

CANADA / JUDGMENT

Staff v. Moore

2020 BCSC 284

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 284 Staff v. Moore

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Staff v. Moore,

2020 BCSC 284

Date: 20200302

Docket: M53955

Registry: Vernon

Between:

Justine Staff

Plaintiff

And

Richard Moore

Defendant

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

Reasons for Judgment

Counsel for the Plaintiff:

M.J. Yawney, Q.C.

A. Jaquish

Counsel for the Defendant:

M.G. Howard

E. Ross (Articling Student)

Place and Date of Trial/Hearing:

Kelowna, B.C.

January 20 - 23, 2020

Place and Date of Judgment:

Kelowna, B.C.

March 2, 2020

Introduction

- [1] The plaintiff claims damages for injuries she sustained in a motor vehicle collision on March 14, 2015, on Highway 97A near Armstrong, BC ("Accident"). The defendant has admitted liability for the Accident. This is an assessment of damages for those injuries.

The Plaintiff

- [2] The plaintiff is 30 years of age and until this past summer, was a single mother of a son, aged 7, and a daughter, aged 4. She married Cole MacDonald, aged 38, on June 15, 2019. She is employed at Colonial Farms, a poultry processing facility in Armstrong, BC, as an industrial meat cutter, known as a "sawyer".
- [3] As a child growing up, her parents moved quite often. Her parents separated when she was quite young and she split her time between them. She enjoyed outdoor activities such as camping and various snow sports. She was active in school sports such as soccer, volleyball, basketball and rugby. She went to high school in Armstrong where her mother had moved, but in her grade twelve year, split her time between Armstrong and Smithers where her father was living, taking school courses through correspondence. On returning to Armstrong, she was one course short from graduation and did not complete her grade 12. She describes herself as a "C" student. Throughout school, she worked part-time at various minimum wage jobs.
- [4] She started working at Colonial Farms in 2009 at age 19 and within eight months trained for and obtained the sawyer position where she has worked ever since. Her main duties are cutting recently processed three to five pound chickens into nine pieces and/or preparing whole chickens for packaging. It is a physically demanding, labour intensive, repetitive and messy job. She is currently paid \$22.70 per hour plus non-wage benefits including a pension. She works an eight hour per day shift, Monday through Friday, with occasional overtime to ensure orders are filled. The job provides stable income for the plaintiff, who did not have a stable upbringing.

- [5] Her first child was born on November 14, 2012, and she took maternity leave until November 2013. Her second child was born on December 26, 2015, after the Accident, and she took maternity leave from November 30, 2015 until December 5, 2016.
- [6] She had no pre-Accident health issues or injuries and enjoyed a healthy and active lifestyle focussed mainly on raising her young son, work, and social activities. In the two years leading up to the Accident she was quite happy with her life, was active with her son, loved being a mother and had no plans to change her employment, even though, as she conceded, it wasn't exactly her "dream" job.
- [7] She took pride in and was meticulous in the maintenance of her home, doing all household chores, inside and out, without issue.
- [8] Her husband works in Fort St. John on the Site "C" dam project. His typical work pattern is three weeks away and one week at home. The couple are planning to expand their family with the plaintiff planning to become pregnant in the not-to-distant future.

The Accident

- [9] The plaintiff was driving her 2009 Hyundai Tucson SUV southbound on Highway 97A and was approaching Powerhouse Road when the defendant, driving a 1995 Buick Century sedan, pulled out of Powerhouse Road and directly into the plaintiff's path causing a T-bone collision. The plaintiff's vehicle ended up on the opposite side of the highway. She recalls being terrified. She required assistance to exit her vehicle. Both vehicles sustained significant damage and were total losses.

The Injuries

- [10] The plaintiff was taken by ambulance to the Vernon Jubilee Hospital for assessment of her injuries. She was there for five to six hours. It was determined that she had a broken left clavicle requiring surgery, but was told to come back the next day because the hospital could not accommodate the surgery that day. She returned the following day and again, the surgery was postponed until the next day because of scheduling issues. This time, she was admitted to the hospital. Dr. Ball performed an open reduction internal fixation surgery on March 16, 2015, and installed a plate and screws into her left clavicle. She was discharged the following day.
- [11] The following weeks and months brought with them significant pain all over. Not surprisingly, the plaintiff felt like she had been hit by a bus and "everything hurt". She was off work until mid-June 2015 to allow her to recuperate.
- [12] In addition to her broken left clavicle, the plaintiff also suffered soft-tissue injuries to her neck, back and bruising to both knees.

