IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Lourenco v. Pham*,
2013 BCSC 2090

Date: 20131120
Docket: M113569
Registry: Vancouver

Between:

Vera Lourenco

Plaintiff

And

Tommy H. Pham and Dinh Cuong Pham

Defendants

Before: The Honourable Madam Justice Gropper

Reasons for Judgment

Counsel for the Plaintiff:	K. J. Miles P. R. Bisbicis
Counsel for the Defendants:	J. L. Archibald M. Gibson
Place and Date of Trial/Hearing:	Vancouver, B.C. June 10 - 14, 2013
Place and Date of Judgment:	Vancouver, B.C. November 20, 2013

Introduction

[1] Vera Lourenco seeks damages in respect of injuries she sustained in a motor vehicle accident ("MVA") on November 25, 2009. Ms. Lourenco was a pedestrian who was hit by the defendant Tommy Pham who was the driver of a 2008 Honda Civic, owned by Dinh Cuong Pham. He turned his car into the intersection of Grandview Highway and Renfrew Street in Vancouver and struck the left side of Ms. Lourenco's body while she was a pedestrian in a crosswalk. The defendants admit liability for the accident.

Facts

Before the Accident

[2] Before the collision, Ms. Lourenco was a healthy, fit and active 22 year old. She ran, worked out at the gym, hiked, cycled, snow boarded and danced.

[3] In June 2009 she enrolled in a one year event management program at the Art Institute of Vancouver. She intended to pursue a career in event management. She was in the program when the MVA occurred.

[4] Ms. Lourenco was also working at the time of the collision as a grocery clerk at Save On Foods. Her job there was in schematics. Her responsibilities included lifting and organizing shelves for the placement of groceries. It was a physically demanding job and Ms. Lourenco did not have difficulties performing it.

The Accident

[5] Ms. Lourenco says that immediately after the collision occurred she could not feel her legs. She was taken by ambulance to the emergency department at Vancouver General Hospital. At the hospital, x-rays were taken of Ms. Lourenco's pelvis, right hip, right knee and right ankle. There were no fractures. She had multiple contusions. The feeling gradually returned to her legs while she was at the hospital. She was observed at the hospital for a few hours and then discharged.

After the Accident

[6] The plaintiff describes her injuries over the next few days following the accident. She says she was sore and in a lot of pain. She did not move much.

[7] Five days after the accident Ms. Lourenco went to see her family doctor, Dr. Daniel Ezekiel. Ms. Lourenco advised Dr. Ezekiel that she had pain in both her elbows, both knees and in her right buttock. She walked with a limp. She had obvious bruises on her elbows, knees and right buttock. Ms. Lourenco acknowledges that Dr. Ezekiel recommended that she attend physiotherapy. She did not pursue physiotherapy at that time. She says that she was too sore to begin immediately and she could not afford it at that time.

[8] Ms. Lourenco describes the first month after the accident as very tough. She could not do much. She did go to Toronto in that period to visit her family. The trip was booked after the accident. She says that while in Toronto she did not go out very much.

[9] Ms. Lourenco returned to Save On Foods in June, 2010. She worked there for approximately a month on graveyard shifts. She was assigned light duties and did not return to her former position in schematics.

[10] Ms. Lourenco continued her studies at the Art Institute. Before the MVA occurred, she intended to graduate in June 2010, but she says because of the collision and the injuries and pain that resulted she found that she could not finish her work on time. She dropped courses to reduce her course load. As a result she graduated in September 2010.

[11] Ms. Lourenco was involved in another motor vehicle accident on December 29, 2009. She was parallel parking and backed into a car behind her. She says she was not hurt. There was no change in her level of pain. She did not report the December 29, 2009 accident to her doctor.

[12] Ms. Lourenco describes her major injuries as headaches, neck pain and back pain from her shoulders to her upper and mid back. Her right knee hurts if she sits for too long. She had right hip pain for three or four months after the accident.

[13] The plaintiff says she still has anxiety crossing the street though not as intensely as right after the accident.

[14] Ms. Lourenco began physiotherapy in March 2010, which she says provided temporary relief. Her symptoms improved with the exercises and stretches that she learned and she continues to do them every day. She finds when she does not do the exercises her pain levels increase. She had a total of 20 physiotherapy sessions between March 2010 and May 2011 and 12 active rehabilitation sessions from July 2011 to August 2011.

[15] Ms. Lourenco describes her energy levels as low. She is not as energetic as she was before the accident. She has good days and bad days.

