

CANADA / JUDGMENT

Williams v. Dolhan

2020 BCSC 136

COURT

Supreme Court of British Columbia

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2020 BCSC 136 Williams v. Dolhan

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Williams v. Dolhan,

2020 BCSC 136

Date: 20200206

Docket: M112404

Registry: Kelowna

Between:

Dawn Williams

Plaintiff

And

Jenine Nicole Dolhan, Michael Dolhan and Xuhiu Shi

Defendants

Before: The Honourable Mr. Justice G.P. Weatherill

Reasons for Judgment

Counsel for the Plaintiff:

S.T. Pihl, Q.C.

R. St. Ventura

Counsel for the Defendants:

M.F. Ruessmann

Place and Date of Trial/Hearing:

Kelowna, B.C.

January 13-17, 2020

Place and Date of Judgment:

Kelowna, B.C.

February 6, 2020

Introduction

- [1] This is an assessment of damages for injuries the plaintiff sustained in two separate motor vehicle accidents that occurred approximately seven weeks apart. She commenced one action covering both accidents and the defendants have admitted liability for both accidents.
- [2] Defence counsel, who acts for all defendants in this matter, confirmed during the trial that no apportionment of damages is required. This means that the defence accepts that liability is joint and several and that there are no insurance coverage or limits issues involved.

The Accidents

- [3] The first accident occurred on September 5, 2014 ("First Accident"). The plaintiff was on her way to work driving her Mazda CX-9 vehicle, eastbound on Yates Road in Kelowna. The defendant Jenine Dolhan was operating a vehicle owned by the defendant Michael Dolhan and was either stopped or had slowed on the eastbound shoulder and attempted a U-turn as the plaintiff was driving by impacting the right side of the plaintiff's Mazda and forcing it into the westbound lane. The plaintiff was shocked but otherwise felt okay at the time. Both vehicles were driveable, there were no significant injuries and, accordingly, the plaintiff was advised to take her vehicle to ICBC for an assessment and repairs. No emergency personnel attended.
- [4] The second accident occurred on October 25, 2014 ("Second Accident"). It was a rear-end collision. The plaintiff had just picked up her Mazda from the body shop after repairs from the First Accident were completed and was on her way home. She was stopped at a red light at the intersection of High Road and Glenmore Road in Kelowna. She observed a yellow Camaro approaching in her rear view mirror at speed and not slowing down. The Camaro impacted the rear of the Mazda in the area of its trailer hitch. Her vehicle was pushed forward approximately one car length. Again, she was able to drive her car home from the scene.

- [5] For ease of reference and because it is conceded that the plaintiff's injuries' liability is joint and several, the First Accident and the Second Accident will be referred to together as the "Accident" or "Accidents" as necessary.

The Plaintiff

- [6] The plaintiff is a 43-year-old single mother of two boys, ages 17 and 19. She is currently employed with the Glenmore Ellison Improvement District ("GEID") as its administrator.
- [7] She graduated high school in 1994 with honours. She performed particularly well in math, engineering, drafting and architecture related courses. In her youth, she was a competitive swimmer on a national level. She ceased swimming at age 17 because of the time and financial demands.
- [8] After graduation, she enrolled in the civil engineering technology program at Okanagan College and successfully completed the two-year diploma program with honours. On graduation she completed two work terms at the Central Okanagan Regional District's engineering and parks department. In 1998, she started working as an engineering technologist for a local private engineering firm known as D.E. Pilling Engineering ("Pilling"). Her work duties included drafting design submissions, computer design work, designing roads, infrastructure, subdivisions, water systems, sewer systems and things of that nature. In 2008, even though she was not an engineer, she was offered and accepted a partnership at Pilling and went on to become its managing partner.
- [9] The Accidents occurred while she was a partner at Pilling.
- [10] In April 2015, after the Accidents, she was approached by the Black Mountain Irrigation District ("BMID") with whom she had worked while at Pilling and was offered a job as its administrator, managing its operations. She accepted and left her association with Pilling to pursue that opportunity.
- [11] As the administrator, she essentially ran BMID's day-to-day affairs, reporting to its Board of Trustees on a monthly basis. Her duties included payroll, bylaws, reviewing various development applications, consultations with engineers on matters such as system capacity, and preparing reports and budgets. She was well liked by BMID's Board of Trustees and performed her job functions well. BMID was aware of the Accidents and of her need to take time away from the office during the day for various accident-related appointments. They were quite accommodating.
- [12] In the fall of 2017, the GEID lost its administrator and approached BMID with a request to allow the plaintiff to help them on "emergency" matters while they found a replacement. BMID agreed and the plaintiff assisted GEID for about four months while also working full time for BMID. In January 2018, GEID made her an attractive offer to become its full-time administrator and she accepted. Her new position meant not only increased salary, but a much shorter commute to work. It was also a better fit for her because it was less

demanding work. For example, she was no longer required to process development applications and required less time working in the field. However, it required increased computer work, phone calls and meetings, all of which comprise the majority of her day.

