

CANADA / JUDGMENT

Bidulka v. Haugen

2020 BCSC 1065

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2020 BCSC 1065 Bidulka v. Haugen

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Bidulka v. Haugen,

2020 BCSC 1065

Date: 20200720

Docket: S20319

Registry: Dawson Creek

Between:

Penny Ann Bidulka

Plaintiff

And

Meghan Kathleen Haugen and Garth Haugen

Defendants

- and -

Docket: S20486

Registry: Dawson Creek

Between:

Penny Ann Bidulka

Plaintiff

And

Donita Marie Dunne and David Stuart Francis Dunne

Defendants

Before: The Honourable Madam Justice Jackson

Reasons for Judgment

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Place and Date of Trial:

Dawson Creek, B.C.

February 24-28 and March 2-6, 2020

Place and Date of Judgment:

Dawson Creek, B.C.

July 20, 2020

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I. INTRODUCTION

- [1] The plaintiff, Penny Bidulka, seeks damages from the defendants, Meghan Haugen, Garth Haugen, Donita Dunne, and David Dunne, for injuries she sustained in accidents that occurred on September 11, 2011 (the "2011 Accident") and March 6, 2012 (the "2012 Accident") (collectively the "Accidents").
- [2] The 2011 Accident occurred as the plaintiff was driving out of town toward Fort St. John with her daughters. According to the plaintiff, she noticed something coming in her rearview mirror, began to twist her torso to the right to look, and while she had her left hand on the steering wheel and her right hand on the passenger seat, she was struck from behind by one of the Haugen defendants. The impact pushed the plaintiff's vehicle forward into the vehicle in front of her resulting in a second collision.
- [3] The 2012 Accident occurred when one of the Dunne defendants backed their car out of a diagonal parking spot into the side of the plaintiff's vehicle.
- [4] The trial took place over the course of 10 days and included oral testimony, expert reports, a document agreement, and an extensive agreed statement of facts.

II. ISSUES

- [5] The defendants have admitted fault for their respective accidents. The issues for determination relate to what, if any, injuries were caused by the Accidents and assessment of the plaintiff's damages flowing from the Accidents.

III. THE PLAINTIFF'S ORIGINAL CONDITION

A. Health

- [6] The plaintiff was 40 years old at the time of trial. She has two daughters who were 19 and 17 at the time of trial. The plaintiff was born in 1979 in Dawson Creek and raised on a farm outside of town. Beginning at a very young age, she helped out on the family's farm by doing all manner of chores, including physically demanding tasks.
- [7] When the plaintiff was 14 the family left the farm and moved to town. The transition was difficult for the plaintiff and led to some rebellious activity. The plaintiff left school at grade 8. When she was 16 she was diagnosed with cervical cancer which required three surgeries.
- [8] Some time in 2009 or 2010, the plaintiff had a seizure while driving her car. Prior to the Accidents the plaintiff also suffered from occasional dizziness, low back pain, right upper back pain, frequent shoulder pain, neck pain, head pain, and frequent hip pain. She received chiropractic treatment from Dr. Irwin in 2007 and 2008 for the pain. However, the plaintiff attributes this pain largely to her lifestyle, including the physical demands of parenthood and the physical nature of the work she was doing at the time, including painting.
- [9] The plaintiff was a single mother to both of her daughters. The plaintiff was also responsible for all of the household chores, inside and out, including shoveling her walkway, mowing her lawn using a push mower, and doing all the cooking, cleaning, and laundry for her and her daughters. She kept her home in a clean and tidy condition. The plaintiff's daughters helped with the chores, as the plaintiff had done when she had been a child, but this was done to teach them independence and self-sufficiency and not because of any physical limitations of the plaintiff. The plaintiff had no limitations in her ability to dress herself or look after her own hygiene and self-care.
- [10] Prior to the Accidents the plaintiff had a large circle of friends and enjoyed social activities including dancing, going to the pool, camping, visiting with friends, and campfires. She did volunteer activities with her children, including participating in the fall fair every year and shovelling sidewalks for seniors in the community. Starting around 2007, the plaintiff and her daughters participated in farmers' markets. They also enjoyed bike riding, walking, skiing, and riding quads. In addition, they went snowmobiling at her father's property two to three times per month.

- [11] At the time of the 2011 Accident, the plaintiff would often help her father with physical chores on his property just outside of Dawson Creek, including mowing his large lawn using a ride mower and helping to stack wood. On direct examination she initially testified she had also been looking after her father's large garden, but later acknowledged she had stopped doing this after she hurt her mid-back in a workplace accident in December 2009 when she tripped while carrying lumber at Greensmart Manufacturing Ltd. ("Greensmart"). She tried to return to work four days later, but lost her footing and fell again. I will refer to these two workplace injuries collectively as the "Workplace Injury".
- [12] As a result of the Workplace Injury, the plaintiff injured her mid-back and experienced pain which radiated throughout her spine. She had muscle spasms between her shoulder blades and in her lower back. The plaintiff continued to have difficulty twisting and bending and experienced pain for several months after the Workplace Injury. The plaintiff became frustrated with her pain, experienced weight loss, and was fatigued.
- [13] The plaintiff was prescribed Percocet after the Workplace Injury for pain and her evidence was that she began using it as a "pick me up" when she felt fatigued. She was sent to rehabilitation by WorkSafeBC but had constant pain in her mid-back which never went away. The plaintiff tried physiotherapy, traction, dry needling, acupuncture, massage therapy, and exercising at home, but found all of these treatments largely ineffective. She received some treatments from a person named Tracy Heartt, although the precise nature of those treatments was not fully described at trial. The plaintiff testified the treatments she received from Ms. Heartt led to a reduction in the amount of mid-back pain she felt, however she admitted she had also been taking Percocet at the time and had lied to Ms. Heartt about doing so. By that point the plaintiff admitted she had begun abusing Percocet.
- [14] The medical documentation reflects that between September 2010 and May 2011 the plaintiff's mid-back pain arising from the Workplace Injury resolved. This is consistent with the plaintiff's evidence, and that of several collateral witnesses that by that point in time she was back to normal without any limitations, although she experienced some back pain when scanning heavy items while working as a cashier in the summer of 2011. Others who observed the plaintiff working in her cashier position observed no limitations in the plaintiff whatsoever.
- [15] Based upon an overall consideration of the evidence I find that the time of the 2011 Accident the plaintiff's mid-back pain from the Workplace Injury was only causing her minimal pain on infrequent occasions and was not causing any physical restrictions.

