

CANADA / JUDGMENT

Buezo v. Ng

2022 BCSC 857

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Supreme Court of British Columbia

DECIDED

20 May 2022

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2022 BCSC 857 Buezo v. Ng

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Buezo v. Ng,

2022 BCSC 857

Date: 20220520

Docket: M213609

Registry: New Westminster

Between:

Gladis Ulloa Buezo

Plaintiff

And

Lucas Ng

Defendant

Before: The Honourable Justice Lamb

Reasons for Judgment

Counsel for the Plaintiff:

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Place and Dates of Trial:

New Westminster, B.C.

January 31-February 4, 2022

February 7-11, 2022

Place and Date of Judgment:

New Westminster, B.C.

May 20, 2022

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Introduction

- [1] On January 17, 2018, Gladis Buezo was crossing the street when she was struck by a vehicle driven by the defendant. The defendant admits liability for the accident.
- [2] Ms. Buezo claims damages for chronic pain and the psychological consequences of the accident, which she says have affected nearly every aspect of her life.
- [3] The defendant concedes that Ms. Buezo suffered soft tissue injuries as a result of the accident and that she developed chronic pain with elements of anxiety. However, the defendant disputes the gravity of Ms. Buezo's injuries. The defendant argues that Ms. Buezo's evidence regarding the severity of her pain and its impact on her life was unreliable. Further, the defendant says that Ms. Buezo failed to mitigate her losses by following an appropriate treatment plan and that there is still potential for her condition to improve. The defendant does not accept that Ms. Buezo is permanently functionally impaired.

Credibility and Reliability

- [4] In a case where there is little objective evidence of ongoing injury but significant complaints of pain and disability, the defendant says that the court should be cautious about accepting the plaintiff's complaints as reliable.
- [5] The evidentiary principles to be applied in such circumstances were helpfully summarized by Justice Skolrood in *Radacina v. Aquino*, 2020 BCSC 1143:
- [92] Numerous authorities have discussed the principles governing the assessment of credibility: see in particular *Faryna v. Chorny*, [1952] 2 D.L.R. 354 at 356-357 (B.C.C.A.); *Bradshaw v. Stenner*, 2010 BCSC 1398 at paras. 185-87, *aff'd* 2012 BCCA 296, leave to appeal *ref'd* [2012] S.C.C.A. No. 392. In *Bradshaw*, Madam Justice Dillon held that conflicting testimony should be assessed in light of the "preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions" (at para. 187, citing *Overseas Investments (1986) Ltd. v. Cornwall Developments Ltd.* (1993), 12 Alta. L.R. (3d) 298 at para. 13 (Q.B.)).
- [93] In addition to the approach advanced by Justice Dillon in *Bradshaw*, Justice Abrioux, as he then was, in *Karim v. Li*, 2015 BCSC 498 at para. 89, identified a number of principles that may inform the court's approach in cases in which there is an absence of objective medical findings or where those findings are out of proportion to the symptoms claimed:
- no one can expect compensation in the absence of convincing evidence that complaints of pain are true reflections of a continuing injury: *Price v. Kostryba* (1982), 70 B.C.L.R. 397 at 399 (S.C.);
 - every injured person has a different understanding of his or her own complaints and injuries and it falls to judges to translate injuries to damages: *Price* at 397;

- where there is little or no objective evidence of continuing injury and where complaints of pain persist for long periods extending beyond the expected resolution, the court should be exceedingly careful to assess assertions in light of the surrounding circumstances including the medical evidence: Price at 399; Tai v. De Busscher, 2007 BCCA 371 at para. 41;
- it is the doctor's function to take the patient's complaints at face value and offer an opinion based on them and it is for the court to assess credibility. If there is a medical or other reason for the doctor to suspect the plaintiff's complaints are not genuine, are inconsistent with the clinical picture or are inconsistent with the known course of such an injury, the court must be told of that. But it is not the doctor's job to conduct an investigation beyond the confines of the examining room: Edmondson v. Payer, 2011 BCSC 118 at para. 77, aff'd 2012 BCCA 114; and
- in the absence of objective signs of injury, the court's reliance on the medical profession must proceed from the facts it finds, and must seek congruence between those facts and the advice offered by the medical witnesses as to the possible medical consequences and the potential duration of the injuries: Fan (Guardian ad litem of) v. Chana, 2009 BCSC 1127 at para. 73, aff'd 2011 BCCA 516.

[6] Justice Skolrood went on to explain the distinction between credibility and reliability:

[94] Credibility refers to the veracity of a witness's testimony whereas reliability is concerned with the accuracy of the testimony: R. v. Morrissey (1995), 22 O.R. (3d) 514 at 526 (C.A.).

[95] The distinction is well summarized by the Ontario Court of Appeal in R. v. H.C., 2009 ONCA 56 at para. 41:

Credibility and reliability are different. Credibility has to do with a witness's veracity, reliability with the accuracy of the witness's testimony. Accuracy engages consideration of the witness's ability to accurately

i. observe;

ii. recall; and

iii. recount

events in issue. Any witness whose evidence on an issue is not credible cannot give reliable evidence on the same point. Credibility, on the other hand, is not a proxy for reliability: a credible witness may give unreliable evidence: R. v. Morrissey (1995), 22 O.R. (3d) 514, at 526 (C.A.).

[96] Credibility and reliability are not all or nothing propositions. A trier of fact may believe all, part or none of a witness's evidence, and may attach different weight to different parts of a witness's evidence: R. v. R. (D.), [1996] 2 S.C.R. 291 at para. 93; R. v. Howe (2005), 192 C.C.C. (3d) 480 at para. 44 (Ont. C.A.).

- [7] The assessment of credibility is complicated in this case because both Ms. Buezo and her husband, Jose Hernandez, gave evidence at trial with the assistance of a Spanish-speaking interpreter. The interpreter attended by video for the first day of Ms. Buezo's testimony, which only compounded the challenges inherent in receiving evidence through an interpreter. These challenges were aptly described by Justice Sharma at para. 101 of *Kim v. Khaw*, 2014 BCSC 2221:
- [101] There is no doubt that hearing evidence through the filter of an interpreter can be challenging: *Wang v. Hu*, 2003 BCSC 552 at para. 24; *R. v. A.F.*, 2010 ONSC 5824 at para. 87. The court must be alive to the fact that the impact or nuance of interpreted testimony may be "lost in translation", especially during cross-examination. For example, inconsistencies in explanations or expressions may be the inevitable result of there being no exact translation, or perhaps many translations, for an English word, phrase or concept in the foreign language.
- [8] In particular, in considering the evidence identified by the defendant that might reflect negatively on Ms. Buezo's credibility, I have not ignored the fact that a number of experts spoke to Ms. Buezo through an interpreter, some with additional assistance from her daughter Joanna. As a further complication, the psychiatric assessments took place by videoconference.
- [9] It is within this factual context and legal framework that I will assess the evidence in this case.

Background

- [10] Ms. Buezo was born in Honduras in May 1981. Her parents were coffee farmers who also raised livestock. Ms. Buezo was the eldest of nine children. As a result, she started helping on the farm and looking after her siblings when she was very young. She attended elementary school with limited success and left at age 16 after completing grade six.
- [11] When she was 17 years old, Ms. Buezo met her husband, and they started living together. Their son, Antonio, was born the following year. In 2002, Ms. Buezo and Mr. Hernandez left their young son in Honduras and travelled north, eventually crossing the border into Canada with the assistance of "Coyotes", individuals who might be described as migrant smugglers. The journey was dangerous and harrowing, but as Mr. Hernandez tells it, the family brought with them a knapsack full of dreams for their lives here.
- [12] Shortly after arriving in Canada, Ms. Buezo and Mr. Hernandez applied for and were granted refugee status. They found rental accommodation in Vancouver. Mr. Hernandez secured employment, and Ms. Buezo started studying English at Vancouver Community College. Their daughter Joanna was born in August 2003.

