

CANADA / JUDGMENT

Caffrey v. Davies

2020 BCSC 792

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Supreme Court of British Columbia

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2020 BCSC 792 Caffrey v. Davies

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Caffrey v. Davies,

2020 BCSC 792

Date: 20200528

Docket: M156307

Registry: Vancouver

Between:

Rebecca Caffrey

Plaintiff

And:

Jelaine Marie Davies

Defendant

Before: The Honourable Madam Justice Morellato

Reasons for Judgment

Counsel for the Plaintiff:

M. Kazlowski

Counsel for the Defendant:

S. Murphy

Place and Date of Trial/Hearing:

Vancouver, B.C.

December 16-20, 2019

April 8, 2020

May 8, 2020

Written Submissions:

May 7, 2020

May 13-14, 2020

Place and Date of Judgment:

Vancouver, B.C.

May 28, 2020

I. Introduction

- [1] The plaintiff, Ms. Rebecca Caffrey, was injured in a motor vehicle accident which occurred on September 28, 2013 in Langley, British Columbia ("Accident"). At the time of the Accident, Ms. Caffrey was a passenger in a vehicle driven by her husband, Mr. Graham Muchmore. They were rear-ended by the defendant. Liability is admitted.
- [2] Ms. Caffrey claims damages for physical injuries to her neck, shoulders, and her middle and lower back. She also claims damages for psychological injuries including generalized anxiety disorder, depression, panic attacks, and agoraphobia. The defendant admits liability but argues Mrs. Caffrey's injuries and symptoms have largely resolved; counsel for the defendant also submits that her current psychological symptoms are not a result of the Accident, and were not foreseeable. Counsel argues that Ms. Caffrey's psychological problems would have surfaced even if the Accident had not occurred.
- [3] Ms. Caffrey claims the usual categories of damages: non-pecuniary damages for pain and suffering, loss of past income earning capacity, loss of future income earning capacity, cost of future care, loss of housekeeping capacity and special damages. She also claims an in-trust award related to lost income her husband incurred when he left his job on her psychiatrist's advice to take care of her following a psychotic episode. The parties have agreed to special damages in the amount of \$4,821.50, although Ms. Caffrey also claims additional special damages, which are in dispute. Essentially, the defendant takes issue with Ms. Caffrey's entitlement to the damages claimed, including the quantum of damages she seeks.

II. Summary of Evidence

A. Testimony of Ms. Caffrey

- [4] Ms. Caffrey is currently 33 years old; she was 27 years old on the day of the Accident. She was born and raised in Liverpool, England. She is a trained nurse, specializing in pediatrics. She is married with two children who were born following the Accident.
- [5] Prior to the accident Ms. Caffrey was active and healthy. She exercised regularly and did not suffer from psychological or physical pain.
- [6] Ms. Caffrey worked for approximately two years as a nurse in England before immigrating to Canada in 2011. She and her then fiancée, Mr. Muchmore, moved to Canada along with her mother, father, and younger brother. She was a permanent resident before coming to Canada because her father had successfully applied for permanent residency status when he was in the UK. His permanent residency status included his wife, Ms. Caffrey and her younger brother. Mr. Muchmore came to Canada with a visitor's visa. Ms. Caffrey's parents and her younger brother have since moved back to England. In June 2018, Ms. Caffrey, along with her family and children also moved back to England.
- [7] Ms. Caffrey's nursing degree was not automatically recognized in Canada; she was required to take some equivalency courses in order to practice nursing. Because her husband was not able to work on a visitor's visa, Ms. Caffrey delayed her equivalency training; she needed to work in order to meet the young couple's living expenses and to pay for her equivalency training fees.
- [8] After their arrival in Canada, Ms. Caffrey found part-time work at a spa, and later at a pharmacy, making essentially minimum wage. In order to save money, she and her husband moved into the same residence as her mother, father and brother.
- [9] In May 2012, Ms. Caffrey commenced her upgrading courses at Kwantlen Polytechnic University. She completed her equivalency training in June 2013 and obtained a position as a "casual" pediatric nurse at Langley Memorial Hospital on August 6, 2013. As a casual employee her hours varied, although Ms. Caffrey testified that she worked "usually close to full-time hours." Approximately seven weeks after beginning this new job, Ms. Caffrey was injured in the Accident.
- [10] Ms. Caffrey was wearing a seatbelt on the day of the Accident. She was a passenger in a vehicle driven by her husband. No airbags were deployed; the evidence does not establish a loss of consciousness, although Ms. Caffrey was very upset by the experience. She was taken by ambulance to Langley Memorial Hospital. She was sent for x-rays which revealed no fractures or broken bones. She was discharged that same day.

- [11] Two days after her Accident, on September 30, 2013, Ms. Caffrey went to see her family physician, Dr. Desai. She reported headaches, neck pain, shoulder pain, dizziness, back pain, nausea, light-headedness and a tingling sensation in her fingers. She also reported a twitching sensation in her left arm. When she saw Dr. Desai again on October 1, 2013, she had also developed problems with hearing on her left side, and pain in her temporomandibular joint.
- [12] Ms. Caffrey testified she started feeling anxious very shortly after the Accident. Her anxiety arose while she was travelling in vehicles. Ms. Caffrey also testified that within the first two or three months immediately after the Accident her sleep was poor due to back pain, and she also had dreams in which she had "flashbacks" about the moment of impact; during such dreams about the Accident, she would wake up screaming.
- [13] Following the Accident, Ms. Caffrey missed about two weeks of work, then continued to work as a causal nurse. Her post-Accident symptoms also continued. She tried to schedule more night-time and weekend shifts because, she explained, the work was lighter on the ward when the children were sleeping. She testified that because she was injured just a few weeks after she was hired, she pushed herself to keep working despite her injuries.
- [14] In January 2014, Ms. Caffrey applied for and obtained what she described as her "dream job" at BC Children's Hospital in Vancouver ("Children's Hospital"). This was a full-time position as a "float nurse" which meant she was required to move to different units within the hospital to fill shortages. The work at Children's Hospital was not easy; she found it "heavier" than at Langley Memorial Hospital. The children were much sicker and required more intensive care.
- [15] The job at Children's Hospital also required her to commute from Langley to Vancouver. She testified it would take her approximate one hour to drive to work; the two-hour round trip daily commute became very problematic over time. Her anxiety level about driving increased and she started having more panic attacks. She attributes the anxiety and panic attacks to the trauma she experienced in the Accident. She testified there were days that she called in sick because she "could not face the drive." The anxiety also became more generalized and more frequent over time. She testified that eventually there was "no rhyme or reason" to when the panic attacks occurred.
- [16] In mid-July 2014, Ms. Caffrey left her position as a float nurse, and began working in the surgical daycare department, again at Children's Hospital. She testified that the inpatient wards that she was working on as a float nurse aggravated her back pain. The shifts in surgical daycare at Children's Hospital were less taxing; these shifts were 7.5 rather than 12 hours long. However, Ms. Caffrey continued to suffer from anxiety and started feeling depressed as well. During her time working in the surgical daycare, around July 2014, Ms. Caffrey was prescribed medication for anxiety and depression, as well as pain medication for her back.

- [17] While working at Children's Hospital, Ms. Caffrey and her husband moved from Langley to a residence in Surrey, which she stated was closer in proximity to Children's Hospital. On cross-examination, Ms. Caffrey acknowledged that the commute from Surrey to Children's Hospital and from Langley to Children's Hospital was approximately the same and that the proximity to her workplace was less a factor in her move than finding a neighbourhood she liked.
- [18] On October 6, 2014 Ms. Caffrey transferred to the BC Cancer Agency at Surrey Memorial Hospital ("Cancer Agency"). Ms. Caffrey testified that she made the switch because of the frequent panic attacks and sleep loss related to the anxiety about the anticipated commute to work each day. She was able to take the bus to work to the Cancer Agency, which helped improve her anxiety level.
- [19] Ms. Caffrey became pregnant with her first child in October 2014. Dr. Desai testified that he counselled her to discontinue her psychotropic medications during her pregnancy. Ms. Caffrey testified that she did not feel like her mood changed very much after she discontinued the medication; she continued to suffer anxiety and depression.
- [20] In 2015, Ms. Caffrey was referred, by her family doctor, to a physiatrist, Dr. Jaworski. He recommended core strengthening exercises. Ms. Caffrey testified that she diligently did her home exercises every evening. On the recommendation of Dr. Desai, she also sought message therapy and physiotherapy treatments. Her last physiotherapy treatment appears to have been in May 2015.
- [21] This was a very difficult time in Ms. Caffrey's life. Her parents returned to England to take care of her mother's father who was very ill. In addition, pre-natal testing indicated that her unborn child might have spina bifida. As well, an abnormal pap smear indicated Ms. Caffrey might have cervical cancer. Fortunately, Ms. Caffrey did not have cancer and she delivered a healthy baby girl on July 13, 2015.
- [22] After her daughter was born, Ms. Caffrey and her husband moved to a townhome in Surrey. During this time, she continued to have back pain. Holding or bathing her daughter was physically difficult, as was changing her daughter's diapers. She also continued to be anxious and to suffer from low moods.
- [23] She testified that their townhouse was located in an area where public transit was poor; she stayed at home most of the time. Sometimes she took her daughter out for a walk in her stroller. The only help she had with her newborn was her husband who would leave for work around 6:00 a.m. and return at 5:00 p.m. During her maternity leave she testified how she "cried a lot." As well, because of her back pain and because her daughter woke her up at night, she slept poorly. She also continued to have nightmares about the Accident.
- [24] In June 2016, after her one-year maternity leave, Ms. Caffrey returned to work at the Cancer Agency. She initially started working full-time but soon found she was struggling to cope with her mental health. She reduced her hours to part-time work. She would walk with her

daughter to the daycare, which was a 45 to 55-minute walk, or she would take the bus. She testified that she preferred walking over driving. On those occasions where she chose to drive, she felt physically sick due to the anxiety caused by her fear that an accident might occur while her daughter was in the car.