B. Education and Employment

- [16] After leaving school the plaintiff worked a series of minimum-wage jobs, most of which lasted only a short period of between three to six months. Many of these jobs were physically demanding, but the plaintiff had no difficulties with the physical nature of any of these jobs. She lived in various places including Fort St. John and Chilliwack.

- [17] In September 2005, the plaintiff quit her job with J.E. Developments for various reasons including that the job was hurting her back, she was experiencing personal problems, and she needed some time with her children.
- [18] In 2006 the plaintiff was employed as a bookkeeper at Kal Tire in Dawson Creek. The plaintiff says she quit, but also that her employer fired her. The plaintiff says she quit because of allegations that she was stealing, which she denies and of which there is no proof. After she left Kal Tire she badmouthed her supervisor and word got around town.
- [19] Later in 2006 the plaintiff commenced employment as a customer service representative with the Bank of Nova Scotia in Dawson Creek. She was fired from that job for having an unprofessional attitude, including eating, being loud at her station, even after she had been warned, and having an argument with her boyfriend while inebriated at a work function.
- [20] In May 2009 the plaintiff started working at Greensmart as an interior painter. She then transitioned into building work with Greensmart, which was more physical in nature. It was at that point that she suffered the Workplace Injury as described above.
- [21] After the Workplace Injury the plaintiff received 15 weeks of sick leave benefits. When those benefits ended, the plaintiff applied for Employment Insurance sickness benefits based on Dr. Neveling's assessment of her condition. Dr. Neveling anticipated the plaintiff would not be able to return to work until December 2010. However, before that time, when her EI sickness benefits were expiring, the plaintiff applied for regular EI benefits. In order to qualify for regular EI benefits she needed to establish she was capable of work. It was at that point the plaintiff sought out Tracy Heartt for treatment. Ms. Heartt provided an opinion that the plaintiff was able to work. However, that opinion was based on misinformation provided by the plaintiff that she had dramatically reduced her consumption of Percocet.
- [22] The plaintiff worked 332 hours as a cashier at No Frills grocery store between May 9 and September 2, 2011. She resigned to become a full-time student in the Applied Business Technology Program ("ABT Program") at Northern Lights College. The ABT Program is a full time 39-week program to earn a Certificate as an Administrative Assistant. Students can exit after 23 weeks as an Office Assistant, or after 29 weeks as a Financial Assistant.
- [23] The plaintiff's ABT Program involved attending classes five days a week for six hours per day and a lot of sitting and working on the computer. The plaintiff had no problem with the work, nor did the sitting for extended periods in front of a computer cause her any pain. The program included a large lecture component, which made attendance imperative in order to not fall behind.

IV. THE PLAINTIFF'S CONDITION AFTER THE ACCIDENTS

A. Health

- [24] After the 2011 Accident, an ambulance was called and the plaintiff was transported to the hospital. She immediately felt an intense burning pain in her neck. After several hours she was discharged from the hospital, however she returned a couple of days later with increased pain in her neck, the top of her shoulders, and her upper back in the shoulder blade area, as well as her lower back. In the plaintiff's words her "whole back hurt".
- [25] Approximately 10 months after the 2011 Accident the plaintiff experienced another seizure, although based on research she undertook she believes she had several smaller ones before this.
- [26] The plaintiff candidly acknowledged she does not fully recall the condition of her neck, shoulder, and upper and lower back pain at the time of the 2012 Accident because she was still abusing Percocet, but she believes she was starting to improve. The plaintiff testified the 2012 Accident caused her to "snap my neck again". She did not attend the hospital.
- [27] In the months and years that followed the Accidents the plaintiff continued to experience pain in her neck, shoulders, upper back, and lower back. Her mood deteriorated and she became depressed and frustrated with her physical condition and what she perceived to be the financial consequences of her condition.
- [28] In 2016, the plaintiff was drinking heavily four or five nights a week and smoking cannabis heavily and regularly (up to three joints per day). Her counsellor feared she had developed addictions to both. She was feeling very poor about herself and her situation, including financial pressures and stress related to her children.
- [29] The plaintiff testified she stopped taking Percocet in 2013, which is consistent with the documentation respecting her prescription history. However, in 2017 and 2018 the plaintiff was still trying to have her physicians prescribe Percocet for pain.
- [30] The plaintiff does stretches at home for pain relief and has tried various treatments, including physiotherapy and chiropractic therapy, most without any success, although some that provided temporary relief. She has seen several psychiatrists and been referred to a counsellor. The plaintiff was prescribed anti-depressant medications but discontinued them because they made her feel like she was not in reality.
- [31] The plaintiff is no longer able to do most of the household chores she did prior to the Accidents. Her daughters have to help her do the laundry by carrying the laundry baskets up and down the stairs. While she can do some mopping, sweeping, and vacuuming, the girls assist with what she cannot do. She gets pain in her shoulders from reaching back and forth with the mop. Even chopping food for meal preparation takes longer and she has to take breaks. The plaintiff has developed coping strategies, such as soaking the dishes so she does not need to scrub them so hard and chopping vegetables for meal preparation in sessions rather than trying to complete it all at once. She is no longer able to help her father chop wood like she did before the Accidents. In addition, there are days when the pain prevents

the plaintiff from moving her arms above her head, and so consequently she goes days without washing her hair. Her daughters sometimes assist with brushing her hair and taking off sweaters for the same reason.