[16] Ms. Lourenco wishes to pursue a career in the event industry. She says she studied for this career and spent about $34,000 on tuition. She has not yet secured a position in that industry. In the interim, she is a sales associate at Zara, a women's clothing store. She says she continues to look for event coordinating jobs.

[17] Ms. Lourenco says she has not snow boarded since the accident; she has sold her board. She does not hike anymore and stopped running when advised not to run by a physical medicine and rehabilitation physician, Dr. Nairn Stewart.

[18] Ms. Lourenco had another car accident on May 20, 2011. She was leaving a parking spot when another vehicle drove by and hit the front corner of Ms. Lourenco's vehicle. Ms. Lourenco says she was not hurt and there was no change in her symptoms or pain level.

[19] Between January 2011 and July 2011, Ms. Lourenco was employed on a part-time contractual basis as a trip leader for S-Trip, a company that organizes educational trip programs for youth and students. She accompanied students on four

ski trips to Kelowna, as well as trips to Cuba and the Dominican Republic. Her job duties excluded any strenuous work. Ms. Lourenco's supervisor, John-Ryan De Lima (who was also her boyfriend at the time) says that Ms. Lourenco's activities were limited because he was aware of her physical limitations. Other trip leaders were actively involved in physical activities along with the students while Ms. Lourenco remained at the hotel and addressed administrative matters.

[20] Ms. Lourenco says that she has some sexual limitations: certain positions cause pain and she is often too tired or does not feel like engaging in sexual activity. She says that did not happen before the accident.

[21] Ms. Lourenco was in Los Angeles for four days in May 2012 and she visited her family in Portugal for a month in August 2012. She says her activities were limited: she could not go dancing every night, she could not bike for very long, and she could not surf.

[22] Since graduating from the Art Institute in September 2010, Ms. Lourenco has applied for 31 jobs in event management. She says that some of the positions would have required setting up and taking down of furniture and equipment. During job interviews she advised prospective employers of her physical limitations. She had no follow up interviews.

[23] Ms. Lourenco says that since April 2013 she has changed her interviewing strategy and no longer discloses her physical limitations. Ms. Lourenco was recently granted a second interview after not disclosing her physical limitations in the first interview.

Experts

Dr. Daniel Ezekiel

[24] In his report of February 8, 2013, Dr. Ezekiel describes the office visits which Ms. Lourenco attended between the time of the accident and the date of the letter. She saw Dr. Ezekiel on a monthly basis until August 2010, and then has seen him from time to time. He describes her progress in his report as follows:

> In the past, Ms. Lourenco has been a very healthy individual. She does not suffer from any chronic illnesses and does not take any regular medications. She does have some minor environmental allergies.
>
> In summary then, Ms. Lourenco was involved in a motor vehicle accident on November 25, 2009, in which she was struck as a pedestrian. The patient sustained multiple soft tissue injuries to her cervical spine, thoracic spine, lumbar spine, both elbows, both knees, and right buttock. Most of her injuries resolved over the ensuing months but she continues to experience pain in her neck and upper back to this day. These symptoms have persisted despite physiotherapy, active rehabilitation, and a home-based fitness program.
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> It is certainly well-established that soft tissue injuries of the type that Ms. Lourenco sustained in this motor vehicle accident are notoriously variable in the time that they can take to resolve. In other words, it is impossible to predict when a patient's symptoms will abate as healing times differ widely from one person to another. Most authorities will agree however, that the great majority of soft tissue injuries will settle down within one to two years. If symptoms persist beyond this period of time, then it is virtually certain that they always will, and the patient will have developed a Chronic Pain Syndrome. In this case, almost three and a half years have now passed since the accident occurred, long past the recognized milestone for recovery.

[25] Dr. Ezekiel considers Ms. Lourenco's prognosis as guarded and believes that she has developed chronic pain. He considers that a proper program of physical fitness is required and will provide the "best chance of minimizing her pain moving forward."

[26] Dr. Ezekiel recommended physiotherapy to Ms. Lourenco when he saw her on December 4, 2009 - her first appointment after the MVA. She did not seek treatment until March 31, 2010, after which she reported improvement in her symptoms. Dr. Ezekiel says that she may have seen improvement earlier had she begun physiotherapy treatment sooner.

[27] Dr. Ezekiel was not aware of the other motor vehicle accidents in December 2009 and May 2011 in which Ms. Lourenco was involved. During her appointment on December 30, 2009, Ms. Lourenco complained of neck pain. She did not complain of neck pain before that date. Dr. Ezekiel considers that it is possible that the December 29, 2009 accident might be the cause of the neck injury. He also says that it is also possible that the May 2011 accident accounted for the symptoms that she reported after that. From August 2010 to July 2011, Dr. Ezekiel says that

Ms. Lourenco did not complain of ongoing injuries, but on July 11, 2011 she asked to try "a more active form of physiotherapy as her symptoms had not resolved."

