# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Dacre v. Boloten,*
2023 BCSC 781

Date: 20230509
Docket: M117156
Registry: Kelowna

Between:

**Nicole Dacre**

Plaintiff

And

**Kathleen Boloten**

Defendant

Before: The Honourable Justice Branch

## Reasons for Judgment

| | |
|---|---|
| Counsel for Plaintiff: | J. Kennedy |
| Counsel for Defendant: | Z. Fang<br>R. Pici |
| Place and Date of Trial: | Kelowna, B.C.<br>March 21-24, 27-28, 2023 |
| Place and Date of Judgment: | Kelowna, B.C.<br>May 9, 2023 |

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## I. INTRODUCTION

[1] The plaintiff seeks compensation for injuries sustained in a motor vehicle accident on April 21, 2016 (the "Accident"). Liability is admitted.

## II. FACTUAL BACKGROUND

### A. The Plaintiff

[2] The plaintiff, Nicole Dacre, was born on November 9, 1995 and is currently 27 years of age. As a child, she grew up with her parents in Peachland, BC.

[3] In June 2013, the plaintiff graduated from high school. She struggled with mathematics and science. She had some performance anxiety around exams, although she did not seek treatment for this problem. She worked in a variety of service positions during high school. She was also active in the 4-H club, once winning an entrepreneurship prize. She was an avid skier, able to ski for many hours in a day on the most difficult black diamond runs.

[4] After graduation, she took a year off before embarking on her post-secondary education. On September 21, 2013, the plaintiff began working part-time as a London Drugs Beauty Advisor.

[5] In September 2014, the plaintiff commenced business studies at Okanagan College.

### B. The Accident: April 21, 2016

[6] At the time of the Accident, the plaintiff was in her second year at Okanagan College while still working at London Drugs. On the day of the Accident, she was driving her 2008 Mini Cooper in an easterly direction on Highway 97 in West Kelowna. The plaintiff's vehicle was struck from behind by a 2004 Toyota owned and operated by the defendant, Kathleen Boloten. It was a significant collision. The plaintiff's vehicle was pushed into the car in front of her and her air bags deployed. She sustained significant damage to both ends of her vehicle. The vehicle was not driveable after the Accident and was written off.

[7] The plaintiff sought medical treatment the same day from the office of her general practitioner, Dr. Ryan Bystrom (although she was seen by one of his associates). By the end of the day, she noted the following injuries:

a) pain in her neck and shoulders and into the base of her skull;

b) a burn to her arm from the air bag, resulting in some superficial scarring;

c) lower back and hip pain; and

d) pain in her gluteus muscles extending down both legs to her knees.

### C. Post-Accident

[8] The Accident occurred on a Thursday. The plaintiff was able to return to work the following week, although she was not feeling particularly well.

[9] Six months after the Accident, the pain in her neck and shoulders had dissipated, as had the scarring. However, the pain in her lower back and hips continued through to trial.

[10] The plaintiff initially tried physiotherapy and massage therapy, but obtained only short-term relief. Commencing November 24, 2016, the plaintiff started seeing a kinesiologist, who helped her work on strength exercises.

[11] The plaintiff stopped working at London Drugs on April 22, 2017. There was little suggestion that this was due to the Accident, but rather was due to a desire to get into the tourism industry. From April 2017 to April 2019, the plaintiff worked at the Delta Grand Hotel in Kelowna, initially as a concierge, and later as a guest service agent. This position involved quite a bit of standing.

[12] In January 2018, the plaintiff was awarded a college diploma in Business Administration: Marketing Option. Her marks were quite average. She acknowledges that she was probably socializing too much with her friends during this period, particularly before the Accident. She had been going out four to five times per week.

[13] Beginning in November 2, 2017, the plaintiff started receiving injections from her physiatrist, Dr. McCann. They provided temporary relief, the length of which began to diminish over time. The injections themselves were quite painful. However, she decided to continue with same given that they still provided some relief and facilitated her exercise.

[14] From April 2019 to August 2020, the plaintiff worked at the Four Points by Sheraton Hotel, Kelowna Airport ("Four Points"), initially as a sales and events coordinator, and later as a conference services manager. The core reason for her move to another hotel was the ability for career advancement, but she also hoped that the reduced standing in her new position would help ease her pain. Unfortunately, she found the prolonged sitting required in the new position to be just as problematic as the standing.

[15] At Four Points, she initially worked in the same office as Kevin Maloney, her current partner. Later Mr. Maloney moved to his own office. Mr. Maloney noted that the plaintiff:

a) would often need to stretch out flat on the floors of both offices in order to help ease her symptoms;

b) was reluctant to do the manual labour required to help set up larger banquets, which assistance was normally expected of someone in her position.

[16] The plaintiff was laid off in 2020 due to COVID-19's dramatic effect on the hotel business. The plaintiff also stopped going to the gym or receiving treatment for her injuries as the result of pandemic closures.

[17] Commencing September 2020, the plaintiff entered the Bachelor of Human Kinetics program at the University of British Columbia, Okanagan Campus. She was inspired to pursue this new career path by her own physical struggles. From March 2021 to September 2022, the plaintiff also worked part time as an "Educator" (a floor level sales position) at the Lululemon retail store in Kelowna. Her supervisor at the time, Anna Florinski, testified that, while she was generally a good employee, her

attendance was unreliable, and she shied away from the most physical inventory tasks. Ms. Florinski would not choose to have her as an employee again.

[18] From June 2022 to September 2022, the plaintiff worked part time at Frind Estate Winery in West Kelowna as a Tasting Associate.

[19] The plaintiff started dating Mr. Maloney in or about July 2022. She started staying at Mr. Maloney's apartment around 5 to 6 nights a week in September and October 2022, before a later permanent move-in. Mr. Maloney says that given the plaintiff's physical limitations, he does most of the heavier cleaning. He also does much of the driving so that the plaintiff can put her seat back, which she finds easier on her spine. The plaintiff's mother also remarked on how the plaintiff can no longer drive right through to Vancouver for their shopping trips, but rather needs breaks along the way.

