IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Bates v. Buchanan,*
2023 BCSC 687

Date: 20230426
Docket: M192885
Registry: Vancouver

Between:

Elya Undina Bates

Plaintiff

And

Jesse Andrew Buchanan

Defendant

Before: The Honourable Justice Shergill

Reasons for Judgment

Counsel for Plaintiff:	N.J. Hartney K. McStravick
Counsel for Defendant:	C.G. Kelly
Place and Dates of Trial:	Vancouver, B.C. September 26-29, 2022 October 3-6, 2022
Place and Date of Judgment:	Vancouver, B.C. April 26, 2023

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I. OVERVIEW

[1] The plaintiff, Elya Bates, claims damages for personal injuries sustained in a motor vehicle collision which occurred on April 16, 2018, in Langley, British Columbia (the “MVC” or the “Collision”). Liability is denied.

[2] The defendant, Jesse Buchanan, denies liability. Yet he agrees that the plaintiff was injured in the Collision, and as a result, she has suffered past loss of earning capacity and special damages.

[3] The quantum of past income loss and special damages has been agreed to by the parties, subject to the liability determination by the Court. However, the parties have not been able to agree on the quantum for non-pecuniary damages, future loss of earning capacity, and costs of future care.

II. FACTUAL BACKGROUND

[4] The parties entered an Agreed Statement of Facts (“ASF”) into evidence. Where relevant, I have referred to specific facts from the ASF in the body of these Reasons.

A. The Plaintiff

[5] Ms. Bates is a 37-year-old lash and brow bar technician (“esthetician”) who resides in Mission, B.C. She is in a long-term relationship with Jeffrey Davis, her partner of over three years. Ms. Bates has a six-year-old child, C.,[1] from a previous relationship with Todd Leonard.

[6] Ms. Bates was born in Victoria, B.C., in 1985. She lived in various provinces as a child, ultimately landing in Winnipeg, Manitoba, where she graduated from high school in 2003.

[7] Following high school, Ms. Bates enrolled in the nursing program at the University of Manitoba on a scholarship. Ms. Bates found it difficult to manage

[1] The child’s name has been anonymized to protect her privacy.

working and attending school at the same time, and eventually dropped out of the nursing program. Not long after, she commenced a romantic relationship which had devastating personal consequences. Ms. Bates was sex trafficked and sent to work in Surrey, B.C. She endured her tragic situation for 5 years, before finally escaping.

[8] Once she landed back on her feet, Ms. Bates began to make career plans so she could turn her life around. She took several courses at Vancouver Community College, before deciding to become a care aide. Ms. Bates successfully completed the six-month program, and obtained a care aide certificate from Drake Medox College in April 2012.

[9] Around August 2012, Ms. Bates commenced employment at Czorny Alzheimer Centre ("Czorny") as a care aide through the Fraser Health Authority ("FHA"). Ms. Bates found the work to be physically demanding, as she was dealing primarily with patients with Alzheimer and dementia. She testified that she continued to work at this job until January 2013, when she suffered a right shoulder injury in a motor vehicle collision (the "2013 Collision").

[10] It was Ms. Bates' evidence that she was off work for about two to three months following the 2013 Collision, after which the right shoulder injury fully resolved. Under cross-examination, Ms. Bates agreed that she received employment insurance ("EI") benefits for about three months, starting in June 2013. Though she could not confirm whether the EI benefits were for the 2013 Collision, the preponderance of probability is that they were for the 2013 Collision, which I find occurred in June 2013.

[11] Ms. Bates returned to work around September 2013. At this time, she was employed at Langley Memorial Hospital as a health care assistant. About one year later, the plaintiff transferred to Mission Memorial Hospital, where she worked in a residential care home ("TRIM") as a nursing assistant. Ms. Bates' duties included working as a porter. She continued to be gainfully employed in this capacity until late 2016.

[12] In August 2016, Ms. Bates was kicked in the stomach by a patient while working at TRIM. She was pregnant at the time with her first child. She experienced bruising to her abdomen, as well as anxiety surrounding the event. Ms. Bates went on medical leave in either September or October, 2016. She gave birth to C. in December of the same year.

[13] Ms. Bates was on maternity leave for about one year. She returned to work in December 2017, as a porter at Langley Memorial Hospital.

[14] The subject Collision occurred in April 2018.

B. The Collision

[15] In the early morning hours of April 16, 2018, Ms. Bates was on her way to work, with a plan to first drop her daughter off at Mr. Leonard's house. C., who was one-and-a-half years old at the time, was seated in the back seat.

[16] Ms. Bates was driving northbound on 200th Street in Langley. She was operating her 2014 Ford Escape vehicle.

[17] Around the same time, the defendant, Jesse Buchanan, was heading home from his girlfriend's house. Mr. Buchanan was 17 years old and in grade 11. His plan that morning was to change his clothes, and then go to school. Mr. Buchanan was also heading northbound on 200th Street. He was driving his 2006 Infiniti G35.

[18] There are two lanes in each direction of 200th Street in the vicinity of the accident scene. Ms. Bates was driving in the center or left most lane when she passed the intersection of 40th Avenue. Mr. Buchanan was driving in the right or curb lane.

[19] The two vehicles collided just before the intersection of 42nd Avenue, when Ms. Bates made a lane change into Mr. Buchanan's lane of travel.

[20] Emergency vehicles attended the scene of the Collision.

III. LIABILITY

[21] Each party argues that the other party is fully liable for the Collision. In the alternative, the plaintiff seeks liability apportionment of 90% against the defendant, and 10% against her. The defendant's alternative position is that I should find the plaintiff 67-75% liable, with him being found either 25-37% responsible.

[22] Ms. Bates argues that the defendant's excessive rate of speed was the sole cause of the Collision. The defendant does not deny that he was speeding, but says that his speed was not the cause of the Collision. Rather, he submits that the Collision occurred because the plaintiff made an unsafe lane change directly into his line of travel.

[23] For the reasons that follow, I find that liability should be apportioned equally between the parties.

A. Evidence

[24] In addition to the parties, two fact witnesses testified on the issue of liability: Heather Anderson, who was an eye witness to some of the events; and Constable Rasmussen, who spoke to the parties immediately following the Collision, and took photographs of the scene.

[25] Ms. Bates provided the following evidence, regarding the circumstances of the Collision:

a) When she left her home on the morning of April 16, 2018, it was dark outside and raining. By the time she turned onto 200th Street, it was around 6:15 a.m., and just starting to get light out. Her headlights were on.

b) Ms. Bates estimated that she was driving between 50 to 55 kilometers per hour ("kph"), and that the posted speed limit was either 50 or 60 kph. Under cross-examination, Ms. Bates admitted that she could have been driving slightly above 55 kph immediately prior to the Collision.

c) Ms. Bates was travelling in the left-hand lane of 200th Street, with the intention to make a right turn off 200th Street at 56th Avenue. The road was flat and straight.

d) After passing the intersection of 40th Avenue, Ms. Bates decided to move her car into the right lane. She did not see anyone in the right-hand lane. She turned on her signal, looked at her mirrors, and checked her blind spots. She determined that it was safe to change lanes. She moved her vehicle into the right lane, and was straightening it out when she got hit from behind by the defendant. Under cross-examination Ms. Bates agreed that she told the police that she turned her right turn indicator on after she had checked her mirrors and completed the shoulder check. In other words, she merged into the curb lane immediately after putting on her turn signal. Ms. Bates explained that she was nervous when she gave this statement to the police, and insisted that her evidence at trial was the correct version of events. In regards to this specific issue, I have preferred the statement she made to Constable Rasmussen as being a more reliable and accurate reflection of the sequence of events.

e) The Collision was sudden and unexpected. Her car made a 360 degree turn with the force of impact, hitting a curb and a pole. Ms. Bates' car came to its final resting spot facing in the same direction as she was originally travelling.

[26] Ms. Bates' car sustained damage to the rear bumper, which she testified was caused by the impact with the defendant's vehicle. In addition, it sustained front end damage due to the impact with the pole. The damage was significant and irreparable, and her car was later written off. Under cross-examination, she was asked about photographs depicting damage to the right rear of her car and the deflated tires on the right side. She stated she believed that the deflated rear tire was caused by her hitting the curb rather than direct impact with the defendant's car.

[27] The plaintiff's evidence regarding the circumstances of the Collision was largely unshaken in cross-examination. Though there were some inconsistencies, these were mostly minor, with the exception of her evidence regarding when she turned on her right turn indicator. As to this latter issue, I find that the inconsistency is more reflective of the human tendency to recast events in a manner favourable to oneself, rather than an outright attempt to mislead the court.

