COPY

IN THE SUPREME COURT OF BRITISH COLUMBIA

Date: 20121221
Docket: M112339
Registry: Vancouver

Between:

Tamara Renae Hagel

Plaintiff

And

Caitlin Dorey Rennison and Eric Joseph Benoit

Defendants

Before: The Honourable Mr. Justice Harvey

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff:	I. Kordic M. Murphy, Articled Student
Counsel for the Defendants:	T. Kushneryk (as agent for L. Sandhu)
Place and Date of Trial:	Vancouver, B.C. December 12-14, 2012
Place and Date of Judgment:	Vancouver, B.C. December 21, 2012

[1] **THE COURT:** The plaintiff is a 27 year old viticulturist who was injured in a two car collision (the "accident") that occurred on August 14, 2009, in Osoyoos, B.C. At the time, Ms. Hagel was a front seat passenger in a vehicle operated by the defendant, Caitlin Rennison. Liability has been admitted on Ms. Rennison's behalf and the sole issue before me is the measure of the plaintiff's damages.

[2] At the time of the accident, she was employed at Nk'Mip Cellars in a position akin to a practicum. She was taking a Master's degree in viticulture and, as part of the coursework, was working both in the field and in the cellar performing tasks associated with winemaking. She was paid between $12 to $14 hourly dependent on the role she was filling.

[3] In the summer months when tourism flourished and the vines needed less attention, the plaintiff worked as a wine server in the tasting room and food server in the winery's restaurant; in the latter role, she earned tips. This, she says, was the role she was assuming in August 2009 into September 2009 immediately in the aftermath of the accident.

[4] Some of the work she performed at the winery was heavy and involved working on an uneven terrain. The work is seasonal and has different tasks which involve different physical intensity. The harvest and the weeks following is a particularly busy time resulting in substantial hours of work of performing difficult tasks. While performing work in the field, as I note, she earned $14 an hour as opposed to $12 which was what she earned while working indoors.

[5] The aftermath of the accident, says the plaintiff, is that she has been left with chronic, albeit not disabling pain.

The Background

[6] Briefly, the circumstances of the accident are that the defendant, Rennison, failed to come to a complete stop at a stop sign on 74th Avenue at 87th Street is Osoyoos, B.C.. As she proceeded through, another vehicle lawfully entered the

intersection and collided with the passenger side of Rennison's Volkswagen Jetta. The impact was severe.

[7] The left passenger side of the defendant's vehicle bore the brunt of the impact. It was damaged to such an extent that the plaintiff was removed via the driver's door by ambulance personnel who attended in response to a call from a citizen.

[8] At the plaintiff's direction, the ambulance returned the plaintiff firstly to her mother's home, but later she went to the emergency ward of the Osoyoos Hospital where she was assessed and treated by Dr. Thomas Francis. He eventually became the plaintiff's treating physician, given she had no regular doctor in Osoyoos immediately prior to the accident.

[9] The plaintiff's immediate concerns were to her neck, shoulders, upper back, chest, right elbow, lower back, and left hip. Her neck and upper back pain was accompanied by frequent headaches.

[10] She testified that she had been physically well prior to the accident, albeit she attended, on occasion, for chiropractic or massage treatment for her neck, back and hips. This, she says, was for occasional treatment for discomfort arising from situational pain; back pain from prolonged sitting, or headaches caused by the tension of exams.

[11] Initially, there was concern for bony injury but X-rays taken at the emergency room revealed no breaks. Dr. Francis prescribed bed rest, physiotherapy, and painkillers as required in the days following the accident.

[12] He also prescribed a course of physiotherapy and, in the approximate five months following the accident, the plaintiff attended approximately 32 such treatments at a local clinic. She stopped treatment late in 2009 noting her recovery had plateaued and she did not find the treatments were further assisting her.

[13] Her treatment was coincidental with the harvest, the busiest time in the wine industry. The hours are long and the work heavy.

[14] She remained off work for four weeks from August 14, 2009, until the middle of September. Since her return, she has not missed further time from work and there is no medical opinion that her residual complaints will affect her future career plans. Her work at the winery, however, is said to aggravate her symptoms and leave her feeling tired and in pain on days when the physical effort is intense.

[15] Occasionally, she required – and still does – assistance with heavier tasks at work. Nonetheless, she appears to be a valued employee by her current employer, Black Hill Winery. She has been there since the spring of 2011. At present, she shares her time between fieldwork, paid $14 hourly, and work in the cellar, paid at $18 per hour.