- [25] In November 2016, Ms. Caffrey became pregnant for the second time. There was some risk of a premature delivery. Ms. Caffrey was put on bed rest 32 weeks into her pregnancy, commencing her maternity leave early.
- [26] In February and March 2017, while pregnant with her second child, Ms. Caffrey saw Dr. Jung, a registered psychologist in an effort to address her continuing anxiety and depression; she discontinued her treatment after two sessions.
- [27] Ms. Caffrey testified that, as the second pregnancy progressed, her back pain increased again. She said that she sought relief by lying in bed with heat packs. Her second daughter was born on August 8, 2017. Ms. Caffrey testified that at this time, their immediate family was living in the same townhouse in Surrey. Her youngest daughter was two years old. Mrs. Caffrey testified that she felt very isolated and that her husband was her only source of support. She did not feel like going out much.
- [28] Ms. Caffrey described how she was constantly irritable and angry with her children during this time period. Her back pain was exacerbated due to breast-feeding. She continued to have panic attacks and felt unable to cope with even the simplest of things. She said she often wished she would not wake-up in the morning. She dreaded being alone with the children. She has very unhappy.
- [29] At a six-week postpartum check, Ms. Caffrey's obstetrician referred her to counselling at the reproductive mental health program at BC Women's Hospital. Ms. Caffrey was suffering from postpartum depression. She saw Dr. Bowering, a psychiatrist at BC Women's Hospital in September 2017. On that date, Dr. Bowering made the following recommendations:
- a) that Ms. Caffrey see one of the counsellors at the reproductive mental health program;
 - b) that she consider hiring a postpartum doula for the night time; and
 - c) that she take sertraline, an anti-depressant.
- [30] Ms. Caffrey testified that she was placed on a waiting list to see one of the counsellors. She stated that she was unable to afford a postpartum doula, and that she did not start the sertraline because she was concerned the drug would transfer through her breast milk to her daughter.
- [31] Ms. Caffrey's psychological condition worsened and, one evening in January 2018, she suffered a psychological breakdown. Dr. Latimer, the expert witness for the defendant and a psychiatrist, described this event as a psychotic break.

- [32] Her husband was working a night shift the evening of this psychotic episode. Her children had been up for a few nights crying and she was exhausted. Ms. Caffrey said that suddenly her heart started to beat rapidly she started having a panic attack. She said she felt like she had to run out of the house. She called her mother in England, crying hysterically. She recalls yelling and stamping her feet. Ms. Caffrey's mother called Mr. Muchmore, explaining that Ms. Caffrey was deeply distressed and needed immediate help. He left work that evening to be with Ms. Caffrey.
- [33] Ms. Caffrey was not hospitalized but was treated by Dr. Bowering. Dr. Bowering recommended that Mr. Muchmore stay off work until Ms. Caffrey was able to cope with childcare without his assistance. Dr. Bowering again recommended she take sertraline to alleviate her psychological distress. Ms. Caffrey testified that the sertraline generated severe frontal headaches and increased her appetite, although her headaches dissipated after approximately two weeks. Even so, Ms. Caffrey did not feel that the sertraline was particularly effective.
- [34] Ms. Caffrey testified that once her husband was at home during the day, she and her husband tried to share the childcare 50/50. Her husband helped with the childcare at night, but Ms. Caffrey still slept poorly. She testified that she was still up at night and into the early morning hours breastfeeding every 2 to 3 hours; she found it hard to fall asleep afterwards. Ms. Caffrey and her husband also found the arrangement financially difficult. She was receiving maternity pay and her husband was receiving employment insurance benefit payments. No evidence was led with regard to the amount of employment insurance income Mr. Muchmore received.
- [35] Ms. Caffrey had hoped that her mental health would improve with the additional support from her husband, but she continued to struggle. Ms. Caffrey and Mr. Muchmore decided to return to England to avail themselves of the wider support network there. The family had initially planned that once her mental health improved, they would return to Canada. They have since decided not to return and have decided live in England permanently.
- [36] Ms. Caffrey and her husband returned to England on May 17, 2018. They moved into her parents' house which was a four-bedroom, 1.5-bathroom home. At the time her younger and older brothers were also both living there with her parents.
- [37] As Ms. Caffrey's maternity leave was drawing to a close, she had still not recovered sufficiently to return to Canada. As a result, she asked for and received a one-year unpaid leave of absence at the BC Cancer Agency.
- [38] Ms. Caffrey says that she brought a six-month supply of sertraline with her from Canada. She testified that there was a delay in being able to qualify for coverage through the healthcare system in England. She first saw her family physician in England in December 2018. The doctor wrote a new prescription for sertraline and put her on a waiting list to see a psychiatrist. Ms. Caffrey says that it takes three to four months to get an appointment to see a doctor through the English health care system. She explained that doctor's appointments

are not necessary to have prescriptions refilled and, as a result, she has only seen her family physician one time. She is still on a waiting list to see a psychiatrist.

- [39] Ms. Caffrey testified that on March 18, 2019, she felt well enough to commence working as a nurse two days a week, 10 hours a day at the Alder Hey Children's Hospital. She says the work is not physically demanding in terms of lifting, but she is still on her feet for the entire shift. She says that she feels she could not mentally cope with more work. She says that it is sometimes a struggle even to do the two days a week. On cross-examination, Ms. Caffrey acknowledged that no one has advised her that she could not work more than two days a week, although she stated she was aware of her own limits.
- [40] Ms. Caffrey acknowledged that her mental health has improved somewhat since she left Canada but said she still struggles with panic attacks. She continues to avoid driving as much as possible. She says the public transit in England is much better, so she is able to get out more.
- [41] Ms. Caffrey was asked on cross-examination whether she recalls falling down the stairs in January 2014. She testified she did not recall such a fall.
- [42] On cross-examination, Ms. Caffrey resisted counsel's suggestion that she suffered from postpartum depression, testifying that she was not told about the specific type of depression she experienced. When asked on cross-examination whether she related her psychotic break to the Accident, Ms. Caffrey responded: "I do in some respects."

B. Testimony of Mr. Muchmore

- [43] Mr. Muchmore's evidence reflected that of Ms. Caffrey. He testified that prior to the Accident his wife was physically active and healthy. They went to gyms and recreation centres and she exercised in the garage regularly to YouTube videos. They would also go walking and would hike, which included the Grouse Grind and the Stawamus Chief.
- [44] Mr. Muchmore testified that prior to the Accident she would "light up a room when she walked in." She was chatty and confident, making friends easily. She was "happy" and had "no issues or worries." Following the Accident, Mr. Muchmore described how Ms. Caffrey developed anxiety about driving, and that she would at times need him to drive her to work. Over time, she became irritable and withdrawn. Her psychological difficulties became worse after the birth of their children.
- [45] Mr. Muchmore recalls receiving a telephone call from his mother-in-law the evening Ms. Caffrey had her psychotic break. Ms. Caffrey's mother told him that she had received a call from Ms. Caffrey and that she was in a bad state; she was very worried for her safety. He left work early that night and went home. He says that, when he arrived home, all the lights in the house were out except for the light in the range hood. He said Ms. Caffrey was sitting on the sofa in the living room with her oldest daughter. He could not hear or see the youngest daughter. He said he was very concerned and ran upstairs to check on the baby, who was

alright. When he returned downstairs, he said that Ms. Caffrey looked vacant, with a glazed look in her eyes.

- [46] On cross-examination, Mr. Muchmore was asked whether he recalled his wife falling down the stairs in January 2014. He testified he did not recall the incident. Mr. Muchmore was taken to a Facebook entry he made on January 19, 2014 which stated he witnessed his wife fall down the stairs that day. Upon further cross-examination, Mr. Muchmore did not dispute Ms. Caffrey had fallen down the stairs and he acknowledged the incident must have occurred.

C. Expert Evidence of Dr. Jaworski

- [47] Dr. Jaworski was qualified as an expert in Physical Medicine and Rehabilitation. At the request of her family physician, Dr. Jaworski first saw Ms. Caffrey on May 25, 2015. His initial diagnostic impression was that she was "suffering from chronic myofascial pains in the context of advanced pregnancy." He noted various "trigger points", including tenderness in her neck and back. He was of the view that she "was coping with her pain problem very well, maintaining a full-time job" and concluded "there was no need for formal additional treatment until she had her baby."
- [48] Dr. Jaworski reassessed Ms. Caffrey on June 15, 2016, again at the request of her family physician. He observed that "lumbosacral spine mobility was reasonably well-maintained" and that there was "mild diffuse tenderness over the lumbosacral areas." Overall, he concluded that she has had "chronic back pain with mechanical or activity related features."
- [49] When Dr. Jaworski saw Mrs. Caffrey again in September 2016, she was again complaining of back pain. He found the "pains were clearly activity-related (mechanical). Mrs. Caffrey had returned to work following her maternity leave and was doing exercises to strengthen her core muscles. Dr. Jaworski reported that "I felt she needed to intensify her exercise efforts."
- [50] Ms. Caffrey was again assessed by Dr. Jaworski in December 2016. At that juncture, she reported having intermittent low back pains which were activity related. She was in the early stages of her second pregnancy.
- [51] At her counsel's request, Dr. Jaworski examined Ms. Caffrey again in April 2018. She again presented with ongoing back pains. Dr. Jaworski concluded:

It is likely that the trauma of the [Accident] triggered this now chronic and largely non-specific back pain (with some features of mechanical or activity- related back pain) with her current stressors related to gynecology/obstetric concerns.

- [52] In his report, Dr. Jaworski also noted documentation he reviewed regarding Ms. Caffrey's concurrent history of anxiety, depression, post-traumatic stress, and "gynecology/obstetric" concerns. He did not provide a precise prognosis:

Optimizing her general health would be a significant part of the management of her pain problem. Considering the non-specific nature of her pain experiences, it is difficult to be more precise in terms of prognostication.

[53] Dr. Jaworski confirmed during cross-examination that he was not provided with a copy of Dr. Bowering's clinical records, wherein Dr. Bowering notes: that Ms. Caffrey reported a "remote history of an eating disorder, which has been in long remission"; that her mother had suffered from "severe post-partum depression"; and that both her father and brother suffered from depression. Dr. Jaworski did note in his report that Ms. Caffrey was treated for postpartum depression by Dr. Bowering. He testified that it was "very likely" Ms. Caffrey advised him of her history of postpartum depression.

D. Expert Evidence of Dr. Jung

[54] Dr. Jung was qualified as a clinical psychologist, able to render opinions regarding the diagnosis, treatment and prognosis of psychological conditions including depression, anxiety, panic attacks and phobias. Dr. Jung submitted an expert report after having examined and assessed Ms. Caffrey in February and March 2017. He also met Ms. Caffrey for "two sessions of psychological treatment" in July 2017 and provided an "update assessment" on March 16, 2018.