Plaintiff's Pre-First Accident Health

- [13] The plaintiff describes her life and general health prior to the Accidents as quite good. She says that although she had been dealing with depression-related health issues for a number of years before the Accidents and had problems sleeping, all things considered she was doing well. She was raising two active teenage boys, had a job she liked (at the time, with Pillings), was active in recreational activities such as hiking and golf, and had an active social life.
- [14] She describes having had to deal with a nagging tension-related "knot" in her mid-back since approximately age 16 that related to her intense swimming program. The mid-back knot would flare up from time-to-time and would cause shooting pains into her right elbow. She stated that the knot issue was triggered by stress but was not overly bothersome. In 2013 and 2014, she had cortisone and saline injections into the knot. She was also prescribed the anti-inflammatory, Arthrotec.
- [15] She consulted a chiropractor in an effort to resolve the knot issue whom she saw in the years leading up to the Accidents. She stopped seeing the chiropractor in October 2013 because she could not afford the treatments. At that point, her work benefits at Pilling did not cover the treatments.
- [16] In addition, she also suffered from depression prior to the Accidents and was having trouble with insomnia. She was prescribed anti-depressant medications and sleeping pills. Through consultations with her general practitioner, Dr. Lange, she tried various forms of antidepressant medications. At some point, she switched from Sertraline to Wellbutrin, but she was concerned that the medication was causing weight gain.
- [17] In April 2014, Dr. Lange referred her to Dr. Di Pieri, a doctor specializing in alternative forms of medicine. At the time she was experiencing low energy, low mood and continued insomnia. During a visit with Dr. Di Pieri in June 2014, the plaintiff told him that she wanted to stop taking the antidepressant, and that she had concerns about Wellbutrin being the cause of weight gain issues. Dr. Di Pieri advised her to stay on the medication. She stopped taking Wellbutrin a few days before the First Accident.
- [18] Dr. Di Pieri noted that he thought she may have had an issue with her thyroid, possibly a hypothyroid condition, but the plaintiff does not recall him ever making a diagnosis of hypothyroidism. She was, however, treated with a "desiccated thyroid".

Accident-related injuries

- [19] The plaintiff says that the First Accident caused headaches, neck pain and low back pain. In the days following, it got progressively worse and her neck and back seized up. Dr. Lange referred her to a chiropractor and massage therapist for treatments. The neck pain moved around from the left side to the right side. She had numbness in her right thumb and forefinger. The spasms in her back made breathing difficult. She also experienced headaches, some dizziness and disrupted sleep.
- [20] She found sitting caused "excruciating" pain. She stayed home from work for four days and then began a self-regulated graduated return to work program starting with four hours per day increasing to five to seven hours per day by the time of the Second Accident. She also worked from home. She was going to the chiropractor approximately four times per week and to the massage therapist once per week.
- [21] She was in the process of slow but steady recovery, when she was rear-ended in the Second Accident seven weeks after the First Accident.
- [22] She felt that the Second Accident erased any improvement she had made and put her back at square one. Indeed, her symptoms were worse, in particular in her low back and neck. Her headaches were worse and her back felt locked-up. The pain in her mid-back felt like one of her ribs was out. The numbness in her right thumb and forefinger was worse. She was also very upset and frustrated with what happened to her.
- [23] The day following the Second Accident she went to a walk-in clinic and was told to continue taking the pain and anti-inflammatory medications she had been prescribed following the First Accident.
- [24] The constant headaches and right-hand numbness subsided after about six months but she notes that if her neck or back flared up, the headaches would return. She now deals with headaches about three times per week and treats them with Advil and stretching exercises.
- [25] Initially her neck was the biggest issue for her. Massage therapy helped to the point that it only bothers her if she is stressed or picks something up the wrong way.
- [26] Her treatment and rehabilitation consisted of physiotherapy, chiropractic and massage therapy. She also has had and continues to use the services of a kinesiologist. She has also had some form of electromagnetic muscle shockwave therapy which helps the pain. She saw a counsellor twice in 2018 to discuss a variety of issues and stressors, including her ongoing pain and frustration. She was told to continue doing what she was doing and to be patient. She has had a series of non-traditional needleless acupuncture treatments ("SCENAR") that, although expensive, she found helpful in relieving her tension and back pain.
- [27] She also continues to regularly work out in her home gym and follow the exercise regime given to her by her kinesiologist.

