IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Dutton-Jones v. Dha,*
2023 BCSC 854

Date: 20230519
Docket: M189390
Registry: Vancouver

Between:

Samantha Rae Dutton-Jones

Plaintiff

And

Amrik Singh Dha and Pavan Kaur Dha

Defendants

- and -

Docket: M208483
Registry: Vancouver

Between:

Samantha Rae Dutton-Jones

Plaintiff

And

Godfrey Vallejos

Defendant

Before: The Honourable Justice Lamb

Reasons for Judgment

Counsel for the Plaintiff: J. Small
R.S. Bains

Counsel for the Defendants: M.A. Liechti
M.B. MacNeil, Articled Student

Place and Dates of Trial:	Vancouver, B.C. January 3-6; 9-13, 2023
Place and Date of Judgment:	Vancouver, B.C. May 19, 2023

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Introduction

[1] Samantha Dutton-Jones was starting her second year in a Bachelor of Arts program at Simon Fraser University when she was rear-ended on her way to class on September 6, 2016. She suffered injuries to her neck, back and left shoulder and her pre-existing anxiety was aggravated. Ms. Dutton-Jones had not fully recovered when she was involved in a second motor vehicle accident on September 18, 2018.

[2] Liability for both accidents has been admitted. The parties have agreed on the amount of damages to be awarded for net past wage loss, net past loss of earning capacity for delayed entry into the workforce, future care costs and special damages. I am left to decide the appropriate awards for non-pecuniary damages and future loss of earning capacity.

[3] The defendants acknowledge that Ms. Dutton-Jones suffers from chronic pain and mental health symptoms as a result of the two accidents. However, the defendants question whether she is as functionally impaired as she claims to be and whether her future earning capacity has been impaired as a result of her injuries. Further, the defendants say that the plaintiff has failed to mitigate her losses by failing to pursue physiotherapy and counselling.

[4] The two expert physiatrists largely agree on the diagnosis, impact on function and prognosis for Ms. Dutton-Jones's physical symptoms. The two expert psychiatrists agree that the accidents aggravated the plaintiff's pre-existing generalized anxiety disorder, but they disagree on whether she meets the criteria for another psychiatric diagnosis.

Background

[5] Ms. Dutton-Jones is 28 years old. She currently works full-time as an event coordinator with the Greater Vancouver Board of Trade. She also works on a casual part-time basis helping with events at Science World and organizing weddings. Since October 2022, she has lived with her fiancé, Tyler Born, who gave evidence at trial.

[6] Before the first accident, Ms. Dutton-Jones had completed a two-year diploma in public relations and an additional year of studies at Kwantlen Polytechnical University ("KPU"). She transferred to Simon Fraser University ("SFU") in the fall of 2015 to pursue a Bachelor of Arts in communications. She lived at home with her parents and younger brother in Ladner, British Columbia. Her younger brother testified at trial.

[7] Ms. Dutton-Jones's pre-accident health was generally good aside from a diagnosis of generalized anxiety disorder ("GAD") in May 2016. A few episodes of rapid heart rate over a few years were eventually diagnosed as symptoms of GAD. Her family doctor prescribed Wellbutrin and Sertraline in May 2016. She started taking these medications shortly before the first accident. Ms. Dutton-Jones testified that the medications minimized her heart palpitations and the general buzz of anxiousness that she had felt in her body on a daily basis. She also cut caffeine out of her diet.

[8] Prior to the first accident, Ms. Dutton-Jones had a history of some minor physical complaints. She would develop neck and back pain when she studied for exams, which would dissipate when she stopped studying. This study pain did not interfere with her work or schooling to any significant extent. Before the first accident, she had experienced two or three migraine headaches, each of which lasted about a day; her family doctor did not prescribe any treatment or refer her to any specialists.

[9] In terms of pre-accident activities, Ms. Dutton-Jones testified that she enjoyed different dance styles and socializing with friends and family. During her first year at SFU, she worked out a few times per week at the gym. She enjoyed outdoor activities, including hiking, biking and kayaking.

The first accident and aftermath

[10] The first accident occurred on September 6, 2016. Ms. Dutton-Jones was driving up Gagliardi Way toward SFU when a vehicle in front of her stopped suddenly. She was able to stop in time to avoid a collision with the vehicle in front of

her, but her vehicle was struck from behind by the defendants' vehicle. Ms. Dutton-Jones remembers being jolted forward.

[11] Shortly after the accident, Ms. Dutton-Jones felt pain in her neck and shoulder, and she felt anxious about having been in a car accident. She went to the emergency room at Delta Hospital for assessment. Ms. Dutton-Jones was referred to physiotherapy either by the emergency room physician or by her family doctor, Dr. E. Bertha Briscoe, a few days later.

[12] Following the first accident, Ms. Dutton-Jones took two to three weeks off school and her part-time jobs as a sales associate at Urban Barn and a contractor doing public relations work for Hartley PR. When she returned to work and school, Ms. Dutton-Jones continued to have pain. She was anxious about her pain and her recovery. She was also anxious about falling behind in her courses at SFU. Ms. Dutton-Jones completed all of her courses in the fall 2016 semester but with lower grades than she had hoped to achieve. She found it difficult to concentrate in class because her pain was aggravated by sitting for long lectures.

[13] Ms. Dutton-Jones did not attend physiotherapy as recommended in the fall of 2016.

[14] Ms. Dutton-Jones spent the winter 2017 semester studying abroad at the University of Sussex in England. She did not attend any treatment for her injuries while in England. Her pain and anxiety were somewhat reduced because her school workload was minimal until exams at the end of the term. She experienced quite a few migraines while living abroad. Ms. Dutton-Jones was able to travel to 12 countries from her home base in England during the six months she was there. She described her time at the University of Sussex as an extended vacation.

[15] After returning home in July 2017, Ms. Dutton-Jones took a few weeks off to assimilate back into life in Canada. She then returned to work at Urban Barn and Hartley PR for a few weeks before the fall semester started at SFU.

