IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Connolly v. Cowie,*
2012 BCSC 242

Date: 20120113
Docket: M106342
Registry: Vancouver

Between:

Nicola Connolly

Plaintiff

And

Jane Cowie and Ward Cowie

Defendants

Before: The Honourable Mr. Justice Butler

Oral Reasons for Judgment

Counsel for the Plaintiff:	F. Jiwa
Counsel for the Defendants:	P. Tung
Place and Date of Trial:	Vancouver, B.C. January 3-5, 2012
Place and Date of Judgment:	Vancouver, B.C. January 13, 2012

[1] **THE COURT:** Nicola Connolly was driving her Honda Fit on January 19, 2009, when she was struck from behind by the car driven by the defendant, Jane Cowie. Ms. Connolly suffered injuries in the accident which she says have persisted to the present time. The defendants admitted liability for the accident, but say that any injuries suffered by Ms. Connolly were minor. The case proceeded to trial for an assessment of damages.

BACKGROUND AND FINDINGS OF FACT

[2] Prior to setting out the background and my findings of fact, I want to comment on the issue of Ms. Connolly's credibility. The defendants argue that Ms. Connolly is an unreliable witness and that she was an unreliable historian when she described her injuries and symptoms to her doctors. This argument is based to a large extent on the submission that she failed to advise doctors and has not been forthright in court about the nature and extent of the low back problems she experienced prior to the accident. The defendants say that Ms. Connolly had chronic pre-existing low back pain that she failed to acknowledge to the Court and to Drs. Wong-Ting and Heran. The defendants also say Ms. Connolly responded to questions regarding her medical history in a vague and imprecise way.

[3] I reject the defendants' submission on Ms. Connolly's credibility. I agree that she did not give detailed answers to many questions. She gave curt responses and appeared to be somewhat frustrated by the legal process. However, I decline to draw any conclusion about her credibility based on her brusque manner. When I consider the substance of her evidence, I conclude she was a direct and honest witness. She frankly admitted to the Court and to Dr. Heran, that she experienced right-sided low back pain for many years prior to the accident. Her claim is based on the fact that the location and extent of the back pain is quite different from what she experienced before the accident. There is sufficient evidence to confirm this. In addition, she frankly described the extent of the running and exercise she has done since the accident as well as her persistent attempts to work as a fitness instructor.

The fact that she was determined and stoic in her attempt to pursue her chosen occupation and her passion for running does not detract from her credibility.

[4] In summary, I have accepted Ms. Connolly's evidence about her pre-existing condition, the nature and extent of her injuries, and the impact of those injuries on her ability to function.

[5] At the time of the accident, Ms. Connolly was 35 years old. She lived in Cloverdale with her husband, Thomas, and their two sons, Cameron and Jesse. At the time of the accident, Cameron was six years old and in grade 1. Jesse was three years old and attended preschool two mornings a week. Ms. Connolly was primarily responsible for all of the housework including the care and nurturing of her young sons. Mr. Connolly worked full-time and assisted with the housework and childcare on occasion when requested to do so by Ms. Connolly.

[6] Ms. Connolly attended the University of Victoria for two years and then obtained a diploma from Kwantlen College as a geriatric activity coordinator. This qualification enables her to work as a recreational therapist for seniors. From 2004 to 2008, she worked at Rosewood Manor, a seniors' home in Richmond. It was an on-call position where she performed one-on-one fitness work with residents and carried out preparation and planning for parties and recreational activities at the home.

[7] In the summer of 2008, Ms. Connolly decided to retrain as a fitness instructor with the goal of working at a fitness boot camp run by a friend. She also hoped to become a personal trainer. She made the decision to change her occupation for a number of reasons. She did not enjoy the lengthy commute from Cloverdale to Richmond. She had just taken on responsibility along with her brother for the care of an aging grandparent and she thought that she could better accommodate her duties as a mother of a young family with the work hours of a fitness instructor.

[8] Certification is required in order to work as a fitness instructor in British Columbia. This is attained by successfully completing courses offered by the B.C.

