COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Langford (City) v. Matthews,* 2024 BCCA 214

Date: 20240606
Docket: CA49071

Between:

City of Langford, Performance Plus Hockey Inc., Greg Smith, John Doe, Eagle Ridge Roller Hockey Team

Appellants
(Defendants)

And

Sherry Lynn Matthews

Respondent
(Plaintiff)

Before: The Honourable Justice Griffin
The Honourable Mr. Justice Grauer
The Honourable Madam Justice Horsman

On appeal from: An order of the Supreme Court of British Columbia, dated April 18, 2023 (*Matthews v. Langford (City)*, Victoria Docket 160930).

Counsel for the Appellants:	A.M. Mersey, K.C. E.J. Segal
Counsel for the Respondent:	P.W. Dudding K.A. Schille
Place and Date of Hearing:	Vancouver, British Columbia April 29, 2024
Place and Date of Judgment:	Vancouver, British Columbia June 6, 2024

Written Reasons by:
The Honourable Madam Justice Horsman

Concurred in by:
The Honourable Justice Griffin
The Honourable Mr. Justice Grauer

Summary:

The respondent was struck in the head by a puck while watching a roller hockey game. The appellants admitted liability. The assessment of damages was tried before a jury. The appellants appeal the jury awards of $804,000 for loss of past earning capacity, and $175,000 for non-pecuniary loss. Held: Appeal dismissed. The award for past loss of earning capacity is supportable on the evidence and not wholly disproportionate. The award of non-pecuniary damages is not wholly disproportionate to the respondent's circumstances, having regard to judge-made awards.

Reasons for Judgment of the Honourable Madam Justice Horsman:

Overview

[1] In May 2014, the respondent, Sherry Matthews, was struck by a puck over her right eye while watching a roller hockey game in Langford, British Columbia (the "Accident"). She was 60 years old at the time of the Accident, and 69 at the time of trial.

[2] The appellants admitted liability for the Accident. The parties did not agree on the nature of the respondent's Accident-related injuries, or the quantum of her damages. These issues were tried before a jury over ten days in April 2023.

[3] The respondent's evidence at trial was that the injuries caused by the Accident had severely impacted her life, leaving her unable to work or manage day-to-day household activities. She testified to experiencing ongoing severe headaches, vision and breathing problems, cognitive difficulties, and low energy and motivation. Experts called by the respondent opined that she had suffered a mild traumatic brain injury ("MTBI") in the Accident, leading to a neurocognitive disorder, persistent depressive disorder, generalized anxiety disorder, and impairment of executive functioning skills.

[4] The appellants maintained that the Accident did not cause the respondent significant physical or psychological harm. They asserted that her post-Accident symptoms were causally related to her pre-existing depression, anxiety, and

headaches. They argued that the respondent was not a credible witness, and this undermined the reliability of her expert evidence.

[5] The jury awarded the respondent damages in a global amount of over $1 million, including $175,000 for non-pecuniary loss and $804,000 for loss of past earning capacity.

[6] The appellants appeal the awards for loss of past earning capacity and non-pecuniary loss. The appellants do not allege any errors by the trial judge in her charge to the jury, or rulings made during the course of the trial. Rather, they say that the award for past loss of earning capacity is unsupportable on the evidence, and the award of non-pecuniary damages is not proportionate to the respondent's circumstances and comparable judge-made awards.

[7] For the reasons that follow, I would dismiss the appeal.

Background

The respondent's pre-Accident work history and personal circumstances

[8] The respondent had a varied work history. She spent most of her 20s working at an equestrian track in California, where she trained racehorses. On her return to British Columbia in the early 1980s, the respondent obtained employment as a life insurance salesperson with the Independent Order of the Foresters ("IOF"), and also through her own company. After the death of her father in the early 2000s, the respondent switched focus, and began caring for Shay, a young girl who had been severely injured in a motor vehicle accident. The respondent paid Shay's expenses and cared for her for a period of approximately seven years. Between 2010 and 2013, the respondent worked intermittently in various roles in natural gas and mining camps.

