

CANADA / JUDGMENT

Fines v. Johnson

2020 BCSC 386

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2020 BCSC 386 Fines v. Johnson

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Fines v. Johnson,

2020 BCSC 386

Date: 20200316

Docket: M51154

Registry: Kamloops

Between:

Colleen Mae Fines

Plaintiff

And

Patrick Joseph Johnson

Defendant

Before: The Honourable Mr. Justice Mayer

Reasons for Judgment

Counsel for the Plaintiff:

E.C. Hughes

J.A. Jakel

Counsel for the Defendant:

E.A. Harris

J.M. Brown

Place and Date of Trial/Hearing:

Kamloops, B.C.

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Introduction

- [1] The plaintiff Colleen Mae Fines was injured in a motor vehicle accident that occurred on July 1, 2013 in a supermarket parking lot in Kamloops, British Columbia when her vehicle was struck on the left by the vehicle driven by the defendant Patrick Joseph Johnson (the "Accident"). Mr. Johnson is now deceased and the defence of this case was handled by ICBC, pursuant to its role as Mr. Johnson's insurer.

Issues

- [2] Ms. Fines claims that due to the injuries she sustained in the Accident, which include injury to her neck, right shoulder and upper back, and the related symptoms, that her social and recreational activities and vocational opportunities have been severely impacted. She seeks damages for pain and suffering, past and future income earning capacity, special damages, costs of future care and loss of housekeeping capacity. She also advances an in-trust claim for assistance provided to her by her daughter after the Accident.
- [3] ICBC has admitted liability for the Accident. It admits that Ms. Fines sustained soft tissue injuries to her neck and upper back and suffers from resulting chronic pain. It denies that the Accident resulted in injury to Ms. Fines' right shoulder or that this injury contributed to a subsequent injury to her left shoulder when Ms. Fines slipped on some stairs. Further, it denies that the Accident caused Major Depressive Disorder, Somatic Symptom Disorder and Unspecified Anxiety Disorder, as is alleged, although it does not dispute that Ms. Fines suffers from some symptoms of depression that result from the Accident.

- [4] ICBC disputes the amount of damages claimed by Ms. Fines under the various heads of damages. In addition, ICBC alleges that Ms. Fines has failed to mitigate the extent of her damages by completing recommended cognitive behavioral psychotherapy treatments and that as a result, a deduction to any damages award should be made across-the-board.
- [5] A summary of the issues for determination is as follows:
- a) Whether the Accident caused Ms. Fines' right shoulder injury and whether this injury caused or contributed to the subsequent injury to Ms. Fines' left shoulder;
 - b) What are Ms. Fines' non-pecuniary and income loss damages suffered as a result of the Accident;
 - c) Whether Ms. Fines is entitled to the disputed special damages;
 - d) Whether Ms. Fines is entitled to damages for costs of future care and loss of housekeeping capacity;
 - e) Whether Ms. Fines' daughter is entitled to the amount claimed "in-trust" for her; and
 - f) Whether any of the amounts awarded to Ms. Fines should be reduced as a result of a failure to mitigate;

Background Facts

- [6] Following is a summary of relevant background facts provided through the testimony of Ms. Fines and lay witnesses.

Pre-Accident Background

- [7] Ms. Fines is currently 45 years old and was 39 years old at the time of the Accident. She has been a social worker with the Ministry of Children and Family Development in Merritt since 2015. She grew up in Prince Rupert, British Columbia and married in 1994. After her marriage, Ms. Fines and her then husband had three children including two daughters, who are currently 24 and 23 years old, and a 17 year old son. Only Ms. Fines' middle daughter was living with her full-time at the time of the Accident and she now lives with her son and fiancé in Merritt. Her first marriage, which she described as verbally and financially abusive, ended in 2007.
- [8] While in Prince Rupert Ms. Fines had a diverse work background which included operating a video business she had started with a friend, and working in a bakery, a bank, a pharmacy and at a transition house as a drug and alcohol counsellor. Ms. Fines sought to improve her employment prospects and took a number of on-line courses during her first marriage and afterwards.

- [9] In 2012 Ms. Fines was admitted into the social work program at Thompson Rivers University in Kamloops. After she relocated from Prince Rupert to Kamloops she worked part-time while in school as a community support worker with the John Howard Society. She obtained her Bachelors in Social Work ("BSW") degree nine months after the Accident, in April 2014. She obtained high grades during her studies although her grades declined somewhat after the Accident.
- [10] Ms. Fines led a very physically active life in the years before the Accident including regularly playing squash, kayaking, hiking, camping, skiing and running. She took pride in her homes that were always clean, completed landscaping, home repair and renovation work and performed some vehicle maintenance. She sought to be self-sufficient both for reasons of personal interest and financial necessity.
- [11] In 2009, Ms. Fines rekindled a romance with her high-school years' boyfriend, who was living in Williams Lake at the time their relationship restarted but eventually relocated to Kamloops to be closer to his family. Ms. Fines and her then boyfriend enjoyed doing a number of physical activities together including squash, hiking and skiing.
- [12] Prior to the Accident Ms. Fines had been involved in four previous minor MVAs. She had injured her right shoulder twice - the first time while figure skating in 2003 and then while playing floor hockey in 2010. She had various surgeries or treatments to her left and right knees. She had psoriatic arthritis of her hands and feet from the age of 17. There is no evidence that any of these previous incidents, injuries and conditions relate to any of the symptoms that arose after the Accident.

The Impacts of the Accident

- [13] During the Accident Ms. Fines' vehicle was "T-Boned" by the vehicle driven by Mr. Johnson. At the time that her vehicle was hit, she had her left hand on the steering wheel and her right hand on the gearshift lever. Although her vehicle was damaged, it was still drivable.
- [14] Ms. Fines did not immediately feel injured after the Accident but felt out of sorts and was unable to drive. Her daughter, who she had come to pick up from work, drove home. As the evening progressed Ms. Fines noticed increasing pain in her neck and right shoulder and developed bruising in her ribs, pain in her lower back and left hips and dizziness. In a report to a doctor at a walk-in clinic the day after the Accident, on July 2, 2013, Ms. Fines complained of pain over the left side of her neck, left ribs and right shoulder, together with restricted movement in the right shoulder and neck.
- [15] By the time of trial, some of Ms. Fines' post-Accident symptoms had improved. She only experiences occasional dizziness when her neck and back pain are bad. Her symptoms of rib, lower back and left hip pain and occasional left and right arm numbness have resolved.

- [16] Many of Ms. Fines' symptoms persist. Her current symptoms include chronic neck pain radiating to the back of her skull and into her upper back. She suffers from headaches up to three times per week. Her neck and back pain is aggravated when she sits at her desk for an extended period or during long drives. She experiences intermittent pain in her right shoulder and has a reduced ability to use her right arm at or above shoulder height. Her pain symptoms affect her ability to fall asleep and remain asleep throughout the night.
- [17] Ms. Fines suffers from some psychological symptoms including anxiety when driving through intersections or walking in busy crowds and suffers from depression. She occasionally has trouble with concentration and short-term memory issues.
- [18] Ms. Fines is no longer able to participate in the same type of physical activities that she once enjoyed. She now only hikes on flat groomed trails and can only jog short distances. She has only gone kayaking a handful of times and now requires assistance loading her kayak onto her vehicle's roof. She has only gone camping one time compared with more regular pre-Accident camping trips. She has gone biking but doing so hurts her shoulders. She has stopped downhill skiing, playing squash, fishing and swimming.
- [19] Her reduced ability to participate in physical activities to the extent she previously did has affected her relationship with her children and contributed to the demise of her relationship with her high-school boyfriend, which ended in February 2016. In addition, as a result of her reduced level of physical activity and poorer eating habits, Ms. Fines gained a significant amount of weight.
- [20] Ms. Fines started a new relationship in March 2016 and is now engaged to be married. She lives with her fiancé and son in Merritt.
- [21] Ms. Fines no longer maintains her home to the same level of cleanliness that she did prior to the Accident. After the Accident, her daughter drove her to work, one and one-half hours each way from Kamloops to Enderby, for a period of approximately four weeks and took over the majority of household tasks including cooking and cleaning. At this time, Ms. Fines is able to perform most household tasks, although with some discomfort. Her son and fiancé assist with shopping, cleaning and heavy lifting at their home in Merritt.
- [22] Ms. Fines continues to experience occasional pain in her neck and right shoulder while at work which requires frequent stretching and breaks. She has made some minor modifications to her work environment including moving her case files from an upper to a lower shelf but nothing else of significance. She is concerned that she would not be capable of dealing with child protection matters (removals from care) in the field due to her shoulder injury and neck pain. She struggles with fatigue at the end of the workday. Her colleague testified that she appears to be struggling both physically and emotionally and is behind on her work as a child protection worker - although she does her best to carry out the essential duties of her job.