- [28] She says that although the pain is better, it continues to bother her in her neck, mid-back and lower back, the lower back being the worst. She uses Advil and Robaxacet regularly to help with her symptoms.
- [29] She finds the entire ordeal has been exhausting and frustrating.
- [30] Currently, she feels her neck is relatively strong with occasional flare-ups with tension that she manages with stretching and Advil. She also is aware of what triggers her neck pain and takes conscious steps to avoid those triggers. Likewise, her mid-back is relatively good. It is not a major source of pain and she is able to manage.
- [31] The biggest ongoing issue for her is her low back. She describes that she has constant pain, ranging from 2 - 9/10. She uses a nightly heating pad, daily hot tubs and pain medications. Although the exercises she does help, the low back pain affects her day-to-day function, work, recreational activities, social activities and sleep.
- [32] Some activities, such as hiking and golfing, as well as remaining in a static position for extended periods of time, cause her symptoms to flare up.

The Medical Evidence

- [33] The plaintiff and the defendants each tendered medical/legal reports from qualified physiatrists. The plaintiff was assessed by Dr. Hugh Anton on February 21, 2017, at her counsel's behest, and by Dr. Joseph Wong on September 11, 2019, on behalf of the defendants. Both were qualified and each authored two reports (Dr. Anton's reports are dated February 21, 2017 and November 7, 2019; Dr. Wong's reports are dated October 6, 2019 and November 28, 2019) which were tendered into evidence without debate. Both experts also testified.
- i. Dr. Hugh Anton
- [34] Dr. Anton's diagnosis is that the plaintiff suffered soft tissue injuries to her neck and back in the Accidents. He opines that her ongoing neck pain is probably due to myofascial pain syndrome, that the "knot" in her right rhomboid muscle in her mid-back is also due to myofascial pain syndrome that, although pre-existing, was exacerbated by the Accidents. He further opines that her lower back pain is both mechanical and myofascial in nature and that the Accidents were a major contributing factor. In short, his opinion is that her ongoing chronic neck and back pain is related to the injuries she suffered in the Accidents.
- [35] Dr. Anton described myofascial pain syndrome as referring to pain arising from myofascial structures (in this case muscles and/or fascia lining around the muscle) manifested by the presence of trigger points associated with a pattern of symptoms of pain, often referred pain away from the trigger point and often numbness or tingling.

- [36] He described chronic pain as a complicated phenomenon comprising a constellation of physical, social and psychological factors. He attributes her ongoing chronic pain to the late effect of soft-tissue injuries she suffered in the Accidents. He does so based on her history, examination and because there is no competing explanation for her symptoms. She had a prior history of fluctuating pain in her mid-back and he agrees she probably had a pre-existing chronic pain issue between her shoulder blades. But she had no prior history of neck pain or low back pain.
- [37] He testified that her condition would place her at risk of symptom flare-up with activity depending on the nature of the activity.
- [38] He felt that her pre-Accident history of depression symptoms were likely exacerbated by her post-Accident pain issues because chronic pain quite often results in depression. He agrees that depression can have multiple causes and be exacerbated by life stressors.
- [39] While agreeing that an untreated or undertreated condition of hypothyroidism can mimic symptoms of depression, such as fatigue, insomnia, low energy, difficulty concentrating, he did not accept that the plaintiff's depressive symptoms could be explained by a pre-accident diagnosis of hypothyroidism nor the treatment she was receiving from Dr. De Pieri which he viewed as an unorthodox method of thyroid therapy or treatment.
- [40] Dr. Anton felt that the plaintiff had the potential to improve but because the pain has been with her for (at that point) 2.5 years, it was unlikely to resolve completely. He stated that her prognosis for improvement was dependant in part on her response to further treatment.

