

CANADA / JUDGMENT

Flores v. Joynson

2020 BCSC 655

COURT

Supreme Court of British Columbia

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2020 BCSC 655 Flores v. Joynson

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Flores v. Joynson,

2020 BCSC 655

Date: 20200429

Docket: M152746

Registry: Victoria

Between:

Elaine Flores

Plaintiff

And:

Steven Douglas Joynson

Defendant

Before: The Honourable Mr. Justice MacKenzie

Reasons for Judgment

Counsel for the Plaintiff:

S. Sweeney

M.C.E. Merryfield

Counsel for the Defendant:

R.R. Lawler

Place and Date of Trial:

Victoria, B.C.

February 10-12, 2020

and March 10, 2020

Place and Date of Judgment:

Victoria, B.C.

April 29, 2020

INTRODUCTION

- [1] This litigation concerns injuries the plaintiff, Ms. Flores, suffered in a motor vehicle accident that occurred nearly six years ago. Liability is admitted. The defendant also admits his negligence caused the injuries Ms. Flores still suffers from. As a result, the only issue is what amount of damages should be awarded to Ms. Flores. Unlike many such cases, the parties are fairly close when it comes to what they say would be a fair assessment for non-pecuniary damages, and actually agree on the amount of damages for past loss of earning capacity and special damages.
- [2] Conversely, they have dramatically different positions when it comes to damages for future loss of earning capacity and the cost of future care. Even with the defendant agreeing that Ms. Flores is entitled to a sizeable award for future loss of earning capacity and cost of future care, the parties are still some \$600,000 to \$700,000 apart in the former and \$100,000 or so apart in the latter.
- [3] Even though the plaintiff seeks damages of well over a million dollars, the trial was conducted with great economy, with just over two days of viva voce testimony, and relatively brief submissions, notwithstanding the dramatic discrepancy in what the parties say is a fair award for future loss of earning capacity. While the quest for a speedy and efficient trial has been achieved by experienced counsel, what remains is the "just" resolution of the matter, a question of great significance to both parties, but especially the injured party, Ms. Flores.

BACKGROUND

- [4] Ms. Flores is now 33 years of age. She is married with a daughter who is four years of age. She is a dental assistant, much valued by her employer, who she has been with since 2007. Her husband operates a successful Information Technology business out of their rental accommodation, employing contract employees who work remotely. Prior to the accident, she and her husband enjoyed an active lifestyle, travelling and participating in many outdoor activities, such as scuba diving, surfing and snowboarding. Ms. Flores was a healthy young woman. She had no prior hip or shoulder problems or any other significant injuries

or medical issues, other than when she was 11 or 12 years old, she was diagnosed with an anxiety disorder. Since high school Ms. Flores has been able to manage her anxiety disorder without medication.

THE ACCIDENT

- [5] On July 17, 2014, Ms. Flores says "her life changed," when at approximately 7:15 a.m., driving to work in her Honda Civic, she was involved in the motor vehicle collision. She was proceeding through a green light when the defendant, blinded by the early morning sun, drove his Chevrolet Silverado pickup truck through the red light, travelling at approximately 50 kilometres an hour. The front of his truck struck Ms. Flores's right rear side panel and spun her vehicle 180 degrees until the front driver side of her vehicle struck a telephone pole. Ms. Flores's vehicle was written off and the damage to the pick-up was extensive.
- [6] The impact was significant. Ms. Flores testified her left shoulder "slammed" against the driver's door. Her right hip and left ankle were quite sore and she was left "pretty shaken." She was quite disoriented and distraught, focusing only on letting her employer know that she would be "late" for work.
- [7] Ambulance attendants arrived and took Ms. Flores to the hospital. Her hip was very sore and she felt quite nauseous. She left the hospital within a reasonable period of time, but not before vomiting prior to discharge. Her mother took her home to her parents' residence at Shawnigan Lake. Ms. Flores experienced a throbbing headache for the remainder of the day.
- [8] She testified that her right hip continued to be "very sore." Her left shoulder was "pretty sore," along with her left ankle. She testified she had severe headaches and said she thought her head was going to "explode." She also experienced neck pain.
- [9] In a day or two, her mother took her to a walk-in clinic, where she was diagnosed with a concussion. She was advised to rest, be quiet and stay in a dark room. She resided with her parents for five to seven days and then went home with her hip and shoulder still being "pretty sore" and her head "throbbing." For six weeks, her shoulder, neck, hip and back remained sore and she had constant headaches. She testified she had constant throbbing in her head and was unable to do "almost anything." She described the pain as "severe."

