IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Poirier v. Aubrey,*
2010 BCSC 75

Date: 20100120
Docket: M075032
Registry: Vancouver

Between:

Laurie Poirier

Plaintiff

And

Fenton W. Aubrey, WS Leasing Ltd. and Canadian Car and Truck Rental Ltd.

Defendants

Before: The Honourable Mr. Justice Stewart

Reasons for Judgment

Counsel for the Plaintiff:	T. Delaney
Counsel for the Defendants:	R. Pearce J. Suen
Place and Date of Trial:	Vancouver, B.C. December 7-11 and 14-18, 2009
Place and Date of Judgment:	Vancouver, B.C. January 20, 2010

[1] The plaintiff claims damages for negligence arising out of a motor vehicle collision which occurred on September 5, 2006 on Highway #1 near the 176 Street exit and approaching the Port Mann Bridge in the City of Surrey. The plaintiff's vehicle was struck from the rear. The defendant admits liability.

[2] The plaintiff told me that her vehicle was stopped in a line of traffic at the material time and that her vehicle was hit "hard". No other evidence exists as to the severity of the blow. No pictures of the damaged vehicles were placed before me. There is no evidence as to the cost (if any) of repairing the vehicles.

[3] That the plaintiff was injured as a result of the negligence of the defendants, is admitted by the defendants. (For the sake of simplicity I will refer hereafter to "the defendant".)

[4] Paragraph two of the defendant's written submissions reads as follows:

> With respect to the plaintiff's injuries resulting from the accident, the defendants concede that the plaintiff suffered soft tissue injury to her neck and upper back, but do not acknowledge that the accident was a materially contributing cause of the plaintiff's current regional pain condition, whether that condition be a regional pain condition or fibromyalgia.

I note that the plaintiff suffered additional minor injuries, such as an injury to her knee, and those injuries are not disputed and have been taken into account by me.

[5] My task in preparing reasons for judgment at the end of a trial has been settled by the Supreme Court of Canada in a series of cases that encompasses ***R. v. Sheppard***, [2002] 1 S.C.R. 869; ***R. v. Dinardo***, 2008 SCC 24; ***R. v. R.E.M.***, 2008 SCC 51; and ***R. v. H.S.B.***, 2008 SCC 52. In brief, I am not to produce a form of transcript of the evidence. That is what the taping system is for: ***R. v. Yang***, 2004 BCCA 235; ***R. v. McDonald***, 2007 BCCA 224, para. 7. Nor am I to articulate the "machinations of my mind": ***R. v. Jordan***, 2004 BCCA 70. Instead, I must give reasons for judgment responsive to the live issue or issues and, having regard to the particular circumstances of the case, reasonably intelligible to the parties and productive of a basis for a meaningful appellate review of the correctness of my decision by an appellate court armed with the combined effect of what I say in these reasons for judgment and the record of the trial.

[6] In ***R. v. R.E.M.***, *supra*, and ***R. v. H.S.B.***, *supra*, the Supreme Court of Canada reversed two decisions of our Court of Appeal. In doing so, the Supreme Court of Canada chose to lay to rest a number of misconceptions about the irreducible content of the duty of a judge in giving reasons after a trial. Both cases bear repeated reading, but the most comprehensive statement by the court appears in ***R. v. R.E.M.***, *supra*, at paras. 15-57. I am bound by the whole of it and have crafted my reasons for judgment in the case at bar in light of what the Supreme Court of Canada has said.

[7] For present purposes, I choose to note only the following. The Supreme Court of Canada has stated once and for all that the need for a judge to state what he decided and why does not mean the judge must articulate how he made the decision. The "what" is the verdict and the "why" is the basis for the verdict. The judge is not required to set out every step, finding or conclusion taken, made or arrived at by him in the process of arriving at the verdict. Stating the "what" and giving the "why" against the background of the record is a matter of connecting the evidence and the law on one hand with the verdict on the other. Crucially, considering the problematic state of the law in this province prior to October 2, 2008 and the handing down by the Supreme Court of Canada of its decisions in ***R. v. R.E.M.***, *supra*, and ***R. v. H.S.B.***, *supra*, decisions by the trial court judge as to the testimonial reliability of the various witnesses need not be "justified". Interestingly, the Supreme Court of Canada had presaged that ruling in ***R. v. Lifchus***, [1997] 3 S.C.R. 320 at para. 29, amended reasons irrelevant to this point given in January 1998.

