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JUDGE AWARDS $1,000,000.00 FUTURE WAGE LOSS TO PLAINTIFF UNABLE TO PURSUE HER CHOSEN CAREER AS A REMOTE-CATERING CHEF.

M vs. D

2020 BCSC 2052

The Reasons for Judgment of The Honourable Madam Justice Adair were given on December 23, 2020.

The Plaintiff, Ms. M, now 31 years of age, was involved in three motor vehicle collisions. The first in March 2014, the second in December 2015 and the last was in May 2017. The Defendants have admitted liability for the accidents. Ms. M contends that, as a result of the collisions, she has been left with chronic pain in her neck and back as well as migraine-like headaches. She further maintains that, as a result of her injuries, she can no longer pursue her dream career as a remote-catering chef. In addition to non-pecuniary damages, Ms. M is seeking compensation for loss of past and future earning capacity, cost of future care and special damages.

While the Defendants admit that Ms. M sustained injuries, it is their position that there is a good chance she would not have pursued a career as a remote-catering chef and damages, particularly non-pecuniary and loss of earning capacity must be assessed accordingly.

Early 2014 Ms. M had obtained her GED, was an accomplished and highly regarded executive chef, working full time in remote locations. She claims she had the potential to earn between $90,000.00 and $100,000.00 a year, doing a job that she loved. She had been approved and was ready to challenge for her "Professional Cook 3" or "Red Seal". Unfortunately, she was not able to complete the examination before the first motor vehicle collision.

MARCH 6, 2014 – Ms. M was a passenger in a vehicle that hydroplaned and hit a concrete barrier. She experienced a loss of consciousness, a chipped tooth, a fractured sternum and clavicle, injuries to her neck, right shoulder, chest and hips. She was discharged from hospital after several hours. Ms. M recalled that she was in excruciating pain in the days following the accident.

She was unable to return to work. She was concerned that she may not be able to cope with the physical demands of her career and decided to apply for enrollment in a September 2014 program, leading to a Business Diploma at Camosun College. She did very well in school, making the Dean's Honour Roll on more than one occasion. In a classroom setting however, she experienced increased neck pain and found it difficult to sit for long periods.

She worked as a chef at a fishing lodge for two summers while she was going to school, but she found it extremely difficult. Even though she relied on others for assistance with heavier tasks, she experienced in increase in headaches as well as neck and hip pain. She was unable to complete the final three weeks of each season, which involved cleaning and preparing the lodge to close for the winter. Despite her struggles in coping with her pain, she continued to do well academically.

DECEMBER 17, 2015 – Ms. M was driving home from an exam. The driver in front of her made a U-turn and slammed into her vehicle. Impact was described as forceful. Ms. M recalled her body as feeling inflamed and aggravated – especially her neck and hips. She was frustrated and angry. She felt she had been making progress before the second accident, and now she had to start all over again.

In the summer of 2016 Ms. M made another attempt to work as a relief chef, covering for others while they were on vacation. In mid-August she aggravated her hip and had to be flown out of camp. The pain was unbearable and she couldn't walk. That was the last time Ms. M worked as a remote-chef. She continued to excel at her studies albeit with considerable pain.

By May 2017 Dr. Renaud, Chiropractor, said she had healed quite well and had her symptoms under control.

MAY 28, 2017 – Ms. M was a passenger in her own vehicle, being driven by a friend. Another vehicle went through a stop sign and hit the front driver's side. The impact was significant and spun the car around. She was thrown to the right and hit her head on the window. Her head, right elbow, hips and back were all sore at the scene. Ms. M was taken to Victoria General Hospital and told she was in shock. She was covered in ice packs to cool down her body. She was treated and released. The next few days it was difficult for her to move. Using the computer triggered headaches. The whole right side of her body was swollen and tender for several days after the accident. Her neck, shoulder, back and hips were all aggravated and this time she had many more headaches, with migraine features. She also had trouble with her vision. She was fatigued and disorganized as well as having some cognitive problems.

Over time Ms. M's symptoms seemed to worsen and become more pronounced. Her headaches were incapacitating – her eyes were watering when she used the computer. Her grades suffered. It was difficult to sit in class because of her neck and hip pain. In September 2019, as required to complete

her Bachelor of Business Administration, Ms. M started a temporary placement with BC Pensions Corporation. It was scheduled from September 3rd to December 20, 2019. The position required 85 – 80% computer work. Ms. M's headaches and watery eyes worsened. In two months she missed 67.7 hours of work. She was terminated at the end of October. This was devastating for her. She withdrew socially. She found it difficult to participate in leisure activities that she enjoyed such as swimming, hiking, volunteer work and cooking for friends.

