IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Mulvey v. Ross,*
2023 BCSC 1522

Date: 20230830
Docket: 181108
Registry: Victoria

Between:

Deanna Dawn Mulvey

Plaintiff

And

Heidi Lilianne Ross

Defendant

Before: The Honourable Madam Justice W.A. Baker

Reasons for Judgment

Counsel for Plaintiff:	L. Oss-Cech
Counsel for Defendant:	A. Buchanan
Place and Date of Trial:	Victoria, B.C. February 2, 2023 March 1-3 and 6, 2023
Place and Date of Judgment:	Victoria, B.C. August 30, 2023

Table of Contents

I. Introduction

[1] In this action, Deanna Mulvaney seeks damages resulting from the injuries she sustained in a car accident on October 21, 2016. Liability was admitted by the defendant, who called no witnesses before me.

II. Issues

[2] This case raises the following issues:

a) Did the accident cause Ms. Mulvey's injuries?

b) Is Ms. Mulvey entitled to any damages?

III. Analysis

A. Did the accident cause Ms. Mulvey's injuries?

1. Ms. Mulvey's abilities and health pre-accident

[3] Ms. Mulvey had no physical complaints or limitations prior to the accident. She had been in a car accident when she was 11 or 12 years old in which she injured her hip, but that injury had healed. While Ms. Mulvey testified her hip still periodically bothered her, she also confirmed that her hip caused her no limitations in the three years before the accident.

[4] Ms. Mulvey was a single parent of a five year old son at the time of the accident. She was a physically active parent, who took her son on hikes, climbed on rocks with him, gave him piggy back rides, and swam with him. Ms. Mulvey's mother confirmed that Ms. Mulvey was very active with her son. Ms. Mulvey routinely brought her son to her parents' home where the family swam, played games outside, hiked, camped, rode quad bikes, and went boating and inner tubing.

[5] At the time of the accident, Ms. Mulvey was working as a residential painter. This was a physical job. She was required to lift 50lb cans of paint out of a cart, and routinely climb up and down ladders while she fixed light fixtures, repaired holes in the walls, and painted walls and ceilings. The work was repetitive and required her

to hold her arms over her head, reach forward and overhead, stoop, kneel, and perform other physical tasks.

2. Injuries caused by the accident

[6] In the accident, Ms. Mulvey was hit from behind during rush hour on the Island Highway. The traffic was moving slowly. The car in front of her braked and Ms. Mulvey braked in response. Ms. Mulvey was looking at her mirror on her left side when she was struck from behind by the defendant. The impact pushed her body forward and back, and she hit her head on the head rest. Ms. Mulvey's car had to have its rear bumper replaced as a result of the accident.

[7] As summarized by the court in *Kallstrom v Yip*, 2016 BCSC 829, at para. 318, the general test for causation is the "but for" test, which requires the plaintiff to demonstrate that their injury and loss would not have occurred without the defendant's negligence. However, this test should not be applied too rigidly, as causation is a practical question of fact that can be determined using ordinary common sense rather than scientific precision.

[8] I find that Ms. Mulvey has established on a balance of probabilities that she suffered a number of injuries in the accident caused by the defendant, some of which resolved quickly, and some of which continue to impact her today. In particular, Ms. Mulvey suffered some immediate minor cognitive impairments from a concussion, which were not of lasting duration. She suffered soft tissue injuries resulting in chronic myofascial pain in her cervical spine and right shoulder girdle, and right ulnar nerve irritation, which continue to impact her physical abilities. Ms. Mulvey continues to suffer ongoing headaches and dizziness associated with her soft tissue injuries. I make these findings based on the following evidence.

[9] Dr. Corrie Graboski was qualified as an expert in physical medicine, rehabilitation, and electromyography, as well as in the diagnosis and treatment of brain injuries. She examined Ms. Mulvey in December 2020, and diagnosed Ms. Mulvey with the injuries I have described above. Dr. Graboski identified a consistent temporal relationship between the date of the accident and the onset of the

symptoms described by Ms. Mulvey and noted in her clinical records following the accident. Dr. Graboski noted no abnormal or chronic soft tissue injuries in Ms. Mulvey's records or history prior to the accident which would have impacted her recovery from the injuries she suffered in the accident, and noted that Ms. Mulvey had diligently pursued an active rehabilitation program and was compliant with all treatment recommendations. Ms. Mulvey had no post-accident factors which impacted her recovery.

