

CANADA / JUDGMENT

Tait v. Soda

2020 BCSC 638

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 638 Tait v. Soda

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Tait v. Soda,

2020 BCSC 638

Date: 20200424

Docket: M178294

Registry: New Westminster

Between:

Jennifer Tait

Plaintiff

And

Umberto Soda and 4D Investments Ltd.

dba Central Island Distributors

Defendants

Before: The Honourable Mr. Justice Harvey

Reasons for Judgment

Counsel for the Plaintiff:

W.K. Briscoe

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M. Pytlewski

K. Pintye

Place and Dates of Trial:

New Westminster, B.C.

March 9-12 and 26, 2020

Place and Date of Judgment:

New Westminster, B.C.

April 24, 2020

Introduction

- [1] The now 50-year-old plaintiff, Jennifer Tait, was injured in a motor vehicle accident on April 7, 2014 when her vehicle, a 1998 Ford Excursion, was rear-ended by a Freightliner truck. She was the seat belted driver lawfully stopped at a red light when the defendants' vehicle struck her from behind. She had no forewarning of the collision. The defendants have admitted liability, leaving the assessment of the plaintiff's damages as the singular issue in this proceeding.
- [2] The plaintiff was on her way to work when the accident occurred. The impact was significant. The plaintiff had her brakes on awaiting a green light for her direction of travel. When struck, she was thrust forward in her seat and then, by virtue of her three-point seatbelt engaging, was pulled back toward the seat.
- [3] Police attended and oversaw the exchange of information. No other emergency personnel attended and the plaintiff left the scene and "limped" her vehicle home. Ultimately, her vehicle was written off. The damages to her vehicle exceeded \$8,500.
- [4] The plaintiff alleges the following injuries from the accident:
- Damage to her left breast by virtue of a crushed or displaced implant;
 - Shoulder injury;
 - Concentration issues;
 - Injury to low back and radiating sciatic pain;
 - Headaches;
 - Neck pain;
 - Electric-type sharp pains in mid to lower back; and

· Low mood/depression.

- [5] In the days following the accident her pain increased. She sought treatment from a general practitioner at a walk in clinic who, in turn, referred her for treatment with physiotherapy and referred her to specialists for investigation.
- [6] The injuries, she says, still impact her day-to-day life and her capacity to earn income. She, according to her evidence, is restricted in her day-to-day activities and her ability to perform household chores.

Issues

- [7] The singular issue is the quantification of the plaintiff's damages. She seeks general damages, past wage loss, future loss of capacity, loss of housekeeping capacity, costs of future care and special damages.

The Plaintiff Pre-Accident

- [8] The plaintiff was 45 when the accident occurred. She is the mother of five children, now all young adults. Three of them remain living with her at her home. She has resided in Langley for the past decade.
- [9] She has a Grade 11 education coupled with completion of some Arts courses from Kwantlen College. Her vocational background consists mainly of employment as a server in the entertainment sector; bars, clubs etc. She also worked doing staging, face-painting and floristry.
- [10] At the time of the accident she was working both at The Brick as a visual merchandiser and at Gabby's Country Cabaret as head server. The later employment began in 2004. Her income from Gabby's consisted of wages and tips; all of which are reported on her income tax returns filed throughout the period she worked in the service industry. Similarly, when she earned income from staging or floristry she declared the income received as cash payments.
- [11] When she began at Gabby's she worked a minimum of two days a week. Usually she worked Thursday, Friday and Saturday. As at the accident date, she worked just Friday and Saturday. Her shifts were typically 9pm to 3am. Some days she began at 7pm. Her attendance record was good and she was a valued employee.
- [12] Her job description was server but she performed some supervisory tasks. She carried trays of drinks up and down stairs in high heels to the two levels of the bar, moved kegs of beer, put glasses into a dishwasher and removed empties from tables. The bar was situated downstairs. All of this she did without any physical restriction despite a long-standing injury to her right shoulder that developed into tendinopathy.
- [13] Her first sick day in approximately 10 years of working at Gabby's was the Saturday following the accident.

- [14] Just prior to the accident happening, she began employment at The Brick as a visual merchandizer, Monday through Friday, at a rate of \$16.80 hourly. As part of her job duties, she removed furniture from delivery trucks, tagged items and entered the inventory into the computer and staged some of the lighter furniture items in the body of the stores she worked in.
- [15] Following the accident, she was off work from both jobs for several weeks owing to her injuries. She then returned to both jobs. 2014 was the plaintiff's highest year of income. Prior to the accident she was in good health. Previously she suffered a rotator cuff injury to her right shoulder and had calcification in the shoulder joint. That injury flared up from time to time but was not disabling and not the subject of any treatment immediately before the accident. She performed all her work and domestic duties without any problems.
- [16] She treated occasional flares ups to her shoulder with marihuana. She is not a 'fan' of pharmaceuticals and resists them because of historical side effects. For example, when she attempted to quit smoking, she was prescribed Wellbutrin and reported that she felt suicidal because of its side effects. She ceased treatment and continues to smoke half a pack of cigarettes daily.
- [17] She also suffered from irritable bowel syndrome but, again, denies that it impacted her daily life.
- [18] She had breast implants in or about 2004/05 as a result of loss of breast mass on her left breast. Benign tumors were removed from her breast in her twenties and that, combined with breast feeding five children, resulted in loss of tissue in her left breast leading to her decision to have implants. I refer to this because of the injury to her left breast. The plaintiff asserts that the current problems result from the accident, while the defendants point to earlier difficulties with the implant and suggest the current complaint is unrelated to the sequelae of the accident.
- [19] She re-attended the surgeon who performed the implant surgery shortly following the surgery, long before the accident, explaining that there was a shifting of the implant. Her surgeon, Dr. Wong, assured her such was not the case and she moved on. She continued, following the original surgery, to have periodic fibrous growths. However, there was no pain associated with either breast following the original surgery.
- [20] The plaintiff also had a history of infrequent migraines prior to the accident. She also had occasional 'regular' headaches prior to the accident but they were infrequent and, unlike the migraines, not debilitating.
- [21] She lived, and still lives, with her common law spouse, Christopher Hanna. Mr. Hanna is a sheet metal worker. They have lived together for almost 10 years.

- [22] Prior to the accident, the plaintiff was active outside of the home and in managing a family of five children. The children's natural father was not involved in their lives. The plaintiff took them to their activities; soccer, karate, art activities, dance, baseball and other extra-curricular activities. Her life was hectic given she also worked.
- [23] Personally, she enjoyed biking, hiking, walking their dogs daily, boating and snowboarding. Many of the activities she did with her family; some just with Mr. Hanna. The family holidayed in Osoyoos annually where they boated, hiked, went tubing and operated Sea-Doos.
- [24] The plaintiff was involved with her daughters in an animal rights group that involved demonstrating, by standing for as long as four hours at a time, to publicly demonstrate the plight of animals subjected to lab testing. She attended several music concerts a year in varied locations; some local and some in the United States. She still attends concerts, but does not go to the front of the stage because of the crowd and fear of being jostled.
- [25] The plaintiff, despite a challenging upbringing, never experienced psychiatric symptoms prior to the accident save for postpartum depression of undetermined, or undescribed, duration.
- [26] At her work at Gabby's, she was outgoing, energetic and a favourite of the regulars. Gabby's was described by both the plaintiff and her friend and former workmate Brandt Vanderhoek as a crowded, lively establishment with many customers standing and a narrow pathway for servers to navigate through the crowd with heavy trays laden with drinks held over their heads. The plaintiff wore high heels partly because of her diminutive size and partly as a fashion statement. She routinely went up and down stairs between the two floors of Gabby's in heels carrying drink trays.
- [27] In the short period of time she worked at The Brick prior to the accident, she was described by her supervisor, Ms. Brown, as a valued and talented employee.

Post-Accident

- [28] Following the accident, the plaintiff knew right away that she had been injured. Her immediate feelings of pain were to her neck, shoulder and left breast.
- [29] She was able to drive home in her vehicle but felt unwell. She cannot recall whether it was that day or the following day she attended at the Willoughby Medical Clinic for treatment. She did not have a family doctor at the time. It appears her treatment was overseen by various doctors at a variety of clinics. Those who gave evidence at trial were examiners who evaluated the plaintiff's injuries at the behest of counsel; they are not her treating physician(s).

