

CANADA / JUDGMENT

Bachynsky v. Quinnell

2020 BCSC 2066

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2020 BCSC 2066 Bachynsky v. Quinnell

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Bachynsky v. Quinnell,

2020 BCSC 2066

Date: 20201223

Docket: M183947

Registry: New Westminster

Between:

Casey Pamela Bachynsky

Plaintiff

And

David Gift Quinnell

Defendant

Before: The Honourable Madam Justice Gerow

Reasons for Judgment

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Place and Date of Trial:

New Westminster, B.C.

October 5-9, 13, 15, 2020

Place and Date of Judgment:

New Westminster, B.C.

December 23, 2020

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Introduction

- [1] Casey Bachynsky was involved in a motor vehicle accident on October 26, 2014. She seeks damages for the injuries she alleges she suffered in the accident.
- [2] The defendant admits liability for the accident, and that Ms. Bachynsky was injured in the accident. However, the defendant disagrees about the nature, extent and seriousness of Ms. Bachynsky's injuries caused by the accident.
- [3] The defendant says Ms. Bachynsky has not proven her ongoing complaints were caused by the accident. The defendant asserts Ms. Bachynsky's ongoing physical complaints are the result of unrelated degenerative changes and other lifestyle factors.

Issues

- [4] The issues raised by the pleadings and submissions are:
 - 1. What are the nature, extent and duration of the injuries Ms. Bachynsky suffered in the accident?
 - 2. What is the appropriate award for general damages for pain and suffering?
 - 3. What amount, if any, should be awarded for the past and future loss of income or loss of income earning capacity?
 - 4. What amount, if any, should be awarded for loss of housekeeping capacity?
 - 5. What amount, if any, should be awarded for cost of future care?
- [5] Special damages have been agreed upon by the parties in the amount of \$3,820.53.

Background

- [6] The motor vehicle accident occurred on October 26, 2014 on Dewdney Trunk Road, Maple Ridge, B.C. Ms. Bachynsky was driving her Chevrolet Blazer to Coquitlam Centre to run an errand when her vehicle was rear ended by the defendant driving a 1993 GMC 1500 pick-up truck. At the time of the accident, Ms. Bachynsky was 38 years old and a mother of three children.
- [7] Ms. Bachynsky testified that at the time of impact she had her right foot on the brake and her right hand on the steering wheel. She testified that it was a sudden unexpected impact and that her body jolted forward on impact. Ms. Bachynsky testified that at the accident site she was shaking, sweating and tearful. She testified she felt pain along her shoulder blades and in her neck.
- [8] Ms. Bachynsky's evidence was that she had arranged to meet a person who would deliver an item to her mother who lived outside of Canada. Ms. Bachynsky did not know how to contact the person, so after the collision she drove to Coquitlam Centre to deliver the item. She testified she felt very upset and was afraid to drive. She had called her common law husband, Robert Schneider, and they agreed to meet at Tim Hortons. Ms. Bachynsky was able to drive her vehicle home with her husband following. The vehicle was subsequently written off. There was damage to the bumper and the driver's seat was on a slant to the right.
- [9] Ms. Bachynsky testified about a chaotic and traumatic childhood and young adult life. Despite the challenges in her life, Ms. Bachynsky obtained her GED. At the time of the accident, she was employed as a cashier at Save-On-Foods with the Overwaitea Food Group, where she had worked since 1999.
- [10] Ms. Bachynsky testified that one of the traumatic events in her life prior to the accident was when she was robbed at work in 2008. After the robbery, she suffered from post traumatic stress disorder (PTSD) and was off work for approximately three months.
- [11] Ms. Bachynsky testified that following her return to work after the robbery she threw herself into work and parenting her three children. When she returned, Ms. Bachynsky started to have more responsibilities at work. She became a member of the Health & Safety Committee, had a role in new staff orientation, and was the shop steward, and lead fund raiser and organizer for Children's Hospital, a year round fundraising program. In 2013, Ms. Bachynsky received the Personal Achiever award at work. Ms. Bachynsky's performance reviews prior to the accident were very positive, and she had aspirations to move into management.

- [12] Ms. Bachynsky testified that prior to the accident she had no physical limitations or health conditions that affected her employment, recreational or household duties. She had an active lifestyle which included hiking, boating, motorcycle riding, and kayaking with Mr. Schneider. She testified about her significant involvement with her children's activities. Ms. Bachynsky's evidence was that in the year prior to the accident, alcohol was not an issue for her. Mr. Schneider rarely drank, and Ms. Bachynsky's drinking was limited.
- [13] Ms. Bachynsky testified that she saw her family doctor, Dr. Danny Wong, the day after the accident. At the time she was complaining of pain in her neck radiating into her shoulders and pain in her low back and right hip. Dr. Wong prescribed pain killers, physiotherapy, and light duties. On October 28, 2014, Ms. Bachynsky attempted to go to work but was in a lot of pain. She went to see Dr. Wong complaining that she felt like there was a brick sitting on her shoulder. Dr. Wong examined her and advised her to stop work. Ms. Bachynsky was off work from November 4 - 30, 2014, and then returned to light duties. She returned to full duties in the middle of February 2015.
- [14] Ms. Bachynsky testified that despite her efforts at work and her treatments, her symptoms continued. Ms. Bachynsky developed left groin pain which caused her to load onto her right side, aggravating her right hip and low back pain. From July 2015 to April 2016 her work was reduced to part-time light duties.
- [15] In April 2016, Ms. Bachynsky had a hernia repair surgery after which she missed about six weeks of work. She testified that after the surgery she only experienced mild discomfort at the surgery site.
- [16] Ms. Bachynsky testified that when she returned to work following the hernia surgery, her symptoms continued in her right shoulder and down her arm into her elbow, low back and right hip. Ms. Bachynsky testified she was frustrated about her slow recovery and felt sad. She steadily increased her consumption of alcohol following the accident. Ms. Bachynsky also testified about her increasingly disrupted sleep and her growing isolation from her husband and youngest child.
- [17] Ms. Bachynsky described the physical demands and duties of cashier and service desk work. She testified that in early 2017 her symptoms were such that she had to give up her position at the service desk, a position that she worked hard to obtain. She testified that the combination of late shifts, lack of sleep and ongoing symptoms was too much for her. After resigning the service desk position Ms. Bachynsky was posted to the meat department, which was a very physically demanding job. Ms. Bachynsky testified that the job demands aggravated her right shoulder, right hip and low back.

- [18] Ms. Bachynsky testified that her symptoms were such that she had to give up her volunteer role as the lead fundraiser for the store for the Children's Hospital. By late 2017, she testified that she could barely move her right shoulder, and that her right arm, right hip and low back were sore. In December 2017, Ms. Bachynsky saw her doctor about her shoulder getting worse, and was booked off work.
- [19] Ms. Bachynsky's evidence is that since the accident she has undertaken a myriad of treatments for her injuries, including surgery on her right shoulder, but none have provided lasting relief for her primary symptoms involving her right hip, right shoulder, right elbow, low back and the pain that runs along the top of her shoulder blades.

What are the nature and extent of the injuries suffered in the accident?

Plaintiff's Position

- [20] Ms. Bachynsky's position is that she is suffering from ongoing neck, shoulder, elbow, back, and hip pain as a result of the injuries she sustained in the motor vehicle accident. Her evidence is that the ongoing pain she is suffering impacts her ability to participate in her pre-accident activities. Ms. Bachynsky says that to the extent her symptoms were caused by her pre-existing degenerative changes, the degenerative changes were asymptomatic, and were triggered by the trauma of the accident into becoming symptomatic. Ms. Bachynsky asserts that absent the accident it is unlikely she would have chronic pain in her neck, shoulder, elbow, hip and back.
- [21] Ms. Bachynsky asserts that as a result of her chronic pain, she has become withdrawn and depressed. With the support of her husband, Ms. Bachynsky has attained sobriety, but she continues to suffer from chronic pain, sleep disruption and depressed mood. Her PTSD, which had been in remission for many years, has resurfaced and is worse as it includes severe and debilitating panic attacks. Ms. Bachynsky continues to be on a variety of medications which only control her symptoms to a certain degree.
- [22] Ms. Bachynsky submits that the ongoing symptoms she is suffering from, including the relapse in her PTSD and addiction struggles, are a result of the injuries she sustained in the accident.
- [23] Ms. Bachynsky submits her ongoing symptoms affect every aspect of her life. Since the accident she has been unable to look after her home as she did before the accident, or continue with her volunteer work, or many of her physical and social activities. In late 2017, she had to stop work because of the pain.

Defendant's Position

- [24] As noted earlier, the defendant concedes that Ms. Bachynsky sustained soft tissue injuries in the motor vehicle accident. However, the defendant submits that the injuries Ms. Bachynsky sustained in the accident have healed and the residual effects that plague her today are the result of unrelated degenerative changes and over 15 years of work in a demanding grocery store environment.
- [25] The defendant says that Ms. Bachynsky's other reported injuries, including those to her neck, right shoulder, upper back, and right hip are not consistent with a traumatic event like the motor vehicle accident.
- [26] Although the defendant admits that Ms. Bachynsky likely suffered initial injuries as a result of the accident, those injuries have healed. The defendant submits that Ms. Bachynsky reinjured her lower back on September 26, 2017 in a workplace incident. This incident, in addition to the age-appropriate degenerative changes and the years of accumulated wear and tear of working at the grocery store for over 15 years, and other lifestyle factors such as smoking, interpersonal stressors, monetary stressors, job satisfaction, and stressors from the medical/legal process, etc. have led to the myofascial pain and calcific tendonitis that Ms. Bachynsky is experiencing today. Ms. Bachynsky admits the left-sided hernia and April 2016 surgery are not related to the accident.

