IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Moore v. Peng,*
2019 BCSC 2078

Date: 20191212
Docket: M167028
Registry: Vancouver

Between:

Lanita Kathleen Moore

Plaintiff

And

Guo Peng and KVC Industries Corporation

Defendants

Before: The Honourable Mr. Justice Crossin

Reasons for Judgment

Counsel for the Plaintiff:	R.N. Bisbicis P.R. Bisbicis
Counsel for the Defendants:	E. Kotsaboikidis K. Hall L. Dorner, Articled Student
Place and Dates of Trial:	Vancouver, B.C. March 4–8, 11–15, and April 15 and 18, 2019
Place and Date of Judgment:	Vancouver, B.C. December 12, 2019

[1] This is a motor vehicle accident case. Liability is admitted. The issue is damages.

[2] The accident in question occurred on February 23, 2016 in North Vancouver British Columbia (the "accident"). It appears by any reasonable standard, it was a minor accident.

[3] The plaintiff, Ms. Moore, was stopped at the intersection of Capilano Road and Keith Road. She was waiting to merge with traffic, to travel north on Capilano Road.

[4] At the time of the accident, the vehicle owned by the defendant, KVC Industries Corporation and driven by the defendant, Guo Peng was behind the vehicle of Ms. Moore, also waiting to merge. Ms. Peng, at some point, based upon the assumption Ms. Moore was about to merge with the traffic, began to move forward and hit the rear end of Ms. Moore's vehicle.

[5] Ms. Peng testified that she estimated the speed of her vehicle on impact as under 5 km/h.

[6] After the exchange of information, Ms. Moore carried on with her daily business of the day. She picked up one of her daughters from school and drove her to gymnastics class. The evidence concerning damage to the vehicles was somewhat vague. Neither party apparently saw the need to make any claim for vehicle damage.

[7] Ms. Moore attended to her family physician, Dr. Ramona Penner, within a day or two of the accident. Ms. Moore testified that immediately following the accident, her head was sore, as was her neck. Within a month or so, her neck stiffened and remained sore. She experienced headaches and had difficulty focusing. It is alleged, as a consequence, Ms. Moore suffers from daily ongoing headaches that continue to this day. Ms. Moore testified that her quality of life has been significantly impacted by the accident.

[8] Ms. Moore has particularized a litany of injuries she has suffered:

a. headaches;

b. ringing in her ears;

c. neck pain;

d. shoulder pain;

e. back pain;

f. right arm pain;

g. pain between shoulder blades;

h. hip pain;

i. sensitivity to light;

j. feelings of being off balanced;

k. head injury;

l. post-traumatic stress disorder;

m. anxiety;

n. concussion and concussion symptoms;

o. psychological symptoms; and

p. psychiatric symptoms.

[9] The defendant concedes the accident caused certain injuries to Ms. Moore's neck, causing some headaches. She also concedes the accident may have exacerbated a right shoulder and right arm injury. However, she does not accept Ms. Moore's description of the extent of those injuries.

[10] The defendant also submits there were "pre-accident issues" occasioning pain in Ms. Moore's right shoulder, right arm, low back, and hip. It is submitted that some of these pre-accident issues were a result of injuries sustained by Ms. Moore playing tennis, a sport she had taken up in her late 30s.

[11] Ms. Moore, at the time of the accident, was 49 years of age and was employed by a manufacturing company, Watson Gloves. Watson Gloves is a family business that had apparently been in her husband's family for many decades. In addition, she was engaged as a homemaker, participated in volunteer activities, was a member of the Hollyburn Golf & Country Club, and, it appears, played a good deal of tennis.

[12] Ms. Moore separated from her husband in 2017. She remains in the matrimonial home. She is no longer employed by the family business. It is conceded that the separation and the end of her employment at Watson Gloves is not related to the accident. Mr. and Ms. Moore are currently in litigation concerning their divorce proceedings. At the time of the trial, two of the three children (two daughters aged 18 and 14) still resided in the matrimonial home.

[13] Ms. Moore began full-time employment with the West Vancouver School Board (the “School Board”) in August 2016, some months after the accident. She has been in a permanent full-time position with the School Board since February 2017 and had not missed any days of work, at least to the date of trial.

[14] Ms. Moore described her typical day as at the time of trial. She testified she wakes up every morning with a headache. She finds showering difficult due to some restricted movement in her right arm.

[15] She testified that sitting, including sitting at work, aggravates her neck and shoulder pain and, consequently, causes her headaches to continue more or less throughout the day.

[16] Ms. Moore testified she returns from work at approximately 4:30 p.m. and must take a rest before embarking upon, what I understand to be, her domestic chores, including making dinner for herself and her two daughters, “dealing” with their homework, and cleaning the home.

[17] The matrimonial home is a home consisting of six bedrooms and seven bathrooms on three floors.

[18] Ms. Moore testified that cleaning the home took up a great deal of time prior to the accident and the accident has curtailed her ability to clean in the way that she desires. Ms. Moore says that on some occasions, she will ask one or more of her daughters to help carry the laundry and empty the dishwasher. She has also testified that she has asked them to make their beds. All, apparently, to no avail.

[19] Ms. Moore testified that prior to the accident, her housekeeper, Yvonne Wen, came to the house once a month. After the accident, Ms. Wen was required once a week. Ms. Wen testified she had been the housekeeper for the Moore's for many years and initially she attended every two weeks. Ms. Wen testified that, at some point, this changed to once a week.

