

CANADA / JUDGMENT

Stewart v. Dhoulthon

2020 BCSC 1439

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Supreme Court of British Columbia

DECIDED

29 September 2020

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2020 BCSC 1439 Stewart v. Dhoulthon

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Stewart v. Dhoulthon,

2020 BCSC 1439

Date: 20200929

Docket: M173868

Registry: Vancouver

Between:

Samantha Rose Stewart

Plaintiff

And

Chanteyhl Dhoulthon

Defendant

Corrected Judgment: The text of the judgment was corrected on the front page on March 12, 2021.

Before: The Honourable Madam Justice Francis

Reasons for Judgment

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Place and Date of Trial/Hearing:

Vancouver, B.C.

August 17-20, 2020

Place and Date of Judgment:

Vancouver, B.C.

September 29, 2020

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Introduction

- [1] Samantha Stewart sustained injuries in a motor vehicle accident on May 20, 2015, while sitting in the front passenger seat of a vehicle driven by her roommate. The vehicle was stopped at the intersection of Oak Street and 33rd Avenue in Vancouver when it was rear-ended by a large sedan.
- [2] Liability was admitted by the defendant and the matter proceeded to trial on the issue of damages only.
- [3] The primary issue between the parties is causation. Prior to the Accident, Ms. Stewart suffered from neck, upper back, and lower back pain. She also had a history of depression and headaches. Ms. Stewart argues that the Accident exacerbated her pre-existing conditions. The defendant argues that Ms. Stewart's injuries do not arise from the Accident at all, and that all of her present complaints would still exist today had the Accident not occurred.
- [4] Ms. Stewart seeks an award for non-pecuniary damages and loss of earning capacity. The parties have reached an agreement on special damages and cost of future care.

Causation

- [5] In order to be entitled to any damages award, Ms. Stewart must establish a causal connection between the defendant's negligence and her current condition.

The plaintiff's circumstances

- [6] Ms. Stewart is an active, athletic, 33-year-old woman. She lives with a roommate in a house in White Rock.
- [7] Since 2012, Ms. Stewart has worked in her family business, Heartwood Landscaping Ltd., a high end landscape design company owned by her father, Colin Stewart. Ms. Stewart runs the company office, manages the books, and operates software that prepares three-dimensional design renderings. This is a full-time job that primarily involves sitting at a desk. The company office is located in Ms. Stewart's parents' home.
- [8] Additionally, since 2017, Ms. Stewart has run her own small business, Bee's Knees Microgreens. Through this business, Ms. Stewart grows microgreens for sale to local restaurants and retailers. She operates this business from a greenhouse located on her parents' property. In the first few years of operation, Bee's Knees Microgreens has grown significantly. Profits from the business were \$3,143 in 2018 and increased to \$13,457.02 in 2019.
- [9] Ms. Stewart is presently taking horticulture courses at Kwantlen Polytechnic University with a view to obtaining her Bachelor of Horticulture degree.

Plaintiff's condition prior to the Accident

- [10] Ms. Stewart has always been an athlete. As a high school and college student, she played basketball and baseball at a high level. She is an avid hiker and plays recreational league volleyball. She described her health prior to the accident as being good, although she had some long-standing sports injuries and associated "aches and pains". She also suffered from depression for a period of time prior to the Accident and was taking antidepressant medication at the time of the Accident.
- [11] Approximately a year before the Accident, Ms. Stewart saw Dr. Farokh Zavosh, a chiropractor. On direct examination, she testified that she saw the chiropractor because of her various aches and pains, and because she wanted to make sure she was in good shape for her planned hike of the Inca Trail in Peru. The intake form completed by Ms. Stewart on her first visit to Dr. Zavosh on May 3, 2014 describes pain on the right side of her head, neck, thoracic spine, and shoulder that is aggravated by sitting and driving. The chiropractor's notes of the first interview describe right neck pain, headaches, and pain in the cervical, thoracic, and lumbar spine. Ms. Stewart received four chiropractic treatments in May 2014 and then a single treatment just over a month before the Accident on April 8, 2015. The chiropractor's notes from the April 8, 2015 appointment record right neck and upper back muscle tension as well as headaches.
- [12] The medical records of Ms. Stewart's family doctor make no reference to any musculoskeletal pain complaints prior to the Accident. The only evidence of Ms. Stewart's pre-existing condition comes from the chiropractor's file and her own evidence that, prior to the Accident, she had some minor, long-standing back pain from sports injuries.

