
CANADA / JUDGMENT

Stenner v. Mohr

2020 BCSC 1492

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 1492 Stenner v. Mohr

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Stenner v. Mohr,

2020 BCSC 1492

Date: 20201007

Docket: M153751

Registry: Vancouver

Between:

Petra Stenner

Plaintiff

And:

Sharlene Lisa Mohr and Charles Wesley Patterson

Defendants

Before: The Honourable Mr. Justice D.M. Masuhara

Reasons for Judgment

Counsel for the Plaintiff:

S.W. Hood

Counsel for the Defendants:

J.W. Burgoyne

Place and Date of Trial/Hearing:

Vancouver, B.C.

June 22-26, 2020

June 29, 2020

Place and Date of Judgment:

Vancouver, B.C.

October 7, 2020

I. Introduction

- [1] These Reasons deal with a personal injury claim arising from a motor vehicle accident which occurred on August 2, 2013, on Highway 16 at or near Junction 37, in Terrace, B.C. (the "Accident"). The defendant, Ms. Mohr, was driving a 2009 GMC Sierra in the same direction as the plaintiff, Ms. Stenner (now Ms. Brown), and struck the rear of the plaintiff's vehicle, a 2003 Hyundai Elantra. The plaintiff's vehicle appears to have struck a pole as a result, continued off the right shoulder of the highway, and rolled down an embankment for about four metres. The plaintiff was able to extract herself through the window of her wrecked car. She climbed up to the highway where a woman came to her assistance, providing her with water and company until an ambulance arrived. She was then transported to the hospital and was released a few hours later.
- [2] At the time of the Accident, the plaintiff was 37 years old and was the owner of a popular restaurant in Terrace, Cafe Zesta. She sold her share in the business approximately one year after the Accident.
- [3] The plaintiff asserts that as a result of the Accident she has suffered a multitude of chronic injuries and conditions that have affected and continue to affect her ability to work. These include chronic pain affecting her neck, upper back, and lower back, as well as problems with ongoing depression and anxiety.
- [4] This action was commenced May 26, 2015. The plaintiff seeks damages under the usual heads relating to personal injury in a motor vehicle accident. Liability is admitted. Contributory negligence is not asserted.
- [5] The damages sought by the plaintiff are disputed by the defence. The defence submits that the plaintiff's injuries are minimal and a consequence of her not following medical advice; lack of mitigation is pleaded.
- [6] The following witnesses testified as part of the plaintiff's case:
- Ms. Petra Brown, the plaintiff;
 - Mr. David Brown, the plaintiff's husband;

- Dr. David Morgan, psychiatrist called as expert;
- Mr. Dominic Shew, occupational therapist called as an expert;
- Ms. Larsen, the plaintiff's friend and former employee at the Starfish Bistro;
- Ms. Bernice Johnson, former business partner of the plaintiff.

[7] The defence did not call a case.

II. Background

- [8] At the time of trial the plaintiff was 43 years old. She was born in Germany and grew up there. Following high school, she attended a trade school to become a seamstress and worked in the trade upon completion. She married but then divorced. In 2003, the plaintiff decided to travel the world obtaining a scuba diving instructor certificate along the way. It was during her travels that she met Mr. Larson, who is from Terrace, BC and formed a relationship. Following further travels, the plaintiff and Mr. Larson moved to Terrace together in 2007. They subsequently started a cafe, the Starfish Bistro (which Ms. Brown operated), and a dive excursion business together. In 2009, the plaintiff gave birth to their son.
- [9] Prior to the Accident, the plaintiff had an active lifestyle. The plaintiff operated the cafe's business and enjoyed outdoor recreational activities. In 2011-12, she obtained a personal training certificate and began leading group fitness classes part-time. Unfortunately, during 2011 and 2012 the plaintiff began suffering from stress, moodiness, lack of sleep, low energy, fatigue and depression. In 2012, her relationship with Mr. Larson deteriorated and she left it. The plaintiff described the situation as an "angry one". She began living with her son in a small apartment and assumed all the household and caretaking responsibilities of a single parent.
- [10] In the same year, the Starfish Bistro closed. Upon closing, the plaintiff was approached by one of her employees Ms. Johnson, who was looking to open a restaurant in Terrace. Ms. Johnson asked if the plaintiff would be interested in partnering in the business on a 50/50 basis. The plaintiff agreed and the two opened Cafe Zesta in 2012. They paid themselves \$300 per week.
- [11] The plaintiff began taking online bookkeeping courses around this time but did not complete them due to the Accident.
- [12] In 2013, prior to the Accident, the plaintiff on the advice of a friend went to see her family doctor regarding depression, fatigue and stress. She did not think counselling was right for her and instead chose activities such as hiking, running, kickboxing and other exercise to deal with her depression. In the same year she began dating Mr. Brown, who has worked for many years as a long term crane operator for Rio Tinto in Kitimat. They eventually married and have a child together. Both the plaintiff and Mr. Brown are avid fishers and their

relationship developed as they would meet regularly fishing the Skeena River. They alternated two to three days per week at one another's home prior to cohabiting.