[20] In addition, Ms. Moore owns an eight-year-old goldendoodle dog. Prior to the accident, Ms. Moore would walk the dog, but can no longer do so because he cannot be off-leash. Ms. Moore testified her injuries prevent her from dealing with the dog on a leash. She hired dog walkers after the accident, but since September 2018, that has stopped because she cannot afford dog walkers. Despite this, Ms. Moore purchased another dog after the accident. The claim relating to the expense concerning dog walking was eventually abandoned.

[21] There is a good deal of evidence concerning Ms. Moore's tennis activities and the loss of that activity as a result of the accident. She testified that she had been playing tennis on a regular basis up until September 2015, but had not played for some months at the time of the accident as a result of a foot injury.

[22] Ms. Moore has conceded that she had occasionally suffered pain in the right shoulder, her back, and her hip prior to the accident. All of these are related to her tennis playing.

[23] Ms. Moore says her biggest concern is her employment. She has now departed an unhappy marriage and wants to work but is worried that she will not be able to continue to do so.

[24] Ms. Moore also testified she is gaining weight and believes this also contributes to her hip pain. Ms. Moore has testified that she has no “real issues” with driving except that her right shoulder check is painful.

[25] Ms. Moore states that when she began her employment with the School Board, the School Board provided her with a stand-up desk which alleviated some of the pain and difficulty but, apparently, she had to move within the building and no longer has a stand-up desk and must now sit and share office space. Ms. Moore agreed that she feels better at work if she stands. The issue that aggravates matters at work is reaching and sitting. Ms. Moore testified that she has requested the School Board provide her with a stand-up desk and Ms. Moore says that she has been told that a stand-up desk will be forthcoming.

[26] Ms. Moore has attempted to pursue a regime of treatment, although the evidence paints a picture of a sometimes less than sterling effort in this regard.

[27] Ms. Moore states that she has been given exercises to do to improve her situation but she is limited to the extent she can exercise due to the fact she is working.

[28] Ms. Moore consulted her family physician, Dr. Penner, following the accident. I will address the evidence of Dr. Penner in more detail momentarily. At present, I note simply that Dr. Penner recommended that Ms. Moore undertake physiotherapy and chiropractic treatment, following this initial appointment.

[29] Ms. Moore testified she attended just six physiotherapy sessions in the few months following the accident. She testified she stopped physiotherapy because she did not like Intramuscular Stimulation (“IMS”) as an aspect of the treatment. Ms. Moore testified that she stopped going to physiotherapy altogether because she was of the view all physiotherapists would perform IMS.

[30] Ms. Moore attended chiropractic treatments for some months after the accident which helped alleviate her symptoms. However, she also stopped attending chiropractic treatments for reasons that remain, at least to me, somewhat unclear.

Ms. Moore's evidence on this point is that she finds it impossible to regularly attend chiropractic treatments because her “kids need lots of appointments”.

[31] Ms. Moore testified that she has received a Botox treatment from Dr. Robinson at Vancouver General Hospital in relation to her headaches. The first series of shots was in January 2019 just prior to trial. Ms. Moore testified that these treatments assisted. For at least a couple of weeks or so, her headaches diminished. Her next appointment was scheduled for April 2019.

[32] Ms. Moore testified that she went to Disneyland within a couple of weeks after the accident but says that she did not go on the rides as a result of the accident. She testified she could not recall whether she went to Mexico after the accident. It was later confirmed that in fact she did go to Mexico after the accident.

[33] She also testified that sunlight bothers her and aggravates her headaches.

[34] She did say, however, that she had gone to Hawaii at Christmas in 2016 and also during spring break in 2018 but is able to deal with the sunlight aggravation by wearing sunglasses.

The Reliability/Credibility of Ms. Moore

[35] There is evidence before the court from a variety of witnesses that have observed the conduct and demeanour of Ms. Moore both before and after the accident. In addition, various expert witnesses were called in support of Ms. Moore’s claim for damages.

[36] The weight to be afforded the evidence of Ms. Moore is of obvious importance. In addition, the value of the expert evidence rests, to a large degree, on the faith to be placed upon the advice and information provided by Ms. Moore to the medical witnesses.

[37] I observed Ms. Moore during the course of the trial and carefully listened to her evidence. I did not find her to be a particularly credible or reliable witness. I do not reject her evidence in its entirety. There is no doubt she suffered injuries as a

result of the accident. I also accept she continues, to some degree or another, to suffer some of the consequences of those injuries.

[38] I do not wholly accept her evidence however in describing the nature, effect, and current impact of those injuries. I found her evidence at times, vague, uncertain, over stated, and inconsistent.

[39] In addition, Ms. Moore exhibited an inconsistent memory of her discussions with her medical caregivers; particularly where an alleged note of a conversation was perceived by Ms. Moore to be contrary to her self interest. I appreciate these matters are not a memory test; and courtrooms create unfamiliar stress; but I found Ms. Moore to be sometimes pointedly casual and cavalier in the giving of her evidence; rather than demonstrating a genuine attempt to reconstruct her prior reporting.

[40] These findings concerning the reliability and credibility of the evidence of Ms. Moore impacts the weight I place on the medical expert reports. I must approach the reports with caution and some skepticism.

[41] I will provide only some examples from Ms. Moore's testimony that give rise to my concerns about her credibility and reliability as a witness.

[42] The evidence of Ms. Moore did not begin well. The curriculum vitae of Ms. Moore indicates that she has a diploma. The evidence of Ms. Moore left it unclear whether she did or did not have a diploma.

[43] Ms. Moore testified at trial that her employment at the family business of Watson Gloves was not for the purpose of income splitting. An innocuous question, in the context of the issues in this case, to be sure. Nevertheless, she agreed that she had sworn under oath in her examination for discovery on February 18, 2018, that her employment at Watson Gloves was income splitting. Ms. Moore then testified that her evidence at the examination for discovery was not true.