[8] The plaintiff's case is that as of September 5, 2006 she was in good health. The result for her of the defendant's negligence has been pain and discomfort that has been constant, consistent, persistent and now classified as chronic by the doctors and labelled, by some of them, "fibromyalgia". The future promises to be much like the past. The plaintiff asserts that the effect on her life of the results for her of the defendant's negligence has been devastating. She can no longer work as an insurance adjuster, a job she says she

loved. Her very active life apart from work, has been severely curtailed.

[9] The defendant's case is more nuanced. At the heart of it, the defendant asserts that the plaintiff's testimonial reliability is such that both her testimony before me and the opinions offered by the doctors called to testify on her behalf are suspect in all areas that matter. The defendant asserts that as of September 5, 2006, the plaintiff was burdened with a chronic intermittent pain condition which may have been exacerbated by the results for her of the defendant's negligence but was, and would have remained, her lot in any event.

[10] The Rosetta Stone in the case at bar is recognition that the meaning and effect of the expert opinion evidence placed before me in writing pursuant to Rule 40A changed dramatically after the doctors testified before me. It is not a case in which the experts resiled from positions taken in their Rule 40A written statements. There was a bit of that, but not as to anything of real significance. No, what occurred here is that what I could fairly take from the evidence of the doctors only became clear as they explained to me how they had employed certain terms or exactly what lay behind their conclusions. For example, Dr. Jaworski's referring, at Exhibit 7, Page 3, to a "pre-existent pain condition" was music to the defendant's ears. But it became clear to me that Dr. Jaworski was not using that term in the sense of a prevailing, persistent condition, but only as a way of referring to the fact that just before September 5, 2006 the plaintiff complained of pain and discomfort periodically, as does any adult. He was not referring to a pre-existing chronic pain syndrome. Another example – and something that looms large in what follows – is the laying out by Dr. Watterson as he testified before me of what lay behind his finding of a pre-existing "chronic intermittent musculoskeletal pain". (Exhibit 6, Tab C, Page 2) My analysis of what the doctor accepted as an adequate foundation for his opinion, and the way in which he arrived at one element of that foundation, bears directly on both my conclusion as the trier of fact as to the testimonial reliability of the plaintiff and my conclusion as to the existence – or the lack of it – of a relevant, significant pre-existing condition.

[11] Against the background of the record and having considered the whole of the evidence together, I say as the trier of fact that:

a) Crucial to the defendant's case is an assertion that I should conclude that the plaintiff has not been candid with the doctors or with me. That is so because, as always in a case such as this, the sheet anchor of a doctor's opinion and of my findings is an acceptance of the plaintiff's statements and testimony as to the state of her health as accurate.

b) The defendant grounds the attack on the plaintiff's testimonial reliability on a number of points. But, for me, the focus narrows. What I conclude about the overarching issue of the testimonial reliability of the plaintiff turns, for this trier of fact, on what I conclude about the accuracy of the plaintiff's assertions to the doctors and to me that as of September 5, 2006 she was, in effect, feeling just fine and suffered no longer from the pain and discomfort that was her lot as a result of what we have come to call the July 18, 2006 bus accident.

c) The defendant relies on bits of circumstantial evidence in building a case to the effect that the plaintiff must have continued to suffer from the effects of the bus accident as of September 5,

2006.

d) I say that for this trier of fact absent my accepting the evidence of the doctor called by the defendant, Dr. Watterson, to the effect that the fact Diazepam was prescribed for the plaintiff on August 3, 2006 by Dr. Smith means that Dr. Smith was of the opinion that he was dealing with a case of not mild or moderate soft tissue damage, but severe soft tissue damage, I do not have a body of circumstantial evidence which looked at cumulatively puts paid to the plaintiff's assertion that as of September 5, 2006 she was feeling just fine.

e) Dr. Smith never testified before me.

f) The evidence that is before me is equivocal.

g) Dr. Watterson said, as above, that the prescribing of Diazepam means that the treating physician, here Dr. Smith, was of the opinion that he was dealing with a case of severe soft tissue damage.

