

CANADA / JUDGMENT

Carlos v. Maier

2021 BCSC 1056

COURT

Supreme Court of British Columbia

DECIDED

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2021 BCSC 1056 Carlos v. Maier

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Carlos v. Maier,

2021 BCSC 1056

Date: 20210602

Docket: M09271

Registry: Courtenay

Between:

Leah Carlos

Plaintiff

And

Travis Maier

Defendant

- and -

Docket: M10139

Registry: Courtenay

Between:

Leah Carlos

Plaintiff

And

Terry Denouden and Tracy Denouden

Defendants

- and -

Docket: M09351

Registry: Courtenay

Between:

Leah Carlos

Plaintiff

And

James Revenberg and Comox Valley Nissan Ltd.

Defendants

Before: The Honourable Mr. Justice Baird

Reasons for Judgment

Counsel for the Plaintiff:

M. Tinmouth

Counsel for the Defendants:

L. Kohlruss

S. Faleiro

Place and Dates of Trial:

Courtenay, B.C.

January 25-29, February 1-5 and

February 8-10, 2021

Place and Date of Judgment:

Courtenay, B.C.

June 2, 2021

INTRODUCTION

- [1] These are three motor vehicle negligence actions heard together by consent. The accidents occurred on September 14, 2015 ("first accident"), September 16, 2015 ("second accident"), and November 26, 2019 ("third accident"). Liability is admitted throughout. There is no dispute that the plaintiff suffered injuries for which each defendant is liable to compensate her.
- [2] The plaintiff argues that her injuries are indivisible. She seeks just over \$750,000 in damages across all heads. The defendants maintain that the injuries from the first and second accidents are divisible from those sustained in the third accident. They argue that a just, fair and proportionate total award would be in the \$59,000 to \$93,000 range.

BACKGROUND

- [3] The plaintiff was born May 28, 1980. She was 40 years old at the time of trial. She has her "Red Seal" certification as a chef and worked for several years in the restaurant and hospitality field. In 2002, she adopted her nephew, C.C., who suffers from fetal alcohol spectrum and anxiety disorders. Through C.C., the plaintiff discovered a vocation providing care for children with special needs. She obtained a certification as an educational assistant and is now recognised by the local health authority as an early childhood educator. In June 2015, only a matter of weeks before the first accident, she started her own business as a daycare operator.
- [4] The plaintiff owns the daycare with an equal partner, Allison Abrahams. They bought their own building, formerly a single family dwelling house, and adapted it to their purposes of caring for approximately 25 children, ranging in age from infants to five year olds. It has been a successful venture. They built an addition to the facility which has increased capacity. Over the years they have raised their fees. Revenues have flourished. The plaintiff's annual income has risen every year to the present. The daycare now employs 17 staff including the plaintiff, Ms. Abrahams, a cook, and a cleaner. All staff members who work directly with children have specialised qualifications in early childhood care and education.
- [5] In 2005, the plaintiff married Bruce Carlos, a local high school principal. Together they have adopted four more children and had two of their own. From time to time they have also acted as foster parents to children in need of protection. Their eldest adopted child, C.C., is now an adult who lives independently with his spouse and an infant child. Another, A.C., age 18, lives in a group home. There remain five children between the ages of 7 and 13 living with the plaintiff and her husband. The plaintiff was a full-time parent before opening her daycare. She was principally responsible for running all aspects of the family home and property. She did not rely on outside assistance from housekeepers or babysitters.

