

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Joly v. Norman*,
2023 BCSC 970

Date: 20230607
Docket: M192072
Registry: Vancouver

Between:

Karyn Anne Joly

Plaintiff

And

Edward Albert Norman

Defendant

Before: The Honourable Mr. Justice Thomas

Reasons for Judgment

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Place and Date of Trial/Hearing:

Vancouver, B.C.
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Introduction

[1] Ms. Joly suffered soft tissue injuries which developed into a chronic pain condition as a result of being involved in a car accident on December 14, 2017. The parties are unable to agree on the impact that the accident has had on her life, and past and future employability.

[2] Ms. Joly was on medical disability at the time of the accident but was hoping to return to work in the new year. She attempted to return to work but was unable to do so. She was provided modified duties but did not enjoy the position and decided to pursue other endeavours.

[3] She retrained in office administration and obtained employment first with Kingfisher Resort as a reservation agent, and then as a dental receptionist at Quantum Dental. She enjoys working at Quantum Dental and plans on continuing working there. She is currently working four days a week. She is unable to work full time due to her chronic pain condition.

Pre-Accident Facts

[4] Ms. Joly was born on March 19, 1980. She began working for WestJet as a flight attendant in 2008. She is currently 43 years old.

[5] A flight attendant requires working in blocks which requires one to be away from home for a number of days in a row. Usually, Ms. Joly would work in five–seven-day blocks. It was typical for her to be away for 16 days a month while working.

[6] She moved with her partner, Mark Joly, to Cumberland in 2010.

[7] Mr. Joly began working in the oil patch and was home at most one week a month, but generally less.

[8] They have a son, Kingston, who was born on January 1, 2012. Ms. Joly took 17 months of maternity leave. The extension in maternity leave was necessitated by difficulties in obtaining appropriate childcare during the blocks of days that she would be away for work.

[9] When she returned to work, initially, they retained a live-in nanny, but that did not work out. Ms. Jolly found a person, Jennifer, who would look after Kingston at her home when Ms. Jolly was working during her blocks at WestJet. Mr. Jolly continued to work in the oil patch at the same schedule.

[10] They have a daughter, Evangeline, born on August 13, 2014. Ms. Joly took a year of maternity leave.

[11] She developed some post-partum depression after Kingston's birth, and it became more severe after Evangeline's birth.

[12] She returned to work as a flight attendant in late 2015. She continued to use Jennifer to care for her children when she was away. Difficulties arose with Jennifer, and she began to use Kate to look after her children.

[13] In the fall of 2016, she missed three months of work due to difficulties in arranging childcare and sickness.

[14] In August 2017 Kate could no longer provide child support, so it was difficult to find childcare for her children for the blocks of days that she needed to be away for work.

[15] At the end of August 2017, Ms. Joly was suffering from depression and anxiety. I find the underlying cause of these conditions were the following:

1. her husband worked out of town the majority of the time;
2. she had difficulty arranging for childcare for her children for blocks of days;
3. being away from her children for blocks of days was stressful;
4. she and her husband argued about his prolonged absences from home and her lack of support;
5. longstanding difficulties with her parents persisted; and

6. she was overwhelmed by looking after the house and her children on her own.

[16] She also suffered from some sleep difficulties that interrelated with her depression and anxiety.

[17] Ms. Joly went on stress leave and received medication and counselling. She stopped receiving childcare assistance when she went on stress leave.

[18] By the middle of October 2017, Ms. Joly was having trouble with her medication. She was suffering from anxiety, headaches, and insomnia, sleeping five hours per night. She felt driving was dangerous, and her concentration was poor. Her stressors included her kids and flight attendant work with WestJet. She did not want to return to work as she “gets anxiety from hearing planes.”

[19] By the middle of November 2017, Ms. Joly was having good days and bad days. She was having difficulty sleeping and managing her daughter’s temper tantrums.

[20] Ms. Joly did not have any symptomatic physical difficulties for at least a year prior to the accident.

The Accident

[21] On December 14, 2017, Ms. Joly was rear-ended by the defendant while at a stop light in Courtney, B.C.