- [13] In 2004, Ms. Buezo completed a course that allowed her to look after children in her home, which she did for the next two years. In 2006, after becoming a permanent resident, Ms. Buezo travelled to Honduras to visit her family and to bring Antonio to Canada. She stopped babysitting other children at that point: Antonio has special needs that required her extra supervision and support.
- [14] For the next two years, Ms. Buezo took more courses at the local community centre to improve her English and to prepare for the citizenship exam. In 2007, Ms. Buezo's younger daughter Yocelin was born. In 2008, Ms. Buezo became a Canadian citizen. Mr. Hernandez passed the citizenship exam a few months later. By then, he was working in construction with the company that continues to employ him.
- [15] In 2010, Ms. Buezo started working as a cleaner and continued to do so until the accident. The details of her employment will be reviewed when I address loss of earning capacity.
- [16] In 2016, Ms. Buezo and Mr. Hernandez were both very proud to buy their first home, a townhouse in Surrey, fulfilling one of the dreams from their knapsack.
- [17] Prior to the accident, Ms. Buezo was a meticulous housekeeper. She completed almost all the domestic chores for her family without assistance from her husband or then young children.

The Accident and its Aftermath

- [18] Early on the morning of January 17, 2018, Ms. Buezo was on her way to catch the bus for her commute to work when she was struck by the defendant's vehicle as she crossed the road. The defendant was turning left. His vehicle struck Ms. Buezo on the left side of her body and on her right calf. She fell to the ground. She extended her left hand to break her fall.
- [19] When she didn't get up on her own, Ms. Buezo was moved to the side of the road by the defendant and a passerby. Ms. Buezo called her husband. Mr. Hernandez and their oldest daughter Joanna rushed to the scene, which was only a few minutes away from their home. Ms. Buezo was very upset, and her family was understandably worried. Shortly after the accident, Ms. Buezo noticed pain in her neck and back and the left side of her body. Her right calf hurt. Eventually, an ambulance arrived and took Ms. Buezo to the hospital.
- [20] The day after the accident, she went to see her family doctor, Dr. Hamid Shabbir, in Vancouver. Dr. Shabbir recommended that she take two weeks off work. Mr. Hernandez took three or four days off work to look after her.
- [21] Ms. Buezo described the pain in the first few months after the accident as unbearable. She says she was quite depressed and had lots of nightmares.
- [22] Dr. Shabbir recommended physiotherapy and wrote a series of notes stating that Ms. Buezo was unable to work until she recovered. The last of these notes was dated May 2, 2018.

- [23] In early 2018, Ms. Buezo became a patient of Dr. Benitez-Lazo, a Spanish-speaking general practitioner with an office in Surrey. She saw him initially for non-accident-related health issues until he eventually agreed in September 2018 to treat her accident-related complaints. As of that date, Ms. Buezo continued to complain of pain primarily in her low back. Dr. Benitez-Lazo referred her to physiotherapy, kinesiology, chiropractic and acupuncture. He described her as a poor historian who is very disorganized when presenting her medical concerns.
- [24] From August 14, 2018 to March 14, 2019, Ms. Buezo attended counselling with Spanish-speaking psychologist, Dr. Maria Undurraga. According to Ms. Buezo, Dr. Undurraga taught her relaxation exercises that helped quite a bit with her "terrible depression". Although she testified that she stopped attending when she had bladder surgery, Dr. Undurraga's records confirm that Ms. Buezo completed the ten sessions for which funding was pre-approved. Dr. Benitez-Lazo was apparently unaware of this counselling when it was happening.
- [25] On May 17, 2019, Ms. Buezo underwent bladder surgery. There is no evidence suggesting that this surgery was related to the accident.
- [26] After the accident, Ms. Buezo did not return to work as a cleaner. She remained off work entirely until February 2021 when she was hired as a playground supervisor for one hour per day at an elementary school in Surrey. She continues to work in that capacity.

Expert and other Medical Evidence

- [27] The following experts prepared reports that were filed as evidence at trial:
- 1) Dr. Anibal Bohorquez, a physiatrist who assessed the plaintiff at the request of her counsel on October 12, 2021;
 - 2) Dominic Shew, an occupational therapist who performed a functional capacity examination at the request of plaintiff's counsel on September 27 and October 18, 2021;
 - 3) Dr. Todd Bentley, a physiatrist who assessed the plaintiff at the request of the defendant's counsel on April 28, 2021;
 - 4) Ralph Cheesman, an occupational therapist who performed a functional capacity examination at the request of defendant's counsel on October 6, 2021;
 - 5) Dr. Kulwant Riar, a psychiatrist who assessed the plaintiff at the request of the defendant's counsel on June 2, 2021; and
 - 6) Dr. Alex Leung, a psychiatrist who assessed the plaintiff on November 12, 2021, and prepared a rebuttal report in response to Dr. Riar's report.
- [28] Dr. Benitez-Lazo, the plaintiff's general practitioner, provided non-opinion evidence at trial regarding his observations and recommendations.

- [29] Overall, the experts agree that Ms. Buezo is experiencing chronic pain with psychological factors that aggravate her perception of pain.
- [30] I found Dr. Bohorquez to be a very helpful witness, in part because he could communicate directly with the plaintiff in Spanish and in part because his evidence was balanced and objective. Dr. Bohorquez prepared a report dated October 12, 2021 following an assessment on that date. On exam, Dr. Bohorquez found few functional limitations but noted that Ms. Buezo reported pain with movement. Dr. Bohorquez diagnosed her with chronic myofascial pain, which he described as a "regional pain condition associated with tight bands of muscle" in her neck, upper back, mid-back, lower back, gluteal and hip muscles.
- [31] Dr. Bentley reached a similar diagnosis: "chronic pain disorder with symmetrical widespread body pain". When examined by Dr. Bentley, Ms. Buezo had full range of motion but complained of pain.
- [32] The physiatrists provided similar explanations as to why Ms. Buezo may complain of more pain than one might expect she would have almost four years after suffering soft tissue injuries. Dr. Bohorquez opined that, over time, other parts of Ms. Buezo's body were affected by referred pain and a hyperactive central nervous system. As he explained, because of excessive pain stimulus to the brain, chronic pain patients become desensitized so that the brain experiences pain in circumstances that other people would perceive as benign. Dr. Bentley agreed that chronic pain could lead to hypersensitization of the central nervous system, leading to fairly significant pain in response to minor touching.
- [33] Dr. Bohorquez confirmed that chronic pain is very difficult to treat; he opined that the prognosis for full symptom resolution is low now that Ms. Buezo has entered a cycle of chronic pain, poor sleep and poor mood. He said that the best option for chronic pain patients is to be active despite discomfort. He believes that pursuing cognitive behavioural therapy with a psychologist would help Ms. Buezo immensely to overcome her fear of being more active, which would improve her function though not necessarily alleviate all her pain. On cross-examination, Dr. Bohorquez agreed that Ms. Buezo could potentially learn to work through any ongoing discomfort.
- [34] Dr. Bentley's prognosis for recovery was guarded based on the duration of Ms. Buezo's symptoms, her perception of her pain and disability, the presence of diffuse whole-body soft tissue pain, and the possible contribution to her physical complaints by a concurrent psychological condition. Dr. Bentley agreed that the likelihood of complete resolution of her symptoms is low, even with psychological treatment, though her function may improve. Dr. Bentley said there is no physical impairment that prevents Ms. Buezo from working.
- [35] In short, both physiatrists anticipate that it is unlikely that Ms. Buezo will ever be pain free, though she may regain function and increase her working capacity with psychological treatment.