At the time of trial she was enrolled in one course at university. She is no longer working at her part time jobs at ReMax and Atomique Productions (event planners). She is working with a pain therapist and a counsellor. She is coping with her pain better because of the reduced demands and is feeling less overwhelmed. She is determined to finish her degree, however, she explains that she would have to seek a position without time pressure, more self-directed and with flexible hours. She is not sure what she will do but it is a much different future from what she had planned for herself.

EXPERTS:

[108] Dr. Giantomaso was tendered and qualified as a specialist in physical medicine and rehabilitation, including the management of spinal injuries, head trauma and chronic pain (including migraines and headaches). He carried out an independent medical assessment of Ms. M on November 29, 2019.

[109] In Dr. Giantomaso's opinion, the following diagnoses were directly related to the first accident:

a. post-traumatic non-displaced right sternal and clavicular fractures, from which Ms. M recovered without ongoing clavicular or sternal pain;

b. post-traumatic cervical sprain/strain injury consistent with whiplash associated disorder II injury; chronic;

c. post-traumatic thoracic sprain/strain injury grade 1-2; chronic;

d. post-traumatic lumbar sprain/strain injury grade 1-2; chronic;

e. mild post traumatic headaches "seemingly" cervicogenic, without many migrainous-type features.

[110] With respect to the second accident, Dr. Giantomaso diagnosed the following as "likely related": exacerbation and aggravation of pre-existing cervical, thoracic and lumbar pain. In his opinion, pain was "chronic and ongoing" prior to the third accident, but "fairly mild."

[111] Finally, Dr. Giantomaso diagnosed the following as "temporally and causally related" to the third accident:

a. mild traumatic brain injury, but no significant ongoing sequelae of brain injury;

b. significant post-traumatic headaches, including new onset headaches with migrainous features; chronic and ongoing; and

c. exacerbation and aggravation of pre-existing cervical, thoracic and lumbar sprain/strain injuries grade 1-2; chronic.

[112] Dr. Giantomaso said that a diagnosis of post-traumatic low mood and anxiety was outside the scope of his specialty, but "possibly" related to the accidents.

[113] In Dr. Giantomaso's opinion, the third accident was the most severe with respect to "post traumatic issues," and, in that respect, he specifically noted Ms. M's development of "significant post-traumatic headaches with migrainous features." He commented, negatively, on the fact that Ms. M had not yet seen a neurologist even though, in his opinion, she met the criteria for chronic migraine. Dr. Giantomaso said:

At this point it is quite obvious that she should be directed to a physiatrist or neurologist with an interest in post-traumatic migraine headaches and post-traumatic pain management. In particular, she should follow at least basic treatments for migraine management including migraine medications and Botox.

[114] Dr. Giantomaso strongly recommended an immediate referral to a neurologist or physiatrist with an interest in the treatment of post-traumatic migraines. In Dr. Giantomaso's opinion:

> [Ms. M] would definitely benefit from trials of amitriptyline 10 to 20 mg at night as well as Maxalt Rapid Dissolve at the onset of a migraine headache. If this is insufficient, she should then go on to trials of Aimovig 70-140 mg injections every month and/or trials of Botox for migraine headaches. In my experience this type of treatment can be very effective for post-traumatic migraines.

[115] Dr. Giantomaso explained that amitriptyline is usually one of the first drugs used to treat migraine-like headaches. Although it has side effects, it can be helpful. He described Maxalt as another medication in the triptan family, and a migraine-abortive medication, but expensive. Dr. Giantomaso described Aimovig as a new medication, very expensive and something that would be used monthly. He described it as something that can be a "game changer" for a patient. Dr. Giantomaso described migraines as extremely disabling, but with treatment, physicians can get patients functioning. He estimated that about 50% of patients respond well to treatment.

[116] With respect to prognosis, Dr. Giantomaso noted that the "vast majority of improvement through natural history and rehabilitation would have been expected to have occurred in the first 6 to 12 months post-trauma or earlier." He commented that the prognosis after multiple whiplash injuries is worse than from a single accident. In Dr. Giantomaso's opinion, Ms. M will likely continue to experience chronic pain "to some degree long term in the future." He commented that, by following his recommendations, Ms. M

> may experience decreased pain and increased function in the future, however this should be considered part of a long-term pain management strategy and should not necessarily be considered curative.

