

CANADA / JUDGMENT

Tougas v. Mostat

2020 BCSC 1281

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Supreme Court of British Columbia

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2020 BCSC 1281 Tougas v. Mostat

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Tougas v. Mostat,

2020 BCSC 1281

Date: 20200828

Docket: M203042

Registry: New Westminster

Between:

Brigitte Tougas

Plaintiff

And

Curtis Mostat, Naseem Khan, Mehar Alladin, Ronald Peters,

Jeffrey Peters and Sherry Lee Watkinson

Defendants

Before: The Honourable Mr. Justice Ball

Reasons for Judgment

Counsel for the Plaintiff:

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Place and Dates of Trial:

New Westminster, B.C.

November 25-29 and

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Place and Date of Judgment:

New Westminster, B.C.

August 28, 2020

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Introduction

- [1] This trial arose out of claims for personal injuries arising from three motor vehicle accidents which took place July 8, 2016 (the "first accident"), August 13, 2016 (the "second accident"), and May 4, 2018 (the "third accident").
- [2] Liability has been admitted for all three accidents.

Pre-Accident Life

- [3] The plaintiff in this case, Ms. Tougas, was born in 1968 in Winnipeg, and was 51 years old at trial. Her parents separated when she was very young. As a result, at age two, she moved with her father and two siblings to Powell River, British Columbia, where she grew up and spent most of her adult life. Her father entered a new relationship in Powell River and Ms. Tougas gained several step-siblings in the following years.
- [4] Her high school graduation took place in Powell River in 1986, when the plaintiff was 18. Ms. Tougas took no secondary education, but later took courses in hairdressing and hotel and restaurant management.
- [5] Her first son, Kyle, was born in 1988.

- [6] She lived as a single mother on welfare until she met her first husband, Elliot Mostat. After two years of cohabiting, the couple married in 1993. They had two sons together, Cody (born in 1992) and Curtis (born in 1996). Eventually, Ms. Tougas separated from Mr. Mostat in 1997 when the youngest son of that relationship, Curtis, was approximately five years old. Mr. Mostat was away from home for a great deal of the time with work and took no part in raising the children.
- [7] In 1997, Ms. Tougas began a first job in Powell River at the Red Lion Pub., where she worked for a year. Then she worked at the Shingle Mill Pub, also in Powell River, from 1998 to 2006 and later returned to Shingle Mill Pub in 2014 as a bartender/server. She also took some work at other restaurants and bars during this time period, and would dress hair on a part-time basis for a small number of clients.
- [8] In approximately 2005, Ms. Tougas began a relationship with Alan Rae. At the beginning of that relationship, Ms. Tougas was working at several part-time jobs as a bartender/server. Ms. Tougas married Alan Rae in 2009. That relationship lasted until they separated in 2013. While married to Mr. Rae, Ms. Tougas was not required to work as Mr. Rae had a generous income and was able to support the family.
- [9] In 2006, Ms. Tougas began a program in cosmetology school, eventually obtaining a haircutting certificate in North Vancouver in 2007. Mr. Rae built a salon for the use of Ms. Tougas and her clients in the family home. Ms. Tougas' clients were essentially family and friends.
- [10] She also obtained a certificate in hotel and restaurant management through an online course in 2010.
- [11] Her sons were involved in a very busy schedule of sports activities. Ms. Tougas was involved in driving her sons to and from hockey, soccer and baseball practices and games. Ms. Tougas herself was an accomplished softball player, particularly as a pitcher in fast pitch and mixed softball.
- [12] Tragically, Ms. Tougas' sons developed heroin addiction problems which, according to the testimony of Ms. Tougas, resulted from her then-husband introducing her sons to drugs and selling drugs to them.
- [13] Following her separation from Alan Rae in December 2013, Ms. Tougas returned to work at the Shingle Mill Pub where she was paid \$9.45 per hour as a server and \$12 per hour as a bartender. She testified she also received between \$40 to \$80 per shift in tips. Ms. Tougas openly testified that she did not declare income from hair dressing or tips on her income tax returns. The hairdressing income involved two to three appointments each week.
- [14] Her sons' heroin addictions continued and emotional struggles followed caused by the stress of marital breakup and her sons' addictions. One son attempted suicide, which greatly upset Ms. Tougas.

- [15] Ms. Tougas was busy with a full active life. She had many friends and socialized regularly. She participated in Aquasize classes daily. She played as a pitcher in a competitive fast pitch women's league and also played on a mixed slow pitch softball team. She regularly played between two and four softball games a week until she moved from Powell River in April or May 2015.
- [16] Having decided she needed to have a change of location to start a new life, in April 2015, Ms. Tougas moved from Powell River to Langley to provide access to a substantial rehabilitation program for her son, Cody, in hopes of resolving his addiction to heroin.
- [17] Ms. Tougas obtained a first Lower Mainland job as server at a Denny's restaurant in May 2015, but left after a week because she did not find the work pleasant. She also found a job as a server at Baselines Pub and Sports Bar for a week, but eventually found a job at the Newlands Golf and Country Club on August 17, 2015. Initially, she was hired as a bartender/server on August 17, 2015. Through creativity and hard work she was promoted to Bar Supervisor of the Bar and Grill on September 24, 2015.
- [18] The clubhouse on Newlands' main floor included several large ball rooms serviced by a large kitchen and a smaller kitchen with dish washing facilities. The Bar and Grill is located on the second floor and food services were provided from the small kitchen on the main floor. Used dishes were returned to the main floor kitchen for washing.
- [19] Correspondence with respect to the promotion to Bar Supervisor was contained in Exhibit 1, Volume 2, Tab 10, in an email chain with Vonda Dickman, assistant general manager of the Newlands Golf and Country Club, and Judy Davies, an owner of the Golf Club, referred to in evidence. Ms. Tougas wrote an email to management dated September 15, 2015, which outlined a number of issues where practices in the Bar and Grill could be improved to increase sales and reduce waste of liquor, beer and food products, add activities and special events to the bar calendar to improve sales, as well as to improve the teamwork of the staff of the Bar and Grill. Management then met with Ms. Tougas to discuss her proposal and decided she should be hired to be Supervisor of the Newlands Bar and Grill. The new appointment was announced to the employees in writing on October 2, 2015.
- [20] The position of Bar Supervisor carried an increase in salary from \$9 dollars per hour for server and \$12 per hour for bartender, to \$15 per hour for Bar Supervisor, both positions earning tips. Ms. Tougas testified that tips would vary from \$80 to \$120 dollars per shift on slow days or weekdays, to \$300 per shift for weekends and shifts featuring weddings, special events, popular rock bands, birthdays and other events. Ms. Tougas noted in evidence she would receive tips in cash from customers and there was a tip pooling system which paid 10% to working bartenders and working supervisors. Ms. Tougas also testified that she normally worked 35 hours per week, but regularly, if an employee did not attend for any reason, she would work a double shift to cover for the missing employees. She also testified that with additional shifts and special events, she worked some seven day weeks.

- [21] Ms. Tougas very much enjoyed working at Newlands Golf and Country Club and found the employees with whom she worked very supportive of the teamwork she espoused. She intended to remain working at Newlands for as long as she could.
- [22] A typical day at Newlands required that Ms. Tougas obtain cash to conduct business from the head office, as well as the keys to open the bar facility. She would then fill ice wells, ready juices, mixers and garnishes for bartending, prepare the coffee station, wipe down and clean chairs and tables, place furniture in appropriate locations, review and coordinate reservations, place cash into an Automatic Teller Machine, and place cash floats into cash drawers. She was also responsible for stocking drink coolers and ensuring beer kegs stored on the main floor were brought up the sixteen stairs to the Bar and Grill.
- [23] A list of "areas to address" prepared by Newlands for Ms. Tougas is contained at Exhibit 1, Volume 1, Tab 10, page 7, and demonstrates the issues to which Ms. Tougas was to bring her experience to bear. During the working shift, she would take food and drink orders as on slow days she was the sole server. On weekends and during functions there were a number of employees in the Bar and Grill to service the larger number of customers.
- [24] While working at Newlands, she was living with her sons in Langley when she was involved in the first accident. She was 48 years old at that time.
- [25] In 2017, she moved in with Silas Scaddan in Vancouver and then in his mother's house with Silas and Curtis in Langley. The mother's house was large with a ground level basement suite. This was after the first couple of accidents. They lived there for two years, did not want to move out of that house, but he fell out of love with Ms. Tougas because they did not do any of the activities he enjoyed.

Pre-accident Medical Condition

- [26] In 2008, Ms. Tougas was attending a bar and sitting in a chair which broke. She fell to the ground, injuring her left shoulder, neck and lower mid back. To seek relief from this injury, she attended physiotherapy and was prescribed medication, including a muscle relaxant, Cyclobenzaprine. The injuries to Ms. Tougas' neck, shoulder and back substantially improved over time, but never completely resolved. She described pre-accident neck and back pain as tension and stiffness, which occurred once or twice a month. She would experience muscle tension and stiffness at the end of a long day working on her feet. At times, the muscle tension created by standing too long apparently caused migraine headaches in the front of her head and into her sinuses, which she would experience once or twice a month.
- [27] Despite these injuries and the muscle tension and stiffness, Ms. Tougas was able to continue her work as a bartender, play softball at a competitive level, and clean and maintain her home without apparent restriction. A witness called by the plaintiff, Vonda Dickman, was familiar with Ms. Tougas' working situation pre-accident. She confirmed Ms. Tougas often worked over 50 hours a week as a bartender and Bar Supervisor. Ms. Dickman testified she

was not aware of any health problems Ms. Tougas may have had before the accidents; that Ms. Tougas never asked for any accommodation to relieve any medical condition and was capable of dealing with physically demanding aspects of the bartending job. The physical aspects included standing or walking all shift, moving kegs of beer, bussing and cleaning tables, mopping spills, climbing stairs with food and descending stairs with tubs containing used dishes, cleaning bar, organizing bottles (including moving boxes of beer and hard liquor), clearing dishes and emptying garbage.

