

CANADA / JUDGMENT

Thompson v. Masse

2021 BCSC 159

COURT

Supreme Court of British Columbia

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2021 BCSC 159 Thompson v. Masse

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Thompson v. Masse,

2021 BCSC 159

Date: 20210202

Docket: M177289

Registry: Vancouver

Between:

Alana Kathleen Thompson

Plaintiff

And

Steven Raymond Masse

Defendant

- and -

Docket: M185215

Registry: Vancouver

Between:

Alana Kathleen Thompson

Plaintiff

And

Gurjit Singh Bilg

Defendant

Before: The Honourable Mr. Justice Mayer

Reasons for Judgment

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Place and Date of Trial/Hearing:

Vancouver, B.C.

December 7-11 and 16-17, 2020

Place and Date of Judgment:

Vancouver, B.C.

February 2, 2021

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Introduction

- [1] The plaintiff Alana Thompson seeks damages arising from two motor vehicle accidents.
- [2] The first accident occurred on September 9, 2015 at the intersection of 160th Street and 88th Avenue in Surrey, British Columbia (the "First Accident"). Ms. Thompson was seriously injured when she was thrown from her scooter after being cut off by the right-turning vehicle driven by the defendant Steven Masse. Mr. Masse admits liability for the First Accident.
- [3] The second accident occurred seven months later, on April 14, 2016, at the intersection of 72nd Avenue and 152nd Street in Surrey, when Ms. Thompson's vehicle was rear-ended by the vehicle driven by the defendant Gurjit Bilg (the "Second Accident"). Although Mr. Bilg has not admitted liability for the Second Accident, he takes no position on the issue of liability.
- [4] In these reasons I will refer to the First Accident and Second Accident collectively as "the Accidents".
- [5] Mr. Masse admits that as a result of the First Accident Ms. Thompson sustained a burst fracture to her L1 vertebrae, a hematoma to her buttocks and was bed ridden. With respect to the Second Accident Mr. Bilg contends that her injuries were entirely unrelated to the injuries sustained in the First Accident and consist primarily of soft tissue injury to the neck.
- [6] As a result of the injuries she sustained in the Accidents, Ms. Thompson seeks damages for personal injury, past and future loss of income earning capacity, past and future loss of housekeeping capacity, special damages and costs of future care. Liability for special damages in the amount of \$816.77 is admitted by the defendants. In total, Ms. Thompson seeks damages in the amount of \$613,249.77.

- [7] The defendants dispute the quantum of damages claimed by Ms. Thompson under all heads of damage. In particular, the defendants contend that Ms. Thompson has not proven that she is entitled to the amounts claimed for past and future loss of income earning capacity on the basis that she was not earning significant amounts as a hairstylist before the Accidents and likely would not have done so in the future, if the Accidents had not occurred. The defendants submit that Ms. Thompson should be awarded damages totalling \$118,816.77 - the bulk of which is for pain and suffering.

Issues

- [8] The primary issues for determination are therefore as follows:
- Liability: Is Mr. Bilg liable for the Second Accident?
 - Causation: Which of Ms. Thompson's injuries and related physical symptoms were caused by the Accidents?
 - Damages: What damages is Ms. Thompson entitled to as a result of the injuries she sustained in the Accidents and her related physical symptoms?

Liability for the Second Accident

- [9] The evidence establishes that the Second Accident occurred on April 14, 2016 when Mr. Bilg's vehicle rear-ended Ms. Thompson's vehicle when her vehicle was stopped at a red light, waiting to travel through the intersection at 72nd Avenue and 152nd Street in Surrey. I have little difficulty concluding that Mr. Bilg is solely responsible for the Second Accident.

Causation

- [10] The next issue to be decided is what injuries and related symptoms were caused by the Accidents.
- [11] A plaintiff must establish on a balance of probabilities that a defendant's negligence caused or materially contributed to an injury. The defendant's negligence need not be the sole cause of the injury so long as it is part of the cause beyond the range of de minimus. Causation need not be determined by scientific precision: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at paras. 13-17 [*Athey*]; *Farrant v. Laktin*, 2011 BCCA 336 at para. 9.
- [12] The primary test for causation asks: but for the defendant's negligence, would the plaintiff have suffered the injury? The "but for" test recognizes that compensation for negligent conduct should only be made where a substantial connection between the injury and the defendant's conduct is present: *Resurfice Corp. v. Hanke*, 2007 SCC 7 at paras. 21-23.
- [13] Causation must be established on a balance of probabilities before damages are assessed: *Blackwater v. Plint*, 2005 SCC 58 at para. 78.

