IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Chingcuangco v. Herback,*
2013 BCSC 268

Date: 20130220
Docket: M103203
Registry: Vancouver

Between:

Mabel Colibao Chingcuangco
(now Mabel Colibao Halliday)

Plaintiff

And

Matthew Daniel Herback and Edgardo Limjuco Rafael

Defendants

Before: The Honourable Mr. Justice Weatherill

Reasons for Judgment

Counsel for the Plaintiff:	R. Marcoux
Counsel for Matthew Daniel Herback:	C. Thiessen
Counsel for Edgardo Limjuco Rafael	B. Hirsch
Place and Date of Trial	Vancouver, B.C. January 28 - 31, 2013
Place and Date of Judgment:	Vancouver, B.C. February 20, 2013

Introduction

[1] On September 15, 2008, the plaintiff was a passenger in a vehicle she owned and which was being driven by her then boyfriend, the defendant Edgardo Lumjuco Rafael ("Rafael"). At the intersection of 88th Avenue and 156th Street, Surrey, British Columbia, her vehicle collided with a vehicle owned and operated by the defendant Matthew Daniel Herback ("Herback").

[2] The plaintiff sustained various injuries as a result of the collision.

[3] At issue is which of the two drivers was at fault. Also at issue is the extent of the plaintiff's injuries and the quantum of damages to which she is entitled.

The Plaintiff's Case

[4] The following is a summary of the evidence provided by witnesses called as part of the plaintiff's case:

i. The Plaintiff

[5] At the time of the accident the plaintiff was 25 years old and was working as a data entry clerk at Canada Revenue Agency ("CRA") in Surrey. She commenced her employment there on May 3, 2004. She was also working on Saturdays at Ingledew's Shoes ("Ingledew's).

[6] As a unionized employee of CRA, the plaintiff enjoys a somewhat flexible work schedule. She must work 150 hours over a four week period. She is able to arrange her schedule such that she works 9.5 hours three days per week and 7.5 hours one day per week, making up the balance of the 150 hours as necessary. The plaintiff is also entitled to sick leave with pay, which she is able to accumulate at the rate of 9.375 hours for each calendar month in which she receives pay for at least ten days.

[7] The plaintiff had been conditionally accepted into a psychiatric nursing program at Douglas College. Her flexible work schedule allowed her to take the prerequisite courses she needed while still working full time for CRA.

[8] The plaintiff was also recreationally active. She hiked, worked out at the gym and took cardio kick-boxing lessons. She was generally healthy, although she experienced headaches two to four times per month that felt like migraines.

[9] On September 15, 2008, the plaintiff was picked up after work by Rafael in the plaintiff's car. They proceeded east along 88th Avenue on their way to Rafael's house. They were in the centre of three eastbound lanes. The plaintiff estimated their speed at approximately 50 kph, which is the posted speed limit. As they approached the 156th Street intersection, the light was green in their direction. A red car that was approaching them westbound along 88th Avenue turned left in front of them onto 156th Street. It had ample room to do so. As they entered the intersection, a second vehicle (driven by Herback) which was also proceeding westbound along 88th Avenue followed the red car by turning left onto 156th Street. It did not have room to do so. It turned directly in front of the plaintiff's vehicle which had the right of way.

[10] The plaintiff recalls that she slammed her right foot into the front passenger floorboard in a futile attempt to apply non-existent brakes. A collision occurred. The air bags in the plaintiff's vehicle did not deploy.

[11] The impact caused the plaintiff's body to be thrown forward and, when her seatbelt engaged, then backward. She does not recall her head hitting the headrest. Initially she felt as though she couldn't breathe - like her chest had "caved in". She was crying and in shock. Her right toe felt like it was fractured. She chipped a tooth during the impact.

[12] She remained in her vehicle until an ambulance arrived. She was placed in a neck brace and on a stretcher and taken to hospital.

[13] Although x-rays of her chest and right toe were normal, her entire body felt stiff and sore. She had bruising from the seat belt which lasted for two to three months.

[14] In the days and weeks following the accident, she began to get severe headaches and experience some dizziness. She developed pain in her neck and lower back. Her neck was stiff and movement was restricted by the pain.

[15] She did not return to work at CRA for two weeks. She never did return to work at Ingledew's.

[16] The trauma of the accident resulted in the plaintiff being emotionally unable to drive until mid-May 2009.

[17] On September 30, 2008 she returned to work at CRA but only for three hours of her scheduled 7.5 hour shift. Thereafter, from October 1, 2008 to the end of December 2008, she worked sporadically. Her job entails sitting long hours at a desk. She found that her neck, back pain and headaches were aggravated by such long periods of sitting. She worked when she could and went home when the pain was such that she could not work any longer. Initially, she was able to take sick leave with pay but when her accumulated sick leave days were exhausted, she had to take sick leave without pay, with the exception of a few days when she used her vacation time.

[18] During the period September 15 to December 31, 2008, the plaintiff attended 22 physiotherapy treatment sessions. She was prescribed Tylenol 2, Tylenol 3 and Celebrex for her pain. She was also prescribed muscles relaxants and sleeping aids.

[19] The plaintiff's doctor referred her to Karp Rehabilitation, where she attended an exercise program for 12 visits. There was only marginal improvement. She was then referred to massage therapy at Legacies Sports Massage. She attended 36 massage sessions from April 29, 2011 to January 18, 2012.

[20] Commencing January 2009, the plaintiff began taking prerequisite courses at Douglas College for the psychiatric nursing program. She reduced her weekly CRA work hours from 37.5 to 27.5. Her reason for doing so was in part because she was trying to manage her course load at Douglas College and in part because she felt

she was beginning to look bad in the eyes of her employer for taking so many sick leave days. She testified that she would not have reduced her work hours had the accident not occurred as she would have been able to manage her schooling without pain.

[21] She found that she was not able to focus during her college studies due to ongoing headaches and pain in her neck and lower back. She found the courses to be a challenge. She lost interest in them. She failed her human anatomy course. She took it a second time and barely passed.

[22] In April 2009, her family doctor, Dr. Mergens, approved her return to full time work at CRA. However, she only increased her work hours from 27.5 to 29.5 hours per week. She testified that she still needed to take time off due to pain. In June 2009 she increased her hours again to 31.5 hours per week. In September 2009, after she had completed her prerequisite courses for the nursing program, she returned to the full time equivalent of 37.5 hours per week at CRA. Even though she continued to suffer from neck and lower back pain as well as headaches, in her words “life was back to normal again”.

