collision which occurs.

[53] The plaintiff emphasized the foregoing passages from *Pacheco* in support of her submission that the defendant should be found wholly at fault. Similarly, she relied on *Hinder v. Yellow Cab Co.*, 2015 BCSC 2069 which applied *Pacheco* in a factual situation where there were lanes of congested traffic to the left of the plaintiff as the plaintiff approached an uncontrolled intersection in which the defendant was attempting a left-hand turn. Relying on *Pacheco* and related authorities, the Court found the defendant to be wholly at fault.

[54] In *Pacheco*, I note that the Court of Appeal also stated:

[23] Counsel for the respondent relied upon the decision of the Ontario Court of Appeal in *Nash v. Sullivan* (1973), 39 D.L.R. 501 and on a passage in that judgment on page 502 in which the court held that a plaintiff who was proceeding along a through street along a curb lane on a motorcycle past a line of vehicles to his left which were stopped and which obscured his view of the defendant was not entitled to an absolute right-of-way. The court held that he was contributorily negligent when he collided with the defendant who was turning left across his path. The court held that the plaintiff had a duty to exercise care in the circumstances and was negligent in failing to slow his motorcycle and in failing to keep a proper lookout when he saw, or should have seen, that the cars in the line of traffic to his left had stopped to allow the defendant to make a left hand turn. In my opinion, that case is distinguishable on its facts from the case under appeal. There was no indication here that traffic on the left hand side of the plaintiff had stopped so that the plaintiff should have been alerted to a situation of potential danger.

[Emphasis added.]

- [55] In *Pacheco*, the intersection was controlled by traffic lights. The plaintiff was riding his bicycle when the defendant, while making a left-hand turn in her car, collided with the plaintiff. There was no evidence of a situation of potential danger such as congested traffic which would have blocked the plaintiff's full view of the intersection. The plaintiff's view was blocked only after he had "almost reached" the intersection when a car overtook him on his left side.
- [56] In my view, the issue becomes whether a driver approaching an uncontrolled intersection is entitled to proceed into it at the posted speed limit where the driver's view is blocked by stopped, congested traffic in the two lanes to his or her left. What constitutes the "exercise of reasonable care"? Should the driver, when approaching an uncontrolled intersection, with his or her view blocked by stopped, congested traffic, slow down, possibly to a crawl, to ensure that a left turning driver is not executing a left turn in "disregard of the law"?
- [57] Sections 144(1), 158 and 174 of the MVA, when married to the common law, should operate to reduce motor vehicle accidents and the associated financial and personal costs.
- [58] I find that Justice Cartwright's and Justice Locke's phrase "by the exercise of reasonable care should have become aware of the [defendant's] disregard of the law" in *Walker* required the plaintiff to slow down until she had a clear view of the intersection.
- [59] I am bound, in my view, and fittingly so, by *Walker*. I do not read *Pacheco* as inconsistent with *Walker*. In *Pacheco*, the Court of Appeal states at para. 15:

the dominant driver who is proceeding through the intersection is generally entitled to continue

[Emphasis added.]

- [60] The case at bar is one example of an exception to *Pacheco*'s general rule and is within *Walker*'s requirement to exercise reasonable care in the circumstances.

- [61] In *Wormald v. Chiarot*, 2016 BCCA 415, our Court of Appeal summarized succinctly contributory negligence. Justice Donald for the Court stated:
- [13] In *Bradley v. Bath*, 2010 BCCA 10, Tysoe J.A. adopted the following description of contributory negligence:
- [25] The concept of contributory negligence was described in John G. Fleming, *The Law of Torts*, 9th ed. (Sydney: LBC Information Services, 1998) at 302, as follows:

Contributory negligence is a plaintiff's failure to meet the standard of care to which he is required to conform for his own protection and which is a legally contributing cause, together with the defendant's default, in bringing about his injury

[Emphasis added by Donald J.A.]

- [14] The analysis for contributory negligence involves two considerations: (1) whether the plaintiff failed to take reasonable care in her own interests; and (2) if so, whether that failure was causally connected to the loss she sustained: *Enviro West Inc. v. Copper Mountain Mining Corporation*, 2012 BCCA 23 at para. 37.
- [15] To satisfy the requirement of a causal connection between the plaintiff's breach of the standard of care and the loss sustained, the defendant must establish more than that but for her negligence, the damage would have been avoided. The plaintiff's conduct must be a "proximate cause" of the loss in that the loss results from the type of risk to which the appellant exposed herself: *Bevilacqua v. Altenkirk*, 2004 BCSC 945 at paras. 39-43 (per Groberman J., as he then was). In other words, the plaintiff's carelessness must relate to the risk that made the actual harm which occurred foreseeable: *Cempel v. Harrison Hot Springs Hotel Ltd.* (1997), 43 B.C.L.R. (3d) 219, [1998] 6 W.W.R. 233 (C.A.) at para. 13.
- [62] In *Zaborniak v. Smerdal*, 2014 BCSC 1367, I found the dominant driver to be 40% contributorily negligent where her view of the intersection was blocked by a stationary bus on her left when she passed it on its right as she approached and entered the intersection.
- [63] It is not relevant whether the dominant driver's view as he or she approaches an intersection at speed is blocked by a stationary bus or congested traffic in lanes to his or her left. The exercise of reasonable care by the dominant driver is warranted. It may reasonably be expected that a servient driver may be attempting to make a left turn in disregard of the law. As stated in *Pacheco*, the dominant driver, should be "[alert] to a situation of potential danger". The plain fact is that the dominant driver cannot see the full intersection without slowing down, which the exercise of reasonable care requires.
- [64] In this case, both parties were negligent: the defendant breached s. 174 of the MVA and the plaintiff breached ss. 144(1)(c) and 158 of the MVA and each breached the common law duty to exercise reasonable care.