(ii) The headache specialists

[117] Dr. Sexton was tendered and qualified as a neuro-ophthalmologist, qualified to give opinion evidence concerning headaches and eye disorders. Dr. Sexton carried out an independent medical assessment of Ms. M on January 22, 2020.

[118] In Dr. Sexton's opinion, after the first accident, Ms. M met the diagnostic criteria for chronic headache following injury to her neck. Following the second accident, Ms. M experienced an exacerbation of her headaches, with the second accident being the most likely cause. In Dr. Sexton's opinion, Ms. M experienced further exacerbation of headache frequency and intensity after the third accident. Based on Ms. M's reports, her symptoms took on a "migraine phenotype," and, in Dr. Sexton's opinion, Ms. M's vision symptoms were and are related to these migraine-type headaches. Ms. M's continuing headaches are secondary to the motor vehicle accidents.

[119] In Dr. Sexton's opinion, Ms. M requires prophylactic treatment to reduce her headache frequency and intensity. Dr. Sexton identified Botox, Aimovig and Emgality as possible treatment agents, and she noted that any of these agents could reduce headache intensity and frequency by 50% in about 50% of individuals. Dr. Sexton noted that Aimovig and Emgality need to be trialed for at least six months each before treatment failure is determined. Dr. Sexton also mentioned a number of "second line agents," including topiramate.

[120] In Dr. Sexton's opinion, if none of the medications reduced Ms. M's headache burden:

> it is unlikely that she will get significant spontaneous improvement at this juncture. Nor is she likely to get significant spontaneous worsening. If she remains at her current level of function she is unlikely to be able to work full time. She will not be able to work full time in front of a computer screen.

[121] In Dr. Sexton's opinion, there was no role for vision therapy in Ms. M's treatment, and Ms. M did not have binocular dysfunction.

[122] Dr. Robinson was tendered and qualified as a neurologist, qualified to give opinion evidence in the area of neurology and headache disorders, including the cause of and prognosis for Ms. M's headaches, as well as treatment recommendations. Dr. Robinson saw Ms. M for an independent medical assessment on March 10, 2020.

[123] In Dr. Robinson's opinion, Ms. M did not sustain a mild traumatic brain injury in any of the accidents.

[124] In Dr. Robinson's opinion, Ms. M's headaches began in clear temporal relationship to the first accident, and appeared to be mainly aggravated by the second accident. In Dr. Robinson's opinion, soft tissue injuries to Ms. M's neck as well as increasing psychological symptoms and sleep disruption have probably been major factors aggravating Ms. M's headaches. In Dr. Robinson's opinion, Ms. M's history and examination were consistent with a diagnosis of persistent post-traumatic headaches related to soft tissue injury to Ms. M's neck sustained in the three accidents. He explained that headache is a common symptom following soft tissue injury to the neck, and that the head pain may have various characteristics that are similar to primary headaches, such as migraine and tension-type headaches. Dr. Robinson explained that, in the majority of cases, clinical examination and investigation is normal in patients suffering from recurring headache, and the diagnosis rests on the temporal relationship to trauma and the historical features reported by the patient. Dr. Robinson explained that triggers or aggravators to moderate to severe headache episodes often include physical activities requiring repetitive neck movements or the need to maintain a fixed neck position.

[125] Dr. Robinson explained further that the treatment of chronic headache related to head and neck trauma "is usually difficult." In Dr. Robinson's opinion, medications are often unhelpful in the treatment of chronic post-traumatic headache. Analgesics, muscle relaxants and anti-inflammatory drugs are usually of little value. However, "[m]igraine abortive medications (triptans) such as sumatriptan (Imitrex) may be helpful when headaches have migrainous features." In Dr. Robinson's opinion, given that Ms. M's more severe headaches have migrainous features, "it is possible that these would be improved with the use of a triptan medication." Dr. Robinson noted that there are a number of drugs used to prevent migraine attacks. In Dr. Robinson's opinion, Botox is "the treatment of choice" for Ms. M's post-traumatic headaches.