[23] In September 2009, she returned to cardio kick-boxing lessons. Unfortunately, those lessons resulted in her pain flaring up and becoming intense again. This flare-up lasted four to five days.

[24] In February 2010 and again in the fall of 2010, the plaintiff experienced other pain flare-up episodes which lasted approximately one week on each occasion. Other than those flare-ups, 2010 was a good year for the plaintiff pain-wise. She was able to return to her pre-accident cardio kick-boxing schedule.

[25] The flare-ups returned in the spring and fall of 2011. Otherwise, 2011 was a good year pain-wise.

[26] In November 2012, the plaintiff experienced another flare-up that was so intense she was unable to go to work for one week.

[27] On cross-examination the plaintiff agreed the bruising from the accident was resolved within two to three months. Her chest and right toe pain were resolved by 2009. Her lower back pain was more or less resolved by late 2009/early 2010, although activities would aggravate it. Her headaches remained constant after the accident for about two weeks and then returned while she was at work. They are now infrequent. Finally, she has neck pain that flares up from time to time.

[28] The plaintiff continues to have bad days. She generally feels she is getting better but she still lives with some lower back pain. She is resolute that it will not take over her life.

[29] The plaintiff has resumed hiking, although her hikes are not as frequent or lengthy. Her gym routine is not as frequent or intense as it was prior to the accident, in part because she has less time with her school work load. She is able to perform household chores without restriction.

[30] The plaintiff has abandoned her plans to become a psychiatric nurse. Instead, she is focussing on furthering her career at CRA by taking accounting courses at Douglas College. Her plan is to become a CRA auditor.

ii. Violet Leeson

[31] Ms. Leeson was an employee of CRA for over 33 years until her retirement in September 2012. For the last 26 years she has been a team leader. She supervised approximately 15 employees. From 2006 until 2010 the plaintiff was part of her team.

[32] Before the accident, she described the plaintiff's work as dependable and conscientious. The plaintiff was extremely efficient and she was seldom absent. She never complained of headaches.

[33] In Ms Leeson's words, the plaintiff was driven to do her very best at all times.

[34] Upon the plaintiff's return to work after the accident, she observed that the plaintiff was in obvious pain - she could see it in her eyes. The plaintiff would try to

soldier on (she told Ms. Leeson that she did not want to let her down) but often couldn't and Ms. Leeson would tell her to rest or go home. Other team members would help the plaintiff perform her work duties when the plaintiff was suffering from debilitating pain.

[35] Ms. Leeson arranged for an ergonomic specialist to examine the plaintiff's work station. Changes were made to her mouse, keyboard and chair.

[36] Ms. Leeson observed the plaintiff in pain and having occasional bad days right up until her retirement in September 2012.

iii. Linda Parris

[37] Ms. Parris has worked at CRA since 2007 either on the same team as the plaintiff or in the same office area. The plaintiff and Ms. Parris became friends and they worked out at the gym together. It was Ms. Parris who introduced the plaintiff to cardio kick-boxing.

[38] Ms. Parris described the plaintiff as being very social, happy and full of energy prior to the accident. She does not recall the plaintiff ever complaining of headaches prior to the accident.

[39] When she first saw the plaintiff after the accident, the plaintiff was obviously sore. Her movement was stiff and limited. She complained of pain and headaches.

[40] Upon the plaintiff's return to work after the accident, Ms. Parris observed her in pain and she tried to assist her as best she could. The plaintiff's work days were short. She used a heating pad on her neck.

[41] As best Ms. Parris could recall, the plaintiff resumed her normal recreational activities approximately one year after the accident, including cardio kick-boxing, although she moved with care and here movements were limited.

[42] Ms. Parris testified that she and the plaintiff work out in the gym together once every couple of weeks. They also attend kick-boxing classes. However, she can tell from the way the plaintiff moves that she has occasional pain and discomfort.

iv. Josh Halliday

[43] Mr. Halliday is the plaintiff's husband. He met the plaintiff in October 2010, two years after the accident.

[44] He described the plaintiff as a confident, kind and strong woman who is devoted to her family and friends.

[45] He testified that the plaintiff continues to struggle from time to time with neck and lower back pain and she is conscious of her condition. She also complains of headaches from time to time. He has occasionally observed her in obvious discomfort during activities such as hiking. She uses heating pads and a special pillow at night for neck support. The plaintiff is able to manage household chores.

[46] Mr. Halliday and the plaintiff plan to start a family but they are concerned that lifting a child will be a challenge for the plaintiff.

v. Dr. Mark Frobb

[47] Dr. Frobb is a pain management physician who specialized in orthopedic medicine rehabilitation, management of chronic back pain and acceleration/deceleration spinal injuries. He has worked in this specialized area for over 30 years. He was qualified to give opinion evidence on the non-surgical treatment and management of vertebral spinal column pain syndromes, including whiplash-associated disorders.

[48] Dr. Frobb examined the plaintiff on December 20, 2011. He diagnosed a "persistent biomechanical dysfunctional vertebral movement disorder affecting the spinal segmental areas of the lumbosacral spine, thoracic spine and cervical spine associated with an accompanying chronic myofascial pain syndrome". In other words, the plaintiff's back was twisted and the muscles were in spasm trying to

remedy the situation. Since he was given no evidence of any symptoms affecting these areas prior to the accident and as the plaintiff's injuries were typical of those associated with acceleration/deceleration spinal injuries (whiplash-associated disorders), he opined that the plaintiff's pain syndrome is attributable to the September 15, 2008 accident.

[49] In Dr. Frobb's opinion, whatever the plaintiff had been doing in terms of exercise and therapy over the three year period between the accident and his examination of her had not worked for her. He was of the view that the plaintiff needs to address her loss of core strength and aberrant postural changes. Although the plaintiff was previously referred to a kinesiologist at Karp Rehabilitation, he recommended that she see another kinesiologist both as a "refresher" and to help motivate the plaintiff. He thought that a series of five to ten sessions would be sufficient. He agreed on cross-examination that the plaintiff will not require a kinesiologist if she becomes more diligent in doing the exercises she was previously advised to do.

[50] It was Dr. Frobb's opinion that the plaintiff would benefit from "manual therapy" (massage) in order to address the underlying biomechanical dysfunctional vertebral movement disorder affecting the lumbosacral, thoracic and cervical spinal segments. In addition, he recommended concurrent myofascial therapy to address the associated muscle spasms. It was also his opinion, however, that such therapy may or may not help. At best it would only provide temporary relief from the pain.