a) The Defendant's Breach

- [65] The defendant breached s. 174 of the MVA by turning left and not yielding to oncoming traffic that constituted an immediate hazard. With traffic blocking the defendant's view, he could not determine whether there was an immediate hazard.
- [66] I reject any suggestion by the defendant that he had a clear view of the northbound curb lane. If he had, he would not have pulled out in front of the plaintiff's vehicle. He also testified that he did not see the plaintiff's vehicle before impact.
- [67] Relying on the waves by facing drivers in the left and middle northbound lanes of 200th Street does not justify the defendant proceeding, let alone accelerating, into the northbound curb lane.
- [68] Before entering the intersection, the defendant should have waited for the northbound congested traffic to clear after the light at the intersection north of the subject intersection turned green. Mr. Smith stated that he monitored the light at the intersection to the north.
- [69] Without a clear view of the northbound curb lane of 200th Street, the defendant should not have attempted to enter or cross the intersection.

b) The Plaintiff's Breach

- [70] The plaintiff breached ss. 144(1)(c) and 158 of the MVA by entering the intersection at or slightly below the posted speed limit, without having a full view of the intersection, as a result of the stopped, congested traffic on her left.
- [71] Assuming that any left turning traffic will observe s. 174 of the MVA does not relieve the plaintiff of all fault. Stopped, congested traffic blocking a clear view of the intersection should alert the dominant driver of potential danger and requires the driver to exercise reasonable care. The plaintiff should have reduced her speed, possibly to a crawl, in order to proceed with caution.

7. contributory negligence

- [72] The Court apportions liability to the plaintiff and the defendant 40% and 60% respectively. Neither party had a full view of the intersection as a result of the 200th Street northbound traffic "stopped in the left and middle lanes". Neither party exercised reasonable care.
- [73] The Court apportions a greater degree of liability to the defendant because he had a clear obligation to yield (s. 174 uses the words "must yield"). The Court's apportionment accords with that in *Nerval v. Khehra*, 2012 BCCA 436 and *Zaborniak*, cases with similar, although not identical, facts.

8. injuries

- [74] As a result of the Accident, the plaintiff says she suffered the following injuries:

a) head injury (concussion or mild traumatic brain injury);

- b) neck injury consisting of some restriction in range of motion and pain;
- c) occasional tinnitus;
- d) occasional dizziness;
- e) anxiety, depression, cognitive difficulties, and emotional upset with a change in personality;
- f) cut to her left thumb;
- g) injury to her shoulders (high);
- h) injury to her left arm;
- i) bruising and soreness to her sternum;
- j) back injury; and
- k) injury to her left buttock and leg.

[75] With respect to the cut to the plaintiff's left thumb, it resolved with treatment and time. There is no ongoing deficit.

[76] With respect to the injuries listed as g) to j) above, these have also resolved without ongoing deficit.

[77] With respect to the left buttock injury, the defendant argued that the injury was pre-existing and related to a trampoline accident some 30 years ago.

[78] Similarly, the defendant argued that some of the other injuries (neck, shoulders, and lower back) were caused by a 2009 motor vehicle accident.

[79] Prior to the Accident, the plaintiff was exceptionally physically active. She skied at an expert level. She undertook long mountain hikes. She would sea kayak with her husband from White Rock to Crescent Beach and they would occasionally undertake much longer journeys. She was an avid walker and bowled regularly. She also helped crew a racing yacht her husband had acquired. With these activities, I find that the plaintiff had no injuries that affected her physically in any meaningful manner prior to the Accident.

[80] The plaintiff's most significant injury is her head and brain injury. She lost consciousness for at least a brief period as a result of the Accident. She had a large bruise to her left forehead consistent with a significant hit leading to a concussion. The various medical experts agreed that the plaintiff suffered a concussion (mild traumatic brain injury). She had no previous history of brain injury or mental difficulties.

[81] As a result of the Accident, the plaintiff has suffered an ongoing and permanent personality change and cognitive difficulties. She has gone from having a dynamic and outward personality to an inward personality with occasional suicidal thoughts.

- [82] The plaintiff's relationships with her circle of friends, her family and, in particular, her husband of 34 years have been adversely affected. For her husband, a relationship of fun and love has become one of worry and love.
- [83] The plaintiff is often anxious or depressed. She finds that she will lose her train of thought in mid-sentence. She is not able to undertake a job, such as bookkeeping, which requires multitasking or the co-ordination and collection of information with efficiency. She has lost the necessary ability to focus.
- [84] I found the plaintiff on the whole to be credible and reliable in the description of her injuries. Her testimony was in "harmony with the preponderance of probabilities": *Faryna v. Chorny* (1951), [1952] 2 D.L.R. 354 (C.A.) at 356-357. With respect to financial matters, I had reservations as to the plaintiff's credibility and reliability in that her testimony had a speculative element and, accordingly, I required independent evidence to support findings regarding particular financial aspects the plaintiff sought.
- [85] In making my findings as to the plaintiff's brain injury I have accepted, after extra scrutiny, the observations of her family (her husband and her daughter) and her friend (Ms. Doni Gerain). Her husband has seen the plaintiff the most and in various situations. I found him to be a credible and reliable witness.
- [86] In *Leach v. Jessen*, 2017 BCSC 577, I noted that the testimony of a party or interested persons should not be disregarded or unduly discounted simply on the ground that the person is a party or has a personal or financial relationship with a party.
- [87] However, a close relationship to a party to an action is a relevant factor to be considered. In *R. v. Laboucan*, 2010 SCC 12, the Supreme Court of Canada stated:
- [11] The fact that a witness has an interest in the outcome of the proceedings is, as a matter of common sense, a relevant factor, among others, to take into account when assessing the credibility of the witness's testimony. A trier of fact, however, should not place undue weight on the status of a person in the proceedings as a factor going to credibility. For example, it would be improper to base a finding of credibility regarding a parent's or a spouse's testimony solely on the basis of the witness's relationship to the complainant or to the accused. Regard should be given to all relevant factors in assessing credibility.
- [88] Historically, as I noted in *Leach*, the parties and interested persons were prohibited from testifying in the common law courts. Professor J.H. Baker in *An Introduction to English Legal History*, 5th ed. (Oxford: Oxford University Press, 2019) states, at 99 (updated since *Leach*):

Another major procedural reform of the 1850s concerned the admission of evidence. At common law (though not in equity) the testimony of the parties and interested persons had been excluded, on the grounds of bias, and this frequently made it impossible to prove a just cause of action or defence. Bentham scathingly attacked the rule as shutting out the evidence of the only people likely to know anything relevant, and it was ridiculed by Dickens. The complaints were heard. In

1843 persons with an interest, and in 1851 the parties themselves, were enabled by statute to be competent witnesses.