[9] In 1992, the respondent's son, Ryan, was born. The respondent's relationship with Ryan's father was not a happy one, and she left him when Ryan was very young. The respondent raised Ryan on her own, while continuing to work full-time

and support her parents. The respondent and Ryan travelled quite a bit together, both for her work and his hockey tournaments. By all accounts, the respondent's life revolved around her work and her family.

[10] The respondent had some pre-Accident injuries, notably to her nose and left calf. The symptoms associated with the injuries to her left calf were managed with prescription pain medication.

[11] In the fall of 2013, the respondent became an independent contractor with Axxess Payments Inc. ("Axxess"), working as a salesperson. Axxess leased and sold credit and debit card processing terminals to businesses. Contractors working for Axxess, such as the respondent, earned upfront sign-up fees for each terminal they leased or sold. At some point in late 2013 or early 2014, the respondent was moved from Axxess to a related company, Payzium, performing the same work.

[12] While working for Axxess and Payzium prior to the Accident, the respondent signed lease agreements with approximately 15 to 20 businesses a month, leasing, on average, between 20 to 30 individual terminals. She earned $125 for every machine she leased to a client business. In 2013, the respondent earned $53,907 in gross commission earnings for the approximately four months she worked for Axxess and Payzium in that year. In 2014, she earned $44,646 in gross commission in the four months prior to the Accident.

[13] By the time of the Accident, the respondent had been advised that she would be offered a more lucrative contract with Pivotal Payments ("Pivotal"), the parent company of Axxess and Payzium. The contract with Pivotal paid a higher amount of commission ($800) for each terminal that she leased, as well as paying "residuals", comprising income in the form of a percentage of sales put through each of those terminals.

The Accident and its aftermath

[14] The Accident occurred on May 3, 2014, as the respondent watched Ryan play in a roller hockey game at the Eagle Ridge Hockey Arena in Langford. A puck

travelled through a break in the safety netting, and struck the respondent over her right eye. Within minutes of the impact, the respondent had a visible mark and swelling above her eye. She went to sit alone at a nearby table to rest. It is unclear whether the respondent lost consciousness at this time because she was sitting alone and has no memory of this period of time.

[15] In the ensuing days, the respondent suffered from nausea, headaches, and light sensitivity. Ryan took the respondent to a medical clinic, and she was advised to attend a hospital emergency department. At the hospital, the respondent underwent a CT scan, which indicated a fracture to her nose. The evidence at trial was not clear as to whether the fracture was due to the Accident or due to a pre-Accident injury, and, if the latter, whether the Accident had aggravated the injury.

[16] The respondent's income declined in the years following the Accident, although the reasons for her difficulties were contested at trial. The more lucrative contract with Pivotal was in place by December 2014. However, the respondent was unable to earn a steady income from the sales work. She attempted to supplement her income by way of other part-time jobs. In 2019, she stopped working for Pivotal altogether after deciding she could no longer perform the work competently. The respondent briefly worked as a part-time florist during the COVID-19 pandemic. She had not worked at all in the two years prior to trial.

The trial

The evidence

The respondent's evidence

[17] The respondent led evidence to show that the Accident had caused her to suffer from impaired cognition and memory, in addition to fatigue, lack of motivation, problems with her vision and sense of smell, and almost-daily headaches. The respondent's mother, her son, her friend and former co-worker Virginia Malejko, and Shay's former lawyer Richard Margetts, K.C., also testified. They provided corroborative evidence about the marked difference in the respondent's condition before and after the Accident in terms of her cognitive functioning, energy level, and

capacity for activities she previously enjoyed. The respondent's witnesses described her as a highly energetic, outgoing, confident, ambitious, and motivated person prior to the Accident. By contrast, after the Accident, she was observed to be depressed, lacking in motivation and concentration, confused and forgetful, and not the same person. According to the witnesses, the respondent has rarely left her house since the Accident and has spent much of her time in bed.