THE FIRST AND SECOND ACCIDENTS

- [6] The first and second accidents happened within 48 hours of each other. In the first, the plaintiff was stopped in traffic at around 3:30 p.m. near the intersection of Ryan Road and the Trans-Canada Highway in Courtenay. She was rear-ended by the defendant, Mr. Maier. She was driving a minivan with five of her children as passengers.
- [7] The plaintiff testified that her body was "jolted forward" and she felt pain immediately from her head, into her neck, down her back, and into her hips and legs. The children were crying and upset. The plaintiff called her husband, who rushed to the scene to assist the plaintiff and collect the children. Emergency services attended and the plaintiff was transported to hospital by ambulance on a back-board. X-rays were taken of the plaintiff's back and she was given pain killers. She went home the same evening. She was in pain and did not return to work at the daycare before the second accident.
- [8] The second accident occurred two days later in a school parking lot. The plaintiff was walking with her daughter when the defendant, James Revenberg, driving a pickup truck leased from Comox Valley Nissan Ltd., reversed into her. The plaintiff saw what was coming and managed to push her daughter out of harm's way, but she herself was knocked over and landed on the pavement. She felt a "ripping" sensation, as if all the muscles in her back had been torn. There was generalised body pain almost immediately.
- [9] The plaintiff went to see her family doctor, Dr. Russell-Atkinson, later the same day. She reported upper and lower back pain, neck, shoulder and arm pain, headaches, and numbness in her extremities. She exhibited a limited range of motion in her cervical spine. She was prescribed muscle relaxants and analgesics and was told to rest at home. Her doctor recommended that she take time off work and engage outside help to look after her children while she was laid up.
- [10] In early 2016, the plaintiff received the alarming news that an ocular melanoma had been detected in her right eye. For a number of months this condition was the focus of the plaintiff's medical care. She had started a program of physiotherapy to address physical deficits caused by the first and second accidents, but this was interrupted while she attended melanoma treatment in Calgary, Alberta. Her eye condition stabilised within a number of months, and she was able to resume physiotherapy. In February 2017, she underwent ocular plaque radiation therapy and follow-up.
- [11] The result, thankfully, has been positive. By June 2017, the plaintiff was back on track with accident-related rehabilitation. She continued to have back pain, but changed physiotherapists and started feeling better. In an October 25, 2016 consultation with Dr. Russell-Atkinson, the plaintiff reported ongoing back and neck pain. Intermittent right leg numbness had recently caused a fall down stairs, but overall her health and fitness were improving. The headaches stopped. She reported difficulties managing the physical aspects of caring for her children and an inability to sit for long periods due to pain.

- [12] The plaintiff arranged to get support care for her children through the Ministry of Children and Families at no cost to herself. She continued to be unable to work at the daycare other than to perform supervisory and administrative tasks. She took care of all the paperwork, dealt with correspondence, grant applications, and the like, amounting to several hours of work per day. But because of accident-related pain, she was not able to work hands-on with the children in the infant/toddler room, as had been intended when the business opened. The plaintiff and Ms. Abrahams hired another early childhood care specialist, Denise Rowe, to do this work.
- [13] The plaintiff was referred to Dr. Paul Winston, a physiatrist, who examined her on May 29, 2017. Her main complaint at that time was back pain. On physical examination, the plaintiff appeared to have good cervical alignment, a normal gait, full fluid movements and rotation of the neck in flexion-extension without pain, and pain-free active and passive range of motion in her shoulders.
- [14] With respect to her back, Dr. Winston noted symptoms suggesting right-sided pelvic dysfunction. Palpation of the low back showed that the muscles of the right side of the back were quite taut and tender. She had limited lumbar flexion forward but had full backward extension and movement. Lateral bending and twisting were normal. Dr. Winston noted that the plaintiff's range of motion in her hips was markedly decreased upon right-sided external rotation. In order to cross her right leg over her left knee, she had to manually lift her leg, indicating piriformis syndrome. Other evidence of this syndrome was found in physical testing while the plaintiff was in the supine position. The plaintiff's examination was otherwise normal.
- [15] Dr. Winston's diagnosis, based on his review of the plaintiff's medical records and his physical examination, was that the plaintiff had suffered soft-tissue injuries to her neck, shoulder and back in the first and second accidents. On presentation, these symptoms had resolved primarily into lower back pain. The plaintiff had significant findings of muscle stiffness in the right side of her low back consistent with a diagnosis of piriformis syndrome. He offered the opinion that the plaintiff is likely to "plateau" in her recovery, but he suggested that with physiotherapy there should be an improvement of 50 per cent or more. He did not expect her to develop any degenerative changes, but expressed the opinion that, because of her ongoing lower back pain, she would continue to be challenged by some of her daily activities, including heavier housework and more strenuous levels of exercise such as running and skiing.

