IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Lees v. Compton,*
2013 BCSC 1015

Date: 20130607
Docket: M102713
Registry: Vancouver

Between:

Tamara Lees

Plaintiff

And

Corilynne Diane Compton, Andrew James Compton and Canadian Road Leasing Company/Compagnie De Location Canadian Road

Defendants

Before: The Honourable Mr. Justice Goepel

Reasons for Judgment

Counsel for the Plaintiff:	W. Mussio E. Goodman
Counsel for the Defendants:	E. Lyszkiewicz
Place and Date of Trial:	Vancouver, B.C. January 28-30, 2013 February 1, 2013
Place and Date of Judgment:	Vancouver, B.C. June 7, 2013

INTRODUCTION

[1] On September 28, 2008, the plaintiff, Tamara Lees, was injured in a motor vehicle accident when her vehicle was struck by a vehicle driven by the defendant, Corilynne Diane Compton. Liability for the accident has been admitted. The trial was limited to an assessment of the plaintiff's damages.

[2] The plaintiff asserts that she has a permanent painful and disabling condition that has and will continue to affect her daily life and has prevented her from enjoying many activities. She submits that as a result of her injuries she has been rendered less capable of earning income and has lost the ability to take advantage of all income earning opportunities that would have been available to her if she was not injured.

[3] The defendants do not dispute that the plaintiff sustained some soft tissue injuries as a result of the accident. They submit however that the impact of those injuries on the plaintiff has not been as significant as she claims. They submit that she made a substantial recovery within a year of the accident. They submit that some of her complaints were likely contributed to by a subsequent accident which was the fault of the plaintiff. They submit that the plaintiff's claim for past income loss is limited and her claim for loss of future earning capacity is not supported by the medical or factual evidence.

BACKGROUND

A. Personal History

[4] The plaintiff was born in April 1988 and is currently 25 years old. She was raised in West Vancouver where she resided with her parents until moving to Montreal in September 2012 to attend McGill University.

[5] The plaintiff graduated from high school in 2006. She then attended Capilano College and in August 2008 transferred to Simon Fraser University ("SFU") where, in

April 2012, she obtained a Bachelor of Arts degree with honours in History and English.

[6] In September 2012, the plaintiff commenced studies at McGill University where she is enrolled in a program to obtain a Master's degree in history. She intends to then obtain a Ph.D. and ultimately work as a university professor. The plaintiff's goal to become a university professor predates the accident.

[7] In Montreal she lives by herself in a studio apartment close to campus.

[8] Prior to the accident the plaintiff was in good health. She described herself as being quite social, outgoing and carefree. Growing up, she had been very active in sports. In high school she was a competitive mountain biker and snowboarded frequently. At the time of the accident, she was playing in a competitive field hockey league.

B. The Accident and Aftermath

[9] On September 28, 2008, the plaintiff was driving northbound on Burrard Street accompanied by her boyfriend, Ryan Weymark. Her vehicle was struck on the driver's side by a vehicle driven by Ms. Compton, who was proceeding eastbound on West Second Avenue.

[10] Photographs of the two vehicles show heavy damage and deployed airbags. The damage to the plaintiff's 2008 Honda Civic was in excess of $16,000. The vehicle was declared a total loss.

[11] Police, firefighters and ambulance attended following the accident. The plaintiff was examined at the scene by the ambulance crew's paramedics but was not transported to hospital. She subsequently called her parents who came and picked up the plaintiff and her boyfriend.

[12] Immediately following the accident, the plaintiff recalls experiencing pain in her left arm and head. Later that evening she began experiencing pain in her neck, shoulders and back.

[13] The plaintiff attended her family doctor, Dr. Jansen, the day following the accident. She took a week off school and two weeks off her sales job at American Eagle. She missed one school assignment for which she received a doctor's note.

[14] Ms. Lees testified that she suffered significant neck pain over the first three years following the accident. She indicated she has experienced some improvement although her symptoms still flare up on a regular basis. She testified that her neck pain gets worse as the day progresses.

[15] She testified that the injuries to her shoulder blades continue to cause constant daily pain. Similarly her middle and upper back symptoms have remained consistently painful since the accident. She said that the injury to her lower back mostly resolved after a year, although she still experiences periodic flare-up.

[16] Ms. Lees testified that on a weekly basis the pain in her upper back will radiate into her chest and specifically her sternum. She says this has caused her to experience panic attacks. Her last significant panic attack occurred in the summer of 2012 during a car trip from Tumbler Ridge to Elkford with her boyfriend. Despite numerous stops along the way to accommodate the plaintiff's symptoms, her pain resulted in a visit to the hospital Emergency Room in Fernie.

[17] The plaintiff began to experience headaches following the accident. The frequencies of her headaches have abated over time, although she still experiences them approximately once a week when her neck symptoms flare up.

[18] Ms. Lees testified that her injuries have caused her considerable sleeping difficulties. She has trouble with falling and staying asleep because of pain.