- [13] On August 2, 2013, the Accident occurred. The plaintiff submits that the Accident is the cause of pain in her neck, back, and shoulders, as well as headaches, fatigue, and a range of psychological issues. While the plaintiff was able to immediately return to work at Cafe Zesta after the Accident, she initially worked reduced hours. After starting at about four hours a day for five days a week she gradually increased her workload to eight hours day, five days a week. She did not return to the much longer hours she worked there. Ms. Johnson testified however, that the plaintiff had difficulties both physically and emotionally at work, which led to arguments between the two.
- [14] The plaintiff testified that due to her physical and emotional difficulties and an inability to handle stress she made the decision to leave Cafe Zesta. The work there required standing for most of the day, lifting and carrying items (some quite heavy) and preparing foods. She also had difficulties with her business partner. In May 2014, she sold her interest in the cafe for \$12,000 - \$13,000 to Ms. Johnson's sister.
- [15] Shortly thereafter, the plaintiff started to work full-time as a labourer at Do-Your-Part recycling depot. Her pay was \$16/hour. While her symptoms improved, the depot became busier over time and the work required dealing with heavier items. The plaintiff testified that this re-aggravated her neck and back and that she developed some shoulder pain sometime around 2015. Despite this, she did not take any time off.
- [16] In addition to her work at the recycling depot, the plaintiff did the bookkeeping for Cafe Zesta and began working part-time as a bookkeeper for Watson Accounting on Saturdays in March 2014. The plaintiff began full-time work at Watson Accounting in the summer of 2015 through to 2017, leaving her position at the depot. She started at \$16/hour and gradually increased to \$22/hour. She says she left the recycling plant because the physical duties were too much for her as the work became more demanding and heavier items had to be managed.
- [17] In 2017, the plaintiff began pursuing the option of in-vitro fertilization with Mr. Brown. By this point, the parties were cohabiting. She travelled to Germany for the procedure because it would cost less and she could stay with her family instead of paying for accommodation. It was around this time that she developed hypothyroidism and high blood pressure. As a result, she takes prescribed medication for both conditions.
- [18] In December 2017, the plaintiff had a positive pregnancy test result. Their daughter was born in August 2018. She took maternity leave from Watson Accounting just prior to her delivery date and returned one year later in July 2019 on a full-time basis.

[19] The plaintiff testified that after the Accident she became short tempered and moody and that she takes out her frustration on her family which causes her to feel very guilty. Mr. Brown stated that these changes caused them to fight more which led them to take a break from their relationship. The separation occurred around October 2019 and they reconciled in March 2020. Mr. Brown described their current relationship as positive but said there were difficulties with intimacy because of Ms. Brown's injuries.

[20] In October 2019, the plaintiff left Watson Accounting to work with CDG Construction on a part-time basis (approximately 25-30 hours a week) earning \$28/hour. She earned as much working part-time there as she did full-time at Watson Accounting.

[21] The income of the plaintiff as reflected in her income tax documents is as follows:

Year

Amount

Comment

2009

\$15,878

2010

\$9,568

2011

\$4,578

2012

\$14,498

2013

\$11,664

2014

\$18,974

2015

\$31,462

2016

\$32,379

2017

\$35,997

2018

\$34,613

(income \$24,213 and EI of \$10,833)

2019

\$34,229

(income \$21,330 and EI of \$21,717)

A. Plaintiff's Complaints following the Accident

- [22] The plaintiff submits that the Accident is the cause of pain in her neck, back, shoulders, headaches, and fatigue. She also says that as a result of the Accident she has become moody, argumentative, irritable, and has a temper. She also complains of a decreased libido due to headaches.
- [23] She says that despite the many chiropractic, massage and acupuncture treatments she has had in the years following the Accident, they only provide short term relief.
- [24] The plaintiff testified that the pain and other ailments she attributes to injuries from the Accident have become chronic and severely disabling. While she predominantly worked full-time in the years following the Accident (aside from maternity leave and a reduction in hours at Cafe Zesta), she is currently working as a bookkeeper with CGD Construction on a permanent part-time basis because of her condition.
- [25] The plaintiff says her condition also leaves her unable to partake in her pre-Accident recreational and social activities to the same extent. She says she needs assistance from her husband to cast her fishing line from the shore as she has difficulty doing so unaided. She has attempted to return to working out and kickboxing, but has felt significant soreness and pain during or immediately after these activities.
- [26] She says she also suffers from shoulder, neck, and back pain which limit the physical work she can perform, resulting in weight gain. The plaintiff testified that the sedentary nature of her bookkeeping work has caused new pain to arise in her back and headaches. She further testified that after the Accident she had limited energy at the end of a workday. This impacted her ability to pursue recreational activities and play with her son, taking an emotional toll.

[27] However, the plaintiff's more recent transition to part-time work at CGD Construction (25 to 30 hours) has made a notable difference to her general well-being and quality of life. At her new bookkeeping position she is able to earn as much as she did working full-time at Watson Accounting. As a result, she has enough energy at the end of the day to go for walks with her dog and play with her children outside.

III. Medical Evidence

[28] The plaintiff adduced the reports of two medical experts. The defence did not adduce any.