- [23] In February of 2019, Ms. Fines sustained a minor injury to her left shoulder when she slipped on some icy stairs outside her apartment. She testified that she was holding on to the left railing with her left hand and not both railings, as she would have done if her right shoulder had not been injured in the Accident.

Impact of the Accident on Ms. Fines' Educational and Vocational Plans

- [24] In July 2014, after completing her BSW in April 2014, Ms. Fines took a job as a social worker with the Splat'sin First Nation in Enderby, British Columbia. In April 2015 she commenced work with the Friendship Aboriginal Society in Kamloops. In July 2015 she was hired as a child protection worker with the Ministry of Children & Family Development ("MCFD") in Merritt, British Columbia. She moved from Kamloops to Merritt for this job.
- [25] Since moving to Merritt Ms. Fines tried other positions with MCFD including working as a child protection worker in Ashcroft in 2017. She testified that she did so in an effort to reduce pain related symptoms arising from her job requirements, which included extended periods of sitting while working on case files or driving to visit clients. Her efforts were not successful and Ms. Fines eventually returned to work as a child protection worker full-time in Merritt and tried a new position working with children with special needs. In February 2019 she returned to her previous job as a child protection worker.
- [26] Ms. Fines testified that before the Accident, she planned to work as a social worker for a short time after she obtained her BSW in April 2014 and then start a full-time Masters in Social Work ("MSW") program, starting in September 2014 and finishing in the summer of 2015. She testified that it was her intention to fund her masters' degree by working part-time as a counsellor, approximately 10-15 hours per week and with student loans, scholarships and bursaries.
- [27] Ms. Fines testified that after completing her masters, she planned to obtain full-time employment as a social worker and work ten hours per week, after hours, as a private counsellor. With respect to her intention to work as a private counsellor, she testified that she had started to build relationships with local First Nations' communities with a view to obtaining private counselling work with them after she completed her MSW.
- [28] Ms. Fines testified that because of her post-Accident symptoms she was initially unable to both work as a social worker and commence MSW studies in 2014 as she had planned. Ms. Fines eventually started a part-time MSW program in Merritt in 2018. She has taken some courses for which she obtained high grades. She testified that because of her symptoms she has not been able to complete this program, from which she is currently on leave.

Credibility and Reliability of Ms. Fines' Evidence

- [29] ICBC submits that Ms. Fines' evidence should be treated with caution. That is, they suggest that Ms. Fines was not a wholly credible or reliable witness. In support of this submission, ICBC says that Ms. Fines was evasive and argumentative during cross-examination. In addition, ICBC says that Ms. Fines overstated her income loss resulting from days of work missed to attend at medical treatments and was untruthful in her income in income tax filings and scholarship applications.
- [30] In my view, Ms. Fines was generally a credible witness and attempted to answer the questions put to her honestly. In a few cases Ms. Fines was unable to explain why medical practitioners recorded improvements to her symptoms after the Accident, which did not accord with Ms. Fines' testimony at trial regarding the severity of her symptoms at the relevant times. In those cases, I have treated Ms. Fines' evidence with some caution.

Medical Evidence

Dr. Hughes

- [31] Ms. Fines tendered four expert reports from Dr. Scott Hughes prepared in 2015, 2017 and 2019. Dr. Hughes was qualified as an expert in the area of orthopedic surgery and musculoskeletal disorders.
- [32] Dr. Hughes first examined Ms. Fines in December 2013 and performed the first of two right shoulder surgeries to Ms. Fines' right rotator cuff in 2014.
- [33] In his 2015 report, Dr. Hughes stated that in his opinion it was more likely than not that the Accident caused a right shoulder rotator cuff tear. His prognosis at that time was that the chances of Ms. Fines' shoulder recovering to "near full function" was good but considered that she would experience a 10-15% deficit in pre-injury right shoulder function. He recommended that Ms. Fines avoid repetitive shoulder level height and above activity and lifting, carrying, pushing and pulling of weights, in excess of what she comfortably tolerated at physical therapy.
- [34] In his follow up 2017 report Dr. Hughes stated that in his opinion, given Ms. Fines' on-going symptoms, that she had likely reached a clinical plateau. He considered that the pain she was experiencing, both to her shoulder and neck, were likely multifactorial and were chronic - although in this respect he deferred to an expert in pain management and rehabilitation. He revised his assessment of the extent of Ms. Fines' right shoulder injury stating that he now considered she had a 25% deficit in pre-injury shoulder function.
- [35] Dr. Hughes completed a further repair to Ms. Fines' right shoulder rotator cuff in May 2018. At trial, he testified that it was most likely that the further repair, which was to a different location on Ms. Fines' rotator cuff, was likely an area which had been injured in the Accident but was not diagnosed prior to the first surgery in 2014.

- [36] In the patient history recorded in his October 2019 report Dr. Hughes recorded for April 22, 2018 that Ms. Fines "continued to do extremely well in the postoperative period and was working hard and very compliant". He recorded for March 25, 2019 that she "continued to make excellent gains with respect to her postoperative rehabilitation" and "was dramatically improving with respect to her overall pain profile, and strength" and "was back to doing most of her activities both day by day activities as well as recreational activities with much less functional restriction."
- [37] In his October 2019 report, Dr. Hughes stated that from a functional standpoint Ms. Fines was "dramatically improved but likely left with a 10-15% deficit in pre-injury shoulder function. He considered that this likely would cause earlier "fatiguability" of the right shoulder muscles and symptomology with repeated overhead use and weakness with heavy manual duties. In his opinion, Ms. Fines had improved with respect to her overall pain profile and her day-to-day functioning. He repeated his earlier advice that she avoid significant repetitive overhead activities or heavy manual overhead lifting.
- [38] In his November 2019 report, Dr. Hughes included his opinion that Ms. Fines' left shoulder injury resulted from an effort on her part to protect her right arm from further injury when she slipped on some icy stairs. At trial, it was apparent that Dr. Hughes' opinion was in part based on his misunderstanding of the manner in which Ms. Fines grabbed onto a handrail when she slipped on the stairs outside her apartment. Dr. Hughes incorrectly assumed that she had reached across her body with her left arm to grab the right-side handrail when she had actually reached to the left railing with her left hand as she fell. As well, Dr. Hughes confirmed in response to a question from the court that his opinion regarding the mechanism of Ms. Fines' left shoulder injury was not a medical opinion. In any case, Dr. Hughes opinion was that the prognosis for recovery for Ms. Fines' left shoulder injury was very good.

Dr. Etheridge

- [39] Ms. Fines tendered two expert reports from Dr. Etheridge prepared in 2017 and 2019. Dr. Etheridge was qualified as an expert in the area of musculoskeletal problems and diagnosis, anesthesia and interventional pain blocks including nerve blocks and rhizotomy, orthopedic surgery and musculoskeletal disorders.
- [40] In his 2017 report Dr. Etheridge provided his opinion that Ms. Fines sustained the following injuries as a result of the Accident: soft tissue injury to the left side of her neck - classified as a WAD type II injury; soft tissue injuries to joint capsules in her cervical spine; on-going cervicogenic and occipital headaches caused by ongoing pain in her cervical spine and overlying muscles; right shoulder rotator cuff tear; and, soft tissue injuries to her lower back.