[16] Ms. Dutton-Jones says that her pain and stress increased upon her return to SFU and her part-time employment in the fall of 2017. In September 2017, Ms. Dutton-Jones was promoted to operations coordinator at Urban Barn. At the end of October 2017, she was let go as a contractor from Hartley PR because her work quality was not meeting expectations. Ms. Dutton-Jones said that she didn't have the same level of commitment to Hartley PR, but she found being let go "a hard pill to swallow".

[17] Ms. Dutton-Jones described the fall 2017 semester as "an epiphany moment" for her: she realized that she was in trouble because she was not recovering from her pain as she had anticipated and her anxiety was increasing. Ms. Dutton-Jones attended 11 active rehabilitation therapy sessions at Karp Rehabilitation between August 17, 2017 and November 2, 2017. She attended seven more times in January and February 2018 and a final three times between June and July 2018. The 21 sessions at Karp Rehabilitation were the only active rehabilitation treatment the plaintiff pursued for her physical injuries after either accident.

[18] By the end of 2017, Ms. Dutton-Jones felt that her lower back pain had improved, but her upper back, neck and left shoulder symptoms remained unchanged.

The second accident and aftermath

[19] The second accident happened on September 18, 2018, when another driver tried to turn left from a side street onto the through road on which Ms. Dutton-Jones was driving. The other driver t-boned Ms. Dutton-Jones's vehicle. Ms. Dutton-Jones had been on her way to a sorority event when the second accident happened. She attended the event but left earlier than planned.

[20] The second accident aggravated Ms. Dutton-Jones's ongoing symptoms of neck, left shoulder and upper back pain. The second accident did not cause any new injuries. Ms. Dutton-Jones was anxious that the second accident would have the same impact on her as the first accident.

[21] Ms. Dutton-Jones completed her degree requirements in the fall 2018 semester at SFU. At that point, she was optimistic about joining the workforce. She still had pain, but she felt her anxiety had improved, so much so that she decided after consulting her family doctor to discontinue her anxiety medication in January 2019.

[22] Ms. Dutton-Jones started a full-time position at KPU as an event planner on March 11, 2019.

[23] Ms. Dutton-Jones attended two counselling sessions in the summer of 2019.

[24] In the summer of 2020, Ms. Dutton-Jones's anxiety increased significantly when her father's health declined. At that point, Ms. Dutton-Jones still lived at home with her parents and brother. Her anxiety was aggravated by the effects of social isolation required in response to the COVID-19 pandemic. She resumed taking medication for anxiety in July of 2020. In 2020, she had two sessions with a counsellor available through her extended benefit provider.

[25] In February 2021, she moved out of the family home because caring for her father and seeing his decline were having an adverse effect on her own mental health. She took a month off work to move and to improve her mental health. When she applied for short-term disability coverage through her employer, she attributed her need for time off to her reaction to her father's health.

[26] In January 2021, Ms. Dutton-Jones met her fiancé, Tyler Born. They started dating in March 2021 and moved in together in October 2022.

[27] Ms. Dutton-Jones resigned from KPU on July 29, 2022. She started her current employment as an event coordinator with Greater Vancouver Board of Trade ("GVBT") on August 8, 2022.

Findings regarding injuries

Physical injuries

[28] I find that, as a result of the accidents, Ms. Dutton-Jones suffered soft tissue injuries to her neck, left shoulder and upper back that continue to be symptomatic. Given the duration of her symptoms, I accept that she has developed chronic pain. Although Ms. Dutton-Jones had some pre-accident neck pain with studying, she had no ongoing pre-accident neck pain that caused or contributed to her post-accident condition. There was no evidence that Ms. Dutton-Jones would have developed chronic neck, shoulder or back pain but for the accidents.

[29] Despite the long-standing nature of her soft tissue injuries, I find (based on the opinion evidence of physiatrists Drs. Catherine Ho and Catherine Paramanoff) that there remains potential for functional and symptomatic improvement with additional treatment. However, it is likely that she will be left with some residual pain symptoms in her upper back and neck. Dr. Ho and Dr. Paramanoff agree and I accept that Ms. Dutton-Jones is capable of performing activities of daily living, household duties and low-level recreational pursuits with some adaptations to accommodate her ongoing pain. I find that there is no physical limitation that prevents her from continuing to work full-time in a sedentary or light job, but her ongoing pain symptoms may impair her higher-level recreational activities and overall quality of life.

[30] Ms. Dutton-Jones also suffered an injury to her low back in the first accident, which largely resolved by the end of 2017.

[31] From time to time after the accidents, Ms. Dutton-Jones experienced tingling in her left arm and left leg and a “depersonalization” sensation. Based on the expert evidence at trial, I find these symptoms were likely related to her soft-tissue injuries rather than a neurological injury and according to the plaintiff have largely resolved.

[32] Ms. Dutton-Jones also suffered from tension headaches as a result of her accident-related neck injuries, and she reported increased frequency of migraine

headaches in 2017 and 2018. The migraines have improved and now happen only infrequently (two to three times in 2022). She continues to experience tension headaches when her neck pain flares.

Psychological injuries

[33] One area of contention is the proper diagnosis for Ms. Dutton-Jones's psychological symptoms. On balance, for the reasons that follow, I prefer and accept the diagnosis offered by Dr. Eugene Okorie over the diagnosis offered by Dr. Zohar Waisman. In particular, I accept that Ms. Dutton-Jones's pre-existing GAD was aggravated by the accidents, but I do not accept that the accidents triggered an adjustment disorder with mixed anxiety and depression.