[20] The plaintiff remained enrolled in UBC's Human Kinetics program at the time of trial. She is in the process of completing her fourth year. She hopes to graduate by the end of this year. The plaintiff has continued to struggle academically however, particularly in any course requiring mathematics. Her average to this point has been 69.7% overall, but only 65.9% in her upper year courses.

[21] The plaintiff says that her injuries can make it difficult to concentrate. The university has granted her accommodations given her physical difficulties. She has had to get up and leave the room on occasion during lectures. She is less able to study at the university library like she used to, given that long periods sitting in a chair are difficult. She has taken less than a full course load more recently, although this seems to have been motivated more by a desire to improve her marks than being the direct result of having to manage her physical injuries.

[22] The plaintiff has been able to take trips to Mexico and Southeast Asia since the Accident. However, she essentially just stayed on the beach in Mexico and did not do particularly strenuous activities while in Southeast Asia. She found the long plane trip difficult.

[23] The plaintiff has greatly curtailed her skiing in terms of duration, frequency and difficulty. The plaintiff has also been less socially active since the Accident, often turning down invitations. I note that the plaintiff had a very flat demeanour over the course of her testimony. This is in apparent contrast to her personality before the Accident, described as “bubbly” and “happy go lucky” by her mother, Julie Dacre.

[24] Although she has not received much treatment since the pandemic began, overall she has had 94 sessions with a kinesiologist, 39 sessions with physiotherapists, and 21 sessions with massage therapists. She constantly stretches at home and at her job.

[25] In terms of future plans, she has not completely abandoned her plans to be a physiotherapist. However, she has been told that this position may be difficult given its physical demands. Furthermore, it appears that the plaintiff may be hard-pressed to obtain admission to her first choice of physiotherapy at UBC. Mr. Louis-Alexandre Douesnard, the admissions officer for the program, testified how the minimum average to apply is 76% and that a competitive percentage to ensure an interview would be 85-89%. There are also additional academic and volunteer requirements. The plaintiff did suggest that she was prepared to retake courses, or take additional courses, in order to improve her standing. She also indicated that she was prepared to consider other physiotherapy schools in either Canada, Ireland or the United Kingdom.

[26] In light of her potential challenges getting into a physiotherapy program, the plaintiff is also considering three alternate career paths as either a speech and language pathologist, an occupational therapist, or as a nurse.

### D. The Plaintiff's Earnings History

[27] The plaintiff's reported Line 150 earnings pre- and post-Accident are as follows:

| Year | Income |
|---|---|
| **Pre-Accident** | |
| 2013 | $7,531 |
| 2014 | $11,035 |
| 2015 | $9,490 |
| 2016 (year of Accident) | $10,213 |
| **Post- Accident** | |
| 2017 | $25,692 |
| 2018 | $43,700 |
| 2019 | $39,828 |
| 2020 | $36,252 (including $19,000 in government benefits) |
| 2021 | $30,269 (including $16,821 in government benefits) |
| 2022 | $19,686.98 |

## III. EXPERT AND TREATING PHYSICIAN EVIDENCE

### A. Dr. Shawn McCann, Physical Medicine and Rehabilitation Specialist

[28] Dr. Shawn McCann has been treating the plaintiff for several years. He also prepared two expert reports at the plaintiff's request dated May 16, 2018 and June 14, 2022.

[29] As noted, Dr. McCann has provided the plaintiff with trigger point injections. Given the reduction in the period of pain relief from these injections, Dr. McCann

recently decided to switch to platelet rich plasma ("PRP") injections. He was reluctant to move towards the further alternative of a lumbar facet rhizotomy given her youth and the unknown side effects of this procedure over a full lifespan.

[30] Based on his treatment and testing of the plaintiff, Dr. McCann concluded as follows:

a) The plaintiff's neck, base of skull, and shoulder pain has resolved.

b) The plaintiff has a mild chronic impairment and disability from her back pain, particularly with respect to prolonged sitting and heavier lifting from floor to waist.

c) PRP injections and other interventions have a small chance of improving her overall pain and function, but are still worth trying, however, the plaintiff has most likely reached her maximal medical rehabilitation recovery.

d) The plaintiff would be capable of occasional to sometimes more than occasional moderate strength work, as well as full time light intensity work. Ideally, the plaintiff would be able to work in an occupation where she was able to change positions on a frequent basis and which would not require repetitive heavy lifting.

e) The plaintiff would have challenges getting into a physiotherapy program, like any other student, as these schools are difficult to get into. However, if she did gain admission, she most likely would be capable of most of the position's associated duties so long as she paced herself. She may have some mild restrictions with respect to prolonged sitting or prolonged treatments with patients over time. He assumed that she would be able to work either part time or by pacing herself during longer term hours. If she had a strong desire for this to be her occupation she most probably would be able to work through the pain and discomfort.

f) He felt it was worthwhile for her to complete her human kinetics degree, as she may at least be able to look into alternative work as a personal trainer or kinesiologist.

g) He anticipated that the plaintiff will be able to continue with activities such as skiing and hiking occasionally, again so long as she paces herself.

h) The plaintiff will need to continue to perform stretching and regular exercise throughout her lifetime to manage her complaints as the more physically fit she is, the less symptoms she will have over time.

i) The relief that the plaintiff was receiving from the trigger point injections plateaued in 2021. In terms of the new PRP injections, individuals typically require 2-3 sets of injections over a period of 1.5 years. He assumes that they will most likely discontinue injection therapies in the next 6-12 months if the plaintiff does not get dramatic relief from the PRP injections.

### B. Dr. Ryan Bystrom, General Practitioner

[31] Dr. Bystrom described the plaintiff's course of treatment after the Accident. However, his evidence was of minimal assistance, as he delegated the majority of the treatment responsibilities for the injuries sustained in the Accident to Dr. McCann.

