IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Whyte v. Morin,***
2007 BCSC 1329

Date: 20070905
Docket: M052373
Registry: Vancouver

Between:

Jan Whyte

Plaintiff

And

Corey Rhylin Morin

Defendant

Before: The Honourable Madam Justice Lynn Smith

Reasons for Judgment

Counsel for Plaintiff	W. Mussio
Counsel for Defendant	M. Dong
Date and Place of Trial:	May 29, 30, 31 and June 1, 2007 Vancouver, B.C.

INTRODUCTION

[1] On April 29, 2004, Jan Whyte was with her common law spouse, Dan Johnson, in a crosswalk in Vancouver. A car threatened to hit both of them and Mr. Johnson pushed Ms. Whyte away from the path of the car. She landed on her left hip and arm. Mr. Johnson was struck by the car and was treated in hospital. Ms. Whyte did not obtain treatment in hospital but also suffered some injuries. Ms. Whyte, the plaintiff, now seeks damages for those injuries from the defendant, the driver of the vehicle.

[2] The defendant does not dispute liability. The sole issue to be determined is the damages to which the plaintiff is entitled.

[3] The plaintiff's position is that she suffered a neck injury in the accident which has led to ongoing pain in the neck, upper back and head. She also suffered minor injuries to her left shoulder and wrist, abrasions, numbness in the hands and some jaw complaints. She says that she has developed general body aching and fatigue, diagnosed as fibromyalgia or chronic pain syndrome.

[4] The defendant does not dispute that the plaintiff suffered some injuries in the accident, but disputes the diagnosis of fibromyalgia syndrome and disputes that the symptoms of general body aching that have arisen were caused by the accident.

[5] The plaintiff's position is that she has lost income since the accident, and that her ability to earn income in the future has decreased. The defendant's position is that Ms. Whyte has been as employed as she has wished to be and has suffered

only minor income loss; further, that she has not established loss of capacity to earn income in the future.

EVIDENCE AND FINDINGS OF FACT

The Plaintiff's Evidence

[6] Ms. Whyte testified that she was born on May 4, 1964, and that she has two children from a previous marriage and two stepchildren. She has worked as a legal secretary or paralegal since taking legal secretary training at Douglas College in 1983, both full-time at a number of firms, and on ad hoc assignments as a free-lancer.

[7] Ms. Whyte previously suffered injuries to both wrists, her neck and lower back caused by a motor vehicle accident in 1997. She was in another minor accident in 2000 which may have caused a slight aggravation of the wrist injury. She says that she had recovered from the effects of both those accidents and was in good health at the time of the accident in 2004.

[8] The plaintiff gave evidence that she was air-borne after Mr. Johnson pushed her out of the path of the oncoming car, and landed on her left hip and arm on the pavement. She felt an ache in her shoulder while at the hospital with her spouse but not so much that she sought medical care; she said she was more concerned about him. When she got home she saw a red mark on her left hip and a slight abrasion on her right hand.

[9] In the day or two after the accident she began to experience nagging neck pain. She went to see a doctor at the Chaldecott Medical Clinic, which was nearby, and took anti-inflammatory medication as recommended.

[10] Ms. Whyte at that time was working at MacKenzie Fujisawa. She returned to work the following Monday, but found the pain to be terrible. Although her shoulder pain resolved within a month or so, and abrasions on her left hand and hip did not cause her difficulty, the neck pain continued, as did the headaches. She took a month off work beginning at the end of May 2004 in order to rest, do physiotherapy, and recover from the accident. She returned to work in July 2004, but continued to experience pain.

[11] Ms. Whyte was given notice of termination by her employer on July 23, 2004. On July 26, 2004, she began working at Arvay Finlay where she remained until the end of December 2005. From January 1, 2006 to the end of October 2006 she worked at Jenkins Marzban (some of the time for four days per week) and from November 2006 to the end of January 2007 she worked at Marquardt & Company, filling in for an assistant who was on medical leave. She is currently working at Lang Michener.

[12] Ms. Whyte's evidence is that she has continued to suffer pain from the date of the accident to the present. She testified, however, that her symptoms have changed from time to time. For some periods they have been more or less under control, when she has been able to rest and exercise, and undertake acupuncture treatments. For other periods they have been out of control, particularly when it has

been necessary to work long hours under stress, doing things that aggravate the injuries, such as prolonged sitting and keyboarding, lifting, or using a manual cerlox machine. She testified that in September 2006 she developed general body aches, which increased in November or December of that year, and that she still experiences those symptoms, with aching sometimes concentrated in her back and forearm. She takes muscle relaxants and pain medication as well as anti-inflammatory medication.

[13] Ms. Whyte said that her level of fatigue at the end of a working day is high, and that she typically is unable to do anything in the evening except go to bed by 8:00 p.m. She has gained about 30 pounds, she says, due to lack of activity. She agreed on cross-examination that she drinks alcohol and said that it relaxes her and relieves the pain. However, she said that she has modified that practice since she received Dr. le Nobel's report (which will be described later) and decided to make a major lifestyle change, including a move to White Rock with her family in November 2006.