- [32] Since the Accidents the plaintiff has lost her circle of friends. She does not get invited to activities, and believes this is partially because she is not able to do the activities that many of her friends do but also because people saw that she was not happy anymore and did not want to be around her. She has not had boyfriends or other intimate relationships since the Accidents. All of this makes her sad, lonely, frustrated, and depressed. Her relationship with her daughters has been impacted. She testified that her daughters found it difficult to go from having a mother who was very engaged and physically active to one who was not able to do activities with them, attend school field trips, take them to a pool, or even play an entire game of Monopoly. The plaintiff can no longer ride her bike because of shoulder and neck pain, she cannot ride a quad like she used to, and she is unable to go for lengthy walks. Nonetheless she tries to go for walks inside the mall for 20 to 30 minutes, but by the end of the walk she is in significant pain. She can no longer go camping because she cannot sleep on the ground, even with an air mattress.
- [33] The plaintiff testified she continues to have neck, shoulder, upper back, and lower back pain. As a result, she has difficulty remaining in one position for extended periods of time or walking for more than half an hour. She does not have pain in her legs as frequently as she did shortly after the Accidents. Similarly, her headaches are much less frequent and treatable with over the counter pain relief medication. Her pain, frustration over her physical condition, and stress over what she sees as its financial consequences, all contribute to her poor mood and she feels she has lost her zest for life. She experiences sleep disturbance and decreased appetite. According to the plaintiff, she used to be a woman who prided herself on raising her girls and being a hard worker, but she now feels useless to herself and others.

B. Education and Employment

- [34] The plaintiff testified that after the 2011 Accident she missed lectures because of her shoulder and back pain and began to fall behind in her ABT Program course work. She had to study a lot outside of class, which was not easy. She had to read things two or three times before information would sink in. She found it painful to remain in one position for extended periods while in class or studying. She obtained permission to extend her one-year ABT Program over the course of two years. Therefore, she was able to persevere and not withdraw from any classes.
- [35] Although the ABT Program included a job placement component, the plaintiff testified that the school would not place her in the community because she had experienced a seizure during class. She completed her placement in the college's administrative office.

- [36] The plaintiff finished school in the spring of 2013. In June of that year she received her Certificate in Applied Business Technology - Office Assistant and Certificate in Applied Business Technology - Financial Assistant.
- [37] Between completing the ABT Program in the spring of 2013 and September of 2015, the plaintiff worked at a series of entry level positions, none of them lasting longer than six months.
- [38] Other than a brief two-week term position doing clerical work, she has not worked since. She says she has now lost all of her skills because it has been so long, and because she developed a memory problem beginning around 2014 / 2015.

V. CREDIBILITY AND RELIABILITY

- [39] It is possible for a plaintiff to be a sincere and genuine person yet still be an unreliable witness: *Price v. Kostryba*, 1982 CanLII 36 (BC SC) at 1. The defendants argue the plaintiff's memory is poor and raise concerns about the accuracy of her evidence. The defendants also argue the plaintiff's testimony about her symptoms, and the reports she made to professionals about those symptoms, are not credible.
- [40] Credibility and reliability are related but distinct concepts: *United States v. Bennett*, 2014 BCCA 145 at para. 23.
- [41] Justice Dillon summarized the factors to consider when assessing credibility in *Bradshaw v. Stenner*, 2010 BCSC 1398, aff'd 2012 BCCA 296, but the following factors are also relevant to assessing the reliability of a witness' evidence:
- [186] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis*, [1926] 31 O.W.N. 202 (Ont.H.C.); *Farnya v. Chorny*, [1952] 2 D.L.R. 152 (B.C.C.A.) [*Farnya*]; *R. v. S.(R.D.)*, [1997] 3 S.C.R. 484 at para.128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (*Farnya* at para. 356).
- [42] In *Hardychuk v. Johnstone*, 2012 BCSC 1359 at para. 10, Justice Dickson described the approach to assessing credibility and reliability:

- [10] The typical starting point in a credibility assessment is to presume truthfulness: Halteren. Truthfulness and reliability are not, however, necessarily the same. A witness may sincerely attempt to be truthful but lack the perceptive, recall or narrative capacity to provide reliable testimony. Alternatively, he or she may unconsciously indulge in the human tendency to reconstruct and distort history in a manner that favours a desired outcome. There is, of course, also the possibility that a witness may choose, consciously and deliberately, to lie out of perceived self-interest or for some other reason. Accordingly, when a witness's evidence is demonstrably inaccurate the challenge from an assessment perspective is to identify the likely reason for the inaccuracy in a cautious, balanced and contextually sensitive way.
- [43] In Bennett, the BC Court of Appeal provided similar guidance on assessing the reliability of a witness' evidence. Unreliable evidence includes bare assertions without content or explanation and answers that are incomplete and selective in the information the witness discloses: para. 26.
- [44] The plaintiff admitted she had a poor recollection of many things and was unable to recall some information about her condition at various points in the past. Some degree of inability to recall facts is expected given the passage of time, and where the plaintiff's inability to recall facts involved insignificant matters, it raises no concerns. However, there were other problems with her evidence. The plaintiff gave inconsistent evidence at times. Some of these inconsistencies were not significant but some of them were. For example, she initially said she had not read Dr. McKenzie's report in which he had recommended she stopped chiropractic treatment (the plaintiff did not stop chiropractic treatment). However, at her examination for discovery she admitted she had read Dr. McKenzie's report and was aware of his recommendation that she stop chiropractic treatment. More significantly, she misled various health care providers about her use of Percocet. For example, she told a rheumatologist (Dr. Sejanian) she had taken Percocet "in the distant past" when she was still taking it. She misled Tracy Heartt the same way, and she did not correct that misinformation when Dr. McKenzie later relied on it in formulating his opinion. Their opinions were based on that misinformation.
- [45] Another issue that causes me to question the reliability of the plaintiff's evidence involves her interactions with Dr. Waseem and Dr. Neveling. In his report, Dr. Waseem recommended that the plaintiff restart Percocet. However, when asked about this during cross-examination he resiled from that opinion. He explained he resiled from that opinion because the plaintiff contacted him the weekend before he testified at trial to tell him she had been abusing Percocet. Based on the information the plaintiff provided to him, Dr. Waseem opined that the plaintiff was dependent on Percocet prior to the Accidents. He also altered his opinion that prescription marijuana would be beneficial for the plaintiff on the same basis. In his view that was now contraindicated because of her asserted dependency. I find it troublesome that the plaintiff contacted Dr. Waseem for the purpose of providing him with information aimed at altering his opinion. This was not the only time the plaintiff endeavoured to persuade one of her physicians to alter their opinion.