- [30] In addition to her upper body pain, the plaintiff had headaches and felt a sensation like an electric shock in her back. She described her neck and head as "heavy" and that her left breast hurt and she thought the implant had been detached from its placement and was "moving about" in the capsule.
- [31] Her low back pain began to radiate into her leg. All of her symptoms interfered with her sleep such that her energy level crashed.
- [32] She was prescribed physiotherapy and took some treatments albeit not an extensive course.
- [33] She described her pain, currently, as low-grade but continuous. She had headaches which, though they had improved since the accident, still occur several times weekly and last in excess of a day.
- [34] After a brief absence from both The Brick and Gabby's, the plaintiff returned to her employment, resuming the same schedule as before the accident. She testified that she found her work routine overwhelming, but she carried on out of financial need.
- [35] She disengaged from all of her previous leisure activities. She testified she has not bicycled, tubed, snowboarded or actively walked her dog since the accident because of ongoing pain.
- [36] She perceives her largest problem as pain in the low back area and testified she believed something was "chipped", although x-rays disclosed no bone issue. Her low back pain is aggravated by any active movement.
- [37] The totality of her complaints restrict her participation in household chores, although she still tried to carry on as before. She did so, according to her testimony, because of financial requirements and the needs to keep her household running. At work, she began to modify her performance by not lifting beer kegs or carrying two trays at the same time. She stopped wearing high heels because of the increase pain it caused in her back. While her right shoulder remains painful from the rotator cuff, the pain now is across the entirety of her shoulder and neck. She denies that the rotator cuff is the primary source of her difficulties.
- [38] Since the accident she stopped wearing a bra unless absolutely necessary because of discomfort to her breast. She says even carrying a purse across her body aggravates the pain in her left breast.
- [39] Movement of all types aggravates her pain including sitting too long, lifting anything, standing for too long or driving for too long.
- [40] She states that when she drives for over 40 minutes she needs to get out and stretch or she begins to get shooting pain in her right hip. The sciatic pain she complains of is mainly restricted to when she is driving.

- [41] The plaintiff testified that she faithfully performs the exercises given to her by her physiotherapist and rehabilitation specialist. She brings her knees up to her chest either when she is lying down or sitting in a chair to alleviate her low back pain and her partner, Chris Hanna, often massages the areas that are painful.
- [42] She does yoga in addition to her exercises and has a ball that she places under her back and rolls on to alleviate back pain.
- [43] She testified that after working two days at Gabby's, Sundays were very bad in that she had lots of pain and could barely do anything around the house on what was otherwise her day off.
- [44] The modalities of treatment that she underwent - physiotherapy, chiropractic treatment (twice) and active rehabilitation - provided little by way of significant relief. In the beginning, following the accident, she restricted her movements to necessities such as what was required at work and what modest housework she could accomplish. While she still went with Mr. Hanna to the local dog park, the walks were much shorter. She says that her social life has become much more compact. They go out less frequently and often remain home to watch movies as their entertainment.
- [45] A major problem is the sleep disruption that has resulted from what the plaintiff describes as constant pain. She said she constantly wakes because of pain caused by movement and is so sensitive to movement that she creates a baffle of pillows between herself and Mr. Hanna so as not to be disturbed by his movement within the bed. He, however, gets up at 4:45 am each morning, often waking her and causing her upset and an inability to get back to sleep.
- [46] She treats herself with over-the-counter analgesics such as Aleve or ibuprofen. She has tried treatment with marihuana when the pain gets intense. She has used melatonin in an effort to enhance her sleep, but has not used prescriptive sleeping drugs because of her aversion to non-natural remedies.
- [47] Prior to the accident, the family, the plaintiff, Mr. Hanna and three or four of her now teenaged or early adult children went to Osoyoos for summer activities on a lake. While the family has gone since, she is unable to participate in any of the activities that she previously enjoyed, including hiking, tubing and bicycling.
- [48] Her left breast is a major source of concern. She described it as if the implant were "ripped from her chest wall". She feels it is become dislodged and is now "free-floating". It is painful when it moves but also is cosmetically unpleasing.
- [49] The plaintiff lost at least 10 pounds as a result of diminished appetite she attributes to pain. That, in some people, would be less noticeable, but the plaintiff previously weighed something in the order of 105 pounds and probably now weighs closer to 90.
- [50] Sleep deprivation and pain have affected her concentration. She testified she cannot recall dates, codes at work for the safe door or other items that her partner tells her.

- [51] Her mood has been depressed since shortly following the accident and she lost interest in many of the things she used to do. She used to paint and make clothing for children but has stopped all of that. She says her temper has changed and she gets frustrated easily and is now more inclined to argue with her partner, Mr. Hanna.
- [52] She has seen a counsellor several times, Trudy Blair, although it is not clear whether that is ongoing. Finances play a role in what she can afford. Her friend, Lisa Llewellyn, is a psychiatric nurse and the plaintiff often confides in Ms. Llewellyn about her problems as a form of therapy.
- [53] Her diminished mood affected her work at Gabby's. She was not as outgoing and not able to do all the tasks that she did earlier. She eventually resigned from Gabby's in 2015. Her work at The Brick was interfered with because it often required movement of items about the store's floor. Sometimes warehouse workers were there to help her; sometimes not.
- [54] While she returned to work at The Brick shortly following the accident, the medical records indicate she took medical leave from The Brick from April 14 to July 6, 2015. She says this was because of the pain associated with performing her job.
- [55] Her mood and energy level were much lower in the morning such that she made arrangements, sometimes, to go in late and stay later to perform her duties. Sometimes she works Saturdays as opposed to Monday through Friday so as to accommodate either medical appointments or her level of pain.
- [56] In December 2015, she sustained a foot injury while in Las Vegas to celebrate her partner's parents' anniversary. She was in a cast for several months and on crutches. When she returned to British Columbia one of the first things she did was give notice at The Brick. She worked through her notice period, the first two weeks of January, on crutches and in a cast. She said the work was too demanding and she would often simply come home, take a bath, and go to bed to prepare for the next day.
- [57] Although she had resigned her full-time position at Gabby's, she still took the occasional part-time shift in 2016 when her supervisor would phone her because of the unavailability of another server.
- [58] In 2017 she obtained employment at Walnut Grove Pub. She states the job is much easier because her work does not entail carrying a tray serving volumes of drinks. She began slowly and eventually moved to full-time hours. She had no fixed schedule but rather worked five days, some days and some nights. She has obtained a supervisory level of employment and oversees scheduling and some ordering. While the job is still demanding, it is less physically demanding.
- [59] It is not clear whether she serves and still receives tips as part of her compensation.

- [60] Nonetheless, working five days apparently was too much for her such that she gradually reduced her hours to two days a week voluntarily, despite what she described as the financial hardship that it has caused. She did so because she said what happens after a day at work is "not worth it".
- [61] According to the plaintiff, she reports all income whether received in cash from housecleaning, face decorating or tips when she worked as a server.
- [62] Her social life is heavily modified. She goes out less frequently, shops less frequently, spends more time at home and her relationship with her partner is strained. Then had planned to be married but the plaintiff testified that is now more "up in the air". Mr. Hanna, on the other hand, is anxious to get married so whatever reticence there is seems to be more on the part of the plaintiff.
- [63] In total, the plaintiff describes a much changed lifestyle from that before the accident and a much reduced capacity to work. Currently, there is no significant treatment she is undergoing which would see an end to this.

Collateral Witnesses

- [64] In addition to the medical evidence, the plaintiff called four collateral witnesses to speak to her changed condition following the accident: Lisa Llewellyn, a psychiatric nurse and long-time friend; her former workmate and friend Mr. Vanderhoek; Brenda Brown, her supervisor at The Brick; and her common-law spouse, Chris Hanna, to attest to her pre-and post-accident condition.
- [65] All spoke glowingly of the plaintiff as a friend, partner and employee prior to the accident. All testified as to significant changes they observed following the accident.
- [66] Ms. Llewellyn has known the plaintiff for over 35 years. She described their relationship as 'like sisters'. Her description of the plaintiff, prior to the accident, was that of a vivacious, active and energetic mother of five who assumed the role of both parents following her separation from her abusive husband. She worked hard outside the house in a number of entrepreneurial fashions to support them and also made the time and found the energy to enjoy recreational activities such as tubing, waterskiing, and overseeing the children at waterparks.
- [67] In short, Ms. Llewellyn described an active person unimpeded by any outwardly appearing physical or psychological impairments. She described the plaintiff's home, pre-accident, as being immaculately kept and decorated with the changing season. She saw the plaintiff sit for three to four hours doing professional face painting at birthday parties, went tubing with her, went on trips with her and generally shared an active lifestyle with the plaintiff over many years.