The First Accident

- [14] As I have already stated Mr. Masse admits that as a result of the First Accident Ms. Thompson sustained a burst fracture to her L1 vertebrae and a hematoma to her right buttock and as a result of her injuries was bedridden - which the evidence establishes was for a period of approximately three months.
- [15] Ms. Thompson testified that after the First Accident she was first admitted to Surrey Memorial Hospital for a few days and later transferred to Royal Columbian Hospital in New Westminister to undergo back surgery. She was cocooned with bandages to restrict movement and prevent further injury to her back. She had to be turned every few hours. After Ms. Thompson was transferred to Royal Columbian Hospital, she was initially isolated as a result of a staph infection outbreak at Surrey Memorial Hospital, which she says caused significant anxiety. In addition, she suffered an allergic reaction to oxycodone which caused her to become quite ill.
- [16] After a few days at Royal Columbia Hospital, Ms. Thompson was advised that back surgery was not required, or recommended, to repair her injured vertebrae. She made the decision to recover at home and was discharged. She returned to the townhouse in Surrey where she lived with her partner Steve Crane.
- [17] Ms. Thompson testified that during the time that she was bedridden at home, she continued to be "cocooned" and was only able to leave bed to go to the bathroom with difficulty. She testified that she became depressed because of her inability to move and because she was totally dependant upon others for her care. She was unable to get proper sleep and experienced back pain when lying on her back or her side.
- [18] It took several months until Ms. Thompson was able to venture out of the townhouse, which started with short walks within her gated townhouse complex. She started physiotherapy treatments approximately four and one-half months after the First Accident but only attended at six or seven sessions. She testified that she could not afford to pay the up-front cost of these treatments and decided to carry out the exercises recommended by her physiotherapist at home. Ms. Thompson did not return to work as a hairstylist, which work she had done for several years before the First Accident, on a part-time basis from home.
- [19] Ms. Thompson called Dr. Flaschner as an expert witness. Dr. Flaschner was qualified to provide opinion evidence as an expert physiatrist. He assessed Ms. Thompson on October 18, 2018.
- [20] Dr. Flaschner's opinion is that as a result of the First Accident Ms. Thompson sustained a burst fracture to her L1 vertebrae, a lumbosacral contusion and an aggravation of pre-existing degenerative disc disease.

- [21] Mr. Masse called Dr. Kuchinad as an expert witness and he was qualified to provide opinion evidence as an expert physiatrist. Dr. Kuchinad considered that during his examination on September 25, 2020, Ms. Thompson demonstrated some exaggerated pain behaviours. Contrary to Ms. Thompson's testimony at trial, Dr. Kuchinad did not observe Ms. Thompson experience any difficulty removing her socks and shoes during testing.
- [22] It was also Dr. Kuchinad's opinion that the First Accident caused the L1 vertebrae burst fracture and exacerbation of pre-existing degenerative disc disease of the lumbar spine. He considered the on-going impairment resulting from the L1 vertebrae burst fracture to minor.

The Second Accident

- [23] The Second Accident occurred within a few months of Ms. Thompson ceasing physiotherapy treatments. She testified that prior to the Second Accident she had started to feel better but was terrified that she would reinjure her back.
- [24] Ms. Thompson testified that after the Second Accident her heard hurt and that she began to experience neck and shoulder pain. She stayed in bed for a couple of days. She did not attend at the hospital and did not visit her family doctor until approximately six weeks later, when she began to experience double vision. She explained that she did not do so because she knew what she needed to do, being to stay at home, lay down and rest. In addition, she testified that she thought she might do more damage to her back if she travelled to her Doctor's office in Burnaby.
- [25] Ms. Thompson testified that she experienced double vision for a couple of weeks and initially had headaches daily. She says that she experienced neck pain in the first year and an associated decrease in range of motion. She also says that she experienced left shoulder pain extending from her shoulder blade to the base of her skull.
- [26] Since the Second Accident Ms. Thompson has not received any physical therapy or sought massage therapy for her on-going symptoms. She testified that she did not seek this treatment, as she was unable to afford the cost. During cross-examination Ms. Thompson conceded that she was likely covered for such treatments under Mr. Crane's extended healthcare coverage starting in the spring of 2019.
- [27] Dr. Flaschner's opinion is that as a result of the Second Accident Ms. Thompson sustained a soft tissue (whiplash) injury to her neck, post-whiplash headaches and may have sustained a mild concussion which has now resolved. During his 2018 examination of Ms. Thompson Dr. Flaschner found that she had full range of motion in the shoulder, lumbar spine and hips. He considered it likely that her symptoms of upper neck, back and low back pain are likely permanent but that the severity of these symptoms may vary depending on treatment. He assumed, given that Ms. Thompson did not report headaches when he examined her, that her post-whiplash headaches had resolved.

- [28] In Dr. Flaschner's opinion Ms. Thompson's reports of functional limitations, including decreased sitting and standing tolerance preventing her from working part-time as a hairstylist, are consistent with the injuries she sustained in the Accidents. In his view the impact of these functional limitations, caused by pain, will vary depending on her response to treatment.
- [29] Dr. Kuchinad also considered that Ms. Thompson sustained a whiplash injury to her neck. He did not find any limitation in the range of motion of Ms. Thompson's cervical spine or any indicia of pain in her knees, ankles, shoulders, elbows or wrists. He found only minor limitation to the range of motion of her lumbar spine. In his opinion Ms. Thompson's whiplash injury resulted in a very little disability.