[28] In respect of causation, he says that the additional accidents had "muddied the waters."

Dr. R. Nairn Stewart

[29] At the request of her counsel, Dr. Stewart saw Ms. Lourenco on October 16, 2012. Dr. Stewart is a medical doctor and is licensed to practice a speciality of physical medicine and rehabilitation.

[30] Dr. Stewart provided the following opinion:

> According to Ms. Lourenco's report, she had no problems with neck or back pain, headaches, knee pain or sleep disturbance prior to the motor vehicle accident and her records support that claim. Since the motor vehicle/pedestrian accident of November 25, 2009 she has complained of all of those symptoms, and her symptoms have gradually improved. Given this history it is my opinion that she sustained soft tissue injuries to her neck, back and right knee in the motor vehicle accident. Her symptoms have been aggravated by increased muscle tension and poor attention to pacing her activities with a tendency, for example, to sit too long.
>
> She has had some post-traumatic stress symptoms in the form of bad dreams about the accident earlier and flashbacks to the accident more recently. Those symptoms have likely contributed to an increase in muscle tension and therefore to increased pain.
>
> It would be advisable for Ms. Lourenco to continue daily stretching exercises for her neck and back. It would also be advisable for her to continue a regular gym exercise program but I would recommend that she stop running because it aggravates her back and right knee pain.
>
> Although I found no abnormalities on examination of her right knee I would recommend that she have an MRI scan of the knee to rule out a meniscal injury.
>
> I would recommend that she have psychological counselling for her residual post-traumatic stress symptoms. A total of 12 counselling session would suffice for this purpose.
>
> I recommended to her that she consider taking a yoga class, for the stretching and muscle relaxation benefit. I also provided her with information in regard to a relaxation workbook as it would be helpful in reducing the muscle tension component of her pain.
>
> I would recommend that Ms. Lourenco have an ergonomic assessment of her workstation and that any recommended changes be implemented.

> I discussed with her the importance of pacing her activities, including taking regular breaks at work, in order to avoid aggravating her symptoms.
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> With the recommended approach it is likely that she will notice an improvement in her ability to control her symptoms. Given that it has now been almost three years since the motor vehicle accident, it is likely that she will continue to have neck and back pain and headaches to some degree over the long term because of her injuries in the motor vehicle accident.
>
> She would be unable to do physically demanding work because of her injuries. She is best suited to work at the sedentary to light level of physical activity with the opportunity to change her work tasks and position periodically throughout her workday. She is likely to continue to require assistance with heavy lifting at home and to be limited with regard to more strenuous and jarring leisure activities over the long term because of her injuries.

[31] Dr. Stewart is of the opinion that the four month delay in Ms. Lourenco beginning physiotherapy after being advised to try it has not made a difference in her condition. Dr. Stewart opines that it may have been premature to begin physiotherapy immediately following the trauma of the accident.

[32] Dr. Stewart was advised of Ms. Lourenco's two additional motor vehicle accidents just before she gave her evidence. Dr. Stewart comments that if they were serious, Ms. Lourenco would have mentioned them to her. Dr. Stewart considers that all of the plaintiff's injuries were related to the motor vehicle accident of November 2009.

Paul Pakulak, Occupational Therapist

[33] At the request of Ms. Lourenco's counsel, Paul Pakulak undertook a Functional Capacity Evaluation Report and the Cost of Future Care Assessment Report.

[34] The defendants asserted that Mr. Pakulak's report was not admissible because another individual, Haley Tencha, conducted the testing under his supervision. I dismissed the defendants' objection to the admissibility of Mr. Pakulak's Functional Capacity Evaluation Report.

[35] In their closing submissions, the defendants argued that Mr. Pakulak's Functional Capacity Evaluation Report should be given little weight because

Ms. Tencha also took the clinical history which is located at Appendix A, which is not disclosed in the report. The defendants also argue that the conclusions which Mr. Pakulak reached regarding Ms. Lourenco were identical to conclusions that he reached in other recent decisions: *Gravelle v. Seargeant*, 2013 BCSC 536 at paras. 67-68; *Narain v. Gill*, 2012 BCSC 848 at para. 59. The defendants argue that Mr. Pakulak's conclusions were not tailored to Ms. Lourenco but were merely boiler plate.