Injuries from Accident

- [13] Immediately after the Accident, Ms. Stewart felt pain and burning in her neck and shoulder. She described two distinct areas of pain: (1) her neck, shoulder, and upper back; and (2) her lower back. She testified that both areas were extremely painful after the Accident. With respect to the neck, shoulder, and upper back pain, she testified that she felt the pain mostly at the base of her skull, along her bra line, and under her right shoulder blade.
- [14] The notes of Ms. Stewart's family doctor, Nithya Ramani, indicate that Ms. Stewart saw Dr. Ramani the day after the Accident. Dr. Ramani recorded that, after the Accident, Ms. Stewart developed neck and upper back pain. On physical examination, Dr. Ramani noted stiffness in the neck and left trapezius. On June 5, 2015, Ms. Stewart saw Dr. Ramani again about her Accident-related injuries. Dr. Ramani noted that Ms. Stewart continued to have significant neck pain and stiffness with cervical tension headaches. She noted tenderness and stiffness in the left trapezius and pain in the left supraclavicular region.

- [15] Ms. Stewart saw Dr. Ramani for her Accident-related injuries seven times in the year following the Accident. Dr. Ramani's notes during this period only record pain in Ms. Stewart's neck and upper trapezius and do not mention any complaints of lower back pain.
- [16] In the weeks following the Accident, Ms. Stewart began to experience headaches related to her back pain. She also began to suffer sleep disturbances as a result of her pain. Both her headaches and her sleep problems continued to the time of trial. She testified that her lack of sleep causes her to be cranky and irritable. Additionally, she testified that she suffers from low mood since the Accident and that she has gained weight, impacting her self-esteem and confidence.
- [17] Ms. Stewart described flare-ups that happen about one to three times a month. When she has a flare-up, Ms. Stewart is unable to move or walk and is seized with debilitating pain in her back.

Recovery from the Accident-related injuries

- [18] Ms. Stewart testified that she had some improvement in the year after the Accident but that at a certain point her recovery plateaued.
- [19] In terms of resumption of her activities, Ms. Stewart had started playing volleyball by early July 2015, approximately six weeks after the Accident. Shortly after that, she started attending the gym. In August 2015 she completed a three-hour hike carrying a ten-pound hydro pack. She felt some burning in her neck and had a headache after the hike, but after resting she felt better.
- [20] When asked about how her back and neck pain post-Accident compares to her pre-Accident back and neck pain, Ms. Stewart said that the pain post-Accident is more intense, more frequent, and more widespread than before.
- [21] Dr. Ansel Chu, an expert in physical medicine and rehabilitation, examined Ms. Stewart on May 29, 2020 and provided an expert report. Dr. Chu's opinion on the relationship between Ms. Stewart's pre-Accident pain and her Accident related injuries is helpful. Dr. Chu offered the following opinions:
- a) Ms. Stewart's pain complaints from before the Accident and her pain complaints as of the date of examination are "pretty much the same" in terms of the location of the pain and aggravating factors, but the intensity of her post-Accident pain is much greater.
 - b) The source of Ms. Stewart's pain in her neck, upper back, and lower back is likely the facet joints, which were injured in the Accident.
 - c) The Accident has exacerbated Ms. Stewart's pre-existing condition, which is a long standing injury to her neck, mid back, and low back.