Current Symptoms

- [30] Ms. Thompson testified that she continues to experience difficulty bending over and that she now has to sit down and draw her leg up onto the opposite thigh to tie her shoes. She testified that although her back pain has improved somewhat, she manages her pain. She is unable to stand in place for very long as doing so results in pain which prevents her from working as a hairstylist. She is also unable to travel extended distances or by car or by air - which she used to do along with Mr. Crane, who works as a roadie and musician with the band Trooper. Finally, she is unable to do heavy gardening work, which she enjoyed doing before the Accidents.
- [31] Ms. Thompson testified that she continues to experience neck and shoulder blade pain and a decreased range of motion in her neck. She says this pain is constant and she just deals with it. She says that she still experiences headaches but less frequently than immediately after the Second Accident - now two to three times per week.
- [32] Ms. Thompson's family doctor, Dr. Look, testified at trial as an expert in family medicine. In Dr. Look's opinion Ms. Thompson continues to suffer from ongoing pain, particularly with her "back and head injury", and suffers from decreased stamina, physical limitations, disturbed sleep and ongoing headaches. In his opinion, as set out in a rebuttal report to that of Dr. Kuchinad, Ms. Thompson's lower back pain results from injuries sustained in the First Accident.
- [33] Dr. Look noted in his expert report that prior to the Accidents Ms. Thompson only experienced back pain, including an episode of sciatica, in the mid 1990's. His report notes that prior to the First Accident she was able to work up to ten hours per day as a hairstylist but not afterwards.
- [34] Dr. Flaschner and Dr. Kuchinad disagree with respect to the cause of Ms. Thompson's ongoing lower back pain symptoms.

- [35] In Dr. Kuchinad's opinion, although he agrees that the First Accident likely temporarily exacerbated Ms. Thompson's pre-existing disk degeneration disease, her current lower back pain is caused by the onset of symptoms related to this pre-existing condition and not the L1 vertebrae burst fracture.
- [36] In Dr. Flaschner's opinion, as set out in a rebuttal report to that of Dr. Kuchinad, there are no objective tools available to determine what portion of Ms. Thompson's current back pain symptoms are residual symptoms arising from her L1 burst fracture or unrelated degenerative changes to her spine. He also noted in his expert report, similar to comments made by Dr. Look in his report, that Ms. Thompson's pre-existing intermittent low back pain was not associated with functional limitations. That is, Ms. Thompson's inability to work as a hairstylist only arose after the First Accident.
- [37] With respect to cognitive and psychological impact arising from the Accidents Ms. Thompson testified during direct examination that after the Accidents she suffered from anxiety and depression. She said that she felt anxious in large crowds and was generally less social. She testified that at this time she still feels nervous about reinjuring her back but provided little additional testimony regarding on-going, relevant symptoms.
- [38] Ms. Thompson called Dr. Misri who was qualified to provide opinion evidence at trial, as an expert psychiatrist. Dr. Misri conducted an interview of Ms. Thompson via "Zoom" on August 4, 2020.
- [39] In Dr. Misri's opinion Ms. Thompson developed a generalized anxiety disorder and suffers from depression, as a result of the First Accident. In her opinion, these symptoms worsened after the Second Accident and Ms. Thompson now suffers from severe anxiety and mild to moderate depression, with a prognosis for recovery of poor and guarded, respectively.

Analysis and Conclusion on Causation

Physical Injuries

- [40] I find that as a result of the First Accident Ms. Thompson sustained a burst fracture to her L1 vertebrae and a hematoma to her right buttock.
- [41] I find that Ms. Thompson continues to experience low back pain, which impacts her ability to stand or sit in one place for extended periods. With respect to the cause of this ongoing low back pain, I prefer the opinion evidence of Dr. Flaschner over that of Dr. Kuchinad. That is, I accept Dr. Flaschner's opinion, which is supported by the clinical observations of Dr. Look regarding the onset of relevant symptoms, that it is probable that Ms. Thompson's current low back pain results from her L1 vertebrae burst fracture, and the on-set, or exacerbation of symptoms related to her pre-existing degenerative disk disease, which was also caused by the First Accident. I find that this pain is likely chronic but that the severity of pain symptoms may vary in the future depending on treatment.

- [42] I find that Ms. Thompson sustained a soft tissue (whiplash) injury to her neck in the Second Accident resulting initially in post-whiplash headaches which she now experiences only occasionally. I also find that as a result of this injury Ms. Thompson continues to experience upper neck and shoulder pain which is likely chronic - but again, the severity of these symptoms may vary in the future depending on treatment.
- [43] Although the evidence is unclear as to whether Ms. Thompson sustained a concussion in the Second Accident and I am therefore unable to conclude that she did, I am satisfied that she suffered some short-term injury resulting in double vision, which resolved a few weeks after this accident.