- [46] Dr. Neveling wrote to the plaintiff's counsel on January 28, 2013, and set out his opinion that the seizures were not related to the Accidents. In a subsequent clinical note Dr. Neveling noted the plaintiff had asked him to change his opinion on that point. At trial the plaintiff denied she had done so. The evidence reflects the plaintiff believed, and tried to convince numerous professionals, that the Accidents had caused her seizures. I find that her evidence denying she tried to convince Dr. Neveling to change his opinion is not in harmony with the preponderance of evidence I find reliable.
- [47] For the above reasons I approach the plaintiff's evidence with caution, particularly in areas of her evidence touching on the nature of the losses she claims to have suffered as a result of the Accidents.

VI. CAUSATION

- [48] Causation is established once a plaintiff proves on a balance of probabilities that the defendant caused or contributed to the injury, but causation need not be determined with scientific precision: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at paras. 13-16.
- [49] As noted in *Athey* at para. 32:
- The essential purpose and most basic principle of tort law is that the plaintiff must be placed in the position he or she would have been in absent the defendant's negligence (the "original position"). However, the plaintiff is not to be placed in a position better than his or her original one. It is therefore necessary not only to determine the plaintiff's position after the tort but also to assess what the "original position" would have been. It is the difference between these positions, the "original position" and the "injured position", which is the plaintiff's loss. In the cases referred to above, the intervening event was unrelated to the tort and therefore affected the plaintiff's "original position". The net loss was therefore not as great as it might have otherwise seemed, so damages were reduced to reflect this.
- [50] Where there are several tortious and non-tortious causes of injury, so long as the defendant's act is one of the causes of the plaintiff's damage, the defendant is fully liable for that damage: *Blackwater v. Plint*, 2005 SCC 58 at para. 78.
- [51] At the later stage of assessing damages, to the extent that the evidence shows that the effect of the defendant wrongful acts would have been greater because of the plaintiff's pre-existing injury, that pre-existing condition can be taken into account. Once causation has been established, it falls to the defendant to persuade the court "that some or all of the injury claimed would have happened in any event, or that the plaintiff would not have earned as much as he or she claims had no injury occurred": *Webster v. Ernst & Young*, 2000 BCCA 229 at para. 15. Such a hypothetical will be taken into account if the defendant establishes it is a "real and substantial possibility" and not merely speculation: *Athey* at para. 27.

A. What injuries did the Accidents Cause?

1. Lay Witnesses

- [52] The plaintiff testified that she could not remember when her depression, which she attributes to her pain, began. The plaintiff was in significant pain prior to the Accidents and was becoming depressed about that pain before the Accidents occurred.
- [53] The plaintiff called Melanie Tom, Twyla Lindberg, and Lena Mann. All of these women were friends of the plaintiff many years ago but had lost touch with her. She reconnected with Twyla and Lena in January at a Tim Hortons, where she had asked them to meet up so she could discuss them being witnesses at the trial.
- [54] Ms. Tom testified that the plaintiff is less social and that she sees her much less often now. Her evidence did not include reliable information about time frames and therefore it is difficult to draw any conclusions about causation based on her evidence.
- [55] Ms. Lindberg met the plaintiff some time around 2010, but they did not socialize extensively. She saw the plaintiff at No Frills in 2010 and 2011. She did not observe the plaintiff to have any physical limitations. The two lost touch and Ms. Lindberg testified that when she saw the plaintiff in January (at the Tim Hortons meeting) she was a lot thinner and appeared anxious, depressed, and to be in pain when she walked.
- [56] Ms. Mann met the plaintiff when she was driving the church bus and the plaintiff would send her children to Sunday school. The plaintiff also attended the church functions starting around 2008. In addition, Ms. Mann and the plaintiff would meet up for tea and coffee and go for walks. She was not aware that the plaintiff had suffered any workplace injury. Ms. Mann also saw the plaintiff occasionally working at No Frills prior to the Accidents, and does not recall observing any physical limitations at the time. The plaintiff would walk three to four blocks from the plaintiff's home to Ms. Mann's house and drop off the girls for sleepovers. According to Ms. Mann, the plaintiff went downhill after the Accidents. At the Tim Hortons meeting the plaintiff complained about the chair being uncomfortable, and Ms. Mann observed her to be anxious and have difficulty forming thoughts and sentences. According to Ms. Mann "she is not the person I used to enjoy". Ms. Mann testified the plaintiff and one of her daughters showed up on the quad, with Morgana driving, sometime around 2016. The plaintiff seemed uncomfortable as a result of being on the quad.
- [57] Rebecca Jackson, one of the owners of Elite Auto, also testified at the trial. She said would not hire the plaintiff back if she had the opportunity to do so because her memory was too poor. Ms. Jackson testified that the plaintiff's position at Elite Auto arose informally. The plaintiff had been a customer and Ms. Jackson mentioned they could use some extra help. The plaintiff said she was interested and was hired. Her evidence was that the plaintiff's rate of pay was not discussed until after she was hired. She testified that the plaintiff's performance was adversely impacted by poor memory and she made mistakes, such as forgetting to book appointments into the log. She also testified that the plaintiff was sometimes rude and would at times appear to be daydreaming and just kind of zone out.