- [22] The plaintiff attended regular physiotherapy sessions after the Accident. These sessions appear to have been entirely focussed on Ms. Stewart's pain complaints in her neck and shoulder and associated headaches.
- [23] In late October 2015, after a pain flare-up, Ms. Stewart started regularly seeing a chiropractor named Dr. Mark Prii. Dr. Prii's notes indicate that on Ms. Stewart's third visit on November 2, 2015, she mentioned lower back pain as one of the problems for which she was seeking chiropractic treatment. This is the first mention in the evidence of Ms. Stewart seeking therapeutic assistance for lower back pain since the Accident, six months earlier.
- [24] Ms. Stewart completed a number of self-assessment forms for the chiropractor over the course of her treatment. These forms provide helpful evidence of Ms. Stewart's personal and subjective assessment of her injuries over a period of time. The forms completed by Ms. Stewart describe her current complaints as relating to her neck, shoulders, and upper back. They do not refer to lower back pain. The forms also show the following self-reporting by Ms. Stewart:
- a) December 4, 2015: pain at 5/10, percentage improvement since beginning of chiropractic treatment on October 31, 2015: 60%.
 - b) January 18, 2016: pain at 2/10, percentage improvement since beginning of chiropractic treatment on October 31, 2015: 70%.
 - c) March 9, 2016: pain at 2/10, percentage improvement since beginning of chiropractic treatment on October 31, 2015: 80%.
 - d) June 1, 2016: pain at 2/10, percentage improvement since beginning of chiropractic treatment on October 31, 2015: 80-90%.
 - e) November 2, 2016: pain at 3/10, percentage improvement since beginning of chiropractic treatment on October 31, 2015: 80%.
 - f) January 25, 2017: pain at 2/10, percentage improvement since beginning of chiropractic treatment on October 31, 2015: 80%.
 - g) April 19, 2017: pain at 3-4/10, percentage improvement since beginning of chiropractic treatment on October 31, 2015: 70-80%.
- [25] Based on Ms. Stewart's reporting to the chiropractor, it appears that her pain symptoms plateaued at a subjective level of 2-3/10 approximately eight months after the Accident. While this is helpful evidence in terms of discerning the timeline of her recovery, it is not determinative of her level of discomfort. Ms. Stewart is an athlete who has endured broken bones and other sports injuries; by all accounts she is a stoic character. She may well have a subjective perception of pain that is different from someone with a different temperament or a different injury history.

- [26] Ms. Stewart's family members and her roommate testified about their observations of how Ms. Stewart's pain symptoms impact her day to day life. Her mother, Heather Stewart, testified that she observes Ms. Stewart daily at work in the family home. She testified that about once an hour Ms. Stewart has to leave her desk to take a break and stretch out her shoulders. She also testified that there has been a change in Ms. Stewart's mood since the Accident and that she is not as engaged with life as she used to be.
- [27] Colin Stewart, Ms. Stewart's father and her employer, testified that he often sees Ms. Stewart in visible pain from her injuries. He has noticed her lying on the floor to stretch out her back, and regularly craning her neck to try to stretch it.
- [28] Sean Stewart, Ms. Stewart's brother, operates a landscaping company that is also situated on the Stewart family property. As such, he sees Ms. Stewart on most workdays. He also has observed her cracking and pulling her neck and shoulders. He described a time, approximately five or six months after the Accident, when he assisted Ms. Stewart in getting to the chiropractor after she had a flare-up so severe she could not move.
- [29] Rachel Dyck is Ms. Stewart's roommate. She has also observed Ms. Stewart showing visible signs of pain, particularly on longer car drives and in circumstances where she is sitting for long periods of time.
- [30] All four of the lay witnesses testified that Ms. Stewart has become more short-tempered and irritable since the Accident. All four also testified that, to the extent that they ever witnessed Ms. Stewart show signs of back and neck pain before the Accident, her symptoms were considerably more dramatic and more visible since the Accident.

Law re: causation

- [31] The test for causation is the "but for" test. In determining whether there is a causal link between the defendant's negligence and the plaintiff's injuries, the court must consider whether, but for the defendant's acts, the plaintiff's damages would have been incurred. The governing principle is that the defendant need not put the plaintiff in a better position than their original position and should not compensate the plaintiff for any damages they would have suffered anyway: *Blackwater v. Plint*, 2005 SCC 58 at para. 78.
- [32] The plaintiff must establish on a balance of probabilities that the defendant's negligence caused or materially contributed to an injury. The defendant's negligence need not be the sole cause of the injury. As long as a defendant is part of the cause of an injury, the defendant is liable, even though his act alone was not enough to create the injury: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at paras. 13-17.
- [33] The role of the plaintiff's pre-existing injuries is the primary issue in contention in this case. The pre-existing injuries are relevant both to causation and damages.