- [68] Following the accident, Ms. Llewellyn's description of the plaintiff changed radically. Ms. Llewellyn noticed a gradual decline in the plaintiff's mood and inner sociability.
- [69] While they still get together socially, the frequency has diminished. The activity level has decreased radically. Most activities in which they engage together are at the plaintiff's residence and sedentary. They watch movies, occasionally shop together either at garage sales or value clothing stores.
- [70] Ms. Llewellyn described the appearance changes in the plaintiff. She testified that the plaintiff has clearly lost weight which is observable in both her face and her clothes. She has observed the plaintiff using a safety pin to hold the waist tight on some outfits.
- [71] When Ms. Llewellyn attends the plaintiff's home, it is in a state of disarray. It is not as well maintained, nor is it decorated in the same fashion for seasonal celebrations.
- [72] They socialize less frequently in part because it was the plaintiff who used to organize events out. According to Ms. Llewellyn's testimony, the plaintiff no longer exhibits the high energy she once did and has a flat almost despairing outlook on life quite different than that from before the accident.
- [73] In cross-examination, Ms. Llewellyn noted she was unaware of the plaintiff's previous shoulder injury or any impact it had on her day-to-day life. Ms. Llewellyn was not asked about any pre-accident concerns expressed by the plaintiff about her left breast or the complaints now expressed by the plaintiff about her implant.
- [74] Mr. Vanderhoek is now the operations manager for the nightclub, Gabby's, at which the plaintiff previously worked. They both began in approximately 2006 or 2007. Prior to the 2014 accident, Mr. Vanderhoek described the plaintiff as his go-to server. She was responsible for overseeing the other servers and he oversaw her work when she worked Thursdays, Fridays and Saturdays.
- [75] He described the tasks of the main server, serving upstairs, walking on high heels carrying sometimes two trays laden with drinks, carrying and loading bus bins filled with empty glasses and half-filled beer bottles and the like. In addition to her serving duty, she was also active providing seasonal decorations on the establishment's mirrors.
- [76] Mr. Vanderhoek noted he was impressed with her willingness to do the heavy lifting. In particular, she was responsible for moving beer kegs on dollies to the front of the bar when they need refilling, bringing cases of beer to the front, etc.
- [77] Prior to the accident she exhibited no difficulties doing her full share of the work and then more.
- [78] Mr. Vanderhoek also socialized with the plaintiff. They occasionally went on trips including to Las Vegas. The plaintiff and her common-law spouse, Chris Hanna, would attend at his residence to watch wrestling matches.

- [79] He described her as being a positive thinker, a proactive instigator of many of the activities that they engaged in and an excellent employee.
- [80] Prior to the accident she wore fancy outfits to work and high heels. The plaintiff is quite short and because of the positioning of the cash register at least in one location, he noted the high heels because when she stopped wearing them it was difficult for her to operate a cash register.
- [81] She did return to work at Gabby's, although it was not clear when and for how long. When she returned she was wearing flat sensible shoes and seemed to struggle with many of her duties. In his estimation she did not exhibit the same swagger as before and there was a discernible change in her energy level.
- [82] She was less positive and less engaging with customers and, on occasion, asked to be the first to leave if the establishment was slow. Mr. Vanderhoek could not recall her doing that prior to the accident.
- [83] She eventually stopped working at Gabby's altogether but he did call her back occasionally to work casually. Eventually, it came to the point where he called and she indicated to him that she was unable to do the work and he stopped calling altogether.
- [84] Mr. Vanderhoek confirmed his observations of the plaintiff pre-and post-accident that she is now thinner.
- [85] He continues to socialize with her and made similar observations to Ms. Llewellyn as to the status of her home. It was previously very well maintained. Now he says it is in disarray. He recently attended in early February and said her Christmas decorations were still up which he found odd.
- [86] He described her as an excellent employee and said he would not hesitate to rehire her if she reapplied.
- [87] Brenda Brown was the plaintiff's supervisor as a virtual merchandiser for The Brick. Ms. Brown testified that she hired Ms. Tait after an interview in early April and that she, Ms. Brown, oversaw the plaintiff's training during the first week or so of April and was impressed with her enthusiasm, her energy and her skills as a decorator.
- [88] Ms. Brown learned of the accident when called by the plaintiff the same morning. Ms. Brown advised her not to come in to work until ready. She was uncertain how long the plaintiff took off but she did return to work for The Brick and changes were noticed. Ms. Brown was not in day-to-day contact with the plaintiff but did oversee some of her work when the virtual merchandisers would focus on tasking the restructuring of one particular Brick store. She recounted incidents where she saw the plaintiff overextend herself whether lifting or hanging a picture. She said she noticed pain in her face and concluded such was from the after-effects of the accident.

- [89] The plaintiff's attendance at work was not always as scheduled. The regular shifts would be Monday to Friday 9am to 5pm, but because the plaintiff, according to the plaintiff's testimony, was not feeling up to working some mornings, her shifts were delayed or sometimes she would work Saturdays. She would usually get permission from either Ms. Brown or the operations manager of the particular store.
- [90] Sometime into her employment in 2015, Ms. Brown stopped sending the plaintiff to Chilliwack or Abbotsford stores because of complaints by the plaintiff about the effect driving had on her.
- [91] Ms. Brown described the job of being a virtual merchandiser as entailing some hard physical work. While there were sometimes younger, more able employees to do the heavy lifting, the virtual merchandiser was often responsible for movements of couches or heavier items to place rugs underneath them or simply to move them about the store.
- [92] While a good employee, Ms. Brown was not surprised when the plaintiff tendered her resignation sometime in January 2016. Although not entirely clear from the evidence, it would appear she announced her resignation on January 1st but worked until the middle of January, giving the store two weeks' notice. Ms. Brown recalled seeing the plaintiff in a boot or cast during this period.
- [93] The plaintiff's common-law spouse, Mr. Hanna, testified in a like manner to Ms. Llewellyn and Mr. Vanderhoek. He described the plaintiff as being energetic, jovial, proactive and generally content with her life prior to the accident. He noticed changes quickly after the accident in terms of her outlook on life. She became more irritable and, from his observations, she was clearly reacting to attempting to do too much.
- [94] This was particularly apparent to him when she worked at The Brick. She would return from a shift looking haggard and drawn. She would not be social. If she had worked late she would go directly to bed.
- [95] The activities they did before the accident as a family or a couple became sharply curtailed. Previously he described swimming, tubing, long walks, concert attendances where the plaintiff was in the "middle of the action" at the front of the stage. Following the accident, she generally does not accompany him on long walks with the dogs. She has not tubed since the accident.
- [96] When they go to Chilliwack or Mission for concerts, he drives on the way there, but because he drinks and she does not, she drives back and he can tell from her facial expression and reaction that she is experiencing pain. He described her sleeping with pillows as baffles to try to ensure that there was no contact through the night and described her sleep as being often interrupted by her waking because of either his movements or him getting up early in the morning to go to work.

- [97] He described the adverse affect the accidents apparently had in relation to housework. Previously the house was kept in a clean and uncluttered state. The children were younger and did not pitch in as much. Now her children are older and attend to their own laundry and some other chores, but the home is often cluttered, areas go unwashed and the plaintiff no longer participates in grocery shopping because she cannot carry heavy bags.
- [98] He says the intimacy in their relationship has been impaired and that they quarrel more often over small issues because she is irritable.

The Medical Evidence

Dr. Spivak

- [99] Dr. Spivak is a psychiatrist who saw the plaintiff once for an independent medical examination. Such was done at the instance of her counsel.
- [100] In her meeting with Dr. Spivak, the plaintiff denied any prior history of mental health issues either personally or within her family. She is a non-drinker but uses cannabis occasionally for pain control. She readily admitted her previous right shoulder rotator cuff injury to Dr. Spivak but denied any functional impairment and stated her pain since the accident is entirely different from the earlier pain symptoms.
- [101] Although she described her work as generally pleasant, she felt she had to work around pain which limited her ability to go to work and restricted her function.

- [102] According to Dr. Spivak:

Ms. Tate (sic) meets criteria for a diagnosis of a somatic symptom disorder. Her life, her psychological world and all facets of her functioning have been impacted by her experience of pain and her perception of the same. In response to this, she has developed depressive symptoms. One could argue that these depressive symptoms could be seen as subsumed by the somatic symptom disorder diagnosis or alternatively could be seen as its own independent diagnosis with her meeting criteria for a major depressive disorder.

- [103] As to causation, Dr. Spivak opined that the symptoms were caused by the indexed accident. He stated:

Her symptoms have correlated logically and temporally with the indexed accident. Absent the accident, it's impossible to imagine that she would be experiencing her current constellation of symptoms. There are no other factors that could account for the type of symptoms that Ms. Tate has been experiencing.

- [104] As to impairment, given that the primary issue is pain, Dr. Spivak was unable to tease out the extent to which psychological factors might be amplifying her actual physical injury. He noted her depressive symptoms would tend to amplify her experience of pain and vice versa.