[51] Dr. Frobb agreed with Dr. Mergen's assessment that the plaintiff is not likely to become disabled from her injuries, although she may indefinitely suffer intermittent symptoms of discomfort and stiffness in her neck and back as well as muscle tension headaches. He also agreed with Dr. Horlick's opinion that the plaintiff's symptoms will continue to improve over time and will not result in any significant impairment with respect to her vocational or avocational pursuits, now or in the future. He believed the plaintiff is capable of accomplishing whatever she wants so long as she is willing to "pay the price", which I take to mean both living

with intermittent pain and conscientiously adhering to the fitness regime designed by either Karp Rehabilitation or a new kinesiologist.

vi. Dr. Joseph Mergens

[52] Dr. Mergens has been a family physician since 1973. The plaintiff has been his patient since 2007. He was qualified as an expert on the diagnosis and prognosis of soft tissue injuries.

[53] He testified that the plaintiff had complained of headaches prior to the September 15, 2008 accident. He attributed these headaches to stress. He had prescribed Tylenol 3.

[54] The plaintiff was seen by Dr. Garvin, with whom Dr. Mergens shares an office, on September 18, 2008, three days after the accident. Dr. Mergens first saw the plaintiff after the accident on September 23, 2008. She complained of headaches and pain across her neck and shoulders on both sides. She was sore and tender about the anterior chest wall, about the joints of her rib cartilages and on both sides of the sternum. She had an abrasion on the right and left sides of her low abdomen wall. She had pain in her lower back. She demonstrated reduced movement of the neck and back. Dr. Mergens advised her to do home exercises and he prescribed analgesics. He did not consider her fit to go to work.

[55] Dr. Mergens saw the plaintiff again on September 26, 2008. She complained of headaches. She demonstrated reduced range of movement in her neck and back. She had pain about her neck, shoulders and chest wall. She had a bruise about her right inguinal/abdominal wall area and pain in her right foot. She was sore about the middle low back area.

[56] Dr. Mergens saw the plaintiff again on October 3 and October 8, 2008. She complained of pain and stiffness of her lower back which worsened when she sat for more than 30 minutes. She was tender on both sides of her lower back and her movement was guarded. She was having pain about her lower neck and shoulder. She told Dr. Mergens that she was having headaches daily which worsened after

three to four hours of desk work. He recommended that she continue her home exercises.

[57] On October 13, 2008, Dr. Mergens completed a Form CL19 ICBC Medical Report in which he reported the plaintiff's current symptoms as neck and lower back pain, some tenderness and guarded range of motion. He also reported the plaintiff's complaints of headaches, neck and back myofascial pain, foot and chest pain and bruises. He diagnosed a Grade II soft tissue injury.

[58] Dr. Mergens saw the plaintiff next on October 17, 2008. She was having headaches every day. Working four hours a day caused neck discomfort and headaches. She advised that she was receiving physiotherapy and massage therapy.

[59] The plaintiff was next seen by Dr. Mergens on October 29, 2008 for a physical examination to support her application for admission into the psychiatric nursing program at Douglas College. The plaintiff told Dr. Mergens that she was experiencing sharp pains from the neck up to the rear of her head. In his report to Douglas College, he stated that the plaintiff had no back or joint abnormalities and that she was fit to be a psychiatric nurse, which he said required only modest physical exertion. He intended for this report to be restricted to her abilities to become a psychiatric nurse.

[60] On November 7, 2008, the plaintiff advised Dr. Mergens that she would develop pain and stiffness in her neck and lower rear aspect of her head after working 4.5 to 6 hours. On November 26, 2008 she reported headaches on both sides of her head, front to back. Her headaches worsened after 6 hours of work. She felt tired.

[61] The plaintiff saw Dr. Mergens again on December 3, 2008. She advised that she was willing to increase her work hours from 5 to 6 hours to 8 hours daily if it could be tolerated.

[62] The plaintiff saw Dr. Mergens again on January 14, January 27, March 2, April 29 and November 10, 2009. In each visit she complained of shoulder pain and headaches. She was still experiencing back pain most days.

[63] During her visit with Dr. Mergens on January 4, 2010, she reported that her neck and back pain had not improved. Those complaints were repeated during her next visits on April 12, August 13, and October 15, 2010.

[64] She saw Dr. Mergens again on January 7, 2011, complaining of nearly daily neck pain. She was having three to four headaches per week, each of which lasted several hours. She was still experiencing mid and lower back pain after several hours of work. Those symptoms were also reported to Dr. Mergens during the following visit on February 28, 2011.

[65] During her visits with Dr. Mergens on March 16 and April 20, 2011, she complained of worsening back pain. She was referred to a physical medicine and rehabilitation specialist. Notwithstanding her complaints, on April 20, 2011, Dr. Mergens advised the plaintiff she could return to work full time.

[66] On August 26, 2011, the plaintiff advised Dr. Mergens that she was feeling better, although desk work caused pain across her lower neck and shoulders.

[67] During her visit on October 5, 2011, the plaintiff informed Dr. Mergens that her neck and shoulder became stiff and sore one to three times per week and that her movement was restricted. She complained of pain about her right shoulder, left side of her neck and head, lower back pain and stiffness.

[68] Dr. Mergens agreed that the plaintiff's injuries to her chest and lower abdomen, likely caused by seat belt contact, had resolved quickly. However, he opined that the collision had caused strain injuries of the muscular and fascial soft tissues of her neck, shoulders and upper and lower back. The myofascial strain injuries caused muscle tension headaches.

[69] Dr. Mergens described the plaintiff as someone who was active and hardworking with a positive attitude. In his view, the pain she was enduring as a result of the accident seriously impinged on her daily activities. He was of the opinion that the plaintiff is now able to function well but still suffers physical discomfort, anxiety, insomnia and frustration attributable to the accident.

[70] Dr. Mergens opined that the plaintiff is not likely to become disabled from her injuries in the long term. Rather, she will likely suffer intermittent symptoms of discomfort and stiffness of her neck and back and muscle tension headaches for an indefinite period of time. These symptoms may continue to moderate with time and consistent physical activity. Dr. Mergens did not believe that there will be any permanent effect on the things that the plaintiff is doing or wants to do, although she may have to miss the odd day of work due to flare-ups.

[71] Dr. Mergens agreed on cross-examination that his last prescription of drugs to the plaintiff relating to the accident was on March 2, 2011.