THE THIRD ACCIDENT

- [16] The third accident happened on November 6, 2019. Once again, the plaintiff was driving on Ryan Road in Courtenay, B.C. and was rear-ended while stopped at a traffic light. This time she had two children in the car, including her grandchild who was only several months old. The impact forced her body forward in a whiplash mechanism. She did not strike her head or body on any of the vehicle's interior appointments. She pulled into a nearby Tim Horton's

parking lot to collect herself and then drove to her doctor's office. She was told to go to the hospital.

- [17] Immediately after this accident, she experienced pain in her arm, neck and back. As far as I am concerned this amounted to a reactivation of unresolved injuries sustained in the previous two accidents. I have concluded that the injuries across all three accidents are indivisible. They cannot be separated one from the other. I will proceed on the footing that the defendants are jointly and severally liable to compensate the plaintiff for her resulting injuries in their totality.
- [18] The plaintiff testified, and I accept, that the impact of the third accident made her pre-existing injuries worse; these were not new injuries, in other words, merely the aggravation or exacerbation of those caused by the first two accidents. On all of the evidence, I am not persuaded that the plaintiff's neck injury had fully resolved prior to the third accident, even though Dr. Winston recorded a statement to that effect from the plaintiff. Instead, I accept the plaintiff's trial evidence that her neck injury was much improved before the third accident, and that she had days free of neck pain, but that it flared up occasionally with exertion or fatigue.
- [19] The plaintiff's evidence, overall, was that she had returned to roughly 70 per cent of normal functionality immediately before the third accident, and after it she was set back to roughly the same condition she was in after the first and second accidents. I have no difficulty accepting this evidence given the nature and dynamics of the collision in question. Her back, shoulder and neck pain was reactivated, causing her trouble to this day, although it waxes and wanes with physiotherapy and rest.
- [20] Dr. Winston examined the plaintiff again on October 7, 2020, in light of the intervening third accident. He noted that the plaintiff had problems raising her arms to full height from her sides. She reported pain in her neck and trapezius regions, as well as down her central spine, with associated numbness in her hands. She had a normal gait. She had an "adequate" range of motion in her cervical spine but reported discomfort with right and left neck flexion. She had tenderness in her shoulders going up to the neck, with a limited range of shoulder motion in forward flexion and abduction. There continued to be limitations in forward flexion of the lumbar spine, and on this occasion backward extension was "adequate" but "uncomfortable."
- [21] Dr. Winston's opinion, with which I agree on all of the evidence, is that the plaintiff suffered soft tissue injuries primarily to the neck and upper back in the third accident, along with exacerbation of symptoms caused by the first and second accidents, notably of her low back pain. The plaintiff has said consistently, and her medical advisers have noted and discussed, that this range of damage has its origins in the first and second accidents. As I have said, I accept the plaintiff's evidence that her injuries from those accidents had not fully or durably resolved before the third accident and that the impact thereof made them worse.

- [22] Dr. Winston recommended active therapy, and I agree that this will be vital. Without finding that the plaintiff has failed to mitigate her losses - she has had her hands full in recent years, not only coping with pain caused by the three accidents, but also dealing with cancer, opening a business, and raising a large family - I fully support the notion that the time has come for her to start the hard work of physical rehabilitation towards improved strength, stamina and a durable, maximised recovery. I accept that the plaintiff continues to be injured, and she is entitled to general and pecuniary damages both past and future, but I am satisfied that she can sharply limit the extent of her losses through active physical rehabilitation.
- [23] Dr. Winston was clear about this: passive interventions such as physiotherapy and intermuscular stimulation should be discontinued. He said, in fact, that the absence of active rehabilitation was a major barrier to improvement. He recommended that the plaintiff start work immediately with a kinesiologist on the development of a "strengthening protocol" to increase functionality and to limit pain. Improvement is likely, he testified, and a full recovery cannot be ruled out. That said, he remained guarded - and I share his caution - about her long-term capacity to perform the physical tasks inherent in professional infant and toddler care, primarily lifting and holding.
- [24] I agree with Dr. Winston that the plaintiff, at present, is not fully able to look after small children on a sustained basis: she cannot consistently lift, hold, play with, or run after them. In my view these are accident-related deficits for which the plaintiff is entitled to compensation. But I also accept Dr. Winston's opinion that the plaintiff's physical conditioning will improve with active rehabilitation and her physical strength and functionality along with it. It may be that her recovery will be less than full, but I have concluded that, with some determined efforts at physical rehabilitation, at the very least there are far better days ahead.
- [25] In summary, under contemplation here is a moderate whiplash case involving mostly the neck and lower back. The correct approach is to be guarded but cautiously optimistic about the plaintiff's future. The goal to be accomplished is to compensate her for accident-related pain and suffering, to make good her pecuniary losses both past and future flowing from accident-related incapacity, and to provide her with the wherewithal to achieve maximum improvement and self-sufficiency through her own efforts at rehabilitation.
- [26] The plaintiff is entitled to an award for non-pecuniary damages, past and future loss of income earning capacity, cost of future care, and special damages. I intend to subsume her demand for loss of housekeeping amenities in the non-pecuniary award: *Kim v. Lin*, 2018 BCCA 77 at para 26.