[28] Mr. Buchanan provided the following evidence:

a) The Collision happened on 200th Street, just before the intersection of 42nd Avenue, while he was travelling in the curb lane. Mr. Buchanan had turned onto 200th Street a few minutes earlier at 36A Avenue, with plans to take a right turn at 48th Avenue.

b) Mr. Buchanan did not recall his speed, though he remembers slowing down when he entered an area called Brookswood, which starts around 40th Avenue. Under cross-examination he stated that he did not have an actual memory of slowing down after 40th Avenue. He agreed that the road conditions were poor and that it was "pouring rain".

c) His automatic headlights were on. As he approached Ms. Bates' vehicle, he noticed that it was travelling in the left-hand lane. Mr. Buchanan does not recall how fast Ms. Bates was travelling, though the plaintiff was moving slower than him. When asked under cross-examination, he could not confirm if Ms. Bates' brake lights were on as he was approaching.

d) Mr. Buchanan stated he was about one car length behind Ms. Bates, when she turned on her signal and immediately (within one to two seconds) merged into his lane. He slammed on his brakes and held his horn down. He was unable to avoid the Collision, and his car collided into the right rear of the plaintiff's car. Under cross-examination, he agreed that his brakes locked up and his vehicle hydroplaned before striking the back of Ms. Bates' vehicle.

e) Mr. Buchanan's car sustained damage to the front end (left side), as a result of the Collision with Ms. Bates' vehicle, as depicted in the photographs. The damage was significant and the vehicle was a write off.

f) Following the Collision, Mr. Buchanan provided a statement to a police officer. He admits that he told the police officer that he was driving at 65 to 70 kph when the Collision occurred, though he denies that this was his actual speed. Under cross-examination, Mr. Buchanan explained that he was nervous when speaking to the police officer.

g) Mr. Buchanan received a violation ticket (the "Violation Ticket") under s. 144(1)(c) of the *Motor Vehicle Act*, R.S.B.C. 1996, c. 318 [*Act*] which he eventually paid. Under cross-examination he agreed that he knew he was entitled to dispute the Violation Ticket. A document in the police file indicates that a court date was set for a hearing date to dispute the Violation Ticket. However, Mr. Buchanan had no memory of attending the hearing.

[29] I found Mr. Buchanan to be a generally credible witness, though some of his testimony was unreliable, particularly in relation to the issue of his speed of travel and how long Ms. Bates had her right turn indicator on. These discrepancies in his evidence are reflective of the frailties in memory caused by the passage of time, and the aforementioned human tendency to recast matters in a favourable light. I do not consider them to be indicative of any attempt on his part to mislead the Court.

[30] I turn now to Ms. Anderson's evidence. Ms. Anderson testified that on the day of the Collision, she left her sister's home in Langley, at approximately 6:00 A.M. It was dark and raining, and visibility was poor. Ms. Anderson was heading westbound on 40th Avenue when she arrived at the intersection of 200th Street. She stopped at the red light, and waited to make a right turn onto 200th Street. She testified that as she looked to her left, she saw a dark coloured car "flying" past her. It was moving so fast that she yelled an expletive out loud. Ms. Anderson estimated that the car was driving at least 85 kph, though she believed it was closer to 90 kph. In cross-

examination she admitted that she only had sight of the car for one to two seconds, due to its speed. She does not know if the car slowed down at some point after it went past her.

[31] Ms. Anderson then proceeded to make her right turn onto 200th Street, at which point she observed tail lights up ahead that were not moving in a regular fashion. As she approached the area, she saw that there had been a car accident.

[32] Ms. Anderson spoke to the defendant at the scene of the Collision. She testified that he told her he was travelling 70 to 80 kph. Mr. Buchanan had no memory of what he said to Ms. Anderson, though he did not dispute that he may have said this to her. Ms. Anderson also spoke to Ms. Bates, who told her she did not see the defendant's car prior to the Collision.

[33] I generally found Ms. Anderson to be a credible witness, though her testimony was not reliable in terms of her estimate of Mr. Buchanan's speed when his car passed her. This issue, as well as any concerns about the reliability of the parties' evidence regarding liability, are addressed more fully in the next section.

[34] Constable Rasmussen is a general duty officer with the Langley RCMP. He arrived at the scene of the Collision just after 7:00 A.M. Fire crews and ambulance were already there. Constable Rasmussen confirmed that the posted speed limit in the area is 50 kph. He stated that he interviewed Mr. Buchanan following the Collision. Mr. Buchanan told him that he was travelling at approximately 65 to 70 kph when the Collision occurred. He issued a violation ticket to Mr. Buchanan for driving at a high rate of speed relative to the road conditions. He based this in part on Mr. Buchanan's own admission of his speed.

[35] Constable Rasmussen interviewed Ms. Bates at the hospital. She told him she was travelling between 50 to 55 kph prior to the Collision. She also told him that she turned her right turn indicator on after she had checked her mirrors and completed her shoulder check. According to Constable Rasmussen, Ms. Bates did

not appear confused when she made this statement. I found Constable Rasmussen to be a credible and reliable witness.

B. Analysis

[36] The duty of care in this case is established through both the common law and statute. Under the common law, every driver owes a duty to exercise reasonable care in all the circumstances: *Salaam v. Abramovic*, 2010 BCCA 212, at para. 21. As drivers, both the plaintiff and defendant are bound by that duty.

[37] The parties also owe a duty of care under the provisions of the *Act*.

[38] Section 144 of the *Act* establishes a general duty to drive with due care and attention and with reasonable consideration for other drivers on the road. In addition, it requires a person to drive at a speed that is appropriate in the circumstances. Section 144 states:

> **144**(1) A person must not drive a motor vehicle on a highway
>
> (a) without due care and attention,
>
> (b) without reasonable consideration for other persons using the highway, or
>
> (c) at a speed that is excessive relative to the road, traffic, visibility or weather conditions.

[39] A driver who is switching lanes while driving is required to ascertain that it is safe to do so, and to signal their intent. Section 151 of the *Act* provides:

> **Driving on laned roadway**
>
> 151 A driver who is driving a vehicle on a laned roadway
>
> (a) must not drive it from one lane to another when a broken line only exists between the lanes, unless the driver has ascertained that movement can be made with safety and will in no way affect the travel of another vehicle,
>
> …
>
> (c) must not drive it from one lane to another without first signalling his or her intention to do so by hand and arm or approved mechanical device in the manner prescribed by sections 171 and 172,
>
> …

[40] A driver is also restricted from passing on the right of a vehicle, except in certain circumstances as set out in s. 158 of the *Act*:

> Passing on right
>
> **158** (1) The driver of a vehicle must not cause or permit the vehicle to overtake and pass on the right of another vehicle, except
>
> (a) when the vehicle overtaken is making a left turn or its driver has signalled his or her intention to make a left turn,
>
> (b) when on a laned roadway there is one or more than one unobstructed lane on the side of the roadway on which the driver is permitted to drive, or
>
> (c) on a one way street or a highway on which traffic is restricted to one direction of movement, where the roadway is free from obstructions and is of sufficient width for 2 or more lanes of moving vehicles.
>
> (2) Despite subsection (1), a driver of a vehicle must not cause the vehicle to overtake and pass another vehicle on the right
>
> (a) when the movement cannot be made safely, or
>
> (b) by driving the vehicle off the roadway.

[41] The language of "dominant" and "servient" driver is often used to establish who has the right of way. In *Nerval v. Khehra*, 2012 BCCA 436, Justice Harris explained it thus:

> [38] Whether a through driver is dominant turns on whether the driver's vehicle is an immediate hazard at the material time, not why it is an immediate hazard. Dominance identifies who must yield the right of way. One consequence of this analysis is that negligence on the part of a through driver does not disqualify that driver as the dominant driver. The through driver remains dominant, even though their conduct may be negligent. Indeed, the through driver's fault may be greater than the servient driver's fault. In other words, a through driver may be an immediate hazard even though that driver is speeding and given her speed would have to take sudden action to avoid the threat of a collision if the left turning driver did not yield the right of way. The correct analysis is to recognize that the through driver is breaching his or her common law and perhaps statutory obligations and to address the issue as one of apportioning fault, not to reclassify the through driver as servient based on the degree to which the through driver is in breach of her obligations.

[42] Just as negligence on the part of a through driver does not disqualify them from being the dominant driver, having the right of way does not insulate a party from liability. The duty to exercise reasonable care in the circumstances exists even

if someone has the right-of-way: *Coffey v. Sabbaghan*, 2020 BCCA 335 at paras. 26–28:

[43] In *Salaam*, Justice Groberman explained the requirement to consider the reasonableness of a party's actions:

> [21] In the end, a court must determine whether, and to what extent, each of the players in an accident met their common law duties of care to other users of the road. In making that determination, a court will be informed by the rules of the road, but those rules do not eliminate the need to consider the reasonableness of the actions of the parties. This is both because the rules of the road cannot comprehensively cover all possible scenarios, and because users of the road are expected to exercise reasonable care, even when others have failed to respect their right of way. …

[44] In this case, both parties submit that the other was completely or primarily at fault for the Collision.

[45] To succeed against the defendant in negligence, the plaintiff must establish that: (1) the defendant owed the plaintiff a duty of care; (2) the defendant's actions breached the requisite standard of care; (3) but for the defendant's breach of the standard of care, the collision would not have occurred; and (4) the collision as it occurred was a reasonably foreseeable consequence of the defendant's breach of the standard of care: *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27 at para. 3.

