
CANADA / JUDGMENT

Dabu v. Schwab

2016 BCSC 613

COURT

Supreme Court of British Columbia

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2016 BCSC 613 Dabu v. Schwab

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Dabu v. Schwab,

2016 BCSC 613

Date: 20160408

Docket: M134385

Registry: Vancouver

Between:

Loida Benavides Dabu

Plaintiff

And

Pamela Rose Schwab

Defendant

Before: The Honourable Mr. Justice Steeves

Reasons for Judgment

Counsel for the Plaintiff:

T.C. McIvor

R.J. Chang

E. A. Orr-Ewing

Counsel for the Defendant:

J.Z. Murray

M.J. Straw

Place and Date of Trial/Hearing:

Vancouver, B.C.

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April 8, 2016

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A. INTRODUCTION

- [1] The plaintiff was injured in a motor vehicle accident on September 23, 2011. She now suffers from neck, back and shoulder pain. Liability is admitted.
- [2] The experts from both parties opine that the plaintiff suffers from psychological problems caused by the 2011 accident. There is a difference about the diagnosis and the extent of these problems. The plaintiff's expert psychiatrist has diagnosed a major depressive episode and panic attacks causally related to the accident. However, a psychiatrist retained by the defendant disagrees and says the plaintiff suffered from an adjustment disorder, now in remission, and currently suffers from a continuing somatic symptom disorder.
- [3] Special damages are agreed. The plaintiff claims further damages under the following heads: past wage loss, non-pecuniary, future care, loss of housekeeping capacity, and loss of future earning capacity.

B. BACKGROUND

- [4] The following is taken from an agreed statement of facts and the evidence at trial.
- [5] At trial the plaintiff was 54 years old. She was born in the Philippines in 1962 and came to Canada in 1990. Her husband, Melchor Benavides, and son, Fender Benavides, joined her in Canada in 1995. A daughter, Melody Benavides, was born in Canada. At trial the daughter was 16 years and the son was 25 years old. Both children live at home with their parents. Mr. Benavides, the father, works as an assembler/electrician.
- [6] The plaintiff first worked as a nanny in Canada and then she went to school for one year to be a healthcare aid. In 1997 she obtained employment in that field at the Granville Park Lodge. At trial she was still working there full-time.
- [7] On September 23, 2011 the plaintiff was a passenger in a vehicle being driven by her son. The car stopped or paused at an intersection and it was rear ended by a vehicle driven by the defendant. It is agreed that the impact was low-velocity.
- [8] The plaintiff testified that she immediately had dizziness and headaches as a result of the accident. She saw her family physician, Dr. Miguel Imperial, the next day, September 24, 2011. She testified that she suffered pain in her neck and back shortly after the accident.
- [9] A few days after the accident the plaintiff returned to her work as a care aide. However, while attempting to move a patient she felt pain in her back and neck and, as she testified, she could not move her left shoulder. She could not hold the patient and he fell. She talked with her doctor and she was then off work.

- [10] In early 2013 the plaintiff was feeling better and she tried to return to work. She testified that she thought she could work full-time but she realized that she was wrong. At the suggestion of her doctor she tried a graduated return to work. This continued until mid-2013 when she returned to work full-time at 37.5 hours per week. She continues with full-time work but with pain, and she and her husband testified that she now does very few tasks at home. Her current work and home life is discussed in detail below.
- [11] The plaintiff claims for loss of income for being off work entirely from September 23, 2011 to April 1, 2013 and for reduced earnings from April 5, 2013 to July 1, 2013. She also says that her symptoms have waxed and waned since July 2013 and she claims for periodic time loss due to pain related to the September 2011 accident. She received paid sick time from her employer but she says she needed and needs more time off as a result of the accident; she claims for these additional days in this litigation.
- [12] The plaintiff also claims for psychological symptoms. According to the expert evidence of the plaintiff these include a major depressive disorder and panic attacks. The expert for the defendant says there is an adjustment disorder (in remission), a somatic symptom disorder (continuing) and some symptoms of post-traumatic stress disorder ("PTSD").
- [13] In late 2013 the plaintiff was off work for about two months for kidney stones (including surgery) and she also was off for an infection in May 2014. Both of these are unrelated to the 2011 accident.
- [14] The following is a summary of some of the treatment the plaintiff has received for her 2011 accident:
- (a) 68 visits to her family doctor, Dr. Imperial.
 - (b) 95 visits to five different providers of physiotherapy.
 - (c) 19 visits to two different providers of massage therapy.
 - (d) 24 visits to two different providers of chiropractic therapy.
 - (e) 13 visits to two different providers of psychological counselling.

C. EXPERT REPORTS

- [15] The plaintiff relies on five experts in the following areas:
- (a) Psychiatry: Dr. Shaila Misri, reports dated March 25, 2015 and November 12, 2015.
 - (b) Physical medicine and rehabilitation: Dr. Lisa Caillier, reports dated September 30, 2014 and October 30, 2015.
 - (c) Family medicine: Dr. Miguel Imperial, report dated October 9, 2015.
 - (d) Occupational therapy: Paul Pakulak, report dated November 5, 2015.

(e) Economics: Curtis Peever, report dated November 10, 2015.

[16] The defendant relies on one expert:

(a) Psychiatry: Dr. Fred Shane, report dated August 10, 2015.

[17] All experts were cross-examined.

D. ANALYSIS

[18] The following are issues to be considered:

(a) Non-pecuniary damages

(b) Past wage loss

(c) Future income loss

(d) Future care

(e) Loss of housekeeping services (past and future)

(f) Special damages

[19] My discussion of those issues follows.

(a) Non-pecuniary damages

(i) Legal context

[20] The plaintiff seeks damages for non-pecuniary loss in the amount of \$108,000 to \$135,000. This is on the basis of all of the plaintiff's physical and psychological symptoms being causally related to the 2011 accident. Cases cited by the plaintiff to support this figure include: *Poirier v. Aubrey*, 2010 BCCA 266; *Hosseinzadeh v. Leung*, 2014 BCSC 2260; *S.R. v. Trasolini*, 2013 BCSC 1135; and *Morlan v. Barrett*, 2010 BCSC 1767, varied, but non-pecuniary damage award aff'd, 2012 BCCA 66.

[21] According to the defendant, total non-pecuniary damages in the range of \$40,000 to \$50,000 are appropriate in this case. Cases relied on include: *Chen v. Beeler et al.*, 2004 BCSC 584; *Rabiee v. Rendleman*, 2015 BCSC 595; and *Matias v. Lou*, 2015 BCSC 544.

[22] An award of non-pecuniary damages "acts as a substitute for the pleasure and enjoyment which has been lost and endeavours to alleviate, as far as possible, the pain and suffering that the plaintiff has endured and will have to endure in the future" (*ter Neuzen v. Korn*, [1995] 3 S.C.R. 674, at para. 106). The broad framework for the assessment of non-pecuniary damages has been set out by the Court of Appeal (*Stapley v. Hejslet*, 2006 BCCA 34, leave to appeal to S.C.C. refused 2006 CanLII 35804):

[46] The inexhaustive list of common factors cited in *Boyd* [*Boyd v. Harris*, 2004 BCCA 146] that influence an award of non-pecuniary damages includes:

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

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

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

[23] The ability to work is relevant to non-pecuniary damages because it may impact a person's enjoyment of life. As explained in Ken Cooper-Stephenson, *Personal Injury Damages in Canada*, 2nd ed. (Scarborough: Carswell, 1996) at p. 553:

In the vast majority of cases a plaintiff is entitled to an award for loss of working capacity together with a sum for non-pecuniary loss assessed on a functional basis. The two heads of damage are designed for different purposes. The first is a replacement of what otherwise would have been received. The second is a solace to allow the plaintiff to enjoy substitute amenities to replace lost enjoyment and to counteract the negative effect of pain and suffering.

[24] As Dickson J. said in his dissenting opinion in *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, at p. 368, in a passage that has been frequently quoted since:

Work is one of the most fundamental aspects in a person's life. ... A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being.

(See also: *Boyd v. Harris*, 2004 BCCA 146, at para. 54).

(ii) Effect of the accident

[25] The accident on September 23, 2011 was, by agreement, a low velocity collision. Notwithstanding this agreement, the defendant testified about the accident. She apparently believed (incorrectly) at the scene that her insurance was in jeopardy and she said in discovery that she was frantic.