- [36] Both psychiatric assessments were done by videoconference through an interpreter. I accept that this may have resulted in some miscommunication between the plaintiff and the psychiatrists, and that it may account for some of the challenges Ms. Buezo apparently had in explaining some of her psychiatric symptoms. That said, I cannot ignore the consistent comments from both psychiatrists that she had difficulty providing detail and elaborating on some mental health and psychological symptoms. Dr. Leung opined that these difficulties might arise from her depression and anxiety. This does not explain why Ms. Buezo was able to provide details of her physical pain and perceived limitations but was more challenged when asked to describe her mood and how it affects her.
- [37] Based on his interview with the plaintiff and a review of some medical records, Dr. Kulwant Riar diagnosed somatic symptom disorder ("SSD"), mild to moderate degree. He described SSD as a disorder in which a person devotes excessive time and energy to thinking about the symptoms of their physical condition, resulting in anxiety and distress. Dr. Leung did not preclude this diagnosis, but he did not have access to the psychiatry reports that might have allowed him to determine whether her response to her physical injuries was disproportionate.
- [38] Based on all the expert evidence, including the functional capacity examinations, it is clear that Ms. Buezo has more functional ability than she currently believes. Even though he did not have access to recent clinical records when he made his diagnosis, I accept Dr. Riar's opinion that she has SSD.
- [39] Dr. Riar also diagnosed adjustment disorder with mixed anxiety and depression, mild to moderate intensity, which has continued due to ongoing stressors and the lack of treatment or intervention. An adjustment disorder is the psychological and psychiatric reaction to distress (in this case arising from the accident) that includes anxiety and depression. An adjustment disorder diagnosis would not be appropriate if the criteria for another mental disorder are satisfied.
- [40] In his rebuttal report, Dr. Leung diagnosed the plaintiff as having Major Depressive Disorder ("MDD") and Posttraumatic Stress Disorder ("PTSD") as a result of the accident, the symptoms of which have improved somewhat with medication and psychotherapy. Dr. Leung explained that his diagnoses of MDD and PTSD indicate a higher degree of severity of mental illness than adjustment disorder. In his report, Dr. Leung failed to explain how his factual assumptions supported these diagnoses.
- [41] In cross-examination, Dr. Riar explained that Ms. Buezo does not meet the diagnostic criteria for PTSD because she does not have intrusive thoughts or nightmares that represent the accident, and she lacked the requisite cognitive and behavioural reaction when thinking about the accident. I accept Dr. Riar's distinction between "thoughts" and "flashbacks", and I accept his evidence that what she described was a "thought" as opposed to an "intrusive thought" that included visualizing, which would qualify as a "flashback". On balance, I accept Dr. Riar's opinion that Ms. Buezo does not meet the diagnostic criteria for PTSD.

- [42] Dr. Riar does not agree that Ms. Buezo has MDD. In cross-examination, Dr. Riar confirmed the nine diagnostic criteria listed in the Diagnostic and Statistical Manual of Mental Disorders, 5th Edition ("DSM 5"), at least five of which are required to make the diagnosis. However, he was not asked to comment on whether Ms. Buezo met any of these criteria.
- [43] In closing submissions, counsel for the plaintiff invited the Court to consider whether there is evidence to satisfy at least five of the MDD criteria listed in the DSM 5. Counsel for defendant suggested and I agree that such an exercise would be akin to asking the Court to make a psychiatric diagnosis, which is something I am not qualified to do nor prepared to undertake.
- [44] As a result, I am left with a diagnosis of MDD without explanation from Dr. Leung and a rejection of that diagnosis without explanation by Dr. Riar. There were inconsistencies in Ms. Buezo's evidence and reporting that complicate the weighing of the psychiatric diagnosis. For example, Ms. Buezo reported to Dr. Leung that her mother had a history of depression, which together with her history of chronic low iron led him to suggest that she may have been predisposed to developing MDD and PTSD. She told Dr. Riar that there were no psychiatric problems in her family. However, Ms. Buezo testified at trial that she discovered her mother suffered from depression when her mother used money sent from Canada to buy medication. It is unclear why she told Dr. Riar there was no history of depression in her family.
- [45] On balance, I am not satisfied that it is more likely than not that the plaintiff has MDD as opposed to an adjustment disorder. As a result, I will largely rely on Dr. Riar's prognosis and treatment recommendations.
- [46] Dr. Riar expects Ms. Buezo would benefit from 12 to 14 sessions of cognitive psychotherapy to understand her anxiety and depression and to give her coping strategies for dealing with her pain. Although he felt that she was capable of doing more than she perceived, he anticipated that encouraging her to do more would be futile until after she receives appropriate psychotherapy. He offered a guarded prognosis for the next four to six months but anticipated her function could improve after psychotherapy. He expects remission of her psychiatric symptoms in the future, though he could not say when. Improvement of her psychiatric symptoms would allow her to cope better with her residual physical complaints.
- [47] In cross-examination, Dr. Riar acknowledged that even if her psychiatric symptoms improve, Ms. Buezo will remain at risk of relapse, though the risk is small if her life is going well.
- [48] In cross-examination, Dr. Riar acknowledged the prognosis for recovery from a psychiatric condition is worse when there is ongoing pain to remind the person of the triggering incident. Recovery can be more difficult for someone with more limited intellectual ability or education, because they may have more difficulty understanding their condition and they may have fewer options for alternative employment if they are not able to return to their previous employment. This can, in turn, lead to financial strain. The fact that Ms. Buezo was

functioning well prior to the accident with no history of anxiety or depression suggests that her chances of getting better are significantly higher.

Non-Pecuniary Loss

- [49] An award for non-pecuniary loss is intended to compensate a plaintiff for her pain and suffering and for her loss of enjoyment of life. The factors to be considered when making such an award include the plaintiff's age; the nature of the injury; the severity and duration of pain; disability; emotional suffering; impairment of life; impairment of family, marital and social relationships; impairment of physical and mental abilities; loss of lifestyle; and the plaintiff's stoicism (a factor that should not, generally speaking, penalize the plaintiff): *Stapley v. Hejslet*, 2006 BCCA 34 (leave to appeal ref'd: [2006] S.C.C.A. No. 100) at paras. 45-46. An award of non-pecuniary damages must be fair and reasonable to both parties.
- [50] Ms. Buezo testified at length and often in a somewhat rambling manner about the extreme pain and significant limitations she continues to experience as a result of the accident. She complains of constant, severe pain in her neck and back. She says her mood is affected, and she was sometimes emotional during her testimony. Before the accident, Ms. Buezo was more easy-going and light-hearted than she is now. Her husband and daughter confirm her ongoing complaints of pain and change in demeanour.
- [51] The defendant argues that Ms. Buezo's subjective complaints of pain should be viewed cautiously given the lack of physical limitations. However, the experts agree that she has chronic pain with psychological factors that aggravate her perception of pain: She feels more pain than expected based on the current status of her physical injuries due to hypersensitization of the central nervous system and anxiety that increases her perception of pain.
- [52] Before the accident, Ms. Buezo did all of her family's cooking, housecleaning and laundry. After the accident, Mr. Hernandez took over most of the household chores, including most of the cooking, with help from their daughters. Ms. Buezo helps a little with tidying the house, but she primarily supervises. She will cook meals for herself when she is motivated.
- [53] Before the accident, Ms. Buezo was the primary support person for her son, Antonio. She helped him stay organized, ensured that he got to school, and guided him through cleaning his room and doing laundry. Since the accident, she has continued to support her son, but her husband and eldest daughter assist sometimes.
- [54] I am satisfied that Ms. Buezo perceives herself to be more functionally limited than she actually is. In other words, she is capable of more physical activity than she believes. For example, Dr. Bohorquez confirmed on cross-examination that the functional limitations she reported (bending, squatting, etc.) were not present on his examination, though she complained of pain when moving through these positions. During the functional capacity assessment performed by Mr. Cheesman, Ms. Buezo was able to perform many of the activities (mopping, sweeping, vacuuming) that were part of her pre-accident employment

and her daily household chores, even though she believes that she is not able to do these tasks.