[19] In the first few months following the accident, the plaintiff says she was anxious about driving or riding in a vehicle, although the severity of that anxiety has decreased over time. She would ask her parents or boyfriend to drive her where she needed to go as she was reluctant to drive herself.

Post-Accident Treatments

[20] Between February 2010 and September 2012, the plaintiff attended 59 massage therapy treatments. Between October 1, 2008, and January 15, 2010, she attended 77 physiotherapy appointments. She had one further physiotherapy appointment in June 2011. The plaintiff testified that the physiotherapy stopped being of assistance to her after six or eight months. She found that she obtained short term benefits from the massage therapy but it did not provide long term relief.

C. Impact of Injuries

[21] The plaintiff testified that the injuries have impacted her daily life. She has become less social and more withdrawn. She does not commit to activities. She is no longer able to ski or snowboard. She says that when she tried biking it exacerbated her injuries. Prior to the accident she practised and played field hockey three times a week. She says that subsequent to the accident, other than one practise, she has not played field hockey. She tried jogging but found it too hard.

[22] Post accident the plaintiff has tried yoga and Pilates but has found it difficult. She tried wake surfing but was concerned about aggravating her injuries. She did learn to swim but found it neither helped nor exacerbated her injuries.

[23] The plaintiff still attends the occasional party and has taken several vacations with her family or her boyfriend and his family. She says she is less inclined to commit to social events due to her pain.

[24] The plaintiff says she has difficulty carrying heavy objects such as school books and groceries. She found it hard to do household chores such as laundry, cleaning her room and bathroom and vacuuming. After the accident her parents often did such tasks for her.

[25] The plaintiff says her injuries have impacted her school work. She says she cannot sit for extended periods of time which impacts on her studying. Her pain medication can make her “foggy”.

[26] The plaintiff testified that she worries about her future and how she will be able to support herself. She is concerned how she will mange if she becomes pregnant.

D. Work History

[27] The plaintiff's employment history commenced with summer employment in 2005 and 2006 at a bike camp. In 2006 she began working 15 hours a week at the Gap. She left the Gap in 2007 and began working as a part-time sales associate at American Eagle, a position she had at the time of the accident.

[28] At American Eagle the plaintiff earned between $8.50 and $9.00 per hour. At the time of the accident, she worked at least four to eight hours a week, and 20 hours a week during holidays and when the store received shipments.

[29] Following the accident, the plaintiff took two weeks off work. When she returned she worked reduced shifts. She testified that while at work she struggled to perform the various duties required of her, including lifting boxes and stacks of clothing or bending down to fold clothes. She said that when she returned to work after her accident her supervisor was very accommodating and excused the plaintiff from performing strenuous activities. She gave the plaintiff a positive performance evaluation.

[30] In the spring of 2009, her supervisor was replaced. Ms. Lees testified that the new supervisor was less sympathetic to her difficulties and reduced her amount of shifts. In August 2009, she quit her job. She said she did so because her injuries made it too difficult for her to work.

[31] Ms. Lees did not confront her supervisor about her poor treatment. She said that after she left she did lodge a complaint with the head office of American Eagle. The American Eagle separation form indicated that the plaintiff's reason for leaving her employment was that she had accepted another job. In her letter of resignation, she thanked American Eagle for the opportunity they gave her and said she got great benefits from working there. She did not mention anything about the car

accident or any difficulties that she had while employed. Nor did she complain about how she was treated by her new supervisor.

[32] In the fall of 2009, the plaintiff worked for a short time as a tutor. She did not work again until September 2011 when she worked as a research assistant at SFU, a job she continued to do until August 2012. She said she did not seek out other work after leaving American Eagle as she did not feel capable of functioning in the retail, sales or service industry.

[33] Ms. Lees is presently living in Montreal and completing her Master's degree at McGill. She has three classes and only attends school one day a week. She will complete the program in the summer of 2013.

[34] The plaintiff presently works a few hours a month taking photographs for an SFU professor. She says her injuries prevent her from working as a teacher's assistant at McGill.

[35] When she completes her Master's degree she plans to take one year off and then enroll in a Ph.D. program in September 2014. She testified that the Ph.D. program will take 5 years to complete. She hopes to start work as a university professor in 2018.

E. Subsequent Accidents

[36] The plaintiff has been in three subsequent motor vehicle accidents. The first accident occurred on May 9, 2009. While the plaintiff was driving, she rear-ended a Mercedes Benz vehicle with sufficient force that it was pushed into the rear of a truck in front. The accident was the plaintiff's fault. The Mercedes Benz was a total loss. The plaintiff's vehicle required $7,600 in repairs.

[37] On December 12, 2009, the plaintiff was a passenger in her father's vehicle when it was rear ended in the state of Washington. The vehicle she was in sustained about $4,000 in damages.

[38] On April 2, 2011, the plaintiff was walking in a parkade at SFU when a vehicle backed up and struck her. She went to the SFU health clinic.

[39] The plaintiff said that she was not injured in any of these accidents. She said they did not in any way exacerbate her existing injuries she sustained in the September 2008 accident.