[16] She has remained under the care of Dr. Francis until the present time.

[17] She completed the practicum at Nk'Mip in 2010 and began working at Tinhorn Creek Winery in further fulfilment of her course requirements. Her job description there was similar to that at Nk'Mip.

[18] What she could not do, according to her evidence, was give the necessary focus to writing her Master's thesis which was due in April 2010. Pain, coupled with time lost to treatment of her injuries in 2009, caused her to delay the completion of her thesis until October of 2010, the thesis being the last course requirement she needed to be granted her degree by Brock University.

[19] The plaintiff says the delay in obtaining her degree precluded her from seeking other work in the spring of 2010 which would have resulted in better wages than were paid to her at Tinhorn Creek had she been in receipt of the credential of her degree.

[20] In the spring of 2011, equipped with that degree, she obtained her present employment where she was provided increased salary benefits.

[21] Despite the cessation of treatment, the plaintiff's pain persisted, especially in her left hip. Dr. Francis was concerned the hip pain might be as a result of a torn labrum. Such would not be visible on an X-ray so she was referred to Dr. Taylor, an orthopaedic specialist, so as to obtain a referral for an MRI. The MRI was negative for any damage to the labrum.

[22] In total, the plaintiff has seen Dr. Francis some 12 times from the date of the accident to the date of his report, July 3, 2012. He has prescribed additional painkillers in 2011, notably Tylenol 3 and Celebrex. The visits throughout 2010 and thereafter seem mainly for assessment rather than treatment.

[23] The plaintiff acknowledged, in her testimony, that she was some 50% to 60% recovered by early 2010. Her pain, however, persists, dependent to some degree on the requirements of her work. When she has light duties, her pain is occasional. When work places high demands upon her, she suffers more intensely and is more hampered in the pursuit of recreational and social activities as a result.

[24] She has taken some of the painkillers prescribed by Dr. Francis, but not others. She, by self-report, is not a pill person. She treats her ongoing discomfort with Ibuprofen. No estimate of how often she takes it or how many have been given. No receipts were proffered as part of the claim for special damages for Ibuprofen.

[25] She has attended an occupational therapist in 2011, well after the conclusion of her original course of physiotherapy. That OT suggested a variety of treatments including further physiotherapy with a Mr. Gillespie, who practices in Kelowna, and injections. Mr. Gillespie apparently offered modalities of treatment especially aimed at the type of traumatic injury suffered by the plaintiff.

[26] The OT also suggested core strengthening by way of yoga and exercise. The plaintiff bought a membership at a community centre and began doing yoga and exercise. At some time during her recovery, she purchased an SI belt to help support her left hip and low back.

[27] The yoga course was completed, but she has not returned thereafter for ongoing yoga. She continues to exercise at the gym, albeit intermittently. Her attendance is driven by the demands of work. She briefly re-engaged with physiotherapy with Mr. Gillespie, but the drive to Kelowna was lengthy and the plaintiff was busy with work. After discussing the possible effects of the injections suggestion by the occupational therapist with her family physician, Dr. Francis, she determined that she did not wish to take them and she was supported in that view by Dr. Francis.

[28] Her complaints have persisted. Left hip pain was interfering with her sleep. As a result, she says in March 2011, she bought a new firmer mattress at a cost of $912.98. This, she says, assisted with her problem.

[29] She says she has been less engaged socially because her work exacted such a toll on her that she has little time for recreational activities. Previous to the accident, she ran recreationally and played occasional games of pick-up basketball.

[30] Following the accident, she testifies she has little energy to exercise or go out socially with friends. Despite this, since the accident, she has entered into a steady relationship with Mr. Feist and she has acquired a dog. She and he live together and have two mid-sized dogs and maintain their home. She has recently participated in a recreational slow-pitch league, although she says the social component is more important that the sports component.

[31] According to both she and Mr. Feist, he does 60% to 80% of the domestic chores, depending on the level of her complaint at any given time. Given his allergy, she mows the 10-acre property they jointly own using a powered push mower.

[32] The plaintiff worries about the long term impact of her ongoing complaints on her career and describes periods of moodiness and irritability which correspond with her increased pain.

[33] Other than treatment from Dr. Francis and the physiotherapists I have noted, the plaintiff has seen Dr. Taylor solely for the purposes of the MRI referral suggested by Dr. Francis. She has seen Dr. Underwood, a physiatrist, for an independent

medical examination arranged by her counsel, and undergone a functional capacity assessment with an occupational therapist, Ms. Nancy Scullion, so as to assess both function and the costs of future care for her lingering injuries.