Parks and Recreation Association. The courses are offered primarily online, but successful candidates are required to complete a practicum, and an instructor competency evaluation for each specialty module. Ms. Connolly completed the theory of fitness course around the time of the accident. After the accident, she took specialty modules and became certified as a weight trainer and a group program instructor. She also attempted to take the module that would have provided certification to act as a personal trainer, but found that she was unable to do the required level of physical activity.

[9] Prior to the accident, Ms. Connolly was extremely fit. She was an avid runner, having completed a number of half marathons and numerous ten kilometre races. While training for the half marathons, she frequently ran for distances up to 18 kilometres. She was planning to run her first marathon in May 2009. At the time of the accident, she was training with a running clinic. She was running five to ten kilometres, five or six days a week. She was gradually increasing the length of her runs in order to prepare for the marathon and had worked her way up to 11 or 12 kilometres.

[10] As a result of pain in her right knee and lower back, which she experienced during and after runs, she attended a chiropractor, Dr. Sigurdson, on January 2, 2009. This was her first attendance at his office. The pain in her lower back was right-sided. She attended for four treatments prior to the accident. In response to questions on Dr. Sigurdson's intake form, Ms. Connolly wrote the following:

> Lower back goes out esp. during/after run. Right knee is very painful after/during run and walking days after run.

[11] Dr. Sigurdson's notes indicate that Ms. Connolly advised him of those complaints and he added the notation, "10 years chronic".

[12] Ms. Connolly indicated that the reason for the visit to Dr. Sigurdson was primarily a concern with her right knee. She understood this to be caused by irritation of the iliotibial (IT) band. She indicated she had experienced low back pain for some time, but never to the extent where she sought medical treatment or

treatment from a chiropractor. She could not recall what she told Dr. Sigurdson, but did not contest that she said she had experienced some right-sided low back pain for ten years.

[13] Dr. Sigurdson stated that prior to the accident his treatment of Ms. Connolly was focused on the right pelvis and the soft tissues from the hip down to the right knee. Her condition improved before the accident to the extent that she had completed runs of six and ten kilometres with some pain experienced after seven kilometres. After the accident, Ms. Connolly continued to attend Dr. Sigurdson. However, she said the nature and location of the pain was very different from what she experienced before the accident. Dr. Sigurdson's notes and the evidence he gave at trial confirmed this. After the accident, the focus of his treatment shifted from Ms. Connolly's right knee to the left side of her pelvis and lower back. His notations of Ms. Connolly's complaints following the accident are consistent with that evidence. The notes indicate that she was experiencing pain in her left lower back in the area of the left sacroiliac joint.

[14] The defendants rely on two notations in the clinical records of Dr. Eadie, Ms. Connolly's family physician at the time of the accident, for the proposition that she experienced right-sided back pain after the accident. Ms. Connolly adamantly denied that she reported right-sided back pain to Dr. Eadie. She said the accident produced pain symptoms in her left lower back. She changed family doctors in the months after the accident because she felt that Dr. Eadie was simply not taking her health issues seriously, including the injury suffered in the accident. Dr. Eadie was not called as a witness by either party.

[15] As I have indicated, I accept Ms. Connolly's evidence regarding the location and nature of the symptoms she experienced after the accident. Dr. Sigurdson's evidence confirms that immediately after the accident, Ms. Connolly experienced left-sided low back pain which was quite different from what she had experienced in the preceding years.

[16] Soon after the accident, Ms. Connolly realized that she would not be able to run the marathon and did not persist with the training. However, she did attempt to continue her active regime and she continued to work towards certification for the fitness instructor modules. She found that she was not able to run as far as she could before the accident. The maximum distance she could run was seven kilometres. Even these shorter runs caused her to experience discomfort. She also found that household activities caused her to experience back pain, primarily located in her left lower back. She had difficulty walking, running, and lying down.

[17] While she was unable to maintain her previous level of activity, she managed to complete two of the modules and started to assist her friend with the Loosemore Fitness boot camps. She worked as a casual employee for Loosemore Fitness from September 2009 to June 2011. She taught or acted as an assistant for outdoor classes which were one hour in length, most of which started at 6:00 a.m. She taught more than 130 classes in total. While teaching the classes, she avoided any high impact work and did not run laps with the participants. The participants knew she was injured and so understood why she did not actively participate in the activities.