A. Dr. Chow, physiatrist:

[29] Dr. Chow is qualified as a physiatrist and authored two expert reports for the plaintiff. They are dated October 18, 2016 and July 15, 2019. Dr. Chow's prognosis of the plaintiff is stated as poor. Dr. Chow's diagnosis was that as a result of the Accident the plaintiff suffered from soft tissue injuries to the cervical, thoracic and lumbar spine involving muscles, ligaments, tendons, joint capsule and facet cartilage. He further found that as a result of the Accident the plaintiff suffers from post-traumatic headaches and has gained weight due to her reduced level of physical activity. Dr. Chow also found that the plaintiff had psychological issues and would defer to a psychiatrist or psychologist.

[30] After seeing the plaintiff, Dr. Chow made the following recommendations in his 2016 report:

- (a) Occupational therapy intervention: she will require the services of an occupational therapist to educate her regarding proper body biomechanics when doing functional tasks. She will also need to know the pain concept of hurt versus harm, workload division and pacing strategies, task and work ergonomics, work station ergonomics, a job site analysis and an in-home assessment.
- (b) Physical therapy: I will expect that she will experience on and off flare-ups of her neck and back pain from time to time in the future and will require a brief course of physiotherapy during the flare-up. Physical therapy will include physiotherapy, manual therapy modality treatments, acupuncture, massage and chiropractic treatment.
- (c) Pharmacotherapy: she is taking Advil. She will continue to require over-the-counter medications for pain and non steroidal anti-inflammatory. From time to time she will require a stronger medication such as narcotics or opioids but long-term usage should be discouraged since there is potential complication of addiction.
- (d) She has chronic headaches. Certain medications such as tricyclic antidepressant, Lyrica or Cymbalta will be recommended. Botox injection may be indicated in certain cases. A referral to a neurologist who specializes in headaches will be necessary.

- (e) Exercise: She is doing some exercises on her own but she will need to be trained by a kinesiologist to do the appropriate exercise for the neck and back so that she can do the exercise safely on her own. She will need stretching and strengthening exercises in addition to endurance fitness exercise to maximize her function and fitness level. A gym membership to enhance her motivation and compliance will be necessary. Hydrotherapy also will be necessary.
 - (f) Intervention study: She has chronic neck and back pain. She will need to consider diagnostic facet block especially when her symptoms worsen further restricting her functional ability.
 - (g) Weight reduction program: She has weight gain and a weight reduction program will be necessary.
 - (h) Multidisciplinary chronic pain therapy: She has chronic pain with psychological issues. A multidisciplinary chronic pain program to address the physical and psychological issues using evidence-based treatment strategy will be recommended.
- [31] Dr. Chow saw the plaintiff for another independent medical examination in July 2019. He found that from a physical perspective the plaintiff had impairment of the cervical, thoracic and lumbar spines. He opined that her residual conditions related to the Accident were: chronic headache; chronic neck pain; chronic mid-back pain; chronic low back pain; late whiplash syndrome; and weight gain.

[32] In his 2019 report, Dr. Chow states:

It is now going on six years since the accident. Her recovery has plateaued. She has reached maximum medical recovery. She has findings of chronic pain presentation with a central sensitization process. She is 42 years old. She likely has permanent impairment of cervical, thoracic and lumbar spines. She likely will experience exacerbation of symptoms with the passage of time. It is unlikely she will continue to be able to maintain her current levels of functional ability with the passage of time. It is unlikely that she will be able to do her bookkeeping job on a full-time basis. She will need accommodation.

B. Dr. Morgan, psychiatrist

[33] Dr. Morgan is qualified as a psychiatrist. Dr. Morgan diagnosed the plaintiff experienced persistent, moderate to severe somatic symptom disorder; persistent depressive disorder; and unspecified trauma and stressor related disorder--all of which he opined were related to the Accident. Dr. Morgan opined that the unspecified trauma and stressor related disorder had resolved but that the plaintiff's other conditions remain.

[34] Dr. Morgan's report states:

90. Following the litigated motor vehicle accident of August 2, 2013, Ms. Stenner developed a Somatic Symptom Disorder. Again, there do not appear to be any other factors which could account for this condition developing, but her not communicating her distress and her being raised as a stoic individual would have predisposed her to developing a Somatic Symptom Disorder. I am of the clinical opinion that Ms. Stenner developed a Somatic Symptom Disorder as a result of the litigated motor vehicle accident of August 2, 2013.
91. Over time, in the context of her functional level being markedly reduced, and her not being able to exercise to deal with her frustration, Ms. Stenner developed a Major Depressive Disorder which evolved into Persistent Depressive Disorder overtime. There do not appear to me to be any readily identifiable factors which could have precipitated the development of this condition. In my clinical opinion, Ms. Stenner developed a Persistent Depressive Disorder as a result of the litigated motor vehicle accident of August 2, 2013.
- [35] In terms of treatment and prognosis the report states:
93. Ms. Stenner would benefit from a trial of antidepressant treatment, and would benefit from meeting with a psychiatrist. In the event that she does not wish to take a prescribed antidepressant, a natural alternative would be St. John's Wort.
94. Ms. Stenner would benefit from Cognitive Behavioural Therapy. This is a psychological treatment which has been shown through scientific evidence to be effective in the treatment of Somatic Symptom Disorder and Major Depressive Disorder. Ideally, such treatment would be given by a Registered Psychologist who is appropriately trained, credentialed, and experienced. Given that Ms. Stenner lives in Terrace, treatment with a Registered Psychologist may prove difficult to arrange, unless she travels to a more urban setting, such as Prince George.
95. Factors which would indicate a positive response to CBT would include Ms. Stenner's intelligence and her desire to get better. However, factors which would point towards a less positive outcome would include her current levels of pain and distress, her active cognitive symptoms, her active depressive symptoms, and the difficulty she experiences in opening up to professionals regarding her distress.
96. Whilst Ms. Stenner remains in physical pain, and avoids physical exercise as a result of her fear of injuring herself further, she will probably not be able to exercise. As this appears to me to have been her main mechanism with coping with distress prior to the litigated motor vehicle accident, she will probably continue to feel very guilty regarding her impaired functional level and the effect this has on her family, and this will perpetuate her chronic depressive symptoms.

