IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Dalgety v. Nukina,* 2024 BCSC 470

Date: 20240227
Docket: M172931
Registry: Victoria

Between:

Shirley Anne Dalgety

Plaintiff

And:

Summer Celeste Nukina and Dennis Nukina

Defendants

Before: The Honourable Justice Morley

Oral Reasons for Judgment

Counsel for the Plaintiff:	M. S. Cho A. F. Estey
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Place and Dates of Trial/Hearing:	Victoria, B.C. February 5 - 9, 12 and 13, 2024
Place and Date of Judgment:	Victoria, B.C. February 27, 2024

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INTRODUCTION

[1] **THE COURT:** These are edited oral reasons for judgment.

[2] Shirley Dalgety sues for personal injuries as a result of an August 9, 2015 accident in which her vehicle collided with another vehicle driven by the defendant Summer Nukina and owned by the defendant Dennis Nukina.

[3] Liability is no longer in issue. The parties have agreed that the defendants are 75 percent and the plaintiff 25 percent at fault in the accident. The remaining issues are causation and damages.

[4] A number of Ms. Dalgety's injuries resolved within a few years of the accident, including a laceration of the neck from her seatbelt on impact, contusion in her right breast region, a bump on her left skull, headaches, stiffness, and then pain in the neck and upper body. These now-resolved injuries were clearly caused by the accident.

[5] By contrast, causation is in dispute for the conditions that continue to affect Ms. Dalgety now, eight years later. She continues to suffer from mid- and lower-back pain and extension of pain down the front of her legs. These conditions cause functional impairment, both at work and with home and recreational activities. They may be ameliorated by surgery, but they will not otherwise get better, and might get worse. They make Ms. Dalgety's life harder and contribute to her transformation from a generally optimistic, bubbly, and social person to someone who has a much lower mood and keeps to themselves.

[6] A central issue in this trial, therefore, was whether the persistent issues, as opposed to the resolved ones, can be causally attributed to the accident. Medically, the persistent issues are agreed to be a symptomatic manifestation of a pre-existing asymptomatic condition called “spinal stenosis”. Ms. Dalgety's expert says the trauma of the accident caused an asymptomatic version of this condition to cross the threshold and become symptomatic. The defendants' expert, by contrast, says this

condition was solely degenerative and the accident did not cause or contribute to the onset or progression of the condition.

[7] For reasons I discuss below, I prefer the conclusion of Ms. Dalgety's expert and find, therefore, that the accident is the legal cause of her ongoing pain and loss of function. The defendants must therefore pay damages to compensate for both the resolved and persistent injuries, albeit with a deduction to represent the contingency that her spinal stenosis would have become symptomatic even if the accident had never happened.

[8] In addition to the real and substantial possibility that Ms. Dalgety's spinal stenosis would have been triggered in some other way, I find that two other contingencies are real and substantial possibilities that must be considered in assessing damages: first, that she would have been able to scale up her business as she originally hoped to do, but had not yet accomplished when the accident occurred – which tends to increase damages; and, second, the possibility that she will finally get surgery that will substantially lessen the pain she currently experiences – which will tend to reduce them.

[9] Based on these findings, I will analyze the various heads of damage to come up with a total for damages of $587,625.87. The total is subject to the fact that I adjourned the determination of special damages and is also subject to s. 83 of the *Insurance (Vehicle) Act*. Ms. Dalgety is entitled to an award equal to 75 percent of that figure or $440,719.40, subject to those caveats and subject to determinations of court-ordered interest.

BACKGROUND

[10] Most of the evidence about the background facts came from Ms. Dalgety, although some was included in an agreed statement of facts.

[11] I note at the outset that there is no serious issue about Ms. Dalgety's credibility (i.e. her sincere attempt to tell the truth), as opposed to her reliability

(i.e. the correspondence between her memory of events and what actually happened). Moreover, even the reliability issues are relatively minor.

[12] The defendants argued, and I accept, that the accident happened a long time ago and Ms. Dalgety's memory, like everyone else's, is imperfect.

[13] However, the main factual issues in dispute are about expert opinion, including whether those opinions were based on errors of Ms. Dalgety in the past, or are about assessing the probabilities of hypothetical events.

[14] One exception was the question of weight gain as a result of the accident. Ms. Dalgety testified that she had gained weight because she was unable to exercise as much after the accident. I find that while she believes this, it is not borne out by more objective and contemporaneous sources of information. I agree with the defendants that there is no basis to conclude that Ms. Dalgety gained weight as a result of the accident, although she clearly did reduce her exercise.

[15] With that exception, the basic facts are not particularly contentious.

[16] Ms. Dalgety was born on November 18, 1961, and so was 53 at the time of the accident and 62 at the time of trial. She grew up in the Greater Victoria area. She is single and has no children. Ms. Dalgety is close to her sister and her sister's family and moved to Kamloops in 2011 to be in physical proximity to them. For most of the time since her move, she has lived in a “fifth wheel” mobile home, although she moved into an unoccupied house owned by her sister in October 2023, which was where she was living at the time of trial.

[17] Ms. Dalgety's lifelong career has been in esthetics. After graduating from high school, she began working as a nail technician. Ms. Dalgety took an esthetics course, and learned how to do other services, including waxing and makeup. In 1988, she purchased the esthetics business in Victoria at which she worked, called “Second Look”. She sold that business in 2007.

[18] In June 2012, a year and a half after she moved to Kamloops, Ms. Dalgety opened Rowan Tree Day Spa, which she operates as a sole proprietor. She has taught esthetics in Kamloops. She was by all accounts very good at being an esthetician and had no physical limitations doing that job prior to the accident. She had a lot of energy and a friendly, extroverted personality suited to that work. Rowan Tree is located on the north shore of Kamloops. It does not get a lot of walk-in traffic, although it is easily accessible and visible. She had a net business loss of $8,362 in 2012, and modest profits of $12,595 in 2013, $10,643 in 2014, and $10,865 in 2015. She worked between 45 and 50 hours per week.

[19] Ms. Dalgety's plan was ultimately to scale up the business so that she would be working primarily as a manager. She was aiming at a gross income of $250,000 per year after a few years. However, this scaling-up plan had not succeeded. She had a succession of four employees in sequence. At the time of the accident, her employee was Heidi Korpela, who testified at trial. Ms. Korpela and Ms. Dalgety were clearly friendly, and Ms. Korpela did her best to help Ms. Dalgety after the accident. However, Ms. Korpela's introverted personality was not really suited for esthetics and she does not seem to have generated a profit for the spa, which relied primarily on Ms. Dalgety's direct work.

[20] Up to the time of the accident, Ms. Dalgety did not manifest any significant health problems. She is a smoker. She has diabetes, which was only diagnosed after the accident but must have been present earlier. But immediately before the accident, Ms. Dalgety was at least outwardly healthy and had not seen a doctor for years.

[21] Before the accident, Ms. Dalgety was physically active and had no physical constraints with her work, recreational, or home activities. She walked her dog regularly, would go on power walks, and took weekly hikes with her sister in the hills of Kamloops.

[22] Ms. Dalgety has had a history of untreated anxiety, which she managed with power walking and listening to music. Ms. Dalgety testified that she had not had an

episode for 20 to 25 years. I take this to mean a debilitating episode, because she clearly did consider this an issue she had to manage. She never sought any professional treatment for this issue.

The Accident

[23] Since liability is not in dispute, I will not spend a great deal of time on the accident. However, it was clearly a forceful one that could be expected to cause more than trifling injury.

[24] Ms. Dalgety was driving a black 2012 Mazda 3 on 8th Street in Kamloops. She was wearing her seatbelt. Her pet dog was in the passenger seat. While she was going through the intersection with Lethbridge Avenue, the defendant’s vehicle attempted to make a left turn and T-boned Ms. Dalgety's vehicle. She recalls reaching out her hand to stop her dog from flying through the windshield and thinking for a moment they were going to die.