[18] Christopher Clark, the former Director of Business Development at Axxess, also testified for the respondent. Mr. Clark was the person who hired the respondent. He testified that the respondent was an excellent salesperson, with strong initiative and drive, and described her as one of the top 30 to 50 sales people he had ever come across. According to Mr. Clark, the respondent stood to significantly increase her income through the Pivotal contract, particularly given that it provided income in the form of residuals. Mr. Clark stated that during his time working for Pivotal, the top salespeople earned between $300,000 to $400,000 annually in income from residuals alone.

[19] The respondent testified that, but for the Accident, she expected to work for another ten years for Pivotal, at which point she had plans to retire and open an animal sanctuary with her savings.

[20] The respondent tendered evidence from medical experts. Their opinions may be summarized as follows:

a) **Dr. Donald Cameron, neurologist:** Dr. Cameron opined that the respondent fulfilled the criteria for a diagnosis of an MTBI at the time of the Accident, and has since developed symptoms of post-traumatic brain injury syndrome including chronic, recurrent headaches and cognitive difficulties. Dr. Cameron said that the respondent had been left permanently partially disabled as a result of these symptoms.

b) **Dr. Shaila Misri, psychiatrist**: Dr. Misri opined that the MTBI the respondent suffered in the Accident led to a neurocognitive disorder.

Dr. Misri explained that as a result of the severity and chronicity of the MTBI symptoms, the respondent has experienced emotional blunting and apathy, as evidenced by her emotional disengagement and lack of initiative. Dr. Misri said that the respondent remained severely impaired in many aspects of her functioning as a result of the neurocognitive disorder. Dr. Misri also diagnosed the respondent with persistent depressive disorder and generalized anxiety disorder, which she opined were causally related to the Accident.

c) **Margherita Bracken, occupational therapist**: Based on the results of functional capacity testing, Ms. Bracken opined that the respondent's anxiety, low motivation, and limitations with respect to memory and executive functioning skills impaired her work capacity. As such, in Ms. Bracken's view, the respondent did not retain the capacity to work in either a full-time or part-time capacity as a salesperson. Ms. Bracken thought that the respondent may have the capacity for some form of part-time work with a flexible and accommodating employer, provided that the work: was near her home; involved limited or no interaction with the public and limited environmental stresses; called on her to perform predictable and consistent tasks that did not require decision-making; and had shift times in the afternoon to accommodate her sleeping difficulties. Ms. Bracken acknowledged it would be difficult for the respondent to locate employment that met these requirements.

[21] The respondent also led evidence from an expert economist, Darren Benning. Mr. Benning was provided with financial information from Pivotal that allowed him to determine the respondent's average monthly business income per client while she still worked for Pivotal in the years 2016–2019. Using this data, Mr. Benning prepared tables showing the income from residuals that she would have earned with additional clients. Mr. Benning explained:

> In each Table, we have summarized the average number of monthly customers. As well, we have summarized the sales volumes, profits and agent residuals on a monthly and monthly per client basis. From this

> information it is relatively straightforward to estimate monthly and annual loss values based on the number of foregone clients.

[22] By way of illustration, Mr. Benning's analysis showed that with the addition of 125 new clients per year (approximately ten per month), the respondent would have been earning over $400,000 annually by 2020 under the Pivotal contract. Mr. Benning opined that this business income should be reduced to account for the variable expenses incurred to earn the income, although the information he was provided did not permit him to quantify an allowance for variable expenses.

The appellants' evidence

[23] The appellants called three lay witnesses: the appellant Gregory Smith, the hockey player whose errant pass caused the puck to strike the respondent; Douglas Matheson, another spectator who was present at the time of the Accident; and Kristin St. Cyr, a representative of the company that manages recreational facilities in Langford, including the Eagle Ridge Hockey Arena. Mr. Smith and Mr. Matheson testified that they saw the respondent after the Accident, and did not observe her to be bleeding or unconscious. Ms. St. Cyr testified that no incident report had been filed as a result of the Accident. The purpose of this evidence, it appears, was to demonstrate that the Accident was relatively minor.