- [34] As noted by Madam Justice Dardi in *Brooks v. Habib*, 2019 BCSC 1398 at para. 217, whether a defendant is liable to a plaintiff for an injury is a matter of causation; the amount of compensation the defendant must pay is a matter of assessment of damages. It is necessary to keep in mind the analytical distinction between determining causation and assessing damages, since different principles apply to each.

Conclusion re: causation

Neck and upper back injury and associated headaches

- [35] I am satisfied that there is a causal relationship between the Accident and Ms. Stewart's pain complaints in her neck, upper back, and shoulder and her associated headaches.
- [36] The evidence of Ms. Stewart herself, as well as her mother, father, brother, and roommate, is consistent with the conclusion that Ms. Stewart's neck, upper back, and shoulder pain is more frequent and more severe than it was before the Accident. All of the lay witnesses testified that on a daily basis they witness Ms. Stewart exhibit pain behaviour such as wincing or physically moving in a way that appears intended to alleviate pain (for example, stretching and cracking her neck). All testified that they did not witness these behaviours prior to the Accident. All the lay witnesses also testified that Ms. Stewart's personality and mood had changed since the Accident. They describe her as regularly irritable and short-tempered, traits that she did not exhibit prior to the Accident.

Lower back pain

- [37] I am not satisfied that the plaintiff's lower back pain was caused by the negligence of the defendant.
- [38] On cross-examination, the defendant took the plaintiff through her clinical records. Ms. Stewart agreed that she did not report any lower back pain symptoms to her general practitioner, or any doctor, in the first 10 months after the Accident. Dr. Chu testified that, had Ms. Stewart injured her lower back in the Accident, he would anticipate her pain symptoms to manifest shortly after the Accident. The earliest evidence of any lower back pain being reported by the plaintiff to anyone is a notation in the chiropractor's records dated November 2, 2015, about six months after the Accident, where a check mark is placed next to the letters "LBP."
- [39] The plaintiff's counsel relies on *Edmondson v. Payer*, 2011 BCSC 118, in support of the proposition that the absence of a notation about a symptom in a clinical record is not evidence that the symptom was not discussed. However, in this case the issue is not simply that there is no reference to lower back pain in the clinical records describing five visits Ms. Stewart had with her GP over the 10 months following the Accident. Rather, Ms. Stewart herself testified that she did not report to her doctor at any of these visits that she had lower back pain. Further, the records of the chiropractor and Ms. Stewart's self-assessment forms suggest that her primary complaint at all times after the Accident related to pain in her neck

and thoracic spine, as well as associated headaches.

- [40] I find that the occasional treatments the plaintiff has received for her lower back pain in the years following the Accident is consistent with occasional flare-ups of the same lower back pain she suffered prior to the Accident. As such, I decline to find that the plaintiff's lower back pain was caused by the Accident.

Role of pre-existing injury in damages assessment

- [41] The parties in this case disagree about whether the plaintiff is a "thin skull" or a "crumbling skull" plaintiff. These two doctrines relate to the assessment of tort damages. They were reviewed by the Supreme Court of Canada in *Athey*:
- [34] The "crumbling skull" doctrine is an awkward label for a fairly simple idea. It is named after the well-known "thin skull" rule, which makes the tortfeasor liable for the plaintiff's injuries even if the injuries are unexpectedly severe owing to a pre-existing condition. The tortfeasor must take his or her victim as the tortfeasor finds the victim, and is therefore liable even though the plaintiff's losses are more dramatic than they would be for the average person.
- [35] The so-called "crumbling skull" rule simply recognizes that the pre-existing condition was inherent in the plaintiff's "original position". The defendant need not put the plaintiff in a position better than his or her original position. The defendant is liable for the injuries caused, even if they are extreme, but need not compensate the plaintiff for any debilitating effects of the pre-existing condition which the plaintiff would have experienced anyway. The defendant is liable for the additional damage but not the pre-existing damage: *Cooper-Stephenson*, supra, at pp. 779-780 and *John Munkman*, *Damages for Personal Injuries and Death* (9th ed. 1993), at pp. 39-40. Likewise, if there is a measurable risk that the pre-existing condition would have detrimentally affected the plaintiff in the future, regardless of the defendant's negligence, then this can be taken into account in reducing the overall award: *Graham v. Rourke*, supra; *Malec v. J. C. Hutton Proprietary Ltd.*, supra; *Cooper-Stephenson*, supra, at pp. 851-852. This is consistent with the general rule that the plaintiff must be returned to the position he would have been in, with all of its attendant risks and shortcomings, and not a better position.