The Defendants' Cases

[72] The following is a summary of the evidence provided by witnesses called as part of the defendants' cases:

i. Matthew Daniel Herback

[73] Herback described his version of the accident event.

[74] He testified that, on September 15, 2008, the weather was clear and dry. At approximately 5:30 pm, he was headed westbound on 88th Avenue in Surrey approaching the intersection of 156th Street. There were two westbound lanes, a through lane and a left turn lane. Eastbound there were three lanes, a left turn lane, a center through lane and a right turn only lane. The light was green in his direction.

[75] A red vehicle that was travelling westbound ahead of Herback safely turned left onto 156th Street southbound.

[76] Herback also intended to turn left on to 156th Street southbound. He saw the plaintiff's vehicle eastbound on 88th Avenue but says it was in the right turn only lane. He thought it was safe for him to turn left onto 156th Street. Instead of turning right onto 156th Street, the plaintiff's vehicle moved into the center through lane and proceeded straight through the intersection. The collision occurred. The vehicles came to a stop in the middle of the intersection.

[77] The attending police officer issued a ticket to Herback for making an improper left turn. He did not dispute the ticket.

[78] When it was put to him on cross-examination by counsel for Rafael that the plaintiff's vehicle was in the center lane, Herback responded by saying "I don't believe so - I saw it in the right lane and move to the center lane."

[79] Herback admitted that he was a "New" driver and was required to have an "N" displayed on his vehicle. He did not have an "N" displayed at the time of the accident.

[80] Herback's vehicle was written off by ICBC.

ii. Edgardo Limjuco Rafael

[81] Rafael was driving the plaintiff's vehicle when the accident occurred. He had picked the plaintiff up at the CRA after work and was driving to his home. He proceeded along Fraser Highway and then turned left on 88th Avenue headed eastbound. This was his normal route home and he was familiar with it.

[82] He was also familiar with the intersection of 88th Avenue and 156th Street. There were three eastbound lanes - a left turn lane, a center through lane and a right turn lane.

[83] As he approached the intersection Rafael was driving in the center through lane. A red vehicle travelling westbound made a safe left turn onto 156th Street ahead of him. Rafael slowed down by taking his foot off the accelerator in order to allow the red vehicle to safely turn across his path. A second westbound vehicle

(driven by Herback) “came out of nowhere” and followed the red vehicle, also attempting to turn left onto 156th Street right in front of the plaintiff’s vehicle. The collision occurred in the middle of the intersection.

[84] Rafael denies that he was ever in the right turn lane.

[85] Rafael was not issued a ticket by the police.

[86] Rafael testified that he had a four year relationship with the plaintiff, having met her in 2006. Prior to the accident, the plaintiff was quite active. He and the plaintiff went to the gym together three to four times per week and they went hiking together on occasion. The plaintiff never complained to him of headaches or neck or back pain prior to the accident.

[87] Rafael testified that, after the accident, the plaintiff complained of headaches and lower back and neck pain. He said the plaintiff became a “home body”. It took her almost one year to return to the gym.

iii. Dr. Simon Horlick

[88] Dr. Horlick is an orthopaedic surgeon who examined the plaintiff on April 27, 2012. His expert medical-legal report was introduced in evidence without him being called to testify.

[89] In Dr. Horlick’s opinion, the plaintiff’s symptom complex in her cervical spine region has gradually improved over time and should continue to do so with intermittent treatments, including massage therapy, chiropractic treatments and generalized range of motion and strengthening exercises. He also recommended judicious use of non-narcotic analgesics and gradual reduction of muscle relaxants.

[90] Dr. Horlick opined that it is unlikely the plaintiff will have significant impairment or subsequent disability associated with her cervical spine. He expects the plaintiff’s symptoms will continue to improve over time and will not result in any significant impairment with respect to her vocational or avocational pursuits, now or in the near future. Unfortunately, Dr. Horlick did not explain what he meant by “significant”.

[91] As Dr. Horlick was not cross-examined, his opinions are not contradicted.

Analysis

a. Liability

[92] Rafael and the plaintiff say they were proceeding in the center through lane and that Herback's vehicle suddenly turned in front of them. Herback says he saw the plaintiff's vehicle in the right turn lane, and that he thought it was safe for him to turn left and that the plaintiff's vehicle moved to the center through lane immediately before the collision occurred.

[93] Herback was somewhat equivocal when giving his evidence. He stated that he "didn't believe" the plaintiff's vehicle was always in the centre through lane. He appeared to be reluctant to give his evidence in this respect with certainty.

[94] I have no reason to disbelieve the plaintiff's and Rafael's versions of the event. I found them to be credible witnesses. They were taking their normal route home from the CRA office. Rafael was familiar with the intersection of 88th Avenue and 156th Street. He would have had no reason to be in the right turn lane when, to go home, he would have to proceed through the intersection.

[95] When the driver of a vehicle intends to turn left at a controlled intersection with a green light exhibited, he/she must yield the right of way to approaching traffic. In order to fix any blame on the approaching driver, he/she must establish that the approaching driver had sufficient opportunity to avoid a collision, opportunity of which a reasonable, careful and skilful driver would have availed him or herself of. Any doubt is to be resolved in favour of the approaching driver: *McCowan v. Arjune*, 2002 BCCA 267 at paras 19 and 20.

[96] I find that Herback's vehicle attempted to beat the plaintiff's oncoming vehicle by making a left turn across its path when it was unsafe to do so. There was no evidence that Rafael had sufficient opportunity to avoid the collision.

[97] Herback was negligent and is solely liable for any injury and damages suffered by the plaintiff as a result of the September 15, 2008 collision.

b. Non-Pecuniary Damages

[98] In the assessment of non-pecuniary damages, each case is decided on its unique facts but it is helpful to consider other cases with similar factual circumstances for guidance when determining the appropriate award.

[99] Counsel for the plaintiff submits that non-pecuniary damages in the range of $45,000 to $50,000 are appropriate in this case. He relies on the following recent decisions in support of this submission:

a) *Mayenburg v. Lu*, 2009 BCSC 1308 ($50,000);

b) *Ching v. McCabel*, 2006 BCSC 1589 ($50,000);

c) *Loeppky v. ICBC*, 2012 BCSC 7 ($45,000);

d) *Sooch v. Snell*, 2012 BCSC 696 ($45,000); and

e) *Unger v. Bailey*, 2012 BCSC 932 ($50,000).