[18] Further, at the boot camps, Ms. Connolly says the most important task for the instructor is to demonstrate and motivate rather than to actively participate. As a result, it was easier for her to work with groups than to attempt to act as a personal trainer where the client would expect her to participate actively in the exercise program.

[19] Following the accident, she also taught running classes at one of the Running Room outlets. She taught classes for beginners and participants who were training for five kilometre runs. She did not feel she could lead classes for those training for ten kilometre runs and did not do so.

[20] In the months following the accident, she continued to experience persistent pain in the left sacroiliac joint area. She continued to seek medical treatment from her family physicians who recorded the persisting complaints of pain. She also

continued to go to Dr. Sigurdson for chiropractic treatments. She indicated that those treatments provided little relief. However, they obviously provided enough relief that she continued with them through to 2011.

[21] At the recommendation of Dr. Eadie, she went for eight or nine physiotherapy treatments. She found that those treatments did not provide significant relief and she stopped them once the funding ran out through her husband's extended health benefits. Instead, she went to her mother for physiotherapy treatments. Her mother's methods were less aggressive and easier on her back.

[22] Eventually, she was referred by Dr. Fahim, her new family physician, for a CT scan and an MRI. These were ordered after an x-ray in August 2009 did not reveal any abnormalities. The CT scan demonstrates a generalized bulge of the disc with foraminal protrusion at L5-S1. The MRI scan showed moderate left-sided foraminal narrowing secondary to a generalized disc bulge and an annular tear related to the bulge. There was, however, no significant nerve root compression.

[23] In spite of the pain she was experiencing, Ms. Connolly continued with an active exercise program into 2011. While she had previously focused on running, she began to do more walking as well as cycling and workouts on an elliptical trainer. She signed up to walk a half marathon in February 2011. All of her training in preparation for the event was walking. However, on the day of the race, she was with a group of people who she knew and so she attempted to run much of the race. She did this even though she was in agony throughout the race. Since then, she has substantially restricted running. She tried over the holidays and found that she could not run without disabling pain. She also finds that going for long walks causes significant pain if she has not trained by building up to it.

[24] Ms. Connolly continues to do most of the housework as well as the work required to care for her two sons. In the first year and a half after the accident, she asked her husband to assist her with tasks that required lifting. Since then, she has called for his assistance less frequently. She still does most of the activities she

used to do with her boys, but finds that she can no longer do some of the activities such as road hockey.

ISSUES

[25] The issues are as follows:

1. Was the disc bulge at L5-S1 caused by the accident?

2. What is the nature and extent of the injuries caused by the accident?

3. What damages should be awarded to Ms. Connolly?

Position of the Parties

[26] Ms. Connolly argues there is sufficient medical evidence to find that the herniation of the disc was caused by the accident. Even if it was not, she argues that she suffered a significant injury to her back which was caused by the accident and which has resulted in chronic pain. She says I should accept the evidence of Dr. Heran both with regard to diagnosis and prognosis. Dr. Heran is of the opinion that it is unlikely she will have a complete resolution of the pain symptoms because she has experienced chronic pain for three years.

[27] With regard to damages, Ms. Connolly says that the range of non-pecuniary damages is $50,000 to $65,000. She says she has lost the capacity to perform certain jobs, including her chosen occupation of a fitness instructor and that this represents a loss of earning capacity. She seeks damages in the amount of $5,000 to $7,500 for past loss of earning capacity and $35,000 to $45,000 for future loss.

[28] The defendants argue that Ms. Connolly has failed to prove that the disc hernia was caused by the accident and say there is no evidence that she is suffering any kind of neurological pain. The defendants admit that she suffered a low back strain at the time of the accident, but say it was not significant. They argue that the pre-existing condition of her back is the primary cause of Ms. Connolly's continuing pain. They say she has degenerative changes in her spine and was experiencing significant back pain even before the accident. They say that the accident caused

right-sided pain, the same symptoms that she had before the accident. However, if I conclude that she experienced pain in the left side of her back after the accident, they argue that it has the same physiological cause as the pre-existing pain and that is degenerative back changes.