Post-Accident Treatment and History

- [13] Meridian Rehabilitation was retained by her insurer to provide occupational therapy and kinesiologist services to the plaintiff. The plan was to get her to the point that she could return to her job as soon as possible. Despite being a single mother of one young child, she did not receive any homemaking assistance and struggled the best she could. Her focus was on returning to work as soon as she could so that she could pay her bills and support her son.
- [14] In May 2015, she discovered that she was pregnant with her second child who was due in late December. Because she had been off work since the Accident, she knew that she would need to accumulate work hours in order to be able to take a maternity leave. This was further motivation to be able to return to work as soon as she realistically could.
- [15] By June 2015, she could not afford to be off work any longer and started a graduated return to work program on June 15, 2015, despite not being fully recovered. Although she continued to have constant and significant collarbone pain, her neck pain was more intermittent. She noted that it radiated into her right shoulder depending on her activities.
- [16] By July 16, 2015, she had returned to her normal shift working full time hours.
- [17] Dr. Ball was optimistic for a full recovery from her broken left clavicle and the plaintiff was hopeful her soft-tissue pain would eventually subside. Unfortunately, it did not and remained constant. She managed the pain as best she could with regular use of Advil and Tylenol, however it remained difficult for her because she was working full time, was pregnant with her second child, was caring for her first child and was maintaining her household without assistance.
- [18] Between her return to work and the birth of her second child in December 2016, her collar bone pain did not improve. It was hard for her to get through a day and by the end of a work week, she was exhausted. She had trouble sleeping.
- [19] During her maternity leave through 2016, she noted that although the pain was not as severe as it was while working, housework aggravated it. She noted the pain would radiate from her clavicle to her neck and around to her right shoulder. She prided herself as a meticulous homemaker but her ability to maintain her house was far below her pre-Accident standards.
- [20] It was hard for her to return to work in December 2016 following her maternity leave. She felt defeated and exhausted by the end of each work week, but carried on because she had to support her home and her family. She could not afford to take any more time off work. Her left shoulder and upper torso area continued to bother her with the pain radiating into her neck and right shoulder. The pain fluctuated with activity and workload.

- [21] She tried a few sessions of physiotherapy in the fall of 2017 but stopped because she did not feel it was helping and she could not afford the user fees. Her physiotherapist suggested that removal of the clavicle hardware might relieve some of her shoulder pain, which she investigated with her family doctor. A referral was made to Dr. Ball who ultimately removed the hardware on February 15, 2019 ("Second Surgery"). The Second Surgery, although successful, did not relieve her shoulder pain and she did not recover as expected.
- [22] She returned to her sawyer job four weeks following the Second Surgery.
- [23] Other than being off work from the Accident date until starting a month-long graduated return to work program on June 16, 2015 through July 22, 2015, and being off work as a result of recovery necessitated by the Second Surgery, she has essentially been working her regular full time shifts.

The Medical and Expert Evidence

- [24] The plaintiff tendered expert reports authored by Dr. Tony Giantomaso, a physiatrist; Ms. Debbie Ruggiero, an occupational therapist; Ms. Jodi Webster, a vocational consultant; and Mr. Robert Carson, an economist. Dr. Giantomaso, Ms. Ruggiero and Ms. Webster were also cross-examined on their reports.
- [25] The only defence expert report tendered was that of Mr. Mark Gosling, an economist. There were no medical reports tendered by the defence.
- a. Dr. Tony Giantomaso, Physiatrist
- [26] The plaintiff was assessed by Dr. Tony Giantomaso, on March 16, 2017 and August 9, 2018. Dr. Giantomaso authored reports respecting those assessments dated March 22, 2017 and August 18, 2018, respectively. Dr. Giantomaso also authored a third report dated August 24, 2019, commenting on various medical records that were provided following the Second Surgery, providing his opinion on the outcome of the Second Surgery and making further recommendations for treatment.
- [27] In his March 22, 2017 report, Dr. Giantomaso diagnosed that the plaintiff was suffering chronic pain, describing the plaintiff's Accident-related injuries as follows:

Posttraumatic left clavicular fracture, significant displacement requiring open reduction and internal fixation. Healed well. Ongoing left shoulder impingement syndrome, mild;

Posttraumatic cervical sprain/strain injury consistent with a WAD-II injury. Chronic.

Posttraumatic thoracic sprain/strain injury grade 1 to 2. Chronic.

- [28] His physical examination of the plaintiff was consistent with this diagnosis and was consistent with soft tissue injury. She had reproducible trigger points and a painful range of motion. He did not believe the fractured clavicle would cause any extra osteoarthritis in the future, but because she continued to have issues with overhead activities, he felt her pain

would continue. He described the trigger points as taut bands of tissue that often reproduce referred pain in areas away from the area of palpation. It is a common objective finding presented in patients with soft tissue injuries. Referred pain can move to different locations and often change over time. Localized pain over long periods can become widespread because of abnormal body mechanics. It is not unusual to have areas of pain or tenderness that vary over different examinations with differing trigger points. He stated that this was the case in the two examinations of the plaintiff he performed some 18 months apart. As he described it, the muscles attached to the plaintiff's clavicle and neck are integrated and part of the same anatomy.

[29] Dr. Giantomaso recommended an active rehabilitation program, the use of topical Lidocaine, diclofenac and Flexeril cream, amitriptyline, Lyrica or gabapentin if needed. He opined that the plaintiff could experience exacerbation and flare-ups of her symptoms with the use of her upper body and arms especially at work. If work became a significant issue for her, he stated that she may have to consider retraining into a less manual or physical vocation.

[30] Respecting her function, Dr. Giantomaso stated:

Justine relates ongoing activity limitations and participation restrictions in avocational, vocational and recreational realms. She notes that she has recently returned to work and does note increased pain in the shoulder while working at Colonial Farms, a chicken plant. Otherwise, at home she notes some mild pain with overhead activities, lifting, pushing and pulling activities, but generally she is able to perform most household chores and child care with a minimum of discomfort. She notes at night, discomfort when lying on her left side but otherwise, most life activities outside of work are well tolerated.

[31] When he reassessed her on August 9, 2018, he noted that his previous recommendations were not specifically followed, but that instead the plaintiff had been working out in the gym which helped with her overall endurance. He pointed out that the recommendations he had earlier made were for management of her symptoms only and would not change her prognosis.