[25] The airbags deployed in the two vehicles, both of which were sufficiently damaged to be declared a total loss.

Ms. Dalgety After the Accident

[26] Ms. Dalgety was understandably shaken by the accident. She was checked by a paramedic on the scene. No bones were broken. She had a bruise on the side of her head and a cut in the neck from the seat belt. She reported pain in the right breast area to the paramedic who noted an elevated heart rate. Ms. Dalgety decided not to go to the hospital, because she was worried about who would take care of her dog while she was there.

[27] After being driven home, Ms. Dalgety experienced some stiffness and a “terrible” headache. The cut on her throat was “stingy”. She had trouble sleeping that night. But her overall reaction was to minimize. The spa was closed the next day anyway and so she rested that day. She went to work the following day and tried to operate on the basis that this was “not a big deal”.

[28] A few days after the accident, Ms. Dalgety decided to seek medical attention at a drop-in clinic. At that point, her principal complaints were headaches and uncontrolled anxiety.

[29] Eight days after the accident, Ms. Dalgety attended at the Emergency Department at Royal Inland Hospital. At this point, the stiffness had worn off, but she was complaining about back pain. She characterized the spine check conducted at that point as “perfunctory”.

[30] On August 31, 2015, Ms. Dalgety had an appointment with Dr. Brian Pasula, a general practitioner. She complained of pain and stiffness in her neck, back, and shoulders and of headache. Dr. Pasula prescribed Flexeril and Naproxen, and referred her to massage therapy.

[31] Ms. Dalgety took the prescribed medication. She attended massage appointments, but found them “incredibly” painful, “like boils”. She was unable to lean back in the massage chair. She discontinued these treatments.

[32] In September 2015, Ms. Dalgety began attending with a chiropractor.

[33] In the fall of 2015, Ms. Dalgety cut back on her work hours. She could no longer perform full body massages, and has never returned to that line of service. She continued to do nails and pedicures – although she asked her employee to assist her with moving buckets of water used in the pedicure process. She did not have energy to do the extra work that she previously had done in promoting her business.

[34] Notwithstanding the injuries, the business grew and became somewhat more profitable, although at least arguably not as profitable as it would have been. There was no evidence that the demand for her services ever dropped below her ability to do the work, with the obvious exception of 2020 when the COVID pandemic first hit.

[35] Ms. Dalgety continued to do basic housework, but no longer did more than the bare minimum. She would walk, but slowly, and stopped both her power walks

and her hikes with her sister. Her personality changed and she became more withdrawn and less optimistic.

[36] In the course of 2016, many of her symptoms got better, but the exceptions were the lower- and mid-back pain and the radiating pain down her thighs, all of which were triggered by standing and walking. She began to suspect that the pain was neurogenic. When she started seeing her present general practitioner in the summer of 2020, this possibility was finally investigated.

[37] In January 2021, she received an MRI on her lumbar spine, which revealed moderate to severe spinal stenosis at the L4-5 vertebrae. Nerve conduction tests revealed that nerve impingement, tied to the spinal stenosis, is responsible for the shooting pain down her thighs.

[38] There is no question her continuing symptoms relate to the spinal stenosis condition. She has received epidural steroid injections, which temporarily control the pain radiating down her thighs.

Ms. Dalgety's Business After the Accident

[39] As already mentioned, Ms. Dalgety continued to run her spa after the accident, essentially without a break. She now works alone, putting in about 30 hours per week. The exact amount of work she has done has varied, but I accept that it has remained lower than before the accident, and at least on an annual basis seems to be fairly consistent, with the exception of 2020, the first year of the COVID pandemic.

[40] With that exception, Ms. Dalgety's business did somewhat better after the accident, although it never scaled up the way she wanted. She had a profit of $16,921.46 in 2016, $11,014.15 in 2017, $20,965 in 2018, $22,796 in 2019, dropping to $9,377 in 2020, $14,979 in 2021, and $18,882 in 2022. Further calculations from evidence filed about 2023 suggest that she had a net profit of $22,217 in that year. These are not high incomes, but in line with what she was making in the three years before the accident and some slightly higher. This of

course does not mean she would not have made more if the accident had not happened, an issue I will return to later.

Prognosis and Treatment

[41] There was a certain degree of common ground on Ms. Dalgety's prognosis and recommended treatment. Spinal stenosis is a degenerative condition and so it will not get better without surgical intervention. Indeed, it is unfortunately more likely to get worse. Exercise and fitness help, while smoking tends to make things worse. Medication aimed at neurological pain, in particular epidural injections, provides temporary relief.

[42] She has not yet had appropriate neurosurgical assessments, but her expert testified that her best option would be a L4-5 instrumented fusion with decompression. If successful, this would reduce her pain substantially. It would take three to six months to recover. Like any surgery, it has risks. In some cases, adjacent level breakdown (i.e. the body compensating for the lack of motion as a result of the surgery) leads to a need for further surgery. But once she gets through the wait list and completes the recovery, this surgery has a real prospect of providing very significant improvement.

WERE MS. DALGETY’S CURRENT PROBLEMS CAUSED BY THE ACCIDENT?

[43] I now turn to the first and most important issue in dispute, which is whether Ms. Dalgety's ongoing problems were caused by the accident or would have happened anyway.

[44] Ms. Dalgety suffered from a number of problems, as I mentioned, as a result of the accident that have now resolved, and causation is not in dispute with respect to them.

[45] Her persistent problems – in medical jargon her “current presentation” – are mid- and lower-back pain and extension of pain down the front of her legs. These make prolonged standing or walking extremely painful, leading Ms. Dalgety into a cycle of pain and fatigue. I will address how this affects her subjective well-being,

daily activities, and work performance later, but there is no question that these are serious and ongoing problems. If the only injuries attributable to the accident are the ones that have resolved, then damages will be much lower than if her persistent problems are also causally attributable to the accident.

[46] With inapplicable exceptions, 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: *Clements v. Clements*, 2012 SCC 32 at paras. 8-9.

[47] But while the accident must be a necessary condition of compensable injuries, it need not be the only necessary condition. It does not matter if it is also true that “but for” something else – a pre-existing condition or earlier accident – the injury would not have manifested either. The “but for” test applies to the subject accident. Pre-existing conditions – in this case diabetes, osteoarthritis, and asymptomatic spinal stenosis – only negate causation if they would have manifested in otherwise-compensable damages even if the accident had never occurred. It does not matter if a plaintiff would not have suffered as much, or at all, if she did not have the pre-existing condition: *Athey v. Leonati*, [1996] 3 S.C.R. 458.

[48] In what have been called the “thin skull” cases, a pre-existing condition or previous accident makes a plaintiff more susceptible to injury, which is triggered by the tort. Subject to the principle that damages must be foreseeable, this does not reduce damages. By contrast, in “crumbling skull” cases, injuries are attributable to a pre-existing condition or previous accident, in the sense that they would have occurred even if the subject accident had never happened. That will reduce damages. The principle is the same in both types of case: the plaintiff is to be put in the same position he or she would have been in had the tort not occurred, neither better nor worse, to the extent money can accomplish that.

[49] The experts agree that Ms. Dalgety's current suffering and limitations for work, recreation, and household tasks can be attributed to "spinal stenosis" (narrowing of the spinal canal with consequent pressure on the nerves when in a standing or walking position). Ms. Dalgety's spinal stenosis has many causes: a congenitally short pedicle in her lower vertebrae; age for certain; smoking and diabetes quite possibly. They also agree that while spinal stenosis sometimes causes severe pain and functional limitation, it can be present, even in severe form, for an entire lifetime without causing any symptoms at all. The experts agree that Ms. Dalgety had asymptomatic spinal stenosis before the accident and that it became symptomatic afterwards.

[50] But none of this is the legally essential issue, which is what the experts disagree about: namely, whether her previously asymptomatic spinal stenosis would have become symptomatic if the accident had not happened. This is what the "but for" test asks.