[29] With regard to quantum, the defendants argue that the appropriate range for non-pecuniary damages is $15,000 to $20,000. This assessment is based on the proposition that Ms. Connolly's injury is a minor aggravation of a pre-existing condition. Further, they say she failed to mitigate her damages because she did not take medications that were prescribed to her, nor follow up with physiotherapy after the first eight sessions.

[30] In relation to the loss of opportunity claim, the defendants argue that Ms. Connolly has failed to prove anything but a minimal loss. First, they say that since her first child was born, she has earned little income. They argue that as a mother of two young children with a husband who does not assist greatly with household chores, it is unlikely Ms. Connolly would have worked significantly more than she did in the years between the accident and the trial. They submit an award of $3,400, representing one year of income based on an average of pre-accident earnings, is appropriate.

[31] In the future, they say that she will not work extensively even though as of September 2011, both of the children are now in school for full days. However, if she decides she wants to work, they say she could obtain a job at her former occupation as a recreational therapist and would suffer no income loss if she did so.

Issue 1. Was the disc bulge at L5-S1 caused by the accident?

[32] I have no hesitation in concluding that Ms. Connolly has failed to prove that the disc bulge was caused by the accident. Neither of the doctors who provided opinions to the Court was of the view that the disc bulge was caused by the accident or that Ms. Connolly's symptoms have a neurological component. Dr. Wong-Ting stated:

> I am not able to make a definite cause and effect relationship between the motor vehicle accident and Nicola's symptoms and the radiology/MRI findings. The L5-S1 posterior annular tear and associated disc protrusion may be a result of the trauma but it can also be caused by degeneration or a genetic predisposition.

[33] Dr. Heran was more circumspect, but was not prepared to diagnose disc impingement on the nerves. At its highest, the evidence simply suggests that the disc bulge and annular tear may have been caused by the accident. However, it has been three years since the accident and Ms. Connolly's symptoms do not appear to have a neurological cause. Even if the disc bulge was caused by the accident, it does not appear that the symptoms were caused by a bulge. In these circumstances, I find that Ms. Connolly has not proved on a balance of probabilities that the disc protrusion and annular tear were caused by the accident.

Issue 2. What is the nature and extent of the injuries caused by the accident?

[34] In addition to the low back injury, Ms. Connolly had an injury to her right wrist. This was minor and was painful for approximately a week. She also complains of pain in her left shoulder. When Dr. Wong-Ting saw Ms. Connolly on November 16, 2010, Ms. Connolly indicated that she had been experiencing left shoulder pain for approximately two months. She was diagnosed with calcific tendinosis. Neither doctor opined that the left shoulder injury was caused by the accident. I find that the left shoulder injury is unrelated to the accident.

[35] The only significant injury suffered in the accident was to Ms. Connolly's left lower back, although there has been some extension of the pain into her mid-back. As I have already indicated, the symptoms she experienced after the accident were appreciably different from the back pain she had before the accident. Before the accident, the pain was not disabling and did not restrict her very active exercise regime. She was able to train for and run numerous ten kilometre races and half marathons without debilitating pain. While the right low back pain was experienced for many years, she never visited a doctor for treatment or diagnosis. She never went for imaging. While she did see her chiropractor in early January, I accept that

the main focus for that visit was the IT band pain she was experiencing in her right knee. Dr. Sigurdson's evidence confirmed this. Further, Dr. Sigurdson indicated that the pre-accident right-sided injury was already significantly better by the date of the accident. She quickly worked her way back to running ten kilometres with limited pain. That situation is very different from what she experienced after the accident.

[36] Following the accident, Ms. Connolly had persistent left-sided low back pain. She regularly attended her physicians to help resolve the pain symptoms. She never did that in the years before the accident. When the symptoms did not improve, she was referred for an x-ray, a CT scan, and an MRI. She continued with visits to the doctors, her chiropractor, and some physiotherapy. In spite of her continued attempts to exercise, the pain symptoms have persisted. Contrary to the defendants' assertion, this is not a case of a minor aggravation of an existing problem. Rather, Ms. Connolly suffered a new injury in January 2009 which has, as noted by Dr. Heran, become chronic.