[22] The defendant has admitted responsibility for the accident.

Injuries Suffered in the Accident

[23] Ms. Joly suffered soft tissue and some mechanical injuries to her neck, mid and lower back in the accident. She also injured her shoulder which was bruised by her seat belt during the accident. Her shoulder pain resolved within one year.

[24] Her neck and back injuries progressed into a myofascial pain syndrome due to over-stretch of the musculature in the accident. She had some pre-existing asymptomatic structural issues in her cervical spine and lumbar spine that made her more susceptible to injury.

[25] She continued to suffer from her pre-existing anxiety and mood issues; her pre-existing sleep difficulties were aggravated by injuries suffered in the accident.

Treatment / Special Damages

[26] Ms. Joly was recommended to attend and attended the following medical treatment for injuries suffered in the accident:

1. 60 massage therapy treatments;
2. 60 chiropractic treatments;
3. 85 physiotherapy treatments;
4. eight acupuncture treatments;
5. five counselling sessions; and
6. 25 general practitioner appointments.

[27] In addition, she has purchased a variety of over-the-counter anti-inflammatories and heat devices, self-massage tools, and rubs.

[28] She has spent approximately \$11,019.58 on these services and items, which I award as special damages.

Post-Accident Employment

Westjet

[29] Ms. Joly returned to work for WestJet in March 2018 and was given modified duties at the Comox airport. This enabled her to avoid heavier lifting which might

aggravate the injuries she suffered in the accident, and enabled her to remain in Cumberland and look after her children.

[30] She says she did not enjoy this work because:

1. she felt more like a greeter as she was not able to arrange or modify reservations because these activities were managed by an affiliate airline; and
2. she had to work split shifts as there were not enough flights to work more than two hours or so each shift.

[31] She wanted to travel and return to work as a flight attendant but did not know if she could manage the work with her injuries and was concerned about leaving her children for blocks of days.

[32] She decided to recertify as a flight attendant and attempted to return to work in November 2018.

[33] During her first block of work, she tweaked her neck. She was in pain and was emotional. She stopped work and flew home and went on a leave of absence.

[34] In April 2019 WestJet offered to provide her with modified duties back at the Comox airport. They offered her a new job title, but it was essentially the same job as she had the previous year. She refused to return to work at Comox airport as she did not like the work and found it demeaning hosting passengers at the gates, instead of being a flight attendant.

[35] Ms. Joly did not try to obtain a job with the affiliate airline at Comox airport because she did not want to lose the seniority she had with WestJet.

Kingfisher Resort

[36] Ms. Joly wanted to take care of herself and see what other work options were available to her. She suffered from a gall bladder issue for a short period of time in July 2019. She spent the summer driving her kids to various summer camps.

[37] Ms. Joly started to take an on-line administrative course in the fall of 2019. She obtained a job with Kingfisher Resort, working as a clerk and reservations agent, on February 21, 2020. She worked four days a week, eight hours a day. Covid forced the Kingfisher Resort to temporarily close until June 2020.

[38] Mr. Joly stopped working in the oil fields during Covid and returned to live full time in their home in Cumberland. He was unemployed for some time, and then began working for a marihuana corporation and as an on-line entrepreneur.

[39] Mr. Joly's return home stabilized their marriage. He was able to provide more assistance to Ms. Joly in looking after the children and maintaining the household. This provided considerable relief to Ms. Joly.

[40] Ms. Joly returned to work for Kingfisher later in 2020, four days a week, eight hours a day. Mr. Joly purchased a sit/stand desk to assist her in managing her back symptoms at work. She earned approximately \$12,600 from Kingfisher in 2020.

[41] She continued to work at Kingfisher until November 2021. Her hourly rate increased from \$14.60 to \$19.00 per hour. She earned approximately \$28,000 in 2021 working at Kingfisher.

Quantum Dental

[42] In the fall of 2021, Ms. Joly did an on-line course in dental administration and was hired by Quantum Dental immediately after leaving Kingfisher. She was offered a full-time position but felt she could only manage four days a week due to her injuries. She started at \$26 per hour and now receives \$30 per hour, for annual earnings of approximately \$35,000.