[51] Dr. Navraj Heran, the expert called by Ms. Dalgety, takes the opposite view from Dr. Jacqueline Pierce, the expert called by the defendants, on this crucial issue. Dr. Heran says that while Ms. Dalgety likely had asymptomatic spinal stenosis before the accident, her current presentation would not exist "had the subject accident not transpired". Dr. Pierce, by contrast, says that while the symptoms characterizing her current presentation developed after the accident, they did not develop because of the accident: "the MVA did not cause or contribute to the onset or progression of this condition [i.e., the spinal stenosis]."

[52] Dr. Heran is a neurosurgeon, while Dr. Pierce is a neurological physiatrist: they are both qualified, based on their training and expertise, to give opinions about causation when spinal changes lead to neurological pain. As trier of fact, it is my unenviable task to try to determine which of these experts is right.

[53] Fortunately, there was significant common ground within which it is possible to identify the basis for disagreement, which I find to turn on the chronology of the

development of Ms. Dalgety's symptoms, a factual issue I can resolve based on the overall evidence.

[54] I will start with the areas of agreement.

[55] Ms. Dalgety has “moderate to severe spinal stenosis” at the L4-5 lumbar spine vertebrae. Both doctors explained that spinal stenosis is the narrowing of the space provided by the backbone for the spinal cord or for the nerves emanating from the bottom of the spinal cord. These nerves communicate between the central nervous system (the brain and the spinal cord) and the rest of the peripheral nervous system of which they are a part.

[56] Once spinal stenosis becomes symptomatic, it will cause pain depending on body posture. This can take the form of lower back pain, sharp or shooting pain in the legs and buttocks, fatigue in those areas, and reduced tolerance for walking and standing. Individuals who have spinal stenosis sometimes compensate by leaning forward while walking, standing, or sitting to take the pressure off the spinal nerves.

[57] Both doctors agree that Ms. Dalgety’s spinal stenosis is responsible for her mid- and lower-back pain and for the shooting pain in her thighs, which they refer to as “neurogenic claudication”.

[58] In his report, Dr. Heran says the following about causation:

> There are pre-accident factors that influence her presentation with underlying degenerative disc disease/osteophyte formation and facet arthropathy. These were likely already resulting in the narrowing of her spinal canal with asymptomatic spinal stenosis. The majority of patients with such degenerative changes remain well in their lifetime with a lack of symptomatic presentation.

[59] In her evidence, Dr. Pierce also asserted that Ms. Dalgety had underlying degenerative problems before the accident that were narrowing the spinal canal, but were, at that point, asymptomatic. Dr. Pierce agreed in her oral evidence that patients, even with severe narrowing, may remain asymptomatic throughout their entire lives or may have relatively mild symptoms when older, such as leaning forward while walking.

[60] In support of the congenital nature of the pre-existing condition was the fact that Ms. Dalgety has a congenital short pedicle (part of the structure of the vertebral arch), which gives less room in the spinal canal.

[61] While Dr. Pierce was of the view that the subject accident did not “accelerate” the transition from an asymptomatic to symptomatic condition, she agreed in cross-examination that traumas, including motor vehicle accidents, can do so. Trauma will sometimes render an asymptomatic condition a symptomatic one. She said there was no support in her clinical experience or in the literature she was aware of for a past accident to be a “risk factor” for the transition from asymptomatic to symptomatic stenosis, but in context, this was clearly if there is a substantial delay between the trauma and the symptoms. She used the term “years”, between the trauma and the onset of symptoms. In cross-examination, she agreed that low back pain or shooting pain down the leg shortly after a trauma would be consistent with the trauma causing the spinal stenosis to become symptomatic.

[62] For his part, Dr. Heran opined that trauma to the back, such as occurs in motor vehicle accidents, or deconditioning of the relevant muscles, as may occur as a result of the cessation of activity following an accident, can trigger symptoms in what was previously an asymptomatic degenerative condition of spinal stenosis, but he also agreed in cross-examination that symptoms can develop spontaneously, usually gradually. Dr. Heran agreed with Dr. Pierce that if there is a substantial delay between a trauma and the onset of symptoms, it is unlikely that the trauma is the reason for the transition to a symptomatic condition. On the other hand, both experts testified that if the trauma and the onset of symptoms are proximate in time, it is more likely that the trauma accelerated the symptoms.

[63] I find that the reason the experts came to different conclusions was in their interpretation of the course of symptom onset. Fortunately, on this point I can come to an independent judgment based on the evidence.

[64] Neither doctor found any reason to doubt that Ms. Dalgety accurately recounted her symptoms and, based on my observations, she is a truthful witness in

this regard, disinclined to exaggeration. Nor does there appear to be any material difference in the clinical records they had available to them or in what Ms. Dalgety told them. However, Dr. Heran found Ms. Dalgety's stenosis-related symptoms to be “immediate and persistent with further worsening over time”, while Dr. Pierce considered the stenosis-related symptoms to be sufficiently delayed that she decisively rejected the possibility that the trauma of the accident was causative in the transition from an asymptomatic condition.

[65] I find that Dr. Heran's assumptions about symptom onset are supported by the evidence and Dr. Pierce's are not. Dr. Pierce did not attend to a critical piece of the clinical record, and did not explain why she failed to credit Ms. Dalgety's own assessment of symptom onset.

[66] First, I find that Ms. Dalgety complained of back pain eight days after the accident, despite her predilection to minimize pain and not seek medical attention. That is consistent with immediate symptoms after the trauma of the accident.

[67] Second, Ms. Dalgety gave unchallenged testimony that, right after the accident, she had difficulty standing, which I also accept. Dr. Heran pointed to this is a symptom of accelerated spinal stenosis. Dr. Pierce referred to this in her account of Ms. Dalgety's narration of her history as occurring six months later. I find that this is incorrect. It was central to Dr. Pierce's inferences on causation.

[68] Third, on March 10, 2016, Dr. Pasula recorded that Ms. Dalgety complained of a “two or three month history of her anterior/lateral thighs feeling numb on and off, especially with too much standing”. These symptoms were therefore present by the end of 2015 or beginning of 2016, three and a half months after the accident. Dr. Pierce testified that this symptom is a “classic” symptom of spinal stenosis. Symptoms definitively linked to spinal stenosis were thus demonstrably in place a few months after the accident, not the “years” Dr. Pierce assumed in her opinion. It appears that Dr. Pierce either did not have this clinical note when she prepared the report or did not attend to it.

[69] Dr. Heran, unlike Dr. Pierce, referred to the March 10, 2016 clinical record, giving weight to the two- or three-month history of anterolateral thighs feeling numb on and off, especially with too much standing. Dr. Heran also gave significant weight to the immediate reports of back pain. He noted the lack of subsequent traumatic events or other adverse influences.

[70] Fourth, Ms. Dalgety told Dr. Pierce that shortly after the MVA, the upper part of her leg felt sunburnt. This is agreed to be a description of claudication. Dr. Pierce recounts this in her report, but does not explain how it is consistent with her conclusion that the MVA did not cause or contribute to the onset or progression of spinal stenosis, assuming, as I think I must, that a transition from an asymptomatic to symptomatic condition is progression. I find that it is not consistent with the evidence to base a causation analysis on an assumption that Ms. Dalgety's related symptoms took years to emerge.

[71] Since the foundation of Dr. Heran's analysis conforms more closely with the evidence, I find that his conclusion is more probable than Dr. Pierce's.

[72] Ms. Dalgety has therefore established, on a balance of probabilities, that her current symptoms would not have arisen when they did if the accident had not happened. This is not to say that they would not have arisen at some point, either as a result of spontaneous degeneration or a different trauma, but this is just a real and substantial possibility that should be taken into account in damages assessment. It does not change the conclusion that the accident was a “but for” cause of Ms. Dalgety's present condition.

ASSESSMENT OF REAL AND SUBSTANTIAL POSSIBILITIES

[73] Having accepted that Ms. Dalgety's ongoing symptoms were caused by the accident, I must now consider what real and substantial possibilities are contingencies that need to be considered in assessing damages.