ii. Dr. Joseph Wong

- [41] Dr. Wong's diagnosis is that of mild myofascial injury to the right side upper back muscle, right side lumbar spine and right sided upper sacral spine gluteal muscle. He described it as "discomfort" rather than "pain". He noted a normal range of movement in her neck. He incorrectly noted that she had a chronic history of right-sided neck and upper back muscle strain.
- [42] He noted that she had a pre-existing chronic rhomboid muscle problem that, on examination, exhibited only mild stiffness. There was no joint or nerve damage associated with the lower back discomfort. In his view, the Accidents may have only temporarily aggravated her prior condition.
- [43] His opinion is that she suffered a myofascial strain of the right side lower back and gluteal muscles possibly caused by the Accidents but he points out that these types of issues are very common in the general population who do desk work and have to sit for prolonged periods of time, or who do repetitive arm movements when using a computer. In his view, her ongoing symptoms are due to either pre-existing chronic upper back injury and/or from her office work rather than the Accidents.

- [44] He opines that the plaintiff's prognosis is good because the areas of strain are localized in the right side upper back and right side lower back and gluteal area. In his view, the condition can get better with more exercise to strengthen these muscles.
- [45] He recommended continued use of pain medication or muscle relaxant as needed and continued exercise in accordance with what her kinesiologist provided her. He also suggested trigger point injections if needed.
- [46] In sum, he stated there was no "substantial" disability preventing her from functioning at work, at home or recreationally.
- [47] He felt he was not qualified to comment on her psychological stress as it relates to her pre-Accident and post-Accident presentation.

Discussion

- [48] The defendants concede that the plaintiff suffered injuries in the Accidents but dispute their severity and the extent to which she says they have affected her function.
- [49] The plaintiff presented her evidence in a straightforward, sincere and credible manner. She did not appear to embellish how she feels the accident has affected her life. I consider her evidence reliable.
- [50] My assessment of her is that she is an intelligent, hardworking, driven and ambitious person who continues to suffer from chronic myofascial pain to her neck, mid-back and low back to varying levels and degrees. She is highly motivated and holds herself to high standards.
- [51] The plaintiff says, and I accept, that since the Accidents she has had pain and discomfort in her neck, mid-back and lower back. She was recovering from the First Accident when she was impacted by the Second Accident which exacerbated the injuries she received from the First Accident. The constant headaches and right-handed numbness she has suffered since the Accidents have since subsided and are now intermittent and occasional.
- [52] I conclude that the plaintiff had no pre-existing issues with her neck and low-back leading up to the Accidents and that it was the Accidents that caused her symptoms in those areas. I also conclude that she had a pre-existing issue with her mid-back that had started in her teenage years that was aggravated by the Accidents.
- [53] I accept that the usual recovery time for soft tissue injuries in the general population is between four and twelve weeks. However, some individuals don't recover and go on to develop a chronic pain condition after soft-tissue injuries. I conclude that the plaintiff is one such individual.

- [54] I accept that she has continued to struggle since the Accidents in terms of her pain levels waxing and waning with activity and with flare-ups that increase her pain. She is able to perform most of her lighter household duties but finds the heavier housekeeping duties somewhat onerous and has employed the services of a bi-weekly housekeeper to perform them.
- [55] I accept that her social and recreational activities have been curtailed to some degree after the Accidents. She leaves work for treatment related appointments, or goes home at lunch to soak in the hot tub to help her pain. Both GEID and BMID (while she was employed there) have been quite accommodating of her needs.
- [56] The plaintiff had pre-Accident issues with depressed mood and other depression related issues and was receiving treatment for it. She states that the Accidents did not really affect those issues nor her ability to work, however the ongoing Accident-related chronic pain issues are a source of frustration for her.
- [57] Other than using up sick time and vacation time to make up for time she has taken off work to deal with Accident-related appointments, she has suffered no loss of earnings. All her jobs since the Accidents allow flexible hours and schedule.
- i. Lay Witnesses
- [58] The plaintiff's evidence is generally supported by friends and a co-worker.
- [59] Ms. Nannette Jeffrey has known the plaintiff for some 12-13 years and they are good friends. Ms. Jeffrey described the plaintiff as "bubbly, smiley, fun and good company" before the Accidents. Ms. Jeffrey and the plaintiff used to see each other at least on a weekly basis before the Accidents, but the frequency of those visits dropped off for a period of time. They have now resumed. She notices that the plaintiff seems to struggle with her back and that she is not as vibrant or bubbly as she was before the Accidents.
- [60] GEID's current operations manager, Mr. Kevin Birch has worked alongside the plaintiff at both BMID and GEID and has seen her look uncomfortable, often stretch her back, stand up at long meetings and stand along back walls at conferences. He assumes this is because of her back issues. Nevertheless, he describes her as a very diligent, hard working person and a stoic.
- [61] Amanda Swoboda has been good friends with the plaintiff for some 19 years. She describes the plaintiff before the Accidents as friendly, kind, hard working and independent. She was impressed with her abilities as a single parent. They hiked and worked out together in the plaintiff's home gym. After the Accidents, she describes the plaintiff "going underground" and "derailing", meaning that she became a sort of recluse. They did not communicate or get together much. Attempts to go hiking as before were not successful. She, too, describes the plaintiff as a stoic. The biggest change she has noticed since the Accidents is the plaintiff's isolation.