MEDICAL TREATMENT

- [10] On July 29, 2014, some 12 days after the accident, Ms. Flores saw her family doctor, Dr. Childs. She testified her left shoulder pain was worse and she could not sleep on her left side. Her right hip remained sore. She still had a 24-hour headache, but the headache was not as severe as during the first week following the accident. Dr. Childs' diagnosis was soft tissue injuries as a result of the collision.

- [11] Prior to seeing Dr. Childs, Ms. Flores had embarked on a physiotherapy and massage regime, beginning on July 21, 2014, which she said was somewhat helpful. At her July 29 appointment, Dr. Childs instructed Ms. Flores to continue with these therapies and to stay off work for a couple of weeks.
- [12] Ms. Flores testified that Dr. Childs prescribed her OxyContin for pain, Gabapentin for pain and muscle relaxation, and Flexeril for sleep. She testified the only relief she got was from 900 mg of Gabapentin, but because this significant dose left her feeling "stoned," she stopped taking this particular medication.
- [13] Ms. Flores returned to work a month later on August 18, 2014. She testified that since being diagnosed with an anxiety disorder at an early age, she has difficulty coping unless she is active and busy. As a result, she was determined to return to her "normal life" as soon as possible, thereby prompting her return to work, notwithstanding the concerns expressed by her husband and Dr. Childs. Ms. Flores testified she wanted to immediately return to her regular four-day work week, but was advised by her office manager to try working a couple of days a week and see how she managed.
- [14] Ms. Flores testified that, by this point in time, her headaches had got "quite a bit better," her neck pain had improved, but her shoulder and hip were still sore.
- [15] Ms. Flores testified she believed she could "power through work" but that work on August 18 was "horrible." She left work at lunch as the pain in her left shoulder and right hip and a headache precluded her from completing her full day. She testified she could hardly drive home as she was so sore. She did not work on Wednesday, August 20, but went to work on Thursday. She testified she was so sore at the end of that shift that she went home crying, "crawled" into bed and tried to rest until the following Monday. At that point in time she decided she would work Monday and Tuesday, take Wednesday off, go back to work on Thursday and then recuperate Friday, Saturday and Sunday. She testified she was unable to contemplate working her usual four days. She said she "suffered through" this three-day work week, stating that she thought, "if I can distract myself at work, I can get over it."
- [16] In early September 2014 Ms. Flores returned to see Dr. Childs. The primary issue again was her right hip and left shoulder. She testified that although her headaches were not constant, after a work shift she experienced some relatively significant headaches. Dr. Childs ordered an X-Ray of Ms. Flores's right hip and lumbar spine and an MRI without contrast of her right hip and pelvis.
- [17] Ms. Flores testified that psychologically she was having difficulty dealing with her incapacity and that she was "pretty upset," as her "whole life was turned upside down." She testified she was not sleeping, she was "super depressed" and "cranky" and had little time for her husband.