h) Dr. Hunter, a doctor who practices in the same clinic as Dr. Smith, the Thorson Clinic, did testify before me. His evidence came to this – the prescribing by him or another physician in their clinic of Diazepam does not mean that the patient has presented with severe soft tissue damage. He did allow, however, that it is "possible" that the combination of drugs prescribed on August 3, 2006 – of which Diazepam was but one – means that the treating physician was of the opinion he was dealing with severe soft tissue damage.

i) The absence of Dr. Smith from the witness box resulted in a submission by the defendant that I should draw an inference adverse to the plaintiff.

j) The Court of Appeal has underlined in a number of cases just how rarely such an inference should be drawn. The Court of Appeal spoke to this issue in the context of a case such as this in ***Buksh v. Miles***, 2008 BCCA 318.

k) Applying what was said there about the modern medical system and the transparency of litigation under our Rules to what is thrown up here, I find that it would be wrong to draw an inference adverse to the plaintiff from her not having called Dr. Smith. It was the defendant's doctor, Dr. Watterson, who was the head and source of the theory of the significance of Diazepam and the pre-trial discovery of documents and exchange of expert reports told the defendant that the doctor who dealt with the plaintiff on August 3, 2006 was not Dr. Hunter. The defendant was in as good – I say better – position as the plaintiff to appreciate the significance of Dr. Smith's opinion and of the need to subpoena Dr. Smith into the witness box. It was not done.

l) As made clear, above, Dr. Watterson's opinion about the inference to be drawn by the prescribing of Diazepam for the plaintiff on August 3, 2006 was just one bit of circumstantial

evidence bottoming the defendant's submission that, contrary to what the plaintiff says, the fact was that on September 5, 2006 she was still suffering pain and discomfort as a result of the bus accident on July 18, 2006. But, as I made clear above, for me, absent acceptance of Dr. Watterson's opinion about the significance of the prescribing of Diazepam I could not conclude that the truth of the matter about the plaintiff's condition on September 5, 2006 was the opposite of what the plaintiff has asserted before me and to the doctors. And also, as I have made clear, absent finding that the plaintiff was not candid with the doctors and me on that point, this trier of fact could not make the overarching finding that the plaintiff is a litigant whose want of testimonial reliability fundamentally undermines – in all contexts – the weight to be given to the medical evidence placed before me by the doctors and, in addition, her testimony before me as to virtually everything.

m) And I say as the trier of fact that I do not draw the inference from the prescribing of Diazepam that was urged upon me by counsel for the defendant on the basis of Dr. Watterson's opinion.

n) In the result, I proceed on the basis that the plaintiff has been candid with me and with the doctors. Subsumed in that conclusion is a finding by me that the plaintiff does not exaggerate when she describes her aches and pains. She is simply articulate and blessed with a gift for finding a telling analogy, metaphor or simile. Nobody is misled. And Dr. Hunter's allowing on cross-examination that it is possible she exaggerates is of no moment. Of course it is possible that she exaggerates. I find she does not.

o) I turn to the question of whether the evidence reveals that the plaintiff as of September 5, 2006 had a relevant – note the word relevant – significant pre-existing condition for the purposes of the law.

p) I find as the trier of fact that the answer is no.

q) The defendant's submission to the effect that the plaintiff suffered from a relevant significant pre-existing condition rests on a number of too thin reeds. I will speak to the detail of only three of them.

r) First, in pointing to anemia that was the plaintiff's lot before September 5th and until the summer of 2008 when corrective surgery took care of the plaintiff's problem, the defendant ignores the fact that whatever the plaintiff's problem with anemia was the plaintiff, before September 5, 2006, functioned well both at work and in her private life. Her anemia is as significant to the outcome of this case as would be evidence that for a time she suffered from severe hair loss.

s) Next, the defendant's reliance, in asserting that there was a significant pre-existing condition, on the plaintiff's having, over a period of years, sought help from doctors, chiropractors and other caregivers for the results for her of such things as (by way of examples) moving furniture, being robbed at gunpoint, being punched in the face by an irate brother-in-law and falling during the bus incident referred to above, ignores the fact that, as I find it to be, each of these incidents

was isolated in nature and resulted in pain, discomfort and anxiety from which the plaintiff recovered and simply got on with her life. A subset here is that evidence of a possibility that repeated attendance upon chiropractors could result in a defect rendering a patient susceptible to future injury never rose above the establishing of only that i.e. a possibility.