[43] Ms. Joly enjoys working at Quantum and plans to continue working there for the foreseeable future.

Loss of Earning Capacity

Legal Principles

[44] Three decisions of the Court of Appeal address the proper approach to assessing damages for loss of earning capacity and determining the impact of contingencies: *Dornan v. Silva*, 2021 BCCA 228; *Rab v. Prescott*, 2021 BCCA 345; and *Lo v. Vos*, 2021 BCCA 421.

[45] In *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 32, the court described a claim for loss of earning capacity in these terms:

[32] ... An award for future loss of earning capacity thus represents compensation for a pecuniary loss. It is true that the award is an assessment, not a mathematical calculation. Nevertheless, the award 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: *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 11; *Ryder v. Paquette*, [1995] B.C.J. No. 644 (C.A.) at para. 8. ...

[46] Ms. Joly need not establish earnings loss on a balance of probabilities since what would have happened between the date of the accident and prior to the trial is essentially hypothetical, as are predictions regarding future losses. As stated in *Smith v. Knudsen*, 2004 BCCA 613 at para. 29:

[29] ... What would have happened in the past but for the injury is no more "knowable" than what will happen in the future and therefore it is appropriate to assess the likelihood of hypothetical and future events rather than applying the balance of probabilities test that is applied with respect to past actual events.

[47] A hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 27; *Morlan v. Barrett*, 2012 BCCA 66 at para. 38.

[48] As set out in *Rab* at para. 47, the three steps for assessing claims for loss of future earning capacity are as follows:

[47] ... The first is evidentiary: whether the evidence discloses a *potential* future event that could lead to a loss of capacity (e.g., chronic injury, future surgery or risk of arthritis, giving rise to the sort of considerations discussed in *Brown*). The second is whether, on the

evidence, there is a real and substantial possibility that the future event in question will cause a pecuniary loss. If such a real and substantial possibility exists, the third step is to assess the value of that possible future loss, which step must include assessing the relative likelihood of the possibility occurring—see the discussion in *Dornan* at paras 93–95.

[49] Justice Grauer commented on and clarified how this three-step process will apply in *Steinlauf v. Deol*, 2022 BCCA 96 at paras. 52–56. He emphasised the test was designed particularly with a view to dealing with cases “where the evidence indicates no loss of income at the time of trial”. He noted, most often, the initial evidentiary step is “a given” because “the event giving rise to a future loss is manifest and continuing at the time of trial”. Where, as here, a plaintiff has sustained injuries that are ongoing and have impaired her capacity to earn income, the first step is satisfied.

[50] Loss of earning capacity will not always result in an actual loss of income; if an accident causes a loss of ability to perform work in a field that the plaintiff is not, and will not become, involved in, the second element of the test will not be made out. The court in *Steinlauf* also noted the second and third elements, too, may be “superfluous” by the time of trial:

[53] The second step, which in practical terms may prove to be the first, is whether, on that evidence, the plaintiff has established entitlement by demonstrating that there is a real and substantial possibility of an event giving rise to a future loss: see, for instance, *Perren v Lalari*, 2010 BCCA 140 at para 32. As this Court explained in *Rab* at para 29, establishing that threshold question, too, is less challenging in some cases than others:

... In cases where, for instance, the evidence establishes that the accident caused significant and lasting injury that left the plaintiff unable to work at the time of the trial and for the foreseeable future, the existence of a real and substantial possibility of an event giving rise to future loss may be obvious and the assessment of its relative likelihood superfluous. Yet it may still be necessary to assess the possibility and likelihood of future hypothetical events occurring that may affect the quantification of the loss, such as potential positive or negative contingencies. *Dornan [v Silva]*, 2021 BCCA 228] was such a case.

Past Loss of Earning Capacity

[51] Ms. Joly says that but for the accident, she would have returned to working full time as a flight attendant in January 2018. The defendant says that there is no loss of income as the stressors that caused her to go on stress leave remained after the accident and would have prevented her from returning to work as a flight attendant had she not been involved in the accident.