[44] Ms. Moore was vague in terms of the damage that occurred to her vehicle. In her examination for discovery, Ms. Moore testified that she had taken photos of the damage to her vehicle. When this was put to her at trial, she conceded that apparently she did not have photos of the damage.

[45] Ms. Moore testified in her direct evidence that she continued to drive the vehicle that was involved in the accident “for a couple of months”. Nevertheless, she agreed in cross-examination that she had testified in her examination for discovery she drove the vehicle in question for 18 months following the accident. In the end, Ms. Moore testified she did not know which of these two answers was accurate.

[46] Ms. Moore testified at trial that she continues to suffer from hip and lower back pain as a result of the accident. In this regard, Ms. Moore recognized that her chiropractic records indicate she was complaining of hip pain in June 2015 although she does not now recall complaining of such hip pain. In any event, Ms. Moore testified at her examination for discovery that the hip pain had resolved. When this previous evidence was put to Ms. Moore at trial, Ms. Moore testified that what she had intended to say at the examination for discovery was that she was not suffering hip pain “on that day”. I do not find this exchange credible.

[47] Ms. Moore testified that, prior to the accident and for some time after, she was involved in volunteer activities but, due to the accident, she had to stop. One example that took up much of Ms. Moore’s time was her involvement with Flicka Gymnastics, a large gymnastics club where her daughter participated in gymnastics. Ms. Moore was in fact the president of Flicka Gymnastics prior to the accident and testified that it was in effect a full-time job. Ms. Moore testified that she had to step down from this long time commitment due to the pain that she suffered after the accident. She resigned as president in April 2016.

[48] When pressed in cross-examination, Ms. Moore conceded that her daughter had quit gymnastics, about the time of her resignation, and that in fact she was embroiled in disagreements with the Board of Directors of Flicka Gymnastics at that point. She ultimately testified that she would have resigned in any event, regardless

of the accident. Nevertheless, Ms. Moore clung to the notion that she resigned, “at least in part, due to her injuries”. I found this to be another example of Ms. Moore being less than forthright.

[49] The central feature of Ms. Moore's claim is the fact that she alleges she suffers from constant headaches. In particular, Ms. Moore testified that she wakes up with a headache every day.

[50] Again, Ms. Moore’s testimony at her examination for discovery casts doubt on her testimony. There she testified that she in fact does not wake up with headaches every day but that sitting and driving will trigger her headache during the day. Ms. Moore stated this previous evidence was incorrect, but offered no explanation concerning these diametrically opposed positions.

[51] Consequently, I must strive to find an appropriate assessment of damages while hampered by my conclusion that the evidence of Ms. Moore cannot be accepted at face value and, indeed, creates, as previously stated, a good deal of skepticism.

Expert Evidence

Dr. Ramona Penner

[52] Dr. Penner is a long time friend of Ms. Moore. She is also Ms. Moore’s family doctor.

[53] The report of Dr. Penner is primarily based upon the information provided by Ms. Moore, but also in part based upon her notes of her observations of Ms. Moore.

[54] Dr. Penner initially diagnosed Ms. Moore with headaches resulting from the accident, and, in particular, diagnosed her with “mild post-concussive symptoms”. This was based on Ms. Moore’s reporting of ringing in her ears and “being foggy for a few days”. In addition, Dr. Penner’s diagnosis was based upon Ms. Moore’s statement following the accident that she “had been plowed into” from behind.

[55] Following Ms. Moore's attendance at Dr. Penner's office immediately following the accident, Dr. Penner recommended that she undertake physiotherapy and chiropractic treatment, as previously referenced.

[56] Dr. Penner provided some evidence concerning Ms. Moore's medical issues prior to the accident. Dr. Penner did confirm that Ms. Moore was complaining of low back pain before the accident. Dr. Penner also recalled her complaining of elbow pain and foot issues before the accident. She does not recall Ms. Moore complaining of shoulder pain before the accident.

[57] Dr. Penner testified that Ms. Moore advised her in an appointment in May 2016 that her "headaches [were] not constant … only once every two or three days…".

[58] In my view, the opinion and diagnosis of Dr. Penner that Ms. Moore suffered from "mild post-concussive symptoms" is based upon a thin foundation. Dr. Penner saw Ms. Moore once shortly after the accident and thereafter only saw her on four or five more occasions, all in 2016.

[59] Dr. Penner's evidence also suffers from the fact she appeared as both an expert witness and a close friend of Ms. Moore. Her testimony as a lay witness was for the purpose of discussing certain factual matters concerning her observations of Ms. Moore outside the office.

[60] Finally, Dr. Penner became combative and indignant during the trial while giving her evidence, for reasons that were not fully apparent to me.

[61] Dr. Penner was placed in a difficult position by being put forward as an objective unbiased expert witness when she was neither objective nor unbiased.

[62] Separate and apart from the fact I am unable to place full reliance on the information provided to Dr. Penner by Ms. Moore, the obvious conflict within which Dr. Penner was placed significantly undermines the weight to be given to her

evidence. In fact, I have no confidence in placing any weight on Dr. Penner's evidence.

Dr. Terry Dickson

[63] Dr. Dickson is a chiropractor at the North Shore Wellness Centre. Dr. Dickson has been Ms. Moore's chiropractor since 2003.

[64] Dr. Dickson testified that Ms. Moore was in fact attending chiropractic treatments in 2014 and was complaining of multiple headaches. He testified that Ms. Moore showed signs of neck and shoulder pain and also continued to complain of headaches after the accident. He indicated that her post-accident complaints concerning headaches, as well as pain in her right shoulder and right elbow were different from her prior complaints.