- [55] The injuries have affected Ms. Buezo's recreational activities. Prior to the accident, she enjoyed gardening, both with house plants and in a community plot. She continues to derive pleasure from gardening, though she relies on others for the heavier aspects. She walks less than she did before the accident.
- [56] Ms. Buezo also recounted vivid daily nightmares in which she is in a car involved in an accident or her children are in car accidents. Mr. Hernandez confirmed that she thrashes around in her sleep when having nightmares. Her sleep was also disrupted by pain from her accident injuries and the need for frequent urination (which is unrelated to the accident). Ms. Buezo told Dr. Leung that the medications prescribed by Dr. Benitez-Lazo in February 2021 were helpful for her sleep and nightmares.
- [57] The injuries from the accident have affected Ms. Buezo's family relationships. Mr. Hernandez clearly adores his wife, and he does what he can to support her. Their relationship remains strong despite the change in their roles around the house and Ms. Buezo's mood, though there is more conflict between them than before.
- [58] Although Ms. Buezo's counsel submitted that her injuries have had a negative impact on intimate relations with her husband, her evidence at trial identified unrelated pelvic pain as the impediment.
- [59] In addition to taking on housekeeping responsibilities, Ms. Buezo's daughter Joanna has had to step up by helping her mother with translation during medical appointments and her online courses. Joanna went beyond translation and helped her mother with the online exam for the Building Services course she took in the fall of 2020. Joanna is attentive to her siblings and their needs, and she reminds her mother to relax when she gets worked up. The plaintiff and her daughter continue to have a good relationship, though Ms. Buezo feels guilty that Joanna has assumed extra burdens as a result of her mother's injuries.
- [60] Ms. Buezo continues to socialize with her best friend, Norma Gladis Pinera. The frequency of their visits did not change after the accident, though their in-person contact has been affected by the COVID-19 pandemic. They continue to speak to each other every day. Ms. Buezo has other friends and family that she talks to on the phone. She was able to assist recently at her niece's baptism, and she does have outings to Vancouver with her husband from time to time.
- [61] In summary, I accept that Ms. Buezo continues to experience pain in her neck, back, gluteal and hip regions as a result of the accident that occurred four years ago, and it is unlikely that her pain complaints will completely resolve. I am satisfied on the whole of the evidence that the pain led to depressed mood and anxiety. Her injuries have caused her to limit her activities, though she is physically capable of doing more than she believes. Her family relationships have been adversely affected, and she has maintained her strongest

friendships. Based on the evidence of the psychiatrists and Dr. Riar, I find that there is a reasonable likelihood of improved psychological symptoms and better function overall with appropriate psychological therapy and medication. However, there remains a risk that her condition will not improve.

[62] Comparable cases may provide some guidance as to a non-pecuniary award that would be fair to all parties, though each case turns on its facts.

[63] Ms. Buezo seeks an award in the amount of \$175,000 and a separate award for loss of housekeeping capacity. Her counsel referred me to cases involving chronic pain with a psychological component in which the court awarded non-pecuniary damages in the range of \$176,000 to \$350,000 in today's dollars:

- Kallstrom v. Yip, 2016 BCSC 829;
- Brundige v. Bolton, 2018 BCSC 1843; and
- Grabovac v. Fazio, 2021 BCSC 2362 [Grabovac].

[64] In general, the plaintiffs in these cases had more complicated or severe psychiatric conditions with a more guarded prognosis than Ms. Buezo. As for Grabovac, the significant non-pecuniary award included compensation for the plaintiff's loss of housekeeping capacity and the likelihood that she would not bear children as a result of her injuries.

[65] The defendant submits that the appropriate award for non-pecuniary damages is \$110,000 and referred me to the following cases:

- Carrasco v. Gibson, 2020 BCSC 73;
- Tait v. Soda, 2020 BCSC 638;
- Broomfield v. Lof, 2019 BCSC 1155 [Broomfield].

[66] The first of these cases involved a pre-existing condition and time-limited symptoms, neither of which is analogous to the case at bar. In the second of these cases, the plaintiff's psychological symptoms did not cause the degree of functional impairment that Ms. Buezo has experienced.

[67] The most analogous case to the one at bar is Broomfield. In Broomfield, the plaintiff had ongoing soft tissue pain in her neck that was unlikely to resolve, and she was diagnosed with major depression and chronic somatic symptom disorder with a guarded prognosis. The plaintiff had been off work for much of the time between the accident and trial and had returned to work as a special education assistant at 80% of full-time with medical modifications. The court awarded non-pecuniary damages of \$130,000 and made a separate award for loss of housekeeping capacity.

- [68] I find that an award of \$130,000 for non-pecuniary loss is appropriate in this case. This award reflects the impact Ms. Buezo's injuries have had on her and her enjoyment of life. It also accounts for her prognosis.
- [69] Ms. Buezo's counsel sought a separate award for loss of housekeeping capacity, emphasizing the pride with which Ms. Buezo maintained her home to a high standard of cleanliness and orderliness. Her feelings about her perceived loss of housekeeping abilities have been accounted for in the award for non-pecuniary loss. However, as in *Broomfield*, I accept that she should receive a separate award to compensate for her loss of housekeeping capacity.

Loss of Earning Capacity

- [70] In order to assess whether Ms. Buezo suffered a loss of earning capacity as a result of the accident, it is necessary to assess both what her earning capacity was prior to the accident and what impact the accident has had on that capacity.
- [71] Ms. Buezo's limited education and poor English skills (despite many years of language training) restricted her realistic employment opportunities before the accident to childcare and cleaning services.
- [72] In 2004, Ms. Buezo took a course and registered as a license-not-required daycare provider, which allowed her to look after two children in addition to her own, in her own home. She stopped babysitting for other families after Antonio arrived in Canada. At that point, Ms. Buezo felt tired of looking after other children and needed a break.
- [73] In 2010, Ms. Buezo started working as a cleaner. She continued in this employment until the accident. Initially, she worked as part of a team of three, cleaning houses for \$15/hour. The hours were part-time and variable. She did not report the cash earnings from this work on her income tax returns.
- [74] In 2015, Ms. Buezo met Sonia Trejo on the bus. Ms. Trejo worked as a cleaner of a retail store and supplemented her income by cleaning apartments when tenants moved out. Ms. Trejo started calling Ms. Buezo when she needed help cleaning apartments. Again, the hours were variable, and Ms. Buezo was paid cash. Ms. Trejo reported that Ms. Buezo was an efficient cleaner and a cheery person before the accident. Ms. Trejo confirmed that cleaning apartments involved a variety of body positions, including crouching or kneeling, and full body movement to vacuum or mop a floor.
- [75] In 2016, Ms. Buezo worked for a company cleaning the common areas of residential apartment buildings and was paid \$12/hour by cheque. She would occasionally clean a resident's apartment for cash, earning \$15/hour or \$20/hour for four to five hours' work. She did not report her cash earnings on her income tax return.
- [76] In September 2017, Ms. Buezo was hired by Jenni Glen to clean a private school in Vancouver. She was paid \$13/hour. She had been doing this job for approximately four months when the accident happened. Her job duties included vacuuming; cleaning the

school kitchen; cleaning glass doors, washrooms and handrails; wiping tables and desktops; taking out garbage; and mopping. Ms. Buezo described the cleaning at the school as "very heavy work". In cross-examination, she conceded that the garbage bags she lifted weighed only a little more than five or six pounds. The heaviest tasks were mopping, vacuuming and cleaning windows and bathrooms.

[77] Ms. Buezo reported the following income from employment in the years prior to the accident:

2015

\$Nil

2016

\$14,292

2017

\$23,633

2018

\$1,268

[78] After the accident, Dr. Shabbir wrote a series of notes between January and May 2018 that say Ms. Buezo was unable to work due to her medical condition. Dr. Benitez-Lazo told her in September 2019 that she was unable to perform heavy physical work but could do modified light duties. He agreed in cross-examination that she was able to perform some degree of work and that it would have been helpful for her mood to return to work. From October 2019 through 2020, Dr. Benitez-Lazo continued to recommend that she be off work, sometimes without doing a further physical examination. At an appointment shortly before trial, Dr. Benitez-Lazo told the plaintiff that it would be helpful for her to return to work, even if it is light or modified work. However, on cross-examination, he was reluctant to agree that it would be beneficial for her to return to a cleaning job if her duties were light and she could work part-time. It was clear that Dr. Benitez-Lazo was not aware of Ms. Buezo's actual job requirements with Jenni Glen but instead relied on certain assumptions about what is expected of cleaners.

[79] In the fall of 2020, Ms. Buezo took a 10-week Building Service Worker course at Vancouver Community College to learn how to supervise cleaning staff. She did a two-week practicum that involved cleaning for eight hours per day, which she says aggravated the pain in her neck, back and left arm. As noted above, she passed the final online exam with help from her daughter.