[74] An award of damages in a personal injury negligence case involves a comparison between the actual past and a counterfactual past in which the accident

did not occur, as well as between what can be expected to occur in the future given the accident did happen (the expected future) and what would be expected to occur if it did not (the counterfactual future). The counterfactual past, the expected future, and the counterfactual future all consist of hypothetical events, from the standpoint of our current knowledge, while the actual past consists of actual events. While we may not know exactly what those events were, we can infer them from the traces they leave in witnesses' memory and other evidence.

[75] As the Supreme Court of Canada explained at paras. 27 and 28 of *Athey*, the approach to proof of hypothetical or future events differs from that used to approach past events that may be subject to uncertainties in our knowledge, but which either happened or did not:

> [27] Hypothetical events (such as how the plaintiff's life would have proceeded without the tortious injury) or future events need not be proven on a balance of probabilities. Instead, they are simply given weight according to their relative likelihood ... For example, if there is a 30 percent chance that the plaintiff's injuries will worsen, then the damage award may be increased by 30 percent of the anticipated extra damages to reflect that risk. A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation ...
>
> [28] By contrast, past events must be proven, and once proven they are treated as certainties. ...

[76] In this case, I apply the balance of probabilities standard to the following, and find them to have been established:

a) that the accident accelerated Ms. Dalgety's stenosis condition and rendered it symptomatic;

b) that Ms. Dalgety is able to work fewer hours and cannot perform certain services, such as body massage, as a result of the accident;

c) that Ms. Dalgety has dramatically reduced her recreation activities, and that this has reduced her time with her sister and her sister's family, and has resulted in a worse mood and outlook on life; and

d) that Ms. Dalgety's past income is what it has been reported to be.

[77] However, a number of other issues that are critical to damage assessment are hypothetical contingencies.

[78] Once the plaintiff or, in the case of a contingency that reduces damages, the defendant, establishes the contingency is a real and substantial possibility, the court must assess its likelihood and adjust the damages assessment accordingly: *Grewal v. Naumann*, 2017 BCCA 158. I note that, depending on the nature of the damages claim, this may be done through an explicit calculation with a probability percentage or may be done globally.

[79] I will address three past/future hypothetical events that I have concluded were "real and substantial possibilities":

a) Ms. Dalgety's spinal stenosis would have become symptomatic even if the accident had not occurred. This contingency of course becomes more likely later in Ms. Dalgety's life, while it has different implications for damages at different points in her life;

b) Ms. Dalgety would have successfully scaled up her business if the accident had not occurred. In my view, if this were going to happen, it would have happened by the time of trial, but its likelihood has implications for future income;

c) Surgical intervention will dramatically reduce Ms. Dalgety's pain and functional limitations in the future. For reasons I discuss, this does not have implications for Ms. Dalgety's past or future income, but it does have implications for non-pecuniary loss.

[80] I will start with the contingency that the spinal stenosis would have become symptomatic without the accident.

Contingency that the Spinal Stenosis Would Have Become Symptomatic Without the Accident

[81] Ms. Dalgety had asymptomatic spinal stenosis before the accident. This condition does not necessarily ever become symptomatic, but there is some risk that it would have done so, even if the accident had never occurred. To avoid either under- or over-compensation, I must try to come to an objective assessment of what this likely would have been in different age ranges, relevant to damage assessment.

[82] From Dr. Heran and Dr. Pierce's report and testimony, I take the following to be the state of medical knowledge:

a) Spinal stenosis is an objective condition of the narrowing of the spinal column that reduces the space for the nerves. Its degree of severity is evaluated objectively; i.e., in terms of how much narrowing there is.

b) Spinal stenosis, even severe spinal stenosis, sometimes remains asymptomatic into old age. However, as people age, it becomes more likely that it will result in posture change and possibly debilitating pain.

c) Risk factors for symptomatic spinal stenosis include lack of conditioning and smoking. Smoking was present, regardless of the accident, and lack of conditioning was increased by the accident.

d) Trauma, including motor vehicle accidents, can trigger the onset of symptoms.

[83] The record does not include any kind of population statistics or objectively derived risks of Ms. Dalgety's condition becoming symptomatic at various ages. Damage assessment is not an exact science and a trial judge in my position has to accept the limits of the record. I must therefore estimate the various likelihoods in the face of evidentiary uncertainty.

[84] I would evaluate the likelihood that Ms. Dalgety's spinal stenosis would have become symptomatic in the nine years to trial if the accident had never happened to

be real but low. We know that she did not suffer any trauma of comparable impact. She was in her fifties for most of that time, and I do not have any evidence that significant symptoms spontaneously emerge for people of that age very often. I take into account Ms. Dalgety's diabetes and smoking, but also her apparent good health. I would place a five-percent contingency for past damages, a contingency which takes into account that there is a higher likelihood that lesser symptoms would have emerged, and that also takes into account the fact that Ms. Dalgety's resolved symptoms would still have caused pain and functional limitations for a period of time.

[85] For the next five years of her life, which also represents her pre-accident expected pre-retirement period, I would increase the contingency to 10 percent. There would be a real and substantial possibility of a new trauma and of age-related degeneration of the condition in Ms. Dalgety’s sixties.

[86] For the post-retirement period, the contingency will only affect non-pecuniary damages. I think there would have been a significant likelihood that Ms. Dalgety would have developed conditions similar to those she currently experiences in her late sixties or older, with the probability obviously increasing with her age. I do not think it is necessary or helpful to quantify a specific likelihood. I do not have any expert evidence and I do not propose to do an amateur actuarial analysis, but I have considered this globally in the award of non-pecuniary losses below.

[87] I will next consider the contingency that Ms. Dalgety would have scaled up her business without the pain and physical limitations caused by the accident.

Contingency that Ms. Dalgety Would Have Scaled Up Her Business Without the Pain and Physical Limitations Caused by the Accident

[88] Ms. Dalgety had a plan of scaling up Rowan Tree, so that most of the work would be done by employees and she would be in a primarily managerial role. If this had happened, the accident might still have affected her earnings, because she would have had less energy and lost some of her patience and positive demeanour, both of which are important both to management and running a day spa, but the impact would have been less.

[89] However, Ms. Dalgety was not able to scale up in the years between opening Rowan Tree and the accident. I find that this was not so much because of a failure to build up a loyal clientele and profile, but because of difficulty in attracting and retaining suitable employees.

[90] I now turn to the hypothetical question of whether she would have been able to do this in the years after 2015, if the accident had not happened.

[91] I consider this to be a real and substantial possibility, but no more. There is at least an equal probability that she would not have scaled up her business, even if the accident had not occurred and she had remained without significant physical limitations and in the extroverted and upbeat mood she had before the accident. This is because the obstacles she had to scaling up were independent of her mood, energy and physical abilities. They were her inability to find, train, and retain suitable employees in Kamloops. This problem had manifested itself before the accident, and I have to give some significant weight to the possibility that this would have continued in any event.

[92] Ms. Dalgety argues that the fact that she had to discharge Ms. Korpela in 2017 was causally related to the accident. I disagree. Ms. Korpela was not suited for the line of work she was in, and she was not able to build up her own client base. I do not see any evidence that the demand for the spa's services was affected by the accident. It was Ms. Dalgety's ability to meet that demand that was impaired. If Ms. Korpela had had the kind of personality that works well in the esthetics context, she could have increased her client base, even with Ms. Dalgety's accident. On the other hand, because Ms. Korpela's personality meant she was unable to retain the long-term loyalty of clients for reasons unrelated to the accident, on the evidence before me, Ms. Dalgety would inevitably have had to let her go, even if the accident had never happened. Ms. Korpela has now found an occupation that suits her talents better. Therefore, the discharge was not causally related to the accident.

