
CANADA / JUDGMENT

Evans v. Keill

2018 BCSC 1651

COURT

Supreme Court of British Columbia

DECIDED

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2018 BCSC 1651 Evans v. Keill

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Evans v. Keill,

2018 BCSC 1651

Date: 20180925

Docket: M152181

Registry: Vancouver

Between:

Crystal Evans

Plaintiff

And

Sunni Keill and Wendy Abbott

Defendants

Before: The Honourable Madam Justice Matthews

Reasons for Judgment

Counsel for the Plaintiff:

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M. Jeftic

Place and Dates of Trial:

Vancouver, B.C.

April 16-20 and 23-27, 2018

Place and Date of Judgment:

Vancouver, B.C.

September 25, 2018

I. Introduction

- [1] The plaintiff, Crystal Evans, seeks damages for neck, upper back and psychological injuries in this claim for damages for personal injuries arising out of a motor vehicle accident. She alleges that these injuries caused severe headaches, migraines, neck pain, back pain and mental illness that permanently interfered with her ability to do physical work and required her to limit her recreational and social pursuits. She also seeks damages to compensate her for expenses relating to treatment and vocational retraining.
- [2] The defendants, Sunni Keill and Wendy Abbott, are the driver and owner, respectively, of the motor vehicle which hit Ms. Evans' motor vehicle from behind. Ms. Keill and Ms. Abbott do not dispute liability for the action or for the injuries that Ms. Evans submitted were caused by the accident. Rather, Ms. Keill and Ms. Abbott dispute the extent of the injuries and whether the injuries were solely caused by the accident or were, with regard to her mental health issues, pre-existing the accident. Ms. Keill and Ms. Abbott argue that Ms. Evans failed to mitigate her losses with regard to her work. They submit that this failure to mitigate should be taken into account in assessing her past income loss and future loss of earning capacity.

II. Issues

- [3] The issues are:
1. What injuries were caused by the accident and what is their prognosis?
 2. Did Ms. Evans fail to mitigate her losses:
 - a. by taking a buyout of her position with Canada Safeway ("Safeway");
 - b. by resigning from her position with Telus; or
 - c. by retraining to be a chef?
 3. What are Ms. Evans' likely future employment and earnings prospects?

4. Taking into account the answers to the above questions, what is the appropriate award for damages for:
 - a. non-pecuniary damages;
 - b. past income loss;
 - c. loss of future earning capacity;
 - d. loss of pension;
 - e. cost of future care;
 - f. cost of vocational retraining; and
 - g. special damages?

III. The Accident Injuries and Prognosis

- [4] The facts that I set out are my findings except where I indicate that there is a contest about the facts. In such cases I will set out the conflicting evidence and my findings.

A. Pre-Accident Background

- [5] Ms. Evans was born in Saskatoon, Saskatchewan on November 22, 1978. She grew up in Sherwood Park, Alberta. She was one course short of graduation when she left high school. She has never achieved high school graduation. She was 34 years old at the time of the accident and 39 years old at the time of trial.
- [6] After leaving high school, Ms. Evans was been consistently employed until two years after the accident. Since her early twenties, she has been employed in the banking and credit industry the retail industry, specifically for Safeway.
- [7] In 2002, Ms. Evans and her then partner, Bradley Parker, moved from Alberta to British Columbia. At that time, Ms. Evans was working for Household Finance. She transferred from their Edmonton branch to their North Delta branch.
- [8] In 2004, Ms. Evans resigned from her position with Household Finance. She applied to Safeway and was hired as a grocery clerk at the Robson Street store. She transferred to the Caulfeild Village store, and then to the Davie Street store where she worked from 2009 up to and after the time of the accident.
- [9] At the time of the accident, Ms. Evans held the position of produce manager. She belonged to the United Food and Commercial Workers Union, Local 158. Her employment wages and benefits were provided for by a collective agreement.
- [10] Ms. Evans testified that she enjoyed her work with Safeway and she did well in the positions she held up until the accident. Some of her co-workers testified to this, as did her one time supervisor, Mr. Shoring. He testified that she was one of the strongest produce managers

under his supervision and one of the few women in that role in his area. Her performance reviews were strong. In 2012, the year before the accident, her performance was rated as exceeding expectations in all categories but one. Ms. Evans was proud that she had attained a position of responsibility and good pay despite not having graduated from high school.

- [11] At the time of the accident, Ms. Evans was earning \$29.02 per hour. She worked 40 hours per week. She had four weeks of holiday per year and a benefit she described as "accumulated time off": four hours of time off for every 40 hours worked. This generally amounted to five weeks off per year in addition to her four weeks of holiday. She had a sick time allowance which was paid out to her if not used, a pension plan, extended medical benefits, and dental coverage.
- [12] As produce manager, Ms. Evans supervised between five and ten employees per shift, depending on how busy it was. A typical shift involved several hours of physical work receiving produce which could include pushing or pulling heavy pallets; stocking the produce department which could include lifting produce of up to 50 pounds; and lighter duties such as scheduling shifts and ordering produce.
- [13] In 2005, Ms. Evans and Mr. Parker were married. In 2009, they divorced. Their parting was amicable. They shared a residence for two years following their divorce and they remain friends.
- [14] Prior to the accident, Ms. Evans was physically active. She hiked two to three times per week with a friend, including the Grouse Grind and Lynn Loop. She attended yoga classes. Her job was also physically demanding and required her to lift up to 50 pounds frequently and regularly.
- [15] Prior to the accident, Ms. Evans socialized with friends with whom she hiked and with other friends and co-workers. In addition to socializing through physical and recreational activities, she liked to get together with friends informally or to go out for dinner. She drank socially. She testified that she had no problems with alcohol abuse prior to the accident.

B. The Accident

- [16] On July 18, 2013, Ms. Evans was driving home from work at the Davie Street Safeway store. She was driving north on Capilano Road in North Vancouver and took the eastbound exit to Highway 1. As she prepared to merge with highway traffic, she came to a stop behind another eastbound vehicle in traffic. She was struck from behind by Ms. Abbott's vehicle which was being driven by Ms. Keill. The force of the impact dislodged her rear-view mirror and retracted her sunroof cover.
- [17] The day after the accident, Ms. Evans had severe pain in her neck, back and trapezius muscles. She went to work but could not perform her duties due to the pain. She saw her family doctor, Dr. Love, that day. He noted significantly reduced range of motion and diagnosed soft tissue injuries to her cervical spine and trapezius muscles. He prescribed

Ibuprofen for swelling, Emtec-30 for pain, icing and physiotherapy. He directed that she be on medical leave from work given the physical demands of her position as a produce manager.

[18] Ms. Evans started physiotherapy at the end of July 2013 and attended physiotherapy thereafter to control her symptoms. The frequency has varied based on her ability to afford the therapy and her symptoms. Ms. Evans has also sought out massage therapy and chiropractic treatment at various times since the accident. She has received hundreds of such treatments.

[19] In addition to the pain in her back, neck and trapezius muscles, Ms. Evans suffered from headaches, some of which were accompanied by nausea, dizziness and vomiting, as well as pain in the backs of her eyes. These headaches would last for a few hours to a few days.

[20] Ms. Evans testified that her injuries affected her sleep because they caused her to wake in the night with pain. She often felt fatigued in the morning.

i. Affects of Accident on Safeway Work

[21] Ms. Evans was off work for six weeks. She returned to work on a gradual basis, starting with restrictions that she not lift and that she only work four hours per day. Ms. Evans did that but found that she often came home from work with pain in her neck and upper back and often had a throbbing headache. Dr. Love advised her to reduce her work to allow for days off between shifts to recover and seek treatment. Ms. Evans followed this advice.

[22] In October 2013, Ms. Evans wanted to increase her work. Dr. Love permitted her to work four hours a day, five days per week on light duties. Ms. Evans also tried some light lifting at work but she continued to experience neck pain and headaches. She discontinued lifting and went back to four hours per day, three days per week.

[23] In December 2013, Ms. Evans tried light lifting at work because it was the Christmas season and she felt pressure to work at greater capacity. She did so against Dr. Love's recommendation. She experienced neck pain and headaches.

[24] In February 2014, Ms. Evans again tried lifting with the same results. This pattern of trial and setback continued over the first half of 2014. In August 2014, ICBC provided for an occupational therapist who drafted a graduated return to work program. That program anticipated that she would lift up to 40 pounds (20% less than her job requirement of 50 pounds) and work eight hours a day, five days a week by the end of October 2014. Ms. Evans was willing to try it. She encountered problems with neck pain and headaches when lifting 30 pounds. Dr. Love reduced her lifting restriction to 20 pounds.

[25] Around this time, in September 2014, Safeway demoted her from produce manager to grocery clerk and transferred her from the Davie Street store to the Caulfeild Village store.

- [26] As a grocery clerk, her hourly wage was \$25.41, a 13% reduction from her previous hourly wage. She was no longer eligible for her annual 20% bonus. She was not entitled to the accumulated time off benefit. Her vacation time was no longer four weeks but a percentage of hours worked. She lost sick day benefits as well as her life and disability benefits. Although the grocery clerk position had exactly the same physical requirements as the produce manager position, there was not enough work for her in the produce department within her restrictions and the situation was increasing the workload for other staff.
- [27] Mr. Hogeweide, the manager of the Caulfeild store, gave evidence that enough work could be found for her in the grocery department. He said they did provide her with work that was lighter. Ms. Evans disputes this. She testified that when she was working in an area and light duties had been exhausted, she was required to do whatever work was needed regardless of whether it was within her restrictions. On some days she was lifting or moving crates of soft drinks. On some days she was assigned to work in the dairy section, one of the most physically demanding positions in the store. She was scheduled to work the night shift which involves constant lifting and re-stocking shelves. She did not complain because she wanted to get her produce manager job back, and to do so she had to prove she could do the physical job requirements of the grocery clerk job which were the same as those of produce manager.
- [28] Mr. Cristofferson, a co-worker, testified that Ms. Evans was scheduled to work in the dairy from time to time. He was aware of this because he worked in the dairy and he was particular about how the work was done so he made it his business to know who was scheduled there. Mr. Hogeweide did not schedule Ms. Evans work so his knowledge of where she was working was restricted to what he noticed when they were on shift together. I accept Ms. Evans' evidence about the nature of work she did as a grocery clerk.
- [29] Ms. Evans grieved the demotion. However, her union representative advised her that after discussions with Safeway, the union viewed the accommodation as reasonable until such time as she could work the produce manager position without restrictions. This evidence came from Ms. Evans and is hearsay. I accept this evidence as being what she was told. The facts show that the union did not pursue the grievance.
- [30] On November 30, 2014, Ms. Evans' life insurance and disability insurance benefits were cancelled because she had not maintained an average of 32 hours of work per week.
- [31] In early December 2014, Ms. Evans received Botox injections for her neck pain and headaches on the recommendation of Dr. Love. She paid for the treatments privately in order to expedite them. The first set of injections was successful and enabled her to work a good part of the very busy Christmas grocery season without exacerbating her neck pain and headaches. She had a second set of injections in January 2015 which did not provide any relief and her headaches returned. Dr. Love recommended that she decrease her work to six hours every second day.