[34] Ms. Dutton-Jones's soft-tissue pain exacerbates her anxiety, and her anxiety amplifies her perception of her pain. She now worries about her pain, her recovery, and the impact her injuries will have on her future. Ms. Dutton-Jones has had more frequent panic attacks after the accidents than she did before. I accept her description of the change in her anxiety: before the first accident, she had a constant low-level of anxiety that she was generally able to control and keep below a level where her anxiety becomes unmanageable; since the accidents, her coping resources are reduced, and her baseline level of anxiety is higher because of her pain and concern about her health, which means she is less able to cope with stressors that would have been manageable before the accidents. Ms. Dutton-Jones's brother confirmed this change in her baseline anxiety, which he illustrated by noting that she is less tolerant of his teasing after the accidents than she was before the accidents.

[35] Dr. Okorie, psychiatrist, assessed the plaintiff on June 11, 2022 and prepared a report dated August 7, 2022, in which he opined that "the subject MVAs and resultant pain and related functional limitations aggravated, not caused, her GAD by introducing concerns and anxieties about road safety and pain into her spectrum of worries". Dr. Okorie explained that GAD is a chronic condition that "fluctuates in severity and functionally impacts patients depending on their circumstances,

treatment, and coping capacity". Dr. Okorie opined that Ms. Dutton-Jones's GAD would have been present even if the accidents had not happened.

[36] Dr. Waisman, psychiatrist, assessed the plaintiff on August 7, 2022, and prepared a report dated September 30, 2022. In his written report, Dr. Waisman downplayed the significance of Ms. Dutton-Jones's pre-existing GAD. When asked to opine on whether Ms. Dutton-Jones suffers from a psychiatric condition, Dr. Waisman wrote that "the subject accidents led Ms. Dutton-Jones to collapse her defenses and develop an adjustment disorder with mixed depression and anxiety". In setting out his diagnosis in his written report, Dr. Waisman did not mention her pre-existing GAD or that it was aggravated. In answer to a question in plaintiff's counsel's letter of instruction about whether the diagnosed psychiatric condition is related to the accidents, Dr. Waisman wrote in his report that her pre-accident history of anxiety was a vulnerability that the first accident triggered, leading to the development of the adjustment disorder with mixed depression and anxiety, which was later aggravated by the second accident. In direct examination, Dr. Waisman testified that when he wrote "triggered this pre-existing vulnerability", he intended to convey that the accidents aggravated Ms. Dutton-Jones's GAD. This imprecise language in Dr. Waisman's written report is inaccurate at best and verges on misleading.

[37] Plaintiff's counsel's letter of instruction asked Dr. Waisman whether there were "any pre-existing conditions that might realistically have caused or contributed to her psychiatric condition apart from the accident". In response, after reviewing a list of pre-accident *physical* complaints, Dr. Waisman mentioned Ms. Dutton-Jones's pre-accident history of GAD (though he incorrectly wrote that the GAD was diagnosed in 2015 when in fact it was diagnosed in 2016). Dr. Waisman again wrote that "[t]he subject accidents triggered a pre-existing vulnerability to the effects of trauma". Despite being directly asked about pre-existing conditions, Dr. Waisman did not write that the plaintiff had recently been diagnosed with GAD and was being treated for GAD at the time of the first accident or that her GAD was aggravated by the first accident. Dr. Waisman readily conceded in cross-examination that the

accidents aggravated the plaintiff's pre-existing GAD. There is no obvious reason why he did not articulate this opinion clearly in his written report.

[38] Dr. Waisman's report did not include the factual underpinnings for his adjustment disorder diagnosis. In direct examination, he sought to defend this diagnosis by expanding (without objection) on what he had written in his report. For example, Dr. Waisman testified that he diagnosed an adjustment disorder because Ms. Dutton-Jones developed new symptoms after the first accident that did not exist before, including depressive symptoms, depersonalization and dissociation. His report did not identify the latter two symptoms as factors in his diagnosis. In direct examination, Dr. Waisman testified the other "pre-existing vulnerability" that led to the plaintiff's developing an adjustment disorder was her relationship with her father: there is no suggestion in his written report that her relationship with her father had anything to do with her post-accident condition.

[39] Dr. Waisman documented symptoms not reported to others nor proven at trial. For example, he documented flashbacks and nightmares as part of his history: Ms. Dutton-Jones did not mention either in her testimony, and these symptoms were not reported to other assessors.

[40] In a responsive report, Dr. Okorie rejected Dr. Waisman's diagnosis of adjustment disorder. Dr. Okorie wrote that "an adjustment disorder should only be diagnosed when a patient's stress-related disturbance does not meet the criteria for another mental disorder and is not merely an exacerbation for a pre-existing disorder". Dr. Okorie wrote that aggravation of Ms. Dutton-Jones's GAD "completely and satisfactorily explains her post-MVA pain and road-related [psychological] symptoms", thus rendering redundant a diagnosis of adjustment disorder.

[41] The plaintiff says that I should prefer Dr. Waisman's diagnosis over that of Dr. Okorie's because Dr. Okorie "fails to take into consideration the new depressive symptoms with this single diagnosis". However, the task of weighing these competing psychiatric opinions was complicated by plaintiff's counsel's failure to cross-examine Dr. Okorie on either his primary or responsive report. In final

argument, plaintiff's counsel identified some of the plaintiff's complaints that she says are depressive symptoms as well as the plaintiff's scores on the PHQ-9 (a depression screening tool). Plaintiff's counsel then asked the Court to infer that Dr. Okorie's opinion must be wrong because he ignored the plaintiff's depressive symptoms. However, plaintiff's counsel failed to put to Dr. Okorie that his rejection of the adjustment disorder diagnosis was flawed because his diagnosis failed to account for these "depressive symptoms". The plaintiff's strategic decision not to cross-examine Dr. Okorie creates a challenge for the trier of fact, who is "generally neither conversant nor familiar with the subject matter of the evidence and lacks the independent means by which to weigh or measure the merits of two competing views": *Yip v. Chin*, 2009 BCSC 451 at para. 33. By failing to test Dr. Okorie's opinion through cross-examination, the plaintiff deprived the trier of fact of a way to weigh the competing views on whether or not the plaintiff meets the diagnostic criteria for adjustment disorder.