- [26] In her actions at the scene of the accident and in her evidence the defendant was plainly of the view that the plaintiff was engaged in some sort of fraudulent activity. She described the collision as a "love tap", apparently meaning there was minimal contact. However, that is inconsistent with her acknowledgement in cross-examination that she knew that there was structural damage to the plaintiff's vehicle. Similarly, the defendant believed the plaintiff's vehicle was uninsured because a photograph she took allegedly showed the insurance had expired. Despite her sister pointing out that the insurance had not expired, the defendant maintained her position.
- [27] The defendant also testified that she observed the plaintiff's vehicle before the accident and she saw pre-existing damage to it. Considering the short length of time the two vehicles were near each other in busy traffic, and considering that the defendant could not remember anything else that occurred that day before the accident, the defendant's evidence is not reliable. As it happened the plaintiff later admitted there was some previous damage. But it is unlikely the defendant would have seen that in the few minutes she was behind the plaintiff and distracted by traffic around her.
- [28] Counsel for the defendant has not argued that there was any fraudulent or improper clam by the plaintiff and nor could that proposition be reasonably supported on the evidence. As will be seen, there is agreement between the parties that the plaintiff suffers from a psychological condition as a result of the accident. There is also agreement that the plaintiff is not malingering. Since the negligence of the defendant is admitted, it is not clear why the defendant was called as a witness at all. Having heard the evidence is it necessary that I consider it.
- [29] Finally, it is well-established that minimal vehicle damage is not the "yardstick" to measure the extent of a plaintiff's injuries. That may be the philosophy of insurance carriers but it has no application in court and no medical basis. The presence and extent of injuries are determined on the basis of evidence rather than extraneous theories (*Duda v. Sekhon*, 2015 BCSC 2393, at para. 62, citing *Lubick v. Mei and another*, 2008 BCSC 555, at para. 5, citing *Gordon v. Palmer* (1993), 78 B.C.L.R. (2d) 236 (S.C.)). I comment below on the plaintiff's evidence.

(iii) After the accident

- [30] The plaintiff was 57 years old at trial. She is married with two children. Her adult life can be fairly described as a considerable success when her modest beginnings in the Philippines are compared with the life she has built in Canada. As a result of hard work and sacrifices on the part of the plaintiff and her husband, that life includes secure employment for them and genuine opportunities for their children.

[31] It is of some significance that the plaintiff was well-established in her adult life when the September 2011 accident occurred. Since then she has been able to work full-time but her non-work activities are severely restricted. For example, her husband and children did some household duties before the accident but they now perform virtually all of the cooking, cleaning and gardening duties. In addition, the plaintiff's relationship with her husband has suffered and she has a minimal social life now.

[32] The plaintiff presents with both physical and psychological symptoms.

[33] With respect to the physical complaints the chart notes of the plaintiff's family physician, Dr. Imperial, are instructive. His report of October 9, 2015 includes summaries of three assessments done within three days of the September 23, 2011 accident. The first was on September 24, 2011, when the plaintiff saw a locum (Dr. G. Boparai), and the second with another locum (Dr. Raymond Marsh) on September 25, 2011. The third assessment was done on September 26, 2011 by Dr. Imperial. Those assessments were summarized by Dr. Imperial as follows:

September 24, 2011: She was first assessed post-MVA at the Station Square Medical clinic by Dr. G. Boparai. His chart notes indicate her chief complaint was that of a headache. He indicated that she had a motor vehicle accident the day prior at approximately 1:10 PM where she was the seat-belted passenger of a vehicle which was rear-ended. On examination, she was noted to be neurologically normal with an elevated blood pressure of 154/100. She was advised to follow-up within the next few days.

September 25, 2011: She was assessed by Dr. Raymond Marsh, who noted the details of the MVA on September 23, 2011. His notes indicated she complained of a frontal type of headache, as well as pain in both shoulders and trapezius muscles. Physiotherapy was suggested.

September 26, 2011: I [Dr. Imperial] saw Ms. Benavides Dabu for the first time. I noted she worked as a care aid. Her complaints on that visit consisted of lower back pain on the left and right in the middle of the back. She also complained of neck pain, mostly on the right side and left arm and chest pain. When I examined her, I noted she had tenderness in the upper trapezius muscles. There was no midline neck pain. She also had mild tenderness in the lumbar spine, both midline and laterally. I noted range of motion in the entire spine appeared normal. I diagnosed soft tissue injuries and suggested she attended physiotherapy and continue with early mobilization.

[34] As a comparison, a more current assessment is contained in the October 30, 2015 report of Dr. Lisa Caillier, an expert in physical medicine and rehabilitation for the plaintiff:

When seen on October 22, 2015, Ms. Benavides Dabu continued to complain of pain complaints involving her neck, upper back, shoulders, as well as lower back regions[. The neck complaints have been worsening since I last saw her [August 1, 2014]. She has constant pain involving the lower back regions and again this is more tolerable than her neck and shoulder pain. She will also experience radiating left greater than right arm numbness, as well as radiating numbness into the left leg with increased pain. She has headaches on a daily basis from the neck region.

[35] Dr. Caillier also stated that the plaintiff can and should do more activities in order to improve her conditioning and reduce her pain. The plaintiff is not at risk of further injury by increasing her activities.

[36] There is no physical assessment of the plaintiff by experts for the defendant.

[37] At trial and in her evidence the plaintiff described pain in her neck, shoulders and lower back. She acknowledged some improvement since the September 2011 accident but she maintained she had significant pain and significant limitations.

[38] The explanation for these physical complaints, according to Dr. Imperial in his report of October 9, 2015, is:

soft tissue injuries affecting primarily the neck and shoulders as a result of the MVA September 23, 2011. She also suffered from soft tissues [sic] injuries to the mid and lower back with some symptoms in the legs to a lesser extent. The back and leg pains largely resolved early on in the course of the last four years; however the injuries in the upper back, neck and shoulders have resulted in pain over the last four years that continues to the present and appears to have evolved into a more complex pain syndrome with possible central sensitization syndrome.

[39] In the opinion of Dr. Caillier, the physical injuries related to the September 2011 accident included soft tissue musculoligamentous injury involving the neck, upper back and the posterior shoulder girdle region. There is also soft tissue musculoligamentous injury involving the lower back, left leg sensory complaints (likely a referral of soft tissue pain) and sensory symptoms involving the arms, as well as radiating arm pain, likely referral of soft tissue pain.

[40] Taken overall, I accept that the plaintiff presents with a complex set of symptoms. In her evidence she was weeping on several occasions and in obvious distress with pain she described in many parts of her body. She testified that her symptoms had not improved but then said they had. For these reasons, there are problems in the reliability of the plaintiff's symptoms as she presented them in her evidence. There is no suggestion of deception but it is clear the plaintiff presents herself as significantly disabled even though she works in a job that requires moderate physical activities. The evidence is also that the plaintiff's symptoms are improving, albeit slowly, and she had difficulty accepting this in her evidence.

- [41] I conclude that a fair interpretation of the plaintiff's self-reported symptoms that is consistent with the medical evidence is that the plaintiff continues to have pain and other symptoms in her neck, shoulder and back, including limitation of movement. I also acknowledge that the plaintiff presents with more physical complaints than can be justified on a purely physical basis. That inconsistency can be explained, in my view, by consideration of the psychological evidence.
- [42] There is agreement between the experts of both parties that the plaintiff suffers from a psychological disorder but there is a disagreement as to its diagnosis. According to the plaintiff's psychiatrist, Dr. Misri, the plaintiff suffers from a major depressive disorder and panic attacks as a result of the September 2011 accident. In contrast, the psychiatrist retained by the defendant, Dr. Shane, opines that the plaintiff suffers from an adjustment disorder (that is in remission) and a continuing somatic pain disorder. She also has symptoms of post-traumatic stress disorder but not enough to make that diagnosis, according to the defendant's expert.
- [43] I acknowledge the differences between the experts about diagnosis and I accept that diagnosis is relevant to treatment. However, for the purposes of assessing damages it is sufficient to point out that there is no dispute that the plaintiff currently suffers from a psychological disorder as a result of the 2011 accident. At a minimum it is either a major depressive disorder (Dr. Misri) or somatic pain disorder (Dr. Shane). On the defendant's evidence it also includes an adjustment disorder that is now in remission and some symptoms of PTSD. The plaintiff's expert would add panic attacks but not adjustment disorder or symptoms of PTSD, as described by the defendant's expert.
- [44] With the above in mind, for the purposes of assessing damages as a result of the 2011 accident it is not necessary to review the reports of the experts with respect to diagnosis and make a decision about which diagnosis is appropriate. Other parts of their reports are of assistance in providing information about the pain and suffering of the plaintiff, as reported by her and recorded by the psychiatrists. The reports are also useful for their prognoses.
- [45] In her report of March 25, 2015 the plaintiff's expert, Dr. Misri, said the following:

OPINION

In my opinion, Loida Benavides Dabu presented as a 52-year old woman with two sets of injuries which resulted from the MVA of September 23rd, 2011. Because her ongoing chronic pain symptoms, which have lasted for more than three and a half years are closely linked to her present psychiatric disorders, I will briefly describe the current reported symptoms of pain by Loida and then describe the psychiatric consequences.

