

CANADA / JUDGMENT

Di Pascale v. King

2023 BCSC 1815

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Supreme Court of British Columbia

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2023 BCSC 1815 Di Pascale v. King

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Di Pascale v. King,

2023 BCSC 1815

Date: 20231017

Docket: M215777

Registry: New Westminster

Between:

Adelaide Di Pascale

Plaintiff

And

Herbert Edward King

Defendant

Before: The Honourable Justice Shergill

Reasons for Judgment

Counsel for Plaintiff:

N.A. Mulholland

Counsel for Defendant:

P. Gill

Place and Dates of Trial:

Port Coquitlam, B.C.

March 27-30 2023

Place and Date of Judgment:

New Westminster, B.C.

October 17, 2023

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I. Overview

- [1] The Plaintiff, Adelaide Di Pascale, claims damages for injuries and loss sustained as a result of a motor vehicle collision that occurred on January 24, 2018, in Prince Rupert, British Columbia (the "Collision" or "MVC").
- [2] The Defendant, Herbert Edward King, has admitted liability for the Collision. The parties have also agreed on an appropriate sum for special damages. Left for my determination is the amount of compensation that is payable to the Plaintiff for non-pecuniary damages, past income loss, impairment of future earning capacity, and cost of future care.
- [3] The Defendant admits that the Plaintiff suffered soft tissue injuries for which she is entitled to compensation. However, he submits that the injuries are less severe than what is claimed by the Plaintiff. Further, he argues that Ms. Di Pascale's damages award should be reduced on account of her failure to mitigate her losses as well as her pre-existing health conditions that contribute to the Plaintiff's current state.

II. Collision and Aftermath

- [4] On the day of the Collision, Ms. Di Pascale was a front seat passenger in a 2013 Chevrolet Equinox vehicle (the "Vehicle"), driven by her husband, Giuseppe Di Pascale. Mr. Di Pascale had stopped the Vehicle on 2nd Avenue near 3rd Street in the downtown area of Prince Rupert, waiting for pedestrians to pass. The Vehicle was struck from behind by a Dodge Caravan driven by Mr. King (the "Caravan").
- [5] Ms. Di Pascale was turned towards her left and in mid-conversation with her husband, when the impact occurred without warning. The force of the Collision pushed the Vehicle forward and caused the Plaintiff's body to move forwards and backwards. Ms. Di Pascale recalled the back of her head striking the headrest.
- [6] Ms. Di Pascale was in shock and shaken. After exiting the vehicle, she noticed that the hood of the Caravan was bent upwards, and the engine was "steaming".
- [7] Ms. Di Pascale and her husband drove themselves to the emergency room of Prince Rupert Regional Hospital ("PRH"). On arrival at the hospital, Ms. Di Pascale was feeling tightness in her neck. She also had a bruise on her right shoulder at the location of her seatbelt. The Plaintiff was examined and x-rayed. She was discharged a few hours later and advised to take over the counter pain relief medication to treat her symptoms.

- [8] Later that evening, Ms. Di Pascale felt increased stiffness and tightness in her shoulder, neck, and mid-back area. By the next day she had also developed a headache and was experiencing "terrible" nausea.
- [9] Over the ensuing days and weeks, Ms. Di Pascale experienced neck pain that radiated to her upper back and shoulder blades, and down her left arm; lower back pain; disrupted sleep; anxiety; and frustration. On occasion, she felt numbness radiating down her left leg. She also experienced symptoms of forgetfulness, mental "fogginess", lack of concentration, and irritability.
- [10] Approximately two to three weeks following the Collision, Ms. Di Pascale's symptoms prompted her to attend the emergency room at PRH.
- [11] On the recommendation of her family practitioner, Dr. Kloppers, the Plaintiff attended at Cornerstones Wellness Centre ("Cornerstones") in 2018 for approximately 12 sessions of physiotherapy and massage therapy. She does not appear to have attended any treatment in 2019 or 2020 (the year of the pandemic). Ms. Di Pascale returned to Cornerstones in 2021 for two additional sessions of treatment.
- [12] An MRI of the neck and shoulder area performed in April 2018 revealed moderate multi-level spondylosis and multi-level degenerative changes--most significantly to the C5-C6 region.
- [13] In 2019, Ms. Di Pascale was referred by Dr. Kloppers to Dr. Waspe, a physiatrist. Amongst other things, Dr. Waspe recommended massage, stretching exercises, and topical creams to help alleviate pain and muscle spasms.
- [14] Ms. Di Pascale was seen by Dr. Underwood, a physiatrist, for medical legal purposes around June 2021. Dr. Underwood administered myofascial trigger point injections, which provided some temporary pain relief.
- [15] In addition to doing at-home exercises, Ms. Di Pascale took Tylenol and Advil. She was also prescribed Diclofenac cream, Cyclobenzaprine, a CBD-based cream, and Flexeril.

III. Evidence

- [16] A total of six witnesses testified in the trial. These included the Plaintiff, her husband (Giuseppe Di Pascale), two co-workers (Susanne Doucette and Shelley Scott), one supervisor (C.J. Butcher) and one expert (Dr. Underwood).

A. Plaintiff

- [17] Ms. Di Pascale testified about her injuries, treatment, recovery, and the impact of the injuries on her pre- and post-Collision lifestyle and work.
- [18] At the time of the Collision, Ms. Di Pascale was 57 years old. She was married with three children. She had four grandchildren, ranging in ages from five to 16 years.

- [19] Ms. Di Pascale described an active pre-Collision lifestyle, unrestrained by any serious health concerns. She was passionate about her work, enjoyed socializing with her family and friends, and participated in numerous recreational activities. She went on annual motorcycle rides to raise funds for various social causes, and enjoyed hiking, going for long walks, and working in her garden.
- [20] Ms. Di Pascale described herself as a happy person prior to the Collision, who "enjoyed everything about [her] life". She found meaning and fulfillment in her work, family life, and recreational activities.
- [21] Ms. Di Pascale explained how her ability to function in the various aspects of her life has been compromised by the lingering effects of her injuries. According to Ms. Di Pascale, her symptoms have remained relatively unchanged for the past two years and, in fact, may have worsened. In addition to the physical pain and restrictions, Ms. Di Pascale testified that the MVC has affected her mood. She is irritable, moody, and impatient. She has difficulty sleeping due to the pain.
- [22] At the time of the Collision, Ms. Di Pascale was employed as a nursing unit clerk at PRH. She had been working at the same hospital for approximately 30 years. She enjoyed her job and described her co-workers as her "second family". Ms. Di Pascale was one of three nursing unit clerks. She worked on a busy floor that involved several medical departments. Ms. Di Pascale assisted approximately 13 physicians and several nurses.
- [23] Ms. Di Pascale described herself as the "glue that holds the floor together". Due to chronic staffing issues and labour shortages, Ms. Di Pascale was often required to multi-task. Her work included managing patient charts, transcribing physicians' orders, answering phones, sending faxes, arranging patient travel, receiving visitors, and numerous other clerical-type tasks. Ms. Di Pascale worked 12-hour shifts, on a "four days on and four days off" schedule.
- [24] Following the MVC, Ms. Di Pascale had difficulty performing all of her job duties due to her injuries. She was in constant pain and experienced headaches and nausea. Nevertheless, she continued working due to financial constraints. Ms. Di Pascale testified that she did her best to work through her pain but at times found that "[she] could not do it anymore". She began to take days off intermittently due to her pain, using her accumulated sick-bank credits that she had been earning for several years. At some point following the Collision, she was provided with an ergonomic chair.
- [25] Ms. Di Pascale described being very forgetful and distracted by her pain while at work. This caused her to make some uncharacteristic mistakes at her job, which was very distressing for her. Fortunately, her co-workers caught her mistakes before any harm could come to patients.
- [26] Ms. Di Pascale testified that her ongoing pain and limitations from her injuries have made it difficult for her to keep up with the growing workload. Consequently, she is now considering early retirement.