Psychological Injuries/Impairments

- [44] Although it is the opinion of Dr. Misri that Ms. Thompson suffers from generalized anxiety disorder and depression I consider that there is an insufficient factual basis for her conclusion that these conditions result from the Accidents.
- [45] Dr. Misri was not aware that Ms. Thompson had experienced family violence in a previous relationship - albeit many years before the Accidents. In addition, Dr. Misri was also not aware of Ms. Thompson's on-going concerns regarding her daughter's mental health challenges. During her cross-examination, when taken to Ms. Thompson's clinical records that recorded pre-accident experiences with anxiety, Dr. Misri admitted that she might have dropped the ball when she included a remark in her expert report that Ms. Thompson did not have a previous history of anxiety.
- [46] In addition, in my view, Dr. Misri did not consider the impact of, or was too quick to dismiss, Ms. Thompson's diagnosis of Grave's Disease in 2018. Ms. Thompson's clinical records suggest that these symptoms dominated her concern at a number of medical appointments until the condition was diagnosed and treated. It is noteworthy that Ms. Thompson admitted during-cross examination that she found the symptoms arising from Grave's Disease, such as shaking uncontrollably, to be unbearable.
- [47] I also note Dr. Flaschner 's opinion that it is more likely than not that Ms. Thompson's symptoms of agitation and restlessness likely arise from her Grave's Disease and are not related to the Accidents.
- [48] Ms. Thompson's reporting of the extent of her psychological symptoms to medical practitioners has been inconsistent. In a consultation with Dr. Hosseini, a psychiatrist at Surrey Memorial Hospital in August 2020, three weeks after Ms. Thompson's "Zoom" assessment meeting with Dr. Misri, Ms. Thompson did not describe significant on-going psychological impairments. She told Dr. Hosseini that:
- a) Ever since she was diagnosed with hyperthyroidism, she had experienced on/off anxiety;
 - b) She denied experiencing any concerns with her mental health;

- c) Her overall mental health had been stable;
 - d) She denied she has had any periods of pervasive low mood;
 - e) She denied any concerns with her sleep; and
 - f) She denied day-to-day worries.
- [49] In my view, when cross-examined at trial about the truthfulness of the information contained in the consultation report of Dr. Hosseini, Ms. Thompson provided a vague and argumentative response. This affects my assessment of the reliability of her evidence with respect to her post-accident psychological symptoms.
- [50] In my view, Ms. Thompson provided limited evidence at trial with respect to the extent of her current symptoms of anxiety and depression. Her testimony was essentially, that she remains nervous in large crowds. Contrary to this testimony, she also admitted that she still goes to Trooper concerts with Mr. Crane, but not as often as she did before as her back pain makes it difficult to fly or drive long distances. This evidence suggests that it is her physical rather than psychological symptoms that prevent this activity.
- [51] In addition, Ms. Thompson testified that she travels by car or public transit from her home in Surrey to her workplace in downtown Vancouver, for her current job working as a support worker with Atira Properties ("Atira") at a single room occupancy hotel in the downtown eastside. Her ability to travel to and from work and to work in her current occupation as a support worker does not, in my view, suggest that she is continuing to experience severe symptoms of depression or anxiety.
- [52] Ms. Thompson called her daughter, Chanel Thompson as a witness at trial. Chanel Thompson testified with respect to Ms. Thompson's mood changes since the Accidents. She says that since the Accidents Ms. Thompson is now quiet and not as bubbly as she was before and that they tend to bicker more. She was not concerned about her mother's mood or mental health, although she considered that Ms. Thompson's work at Atira was draining on her.
- [53] I find that Ms. Thompson likely suffered from symptoms associated with post-accident anxiety and depression for a time after the Accidents. I am not satisfied that any current symptoms of anxiety or depression are debilitating or were caused by the Accidents.

Non-Pecuniary Damages

- [54] Non-pecuniary damages are awarded to compensate the plaintiff for pain, suffering, loss of enjoyment of life and loss of amenities. The compensation awarded should be fair to all parties, and fairness is measured against awards made in comparable cases. Comparable cases, though helpful, serve only as a rough guide. Each case depends on its own unique facts: *Benavides v. Doe*, 2015 BCSC 1831 at para. 94; *aff'd by Benavides v. Insurance Corporation of British Columbia*, 2017 BCCA 15.

[55] The effect of the injuries on a plaintiff's particular circumstances must be considered. Factors in assessing non-pecuniary damages include the age of the plaintiff, nature of the injury, severity and duration of pain, disability, emotional suffering, loss or impairment of life, impairment of family, marital and social relationships, impairment of physical and mental abilities and loss of lifestyle: *Stapley v. Hejslet*, 2006 BCCA 34, at para. 45 [Stapley].

[56] Ms. Thompson seeks non-pecuniary damages of \$175,000. She relies upon the following authorities:

Neufeldt v. Marcellus, 2020 BCSC 427

\$200,000

Lai v. Griffin, 2020 BCSC 377

\$200,000

Watts v. Lindsay, 2019 BCSC 2239

\$170,000

[57] The defendants submit that an appropriate award under this head of damages is \$100,000. They contend that the more significant impact on Ms. Thompson's current health arises from her Grave's Disease. The defendants rely upon the following authorities:

Hutchinson v. Dyck, 2015 BCSC 1039

\$ 90,000

Briggs v. Guliker, 2019 BCSC 1441

\$100,000

Gee v. Bock, 2019 BCSC 1348

\$100,000

Bain v. Goodridge, 2019 BCSC 1450

\$100,000

Wiebe v. Wiebe, 2017 BCSC 898

\$ 85,000

[58] Ms. Thompson was 47 years old at the time of the First Accident and 48 years old at the time of the Second Accident. Before the Accidents she had worked from her home as a hairstylist, on a part-time basis, for several years. Although she was not physically active she enjoyed gardening, spending time with her daughter and granddaughter and travelling with Mr. Crane when he toured with Trooper.