[65] Dr. Dickson's evidence revealed the helpful nature of the chiropractic treatments Ms. Moore was receiving subsequent to the accident. However, Ms. Moore ceased attending chiropractic treatments in November 2016, although it was clear on the evidence the treatments were alleviating her symptoms. Ms. Moore began re-attending chiropractic treatments in May 2018, approximately 18 months later. Dr. Dickson testified that Ms. Moore again began to improve with these chiropractic treatments but stopped, once more, in September 2018.

Dr. Heather Finlayson

[66] Dr. Finlayson provided an independent medical examination. Dr. Finlayson is an expert physiatrist focusing on physical medicine and rehabilitation concerning causation diagnosis, prognosis and treatment of injuries to the body. The report of Dr. Finlayson states that Ms. Moore probably suffered right side neck pain and headaches as a result of the accident.

[67] In this regard, Dr. Finlayson was able to identify one objective physical symptom: taunt bands or knots in the neck and shoulder of Ms. Moore. Dr. Finlayson testified, however, that notwithstanding the "bands", Ms. Moore had a full range of motion in her neck and shoulder. Dr. Finlayson agreed with the views of

Dr. Robinson that injections of Botox is a solution for the “reasonable management of daily headaches”. Dr. Finlayson did testify that Ms. Moore was at significant risk to continue to experience intermittent flare-ups of her pain.

[68] Dr. Finlayson testified that in the event of flare-ups, there is a substantial possibility Ms. Moore will need time off work, and that such flare-ups are likely to occur in the future.

[69] Dr. Finlayson did express the view that Ms. Moore could have achieved improvement in her symptoms had she attended physiotherapy and chiropractic treatments on a regular basis over the last two years.

[70] It must be said once again that, like most all of the expert medical reports, the report places a great deal of reliance on the veracity of the reporting of Ms. Moore.

Dr. Gordon Robinson

[71] Dr. Robinson was qualified as an expert neurologist with a focus on headache disorders. Dr. Robinson diagnosed Ms. Moore with post-traumatic headaches. The entirety of Dr. Robinson's report is based upon the information Ms. Moore provided and, of course, based upon the assumption Ms. Moore provided a full and accurate accounting of her symptoms.

[72] For the purpose of his report, Dr. Robinson saw Ms. Moore for two hours. Dr. Robinson testified that the history he was provided, coupled with the information provided by Ms. Moore, was consistent with the diagnosis of persistent post-traumatic headaches related to soft tissue injury to the neck. Dr. Robinson testified that physical activities requiring repetitive neck movement or the need to maintain a fixed neck position, may trigger the headache discomfort.

[73] In this regard, Ms. Moore has testified that she reaches for the phone at work and reaches during photocopying at work, all of which causes her difficulty.

[74] Dr. Robinson testified that, in his opinion, the headaches were unlikely to worsen and Botox was a reasonable treatment, the cost of which most third-party payors would cover.

[75] Dr. Robinson testified that Ms. Moore will probably continue to have headaches indefinitely.

Ms. Haley Tencha

[76] Ms. Haley Tencha provided expert evidence in the field of occupational therapy. Ms. Tencha assessed Ms. Moore in July 2018.

[77] Ms. Tencha concluded that Ms. Moore showed no signs of any significant limitations to inhibit required prolonged standing, gripping, balance, or left sided reaching or dexterity.

[78] Ms. Tencha did find mild limitations concerning tasks requiring prolonged sitting and prolonged reaching with her right upper extremity.

[79] In Ms. Tencha's view, Ms. Moore's injuries will not prevent her continuing to be gainfully employed, provided she receives certain accommodations.

[80] Once again, Ms. Tencha relied on the self-reporting of Ms. Moore for the purposes of her report.

Dr. Robin Rickards

[81] Dr. Rickards is an orthopedic surgeon and offered evidence concerning the pre-existing medical issues of Ms. Moore and how, if at all, these issues might relate to her current complaints.

[82] Dr. Rickards testified Ms. Moore suffers from cervical facet joint syndrome in the right shoulder and neck area that was probably aggravated by the accident.

[83] Dr. Rickards gave evidence that Ms. Moore would likely experience improvement with exercise and some muscle strengthening.

[84] In addition, Dr. Rickards indicated that anti-inflammatories could assist in addition to other alternatives that would assist Ms. Moore. It is unclear on the evidence whether Ms. Moore has tried anti-inflammatories, and, if not, why not.

[85] Again, the evidence of Dr. Rickards must be viewed with some caution as it relies heavily on the completeness and accuracy of the reporting of Ms. Moore.

Other Witnesses

James Plett

[86] Mr. Plett is Ms. Moore's current boyfriend. Mr. Plett lives in Kitsilano and is in the construction business.

[87] Ms. Moore and Mr. Plett were old friends, but had lost touch. They reconnected on Facebook in March 2017. In September 2017, Ms. Moore separated from her husband. Mr. Plett and Ms. Moore began dating in the spring of 2018.

[88] Mr. Plett testified that he sleeps at Ms. Moore's residence sometimes three times a week, but sometimes not at all. On the days Mr. Plett sees Ms. Moore, she takes medication for headaches. He testified that when he does sleep over at her house, Ms. Moore sleeps on her back. Ms. Moore testified that she has no difficulty falling asleep and will often sleep through the night. Mr. Plett testified that Ms. Moore complains of a headache in the morning; on the mornings he is there.

[89] It also appears Ms. Moore will contact Mr. Plett in the middle of the day from work and again call him after work to complain about her headaches, her shoulder pain, the demands of the teachers, the demands of the parents, and the demands of the students.