[24] The appellants tendered one expert report from Dr. Andrew Woolfenden, a neurologist. Dr. Woolfenden opined that while it was possible that the respondent suffered an MTBI in the Accident, it was not probable. Dr. Woolfenden stated that 85–90% of patients who suffer an MTBI will experience complete resolution of their cognitive complaints over time, typically within days to weeks of the injury. He stated that a large majority of patients who develop headaches following a head trauma also experience complete resolution of their pain over time, typically within months of the injury. Therefore, Dr. Woolfenden opined, if the respondent did suffer an MTBI in the Accident, she was likely, "from a statistical perspective", to fully recover.

[25] The appellants also relied on the respondent's PharmaNet records, which reflected that she had taken a variety of medications prior to the Accident due to

earlier unrelated injuries. These medications included opioids (prescribed for pain relief), antidepressants, and migraine and anti-anxiety medications.

Closing addresses to the jury

[26] The respondent submitted to the jury that she had suffered physical and psychological injuries in the Accident that have had a devastating impact on her life. The injuries included an MTBI, headaches, vision and breathing problems, cognitive impairment, and psychiatric injuries. The respondent reviewed the evidence of her pre-Accident life, which painted a picture of a highly motivated individual, with an outgoing personality and the mental acuity required to succeed in a sales career. The respondent submitted that the evidence showed that her prior injuries and medications did not impact her day-to-day life. The respondent also pointed to the evidence of her friends and family who uniformly testified that the respondent became a fundamentally different person after the Accident, changing from outgoing and adventurous to anxious, uncertain, and mostly homebound.

[27] The respondent invited the jury to rely on the analysis of Mr. Benning to assess her loss of earning capacity. She highlighted the table in Mr. Benning's report that indicated she would have been earning over $400,000 annually by 2020 under her contract with Pivotal with the addition of 125 clients per year. The respondent contrasted this with the actual income she had managed to earn after the Accident, consisting of her ultimately unsuccessful attempt to maintain her sales work with Pivotal, and sporadic part-time jobs that she struggled to maintain.

[28] In contrast, the appellants submitted to the jury that the respondent suffered only a short-term injury in the Accident, and her evidence to the contrary was not credible. The appellants suggested that the respondent did not tell the truth in her evidence, and, instead, was simply trying to build a claim for compensation. The appellants submitted that the respondent's experts were biased, and trying to assist the respondent in claim-building. Further, they said, since the respondent was not credible, there was no foundation for the opinions expressed by her medical experts. In contrast, the appellants encouraged the jury to accept the opinion of

Dr. Woolfenden, who they maintained was not biased, but rather was reasonable and rational in opining that the respondent did not have an MTBI.

[29] The appellants submitted that even absent the Accident, the respondent was unlikely to have had much success in payment processing sales. They stated that the respondent's income decline in the post-Accident period could be accounted for by other factors. The appellants submitted that the jury should not award the respondent any damages for loss of earning capacity, past or future.

The jury verdict

[30] The jury awarded the respondent damages under the following heads of loss: $804,000 for loss of past earning capacity; $11,000 for loss of future earning capacity; $60,000 for the cost of future care; and $175,000 for non-pecuniary loss.

On appeal

[31] The appellants raise two grounds of appeal:

a) the jury's award of $804,000 for loss of past earning capacity is unsupportable on the evidentiary record, and is therefore unjust and unreasonable; and

b) the jury's award of $175,000 for non-pecuniary damages is not proportionate to the respondent's circumstances compared to judge-made awards.

Standard of review

[32] The standard of review for a jury award is even more deferential than the standard applied to a judge alone-award. With a jury award, it is not enough to show that the award is inordinately high or low. Appellate interference is warranted only where it is demonstrated the award is "wholly disproportionate or shockingly unreasonable": *McCliggot v. Elliott*, 2022 BCCA 315 at para. 51; *Little v. Schlyecher*, 2020 BCCA 381 at para. 6. A jury's verdict on damages will "not be set aside unless it is so plainly unreasonable and unjust as to satisfy the court that no jury reviewing

the evidence as a whole and acting judicially could have reached it": *Thomas v. Foskett,* 2020 BCCA 322 at para. 47, quoting *Lennox v. New Westminster (City)*, 2011 BCCA 182 at para. 21.