Loida complains of:

1. Stiff neck, more on the left than on the right. It extends around. She complained of the pain extending to her lower back and the mid part of her head every day.

2. Spasm in the upper back muscles between the shoulder blades, which occurs every single day.
 3. Pain in the upper shoulder extending down to the left arm and weakness every day.
 4. Pain in the lower back that radiates to the left thigh and lower leg off and on. This pain is not present daily.
 5. Pain around the left part of her head resulting in occasional headaches, which can be quite intense, off and on.
1. Mood Changes

As a result of the ongoing pain which did not appear to be helped by a number of interventions that were offered to her, it appears that the symptoms of depression set in gradually, triggered by insomnia related to the pain. It was first noted by her family physician in May of 2012 but in my interview, she reported that the pain symptoms, the lack of work and loneliness, and the fear of the pain were some of the major factors that slowly began to affect her mood. She was off work until April of 2013 and was almost house-bound. She said the constant, relentless pain eventually got to her and she felt that her life had changed completely. She said that she was not "used to this sort of life", she always used to work and was never at home "doing nothing." She tried to go back to work within a few days of the injury but was sent home by her supervisor as she accidentally dropped the resident who then broke her hip.

This incident was also one of the main triggers for the decline in her self-confidence. She had always prided herself in being an excellent worker and was much liked at work and she always looked forward to going to work. Therefore, this mistake that happened during her shift literally shocked her. "Every day thereafter was a disaster for me." She kept ruminating about the resident. In the meantime, the pain continued to affect her in several areas of her life. Sleeping was difficult, having any sexual contact or any sort of intimacy with her husband became a big issue. Prior to the MVA, she stated she had a stable marital relationship and a healthy sex life. She felt upset, and inadequate, "as a wife." "I felt sorry for him."

Sadness started to set in soon after the incident with the resident at work, as she knew that she may no longer be able to work ever again. Crying spells began to appear and negative thoughts of her capabilities was the main focus. The chronic pain reminded her of the way her quality of life had changed, and it made her desperate and angry. Generally, she is not a woman who has a short fuse or temper, but she found herself in an impossible place where she was not able to function, doing her daily chores around the house, nor was she functional at work. Everything became an extremely overwhelming task for her, especially with ongoing chronic pain. Simple things like cooking, which she saw as her exclusive responsibility in the marriage, became a major issue. She felt useless as she could not get food on the table before her husband returned from work after a long day.

She also missed her friends from work and all the fun in her life was gone. Most of her pleasure prior to the accident came from mingling with her colleagues at Granville Park Lodge where she worked for several years. She missed socializing with them and loneliness began to haunt her. Work has always defined her identity and she has always felt very proud of it.

Her symptoms of Major Depressive Disorder that began to set in five to six months after the MVA include the following:

- a) Sleep - finding a comfortable position became difficult. She had initial insomnia, had difficulty remaining asleep throughout the night, and woke up earlier than usual in the morning. Presently, she is taking 10 mg of Aventvl, a sedating antidepressant, which is still not helping her to sleep very much, as she only gets 3-4 hours of sleep per night.
- b) Appetite - it varies, she stated. She has gained a lot of weight due to lack of exercise and activity associated with her ongoing pain. As soon as she comes home from work, she has to rest so that she doesn't get too tired for work the next day.
- c) Energy Level - This is affected in a major way. She says that during her break at work, she has to lie down and stretch, as pain makes her very tired. She went back to work in April of 2014 and the amount of exhaustion and tiredness, especially when she comes home after putting in a full day, is very high at the present time. Work is all that she can manage. The ongoing physical participation with the residents exhausts her and brings back her pain even more, and this tires her out.
- d) Anger and Short Temper - "Why me?" A sense of hopelessness makes her wonder why she is not able to fulfill her own needs and that of her husband. The constant pain makes her very angry and mad, she stated.
- e) Joy - No longer does she feel that she is able to enjoy doing anything with her friends or relatives. She prefers to be at home mostly, "not doing very much."

Loida states that after the car accident, in the immediate few weeks and months, her mood fluctuated between 0 and 4. Although she has never been actively suicidal, she told me that she had never wanted to live in this kind of way "ever in her life." Until she went back to work, this feeling of being hopeless and trapped was a central theme in her life. Now that she is back to work, although she feels a little bit better about herself and her mood has improved somewhat, because she sees people around her and feels that she is contributing financially to her family and distracting herself from the pain. However, her mood now continues to fluctuating between 5 and 7. Because she has been determined to go back to work despite the pain, going back to work is actually helping her, but this completely curtails her functionality in other aspects of her life because, although she suffers at work, she told me that she prefers that to "the pain of being at home." She likes being independent and prefers to work and make her own money.

In my opinion, the accident of September 23rd, 2011 has more likely than not caused the onset of Major Depressive Disorder which meets the criteria of DSM-5. It is now chronic, fluctuating in nature, and has not been in a state of remission ever since it began post-accident.

2. Panic Attacks

The first episode began spontaneously after months following the accident. The symptoms of panic episodes are fast heartbeat, tightness of chest, breathlessness and a feeling of panic and dread. When it occurred the first time, she felt extremely frightened and thought she was having a heart attack. This occurred three to four days in a row and she could not stand it any longer and went to Burnaby Hospital Emergency where she was told that either she had pulled a muscle or she may have been anxious. She was reassured that she was not going to have a heart attack. Then she went again to VGH Emergency in 2013 with an acute anxiety attack, and at that time, she also got to see a cardiologist who reassured her that she was not having heart problems.

It was at this time that her family physician told her that she needed to get psychiatric help. Loida has always been afraid to go and see a psychiatrist because she did not believe at the time that there were any psychological issues in her life, or that she was in a state of depression.

Eventually, she states that she went to the Burnaby Mental Health team and was seen by a psychiatrist whose name she does not remember. She apparently saw a counselor a few times but could not handle group sessions, as listening to other people's problems magnified her own sense of distress, she told me. She eventually stopped going. The family doctor in 2012 also gave her almost a month's trial of Cymbalta but due to side effects, she could not take this medicine and to my knowledge, there has been no other antidepressant that has been prescribed to her.

Presently, the panic episodes are sporadic and occur especially when she is under stress.

In my opinion, the sporadic panic attacks which Loida is experiencing, are more likely than not caused by the accident of September 23rd, 2011. Although they are not as intense as they were in the beginning immediately post-accident, they are triggered under stress. They have occurred for the past two or three years.

[46] In terms of prognosis and recommendations for treatment Dr. Misri opines as follows; I have emphasized the parts that, in my view, are particularly apt:

PROGNOSIS

1. Major Depressive Disorder

Spontaneous recovery anytime in the future is unlikely. She has had relentless ongoing low mood with crying spells without any symptom remission for the last three and a half years post-accident. It appears to me that this mood change has occurred as a result of pain and now both these clinical entities are intertwined in a complex way. The one set of symptoms make the other worse. In other words, the chronic pain is affecting her mood negatively, and in turn, the mood is impacting her pain issues and coping strategies. A chronic vicious cycle has set in. It is in my opinion that even with treatment, it is unlikely that she is doing to achieve total remission of

depressive symptoms. Her prognosis remains poor, if not guarded.