- [28] The high level at which Ms. Tougas functioned prior to the accidents was also confirmed by the testimony of Ms. Annette Rae and Mr. Mostat. Ms. Rae testified that she was not aware of Ms. Tougas suffering any other injuries and she had no complaints of pain prior to moving to Langley. Ms. Rae testified to the very active work, social and recreational life of Ms. Tougas prior to the first accident.
- [29] Mr. Mostat testified that he was unaware that Ms. Tougas had injuries or pain other than normal "growing pains" caused by aging. Ms. Tougas attended the Clayton Heights Medical Clinic which indicated the last pre-accident visit with respect to neck or back pain was on October 2, 2015, when Ms. Tougas was seen by Dr. Wang (Exhibit 1, Tab 3, pages 16 and 17). Ms. Tougas attended the same clinic on several occasions prior to the first accident on July 8, 2016, but none of those attendances involved complaints of neck or back pain or migraine headaches.
- [30] Ms. Tougas also had a history of depression and anxiety. She was taking antidepressant medication for approximately 15 years and at the time of the first accident, she had prescriptions for 50 mg of Sertraline each day and 0.5 mg of Clonazepam once or twice a month, mainly as a sleep aid.
- [31] Despite episodes of depression or anxiety, prior to the first accident, Ms. Tougas coped well and was able to carry on with her busy schedule. Dr. Spivak also confirmed that Ms. Tougas had a baseline of mood and anxiety that "did not impair function".

First Accident

- [32] When the first accident occurred in July 2016, Ms. Tougas was a front seat passenger restrained by a seatbelt in the 2014 Chrysler 300 S, which she owned and which was being driven by her son, Curtis. At the time of the accident, the Chrysler was exiting a gas station on to Fraser Highway near the intersection with 200th Street in Langley. Traffic was stopped, waiting for a train at the railway crossing nearby. The driver of a vehicle in the curb lane stopped to allow them to enter the roadway and they were in the process of turning right into the curb lane when a vehicle, driven by a defendant, hit the front driver's side of Ms. Tougas' vehicle. Ms. Tougas reported that at the time of the impact, she was turned looking over her shoulder to wave a "thank you" at the driver of the car who had allowed them to enter Fraser Highway. The Chrysler was pushed sideways to the right and into the curb. Ms. Tougas was thrown initially to the right, hitting her head on the passenger window and then

driving her forward when the vehicle impacted the curb. The force of the collision ripped the driver's side front quarter panel off of the Chrysler, together with the front headlight and the rear-view mirror was broken off. Ms. Tougas described the impact with the other car as hard and impact with the curb as less hard.

Second Accident

- [33] When the second accident occurred in August 2016, Ms. Tougas was a restrained front seat passenger in the same Chrysler 300 S then driven by her son Curtis. They had stopped at a red light at 200th Avenue in Langley when their vehicle was struck from behind by a Toyota Tundra pickup truck. The impact of the collision pushed the Chrysler forward and Ms. Tougas testified that her body was pushed forward in her seat.

Third Accident

- [34] At the time of the third accident in May 2018, Ms. Tougas was driving a 2013 Chevy Camaro which she owned. At the time, she was in a Save On Foods grocery store parking lot on Fraser Highway in Langley, British Columbia. She had stopped her vehicle waiting for a pedestrian to cross in front of her when the defendant driver backed into the driver's side quarter panel of the plaintiff's car while the defendant was reversing out of a parking stall.

Liability

- [35] Liability for all three accidents has been admitted by the defendants, Curtis Mostat, Ronald Peters, Jeffrey Peters and Sherry Lee Watkinson. Injuries and Medical Evidence
- [36] As a result of the three accidents, Ms. Tougas suffered the following injuries and symptoms:
- Injury to neck and shoulder areas. These injuries have been characterized by Dr. Nadeau as chronic myofascial pain of the cervical spine; by Dr. Bentley as Whiplash Associated Disorder Type III C5-6 with impairment of the cervical spine range of movement and secondary restriction in bilateral shoulder range of movement; and by Dr. Spivak as persistent daily pain or chronic pain;
 - Injury to the low back. This has been characterized by Dr. Nadeau as chronic myofascial pain of the back, by Dr. Bentley as a lumbar sprain/strain; and by Dr. Spivak as persistent daily pain or chronic pain;
 - Injury to left ankle. Dr. Bentley diagnosed this injury as left anterolateral ankle capsular impingement;
 - Headaches. Dr. Bentley diagnosed the headaches suffered by Ms. Tougas as cervicogenic headaches related to the Neck Whiplash Associated Disorder Type III;
 - Chronic pain. Dr. Nadeau diagnosed Ms. Tougas with a chronic pain disorder which Dr. Spivak's report referred to as "persistent daily chronic pain affecting state of mood";

- f. Depression. Dr. Nadeau diagnosed Ms. Tougas as having an exacerbation of pre-existing depression as a result of ongoing chronic pain. Dr. Spivak diagnosed this as a Major Depressive Disorder (moderate) relating to physical limitations and chronic pain;
 - g. Anxiety. Dr. Nadeau characterized her anxiety as an exacerbation of pre-existing anxiety resulting from ongoing chronic pain. Dr. Spivak diagnosed the anxiety as comorbid (going hand-in-hand) with depression and explained the anxiety as worry that becomes pathologic;
 - h. Fear of driving. Dr. Spivak diagnosed this fear with the term "specific phobia" (vehicular type); and,
 - i. Sleep disturbance. Dr. Nadeau diagnosed sleep disturbance due to chronic pain.
- [37] Despite the three-and-a-half-year period from the first accident, it was apparent Ms. Tougas continues to suffer from constant disabling pain in her neck, shoulder and low back, as well as regularly occurring headaches. As noted above, she has been diagnosed with chronic pain disorder, depression and anxiety related to and exacerbated by pain. The injuries referred to above have caused a profound negative impact on her life. There is no expectation of meaningful recovery from any of her injuries. Her injuries are therefore considered permanent injuries which will cause constant pain and leave her with a significant level of disability.

Post-Accident Treatment

- [38] Following the first accident, Ms. Tougas has followed the advice of her medical providers and has had "extensive physiotherapy and active rehabilitation" (Exhibit A, Tab 1A, page 9). She has attended treatments, including physiotherapy, and massage therapy, occupational therapy, kinesiology, chiropractic care, trigger point injections from a physiatrist (Dr. Wang), psychiatric treatment, psychological counselling and a consultation with Dr. Nadeau, orthopedic surgeon. During this process of treatment, she has been prescribed a number of medications for relief of pain and psychological symptoms including Naproxen, Cyclobenzaprine, Tylenol, Pregabalin, Sertraline, Clonazepam and Lakota muscle pain cream.

The Plaintiff's Evidence

- [39] The plaintiff testified, pre-accident, that she experienced stiffness after long working shifts and occasionally, once or twice a month, had a headache. She was afflicted by emotional issues brought about by her marital decay and the drug addiction experienced by her sons, but was able to obtain assistance from her family doctor and a psychiatrist using anti-depressive and anti-anxiety medication. She had no apparent limitations at her worksite or in her home. She participated in household chores and significant recreational activities, as well as social experiences. She recorded her daily activities with a "Fitbit" which indicated she was taking between 20,000 and 30,000 steps a day. Her recreational activities included Aquasize classes, long hikes and walks, camping regularly in summers, social experiences

with friends, dancing, driving for sightseeing purposes and playing both "beer-league" mixed and women's competitive fast pitch softball.

- [40] There was a gap in her softball career when she moved from Powell River to Langley but she was actively looking to join a team in Langley.
- [41] After joining Newlands Golf Club, Ms. Tougas expressed that she was in a "happy, happy place"; she had survived her own divorces, separations and her sons' addictions, she had been very depressed, but the anti-depressants had provided substantial relief.
- [42] Following the first accident, on July 8, 2016, Ms. Tougas experienced pain in her left ankle, left shoulder, lower back, neck and head, as well as her ankle. Her head had hit the window inside the car in the collision. She experienced bruising on her chest and lap, which she believed was caused by her seatbelt. She also experienced some shock and a significant level of anxiety about the accident. She attended the nearby hospital, but found the line of people awaiting treatment was too long given her need to rest. After receiving pain medication from the hospital, she returned home, did not go to work that night and rested. The next day, she attended Dr. Naidoo's office with complaints of a sore neck, shoulder, back and ankle with high anxiety and pain on the right side of her head where her head struck the inside of the car. Her experience over the next few weeks was that she had a hard time sitting, standing, walking and focusing on activities. She testified that her anxiety state was "crazy" and she was not able to focus or go back to work. That was a significant concern to her.
- [43] After the first accident, Ms. Tougas testified that she rested and slept a great deal after her doctor told her to take two weeks away from work. She was prescribed a muscle relaxant, Cyclobenzaprine, Tylenol, as well as anti-depressant and anti-anxiety medication, Citraline. She took physiotherapy treatments at Clayton Heights Physiotherapy and tried to go back to work. She was in considerable pain.
- [44] She went into Newlands for one short shift to train another employee and not to do physical work. She also attended Newlands to perform scheduling of staff and managerial duties. She had difficulty sitting in the meetings and experienced pain in her back, neck, and head during these meetings.
- [45] The second accident occurred approximately one month later. At that time, Ms. Tougas' symptoms were unchanged as she experienced pain in her neck, shoulder and back, with increased anxiety and depression. Her ankle injury was improving towards resolution. Following the second accident, Ms. Tougas found her neck and back very painful. She remained lying on the back seat of her car while the police attended the scene and investigated. She was very anxious, but also physically stiff and sore. She returned to her home and continued to take Cyclobenzaprine, Tylenol and using Lakota cream to ease muscle soreness with a heating pad. Approximately a week after the second accident, Ms. Tougas attended Dr. Naidoo's office with complaints of stiffness, soreness, headaches and continuing significant anxiety. He prescribed physiotherapy, medication as noted above and

to stay off work and rest. Ms. Tougas experienced significant pain in her neck and back as well as ongoing headaches in the period following the second accident. She described herself, and others described her, as very depressed, moody, short-tempered and not wanting to be around other people. She testified she took her prescribed medication, attended physiotherapy and rested as she could. Her psychiatrist prescribed an increased dosage of Sertraline from 50 mg to 75 mg. The prescription was again increased thereafter to 100 mg, which is the dosage she was taking at the time of trial.

