

CANADA / JUDGMENT

Achan v. Jin

2020 BCSC 1430

COURT

Supreme Court of British Columbia

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2020 BCSC 1430 Achan v. Jin

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Achan v. Jin,

2020 BCSC 1430

Date: 20200925

Docket: M178752

Registry: Vancouver

Between:

Margret Ambrose Achan

Plaintiff

And

Hua Jin

Defendant

Before: The Honourable Justice Fleming

Reasons for Judgment

Counsel for the Plaintiff:

B. Cooper

Counsel for the Defendant:

A.H. MacLennan

Place and Date of Trial/Hearing:

Vancouver, B.C.

June 22-25 and 29, 2020

Place and Date of Judgment:

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September 25, 2020

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Introduction

- [1] The plaintiff Margret Achan claims damages for injuries sustained in a car accident that occurred on November 17, 2015. Ms. Achan's car was struck from behind or "rear-ended" by a car driven by the defendant as both were proceeding westbound on Marine Way in Burnaby, BC. The defendant admits her negligence caused the accident.
- [2] Ms. Achan asserts that in addition to causing soft tissue injuries to her neck and back, the accident resulted in ongoing pain, headaches, poor sleep, and psychological symptoms including feelings of anxiety, driving anxiety, and low mood and sadness.
- [3] At the time of the accident, Ms. Achan states she was looking for employment, not having worked outside the home since 2008. She was also a single parent to six children; she and the children were supported by income assistance. Since February 2019, Ms. Achan has worked full-time as a packer in a warehouse.
- [4] She seeks non-pecuniary damages, and damages for past and future loss of earning capacity, past and future loss of housekeeping capacity and the cost of future care. The parties have agreed on special damages of \$4,562.61.
- [5] The defendant acknowledges Ms. Achan suffered soft tissue injuries in the accident but disputes her psychological symptoms, namely driving anxiety, and the extent and cause of her ongoing pain complaints.
- [6] The defendant takes the position that Ms. Achan's non-pecuniary damages award should be reduced for failing to mitigate and she is not entitled to any award for loss of earning capacity, loss of housekeeping capacity or the cost of future care.

- [7] In addition to an agreed statement of facts ("ASF") and her own evidence, Ms. Achan relies on the testimony of her second oldest child, Daughter Achan; the expert opinion evidence of Dr. Trent Faraday, a general practitioner; Dr. Eugene Okorie, a psychiatrist; and Dr. Denise Hall, a vocational rehabilitation consultant and occupational health specialist; all of whom were cross-examined. Appended to Dr. Faraday's report is functional testing data obtained by Darla Walsh, a kinesiologist, who also testified as a fact witness.
- [8] Aside from the ASF the defendants adduced no evidence.

Background

- [9] Now 42, Ms. Achan was born on May 30, 1978 in Sudan. Her first language is Arabic. She also speaks Acholi. When she was seven or eight, Ms. Achan left Sudan for a settlement camp in Western Uganda, with her mother and four siblings, to escape the violence of the civil war. Tragically, her father and oldest brother who remained in Sudan were killed. In the settlement camp, Ms. Achan learned English at school until she had to stop attending in or about grade 8 because her mother could not afford the fees. Ms. Achan later worked selling radios in the settlement camp that she bought in the city, which required her to travel long distances by bus to and from the city.
- [10] In May 2006, Ms. Achan and her four oldest children, Sandra born in 1996, Daughter born in 1998, Matthew born in 2001 and Monica born in 2005, came to Canada as government sponsored refugees.
- [11] The family settled in Surrey. Shortly after their arrival, Ms. Achan began working as a cashier at a gas station. Her employment continued until 2008 when she was pregnant with Ruth who was born that year. The youngest child Shannon was born in 2011. Both Ruth and Shannon suffer from seizure disorders. Ms. Achan and her former husband separated in 2013 or 2014. All of the children remained with her.
- [12] Ms. Achan was physically healthy before the accident. She gave undisputed evidence that she had never injured her back or neck and had no history of back or neck pain or reoccurring headaches. Asked whether she ever had previous feelings of depression or low mood, she said "a little bit" due to the separation. Ms. Achan was cross-examined about evidence she gave at her examination for discovery regarding depression and treatment for depression before the accident. At the discovery, when asked about her mood in the year or two before the accident, she initially testified her mood was not good. She also said she felt depressed because of pain indicating she thought she was being asked about how she felt after the accident. When asked again about her mood before the accident, she testified she was a "little bit fine". Ms. Achan also agreed she had been seen by a psychiatrist named Dr. M.A. Khan but denied being diagnosed with depression. She gave additional evidence that it was possible she was diagnosed but forgot. Asked at the trial whether she forgot about having depression at the discovery, rather than forgetting she was diagnosed, she agreed.

- [13] The only other admissible evidence related to Ms. Achan's mental health and any mental health treatment she received prior to the accident is contained in the ASF. It provides that Ministry of Health pharmaceutical records between January 1, 2013 and November 16, 2015 show purchases of anti-depressant and sleeping pill medication. Under the heading "[t]reatment, findings, clinical attendance", the ASF also provides Ms. Achan was treated by psychiatrist, Dr. M.A. Khan, but not when. Under this heading there are no other facts that occurred before the accident.
- [14] At home from 2008 onward, Ms. Achan estimated spending eight or nine hours each day caring for her children and managing the household. She and the children have continued to live in the upper floor of a two-storey house in Surrey, except for the eldest Shannon who moved out after the accident, in or about 2017. The home has three bedrooms, dishes are washed by hand and laundry is done at the laundromat. In other words, there is no dishwasher or in-suite laundry. In addition to being responsible for the laundry, cooking, cleaning, grocery shopping, and cutting the grass for the landlord every couple of weeks, Ms. Achan drove the children to and from school and their activities. Her son was involved in football and one of her daughters played basketball. She also took Ruth and Shannon to regular medical appointments.
- [15] Ms. Achan's evidence about her role in the family and their activities together was largely confirmed by Daughter Achan who is now 21. Daughter also said that before the accident the family would go on long drives, stating every summer they went berry picking in Chilliwack.
- [16] When questioned about her own activities before the accident, Ms. Achan said she had been involved in track and field at school, running the 400 metre race and she liked to play soccer with other women in the settlement camp. She had also been involved in cycling competitions. After moving to Surrey, she and the children spent time at Bear Creek Park on the weekends, playing soccer together. Sometimes they played basketball and her son was teaching her how to play football. Ms. Achan also liked to run and walk on her own sometimes.
- [17] Baptised as an infant in the Catholic Church, Ms. Achan has attended church all her life. In Surrey, she joined the Gateway Baptist Church and went every Sunday. After the service she would socialize over coffee and snacks, which she and other church members took turns preparing and cleaning up.
- [18] Both Ms. Achan and Daughter also described her and the children as involved with family, friends and their community.
- [19] Before the accident, Ms. Achan and the children were dependent on social assistance benefits which paid approximately \$1,200 per month. She said that by the time of the accident, she was planning to return to the work and had applied for jobs by dropping off her resume at various locations, identifying several, but she was not successful. Ms. Achan also testified that although her two youngest daughters were "sick", social assistance was sending letters indicating she should get a job even if only very part-time. In cross-

examination she was asked about her discovery evidence on this point. At her discovery, after confirming she had been looking for a job before the accident, Ms. Achan gave somewhat unclear evidence that at the time she was being told she could not work because she had to first take care of her two children who had seizures. Asked to confirm she did not find a job before the accident because she prioritized the children, she appeared to agree.

The Accident

- [20] On November 17, 2015, Ms. Achan was on her way to her brother's home from Surrey. As she was driving westbound on Marine Way near Nelson Avenue in Burnaby she heard a loud sound, her chest hit the steering wheel and then the back of her head and neck hit the headrest and the driver's seat. Indicating she braked to avoid hitting the car in front of her, Ms. Achan said she stopped her car in the lane, grabbed her cell phone out of her purse and called 911. Emergency vehicles attended. She had never been in an accident before and refused the defendant's suggestion that she pull to the side of the road. She first felt pain in her neck, middle and lower back and testified to feeling scared and thinking she was going to die. She recalled not being able to get out of the car and paramedics opening the door with some effort. They put a brace around her neck, put her on a stretcher and took her to Burnaby Hospital.
- [21] Cross-examined about her assertion she could not get out of the car and she did not walk around at the scene, based on records that were not put to her specifically or in evidence, Ms. Achan maintained her evidence.
- [22] Photographs of the defendant's car show extreme damage to the front end. The cost of repairing it was estimated at \$9,591.68. Ms. Achan's car, which appears less damaged was deemed a total loss.

After the Accident

- [23] The ASF provides that at the hospital Ms. Achan was diagnosed with musculoskeletal pain. She had full range of motion in her neck, with back pain. The plan was to take Advil and mobilize.
- [24] Ms. Achan testified she could not sleep that night due to pain in her neck and back. The next day she saw her family doctor at Gateway Medical Clinic and was prescribed physiotherapy for paracervical/trapezius/lumbar muscle strain which she began attending almost immediately.
- [25] Ms. Achan also experienced headaches everyday that required medication. In addition to taking Tylenol and Advil she found she also needed to rest and sleep.
- [26] Her neck and back pain prevented her from standing for too long, cleaning the house and washing dishes.