[14] Ms. Whyte continued to seek treatment after the accident at the Chaldecott Medical Clinic, not from her usual family doctor, Dr. Shirley Schwab. She saw Dr. Jenkins or Dr. Tai there on April 30, 2004, May 12, 2004, May 18, 2004, August 14, 2004, November 23, 2004, and August 24, 2005. She also saw Dr. Schwab on a number of occasions from February 24, 2005, through to April 2007, but most of her visits to Dr. Schwab related to matters other than the injuries from the accident (such as stress, emotional issues and gastric upset).

[15] The plaintiff also received physiotherapy treatment in July 2004, acupuncture in 2005 and some massage therapy in 2006.

[16] On cross-examination, the plaintiff agreed that on her last visit to Dr. Tai at the Chaldecott Clinic, in August 2005, she felt she had improved to 75%. She said, however, that the neck pain increased after August 2005, probably exacerbated by her work and the driving she did on weekends to visit her son and family members in the United States.

[17] Ms. Whyte agreed on cross-examination that after the prior accident in 1997 she had suffered fatigue, confusion, memory problems, anxiety and depression – problems similar to those following the accident at issue in this case. She testified, though, that all of those problems were resolved by 1999. She agreed that she had experienced pain in her neck prior to the motor vehicle accident, and that she had injured her neck, back and wrists in the 1997 accident and her neck and back in the 2000 accident. She said that the injuries in the 1997 accident interfered with her work for a time, but that she was back to her usual hours by 1998. The 2000 accident led to problems with her wrists and made working with binders difficult, but she did not recall taking time off work.

[18] Prior to the accident, Ms. Whyte testified, she was physically active, including participating in a mini-triathlon, tennis, volleyball and snowboarding. She said that before the accident she did most of the housework, but now they have house and yard help once a week (a benefit available to her common law spouse) and her only household activities are doing her own laundry and some cooking on weekends.

[19] Ms. Whyte testified that she finds it difficult to meet the demands of a legal assistant or paralegal job because of the need to sit and type for lengthy periods, and because of the physical demands which are sometimes imposed (such as moving heavy files and binders). At the date of trial she was working at Lang Michener, in what she described as an apprenticeship position as assistant human resources manager. This position, she feels, is more consistent with what she is able to do, but pays less than most of her previous positions in recent years.

Medical Opinion Evidence

Dr. le Nobel

[20] Dr. John le Nobel, a physical medicine and rehabilitation specialist, saw Ms. Whyte on May 17, 2006, at the request of plaintiff's counsel. He testified by way of a videotaped deposition on May 24, 2007.

[21] In his report, Dr. le Nobel stated that, based on the time elapsed since the plaintiff was injured and the continuing symptoms she reported, she is affected with a chronic pain condition. He said that condition causes headaches (in keeping with cervicogenic headache), neck pain (in keeping with chronic soft tissue pain), pain in the upper back (due to a combination of referred pain from the cervical spine as well as local trauma at the time of the pedestrian accident) and numbness into her right upper limb (consistent with diffuse musculoskeletal injuries). He found Ms. Whyte to be "deconditioned with weight gain, shortness of breath and loss of muscle strength and endurance, on account of activity restriction …." He recommended further treatment in order to reduce the deconditioning, including a regular stretching

program, core muscle strength training, and non-impact cardiovascular exercise. He also recommended that she have access to medications and to physical treatment measures, as well as to assistance from a fitness trainer and physiotherapist on a liberal basis.

[22] This witness agreed on cross-examination that the plaintiff's prognosis might be more positive if she improved her cardiovascular fitness, lost weight and obtained assistance with her alcohol habit, and that stressors in her life would affect her outcome and prognosis.

[23] However, Dr. le Nobel's opinion is that the prognosis is guarded: while the plaintiff might be able to regain a significant portion of her lost fitness, full return to all of her pre-accident capabilities in a symptom-free state was not anticipated.

Dr. Tai

[24] Dr. Linda Tai is a family physician who treated the plaintiff at the Chaldecott Clinic in connection with the April 2004 accident. Another physician in that clinic, Dr. Heather Jenkins, first saw Ms. Whyte on April 30, 2004 and found good range of motion in her left hip but decreased range of motion in her left shoulder, and a tender left trapezius muscle. Use of Tylenol #3 was recommended. On May 12, 2004, Dr. Tai found Ms. Whyte to have symptoms of cervical soft tissue strain and possible impingement of her C6, 7 nerves. She prescribed Naprosyn and continued physiotherapy. A CT scan in November 2004 was negative for signs of herniation.

[25] Dr. Tai saw Ms. Whyte for the last time on August 24, 2005. On that date Ms. Whyte reported that she her family doctor was treating her with Paxil for sleep/depression, and that she felt she had returned to 75% of her pre-accident status. Lateral rotation of her shoulder was found to be improved on examination, and she could turn both left and right with no pain or restriction.