- [32] At this time, Dr. Love was of the opinion that Ms. Evans was going to have to change her work because despite several attempts to increase her lifting capabilities and her working hours, she was still suffering from pain and headaches affecting her ability to work. He recommended that she consider a change in employment to a less physically demanding job.
- [33] In March 2015, Ms. Evans was in a conundrum. The position to which she had been demoted, grocery clerk, required the same physical abilities as the produce manager position, except that as a produce manager, she was able to delegate heavy lifting and was therefore better able to manage her symptoms. Safeway would not permit her to return to her produce manager position until she was cleared to work it without restrictions. Her union told her that it would not proceed with her grievance until she was able to work the position. She was highly stressed financially.
- [34] Ms. Evans went to Dr. Love and persuaded him that if she was medically cleared to return to full duties, and was able to get back to the produce manager job where she could delegate heavy lifting, she would be better off both physically and emotionally. Dr. Love reluctantly acceded to her request to remove the restrictions on lifting and hours of work. Ms. Evans advised the Safeway rehabilitation specialist who was overseeing her return to work program that "I explained to my doctor that if I can lift the restrictions I may be able to get back my position, less lifting, so we decided to lift the restrictions. I'm hoping and excited to get back as a produce manager." Safeway did not accept this approach. Safeway Human Resources Director Dave Robertson told Ms. Evans that until she could work full time hours consistently, Safeway would not consider other work for her.
- [35] Ms. Evans increased her work schedule from 32 hours to 40 hours per week. She testified that her neck ached and her headaches worsened. She was resigned to not being able to work without pain and not being able to work as a produce manager. Ms. Evans testified that she was afraid she would be fired. The evidence of Safeway personnel who testified was that there were no plans to fire her and no one had threatened to fire her. I find that she was not in danger of being fired.
- [36] Meanwhile, Ms. Evans' long-term disability benefits, which paid 60% of the difference between her full time produce manager wage and her part time grocery clerk wage, were set to run out at the end of June 2015.
- [37] In June 2015, Safeway offered a voluntary severance package to long-term employees who held certain positions, including grocery clerks, as part of a downsizing program. It was not available to produce managers. The severance payout was \$60,000. Ms. Evans accepted it and decided to retrain for another occupation. The package required her to work full time until September 5, 2015, but she was not required to do any duties that caused her discomfort. She met this criteria. At this time, she also started taking a course in wine appreciation as she was interested in working in the wine industry.

[38] In July 2015, Dr. Love referred Ms. Evans to a specialist in rheumatology to consider trigger point injections and possibly Botox injections. Ms. Evans saw Dr. Badii for trigger point injections in 2016.

ii. Social, Recreational and Mental Health

[39] After the accident, Ms. Evans stopped socializing and stayed at home to try to recuperate from her pain, headaches and fatigue from not sleeping.

[40] Friends and co-workers testified that Ms. Evans stopped going out completely for a period of time after the accident. Then, several months after the accident, she began to make arrangements to go out but would often cancel them and explain that she had a headache.

[41] One of these witnesses was Mr. Parker, Ms. Evans' ex-husband. He testified that he saw her less frequently following the accident. He attributes this to the headaches she told him that she was suffering from. He said that when he did see her she appeared to be uncomfortable and unhappy.

[42] Ms. Evans was not physically active due to the accident until the spring of 2014. Due to her inactivity, she gained 30 pounds. This caused her to feel depressed and lowered her self-esteem. Friends who had previously hiked with Ms. Evans testified that she did not hike with them for the balance of 2013.

[43] In addition, she began drinking heavily. She would often consume two bottles of wine in the evening which contributed to her feelings of depression. Mr. Parker testified that prior to the accident Ms. Evans was a social drinker who would consume four or five drinks in an evening. He described her drinking after the accident as out of control.

[44] In the spring of 2014, Ms. Evans was dating someone. At this time, she said her mood was poor. She was drinking heavily. The individual whom she was dating broke off the relationship. Ms. Evans testified that after that time her drinking "took over".

[45] On an evening in May 2014, Ms. Evans was at home and drinking alone. She took a handful of sleeping pills that had been prescribed to her and drank approximately two bottles of wine. She testified that when she swallowed the pills, her wish was to go to sleep and not wake up. She sent a message to a friend about what she was feeling. Her friend contacted the individual Ms. Evans had been dating. He came to Ms. Evans' apartment and stayed with her until she revived. Ms. Evans did not seek medical attention following that episode or report it to her family doctor because she was embarrassed and ashamed of what she had done. Ms. Evans testified that prior to this episode, she had never become depressed or sought to harm herself following the loss of a relationship, including at the time of her divorce in 2009. Ms. Evans testified that two years prior to the accident she had sought counselling due to issues she had with a relationship but she was not depressed at that time.

- [46] After the May 2014 incident, Ms. Evans took steps to improve her mental health. She attended a ten day meditation retreat and tried to learn techniques to relax. She found this beneficial. After the retreat, Ms. Evans slowly began trying to resume her recreational activities. She began to take yoga classes again but found that many of the poses aggravated her neck symptoms and caused headaches. She also attempted to start hiking again.
- [47] In 2014, she hiked the Stawamus Chief (the "Chief") with some friends. She was badly affected by pain in her neck and shoulders. She switched her backpack for a friend's waist pack, and continued the hike to the top. Ms. Evans testified that the steep downward portion was painful because she had to keep her neck angled to look down at her footing. One of her hiking friends testified that it was apparent that she was in pain especially hiking down the Chief. Another friend testified that Ms. Evans was faster going up than she was because she was in better shape.
- [48] She testified that she attempted to continue to resume hiking by doing occasional short and easy hikes on level terrain. She also purchased her own waist pack to use instead of a backpack.
- [49] The Safeway demotion further exacerbated her feelings of low self-worth and depression especially since it involved a transfer back to the Caulfeild store as a grocery clerk alongside people she had formally supervised when she was a produce manager. After the meeting during which she learned of her demotion, Ms. Evans said she went home, cried and drank. She was sad and depressed about having lost a job that she loved. She was worried about her finances. Ms. Evans had to move out of her one-bedroom apartment into a less expensive studio apartment. She caused herself to be socially isolated and continued to drink heavily.

iii. Post Safeway Buyout

- [50] After leaving Safeway in September 2015, Ms. Evans took a six-week holiday to recover from what she considered to have been a hard two years of rehabilitation and setbacks at work. She used her buyout money to finance that holiday, reduce her debt, and provide for retraining and job search costs.
- [51] When she returned from her holiday, she began working with a career counsellor to put together a curriculum vitae and to look for work. She made numerous job applications. In February 2016, she took a part-time job with Telus as a telephone customer service operator. The training was full-time and took place over several months.
- [52] In March 2016, Dr. Badii tried trigger point injections in her shoulder and upper back to address her pain and headaches. She had minimal lasting benefit from those injections and Dr. Badii did not recommend them further.
- [53] In June 2016, Ms. Evans completed her training with Telus and began working in the call centre. She was assigned more shifts than she anticipated. She found the work demanding and the breaks were not frequent enough to allow her to stretch. She was required her to sit or stand at a desk and wear a headset. During phone calls, she used a keyboard to take notes.

She was not a proficient typist and had to flex her neck forward when typing to see the keyboard. There were no substantial opportunities to stretch or move around as the employees were only permitted a 30-second break between calls. She tried to alternate sitting and standing with no significant relief. Her neck pain, back pain and headaches were aggravated.

- [54] A co-worker testified that he worked near Ms. Evans and observed that she was in pain. Ms. Evans told him she had neck pain and headaches. In 2016, Ms. Evans tried hike the Chief again with this same Telus co-worker who had become a friend. She testified that despite wearing a waist pack, she had pain in her neck and back as well as a headache and was unable to carry on. She had to turn around and return to the bottom of the mountain shortly after the hike began. The rest of the group carried on and met her at the bottom afterward.
- [55] In July 2016, Dr. Love concluded that Ms. Evans was depressed based on her reporting to him that she was crying at home, had a decreased appetite, was having pain at work, and a four month relationship had broken up. He prescribed an anti-depressant, duloxetine, and suggested she see a psychologist for counselling. Ms. Evans saw a psychologist but did not find that session helpful.
- [56] In August 2016, Ms. Evans consumed a couple bottles of wine and took a number of pills. Once again she hoped to go to sleep and not wake up. Her ex-boyfriend took her to the hospital. The hospital referred her to the North Vancouver HOpe Centre, a mental health treatment centre, but Ms. Evans did not receive follow-up communication from the HOpe Centre despite seeking it out. She continued to see Dr. Love who refilled her prescription for duloxetine. Over the next few months her prescription was switched to venlafaxine as Ms. Evans was experiencing nausea from duloxetine. Ms. Evans reported to Dr. Nader, a psychologist she saw on two occasions, that she felt the medication helped to improve her mood and to reduce her overall level of negative emotions.
- [57] In the fall of 2016, Ms. Evans was still working for Telus, recovering from her suicide attempt, and living in North Vancouver. She met Greg Montgomery, and over the course of a few months, their friendship evolved into a romantic relationship. At the time, Ms. Evans was drinking heavily. Mr. Montgomery testified that when he met her she was drinking approximately a case of wine per week and her mood was depressed. He also noted that strenuous activity such as lifting, sitting or standing would trigger a headache for Ms. Evans for which she would lie down in a dark room and take pain medication.
- [58] In September 2016, Mr. Montgomery moved to California to take advantage of a job opportunity. Ms. Evans moved into his vacant apartment. Despite having hired movers for her belongings, Mr. Montgomery observed Ms. Evans carrying some small bags and boxes herself. He testified that this effort knocked her out for a few days with neck pain and headaches.

- [59] Ms. Evans and Mr. Montgomery maintained a long-distance romantic relationship and saw each other whenever Mr. Montgomery had occasion to return to North Vancouver from California.
- [60] In the summer and fall of 2016, Ms. Evans missed work frequently due to her pain and headaches. This prompted a talk from her manager at Telus. Ms. Evans explained that she had taken the job expecting it to be part-time but that she was working full-time hours. Her manager told her that she would look into putting her on a schedule of working evenings and weekends that would reduce her hours. Ms. Evans did not hear anything back from her manager on this issue. Ms. Evans wanted to transfer to another department but understood that Telus would not permit that to happen without her manager's consent, and given the extensive training that Ms. Evans had received, it would not be well-received for her to ask for a transfer until she had worked in the position for which she been trained for at least two years. After the meeting with her manager, and no response on her request to work part-time, Ms. Evans began to worry that she would be fired due to her frequent absences. In December 2016, she resigned from Telus.
- [61] In January 2017, Ms. Evans visited Mr. Montgomery in California. Ms. Evans had taken courses through the Wine & Spirit Education Trust ("WSET") in order to pursue work in the wine industry as a sommelier agent. During this visit to California, Ms. Evans developed an interest in working in the produce industry, and decided to combine her education in wines and spirits with becoming a chef.
- [62] Ms. Evans enrolled in a culinary institute specializing in raw vegan cuisine, which she testified was a niche area with a growing customer base in California. She had looked at other cooking schools and most required a year of full-time culinary studies. The school in which she enrolled permitted her to take several separate one-month courses to complete the course as a whole. She considered this to be more appropriate given her uncertainty around her physical limitations and culinary training. Unfortunately, she had an accident with a knife during the first level of the course. She had to postpone completion of the course.
- [63] In the meantime, Ms. Evans and Mr. Montgomery married. Ms. Evans then completed the first and second levels of the culinary course. She started the next level of course work but found it to be more physically demanding as it required a lot of standing time in the kitchen and postures with neck angulation that triggered pain and headaches. At the time of trial, Ms. Evans was working with a physiotherapist to strengthen her muscles with the aim of rejoining the course in June 2018.
- [64] Once she completes the full set of raw cuisine courses she plans to enroll in a more traditional culinary program which will involve a six-month culinary arts diploma and then follow that with a six-month baking and pastry arts diploma. Ms. Evans does not believe that restaurant cooking is feasible for her because it is physically demanding and requires significant lifting. However, she hopes that training as a chef will permit her to seek

employment within her physical limitations such as being a private chef, running a catering company or teaching.

