

CANADA / JUDGMENT

Baird v. Lam

2020 BCSC 615

COURT

Supreme Court of British Columbia

DECIDED

22 April 2020

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2020 BCSC 615 Baird v. Lam

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Baird v. Lam,

2020 BCSC 615

Date: 20200422

Docket: 171837

Registry: Victoria

Between:

Moira Jane Baird

Plaintiff

And:

Chun Keung Lam and Ya Luo

Defendants

- And -

Docket: 174510

Registry: Victoria

Between:

Moira Jane Baird

Plaintiff

And:

James Gregory Baker

Defendant

Corrected Judgment: These reasons are corrected at paragraphs: 7, 8, 25

and 54; 74 to 77 are deleted and paragraphs 78, 79 and 80 are renumbered as paragraphs 74, 75 and 76; and paragraph 74 is corrected, on July 7, 2020.

Before: The Honourable Madam Justice Murray

Reasons for Judgment

Counsel for the Plaintiff:

D.D. McKnight

Counsel for the Defendants:

H.F. Turnham

B. Keigan

Place and Date of Trial:

Victoria, B.C.

March 9-13, 2020

Place and Date of Judgment:

Victoria, B.C.

April 22, 2020

Introduction

- [1] Ms. Baird seeks damages for injuries suffered in two motor vehicle accidents: June 12, 2015 and December 3, 2015 (the "MVAs" or "the accidents"). Liability is admitted.
- [2] Ms. Baird is 50. A mother of three children, the youngest of which is 15, she works part-time in food services at a care home.
- [3] Both accidents were relatively minor. Police were not called to either.
- [4] The first occurred on June 12, 2015 when a car pulled out of a driveway and struck the passenger side of Ms. Baird's car. Ms. Baird testified that her body was thrown to the left. Her vehicle suffered minor damage.

- [5] The second MVA occurred on December 3, 2105. Ms. Baird was rear-ended by a truck as she was stopped at a stop sign. Following the accident, she spoke to the other driver through her window but did not get out of her car. Her vehicle was not damaged.
- [6] After the second MVA, Ms. Baird had another accident. In December 2016 she was driving in snow and slid into the left rear bumper of a sport utility vehicle. She was not injured. No damages are being sought for this accident.

Issues

- [7] The task of this court is to determine the appropriate monetary amount to be awarded under the following heads of damages:
- a) Non-pecuniary damages, and
 - b) Future loss of earning capacity.
- [8] Cost of future care and special damages will be dealt with at a later date.
- [9] I will deal with each heading in turn.

NON-PECUNIARY DAMAGES

Causation

- [10] Causation is established when the plaintiff proves on a balance of probabilities that the defendant caused or contributed to his or her injury. This is the "but for" test as set out by the Supreme Court of Canada in the seminal decision *Athey v. Leonati*, [1996] 3 S.C.R. 458.
- [11] As stated at para. 17 of *Athey*, the plaintiff does not have to establish that the defendant's negligence was the sole cause of the injury:

There will frequently be a myriad of other background events which were necessary preconditions to the injury occurring. ... As long as a defendant is part of the cause of an injury, the defendant is liable, even though his act alone was not enough to create the injury. There is no basis for a reduction of liability because of the existence of other preconditions: defendants remain liable for all injuries caused or contributed to by their negligence.

- [12] The defendant's contribution must be material in that there is a substantial connection between the accident and the injury beyond a de minimus range: *Farrant v. Laktin*, 2011 BCCA 336 at paras. 9-11.
- [13] The general rule is that the plaintiff is to be restored to his or her original position and not to a better position: *Blackwater v. Plint*, 2005 SCC 58 at para. 78.