[93] I thus reject the submission that the failure to grow the business was necessarily related to the accident. Indeed, in principle, Ms. Dalgety after the

accident had more ability to recruit and manage employees than she did to perform spa services herself. I have to give weight to the possibility that not doing so had nothing to do with the accident.

[94] At the same time, I do accept that the accident sapped Ms. Dalgety's energy and optimism, and took away her ability to put in the extra time that would be necessary for entrepreneurs seeking to grow a business. There was an element of bad luck in her inability to scale the business up before the accident. She had increased the scale of the business she bought in Victoria. Her peers and employees had high esteem both for her entrepreneurial abilities and her knowledge as an esthetician. I therefore find that it was at least a real and substantial possibility that if the accident had not happened, Ms. Dalgety would have succeeded in realizing her original business idea of a spa with a small number of employees in which Ms. Dalgety was at least largely a supervisor.

[95] Having come to this conclusion, I must now assign probabilities to each of these scenarios.

[96] It is of course very difficult to put any kind of precise numbers on the probabilities of these completely hypothetical possibilities. I find, however, that a realistic and objective assessment is that the failure to scale was more likely than success. Most small businesses do not succeed, as Ms. Dalgety herself said. While past failures to grow above the level of a single employee hardly guarantee that this would have continued, a realistic assessment that is fair to the defendant has to take past experience as the most likely guide to the future, or the hypothetical future. Finally, in retrospect, we know that the COVID pandemic would have created an additional obstacle, unforeseeable at the time, to a major breakthrough in the market in Kamloops.

[97] I assess the contingency that Ms. Dalgety would have been in a position to grow her business to a gross income of $250,000 in normal years, i.e., not including 2020, between 2015 and the present if the accident had not occurred at 33 percent, while the contingency that she would have continued to be the sole esthetician

generating a positive margin to be 67 percent. I will therefore assess both past and future earning capacity based on both scenarios and discount accordingly.

Contingency that Surgery Will Substantially Reduce Ms. Dalgety's Pain and Consequent Physical Limitations

[98] Finally, I need to consider the contingency that Ms. Dalgety will obtain surgery along the lines recommended by Dr. Heran, and that surgery will significantly reduce her pain and functional limitations.

[99] Based on Dr. Heran's evidence, I think it is very likely that the surgery would be a success, in the sense that it would reduce pain and corresponding functional limitations significantly. After a recovery period, this would likely put Ms. Dalgety in more or less the same position in terms of functional restrictions as she would have been in had the surgery not happened, and while she will continue to experience some pain, it will be much diminished.

[100] As with any surgery, there are risks of complication. There is a greater likelihood that the surgery would only have temporary efficacy as a result of adjacent level breakdown. Dr. Heran estimated this possibility at five to 10 percent every five to 10 years.

[101] A serious uncertainty is how long it will take Ms. Dalgety to actually get this surgery, even with a firm recommendation that it is medically advisable. The reality in this province is that surgery to address pain and the types of disabilities Ms. Dalgety has are deprioritized relative to emergency or acute surgeries and waiting times are unpredictable and potentially quite long.

[102] The uncertainty of when Ms. Dalgety can reasonably expect this surgery to occur means that it is difficult to even say whether it will increase or diminish her future earnings relative to her current situation. Ms. Dalgety has based her damage claim on five more years of working life. After her recovery time, the surgery would likely increase her earning potential, but whether that even makes up for the loss of earnings during her recovery period is uncertain, and would only be more probable

than not if the surgery happens relatively soon. I am therefore not inclined to take this contingency into account at all in future earning capacity calculations, since the direction of effect is uncertain.

[103] I must, however, take the prospect of successful surgery into account in non-pecuniary damages. But, in my view, it makes more sense for this to play a role in a holistic assessment than as a scenario that is evaluated and discounted by a percentage. I note that since I think the surgery is very likely to substantially reduce pain and functional limitation and is very likely to be successful, probably permanently, it plays a major role in reducing non-pecuniary damages from what they would otherwise be. However, it only reduces the length of time that Ms. Dalgety conceptually suffers her non-pecuniary loss, and I must give some weight to the real and substantial possibility that the surgery will not succeed or will give rise to complications that would have their own negative consequences. I have included all these considerations in my global assessment.

MITIGATION

[104] Before considering each of the heads of damages, I must address the defendants' argument that Ms. Dalgety failed to mitigate her damages. I do not agree that a failure to mitigate should reduce damages.

[105] The legal principle is the following: If a plaintiff's damages are caused by a tort, but would be lessened if that plaintiff had taken reasonable steps to reduce the loss, then an award of damages will be reduced to reflect this “failure to mitigate”. The onus of establishing a failure to mitigate is on the defendant. When the basis for the plea of failure to mitigate is that the plaintiff has not followed a course of medical treatment recommended by medical professionals, the defendant must prove both (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 or she acted reasonably: *Chiu v. Chiu*, 2002 BCCA 618 at para. 57.

[106] With respect to her physical and pain-related complaints, I find no failure to mitigate. With respect to anxiety, I agree with the defendants that Ms. Dalgety has

not sought recommended medical or other help, but this does not affect my award because I consider her ongoing anxiety symptoms to be a pre-existing condition and therefore not compensable in any event. The only anxiety symptoms I am willing to attribute to the accident were those occurring immediately after the accident. Those would not have been susceptible to mitigation through treatment.

[107] The defendants point out that between July 6, 2017, and May 24, 2023, Ms. Dalgety did not attend any treatment for injuries related to the accident aside from two occupational therapy assessments in early 2021. However, I have no evidence of medically-recommended physical treatments during this period that would have substantially reduced damages.

[108] The defendants point to the following recommendations and referrals provided to Ms. Dalgety:

a) a pool exercise program recommended March 10, 2016;

b) attendance with a psychologist, recommended December 19, 2016; and

c) attendance with a psychologist, recommended March 8, 2021.

[109] Ms. Dalgety agreed on cross-examination that she did not start the pool exercise program recommended on March 10, 2016, and she was clear that she has never seen a psychologist or pursued counselling, despite recommendations.

[110] The pool exercise program was recommended because exercise in the water allows people in Ms. Dalgety's position to maintain basic conditioning in a low-impact way. With respect to the pool exercise program though, I do not think the defendants have established the plaintiff acted unreasonably overall. She engaged in other attempts to exercise more than she had in the immediate aftermath of the accident. She has been diligent in certain daily physiotherapist-recommended exercises. She has walked. She was a member of a pool until COVID, and she now swims in the

pool at her sister's home. I do not think the failure to continue the pool exercise program specifically was unreasonable.

[111] In any event, the defendants have failed to establish the second part of the *Chiu* test by demonstrating Ms. Dalgety's damages would be reduced if she had followed medical advice. Based on Dr. Heran's evidence, Ms. Dalgety's basic condition is not susceptible to more than very temporary amelioration short of surgery. Surgery has been delayed, but not because of Ms. Dalgety. The experts agreed that exercise is a positive, but there is not much on which I could say that there is a basis for reducing damages.

[112] I agree that Ms. Dalgety has consistently preferred not to address her anxiety symptoms with help from mental health professionals, even when that is recommended. This might lead to a mitigation issue, except that I am not inclined to weigh anxiety as a result of the accident as a major source of damages in any event. Ms. Dalgety took medication for anxiety for a few days after the accident to break the cycle, which seems to have worked for the acute anxiety caused by the accident. I have no doubt that this acute attack of anxiety was because of the accident, and I reflect this in the non-pecuniary damage award.

[113] But I have more difficulty finding that longer-term issues of anxiety were caused by the accident. On the evidence, she had these issues before the accident and she has consistently preferred to manage them herself. Although she had some anxiety while driving after the accident, it was never such as to stop her from driving at all. On the evidence, Ms. Dalgety clearly did fixate on the accident, but I do not have sufficient evidence to say this was a compensable injury caused by the accident.

[114] In other words, other than an acute bout of anxiety in the weeks after the accident, I am not persuaded there is a compensable injury here. If there were, however, I would agree with the defendants that beyond the initial acute period, Ms. Dalgety has failed to mitigate.