- [27] Ms. Di Pascale also testified that her injuries have impacted her homelife. Prior to the Collision she was able to perform all household tasks without difficulty. Now, routine household responsibilities leave her neck and arms feeling sore and fatigued. Tasks often take her longer and she has to pace herself. For example:
- a) The repetitive motion of vacuuming and mopping aggravates her neck and shoulders and leaves her arms feeling fatigued. Even after purchasing a spin mop and lighter vacuum cleaner to make the tasks easier, she has not been able to vacuum at the same frequency as she did prior to the Collision.
 - b) She also has difficulty folding laundry and changing sheets--she has to seek the assistance of her daughter, who is busy with her own work responsibilities.
 - c) Ms. Di Pascale's gardening has also suffered. She is no longer able to prune, weed, or plant flowers with the same frequency as before. This has impacted her garden, which she very much enjoyed.
 - d) One of Ms. Di Pascale's passions prior to the Collision was cooking. She testified that she enjoyed making her own bread dough from scratch, and routinely provided fresh bread to friends, family, and co-workers. For about a year following the MVC she could not make bread at all. Though she has resumed making fresh dough, it is with less frequency, as the laborious process leaves her feeling sore and tired. She now purchases pre-made dough for making pizzas, rather than making it herself.
 - e) Prior to the Collision, Ms. Di Pascale used to assist her husband with home renovation tasks and also his construction-type job duties. She now finds these tasks painful and exhausting.
- [28] Ms. Di Pascale also testified about the impact of her injuries on her social and family relationships. Ms. Di Pascale testified that she has reduced the number of family dinners and social events that she hosts, due to her pain and limitations. She does not attend as many work functions as she used to. She spends less time socializing and cooking with her children and grandchildren.
- [29] Most distressing for Ms. Di Pascale was the impact of her injuries on her marriage, including the loss of intimacy. She testified that the symptoms from her injuries put a strain on her marriage. This resulted in her husband moving out of the home around 2021. However, Mr. Di Pascale had moved back by the time of trial, and the two of them were attempting to reconcile.
- [30] Ms. Di Pascale also testified about the impact of her injuries on her recreational activities. For example:
- a) She used to be an avid fisher but has not been able to return to fishing due to the onset of pain and fatigue in her neck and arms.

- b) She used to go on frequent motorcycle rides with her husband prior to the Collision. She found the activity relaxing and socially engaging. They often went on organized rides with other people for recreational purposes or to raise money for various charities. However, she has had to reduce the number of organized rides that she participates in by half, as she finds it exhausting.
 - c) She has difficulty taking her golden retriever out for walks, which has resulted in shorter and less frequent walks with the dog. The injuries have also impacted her ability to groom the dog. She now takes him to a professional groomer at an added cost because she is not able to manage the task herself.
- [31] She currently feels "very stressed" and "mentally, physically, and emotionally exhausted." She finds that she no longer has the same passion for her work, leisure activities, or life in general.
- [32] I found Ms. Di Pascale to be a credible witness. She was forthright in her testimony, readily admitted the limits of her memory, and did not appear to exaggerate. Much of her evidence was corroborated by other witnesses. Though there were a few discrepancies in her testimony, this did not affect my view of her credibility. By the time of trial, more than five years had passed since the Collision. Most of the discrepancies in Ms. Di Pascale's evidence were easily explained by the impact of the passage of time on her memory. However, Ms. Di Pascale's poor recall of some events meant that her evidence was not always reliable. In such circumstances, I have looked to other evidence (such as that of lay witnesses or documentation) to make the necessary findings of fact.

B. Lay Witnesses

- [33] Most of Ms. Di Pascale's testimony regarding the impact of the injuries on her social, family, and work life, was corroborated by the lay witnesses. I had no concerns about the credibility or reliability of any of their evidence.
1. Giuseppe Di Pascale
- [34] Mr. Di Pascale testified that he and Ms. Di Pascale separated for about two years following the Collision, but that he had moved back in a few months prior to the trial in an effort to reconcile. Despite their separation, they remained close. He continued to visit Ms. Di Pascale several times per week. He took her with him on motorcycle rides, and they travelled together on vacation to Italy.
- [35] Mr. Di Pascale's testimony largely corroborated that of Ms. Di Pascale, with the exception that he did not attribute their separation to her injuries from the Collision. Rather, Mr. Di Pascale blamed their separation on his increased drinking. He stated that he used alcohol to cope with his own injuries following the Collision, and that this was a source of strife between the two of them. Mr. Di Pascale testified that his wife became crankier and frustrated after the Collision. He found that they would argue over trivial matters.

- [36] Mr. Di Pascale also noted that it takes Ms. Di Pascale longer to complete household tasks. Whereas previously she would commence house cleaning on her first day off after a four-day work rotation, she will now often delay house cleaning for a few days, and it takes her double the time to complete the tasks.
- [37] According to Mr. Di Pascale, the Plaintiff also hosts fewer social gatherings and does less physical activity. In relation to the latter, he noted that they went on fewer organized motorcycle rides together and did less frequent and less rigorous hiking. However, Mr. Di Pascale explained that this decrease was in part due to his own Collision-related injuries, which impacted his ability to hike and required him to make more frequent stops when riding his motorcycle.
- [38] Mr. Di Pascale testified about travel plans that he and the Plaintiff had made after her planned retirement at age 65. He felt that it would now not be possible for them to pursue their goal of riding their motorcycle across Canada.
- [39] I found Mr. Di Pascale to be a credible and reliable witness. He provided a fair and balanced account, despite his relationship with Ms. Di Pascale. He was candid and forthright, and readily admitted the impact of his own physical limitations and alcohol misuse issues on their personal relationship and recreational activities.

2. Susanne Doucette

- [40] Ms. Doucette is a work colleague and close friend of Ms. Di Pascale. She works at PRH as a Licensed Practical Nurse and unit clerk. Ms. Doucette and the Plaintiff have worked together for over 20 years. Ms. Di Pascale trained Ms. Doucette for her job.
- [41] Prior to 2018, they worked on the same floor of the hospital. In 2018, Ms. Doucette's job was moved to a different floor. However, she continues to pick up shifts as a unit clerk on the third floor, when Ms. Di Pascale is not there.
- [42] Ms. Doucette described Ms. Di Pascale prior to the Collision as being very efficient, very happy, and noted that "nothing slows her down". She was rarely off work and seldom sick.
- [43] Ms. Doucette confirmed the heavy nature of the workload on the Plaintiff's floor. She noted that the workload had increased substantially over the past two years. She described the third floor as being chronically over-capacity and short-staffed, and stated that many staff are "burnt out." She noted that Ms. Di Pascale "does not want to work until age 65 and neither do I the hospital is not a great place to be at the moment".
- [44] Ms. Doucette testified that following the Collision, she noticed that Ms. Di Pascale appeared more tired and frustrated. She was no longer the cheerful and outgoing co-worker they had all known prior to the Collision.

[45] Ms. Doucette explained the importance of accuracy at work, and the dangerous consequence that could befall a patient due to erroneous entries in the patient's medication or dosage requirements. On a few occasions, the Plaintiff made some mistakes on patient charts. This was uncharacteristic of Ms. Di Pascale. Ms. Doucette corrected the mistakes

[46] Ms. Doucette testified that the Plaintiff is obviously "not herself." Prior to the Collision, Ms. Di Pascale would often bring pizza for her work colleagues, and hosted monthly dinner parties. Since the Collision, she has pulled back from everyone and does not have them over as often.

3. Shelley Scott

[47] Ms. Scott is a Registered Nurse and considers herself a "work friend" of the Plaintiff. They first met in 2007 when Ms. Scott started working at PRH. They worked together about three to four times per week prior to the Collision. However, due to Ms. Scott's own shift changes, she and Ms. Di Pascale now work together about eight times per month. Outside of work, they saw each other at work-related social events.