2. Panic Attacks.

If she is on a proper dose of an appropriate antidepressant, it is possible that the panic attacks that bother her on a sporadic basis might completely disappear. In addition, if she sees a counselor who gives her help with breathing techniques when these episodes come on, then it is possible that she might be able to control the episodes in future. Her prognosis for panic episodes is good, provided treatment is undertaken.

RECOMMENDATIONS FOR TREATMENT

1. In my opinion, it is really important that Loida is started on an antidepressant by her family physician as soon as possible. He should first try her on a Serotonin Reuptake Inhibitor (SSRI) such as Cipralex and/or another Serotonin Norepinephrine Reuptake Inhibitor (SNRI), such as Desvenlafaxine. Any of these medications should be given an adequate trial in the proper dose for at least for four to six weeks before the trial is abandoned. Unless and until effective antidepressants are prescribed and her mood monitored, my impression is that her underlying mood disorder is going to affect the pain, and recovery will be difficult.
 2. If the family physician is unable to monitor her mood himself, a referral back to the Burnaby Mental Health team would be appropriate for consultation. In turn, the psychiatrist there should be requested to provide Loida with ongoing psychiatric care in the Outpatient Department. A counselor from the Burnaby Mental Health Team on a one-to-one basis is recommended rather than group therapy as she has not responded well to group therapy in the past. The rationale for individual psychotherapy is recommended in order for her to vent her level of frustration, and deal with some of the anger that she feels about the quality of her life. If this is not possible to do at the Burnaby Mental Health Team, I would suggest that she be seen by a private psychologist who is able to provide her with ongoing support.
 3. Management of her pain by a multi-disciplinary approach is the key to her progress with regard to her recovery. I suggest that a chronic pain program, which is available to her privately, should be considered. Usually, publicly-funded system has very long wait times and that will be counter-productive for Loida at this point.
 4. Her family physician should increase her dose of Aventyl by another 10 to 20 mg so as to ensure that she gets up to seven hours of restorative sleep.
 5. I would also suggest that she continue with pool and gym-related exercises under supervision, which will help with both her mental and physical chronic pain symptoms.
- [47] The psychiatrist retained by the defendant, Dr. Shane, opines that the plaintiff suffers primarily from somatic symptom disorder and adjustment disorder. He discusses this in his report of August 10, 2015 as follows; I have also emphasized parts of the report that are, in my view, noteworthy:

Diagnostic Considerations

Adjustment Disorder with Mixed Anxiety and Depressed Mood

The diagnostic features of this type of disorder are related to the presence of emotional and behavioral symptoms in response to an identifiable stressor. The stressor may be of a psychosocial, occupational or of a personal nature. Adjustment Disorders are often associated with an increased risk of suicide attempts and completed suicides. The disorder usually begins within three months of the stressor and lasts no longer than six months after the stressor and its consequences have ceased. If the stressor or consequences persist, the Adjustment Disorder may also continue and become chronic.

As documented, she was quite depressed following the motor vehicle accident on September 23, 2011 and also subsequent to the accident at her work. Since returning to work her mood appears to have ameliorated to a great degree. Clinically, at this time she is in remission, although she is vulnerable to depressive symptoms episodically when she is reminded of the death of the individual whom she dropped while working.

Somatic Symptom Disorder

The diagnostic criteria are:

1. One or more somatic symptoms that are distressing;
2. Excessive concerns regarding one's health which creates problems with anxiety over health concerns;
3. The symptoms typically persist for more than six months.

There are specifiers regarding individuals with somatic symptoms which predominantly involve pain. There are specifiers that characterize the intensity of the pain. There are specifiers for individuals whose somatic symptoms are predominantly pain in terms of its duration.

She continues to have significant somatic symptoms which concern her. Based upon the review of the information available to me from other specialists, her symptoms appear to be related to a diagnosis of chronic Pain Syndrome and soft tissue injuries subsequent to the motor vehicle accident on September 23, 2011. At this point, although her symptoms are persistent they are less intense, less marked and do not impair her occupationally. She tends to have help at home and is not as active physically in athletic pursuits as she was before the accident.

Post Traumatic Stress Disorder

She has some symptoms but not enough to merit a diagnosis of this disorder.

Adjustment Disorder with Depressed Mood and Anxiety - in remission, ICD Code 309.28

Somatic Symptom Disorder - mild, persistent ICD Code 300.82

[48] I note that, despite the conclusion that the adjustment disorder is in remission, there is also the comment that the plaintiff is vulnerable to depressive symptoms. As well, the symptoms of somatic pain disorder are persistent, although less intense and less marked.

[49] Dr. Shane answered counsel's questions to him as follows:

1. My diagnosis and prognosis;

I have documented my diagnosis from a psychiatric perspective in the context of this report. In terms of prognosis, I am optimistic that from a psychiatric perspective Ms. Benavides' psychological functioning will remain stable, although she may continue to experience moments of distress from time to time related to memories of the MVA and the accident in her workplace.

2. My assessment of Ms. Benavides' present level of impairment and/or disability, if any, and whether any improvement can be expected;

From a psychiatric perspective, I think she is functioning quite well since returning to work. She is not disabled, as she has returned to work. Any issues have been documented.

3. Whether there is a causal relationship between the accident and Ms. Benavides' impairment and/or disability (if any);

It is my opinion that the motor vehicle accident on September 23, 2011 was significant in terms of precipitating physical pain and the subsequent development of depression and Somatic Symptom Disorder. As well, it is my opinion that the accident at work was significant also in terms of predisposing her to depression and perhaps a protracted absence from work.

4. Whether Ms. Benavides requires any rehabilitation program, therapy or other treatment;

From a psychiatric perspective, I do not think she needs any active intervention from a psychiatric perspective at this time. Physical interventions are already ongoing and this should be monitored by her family practitioner.

5. My assessment of whether Ms. Benavides is restricted in terms of employment, homemaking or activities of daily living;

Ms. Benavides is not restricted in terms of employment. In terms of homemaking and activities of daily living, I understand she receives some assistance at home and is more limited in terms of her previous physical activities. She is able to drive in a competent manner and function socially.

[50] Dr. Misri has provided a second report dated November 12, 2015 in response to the report of Dr. Shane. She challenges Dr. Shane's diagnosis of adjustment disorder and somatic symptom disorder and she disagrees with Dr. Shane's opinion that the plaintiff is functioning well. Dr. Misri also disagrees with Dr. Shane's opinion that the plaintiff does not require further psychiatric intervention.

(iv) Conclusion: non-pecuniary damages

- [51] Overall, there are findings of physical limitations and an undisputed psychological disorder that are related to the 2011 accident. These continue and they affect the life and work of the plaintiff. I note that Dr. Shane opines that the prognosis is that the plaintiff's psychological functioning will remain stable. From his previous comments about the persistence of somatic symptom disorder and chronic pain syndrome I take his meaning to be that these conditions will continue. This is generally consistent with the prognosis given by Dr. Misri that the prognosis is poor, if not guarded (based on different diagnoses). There is also evidence that the plaintiff's symptoms are slowly improving and her specialist in physical medicine and rehabilitation believes she can increase her activities and she should do so.
- [52] The plaintiff continues to work and previous cases have considered the loss of work as a factor in the assessment of non-pecuniary damages. It is generally part of a global amount so it is not specifically assessed. In *Stapley* the plaintiff was forced to stop living and working on a ranch, which was his dream job and lifestyle for 25 years. The high end of awards for similar injuries was \$100,000 at that time, but the plaintiff's "unique loss" of his lifestyle entitled him to an additional \$75,000 (at paras. 109-113). Cases where loss of enjoyable work was considered, but not separately valued, include *Danicek v. Alexander Holburn Beaudin & Lang*, 2010 BCSC 1111, at para. 258; *Gohringer v. Hernandez-Lazo et al.*, 2009 BCSC 420, at para. 87; *Majchrzak v. Avery*, 2013 BCSC 1626, at para. 81.
- [53] In the subject case the plaintiff has managed to work full time and this brings her considerable satisfaction and contributes positively to her emotional well-being. However, she is not able to work at the same level as before the accident and her home life has become reduced in a significant way so she can recover from and rest for work. She also has limitations in what she can now do at work. This is discussed in more detail below under loss of future earning capacity. As a matter of non-pecuniary damages it is enough to say that the plaintiff has not lost the enjoyment that her work gives to her but there has been a related loss because of the limitations her pain and suffering have placed on her home life.
- [54] As above, the defendant relies on prior decisions for her position that the range for non-pecuniary damages in this case is \$40-50,000. For example, in the *Matias* decision non-pecuniary damages were assessed at \$50,000. However, in that case bilateral frozen shoulders were found to be very significant for the plaintiff's disability but they were found to be unrelated to the accident in dispute. In *Chen*, a decision from 2004 where non-pecuniary damages of \$35,000 were awarded, there were soft tissue injuries somewhat similar analogous to the ones in the subject case but the psychological diagnoses related to pain were absent. The *Rabiee* judgment can be similarly distinguished.
- [55] With respect to the authorities relied on by the plaintiff for her range of \$128,000 to \$135,000, in *Poirier* an award of \$100,000 for non-pecuniary damages was given but the plaintiff's condition was likely permanent and the prospect for improvement was guarded. In *Hosseinzadeh* there was significant pain to the point of rendering the plaintiff immobile