1. Defendant's Conduct

[46] There is no doubt that the defendant owed a duty of care to the plaintiff while operating his motor vehicle. The duty included ensuring he was driving safely having regard to other travellers on the roadway.

[47] The evidence establishes that the plaintiff was driving at least 20 kph above the posted speed limit. I rely, *inter alia*, on the following evidence in support of this conclusion: Constable Rasmussen's evidence that the posted speed limit was 50 kph; the plaintiff's statement to the police that she was driving between 50 to 55 kph; the defendant's evidence that he was driving faster than the plaintiff; the defendant's statement to the police that he was driving around 65 to 70 kph; the defendant's statement to Ms. Anderson that he was driving around 70 to 80 kph; and

Ms. Anderson's observation that the defendant appeared to be driving well beyond the speed limit when his car passed by her.

[48] I accept Mr. Buchanan's evidence that he was nervous when he spoke to the police officer. However, I do not accept that this resulted in him over-reporting his actual speed to Constable Rasmussen. Rather, it is more likely that his nervousness is reflected in the different ranges that he provided to the police versus what he told Ms. Anderson. I find that Mr. Buchanan's speed was at least 70 kph at the time of the Collision. This figure is the upper end of the range he provided Constable Rasmussen, and the lower end of the range he provided Ms. Anderson.

[49] Ms. Anderson's observation of Mr. Buchanan's vehicle just prior to the Collision, is also consistent with him driving at least 70 kph. Ms. Anderson's years of driving experience (over two decades), and her location and site of view when Mr. Buchanan drove by her, make her general observation that he was driving well in excess of 50 kph, reliable. However, given the small amount of time that she had to observe Mr. Buchanan's vehicle as it sped past her, I am not able to place much weight on Ms. Anderson's opinion that the defendant was travelling at least 85 kph.

[50] Given the posted speed limit, rain conditions, lack of daylight, poor visibility, and the fact that there were other cars on the road, I find that the defendant's speed of at least 70 kph was unreasonable in all the circumstances. Consequently, he breached the standard of care owed to the plaintiff.

[51] In addition, the evidence establishes that Mr. Buchanan contravened s. 158(2)(a) of the *Act*, by attempting to pass Ms. Bates on the right. Making such a move in dark and rainy conditions is particularly dangerous and unsafe, for precisely the reasons that occurred in this case – it created a real risk that the plaintiff would not anticipate a vehicle trying to pass her on the right when she was executing a lane change.

2. Plaintiff's conduct

[52] The plaintiff's conduct is also concerning. When Ms. Bates made the decision to move her car into the right lane, she had a duty to ensure that it was safe to do so. Section 151 of the *Act* required her to ascertain that the movement could be made safely without affecting the travel of another vehicle.

[53] The evidence leads me to conclude that Ms. Bates failed in her duty by not performing a proper check to ascertain if the movement could be made safely. I accept that Ms. Bates looked in her rear-view mirror and checked her blind spots before making the lane change. I also accept that she did not see Mr. Buchanan when she performed these checks. Yet there is no doubt that Mr. Buchanan was there to be seen. The fact that Ms. Bates did not see him, means that Ms. Bates was not as thorough in performing her mirror and shoulder checks as she should have been.

[54] However, I do not agree with the defendant that Ms. Bates did not wait for enough time to pass between turning on her right turn signal, and proceeding with the lane change. Mr. Buchanan testified that Ms. Bates turned on her right-hand signal only one to two seconds before moving into his lane. This evidence is inconsistent with the circumstances of the Collision, as described by Mr. Buchanan. For example, Mr. Buchanan testified that he was travelling faster than the plaintiff, and that Ms. Bates was about one car length in front of him when he saw her put on her turn signal. He also agreed that his brakes locked up and his car hydro-planed before striking the rear of the plaintiff's vehicle. Given how fast he was travelling, and the location of the damage to Ms. Bates' car, I find that she was likely several car-lengths in front of Mr. Buchanan when Ms. Bates started her lane change. This would have provided sufficient time for Mr. Buchanan to take steps to avoid the Collision, had he not been speeding.

[55] I also reject the notion that Ms. Bates was driving at an unsafe rate of speed. First, a variation of 5 kph above or below the posted speed limit is not unreasonable. Indeed, it would be virtually impossible for a driver to consistently maintain driving

exactly at the speed limit. Second, even in rainy conditions, a travelling speed of 50 to 55 kph is not unreasonable, given the straight nature of the road and posted speed limit.

3. Causation

[56] I turn now to the question of factual causation – in other words, whether the Collision would have occurred, but for the defendant's negligence: *Hoang v. Dean,* 2021 BCSC 2211 at para. 123.

[57] For the following reasons, I conclude that the defendant's breach of the standard of care contributed to the Collision. I also find that the Collision was a reasonably foreseeable consequence of the defendant's careless driving.

[58] In this case, Mr. Buchanan was the through (or dominant) driver. His vehicle posed an immediate hazard to Ms. Bates' vehicle and she had a duty to take steps to ensure that she could make the lane change into his line of travel, safely. However, I find that Ms. Bates' ability to do so was compromised both by Mr. Buchanan's decision to pass her on the right, and by his excessive rate of speed, relative to the road and weather conditions. Ms. Bates' inability to see Mr. Buchanan, despite doing her mirror and shoulder checks, can partly be explained by her own negligence and partly by Mr. Buchanan's high speed of travel.

[59] It is reasonably foreseeable that a speeding vehicle will be more difficult to detect, especially when the vehicle is black, and it is dark and raining outside. This is the case even if the vehicle has its headlights on. Ms. Anderson testified that she was able to see Mr. Buchanan's black car because it passed right in front of her. Ms. Bates did not have this vantage point, as Mr. Buchanan was driving from behind her in the next lane and in the process of passing her on the right.

[60] In addition, I find that Mr. Buchanan's rate of speed contributed to his inability to stop the vehicle in time to avoid the Collision. As noted earlier, I have found on the evidence that Ms. Bates was several car lengths ahead of Mr. Buchanan when she signalled to make her lane change. Though Mr. Bates saw her turn signal, he was

unable to avoid the Collision as his brakes locked up and his car hydro-planed before striking the rear of the plaintiff's vehicle. Had the defendant been driving at a more appropriate rate of speed relative to the weather and road conditions, I find that he would have had time to take steps to avoid the Collision.

4. Apportionment of Liability

[61] Sections 1 and 4 of the *Negligence Act,* R.S.B.C. 1996, c. 333, address circumstances where a loss, damage or injury is caused by the fault of two or more persons.

> **1**(1) If by the fault of 2 or more persons damage or loss is caused to one or more of them, the liability to make good the damage or loss is in proportion to the degree to which each person was at fault.
>
> (2) Despite subsection (1), if, having regard to all the circumstances of the case, it is not possible to establish different degrees of fault, the liability must be apportioned equally.
>
> (3) Nothing in this section operates to make a person liable for damage or loss to which the person's fault has not contributed.
>
> …
>
> **4**(1) If damage or loss has been caused by the fault of 2 or more persons, the court must determine the degree to which each person was at fault.
>
> (2) Except as provided in section 5 if 2 or more persons are found at fault
>
> > (a) they are jointly and severally liable to the person suffering the damage or loss, and
> >
> > (b) as between themselves, in the absence of a contract express or implied, they are liable to contribute to and indemnify each other in the degree to which they are respectively found to have been at fault.

[62] In *Alberta Wheat Pool v. Northwest Pile*, 2000 BCCA 505 Justice Finch wrote:

> [46] Fault or blameworthiness evaluates the parties' conduct in the circumstances, and the extent or degree to which it may be said to depart from the standard of reasonable care. Fault may vary from extremely careless conduct, by which the party shows a reckless indifference or disregard for the safety of person or property, whether his own or others, down to a momentary or minor lapse of care in conduct which, nevertheless, carries with it the risk of foreseeable harm.

[63] In *Kanning v. Fettback*, 2022 BCSC 864, the plaintiff had changed lanes in front of the defendant, clipping the defendant's car tire. In rejecting the plaintiff's

argument that he was well established in his lane prior to the Collision, or that the defendant prevented him from being well established, Justice Giaschi held as follows:

> [127] As I will address more fully when I consider the plaintiff's faults, the plaintiff did not have any absolute right to merge. Pursuant to s. 151(a) of the *MVA*, he had the right to merge only if it could be done safely and would "in no way affect the travel of another vehicle". The defendant had the right to assume the plaintiff would comply with the rules of the road and not attempt to merge contrary to s. 151(a).
>
> …
>
> [134] I appreciate that the defendant says things happened quickly and he did not have time to react. However, my findings indicate that things did not happen as quickly as the defendant said. He had six seconds to react from the time he was aware the plaintiff was intending to merge until the time of the collision. More importantly, he had four seconds to react from the time the plaintiff actually moved into the left lane and created a dangerous situation. Once the dangerous situation developed, he could have slowed down or stopped and thereby have avoided the collision. He was either unaware of the developing situation, which means he was not keeping a proper lookout, or he simply failed to brake sufficiently to avoid the collision. In either case, he failed to exercise reasonable care.