[48] Ms. Scott described Ms. Di Pascale prior to the MVC as a fun, outgoing person who always had a sparkle in her eye. She often brought homemade pizza buns for work colleagues, which she would bake fresh that day. She was a very good employee, made few mistakes, was good at multi-tasking, and never asked anyone for help.

[49] Following the Collision, Ms. Di Pascale lost that "sparkle". Ms. Scott has seen the Plaintiff frequently rubbing her neck at work, holding her head in pain, moaning, and complaining of a headache. Ms. Scott has also observed Ms. Di Pascale sometimes putting the wrong labels on things, but noted that this "happens with everyone."

[50] Ms. Scott testified that the workload at PRH has changed "big time" over the past few years. Her testimony about the workload at the hospital was consistent with that of Ms. Doucette and Mr. Butcher.

4. C.J. Butcher

[51] Mr. Butcher has known Ms. Di Pascale since March 2022, when he assumed the position of acute care manager at PRH. He is Ms. Di Pascale's direct supervisor.

[52] Mr. Butcher described Ms. Di Pascale as a pleasant, dutiful, and good employee. She is sociable, keen to teach others, and likes to organize things. His review of her personnel record revealed no concerns regarding her work performance or attendance.

[53] Ms. Di Pascale has complained to Mr. Butcher about headaches, a sore shoulder, and a bit of dizziness. Mr. Butcher testified that Ms. Di Pascale has been given a special chair at work to assist her with pain due to the MVC. From time to time, Ms. Di Pascale will take overtime shifts, but she has declined some shifts due to her pain.

- [54] Mr. Butcher testified that the unit clerk is the first person who sees the patient chart after the physician makes notations. As the duty nurse may be too busy to check the unit clerk's notations, it is very important for a unit clerk to be accurate. Mr. Butcher was not aware of any complaints about the Plaintiff's accuracy since he arrived in his position a year prior.
- [55] Mr. Butcher confirmed that the patient load at the hospital is above capacity, which means that everyone is very busy. He agreed under cross-examination that Ms. Di Pascale was a hard worker, and able to perform all tasks required of her as a unit clerk.

C. Medical Expert

- [56] Dr. Heather Underwood was qualified as an expert in Physical Medicine and Rehabilitation. Dr. Underwood treated Ms. Di Pascale in June 2021, and also prepared a medical legal report dated August 3, 2021 (the "MLR").
- [57] In her examination of the Plaintiff on June 14, 2021, Dr. Underwood noted that Ms. Di Pascale was complaining of moderately intense headaches (described as a 7-8/10 in intensity), nausea about twice per week, and a burning pain in her shoulder blades and the sides of her neck. Although Ms. Di Pascale reported an initial presence of tinnitus and mental fatigue, those have improved over time. Ms. Di Pascale reported that her cognitive foginess improved after six months.
- [58] The most significant issue complained of by Ms. Di Pascale to Dr. Underwood was ongoing neck pain (primarily on the left side), which the Plaintiff reported as being constantly present and about an 8/10 in severity. Ms. Di Pascale reported experiencing arm fatigue while washing dishes and using the computer mouse, and occasionally had left arm tingling while at work. Her pain increased with heavier lifting, and distracted Ms. Di Pascale from her work duties.
- [59] Dr. Underwood diagnosed Ms. Di Pascale with myofascial pain in the neck and periscapular region; headaches secondary to trauma to the neck and head; and "mild traumatic head injury as reported by Dr. Waspe".[1]

- [60] Dr. Underwood provided the following opinion regarding Ms. Di Pascale's prognosis:[2]

Ms. Di Pascale's overall prognosis is quite good. Any cognitive symptoms appear to have improved and her headaches have improved. She does have some myofascial pain, but has had some improvement with treatment with trigger point injections. She has had physiotherapy, but has been somewhat inconsistent, but if this was treated on a regular basis and a gradual active rehabilitation program, this would be beneficial.

She works as a unit clerk, so she is at increased risk for exacerbation when she has limited positional changes as well as with lifting heavier items. She does work a 12-hour shift, which likely exacerbates her pain. Longer motorcycle rides will likely require frequent stops.

Overall, her prognosis is good, but she will likely have recurrent exacerbations. If she was to have future accidents, her risk of reinjury would be higher.

- [61] According to Dr. Underwood, the Plaintiff's injuries are considered permanent. She explained that while Ms. Di Pascale may obtain some benefit from a gradual active rehabilitation program, disruption to her life and functioning would continue on account of her MVC related symptoms.
- [62] Dr. Underwood was of the opinion that Ms. Di Pascale's injuries were all causally related to the Collision, noting that "Ms. Di Pascale had no significant medical issues prior to her accident of January 24, 2018." [3] During her cross-examination, which focussed on Ms. Di Pascale's pre-Collision history, [4] Dr. Underwood did not resile from her opinion regarding the causative significance of the MVC.
- [63] With the exception of the mild traumatic head injury ("MTHI") diagnosis, Dr. Underwood was unshaken during her cross-examination. For the following reasons, I place no weight on the diagnosis of an MTHI. First, this was not a diagnosis made by Dr. Underwood. At best, Dr. Underwood was endorsing a diagnosis purportedly made by Dr. Waspe. Dr. Waspe did not testify in the trial, nor was an expert opinion elicited from her. Thus, no weight can be placed on any comments Dr. Waspe may have made in her medical files about Ms. Di Pascale experiencing an MTHI.
- [64] Second, Dr. Underwood agreed during her cross-examination that she did not examine Ms. Di Pascale for an MTHI, nor was she qualified at trial to provide an opinion regarding the same.
- [65] Although I am unable to find that Ms. Di Pascale experienced an MTHI from the Collision, this does not mean that her symptoms relating to such a diagnosis cannot be taken into consideration. The symptoms, standing on their own, can ground a claim for compensation. As held by the Court in *Saadati v. Moorhead*, 2017 SCC 28 at para. 31, "the trier of fact's inquiry should be directed to the level of harm that the claimant's particular symptoms represent, not to whether a label could be attached to them."

D. Pre-Existing Condition

- [66] There is no dispute that Ms. Di Pascale had numerous health conditions prior to the Collision, though the parties disagree on their seriousness and significance.
- [67] In May 2015, Ms. Di Pascale reported to Dr. Kloppers that she was experiencing "chronic low back pain". At trial, Ms. Di Pascale acknowledged making this report, though she denied requiring any treatment for the low back pain. Dr. Underwood (who did a detailed review of Ms. Di Pascale's pre-Collision medical history) noted the following in relation to the x-rays that were taken during that time: [5]

Xray revealed severe narrowing of L4-5 disc with reactive sclerosis and small osteophytes and moderate sclerotic change in the facet joints of L4 to S1. Thoracic imaging revealed a slight thoracic scoliosis concave to the right with cortical margin of the vertebral bodies appearing normal. There was slight narrowing of the intervertebral space of the mid-thoracic spine in keeping with spondylosis. Paraspinal tissues were reportedly normal.