- [27] According to Ms. Achan neck and back pain continued to disrupt her sleep. It also made driving and getting dressed difficult. She indicated that pain prevents her from driving too far. Ms. Achan described particular difficulties putting on tops. With pants, she holds onto something to support her back and finds she cannot bend because it causes too much pain.

Symptoms and Their Impact

- [28] Ms. Achan estimated the frequency of her headaches reduced to two or three times per week by November 2019 and she now experiences them about twice per week.
- [29] Ms. Achan gave similar evidence regarding neck and back pain, indicating she was experiencing both, two or three times a week by November 2019.
- [30] Asked how she was feeling when she met with Dr. Faraday, Ms. Achan recalled having neck and back pain two or three times per week by then. She also said however that when she went back to work she felt a lot of pain after work.
- [31] Estimating her overall recovery now at 50%, Ms. Achan rated her neck pain when she has it now at two to four on a scale of one to ten. Bending and lifting make it worse and she feels neck pain when she sits. She rated her back pain similarly, at two to four but she feels it everyday.
- [32] Ms. Achan also described ongoing sleep disruption due to neck and right shoulder pain. Indicating her lower back pain is still there but "not that much now", she said pain in her right shoulder and neck wakes her up at 2:45 a.m. and remains awake.
- [33] When she feels neck and back pain now Ms. Achan continues to take medications including a muscle relaxant and Tylenol. She also sometimes uses an at home Dr. Ho TENS machine when the pain is particularly bad.
- [34] Daughter testified that her mother's attendance at extended family events such as Christmas and Easter has diminished since the accident. Sometimes she does not attend at all or she will not stay as long. Daughter also recalled her mother missing a family wedding in Alberta in or about 2016 because she could not tolerate the long drive.
- [35] Asked about psychological symptoms after the accident, Ms. Achan said she was anxious and indicated she experienced low mood. She testified to feeling sad sometimes about her ongoing pain and limitations. Not being able to play sports with her children or take them on longer driving trips also causes sadness. She mentioned a particular occasion when she could not drive her son to a football event at Whistler and he had to travel with a friend's parent instead.
- [36] Ms. Achan gave evidence that by late 2018 she was feeling a little better and returning to work helped. At the same time, however, she described a general loss of interest in things and a loss of appetite. She has lost 20 pounds since the accident.

- [37] Ms. Achan's demeanour was consistent with her testimony regarding her psychological symptoms. She appeared sad and very serious if not miserable at times.
- [38] Daughter agreed her mother's mood and attitude changed after the accident, specifying she is easily irritated and frustrated.
- [39] Ms. Achan described her experience of driving anxiety in some detail. Very anxious about driving and nervous while driving, Ms. Achan testified that she stopped for almost six months and drove less once she resumed. Ms. Achan specified she feels as though she does not want to get close to other cars, she is always scared to and will not drive on the highway and she avoids busy areas. Ms. Achan also arranges for someone else to drive when she has to go downtown.
- [40] In addition to not driving for a period of time, Ms. Achan testified that she stopped attending church for about one year, feeling unable to fulfill some of her obligations there. She explained people take turns preparing coffee and snacks and cleaning the church. In cross-examination, Daughter testified her mother stopped attending as much after the accident.

Treatment

- [41] Regarding treatment, the ASF provides:
- Ms. Achan attended ongoing medical appointments for her symptoms at Gateway Medical Clinic, which included back, rib neck pain, and headaches. Her clinical records from Gateway also noted tenderness in the thoracic and lower lumbar regions of her back, decreased range of motion in her lumbar spine due to pain, and headaches, examination findings. I note the parties' document agreement states that examination findings were as recorded.
 - Ms. Achan's clinical records include notations respecting medications "like" Naproxen, Voltaren gel, Flexeril, Efflexor (anti-depressant) and Trazadone (for sleep).
 - From November 19, 2015 and to May 3, 2016 Ms. Achan received approximately 42 physiotherapy treatments. Subsequently, she attended at least 16 sessions of physiotherapy from August 8, 2016 to May 1, 2017, at least 10 sessions of kinesiology from November 26, 2016 to January 17, 2017, at least 10 sessions of massage therapy from March 4, 2017 to July 5, 2017 and 21 sessions of active rehabilitation and physiotherapy from January 30, 2018 to May 29, 2018.
 - As of May 29, 2018, the Gateway Physiotherapy & Sports Clinic recorded that Ms. Achan, "has shown improvement in terms of increased strength and endurance. She still has some tightness at times and has been given stretches and exercises for the same".
 - Ms. Achan also received unspecified treatment from Dr. O. Bamgbade at the Salem Anaesthesia Pain Clinic and in or about 2019 some injection therapy.
- [42] In addition, she attended chiropractic treatment and acupuncture.

[43] Ms. Achan was subject to rather confusing cross-examination related to referrals for counselling that focused for the most part on portions of her discovery evidence. The transcript shows that after several questions regarding various forms of treatment she was asked if she had done any counselling. Her answer was "not really" which she went on to say meant no. In cross-examination, Ms. Achan confirmed this was true. She then agreed she had been referred to counselling for her accident related injuries prior to her discovery. When asked how many times, she said she went to her family doctor two or three times. Rather than clarify this answer, she was asked to agree that he referred her for counselling/therapy for anxiety due to the accident, which she did. However, she denied ignoring the doctor's treatment advice. Ms. Achan was then taken to her discovery evidence in response to being asked if her family doctor referred her to counselling in the past, to which she replied, "[y]eah, he refer me and then something happened and I didn't go". She went onto explain her daughter had a seizure at school, apparently referring to a time after the accident. In cross-examination at the trial, Ms. Achan confirmed she did not attend but also gave evidence that she went after the discovery, indicating she saw a lot of doctors, and some she does not remember. In addition, she agreed her family doctor referred her for therapy around September 2019, also indicating she went. Additionally she was asked to confirm her discovery evidence related to anxiety, which she did. Asked at discovery if the accident caused anxiety, she said yes. Asked if had gone away, she responded that it is going away now.

Return to Work

- [44] As I have indicated, in February 2019 Ms. Achan began working full-time as a packer in a warehouse. By that time, she said, she was feeling a bit better and thought she could work, also stating she did not think she could have done so in 2016 or 2017 because of pain.
- [45] Regarding her financial circumstances, Ms. Achan gave evidence that she has a brother and sister in Uganda who expect her to send money. Her sister is raising the children of another sister who died. Ms. Achan described the phone ringing in the middle of the night. She tells them that she is struggling too, but she does send money once a year at Christmas.
- [46] Ms. Achan's job involves eight hour shifts five days per week from 7:00 a.m. to 3:30 p.m. Her starting wage was \$13.85 per hour. Now she earns \$14.60. At first, Ms. Achan worked with an assembly of employees in the "beer section" who rotated through different positions, some of which involved loading as many as 24 beer cans onto trays. Ms. Achan said she found the lifting required too heavy and it caused her pain.

- [47] After speaking to a supervisor her job duties changed to packing paper tissue or Kleenex boxes into a machine that wraps them. Ms. Achan is required to stand in front of a conveyer belt throughout her shift. She has 15 minute breaks in the morning and afternoon and a 30 minute lunch break. Sometimes she experiences pain at work and she is "sore a lot" at the end of each workday. She stated she leaves early two or three days per month due to pain. At her discovery, she testified to missing a day or two.
- [48] Ms. Achan testified that after work she is tired and feels unable to do very much. Sometimes she showers and sleeps for two hours before cooking dinner. Ms. Achan described her children as helpful. They allow her to rest or sleep when she is tired and in pain.
- [49] Regarding the impact of the accident on Ms. Achan's housekeeping, Daughter recalled her mother not cooking as much after the accident. She also asked for help with laundry and groceries, taking some of the children with her to the laundromat and grocery store. These were tasks she completed on her own before the accident. Daughter indicated her mother had trouble folding clean laundry which required standing for long periods, and carrying the laundry and grocery bags. Although it was always "normal" for the children to help her around the house, Daughter also described helping her mother more with general cleaning since the accident, including tasks such as mopping, sweeping and lifting furniture to clean.
- [50] Asked about current housekeeping limitations, Ms. Achan said she can cook now which she does a lot for her children. When she cleans she feels pain if she bends down, referring to mopping and vacuuming. She has not attempted to do yard work since the accident. Daughter testified that her mother still does not cook as much as, or like she used to, and she asks for Daughter's help with cooking more than she did before the accident. Although she also asks for help with dishes and other chores, Daughter indicated her mother did this before the accident.

Medical Evidence

- [51] As I have already stated, Ms. Achan relies on the expert opinion evidence of Dr. Trent Faraday, who considers the functional testing data provided by kinesiologist Darla Walsh, Dr. Eugene Okorie and Dr. Denise Hall, all of whom were cross-examined.

Dr. Trent Faraday

- [52] Dr. Faraday, a medical doctor and general practitioner, was qualified to provide opinion evidence with respect to musculoskeletal injuries and chronic pain. Dr. Faraday has a specialized practice that focuses on musculoskeletal injury management. Most patients he treats are dealing with chronic pain, meaning pain that persists for six months or more beyond the expected recovery period. In addition, Dr. Faraday has considerable experience in occupational medicine involving various aspects of long-term disability and workplace injury claims.