The Evidence

- [14] Ms. Baird testified that after the first MVA, she felt shaky and upset but she was not in pain when she drove away. Later that day she had a headache and her neck "felt wobbly".
- [15] Sometime after the first MVA, Ms. Baird had difficulty driving her daughter to Comox for a gymnastics competition. Her arms hurt, she got a headache and was exhausted. In direct Ms. Baird was uncertain as to when she first noticed this but thought it was a couple of months after the first MVA.
- [16] Although she suffered pain in her neck, shoulders and arm- primarily the left side- and headaches, Ms. Baird did not see her family doctor following this accident
- [17] Trent Abbott, Ms. Baird's husband, testified that immediately after the first MVA, Ms. Baird was scattered and nervous. He further testified that she commented about having headaches and back pain, and that her neck felt loose.
- [18] After the second MVA, Ms. Baird said that she again felt shaky and upset. On December 8, 2015 she saw her long-time family doctor, Elizabeth Grant and reported that she had a sore shoulder and neck and was suffering from headaches. She also reported difficulty sleeping. Dr. Grant found her to have full range of motion in her neck. She prescribed her Flexeril. Dr. Grant, who is now retired, did not testify at the trial.
- [19] Before her accidents, Ms. Baird was "pretty active". She had three active children. She did all of the house and yard work. She walked regularly and went to yoga and Pilates. She tubed, swam, and boated at the family cabin on Shawnigan Lake. She went to dinner and coffee with friends. Her health was good.
- [20] Since the accidents, Ms. Baird has trouble keeping up with household chores and describes her house as a disaster. Ms. Baird has adjusted the way she does things to minimise pain and discomfort. For example, she no longer takes the family dog for hour long walks on a leash. Instead she drives the dog to a dog park where he can run off leash. She does not go out socially as much as she did before the accidents.
- [21] She continues to suffer when driving long distances. Her arms hurt and she gets very tired. This makes taking her daughter to her many gymnastics competitions difficult.
- [22] Ms. Baird complains of pain mainly in her left neck, shoulders and arm. Her neck continues to feel "loose". She suffers headaches three to four times a week. Some days are better than others. Ms. Baird deals with the pain by pushing through.
- [23] Since the accidents, Ms. Baird describes herself as "exhausted all the time." She does not feel like doing much. She is more irritable. Her "anxiety is high". She worries that she is unable to contribute financially to the family as she cannot physically work more than her current part-time hours. She is also worried about her relationship with her husband because she is irritable and tired. She was tearful when she spoke of these fears.

- [24] Ms. Baird suffered from depression before the MVAs but said it was under control. She testified that since the MVAs, her anxiety is high and she has had to increase her antidepressant medication. She did not provide any detail about that.
- [25] Ms. Baird testified that she did not suffer pain or have difficulty sleeping or keeping up with her activities before the MVAs.
- [26] Mr. Abbott testified that Ms. Baird is the toughest person he knows. That fits with the impression I formed from her testimony. I found Ms. Baird to be a straightforward, down to earth person who is not about to let injuries get in her way. As she testified a number of times, her way of dealing with the pain is to "put her head down and keep going." What also came shining through her evidence is that Ms. Baird is a caregiver to her husband and children, her mother and at work. She puts others before herself.
- [27] The evidence about the impact of the MVAs on Ms. Baird is somewhat thin. There are two reasons for this. First, Ms. Baird is unable to recall when things happened. Vascular surgeon Dr. Anthony Salvian noted the same in his report stating that "Ms. Baird is a very pleasant, straight forward woman who is somewhat vague with the timeline of the symptomology." Because Ms. Baird did not see a doctor after the first MVA, there are no medical records to assist.
- [28] Second, Ms. Baird demonstrates a tendency to downplay her issues. I have no doubt that some of the understatements and failures to report to her medical professionals are due to the qualities listed above. As she testified, she does not like to talk about her issues. Ms. Baird is not a malingerer and, as the evidence shows, does not visit the doctor often.
- [29] The evidence of her husband and friend did not add much detail. Nor was any medical evidence called to fill in the gaps. The only medical evidence came from Dr. Salvian who the plaintiff called as an expert.
- [30] This deficiency of evidence was the focus of the defendants' closing submissions. The defendants submit that there is no evidence upon which I can conclude that Ms. Baird was injured in the first MVA and, if she was, it was de minimus. They invite the court to dismiss the claim regarding the first MVA. The defendants further argue that this court cannot be satisfied that the injuries were caused by the MVAs as the accidents were so minor.
- [31] I reject these arguments. First, I am satisfied that there is evidence that Ms. Baird suffered injuries in the first MVA and that they are not de minimus. Second, it is well recognised in this court that injuries can arise from minor accidents. Assumptions are not to be drawn from the force of the impact or amount of vehicle damage: *Greenway-Brown v. MacKenzie*, 2019 BCCA 137 at para. 27.
- [32] Overall, the defendants question the plaintiff's evidence regarding her injuries. While they do not challenge her credibility, they challenge her reliability.