### C. Dr. Mark Adrian, Physical Medicine and Rehabilitation Specialist

[32] Dr. Adrian prepared a report at the defendant's request dated December 13, 2022. The reports followed an in-person examination of the plaintiff on October 22, 2021.

[33] Dr. Adrian found that:

a) The plaintiff had full pain-free range of motion in her lower back.

b) The plaintiff has mechanical/soft tissue pain of the lumbosacral spine, spreading to the hip girdles.

c) The plaintiff will probably continue to experience symptoms involving her lumbosacral spine into the future, but these symptoms are unlikely to deteriorate further.

d) The plaintiff's pain will continue through prolonged sitting, standing or stooping, or heavier lifting or carrying.

e) It is unlikely that further physical therapy, massage and kinesiology will be of benefit.

f) Although she is most suited to roles that allow her to alter her position from prolonged sitting and limit heavier lifting, there is no medical contraindication for her to participate in these activities. Her ability to do so is a matter of her tolerance of her symptoms.

g) There are no medical contraindications to her continuing with her studies and service work, nor to pursuing a career as a physical therapist.

h) He encouraged the plaintiff to resume her exercise program. It is unlikely however that exercise will be curative.

i) The plaintiff will probably continue to experience temporary benefit with injections, but they are also unlikely to be curative.

j) The plaintiff may benefit from the involvement of an occupational therapist to instruct her in optimizing the ergonomics of her workstation.

### D. Michelle Van Biljon, Occupational Therapist

[34] Ms. Van Biljon, performed functional capacity evaluations of the plaintiff in 2018 and 2022. She found that the plaintiff is best suited to work in which she can alternate between sitting and standing, and with limited low-level demands and within light strength capacity (although she is capable of select medium strength activities).

[35] She recommended the following cost of care items:

a) protein rich plasma injections: two additional injections totaling $700;

b) eight to ten physiotherapy or massage therapy sessions per year at $90 and $120 each, respectively;

c) 12 additional kinesiology sessions at $1,020;

d) a gym membership at $636 per year;

e) a long-handled scrub brush of tub/shower with a recommended budget of $20

f) a portable pillow with a recommended budget of $75 plus tax;

g) an ergonomic office chair with a recommended budget of $600-$750 plus tax;

h) an electric sit/stand desk with a recommended budget of $650-$750 plus tax; and

i) home support services at $35 per hour, with 10 hours spread out over the year, and an estimated total cost of $350 per year.

### E. Niall Trainor, Vocational Specialist

[36] Mr. Trainor, performed a vocational assessment dated October 10, 2019. He found as follows:

a) The plaintiff is most interested in the areas of sales, marketing, athletics, politics, and office management.

b) The plaintiff scored well on reading comprehension, but very poorly in mathematics, where she was in the 23rd percentile, at a grade 8 level. As such, even prior to the Accident, she was not well suited to any math-oriented programs or occupations.

c) Pre-accident, she was employable in an array of low, semi-skilled and some skilled occupations in business, sales and the service industry.

d) Post-accident, based on her self-reported symptoms and her work experience to date and considering the positive medical prognosis offered by Dr. McCann, her injuries were unlikely to have a manifest impact on her employability, but he would not rule out some latent consequences for her employability. He did accept that as long as she continues to have pain, the plaintiff is less competitively employable than she was prior to the Accident.

[37] Mr. Trainor explained how chronic pain can reduce job performance through reduced job satisfaction. Pain can also cause unreliable job attendance, which in turn can put the individual in a bad light with employers.



## IV. CREDIBILITY AND RELIABILITY

[38] In *Bradshaw v. Stenner*, 2010 BCSC 1398, aff'd 2012 BCCA 296, the court summarized the test for the assessment of credibility as follows:

> [186] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides. The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally. Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time.
>
> [Emphasis added; citations omitted.]

[39] Reliability concerns the accuracy of the witness's testimony and involves concepts such as the ability to accurately observe, recall and recount the events at issue. A witness who is credible may be unreliable: *Celones v. Chandra*, 2023 BCSC 38 at para. 112.

[40] I find that the plaintiff was generally truthful. The defendant did not suggest otherwise. However, the defendant raised concerns about the plaintiff's reliability in terms of reporting her symptoms. In particular, the defendant submits that the

plaintiff's evidence regarding the degree of pain she was experiencing ought to be closely scrutinized.

[41] While I agree that there were some minor inconsistencies, overall I find that the plaintiff did not exaggerate her injuries in any way. Given the plaintiff's substantial efforts to keep working and studying in the face of her recognized injuries, I would more accurately describe her as stoic.

## V. CAUSATION

[42] It is admitted that the plaintiff suffered at least some injuries in the motor vehicle collision. As such, it is only the nature and extent of her injuries that is at issue.

## VI. DAMAGES

### A. Non-Pecuniary Damages

#### *1. Generally*

[43] Non-pecuniary damages are awarded to compensate the plaintiff for pain, suffering, loss of enjoyment of life, and loss of amenities. The compensation awarded should be fair and reasonable to both parties: *Trites v. Penner*, 2010 BCSC 882 at para. 188. Fairness is measured, in part, against awards made in comparable cases: *Trites* at para. 189. That said, other cases serve only as a rough guide. Each case still depends on its own facts: *Trites* at para. 189.

[44] In *Stapley v. Hejslet*, 2006 BCCA 34, the Court of Appeal outlined certain factors to be considered when assessing non-pecuniary damages:

> [46] The inexhaustive list of common factors cited in *Boyd* 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 (QL), 2005 BCCA 54).