Relevant Law

- [27] The Supreme Court of Canada considered causation in *Clements v. Clements*, 2012 SCC 32. The Court confirmed that the basic test for determining causation remains the "but for" test articulated in *Snell v. Farrell*, [1990] 2 S.C.R. 311 and *Athey v. Leonati*, [1996] 3 S.C.R. 458. The plaintiff bears the burden of showing on a balance of probabilities that "but for" the defendant's negligent act or omission the injury would not have occurred.
- [28] In order to establish causation, Ms. Bachynsky must prove, on a balance of probabilities, that but for the accident she would not have suffered the injuries she complains of.
- [29] A plaintiff is not required to establish that the defendant's negligence is the sole cause of his or her injuries. A tortfeasor must take his or her victim as the tortfeasor finds the victim, and is liable even if other causal factors, for which the tortfeasor is not responsible, result in the victim's losses being more severe than they would be for the average person. At the same time, the tortfeasor need not put the victim in a better position than the victim would have been in but for the accident, and need not compensate the victim for the effects of a pre-existing condition that the victim would have experienced in any event: *Athey* at paras. 34-35.

Application of the Law to the Facts

- [25] A number of doctors provided expert reports and testified regarding their observations of Ms. Bachynsky, and their diagnoses and prognoses regarding her injuries. I will briefly review the opinions. Based on my review of the evidence, I find that as a result of the accident, Ms. Bachynsky will continue to suffer from the chronic pain and psychiatric problems she complains of.
- [30] Dr. Ansel Chu, an expert in physical medicine and rehabilitation provided two reports and testified at the trial. Dr. Chu started treating Ms. Bachynsky in June 2017 after she was referred to him by Dr. Wong. Dr. Chu testified that he treated Ms. Bachynsky for various problems with her right shoulder, right lower back, and right hip. When he first saw Ms. Bachynsky in June of 2017, she was not complaining of neck pain or headaches but had significant problems with her right shoulder. She also complained of right low back pain that radiated into the right hip and buttock area. Ms. Bachynsky reported to Dr. Chu that she was suffering from mood and sleep disturbance as a result of the ongoing pain.
- [31] Dr. Chu's opinion is that the right shoulder and right low back injuries Ms. Bachynsky suffered in the accident are the cause of her ongoing problems with her shoulder, lower back and hip. Ms. Bachynsky had no history of those problems prior to the accident.
- [32] In Dr. Chu's opinion, Ms. Bachynsky likely suffered a strain to the right supraspinatus tendon in her shoulder in the accident which has produced the chronic pain and calcification. Dr. Chu opined that Ms. Bachynsky's right shoulder girdle pain has features of myofascial pain syndrome or regional pain syndrome. Dr. Chu noted that there are various factors that come into play in the development of myofascial pain syndrome other than the initial injury, such as the person's perception of the sick role, interpersonal stressors, monetary stressors, job satisfaction, and stressors from the medical/legal process, amongst others. However, Dr. Chu's opinion is the accident was the initial triggering event that caused Ms. Bachynsky's right shoulder girdle and scapular pain.
- [33] Dr. Chu's opinion is that Ms. Bachynsky likely suffered a strain to the supportive muscles and ligaments of her lower back in the accident. When mechanical structures, such as facet joints, are injured, this can lead to chronic mechanical pain. Dr. Chu's opinion is that the chronic mechanical pain is the reason for Ms. Bachynsky's ongoing right low back problems, with pain radiating down to her right hip.
- [34] In his report dated March 26, 2018, Dr. Chu's prognosis for the resolution of Ms. Bachynsky's right sided lower back pain and the more widespread myofascial pain in her right shoulder girdle and rotator cuff impingement was guarded.

- [35] In cross-examination, Dr. Chu was asked about the effect of the September 2017 work incident where Ms. Bachynsky twisted her back. According to Dr. Chu, Ms. Bachynsky did not complain to him of any injuries arising from the incident. In Dr. Chu's opinion this incident would likely just have irritated the low back injury she had sustained in the accident. This is consistent with Ms. Bachynsky's evidence that the incident at work in 2017 caused a flare up of her ongoing low back pain.
- [36] At the time of Dr. Chu's second report in June 2020, Ms. Bachynsky had undergone shoulder surgery resulting in significant improvement in her right shoulder. However, Ms. Bachynsky's right shoulder still became painful with overuse and repetitive reaching. In June 2020, Dr. Chu opined that because of the mechanical pain in her right shoulder, Ms. Bachynsky is getting some secondary regional pain in the muscles of her shoulder girdle, and because of the mechanical pain in her low back she is getting secondary myofascial or regional muscle pain in her right buttock and the muscles of the hip girdle. Dr. Chu's opinion is that the right shoulder and right low back mechanical injuries are directly related to the injuries she sustained in the car accident, and that Ms. Bachynsky's ongoing pain is caused by those injuries.
- [37] Dr. Chu's prognosis for the resolution of Ms. Bachynsky's right shoulder and right low back pain is still guarded. Dr. Chu's opinion is that it is possible for Ms. Bachynsky to return to work with a tailored return to work program.
- [38] Dr. Albert Chan, an expert in orthopaedic surgery, provided an expert's report dated July 7, 2020 and testified. Dr. Chan saw Ms. Bachynsky on February 16, 2018, at the request of Dr. Chu. At that time, Ms. Bachynsky was complaining of generalized right shoulder pain and a significant reduction in movement in her right shoulder. Dr. Chan performed surgery on Ms. Bachynsky's shoulder on June 1, 2018. At the end of her postoperative rehabilitation, Ms. Bachynsky's right shoulder pain and motion had improved, however, she had residual symptoms in her shoulder.
- [39] Dr. Chan provided an opinion that Ms. Bachynsky's ongoing right shoulder symptoms are likely the result of the motor vehicle accident as there was no evidence of any right shoulder problems prior to it. Dr. Chan opined that Ms. Bachynsky likely developed inflammation to her right shoulder rotator cuff tendon from the jolt of the impact when her right hand was on the steering wheel. Dr. Chan acknowledged that calcific deposits can be incidental findings in people past the fourth decade of life. However, his opinion is that even if an imaging study prior to the accident showed the presence of calcific deposits to Ms. Bachynsky's right shoulder rotator cuff, she did not have any symptoms. The accident likely precipitated the onset of the rotator cuff pain. Dr. Chan explained that if rotator cuff tendons are injured that can lead to inflammation to the muscle group and the tendons around it. Not all inflammation and tendonitis will resolve. The inflammation and tendonitis can lead to scar tissue in the area which, in turn, can cause ongoing pain.

- [40] Following surgery, Ms. Bachynsky still has limitations in performing repetitive movements, especially when her right arm is higher than shoulder level. In Dr. Chan's opinion, Ms. Bachynsky's residual right shoulder symptoms and limitations prevent her from performing work that involves quick and repetitive actions. Dr. Chan's opinion is that Ms. Bachynsky has likely achieved the maximum recovery to her right shoulder.
- [41] Dr. Shaohua Lu, an expert in psychiatry, testified at trial and provided a report dated April 18, 2020. Dr. Lu described Ms. Bachynsky's troublesome childhood and young adulthood. Dr. Lu explained that although Ms. Bachynsky had suffered abusive relationships both as a child and young adult, she was able to maintain a work ethic. At the time of the accident Ms. Bachynsky was not on any medication and was working full-time at Save-On-Foods. Ms. Bachynsky had many duties at work, and she told Dr. Lu that her job was very important to her as it helped her cope with life. Ms. Bachynsky had previously been diagnosed with PTSD relating to the robbery at work in 2008.
- [42] Dr. Lu noted that Ms. Bachynsky had periods of drug and alcohol use earlier in her life. At the time of the accident, she was drinking far less than she had in the past as her husband doesn't drink and her life was stable. At the time of the accident, Ms. Bachynsky was coping, working, and did not have any drug or alcohol problems. After the accident, Ms. Bachynsky attempted to keep up with her work, but struggled with pain. From 2014 to December 2017, when she eventually stopped working, Ms. Bachynsky reported she had tried different medications and surgery.
- [43] Ms. Bachynsky's mood became gradually affected by her ongoing pain and her alcohol use gradually increased after the accident. Ms. Bachynsky initially stopped drinking alcohol in August 2018, but had some relapses. She has been sober since November 2019. Ms. Bachynsky feels that even with her sobriety, not working or having a structure is not good. There is a loss in her day-to-day enjoyment and Ms. Bachynsky is frustrated that she has ongoing pain in her shoulder and low back. Since the accident, Ms. Bachynsky has become much more cautious about driving and restricts her activity.
- [44] In Dr. Lu's opinion Ms. Bachynsky meets the DSM-5 diagnostic criteria for PTSD, and is in early remission from alcohol addiction. Dr. Lu opined that Ms. Bachynsky's psychiatric symptoms play a major role in her continuing functional limitations and impairments. In Dr. Lu's opinion the chronic pain Ms. Bachynsky suffered following the accident caused a relapse of her PTSD and alcohol abuse. There was a potential for deterioration before the accident, but the accident was the primary cause of her relapse. While Ms. Bachynsky was vulnerable because of her pre-existing psychiatric condition prior to the accident, it was not affecting her functionality. She was able to work and care for her family. Dr. Lu is of the opinion that the fact Ms. Bachynsky did not immediately relapse after the accident is indicative of her remarkable psychological resilience.