- [65] With the support of Mr. Montgomery, Ms. Evans has limited her alcohol intake to occasional glasses of wine when socializing. She testified that her mood is improved and her depression has gone into remission. She has given up hiking as she finds it places too much strain on her neck. She walks her dog on flat terrain for exercise. She attends physiotherapy and is undertaking strength training to try to improve her stamina.

C. Ms. Evans' Credibility

- [66] Before I address the expert evidence tendered by the parties, I will address the defence's argument that I must take into account that much of the evidence about Ms. Evans' injuries and the impact they have had on her comes from Ms. Evans herself.
- [67] There must be convincing evidence led by the plaintiff. It can be the plaintiff's own evidence, so long as the court is careful to scrutinize the evidence when there is no objective evidence available. As stated in *Butler v. Blaylock*, [1983] B.C.J. 1490 (C.A.) at para. 13:
- [13] It is not the law that if a plaintiff cannot show objective evidence of continuing injury that he cannot recover. If the pain suffered by the plaintiff is real and continuing and resulted from the injuries suffered in the accident, the plaintiff is entitled to recover damages
- [68] In assessing credibility, I follow the approach described by Dillon J. in *Bradshaw v. Jenner*, 2010 BCSC 1398 at para. 186, *aff'd* 2012 BCCA 296:

Credibility involves an assessment of the trustworthiness of a witness' testimony based on the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis*, [1926] 31 O.W.N. 202 (Ont. H.C.); *Faryna v. Chorny*, [1952] 2 D.L.R. 152 (B.C.C.A.) [Faryna]; *R v. S.(R.D.)*, [1997] 3 S.C.R. 484 at para. 128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (*Faryna* at para. 356).

- [69] The defence argues that the nature of Ms. Evans' injuries must be assessed taking into account that there is no objective evidence of them, only Ms. Evans' subjective reporting. Aside from the fact that the law does not preclude recovery in such circumstances, I do not accept this argument on the facts of this case. There is evidence of several doctors as well as lay witnesses that is objective in nature.

- [70] For example, Dr. Waseem, a physiatrist seen by Ms. Evans, testified that he identified trigger points in her left paraspinal muscle which caused pain in her upper back upon palpation. He also observed spasms on both sides of the base of her neck and in her trapezius muscles in the region of her neck. The evidence includes co-workers and friends who saw signs of apparent pain in Ms. Evans and testified that she cancelled plans with them and withdrew socially.
- [71] In addition, Ms. Evans' evidence is acceptable on a credibility analysis following the approach and factors outlined in Bradshaw. Ms. Evans' actions corroborate her evidence of her injuries. She is a hardworking individual who attempted, for two years, to recover from her injuries and get back to the work she loved to do. She invested financially in the costs of treatment such that she fell into debt. She has missed days of work and she was demoted, losing a position that superior in terms of its financial compensation and the fulfillment she derived from it. She did not present as a person attempting to exaggerate her problems for financial gain. In the almost five years between the accident and this trial, she has behaved like a person trying to regain and then rebuild her life.
- [72] I find there to be corroborating evidence that Ms. Evans' pain and headaches were severe enough to cause her to not be able to work, socialize and engage in recreational activities as she reports. The sacrifices she endured to her financial well-being and her lifestyle are such that I find she has not exaggerated her symptoms. Her account of her injuries and the affects they have had on her makes sense and I accept it.

D. Expert Medical Evidence

- [73] Ms. Evans tendered the reports of the following medical experts: Dr. Love, her family physician (reports dated July 10, 2015 and July 28 2015), Dr. Heran, a neurosurgeon (report dated July 3, 2015); Dr. Waseem, a physiatrist (report dated August 13, 2015); Dr. Badii, a rheumatologist (reported dated July 28, 2017); and Dr. Nader, a psychologist (reports dated October 5, 2015 and June 26, 2017).
- [74] Ms. Evans underwent independent medical examinations at the request of the defendants. The defendants did not tender any reports.
- [75] The medical evidence is cohesive and not challenged on the following points:
- a) Ms. Evans has soft tissue injuries to her neck, shoulder and upper back. The injuries have led to chronic myofascial pain which affects the muscles and muscle lining in the area of her neck, shoulders and upper back;
 - b) Ms. Evans initially had pain in her low and mid-back as well but that has completely resolved;
 - c) her myofascial pain has resolved somewhat, but it is chronic; and

- d) she has had cervicogenic headaches (headaches originating in the muscles around the neck) as well as migraine headaches featuring severe pain, sensitivity to light, nausea and vomiting. The migraine headaches became less frequent over time.

[76] The defendant takes issues with the medical evidence in the following regards:

- a) the extent of improvement Ms. Evans had in the first two years following the accident and whether she will continue to improve;
- b) whether Ms. Evans' facet joints are affected and part of her ongoing pain, and if so, whether all treatment options have been exhausted;
- c) whether Ms. Evans should have passive rehabilitation as well as active rehabilitation or only active rehabilitation; and
- d) whether Ms. Evans' psychological issues were due to relationship problems or the accident and whether the events described as suicide attempts were in fact suicide attempts, in particular the first event.

i. The Extent of Ms. Evans' Improvement

[77] The debates about Ms. Evans' improvement are two fold. First, there is debate about whether she, by 2015, had daily neck and upper back pain and headaches, or whether she has some headache-free and/or pain-free days and was significantly improved by the summer of 2015. Second, there is a debate as to whether she may still improve.

[78] Dr. Love contends that Ms. Evans is never headache free and pain-free and she has not had significant improvement. The defendants criticize Dr. Love as an advocate for Ms. Evans and argue that I should not rely on his evidence for much, if anything. Dr. Love knew Ms. Evans prior to the accident and saw her on a regular basis throughout her recovery. He provided two medical-legal reports, chronicling her visits, his advice and her progress. He testified at trial. In many respects, his opinions are similar to those given by the other medical experts. At times he reported that she was pain-free upon examination and at other times he reported marked pain. He testified about his involvement in her return to work attempts over the course of two years. At some junctures, he was reluctant to approve certain aspects of Ms. Evans' return to work plan but he supported Ms. Evans who wanted to keep her job and regain her position as a produce manager after she was demoted.

[79] There are parts of Dr. Love's evidence which appear to be overstatements of Ms. Evans' pain status. When questioned on this in cross-examination, he became unreasonably insistent despite internal contradictions in his reports and contradictions with Ms. Evans' evidence. I accept that Dr. Love's objectivity has been impacted because of the position he has been trying to mediate between Ms. Evans' physical symptoms, which were exacerbated by lifting and working full-time hours, and her emotional state, which was impacted by feelings of depression around the loss of the work she loved as well as the financial stress of her demotion and reduced work hours. He became her advocate in her rehabilitation. He

presented that way at trial on some issues.

- [80] There are certain elements of his evidence, mostly matters of degree, which I do not accept because they are in conflict with the other evidence that Ms. Evans put forward - including her own evidence.
- [81] An example is the evidence pertaining to the extent of her recovery, and in particular, whether she experienced about a 60% recovery by the summer of 2015 and whether she had pain-free days.
- [82] In July 2015, Ms. Evans saw Dr. Heran, a neurosurgeon, for an independent medical examination. Dr. Heran reported that at that time Ms. Evans reported that her accident symptoms had improved and she thought she was getting better over time. She said the pain had improved from being in her neck, trapezius, shoulders and arms to being really only in her neck and extending into the proximal trapezii. At that time she reported that she still got headaches. She reported that she was never pain-free but from time to time she was headache-free. She reported that the headaches typically occurred once or twice per week. Ms. Evans confirmed that this was her status at that time.
- [83] Ms. Evans also saw Dr. Waseem, a physiatrist, for an independent medical examination on July 28, 2015. Dr. Waseem reported that Ms. Evans told him that she had improved by about 60% and then plateaued. At that time, Ms. Evans reported to Dr. Waseem that her neck pain and her trapezius pain was present one half to three quarters of the time and her headaches occurred less than one quarter of the time. Ms. Evans testified that initially she had debilitating headaches five out of seven days per week. At the time she saw Dr. Waseem, she was having them less than one quarter of the time. She told Dr. Heran that she was having them one or two days per week. That is a reduction that corresponds well to a 60% improvement. This type of improvement was echoed with regard to neck and trapezius pain and Dr. Love's reports on her headache frequency.
- [84] Dr. Love also reported that in June 2017 Ms. Evans had a sore neck all day, every day and her trapezius muscles were sore all day every day. I note Dr. Heran reported in July 2015 that she was never pain-free from the neck and trapezius pain. If these statements are taken to represent her status during the whole of her recovery, they are contradicted by other statements in Dr. Love's reports and Ms. Evans' evidence at trial. She confirmed on cross-examination that when on holiday, for example, she had a pain-free week. She also agreed that when she was not doing something strenuous, she would not experience pain. I do not accept Dr. Love's insistence that Ms. Evans has had pain every day since the accident.
- [85] With regard to ongoing improvement, Ms. Keill and Ms. Abbott rely mainly on Dr. Heran's opinion that her soft tissue areas of pain would likely continue to improve. He felt that she should continue to further manage the pain with the treatment she was already using but she should also be re-integrating back into all aspects of her life including trying to lift and do activities at work. With regard to her headaches, he felt that the trigger point injections might be helpful. He also said there was room for consideration for management of the

facet joints and for Botox injections. With respect to medications, he noted that in her condition there was a role for "neuromodulating medications". He thought she was borderline for implementing those at that time as she was able to tolerate her symptoms and manage her affairs by adjusting her activities. He felt that those medications should be considered if her symptoms were to worsen.