MEDICAL REPORTS

[40] The plaintiff filed reports from Ms. Lees' family doctor, Dr. Jansen, and a rheumatologist, Dr. Shuckett. Dr. Jansen and Dr. Shuckett both attended trial and were cross-examined. The defendant filed a report of Dr. Oliver, an orthopaedic surgeon. The plaintiff did not require Dr. Oliver's attendance for the purposes of cross-examination. While the plaintiff testified that she has suffered from anxiety and panic attacks, she led no medical evidence relating those conditions to the accident.

A. Dr. Jansen's Report

[41] Dr. Jansen's report is dated May 6, 2012. She first saw Ms. Lees the day following the accident and has seen her on several occasions thereafter. Her diagnosis of Ms. Lees' injuries sustained in the motor vehicle accident is myofascial stretch and strain of the cervical and thoracic spine with likely subsequent development of early and mild osteoarthritic changes at T7/8. She opined that a full recovery to her pre-motor vehicle accident status was unlikely due to the extensive therapy undergone to date. She expressed concerns that when she enters grad school for her Master's degree Ms. Lees will experience a recurrence of symptoms. She found there was no period of permanent disability but that her injuries did prevent her from participating in field hockey and other strenuous sports activities. She found that the myofascial injury will continue to cause pain in Ms. Lees' neck and thoracic spine, particularly if she is entering a profession which requires prolonged sitting, bending or lifting. She anticipated that Ms. Lees would require regular treatments in the upcoming year or two while she works towards achieving

her Master's degree and hopefully thereafter she would only need massage or physiotherapy on a monthly basis.

B. Dr. Shuckett

[42] Dr. Shuckett is a rheumatologist. She assessed Ms. Lees on April 28, 2012. On examination, she noted several objective signs of injuries including palpable muscle firmness and spasms over the neck, shoulder and spinal muscles. Dr. Schuckett made the following diagnoses:

1) the neck injury, which is most likely musculoligamentous in nature with soft tissue injury, particularly on the right side of the neck;

2) myofascial pain syndrome of the neck and shoulder girdle region, right side greater than left, and right parascapular and parathoracic spine muscle spasm and myofascial pain;

3) injury to the thoracic spine, particularly on the right side, with musculoligamentous injury;

4) headaches, most likely cervicogenic, without migraine features; and

5) impingement of both shoulders.

[43] Dr. Shuckett testified that the plaintiff does not have chronic pain syndrome. She believed that the cause of her injuries was due primarily to the motor vehicle accident. She noted that Ms. Lees' symptoms were described in close proximity to the motor vehicle accident and have been consistent over time. She relied on the history that had been given to her by Ms. Lees.

[44] Dr. Shuckett noted that once pain had been present for such a long period after the onset of soft tissue injuries, the chance of the soft tissue injuries completely regressing or significantly improving diminished. Given that the plaintiff remained symptomatic three and one-half years after the accident, Dr. Shuckett opined that while it was possible that her symptoms might improve or ameliorate that it was

more probable that she was going to be left with her current symptoms for the foreseeable future.

[45] With regard to treatment, she believes Ms. Lees should try aquafit. While acknowledging that massage therapy did not influence the natural history of her symptoms, she believed that message therapy could be rationalized if it gives her some improvement.

C. Dr. Oliver

[46] Dr. Oliver examined the plaintiff and provided a report dated August 21, 2012. He agreed with Dr. Jansen's opinion that the plaintiff sustained musculoligamentous soft tissue injuries at the neck and thoracic spine. He questioned Dr. Jansen's diagnosis of the development of early osteoarthritic changes. He was in general agreement with the report of Dr. Shuckett except for her findings of impingement in the shoulders. With respect to prognosis, he suggested that with appropriate and regular activity, the symptoms that Ms. Lees experiences may further improve. He agreed with the recommendation for regular exercise including stretching and appropriate conditioning as applied in aquafit exercise. He did not believe that regular massage therapy would be of benefit on a long term basis.

ADDITIONAL EVIDENCE

A. Plaintiff's Witnesses

[47] In support of her case, the plaintiff called her parents, Mr. and Mrs. Lees and her boyfriend's mother, Lynn Weymark. Her father recalls picking up his daughter at the accident scene. He observed that she was shaken up and appeared to be in a fair amount of pain. Both her parents testified how they continued to observe their daughter favouring her neck and back on a regular basis. Mrs. Lees testified the plaintiff used ice and hot packs and took hot baths to ease her pain. She sees her constantly shifting in her seat and standing up to stretch. She has witnessed a decline in her energy level and observed that she has trouble carrying things.

[48] The plaintiff's parents confirmed that she stopped snowboarding and mountain biking after the accident, and that she learned to swim in an effort to alleviate her symptoms. They described how their daughter has generally become less sociable and more subdued.