- [18] Nevertheless, Ms. Flores continued to undergo physiotherapy and massage therapy and agreed that this "really helped to relax [her] whole body." She saw Dr. Childs on a regular basis and testified that it was his view that she was working too hard. However, she said work kept her "sane."
- [19] In due course, the X-Ray and MRI ordered by Dr. Childs indicated that her hip and lumbar were "normal." Nevertheless, she was still suffering from significant pain in her right hip. As a result, in October 2014 she was referred to Dr. Burnett, an orthopaedic surgeon. At that time, the pain in her hip was constant and whilst her left shoulder was still "pretty sore," her hip was the most significant issue. Dr. Burnett ordered a with-contrast MRI.
- [20] Dr. Burnett prescribed Celebrex. Ms. Flores testified this offered meaningful relief, and while it did not eliminate her pain completely, it assisted her in getting a reasonably decent night's sleep, although she did not sleep nearly as well as she had before the accident.
- [21] In late January 2015, the MRI ordered by Dr. Burnett again disclosed no obvious deformity, prompting Dr. Burnett to suspect a labral tear in her hip. He then referred Ms. Flores to a Vancouver orthopaedic surgeon, Dr. Gilbert, and to Dr. Filbey, a physiatrist.
- [22] As her pain persisted, Ms. Flores started seeing a chiropractor in early February 2015. At this time she also tried various procedures such as IMS but this proved to be, according to her, "useless." Ms. Flores reiterated that massage therapy and chiropractic treatments continued to be of assistance.
- [23] In late February 2015, Dr. Filbey administered a diagnostic injection to freeze Ms. Flores's right hip joint. Her pain disappeared immediately. As a result, Dr. Filbey determined that the source of her pain was indeed her hip joint. At the same time, Ms. Flores testified that her emotional state was still poor. She continued to be "cranky" and was losing weight. She went to work three days a week but at the end of each day, she would simply go home and go to sleep. She continued to have no time for her husband. She testified that during this period of time her hip was really painful while she was working, but work was a distraction from her pain, even though she had to "hobble" around. She testified the pain was less when she worked but that she would be in tears on the drive home. At work she would shift her weight to try to alleviate the pain in her hip, but this only aggravated the pain in her shoulder. The pain in both her hip and shoulder made sitting in any one particular position quite problematic.
- [24] Ms. Flores gave an example of how driving would exacerbate her pain. When she moved her right leg from the gas pedal to the brake, she said the pain in her hip and groin was "excruciating." She testified that on occasion she would get tingling in her leg and sometimes in her lower back. She testified she had constant pain at that time in her groin and hip whilst her other pain, for instance the pain in her shoulder, was intermittent.

- [25] In June 2015 Ms. Flores found out that she was pregnant. As a result, in due course she reluctantly succumbed to the recommendations of her doctor and husband that she reduce her work week from three days a week to two and one-half days a week. This regime lasted until September 2015. Then, from September 2015 to March 2016 her work week was reduced to two days per week, Monday and Thursday. She testified this reduced work schedule was beneficial for her relationship with her spouse, as she was comfortable enough after work that they could spend some evenings together and partake in some modest recreational activities.
- [26] In March 2016 Ms. Flores's daughter was born. Ms. Flores was then on maternity leave for one year. She testified that her ability to care for her child was somewhat compromised due to her pain. For example, it was difficult putting the baby in the car and taking her out of the crib. She did however receive significant help from her husband for these daily parenting chores, as one would expect from a devoted spouse and parent. Ms. Flores refrained from using Celebrex while she was pregnant and while breastfeeding. Although her symptoms persisted, her pain was not as severe and she was able to have a positive and healthy pregnancy.
- [27] Because her pain was ongoing, in September 2016, at the request of the defendant, she saw Dr. Stothers, an orthopaedic surgeon in Vancouver. After a relatively brief examination, Dr. Stothers recommended Ms. Flores receive a cortisone injection in her hip. As the defendant has emphasized, Dr. Stothers is the only orthopaedic surgeon who has provided an expert report in this litigation. The defendant also points out that Dr. Filbey acknowledged he would defer to the opinion or recommendation of an orthopaedic surgeon with respect to any need for surgery and whether or not such surgery might be successful.