[64] Justice Giaschi apportioned liability 75% to the plaintiff, and 25% to the defendant. The greater apportionment of liability on the part of the plaintiff in *Kanning*, was due to the fact that unlike Ms. Bates, Mr. Kanning had committed a number of negligent acts in addition to breaching ss. 151(a) and (c) of the *Act*. For example, Mr. Kanning was speeding, and passing on the right. In this case, it was Mr. Buchanan who was speeding and passing on the right.

[65] After having regard to all of the evidence in this case, I conclude that liability should be apportioned equally between the plaintiff and the defendant.

[66] The plaintiff's fault in this case, was creating a dangerous situation by attempting a lane change without adequately checking her mirrors to see if it was safe to do so. At all times, Mr. Buchanan was travelling in his lane of travel. It was Ms. Bates' decision to change lanes in front of him at the time that she did, which put her directly in harm's way.

[67] Mr. Buchanan's fault lies in him driving at a dangerously high rate of speed in poor weather conditions. He was at least 20 kph over the speed limit, which gave him inadequate time to respond when he saw Ms. Bates' turn on her signal to indicate that she was intending to move into his line of travel.

[68] In my view, the defendant's fault or blameworthiness is equal to the plaintiff's fault or blameworthiness. Consequently, I conclude that liability in this matter should be apportioned 50% to the defendant and 50% to the plaintiff.

IV. INJURIES

A. Plaintiff's Evidence

[69] There is no dispute that the force of the Collision was significant. It caused Ms. Bates' car to spin around 360 degrees, hit a pole, and hit a curb. Ms. Bates immediately felt tension in her back and left shoulder. She called Mr. Leonard, who drove her to Langley Memorial Hospital. She was advised to stay off work and monitor her symptoms.

[70] Over the next few days Ms. Bates began to experience increased pain in her left shoulder. The pain radiated down her arm to her wrist, down the left side of her spine into her low back, and up into her neck and side temple, causing headaches. Ms. Bates testified that she did not have pain in any of these areas prior to the Collision nor did she previously experience regular headaches.

[71] Ms. Bates was off of work for approximately one year after the Collision. During this time, she participated in various treatment modalities such as physiotherapy, chiropractic treatments, and acupuncture. She found these beneficial in helping reduce the pain from her Collision related injuries. Nevertheless, despite treatment, she continued to experience headaches, pain in her left shoulder, left side back pain in her mid and lower back, and stiffness.

[72] Ms. Bates testified that although she had not recovered, she felt compelled to return to work due to financial constraints. Ms. Bates commenced a gradual return to work program with FHA in May 2019. She completed the program in June 2019, and

commenced working at Czorny as a care aide. Ms. Bates found the long commute to work difficult but continued working.

[73] Ms. Bates experienced some swelling and pain in her right elbow in 2019 which was unrelated to the Collision. In late 2019, Ms. Bates was diagnosed with Reynaud's disease, which affected her circulatory system. Some of her symptoms included pain and discolouration in her digits (toes and fingers). Ms. Bates testified that she lost about one week of work due to her Reynaud's condition. She was prescribed medication and told to quit smoking. Ms. Bates had started smoking when she was 13 years old. She managed to quit smoking for about two years with the assistance of laser therapy, before starting smoking again around 2022. Ms. Bates testified that she currently still experiences numbness and discolouration in her digits, though the pain is less intense then previously.

[74] March 2020 was the last time that Ms. Bates worked as a care aide. In early March, just before the pandemic was declared, Ms. Bates sustained a right trapezius and forearm injury while at work (the "right arm work injury"). She received wage loss benefits from WorkSafeBC ("WCB") until about May 2020. Once her benefits were terminated, Ms. Bates decided not to return to work as a care aide, due to concerns of contracting Covid-19. Ms. Bates testified that C. suffered from febrile seizures, and Ms. Bates did not want to potentially expose C. to the virus. She agreed under cross-examination that even if the Collision had not occurred she would not have returned to work during the pandemic due to these concerns.

[75] Ms. Bates testified that her right shoulder and MVC were still impacting her ability to perform her job duties as a care aide. However, she did not tell this to WCB. She admitted under cross-examination that she only told WCB about her childcare and Covid-19 exposure concerns, stating that she regrets not telling them about her ongoing right shoulder and MVC injury pain.

[76] In August 2020, Ms. Bates moved to Mission, B.C. with C. and commenced cohabitation with Mr. Davis. Ms. Bates left the healthcare industry, and began

working as a “Beauty Technician”, focusing on artificial eyelashes. She received her formal eyelash certification in March 2021.

[77] Ms. Bates testified that despite the career change, she continues to experience pain which restricts her employment. Her left shoulder is the most problematic injury for her and it has worsened over time. She has near daily left shoulder pain under the shoulder blade, which travels down her left arm and into her neck, as well as to the left side of her back, between her chest and mid back areas. The pain is worse in the morning and at night. She described it as a constant stabbing, poking and throbbing type of pain. She does have some pain free days.

[78] Ms. Bates’ testified that her headaches have worsened over time and she has “good days and bad days”. She currently experiences headaches ranging from one to three days per week. They feel like a poking sensation in her skull/ear/temple area. The headaches affect her sleep, and are triggered by driving, strenuous housework such as vacuuming, and grocery shopping.

[79] Ms. Bates explained that her injuries are aggravated by many activities, such as lifting her daughter, washing the dishes, doing laundry, vacuuming, and bending. In cross-examination, Ms. Bates testified that while she is able to do household tasks such as vacuuming, she experiences pain while doing so. She acknowledged that she has had some improvements in energy levels, emotional stress and pain management since the Collision.

[80] Ms. Bates also testified that she has developed anxiety related to driving following the Collision, for which she takes Ativan. In addition, Ms. Bates takes various medications for pain relief such as naproxen, cyclobenzaprine, and Tylenol No. 3. She pays for her prescription medications out of pocket.

[81] Ms. Bates explained that she has not attended the gym very often in the past year, as she finds it difficult to juggle with her job and childcare. However, she continues to do at home exercises and regularly uses a TENS machine.

B. Lay Witness Evidence

[82] A number of friends and family testified on behalf of the plaintiff. I found them all to be credible. Though they were emotionally close to Ms. Bates, they each provided their testimony fairly, without embellishment, and without evidence of bias. All of the lay witness testimony was reliable, with the exception of Kim Bates, who had only a vague memory of events.

[83] Mr. Davis has been in a romantic relationship with Ms. Bates since July 2019. They began living together in the summer of 2020. Mr. Davis learned of the Collision from Ms. Bates. He described Ms. Bates as an outgoing person. He testified that Ms. Bates is a stoic individual, and tries to "mask" her pain. While she tries to live a normal life, simple activities such as going for a bike ride, or washing the dishes, appear to exacerbate the pain in her arm and shoulder. On occasion, her pain has impacted their intimacy. Mr. Davis explained that he tries to help where he can, and frequently applies topical treatments to Ms. Bates' shoulder and neck before bed. In addition, he has observed her taking medications for pain relief.

[84] Mr. Leonard works as a deck hand on tug boats. He generally works seven days on and seven days off. Mr. Leonard has known Ms. Bates for about seven years. They had an on-again/off-again relationship which lasted for several years. They remain on good terms. Mr. Leonard described Ms. Bates as being an active, happy and bubbly person prior to the Collision. Following the Collision, he found that she would complain about being in pain, easily got upset, and was often in a low mood. Ms. Bates did not want to do many physical activities following the Collision. While she was always a good mother to C., he noted that following the Collision, Ms. Bates required his assistance to take C. in and out of her crib. Mr. Leonard finds Ms. Bates to be "nervous", "paranoid", and "jumpy" when in a vehicle. She is also much more careful when strapping C. into her car seat.

[85] Amber Molena is Ms. Bates' ex-sister-in-law, and a good friend of Ms. Bates. They have known each other for about seven years. They also lived together for some time. Ms. Molena described Ms. Bates as bubbly and funny prior to the

Collision. Following the Collision, she noticed a change in her mood. She found that Ms. Bates was short tempered, and frequently “snapped” at other people. Ms. Molena testified that she has observed Ms. Bates having difficulty picking up her daughter, and moving furniture. Further, she finds that Ms. Bates is very anxious when driving. In addition to being friends, Ms. Molena is a client of Ms. Bates, and gets her eyelashes done by her. Ms. Molena has observed that Ms. Bates takes over three hours to finish her eyelashes as she needs to take small breaks in between.

[86] Kim Bates is the plaintiff’s mother. They live in separate cities, and prior to the Collision would see each other every few weeks. Their visits have decreased in frequency since the Collision. Kim Bates described the plaintiff as a “silent sufferer”. She did not consider there to have been any changes in the plaintiff’s personality following the Collision. Their primary activity together was shopping, but following the Collision she has found her daughter does not want to do much.