[49] Mrs. Lees testified she would assist the plaintiff in carrying items such as her course books. She would also massage the plaintiff's back from two times a day to two times a week in an effort to alleviate her pain. In the six months following the accident, Mrs. Lees often drove the plaintiff to where she needed to go due to the plaintiff's fear of driving herself.

[50] Since the accident, when she was living at home, the plaintiff is asked to do fewer chores since the accident. Mrs. Lees now assists the plaintiff with her laundry and cleans the bathtub on her behalf.

[51] Ms. Weymark described family activities that they have invited the plaintiff to since the accident. The plaintiff has declined biking trips, skiing lessons and has already declined to attend a canoe trip the Weymarks planned for the upcoming summer.

[52] I note that the plaintiff did not call any contemporaries as witnesses. She did not call anyone she worked with at American Eagle. She did not call any friends with whom she socialized or played sports. While I was advised that the plaintiff's boyfriend, due to work commitments in Tumbler Ridge, could not testify at the trial, it was not suggested that he could not have testified by deposition or some other means.

[53] The plaintiff did call Ms. Shelley Welch who was on her field hockey team, the Vipers, at the time of the accident. Her evidence was limited to testimony that other than coming to one practice, Ms. Lees had not played field hockey for the Vipers since the accident. She, however, had no social relationship with Ms. Lees and did not testify concerning the impact of the injuries on her lifestyle.

B. Physiotherapy Records

[54] The defendants put to the plaintiff in cross-examination certain excerpts from the clinical records of the physiotherapists who had treated her. Plaintiff's counsel agreed that the excerpts were admissible as business records pursuant to s. 42 of the *Evidence Act,* R.S.B.C. 1996, c. 124.

[55] The plaintiff testified that as a result of the accident she gave up field hockey, a sport that she loved and excelled at. She said that following the accident the only time she had attempted to play field hockey was when she attended a practise approximately one month following the accident.

[56] The clinical records contain entries which contradict the plaintiff's evidence. The plaintiff commenced attending West Vancouver Physiotherapy on October 1, 2008. She attended seven times in October and then returned on November 26, 2008. The clinical notes indicate that on November 26 the plaintiff told the physiotherapist "intermittent neck sore with field hockey and mid back sore with bending over – played two games".

[57] Her next visit was on December 1, 2008. On that occasion the physiotherapist's notes report that she stated "shooting pain playing field hockey Saturday".

[58] On January 20, 2009, she told the physiotherapist "Sore after field hockey. Good during, however".

[59] On February 10, 2009, she is reported to have said "worse lately with field hockey".

[60] Ms. Lees denied making any of those statements. She insisted that the only time she attempted to play field hockey subsequent to the accident was when she attended at a practice approximately one month post-accident.

[61] The plaintiff testified that subsequent to the accident she had attempted running on a few occasions, but the longest she had run was 15 minutes. She denied she had ever run as far as 5 or 10 kilometres.

[62] On July 16, 2009, the notes of the physiotherapist indicated “Ran 10k Tuesday”. On September 9, 2009, the physiotherapist’s notes state “Light run 5k”.

[63] Again, as in relation to the field hockey notes, Ms. Lees denies that she had run those distances and testified that the physiotherapist’s notes are in error.

[64] The plaintiff gave evidence that she had difficulty studying. She denied that she would study 12-14 hours per day or ever study all night. Her evidence on these points was again contradicted by the physiotherapist’s clinical notes. On October 5, 2009, the clinical notes state “studying 12-14 hours daily”. The notes for December 9, 2009, state ‘had 3.5 all nighters last wk.” Again Ms. Lees says the notes are in error.

DISCUSSION

[65] This case is dependent on the plaintiff’s subjective reports of pain and how her injuries have impacted her life. In *Price v. Kostryba*, [1982] 70 B.C.L.R. 397 (S.C.), Chief Justice McEachern cautioned that courts must proceed with care in dealing with cases where there is minimal objective evidence of continuing injury. He said at 399:

> In *Butler v. Blaylock*, decided 7th October 1981, Vancouver No. B781505 (unreported), I referred to counsel’s argument that a defendant is often at the mercy of a plaintiff in actions for damages for personal injuries because complaints of pain cannot easily be disproved. I then said:
>
> > I am not stating any new principle when I say that the court should be exceedingly careful when there is little or no objective evidence of continuing injury and when complaints of pain persist for long periods extending beyond the normal or usual recovery.
> >
> > An injured person is entitled to be fully and properly compensated for any injury or disability caused by a wrongdoer. But no one can expect his fellow citizen or citizens to compensate him in the absence of convincing evidence –

> which could be just his own evidence if the surrounding circumstances are consistent – that his complaints of pain are true reflections of a continuing injury.

[66] In this case, the plaintiff's injuries are largely subjective in nature. While the defendants acknowledge and I find that the plaintiff did suffer soft tissue injuries, the difficult question is whether the extent and duration of those injuries have been as significant and serious as the plaintiff alleges in her evidence.