[10] While the defence took issue with Dr. Graboski's diagnosis of concussion following the accident, I am satisfied that Dr. Graboski's expertise allows her to draw the conclusion she did, and I accept Dr. Graboski's diagnosis. In any event, it is not the impact of the concussion which brings Ms. Mulvey before the court in this matter. Her continuing headaches and dizziness are attributed to her whiplash (soft tissue) injuries, which are consistently recorded in Ms. Mulvey's visits to health practitioners following the accident.

[11] I am also satisfied that Dr. Graboski properly reviewed the clinical records of the various health practitioners and conducted her own physical assessment of Ms. Mulvey. I am satisfied that Dr. Graboski is entitled to rely on conclusions made by Ms. Mulvey's treating practitioners, and assign the weight to those conclusions as she deemed appropriate within her assessment. Doctors routinely rely on the assessments made by other specialists and practitioners when conducting their own assessment of a patient. I do not agree with the defence that Dr. Graboski improperly relied on the assessments made by Ms. Mulvey's treating physicians, or that she failed to make her own independent assessment of Ms. Mulvey's injuries.

[12] Ms. Mulvey described the impact of the injuries on her ability to continue to work as a painter, and on her ability to lead active life with her family. Ms. Mulvey attempted to paint her own home following the accident, but found she no longer had a steady hand and the repetitive nature of the work left her in pain for two to three days following the work. She was unsteady due to dizziness and was not safe to use a ladder. She has difficulty using a computer for more than a short period of time

because it causes headaches. She cannot watch TV for more than one hour a day without getting headaches.

[13] Ms. Mulvey's mother described Ms. Mulvey's very active, physical life before the accident. Since the accident, she has seen a change in Ms. Mulvey's behavior and abilities. Ms. Mulvey is no longer able to ride quad bikes or go inner tubing. She doesn't play games in the back yard any more. She has become short tempered with her son, particularly when he wanted to engage in physical play like she did before the accident. Ms. Mulvey's mother observed Ms. Mulvey unable to continue to do the physical work she did before the accident, including painting, sanding and working on houses.

[14] Mr. Phil Towsley was qualified as an expert in functional work capacity evaluation, occupational therapy, and cost of future care analysis. Mr. Towsley conducted his assessment of Ms. Mulvey in September 2020. Mr. Towsley assessed Ms. Mulvey's range of motion and functionality of her upper limbs. Her forward and overhead reaching, gripping, handling and fine motor manipulation were functional throughout testing, but reaching caused pain in her upper trapezius and neck.

[15] Mr. Towsley assessed her lower limb function and found that while balancing, stair and ladder climbing, and walking were functional during testing, issues with her vestibular-ocular reflex, motion sensitivity and convergence insufficiency may result in dizziness making working on a ladder unsafe.

[16] With respect to body positioning and mobility, Mr. Towsley assessed that prolonged neck flexion increased Ms. Mulvey's pain, and her tolerance for neck extension was considerably reduced. He assessed Ms. Mulvey's strength tolerance as full light strength capacity, with select aspects of medium strength capacity.

[17] During and following the testing by Mr. Towsley, Ms. Mulvey reported the onset of pain, tightness, and throbbing in her back, right shoulder, right elbow, and numbness in her right fingers and toe. She also reported headaches.

[18] Overall, Mr. Towsley was of the opinion that Ms. Mulvey's "demonstrated functional limitations and behaviors closely correlated with her symptom and disability reports. Reported symptom levels matched movement patterns and behaviors."