- [68] Ms. Di Pascale also experienced some bursitis in her knees in 2015. In late 2015, Ms. Di Pascale fell and injured her right knee. Around November 2015, Ms. Di Pascale saw Dr. Smith, an orthopaedic surgeon, for right knee pain. At the time of the appointment, she was also experiencing a sudden onset of left knee pain. Dr. Smith's consultation report indicates that he prescribed antibiotics for left knee bursitis caused by an "acute bacterial" infection.
- [69] In early 2016, Ms. Di Pascale was treated for varicose veins. She was given some injections which she testified fully resolved the issue.
- [70] In mid-2016, Ms. Di Pascale was treated for a right second hammertoe. Ms. Di Pascale also experienced an episode of "tennis elbow" in her left arm.
- [71] Around January 2017, Ms. Di Pascale experienced right hip pain. The clinical notation indicates that she was prescribed anti-inflammatories and some topical cream. Ms. Di Pascale testified that the right hip pain resolved fully without further treatment.
- [72] Around 2017, Ms. Di Pascale also had some chest palpitations and light-headedness along with sleep and appetite disruption. Ms. Di Pascale was asked about some entries in her medical records suggesting that she was experiencing stress. She testified that she was under a lot of pressure at work, which was a source of stress. She also explained that her thyroid problem could have been contributing to her sleep-related concerns prior to the Collision. Finally, Ms. Di Pascale testified that some of her symptoms were related to menopause, which she was going through at the time.
- [73] Dr. Underwood was cross-examined on the significance of Ms. Di Pascale's pre-Collision history. She testified that she would not consider the medical history to be lengthy or unusual, particularly given Ms. Di Pascale's age. She agreed that Ms. Di Pascale had experienced some low back pain in the past. However, according to Dr. Underwood, there was a clear distinction between Ms. Di Pascale's current neck and shoulder pain, and pre-Collision complaints of low back pain. Dr. Underwood agreed that degenerative changes in the low back could cause flare ups or discomfort on their own. However, Dr. Underwood did not agree that the current complaints of neck, shoulder, or arm pain were connected to the degenerative changes in the low back that were evident prior to the Collision.
- [74] Before I consider the impact of Ms. Di Pascale's pre-Collision health on the quantum of damages, I will address the question of her non-pecuniary damages.

IV. Non-Pecuniary Damages

A. Legal Framework

- [75] A damage award for non-pecuniary losses is intended to compensate a plaintiff for pain, suffering, loss of enjoyment of life, and loss of amenities. Though restitution is never possible for these types of losses, the monetary award is intended to provide a substitute for pleasures and amenities to make the life of the plaintiff "more bearable": *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 at para. 274, 1985 CanLII 179 (S.C.), *aff'd* (1987), 49 B.C.L.R. (2d) 99 (C.A.); and *Pololos v. Cinnamon-Lopez*, 2016 BCSC 81 at para. 105.
- [76] In *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46, leave to appeal to SCC *ref'd* [2006] S.C.C.A. No. 100, the Court set out a non-exhaustive list of factors to be considered in assessing non-pecuniary damages. These include: the plaintiff's age; nature of the injury; severity and duration of pain; disability; emotional suffering; loss or impairment of life; impairment of family; marital and social relationships; impairment of physical and mental abilities; and loss of lifestyle: *Stapley*, at para. 46. The plaintiff's stoicism is a factor that should not, generally speaking, penalize the plaintiff: *Stapley*, at para. 46 citing *Giang v. Clayton*, 2005 BCCA 54 at para. 55.
- [77] The award is to be fair to both parties and fairness is measured against awards in comparable cases: *Olson v. Farran*, 2016 BCSC 1255 at para. 156.
- [78] Loss of housekeeping or domestic capacity may be compensated by a pecuniary or non-pecuniary award. The non-pecuniary approach may be preferred where the plaintiff is limited, but not unable, to do household tasks for physical or psychological reasons. A pecuniary award may be more appropriate where replacement services are hired or family members provide gratuitous support: *Kim v. Lin*, 2018 BCCA 77 at para. 28 citing *McTavish v. MacGillivray*, 2000 BCCA 164 at para. 73.

B. Positions of the Parties

- [79] The Plaintiff submits that an appropriate range of non-pecuniary damages for the Plaintiff's injuries (including loss of housekeeping capacity) is \$90,000 to \$100,000. In support, the Plaintiff relies on the following authorities, after the figures have been adjusted for inflation: *Sidhu v. Jung*, 2021 BCSC 1084; *Bucholtz v. Zhang* 2020 BCSC 571; and *Pasemko v. Kosolofski*, 2020 BCSC 246.
- [80] The Plaintiff submits that *Sidhu* is most similar in facts to the Plaintiff's circumstances. Ms. *Sidhu* was a 45-year old full-time clerical employee. Ms. *Sidhu*'s pre-collision history was not held to be of causative significance to her current condition. In contrast to Ms. *Di Pascale*, Ms. *Sidhu* had been involved in multiple collisions, causing her to re-start her recovery multiple times. However, like Ms. *Di Pascale*, Ms. *Sidhu* achieved a fair degree of recovery over time, with her symptoms ultimately plateauing and becoming chronic: *Sidhu* at para. 112. Although she was able to carry on with most of her pre-collision activities with some modifications, there were some things that were no longer possible for Ms. *Sidhu*, such as sitting on a couch to watch a movie with her children. Justice Veenstra awarded the plaintiff

non-pecuniary damages of \$85,000.

- [81] In Bucholtz, the plaintiff was a 49-year old warehouse worker who sustained chronic neck, shoulder and upper back injuries in a rear-ending motor vehicle incident. Like Ms. Di Pascale, he carried on working after his accident. His symptoms improved to a fair degree following his accident but he remained symptomatic at trial. His symptoms required him to modify his personal and social activities. Non-pecuniary damages were assessed at \$85,000.
- [82] In Pasemko, the 56-year-old plaintiff suffered injuries in two low-velocity motor vehicle accidents. Over time, her neck and shoulder pain reduced, but still flared up. She continued to work after her injuries at a cost to her mood and energy levels. The plaintiff was an active, outdoors-oriented person and many of her activities were curtailed due her pain. The court assessed Ms. Pasemko's non-pecuniary damages at \$90,000.
- [83] The Defendant submits that a suitable award for Ms. Di Pascale's injuries is in the range of \$60,000-\$70,000. This award includes any loss of domestic capacity, and factors in a discount of 10% for Ms. Di Pascale's pre-existing health conditions, and another 5% for her failure to mitigate.
- [84] The Defendant relies on the following authorities (after adjusting for inflation) to support the non-pecuniary damages range: *Ohri v Aminie*, 2020 BCSC 270; *Eng v Titov*, 2012 BCSC 300; and *Lambert v. Dong*, 2021 BCSC 249.
- [85] In *Ohri*, the 67-year-old plaintiff suffered injuries to the left-side of his head, hip and left shoulder. The injuries resolved in a short-time, aside from his shoulder, which plateaued at 70% recovered. The injury did not interfere with his employment, but affected his personal activities. The court assessed non-pecuniary damages at \$65,000.
- [86] In *Eng*, the 43-year-old plaintiff suffered injuries to his neck, shoulders, and low back. He also had headaches, pain to the right knee and experienced a mood disorder. He took time off from work. Some of his injuries resolved but he still experienced pain to his neck and shoulders along with headaches. The court assessed non-pecuniary damages at \$40,000.
- [87] In *Lambert*, the plaintiff was 22 years old at the time of the accident. He suffered several injuries including to his upper back, shoulder, and neck. The latter two injuries were ongoing with a guarded prognosis. The court assessed non-pecuniary damages at \$60,000.
- [88] Bearing in mind that no two cases are the same, I find that the Plaintiff's cases more closely match the circumstances of Ms. Di Pascale in terms of injuries, prognosis and pre-accident lifestyle among other factors.

C. Quantum

- [89] Ms. Di Pascale is 62 years old. She was born in Italy and raised in Prince Rupert, B.C., where she resides with her husband and one daughter. Ms. Di Pascale has two other daughters and four grandchildren, ranging in ages from five to 16 years old.