[36] Though Dr. Morgan recognizes that the plaintiff was able to work full-time until she went on maternity leave, he finds that as result of her condition and anxieties regarding a return to full-time hours the plaintiff has returned to work only part-time. Specifically, as a manifestation of her somatic symptom disorder, she is worried about returning to full-time hours as her job involves sitting for long periods, and this aggravates her pain.

IV. Functional Capacity Evaluation

[37] The plaintiff also tendered a functional capacity evaluation report dated November 16, 2016. The report was authored by Mr. Dominic Shew, an occupational therapist. Mr. Shew's report was based upon a functional capacity examination of the plaintiff he conducted over seven hours on July 13, 2016, and involved the standard interview, testing, measuring and observations.

[38] Mr. Shew's summary of findings was that:

Ms. Stenner demonstrated the capacity to perform activity that required sedentary to medium strength; for example, occasional two handed carrying over 28 feet from 0-40 lbs occasional two handed lifting from floor to knuckle height from 0-50 lbs, et cetera.

She did not demonstrate any significant functional limitations with tasks involving hand dexterity, grasping, and weight bearing (i.e., walking, standing, balancing, climbing, and standing).

She, however, demonstrated mild functional restrictions with tasks that applied stress to her right shoulder when, for example, completing activities requiring the repetitive lifting of moderate loads, and vertical reaching.

She also demonstrated mild to moderate functional limitations with tasks that applied stress to her trunk/lower spine when, for example, completing activities requiring prolonged stooping and crouching, repetitive bending and squatting, and prolonged sitting.

In addition, she demonstrated moderate functional limitations with tasks that applied stress to her neck and upper back when for example, completing activities requiring sustained head and/or neck positions, vertical reaching, horizontal reaching and prolonged sitting.

[39] Mr. Shew found that the plaintiff demonstrated that she could safely handle loads involving sedentary/limited, light, and medium strength demands. Mr. Shew found that she demonstrated reasonable functional strength relative to the general demands of the position of an owner and operator of a cafe. However, he stated that the upper strength demands are likely approaching her safe, biomechanical limit. Mr. Shew stated that because of her limitations and accommodations that would be required, she is likely at a competitive disadvantage to others who do not have such physical and functional restrictions.

[40] As a salvage operator (i.e. the plaintiff's employ at the recycling plant), Mr. Shew found:

Regarding functional strength, Ms. Stenner demonstrated the safe capacity to handle loads requiring sedentary/limited, light, and medium strength demands. Thus, she demonstrated reasonable basic strength to manage the demands of such a position. However, the measured reduction in her neck, upper spine, and right upper extremity function indicates that the handling of moderate loads particularly above her knuckle height should be restricted to an occasional basis only. Thus, although she has reasonable basic strength, it is unlikely that she will be able to sustain the frequency that is required, particularly when handling moderate loads above her knuckle level.

[41] As a bookkeeper, Mr. Shew found:

Results of the F/WCE and her response infer that Ms. Stenner is likely safe and gainfully employable performing such work as she demonstrated the strength and capacity to perform the essential demands. Specific to the demands of this occupation, she did not demonstrate any significant functional limitations with tasks involving hand dexterity and grasping. However, she demonstrated difficulties tolerating prolonged positioning of her head, neck, upper spine, and lower spine when completing tasks involving prolonged "casual" sitting (e.g., likely encountered when attending meetings or conversing) and "work-intensive" sitting (e.g., static positioning of the body and spine when reading, writing, using a computer, et cetera). Her difficulties tolerating tasks that applied stress to her neck, upper spine, and lower spine indicates that she is best suited for a position that allows her the opportunity to take frequent breaks to rest, stretch, and/or change positions. In addition, to manage her symptoms while attempting to remain functional, she will require ongoing and appropriate ergonomic equipment and an appropriately set-up workstation.

[42] In terms of avocational tasks, Mr. Shew found that:

In terms of her capacity to manage avocational tasks, although there were measured and observed restrictions related to tasks that stressed her neck, upper spine, right shoulder, and lower spine her residual capacity is likely functional for most general, day-to-day demands. As such, I anticipate that she is safe and able to manage all her Basic ADL's and engage in her chosen light to moderate day-to-day household activities/Instrumental ADLs (e.g., hand washing dishes, completing laundry, cleaning countertops, et cetera) as long as she breaks up her activities appropriately to manage her symptoms.