[32] During the re-assessment, the plaintiff reported ongoing difficulties with overhead movements, repetitive flexion-extension maneuvers, and reaching, pushing and pulling involving her left shoulder. She also reported that standing or sitting in one place for extended periods, such as while at work, caused increased neck pain. Dr. Giantomaso's overall impression was similar to when he saw her 18 months previously, namely, she was suffering from chronic pain in the areas of her left shoulder and neck. He stated:

. . . It is clear that, over time, she has had persistent problems that are noted in her documentation, including neck and upper back pain, and shoulder issues. She continues to have difficulties with household chores and some difficulties with higher level physical activities, this is including the use of the left arm. . .

... I continued to find ongoing neck and upper back pain worse on the left than the right side, including reproducible trigger points in the upper trapezius, levator scapulae and rhomboid this is fairly mild with moderate scalene involvement on the left, and sternocleidomastoid involvement on the left, and pain again over the clavicular attachments of these muscles.

[33] At the time of the second assessment, nothing much had changed since he had seen her previously. It was over three years' post-accident. Dr. Giantomaso did not recommend anything that the plaintiff could or should be doing other than trying to remain active. He again felt that if her work duties continued to bother her, she might need to look at retraining into a less physically demanding occupation.

[34] Dr. Giantomaso's third report followed his review of records after the Second Surgery. He had earlier noted that he did not expect the hardware removal would reduce her shoulder pain, stating:

... she has quite a few impingement-type symptoms in the shoulder and the combination of chronic whiplash injury to the cervical and thoracic spine combined with the fracture of a clavicle often leads to abnormal body mechanics and ongoing shoulder dysfunction. Her job as a chicken cutter and assembly line worker is also very hard on the upper extremities.

The culmination of these issues in my opinion will continue to lead to ongoing left shoulder pain. In my opinion her recovery at this point has likely plateaued. . .

In my opinion her ongoing left shoulder dysfunction post-trauma and post-surgery and post-hardware removal is permanent and will continue to cause some degree of impairment in the future.

[35] He went on to recommend that she could benefit from a referral to a physiotherapist to work directly on the left shoulder impingement, referral to an interventional pain management specialist and the use of topical pain medications. He cautioned that these recommendations were made with the goal of maintaining function and should not be considered curative.

b. Ms. Debbie Ruggiero, Occupational Therapist

[36] Ms. Ruggiero is an occupational therapist who completed a functional capacity evaluation ("FCE") of the plaintiff on June 12 and 13, 2018, and prepared a FCE report dated August 1, 2018. She also prepared a cost of future care assessment ("CFC") report dated October 3, 2018.

[37] Both the FCE and CFC reports were admitted into evidence without debate. Ms. Ruggiero's qualifications as an occupational therapist and expert qualified to provide opinion evidence concerning occupational therapy, functional capacity evaluations and make recommendations for future care needs were also admitted.

[38] The FCE report is somewhat lengthy, but can be summarized as follows:

- a) The plaintiff gave full effort over the two days of testing. In Ms. Ruggiero's opinion, the test results were valid and were a good indication of her functional capacity.
 - b) As at the date of the FCE, the plaintiff continued to experience Accident-related symptoms. The FCE testing and the plaintiff's subjective reports were consistent with her demonstrated function.
 - c) The plaintiff demonstrated limitations and intolerances due to left shoulder pain and recently developed intolerances due to right shoulder pain. Her left shoulder symptoms limited her tolerance for unsupported reaching/handling above chest level. Increased pain resulted from more frequent left shoulder movements or forceful exertion of the left arm. Objective signs of decreased performance doing tasks above chest level were displayed.
 - d) The results of the FCE were that the plaintiff's functional strength and ability to manage weights in lifting, carrying, pushing or pulling is limited to the light to medium demand level. Her overall endurance for functional activities is equivalent to the medium physical demand level. The more frequent the lifting and/or carrying, the more the left shoulder pain increased.
 - e) The National Occupational Classification ("NOC") description of a sawyer in a meat processing plant includes "heavy strength demands and upper limb coordination". Although these are general guidelines, individual work places have unique or different physical demands. In the plaintiff's case, while the weight component of lifting processed chickens is in the 10 pound range, the repetitive nature of the job places it in the "heavy" category of job descriptions. Ms. Ruggiero testified that the weight component of the plaintiff's work duties cannot be looked at in isolation to her other duties. The repetitive nature of the job must also be considered in determining whether she will be able to perform the job in the long term.
 - f) Ms. Ruggiero had concerns respecting the plaintiff's ability to perform her duties at Colonial Farms over the long term based on the highly repetitive upper extremity positioning that was required at and above waist level, exertion with her right shoulder (she is right-hand dominant) to make cuts and left shoulder to reach and hold the bird, material handling of bags and boxes of partially processed and processed poultry and ambient temperature of two to four degrees Celsius at the plant resulting in increased aching pain in her left shoulder/clavicle.
- [39] Ms. Ruggiero's cost of future care recommendations are aimed at maximizing the plaintiff's function and minimizing her symptoms. In her view, they are all justifiable for symptom management.
- c. Ms. Jodi Webster, Vocational Consultant
- [40] Ms. Webster is a vocational rehabilitation consultant and counsellor. She assessed the plaintiff on July 20, 2018, for the purpose of providing an opinion on how the Accident may have affected her vocational path and capacity to work. She authored a report dated September 25, 2018, entitled "Vocational Evaluation, Transferable Skills Analysis, Labour

Market and Educational Research Report" that was also admitted into evidence without debate. Her qualifications to provide such a report and to opine on the plaintiff's vocational capacity and training, were also admitted.