[33] In reviewing a jury award of non-pecuniary damages, the British Columbia courts have adopted a comparative approach, which looks to whether there are judge-alone precedents that are reasonably comparable and suggest a range of reasonable awards. The level of regard the Court should have to comparators is linked to the degree of comparability between their circumstances and those of the plaintiff in the case under review: *McCliggot* at para. 79. Under the comparative approach, a jury award is still allowed a significant margin of deviation. Appellate intervention is justified only if the award is wholly disproportionate or shockingly unreasonable, having regard to the range established by comparable cases: *McCliggot* at para. 109.

[34] Where a jury award is said to be disproportionately high, the appellate court must assume the jury found the facts most favourable to the plaintiff: *Taraviras v. Lovig*, 2011 BCCA 200 at para. 36.

Analysis

Issue (a): Is the award for loss of past income capacity wholly disproportionate and shockingly unreasonable?

[35] The appellants argue that the jury award is wholly disproportionate when compared to the respondent's historical earnings. The appellants say that the award for loss of past earning capacity works out to a net income of $80,400 for each year in the pre-trial period. They compare this to the respondent's average net commission income for 2013 and 2014, after deduction of business expenses, of approximately $10,000. The appellants argue that a net annual income award that is roughly eight times more than historical income is "plainly unreasonable". They seek an order replacing the jury award with an award of $100,000 for past loss of earning capacity, to reflect their theory that the respondent's income loss should be measured by her pre-Accident earning history.

[36] The appellants' approach wholly ignores the main theory of past loss of earning capacity advanced by the respondent at trial, which was based on the income she would have earned, but for the Accident, under the more lucrative Pivotal contract. There was support in the respondent's evidence, including the evidence of Mr. Clark, that the respondent was highly successful in her sales role with Axxess and Payzium, and had signed up new clients at a rate of 15 to 20 per month. Mr. Benning's analysis, which relied on information provided by Pivotal, allowed the jury to make findings about the income the respondent would have earned through her contract with Pivotal if she had continued to sign new clients at the same rate. By way of illustration, Mr. Benning's tables indicated that if the respondent had been able to sign up an additional 125 clients per year—a rate that was actually less than her performance with Axxess and Payzium—she would have earned $2.8 million in business income in the pre-trial period.

[37] The evidence regarding the respondent's potential earnings with Pivotal is only addressed by the appellants in their reply factum. There, they make the assertion that Mr. Benning's analysis shows that the respondent's number of new clients actually increased rather than decreased after the Accident. The appellants then argue that the purported increase in "client sign-ups" supports their view that the Accident did not have any lasting effect on the respondent's capacity to earn income.

[38] This submission is based on a misreading of Mr. Benning's report. Mr. Benning's tables have a column headed "No. of Clients", which the appellants have interpreted to mean number of new clients. This interpretation is incorrect. As Mr. Benning explains in his report, the "No. of Clients" column summarizes the "average number of monthly customers", not the number of new clients. To the extent that there is any ambiguity in the report, it is resolved by Mr. Benning's *viva voce* evidence at trial:

> Q. Starting with table A on the topside of this sheet, number of clients, Mr. Benning, what does that refer to?
>
> A. So that's just the number of people she had in that month, number of clients who had transactions.

> Q. To clarify, now, the number of clients, is that new clients each month, or is that total number of clients each month?
>
> A. That's total clients each month.
>
> [Transcript at 392]
>
> Q. …Mr. Benning, it looks here June of 2016 she had 26 clients, and it looks like in December of 2016 she had 21 clients?
>
> A. That's correct.
>
> Q. So she lost about five clients over the course of that year?
>
> A. That's right.
>
> [Transcript at 393]

[39] Properly understood, Mr. Benning's charts show that the respondent lost five clients in 2016, and added seven, nine, and 14 new clients in the years 2017, 2018, and 2019 respectively. This was significantly under the pace—180 to 240 new clients per year—that the respondent was able to maintain while working for Axxess and Payzium prior to the Accident.