- [53] In his report dated November 18, 2019, Dr. Faraday set out the opinion the accident resulted in the following injuries and symptoms to Ms. Achan:
1. Musculoligamentous injuries of the neck, with on-going pain symptoms;
 2. Musculoligamentous injuries to the upper back, with on-going pain symptoms;
 3. Musculoligamentous injuries to the lower back, with on-going pain symptoms;
 4. Cervicogenic headaches, with on-going symptoms.
 5. Depressive and anxiety symptoms, with on-going symptoms.
- [54] His report specifies that Ms. Achan reported experiencing daily neck, right upper back and mid-lower back pain as well as headaches from her neck once or twice per week. At the same time, she reported all of her pain symptoms were still improving. She also reported waking up at night because of pain and that she was nervous while driving after the accident. In addition, she reported feeling depressed because of pain and decreased ability, but her mood had been better since she started working in February 2019. Ms. Achan told Dr. Faraday she had no limitations with her current job duties which involved standing the whole time, but she was sore at the end of the day.
- [55] Appended to Dr. Faraday's report is the functional test data obtained by kinesiologist Ms. Walsh on August 7, 2019. On that day before the testing, Ms. Achan reported 2/10 (non-disabling) pain in her mid and low back and 1/10 (non-disabling) neck, right shoulder and right upper arm. After the testing, she reported 4-5 (visibly disabling to very disabling pain) in her mid and low back and 3-4 (visibly disabling pain) in her neck, right shoulder and right upper arm.
- [56] Ms. Walsh found reductions, some very significant, in almost all aspects of the range of motion in Ms. Achan's cervical, thoracic and lumbar spine. She demonstrated a sustained sitting tolerance of 30 minutes (total sitting tolerance of 60 minutes), a sustained standing tolerance of 45 minutes (total standing tolerance of 90 minutes) and a walking tolerance well below a competitive level. Ms. Achan's manual dexterity was poor, her work rate was below a competitive level, and her dynamic lifting was up to 20 pounds (light strength). She was able to carry a box of that same weight with a moderate breakdown in body dynamics. Ms. Achan also had moderate difficulty with single-leg balancing and a stair climbing tolerance below a competitive level. She demonstrated the ability to reach, stoop, kneel and crouch.
- [57] Ms. Walsh described Ms. Achan as completing some tests with objective signs of effort and some not. She also wrote that while Ms. Achan perceived her physical abilities as below sedentary, her performance was within the light strength category, indicating she underestimated her capacity.
- [58] Based on her variable effort during Ms. Walsh's testing, Dr. Faraday concluded the functional test results reflect a minimum baseline of her current physical abilities.

- [59] With respect to a number of strength tests, Ms. Walsh specified that she stopped it or Ms. Achan did not complete it because she was not able to complete the protocol during the requisite time frame, the increased level of pain she reported, and/or tension palpated over the trapezius, scapula, paraspinals of the neck, mid back and low back.
- [60] During his own assessment, Dr. Faraday observed that Ms. Achan seemed to do her best to participate, did not show any exaggerated pain behaviour and presented in a straightforward manner. When he examined her, he found tenderness to palpation of the sub-occipital area and posterior neck muscles. The range of motion in her cervical spine was "fair", and she had pain at the end of the range. In her shoulders, there was no tenderness to palpation, but Ms. Achan had decreased range of motion for right shoulder flexion and internal rotation, the latter due to right upper back pain. When Dr. Faraday examined her upper back, she had tenderness to palpation of the right trapezius and right periscapular muscles. His examination of her lower back found tenderness to palpation of the right lumbar paraspinal muscles and lumbosacral area and reduced lumbar spine range of motion for forward flexion and extension.
- [61] Dr. Faraday's opinions regarding Ms. Achan's ongoing pain and headaches are based on his own clinical findings, the absence of pre-accident pain or recurrent headaches, Ms. Achan's report of symptoms immediately post-accident, as well as initial and subsequent clinical findings, the specifics of which are not in evidence. He explained that cervicogenic headaches are commonly associated with musculoligamentous neck pain and typically due to muscle tension that starts in the neck muscles and spreads to the scalp muscles.
- [62] Cross-examined about her report of daily neck and back pain, Dr. Faraday maintained his opinion when asked to assume her neck pain was less frequent at the time. He explained that the natural course is for chronic pain to undulate; it is not a straight line, although there is a baseline. He also stated that pain fluctuations with changes in activity level are common and if Ms. Achan is reporting improvement, it was quite possible she may be limiting her activities to avoid pain symptoms, pointing out her current job involves lighter lifting or strength requirements than the requirements of the broad category, discussed below.
- [63] Noting in his report Ms. Achan had depression before the accident that was treated with anti-depressant medication, he opined that her "pre-existing condition" likely made her more susceptible to depressive and anxiety symptoms after the accident. Referring to medical records not in evidence but consistent with Ms. Achan's testimony and her report to him, he commented she developed driving anxiety and depressive symptoms associated with pain and decreased physical ability. He also noted, apparently with reference to these same medical records, that Ms. Achan was scheduled to undergo counselling for her depressive and anxiety symptoms.

[64] In cross-examination, Dr. Faraday emphasized that what struck him about Ms. Achan was her negative view of her ability, which he attributed to the impact of her psychological condition. He testified he would not defer to a psychiatrist's opinion on this point, or with respect to the diagnosis and initial management and treatment of psychological conditions, explaining he treats many people with psychological conditions given their prevalence amongst those with chronic pain and the inextricable link between the two.

[65] Regarding Ms. Achan's prognosis, Dr. Faraday wrote:

In my experience, most people who sustain headaches, and neck, upper back and lower back musculoligamentous injuries after an accident, such as those sustained by Ms. Achan, normally improve with symptoms completely resolving within 6 to 12 months. Some people, however, continue to have pain that becomes persistent. Given that it is nearly 4 years since the November 17, 2015 motor vehicle accident, her pain is likely to be persistent.

Ms. Achan's prognosis for a full recovery is guarded, given the amount of time that has elapsed since the accident and the temporary response to therapy. I would expect her to have on-going headaches, and neck, upper back and lower back pain symptoms for the foreseeable future.

With respect to her depressive and anxiety symptoms, Ms. Achan has not received counselling. Her depressive and anxiety symptoms have the potential to improve with counselling.

[66] Dr. Faraday also provided opinions about the impact of Ms. Achan's injuries on her capacity for work, including the opinion that not working until February 2019 was appropriate and related to the physical and psychological effects of the accident.

[67] Ms. Walsh identified Ms. Achan's current job as a packer, under the National Classification System as closest to "Other Labourers in Processing, Manufacturing and Utilities". Based on the NOC classification, the physical demands include B4 (other body positions (e.g. crouching, kneeling, stooping), L1 (upper limb coordination), and S4 (heavy strength (20 kg or more)). Dr. Faraday wrote that although Ms. Achan does not fully meet the strength demands of the occupation, estimating her status as S2 (light strength (5-10 kg)), she has demonstrated the ability to perform her current job.

[68] More specifically, he concluded Ms. Achan has the capacity to work full-time, performing light duty work tasks occasionally (with some limitations for fast paced work, stair climbing and single-leg balance). He also concluded her accident related injuries should not affect her future ability to work as a machine operator (packer) with her current employer, but if her work duties were to change and require frequent bending, twisting of her low back, or heavy lifting or carrying, she would be at risk of increased pain. In addition, if she were to lose her job, she would likely be less competitive in finding the same position with another employer due to her on-going physical limitations and the large variability in work demands for the occupation. In other words, Ms. Achan's accident related condition would limit her to light duty machine operator or packer jobs. Further Dr. Faraday expressed concern about Ms. Achan's ability to work as she ages, explaining that in his experience patients with chronic

pain have a reduced ability to tolerate work demands as they get older resulting in decreased efficiency, decreased competitiveness and early retirement.

[69] In cross-examination, Dr. Faraday did not agree with the suggestion that repetitively lifting tissue boxes may result in shoulder strain, or that Ms. Achan's "right shoulder symptoms" were due to her job, indicating he would need far more information about the weight of the items, the pace of the work, and other aspects of her work tasks. Cross-examined about shoulder symptoms and their absence from a particular clinical record that is not in evidence, Dr. Faraday explained the term shoulder is used differently by medical professionals and patients. When a physiotherapist or physician refers to the shoulder they mean the shoulder joint, but patients typically mean the shoulder blade or upper back, consistent in my view with his examination findings and Ms. Achan's evidence of shoulder pain.

[70] Dr. Faraday recommendations include:

- Daily indefinite use of her current medications to relieve pain, which include Tylenol, a muscle relaxant and another pain medication;
- Self-managed use of a home TENS machine, that provides electrical stimulation of muscles to control pain symptoms on an as needed basis;
- Participation in a regular active exercise program such as swimming, yoga or gym based program with the benefit of a gym/pool pass to assist with stretching and strengthening of her neck, upper back and lower back, with the goal of increasing her capacity to manage her pain symptoms and return to her pre-accident recreational activities;
- Indicating Ms. Achan's depressive and anxiety symptoms have not been fully investigated or treated, at least eight sessions of psychological counselling;
- Increased pain medication and passive paramedical care (four visits over two weeks) during acute exacerbations of her pain that are likely to occur once per year on average; and
- Ongoing assistance of two hours per week with housework and yard work management.