[37] In arriving at my finding regarding the nature and extent of her injuries, I have accepted the opinion of Dr. Heran. I accept as true the facts and assumptions upon which his opinion is based. I note, as well, that the defendants presented no contrary opinion evidence. Specifically, I accept the following statements by Dr. Heran:

> I believe that Ms. Connolly presents with an indiscrete pain syndrome. The exacerbation of her thoracic and lumbar discomfort with activities suggests a myofascial component. ...
>
> ...
>
> Prior to the MVA on January 19, 2009 Ms. Connolly had intermittent low back pain, nothing significant and nothing requiring intervention as far as I can establish. There was no eccentricity towards her left sacroiliac region. Following the MVA she has had clear cut delineation of chronic low back pain epicentered towards the left sided sacroiliac region and exacerbations with certain activities. This is suggestive that the MVA is directly responsible for these problems. ... The thoracic and upper low back discomfort is directly an extension of the low back discomfort, likely arising from paraspinous muscle fatigue, spasm or irritation.
>
> ...

> ... I believe that she should be able to proceed with the majority of her usual activities, albeit with pain. She has chronic pain and at this point in time it is unlikely, nearly 3 years from the MVA, that she will have complete resolution of this. No conservative measures have provided this relief for her as of now. I cannot make any further recommendations in terms of conservative measures that would likely improve her current state.

[38] Before leaving this issue, I should comment on the defendants' argument regarding mitigation. The plaintiff has an obligation to take all reasonable measures to reduce his or her damages including undergoing treatment to alleviate or cure injuries: *Danicek v. Alexander Holburn Beaudin & Lang*, 2010 BCSC 1111, at para. 234. Once the plaintiff has established liability for his or her injuries, the defendant must prove that the plaintiff acted unreasonably and that reasonable conduct would have reduced or eliminated the loss. Whether the plaintiff acted reasonably is a factual question which involves a consideration of all the circumstances: *Gilbert v. Bottle*, 2011 BCSC 1389, at para. 202.

[39] The evidence before the Court falls far short of establishing that there were treatments that Ms. Connolly could have taken that may have ameliorated her condition and which she unreasonably refused to follow. Ms. Connolly did take eight or nine physiotherapy sessions. She did not take further sessions because she felt the relief provided was minor. Further, she had available to her free physiotherapy sessions from her mother. I reject the defendants' argument that I should disregard her assertion that her mother, who is a registered physiotherapist, provided treatments to her. Ms. Connolly stated, and I accept, that her mother provided holistic physiotherapy treatments that provided limited relief.

[40] The defendants' argument that Ms. Connolly failed to mitigate her loss because she did not take prescription medications is lacking in merit. Ms. Connolly did try most of the medications prescribed to her. However, she did not find relief from the medications. She did not like the sensation she experienced when taking the drugs she tried. She is the only one who can judge if a prescribed medication provides sufficient relief such that she should take it and put up with the side effects.

I am not prepared to second guess her assessment of the benefit that the medication provided to her.

[41] In summary, I conclude that Ms. Connolly suffered a significant low back strain as a result of the accident. The accident has caused injury to the myofascial tissues in her left sacroiliac region. The injury has not resolved in spite of her aggressive attempts to continue with exercise and chiropractic treatment and some physiotherapy. She now has chronic pain which is not disabling, but does restrict the type and extent of activities and exercises she can perform. She is still able to do most household tasks, but it is likely she will continue to experience pain with activities. It is unlikely that the pain symptoms will resolve.

Issue 3. What damages should be awarded to Ms. Connolly?

Non-pecuniary Loss

[42] Counsel have provided a number of cases supporting their view of the appropriate range for damages. The defendants rely on *Pearlman v. Phelps Leasing Ltd.*, 2011 BCSC 1696; *Hough v. Wyatt*, 2011 BCSC 910; and *Dempsey v. Oh*, 2011 BCSC 216. Those cases all involved situations where the court concluded that the plaintiff suffered a minor aggravation of a pre-existing injury. The decisions are not relevant to the present case.