[105] Finally, he noted:

If viewing her pain as a psychiatric symptom alone, Ms. Tate's symptoms could be rated is quite severe. As I noted above, there are no aspects of her life that have not been impacted by pain. Her overall quality of life is been dramatically diminished, her sense of security is changed and her overall sense of self has been altered. She is unable to function vocationally, socially or recreationally as she did before.

Her depressive symptoms have been mild to moderate in their manifestation. These symptoms alone have not interfered with her functioning, but rather they are representative of her experience of her diminished quality of life and her persistent pain.

[106] Given her aversion to medications, Dr. Spivak did not recommend an immediate trial of antidepressants. He did recommend some therapy and opined that improvement might occur in the context of meeting a psychologist with a multidisciplinary pain clinic.

[107] Failing that, he remarked that antidepressant medications remain an option.

[108] Given the limited improvement from the date of the accident to the date of his assessment in May 2019, he expressed the opinion that her prognosis was poor and intertwined with her physical issues.

[109] In cross-examination, Dr. Spivak acknowledged that he did not set out the underlying criteria giving rise to his diagnosis of somatic symptom disorder. According to the DSM-5, they are as follows:

A. One or more somatic symptoms that are distressing or result in significant disruption of daily life.

B. Excessive thoughts, feelings, or behaviours related to the somatic symptoms or associated health concerns as manifested by at least one of the following:

1. Disproportionate and persistent thoughts about the seriousness of one's symptoms.
2. Persistently high level of anxiety about health or symptoms.
3. Excessive time and energy devoted to these symptoms or health concerns.

C. Although any one somatic symptom may not be continuously present, the state of being symptomatic is persistent (typically more than 6 months).

Dr. Badii

[110] Dr. Badii is a specialist in rheumatology called by the plaintiff. He saw her in May 2019 and, after taking a history and examining the plaintiff, he opined that the plaintiff sustained whiplash-associated soft tissue injuries to her neck, shoulder and upper and lower back, worse on the right side, in the April 2014 accident. Her complaint of headaches, which he described as cervicogenic, are, in his opinion, a result of the accident.

- [111] He acknowledged that prior to the 2014 accident she presented with chronic right shoulder pain attributable to rotator cuff tendinitis. X-rays taken of the area indicated a calcific tendinopathy affecting the right shoulder which, in Dr. Badii's opinion, had been aggravated by the accident.
- [112] Dr. Badii described the plaintiff's pain as chronic and described her reaction to it as "poor". He described a number of accompanying symptoms that he thought indicated depression including low or labile mood, poor appetite, unrefreshing sleep resulting in fatigue and low energy during the day.
- [113] The plaintiff expressed feelings of hopelessness and helplessness and easily teared up.
- [114] Dr. Badii noted that "in addition it is known that pain and depression can make each other worse and a vicious cycle".
- [115] The heart of Dr. Badii's opinion is that:

Ms. Tate has likely developed central sensitization. Central sensitization is a condition of the nervous system that is associated with the development and maintenance of chronic pain. With central sensitization, the regions of the brain and spinal cord that are involved in the experience of pain developed heightened sensitivity to outside stimuli. "Normal" stimuli that in the absence of central sensitization may cause only minor discomfort, or even go unnoticed can now produce the experience of much more severe pain in the person affected.

Central sensitization places the affected person at higher susceptibility not only to experiencing pain but also to other related symptoms such as depression, anxiety, poor sleep, cognitive dysfunction and chronic fatigue amongst others.

- [116] Dr. Badii related his diagnosis to the accident of April 2014 based upon the close temporal relationship between the accident and the onset of symptoms as well as the medical plausibility of the injuries he described occurring during the type of accident in which the plaintiff was involved.
- [117] He noted the negative effect that her symptoms had had on both her functional capacity and quality of life in areas of work, daily living and social and recreational activities.
- [118] Given the five years that have passed since the accident, Dr. Badii characterized her pain as chronic. He noted some improvement was possible with treatment of the underlying depression as well as addressing other risk factors. He recommended an independent psychiatric assessment with the hope that medications or cognitive behavioural treatments might reduce the underlying psychological aspects of her chronic pain.
- [119] Further he noted that the plaintiff had become deconditioned over the past year suffering from chronic pain and although she did yoga regularly and some exercises she required a regular aerobic and core strengthening routine with a goal of improving her fitness levels.

[120] Finally, his recommendations included a course of active rehabilitation. She began the course but did not complete all sessions. He also suggested access to a kinesiologist or personal trainer, massage, physiotherapy and referral to a pain clinic.

Dr. Oxley

[121] Dr. Oxley is a plastic surgeon. The focus of his independent medical examination conducted in November 2019 was the impact, if any, of the accident upon the plaintiff's left breast implant.

[122] He noted the implant surgery took place in 2003. He described the method of implant as "sub-pectoral" using textured, shaped implants. The plaintiff described a history of having issues with her left breast in 2006 when she felt there was a lump and that the implant "had flipped over". She saw the original surgeon in 2006 who reassured her and told her that the implant was in an acceptable aesthetic position. She was not seen by him since.

[123] Following examination, Dr. Oxley diagnosed the plaintiff as having a displaced left breast implant with capsular contracture with clockwise malpositioning.

[124] The condition is treatable by way of removal of the implants and placement of new implants. As a result of a recall of the implants which the plaintiff currently has in place, the medical service commission has agreed to cover the cost of removing the implants, but not replacing them. The recall, of course is unrelated to the plaintiff's personal experience but is based upon considerations that in testing there is a small risk that the particular breast implants the plaintiff has are associated with anaplastic large cell lymphoma.

[125] If the plaintiff undergoes surgery before the end of 2021 the cost of removing the implant would be covered by MSP and the cost of new implants would be covered by the company. What is not covered is the associated cost of running the operating room. Current costs of such are approximately \$10,500. There is also a small risk that she would face additional costs.

[126] If surgery is delayed until after 2021, the price would include the cost of implants, approximately \$1,800.

[127] In Dr. Oxley's opinion, the current state of her left breast implant is related to the collision itself. The 2006 "incident" resulting in a re-attendance upon Dr. Wong did not result in any further need for treatment. Dr. Oxley noted that currently, the right breast implant is very slightly off axis but, in isolation, appears to be in a reasonable aesthetic position. The left implant is "malrotated" and is "obviously misaligned". This is consistent with some blunt pressure pushing the implant into a different position. Dr. Oxley opines this is as a result of seatbelt pressure during the collision.

- [128] Dr. Oxley stated further that had the problem been as a result of problems inherent with breast implants and as described in the release signed by the plaintiff back in 2003 that the plaintiff would have returned to Dr. Ward's office following 2006 to complain of the positioning of the implant. In the absence of such visits, Dr. Oxley believes the implant had settled back into a normal, stable, and cosmetically satisfactory position which did not cause pain.
- [129] If the matter is left unattended, Dr. Oxley was of the opinion that she would continue to suffer the same discomfort that she is currently having and while many women with textured implants, such as the plaintiff, choose to have them removed prophylactically, the majority do not. Therefore, he opines that it would be unlikely that the plaintiff would have undergone surgery for the implants regardless of the accident. Assuming surgery is performed, he anticipated a good recovery.

Dr. Neufeld

- [130] The defendant called two medical experts, Dr. Neufeld, a specialist in disability medicine and impairment evaluation, and Dr. Solomons, a psychiatrist.
- [131] Dr. Neufeld saw the plaintiff in September 2017 and, as such, his report is somewhat dated and not based on the most current information.
- [132] He describes the same history as was taken by the other doctors of the plaintiff experiencing symptoms immediately following the accident in the afflicted areas, struggles with work and ongoing pain in her neck, arm, back and upper leg region, as well as headaches, some numbness and weakness.
- [133] Her x-rays have all returned to normal but her pain has continued.
- [134] In testing done by Dr. Neufeld, her range of motion was essentially normal although pain has persisted. He noted the right shoulder calcific tendinitis diagnosed in April 2012 and that it had been causing pain to the plaintiff for several years. She also complained in 2013 of mild back pain.
- [135] On physical testing, the plaintiff displayed a reaction or demonstrated nonorganic signs to simulated axial loading; one of five signs of non-organic pain behaviour. Dr. Neufeld did not find this particularly helpful in assessing the legitimacy of the complaints.
- [136] He diagnosed the plaintiff with chronic pain but described her prognosis as excellent given she had continued in both occupations for approximately a year following the accident before deciding to go off work altogether. At the time of her visit to him she was returning to both waitressing and home staging which he noted indicated an excellent prognosis.
- [137] Unfortunately that has not borne out in the past 2 1/2 years.
- [138] As to the origin of her chronic pain, Dr. Neufeld noted:

The causes of chronic pain are complex and include a multitude of bio psychosocial factors. Psychological vulnerability, stress and depression often play a major role in the development of chronic pain. In my opinion, Ms. Tait's April 9, 2014 [sic] MVA related soft tissue injuries were likely a minor contributing factor in initiating the development of her chronic pain.