[90] Mr. Plett testified concerning the family dynamic at the Moore household relating to chores. I assume this evidence was restricted to the evenings he is at the home.

[91] His observations appear to mirror the evidence of Ms. Moore. Mr. Plett observed that Ms. Moore takes responsibility for the laundry of the two teenage girls,

which laundry he describes as “immense”. He testified that it seemed to him there were two laundry units in the house going full-time. It is Ms. Moore that takes on the responsibility of washing, drying, sorting, and folding all of this laundry.

[92] Mr. Plett gave no evidence that the daughters assisted with their own laundry, nor whether they were asked to assist to take on the responsibility for their own laundry. Mr. Plett also testified it appears that Ms. Moore is required to take on the responsibility of ironing one of the daughter’s school uniforms.

Eleni Grant

[93] Ms. Grant is Ms. Moore’s younger sister. Ms. Grant gave evidence concerning some of her observations of Ms. Moore in the two years before the accident and some of her subsequent observations. She also testified to some matters told to her by Ms. Moore. Ms. Grant testified concerning the relationship Ms. Moore has with the cleanliness of her home. Ms. Grant testified that before the accident, Ms. Moore kept her home in an immaculate state. Now Ms. Grant described it as a mess, noting that she observed dishes left on the counter after use, which struck her as uncharacteristic.

[94] According to Ms. Grant, before the accident, Ms. Moore would clean the home before the cleaning lady arrived on the day, and then clean the home after the cleaning lady had left.

[95] Ms. Grant testified that Ms. Moore is not as “bubbly” as she was before the accident. She is not as energetic and does not host as many family events as she used to. In Ms. Grant’s words, there is a “vacancy about her”.

[96] On the other hand, Ms. Grant has observed that post-accident and post-separation from her husband, Ms. Moore is the “happiest she’s ever been”.

Regla Wong

[97] Ms. Wong is Ms. Moore's mother. Prior to the accident, Ms. Wong would assist Ms. Moore in driving the children to school, to various appointments, and to extra curricular activities.

[98] Ms. Wong testified Ms. Moore would also help out Ms. Wong prior to the accident, driving her from time to time and assisting with groceries.

[99] Since the accident, Ms. Wong has observed, contrary to Ms. Grant, that Ms. Moore is not as happy a person as she was before the accident. Ms. Wong testified that Ms. Moore complains about headache and shoulder pain.

[100] Ms. Wong testified that she now assists more with driving the children to various activities than she did before the accident. It was unclear why this was so but it seems reasonable to conclude that part of the reason is that Ms. Moore now works full-time. It is not clear as well, on the evidence, just how, if at all, Mr. Moore shares in the responsibilities concerning the children.

[101] Ms. Wong also testified that she will pick up the daughters to take to school and when she does this, she notes what she describes as a deterioration in the usual spotlessness of the home. For instance, she also testified, she has observed dishes left on the counter.

[102] Finally, Ms. Wong indicated she will now iron the granddaughters' uniform when she has the occasion to pick them up for school. Again, it remained unclear on the evidence what prevents Ms. Moore's daughters from ironing their own uniforms, doing their laundry, and putting away their dishes.

Sally Ruffles

[103] Ms. Ruffles described herself as a good friend of Ms. Moore and, indeed, their children are friends with each other.

[104] Ms. Ruffles testified that she and Ms. Moore would see each other often, perhaps two or three times a month before the accident, the breakup of her

marriage, and her full-time employment. Ms. Ruffles described Ms. Moore as happy and bubbly during this time. Ms. Ruffles testified that Ms. Moore did not complain about any physical ailments. Ms. Ruffles also remarked on the deterioration of Ms. Moore's home, which she described as being "very spotless" prior to the accident, but has since become a little untidy.

[105] In any event, since the accident, Ms. Ruffles does not see Ms. Moore as much. Ms. Moore does not commit to day-to-day activities together as she used to. Ms. Ruffles has observed Ms. Moore taking pills for headaches and has seen her holding her shoulder.

Martin Moore

[106] Mr. Moore is Ms. Moore's husband from whom she separated in 2017. He testified that before the accident, he did not notice or hear Ms. Moore complain about physical issues. After the accident, he observed Ms. Moore having a sore neck and exhibit difficulty unloading groceries and reaching overhead.

[107] Mr. Moore testified that the household had a cleaning lady for many years, Ms. Yvonne Wen, who came to the house more than once a month but Mr. Moore cannot recall if this changed after the accident.

[108] Mr. Moore provided no evidence concerning his involvement and participation in the lives of his daughters.

Analysis of Damages

[109] Ms. Moore seeks damages under the following heads of damage:

1) non-pecuniary damages;

2) future loss of earning capacity;

3) cost of future care;

4) loss of housekeeping capacity;

5) special damages; and

6) in trust claim.

Non-pecuniary damages

[110] The evidence of Ms. Moore is that she continues to suffer headaches. This appears to be Ms. Moore's biggest challenge. In addition she has testified that right shoulder and arm pain continue to be troublesome and she continues to have neck, back and hip pain.

[111] Dr. Robinson gave the most cogent evidence concerning the issue of headaches. Dr. Robinson diagnosed her with a persistent post traumatic headache related to soft tissue injury based on the history provided by Ms. Moore, coupled with his examination over the course of two hours.

[112] Dr. Robinson further testified that the discomfort related to the headaches can be triggered or even aggravated by, for example, repetitive neck movement, or conversely, the need to maintain a fixed neck position.

[113] As previously referenced, Ms. Moore testified that she must reach for the telephone as part of her job. This aggravates her headaches. As well, she does photocopying at work, which requires repetitive reaching.