[42] A careful reading of Dr. Okorie's report suggests that he did not ignore the so-called "depressive symptoms". Dr. Okorie specifically documented that the plaintiff grew tearful when talking about her pain and related functional limitations; he included her score on the PHQ-9 he administered, which correlates to "moderate depression" on the test's severity score, as part of the facts he relied upon in reaching his opinion; and he included reference to a clinical entry in the family doctor's chart that indicated she was taking Wellbutrin and Trazodone for depression. Dr. Okorie was alive to these symptoms when he offered his opinion to the Court; however, he opined that an exacerbation of her GAD explained all of her accident-related psychological symptoms. Dr. Okorie was not given an opportunity to answer the critique of his report outlined by the plaintiff in closing argument. As in *Yip*, I am inclined to attach "some weight or significance to the fact that [Dr. Okorie's] report[s were] introduced without any part of [their] contents being tested further" (at para. 37).

[43] Defence counsel cross-examined Dr. Waisman on his opinion, but certain questions remain unanswered. On cross-examination, Dr. Waisman acknowledged

that Ms. Dutton-Jones's depression symptoms were not severe enough to meet the criteria for diagnosing a major depressive disorder. However, Dr. Waisman was not cross-examined on the differences in factual assumptions that underlie his opinion and that of Dr. Okorie. For example, Ms. Dutton-Jones denied any depression when assessed by Dr. Okorie (in early June 2022 while still employed by KPU), but she described her mood as "depressed and frustrated" when she was assessed by Dr. Waisman six weeks later (a few days after resigning from KPU and the day before starting at GVBT). Ms. Dutton-Jones denied "persistent depression, hopelessness, loss of joy/interest" when asked by Dr. Okorie; however, she reported feelings of sadness depending on her pain levels and "anhedonia" to Dr. Waisman. She scored 11/27 on the PHQ-9 when administered by Dr. Okorie and 13/27 on the PHQ-9 when administered by Dr. Waisman: I have no evidence as to whether this difference in scores is clinically significant. Similarly, I have no evidence as to whether there is any clinical significance to the plaintiff's achieving a similar score on a PHQ-9 administered by Dr. Ho a few days after the PHQ-9 administered by Dr. Okorie. I note that Dr. Ho specifically described the PHQ-9 as a screening tool and not a diagnostic tool (i.e. Dr. Ho did not diagnose the plaintiff with moderate depression based on her PHQ-9 score).

[44] On the whole of the evidence, I am satisfied that Ms. Dutton-Jones's predominant psychological symptoms are better described as anxiety-related rather than depressive symptoms. Ms. Dutton-Jones's testimony focused on her higher level of anxiety and worry post-accident. Her brother and her fiancé emphasized her anxiety symptoms.

[45] I accept that Ms. Dutton-Jones has experienced sadness when her pain is significant; however, the plaintiff has failed to prove that this sadness amounts to "marked distress out of proportion to the severity or intensity of the stressor", one of the diagnostic criteria for adjustment disorder. At trial, Ms. Dutton-Jones was emotional at times when discussing her pain; however, she was upbeat during most of her testimony. I am not able to conclude that intermittent sadness when her pain

is severe or when she talks about it amounts to “marked distress out of proportion to the severity” of her pain.

[46] In regards to Ms. Dutton-Jones’s GAD, Dr. Okorie’s report was more thorough and detailed than Dr. Waisman’s report. Dr. Okorie addressed the original cause of her GAD and how it progressed over time since the accidents, including the fact that she discontinued anxiety medication in January 2019 and resumed taking it when her symptoms increased in the summer of 2020. In his interview with Ms. Dutton-Jones, Dr. Okorie identified other stressors that aggravate her GAD (which Ms. Dutton-Jones confirmed in cross-examination). Dr. Waisman did not address any of these issues. Dr. Okorie recommended increasing the dosage of Wellbutrin to improve or fully remit her GAD. In his report, Dr. Waisman did not mention medication as part of his treatment recommendations. In cross-examination, Dr. Waisman acknowledged that GAD is a chronic condition that lasts for long periods of time, and symptoms may worsen or remit. Dr. Waisman acknowledged that GAD can be a lifetime struggle that needs to be managed.

[47] In terms of prognosis, Dr. Okorie anticipates further improvement of Ms. Dutton-Jones’ GAD with an adjustment to her medication and counselling, based on the symptomatic and functional improvement she has had with her current prescription medications and the limited counselling she has attended.

[48] Although I generally prefer Dr. Okorie’s opinion, I am not able to accept his opinion that Ms. Dutton-Jones was functioning well with her work duties at the time of his assessment. It is not clear how much information Dr. Okorie had about her job performance (another topic that warranted exploration on cross-examination but was not attended to); however, evidence from Ms. Dutton-Jones’s supervisors suggests that she was not functioning as well as Dr. Okorie assumed. I will address this issue in more detail when I address the claim for future loss of income earning capacity.

Agreed upon awards of damages

[49] In addition to any award of damage that I determine to be appropriate, the parties agree that Ms. Dutton-Jones is entitled to the following amounts, as described by the parties:

a) $17,669.93 for net past loss of earning capacity for delayed entry into the workforce;

b) $1082.43 for net past wage loss;

c) $8306.00 for future care costs; and

d) $1779.96 for special damages.

[50] The parties agree that these amounts are not subject to reduction for an alleged failure to mitigate.

Future loss of earning capacity

[51] The plaintiff seeks an award of damages to compensate her for loss of future earning capacity despite losing no income as a result of her accident-related injuries since starting full-time employment in March 2019. On the whole of the evidence, I am not satisfied that the plaintiff has established that there is a real and substantial possibility that her ongoing injuries will cause a pecuniary loss in the future.