[62] Samantha Watters has known the plaintiff for about 11 years and considers her to be her best friend. She describes the plaintiff pre-Accidents as being a joy to be around and easy to be friends with. They saw each other most weekends and they have vacationed together. She says that before the Accidents, the plaintiff was always on the go and never seemed to sit down. After the Accidents she continued to see her most weekends but has noted that the plaintiff has difficulty sitting, moving and sleeping. Hikes that they used to go on have turned into short walks. She looks uncomfortable and is not as happy. She is no longer as outgoing as she once was and "retreats inside". She no longer constantly cleans. The changes she has seen the plaintiff undergo, she says, have been hard for her to watch.

[63] I generally accept the evidence provided by the lay witnesses as reliable.

ii. Medical Opinions

[64] Where there is disagreement on the medical evidence, I accept Dr. Anton's opinion over Dr. Wong's. Dr. Anton was an impressive witness with impressive credentials who answered questions in a thoughtful, fair and unbiased manner. I cannot say the same for Dr. Wong who, when confronted with a series of clear and obvious mistakes and omissions in his reports, became unnecessarily defensive. His attempts to explain the mistakes and omissions were unpersuasive. Regrettably, instead of complying with his duty to assist the court in an unbiased manner, he crossed the line into advocacy for the defendants. He seemingly forgot the certification he gave respecting Rule 11-2(1) of the Supreme Court Rules. I give his reports and evidence little weight.

[65] Dr. Anton's opinion, which I accept, is that the plaintiff is suffering from chronic pain with varying degrees of intensity. His diagnosis is that she is suffering from chronic myofascial pain and has suffered for over five years and the condition continues to plague her to some degree. The pain level has fluctuated over time but despite the pain she has managed through work in senior positions with Pillings, BMID and GEID. She has worked to mitigate her losses, making up lost time during evenings, weekends and holidays.

[66] Dr. Anton recommended that she see a psychologist for counselling. Accordingly, she saw a counsellor on two occasions to discuss various life stressors including her frustration about the Accident-related pain she was experiencing. She does not feel she needs any further counselling.

[67] The defendants suggest that to the extent she is continuing to suffer pain and an alteration in her mood, the Accidents are not to blame. They assert that the plaintiff has had a hypothyroid condition since before the Accidents, and it is that condition that is continuing to affect her.

[68] The defendants have not proven this allegation. At best, they have proven that she was assessed by Dr. Di Pieri, who had prescribed thyroid medication and who was monitoring her thyroid levels. There is no medical opinion before me that proves any connection between the plaintiff's possible thyroid condition and her ongoing symptoms.

iii. Conclusions regarding the plaintiff's injuries

- [69] I accept that the plaintiff has proven that the Accidents were the cause of her myofascial pain syndrome affecting her neck and low back, and exacerbating her pre-existing mid-back condition and that she suffers various levels of pain most days. She is able to function at work and participate in other activities but in some pain. I find that although she has some pain, she by no stretch is disabled.
- [70] I accept that she is a stoic. She continues to use Advil and Robaxacet on an as-needed basis and has the benefit of an ergonomic workplace including the use of a sit/stand desk at work. She has been implementing the advice from her kinesiologist regarding correct posture to reduce the tension she feels in her neck and mid-back.
- [71] Given the passage of time since the Accidents, and accepting Dr. Anton's opinion on the prognosis for the future, I conclude that she has plateaued and is likely to continue to experience waxing and waning levels of pain into the foreseeable future.
- [72] I accept that her chronic pain condition has affected her social, domestic and family life to some degree. The plaintiff is able to function in her day-to-day and work life but some heavier activities affect her in a negative way. She is aware of these limitations and takes steps to minimize the effect they have on her.
- [73] She states she is happy at work at GEID and the Board of Trustees of GEID are happy with her. She feels however that she is unable to give the GEID 100% of what she could be giving them but for her ongoing chronic pain.
- [74] So, she can do everything asked of her, but is not as efficient as she could be. She is also not able to function pain free and without being mindful of her activity level.