[36] In his evidence, Mr. Pakulak explained that Ms. Tencha was an occupational therapist at the time of the testing and she was working towards her certification. While she was not licensed to conduct the test, she did so under the direction of Mr. Pakulak, a certified functional capacity evaluator. He was present throughout the testing. He designed the testing and its order and he prepared the opinions. Ms. Tencha's observations were consistent with raw test data and he confirmed the observations from the test data. He looked over the notes that Ms. Tencha made.

[37] Mr. Pakulak's opinion is based upon the testing results. He used the data collected by Ms. Tencha to base his opinions. In his role as a functional capacity evaluator, he assesses and provides opinions for people with similar types of injuries; he is not required to provide unique wording in each report. His testing and opinions are of assistance to the Court. They are entitled to weight, especially as there are no conflicting opinions.

[38] Mr. Pakulak provided the following opinion:

> In my opinion, Ms. Lourenco demonstrated the physical capacity to be employable at up to a light level on a full time basis with restrictions and limitation as noted above. Overhead work and prolonged crouching should be kept to an occasional basis. Prolonged bending and prolonged positioning of the neck, shoulders and arms for work in front of the body will also result in increases in symptoms and she will require the flexibility to take extra breaks to manage symptoms if these demands are required on more than an occasional basis.
>
> It is also my opinion that her overall ability to compete for work in an open job market is significantly reduced due to her ongoing injuries and resultant physical limitations. This is, the overall number of jobs that she would be able to compete for given her physical limitations are significantly limited.

[39] He also describes the physical demands of the work of an event planner as described in the National Occupation Classification under the category conference and event planners. The position is described as requiring limited or sedentary level strength, sitting, standing and walking, verbal interaction, and near and far vision. Mr. Pakulak describes variability in demands in the work, including hands on venue setup and work which requires other body positions such as upper limb coordination and functional strength demands above a limited/sedentary level. He considers Ms. Lourenco limited in her capacity to assist with venue setup and applies his opinion with regard to periods of prolonged sitting and prolonged computer work and the requirement of flexibility in respect of these positions. He says "she may be gainfully employable in this field but her opportunities may be somewhat limited depending on the demands of the individual jobs that she may pursue."

[40] Mr. Pakulak continues:

> With respect to avocational activities she did demonstrate the capacity to complete the aspects of household cleaning chores required in her present residence (she is living with her parents and does not have a lot of responsibilities at home). If she were to live on her own or be responsible for the household cleaning chores, I would anticipate that she would have the capacity to complete the lighter chores but would have limited capacity for the more physically demanding tasks requiring heavier lifting or carrying, prolonged or repetitive below waist level work and prolonged or repetitive overhead work. As such, she may require assistance with some of the more physically demanding chores in the future. It is difficult to predict how much assistance she will require as this will depend on the size and layout of the home that she is living in.

[41] In his Cost of Future Care Assessment Report, Mr. Pakulak relies on the medical legal report of Dr. Stewart dated October 27, 2012. He refers to the cost of an annual plan to a fitness facility as between $400 and $500 per year. He recommends a provision of funding for three hours of occupational therapy for two visits to a work site to complete an assessment, ensure the proper setup of equipment, and provide education with regard to adjustment and uses of equipment. The total cost should amount to approximately $370.

[42] Mr. Pakulak also costed out 12 psychological counselling sessions at $175 per hour for a total cost of $2,100.

Causation

The "But-For" Test

[43] Before addressing the quantum of damages that ought to be awarded to Ms. Lourenco, I must determine whether her injuries were caused by the motor vehicle accident of November 25, 2009. Ms. Lourenco must demonstrate, on a balance of probabilities, that the defendants' negligence caused an injury or exacerbated a condition to justify compensation.

[44] The test to be applied was explained in *Clements v. Clements*, 2012 SCC 32 at paras. 8-10:

> [8] The test for showing causation is the "but for" test. The plaintiff must show on a balance of probabilities that "but for" the defendant's negligent act, the injury would not have occurred. Inherent in the phrase "but for" is the requirement that the defendant's negligence was *necessary* to bring about the injury - in other words that the injury would not have occurred without the defendant's negligence. This is a factual inquiry. If the plaintiff does not establish this on a balance of probabilities, having regard to all the evidence, her action against the defendant fails.
>
> [9] The "but for" causation test must be applied in a robust common sense fashion. There is no need for scientific evidence of the precise contribution the defendant's negligence made to the injury. [citations omitted.]
>
> [10] A common sense inference of "but for" causation from proof of negligence usually flows without difficulty. Evidence connecting the breach of duty to the injury suffered may permit the judge, depending on the circumstances, to infer that the defendant's negligence probably caused the loss. [citations omitted.]