- [86] Dr. Waseem opined that her current symptoms were chronic myofascial pain syndrome involving the cervical spine as well as chronic post-traumatic headaches with mixed migraine and cervicogenic features. He noted that her conditions and symptoms have been "refractory" which means not resolved by spontaneous recovery, conservative therapy, or Botox injections, all of which had been tried before he saw her. He opined that the conditions were permanent in nature and her prognosis for full symptom recovery was guarded.
- [87] Dr. Badii opined that Ms. Evans has had her maximum medical improvement and now has chronic pain; she will always have a level of pain similar to her current level in her neck and shoulders; and she will continue to have cervicogenic headaches. He opined that her symptoms will be aggravated by strenuous physical activity and/or prolonged sitting. His view is that she should be able to work full time in a line of work that does not require prolonged sitting, keeping the neck in one position, or any significant degree of heavy lifting. He opined that Ms. Evans' pain is chronic and she needs to manage by adjusting her lifestyle accordingly. He reported that she has lower pain days, but she is rarely pain free.
- [88] Ms. Evans' physical symptoms have neither improved nor worsened since she saw Dr. Heran. It has been almost three years since he saw her. She had already tried Botox injections, and she subsequently tried trigger point injections without success. Dr. Badii did not think there was an indication that deeper facet joint injections (blocks) were warranted given the risks and the chances of only temporary relief. Dr. Badii treated her and I accept his opinion in this regard.
- [89] Dr. Love opined in July 2017 that after four years it was unlikely that she would improve and that she would have pain in her neck, in her trapezius muscles and cervicogenic headaches indefinitely.
- [90] I conclude that Ms. Evans' symptoms have improved. Fortunately, her headaches have reduced from most days of the week to between one and three days per week, depending on her activity. She has pain in her neck and upper back more than half the time. While this is an improvement from the first few months after the accident, it is chronic and regular, if not constant. The evidence was also clear that Ms. Evans experiences exacerbation of the pain and the onset of headaches when lifting, working with her arms over her head, or working with her neck flexed forward. I accept that Ms. Evans has some pain-free days and has headaches weekly but not daily. She reached that level of improvement by mid-2015. Her condition has not changed significantly since then and is not likely to.

ii. Facet Joint Injuries

- [91] Ms. Evans argues that Ms. Evans' ongoing pain stems at least in part from facet joint injuries. The expert evidence was inconsistent on whether or not Ms. Evans' ongoing pain stems primarily from soft tissue injuries, her facet joints, or both.
- [92] The evidence of Dr. Heran was that the difference between the two types of injuries is that soft tissue injuries settle down after they are aggravated, but facet joint injuries do not. He also opined that facet joint injuries can get worse over time. While this issue is important to the issue of whether her condition might deteriorate, it does not affect whether she can expect improvement. All the opinions are that she cannot work in occupations which keeping the neck fixed in one position, or any significant degree of heavy lifting and strenuous physical activities; she is only suited to strength activities of up to 10 pounds which essentially limits her to sedentary-light occupations; and she should avoid prolonged and sustained neck postures and repetitive cervical extensions and shoulder checks. These opinions are based on the nature of her pain, not the source of it.
- [93] Dr. Heran opined that Ms. Evans' pain was arising from both soft tissues and facet joints because the source of her pain on the left side appeared to be within the region of the facet joint complex. He recommended targeting her facet joint at the C4-5 level with injections with local anaesthetic and steroids for diagnostic purposes. He also felt she would benefit from facet joint blocks. He said, however, that where there is substantial overlap between the sources of pain, it can be impossible to tell even with injections.
- [94] Dr. Waseem diagnosed chronic myofascial pain and recommended cervical facet joint blocks to address Ms. Evans' cervicogenic headaches. In his testimony he explained that "blocking the joint" or "the nerve" can help treat headaches. He did not opine that her pain or headaches had a "structural" component as did Dr. Heran.
- [95] Dr. Badii treated Ms. Evans with injections. Dr. Badii tried trigger point injections in her neck with local anaesthetic and a corticosteroid. These are more superficial injections which Dr. Heran described as being for the soft tissue injuries and which, if offering relief, would assist in diagnosing a significant soft tissue injury component. Ms. Evans had minimal lasting benefit from those injections and Dr. Badii did not recommend them further. Dr. Badii stated in his report and on the stand that he thinks soft tissue injuries are the main source of Ms. Evans' pain.
- [96] Dr. Badii testified that based on the fact that neither Botox injections nor trigger point injections offered lasting or repetitive relief, he did not see a further basis for attempting other treatment modalities such as facet joint blocks or deeper injections. He considered them, but did not recommend them because he felt that her baseline pain, i.e. when her neck and back were not aggravated, was manageable for her. Facet joint block injections are deeper injections and carry with them risks of damaging blood vessels or nerves. The treatment does not provide permanent relief. At best it offers three to six months of relief.

[97] Ms. Keill and Ms. Abbott argue that Dr. Badii's evidence should be interpreted to mean that Ms. Evans' facet joints were not affected. I agree. Dr. Badii's evidence, in his report and in oral evidence, was that he thinks her pain is mainly soft tissue related. While he did not definitively rule out the facet joints as a source of her pain, he also did not offer the opinion that they are a source of the pain or even mention them in his report. Dr. Badii treated Ms. Evans on four occasions. He was able to see her reaction to the trigger point injections.

[98] In his second report, Dr. Love referred to Dr. Heran's opinion of left facet joint mediated pain and the potential for degenerative changes. Despite having seen that opinion, he offers the same opinion he had previously: that her pain arises from soft tissue injuries.

[99] In my view, Ms. Evans has not proven facet joint involvement on a balance of probabilities.

iii. Recommended Course of Rehabilitation

[100] Ms. Keill and Ms. Abbott argue that the medical evidence was that passive rehabilitation (physiotherapy, massage therapy, chiropractic treatment) will not have long-lasting benefits and are not reasonable expenses.

[101] This argument is mostly based on the opinion evidence of Dr. Heran. He recommended Ms. Evans continue with active rehabilitation but did not think that passive modality treatments would be of value for long-term injury and pain management. However, he also opined that the passive modality treatments have been reasonable in the past and if they provided substantial benefit lasting from several to many days, they could still be considered.

[102] Dr. Waseem and Dr. Love support the use of passive modalities such as physiotherapy and massage therapy to manage symptom exacerbation on an as required basis. Dr. Badii opined that 12 to 24 physiotherapy sessions a year for symptom control would be reasonable.

[103] Ms. Evans has been attending passive therapy sessions including physiotherapy, massage therapy and chiropractic treatment since shortly after the accident as her finances have permitted. Within about two months of the accident, she began active rehabilitation. At present, Ms. Evans is using both active and passive modalities with a focus on strength-training to build up her endurance.

[104] She had been prepared to invest in these therapies with her own funds, causing her considerable financial distress, because they offer relief.

[105] I conclude that the weight of the opinion is that active rehabilitation should be Ms. Evans' focus, but that it is reasonable for her to use passive treatments to manage her symptomatology and that she is likely to require such symptom management on an ongoing basis.

iv. Psychological Injuries

- [106] The defence argues that Ms. Evans' suicide attempts coincided with her relationship breakdowns and those relationship breakdowns were the main causes of her major depressive episodes and suicide attempts.
- [107] In a personal injury case, the plaintiff must establish on a balance of probabilities that the defendant's negligence caused or material contributed to an injury. There must be a substantial connection between the injury and the defendant's conduct. The primary test for causation is the "but for" test: but for the defendant's negligence, would the plaintiff have suffered the injury?: *Resurface Corp. v. Hanke*, 2007 SCC 7 at paras. 21-23.
- [108] However, the defendant's negligence need not be the sole cause of the injury so long as it is part of the cause beyond the range of de minimus: *Athey Leonati*, [1996] 3 S.C.R. 458 at paras. 13-17; *Farrant v. Laktin*, 2011 BCCA 336 at para. 9.
- [109] Where there are both tortious and non-tortious causes of injury, the defendant is liable so long as the defendant's conduct is a cause of the plaintiff's injury. The plaintiff must establish such causation on a balance of probabilities before damages are assessed: *Blackwater v. Plint*, 2005 SCC 58 at para. 78.
- [110] As described above, after the accident Ms. Evans did not see friends as often as she previously did. She cancelled plans. She drank heavily. On two occasions she took pills after drinking large amounts of wine and hoped to go to sleep and not wake up. She was prescribed two different types of antidepressants. The second prescription helped her and in late 2016, with a combination of medication and other changes in her life, her mood improved. She drinks less and feels better.
- [111] With regard to her emotional distress and psychological condition, Ms. Evans tendered the medical evidence of an independent psychologist, Dr. Nader. In his November 2015 report, Dr. Nader opined that Ms. Evans met the diagnostic criteria for mild somatic symptom disorder, major depressive disorder in partial remission, and social anxiety disorder.
- [112] Dr. Nader opined that Ms. Evans' somatic symptom disorder was precipitated by her physical injuries and complaints following the accident. Somatic symptom disorder caused Ms. Evans to catastrophize and ruminate on the impact of her pain which was likely maintaining her distress about it. With regard to depression, Dr. Nader noted that she had not experienced significant depression symptoms prior to the accident. Dr. Nader opined that her psychological symptoms were most significant in the year following the accident and that in October 2015 she no longer met the diagnostic criteria for major depressive disorder but had ongoing residual symptoms of depression. Her prognosis was cautiously optimistic. Having seen her after she had taken the buyout from Safeway, he raised concerns about her then current transition with regards to her work: he felt that if she had difficulty finding meaningful work in the next six to twelve months then she would be at a relatively high risk for relapse of her depressive symptoms and would benefit from psychological treatment. Dr. Nader also opined that her 2014 major depressive episode meant that she had a greater than 50% chance of experiencing another major depression

and that psychological treatment may benefit to assist with her current symptoms and prevent future episodes of depression.

- [113] Ms. Evans saw Dr. Nader for a second time in June 2017. He opined that at that time, Ms. Evans no longer met the diagnostic criteria for somatic symptom disorder or major depressive disorder. He opined that Ms. Evans was more accepting of her pain and not as bothered by it. Her attention had shifted to how to function effectively within her physical limitations. He opined that she had suffered a second depressive episode in the summer of 2016 leading up to the second suicide attempt. Dr. Nader opined that her depression in the summer of 2016 was related to the fact that she had been optimistic and hopeful about starting her new job at Telus - in particular that it would help her get back on her feet financially - but that within a few months of starting the job she realized she would not be able to function at the job long-term and started having increasing headaches and worsening pain. This led to stress and caused her to question what she would be able to do for work in the future. This concern about her future, the stress of the job itself, and the relationship problems she had contributed to the worsening of her mood. Her previous major depressive episode increased her risk of this second depressive episode. Dr. Nader opined that her treatment with Effexor had gone well and she was not experiencing any significant depressive symptomology at the time of the examination and had not since September 2016.
- [114] Dr. Nader opined that her prognosis was cautiously optimistic. He opined that she should consider psychological treatment in the future should she notice a recurrence of depressive symptoms. However, he did not feel that she needed psychological treatment at that time.
- [115] In my view, the submission of the defendants that relationship break-ups were the cause of Ms. Evans' suicide attempts parses the evidence too thinly and ignores other evidence. Ms. Evans' evidence, as supported by evidence of friends and co-workers, was that was depressed after the accident. She was moody and irritable. She withdrew socially. Her evidence was that she was drinking heavily which had not been a problem for Ms. Evans prior to the accident. Prior to the accident she had endured a marital breakdown without a depressive episode.
- [116] I accept that the relationship breakdowns that immediately preceded her two post-accident suicide attempts played a role in her depression and suicide attempts. But I also accept that she became depressed as a result of her accident injuries, her loss of self-esteem due to not being able to do a job she had previously been very good at and derived a lot of self-worth from, her inability to engage in strenuous and challenging physical activity, her associated weight gain; and her inability to become and remain pain-free and headache-free.
- [117] I find that the accident was meets the but for causation test with regard to Ms. Evans' somatic symptom disorder, which caused her to dwell on and catastrophize her symptoms, her depression and her suicide attempts.