[26] Dr. Tai recommended that Ms. Whyte attend an active rehabilitation program to help with overall strengthening of her shoulder girdle, cervical, lumbar muscles and hip girdle areas. She stated in her report of April 17, 2006, that the plaintiff's overall prognosis for a full recovery is good, and that patients with cervical strain usually return to 80% of their pre-accident status by one year and to 90-95% by two years.

Dr. Schwab

[27] Dr. Shirley Schwab is the plaintiff's family physician, who has treated her for stress and emotional issues, gastric upset, and pain. Dr. Schwab referred Ms. Whyte to Dr. Kelsal, a rheumatologist, but Ms. Whyte had not yet been able to see Dr. Kelsal at the date of trial. Dr. Schwab agreed with Dr. le Nobel that perhaps some of the plaintiff's pain is due to deconditioning and a core strengthening exercise program would be in order. Dr. Schwab believes that Ms. Whyte likely has fibromyalgia, but that she does not feel qualified to test for it and therefore made the referral to Dr. Kelsal.

Dr. Shuckett

[28] Dr. Rhonda Shuckett is a specialist in internal medicine and rheumatology who saw Ms. Whyte at the request of plaintiff's counsel on January 12, 2007. She testified that about 25% of her practice is related to regional pain or fibromyalgia.

[29] In her report Dr. Shuckett stated that she had arrived at the following diagnoses: neck injury, myofascial pain syndrome of neck and shoulder girdle regions, hip girdle pain particularly on the right side, and diffuse soft tissue pain in keeping with fibromyalgia syndrome. She said that she does not believe that the plaintiff has chronic pain syndrome or pain disorder. In Dr. Shuckett's opinion, the injuries suffered in the accident materially contributed to the diagnoses; in particular, the fibromyalgia occurred after a downward spiral of deconditioning, pain and sleep disorder following the accident and would not likely have occurred in the absence of the accident.

[30] With respect to Ms. Whyte's prognosis, Dr. Shuckett wrote:

> It is presently two years and about ten months since the subject MVA. She remains very symptomatic. The fact that her symptoms are ongoing this long after the MVA does bode poorly for her prognosis. It is very conceivable that she is going to continue to have her symptoms in the longer term future. It is in keeping with her symptoms that she is finding herself more challenged in functioning at her job, which sounds like quite a challenging job, both mentally and physically. I believe that this patient is at some risk of having to go on disability related to her job challenges.
>
> There is a risk of job interruption and job cessation related to her ongoing symptoms at this point in time.

[31] Dr. Shuckett recommended medication (an anti-inflammatory drug) and active exercise, with the assistance of a personal trainer.

[32] In her testimony, Dr. Shuckett said that on examination of Ms. Whyte she found 12 of 18 painful fibromyalgia tender points (mostly in the upper body, though some in the lower body). She said that the diagnosis of fibromyalgia is founded on musculoskeletal pain in the upper and lower body, and at least 11 out of 18 of the fibromyalgia points distributed in the four quarters of the body. She said that fibromyalgia is a syndrome, not a disease – a constellation of symptoms that is usually chronic but that can wax and wane. Dr. Shuckett testified that she found no chronic pain syndrome, which she said is defined as a disability with dependence on narcotic drugs, and depression. Pain disorder, she said, is a somatoform disorder with a significant psychiatric basis.

[33] Dr. Shuckett agreed that stressors can play a role in precipitating fibromyalgia; it can be multifactorial, and possibly more than one factor could be participating in this case. She agreed that work stress can lead to fatigue and body pain.

[34] Dr. Shuckett testified that a review of the records regarding the 2000 motor vehicle accident did not change her view that the April 2004 motor vehicle accident caused the fibromyalgia.

Dr. Hirsch

[35] Ms. Whyte saw Dr. Gabriel Hirsch on March 30, 2007, for an independent medical assessment at the request of the defendant. Dr. Hirsch is a physical medicine and rehabilitation specialist.

[36] Dr. Hirsch's opinion is that Ms. Whyte does not meet the diagnostic criteria for fibromyalgia. He noted that as of May 30, 2006, when she was evaluated by Dr. le Nobel, she was not experiencing discomfort or pain below the shoulder blades. He wrote:

> Ms. Whyte reported that in the fall of 2006 she developed the new onset of pain extending across her upper back into the shoulder caps and hip girdle. In January of 2007, she was assessed by Dr. Shuckett. … Of note, there is no reference to diffuse musculoskeletal symptoms in the forwarded clinical records prior to the assessment of Dr. Shuckett. Therefore, if Ms. Whyte indeed fulfilled the diagnostic criteria for fibromyalgia at the time of Dr. Shuckett's assessment, it would have been my opinion that this syndrome was not causally related to the subject motor vehicle accident.
>
> Irrespective, today's examination was not indicative of the diagnosis of fibromyalgia syndrome. Only 4/18 sites associated with the diagnosis of fibromyalgia were reportedly tender on direct questioning. These sites were, however, not tender during distraction.
>
> It appears that in the fall of 2006, Ms. Whyte's clinical presentation changed. This coincided with significant stressors at work. It would be my opinion that these work-related issues and possibly other psychosocial stressors were instrumental factors.