[40] Accordingly, taking the respondent's case at its most favourable, there was evidence to support an award for past loss of earning capacity in the range of up to $2.8 million. The jury award is perfectly rational in light of the evidence of the respondent and Mr. Clark regarding her sales performance for Axxess and Payzium, and Mr. Benning's evidence of the pecuniary loss to the respondent of being unable to sign up new clients for Pivotal at her pre-Accident pace. The judge's instructions, which again are not challenged on appeal, explained to the jury how they should go about assessing damages for hypothetical events, including the concept of real and substantial possibilities and the assessment of contingencies. The judge specifically instructed the jury that they would need to consider whether to deduct business expenses from the award if they used Mr. Benning's calculation. The jury award is easily explained as reflecting Mr. Benning's calculations, with contingency deductions applied that the jury considered appropriate. I agree with the respondent that the evidence as a whole demonstrates that the jury's award for past loss of income capacity was not merely justifiable, but represented a significant discounting from the income loss calculated in Mr. Benning's report if the respondent had continued to function at pre-Accident levels.

[41] Finally, I am not persuaded by the appellants' argument that the purported inconsistency between the award for future loss of earning capacity ($11,000) and past loss of earning capacity ($804,000) demonstrates the irrationality in the award for past income loss. The relatively lower award for future loss of earning capacity is consistent with the respondent's evidence about the timing of her retirement, which the judge reminded the jury of in her charge:

> The evidence relevant to Ms. Matthews' hypothetical without-incident income-earning capacity is very similar to the evidence about her past income-earning capacity. Ms. Matthews testified that she intended to continue her payment processing business until she was around 70. Ms. Matthews will turn 70 in December of this year.
>
> [Transcript at 878]

[42] If anything, the award for future loss of earning capacity demonstrates the jury's careful attention to the evidence, the parties' submissions, and the judge's error-free instructions to them as to how to go about their tasks.

[43] For these reasons, I would reject the appellants' argument that the award is "unsupportable on the record". In light of the evidence tendered at trial, I consider that it was open to a properly instructed jury, acting judicially, to assess damages for past loss of earning capacity in the amount of $804,000.

Issue (b): Is the award for non-pecuniary loss wholly disproportionate as compared to judge-made awards?

[44] Non-pecuniary damages are intended to compensate the plaintiff for pain and suffering caused by their injuries and the consequences of those injuries, including the loss of amenities and enjoyment of life: *McCliggot* at para. 43. The amount of an award for non-pecuniary damages is determined by a functional approach that does not depend solely on the gravity of the injury, but also on the circumstances of the particular plaintiff: *McCliggot* at para. 44. While an assessment of comparator awards is important, damage awards in each case will vary to meet the specific circumstances of that case: *Howes v. Liu*, 2023 BCCA 316 at para. 26. In British Columbia, the assessment of non-pecuniary damages is generally guided by the non-exhaustive list of factors set out by this Court in *Stapley v. Hejslet*, 2006 BCCA

34 at para. 46. They include the plaintiff's age, the nature of the injury, the severity and duration of pain, level of 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.

[45] The appellants cite the following cases as appropriate comparators:

a) *Suedat v. Kara*, 2014 BCSC 1837: $50,000 (approximately $60,000 when adjusted for inflation). The 43-year old plaintiff suffered a mild concussion and psychological injuries as a result of a relatively innocuous motor vehicle accident. The plaintiff had a long history of psychological and physical health issues. Post-accident, the plaintiff was diagnosed with post-traumatic stress disorder and adjustment disorder, with depressed mood. The judge found that the plaintiff had long-standing pre-existing health conditions that would have been ongoing regardless, but found that the accident had exacerbated these conditions and made her less functional.