- [59] I consider that the short-term impact of the First Accident, which resulted in Ms. Thompson being bed-ridden for approximately three months, was severe. The evidence indicates that prior to the Second Accident Ms. Thompson's symptoms had started to improve. Both Dr. Faschner and Dr. Kuchinad conclude that her L1 vertebrae burst fracture has now healed but acknowledge that Ms. Thompson continues to experience low back pain - although to a reduced extent.
- [60] The Second Accident caused a whiplash injury that has resulted in ongoing neck and shoulder pain and periodic headaches. I am not satisfied on the evidence that the symptoms arising from this accident were severe. I do not accept Ms. Thompson's explanation that she did not see her family doctor until several weeks after the Second Accident because she was concerned that driving to his office would hurt her back. Given Ms. Thompson's evidence that she was anxious about further injury to her back after the First Accident it is more likely that she would have gone to her family doctor sooner rather than later if her symptoms after the Second Accident were significant.
- [61] In addition, I have considered the evidence of Dr. Flaschner that Ms. Thompson's symptoms of pain may improve over time depending on her response to treatment.
- [62] As I have already stated, I consider that for a time after the Accidents Ms. Thompson experienced symptoms associated with anxiety and depression. I do not find, to the extent relevant symptoms were caused by the Accidents, that they were or are severe. I agree with the submission of the defendants that it is likely that Ms. Thompson's struggles with symptoms associated with Grave's Disease, which is currently being managed by medication, caused her significant psychological stress in 2018 and into 2019.
- [63] As a result of low back pain symptoms arising from the First Accident, Ms. Thompson stopped working as a part-time hairstylist. I accept her evidence that she liked this work and that the loss of ability to continue to carry it out has affected her sense of self worth. Because of her stoicism Ms. Thompson obtained new employment working as a support worker at SROs with Atira, which although she finds stressful she also finds fulfilling. She is good at this work.
- [64] I accept Ms. Thompson's evidence that her low back pain has affected her ability to perform some duties around the house, such as cooking and cleaning which require bending over, and gardening. Although she is not completely disabled from carrying out some of these types of activities, her capacity is reduced.
- [65] Finally, I accept Ms. Thompson's evidence that her relationship with Mr. Crane, in particular their level of intimacy, has been impacted by symptoms associated with her accident related injuries. In addition, I accept that as a result of her symptoms she is not able to participate in social activities, such as attending at music concerts, to the extent she did prior to the First Accident.

- [66] In consideration of the range of damages set out in the authorities referred to by the parties and the factors set out in *Stapley* which I have addressed above, I assess Ms. Thompson's non-pecuniary damages at \$120,000.

Past Loss of Income Earning Capacity

- [67] Ms. Thompson seeks damages for past loss of income earning capacity, from the date of the First Accident to trial, of \$83,750. This portion of her claim is based on a calculation of income of \$63,750 (\$1,500 per month) she could have earned working as a part-time hairstylist, from the date of the First Accident until November 2019 when she got a job working with Atira Properties, and an additional \$20,000 for loss of capital asset over the next thirteen months.
- [68] The defendants submit that Ms. Thompson's damages for past loss of income earning capacity should be assessed at \$500 per month (\$6,000 per year) for the three-year period during which she would have worked if the Accidents had not occurred. The defendants contend that as a result of the onset of symptoms associated with Graves Disease in 2018, which are unrelated to the Accidents, Ms. Thompson would have been unable to work for approximately two years between the First Accident in September 2015 and the date of trial.
- [69] Compensation for loss of past and future income earning capacity is to be based on what the plaintiff would have, not could have, earned but for the injury that was sustained: *Ibbitson v. Cooper*, 2012 BCCA 249 at para. 19; *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30 [Rowe]; *M.B. v. British Columbia*, 2003 SCC 53 at para. 49.
- [70] A claim for past income loss is actually a claim for past loss of earning capacity. That is, a claim for the loss of the value of the work that the injured party would have performed but was unable to perform because of the injury. Loss of earning capacity rather than the loss of actual income is to be considered, although loss of income may provide some basis in determining the value of loss of capacity: *Mojahedi v. Friesen*, 2016 BCSC 1225 at para. 73 referring to *Rowe* at para. 30.
- [71] The burden of proof of actual past events is proof on a balance of probabilities. An assessment of loss of both past and future earning capacity involves consideration of hypothetical events. A plaintiff is not required to prove these hypothetical events on a balance of probabilities. A hypothetical possibility can be considered so long as there is a real and substantial possibility that it would have occurred, or will occur, and is not mere speculation: *Athey* at para. 27; *Morlan v. Barrett*, 2012 BCCA 66 at para. 38; *Grewal v. Naumann*, 2017 BCCA 158 at paras. 48 - 49

- [72] The amount of past or future income loss may be proven using the "earnings approach" or the "capital asset" approach. The former will be more useful when a loss is more easily measureable - for example where a plaintiff's income is not expected to fluctuate, up or down, over time. The latter is more useful when the loss is not easily measured: *Perren v. Lalari*, 2010 BCCA 140 at para. 32 [Perren].