[28] In this regard, Dr. Stothers stated in his December 2016 report:

4. Opinion

- a. Her main complaint after the accident [is] [her] right hip pain. I think probably the abnormality seen on the MRI arthrogram is a labral tear. It is possible that this is a normal variant as discussed by the radiologist however the diagnostic block injected into her hip by Dr. Filbey confirms that whatever is causing the pain in her right hip the source is located inside the hip joint itself. When I examined the patient she was having more pain than I would ordinarily expect from somebody who has a labral tear nonetheless I think this is probably the primary source.
- b. There are times when patients are predisposed to having a labral tear based on the shape of the bones around her hip joint. Sometimes the hip socket is too deep or pointed slightly backwards (retroverted) which predisposes to "pincer type" impingement. Sometimes the femoral head is not perfectly round and instead has a cam shape which predisposes to "cam type" impingement. Different types of impingement often co-exist in the same patient. To my eye she does have mild abnormality in the shape [of] her bones. The MRI scan does show an increased alpha angle on the right compared with the left. The plain radiograph of

her pelvis shows a pincer sign. Both of these findings are mild but I think they do predispose her to labral injury. Neither radiologist mentioned cam or pincer type femoral acetabular impingement in their reports. I do not think these abnormalities are severe enough that she was doomed to eventually tear her labrum.

- c. A labral tear of the hip is usually treated with hip arthroscopy. The labrum can be repaired. The results of this type of treatment are generally good. Hip arthroscopy is a daycare procedure but it is considerably larger in scope than arthroscopy of other joints that are more easily accessible. Recovery from hip labral surgery would probably take 6 months. Often the recovery is reported to be much longer but often the surgery also includes altering the shape of the bones around the hip.
 - d. Over the long term there is a consideration for an increased risk of arthritis in her hip secondary to having a labral tear. The abnormality seen on the MRI scan sounds relatively small and I would anticipate that repair of this lesion would be successful which would mitigate the future risks for arthritis. If there is an increased risk it probably would not manifest for 20 years or longer.
- [29] When Ms. Flores was unable to see Dr. Gilbert due to his lengthy waitlist, Dr. Childs referred Ms. Flores to Dr. McConkey. Dr. McConkey saw Ms. Flores in August 2017. He ordered an X-Ray and reviewed the two earlier MRIs that Ms. Flores had undergone. Dr. McConkey reported, "nothing jumped out" to him and he was "not sure" what was causing Ms. Flores's hip pain. However, like Dr. Burnett and Dr. Stothers, he speculated that Ms. Flores could have a labrum tear in her hip. Like Dr. Stothers, he too suggested a cortisone injection.
- [30] As a result of these recommendations, in October 2017 Dr. Filbey gave Ms. Flores a cortisone injection. It was extremely painful but Ms. Flores testified she did have significant relief for two to three months after the cortisone injection. Indeed, the improvement was such that she said she could work with no pain. As a result, she decided to "hit it hard," see a kinesiologist, go to the gym to increase the strength in her muscles and try to "get her life back together."
- [31] I pause to note that in the meantime, in March 2017, after her year of maternity leave, Ms. Flores returned to working two days a week, averaging eight hours per shift. From April 28, 2018 to March 2019 she worked eight hours on Monday and six hours on Friday. The shorter shift on Friday was due to the dentist's schedule and not because of any difficulties Ms. Flores had in performing her duties on this limited schedule.
- [32] Returning to Ms. Flores's medical treatment, by January 2018 she testified that her hip pain was again "unbearable." She had constant pain and was unsure whether she "pushed too hard" physically or whether it was the cortisone wearing off. She went back to using Celebrex to alleviate the pain.