- [45] Dr. Lu's opinion is that the accident with the resulting pain, limitations, and the fact that she has been unable to get relief despite numerous treatments, collectively contributed to Ms. Bachynsky's psychiatric problems. In Dr. Lu's opinion there was no medical or clinical indication that absent the accident, Ms. Bachynsky would have a relapse of her prior psychiatric symptoms. Ms. Bachynsky had a gradual change in her mood and anxiety in response to her pain and the associated symptoms. She described a deep frustration with her pain and its impact on her ability to balance personal and work responsibilities. The fact she did not have a relapse of her past psychiatric condition and was able to maintain work in the initial period of adjustment to her pain, is an excellent clinical indication that she was not at risk of deterioration at the time of the accident. Dr. Lu's opinion is that the accident was a direct contributing event to Ms. Bachynsky's ongoing psychiatric problems. Once reactivated Ms. Bachynsky's chronic pain and her psychiatric symptoms have become intermingled.
- [46] Dr. Lu's opinion is that in her current state, Ms. Bachynsky has reduced cognitive reserve and psychological stability to participate in any job retraining. However, work is important for her mental health recovery and Dr. Lu recommends vocational and occupational support. As well, Dr. Lu recommends that Ms. Bachynsky receive psychological counselling. Dr. Lu's prognosis for Ms. Bachynsky is guarded as the accident has substantially worsened her lifelong psychiatric trajectory.
- [47] Dr. C. Preet Chahal, an expert in neurology, testified and provided a report dated July 7, 2020. Ms. Bachynsky was referred to Dr. Chahal by her family doctor and saw him initially on November 2, 2017. At the time, Ms. Bachynsky complained that since the accident she has episodic symptoms of numbness and tingling in her right upper extremity, particularly numbness in the fingers of her right hand. She was also complaining of neck pain and pain into her right shoulder and elbow region.
- [48] Dr. Chahal found there was no electrodiagnostic evidence to suggest entrapment at Ms. Bachynsky's right wrist or elbow. Despite the normal electrodiagnostic studies, Dr. Chahal opined that in part Ms. Bachynsky's symptoms in her right hand are caused by intermittent right ulnar nerve compression at the cubital tunnel in her elbow. In Dr. Chahal's opinion the injuries sustained in the accident likely caused the development of the right cubital tunnel syndrome. The injuries to her right shoulder likely caused Ms. Bachynsky to rest on her elbow to compensate for the pain, resulting in pain and numbness in her right elbow and hand. Dr. Chahal testified that it is common for patients with shoulder injuries to load their elbows at rest in an attempt to alleviate pain at the shoulder, which leads to ongoing compression of the ulnar nerve in the elbow. Dr. Chahal disagreed that Ms. Bachynsky would have developed cubital tunnel syndrome in her right elbow from repetitive actions. Dr. Chahal explained that the syndrome is developed from resting on the elbow in an attempt to alleviate the pain in the shoulder.

- [49] Dr. Chahal's clinical experience is that patients with ongoing cubital tunnel syndrome in their dominant hand have a real possibility of having a significant interference in their daily living and vocational activities. Dr. Chahal testified that cubital tunnel syndrome is dependency related, not movement related. Once you develop it then the more you move it the more the nerve becomes agitated because it does not heal. Dr. Chahal's opinion is that Ms. Bachynsky will have continued symptoms, and will need to manage them. Dr. Chahal is of the view surgery may improve Ms. Bachynsky's symptoms but it is unlikely the condition will resolve spontaneously.
- [50] Dr. Chahal's opinion is that Ms. Bachynsky will not be able to return to her pre-accident occupation as a grocery store cashier/clerk for the foreseeable future because the job involves significant movement at the elbow which would exacerbate her symptoms.
- [51] The report of Dr. Andrew Wong, an expert in general surgery, who performed Ms. Bachynsky's hernia operation, was entered as an exhibit. Ms. Bachynsky is not asserting the hernia was caused by the accident. Dr. Wong's opinion is that Ms. Bachynsky would have been disabled from activities that require straining of the abdominal muscles including bending and twisting for six weeks.
- [52] Dr. Stephen Maloon, an expert in orthopaedic surgery, testified and provided two reports dated May 27, 2020 and August 21, 2020. Dr. Maloon saw Ms. Bachynsky for an independent medical examination on May 27, 2020. The purpose of the evaluation was to provide an independent assessment of injuries allegedly sustained in the accident. At the time of the visit Ms. Bachynsky was complaining of pain in her right hip, low back, neck, right shoulder and right large toe.
- [53] Dr. Maloon's opinion is that Ms. Bachynsky probably sustained a mild soft tissue strain to her neck in the accident. Dr. Maloon could not find any objective evidence of musculoskeletal or neurological injury that she may have sustained in the accident. Dr. Maloon's opinion is that Ms. Bachynsky's level of self-reported disability was inconsistent with the lack of objective musculoskeletal or neurological findings. Dr. Maloon is of the view that Ms. Bachynsky's hip symptoms began more than six months after the accident and therefore the ongoing trochanteric bursitis symptoms are not the result of the accident.
- [54] Dr. Maloon's opinion is that Ms. Bachynsky's neck and low back pain failed to resolve within the normal time for soft tissue healing. Evaluation of her back showed no signs of structural injury or indication of a structural injury. Dr. Maloon's opinion is that it is unlikely the mild soft tissue injuries would have been significant enough to alter the natural history of Ms. Bachynsky's pre-existing neck or back condition. Dr. Maloon's opinion is that Ms. Bachynsky's right shoulder injury was not caused by the accident. Dr. Maloon is of the view that the mechanism of injury in a rear end collision is not consistent with an injury to the right shoulder, and Ms. Bachynsky's symptoms did not begin until two years after the accident.

- [55] Dr. Maloon testified he could not find any evidence to suggest Ms. Bachynsky has been in any way physically impaired by musculoskeletal or neurological injuries she may have sustained in the accident. He would have expected Ms. Bachynsky to be partially disabled for four to six weeks.
- [56] However, in my opinion, not much weight can be given to Dr. Maloon's opinions. Dr. Maloon's opinion about the cause of Ms. Bachynsky's shoulder and hip problems is based on an erroneous assumption that her first complaint of shoulder pain was on January 3, 2018, two years after the accident.
- [57] Dr. Maloon was missing some pages of Dr. Wong's records, notably the November 4, 2014 entry where Dr. Wong notes Ms. Bachynsky's complaints of pain in her right shoulder and neck and a limited range of motion. There are many entries in the medical records starting in the fall of 2014 referring to problems Ms. Bachynsky was experiencing with her shoulder.
- [58] On October 28, 2014, Dr. Wong completed a worker ability form for Ms. Bachynsky's workplace where he indicated she was unable to use her right arm for pushing, pulling, or grasping and was incapable of lifting. In Dr. Wong's clinical records there is an entry in December 2014 that refers to pain in her shoulder blades and an entry in January 2015 that refers to constant pain over the rotator cuff of her shoulder. In August 2015, there is an entry indicating Ms. Bachynsky is in constant pain over her shoulders. As well, there is a physiotherapist record dated November 11, 2014 indicating that Ms. Bachynsky had a limited range of motion in her right shoulder.
- [59] Despite including a certification that he had a duty to assist the court and not to be an advocate for any parties, I found Dr. Maloon argumentative during cross-examination and that he acted as an advocate for the defendant. Dr. Maloon states in his first report that the first record of right shoulder pain was on January 3, 2018. When taken to records on November 16, 2017 and December 9, 2017, that indicated Ms. Bachynsky was complaining of pain in her right shoulder, he queried if he had seen those records, although they were on the same page as the note Dr. Maloon referred to in his report of January 3, 2018. When asked about the physiotherapy records dated November 14, 2014, which documented right shoulder complaints and a limited range of motion, Dr. Maloon dismissed them as physiotherapy records implying they were irrelevant.
- [60] Dr. Maloon indicated he does not accept myofascial pain as a diagnosis, even though he understands that experts in physical medicine and rehabilitation view it as a valid diagnosis. Dr. Maloon's opinion that pain specialists are wrong when they diagnose myofascial pain is not consistent with the other medical experts who testified. Given that Dr. Maloon is not an expert in physical medicine and rehabilitation, I prefer Dr. Chu's opinion in that regard.

- [61] The defendant argues that Ms. Bachynsky's upper and lower back pain, right shoulder and arm pain, and right hip pain are not the result of the accident based on Dr. Maloon's report. As stated earlier, Dr. Maloon's opinion that Ms. Bachynsky's symptoms are not a result of injuries she sustained in the accident is incorrectly based on the time lapse in her reporting her symptoms and the fact he does not accept a diagnosis of myofascial pain. As a result, I give no weight to Dr. Maloon's opinion.
- [62] The defendant asserts that the workplace incident that occurred in September 2017, when Ms. Bachynsky twisted her back, is an intervening event and is the cause of her back pain. However, the evidence does not support this assertion. When Dr. Chu was cross-examined as to whether it would change his opinion regarding causation, he answered that it would not.
- [63] In June 2017, Ms. Bachynsky sought treatment from Dr. Chu for her low back pain and right shoulder. Dr. Chu's evidence is that the pain from the mechanical back injury preceded the workplace incident. At best the evidence about the incident indicates a minor event that caused a flare up of Ms. Bachynsky's symptoms. This is consistent with Ms. Bachynsky's evidence regarding the incident, i.e. that it caused a flare up of the pre-existing back pain.
- [64] The evidence of the plaintiff's medical experts supports a finding that the accident caused the soft tissue injuries to Ms. Bachynsky's neck, shoulder, and lower and upper back which have resulted in the ongoing symptoms she is continuing to suffer. The defendant asserts there is a lack of objective evidence of a continuing injury. However, there is objective evidence of Ms. Bachynsky undergoing treatment for her injuries, including shoulder surgery, trigger point injections, and a nerve ablation procedure to her lower back.
- [65] Since the accident, Ms. Bachynsky has consistently complained about, and sought treatment for, the pain in her neck, shoulder, arm, back, and right hip. The evidence of Ms. Bachynsky's medical experts is that the accident is the cause of the injuries she sustained and the ongoing pain she is suffering.
- [66] There is no evidence that Ms. Bachynsky had any significant right shoulder, elbow, back or hip pain prior to the accident. There is no evidence that Ms. Bachynsky's symptoms in her shoulder and back would have arisen spontaneously. None of the experts provided an opinion that, absent the accident, the degenerative condition in her low back or shoulder would have become symptomatic, and if they did, to what degree. The evidence from the experts is that degenerative disease is common in individuals as they age, and is most often asymptomatic without trauma.