- [41] Dr. Etheridge reported that Ms. Fines had on-going symptoms including left side neck pain and occipital headaches, upper back pain and ongoing right shoulder pain with decreased range of motion. Despite these on-going symptoms, Dr. Etheridge was of the opinion that Ms. Fines was able to perform the duties of her job and that her recreational and homemaking activities were moderately limited. He considered that there was a substantial possibility that her neck pain, which is aggravated by prolonged deskwork and driving, would continue into the future and would affect her ability to perform the essential duties of her job in the long term.
- [42] In 2017 Dr. Etheridge suggested that Ms. Fines could benefit from future facet joint rhizotomies to cauterize the nerves causing neck pain - which could provide pain relief for an average of 12 months. In his opinion, Ms. Fines could continue to use over the counter pain medication periodically.
- [43] In June 2019 Dr. Etheridge administered a rhizotomy treatment to Ms. Fines' neck.
- [44] In his September 2019 update report Dr. Etheridge noted that Ms. Fines reported that her headaches, neck, upper back and right shoulder pain had decreased in severity, with the level of pain reported to her right shoulder at a nuisance level. He found that she had decreased right-side neck rotation with increased left side neck pain but normal range of motion for her right shoulder and moderately restricted left side shoulder movement.
- [45] At trial, Dr. Etheridge confirmed that in general, Ms. Fines appeared to be substantially better in 2019 than when he first saw her in 2017 and agreed that every one of her previous complaints either had improved or had resolved. He noted that following the rhizotomy treatment she had no facet joint pain in her cervical spine but had on-going myofascial pain affecting her neck and upper back muscles.
- [46] In his 2019 report, Dr. Etheridge referenced Ms. Fines' report that by the end of her workday her pain decreases her ability to perform academic duties, housekeeping and yard work and leisure activities. He did not consider that these limitations would significantly change over time.
- [47] With respect to ongoing treatment, Dr. Etheridge recommended further rhizotomy treatments that would help with headaches, neck and back pain. In his opinion, such treatments could provide pain relief for between six months and three years. He did not provide an opinion regarding how long these treatments would be required. Although in his 2019 report Dr. Etheridge stated that Ms. Fines would require 4-6 weeks to recover from the pain and discomfort associated with each rhizotomy treatment, his evidence at trial was that a 2-4 week recovery period was also possible.
- [48] At trial, Dr. Etheridge confirmed that nerve pain that is initially eliminated after a rhizotomy treatment, would slowly increase over time as the cauterized nerves healed, until a new treatment is provided.

Dr. Riar

- [49] Ms. Fines tendered two expert reports from Dr. Kulwant Riar prepared in 2017 and 2019. Dr. Riar was qualified as an expert psychiatrist.
- [50] In both of his reports, Dr. Riar provided his opinion that because of the Accident Ms. Fines suffers from Somatic Symptom Disorder, Major Depressive Disorder and Unspecified Anxiety Disorder.
- [51] In his 2017 report Dr. Riar recommended that Ms. Fines do active exercise rather than relying on passive treatment as she had primarily been doing to date. In addition, he recommended that she be prescribed with an adequate dosage of anti-depressants and that she participate in between 12 and 14 cognitive behavioral psychotherapy sessions.
- [52] As at 2017, Dr. Riar did not consider Ms. Fines to be disabled, although he expressed his opinion that some of her activities of daily living were restricted due to ongoing depression, anxiety and her somatic symptom disorder. In his opinion, Ms. Fines would likely achieve remission from her psychiatric conditions in the future if she followed treatment recommendations, although he could not say when.
- [53] In his 2019 report, Dr. Riar stated "[a]s far as disability, for the last couple of years, although she has been functioning in personal and professional life, some aspects of her life are limited due to ongoing pain and emotional symptoms. Her overall functioning is quite precarious, [due] to any added stress which can deteriorate her psychiatric disorders and functioning; likely rendering her disabled."
- [54] With respect to her psychiatric prognosis, Dr. Riar's opinion was that Ms. Fines had not received optimal psychiatric care. Although he was somewhat equivocal in his report, his opinion was that there is a good chance that Ms. Fines will recover from anxiety and depression in time and that this will result in an improvement in her somatic symptom disorder.
- [55] The assumptions relied upon by Dr. Riar supporting his diagnosis of major depressive disorder, somatic symptom disorder and unspecified anxiety disorder were significantly challenged on cross-examination.
- [56] Dr. Riar diagnosed Ms. Fines with major depressive disorder by applying the DSM V diagnostic criterion. He agreed on cross-examination that there was no evidence that Ms. Fines had suffered from five symptoms in a two-week period, which is a requirement for diagnosis of this disorder under the DSM V. With respect to the specific criterion he relied upon, Dr. Riar agreed that there was no evidence to support a finding that Ms. Fines was depressed most of the day nearly every day. He also agreed that there was no evidence that Ms. Fines lacked interest or took no pleasure in all activities. He did not know if Ms. Fines gained or lost more than 5% of her body weight in a month. He did not have a basis for finding that Ms. Fines was fatigued every day. Finally, he agreed that he did not have a basis for concluding that Ms. Fines suffered from a loss of concentration every day.

- [57] Dr. Riar suffered from similar problems with respect to the objective findings required to support a diagnosis of somatic symptom disorder and unspecified anxiety disorder under the DSM V. For example, he admitted that he did not specifically inquire whether Ms. Fines spent significant periods of time catastrophizing about her symptoms, which is a requirement under the DSM V. According to Dr. Riar, he simply looked at Ms. Fines and at her patient records and tried to "figure it out".
- [58] With respect to Dr. Riar's diagnosis of unspecified anxiety disorder, he testified that such a diagnosis involves a finding of clinically significant distress or disorder. When asked during cross-examination what evidence he relied upon to make such a finding, Dr. Riar referred to paras. 22 to 23 of his July 2017 report. In my view, although those paragraphs refer to Ms. Fines experiencing some nervousness and anxiety driving and being in large crowds, they do not specify significant distress or disorder. In addition, Dr. Riar agreed on cross-examination that many of the symptoms of anxiety that he considered existed might have been present before the Accident given that Ms. Fines displayed pre-Accident symptoms of obsessive-compulsive disorder.
- [59] Dr. Riar admitted on cross-examination that during his assessment of Ms. Fines, he was not aware that after the Accident Ms. Fines' daughter had attempted suicide and Ms. Fines was concerned she may attempt suicide again, that her son's cousin had committed suicide resulting in her son's temporary drug use and depression or that Ms. Fines' mother-in-law to be had recently passed away. He confirmed that knowledge of these events might have changed his opinion that the Accident caused the psychiatric disorders he identified.
- [60] Finally, on cross-examination Dr. Riar confirmed that in his opinion Ms. Fines would have benefitted from the various treatments he recommended including cognitive behavioral psychotherapy, active exercise rather than passive therapy, and a continual course of anti-depressants (Cymbalta) of 60mg per dose rather than the 30mg doses which Ms. Fines had previously been taking on an on-and-off basis.

The Defence Experts

- [61] ICBC tendered expert evidence from Dr. Kendall and Dr. McGraw, who are both orthopedic surgeons and were qualified to provide opinion evidence at trial.
- [62] Dr. McGraw's opinion was that Ms. Fines sustained a whiplash injury to her neck (WAD Type II), a soft tissue injury to thoracic spine, a right shoulder rotator cuff tear and bruised ribs during the Accident. His opinion was that the long-term prognosis for Ms. Fines' neck and thoracic spine was good although it was unclear if she would ever be free from associated pain. He noted that the bruising to Ms. Fines' ribs and low back pain had resolved.

- [63] In his report of October 2019, Dr. Kendall expressed his opinion that Ms. Fines suffered a soft tissue injury to her neck and upper back in the Accident. In his view, the three possible causes of Ms. Fines' right shoulder, rotator cuff tear include the following: a pre-existing asymptomatic injury - which he considered to be most likely; a tear which occurred at the time of the Accident - which he considered to be less likely but possible; and, a tear which occurred later and is unrelated to the Accident - which he considered to be the least likely.
- [64] In his report, Dr. Kendall states that a basis for his opinion that it is less likely that the right shoulder rotator cuff tear occurred during the Accident is because Ms. Fines did not report any shoulder pain shortly after the Accident. I note that later in his report Dr. Kendall goes on to state that "it appears that she did indeed have pain arising from this cuff tear, as the first surgery did improve her symptoms somewhat".

Causation

- [65] Ms. Fines must establish on a balance of probabilities that Mr. Johnson's negligence caused or materially contributed to her injuries. Mr. Johnson's negligence need not be the sole cause of her injuries so long as it is part of the cause beyond the range of de minimus. Causation need not be determined by scientific precision: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at paras. 13-17 [*Athey*]; *Farrant v. Laktin*, 2011 BCCA 336 at para. 9.
- [66] In *Clements v. Clements*, 2012 SCC 32, at para. 9 [*Clements*], the Supreme Court of Canada affirmed the "but for" causation test, which is a factual determination that is to be applied in a robust common sense fashion. There is no need for scientific evidence of the precise contribution the defendant's negligence made to the injury.
- [67] I am satisfied that the *Clements*' robust and common sense approach to the "but for" test applies. Accordingly, Ms. Fines must establish on a balance of probabilities that her physical and psychological injuries would not have occurred but for the negligence of Mr. Johnson.