Analysis

[45] Ms. Lourenco bears the burden of proving on a balance of probabilities that her current symptoms were caused by the MVA. The defendants argue that she cannot do so because Dr. Ezekiel conceded he was no longer able to state that her symptoms were causally related to the accident. Dr. Ezekiel conceded her neck pain may have been caused by the second accident on December 29, 2009 and he also conceded that any symptoms Ms. Lourenco was experiencing from either the MVA

or the second accident may have been resolved by August, 2010 and that her ongoing symptoms may be related to the third accident in May 2011.

[46] Dr. Stewart had the opportunity to consider the two subsequent accidents before she gave her evidence, although she was unaware of them until the morning she appeared. Her opinion was that if these accidents were serious Ms. Lourenco would have mentioned it to her.

[47] I have Ms. Lourenco's evidence of the two subsequent accidents. There is no basis to conclude that she sustained new or additional injuries in either of them. While I agree with the defendants that it would have been better if she had disclosed the two subsequent accidents to her physicians, I cannot conclude that the two subsequent accidents had any effect on the symptoms which Ms. Lourenco had arising from the first accident. It must be remembered that the first accident involved a collision between the defendants' vehicle and Ms. Lourenco's body. It was of significant force and caused Ms. Lourenco to become airborne before landing on the pavement. In the second and third accident, Ms. Lourenco's body was protected by a vehicle and the impacts were not significant. There is no other evidence about the subsequent accidents. To consider that the subsequent accidents are responsible for Ms. Lourenco's ongoing symptoms places undue emphasis on minor collisions.

[48] I find that Ms. Lourenco has proved that the MVA is the cause of her injuries and ongoing symptoms.

Damages

Mitigation

[49] The defendants assert that Ms. Lourenco has failed to mitigate her damages. They argue that had the plaintiff pursued physiotherapy in accordance with Dr. Ezekiel's recommendation on December 4, 2009 that her symptoms would have improved earlier.

[50] Once the plaintiff establishes that the defendants are liable for her injuries, the burden of proof shifts to the defendants. In order to prove the plaintiff did not

meet her duty to mitigate, the defendants must establish that she acted unreasonably and that reasonable conduct would have reduced or eliminated the loss. Whether the plaintiff acted reasonably is a factual question.

[51] The test for failure to mitigate set out in *Chiu v. Chiu*, 2002 BCCA 618 at para. 57, which provides:

> [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…

[52] The defendants argue that Ms. Lourenco was not compliant with Dr. Ezekiel's advice during the first post-MVA appointment to attend physiotherapy. They claim that this demonstrates a failure to mitigate her losses and suggests that her injuries were not as serious as she claims. They assert that the evidence shows that physiotherapy did assist in an improvement of her symptoms and provided her with a regime that affords her some relief. Ms. Lourenco was unreasonable in not pursuing physiotherapy sooner than March 2010 and that her pain and suffering would have been reduced if she had. The defendants' claim is similar to other failure to mitigate arguments that have been considered and rejected in previous cases.

[53] In *Smith v. Both*, 2013 BCSC 1995 the court did not accept the defendant's argument that the plaintiff had failed to mitigate her damages despite the fact that there was an 18 month delay between her doctor's recommendation that she undertake a physiotherapy and rehabilitation program and her commencing such a program.

[54] In *Manson v. Kalar*, 2011 BCSC 373 the plaintiff's doctor recommended that he attend physiotherapy and strengthen his core muscles by undergoing an exercise program under the supervision of a personal trainer. The plaintiff did not undertake any kind of exercise program and only attended minimal physiotherapy

appointments. Yet the court similarly rejected the defendant's claim of failure to mitigate damages.

[55] While I accept that physiotherapy had positive effects on Ms. Lourenco's injury symptoms, I cannot find that she acted unreasonably by not pursuing treatment until four months after the MVA. Again, Ms. Lourenco was a pedestrian hit by a vehicle. I do not doubt that she suffered a great deal of pain and that her belief that physiotherapy would be too painful to pursue right after the MVA was reasonable. I also accept that she did not have the money to pay for physiotherapy. It is not reasonable, as the defendants suggest, that she borrow money from her parents and friends to enable her to go to physiotherapy.

[56] The defendants have not met the onus of proof required to demonstrate that the plaintiff could have avoided all or a portion of the loss.