[43] Of the cases relied upon by the defendants, the two which are most similar to the present circumstances are *Warren v. Ouellette* (11 July 1994), Vancouver B924490 (S.C.); and *Dutchak v. Fowler*, 2010 BCSC 128. In *Dutchak*, the plaintiff was awarded $45,000 for soft tissue injuries that lasted three and a half years post-accident. At the time of the trial, the plaintiff was able to run 30 to 40 kilometres per week, but did so with pain. She was able to manage the pain by taking a considerable amount of medication. The Court awarded damages at the lower end of the range for cases involving chronic pain.

[44] *Warren* is an older case and so of more limited use. The plaintiff was awarded $40,000 for non-pecuniary damages. However, the facts in that case as in

Dutchak, have some similarity to the present circumstances. The plaintiff was unable to compete in marathons and triathlons as he had done before the accident. He still competed in duathalons. Justice Williamson stated:

> ... Although he has had to give up marathons and triathalons, remarkably he continues to participate in duathalons (running for up to 3 kilometres, bicycling for up to 20 kilometres, and running again for up to 3 kilometres) using his mountain bike rather than a racing road bicycle. However impressive this may seem to the more sedentary among us, the plaintiff was clear in his testimony this reduced athletic activity means he does not gain the satisfaction which he did previously from participation in such events. I accept this is, to him, a significant loss.

[45] Here, Ms. Connolly is unable to continue with long distance running. She does not take medications like Ms. Dutchak, but has persisted with more restricted activities. In the past, she thrived on the combination of exercise and camaraderie with a group of fellow competitors. Her inability to continue with that is a significant loss to her. She has continued to exercise and is now focusing on cycling as a replacement for her previous passion, but has had to give up her dream of working as a fitness instructor. She put much thought and several years of work into attempting to develop a skill that would provide her with income and help fulfil her desire to do strenuous exercise with like-minded people. She is no longer able to do that and this is a significant loss.

[46] In addition to these significant losses, she has to put up with continuing pain and it is likely this will not abate in the future. Considering all of the circumstances, I find that $50,000 is an appropriate award for non-pecuniary loss.

Loss of Capacity to Earn Income

[47] After the birth of her second child, Ms. Connolly worked in the casual position at Rosewood Manor in Richmond. After the accident, when she became qualified as a fitness instructor, she did casual work at the Running Room and the Loosemore Fitness boot camps. Her income from employment since 2006 is as follows:

2006 – $1,080

2007 – $4,026

2008 – $5,074

2009 – $927

2010 – $2,438

I understand that her income in 2011 is quite limited.

[48] Given her work history and changing plans at the time of the accident, it is not possible to approach her past income loss by calculating a stream of loss of earnings. Both parties agree that the appropriate way to approach the claim for income loss, both past and future, is as a loss of capacity claim.

[49] My assessment of Ms. Connolly's past loss is guided by the following findings. I conclude that if she had not been injured, she would have been able to complete the module to become qualified as a personal trainer. She would have worked more hours with the Running Room and Loosemore Fitness than she did. However, she would not have worked significantly more. While she would have increased her level of work as a fitness instructor starting in 2011, it would have taken a number of years to build up a personal trainer business. While I take all of the circumstances into account, I assess her past loss of earning capacity at $5,000. I find that this would have been earned primarily in 2011, although some of it would have been earned in 2010. Given the modest income she has earned, I find that the $5,000 loss is a net loss of income after taxes.

[50] In *Perren v. Lalari*, 2010 BCCA 140, Garson J.A. described the proper approach to assess a future loss of earning capacity. At para. 32, she provides a useful summary of the principles established in a series of British Columbia decisions:

> [32] A plaintiff must <u>always</u> prove, as was noted by Donald J.A. in *Steward*, by Bauman J. in *Chang*, and by Tysoe J.A. in *Romanchych*, that there is a real and substantial possibility of a future event leading to an income loss. If the plaintiff discharges that burden of proof, then depending upon the facts of the case, the plaintiff may prove the quantification of that loss of earning capacity, either on an earnings approach, as in *Steenblok*, or a capital asset approach, as in *Brown*. The former approach will be more useful when the loss is more easily measurable, as it was in *Steenblok*. The

> latter approach will be more useful when the loss is not as easily measurable, as in *Pallos* and *Romanchych*. A plaintiff may indeed be able to prove that there is a substantial possibility of a future loss of income despite having returned to his or her usual employment. That was the case in both *Pallos* and *Parypa*. But, as Donald J.A. said in *Steward*, an inability to perform an occupation that is not a realistic alternative occupation is not proof of a future loss.
>
> [Emphasis in original.]