[19] The defence challenged the reliability of Ms. Mulvey's evidence, due to minor inconsistencies between prior statements about her medical history and treatments. I do not find Ms. Mulvey's memory to be generally unreliable. No person can be expected to remember in detail every time they visited a health practitioner. I am satisfied that Ms. Mulvey's recollection of the accident, and the injuries she suffered is generally reliable. The defence attempted to challenge Ms. Mulvey because one doctor, Dr. Kirby, described Ms. Mulvey's work as involving scaffolding. I do not accept this challenge to Ms. Mulvey's credibility or reliability. Ms. Mulvey was clear she was a commercial, residential painter and denied telling Dr. Kirby that she used scaffolding. Dr. Kirby did not testify and the source of his notes regarding scaffolding was not proven. It is quite possible he made an assumption about the structures used by Ms. Mulvey in her commercial painting work. The defence also challenged statements made by Ms. Mulvey about her education; however, the inconsistencies identified by the defence, in my view, are not material and were adequately explained by Ms. Mulvey under cross examination.

[20] The defence argued that this was a low impact accident, and therefore I should be inclined to find Ms. Mulvey's injuries are less severe than her evidence would otherwise support. I decline to adopt this submission of the defence. The Court of Appeal in *Greenway-Brown v MacKenzie*, 2019 BCCA 137 at paras. 24-30 clearly stated that any assessment of the severity of impact on evidence of injury must be rooted in evidence and not in speculation. In my view, the defence submission invites me to engage in precisely the kind of speculation about the extent of Ms. Mulvey's injuries which could flow from this accident which was the subject of the court's negative findings in *Greenway-Brown*. There is no evidence before me which would support a conclusion that Ms. Mulvey's injuries were caused by

anything other than the accident at issue, or have been overstated by Ms. Mulvey at trial or to her treating physicians over the years.

3. What is Ms. Mulvey's prognosis?

[21] Dr. Graboski was of the opinion that Ms. Mulvey's cognitive difficulties had resolved as of the date of her assessment. I saw nothing at trial that would suggest this opinion was incorrect two years later at the date of trial.

[22] Dr. Graboski was of the opinion that Ms. Mulvey will continue to suffer from headaches, neck pain and shoulder girdle pain after engaging in physical activity that involves her arms or static positioning. Repetitive activities will exacerbate her symptoms, as will strenuous activities and the use of her arms above her head. Ms. Mulvey is unlikely to be able to resume the same level of activity or productivity as she did prior to the accident. While with further management she may be able to increase her tolerance, such increases will likely be small and her recovery will be incomplete.

[23] Having heard the evidence of the witnesses at trial as to Ms. Mulvey's current abilities, I am satisfied that Dr. Graboski's opinion from 2020 is realistic and reliable. I find on the balance of probabilities that Ms. Mulvey's injuries, including chronic pain arising from soft tissue injuries to her neck and shoulders, and ongoing headaches and periodic dizziness, are permanent and will not fully resolve in future.

B. Is Ms. Mulvey entitled to damages?

[24] The plaintiff claims non-pecuniary damages, and the following pecuniary damages: loss of income earning capacity (past and future), cost of future care, and special damages.

1. Non-pecuniary damages;

[25] Non-pecuniary damages are awarded to compensate a plaintiff for pain, suffering, loss of enjoyment of life, and loss of amenities. As stated by our Court of Appeal in *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46:

> [46] The inexhaustive list of common factors cited in *Boyd* [*Boyd v. Harris*, 2004 BCCA 146] that influence an award of non-pecuniary damages includes:
>
> (a) age of the plaintiff;
>
> (b) nature of the injury;
>
> (c) severity and duration of pain;
>
> (d) disability;
>
> (e) emotional suffering; and
>
> (f) loss or impairment of life;
>
> I would add the following factors, although they may arguably be subsumed in the above list:
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> (g) impairment of family, marital and social relationships;
>
> (h) impairment of physical and mental abilities;
>
> (i) loss of lifestyle; and
>
> (j) the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff: *Giang v. Clayton*, [2005] B.C.J. No. 163 (QL), 2005 BCCA 54).

[26] Ms. Mulvey seeks $160,000 in non-pecuniary damages. The defence agrees some non-pecuniary damages are properly awarded, but submits the correct award is between $70,000 and $90,000.