[52] An award for future loss of earning capacity "involves a comparison between the likely future of the plaintiff if the accident had not happened and the plaintiff's likely future after the accident has happened": *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 32. Before such an award can be made, a plaintiff must demonstrate "that there is a real and substantial possibility of a future event leading to an income loss": *Perren v. Lalari,* 2010 BCCA 140 at para. 32.

[53] More recently, at para. 47 of *Rab v. Prescott,* 2021 BCCA 345, the Court of Appeal set out a three-stage process for analyzing such claims:

a) Does the evidence disclose a potential future event that could lead to a loss of capacity?

b) Is there a real and substantial possibility that the future event in question will cause a pecuniary loss?

c) If there is such a real and substantial possibility, what is the value of the possible future loss?

a) Does the evidence disclose a potential future event that could lead to a loss of capacity?

[54] I find that the first step of the *Rab* analysis is satisfied because there is a possibility that the plaintiff's aggravated GAD *could* result in a loss of capacity. In *Rab* at para. 47, Justice Grauer included "chronic injury" as a future event that could lead to a loss of capacity. Ms. Dutton-Jones continues to suffer from soft tissue pain and an aggravation of her pre-existing GAD. Ms. Dutton-Jones testified that she would get distracted by pain while at work, which reduced her productivity. As set out above, I accept that the plaintiff's baseline level of anxiety is higher post-accidents than it was before the accidents, which means she has less capacity to cope with stressful circumstances than she had before the accidents. When she is more anxious, Ms. Dutton-Jones finds it more difficult to focus on work tasks and to multi-task. Her employment as an event planner requires multi-tasking and working to deadline. Increased anxiety interferes with her ability to deploy these skills.

[55] Two of her KPU supervisors confirmed that Ms. Dutton-Jones has had issues with job performance. When she supervised the plaintiff from October 2020 to February 2022, Desiree McLeod observed that Ms. Dutton-Jones seemed to have difficulty multi-tasking and focusing and that she seemed to shut down when stressed. Ms. McLeod testified that Ms. Dutton-Jones appeared to be sad and overwhelmed, in contrast to her upbeat personality exhibited during her first six months on the job.

[56] Anna Rucker supervised the plaintiff from February 2022 until the end of July 2022. Ms. Dutton-Jones required more oversight than other employees to ensure that key tasks were completed on time. Ms. Rucker thought Ms. Dutton-Jones seemed overwhelmed.

[57] I am satisfied that Ms. Dutton-Jones's ongoing aggravated GAD *could* lead to impairment of her income earning capacity in the future if her GAD prevents her from performing key components of her employment. I note, however, that Dr. Okorie anticipates improvement of her anxiety symptoms with counselling and improved medication management, which suggests her GAD may affect her function less as time goes on and any aggravation of her GAD caused by the accidents may be ameliorated with further treatment.

[58] On the other hand, I am not satisfied that there is a possibility Ms. Dutton-Jones's chronic pain is a potential future event that could impair her income earning capacity into the future. Based on the evidence of both physiatrists at trial, I found as a fact that there is no physical limitation that prevents Ms. Dutton-Jones from continuing to work full-time in a sedentary or light job, i.e., the type of employment she has engaged in since graduating from SFU and that she aspired to do prior to the accidents. Both physiatrists opined that there is potential for functional and symptomatic improvement with additional treatment, which suggests that her work capacity is not expected to be compromised going forward based on her physical symptoms.

[59] Before leaving the first step in the *Rab* analysis, I note that the plaintiff relied on the opinion of Dr. Waisman as evidence that she has a psychological impairment that interferes with her capacity to work. For the reasons outlined above, I do not accept the opinion of Dr. Waisman.

b) Is there a real and substantial possibility that the future event in question will cause a pecuniary loss?

[60] Turning to the second step in the *Rab* analysis, I am not satisfied that the plaintiff has established that there is a real and substantial possibility that an ongoing

accident-related injury will cause a future pecuniary loss. I find that the potential that the plaintiff's ongoing injuries will result in a pecuniary loss is "only possible and speculative" rather than a real and substantial possibility: *Gao v. Dietrich*, 2018 BCCA 372 at para. 34. I am not satisfied that the plaintiff's "likely future" is different than it would have been absent the accidents: *Gregory* at para. 32.

[61] As a starting point, Ms. Dutton-Jones concedes that she has not suffered a loss of income since entering the full-time workforce in March 2019. She was off work for a few weeks after the first accident in September 2016, for which the parties agreed to an award of damages of $1082.43. The parties have also agreed on damages for her delayed entry into the workforce as a result of her injuries. Otherwise, there is no basis in the evidence to conclude that Ms. Dutton-Jones's pre-trial with-accident earnings were lower than her expected pre-trial without-accident earnings.

[62] Ms. Dutton-Jones says that her ongoing injuries may limit her ability to continue to work at some point in the future. She argues that the impairments identified by Dr. Waisman have had an impact on her ability to perform her job duties at KPU, and the current employment situation is "simply not sustainable on a regular consistent basis". As noted above, I do not accept the opinion of Dr. Waisman, including his views regarding impairment to the plaintiff's working capacity. Dr. Okorie's prognosis for improvement of Ms. Dutton-Jones's GAD symptoms does not support the plaintiff's argument that she will be unable to continue working full-time. Further, the plaintiff's work history since starting at KPU in March 2019 does not support her submission that she will not be able to continue working full-time as an event planner.

[63] Ms. Dutton-Jones's limited accident-related time away from work up to the date of trial suggests that any future pecuniary loss is speculative. Detailed cross-examination of Ms. Dutton-Jones confirmed that she has taken the following number of days off work as sick days or for medical appointments each year since starting full-time employment on March 11, 2019:

a) From March 11, 2019 to December 31, 2019, no days;

b) In 2020, approximately five days;

c) In 2021, approximately 37 days;

d) From January 1, 2022 to July 29, 2022, approximately 10 days; and

e) From August 8, 2022 to December 31, 2022, a few days.