- [67] As well, the medical evidence is that Ms. Bachynsky developed increased psychiatric and mood problems associated with PTSD and depressed mood as a result of the ongoing pain and frustration caused by the injuries she sustained in the accident. In Dr. Lu's opinion, Ms. Bachynsky's chronic pain and psychiatric symptoms have become mutually aggravating, and the re-emergence of her psychiatric symptoms has a direct negative impact on her functionality.
- [68] In my opinion, the preponderance of the evidence establishes a temporal connection between the accident and Ms. Bachynsky's ongoing physical and psychiatric symptoms. The evidence supports a finding that the whiplash injuries Ms. Bachynsky suffered in the accident caused or contributed Ms. Bachynsky's chronic pain.
- [69] Based on my review of the medical evidence, I find that Ms. Bachynsky suffered soft tissue injuries to her neck, shoulders, and upper and lower back in the accident. While she has recovered from a number of the injuries, the injuries Ms. Bachynsky sustained in the accident have resulted in the chronic pain she experiences in her right shoulder, low back and right hip.
- [70] The evidence establishes the injury Ms. Bachynsky sustained in the accident precipitated the scarring and subsequent calcification in her right rotator cuff causing the ongoing limitations and pain in her right arm and shoulder. The evidence also establishes that the mechanical structures injured in the accident are the probable cause for Ms. Bachynsky's back and hip pain. The injuries sustained in the accident resulted in chronic mechanical pain, and the development of the secondary myofascial pain.
- [71] Insofar as the defendant suggests that Ms. Bachynsky's ongoing complaints are the result of prior degenerative conditions, there is no evidence that Ms. Bachynsky was suffering pain as a result of her degenerative conditions in her shoulder or spine prior to the accident. As noted by Dr. Chu and Dr. Chan, many people have degenerative conditions and are asymptomatic. Given the lack of symptoms prior to the accident, it is likely the accident made Ms. Bachynsky's pre-existing asymptomatic degenerative condition in her shoulder and low back symptomatic.
- [72] Although the accident is not the original cause of Ms. Bachynsky's PTSD or addiction problems, she was in remission before the accident. While there was a risk that Ms. Bachynsky could suffer a relapse of her PTSD despite the accident, there was no evidence that would occur. In fact the evidence was to the contrary, Ms. Bachynsky was stable, and thriving at work and home. She had by all reports been active both physically and socially prior to the accident.
- [73] Mr. Schneider and Shelley O'Hanley, two lay witnesses, testified that there was a marked change in Ms. Bachynsky, both physically and mentally, following the accident. Ms. Bachynsky's evidence is that despite her attempts to do so, she has not been able to return to many of her pre-accident activities and interests.

[74] None of the medical experts, except for Dr. Maloon, suggest Ms. Bachynsky's symptoms will completely resolve regardless of the treatments she receives, or steps she takes. In my view, the medical evidence supports a finding that Ms. Bachynsky will likely experience some improvement over time with further physical and psychological treatment, but will not have a resolution of her symptoms or a return to her pre-accident condition.

[75] Accordingly, I find on a balance of probabilities that as a result of the accident Ms. Bachynsky will continue to suffer from chronic pain in her right shoulder, upper and lower back, and right hip. As well, she will suffer intermittent discomfort in her right arm and hand. Finally, I find that as a result of the accident Ms. Bachynsky will continue to suffer from psychiatric symptoms of depressed mood and symptoms of PTSD.

What is the Appropriate Award of General Damages for pain and suffering?

[76] Ms. Bachynsky seeks an award of \$175,000 to \$200,000 for general damages. The defendant submits an appropriate award for general damages is \$65,000 to \$85,000.

[77] For the reasons that follow, I find the appropriate award for general damages is \$150,000.

Applicable Law

[78] A plaintiff is entitled to reasonable damages for her pain and suffering. The plaintiff should be placed in the same position she would have been if the accident had not occurred, but not in a better position. In *Stapley v. Hejslet*, 2006 BCCA 34 at paras. 45 and 46, the court noted that a non-pecuniary award will vary to meet the specific circumstances of each case, and set out the factors to be considered in making such an award:

[46] The inexhaustive list of common factors cited in *Boyd* that influence an award of non-pecuniary damages includes:

- (a) age of the plaintiff;
- (b) nature of the injury;
- (c) severity and duration of pain;
- (d) disability;
- (e) emotional suffering; and
- (f) loss or impairment of life;

I would add the following factors, although they may arguably be subsumed in the above list:

- (g) impairment of family, marital and social relationships;
- (h) impairment of physical and mental abilities;
- (i) loss of lifestyle; and

- (i) the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff: *Giang v. Clayton*, [2005] B.C.J. No. 163 (QL), 2005 BCCA 54).
- [79] Ms. Bachynsky relies on *Kallstrom v. Yip*, 2016 BCSC 829; *Cole v. Sandhu*, 2020 BCSC 709; *Gill v. Apeldoorn*, 2019 BCSC 798; and *Watts v. Lindsay*, 2019 BCSC 2239, to support the argument that the appropriate award for general damages is \$175,000 to \$200,000.
- [80] The defendant relies on *Dhugga v. Poirier*, 2020 BCSC 914; *Block v. Schmitt*, 2019 BCSC 1575; *Naiodro v. Gill*, 2019 BCSC 1857; *Fabian v. Song*, 2018 BCSC 762 and *Lally v. He*, 2016 BCSC 2187, to support the argument that the appropriate award for general damages is \$65,000 to \$85,000.

Application of the Law to the Facts

- [81] The defendant's submissions, and supporting cases, are predicated on Dr. Maloon's assessment that Ms. Bachynsky suffered a mild soft tissue strain to her neck in the accident, and any injuries to her neck and back would have resolved in six to eight weeks. The defendant submits Ms. Bachynsky's ongoing neck and back symptoms are likely the result of pre-existing degenerative changes in her neck and back. The defendant also relies on Dr. Maloon's opinion that her right shoulder and arm problems are not the result of the accident based on the incorrect assumption that Ms. Bachynsky did not have any symptoms until January 2018, more than two years post-accident. As discussed, not much weight can be given to Dr. Maloon's opinions.
- [82] As well, the range suggested by the defendant is predicated on the argument that Ms. Bachynsky's ongoing psychiatric problems were not caused by the accident.
- [83] However, in my view, the facts do not support the defendant's arguments.
- [84] As stated above, Ms. Bachynsky suffers from ongoing pain in her shoulder, right arm, back and right hip as a result of the accident. I accept the evidence of Ms. Bachynsky and the lay witnesses that the accident had a significant impact on all aspects of her life.
- [85] Ms. Bachynsky testified that since the accident she has suffered from ongoing pain, particularly in her right shoulder and low back, radiating into her right hip. She has pursued all of the treatments that have been recommended since the accident, including injections into her spine, nerve ablations, and surgery to her shoulder. She is currently awaiting a possible surgery on her elbow which flares up intermittently.
- [86] Ms. Bachynsky's evidence is that despite the treatments she has not recovered. She testified that any activity she undertakes results in increased pain in her shoulder, low back and hip afterwards. Ms. Bachynsky found that her job duties as clerk/cashier caused her increased pain and discomfort. Ms. Bachynsky testified that she had to give up her service desk position, and her volunteering, and eventually had to stop work completely.

- [87] Further, Ms. Bachynsky testified she has not been able to sleep well since the accident. She wakes up with pain during the night and cannot get comfortable. Ms. Bachynsky testified that her alcohol consumption increased because it gave her some relief from the pain and anxiety caused by the accident. She has now given up alcohol but according to Dr. Lu remains at risk for a relapse.
- [88] Ms. Bachynsky testified that she is no longer able to do house work in the manner she did before. Ms. Bachynsky is also unable to take part in all of her pre-accident extracurricular activities. Prior to the accident, she was a very active mother of three children. She was extremely involved in her youngest child's school and sporting activities. She loved hiking, bicycling, walking, motorcycling, boating and doing activities with her children and husband. She loved having friends and family over for dinners and get-togethers.
- [89] Although she has returned to some of her pre-accident activities, Ms. Bachynsky has been unable to ride a motorcycle, bicycle, boat or hike. Ms. Bachynsky has been able to do some gardening since the accident.
- [90] Finally, Ms. Bachynsky's evidence is that her relationships with her family and friends have suffered because she has become socially withdrawn and turned to alcohol. Ms. Bachynsky's relationship with her husband and youngest son has suffered. Ms. Bachynsky's evidence is that she has become more depressed and anxious since the accident. Ms. Bachynsky testified she has done some volunteering since the accident but had to stop her volunteering for Children's Hospital in May 2017. In 2019, she did some volunteering with the Elizabeth Fry Society. Ms. Bachynsky has continued to take courses on line since the accident.
- [91] Mr. Schneider and Ms. O'Hanley testified about Ms. Bachynsky's abilities and attitude both pre and post-accident. They both described her as a happy and energetic person prior to the accident. They both testified that since the accident they have observed there have been dramatic changes in her mood and physical abilities. Ms. Bachynsky has become depressed and is physically restricted in what she can do.
- [92] Mr. Schneider met Ms. Bachynsky in 1999 and they started dating in 2012. At the time of the accident, he and Ms. Bachynsky were not living together but they were spending approximately 85% of their time together. In 2015, they purchased a house together, and have been living together since then.
- [93] Mr. Schneider testified that prior to the accident Ms. Bachynsky was fun to be around, very spontaneous and had lots of energy. Ms. Bachynsky had no problems with alcohol prior to the accident. Mr. Schneider would visit Ms. Bachynsky at work three or four times a week and described her as a cheer leader for Save-On-Foods.