- [90] The Collision caused the Plaintiff to experience soft tissue injuries to her neck, shoulders, upper back, and lower back, with pain radiating into her left arm and left leg. She also had headaches, dizziness, nausea, insomnia, and fatigue. Ms. Di Pascale had difficulties with cognition (such as feeling "fogginess", difficulty with concentration, and forgetfulness) and mood (such as feeling distracted, irritable, and frustrated).
- [91] Ms. Di Pascale received physiotherapy, dry needling, and trigger point injections. She also used topical steroid creams and various pain control medications.
- [92] Around six months following the Collision, Ms. Di Pascale's cognitive symptoms and mood disruption saw significant improvement. By 2021, the lower back symptoms had fully resolved.
- [93] Ms. Di Pascale's most significant ongoing symptoms are pain in her neck (particularly the left side), shoulders, and upper back. Though these symptoms have abated somewhat, the neck pain remains disruptive. The pain varies depending on activity levels. She has associated headaches and nausea, and pain in her left arm which radiates from the neck, causing tingling and fatigue. The pain in her neck, shoulder, and arm is exacerbated by parallel parking, shoulder checks, washing dishes, working on the computer, and lifting heavy objects.
- [94] Ms. Di Pascale continues to experience headaches after a long shift, and nausea several times per week. She reports constantly feeling tired and moody due to her ongoing physical symptoms. In addition, she continues to experience distractedness, frustration, and irritability.
- [95] Ms. Di Pascale's injuries have caused her to experience a significant loss of enjoyment of life. The injuries have had a profound impact on her personal, home, work, and social life, and have interfered in her recreational activities.
- [96] Of paramount importance to Ms. Di Pascale is her family. Her pain and injuries impacted Ms. Di Pascale's ability to interact with her children and grandchildren. They also put a strain on her marriage, which was already going through challenges due to her husband's issues with alcohol. Though I find that Ms. Di Pascale's injuries were not the cause of her marital separation, there is no doubt that they made an otherwise challenging homelife even more difficult.
- [97] The injuries have also impacted Ms. Di Pascale's employment. Ms. Di Pascale has been working at PRH for virtually her entire career. She loved her job and felt immense joy and fulfillment from it. Following the Collision, Ms. Di Pascale had difficulty performing her job duties. She experienced intermittent periods of interruption in her work and had to rely on banked sick leave when her symptoms became unbearable. Her injuries continue to impact her job performance and cause her significant angst. Ms. Di Pascale worries about the grievous harm that could befall a patient if she makes a mistake such as recording the incorrect medication or dosage on a patient record.

- [98] Though Ms. Di Pascale continues to remain gainfully employed at PRH, she is considering early retirement on account of her injuries. This is particularly distressing for her as a large part of her enjoyment of life is through her work.
- [99] The injuries have further impacted Ms. Di Pascale's recreational activities and social life. Ms. Di Pascale has always been very physically active. Prior to the Collision, she participated in a wide variety of activities including hiking with her husband, long walks with their dogs, fishing, and gardening. Ms. Di Pascale particularly enjoyed motorcycle riding with her husband. This was a seasonal activity which involved annual charity toy-runs and fundraisers. Many of these activities have had to be curtailed (such as hiking, walking, and motorcycle riding), or discontinued entirely (such as fishing), due to the Collision-related injuries. Though some decrease is due to Mr. Di Pascale's own physical health and their marital issues, there is no doubt that Ms. Di Pascale's injuries have affected her ability to participate in recreational activities to the extent that existed prior to the Collision.
- [100] Ms. Di Pascale was also very socially active prior to the Collision. She enjoyed entertaining, and frequently hosted large dinners and gatherings. Her passion was cooking, and she regularly made bread and pizza dough from scratch. Cooking was an opportunity for Ms. Di Pascale to bond with her grandchildren, and she often involved them in preparing meals. Her injuries have made it difficult for her to participate in these activities to the extent that she would like. She finds it challenging to make her own bread dough and does not entertain as much as she used to.
- [101] The impact on Ms. Di Pascale's domestic activities has also been significant. Prior to the Collision, Ms. Di Pascale took pride in maintaining a clean home, cooking fresh food for her family, and maintaining a nice garden and yard. Though she is still able to do these activities, it is at a much slower pace and with less frequency than before.
- [102] In summary, I borrow from the Plaintiff's counsel's written submissions at para. 29:
- the Plaintiff was a dedicated, hard-working, conscientious employee, a busy wife, mother and grandmother, and a good and generous friend to her co-workers. She was leading an active and enjoyable life when the subject [Collision] disrupted that life, with much of that disruption persisting to the present.
- [103] After considering all of the evidence in this case, I find that a fair and reasonable sum to compensate Ms. Di Pascale for her non-pecuniary loss is \$100,000. This award recognizes her pain and suffering and loss of enjoyment of life including the impact on her domestic capacity on account of her compensable injuries.

1. Pre-Existing Condition

- [104] The Defendant relies on *Athey v. Leonati*, [1996] 3 SCR 458, 1996 CanLII 183 at para. 35, for the proposition that the defendant need not compensate the plaintiff for any debilitating effects of a pre-existing condition if the plaintiff would have experienced them regardless of the accident.
- [105] It is trite law to say that the defendant is only required to return the injured plaintiff to the original position that she would have been in "but for" the accident; in other words, the defendant is not obliged to return the plaintiff to a better condition than her original position: *Vintila v. Kirkwood*, 2016 BCSC 930 at para. 33.
- [106] Application of the "but for" test is an exercise in hypotheticals. These "hypothetical" possibilities must be considered and weighed according to their relative likelihood of occurring. If there is a real and substantial possibility that a pre-existing condition would have caused the plaintiff to suffer some or all of the harm for which she seeks compensation, regardless of the tort, then the likelihood of that possibility must be taken into account: *Anderson v. Molon*, 2020 BCSC 1247 at paras. 204-205.
- [107] The court requires "a measurable risk" or "a real or substantial possibility and not speculation" that the pre-existing condition would have manifested in the future regardless of the defendants' negligence. The measurable risk need not be proven on a balance of probabilities but given weight according to the probability of its occurrence: *Athey* at paras. 27, 35.
- [108] The Defendant argues that the risk of Ms. Di Pascale having an exacerbation of her back pain, pain in her hip, and pain in her knee, absent the Collision, is a hypothetical event that must be considered in this case. While I agree that these should be considered in the assessment of any future losses, these do not impact my assessment of Ms. Di Pascale's non-pecuniary damages award. This is because there is insufficient evidence that these conditions actually manifested following the Collision.
- [109] For example, while she did suffer from low back pain following the Collision, it is speculative to suggest that Ms. Di Pascale's low back pain following the Collision was related to her pre-existing low back condition. While Dr. Underwood agreed during her cross-examination that degenerative changes in the low back could cause flare-ups or discomfort on their own, she did not agree that these were contributing to Ms. Di Pascale's current condition. In any event, Ms. Di Pascale's low back pain resolved fully and has not been an issue since 2021.
- [110] The relevance of prior Collision pain in the hip is even more remote, given the paucity of evidence regarding the pre-Collision and post-Collision hip pain.
- [111] While Ms. Di Pascale did complain of pain in her knee following the Collision, there is an absence of evidence suggesting that this was in any way related to the knee pain complained of prior to the Collision. Indeed, the evidence indicates that Ms. Di Pascale recovered fully from the knee pain that arose in 2015 after being treated by Dr. Smith.