- [33] The defendants point to two Pain Catastrophizing forms filled out by Ms. Baird. The first time Ms. Baird filled out the form was October 30, 2017 for Dr. Bowler who performed trigger point injections. On that occasion Ms. Baird rated her pain as a 2. The second time she filled out the identical form was February 2019 for Claudia Walker, the occupational therapist in preparation for this trial. On that date Ms. Baird scored her pain as a 32. The defendants argue that the difference in scoring should cause this court to doubt the reliability of Ms. Baird's evidence.
- [34] I disagree. In October 2017 Ms. Baird was not working. In February 2019 she was. The increase in the score fits with Ms. Baird's evidence that work increased her symptoms.
- [35] As noted above, Ms. Baird did not go to the doctor after her first accident but she did see her family doctor on December 8, 2015, five days after the second accident. On that date Ms. Baird complained of soreness in her neck and back as well as headaches. She reported problems sleeping as her arm was going numb causing her to wake up. Her doctor prescribed her a muscle relaxant. Ms. Baird did not go return to her doctor until June 28, 2016. As also noted above, Ms. Baird's recall of who she has seen and what occurred during the appointments is less than clear. She testified that she gets confused and does not recall exactly.
- [36] That Ms. Baird soldiers on in spite of injuries and does not frequent the doctor with complaints does not in my view detract from her evidence. While Ms. Baird's timeline of the symptomology is vague, it does not stand alone. The evidence from her husband and her friend added some detail and corroboration.
- [37] Mr. Abbott testified that his wife had no physical limitations or sleeping difficulties prior to the MVAs. After the first MVA, Ms. Baird suffered from headaches and back pain. She would complain that her neck felt loose. She no longer slept well; she was constantly shifting and getting up complaining that her arm fell asleep and of pain.
- [38] Mr. Abbott described his wife before the MVAs as light, active, gregarious, very effervescent, and engaging. She had a great sense of humour. Since the MVAs she is stressed, constantly in pain, always tired and less patient with the kids. He testified that when Ms. Baird gets home from work, she is drawn, worn out and "done for the night".
- [39] Kelli Simonovic is Ms. Baird's close friend. They have known each other for 20 years. She and Ms. Baird see each other daily and have for some time, both before and since the MVAs. Ms. Simonovic testified that before the accidents Ms. Baird had no problem physically doing things and did not complain of pain. Ms. Baird ran "a tight ship" at home and her house was very tidy. Since the accidents, Ms. Baird's "spirit is less light" and she tends to be a bit more negative. Ms. Baird is reluctant to go out and when she does, she wants to leave early.
- [40] I found Ms. Baird, her husband and her friend to be credible witnesses. I accept their evidence.