- [41] The vocational testing disclosed that due to the plaintiff's academic skills (high school marks were mostly in the "C" range), failure to graduate grade 12, limited past employment experience and functional limitations disclosed in the FCE report, the scope of her employment options (both type and number) has been significantly decreased. In Ms. Webster's opinion, it is likely that her ability to continue at Colonial Farms is not sustainable in the long term and she will need to consider alternate occupational options. Considering her current lack of education, her transferable skills, and her residual functional capacity, Ms. Webster felt that she would be likely to encounter difficulty finding an alternate vocation and considers her competitively unemployable unless she receives retraining in other occupations that are realistic for her.

d. Robert Carson, Economist

- [42] Mr. Carson is a well-known and well regarded economist. He prepared a costs of future care report dated November 23, 2018, providing the present value of Ms. Ruggiero's cost of future care recommendations with a valuation date of February 19, 2019, the date when this matter was first set for trial.
- [43] Mr. Carson also provided present value multipliers and occupational earnings information in a second report, also dated November 22, 2018, and also with a valuation date of February 19, 2019.
- [44] Mr. Carson's reports were admitted into evidence without debate.

e. Mark Gosling, Economist

- [45] Mr. Gosling, also a well known and well regarded economist, prepared two reports at the defendant's behest dated December 20, 2018, critiquing Mr. Carson's future care and loss of future earnings reports. He also used a valuation date of February 19, 2019.
- [46] Mr. Gosling's reports were also admitted into evidence without debate.

Discussion

- [47] The evidence easily persuades me that the plaintiff is a stoic and non-complainer. Despite a difficult upbringing and not graduating from grade 12, she was successful in the sense that she had a young family and had employment in a physically demanding but well-paying job with benefits and a pension. Prior to the Accident, she was fun-loving, happy and fully functional. I accept that she has always relied on her physical abilities to get her through. Her positive personality allowed her to brush off many adversities life threw at her.

- [48] There is little doubt that the forces involved in the Accident were significant. The photographs of the after-math and of the two vehicles involved confirm the point.
- [49] The plaintiff says that the Accident caused soft-tissue injuries to her neck and back, bruising to both knees and fractured her left clavicle requiring two surgeries. She was hopeful that the Second Surgery would alleviate the pain she was having in the area, but she says it did not and she continues to have pain in her clavicle and shoulder area that radiates into her neck and right shoulder, worse with overhead and repetitive activity.
- [50] I accept the plaintiff's evidence without reservation.
- [51] The evidence suggests that the plaintiff is not a complainer and goes about her work and daily routine, including raising her two young children as best she can. She is far from being disabled. Nevertheless, she does have Accident-related pain and difficulties, and does her best to manage, but these ongoing issues are emotionally draining on her.
- [52] When asked to summarize her post-Accident life, she replied "It sucks". I accept this description as an accurate and succinct summary.
- [53] I accept that everyday life for the plaintiff has been harder since the Accident. Functionally, she is not back to her pre-Accident condition and I accept will likely not be in the foreseeable future. I accept Dr. Giantomaso's medical opinion in that regard.
- [54] The collateral witnesses who testified all agree that she is a stoic. For example, her best friend for the past seventeen years, Ms. Franki Burylo, who has spent considerable time with her both before and after the Accident, testified that she has seen the plaintiff struggle with day-to-day activities such as lifting and carrying her children. She observed changes and difficulties since the Accident, including at the gym, and has seen the general frustration the plaintiff has had with the recovery process. She described the plaintiff in the years leading up to the Accident as an active, outgoing, an amazing mother and a hard worker with lots of energy. She was strong both physically and emotionally and observed her to always push through any of life's difficulties. She stated that the plaintiff was a "clean freak" always maintaining a spotless home. While Ms. Burylo does not currently see the plaintiff as often as she once did because their work schedules do not match and because they both have young children, she is clear that since the Accident, the plaintiff has had difficulties keeping up with her housework and struggles with carrying her children. From her observations, the plaintiff is not as strong as she was pre-Accident.
- [55] The plaintiff's husband, Mr. McDonald has known the plaintiff since December 2016. He currently works as a tower operator at the Site "C" dam project near Fort St. John, BC. He returns to Armstrong for one week out of every four. He was attracted to the plaintiff because of her independence, out-going personality, contagious laugh, and work ethic. He described her as a passionate, selfless woman and a nurturing mother. He notes that she has difficulties with lifting heavy things such as her daughter. He describes her as looking exhausted and "frazzled" when she comes home from work. He has a hard time

understanding how she is able to manage the household, work and children when he is away working. He believes her strength is declining. He testified that he noticed her pain complaints have increased since the Second Surgery and she seems to be more easily agitated, prompting him to give her as much distance as she needs. He commented that the plaintiff continues to be passionate about her job because there are very few realistic alternatives available for her in the Armstrong area.