[45] Based on *Athey v. Leonati*, [1996] 3 S.C.R. 458, it is trite law that damages must be assessed having regard to the plaintiff's original position:

> [32] … The essential purpose and most basic principle of tort law is that the plaintiff must be placed in the position he or she would have been in absent the defendant's negligence (the "original position"). However, the plaintiff is not to be placed in a position <u>better</u> than his or her original one. It is therefore necessary not only to determine the plaintiff's position after the tort but also to assess what the "original position" would have been. It is the difference between these positions, the "original position" and the "injured position" which is the plaintiff's loss. …
>
> [Emphasis in original.]

### *2. Authorities*

[46] The plaintiff proposes that the Court award non-pecuniary damages of $110,000, or $130,000 if the claim for loss of housekeeping capacity was embedded. The plaintiff relied on the following authorities:

a) *Wardrop v Gleeson*, 2022 BCSC 2001: Ms. Wardrop was in two motor vehicle accidents. She was almost 21 on the date of her first accident and was 26 at trial. At trial, she continued to experience chronic pain in her neck, mid- and lower back, and the court found that she would continue to do so for the foreseeable future. She experienced periodic bouts of anxiety and headaches. She regularly had trouble sleeping. Although she was able to work in her chosen field, she had to put up with pain in order to do so. Even then, some tasks remain beyond her abilities, leading to a need for accommodation. Her career plans were delayed. She was unable to do household chores as before. She was restricted to light cleaning, dusting and sweeping. She was unable to enjoy recreational activities to the same extent. Her partner had to carry groceries and heavy gear for her. Her injuries adversely affected her marital relationship, including her plans for children. She was off work three weeks after her first accident and several days per

month thereafter. The court awarded **$150,000,** including an award for housekeeping.

b) *Herman v. Paley*, 2017 BCSC 728: The 40-year-old plaintiff suffered pain in her upper neck, back, shoulder blades, as well as headaches. She missed several months of work. She underwent a series of facet rhizotomies. Prior to the collision, she enjoyed landscaping and gardening as well as fishing, canoeing, hiking, cross-country skiing, swimming, yoga, running, quilting and sewing. She and her husband regularly took camping trips in the summer and fall. At the time of the collision the plaintiff was about to commence her goal of becoming a full-time regular perinatal nurse. As a result of her injuries, that position proved too physically demanding. She moved towards leadership positions. At the time of trial, she was working six to eight 12-hour shifts per month. The court found that she would require reduced work hours and injections to control her pain for the rest of her life. The court awarded $110,000 (**$131,000** in today's dollars).

c) *J.D. v. Chandra*, 2014 BCSC 466 aff'd 2015 BCCA 131 ("*Chandra*"): The plaintiff was injured in two motor vehicle accidents: the first on February 18, 2006, when she was 17 years old, and the second on March 26, 2010, when she was in her fourth year of university. Prior to the accident, she had been an elite volleyball player. The plaintiff injured her back, neck and right shoulder. She did not miss any school after the first accident, and only a week after the second accident. She had surgery on her shoulder, but was left with continuing symptoms. At trial, she continued to have pain in her back and right shoulder and sometimes her neck if she sat or stood for an extended length of time. The court found that she later missed 381 hours of potential work given that she was only able to work part time. She had to continually shift and move around and stretch to try to limit the negative effects of sitting or standing. The court found that this was likely to continue. The court found that she had trouble sleeping and concentrating. She was attending law school at the time of trial. The court found that there would be a 20% reduction in her future capacity to work as a lawyer. The court awarded $100,000 **($124,000** in today's dollars), not including housekeeping. An additional $15,000 award was made for housekeeping.

d) *Johal v. Meyede*, 2013 BCSC 2381, aff'd as to award for future loss of income 2014 BCCA 509: The plaintiff was approximately 27 years old at the time of the accident. Prior to the accident, the plaintiff participated in many sports. The plaintiff worked in the hospitality industry as an assistant front office manager. She hoped to become the general manager of a hotel. The court noted that even a general manager was expected to carry luggage or make a bed when the need arose. The parties agreed that there was only $1,300 of past wage loss. The court considered that the plaintiff wished to be a mother, and found that her injuries will give rise to practical, albeit surmountable, difficulties in carrying or lifting a child. The court awarded $85,000 (**$107,000** in today's dollars).

e) *Small v. Upshaw*, 2012 BCSC 1225: The plaintiff was injured in three motor vehicle accidents. He was 17 years old at the time of the first accident, 19 years old for the second, and 20 years old for the third. The plaintiff's left shoulder, neck and back were injured in the accident. He missed approximately two weeks of school. At the time of the second accident, he was working as an apprentice mechanic. He missed two weeks of work. He had intermittent numbness and tingling in his left arm. By two years after his second accident, the plaintiff's neck, back and left shoulder were still stiff and sore. As the workday progressed so did his symptoms. He had little energy left to socialize or do recreational activities in the evening. This third collision caused the plaintiff considerable emotional upset. For two weeks, the symptoms he was still feeling from the second accident were aggravated by the third. His level of function then settled back to its previous and relatively unchanging state. The court awarded $80,000 (**$102,000** in today's dollars), along with a separate award of $60,000 for "future care/loss of management capacity".