Non-pecuniary Damages

[57] Non-pecuniary damages are awarded to compensate a plaintiff for pain, suffering, loss of enjoyment of life and loss of amenities. The list of factors to be considered by the court generally include the plaintiff's age, the nature of the injury, the severity and duration of the pain, the level of disability, the emotional suffering, the loss of lifestyle and impairment of life: *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46. Compensation should be fair to all parties. Fairness is measured against awards made in comparable cases, which provide general guidance. Ultimately, each case must be decided on its own facts.

[58] Ms. Lourenco submits that the appropriate range of damages in this case is $80,000. This position is based on the nature of her injuries, the various diagnoses and prognoses, her continuing symptoms and the significant impact the MVA has had on her lifestyle, at home and at work, her relationships, and her extracurricular activities.

[59] The defendants submit that there are three ways to assess Ms. Lourenco's non-pecuniary damages. The first is to consider that her neck and low back pain

were caused by the second accident. If that is the case, Ms. Lourenco is entitled to damages for bruises and contusions that resolved within a month. The non-pecuniary damages for these injuries would be minimal. The second way to assess her damages is to accept Dr. Ezekiel's opinion that Ms. Lourenco's injuries were almost resolved by March 2010 and did in fact resolve in and around August 2010. The defendants claim that under this scenario, non-pecuniary damages would be in the $7,000 - $10,000 range. Finally, the defendants argue, if it is accepted that Ms. Lourenco's current complaints are causally related to the MVA they are intermittent and non-disabling. They are in the mild to moderate range of soft tissue injury and thus should be reflected in an award in the $30,000 - $40,000 range.

[60] In light of the findings that I have made in respect of causation, I accept that Ms. Lourenco's current complaints are causally related to the MVA.

[61] I have reviewed the authorities provided by the plaintiff and the defendants. I consider that the MVA and the injuries which Ms. Lourenco sustained have significantly impacted her enjoyment of life. They are likely to continue to affect her. In considering the cases that the parties have provided, I assess non-pecuniary damages at $50,000.

Past Loss of Income

[62] The parties agree to past wage loss from Ms. Lourenco's job at Save On Foods of $1,632.

[63] Ms. Lourenco says that as a result of the injuries she sustained in the MVA, she had to reduce her class load at the Art Institute and postpone her graduation by several months. Her injuries were accommodated by her employers S-Trip and Save On Foods. Her current employer, Zara, does not require her to lift and carry heavier boxes of clothes. The plaintiff relies on the opinion of Mr. Pakulak, as expressed in his Functional Capacity Evaluation Report, that Ms. Lourenco "demonstrated the physical task capacity to be employable at up to a light level on a full time basis with restrictions and limitations." On that basis, the plaintiff argues that Ms. Lourenco cannot perform a critical task associated with the event industry and that but for the

MVA, on a balance of probabilities, Ms. Lourenco would have been working in the event industry after she obtained her diploma as projected in June 2010.

[64] The plaintiff suggests that an accurate measure of her past loss of income is by reference to one of her colleagues who graduated from the same program in 2010 and now earns $42,000 per year. Further, the plaintiff relies on the economist report from Hassan Lakhani of Peta Consultants Ltd. of March 13, 2013, which shows the annual income of female conference and event planners in B.C. is $46,634 per year. The plaintiff says that the income which she could have earned through her career in event planning should be based on $40,000 a year less the $35,241 she has earned in the last three years. The plaintiff's claim for past loss of income is $84,759.

[65] The defendants say that the MVA is not the cause of Ms. Lourenco's late graduation from the Art Institute. They also argue that Ms. Lourenco has not presented any evidence that she failed to obtain a job because of her injuries. She has applied for 23 jobs in the event industry between January 12, 2011 and May 13, 2013. Of the 23 job applications, she was only granted four interviews and one second interview. None of the interviews resulted in a job offer. The defendants also assert that Ms. Lourenco's resume contained several misrepresentations: she described her employment at Zara as continuous, although there was a five month gap; she listed her employment for GetWorkers as being part-time, but it was only four days in two months; she listed her employment with S-Trip as being a contract running from January 2011 to July 2011 when she only did six trips with the company; and she listed her education as including a "Human Kinetics Undergraduate" at Langara, although she did not complete a degree.

[66] I am satisfied that the plaintiff suffered some loss of income as a result of the injuries sustained in the MVA. I do not place a great deal of weight on the resume or the "misrepresentations" to which the defendants refer. Resumes always put the best attributes forward to a prospective employer. It is not a sworn statement

reflecting the time spent in each job over a particular period of time. I do not find the resume to demonstrate a lack of credibility on the part of the plaintiff.