- [94] Mr. Schneider testified that Ms. Bachynsky called him right after the accident and he went to meet her. She was shaken up and they sat in her vehicle for about an hour and a half before she was able to drive home with him following her. Mr. Schneider's evidence is that after the accident Ms. Bachynsky was in a lot of pain. She had trouble getting up and down from a chair and her bed. He observed her constantly rubbing her lower back, hip and right shoulder.
- [95] Mr. Schneider testified that since the accident Ms. Bachynsky has a lot of trouble sleeping and he notices she is constantly getting up at night which disturbs his sleep. Mr. Schneider testified that Ms. Bachynsky has not been herself since the accident, she is depressed and down on herself. Her energy level has gone down and she does not do many of the activities she used to. After the accident, he noticed that Ms. Bachynsky started drinking and having problems with alcohol. Mr. Schneider testified that he has to do a lot of the household chores and the shopping. They do not entertain anymore, and they do not do any recreational activities that can jar her back such as motorcycle rides, bicycling, and boating. Mr. Schneider testified that he built Ms. Bachynsky some raised garden beds so she can do some gardening.
- [96] Ms. O'Hanley has worked as a cashier at Save-On-Foods for 26 years. She has worked with Ms. Bachynsky since 1999. Ms. O'Hanley described the physical nature of the job of cashier. Each of the positions of cashier, service desk and self-scanning clerk all have significant demands such as bending, reaching, lifting, pulling, walking and standing.
- [97] Ms. O'Hanley testified that before the accident Ms. Bachynsky got along well with management and staff, and did not have any physical or emotional problems. She described Ms. Bachynsky as bubbly and full of energy before the accident. Ms. O'Hanley testified that after the accident she observed Ms. Bachynsky struggling with her duties, and that she and other employees pitched in so she could take a break. Ms. O'Hanley testified that their store used to be number one for fundraising for Children's Hospital, but the amounts raised by the store dropped off after Ms. Bachynsky stopped being involved in the fund raising.
- [98] There were agreed statements of facts filed for three other lay witnesses who worked with Ms. Bachynsky.
- [99] Cheryl Lawson worked at Save-On-Foods from 1993 to March 2014. She came back to the store in 2016. Ms. Lawson did not recall Ms. Bachynsky having any difficulties discharging her duties before or after the accident. However, Ms. Lawson had limited opportunities to observe Ms. Bachynsky at work after the accident as she was not working at the same store at the time of the accident, and when she returned to the store in late 2016, she was not working in the same area of the store.

- [100] Charlynn Stunder was a store manager from 2016 to October 2017. Ms. Stunder cannot recall Ms. Bachynsky having any difficulty performing her job duties from May 2016 to October 2017 and was unaware of any accommodations she may have sought. However, Ms. Stunder did not know Ms. Bachynsky prior to the accident and her evidence is inconsistent with the "Worker Ability Report" filed in May 2016 that indicates Ms. Bachynsky could not work full time hours and needed breaks.
- [101] Ryan Schmidt worked at Save-On-Foods from 2010 to 2015. He started as a grocery clerk and when he left he was the assistant manager. Mr. Schmidt states that Ms. Bachynsky was a good employee. Mr. Schmidt could not recall that Ms. Bachynsky was involved in an accident or that she had any difficulty discharging her duties. However, Mr. Schmidt's evidence is inconsistent with the records that show that Ms. Bachynsky was off work after the accident and participated in a graduated return to work program.
- [102] In my view, the medical expert evidence, and the evidence of Ms. O'Hanley and Mr. Schneider, is consistent with Ms. Bachynsky's evidence that the accident has had a profound effect on all aspects of her life.
- [103] I have reviewed the various cases provided by counsel regarding the appropriate range for general damages. As stated earlier, the defendant's cases are based on the arguments that Ms. Bachynsky's right shoulder, low back and hip problems were not caused by the accident, and that any problems she is suffering from are a result of degenerative changes and other lifestyle factors. However, as stated above, the evidence does not support those arguments.
- [104] As well, having reviewed the cases, it is my view that in some of the cases relied upon by Ms. Bachynsky, the plaintiffs have more significant psychological symptoms. For example, in Gill the plaintiff's interaction with his friends and family were non-existent and he was unable to engage in basic health self-care and personal hygiene. In my view, Watts is the most similar to the case at bar. However, in Watts, the plaintiff was diagnosed with a major depressive disorder as well as PTSD.
- [105] The cases are helpful for the principles set out in them but as noted in Stapley, at para. 45, an award of non-pecuniary damages will vary in each case depending on the specific circumstances of the case.
- [106] Having considered the extent of Ms. Bachynsky's injuries, the fact that the symptoms have been ongoing for six years with little improvement, Ms. Bachynsky's age, the guarded prognosis for full recovery, and the other factors set out in Stapley, as well as the authorities, I am of the view that the appropriate award for non-pecuniary damages is \$150,000.

Loss of Income and Income Earning Capacity

[107] Ms. Bachynsky advances a claim for past loss of income and past and future income earning capacity.

Past Loss of Income Earning Capacity

[108] Ms. Bachynsky advances a claim for past loss of income and loss of income earning capacity in the amount of \$179,500. Ms. Bachynsky points to the fact that she was engaged in long term permanent employment at the time of the accident, and has been unable to work since December 2017. She says as a result an arithmetical approach to the valuation is appropriate.

[109] The defendant agrees that Ms. Bachynsky is entitled to past loss of income for the 2.5 months of work she missed after the accident. The defendant takes the position that any time Ms. Bachynsky missed from work from July 2015 to May 2016 was a result of pain from her left sided hernia, not the injuries she sustained in the accident. The defendant submits that the period Ms. Bachynsky missed from December 2017 to present is a result of the September 2017 work related accident and other myofascial pain related to degenerative changes and which are unrelated to the accident. The defendant submits the amount Ms. Bachynsky should be awarded for past loss of income is \$10,765.20.

[110] For the reasons that follow, I find the appropriate award for past loss of income and income earning capacity is \$125,000.

Applicable Law

[111] The assessment of loss for past and future income earning capacity was discussed in *Grewal v. Naumann*, 2017 BCCA 158:

48 In summary, an assessment of loss of both past and future earning capacity involves a consideration of hypothetical events. The plaintiff is not required to prove these hypothetical events on a balance of probabilities. A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation. If the plaintiff establishes a real and substantial possibility, the Court must then determine the measure of damages by assessing the likelihood of the event. Depending on the facts of the case, a loss may be quantified either on an earnings approach or on a capital asset approach: *Perren v. Lalari*, 2010 BCCA 140 at para. 32.

49 The assessment of past or future loss requires the court to estimate a pecuniary loss by weighing possibilities and probabilities of hypothetical events. The use of economic and statistical evidence does not turn the assessment into a calculation but can be a helpful tool in determining what is fair and reasonable in the circumstances: *Dunbar v. Mendez*, 2016 BCCA 211 at para. 21.

- [112] Compensation for past loss of earning capacity is to be based on what the plaintiff would have, not could have, earned but for the injury that was sustained: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at paras. 28-30; *M.B. v. British Columbia*, 2003 SCC 53 at para. 49.
- [113] The burden of proof of actual past events is a balance of probabilities. An assessment of loss of both past and future earning capacity involves consideration of hypothetical events. The plaintiff is not required to prove these hypothetical events on a balance of probabilities. The future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation: *Athey*, at para. 27.
- [114] The assessment of damages for past and future loss of earning capacity is a matter of judgment not calculation, as summarized in *Kallstrom*:
- [401] Even where mathematical calculation is involved, our Court of Appeal has repeatedly reminded us that the assessment of damages is a matter of judgment, not calculation. The court must still use careful judgment in weighing all substantial possibilities and the overall fairness and reasonableness of the award must be considered, taking into account all of the evidence.
- [402] At the end of the day, instead of simply adverting to general principles and "plucking a number from the air", the court is obliged to make a "reasoned analysis to explain and justify the award" and in doing so expressly relate the findings of fact in the case to the actual assessment of damages: *Schenker v. Scott*, 2014 BCCA 2003. See also *Morgan v. Galbraith*, 2013 BCCA 305; *Meghji v. British Columbia (Ministry of Transportation and Highways)*, 2014 BCCA 105; *Gillespie v. Yellow Cab Company Ltd.*, 2015 BCCA 450; *Tsalamandris v. McLeod*, 2012 BCCA 239.