[51] Here, Ms. Connolly premises her claim on the capital asset approach as set out in *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 (S.C.). She says that she has been rendered less capable overall from earning income because of her chronic pain. This will make her less marketable and will prevent her from taking advantage of all opportunities that would have been available to her. The defendants say that she has failed to prove that there is a real possibility of a future event leading to an income loss. This is because she is well qualified to act as a recreational therapist which is more remunerative than the work she wanted to do as a fitness instructor.

[52] There is merit to both these positions. Ms. Connolly did earn more in her former job even after the birth of her first child than she did as a fitness instructor. It is unlikely that her planned work as a casual fitness instructor would have provided her with significant income. Further, she readily admitted that even though her injuries prevent her from working as a fitness instructor as she had planned, she is certain she can find, and I quote her, “meaningful employment”. She has accordingly changed her future plans.

[53] At the same time, there is no doubt that a consideration of the factors in *Brown* leads to a conclusion that Ms. Connolly has suffered a real loss. As Dr. Heran noted, she will experience some level of continuing pain. The fact that she will experience chronic pain related to her daily activities satisfies me that Ms. Connolly has proved a real and substantial possibility of a future income loss. In arriving at this conclusion, I have taken into account the decision in *Sevinski v. Vance*, 2011 BCSC 892, where Voith J. awarded $22,500 for future income loss. His comments at para. 104 are applicable to Ms. Connolly’s situation:

> ... The prospect of the plaintiff living with some level of ongoing pain, even if manageable, has a real and substantial possibility of rendering the plaintiff less able to earn income. This is particularly the case when the employment options available to her are predominantly physical in nature.

[54] Quantifying the loss is difficult. Ms. Connolly does not have a history of earning significant amounts of income. I conclude that she will continue to be the primary caregiver and homemaker for her family and this will preclude her from working extensively outside of the home in the near future. While there may be jobs available to her that would provide higher levels of income than she could have earned as a fitness instructor, such work may not fit into her schedule as readily as that work would have. As a result, she may not be able to take full advantage of those opportunities. The loss of work within a flexible schedule represents a real loss to Ms. Connolly and forms the primary basis for this claim. When I consider all of these factors, I conclude that a reasonable assessment of her loss of future earning capacity is $15,000. I appreciate that this is not a significant sum. It does, however, represent three times her highest level of earnings in the years after the birth of her second child. As the children get older and she has more flexibility to work outside of the home, I conclude that the chance of an ongoing loss diminishes.

Cost of Future Care

[55] Ms. Connolly seeks a nominal award for cost of future care. No evidence was presented to support such an award. Accordingly, I decline to make any such award.

Special Damages

[56] Ms. Connolly claims $4,792.80 for special damages. The majority of this sum, $3,155, is for chiropractic treatments. Ms. Connolly said that the treatments did not provide much relief. Given that admission, I agree with the defendants' submission that 81 treatments was excessive. Accordingly, I would allow only $1,500 for chiropractic treatments. I also reduce the claim for mileage to $100 because much of the claim is based on the excessive chiropractic treatments and, in

addition, there was little evidence provided to support that claim. The amount I award is thus $2,737.80.

[57] In summary, I find that Ms. Connolly suffered a low back strain in the area of her left sacroiliac joint which has left her with a modest level of chronic pain. I make the following damage awards:

Non-pecuniary damages	$50,000
Past loss of earning capacity	$5,000
Loss of future earning capacity	$15,000
Special damages	$2,737.80

[58] Subject to any submissions regarding offers of settlement, Ms. Connolly is also entitled to costs at Scale B.

[DISCUSSION RE COSTS]

[59] THE COURT: I think I will simply leave that to the parties and if there is a need to make written submissions, you can do that.

"Butler J."