[Emphasis in original.]

- [42] A pre-existing condition that might, irrespective of the defendant's negligence, realistically cause or contribute to the loss suffered by the plaintiff is relevant to the assessment of damages as a contingency that should be accounted for in the award. Such a contingency does not have to be proven to a certainty and should be given weight according to its relative likelihood: *T.W.N.A. v. Canada (Ministry of Indian Affairs)*, 2003 BCCA 670.
- [43] In this case, the plaintiff had a pre-existing condition that would have impacted her irrespective of the Accident, namely her ongoing neck, upper back, and shoulder pain. On cross-examination, Dr. Chu opined that Ms. Stewart was likely to have suffered pain

symptoms in these areas even had the Accident not occurred. Ms. Stewart's pre-existing condition impacts the determination of what her original position was and must be considered in assessing damages. I have factored the contribution of the plaintiff's pre-existing condition to her ongoing pain complaints in assessing damages below.

- [44] In considering damages, I have only considered the plaintiff's neck pain, upper back pain, and headaches. I have not considered the impact of the plaintiff's lower back pain on her enjoyment of life or her earning capacity, as I have found that this injury is not causally connected to the Accident.

Non-pecuniary damages

- [45] The plaintiff seeks an award of \$80,000 - 90,000 for non-pecuniary damages. The defendant submits that non-pecuniary damages should be assessed in the range of \$25,000 - 30,000.
- [46] Non-pecuniary damages are awarded to compensate a plaintiff for pain, suffering, loss of enjoyment of life, and loss of amenities. In assessing non-pecuniary damages, the court may look to awards made in analogous cases. However, each case must turn on its own unique facts. No two personal injury claims are identical and awarding damages involves an exercise of judgment: *Kapelus v. Hu*, 2013 BCCA 86 at para. 16.
- [47] In *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46, the Court of Appeal enumerated the factors to be considered in assessing non-pecuniary damages. The factors to be taken into account include: the plaintiff's age; the nature of the injury; the severity and duration of pain; disability; emotional suffering; impairment of family, marital and social relationships; impairment of physical abilities; loss of lifestyle; and the plaintiff's stoicism.
- [48] The plaintiff put the following cases before the court in support of her position on non-pecuniary damages: *Rajan v. Budruga*, 2020 BCSC 1056 (\$80,000), *Khakh v. Josol*, 2020 BCSC 286 (\$90,000) and *Matheos v. Scott*, 2019 BCSC 1738 (\$80,000).
- [49] The defendant puts the following cases before the court in support of their position on non-pecuniary damages: *Tisalona v. Easton*, 2015 BCSC 565 (\$32,000); *Olynyk v. Turner*, 2012 BCSC 1138 (\$40,000 reduced by 30% to \$28,000 to account for a pre-existing condition); *Hunter v. Yuan*, 2010 BCSC 1526 (\$35,000); and *Chapman v. Zilm*, 2020 BCSC 695 (\$30,000).
- [50] I have considered the cases cited by both counsel. I note that the cases relied on by the plaintiff concerned plaintiffs whose injuries impacted their lives more severely than I find Ms. Stewart's life has been impacted. The defendant's cases have facts that are more analogous to this case, although some of them are dated. Each case turns on its own specific facts.
- [51] In assessing non-pecuniary damages, I must look at the various injuries suffered by the plaintiff through the lens of the *Stapley* factors, as enumerated above.