[52] I do not accept Ms. Joly would have returned to work as a flight attendant had the accident not occurred. This was not a realistic possibility for Ms. Joly. She tried to continue working as a flight attendant before the accident but was unable to do so because:

1. her husband worked out of town the majority of the time;
2. she had difficulty arranging for childcare for her children for blocks of days;
3. being away from her children for blocks of days was stressful;
4. she and her husband argued about his prolonged absences from home and her lack of support;
5. longstanding difficulties with her parents persisted; and
6. she was overwhelmed by looking after the house and her children on her own.

[53] All of these stressors remained after the accident and would have prevented her from returning to work as a flight attendant.

[54] After the accident she remained on a combination of disability and work graduation/accommodation with WestJet until April 2019, earning approximately \$30,000 per year. She was then unemployed for approximately ten months before finding employment with Kingfisher. She earned approximately \$28,000 per year at Kingfisher, and approximately \$35,000 per year at Quantum Dental in 2022.

[55] In my view, had the accident not occurred, it is likely Ms. Joly would have found alternative employment, similar to what she found with Kingfisher immediately after leaving WestJet. I say this because Ms. Joly has a strong work ethic and wishes to work full time, but required ten months off from work after leaving Westjet to treat and come to terms with the injuries suffered in the accident.

[56] Had she not been injured, it is likely she would not have been unemployed for ten months after leaving WestJet. I assess this probability at 80 percent.

[57] In addition, I find that Ms. Joly's injuries were ongoing and significant enough to prevent her from working on a full-time basis. I say this because:

1. her injuries required significant ongoing rehabilitation prescribed by her health care practitioners. This included physiotherapy, chiropractic care, massage therapy, and acupuncture;
2. when she was required to work more than four days a week to assist her employers, her symptoms became more symptomatic and debilitating;
3. independent medical examinations conducted by two psychiatrists, Dr. Davidson and Dr. Hosseini, concurred that Ms. Joly's injuries could impact her ability to work full time due to pain;
4. a functional capacity evaluation performed by Ms. Mullins established that Ms. Joly demonstrated some physical limitations but working at Quantum or other administrative or clerical roles was sustainable if she limited her work to four days a week. This assessment was based on Ms. Joly's current level of function; and
5. her general practitioner advised her that working four days a week was appropriate. I note this occurred after Ms. Joly had returned to work with Kingfisher.

[58] In my view, had Ms. Joly not suffered injuries in the accident, she would have returned to full-time work—she would have worked five days a week instead of four

days a week. I say this because of the strong work ethic she has displayed from a teenager up to working for WestJet. Ms. Joly would not have worked part time while raising her children if she had not been injured in the accident. Given the availability of work at both Kingfisher and Quantum, and Ms. Joly's circumstances from 2020 to the date of trial, I assess this probability at 100 percent.

[59] Ms. Joly is entitled after-tax loss of income and prejudgment interest for:

1. an 80% probability of losing ten months of after-tax full-time employment income for 2019; which I assess at $(\$28,000/12) * 10 * 0.815$ (18.5% tax rate) * (80%) for a total of \$15,213.33;
2. the after-tax difference between full-time employment income and part-time income for 2020 (adjusted for Covid); 2021, 2022, and 2023 up to the date of trial; which I assess as follows, for:
 - a. 2020 - $\$12,600$ (actual income) * (0.815) (18.5% tax rate) * (.25) (difference between working 5 days compared to 4 days) = \$2,567.25;
 - b. 2021 - $\$28,000$, (actual income) * (0.815) (18.5% tax rate) * (.25) (difference between working 5 days compared to 4 days) = \$5,705.00;
 - c. 2022 - $\$35,000$ (actual income) * (0.815) (18.5% tax rate) * (.25) (difference between working 5 days compared to 4 days) = \$7,131.25; and
 - d. 2023 - $\$10,000$ (actual income) * (0.815) (18.5% tax rate) * (.25) (difference between working 5 days compared to 4 days) = \$2,037.50.