[Footnotes omitted.]

[89] Baker's references to 1843 and 1851 are to Lord Denman's Act 1843, 6 & 7 Vict., c. 85 and Lord Brougham's Evidence Act 1851, 14 & 15 Vict., c. 99 respectively.

[90] The preamble to Lord Denman's Act ("An Act for Improving the Law of Evidence") reads:

WHEREAS the Inquiry after Truth in Courts of Justice is often obstructed by Incapacities created by the present Law, and it is desirable that full Information as to the Facts in Issue, both in Criminal and in Civil Cases, should be laid before the Persons who are appointed to decide upon them, and that such Persons should exercise their Judgment on the Credit of the Witnesses adduced and on the Truth of their Testimony.

[91] In considering a soft tissue injury (a whiplash), in *Butler v. Blaylock Estate*, [1981] B.C.J. No. 31 (S.C.), Chief Justice McEachern observed:

[18] I am not stating any new principles when I say that 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 extending beyond the normal or usual recovery period.

[19] An injured person is entitled to be fully and properly compensated for any injury or disability caused by a wrongdoer. But no one can expect his fellow citizen or citizens to compensate him in the absence of convincing evidence - which could be just his own evidence if the surrounding circumstances are consistent - that his complaints of pain are true reflections of a continuing injury.

[92] A plaintiff does not need to show objective evidence of continuing injury in order to recover damages: *Butler v. Blaylock Estate*, [1983] B.C.J. No. 1490 (C.A.).

[93] With respect to claims of soft tissue injuries, in some cases, a plaintiff's exaggeration or fraud has been exposed by video surveillance undertaken by the defendant to the claim.

[94] Unlike a whiplash soft tissue injury, a permanent brain injury with cognitive impairment resulting in a change in personality is more difficult to exaggerate or imitate and comes with the cost of adversely affecting one's relationship with friends and family.

[95] I find that the plaintiff's brain injury is permanent. I find that the plaintiff is no longer capable of undertaking the tasks of a bookkeeper or that of finding, engaging, and helping clients wishing to construct a family home. The medical evidence supports the general experience that most concussions will resolve with time but some do not. I find, with the passage of over three years, that the plaintiff's brain injury (with cognitive impairment) is permanent. It falls outside the general experience.

[96] I also find that the plaintiff's anxiety, depression, and emotional upset are related to her brain injury. There are few thoughts worse than realizing that one is no longer the person one once was and without the mental abilities one once had.

[97] The expert medical opinion evidence is generally confirmatory of my foregoing findings that the plaintiff's brain injury is permanent and that the plaintiff's anxiety, depression, and emotional upset are related to her brain injury.

[98] Dr. H. Finlayson, physical medicine and rehabilitation, in her May 31, 2018 report, opined as follows (in part):

Based on my assessment of Ms. St Denis and the facts listed, it is my opinion she probably suffered the following injuries in the motor vehicle accident (MVA) of November 27, 2015:

1. Mild traumatic brain injury: Ms. St Denis' history is consistent with a diagnosis of mild traumatic brain injury (TBI). This is commonly referred to as a concussion,

Ms. St Denis sustained trauma to her head based on her reported history and the documentation in the records that there was a bump or abrasion on the left side of her head immediately after the MVA. She experienced a loss of consciousness and loss of memory around the time of the MVA. She reports that her last memory was driving along the road, and she has no memory of the collision itself. Her next memory was "coming to" in the car and she was disoriented. The history of a loss of consciousness and loss of memory is consistent with a mild TBI. The brief duration of altered consciousness and loss of memory classifies it as mild (rather than moderate or severe). Although the records of the ambulance crew and Langley Memorial Hospital do not document that she had a loss of consciousness, it is often the case that this is not clearly established, particularly when the person is slightly confused after the impact.

Ms. St Denis' symptoms following the MVA are typical of mild TBI. These include her symptoms of difficulty with concentration, feeling overwhelmed, headaches, dizziness, and ringing in the ears. Her development of symptoms of anxiety and depression is also typical of the common effects of mild TBI.

Ms. St Denis had no history of cognitive difficulties prior to the MVA. The mild TBI that she likely sustained in the MVA explains her symptoms that began after the MVA and that have persisted. As noted above, she also developed symptoms of low mood and anxiety after the MVA. These are probably at least partly a consequence of the mild TBI, and they also contribute to worsening of cognitive symptoms, such that a vicious cycle is created.

[99] Dr. H. Viljoen, neuropsychologist, in his March 8, 2019 report, opined as follows (in part):

In conclusion, therefore, Ms. St Denis is a woman who was at the prime of her life when she was injured in the index motor vehicle accident of November 27, 2015. She reported satisfying family and work experiences, as well as an active leisure lifestyle and social activities.

However, post-injury, Ms. St Denis has, despite evidence of improvement over time, experienced persisting limitations related to cognitive functioning that affects her work performance and efficiency, as well as resulting in increased stress related to concerns about errors as well as her experiences of a "drop-off" of her thoughts in mid-conversation, affecting social confidence. She also experiences ongoing issues related to activity tolerance/endurance, chronic pain, a non-restorative sleep pattern, fatigue/reduced activity tolerance, tinnitus, and dizziness. She also experiences emotional factors that include reduced situational anxiety relating to travelling in motor vehicles, and a depressed mood that she describes still being engaged in a constant struggle to manage.

At this point, it is not possible to predict the extent to which Ms. St Denis might be able to improve her residual symptoms and to increase her level of functioning following the interventions described above. As noted, she has demonstrated good improvement over time and appropriate response to the treatment interventions provided to date, but still continues to present with persisting reduction in cognitive functioning and reported reduction in her pre-injury level of cognitive functioning.

As regards prognosis with regard to the closed head injury, Ms. St Denis is now more than 3 years post-accident when considering the accident of November 27, 2015. The 18 to 24-month period of spontaneous improvement typically seen after acquired brain injury has therefore elapsed, and no further spontaneous improvement would be expected at this point. The potential for a more serious grade of traumatic brain injury, given evidence of PTA in excess of 24 hours and an apparent period of dense retrograde amnesia of approximately 6 months may also affect prognosis.