- [52] The plaintiff suffered some diminishment of her recreational activities as a result of the Accident. However, she was playing recreational volleyball again less than two months after the Accident and in late July 2015 started going to the gym regularly. She also started hiking again in the summer of 2015. She is presently able to do most of the things she loves to do, although she is engaging in those activities at a much lower level of intensity than before. The plaintiff's inability to perform at her previous athletic level is an important factor in assessing non-pecuniary damages because of the joy she clearly derives from sports and intense physical activities.
- [53] I also am mindful of the emotional toll taken on the plaintiff by her injuries. The irritability and low mood associated with her frequent pain have impacted her quality of life. She feels pain every day and, while she is able to perform her daily functions at work, she suffers ongoing physical discomfort in doing so.
- [54] Further, the Accident took place five years ago and there was little evidence presented that suggests much chance of Ms. Stewart's symptoms improving in the future. She is likely to continue to struggle with neck and upper back pain for the rest of her life. Prolonged periods of sitting, at work or on long car rides, make her symptoms worse and this no doubt will impact her enjoyment of life.
- [55] I find that \$60,000 would be an appropriate award to compensate the plaintiff for loss of enjoyment of life as a result of her neck, shoulder and upper back pain and associated headaches. However, I must also factor in the plaintiff's pre-existing injury which would likely have caused her some element of discomfort and some limitations to her recreational activities irrespective of the Accident. In the circumstances, I find that the non-pecuniary damages award should be reduced by \$5,000 to account for the plaintiff's pre-existing injury and I award her \$55,000 under this head of damages.

Loss of income earning capacity

- [56] The plaintiff makes no claim for past loss of income earning capacity, but she seeks an award in the range of \$123,606.96 to \$185,410.44 for future loss of income earning capacity. The plaintiff asks the court to apply a capital asset approach to the plaintiff's loss of income earning capacity, and calculate her damages with reference to two to three years of income loss based on her 2019 income of \$61,803.48.
- [57] In *Falati v. Smith*, 2010 BCSC 465 at paras. 40-41, aff'd 2011 BCCA 45, this Court set out certain principles which inform the assessment of loss of earning capacity:
1. The amount of damages for loss of earning capacity may involve a consideration of hypothetical events;
 2. The standard of proof is not the balance of probabilities. The plaintiff need only establish a real and substantial possibility of loss;

3. The court must make allowances for the possibility that the assumptions upon which an award is based may prove to be wrong; and
 4. The court must undertake an assessment of damages for loss of earning capacity, rather than take a purely mathematical approach to the issue.
- [58] A plaintiff must always establish that there is a real and substantial possibility of a future event leading to an income loss. If the plaintiff discharges that burden, they then must prove the quantification of loss of future earning capacity on an earnings approach or a capital asset approach. Both are correct. The capital asset approach is often more appropriate where the pecuniary loss is not easily measured: *Perren v. Lalari*, 2010 BCCA 140 at para. 32. Either way, this Court must endeavour to quantify the financial harm accruing to the plaintiff from her injuries over the course of her working career, taking into account relevant and realistic negative and positive contingencies: *Pett v. Pett*, 2009 BCCA 232 at para. 19.
- [59] Is there a real and substantial possibility of a future event leading to an income loss in this case? In order to answer this question, it is necessary to consider Ms. Stewart's current and possible future vocational prospects.
- [60] Presently, Ms. Stewart works full time as an office manager for Heartwood Landscaping Ltd., a job she has held since 2012. She testified, as did her father and her brother, that Colin Stewart's long-term plan is to have his adult children take over his business when he retires. While Colin Stewart hasn't made any concrete plans to retire, given the harmonious relationship amongst the members of this family and their mutual desire to continue the family business after Colin Stewart's retirement, it is unlikely that Ms. Stewart will pursue a different career path. If she were to leave the family business, given her work experience and studies in horticulture, she will likely obtain a position in which she can earn as much or more than she is presently earning.
- [61] In her present job, Ms. Stewart is able to perform all work tasks required of her, so long as she has the flexibility to take breaks. She has been, and I find that in the future she likely will be, accommodated in this regard by her family members. There are no work tasks that she could perform before the Accident that she is no longer able to perform. Ms. Stewart's income from Heartwood has increased since the Accident.
- [62] I find that there is no real and substantial possibility of Ms. Stewart's income from Heartwood decreasing in the future as a result of her injuries. On the contrary, when she and her brothers ultimately take over the company from their father, she will be eligible to share in the profits of the business. Colin Stewart testified that his net annual income from the business ranges from \$275,000 to \$800,000. Ms. Stewart's income is therefore likely to increase significantly when she becomes an owner of the business.
- [63] I therefore do not find that there is a real and substantial possibility of Ms. Stewart suffering a future income loss as a result of her injury with respect to her work in the family business.