for days at a time (at para. 103) and damages of \$125,000 were awarded. Damages of \$130,000 were given for non-pecuniary damages in *S.R.*, where the trial judge accepted an expert opinion that the plaintiff would not fully recover to her former self despite completion of a pain program (at para. 169) and her ability to participate in one of her most passionate goals in life, her faith, was limited (at para. 172). Finally, in *Morlan*, the plaintiff could no longer work in her pre-accident work which brought her considerable satisfaction. The Court of Appeal considered non-pecuniary damages of \$125,000 to be generous but not excessive.

[56] In the subject case the plaintiff's own expert believes she can increase her activities at home and at work and she continues in her work which brings her considerable satisfaction and enjoyment.

[57] With the above in mind I conclude that an appropriate amount of non-pecuniary damages in this case is \$95,000.00.

(b) Past loss of income

[58] The plaintiff claims \$64,000 for past loss of earnings. The defendants say that an amount in the range of \$55,000 to \$60,000 is appropriate in this case.

[59] A claim for past loss of earnings is for the loss of earning capacity or the loss of the value of the work that the plaintiff would have performed but was unable to perform because of the injury (*Rowe v. Bobell Express Ltd.*, 2005 BCCA 141, at para. 30).

[60] It seems clear that it is the loss of earning capacity rather than the loss of actual income, although the loss of income can be a way to measure loss of capacity. This is described in *Personal Injury Damages in Canada* at p. 205-06 as follows:

The essence of the task under this head of damages is to award compensation for any pecuniary loss which will result from an inability to work. "Loss of the value of work" is the substance of the claim - loss of the value of any work the plaintiff would have done but for the accident but now will be unable to do. The loss framed in this way may be measured in different ways. Sometimes it will be measured by reference to the actual earnings the plaintiff would have received; sometimes by a replacement cost evaluation of tasks which the plaintiff will now be unable to perform; sometimes by an assessment of reduced company profits; and sometimes by the amount of secondary income lost, such as shared family income.

[Emphasis in original.]

[61] The majority of the Court of Appeal in *Rowe* also adopted the following from an Australian decision (*Arthur Robinson (Grafton) Pty Ltd. v. Carter* (1968), 122 C.L.R. 649, at p. 658, [1968] H.C.A. 9):

The respondent is not to be compensated for loss of earnings but for loss of earning capacity. However much the valuation of the loss of earning capacity involves the consideration of what moneys could have been produced by the exercise of the respondent's former earning capacity, it is the loss of that capacity, and not the failure to receive wages for the future, which is to be the

subject of fair compensation. In so saying, I realize that many statements may be found in the reported cases where loss of earnings has been the description of this element in special damages. But I do not find that in these it was necessary to consider or draw the distinction between the loss of earnings and the loss of earning capacity. But where in Australia attention has been drawn to the distinction, authoritative expressions with which I respectfully agree have indicated that it is loss of earning capacity and not loss of earnings that is to be the subject of compensation. But though this is I think the recognized position in Australia, the wages which would have been earned between the receipt of the injury and the date of trial are somewhat illogically, as I think, calculated and treated as special damages. In my opinion, it would be better that they should not be so treated for amongst other things, such treatment tends to plant in the mind the idea that it is the loss of the earnings which is to be compensated. On the other hand, not to so treat them would help to emphasize that it is the loss of earning capacity which is the subject of the damages. However, in most cases they may have but small practical significance; and in this case, in relative terms, none.

[62] In addition, a claim for past (or future) lost earning capacity is an assessment rather than a calculation, it requires considerations of fairness and reasonableness and all negative and positive contingencies are to be taken into account (*Abbott v. Gerges*, 2014 BCSC 1329, at para. 165).

[63] In the subject case, the specific periods claimed by the plaintiff include the time she was off work entirely from September 23, 2011 to April 1, 2013 and for reduced earnings from April 5, 2013 to July 1, 2013. She also says that her symptoms have waxed and waned since July 2013 and she claims for periodic time-loss due to pain related to the September 2011 accident. There are employment records in evidence showing those absences. A further issue for consideration is that, in late 2013, the plaintiff was off work about two months for kidney stones (including surgery) and she also was off for an infection in May 2014. Both of these are unrelated to the 2011 accident and no claim for damages is sought by the plaintiff for these periods.

[64] The plaintiff's history of employment income is as follows:

Year

Income

2006

\$38,730

2007

\$37,912

2008

\$38,000

2009

\$38,883

2010

\$44,935 (a)

2011

\$36,797 (b)

Date of Accident: September 13, 2011

2012

\$8,091 (c)

2013

\$16,809

Return to work: Mid 2013

2014

\$43,400 (d)

2015

\$42,810

(a) Includes RRSP income of \$5,000.

mm

Off work 9.5 weeks with kidney stones, unrelated to 2011 accident.

(b) Includes EI benefits (\$4,642).

(c) Amount of \$8,091 includes employment insurance (\$1,688) and RRSP income (\$6,403). Plaintiff was not working in 2012 and there was no employment income in that year.

(d) Off five shifts with infection, unrelated to 2011 accident. Includes employment insurance (3,308).

[65] Turning to the defendant's expert reports, Dr. Shane opines that an adjustment disorder, such as he diagnosed, usually begins within three months of the stressor (presumably the accident on September 23, 2011) and lasts no longer than six months "after the stressor and its consequences have ceased." She is also vulnerable to episodes of depression. With respect to the somatic symptom disorder diagnosed by Dr. Shane, the plaintiff's symptoms continue and are persistent although they are "less marked and do not impair her occupationally." Dr. Shane's opinion that the plaintiff is not disabled is very much based on

her working full-time. However, it is not the case that the plaintiff works at the level she did before the accident and she also has reduced her activities at home so she can work.

- [66] In any event, Dr. Shane accepts that plaintiff has an ongoing somatic symptom disorder, she is subject to depression related to the adjustment disorder and she has symptoms of PTSD. I conclude that the plaintiff does have continuing physical and psychological symptoms from the 2011 accident that affect her ability to work.
- [67] I am also urged by the defendant to reject the plaintiff's calculation of her past wage loss because it is based on her income returns. With respect, as I read the authorities they generally use income tax records to assess past income loss. It is true that income tax records do not include hours worked or rates of pay but they provide a reliable base on which to make decisions about income earned. In any event, there is evidence about the plaintiff's hours of work and her hourly rate.
- [68] The plaintiff's hourly wage rate for the relevant times was \$21.32. Employment records include information about her days off for sick time and for time off beyond her sick time entitlement. There is no dispute that she needed these additional days to recover from symptoms related to the 2011 accident. She was also off work for 9.5 weeks for kidney stones in late 2013 and she missed five shifts in 2014 for an infection. Neither condition is related to the accident at issue here.
- [69] Overall I accept the plaintiff's calculation of past wage loss of \$64,000. This is a gross figure that is to be adjusted to reach a net assessment.
- (c) Future loss of earning capacity
- [70] According to the plaintiff, the loss of her future earning capacity justifies damages in the amount of \$137,500 to 200,000. This is on the basis of a capital asset approach and a 40% loss in her earning capacity. The defendant submits that there should be no damages for loss of future earning capacity.
- [71] The following sets out the general approach to the assessment of future earning capacity (*Tsalamandris v. McLeod*, 2012 BCCA 239, at para. 31):
- [31] The appellants do contest how the trial judge then went about assessing that loss [of future earning capacity]. The trial judge set out to apply the principles canvassed in *Rosvold v. Dunlop*, 2001 BCCA 1, saying at para. 259:

The principles that govern the measurement of damages for loss of earning capacity were thoroughly discussed in *Rosvold v. Dunlop*, 2001 BCCA 1, 84 B.C.L.R. (3d) 158. The principles set out in that case can be summarized as follows:

1. the assessment of damages is not a precise mathematical calculation but a matter of judgment;
2. a plaintiff is entitled to be put in the position she would have been but for the accident;

3. an award for loss of earning capacity recognizes that the ability to earn income is an asset and the plaintiff deserves compensation if this asset has been taken away or impaired;
4. since these damages must often be based on a hypothetical, the standard of proof of a hypothetical is "real and substantial possibility" and not mere speculation;
5. the court must consider the real and substantial possibilities, and give weight to them according to the percentage chance they would have happened or will happen;
6. one starting approach to valuation may be to compare the likely future of the plaintiff had the accident not happened, and the likely future of the plaintiff after the accident has happened, and to consider the present value of the difference between the amounts earned under these two scenarios. (I note that in using the word "likely", the Court on this point was meaning what hypothetical was a real and substantial possibility);
7. however, the overall fairness and reasonableness of the award must be considered, taking into account all of the evidence.

[72] Loss of future earning capacity can be quantified on an earnings approach or a capital asset approach: *Perren v. Lalari*, 2010 BCCA 140, at para. 32. The two approaches were summarized by Warren J. in *Hosseinzadeh* as follows:

[126] The earnings approach is generally appropriate where the loss is more easily measured, such as where the plaintiff has some earnings history or where the court can otherwise reasonably estimate what the plaintiff's likely future earning capacity will be: *Perren*, at para. 32; *Clemas v. Gabrlik*, 2013 BCSC 1412 at para. 170. This approach typically involves an assessment of the plaintiff's estimated annual income loss multiplied by the remaining years of work and then discounted to reflect current value, or alternatively, awarding the plaintiff's entire annual income for a year or two: *Pallos v. Insurance Corp. of British Columbia* (1995), 100 B.C.L.R. (2d) 260 (C.A.) at para. 43; *Gilbert v. Bottle*, 2011 BCSC 1389 at para. 233; *Clemas*, at para. 170. While there is a more mathematical component to this approach, the assessment of damages is still a matter of judgment not mere calculation.

[127] The capital asset approach, typically used in cases where the plaintiff has no clear earnings history, involves consideration of a number of factors such as whether the plaintiff has been rendered less capable overall of earning income from all types of employment, is less marketable or attractive as a potential employee, has lost the ability to take advantage of all job opportunities that might otherwise have been open, and is less valuable to herself as a person capable of earning income in a competitive labour market: *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 (S.C.) at para. 8.

[73] The capital asset approach is not restricted to cases where the plaintiff has no clear earnings history. It is more appropriate than the earnings approach in any case "where the loss, though proven, is not measurable in a pecuniary way": Perren, at para. 12. One example is Kwei v. Boisclair (1991), 60 B.C.L.R. (2d) 393 (C.A.), which was discussed in Perren at para. 11 as follows:

... In Kwei, where it was not possible to assess damages in a pecuniary way as was done in Steenblok [(1990), 46 B.C.L.R. (2d) 133 (B.C.C.A.), Taggart J.A., speaking for the Court, held that the correct approach was to consider the factors described by Finch J., as he then was, in Brown v. Golaïy (1985), 26 B.C.L.R. (3d) 353. Mr. Kwei had suffered a significant head injury with significant permanent sequelae that impaired his intellectual functioning. However, both before and after the accident, he worked at a variety of low paying jobs, thus making it difficult for him to demonstrate a pecuniary loss. Mr. Justice Taggart cited the Brown factors with approval:

[25] The trial judge, as I have said, referred to the judgment of Mr. Justice Finch in Brown v. Golaïy. Future loss of earning capacity was at issue in that case. It stemmed from quite a different type of injury than the injury sustained by the plaintiff in the case at bar. But I think the considerations referred to by Mr. Justice Finch at p. 4 of his reasons have application in cases where loss of future earning capacity is in issue. I refer to this language at p. 4 of Mr. Justice Finch's judgment:

The means by which the value of the lost, or impaired, asset is to be assessed varies of course from case to case. Some of the considerations to take into account in making that assessment include whether:

1. The plaintiff has been rendered less capable overall from earning income from all types of employment;
2. The plaintiff is less marketable or attractive as an employee to potential employers;
3. The plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to him, had he not been injured; and
4. The plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market.

[74] I have set out above the earnings history of the plaintiff. She is 54 years old. As can be seen, she was off work as a result of the September 23, 2011 accident from that date, she did a gradual return to work and she returned to full-time work in mid-2013. There were also the two absences in 2013 (kidney stones) and 2014 (infection) that are unrelated to the 2011 accident.

[75] Since mid-2013 the plaintiff has continued to work full-time as a care aide. Her duties require moderate levels of physical activities such as moving patients in their beds or chairs (but not lifting them). The plaintiff, all of her doctors and the expert of the defendant make a compelling case that her work is vital to her psychological health and sense of well-being.

She has the satisfaction of helping patients in an environment which is familiar and which includes long-standing friendships. No one, least of all the plaintiff, is suggesting that she should stop work.

- [76] Looking at the loss of earnings approach, in 2010, the year before the accident, the plaintiff earned \$39,935 and then in 2011 she earned \$32,155. She was off work all of 2012 and then returned to work on a gradual basis then full-time in 2013. In that year she earned \$16,809. In 2014 she earned \$40,092 (and \$42,810 in 2015). As can be seen, comparing the plaintiff's full-time earnings before the accident (2010, \$39,935) with her full-time earnings after the accident (2014, \$40,092; 2015, \$42,810) suggests that there has not been a loss of earnings.
- [77] Nonetheless the plaintiff is not able to work as she did before the September 2011 accident. At work she is less mobile and always in pain. Her co-workers describe her as less "happy", they can see the pain in her face and she no longer participates in activities with patients such as dancing. She takes daily doses of a narcotic for pain and she takes a Tylenol during her work shift. Prior to the injury the plaintiff would return home about midnight after her afternoon shift and do some chores around the house such as cleaning and cooking. Now she simply comes home to get rested for the next day's work. She takes time off from time to time for pain and she has to take more days off than her entitlement at work for sick days. She did not do this before the 2011 accident.
- [78] In my view the plaintiff has been rendered less capable of earning income as a result of the 2011 accident. Fortunately, she has had the benefit of an employer who is very willing to accommodate her limitations and her co-workers assist her (more than they did before the accident). If the plaintiff had to move to other employment it is reasonable to conclude that her physical and psychological limitations and age of 53 years would make her less marketable as an employee. The defendant relies on previous cases where no damages for loss of future earning capacity were the result, including *Tomana v. Galvin*, 2015 BCSC 2451. However, the finding in that case was that there were no residual symptoms that would adversely affect the plaintiff's ability to obtain gainful employment (at para. 37).
- [79] The result in the subject case is that the plaintiff has lost the ability to take advantage of all the job opportunities that were available to her before the accident and she is less valuable to herself as a person capable of earning income in a competitive labour market (Perren, at para. 11). In short, the plaintiff's capacity to earn income has been reduced by the 2011 accident.
- [80] The difficulty here is quantifying the loss of capacity in the context of her working full time. I am required to take into account any contingencies which affect the loss, including positive and negative contingencies. An example of the former would be a promotion and the latter might be a lay-off. There are also general contingencies that are common to the population as well as specific contingencies that are particular to the plaintiff (*Hussack v. Chilliwack School District No. 33*, 2011 BCCA 258, at para. 93, citing *Graham v. Rourke* (1990), 74 D.L.R. (4th) 1 (Ont. C.A.), at para. 14).