t) Next, in asserting that there was a significant pre-existing condition, the defendant relies heavily on the opinion of Dr. Watterson which I find in turn depended heavily on what he made of the results for the plaintiff of the bus accident. And that, in turn, depended overwhelmingly on what he inferred from the prescribing of Diazepam, as above, by Dr. Smith on August 3, 2006. And what I have said, *supra*, puts paid to this aspect of the defendant's case.

u) In light of the findings made thus far by me as the trier of fact, the case becomes one in which the plaintiff is an accurate source of information, there was no relevant significant pre-existing condition and the doctors may differ as to what label should be applied to the plaintiff's condition – fibromyalgia, fibromyalgia-like syndrome, chronic pain condition – but the fact is that she suffers from chronic widespread pain that is, for her, debilitating and with respect to which the prognosis is guarded. An "optimal fibromyalgia based treatment protocol", including biofeedback, is recommended and there is a real and substantial possibility, bordering on likelihood, that her pain and discomfort will be relieved and her functioning improved. (Exhibit 5 Tab B Page 6). But no "cure" is in prospect.

v) Post hoc ergo propter hoc (after this, therefore caused by) reasoning must be avoided. But I find as a fact that the plaintiff's persistent, consistent and, ultimately, chronic pain and suffering arose only immediately after the September 5, 2006 motor vehicle accident. The schism in the expert medical evidence placed before me was not as to whether the September 5, 2006 trauma was a materially contributing cause of the plaintiff's ongoing chronic pain condition but as to whether it so contributed by exacerbating a pre-existing chronic pain condition or by simply triggering a chronic pain condition. It is now a fact that there was no significant pre-existing condition. The only available conclusion in the case at bar is that but for the defendant's negligence on September 5, 2006 the plaintiff would not be burdened with the chronic pain condition that has been her lot since September 5, 2006.

[12] I turn to the assessing of damages.

[13] The plaintiff's date of birth is June 20, 1971. She was 35 on September 5, 2006. She is now 38 years of age. She had her first child, a girl, when she was 17. Her second child, also a daughter, came along a year later. A third child was born in 1992 and placed for adoption. In 2000, she married Rene Poirier. He brought a daughter into the marriage. As of September 5, 2006, she and her husband lived with one of her daughters and her husband's daughter. In the fall of 2007 she and her husband separated. They got back together in the spring of 2008. In November 2009 they separated again.

[14] The plaintiff believes that the split is permanent and blames the effects on her of the September 5,

2006 motor vehicle accident for her husband's deciding to leave her. The husband did not testify before me. All I have as to the reason for their separating is the plaintiff's conclusory opinion. The evidence revealing what the husband had to say about his beliefs of the moment was not placed before me in a way that provides a decent foundation for the forming of an objective opinion by me. The testimony of Dawn Fiorante, who knows both the plaintiff and her husband, took the form of hearsay statements by him of what he said the plaintiff had said to him. It was not a coherent statement of his present state of mind. I find that the plaintiff has not convinced me that the sad state of her marriage was caused by the results for her of the September 5, 2006 motor vehicle accident.

[15] The plaintiff's education was interrupted by her having her first child. But she persisted and received the equivalent of a high school diploma in 1992. She has had some post-secondary education. She has training in Computerized Accounting and Automated Office Technology. In 1993 she took some introductory university courses.

[16] The plaintiff told me that she entered the workforce in 1992. By 1998 she was working for an office equipment company. From 2000 to 2003, she worked for first one restoration service company and then another. From 2003 to 2006 she worked for the Brick.

[17] In a nutshell, the plaintiff's work history prior to her entering the world of claims adjusting in 2006 is that of someone who works well and consistently and reveals no evidence of her being a slacker.

[18] In February 2006, the plaintiff joined an insurance adjusting firm, CGI Adjusters. On weekends she attended courses and, in the result, obtained her level one licence. On September 5, 2006 she was injured in the motor vehicle accident that bottoms the litigation in the case at bar. She was off work for roughly six weeks. Then she returned to work half-time for approximately two months. Then she returned to full-time work. Early in 2007 – but not because anyone at CGI was unhappy with her work – she went to work for another firm of adjusters, SCM. She was away from work for two months in the summer of 2008. In mid-August 2008 she returned to work and remained at work until May 11, 2009 when she stopped working. She has not worked since.