Application of the Law to the Facts

- [115] At the time of the accident, Ms. Bachynsky was earning \$24.60 per hour plus benefits. Ms. Bachynsky's tax returns reveal her preaccident income was as follows:

2012 \$51,227.00

2013 \$51,965.00

- [116] Since the accident Ms. Bachynsky's employment income was as follows:

2014 \$47,651.00

2015 \$37,686.00

2016 \$35,339.00

2017 \$50,719.00

2018 \$1,965.00

2019 \$1,500.00

2020 \$0.00

[117] The evidence also establishes Ms. Bachynsky would have been entitled to raises, up to a maximum of \$26.50 per hour plus benefits. Furthermore, she would have received the \$2.00 per hour "hero pay" for 16 weeks commencing in March 2020.

[118] Ms. Bachynsky asserts that the evidence supports the conclusion there was a real and substantial possibility she would have been promoted to the level of a supervisor earning \$28.50 per hour plus benefits by January 1, 2018. Although that was her goal, and she was doing well at work, in my view, there is insufficient evidence to conclude that she would have, in fact, been promoted to supervisor or management.

[119] Ms. Bachynsky argues that the past loss of earning capacity should be based on the assumption that she would have earned \$26.50 per hour by January 1, 2017 and that she would have been a supervisor by January 1, 2018 earning \$28.50.

- At \$24.50 per hour her annual salary would be \$50,960.00.
- At \$26.50 per hour her annual salary would be \$55,120.00; and
- At \$28.50 per hour her annual salary would be \$59,280.00.

[120] Therefore, Ms. Bachynsky asserts her past loss of income is as follows:

2014 \$50,960.00 - \$47,651.00 = \$3,309.00

2015 \$50,960.00 - \$37,650.00 = \$13,310.00

2016 \$50,960.00 - \$35,339.00 = \$15,621.00

2017 \$55,120.00 - \$50,719.00 = \$4,401.00

2018 \$59,280.00 - \$1,965.00 = \$57,315.00

2019 \$59,280.00 - \$1,500.00 = \$57,780.00

2020 \$51,870.00 + \$1,280.00 = \$53,150 - 0.00 = \$53,150.00

Total: \$204,886.00

[121] I agree with Ms. Bachynsky that the medical evidence establishes the accident materially contributed to her inability to work in 2015 and 2016. However, Ms. Bachynsky also took time off work due to her hernia operation. As set out in Dr. Wong's report, most people are able to work with a hernia, but require six weeks off after surgery.

[122] Ms. Bachynsky's assessment of the past loss of income assumes that she has been totally disabled from all types of work since January 2018. However, that is not consistent with the evidence.

- [123] Kimberley Dimayuga, an expert in occupational therapy, performed a functional capacity evaluation of Ms. Bachynsky on May 29 and 30, 2020. She provided a report dated July 7, 2020 and testified at the trial.
- [124] While Ms. Dimayuga is of the view Ms. Bachynsky does not meet the physical demands of working as a grocery clerk or cashier on a part or full time basis, it is her opinion that Ms. Bachynsky has the physical capacity to perform work on a part-time to three-quarter time basis, on the average of 4-6 hours a day for a total of 20 - 30 hours a week. In Ms. Dimayuga's opinion, Ms. Bachynsky's capacity for full-time work in the future is dependent on the outcome of her treatment. Ms. Dimayuga was unaware of what accommodations could be made at Ms. Bachynsky's workplace.
- [125] Ms. Bachynsky suggests that there is no potential for working part-time or accommodations being made at work. However, that is not consistent with the evidence from management. Both Mr. Schmidt and Ms. Stunder indicated there is an accommodations committee who decide what, if any, accommodations need to be made and if there is a position available.
- [126] Accordingly, it is my opinion that the assessment of her past loss should not be done on a purely arithmetical basis as suggested by Ms. Bachynsky. As noted in the case law, while a judge is entitled to use economic and statistical evidence as a tool in determining what is fair and reasonable, the court is to make an assessment as opposed to applying a mathematical calculation. In determining a reasonable and fair award economic and statistical evidence can be a useful tool.
- [127] If Ms. Bachynsky had remained as a cashier/clerk her income would have been \$26.50 per hour. As noted there is insufficient evidence to establish that Ms. Bachynsky would have been promoted to supervisor by January 2018. As well, Ms. Bachynsky has a residual ability to work, at least part time if not three quarter time. There is evidence of an accommodation committee at Ms. Bachynsky's workplace. It is unclear what steps Ms. Bachynsky has taken since December 2017 to attempt any graduated returns to work.
- [128] Taking all that into account, I find a fair and reasonable assessment of Ms. Bachynsky's gross past loss of income earning capacity is \$125,000.

Future Loss of Income Earning Capacity

- [129] Ms. Bachynsky is advancing a claim for future loss of income earning capacity in the range of \$520,000 to \$750,000 on the basis that her injuries will continue to impair her future income earning capacity. Ms. Bachynsky submits that the evidence of Ms. Dimayuga establishes that Ms. Bachynsky does not have the physical capacity to return to work as a cashier and there are serious doubts that Save-On-Foods will be able to accommodate her in any capacity.

- [130] The defendant submits Ms. Bachynsky has not discharged her burden of proving that the accident caused a real or substantial possibility of a future event leading to a loss of income. Ms. Bachynsky proved she was capable of working when she continued to work in her regular capacity for almost three years following the accident.
- [131] In the alternative, should there be a finding that Ms. Bachynsky has established a loss of future earning capacity, the defendant submits any award should be assessed using the capital asset approach for one or two years, based on her income in 2014. The defendant submits that an appropriate award would be in the range of \$51,673 to \$103,346.
- [132] For the reasons that follow, I find the appropriate award for loss of future income earning capacity is \$375,000.

Applicable Law

- [133] In *Perren v. Lalari*, 2010 BCCA 140, the court set out the law regarding a claim for loss of future income earning capacity. The first inquiry in dealing with a claim of this nature is whether a substantial possibility of future income loss exists. The court stated at para. 32:

A plaintiff must always prove, as was noted by Donald J.A. in *Steward*, by Bauman J. in *Chang*, and by Tysoe J.A. in *Romanchych*, that there is a real and substantial possibility of a future event leading to an income loss. If the plaintiff discharges that burden of proof, then depending upon the facts of the case, the plaintiff may prove the quantification of that loss of earning capacity, either on an earnings approach, as in *Steenblok*, or a capital asset approach, as in *Brown*. The former approach will be more useful when the loss is more easily measurable, as it was in *Steenblok*. The latter approach will be more useful when the loss is not as easily measurable, as in *Pallos* and *Romanchych*. A plaintiff may indeed be able to prove that there is a substantial possibility of a future loss of income despite having returned to his or her usual employment. That was the case in both *Pallos* and *Parypa*. But, as Donald J.A. said in *Steward*, an inability to perform an occupation that is not a realistic alternative occupation is not proof of a future loss.

[Emphasis in original]

- [134] An award for future loss of earning capacity represents compensation for a pecuniary loss. It is an assessment rather than a mathematical calculation. However, it involves a comparison between a plaintiff's likely future earnings before and after the accident: *Rosvold v. Dunlop*, 2001 BCCA 1 at paras. 11-12. Using the capital asset approach, a trial judge may begin by comparing the present value of the difference between the plaintiff's earnings before and after the injury, but that is not conclusive.
- [135] In *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144, the Court discussed the assessment of an award for a loss of future income as follows:

[32] In my view comparator cases are of limited utility in the assessment of awards for future losses, generally. It is well settled that an individual's earning capacity is a capital asset: *Parypa v. Wickware*, 1999 BCCA 88 at para. 63. An award for future loss of earning capacity thus represents

compensation for a pecuniary loss. It is true that the award is an assessment, not a mathematical calculation. Nevertheless, the award involves a comparison between the likely future of the plaintiff if the accident had not happened and the plaintiff's likely future after the accident has happened: *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 11; *Ryder v. Paquette*, [1995] B.C.J. No. 644 (C.A.) at para. 8. The degree of impairment to the plaintiff's earning capacity depends upon the type and severity of the plaintiff's injuries and the nature of the anticipated employment at issue.

[33] In valuing the award, the judge must consider the likely duration of the plaintiff's prospective working life and must account for negative and positive contingencies which are unique to each case. The final award must be fair and reasonable in all the circumstances. This assessment requires a very fact-intensive, case-specific inquiry. I am persuaded by what Macfarlane J.A. said in *Lawin v. Jones*, 98 B.C.L.R. (2d) 126, [1994] B.C.J. No. 2107 at para. 35, about the lack of utility in comparisons to other cases:

[G]iven the fact that we cannot foresee the future, it is impossible in a case like this to find any comfort in resort to other cases where the future may be more predictable. Judges will differ, perhaps widely, in making assessments in cases which have been said to depend on what may be seen in a crystal ball. What is certain is that a trial judge who hears and observes the witnesses is in a much better position than an appellate judge to come to a conclusion as to what is fair and reasonable in the circumstances. ...

[136] In determining a plaintiff's loss of future income earning capacity the factors to be considered include:

- Has the plaintiff been rendered less capable overall from earning income from all types of employment?
- Is the plaintiff less marketable or attractive to an employer as an employee?
- Has the plaintiff lost the opportunity to take advantage of all job opportunities since he or she was injured?
- Is the plaintiff less valuable to him or herself as a person capable of earning income in a competitive labour market?

Brown v. Golaiy (1985), 26 B.C.L.R. (3d) 353 (S.C.); *Perren* at para. 11.

[137] In conducting the analysis under this head of damage the court then has to consider the contingences, both positive and negative, that are applicable in arriving at a final sum.