Non-Pecuniary Damages

- [75] It is trite that the purpose of non-pecuniary damages is to compensate a plaintiff, as best as money can, for the pain, suffering and loss of enjoyment of life caused by injuries. Such damages are not restitution but an attempt to make up for a loss which cannot be replaced in any direct way. They provide "substitute pleasures and amenities to make the life of the injured person more bearable": *Rozendaal v. Landingin*, 2013 BCSC 24 at para. 77.
- [76] In assessing the appropriate amount for non-pecuniary damages, the court considers each individual plaintiff's circumstances including the oft-quoted factors set out by the Court of Appeal in *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46. The amount awarded should be fair for all parties. Awards made in similar cases provide rough guides, but each case depends on its own unique facts and the plaintiff's personal experiences in dealing with the effects and consequences of his or her accident related injuries: *Trites v. Penner*, 2010 BCSC 882 at paras. 188-189; *Dilello v. Montgomery*, 2005 BCCA 56 at para. 25.

- [77] The plaintiff seeks a non-pecuniary award of \$100,000. She asserts that her stoicism and perseverance in continuing to work through her pain and resultant reduction of her financial losses should not result in her being penalized. She refers to the following cases in support of her non-pecuniary damage claim which she says are comparable and in which non-pecuniary damage awards of \$85,000-\$140,000 were assessed: *Bain v. Goodridge*, 2019 BCSC 1450; *Leach v. Jesson*, 2017 BCSC 577; *Dhaliwal v. Meerdink*, 2014 BCSC 2418; *Lewis v. Wang*, 2020 BCSC 16; *Dzumhur v. Davoody*, 2015 BCSC 2316; *Merko v. Plummer*, 2016 BCSC 1403; and *Ferguson v. Watt*, 2018 BCSC 1587. Most of these cases fall into the \$90,000 to \$100,000 range.
- [78] The defendants say the award should be more in the range of \$40,000 and refer to the following cases in support: *Haroon v. Basran*, 2015 BCSC 794; *Rozendaal v. Landingin*, 2013 BCSC 24; and *Sandher v. Hogg*, 2010 BCSC 1152. These are also comparable cases, where non-pecuniary awards of \$45,000, \$40,000 and \$40,000, respectively, were made.
- [79] I have reviewed each of these cases and, as can be expected, they contain both similarities and differences from Ms. Williams' case.
- [80] I have found that the plaintiff suffered soft-tissue injuries to her neck, mid-back and low back. I have accepted Dr. Anton's medical diagnosis of a myofascial pain disorder that is chronic. As a consequence, although she is still able to function in her personal, homemaking, social and vocational life, she has nonetheless been negatively affected. The plaintiff goes about her day-to-day life without much complaint but is suffering various degrees of pain with some flare ups. She is to be credited for working through the pain and not allowing it to get the best of her and have it affect her work performance. She is acutely aware of what activities aggravate her symptoms and modifies her day accordingly. I also conclude that her current symptoms will likely continue for the foreseeable future.
- [81] All things considered, I assess the plaintiff's non-pecuniary damages at \$90,000.

Special Damages

- [82] At the outset of the trial, the parties agreed that a fair and proper amount for special damages the plaintiff incurred as a result of the Accidents is \$4,661.00, and I award that sum.

Future Care Costs

- [83] The plaintiff continues to use over-the-counter pain medication (Advil) and muscle relaxants (Robaxacet) on an as-needed basis. After seeing a massage therapist for the first three years after the Accidents, and a hiatus of two years thereafter, she returned for a treatment in December 2019. Massage therapy costs \$115 per session and is mostly covered by her current employment benefit provider as part of her employment.
- [84] The plaintiff has no plans to attend for future counselling but is open to seeing Dr. McEachern again if she has difficulty coping.