IV. Failure to Mitigate

[118] Ms. Keill and Ms. Abbott argue that Ms. Evans failed to mitigate her past wage loss damages in the following ways:

- a) taking a buyout from Safeway;
- b) limiting her post-Safeway job search;
- c) resigning from her position with Telus; and
- d) choosing to retrain as an executive chef by taking vegan culinary courses.

[119] In the result, they submit that past income loss should be limited to the losses up to when Ms. Evans left Telus and her loss of earning capacity damages should be reduced by 30% after reduction for negative contingencies.

A. Legal Principles

[120] A plaintiff in a personal injury action has a positive duty to mitigate, including actively pursuing job opportunities. A failure to mitigate loss of income can be found on the basis of a lack of diligent efforts to find alternative employment: *Graham v. Rogers*, 2001 BCCA 432 at para. 82, leave to appeal dismissed, [2001] S.C.C.A. No. 467. The plaintiff is obliged to take reasonable steps to find employment at a level he or she reasonably could have been expected to achieve in light of the injuries suffered as a result of the accident: *Midgley v. Nguyen*, 2013 BCSC 693 at para. 282.

[121] The defendant bears the burden of establishing on a balance of probabilities: (1) that there were steps the plaintiff could have taken to mitigate; (2) that those steps were reasonable; and (3) the extent, if any, to which the loss would have been avoided by taking those steps: *Wright v. Mistry*, 2017 BCSC 239 at para. 103, citing *Lemieux v. Evers*, 2000 BCSC 1464 at para. 64. If the defendant establishes, on a balance of probabilities, that the plaintiff acted unreasonably, the determination as to the amount the plaintiff's damages would have been reduced as a result of him or her acting reasonably may involve hypothetical or future possibilities which the court will weigh according to the relative likelihood, where the possibility is real and substantial: *Gill v. Lai*, 2018 BCSC 101 at para. 73. In *Power v. Carswell*, 2011 BCSC 1672 at para. 220, the Court described the defendant's burden as heavy.

[122] With regard to the first two steps, while the analysis is focussed on whether the plaintiff's actions have been reasonable, the analysis is not purely objective. The court should take into account the subjective knowledge of the plaintiff regarding the proposed alternative employment: *Gallina v. Honda Canada Finance Inc.*, 2014 BCSC 974 at para. 129. If the injuries the plaintiff has suffered, for example psychological injuries or a brain injury, are at the root of the alleged unreasonable behaviour, it will be inappropriate to make a deduction for failure to mitigate: *Mullens v. Toor*, 2016 BCSC 1645 at para. 123, *aff'd* 2017 BCCA 384, and *Litt v. Guo*, 2015 BCSC 2207 at paras. 415-16.

- [123] A plaintiff is not being reasonable in circumstances where he or she is not able to undertake pre-accident employment and insists on pursuing a line of work which he or she likes but which is not reasonable because it does not offer good employment opportunities, will require lengthy retraining compared to an alternative option, or does not provide comparable income as an available reasonable alternative would: see, for example, Mullens at paras. 112-14.
- [124] Where the plaintiff does not take reasonable steps by pursuing employment that is not suitable, the trial judge, in assessing future loss of earning capacity, may take into account the earnings that would have been attained at reasonable employment, rather than from the employment the plaintiff has chosen to pursue. For example, in *Odian v. Carriere*, 2016 BCSC 112, the plaintiff could not work as a finishing carpenter due to her accident injuries, but was suited to work in the supervisory aspects of homebuilding. Medical professionals - an occupational therapist and a vocational expert - had recommended that course. Instead, the plaintiff decided to retrain as a bookkeeper. Mr. Justice Dley held that the plaintiff had established an entitlement to loss of earnings capacity, but compared her pre-accident earning capacity as a finishing carpenter with what she was deemed capable of earning post-accident as a homebuilder on modified duties, as recommended by the experts, rather than what she was capable of earning as a bookkeeper (see paras. 111-123). Dley J. also refused to award the plaintiff retraining expenses for the costs of retraining as a bookkeeper on the basis of the expert evidence that she was "best suited to continue as a home builder": *Odian* at para. 133.

B. Discussion

- [125] The evidence shows that Ms. Evans was not able to do her job at Safeway without an unacceptable level of pain even on a part time basis. She made genuine efforts to her detriment in exacerbating her pain and headaches. After two years of trying, it was clear that she was not going to be able to go back to her produce manager position or work as she had on a full-time basis.
- [126] Ms. Keill and Ms. Abbott argue that the fact that she worked full time during the month prior to leaving Safeway on September 15, 2015 proves that she was continuing to improve and if she had not given up her employment at that time, she could still be working full time for Safeway.
- [127] This position is undermined by the factual evidence and the expert opinion evidence. The factual evidence demonstrated that when she worked full time with lifting and reaching duties, she exacerbated her pain and headaches. She was able to work the last month because she was told that in order to qualify for the severance package, she must be present at her job but was not required to do anything that made her uncomfortable. This was not a work arrangement that was available to her except to qualify for the severance package. The medical evidence was that she is not fit for physically demanding work and her recovery has plateaued. There was no evidence that supports the contention that if she had

simply kept at it, she would be able to do the grocery clerk job full time.

- [128] Ms. Keill and Ms. Abbott also argue that there were other Safeway jobs available that were not physically demanding including positions in the meat department, in the flower department and in the bakery. Ms. Evans' evidence was that the flower department positions required employees to lift heavy buckets of water. The meat department and bakery were different union locals and paid less. In order to secure a position in these departments, Ms. Evans would have had to give up her seniority and her pay grade. With no seniority, she had a diminished ability to secure a position in these departments. Mr. Koehler, a Safeway store manager to whom Ms. Evans reported when she was the produce manager at the Davie Street store, testified that Ms. Evans was not eligible for such positions.
- [129] In addition, the defendants argue that in taking the buyout, Ms. Evans abandoned her grievance. They argue she should have taken a position in the meat department, floral department or the bakery and waited out the resolution of the grievance. The evidence from Ms. Evans was that there had been no activity on her grievance because the union was unwilling to pursue it unless she could physically do her produce manager job. As noted above, she had tried to "fudge" her way back into that job but Safeway did not accept that she could physically do the job.
- [130] Finally, Ms. Keill and Ms. Abbott argue that Ms. Evans' took the buyout for financial reasons. Ms. Evans agrees. Her inability to do her job had resulted in a demotion where her pay was cut. She was not able to work full time. Her long-term disability benefits made up part of the difference, but they were about to terminate at the end of June 2015. Due to her reduced pay and the costs of her therapy to rehabilitate, she had fallen into debt even though she had moved out of a one bedroom apartment into a studio apartment. She saw the \$60,000 buyout as a way to support herself through retraining.
- [131] At the time Ms. Evans left Safeway, her condition had improved and plateaued. I will review the evidence pertaining to Ms. Evans' vocational options with reference to her abilities and the medical evidence as of that time.
- [132] The physicians opined that Ms. Evans is capable of full time work so long as the position does not require heavy lifting (Dr. Waseem specified no more than 10 pounds); prolonged sitting; prolonged neck flexion; or strenuous physical activity (pushing, pulling and carrying). Although cross-examined, none of this expert evidence was undermined and I accept it.

- [133] Ms. Keill and Ms. Abbott focus on Dr. Heran's opinion that the soft tissue areas of pain would likely continue to improve. Dr. Heran stated "if major improvements are established with time, then she should be able to get back to her previous level of vocational functioning". This eventuality has not developed. On the evidence before me, I am of the view that it is not possible that Ms. Evans will be able to return to work as a produce manager or as a grocery clerk.
- [134] Ms. Evans tendered the expert reports of Mr. Jeff Padvaiskas, an occupational therapist who undertook a functional capacity evaluation of Ms. Evans in September 2015. He prepared a report after that evaluation and a supplementary report to take into account the lifting limitation of 10 pounds imposed by Dr. Waseem. He opined that the 10 pound strength limitation limits her to sedentary or limited strength occupations. The limits on neck posture and positioning impact her suitability for desk or computer based types of positions. He opined that if a position requires substantial sitting she should have ergonomic adaptations and/or intersperse her tasks to allow her to move around and take breaks.
- [135] On cross-examination, Mr. Padvaiskas agreed that Ms. Evans could do sedentary work involving sitting or standing as long as she has a good ergonomic set up. Regardless of sitting or standing, she is not suited to work with awkward positions, non-neutral neck and back positions or work involving reaching, lifting or having her arms loaded.
- [136] The parties relied on expert reports on vocational rehabilitation: Trevor Lesmeister for the plaintiff and Diane Cameron for the defendants.
- [137] Mr. Lesmeister opined that with Ms. Evans' limited education, including not graduating from high school and not having any other formal education, the loss of her ability to work in a physical capacity significantly narrows her pre-accident range of suitable positions. He provides examples of the type of work she can no longer consider such as a landscaper, housekeeper or painter.
- [138] Mr. Lesmeister opined that there are some suitable occupations within her pre-accident industry of retail such as a merchandiser, assistant store manager, or buyer. He opined that some of those may have physical requirements for which she would need accommodation. He opined it was not likely she would secure employment in these jobs.
- [139] Ms. Cameron criticized Mr. Lesmeister for ruling out work as a produce manager given Dr. Heran's opinion about the potential for improvement in her pain from her soft tissues injuries. For the reasons given above, I do not accept this to be a valid criticism. Ms. Cameron also opined that Ms. Evans is suited to retail management positions that are within her physical tolerances as they are categorized as limited strength requirements. Mr. Lesmeister's expressed the concern that notwithstanding the job classification of limited strength, some positions may involve carrying product or stocking shelves for which Ms. Evans would need accommodation. I agree with Ms. Cameron that this opinion is too sweepingly restrictive. Obviously, there will be some positions that are not suited to Ms.

Evans, but there will be others that are.

[140] Mr. Lesmeister opined precisely that later in his report when he gave some examples of occupations that are suitable such as retail sales:

While I note that Ms. Evans would be able to access these types of positions given her current education and functional limitations, there could be specific positions that had job demands that exceeded her physical capabilities. Therefore she would not be able to consider them as options and this would narrow the overall number of employment opportunities available to her.

[141] Mr. Lesmeister opined that without further training, Ms. Evans is suited to work involving customer service such as retail sales, a casino worker or hotel front desk clerk. He opined that with further retraining she could improve her options to obtain a higher paying position (but not as high as a produce manager position), such as sales representative, event planner, retail supervisor or office administrator.

[142] Mr. Lesmeister prepared a second report in which he was asked to provide an opinion on the suitability of Ms. Evans to participate in a one year culinary arts program. He opined that this would fit within her vocational capacity but he deferred to a functional capacity expert on the issue of whether she has the functional capacity to undertake such a program. Such an opinion was not proffered.

[143] Ms. Cameron criticized Mr. Lesmeister for only providing the median hourly wages for the jobs he opined are open to Ms. Evans. Ms. Cameron provided the low, median and high wage rates for these positions. For some of these positions, the range between the low and high rate is so great that they do not add any meaningful information. Having said that, it is helpful to know the ranges for the purpose of addressing contingencies in loss of earning capacity as discussed below.