Discussion and Conclusion on Causation

- [68] I find that in the Accident Ms. Fines sustained a soft tissue (whiplash) injury to the left side of her neck and soft tissue injuries to joint capsules in her cervical spine. I also find that as a result of these injuries Ms. Fines suffers from symptoms including on-going headaches which occur approximately three times per week, chronic neck pain and sleep disturbance. In my view this position is supported by the evidence of Ms. Fines, the lay witnesses and both Ms. Fines' and ICBC's experts.
- [69] With respect to the cause of Ms. Fines right shoulder injury, I prefer the opinion evidence of Dr. Hughes over that of Dr. Kendall that it is more likely than not that the Accident caused the tears in Ms. Fines' right shoulder rotator cuff which required two surgeries to effect necessary repairs. Dr. Kendall's opinion, that it was more likely that the right shoulder rotator cuff injury was an asymptomatic pre-Accident injury, is not supported by the evidence adduced at trial that Ms. Fines was not suffering right shoulder pain just before the

Accident but did immediately afterwards. In addition, it was Dr. Hughes' evidence that when he completed the first surgical repair to Ms. Fines' rotator cuff, the damaged tissues did not appear to be show old damage. Finally, Dr. Hughes' opinion that the Accident caused Ms. Fines' right shoulder injury is supported by the opinion evidence of Drs. McGraw and Etheridge,

- [70] I accept Dr. Hughes' opinion evidence at trial that the second right shoulder surgery, completed in 2018, was to a portion of Ms. Fines' rotator cuff injured in the Accident and not diagnosed at the time of the first surgery in 2014. Dr. Hughes, as the surgeon that completed the repairs in 2014 and 2018, is in my view in the best position to make this finding. In addition, there is no evidence of an incident occurring after the Accident which would have caused a further tear.
- [71] In summary, I find on a balance of probabilities that the Accident caused Ms. Fines' right shoulder rotator cuff injury which resulted in two surgeries. I accept Dr. Etheridge's opinion that Ms. Fines suffers from a 10-15% deficit in pre-injury, right shoulder function. In addition I accept Dr. Hughes' opinion that in order to avoid further injury or pain Ms. Fines is now required to avoid repetitive right shoulder movement at shoulder level height and above and activities such as lifting, carrying, pushing and pulling of weights in excess of what she can comfortably tolerate at physical therapy.
- [72] With respect to the left shoulder injury Ms. Fines sustained in 2019, I find on a balance of probabilities that but for the Accident Ms. Fines would have used both her right and left arm when walking down the stairs outside her apartment. I accept her evidence that she did not hold onto the railing with her right arm in order to protect her right shoulder from potential further injury. Accordingly, I find on a balance of probabilities that but for her right shoulder injury Ms. Fines would not have sustained the subsequent injury to her left shoulder. Again, the evidence of Dr. Hughes and Ms. Fines indicates that the injury to Ms. Fines' left shoulder was relatively minor and that her left shoulder is not permanently impaired.
- [73] With respect to Dr. Riar's diagnosis of Major Depressive Disorder, Somatic Symptom Disorder and Unspecified Anxiety Disorder, I am not satisfied on a balance of probabilities that these specific diagnoses are correct. With all due respect to Dr. Riar, in my view he relied upon assumptions rather than objective findings with respect to many of the required diagnostic criteria set out in the DSM V manual. In addition, Dr. Riar was not advised of many of the other significant stresses in Ms. Fines' life after the Accident that may have contributed to her symptoms. He admitted that had he known about these stresses it might have affected his opinion that the Accident caused all of Ms. Fines' psychiatric symptoms.
- [74] I am satisfied on the evidence of Ms. Fines and the lay witnesses, that as a result of the Accident Ms. Fines suffered and continues to suffer from symptoms of depression and anxiety, although not to the extent that these symptoms could be described as debilitating.

Damages

Non-Pecuniary Damages

- [75] Non-pecuniary damages compensate a plaintiff for pain, suffering, loss of enjoyment of life and loss of amenities. The compensation awarded should be fair to all parties. Although comparable cases serve as a rough guide in determining fairness, each case depends on its own unique facts: *Benavides v. Doe*, 2015 BCSC 1831 at para. 94; *aff'd by Benavides v. Insurance Corporation of British Columbia*, 2017 BCCA 15.
- [76] Factors to be considered in assessing non-pecuniary damages include the 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 and loss of lifestyle: *Stapley v. Hejslet*, 2006 BCCA 34, at para. 45.
- [77] Ms. Fines submits that non-pecuniary damages in the range of \$150,000 to \$175,000 are appropriate in the circumstances and relies upon the following cases:
- *Noftle v. Bartosch*, [2018] B.C.J. No. 884 [\$170,000]
 - *Cornish v. Khunkhun*, [2015] B.C.J. No. 60 [\$160,000]
 - *Williams v. Sekhon*, [2019] BCJ No. 1691 [\$135,000]
- [78] ICBC submits that non-pecuniary damages, before a reduction for a failure to mitigate, of \$80,000 are appropriate and relies upon the following cases:
- *Gaudreault v. Gobiel*, 2015 BCSC 483 [\$75,000]
 - *Mir Tabatabaei v. Kular*, 2015 BCSC 295 [\$75,000]
 - *Blackman v. Dha*, 2015 BCSC 698 [\$80,000]
 - *Burtwell v. McCaffrey*, 2013 BCSC 886 [\$80,000]
- [79] It is not necessary for me to review the details of the cases cited by counsel in these reasons. I have considered the similarities and differences between the cases cited by counsel and the case at bar.

Discussion and Conclusion on Non Pecuniary Damages

- [80] My findings with respect to the injuries Ms. Fines sustained in the Accident and the injuries to her left shoulder have been set out earlier in my reasons and there is no need to repeat them. In my view the most significant permanent impact of the injuries Ms. Fines sustained is the permanent impairment to right shoulder function, of 10-15% from pre-Accident levels and her ongoing neck pain, which has become chronic, and the associated headaches and fatigue.

- [81] Ms. Fines' evidence at trial was that after the Accident and to date she continues to suffer from significant pain and pain related symptoms including headaches, and loss of restful sleep and associated fatigue.
- [82] I accept that within a short time after the Accident Ms. Fines experienced significant pain to her neck, back and right shoulder. The medical evidence calls into question the extent to which some of those pain symptoms persist. The most recent reports of both Dr. Hughes and Dr. Etheridge suggest that Ms. Fines' pain levels have significantly decreased and is not debilitating. I find that Ms. Fines' pain symptoms have improved since the Accident.
- [83] I am conscious of Dr. Etheridge's opinion that the reduction in neck pain results from the successful rhizotomy treatment Ms. Fines received in June 2019 is not permanent and that over time this pain will return until she receives another rhizotomy treatment. I find it significant that Ms. Fines will require additional rhizotomy treatments, which themselves will involve pain and a period of recovery.
- [84] Unfortunately, Dr. Etheridge did not provide any evidence with respect to how long Ms. Fines will require rhizotomy treatments to manage her neck pain. Dr. Kendall provided evidence during cross-examination that pain generally decreases with age - or stated somewhat differently, that an individual's ability to deal with pain improves over time. For the purposes of assessing Ms. Fines' damages, I have assumed that within ten years her pain related symptoms will improve to a level where they are no longer impacting her vocational or recreational pursuits and that she will no longer require rhizotomy treatments.
- [85] With respect to Ms. Fines' symptoms of depression and anxiety I am not satisfied that these conditions arise solely from the Accident. Dr. Riar's evidence and the evidence of Ms. Fines' son suggest that Ms. Fines displayed obsessive-compulsive behaviour, which includes symptoms similar to anxiety, before the Accident. In addition, Ms. Fines has experienced significant non-Accident related personal stresses in her life since the Accident and by her own evidence and those of her colleagues, works in a high-stress, emotionally challenging profession. In any case Dr. Riar's prognosis, although somewhat guarded, was that with further treatment there is a good chance that Ms. Fines' symptoms of anxiety and depression will resolve over time. I assume with treatment these symptoms will resolve within five years.
- [86] I find that Ms. Fines' Accident-related symptoms have impacted her ability to advance her plans to complete a MSW as quickly as she had planned. I will deal with the extent of delay in more detail later in my reasons. I also find that her symptoms have had a negative effect on her performance at work. Finally, I find that her symptoms have had a negative impact on her self-esteem and sense of self-worth.