- [80] After completing that course, Ms. Buezo worked without pay at a cleaning company on weekends in order to secure a reference letter from the company's owner. In this volunteer role, she did various cleaning tasks that were similar to her job duties at Jenni Glen, though she insisted the voluntary work was not very heavy.
- [81] Ms. Buezo used the reference letter to apply for two positions at BC Children's Hospital, one as a cleaning supervisor and the other delivering meals to patients. Her English language skills were not strong enough to qualify for these positions, though she was prepared to accept either of these jobs had it been offered.
- [82] In October 2020, Ms. Buezo renewed her registration as a license-not-required daycare provider.
- [83] In February 2021, Ms. Buezo was hired to work one hour per day as a lunch time playground monitor at a local elementary school at a salary of \$22/hour. She was working in that position at the time of trial. Her job duties include patrolling the playground to supervise the children and reporting any incidents.
- [84] In early 2022, Ms. Buezo enrolled in a course that will qualify her to provide before- and after-school childcare for four hours per day, a job that pays \$22/hour. She restarted English classes, as she recognizes that she needs to improve her language skills to secure such a position.
- [85] Ms. Buezo was a bit vague about her pre-accident retirement plans. She planned to continue working until the usual age of retirement, though she wasn't sure whether that meant 67 or 65 years old. She doesn't think she will be able to return to her previous occupation because it was a physical job. She wants to try to get a part-time job after completing the childcare course in which she is currently enrolled. She will see what job she can get in the future if her condition improves. She currently plans to continue working in order to qualify for Canada Pension Plan.
- [86] In her direct evidence, Ms. Buezo repeated that she still hopes her condition will improve and that she hasn't given up. Only under cross-examination, in response to a suggestion that she will improve little by little if she continues to work on her recovery, did she say that she feels worse every day.
- [87] Prior to the accident, Ms. Buezo returned to Honduras for a few months at a time every second or third year to spend time with her parents. She did not work during such visits. She has not visited Honduras since the accident due to financial constraints, but she hopes to resume that pattern or to bring her parents to Canada.
- [88] Ms. Buezo attended for a functional capacity examination ("FCE") with Dominic Shew on September 27, 2021 at the request of her counsel. Mr. Shew reported that she was scared about what the testing would involve, and she asked him to contact her family doctor to discuss limitations.

- [89] When consulted, Dr. Benitez-Lazo imposed a restriction on the FCE to preclude lifting of more than 15 to 20 lbs; "heavy straining - pushing/pulling"; "moderate to heavy repetitive activities involving entire axial skeleton"; and "repetitive squatting, overhead activities". He imposed these restrictions based on his findings on exam, the imaging studies and her subjective reports of her limitations. In his view, at an FCE, an assessor will force a patient to do their best, "no matter what". In my view, the medical restrictions imposed by Dr. Benitez-Lazo were not justified in light of the physiatrists' opinions and likely were motivated by his assumptions about FCE assessors and his desire to support his patient. Unfortunately, these restrictions interfered with obtaining an accurate assessment of the plaintiff's actual physical capacity.
- [90] In any event, FCE assessments by both Mr. Shew and Mr. Cheesman demonstrated that, despite some physical and functional limitations, Ms. Buezo was capable of more physical and functional activity than she believes. Likewise, the assessments showed that she is currently able to work at least part-time doing light cleaning.
- [91] When assessed by Mr. Shew, Ms. Buezo showed decline over the course of the day in speed and function for reaching, stooping, sustained head/neck positions and repetitive walking and climbing. Although he was not able to test her full-strength abilities due to the restrictions imposed by Dr. Benitez-Lazo, Mr. Shew opined that she likely had the strength required to work as a cleaner, which did not involve heavy lifting but did include working in a variety of body positions. Mr. Shew acknowledged that her functional abilities on testing would allow her to complete her pre-accident work tasks on a part-time basis if she could take breaks to stretch and avoid higher-level tasks and heavy lifting.
- [92] Mr. Cheesman assessed Ms. Buezo's capacity for working as a cleaner by having her attempt various cleaning tasks. She demonstrated no difficulties with cleaning work simulation tasks over the course of eight hours. She had some functional limitations (for example, light handling activities at a competitive speed and only occasional stair climbing); however, Mr. Cheesman concluded that she could work full-time provided the functional demands of the job were within her capacity. He identified that she currently did not have the material handling capacity to meet the medium strength demands typical of cleaning positions; however, an accurate assessment of her true ability was not possible due to the medical restriction imposed by Dr. Benitez-Lazo. Based on his assessment of her efforts on testing, Mr. Cheesman opined that she likely had "some reserve capacity for greater strength exertions". Ms. Buezo reported positively on her assessment with Mr. Cheesman. She appreciated the respect he showed her.
- [93] In his report, Dr. Bohorquez wrote that he did not anticipate that Ms. Buezo would be able to return to physically demanding work as a janitor or cleaning houses due to difficulties with repetitive bending, twisting and repetitive work. However, he confirmed on cross-examination that she would benefit from being more active. Further, he would encourage her to return to light cleaning work within her physical abilities.

[94] Dr. Bentley opined that she is not disabled from working from a physical medicine perspective.

Past Loss of Earning Capacity

[95] In terms of past loss of earning capacity, Ms. Buezo is entitled to be compensated based on what she would have earned but for the injuries sustained in the accidents: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30. When assessing damages for past loss of earnings, I may consider hypothetical events that may have happened in the past provided there is a real and substantial possibility they would have occurred but for the injuries Ms. Buezo suffered: *Athey v. Leonati*, [1996] 3 S.C.R. 458, 1996 CanLII 183 (SCC) at para. 27.

[96] Section 98 of the Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231 stipulates that only net income loss is recoverable.

[97] At the time of the accident, Ms. Buezo was working full-time as a cleaner. She enjoyed her work and expected to continue working until the usual retirement age. She reported earnings of approximately \$23,633 in the year prior to the accident, at a rate of \$12/hour for the first eight months and \$13/hour for the last four months. That is equivalent to working approximately 37 hours per week.

[98] Ms. Buezo did not return to work after the accident until February 2021.

[99] The plaintiff argues that she should be compensated based on a complete loss of earning capacity to work full-time as a cleaner at just above minimum wage, reduced by her earnings for three months (when she would have been off work following bladder surgery in May 2019) and by her earnings since February 2021. The plaintiff calculates her net loss of earnings to be \$98,079.

[100] The defendant argues that past loss of earning capacity should be assessed based on Dr. Bentley's opinion that, based on the nature of her physical injuries, Ms. Buezo might have been expected to return to work within three to six months of the accident. With average earnings of approximately \$1000/month over the previous three years, the defendant says the gross award for past loss should be \$6000 to \$12,000.

[101] The defendant recognizes that Dr. Benitez-Lopez continued to recommend that Ms. Buezo remain off work until September 2021 (even though she was working as a playground monitor starting in February 2021) and that it was not unreasonable for her to follow her family doctor's advice. If the Court is inclined to recognize a longer period of past wage loss, the defendant urges consideration of the following factors:

- a) Ms. Buezo did not reliably report her job requirements to Dr. Benitez-Lazo, which may have contributed to his recommendation to remain off work;
- b) she would have been off work for three to six months as a result of bladder surgery in 2019; and

c) a failure to mitigate.

[102] In recommending that Ms. Buezo remain off work, it became clear through his testimony that Dr. Benitez-Lazo drew his own conclusions about the physical demands of her cleaning position rather than asking for and relying on information from Ms. Buezo. Based on the whole of his testimony, I find that he was protective of his patient and generally skeptical of the motives of the Insurance Corporation of British Columbia, her first party benefits provider, when it came to encouraging a return to work or assessing her level of disability. While the expert evidence suggests that it would have been physically and emotionally beneficial for her to be more active or return to work sooner, I accept that it was reasonable for Ms. Buezo to follow her family doctor's advice and remain off work. I accept that her loss of earnings prior to the trial was caused by her injuries from the accident.