[100] In *Mayenburg*, the plaintiff was 20 years old at the time of the accident. She suffered from myofascial pain of mild severity as well as mechanical lower back pain. Her pain and limited mobility initially prohibited her from working and interfered with her studies. Work caused her pain, and she attempted to remedy this pain by changing jobs on several occasions. She was eventually able to resume physical activity with some modifications. At the time of trial, two years later, the prognosis for her recovery was “guarded”.

[101] In *Ching*, the plaintiff was 43 years old at the time of trial. Although she did not initially experience any noteworthy symptoms, several days after the accident she awoke to the sensation of her tongue going down her throat. She was also experiencing pain on her right side behind her ear to her chin, stiffness in her shoulder and reduced mobility in her neck. She was diagnosed with soft tissue

injuries to the neck, shoulder and upper back, which caused her headaches. She did not take time off work after the accident although there was evidence of a reduction in her hours. Her pain limited her ability to participate in outdoor activities and housework. It had also impacted her relationship with her husband. She had recovered substantially by the time of trial, four years later. The court found her recovery had reached a plateau.

[183] In *Loeppky*, the 36 year old plaintiff sustained injuries in his jaw, neck, mid and upper back and thigh as a result of a rear-end collision. He suffered from pain and headaches. Three to six months after the accident, he had recovered fully from his injuries with the exception of his back. The court found he was able resume his former fitness regime with some adjustments although he was forced to change positions within the Vancouver Police Department as a result of his injuries. The court held he would likely continue to suffer mild back pain and stiffness as well as flare-ups.

[184] In *Sooch*, the plaintiff was 33 years old at the time of the accident. Initially, he had experienced sharp headaches, pain in his neck and discomfort in his jaw. He also felt intense pain in his left shoulder and arm. He suffered from mild lower back pain for approximately four months. While he was still able to work, it aggravated his injuries. His ability to care for his young child was also affected. By the time of trial, four and a half years later, he had occasional headaches. However, he suffered from persistent and disabling neck and shoulder pain. The court found this pain was chronic, fluctuating between a mild and moderate level. There was a reasonable prospect of progressive diminishment.

[185] In *Unger*, the plaintiff was 33 years old at the time of trial. Prior to her accident two years earlier, the plaintiff had suffered back and neck pain from a succession of prior accidents. The accident at issue caused headaches, neck pain as well as upper and lower back pain. Her pain was aggravated by her work. At the time of trial, she claimed that her level of pain had not changed after the end of the first six months. She was able to resume physical activity although she still experienced

difficulty in housekeeping. The court accepted that she experienced chronic pain and found that she would suffer from this pain indefinitely. Despite a finding that many of her difficulties were associated with the earlier accidents, the court awarded the plaintiff $50,000.00 for non-pecuniary damages. Lumped in with that award was her claim for loss of housekeeping ability.

[186] The defendants submit that an appropriate range for non-pecuniary damages in this case is $20,000 to $40,000. They rely on the following decisions:

a) *Bray v. Gaete,* 2004 BCSC 335 ($17,000);

b) *Hamilton v. Vance*, 2007 BCSC 1001 ($38,000);

c) *Fisher v. Stone*, 2008 BCSC 430 ($22,500);

d) *Chan v. Lee*, 2008 BCSC 594 ($35,000);

e) *Guilbault v. Purser*, 2009 BCSC 188 ($35,000);

f) *Ponipal v. McDonagh (Committee of)*, 2009 BCSC 461 ($31,500);

g) *Co v. Watson*, 2010 BCSC 950 ($27,500);

h) *Sandher v. Hogg*, 2010 BCSC 1152 ($40,000);

i) *Frech v. Langley*, 2012 BCSC 1230 ($35,000).

[187] In *Bray*, the plaintiff sustained minor soft tissue injuries to her neck and shoulders as well as her lower back. She was still suffering from pain four years after the motor vehicle accident. It prevented her from continuing her active lifestyle. She found working long hours as a seamstress and a designer difficult because the postures aggravated her lower back pain. The court found that in these circumstances, an award of $20,000.00 would have been appropriate. However, the plaintiff had moved to a new city a year after the accident and had failed to pursue a regime of fitness and rehabilitation there as recommended by her physiotherapist. Accordingly, her award in non-pecuniary damages was reduced to $17,000.00

[188] In *Hamilton*, the plaintiff at the time of trial was 45 years old. She had sustained soft tissue injuries to her neck, upper left shoulder and lower back,

causing her pain and headaches. She also experienced pain and numbness in her left buttock, leg and toes. She suffered from significant pain in the first two months following the accident. At the date of trial, she was still suffering from pain in her upper back about her shoulder blades, her lower back and left thigh. She also had numbness in her left foot. While there was disagreement between the expert witnesses over the permanence of her condition, the court found the plaintiff had proven a permanent partial disability in her neck.

[189] In *Fisher*, the plaintiff was 26 years old at the time of the accident. The plaintiff felt sharp pain in her hip and back area. She continued to feel stiff and sore and she suffered from radiating pain in her hip. Staying in one position for any length of time would aggravate her pain. Sometimes she suffered spasms. She had to change her job to accommodate her pain. Eventually she resumed her exercise regime, although not to the same degree of intensity. She eventually felt better about her health but in her new role as a police officer she found the physical demands of her job caused flare-ups in her pain. The court concluded it was unlikely the plaintiff would completely recover from her injuries, despite her diligent efforts to get better through fitness. The court found her injuries prevented her from excelling physically in her work but they were not of such a great magnitude as to prevent her from engaging in the activities she enjoyed. The court determined that a $30,000.00 non-pecuniary damages award would be appropriate, subject to a 25% deduction to allow for contingencies that there would have been restrictions on her future abilities regardless of the accident.

[190] In *Chan*, the plaintiff was 31 years old at the time of trial. The plaintiff sustained soft tissue injuries in her upper back, neck and shoulder, which the court categorized as mild to moderate. Her injuries were complicated by myofascial pain syndrome as well as psychiatric disorders attributable to the accident. The plaintiff's pain was largely resolved within a year, although she still suffered from intermittent pain and tightness. However, her psychological condition of anxiety did not improve. The plaintiff never missed work as a result of her injuries but she was limited in her

ability to return to her former active lifestyle. The court found there was no prospect of long term future effects.

[191] In *Guilbault*, the plaintiff was 22 years old at the time of trial. She sustained soft tissue injuries in her neck, shoulder and back. She suffered from pain and "distressing" headaches. She claimed the pain impacted her participation in outdoor activities. Her pain had diminished four and a half years later because she had developed coping mechanisms. The injuries did not bear any impact on her ability to participate in physically demanding work. The court found the accident would continue to impact her capabilities to some degree in the future.