[67] There is little controversy in the medical reports themselves. The medical professionals are in general agreement that the plaintiff sustained musculoligamentous soft tissue injuries at the neck and thoracic spine. They also are in agreement that she remains symptomatic. I agree with Dr. Shuckett that while there might be some opportunity for improvement or amelioration of the symptoms, she is probably going to be left with her current symptoms for the long term.

[68] The more difficult question is the impact that these injuries have had on the plaintiff's life. The plaintiff suggests that the injuries have had a significant impact on her life. She says she has been forced to give up sports and is no longer capable of holding down a part-time job. The plaintiff does acknowledge that her long time goal of being a university professor remains intact but submits that her injuries will in the future likely impact on her ability to fulfill the functions of that employment.

[69] The excerpts in the clinical records suggest that the plaintiff's limitations are not as great as she claims. The records clearly put in question certain of the plaintiff's evidence and raise issues as to her credibility. The records indicate that the plaintiff has misled the Court with respect to playing field hockey subsequent to the accident, running subsequent to the accident, and the impact of the accident on her study habits.

[70] In *Edmondson v. Payer*, 2011 BCSC 118 [*Edmondson*], N. Smith J., at paras. 26-38, discussed the use that could be made of clinical records. He noted that statements made by a party, including a description of their symptoms, are evidence of the fact that the plaintiff made the recorded statements on those occasions.

When the recorded statements are inconsistent with the plaintiff's evidence at trial, they may be used in cross-examination to impeach the plaintiff's credibility. Unlike prior inconsistent statements of an ordinary witness, prior inconsistent statements of a party may also be treated as admissions and accepted for the truth of their content.

[71] In *Edmondson*, N. Smith J. pointed out certain concerns in relation to clinical records including the fact that they are usually not intended to be a verbatim record of everything that was said and the records may only be a brief summary or paraphrase. Those concerns are real and can, in many cases, diminish the importance of a specific clinical note.

[72] The plaintiff submits that the physiotherapy records with respect to field hockey, running and studying are unreliable and inaccurate. In this regard, they refer to the evidence of the plaintiff, her parents, Ms. Weymark and Ms. Welch. They note that the defendant did not call any of the physiotherapists to confirm the accuracy of the records, or to confirm whether they were written contemporaneously or at the end of their shift after having seen a number of other clients.

[73] In the course of the trial the plaintiff admitted that the physiotherapy notes were business records and admissible pursuant to s. 42 of the *Evidence Act*. By definition, that means the document was made in the usual and ordinary course of business and it was in the usual and ordinary course of the business to record in that document a statement of the fact at the time it occurred or within a reasonable time thereafter. The notes record information that would be of importance to a physiotherapist in formulating an appropriate treatment plan. It is not the type of note which one would expect would be wrongfully recorded.

[74] While I acknowledge the comments of N. Smith J. in *Edmundson* that clinical records must be viewed with caution, in this case there are eight separate notes that are in issue. With regard to each note, the plaintiff claims the physiotherapist is wrong and she never gave the information in question because the information sets

out activities in which she did not participate and indeed could not participate because of her injuries.

[75] On the evidence before me I cannot disregard the physiotherapist's notes. While it is possible that a clinical note may be in error it is highly improbable that there would be eight such errors. There is also little evidence that contradicts the notes. As noted earlier, other than Ms. Welch, the plaintiff did not call any of her contemporaries as witnesses and Ms. Welsh's evidence was limited to her experience on one field hockey team.

[76] I find that the plaintiff made the statements to the physiotherapist that are recorded in the clinical notes. Those statements raise significant questions concerning the plaintiff's credibility. Her evidence must be viewed with great caution.

[77] The statements made to the physiotherapist lead to the conclusion that the impact on the plaintiff's life of the injuries she suffered in the accident is not as great as she now alleges. That said, I do accept that the plaintiff was injured in the accident. The various notes concerning playing field hockey reflect that fact. Each of the entries indicates that she suffered discomfort while playing field hockey.

[78] The running references are more problematical. The significance of the plaintiff going for a 5 or 10 km run is not confined to her credibility. It also gives insight into her recovery and the impact of the injuries. It would be a rare occasion for an individual to spontaneously run 10 km. Each year in Vancouver thousands train for several months to learn to run such a distance. The plaintiff's reports of significant ongoing pain and disability are inconsistent with such an accomplishment.

[79] Similarly, throughout her testimony the plaintiff stated she had difficulty studying. She denied studying 12 to 14 hours per day or studying all night. Again, her evidence is contradicted by her reports to the physiotherapist.

[80] I note that the physiotherapist's notes concerning running and studying occur within 10 to 14 months of the date of the accident.

[81] I cannot find on the evidence that the subsequent accidents aggravated the plaintiff's injuries. The at-fault accident occurred on May 9, 2009. The clinical notes concerning the plaintiff's 10 and 5 km runs were on July 16 and September 9, 2009. If the plaintiff had suffered any significant injuries in the May 9, 2009 accident, it is most unlikely she would have been able to embark on such runs so soon thereafter.