- [64] A slightly different analysis applies to Bee's Knees Microgreens. That business was started by Ms. Stewart in 2017, after the Accident. It involves some fairly intense physical work, such as lifting trays full of soil. Ms. Stewart has never been able to do this work but rather enlists the assistance of her mother and sometimes her roommate to help her with the heavier tasks associated with the business.
- [65] The microgreens business has grown impressively since it was started in 2017. The demand for her products is high and it is likely that Ms. Stewart will continue to enjoy growth and success in this venture.
- [66] I find that there is a real and substantial possibility that Ms. Stewart will have to hire labour to assist her with the business as it grows. Her mother and roommate are unlikely to always be available to assist with heavy labour, and the requirements of heavy labour are likely to increase as demand for Ms. Stewart's products increase. It is difficult to quantify Ms. Stewart's loss in this regard. As such, the capital asset approach is the most appropriate one for quantifying future income loss related to the business.
- [67] The capital asset approach requires the court to consider the four factors set out in *Brown v. Gola* (1985), 26 B.C.L.R. (3d) 353, in the context of the particular facts of the case. The court must make findings of fact as to the nature and extent of the plaintiff's loss of capacity and how that loss may impact the plaintiff's ability to earn income: *Morgan v. Galbraith*, 2013 BCCA 305 at para. 56.
- [68] The four factors are:
- a) whether the plaintiff has been rendered less capable overall from earning income from all types of employment;
 - b) whether the plaintiff is less marketable or attractive as an employee to potential employers;
 - c) whether the plaintiff has lost the ability to take advantage of job opportunities which might otherwise have been open to her, had she not been injured; and
 - d) whether the plaintiff is less valuable to herself as a person capable of earning income in a competitive market.
- [Morgan at para. 53]
- [69] Under the capital asset approach, one way of assessing loss of future earning capacity involves a consideration of a multiplier of annual income, but this is not the only available option. There is no single formula for determining loss of future income earning capacity: *Jurczak v. Mauro*, 2013 BCCA 507 at para. 35.
- [70] I find that Ms. Stewart's microgreens business will be less profitable in the future as a result of her injuries, primarily because she will eventually have to hire someone to do the heavy labour that, uninjured, she would have been able to do herself.

[71] Recognizing that a mathematical calculation is not possible, I would place a value of \$50,000 on the future loss of income earning capacity of the plaintiff as a result of her neck, shoulder, and upper back pain as well as associated headaches. However, but for the Accident, I find it is likely that her pre-existing condition would limit her ability to do physical labour in any event. Therefore, I reduce the future loss of income earning capacity award to \$45,000 to account for this likelihood.

Special damages

[72] The plaintiff and defendant have agreed on the sum of \$16,886.75 for special damages.

Cost of future care

[73] The plaintiff and defendant have reached an agreement to keep Part 7 benefits open towards future care costs and have not asked the court to adjudicate the plaintiff's claim for costs of future care.

Conclusion

[74] In summary, the damages are assessed as following:

Non-pecuniary damages

\$55,000.00

Future Income Loss

\$45,000.00

Special Damages

\$16,886.75

[75] If the parties are unable to agree on costs, they may make arrangements through Supreme Court Scheduling to appear before me to speak to the issue, but they must do so within thirty days of the date of these Reasons for Judgment.

"Francis, J."

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Prepared on 28 October 2026 · Esheria