[114] The law in relation to non-pecuniary damages is well understood. Non-pecuniary damages are awarded to compensate a plaintiff for pain, suffering, loss of enjoyment of life, and loss of amenities.

[115] The assessment in this regard is fact-driven and addresses a host of factors relevant to the life of a plaintiff: *Stapley v. Hejslet*, 2006 BCCA 34 at paras. 45 and 46.

[116] I cannot conclude on the evidence the accident has caused or aggravated Ms. Moore’s low back and hip pain. There is evidence Ms. Moore suffered from these problems prior to the accident. I am troubled by the inconsistency of her

evidence in this regard. I am unable to place any weight on the evidence of Dr. Penner on this particular aspect of the matter.

[117] The evidence in relation to the injuries to Ms. Moore's right arm and shoulder is more reliable.

[118] Ms. Moore was receiving treatment from time to time in this regard and, in my view, the accident has somewhat exacerbated those difficulties.

[119] I also find Ms. Moore suffered neck pain and headaches as a result of the accident. I also find, as a result of the injuries, Ms. Moore has suffered and continues to suffer pain, loss of enjoyment of life and loss of amenities.

[120] The injury impacts her life. Her life is in fact diminished in certain ways. Clearly this is so in relation to playing tennis and caring for her home.

[121] There is evidence Ms. Moore is less engaged than she used to be in social activities, at least with certain persons. It is again however difficult to pinpoint the state of her mental health. She has now extracted herself from an unwanted marriage and is involved in a new romantic relationship. In addition, she has secured new employment that she enjoys and is looking forward to receiving certain accommodations to reduce the stress and headaches that are triggered by some aspects of her work.

[122] Certain witnesses that know Ms. Moore well observed that she is simply not as vibrant and bubbly as she was before the accident; however, another witness, who knows her well, describes Ms. Moore as never as happy as she is now.

[123] Counsel for Ms. Moore helpfully provided various reported cases concerning non-pecuniary damages suggested as reasonably mirroring the circumstances alleged by Ms. Moore, including *Rizzolo v. Brett*, 2010 BCCA 398 ($125,000); *Leach v. Jesson*, 2017 BCSC 577 ($110,000) and *Kam v. Van Keith*, 2015 BCSC 1519 ($125,000). These authorities however reflected findings of pain and discomfort that

would exist into the indefinite future, resulting in a continued debilitated state. I cannot make such a finding in the case at bar.

[124] In light of these alleged comparables, Ms. Moore seeks non-pecuniary damages in the amount of approximately $125,000.

[125] In this regard, I must return to my finding that I am obliged to approach the evidence of Ms. Moore on these issues with care because I do not fully embrace her evidence and the integrity of her self-reporting.

[126] Having said this, and while I do have scepticism concerning the real ongoing impact of the injuries, I also view the defendants' position on non-pecuniary damages as too meagre.

[127] In my view, Ms. Moore has had symptoms since the accident and will continue to have symptoms. I also conclude the injuries have impacted her life and as well, to some degree, will continue.

[128] In light of authorities placed before me, and accounting for inflation, the appropriate award for non-pecuniary damages is $75,000.

Future loss of earning capacity

[129] The approach to this issue is well settled. The court in *Rosvold v. Dunlop,* 2001 BCCA 1, approached the matter as follows:

> [8] The most basic of those principles is that a plaintiff is entitled to be put into the position he would have been in but for the accident so far as money can do that. An award for loss of earning capacity is based on the recognition that a plaintiff's capacity to earn income is an asset which has been taken away: *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229; *Parypa v. Wickware* (1999), 65 B.C.L.R. (3d) 155 (C.A.). Where a plaintiff's permanent injury limits him in his capacity to perform certain activities and consequently impairs his income earning capacity, he is entitled to compensation. What is being compensated is not lost projected future earnings but the loss or impairment of earning capacity as a capital asset. In some cases, projections from past earnings may be a useful factor to consider in valuing the loss but past earnings are not the only factor to consider.
>
> [9] Because damage awards are made as lump sums, an award for loss of future earning capacity must deal to some extent with the unknowable. The

> standard of proof to be applied when evaluating hypothetical events that may affect an award is simple probability, not the balance of probabilities: *Athey v. Leonati*, [1996] 3 S.C.R. 458. Possibilities and probabilities, chances, opportunities, and risks must all be considered, so long as they are a real and substantial possibility and not mere speculation. These possibilities are to be given weight according to the percentage chance they would have happened or will happen.
>
> [10] The trial judge's task is to assess the loss on a judgmental basis, taking into consideration all the relevant factors arising from the evidence: *Mazzuca v. Alexakis,* [1994] B.C.J. No. 2128 (S.C.) (Q.L.) at para. 121, aff'd [1997] B.C.J. No. 2178 (C.A.) (Q.L.). Guidance as to what factors may be relevant can be found in *Parypa v. Wickware*, *supra*, at para. 31; *Kwei v. Boisclair* (1991), 60 B.C.L.R. (2d) 126 (C.A.); and *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 (S.C.) *per* Finch J. They include:
>
> > [1] whether the plaintiff has been rendered less capable overall from earning income from all types of employment;
> >
> > [2] whether the plaintiff is less marketable or attractive as an employee to potential employers;
> >
> > [3] whether the plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to him, had he not been injured; and
> >
> > [4] whether the plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market.
>
> [11] The task of the court is to assess damages, not to calculate them according to some mathematical formula: *Mulholland (Guardian ad litem of) v. Riley Estate* (1995), 12 B.C.L.R. (3d) 248 (C.A.). Once impairment of a plaintiff's earning capacity as a capital asset has been established, that impairment must be valued. The valuation may involve a comparison of the likely future of the plaintiff if the accident had not happened with the plaintiff's likely future after the accident has happened. As a starting point, a trial judge may determine the present value of the difference between the amounts earned under those two scenarios. But if this is done, it is not to be the end of the inquiry: *Ryder (Guardian ad litem of) v. Jubbal*, [1995] B.C.J. No. 644 (C.A.) (Q.L.); *Parypa v. Wickware, supra*. The overall fairness and reasonableness of the award must be considered taking into account all the evidence.