- [46] Two years followed before the third accident and during that period, Ms. Tougas regularly attended physiotherapy, massage therapy, her family doctor, a psychiatrist, occupational therapy and counselling. She made unsuccessful attempts to return to work as a bartender and server. She attempted to join a softball team, but found she was unable to swing a bat or throw a ball without pain in her neck and back. She testified that she gained 40 pounds going as a result of not being active. Her Fitbit now records fewer than 1000 steps a day.
- [47] By the date of the third accident, May 4, 2018, Ms. Tougas had little improvement in her symptoms and was still unable to return to work. Immediately following the third accident, she reported significant pain in her neck and back as well as some shock and a further experience of anxiety. Those symptoms have continued.

Non-Medical Witnesses called by the Plaintiff

Cody Mostat

- [48] Cody Mostat is one of the sons of the plaintiff, who at the time of trial was 27 years old, worked for a commercial truck dealer as a welder installer on heavy equipment. His elder brother is Kyle, aged 31. His younger brother Curtis is 23 years old.
- [49] Mr. Mostat grew up in Powell River and lived in a split custody relationship between his mother and father. Mr. Mostat was aware that his mother began a relationship with Alan Rae in approximately 2005. They married later.
- [50] Ms. Tougas worked hard to provide a good childhood for Mr. Mostat, providing him with opportunities to play soccer, baseball and hockey while he lived in Powell River. He considered his mother to be a very skilled ball player both in slow pitch and fast pitch softball. He testified that the many trophies won by his mother decorated their home.
- [51] Apart from playing sports, Ms. Tougas worked as a bartender/server in Powell River for a number of years. She was the winner of many trophies which adorned the family home as Mr. Mostat grew up.
- [52] By 2011, Mr. Mostat had moved to Vancouver. There he was injured in a job site accident and while in recovery, he moved back to Powell River. He had been prescribed opioids by his doctors for the pain caused by the injury. While he tried to recuperate in Powell River, he began to self medicate with street drugs, quickly becoming the subject of an addiction. His younger brother also became addicted around the same time frame. The drug abuse by the

plaintiff's two sons had a profoundly negative effect on them and their mother. Cody Mostat also testified that he stole Clonazepam and Ativan from his mother's prescriptions while he was self-medicating. Cody Mostat testified that he spent time in jail (four months) and Curtis Mostat remained in jail at the time of the trial. Cody Mostat testified that the addiction experienced by he and his brother appeared to take everything away from the plaintiff, but she continued to be supportive of her children.

- [53] Once his mother began working at Newlands, she was getting phone calls at home about organizational issues and staffing issues at her work place. He testified that she was happy and feeling supported in a management position at Newlands.
- [54] He further testified that the plaintiff was enjoying social life with family and friends at various activities.
- [55] Mr. Mostat testified that he did little cleaning around the house but that his mother was doing all of the cleaning, cooking and tidying around their home.
- [56] He was actually in jail when the first accident occurred, but he encouraged his mother to seek medical care by telephone. He was aware when he was released from jail in August 2016 that his mother was unable to sleep because her back pain was so significant. She was unable to cook and he frequently purchased take out meals for his mother. Mr. Mostat testified that he spoke to his mother every day by telephone and she was frequently in tears due to frustration caused by constant pain.
- [57] He testified that she formed a loving relationship with Silas Scaddan but that it was short-lived because Ms. Tougas was unable to participate in the active lifestyle he enjoyed, and that she would have enjoyed with him except for the constant back pain. Mr. Mostat expressed concern about his mother's state of sadness and depression as she had been working to improve her life. Prior to the accidents, he had not seen her express worthlessness caused by the fact that pain prevented her from working. He observed her make a couple of attempts to work but her pain and discomfort simply prevented any consistent ongoing work.
- [58] The cross-examination of Mr. Mostat was a single question asking if Mr. Mostat believed his mother had done a good job for him. He replied that his mother did a good job for him.

Vonda Dickman

- [59] Vonda Dickman, called by the plaintiff, is the General Manager of Newlands and has been employed there for 28 years. She is responsible as one of a group of managers for the oversight of the operation of Newlands, a facility with two golf courses, a club house with several ball rooms, a dining room, a bar and grill and additional meeting spaces, which has an overall capacity of 1400 guests.

- [60] Ms. Dickman is specifically responsible for hiring and firing of staff, training of staff and all financial arrangements involving staff at Newlands. Ms. Dickman received an application from the plaintiff for employment as a bartender/server in the Bar and Grill at Newlands. The Bar and Grill has capacity for 225 guests with indoor dining and beverage services as well as a large balcony overlooking the golf courses. There are about 12 to 15 employees at peak times in the Bar and Grill on weekends, holidays and special occasions in that facility. Entertainment offered includes live bands, disc jockey events, karaoke events and other events for cooking and artistic painting classes.
- [61] On August 17, 2015, Ms. Tougas was hired by Ms. Dickman based on her experience and Ms. Tougas quickly impressed Ms. Dickman as being a really good employee. She worked in a full time position as a bartender/server for 35 or more hours per week at \$9 to \$12 per hour depending on duties, overtime and other special events. Ms. Tougas volunteered for extra jobs, helping out in ballrooms and other bars, large parties as well as additional shifts in the dining room.
- [62] Within a month of commencing work at Newlands, on September 15, 2015, Ms. Tougas wrote an email to Ms. Dickman and Ms. Judy Davies, an owner of Newlands, advising that Ms. Tougas believed she could make changes to the operation of the Bar and Grill which would significantly improve the income of that facility. Ms. Tougas also requested a promotion to a supervisory capacity in the Bar and Grill. In response to the email, Ms. Tougas was invited to a meeting with Ms. Dickman and another manager on September 23, 2015. On September 24, 2015, Ms. Tougas was promoted to Bar Supervisor in the Bar and Grill at Newlands with a pay increase to \$15 per hour with typical benefits. Her duties included serving, bartending, staffing, scheduling of staff, maintaining liquor inventories, promotions and building revenue, cost containment, overseeing functions and parties and booking entertainment. Ms. Dickman described Ms. Tougas as a very good manager who got along well with other managers and staff. A letter filed demonstrated a very pleased customer after a birthday party managed by Ms. Tougas.
- [63] Ms. Dickman confirmed that prior to the accidents, Ms. Tougas was able to fulfill all physical requirements of the server/bartender and Bar Supervisor duties without any accommodation for health problems. In fact, Ms. Dickman was unaware that Ms. Tougas may have had pre-accident health issues.
- [64] Following the first accident, Ms. Tougas attempted a return to work limited to management duties and scheduling tasks limited to five to seven hours per week. She was then unable to lift trays or boxes and in Ms. Dickman's observation unable to fulfil the duties Ms. Tougas had previously been assigned.

- [65] Ms. Dickman testified that Ms. Tougas received \$15 per hour as Bar Supervisor, in addition to tips including a benefit plan with life insurance, long term disability insurance, extended dental and health insurance. Tips would vary from a minimum of \$20 to \$40 per shift on weekdays; to \$40 to \$60 per shift in summer day shifts; to \$200 to \$250 per shift on weekends and for weddings and other special events.
- [66] Ms. Tougas worked briefly, for short periods, until the second accident and she did not return to Newlands or apply for reinstatement at Newlands thereafter.
- [67] Ms. Dickman would re-hire Ms. Tougas in the future were Ms. Tougas healthy and physically capable of doing the job.

Wes Levesque

- [68] Wes Levesque is an entrepreneur who encountered Ms. Tougas when she applied for a bartender/server position at a softball facility in Surrey, B.C. Based on her experience in the bartending and food service industry, Mr. Levesque hoped that she would move into a management role. When Mr. Levesque interviewed Ms. Tougas, he was told of her injuries in significant car accidents and that she was continuing to experience pain, but was hoping she could attempt to re-enter the workforce. Mr. Levesque decided to hire Ms. Tougas and arranged for her to be trained on the point of sale system used in the bar.
- [69] In the softball facility, which Mr. Levesque had recently begun operating, the bar and food service areas were located on second floor. The walk-in cooler, where beer and other beverages were cooled before consumption by patrons, was located on the first floor. Ice, beer, and beverages were moved by employees from the first to second floors on carts using an elevator or carried up a flight of stairs by an employee from the first to second floor. In addition to moving beverages from the lower floor to the upper floor, the duties Ms. Tougas was expected to perform, included bartending, moving kegs of beer (an estimated 120 pounds) and 24 can cases of beer (an estimated 15 pounds), carrying buckets of ice (16 litres weighing an estimated 20 to 30 pounds) serving food to tables, bussing and cleaning tables, stacking tables and chairs (estimated at five pounds each) , as well as returning full bus trays with used dishes and cutlery for washing and return to kitchen for following service.
- [70] Mr. Levesque described the pace of work in the bar/food service area as "there was no sitting down; servers were "on their feet all day long".
- [71] Ms. Tougas observed personally by Mr. Levesque while working at the bar, was unable to keep up the physical aspects of the job because of the impediment of pain; the phrase used by Mr. Levesque in cross-examination "but it seemed like it was pretty crippling pain" (Transcript, November 18, 2019, page 20, line 15). Other staff members told Mr. Levesque that Ms. Tougas, while complaining of pain, was unable to lift items and unable to perform physical tasks necessary to the job she was hired to do. Ms. Tougas missed several shifts because of reported pain. As a result being absent from work, Mr. Levesque terminated Ms. Tougas after she had only completed a handful of shifts.