- [56] Ms. Janet Jefcoat has been a co-worker and good friend since the plaintiff joined Colonial Farms in 2009. Ms. Jefcoat has been a sawyer since 2002 and works alongside the plaintiff. They also see each other socially. She confirms that the plaintiff is a hard worker and does her best to get the job done and enjoys working with her. Ms. Jefcoat confirmed the physical nature of the job. She also confirmed that the plaintiff had no physical impairments prior to the Accident and was able to perform her duties well. She testified that since returning to work after the Accident, although the plaintiff did her best to do the job without complaint, it was obvious to Ms. Jefcoat that she was hurting. She has seen the plaintiff quietly step back from the saw, stretch and shift. She used to carry the heavy boxes of chickens and now uses a cart. She now needs help lifting the boxes. Ms. Jefcoat knows when the plaintiff is sore and steps in to assist without being asked. She has noted the plaintiff's pain mannerisms increase since the Second Surgery. For example, on occasion, the plaintiff has stepped away from the saw with an emotional breakdown. She aptly summed up the plaintiff as being like a hard candy with a tough exterior. By that she meant that the plaintiff is strong willed and determined, but in her view the Accident has changed her. She is no longer invincible. Ms. Jefcoat has concerns that as the plaintiff ages, she will not be able to perform her current job.
- [57] I also accept these lay witnesses' testimony without reservation. They were sincere and forthright and I was not left with the impression that they were partisan or simply advocating for the plaintiff.
- [58] Respecting Ms. Ruggiero and Mr. Webster's unchallenged evidence, although the defendant was able to point to some areas of concern during cross-examination (for example, respecting the plaintiff's unrelated and inconsequential diagnosis of a femoral hernia that was present during the FCE in June 2018; the difference between the plaintiff's job duties and the NOC classification for a sawyer; and Ms. Ruggiero's incorrect assumption that the plaintiff's job of a sawyer involves pulling the saw downward to cut chickens when in fact the saw is stationary), both experts evidence fit with the whole of the evidence and I accept it. In short, they relied on the assumption, which I have accepted, that the plaintiff's physical abilities have been affected by the Accident, she suffers from a chronic pain condition, and that she will struggle with her ability to function as a sawyer at some point in the future.

[59] The plaintiff fully acknowledges that she has recovered from many of her Accident-related symptoms. I conclude however that she continues to have issues with her left clavicle and chronic pain in her neck and back. Based on Dr. Giantomaso's opinions, which I accept, the prognosis for a complete recovery is guarded.

[60] The evidence persuades me that the plaintiff's function at work and at home has been negatively impacted by her ongoing symptoms and that because it hasn't resolved by now, it will likely to be a chronic issue for her in the future.

a. Non-Pecuniary Damages

[61] The plaintiff is a young mother of young children. The Accident caused a broken left clavicle requiring the plaintiff to undergo two surgeries. She has been left with ongoing chronic pain on the lower end of the range but that still affects all aspects of her life. She is not disabled but lives her life dealing with various levels of pain depending on her activities. But for the Accident, the plaintiff would not have had these issues to deal with.

[62] I accept that the plaintiff has used activity modification and activity avoidance as her primary method of managing her symptoms. So far, she has done quite well, mostly because of grit, perseverance, stubbornness, and necessity. It is likely she can look forward to suffering from chronic pain to varying degrees into the foreseeable future.

[63] By all accounts she is a stoic. She manages full time work, two young children and her home. Her husband assists where and when he can, but he works out of town leaving her to deal with day-to-day life most of the time.

[64] Non-pecuniary damages are intended to compensate the plaintiff for the effect her Accident-related injuries have caused and will cause into the future. It is this plaintiff's loss and the need for solace for this plaintiff that is important.

[65] The plaintiff seeks a non-pecuniary damage award of \$130,000, the upper range of the cases she refers to as illustrations: *Hutton v. Breitreutz*, 2015 BCSC 1164; *Grigor v. Johal*, 2008 BCSC 1823; *Bellaisac v. Mara*, 2015 BCSC 1247; *Hagreen v. Su*, 2009 BCSC 1455; *Herman v. Paley*, 2017 BCSC 728; and *Klingler v. Lau*, 2019 BCSC 1776. She asserts that the most significant considerations relate to the chronicity of her symptoms, the two surgeries she has had to endure, and most importantly, her life circumstances and how they have compounded the effect her injuries have had on her. She points to the medical reports that suggest her prognosis for improvement is poor.

[66] The defendant argues that non-pecuniary damages ought to be more in the range of \$70,000, referring in support to: *Anderson v. Kozniuk*, 2014 BCSC 1206; *Druet v. Sandman Hotels, Inns & Suites Ltd.*, 2011 BCSC 232; and *Talarico v. Town of Fort Nelson*, 2008 BCSC 861, in support. These cases, he argues, are similar because they all involved significant accidents, broken bones, surgeries and removal of hardware and recurring mild pain. The defendant acknowledges that the plaintiff is a "go-getter" and hard-worker. While acknowledging that the Accident and the injuries were significant, and that she hasn't returned to her pre-

Accident condition, the defendant argues that any lingering issues she may have are minimal. He points out that, by her own admission, the plaintiff rated her typical level of pain in the 1-2/10 range to those who assessed her.

[67] I have taken into account the factors set out in *Stapley v. Hejslet*, 2006 BCCA 34, including the plaintiff's young age, the nature of her injury, the severity and duration of her pain which is ongoing, the impact her injuries have had on her function and ability to enjoy life and the fact that she is a stoic. Her ability to continue to tolerate and manage her work, and domestic and family demands remains a concern. Her symptoms continue to have a negative impact on her recreational activities, her fitness, her ability to maintain her home as she would like, and her ability to function at her job, compounding an already difficult life.

[68] All things considered, I assess her non-pecuniary damages at \$100,000.

b. Special Damages

[69] The plaintiff incurred fees for three physiotherapy treatments in the fall of 2017 (\$170.00) and Accident-related mileage expenses of \$553.40. She also estimates having incurred \$698.75 for Tylenol and Advil since the Accident. Her total claimed special damages is \$1,422.15.