[103] In reaching this conclusion, I have not ignored the problems with her evidence related to employment. Ms. Buezo was inclined to overstate the physical demands of her pre-accident cleaning job and understate the physical demands of the work she did more recently on a volunteer basis. Through adept cross-examination, it became clear that the tasks and physical demands for these two positions were in fact very similar. But for the longstanding advice of her family physician to stay off work, it would have been more difficult to conclude that her past loss of earnings was entirely attributable to the accident. Her reluctance to state accurately her job duties cannot, on the available evidence, be attributed to her psychological symptoms.

[104] Turning to an assessment of the loss, an average of her earnings for the three years prior to the accident understates her earning capacity because she reported no employment income in 2015, presumably because she only earned cash that year. By early 2018, she had worked full-time for Jenni Glen for a few months and planned to continue doing so. That said, it is not clear from the evidence whether she would have continued cleaning the school through the summer months or whether she would have returned to Honduras for a few months as she had done every few years prior to the accident. I accept that Ms. Buezo could have secured other work as a cleaner even if the Jenni Glen position did not continue through the summer.

[105] The plaintiff has calculated that she had the total capacity to earn \$102,083 (net) from cleaning on a full-time basis between the date of the accident and date of trial, reduced to \$98,079 to account for actual earnings and time off work unrelated to the accident.

[106] In my view, this amount should be reduced to reflect the contingency that the plaintiff would not have been continuously employed on a regular full-time basis even if the accident had not happened, keeping in mind that the plaintiff had only been working full-time for approximately 18 months before the accident and there were potential interruptions in her annual earnings. There is also a real and substantial possibility that she would have been off work for longer than three months after the bladder surgery. There is no evidence to establish a real and substantial possibility that the plaintiff had the

capacity to earn more that she would have earned working full-time as a cleaner.

[107] On the whole of the evidence, I am satisfied that a net award of \$90,000 for past loss of earning capacity is a fair assessment of her loss.

[108] I will address the alleged failure to mitigate later in these reasons.

Future Loss of Earning Capacity

Legal Principles

[109] The BC Court of Appeal recently released a trilogy of cases that provide guidance on how to assess a claim for future loss of earning capacity: *Dornan v. Silva*, 2021 BCCA 228 [Dornan]; *Rab v. Prescott*, 2021 BCCA 345 [Rab]; and *Lo v. Vos*, 2021 BCCA 421 [Lo].

[110] In *Dornan*, at para. 156, Justice Grauer cited *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 32, where the Court described an award for loss of earning capacity as follows:

An award for future loss of earning capacity thus represents compensation for a pecuniary loss. It is true that the award is an assessment, not a mathematical calculation. Nevertheless, the award involves a comparison between the likely future of the plaintiff if the accident had not happened and the plaintiff's likely future after the accident has happened: *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 11; *Ryder v. Paquette*, [1995] B.C.J. No. 644 (C.A.) at para. 8

[111] Once a loss of capacity is found, the court must determine what the value of that lost asset is and how much it has been impaired: *Dornan*, para. 156.

[112] In *Rab*, after reviewing the leading authorities, Grauer J.A. distilled a three-step process for assessing claims for loss of future earning capacity:

[47] The first is evidentiary: whether the evidence discloses a potential future event that could lead to a loss of capacity (e.g., chronic injury, future surgery or risk of arthritis, giving rise to the sort of considerations discussed in *Brown*). The second is whether, on the evidence, there is a real and substantial possibility that the future event in question will cause a pecuniary loss. If such a real and substantial possibility exists, the third step is to assess the value of that possible future loss, which step must include assessing the relative likelihood of the possibility occurring - see the discussion in *Dornan* at paras 93-95.

[113] Ms. Buezo argues that *Rab* is not as relevant as *Dornan* and *Lo* based on different circumstances giving rise to her claim for loss of earnings. In my view, despite the factual differences, the approach outlined in *Rab* for assessing an award for future income loss is nevertheless appropriate for the case at bar.

[114] In *Dornan* at para. 94, Grauer J.A. adopted the following explanation of "real and substantial possibility" from *Gao v. Dietrich*, 2018 BCCA 372 at para. 34:

The standard of a "real and substantial possibility" is a lower threshold than a balance of probabilities but a higher threshold than that of something that is only possible and speculative.

[115] Once a future loss of capacity is established, the third step of the Rab test involves the quantification of that loss by using the "earnings approach", as in *Pallos v. Insurance Co. of British Columbia* (1995), 100 B.C.L.R. (2d) 260, [1995] B.C.J. No. 2 (C.A.), or the "capital asset approach" from *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353, [1985] B.C.J. No. 31 (S.C.). Both of these approaches are correct. The earnings approach will be more useful when the loss is easily measurable: *Perren v. Lalari*, 2010 BCCA 140 at para. 32.

[116] 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.

[117] After following the three-step process from Rab, the Court must consider whether the proposed award for loss of earning capacity is fair and reasonable: Lo at para. 117.

Does the evidence disclose a potential future event that could lead to a loss of capacity?

[118] At present, Ms. Buezo suffers from ongoing pain, depressed mood and anxiety. Her perception of her pain and her perception of reduced function, rather than actual functional impairment, are currently preventing her from returning to work doing light cleaning. Based on the expert evidence, her perception of her pain and limitations is caused by her injuries from the accident. Dr. Riar says that her level of function is not likely to improve until she undergoes psychological treatment.

[119] The defendant argues that the plaintiff does not currently have a diminished capacity to earn income based on a number of factors:

- a) she currently has the capacity to perform her pre-accident employment;
- b) there is no medical evidence suggesting that she will deteriorate in the future; instead, the physiatrists encourage her to be active and both psychiatrists are hopeful she will improve after cognitive behavioural therapy; and
- c) she has demonstrated that she can supervise children and is taking courses to improve her employment prospects.

[120] In my view, the defendant's position ignores Dr. Riar's opinion. Until Ms. Buezo understands that she is able to work as a cleaner without causing further harm and until she develops better pain coping strategies, there is little point in pushing her to work more. Unless and until her physical capacity to do more is accompanied by the requisite positive outlook, her ongoing functional impairment could obviously lead to a loss of earning capacity.

Is there a real and substantial possibility that the future event will cause a pecuniary loss?

[121] Ms. Buezo is currently working only one hour per day rather than working full-time as a cleaner.

[122] The defendant says that there is not a real and substantial possibility that she will suffer a pecuniary loss due to her impaired capacity based on the following:

- a) she has the capacity to do the type of work she was doing before the accident; and
- b) if she succeeds in the childcare course she is currently pursuing, her income earning potential will exceed what it was prior to the accident.

[123] Again, the defendant's arguments focus on her physical limitations and ignore the psychological impediments that prevent her from working to her fullest potential. She continues to suffer a pecuniary loss because she is not able to work to her pre-accident capacity. Further, although the psychiatrists and Dr. Bohorquez anticipate improved function, I am satisfied that there is a real and substantial possibility that Ms. Buezo will not regain her ability to work full-time in the variety of cleaning positions for which she was eligible prior to the accident. In summary, I am satisfied that her ongoing functional impairment continues to cause a pecuniary loss.

What is the value of the possible future pecuniary loss?

[124] At this stage of analysis, I must quantify Ms. Buezo's loss by comparing what her future earning capacity would have been if the accidents had not happened to what it is now that the accidents have happened. For this crystal ball gazing exercise, I will consider the real and substantial possibilities based on the evidence and consider their relative likelihoods.

[125] Prior to the accident, Ms. Buezo was working as a cleaner full-time and planned to continue doing so until she retired. She submits that her pre-accident earning capacity should be assessed based on working full-time as a cleaner at \$16/hour (\$33,000 per annum) to age 67, which she calculates to be \$749,981.65. After noting that she currently earns approximately \$5000/year (i.e. 15% of her pre-accident annual earnings), she argues that there is a "75% likelihood of her not achieving her potential earnings absent the [accident]". She calculated 75% of the present value of a lifetime of earnings to be \$562,486. Based on these calculations, she argues that a reasonable award for loss of earning capacity would be \$575,000.

[126] At this third stage of the analysis, the defendant returns to the argument that no award should be made for loss of capacity because Ms. Buezo has the functional capacity to perform light cleaning work on a full-time basis. I have already rejected this argument as providing a full answer to the loss of future earning capacity claim.