- [72] Mr. Levesque testified that as a starting employee, Ms. Tougas was paid minimum wage and also earned tips of between \$40 to \$50 per weekday shift and \$300 per day on weekends when softball tournaments were being played.
- [73] In cross-examination, counsel for the defendants focused questions to Mr. Levesque on his personal experiences with car accidents, what medications Mr. Levesque used in relation to pain caused by injuries. With respect, Mr. Levesque's personal experience with car accidents and injuries caused, thereby has no apparent relevance to the experience of the plaintiff in car accidents or the pain arising from the injuries caused thereby. This evidence is of no assistance to the Court in deciding issues in this case.

Polly Scaddan

- [74] Ms. Scaddan is a seven-year resident of Surrey, B.C, now a 72-year-old retiree. She lives with her sons, Silas and Heathcliff and her granddaughter.
- [75] The plaintiff and Silas were girlfriend and boyfriend for several years. They moved into the ground level suite in Ms. Scaddan's home. Ms. Scaddan met the plaintiff about three years before the trial. Ms. Scaddan observed the plaintiff react in pain daily; if the plaintiff moved the wrong way she would have to remain still or lay down and stop activities until the pain ceased. This occurred often.
- [76] Ms. Scaddan testified that Ms. Tougas was fun to be with and that the two women would shop together and spend time getting manicures and pedicures. Ms. Tougas would sometimes have to stop and breathe to try to relax her spasm and headaches. Activities were reduced and she spent most of her time laying down with hot pads on her back or with migraines.
- [77] Ms. Tougas would cancel plans with Ms. Scaddan to go out for dinner. Ms. Scaddan saw Ms. Tougas socialize with friends, but she rarely went out of the house. She did little cooking and cleaning. Ms. Scaddan would cook for the whole family.
- [78] Pain impacted her mood and as a result, she was not happy when she had painful spasms; she would have to stop whatever she was doing.
- [79] She had to reduce her activities and would not join Silas, who liked to go to sporting activities. The injuries adversely affected the relationship between Silas and Ms. Tougas, and their relationship came to an end in 2018.

Silas Scaddan

- [80] Mr. Scaddan is a Surrey resident and has managed the operations of a lumber yard since 1994. Mr. Scaddan and Ms. Tougas met in 2017 and began to live together that year. He testified she was pretty and had a sweet personality and was very funny; they would socialize, watch sports, and attend restaurants. He liked to attend baseball games live. She told him she had been in prior car accidents. After a while, she masked her pain and over

time, she did not want to participate in activities that Mr. Scaddan wanted to attend. He received tickets for hockey games and tickets to Mariners baseball in Seattle. Due to pain during the baseball game, she was uncomfortable and she could not attend a planned dinner after the ball game, much to Mr. Scaddan's disappointment.

- [81] Mr. Scaddan would apply Lakota muscle relaxant to her back and neck to attempt to resolve pain Ms. Tougas was experiencing. Frequent, she also lay alone for a day in the dark in bed to resolve migraine headaches. According to Mr. Scaddan, near the end of their relationship, Ms. Tougas became quiet and "in a dark place". She could not sit for long periods, even for a car ride to see interesting sights or to attend sporting events.
- [82] Mr. Scaddan testified he enjoyed camping, but Ms. Tougas stayed in a trailer. The couple drove to Lightning Lake in Manning Park and to Prince George, but Ms. Tougas sat in the cab of the truck for brief periods and then had to lay down in the back of the truck. He would go hiking or canoeing, but Ms. Tougas could not participate as these activities were too strenuous for her. A trip to Mexico was disappointing for Mr. Scaddan as Ms. Tougas did not enjoy activities such as a theatrical folk play, where Ms. Tougas left in tears, complaining of pain. Mr. Scaddan spent more time with his friends than with Ms. Tougas, who spent her time laying in bed.
- [83] At a work function at a Vancouver Canadians baseball game, she could not sit through the baseball game, despite being given a special chair. When she had to leave the game and return home, the couple argued and their relationship came to an end.
- [84] Mr. Scaddan testified that he performed household cleaning, including bathrooms and moping floors. Except for the occasional meal, he prepared dinners and most of the time, he washed the dishes. He also performed yard work.
- [85] Mr. Scaddan found that their intimate life deteriorated and was not enjoyable.

Annette Rae

- [86] Annette Rae was a sister-in-law of Ms. Tougas after Ms. Tougas married Alan Rae. She is a full-time hair stylist and part-time bartender in Powell River.
- [87] Both played softball together in a mixed league. During cross-examination, Ms. Rae testified that while playing softball with Ms. Tougas, two or three times each week during the softball schedule, she was not aware of any injuries (including any pull, sprain, pull, twist or turn) incurred by Ms. Tougas. The two women had a weekly meeting to watch a favourite television show. In cross-examination, Ms. Rae said that no social or weekly meetings planned with Ms. Tougas in Powell River were ever cancelled because of a migraine headache, and that Ms. Tougas attended all such scheduled meetings.

- [88] Ms. Rae and Ms. Tougas would style one another's hair. Ms. Rae testified that it is very hard to maintain a part-time hair stylist practice and not practical or not realistic to do so because of scheduling problems. Ms. Rae was aware that Ms. Tougas did style hair on a part-time basis for a small number of clients (friends and relatives).
- [89] Before moving to the lower mainland, Ms. Rae described Ms. Tougas as social, active and bubbly with lots of friends. Ms. Rae had relatives in Langley and visited frequently.
- [90] After the accidents, Ms. Rae observed Ms. Tougas in pain, depressed and struggling financially because she could not work. Ms. Rae would find Ms. Tougas in her room in the dark because of headaches. Ms. Tougas did not like to drive and could not be in a vehicle, as required, to attend for funerals or weddings in Powell River, a five-hour drive. Ms. Rae described Ms. Tougas as being stiff and not able to bend or move because of pain. Ms. Rae testified she was aware that Ms. Tougas' back and neck were injured.
- [91] As a result of her accident-related injuries, Ms. Rae found Ms. Tougas' mood changed as she became less social, did not want to go out, go to the swimming pool or play softball.
- [92] Ms. Rae also described that Ms. Tougas put on weight and expressed frustration because she could not do any exercise to get rid of the weight. Ms. Rae described Ms. Tougas during attempted visits as not happy about herself; she would stay home in the dark feeling depressed. Ms. Rae understood that there was no physical activity that Ms. Tougas could do which did not cause pain.
- [93] The relationship between Ms. Tougas and Ms. Rae became distant as Ms. Tougas would cancel planned dinners in Langley and conversations by telephone grew less frequent. Ms. Rae testified that she has continued to maintain a relationship with Ms. Tougas up to the present day. Ms. Rae tries to see Ms. Tougas whenever she is in the Langley area. Ms. Tougas responds to Ms. Rae's attempts with comments that "it is a bad, painful day" or "I have a bad headache" or "I have to stay in bed".

Expert Witnesses called by the Plaintiff

Dr. Erin Naidoo

- [94] Dr. Naidoo testified as an expert medical witness. He was qualified as a specialist in Family Medicine and authored a report dated November 15, 2017.
- [95] Dr. Naidoo's report dealt with the first two accidents, but by the time the third accident occurred in 2018, he had retired from the practice of medicine.
- [96] He noted as supportive facts and assumptions that the plaintiff had a history of mood and migraine headaches prior to the accidents. She had never been diagnosed with neck or back issues of note which prevented her from working on a full time basis as a bartender or manager prior to the motor vehicle accidents.

- [97] Dr. Naidoo examined the plaintiff in person on July 9, 2016, on the day following the first accident. Dr. Naidoo testified that the plaintiff reported neck pains, headaches, whole back pain, right hand pain and bruising. She also reported worsening of anxiety about being in a car; she was "stressing out".
- [98] On examination at that appointment, Dr. Naidoo found that on palpation Ms. Tougas had spasm and tenderness of the right and left of her back with mid and lower back spasm, more so on the left side than on the right side.
- [99] Dr. Naidoo prescribed physiotherapy treatments, anti-inflammatory medication, Naproxen at 500mg twice daily and Cyclobenzaprine at 10 mg daily as a muscle relaxant.
- [100] On subsequent appointments, she reported neck pains, headaches and lower back pain radiating down her left leg.
- [101] Four days after the second accident, the plaintiff attended an appointment with Dr. Naidoo where she reported headaches, worsening neck and back pains with the distinction that pains were on the right side, as well as the left side. On examination, Dr. Naidoo observed spasm and tenderness in her entire neck, as well as mid and lower back, worse on the right than the left side. Dr. Naidoo continued to prescribe physiotherapy, anti-inflammatory and muscle-relaxant medication as before.
- [102] Dr. Naidoo reported that the plaintiff continued to attend appointments at the office of Dr. Naidoo during the balance of 2016 and 2017, with persistent neck pains, back pains, headaches, and mood and sleep related issues aggravated and caused by the first and second accidents (page 6).
- [103] Dr. Naidoo diagnosed the plaintiff, following the first and second accidents, with myofascial neck and back pains caused by the accidents; "The description of the pain to the spine, the reproduction of pain with active range of motion of the back, and the reproduction of pain with palpation of the paraspinal soft tissues." (Exhibit 5, Tab 1A, page 7) In other words, on an objective assessment of the paraspinal muscles, Dr. Naidoo was able to detect the spasm present there.
- [104] Dr. Naidoo opined that the plaintiff's mood and sleep were adversely affected by the first two accidents: "Ms. Tougas continues to experience symptoms of anxiousness, frustration and ongoing sleep disturbances due to her persistent and chronic neck and back pain." Dr. Naidoo also commented on the history of depression and anxiety which the plaintiff experienced prior to these accidents. His opinion was that the resulting injuries in these accidents resulted in an ongoing cycle of chronic pain that has caused an exacerbation of these mood-related issues in addition to sleep disturbances.
- [105] Dr. Naidoo was of the opinion that the injuries referred to above are a direct result of the motor vehicle accidents which occurred July 8, 2016 and August 13, 2016. The plaintiff had some symptoms of ongoing lower back pain prior to the accidents, but was able to sleep and remain physically active while engaging in various physical and recreational activities,

notwithstanding the lower back pain. Dr. Naidoo described that following the accidents, Ms. Tougas developed ongoing and persisting cervical spine pain, right shoulder pain and immobility and a drastic reduction in her ability to engage in physical activities, as well as mood and sleep disturbances.