[82] Similarly, there is no basis to conclude that the plaintiff suffered injury in either the December 12, 2009, or April 2, 2011 incidents. In both those cases, the plaintiff was not at fault. If she had been injured in those accidents, there would be no reason to claim otherwise.

[83] I find the plaintiff was injured in the accident. As a result of the accident, she suffered soft tissue injuries which continued to cause her some difficulties. The injuries, however, did not impact on her life to the extent that she has claimed.

DAMAGES ASSESSMENT

A. Non-pecuniary Damages

[84] The plaintiff seeks $100,000 for non-pecuniary damages. She submits she has a permanent painful and disabling condition that has and will continue to affect her daily life and has removed her from her athletic passions. She relies on the following cases: *Clark v. Kouba*, 2012 BCSC 1607 ($85,000), *Crane v. Lee*, 2011 BCSC 898 ($100,000); *Kilian v. Valentin*, 2012 BCSC 1434 ($75,000); *Klein v. Dowhy*, 2007 BCSC 1151 ($75,000); and *MacKenzie v. Rogalasky*, 2011 BCSC 54 ($100,000).

[85] The defendants submit an award between $35,000 to $40,000 would be appropriate for the plaintiff's non-pecuniary damages. They rely on *Sharpe v. Tidley*, 2009 BCSC 948; *Sandher v. Hogg*, 2010 BCSC 1152 and *Rozendaal v. Landingin*, 2013 BCSC 24.

[86] In each of the cases cited by the defendants, the court ordered $40,000 for non-pecuniary damages.

[87] In *Harnett v. Leischner*, 2008 BCSC 1589, Russell J. summarized the law with respect to non-pecuniary damages at para. 80-81:

> [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, 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, 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.)).

[88] In this case the plaintiff is a relatively young woman. The injuries have caused pain and suffering and will continue to do so into the foreseeable future. While the injuries have had some impact on her life, I find it is less so than she alleges. Since the accident she has graduated from university, commenced a doctorate program and her life goal of being a university professor remains intact. There is no evidence that her relationship with her boyfriend has been significantly impacted.

[89] While the various authorities cited by the parties are of value, they do demonstrate a wide divergence of opinion in relation to injuries which have much in common. In the circumstances of this case the authorities cited by the defendant are more reflective of the plaintiff's injuries. I award the plaintiff $45,000 in non-pecuniary damages.

B. Past Wage Loss

[90] The plaintiff claims $28,754 in past wage loss. Following the accident, the plaintiff missed two weeks of work at American Eagle and returned to a reduction in shifts. Absent the accident, the plaintiff submits that her 2008 income would have been $4,000 leaving a loss of $605.

[91] The plaintiff submits she would have continued to earn $4,000 per year at American Eagle or a similar retail job during her 2009/2010 years at SFU. Her total claim for those years is $7,209 based on deducting from $8,000 the $791 she in fact earned in 2009.

[92] The plaintiff submits that in 2011 and 2012 she would have earned money as a research assistant at SFU. She testified that a research assistant's position pays $25 per hour as opposed to $8.50 at American Eagle. The plaintiff submits she would have earned approximately $12,000 per year in 2011 and 2012.

[93] The defendant submits that the past wage claim should be limited to $160 representing the two weeks' work she lost at America Eagle as a result of the accident. The defendant says there is not sufficient evidence to establish that the plaintiff's failure to work after leaving her position at American Eagle was as a result of the accident.

[94] I am in general agreement with the defendant's position. The plaintiff was able to maintain her employment at American Eagle for almost one year following the accident. She received satisfactory performance reviews. She clearly had the capacity to work but subsequent to leaving American Eagle she chose not to. In

light of all of the evidence, I cannot accept her bald assertion that she did not seek other work because she was not capable of working in the service or retail industry.

[95] The onus lies on the plaintiff to establish her loss. She called no evidence of any witness to support her claims that she was not capable of carrying out her duties at American Eagle. Her letter of resignation to American Eagle suggests that she quit because she had obtained a different job.

[96] The evidence also indicates that once the plaintiff enrolled at SFU, she devoted more and more time to her studies. This in turn would impact on her ability to work part-time. There is no evidence that she even attempted to seek such employment. I award $150 for past wage loss.

C. Loss of Future Earning Capacity

[97] The plaintiff submits that the medical evidence establishes that the plaintiff's injuries are permanent and will cause restrictions in her ability to perform in her chosen career. The plaintiff submits she has been rendered less capable of earning income as a result of her injuries and has lost the ability to take advantage of all income earning opportunities that would have been available to her had she not been injured.

[98] The plaintiff led expert evidence with regard to the salary of Canadian females working fulltime as university professors. That evidence indicated that the lump sum present value of the plaintiff's future income as a university professor, assuming that she would receive earnings commensurate with those of an average Canadian female university professor until her presumed retirement no later than age 65 would be $1,528,688. The plaintiff seeks as award of $382,172 which amount represents 75% of what she otherwise would have earned.