[41] Dr. Salvian examined Ms. Baird on October 2, 2017 and reached the following conclusions:

- a) She has chronic myofascial pain syndrome in the left neck and shoulder which is commonly caused by whiplash type trauma. Headaches are a common consequence of this condition;
- b) Ms. Baird suffers from post-traumatic thoracic outlet syndrome which causes ongoing numbness, tingling and pain radiating down her left arm and into her fingers that she complains of;
- c) These conditions were caused by the MVAs. Ms. Baird suffered a whiplash injury in the first MVA that caused headaches, left sided neck pain and likely the start of thoracic outlet syndrome. The second MVA exacerbated the symptoms, including the thoracic outlet syndrome;
- d) While Ms. Baird's symptoms may "wax and wane" depending on activity, it is unlikely that they will ever be "cured";
- e) She may benefit from Botox injections to manage the headaches and neck pain;
- f) Ms. Baird needs to keep her arms down and avoid activities/motions that exacerbate the numbness and tingling like driving long distance, heavy lifting, repetitive movements and reaching for things overhead;
- g) She needs a good mattress and pillow to help her find a comfortable resting position;
- h) She will need assistance with heavy seasonal housework;
- i) She needs to maintain her physical conditioning. To this end, Dr. Salvian recommends a couple of sessions with a personal trainer or kinesiologist. He also recommends Feldenkrais physiotherapy.

[42] Dr. Salvian's evidence fits with the other evidence. I accept his opinions.

[43] Taking into consideration all of the evidence, I am satisfied that, while the evidence is somewhat thin, there is evidence that clearly proves that Ms. Baird suffered injuries in the first MVA that were aggravated in the second MVA. I make the following findings:

- a) after the first accident, Ms. Baird suffered from headaches and left sided neck and shoulder pain;
- b) at some point after the first accident, when doing activities like driving long distances and sleeping she began experiencing numbness in her left arm and hand;
- c) the second accident exacerbated her symptoms;
- d) as a result of the MVAs, Ms. Baird suffers from chronic myofascial pain syndrome and post-traumatic thoracic outlet syndrome in the left neck and shoulder. These conditions will likely never be cured;

- e) Ms. Baird is constantly in pain. She is exhausted and irritable. She is unable to walk the dog, exercise, socialize and take care of her household and family as she did before the MVAs;
 - f) Working is difficult because of the repetitive arm/shoulder movements. While it is uncertain whether this employment is sustainable for her, she is unable to work more than part-time.
- [44] The question now becomes, what then is the appropriate award for these non-pecuniary damages.

Quantum

- [45] An award of non-pecuniary damages does not depend upon the seriousness of the injury, but on its ability to ameliorate the condition of the victim considering his or her particular situation. The gravity of the injury alone is not determinative. An appreciation of the individual's loss is the key. There is no "tariff". An award will vary in each case to meet the specific circumstances of the individual case: *Lindal v. Lindal*, [1981] 2 S.C.R. 629 at 637.
- [46] In *Gohringer v. Hernando-Lazo et al.*, 2009 BCSC 420, Russell J. outlined the factors to be considered by the Court in assessing non-pecuniary damages:
- [81] The purpose of non-pecuniary damage awards is to compensate the plaintiff for "pain, suffering, loss of enjoyment of life and loss of amenities": *Jackson v. Lai*, 2007 BCSC 1023, B.C.J. No. 1535 at para. 134; see also *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229; *Kuskis v. Tin*, 2008 BCSC 862, B.C.J. No. 1248. While each award must be made with reference to the particular circumstances and facts of the case, other cases may serve as a guide to assist the court in arriving at an award that is just and fair to both parties: *Kuskis* at para. 136.
- [82] There are a number of factors that courts must take into account when assessing this type of claim. Justice Kirkpatrick, writing for the majority, in *Stapley v. Hejslet*, 2006 BCCA 34, 263 D.L.R. (4th) 19, outlines the factors to consider, at para. 46:

The inexhaustive list of common factors cited in *Boyd* [*Boyd v. Harris*, 2004 BCCA 146] 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
- (j) the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff: *Giang v. Clayton*, [2005] B.C.J. No. 163, 2005 BCCA 54 (B.C. C.A.)).

[47] The general rule is that the plaintiff is to be restored to his or her original position and not to a better position: *Blackwater v. Plint*, 2005 SCC 58 at para. 78.