[37] Dr. Hirsch's diagnosis was myofascial pain disorder, the onset of which, he said, was in part causally related to the April 2004 motor vehicle accident, but with a significant superimposed component pertaining to independent psychosocial stressors. He recommended a regular exercise program, with a few treatment

sessions (up to 10) with either a kinesiologist or a physiotherapist, and possibly trigger point injections. He did not recommend passive treatment modalities. He gave the opinion that a temporary partial vocational handicap of four to six weeks would have been reasonable and that Ms. Whyte is currently physically capable of working full-time in occupations for which she is qualified, and of resuming her former sporting activities and domestic work.

[38] Dr. Hirsch observed no exaggerated illness behaviour on the part of the plaintiff.

[39] Dr. Hirsch testified that although the definition of fibromyalgia originated with rheumatologists, qualification as a rheumatologist is not necessary in order to diagnose or treat the syndrome, and the majority of patients with it are managed by general practitioners. He agreed that he is not a specialist in fibromyalgia.

[40] As for the stressors, he agreed that the biggest contributing factor appeared to be work-related stress, based on Dr. Schwab's clinical records. He agreed that fibromyalgia can wax and wane. He disagreed with the use of anti-inflammatory medications suggested by Dr. Shuckett. He agreed with Dr. le Nobel's recommendations for treatment.

[41] Dr. Hirsch did not consider that the pre-accident medical history had any bearing on Ms. Whyte's symptoms following the April 29, 2004, accident.

[42] As for Ms. Whyte's ability to work, Dr. Hirsch testified that he is not a vocational consultant and had not conducted a functional capacity evaluation. He

had not contacted any of her employers. He said that although Ms. Whyte told him that she had been having significant difficulties at work, he did not find any impairment.

Credibility

[43] I found the plaintiff to be a credible witness. She did not seem prone to exaggeration. She was not shaken by a fairly searching cross-examination aside from some questions of the timing and extent of her work following the accident. Her testimony as to the pain she has experienced at work was corroborated by witnesses who had observed her in the workplace. No medical expert witness suggested exaggeration of symptoms or inappropriate “pain behaviour”. Her demeanour and approach to her testimony bore out her own self-description as an optimistic person who is motivated to do her best. I accept her evidence in general. The only exception relates to the detail regarding the number of days and hours she worked after the accident; there, I find that she was in some respects mistaken and I rely on the written records.

Causation

[44] The defendant does not dispute the existence of the plaintiff’s symptoms but does dispute the diagnosis of fibromyalgia and the cause of the symptoms. Ms. Dong, counsel for the defendant, emphasized that in her view the symptoms that arose in December 2006 (the general body pain) were new, unrelated to the motor vehicle accident. Thus, she argued, even if the plaintiff has fibromyalgia syndrome

(which she submits is not the case) the fibromyalgia was not the result of injuries suffered in the accident.

[45] In ***Resurfice Corp. v. Hanke***, 2007 SCC 7 at para. 21 the Supreme Court of Canada reaffirmed that the basic test for causation remains the "but for" test: the plaintiff must show on a balance of probabilities that the injury would not have occurred but for the negligence of the defendant. However, the plaintiff is not required to establish that the defendant's negligence was the sole cause of the injury and the law does not excuse a defendant from liability merely because other causal factors for which the defendant is not responsible also helped produce the harm: ***Athey v. Leonati***, [1996] 3 S.C.R. 458, 140 D.L.R. (4th) 235.

[46] Dr. le Nobel saw Ms. Whyte on May 17, 2006, and found her to have a chronic pain condition caused by the accident. Dr. Shuckett saw her on January 12, 2007, and found her to have fibromyalgia syndrome caused by the accident. Dr. Hirsch saw her on March 30, 2007, and found her to have myofascial pain disorder, in part causally related to the motor vehicle accident but with a significant source in independent psychosocial stressors. Whether the diagnosis of fibromyalgia is the correct one (it appears to be borderline, on all the evidence), or whether the diagnosis of chronic pain (Dr. le Nobel) or chronic myofascial pain (Dr. Hirsch) is more accurate, I am satisfied that the plaintiff has experienced and continues to experience fairly significant pain which she would not have experienced but for the accident. I find that her stress existed, in considerable measure, because the pain interfered with her ability to work in her usual manner.

[47] I do not find that the injuries suffered in the previous accidents, or the other stressors in the plaintiff's life, would have led in any event to the condition in which she now finds herself.

[48] I find that the plaintiff has established on the balance of probabilities that her ongoing neck pain, headaches and general body pain would not have occurred but for the defendant's negligent conduct.