[43] Mr. Shew also provided some costing information for the various treatments recommended by Dr. Chow and himself.

V. Discussion

A. Findings on injuries

[44] There is no question that the combination of being hit by another car while driving without any warning, striking a pole, and then rolling over twice down an embankment in her vehicle was serious and was frightening for the plaintiff.

- [45] I have no trouble finding that the plaintiff suffered from injuries related to the Accident in its aftermath. It is the extent of the injuries which is the issue.
- [46] As mentioned, the defence submits that the evidence supports only that the plaintiff suffered minor injuries in the Accident that have had a minor impact on her since. The defence notes the plaintiff had regular contact with her family physician, Dr. Meyburg, and offered no complaints to him of any mood issues after the Accident. She similarly made few complaints regarding physical injuries. From Dr. Meyburg's notes there appears to have been one entry related to post-Accident injuries occurring one year following the Accident. However, there is evidence of concerns and complaints raised with Dr. Ugbekile, whom the plaintiff began seeing as her family physician in May 2019. For example, Dr. Ugbekile's notes register a complaint of neck pain and a related referral for a neck pain program.
- [47] In my view, I accept that the plaintiff's injuries have now become chronic. At the same time while recognizing the argument that there is a level of stoicism, I am of the view that her condition is not as severe as submitted by the plaintiff. While she has physical limitations, in my view, her capacities in personal and work activities are greater than expressed.
- [48] I make this finding based on the fact that the plaintiff continued to work for four years following the Accident, except for a relatively short period following the Accident where she worked limited hours. During those four years she engaged in activities such as running the cafe; working as a labourer at a recycling plant and working part-time during this same time doing bookkeeping for the cafe and Watson Accounting; working full time as a bookkeeper in the accounting firm; and finally part-time as a bookkeeper for a construction firm.
- [49] The evidence also shows that since the Accident the plaintiff engaged in a range of activities such as: entered into an in-vitro fertilization program and travelled to Germany for the procedure; had the demanding task of caring for her son as a single parent; formed a meaningful relationship and partnership with Mr. Brown; assisted her husband in renovating their new home; and resumed physical recreation activities such as swimming, occasional hikes, fishing and kickboxing, albeit with limitations.
- [50] Though Dr. Morgan opined that the plaintiff suffered from unspecified trauma and stress-related disorder (now resolved), somatic symptom disorder, and major depressive disorder, the timeline does not indicate that these disorders impacted the plaintiff's ability to work continuously after the Accident.
- [51] While clinical notes are not in and of themselves determinative, and though the plaintiff indicated that she mentioned her complaints from her injuries to her family doctor, to the extent that she did mention them, my sense from the plaintiff's testimony and the overall circumstances, is that her injuries were not as concerning to her as she complained of at trial. It would have been of assistance to my determination in this case to have heard from the plaintiff's primary family doctor who has provided her with consistent, ongoing care.

- [52] Also, the clinical notes from her most recent appointment with her new family doctor, Dr. Ugbekile, observed that the plaintiff was emotionally stable and presented a regular mood. He also noted normal musculo-skeletal findings for neck, upper limb, and lower limb musculature and bones while noting nothing of concern in these areas. However, Dr. Ugbekile did make a referral for a neck massage and therapy and a request for assessment for intake.
- [53] I also note, that the plaintiff was given recommendations by Dr. Chow on treatments for her condition which were reiterated by Mr. Shew. She was aware of these recommendations. She did not pursue these. While she made an appointment with a neurologist, she did not follow through with the appointment. She testified she did not pursue the recommendations because she thought she was doing well with massage therapy and physiotherapy. She states that she did not follow up with a kinesiologist because she is a fitness therapist and as a result did not feel it was necessary. In terms of medications, she stated that she did not believe in medications. While she did discuss weight reduction with her family doctor she did not follow up in finding a weight reduction program. She also did not discuss the recommendations with her family doctor. While there was some question in the evidence as to whether such services were available in the region she lives in, the plaintiff did not testify that this factor impacted her decision not to follow up with the recommendations. There was also evidence that residential programs in the lower mainland were available and patients frequently would avail themselves of these programs.
- [54] In my view, the plaintiff's decision not to take up these recommendations weighs against a finding of moderate to severe chronic pain.
- [55] My overall view is that her condition is mild to moderate, and closer to mild, in terms of chronic pain.
- [56] There is however, in my view, a psychological component to her injury from the Accident identified. This psychological component, as presented by the experts tendered by the plaintiff, has played a role in her more recent decision to work part-time and she is entitled to compensation for this.

B. General Damages

- [57] The purpose of an award for non-pecuniary damages is to compensate the plaintiff for pain, suffering and disability as experienced to the date of trial, and as will be experienced into the future. The award is intended to permit the plaintiff to substitute other life amenities for those lost as a result of the defendant's negligence.
- [58] Awards made in other cases involving similar circumstances and injuries provide guidance. However, each case requires an assessment on its own specific circumstances--no two personal injury cases are identical: *Kapelus v. Hu*, 2013 BCCA 86 at para. 16.