- [112] Similarly, I am not swayed that Ms. Di Pascale's reports of chest pain and heart palpitations prior to the Collision, constitute a "pre-existing condition." First, there is no admissible expert opinion evidence explaining the cause or nature of the pre-Collision chest pain and heart palpitations. Though Ms. Di Pascale testified that she was experiencing work-related stress during that time, there is no expert evidence which provides a connection between the reported stress and the symptoms of chest pain and heart palpitations. These could have arisen due to any number of reasons, such as a physical injury, physiological condition, or psychological condition. Second, there is no evidence that these symptoms (which arose approximately one-year prior to the Collision) were long lasting, ongoing, or recurrent in nature. Third, while Ms. Di Pascale did report chest pain following the Collision, she also reported having a bruise on her chest when the seatbelt pressed into her during the force of the Collision. It is speculative to suggest that Ms. Di Pascale's post-Collision chest pain is connected to anything other than the bruise from the seatbelt.
- [113] I turn finally to Ms. Di Pascale's evidence regarding being overworked and the stress related to her marriage. There was overwhelming evidence that the hospital staff were all overworked and under an enormous amount of stress. Ms. Di Pascale's evidence itself revealed the pressure she was under, and the difficulty she was having with coping with the workload and her injuries. On top of this, there was evidence that her marital breakdown, post-Collision, was taking a toll on her as well.
- [114] Non-pecuniary damages are "always to be assessed by reference to the situation that the plaintiff would be in but for the wrongdoing": *Gordon v. Ahn*, 2017 BCCA 221 at para. 33.
- [115] I conclude that but for the Collision, Ms. Di Pascale would not have suffered the injuries that are claimed. Consequently, no deduction of her non-pecuniary award is made for any pre-existing conditions.
2. Failure to Mitigate
- [116] The Defendant argues that Ms. Di Pascale failed to mitigate her losses by refusing to follow Dr. Underwood's recommendations to undergo a "full" program of physiotherapy and active rehabilitation to assist with ongoing neck and shoulder pain. Consequently, the Defendants seek a reduction in the damages award by 5% for the failure to mitigate.[6]
- [117] The Plaintiff argues that the Defendant has failed to meet his burden of proof to establish that the Plaintiff's damages would have been reduced had she participated in these treatment programs.
- [118] In *Haug v. Funk*, 2023 BCCA 110, the Court of Appeal addressed the issue of the appropriate test to be applied for a reduction in a damages award due to the plaintiff's failure to mitigate their losses. The Court reiterated the oft-cited test from *Chiu v. Chiu*, 2002 BCCA 618, noting that the defendant must prove on a balance of probabilities:
- 1) that the plaintiff acted unreasonably in eschewing the recommended treatment; and

- 2) the extent, if any, to which the plaintiff's damages would have been reduced had they acted reasonably.

Huag at paras. 22, 55

- [119] Chief Justice Bauman, writing for the Court, clarified further that the second branch of the Chiu test requires the defendant to prove on a balance of probabilities that the plaintiff's injuries would have been reduced to some degree had they acted reasonably:
- [61] Only once this is established does the Court go on to assess the reduction to the damages award based on the extent to which the injuries would have been avoided, which is the true hypothetical.
- [120] I will first consider the reasonableness of Ms. Di Pascale's refusal to attend the recommended treatment.
- [121] The evidence establishes that: (a) Dr. Underwood recommended treatment in the form of further physiotherapy and a gradual active rehabilitation program; (b) Ms. Di Pascale was aware of this recommendation; and (c) Ms. Di Pascale did not comply with this advice.
- [122] Dr. Underwood agreed under cross-examination that she had recommended to Ms. Di Pascale that she attend for further physiotherapy sessions and active rehabilitation treatment. There is no dispute that Ms. Di Pascale did not attend.
- [123] Dr. Underwood also noted that there was limited access to physiotherapy and active rehabilitation treatment in Prince Rupert. It was her evidence that there existed only one physiotherapy clinic in Prince Rupert and "they all fight to go there". Dr. Underwood also stated that the pandemic had impacted people's ability to access physiotherapy and active rehabilitation services, such that "if there is no therapist there is no access".
- [124] Ms. Di Pascale acknowledged that she was aware of Dr. Underwood's recommendation for further treatment. However, after completing her course of treatment in 2018, Ms. Di Pascale attended only two further physiotherapy treatments in 2021. She did not participate in any active rehabilitation program. When asked to explain why she did not attend further treatments after Dr. Underwood had recommended them, the Plaintiff first gave two reasons: (a) due to the impact of Covid-19 restrictions; and (b) she did all the exercises at home that the physiotherapist had taught her. When it was pointed out to her that the treatment sessions under discussion were in 2021 (and not during the pandemic), Ms. Di Pascale explained that she did not know why she did not attend at further sessions, but it could have been because she was working too much.
- [125] In my view, none of the reasons the Plaintiff provided for not complying with Dr. Underwood's recommendations are reasonable. While it may be the case that there was a lack of physiotherapy services in Prince Rupert, this was not the reason given by Ms. Di Pascale for failing to attend. Rather, Ms. Di Pascale pointed to her decision to do her exercises at home, the impact of Covid-19 restrictions, and her busy work schedule.

Completing physiotherapy exercises at home may be an adjunct to physiotherapy and active rehabilitation treatment, but it is not a reasonable substitute. Further, by the time Ms. Di Pascale met with Dr. Underwood, the pandemic restrictions had been lifted. Finally, I also reject the notion that Ms. Di Pascale did not have the time to attend sessions due to her busy work schedule. Ms. Di Pascale has consistently worked a four day on and four day off schedule. She could easily have fit physiotherapy and active rehabilitation sessions into her days off, if she chose to do so.

[126] I conclude that Ms. Di Pascale's decision not to attend for further physiotherapy was unreasonable. Ms. Di Pascale already had personal experience of benefitting from physiotherapy treatment. She testified that when she attended physiotherapy following the Collision, she found it beneficial in reducing her pain. Ms. Di Pascale also had the recommendation of a medical expert that she should attend for further physiotherapy treatment.

[127] I turn now to the second aspect of the Chiu test.

[128] When asked about the benefits of further treatment for Ms. Di Pascale, Dr. Underwood testified that Ms. Di Pascale would not have been able to achieve full recovery. However, she would have been able to improve her quality of life, improve her ability to cope better with things, and do things more effectively.

[129] After considering the evidence and the case authorities, I conclude that 5% is a reasonable and fair assessment of the extent to which the Plaintiff's damages would have been reduced had she acted reasonably. Consequently, her non-pecuniary damages award is reduced to \$95,000.

V. Special Damages

[130] The parties have agreed to the sum of \$1,462.14 for the Plaintiff's special damages.

VI. Impairment of Earning Capacity

[131] Damages for impairment of earning capacity are awarded to provide a plaintiff with full compensation for all their pecuniary losses: *Thomson v. Thiessen*, 2018 BCSC 1353 at para. 55. The purpose of the award is to restore the plaintiff to the position he would have been in but for the accidents.

[132] The value of the plaintiff's earning capacity loss may be measured in different ways. For example, it could be assessed on the basis of actual earnings the plaintiff would have received; the replacement costs of the tasks the plaintiff is no longer able to do; an assessment of reduced company profits; or the amount of secondary income that has been lost: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141, at para. 31, citing *Cooper-Stephenson in Personal Injury Damages in Canada*, 2nd ed. (Scarborough, Ont.: Carswell, 1996) at pg. 205-06.