[67] At the same time, I do not accept that the evidence establishes that upon her graduation from the Art Institute she would have been fully employed in an event planning capacity continually for the last three years.

[68] I assess the plaintiff's past loss of income as $75,000, from which I deduct $35,241. The award for past loss of income is therefore $39,759 gross.

Future Income Loss and Loss of Future Earning Capacity

[69] The plaintiff argues that as a result of the MVA there is a real and substantial possibility of a future event leading to income loss. Ms. Lourenco will be unable to work full-time in the event industry because of her physical limitations resulting from the MVA. The physical limitations prevent her from fulfilling the full job responsibilities of an employee in the event industry. Her capital asset has been impaired.

[70] The plaintiff refers to Dr. Stewart's evidence that it is likely that the plaintiff will continue to have neck and back pain and headaches to some degree over the long term and that she will be unable to do physically demanding work. Dr. Stewart considered the plaintiff "best suited to work at the sedentary to light level of physical activity with the opportunity to change her work tasks and position periodically throughout her work day." The plaintiff also relies on Mr. Pakulak's Functional Capacity Evaluation Report and his opinion that the plaintiff's "overall ability to compete for work in an open job market is significantly reduced due to her ongoing injuries and resulting physical limitations."

[71] The plaintiff asserts that her future is bleak because she cannot work in her chosen occupation. She relies on the income of her friend and demonstrates the income she could earn if she had a job in the event industry. She submits that she will lose $20,000 per year in income from now until age 65 and claims the net present value of her future loss as $309,660.

[72] The defendants argue that Ms. Lourenco's claim for future loss is predicated on her contention that but for the MVA she would have had a successful career in event planning. They submit that the evidence fails to establish that it is the alleged injuries which limit her career. The defendants argue that Ms. Lourenco has a physical capacity to pursue her chosen career full-time provided she has the ability to stretch and take breaks.

[73] The legal framework regarding a claim for loss of future earning capacity was described by Madam Justice Dickson in *Hardychuk v. Johnstone*, 2012 BCSC 1359 at paras. 192-198:

> [192] A claim for loss of future earning capacity raises two key questions: 1) has the plaintiff's earning capacity been impaired by his or her injuries; and, if so 2) what compensation should be awarded for the resulting financial harm that will accrue over time? The assessment of loss must be based on the evidence, and not an application of a purely mathematical calculation. The appropriate means of assessment will vary from case to case: *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353; *Pallos v. Insurance Corp. of British Columbia* (1995), 100 B.C.L.R. (2d) 260; *Pett. v. Pett*, 2009 BCCA 232.
>
> [193] The assessment of damages is a matter of judgment, not calculation: *Rosvold v. Dunlop*, 2001 BCCA.
>
> [194] Insofar as is possible, the plaintiff should be put in the position he or she would have been in, from a work life perspective, but for the injuries caused by the defendant's negligence. Ongoing symptoms alone do not mandate an award for loss of earning capacity. Rather, the essential task of the Court is to compare the likely future of the plaintiff's working life if the accident had not happened with the plaintiff's likely future working life after its occurrence: *Lines v. W & D Logging Co. Ltd.*, 2009 BCCA 106; *Moore v. Cabral et. al.*, 2006 BCSC 920; *Gregory v. Insurance Corp. of British Columbia*, 2011BCCA 144.
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> [195] There are two possible approaches to assessment of loss of future earning capacity: the "earnings approach" from *Pallos*; and the "capital asset approach" in *Brown*. Both approaches are correct and will be more or less appropriate depending on whether the loss in question can be quantified in a measureable way: *Perren v. Lalari*, 2010 BCCA 140.
>
> [196] The earnings approach involves a form of math-oriented methodology such as i) postulating a minimum annual income loss for the plaintiff's remaining years of work, multiplying the annual projected loss by the number of remaining years and calculating a present value or ii) awarding the plaintiff's entire annual income for a year or two: *Pallos*; *Gilbert v. Bottle*, 2011 BCSC 1389.
>
> [197] 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) is less marketable or attractive as a potential employee; iii) has lost the ability to take advantage of all job opportunities that might otherwise have been open; and iv) is less valuable to herself as a person capable of earning income in a competitive labour market: *Brown*; *Gilbert*.
>
> [198] The principles that apply in assessing loss of future earning capacity were summarized by Low J.A. in *Reilly v. Lynn*, 2003 BCCA 49:
>
> > 101 The relevant principles may be briefly summarized. The standard of proof in relation to future events is simple probability, not the balance of probabilities, and hypothetical events are to be given weight according to their relative likelihood: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 27. A plaintiff is entitled to compensation for real and substantial possibilities of loss, which are to be quantified by estimating the chance of the loss occurring: *Athey v. Leonati, supra*, at para. 27, *Steenblok v. Funk* (1990), 46 B.C.L.R. (2d) 133 at 135 (C.A.). The valuation of the loss of earning capacity may involve a comparison of what the plaintiff would probably have earned but for the accident with what he will probably earn in his injured condition: [*Milina*] *v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 at 93 (S.C.). However, that is not the end of the inquiry; the overall fairness and reasonableness of the award must be considered: *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 11; *Ryder v. Paquette*, [1995] B.C.J. No. 644 (C.A.) (Q.L.). Moreover, the task of the Court is to assess the losses, not to calculate them mathematically: *Mulholland (Guardian ad litem of) v. Riley Estate* (1995), 12 B.C.L.R. (3d) 248 (C.A.). Finally, since the course of future events is unknown, allowance must be made for the contingency that the assumptions upon which the award is based may prove to be wrong: *Milina v. Bartsch, supra*, at 79...