- [58] The plaintiff's father, Edward Bidulka, also testified. He previously had a stroke and admitted that his memory is not good. He testified that after the plaintiff's Workplace Injury it took time for her to improve but that her condition got "pretty good after a while". Mr. Bidulka agreed that the plaintiff was raising her girls as she had been raised--helping out with chores and working hard around the house--and her involving the children in chores was not something that had not arose simply because of the Accidents.
- [59] The plaintiff's oldest daughter also testified. Her evidence confirmed much of her mother's evidence, although based on her evidence the plaintiff had greater residual ability to do some housework and chores. She describes her mother now as "an empty shell". She testified she has observed her mother have seizures, the first being the seizure in 2009.

2. Expert Evidence

a) Dr. Spivak

- [60] Dr. Mitchell Spivak, a psychiatrist, testified for the plaintiff. Dr. Spivak was qualified to give expert opinion evidence on the diagnosis, treatment, management, impairment, causation, and prognosis of mental disorders, including maladaptation relating to mood and behaviour. Dr. Spivak diagnosed the plaintiff with an adjustment disorder with anxiety and depression, meaning an inability to adjust to a stressors, with accompanying symptoms of depression and anxiety. According to Dr. Spivak, the plaintiff's condition and mental health issues correlate directly with her ongoing experience of pain and her subsequent functional limitations. According to Dr. Spivak, the source or cause of the plaintiff's pain is also the cause of her adjustment disorder. Dr. Spivak was of the opinion the plaintiff's pain had arisen from the Accidents.

b) Dr. McKenzie

- [61] Dr. Gerard McKenzie, an orthopedic surgeon, also testified for the plaintiff. Dr. McKenzie was qualified to give expert opinion evidence in the area of orthopedics, in particular regarding individuals who may have been injured in motor vehicle collisions and who suffer from musculoskeletal problems, including evidence with respect to issues of causation, diagnosis, treatment recommendations, and prognosis. During his examination of the plaintiff, Dr. McKenzie noted some loss of flexion and diffuse tenderness in the plaintiff's neck through to her mid-thoracic spine. Dr. McKenzie also noted that her lumbar extension was quite limited and that she had tenderness in her lower back.
- [62] Dr. McKenzie's opinion was the Accidents caused the plaintiff chronic myofascial pain in her neck and upper back as well as lower back pain. Dr. McKenzie observed the plaintiff was experiencing sleep disturbance, anxiety, and depression. In Dr. McKenzie's opinion, it was unlikely that the plaintiff's neck, lower, and upper back pain would resolve with the passage of time. Dr. McKenzie observed that the plaintiff's reported difficulties with work, house and yard work, and recreational activities were all consistent with a chronic pain condition. Dr. McKenzie recommended the plaintiff continue on a stretching, strengthening exercise

program, but was of the opinion that chiropractic treatment was not appropriate. It was his opinion that massage therapy might be appropriate particularly for the myofascial pain in the plaintiff's neck and upper back area.

c) Dr. Waseem

[63] Dr. Zeeshan Waseem, a physiatrist, also testified for the plaintiff. Dr. Waseem was qualified to provide expert opinion evidence in the area of physical medicine and rehabilitation concerning individuals who may have been injured in motor vehicle collisions and suffer from soft tissue or myofascial pain conditions, including causation, diagnosis, treatment recommendations, and prognosis for such patients.

[64] Dr. Waseem examined the plaintiff on April 5, 2017 and observed muscle stiffness, increased muscle tone, spasms, taught bands, and trigger points were all notable in the plaintiff's cervical spine. He observed that the plaintiff's thoracic spine was normal, and was of the opinion that the Accidents had not aggravated any earlier injury sustained by the plaintiff in that area. However, the plaintiff's lumbar spine reflected the same muscle stiffness, increased muscle tone, spasms, taut bands, and trigger points as her neck. It was his opinion that the plaintiff's physical conditions were probably caused by the Accidents and that the plaintiff's prognosis for recovery was poor.

[65] With respect to further treatment, Dr. Waseem recommended the plaintiff to enrol in a multidisciplinary chronic pain program for one month. He also recommended a referral to a physiatrist for trigger point injections to treat her chronic myofascial pain. Following those treatments, he recommended the plaintiff to enrol in an active rehabilitation program for three months and then transition into a gym setting with annual membership and bimonthly personal training. His opinion was that passive facility-based modalities, by which I understand him to mean massage therapy and chiropractic treatment, should be avoided at that point in the plaintiff's recovery. Dr. Waseem was also of the opinion that a referral to a psychologist would be beneficial. Finally, he recommended an occupational therapist attend at the plaintiff's home to provide advice regarding proper body mechanics, load splitting techniques, pacing, and potentially provision and use of adaptive equipment and devices to increase her level of activity in her home. He was of the view that four to six sessions with an occupational therapist would suffice.

d) Dr. Tessler

[66] By agreement between the parties the report of Dr. Bernard Tessler, a neurologist, was tendered as expert opinion evidence. Dr. Tessler examined the plaintiff in February 2015. His opinion was that the Accident resulted in the plaintiff experiencing chronic pain. Dr. Tessler did not find a causal relationship between the plaintiff's seizures and the Accidents. He opined that the plaintiff had cervicogenic headaches which had been aggravated by neck movements.

3. Conclusion

- [67] The defendants called no expert medical evidence, nor did they displace the sound evidentiary foundation of causation through their cross-examination of the plaintiff's medical experts.
- [68] Based on my consideration of the evidence, including the plaintiff's testimony and the objective findings of the physicians who examined her and their expert opinions, I find the Accidents caused the plaintiff to develop chronic myofascial pain in her neck and upper and lower back which is unlikely to resolve. Even if the plaintiff had a pre-existing condition involving pain in her lower back as a result of the Workplace Injury which was aggravated by the Accidents for a period of time, I would have found such an injury was indivisible from her chronic pain condition caused by the Accidents. I also find on a balance of probabilities that the Accidents caused the plaintiff to develop cervicogenic headaches. The plaintiff's evidence was that her anxiety, depression, and fatigue all arose after the Accidents. The fact that she had no pre-existing condition of this nature, and that there was no other potential cause presented, support my further finding that on a balance of probabilities the Accidents caused the plaintiff's adjustment disorder with anxiety and depression. However, on a balance of probabilities I do not find her memory problems or seizures were caused by the Accidents.