Application of the Law to the Facts

[138] As noted earlier, the evidence is that a grocery store clerk/cashier is a physical job. Ms. Bachynsky asserts that she has demonstrated there is a real and substantial possibility of a future event leading to an income loss. Ms. Bachynsky submits, based on the expert evidence, it is apparent that she has functional impairments that will likely continue to impact her ability to perform any physical jobs, and in particular the physical aspects of

any cashier/clerk job. She points to the fact Ms. Dimayuga concluded that as a result of her shoulder, arm, back and hip problems she has diminished capacities.

- [139] Ms. Dimayuga opined that the most significant limiting factors are that Ms. Bachynsky's pre-accident occupation required her to be on her feet for the duration of the day with frequent bending, reaching and stooping demands. Ms. Bachynsky demonstrated marked reduced tolerance for these positions. In Ms. Dimayuga's opinion the disparity between the postural tolerances of the job and Ms. Bachynsky's demonstrated performance indicated that she is not fit to work as a cashier, either part-time or full-time.
- [140] The medical evidence is that Ms. Bachynsky is likely to continue to have pain symptoms in her right shoulder, right arm, low back and right hip which make it unlikely she will be able to continue working as a clerk/cashier. There is a possibility that accommodations can be made to allow her to work with her current employer, although it is unlikely.
- [141] However, Ms. Dimayuga's opinion is that, at the time of the assessment, Ms. Bachynsky was capable of working 20 to 30 hours a week in a less physically demanding job. Whether she will be able to work full-time in the future will depend on her response to further treatment.
- [142] It is my view that since Ms. Bachynsky has lost her ability to work full time as a cashier/clerk, but has a residual capacity to work, that her loss is not easily measurable. Accordingly, the earnings approach is not appropriate, and the capital asset approach should be used to assess her future loss.
- [143] In *Perren* at para. 11, the court confirmed that the approach to be taken for a future loss of earning capacity in situations where the loss, though proven, is not measurable in a pecuniary way is the one set out in *Brown*.
- [144] In my view, Ms. Bachynsky has established that it is unlikely she will be able to return to work as a clerk/cashier. As well, she has established that she has been rendered less capable overall from earning income from all types of employment, she is less marketable and attractive as an employee, and she may not be able to take advantage of all job opportunities. It was evident from her testimony and that of her husband, Ms. Bachynsky is less valuable to herself as a person as a result of her diminished capacity.
- [145] While the defendant asserts that Ms. Bachynsky has capacity to work full-time as a clerk/cashier, the evidence does not support that conclusion. However, it is my opinion that the evidence supports a finding that Ms. Bachynsky has the residual capacity to work, at least part-time. While Ms. Bachynsky may not be able to earn as much as she earns as a cashier/clerk given her lack of education and training, the evidence of Ms. Dimayuga supports a finding that Ms. Bachynsky is able to work 20 to 30 hours a week in other less physically demanding types of employment. This capacity may increase with further treatment.

- [146] There is evidence that Ms. Bachynsky is motivated to continue her education as she has been taking courses on line. In my view, the evidence supports a finding that Ms. Bachynsky has a residual ability to earn between \$15-\$20 per hour on a part time basis which is approximately 30 to 50% of what she would earn if she was able to continue to work as a clerk/cashier.
- [147] Ms. Bachynsky submits that she has established she would have been promoted into management at least as a supervisor and would have worked until age 67 which would provide \$1,100,000 in income. She asserts that when positive and negative contingencies such as large bonuses, raises, becoming a manager, the labour market, mortality, etc. are taken into consideration, a fair award would be in the range of \$520,000 to \$750,000.
- [148] However, Ms. Bachynsky's calculations are based on the earnings approach which is in my view not appropriate in this case.
- [149] In this case the positive contingencies are that Ms. Bachynsky may have been promoted to management and earned more money. The negative contingencies are that Ms. Bachynsky might not have been able to continue working full-time with the physical demands of the cashier/clerk job, regardless of the accident. The fact that Ms. Bachynsky has residual earning power, some prospect of improvement in symptoms, and is motivated to continue with her education are all factors to be considered. One of the positive contingencies is that Ms. Bachynsky may be able to work full-time in a position that is not as physical as a clerk/cashier.
- [150] Having considered the positive and negative contingencies it is my view that the appropriate award for future loss of earning capacity is \$375,000.

Loss of Housekeeping Capacity and Cost of Future Care

- [151] Ms. Bachynsky is advancing claims for loss of housekeeping capacity and loss of future care in the amount of \$150,000 to \$225,000. The defendant takes the position that Ms. Bachynsky has not established either a claim for loss of housekeeping capacity or loss of future care.
- [152] For the following reasons, I find the appropriate award for loss of housekeeping capacity is \$15,000 and the appropriate award for cost of future care is \$45,096.

Loss of Housekeeping Capacity

Applicable Law

- [153] In *O'Connell v. Yung*, 2012 BCCA 57, the court reiterated that loss of housekeeping capacity is distinct from future care costs.
- [154] In *Westbroek v. Brizuela*, 2014 BCCA 48 at para. 74, the court discussed the difference between loss of homemaking or housekeeping capacity and cost of future care:

I agree that the trial judge miscategorised the homemaking award under the head of future cost of care damages. In *O'Connell v. Yung*, 2012 BCCA 57 at paras. 59–68, this Court clarified that homemaking costs, properly considered, are awarded for loss of capacity and are distinct from possible future cost of care claims. An award ordered for homemaking is for the value of the work that would have been done by the plaintiff but which he or she is incapable of performing because of the injuries at issue. The plaintiff has lost an asset: his or her ability to perform household tasks that would have been of value to him or herself as well as others in the family unit but for the accident. This is different from future care costs where what is being compensated is the value of services that are reasonably expected to be rendered to the plaintiff rather than by the plaintiff.

[155] The court went on to adopt, at para. 77, the cautionary approach for awards for loss of housekeeping capacity suggested in *Kroeker v. Jansen*, [1995] 6 W.W.R. 5 (B.C.C.A.), i.e., that awards for this type of claim should be amount commensurate with the loss.

Application of the Law to the Facts

[78] Ms. Bachynsky claims she has suffered a loss of housekeeping or homemaking capacity. Her evidence is that she has difficulty with housework and cooking. Mr. Schneider testified that he assists Ms. Bachynsky with the household chores, including the shopping, cooking and cleaning.

[156] Ms. Bachynsky is seeking an award for loss of housekeeping capacity based on recommendations made by Ms. Dimayuga. In her report, Ms. Dimayuga indicated that prior to the accident Ms. Bachynsky was responsible for the majority of the household chores. Currently Ms. Bachynsky lives with Mr. Schneider and one of her adult sons.

[157] In her report, Ms. Dimayuga indicates that at present Ms. Bachynsky is able to perform her share of the household chores using a paced approach. It is Ms. Dimayuga's opinion that Ms. Bachynsky requires assistance with homemaking tasks that require prolonged overhead reaching, such as dusting, cleaning shower stalls, and prolonged sustained stooping or kneeling, such as cleaning the bathtub and around the toilet, cleaning lower level cupboards or baseboards.

[158] Ms. Dimayuga recommends two to three hours per week of homemaking support when Ms. Bachynsky returns to work so she can focus her energy on work and parenting. As well, Ms. Dimayuga suggests an additional 24 hours of support annually for periods of symptom flare up.

[159] However, it is clear from the case law that loss of housekeeping or homemaking capacity is a loss of capacity claim and not a claim for future care. It is to reflect the diminished capacity of a plaintiff to take care of her household, not the cost of provision of services by others.

- [160] In this case, Ms. Bachynsky is advancing claims under cost of future care for housecleaning services.
- [161] While it is apparent that Ms. Bachynsky has a diminished capacity to take care of her household and herself, a conservative approach should be taken in making any such award.
- [162] Having considered the evidence, it is apparent Ms. Bachynsky has suffered diminished capacity in her ability to care for her house and perform other household tasks. However, she is still capable of performing housework and other household tasks at a slower pace. Accordingly, I have concluded it is appropriate to make some award under this head of damage. In my view, an award of \$15,000 is appropriate to compensate Ms. Bachynsky for her loss of capacity.

Cost of Future Care

- [163] Ms. Bachynsky is advancing a claim for cost of future care in the range of \$74,140 to \$258,117. Ms. Bachynsky is relying on Ms. Dimayuga's report on cost of future care and the recommendations of the various experts regarding future treatment.
- [164] The defendant submits that Ms. Bachynsky has not established the need for future care resulting from the accident. In the alternative, the defendant submits that many of the items Ms. Bachynsky is claiming are neither medically justified nor reasonable. The defendant says that if there is an award for cost of future care it should be limited to the nerve ablation and consultation with an occupational therapist to formulate a graduated return to work plan.
- [165] For the reasons that follow, I find the appropriate award for cost of future care is \$45,096.

Applicable Law

- [166] Cost of future care is established if there is a medical justification for the claim, and the claim is reasonable: *Aberdeen v. Zanatta*, 2008 BCCA 420 at para. 42.
- [167] In *O'Connell*, the Court of Appeal discussed cost of future care:
- 20 The law is settled as to the appropriate approach to be taken in assessing future care costs. In *Kringle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at paras. 21-22, [2002] 1 S.C.R. 205, referred to by the trial judge, the Court articulated the test:
- 21 Damages for cost of future care are a matter of prediction. No one knows the future. Yet the rule that damages must be assessed once and for all at the time of trial (subject to modification on appeal) requires courts to peer into the future and fix the damages for future care as best they can. In doing so, courts rely on the evidence as to what care is likely to be in the injured person's best interest. Then they calculate the present cost of providing that care and may make an adjustment for the contingency that the future may differ from what the evidence at trial indicates.