[55] Dr. Jung noted cancellations of treatment sessions with Ms. Caffrey for reasons related to work and childcare issues, noting that eventually sessions were postponed due to the upcoming delivery of her second child.

[56] In 2017, Dr. Jung diagnosed Major Depressive Disorder (Mild), Specific Phobia, and Generalized Anxiety Disorder (mild) with panic symptoms. The following year, in March 2018 and after the birth of her second child, Dr. Jung reassessed Ms. Caffrey. He opined that at that time she "continued to meet the criteria of Major Depressive Disorder (moderate-severe), Specific Phobia (situation: and being in traffic) and Generalized Anxiety Disorder (moderate to severe) with panic symptoms."

[57] Dr. Jung further opined as follows:

If not for the [Accident], Ms. Caffrey would not have developed her Major Depression in the mild range and Specific Phobia, and her Generalized Anxiety Disorder with panic symptoms in the mild range. I am of the opinion that her persisting physical and psychological problems rendered her less able to deal with the regular ebb and flow of stressors in normal life, Ms. Caffrey was much more vulnerable to life's daily stresses. Her depressive and anxiety symptoms from her [Accident] made her more vulnerable to deterioration following her pregnancy. Following her second pregnancy, the impact of her psychological problems arising from her [Accident], combined with the demands of raising a growing family, exacerbated her depressive and anxiety symptoms.

- [58] Dr. Jung stated in his report that the prognosis for Ms. Caffrey returning to her pre-accident state "is guarded." He pointed out, however, that since Ms. Caffrey has not received any consistent level of psychological intervention, he anticipates improvement once treatment is provided. He further notes that "as long as her physical injuries and pain persist, she is likely to continue experience psychological problems and/or be vulnerable to relapse. He defers to "the respective medical specialist to comment further on her physical injuries and diagnosis."
- [59] Dr. Jung recommended psychological intervention once a week for four to six months, followed by biweekly treatment for three to four months, and then follow-up sessions on a monthly basis for a year. Dr. Jung also recommended Ms. Caffrey see a psychiatrist as "emotional recovery is optimized when judicious use of psychotropic medication is combined with psychological intervention."
- [60] Dr. Jung confirmed under cross-examination that he was not provided with Dr. Bowering's clinical notes which reference Ms. Caffrey's eating disorder during her youth, as well as her brother and father's history of depression. Dr. Jung's report does not reference Ms. Caffrey's medical or psychological history in detail, and simply states:
30. With respect to her past health, Ms. Caffrey did not appear to have any major physical problems, illnesses, hospitalizations or surgeries as a child, teenage or adult, prior to this [Accident] of concern.
- [61] On cross-examination, Dr. Jung acknowledged that, while he concluded Ms. Caffrey suffered from depression, he did not mention postpartum depression in his report. On further cross-examination, Dr. Jung agreed Mrs. Caffrey did not disclose to him the full extent of her postpartum symptoms. When asked whether Ms. Caffrey's depression could be treated, he responded: "Oh yes." He also stated that "I do believe she will get better."
- [62] Dr. Jung acknowledged the four-year gap between the Accident and his two treatment sessions. He agreed Ms. Caffrey "would have been better off" if she received treatment earlier than she did.

E. Expert Evidence of Dr. Desai

- [63] Dr. Desai has been Ms. Caffrey's family physician since 2011. He was qualified as an expert in the general practice of medicine, including diagnosing as well as treating soft tissue injuries and psychological conditions such as anxiety and depression.
- [64] Dr. Desai provided an expert report. In his report he confirmed he saw Ms. Caffrey on September 20, 2013, two days after the Accident; he saw her two more times in 2013, once in November 2013 and once in December 2013. During these visits Ms. Caffrey complained of headaches, neck pain, neck stiffness, shoulder pain, dizziness, back pain, nausea, light-headedness and tingling sensations in her fingers. She was also feeling a twitching sensation in her left arm. Dr. Desai found she was tender in her neck, mid-back and lower-back, with

pain and reduced movements in these areas in all directions. Her ears were normal although she had pain in her left temporomandibular joint. She was prescribed an anti-inflammatory and a muscle relaxant. She was advised to continue exercising.

- [65] Dr. Desai noted in his report that by October 12, 2013, Ms. Caffrey had returned to regular hours of work, although her symptoms continued. She started seeing a physiotherapist and Dr. Desai was of the view this was helping.
- [66] In January through April 2014, Ms. Caffrey continued to have neck pain, shoulder pain, back pain, difficulty sleeping and hearing loss in her left ear. When she saw Dr. Desai on January 28, 2014, Dr. Desai does not record an incident where Ms. Caffrey fell down the stairs. Dr. Desai notes in his report that on, January 28, 2014, Ms. Caffrey was having increased symptoms of anxiety. He states "She had changed jobs and had to drive into Vancouver. She was struggling while driving. She would have panic type attacks and be more anxious after driving." Dr. Desai referred Ms. Caffrey for counseling, and advised that she continue with physiotherapy. He also advised her "to do light duties at work."
- [67] Ms. Caffrey continued to see Dr. Desai throughout 2014 for continuing pain in her neck, shoulders and back, as well anxiety and insomnia. Dr. Desai also found Ms. Caffrey was suffering from "post-traumatic stress especially while driving." On July 4, 2014, Dr. Desai prescribed medications for anxiety and depression, in addition to the pain medications that he had previously prescribed for her neck and back.
- [68] Dr. Desai noted that by the fall of 2014, Ms. Caffrey's anxiety attacks had increased to twice a day and were not limited to when she was driving. She was using Ativan as needed during these episodes. She was no longer going to counselling sessions. Her Cipralext prescription as increased and this helped her. However, she stopped taking these medications when she became pregnant, and her conditions worsened. Dr. Desai referred her to a psychiatrist.
- [69] Dr. Desai reports that by the spring of 2015, when Ms. Caffrey was about 25 weeks pregnant, her symptoms worsened overall, "aggravated in part by complications in her pregnancy." Following the birth of her first child in July 2015, Dr. Desai reports that Ms. Caffrey continued to struggle with neck and back pain. She continued to have anxiety, especially while driving.
- [70] Ms. Caffrey saw Dr. Desai on July 22, 2015, a week following the birth, and then returned to see him the following year on May 13, August 14, and October 23, 2016. She returned to work in the summer of 2016, following a one-year maternity leave. Dr. Desai reported that she continued to have back pain at this time, which increased by the end of the work day.
- [71] Dr. Desai reports he saw Ms. Caffrey again in February 2017 for "follow-up on her MVA related injuries", noting that "she continued to have back pain, mainly lower back." He notes that the symptoms were getting worse "as she was pregnant for a second time." At this point she was working part-time due to pain. Dr. Desai referred Ms. Caffrey for massage therapy.

- [72] Dr. Desai opined that, in the absence of any events of which he was not aware, it was likely that: (1) Ms. Caffrey suffered soft tissue injuries to her neck, upper and lower back and both shoulders as a result of the Accident; and (2) she suffered from the psychological symptoms of anxiety, depression and post-traumatic stress symptoms from the Accident. He stated that "Ms. Caffrey's treatment for her current medical conditions related to the MVA" [as of August 2017], should include continued avoidance of excessively physical activities, anti-inflammatories and pain medications." He also stated that Ms. Caffrey "may require further physiotherapy, message therapy, and counseling and also chiropractic therapy, acupuncture and local cortisone injections in the future." He adds that there "may also be a role for other types of treatment like laser therapy and trigger point injections" and also that "she may need to see the physical medicine and rehabilitation [specialist] again, and also may need to see a psychiatrist for psychological symptoms.
- [73] Dr. Desai opined that "given the extent and nature of Ms. Caffrey's injuries, they are unlikely to resolve in the near future [as of August 2017]; however he also opined that "he was unable to comment on the possibility of permanent impairment or the time within which maximum recovery could be expected."
- [74] Dr. Desai's report was update either in or 2018 or 2019.

F. Expert Evidence of Dr. Latimer

- [75] The defendant called Dr. Latimer, who was qualified to give opinion evidence in the field of psychiatry, including the diagnosis, treatment and prognosis of depression and anxiety. He examined and assessed Ms. Caffrey on September 10, 2019 and issued his expert report on September 16, 2019. I found his report particularly instructive.
- [76] Dr. Latimer made the following diagnoses in regard to Ms. Caffrey's mental state:
- Major Depressive Disorder, single episode, with psychotic features;
 - Specific Phobia, driving and traffic;
 - Generalized Anxiety Disorder;
 - Panic Disorder; and
 - Agoraphobia.
- [77] Dr. Latimer's assessment makes it clear that Ms. Caffrey remained depressed at the time of his assessment in September 2019, but not to the degree she was in January 2018. He found that at the time of his assessment, Mrs. Caffrey was moderately depressed.
- [78] Ms. Caffrey advised Dr. Latimer that she did not have any psychiatric assessment or treatment prior to the Accident and she reported being unaware of any psychiatric assessment or treatment among her biological relatives.

[79] Dr. Latimer noted that Dr. Jung reported he was advised by Ms. Caffrey that her mother had experienced postpartum depression and struggled with depressive symptoms.

[80] Dr. Latimer reported Ms. Caffrey advised she was disappointed about leaving her job at Children's Hospital and that she disliked her job at the BC Cancer Agency. He observed that she became pregnant and stopped her Cipralext; further, around this time her parents also decided to return to England, which Ms. Caffrey described as "devastating" during her examination with Dr. Latimer. Dr. Latimer observed that Ms. Caffrey was left in a new country, missed her parents, felt physically unwell, was depressed and pregnant, and was doing a job she did not like. He also noted in his report that Ms. Caffrey may have had some genetic predisposition to depression, given her mother's history of postpartum depression. He opines that her panic disorder, agoraphobia and her psychotic episode emerged as her depression became more severe. He also opined that the Ms. Caffrey's driving disorder "certainly resulted" from the Accident.

[81] Dr. Latimer opined that further treatment is necessary:

Even now her treatment is relatively inadequate. The dose of sertraline could certainly be increased to 200-300 mg daily and could be supplemented with Abilify 1-5 mg if necessary. She should certainly be seeing a psychiatrist.