[48] The process for assessing an appropriate award was discussed by Branch J. in *Hanger v. Shin*, 2019 BCSC 99:

"... The compensation awarded [for non-pecuniary loss] should be fair and reasonable to both parties: *Trites v. Penner*, 2010 BCSC 882 at para. 188. Fairness is measured in part against awards made in comparable cases: *Beaton v. Perkes*, 2016 BCSC 2276 at para. 51. Other cases are helpful but serve only as a rough guide. Each case still depends on its own facts: *Trites* at para. 189." (paragraph 80) (Also see, *LaRocque v. LaRocque*, 2019 BCSC 655 at paragraph 71).

[49] In addition to the usual factors, Ms. Baird submits that in assessing quantum, this court should take into consideration the loss of her ability to work. She relies on two decisions of this court for the proposition that the loss of the ability to perform work can be taken into account in the assessment of non-pecuniary damages if it affects the plaintiff's sense of self worth, sense of identity and enjoyment of life: *Burdett v. Eidse*, 2010 BCSC 219 at para. 212; *Dabu v. Schwab*, 2016 BCSC 613 at para. 23.

[50] In my view, that argument does not apply in this case. The evidence does not establish that Ms. Baird has lost the ability to work. I will discuss that under diminished earning capacity. Despite that, there is no evidence that her work is important to her self worth or emotional well-being. The only evidence before this court is that Ms. Baird enjoys the work because she likes helping seniors and she likes her co-workers. Nor is this long-term employment; Ms. Baird has only worked in food services in seniors' care facilities since July 2018.

[51] Ms. Baird further argues that, in the assessment the court should take into consideration the toll the litigation process has taken on her. I reject that argument as well. The process that led to this trial is unknown. That is a factor more appropriately considered when assessing costs.

[52] The plaintiff seeks an award for non-pecuniary damages in the range of \$110,000 to \$140,000. To establish that range, Ms. Baird relies on a number of decisions of this court: *Downey v. O'Connor*, 2017 BCSC 1459; *Winick v. Goddard*, 2020 BCSC 4; *Miller v. Resurreccion*, 2019 BCSC 1719; *Morrison v. Koschzek*, 2019 BCSC 945; *Tench v. Van Bugnum*, 2019 BCSC 1877; *McCull v. Sullivan*, 2020 BCSC 137; *Iampietro v. Leung*, 2019 BCSC 1750; *Easton v. Wolovets*, 2015 BCSC 210; *MacLeod v. Whittemore*, 2018 BCSC 1082; *Lo v. Vos*, 2019 BCSC 1306; *Gill v. Lai*, 2018 BCSC 101.

- [53] The defendants argue that the appropriate award is \$40,000. They rely on *Unger v. Singh*, 2000 BCCA 94, in which our Court of Appeal found that the range for cases involving primarily soft tissue injuries with some emotional problems, including sleep disruption, nervousness and depression, was between \$35,000 and \$125,000. The defendants submit that the award should be at the lower end of this range as the plaintiff's injuries are at the "low end" of thoracic outlet syndrome and have had very little impact on her life. I note that the court in *Unger* cautioned that these were guides only. I further note that the decision is 20 years old and would have to be adjusted for inflation. In any event, given my findings as outlined above, I do not agree that Ms. Baird's injuries are at the low end or that she is barely impacted by them.
- [54] For the most part, the cases referred to me by the plaintiff are similar to the present case but the injuries and/or impact of same are, in my view, greater. I find the *Winick* case to be closest factually. That case involved a 37-year old teaching student who was involved in three minor accidents. She suffered soft tissue injuries to her neck and back in the first accident which were aggravated by the second and third accidents. She also suffered from headaches. Dr. Salvian diagnosed Ms. Winick with thoracic outlet syndrome which, as with Ms. Baird, is likely to persist. Ms. Winick was able to continue her employment but only at 75% and was able to continue with her studies. She suffered loss of enjoyment of activities that she enjoyed before the accident. The curtailment of those activities has affected her psychological well being. The court awarded Ms. Winick \$110,000 for non-pecuniary damages. On the evidence before me, I find that Ms. Baird's injuries and the impact thereof are less serious than in *Winick*.
- [55] I am satisfied that Ms. Baird will continue to suffer from the effects of her injuries. She is limited in her physical activities, including housework and dog walking. She will continue to find work physically challenging. Having regard to the *Stapley* factors and the authorities referred to me, I am satisfied that an appropriate assessment for non-pecuniary damages is \$95,000.