[60] I will leave it to counsel to calculate prejudgment interest on each of these amounts.

Future Loss of Earning Capacity

[61] Ms. Joly is currently working four days a week at Quantum. I have found that this is all that she is capable of working due to her injuries.

[62] If physically able, I believe that Ms. Joly would work full time, that is she would have worked five days a week instead of four days a week. I say this for the same reasons that I concluded she would have worked full time but for the accident in assessing her past loss of earning capacity.

[63] These findings satisfy the first two steps set out by our Court of Appeal in *Rab*.

Contingencies

[64] Dr. Davidson opined that the frequency, intensity, and duration of Ms. Joly’s pain are expected to improve “a little bit more” with an active rehabilitation program. Her pain may be treatable through medial branch blocks and radiofrequency ablation which may provide relief for up to a year after which it would need to be repeated. He opined that he expected Ms. Joly’s ability to adapt and cope with her limitations will result in an improvement in function over time. He characterized her disability as a mild indefinite partial disability with respect to her current role.

[65] Dr. Hosseini opined that Ms. Joly had not yet received optimal treatment for her injuries. In his view, with appropriate treatment he is optimistic that she would return to full function; but there is a possibility of ongoing symptoms even after optimized treatment given the chronicity of her symptoms.

[66] It is clear that Ms. Joly has not received optimized treatment for her injuries. With optimal treatment there is a good prognosis for recovery. However, there remains a real and, in my view, significant possibility of ongoing restrictions on her ability to work. Given the expert evidence, in my view, there is certainly a greater than 50% possibility of recovery. I would assess the positive prognosis of recovery at 60 percent. In my view, the medical evidence does not establish a basis for applying a negative contingency for a worsening of her symptoms.

[67] In addition to a contingency for recovery, I recognize that there are general contingencies that Ms. Joly faces due to premature death, possibility of future injury, and labour market fluctuations. Given her age and work ethic, I would assess her general contingencies at ten percent: see *Omerovic v. Merced*, 2023 BCSC 727 at paras. 105–106, 118.

Quantification

[68] Ms. Joly’s annual income at Quantum for 2022 was \$35,000 per year. Given her recent raise and performance, I estimate her 2023 income at \$40,000. If she were able to work five days per week instead of four days per week, her annual income would be \$50,000. This results in a gap between her actual annual income and her “but for” income of \$10,000.

[69] A majority of people who work in Ms. Joly’s field are younger than 60. It is common for dental administrators to choose to work less than full time. This is balanced against Ms. Joly’s work ethic and the financial needs of her family.

[70] In my view, an appropriate retirement age from full-time employment for Ms. Joly would be age 65. I acknowledge Ms. Joly’s strong work ethic, but, in my view, she would not continue to work full time past the age of 65 if she had not been injured in the accident.

[71] Using the multiplier from the *Law and Equity Act*, R.S.B.C. 1996, c. 253 [LEA], I calculate the present value of Ms. Joly’s loss of future earning capacity as follows:

1. $\$10,000 * 18.6208$ (the present value multiplier from the LEA) = \$186,208;
2. $\$186,208 * .3$ (adjusted for a 60% positive prognosis contingency and a 10% general contingency) = \$55,862.40.

[72] Using these calculations as a starting point, I would assess her loss of future earning capacity at \$55,000.

Cost of Future Care

[73] The purpose of an award for the cost of future care is, so far as is possible with a monetary award, to restore the plaintiff to the position she would have been in had the accident not occurred. The award is based on what is reasonably necessary on the medical evidence to promote the mental and physical health of the plaintiff: *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at paras. 29–30, citing *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.) and *Aberdeen v. Zanatta*, 2008 BCCA 420 at para. 41.

Health Care Providers

[74] Dr. Davidson opined that Ms. Joly has relied heavily on passive modalities without substantial benefit. He recommends at most four passive therapy sessions a year to deal with flare-ups of pain.

[75] Dr. Hosseini did not recommend any passive modalities and felt that Ms. Joly needed to focus on pharmacological therapy and active therapy. With respect to active therapy, there is little need for ongoing therapist involvement depending on her level of knowledge and access to equipment. In his view, use of passive modalities is contraindicated because they result in more flare-ups and are not curative.