PRELIMINARY REMARKS

- [27] There are a number of things that I would like to emphasise before continuing.

- [28] First of all, I have focussed on Dr. Winston's evidence because he is the only reporting expert medical opinion witness who actually performed physical examinations of the plaintiff. I have not overlooked Dr. Connell's testimony about reading the plaintiff's CT scan, or his criticisms of Dr. Winston's report, but I did not find his contributions particularly helpful or persuasive. A proper independent medical examination of the plaintiff would have been of greater assistance.
- [29] I have noted, mind you, that Dr. Connell considers it possible that the plaintiff's back pain is caused, in part at least, by a nerve-root abnormality observable on the CT scan at S-1. This abnormality, in his view, was not caused by the accidents and may be treatable. I will take this contingency into consideration, along with Dr. Winston's opinion that the plaintiff's physical condition will improve with proper rehabilitation efforts, and that a full recovery cannot be ruled out.
- [30] Secondly, the plaintiff retained two occupational therapists to give opinion evidence at trial, but neither performed a functional capacity evaluation, even though the extent of the plaintiff's accident-related diminution of functionality and the compensation to be paid for it were the only issues for me to decide. The opinions submitted were restricted to the costs associated with the alleged loss of housekeeping and childcare capacity based chiefly on the plaintiff's self-reported limitations which her expert witnesses simply assumed to be true.
- [31] Absent, in other words, was the sort of objective physical testing, including placebo testing, that I would expect to accompany a demand for compensation of the magnitude sought by the plaintiff. I agree with a number of the criticisms made by a rebuttal occupational therapist retained by the defendants about this. Such physical tests as were performed, limited though they were, did not confirm the physical disabilities claimed by the plaintiff in oral consultation. No attempt was made to establish a pre-accident baseline of functionality from which to measure the extent of any putative post-accident decline. There was no assessment of the plaintiff's actual functional abilities related to home-making tasks, or any discussion of how the plaintiff's claimed deficits might be ameliorated by reasonable modifications or adaptive equipment.
- [32] Overall, the plaintiff's occupational therapy evidence failed to establish in clear and cogent terms which aspects of the plaintiff's home-making and child-rearing capacities, if any, were negatively affected by the accidents. Many of the items of expenditure recommended for childcare, furthermore, relate to the children's disabilities, not the plaintiff's. They have no connection to the accidents. They would have to be incurred in any event. I am referring to such things as speech therapy, physiotherapy, and psychological and behavioural counselling. The cumulative total cost of such services compiled by the plaintiff's expert witness in her filed report was enormous. The plaintiff, quite rightly, did not press these claims in final submissions.