[139] Physical examination by Dr. Neufeld revealed no objective evidence of trauma-related conditions. He felt her period of disability would only be the short time following the accident until her return to her daytime job at The Brick as a visual merchandiser. She did not miss any time from her position as a server at Gabby's Cabaret.

[140] According to Dr. Neufeld:

Ms. Tate had prior and ongoing right shoulder problems documented in the medical record. It is likely that these pre-existing right shoulder problems adversely impacted her ability to continue working, and probably would have done so even if the accident had not occurred. The right shoulder problems would have especially have adversely impacted her work as a cocktail waitress which frequently required her to carry heavy trays above her head with her right hand.

[141] With respect to further treatments, he noted that she had participated in a kinesiologist-supervised exercise program and "it is not clear that she benefited significantly from this treatment".

Dr. Solomons

[142] Dr. Solomons saw the plaintiff on August 8, 2019 and provided a written report.

[143] Dr. Solomons disagreed with Dr. Spivak that Ms. Tait's presentation gave rise to an identifiable psychiatric disorder. His opinion followed a lengthy interview with the plaintiff and review of her records.

[144] Under the heading Mental Status Examination, Dr. Solomons noted that the plaintiff:

attended fully throughout the interview without any signs of concentration, memory, speech, language or communication difficulties. She was calm and relaxed and showed no signs of fatigue. She had a full, normal, wide-ranging and appropriately react mood with no signs of depression, sadness, irritability, anxiety, tension or lability She showed no signs of stress related to having arrived at the appointment one hour late. Her thinking was ordered and goal-directed, her reasoning and reality testing were intact and she had no unusual seems to her thinking. She provided a clear, concise and informative account of her personal background and the details of the accident, which contrasted starkly with her extremely vague, hesitant, tangential, and rambling account of her symptoms. She sat comfortably on the sofa and also sat comfortably on her knees for a long time. She changed positions a few times and was not restless or fidgety. She showed no signs of pain or pain behaviours. On the interpersonal front, there was a somewhat melodramatic quality to her presentation with no striking signs of interpersonal or personality difficulties.

[145] Based on the "vagueness of her account" and the absence of what Dr. Solomons has described as a "constellation and course of mood anxiety or other psychiatric symptoms that corresponds with any psychiatric disorder or illness" he concluded that there was no psychiatric disorder arising from the accident.

[146] As such, the question of prognosis does not arise. He opined there is no requirement for psychiatric treatment of any kind as the accident did not result in a psychiatric disorder or an impediment.

Position of the Parties

[147] The plaintiff argues that the entirety of the plaintiff's complaints relate to the defendant's negligence and, but for the 2014 accident, the plaintiff would have carried on in her pre-accident condition working at both Gabby's Cabaret and The Brick.

[148] The plaintiff submits her non-pecuniary loss should be in the amount of \$110,000 based, primarily, on the plaintiff's ongoing chronic pain syndrome as opined by her experts and the depressed mood she suffers from which interferes with all aspects of her enjoyment of life and the pursuit of full-time employment.

[149] Further, counsel on behalf of the plaintiff argues that the plaintiff has sustained a past loss of earning capacity. But for the accident, the plaintiff argues that she would have earned a minimum of \$38,500 annually as a combination of her employment income together with tips and income from miscellaneous sources such as face painting, staging and/or floristry. She says this would have risen to \$45,000 annually shortly before trial.

Year

Income would have earned

Total Actual Income

Loss (Gross)

Loss (Net based on taxes of 20%)

2014

\$38,500

\$23,146

\$15,354

\$12,283.20

2015

\$38,500

\$14,618

\$23,882

\$19,105.60

2016

\$38,500

\$6,825

\$31,675

\$25,340

2017

\$38,500

*\$21,008

\$17,492

\$13,993.60

2018

\$38,500

\$17,368.93

\$21,131.07

\$16,904.86

2019 (January to March)

\$11,250 (\$45,000/year /12 x 3 months)

\$2,740.74 (\$10,962.95 /12 = \$913.58 x 3)

\$8,509.26

\$6,807.41

2019 (April to December)

\$33,750 (\$45,000/year /12 x 9 months)

\$8,222.22 (\$913.58 x 9)

\$25,527.78

\$20,422.22

2020 (10 weeks to trial)

\$8,653.84 (\$45,000/year /52 x 10 weeks)

\$2,240 (\$224 x 10)

\$6,413.84

\$5,131.07

Total net loss

\$119,987.96

*No income documentation exists for this year. This figure assumes she worked full-time for all of 2017.

[150] As to future loss of earning capacity, the plaintiff argues that the lingering effects of the plaintiff's injuries will impair her capacity to earn income and suggests that the appropriate award for loss of future income is \$100,000.

[151] In addition, the plaintiff seeks an award for loss of housekeeping capacity and costs of future care. Special damages are agreed \$1,297.

[152] The defendant, while conceding the plaintiff suffered mild to moderate soft tissue injuries to her neck, upper back and lower back as well as developing chronic pain, argue that some of her injuries, as alleged, are unproven. Specifically, the defendants do not accept or concede the plaintiff's psychological injuries as described by Dr. Spivak nor that she sustained an injury to her left breast implant. The defendants note the absence of objective evidence of some of the complaints and rely upon the opinion of Dr. Solomons as debunking the plaintiff's assertion that she has suffered a psychological injury in combination with chronic pain.

[153] Despite agreeing the plaintiff suffers from chronic pain, the defendants suggest an award for non-pecuniary damages from \$35,000 to \$50,000.

[154] They deny the plaintiff has proven the compensable diminishment of her household capacity, noting that with the help of her common-law spouse and family members she is currently able to complete all housekeeping duties required of her albeit not without some enhancement of the pain.

[155] As to past loss of earning capacity, the defendants argue these are unproven, noting the below chart of her income from 2008 to 2019:

Year

Total Earnings

(T4)

Other Employment Income

Universal Child Care Benefit

Total Income

(Line 15)

2008

\$6,38900

\$9,000.00

\$15,389.00

2009

\$7,414.00

\$8,400.00

\$15,814.00

2010

\$7,583.00

\$5,200.00

\$12,783.00

2011

\$7,408.00

\$8,000.00

\$15,408.00

2012

\$8,538.00

\$8,700.00

\$17,238.00

2013

\$8,836.00

\$8,640.00

\$17,476.00

2014

\$20,946.00

\$2,200.00

\$23,146.00

2015

\$12,618.00

\$2,000.00

\$1,980.00

\$16,598.00

2016

\$2,825.00

\$4,000.00

\$720.00

\$7,545.00

2017

Not Filed

2018

\$17,368.93

Not Filed

2019

\$10,962.95

Not Filed

[156] The defendants note that the plaintiff, in any event, took months off as a result of her right foot injury which was not a result of the accident. The plaintiff's highest income earning year since 2008 was the year of the accident in which she earned \$23,146 as stated in her 2014 income tax return. Her average earnings for the previous six years were under \$16,000. Looking at the plaintiff's post-accident earnings, the defendants suggest there is little difference.

- [157] As to future care costs, the defendants argue none are required. They argue there is nothing warranting future care costs. Special damages are agreed, leaving only the question of mitigation.
- [158] The defendants argue that the plaintiff's damages should be reduced by 20% to 40% to reflect her failure to mitigate her damages by following the prescribed course of treatments: completion of the rehabilitative course and taking prescriptive medications for pain relief.

Discussion

- [159] I begin with the obvious: the bulk of the plaintiff's complaints are subjective and, as such, ought to be subject to the scrutiny of ensuring that her complaints are credibly presented, reliable and in harmony with the totality of the evidence: *Price v. Kostryba* (1982), 70 B.C.L.R. 397 (S.C.).
- [160] While acknowledging the plaintiff gave modestly differing reports to some of the independent examiners, specifically her report to Dr. Solomons of right rib pain and general right-sided pain, I found the plaintiff, generally, to be a credible witness. Her overall credibility is buttressed by the evidence of the four collateral witnesses, all of whom credibly attested to the discernible impact of the plaintiff's complaints upon her post-accident behaviour.
- [161] While admittedly her common-law husband has some financial interest in the outcome, the other three witnesses do not. Their evidence was presented in a straightforward fashion and wholly credible. To the extent I would have any reservations about accepting the plaintiff's evidence as to the accident's after-effects, were it standing alone, I am comforted by the collateral evidence in concluding that the plaintiff generally has honestly described the impact of the accident upon her. Such may be embellished by her pain perception but that, in my view, is not an uncommon characteristic of what is described as chronic pain syndrome or, in psychological terms, somatic symptom disorder.
- [162] Hence, I reject the defendants' suggestion that the plaintiff's evidence should be viewed sceptically.
- [163] That, in my view, addresses the defendants' concern about the plaintiff not calling all of the family doctors. They ask for an adverse inference, but it is clear that the plaintiff was treated by a number of doctors within a clinic. None had specialties in either psychiatry, plastic surgery (the breast injury) or physiatry. The family physicians she saw were available to the defendants had they wished to call them as to any fact in dispute. The nature of the alleged injuries were within the specific expertise of the independent evaluators chosen by each party to assess the plaintiff.