[19] The combined effect of the evidence of the plaintiff and of her mentor, Mike Parsons, her boss, Pierre Chavigny, her fellow junior adjuster, Julie Sykes and the senior adjuster to whom she reported toward the end of her working at SCM, Monique Aisler, is that I am satisfied that the plaintiff enjoyed her work, was good at it, did all she could by way of taking courses to improve her position as an adjuster, and worked through the pain and discomfort that was her lot as a result of the September 5, 2006 motor vehicle accident but was eventually worn down by her pain and discomfort. The fact that she was observed to lift this or that or was able to drive to her assignments is entirely consistent with the picture painted by the witnesses. It is obvious to me that the plaintiff was valuable to the firm and her duties were adjusted in an attempt to permit her to remain at work. In spite of her making her best effort, and Pierre Chavigny's doing all he could, ultimately she wilted. And I find that she did so because of the results for her of the September 5, 2006 motor vehicle accident.

[20] I turn to the plaintiff's life apart from the workplace. I find that she enjoyed camping and hiking. She owned her own kayak. Her husband was an avid fisherman. She was not. But she would accompany him and walk the dogs while he fished. She and her husband split household duties 50:50.

[21] What I have described is her life prior to September 5, 2006 save for the brief period that followed the bus accident in July 2006.

[22] I find that all of this has been lost to her, or severely curtailed, because of the effect on her of the defendant's negligence on September 5, 2006. The plaintiff's pain and suffering on and after September 5, 2006 has varied between what I would describe as severe and what I would describe as simply significant.

[23] Soft tissue damage is the source of her problems. I have kept ***Maslen v. Rubenstein*** (1993), 83 B.C.L.R. (2d) 131 (C.A.) in mind. I find that the plaintiff is one of that small percentage of people, well known to the law, whose pain and suffering continues long after science would say that the injured tissue must have healed. I have cautioned myself about the need to be slow to rely on what are uncorroborated reports of long-standing pain and discomfort. But, on the whole of the evidence I have decided that her complaints of pain are true reflections of a continuing injury and are not a product of desire by the plaintiff for things such as care, sympathy, relaxation or compensation and that she has used every ounce of willpower she has to overcome her problems and could not reasonably be expected to have achieved more by her own inherent resources or willpower. (***Maslen v. Rubenstein***, *supra*, paragraphs 8 and 15).

[24] I turn to the future.

[25] To use language employed by Dr. Jaworski, the prognosis is "guarded". Taken together, the evidence of Dr. Hyams, Dr. Shuckett and Dr. Jaworski bottoms the conclusion that what is now in place – an ongoing, positive, pro-active approach, to echo Dr. Shuckett – means that there is a real and substantial possibility that significant improvement is in the offing. To date, the plaintiff has sought help in such things as prescription drugs, chiropractic treatments, physiotherapy, massage, acupuncture and trigger point injections. Only now is the plaintiff in the course of an organized effort to both alleviate her pain and discomfort to the extent possible and teach her techniques and methods of dealing with and surmounting her pain and discomfort.

[26] I turn to the assessing of non-pecuniary damages. The plaintiff has been burdened thus far for 39 months. Her prospects are not bleak, but guarded. The level of the pain and discomfort she has endured was such that her life apart from work has been turned from one full of activity to one devoted to rest and recovery. She is not housebound. She drives a car for up to 20 hours a week and makes herself useful in the lives of her children. The level of her pain and discomfort resulted in this woman – whom I am convinced is not a slacker and enjoyed her job in the world of insurance adjusting – being off work for six weeks, returning to work at half-time for two months and, ultimately, stopping work after having her employer cooperate in every way possible to reduce the demands of the job so that she could continue working. That speaks volumes about her condition. Additionally, the fact she actually enjoyed her work and has had it curtailed as a result of the defendant's negligence must weigh heavily in the assessment of non-pecuniary

damages. I have considered the cases placed before me by counsel. To track some of the language used in ***Knauf v. Chao***, 2009 BCCA 605, I classify this as a case in which there is a real and substantial possibility that the plaintiff's soft tissue injury will prove to be "permanent" but the degree of pain and discomfort cannot be considered to be "the most severe in nature" when compared with that of plaintiffs in other such cases. Taking into account not just what I have said here but the whole of the evidence and all I have said thus far in these reasons for judgment, I award the plaintiff $60,000 by way of non-pecuniary damages.