- [81] In her report of October 30, 2015 Dr. Caillier described the plaintiff's vocational abilities and limitations (at p. 11-12). There was a combination of deconditioning, chronic pain, headaches, emotional and psychological symptoms, and poor sleep that impacted on the plaintiff's ability to work. Dr. Caillier supported the plaintiff continuing to work full time because it was a very important part of her life and identity and, if she did not work in some fashion, there would likely be a disastrous impact upon her mental health. However there is reduced participation in home and social life as well as the reduced ability to participate in activities to manage her pain. She is still calling in sick and using her holidays to manage her pain. It was recommended that the plaintiff not work during the time of a recommended chronic pain management program.
- [82] Dr. Caillier opined that if the plaintiff does respond positively to a pain management program that would allow her to continue working although with some time off depending on flare up for pain. "However, if she does not respond positively to recommendations made, reducing her work hours to four days per week would likely prove helpful in order to allow her to better manage her pain" (p. 12).
- [83] As previously noted there is a cost to her working full-time and it is entirely reasonable to conclude that this cost will require a reckoning at some point. I conclude that Dr. Caillier's opinion about reducing the plaintiff's work week by one day provides a basis for assessing that cost. That amounts to a 20% reduction in work. In my view, this figure is a good approximation of the decrease in value of the plaintiff's capacity to earn.
- [84] To assess the plaintiff's loss of future earning capacity I begin with her income in 2015 of \$42,810 (earnings in 2014 of \$40,092 were similar). She was unpaid for some shifts in 2015 because she had used up her sick time and that cost was \$1,758. Her loss from the unpaid shifts plus her income in 2015 is \$44,568. The plaintiff was 54 years old at trial and she can be expected to retire at age 65, after 11 years.
- [85] Pursuant to s. 56 of the Law and Equity Act, R.S.B.C. 1996, c. 253, and the Law and Equity Regulation, B.C. Reg. 352/81, as amended by B.C. Reg. 74/2014, the discount rate used to calculate the present value of future income losses is 1.5%. The multiplier for the period of 11 years at 1.5% is 10.0711 (see Appendix E of CIVJI: Civil Jury Instructions, 2nd ed. (Vancouver: Continuing Legal Education Society of British Columbia, 2009) (loose-leaf 2016 update)). The net present value for the plaintiff's earning capacity absent the September 2011 accident is, therefore, \$448,849. The plaintiff's loss of earning capacity is 20% of the \$448,849 figure, or \$89,770.
- [86] With respect to contingencies, I am of the view that no deduction should be made. Given the importance the plaintiff placed on her employment, I do not think that there is a real possibility that she would have left work before 65 or voluntarily reduced her working hours. On the contrary, she may have worked beyond that age on a full- or part-time basis. While the plaintiff may have required time off for illness in the future even without the accident, it is also possible that she would be promoted to a higher-paying position. Finally, a lay-off is

possible but unlikely; her employer is accommodating and evidently thinks highly of the plaintiff as an employee. Overall, I conclude that the positive and negative contingencies balance out.

[87] On the basis of the above I assess the plaintiff's future loss of earning capacity at \$89,698.

(d) Cost of future care

[88] The plaintiff seeks damages for future care in the range of \$63,500 to \$68,000. The defendant submits that an amount in the range of \$3,000 to \$5,000 is appropriate.

[89] A useful summary of the approach to be taken when considering the cost of future care is that of McLachlin J. (as she then was) in a previous decision of this court (*Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33, at p. 83-84 (S.C.)),

... In *Andrews* [*Andrews v. Grand & Toy (Alta) Ltd.*, [1978] 2 S.C.R. 229, [1978] 1 W.W.R. 577], *supra*, Dickson J. (as he then was) distinguished damages for cost of future care from damages for non-pecuniary loss in the following terms at p. 603 [W.W.R.]:

The money for future care is to provide physical arrangements for assistance, equipment and facilities directly related to the [plaintiff's] injuries. Additional money to make life more endurable should then be seen as providing more general physical arrangements above and beyond those relating directly to the injuries.

The physical arrangements to be used in assessing cost of future care are based on what is required to preserve and promote the plaintiff's health. In *Andrews*, *supra*, Dickson J. said at p. 586:

... to the extent, within reason, that money can be used to sustain or improve the mental or physical health of the injured person it may properly form part of a claim. [emphasis added]

In *Thornton* [*Thornton v. School Dist. No. 57 (Prince George)*, [1978] 2 S.C.R. 267, [1978] 1 W.W.R. 607], *supra*, the court, in defining "optimal care" stated at p. 609 [W.W.R.]:

... it is clear from the medical evidence that the term merely connotes an ongoing practical level of orderly care in a home environment. [emphasis added]

If there was any doubt as to whether the award for cost of future care must be justified on a medical basis, it was dispelled by *MacDonald v. Alderson*, [1982] 3 W.W.R. 385, 20 C.C.L.T. 64, 14 M.V.R. 212, 15 Man. R. (2d) 35 (C.A.), leave to appeal to the Supreme Court of Canada refused [17 Man. R. (2d) 180n, 45 N.R. 180]. In that case it was suggested that the plaintiff, a quadriplegic, should be awarded sufficient funds to purchase and maintain his own house on the non-medical grounds that this would give him a greater sense of "autonomy, privacy, financial stability and pride of ownership ... and greater opportunities for gardening, owning a pet, and more space for hobbies". The Manitoba Court of Appeal rejected this evidence as "subjective theorizing" and reduced the award made at trial. The test for determining the appropriate award under the heading of cost of future care, it may be inferred, is an objective one based on medical evidence.

These authorities establish (1) that there must be a medical justification for claims for cost of future care; and (2) that the claims must be reasonable. On the latter point, Dickson J. stated in *Andrews* at p. 586:

An award must be moderate, and fair to both parties But, in a case like the present, where both courts have favoured a home environment, "reasonable" means reasonableness in what is to be provided in that home environment.

This then must be the basis upon which damages for costs of future care are assessed.

It follows that I must reject the plaintiff's submission that damages for cost of future care should take into account the cost of amenities which serve the sole function of making the plaintiff's life more bearable or enjoyable. The award for cost of care should reflect what the evidence establishes is reasonably necessary to preserve the plaintiff's health. At the same time, it must be recognized that happiness and health are often intertwined.

[90] The expert evidence on the issue of future care is from, primarily, the experts of the plaintiff. There is no expert evidence from the defendant with respect to the physical symptoms of the plaintiff.

[91] With respect to psychological issues, as above, the experts of both parties have diagnosed disorders but they differ on the diagnosis. Dr. Misri has provided an expert opinion for the plaintiff. Dr. Shane, the psychiatrist retained by the defendant, opines that the plaintiff is functioning well and she is not disabled from work. He also says that active intervention is not needed and physical interventions are ongoing and monitored by the family physician. I note that Dr. Shane also stated that the adjustment disorder he diagnosed is in remission but the plaintiff is vulnerable to depressive symptoms.

[92] In my view the following claims for future care are justified on a medical and psychological basis and are reasonable in this case:

(i) Pain management

[93] Whether it is called a major depressive disorder or somatic symptom disorder, the plaintiff's major complaint is pain. It is described in the expert reports and the evidence of the plaintiff.

[94] A pain management program is therefore justified and appropriate. Dr. Caillier recommended a four to six week program and she strongly recommended it take place on a full-time basis. I accept that recommendation and Mr. Pakulak's cost assessment of it and order \$10,000 on a one-time basis.

(ii) Exercise

[95] Dr. Caillier opines that the plaintiff needs to be involved in a life-long exercise program in order to improve pain in the neck, back shoulders and lower back.

[96] I also note that Dr. Caillier believes that the plaintiff can do more at home than what she is doing presently, which is some stretching on a daily basis. Specifically the plaintiff is capable of cooking and cleaning and she can gradually increase what she is doing. She can also resume her socialization activities. She needs to do more in order to improve upon the management of her pain as well as improve her physical conditioning. Further, the plaintiff is unlikely to cause herself further harm with a regular strengthening program; "[s]he needs to understand that if she tries to do something that she has not done for a while she will likely be sore and have more pain, which is not surprising" (September 30, 2014, p. 12).

[97] Overall, a combination of a supervised program and self-directed exercise is appropriate in this case. I conclude that a one-year program of supervised exercise with a kinesiologist is appropriate with a one-time cost of \$500. A gym pass is also appropriate but not for life as proposed by the plaintiff. A one-time cost of \$3,500 is appropriate, for about nine years.