[76] I accept the evidence of Dr. Hosseini that, in this case, passive modalities are not medically necessary and that Ms. Joly has been dependent on non-curative treatments that likely have made her difficulties worse.

[77] The Jolys have a large number of equipment for strength training and active workouts in their home. They enjoyed working out together in the past and are knowledgeable with respect to these activities. In my view, it is not necessary for Ms. Joly to receive ongoing assistance from a kinesiologist.

[78] In my view, four sessions a year from a therapist, such as a kinesiologist, physiotherapist, massage therapist, or chiropractor, to assist with her rehabilitation

or to provide flare-up pain relief is appropriate. I would estimate this amount at \$250 per year.

Assistive Items

[79] Ms. Mullen sets out a list of items that Ms. Joly uses including: therabands, physio tape, Graston and rub, cupping kit, massage gun, electric heat pads, back brace, exercise balls, Lakota roll on pain relief, Thermacare wraps, which, along with her medication and heat creams, total approximately \$900.

[80] In my view, this list consists of more of an encyclopedia of items Ms. Joly has used over the years as opposed to a list of items she actually uses. Having said that, I accept that she uses a large number of over-the-counter assistive devices and creams to assist her in staying active. I assess a reasonable amount for ongoing over-the-counter expenditures is \$750 per year.

Loss of Housekeeping

[81] Ms. Mullen did a functional capacity evaluation and determined that Ms. Joly is able to manage the majority of her house cleaning activities with extra time, strategies, and equipment but is not able to complete seasonal tasks outside of her limitations, such as wiping out cupboards and cleaning the oven. Ms. Mullen opined that Ms. Joly requires 16 hours of annual house cleaning assistance for these tasks at an annual cost of \$600.

[82] Ms. Joly did almost all of the housecleaning tasks when her husband worked in the oil fields. However, now that Mr. Joly is no longer working in the oil fields, he is able to assist with some household chores, as one would expect that he would. In my view the services he provides are in accord with what are typically provided by partners. I do not accept his evidence with respect to the amount of household chores he currently provides.

[83] I agree with the opinion of Ms. Mullen on this issue and award ongoing annual household services of \$600.

Contingencies

[84] The annual amount of ongoing care costs totals \$1,600 per year. In my view this should continue for 25 years subject to a 60% contingency for an improvement in her symptoms that would make the care items unnecessary.

Quantification

[85] The prescribed discount rate of two percent for 25 years yields a present value calculator of 19.5235. Therefore, the present value of Ms. Joly's cost of care award is $\$1,600 * 19.5235$ (present value multiplier) $* 0.4$ (modified for 60% contingency that her injuries and function will improve with treatment) = \$12,495.04.

[86] I find that Ms. Joly is entitled to \$12,500 in compensation for the cost of her future care needs.

Non-Pecuniary Damages

Legal Principles

[87] The general principles applicable to non-pecuniary damages were summarized in *Jaehrlich v. Kuechler*, 2019 BCSC 1126 at para. 80:

[80] Non-pecuniary damages are awarded to compensate the plaintiff for pain, suffering, loss of enjoyment of life and loss of amenities. The compensation awarded should be fair to all parties and fairness is measured against awards made in comparable cases. Such cases, though helpful, serve only as a rough guide. Each case depends on its own unique facts: [citation omitted.]

[88] It is neither possible nor desirable to develop a "tariff": *Dilello v. Montgomery*, 2005 BCCA 56 at paras. 39–43.

[89] The principles governing an award of non-pecuniary damages are well settled:

- a) the amount of the award should not depend alone on the seriousness of the injury but upon its ability to ameliorate the condition of the victim considering his or her particular situation;

- b) an appreciation of the plaintiff’s loss is the key and the “need” for solace will not necessarily correlate with the seriousness of the injury;
- c) an award will vary in each case “to meet the specific circumstances of the individual case”;
- d) the inexhaustive list of factors that influence an award includes:
 - i. age;
 - ii. nature of the injury;
 - iii. severity and duration of pain;
 - iv. disability;
 - v. emotional suffering;
 - vi. loss or impairment of life;
 - vii. impairment of family and social relations;
 - viii. impairment of physical and mental abilities;
 - ix. loss of lifestyle; and
 - x. the plaintiff’s stoicism should not, generally speaking, penalize the plaintiff.