- [164] The records made available in the cross-examination of the plaintiff satisfy me that her reports of ongoing pain and discomfort were consistent in the period following the accident. Accordingly, I decline to draw an adverse inference against the plaintiff for her failure to produce a medical report from one of the attending family physicians who oversaw her treatment following the accident.
- [165] Despite knowing of the complaints the plaintiff had regarding her left breast, the defendants have called no evidence challenging the opinion of Dr. Oxley. Instead, they rely upon complaints of a not dissimilar nature made by the plaintiff going back to 2006.
- [166] Given there is no history of ongoing complaints from 2006 to the time of the accident, it is hard, absent some opinion to the contrary, to ignore Dr. Oxley's opinion as to the etiology of her current complaints concerning her left breast.
- [167] Logically, an injury to her left breast implant is consistent with the mechanism of injury, a sudden thrust forward while restrained by a seatbelt which, in part, would have run over the plaintiff's left breast.
- [168] Once again, her complaints in this regard have been consistent. The misalignment of the breast is noted. The only question, reasonably, is whether or not the plaintiff is committed to having the necessary surgery, when, and what cost will ensue as a result.
- [169] As to the differing diagnoses of the team's psychiatrist, Dr. Spivak and Dr. Solomons, I generally accept the opinion of Dr. Spivak, whose diagnosis of somatic symptom disorder and depression more accords with my impression of the plaintiff as described in her own evidence and, more importantly, the evidence of credible collateral witnesses describing the change in mood from the plaintiff's pre-accident and post-accident condition.
- [170] Despite acknowledging the plaintiff fulfilled the stand alone criteria for somatic symptom disorder, he opined they were contextual and that her complaints had to be seen in light of her claimed sleep disruption and that her symptoms, although persistent, were 'vague'.
- [171] Indeed, whether her condition rises to the level of a psychiatric disorder as opined by Dr. Spivak, or is more a constellation of symptoms with other origins, sleep deprivation, etc. as opined by Dr. Solomons, is of no moment given the fact I find that she has a compensable injury arising from her altered mood. Whether it rises to the level of a psychiatric diagnosis is not, in my view, determinative of her entitlement to damages.
- [172] In *Saadati v. Moorhead*, 2017 SCC 28, the headnote reads, in part:

A finding of legally compensable mental injury need not rest, in whole or in part, on the claimant proving a recognized psychiatric injury. The law of negligence accords identical treatment to mental and physical injury. Requiring claimants who allege mental injury to prove that their condition meets the threshold of recognizable psychiatric illness, while not imposing a corresponding requirement upon claimants alleging physical injury to show that their condition carries a certain classificatory label, would accord unequal protection to victims of mental injury.

Distinct rules which operate to preclude liability in cases of mental injury, but not in cases of physical injury, should not be erected. The elements of the cause of action of negligence, together with the threshold stated in *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27, [2008] 2 S.C.R. 114, for proving mental injury, furnish a sufficiently robust array of protections against unworthy claims.

Furthermore, confining compensable mental injury to conditions that are identifiable with reference to psychiatric diagnostic tools is inherently suspect as a matter of legal methodology. While, for treatment purposes, an accurate diagnosis is obviously important, a trier of fact adjudicating a claim of mental injury is not concerned with diagnosis, but with symptoms and their effects. There is no necessary relationship between reasonably foreseeable mental injury and a diagnostic classification scheme. A negligent defendant need only be shown to have foreseen injury, and not a particular psychiatric illness that comes with its own label. The trier of fact's inquiry should be directed to the level of harm that the claimant's particular symptoms represent, not to whether a label could be attached to them.

To establish mental injury, claimants must show that the disturbance is serious and prolonged and rises above the ordinary annoyances, anxieties and fears that come with living in civil society. Expert evidence can assist in determining whether or not a mental injury has been shown, but where a psychiatric diagnosis is unavailable, it remains open to a trier of fact to find on other evidence adduced by the claimant that he or she has proven on a balance of probabilities the occurrence of mental injury. It also remains open to the defendant, in rebutting a claim, to call expert evidence establishing that the accident cannot have caused any mental injury, or at least any mental injury known to psychiatry.

[173] The plaintiff, in my view, has discharged that burden in relation to her psychological symptoms. I find her proven altered mood and the resulting impact on her vocational and recreational pursuits are as a direct result of the accident.

[174] Finally, as to the matter of chronic pain, I reject the evidence of Dr. Neufeld who opined that such largely stems from the plaintiff's pre-existing rotator cuff injury. That view fails to recognize the demonstrable change in the plaintiff's behaviour and activity level following the accident. Prior to the accident, with the same rotator cuff injury that Dr. Neufeld places such reliance on, the plaintiff was active in her employment, socially and recreationally.

[175] The description of the plaintiff both in her own evidence and that of others post-accident makes clear the temporal connection between the change in her abilities and the occurrence of the April 2014 accident; not the progression of her rotator cuff injury.

[176] Hence, I am satisfied that the plaintiff has proven a causal connection between her altered mood, her diminished physical state and the injury to her left breast as a result of the defendant's negligence. It is speculative to say that her pre-existing complaint, the rotator cuff injury, had any substantial impact on her post-accident state although it is a contingency I need consider when I come to assess what, if any, economic loss flows from the plaintiff's injuries as I have described them. With that said, I go on to assess the various

heads of damages sought by the plaintiff.

Non-Pecuniary Loss

[177] Both parties have referred me to *Stapley v. Hejslet*, 2006 BCCA 34, where Madam Justice Kirkpatrick set of the non-exhaustive list of considerations underlying an award from non-pecuniary loss:

[46] The inexhaustive list of common factors cited in *Boyd* [*Boyd v. Harris* (2004), 237 D.L.R. (4th) 193 (B.C.C.A.)] that influence an award of non-pecuniary damages includes:

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

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

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

[178] The plaintiff's suggested award of damages of \$110,000 more accurately reflects the awards of damages for chronic pain experienced by the plaintiff when coupled with the psychological impairment which I find exists here.

[179] Briefly, I was referred to a number of cases by the plaintiff, including: *Sharma v. MacDonald*, 2017 BCSC 2121; *Reitsema v. Lammers*, 2017 BCSC 1374; *Ahonen v. Thauli*, 2013 BCSC 1607; *Dorosh v. John*, 2013 BCSC 1442; and *Clark v. Kouba*, 2012 BCSC 1607.

[180] Amongst the cases I was referred to is *Kingston v. Warden*, 2017 BCSC 794, wherein the plaintiff, much the same age as the plaintiff here, sustained injuries I consider similar to those experienced by the plaintiff, specifically requiring left breast surgery to remove an implant damaged as a result of the accident and pain to her neck and shoulders with resultant headaches and a concurrent impact upon her social life. In *Kingston*, the plaintiff was awarded \$100,000.

- [181] In *Starchuk v. Hanning*, 2016 BCSC 1655, a similarly aged plaintiff was awarded \$135,000 who was, prior to the accident, active and athletic, but suffered soft tissue injury, injuries to her upper limbs, back, chest and right foot with a capsular tear of her breast implant resulting in surgery. The surgery left her with post-operative pain and loss of nipple sensation, chronic mechanical neck and shoulder pain together with somatic symptom disorder, chronic pain and a mild traumatic brain injury (absent here).
- [182] I did not find the authorities referred to me by the defendant particularly helpful. Some are dated and most do not describe injuries of the magnitude I have found here.
- [183] Accordingly, looking at the authorities generally for chronic pain and those involving injuries to a breast implant (admittedly where surgery took place, which is not currently the situation here) the damages range from \$100,000 to \$135,000. In *Starchuk*, the plaintiff was found to have a mild traumatic brain injury, which is not the case here.
- [184] Accordingly, I assessed the plaintiff's non-pecuniary loss at \$110,000.