[70] The defendant does not dispute that these amounts are reasonable.

[71] The plaintiff is therefore awarded \$1,422.15 as special damages.

c. Past Wage Loss

[72] The parties have agreed that the plaintiff's past wage loss claim to the date of trial is \$15,856.67 net of tax and I make that award.

d. Future Care Costs

[73] The purpose of an award for future care costs is to restore, as best as possible with a monetary award, the injured person to the position he or she would have been in had the accident not occurred. The award is based on what is reasonably necessary on the medical evidence to promote the plaintiff's mental and physical health: *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at paras. 29-30. There must be some evidentiary link drawn between the medical assessment of pain, disability and recommended treatment and the care recommended by a qualified health care professional, but the level of care should reflect the normal expectations of what an injured party would reasonably require: *Spehar v. Beazley*, 2004 BCCA 290 at para. 19.

[74] The plaintiff claims future expenses she says she will incur for medications/supplies, therapies, assistive devices, vocational rehabilitation and home support services, all of which she asserts are directly related to her on-going Accident-related chronic pain issues. She argues that funding these expenses will go a long way towards placing her in the same position she would have been in but for the Accident. I will review each of the claimed items in turn:

i. Medications

[75] The plaintiff testified, and I accept, that she uses Tylenol and Advil regularly to control her pain. She takes this medication on average three times per week. Dr. Giantomaso recommended that she continue to do so as needed. The evidence puts the annual cost at about \$250. Projecting that cost into the future, I assess the present value of her future Accident-related pain medication costs at \$4,000.

ii. Kinesiology

[76] Dr. Giantomaso recommend that the plaintiff work with a kinesiologist to develop and monitor an individualized community based, physical exercise program. The present value of the cost of 16 sessions spread over a four to six month period is approximately \$1,400. I accept that such a program is both reasonable and necessary to allow the plaintiff to continue to function at home and at work. That sum is allowed.

iii. Physiotherapy and/or Massage Therapy

[77] Dr. Giantomaso also recommends physiotherapy and/or massage therapy as needed to assist the plaintiff with pain management flare-ups. I agree that she would benefit from such treatments into the future to allow her to continue working. The plaintiff enjoys non-wage work benefits including extended health coverage. Nevertheless, I conclude that some funds need to be set aside to allow for the contingency that either such funding may not be available or that her coverage may be insufficient to cover her annual costs. The annual cost of 8 and 16 sessions per year is \$680 and \$1,360 respectively. All things considered, I conclude that \$500 per year to age 65 for such treatments would be reasonable. Using Mr. Carson's net present value calculations and rounding off, I award the sum of \$13,000 for these treatments.

iv. Assistive Devices

[78] The plaintiff seeks the costs of various devices and gadgets to help her with housework activities and to minimize aggravating postures and biomechanical stressors. These include the cost of a robotic vacuum, a long-handled duster, a long-handled tub cleaner. She also seeks the costs of future workplace and educational tools as recommended by Ms. Ruggierro.

[79] Having reviewed the evidence and Ms. Ruggierro's recommendations for assistive devices, I conclude that a one-time award of \$3,000 to cover the costs for these items would be reasonable.

v. Vocational Rehabilitation

[80] I have concluded that at some future point and because of her Accident-related injuries, the plaintiff will be unable to continue her job as a sawyer and will need retraining. That being the case, she will need some vocational support and intervention to support retraining and transition into an alternative occupation.

[81] Ms. Webster's evidence is that the cost of such vocational support and intervention will be in the \$7,000 to \$9,000 range. All things considered, I find that the sum of \$4,000 would be a reasonable sum to set aside for such future training.

vi. Home Support Services

[82] By far the largest amount the plaintiff seeks for future care costs is for home support services including yard maintenance, management, seasonal home support and assistance. She argues that given the significant reduction in her capacity to perform yard work and some homemaking tasks that will continue for her lifetime, over \$150,000 is required to replace those services for her life expectancy, based on an annual cost of \$4,544.

[83] While I agree that the plaintiff ought to be entitled to the cost of the heavier aspects of her homemaking and yard maintenance, I do not agree that she requires the amount she seeks. I am not persuaded that she cannot perform her regular day-to-day light homemaking activities. Weekly or bi-weekly homemaking support to cover the heavier aspects of homemaking, combined with seasonal yard and garden support and maintenance is reasonable.

[84] In my view, the sum of \$1,000 per year till her age 65 would be reasonable to cover the cost of the heavier seasonal homemaking and yard maintenance tasks as recommended by Ms. Ruggiero.

[85] All things considered, I award \$25,000 to cover these costs.

[86] In sum and rounding off the numbers, I award a total of \$50,000 for future care costs.

e. Loss of Future Earning Capacity

[87] The most contentious issue between the parties is the plaintiff's claim for an award for loss of future earning capacity. The plaintiff argues that given her ongoing chronic pain issues, she should take Ms. Webster's and Dr. Giantomaso's advice, cease her current full-time employment immediately and focus on either retraining into another occupation or work part-time hours only. She says that the only reason she continues to work is because economically she has no choice. Using Mr. Carson's report and multipliers, the plaintiff claims the sum of \$600,000 under this head as the rough and ready difference between a "no-

Accident" scenario with the plaintiff working at Colonial Farms to age 65 (present value of approximately \$1.4M) and what she will now make either working at a less physically demanding minimum wage job (approximately \$680,000), or working three days per week at Colonial Farms (approximately \$562,000).