The Plaintiff's Pre-Accident Health

[34] As to her medical health, Dr. Francis became her physician after the accident and was not provided any background of any previous physical complaints. He notes in his report, "She had no pre-existing history of illness or injury prior to the accident which would in any way affect her symptoms subsequent to the accident."

[35] In his description of each of her symptoms, he prefaced the diagnosis with the statement, "No history of pain in this area before the accident."

[36] As to causation, that is, the relationship between the plaintiff's ongoing complaints and the accident, he stated:

> Ms. Hagel is a 27 year old female who was a passenger in a motor vehicle which was struck on the passenger side. She had no antecedent history of illness or injury to the head, neck, back or hips. Her injuries and pain symptoms in my opinion were caused by and are in keeping with the motor vehicle accident of August 14, 2009.

[37] The plaintiff denied any previous history of complaint to the affected areas to Dr. Francis including trauma.

[38] The history given by the plaintiff at trial of her pre-accident condition is that of periodic chiropractic or massage treatments to treat situational pain such as arose from extended periods of sitting or headaches associated with tension. She denied to both Dr. Francis and Dr. Underwood any previous involvement in motor vehicle accidents or injury to the affected areas. Her medical records note a previous motor vehicle accident as well as a slip in a bathtub sometime well before the happening of the accident.

[39] Produced in the proceedings were the records of the Agassiz Family Chiropractic Centre which demonstrates that from as early as September 2002 until

as recently as July 22, 2009, less than a month before the motor vehicle accident, the plaintiff was routinely receiving chiropractic treatments for a variety of complaints.

[40] Most prominent amongst those, as can readily be gleaned from the records, are pain to the areas of her neck, lower back and left hip. The records disclose frequent references to headache and, here I agree with Dr. Underwood, many unreadable entries which offer no insight into the plaintiff's pre-accident history.

[41] A recorded entry on August 11, 2008, give credence to the suggestion that the plaintiff, while away at Brock University in Ontario for two years from 2007 to 2009, received advice from the school nurse suggesting she received physiotherapy and should use a "fit ball" for ongoing complaints.

[42] The Agassiz Family Chiropractic records are augmented by records from the Dogwood Clinic of Massage Therapy which indicate the plaintiff was a patient of that clinic from August 2004 until December 2008.

[43] In my view, the entries are illuminating as to her pre-accident history. In 2004, the plaintiff presented with a history of ongoing headaches together with low back pain. In an assessment in 2006, she complained of tense shoulders and neck pain together with sore knees and headaches.

[44] Under the heading, "Please Check Any of the Following Conditions That Apply to You," she ticked recurring headaches and backaches (lumbar).

[45] Clinical entries in 2006 reference tenderness to the left leg and hip. The most recent records, those between December 17, 2007, and December 19, 2008, reference complaints of tightness in the shoulder and neck with stress. On each of the four visits noted, December 17, 2007, December 28, 2007, February 19, 2008, and December 19, 2008, the area of the plaintiff's low back is shaded, denoting concern and, on the two most recent entries, those of February and December 2008, the left hip is denoted as a trouble area with an arrow pointing downward indicating possibly pain radiating downward from that area.

[46] Those same records were reviewed by Dr. Underwood, the physiatrist who saw the plaintiff on one occasion in June 2011 and provided an independent medical report in respect of her condition. Dr. Underwood, too, was of the opinion that the plaintiff's current set of complaints, which were characterized by her as chronic, were as a result of the motor vehicle accident.

[47] Dr. Underwood noted that Ms. Hagel advised she had no significant difficulties with neck, perithoracic spine, hip pain, or headaches prior to the accident and noted in her report:

> In my opinion Ms. Hagel's injuries are in keeping with the motor vehicle accident of August 14, 2009. She infrequently had left neck, parascapular and left hip pain prior to her accident with such activities as push ups. She did receive some chiropractic treatments to these areas prior to her August 14, 2009 accident. Her treatments were infrequent and she had no functional limitations secondary to them. Her history of pain in those areas prior to the August 14, 2009 accident put her in increased risk for injury compared to if she had never had pain in those areas.

[48] Dr. Underwood was reluctant to attempt to interpret the medical records of another. I agree that the shorthand displayed in the records often leads itself to no real conclusion as to the reason for the plaintiff's attendance. Nonetheless, Dr. Underwood was prepared to agree there were repeated references to the areas of focus of the plaintiff's present complaints.