[71] Cross-examined about whether Ms. Achan would have improved had she attended counselling already, Dr. Faraday equivocated at first stating he could not say but it was recommended, also stating in general his experience was some people improve but some, those who see things in black and white, do not. He then said she probably would have seen some degree of improvement.

Dr. Eugene Okorie

[72] Dr. Okorie is a psychiatrist who practiced general medicine in Nigeria before being certified in psychiatry which he practiced in Ireland before British Columbia.

- [73] In his report dated February 10, 2020, Dr. Okorie opined that Ms. Achan developed anxiety, worry, guilt, reduced self-esteem, sleep disruption, and resultant fatigue and poor motivation in reaction to accident-related physical pain, dysfunction and limitations. He concluded her emotional difficulties meet the DSM-5 criteria for Adjustment Disorder with Anxiety ("adjustment disorder"). In addition, it is his opinion that Ms. Achan also developed an inappropriate fear of accidents with resulting driving anxiety, hypervigilance, and avoidance of driving in certain situations. Those symptoms meet the DSM-5 criteria for Driving Anxiety Disorder ("driving anxiety disorder").
- [74] Dr. Okorie expressed the view that Ms. Achan's adjustment disorder and driving anxiety disorder have limited her motivation and enjoyment of recreational pursuits, driving and life in general, as well as her access to community based and social activity. Further, "chronic pain and related disabilities" arising from the accident delayed her return to the workforce.
- [75] Dr. Okorie predicted that in the long-term Ms. Achan's chronic pain, adjustment disorder and driving anxiety disorder will limit her competitiveness in the job market. He identified the prognosis for both disorders as guarded because they are tied to the outcomes for her chronic pain, effective treatment for her pain and psychological condition, and treatment compliance. He also opined that chronic pain and adjustment disorder have added to pre-existing risks to further increase her vulnerability to further episodes of depression. Similarly, the trauma of the accident and the driving anxiety disorder pre-dispose her to further trauma syndromes including post-traumatic stress disorder if exposed to traumas in the future.
- [76] Dr. Okorie was cross-examined about his awareness of Ms. Achan's prior history, based on clinical records not in evidence, although in his report and in his testimony he made it clear he was aware of that history in providing his opinions. He confirmed that Ms. Achan's adjustment disorder and driving anxiety disorder, which include symptoms of depression and anxiety, were directly related to the accident and her pain.
- [77] Dr. Okorie recommended that Ms. Achan undergo further evaluation of treatment options for her pain, and a referral to a psychiatrist or pain medicine specialist to develop and coordinate care for her physical issues. He also recommended an occupational therapist be involved to assist her with ergonomic modifications as well as structuring and managing her tasks to better accommodate her pain.
- [78] Regarding mental health treatment, he recommended 24 acute sessions of culturally sensitive cognitive behavioural therapy ("CBT"), "preferably by a therapist who could relate with her culture". He specified the CBT should include stress management techniques, coping skills training, and trauma desensitization to address her driving anxiety. In addition, he recommended 12 acute sessions of Acceptance and Commitment Therapy ("ACT"). During his testimony, he explained that as the name implies, ACT is specific form of therapy that teaches acceptance of things that cannot be changed. Finally, he recommended

ongoing periodic psychological support and treatment for the foreseeable future after the acute series of CBT and ACT, given the "chronicity of her pain and physical difficulties, which serve as chronic reminders of the accident".

Dr. Denise Hall

- [79] Dr. Hall, a vocational consultant and occupational health specialist, has a Doctor of Clinical Psychology degree and the designation of Masters Certified Vocational Rehabilitation Professional. She has considerable experience in assessing and treating people with chronic pain with the goal of helping them to return to work or retraining. She was qualified to provide expert opinion evidence regarding the vocational assessment, occupational health and employability of person's injured in a motor vehicle accident.
- [80] Her report dated March 4, 2020, is based on her assessment of Ms. Achan on February 18, 2020. During that assessment, Ms. Achan completed vocational testing that included, among other instruments, the Beck Inventories for Anxiety and Depression, Impact of Event Scale, aptitude testing and interest testing.
- [81] Dr. Hall's report provides that Ms. Achan's scores on the Beck Inventories placed her in the severe anxiety and severe depression range. Her score on the Impact of Event Scale was very high. Dr. Hall explained high scores are associated with intrusive thoughts and images, avoidance of stimuli and arousal. She described the test as very helpful in measuring the effect of routine life stress, everyday traumas and acute stress.
- [82] Ms. Achan's aptitude testing results were very low except for mechanical reasoning. Dr. Hall concluded they should not be considered reliable because they likely reflect Ms. Achan's challenges with written English and may possibly be pain related, also writing: "because of cultural and language differences in the testing, the assessment is therefore not considered a valid representation of Ms. Achan's abilities."
- [83] In discussing Ms. Achan's background, Dr. Hall noted Ms. Achan had failed the Canadian citizenship test, something she acknowledged in her evidence, but Ms. Achan was able to communicate verbally in English throughout the assessment. Dr. Hall also noted Ms. Achan was accompanied by her ex-spouse who assisted her in completing the Beck Inventories and the Impact of Event Scale, she presented as ambivalent, all the assessment instructions had to be explained to her and she stopped one of the interest inventories which Dr. Hall then had to read to her. During her testimony, Dr. Hall confirmed that Ms. Achan struggled with reading and writing English, not speaking it.
- [84] Referring to Dr. Faraday's report, Dr. Hall agreed that Ms. Achan faces multiple barriers and limitations to achieving durable employment:

With physical limitations, psychological conditions and English language deficits, she would not be competitively employable and her range of job prospects and earning potential are quite limited. She would also need accommodation from her employer, and it is challenging to find a supportive employer.

- [85] Regarding Ms. Achan's accident related vocational outcome, Dr. Hall opined that her injuries and limitations make it much more difficult to find physically suitable work with a supportive employer, particularly if she has to miss some work time because of increased symptoms. Referring to a "likely plan" to return to work when her youngest child was in full-time school (fall of 2017), something Ms. Achan did not discuss during her testimony, Dr. Hall also expressed the view she likely would have found better paying and more physically demanding work, absent her accident related injuries and limitations.
- [86] Based on the reports of Dr. Faraday and Dr. Okorie, Dr. Hall further opined that although Ms. Achan is able to sustain full-time work in her present position, her durability is guarded and her earnings are at the lower end of the range.
- [87] Clearly, Dr. Hall's expertise limits her to opinions addressing occupational/vocational requirements and employability, not Ms. Achan's physical capacity.
- [88] Dr. Hall identified the annual median salary for Ms. Achan's current job classification, again other labourers in processing, manufacturing and utilities, as \$37,440 or \$18 per hour with the range being from a low of \$13.85 per hour to a high of \$35 per hour. The annual median salary for her former job as a cashier is significantly lower at \$26,312 or \$13.85 per hour which is also the low end of the range, the high being \$18 per hour.
- [89] Dr. Hall also set out other possible job options for Ms. Achan, such as light duty cleaning and food and beverage serving all of which paid \$13.85 at the low end and \$18 per hour at the high end of the range.
- [90] In cross-examination, Dr. Hall resisted the suggestion that her opinions about employability depended on Dr. Faraday's conclusion that Ms. Achan is only capable of sedentary to light strength work, indicating there were other factors or limitations at issue. But Dr. Hall did concede that she understood this to be her maximum capacity.
- [91] In terms of recommendations, Dr. Hall specified that Ms. Achan is not a candidate for formal training and is best suited to hands on or practical training, which she recommended after Ms. Achan has received the psychological treatment recommended by Dr. Okorie. Opining Ms. Achan would require the assistance of a vocational consultant and job placement provider if she were to lose her current job, Dr. Hall estimated the cost at \$1,200 to \$1,800.

Assessing the Evidence

[92] Before assessing and making findings based on the expert evidence, I turn to assess the credibility and reliability of the fact witnesses, most importantly, Ms. Achan.

[93] Of course credibility or the truthfulness of a witness is not the same as the reliability of their evidence which relates to its accuracy. Simply put, an honest witness can be mistaken.

[94] The proper approach to testing the credibility of any interested witness's testimony was articulated many years ago in *Faryna v. Chorny*, [1952] 2 D.L.R. 354 at 357 (B.C.C.A.):

The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

[95] The factors identified in *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186 also inform the assessment of whether the evidence of a witness is credible and reliable. They include:

- the capacity and opportunity of the witness to observe the events at issue;
- the witness's ability to remember those events;
- the ability of the witness to resist being influenced by their interest in recalling those events;
- inconsistency in the witness's evidence, meaning changes in their testimony between or during direct and cross-examination, or inconsistencies between prior statements, discovery evidence and their evidence at trial;
- whether the witness's evidence harmonizes with or is contradicted by other evidence, particularly independent or undisputed evidence;
- whether their evidence seems unreasonable, improbable or unlikely, bearing in mind the probabilities affecting the case; and
- the witness' demeanour, meaning the way they presented while testifying.