C. Treatment Providers

[87] Two of the plaintiff’s treating healthcare practitioners testified in the trial. Their evidence was mostly restricted to interpreting their clinical records and notes.

[88] Liliana Harvard is a physiotherapist and the owner of Oasis Mission Physiotherapy. She has treated Ms. Bates since October 5, 2021. She confirmed that she has been treating Ms. Bates with physiotherapy and acupuncture for pain in her neck, shoulder, and thoracic spine.

[89] Dr. Robin Randhawa is a chiropractor at Life Force Chiro. She began treating the plaintiff in May 2018, mainly for pain in the neck, head and mid back area. Dr. Randhawa noted the plaintiff reported being in pain, and feeling some tight muscles on palpation. Dr. Randhawa confirmed on cross-examination that Ms. Bates did not complain of left shoulder issues. In the 52 visits completed by Ms. Bates in the first 11 months following the Collision, three instances of low back pain complaints were noted by Dr. Randhawa.

D. Medical Experts

[90] Each party called a physical medicine and rehabilitation specialist (physiatrist) to testify on their behalf. There is a large degree of concordance with the expert's opinions. The primary difference lies in whether or not Ms. Bates is able to perform the duties of a healthcare aide in light of her Collision related injuries.

1. Dr. Lawrence Kei Physiatrist

[91] The plaintiff tendered an expert opinion report dated June 30, 2022, from Dr. Lawrence Kei (the "Kei Expert Report"). Dr. Kei was qualified as an expert in physical medicine and rehabilitation.

[92] Dr. Kei assessed Ms. Bates on May 30, 2022. He noted that Ms. Bates presented with symptoms of: headaches, experienced about once per week – mostly at night; left sided neck pain exacerbated by movement to the left, which also occasionally radiates down into her arm but not her hands; mid and low back pain increased on sitting and alleviated with lying down; and depressed mood with ongoing treatment for anxiety for issues "unrelated to the accident". Ms. Bates had palpation pain to the mid back.

[93] Dr. Kei diagnosed Ms. Bates with the following:

a) Post-traumatic cervical sprain-strain injury consistent with chronic whiplash and in particular injuries to the cervical intervertebral discs and facets;

b) Cervicogenic headaches;

c) Thoracic spine sprain-strain injury;

d) Left shoulder rotator cuff sprain-strain injury; and

e) Lower lumbar sprain-strain injury.

[94] Dr. Kei opined that these injuries were more likely than not caused by the Collision. He testified that the right arm work injury did not have any impact on the injuries sustained by Ms. Bates in the Collision.

[95] Dr. Kei was of the opinion that the injuries had "significantly interfered with her ability to work at the occupation as a healthcare aide at her pre-accident capacity".[2] He went on to note that Ms. Bates will not be able to return to a job that involves repetitive physical activities "as this will likely lead to increasing pain and eventual time off work".[3] Further, sustained neck and back postures would likely increase her pain.

[96] In terms of non-work activities, Dr. Kei opined that Ms. Bates could do most social activities, albeit with some pain when doing things such as playing on the trampoline with her daughter, or pushing her on the swings. He also noted that while there was no medical contraindication to participate, she would likely have pain with certain recreational activities that involve repetitive or prolonged movements.

[97] Dr. Kei provided a poor prognosis for the plaintiff to return to her pre-Collision capacity. While he believed that Ms. Bates' shoulder may improve, Dr. Kei stated that "her back and neck pain will likely remain the same".[4]

[98] On cross examination, Dr. Kei stated that his opinion about Ms. Bates' ability to return to her healthcare aide job was based in part on his examination of her, and in part on Ms. Bates' informing him that she had missed several days of work due to her Collision related injuries after her return in June 2019. The evidence in trial was that her return to work in June 2019 was successful, and the plaintiff did not miss any work after that due to her Collision related injuries.

[99] Dr. Kei was cross-examined on whether the plaintiff complained to him of left shoulder or low back pain. He explained on re-direct that while he may not have noted left should pain specifically, the shoulder was included in the reference to

[2] Kei Expert Report at p. 10.
[3] Kei Expert Report at p. 10.
[4] Kei Expert Report at p. 11.

"neck down posterior" pain in the arm area, which is why he performed testing on her left shoulder. Similarly, while he did not specifically note reports of low back pain, Ms. Bates told him that she wore a belt to help with low back pain. He performed a lumbar examination, which indicated that the plaintiff was pain free and had full range of motion.

[100] Dr. Kei maintained under cross-examination that Ms. Bates' pattern of behavior was consistent with a rotator cuff injury. However, he admitted that both tests performed by him that showed any possible rotator cuff issue were not very specific.

2. Dr. Mark Adrian Physiatrist

[101] The defendant tendered an opinion report dated May 13, 2022, from Dr. Mark Adrian (the "Adrian Expert Report"). Dr. Adrian was qualified as an expert in physical medicine and rehabilitation, with a sub-specialty is musculoskeletal conditions.

[102] Dr. Adrian assessed Ms. Bates on May 2, 2022. He noted that Ms. Bates presented with symptoms of pain in her neck, mid and upper back. The pain fluctuated depending on activity, and was triggered by activities that involved sitting, static positioning, reaching, lifting, and carrying. The neck and mid-back pain symptoms spread into her left shoulder blade region, down the arm – and at times – into the wrist. Ms. Bates denied having any pain in the low back. Ms. Bates also reported experiencing headaches on the left side of the head which flared from her neck pain, and occurred about once per week. She reported having occasional low mood due to pain. The pain reportedly affected her sleep and concentration, as well as memory.

[103] Dr. Adrian diagnosed Ms. Bates with mechanical neck and mid-back pain; soft tissue pain, left shoulder girdle; and cervicogenic (neck-related) headaches. He concluded that all of the above injuries were causally related to the Collision. He considered it unlikely that Ms. Bates' right arm work injury was related to the Collision.

[104] Dr. Adrian noted that given the passage of time, it was probable that Ms. Bates would continue to experience symptoms involving her neck, back, and left shoulder, with activities that involve reaching, pushing, pulling, lifting, carrying, holding, and awkward positions involving her neck and back. However, her musculoskeletal condition was stable, and should not deteriorate over time.

[105] Dr. Adrian also opined that there was no medical contraindication to Ms. Bates continuing to work full-time as an eyelash technician, or returning to work as a healthcare aide. However, he acknowledged under cross-examination that duties of a healthcare aide involve pushing, pulling, reaching, bending and holding. He also agreed that this job entailed bathing and transferring patients. Dr. Adrian admitted that some of the physical aspects of this job could lead to increased symptoms, which should eventually settle back to baseline.

[106] Dr. Adrian was also cross-examined on the plaintiff's usage of Tylenol 3, which was prescribed for the first time in late August 2022. He expressed surprise as to why she would require the prescription four years later to control Collision related pain. He noted that Ms. Bates' condition is one that fluctuates but does not deteriorate over time.

3. Conclusion re Expert Evidence

[107] Though the experts agree on many issues, their opinions diverge on whether Ms. Bates is restricted from her healthcare aide job due to the Collision, and whether the Collision caused a possible rotator cuff injury, or low back injury.

[108] Regarding any restrictions to her healthcare aide job, I have not put much weight on Dr. Kei's opinion that Ms. Bates cannot perform the duties of a healthcare aide on account of her injuries. This opinion is based in part on his mistaken belief that Ms. Bates' injuries caused her to miss some work after June 2019 – which is contrary to her evidence. Dr. Adrian's opinion on this issue is also problematic. Dr. Adrian agreed during his testimony that performing some of the functions of the healthcare aide could cause an exacerbation of her symptoms. Though he characterized the exacerbation as being temporary, he did not explain how long it

might take for the plaintiff to reach her baseline after each episode of exacerbation, or what could happen if she had repeated episodes of exacerbation of her symptoms, without an opportunity to rest in between. I therefore have concerns about putting too much weight on his conclusion that Ms. Bates is able to perform the duties of a healthcare aide.

[109] On the question of the rotator cuff injury, I did not find Dr. Kei's opinion on this issue reliable, given the non-specific nature of the testing. However, regardless of whether the exact etiology of a condition can be found, it remains compensable so long as the symptoms are causally related to the injuring event: see *Snell v. Farrell,* [1990] 2 S.C.R. 311, 1990 CanLII 70 (S.C.C.); and *Clements v. Clements*, 2012 SCC 32.

[110] Finally, in regards to the low back injury, I conclude that while Ms. Bates did have a low back injury caused by the Collision, that injury has fully resolved and she is pain free with full range of motion in that area.

V. NON-PECUNIARY DAMAGES

[111] A damage award for non-pecuniary losses is intended to compensate a plaintiff for pain, suffering, loss of enjoyment of life, and loss of amenities. Though restitution is never possible for these types of losses, the monetary award is intended to provide a substitute for pleasures and amenities to make the life of the plaintiff "more bearable": *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 at para. 274, 1985 CanLII 179 (B.C.S.C.), aff'd (1987), 49 B.C.L.R. (2d) 99 (B.C.C.A.); and *Pololos v. Cinnamon-Lopez,* 2016 BCSC 81 at para. 105.