[144] Ms. Cameron also disagreed with Mr. Lesmeister's opinion that Ms. Evans is more suited to shorter hands-on retraining programs of one year in duration or less. Ms. Cameron opined that Ms. Evans has the general learning ability for training programs up to two years in duration. In addition, Ms. Cameron criticized Mr. Lesmeister's choice of expensive retraining programs. However, admission to the Capilano University program that Ms. Cameron recommends requires grade 12 graduation and so is not suitable.

[145] After leaving Safeway, in September 2015, Ms. Evans did not begin looking for replacement work for three months, 38 days of which was spent on an extended holiday. She then commenced working with a career counsellor to put together a curriculum vitae and look for work. She made numerous job applications in the retail area and the wine industry. She only had one interview. In February 2016, she was offered a part-time job with Telus as a telephone customer service operator. She took the position, even though it was not the type of job she wanted to do, so that she could support herself financially while she continued to consider options for a rewarding career.

- [146] A break from work to rehabilitate, consider future options and undertake a certain period of job hunting is reasonable. In my view, Ms. Evans' five month break and job search was too long. The evidence was that from the time she started searching for a job to the time she attained the Telus position was two months. I conclude that had she acted reasonably, she could have had a job within three months after leaving Safeway.
- [147] With regard to her employment at Telus, the defence argues that Ms. Evans resigned because she did not like the job, not because she could not do the job. They argue that the ergonomic accommodations at Telus were appropriate for her. They submit that it was unreasonable for her to leave a unionized job with benefits and a pension without having another job to go to. They submit that I should not accept that the job caused exacerbation of her neck pain and headaches because the evidence on the point is only that of Ms. Evans.
- [148] I have already addressed that I find Ms. Evans to be credible. I accept her evidence that she had increased pain because despite the ergonomic set up there were prolonged periods when her neck was flexed forward. Her evidence is supported by the evidence of a co-worker who witnessed pain behaviour, and her husband, who was a friend at the time, who saw that she was in pain after her shifts. He described that she would cancel plans because of it.
- [149] I also accept that the fact that Ms. Evans did not like the work at Telus played a role in her decision to resign. She took the job knowing it was not her preference but with a plan to find work that she would like while working part time at Telus. She was assigned full time shifts. She asked for part time shifts but there was no change. In my view, the fact that she was prepared to take a job that was not the type of work she wanted to do demonstrates that she is not trying to make the defendants pay for her to find a job she likes. I find that the exacerbation of her neck pain and headaches, the related onset of another depressive episode, and the fact that the work was full time so she had no break to recover and look for alternate work, were significant factors in her decision to resign. I find the decision to be reasonable.
- [150] Ms. Evans left Telus in December 2016. She has not worked since. Rather, she has been training to become a chef. There was a four month gap between leaving Telus and enrolling in her first raw cuisine, which she had to discontinue after the first month due to being injured by a knife. She completed the first course in July 2017. She took the second course and completed it in August 2017. She enrolled in the next course in January 2018, but had to discontinue that course due to neck pain and headaches. In that course, there was less classroom work and more kitchen work than the first two courses. She is working on rehabilitation with the goal to be able to complete the course in the summer of 2018. She then plans to take a final raw food course. Following that, she will take two courses in traditional culinary training. Her evidence was that once the training work became kitchen-oriented, she experienced a recurrence of neck pain and headaches. This is consistent with the evidence that even with an ergonomic set up at Telus, Ms. Evans found that she had neck and back pain due to the postures she needed to maintain and the pace of the work.

- [151] Ms. Evans testified that she does not think she will be able to work as a chef in a restaurant but believes she could be a personal chef or teach cooking. There was no evidence to demonstrate that type of chef work would accommodate her neck pain and headache issues.
- [152] Ms. Evans' damages claim are premised on the assumption that starting in January 2019, she will be in a position to seek employment as a chef. This assumes that she will not complete the traditional chef training because she will not finish her raw food training until some time in mid to late 2018.
- [153] Ms. Keill and Ms. Abbott argue that she has led no evidence about the earnings of a chef. It is true that Ms. Evans' evidence was simply that she felt there was a good niche for raw cuisine chefs in California. She has led evidence, through her expert economist, Mr. Benning, of chef wages in Canada. It is not clear on the evidence whether Ms. Evans plans to work in California or Canada but she plans to take all of her training in California.
- [154] On the issue of mitigation, I conclude that the defendants have shown that Ms. Evans has not acted reasonably since she decided to pursue becoming a chef given how much of the work inherently involves standing with a flexed neck posture. She started in a niche area, raw cuisine. Between leaving Telus in December 2016 and trial in April 2018, a period of 16 months, she has completed two months of coursework. She has another two months to complete. At the time of trial, she had discontinued her third course because of her neck and back pain. Given her experience with work that exacerbates her neck pain and headaches, it is not reasonable for her to think that more rehabilitation at this time will make this work feasible for her.
- [155] In their submissions, each party argued that the other bears certain evidentiary burdens that relate to mitigation that have not been met. Counsel for the defendants asserted that the plaintiff bears the burden on past income loss and loss of earning capacity, including proving what work she is capable of doing and what loss is occasioned. Counsel for the plaintiff submitted that the defendants bear the burden of proving failure to mitigate.
- [156] I accept that Ms. Evans bears the burden in proving what her losses are. For loss of past income and loss of earning capacity, that means showing the difference between what Ms. Evans would have earned had the accident not occurred, and what she has earned and/or how her capacity has been diminished. She is entitled to do that based on her theory of the case, which is that absent the accident she would have continued to work at Safeway as a produce manager and her earning capacity has been diminished by the difference between her career at Safeway and what she will earn as a chef. She has led evidence on all of these points.
- [157] I accept that the defendants bear the burden of proving failure to mitigate. As stated in Graham, at para 35:

Mitigation goes to limit recovery based on an unreasonable failure of the injured party to take reasonable steps to limit his or her loss. A plaintiff in a personal injury action has a positive duty to mitigate but if a defendant's position is that a plaintiff could reasonably have avoided some part of the loss, the defendant bears the onus of proof on that issue.

[158] Proving Ms. Evans could reasonably have avoided some part of her loss requires demonstration that Ms. Evans failed to pursue reasonable opportunities available to her. The factual context is such that this exercise is necessarily hypothetical and a matter of considering possibilities. The vocational evidence led by both parties is evidence of what other options she could have pursued, as is Ms. Evans' own evidence, including her interest in retail work and the wine industry. The evidence as a whole discharges the defendants' burden to prove that there were reasonable alternatives to mitigate damages.

C. Conclusion on Mitigation

[159] Ms. Evans has acted reasonably except with regard to the length of time she took to find replacement work after leaving Safeway and her efforts to retrain after leaving Telus, especially after she learned that chef work exacerbates her neck pain and headaches.

[160] The vocational evidence was that Ms. Evans is suited to training programs of one to two years in length. I conclude that two years (24 months), including time for a job search, represents a reasonable vocational retraining period for Ms. Evans. The total time that Ms. Evans has been unemployed since leaving Safeway, excluding the time she worked for Telus, was approximately 21 months up to the time of trial in April 2018. Three additional months from trial exhausts the two year retraining period. This occurs in July 2018. As will be discussed below, Mr. Benning, her expert economist, calculated her loss of earning capacity assuming she commences employment as a chef in 2019. If she commences working in January 2019, her time to retrain and find a new job will have exceeded what I have concluded is reasonable by about six months. I will take two months into account when assessing her past loss of income and four months into account in assessing her loss of earning capacity.

V. Assessment of Damages

[161] The fundamental principle of compensation in personal injury cases is that a plaintiff should receive full and fair compensation, calculated to place them in the same position as they would have been had the tort not been committed, insofar as this can be achieved by a monetary award: *Lines v. Gordon*, 2009 BCCA 106 at para. 167, citing *Ratych v. Bloomer*, [1990] 1 S.C.R. 940 at 962-63.

[162] This principle is accomplished by awarding damages for pecuniary loss in the amount reasonably required to permit a standard of living and day to day functionality that, to the extent possible, approximates what the plaintiff would have experienced but for the wrong they were subjected to. Non-pecuniary damages are assessed to compensate for pain,

suffering, and loss of enjoyment of life both prior to trial and into the future having ensured that the pecuniary losses are appropriately compensated and will not erode the non-pecuniary damages.

- [163] In a trilogy of cases decided in 1978, the Supreme Court of Canada set a rough upper limit of \$100,000 (in 1978 dollars) for non-pecuniary damages based on the premise that pecuniary damages are fully compensated: *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229 at 261-62; *Arnold v. Teno*, [1978] 2 S.C.R. 287 at 333-34; and *Thornton (Next friend of) v. Prince George School District et al.*, [1978] 2 S.C.R. 267 at 270. In 2018, the rough upper limit, adjusted for inflation, is \$382,681.
- [164] The premise on which the rough upper limit was set demonstrates that while the heads of damages are to be assessed individually, they are also interlocking. In particular, the future needs of the plaintiff must be met through the pecuniary awards so that the balance struck between restorative care awards and policy-driven non-pecuniary damages will be achieved.

A. Non-pecuniary damages

- [165] In *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46, the Court of Appeal set out a non-exhaustive list of factors to consider when assessing non-pecuniary damages: age of the plaintiff; 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; loss of lifestyle; and the plaintiff's stoicism.
- [166] I have concluded that as a result of the accident, Ms. Evans has suffered pain and a loss of enjoyment of life, which will continue into the foreseeable future and from which she is unlikely to ever fully recover.
- [167] As a result of the injuries she sustained in the accident, Ms. Evans suffered from soft tissue injuries to her mid-back, upper back, neck and shoulder. She now has chronic pain in her neck and upper back. The pain is exacerbated by lifting and many different postures, including sitting, standing, certain neck angles and some yoga postures. It is exacerbated by physical activities where her neck or back bears weight, or involves lifting or working with her arms above a certain height. She experiences headaches and migraines. Over the course of two years after the accident the pain has gradually improved by about 60% but has plateaued at its present level. It is permanent and not likely to improve. She has been prescribed analgesics and has taken over-the-counter medications to cope with her pain.
- [168] Before the accident, Ms. Evans' mood was good and she enjoyed being physically active and social. She hiked several times a week, sometimes with friends, and regularly did yoga. She had a career that she enjoyed and was justifiably proud of given her eligibility for further promotion and that she achieved it without graduating high school. Her injuries rendered her unable to do her job.