[49] I find that those symptoms have caused her difficulty in continuing to work as a senior legal assistant, given the demands of that position. However, as will be seen later, in the quantification of the plaintiff's damages I do take into account the fact that, even if the plaintiff had not been injured in April 2004, other factors may have affected her ability to earn income since the accident and into the future. In the assessment of damages, the plaintiff is not entitled to be placed in a better position than she would have been but for the accident.

Work Record

[50] A number of witnesses testified as to the plaintiff's work. None described any previous problems with health or unusual absenteeism prior to the accident. All were positive about Ms. Whyte's qualities as a legal assistant.

[51] Chris Harvey, Q.C., testified that Ms. Whyte had worked for him a number of years previously when he was at Russell and DuMoulin, and that she was good at her job. He said his clients liked her, and she was "on top of the files", knew what was going on, and had good energy and enthusiasm. He hired her again in

September 2003 to assist him in his work as Associate Counsel at MacKenzie Fujisawa. He said that she did an "amazing amount in a short time", transforming his practice by making all documents accessible electronically. He said that after the April 2004 accident her work product was not the same; she did not have the same energy, fatigued early, and appeared to be in some discomfort. The firm gave her a month off till June 21, 2004. Mr. Harvey testified that Ms. Whyte was terminated in July 2004 because he had a heavy trial coming up in September, and found that she was unable to look after both his work and that of his junior lawyer. The junior lawyer's work was not getting done, and he concluded that there was an attitude problem. It is fair to infer, and I do, that this termination would not likely have occurred if the accident had not caused Ms. Whyte to miss work and to be in pain when she returned to work.

[52] Murray Tevlin testified that he hired Ms. Whyte on three occasions, at three different firms, most recently in the fall of 2000. He was starting a new firm at that time, and Ms. Whyte worked for that firm for the next two and a half years. As the senior legal assistant or office manager she was given responsibilities such as dealing with suppliers, setting up computer systems, and organizing client appreciation nights. Mr. Tevlin said that she did well, describing her as enthusiastic and liked by clients. He said that Ms. Whyte left his firm in 2003 because she was having a dispute with one of the newly hired junior lawyers.

[53] David Blair employed Ms. Whyte for a total of about a year on various temporary assignments, between 1994 and 2003. He said that she is among the most capable legal assistants they have ever been able to employ at Victory Square

Law Office and that they offered her permanent employment which she declined. Mr. Blair commented on her adeptness with the complex aspects of word processing programs, and on her strong memory.

[54] Leslie Green is the administrator at Hamilton, Duncan in Surrey, but in 1998 was at Heenan Blaikie where Ms. Whyte was hired as a contractor to work for Peter Gall, Q.C. Ms. Whyte performed extremely well and was described by this witness as knowledgeable, organized and energetic. Ms. Whyte left because she and the lawyer she worked for did not see eye to eye; later, however, he asked her to return, which she did for another period.

[55] Betty Garbutt operates an employment agency called Legal Freelance Centre. She said that she has known Ms. Whyte since 1991 and has placed her in various temporary assignments from time to time. Ms. Garbutt described the plaintiff as a star performer from the beginning, with extensive knowledge about litigation, great energy and exuberance. She said that Ms. Whyte was always well received and would be requested back, being exceptional in customer service skills, and able to handle any amount of work or stress without fail. She invited Ms. Whyte to become involved in some special projects, including the production of instructional videos.

[56] However, Ms. Garbutt testified, since April 2004 she had received some complaints from staff that Ms. Whyte was quick tempered and unpredictable, and she observed that Ms. Whyte appeared depressed at times. She said that Ms. Whyte was sometimes weepy and difficult to deal with. Prior to then, she had

always seemed cheerful and optimistic, able to handle anything, energetic and happy.

[57] John Marquardt (whose evidence was received by way of an agreed statement of facts) employed the plaintiff as a legal assistant from November 2006 to January 2007 in a temporary position, 30 – 40 hours per week. He observed her to exhibit, from time to time, behaviour consistent with back or neck pain, and on occasion she would take time off and work from home. Mr. Marquardt viewed the plaintiff as a hard worker, with a good work ethic. He said he does not have a problem with the quality of her work and would re-hire her.

[58] Stephen Hinds was called by the defence. He is the human resources manager at Lang Michener. He testified that Ms. Whyte had taken a temporary position with Lang Michener at the last minute in their litigation department from April 23 to May 4, 2007, and that she had worked full time and sometimes longer hours. He said that he had not heard any complaints about her work but had not spoken directly to the lawyer for whom she was working. He said that he has asked Ms. Whyte to do a three month trial as a human resources assistant, which is underway.

[59] It is obvious from the evidence of her former employers that Ms. Whyte has done well as a legal assistant and has established a strong reputation in that field. While the evidence from these past employers shows that the plaintiff from time to time left positions due to conflict with junior lawyers, such disagreements were described as not uncommon. Ms. Whyte does not seem to have had difficulty in finding as much employment as she has wished to undertake, both before and after

the accident. I find that she enjoyed her work and its challenges, and that prior to the accident she was in a good position to continue taking temporary or permanent assignments as a senior legal assistant.