[100] Dr. B. Tessler, neurologist, in his February 14, 2019 report, opined as follows (in part):

The degree of injury is deemed mild, at the lower end of the Mild Traumatic Brain Injury spectrum. Her Glasgow Coma Scale was 15/15 when the ambulance arrived within 5 minutes of being called.

As a result of the Motor Vehicle Accident on November 27, 2015, she sustained soft tissue cervical strain injury of musculoligamentous type. This resulted in pain and restriction of neck movements. There was no radiation of pain into her upper extremities to suggest nerve root or spinal cord involvement.

As a result of the Motor Vehicle Accident, she developed post-traumatic headaches which are present in the posterior cervical occipital area and aggravated by cervical movements, indicating that these are cervicogenic headaches, that is arising from the cervical injury. There may be an additional component from her Mild Concussive Injury.

She complained of some problems with concentration and attention, although this could be caused by her very Mild Concussive Injury, distraction from pain, lack of restorative sleep and anxiety are most likely the more prominent contributing factors.

She did develop some symptoms of depression by her admission and was started on some antidepressant medication briefly but I would defer to Psychology or Psychiatric opinion with regard to the psychological and psychiatric impact of the accident.

[101] As noted, I find the expert medical evidence to be generally confirmatory of my findings as to the plaintiff's brain injury with cognitive difficulties and related anxiety, depression, and emotional upset. With respect, Dr. Tessler under weighs or does not appreciate fully the plaintiff's brain injury (and related mental effects) where he refers to "some problems with concentration and attention".

[102] In examination-in-chief, Dr. Tessler testified that in relation to traumatic brain injuries, it is the "outcome" that is "important". A severe traumatic brain injury may have a "very good outcome" and a mild traumatic brain injury may have a "poor outcome". The categorization of mild, moderate, and severe is based on the "initial characteristics" of the injury.

[103] Different areas of medicine provide a greater or lesser degree of help for the trier of fact. Since Dr. Nicolas Andry's time, the knowledge of orthopaedics has advanced dramatically. Similarly, since Dr. Christiaan Barnard's time, the knowledge of the heart has advanced significantly. The advances in the relative knowledge of the brain, although remarkable, still leave many mysteries unanswered. Many of the advancements in orthopaedics, the workings of the heart, and the functioning of the brain, are the result of imaging. The imaging of the brain, although often helpful, is not sufficiently precise to observe to the same relative degree all of the particular workings of the brain. The future may allow the knowledge of the brain and its workings, so to speak, to catch up.

[104] As a trial judge, I must deal with the present and the case before me. With the undisputed evidence of a violent crash and an obvious hard hit to the left side of the plaintiff's head above her eyebrow and slightly ahead of her temple, I find that, on a balance of probabilities, the plaintiff's cognitive impairment is caused by a physical injury to her brain.

[105] Simply because the CT scan of the plaintiff's brain was unremarkable (e.g., no "bleed" within the brain), I am not satisfied that the plaintiff's cognitive difficulties are not the result of a physical injury to the plaintiff's brain.

[106] Dr. Finlayson testified that the location of the hit to the plaintiff's head was likely not relevant to the type of brain injury (concussion) the plaintiff sustained. However, Dr. Finlayson added that the type of brain injury the plaintiff sustained was "caused by the sheering forces within the brain" resulting from the crash which in turn "[caused] changes in the brain physiology and as a result the brain's function".

[107] I reject the defendant's submission that there may be "significant improvement if not full resolution of [the plaintiff's] cognitive and psychological challenges through occupational therapy, psychotherapy and antidepressant medication".

- [108] In *Dinnissen v. Lee*, 2019 BCSC 1729, I stated:
- [184] One cannot lie to a person with a physical brain injury causing cognitive impairment and pretend that such does not exist. The reality must be addressed.
- [185] With the acceptance of the new reality, it may be possible to use strategies and tools to cope with the new reality but the recognition of the new reality remains. In many different situations, the person will ask himself or herself: If I did not have my brain injury would I be acting like this?
- [109] In reaching my findings as to the plaintiff's brain injury and related mental difficulties, I have given particular weight to the evidence of the plaintiff's husband. He is in the position to give longitudinal observations of the plaintiff both before and after the Accident.
- [110] The plaintiff's husband described how the plaintiff, after the Accident, has been flat, forgetful (even with the help of a list), has a loss of attention span, and is more argumentative.
- [111] As to his current relationship with the plaintiff, the plaintiff's husband testified that they are "learning a lot about life and about mercy and learning each other's shortcomings". He further testified that they "have a very good marriage" and "can actually rely on what we had and do have", but he is working on being "patient", "more forgiving", and on "what to say" and "how to say it".
- [112] In my view, the plaintiff's husband's testimony reflects a loving spouse realizing and struggling with the fact that the plaintiff is a changed person. With a longitudinal view, I find that the change relates primarily to the plaintiff's brain injury (with cognitive difficulties and related mental effects) rather than the pain associated with the plaintiff's neck injury or other physical injuries.
- [113] The plaintiff's other unresolved injuries are the neck injury, occasional tinnitus, occasional dizziness, and a left buttock and leg injury. With time and treatment, the plaintiff's left buttock and leg injury have improved significantly but have not resolved fully.
- [114] With respect to the left buttock injury, the defendant argued that it was a pre-existing injury resulting from a trampoline injury the plaintiff suffered approximately 30 years ago which was then aggravated by the 2009 motor vehicle accident. Similarly, the defendant argued, as noted, that the neck injury and some of the other injuries related to the 2009 motor vehicle accident.
- [115] In the immediate years prior to the Accident, it is readily apparent that the plaintiff was engaged in many physical activities, such as skiing and kayaking. I find that any injury to the plaintiff's neck, shoulders, lower back, buttocks, or legs had resolved to the extent that they did not interfere with the plaintiff's ability to undertake any of the physical activities or to affect her enjoyment of them. Accordingly, I have given little weight to the reports (January 18, 2019 and April 2, 2019) and testimony of Dr. R. Loch, orthopaedic surgeon.