[82] Dr. Latimer was also clearly of the view that Ms. Caffrey would benefit from psychiatric treatment.

III. Causation

[83] The defendant admits Ms. Caffrey was injured as a result of her negligence and does not dispute that Ms. Caffrey suffered neck and low-back pain in the Accident. However, counsel submits Ms. Caffrey's physical injuries have largely resolved and disputes the extent to which the defendant is responsible for Ms. Caffrey's present psychological condition.

[84] Notably, Ms. Caffrey candidly acknowledges that, currently, her primary disability is psychological. The defendant underscores that the cause of her current psychological disability is not a function of the Accident. Rather, counsel submits that Ms. Caffrey's psychological condition is a function of a pre-existing hereditary disposition to depression and a severe postpartum depression, coupled with challenging circumstances in her life situation; he submits all of this would have occurred in any event, without the Accident.

[85] The law is clear that Ms. Caffrey must establish, on a balance of probabilities, that the defendant's negligence caused or materially contributed to an injury. The defendant's negligence need not be the sole cause of the injury so long as it is part of a cause beyond the range of de minimus. Further, causation need not be determined by scientific precision: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at paras. 13-17; *Farrant v. Laktin*, 2011 BCCA 336 at para. 9.

[86] The primary test for causation asks: but-for the defendant's negligence, would Ms. Caffrey have suffered the injury? The "but-for" test recognizes that compensation for negligent conduct should only be made where a substantial connection between the injury and the defendant's conduct is present: *Resurface Corp. v. Hanke*, 2007 SCC 7 at paras. 21-23.

[87] Causation must be established by the plaintiff before damages are assessed, so that the defendant's damages do not put the plaintiff in a better position than she was in before the negligent act occurred and the plaintiff must not be compensated for damage that would have occurred anyways. As McLachlin, C.J.C. stated in *Blackwater v. Plint*, 2005 SCC 58 at para. 78:

Even though there may be several tortious and non-tortious causes of injury, so long as the defendant's act is a cause of the plaintiff's damage, the defendant is fully liable for that damage. The rules of damages then consider what the original position of the plaintiff would have been. The governing principle is that the defendant need not put the plaintiff in a better position than his original position and should not compensate the plaintiff for any damages he would have suffered anyway: *Athey*.

[88] The most basic principle of tort law is that the plaintiff must be placed in the position he or she would have been in, if not for the defendant's negligence, no better or worse. However, the law also requires that tortfeasors must take their victims as they find them, even if the plaintiff's injuries are more severe as a consequence of the negligence than they would be for a normal person; this is the "thin skull" rule. Nevertheless, the defendant need not compensate the plaintiff for any debilitating effects of a pre-existing condition which the plaintiff would have experienced anyway, often referred to as the "crumbling skull" rule: *Athey* at paras. 32-35.

[89] In this case, causation is difficult to assess, in part because the evidence identifies a number of potential causal events that are responsible for Ms. Caffrey's current psychological condition, but also because in rendering the expert opinion that the Accident caused Ms. Caffrey psychological disabilities, Dr. Jung was not provided with a complete history or complete information concerning Ms. Caffrey's familial history or possible predisposition to her current psychological problems.

[90] Notably, Dr. Latimer did not specifically attribute his diagnoses of depression, generalized anxiety disorder, panic disorder and agoraphobia to the Accident, although he found that Ms. Caffrey's fear of driving "certainly" resulted from the Accident. He also observed there may have been some genetic predisposition to depression given her mother's history.

- [91] In light of the totality of the evidence before me, I am satisfied that, as a result of the Accident, Ms. Caffrey suffered injuries to her neck, shoulder, ear and her upper and lower back, which have now largely resolved, except for some intermittent lower back pain. I also accept Dr. Latimer's opinion that the Accident caused driving anxiety, which has escalated into a driving phobia. I find that Ms. Caffrey's panic attacks and generalized anxiety disorder were also caused by the Accident.
- [92] I find that Ms. Caffrey would have likely suffered from postpartum depression even if the Accident had not occurred. I am not persuaded, on a balance of probabilities that the Accident directly caused her postpartum depression or the psychotic episode she experienced in January 2018; there were a number of contributing stressors at play (e.g., her family's departure to England; a familial predisposition to postpartum depression, as well as the birth of her second child without daytime support at home).
- [93] Nevertheless, I must also consider the more difficult question of whether the Accident exacerbated Ms. Caffrey's postpartum depression; in this regard, I find that it did. Ms. Caffrey developed a driving phobia, generalized anxiety and depression, after the Accident, before she experienced her postpartum depression. Her psychological condition was deteriorating before the birth of her first child and deteriorated even further after the birth of her second child. Dr. Desai noted in his report and clinical records that between January and April 2014, a few months after the Accident, Ms. Caffrey was experiencing increasing anxiety about driving to work. He opines that in the summer of 2014, a year before the birth of her first child, Ms. Caffrey was suffering from depression. Dr. Jung opines that after the birth of her second child, shortly after her psychotic episode, Ms. Caffrey's depression had escalated from mild to "moderate to severe."
- [94] I also accept Dr. Jung's opinion that Ms. Caffrey's physical and psychological problems "made her less able to deal with the regular ebb and flow of stressors in normal life" and that this made her "more vulnerable to deterioration following her pregnancy. As a result, following her second pregnancy, the depression and anxiety caused by the Accident exacerbated her depression and anxiety symptoms. In light of this evidentiary matrix, I find that the Accident materially contributed to and exacerbated Ms. Caffrey's psychological condition in 2017 and 2018.
- [95] Ms. Caffrey continues to experience depression and anxiety, although I find that her psychological condition has improved and that she is not as depressed as she once was. This is born out by both Dr. Latimer's assessment in 2019 and Ms. Caffrey's acknowledgement on cross-examination that her psychological condition has improved.

IV. Non-Pecuniary Damages

- [96] It is well established that, in determining non-pecuniary damages, each case must be assessed based on the particular facts before the court and in light of the following factors delineated in *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46:

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

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

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

- (g) impairment of family, marital and social relationships;
- (h) impairment of physical and mental abilities;
- (i) loss of lifestyle; and
- (j) the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff: *Giang v. Clayton*, [2005] B.C.J. No. 163 (QL), 2005 BCCA 54).

[97] As noted by the Court of Appeal in *Moskaleva v. Laurie*, 2009 BCCA 260 at para. 95, the amount of the non-pecuniary award should compensate for more than just direct injuries:

[95] The underlying purpose of non-pecuniary damages is to "make life more endurable" and should be seen as compensating for more than just a plaintiff's direct injuries. [T]he quantum of an award is determined through a functional approach and should not necessarily correlate with the gravity of the injury.

[Citations omitted.]

[98] Accordingly, the amount of an award for non-pecuniary damage should not depend solely on the seriousness of the injury but must also reflect how the injury affects the condition of the plaintiff, in his or her particular situation. The gravity of the injury alone will not be determinative. An appreciation of the individual's particular loss is key; consolation or solace for his or her distress must be embodied in the compensation award: *Lindal v. Lindal*, [1981] 2 S.C.R. 629 at 636-637. In dealing with an award of this nature, it will be impossible to develop a "tariff". An award will vary in each case "to meet the specific circumstances of the individual case": *Thornton v. Board of School Trustees of School District No. 57 (Prince George)*, [1978] 2 S.C.R. 267 at 284.

- [99] I have examined each of the factors in Stapley, Moskaleva, and Lindal, in light of the circumstances of this case. I have also taken into account the specific submissions of the parties regarding the factors that inform my analysis in assessing non-pecuniary damages. In doing so, I have examined the nature of the injuries that Ms. Caffrey sustained as a result of the Accident, including whether and to what degree her various injuries have persisted, and how her lifestyle has been impacted.
- [100] There is no question that Ms. Caffrey was injured as a result of the defendant's negligence. As discussed above, I have concluded that Ms. Caffrey suffered various injuries, including injuries to her neck, shoulder, ear, and her upper and lower back. I also find that these injuries have now largely resolved, except for some activity-related, intermittent lower back pain.
- [101] I accept Dr. Latimer's opinion that the Accident caused driving anxiety which has escalated into a driving phobia. I also find that Ms. Caffrey's panic attacks and her generalized anxiety disorder were also caused by the Accident.
- [102] I have concluded that Ms. Caffrey's overall health, recreational activities and general lifestyle have been impaired as a result of the Accident. I have considered how her injuries, functional losses and continuing symptoms have curtailed her ability to maintain the active lifestyle she once did. I also find that Ms. Caffrey's ability and capacity for doing housework has been negatively impacted and that her back pain continues to affect her ability to do housework from time to time. These factors have also been taken into account in assessing Ms. Caffrey's non-pecuniary damages.
- [103] Overall, I find the evidence does establish a real and substantial possibility that Ms. Caffrey's Accident-related back pain is likely to be permanent. In regard to my findings that Ms. Caffrey has suffered and continues to suffer from depression as a result of her injuries, as noted above, Dr. Jung testified that he was of the view that Ms. Caffrey's psychological conditions could be treated and, further, he also testified she would get better with treatment. Similarly, Dr. Latimer's assessment also indicated that Ms. Caffrey's depression has improved since 2018 and was of the view that she would benefit from proper treatment. On the basis of the evidence before me, I find that Ms. Caffrey's psychological conditions are treatable and there is a substantial possibility that they will heal over time.
- [104] As regards the evidence that Ms. Caffrey fell down some stairs on January 20, 2014, I am unable to conclude this injury is a cause of her continuing, intermittent back problems. While, her husband's Facebook entry referred to the fall, it suggested he found the incident somewhat comical and, while Ms. Caffrey did report this fall during a physiotherapy treatment on January 20, 2014, when she saw Dr. Desai a few days later on January 28, 2014, no note of the fall or a related injury was made. Dr. Jaworski was also not advised of the fall. The physiotherapist who saw Ms. Caffrey was not called by either party. As noted above, Ms. Caffrey did not recall the event and her husband appeared to have a limited recollection of it. As a whole, the evidence regarding Ms. Caffrey's fall does not establish that

the injury was serious or that it had any permanent effect.