- [133] The two possible approaches to assessment of loss of future earning capacity are the "earnings approach" and the "capital asset approach". Under either approach, the plaintiff must prove that there is a "real and substantial possibility" of various future events leading to an income loss: *Perren v. Lalari*, 2010 BCCA 140 at paras. 11, 12, 33. The earnings approach will be more appropriate when the loss is more easily measurable: *Westbroek v. Brizuela*, 2014 BCCA 48 at para. 64. Regardless of which approach is used, the overall fairness and reasonableness of the award must be considered in light of all the evidence: *McColl v. Sullivan*, 2021 BCCA 181 at para. 59.
- [134] The balance of probabilities test that is applied with respect to past actual events is not appropriate when assessing a claim for past loss of earning capacity. Rather, claims for past and future loss of earning capacity are subject to the same legal test, i.e. whether, on the evidence, there is a real and substantial possibility that the future event in question will cause a pecuniary loss: *Grewal v. Naumann*, 2017 BCCA 158 at para. 48.
- [135] Assessing the likelihood of hypothetical and future events is more appropriate than applying the balance of probabilities test, because what would have happened in the past, absent injury, is no more "knowable" than what will happen in the future: *Smith v. Knudsen*, 2004 BCCA 613 at para. 29.
- [136] Claims for past and future loss of earning capacity are subject to the same legal test: whether, on the evidence, there is a real and substantial possibility that the future event in question will cause a pecuniary loss: *Grewal* at para. 48.
- [137] Hypothetical events are given weight according to their relative likelihood. A hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation: *Turner v. Dionne*, 2017 BCSC 1905 at para. 316, referencing *Athey* at para. 27. See also *Dornan v. Silva*, 2021 BCCA 228 at paras. 93-94.
- [138] The onus is on the plaintiff to demonstrate that the injuries suffered in the accident have impaired the plaintiff's income earning ability, such that there is a real and substantial possibility that the diminished earning capacity has resulted in a pecuniary loss: *Perren* at paras. 21, 32-33. The court must then award compensation on an estimation of the chance that the event will occur: *Steward v. Berezan*, 2007 BCCA 150 at para. 17.
- [139] In *Rab v. Prescott*, 2021 BCCA 345 the Court restated the proper approach for assessing loss of future earning capacity. At para. 47, the Court provided the following three-step analysis to guide an assessment of future earning capacity, "particularly where the evidence indicates no loss of income at the time of trial":
- a) The first is evidentiary: whether the evidence discloses a potential future event that could lead to a loss of capacity (e.g., chronic injury, future surgery or risk of arthritis);
 - b) The second is whether, on the evidence, there is a real and substantial possibility that the future event in question will cause a pecuniary loss; and

- c) If such a real and substantial possibility exists, then the third step is to assess the value of that possible future loss, which must include assessing the relative likelihood of the possibility occurring.

[140] In general, the value of the plaintiff's capacity to earn is equivalent to the value of the earnings she would have received in the past or the future, had the tort not been committed: *Crimeni v. Chandra*, 2015 BCCA 131 at para. 15. The court must consider both positive and negative contingencies when conducting this analysis: *Kellett v. Stam*, 2018 BCSC 1127 at para. 77

A. Past Loss of Income

[141] The Plaintiff seeks net past loss of income in the amount of \$11,095.06. This figure is based on the Plaintiff using an estimated 567 hours of sick bank credits due to her injuries. At a wage rate of \$24.46 per hour, this amounts to a gross loss of \$13,868.82. Applying a 20% reduction for taxes and statutory deductions, the Plaintiff arrives at a net past wage-loss claim of \$11,095.06.

[142] The Defendant agrees that Ms. Di Pascale is entitled to past loss of income, but say this figure should be \$2,678.33, based on two weeks of wage loss for her injuries and one week for attendance at medical appointments (144 hours[7] x \$24.46 per hour), less approximately 25% for taxes and statutory deductions[8].

[143] The difference between the two positions lies in the parties' disparate views of the evidence. The Plaintiff relies on her viva voce evidence estimating the portion of her sick bank hours that were used for her Collision-related injuries by deducting days when she was sick with Covid and bronchitis. The Defendant relies on an entry in Dr. Underwood's MLR noting that the Plaintiff had taken off two weeks for her Collision-related injuries, notations in the employment records that correlate with when Ms. Di Pascale took time off to attend medical appointments, and Ms. Di Pascale's trial evidence that she continued working full-time and did not take any time off following the Collision.

[144] I do not agree with the Defendant that Ms. Di Pascale's past wage loss should be so narrowly construed and limited to three weeks.

[145] First, I do not find any inconsistency in Ms. Di Pascale's trial evidence and her claim for 567 sick bank hours. I infer that when she said that she did not take any time off following the Collision, what Ms. Di Pascale meant was that she did not take any dedicated time off following the Collision. Rather she continued to work full-time for as long as she could, and then took sporadic days off when the pain became unbearable.

- [146] Second, I found Ms. Di Pascale to be candid and forthright on this issue, and her evidence does not raise concerns regarding her credibility. She readily admitted to the limits of her memory, and made admissions against self interest, such as testifying that she took a number of days off in 2021 for Covid and bronchitis. These were deducted from her total claim.
- [147] Third, there is some documentary evidence to support Ms. Di Pascale's claim. The employment records identify all of the sick days she took following the Collision. They reveal the frequency with which Ms. Di Pascale was relying on her sick bank post-Collision. These employment records show a pattern that is consistent with Ms. Di Pascale's testimony and the evidence of other witnesses regarding Ms. Di Pascale's increasing inability to cope with her workload.
- [148] I turn finally to the purported statement made to Dr. Underwood that Ms. Di Pascale took two weeks off for her Collision-related injuries. The court must exercise caution when assessing evidence based on statements recorded in medical or other records. Simply because the notation appears in Dr. Underwood's records does not mean that it is true. The words of Justice Smith in *Edmondson v. Payer*, 2011 BCSC 118 at para. 34, *aff'd* 2012 BCCA 114, are particularly apt in this case. As noted by the Court:
- [34] The difficulty with statements in clinical records is that, because they are only a brief summary or paraphrase, there is no record of anything else that may have been said and which might in some way explain, expand upon or qualify a particular doctor's note. The plaintiff will usually have no specific recollection of what was said and, when shown the record on cross-examination, can rarely do more than agree that he or she must have said what the doctor wrote.
- [149] In this case, Ms. Di Pascale could not recall telling Dr. Underwood that she had only taken off two weeks, and Dr. Underwood was not asked to explain the source of this information.
- [150] Further, even if I was to accept that Ms. Di Pascale told Dr. Underwood in 2021 that she had taken two weeks for her Collision-related injuries (which I do not), this does not mean that Ms. Di Pascale did not lose any further time off work. Ms. Di Pascale saw Dr. Underwood around the summer of 2021. The trial of this matter occurred about 1.5 years later, during a period when Ms. Di Pascale testified she felt that her condition was getting more unmanageable.
- [151] I turn now to assessing the loss.
- [152] The documentary evidence, though helpful, is of limited use. This is because the records do not indicate the reasons why Ms. Di Pascale was sick. The only exception are notations indicating when Ms. Di Pascale obtained leave to attend medical appointments. The Defendant agrees that these appointments were for Collision-related visits.

- [153] Ms. Di Pascale's evidence is that all of the sick leave time taken, with the exception of the days taken for bronchitis and Covid-19, was for the Collision-related reasons. The evidence does not inevitably lead to that conclusion. There is no dispute that Ms. Di Pascale experienced a number of health conditions both before and following the Collision. I have already addressed the pre-existing conditions elsewhere.
- [154] In terms of the post-Collision events, there are several of them that merit consideration. For example, in addition to the Covid and bronchitis, Ms. Di Pascale suffered a burn injury to her hand, an injury to her right foot from a dog bite, swelling in her hand and index finger, and complaints of abdominal pain. Ms. Di Pascale denied taking any time off for those events. There is no reason for me to doubt her evidence on this issue, but I do not accept the notion that other events were not contributing to Ms. Di Pascale's increasing absenteeism from work.
- [155] There is compelling evidence that Ms. Di Pascale was feeling a great degree of pressure at work, which caused her significant stress. She was also experiencing stress related to her marriage. The evidence leads me to conclude that Ms. Di Pascale was finding it increasingly difficult to cope with her workload, in part due to the added pressures at work, which had nothing to do with her injuries. I find that there is a strong probability that these non-Collision-related stressors would have caused Ms. Di Pascale to take time off work regardless of the Collision.
- [156] The employment records indicate that each sick day was equivalent to 10.25 hours. This means that Ms. Di Pascale's claim of 567 sick bank hours, is equivalent to her taking approximately 55 days off for her Collision-related injuries. This averages to approximately 10-11 days per year (or 2.5 to 3 weeks) over the 5.25 years between the Collision and the trial. In my view, this figure is higher than what I find is proven on the evidence. The evidence leads me to conclude that in addition to the time she took for Covid-19 and bronchitis, Ms. Di Pascale took on average, two to four sick days per year for non-Collision-related matters. These should be factored into her past wage loss award.
- [157] Based on the evidence, I assess Ms. Di Pascale's past income loss related to the Collision to average eight to ten days per year, or 420 to 525 hours to the date of trial. In my view, 500 hours is a more reasonable sum that approximates Ms. Di Pascale's loss of banked sick time. Multiplying this figure with Ms. Di Pascale's hourly rate of \$24.46, yields a range of \$10,273 to \$12,841.
- [158] Bearing in mind that this is an assessment and not a precise mathematical calculation, I assess Ms. Di Pascale's net past income loss at \$9,500. This figure includes a deduction for income tax and statutory deductions, and also takes into account any overtime shifts that Ms. Di Pascale was unable to complete due to her Collision-related injuries.