[49] In her view, the level of treatment indicated by the records did not indicate a complaint of a chronic nature, but was more in the nature of episodic complaints. Her review of the records had no impact on her opinion as to the cause or effect of the plaintiff's current condition which she accepted at face value.

[50] Dr. Francis had no idea of the previous involvement of the plaintiff with healthcare professionals for her neck, back, hip, and headaches.

[51] After first describing the plaintiff's pre-accident history as unintelligible, he agreed it demonstrated a history of pre-existing complaints to areas he understood were previously pain-free. He stated the new information did not affect his

prognosis, that of ongoing chronic pain, but acknowledged the records demonstrated a history of ongoing complaints to the areas he was treating.

[52] Ms. Scullion offered no medical opinions, but rather was asked to determine the impact of the accident upon the plaintiff's future medical requirements as well as her function. She tested the plaintiff over a series of four days. She accessed all of the medical reports and records presented at trial.

[53] She observed that the plaintiff presented with "abnormal posture with left shoulder drop and left-side trunk shortening in stance and during gait". She offered no opinion as to the origins of the noted abnormality.

[54] After simulated testing as to the job requirements of the plaintiff's employment and actual observation of her function within the setting of the plaintiff's home, Ms. Scullion determined the plaintiff was functionally independent in both her work and homemaking capacity.

[55] Ms. Scullion went on to say:

> While Ms. Hagel demonstrated the ability to recover from the physical demands of her work from day to day, she has periods when such is not the case. She presents with physical signs, namely, postural misalignment through her left side as well.

[56] Ms. Scullion went on to recommend a course of psychological counselling to assist the plaintiff to overcome her mood issues and to assist her in dealing with her fear of her injuries worsening. She also recommended an ongoing fitness regime initially overseen by a personal trainer and then followed by regular attendance at a gym.

[57] Ms. Scullion opined the plaintiff would require periodic chiropractic, massage, or physiotherapy treatment for management of her pain on an indefinite basis.

[58] I note the pre-accident records of the plaintiff offer no insight as to the impact of the recorded complaints on her function, if any. There is no commentary within the records presented which cause me to conclude the plaintiff's function was

impaired by the complaints she was bringing to the attention of the attending care providers.

[59] The defendant has called no medical evidence in this proceeding.

Position of the Parties

[60] The plaintiff seeks damages for (1) non-pecuniary losses; (2) past wage loss, including a sum for delayed completion of her Master's thesis said to have impinged upon her income between May of 2010 and May of 201; (3) costs of future care; and (4) special damages.

[61] As to non-pecuniary loss, the plaintiff suggests that the evidence demonstrates the plaintiff currently suffers from chronic pain to the neck, shoulder region, low back and left hip area. In the words of Dr. Francis, it has now been over "1000 days" from the accident making clear that the symptoms which remain are of an enduring and lasting nature.

[62] Her most significant complaint is to her lower back and left hip. The plaintiff now complains that the pain is radiating down as far as her left ankle. The pain is still controlled by taking Ibuprofen or Aleve. She does frequent stretches, applies ice, and obtains massage from others when she can. She still continues to suffer from neck pain which often results in headaches and pain in her shoulders and upper back.

[63] Her headaches are as infrequently as once a week during good periods but daily during bad periods. The bad period generally accompany periods of intense physical demands at work.

[64] She complains of sleep disturbance, but I note that in the report of Ms. Scullion, she expressed no difficulty with sleep, nor any history of sleep interruption, nor does such a complaint arise in the reports of either Dr. Francis or Dr. Underwood.

[65] The plaintiff says her mood has been affected by her pain and that she experiences mood swings, irritability, and anger with others. At times, she feels like crying.

[66] On the basis of the authorities I have been referenced, namely, *Milliken v. Rowe*, 2011 BCSC 1458; *Pett v. Pett*, 2008, BCSC 602; *Pisani v. Pearce*, 2012 BCSC 1118; and *Crane v. Lee*, 2011 BCSC 898.

[67] All of these authorities are soft tissue cases that resulted in chronic pain in plaintiffs of various ages and occupation. The ranges of the damages bridge between an $80,000 low to a high of $100,000. The plaintiff here suggests that $85,000 is appropriate award for non-pecuniary loss.