- [105] It would have been best if the expert witnesses were advised of the fall, along with specifics regarding the nature of the fall and the surrounding circumstances. I find that, overall, Ms. Caffrey could have been more thorough and candid about disclosing her health history (e.g., her fall in January 2014 and her family's history of depression) to the expert witnesses, although I note she was not cross-examined on this point.
- [106] Counsel for the defendant also asserts that as a knowledgeable health professional, Ms. Caffrey should have been more diligent and committed to pursuing counselling and treatment for her depression and anxiety during the years since the Accident. He submits that if she had done so, Dr. Latimer's opinion makes it clear that her psychological condition would be much improved and she may not have suffered a psychotic break. On the evidence before me, I find that while Ms. Caffrey did attend a few counseling sessions over the years, she did not actively pursue treatment or counselling opportunities that were available to her. However, as Dr. Latimer testified, this is a common pattern of behaviour among depressed patients. Dr. Latimer testified that the failure to follow through with treatment for depression is, generally speaking, a reflecting of the illness itself. To his credit, counsel for the defendant did not pursue the defence of failure to mitigate in light of this evidence.
- [107] Counsel for Ms. Caffrey asserts that the non-pecuniary damages in this case should be \$140,000. Counsel for the defendant submits that a fair award would fall within the range of \$70,000-\$85,000. In light of the case law, and the facts before me, I am unable to accept either of these submissions.
- [108] Counsel for Ms. Caffrey relies on the decision of this court in *Khosa v. Kalamatimaleki*, 2014 BCSC 2060. In that case a 38 year old nurse was injured in an accident wherein she suffered moderate soft tissue injuries, including significant pain initially to her neck and whole left side. Following the Accident, she had nightmares and flashbacks, and was diagnosed with depression and anxiety. She was also diagnosed with specific phobia of motor vehicle travel of moderate severity, panic disorder with agoraphobia, sub-clinical depressive symptoms and somatic symptoms disorder (primarily pain). She was awarded \$140,000 in non-pecuniary damages.
- [109] Having reviewed the facts in *Khosa*, I find that they are distinguishable in several key respects. Justice Saunders found that the plaintiff was and continued to be both physically and psychologically disabled and not able to return to her previous employment as a nurse. Justice Saunders also found that at the time of trial, Ms. Khosa lacked the ability, at least psychologically, to undergo any form of retraining or upgrade of her skills, and that she lacked the physical and psychological wherewithal to discharge the job duties of a registered nurse. On the basis of the evidence before me, I am unable to find that Ms. Caffrey does not have the physical and psychological wherewithal to return to nursing. This is a significant distinguishing factor.

- [110] Justice Saunders also found that Ms. Khosa suffered from a constellation of issues around tasks requiring management of stress, memory, and concentration, including concerns about her ability to safely administer medication and perform feeding procedures on her young patients. Again, no such evidence was tendered in this case.
- [111] There are other distinguishing factors that have persuaded me that Khosa is distinguishable; however, based on the two I have already enumerated, the case is sufficiently distinguished so as to be of limited assistance. Suffice it to say that each case must be decided on the particular evidentiary matrix before the Court. I find that Ms. Caffrey's injuries and symptoms and their effect on her lifestyle, including her subjective experience, is categorically different than what Justice Saunders found in Khosa.
- [112] In so deciding, I do not wish to dismiss the seriousness of Ms. Caffrey's depression before or after the birth of her children. However, I have considered the expert evidence, including Ms. Caffrey's own acknowledgment that her psychological condition has improved since that time.
- [113] In support of the range of damages of \$70,000 to \$85,000, counsel for the defendant referred to the following recent cases of this Court: *Bischoff v. Gudaitis*, 2019 BCSC 2169; *Abraha v. Suri*, 2019 BCSC 1855; *Jellis v. Lukinuk*, 2019 BCSC 1577. Counsel submits that all three cases involve female plaintiffs of approximately the same age as Ms. Caffrey and that the *Bischoff* case is particularly helpful, involving chronic myofascial pain, depression and anxiety.
- [114] In *Bischoff*, Justice Choi reviews recent non-pecuniary awards from this court and concludes the plaintiff was entitled to an award of \$70,000. The facts in *Bischoff* are more aligned with those before me. In that case, the plaintiff suffered injuries to her neck, back, right hip, collarbone and head. She also suffered from depression and anxiety, which led to three years of alcohol and drug abuse. The case is somewhat distinguishable in that Ms. *Bischoff* also suffered from migraines and difficulty concentrating, which has not been a notable feature in this case. Like Ms. Caffrey, at the time of trial, Ms. *Bischoff* had not returned completely to her pre-accident levels of recreation or fitness and she continued to take anti-depressants. Ms. *Bischoff* also continued to have neck pain and headaches from her accident; like the instant case, the Court found these injuries were not permanent.
- [115] In *Abraha*, as in *Bischoff*, the court found the plaintiff was entitled to a \$70,000 in damages for pain and suffering. Ms. *Abraha* suffered pain symptoms in her neck, shoulders and back as a result of her accident. Ms. *Abraha* also suffered from depression, anxiety and difficulty sleeping. More specifically, she was diagnosed with "major depressive disorder- single incident, severe"; generalized anxiety, "other specified trauma and stressor related disorder, and somatic symptom disorder - moderate with predominate pain." In addition, the court found the plaintiff struggled with memory loss and that the changes from her physical and psychological pre-accident state were "significant." The court accepted the guarded prognosis with respect to her pain and psychological symptoms.

- [116] In Jellis, the plaintiff suffered damages for injuries suffered in two motor vehicle accidents in March and May 2015. The injuries involved the exacerbation of chronic myofascial pain to her neck and mid-low back, tinnitus, headaches, and sleep disturbance. Her prognosis was guarded. Unlike Ms. Caffrey, Ms. Jellis "did not suffer significant emotional disruption" at any point. Ms. Jellis was awarded \$85,000 for pain and suffering.
- [117] Having reviewed the case law, I am of the view that \$70,000 would not be an adequate award in this case, primarily because of the severity of Ms. Caffrey's depression and the challenges of pregnancy, and childrearing while suffering from severe postpartum depression, anxiety and other physical and psychological symptoms as described above. Her situation can be distinguished from Bischoff, Abraha and Jellis on this basis. Even though I find that the prognosis for Ms. Caffrey's psychological recovery is good, further treatment is necessary. Her award should reflect her unique circumstances.
- [118] Having reviewed the arguments of the parties and the guiding case authorities, I find that Ms. Caffrey is entitled to an award \$90,000 for non-pecuniary damages in light of the specific facts of this case.

V. Past Loss of Earning Capacity

- [119] Assessments of loss relating to past and future earning capacity are subject to the same legal test and involve consideration of hypothetical events. In essence, a plaintiff is not required to prove these hypothetical events on a balance of probabilities. Rather, future or hypothetical possibilities will be taken into consideration as long as they constitute real and substantial possibilities and not mere speculation: *Athey* at para. 27; *Morlan v. Barrett*, 2012 BCCA 66 at para. 38. Where the plaintiff establishes a real and substantial possibility of past loss of earning capacity, the Court must weigh the hypothetical or future event according to its relative likelihood: *Athey* at para. 27; *Gao v. Dietrich*, 2018 BCCA 372 at para. 37.
- [120] Greater clarity on the application of these principles is provided by our Court of Appeal in *Grewal v. Naumann*, 2017 BCCA 158:
- [45] The governing authority in this Court is *Smith v. Knudsen*, 2004 BCCA 613. In *Smith*, this Court, after an extensive review of the authorities, rejected the proposition that a claim for past loss of opportunity had to be established on a balance of probabilities. *Rowles J.A.* wrote for the court. She explained that the plaintiff in the first instance was required to establish both liability and causation on a balance of probabilities. This required the plaintiff to establish that the respondent's negligence, in whole or in part, caused the accident, and that the injuries the appellant sustained in the accident caused or contributed to the loss for which damages were sought (para. 26).
- [46] *Rowles J.A.* then went on to discuss the assessment of damages. She noted that the same test applies regardless of whether you are assessing past or future loss of earning capacity. In both situations the judge is considering hypothetical events. She reasoned:

- [29] What would have happened in the past but for the injury is no more "knowable" than what will happen in the future and therefore it is appropriate to assess the likelihood of hypothetical and future events rather than applying the balance of probabilities test that is applied with respect to past actual events.
- [121] I am in agreement with counsel for Ms. Caffrey that she must demonstrate that the injuries she suffered in the Accident and the resulting symptoms have, on a balance of probabilities, impaired her ability to earn income; further, there must be a real and substantial possibility that her diminished earning capacity has resulted in a pecuniary loss.
- [122] Counsel for Ms. Caffrey proposes that her loss of past totals \$68,797.94, which includes income loss for full and part days of work, as well as loss of shift premiums for working nights and statutory holidays ("lost shift differential") as follows:
- Lost Shift Differential
- \$10,520.48
- Reduced Hours June 30, 2016 to July 27, 2017
- $\$51,501.43 \times .718 \text{ (taxes)} = \$36,978.02 \text{ (net)}$
- Completely Unemployed August 1, 2018 to March 18, 2019
- $\$53,044 \times .7869 \text{ (taxes)} = \$41,740.32 \text{ (net)}$
- [123] Counsel for the defendant agrees that Ms. Caffrey should be compensated for the loss of two weeks of lost wages of approximately \$3,000 representing the two weeks she was off work following the Accident, plus \$10,520 representing the value of the loss of shift differential pay while at Children's Hospital, for a total of \$13,520.
- [124] Counsel for the defendant takes issue with Ms. Caffrey's claim for wage loss following her return from her first and second maternity leave. He submits she is not entitled to any compensation for loss of earning capacity during these periods, submitting that her psychological illnesses following the birth of her daughters were not reasonably foreseeable and were not a function of the Accident. I have found on the evidence before me that Ms. Caffrey significant depression and anxiety during the postpartum periods were exacerbated by the injuries and symptoms resulting from the Accident; her anxiety and depression were caused by the Accident and exacerbated her postpartum depression. As discussed above, the "thin skull" principle applies in this case. I also find that her psychological state interfered with her ability to work full-time and at times, her ability to work at all. Accordingly, I conclude she should be compensated for the associated past wage loss.
- [125] In 2016, when Ms. Caffrey returned to work after her first maternity leave, she started working full-time but gradually reduced her hours. She testified that she was depressed, tearful and anxious throughout her maternity leave, and when she returned to work, she

continued to struggle with her mental health and could not cope with full-time work. She reduced her hours to part-time. Based on the expert evidence before me regarding her mental conditions and Ms. Caffrey's testimony, I am satisfied that her inability to work, during the periods past wage loss is claimed, is a function of the Accident and that she should be compensated for the associated wage loss.