[96] Regarding the last factor, Chorny and other authorities have discussed the dangers of relying on demeanour to determine credibility, recognizing the risk of preferring the testimony of the better actor, and conversely, misinterpreting the poor presentation of an honest witness as deceptive (see e.g. *R. v. Jeng*, 2004 BCCA 464 at para. 54; *R. v. Tyers*, 2015 BCCA 507 at para. 18).

- [97] Rather than impugn her honesty, the defendant argues Ms. Achan is a poor historian and has challenges with the English language that make her evidence unreliable, pointing to apparent inconsistencies between her testimony and statements contained in records that were not put to her, or in evidence, and apparent discrepancies between her discovery evidence and her testimony at trial, as well as her testimony and Daughter.
- [98] I largely disagree. Firstly, I was not concerned by Ms. Achan's ability to speak and understand English, although she has a strong accent. Obviously reserved Ms. Achan gave very brief and sometimes vague answers and required frequent prompting and focusing during direct examination. She also struck me as quite concrete and easily confused or misled by questions during cross-examination that were in any event often less than straightforward, imbedded and or cryptic.
- [99] Daughter who has no difficulties with English and was cross-examined only minimally, also gave very brief answers in direct examination.
- [100] Most, if not all of the apparent discrepancies between her testimony and Ms. Achan's arise from aspects of her direct evidence that were not challenged in cross-examination. For example, instead of cross-examining Ms. Achan about her evidence she stopped driving for six months and attending church for about a year after the accident, the defendant asked Daughter to confirm that her mother took them with her in the car when she drove to the laundromat and the grocery store after the accident, and her mother attended church less often. Furthermore, Daughter was never asked whether her mother ever stopped driving or attending church for a period of time.
- [101] Apparent discrepancies between Ms. Achan's discovery evidence and her testimony at trial were also not well established. For example at discovery, Ms. Achan said she had missed two days from work due to pain. At trial, she said she left work early about two or three times per month. These two pieces of evidence are not necessarily inconsistent bearing in mind the different time frames.
- [102] Overall, I found Ms. Achan to be a credible witness, meaning I am satisfied she testified honestly. I was never concerned she was exaggerating her complaints or tailoring her evidence based on her interest. My impression of her reliability is more tentative. Although, I do not accept she was a really poor historian, she was also not a particularly good one. On some points, her memory seemed fair at best. I have in mind specific parts of the chronology regarding her symptoms. I accept that Ms. Achan told Dr. Faraday she was experiencing daily symptoms although in her testimony she recalled them being less frequent. I also accept, however, that this sort of apparent inconsistency likely reflects the effect of the passage of time and some confusion between the increase in her symptoms when she began working full-time and the timing of her visit with Dr. Faraday.
- [103] Importantly, Ms. Achan's evidence regarding her injuries, ongoing symptoms and their impact over time, harmonizes with the independent or objective evidence, namely her almost immediate and ongoing participation in physical therapy and medical treatment,

the medications prescribed and the examination findings of Dr. Faraday and to a lesser extent Ms. Walsh. Similarly, her very brief evidence about psychological symptoms and more fulsome evidence about driving anxiety were congruent with her sad, very serious presentation and the results of the Beck Inventories administered by Dr. Hall, although less detailed than what she reported to each of the experts.

- [104] Turning to the assess the expert evidence, I was particularly impressed by Dr. Faraday who presented as not only particularly knowledgeable about treating and managing patients with injuries and chronic pain much like Ms. Achan but also straightforward, objective and reasonable. He readily acknowledged, for example, the limits of Ms. Walsh's testing results in both his report and his testimony. Cross-examination served to clarify his evidence rather than undermine it. His examination findings were not challenged.
- [105] Although he and the other experts were provided with clinical records that are not in evidence, few if any of the factual assumptions underlying his diagnoses, prognosis and recommendations are affected by them. With his own caveats in mind, I accept Dr. Faraday's opinion evidence and his recommendations.
- [106] For the most part, I also accept Dr. Okorie's opinions and recommendations. Again, his evidence was not undermined in cross-examination, which largely involved unsuccessful attempts to suggest he did not consider or misconstrued Ms. Achan's past history, and a failure to mitigate. Again none of the details involving the diagnosis, prognosis or treatment (aside from medication) for past mental health issues have been proved by the defendant.
- [107] Regarding Dr. Hall's evidence, there is no dispute that her aptitude testing results are unreliable given Ms. Achan's limitations with written English and her ambivalent participation. Although this was not suggested, with respect to the results of the Beck Inventories I have a limited concern about their reliability too because her former husband assisted her in completing them. It occurs to me his involvement could have had an impact on her responses. Much of Dr. Hall's opinion and fact evidence regarding Ms. Achan's suitability for particular job classifications, their salary ranges and employability generally however, was not challenged nor apparently impacted by the unreliable testing results. I accept some of those parts of her evidence.

Findings

- [108] The defendant acknowledges the accident caused soft tissue injuries to Ms. Achan's neck and back and does not dispute that those injuries resulted in some pain and headaches.
- [109] I find Ms. Achan suffered soft tissue injuries to her neck and her back, mostly her upper and low back, that resulted in significant ongoing pain and frequent headaches, which improved but did not resolve over time, as well as disrupted sleep that fatigue.

- [110] The defendant suggests Ms. Achan's major ongoing complaint is right shoulder pain which was not caused by the accident. It should be clear by now that I reject the notion Ms. Achan's ongoing pain is due to a right shoulder injury or condition unrelated to the accident. There is no evidence of a subsequent injury or another cause for her pain symptoms. Based on Dr. Faraday's evidence, I am satisfied that the right shoulder pain is accident related pain associated with the soft tissue injury in her right upper back.
- [111] Largely accepting Ms. Achan's evidence about her current symptoms, which as I have indicated is consistent with the examination findings of Dr. Faraday, I find that Ms. Achan has chronic pain in her neck, upper back and to a lesser extent her lower back, which is as frequent and as intense as she described, worsened by working all day and certain activities including bending and lifting and significant enough to frequently curtail her sleep, resulting in fatigue. While I accept that Ms. Achan's strength and other aspects of her physical capacity may be greater than the functional testing data results show, I also accept that her chronic pain is a limiting factor. In other words even though she may be strong enough to do the lifting required by her previous job duties, doing so caused her pain because of her accident related injuries. Similarly, Ms. Achan experienced increased pain with some of the strength testing, tension was palpated in the muscles of the neck and back and Ms. Walsh observed a moderate breakdown in Ms. Achan's body dynamics when she carried a box weighing up to 20 pounds.
- [112] I accept the pain Ms. Achan experienced when performing her previous job duties was significant enough to present a barrier to Ms. Achan's job performance. I draw this inference because Ms. Achan who was no doubt aware of her vulnerability as a new employee with a very limited and dated work history and very much in need of income took the initiative to speak to a supervisor about the problem. Furthermore, despite the absence of any meaningful lifting in her current position, she continues to experience pain at the end of the workday, requiring rest if not sleep before cooking for her family.
- [113] Accepting Dr. Faraday's prognosis and the duration of Ms. Achan's chronic pain, I find that it will likely continue over the long-term.
- [114] The defendant's position regarding the psychological injuries claimed by Ms. Achan is somewhat unclear, apart from arguing her evidence about driving anxiety is unreliable, which I reject. Although there is very little evidence about Ms. Achan's mental health before the accident and no evidence of a diagnosis or prognosis, there appears to be no dispute she was prescribed anti-depressant medication both before and after the accident. Even though both Dr. Faraday and Dr. Okorie assumed a prior history, neither opined nor suggested her post accident psychological symptoms involved an exacerbation of a pre-existing condition. I accept Dr. Okorie's opinion that the accident caused Ms. Achan to suffer both an adjustment disorder as well as a driving anxiety disorder, to which her previous symptoms made her more vulnerable. Her primary symptoms are low mood or sadness, irritability and feelings of anxiety when driving.

[115] Taken together the prognoses of Drs. Faraday and Okorie regarding Ms. Achan's accident related symptoms of depression and anxiety, convince me that if Ms. Achan can access and complete the specific treatment he recommends there is a real and substantial possibility her mental health will improve and she will be better able to manage and cope with her chronic pain, although it will continue.

Non-Pecuniary Damages

Legal Principles

[116] Non-pecuniary damages are awarded to compensate a plaintiff for the pain and suffering, loss of enjoyment of life and loss of amenities caused by a defendant's negligence. The amount of the award is not determined by the nature or seriousness of the plaintiff's injuries alone. Additional factors include the plaintiff's age; the severity and duration of the pain; disability; emotional suffering; impairment of family, marital and social relationships; impairment of physical and mental abilities; and loss of lifestyle (Stapley v. Hejslet, 2006 BCCA 34 at para. 46). A plaintiff should not be penalized, generally speaking, for stoicism. An appreciation of the plaintiff's loss is the key: Lindal v. Lindal, [1981] 2 S.C.R. 629 at 637.