9. non-pecuniary damages

[116] Our Court of Appeal in *Stapley v. Hejslet*, 2006 BCCA 34 sets forth an open list of factors to guide the assessment of non-pecuniary damages:

[46] The inexhaustive list of common factors cited in *Boyd* that influence an award of non-pecuniary damages includes:

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

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

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

[117] The plaintiff seeks \$200,000 as an award for non-pecuniary damages. The defendant says that the award should be between \$60,000 and \$90,000 with a further 20% reduction for that which the defendant says was a pre-existing left buttock and leg injury.

[118] I will award \$200,000 as non-pecuniary damages. Of the \$200,000, I have awarded \$160,000 for her brain injury with cognitive difficulties and the related anxiety, depression, emotional upset, and change in personality.

[119] In the case at bar, the plaintiff has real difficulty multi-tasking, focusing, and keeping her train of thought. She has suffered emotionally and her injuries have adversely affected her lifestyle and marital and social relationship significantly. She is a changed person with little prospect of significant improvement. Treatment will need to be focussed on strategies and tools to deal with the new reality, much as the plaintiff's husband is realizing.

[120] I have awarded \$40,000 for the plaintiff's other injuries, including the injuries that resolved fully. In making this award, I recognize that the plaintiff's neck injury and left buttock and leg injury may continue to improve.

[121] In making the foregoing award, I have been guided by the authorities relied upon by the plaintiff and the defendant:

Plaintiff's cases

Award

Cikojevic v. Timm, 2010 BCSC 800

\$160,000

Mastromonaco v. Moraal, 2015 BCSC 228

\$160,000

Gabor v. Boilard, 2015 BCSC 1724

\$200,000

White v. Bysterveld, 2016 BCSC 1952

\$150,000 (before adjustment for pre-existing condition)

Dornan v. Stephens, 2019 BCSC 701

\$200,000

Defendant's cases

Award

Pham-Fraser v. Smith, 2010 BCSC 322

\$95,000

Brown v. Bevan, 2013 BCSC 2136

\$95,000

Gillespie v. Yellow Cab Co., 2014 BCSC 1745 aff'd 2015 BCCA 450

\$85,000

[122] In reviewing the authorities, I have considered, in particular, the age of the plaintiff and the Stapley factors (g), (h), and (i), which are arguably subsumed in the Stapley factors (a) to (f).

[123] In *Trites v. Penner*, 2010 BCSC 882, Justice Ker states:

[188] Non-pecuniary damages are awarded to compensate the plaintiff for pain, suffering, loss of enjoyment of life and loss of amenities. The compensation awarded should be fair and reasonable to both parties: *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229 [Andrews]; *Jackson v. Lai*, 2007 BCSC 1023 at para. 134 [Jackson]; *Kuskis v. Hon Tin*, 2008 BCSC 862 at para. 135 [Kuskis].

[189] For the purposes of assessing non-pecuniary damages, fairness is measured against awards made in comparable cases. Such cases, though helpful, serve only as a rough guide. Each case depends on its own unique facts: *Andrews*; *Jackson*; *Jenkins v. Bourcier*, 2003 BCSC 388 at para. 87; *Radford v. Drobot et al.*, 2005 BCSC 293 at para. 62; *Kuskis* at para 136.

[124] I find that the plaintiff suffered a life-altering brain injury and related mental effects as a result of the Accident and that the prognosis for significant recovery is poor. Accordingly, an award at or near the higher range of the foregoing authorities is appropriate.

10. Past Loss of earning capacity

[125] With respect to past loss of earning capacity, Justice K. Smith, writing for our Court of Appeal in *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141, stated:

[30] Thus, in my view, a claim for what is often described as "past loss of income" is actually a claim for loss of earning capacity; that is, a claim for the loss of the value of the work that the injured plaintiff would have performed but was unable to perform because of the injury.

[31] Evidence of this value may take many forms. As was said by Kenneth D. Cooper-Stephenson in *Personal Injury Damages in Canada*, 2nd ed. (Scarborough, Ont.: Carswell, 1996) at 205-06,

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

[K. Smith J.A.'s underscoring; other emphasis in original.]

[126] With respect to past unreported income, our Court of Appeal in *Iannone v. Hoogenraad* (1992), 66 B.C.L.R. (2d) 106 (C.A.) stated:

The calculation of the quantum of the past wage loss award was based in part upon the plaintiff's evidence of income earned but not reported on his income tax return. The defendant (appellant before us) contends that to take unreported income into account is to allow recovery which ought to be barred on the grounds of public policy. In my respectful opinion that proposition confuses the concepts of a right to recover on a cause of action and the burden of proof upon a plaintiff whose right of recovery is not barred by a principle like *ex turpi causa*.

This plaintiff, like others in similar circumstances, had the burden of leading evidence of past accident wages losses. That will be a difficult burden to discharge where there is no corroborating evidence such as income tax returns, but it is not an impossible burden to discharge. Here the trial judge was satisfied on the evidence that the injuries sustained by the

plaintiff prevented him from earning income which he would otherwise have earned. The burden of proof was therefore discharged. The loss was proven. It is not, in my opinion, open to the defendant to avoid compensating for that loss on the ground that unreported income was taken into account in computing it.

[127] With respect to her income from Usana, the plaintiff has not presented "sufficiently clear, convincing and cogent" evidence to prove her related claim. She provided a bank statement showing amounts received from Usana but there was little detail as to the related expenses to determine her net income. In examination-in-chief, the plaintiff testified that she wanted "to bring in enough as well as enjoy the company of the people".

[128] With respect to income from Jeunesse, counsel for the defendant says:

- [The plaintiff] had not yet made any money from Jeunesse before the Accident;
- [The plaintiff] had an initial expense in the amount of approximately \$3,000, with an unknown monthly expense following that for more product;
- The plaintiff indicated that to get paid, she had to develop two "legs" of distribution. She was working on her British Columbia leg, but she could not make money until she developed her other "leg", which she had to go China to do;
- [The plaintiff] admitted on cross-examination that her plan was to go to China with the unnamed Chinese women who had signed her up and become part of their Jeunesse team;
- [The plaintiff] testified that she does not speak Chinese, and that she was not planning on hiring an interpreter. She said she was "somehow" very good at communicating with people wherever she goes. She also said she was very bad at learning languages;
- [The plaintiff] admitted that she is unfamiliar with the fundamental Chinese business concept of "guanxi [relationship]", and that she had no contacts in China other than the Chinese women who had signed her up;
- [The plaintiff] had no plans to learn Chinese, a skill of the defendant submits is essential for marketing in China; and
- [The plaintiff] agreed that the women she was planning to go to China with were her competitors, who would be looking for their own customers and downlines.