[126] Counsel for Ms. Caffrey claims Mr. Muchmore's wage loss as a result of his need to stay at home with Mrs. Caffrey after the birth of her second child, after she had a psychotic episode and was suffering from severe postpartum depression. There may be a legitimate basis for damages in such circumstances. However, this issue ought to be addressed under a different head of damages, and I do so later in these Reasons. Notably, counsel for Ms. Caffrey agreed that this claim should be addressed as an in-trust claim for compensation.

[127] In total, I assess Ms. Caffrey's past income loss award at \$79,318.42.

VI. In-Trust Claim

[128] Ms. Caffrey is seeking compensation for the income Mr. Muchmore lost when he was required to leave his employment and take care of her during a time when she was suffering from a psychotic break.

[129] The evidence before me established that, as a result of Ms. Caffrey's serious mental health condition, Mr. Muchmore was required to leave his employment to take care of her from January 10, 2018 until he obtained employment when the couple and their children returned to England in mid-June 2018.

[130] In *Andrews v. Grand & Toy*, [1978] 2 S.C.R. 229, the Court reasoned that there is ample authority to support the conclusion that a spouse who chooses to look after an infirm spouse, should not be expected to do so gratuitously (at para. 243). In the same vein, the Court in *Crane v. Worwood* (1992), 65 B.C.L.R. (2d) 16 (S.C.) held that an award may be made for services a spouse provides outside the normal range of duties, which would have to be done by a hired third party if the spouse did not perform them. The services need not be of a professional nature. Essentially, the court will award the costs of reasonable care.

[131] In *Bystedt v. Hay*, 2001 BCSC 1735 at para. 180, aff'd 2004 BCCA 124, the Court characterized such a claim as a "in-trust" claim for past care, and identified the following factors to be considered in such cases:

- a) the services provided must replace services necessary for the care of the plaintiff as a result of a plaintiff's injuries;
- b) if the services are rendered by a family member, they must be over and above what would be expected from the family relationship;
- c) the maximum value of such services is the cost of obtaining the services outside the family;

- d) where the opportunity cost to the caregiving family member is lower than the cost of obtaining the services independently, the court will award the lower amount;
- e) quantification should reflect the true and reasonable value of the services performed taking into account the time, quality and nature of those services;
- f) The family members providing the services need not forego other income and there need not be payment for the services rendered.

[132] I find that this legal test, on balance, has been satisfied in this case and that an in-trust compensation award should be granted. This case is unique. Mr. Muchmore's decision to leave his employment to take care of his wife formed part of treatment plan put in place by Dr. Bowering, who recommended he do so. As noted earlier in these Reasons, Dr. Bowering is a psychiatrist, specializing in reproductive mental health. In a letter dated February 22, 2018, addressed to "Whom it may concern" and provided to Mr. Muchmore's employer, Dr. Bowering stated that Mr. Muchmore was unable to work, until further notice as he was required to take care of his wife who she described as "critically ill."

[133] The evidence establishes that the services rendered by Mr. Muchmore, in caring for his wife, were necessary and his decision to stay home to take care of his wife was on the recommendation of Dr. Bowering who was clearly very concerned about her at that time. Certainly, staying home from work "is over and above what would be required of a family relationship". Moreover, while the legal test does not require that a family member actually forgoes other income, in the specific circumstances in this case, Mr. Muchmore did so; he was required to leave his job.

[134] The more difficult question before me concerns the proper quantum of damages of the in-trust award. This Court has been willing to consider the income lost by the caregiving family member in quantifying the award. However, where the value of the caregiving family member's loss of opportunity is less than the cost of obtaining services outside of the family, the court will award the lower amount: see e.g. *Yoshikawa v. Yu*, [1994] B.C.J. No. 748 (S.C.); *Lee (Guardian ad litem of) v. Richmond Hospital Society*, 2002 BCSC 469, aff'd 2003 BCCA 678; *McGlone (Guardian ad litem of) v. Kelly*, 2002 BCSC 774 at para. 271; *Isbister v. Delong*, 2014 BCSC 1395.

[135] No evidence was tendered at trial regarding the hourly rate of a qualified care provider for Ms. Caffrey; that certainly would have been of assistance to the Court. Yet, the in-trust compensation claimed in this case is rather modest; it is based on Mr. Muchmore's wages and does not include the cost of weekend care. As well, the wage based claim is made in circumstances where Dr. Bowering, who was the psychiatrist responsible for Ms. Caffrey's treatment, recommended he be the one to care for her full-time.

[136] Mr. Muchmore was earning \$20 per hour at his job, and working 40 hours a week; based on this formula, this claim for compensation totals \$13,370 after taxes (during the period between January 10, 2018 and mid-June 2018). While the plaintiff, on behalf of her spouse,

claims only the wages he would have earned had he worked 40 hours a week, it is clear Mr. Muchmore provided in excess of eight hours of care per day, five days a week. Mr. Muchmore was working at home taking care of his very ill wife (and also two very young children) seven days a week, underscoring the reasonableness of the approach to quantifying the claim.

- [137] There are cases where in-trust awards have been quantified based on the hourly wage the caregiving family member would have received if he or she were not at home caring for the plaintiff. In *Yoshikawa v. Yu*, [1994] B.C.J. No. 748 (S.C), the court made an in-trust award that reflected the value of the plaintiff's husband lost income. As in this case, the plaintiff was injured in a motor vehicle accident and her husband quit his job in order to stay home and care for her. Like the facts before me, Justice Trainor did not appear to have been provided with evidence regarding what would have been charged by professional caregivers. Nevertheless, he accepted the sum of \$54,600 (or \$15,600 per annum) as claimed, concluding the sum "is considerably less than would have been charged by professional caregivers and in the circumstances I accept it as being a reasonable claim."
- [138] Similarly, in *Lee*, the plaintiff's mother quit her job to care for the plaintiff full-time. The plaintiff's mother was awarded the wages she would have earned had she not quit her job in-trust, which was less than hiring a professional attendant (at para. 89). Notably, in this case, evidence was also led regarding the cost of a personal care attendant. That certainly is the practice that ought to be followed.
- [139] As well, in *Isbister*, Justice Bowden also quantified the in-trust award based on the caregiving family member's lost wages. In that case, like the one before me, the plaintiff's partner stopped work to care for her full-time. He claimed that he should be awarded \$30 per hour for the care he provided, which was the cost of hiring a professional caregiver. The court rejected this submission, and made an award based on \$18.78 per hour, which was the wage the plaintiff's partner was earning before the accident in that case. Justice Bowden reasoned that the appropriate hourly rate should be the cost of the caregiver's "lost opportunity cost", which he concluded was his lost wages. In addition, the court further reduced the award because some of the activities the plaintiff's partner performed throughout the day were activities he would have done even if his partner was not injured in the accident (at paras. 250-253).
- [140] In *Shaw*, the court did not assess the cost of replacement care by a professional caregiver. Rather, Justice Collver made an in-trust award based on the caregiving family member's lost income (in this case the mother).
- [141] It is clear that courts have considered the lost wages of the family caregiving family member as a reasonable approach in assessing in trust compensation claims. Justice Davies provided further guidance on quantifying an in-trust award in *Hans v. Volvo Trucks North America Inc.*, 2016 BCSC 1155 at para. 539, (aff'd 2018 BCCA 410, indicating that the Court must attempt to measure the reasonable value of those services based on the time involved

in performing them, as well as the costs that would have been incurred had a third party caregiver or worker been paid by them. That is what I have at least endeavored to do in this case, albeit with some difficulty.

- [142] At para. 543 of *Hans*, Justice Davies erred on the side of caution in such an assessment, bearing in mind that in-trust awards should be modest but must also reflect the totality of the circumstances in which they arise. In *Hans*, detailed evidence was not provided about the precise number of hours devoted to caring for the plaintiff, or to the household and child caring tasks which would otherwise have been undertaken by the plaintiff but for the collision. What is not precise or clear in the instant case is what a third party caregiver would have charged for taking care for Ms. Caffrey. As Justice Davies noted at paras. 547 of *Hans*, in such circumstances, the best the Court could do is assess the quantum of damages by grounding the analysis in the evidence and being as fair as possible in doing so, not only to the plaintiff but also to the defendant. Obviously, each case must turn on its specific facts.
- [143] In light of the totality of the facts before me, it is unlikely that the costs claimed for Mrs. Caffrey's care would be more than that of a third party caregiver. The evidence established that prior to quitting his job to care for the plaintiff, Mr. Muchmore would often leave for work at 6:00 a.m. and return around 5:00p.m. As noted above, Ms. Caffrey also required her husband's care on weekends. In addition, Ms. Caffrey testified that she and her husband considered hiring a doula to assist with night-time care, but found they could not afford to do so. Further, the fact that Dr. Bowering was of the view that Mr. Muchmore should be the person who cares for Ms. Caffrey, attests to the reasonableness of this particular in-trust claim.
- [144] Counsel for the defendant objected generally to an in-trust compensation award flowing from Ms. Caffrey's postpartum depression or her psychotic episode. He asserts these psychological maladies were not caused by the Accident. Alternatively, he says the plaintiff's psychological distress was not sufficiently connected to the defendant's negligence to fairly hold the defendant liable. I find that these arguments are without merit.
- [145] I have already found that Ms. Caffrey's depression and anxiety was caused by the Accident and that these conditions, in turn, contributed to and exacerbated her postpartum depression; accordingly, this argument cannot stand. A causal link was established. As discussed above, a plaintiff need not establish that a defendant's negligence is the sole cause of the injury: *Athey* at para. 34.
- [146] Counsel for the defendant further opposes the in-trust claim by asserting that the plaintiff's loss is too remote. The remoteness inquiry asks whether the harm is so unrelated to the wrongful conduct to fairly hold the defendant liable. When the plaintiff suffers mental injuries, the operative question is whether the injury could foreseeably occur in a person of ordinary fortitude: *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27.