- [106] Dr. Naidoo opined that as the injury symptoms had continued since the accidents, he considered the experience of pain by the plaintiff to be "chronic". He also was of the view that this condition would worsen over time and as pain was the trigger for mood disorder and sleep disturbance, it was reasonable to assume that those problems would continue to persist into the future.
- [107] Dr. Naidoo opined that the injuries described above have resulted in severe limitations and restrictions to all aspects of Ms. Tougas personal life and would likely prevent a return to gainful employment requiring physical ability. Dr. Naidoo considered Ms. Tougas' prognosis over the long term to be guarded and it was unlikely she would return to her pre-accident level of functioning.
- [108] Dr. Naidoo recommended rehabilitative therapies, including physiotherapy, massage therapy, chiropractic therapy, acupuncture and counselling, in particular for mood and sleep issues. He also recognized the need for specialized pain management services into the future. Dr. Naidoo also recommended that Ms. Tougas needed assistance with respect to household work and homemaking chores and he expected this need would increase into the future.
- [109] Clinical records of Dr. Naidoo made approximately two weeks prior to the third accident in April 2018, show Ms. Tougas had subjective complaints of neck, arm and shoulder pains. Dr. Naidoo detected spasm and tenderness in the left and right trapezius, as well as a decreased range of motion. At that time, he assessed soft tissue injuries of neck and back and arranged a plan for massage therapy, chiropractic treatment and counselling.
- [110] Dr. Naidoo did see the plaintiff on May 10, 2018, following the third accident, at which point he noted a reported flare-up of neck and back pains, headaches, and that the plaintiff was having difficulty sitting. Dr. Naidoo recorded objective findings including spasm and tenderness in the cervical spine, shoulders and thoracic spine, and left shoulder tenderness resulting in a decreased range of motion. Again the assessment was soft tissue injuries to the neck, back and shoulders.

Dr. Todd Bentley

- [111] Dr. Todd Bentley is licensed in British Columbia and Ontario as a Physical Medicine & Rehabilitation specialist, who practices as a physiatrist, dealing with elements of neurology, rheumatology, orthopaedic-type medicine, individuals with significant disabilities such as spinal cord injuries, stroke and brain injuries, as well as individuals with amputations. His clinical practice in hospital involves assessing patients with both nerve and muscle injuries and evaluating patients using diagnostic testing and teaching in a hospital setting. He also

practices seeing individuals with muscle, bone, joint, tendon, nerve injuries and sports injuries.

- [112] Dr. Bentley was accepted as an expert in the field of physical medicine and rehabilitation, capable of giving opinion evidence on the diagnosis, causation, treatment, prognosis, and effect on functioning of musculoskeletal injuries.
- [113] Dr. Bentley wrote two reports in this case. The first report was dated April 4, 2018 and an addendum report was dated June 26, 2018.
- [114] The facts and assumptions relied upon by Dr. Bentley included results of review of clinical records and report of Dr. Naidoo and Dr. Wang who assessed Ms. Tougas in October of 2015 with reference to low back pain. Dr. Bentley also noted that Ms. Tougas was treated at some time prior to the accidents for anxiety and depression and he noted that she had been on some form of psychotropic medications since the early 2000s and had attended psychiatric treatment in Powell River.
- [115] In cross-examination, reference was made to records of Harvie Medical Clinic or hospital records from Powell River. The subject matter of the records of the Harvie Medical Clinic or hospital records concerning Ms. Tougas was not discussed in any meaningful way in the evidence and therefore the relevance of such records cannot be judged.
- [116] Significantly, Dr. Bentley conducted a physical examination of Ms. Tougas which provided objective testing results demonstrating a reduced range of motion in her neck, shoulders and lower back.
- [117] Dr. Bentley diagnosed Ms. Tougas from a musculoskeletal perspective with:
- (a) Whiplash Associated Disorder (WAD) Type II vs. WAD III C 5-6 radiculopathy with cervicogenic headache - impairment in cervical spine range of movement; secondary restriction in bilateral shoulder range of motion and; symptoms suggestive of bilateral radiculopathy; x-rays demonstrating degenerative disc disease and disc space narrowing; normal myotomal and reflex examination; sensory abnormalities left C5-6.
 - (b) Lumbar sprain/strain - impairment in lumbar spine bilateral side flexion range of movement; suspected spondylotic referral L5-S1; negative neural tension; normal myotomal and reflex examination; sensory abnormalities left L5-S1, the latter not temporally associated with either dates of loss.
 - (c) Left anterior lateral ankle capsular impingement-no impairment.
- [118] In relation to Dr. Bentley's addendum report, he expressed the medical opinion that the original accident on June 8, 2016 served to render the diagnoses listed above with 100% certainty, and that the second accident materially contributed to the exacerbation of Ms. Tougas' existing symptoms. He also commented on her pre-existing conditions, but noted these did not hinder her at home or in the workplace.

[119] Dr. Bentley also opined that the effect of her accident-related injuries is considered significant with respect to ongoing partial disability in the domains of housekeeping, driving, and recreational tasks, in addition to sustaining gainful employment. Dr. Bentley opined that given time elapsed since the dates of loss the partial disability from physical activity would be "indefinite".

[120] Dr. Bentley's opinions were not challenged during cross-examination.

Dr. Mitchell Spivak

[121] Dr. Spivak is an experienced psychiatrist who assessed the impact of the injuries from the three accidents on the mental health of Ms. Tougas. He met with and assessed her on February 17, 2018, and prepared an expert medical legal report on the same date.

[122] Dr. Spivak agreed that Ms. Tougas had pre-existing mental health symptoms prior to the accidents, with some element of a psychological vulnerability towards depression given the experience she had had with emotional dysregulation throughout her life. The new experience from the accidents is a development of chronic pain which has affected her ability to work and support herself financially. The persistent chronic pain has adversely affected Ms. Tougas' mood. Dr. Spivak opined that Ms. Tougas symptoms were materially contributed to by the motor vehicle accidents in question. While there was some pre-accident emotional dysregulation, Dr. Spivak found that Ms. Tougas was stable and the emotional dysregulation did not affect her mood on a day-to-day basis. She did not require ongoing regular psychiatric care.

[123] This symptom of chronic pain has allowed the development of a Major Depressive Disorder, with symptoms which Dr. Spivak described as moderate. He also noted that she has developed a specific phobia (vehicular type); a separate condition from depressive symptomatology. While discussing the feelings of sadness and helplessness, and "a persistent sense of despondency with passive suicidal thoughts" experienced by Ms. Tougas, Dr. Spivak opines that the quality of her life has been dramatically affected by the motor vehicle accidents and her resulting inability to partake in work to support herself and in recreational activities which she greatly enjoyed and where she excelled.

[124] Dr. Spivak gave the prognosis for Ms. Tougas as guarded to poor. He defined "guarded" as the potential for some improvement with some further pain management therapy and defined "poor" as meaning that it is more unlikely than likely there could be improvement in her psychiatric symptoms.

[125] Dr. Spivak's opinion was not challenged during cross-examination.

[126] Dr. Dean Powers Dr. Dean Powers is an expert in the field of vocational rehabilitation assessment and vocational therapy. His credentials were not the subject of cross-examination or otherwise challenged.