[112] In *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46, leave to SCC ref'd, 31373 (19, October, 2006), the Court set out a non-exhaustive list of factors to be considered in assessing non-pecuniary damages. These include: the plaintiff's age; nature of the injury; severity and duration of pain; disability; emotional suffering; loss or impairment of life; impairment of family; marital and social relationships; impairment of physical and mental abilities; and loss of lifestyle: *Stapley* at para. 46.

The plaintiff's stoicism is a factor that should not, generally speaking, penalize the plaintiff: *Stapley* at para. 46 citing *Giang v. Clayton*, 2005 BCCA 54 at paras. 54–55.

[113] The award is to be fair to both parties, and fairness is measured against awards in comparable cases: *Olson v. Farran*, 2016 BCSC 1255 at para. 156.

[114] Loss of housekeeping capacity may be compensated by a pecuniary or non-pecuniary award. The non-pecuniary approach may be preferred where the plaintiff is limited, but not unable, to do household tasks for physical or psychological reasons. A pecuniary award may be more appropriate where replacement services are hired or family members provide gratuitous support: *Kim v. Lin*, 2018 BCCA 77 at para. 28, citing *McTavish v. MacGillivray*, 2000 BCCA 164 at para. 73; *Riley v. Ritsco,* 2018 BCCA 366 at para. 98.

[115] The plaintiff seeks a non-pecuniary damages award of $130,000. This figure includes an award for loss of housekeeping capacity. In support, the plaintiff relies on *Foran v. Nguyen et al*, 2006 BCSC 605; *Beagle v. Cornelson Estate*, 2013 BCSC 933; *Corness v. Ng*, 2022 BCSC 334; and *Lee v. MacLean*, 2022 BCSC 312.

[116] The defendant acknowledges that Ms. Bates suffered soft tissue injuries in the Collision, and agrees that the award should include an amount for loss of housekeeping capacity. The defendant submits that an appropriate award for non-pecuniary damages is in the range of $50,000 to $60,000. In support, he relies on the following authorities: *Brass v. Von Chudentiz*, 2020 BCSC 343; *Cheung v. Gregson*, 2021 BCSC 204; and *Bhumrah v. McLeary*, 2021 BCSC 285.

[117] Bearing in mind that no two cases are alike, I find that the plaintiff’s authorities, though on the upper end of the range, more closely align to Ms. Bates’ circumstances.

[118] At the time of the Collision, Ms. Bates was 37 years old. She was gainfully employed in a physically demanding job. She had good general physical health, and led an active lifestyle. The Collision caused her to suffer injuries to her left shoulder, neck and back, experience headaches. Ms. Bates was off work due to her Collision

related injuries for approximately one year. To her credit, she returned to work despite ongoing pain and restriction. This is a reflection of her stoicism and resilience.

[119] Almost five years have transpired since the Collision. Ms. Bates continues to suffer from chronic pain in her left shoulder, neck and mid and upper back, as well as regular headaches and fatigue. Despite undertaking various forms of treatment – such as physiotherapy, chiropractic adjustments, and acupuncture – Ms. Bates experiences pain on a near daily basis. The pain fluctuates depending on activity, and is triggered by activities that involve sitting, static positioning, reaching, lifting, and carrying. Her neck and mid-back pain symptoms spread into her left shoulder blade region, down the arm, and at times, into the wrist. The headaches occur about once per week. She has developed driving anxiety, and suffers from low mood due to pain. The pain affects her sleep and concentration, as well as memory.

[120] The injuries have had a profound impact on Ms. Bates. Her previously bubbly and happy personality has been impacted: she is more irritable and short tempered due to the pain. Simple tasks like washing the dishes have become painful for her. The injuries have impacted Ms. Bates' ability to be physically intimate with her partner.

[121] Most devastatingly for Ms. Bates, her injuries have interfered in her ability to meet all of her daughter's needs. C. who was only 16 months old at the time of the Collision. Ms. Bates had difficulty doing even simple tasks such as lifting C. in and out of her crib, without the assistance of others. The injuries have also impacted her ability to perform normal and joyful activities such as pushing C. on the swings, and playing with her on the trampoline. This is particularly upsetting as Ms. Bates does not plan to have more children.

[122] The medical experts agree that Ms. Bates symptoms are unlikely to resolve. Nor is she expected to improve much further, even with the recommended treatment.

[123] After considering all of the evidence in this case, I find that a fair and reasonable sum to compensate Ms. Bates for her non-pecuniary loss is $100,000. This award recognizes her pain and suffering, including impact on her domestic capacity.

[124] Based on her contributory negligence of 50%, Ms. Bates' award for non-pecuniary damages is reduced to $50,000.

VI. LOSS OF PAST EARNING CAPACITY

[125] Ms. Bates was off work for approximately one year following the Collision.

[126] The parties have agreed that as a result of the Collision, Ms. Bates' gross past income loss amounts to $38,642.20.[5] They also agree that 20% should be deducted from this figure to account for income tax. The net past income loss is therefore agreed to at $30,916.76.[6] This figure is "subject to s. 83 deduction for TTD's previously paid".[7]

[127] The parties agree that Ms. Bates' entitlement to past income loss is subject to liability determination by the Court.[8] Based on my assessment of 50% contributory negligence on the part of the plaintiff, the defendant is required to pay Ms. Bates $15,458.38 for her net past income loss.

VII. LOSS OF FUTURE EARNING CAPACITY

[128] The plaintiff submits that an award of $200,000 for future loss of earning capacity is proven on the evidence, using a capital asset approach. Ms. Bates grounds her loss of future earning capacity claim based on average earnings of $30,000 per year, with a capital asset loss of 30%. It was her evidence that due to her injuries, she is unable to do the physical duties of a healthcare aide. Further, her injuries continue to cause her pain, which is exacerbated when she is working as an

[5] ASF at para. 4.
[6] ASF at para. 4.
[7] ASF at para. 4.
[8] ASF at para. 6.

esthetician. As a result, Ms. Bates has plans to go to dental receptionist training in January 2023, and maintain her current job as an esthetician, on a part-time basis.

[129] The defendants submit that the plaintiff has not established any entitlement to a loss of future earning capacity award. In the alternative, if such an award is payable, the defendant submits that the starting point for the calculation should be one year's salary assessed at $20,000 to $25,000 per year, for a maximum of two years.

A. Evidence

[130] Although Ms. Bates started her career in healthcare in August 2012, it was quickly interrupted by the 2013 Collision. Thus, her first full year of earnings did not occur until 2014. In that year, she had T4 earnings of $17,637. Ms. Bates made almost the same amount working full-time in 2015 ($17,338). In 2016, Ms. Bates was off work for several months, due to a combination of a work injury (kick to the stomach) and her pregnancy. She earned $17,992 in T4 earnings, and $6,412 in WCB benefits. Ms. Bates was off work on maternity leave for almost all of 2017, returning to work at the tail end of the year to earn $4,819. By the time of the Collision on April 18, 2018, Ms. Bates had only been back at work for about four to five months. In the 2018 year, her T4 earnings were $11,048.

[131] Ms. Bates returned to work around March or April 2019. She earned $16,305 that year in T4 earnings and $14,403 in benefits from Great West Life.

[132] The 2020 year was again interrupted, this time with the pandemic and Ms. Bates' right arm work injury. When Ms. Bates was cleared to return to work in May 2020, she decided not to go back to the healthcare field, due to concerns about contracting Covid-19.

[133] Ms. Bates changed careers and started her own eyelash technician business around August of 2020. This required her to purchase equipment and build a client base. Ms. Bates made $4,083 in T4 earnings through the FHA, and $17,000 in pandemic relief benefits. She also reported $4,800 in gross business earnings.

[134] Ms. Bates obtained her formal eyelash technician certification in March 2021. She completed further training in dermaroller micro-needling in December 2021. Her reported line 150 income that year was $21,800. In addition to seeing her own clients, Ms. Bates worked for various spas. She currently works at HoangLinh Spa and receives a 50% commission from each service she performs. Her schedule varies and she finds it difficult to see more than two clients per day due to the aggravation of her symptoms.

[135] In her current vocation, Ms. Bates is required to frequently bend and hold postures for extended periods. She finds the work physically difficult, and requires frequent micro breaks, as attested to by Amber Molena. Ms. Bates' evidence about the physically challenging nature of her current job was also corroborated by Cherly Ariken.

[136] Ms. Ariken testified for the defence. She has worked in the beauty industry for eight or nine years and owns and operates a medi-spa. Ms. Ariken testified that her spa offers laser hair removal, eyebrow tattooing, microblading, facials, and eyelash services. Ms. Ariken also offers a one-on-one eyebrows course to estheticians. She met Ms. Bates when she taught this course to her in July 2021. The course was taught over two days, during which Ms. Ariken recalls Ms. Bates complaining of back pain.