[27] I turn to the claim for loss of the capacity to earn income to the date of trial.

[28] Real and substantial possibilities hold sway here and proof on a balance of probabilities is not afoot: ***Smith v. Knudsen***, 2004 BCCA 613.

[29] The plaintiff claims $38,000, basing that submission on the report of an economist, Mr. Turnbull, which report appears before me at Exhibit 5, Tab 4B. I am satisfied that Mr. Turnbull took a conservative approach in arriving at lost earnings of $4,700 in 2006, $8,500 in 2008 and $25,000 in 2009.

[30] The $8,500 figure for 2008 relates to the time the plaintiff took off work in the summer, June 14 to August 18 to be exact. It is only that $8,500 that the defendant disputes. The defendant submits that the time off work should be laid at the feet of things such as the flu and ablation surgery undertaken during the time off work. I disagree. I find that the plaintiff's pain and suffering as a result of the events of September 5, 2006 resulted, albeit indirectly, in her taking the two months off because of what began as the side effects of one medication and became the side effects of a concoction she took – Ralivia – in the hope it would improve her lot. In the result under the heading past loss of income earning capacity, I award the plaintiff $38,000.

[31] I turn to the plaintiff's claim for damages for loss of the capacity to earn income in the future.

[32] Here I am driven back to utter basics. The plaintiff is entitled to be returned to the position she would have been in absent the defendant's negligence. In addition, all real and substantial possibilities – both pro and con – must be taken into account. Subsumed within what I have just said is recognition that the contingencies of life – both pro and con – must be reflected in the final award: ***Andrews v. Grand & Toy Alberta Ltd.*** (1978), 83 D.L.R. (3d) 452 (S.C.C.) at page 470.

[33] The defendant points to the absence of a discrete body of evidence – such as a vocational assessment or functional capacity assessment or work capacity evaluation – that gets at the plaintiff's capacity to earn income. The defendant also points to the fact that the plaintiff has done nothing useful by way of seeking work in any field. The defendant then points to case law, such as ***Brown v. Golai*** (1985), 26 B.C.L.R. (3d) 353 (S.C.), ***Pallos v. ICBC*** (1995), 100 B.C.L.R. (2d) 260 (C.A.), ***Palmer v. Goodall*** (1991) 53 B.C.L.R. (2d) 44 (C.A.) and ***Parypa v. Wickware*** (1999) 169 D.L.R. (4th) 661 (C.A.) and takes the position that here the plaintiff has established neither lost capacity to earn income nor reduced capacity to earn income and has not established on a balance of probabilities (***Parypa v. Wickware***, *supra*) that she is not able to mitigate by pursuing other lines of work.

[34] Every award of damages is peculiar to the case before the trier of fact. Here I find that I am confronted

with a case that comes to trial at a time when the plaintiff is at the beginning of a course of treatment which will put the plaintiff in a position to do what she cannot do now – understand just what her usefulness in the marketplace is.

[35] No vocational assessment, etc., undertaken to date would be of any assistance. No flurry of resumes mailed off to sundry businesses would produce anything of value.

[36] As things stand I know this:

a) The plaintiff's physical problems, including but not limited to her pain, her inability to look up and down easily and her inability to reach out easily – and her lack of stamina – make her now unfit for a job of the sort or kind she was engaged in on September 5, 2006. That eliminates office work. And she has worked, in the main, in an office since at least 2000.

b) The plaintiff's pain and discomfort was of a kind and at a level where for the 32 months between September 2006 and May 2009 she was gainfully employed, albeit at the price of periods of time off, reduced working hours at one point, struggling to handle a regular workload for a long period and having her assigned work altered in kind for perhaps four months.

c) Her caregivers are hopeful that the course of treatment she is embarking upon will – in at least two ways – result in her being able to cope much better.

d) The raw material placed before me in Exhibit 3 and summarized in Exhibit 5 at Tab 4 convinces me that prior to September 5, 2006 the plaintiff had demonstrated that she had the capacity to earn a significant income and that between September 5, 2006 and the date of trial the plaintiff's efforts to continue working resulted in her demonstrating a capacity to earn call it $50,000 per year.

e) It may be that the plaintiff will be able to mitigate her loss by retraining (***Bradley v. Bath***, 2010 BCCA 10, para. 39).