(See *Stapley v. Hejslet*, 2006 BCCA 34 at paras. 45–46.)

Impact of the Accident on Ms. Joly

[90] Ms. Joly suffers from chronic pain/injuries to her shoulders, neck, back, and headaches. She had pre-existing anxiety, sleep and mood issues. I agree with Dr. Davidson that the plaintiff has not proven that her anxiety and mood issues were aggravated by the accident. Her most significant mental health issue at this time is

her anxiety as opposed to her mood. I accept her injuries aggravated her pre-existing sleep issues.

[91] Her injuries have had a significant impact on her life specifically:

1. reducing her ability to participate in activities she enjoyed prior to having her children; and
2. negatively impacting her relationship with her husband.

[92] In my view, both of these issues have also been impacted by her pre-existing mental health issues, and she would not have been as active, or have as positive a marriage as she believes she would have, had the accident not occurred.

[93] Ms. Joly testified that she was considering pursuing a breast reduction surgery due to her chronic neck and back pain. She stated that she would not have contemplated such a procedure had she not been injured in the accident. Her counsel suggests this is a factor that should be compensated through non-pecuniary damages.

[94] I do not accept this procedure is appropriate to address injuries suffered in the accident. There are numerous treatments available to Ms. Joly, recommended by the physiatrists, that she has not yet pursued, could alleviate symptoms caused by her injuries. None of the experts have recommended that she pursue breast reduction surgery to alleviate symptoms suffered in the accident.

Comparable Cases

[95] Ms. Joly relies on *Gill v. Borutski*, 2021 BCSC 554, in which a 47-year-old dental receptionist suffered soft tissue injuries in the back and shoulders which led to a chronic pain condition. In addition, the accident caused a significant psychiatric disorder which made her life miserable and caused her a significant vocational impairment.

[96] The court determined that there was a 50% chance that her psychiatric disorder would resolve, leaving her with an ongoing non-disabling chronic pain condition. If that were to occur, the court would award \$110,000; if the prospects of recovery of her psychiatric condition were doubtful, the court would have assessed her damages at \$170,000. Taking a 50% chance of recovery of her psychiatric condition, the court award \$140,000.

[97] The defendant relies on *Johnson v. Heer*, 2020 BCSC 1168 in which a 34-year-old mother and teacher suffered soft tissue injuries to her neck, shoulders, and back that resulted in chronic pain. Her symptoms impacted her ability to participate in her recreational activities but did not impact her ability to work full time as a teacher. The court assessed \$75,000 in non-pecuniary damages.

Analysis

[98] I must assess the impact of Ms. Joly's pre-existing health issues and the positive prognosis for recovery of her injuries caused in the accident in conjunction with the impact that her injuries have had on Ms. Joly's life.

[99] In my view, the degree and impact of Ms. Joly's injuries are more significant than those suffered by the plaintiff in *Johnson*, but not as serious as the condition of the plaintiff in *Gill*.

[100] Considering the legal principles and comparable cases, and applying them to the circumstances of this case, I assess non-pecuniary damages at \$120,000.

Summary

[101] I award Ms. Joly the following damages as compensation for injuries suffered in the accident:

1. \$11,019.58 for special damages, plus interest to be calculated by counsel;
2. \$32,654.33 for past loss of earning capacity, plus interest to be calculated by counsel;

3. \$55,000 for loss of future earning capacity;
4. \$12,500 for cost of future care; and
5. \$120,000 for non-pecuniary damages.

This is a total award of \$231,173.91, plus pre-judgment interest to be calculated by counsel.

Costs

[102] Counsel may apply to appear before me within 30 days of this judgement if they are unable to agree upon costs.

“Thomas J.”