- [59] Assessments under this head are guided by many factors, a non-exhaustive list is provided in *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46. These include: (i) age of the plaintiff; (ii) nature of the injury; (iii) severity and duration of pain; (iv) disability; (v) emotional suffering; (vi) impairment of life; (vii) impairment of family, marital and social relationships; (viii) impairment of physical and mental abilities; (ix) loss of lifestyle; and (x) the plaintiff's stoicism (which should generally not detract from the award).
- [60] The plaintiff seeks an award for non-pecuniary damages of \$125,000. Cases handed up in support of this position are: *Lauriente v. Schoonhoven*, 2017 BCSC 2246; *Dhaul v. Meahan*, 2019 BCSC 990; *Watkins v. Harder*, 2016 BCSC 2078; and *Kam v. Van Keith*, 2015 BCSC 1519. The plaintiff submits that this last case is most analogous to the facts before me.
- [61] The defence submits that fair compensation is \$75,000. Cases handed up in support of this position are: *Richmond v. Osztoivits*, 2019 BCSC 1984; *Dennison v. Jensen*, 2019 BCSC 725; and *VanderVeen v. Amante*, 2019 BCSC 2079.
- [62] All of these cases have certain aspects that are similar to the instant case. However, I find that the circumstances of the plaintiff are not as severe as the cases the plaintiff provides in support of its \$125,000 damages award. As well, my view of the plaintiff's circumstances is that they are equal to and more severe than the cases submitted by the defence.
- [63] Given my findings as to the injuries suffered, the effect on the plaintiff, the age of the plaintiff, and the impacts of the Accident on the plaintiff's lifestyle (including household and domestic tasks) and emotional well-being now and into the future, I assess a fair general damages award to be in the amount of \$100,000.

VI. Loss of Earning Capacity

- [64] Under this head, the onus is on the plaintiff to demonstrate an impairment to her earning capacity as well as a real and substantial possibility that it will result in a pecuniary loss. Mere speculation will not suffice: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 27. This is a different standard of proof than applying the balance of probabilities test: *Smith v. Knudsen*, 2004 BCCA 613 at paras. 28-29.
- [65] A plaintiff may be able to prove that there is a substantial possibility of a future loss of income despite having returned to her usual employment: *Perren v. Lalari*, 2010 BCCA 140 at para. 32. The focus is on loss of earning capacity.
- [66] This same focus is also applied to a plaintiff's claim for "past loss of income," which encompasses the loss of the value of the work that the plaintiff would have likely performed but was unable to as a result of the injury (i.e. as assessed from the time of the Accident to the date of trial). Past loss of income is properly characterized as a component of loss of earning capacity: *Falati v. Smith*, 2010 BCSC 465 at para. 39.

- [67] If the plaintiff is able to establish that there is a real and substantial possibility that her earning capacity is diminished, this Court must assess and weigh the likelihood that such an impairment would have nonetheless manifested in the absence of the sustained injuries. While this Court should attempt to, as much as possible, ground its assessment of hypothetical past events and prospective loss of earnings in the facts and circumstances of the plaintiff before it, the assessment has also been described as "gaz[ing] deeply into the crystal ball:" *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229 at 251.
- [68] Under any approach to determining loss of income damages, the court is to undertake an assessment of the circumstances before it, as opposed to engaging in a mechanical mathematical or statistical exercise: *Falati* at para. 41. Ultimately, the court must base its decision on what is fair and reasonable in the circumstances.

A. Loss of past earning capacity

- [69] The plaintiff seeks \$75,000 for past loss of income. This is based on the argument that because of her injuries she was not able to continue running Cafe Zesta and was forced to enter into more sedentary work. The amount sought by the plaintiff is based upon a calculation of the income she would have earned at Cafe Zesta (\$12,000) multiplied by the number of years she has not worked at the cafe post-Accident (six years).
- [70] The defence submits that the plaintiff has not suffered any past loss.
- [71] The difficulty with the plaintiff's claim for loss of income earning capacity is that she continued to work full-time after the Accident, except for a period of time following the Accident where she worked reduced hours. The evidence indicates that she did not suffer a financial loss as a result of her reduced hours or limitations. Her earnings draw from the cafe did not change.
- [72] While she stated she sold her interest in the cafe because of difficulties caused by from injuries, I have some difficulty with this claim.
- [73] After selling her interest in the cafe she went to work full-time as a labourer at a recycling plant earning \$16/hour and did not miss any days for a year. She continued to do the bookkeeping for the cafe and worked part-time as a bookkeeper at Watson Accounting. She then left that job in the summer of 2015 for a bookkeeping job with an accounting firm, beginning at \$16/hour and with pay increased over time to \$22/hour. The plaintiff worked in this bookkeeping position full-time for three years. The plaintiff left this position in July 2018 on the eve of the birth of her daughter and returned to work in July 2019 full-time. In October 2019 she was hired as a bookkeeper for a construction firm earning \$28/hour where she now works 25 to 30 hours a week. She essentially now earns what she was earning full-time at the accounting firm but while working part-time.

[74] However, there is some loss of capacity on the factors as set out in *Brown v. Golaiy*, (1985), 26 B.C.L.R. (3d) 353 (S.C.) which are set out below. In this regard, considering the loss of capacity is less than asserted and applying the real and substantial probabilities, I award \$5,000.