[130] Dr. Finlayson testified that there is a substantial possibility Ms. Moore will need time off work when she experiences worsening pain and Dr. Finlayson opines this will probably happen.

[131] This view of course must be tempered by the fact I am not persuaded these opinions have the benefit of wholly accurate information as provided by Ms. Moore.

[132] There is some evidence that Ms. Moore's discomfort, particularly her headaches, may not completely resolve. Indeed, Dr. Robinson opined the headaches are likely to persist indefinitely but, of course, Ms. Moore has been able to pursue full-time uninterrupted employment.

[133] However, as stated, I do not wholly reject Ms. Moore's evidence. The fact she continues to experience discomfort and headaches as a result of the accident is, to a degree, supported by other witnesses.

[134] I do conclude that while the symptoms have not caused Ms. Moore to miss a single day at work, and it appears there will be accommodations made at her workplace for her benefit, there is some evidence that allows a finding, albeit reluctantly, that there is a real and substantial possibility of future loss of capacity. The quantification of the value of that loss is, on these facts, more appropriately assessed utilizing the capital asset approach.

[135] The capital asset approach involves considering factors such as:

(i) Whether the plaintiff has been rendered less capable overall of earning income from all types of employment;

(ii) Whether the plaintiff is less marketable or attractive as a potential employee;

(iii) Whether the plaintiff has lost the ability to take advantage of all job opportunities that might otherwise have been open; and

(iv) Whether the plaintiff is less valuable to herself as a person capable of earning income in a competitive labour market: *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 (S.C.); *Gilbert v. Bottle*, 2011 BCSC 1389 at para. 233 [*Gilbert*]; *Morgan v. Galbraith*, 2013 BCCA 305 at paras. 53 and 56 [*Morgan*].

[136] Ms. Moore earned approximately $37,000 per annum in 2017 and 2018. I find the scepticism that must be brought to bear concerning the evidence of Ms. Moore dictates an award of $15,000.

Costs of future care

[137] Again, the legal framework relating to an award of this nature is well-established. Mr. Justice Kelleher in *Maltese v. Pratap*, 2014 BCSC 18 held:

> [76] The quantification of future care costs was discussed by the Supreme Court of Canada in *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at para. 21:
>
> > [21] Damages for cost of future care are a matter of prediction. No one knows the future. Yet the rule that damages must be assessed once and for all at the time of trial (subject to modification on appeal) requires courts to peer into the future and fix the damages for future care as best they can. In doing so, courts rely on the evidence as to what care is likely to be in the injured person's best interest. Then they calculate the present cost of providing that care and may make an adjustment for the contingency that the future may differ from what the evidence at trial indicates.
>
> [77] In this regard, the plaintiff relies on the fact that Drs. Travlos, le Noble, Chan and Kokan all recommended an active rehabilitation program. The plaintiff argued that there is a consensus among these physicians that he needs to recondition himself and would benefit from the assistance of a kinesiologist or personal trainer.
>
> [78] But there must be a likelihood that a plaintiff will incur costs before an award can be made under this head of damages. I conclude that it is entirely unlikely that Mr. Maltese will avail himself of these services in the future. After all, the plaintiff has been advised by medical professionals on numerous occasions to engage in active reconditioning. He has not done so. I conclude an award for cost future care costs in these circumstances is inappropriate: *Izony v. Weidlich*, 2006 BCSC 1315 at para. 74.

[138] The test for determining the appropriate award under the heading of cost of future care is an objective one based on medical evidence. For an award of future care:

(1) there must be a medical justification for claims for cost of future care; and

(2) the claims must be reasonable: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.) at 84; *Tsalamandris v. McLeod*, 2012 BCCA 239 at paras. 62–63.

[139] Future care costs are "justified" if they are both medically necessary and likely to be incurred by a plaintiff. The award of damages is thus a matter of prediction as to what will happen in future. If a plaintiff has not used a particular item or service in the past it may be inappropriate to include its cost in a future care award. However, if the evidence shows that previously rejected services will not be rejected in the future, a plaintiff can recover for such services: *Izony v. Weidlich*, 2006 BCSC 1315 at para. 74; *O'Connell v. Yung*, 2012 BCCA 57 at paras. 57, 60, and 68–70.

[140] The report of Ms. Tencha provides various recommendations concerning the nature and cost of future care. These recommendations of course are gleaned from the reports, particularly the reports of Dr. Robinson and Dr. Finlayson. The present value of any particular cost of future care is contained in the Benning report. Mr. Benning is with the consulting firm PETA Consultants Ltd. The cost of future care expressed in this report in present value ranges from approximately $25,000 to approximately $100,000.

[141] In my view, some of these recommendations remain appropriate concerning the care of Ms. Moore, notwithstanding that I do not completely accept the fundamental factual underpinning of the reports due to my concerns with Ms. Moore's evidence.

[142] I accept a kinesiology regime would be appropriate and helpful to Ms. Moore. I am satisfied she will finally take advantage of a supervised exercise program. I make an award under this heading in the amount of $3,500.