Discussion and Conclusion on Loss of Past Income Earning Capacity

- [73] I am satisfied that if the Accidents had not occurred there is a real and substantial possibility that Ms. Thompson would have continued to work part-time as a hairstylist out of her home between the date of the First Accident and the date of trial. The first question is whether, but for the Accident, she would have worked during all of this period.
- [74] Ms. Thompson's Daughter, Chanel Thompson testified that in the four months prior to the First Accident Ms. Thompson provided childcare for her infant daughter Arya ten hours a day on a full-time basis, when she was at work. After the First Accident, when Ms. Thompson was no longer able to provide childcare support, Chanel Thompson eventually had to stop working. I consider that this evidence establishes a real and substantial possibility that even if the First Accident had not occurred Ms. Thompson would not have been able to work as much as she had as a part-time hairstylist as she would have provided childcare support to her daughter. There was no testimony at trial concerning how long Ms. Thompson would have continued to provide childcare services to Chanel if the Accidents had not occurred.
- [75] The evidence establishes that in 2018 Ms. Thompson began to experience symptoms arising from the onset of Grave's Disease including severe shaking of her hands. I consider it likely that even if the Accidents had not occurred that these symptoms would have, for a time, prevented Ms. Thompson from working as a part-time hairstylist.
- [76] The next question is whether, if the Accident had not occurred, and after considering an inability to work resulting from taking care of her granddaughter and the onset of symptoms from Grave's Disease, how much would Ms. Thompson likely have earned as a hairstylist before trial.
- [77] Ms. Thompson testified that before the First Accident she earned approximately \$1,200 to \$1,500 per month working part-time as a hairstylist from her home. This estimate is based on her estimate of the monthly household and other expenses, including gas, food and personal expenses, which she paid. Ms. Thompson did not provide any documentary evidence supporting her testimony with respect to the monthly expenses that she says she paid.

- [78] There is a dearth of objective evidence supporting Ms. Thompson's testimony with respect to her monthly earnings. She did not produce client records such as appointment calendars, client lists, receipts or other evidence. In addition, I note that Ms. Thompson did not call evidence from any of the client's she claims to have worked with in the period before the First Accident. Mr. Crane testified that he did not know how many clients Ms. Thompson was working with on a weekly or monthly basis before the First Accident.
- [79] Ms. Thompson's testimony with respect to her monthly earnings before the First Accident is at odds with what she reported to ICBC. On the CL22 form Ms. Thompson submitted to ICBC after the First Accident she reported that her gross monthly income loss was \$900. I do not accept Ms. Thompson's testimony that she reported her income to be \$900 because she earned less for a short time when touring with Mr. Crane and Trooper. Chanel Thompson's evidence was that during this time Ms. Thompson was providing full-time childcare for Arya.
- [80] Ms. Thompson admitted at trial that she did not declare any of her income from working as a part-time hairstylist from her home for tax purposes. Her T4s show annual earnings of between \$1 and \$899 for the years 2011 to 2014, which she testified came from royalty payments she received from appearing at a movie filmed in Vancouver in the early 2000s. In my view, Ms. Thompson's tax records do not assist in an assessment of her damages for loss of past income earning capacity.
- [81] It is not appropriate to base an assessment of Ms. Thompson's past loss of income earning capacity on the income declared on her tax returns, as this would ignore her testimony with respect to her undeclared income. I do have serious concerns about the credibility of her evidence with respect to her pre-accident earnings given her willingness to file false tax returns over many years and because of the almost complete lack of corroborating viva voce or documentary evidence. In addition, I note that during her direct examination Ms. Thompson did not provide evidence that she was providing childcare services to her daughter Chanel on a full-time basis before the Accident. This evidence only came out during the testimony of Chanel.
- [82] An award of damages for loss of past income earning capacity requires, at the end of the day, an assessment. In making this assessment, I have taken into consideration the following: the periods of time when Ms. Thompson would have provided childcare support to Chanel and when she would have been prevented from working due to symptoms arising from Graves Disease; and, the commencement of her employment with Atira in November 2019 - after which she made more on a monthly basis working more hours, than she did prior to the Accidents.
- [83] I accept the submission of the defendants that an appropriate estimate of Ms. Thompson's pre-trial earnings, but for the Accidents, is \$18,000 - based on three years of earnings at \$500 per month. I assess her damages for loss of past income earning capacity at this amount.

Future Loss of Income Earning Capacity

- [84] Ms. Thompson seeks damages for future loss of income earning capacity of \$200,000, based on an assessment made using the loss of capital asset approach.
- [85] The defendants contend that Ms. Thompson has not proven a real and substantial possibility of a future event, arising from accident related injuries, leading to an income loss. In particular, they say that the evidence does not support a finding that the Accidents resulted in any limitations that will prevent Ms. Thompson from continuing to work as a support worker with Atira. They say, in essence, that Ms. Thompson now makes more, earning approximately \$40,000 per year working for Atira, than she claims she made working as a part-time hairstylist before the First Accident. For this reason, they say that Ms. Thompson should not receive an award under this head.
- [86] In *Perren*, the Court of Appeal confirmed that the first inquiry in dealing with a claim for future loss of income earning capacity is whether there is a substantial possibility of a future event which will lead to an income loss. The court stated at para. 32:
- [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* [Emphasis in original.]