B. Loss of future earning capacity

[75] A plaintiff may choose to quantify his or her loss of future earning capacity on an earnings approach or a capital asset approach. The plaintiff in this case has adopted a capital asset approach. While the defence argues that there should be no award for loss of future earning capacity, it agrees that if an approach is to be applied, then the capital earnings approach would be appropriate.

[76] The capital asset approach assesses the amount of damages to be awarded to a plaintiff by looking at how the plaintiff's injuries have reduced her overall "value" as an economic generator rather than projecting the plaintiff's future earning level but for the Accident and subtracting her likely future earnings given its effects.

[77] The factors to be considered in a capital asset approach to assessing damages are set out in *Brown*. In that case, Finch J. stated:

The means by which the value of the lost, or impaired, asset is to be assessed varies of course from case to case. Some of the considerations to take into account in making that assessment include whether:

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

[78] The plaintiff submits that she remains symptomatic, experiencing ongoing physical, functional and emotional deficits despite it being over six years since the Accident. The plaintiff submits that she has suffered a loss of opportunity to work in fields that require more physical work such running a cafe or working at a recycling depot. She notes that and being rendered less capable of earning income from all types of employment is one of the factors to be considered in *Brown* above. With regard to the applicable factors, the plaintiff submits that \$125,000 is a reasonable award, which is arrived at by taking the difference between what she can earn full-time at her current position (\$56,000) and what she earns part-time (\$31,000) and multiplying the difference by five years.

- [79] The defence submits that the plaintiff has not established a loss of future earning capacity. The defence submits that the threshold of establishing a real and substantial possibility that the plaintiff would have pursued full-time work at her current income level has not been met. Alternatively, the defence submits that if this Court were to find an award was justified, then a multiplier of one or two years should be applied. This would be \$25,000 to \$50,000.
- [80] While the plaintiff says that she is unable to work full-time because she is exhausted, the fact that she was able to work full-time for many years following the Accident dilutes her assertions as to the extent of her loss of capacity. However, I accept that her psychological condition limits her outlook as to earning capacity. I find that under the factors set out under Brown there is some loss, but it is neither as extensive nor will be as prolonged as the plaintiff submits. I have also tried to accommodate for the Accident's psychological impacts on the plaintiff in the future care items that I award, in the hopes that her limitations will be lessened. Based on my findings regarding the injuries to the plaintiff, a reasonable award is \$40,000.

C. Loss of ability to perform household and domestic tasks

- [81] Under this head of damages the plaintiff seeks \$25,000.
- [82] Calculating damages for a loss of ability to perform household and domestic tasks was recently addressed in *Kim v. Lin*, 2018 BCCA 77. In this case, the Court of Appeal determined whether the loss should be more properly reflected as a general damages award or as a pecuniary award. The key is whether there has been (1) a true loss of capacity which would place the matter in the pecuniary award category; or (2) a loss of amenities or increased pain and suffering where the award would fit within the non-pecuniary category. However, as clarified by Chief Justice Bauman:
- [33] I do not wish to create an inflexible rule for courts addressing these awards, and as this Court said in *Liu*, "it lies in the trial judge's discretion whether to address such a claim as part of the non-pecuniary loss or as a segregated pecuniary head of damage": at para. 26.
- [83] In my view, it seems awards for this type of loss can be considered general damages, pecuniary damages, or both depending on the nature of the loss in the specific case.
- [84] In this regard, I note the report of Mr. Shew which states:

In terms of her capacity to manage avocational tasks, although there were measured and observed restrictions related to tasks that stressed her neck, upper spine, right shoulder, and lower spine her residual capacity is likely functional for most general, day-to-day demands. As such, I anticipate that she is safe and able to manage all her Basic ADL's and engage in her chosen light to moderate day-to-day household activities/Instrumental ADLs (e.g., hand washing dishes, completing laundry, cleaning countertops, et cetera) as long as she breaks up her activities appropriately to manage her symptoms.

[85] In this case, the loss is better reflected as a non-pecuniary loss and is thus included in the non-pecuniary damages award as provided. My view of the plaintiff's condition is that while she has some limitations and experiences some difficulty, she is able to carry out a range of functions. Moreover, I am of the opinion that the difficulty which she experiences could be reduced and better managed with the programs and treatments I have made provision for in the award for future care.