VII. DAMAGES

[69] The Plaintiff seeks an award of damages for:

- a. non-pecuniary damages;
- b. past and future loss of earning capacity;
- c. costs of future care; and
- d. special damages.

A. Non-Pecuniary Damages

- [70] Non-pecuniary damages are intended to compensate a plaintiff for pain, suffering, loss of enjoyment of life, and loss of amenities: *Trites v. Penner*, 2010 BCSC 882 at para. 188. Awards made in comparable cases are used to assess damages that are fair and reasonable to both parties, although each case depends on its unique set of facts: *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229 at 261; *Trites* at para. 189.
- [71] Non-pecuniary damages are to be assessed in accordance with the non-exhaustive list of factors articulated in *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46:
- (a) age of the plaintiff;
 - (b) nature of the injury;
 - (c) severity and duration of pain;

- (d) disability;
- (e) emotional suffering;
- (f) loss or impairment of life;
- (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 penalize the plaintiff).

[72] The plaintiff relies on the following cases:

- L.A.F. v. G.M.F.C. Ltd., 2019 BCSC 2252 - plaintiff awarded \$200,000, which was reduced to \$132,000 to account for the impact of the plaintiff's pre-existing physical and psychological conditions;
- Johnstone v. Rogic, 2018 BCSC 988 - plaintiff awarded \$145,000, which was not reduced because the plaintiff had been effectively managing her pre-existing conditions;
- Pike v. Kasiri, 2016 BCSC 555 - plaintiff awarded \$190,000, which was reduced to \$152,000 on the basis of crumbling skull principle;
- Fancello v. Cupskey, 2019 BCSC 1724 - plaintiff awarded \$175,000;
- Chavez-Salinas v. Tower, 2017 BCSC 2068 - plaintiff awarded \$180,000, this amount included a 10% contingency for her pre-existing conditions; and
- Lo v. Vos, 2019 BCSC 1306 - plaintiff awarded \$175,000, which was reduced by 20% to account for her pre-existing back condition.

[73] The plaintiff submits the Lo case is the most analogous to the circumstances in this case. Based on those cases, the plaintiff submits the appropriate award for non-pecuniary damages in this case is \$175,000.

[74] The defendant relies on the following cases in support of its position that the appropriate award of damages in this case is somewhere between \$50,000 and \$60,000:

- Dupuis v. Tomczak, 2016 BCSC 2225 - plaintiff awarded \$65,000;
- Olson v. Yelland, 2016 BCSC 216 - plaintiff awarded \$60,000;
- Dennison v. Jensen, 2019 BCSC 725 - plaintiff awarded \$50,000; and
- Willing v. Ayles, 2009 BCSC 1035 - plaintiffs found to have exaggerated their symptoms awarded \$20,000 and \$35,000;

- [75] In this case the plaintiff is 40 years old and will probably suffer pain in her neck, shoulders, and upper and lower back, as well as occasional leg pain, headaches, and some numbness in her hand for the rest of her life. Her mood is also likely to continue to be impacted by her pain. The plaintiff remains able to complete most housekeeping tasks with proper pacing.
- [76] I find the injuries suffered by the plaintiff as a result of the Accidents entitle her to non-pecuniary damages in the amount of \$165,000.

B. Past and Future Loss of Earning Capacity

1. Assessing Past and Future Loss of Earning Capacity

- [77] Assessing past and future loss of earning capacity involves consideration of hypothetical events. A hypothetical event will be taken into consideration as long as it is established to be a real and substantial possibility and not mere speculation: *Athey* at para. 27; *Grewal v. Naumann*, 2017 BCCA 158 at para. 48; *Rousta v. MacKay*, 2018 BCCA 29 at paras. 14 and 17.
- [78] Once a real and substantial possibility of the hypothetical event is proven, the plaintiff may prove the valuation of that loss of earning capacity using either an earnings approach, whereby the court compares what the plaintiff probably would have earned but for the injury with what they will probably earn in the injured condition, or a capital asset approach: *Perren v. Lalari*, 2010 BCCA 140 at para. 32. Regardless of the approach, the court makes an assessment of the loss as opposed to a mechanical calculation: *Grewal* at para. 54.
- [79] Because the assessment involves predictions based on hypothetical events, allowance must be made for general and specific contingencies, both positive and negative: *Hussack v. Chilliwack School District No. 33*, 2011 BCCA 258 at paras. 92-93.
- [80] In *Pololos v. Cinnamon-Lopez*, 2016 BCSC 81 at para. 133, Justice Voith summarized many of the legal principles governing claims for loss of future income earning capacity:
- 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;
 - 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;
 - 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;
 - 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.
- [81] In Rosvold v. Dunlop, 2001 BCCA 1 at para. 10, the Court of Appeal identified several factors relevant to assessing the erosion of a plaintiff's capital asset representing their ability to earn income in the future:
- [1] whether the plaintiff has been rendered less capable overall from earning income from all types of employment;
 - [2] whether the plaintiff is less marketable or attractive as an employee to potential employers;
 - [3] whether the plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to him, had he not been injured; and
 - [4] whether the plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market.
- [82] After determining the impairment of a plaintiff's earning capacity and the real and substantial possibility of the future the plaintiff would have had if the accident had not happened, and the present value of the difference between the two, the court must still consider and be satisfied of the overall fairness and reasonableness of the award: Rosvold at para. 11.
2. The Plaintiff's Claim for Past and Future Loss of Earning Capacity
- [83] The plaintiff's loss of earning capacity claim adopts an earnings approach to assess the loss and is premised on the hypothetical that but for the Accidents, the plaintiff would have completed her ABT Program in the spring of 2012, been able to participate in proper practicum rather than one centred in Northern Lights College's offices, and begun a full-time career in her field by June 1, 2013. Based on this hypothetical her past loss of earning capacity would cover the 6.8 years prior to trial. The plaintiff proposes it is a real and substantial possibility she would have earned an hourly rate of \$16.50, which is the median of the plaintiff's hourly rates at Strike Energy, DIR Bookkeeping, and Minute Muffler/Elite Auto, and worked a 40 hour week, earning an annual income of \$34,320 before taxes. The plaintiff submits that after deducting her mitigation earnings of \$21,474.75, her past loss of income should be assessed at \$184,456.25, net of taxes applied at 12%. The plaintiff's future

loss of earning capacity claim is premised on the same hypothetical scenario with the retirement at age 70. Based on the evidence of Mr. Pivnenko, the plaintiff submits the present value of her future loss of earning capacity from her office career is \$787,472, reduced for contingencies to \$600,000.