[27] Ms. Mulvey relies on *Risling v Riches-Glazema,* 2016 BCSC 2423*; Gurung v. Trampleasure,* 2020 BCSC 1643*; Jones v. Rossner,* 2020 BCSC 2056*; Bieling v. Morris,* 2021 BCSC 1905*; and Goode v. Finer,* 2022 BCSC 1477 where awards ranged from $130,000 to $160,000 for plaintiffs suffering from injuries including chronic pain, headaches, and psychological injuries.

[28] The defence relies on *Dostal v. McLeod,* 2020 BCSC 1145*; Bischoff v. Gudaitis,* 2019 BCSC 2169*; Hale v. Keyes,* 2020 BCSC 559*; Sharma (Litigation Guardian of) v. Kandola,* 2019 BCSC 349*; Palmer v. Ansari-Hamedani,* 2019 BCSC 114*; and Matthews v. Doddard,* 2022 BCSC 1386 where awards ranged from $70,000 to $90,000 for non-pecuniary damages in cases with a range of physical and psychological injuries.

[29] Each case is unique. Non-pecuniary damages must be assessed taking into account the unique factors arising in the case at bar. Of the cases noted above, I find the following to be useful comparators: *Risling, Gurung, Goode, Dostal,* and *Hale*.

[30] Ms. Mulvey was 28 at the time of the accident. She was a very active person, and had a happy and close relationship with her young son. She loved being active, and spent her weekends and spare time hiking, playing outdoor games, swimming, inner tubing and playing with her son. She was upbeat and energetic. She worked a physical job as a residential painter, which required her to lift heavy cans of paint, climb ladders, and perform repetitive tasks. She loved her job and expected to keep working in that field.

[31] Since the accident, Ms. Mulvey has become short tempered with her son and her friends and family. She is no longer the energetic, happy person she once was. Before the accident Ms. Mulvey was social, and liked to spend time with friends and family. Immediately after the accident she became withdrawn and irritable. This has improved, but she is no longer the same happy, social person she was before. She met her husband after the accident, and has found that their intimacy is affected by her injuries. She is sad that she cannot participate in intimate relations in the way she did before the accident.

[32] Ms. Mulvey's physical activities are much more limited than before. She feels a sense of loss regarding her son, as she was so limited during his younger years. She could not continue her physical activities with him, such as giving him piggy backs, taking him climbing on rocks and swimming, and playing actively with him. She has suffered from headaches since the accident. While they have improved over time, she still experiences headaches two to three times a month, and this has impaired her life. She experiences pain every day. She has one muscle lump behind her right shoulder blade that feels like it never goes away, and the pain continues up into her neck. This pain does not go away, and increases with activities. While some

of her symptoms have improved, she will continue to be limited in her activities and will suffer from chronic pain for the rest of her life.

[33] I am satisfied that an appropriate award that addresses the impact the injuries have had on her enjoyment of life is $110,000.

2. Loss of earning capacity

[34] The purpose of an award for loss of earning capacity is to restore the plaintiff, as best as possible, to the position she would have been in had the accident not occurred. The plaintiff must establish an impairment in her earning capacity, and that there is a real and substantial possibility that the diminishment in earning capacity will result in a pecuniary loss: *Perren v. Lalari*, 2010 BCCA 140.

[35] The court in *Brown v. Golaiy* (1985), 26 BCLR (3d) 353 (SC) at para. 8 set out the factors to consider in assessing a loss of earning capacity:

> The means by which the value of the lost, or impaired, asset is to be assessed varies of course from case to case. Some of the considerations to take into account in making that assessment include whether:
>
> 1. the plaintiff has been rendered less capable overall from earning income from all types of employment;
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> 2. the plaintiff is less marketable or attractive as an employee to potential employers;
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> 3. the plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to him, had he not been injured; and
>
> 4. the plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market.