Discussion and Conclusion on Loss of Future Income Earning Capacity

- [87] Ms. Thompson's evidence at trial was that she likes her job with Atira and is good at it. She says she has good communication skills and is good at making the residents at the SRO hotel where she works feel better about themselves.
- [88] In my view, neither the lay nor the medical evidence supports a finding of a real and substantial possibility that Ms. Thompson will, because of symptoms arising from the Accident, be unable to continue working with Atira or in a comparable position elsewhere.
- [89] As noted by the defendants in their submissions, Ms. Thompson has not asked for any accommodations at work and has in fact applied for a promotion to move to a larger SRO and take on greater challenges. It is noteworthy that in 2020 Ms. Thompson was capable of working approximately 150 overtime hours.
- [90] It is not sufficient to limit a loss of capacity analysis to a plaintiff's capacity to perform the duties of their current job.

[91] I have already found that Ms. Thompson's low back pain prevent her from working as a hairstylist. This constitutes a loss of capital asset, being the ability to work in an occupation which requires extended periods of standing in one place, which in my view justifies an award for loss of future income earning capacity.

[92] Ms. Thompson contends, and I agree, that the capital asset approach should be applied in this case given that it is difficult to estimate what Ms. Thompson's earnings as a part-time hairstylist would have been if the Accidents had not occurred. The decision in *Brown v. Goilay* (1985), 26 B.C.L.R. (3d) 353 (S.C.); at para. 8 outlines some of the considerations warranted under this approach:

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

[93] At para. 20 of the decision of the Court of Appeal in *Perren* the court summarized the principles to be considered in applying the loss of capital asset approach. In particular, and relevant to a circumstance where a plaintiff earns more after an accident than they did prior to the accident, the court said as follows at para. 14, referencing the decision in *Parypa v. Wickware*, 1999 BCCA 88, 169 D.L.R. (4th) 661:

[14] In *Parypa*, the plaintiff, a 40 year old nurse-in-training, was seriously injured. At trial, the defendant did not dispute that the plaintiff could not work as a nurse in the future, as she had planned before the accident. Mr. Justice Cumming summarized what he described as the well-established principles relevant to determining the quantum of damages for future loss of earning capacity. Of relevance to this case he noted:

- It is not loss of earnings but, rather, loss of earning capacity, a capital asset, for which compensation must be made (para. 62).
- Even a plaintiff able to earn as much after his injury as before his injury is entitled to compensation for the impairment, because some occupations will be closed to him, "and it is impossible to say that over his working life the impairment will not harm his income earning capacity" (para. 63).
- Hypothetical events (such as how the plaintiff's life would have proceeded but for the accident) or future events are given weight according to their relative likelihood (para. 66).

- [94] Ms. Thompson seeks a \$200,000 award for loss of capital asset based on, I assume, a complete loss of her ability to work in any occupation until she is 65 or 70 years old. She makes no allowance for the possibility that she will continue to work with Atira until she chooses to retire. With respect to a potential retirement date, Ms. Thompson testified that she had no retirement plans but was taking things one year at a time.
- [95] There is insufficient evidence on which I can conclude that there is a real and substantial possibility that Ms. Thompson will become unable to continue working with Atira because of her accident-related injuries and symptoms. On the basis that there is some potential that Ms. Thompson will be unable to work at Atira until a reasonable retirement age, and then will be unable to find replacement work requiring extended periods of standing in one place, I conclude that damages of \$25,000 for loss of future income earning capacity is appropriate. I assess Ms. Thompson's damages under this head at this amount.

Loss of Housekeeping Capacity (Past and Future)

- [96] Ms. Thompson seeks an award for loss of housekeeping capacity in the amount of \$95,000 - \$20,000 arising pre-trial and \$75,000 afterwards.
- [97] The evidence establishes that Ms. Thompson was bedridden for a number of months after the First Accident and for a short period after the Second Accident. In addition, the evidence establishes that she is currently unable to perform some housekeeping tasks, including those requiring bending, such as putting dishes and pots away in lower cupboards or cleaning the bathtub. Ms. Thompson's partner, Mr. Crane and her daughter Chanel are now undertaking these tasks. In addition, Ms. Thompson is unable to carry out heavier gardening tasks.
- [98] As was found by the Court of Appeal in *McTavish v. McGillivray*, 2000 BCCA 164 at para. 63, when a plaintiff's ability to perform housekeeping services is diminished because of the injuries sustained they are entitled to damages even where replacement services are being provided gratuitously by members of their family.
- [99] With respect to the impact of loss of housekeeping capacity to the date of trial, I consider that an award of \$20,000 is appropriate. This takes into consideration the fact that Ms. Thompson was incapacitated for approximately three months. With respect to the impact of loss of housekeeping capacity going forward, I note that Ms. Thompson's condition has now for the most part stabilized and that, depending on the success of further treatment may improve. In the circumstances, I consider that an award for future loss of housekeeping capacity of \$20,000 is appropriate - based on a coarse estimate of \$2,000 in annual costs over a ten-year period.
- [100] In total, I assess Ms. Thompson's damages for past and future loss of housekeeping capacity to be \$40,000.