DIMINISHED EARNING CAPACITY

- [56] The essential purpose of an award for past loss of opportunity and diminished earning capacity is to provide the plaintiff with full compensation for all of his pecuniary losses, subject to rules of remoteness and mitigation: *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229. It is to restore, as best as is possible with a monetary award, an injured plaintiff to the same position he or she would have been in had the negligence not occurred. It is the difference between the plaintiff's original position just before the occurrence of the negligent act or omission, and the injured position after and as a result of such act or omission, that comprises the plaintiff's loss: *Athey* at paras. 34-35.
- [57] Our Court of Appeal provided guidance as to how to assess these damages 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.
- [58] In *Pololos v. Cinnamon-Lopez*, 2016 BCSC 81, Voith J. described the legal principles that pertain to this head of loss as follows:
- [133] The relevant legal principles are well-established:
- a) To the extent possible, a plaintiff should be put in the position he/she would have been in, but for the injuries caused by the defendant's negligence; *Lines v. W & D Logging Co. Ltd.*, 2009 BCCA 106 at para. 185, leave to appeal ref'd [2009] S.C.C.A. No. 197;
 - b) The central task of the Court is to compare the likely future of the plaintiff's working life if the Accident had not occurred with the plaintiff's likely future working life after the Accident; *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 32;
 - c) The assessment of loss must be based on the evidence, but requires an exercise of judgment and is not a mathematical calculation; *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 18;
 - d) The two possible approaches to assessment of loss of future earning capacity are the "earnings approach" and the "capital asset approach"; *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 at para. 7 (S.C.); and *Perren v. Lalari*, 2010 BCCA 140 at paras. 11-12;
 - e) Under either approach, the plaintiff must prove that there is a "real and substantial possibility" of various future events leading to an income loss: *Perren* at para. 33;
 - f) The earnings approach will be more appropriate when the loss is more easily measurable: *Westbroek v. Brizuela*, 2014 BCCA 48 at para. 64. Furthermore, while assessing an award for future loss of income is not a purely mathematical exercise, the Court should endeavour to use factual mathematical anchors as a starting foundation to quantify such loss: *Jurczak v. Mauro*, 2013 BCCA 507 at paras. 36-37.
 - g) When relying on an "earnings approach", the Court must nevertheless always consider the overall fairness and reasonableness of the award, taking into account all of the evidence: *Rosvold* at para. 11.

- [59] Hypothetical events such as how the plaintiff's life would have proceeded need not be proven on a balance of probabilities. Rather they are simply given weight according to their relative likelihood. A 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.
- [60] Ms. Baird seeks only loss of future earning capacity.
- [61] At the time of the accidents, Ms. Baird was not working. She left her job waitressing at a golf club at the end of 2011 to care for her children. She had worked there for approximately 30 years.
- [62] Ms. Baird returned to the workforce in May 2018. She worked as a home care worker for seniors for about two months. She left that job as it involved "a lot of driving and the pay was not very good". She then began working in food service at a care home for seniors where she remains. She works part-time, approximately three and one-half hours a day, on a four days on, two days off schedule. A typical shift involves loading a cart with everything required for dinner service including plates, utensils, food and beverages, moving the cart from the main kitchen to a residential floor, serving the meal to residents, then returning everything to the kitchen and cleaning up. She describes the work as fast-paced. It involves reaching for items on high shelves, reaching with stacks of plates, and constant movement of her arms. At the end of a shift, Ms. Baird's arms and shoulders ache and she is exhausted. Ms. Baird testified that she constantly turns down additional or longer shifts as she is physically unable to work more. She has not had to take time off. Ms. Baird enjoys the work as she likes working with seniors and her co-workers.
- [63] Besides working at the care home, Ms. Baird works at her husband's office cleaning every weekend, and filing and filling in for employees when required. She is remunerated for that work.
- [64] In addition to working outside of the home, Ms. Baird is solely responsible for the household. She does all the housework, cooking and gardening. I conclude from the evidence that she receives no help from her family. She also cares for her aged and ailing mother who is in a care facility. She visits her mother every morning to administer medication, tidy up her apartment, bring her groceries and take her to appointments.
- [65] Ms. Baird submits that she had planned to work full-time and is now likely unable to continue even part-time work.
- [66] The parties differ as to whether, but for the MVAs, Ms. Baird was likely to work full-time and, if so, when would she have started and when would she have stopped.
- [67] Throughout her working life, Ms. Baird worked part-time, save some periods of full-time work between pregnancies. What full-time meant was not defined; nor was what period of time that was. According to Ms. Baird's husband, the plan was that she would return to work full-time when their youngest child was in high school. I understand that that child is currently 15 and in Grade 10. Ms. Baird testified that the plan was that she would return to