[68] As to wage loss, there is no contest but that the plaintiff was absent from work for a period of four weeks resulting in lost income. The plaintiff says this should be calculated at 40 hours per week at $12 per hour, plus an allowance for tips, resulting in a net wage loss, after deduction for tax, of $3,332 exclusive, of the claim for delayed acceleration of her income by the completion of her degree.

[69] Additionally, the plaintiff claims she was delayed entry to higher paid positions by virtue of the fact her injuries precluded her from completing her written thesis in April of 2010 as scheduled. Instead, she graduated in the fall of 2010, some six months later, but owing to the hiring seasons of wineries, she was not able to secure other employment utilizing this credential until the spring of 2011. At that time, she obtained her present employment wherein her pay escalated to a range of $14 to $18 an hour, dependent upon the tasks she completes. Through a complicated series of calculations, purely mathematical calculations, the plaintiff suggests there is an additional wage loss over a six to eight-month period ranging from $5,300 to $6,600. In the result, it is suggesting there be a $6,000 award under the heading of, essentially, loss of opportunity for obtaining employment at a higher rate during the period of time that her graduation was delayed.

[70] As to cost of future case, Ms. Scullion, the occupation therapist, made a recommendation that Ms. Hagel should have counselling for her "fear of pain and of re-injury" that she has tended to catastrophize the events surrounding the accident and her perceived level of disability. Ms. Scullion also testified as to the need for a personal trainer coupled with ongoing gym exercise and occasional massage therapy, physiotherapy, or chiropractic therapy. To be clear, it is one of the three of those depending on the modality chosen by the plaintiff.

[71] As part of the conditional program, it is suggested that there be a continuing gym membership.

[72] The plaintiff suggests the totality of this should result in an award of $12,500 for the cost of future care, having taken an appropriate discount of the active therapy to reflect the fact she was taking massage and chiropractic treatment leading up to the accident.

[73] As to special damages, the parties are agreed as to most items, but disagree over the purchase of a mattress, the gym memberships, one massage therapy treatment, and some prescriptions prescribed by Dr. Francis in 2011, some of which were taken by the plaintiff, some of which were not. The difference between the agreed amount and the amount claimed is approximately $1,500.

[74] The defendants say the evidence discloses the plaintiff suffered a moderate soft tissue injury which was essentially recovered by the early part of 2010. By then all manner of treatment had come to a halt. She had returned to full-time work and, by self-acknowledgement, agreed she was some 50% to 60% of normal.

[75] The defendants say that any residual difficulties are no different than the baseline from which she presented prior to the accident. That is she suffered occasionally from neck, back, and hip pain which was accompanied by headaches. The defendants are responsible, they say, only for those damages caused to the plaintiff by the accident and her position should not be enhanced from that which it was before.

[76] The defendants rely upon a series of cases including *Hunter v. Yuan*, 2010 BCSC 1526; *Lee v. Hawari*, 2009 BCSC 1904; *Majewska v. Partyka et al*, 2009 BCSC 175; *Rhodes v. Biggar*, 2010 BCSC 762; and *Sharma v. Didiuk*, 2010 BCSC 280, all of which, say the defendants, should drive me to the conclusion that non-pecuniary loss should be in the approximate area of $35,000, but less a contingency of 25% for her pre-existing condition. The defendants agree to special damages at $2,826.55, but say the plaintiff has overstated her wage loss. The defendants agree to a wage loss of $1,920 and say they have already satisfied that with an advance payment of $2,060. The defendants dispute that there should be an allowance for tips and note that there has been no financial information filed on which to make an assessment of this portion of the claimed loss.

[77] As to the claim for delayed entry into the workforce, the defendants say it is speculative because the plaintiff took no steps to obtain employment and cannot testify as to the availability of jobs in the summer of 2010 requiring the specific credentials that she eventually acquired in October of that same year.

[78] Finally, the defendants say the cost of future care is not warranted because, according to the defendants, the plaintiff is wholly recovered to the level of her pre-accident health and, as such, any ongoing need for treatment should be visited upon her pre-existing condition and not the accident.

Findings and Conclusions

[79] The onus rests on the plaintiff to prove, on the preponderance of evidence, and to demonstrate her current medical condition arose from the accident. Where there is a measurable risk that the plaintiff would have experienced the symptoms regardless of the accident, the measure of damages should be reduced accordingly: *Athey v. Leonati*, [1996] S.C.R. 458.