[143] I do not make an award for a gym membership nor physiotherapy treatments. Ms. Moore has a home gym and is also a member of the Hollyburn Golf and Country Club. In addition, I am not persuaded on the evidence that Ms. Moore would in fact

attend physiotherapy treatment, nor do I accept she is of the view that physiotherapy would assist her.

[144] I will, however, make an award to provide chiropractic treatments. I make an award in this area in the amount of $1,000.

[145] I award Ms. Moore $250 for Ibuprofen and Aleve.

[146] Ms. Moore is currently collaborating with her employer concerning ergonomic accommodation. I decline to award the cost of ergonomic assessments and equipment.

[147] I make an award for Botox injections in relation to her headaches in light of the evidence of Dr. Robinson, Dr. Finlayson and Ms. Moore. In this regard, I make an award of $4,200.

[148] I turn to housekeeping. Once again, however, the vagueness and uncertainty of the evidence regarding the status quo before and after the accident presents a challenge to the assessment.

[149] Mr. and Ms. Moore had retained the services of a housekeeper for some years prior to the accident. I am able to conclude on the evidence that Ms. Moore will require some additional assistance in this regard for a certain time. I make an award under this head in the amount of $3,600.

[150] On this note, I would encourage Ms. Moore to insist on making the household duties a family affair.

[151] The evidence concerning what might be required as yard work is simply too sparse to assist me in coming to any conclusions.

[152] Finally, I am also persuaded the recommendation of Dr. Rickards concerning Medial Branch Block/Radiofrequency Ablation Treatment for facet joint nerve blocks should be undertaken. In accordance with my somewhat tempered view of

Ms. Moore's ongoing pain and suffering and prognosis, I award $3,500 in this regard.

[153] In summary, I award a total of $16,050 for costs of future care.

Loss of housekeeping capacity

[154] I will deal with this separately as I do conclude on the evidence this is a loss of personal capacity on the part of Ms. Moore (see *Suthakar v. Humble*, 2016 BCSC 155).

[155] There is no doubt that while the relationship of Ms. Moore to her house chores might be seen by some as somewhat overly fixated and controlling, it is, nevertheless, a genuine relationship. The injuries have caused certain limitations regarding that enjoyment, or at least, need. In my view, an award in the amount of $5,000 is generous.

Special damages

[156] In light of the evidence presented to me, I am satisfied there ought to be an award of special damages in the amount of $10,274.46.

In trust claim

[157] The law of in trust claims is governed by the principles set out in *Bystedt v. Hay*, 2001 BCSC 1735 at para. 180.

[158] Ms. Moore seeks an in trust claim for services performed by her mother, Ms. Wong. This claim is in relation to services for the assistance Ms. Wong has provided relating to driving the children to and from school and certain extracurricular activities from time to time.

[159] In my view, on all of the evidence, it has not been established that Ms. Wong has rendered services over and above what would be expected from a family relationship. This is particularly so given the evidence in relation to Ms. Wong's assistance to Ms. Moore prior to the accident. I make no award in this regard.

Mitigation

[160] The defendants submit Ms. Moore has failed to mitigate her losses.

[161] A 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.

[162] Once a plaintiff has proved a defendant's liability for his or her injuries, a defendant must prove that a plaintiff acted unreasonably and that reasonable conduct would have reduced or eliminated the loss. Whether a plaintiff acted reasonably is a factual question and it involves a consideration of all of the circumstances: *Gilbert* at para. 202.

[163] *Chiu v. Chiu*, 2002 BCCA 618 at para. 57 sets out the test for failure to mitigate by not pursuing recommended treatment:

> [57] The onus is on the defendant to prove that the plaintiff could have avoided all or a portion of his loss. In a personal injury case in which the plaintiff has not pursued a course of medical treatment recommended to him by doctors, the defendant must prove two things: (1) that the plaintiff acted unreasonably in eschewing the recommended treatment, and (2) the extent, if any, to which the plaintiff's damages would have been reduced had he acted reasonably.

(Also see *Wahl v. Sidhu*, 2012 BCCA 111 at para. 32; and *Morgan* at para. 78.)

[164] More recently, our Court of Appeal has articulated the test in this area as a "subjective/objective test": firstly, whether the reasonable patient ought to have undergone the treatment; secondly, the extent to which a plaintiff's damages would have been reduced or if there was some likelihood that a plaintiff would have received substantial benefit from it: see *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144.

[165] The defendants submit that had Ms. Moore acted reasonably in continuing with certain recommended treatments, her claim for non-pecuniary damages and costs of future care would have been reduced. The defendants submit that a reduction of 30 to 40 percent would be appropriate in these circumstances.

[166] The evidence is quite clear Ms. Moore ought to have pursued both physiotherapy and chiropractic treatments with far more rigor and discipline than the narrative exhibits. In my view, the defendants have proven, particularly through the evidence of Dr. Rickards and Dr. Finlayson, that therapy such as chiropractic and physiotherapy undertaken with the frequency recommended, would have achieved improvement in her symptoms.

[167] However, the evidence is not sufficient to allow any rational conclusion concerning the extent, if any, to which Ms. Moore's damages would have been reduced had she acted reasonably. I certainly suspect there would have been such reduction, but the evidence before me is simply too vague and uncertain to allow a finding in this regard.

[168] In conclusion I award Ms. Moore the following:

Non-pecuniary damages:	$	75,000
Future loss of earning capacity:	$	15,000
Cost of future care:	$	16,050
Loss of housekeeping capacity:	$	5,000
Special damages:	$	10,274.46
Total	**$**	**121,324.46**

[169] There will be pre-judgment interest in accordance with the *Court Order Interest Act,* R.S.B.C. 1996, c. 79.

Costs

[170] Ms. Moore is entitled to an award of costs on Scale B.

"Crossin, J."