- [85] She plans on continuing to get SCENAR treatments for back pain on an as needed basis. The cost is \$115 per session.
- [86] She continues to rely on a booklet of stretching and other exercises her kinesiologist provided her and regularly does them at home, approximately four days per week. She testified that these exercises have been particularly helpful in strengthening her upper body. Her kinesiologist also does "shockwave therapy" on her back which she finds helpful in breaking up scar tissue. He charges \$85 per hour. These treatments are also covered by her employment benefit plan up to a maximum of 10 sessions per year.
- [87] The plaintiff seeks a global award of \$20,000 to cover her future care costs for the next ten years. This amount, she says, will allow her to fund the unfunded portion of therapies and treatments including massage therapy, chiropractic care, kinesiology, SCENAR acupuncture with Mr. Michael Schulting and two sessions of counselling with Dr. Heather McEachern.
- [88] The defendants assert that the plaintiff's condition started to improve considerably after she resumed kinesiology and home exercises and therefore she should not need any of these treatments or medication in the near future. The defendants assert that any award under this head should be minimal.
- [89] I have concluded that the plaintiff's chronic pain condition will continue to trouble her into the foreseeable future. She has thus far done everything that has been recommended and more, yet the pain continues to bother her to varying degrees and at varying levels of intensity.
- [90] I accept that she will likely incur expenses into the future for various treatment modalities and that there should be some money set aside to cover those expenses. The plaintiff's suggestion of a global award makes sense in this case. I am prepared to allow the sum of \$500 per year for the next 10 years, or \$5,000 for those treatments as an amount over and above the costs funded by her employment benefits plan.
- [91] Additionally, I am satisfied that the plaintiff's continued use of a housecleaner once every two weeks to perform the heavier housecleaning duties is reasonable. Her evidence, which I accept, is that she did not hire a housecleaner until after the Accidents and only because she was unable to perform the heavier homemaking chores because of her Accident-related pain. Her housecleaner charges \$25 per hour and is there for 5 hours every second week. This is reasonable. This translates into \$3,250 per year. I conclude that \$10,000 is a reasonable amount to award the plaintiff for her future housecleaning expenses.
- [92] In sum, the plaintiff is awarded \$15,000 for future care costs.

Loss of Future Earning Capacity

- [93] The onus is on the plaintiff to show a "real and substantial possibility" that, because of Accident-related injuries, she may lose income in the future before an award under this head will be justified: *Perren v. Lalari*, 2010 BCCA 140 at para. 32. A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation: *Grewal v. Naumann*, 2017 BCCA 158 at para. 48.
- [94] The plaintiff is very qualified and experienced in what she does. She is a high achiever and performs at a high level. She has grit and determination. She is very happy working at GEID and by all accounts GEID is very happy with her. As GEID's administrator, she is at the top of her field and there are no higher employee positions available.
- [95] Her income has steadily increased over the years and she is now earning approximately \$141,500 per year.
- [96] The plaintiff seeks a loss of future earning capacity award of \$100,000 on the basis that GEID will be forced to amalgamate with the City of Kelowna ("City") in the next five years or so, and her job will be eliminated or subsumed by the City. It will be difficult, she says, for her to obtain comparable employment even if the City keeps her on. She says that if she were to work for the City, she would be stuck at a desk eight hours per day and will not have the flexibility that she currently has to manage her time to accommodate her pain and treatment regime. She says she simply would be unable to do that.
- [97] As examples of cases where a loss of future earning capacity award has been made on the basis of loss of capital asset, despite injuries seemingly not affecting a plaintiff's overall job performance and where their pre-trial income has increased, the plaintiff refers to *Hinder v. Yellow Cab Company Ltd.*, 2015 BCSC 2069; *Mezo v. Malcolm*, 2013 BCSC 1793; and *Yang v. Engen*, 2014 BCSC 1332 at paras. 111-34. Similarly, the plaintiff argues that her position at GEID will at some point in the near future, be eliminated, and she will be thrown out into the marketplace. Given the chronic and long-term nature of her injuries and her evidence that she would be unable to sit all day at a desk, she asserts she has suffered a loss of a capital asset. She says that there is a real and substantial possibility that she will earn less income in the future than she would have but for the Accidents. She asserts that the Accident-related injuries have restricted her future employment options and she is less marketable and attractive than she otherwise would have been to prospective employers.
- [98] My assessment of the plaintiff is that she is a bright, competent and hardworking professional with considerable education and experience in her field. Despite her varying levels of pain, she would be an attractive asset to any water district, city, municipality, private engineering firm or indeed other potential employer.
- [99] Her job is mostly sedentary and will continue to be so into the future. Her symptoms seem to be "on and off" with flare-ups.