[36] Both past and future loss of earning capacity address the same loss. However, there are differences in how this loss is assessed before trial and after trial. To the extent past loss of capacity relies on facts which are capable of proof, those facts must be proven on the balance of probabilities. To the extent past loss of capacity relies on hypothetical facts, the court must be satisfied that there is a real and substantial possibility of such facts occurring. The court may assess the likelihood of such hypothetical facts occurring, and discount or increase an award to reflect such contingencies. Future losses are almost always based on hypothetical

facts, and are assessed on the standard of real and substantial possibility with consideration of relevant contingencies: *Rousta v. MacKay*, 2018 BCCA 29 at para. 14.

a) Pre-trial loss of earning capacity

[37] At the time of the accident, Ms. Mulvey had been working as a painter, earning an average of $1,338.21 per month. After the accident in October 2016, Ms. Mulvey did not work until the end of 2018, or for 26.5 months. Ms. Mulvey claims 26.5 months at $1,338.21, for a total of $35,462.56. After discount for a nominal tax rate of 15%, Ms. Mulvey claims a net award of $30,143.18 for pre-trial loss of earning capacity.

[38] Beginning in 2019, Ms. Mulvey opened a day care business in her home and, as such, Ms. Mulvey makes no pre-trial loss of earning claim from 2019 to the date of trial.

[39] The defence submits that the medical records do not support a medical incapacity for work. Immediately after the accident, Ms. Mulvey was advised by her doctor to take two weeks off work as a painter. This was extended for a further three weeks in December 2016. In January 2017, her doctor again wrote a note indicating she was not able to work as a painter, to be reassessed in February 2018. In April, June and August, her doctors continued to write notes that she was unable to return to painting or using ladders or working from heights. In February 2018 her doctors confirmed that she should not be working on ladders or from heights.

[40] While the defence does not argue that Ms. Mulvey ought to have returned to her old position doing residential painting, they are critical that Ms. Mulvey did not seek alternate accommodated work, such as office work, or seek some other kind of painting job that did not require the use of ladders. The defence points to Ms. Mulvey’s daycare business she started in late 2018, and suggests she could have started this work or something similar much earlier than she did.

[41] I do not agree Ms. Mulvey acted unreasonably by not returning to her painting job. I accept that Ms. Mulvey is not physically able to continue that line of work, as it involves heavy lifting, climbing ladders, and repetitive motions which aggravate her condition. Throughout 2016, 2017 and into 2018 Ms. Mulvey was assessed by her doctors as being unable to return to her work as a painter. I find Ms. Mulvey did not act unreasonably in not returning to work while she waited to see if she would recover from her injuries.

[42] With respect to Ms. Mulvey's ability to work in an office, I accept Ms. Mulvey's evidence that she cannot sit for extended periods of time working on a computer as this will trigger her headaches. As such, moving to a desk job was not realistic following the accident.

[43] Ms. Mulvey did not complete high school before her son was born. She tried to complete high school when her son was young, before the accident, but due to her focus on her child at the time, she did not complete the program. In approximately 2020, she again tried to complete her high school program through an online course, but found it too difficult to concentrate on the computer without getting headaches. As such, she does not have a high school diploma.

[44] In determining whether Ms. Mulvey has established a pre-trial loss of capacity, I am satisfied on a balance of probabilities that Ms. Mulvey would have continued residential painting through to the end of 2018 if she had not been in the accident. I am satisfied that, as a result of the accident, Ms. Mulvey was unable to return to her work as a painter. I am satisfied that the injuries she suffered greatly reduced the opportunities which might otherwise be available to her to work in an office. I find that Ms. Mulvey has established a pre-trial loss of earning capacity in the amount of $30,000, which represents a very modest income over 26.5 months, consistent with her prior earnings and education level. This award is net of income tax.

b) Future loss of earning capacity

[45] In *Rab v Prescott*, 2021 BCCA 345 the court of appeal summarized the three step process to be engaged when determining claims for loss of future earning capacity:

> [47] From these cases, a three-step process emerges for considering claims for loss of future earning capacity, particularly where the evidence indicates no loss of income at the time of trial. 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.

[46] Ms. Mulvey has established that she will suffer from chronic pain in her neck and shoulders, and ongoing headaches and dizziness. These injuries are permanent and limit her ability to continue in a physical occupation such as painting. These injuries also limit her ability to work in sedentary office job where she would be required to use a computer for extended periods of time. Ms. Mulvey is limited in employment options available to her, and is less attractive as an employee due to her limitations.