- [84] In addition to a loss of future earning capacity assessed using the hypothetical scenario of a full-time office administrative personnel, the plaintiff also claims of future earning capacity loss of \$114,615-\$132,553 for income she submits she would have earned had she been able to return selling her baking at the farmers markets and continue doing so until between age 65 and 70.
- [85] The defendants submit the Accidents did not diminish the plaintiff's earning capacity, or in the alternative that any loss of past earning capacity was negligible. They submit that the opinion of Dr. Powers support their position that the plaintiff's vocational capacities, as measured by her interest and intellectual abilities, have remained consistent pre-Accident and post-Accident. They submit an award between \$5,000 and \$10,000 would be appropriate, accounting for a 12% tax reduction. The defendants also deny the plaintiff suffered a diminished capacity to earn income in the future. In the alternative, they submit that any loss in income should be assessed based on a capital asset approach or based on a hybrid approach by establishing an amount for a set period of time, which the defendants submit would appropriately be assessed a \$12,500 a year for two years, resulting in a \$25,000 award.
- [86] The plaintiff concedes the seizures, which she no longer claims were caused by the Accidents, will impair and impact the rest of her life. Because of them she cannot drive, they are extremely painful, and she believes they are part of the reason she has had difficulty maintaining employment. The plaintiff also admits she was let go from Elite Auto because she badmouthed her supervisor to a few people and word eventually got back to him.
- [87] I find the plaintiff's inability to maintain consistent employment over the past eight years has been largely due to her poor memory and difficulty concentrating as well as a lack of adequate skills, even in her field of study. I find that none of those factors are the result of the Accidents. Indeed, even before the Accidents the plaintiff's work history was a series of short-term jobs marked by interpersonal conflicts and concerns about a lack of professionalism and judgement. People have continued to express these same concerns about the plaintiff's work after the Accidents.
- [88] The plaintiff relies on the evidence of Dr. Dean Powers (Psy.D.), who was qualified to provide expert opinion evidence on psycho-vocational rehabilitation, including the residual employability of persons with disabling conditions and the salary ranges of various vocational alternatives. Dr. Powers is not a psychologist. According to Dr. Powers, the reasons the plaintiff left her various positions is only nominally relevant to his analysis, which is based on her qualifications, skills, medical restrictions, and her ability to sustain employment. However, Dr. Powers conceded that a poor reputation can adversely impact a person's ability to obtain employment in a smaller community.

- [89] Dr. Powers' opinion was that the plaintiff has unresolved issues, including cognitive functioning impairment, and that her test scores reveal she is currently not competitive in the job market. Although Dr. Power initially testified the plaintiff's intellectual abilities had diminished since the Accidents, he based that opinion on the results of the plaintiff's testing with him being lower than the marks in the ABT Program and his assumption those courses were graded on a curve, but there was no evidence that was the case. He later agreed the comparison he used to form his opinion would not be possible without the raw data from the plaintiff's ABT Program, which he did not have.
- [90] Dr. Powers assessed the plaintiff's current intellectual ability to be "low average" compared to others of her age level (although average compared to others at her functional education level, which he found to be grade 10 ½).
- [91] In Dr. Powers' opinion the plaintiff's main problem with employment is an inability to sustain employment. However, he was unable to say when her difficulties sustaining employment began and so could not link this to the Accidents. As part of his assessment, Dr. Powers observed the plaintiff's behavior as she was on the phone trying to arrange for a taxi. He observed her manner to be "short" when dealing with both the taxi dispatcher and driver. These observations are consistent with my observations of the plaintiff while testifying and the history of difficulties the plaintiff had with various employers.
- [92] I find the plaintiff has failed to establish it is a real and substantial possibility she would have worked 40 hours per week at \$16.50 per hours consistently after completing her ABT Program. However, I find it is reasonable to infer the plaintiff's physical and mental injuries caused by the Accidents have, as a matter of logic, diminished her earning capacity to some degree: *Morlan v. Barrett*, 2012 BCCA 66 at para. 41.
- [93] I find it is reasonable to assume a more significant negative contingency to account for what I consider to be the real and substantial possibility that after the Accidents the plaintiff would have, and will, continue to experience periods of unemployment and part-time work throughout her working life. I find the Accidents eroded the plaintiff's past and future earning capacity by \$5,000 per year.
- [94] Based on those findings and assumptions, I assess the plaintiff's past loss of earning capacity as \$40,000 (net of taxes).
- [95] I find it is a real and substantial possibility the plaintiff would have retired at age 65. Based on those same assumptions and findings and the expert evidence of Mr. Pivnenko on the present value of future streams of income, I assess the plaintiff's future loss of income as \$100,000.

[96] I make no award for any loss of earning capacity associated with the farmer's market income. This was an activity the plaintiff did with her daughters, but they have grown older and I find she would not have continued with the undertaking without them. Further, I find the plaintiff did not consider the farmer's market to have money making potential of any significance. This is reflected by the fact that she did not report any income earned from it on her income taxes.

C. Cost of Future Care

[97] Chief Justice Dickson described an award of damages for costs of future care in *Andrews* at 241-242:

In theory a claim for the cost of future care is a pecuniary claim for the amount which may reasonably be expected to be expended in putting the injured party in the position he would have been in if he had not sustained the injury. Obviously, a plaintiff who has been gravely and permanently impaired can never be put in the position he would have been in if the tort had not been committed. To this extent, *restitutio in integrum* is not possible. Money is a barren substitute for health and personal happiness, but to the extent within reason that money can be used to sustain or improve the mental or physical health of the injured person it may properly form part of a claim.