[192] In *Ponipal*, the plaintiff was 35 years old at the time of trial. She sustained soft tissue injuries in her neck, right shoulder and arm, mid-back, right leg and abdomen. She also suffered numbness, tingling and headaches. She continued to suffer pain at trial two years later although it had diminished. She had resumed her previous lifestyle subject to some limitations. She was restricted in her ability to work and to perform her household responsibilities. The court awarded $35,000.00, subject to a 10% reduction for failure to mitigate her loss.

[193] In *Co*, the plaintiff suffered from neck and shoulder pain, spinal muscle spasm and tenderness in her left biceps and right temporalis muscles as a result of the accident. This pain limited her movement and caused headaches. She returned to work one month later half time. Three years after the accident, she still suffered from soreness in her neck and shoulders, stiffness in her lower back and occasional neck pain with muscle spasms. Her family physician concluded four years after the accident that the plaintiff had reached her best level of recovery. The court found she was able to work full time and enjoy sports. Her intermittent muscle spasms were relievable with rest. The court held the plaintiff did not suffer from chronic and continuing pain. Nor had her injuries affected her leisure activities.

[194] In *Sandher*, the plaintiff was 23 years of age at the time of the accident and 27 at the time of trial. She sustained soft tissue injuries to her shoulder as well as her upper and lower back, which caused her persistent pain and emotional suffering.

She was healthy and active at the time of the accident. After the accident, she was restricted in her ability to perform routine and recreational activities. She eventually left her position at a salon because the work aggravated her injuries and also because she had not intended to pursue this work as a career. The court concluded there was a realistic possibility she would experience significant improvement in the near future although there was also a reasonable prospect she would never fully recover.

[195] *Frech* involved two motor vehicle accidents (April 11 and November 5, 2007). The plaintiff was 26 years old at the time of the accidents and 31 years of age at the time of trial. After the first accident, she had suffered neck and upper back soft tissue injury, causing her pain. She also suffered from right shoulder pain and right arm pain as well as tension headaches. A medical report prepared for ICBC concluded that she suffered from mild pain and that she had sustained a Grade II injury. She missed two weeks of work. The second accident occurred seven months later. It aggravated her neck and back pain and headaches. She only missed two days of work after the accident. She continued to suffer pain at the time of trial, which had limited her ability to be active. The court concluded she would never be pain free, although her pain could not be characterized as debilitating since she was still able to participate in her pre-accident activities.

[196] As stated above, I found the plaintiff to be an honest and credible witness. The pain and other discomfort that she described from the date of the accident to the date of trial is real and not imagined. She is an energetic, strong, confident and hardworking woman who, since the accident, has done her best to get better and put her injuries behind her. She is focused and motivated to do as well as she can in both her work and exercise regimes. Despite her efforts and through no fault of her own, she has not met with complete success with respect to the latter.

[197] The plaintiff felt some immediate pain in her chest and right toe after the accident. She had no loss of consciousness. X-rays taken at the hospital shortly after the accident were negative. As the days and weeks progressed, she

developed debilitating pain in her neck and lower back, with resulting headaches. She had bruising on her chest and abdomen. She was unable to go to work at CRA for two weeks.

[198] The bruises and the pain she suffered in her chest and right toe pain resolved completely within six weeks. Although she thought her lower back pain had resolved by the end of 2009, she has since experienced severe flare-ups several times since then.

[199] The plaintiff has tried various modalities of treatment. They have provided temporary but not permanent relief. The plaintiff continues to experience persistent pain and muscle spasms. She will continue to have episodic flare-ups of pain in her lower back and cervical spine with associated headaches. I am satisfied that such episodes have been and will continue to be the result of the injuries she suffered during the September 15, 2008 accident.

[200] I agree with the submissions of counsel for Herback that Dr. Frobb's diagnosis and prognosis should not be given significant weight, given that it was based on many assumed facts that were not in evidence. Dr. Frobb did not carry out the full investigation of the plaintiff that in my view he ought to have before providing the opinions that he did. For example, he diagnosed a thoracic spine injury without any evidence to support such a finding. He diagnosed neurocognitive and emotional changes in the plaintiff based simply on her reports to him without any verification. He opined that the plaintiff's injuries will likely affect her competitive employment capabilities without knowing what her job function was.

[201] I find that the plaintiff suffered a Grade II whiplash injury as a result of the September 15, 2008 accident. She also suffered contusion injuries to her chest and lower abdomen, chest wall strain and a chipped tooth. Over four years have passed since the accident and she still suffers from intermittent neck and lower back pain and tension headaches as a result of the accident.

[202] I find that it is reasonable to expect the plaintiff will be fully recovered within five years. In part, I make this finding on the basis that the plaintiff is an achiever. Dr. Mergens gave evidence that she might still suffer some muscle tension headaches for an indefinite period. He did say these symptoms may dissipate with time and conditioning. However, there is no reasonable prospect of permanent impact upon her capabilities.

[203] After considering all of the evidence, the submissions of counsel and the case authorities, I find that an appropriate award for non-pecuniary damages in this case is $45,000.

c. Past Wage Loss

[204] The parties have agreed that the net, after tax, value of the plaintiff's hours at CRA missed without pay as a result of the accident is $7,942.83. However, the defendants argue that only the portion that was lost prior to the plaintiff commencing Douglas College in January 2009 (196 hours) is recoverable. They submit the reason the plaintiff reduced her CRA work hours from January 2009 to the end of August 2009 was because of her college workload and not the injuries she sustained in the accident. They point out that, in April 2009, the plaintiff increased her work hours from 27.5 to only 29.5 hours per week despite Dr. Mergens having approved her return to full time work. She did not return to full time work until September 2009. The defendants argue it is not coincidence that this timing coincided with the plaintiff having completed her Douglas College courses.

[205] The plaintiff was and is an extremely energetic, conscientious and hardworking individual. Ms. Leeson described how the plaintiff was suffering with pain while she was at work after the accident. I have no difficulty finding that the hours of work the plaintiff missed at CRA were due to the pain and discomfort she was in as a result of the accident and not because she was attending a few classes at Douglas College. I find that, but for the accident, the plaintiff would have worked full time at CRA while she was attending Douglas College. In fact, that is precisely

what she is now doing - working full time at CRA and attending courses at Douglas College leading to an accounting diploma.