DAMAGES

Non-pecuniary Damages

[60] The plaintiff's position is that she should receive general damages in the range of $90,000. Counsel for the plaintiff referred to a number of cases in which awards were made in circumstances which he argued were comparable.

[61] In ***Badyal v. Sidhu***, 2006 BCSC 1877 the plaintiff suffered chronic pain and depression for two years by the date of trial. The court concluded that resolution was likely to take some time, and awarded $75,000. In ***Charlebois v. Vandas***, 2004 BCCA 356, 29 B.C.L.R. (4th) 323 a jury verdict of $110,000 was upheld, though described by the Court of Appeal as possibly on the high side, where the Court inferred that the jury must have found that three years after the accident the plaintiff suffered chronic pain in the neck, shoulder blades and lower back, tinnitus, vertigo, and occasional nausea seriously affecting the plaintiff's quality of life. ***Harvey v. Yanko***, 2007 BCSC 216 resulted in a $90,000 award three years after the accident where the plaintiff suffered fibromyalgia, soreness and stiffness in neck and back, headaches, and post traumatic stress disorder in remission. The plaintiff in ***Knickle v. Filipovic***, 2006 BCSC 1693 had neck pain, headaches and pain between the shoulder blades and in the lower back, chronic pain likely to be permanent, chronic

major depressive disorder in the mild range, and significant restriction on the ability to enjoy previous activities. Non-pecuniary damages of $90,000 were awarded.

[62] Counsel for the defendant submitted that non-pecuniary damages should be in the $25,000 - $30,000 range and referred to ***Kartz v. Carlson & Champagne***, 2006 BCSC 716 where the plaintiff suffered continuing severe headaches and pain or tension in the neck and shoulders, interfering with her ability to perform her job functions, and her condition was expected to continue for up to two years. The award for non-pecuniary damages was $30,000.

[63] Ms. Whyte suffered injuries in the April 2004 accident affecting her neck, shoulder and hip. She was unable to work for a month due to acute pain and has suffered ongoing pain, primarily in her neck, but more recently extending into other areas of her body. For reasons related to her personality and her circumstances, she has not taken significant time off work, but I am satisfied that she has experienced the pain she has described, and that she has to some extent worked through pain in order to continue to bring in an income to her family (for which she was the sole breadwinner for some periods of time).

[64] The pain has led to difficulties in her work and to a reduction in her ability to enjoy life, in particular the recreational activities she enjoyed previously. The pain has caused her to greatly reduce her activity level and to become deconditioned. I find that she will likely continue to experience pain for some time but will most probably make a substantial recovery within a few years, particularly if she follows the recommendations of Dr. le Nobel. I advert to the principles for awarding

damages for pain, suffering, loss of enjoyment of life and loss of amenities described in ***Andrews v. Grand & Toy Alberta Ltd.***, [1978] 2 S.C.R. 229, 83 D.L.R. (3d) 452. On the evidence and in the light of the awards in the authorities to which I have been referred, I have concluded that an award of $80,000 for general damages is fair and reasonable in this case.

Past Lost Income

[65] I turn to the question of the plaintiff's entitlement to damages for past lost income. The plaintiff's position is that she lost a total of $29,475, comprised of the following amounts:

> $5,065.04 while at MacKenzie Fujisawa (a claim for which the firm is subrogated);
>
> $1,960 while at Arvay Finlay (seven missed days);
>
> $8,750 while at Jenkins Marzban (25 missed days);
>
> $1,500 while at Marquardt & Company;
>
> $11,200 for seven weeks work missed in 2007;
>
> $1,000 while at Lang Michener (lower wages as a human resources assistant than she would receive as a senior legal assistant).

Counsel also submitted that Ms. Whyte had lost the opportunity for a bonus from Mr. Harvey which would be paid at year end if she achieved more than $25,000 in billings, although he agreed that this loss could not be quantified.

[66] As I understand the defendant's position, it is that Ms. Whyte has proved lost income only to the extent of the $5,065.04 in the subrogated claim by MacKenzie Fujisawa. Ms. Dong argued that the plaintiff's earnings have fluctuated over the years, including in the years just before the accident, and that one reason they were down in 2005 may be that she took at least two trips to England and Arvay Finlay did not keep her fully employed in November and December.

[67] In considering the evidence as to Ms. Whyte's income over the years, for the purpose of rough comparisons, I will (as did counsel) look at gross business income, rather than net income after expenses, in the years when some or all of her income was from self employment. Ms. Whyte's gross business income was $50,341 in 1998 and $40,619 in 2000. (There was no evidence as to 1999.) She earned $58,864 from employment in 2001 and $70,788 in 2002 including a bonus. In 2003 she earned $42,300. In 2004, the year of the accident, she earned gross business income of $25,440 and employment income of $35,835, for a total of $61,275. In 2005, Ms. Whyte earned $42,524 in gross business income and $3,792.88 in employment income for a total of $46,316.88. At the date of trial her 2006 tax return had not yet been filed. However, the evidence was that she had billed a total of $68,928.