- [169] Due to the accident injuries, Ms. Evans suffered two major depressive episodes and somatic symptom disorder. She withdrew socially from her friends. She attempted suicide twice. She drank excessively.
- [170] Overall, Ms. Evans' life is very different from what she enjoyed prior to the accident. However, after a significant and challenging struggle, she has reworked her life into a place where she is happy.
- [171] The most significant of the Stapley factors in this case are Ms. Evans' age; the severity and duration of the pain; the impairment of her physical abilities; her associated loss of lifestyle; and the impairment of her relationships. Ms. Evans is relatively young. She was 34 years old at the time of the accident and she was 39 years old at trial. She faces the prospect of a lifetime of chronic pain and associated functional limitations. One of the most significant impacts of her injuries has been the impact on her ability to do her job as a produce manager, which she enjoyed and which was a source of pride.
- [172] It is typical for courts to consider cases in which the plaintiff has suffered injuries similar in nature and duration to those of the plaintiff in the case at bar. Such cases act as a guideline, but should not be used to develop a "tariff" for injuries of a certain type: *Lindal v. Lindal*, [1981] 2 S.C.R. 629 at 637. Similar injuries may not have similar consequences for the injured person.
- [173] I considered the following cases relied on by Ms. Evans concerning the appropriate quantum of non-pecuniary damages: *Alafianpour-Esfahani v. Jolliffe*, 2017 BCSC 701; *Ashcroft v. Dhaliwal*, 2007 BCSC 533; *Eccleston v. Dresen*, 2009 BCSC 332; *Herman v. Paley*, 2017 BCSC 728; *Leach v. Jesson*, 2017 BCSC 577; *Morena v. Dhillon*, 2014 BCSC 141; and *S.R. v. Trasolini*, 2013 BCSC 1135. Ms. Evans submits that the appropriate range for nonpecuniary damages is between \$110,000 and \$130,000. I have considered the cases relied on by the defendants: *Lourenco v. Pham*, 2013 BCSC 2090; *Blackman v. Dha*, 2015 BCSC 698; *Smith v. Moshrefzadeh*, 2012 BCSC 1458; and *Montgomery v. Williamson*, 2015 BCSC 792. These cases produce a range of \$54,000-\$99,000 in 2018 index dollars.
- [174] In *Stapley*, the 51-year-old plaintiff was injured in a tractor accident. He suffered injuries to his upper back and neck including thoracic outlet syndrome, myofascial pain syndrome to his neck, and strain of ligaments in the thoracic section. He had chronic pain and permanent headaches. He continued to work at his very physical job with some modifications but would finish work in considerable pain. His ability to participate in recreational activities was curtailed but he continued to do some. The jury awarded him non-pecuniary damages of \$275,000 which the Court of Appeal reduced to \$175,000. The Court of Appeal said that the case had special circumstances in that he was a rancher whose occupation was threatened by his injuries. If he could not work as a rancher, he and his family would lose their way of life and community. Had the case not had that feature, the appropriate award would have been \$100,000. The plaintiff had thoracic outlet syndrome in addition to the physical injuries which were similar to the plaintiff in this case. He did not

have psychological injuries or emotional upset like the plaintiff here. He was able to be more active recreationally. He was approximately 15 years older than Ms. Evans.

- [175] *Scelsa v. Taylor*, 2016 BCSC 1122 also has similar features to the present case. The plaintiff was 43 years old at the time of trial and 40 at the time of the accident. The injuries and their sequelae are similar except for in two ways: in *Scelsa* the plaintiff had cervical facet arthroplasty (pain originating from facet joints); and the plaintiff's depression in that case was not as severe as the two major depressive episodes Ms. Evans has had. Mr. Justice Brown determined that an award of \$125,000 was fair and reasonable. In the course of doing so, he reviewed authorities where the plaintiff suffered from myofascial soft tissue injuries (some also included herniated discs or facet joint pain) and observed:
- [234] The higher range of cases exhibit more intense iterations of depression such as social isolation or significant loss of social contact and an impact on significant other persons in the plaintiff's life such as children and spouses. Chronic myofascial pain, permanent or significant loss of work previously highly valued by the plaintiff and/or significant loss of earning capacity also mark cases in the range of \$100,000 or more.
- [176] The comments made by Brown J. in *Scelsa* are apt and apply to the consideration I have undertaken of the cases on which Ms. Evans relies.
- [177] I turn to the cases relied on by the defendants. In *Lourenco*, the plaintiff suffered ongoing chronic pain in her neck and upper back. There was no discussion of a psychological injury. The Court's discussion of its reasons for non-pecuniary damages, other than the causation issues, was very brief.
- [178] In my view, this case is an outlier. All of the cases cited by Ms. Evans involving chronic limiting pain of this type have awards above \$100,000 and all of the cases cited by the defendants have awards above \$80,000.
- [179] In *Blackman* and in *Smith*, the plaintiffs' physical symptoms were similar to Ms. Evans', however in *Blackman* there was no mention of depression or psychological injury and in *Smith* there was a passing mention of counselling for depression but it did not feature significantly in the case. The Court awarded \$80,000 (\$84,000 in 2018 dollars) in non-pecuniary damages in both cases.
- [180] In *Montgomery*, the plaintiff had suffered severe soft-tissue injuries to his upper back and neck and aggravated a pre-existing condition in his shoulder. The description of his chronic pain and symptomatology from his physical injuries, including ongoing headaches, are very similar to this case. He had become irritable and socially withdrawn. The chronic pain, headaches and loss of sleep had a "depressive effect". But there was no medical evidence of a psychological injury and the description of the emotional and mood issues is much less severe than in this case. The Court awarded \$95,000, which is \$99,000 in 2018 dollars.

- [181] In summary, some of the cases cited by Ms. Evans involve other injuries, such as thoracic outlet syndrome, disc herniation or facet joint arthroplasty, on top of chronic myofascial pain and psychological injuries. Most of the defendants' cases do not include cases where a psychological condition has been diagnosed and/or the chronic pain is not as functionally disabling as that experienced by Ms. Evans. The cases which are most similar are Stapley and Montgomery.
- [182] Having considered the Stapley factors and all the above authorities, I assess non-pecuniary damages at \$110,000.

B. Past Income Loss

- [183] Past income loss is Ms. Evans' income loss from the date of the accident to the date of trial. As the evidence above demonstrates, the components of her past income loss include: the six weeks immediately following the accident when she was off work completely; the period of her attempt to return to work full time at Safeway where she was working less than full time hours as part of her graduated return to work as well as days during this time that she called in sick due to headaches and pain; her reduction in wages and associated loss of bonus and benefits when she was demoted from produce manager to grocery clerk; and the difference between what Ms. Evans would have been earning working full time as produce manager at Safeway and what she has earned since she took the buyout from Safeway, less her Safeway buyout of \$60,000.
- [184] Ms. Evans introduced into evidence the expert report of Darren Benning, an economist who calculated past income loss among other things. The defendants did not introduce an expert report disputing Mr. Benning's calculations. Rather, the defendants focused on Ms. Evans' full time produce manager earnings versus her post-buyout earnings and argue, as already discussed, that Ms. Evans' decision to leave Safeway was not reasonable and her efforts to retrain and replace her income loss have not been reasonable.
- [185] Mr. Benning's calculation of her after tax losses were about \$4,750 per month in the months she had no income. He calculates her total pre-trial loss, taking into account her Telus earnings over 10 months, to be \$115,089.00. Had she retrained and commenced working after 3 months instead of after 5 months, she would have reduced her losses by something less than \$4,750 per month. I deduct \$9,000 for failure to mitigate in the pre-trial period.
- [186] I award damages for past income loss in the amount of \$116,089.

C. Loss of Future Earning Capacity

i. Legal Principles

- [187] Assessing an award for loss of future earning capacity involves a comparison between the likely future of the plaintiff if the accident had not happened and the plaintiff's likely future after the accident has happened: *Gregory v. Insurance Corp. of British Columbia*, 2011 BCCA 144 at para. 32. The assessment requires a very fact-intensive, case-specific inquiry; comparator cases are of limited assistance: *Gregory*, at paras. 32-33.
- [188] There are two widely used approaches to quantify loss of future earning capacity, the earnings approach and the capital asset approach. The distinction between the two was explained as follows by Mr. Justice Kent in *Hoy v. Williams*, 2014 BCSC 234 at paras. 156-59:
- [156] The "earnings approach" will generally be more useful when the loss is easily measurable: *Perren v. Lalari*, 2010 BCCA 140 at para. 32. Where the loss "is not measurable in a pecuniary way", the "capital asset" approach is more appropriate: *Perren* at para. 12.
- [157] The earnings approach involves a form of math-oriented methodology such as i) postulating a minimum annual income loss for the plaintiff's remaining years of work, multiplying the annual projected loss by the number of remaining years and calculating a present value or ii) awarding the plaintiff's entire annual income for a year or two: *Pallos v. Insurance Corp. of British Columbia* (1995), 100 B.C.L.R. (2d) 260 (C.A.); *Gilbert v. Bottle*, 2011 BCSC 1389 at para. 233.
- [158] The capital asset approach involves considering factors such as i) whether the plaintiff has been rendered less capable overall of earning income from all types of employment; ii) whether the plaintiff is less marketable or attractive as a potential employee; iii) whether the plaintiff has lost the ability to take advantage of all job opportunities that might otherwise have been open; and iv) whether the plaintiff 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.); *Gilbert v. Bottle*, 2011 BCSC 1389 at para. 233; *Morgan v. Galbraith*, 2013 BCCA 305 at paras. 53 & 56.
- [159] Though the capital asset approach is not a "mathematical calculation", the trial judge must still explain the factual basis of the award: *Morgan v. Galbraith*, 2013 BCCA 305 at para. 56.
- [189] The defining distinction between the earnings approach and the capital asset approach is the extent to which the loss is measureable. If there is little or no evidence of what the plaintiff's post-accident earnings will be, the earnings approach may not be appropriate. Although the earnings approach is more mathematical, both approaches are a matter of judgment, not "mere calculation": *Hosseinzadeh v. Leung*, 2014 BCSC 2260 at para. 126.
- [190] The earnings approach is often used where the plaintiff had an established earnings pattern or career trajectory prior to the accident, and after the accident the plaintiff continued to work in the same position with either reduced hours or modified duties, or took early retirement from that position as a result of accident-related injuries: see, for example, *Riding-Brown v. Jenkins*, 2014 BCSC 382 at para. 25.

- [191] The capital asset approach is used where there is a level of uncertainty making it difficult to measure the loss in a pecuniary way. As this Court stated in *Riding-Brown* at para. 26, this approach is "usually applied in situations where the uncertainty of the plaintiff's future renders quantification difficult."
- [192] The same two-step process is followed, regardless of whether the earnings approach or capital asset approach is used. First, the plaintiff must prove a real and substantial possibility that his or her earning capacity has been impaired: *Perren v. Lalari*, 2010 BCCA 140 at para. 32. Second, if the plaintiff discharges his or her burden of proof, the court turns to an assessment of damages.
- [193] Regardless of the approach taken, per *Falati v. Smith*, 2010 BCSC 465 at para. 41, *aff'd* 2011 BCCA 45, the general principles the court should apply when making an assessment under this head of damages are:
- a) the court should assess damages rather than calculate them mathematically;
 - b) the standard of proof is not the balance of probabilities; the plaintiff need only establish a real and substantial possibility of loss, one which is not mere speculation, and hypothetical events are weighed according to their relative likelihood;
 - c) allowances must be made for the contingencies that the assumptions upon which an award is based may prove to be wrong; and
 - d) the overall goal of the assessment is to be fair and reasonable.
- [194] Turning to the assessment, I find that Ms. Evans has met the threshold test showing that she has a real and substantial possibility of future income loss. She is not employable in her pre-accident position and she has not found replacement work that she is capable of doing that pays an equivalent amount.
- [195] Ms. Evans argues that the earnings approach should be used and the court should compare her pre-accident Safeway earning capacity working as a produce manager until retirement (\$1,223,000 including benefits) with her potential earnings as a chef or as a wine sales representative. Ms. Evans submits that these numbers should be adjusted for contingencies that her opportunities within these industries will be limited and she will be less competitive for those jobs as against able-bodied applicants. She submits that an earnings approach assessment in this manner produces a range of damages of \$634,000 to \$720,000.
- [196] The defence argues the capital asset approach is appropriate, relying on *Mullens*. The plaintiff in *Mullens* worked in a bank at the time of the motor vehicle accident but left the bank to pursue retraining as a counsellor following the accident. The Court held that her decision to leave her work at the bank was "peculiar" and did not accept that she was not able to do that work. Further, if she was not able to work at the bank, the Court held she would not be able to complete the coursework and master's degree to become a counsellor. The Court applied the capital asset approach because the evidence of what work the

plaintiff might do in the future was far too speculative, assessed a loss of earning capacity of \$350,000, and reduced it by 50% for failure to mitigate.