[137] Under cross-examination, Ms. Ariken testified that being an esthetician is a physical job, and involves prolonged periods of bending or hunching over clients. As an example, Ms. Ariken testified that her lower back begins to hurt when she is working on clients. She also explained that "lashing" can be difficult. She testified that her eyelash technicians use "full saddle seats" in order to support their backs. Ms. Ariken stated that she began teaching courses to move away from the demanding physical nature of the job.

[138] Ms. Ariken also gave evidence about the potential earnings of eyelash technicians. She stated that a good eyelash technician can make $10,000 to

$15,000 per month, if she has built up her business. However, she noted the earnings can vary, with many technicians making much less.

[139] Because of the challenges with the job duties, Ms. Bates has decided to obtain training as a dental receptionist. The training was scheduled to start in January 2023. The course is for eight weeks at a cost of $1,575. Ms. Bates' uncontroverted evidence was that the wage rate ranges from $20 to $30 per hour.

[140] Ms. Bates testified that had the Collision not occurred, she would have returned to working as a healthcare aide, earning about $23 to $24 per hour.

B. Legal Framework

[141] Damages for impairment of earning capacity are awarded to provide a plaintiff with full compensation for all their pecuniary losses: *Thomson v. Thiessen*, 2018 BCSC 1353 at para. 55, citing *Grewal v. Naumann*, 2017 BCCA 158 at para. 42. The purpose of the award is to restore the plaintiff to the position they would have been in but for the accidents.

[142] The value of the plaintiff's earning capacity loss may be measured in different ways. For example, it could be assessed on the basis of actual earnings the plaintiff would have received; the replacement costs of the tasks the plaintiff is no longer able to do; an assessment of reduced company profits; or the amount of secondary income that has been lost: *Rowe v. Bobell Express Ltd.,* 2005 BCCA 141 at para. 31, citing Kenneth Cooper-Stephenson in *Personal Injury Damages in Canada*, 2nd ed. (Scarborough, Ont.: Carswell, 1996) at p. 205-06.

[143] Claims for past and future loss of earning capacity are subject to the same legal test, i.e. whether, on the evidence, there is a real and substantial possibility that the future event in question will cause a pecuniary loss: *Grewal,* at para. 48. Assessing the likelihood of hypothetical and future events is more appropriate than applying the balance of probabilities test, because what would have happened in the past, absent injury, is no more 'knowable' than what will happen in the future: *Smith v. Knudsen*, 2004 BCCA 613 at para. 29.

[144] Hypothetical events are given weight according to their relative likelihood. A hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility, and not mere speculation: *Turner v. Dionne*, 2017 BCSC 1905 at para. 316, referencing *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 27, 1996 CanLii 183 (S.C.C.); see also *Dornan v. Silva*, 2021 BCCA 228 at paras. 93–94.

[145] The onus is on the plaintiff to demonstrate that the injuries suffered in the accident have impaired the plaintiff's income earning ability, such that there is a real and substantial possibility that the diminished earning capacity has resulted in a pecuniary loss: *Perren v. Lalari*, 2010 BCCA 140 at paras. 21, 32–33. The court must then award compensation on an estimation of the chance that the event will occur: *Steward v. Berezan*, 2007 BCCA 150 at para. 17.

[146] The legal principles that apply to a claim for loss of future earning capacity were clarified by the Court of Appeal in three judgments authored by Justice Grauer: *Dornan*; *Rab v. Prescott*, 2021 BCCA 345; and *Lo v. Vos,* 2021 BCCA 421.

[147] In *Rab,* the Court restated the proper approach for assessing loss of future earning capacity. At para. 47, Justice Grauer provided the following three-step analysis to guide an assessment of future earning capacity, "particularly where the evidence indicates no loss of income at the time of trial":

a) The first is evidentiary whether the evidence discloses a *potential* future event that could lead to a loss of capacity (i.e., chronic injury, future surgery or risk of arthritis);

b) The second is whether, on the evidence, there is a real and substantial possibility that the future event in question will cause a pecuniary loss; and

c) If such a real and substantial possibility exists, then the third step is to assess the value of that possible future loss, which must include assessing the relative likelihood of the possibility occurring.

[148] In general, the value of the plaintiff's capacity to earn is equivalent to the value of the earnings they would have received in the past or the future, had the tort not been committed: *Crimeni v. Chandra*, 2015 BCCA 131 at para. 15. The court must consider both positive and negative contingencies when conducting this analysis: *Kellett v. Stam*, 2018 BCSC 1127 at para. 77.

C. Impairment of Capital Asset

[149] The parties agree that the earnings approach does not apply in this case.

[150] In *Rab* at paras. 35–36, Justice Grauer noted that the considerations set out in *Brown v. Golaiy* (1985), 26 BCLR (3d) 353 at para. 8 are useful for assessing whether there has been an impairment of the capital asset. Those are whether:

a) the plaintiff has been rendered less capable overall from earning income from all types of employment;

b) the plaintiff is less marketable or attractive as an employee to potential employers;

c) 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

d) the plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market.

[151] There is clear evidence in this case that the plaintiff’s capital asset has been impaired. Five years post Collision, Ms. Bates continues to suffer from neck, shoulder and upper back pain, and headaches. These injuries are permanent and even with treatment, she is not expected to recover from them. There is reliable evidence that her injuries impact her ability to do her current job as an eyelash technician, and are aggravated by movement required of her previous job as a healthcare aide. Dr. Adrian noted that it was probable that Ms. Bates would continue to experience symptoms involving her neck, back, and left shoulder, with activities

that involve reaching, pushing, pulling, lifting, carrying, holding, and awkward positions involving her neck and back.

[152] Further, many jobs involve activities requiring the person to reach, push, pull, lift, carry, or hold an object, or to maintain an awkward position involving their neck and back. Indeed, both Ms. Bates' former and current employment involved such activities, to varying degrees. In a workplace that requires such activities, it follows that when faced with an employee who has no physical restrictions or impediments, versus one that does, an employer would likely prefer the former.

[153] Dr. Adrian also noted that he would expect the plaintiff's pain to flare up with such activities, before it returns to baseline. Mr. Davis testified about seeing Ms. Bates use medication to help manage her pain. He also assisted her by applying topical pain creams on a frequent basis.

[154] Based on the above, I have no difficulty in concluding that Ms. Bates has been rendered less capable overall from earning income from all types of employment. I am also satisfied that by virtue of her injuries, Ms. Bates is less marketable as an employee, and cannot take advantage of all job opportunities that might have been available to her, but for the Collision. Consequently, she is less valuable to herself as a person capable of earning income in a competitive labour market.

[155] In light of the nature of her injuries, their severity, her future prognosis, and her transferable skills, in conclude that Ms. Bates' capital asset loss should be assessed at 30%.

D. Assessment of Loss

[156] I turn now to determining the present value of the plaintiff's without collision earnings. This is made difficult because of the numerous interruptions to her work both prior and subsequent to the Collision.

[157] Though the parties did not specify what annual earnings the past income capacity loss of $38,642.20 was based, it can reasonably be inferred that it was based on Ms. Bates' 2018 earnings, extrapolated over one year.[9] It is the net amount of this figure, i.e. $30,000, that Ms. Bates argues should be used to assess her future loss.

[158] The defendant submits that Ms. Bates' future loss should be assessed based on annual average earnings of $20,000 – $25,000. This would certainly be in keeping with the historical earnings pattern exhibited by Ms. Bates prior to the Collision. However, it must be kept in mind that Ms. Bates' earnings in the two years prior to the Collision, were interrupted repeatedly due to a serious of unfortunate circumstances, such as: the kick to her stomach while she was pregnant; the right arm work injury; and the pandemic. These were all unique events which artificially lowered her historical earnings.

[159] In my view, it is reasonable to assess Ms. Bates' absent Collision earnings at $30,000. I find this figure appropriate regardless of whether Ms. Bates' would have returned to work as a healthcare aide absent Collision, rather than her current plans of working as a dental receptionist. This figure represents Ms. Bates' most recent annual earnings, and fairly and reasonably captures her absent Collision future earning capacity.

[160] In terms of whether Ms. Bates would have returned to work as a healthcare aide (including working as a porter) absent Collision, I note there no reliable evidence to support that notion. It is clear that the plaintiff left her career in healthcare in May 2020 due to circumstances that were unrelated to the Collision, i.e. the physically demanding and "dangerous" nature of the work, coupled with her fears over Covid-19 and her daughter's health. However, even if the evidence established a real and substantial possibility that Ms. Bates would have returned to

[9] $38,642.20 divided by 12 months = $3,220.18 x 3.44 months = $11,077.

work as a healthcare aide absent Collision, it would not have a material impact on the future earning capacity loss calculations.

[161] The $30,000 annual projected earning capacity figure proposed by plaintiff's counsel reflects Ms. Bates' earnings as a healthcare aide in her highest earning period immediately before the Collision. Second, though the hourly rate of a healthcare aide is higher than the starting rate for a dental receptionist, the range of pay for a dental receptionist exceeds that of a healthcare aide. Thus, over time, the two earning streams would like average out to being similar.