[68] Precise calculation of the plaintiff's lost income is difficult because of the nature of her work (entailing moves from assignment to assignment, and sometimes working as an employee, sometimes as a contractor). She testified that before the accident she did not typically take time off between assignments and that she worked a five day week, and often more than eight-hour days. After the accident

she did take some breaks, and attempted to work less than a five day week for some periods of time. I find that the plaintiff did take somewhat more time off after April 2004 than she would have done before the accident.

[69] However, the review of Ms. Whyte's income year by year set out above suggests that her income level has not suffered significantly as a result of the accident. As well, a review of the days and hours which she has worked since the accident suggests that during some of the periods in question it would have been difficult to work more than she did.

[70] I also take into account the evidence showing that due to other issues (family and unrelated health matters) Ms. Whyte may have taken breaks from work in any event.

[71] My assessment is that the plaintiff lost $15,000 in income, including the subrogated claim, to the date of trial.

Lost Future Earning Capacity

[72] The principles to be followed in assessing lost future earning capacity are set out in ***Reilly v. Lynn***, 2003 BCCA 49, 10 B.C.L.R. (4th) 16, at paras. 100 - 101:

> An award for loss of earning capacity presents particular difficulties. As Dickson J. (as he then was) said, in *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229 at 251:
>
> > We must now gaze more deeply into the crystal ball. What sort of a career would the accident victim have had? What were his prospects and potential prior to the accident? It is not loss of earnings but, rather, loss of

> earning capacity for which compensation must be made. … A capital asset has been lost: what was its value?

The relevant principles may be briefly summarized. The standard of proof in relation to future events is simple probability, not the balance of probabilities, and hypothetical events are to be given weight according to their relative likelihood: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 27. A plaintiff is entitled to compensation for real and substantial possibilities of loss, which are to be quantified by estimating the chance of the loss occurring: *Athey v. Leonati, supra*, at para. 27, *Steenblok v. Funk* (1990), 46 B.C.L.R. (2d) 133 at 135 (C.A.). The valuation of the loss of earning capacity may involve a comparison of what the plaintiff would probably have earned but for the accident with what he will probably earn in his injured condition: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 at 93 (S.C.). However, that is not the end of the inquiry; the overall fairness and reasonableness of the award must be considered: *Rosvold v. Dunlop* (2001), 84 B.C.L.R. (3d) 158, 2001 BCCA 1 at para. 11; *Ryder v. Paquette*, [1995] B.C.J. No. 644 (C.A.) (QL). Moreover, the task of the Court is to assess the losses, not to calculate them mathematically: *Mulholland (Guardian ad litem of) v. Riley Estate* (1995), 12 B.C.L.R. (3d) 248 (C.A.). Finally, since the course of future events is unknown, allowance must be made for the contingency that the assumptions upon which the award is based may prove to be wrong: *Milina v. Bartsch, supra*, at 79. In adjusting for contingencies, the remarks of Dickson J. in *Andrews v. Grand & Toy Alberta Ltd., supra*, at 253, are a useful guide:

> First, in many respects, these contingencies implicitly are already contained in an assessment of the projected average level of earnings of the injured person, for one must assume that this figure is a projection with respect to the real world of work, vicissitudes and all. Second, not all contingencies are adverse ... Finally, in modern society there are many public and private schemes which cushion the individual against adverse contingencies. Clearly, the percentage deduction which is proper will depend on the facts of the individual case, particularly the nature of the plaintiff's occupation, but generally it will be small ...

[Emphasis added in ***Reilly v. Lynn***]

[73] The plaintiff's position is that the difficulties she has experienced in performing her functions as a legal assistant, including a decline in her performance

and in her “soft skills” (as confirmed by Betty Garbutt) have led her to seek a less demanding job such as in human resources. I accept that she has found it too difficult to continue in the legal assistant role at this time, despite her best efforts.

[74] I do not find, however, that the plaintiff has established on a balance of probabilities that she will never be able to resume full-time work as a legal assistant. The medical expert witnesses have diverse opinions as to her prognosis. Dr. le Nobel said that the prognosis is guarded, but agreed that there are steps which would improve it. Dr. Tai’s opinion in April 2006, was that Ms. Whyte’s prognosis for a full recovery is good. Dr. Shuckett’s view was that it is likely Ms. Whyte will continue to have symptoms in the longer term future and will find herself challenged in functioning at her job. Dr. Hirsch did not find any current impediment to Ms. Whyte’s working full-time or resuming her former sporting activities and domestic work. I find that it is most likely that Ms. Whyte, if she follows the recommendations of Dr. le Nobel (which were also endorsed by Dr. Hirsch), will substantially recover in time.