- [33] Thirdly, and while on the subject of past and future loss of housekeeping capacity, including childcare expenses, I would emphasise that this is not a major loss case. I am not dealing here with significantly debilitating injuries. A common sense and measured approach is essential. The plaintiff's deficits are reasonably modest and likely to improve. In my overall view, any extra assistance that she might now require to look after her home and family has a great deal more to do with the demands of her growing and successful business than any physical incapacity caused by the defendants. I do not doubt that her enjoyment of family life has been impaired to a perceptible degree by accident-related pain, but this may be compensated adequately as part of the award for non-pecuniary loss.
- [34] Finally, evidence was presented of surreptitious video footage taken of the plaintiff in a Costco parking lot several months before trial. It shows her lifting a large box into the rear of her minivan, which she confirmed at trial contained a bar fridge, then nimbly raising her arms above her head to close the tailgate. There was nothing striking about this, at least not to me. I acknowledge that the plaintiff has claimed here and there, in present and past sworn testimony, to be unable to lift more than 15 pounds, or to raise her arms above shoulder level.
- [35] When all is said and done, however, and putting aside such testimonial flourishes as this, the plaintiff has claimed, Dr. Winston has confirmed, and I have concluded that the accidents under consideration caused her moderate neck and back soft tissue pain. Her condition has improved over time. I am persuaded by Dr. Winston's evidence, enhanced to a degree by that of Dr. Connell, that if she follows medical and active therapeutic advice her recovery will continue. I am not surprised in the least that she is physically capable of the sort of routine tasks depicted in the video. Such evidence merely confirms and fortifies my guarded but prevailingly optimistic outlook about the plaintiff's future.

NON-PECUNIARY DAMAGES

- [36] Non-pecuniary damages are awarded to compensate the plaintiff for pain, suffering, loss of enjoyment of life, and loss of amenities. The compensation awarded must be fair to all parties. A useful guide can be found in analogous precedent cases, bearing in mind, of course, that no two cases are identical and an individual assessment is required: *Trites v. Penner*, 2010 BCSC 882 at paras. 188-89.
- [37] In *Stapley v. Hejslet*, 2006 BCCA 34, leave to appeal ref'd [2006] S.C.C.A. No. 100, the Court of Appeal outlined the factors to be considered when assessing non-pecuniary damages at para. 46:
- [46] The inexhaustive list of common factors cited in *Boyd [v. Harris]*, 2004 BCCA 146] that influence an award of non-pecuniary damages includes:
- (a) age of the plaintiff;
 - (b) nature of the injury;

- (c) severity and duration of pain;
- (d) disability;
- (e) emotional suffering; and
- (f) loss or impairment of life;

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

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

[38] The assessment of non-pecuniary damages is necessarily influenced by the individual plaintiff's personal experience dealing with his or her injuries and their consequences, and the plaintiff's ability to articulate those experiences: *Dilello v. Montgomery*, 2005 BCCA 56 at para. 25.

[39] The plaintiff says that she experienced pain and suffering for four years after the first and second accidents. The pain was most acute in the early going, but the lower back and intermittent neck pain continued to aggravate her. The third accident reactivated and worsened the injuries sustained in the earlier two, and her pain was ongoing and somewhat debilitating at trial, 14 months afterwards.

[40] The plaintiff claims, and I accept, that to a degree she is less capable of maintaining her home and caring for her family than before the accidents. She now requires more assistance. Luckily she has a large family to pitch in and help, including a capable and vigorous husband. Nonetheless, she has limitations in her ability to physically interact or play with her own children and the children at the daycare. She cannot enjoy her recreational activities, such as skiing and camping, to the same extent as before the accidents.

[41] These are significant impairments meriting a solid award in general damages. The plaintiff submits that an appropriate award under this heading is \$100,000 based on a review of the following cases: *Unger v. Singh*, 2000 BCCA 94 (\$90,000), *Teunissen v. Hulstra*, 2017 BCSC 1569 (\$110,000), *Todoruk v. Voronov*, 2019 BCSC 2175 (\$80,000), *Reely v. Zhu*, 2020 BCSC 1520 (\$100,000), and *Pinkney v. Bigg*, 2020 BCSC 848 (\$110,000).

[42] The defendants submit that a global assessment of damages with respect to the first and second accidents would be appropriate as they are close in proximity and the injuries caused were indivisible. They submit that her injuries resolved before the third accident, and that I should assess damages for it separately. They argue that a global award in the

range of \$30,000 - \$40,000 would be suitable for the first and second accidents and \$15,000 - \$25,000 for the third accident. Altogether, they say, a fair and proportionate settlement is in the range of \$45,000 - \$65,000.