[80] In *Athey*, at para. 35, Mr. Justice Major stated the following:

> [35] ... The defendant is liable for the injuries caused, even if they are extreme, but need not compensate the plaintiff for any debilitating effects of the pre-existing condition which the plaintiff would have experienced anyway. The defendant is liable for the additional damage but not for the pre-existing

> damage. ... Likewise, if there is a measurable risk that the pre-existing condition would have detrimentally affected the plaintiff in the future, regardless of the defendant's negligence, then this can be taken into account in reducing the overall award. ... This is consistent with the general rule that the plaintiff must be returned to the position he would have been in, with all of its attendant risks and shortcomings, and not a better position.

[81] The question becomes: Did the plaintiff have a pre-existing condition exacerbated by the defendants' negligence or, as is suggested by the plaintiff, her pre-accident health was fine and all of her complaints stem from the results of the accident?

[82] Both the plaintiff's doctors were originally of the understanding there was no history of complaint in the regions now said to be solely as a result of the accident. Dr. Underwood did have the benefit of some, but not all, of the medical records referenced at trial. She testified she was unable to interpret them, but acknowledged the notes referenced the areas of present complaint. She said her opinion was unchanged as to causation.

[83] Dr. Francis was wholly unaware of the plaintiff's reasonably extensive medical history when he opined the accident as the singular cause for her complaints.

[84] When presented with the records from Agassiz and Dogwood, he stated his prognosis was the same. By that, I took him to mean her condition was chronic and she could expect to experience complaints in the future.

[85] As was noted by the Court of Appeal in *T.W.N.A. v. Canada (Ministry of Indian Affairs)*, 2001 BCCA 670, at para. 28:

> [28] ... a pre-existing condition, whether it is quiescent or active, is part of the plaintiff's original position.

[86] Further, at para. 48, the court went on to say:

> [48] ... Whether manifest or not, a weakness inherent in a plaintiff that might realistically cause or contribute to the loss claimed regardless of the tort is relevant to the assessment of damages. It is a contingency that should be accounted for in the award. Moreover, such a contingency does not have to be proven to a certainty. Rather, it should be given weight according to its relative likelihood.

[87] The defendants do not contest the plaintiff was injured in the accident, but rather suggest the injury was the equivalent to a mild or moderate soft tissue injury and that the plaintiff had returned to her pre-accident condition by sometime in 2010.

[88] The plaintiff says without medical evidence proffered by the defendants which leads to that conclusion, I should arrive at the result that the plaintiff has suffered all of her injuries as a result of the accident and rely upon the evidence of Dr. Underwood as to the causation.

[89] With respect, I disagree. Despite her suggestion that repeated attendances at either chiropractic or massage therapy were for occasional and situational complaints, I am satisfied from the combined record of the Agassiz Chiropractic Centre and Dogwood Massage Therapy that those complaints were of an enduring nature and that the affected areas more or less mirror those complained of at present.

[90] The records demonstrate a pattern of attendance for medical assistance little different from those which followed the accident after the initial course of physiotherapy. As recently as July 2009, a month prior to the accident, the plaintiff attended for treatment on her left side and for low back pain.

[91] Headaches appear to have been a regular part of her pre-accident life according to her self-report to both the chiropractor and massage therapist.

[92] Ms. Scullion noted the postural misalignment of the plaintiff's left side providing a reasonable explanation for some of the plaintiff's complaints, both pre and post-accident. The etiology of that misalignment has not been diagnosed. On the evidence before me, it is every bit as probable the misalignment preceded the accident accounting for some, if not all, of the plaintiff's pre-accident complaints.

[93] As to Dr. Underwood, her comment that she would have expected the plaintiff to have attended massage therapy or chiropractic treatment more frequently if the problems were chronic is a two-edged sword. The plaintiff's MSP printout demonstrates the plaintiff's treatment, post-2009, was less frequent than before the

accident if one eliminates the 32 physiotherapy treatments. Yet Dr. Underwood accepts, as do I, the plaintiff's current complaints are genuine.

[94] I conclude the plaintiff did suffer from an ongoing condition which affected her left side and low back and resulted in headaches.

[95] That being said, I do not discount the plaintiff's current description of her symptoms, nor have either of her doctors or Ms. Scullion. All opine she did not demonstrate any pain behaviour or give any reason to think her complaints are other than genuine.

[96] Save for downplaying the extent of her earlier treatment, to some extent, I found the plaintiff and Mr. Feist credible and reliable witnesses.

[97] The plaintiff was, in my view, a poor candidate for being involved in what I consider to be a significant collision.