[126] With respect to prognosis, in Dr. Robinson's opinion, Ms. M "probably will continue to suffer from posttraumatic headache indefinitely. It is possible that there will be improvement over the next 2-3

years particularly should her headaches respond to the treatments suggested in this report." Further, in Dr. Robinson's opinion, Ms. M "will probably be able to work at least part-time in a job with light to moderate physical demands. Ideally this should have flexible hours and the ability to regularly move about rather than be stationary for long hours in front of a computer."

(iii) The psychiatrists

[127] Both Dr. Spivak and Dr. Scarth were tendered and qualified as psychiatrists, qualified to give opinion evidence in that area concerning Ms. M, including concerning the diagnosis of the psychiatric impact of Ms. M's injuries from the accidents, prognosis and treatments.

[128] Dr. Spivak carried out an independent medical assessment of Ms. M on December 14, 2019.

[129] In Dr. Spivak's opinion, in the context of Ms. M's progressive physical challenges following the accidents, and her recognition of the severity and extent of her physical impairments, she developed depressive and anxiety symptoms. While these symptoms may have met the criteria for a diagnosis of a major depressive disorder at some point, in Dr. Spivak's opinion, "the overall clinical picture of [Ms. M's] symptoms is more suggestive of a diagnosis of an adjustment disorder with mixed anxiety and depression."

[130] Dr. Spivak noted other stressors in Ms. M's life since the first accident. However, in his opinion, the "driving force" behind Ms. M's emotional symptoms was always the impact the accidents had on her physically and how they limited her overall functioning. In Dr. Spivak's opinion:

> It is the physical pain and consequential limitations from the accidents that have led to her emotional symptoms. . . . There are no other factors that could account for the breadth and severity of her psychiatric symptoms, outside of factors related to the motor vehicle accidents. Her symptoms have correlated logically and temporally with the indexed motor vehicle accidents.

[131] Dr. Spivak described Ms. M as having been "persistently affected by a dysphoric disposition and psychologically plagued by an overall sense of loss of self."

[132] Since, in Dr. Spivak's opinion, Ms. M's psychiatric symptoms are being driven largely by her physical issues, "it will be essential that Ms. M receives optimal physical treatment and in particular, treatment of her pain." Dr. Spivak considered Ms. M's prognosis to be "guarded to poor." In Dr. Spivak's opinion, having regular psychotherapy with someone who has expertise in pain management might provide Ms. M with some benefit. At the very least, Dr. Spivak recommended a referral to a psychologist who could provide her with cognitive behavioural therapy.

The judge found Ms. M to be a credible witness.

[157] In my view, Ms. M is both a credible and reliable witness. Her evidence concerning her life and functioning before the accidents, and her pain and limitations following the accidents, is supported by both the medical opinion evidence and Ms. Fischer's functional capacity evaluation, and by the evidence of the lay witnesses. The medical opinion evidence explains, from a medical perspective, how the injuries Ms. M sustained in the accidents can result (and, in Ms. M's case, have resulted) in the pain and limitations Ms. M has experienced and continues to experience. Dr. Sexton and Dr. Robinson are largely in agreement concerning the cause of Ms. M's headaches, which have resulted in significant impairments, as Ms. M (and others) have described.

…

[169] I find that, as a result of the injuries she sustained in the accidents, Ms. M has been left with chronic pain and debilitating migraine-like headaches, although there is some prospect that, with appropriate treatment, Ms. M's headaches may improve. However, Ms. M will now have a life-time of managing her symptoms, and the trajectory of her life has been permanently changed.

The judge did not accept the Defendants' submission that, in the without accident scenario she would have enrolled in Camosun College in September 2014 to complete a 4 year degree.

[199] Accordingly, I find that Ms. M's loss of earning capacity should be assessed on the basis that, without the accidents, she would have continued working as a remote-catering chef.

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SUMMARY

[256] In summary, I award damages to Ms. M as follows:

a. non-pecuniary damages in the sum of $140,000;

b. loss of earning capacity to trial $180,000 (net);

c. loss of future earning capacity $1,000,000;

d. cost of future care $115,256; and

e. special damages in the sum of $15,639.56.

THE FULL REASONS FOR JUDGMENT OF THE HONOURABLE MADAM JUSTICE ADAIR CAN BE FOUND HERE:

LEARN MORE

If you would like to book assessments with Dr. Giantomaso, Physiatrist; Dr. Spivak, Psychiatrist; Dr. Sexton, Neuro-Ophthalmologist; or Dr. Robinson, Neurologist, please contact us at Integra **www.integraconnects.com**