[47] While Ms. Mulvey did not complete high school, she has a long history of work starting in her teen years. She worked in restaurants and retail jobs for a number of years, and then began painting. Ms. Mulvey could not remember if she worked full time or part time, but her tax returns certainly suggest she worked part time at these jobs. She stopped working when she was pregnant, and did not return to work. Her child's father told her to take time off work and he would support her. That relationship failed in the summer of 2012, and Ms. Mulvey went on social assistance. She remained on social assistance until her son was three and a half.

[48] In 2015 Ms. Mulvey took a legal assistant's course. She completed all the course work, but did not complete the program due to a dispute about work she did on one assignment. The school suspected she cheated, which Ms. Mulvey disputes.

In addition, Ms. Mulvey failed an accounting course, which she attributed to the fact she had to miss mandatory attendance due to her son's illness. Ms. Mulvey was unable to find a job working as a legal assistant or in an administrative position. She relied on her family to assist her financially.

[49] In 2016 Ms. Mulvey began working as a painter again, and she continued in that job until the accident. She worked approximately 20 hours a week. Ms. Mulvey testified that she enjoyed painting and hoped to start her own residential painting company. Following the accident, Ms. Mulvey did not work until late 2018.

[50] In late 2018 Ms. Mulvey began a small daycare in her home. This began in November or December 2018 when she started watching one boy. In 2019 she added to her business, and began watching one child full time, one child part time, and one child after school. She earned $14,000 from her business in 2019. In 2020 and 2021, she was impacted by Covid, as no children were in daycares for an extended period of time. She earned $5,780 from her business and received $20,000 in CERB funding in 2020. She received $6,680 from her business and $18,400 in CERB in 2021. In 2022 her business picked up again. She watches between three and four children. She is not licenced, and so is limited to a maximum of four children.

[51] The children in Ms. Mulvey's daycare are between the ages of six and eight. She is not required to physically pick them up. Ms. Mulvey found that working with younger children, where she had to be more physically active and pick them up, aggravated her symptoms. As such, she is limiting herself to older children.

[52] Ms. Mulvey testified that if she had not been in the accident, she would not be running a day care. She would be continuing as a painter.

[53] Ms. Mulvey has also started working one hour a day as a playground supervisor over the noon hour at a local school. She makes $24/day for that work, and testified that the work does not aggravate her symptoms. Ms. Mulvey testified that she would like to work as an educational assistant with special needs children.

[54] Mr. Towsley was of the opinion that Ms. Mulvey does not meet the demands of a residential painter. He was of the opinion that Ms. Mulvey may be able to work in an administrative position in the future, but she would require accommodations to address her neck, shoulder and elbow pain.

[55] Dr. Graboski did not forsee limitations with Ms. Mulvey's after school care business. She also recommended accommodations to improve her tolerance should Ms. Mulvey move to a legal assistant position. Dr. Graboski opined that work as an education assistant or day care operator might be a better fit for Ms. Mulvey's abilities. However, she also noted that Ms. Mulvey will have a decreased tolerance in most jobs, will require regular breaks, and is at increased risk for sick days due to headaches.

[56] I am satisfied that there is a real and substantial possibility that Ms. Mulvey's injuries will cause a pecuniary loss. I am satisfied that Ms. Mulvey has lost the ability to pursue her chosen career as a painter. It is not clear from the evidence that Ms. Mulvey would have succeeded as a legal assistant. However, I am satisfied that some administrative position would have been available to her, and that is now compromised due her limits in working at a computer for extended periods of time.

[57] The value of Ms. Mulvey's potential pecuniary loss is to be determined by assessing the relative likelihood of that loss occurring.

[58] Mr. Wickson, an economist, determined the present value of average Canadian women working in occupations including painting at approximately $606,200. Mr. Wickson testified that a painter Ms. Mulvey's age and education level would earn approximately $38,000 annually. He agreed that he assumed she had completed her legal assistant diploma, and that if she had not completed that diploma it may change his opinion. Mr. Wickson's calculation incorporates statistical data to make allowances for unemployment, possible part-time work, and non-participation in the workforce.

[59] Mr. Wickson testified that a full-time minimum wage job, at $15.60/hour, would earn approximately $31,000 annually. The present value of a full-time minimum wage job would be approximately $500,000.