- [88] The defendant asserts that there should be no award made under this head of damage essentially because since she returned to work in December 2016, following her second maternity leave, she has worked full-time and overtime hours and has performed all of her pre-Accident duties as before. Any ongoing pain she may have, he argues, is, at worst, mild.
- [89] Although the plaintiff continues to work full time as a sawyer for Colonial Farms, her Accident-related chronic pain issues remain. She feels secure with her employment. While it is not her "dream job" she likes it. As she put it, it would be unwise to leave a secure job with reasonable pay and good benefits. The evidence suggests that the plaintiff is required to fill between 65 and 70 boxes of chickens per day. At 9 cuts per chicken and 12 chickens per box, that translates into well over 7,000 cuts per day of unsupported reaching with her arms extended. I accept Ms. Ruggiero's evidence that although the weight demands of a sawyer job at Colonial Farms places it in the light to medium strength category, the NOC classification does not take into account the repetitive nature and frequency of movement and posture requirements.
- [90] The concern is that the plaintiff is only 30 years of age and has her whole working life ahead of her. While she is currently able to tolerate the job because of her stoicism, if her symptoms worsen and she is unable to perform the duties of a sawyer, she has no transferrable skills. As it is, she is able to do the job, but in pain and that pain takes a toll on her. On occasion, she has broken down and cried at work due to the pain. She struggles to get through each week. She says she is generally tired, sore and agitated. She finds it makes her less patient and she tends to take her frustration out on her kids. She generally tries to relax during the weekends to recharge. She does not have much of a social life any more.
- [91] She testified that she plans to continue to work, in some capacity, until age 67. She testified that without retraining assistance, she plans to "keep plugging away" at her job. There are no other less demanding positions at that employment that are realistically available to her.
- [92] I accept Dr. Giantomaso's opinion that her chronic pain symptoms will continue into the future. The totality of the evidence satisfies me that the plaintiff's current work as a sawyer at Colonial Farms, which is a physically demanding job, will result in the plaintiff continuing to experience symptoms in her left shoulder and clavicle area that will radiate into her neck, across the back of her neck and into her right shoulder into the future. By all accounts she is a hard-worker who manages to continue to function at work, but that work exhausts her by the end of each work week.
- [93] I also accept Ms. Webster's evidence and opinion respecting the plaintiff's long-term residual employability, namely, that although she is employable, she is not competitively employable ("placeable" as defined) without some retraining because of her physical

limitations combined with her academic background. In forming her opinion, she relied on her interview with the plaintiff, Dr. Giantomaso's diagnosis and prognosis and the results of the FCE. Ms. Webster has impressive credentials and was an impressive witness. As she explained, the plaintiff has her whole working life ahead of her and her ability to continue functioning as a sawyer in the long term is questionable.

- [94] I find this case similar in nature to what occurred in *Cegielka v. Grace*, 2020 BCSC 115, where Justice Macintosh commented at paras. 41-43:
- [41] On one hand, Mr. Cegielka has proven himself to be a resolute and ambitious employee at Double V in his 10 years of working at that long-established and successful company, known for looking after its employees' interests. Mr. Cegielka is now the youngest foreman at the company. He plans to eventually become a supervisor. From his work history to date, and the testimonials he received at trial from two witnesses who have worked with him, it is reasonable to conclude that he will succeed in his ambition. Today, he is earning more at Double V than at any other time in the past.
- [42] On the other hand, Mr. Cegielka, who is only in his mid-30s, is working in the construction industry, not at an office desk. Double V is both successful and supportive, but no employment is guaranteed in the three decades to come when Mr. Cegielka will probably still hope to be employed. He has some residual, periodic pain he would not have without the accident, and, in my view, there is a real and substantial possibility that the chronic pain will in the long run prejudice his employment prospects.
- [43] This Court has found plaintiffs entitled to damages for lost earning capacity even though, after the accident, they were capable of carrying on with their prior work without having lost income. See, *De Groot v. Heller*, 2018 BCSC 14; *VanderVeen v. Amante*, 2019 BCSC 2079; *Clark v. Kouba*, 2012 BCSC 1607; *Munoz v. Singh*, 2014 BCSC 567; *Rahimi v. Ma*, 2014 BCSC 710; and *Preece v. Leonard*, 2014 BCSC 173. Each of those decisions of course turned on its own facts, from which the Court was able to find a real and substantial possibility of future lost earning capacity due to pain or other difficulties, notwithstanding that the plaintiffs were able to carry on with their prior work at the same incomes.
- [95] Similarly, Ms. Staff is in her early thirties, is resolute, and has been able to continue working full time at Colonial Farms, albeit not in her pre-Accident pain-free manner. It is a physical job, not a desk job, and since the Accident she is exhausted at the end of her shifts, particularly towards the end of the work-week. No job is guaranteed and the future is not certain. But for the Accident, she would have likely continued working in her current position indefinitely, taking time off as needed to expand her family. As a result of the Accident-related chronic pain issues that are likely permanent, I conclude that at some point in the future, the pain will likely get the best of her and she will no longer be able to perform her current job.