B. Future Earning Capacity Loss

- [159] The Plaintiff submits that due to her injuries, she will be forced to retire two years early (i.e. at age 63) rather than working until age 65 as she planned prior to the Collision. She submits that the likelihood of this event occurring is 75%, and should result in a future loss of earning capacity award of \$87,343.
- [160] The Defendant argues first that no future loss of earning capacity is proven. Alternatively, if this Court does find that such an award is warranted, the Defendant asks that the award be limited to one-year worth of earnings, with a 15% deduction for failure to mitigate. After accounting for taxes and other deductions, the Defendant submits that this head of damages should be assessed at no more than \$50,000.
- [161] I am satisfied that there is evidence that due to her Collision-related injuries, the Plaintiff's future earning capacity will be diminished. First, I accept the Plaintiff's evidence that her symptoms: (1) have impacted her ability to earn an income as a unit clerk in the past; (2) continue to limit her in the present; and (3) will continue to do so into the future. This is supported by the evidence of Dr. Underwood, who attested to the permanent nature of the Plaintiff's injuries, and the impact that they will continue to have on her in the future.
- [162] I accept that the Plaintiff is seriously considering retiring early, and may do so as soon as next year.
- [163] Ms. Di Pascale has demonstrated that the injuries suffered in the Collision have impaired her income earning ability, such that there is a real and substantial possibility that she will retire two years early due to her diminished earning capacity.
- [164] After considering all of the evidence, I conclude that there is a 70% likelihood that Ms. Di Pascale will retire at age 63.
- [165] However, I agree with the Defendant that there is strong evidence that absent the Collision, Ms. Di Pascale would have retired early anyways due to the extra workload at PRH. Ms. Di Pascale admitted the impact of the extra workload on her retirement plans. She explained that the heightened workload is making it more difficult for her to maintain full-time employment. Other employees (such as Ms. Scott and Mr. Butcher) attested to this increased workload. Ms. Doucette testified that she is also considering early retirement due to the increased workload. Further, there is a real and substantial possibility that Ms. Di Pascale's various health conditions (that are not Collision-related) would have also caused her to retire early. I place the likelihood that Ms. Di Pascale would have retired at age 63 due to her increased workload and non-compensable health conditions at 25%.

- [166] Ms. Di Pascale's earnings for the years 2019 to 2021 produce an average of \$55,721 per year, or \$111,442 for two years. The employment records suggest an annual wage increase of about 3-4%. Once this is factored in, the total anticipated earnings for two years amount to about \$115,000. Based on a 70% probability that Ms. Di Pascale will retire at age 63, I arrive at \$80,500. After factoring in the 25% likelihood that Ms. Di Pascale would have retired early absent the Collision, I arrive at \$60,375.
- [167] There are two additional aspects that must be taken into account. The first are negative and positive contingencies. There is a chance of Ms. Di Pascale's condition improving with treatment; there is also the chance that she will continue to experience a worsening of her symptoms as time wears on. I consider these positive and negative contingencies to offset each other. The second matter for consideration, is Ms. Di Pascale's failure to mitigate. I conclude that it is appropriate to apply the 5% deduction for failure to mitigate to the future loss of earning capacity award.
- [168] Bearing in mind that this is an assessment and not a precise mathematical calculation, and after having regard to all of the evidence in this case, I assess Ms. Di Pascale's future loss of earning capacity at \$57,500.

VII. Costs of Future Care

- [169] The Plaintiff seeks a future care cost award of \$5,000 for over the counter medications to help Ms. Di Pascale manage her pain. These include Tylenol, Advil, and diclofenac cream. The Defendant submits that Ms. Di Pascale should be awarded \$1,167 for one full session of physiotherapy and active rehabilitation.
- [170] Awards for future care are based on what is reasonably necessary on the medical evidence to promote the mental and physical health of the plaintiff: *Milina v. Bartsch*, 49 BCLR (2d) 33, 1985 CanLII 179 (S.C.) at para 80.
- [171] A claim for future care is established if there is medical justification for the claim, the claim is reasonable, and the expense is likely to be incurred by the plaintiff: *Audet v. Chan*, 2018 BCSC 1123 at paras. 113-115, citing *Milina* at para. 211; and *Hardychuk v. Johnstone*, 2012 BCSC 1359 at paras. 210-212.
- [172] An award for future care costs should be reasonable and fair to both parties: *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229 at 241-242.
- [173] A cost of future care award assessment is subject to a discount rate of 2%: *Pearson v. Savage*, 2020 BCCA 133 at para. 104; see also *Law and Equity Act*, R.S.B.C. 1996, c. 253, s. 56; and *Law and Equity Regulation*, B.C. Reg. 352/81, s. 1.

[174] There is evidence from Dr. Underwood that Ms. Di Pascale would benefit from a full session of physiotherapy and active rehabilitation. The Defendant has conceded that the physiotherapy and active rehabilitation are reasonable and medically justified and will cost at least \$1,167. I have no reason to disagree with that figure.

[175] There is also evidence that Ms. Di Pascale has benefitted from over the counter pain medications and topical treatments that are not covered by her extended health benefits plan. I accept that those treatments are all medically justified, and likely to be incurred by the Plaintiff. I accept that the Plaintiff will have some modest costs associated with purchasing over the counter medications for her Collision related injuries. I put this cost in the range of \$1400 over her lifetime.

[176] Doing the best that I can, with the evidence I have, I conclude that the sum of \$2,500 is fair and reasonable for Ms. Di Pascale's future care costs. This sum includes a 2% discount per Pearson.

VIII. Summary of Damages

[177] Ms. Di Pascale is entitled the following damages:

Non-pecuniary Damages \$ 95,000.00

Past Loss of Income \$ 9,500.00

Future Loss of Earning Capacity \$ 57,500.00

Costs of Future Care \$ 2,500.00

Specials \$ 1,462.14

Total \$ 165,962.14

[178] The Plaintiff is also entitled to interest in accordance with the Court Order Interest Act, R.S.B.C. 1996, c. 79.

IX. Costs

[179] The Plaintiff is entitled to her costs at Scale B, subject to any offers or other matters that I have not been made aware of.

"Shergill J."

[1] Dr. Underwood MLR, at pg. 6.

[2] Dr. Underwood MLR, at pg. 7.

[3] Dr. Underwood MLR, at pg. 6.

[4] This is addressed at length in the following section.

[5] Dr. Underwood MLR, at pg. 2.

- [6] The 5% figure was not expressly articulated by Defence counsel. It is inferred based on counsel's submissions regarding the global 15% reduction sought for pre-existing conditions and failure to mitigate, and 10% sought simply for the pre-existing conditions: Defendant's Written Submissions, at paras. 93 and 118.
- [7] 4 days per week x 12 hours per day x 3 weeks = 144 hours
- [8] Applying a 25% deduction actually yields a figure of \$2,641.68 (\$3,522.24 x 25%).
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