[115] This does not mean that there are no psychological dimensions to Ms. Dalgety's persistent injuries. I accept that the physical pain and discomfort caused by the accident have had an impact on her mood and personality. I have no evidence that this amounts to a disorder, but this is not necessary for compensation: *Sawires v. Paris*, 2021 BCSC 240 at para. 90. Counselling or psychiatric help would not address the pain itself. Counselling has been primarily recommended for anxiety and not for pain-related mood problems, although that may also have been part of the basis for the recommendation. But I have no cogent evidence that counselling or psychological treatment would address the effect on her mood and personality of the pain she experiences. I therefore consider these to be compensable without regard to a mitigation defence.

LOSS OF HOUSEKEEPING CAPACITY

[116] Ms. Dalgety claims for past and future loss of housekeeping capacity as a separate head of damages. I reject this as a separate head of damages. I agree that housework is more painful and tiring for her than it would have been had the accident not occurred. But I think this is an issue that needs to be considered under non-pecuniary damages globally and do not give it a separate award.

[117] Dr. Graboski, Ms. Dalgety's expert physiatrist, summarized her opinion on housekeeping limitations as follows:

> Ms. Dalgety is independent in her basic activities of daily living and I do not foresee difficulty in this area. She does, however, continue to have difficulty with prolonged standing, which will likely persist. She continues to have limited tolerance for postures that involve sustained flexion and overhead activity, and her walking tolerance is also impaired. Hopefully, with a conditioning program, her function will improve, but she will likely not return to pre-MVA function.
>
> Housework: Although housework would not be damaging in any way, it could increase her subjective pain complaints. Patients tend to have a limited “energy budget”. Housework could detract from her ability to complete her work, to enjoy her recreation, and to have a social life. She has been able to manage her housework into manageable chunks.

[118] Wendi Wright, Ms. Dalgety's expert occupational therapist, provided evidence consistent with this conclusion that Ms. Dalgety can do housework but it saps her

energy. Ms. Wright also noted various tasks that Ms. Dalgety would not be able to do.

[119] Ms. Dalgety's direct evidence was also consistent with the overall picture of someone who can accomplish the daily tasks of housekeeping, but finds them more tiring and has some limitations for heavier tasks.

[120] The Court of Appeal has recently clarified the law on when a separate award for loss of housekeeping capacity should be made and when it should form part of non-pecuniary damages: *McKee v. Hicks*, 2023 BCCA 109, paras. 93-115. Where a person is incapacitated from performing household tasks by an accident and either hires someone to do so or obtains the gratuitous services of family members who would otherwise not perform those tasks, then pecuniary damages either will, in the first case, or may, in the second case, be awarded. However, pecuniary awards are “not appropriate” when a plaintiff can perform usual and necessary household work, but with some difficulty or frustration in doing so. In such cases, non-pecuniary awards are typically augmented to properly and fully reflect the plaintiff's pain, suffering, and loss of amenities: *McKee* at para. 112.

[121] The evidence here is that Ms. Dalgety continues to perform useful and necessary household work. Because she tires more easily and has physical limitations, she does not do household work as often or as thoroughly as she did before the accident. This should be reflected in the non-pecuniary award globally, but is not the basis for a separate head of damages.

NON-PECUNIARY DAMAGES

[122] Non-pecuniary losses are those that do not require an actual outlay or loss of money. The purpose of a non-pecuniary damage award is to provide compensation for things such as pain, suffering, disability, inconvenience, disfigurement, loss of enjoyment of life, and loss of expectation of life. Since these are not things that money can provide, one purpose of an award of damages for non-pecuniary loss is to substitute other amenities for those that the plaintiff has lost: *Lindal v. Lindal*, [1981] 2 S.C.R. 629 at pp. 636-639.

[123] It is universally accepted that money is not a sufficient substitute for these kind of harms: *Andrews v. Grand & Toy Ltd.*, [1978] 2 S.C.R. 229 at pp. 260-1.

[124] In *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46, the following non-exhaustive list of factors were identified as being appropriately considered when making an award of non-pecuniary damages:

> (a) age of the plaintiff;
> (b) nature of the injury;
> (c) severity and duration of pain;
> (d) disability;
> (e) emotional suffering; ...
> (f) loss or impairment of life; ...
> (g) impairment of family, marital and social relationships;
> (h) impairment of physical and mental abilities; [and]
> (i) loss of lifestyle.

[125] The plaintiff's stoicism is a factor that should not, generally speaking, penalize the plaintiff.

[126] Compensation awards must be fair to all parties. Fairness must inevitably be measured against awards made in comparable cases, although such cases, however helpful, serve as a rough guide. Each case depends on its own unique facts: *McColl v. Dushenko*, 2020 BCSC 1674 at paras. 72-73.

[127] In this case, compensation for the following should be encompassed in non-pecuniary damages:

a) the immediate pain from the accident and the corresponding anxiety;

b) the long-term pain caused by the transformation of her spinal stenosis condition from asymptomatic to symptomatic;

c) the long-term pain and mood problems as a result of that pain;

d) the loss of recreational activities, including boating and longer walks with her sister;

e) the loss of social interaction in those recreational activities and as a result of finding work harder and more tiring;

f) the tiring nature of basic household tasks and the pain associated with those.

[128] Ms. Dalgety seeks $130,000 for non-pecuniary damages, while the defendants argue $45,000 to $55,000 is more appropriate.

[129] Ms. Dalgety relies on the following cases (dollar amounts not inflation-adjusted): *Popove v. Attisha*, 2019 BCSC 1587 ($120,000 for retired plaintiff no longer able to ride horses or garden and diminished ability to do housework), *Chenier v. Szili*, 2015 BCSC 675 ($90,000 for 61-year-old with significant ongoing back pain, restricting fishing and exercise and impacting relationship), *Verjee v. Dunbrak*, 2019 BCSC 1696 ($150,000 for 59-year-old plaintiff with chronic pain and somatic symptom disorder).

[130] While these cases all differ, I accept they are reasonable comparators for Ms. Dalgety's non-pecuniary damages, without reference to the contingencies. In the *Chenier* case, surgery was specifically found not to be efficacious to address the ongoing pain, which is a significant difference from this situation.

[131] The defendants rely on *Szostakiwskyj v. Launay*, 2020 BCSC 653 ($65,000 before adjustment for a highly athletic 62-year-old with chronic neck and intermittent back pain causing reduced abilities and “shortness” with loved ones), *Parker v. Martin*, 2017 BCSC 446 ($45,000 for soft tissue injuries in a relatively low impact rear-end accident, resulting in neck, shoulder and back pain, as well as associated headaches), *Griffioen v. Arnold*, 2017 BCSC 490 ($75,000 for 51-year-old plaintiff), *Masellis v. Diamond*, 2021 BCSC 790 ($80,000 for 49-year-old plaintiff who suffered daily pain, some loss of housekeeping capacity and loss of ability to play hockey and some other recreation) and *Seebaran v. Schmidt*, 1995 CanLII 3116 (BCSC).

[132] With the exception of *Masellis*, which I do consider to be a comparable case, I do not think the defendants' cases are sufficiently similar to the situation of Ms. Dalgety to be helpful. *Seebaran* was decided almost 30 years ago on a different basis from how personal injury damages are assessed today. The injuries in *Szostakiwskyj* and *Parker* seem to me to have had significantly less impact on the plaintiffs and be of lesser duration than is the case with Ms. Dalgety.

[133] While non-pecuniary damages are not usually divided between past and future, in this case different contingencies apply. For the past, there is only a low negative contingency based on the real and substantial possibility that the injury might have manifested in any event. However, in the future, there is both a more substantial contingency that this will happen, but also the very high probability that surgery will diminish Ms. Dalgety's pain substantially once it occurs.

[134] While Ms. Dalgety's number is a reasonable one before taking these contingencies into account, once the necessary deductions are made, I find that $100,000 is an appropriate amount for non-pecuniary damages, subject to the agreed findings on liability.