[64] Ms. Dutton-Jones did not lose income for any of this time off work. Paid sick leave at KPU and GVBT covered medical absences, and she is entitled to two paid personal wellness days per year at GVBT.

[65] A detailed review of Ms. Dutton-Jones's pre-trial sick leave suggests that there is no real and substantial possibility that she will lose income in the future because her pre-existing GAD was aggravated as a result of the accidents.

[66] In 2019, Ms. Dutton-Jones did not miss any time off work from KPU for accident-related reasons. She felt that her GAD was under control so she stopped taking anti-anxiety medication in January 2019 (though Dr. Briscoe referred her for counselling in the summer of 2019 and she attended two sessions). From March 2019 until approximately August or September 2019, Ms. McLeod supervised Ms. Dutton-Jones, who reportedly performed well. Ms. McLeod described her as bubbly and upbeat during that time frame. Although Ms. Dutton-Jones testified that she found the fall semester to be a stressful time at work due to the heavier workload, she did not miss any days from work or consult her family physician with complaints of increased anxiety.

[67] In 2020, despite pandemic- and family-related stress, Ms. Dutton-Jones missed only five days due to illness. She found working at home during the pandemic to be stressful. She missed socializing with work colleagues. She had increased pain because she did not have an ergonomic work station at home. Ms. Dutton-Jones's father's health declined in the summer of 2020, which led to her self-described "mental breakdown" in June 2020 and caused her to resume taking

her anxiety medication. It appears from her employment records that she took one sick day around the time she saw her family doctor on June 22, 2020. The other sick days and medical time off in 2020 were spread throughout the year and were taken not more than a day at a time.

[68] 2021 was unusual in terms of time off work because Ms. Dutton-Jones missed a total of seven and half weeks as sick days and for medical appointments. However, I find that most of her time off in 2021 was not as a result of her injuries from the accidents.

[69] I am satisfied that Ms. Dutton-Jones was off work for four weeks in February 2021 for reasons related to her father's health and not as a result of injuries from the accidents. She required time off work in February 2021 to address her GAD symptoms. From June 2020 onward, Ms. Dutton-Jones had been a caregiver for her father while she lived in the family home with her parents and brother. Her father's health continued to decline. She found the situation stressful, which led her to decide to move out of the family home.

[70] Ms. Dutton-Jones reported to Dr. Briscoe on February 16, 2021, that she felt she needed two weeks off work to recover from increased anxiety and to move into her own apartment. She prepared an application for short-term disability benefits in which she indicated that her condition was not due to an accident (i.e., she made no connection between her increased anxiety and the accidents). Dr. Briscoe prepared an attending physician statement ("APS") for the plaintiff's short-term disability application in which Dr. Briscoe indicated Ms. Dutton-Jones's anxiety symptoms had started in October 2020, a date she and the plaintiff apparently determined from reviewing her medical chart (this clinical entry was not in evidence). Dr. Briscoe erred when preparing the APS when she said that Ms. Dutton-Jones had never had the same or similar condition, which is clearly inaccurate. In any event, when Ms. Dutton-Jones applied for short term disability benefits, neither she nor Dr. Briscoe attributed the plaintiff's time off work in February 2021 to an aggravation of her GAD caused by the accidents. Neither Dr. Briscoe nor any other experts

provided opinion evidence that Ms. Dutton-Jones would have continued to work in February 2021 (despite family-related stress) if her GAD had not been aggravated by the accidents. In short, Ms. Dutton-Jones has not proven that but for the accidents, the time off work in February 2021 would not have occurred.

[71] Ms. Dutton-Jones was off work for two weeks (from April 26 to May 7, 2021) for a concussion sustained in late April 2021, i.e., for reasons unrelated to the accidents.

[72] As a result, after accounting for sick leave in 2021 that was unrelated to the accidents, Ms. Dutton-Jones missed a week and a half in 2021 for health-related reasons. There were no medical records in evidence that correlated with this time off work.

[73] In 2022, Ms. Dutton-Jones took approximately four and a half days of sick leave in January and approximately five days in the spring of 2022. There were no medical records in evidence that correlated with this time off work.

[74] Since joining GVBT on August 7, 2022, Ms. Dutton-Jones has not taken any sick days for anxiety symptoms. She had a busy fall event season and limited supervision for her first three months at GVBT, but she managed to continue working, including some long days. Her current supervisor started on November 1, 2022 and describes her work quality as “exceptional”, though they continue to address her inconsistencies in meeting deadlines. Ms. Dutton-Jones took two sick days in December for a respiratory illness, and she took a wellness day in December to “chill out a little bit”.

[75] In summary, Ms. Dutton-Jones averaged less than a week and a half of annual sick leave between March 2019 and the trial that may have been related to injuries from the accidents. The actual number of accident-related sick days each year remains unclear. She estimated that 70% of her sick days at KPU were related to the accidents; however, there were no medical records or other documents to establish the reasonableness of this estimate, and I am not prepared to attach

significant weight to her estimate without corroboration given the passage of time and her incentive to attribute time off to the accidents. Further, other than the leave in February 2021 and a day in June 2020, it is unclear whether any sick days were attributable to anxiety symptoms, which is the only accident-related condition I have determined could result in a potential future loss of earning capacity.

[76] In addition to working full-time as an event planner since March 2019, Ms. Dutton-Jones has more recently supplemented her income by taking on additional part-time work, a further indication that she is unlikely to suffer a pecuniary loss in the future as a result of the accidents. In the spring of 2022, the plaintiff started working part-time on weekends as an event assistant at Science World and as a wedding assistant with Sweetheart Events. She has continued to work occasionally on weekends since joining the GVBT and was recently promoted to wedding planner with Sweetheart Events. While she contends that she took on these part-time positions as security against losing her job at KPU, Ms. Dutton-Jones's ability to continue with this weekend work demonstrates that her work capacity remains robust and undermines her argument that there is a real and substantial possibility that she will suffer a pecuniary loss in the future. I make this finding despite Dr. Waisman's view that her ability to work three jobs is potentially a sign of poor judgment rather than a sign of recovery from her injuries. I am satisfied that Ms. Dutton-Jones is functioning well at work since moving to GVBT in August 2022.