full-time work, which she defined as 30-40 hours per week, when all of the children were finished high school. Ms. Baird testified that her plan before the MVAs was to work until she was "60 or so". Ms. Baird testified that she would like to work more to contribute to the family. Both Ms. Baird and Mr. Abbott testified that, financially, the family needs Ms. Baird to work more.

- [68] The evidence regarding the plan to return to work full-time and how long Ms. Baird would work is unclear. What is clear is that Ms. Baird has rarely worked full-time and that she has many responsibilities outside of work that are enduring. Of note in that regard is that the family just moved to a bigger home on a large lot which will doubtless mean more work at home for Ms. Baird.
- [69] Ms. Baird relies on the opinions of Dr. Salvian and Ms. Walker to support her argument that she will likely be unable to continue working even part-time. While Dr. Salvian examined Ms. Baird before she started working at the care home, he opined that she is at risk of exacerbating her injuries working at a job that involves repetitive movements with arms outstretched and/or raised. Ms. Walker is of the opinion that Ms. Baird's current employment is "neither safe nor durable in light of her injuries and physical impairments", and that working is "significantly contributing to her reduced overall performance".
- [70] On the evidence I am not satisfied that Ms. Baird is unable to continue working part-time. The opinions ignore the work Ms. Baird does at home and the fact that Ms. Baird has not missed a day of work. Nor did Ms. Baird testify that she is unable to continue working.
- [71] Given her work history, the work she does at her husband's office, her responsibilities at home and the lack of clarity in the evidence, I am not satisfied that, but for the MVAs, Ms. Baird would return to full-time work. I am however satisfied that there is a real and substantial possibility that but for the MVAs, she would at some point, most likely when her youngest child graduates from high school, work more than she currently does.
- [72] According to her evidence, Ms. Baird currently works 15-20 hours per week, which I take to be half-time. Her youngest child by my calculation will be finished high school in 2022. Given the evidence, I find that there is a real and substantial possibility that, but for the accident, Ms. Baird would likely have increased her work to approximately 25-30 hours per week starting in 2023. I further find that she likely would continue working until she was 60.
- [73] Taking into account all of the foregoing, including positive and negative contingencies and the ups and downs of life, I find that a fair and reasonable assessment of the plaintiff's future loss of earning capacity is \$50,000.

Conclusion

- [74] The plaintiff is entitled to judgment against each of the defendants, jointly and severally, in the total amount of \$145,000, calculated as follows:

Non-pecuniary Damages

\$95,000

Loss of Earning Capacity

\$50,000

TOTAL

\$145,000

[75] As stated at the outset, cost of future care and special damages will be dealt with at a later date.

[76] The plaintiff indicated that she would like to make submissions as to costs. That may be scheduled through Trial Scheduling when courts are back in session.

"The Honourable Madam Justice Murray"

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