[37] It is obvious to me that the plaintiff's capacity to earn income from all types of employment has been adversely affected and will be adversely affected, although the extent of the problem defies description. It is obvious that as she is, the plaintiff is less marketable or attractive as an employee to potential employers and that the extent to which she will become – hopefully – more attractive defies description. It is obvious that as things are, and as they very may well prove to be in the future, the plaintiff has at least a reduced capacity to take advantage of all job opportunities that might be open to her. It is obvious that as she is now, and as she may very well be in the future, the plaintiff is less valuable to herself as a person capable of earning income in a competitive labour market. At that point my crystal ball clouds over.

[38] That is the plaintiff's loss. It is very real. That it defies calculation is not only obvious, but the opposite of a bar to the assessing of substantial damages, as the Court of Appeal makes clear in the recent case of ***Campbell v. Banman***, 2009 BCCA 484 at para. 26. "The essential matter that engages the attention of a

court making an assessment in this area is to endeavour to quantify the financial harm accruing to the plaintiff over the course of his or her working career." (***Bradley v. Bath***, *supra*, at para. 40.)

[39] I have kept the need for caution in settling on a figure in a case such as this front and centre. By the use of an economist's tool, and by making assumptions unlike what I have just finished outlining, the plaintiff arrives at a submission that an award of $600,000 to $700,000 would be appropriate. The defendant submits (closing submissions of the defendant para. 136) that "the plaintiff has not proven on a balance of probabilities that she has suffered a future income earning loss". In the alternative (para. 137), the defendant submits that "a calculation similar to that in ***Chamberlain v. Giles*** [2008 BCSC 171], should be used". With respect, that case reveals no universally applicable method of calculation but, instead, an assessment peculiar to the evidence in that case made by a trial judge confronted – as am I – with a situation that defies calculation.

[40] An "estimate based on prophesies" in a case of "general impairment" results in my "sense of what is fair compensation" settling on the figure $100,000. That is the award (***Morris v. McEachran*** (1996), 23 B.C.L.R. (3d) 256 (C.A.)).

[41] I turn to the claim for special damages. Here the claim was for $10,564. The defendant disputes only one item, and that for $61. That relates to a payment for Weight Watchers. I find that the defendant is right. The plaintiff's problems with gaining weight preceded September 5, 2006. I reduce the award accordingly and award $10,503.

[42] I turn to the claim for the cost of future care. That the plaintiff will require Ketamine gel ($80 per bottle) every three months for some time is established. That neurofeedback therapy (perhaps $1,500 to $4,000) will likely be useful is established. That Botox injections applied periodically over perhaps two years ($200 to $800) may assist the plaintiff has been established. The plaintiff's out-of-pocket portion of the cost of her prescription drugs (perhaps $200 per year) over an unspecified period must be taken into account. The plaintiff seeks an award of $30,000. The defendant submits that no award should be made, or, if it must be let it be in or about $10,000 at the maximum. I assess damages under this heading at $15,000.

[43] I turn to the claim for loss of housekeeping capacity.

[44] The plaintiff claims $50,000. The defendant is right, i.e. the evidence as to this claim is woefully inadequate. Whether a discreet award should be made under this heading or the plaintiff's loss, if any, taken into account elsewhere is a function of the state of the evidence in a given case. (***Foran v. Nguyen***, 2006 BCSC 605, para. 115). As was the case in ***Morrison v. Gauthier***, 2009 BCSC 1271, the lack of precision in the evidence in the case at bar combines with the fact, as I find it to be, that the plaintiff's real loss is her frustration at having to live with lower standards than she did before September 5, 2006 and convinces me that the plaintiff's loss should be reflected in the award for non-pecuniary damages. I have taken that fact into account in the award I made earlier for non-pecuniary damages. Here see ***Travis v. Kwon***, 2009 BCSC 63, paras. 125-128.

[45] As demanded by the case law I "step away" and look at the overall award for reasonableness in the

circumstances. In my opinion, in light of the results for the plaintiff of the defendant's negligence, a global award of $223,503 is reasonable: ***Ruiz v. Bouaziz***, 2001 BCCA 207.

[46] Counsel may arrange, if necessary, to speak to the issue of costs or to any other ancillary matter.

"Stewart J."