[129] The defendant further submits:

that the plaintiff's plan to make income via Jeunesse made little logical sense. The plaintiff's evidence demonstrates a net loss in working with this multi-level marketing company, and the defendant submits that the plaintiff has failed to demonstrate a real and substantial likelihood of past income loss through Jeunesse. Her loss is, at best, speculative. Accordingly, no award should be given for Jeunesse, past or future.

- [130] I find that the plaintiff's claim that her involvement with Jeunesse gives rise to a past loss of income is speculative. As our Court of Appeal in *Gao v. Dietrich*, 2018 BCCA 372 stated:
- [66] Considered as a whole, the evidence simply did not rise to the necessary threshold of a real and substantial possibility of past income loss. Whether there was such a loss was at best speculative. I would vary the order below to dismiss the loss of past earnings claim.
- [131] With respect to income from the plaintiff's services for administrative and bookkeeping services, as may be seen above, she had no "T4 earnings" for these services for the years after the Accident.
- [132] The plaintiff testified that she did work after the Accident, performing bookkeeping and other administrative services, including helping to train Arlene who has since August 2018 been working for the two corporations owned by the plaintiff and her husband. Arlene works four hours per day on a five-day work week. She is paid \$25 per hour.
- [133] The plaintiff's husband testified that, in addition to Arlene, he and his sons helped or covered the tasks that had been assigned to the plaintiff. I accept that it was "painful" for the plaintiff's husband. In line with the general experience of the recovery from a concussion, the plaintiff's husband would reasonably expect that the plaintiff would get better over time. She did not. The plaintiff worked but was not paid.
- [134] Defendant's counsel submitted (in connection with future loss of earning capacity) that the appropriate average income for the plaintiff for administrative and bookkeeping services is \$17,250 per year. This figure is calculated using the T4 earnings shown above for 2010 to 2015 after removing 2013 and 2015 as outlier years. I adopt this sensible approach. I have used it to assess the past loss of earning capacity.
- [135] In quantifying past wage loss, defendant's counsel submitted that the Court should find that the dividends the plaintiff received should be viewed as earnings for the benefit of the plaintiff.
- [136] As noted, the plaintiff had, prior to the Accident, also helped to find customers and was involved with interior design aspects. She testified that her compensation was "sweat equity".
- [137] A dividend is fundamentally different than a wage. A person receives a dividend qua shareholder. A shareholder may expend no effort whatsoever and still receive a large dividend. A dividend is a form of distribution of the corporation's earnings (current and past). In the case at bar, the dividends the plaintiff received may have reflected past sweat equity.
- [138] As past loss of earning capacity, the Court will award \$60,375 (\$17,250 per year x 3.5 years).

- [139] Any claims for amounts paid by either of the two family corporations to Arlene or the corporations' accountants have no legal foundation. It was not established that any such expense was borne by the plaintiff.
- [140] The plaintiff has not tendered evidence that is "sufficiently clear, convincing and cogent" to satisfy otherwise a greater value for her lost earnings or earning capacity. For example, the relevant corporate financial statements were not provided to show the corporations' profitability and the value of any sweat equity.
11. future loss of earning capacity
- [141] In *Perren v. Lalari*, 2010 BCCA 140, our Court of Appeal set forth, at para. 32, the rule that there must be a "real and substantial possibility of a future event leading to an income loss" before assessing the loss. The loss may be quantified using the earnings approach or the capital asset approach. The earnings approach is the more suitable approach in the case at bar.
- [142] In *Rosvold v. Dunlop*, 2001 BCCA 1, our Court of Appeal stated:
- [9] Because damage awards are made as lump sums, an award for loss of future earning capacity must deal to some extent with the unknowable. The standard of proof to be applied when evaluating hypothetical events that may affect an award is simple probability, not the balance of probabilities: *Athey v. Leonati*, [1996] 3 S.C.R. 458. Possibilities and probabilities, chances, opportunities, and risks must all be considered, so long as they are a real and substantial possibility and not mere speculation. These possibilities are to be given weight according to the percentage chance they would have happened or will happen.
- [143] As noted, I find that the plaintiff's brain injury resulting in cognitive impairment is permanent and that she is no longer capable of undertaking what she had done in the past. In short, the plaintiff is not employable.
- [144] The plaintiff's husband testified that it would cost \$70,000 to \$75,000 per year to replace the plaintiff. Without the relevant financial statements and similar evidence, the Court is not in a position to make such a finding. There was little evidence to show the value of the plaintiff's "sweat equity".
- [145] With respect to future income from Jeunesse, I find that the success of the endeavour is speculative and not rising to a simple probability. No award for future loss of earning capacity will be made with respect to the Jeunesse endeavour.
- [146] I find that the plaintiff would have continued to undertake her administrative and bookkeeping tasks until the age of 70.
- [147] The work was done at home. The plaintiff's home is on five acres where her three sons live, two of whom are married with their children.

[148] The living and work arrangements were particularly suitable for continuing to work beyond age 65. The plaintiff could work part-time (four hours per day, five days per week) without commuting. Moreover, most of the family, including her grandchildren, live on the five acre property.

[149] The plaintiff could both work and enjoy her family.

[150] Before the Accident, the plaintiff was in good health with no significant medical issues.

[151] I will reduce my award by 10% for contingencies. The 10% deduction is lower than that which might otherwise be the case because the award covers only ten years.

[152] In summary, the plaintiff is awarded damages for future loss of earning capacity of \$155,250 [(\$17,250 per year x 10 years) x 90%].

[153] I have made no award for any "sweat equity". Again, there was not "sufficiently clear, convincing and cogent" evidence to satisfy even as a "simple probability" the potential earnings or earning capacity. For example, the relevant financial statements of the parties' two corporations were not provided. Moreover, it is realistic to consider that as the plaintiff grew older, she would like to work less (part-time) in order to spend time with her family and, in particular, with her grandchildren.