b) *Eaton v. Riddell*, 2020 BCSC 734: $75,000 (approximately $85,000 when adjusted for inflation). The 43-year old plaintiff was injured in a motor vehicle accident. The plaintiff suffered injuries to his neck and back in the accident that caused him continued pain, discomfort, and headaches. The plaintiff also suffered some form of psychological injury and mild cognitive impairment; however, the judge found this difficult to assess given his concerns with the reliability of the medical evidence. The plaintiff changed jobs after the accident, but continued to work full-time. The judge found that some form of ongoing pain, fatigue, and mild cognitive impairment would impact his performance in the job market indefinitely. The judge also found the injuries had impacted the plaintiff's relationships with his family.

c) *Gill v. McChesney*, 2016 BCSC 1416: $80,000 (approximately $100,000 when adjusted for inflation). The 46-year old plaintiff suffered from soft

> tissue injuries to her neck and back and an MTBI as a result of a motor vehicle accident. The MTBI was at the less serious end of the spectrum and the resulting cognitive and related consequences, such as headaches and memory issues, had resolved prior to trial. The soft-tissue injuries similarly resolved prior to trial. The plaintiff had not established that she suffered any permanent or ongoing cognitive or other deficits from the accident. The plaintiff's injuries, while they were persisting, impacted her enjoyment of her family and relationship with her husband.

[46] These cases establish a range, when adjusted for inflation, of $60,000–$100,000. If the circumstances of these cases were reasonably comparable to the respondent's circumstances, it would be necessary to consider whether an award of $175,000 for non-pecuniary loss, bearing in mind the comparable cases, is wholly disproportionate or shockingly unreasonable such that appellate intervention is warranted. It is not apparent to me that appellate intervention would be justified, even assuming that the cited cases are comparable, given the permitted margin of deviation in a jury award.

[47] However, and in any event, the cases cited by the appellants do not involve reasonably comparable circumstances to those of the respondent. As *Taraviras* directs, we must begin by assuming that the jury found the facts most favourable to the respondent based on the evidence at trial. Accordingly, we must assume that the jury found the respondent to be credible, and found that she suffered the injuries described in the evidence. The injuries included an MTBI, chronic post-traumatic headaches, a neurocognitive disorder, as well as a persistent depressive disorder and generalized anxiety disorder. There was evidence that the effects of these injuries are ongoing, and likely permanent, and that they have left the respondent largely unemployable and housebound.

[48] The respondent argues that the jury's award of $175,000 to compensate her for non-pecuniary loss is, in fact, conservative given the severity of her injuries. The respondent says that in analogous cases involving plaintiffs who have experienced

similar chronic, disabling cognitive and psychological symptoms as a result of an MTBI, the appropriate range of non-pecuniary damages is over $200,000: *Wallman v. John Doe*, 2014 BCSC 79; *Owen v. Folster*, 2018 BCSC 143; and *Megaro v. Vanstone*, 2017 BCSC 2256.

[49] It is unnecessary, in deciding this appeal, to determine whether the respondent's proposed range is appropriate. It is sufficient to conclude that the appellants' cases are not reasonably comparable. The highest non-pecuniary award in the cases the appellants cite (in *Gill v. McChesney*) involved a plaintiff who suffered injuries similar to the respondent's, including an MTBI, but which did not have the same impact on her life and which had resolved by the time of trial. In the present case, it must be assumed that the jury found the respondent's injuries to be devastating, ongoing, and likely permanently disabling. Accordingly, the proper range for assessing the respondent's non-pecuniary damages is significantly higher than the $100,000 that reflects the upper end of the appellants' proposed range. That being the case, I am of the view that the jury award of $175,000 to compensate the respondent for her non-pecuniary loss cannot be said to be wholly disproportionate or shockingly unreasonable.

Disposition

[50] I would dismiss the appeal.

"The Honourable Madam Justice Horsman"

I AGREE:

"The Honourable Justice Griffin"

I AGREE:

"The Honourable Mr. Justice Grauer"