22 The resulting award may be said to reflect the reasonable or normal expectations of what the injured person will require. Jane Stapleton, "The Normal Expectancies Measure in Tort Damages" (1997), 113 L.Q.R. 257, thus suggests, at pp. 257-58, that the tort measure of compensatory damages may be described as the "normal expectancies' measure", a term which "more clearly describes the aim of awards of compensatory damages in tort: namely, to re-position the plaintiff to the destination he would normally have reached ... had it not been for the tort". The measure is objective, based on the evidence. This method produces a result fair to both the claimant and the defendant. The claimant receives damages for future losses, as best they can be ascertained. The defendant is required to compensate for those losses. To award less than what may reasonably be expected to be required is to give the plaintiff too little and unfairly advantage the defendant. To award more is to give the plaintiff a windfall and require the defendant to pay more than is fair.

[Emphasis in original]

[168] Services that a plaintiff is unlikely to avail themselves of should not be awarded. The assessment of cost of future care entails a consideration of losses that may reasonably be expected to be required: O'Connell, at para. 68.

[169] Measures that provide some solace but are not likely to result in medical improvement ought to be compensated for under the head of general damages rather than an expense that is compensable as a cost of future care.

[170] As noted in *Lo v. Matsumoto*, 2015 BCCA 84, at para. 20:

I agree with counsel for the plaintiff that there is no hard and fast rule that requires a plaintiff to testify that he intends to use every item in the "wish list" of an occupational therapist in order to justify some award. On the other hand, a plaintiff must prove his case, both in terms of need and the likely utility of the item sought: see *O'Connell v. Yung*, 2012 BCCA 57 at para. 68. Where the costs claimed are not matters of absolute necessity, a plaintiff cannot assume that the court will simply accept the recommendations of occupational therapists or even of medical practitioners.

Application of the Law to the Facts

[171] In her report, Ms. Dimayuga provided cost estimates for Ms. Bachynsky's future care needs. The following table is included in her report:

[172] Ms. Dimayuga has calculated the yearly expense to be calculated to age 75 using the net present value calculation with a 2.5% discount rate. As can be seen from the table, the range is from a low of \$74,140.00 to a high of \$258,117.00, not including past loss of housekeeping capacity. Considering positive and negative contingencies, Ms. Bachynsky submits the following amounts would be reasonable.

Active rehab

\$ 3,500.00

Psychological assessment and treatment

20,000.00

Symptom management

15,000.00

Future loss of Housekeeping Capacity

150,000.00

Past loss of Housekeeping Capacity

25,000.00

TENS machine

300.00

Medication

40,010.00

[173] The defendant submits that active rehabilitation is unnecessary, and that a gentle home based strengthening program is most suitable. Ms. Dimayuga notes that Ms. Bachynsky was last assessed for kinesiology treatment in 2017, however, she was unclear if Ms. Bachynsky had proceeded with the recommended sessions. Dr. Chu recommends that Ms. Bachynsky continue with an exercise program for shoulder strengthening and states an exercise program is part of an overall symptom management plan. Ms. Dimayuga is of the opinion that Ms. Bachynsky needs 18 to 20 sessions with a kinesiologist, and then 4 to 6 sessions a year for the next three years after that.

[174] Given that Ms. Bachynsky has not been participating in an active rehabilitation program, but has been doing self-exercises, it is my opinion that an award at the low range of \$1,264 + \$316 for a total of \$1,580 is appropriate for active rehabilitation.

[175] Ms. Bachynsky claims \$20,000 for psychological assessment and treatment. Ms. Dimayuga has assessed the cost of the psychological treatments based on Dr. Lu's recommendations that Ms. Bachynsky continue counselling. Ms. Dimayuga recommends that Ms. Bachynsky have 12 sessions for one to three years and 10 to 16 sessions annually for at least an additional two years. Ms. Dimayuga's recommendations for ongoing counselling are not based on Dr. Lu's recommendations. Dr. Lu's recommendation is that Ms. Bachynsky would benefit from receiving counselling until she can successfully return to work and then intermittent counselling for the next five years, not the regular ongoing counselling Ms. Dimayuga has costed. Having considered the evidence, it is my opinion an award of \$6,000 is appropriate. This would provide Ms. Bachynsky with counselling for 12 sessions at approximately \$2,000 for the first year and then intermittent counselling for the following five years.

- [176] Ms. Bachynsky claims an amount of \$15,000 for symptom management, i.e. physiotherapy and massage therapy. As noted by Ms. Dimayuga, Ms. Bachynsky continues to experience episodes of symptom aggravation. Ms. Dimayuga opines that during Ms. Bachynsky's symptom flare ups, she would benefit from physiotherapy and/or massage therapy for hands-on support of symptom management. Ms. Dimayuga recommends a contingency of six to ten sessions per year for a cost of \$420 to \$1,100 yearly. The defendant takes the position that passive therapies do not improve functional performance and that there should be no award for symptom management. However, the evidence is that Ms. Bachynsky has received physiotherapy and massage therapy in the past and it has been helpful for her symptom management. In my opinion, it is appropriate to make an allowance of \$5,000 to provide for periodic physiotherapy or massage therapy.
- [177] Ms. Bachynsky claims the amount of \$25,000 for past housekeeping capacity. There is no evidence that Ms. Bachynsky hired anyone to assist with housekeeping. I have already made an award for loss of housekeeping capacity.
- [178] Ms. Bachynsky claims the amount of \$150,000 for future house cleaning expenses based on Ms. Dimayuga's recommendations that she will need to hire someone to assist her with housekeeping tasks when she returns to work. Ms. Dimayuga sets out in her report that while Ms. Bachynsky has the capacity to perform her housekeeping tasks but will require assistance for tasks that require overhead reaching and prolonged stooping. The defendant takes the position that the functional capacity evaluation results do not preclude Ms. Bachynsky from participating in any homemaking activities and no award should be made under this heading.
- [179] However, I agree that Ms. Bachynsky has some limited capacity for housekeeping as set out in Ms. Dimayuga's report. In my opinion, given Ms. Bachynsky's residual capacity, an award at the low end of the range set out in Ms. Dimayuga's report is appropriate for the future cost of hiring someone to assist her with housekeeping in the amount of \$12,701.
- [180] Ms. Bachynsky claims an amount of \$4,000 to \$5,000 for vocational assessment and counselling. The defendant takes the position that vocational assistance and assessment is unnecessary given the length of time Ms. Bachynsky has worked at Save-On-Foods. However, the defendant agrees that occupational therapist consultation to help formulate a graduated return to work is reasonable.
- [181] Ms. Dimayuga's recommendation is based on Dr. Lu's opinion that Ms. Bachynsky would benefit from active vocational and occupational support in order to regain work capacity. Given that Ms. Bachynsky does not currently meet the physical requirements of her position, it is my view an award for vocational assessment and counselling in the amount of \$5,000 is appropriate.
- [182] Ms. Bachynsky claims an amount of \$300 for a transcutaneous electrical nerve stimulation ("TENS") machine. The defendant points to the fact that Ms. Bachynsky already has a TENS machine and therefore no award should be made. The evidence is that Ms. Bachynsky uses

a TENS machine regularly as part of her symptom management. As set out in Ms. Dimayuga's report, TENS machines require replacement every five to ten years and pad replacements are required every two to three years. A TENS machine costs between \$50 and \$110 and pads cost \$15 to \$20. Having considered the evidence it is my opinion that an allowance of \$300 should be made for this claim.

[183] Ms. Bachynsky claims an amount of \$40,010 for medications. The amount is based on the medications she currently takes plus medications recommended by Dr. Lu. Dr. Lu has recommended that Ms. Bachynsky take antidepressants on a trial basis. One of the most significant costs included in the estimate is an amount for Vortioxetine, an anti-depressant. It is estimated that the cost for Vortioxetine would be \$25,495 if used until age 75.

[184] The defendant takes the position that there should be no award for medications as Ms. Bachynsky has healed from any injuries she sustained in the accident. However, as set out earlier, I have concluded Ms. Bachynsky's ongoing symptoms and requirement for medication is a result of the accident.

[185] In my view, an award is appropriate for the future costs of medication. In my opinion an award of \$14,515 is appropriate, \$40,000 less the proposed cost of \$25,495 for Vortioxetine. Ms. Bachynsky has not started a trial of either of the two potential anti-depressants recommended by Dr. Lu. The yearly cost of Vortioxetine is \$1,204.35 to \$1,385.95 as opposed to the other potential drug, Bupropion which is \$109.35 to 231.55 annually. Ms. Dimayuga has given a range because she is unaware of what dosage would be prescribed. Ms. Dimayuga notes that she would need more specific information related to the dosage and length of the trial in order to be more specific about her estimates.

[186] In summary, I am awarding the following amounts for the cost of future care:

- Active rehabilitation - \$1,580
- Psychological assessment and treatment - \$6,000
- Physiotherapy and massage - \$5,000
- Housekeeping expenses - \$12,701
- Vocational and occupational counselling -- \$5,000
- TENs machine - \$300
- Medication - \$14,515
- Total - \$45,096

Special Damages

[187] The parties have agreed upon special damages in the amount of \$3,820.53.

Conclusion

[188] In summary, I am awarding the following amounts:

- Non-pecuniary damages: \$150,000
- Past income loss: \$125,000
- Loss of future income earning capacity: \$375,000
- Loss of housekeeping capacity: \$15,000
- Cost of future care: \$45,096
- Special damages: \$3,820.53
- Total: \$713,916.53

[189] Ms. Bachynsky is entitled to pre-judgment interest on the special damages. Ms. Bachynsky is also entitled to her costs of this action at scale B, subject to submissions.

"Gerow J."

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