- [87] In addition, I find that Ms. Fines' symptoms have resulted in a reduced ability to carry out physical activities including, most significantly, her ability to participate in sports and exercise, and to a lesser extent her ability to complete home and auto maintenance. I am satisfied that Ms. Fines' reduced ability to participate in the same level of physical activity with her children has had an impact on her relationship with them. This has likely also had a negative impact on Ms. Fines' self-esteem and sense of self-worth.
- [88] I am not satisfied that Ms. Fines' Accident-related symptoms and physical limitations have permanently affected her ability to engage in meaningful relationships. Although in February of 2016 Ms. Fines stopped seeing the boyfriend she had at the time of the Accident, she started a new relationship a short time later and is now engaged to her new partner.
- [89] With respect to my assessment of an award for non-pecuniary damages, in my view many of the cases relied upon by Ms. Fines occupy the higher end of the spectrum for non-pecuniary damage awards for similar injuries. The cases relied upon by ICBC are in my view at the lower range and the damages awarded in those cases are not sufficient to address the pain, suffering and loss of enjoyment of life suffered by Ms. Fines.
- [90] In the end, determination of an award for non-pecuniary damages involves an assessment of all of the relevant factors and consideration of fairness to the plaintiff and the defendant. Having reviewed the cases provided by the parties and considering Ms. Fines' particular circumstances I assess Ms. Fines' non-pecuniary damages at \$110,000.

Past Loss of Earning Capacity

- [91] Ms. Fines testified that but for the Accident, she would have worked part-time until she completed her BSW, then full-time as a social worker until she started her MSW studies in September 2014, which she expected to complete by the summer of 2015. She further testified that she would have worked part-time as a private counsellor while completing her MSW and then afterwards would have found full-time work as a social worker and worked up to ten hours per week as a private counsellor.
- [92] Ms. Fines seeks damages for past loss of earning capacity under three main categories. The first category of loss is for days which Ms. Fines says she was unable to work, as a result of the Accident, with the John Howard Society, Splatsin First Nation, Friendship Society and MCFD - for a total loss of \$36,251.30. The second category concerns alleged income loss from November 2015 (which I believe is after Ms. Fines would have completed a practicum as part of her MSW) to the date of trial of \$7,773.58 resulting from the loss of ability to obtain an MSW degree and thereby earn a higher monthly income. The third category concerns an alleged loss of income from November 2015 to the date of trial of \$221,506.56, resulting from the loss of ability to work as a private counsellor with an MSW degree.

- [93] ICBC submits that there is only evidentiary support for \$28,024 in past income loss arising from Ms. Fines' inability to work because of Accident-related illness or attendance at medical treatments. They submit that there is no evidence that but for the Accident, Ms. Fines would have earned more at MCFD than she did even if she had obtained an MSW. Finally, they submit that Ms. Fines' claim that she would have worked as a private counsellor for ten hours a week earning \$120/hr is mere speculation.
- [94] Compensation for past and future loss of earning capacity is to be based on what the plaintiff would have, not could have, earned but for the injury that was sustained: *Ibbitson v. Cooper*, 2012 BCCA 249 at para. 19; *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30; *M.B. v. British Columbia*, 2003 SCC 53 at para. 49.
- [95] A claim for past income loss is actually a claim for past loss of earning capacity. That is, a claim for the loss of the value of the work that the injured party would have performed but was unable to perform because of the injury. Loss of earning capacity rather than the loss of actual income is to be considered, although loss of income may provide some basis in determining the value of loss of capacity: *Mojahedi v. Friesen*, 2016 BCSC 1225 at para. 73 referring to *Rowe* at para. 30.
- [96] The burden of proof of actual past events is proof on a balance of probabilities. An assessment of loss of both past and future earning capacity involves consideration of hypothetical events. A plaintiff is not required to prove these hypothetical events on a balance of probabilities. A hypothetical possibility can be considered so long as there is a real and substantial possibility that it would have occurred, or will occur, and is not mere speculation: *Athey* at para. 27; *Morlan v. Barrett*, 2012 BCCA 66 at para. 38; *Grewal v. Naumann*, 2017 BCCA 158 at paras. 48 - 49
- [97] The amount of past or future income loss may be proven using the "earnings approach" or the "capital asset" approach. The former will be more useful when a loss is more easily measureable - for example where a plaintiff's income is not expected to fluctuate, up or down, over time. The latter is more useful when the loss is not easily measured: *Perren v. Lalari*, 2010 BCCA 140 at para. 32

Discussion and Conclusion on Past Loss of Earning Capacity

- [98] In this case Ms. Fines essentially submits a calculation for past loss of earnings capacity, an earnings approach assessment, based on her best possible employment and earnings scenario from the date of the Accident to the date of trial. She seeks damages for past loss of earning capacity based on this calculation.

- [99] As I have already noted, ICBC accepts that a portion of Ms. Fines' damages for past loss of earning capacity can be determined by calculating lost income for the days she was unable to work. It submits that adding a wage loss differential (that is, the difference between earnings with a BSW and an MSW) and assuming a loss of private counselling income as Ms. Fines submits will result in an excessive award that bears no resemblance to statistical earnings data for persons with an MSW.
- [100] As the authorities make clear, compensation for past loss of earning capacity is based on what the plaintiff would have, not could have, earned but for an accident.
- [101] I find that there is a real and substantial possibility that but for the Accident Ms. Fines would have continued to work part-time until she completed her BSW in May 2014, then worked as a social worker full-time until she started her MSW in September 2014, and then worked part-time until she finished her MSW (along with the required practicum) by November 2015. I also find that there is a real and substantial possibility that after obtaining her MSW that Ms. Fines would have found full-time employment as a social worker and commenced efforts to start building a business as a part-time private counsellor.
- [102] I accept Ms. Fines' evidence that because of the combination of her physical and psychological symptoms caused by the Accident, that she has been unable to complete her MSW at this time. I will discuss my findings whether it is likely that she will be unable to do so forever later in my reasons.
- [103] There is uncertainty with respect to how much more Ms. Fines would have earned to the date of trial working as a full-time social worker if she had obtained her MSW in November 2015 as she had planned. For example, assuming that but for the Accident Ms. Fines would have obtained a position with MCFD, the evidence did not establish when or if she would have obtained a position with MCFD reserved for those with an MSW. Therefore it is not clear whether, if she had obtained her MSW, this would have resulted in greater earnings than she has made as a social worker with a BSW.
- [104] There is also significant uncertainty regarding Ms. Fines' potential earnings as a part-time private counsellor. Ms. Fines' calculation of loss of private counselling income assumes that almost immediately after obtaining her MSW she would have immediately started at ten hours per week of private counselling and earned \$120/hour for this work. In my view there was no evidence adduced at trial to allow me to determine how long it would have taken Ms. Fines to build up to ten hours of private counselling work per week. There was insufficient evidence at trial to support Ms. Fines' position that she would have earned \$120/hour for such work. The evidence at trial provided by one of Ms. Fines' colleagues, that private counsellors charge \$120/hour, is anecdotal. In addition, I am not satisfied that Ms. Fines has included all potential overhead charges to be off-set against potential income as a private counsellor. She has applied an 8% deduction in this respect which in my view is artificially low.

- [105] Despite my uncertainties with respect to losses resulting from a wage loss differential and loss of private counselling income, an assessment of damages for past loss of income earning capacity is required.
- [106] For the purposes of my assessment of damages I assume that Ms. Fines lost employment income of approximately \$33,000 due to an inability to work caused by the Accident. I have not included any amount for lost income due to Ms. Fines attendance at trial as such losses are not claimable (see *Willing v. Ayles*, 2009 BCSC 1035, at paras. 192-193).
- [107] For the purposes of my assessment of losses arising from an alleged wage differential, I assume that had Ms. Fines obtained her MSW in November 2015, as she had planned, she would have earned an additional \$5,000 in salary before trial.
- [108] Finally, on the assumption that Ms. Fines would have started private counselling work starting in January 2016 averaging 3.5 hours per week in 2016 and seven hours per week each year thereafter, that she would have been able to charge \$100/hr and that her overhead costs would have been 15% of gross earnings, I estimate that but for the Accident, Ms. Fines would have earned \$102,510 in private counselling income before trial.
- [109] In total this would result in past wage loss, before tax, totalling \$140,510. If income tax of 35% is assumed the net amount would be \$91,331.
- [110] In summary, I find that there is a real and substantial possibility that but for the Accident Ms. Fines would have earned an additional \$91,331 after tax, before trial.