- [100] There is no dispute that the City has indicated that it will seek to amalgamate all local water districts, GEID included, at some future point. The plaintiff testified that there is political pressure to do so. The plaintiff testified that she understands the target date for such an amalgamation could be as early as 2025. She also states that GEID's Board has no current appetite for an amalgamation with the City and will oppose it as long as possible.
- [101] She has a good working relationship with the staff at GEID and the Board of Trustees. She is very happy with her employment. There is no realistic likelihood of advancement (as the administrator, she is at the highest level) or of being demoted.
- [102] Despite the evidence that the GEID will eventually amalgamate with the City, which I accept will likely occur at some future date, I am not persuaded that it will happen any time soon. If and when it does, the plaintiff's background, expertise, competence, and skill will be a sought after commodity. It is noteworthy that the plaintiff has not taken any steps to look into alternate employment. The GEID Board is currently making significant capital expenditures to facilitate and improve its infrastructure, operations and administration facilities. She is content to continue working where she is, and will likely continue doing so for the foreseeable future. The risk of her losing her job as a result of a forced amalgamation of GEID with the City and being unable to obtain comparable employment and earn comparable income is, I conclude, no more than a remote and unlikely future possibility.
- [103] While it may be that the job she will land in is less flexible, more structured and will be less tolerant of her taking breaks to go home etc., given what she will bring to the table, I am not persuaded that accommodations, similar to the accommodations she currently receives from GEID, would not be made.
- [104] There is no evidence respecting the plaintiff's plans for retirement. Assuming, for the sake of example, she retires at age 65, there is a window of about 22 years for the amalgamation to be completed, the plaintiff's position to be terminated and the plaintiff to find herself unable to secure alternate and comparable employment as a result of Accident-related chronic pain issues.
- [105] Similar to the findings in *J.P.B. v. D.G.C.*, 2017 BCSC 730 (unreported), *Erwin v. Buhler*, 2017 BCSC 362, and *Kim v. Morier*, 2014 BCCA 63, it is unlikely that the plaintiff will lose her job unless the amalgamation were to occur, the timing of which is far from certain. The negative impact such amalgamation might have on the plaintiff's ability to earn income is speculative. As earlier mentioned, the plaintiff is a highly skilled, motivated, intelligent and hard working administrator with a high level of education and experience. She has managed to work through her pain and has taken measures to manage her pain, without losing any income, for over five years. Her working capacity and resilience is high. She is a stoic who is able to work through her pain.

- [106] I am not persuaded that the plaintiff's Accident-related injuries have made her less capable overall of earning income nor that she is less marketable or attractive as a potential employee in suitable positions.
- [107] The plaintiff has the onus of proving a future loss of earning capacity. I am not persuaded she has proven a real and substantial possibility of loss of future earnings. I decline to make an award under this head.

Loss of Housekeeping Capacity

- [108] The plaintiff seeks an award of \$15,000 for loss of housekeeping capacity on the basis that she has lost the capacity, due to her Accident-related chronic pain, to perform her usual and necessary heavy household work such as vacuuming and scrubbing the showers. She now spends about \$3,300 per year hiring a housecleaner who perform those tasks, totalling \$16,500 over the next five years.
- [109] I acknowledge that loss of housekeeping capacity can be considered as a separate head of damage, pecuniary or not: *Kroeker v. Jansen*, 4 B.C.L.R. (3d) 178. It can also be considered as part of a non-pecuniary award or, in some cases, both. In cases where the household tasks can be completed, but not as efficiently, slower and with difficulty, it may appropriately be compensated by a non-pecuniary damage award: *Kim v. Lin*, 2018 BCCA 77 at para. 33.
- [110] In this case, I conclude that the plaintiff's housekeeping challenges are more in keeping with a loss of amenities and increased pain and suffering, and I have taken her loss of capacity to perform homemaking chores to the same degree as she did before the Accidents, into account in the assessment of her non-pecuniary damage award. I have also included the cost of her housekeeper as part of the award I am making for future cost of care.
- [111] I therefore decline to make a separate award under this head.

Summary

- [112] In sum, the plaintiff is awarded the following damages:

a)

Non-pecuniary damages:

\$90,000.00

b)

Special Damages:

4,661.00

c)

Loss of Future Earning Capacity:

nil

d)

Loss of Housekeeping:

nil

e)

Future Care Costs:

15,000.00

TOTAL:

\$109,661.00

[113] Subject to matters of which I am unaware, the plaintiff is entitled to her costs.

"G.P. Weatherill J."

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