[98] While I conclude that her baseline condition was not as benign as suggested by the plaintiff or Dr. Underwood, I accept that her condition now is worse than it was pre-accident and that the ongoing exacerbation of her symptoms resulted from the accident and have caused possibly permanent interference with some social and recreational activities.

[99] In my view, the proper approach to the assessment of non-pecuniary damages is to assess the plaintiff as she presently presents and then discount the award for damages to reflect the contribution of her baseline situation as at the day before the accident.

[100] I assess her current condition as comparable to the plaintiff's in *Pett* and *Pisani*. Each case had relatively youthful plaintiffs, as is the case before me. In each, there were injuries with chronic features affecting day to day life, not dissimilar to those described and accepted by the plaintiff's medical practitioners.

[101] In *Pett*, the award for non-pecuniary loss was $85,000. In *Pisani*, the award was $80,000.

[102] Here, absent what I have referred to as the plaintiff's underlying pre-condition, I would have assessed her general damages at $80,000 on the basis of the

similarities between the noted cases and the considerations noted in *Stapley v. Hejslet*, 2006 BCCA 34.

[103] In my view, there is a measurable risk that the plaintiff's pre-existing condition would have detrimentally affected her in the future in any event of the accident. This is not a risk which can or need be proven, but given the continuing nature of her complaints, pre-accident, concerning areas now said to be impairing function, I find it probable she would have continued to suffer symptoms in her neck, low back, and left hip which would occasion treatment and intermittent interference with recreational activities.

[104] Like in *Rhodes*, I conclude the plaintiff's difficulties were accelerated and aggravated by the accident, but would likely have caused interference with her work and lifestyle in any event of the accident.

[105] In *Rhodes*, Russell J. assessed damages on the basis of her complaints and then noted at paras. 163 to 164 as follows:

> [163] As a result, although the injuries the plaintiff suffered in the Accident are not the sole cause of her current condition, she did incur soft tissue injuries which continue to cause her suffering and which are somewhat disabling but which are connected with the pre-existing condition inherent in her original position. This must be considered in the assessment of both non-pecuniary damages and damages for loss of earning capacity.
>
> [164] I have considered all of these factors in determining that I would award the sum of $60,000 to the plaintiff for non-pecuniary damages and discount it by 25% taking into account the plaintiff's original position, for a total of $45,000.

[106] Applying a similar 25% discount premised upon the same considerations, I award the plaintiff $60,000 for non-pecuniary loss.

Past Wage Loss and Loss of Opportunity

[107] There is no disagreement but that the plaintiff was unable to work for four weeks following the accident.

[108] Her hourly wage was $12. Based on a 40 hour work week, her base pay would be $1,960.

[109] The plaintiff testified that 90% of her work during the period she was absent would have been as a server either in the wine-tasting area of Nk'Mip or in the restaurant. In the latter position, she earned tips.

[110] I have no documentary evidence as to her earnings, specifically tax information, just the plaintiff's evidence suggesting she would make anywhere from $80 to $200 per shift when working an evening shift, some of which she had to pay to the kitchen.

[111] There is no evidence as to how the plaintiff's shifts were scheduled over the time she was absent from work. I cannot tell from the evidence whether she would have worked more lunches than nights or vice versa.

[112] I accept as a server she would have received tips. The quantification of that amount is incapable of precision, but ought not be ignored. On balance, I conclude her loss of gratuities would have been net $1,000, that being after deduction for payment to the kitchen staff of their portion of the tips she would have received.

[113] As to the claim for loss of income as a result of delayed completion of her Master's degree, there is no cogent evidence as to the availability of jobs offering higher compensation for those who had completed their Master's thesis. The plaintiff had completed all course work and the bulk of her practicum by the time she would have submitted the thesis but for the accident.

[114] She did not apply for better paying work until the spring of 2011, noting during the harvest season, employers already had their staff in place and a change in positions would have been unlikely.

[115] Counsel for the plaintiff approaches the problem from the standpoint that the law says little more than a mathematical calculation. In the absence of a job placement being available for her in the spring of 2010 which was premised upon her having received her Master's degree, I cannot accept this approach.

[116] I accept that had she graduated in April of 2010, she would have been in a better position to seek a position that paid her more than she did earn at Tinhorn. I accept, in the spring of 2011, she found such a position with her current employer and her wages rose accordingly.

[117] In the result, I accept that her delayed graduation did have a negative impact on her actual income over the following approximate one year period. It is possible she might have found work at a pay scale similar to that which she enjoys at Black Hills. It is possible she might not have.