[98] In *Warick v. Diwell*, 2017 BCSC 68, *aff'd* 2018 BCCA 53, Justice Schultes summarized the legal principles governing the assessment of an award for the cost of future care:

[202] With respect to the standard of proof to be met, "[a] plaintiff who seeks compensation for future pecuniary loss need not prove on a balance of probabilities that she will require future care because of the wrong done to her. If the plaintiff establishes a real and substantial risk of future pecuniary loss, she is entitled to compensation...": *Graham v. Rourke* (1990), 74 D.L.R. (4th) 1 (Ont. C.A.).

[203] Claims made for future care must be both medically justified and reasonable. An award "should reflect what the evidence establishes is reasonably necessary to preserve the plaintiff's health": *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.) at paras. 199 and 201; *aff'd* (1987), 49 B.C.L.R. (2d) 99 (C.A.).

[204] This requirement of medical justification, as opposed to medical necessity "requires only some evidence that the expense claimed is directly related to the disability arising out of the accident, and is incurred with a view toward ameliorating its impact": *Harrington v. Sangha*, 2011 BCSC 1035, at para. 151.

[205] The question has often been framed as being whether a reasonably-minded person of ample means would be ready to incur a particular expense: *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229 at p. 245.

- [206] The evidence with respect to the specific care required does not need to be provided by a medical doctor: *Jacobsen v. Nike Canada Ltd.* (1996), 19 B.C.L.R. (3d) 63, (S.C.) at para. 182. However, there must be some evidentiary link drawn between the physician's assessment of pain, disability, and recommended treatment and the care recommended by a qualified health care professional: *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 39.
- [207] Damages for the cost of future care are assessed, not mathematically calculated: *Uhrovic v. Masjhuri*, 2008 BCCA 462 at paras. 28-31. There is an inherent degree of uncertainty and discretion in making such awards. Because awards are made "once and for all" at the time of trial, judges must "peer into the future" and fix the damages "as best they can". This includes allowing contingencies for the possibility that the future may differ from what the evidence at trial indicates: *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9, at para. 21.
- [208] While no award should be made in relation to an expense that the plaintiff will not actually incur (*Izony v. Weidlich*, 2006 BCSC 1315 at para. 74), the focus of inquiry when a justified item or service was previously unused, is whether it is "likely to be incurred on a going forward basis": *Gilbert v. Bottle*, 2011 BCSC 1389 at para. 251.
- [209] A plaintiff is not entitled to an award for that portion of their costs of future care that will be publicly funded. However, the risk that access to public funds may be lost in future is a proper basis to provide a contingency in the award: *Boren v. Vancouver Resource Society for the Physically Disabled*, 2003 BCCA 388 at para. 25.)
- [Footnote omitted.]
- [99] Russell O'Neill, an occupational therapist, prepared a report regarding the costs of future care as recommended by Dr. McKenzie, Dr. Tessler, Dr. Spivak, Dr. Powers, and Dr. Waseem, which was tendered by consent. The plaintiff seeks an award for the costs of the following future treatments, services, and equipment:

Pain Clinic

\$12,372

Living expenses (pain clinic)

\$4,306

Travel (pain clinic)

\$1,200

Psychologist

\$3,143

Kinesiologist (3-month program)

\$1,946

Occupational therapist (3-month program)

\$333

Kinesiologist - ongoing (remainder of year 1, including taxes)

\$1,459

Kinesiologist - ongoing (from year two to age 75, including taxes)

\$44,847

Gym pass (to age 65)

\$15,387

Gym pass (after age 65 indeterminate)

\$1,500

Massage therapy (to age 80, including taxes)

\$27,629

Occupational therapist (one time)

\$1,109

Vocational consultant (one time, including taxes)

\$2,598

Advil (\$547.50 annually for lifetime @ \$29,087)

\$15,925.13

Tylenol (\$25.52 annually for lifetime @ \$29,087)

\$742.30

[100] Based on the evidence presented at trial, I am not satisfied the plaintiff has established there is a real and substantial possibility she will incur the cost of attending the recommended pain clinic. There was no evidence provided about the criteria for such a program, its availability, or whether an application submitted by the plaintiff would be accepted. I find that the plaintiff's attendance at a pain clinic is merely speculative.

[101] With the exception of the vocational consultant, which I find is not a potential expense caused by the Accident, I find the other future care expenses are medically justifiable and the costs forecast reasonable.

D. Special Damages

[102] The amounts incurred by the plaintiff to date are not disputed. Nonetheless, the issue is whether they were medically justified and reasonable. I find the physiotherapy and massage therapy to be medically justified and their costs reasonable. However, I am not satisfied the back seat cushion wedge and the lavender stones were medically necessary, therefore I make no allowance for those items. The defendant does not dispute the reimbursement for other equipment and supplements the plaintiff has claimed.

[103] I find the expenses incurred for chiropractic treatment subsequent to the date of Dr. McKenzie's report, in which he recommended the plaintiff discontinue such treatment, are not medically justified. Any mileage claim associated with those visits is also disallowed.

[104] There was insufficient evidence explaining the nature of the treatments provided by Tracy Heartt. I find those treatments are not medically justified. Any mileage claim associated with those visits is also disallowed.

VIII. CONCLUSION

[105] In summary, I award the plaintiff the following damages:

Non-pecuniary damages

\$165,000

Loss of earning capacity

\$140,000

Cost of future care

\$114,020.43

Special damages

\$7,345.98

Total

\$426,366.41

IX. COSTS

[106] The plaintiff was the successful party and would normally be entitled to her costs at Scale B to be assessed by the Registrar and payable forthwith upon assessment. If the issue of costs is in dispute, the parties are to submit written submissions limited to five pages each, on a schedule agreeable to them but in any event all submissions are to be submitted before August 10, 2020. The court will decide whether further oral submissions are necessary after reviewing the written submissions.

"Jackson J."

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