[206] The plaintiff is entitled to recover net lost wages from CRA of $7,942.83

[207] Prior to the accident the plaintiff was working six to eight hours every Saturday at Ingledew's earning approximately $15.00 per hour. I find that, but for the accident, she would have continued to work those hours until the end of 2008, after which time she started taking prerequisite courses at Douglas College for the psychiatric nursing program. Given that she likely would have continued working full time at CRA and that she was spending long hours studying, I find it is more probable than not that she would have stopped working her weekend hours at Ingledew's when she enrolled in her college programs.

[208] There were 15 Saturdays between the date of the accident and the end of 2008. The plaintiff's gross lost wages in respect of her Ingledew's employment were $1,800.00 ($15/hr x 8 hrs x 15). From that amount, the agreed tax contingency of 25% must be deducted. Accordingly, the plaintiff is entitled to recover net lost wages from Ingledew's in the amount of $1,350.00.

d. Compensation for Loss of Accumulated Sick Leave Benefits

[209] During a portion of the time when the plaintiff was unable to work, she was paid the wages that she otherwise would have received by drawing on her sick leave and vacation benefits. She seeks damages to reflect the depletion of those benefits.

[210] The parties have agreed that the value of the plaintiff's hours missed (sick leave and vacation time used with pay) totals $7,371.09.

[211] The defendants argue that an award to the plaintiff in this regard will result in double recovery because she did not lose any money - she continued to receive her wages by drawing on her sick leave benefits and vacation time.

[212] This issue was addressed by this court in *Bjarnason v. Parks*, 2009 BCSC 48. In that case, Madam Justice Ballance provided a thorough and helpful analysis:

> [56] This court has long recognized the loss of sick bank credits as a compensable loss (see generally: ***McCready v. Munroe*** (1965), 55 D.L.R. (2d) 338, 54 W.W.R. 65 (B.C.S.C.)). In ***Lavigne v. Doucet*** (1976), 14 N.B.R (2d) 700 at para. 12 (C.A.), the New Brunswick Court of Appeal held that the depletion of a plaintiff's accumulated sick leave arising from injuries suffered in an accident removed a benefit that he or she would otherwise have and, therefore, constitutes a genuine loss. That conceptual approach was approved of by McLachlin J. (now the Chief Justice) in ***Ratych v. Bloomer***, [1990] 1 S.C.R. 940 at 972, 69 D.L.R. (4th) 25:
>
> > I accept that if an employee can establish that he or she has suffered a loss in exchange for obtaining wages during the time he or she could not work, the employee should be compensated for that loss. Thus in *Lavigne v. Doucet* the New Brunswick Court of Appeal quite rightly allowed damages for loss of accumulated sick benefits.
>
> [57] Some years later the issue was revived before the Supreme Court of Canada in ***Cunningham v. Wheeler***, [1994] 1 S.C.R. 359, 113 DLR (4th) 1, where Cory J. confirmed at 13 that an employee who uses sick leave in order to receive wages while off work and loses those sick day credits is entitled to receive compensation.
>
> [58] In ***Roberts v. Earthy***, 1995 CanLII 1421 (B.C.S.C.) [***Roberts***], Clancy J. held at para. 8 that it was not necessary to adduce evidence showing that any consideration was paid by the plaintiff or negotiated on the plaintiff's behalf through a collective agreement or other employment arrangement. He did so on the basis that the accumulation of sick days is not related to what has come to be known as the insurance exception to the compensatory principle where such supporting evidence is generally required.
>
> [59] The case authorities do not appear to support a universal approach to the quantification of the loss flowing from the depletion of sick leave benefits. For example, in ***Collins v. Ma***, 1990 CanLII 1634 (B.C.S.C.), the court endorsed a contingency calculation being applied in order to take into consideration the likelihood of an employee drawing on the lost banked sick days in the future. That approach was followed by the court in ***Olson v. Nixon***, [1991] B.C.J. No. 155, 1991 CarswellBC 1346 (S.C.).
>
> [60] In ***Roberts***, however, Clancy J. made no deduction for contingencies. Likewise, more recently in ***Choromanski v. Malaspina University College***, 2002 BCSC 771, the court rejected the defence argument that there should be a reduction of the loss taken based on the plaintiff's work history and the rate at which he had traditionally availed himself of his sick benefits.

[61] In my view, whether it is appropriate to make deductions for contingencies in quantifying the loss will depend upon the presence or absence of certain factors. Those would include, for example, whether there is a maximum limit of accumulated sick leave, whether the plaintiff is able to cash out accumulated sick leave days on termination or retirement, whether the plaintiff has several years of employment remaining in which to potentially use the sick leave or has only a few months of employment left until retirement with a significant sick leave remaining, or whether the plaintiff has left the employment in which he earned the sick day credits altogether. It cannot be predicted with any degree of certainty whether a person who is healthy today will be so tomorrow. Illness or injury can afflict any one of us at any time. Placing much if any reliance on the plaintiff's past use of sick benefits strikes me as an unsound and potentially unfair approach because it fails to adequately protect a plaintiff against an unexpected serious or catastrophic illness in the future which could occur in any otherwise healthy plaintiff, or against a future injury, which, by its nature, is unpredictable. In neither case would those future events necessarily be related to the plaintiff's past use of sick benefits.

[62] I accept that had Ms. Fenwick not used her sick leave credits, she would have been entitled to transfer them from her then employer, the Vancouver School Board, to her new employer, the Coquitlam School Board. As well I am satisfied that, pursuant to her collective agreement, any monies awarded to Ms. Fenwick on account of lost sick days is repayable to her then employer in order to replenish her sick leave bank. Beyond that, the evidence pertaining to the details of the portability of Ms. Fenwick's sick day credits was not well developed. I do not have cogent evidence as to whether there is a maximum number of sick days allowable, the formula for which she has earned them or whether she is able to cash them out on retirement or termination.

[63] As best I can decipher from the evidence, the loss that Ms. Fenwick has sustained is a potential future loss in the sense that it would only be experienced if she has insufficient sick leave credits to adequately cover a future period of absence due to illness in respect of which she could have drawn upon the lost sick bank for income continuation.

[64] Ms. Fenwick thoroughly exhausted her accumulated sick leave as a result of the accident. She is a relatively young woman in the early stages of her career as a teacher. I have found that she likely will experience flare-ups of her symptoms caused by this accident from time to time in the future which may require her to miss brief intervals of time from work. She may also suffer from other illness or medical conditions in the future which will keep her from work.