- [127] Dr. Powers met twice with Ms. Tougas. The first appointment included a vocational diagnostic interview followed by vocational testing conducted by a professional psychometrist, the results of which testing were analysed by Dr. Powers. He conducted a further interview with the plaintiff on September 14, 2018. The tests completed, included the Rey 15 item Test, the Beck Anxiety Inventory test, the Beck Depression Inventory test, the Woodcock-Johnson III Tests of Achievement, the Woodcock-Johnson III Tests of Cognitive Abilities, Mavis Beacon Teaches Typing Deluxe 20 Test and Career Inventory Tests.
- [128] The Anxiety Inventory Score placed the plaintiff in the severe anxiety range inventory. The Depression Inventory Score placed the plaintiff in the severe depression range.
- [129] The opinion expressed by Dr. Powers was that based on a review of medical records in clinical records which dealt with causation, and which he accepted, "Ms. Tougas has likely sustained a permanent loss of vocational capacity, and interruption to her vocational trajectory and a reduction in her range of job options as a result of the cluster of chronic pain and psychological symptoms and physical limitations resulting from the three motor vehicle accidents." Dr. Powers also opined that Ms. Tougas' employment is likely limited to employment less than one-half of full-time and at best, likely limited to work in a small range of jobs within her transferable skills base. Dr. Powers further opined that Ms. Tougas was not competitively employable as a customer service supervisor, bartender, or server, all of which positions were within her transferable skills base and her experience. While it was suggested by others that Ms. Tougas might engage in a more supervisory role as a bar or restaurant manager, Dr. Powers was of the view that the physical requirements of such jobs were simply beyond the realistic realm of possibility in the current labour market.
- [130] Dr. Powers opined that:
- From a vocational rehabilitation perspective, Ms. Tougas is likely permanently partially disabled and therefore, in my opinion, not likely competitively employment in any occupation at this point in her recovery. Furthermore, and in my opinion and experience, she is at-risk of becoming unemployed and unemployable due to the unabated symptoms and restrictions resulting from the subject accidents. It is also my opinion that her vocational capacity has been substantially reduced and she is impeded from openly competing in the job market to access employment within her transferable skill set without hindrance of her disabling condition.
- [131] Dr. Powers recommended services of a vocational rehabilitation consultant to assist her in securing part-time work. He estimated that the services would cost approximately \$125 per hour plus GST in the private sector and that she would require 20 hours of service for this purpose.
- [132] The cross-examination of Dr. Powers was limited to two areas. The first focused on an apparent belief that Dr. Powers was somehow opining on the physical causes of injury which the plaintiff had suffered. It was clear Dr. Powers did not engage in such opinions as he specifically relied on other medical doctors to reach conclusions concerning causation

within their fields of practice. The second area in which cross-examination was focused was in relation to whether Dr. Powers had access to pre-accident medical clinical records. Other medical opinions which Dr. Powers reviewed did contain such information.

[133] Otherwise, the opinions given by Dr. Powers were not challenged in cross-examination.

Jerica Ditson

[134] Ms. Ditson was presented as an expert witness qualified to give opinion evidence in the fields of occupational therapy, and work and lifting capacity evaluation. She is a registered occupational therapist with appropriate university training and practicum training. There were no objections to Ms. Ditson's qualifications or her expert opinion evidence in occupational therapy or functional capacity evaluation.

[135] Ms. Ditson performed a Functional Capacity Evaluation on Ms. Tougas. A Functional Capacity Evaluation is intended to determine by systematic testing the safe and sustainable level of performance by an individual of daily functional activity for employment, in the home, and at leisure including such items as bending, sitting, standing, stooping and reaching.

[136] The medical documentation provided at page 47 of her report was reviewed, but not relied upon for the purpose of preparing this opinion. The Function Capacity Opinion was based on the testing completed during the Functional Capacity Evaluation on March 13, 2018. A series of different physical tests, interviews, strength and mobility testing and later re-testing were repeated for each of the positions reviewed including as a "hairstylist" and "bar manager/server".

[137] Ms. Ditson found that Ms. Tougas provided a consistent and high level of physical effort during testing and the assessment findings were an accurate measure of her functional capacity. Effort is mainly an objectively-based analysis such as heart rate, grip strength analysis and clinical consistency. Durability and sustainability are analyzed with specific observations in early-day testing and late-day testing with repetitive exercises. Her capacity demonstrated decline in capacity over time.

[138] Ms. Tougas was found to have significantly aggravated symptoms after lifting exercises were terminated and retesting which followed. She was physically capable of lifting in the light category, but her capacity was not sustainable and could not be performed on a daily basis. When reviewed against the physical demands of the bartending/bar manager position, she could only perform those demands on the lower end of part-time. In other words, she would need to find a very accommodating employer prepared to require limited duties on a part-time basis of less than 20 hours per week.

[139] In a cost of future care report, where observations were made in her home, there were significant limitations relying on those observations and the contents of opinions in medical reports dealing with causation of physical limitations.

- [140] Cost of future care recommendations included (a) a supportive mattress in the range of \$2,600 to \$5,800 as a pain control instrument, subject to differential cost of her usual mattress; (b) Dr. Bentley and Ms. Ditson both recommended a home cervical traction unit with a cost between \$21.99 and \$334.88.
- [141] A second cost of future care report assumed changed circumstances with separate accommodation where she changed from living with a partner to living on her own and having to perform heavier tasks. The report noted she would require four hours of cleaning assistance per month at between \$29 to \$32.75 per hour plus 5% GST.
- [142] In cross-examination, Ms. Ditson explained the simulation test where Ms. Tougas demonstrated she had the fundamental strength to lift a drink tray or case of beer or water, but could not durably lift to a modified medium category in the standards on a durable or day-to-day basis. Her ability to perform as a bartender/server was not sustainable over a working shift and shorter days, with more breaks and days off between working days would be required. A strictly managerial supervisory position as a bar or restaurant manager with sedentary duties might be manageable for Ms. Tougas, were such a position available.
- [143] Ms. Tougas has the physical strength required for hairdressing work on a part-time basis. She was able to perform one hour of these activities before requiring time off between working activities, and therefore she is not competitive with her cohort.

Hasan Lakhani

- [144] Hassan Lakhani is an economist who testified after being qualified as an expert in economics, capable of giving opinion evidence regarding the calculation of past and future income loss and costs of future care and expenses. His expert credentials were not challenged.
- [145] His first income loss calculation of \$34,999 contained in the report dated July 9, 2019, did not include income from undeclared tips, typical of persons working in beverage and food service industries. The second income loss calculation included (a) a revision of annual earnings because of \$507 paid to Ms. Tougas post-accident by the local golf facility (revised annualized earnings of \$34,020); (b) included an estimate for tip income in the amount of between \$750 to \$1,000 per week, which Mr. Lakhani accepted at a mid-point of \$850 per week for 50 weeks per year. Mr. Lakhani deducted income tax and Canada Pension Plan contributions from the tip amounts yielding an annual total of \$42,500; (c) a single increase of salary from \$15 to \$16 per hour effective September 1, 2016, resulting in annual earnings as of the trial date of \$78,788; and (d) deduction for with-accident earnings less income taxes and Employment Insurance premiums for a total of \$398. On the basis of the foregoing, Mr. Lakhani calculated Ms. Tougas' past net income loss at \$175,572, inclusive of tip income, applying appropriate labour market contingencies and subject to causation.

- [146] Future income loss, also calculated by Mr. Lakhani, was based on the assumption that but for the accidents, Ms. Tougas would have continued to work as a Bar and Restaurant Supervisor at a local Golf and Country Club or similar employment. Apart from a few shifts post-accident at the Golf Club and two other employers, Ms. Tougas has not returned to work and her future earning capacity is uncertain.
- [147] Taking into account future income multipliers and contingencies in the second report of Mr. Lakhani, he calculated her future loss of income at \$741,953, assuming no residual earnings. The calculations which give rise to these figures are set forth on Table 2 of the second report of Mr. Lakhani, dated November 18, 2019.
- [148] The cross-examination of Mr. Lakhani was very brief and did not challenge the sources of financial information, nor the methods of calculations of losses set forth in Mr. Lakhani's reports.

Defence Evidence

- [149] Following the close of the case for the plaintiff, the defendants elected not to call any witnesses.

Non-pecuniary Damages

- [150] Damages for non-pecuniary losses are an attempt at restitution for pain and suffering, loss of enjoyment of life and loss of amenities suffered by the plaintiff and caused by the conduct of the defendants.
- [151] In assessing non-pecuniary damages, the leading case is *Stapley v. Hejslet*, 2006 BCCA 34:
- [45] Before embarking on that task, I think it is instructive to reiterate the underlying purpose of non-pecuniary damages. Much, of course, has been said about this topic. However, given the not-infrequent inclination by lawyers and judges to compare only injuries, the following passage from *Lindal v. Lindal*, *supra*, at 637 is a helpful reminder:

Thus the amount of an award for non-pecuniary damage should not depend alone upon the seriousness of the injury but upon its ability to ameliorate the condition of the victim considering his or her particular situation. It therefore will not follow that in considering what part of the maximum should be awarded the gravity of the injury alone will be determinative. An appreciation of the individual's loss is the key and the "need for solace will not necessarily correlate with the seriousness of the injury" (*Cooper-Stephenson and Saunders, Personal Injury Damages in Canada* (1981), at p. 373). In dealing with an award of this nature it will be impossible to develop a "tariff". An award will vary in each case "to meet the specific circumstances of the individual case" (*Thornton* at p. 284 of S.C.R.).

[Emphasis removed.]

- [152] In other words, in assessing non-pecuniary damages, it is not only a matter of comparing the injuries suffered, but also the effect of those injuries on the lifestyle and personality of each person.
- [153] In *Clark v. Kouba*, 2012 BCSC 1607, the court stated the following with respect to the law of non-pecuniary damage assessments:
- [71] In *Hartnett v. Leischner*, 2008 BCSC 1589, [2008] B.C.J. 2242, Russell J. provides a helpful summary of the law with respect to general or non-pecuniary damages:
- [80] The purpose of non-pecuniary damage awards is to compensate the plaintiff for "pain, suffering, loss of enjoyment of life and loss of amenities": *Jackson v. Lai*, 2007 BCSC 1023, [2007] B.C.J. No. 1535 at para. 134; see also *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229; *Kuskis v. Tin*, 2008 BCSC 862, [2008] B.C.J. No. 1248. While each award must be made with reference to the particular circumstances and facts of the case, other cases may serve as a guide to assist the court in arriving at an award that is just and fair to both parties: *Kuskis* at para. 136.
- [81] There are a number of factors that courts must take into account when assessing this type of claim. Justice Kirkpatrick, writing for the majority, in *Stapley v. Hejslet*, 2006 BCCA 34, 263 D.L.R. (4th) 19, outlines the factors to consider, at para. 46:

The inexhaustive list of common factors cited in *Boyd* [*Boyd v. Harris*, 2004 BCCA 146] 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, 2005 BCCA 54 (B.C.C.A.)).