Past Loss of Earning Capacity

- [185] The plaintiff agreed that during the year of the collision, she had her highest year's income. This was as a result of her working two jobs, at The Brick and at Gabby's. Her earnings would have been at a level never before achieved given her recent hire at The Brick. Her income was higher than in previous years where she worked at Gabby's Cabaret as well as face-painted or did staging.
- [186] The suggested award of \$120,000 (rounded) net of income tax for past loss of earning capacity is a result of the chart prepared by plaintiff's counsel referred to above.
- [187] The defendant notes that the plaintiff's highest year of income was the year of the accident and that income far exceeded the plaintiff's prior earnings.
- [188] The logic advanced by the defendants is that there is no discernible difference in the average pre-accident income of the plaintiff and her post-accident income despite the acknowledged presence of chronic pain.
- [189] That argument, in my view, overlooks the fact the plaintiff had obtained what appeared to be full-time employment with The Brick that reasonably could have resulted in a permanent full-time position. Whether the plaintiff would have continued on at Gabby's in view of that full-time position is more problematic.
- [190] There also needs to be recognition of the plaintiff's intervening injury, her broken foot, in assessing her past loss. As well, I consider the contingency of the worsening of her tendinopathy and the impact same might have on her earnings post-accident.

- [191] The plaintiff gave up her position at Gabby's save for the occasional callout shift. Ultimately, after suffering a foot injury, admittedly unrelated to the accident, she gave up her position at The Brick. However, it is apparent that the job at The Brick was one she enjoyed, was compatible with her talents and one at which she performed well as per the evidence of Ms. Brown.
- [192] While I agree with the defendant's submission that claims for past loss of income or loss of capacity are based on what the plaintiff would have, not could have earned but for the injuries caused by the accident (see *Hancott v. Barnes*, 2015 BCSC 1308 at para. 143), I conclude that the plaintiff has established a loss of capacity as a result of the injuries which, in my view, reasonably caused her to give up her employment at The Brick. Whether she could have soldiered on, but for the foot injury, is speculative.
- [193] Hence, rather than adopting the mathematical approach suggested by the plaintiff or the statistical average approach offered by the defendant, I conclude that the plaintiff did suffer a loss, however it is not, as suggested by the plaintiff \$120,000 net of tax. Such in my view presumes a number of suppositions not borne out by the evidence.
- [194] Firstly, the supposition the plaintiff would earn \$38,500 a year is belied by the fact in 2014 she earned \$23,146 having missed only several weeks of work following the April 2014 accident. Admittedly, she did not commence working full time at The Brick until three months into the year but that does not account for the gap between her actual earnings and the figure advanced by the plaintiff
- [195] Thereafter, on the evidence, while she worked full-time and continued at Gabby's, she sometimes left early and worked in less busy sections where she received fewer tips.
- [196] In 2015, but for the time off taken from April to July, she again worked full-time at The Brick. According to her evidence she gave up her shifts at Gabby's Cabaret at some unidentified time in 2015.
- [197] Hence, I acknowledge there is a hypothetical loss but in my view it is not possible to quantify as suggested by the plaintiff. Her non accident related injury in 2015 but for her resignation likely would have impacted her income. Her pre-existing health issues; mainly her tendinopathy might have interfered, in the long run, with her ability to maintain both jobs.
- [198] I assess the plaintiff's past claim for loss of earning capacity from the accident until the date of trial at \$50,000, which I find to be a fair and reasonable assessment of the plaintiff's income loss from the date of the accident until the date of trial.

Future Loss of Earning Capacity

- [199] For the reasons stated above, I find that the plaintiff has satisfied the requirement to establish a loss of future earning capacity.

- [200] In *Perren v. Lalari*, 2010 BCCA 140, Madam Justice Garson summarized the principles underlying the assessment of damages under this heading:
- [30] Having reviewed all of these cases, I conclude that none of them are inconsistent with the basic principles articulated in *Athey v. Leonati*, [1996] 3 S.C.R. 458, and *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229. These principles are:
1. A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation [*Athey* at para. 27], and
 2. It is not loss of earnings but, rather, loss of earning capacity for which compensation must be made [*Andrews* at 251].
- [31] Furthermore, I conclude that there is no conflict between *Steward* and the earlier judgment in *Pallos*. As mentioned earlier, *Pallos* is not authority for the proposition that mere speculation of future loss of earning capacity is sufficient to justify an award for damages for loss of future earning capacity.
- [32] A plaintiff must always prove, as was noted by Donald J.A. in *Steward*, by Bauman J. in *Chang*, and by Tysoe J.A. in *Romanchych*, that there is a real and substantial possibility of a future event leading to an income loss. If the plaintiff discharges that burden of proof, then depending upon the facts of the case, the plaintiff may prove the quantification of that loss of earning capacity, either on an earnings approach, as in *Steenblok*, or a capital asset approach, as in *Brown*. The former approach will be more useful when the loss is more easily measurable, as it was in *Steenblok*. The latter approach will be more useful when the loss is not as easily measurable, as in *Pallos* and *Romanchych*. A plaintiff may indeed be able to prove that there is a substantial possibility of a future loss of income despite having returned to his or her usual employment. That was the case in both *Pallos* and *Parypa*. But, as Donald J.A. said in *Steward*, an inability to perform an occupation that is not a realistic alternative occupation is not proof of a future loss.
- [201] For reasons set out above, I conclude that the plaintiff has satisfied the burden of establishing that there is a substantial possibility that her ongoing complaints will interfere with her future earning capacity. The extent to which I can evaluate her loss of future earnings capacity is hampered by the fact I do not have the benefit of any vocational testing to determine jobs open to the plaintiff that might replace, in its entirety, her pre-accident income capacity, nor do I have a functional capacity report establishing her limitations.
- [202] I agree with the plaintiff that in those circumstances, the appropriate method of assessing the loss is the capital asset approach described in *Brown v. Golai* (1985), 26 B.C.L.R (3d) 353 (S.C.) and approved thereafter in a variety of cases including *Rosvold v. Dunlop*, 2001 BCCA 1.

- [203] Absent the information that might present itself in a vocational assessment and/or functional capacity report which might militate in favour of higher or lesser awards, I am left in some sense to speculate as to the earning trajectory for the plaintiff over the remainder of her working career.
- [204] I am not satisfied, absent a functional capacity report, she is working at maximum capacity at her current two days per week level. That said, I remain satisfied that there is a substantial possibility of future impairment.
- [205] Doing the best I can looking at the plaintiff's historical earnings coupled with her present earnings, and considering various positive and negative contingencies which may impact the plaintiff's future, I assess her loss of future earning capacity at \$40,000.

Future Care

- [206] The defendants say no future care is warranted and that the plaintiff is unlikely to have the surgery suggested by Dr. Oxley and, dependant upon when that surgery occurs, the costs differ.
- [207] The plaintiff suggests costs of future care amount of \$38,805. The plaintiff argues that she has demonstrated expenses set out in the table referred to below:

Treatment/Procedure

Frequency

Amount

Active Rehabilitation

(per Dr. Badii)

3 to 6 month period

(frequency to be up to the kinesiologist)

\$2,400

Kinesiology

(per Dr. Badii)

12 sessions per year indefinitely

- \$40/session to age 65

\$7,200

Massage Therapy

(per Dr. Badii)

12 sessions per year

indefinitely

- \$85/session to age 65

\$15,300

Counselling

(per Dr. Badii and Dr. Spivak)

\$120/session once per month x 24 months

\$2,880

Surgery (Capsulectomy and breast implant replacement)

(per Dr. Oxley)

\$10,500 + GST

\$11,025

Total

\$38,805

[208] With respect, I disagree these items are all necessary or likely to be incurred. In *Kuskis v. Hon Tin*, 2008 BCSC 862, the court stated:

[163] An award for the cost of future care is notional and imprecise in nature: *Strachan (Guardian ad Litem of) v. Reynolds*, 2006 BCSC 362. The court must consider evidence regarding what care is likely in the injured person's best interest and calculate its present cost, with appropriate adjustment for contingencies in all of the circumstances of the case: *Courdin v. Meyers*, 2005 BCCA 91.

[164] In making an award for future care costs the court must take into account both what is medically required and what expenses the plaintiff will likely incur. Items and services that the plaintiff is unlikely to use in the future cannot be justified as reasonably necessary aspects of the cost of future care: *Izony v. Weidlich*, 2006 BCSC 1315.

[209] Clearly, in the absence of evidence as to the plaintiff's immediate intention to have the breast surgery performed following conclusion of the trial and an award of damages, such is speculative. I also note that it may be harder for the plaintiff to schedule this surgery in the near term because some non-essential surgeries are being delayed by COVID-19. Additionally, as noted by Dr. Oxley, some patients go on to have the contemplated surgery for health concerns unrelated to any malpositioning or cosmetic reason.