[47] The defendants proposed an award of $50,000 to $60,000, based in part on cases they summarized in a chart reproduced below (with minor adjustments and additions):

| Case | Non-pecs awarded | Missed work | Age at the time of accident | Injuries | Background | Activities after MVA |
|---|---|---|---|---|---|---|
| *Carleton v. Warner,* 2020 BCSC 436 | $60,000 | No time off work | 26 (29 at trial) | Chronic myofascial pain to neck and back | Dental assistant working 4 days a week | Went to trip to Europe, avoided strenuous activities, still canoeing and walking, had less energy |
| *Findlay v. Sun,* 2020 BCSC 1330 | $55,000 | Missed less than a week | 27 (31 at trial) | Chronic neck and back pain | Worked at London Drugs, then as a laser technician | Able to travel to Mexico, Tofino, walk dog |
| *Callow v. Van Hoek-Patterson,* 2023 BCCA 92 | $55,000 | No time off school | 20 (27 at the trial) | Chronic pain to shoulder, neck, back | 3rd year in university; Later worked as an administrator at City of Vancouver | Stopped playing soccer on varsity team; played recreational soccer only |

| | | | | | | |
|---|---|---|---|---|---|---|
| *Cheema v. Bains,* 2021 BCSC 1766 | $50,000 | 10 days off | 21 (25 at trial) | Neck and shoulder resolved within 5 months; lower back pain and radiating pain into left leg persisting | Able to continue to work as a long-haul truck driver, had to take breaks every 2-3 hours | No longer running or walking his dog |



### *3. Key Factors and Findings*

[48] The following findings and factors are most germane to the determination of the appropriate non-pecuniary award in this case:

a) The plaintiff's back problems are unlikely to materially improve.

b) While the plaintiff has been able to continue to go to work and school given her stoicism, those efforts have left her in a position where she is exhausted by the end of the day, resulting in a reduced ability to participate in social events or recreational activities.

c) I find that it is more appropriate to embed any consideration of the loss of housekeeping capacity into the general damages award, particularly as (1) there is little evidence of the plaintiff doing substantial housework before the Accident, (2) no expenses were incurred to replace her work, and (3) the plaintiff's partner has been able to do most of the work required in a small apartment, an apartment in which he has traditionally done all of the housework himself: *Kim v. Lin*, 2018 BCCA 77 at para. 33.

### *4. Determination of Non-Pecuniary Damages*

[49] I find that an award of **$110,000** is appropriate. The situation endured by the plaintiff in *Chandra* was clearly worse than the present situation in that: (1) she was in three accidents; (2) she required surgery; and (3) she lost an ability to compete in higher end performance sports. I find that this situation more closely parallels that in

*Small*, which awarded a somewhat lower amount for general damages, but where the court also awarded an additional embedded amount for housekeeping.

### B. Past Loss of Income

[50] This Court discussed the principles applicable to loss of capacity claims in *Engelhart v. Day*, 2022 BCSC 224:

> [113] The steps for performing an assessment of past and future earning capacity are laid out in *Grewal v. Naumann*, 2017 BCCA 158. While Justice Goepel dissented in the outcome, the majority agreed with his summary of the applicable principles (see para. 66):
>
> > [48] In summary, an assessment of loss of both past and future earning capacity involves a consideration of hypothetical events. The plaintiff is not required to prove these hypothetical events on a balance of probabilities. A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation. If the plaintiff establishes a real and substantial possibility, the Court must then determine the measure of damages by assessing the likelihood of the event. Depending on the facts of the case, a loss may be quantified either on an earnings approach or on a capital asset approach: *Perren v. Lalari*, 2010 BCCA 140 at para. 32.
> >
> > [49] The assessment of past or future loss requires the court to estimate a pecuniary loss by weighing possibilities and probabilities of hypothetical events. The use of economic and statistical evidence does not turn the assessment into a calculation but can be a helpful tool in determining what is fair and reasonable in the circumstances: *Dunbar v. Mendez*, 2016 BCCA 211 at para. 21.
>
> [114] The legal principles relevant to determining loss of earning capacity were also summarized by Justice Voith (as he then was) in *Pololos* at para. 133:
>
> > a) To the extent possible, a plaintiff should be put in the position he/she would have been in, but for the injuries caused by the defendant's negligence; *Lines v. W & D Logging Co. Ltd*., 2009 BCCA 106 at para. 185, leave to appeal ref'd [2009] S.C.C.A. No. 197;
> >
> > b) The central task of the Court is to compare the likely future of the plaintiff's working life if the Accident had not occurred with the plaintiff's likely future working life after the Accident; *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 32;
> >
> > c) The assessment of loss must be based on the evidence, but requires an exercise of judgment and is not a mathematical calculation; *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 18;

> d) The two possible approaches to assessment of loss of future earning capacity are the “earnings approach” and the “capital asset approach”; *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 at para. 7 (S.C.); and *Perren v. Lalari*, 2010 BCCA 140 at paras. 11-12;
>
> e) Under either approach, the plaintiff must prove that there is a “real and substantial possibility” of various future events leading to an income loss; *Perren* at para. 33;
>
> f) The earnings approach will be more appropriate when the loss is more easily measurable; *Westbroek v. Brizuela*, 2014 BCCA 48at para. 64. Furthermore, while assessing an award for future loss of income is not a purely mathematical exercise, the Court should endeavour to use factual mathematical anchors as a starting foundation to quantify such loss; *Jurczak v. Mauro*, 2013 BCCA 507 at paras. 36-37.
>
> g) When relying on an “earnings approach”, the Court must nevertheless always consider the overall fairness and reasonableness of the award, taking into account all of the evidence; *Rosvold* at para. 11.

[51] The plaintiff seeks an award of $8,085 for past loss of income, including a small $104 award for the period immediately after the Accident, and with the balance representing an alleged reduction of capacity from September 2022 to trial. I am prepared to make the $104 award, but not the remaining $7,981. I find that any reduced earnings in the identified period were due to her desire to improve her grades, and are not properly causally related to injuries sustained in the Accident.