PAST EARNING CAPACITY

[135] The defendants emphasize that Ms. Dalgety's income did not go down after the accident. This is true, but the measure of damages for past earning capacity is not the difference between what the plaintiff earned before and after the accident. It is the difference between what the plaintiff would have earned if the accident had never happened and what they in fact earned. While pre-accident earnings are obviously probative of what that number would be, an award for loss of earning capacity can be made even if the plaintiff earns more after the accident: *Jarrett v. Wold*, 2021 BCSC 302 at para. 104.

[136] If it is not enough to say that Ms. Dalgety's income went up to calculate losses of past earning capacity, how should these be evaluated? I have determined already that there are two scenarios that need to be evaluated.

[137] The first, more likely, scenario is that Ms. Dalgety would have worked with Ms. Korpela until 2017 and then worked on her own afterwards, but without the physical limitations that she had because of the accident.

[138] The second, less likely, scenario is based on the reasonable possibility that if she had not been injured, she would have succeeded in scaling up the business to a gross income of $250,000 per year, as originally planned, such that she could have played a primarily managerial function.

[139] To calculate past earning capacity, I must first determine what Ms. Dalgety's income would have been as an essentially self-employed person if she had not been injured, deduct the earnings she in fact made, and then multiply that number by two-thirds or 67 percent. I must then determine what Ms. Dalgety's income would have been if she had successfully scaled up her business, deduct her actual earnings, and then multiply that number by one-third or 33 percent. I will then deduct five percent from that total, representing the contingency that her degenerative condition would have manifested itself in any event. This will allow me to calculate an amount for past earning capacity, an amount that will then, along with all the other heads of damages, be subject to a deduction for liability. That is why this is complex.

Past Earning Capacity Loss If No Accident, But Also No Scaling Up

[140] I find that even if Ms. Dalgety had never scaled up her business, but had been uninjured, she would have earned more money because she could have worked longer and provided more services. She was unable to continue one of her more profitable services, full body massages. She is also limited in performing nail services, facials, and cleaning the spa, although she does do those things.

[141] Ms. Dalgety's unchallenged evidence was that she worked 45 to 50 hours a week before the accident and now works about 30 hours per week. There was some evidence of variation as she felt better or worse or received temporarily effective treatments. However, I find that these temporary fluctuations do not detract from the larger picture of someone who just could not work the way she used to. I also find

that trying to address the specific fluctuations over the years would not be productive.

[142] Ms. Dalgety's evidence was backed up by the evidence of Ms. Korpela and by Wendi Wright, Ms. Dalgety's expert functional capacity evaluator.

[143] Matt Gregson was called by the defendants to critique Ms. Wright's report. I accept much of his critique, including that the reliability of Ms. Wright's work-related functional capacity assessment was reduced when she included physical testing that did not model her job-related requirements on the same day as, and before, she did functional assessments related to the job. I agree with the defendants that since functional evaluations should, as much as possible, mirror what is required at work, and non-work-related tasks should not be performed on the same day, and certainly not before, the work-related assessment is complete.

[144] Nonetheless, I accept that Ms. Dalgety is no longer capable of giving full-body massages and that the accident has made other aspects of her work slower, more painful and more tiring. Nothing in Mr. Gregson's critique puts these findings in doubt.

[145] Ms. Dalgety's reduction in her hours was in the order of one-third of her pre-accident injury, which implies that she would have worked 50 percent more if she had not been injured. This is not exact, but provides an appropriate basis for damage assessment. Moreover, full body massages were one of her more profitable services. She undoubtedly was slower in delivering other services.

[146] I find that Ms. Dalgety has therefore established that she would have earned at least 50 percent more in revenue, without a significant increase in costs because many of her costs were fixed. While her variable costs would have increased with more work, they would have been reduced if she had been able to do massages. A 50-percent increase in revenues is sufficiently conservative, because she might in fact have been able to work even longer, and it provides a reasonable basis for calculating increased profits, despite increased variable costs.

[147] I do not consider it reasonable to use pre-2015 numbers because Ms. Dalgety was still building up business at that time.

[148] The exceptional year is 2020, during which Ms. Dalgety was demand-constrained, rather than supply-constrained. I expect her profits in that scenario would have been similar to what they actually were. Basically she had as much work coming in, in 2020, as she could do.

[149] For 2015, the accident only affected the last third of the year. For 2023 and the first months of 2024, I could not use real data, so I averaged Ms. Dalgety's annual non-COVID loss of earnings.

[150] I will provide calculations to counsel after I complete my oral reasons.

[151] I find in the first scenario, wherein she simply was able to do more work but in the same basic structure, the difference over the course of the years comes to $220,398.47.

[152] That is obviously without taking into account court order interest or prejudgment interest. In order for that calculation to be manageable, I will order that prejudgment interest will be calculated on the basis of the loss of income for each calendar as experienced on January 1st of the subsequent year. I have not made that calculation myself and I will leave that to the parties.

Past Earning Capacity Loss Under Scaling Up Scenario

[153] I will now go to the scenario where Ms. Dalgety had been able to scale up her business. This is the only scenario that the plaintiff's counsel contemplate. Counsel asked me to assume a rate of growth of 15 percent per year to approximately $256,000 in 2023. They ask me to assume that variable costs would also have grown 15 percent over the time period, and they have their table and that will be included in the judgment.

[154] Counsel for Ms. Dalgety would ask for a raw calculation of past earning capacity loss of $576,264, for which they ask for a total contingency deduction of

20 percent, leading to $460,000 as their number. I have not taken the same approach to contingencies.

[155] The defendants do not engage these calculations directly, but note that it ignores the effect of the COVID pandemic, which included the Provincial Health Officer ordered closures of spas from March 21, 2020, to mid-May 2020. While spas were permitted to reopen in mid-May 2020, this was with restrictions including that customers and staff must use masks and barriers such as plexiglass shields, and that the business must post signs and ask customers about symptoms. Ms. Dalgety herself agreed that her clientele is older, and I can infer that some, at least, would have been reluctant to go to spas during the pandemic, even when the Provincial Health Officer allowed that. There was also direct evidence that that did have an impact on the business.

[156] As things actually happened, Ms. Dalgety had no employees at all during COVID. This limited her losses on the downside, although I do not have full evidence of how that all could have gone. I agree it also means that she overall cannot make as much money as she would have if her original business plan had been fulfilled.

[157] I also think it is too optimistic to assume that if Ms. Dalgety had hired more employees, variable costs would have grown at the same rate as overall revenues. Since Ms. Dalgety herself would have engaged in a smaller and smaller share of the direct service provision, salaries and/or commissions for her employees would have grown as an overall share of revenue. This was certainly the case when she had employees before the accident.

[158] I therefore think that $350,000 is a more realistic loss of past earning capacity under the “scaling up” scenario. It is not really realistic on this evidentiary record to come to a calculation and I do not have expert evidence of that, but I have therefore made a global assessment of $350,000 as more reasonable than $460,000 in light of the lack of account that number took of the increased compensation costs.

Conclusions on Past Wage Loss

[159] Adding these two figures together and discounting their relative probability gives a total of $263,598.98. Taking off the five-percent contingency, that gives $250,419.03, so just over $250,000 for loss of past earning capacity.

LOSS OF FUTURE EARNING CAPACITY

[160] Next I must assess the appropriate amount of compensation for loss of future earning capacity from the accident.

[161] Ms. Dalgety accepts that the future earning timeframe is the next five years: Plaintiff's Closing Submissions, para. 183. I will therefore take an income that comes out of the two scenarios I have assessed, calculate a net present value of five years' lost income on each such scenario, take a weighted average based on my assessment of the likelihood of each scenario, and then apply a discount of 10 percent for the contingency that symptomatic spinal stenosis would have manifested during this time in any event.