[65] I am satisfied that fair and reasonable damages for this loss is compensation which reflects the actual hours Ms. Fenwick missed from work and used as sick time, multiplied by her approximate average hourly rate, without deduction. To that, I would add her wage loss stemming from fifteen hours of unpaid absences attributable to her injuries. The total damages amount to $5,469.18.

> [66] Ms. Fenwick's counsel raised a concern about whether damages for Ms. Fenwick's lost sick bank entitlement could be validly characterized as pre-trial earnings or income and thereby attract a deduction for income tax pursuant to sections 95 and 98 of the ***Insurance (Vehicle) Act***, R.S.B.C. 1996, c. 231. In my view, this kind of loss is not in the character of past wage loss. Accordingly, there will be no deduction for income tax.

[213] I agree with that analysis and I adopt it in its entirety. Here, the plaintiff exhausted her accumulated sick leave. She also used up several of her vacation days. She has had illnesses unrelated to the accident that have resulted in her being unable to work. She is likely to have them in the future. Her plan is to stay and make a career at CRA.

[214] I am satisfied that the plaintiff is entitled to be compensated for her lost sick leave and vacation benefits which total $7,371.09. There will be no deduction for income tax.

e. Loss of Earning Capacity

[215] The plaintiff must demonstrate both impairment to her earning capacity and a real and substantial possibility that the impairment will result in a pecuniary loss: *Perren v. Lalari*, 2010 BCCA 140 at para. 32; *Drodge v. Kozak*, 2011 BCSC 1316 at para. 147.

[216] Counsel for the plaintiff submits the evidence shows there will be times when the plaintiff will miss work in the future due to her accident related injuries. He points to the fact that the plaintiff has used 81 hours of sick leave due to the accident between October 27, 2011 and the present. He also points to the fact that she missed work in November 2012 for this very reason.

[217] I agree with counsel for the defendants that, in determining the extent of loss of earning capacity I must take into account all substantial possibilities and give them the appropriate weight. As well, I must consider the plaintiff's ongoing duty to mitigate.

[218] Although the plaintiff is now functioning relatively well, will continue to improve and is not likely to be disabled from her injuries, I find that there is a substantial possibility she will continue to miss the occasional work day due to her accident related injuries.

[219] The plaintiff is now 29 years old. She has a full career ahead of her. Counsel for the plaintiff suggests it is reasonable to expect that she will lose $1,500 per year as a result of her injuries. I disagree. The plaintiff is an achiever. She is not going to let her injuries interfere with her work life unless her muscle spasms and pain are debilitating. In my view, it is reasonable to expect she will be unable to work no more than three days per year due to lower back and neck pain and muscle spasm resulting from the accident.

[220] As stated above, it is reasonable to expect she will be fully recovered within five years. Accordingly, she is entitled to compensation for an annual loss of $577.92 (24 hrs per year x $24.08 per hour).

[221] A discount rate of 2.5% is applicable to future income loss. Using that rate for a five year loss yields a present value multiplier of 4.6458. Applying that multiplier to a loss of $577.92 per year yields $2,684.90.

f. Mitigation

[222] Counsel for the defendants argue the plaintiff has failed to mitigate. They submit the plaintiff was told to remain active and continue with a rehabilitation program. At times she complied and at other times she did not because she was too busy with work and school.

[223] The defendants bear the onus of proving the plaintiff failed to undertake the recommended treatment, that by following the recommended treatment she could have mitigated her loss and that her failure to undertake that treatment was unreasonable: *Fox v. Danis*, 2005 BCSC 102 at para. 37 (affirmed 2006 BCCA 324).

[224] In my view, the evidence is clear that the plaintiff was determined to put her injuries behind her and that she did take reasonable steps to recover from them. To the extent she did not go to the gym as often as her doctor had recommended, I am satisfied it was because her pain prevented it.

g. Cost of Future Care

[225] The plaintiff submits she will require ongoing medication, massage, physiotherapy and sessions with a kinesiologist in order to manage her pain. Plaintiff's counsel suggests, without any evidentiary foundation, that a reasonable estimate of her future care needs is $1000 per year for 12 years. Using a discount rate of 3.5%, he submits that an award of $10,000 is appropriate.

[226] Defendants' counsel submits that, based upon Dr. Frobb's opinion, a five session "refresher" course with a kinesiologist at $75.00 per visit, for a total of $375.00 is all that will be required.

[227] I am satisfied that the plaintiff will require future massage and physiotherapy sessions to help relieve her pain flare-ups. I have found that she can expect three flare-up episodes per year. I estimate that each massage session will cost $50.00 and each physiotherapy session will cost $80. Accordingly, she will incur $390.00 per year in future care costs for five years. A discount rate of 3.5% is applicable to cost of future care. Using that rate for a 5 year loss yields a present value multiplier of 4.5151. Applying that multiplier to a loss of $390.00 per year yields $1,760.89.

h. Special Damages

[228] The defendants argue that the plaintiff had extended health benefits through CRA yet failed to submit any claim for her massage therapy to the benefits supplier. They submit that her failure to do so should prevent her from claiming special damages in this regard. The defendants seek to obtain the benefit of a contract of insurance between the plaintiff and her extended health benefits insurer. I know of no basis in law for such an argument, nor was one provided to me.

[229] The defendants are in agreement that the plaintiff incurred the following special costs:

a)	massage therapy	$1,198.40
b)	moving expenses for first move	$313.15
c)	repairs to her chipped tooth	$269.50 (unless already paid)
d)	moving truck rental for second move	$383.81
e)	mileage	$300.00
	Total	$2,464.86

[230] The plaintiff is entitled to recover special damages in the amount of $2,464.86, unless her dental bill has already been paid by ICBC in which case her special costs award will be $2,195.36. Counsel agreed among themselves to determine this point.

Conclusion

[231] The action against Edgardo Limjuco Rafael is dismissed.

[232] The plaintiff is entitled to judgment against the defendant, Matthew Daniel Herback, in the following amounts:

a)	Non-pecuniary damages	$45,000.00
b)	Past Wage Loss (CRA)	$7,942.83
c)	Past Wage Loss (Ingledew's)	$1,350.00
d)	Loss of Accumulated Sick Leave	$7,371.09
e)	Loss of Earning Capacity	$2,684.90
f)	Cost of Future Care	$1,760.89
g)	Special Damages	$2,464.86 or $2,195.36

[233] The successful parties are entitled to recover costs at Scale B. If the parties are unable to agree on costs, they are at liberty to apply.

"Weatherill J."