[77] Ms. Dutton-Jones's limited number of days off work due to the injuries from the accidents together with her sick leave allowance and Dr. Okorie's prognosis lead me to conclude that a pecuniary loss as a result of a possible reduced work capacity is speculative.

[78] Ms. Dutton-Jones argues that she should not be penalized for her stoicism and for continuing to work when it would have been reasonable for her not to work: *Giang v. Clayton*, 2005 BCCA 54 at paras. 54–55. However, the plaintiff has failed to prove that she continued to work when it would have been reasonable for her not to do so. The evidence does not establish on a balance of probabilities that she ought

to have been off work (other than for the first few weeks after the first accident) for accident-related injuries. There was no evidence from Dr. Briscoe or any of the experts that Ms. Dutton-Jones ought to have taken more time off work due to her accident-related injuries or that Dr. Briscoe had recommended additional time off work.

[79] Further, I am not satisfied that Ms. Dutton-Jones faced financial pressures that required her to continue working or take on work in addition to her full-time job when it would have been reasonable for her not to do so:

a) KPU provided a generous sick leave allowance, and short-term disability benefits were available;

b) she lived at home with her parents, and it was not clear on the evidence that she was required to pay rent or otherwise contribute financially to the household;

c) she had no dependents; and

d) there was no evidence that she had ongoing debts or other financial obligations.

[80] In summary, I find that there is no real and substantial possibility that Ms. Dutton-Jones will suffer a pecuniary loss in the future as a result of her aggravated GAD. As such, I decline to award damages for future loss of income earning capacity.

Non-pecuniary loss

[81] I am satisfied that Ms. Dutton-Jones's injuries have caused her pain that continues. The accidents aggravated her pre-existing GAD. Her chronic pain and aggravated GAD have adversely affected her enjoyment of life. An award of $85,000 is reasonable compensation for her non-pecuniary losses.

[82] An award for non-pecuniary loss is intended to compensate a plaintiff for her pain and suffering, her loss of enjoyment of life, and her loss of amenities, both to the date of trial and into the future. In assessing Ms. Dutton-Jones's loss, I have considered the factors set out in *Stapley v. Hejslet*, 2006 BCCA 34 at paras. 45-46, leave to appeal to SCC ref'd, 31373 (19 October 2006).

[83] In assessing Ms. Dutton-Jones's non-pecuniary loss, I have relied on my findings regarding her injuries set out at paragraphs 28 to 48 above.

[84] Ms. Dutton-Jones became less physically active after the accidents. The accidents caused her physical pain that interfered with her fitness activities and made it difficult to study and sit through long lectures at SFU. Ms. Dutton-Jones continues to limit her physical activity, though the physiatrists suggest she could be more active than she is currently. Even if her pain symptoms improve, as both physiatrists say remains possible, her injuries will likely limit her higher level physical pursuits. Ms. Dutton-Jones finds that she cannot hike or ride her bike as vigorously as she did prior to the accidents.

[85] Ms. Dutton-Jones says that her grades at SFU suffered as a result of her injuries, which led to her graduating a semester behind schedule and delaying her entry to the workforce. I accept that the plaintiff's accident-aggravated GAD made it more difficult to focus on her studies; however, her lower grades were also likely due, at least in part, to the fact that she took five classes for the first time in the winter 2018 session while she continued to work part-time.

[86] Ms. Dutton-Jones also argues that she has "struggled significantly since entering the workforce". As set out above, I accept that the aggravation of her GAD has contributed to her employment-related challenges. However, Ms. Dutton-Jones had no pre-accident experience working as an event planner and may have had difficulties meeting the demands of the job (because of her pre-existing GAD or otherwise) even if the accidents had not happened.

[87] Ms. Dutton-Jones has been able to maintain a fairly active social life despite the accidents, though perhaps not as active as it might have been. She emphasized how important it was for her to have social connections. She was in a sorority while at SFU. She met her fiancé online in early 2021, and their relationship progressed to an engagement a year and a half later.

[88] Ms. Dutton-Jones says that an appropriate award for non-pecuniary loss would be in the range of $95,000 to $105,000. She relies on *Singh v. De Stantis*, 2022 BCSC 35 and *Chong v. Nguyen*, 2017 BCSC 1564 and applies a discount to the awards in those cases to account for the distinguishing factors between her and the plaintiffs in those cases. In my view, although the plaintiffs in these cases were similar in age and activity level to Ms. Dutton-Jones, her pre-existing GAD and her more positive prognosis justify a more significant discount than proposed by the plaintiff.

[89] The defendant submits that an appropriate award for non-pecuniary loss would be in the range of $60,000 to $80,000. The defendant relies on *Singh v. Chand*, 2019 BCSC 2055; *Johnson v. Heer*, 2020 BCSC 1168; *Siddall v. Bencherif*, 2016 BCSC 1662; *Dhami v. Madden*, 2020 BCSC 573; and *Manhas v. Jaswal*, 2020 BCSC 586. Many of these cases include plaintiffs with pre-accident anxiety.

[90] An award of non-pecuniary damages must be fair and reasonable to both parties. Comparable cases may provide some guidance as to a reasonable non-pecuniary award; however, each case turns on its facts. In my view, generally speaking, the plaintiffs in the cases cited by Ms. Dutton-Jones have more significant impairments or more negative prognoses or both. On the other hand, the plaintiffs in the cases cited by the defendant are less seriously injured or affected by their injuries.