[117] Compensation for non-pecuniary losses must also be fair and reasonable to both parties. Fairness is measured against awards made in comparable cases, recognizing they offer guidance only because each plaintiff's circumstances are at least to some extent unique: Trites v. Penner, 2010 BCSC 882 at para. 189.

[118] Ms. Achan relies on a number of cases which she submits support an award of \$125,000 in non-pecuniary damages. They include:

- a) Leung v. Draper, 2020 BCSC 219 (\$90,000 less 10% for failing to mitigate);
- b) Lauriente v. Schoonhoven, 2017 BCSC 2246 (\$100,000 now \$104,000);
- c) Walks v. Cody, 2019 BCSC 1371 (\$90,000);
- d) Nadeau v. Toulmin, 2020 BCSC 866 (\$110,000);
- e) Alafianpour-Esfahani v. Holliffe, 2017 BCSC 701 (\$120,000 now \$125,000);
- f) Broomfield v. Lof, 2019 BCSC 1155 (\$130,000); and
- g) Redmond v. Krider, 2015 BCSC 178 (\$150,000 now \$160,000).

[119] In my view, Leung and Nadeau offer the most helpful guidance. Both involved female plaintiffs of a similar ages, soft tissue injuries, chronic pain and psychological symptoms which impacted on their functioning and everyday life. Ms. Leung's chronic pain however was near constant and therefore caused perhaps somewhat more suffering. The prognosis for her psychological injuries which included mild somatic symptoms disorder and anxiety and depression disorders was similar. Like Ms. Achan, Ms. Nadeau suffered from driving anxiety, an adjustment disorder and impaired sleep but her symptoms and their impact

were more severe. Similarly, her chronic pain was constant and therefore worse. Further, it was being treated with narcotic medication that caused significant side effects.

[120] The defendant submits that an award in the range of \$65,000 to \$70,000 is more appropriate, relying on:

- a) McGonigle v. Parada, 2018 BCSC 1017 (\$65,000); and
- b) Fabian v. Song, 2018 BCSC 762 (\$70,000).

[121] McGonigle involved a similar aged plaintiff and similar physical injuries, namely soft tissue injuries to the neck and back and chronic pain. Justice Bracken found however that Ms. McGonigle's injuries improved significantly and she had made significant progress in terms of her chronic pain which was low level. He also found she was not diligent in pursuing treatment including physiotherapy without finding a failure to mitigate. Justice Bracken made no finding that her injuries included anxiety and depression. I also note that she sought a much lower award than Ms. Achan: \$75,000 to \$90,000.

[122] A number of the factual circumstances in Fabian make it distinguishable and therefore less than helpful as a guide to an appropriate award.

Mitigation Defence

[123] The defendant also takes the position that Ms. Achan's damage award should be reduced by 20% for failing to mitigate, on the basis that she did not attend counselling recommended by her family doctor for treatment of her psychological symptoms. To be clear, the defendant does not suggest that Ms. Achan also failed to mitigate based on the psychological treatment recommendations of Dr. Faraday and Dr. Okorie.

[124] Although a plaintiff has an obligation to mitigate, it is for the defendant to prove the plaintiff could have avoided all or a portion of her loss. In *Chiu v. Chiu*, 2002 BCCA 618, the Court of Appeal articulated a two-part test, at para. 57:

[57] In a personal injury case in which the plaintiff has not pursued a course of medical treatment recommended to him by doctors, the defendant must prove two things: (1) that the plaintiff acted unreasonably in eschewing the recommended treatment, and (2) the extent, if any, to which the plaintiff's damages would have been reduced had he acted reasonably. These principles are found in *Janiak v. Ippolito*, [1985] 1 S.C.R. 146.

[125] As I have indicated the defendant adduced no evidence in this case other than the ASF. In support of the argument Ms. Achan failed to mitigate, she relies on the evidence of Dr. Faraday that Ms. Achan probably would have seen improvement had she attended counselling and her own testimony that she was referred to counselling but did not attend.

[126] In my view, this falls well short of establishing a failure to mitigate. Beyond the acknowledgement she was referred for counselling, there is no evidence about what treatment was actually recommended, including what form or length of counselling or

psychological treatment or to whom Ms. Achan was referred. Accepting Dr. Okorie's recommendation that Ms. Achan would benefit from fairly specialized and intensive psychological treatment that includes culturally sensitive CBT and ACT therapy with specific components, I am far from persuaded that any amount of any kind of counselling would have resulted in improvement. Further, based on the evidence as a whole, I do not accept Ms. Achan acted unreasonably by failing to attend. Before she began working full-time earning minimum wage, Ms. Achan and her children were subsisting on income assistance. There is no evidence funding was available for whatever treatment was recommended, or that there was no cost. Any cost associated with counselling would be beyond her means. Furthermore, the ASF make it clear Ms. Achan attended an abundance of other treatment to address her accident related injuries and symptoms.

Discussion

[127] Turning to the Stapley factors, I have found that Ms. Achan's injuries included soft tissue injuries to her neck and back that resulted in headaches and ongoing pain, and psychological symptoms that include driving anxiety and low mood. Although her headaches and pain symptoms became less frequent and improved, she has been left with chronic pain and headaches that are likely to continue. Although not constant or severe, her chronic pain symptoms are frequent and significant enough to limit her sleep and interfere with aspects of her functioning and her enjoyment of life. Ms. Achan no longer engages in most of her own activities or those she would participate in with the children on weekends, she limits her attendance at family celebrations, she cannot travel long distances by car, and the family no longer takes summer driving trips to do things like berry picking, very important sources of meaning and pleasure in the life of a single parent with very little income.

[128] Based on my assessment of her non-pecuniary losses and guided by the most comparable cases, I consider damages of \$90,000 to be fair and reasonable and award Ms. Achan that amount.

Loss of Earning Capacity

[129] Ms. Achan seeks damages for loss of past and future earning capacity.

[130] Claims for past and future loss of earning capacity are subject to many of the same legal principles. Both involve claims for the loss of the value of the work the plaintiff was or will be unable to perform because of the injuries and symptoms caused by the accident (*Falati v. Smith*, 2010 BCSC 465 at para. 39, *aff'd* 2011 BCCA 45).

[131] The plaintiff is required to demonstrate that her accident related injuries and symptoms have impaired her capacity to earn income, resulting in a past or future pecuniary loss. If the plaintiff meets this threshold, the same principles apply to the assessment of past or future loss of earning capacity. While actual past events must be proven on a balance of probabilities and once proven treated as certainties, hypothetical events including what

would have happened in the past had the accident not occurred, and what would have and will occur in the future, will be considered where there is a real and substantial possibility they would occur. A hypothetical event is then given weight according to its relative likelihood and compensation is awarded based on an estimation of the chance the event would have occurred or will occur: *Steward v. Berezan*, 2007 BCCA 150 at para. 17; *Grewal v. Naumann*, 2017 BCCA 158, at para. 44-48.

- [132] The loss or impairment of a plaintiff's earning capacity may be valued using either the earnings or the capital asset approach: *Perren v. Lalari*, 2010 BCCA 140 at para. 32. Both are correct. The earnings approach is viewed as more appropriate where a plaintiff has a history of earnings and the loss is more easily measured. The capital asset approach is typically used when a plaintiff has no clear earnings history, although it is not restricted to this circumstance.
- [133] Applying the capital asset approach involves considering a number of factors articulated in *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 at 356 (S.C.), which include whether the plaintiff has been rendered less capable overall of earning income from all types of employment, is less marketable or attractive as a potential employee, has lost the ability to take advantage of all job opportunities that might otherwise have been available to her, and is less valuable to herself as a person capable of earning income in a competitive labour market. I note that after *Brown*, in *Steward* at para. 18, Justice Donald concluded that an inability to perform an unrealistic alternative occupation is not proof of a future loss.
- [134] Under either approach, the court is required to quantify the financial harm accruing to the plaintiff from the loss or impairment of her earning capacity, taking into account the relevant and realistic contingencies by weighing possibilities and probabilities of future (or past hypothetical) events, relating evidence and findings of fact to the quantification of the loss: *Pett v. Pett*, 2009 BCCA 232 at para. 19; and *Dunbar v. Mendez*, 2016 BCCA 211 at paras. 20-21.
- [135] In *Dunbar*, the Court of Appeal described the task in this way:
- [21] The assessment of future loss requires a court to estimate a pecuniary loss by weighing (even if not assigning specific numeric values to) possibilities and probabilities of future events and relating evidence and findings of fact to the quantification of the loss: *Schenker* at paras. 53, 69; *Ostrikoff v. Oliveira*, 2015 BCCA 351 at para. 29; *Tsalamandris v. McLeod*, 2012 BCCA 239 at paras. 53-55. The usefulness of economic and statistical evidence does not turn an assessment into a calculation. It does, however provide a useful tool to assist in determining what is fair and reasonable in the circumstances: *Parypa v. Wickware*, 1999 BCCA 88 at para. 70.