[99] The plaintiff led no evidence to support her claim that she would be unable to fully carry out the duties of a university professor. A functional work capacity evaluation report was directed to her ability to perform productive competitive

employment as a research assistant. No evidence was led with respect to the plaintiff's ability to work as a university professor.

[100] The defendants note there are no medical opinions or other evidence that would suggest the plaintiff cannot work as a university professor or that she can only work part-time as a university professor. They say the work capacity evaluation report is of no assistance to the court as it was in regard to a different form of employment. The defendants submit that the evidence falls far short of the requirement of providing a substantial possibility of a future event leading to an income loss. The evidence as a whole is insufficient to support the plaintiff's claim for a loss of capacity and should be rejected.

[101] The principles that govern awards for loss of earning capacity were summarized by Walker J. in *Ruscheinski v. Biln*, 2011 BCSC 1263 at pars. 114-119:

> [114] For an award under this head of damages to be made, Ms. Ruscheinski must demonstrate a "substantial possibility that lost capacity will result in pecuniary loss": *Perren v. Lalari*, 2010 BCCA 140, at paras. 4, 7, 21, 31, and 32, 137 D.L.R. (4th) 729; *Steward v. Berezan*, 2007 BCCA 150 at para. 17, 64 B.C.L.R. (4th) 152. A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation: *Perren* at para. 30.
>
> [115] If the plaintiff discharges the burden of proof, then he or she may prove quantification of that loss by an earnings approach or by a capital asset approach: *Perren* at para. 32; *Chang v. Feng*, 2008 BCSC 49 at para. 76, 55 C.C.L.T. (3d) 203.
>
> [116] Garson J.A. wrote in *Perren* at para. 11 that where the loss cannot be measured in a pecuniary way, "the correct approach [is] to consider the factors described by Finch J., as he then was, in *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353. In *Brown*, he said at para. 8:
>
> > The means by which the value of the lost, or impaired, asset is to be assessed varies of course from case to case. Some of the considerations to take into account in making that assessment include whether:
> >
> > 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.

[117] In para. 12 of *Perren*, Garson J.A. said:

> These cases, *Steenblok*, *Brown*, and *Kwei*, illustrate the two (both correct) approaches to the assessment of future loss of earning capacity. One is what was later called by Finch J.A. in *Pallos* the 'real possibility' approach. Such an approach may be appropriate where a demonstrated pecuniary loss is quantifiable in a measurable way; however, even where the loss is assessable in a measurable way (as it was in *Steenblok*), it remains a loss of capacity that is being compensated. The other approach is more appropriate where the loss, through proven, is not measurable in a pecuniary way. An obvious example of the *Brown* approach is a young person whose career path is uncertain. In my view, the cases that follow do not alter these basic propositions I have mentioned. Nor do I consider that these cases illustrate an inconsistency in the jurisprudence on the question of proof of future loss of earning capacity.

[118] A useful summary of the principles governing the determination and measure of an entitlement of an award for loss of income earning capacity is set out at para. 32 in *Perren*:

> A plaintiff must <u>always</u> prove, as was noted by Donald J.A. in *Steward*, by Bauman J. in *Chang*, and by Tysoe J.A. in *Romanchych*, that there is a real and substantial possibility of a future event leading to an income loss. If the plaintiff discharges that burden of proof, then depending upon the facts of the case, the plaintiff may prove the quantification of that loss of earning capacity, either on an earnings approach, as in *Steenblok*, or a capital asset approach, as in *Brown*. The former approach will be more useful when the loss is more easily measurable, as it was in *Steenblok*. The latter approach will be more useful when the loss is not as easily measurable, as in *Pallos* and *Romanchych*. A plaintiff may indeed be able to prove that there is a substantial possibility of a future loss of income despite having returned to his or her employment. That was the case in both *Pallos* and *Parypa*. But, as Donald J.A. said in *Steward*, an inability to perform an occupation that is not a realistic alternative occupation is not proof of a future loss.
>
> [Emphasis in original]

[119] In *Sinnott v. Boggs*, 2007 BCCA 267, 69 B.C.L.R. (4th) 276, Mackenzie J.A. made these remarks at paras. 16-17 in a case involving a 16-year-old female who was awarded $30,000:

> [16] In the case at bar, Ms. Sinnott is a young person who has not yet established a career and has no settled pattern of

> employment. In such circumstances, quantifying a loss is more at large. Southin J.A. commented on this distinction in *Stafford*
>
> > [42] That there can be a case in which a plaintiff is so established in a profession that there is no reasonable possibility of his pursuing, whether by choice or necessity, a different one is obvious. For instance, on the one hand, if a judge of this Court were to be permanently injured to the extent that he or she could not longer do physical, in contradistinction to mental, labour, he or she would have no claim for impairment of earning capacity because the trier of fact gazing into the crystal ball would not see any possibility that the judge would ever abandon the law for physical labour, assuming that immediately before the accident the judge was capable of physical labour. But, on the other hand, if a plaintiff is young and has no trade or profession, the trier of fact gazing into the crystal ball might well consider whether the impairment of physical ability will so limit his future employment opportunities that he will suffer a loss. See e.g. *Earnshaw v. Despins* (1990), 45 B.C.L.R. (2d) 380 (C.A.).
> >
> > [43] There is, if I may use the word, a continuum from obviously no impairment of earning capacity from a permanent physical impairment, no matter how serious the impairment, to a very large potential loss which must be based on all the circumstances of the particular plaintiff.
>
> [17] I agree with those observations. Ms. Sinnott is in a category of those who are young and without a settled line of work. The trial judge has found that Ms. Sinnott faces limitations on her ability to work competitively in jobs that were previously open to her. In my view, that finding is an adequate foundation for the trial judge's award.