D. Future cost of care

- [86] Under this head the plaintiff seeks \$45,000. This is meant to cover the medical recommendations for the plaintiff's future needs and ongoing management of her chronic symptoms. This would include: physical therapy, active rehabilitation with a kinesiologist, a weight loss program, a multidisciplinary chronic pain program in the lower mainland, anti-depressant medications, and cognitive behavioural therapy.
- [87] The defence agrees that some compensation should be awarded under this head but says the amount should be limited to \$3,500. They note that since Dr. Chow's report in 2016, the plaintiff's records show that she spent \$1,480 on treatment which translates to approximately \$370/year. It is submitted that the defendants should not be required to compensate the plaintiff for recommended programs she has twice failed to pursue.
- [88] The test for an award of a future care item requires medical justification and that the claim is objectively reasonable: *Milina v. Bartsch*, 49 B.C.L.R. (2d) 33 at 84, [1985] B.C.J. No. 2762 at para. 199 (S.C.), *aff'd* (1987), 49 B.C.L.R. (2d) 99 (C.A.).
- [89] The item must be reasonably necessary to preserve the mental and physical health of the plaintiff: *Milina* at para. 201. If the item serves only as solace by providing substitute pleasures, it does not qualify as a future care cost, but falls under non-pecuniary loss: *Milina* at para. 193. The distinction in a case is not always clear.
- [90] The medical evidence supporting a future care item is not limited to that provided by a physician, but can also come from other qualified health care professionals so long as there is an evidentiary link to a physician's diagnosis.
- [91] The application of common sense in assessing the reasonableness of an item is a constant.
- [92] The exercise here includes discerning whether the future care cost being incurred is a substantial possibility as opposed to mere speculation. The court may assess the present cost of providing such care and "may make an adjustment for the contingency that the future may differ from what the evidence at trial indicates:" *Krangle* (Guardian ad litem of) *v. Brisco*, 2002 SCC 9 at para. 21.
- [93] It is my view that an award which reflects the future costs of pursuing a multidisciplinary chronic pain program is justified, including: (i) travel and accommodation; (ii) active rehabilitation with a kinesiologist and passive treatment when flare-ups occur; (ii) a weight reduction program; (iv) meeting with a psychiatrist as recommended by Dr. Morgan; and (v)

anti-depressants or the alternative mentioned by Dr. Morgan, are justified. I have discounted the amount awarded because the plaintiff has not taken up similar recommendations in the past. This is distinct from the lack of mitigation issue advanced by the defence, which is discussed below. At trial, she stated that she is averse to taking medications and has indicated that because she is a trained fitness trainer that she did not see the need to see a kinesiologist. I did not hear other reasons for not previously carrying through with the recommendations.

[94] Nonetheless, with the benefit of a multidisciplinary chronic pain program, which should include access to psychologists and therapists to deal with cognitive behaviour matters alongside physical rehabilitation, I think it is likely that the plaintiff will see the benefits of pursuing active treatment. I also find that such a program could assist in helping her manage her pain (including the role of medications or naturopathic alternatives) and weight gain (through access to dieticians and increased physical activity), and develop a plan for dealing with her condition.

[95] Taking all of this into consideration, I find that a fair and reasonable award is \$25,000.

E. Special damages

[96] The plaintiff seeks \$17,000 in special damages. The plaintiff is permitted recovery of reasonably incurred out-of-pocket expenses as a result of her injuries. A list showing the expenses incurred by the plaintiff was produced. The expenses largely relate to chiropractic, massage, physiotherapy and acupuncture treatments as well as gas mileage, air flights, and some meals related to attending certain treatments and examinations.

[97] The defence agrees that the plaintiff is entitled to special damages.

[98] Accordingly, the plaintiff is awarded \$17,000 under this head.

VII. Lack of Mitigation

[99] The defence raises lack of mitigation by the plaintiff. It is submitted that the plaintiff had the benefit of recommendations for treatment set out in the medical and occupational expert reports which were obtained by the plaintiff in support of her case and that she did not take up the recommendations. The defence argues that had she done so the plaintiff would not be in the state that she now argues she is in. As a result, it is submitted that there should be a 20% reduction in the award.

[100] Our court of appeal recently stated the test in respect to establishing the failure to mitigate in *Rhodes v. Surrey (City)*, 2018 BCCA 281. At para. 56 the court stated:

The test for failure to mitigate is set out in *Chiu v. Chiu*, 2002 BCCA 618:

[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.

[101] I recognize that a plaintiff is not to be subjected to an overly critical standard of review, however, in my view, the plaintiff did not act reasonably by not addressing the recommendations set out in Dr. Chow and in Mr. Shew's reports. I find that had she done so, her damages could have been reduced. I say this given the evidence that the plaintiff: (i) did not discuss the report with her family doctor; (ii) did not avail herself of medications because she did not believe in medications; (iii) did not reschedule an appointment with the neurologist; (iv) and did not pursue the services of a kinesiologist because she thought them unnecessary due to her experience as a fitness instructor. Her reasons for not following up on the recommendations were not persuasive. I also did not find persuasive Dr. Morgan's explanation that it was the plaintiff's background and personality that were the reasons for her lack of complaints in light of the evidence of her open communication to medical professionals including her family physician.

[102] As a result, I reduce damages by ten percent.

VIII. Conclusion

[103] I have determined the following under the various heads:

Item

Amount

General damages:

\$100,000

Loss of past earning capacity:

\$5,000

Loss of future earning capacity:

\$40,000

Loss of the ability to perform household and domestic tasks:

[included in general damages]

Future cost of care:

\$25,000

Special damages:

\$17,000

SUBTOTAL:

\$187,000

Reduction for failure to mitigate:

(\$18,700)

TOTAL:

\$168,300

[104] In standing back and considering the fairness of the award to all parties, I am of the view that the total is a fair and reasonable assessment.

[105] Accordingly, \$168,300 is awarded.

[106] Unless the parties wish to speak to cost, the plaintiff is awarded costs on Scale B.

"The Honourable Mr. Justice Masuhara"

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