[118] Weighing the likelihood of each scenario, I find the plaintiff has suffered a loss of opportunity during the period of April 2010 to make use of the credentials she eventually obtained but was actually delayed from using effectively until the next hiring season of the spring of 2011. Based on that, I award her the sum of $2,000 for loss of opportunity.

Special Damages

[119] The parties are agreed on the bulk of the medical expenses. What is in issue is the mattress purchased by the plaintiff, the gym memberships, I believe it is but one massage therapy treatment, and the purchase of some small prescriptive items.

[120] The mattress was not purchased as a result of any medical advice and there is no suggestion her treating physician was aware of any complaint of sleep interruption. Accordingly, I deny the claim for the recovery of the mattress.

[121] The pills were prescribed, but Tylenol 3 was not taken. I agree that the Celebrex is a proper recoverable expense, but not the cost of the Tylenol 3.

[122] The gym membership, or at least conditioning, was recommended by both the original OT seen in 2011, her family physician, and ultimately by Ms. Underwood, Ms. Scullion agrees same is desirable. Accordingly, I am prepared to allow both membership fees paid and claimed as special damages as set out in the exhibits that were filed before me.

[123] I do not think I have missed anything in terms of the disputed items, but to be clear, what I am excluding are the costs of unused prescriptions, which I understand only to be the Tylenol 3, and the cost of the mattress. There is nothing inappropriate about the one further massage therapy treatment taken. I would allow that, too, under the heading of special expenses.

Cost of Future Care

[124] The costs recommended by Ms. Scullion include an allowance for psychological counselling to assist the plaintiff to overcome her fear that her injuries will overtake her work aspirations and to assist her with the relatively mild depression as referenced by the plaintiff's score on the Beck Depression Inventory.

[125] Neither medical doctor made any reference to the role of mood in the plaintiff's complaints or, more importantly, the need to address it.

[126] Ms. Scullion acknowledges she is not able to make any diagnosis regarding the plaintiff's emotional well being. She simply gave her the Beck Depression Inventory test and several others, scored them, and they were a signpost, if I can put it that way, of some mild depression. Ms. Scullion has not relied on any medical opinion for her expressed view that psychological counselling is necessary and I am in agreement with defendants' counsel that the need for the psychological counselling has not been proven.

[127] Ms. Scullion also recommends an ongoing course of hands-on treatment, be it chiropractic, massage, or physiotherapy, so as to assist the plaintiff to manage her complaints. The prescribed therapy constitutes six annual visits.

[128] In my view, those treatments are little different from the degree she was participating in such therapy before the accident. In my view, given the lengthy period over which the plaintiff saw her chiropractic professional and her massage therapist prior to the accident, the pattern will be no different afterwards. Hence, I see no need for the defendants to bear the costs of those ongoing treatments which I find, in all likelihood, would have occurred in any event.

[129] As to core shorts, the plaintiff says she will not wear them.

[130] As to the final item, the gym membership, I note the same as referenced by Dr. Underwood. Conditioning is likely something that would be desirable, if not necessary, given her pre-accident complaints. Both Dr. Underwood and Ms. Scullion see a lifelong exercise regime as being necessary to optimize the plaintiff's function and minimize her pain.

[131] The estimated cost of a gym membership was set at $388 annually. Allowing for one-half of the expense as arising from the accident, I award $5,000 for the cost of future gym memberships after deduction of what I see as, I say, a one-half contingency that such would have been desirable from the standpoint of treating her pre-existing situation in any event. Now it is has simply been recognized by medical practitioners, by the occupational therapist.

Costs

[132] Unless there have been any offers to settle that impact the matter of costs, costs will be to the plaintiff under Rule 15(15).

[133] Have I missed anything or is there a matter of costs that needs to be addressed?

[134] MS. KORDIC: Oh, My Lord, the total for specials, I am not sure if you actually said the number or not?

[135] THE COURT: I did not give the number. I am going to leave that to counsel, by exclusion, to do the math. I apologize for that. If you cannot agree, you can, of course, come back to me, but I think the difference will be in the pennies, not in the hundreds of dollars.

[136] I think I have dealt with each of the items that was a disputed item, the major one being the mattress, and I think there was some small prescription expense which were not taken. So, other than that, the gym memberships, the one

physiotherapy treatment, the Celebrex, those are all included. So, as I say, I am hopeful you can do the math. I did not.