- [127] Alternatively, the defendant says that any award for future loss of earning capacity should be modest given Dr. Bentley's opinion of a three to six month recovery period and the psychiatric evidence regarding potential for improved function after a course of therapy. Further, the defendant notes that if she is able to secure a position providing before and after school care, she will earn more than she would have earned on a daily basis prior to the accident.
- [128] Turning to my analysis of the quantification of the loss, I am satisfied that the income stream approach is appropriate in this case. Based on Dr. Riar's prognosis, which I have accepted, there is little likelihood that Ms. Buezo's function (and consequentially her earning capacity) will increase until she has completed a course of cognitive behavioural therapy, which will take a few months to complete and likely a few months to arrange given the need to find a Spanish-speaking therapist. As a result, I accept that her earning capacity will likely remain at its current reduced level for the next year.
- [129] With therapy, both Dr. Riar and Dr. Bohorquez anticipate that her function will improve. Further, Dr. Bohorquez noted that it is in her interest to remain active, and he encouraged her to return to work doing light cleaning. Ms. Buezo herself expressed hope that she can recover. In this scenario, Ms. Buezo's capacity to earn income as a cleaner would be restored, and she would have no ongoing pecuniary loss.
- [130] Despite the hope for recovery, I cannot ignore the risk that Ms. Buezo will not respond well to cognitive behavioural therapy. Although none of the experts offered a precise likelihood of non-recovery, to the extent that it can be estimated with any degree of mathematical probability, I estimate that there is a 20% likelihood that Ms. Buezo's earning capacity will not improve beyond what it is currently. In making this estimate, I have considered that Ms. Buezo was less than forthright about her pre-accident job requirements, making it somewhat more likely that she herself recognizes that she will be able to return to cleaning.
- [131] In assessing her future loss, I recognize that there is a real and substantial possibility that even with cognitive behavioural therapy, she may still be limited to part-time work. I estimate that there is a 20% likelihood that she will only return to 50% of her pre-accident earning capacity. There is also a real and substantial possibility that she will suffer a relapse of the psychiatric complications that will interrupt her employment.
- [132] After many years of language training, Ms. Buezo continues to have great difficulty with English. This is not surprising based on her limited success with formal schooling in Honduras. I am not satisfied that there is a real and substantial possibility that she will succeed in meeting the training and language requirements to succeed as a before- and after-school childcare provider. The possibility that she will earn a higher hourly wage as a daycare provider or another sedentary job is not realistic enough to warrant consideration in the assessment of her loss of capacity claim.

- [133] Starting with the plaintiff's calculation of her pre-accident lifetime earning capacity, I accept that she likely would have retired at age 67. The plaintiff's estimate of total pre-accident earning capacity was calculated using the 1.5% discount rate but without using an economic multiplier to account for the likelihood of mortality or for attachment to the workforce. Neither party led expert evidence from an economist, nor was there an agreement between the parties as to the appropriate economic multiplier. The plaintiff's estimate of her without accident future earning capacity must be reduced to reflect the contingencies of mortality and less than full employment. Based on her employment history, I would reduce the estimate of her pre-accident capacity by 15% to account for those factors.
- [134] Assuming no improvement for the first year, and factoring in a 20% likelihood that she will continue to experience her current reduced capacity despite treatment and a 20% likelihood of capacity limited to part-time, generates an award for loss of capacity in the amount of \$196,800. I would increase that estimate to account for the risk of relapse.
- [135] Although there should be mathematical anchors, an award for future loss of earning capacity must be assessed rather than calculated, and it should be fair and reasonable. I am satisfied that an award of \$200,000 for future loss of earning capacity is fair and reasonable in the circumstances of this case.

Loss of Housekeeping Capacity

- [136] Ms. Buezo seeks a separate global award for past and future loss of housekeeping capacity in the amount of \$300,000. This figure is derived by starting with the average number of hours of housework done by women as a primary activity (2.8 hours per day according to Statistics Canada, *Women in Canada: A Gender-based Statistical Report - Time use: Total work burden, unpaid work, and leisure*, by Melissa Moyser and Amanda Burlock, Catalogue No. 89-503-X (Ottawa: Statistics Canada, 30 July 2018), using an hourly rate of \$25/hour, and recognizing post-bladder surgery recovery time that was unrelated to the accident. According to the plaintiff's arithmetic, a complete loss of capacity would result in a past loss of housekeeping capacity valued at \$97,440 and a future loss of \$1,124,200 (assuming an average life expectancy to age 84 with no hope of improvement). The plaintiff argues that, on the evidence, the likelihood that she will continue to have a complete loss of capacity is 30%, which would translate into an award of \$337,260 for the future loss of housekeeping capacity. The plaintiff acknowledges that quantification of this loss is an assessment and not an arithmetical exercise and that the award must be reasonable: *Meckic v. Chan*, 2022 BCSC 182 at para. 155. Taking all of this into account, Ms. Buezo says that an award of \$300,000 for past and future loss of housekeeping capacity would be fair.

- [137] I note that the plaintiff's estimate of housekeeping capacity was derived by applying a 1.5% discount rate to an annual value of \$7800 (six hours per week at a rate of \$25/hour) to age 84. The plaintiff's estimate does not consider the risk of mortality but rather assumes a 100% likelihood of survival to age 84 when doing her calculation.
- [138] The defendant says there should be no separate award for loss of housekeeping capacity. In any event, the defendant argues that there is no loss of capacity based on her current physical abilities and the fact that her children are now old enough to assist with household chores.
- [139] I accept that Ms. Buezo's family does most of the housework now, though the medical evidence and results of the FCEs establish that she is physically capable of most if not all of the household chores provided that she takes breaks and paces herself. The main impediment is her perception of her own limitations. As previously noted, Dr. Riar opined that her function is not likely to improve until she has had therapy to help her understand her condition. Even if her children are capable and perhaps should be encouraged to help with household chores, I am satisfied that it would be appropriate in this case to compensate Ms. Buezo for the loss of her housekeeping capacity.
- [140] That said, I am not satisfied on the evidence that Ms. Buezo has had no capacity to do housekeeping since the accident or that her future housekeeping capacity is impaired in the manner suggested by plaintiff's counsel. While there is overlap between her occupation as a cleaner and normal housekeeping tasks, there is a difference between having the capacity to complete a few hours of family housekeeping over the course of the day and the capacity to sustain employment and earn income as a cleaner. There are various tasks and activities that Ms. Buezo has been able to do over the last four years that undermine a claim that she has had no housekeeping capacity since the accident, including helping at her niece's baptism, outings with her husband to Vancouver, and cooking for herself when she is so inclined. Looking forward, while there is some risk that she will not return to her full pre-accident housekeeping capacity, it is likely that her future housekeeping capacity will only be minimally impacted based on her current physical abilities and her prognosis for improved function.
- [141] In these circumstances, I assess an award of \$50,000 for past loss of housekeeping capacity and an award of \$50,000 for future loss of housekeeping capacity to be appropriate. This award recognizes that there will likely be times when the plaintiff will not be able to perform housekeeping tasks to the level she would have if the accident had not happened.

Future Cost of Care

- [142] In *Golkar-Karimabadi v. Bush*, 2021 BCSC 990 at para. 107, Justice Adair summarized the principles that apply to the assessment of future cost of care claims:

An award for cost of future care is based on what is reasonably necessary, on medical evidence, to promote the mental and physical health of the claimant. The award must (1) have medical justification, and (2) be reasonable. The medical necessity of future care costs may be established by a health care professional other than a physician, such as an occupational therapist, if there is a link between a physician's assessment of pain, disability and recommended treatment, and the health care professional's recommended care item. See *Gao v. Dietrich*, 2018 BCCA 372, at paras. 69-70. No award is appropriate for costs that a plaintiff would have incurred in any event: *Shapiro v. Dailey*, 2012 BCCA 128, at paras. 51-55. Moreover, future care costs must be likely to be incurred by the plaintiff. The onus is on the plaintiff to show that there is a reasonable likelihood that she will use the suggested services: see *Lo v. Matsumoto*, 2015 BCCA 84, at para. 20.