(iii) Medication

[98] The plaintiff is currently being prescribed three medications: Tramacet (\$591, annually), Gabapentin (\$296) and Aventyl (\$139). She also takes Advil (\$115). These are recommended by Dr. Misri for depression, mood and pain.

[99] Applying the multiplier calculated by Mr. Peever, the present values of the above medications for life are as follows:

Tramacet

\$13,879

Gabapentin

\$6,951

Aventyl

\$3,264

Tylenol

\$2,701

Total

\$26,795

[100] As discussed above the medical evidence is that the plaintiff's condition is expected to improve and she is encouraged by her own doctor to increase her level of activities. On this basis there is a reasonable prospect that the need for medications will be less in the future and I apply a 10% discount for that reason. The total for medication is, therefore, \$24,117.

(iv) Counselling

- [101] Counselling has been recommended by Drs. Misri and Caillier. The former recommends individual therapy because the plaintiff has not done well in group therapy in the past. This is necessary in order for her to vent her frustration and deal with some of the anger she has about the quality of her life. The objective is to reduce the pain symptomology.
- [102] Counselling over 24 sessions is appropriate with a total one-time cost of \$3,200.
- [103] Total cost for future care is \$40,817.
- (e) Housekeeping services
- [104] The plaintiff seeks damages for future loss of housekeeping capacity in the amount of \$84,000 and \$20,000 for past loss of housekeeping services. The defendant submits that no damages are warranted for loss of past or future housekeeping capacity. The plaintiff is not advancing an "in trust" claim.
- [105] Justice Russell has usefully summarized the law on the issue of loss of housekeeping services in a decision where an award under this head of damages was made (*Hartnett v. Leischner & ICBC*, 2008 BCSC 1589):
- [107] The BC Court of Appeal in *McTavish v. McGillivray*, 2000 BCCA 164, B.C.J. No. 507, recently outlined the law with respect to this head of damages. This award is intended to compensate the plaintiff for a total or diminished loss of capacity with respect to home maintenance activities. It is not designed to compensate the plaintiff for a specific expense or loss incurred: *McTavish* at para. 63. Furthermore, the plaintiff does not have to prove that someone will be hired to perform such services or to establish any actual expenses incurred or monetary loss: *Deglow v. Uffelman*, 2001 BCCA 652, 96 B.C.L.R. (3d) 130 at para. 27; see also *Kroeker v. Jansen* (1995), 4 B.C.L.R. (3d) 178, 123 D.L.R. (4th) 652 (C.A.).
- [108] Any award that is granted must be reduced against any sums paid under special damages: *Tombe v. Stefulj*, 2002 BCSC 154, B.C.J. No. 505 at para. 80. It is important to remember the caution given in *Kroeker*: "[i]t will be the duty of trial judges and this court to restrain awards for this type of claim to an amount of compensation commensurate with this loss": at 189.
- [109] The onus is on the plaintiff to establish a real and substantial possibility that they will not be able to perform all of their usual and necessary household services in the future. Further, the plaintiff must show that they will be forced to hire someone to perform such services or have someone perform such services gratuitously: *Menhinick v. Lobsez*, 2008 BCSC 1285, B.C.J. No. 1824 at para. 55.
- [110] Mr. Hartnett presents a number of cases which support awards for past and future lost home maintenance capacity. These cases indicate that in order to arrive at a reasonable award, courts should look at the nature and the number of hours of household services that the plaintiff provided prior to the injury and assess the future impact of these injuries with respect to this contribution.

- [111] Courts should also be alive to the possibility that other factors may change in the plaintiff's life, including the size of their house and garden, as well as their overall living situation: see Deglow at para. 32; Kitnikone v. Watt, 2000 BCSC 1452, B.C.J. No. 2071 at para. 63.
- [113] Following the Accident, Mr. Hartnett continues to assist with yard maintenance, but not at the same intensity or scope as prior to the Accident due to the pain that results from such activities. Mrs. Hartnett states that she and their two boys have largely taken over these duties. She estimates that they perform approximately 90-95% of the yard maintenance activities.
- [114] Presently, Mr. Hartnett is unable to perform any automotive maintenance and now takes his cars to a garage for such services.
- [115] After the Accident, Mr. Hartnett did replace two decks with the assistance of his wife. In order to deal with the pain however, he was forced to take a day off for each day worked because of the effects on his body.
- [116] Mrs. Hartnett testifies that her husband's contributions inside the home have also decreased. He does not vacuum or cook anymore and she does more of his laundry.
- [117] However, the difficult issue with this claim is that no evidence was led with respect to the number of hours of work Mr. Hartnett performed prior to the Accident, the cost of replacement services or the cost of having the family automobiles serviced at a garage. This situation is similar to that in Ufimzeff v. Brown, 2008 BCSC 1188, B.C.J. No. 1664, where Justice Barrow declined to make an award based on a pecuniary loss because the plaintiff had not tendered sufficient evidence to quantify her claim. However, Barrow J. was satisfied that the plaintiff had demonstrated a loss of home maintenance capacity and held that the plaintiff should be compensated under an award of non-pecuniary damages: at para. 37.
- [118] At the same time, I accept the evidence, that the plaintiff requires recovery time after completing his substantial physical job in the CN Rail yard. To add home and automotive maintenance to his tasks during his down time places an additional burden on his body that he cannot manage. To earn a living for his family is where he has put his priority and he continues to do this by pushing through his pain and then doing stretching exercises at home. He can now do low-level yard work only unless he takes more of his leisure time as recovery time. I do not find this a reasonable consequence which he should have to bear, given the negligence of the defendant, and I award \$10,000 as damages for lost homemaking capacity. I have taken into account the possibility that he will improve over time and I have limited the award to \$2,500 per year for four years following trial.
- [106] As can be seen, there are some similarities in the facts of that case and the subject case. See also: Savoie v. Williams, 2013 BCSC 2060, at paras. 53-60 and Liu v. Bains, 2015 BCSC 486, at paras. 188-192.

[107] In the subject case the evidence is clear enough that before the September 2011 accident the plaintiff did a number of household tasks to support the home. It is true that her husband also did some of the tasks but the plaintiff did most of them. The children also did some minimal work. After the accident the plaintiff does very little around the home. As she testified, and as supported by the medical and psychiatric evidence, it is all she can do to prepare for work, complete her work and then come home to rest for the next day's work. As a result the husband has taken over most of the household tasks since the accident with the assistance of an increased contribution from the daughter.

[108] I also note Dr. Caillier's comments that the plaintiff should take on more activities such as work around the house in order to address her de-conditioning (September 30, 2015, p. 11):

She should do more around the home and push herself to do so. She should pace and prioritize her activities. She is capable of cooking and cleaning and can gradually increase what she is doing. This will also aid in her improvement of her physical conditioning.

[109] With the above in mind I conclude that some assistance for housekeeping services is justified. In light of the ability and opportunity to increase her activities I am not persuaded that the plaintiff is entitled to the amount claimed and for the length of time claimed. In my view an initial assessment by an occupational therapist is appropriate followed up by assistance with the work over a period of time. I adopt the approach in Hartnett and award total damages for housekeeping in the amount of \$10,000 with the expectation that \$2,500 per year over four years is required.

[110] With respect to past housekeeping services I conclude that \$2,500 is an appropriate amount.

[111] The total for housekeeping services, past and future, is \$12,500.

(f) Special damages

[112] The parties are agreed on an amount of \$3,614.50 for special damages. I accept that amount and make that order.

F. SUMMARY

[113] In the circumstances of this case the plaintiff is entitled to the following damages as a result of the negligence of the defendant in the motor vehicle accident on September 11, 2011:

a) Non-pecuniary damages:

\$95,000

b) Past income loss (gross):

\$64,000

c) Future loss of earning capacity:

\$89,698

d) Future care:

\$40,817

e) Housekeeping services (past and future):

\$12,500

f) Special damages:

\$3,614.50

g) Total

\$305,629.50

[114] The plaintiff has been substantially successful and, subject to any application made within 60 days of this judgment (or appeal judgment), she is entitled to her costs at Scale B against the defendant.

"Steeves, J."

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