- [154] The plaintiff submits that she is entitled to non-pecuniary damages for pain and suffering and loss of enjoyment of life. The defendants agreed after the trial evidence was concluded that the plaintiff suffered soft tissue injuries, pain in her neck, upper back, shoulders and arms, paresthesia in both arms, headaches, aggravation of pre-existing insomnia, depression, anxiety and post-traumatic stress disorder.
- [155] Ms. Tougas was 48 years old at the time of the first accident and 51 years old at the end of trial. She suffered and continues to suffer ongoing physical, emotional and cognitive injuries which impact most aspects of her life. Pain was a symptom following the first accident, and has been exacerbated by the second and third accidents. Her prognosis for recovery is poor and unremitting, despite following all medical prescriptions and recommendations for treatment. Pain, particularly caused by migraine headaches, has caused cognitive issues including fatigue, impaired memory and sensitivity to sound and light. This constellation of symptoms has been confirmed by lay witnesses and medical experts.
- [156] The sports career of Ms. Tougas ended with the accidents, as did her ability to perform basic functions of daily living, including household chores. She has a very limited social life and her family and marital relationships have been significantly impaired.
- [157] The combined effect of the plaintiff's physical and psychological injuries is severe. She is either unable or has a significantly reduced capacity to enjoy most of the activities she enjoyed pre-accident. She spends much time resting in a darkened room to alleviate debilitating pain from regular migraine headaches. At the end of her relationship with Mr. Scaddan, she demonstrated chronic pain, and her psychological symptoms have made it hard for those around the plaintiff to continue supporting her.
- [158] Each party submitted a selection of cases which provide some assistance in determining the quantum of non-pecuniary damages. Cases submitted by the defendants such as *Sylte v. Rodriguez*, 2010 BCSC 207, concern much less serious accidents or injuries than those experienced by Ms. Tougas. The same comment may be made about the case of *Wilkinson v. Whitlock*, 2011 BCSC 1781, where the plaintiff was able to return to work after a single accident. In *Wilkinson*, the plaintiff returned to work within three-and-a-half months of the accident and her ongoing symptoms were expected to improve with participation in a fitness program. Ms. Tougas does not share these positive results, nor expectations. I have also reviewed the other cases submitted by the defendants and find they are distinguishable and of little assistance in assessing non-pecuniary damages in this case.
- [159] The authorities submitted by the plaintiff include *Adamson v. Charity*, 2007 BCSC 671, where the plaintiff was awarded \$200,000 when rendered competitively unemployable with a prognosis for full recovery which was not encouraging and expected life long symptoms; and *Felix v. Hearne*, 2011 BCSC 1236, again a \$200,000 award of non-pecuniary damages for a passenger who suffered injuries to her neck, back, shoulder, elbow, wrist, pelvis and ulnar nerve, as well as a concussion.

- [160] A common opinion was rendered by a medical expert: "In general, the longer one experiences complaints following a motor vehicle accident, the less likely full recovery will occur". These cases bear some resemblance to the case at bar except that each involves a single accident unlike the three accidents in the case at bar.
- [161] In the case of *Kean v. Porter*, 2008 BCSC 1594, the plaintiff was the driver of a parked taxi which was struck from the rear with some force. The plaintiff suffered significant injuries, including a fractured sternum, concussion, and spinal and rib contusions. A subsequent medical examination concluded that the plaintiff also suffered a hearing impairment.
- [162] The plaintiff in *Kean* had a series of pre-accident conditions including diabetes, long standing depression, COPD or emphysema and an abdominal aortic aneurism, with a history of coronary artery disease. The accepted medical opinion was that the plaintiff had injuries that were not going to heal in the future and the plaintiff was likely not re-trainable. There was considerable discussion, disagreement and controversy within the medical evidence. After taking into account an unspecified failure to mitigate by not obtaining psychological counselling, the Court awarded non-pecuniary damages of \$180,000.
- [163] In *Sebaa v. Ricci*, 2015 BCSC 1492, the plaintiff suffered multiple soft tissue injuries in her shoulder, arm, back and knee, PTSD, depression disorder with anxiety, and multifactorial chronic pain disorder with associated psychological factors. Similar to the case at bar, the plaintiff had a pessimistic prognosis. The plaintiff was awarded \$180,000 in non-pecuniary damages.
- [164] In written submissions related to non-pecuniary damages, the defendants put forward a series of statements beginning with the phrase "the defendants say". Each of these paragraphs contains a statement of fact or facts not attributed to any particular witness or which are contrary to the evidence of a witness. These statements appear as an attempt to give evidence in the course of argument.
- [165] At para. 72 of the defendants' submissions, the defendants "say" that the accidents, at most, triggered already latent and symptomatic injuries. This assertion is directly contrary to the expert medical opinion of Dr. Naidoo, who opined that the first two accidents resulted directly in the injuries described by that doctor. It is also contrary to the opinion of Dr. Bentley, who opined that while the first accident caused injuries, the second accident material contributed to the exacerbation of those injuries.
- [166] Dr. Bentley noted, in his thorough report, that the plaintiff's pre-accident occurrences of back pain and headaches did not cause the plaintiff to have functional limitations in vigorous sports and physically demanding work as a server/bartender prior to the three accidents.

- [167] The defendants also repeated submissions that the plaintiff's experts failed to review the pre-accident history of Ms. Tougas. Dr. Bentley's evidence is again to the contrary. It should be noted that the defendants did not call any expert medical evidence and did little to challenge the expert evidence called by the plaintiff, which I find to be consistent with the facts of this case and mutually consistent.
- [168] Having taken those authorities into account, including the submissions of counsel and the cases referred to directly therein, as well as the unique evidence heard in this trial, I conclude the appropriate award of non-pecuniary damages in this case is \$195,000.

Past Income Loss

- [169] The parties have both made submissions with respect to the quantum of past income lost. The plaintiff submitted the past income loss is an amount of \$175,572. The defendants and third party submitted that the past income loss should be awarded to the plaintiff in the sum of not more than \$44,000.
- [170] In order to assess the past wage loss of the plaintiff, the court is required to determine what amount the plaintiff would have, not could have, earned but for the injury that was sustained: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30; *M.B. v. British Columbia*, 2003 SCC 53 at para. 49.
- [171] The defendants and third party made submissions that because Ms. Tougas admitted she had not included tips in her reported income, tip income could not be included in the calculation of income. No legal authority was offered to support that submission.
- [172] In *Wepruk v. McGarva*, 2006 BCCA 107 at paras. 18-19, the Court of Appeal noted that it is difficult, but not impossible, to prove loss of earning capacity without tax returns or other supporting documents.
- [173] In *Welygan v. Willms*, 2013 BCSC 219, the Court provided a helpful discussion on unreported tips:

397 Undeclared tips is a commonplace occurrence for young people working in the food service industry, although it makes it more difficult to determine the plaintiff's actual pre-accident income when the only evidence of the value of the tips comes from her "estimate" at trial, unsubstantiated by any written record.

399 I am unable to assess her pre-trial loss of income claim on any other basis than her history of earnings from the food service industry, using her income tax information, and adding a somewhat arbitrary amount for tips that I will accept she was receiving but not reporting, for the time period in which I conclude she was incapable of returning to that work because of injuries related to the accident.

- [174] In short, the courts will not always accept a claim for tips, but the plaintiff's evidence can be enough, as long as the plaintiff does not have significant credibility problems. In the case at bar, the claim for tips is consistent with the evidence of practice in the bar and food service business, the payment of tips to bar servers is well-known enough to be given judicial notice, and supported by the evidence of other witnesses in this case. There is no reason based on credibility to not include tips in the income loss calculation in this case.
- [175] In *Bain v. Nanji*, 2000 BCSC 103, the defendant argued that the plaintiff not declaring tips for tax purposes should prevent her from recovery (they did not seem to deny that she earned the tips). The Court rejected this argument at para. 44. The Court also went on to estimate the amount of tips received, rejecting plaintiff's evidence as too high, but accepting a lower amount of tips received. A similar approach was taken in *Simmavong v. Haddock*, 2012 BCSC 473 at paras. 92-94. In *Lowe v. Johnson*, 2019 BCSC 1283, the Court included undeclared tips being included in income, based on evidence of witnesses at trial, including a former manager of the plaintiff.
- [176] The evidence concerning the payment of tips to a bartender/server was given by Ms. Tougas, Ms. Dickman and Mr. Levesque. The evidence of these three witnesses was consistent and not challenged during cross-examination on the practice of tipping servers or on the estimates of the quantum of tips. The amount of tips cited above were correctly quoted in the reports of Mr. Lakhani and in the submissions of the plaintiff's counsel.
- [177] The plaintiff's submissions on past loss of earning capacity are based on a calculation of the plaintiff's pre-collision annualized income as \$34,020, together with annual tip income of \$42,500. The evidence was that the plaintiff's income would have increased in September 2017 by \$1 per hour, from \$15 per hour, to \$16 per hour. The sum of the three adjusted figures totals pre-accident income of \$177,312, from which must be deducted the small amount of post-accident income earned between the first and second accidents, for a resulting past income loss of \$175,572.
- [178] The sum awarded for past loss of earning capacity is therefore \$175,572.

Loss of Future Earning Capacity

- [179] The purpose of an award for loss of future earning capacity is to put the plaintiff in the position she would have been in but for the defendants' negligence: *Lines v. Gordon*, 2009 BCCA 106 at para. 185.
- [180] The two possible approaches to the assessment of loss of future earning capacity are named "earnings approach" or the "capital asset approach". In *Brown v. Golaiy*, (1985), 26 B.C.L.R. (3d) 353 at para. 8, Finch J. (as he then was) set out considerations to be taken into account by the Court as follows:
1. The plaintiff has been rendered less capable overall from earning income from all types of employment;

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

[181] These factors have been approved repeatedly in the BC Court of Appeal in cases such as *Perren v. Lalari*, 2010 BCCA 140.