[75] The evidence was that senior legal assistants can earn $75,000 per year; Ms. Whyte’s current entry-level human resources assistant position pays $45,000 per year.

[76] Mr. Mussio on behalf of the plaintiff submitted that the net present value of a loss of $30,000 per year is $496,400 and that, taking into account the contingencies, a future loss of earning capacity award of $250,000 would be reasonable. (I note that in making this submission Mr. Mussio relied on the report of Darren Benning

dated May 10, 2007, estimating future income loss multipliers for a person of Ms. Whyte's age. Ms. Dong objected to the admission of that report on two bases: lack of necessity, and lateness. She did not allege any prejudice to the defendant. I concluded that evidence as to the future income loss multipliers met the necessity standard and I exercised my discretion to permit Mr. Mussio to make his submission utilizing the multipliers despite the failure to serve the report 60 days in advance. However, damages are to be assessed, not calculated, and I have not taken a mathematical calculation approach to the assessment of lost future earning capacity, as will be seen below.)

[77] The defendant's position was that the plaintiff is likely to recover completely from her injuries and that there is no basis for an award for loss of earning capacity. Ms. Dong referred to several authorities (***Deno v. Cooper***, 2006 BCSC 1326; ***Doosti v. Enterprise Rent-a-Car Canada Ltd.***, 2006 BCSC 247; ***Holder v. MacLean***, 2001 BCSC 1474; ***Bedwell v. McGill and Currie***, 2006 BCSC 369: ***Borth v. Lee***, 2005 BCSC 1517). Those authorities illustrate applications of the principle that the plaintiff has the burden of showing, on a balance of probabilities, that she has lost her ability to earn income, taking into account whether her injuries have rendered her less capable overall from earning income from all types of employment, whether she is less marketable or attractive as an employee to potential employers, whether she has lost the ability to take advantage of all job opportunities which might otherwise have been open to her, and whether she is less valuable to herself as a person capable of earning income in a competitive labour

market (the factors specified in ***Brown v. Golaiy*** (1985), 26 B.C.L.R. (3d) 353 (S.C.)).

[78] Ms. Dong argued that the fact that the plaintiff has always been fully employed since the accident, and that she has completed almost all of her assignments without complaint from the employers shows the absence of foundation for an award for lost future income. She submitted that ***Borth v. Lee*** is comparable to this case. There, the plaintiff felt her earning capacity was impaired because she had to take longer to perform tasks and her concentration was affected. However, she was able to continue to fulfill her duties of employment (though with difficulty). There was no award for loss of future income.

[79] The difference between that case and the one before me is that Ms. Whyte has found it necessary to change the focus of her work, and to seek employment in an area where the physical demands, potential for stress and the requirement to work long hours under pressure will be reduced, and where the salary is lower. She will need to retrain or at least gain experience in a new field, and, as a result, there will be a loss in her ability to earn income during the period when she is still unable to resume the legal assistant work.

[80] I find that the plaintiff has established a substantial likelihood that her income will be reduced in the future as a result of the injuries suffered in the accident. I find that she has suffered some loss of future earning capacity. Her ability to work in the demanding role of legal assistant has been reduced; the capital asset represented by her experience and reputation in that field has diminished in value. However,

taking into account the probability that she will be able to return to legal assistant work and the fact that there was some possibility that she would, in any event, have had to make a change in direction in her career or reduce the amount of work she took on, I find that an award of damages for lost future earning capacity of $40,000 is appropriate in this case.

Cost of Future Care

[81] The plaintiff seeks $10,000 for the cost of future care with respect to treatments recommended by physicians, including: visits with a kinesiologist or physiotherapist, an exercise program (possibly with a personal trainer), a weight loss program, counselling for stress management, medications, and possibly domestic homemaking services in the future. There was no detailed breakdown of the costs of these treatments and services.

[82] Counsel for the defendant submitted that the only award should be $1,500, to cover a three month gym membership plus some personal training sessions.

[83] I find that $5,000 is the appropriate award under this head.

Special Damages

[84] Finally, as to special damages, the plaintiff seeks a total of $6,889.89. The defendant disputes certain items (an ergonomic chair for $1,700, a double mattress for $342 and a Curvemaster program for $450.) There was no evidence that a chair of that price was necessary, or that a mattress purchase was necessary. The

plaintiff testified that she was unable to make much use of the Curvemaster program.

[85] I will deduct $700 to reflect a less expensive chair, as well as the mattress and Curvemaster amounts, and award $5,397.89 in special damages.

Costs

[86] Unless there is some reason of which I am unaware that makes such an order inappropriate, the plaintiff will have her costs at Scale B.

Conclusion

[87] In summary, I assess the damages to be awarded to Ms. Whyte as follows: $80,000 for pain, suffering, loss of enjoyment of life and loss of amenities; $15,000 for lost income to the date of trial, $40,000 for lost income earning capacity, $5,000 for cost of future care and $5,397.89 for special damages.

"Madam Justice Lynn Smith"