- [143] Ms. Buezo seeks an award of \$21,173 for future cost of care for various passive paramedical therapies, a gym membership, psychological counselling, and a vocational assessment and counselling. She relies on recommendations made by Dr. Bohorquez and Mr. Shew. There is no claim advanced for the cost of medication.
- [144] The defendant identifies that there is a recommendation from Mr. Shew but no medical opinion to support an award for the cost of passive paramedical therapies. The defendant recognizes that an award for the cost of psychotherapy would be appropriate.
- [145] Both psychiatrists recommend psychotherapy, though the duration and nature of treatment varies. I am satisfied that an award of \$12,000 will allow Ms. Buezo to pursue a reasonable course of psychotherapy. This award factors in the possibility that she may need to try more than one therapist.
- [146] Based on the recommendation that she needs to become more active to improve her function, I accept that a course of sessions with a kinesiologist at a cost of \$2500 is reasonable. However, Dr. Bohorquez refers to a home-based exercise program, so I am not prepared to include the cost of a gym pass.
- [147] I am not satisfied that a vocational assessment and vocational counselling is justified when the cognitive behavioural therapy is intended to give Ms. Buezo tools and to help her realize that she is able to return to her pre-accident work as a cleaner.
- [148] The award for future cost of care will be \$14,500.

In Trust Award

- [149] Ms. Buezo advances an in-trust award to compensate her husband for the few days he took off work in the immediate post-accident period to care for her and for various other days he took off work to accompany her to medical appointments. She agreed to waive this claim if I awarded damages for loss of housekeeping capacity, which I have done.

Special Damages

- [150] An injured person is entitled to recover the reasonable out-of-pocket expenses incurred as a result of an accident. This is grounded in the fundamental governing principle that an injured person is to be restored to the position they would have been in had the accident not occurred: *X. v. Y.*, 2011 BCSC 944 at para. 281; *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33, 1985 CanLII 175 (BCSC) (aff'd: [1987] B.C.J. No. 1833, 49 B.C.L.R. (2d) 99 (BCCA)) at 78.
- [151] The parties agreed that \$6771.00 in special damages, most of which related to treatment, ought to be awarded to the plaintiff.
- [152] The defendant disputed the validity of a few additional expenses claimed as special damages. I will review each of the disputed claims in turn.
- [153] Ms. Buezo had a private MRI of her lumbar spine on December 27, 2018, at a cost of \$995. She testified that she paid for the MRI in order to have it done as soon as possible because she wanted to know what was causing her pain. Dr. Benitez-Lazo testified that he recommended an MRI of the lumbosacral region on October 4, 2018 to find out if there was an injury of S2, S3 or S4 levels of the spine. However, the MRI done December 17, 2018 included only the lumbar region and not the sacral region. Upon receipt of the report and in apparent contradiction to his previous testimony, Dr. Benitez-Lazo said he did not follow up with an MRI of the sacral region because there was no compelling evidence of injury to that area. The MRI report itself identifies the referring physician as Dr. Shabbir, though there was no evidence at trial that he made the referral. In short, I am not satisfied on the evidence at trial that the private MRI of the lumbar spine done December 17, 2018 was reasonable or medically necessary: *Lewis v. Rubboli*, 2018 BCSC 17 at para. 140. The claim for the cost of that MRI is dismissed.
- [154] Ms. Buezo claimed the cost of a bed she purchased in August 2021. The plaintiff testified that Dr. Benitez-Lazo suggested getting an orthopaedic bed to see if it would help with sleep disruption related to pain. Dr. Benitez-Lazo testified that she asked for a note to get a bed. I am not satisfied that the plaintiff incurred the cost of the bed as a result of the accident.
- [155] Therefore, the award for special damages will be \$6771.00.

Failure to Mitigate

- [156] The defendant seeks to apply a 20% reduction to the various heads of damage on the basis that the plaintiff failed to mitigate her losses by failing to follow through on prescribed exercises and by failing to return for additional counselling when advised to do so.
- [157] A plaintiff in a personal injury claim has a positive duty to take reasonable steps to mitigate her loss, and the defendant bears the onus of proving a plaintiff could have avoided some or all of her loss: *Graham v. Rogers*, 2001 BCCA 432 (leave to appeal ref'd: [2001] S.C.C.A. No. 467) at para. 35.

- [158] To meet that onus, the defendant must satisfy a two-part test. First, the defendant must show that Ms. Buezo unreasonably failed to exercise or seek counselling as recommended. Second, the defendant must show the extent, if any, to which her damages would have been reduced if she had acted reasonably: *Morgan v. Galbraith*, 2013 BCCA 305 at para. 78.
- [159] The defendant relies on Dr. Bentley's opinion that he would have expected Ms. Buezo's uncomplicated soft tissue injuries to resolve within three to six months with appropriate treatment. However, Dr. Bentley conceded in cross-examination that she seemed to have appropriate treatment (including physiotherapy and active rehabilitation) early in her recovery.
- [160] I find that Ms. Buezo likely did not stretch or exercise to any significant degree except when under the direct supervision of a physiotherapist or kinesiologist. She acknowledged as much to Dr. Bohorquez and Dr. Riar when they did their assessments. Her attempt to resile from that admission at trial was unconvincing. Mr. Hernandez's evidence that he helped Ms. Buezo with her stretches was unusually vague when compared to the rest of his testimony, and I do not accept it.
- [161] Dr. Bohorquez opined that Ms. Buezo has not optimally participated in rehabilitation activities and that "a regular home exercise program would help improve her symptoms". He confirmed on cross-examination that part of the remedy to improve her pain is to become more active and that if she had continued with the prescribed exercises, then she would find herself with fewer symptoms than she currently reports.
- [162] From a mental health perspective, Ms. Buezo's general practitioner initially referred her to psychiatry in April 2018, but she was not assessed at that time. There was no evidence at trial as to whether a psychiatrist agreed to consult or whether her general practitioner simply recommended that she see a psychiatrist. In cross-examination, Dr. Leung agreed that if Ms. Buezo had engaged in treatment, taken medication, and attended therapy in 2018, then her psychiatric condition would likely not be as severe as it is currently. However, I note there is no evidence that anti-depressants were prescribed in 2018.
- [163] Ms. Buezo described her sessions with psychologist Dr. Undurraga from August 2018 to March 2019 as very helpful. When she was referred back to Dr. Undurraga in July 2020, Ms. Buezo phoned once to try to make an appointment but did not follow-up.
- [164] Dr. Benito-Lazo prescribed Trintellix, an anti-depressant, in March 2019, but Ms. Buezo apparently did not take this medication. She did take Cymbalta, as prescribed by Dr. Benito-Lazo in August 2020, and Seroquel at bedtime to help her sleep starting in February 2021.
- [165] It is clear that Ms. Buezo did not follow all of the recommendations for exercise, counselling and anti-depressants. However, there was evidence that her psychiatric symptoms interfered with seeking appropriate treatment. Further, it is not clear that there was ever a comprehensive, coordinated treatment plan for the plaintiff's recovery that included all of the necessary elements. She had no psychiatric diagnosis until the medical

legal assessments were done, and it may be unfair to expect a busy general practitioner to manage the complex care needs of a patient who presents her complaints in such a scattered way.

[166] In short, I am not satisfied that the defendant has met the onus that the plaintiff unreasonably failed to follow treatment advice. While she might have done better with early intervention, the evidence does not establish on a balance of probabilities the extent to which her losses could have been avoided.

Conclusion

[167] To summarize, the defendants are liable to pay the following damages to Ms. Buezo:

Head of Damage

Award

Non-Pecuniary Damages

\$130,000

Past Loss of Earning Capacity

\$90,000

Future Loss of Earning Capacity

\$200,000

Loss of Housekeeping Capacity

\$100,000

Future Cost of Care

\$14,500

Special Damages

\$6,771

TOTAL

\$541,271

[168] Ms. Buezo is also entitled to her costs, subject to any offers or other matters that may require an adjustment to her costs entitlement. If the parties wish to address costs, they may arrange with Scheduling in the next 30 days to make submissions before me for this purpose.

"Lamb J."

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Prepared on 30 October 2026 · Esheria