[182] The plaintiff argued that the "income approach" is appropriate in the case at bar to calculate loss of future earning capacity of Ms. Tougas. The defendants' submissions contained references to both the "income approach" and capital approach", but did not specifically advocate for either approach.

[183] The "capital asset approach" is often used in cases where, due to factual circumstances, damages cannot be based on a mathematical calculation. Such damages are to be assessed as opposed to being based on a mathematical calculation, particularly in the case of a young person who has not yet established a specific career path.

[184] The test to be applied to future hypothetical events is stated in *Rousta v. MacKay*, 2018 BCCA 29 at para. 17:

As can be seen from the above, the standard of proof for hypothetical past events, like hypothetical future events, is the lesser "real and substantial possibility" threshold. This standard can be contrasted with the standard of proof for past events, which is on the ordinary civil balance of probabilities standard, and alleged events which do not rise to the "real and substantial possibility" standard because they constitute mere speculation.

[185] In this case, Ms. Tougas has a long and consistent career as a bartender/server, and was more recently promoted to the position of Bar Supervisor. In her case it is relatively easy to measure damages as a basis for assessment. Therefore, the income or earnings approach is appropriate for use in this case, noting the calculation is still an assessment rather than a mathematical calculation. The Court must also consider the overall fairness and reasonableness of the award: *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 11.

[186] The evidence of the plaintiff's injuries has been previously discussed. Dr. Naidoo opined after reviewing the injuries and symptoms caused by the first and second accidents that Ms. Tougas' condition would be expected to worsen over time and persist without relief into the future. Dr. Naidoo described injuries caused by the accidents which have resulted in severe limitations, which limitations will prevent the plaintiff's return to gainful employment and thereby result in loss of income.

- [187] Dr. Bentley opined that the plaintiff will have a permanent partial disability in the domains of housekeeping, driving and recreational tasks, in addition to negative effects in sustaining employment.
- [188] Dr. Spivak, a psychiatrist, opined that the development of chronic pain has affected the ability of the plaintiff to work and support herself financially. Dr. Spivak gave a prognosis that was guarded to poor.
- [189] Dr. Dean Powers opined that Ms. Tougas likely sustained a permanent loss of vocational capacity and interruption of her vocational trajectory and a reduction in her range of job options as a result of the cluster of chronic pain, psychological symptoms and physical limitations from the three motor vehicle accidents. Dr. Powers opined that Ms. Tougas was not competitively employable as a customer service supervisor, bartender or server; positions within her transferable skills base and experience. Dr. Powers also did not consider a more supervisory role in a bar or restaurant as a realistic position due to the physical requirements of such jobs. Dr. Powers opined that Ms. Tougas was likely permanently partially disabled and therefore, not competitively employable for any occupation at this point in her recovery.
- [190] It is clear from a review of the medical reports cited above that the plaintiff will have grave difficulty entering into any, but a very limited number of work situations which are not readily available. Employment options with a physical component are permanently foreclosed.
- [191] It was Dr. Powers' opinion that Ms. Tougas would be at a competitive disadvantage compared to her nondisabled peers in hiring and promotional opportunities.
- [192] The parties made passing reference to the leading cases in this area, including *Jorgensen v. Coonce*, 2013 BCSC 158; *Perren; Athey v. Leonati*, [1996] 3 S.C.R. 458; *Andrews; Crimeni v. Chandra*, 2015 BCCA 131; and *Penvidic Contracting Company v. International Nickel Company of Canada*, [1976] 1 S.C.R. 267 at page 297, where the court notes the difficulty in assessing damages does not relieve the wrongdoer from the necessity of paying damages; the court must do the best it can to estimate them.
- [193] It is clear from the review of the medical reports cited above that the plaintiff will have grave difficulty entering into any but a limited number of work situations, and those suggested would not support Ms. Tougas. Most employment options within the experience and skill set of Ms. Tougas have been permanently foreclosed. The plaintiff cannot work at anything like a competitive level for more than a few hours a week.
- [194] Upon a review of the effect of the injuries from the three accidents on Ms. Tougas' employment future, I find she is less capable of earning income from all types of employment. She is, post-injury, less marketable or attractive as an employee to potential employers. This point is clear on the evidence of Ms. Dickman, who was prepared to accommodate Ms. Tougas in an injured state but only for a short period of time. Ms. Tougas

cannot take advantage of all job opportunities that might be open to her but for her injuries; and without doubt, Ms. Tougas is less valuable to herself as a person capable of earning income: *Kwei v. Boisclair* (1991), 60 B.C.L.R. (2d) 393 (C.A.).

- [195] The plaintiff sought an award of \$741,953 for loss of future capacity and the defendants submitted orally that the appropriate amount of damages under this heading was \$178,830. The defendants did not provide any expert evidence to support their submission.
- [196] I am satisfied the earnings approach is the appropriate basis for calculation of damages in this case and that the plaintiff's loss of earning capacity, with contingencies applied as provided in the reports prepared by Mr. Lakhani, should be calculated until Ms. Tougas is 67 years old, the statistical average age of retirement. Ms. Tougas and Newlands all expected that given her positive working relationship at Newlands and her promotion to Bar Supervisor, Ms. Tougas would have become a long-serving member of the management group at Newlands, and remained in the employ of Newlands for the balance of her career.
- [197] Keeping in mind the requirements of reasonableness and balance, the award of damages for loss of future income earning capacity is \$730,000.

Cost of Future Care

- [198] The 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, insofar as that is possible. When full restoration cannot be achieved, 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.); *Gignac v. Rozylo*, 2012 BCCA 351 at paras. 29-30.
- [199] A more recent authority on this issue is *Dzumhur v. Davoody*, 2015 BCSC 2316:
- 244 The principles applicable to the assessment of claims and awards for the cost of future care might be summarized as follows:
- the purpose of any award is to provide physical arrangement for assistance, equipment and facilities directly related to the injuries;
 - the focus is on the injuries of the innocent party... Fairness to the other party is achieved by ensuring that the items claimed are legitimate and justifiable;
 - the test for determining the appropriate award is an objective one based on medical evidence;
 - there must be: (1) a medical justification for the items claimed; and (2) the claim must be reasonable;
 - the concept of "medical justification" is not the same or as narrow as "medically necessary";

- admissible evidence from medical professionals (doctors, nurses, occupational therapists, et cetera) can be taken into account to determine future care needs;
- however, specific items of future care need not be expressly approved by medical experts..... It is sufficient that the whole of the evidence supports the award for specific items;
- still, particularly in non-catastrophic cases, a little common sense should inform the analysis despite however much particular items might be recommended by experts in the field; and
- no award is appropriate for expenses that the plaintiff would have incurred in any event.

[200] In the past, Ms. Tougas has been prescribed medical treatment and therapy by medical professionals and has followed the treatment plans recommended to her. I am satisfied that this evidence establishes that it is more likely than not Ms. Tougas will incur the future care costs outlined in Ms. Ditson's report. Some of the items recommended were beyond the financial capacity of Ms. Tougas, and she explained that she was unable to participate in the multidisciplinary pain management program or purchase some of the recommended aids because she simply could not afford these items.

[201] In the report of Ms. Ditson, she has recommended future care treatments, including that Ms. Tougas attend a multidisciplinary pain management program, occupational and physiotherapy, psychological counselling, massage therapy, driving assistance, vocational counselling, medication as prescribed by medical doctors, and some supportive equipment, together with anticipated costs of these recommended items. Her report dated July 5, 2019 and recommendations therein were based on a review of all of the medical documentation, including pertinent expert reports.

[202] In analyzing the recommendations provided by Ms. Ditson, Mr. Lakhani noted that where a range of costs were available, he used the midpoint of the range contained in the reports of Ms. Ditson to determine the present value of calculated costs. Mr. Lakhani used a similar formula to calculate the costs where frequency of need or use of an item was offered in a range. The plaintiff also advanced differential costs in the case of a specialized support mattress rather than full costs, which is a reasonable approach in these circumstances.

[203] The submissions of the defendants with respect to the cost of future care are again framed as "the defendants say", re-framing issues of fact without having put the factual bases of the "say" propositions to any witness, nor having called evidence independently to support such propositions.

[204] With respect to the quantification of costs of future care, the plaintiff has sought damages for the cost of future care as \$149,971. I am of the opinion that the claim included therein for housekeeping assistance is included in the award of non-pecuniary damages and therefore, deduct the amount of \$38,166 from the amount sought. I award the sum of \$111,805 for cost of future care, which I find is fair and reasonable in the circumstances.

Special Damages

[205] The parties agreed that special damages should be awarded in the amount of \$8,888.91 and that is the order of this court in respect to special damages.

Summary of Damages Awarded

[206] Based on the above, Ms. Tougas is awarded damages as follows:

Non-Pecuniary Damages

\$195,000

Past Loss of Earning Capacity

\$175,572

Future Loss of Earning Capacity

\$730,000

Future Care

\$111,805

Special Damages

\$8,888.91

Total:

\$1,221,265.91

Costs and Court Order Interest

[207] The plaintiff is, unless there are circumstances of which the Court is unaware, entitled to the costs of this action on the basis of Appendix B of the Supreme Court Civil Rules forthwith after assessment.

[208] Ms. Tougas is entitled to interest pursuant to the Court Order Interest Act, R.S.B.C. 1996, c. 79 on special damages and past loss of income, to be addressed between the parties, with leave for either party to apply for further directions should the need arise.

"Ball J."

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