- [43] The defendants' submission is based on the following cases: *Bagri v. Heran*, 2020 BCSC 2002 (\$50,000), *Duffy v. Dutt*, 2020 BCSC 995 (\$55,000), *Nguyen v. Bhatti*, 2017 BCSC 1537 (\$45,000), *Wong v. Pannu*, 2020 BCSC 1158 (\$40,000), *Pond v. Bucsis*, 2013 BCSC 2001 (\$30,000), *Nagaria v. Dhaliwal*, 2018 BCSC 569 (\$19,000), *Rosso v. Balubal*, 2014 BCSC 1786 (\$20,000), and *Bae v. Vasquez*, 2013 BCSC 542 (\$12,000).
- [44] As I have said, the evidence supports the finding that the plaintiff has recovered from many of her aches and pains, but that she continues to suffer from soft tissue injuries to her neck and back as a result of the accidents. These injuries are indivisible. The outlook is positive but uncertain. Dr. Winston said that a final prognosis on her condition will be possible in 18 months, but at present it is unclear if she will recover fully or experience some degree of pain for the rest of her life.
- [45] The plaintiff is able to participate in the same activities that she enjoyed before the accidents, but she must be careful and moderate in her approach to them. Generally speaking, she cannot go after life with the same energy and commitment as before. The plaintiff's oldest son, C.C., testified that his mother often appears to be sore and in pain, she takes more breaks when engaged in any physical activity, and is not as physically strong as she used to be. The plaintiff's husband testified that the plaintiff continues to be the primary housekeeper and caregiver, but now she needs more help from him than before.
- [46] Based on Dr. Winston's evidence, as I have already said, it is likely that the plaintiff's physical fitness will improve once she starts engaging in proper rehabilitative efforts. She experienced significant recovery after the first and second accidents. The third accident merely exacerbated her original injuries. I have no reason to think that she will not recover in the same way as before, and experience even greater improvement with active physical rehabilitation. As previously mentioned, Dr. Winston testified that a full recovery could not be ruled out. The risk that she will endure residual discomfort in the long term, however, must be factored into the award: see *Bagri* at para. 87; *Wong* at para. 46.
- [47] Briefly, the plaintiff's neck and back injuries have not resolved, it is unclear how long they will last, but they are not substantially debilitating or severe. They do not impair her ability to administer her daycare business. She is able to care for her home, look after her family, and pursue her customary activities, but in a more careful, reduced and modified manner than before. In my view, the plaintiff's demand for non-pecuniary damages, inclusive of an amount for loss of housekeeping and childcare amenities, is reasonable. My award under this heading is \$100,000.

PAST LOSS OF INCOME EARNING CAPACITY

- [48] In *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at paras. 30-31, the Court of Appeal explained that a claim for what is often described as "past loss of income" is actually a claim for past loss of earning capacity -- i.e., "a claim for the loss of the value of the work that the injured plaintiff would have performed but was unable to perform because of the injury".
- [49] The test to be applied to hypothetical events, past or future, is whether there is a real and substantial possibility that the events would occur: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 27; *Smith v. Knudsen*, 2004 BCCA 613 at para. 29; *Grewal v. Naumann*, 2017 BCCA 158 at paras. 43-46; *Rousta v. MacKay*, 2018 BCCA 29 at para. 14. In measuring the value of the loss, the events are to be given weight according to the relative likelihood that they would have occurred: *Athey* at para. 27; *Smith* at paras. 29, 31.
- [50] I accept that the plaintiff was unable to work at all in the immediate aftermath of all three accidents, but her actual income was unaffected by this, it seems. It likely meant that her business partner had to pick up the slack, but there is no evidence regarding the extra hours she worked or any cost associated with it. In any event, the plaintiff returned to her administrative duties at the daycare fairly soon after each accident. On the totality of the evidence, I find that these duties have increased over time to the extent that they now occupy most of her working day. Her capacity to fulfil them has not been affected by her injuries.
- [51] The daycare business has been very successful, and the plaintiff has enjoyed sizeable increases to her income every year since it opened. However, the evidence establishes to my satisfaction that after the accidents, and throughout the pre-trial period, the plaintiff suffered a diminished capacity to work, as planned, in the infant/toddler room, to cover employee breaks, and to cook for the daycare. This reduced the daycare's profits, as additional labour had to be engaged to carry out these duties. In a case such as this, where the plaintiff runs her own business, an assessment of reduced company profits can be used to measure her lost earning capacity: *Rowe* at para. 31.
- [52] On all of the evidence, I think it unlikely that the plaintiff would ever have worked full-time in the infant/toddler room of the daycare. The business took off from the beginning, and the plaintiff's time would have been steadily and progressively taken up with administrative duties even if the accidents had not occurred. She and Ms. Abrahams would have had to hire additional staff regardless. However, I think it likely that the plaintiff would have spent at least a portion of her day looking after children and cooking their meals.
- [53] All in all, it is fair and reasonable to conclude that the plaintiff's diminished capacities forced the daycare to lay out for four hours of additional labour per day in the pre-trial period to make up for the plaintiff's accident-related incapacity to perform these services - three hours to replace the claimant's activities directly looking after the children, including during breaks taken by other staff members, and one hour for cooking meals. A witness who was engaged to do this replacement work, Ms. Rowe, testified that she started at \$14.50 per