Loss of Future Earning Capacity

- [111] Ms. Fines submits that she is currently not able and will never be able to complete an MSW as a result of her inability to sit and study for prolonged periods of time. She submits that her ongoing pain, fatigue and functional deficits prevent her from working outside of her regular MCFD hours. On this basis, she contends that she will suffer future income losses, which includes the wage differential loss discussed earlier in my reasons, eventually rising to \$14,000/year until she reaches 65 years of age and retires from full-time work and a loss of earnings from private counselling, of \$57,600/year until age 65 and \$144,000/year from 65 to 70 years of age.
- [112] In addition, Ms. Fines submits that she will incur further income losses on the assumption that she will miss three weeks of work per year to recover from annual rhizotomy treatment and a further two weeks per year due to pain and headaches - both to the age of 65.
- [113] In total, Ms. Fines claims damages for loss of future earning capacity of \$1,637,787.
- [114] ICBC submits that Ms. Fines' claim for loss of future earning capacity is significantly inflated. They submit that the calculation completed by Ms. Fines' expert economist, Mark Szekely (who I qualified as an expert witness at trial) relies on a number of unverified assumptions, including the assumption with respect to Ms. Fines' potential earnings as a

private counsellor and the assumption that she would work until after the age of 65. ICBC contends that Mr. Szekely's wage loss calculations bear no resemblance to the statistical averages for female counsellors with a Master's degree.

- [115] In addition, ICBC submits that if I find that Ms. Fines' future earning capacity is impaired as a result of her not having her MSW degree, which they do not concede, that at most Ms. Fines should receive damages equivalent to one-years' salary. ICBC submits that this will enable Ms. Fines to go back to school full-time, obtain her MSW degree and then continue to work on a full-time basis as a social worker and part-time as a private counsellor, as she had originally planned.

Discussion and Conclusion on Future Loss of Earning Capacity

- [116] I consider that Ms. Fines' proposed methodology for assessing her damages for loss of future earning capacity, which is in essence an income approach, is inappropriate in the circumstances. As I stated above concerning Ms. Fines' submissions with respect to past wage loss, Ms. Fines submits a calculation of damages for loss of future earnings capacity based on the best possible scenario for her possible earnings had the Accident not occurred. In my view, there are too many uncertainties with respect to what may happen to Ms. Fines' employment and employment prospects in the future to justify an income approach assessment to this head of damages.
- [117] A claim for loss of future earning capacity raises two key questions: 1) has the plaintiff's earning capacity been impaired by his or her injuries; and, if so 2) what compensation should be awarded for the resulting financial harm that will accrue over time? The assessment of loss must be based on the evidence, and not on an application of a purely mathematical calculation. The appropriate means of assessment will vary from case to case: *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 (S.C.); *Pallos v. Insurance Corp. of British Columbia* (1995), 100 B.C.L.R. (2d) 260 (C.A.); *Pett v. Pett*, 2009 BCCA 232.
- [118] The essential task of the court is to compare the likely future of the plaintiff's working life if the accident had not happened with the plaintiff's likely future working life after the accident: *Gregory v. Insurance Corp. of British Columbia*, 2011 BCCA 144 at para. 32.
- [119] The principles that apply in assessing loss of future earning capacity were summarized by Low J.A. in *Reilly v. Lynn*, 2003 BCCA 49 at para. 101:
- [101] The relevant principles may be briefly summarized. The standard of proof in relation to future events is simple probability, not the balance of probabilities, and hypothetical events are to be given weight according to their relative likelihood: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 27. A plaintiff is entitled to compensation for real and substantial possibilities of loss, which are to be quantified by estimating the chance of the loss occurring: *Athey v. Leonati*, supra, at para. 27, *Steenblok v. Funk* (1990), 46 B.C.L.R. (2d) 133 at 135 (C.A.). The valuation of the loss of earning capacity may involve a comparison of what the plaintiff would probably have earned but for the accident with what he will probably earn in his

injured condition: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 at 93 (S.C.). However, that is not the end of the inquiry; the overall fairness and reasonableness of the award must be considered: *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 11; *Ryder v. Paquette*, [1995] B.C.J. No. 644 (C.A.) (Q.L.). Moreover, the task of the Court is to assess the losses, not to calculate them mathematically: *Mulholland (Guardian ad litem of) v. Riley Estate* (1995), 12 B.C.L.R. (3d) 248 (C.A.). Finally, since the course of future events is unknown, allowance must be made for the contingency that the assumptions upon which the award is based may prove to be wrong: *Milina v. Bartsch*, *supra*, at 79.

- [120] Although she has had difficulty performing her job duties Ms. Fines has been able to complete her studies and obtain work as a social worker. In my view the evidence does not establish that as a result of her Accident-related symptoms, that Ms. Fines is at risk of losing her job, or will otherwise be unable to continue to work as a social worker with MCFD. I agree with the submissions of ICBC that the evidence does support a finding that Ms. Fines has missed an excessive amount of work since the Accident. Although Ms. Fines testified that she has had some difficulties with her current supervisor, there is no evidence of any disciplinary action or other performance based complaints from her supervisors.
- [121] In addition, at this point it appears that only minimal accommodation has been made for Ms. Fines at her workplace, including moving her case files to a lower shelf. In my view, to the extent that Ms. Fines has any limitations (for example reaching, lifting and sitting or driving for extended periods of time) her employer will likely make reasonable efforts to accommodate her, so long as her limitations do not prevent Ms. Fines satisfying the bona fide occupational requirements of her job. By way of example, the evidence suggests that a sit-stand desk may help relieve Ms. Fines' neck and back pain. In addition, there was evidence adduced at trial that there are other types of jobs available to Ms. Fines as a social worker with MCFD that do not involve the same requirements for extended periods of sitting at her desk or driving.
- [122] In my view, the main question with respect to future loss of earning capacity is whether there is a real and substantial possibility that Ms. Fines will be unable to obtain her MSW in the future and if so, for how long. The next question to be answered is what Ms. Fines could have earned but for the accident, compared with her likely earnings in her injured condition.
- [123] Despite the injuries she sustained in the Accident Ms. Fines was able to complete her BSW coursework at Thomson Rivers University. In addition, although she found it difficult (she testified that she worked out of necessity to pay the bills), she was able to continue to work on a part-time basis with the John Howard Society while completing her degree. Although her grades dipped slightly after the Accident, Ms. Fines' continued to perform well in her academic pursuits. This included presenting a paper at a conference in 2014 - which I note she did as she still intended to complete an MSW at that time. Finally, after an extended break from her studies Ms. Fines was able to complete two courses towards her MSW degree in 2018. She took these courses on a part-time basis while she continued to work

with MCFD in Merritt and obtained good grades.

- [124] Ms. Fines concedes, and I find, that Ms. Fines has the intellectual ability to complete a MSW.
- [125] As I have outlined above both Dr. Hughes and Dr. Etheridge were of the opinion that Ms. Fines' condition had significantly improved between 2017 and the later part of 2019. Neither of these experts provided an opinion that she was, or is, unable to attend at school on a part-time or a full-time basis. Nonetheless, I am satisfied that as a result of her current Accident related physical symptoms and psychological symptoms, that Ms. Fines was not capable of taking all of the necessary courses to complete her MSW until some time shortly after she recovered from her first rhizotomy treatment in late 2019.
- [126] With respect to Ms. Fines' submission that her inability to sit and study for prolonged periods prevents her from taking masters' courses, I am not satisfied that there is a real and substantial possibility that this will always be the case. In my view Ms. Fines is a strong capable person who has overcome many obstacles in her past. I consider that that Ms. Fines will likely be able to develop strategies to allow her to complete her studies even if her pain symptoms persist.
- [127] Although I am satisfied that Ms. Fines symptoms of depression have impacted Ms. Fines recovery from her physical symptoms and have otherwise reduced her ability to work and study I do not consider that there is a real and substantial possibility that these symptoms will continue forever. I accept the evidence of Dr. Riar that with further treatment, in particular cognitive behavioral psychotherapy, that Ms. Fines' depression and anxiety, will improve. I expect that Ms. Fines will take the necessary steps to obtain treatment for her psychological symptoms
- [128] In summary, although I have found that as a result of the Accident Ms. Fines has been unable to complete her MSW to date I am not satisfied that she will not be able to do so in the future.
- [129] I note parenthetically, that Ms. Fines' evidence, which I have accepted, is that before the Accident she planned to stop working full-time while she completed her MSW.
- [130] Assessment of damages for loss of future income capacity on a loss of capital approach is not an exact science. In my view an award that provides Ms. Fines' with the financial resources to stop working, seek additional medical treatment and to complete her MSW is reasonable and fair. I conclude that an appropriate award should reflect the real and substantial possibility that Ms. Fines will experience a further delay of one-year and nine months in achieving the Master's degree. This assumes that Ms. Fines' symptoms will continue to improve with further treatment and that she will be in a position to commence a full-time MSW program in September 2020, which she will be able to complete in 2021. Based on Ms. Fines' gross pre-tax income in 2019 of approximately \$80,000 this results in \$140,000 in pre-tax income loss from the date of trial to September 2020.