- [210] Further, while I accept the medical efficacy of some ongoing treatments on a periodic basis, I do not agree the evidence establishes that kinesiology or massage therapy on an ongoing basis until the plaintiff reaches age 65 is either warranted or medically justified.
- [211] I note the plaintiff was enrolled in, but did not complete, a previous course involving oversight of a rehabilitation plan by a qualified kinesiologist.
- [212] Approaching the question of cost of future care holistically, I agree that the course of active rehabilitation as per the opinion of Dr. Badii is desirable. I agree that further oversight of an exercise regime by a kinesiologist would be desirable, as well as some counselling.
- [213] However, I take into account that the plaintiff, by her own report, has learned the necessary exercises to perform through previous treatment.
- [214] She did not complete full attendance at the last sessions provided.
- [215] Accordingly, I award \$10,000 as the cost of future care.

Loss of Housekeeping Capacity

- [216] Once again the defendant, based no doubt on their assessment of the plaintiff's capacity, suggest no award is warranted on the evidence. Once again I disagree. I accept the plaintiff is struggling with some of her household chores and, historically, it did not fall upon either Mr. Hanna or her children to perform those.
- [217] Nonetheless, I take into account the fact that the plaintiff soldiered on doing most of the chores at the cost of exacerbating her symptoms. The exacerbation of her symptoms is included in the above award for non-pecuniary damages.
- [218] The applicable principles are set out in *Larson v. Bahram*, 2017 BCSC 2308, where Madam Justice Adair stated the following:
- [165] The applicable principles are summarized in *Yip v. Saran*, 2014 BCSC 1283, at paras. 81-82:
- [81] Awards for loss of housekeeping capacity may be made for either past or future losses, or both: see *Kroeker v. Jansen* (1995), 123 D.L.R. (4th) 652, 1995 CanLII 761 (B.C.C.A.), at para. 25. . . . Such claims are different from a future cost of care claim in that they reflect a loss of a personal capacity and are not dependent on whether replacement housekeeping costs are actually incurred: see *O'Connell v. Yung*, 2012 BCCA 57, at para. 67. An award ordered for loss of housekeeping capacity is for the value of the work that would have been done by the plaintiff but which he or she is incapable of performing because of the injuries at issue. A claim in respect of loss of housekeeping capacity is also distinct from a claim for non-pecuniary damages. Even though the claim is not dependent on whether replacement housekeeping costs are actually incurred, it is frequently valued using a replacement cost approach.
- [82] However, any award should be approached conservatively: see *Kroeker*, at para. 29.

[219] In Larson, the court awarded housekeeping capacity and out of \$1,000 a year to age 65. The plaintiff here seeks something less than that, specifically \$10,000. In my view, such is a reasonable award to reflect the diminishment of the plaintiff's capacity to do the heavier chores she previously accomplished without family assistance prior to her injuries.

Special Damages

[220] Special damages are agreed to at \$1,297.

Mitigation

[221] The defendants argue the plaintiff's damages ought to be reduced by 20-40% as a result of her failure to mitigate.

[222] They note the plaintiff failed to fully and actively participate in the active rehabilitation plan, take prescribed medications, or act on recommendations of the experts whom she consulted. Further, despite agreeing massage was a useful treatment for her physiological injuries, the plaintiff took only two treatments in the month following the accident. She took one chiropractic treatment.

[223] In 2016, following recovery from her unrelated foot injury, the plaintiff began active rehabilitation with Three Peaks Health. She had previously taken six such treatments in 2015. She took a further eight treatments in the summer of 2016. In each instance, the program was 12 sessions. The plaintiff explained she did not need to attend all because she had learned and was doing the techniques taught to her at the program and derived no further benefit from attending the actual session overseen by a rehabilitation specialist.

[224] As to the failure to take recommended drug treatment, the defendants note the reference in Dr. Solomon's report where he noted:

Part of an October 2015 entry is redacted and she reported continuing back pain and nothing else. In December 2015, the entry reads "multiple problems-back broken foot. Wants narcotics She was given stronger Naprosyn and Tylenol 3.

[225] Given the above, the defendants submit that the plaintiff's non-pecuniary damages should be reduced by 20-40% due to her failure to mitigate, relying on *Latushek v. Bel-Air Taxi (1992) Limited*, 2009 BCSC 798, where the plaintiff's award for non-pecuniary damages was reduced by 40%. Madam Justice Stromberg-Stein (as she was then) found that the plaintiff did not comply with the recommendations for an exercise regime. She stated at para. 85:

There is a duty at law to take reasonable steps to minimize your loss, particularly where, as here, conservative treatments have been recommended. Dr. Jaworski recommended exercises in the pool and gym and brisk walking. Mr. Latushek said he swam once in a while, but he did not go to the gym or do brisk walking. Mr. Latushek does very little regular exercise of any kind, except once or twice a week. He did not try yoga, massage therapy, relaxation therapy, or the medications as recommended by his psychiatrist. He understands that exercise, may improve, if not cure, his symptoms. The Plaintiff has not prioritized his recovery.

- [226] Other cases resulting in a reduction in damages for failure to mitigate are *Olynyk v. Turner*, 2012 BCSC 1138, where damages were reduced by 20% for failure to mitigate because of the plaintiff's failure to participate in a supervised exercise and strengthening regime, and *Pond v. Bucsis*, 2013 BCSC 2001, where the court made a 30% reduction of damages for not taking prescribed medications, taking only 5 of 17 recommended physiotherapy sessions, and failing to stretch and exercise as the plaintiff had repeatedly been advised to do. Medication would have provided moderate benefit and exercise would have provided more significant benefits.
- [227] The defendants questioned the plaintiff regarding her efforts to mitigate her damages by not doing more treatment.
- [228] The leading authority on mitigation is *Chiu v. Chiu*, 2002 BCCA 618. The Court of Appeal sets out the test as follows:
- [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.
- [229] In *Wahl v. Sidhu*, 2012 BCCA 111, our Court of Appeal confirmed that a defendant must provide medical evidence that the recommended treatment would have reduced the plaintiff's damages; mere speculation is insufficient. The Court of Appeal noted:
- [47] Furthermore, with regard to the second step of the analysis in *Chiu* regarding the impact of the recommended treatment, there was no medical evidence that, by attending the pain clinic, the appellant would have made a full recovery by June 2009.
- [230] This proposition has been recently cited in *Harris v. Teo*, 2019 BCSC 1631, where the court found at para. 69 that speculation about the extent to which the plaintiff's loss would have been reduced by following the recommended treatment was insufficient. A similar conclusion was reached in *Ryan v. Lawson*, 2019 BCSC 1389 at para. 89.
- [231] The plaintiff argues the defendants have not discharged their burden, noting there was no evidence adduced by the defendant that the plaintiff acted unreasonably in failing to undertake recommended treatment and that if she had, the same treatment would have reduced her damages.
- [232] It is noted that Dr. Neufeld, the defendants' expert, opined that further rehabilitation or supervised exercise programs would not have resulted in a decrease in the plaintiff's symptoms. On page 14, para. 9 of Dr. Neufeld's report, he wrote:

Ms. Tait participated to the extent she was able in a kinesiologist supervised exercise program. It is not clear that she benefitted significantly from this treatment. She continues to be active at home and continues with a stretching program that she was taught. In my opinion, further participation in an exercise or rehabilitation program would not likely have altered Ms. Tait's complaints or disability.

[233] Dr. Spivak testified that Plaintiff would not do well on anti-depressants and did not recommend an immediate prescription for same. I take his opinion to be that counselling should be the first recommended treatment given the plaintiff's reaction to Wellbutrin when it was prescribed for assistance in stopping her smoking.

[234] Dr. Badii was of the opinion further treatment would not lead to a cure but rather assist the plaintiff in managing her pain.

[235] I accept the plaintiff has complied with at-home exercise regimes and would, if available, willingly participate in counselling or further periodic supervised exercise or massage. I further accept that finances formed a barrier for some of the treatment recommended by Dr. Spivak, specifically counselling.

[236] Accordingly, I agree with the plaintiff that the defendants have not discharged their burden of proving a failure to mitigate.

Summary of Damages

[237] In summary, the plaintiff is awarded the following damages:

Non-Pecuniary Loss:

\$110,000

Past Loss of Earning Capacity:

\$50,000

Future Loss of Earning Capacity:

\$40,000

Future Care

\$10,000

Loss of Housekeeping Capacity:

\$10,000

Special Damages:

\$1,297

Total:

\$221,297

Costs

[238] Unless there have been offers to settle that affect the issue of costs, the plaintiff shall have her costs of the proceeding at Scale B. If either party wishes to make submissions respecting costs they should schedule same through trial scheduling.

"Harvey J."

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