[162] Based on an average annual earning stream of $30,000 per year, and applying the multiplier to age 65, Ms. Bates future earning capacity has a net present value of $681,801.

[163] After applying a 30% capital asset loss, Ms. Bates' future earning capacity loss amounts to approximately $200,000.

E. Contingencies

[164] After a claim for loss of capacity is accepted by the court, the court must consider both positive and negative contingencies when conducting this analysis: *Kellett v. Stam*, 2018 BCSC 1127 at para. 77.

[165] This includes considering whether the plaintiff's pre-existing condition has impacted this head of damages.

[166] In *Dornan*, the Court outlined the approach to contingencies, as follows:

> [94] It follows that here the judge was required to engage in three different kinds of assessments. The first concerned what had happened to the appellant in the past, which had to be proved on a balance of probabilities. The second concerned what might happen to the appellant in the future, which possibilities, as discussed in *Athey*, could be taken into account only to the extent they were found to be real and substantial possibilities. As Mr. Justice Savage put it in *Gao v Dietrich*, 2018 BCCA 372:
>
> > [34] With respect to past facts, the standard of proof is the balance of probabilities. With respect to hypothetical events, both past and future, the standard of proof is a "real and substantial possibility". The standard of a "real and substantial possibility" is a lower threshold than a balance

> of probabilities but a higher threshold than that of something that is only possible and speculative.
>
> [95] Once the hypothetical event in question was found to be a real and substantial possibility, it became incumbent upon the judge to undertake the third assessment: the relative likelihood of that possibility.

[167] Thus, a contingency reduction for pre-existing conditions must be made if there is a "real and substantial possibility" it could have affected the plaintiff's future earnings.

[168] In this case, there are no pre-existing conditions that meet the real and substantial possibility test. For example, there is no indication that Ms. Bates' Raynaud's syndrome cannot continue to be managed appropriately with medication, or that it could affect her ability to fulfill her job duties in the future. Nor does she have other health conditions that would qualify for a contingency reduction.

[169] This Court must also consider case specific negative and positive contingencies. I have considered the possibility that the plaintiff's condition may improve over time or with further treatment; that the plaintiff may have earned more money annually than the projected $30,000 per year; that the plaintiff may have earned less than $30,000 per year because of a variety of events such as her daughter's health concerns; or that she may have stopped working prior to age 65 or beyond age 65. In my view, all of these contingencies set each other off, and thus have no overall impact on the future loss award.

[170] I turn then to general labour market contingencies. The parties agree that a 20% deduction should be made for general labour market contingencies. I agree that this figure is both fair and reasonable. After application of the contingency deduction of 20%, Ms. Bates' future loss of earning capacity is reduced to $160,000.

[171] Given my finding that Ms. Bates as 50% responsible for the Collision, it is appropriate to reduce her future loss of earning capacity award by the same amount. Thus, the defendant is liable to the plaintiff for a future earning capacity loss award of $80,000. In my view, this figure is fair and reasonable, and supported by the evidence.

VIII. COSTS OF FUTURE CARE

[172] When determining a cost of future care award, the court should try to restore the plaintiff, as best as possible with a monetary award, to the position they would have been in had the collision not occurred. The award is based on what is reasonably necessary on the medical evidence to promote the mental and physical health of the plaintiff: *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at paras. 29–30: *Milina* at para. 184.

[173] A claim for future care is established if: (1) there is medical justification for the claim; (2) the claim is reasonable: and (3) the expense is likely to be incurred by the plaintiff: *Audet v. Chan*, 2018 BCSC 1123 at paras. 113–115, citing *Milina* at paras. 184, 211; *Hardychuk v. Johnstone*, 2012 BCSC 1359 at paras. 210–212.

[174] Once a claim is established, the court requires evidence of the amounts claimed in order to assess costs of future care: *Patterson v. Gauthier*, 2019 BCSC 633 at para. 98, citing *Manky v. Scheepers*, 2017 BCSC 1870 at para. 154.

[175] A cost of future care award assessment is subject to a discount rate of 2%: *Pearson v. Savage*, 2020 BCCA 133 at para. 104; see also s. 56 of the *Law and Equity Act,* R.S.B.C. 1996, c. 253 and s. 1 of the *Law and Equity Regulation*, B.C. Reg, 352/81. A future cost of care award can be justified without the need for expert reports: *Moges v. Sanderson*, 2020 BCSC 1511 at para. 168.

[176] Dr. Kei recommended the following treatment for Ms. Bates to help manage her pain:

a) She should continue with physiotherapy, with some focus on her left shoulder. At some point she should transition to an active rehabilitation program with kinesiology “until there is a plateau in her progress”;[10]

b) She should be referred to an interventional pain physician to consider targeting her left cervical facet joints. In particular, a corticosteroid

[10] Kei Expert Report at p. 10.

injection or medial branch block with local anesthetic could be tried. If this is beneficial she could be considered for radiofrequency ablation

c) Though massage therapy provided only temporary relief, it may be beneficial to help her maintain or increase her functional ability; and,

d) Chiropractic therapy for her thoracic spine, which should be discontinued if there is no benefit after six sessions.

[177] The above treatments were aimed at pain management, and would not likely provide a definitive cure for her symptoms.

[178] Dr. Kei also opined that Ms. Bates should be referred for a left shoulder ultrasound to evaluate her rotator cuff tendons, and obtain an x-ray of the thoracic spine.

[179] Dr. Adrian made the following recommendations for treatment:

a) Complete her kinesiology-based exercise program;

b) Continue with home-based exercises to optimize and maintain her fitness level;

c) Continue to use acupuncture and chiropractic treatments for short term pain management;

d) She may benefit from using nortriptyline for sleep; and

e) She may benefit from an occupational therapist attending at her worksite to help ergonomically optimize her workplace so she can perform her work activities in less discomfort.

[180] The plaintiff seeks a future care cost award of $44,000. This is calculated based on 24 chiropractic treatments each year to age 75, at $56 per session ($35,538); and 24 physiotherapy treatments each year to age 75, at $83 per session

($52,669). The plaintiff suggests that a 50% contingency deduction should be made from the resulting total.

[181] The defendant submits that no award should be made under this head of damages.

[182] The evidence establishes that Ms. Bates would benefit from physiotherapy, massage therapy, acupuncture or chiropractic treatments for short term pain management. Ms. Bates has used this type of therapy before, and has achieved temporary relief. However, I do not agree with the plaintiff that there is a likelihood that she will attend at the frequency she suggests.

[183] In cross-examination, Ms. Bates testified that she was prescribed a gym pass by Dr. Shawhney. Ms. Bates also testified that she has not gone to the gym as often in 2022 because she finds it difficult to juggle it with her job and childcare. In cross-examination, Ms. Bates testified that while she is not regularly attending the gym, she does exercises at home.

[184] Dr. Adrian also suggests that she should have an ergonomic assessment done to allow her to optimize her workplace. This will likely result in her having to purchase the necessary equipment to optimize her work environment.

[185] I conclude that a lump sum award of $15,000 for future care costs is fair and reasonable, as follows:

> Chiropractic sessions – 10 per year, for 10 years, totalling $5,600
> Physiotherapy sessions – 10 per year, for 10 years, totalling $8,300

[186] To these figures I have added an allowance for ergonomic equipment and pain medication and ointments that may be necessitated due to the injuries. I have also accounted for a discount rate of 2%.

[187] I conclude that there is medical justification for this award, the award is reasonable, and the expense is likely to be incurred by the plaintiff.

IX. SPECIAL DAMAGES

[188] The parties agree that Ms. Bates has incurred special damages in the amount of $6,375.60, as a result of the Collision.[11] This figure is "subject to liability determination by the Court".[12]

[189] After a deduction for 50% contributory negligence, Ms. Bates' special damages amount for which Mr. Buchanan is responsible, is $3,187.80.

X. SUMMARY OF DAMAGES

[190] The plaintiff's damages are assessed as follows:

Non-Pecuniary Damages	$50,000.00
Past Loss of Earning Capacity	$15,458.38
Future Loss of Earning Capacity	$80,000.00
Costs of Future Care	$15,000.00
Special Damages	$3,187.80
Total Loss	**$163,646.18**

[191] The plaintiff is entitled to interest in accordance with the *Court Order Interest Act,* R.S.B.C. 1996, c. 79.

XI. COSTS

[192] The general rule is that costs follow the event. I am not aware of any reason that warrants a departure from this rule. The plaintiff was successful and as such she is entitled to her costs at Scale B for a matter of ordinary difficulty.

[193] If there are settlement offers or other matters that I am not privy to, a party may prepare written submissions up to a maximum of five (5) pages in length (excluding attachments), for my consideration. These should be submitted through

[11] ASF at para. 5.
[12] ASF at para. 6.

Supreme Court Scheduling within 45 days of this Order. Responding submissions are to be provided seven (7) days thereafter and are not to exceed five (5) pages. Any Reply submissions are to be provided within seven (7) days following receipt of Response submissions, and are limited to three (3) pages.

[194] Absent further submissions, this costs order will stand.

"Shergill J."