- [147] It is well established that a plaintiff can recover for psychological injuries resulting from a motor vehicle accident. Counsel for the defendant did not provide any persuasive or applicable authority suggesting that injuries similar to those sustained by Ms. Caffrey are too remote to be compensable. I find that it is reasonably foreseeable that a person of ordinary fortitude could sustain mental injuries like those suffered by the plaintiff in a motor vehicle accident. I therefore reject the defendant's argument on remoteness.
- [148] In light of previous case law, and given the unique context of this case, I find that the sum \$13,604.80 reflects a reasonable starting point for assessing the value of the services performed by Mr. Muchmore, taking into account the time, quality and nature of those services. However, I must still consider whether this amount should be reduced because Mr. Muchmore received unemployment insurance benefits while he was at home taking care of his wife.
- [149] Where an in-trust claim is quantified on the basis of lost income, unemployment insurance and other income received by the care giver has been deducted from the in-trust award: see Lee at para. 97. In that case, like the one before me, the plaintiff's family could not afford to hire attendants to provide care for the plaintiff's needs and, accordingly, his care fell squarely on the shoulders of his family, particularly his mother who had to quit her job to care for her son. The court deducted disability income, unemployment insurance sick leave and Pan Pacific benevolent payments received by the mother from the in-trust award.
- [150] Similarly, in Spehar (Guardian ad litem of) v. Beazley, 2002 BCSC 1104 at para. 50, the in-trust award was also based on the caregiving family member's forgone income. The court took a contextual approach to the assessment of the value of past services. The court considered the caregiver's lost income as well as lost opportunities related to one of the caregivers' delayed post-secondary education and associated cost increases. "Employment insurance benefits and other income earned" were also deducted.
- [151] As well, in Bystedt at para. 185, Justice D. Smith further reduced the in-trust compensation award by the amount the caregiver received from the Ministry of Social Assistance.
- [152] Notwithstanding these authorities, counsel for Ms. Caffrey argues that the "insurance exception" to the rule against double compensation applies in the instant case. He argues that an in-trust claim is analogous to a claim for lost wages and cites the decision of the Supreme Court in *Ratych v. Bloomer* [1990] 1 S.C.R. 940 at para. 71, as follows:
71. The general principles underlying our system of damages suggest that a plaintiff should receive full and fair compensation, calculated to place him or her in the same position as he or she would have been in had the tort not been committed, in so far as this can be achieved by a monetary award. This principle suggests that in calculating damages under the pecuniary heads, the measure of the damages should be the plaintiff's actual loss. It is implicit in this that the plaintiff should not recover unless he can demonstrate a loss, and then only to the extent of that loss. Double recovery violates this principle. It follows that where a plaintiff sustains no wage loss as a result of a tort because his employer has

continued to pay his salary while he was unable to work, he should not be entitled to recover damages on that account.

[153] Counsel for Ms. Caffrey also relies on the Court's reference in *Ratych* to the decision of the House of Lords in *Parry v. Cleaver*, which identifies the exception to the rule against double recovery.

45. The House of Lords in *Parry v. Cleaver* held that benefits in the nature of proceeds of insurance should not be deducted from a plaintiff's damages, on the principle that the plaintiff has paid for these benefits and should not be deprived of the consideration for which he has contracted.

[154] Counsel for Ms. Caffrey acknowledges the situation referenced by the Court "is not perfectly analogous, because Ms. Caffrey did not pay for the EI benefits, Mr. Muchmore did by way of deduction from his pay cheques." He argues, nonetheless that I should have regard to the Court's analysis in *Ratych*, at para. 53, where the court endorses approaching the issue from a "substantive point of view":

53 The foregoing comments rest primarily on evidentiary considerations. Approaching the problem from a substantive point of view, it may be that there is a valid distinction between cases where a person has prudently obtained and paid for personal insurance, and cases where the benefits flow from the employer/employee relationship. The law has long recognized that in the first situation an exception should be made to the usual rule against double recovery. The existence of such an exception does not mean it should be extended to situations where personal prudence and deprivation are not demonstrated. In the latter case there is little to be weighed in the balance against the general policy of the law against double compensation.

[155] Counsel for Ms. Caffrey argues that approaching the problem from a substantive point of view, may reveal a valid distinction between cases where a person has prudently obtained and paid for personal insurance, and cases where the benefits flow from the employer/employee relationship. The law has long recognized that in the first situation an exception should be made to the usual rule against double recovery.

[156] Counsel for Ms. Caffrey also acknowledges these comments were obiter dicta, since employment insurance benefits were not before the court in *Ratych*. He asserts, nevertheless, that subsequent decisions have found that employment insurance benefits are not deductible, because they fall under the "insurance exception": see *Luis v. Marchiori*, 2015 BCSC 1 at paras. 185-186. I would also note that s. 45 of the Employment Insurance Act, S.C. 1996, c. 23, provides the federal government with the right to recoup employment insurance benefits paid to plaintiffs in circumstances where wage loss awards are received.

- [157] In addition, counsel for Ms. Caffrey relies on the decision in *Tompkins v. Bruce*, 2012 BCSC 266, where the plaintiff's daughter-in-law cared for him on her maternity leave and the judge made an in-trust award in recognition of the care she provided. Notably, the issue of double recovery or a deduction in respect of the daughter-in-law's benefits did not arise, and it is not clear that any employment insurance benefits were actually received. Accordingly, the case is of limited assistance.
- [158] In light of the authorities, I am not persuaded that the exception to the rule against double recovery applies to the specific circumstances before me. Ms. Caffrey chose to advance her in-trust compensation award based on Mr. Muchmore's wage loss, and his wage loss was reduced by his receipt of unemployment insurance benefits. Moreover, there are existing precedents for deducting such income, as discussed above, and no authority was cited, in the context of an in-trust award, where the "insurance exception" was applied so that employment insurance benefit or other income received by the caregiver was not deducted. The existing precedents, discussed above, which deduct such income received from the caregiver, continue to make sense. The actual and specific loss sustained by Ms. Caffrey as a result of her actual cost of care, at the end of the day, was reduced as a result of the employment insurance benefits received by her husband. In my view, deducting these benefits results in an award that most closely reflects her actual loss.
- [159] My conclusion in this regard is galvanized by the decision in *Ratych*. As noted above, the Supreme Court of Canada addressed the question of whether a plaintiff, who lost work as a result of injuries from a tortfeasor, could recover damages for loss of earnings where he has been paid his full salary as a result of his contract of employment. The Court found he could not. Of assistance to this case, the Court also addressed the broader policy question of the inter-relation of the tort system with other systems of compensation. It asked the following question: how far is it right that a person should be compensated for the same loss from more than one source? That is an instructive question, remembering that the loss here was that of Ms. Caffrey as a result of her cost of care. So what was her loss?
- [160] The Court in *Ratych* affirmed that the plaintiff should not recover any damages unless a loss has been demonstrated, and then only to the extent of the loss. The Court also reasoned double recovery violates this principle. The Court noted that an exception to this principle may apply where the Court is satisfied that the "double" source of income or benefits is entitled to be reimbursed on the principle of subrogation or other methods of avoiding double recovery. Certainly, if this were Mr. Muchmore's action and he were claiming compensation for his lost wages as a result of a tortfeasor's negligence, unemployment insurance benefits ought not be deducted from his award: see *Hayre v. Walz* (1992), 67 B.C.L.R. (2d) 296 (C.A.); *Luis*. However, this is not Mr. Muchmore's action. The in-trust award is intended to compensate Ms. Caffrey for the cost of her care, not Mr. Muchmore for his wage loss. In this light, it is clear that Mr. Muchmore's foregone wage loss is simply the mechanism, advanced by Ms. Caffrey herself, that was used for formulating and assessing her cost of past care. Any benefits received that reduce the cost of her care ought to be

taken into account, as other courts before me have done.

[161] In the final analysis, I am satisfied that deducting Mr. Muchmore's employment insurance benefits from his lost income during the period in question from January to June 2018, would best reflect the actual cost of Ms. Caffrey's past care. At the end of the day, the cost of her care was lessened by the income received from his employment insurance benefits and this ought to be taken into account.

VII. Future Loss of Earning Capacity

[162] As noted above, in order to receive an award for loss of future earning capacity, a plaintiff must prove that there is a real and substantial possibility of a future event leading to an income loss: *Athey* at para. 27; *O'Connell v. Yung*, 2012 BCCA 57 at para. 56. If the plaintiff discharges that burden of proof, then depending upon the facts of the case, the plaintiff may prove the quantification of that loss of earning capacity, either on an earnings approach or a capital asset approach: *Perren v. Lalari*, 2010 BCCA 140 at para. 32.

[163] This Court must consider these guiding principles in light of the relevant factors found within the evidence as a whole: *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 10. Such factors include:

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 her had she not been injured; and
4. Whether the plaintiff is less valuable to herself as a person capable of earning income in a competitive labour market.

[164] In *Pololos v. Cinnamon-Lopez*, 2016 BCSC 81, Justice Voith conveniently summarizes the applicable first principles as follows:

[133] The relevant legal principles are well-established:

- a) To the extent possible, a plaintiff should be put in the position he/she would have been in, but for the injuries caused by the defendant's negligence; *Lines v. W & D Logging Co. Ltd.*, 2009 BCCA 106 at para. 185, leave to appeal ref'd [2009] S.C.C.A. No. 197;
- b) The central task of the Court is to compare the likely future of the plaintiff's working life if the Accident had not occurred with the plaintiff's likely future working life after the Accident; *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 32;
- c) The assessment of loss must be based on the evidence, but requires an exercise of judgment and is not a mathematical calculation; *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 18;