[102] In this case, the plaintiff's lifelong goal has been to be a university professor. As noted by the defendants, there is no evidence that her ability to obtain such employment has been compromised by the accident. There is, however, evidence in the workplace evaluation report that there may be other jobs the plaintiff will no longer be able to carry out, if in fact she does not reach her ultimate goal as a university professor.

[103] While the plaintiff may desire to teach history for a living, there is no guarantee that she will be successful in that regard. Not everyone who seeks such a career succeeds. Given the circumstances, I find there is a substantial possibility that the plaintiff's lost capacity might result in pecuniary loss. In the circumstances of this case the loss cannot be calculated on a loss of earnings approach. I find that as a result of the injuries the plaintiff will be limited from opportunities that might otherwise have been available to her. In addition, she may need accommodations from an employer which would make her less employable.

[104] It is not possible to determine exactly what path the plaintiff's life will take. This award cannot be made with any mathematical precision. I would award $50,000 for loss of future earning capacity.

D. Future Care

[105] The plaintiff seeks a loss of future care award in the amount of $43,776. That sum is calculated based on the recommendations in the work capacity evaluation report in relation to rehabilitation and ergonomic modifications and ongoing physio/massage therapy. The latter is based on the recommendations of Drs. Jansen and Shuckett.

[106] The evidence does not justify the costs of a kinesiologist or a fitness membership. The plaintiff's accident happened some five years ago. On the evidence before me, I cannot find that the costs of a fitness membership or a kinesiologist should be borne by the defendants.

[107] The ergonomic modifications total $467. I would make that award.

[108] With regard to physiotherapy and massage therapy, the plaintiff seeks $70 per week for the first two years followed by an amount of $70 per month thereafter. The present value of the proposed award is $32,319. There is some evidence that occasional massage therapy is of assistance to the plaintiff. I cannot find on the evidence, however, that it is necessary in the amount sought. I would award $10,000 for ongoing massage therapy.

E. Special Damages

[109] The plaintiff claims special damages of $10,217.31. Approximately $700 of the expense claim for prescription medications were not borne by the plaintiff, but were in fact covered through her father's extended benefits plan. Mr. Lees testified that he is a member of a union and that his entitlement to benefits is part of the collective bargaining agreement. The plaintiff is covered under the plan as his dependent.

[110] The defendants submit that the plaintiff likely made a substantial recovery within a year or so of the accident and that any expenses beyond that timeframe cannot be their responsibility. Further, they submit that on the evidence the physiotherapy and massage therapy treatments after the first eight months or so were of little assistance.

[111] I find the plaintiff is entitled to recover the special damages amounts claimed including the full costs of the prescription medication. Such sums are recoverable pursuant to the private insurance exception to double recovery: *Cunningham v. Wheeler*, [1994] 1 S.C.R. 359; *Napoleone v. Sharma*, 2008 BCSC 1746. The massage and physiotherapy treatments were recommended by the plaintiff's treating physician. The massage therapy provides short term relief to the plaintiff. I find those amounts are all recoverable.

F. In Trust Claim

[112] The plaintiff seeks an in trust claim with regard to services provided to the plaintiff by her parents. The services included driving the plaintiff for six months after the accident, giving the plaintiff massages, assisting with the plaintiff's laundry, scrubbing her bathtub, carrying her books and occasionally assisting with grocery shopping.

[113] In *Ellis v. Star*, 2008 BCCA 164, the Court of Appeal found that such awards must be sufficiently extensive or related to the injuries to justify such an award. On the facts of this case, I find that such an award is not justified. As previously noted,

the impact of the injuries on the plaintiff's life is not as severe as she has suggested. Although I am certain her parents did provide her with assistance from time to time, that assistance was not sufficiently extensive as to merit an in trust award.

[114] In summary therefore, I award the following sums:

Non-pecuniary damages	$45,000.00
Past wage loss	150.00
Loss of future earning capacity	50,000.00
Future care	10,467.00
Special damages	10,217.31
TOTAL:	**$115,834.31**

[115] Unless there are matters of which I am not aware, the plaintiff is entitled to her costs. If either party seeks a different determination on costs, they should file written submissions within 21 days of the date of these reasons.

"R.B.T. Goepel J."

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The Honourable Mr. Justice Richard B.T. Goepel