Cost of Future Care

- [101] Ms. Thompson seeks an award for the cost of future care in the amount of \$53,683. She claims for the cost of obtaining botox injections, active rehabilitation with a kinesiologist, annual expenditures for massage, physiotherapy and chiropractic care, an ergonomic assessment of her workplace, counselling including marriage counselling and prescription costs.
- [102] The defendants contend that no award for the cost of future care should be made.
- [103] A plaintiff is entitled to compensation for the cost of future care based on what is reasonably necessary to restore her to her pre-Accident condition, in so far as that is possible. When full restoration is not achievable, the court must strive to assure full compensation through the provision of adequate future care. The award is to be based on what is reasonably necessary on the medical evidence to preserve and promote the plaintiff's mental and physical health: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.) [Milina]; *Williams v. Low*, 2000 BCSC 345; *Spehar v. Beazley*, 2002 BCSC 1104; *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at paras. 29-30.
- [104] The test for determining the appropriate award under the heading of cost of future care is an objective one based on medical evidence. For an award of future care: (1) there must be a medical justification for claims for cost of future care and (2) the claims must be reasonable: *Milina* at 84; *Tsalamandris v. McLeod*, 2012 BCCA 239 at paras. 62-63.
- [105] An assessment of damages for cost of future care is not a precise accounting exercise: *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at para. 21.
- [106] Dr. Flaschner has recommended that Ms. Thompson participate in an active rehabilitation program, various physical therapies, and needle based therapies including IMS or trigger point or botox injections and facet joint injections. In addition, he recommends various prescriptions medications and a topical analgesic. This provides the medical justification for incurring appropriate costs but I am not satisfied that all of these costs are justified or that the costs are likely to be incurred.
- [107] Ms. Thompson called Mr. Altieri as an expert occupational therapist at trial. I consider that an award for active rehabilitation costs at the low end of the scale recommended by Mr. Altieri is appropriate. I award \$1,140 for these costs.
- [108] Dr. Flaschner did not provide a recommendation with respect to the frequency of or the period during which physical therapies including physiotherapy, massage therapy or chiropractic care should be provided. Mr. Altieri has recommended that Ms. Thompson receive such ongoing treatments until retirement at an annual cost of between \$720 and \$1,200 and thereafter at an annual cost of \$360 to \$800.

- [109] I note that after the First Accident Ms. Thompson only attended at six physiotherapy treatments but opted to complete the recommended exercises at home. She did not seek any such treatment after the Second Accident, despite the availability of coverage under Mr. Crane's extended healthcare plan starting in the spring of 2019.
- [110] In my view, it is appropriate to award the costs of obtaining physiotherapy, massage or chiropractic treatments. In the circumstances, I do not consider it appropriate to award an amount for annual costs of such treatments for Ms. Thompson's lifetime. I assess her damages for these costs at \$10,000.
- [111] Mr. Altieri has recommended that Ms. Thompson undergo an ergonomic assessment of her workplace. Mr. Altieri did not conduct an in person assessment of Ms. Thompson or visit her workplace. In addition, Dr. Flaschner did not recommend this type of assessment. Ms. Thompson submits that there is a substantial possibility that Ms. Thompson will change jobs that may require an ergonomic assessment. There is insufficient evidence to support this submission. I decline to award an amount for the costs of obtaining an ergonomic assessment or related equipment, as I do not consider it likely that Ms. Thompson will incur such costs.
- [112] There is no evidence establishing that Ms. Thompson will require all of the needle based therapies for which she seeks an award. It is my understanding that IMS and trigger point injections are covered by MSP. It is reasonable to expect Ms. Thompson to seek out these treatments and therefore I decline to award damages for the costs of other needle-based therapies.
- [113] Mr. Altieri did not provide an opinion with respect to the cost of the medications and topical treatments recommended by Dr. Flaschner. Ms. Thompson submits, without any supporting evidence, that a reasonable estimate of monthly costs for such items is \$50 per month and seeks an award of \$10,149.60 for costs over her lifetime. Ms. Thompson has the burden of providing some evidence with respect to the costs of such items. As she has not done so I am unable to conclude whether such costs are reasonable.
- [114] Dr. Misri recommends that Ms. Thompson receive both psychological counselling and marriage counselling. Given my findings that Ms. Thompson is not suffering from symptoms of generalized anxiety disorder or depression resulting from the Accidents there is no basis for an award of damages for the costs of such treatments.
- [115] In summary, I assess Ms. Thompson's damages for costs of future care to be \$11,140.

Special Damages

- [116] The parties have agreed to special damages of \$816.77. I award this amount.

Conclusion

[117] Ms. Thompson suffered injuries and sustained damages as a result of the negligence of the defendants in the Accidents. I award her the following damages:

a)

Non-pecuniary damages

\$120,000.00

b)

Past loss of income earning capacity

\$ 18,000.00

c)

Future loss of income earning capacity

\$ 25,000.00

d)

Loss of Housekeeping Capacity

\$ 40,000.00

d)

Cost of future care

\$ 11,140.00

e)

Special Damages

\$ 816.77

TOTAL:

\$214,956.77

"Mayer, J."

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