- [96] The evidence is that there are no other jobs available at Colonial Farms that she would qualify for that are less physically demanding. I am satisfied that her background, experience and education make it unlikely she will be able to qualify in less physically demanding jobs elsewhere, especially full-time.
- [97] At the same time she is not disabled either. At the point that she will no longer be able to tolerate the physical demands of her current job, it is likely that she could obtain some form of employment even on a part-time basis as she is able to manage. The plaintiff is not academically driven or academically gifted. Her employment opportunities will be limited to jobs requiring the use of her body and strength.
- [98] Considering the evidence as a whole, taking into account that chronic pain takes a toll over time and that common sense dictates that a person's ability to perform a physical job will deteriorate over time, I view the future risk of her being unable to physically manage her job duties at Colonial Farms and losing her relatively good paying job with full benefits and a pension as significant and not speculative.
- [99] In sum, given her young age, her injuries, the physical and repetitive nature of her job, the medical prognosis that I have accepted will result in her pain being chronic, and my conclusion that at some future point she will be foreclosed from continuing her job at Colonial Farms, I conclude that she has shown a real and substantial possibility of earning less income in the future as a result of her Accident-related injuries.
- [100] That loss must now be quantified. It is not a precise mathematical calculation, but rather a matter of judgment and is intended to put the plaintiff in the position she would have been in but for the Accident. An award for loss of earning capacity recognizes that the ability to earn income is an asset and the plaintiff deserves to be compensated if this asset has been impaired: *Tsalamandris v. McLeod*, 2012 BCCA 239 at para. 31; *Moreira v. Crichton*, 2018 BCSC 1281 at paras. 116-118.
- [101] The plaintiff currently earns approximately \$50,000 per year in wage and non-wage benefits. Given she is a young person and that the future risk of being unable to work the types of jobs that she would have been able to but for the Accident and taking into account the whole of the evidence, and using common sense, I conclude that a fair and proper award to compensate her for her loss of future earning capacity is five years' annual earnings, or \$250,000: *Palos v. ICBC* (1995), 100 B.C.L.R. (2d) 260 (C.A.); *Shapiro v. Dailey*, 2012 BCCA 128.
- [102] The plaintiff is awarded \$250,000 under this head.

f. Loss of Homemaking Capacity

- [103] The plaintiff claims loss of homemaking capacity as a separate head of damage on the basis that, viewed as a capital asset, the plaintiff's capacity to maintain her home to the level that she did prior to the Accident, has been significantly reduced. Given her young age and the evidence of the negative change to her meticulous pre-Accident homemaking ability, she seeks an award of \$20,000 to compensate her for that loss.
- [104] The defendant says that any such loss should be considered more of a loss of amenity and factored into her non-pecuniary damage award: *Kim v. Lin*, 2018 BCCA 77 at para. 28, 33 and 34.
- [105] I agree with the defendant that this is a case where the plaintiff's loss of ability to maintain her home to the same standard as she did pre-Accident is in the nature of a loss of amenities. I have factored this loss into the non-pecuniary damage award I have made. I have also provided for the plaintiff's future home and yard maintenance in the cost of future care award that I have made.
- [106] I decline to make a separate award under this head.

g. Mitigation

- [107] The defendant argues that the plaintiff's damage award ought to be reduced by ten percent for what he asserts was her failure to follow Dr. Giantomaso's strong recommendations to participate in an active rehabilitation program as part of his March 16, 2017 report. The recommendations included core strengthening, aerobic and resistance training. Dr. Giantomaso felt that such a program may reduce her pain and increase her function.
- [108] Firstly, I note that requests made by the plaintiff's counsel for funding for Dr. Giantomaso's recommendations were ignored by the defence. Secondly, Dr. Giantomaso made it clear in his evidence that the recommendations he made would not cure the plaintiff's chronic pain condition but were made to assist the plaintiff to manage the pain. Thirdly, instead of a formal active rehabilitation program, she worked out in a gym on her own or with a friend.
- [109] The onus is on the defendant to prove that not only would the plaintiff have reduced her damages by following the recommendations of her medical advisors, including Dr. Giantomaso, but also that her failure to do so was unreasonable: *Chiu v. Chiu*, 2002 BCCA 618 at para. 57; and *Niessen v. Emcon Services Inc.*, 2018 BCSC 1410 at paras. 217-18. It is a subjective/objective test: *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 56.
- [110] The plaintiff is the primary caregiver to her two young children, works full-time, and does her best to maintain her home while her husband is away. While the evidence is clear that the plaintiff did not pursue a formal active rehabilitation program as recommended by Dr. Giantomaso, it was not unreasonable in the circumstances, especially since she went to the gym. She had no resources to pay for the program, and the defendant's agents declined her request for funding. The defendant cannot have it both ways.

[111] In any event, even had she followed Dr. Giantomaso's recommendations, the defendant has not proven that the damages would have been reduced.

[112] The defendant's mitigation argument fails.

Summary

[113] To summarize, the plaintiff is awarded the following damages:

a)

General Damages:

\$100,000.00

b)

Special Damages:

1,422.15

c)

Past Wage Loss (net of tax):

15,856.67

d)

Future Care Costs:

50,000.00

e)

Loss of Future Earning Capacity:

250,000.00

f)

Loss of Homemaking Capacity:

0.00

TOTAL:

\$417,278.82

[114] For ease of calculation, as part of my overall assessment of damages and to save time and costs, I am rounding this number to \$420,000.00, which takes into account that I have already rounded off her future care award and in order to include interest that the plaintiff would otherwise be entitled to under the Court Order Interest Act on her special damage and past wage loss claim.

[115] The plaintiff will therefore have judgment against the defendant in the sum of \$420,000, inclusive of interest.

[116] Subject to matters of which I am unaware, the plaintiff is also entitled to her Scale B costs.

"G.P. Weatherill J."

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