[74] To establish this head of damages the plaintiff must demonstrate a real possibility that she will suffer a loss of income in the future as a result of her injuries. The Court of Appeal pointed out in *Morlan v. Barrett*, 2012 BCCA 66 at paras. 39-41 that is a matter of common sense that a person with constant and continuous pain will, over time, experience a detrimental effect on their ability to work.

[75] I accept that Ms. Lourenco will have some limitation of her earning capacity because of her injuries and that she should be awarded compensation for the resulting financial harm that will accrue over time on a capital asset basis. In *Sinnott v. Boggs,* 2007 BCCA 267, the Court affirmed the decision of the trial judge to use a capital asset approach because “Ms. Sinnott is a young person who has not yet established a career and has no settled pattern of employment. In such circumstances, quantifying a loss is more at large: at para. 16. Mr. Lakhani has

given examples of the lump-sum present value of Ms. Lourenco's future loss of income in his report. I am not relying on Mr. Lakhani to assess the loss but one of his examples is apposite. I consider that Ms. Lourenco will suffer a future loss of income of $10,000 in Years 1-10 for a loss of $58,560, and a loss of $5,000 per year from Year 11 to age 65, for a loss of $48,135.

[76] I assess Ms. Lourenco's loss of future income as $100,000.

Future Care

[77] Dr. Stewart recommends that Ms. Lourenco have 12 sessions of psychological counseling for pain management and meditative techniques; an ergonomic assessment of her workstation; a regular gym exercise program; and assistance with heavy lifting at home for household tasks. In his future cost of care report Mr. Lakhani estimates that the lump sum present value of 12 counseling sessions, an ergonomic assessment, and a gym membership is $13,493. The plaintiff submits that an additional $15,000 should be awarded for the future cost of assistance with household work.

[78] The defendants assert that the plaintiff has not established her entitlement to a cost of future care award. She does not require a pass at the gym as she held one prior to the accident. With regard to counseling, the defendants submit that Dr. Stewart's recommendation is excessive and unnecessary. The defendants argue that Ms. Lourenco is not currently working at a desk job and there is no evidence that she would be unable to obtain an ergonomic assessment through a future employer. Finally, the defendants say that the claim for the future cost of housekeeping assistance is too vague to form the basis for an award.

[79] I agree with the defendants that a gym pass is not appropriate in the circumstances. Ms. Lourenco maintained a gym pass before the MVA and it is reasonable to assume she would have continued to do so regardless of the accident. I also accept that the plaintiff has not established her claim for the cost of future housekeeping assistance.

[80] With regard to counseling, Dr. Stewart's report supports such a future care cost. I similarly find that Dr. Stewart's report supports the need for an ergonomic assessment. On the basis of Mr. Lakhani's report I award the plaintiff $2,500 under this head of damages to cover the cost of counseling and an ergonomic assessment.

Special Damages

[81] The parties agree to special damages of $1,062.

Summary

[82] In summary, Ms. Lourenco is awarded:

Non-Pecuniary Damages	$ 50,000.00
Past Wage Loss (gross)	$ 39,759.00
Past Wage Loss - Save On Foods	$ 1,632.00
Future Loss of Earning Capacity	$100,000.00
Future Care Costs	$ 2,500.00
Special Damages	$ 1,062.00
TOTAL	$194,953.00

Costs

[83] Unless there are matters which I ought to take into account in respect of costs, Ms. Lourenco is entitled to her costs at scale B.

"Gropper J."