[60] Mr. Wickson agreed that a full-time administrative assistant would earn a median annual salary of approximately $51,000, which had a present value of $840,000.

[61] I find on the evidence before me, Ms. Mulvey's injuries have deprived her of her career in painting. The present value of that loss is approximately $600,000, based on an annual income of $38,000. However, that is not the end of the analysis. I must also consider what economic opportunities remain open to her notwithstanding her injuries.

[62] If Ms. Mulvey continues her daycare business, and playground supervision job, her annual income will reasonably be in the range of $20,000, based on her past earnings. A full-time minimum wage job would result in an annual income of $31,000.

[63] The medical experts were of the opinion that Ms. Mulvey would be able to pursue a career as a classroom assistant, or an administrative assistant, albeit with some reasonable accommodations. Ms. Mulvey has expressed interest in obtaining further work as a classroom assistant, which I accept is a real and substantial possibility. I also accept there is a real and substantial possibility that Ms. Mulvey in her lifetime will be able to move to an administrative assistant position, with some accommodations.

[64] Ms. Mulvey submits that $300,000 is a reasonable future wage loss award. This award represents approximately the difference between Ms. Mulvey's current annual income of $20,000, and the annual income for a painter of $38,000. While I agree that is a reasonable starting position, I also find that a positive contingency must be applied to account for the real and substantial possibility that in the future Ms. Mulvey will increase her annual income to at least an amount equal to minimum

wage, by becoming a classroom assistant or an administrative assistant. I apply a 20% contingency to the loss of $300,000 to reflect the likelihood of these possibilities materializing. In the result I award Ms. Mulvey damages for future loss of earning capacity in the amount of $240,000, an amount which I find is fair and reasonable to both parties.

3. *Cost of future care*

[65] Any claim for cost of future care must be medically justified, and must be reasonable to both parties: *Milina v. Bartsch*, (1985) 49 B.C.L.R. (2d) 33. The plaintiff is entitled to services, medications and other items of care that are reasonably necessary to preserve and promote her mental and physical health, and which she is likely to access in the future: *Sendher v. Wong*, 2014 BCSC 140, para 192-195.

[66] Ms. Mulvey testified that she continues to take Advil as pain medication, and would like to access physiotherapy in the future.

[67] Ms. Mulvey testified that she takes between 12-15 Advil tablets each month. Ms. Mulvey asserts a present value of $4,285.17 (inclusive of tax) for a yearly cost of $120.89 for Advil. This yearly cost is based on a monthly consumption of 30-40 tablets, which is double the amount actually used by Ms. Mulvey. I accept Advil is a reasonable future care item which Ms. Mulvey will access in the future, and I award $2,000 as a reasonable estimate of the present value of this care item.

[68] Ms. Mulvey attended physiotherapy regularly from November 2016 to March 2017. Mr. Towsley recommended that Ms. Mulvey continue to attend physiotherapy in the future. However, Ms. Mulvey has taken no steps to engage in physiotherapy in the six years after the accident, and I am not satisfied that Ms. Mulvey is likely to access physiotherapy in the future. I decline to award any future care costs related to physiotherapy.

4. Special damages

[69] Ms. Mulvey claims special damages in the amount of $6,477.59. The defence agrees to $2,003, but disputes the charges relating to glasses and vision related expenses, as well as naturopath treatments. I am satisfied that Ms. Mulvey's vision related problems, which are related to the dizziness she suffered as a result of the accident, are proper special damages. I am also satisfied that Ms. Mulvey's naturopath treatments related directly to her pain symptoms arising from her injuries, and are properly recoverable as special damages.

IV. Conclusion

[70] Ms. Mulvey is awarded the following damages against the defendant:

a)	Non-pecuniary damages	$110,000
b)	Past loss of earning capacity	$30,000
c)	Loss of future earning capacity	$240,000
d)	Cost of future care	$2,000
e)	Special damages	$6,478

[71] The total damages are awarded in the amount of $388,478.

[72] If the parties wish to make submissions on costs, they may do so in writing within 30 days of this judgment. If I receive no submissions on costs, I award costs to Ms. Mulvey at Scale B.

"W.A. Baker J."