- [131] I also consider it reasonable to include an amount of damages to reflect Ms. Fines' loss of earnings from private counselling from trial through until September of 2020, which I assess at \$25,200.
- [132] I am not satisfied that there is a real and substantial possibility that Ms. Fines will be required to take two weeks off per year as a result of pain and headaches. I am satisfied that she will suffer an income loss resulting from the requirement that she take time off for future rhizotomy treatments. In my view, there is insufficient evidence on which I can reasonably conclude that Ms. Fines will require rhizotomy treatments until she is 65 years old. I accept Dr. Kendall's evidence that it is likely Ms. Fines' neck pain will improve over time which may reduce or eliminate the requirement for these treatments.
- [133] For the purposes of my assessment of damages, I find that there is a real and substantial possibility that Ms. Fines will require and will receive rhizotomy treatments for a further ten years, until age 55, and that she will require two weeks leave from work time per year to recover from each of the required treatments. Utilizing the calculation for income loss included in Ms. Fines' closing submissions as a guide, I assess the present value of Ms. Fines' future income losses, resulting from a requirement to miss work for rhizotomy treatments, to be \$25,000.
- [134] Deducting income tax at the rate of 35% from the gross amount for future income loss of \$190,200 results in an award of \$123,630. I assess Ms. Fines' damages for loss of future income earning capacity to be \$123,630.

Cost of Future Care

- [135] Ms. Fines seeks damages of \$270,850 for the costs of her future care relying on the reports of Mary Jo Mulgrew. Ms. Mulgrew was qualified as an expert occupational therapist with expertise in functional capacity assessment and quantifying current and future rehabilitation and care costs. Mark Szekely completed the calculation of the present value of future care costs.
- [136] ICBC accepts that some of the cost of future care items set out in the report of Ms. Mulgrew are appropriate but disputes a number of items claimed by Ms. Fines.
- [137] A plaintiff is entitled to compensation for the cost of future care based on what is reasonably necessary to restore her to her pre-Accident condition in so far as that is possible. When full restoration is not achievable, the court must strive to assure full compensation through the provision of adequate future care. The award is to be based on what is reasonably necessary on the medical evidence to preserve and promote the plaintiff's mental and physical health: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.); *Williams v. Low*, 2000 BCSC 345; *Spehar v. Beazley*, 2002 BCSC 1104; *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at paras. 29-30.

- [138] The test for determining the appropriate award under the heading of cost of future care is an objective one based on medical evidence. For an award of future care: (1) there must be a medical justification for claims for cost of future care and (2) the claims must be reasonable: *Milina* at 84; *Tsalamandris v. McLeod*, 2012 BCCA 239 at paras. 62-63.
- [139] It is not necessary for a medical expert to testify in support of each item of support that is claimed but there must be some evidentiary link between a physician's assessment of pain, disability and recommended treatment and the care recommended by a qualified health care professional: *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 39.
- [140] Future care costs are "justified" if they are both medically necessary and likely to be incurred by the plaintiff. The award of damages is thus a matter of prediction as to what will happen in the future. If a plaintiff has not used a particular item or service in the past it may be inappropriate to include its cost in a future care award. However, if the evidence shows that previously rejected services will not be (able to be) rejected in the future, the plaintiff can recover for such services: *Izony v. Weidlich*, 2006 BCSC 1315 at para. 74; *O'Connell v. Yung*, 2012 BCCA 57 at paras. 55, 60, and 68-70.
- [141] The extent, if any, to which a future care costs award should be adjusted for contingencies depends on the specific care needs of the plaintiff. In some cases, negative contingencies are offset by positive contingencies and therefore a contingency adjustment is not required. In other cases however, the award should be reduced based on the prospect of improvement in the plaintiff's condition or increased based on the prospect that additional care will be required. Each case falls to be determined on its particular facts: *Gilbert v. Bottle*, 2011 BCSC 1389 at para. 253.
- [142] An assessment of damages for cost of future care is not a precise accounting exercise: *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at para. 21.

Discussion and Conclusion on Cost of Future Care

- [143] ICBC submits that the cost of future care report tendered by Ms. Mulgrew should be given little weight on two basis. First, ICBC contends that during her testimony Ms. Mulgrew was evasive and argumentative. Second, ICBC contends that Ms. Mulgrew improperly relied upon a functional capacity evaluation completed in 2017 and Ms. Fines' subjective complaints of pain in 2019 in formulating her opinion with respect to Ms. Fines' care needs in 2019, rather than completing an updated FCE.

- [144] I agree that Ms. Mulgrew appeared to become defensive during her cross-examination at trial. This had an impact on my assessment of the reliability of her evidence regarding Ms. Fines' future care needs. In addition, in my view Ms. Mulgrew did not adequately explain her reliance on her objective evaluation completed in 2017 of Ms. Fines ability to carry out certain tasks around her home in formulating her 2019 opinion regarding Ms. Fines' on-going care needs.
- [145] Ms. Mulgrew's explanation that she considered Ms. Fines' subjective complaints in 2019 to be consistent with her objective findings in 2017 is in my view problematic. I do not consider a sufficient explanation to be, as argued by Ms. Fines counsel at trial, that Ms. Mulgrew was not asked to complete an updated functional capacity evaluation because of cost concerns. In addition, Ms. Mulgrew appears to have unreasonably disregarded the opinion of Dr. Hughes regarding Ms. Fines' progress.
- [146] ICBC agrees that the costs of the cognitive behavioural psychotherapy, recommended by Dr. Riar, for 14 -16 sessions at a cost of \$2,925 is appropriate. I agree that this cost is appropriate.
- [147] ICBC also agrees that the following medications and treatments are reasonable although to a lesser frequency and period of time than set out in the report of Ms. Mulgrew:
- o Cmybalta
 - o Extra Strength Tylenol and Advil
 - o kinesiology sessions
 - o massage therapy
 - o physiotherapy
- [148] I agree that there is insufficient medical support justifying an award of damages premised upon Ms. Fines utilizing all of the above medications for an extended period, given her progress to the date of trial. I consider it appropriate that Ms. Fines receive an award reflecting the use of the above listed medications and treatments for a period of two years. Applying the relevant multiplier from the present value table in Mr. Szekely's report (\$1,959) results in a figure for this period of approximately \$7,000.
- [149] I agree with the submissions of ICBC that none of the medical experts who testified at trial suggested that Ms. Fines take Celebrex or Flexeril or receive chiropractic care. I decline to award any amount for the costs of these items.
- [150] I disagree with ICBC that Ms. Fines should not be entitled to the costs of additional rehabilitative activities including yoga and a gym pass. I award Ms. Fines the costs of obtaining these services for a period of two years, which after applying the same multiplier referred to above results in a calculation of \$1,900 for these costs.

- [151] With respect to the adaptive aids suggested for Ms. Fines' use at home, including a hair dryer stand and kitchen equipment I am not satisfied that as a result of Ms. Fines' Accident-related symptoms these items are medically justified. Further, with respect to the various ergonomic devices suggested for use at work I am not satisfied, given that Ms. Fines likely has a right to seek that her employer provide some or all of these items, that Ms. Fines will incur the cost of obtaining them.
- [152] Finally, with respect to the future cost of compensatory services including house cleaning, window washing, yard maintenance and snow removal and vehicle care, claimed in the amount of \$6,312 annually, I consider it probable that a portion of these costs would likely have been incurred anyway. In addition as set out in *Travis v. Kwon*, 2009 BCSC 63, it is not reasonable to expect to pay to have someone perform services that can and should reasonably be taken on by members of someone's family. The evidence establishes that at this time Ms. Fines' son and fiancé are helping with household tasks that Ms. Fines has difficulty completing herself. In my view, on the assumption that Ms. Fines will incur some costs, an appropriate amount for these costs is \$2,000 over a two-year period.
- [153] In summary, I award Ms. Fines damages for costs of future care in the amount of \$13,825.