### C. Future Loss of Earning Capacity

[52] The Court of Appeal recently released three decisions addressing the proper approach to a claim for loss of future earning capacity: *Dornan v. Silva*, 2021 BCCA 228; *Rab v. Prescott*, 2021 BCCA 345; and *Lo v. Vos*, 2021 BCCA 421. In *Dornan* at para. 156, Justice Grauer cites *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 32, where the court described the proper approach in these terms:

> An award for future loss of earning capacity thus represents compensation for a pecuniary loss. It is true that the award is an assessment, not a mathematical calculation. Nevertheless, the award involves a comparison between the likely future of the plaintiff if the accident had not happened and the plaintiff's likely future after the accident has happened…

[53] In *Rab* at para. 47, Justice Grauer outlines a three-stage framework for assessing a plaintiff's loss of future earning capacity:

a) Stage 1: Does the evidence disclose a potential future event that could lead to a loss of capacity? At this stage, the trial judge considers whether the plaintiff may suffer from ongoing symptoms which could influence their ability to earn income.

b) Stage 2: Does the evidence demonstrate that there is a real and substantial possibility that this potential loss of capacity will cause pecuniary loss?

c) Stage 3: Having established the real and substantial likelihood of pecuniary loss stemming from the plaintiff's loss of capacity, the trial judge must assess the loss. At this stage, the trial judge should determine the relative likelihood of the future loss occurring and whether any contingencies apply. The award should be reduced to account for the relative likelihood that the future event will not occur.

[54] More recently, the Court of Appeal discussed (and clarified) the available approaches in *McKee v. Hicks*, 2023 BCCA 109:

> [80] Having appropriately settled on the capital asset approach for assessing Mr. McKee's loss of future earning capacity, there were a number of methods open to the judge to assess that loss. In *Pallos v. Insurance Corp. of British Columbia* (1995), 100 B.C.L.R. (2d) 260, 1995 CanLII 2871 (C.A.), this Court identified three acceptable methods for doing so:
>
> > 43 The cases to which we were referred suggest various means of assigning a dollar value to the loss of capacity to earn income. One method is to postulate a minimum annual income loss for the plaintiff's remaining years of work, to multiply the annual projected loss times the number of years remaining, and to calculate a present value of this sum. Another is to award the plaintiff's entire annual income for one or more years. Another is to award the present value of some nominal percentage loss per annum applied against the plaintiff's expected annual income.
>
> [81] In this case, the judge seems to have considered the second of these methods to be appropriate. She awarded Mr. McKee $65,000, which was slightly more than two years of his then current annual income as a first-year apprentice ($30,000). She considered this award to be "sound, and reasonable". The remaining question is whether that is so.

> [82] In my respectful view, the judge did not err by failing to assign specific probabilities and timelines to various possible future events. Such precision was unrealistic and not required in a case such as this involving a young plaintiff early on in his career who faced an uncertain risk of future complications but who had not experienced any loss of income due to the injury to the date of trial: *Romanchych v. Vallianatos*, 2010 BCCA 20 at para. 15; *Sinnott v. Boggs*, 2007 BCCA 267 at para. 16. For example, in using the capital asset approach to assess the value of the plaintiff's loss of future earning capacity in *Dornan v. Silva*, 2021 BCCA 228, this Court did not assign specific probabilities and timelines to various possible future events as Mr. McKee suggests the judge was required to do in this case: see *Dornan* at paras. 162-174. "[T]he task of the court is to assess damages, not to calculate them on some mathematical formula": *Parypa v. Wickware*, 1999 BCCA 88 at para. 36, citing *Mulholland (Guardian ad litem of) v. Riley Estate* (1995), 1995 CanLII 1971 (BC CA), 12 B.C.L.R. (3d) 248 (B.C.C.A.) at para. 43.
>
> [83] However, with the greatest respect to the trial judge, she overlooked a critical step that she herself identified in her assessment of Mr. McKee's loss of future earning capacity. At para. 104 of her reasons for judgment, the judge stated:
>
> > [104] When a plaintiff is young and not yet established fully in his career with no established pattern of employment, quantifying a loss is more "at large" tha[n] a mathematical exercise: *Sinnott v. Boggs*, 2007 BCCA 267 at para. 16. Notwithstanding that, the Court of Appeal has noted that it can be appropriate to look at mathematical aids to assist in quantifying the loss. In *Jurczak v. Mauro*, 2013 BCCA 507 at para. 37, the court stated:
> >
> > > [37] With that said, <u>if there are mathematical aids that may be of some assistance, the court should start its analysis by considering them</u>. For example, in Henry v. Zenith (1993), 1993 CanLII 1434 (BC CA), 31 B.C.A.C. 223 at paras. 44-48, 82 B.C.L.R. (2d) 186 (C.A.), this Court held that a trial judge's failure to consider an economist's projections of a plaintiff's lost future earning capacity contributed to the judge committing an error in principle, which "resulted in a wholly erroneous estimate of the damages".
>
> Yet, once the judge rejected the earnings approach, she failed to consider available and highly relevant economic evidence in measuring Mr. McKee's loss of future earning capacity. This was an error in principle.
>
> [Emphasis in original.]

[55] I find that the first two stages set out in *Rab* are satisfied. The evidence clearly establishes the plaintiff will continue to suffer symptoms from her injuries going forward. I am also satisfied that the evidence demonstrates that this loss of

capacity may cause pecuniary loss in the future, given the effect on her capacity noted by almost all of the experts. The question is the appropriate award.

[56] The parties admitted evidence of the average earnings of various positions being considered by the plaintiff, which are set out in the chart below. The plaintiff sought an award of $208,560-$398,545 based on the following analysis:

> [113] If we were to assume that Ms. Dacre will obtain a kinesiology degree, and go no further, her earnings could be expected to commence at the end of this year at the salary level applicable to that degree, namely $52,140 per year.
>
> [114] Ms. Dacre is now 27 years of age. Assuming that she would work to age 65 the multiplier would be 28.8051 (i.e. 1.5% per annum discount rate taken from page G-36 of CivJ). That would result in a discounted to present value some [sic] of $1,501,897.00.
>
> [115] Utilizing a 20% loss of her earning potential over her lifetime would yield a loss of earning capacity of $300,379. We are suggesting the 20% discount because Ms. Dacre will be less effective at her employment, will not be seeking out overtime, will suffer all of the latent losses referred to in the testimony of [Niall] Trainor, and is at risk of being ground down by her chronic pain as the years progress.
>
> …
>
> **Calculations Based on Ms. Dacre Continuing on to Further Education**
>
> [117] Another option would be to do the calculations on the basis that Ms. Dacre will continue in school for another 4 to 5 years to upgrade her marks and land one of the other healthcare related jobs she prefers, where her annual earnings would be more than the vicinity of $85,000 per year.
>
> [118] That calculation could involve five additional years of part time earnings loss given that Ms. Dacre would not be able to work part time while in school owing to her injuries. We already calculated that amount at $7,981.50 per year, or $39,907 over five years. Ms. Dacre would be 32 years of age upon graduation. There would be 33 years to her retirement date. The 33 year multiplier from CivJ would be 25.8790, but that multiplier would not be applicable until five years in the future, being the date she ultimately graduated. The calculation would then involve taking the 33 year multiplier times $85,000 which equals $2,199,715 and subtract from that the five year multiplier (ie: $85,000 multiplied by 4.7826 = $406,521). Following that procedure, $2,199,715 - $406,521 = $1,793,194 in net lifetime earnings to age 65 discounted to present value. A 20% loss there would equal $358,638. Adding to that the part-time loss while in University of $39,907, would yield a **total loss of $398,545**
>
> **Utilizing the Pallos Method of Calculation Earnings Loss**
>
> Utilizing the Pallos approach of estimating it on annual income, the court estimates a number of years for the loss multiplied by the salary expected for

> Ms. Dacre. It is submitted that Ms. Dacre will exceed the salary of a kinesiologist. She was already close to that salary using only [her] business diploma, and could have exceeded that salary merely by remaining in the hospitality industry.
>
> That said, by way of example, if the court were to use three years based on a kinesiology salary as in the *Miller v. Lawlor 2012 BCSC 387*, the loss would be **3 x $52,140 = $156,420.** If a four-year loss like in *Scottv. Cheng* 2019 BCSC 697 decision was utilize the total would come to **$208,560.**
>
> Doing those same calculations using three years and $85,000 would total $255,000. Four years would total **$340,000.**
>
> Another possibility exists that the injuries to Ms. Dacre will prevent her from enhancing her education beyond human kinetics level. We have heard evidence that all the preferred healthcare programs are competitive to get into. Ms. Dacre is definitely less competitive as a result of her injuries. If we were to assume that because of the interference with her education caused by her injuries means that she will underachieve in her academic endeavours, and will achieve an occupation that earns her $10,000 less per year to age 65 than she would have earned in an uninjured condition, the calculation would be $10,000 x 25.8790 **equals $258,790.**
>
> [Bold and underlining in the original.]

[57] I note that in *Chandra* the court awarded a 20% loss of her gross future earning capacity for injuries more severe than, but not wholly dissimilar from, those here. In *Wardrop*, the court used a 15% figure for loss of capacity. I find that a 15% figure is appropriate here given that the plaintiff has shown herself to be quite able to work through her residual pain.

[58] Given that:

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, and she is less valuable to herself as a person capable of earning income in a competitive labour market;

c) the plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to her had she not been injured. The plaintiff's available range of positions, even in the health care or hospitality

fields, may be materially restricted by the physical demands of sitting or standing for long periods, or the requirement for periodic heavy lifting;

d) the plaintiff had not yet settled on a career prior to the Accident;

e) the plaintiff is still in school upgrading her skills, although many of the positions she is considering may be unrealistic given her academic challenges, challenges that existed before the Accident;

f) the plaintiff's need for breaks to stretch, or exemption from certain duties may reduce her future income prospects, particularly in the eyes of her superiors;

I find that a capital asset based *Pallos*-type award of 4 times her expected salary as a kinesiologist would be appropriate, as I find that kinesiology is her most likely career path given how close she is to completing the academic program, and the challenges she would always have faced being accepted into other programs: *Scott v. Cheng*, 2019 BCSC 697 at paras. 102, 131; *Daleh v. Schroeder*, 2019 BCSC 1179 at para. 147. That yields a figure of $210,000.

[59] Cross-checking against a more mathematical earnings-type approach yields a relatively similar figure, based on the findings and assumptions embedded in the chart below. Note though that I have not included a provision for the loss of part-time earnings. Should she decide to pursue further education and be successful, I find she would either not have much time for employment given the difficulty of such programs. Alternatively, I find that if she can work part-time, she should be able to sustain part-time work even with her current capacity challenges:

| Position | Average Annual BC Salary | CIVJI Multiplier (38 years for Kinesiology and 33 years starting 5 years in future for balance) | Lifetime Earnings | Loss of Earning Potential | Lost Value | Likeli-hood of Achiev-ing | Expected Value |
|---|---|---|---|---|---|---|---|
| Physiotherapy | $86,323 | 24.02 | $2,073,478.46 | 15% | $311,021.81 | 5% | $15,551.09 |
| Occupational Therapy | $87,595 | 24.02 | $2,104,031.90 | 15% | $315,604.79 | 10% | $31,560.48 |
| Speech Pathologist | $87,404 | 24.02 | $2,099,444.08 | 15% | $314,916.61 | 10% | $31,491.66 |
| Kinesiologist | $52,140 | 28.81 | $1,501,893 | 15% | $225,283.91 | 70% | $157,698.73 |
| Registered Nurse | $85,810 | 24.02 | $2,061,156.20 | 15% | $309,173.43 | 5% | $15,458.67 |
| | | | | | | 100% | |
| **Total Expected Value of Loss** | | | | | | | $251,760.63 |



### D. Cost of Future Care

[60] In *Peters v. Ortner*, 2013 BCSC 1861, Justice Harris (as he then was) outlined the general principles that should be considered when assessing a plaintiff's cost of future care:

> [141] The plaintiff is entitled to compensation for the cost of future care based on what is reasonably necessary to restore him to his pre-accident condition in so far as that is possible. The award is to be based on what is reasonably necessary on the medical evidence to preserve and promote the plaintiff's mental and physical health: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.); *Williams v. Low*, 2000 BCSC 345; *Spehar v. Beazley*, 2002 BCSC 1104; *Gignac v. Rozylo*, 2012 BCCA 351.
>
> [142] The test for determining the appropriate award under the heading of cost of future care is an objective one based on the medical evidence. For an award of future care: there must be a medical justification for claims for cost of future care and the claims must be reasonable: *Milina; Tsalamandris v. McLeod*, 2012 BCCA 239 at paras. 62-63.
>
> [143] Future care costs are "justified" if they are both medically necessary and likely to be incurred by the plaintiff. The award of damages is thus a matter of prediction as to what will happen in the future. If a plaintiff has not used a particular item or service in the past it may be inappropriate to include its cost in a future care award. However, if the evidence shows that previously rejected services will not be or be able to be, rejected in the future,

> the plaintiff can recover for such services: *Izony v. Weidlich*, 2006 BCSC 1315 at para. 74; *O'Connell v. Yung*, 2012 BCCA 57 at paras. 55, 60, 68-70.
>
> [144] The extent, if any, to which a future care costs award should be adjusted for contingencies depends on the specific care needs of the plaintiff. In some cases negative contingencies are offset by positive contingencies and, therefore, a contingency adjustment is not required. In other cases, however, the award is reduced based on the prospect of improvement in the plaintiff's condition or increased based on the prospect that additional care will be required. Each case falls to be determined on its particular facts: *Gilbert v. Bottle*, 2011 BCSC 1389 at para. 253.

[61] Medical justification, as opposed to medical necessity, "requires only some evidence that the expense claimed is directly related to the disability arising out of the accident and is incurred with a view toward ameliorating its impact": *Harrington v. Sangha*, 2011 BCSC 1035 at para. 151. Reasonableness is assessed in light of whether a reasonably minded person of ample means would incur the expense: *Brewster v. Li*, 2013 BCSC 774 at para. 158. The assessment of the cost of future care is not a precise accounting exercise: *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at para. 21.

[62] The plaintiff claims the following amounts based in Ms. Van Biljon's work (with a slight mathematical correction):

a) two additional protein rich plasma injections totaling $700;

b) Nine physiotherapy sessions per year at $90 per session = $810 x 28.6616 = $23,215 to age 70;

c) 12 additional kinesiology sessions = $1,020;

d) Gym membership at six sessions per year is $636 x 28.6616 = $18,228;

e) Portable pillow $75;

f) Ergonomic office chair $675 [midpoint of range] plus tax at 12% = $756;

g) Electric sit/stand desk $675 [midpoint of the range] plus tax at 12% equals $756; and

h) home support services to age 70 at $350 per year x 28.6616 equals $10,031.

[63] The foregoing totals $54,781 The plaintiff was prepared to discount this figure by 10% for negative contingencies, yielding an amount of $49,303.

[64] The defendant takes no position on the following items sought by the plaintiff:

a) the portable pillow;

b) the ergonomic office chair;

c) the electric sit/stand desk; and

d) 12 additional kinesiology sessions.

[65] The defendant suggests that any care award should be further constrained to reflect the following:

a) there is no medical necessity for additional physiotherapy or massage sessions. There was no evidence from any medical expert that the plaintiff needs physiotherapy and massage treatments, and she had not attended such therapy for over four years;

b) there is no evidence to support any requirement of heavier seasonal cleaning claimed by the plaintiff, given the small size of any apartment in which the plaintiff is likely to live;

c) PRP injections are not a well-established practice, and that there is no evidence that it has any benefit to the plaintiff; and

d) the gym pass is not medically justified because there has been no medical recommendation for it, there are other cost-effective options to support the plaintiff's exercise routines (including utilizing apartment building gyms and at-home exercises), and the plaintiff has not been regularly using the gym.

[66] Using the plaintiff's claim as a base for the analysis, which I find to generally be reasonable and appropriate, I would make the following adjustments:

a) Given the lack of benefit the plaintiff was receiving from physiotherapy, I would reduce this to 4 sessions a year, which figure is meant to address potential flare ups (for a reduction of $12,897); and

b) Given that I expect that her partner should reasonably be expected to perform the heavier chores so long as they are together as a couple, I would reduce the home support services by 50% (for a reduction of $5,015).

[67] This yields a final award under this head of $33,182 after application of a 10% negative contingency.

### E. Special Damages

[68] The plaintiff claims special damages of $10,241. The defendants only dispute the $400 cost of the new PRP injections, and raised a concern with the claim for the gym pass. I find that given that the PRP injection was reasonably recommended by Dr. McCann, the plaintiff should receive this amount. I am also prepared to accept the gym pass claim, since: (1) the plaintiff seems best motivated by participating in this activity outside of her home; and (2) the plaintiff will more likely be able to fend off flares and a deterioration in her condition if she keeps fit.

## II. SUMMARY

[69] In summary, damages are assessed as follows:

| | |
|---|---|
| Non-Pecuniary Damages | $110,000 |
| Loss of Housekeeping Capacity | Included in non-pecuniary damages |
| Past Loss of Income | $104 |
| Future Loss of Income Capacity | $210,000 |
| Future Cost of Care | $33,182 |

| | |
|---|---|
| Special Damages | $10,241 |
| **TOTAL**: | **$363,527, less residual deductions** |

## III. TAXES, STATUTORY DEDUCTIONS, INTEREST, AND COSTS

[70] I leave it to the parties to consider the results of this judgment and address any residual costs, tax, management fees, gross-up, statutory deductions, or interest implications. If they are unable to agree on these matters, they are at liberty to request a hearing to make further submissions. Further to my decision in *Park v Shepheard*, 2022 BCSC 2270 at para. 20, I direct that any application by the defendant for statutory deductions should be served within the next 90 days.

"The Honourable Mr. Justice Branch"