hour. She now earns \$21 per hour. Her average wage in the pretrial period was therefore \$17.75.

- [54] The plaintiff reported 60% improvement in her low back pain to Dr. Winston on May 29, 2017. While this was a significant improvement, she was still experiencing almost half the level of pain as on her initial injury when she could not work at all. I disagree with defence counsel that her pre-trial compensation under this heading, at least for the first and second accidents, should stop as of June of 2017. While her symptoms were getting better, she still suffered from reduced capacity to handle work at the daycare requiring physical strength and agility. It is reasonable for the plaintiff to be compensated for her share of the cost of hiring replacement labour to cover this loss.
- [55] 64 months passed between the first accident and the date of trial. There were periods during summer and winter breaks when the plaintiff would not have worked, and the daycare was closed on the weekends. Using rough numbers, I calculate that the daycare was open 180 days per year in the pre-trial period, or on average 15 days per month. Thus, 64 months requires compensation for the additional labour discussed over 960 work days.
- [56] A suitable measure of compensation, bearing in mind that this is an assessment and not a purely mathematical exercise, while also noting that real-life economic "anchors" are available, would be the cumulative average amount paid to Ms. Rowe in the pre-trial period to perform the physical, hands-on work at the daycare that the plaintiff had planned to do, but was not able to do because of accident-related injuries. This amounts to a cost of \$17.75 per hour, four hours a day, for 960 days, and results in a compensatory figure of \$68,160.
- [57] I agree with the defendants that this amount ought to be divided in half, as the plaintiff has an equal business partner, Ms. Abrahams. The cost of replacement staff was shared between them: see *Engel v. Salyn*, [1993] 1 S.C.R. 306. Rounding off the numbers, in my view a fair award under this head is \$35,000. I trust that counsel will be able to agree on the tax consequences of this. If not, they have liberty to apply.

FUTURE LOSS OF INCOME EARNING CAPACITY

- [58] In the recent case of *Fletcher v. Biu*, 2020 BCSC 1304 at paras. 94-96, this court described the legal framework for the assessment of a future loss of capacity claim as follows:
- [94] A claim for loss of future earning capacity raises two key questions: 1) has the plaintiff's earning capacity been impaired by her injuries; and, if so 2) what compensation should be awarded for the resulting financial harm that will accrue over time? The assessment of loss must be based on the evidence, and not the application of a purely mathematical calculation. The appropriate means of assessment will vary from case to case: *Brown v. Golaiv* (1985), 26 B.C.L.R. (3d) 353 (S.C.); *Pallos v. Insurance Corp. of British Columbia* (1995), 100 B.C.L.R. (2d) 260 (C.A.); *Pett v. Pett*, 2009 BCCA 232 at para. 19.