12. Cost of future care

[154] Our Court of Appeal in *Johal v. Meyede*, 2014 BCCA 509 stated that in considering costs of future care, the trial judge should ensure (at para. 44):

- a) an "evidentiary link between the caregiver's assessment of pain or disability and the recommended care";
- b) "regard for the real and substantial possibility that the expense will be incurred" and that "an allowance for the contingency that the cost may not be incurred"; and
- c) "the specific amount awarded for each item claimed" is identified.

[155] The plaintiff's claim for cost of future case is comprised of:

Kinesiology

15 sessions x \$80/session

\$1,200.00

Treadmill

One time purchase

\$2,800.00

Massage Therapy

20 sessions x \$110/session

\$2,200.00

Physiotherapy

20 sessions x \$75/session

\$1,500.00

Occupational Therapy

12 hours x \$75/session

\$1,452.00

Vestibular Physiotherapy

22 sessions x \$75/session

\$1,650.00

Psychological Counselling

12 sessions per year x 5 years x \$200/session

\$12,000.00

Global Amount for Mileage to attend for therapy

\$1,000.00

Medication

Advil - annual cost of \$36.50 x 15 years

\$547.50

Total

\$24,349.50 rounded to \$24,000.00

[156] In her May 31, 2018 report, Dr. Finlayson gave the following prognosis:

There is potential for improvement in Ms. St Denis' symptoms with the interventions outlined above. The purpose of all of these interventions is to improve her function despite her ongoing pain and cognitive and emotional symptoms. Complete elimination of her symptoms is not a realistic goal.

In the majority of cases, the symptoms following mild TBI resolve or plateau within two years. For any lingering symptoms, it is probable that these will be permanent. Therefore, although Ms. St Denis may be able to improve her function in the setting of her cognitive and emotional changes following the mild TBI, it is likely that the underlying changes will be permanent. There is also potential for improvement in the management of her symptoms of pain in the neck and

left leg as well as dizziness with the interventions outlined above. However, it is likely that these will continue to flare up at least intermittently into the foreseeable future.

[157] Ms. T. Percy, occupational therapist, was qualified to provide expert evidence with respect to a functional capacity evaluation and the cost of future care. In her March 11, 2019 report, she recommends (in part):

A. MEDICAL AND REHABILITATION INTERVENTIONS:

1. Medical Management: Dr. Finlayson recommended that Ms. St Denis be referred to a sports medicine physician, rheumatologist or orthopedic surgeon for further management of her left buttock complaints in the form of a possible corticosteroid injection to the left ischial tuberosity. I have assumed that this would be covered by BC MSP with referral from her family physician.
2. Physiotherapy: Dr. Finlayson recommended that Ms. St Denis receive 8 to 10 sessions with the potential for additional physiotherapy depending on her response to treatment. Interview with Ms. St Denis indicates that she was not provided with any specific passive or active treatment for this area (i.e. ultrasound / TENS/ IMS). I agree with this recommendation and therefore recommend a budget of \$600.00 to \$900.00 (\$75.00 to \$90.00 per treatment session) plus a reserve of an additional 8 sessions for a total budget of \$1,200.00 to \$1,500.00.

I also agree with Dr. Finlayson that Ms. St Denis' vestibular complaint should be reviewed. Dr. Finlayson's estimate for treatment was 8 to 10 initial sessions followed by 6 to 12 session. Although Ms. St Denis previously attended Twin Rinks it may be prudent to trial an alternate practitioner, possibly Ms. J. Jorgensen, Physical Therapist at Lifemark Langley. At a cost of \$75.00 per session I recommend a total budget of \$1,050.00 to \$1,650.00.

With respect to the other supportive therapies, additional information would be beneficial following further vestibular rehabilitation and management of neck complaints to determine if Ms. St Denis would benefit from further acupuncture or massage therapy. The need for supportive therapy would be for the purposes of enabling engagement in employment and ADL's as a complement to her self-directed exercise program. Given her prognosis it appears that this would be medically justified as a supportive intervention to manage complaints and flare-ups. At a rate of \$75.00 to \$110.00 per treatment session, I recommend a budget of \$450.00 or \$660.00 per year to provide for an average of 6 treatments per year.

3. Kinesiologist and Self-Directed Exercise: As per Dr. Finlayson, an additional 8 to 10 Kinesiology sessions followed by further review (3 to 5 reviews) is recommended to support in development and monitoring an appropriate comprehensive exercise program for Ms. St Denis. I agree with this recommendation and recommend a budget of \$800.00 to \$1,200.00 for home based sessions (\$80.00 per session, inclusive of travel and mileage).

I recommend that Ms. St Denis continue with a self-directed exercise program through walking and use of equipment in their home gym, which is located in their garage. In lieu of recommending a gym membership at a local facility, it is my opinion that provision of equipment in the home setting would be more appropriate in Ms. St Denis' case. I recommend a budget for purchase of a treadmill or comparable piece of equipment for cardiovascular fitness, to promote and enable Ms. St Denis to regularly engage in exercise regardless of weather conditions or the status of her driving anxiety. I recommend an initial outlay cost (no replacement) of \$2,499 plus taxes for a quality model as available from Fitness Depot. The recommendation for home exercise equipment is supported by Dr. Finlayson.

4. Occupational Therapy / Ergonomic Intervention: While Ms. St Denis has implemented a number of effective strategies to compensate for identified functional deficits, it is my opinion that she will benefit from time-limited direct intervention in the home environment to assist with organization, planning and scheduling of specified routines (i.e. therapeutic exercise, homemaking, and employment) while reinforcing incorporation of strategies for pain management, stress management, energy conservation, and compensation (i.e. for memory, attention, and fatigue). I also recommend review of her home office environment and recommendations for improved ergonomic equipment to minimize undue stress on her neck and should girdle.

I recommend provision for a total of 10 to 12 hours for these purposes. As per the Private Practice Fee Survey for Occupational Therapy Services in British Columbia (2017), professional time, including preparation, assessment, treatment, verbal and written consultation and reporting, averages of \$112.00/hour with payer rates ranging from a low range average of \$101.00/hour to a high average of \$121.00/hour. Assuming 1 hour of travel and 50 km (return) per 2 hours of direct time I recommend an approximate budget of \$80.50 for travel / mileage. Total budget: \$1,522.50 to \$1,827.00.