[162] In the scenario in which Ms. Dalgety would not have scaled up her business, her average annual income in the non-COVID years was $29,585.38, and I accept this as a good estimate of her continuing loss over the next five years.

[163] The discount rate prescribed under s. 56(2)(a) of the *Law and Equity Act* is 1.5 percent. According to Appendix E of the Civil Jury Instructions put out by CLE BC, this means I should multiply that annual amount by 4.7826 to get a net present value calculation for five years. This would give a total of $141,495.02.

[164] On the “scaling up” scenario, Ms. Dalgety estimates she would obtain a net income of $150,000 annually. As I have already explained, I consider this to be too optimistic, since a larger proportion of revenue would go to the salary of employees under this scenario. I am prepared to accept, in the “scaled up” scenario, an income of $100,000. This gives a net present value of $478,260.

[165] Adding these two numbers together, as discounted by their relative probability, gives $253,750.01. Deducting 10 percent for the contingency that Ms. Dalgety's spinal stenosis condition would have manifested in symptoms, I get an award of $228,375 for loss of future earning capacity.

COST OF FUTURE CARE

[166] Compensation for costs of future care is based on what is reasonably necessary to restore the plaintiff to the condition they would have been in but for the tort, according to the medical evidence, and to preserve and promote the plaintiff's physical and mental health: *Gignac v. ICBC*, 2012 BCCA 351 at paras. 29-30.

[167] In motor vehicle cases, awards for costs of future care are reduced by the amount of "benefits", as defined under s. 83(1) of the *Insurance (Vehicle) Act*, as received by the plaintiff. However, since this amount must not be disclosed to the court or, in the case of a jury trial, the jury, until an assessment of damages has been made, these orders must be made subject to s. 83 of the *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231.

[168] Ms. Dalgety has found that epidural steroid injections have addressed, albeit temporarily, her neurogenic claudication. All the experts agree that these will be required in the future. These are, however, covered by the British Columbia Medical Services Plan.

[169] Ms. Wright has recommended that Ms. Dalgety engage in a pain management program, and I allow $2,500 plus GST. And I will not go through all the GST numbers because you will get them. I will go through the numbers without GST.

[170] Ms. Wright also recommended an occupational therapy visit to address what equipment might assist Ms. Dalgety at home. I allow $825 plus GST for this.

[171] She recommends a four- to six-hour ergonomic assessment of the spa. I agree with this as well and allow $855 plus GST.

[172] Ms. Dalgety is not currently getting any treatment from chiropractors, physiotherapists, or massage therapists. She did not want to obtain benefits from ICBC. She has not been attending a fitness facility. I do not think it is reasonable to allow the recommendations in Ms. Wright's report in this regard.

[173] However, I recognize that if Ms. Dalgety undergoes surgery, she will require some kind of program to complete her rehabilitation. I do not have any real evidence of what this would cost, but I will allow $2,000 all in for this, including GST and other taxes.

[174] As I have already stated, I do not think it is reasonable to provide for counselling or therapy in light of Ms. Dalgety's revealed preference that she is not interested in that. In any event, I have found her persistent anxiety is not caused by the accident.

[175] I accept the claim for a body pillow, $166.88 plus GST, ergonomic cleaning aids, $61.26 plus GST, and ergonomic workplace aids, $250 plus GST.

[176] Not all of the prescription medication Ms. Dalgety takes after the accident is because of the accident. In particular, Ozempic is not recoverable because it is a treatment for diabetes, which was not caused by the accident. Naproxen, on the other hand, is treatment for conditions that were caused by the accident. I accept Ms. Dalgety's claim for $1,940.78.

[177] The total for cost of future care, subject to s. 83 of the *Insurance (Vehicle) Act*, is thus $8,831.83.

SPECIAL DAMAGES

[178] The parties believed they had an agreement on special damages. Unfortunately, it turned out they had different understandings of what they agreed to. As a result, I adjourned assessment of special damages to be addressed at the same time as costs if that is possible, or potentially earlier.

CONCLUSION

[179] In summary, I find that Ms. Dalgety's current problems with pain and functional limitations as a result of the symptoms from her spinal stenosis condition are legally caused by the accident. I have assessed scenarios based on this finding and assessed the heads of damages claimed.

[180] Subject to adjustment when special damages are assessed, and also subject to s. 83 of the *Insurance (Vehicle) Act*, damages are assessed at $587,625.87, divided into the following heads of damages, of which the defendants must pay 75 percent or $440,719.40:

a) non-pecuniary loss in the amount of $100,000;

b) past earning capacity loss in the amount of $250,419.03;

c) loss of future income earning capacity in the amount of $228,375.01;

d) subject to s. 83 of the *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231, cost of future care in the amount of $8,831.83.

[181] Three issues cannot yet be addressed, and I will ask counsel briefly afterwards if there is anything we can do to case manage this part: special damages, adjustments, if any, under s. 83 of the *Insurance (Vehicle) Act*, and costs. It would obviously be desirable to have these matters determined as quickly as possible if they cannot be agreed. Under the *Insurance (Vehicle) Act*, I cannot determine adjustments under s. 83 until a final award of damages is made, which would include special damages.

[182] In the event that there are formal offers to settle, it may not be possible for me to determine costs until all the damage issues are resolved. This creates the unfortunate scenario that the parties would have to have three separate hearings before me on the remaining issues. I will, however, provide that the defendants, in the case of s. 83, and the parties, in the case of costs, can consent to have these matters heard together, which is obviously desirable if possible.

ORDER

[183] I therefore make the following order:

1. A declaration that the plaintiff, Shirley Dalgety, is 25 percent at fault and the defendant Summer Nukina is 75 percent at fault in the collision of their motor vehicles on August 9, 2015 (the “Accident”).

2. A declaration that the damages sustained by the plaintiff, Shirley Dalgety, as a result of the action are, subject to paras. 6 and 9 of this order, $57,625.87, divided as follows:

   a) non-pecuniary loss of $100,000;

   b) past earning capacity loss of $250,419.03;

   c) loss of future income earning capacity in the amount of $227,375.01; and

   d) subject to s. 83 of the *Insurance (Vehicle) Act,* cost of future care in the amount of $8,831.83.

3. Subject to paras. 6 and 9, an award of damages payable by the defendant Summer Nukina to the plaintiff, Shirley Dalgety, in the amount of $440,719.40.

4. An award of interest as determined under the *Court Order Interest Act*.

5. An order that prejudgment interest for loss of past earning capacity be calculated on the basis that the loss for each calendar year is experienced on January 1st of the subsequent year.

6. An order that the determination of the amount of special damages as a result of the Accident is adjourned.

7. A direction that either party may request a further hearing on the issue of costs and special damages from the Victoria Registry, if the request

is made no later than 4:00 p.m., 28 days after the date of these reasons for judgment, the request to be copied to the other party.

8. An order that if no request is received within 28 days after the date of these orders for judgment, there shall be no award for costs or special damages.

9. A direction that the defendants may request a further hearing on adjustment of the award for costs of future care under s. 83 of the *Insurance (Vehicle) Act*, if the request is made by 4:00 p.m. on the later of the following dates, if applicable:

    a) if a request is made by either party to the Victoria Registry for a further hearing on special damages within the time set out by para. 7, no later than 4:00 p.m. 14 days after a decision on an award of special damages;

    b) in any other case, no later than 4:00 p.m., 42 days after the date of the reasons for judgment.

10. An order that, if there is no request for adjustment under s. 83 of the *Insurance (Vehicle) Act* is received within the time set out in para. 9, there shall be no adjustment under s. 83 of the *Insurance (Vehicle) Act*.

11. A direction that a hearing on special damages and on costs may be heard together if both parties consent in writing and provide the consent to the Victoria Registry.

12. A direction that a hearing on the adjustment of the award for costs of future care under s. 83 of the *Insurance (Vehicle) Act* may be heard

together with a hearing on special damages if the defendants consent in writing and provide the consent to the Victoria Registry.

"J. G. Morley, J."
The Honourable Justice Morley