[91] I find that an award of $85,000 is appropriate in the circumstances of this case, after considering the *Stapley* factors and awards made in similar cases. This award reflects the difference between Ms. Dutton-Jones's without-accident and with-

accident conditions and factors in the potential for some improvement of her pain and her pain reaction.

Failure to mitigate

[92] The defendant argues that the plaintiff failed to mitigate her losses by failing to attend physiotherapy as recommended shortly after the first accident and by failing to pursue psychological treatment when recommended by her family doctor in June 2019. I am satisfied that Dr. Ho's opinion evidence supports a finding that the plaintiff has failed to mitigate her losses. I find that a deduction of 10% from the award for non-pecuniary damages is appropriate.

[93] In *Chiu v. Chiu*, 2002 BCCA 618, our Court of Appeal set out the test for reducing a plaintiff's damages as a result of the plaintiff's failure to mitigate their losses:

> [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.

[94] Our Court of Appeal recently confirmed that the onus remains on the party asserting a failure to mitigate "to prove on a balance of probabilities that the plaintiff's injuries *would have* been reduced to some degree" if she had pursued treatment at an earlier stage in her recovery: *Haug v. Funk*, 2023 BCCA 110 at para. 61.

[95] I find that the plaintiff acted unreasonably by failing to attend physiotherapy treatments as recommended. The plaintiff was advised shortly after the first accident in 2016 to attend physiotherapy treatment for her soft tissue injuries. She attended some active rehabilitation treatments with Karp Rehabilitation starting in August 2017, but Dr. Briscoe recommended on five occasions that she engage in physiotherapy after she stopped active rehab in July 2018. A reasonable person would have followed such advice.

[96] The plaintiff testified that she put so much of her energy into school that she did not have “anything left over” to attend physiotherapy in the fall of 2016. However, Ms. Dutton-Jones continued to work at two part-time jobs and maintained an active social life in that time period. A reasonable person would have found time and energy to devote to her recovery.

[97] Ms. Dutton-Jones also says she lacked the financial resources to attend physiotherapy. However, the suggestion that she lacked finances again becomes a question of priorities. In the fall of 2016, the plaintiff had two part-time jobs, and she lived at home with her parents. She was saving money to spend during her semester abroad starting in January 2017, which indicates that she had funds available but she chose to direct those funds toward her travel plans. It is significant that the cost of the active rehabilitation that Ms. Dutton-Jones eventually undertook was covered by her first-party insurer, the Insurance Corporation of British Columbia.

[98] I am not satisfied that the evidence supports a finding that Ms. Dutton-Jones reasonably failed to pursue physiotherapy or active rehabilitation after the summer of 2018 due to impecuniosity. She made no attempt to secure funding to return to physiotherapy or other active rehabilitation after the summer of 2018, either through her extended benefits with her employer or through the Insurance Corporation of British Columbia.

[99] Similarly, Ms. Dutton-Jones stopped counselling after two treatments in the summer of 2019 because, according to the plaintiff, her extended benefits provider would not pay for more sessions. The first session cost $140 and the second $40. In the summer of 2019, she continued to live with her parents, and she was earning more than $40,000 per year. There was no evidence to explain why she could not afford to pay for additional sessions. There is no evidence that she sought funding for counselling through the Insurance Corporation of British Columbia.

[100] Ms. Dutton-Jones attended two sessions with a counsellor provided by her extended health benefits provider in 2020. These two sessions were the only other

counselling she had between the first accident in 2016 and the trial date, despite Dr. Briscoe suggesting to her a number of times that she attend counselling.

[101] In these circumstances, I cannot find that impecuniosity is a legally sufficient reason for failing to pursue recommended treatment: *Olynyk v. Turner*, 2012 BCSC 1138 at para. 57.

[102] I find based on the evidence of Dr. Ho that the plaintiff's injuries would have been reduced to some degree if she had pursued treatment in a timely way. Dr. Ho said the following in her expert report:

> In my opinion, Ms. Dutton-Jones has participated in limited rehabilitative treatments since the MVA. She has only done active rehabilitation, which she started in August 2017, almost one year after the First Accident. She has not done any physiotherapy or counselling. She stated she did not do therapy immediately after the First Accident as she was overwhelmed with her studies since she had fallen behind and was fearful of failing (she did fail her Economics course). She also reported lack of finances prevented her from doing therapies. As a result of her inability to access timely physical and psychological treatment soon after the First Accident, regardless of patient or symptom factors, in my opinion there was a higher likelihood of her pain persisting and becoming chronic.

[103] Dr. Ho testified under cross-examination that if Ms. Dutton-Jones had had early intervention, either physiotherapy or counselling, then chances are that she would not have had as much pain persisting. Dr. Ho acknowledged that how much a reduction is difficult to predict, but treatment early on will increase the chances of a better outcome.

[104] In this case, Ms. Dutton-Jones had no active treatment for more than a year after her soft-tissue injuries. Her soft-tissue injuries in turn increased her anxiety. She did not pursue psychotherapy as recommended beyond two sessions. On balance, I am satisfied that the plaintiff's losses would have been reduced by 10% had she pursued treatment reasonably promptly.

Conclusion

[105] To summarize, after reducing the award for non-pecuniary loss for failing to mitigate, the defendant is liable to pay the following damages to Ms. Dutton-Jones:

Head of Damage	**Award**
a. Net past loss for delayed entry	$17,669.93
b. Net past wage loss	$1082.43
c. Future care costs	$8,306.00
e. Special Damages	$1,779.96
f. Non pecuniary damages	$76,500.00
TOTAL	**$105,338.32**

[106] Ms. Dutton-Jones is entitled to pre-judgment interest on the award of special damages. She is also entitled to her costs, subject to any offers or other matters that may require an adjustment to her entitlement to costs. If the parties wish to address costs or pre-judgment interest on special damages, they may arrange with Supreme Court Scheduling in the next 30 days to make submissions before me for this purpose.

"Lamb J."