Loss of Housekeeping/Handyman Capacity

- [154] Ms. Fines seeks and award of \$50,000 under this head of damages.
- [155] Where a plaintiff suffers an injury which would make a reasonable person in their circumstances unable to perform usual and necessary household work - that is where the plaintiff has suffered a loss of capacity - that loss may be compensated by way of a pecuniary award: *Kin v. Lin*, 2018 BCCA 77 at para. 33.
- [156] Ms. Fines submits that her capacity to perform heavy household tasks, home renovations, furniture refinishing, landscaping and vehicle maintenance has been impacted by the Accident. The evidence establishes that Ms. Fines carried out this type of work before the Accident and that this work was important to her. I am satisfied that the medical evidence, in particular the opinion of Dr. Hughes that Ms. Fines has suffered a 10-15% deficit in her shoulder function, which includes a limitation in above-the-shoulder work and pushing, pulling and lifting weight, has reduced her ability to carry out such work.
- [157] I am not satisfied that the amount claimed by Ms. Fines under this head of damages is justified. With further improvement to her symptoms, Ms. Fines will likely be able to do some of the work she previously did. I award Ms. Fines \$15,000 for damages for loss of housekeeping and handyman capacity.

In Trust Claim

- [158] Ms. Fines seeks and award of \$25,000 in-trust for the value of services provided by her daughter over approximately an 18-month period after the Accident. These services include cooking, cleaning, shopping and most significantly, driving Ms. Fines to and from Enderby, a drive of one and one-half hours each way, over a three month period.
- [159] I have referred to the factors considered in making an in-trust award set out at para. 180 of Bystedt (Guardian ad litem of) v. Bagdan, 2001 BCSC 1735. I will not refer to each of them in my reasons. As set out in Bystedt, to justify an in-trust award the services provided, if rendered by a family member, must be over and above what would be expected from the family relationship.
- [160] I am satisfied that Ms. Fines' daughter was required to provide significant services to Ms. Fines over an 18 month period. Ms. Fines has not provided any evidence with respect to the cost of obtaining such services from third parties. I consider that an appropriate award for the value of driving services to and from Enderby over three months is \$2,500. I consider, on an assumption that Ms. Fines' daughter provided approximately 5 hours of homecare services per week to Ms. Fines over an 18-month period, over and above what she could or would have normally done, that a further in trust amount of \$5,000 is warranted. In total, I order damages to Ms. Fines payable in-trust in the amount of \$7,500.

Special Damages

- [161] ICBC has agreed to the majority of special damages claimed by Ms. Fines. The disputed amount of special damages concerning some mileage, miscellaneous expenses and vehicle maintenance costs total \$2,495 (the "disputed special damages").
- [162] The total value of mileage in dispute is \$170.60. ICBC disputes the claim for vehicle mileage incurred by Ms. Fines in seeking treatment to her left shoulder. Given my finding that her left shoulder injury resulted from injuries sustained in the Accident I find that this claim is appropriate. In addition ICBC disputes that Ms. Fines is entitled to mileage costs at attending at proceedings related to this litigation. I award Ms. Fines special damages for mileage in the full amount claimed.
- [163] ICBC disputes that Ms. Fines should receive special damages for entry fees paid in advance for two sporting events that she was unable to attend after the Accident and for which she could not obtain a refund. In addition, ICBC disputes landscaping costs that Ms. Fines says she incurred because of her inability to complete this work after the Accident. Finally, ICBC disputes the cost of an expedited assessment with Dr. Hughes to address Ms. Fines' left shoulder injury. In my view all of these special damages arise from the Accident are recoverable.

[164] Finally, ICBC disputes that Ms. Fines is entitled to vehicle maintenance expenses totaling \$1,118.13, as she would have incurred these expenses in any case. I accept Ms. Fines' evidence that she has in the past and likely would have continued to perform some vehicle maintenance but for the Accident. I have reviewed the list of maintenance items provided by Ms. Fines and it appears that some or all of the items include amounts for both parts and services. Parts costs are a cost that Ms. Fines would have incurred in any case. In addition, it is not clear that all of the services for which Ms. Fines claims are services that she completed on her own vehicle before the Accident. I find that Ms. Fines is entitled to special damages of \$500 for vehicle maintenance.

[165] In total, I award Ms. Fines special damages of \$19,993.33.

Did Ms. Fines Fail to Mitigate Her Damages?

[166] ICBC contends that Ms. Fines failed to mitigate her damages by failing to follow the recommendations of Dr. Riar, as set out in his 2017 and 2019 reports.

[167] Dr. Riar recommended that Ms. Fines receive an adequate dosage of antidepressant medication, attend cognitive behavioural psychotherapy for 12 to 14 one-hour sessions and engage in active exercise instead of passive treatment. ICBC's principle complaint is that Ms. Fines failed to mitigate her damages by completing the recommended course of cognitive behavioural psychotherapy.

[168] It is ICBC's onus to establish that Ms. Fines failed to mitigate her damages. To satisfy this onus they must show that Ms. Fines acted unreasonably in failing to have undergone the recommended psychotherapy treatments and the extent by which her damages would have been reduced if she had received that treatment. (*Mullens v. Toor*, 2016 BCSC 1645, at para. 104, appeal dismissed *Mullens v. Toor*, 2017 BCCA 384.)

[169] Ms. Fines does not dispute that she was aware of Dr. Riar's 2017 and 2019 recommendations that she attend at cognitive behaviour psychotherapy sessions. She says that she attended at four sessions with Greg Scriver in October and November 2014. Her explanation for not attending at additional psychotherapy treatment sessions was that she felt uncomfortable undergoing counselling sessions in Merritt with counsellors that were her colleagues and that it was too difficult to travel to Kamloops from Merritt for such care.

[170] ICBC contends that it was unreasonable for Ms. Fines not to attend at psychotherapy sessions in Merritt on the basis that doing so would embarrass her. In addition, they say that the evidence establishes that Ms. Fines was travelling to Kamloops on a regular basis to, for example, receive treatment for her physical ailments and to take her son to guitar lessons. They contend that even if it was reasonable for her not to seek psychotherapy treatment in Merritt, there was no reason that she could not have sought this treatment in Kamloops. I note that the evidence indicates that Ms. Fines was also travelling to Chase on a regular basis to visit family.

- [171] Dr. Riar's opinion in both 2017 and 2019 is that with the treatments he recommended, including psychotherapy, Ms. Fines functioning would improve and that she would achieve remission from her psychological conditions. ICBC says that this establishes that Ms. Fines' damages would be lower, if she had followed the recommendations of Dr. Riar.
- [172] Relying on the decision in *Mullens v. Toor* ICBC says that Ms. Fines' damages should be reduced as follows: non-pecuniary damages by 50%, future loss of capacity by 50%, and cost of future care by 10%.

Discussion and Conclusion on Failure to Mitigate Damages

- [173] I am satisfied that it was unreasonable for Ms. Fines not to follow the treatment recommendations provided by Dr. Riar in 2017 that she seek cognitive behavioural psychotherapy treatments. Ms. Fines, as a social worker familiar with the benefits of this therapy, was or should have been aware of the potential value of such treatments in addressing her symptoms of depression and anxiety.
- [174] I do not consider Ms. Fines' explanation that she did not seek such treatment in Merritt because she wished to avoid the embarrassment of seeking treatment from counsellors in the same community where she worked to be reasonable. Potential embarrassment is not a sufficient justification for not seeking treatment. In any case, even if it was reasonable for Ms. Fines not to seek the relevant treatment in Merritt, I find it probable that she could have sought this treatment in Kamloops - which is only a relatively short distance away.
- [175] I am satisfied that had Ms. Fines followed Dr. Riar's treatment recommendations that her Accident related symptoms of depression and anxiety would have been reduced or eliminated before trial. This would have reduced the suffering experienced by Ms. Fines after the Accident and reduced the impact of her symptoms on her ability to continue with her plans to complete her MSW. In my view, this justifies a reduction in the awards for non-pecuniary damages, past loss of income earning capacity and loss of future earning capacity. I consider that a 10% reduction to the awards under these heads of damages is appropriate.
- [176] I am not satisfied that Ms. Fines damages for costs of future care or special damages would have been reduced if she had received cognitive behavioural therapy as in my view most of the associated costs and expense would have occurred no matter what.

Summary

- [177] In summary, damages are awarded to Ms. Fines as follows:

Non-pecuniary damages

\$ 99,000*

Past loss of earning capacity

\$ 82,200*

Lost of future earning capacity

Cost of future care

\$ 111,300*

\$ 13,300

Special damages

\$ 19,993.33

Loss of Housekeeping/Handyman Capacity

\$ 15,000

In-Trust Claim

\$ 7,500

TOTAL

\$348,293.33

[*gross amount minus 10% for failure to mitigate damages]

[178] Ms. Fines is entitled to interest pursuant to the Court Order Interest Act, R.S.B.C. 1996, c. 79.

Costs

[179] Subject to any submissions the parties wish to make, Ms. Fines is entitled to her costs of the action at Scale B.

"Mayer, J."

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