- [95] The assessment of damages is a matter of judgment, not calculation: *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 18. To the extent possible, the plaintiff should be put in the position she would have been in but for the injuries caused by the defendant's negligence: *Lines* at para. 185. The court's essential task is to compare the plaintiff's likely future working life with and without the Accident: *Gregory v. Insurance Corp. of British Columbia*, 2011 BCCA 144 at para. 32.
- [96] There are two possible approaches to the assessment of loss of future earning capacity: the "earnings approach" from *Pallos*, and the "capital asset approach" in *Brown*. Both are correct. The "earnings approach" is generally more useful when the loss is easily measurable: *Perren v. Lalari*, 2010 BCCA 140 at para. 32. When the loss "is not measurable in a pecuniary way", the "capital asset" approach is more appropriate: *Perren* at para. 12. The earnings approach involves a form of math-oriented methodology such as: i) postulating a minimum annual income loss for the plaintiff's remaining years of work, multiplying the annual projected loss by the number of remaining years and calculating a present value; or ii) awarding the plaintiff's entire annual income for a year or two: *Pallos*; *Gilbert v. Bottle*, 2011 BCSC 1389 at para. 233.
- [59] The plaintiff's capacity to continue managing the daycare and perform its administrative duties is not impaired. However, the evidence shows that there is a real and substantial possibility that her diminished capacity to work directly with the children and do the cooking will continue to cost the business money in replacement labour costs. In my view, the plaintiff should be compensated for this on the same basis used for calculating past loss of income earning capacity.
- [60] The plaintiff has suggested that a 10-year compensation period would amount to fair compensation on the footing that after such a span she would likely not be working on the floor of the daycare in any case. I can accept this, but in my view, at least two additional contingencies must also be considered. First, there is the likelihood that the business will continue to grow, obliging the plaintiff to spend more time on administrative work, which she is able to do notwithstanding the accidents. Second, there is the likelihood that her physical capacity will improve substantially with active rehabilitation efforts.
- [61] All in all, I think it fair, reasonable and proportionate that the plaintiff should be compensated for the replacement cost of labour for the next four years. Once again, I will take Ms. Rowe's present wage of \$21.00 per hour, and multiply it by 4 hours per day, 180 days per year, for four years. Making some allowance for increased labour costs over the term, I find there to be a real and substantial possibility that the all-in loss will be in the \$70,000 range. This amount must be divided in half, as previously discussed, to account for the plaintiff's 50 per cent ownership of the business. The result is an award under this heading of \$35,000.

COST OF FUTURE CARE

- [62] The plaintiff is entitled to compensation for the cost of future care based on what is reasonably necessary to restore her as far as possible to her pre-accident condition. When full restoration cannot be achieved, the court must strive to assure compensation through the provision of adequate future care. The award is to be based on what is reasonably necessary on the medical evidence to preserve and promote the plaintiff's mental and physical health: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.); *Spehar (Guardian ad litem of) v. Beazley*, 2002 BCSC 1104 at para. 55; and *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at paras. 29-30.
- [63] An award for cost of future care may be made if there is medical justification for the claim, if the claim is reasonable, and if the expense is likely to be incurred: *Aberdeen v. Zanatta*, 2008 BCCA 420 at para. 42; *Milina* at para. 84; *Tsalamandris v. McLeod*, 2012 BCCA 239 at paras. 62-63; and *Izony v. Weidlich*, 2006 BCSC 1315 at para. 74. A common sense approach must be taken: *Penner v. Insurance Corporation of British Columbia*, 2011 BCCA 135 at para. 13.
- [64] The plaintiff claims the following awards for costs of future care:
- a) kinesiology (\$1,717);
 - b) physiotherapy for one year (\$3,900);
 - c) gym membership (\$1,816);
 - d) over the counter analgesics (\$12,631);
 - e) window cleaning (\$22,454); and
 - f) fence staining (\$1,832).
- [65] I have decided that the plaintiff should be compensated for future care costs that relate to active rehabilitation and strengthening. The future care cost of kinesiology is justified, as is the gym membership. Dr. Winston has advised against more physiotherapy. The only evidence regarding analgesics was that the plaintiff stopped taking them due to their interference with her childcare activities. The claims for window cleaning and fence staining do not meet the test for medical justification and are dismissed. My award under this heading is \$3,533.

SPECIAL DAMAGES

- [66] I will allow the plaintiff's claim for special damages, but it will be restricted to fees and mileage to attend for physiotherapy. The demands for compensation for a dental night guard, gutter cleaning and car seats are too remote. A fair award under this heading is \$1,500.

SUMMARY

[67] I award the plaintiff the following amounts:

Non-pecuniary damages:

\$100,000.00

Past loss of earning capacity:

\$35,000.00

Future Loss of income earning capacity:

\$35,000.00

Cost of future care:

\$3,533.00

Special damages:

\$1,500.00

Total:

\$175,033.00

[68] The plaintiff will have her costs on Scale B.

"Baird J."

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