5. Psychological or psychiatric services: Ms. St Denis currently attends psychological counseling with Dr. Buch once per month and identifies that this is beneficial. It is my opinion that further support is indicated, however, I defer to the appropriate experts regarding an appropriate treatment plan. I also defer to Dr. Buch or another qualified expert regarding the potential benefit of Ms. St Denis engaging in driving rehabilitation as there are programs that specifically address individuals driving anxiety with a target of improving tolerance while minimizing symptom aggravation.

[158] With one exception, I find that the claimed costs of future care satisfy the three Johal criterion. The exception is the amount claimed for a treadmill (or other exercise equipment) to promote cardiovascular fitness.

[159] In my view, there are few winter days in the Lower Mainland where one cannot go outside and walk or run to promote cardiovascular fitness. I find that there is not the necessary evidentiary link and recommended care.

[160] With respect to medications and gas mileage, these amounts, in context of the other items, are sensible and justified.

[161] In summary, the Court awards \$21,200 (\$24,000 - \$2,800) as cost of future care.

13. housekeeping and yard maintenance

[162] In *Riley v. Ristro*, 2018 BCCA 366, Justice Groberman, in writing for the Court of Appeal, stated:

[102] I acknowledge what was said in *[Kroeker v. Jansen (1995), 123 D.L.R. (4th) 652 (B.C.S.C.)]* about segregated non-pecuniary awards "where the special facts of a case" warrant them. In my view, however, segregated non-pecuniary awards should be avoided in the absence of special circumstances. There is no reason to slice up a general damages award into individual components addressed to particular aspects of a plaintiff's lifestyle. While such an award might give an illusion of precision, or suggest that the court has been fastidious in searching out heads of damages, it serves no real purpose. An assessment of non-pecuniary damages involves a global assessment of the pain and suffering, loss of amenities, and loss of enjoyment of life suffered by a plaintiff. By its nature, it is a rough assessment and not a mathematical exercise.

[163] The plaintiff seeks \$21,000 for future housekeeping and yard maintenance as follows:

Seasonal housekeeping

16 hours per year x \$30/hour x 15 years = \$7,200

Home and yard maintenance

30 hours per year x \$30/hour x 15 years = \$13,500

Total

\$20,700 rounded to

\$21,000

[164] Plaintiff's counsel submits that the plaintiff is "no longer able to garden due to the injuries she sustained" from the Accident.

[165] With respect, the evidence supported the fact that the plaintiff is bending, reaching, carrying, digging, lifting, etc. within reasonable tolerances.

[166] Without the Accident, the plaintiff would have had the help of her husband or one of her three sons who live on the 5 acre property with gardening or chores which involved heaving lifting, climbing a ladder, or moving a large object.

[167] I have considered that with respect to the usual bending, reaching, carrying, etc. associated with cleaning or gardening, the plaintiff may experience pain. This pain and associated loss of enjoyment of life are included in my general award for non-pecuniary damages.

[168] I am also satisfied, based on the evidence of the medical experts, that the usual bending, reaching, carrying, etc. within limits and when not over done would benefit the plaintiff. Exercise is usually beneficial and the plaintiff, prior to the Accident, enjoyed being active socially and physically.

[169] In summary, I will not make a separate award for housekeeping and yard maintenance.

14. special damages

[170] The defendant agrees that the plaintiff is entitled to \$3,374 in special damages but disagrees with respect to a further amount of \$1,968.75.

[171] Plaintiff's counsel describes the additional amount as follows:

In addition to the agreed amount for the special damages incurred by Mrs. St Denis, Mrs. St Denis is seeking an additional sum of \$1,968.75 for the reimbursement of landscaping work incurred and paid to Wagner Hills Farm Society. Mrs. St Denis testified that she wanted a personal garden outside of the home for her personal use. Mrs. St Denis further testified that but for the accident she would have completed the landscaping work herself but her injuries from MVC prevented her from doing the same and she was required to retain the services of a third party.

[172] With respect to the further amount of \$1,968.75, the evidence was also not "sufficiently clear, convincing and cogent to satisfy the balance of probabilities test".

[173] The two invoices related to the work undertaken by the Wagner Hills Farm Society were issued to Premium Woodcraft Homes Ltd. There was no evidence provided to show that Premium Woodcraft Homes Ltd. in turn charged the plaintiff. The plaintiff's husband could not readily explain matters other than that personal expenses and corporate expenses are kept separate.

[174] In summary, the Court awards the plaintiff \$3,375 in special damages.

15. mitigation

[175] The defendant says that the plaintiff failed to mitigate by not following recommended medical treatment.

[176] In *Chiu v. Chiu*, 2002 BCCA 618, our Court of Appeal set forth the test for mitigation:

[57] The onus is on the defendant to prove that the plaintiff could have avoided all or a portion of his loss. In a personal injury case in which the plaintiff has not pursued a course of medical treatment recommended to him by doctors, the defendant must prove two things: (1) that the plaintiff acted unreasonably in eschewing the recommended treatment, and (2) the extent, if any, to which the plaintiff's damages would have been reduced had he acted reasonably. These principles are found in *Janiak v. Ippolito*, [1985] 1 S.C.R. 146.

[177] The parties' agreed statement of facts sets forth many of the treatments the plaintiff sought. These included physiotherapy, massage therapy counselling, neurotherapy, and active rehabilitation. The evidence supports my finding that the plaintiff did not eschew recommended treatment. She took the antidepressant medication she was first recommended but it had unwanted side effects. The plaintiff's reluctance to try another antidepressant was not unreasonable. Further, she has a history of drug sensitivity. I will not reduce the plaintiff's award for a failure to mitigate.

16. conclusion

[178] The plaintiff's total damages are \$440,199. The Court has found the plaintiff to be 40% at fault for the Accident. Accordingly, the plaintiff is awarded \$264,120 (\$440,199 x 60%).

17. Costs

[179] If the parties wish to speak to costs, I ask that, within 90 days of the Court resuming normal operations, they arrange through Supreme Court Scheduling a 9 a.m. 55-minute hearing before me.

"Funt J."

Schedule "A"

North

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