Past Loss of Income/Earning Capacity

- [136] Section 98 of the Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231, limits a plaintiff's entitlement to damages for past loss of earning capacity to net as opposed to gross income loss.
- [137] *Smith v. Knudsen*, 2004 BCCA 613 remains the governing authority regarding the burden of proof for past loss of earning capacity. Dealing with a past loss of opportunity specifically, Justice Rowles explained the plaintiff must first establish a causal connection between the accident and the pecuniary loss claimed on a balance of probabilities (at para. 36). In other words, she concluded the plaintiff was required to prove on a balance of probabilities that the injuries caused by the accident impaired his earning capacity, in that case, his ability to take the steps necessary to make a contract bid.
- [138] Ms. Achan argues had she not been injured she would have returned to the work force earlier than February 2019. Relying upon Dr. Hall's evidence about the median salary range for suitable occupational categories, approximately \$30,000 per year, asserting she would have started working in the fall of 2017 when her youngest child began school, but estimating her potential without accident earnings prior to February 2019 at \$90,000 (\$30,000 for three years), she argues \$40,000 (gross) reflects a reasonable assessment of the value of her loss of capacity based on the likelihood she would have obtained similar employment sooner.
- [139] Anticipating a past loss of earning capacity claim based on work time missed due to pain since February 2019, the defendant takes the position Ms. Achan has failed to prove any loss for past loss of earning capacity, absent evidence from her employer, a co-worker or employment records. In response to her actual claim, the defendant argues Ms. Achan's brief evidence about handing out her resume in 2015 without specifying what positions she applied for, as well as her minimal work history prior to the accident, are not sufficient to establish a real and substantial possibility that an impairment of her past earning capacity resulted in a past pecuniary loss. Alternatively, the defendant suggests an award of \$2,530 based on four hours per week at \$12.65 per hour for 50 weeks.
- [140] I disagree with the defendant's positions. Firstly, based on my assessment of the fact and expert opinion evidence, I find that Ms. Achan's injuries and ongoing pain symptoms impaired her earning capacity and prevented her from working after the accident. For the same reason, I also find that it was reasonable for her to return to full-time work when she did.

- [141] I have no difficulty concluding that Ms. Achan has established there is real and substantial possibility that the impairment of her past earning capacity resulted in a pecuniary loss. Although she did not emphasize her own evidence in making submissions on this issue, based on the testimony the defendant describes as insufficient, I accept that shortly before the accident Ms. Achan had been actively looking for, as she put it, any job, which may well have included a part-time job, under pressure from income assistance.
- [142] Being hypothetical, exactly when Ms. Achan would have started working absent the accident cannot be known. However, I accept it would have been earlier than February 2019, although her pre-accident job search was unsuccessful, she was apparently also was influenced by the medical needs of the two youngest children (both ongoing realistic contingencies), and she did not testify to a specific plan to resume working when the youngest child was in full-time school. There are a number of reasons for my finding. Ms. Achan was successful in finding employment as a cashier at a gas station shortly after she arrived in Canada in 2006. She continued working at that job until 2008 before Ruth was born. Within two or three years of Shannon's birth in 2011, Ms. Achan and her former husband separated, leaving her responsible for the full-time care of six children with almost no income. The family's poverty provided a very strong ongoing incentive for Ms. Achan to return to work and earn as much as she could as soon as practicable. Finally, there was no suggestion that Ms. Achan struggled to find the job she now has, once she decided she could return to work.
- [143] For these same reasons, despite the absence of specific evidence on this point, I am satisfied it is reasonable to conclude that absent her injuries, Ms. Achan would have returned to work around the time her youngest child started full-time school.
- [144] Although, I accept that without her injuries and ongoing pain symptoms, Ms. Achan would have been stronger and much more resilient, I am not persuaded that initially she would have found a better paying job than she did, given her limited job history at that stage, limited qualifications, and other limitations unrelated to the accident.
- [145] Applying a capital asset approach, I estimate her total without accident potential earnings based on an estimated annual salary of \$27,000, I consider a gross award of \$30,000 to reflect a reasonable and fair assessment of the past-pecuniary loss arising from the impairment of her past earning capacity. I award that amount net of tax. I trust counsel can agree on the requisite calculation.

Future Loss of Earning Capacity

- [146] Acknowledging she is able to work full-time at her current job, Ms. Achan argues her earning capacity has been impaired by her accident-related injuries and there is a real and substantial possibility she will suffer a future pecuniary loss. She submits that if she loses her job or her work duties change, she would be less competitive in the labour market or at risk of increased pain. Relying on the opinions of Dr. Faraday and Dr. Hall, she also submits

that as she ages, there is a real and substantial possibility her chronic pain will reduce her ability to tolerate work and compromise her efficiency and competitiveness in the future and lead to early retirement. Further, she argues that absent her injuries and ongoing symptoms, she would have found better paying and more physically demanding work.

- [147] In valuing her loss, Ms. Achan argues the capital asset approach is more appropriate because the loss is not easily quantifiable. She proposes two methodologies. First, she estimates the net present value calculation of her future potential earnings to age 65 at \$521,934 based on an approximate salary of \$27,000 to \$30,000 per year (\$14.60 per hour). Arguing there are more realistic negative contingencies than positive and estimating and the "chance of a loss of capacity" at 30%, she proposes an award of \$157,000. Second, applying *Pallos v. Insurance Co. of British Columbia* (1995), 100 B.C.L.R. (2d) 260 (C.A.), she proposes an award of \$54,000 based on approximately two years of her current salary which she estimates at \$27,000. Reconciling the two proposals, she claims \$105,000 for loss of future earning capacity.
- [148] The defendant takes the position that Ms. Achan is not entitled to any award for future loss of earning capacity, arguing she has failed to prove an impairment of based on Ms. Walsh's "unreliable" test data, Dr. Faraday's opinion that the same data reflects her minimum capacity, and the unreliability of the testing results obtained by Dr. Hall.
- [149] Given my findings, I am satisfied that Ms. Achan's future earning capacity has been impaired by her accident-related injuries and ongoing symptoms including, most significantly, ongoing neck and upper back pain and to a lesser extent her psychological symptoms. I am also satisfied that there is a real and substantial possibility that the impairment of her future earning capacity will result in future pecuniary losses.
- [150] As I have said, whether she is strong enough to lift and carry more than she did when tested by Ms. Walsh, I accept Ms. Achan's evidence that she found her initial work duties lifting or moving trays of beer cans painful and too heavy. Even with the change to packing tissue boxes she sometimes leaves work early due to pain. No doubt fatigued by pain-related poor sleep. I also accept that Ms. Achan is very tired at the end of each workday.
- [151] Accepting the consistent opinions of Dr. Faraday and Dr. Okorie, I find it not only substantially possible but likely Ms. Achan will suffer future pecuniary losses if her work duties change or she loses her current job. Even if Ms. Achan remains in her current position, she is likely to continue missing short periods of work due to flares in her pain symptoms. If she loses her current job, her condition will make it harder for her to find another suitable job. Further, although Ms. Achan has limitations that are not accident related such as limited education and a limited ability to read and write English, I accept Ms. Achan's chronic pain will contribute to reducing the income she would have earned in her current occupation and other suitable occupations identified by Dr. Hall absent the accident. In other words, her impaired earning capacity will play a significant role in confining her to the lower end of the range of pay for those occupations. She is less

marketable or attractive as a potential employee and her opportunities for work will be more restricted.

- [152] I also accept that as she ages, her chronic pain will increase the likelihood of income loss and or job loss and she may very well be required to retire earlier than she otherwise would have. Although Ms. Achan gave vague evidence about plans for retirement, her financial circumstances make it necessary for her to work for as long as possible.
- [153] Although, on the whole, any negative and positive contingencies would appear to be in balance, the prospect of effective psychological treatment is a realistic positive contingency that may reduce the extent of her loss. Simply put, if Ms. Achan receives and responds well to the treatment recommended by Dr. Okorie, with improved mood, reduced anxiety and a better understanding of how to manage and address her ongoing pain, her functioning may improve.
- [154] The defendant did not challenge Ms. Achan's calculation of the present value of her future potential earnings, the use of a capital asset approach or melding the awards that result from the application of the two methodologies. I note the calculation of her future potential earnings is based on her current salary and therefore does not account for the likelihood she would have earned a higher salary absent her chronic pain. Further, I see little merit in the Pallos approach of two years salary in this case.
- [155] At the same time, I regard Ms. Achan's estimate of 30% in applying the first methodology, which assesses the impairment of her earning capacity as resulting in a future pecuniary loss equal to 30% of her potential future earnings, as overestimating her loss. Ms. Achan's impaired earning capacity will continue to result in some missed time from work, her chronic pain will continue to restrict her ability to earn income in her current and suitable occupations, she is at risk of income loss if she loses her current job or her job duties change, and her future losses are likely to increase over time as she ages. Based on these considerations and taking into account the potential impact of successful treatment and her underestimate of future potential earnings, as well as recognizing the uncertainty inherent in this exercise, I estimate the impact of her impaired future earning capacity on her future earnings as approximately 15% of her total potential earnings, as calculated by her, or \$80,000. Viewing this amount as fair and reasonable, I award Ms. Achan damages of \$80,000 for her loss of future earning capacity.

Loss of Housekeeping Capacity

- [156] An award for loss of housekeeping capacity provides compensation for the value of the housekeeping the plaintiff would have done but was, or will be, incapable of performing because of the injuries caused by the accident. It does not depend on replacement housekeeping costs actually being incurred. Loss of housekeeping capacity reflects the loss of personal capacity, an asset, and is therefore compensable as a pecuniary loss. In some circumstances, however, it can be compensated by a non-pecuniary award.