- d) The two possible approaches to assessment of loss of future earning capacity are the "earnings approach" and the "capital asset approach"; *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 at para. 7 (S.C.); and *Perren v. Lalari*, 2010 BCCA 140 at paras. 11-12;
 - e) Under either approach, the plaintiff must prove that there is a "real and substantial possibility" of various future events leading to an income loss; *Perren* at para. 33;
 - f) The earnings approach will be more appropriate when the loss is more easily measurable; *Westbroek v. Brizuela*, 2014 BCCA 48 at para. 64. Furthermore, while assessing an award for future loss of income is not a purely mathematical exercise, the Court should endeavour to use factual mathematical anchors as a starting foundation to quantify such loss; *Jurczak v. Mauro*, 2013 BCCA 507 at paras. 36-37;
 - g) When relying on an "earnings approach", the Court must nevertheless always consider the overall fairness and reasonableness of the award, taking into account all of the evidence; *Rosvold* at para. 11.
- [165] Essentially, Ms. Caffrey has psychological conditions which have limited her capacity to perform certain activities and consequently impair her future income earning capacity. Accordingly, she is entitled to compensation. Notably, what is being compensated is not lost projected future earnings but the loss or impairment of earning capacity as a capital asset.
- [166] Where a loss of capacity is established, there are two common approaches to the quantification of the loss. The plaintiff may prove the quantification of the loss of earning capacity, either on an earnings approach, as in *Steenblok v. Funk* (1990), 46 B.C.L.R. (2d) 133 (C.A.) or through a capital asset approach, as in *Brown v. Golaiy*, (1985), 26 B.C.L.R. (3d) 353. The former approach will be more useful when the loss is more easily measurable, as it was in *Steenblok*. The latter approach will be more useful when the loss is not as easily measurable, as in *Pallos v. Insurance Corp. of British Columbia* (1995), 100 B.C.L.R. (2d) 260 (C.A.) and *Romanchych v. Vallianatos*, 2010 BCCA 20.
- [167] Both parties submit that a capital asset approach is proper in this case and would yield the fairest and most reasonable result. I agree. A strict mathematical assessment of Ms. Caffrey's earnings potential, even with the benefit of expert analysis and multipliers (reflecting various contingencies) is not appropriate and would not yield a reasonable or just result in the circumstances of this case. Ms. Caffrey has had an earning history and trajectory that has been disrupted by various life events such as moving from England to Canada, and then back again, and working at low paying jobs while obtaining her qualifications as a nurse in Canada. Properly assessing future loss of earning capacity in the circumstance of this case, assuming the Accident did not happen, based on earnings per week, month or year would be even more riddled with conjecture and assumption than the usual assessment of this nature would entail. As the court reasoned in *Perren*, the capital asset method of assessment is more appropriate in cases such as these where the loss is not easily measurable.

- [168] Counsel for Ms. Caffrey submit that she is entitled to damages for future loss of earning capacity of \$170,000 (inclusive of contingencies). Counsel employed the capital asset approach using approximately two years of lost wages, based on Ms. Caffrey's final salary as a nurse before moving to England. Counsel for the defendants submits that Ms. Caffrey is not entitled to any loss in this regard; in the alternative, he submits that should the Court not accept the defendants' arguments (including those on causation, foreseeability and the reliability of Ms. Caffrey's testimony), then, at best, Ms. Caffrey is entitled to the equivalent of one year's salary.
- [169] In cases where the capital asset approach has applied, the court has awarded the plaintiff's entire annual income for one or more years: *Da Silva v. Pollard*, 2019 BCSC 2249 at para. 151; *Pallos*; *Perren*. In the instant case, I am of the view that assessing Ms. Caffrey's loss of future earning capacity on the basis of one years' earnings is very fair and reasonable. Counsel argues that in addition to her annual income of approximately \$86,000, Ms. Caffrey would also avail herself of shift premiums for an additional \$8,000 per year. I am satisfied, in light of the totality of the evidence before me that the appropriate annual income in the context of this particular case is \$94,000 per year. Accordingly, Ms. Caffrey is entitled to an award of \$94,000 for loss of future earning capacity.

VIII. Cost of Future Care

- [170] In *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9, the Supreme Court of Canada provides the following guidance on assessing damages for cost of future care:
- [21] Damages for cost of future care are a matter of prediction. No one knows the future. Yet the rule that damages must be assessed once and for all at the time of trial (subject to modification on appeal) requires courts to peer into the future and fix the damages for future care as best they can. In doing so, courts rely on the evidence as to what care is likely to be in the injured person's best interest. Then they calculate the present costs of providing that care and may make an adjustment for the contingency that the future may differ from what the evidence at trial indicates.
- [22] The resulting award may be said to reflect the reasonable or normal expectations of what the injured person will require
- [171] The test for determining the appropriate award for cost of future care is an objective one based on the evidence and on costs reasonably necessary to restore the plaintiff to her pre-accident condition insofar as possible. The costs must also be reasonable in the sense that they are costs the plaintiff will likely incur: see *Pololos* at para. 144; *Loeppky v. Insurance Corporation of British Columbia*, 2012 BCSC 7 at para. 109; *Peters v. Ortner*, 2013 BCSC 1861 at para. 141; and *Tsalamandris v. McLeod*, 2012 BCCA 239 at paras. 62-63. Each case must be determined based on its own unique evidentiary matrix. Further, the assessment of damages for cost of future care is not a precise accounting exercise: *Krangle* at para. 21; *Peters* at para. 144.

[172] In *Dzumhur v. Davoody*, 2015 BCSC 2316, Justice Kent summarizes the law, providing further guidance as follows:

[244] The principles applicable to the assessment of claims and awards for the cost of future care might be summarized as follows:

- the purpose of any award is to provide physical arrangement for assistance, equipment and facilities directly related to the injuries;
- the focus is on the injuries of the innocent party... Fairness to the other party is achieved by ensuring that the items claimed are legitimate and justifiable;
- the test for determining the appropriate award is an objective one based on medical evidence;
- there must be: (1) a medical justification for the items claimed; and (2) the claim must be reasonable;
- the concept of "medical justification" is not the same or as narrow as "medically necessary";
- admissible evidence from medical professionals (doctors, nurses, occupational therapists, et cetera) can be taken into account to determine future care needs;
- however, specific items of future care need not be expressly approved by medical experts... It is sufficient that the whole of the evidence supports the award for specific items;
- still, particularly in non-catastrophic cases, a little common sense should inform the analysis despite however much particular items might be recommended by experts in the field; and
- no award is appropriate for expenses that the plaintiff would have incurred in any event.

[173] I have also considered that, in awarding future care costs, there is a duty to be reasonable and the cost must be fair to both parties: *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229 at 241-242.

[174] Based on Dr. Jung's recommendations, counsel for Ms. Caffrey asserts that the reasonable cost of future care in this case is \$13,370. This sum represents the cost of a psychological assessment (\$678) and 38 treatments. Counsel for the defendant argues that even if the Accident had not occurred, Ms. Caffrey would nevertheless be struggling with depression and anxiety. As such that the Court need not make a cost of future care award. In the alternative, counsel submits an award for psychological counseling would be reasonable and fair.

[175] In light of the evidence before me, I agree that an award of \$13,370 for cost of future care is reasonable and appropriate.

IX. Loss of Housekeeping Capacity

[176] In *Firman v. Asadi*, 2019 BCSC 270, Justice Verhoeven reasons at para. 235 that judges have the discretion to address a claim for housekeeping capacity as part of the non-pecuniary loss or as a segregated pecuniary head of damage: *Kim v. Lin*, 2018 BCCA 77 at para. 33; *Riley v. Ritsco*, 2018 BCCA 366 at para. 100.

[177] In *Riley*, Justice Groberman reasons:

[101] It is now well-established that where a plaintiff's injuries lead to a requirement that they pay for housekeeping services, or where the services are routinely performed for them gratuitously by family members or friends, a pecuniary award is appropriate. Where the situation does not meet the requirements for a pecuniary award, a judge may take the incapacity into account in assessing the award for non pecuniary damages.

[102] I acknowledge what was said in *Kroeker* about segregated non-pecuniary awards "where the special facts of a case" warrant them. In my view, however, segregated non-pecuniary awards should be avoided in the absence of special circumstances. There is no reason to slice up a general damages award into individual components addressed to particular aspects of a plaintiff's lifestyle. While such an award might give an illusion of precision, or suggest that the court has been fastidious in searching out heads of damages, it serves no real purpose. An assessment of non-pecuniary damages involves a global assessment of the pain and suffering, loss of amenities, and loss of enjoyment of life suffered by a plaintiff. By its nature, it is a rough assessment and not a mathematical exercise.

[178] In *Firman*, Justice Verhoeven addresses the discretion of the trial judge in discerning how to address this loss, and he underscores the importance of avoiding duplication of compensation:

[236] Duplication in the award must be avoided. Where potential costs for housekeeping assistance are awarded, in the context of costs of future care, then the case for a separate pecuniary award for loss of housekeeping capacity is lessened and perhaps eliminated, depending on the specific facts of the case. In this case a minor award for housekeeping assistance has been made.

[237] With these comments in mind, and after consideration of the evidence in this case, I am not satisfied that the evidence supports a distinct pecuniary award for loss of housekeeping capacity in this case. The evidence establishes only that the plaintiff is limited in her ability to do housework, and a result her house is now untidy compared with before. There is no particular reason to distinguish this loss from her other limitations, which are reflected in the non-pecuniary award.

[179] I am of the view that there is a sound basis in this case to follow the same approach as Justice Verhoeven did in Firman. I have considered and taken into account the effect of the Accident on Ms. Caffrey's housekeeping functions in granting her award of non-pecuniary damages. I do not see any exceptional circumstances that would justify a distinct pecuniary award for loss of housekeeping capacity in this case.

X. Special Damages

[180] The parties have agreed to a special damage award in the amount of \$4,482.50. Counsel for Ms. Caffrey also seeks an additional amount of \$5,482.48 representing the total travel costs for their move back to England. I have carefully reviewed the evidence and I am not persuaded that Ms. Caffrey would not have moved back to England if the Accident had not occurred. I am persuaded, however, that the sum of \$4,482.50 is a proper special damages award.

XI. Disposition

[181] Ms. Caffrey is entitled the following damage awards:

1.

Non-pecuniary Damages:

\$90,000.00

2.

Loss of Past Earning Capacity:

\$79,318.42

3.

Loss of Future Earning Capacity:

\$94,000.00

4.

Cost of Future Care:

\$13,370.00

5.

Special Damages:

\$4,482.50

SUBTOTAL:

\$281,170.92

[182] In addition, to the above awards, I find that Ms. Caffrey's is entitled to an in-trust award, to be calculated as follows: \$13,604.80 less the amount Mr. Muchmore received from employment insurance benefits between January 10, 2018 to June 15, 2018. If the parties are unable to agree on this sum, the matter shall be referred to the Registrar for determination.

[183] Subject to any submissions the parties may wish to make on the question of costs, and absent any circumstances of which I am unaware, Ms. Caffrey is entitled to her costs at Scale B.

"MORELLATO J."

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