[197] Counsel for Ms. Evans argues this case is not similar because it was mostly about the plaintiff's "peculiar" decision, not supported by vocational evidence, to leave her pre-accident line of work. I agree. However, the reasons that the earnings approach was not applicable in that case are germane to this case. Although there was a substantial possibility that the accident caused income loss, the evidence as to what the plaintiff would do for work in the future was too uncertain.

[198] As stated, Ms. Evans submits that the earnings approach should be based on a future career as a chef, which she prefers, or as a wine representative which she had thought of undertaking, and took some courses towards and then abandoned. In my view, neither of these options provides a sufficient evidentiary basis to take an earnings approach even on simple probabilities.

[199] Although Ms. Evans' likely earning capacity if the accident had not happened is relatively easy to quantify, her likely earning capacity after the accident has happened is very uncertain. Accordingly, the capital asset approach is more appropriate in the circumstances.

ii. Application of the Capital Asset Approach

[200] Four non-exhaustive factors from *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 at para. 8 (S.C.), form the basis of the assessment: *Villing v. Husseni*, 2016 BCCA 422 at para. 19-20. Those factors 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 that plaintiff, had he or she not been injured; and
4. the plaintiff is less valuable to himself or herself as a person capable of earning income in a competitive labour market.

[201] Economic evidence provides helpful context to the application of the *Brown* factors by identifying in a general sense the magnitude of the plaintiff's loss: *Dunbar v. Mendez*, 2016 BCCA 211 at para. 20. In *Dunbar*, the Court of Appeal said:

[21] The assessment of future loss requires a court to estimate a pecuniary loss by weighing (even if not assigning specific numeric values to) possibilities and probabilities of future events and relating evidence and findings of fact to the quantification of the loss. The usefulness of economic and statistical evidence does not turn an assessment into a calculation. It does, however provide a useful tool to assist in determining what is fair and reasonable in the circumstances.

[Citations omitted.]

[202] Even though the claim may not readily be measurable on an earnings analysis, earnings projections may provide a starting point for the assessment of the plaintiff's loss: *O'Brien v. Cernovec*, 2016 BCSC 1881 at para. 143. Both positive and negative contingencies should be taken into account in the analysis.

[203] Starting with the *Brown* factors, it is clear that Ms. Evans is less capable overall of earning income from all types of employment. Prior to the accident, she was suited to and did physical work. She is now only suited to work with restricted physical demands or sedentary work. The vocational evidence demonstrates that there are some positions she can do but she will require accommodations or a sympathetic employer. Accordingly, she is less marketable and attractive as an employee. Ms. Evans' former supervisor, Mr. Shoring, testified that he would have considered her for future promotions. The evidence establishes that Ms. Evans lost the ability to take advantage of all job opportunities which might otherwise have been open to her. Ms. Evans derived self worth and fulfillment from the way she did her job as a produce manager, from performance reviews, and from financial rewards, including annual bonuses she earned many years. She is less valuable to herself as a person in regard to her incoming earning capabilities.

[204] I find that her future earning capacity is significantly reduced. Mr. Benning's unchallenged evidence is that had she continued working as a produce manager and earned a bonus every year (she had not earned one every year) her future lifetime earning capacity was \$1,222,503 including the value of her benefits.

[205] One approach, considered in *Mullens*, is to compensate in an amount equal to a few years of income at the pre-accident salary. In this case, two years would be approximately \$150,000 and three years would be \$225,000. In my view, that does not provide adequate compensation for her loss.

[206] If Ms. Evans retrains and earns the median wage of the type of position Mr. Lesmeister sets out in his report and there is no bonus or benefits package, her income will be reduced by approximately 25%-35%. If she does not retrain but pursues the type of employment she is currently suited for, the reduction is greater. This approach does not fully take into account that her range of employment options is markedly narrowed. She is now very vulnerable to the vagaries of the employment marketplace. Given her lack of education, her ability to do physical work well was strongest asset to her in the employment market. She has lost that.

[207] Based on all of the evidence, especially given that Ms. Evans is restricted to sedentary and limited strength work and she has lost a position with excellent benefits, I find that her earnings capacity has been reduced by 40-50%. Applied to her lifetime future capacity, that provides a range of \$488,000 to \$611,000. I reduce this by \$18,000 for failure to mitigate.

[208] I identify the following negative and positive contingencies:

- a) Ms. Evans might achieve earnings higher than the median earnings for jobs for which she might retrain;
- b) given Ms. Evans struggles with retraining as a chef, she might struggle in other occupations and be limited to part time work or work with accommodations, resulting in lower earnings and/or further restricted opportunities;
- c) Ms. Evans might find a position with benefits equivalent to Safeway;
- d) absent the accident, Ms. Evans might have been promoted at Safeway and increased her earnings; and
- e) absent the accident, Ms. Evans might not have earned a bonus at Safeway every year.

[209] In my view, these contingencies largely cancel each other out except the first one. Prior to the accident, Ms. Evans achieved earnings and work that exceeded what might have been considered to be her reasonable capability given her limited education. This cuts both ways. On one hand, she was able to do so because she excelled at physical work and she has lost that ability. On the other hand, her personality and drive were also responsible for her success. Her post-accident attempts to get back to her produce manager job demonstrate that she still has that drive. I find that if she applies her drive to finding work in an area to which she is suited, she will be successful and she will likely exceed the median wages for the type of work for which she is suited.

[210] Taking all of this into account, I assess loss of future earning capacity at \$510,000.

D. Loss of Pension

[211] Mr. Benning calculated Ms. Evans' loss of pension at between \$168,308 and \$170,821 based on careers as a chef or wine sales representative. The defendant does not challenge these calculations. As I said, I cannot determine whether Ms. Evans will establish a career in either of these fields. However, it is apparent that she has suffered a significant loss of benefits, most particularly pension benefits, from her unionized position with Safeway. I conclude that it is unlikely, but not impossible, that she will replace her loss in this regard with a position with an equivalent pension. Future losses are a matter of simple probabilities, not an all or nothing perspective based on where a balance of probabilities lies. Taking into account the possibility that she may have some earnings that generate a pension, I assess her loss of pension at \$140,000.

E. Costs of Retraining

- [212] To date, Ms. Evans has incurred \$2,193 in wine appreciation course expenses and approximately \$14,618.75 in raw cuisine culinary course expenses. The further raw food course she plans to take and the full year traditional culinary arts program will cost an additional \$18,000, approximately.
- [213] The defence submits that the wine appreciation courses are reasonable but the raw food culinary courses and the traditional culinary course are not.
- [214] Ms. Evans' vocational consultant expert, Mr. Lesmeister, opined that Ms. Evans could consider retraining within a business-related program that would complement her previous employment experience. He opined that training for such positions can be completed on a full-time basis in a year or less. He provided an example of Sprott Shaw College which offered a 49 week Business Administration Management program at a cost of approximately \$13,725. This would lead to positions such as a sales representative, an event planner, a retail supervisor or an office administrator, the median wages for which vary between approximately \$18 per hour and \$24 per hour. In his supplemental report, Mr. Lesmeister opined that a one-year culinary program would also be a reasonable choice for Ms. Evans. The Pacific Institute program which Ms. Evans identified costs between \$40,000 and \$41,000 for a year of training consisting of two six-month courses.
- [215] Ms. Cameron opined that Ms. Evans is suited for retraining courses of up to two years in duration. She also opined that public programs, such as Capilano University, are much less expensive, however Capilano's program would require Ms. Evans to complete her high school graduation before being admitted. In my view, in the circumstances, this is not a suitable alternative.
- [216] Mr. Lesmeister recommends a course of vocational counselling costing in the range of \$1,500-\$2,000. Given my findings, I agree this is a reasonable expense.
- [217] Because of my findings that it is not reasonable for Ms. Evans to continue to pursue a career as a chef, and because the other courses of retraining are much less expensive than the raw cuisine course she has taken, the traditional course she plans to take or the Pacific Institute course, I assess her damages in this regard to be much more modest amount. I award \$20,000 for the costs of retraining and vocational counselling, inclusive of the expenses she has already incurred.

F. Cost of Future Care

- [218] Ms. Evans seeks damages for cost of future care for physiotherapy and massage therapy; a gym membership; psychological counselling; occupational therapy; equipment; sleep posture aids; cold packs; and medication.

[219] The defendants dispute the claim for the costs of physiotherapy and massage therapy. They argue that the cost of one of those two modalities is reasonable but both are not. If both are undertaken once per week the cost is \$116,673.

[220] I have found that the balance of medical evidence is that passive rehabilitation will continue to be reasonable to manage her symptoms and flare-ups. She has undertaken and obtained relief from both physiotherapy and massage therapy. Despite that they may not offer long-term improvement, it makes no sense to deny her the short-term relief they offer. In my view, that would be inconsistent with the approach mandated by *Andrews v. Grand & Toy Alberta Ltd.*, at 241-248. However, I find that it is unlikely she will need to undertake both physiotherapy and massage therapy every week.

[221] I award \$50,000 for physiotherapy and massage therapy. The total award for cost of future care is \$71,299.00

G. Special Damages

[222] Ms. Evans has incurred a total of \$40,719.28 in expenses for Botox injections, physiotherapy, massage therapy, active rehabilitation, pain medications, and other medical costs relating to the accident. The defendants have paid \$16,086.59.

[223] Ms. Keill and Ms. Abbott dispute the physiotherapy expenses. They argue Ms. Evans' use of physiotherapy has been excessive. As discussed above, I disagree. Accordingly, I award the full net amount of \$24,632.69.

VI. Conclusion

[224] I award Ms. Evans damages as follows:

- a) non-pecuniary damages: \$110,000.00
- b) past income loss : \$106,089.00
- c) loss of earning capacity: \$510,000.00
- d) loss of pension: \$140,000.00
- e) cost of retraining: \$20,000.00
- f) cost of future care: \$71,299.00
- g) special damages: \$24,632.69.

[225] The total is \$982,020.69.

[226] Subject to any matters of which I am not aware relating to costs, I award Ms. Evans costs at Scale B. If the parties wish to speak to costs, they shall, within 30 days of these reasons, contact the registry to make arrangements to do so.

"Matthews J."

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