- [157] Recently in *Kim v. Lin*, 2018 BCCA 77 at paras. 33-34, the Court of Appeal considered how to properly characterize and value a loss of housekeeping claim, concluding:
- [33] Therefore, where a plaintiff suffers an injury, which would make a reasonable person in the plaintiff's circumstances unable to perform usual and necessary household work -- i.e., where the plaintiff has suffered a true loss of capacity -- that loss may be compensated by a pecuniary damages award. Where the plaintiff suffers a loss that is more in keeping with a loss of amenities, or increased pain and suffering, that loss may instead be compensated by a non-pecuniary damages award. However, I do not wish to create an inflexible rule for courts addressing these awards, and as this Court said in *Liu*, "it lies in the trial judge's discretion whether to address such a claim as part of the non-pecuniary loss or as a segregated pecuniary head of damage": at para. 26.
- [34] Whichever option a court chooses, when valuing these different types of awards, courts should pay heed to the differing rationales behind them. In particular, when valuing the pecuniary damages for the loss of capacity suffered by a plaintiff, courts may look to the cost of hiring replacement services, but they should ensure that any award for that loss, and any deduction to that award, is tied to the actual loss of capacity which justifies the award in the first place.
- [158] The cases have also recognized that any award should be approached conservatively: *Yip v. Saran*, 2014 BCSC 1283 at para. 82.
- [159] Ms. Achan seeks \$20,000 for past loss of housekeeping capacity and \$65,000 for future loss of housekeeping capacity, relying to a large extent on Dr. Faraday's opinion that she is not able to manage her housework and yard work independently and she will require assistance two hours per week on an ongoing basis.
- [160] The defendant takes the position that Ms. Achan is not entitled to any award, arguing she has not established that any difficulties she had with housekeeping required anything more than minor adjustments at home which have not continued nor were they sufficient.
- [161] The defendant emphasized Ms. Achan's evidence that her children helped her with housework both before and after the accident and her right hand and shoulder, not her accident-related injuries, prevent her from pushing the lawn mower.
- [162] I have not found that Ms. Achan has any injuries other than those that were caused by accident. She also gave evidence that she has never tried to mow the grass since the accident, which I accept. Given my assessment of the evidence and findings, I am satisfied that she struggled with all of her housekeeping tasks after the accident due to her injuries, pain and headaches, which given her responsibility for six and then five children as of 2017 were very significant. Accepting her children helped before and after the accident, Ms. Achan's capacity was nonetheless diminished. Without a spouse or another adult in the home to assist her, Ms. Achan had no choice but to try to continue doing the essential aspects of her housekeeping role after the accident.

- [163] I accept that for some time after the accident Ms. Achan struggled with the lifting, prolonged standing, bending and carrying involved in various housekeeping tasks and required the help of her children with tasks she previously completed on her own, which has gradually improved over time. I also accept that Ms. Achan remains unable to perform heavy cleaning tasks and at times is unable to accomplish daily housekeeping tasks when extremely fatigued and her pain symptoms flare. To be more specific, I am satisfied that since sometime before her return to work in February 2019 Ms. Achan has been able to perform most of the essential housekeeping tasks, most of the time. Although she may not cook as much and suffers from pain, discomfort, and fatigue while she engages in daily housekeeping, these are non-pecuniary losses which I have accounted for in the award for non-pecuniary losses and the pecuniary loss of capacity since that time has been mainly limited to heavy housekeeping and yard work.
- [164] Absent any evidence about the replacement cost, and given these findings, I award Ms. Achan \$10,000 for her past loss of housekeeping capacity.
- [165] Turning to her claim for future loss, Dr. Faraday's opinion that Ms. Achan will require two hours per week of ongoing assistance rests in part on factual assumptions that do not accord with my conclusion that Ms. Achan's housekeeping capacity will remain impaired by an inability to perform heavy housework and yard work. Ms. Achan's estimate of \$60,000 also fails to take into account a reduction in her housekeeping responsibilities that is bound to occur once her children live independently. Further, although she is responsible for lawn mowing in her current housing, it is not at all certain that she would face this same sort of requirement if and when her housing changes.
- [166] Estimating her need for assistance until the children leave the home at no more than four hours per month and after that less than 20 hours per year, and again absent any specified evidence regarding the replacement cost, I estimate her future loss of housekeeping capacity at \$20,000 and award that amount.

Cost of Future Care

Legal Principles

- [167] A plaintiff is entitled to compensation for the cost of future care based on what is reasonably necessary to restore her to her pre-accident condition insofar as that is possible and to preserve and promote her mental and physical health: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 at 78 (S.C.), aff'd (1987), 49 B.C.L.R. (2d) 99 (C.A.); *Spehar v. Beazley*, 2002 BCSC 1104 at para. 55, aff'd 2004 BCCA 290; and *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at paras. 29-30.

- [168] The test for assessing an appropriate award is an objective one based on the medical evidence. An item of future care must be medically justified, not medically necessary, and reasonable, to be recoverable: *Milina*. An evidentiary link between a physician's assessment of pain, disability and recommended treatment and the care recommendations of a qualified health care professional is required: *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 39.
- [169] Based on the recommendations of Dr. Faraday, Dr. Okorie and Dr. Hall, Ms. Achan seeks awards for the cost of passive paramedical care, a home TENS machine, CBT and ACT sessions, Tylenol and a vocational consultant. She relies on fee limits for standardized treatment set out in Schedule 3.1 of the Insurance (Vehicle) Regulation, B.C. Reg. 447/83 to estimate the cost for each item.
- [170] Without disputing Ms. Achan has established a medical justification for the items claimed or the cost estimates, the defendant argues no award for future care costs is reasonable, asserting specifically, it is unlikely Ms. Achan will attend psychotherapy in the future, given her "ongoing failure to attend despite being referred". I have already rejected the defendant's argument Ms. Achan failed to mitigate given the absence of evidence on this issue, her rather dire financial circumstances and her entirely reasonable approach to attending other treatment. I am not concerned that Ms. Achan will not attend and participate in psychological treatment Dr. Okorie recommends.

Passive Paramedical Care

- [171] Based on Dr. Faraday's opinion that Ms. Achan will experience pain flare ups about once per year and require increased pain medication and her choice of passive paramedical care involving four visits over two weeks, Ms. Achan estimates the cost at \$320 per year. Assuming 30 years of treatment, and based on the present value of that cost, she claims \$7,000.
- [172] Viewing the item as medically justified, the cost estimate as reasonable and there being no contrary submission by the defendant, I award this amount.

Home TENS Machine

- [173] Dr. Faraday recommended this device as an option for self-management of pain and advised it will need to be replaced every five years. The parties agree the cost of the machine is \$150. Assuming replacement every five years, Ms. Achan estimates this care cost at \$900. As indicated, Ms. Achan has already purchased and uses the TENS Machine when her pain is particularly bad. Since it is medically justified and reasonable I grant the award she seeks for this item.

Medication

[174] Dr. Faraday opined that Ms. Achan requires Tylenol, a muscle relaxant and another pain medication that she was using when they met on a daily basis indefinitely. The only evidence regarding the cost of the medications is found in the ASF. The parties agree that 100 extra-strength Tylenol tablets cost about \$12.99. Ms. Achan estimates the total cost for an ongoing supply at \$750. Medically justified and reasonable, I award this amount.

Vocational Consultant

[175] Dr. Hall recommended a vocational consultant and a job placement provider, at a cost of \$1,200 to \$1,800, to assist Ms. Achan in finding suitable employment should she lose her current job. Again, this is medically justified and reasonable and I award \$1,500.

Psychological Treatment

[176] Again, Dr. Okorie recommends an acute series of 24 sessions of culturally sensitive CBT and 12 sessions of ACT, a recommendation I have already said I accept. He also recommends without specifying ongoing periodic psychological treatment for the foreseeable future, given the "chronicity of her pain and physical difficulties which serve as constant reminders of the accident". For completeness, I note that Dr. Okorie was not challenged on this aspect of his evidence and I accept it too is medically justified. Ms. Achan estimates the cost of acute treatment at \$4,320 based on a regulation's standard rate for counseling of \$120. Noting the standard rate for psychological treatment is \$195 and a certain complexity of treatment imbedded in Dr. Okorie's recommendation, I am satisfied her estimate is more than reasonable.

[177] Ms. Achan estimates the cost of ongoing periodic treatment at \$5,000, which equates to approximately 40 sessions at a cost of \$120 per session. Although Dr. Okorie was not precise in recommending ongoing periodic treatment, this translates to approximately two sessions over the next 20 years which in my view is fair and reasonable.

Conclusion

[178] In summary, the damages I have awarded Ms. Achan are as follows, before appropriate tax adjustments made for past loss of earning capacity:

Non-Pecuniary Damages

\$90,000

Past Loss of Earning Capacity

\$30,000

Loss of Future Earning Capacity

\$80,000

Past Loss of Housekeeping Capacity

\$10,000

Future Loss of Housekeeping Capacity

\$20,000

Cost of Future Care

\$19,470

Total

\$249,470

"Fleming J."

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