- [33] In February 2018 Ms. Flores returned to Dr. McConkey. She told him the relief she received from the cortisone injection was "amazing." As a result, he confirmed that the pain was emanating from her hip and he could see a labrum tear being the cause, but he was not certain, given the lack of clarity from the MRIs. Dr. McConkey discussed with Ms. Flores that surgery was "an option" but he did not explicitly recommend it because he was uncertain as to the cause of her hip pain. As a result, and because she did not want to refrain from weight bearing for possibly six months with a young child, Ms. Flores opted not to have surgery. In his February 19, 2018 follow up note to Dr. Burnett, Dr. McConkey mentioned hip arthroscopy, and wrote, "I would offer [her] surgery as long as she understands that it is not a cut and dry case and she may not entirely benefit from it." Ms. Flores testified that unless it is certain or guaranteed that surgery will be 100 percent successful, she will not have surgery.
- [34] In an attempt to obtain more relief for Ms. Flores, Dr. Childs referred her to Dr. Filbey for consideration of a platelet-rich plasma ("PRP") injection in her hip. In May 2018 Ms. Flores agreed to have an injection which she described as an "excruciating" procedure. This pain however subsided after about four days and after four and one-half weeks, she testified she was getting "real" benefit from this injection. Indeed, the relief lasted for about eight months, until January 2019. As counsel puts it, "she enjoyed a reduced symptom profile." Significantly, Ms. Flores testified that her symptoms improved by about 75 percent from the injection. She testified that during this interval, work was "great" and she had the energy to play with her daughter and participate in social activities with her husband. During this eight-month period, she was not taking Celebrex for pain relief.
- [35] Ms. Flores testified that at this point she was not back to 100 percent but she was doing "quite well." Nevertheless, Dr. Childs suggested, notwithstanding this significant improvement, that she should not go back to work full-time. Ms. Flores acceded to Dr. Childs' suggestion. As a result, Ms. Flores maintained a work regime of only two days a week and continued with massage therapy and chiropractic treatment. However, by January 2019 the relief obtained from the PRP injection began to wear off. The pain returned and gradually got worse. Ms. Flores testified she "thought" of her hip "all day" and as a result, Dr. Childs prescribed Celebrex again, at a dose of 400 mg. Ms. Flores testified the pain eventually levelled out to what she called the "normal pre-injection pain." As a result, her Celebrex dose was reduced to 200 mg.
- [36] Given the dramatic success of the first PRP injection, Ms. Flores had a second injection in July 2019. After about four to six weeks, she felt some improvement following this injection. However, this relief did not last as long as the relief from the first injection, only about two months, and her improvement was about 50 percent. Her most recent PRP injection was on January 21, 2020, about three weeks prior to her testifying in court. Based on past experience, Ms. Flores expects to see some improvement in the near future and is cautiously optimistic that this will again produce about 75 to 80 percent improvement in her level of pain and discomfort. At the present time, Ms. Flores continues to have difficulty with her

daily life activities, as well as sitting in her chair during her work as a dental assistant. However, due to the success of the first two PRP injections, which, in due course, provided Ms. Flores with significant improvement, Ms. Flores is somewhat positive about the future.

- [37] Ms. Flores testified that she plans to continue with these PRP injections rather than pursuing the surgical option due to the significant period of time she would have to refrain from weight bearing. With a four-year-old daughter, it is inconceivable to Ms. Flores that she could carry on as a mother with this significant limitation, coupled with the fact that all the doctors have indicated there is no 100 percent guarantee of surgical success.
- [38] Nevertheless, Dr. Filbey's clinical notes dated November 18, 2019 indicate that Ms. Flores was "doing well" until her October 2019 occupational therapist assessment, which Ms. Flores called a real "set back." Dr. Childs' clinical notes from five days prior, November 13, 2019, corroborate this complaint, where he wrote that Ms. Flores experienced "slow progressive hip pain" following this assessment, and she was "frustrated at this flare [up] of her symptoms, particularly since she had been doing well and was functioning well prior to the OT assessment."
- [39] With respect to Ms. Flores's headaches, she reported to Dr. Filbey that she experiences some headaches when she is tired. Dr. Filbey's prognosis for her headaches was written in his June 2019 report as "positive for further improvement over time."

CROSS-EXAMINATION

- [40] During the brief trial, Ms. Flores was subjected to limited cross-examination by counsel for the defendant. She did confirm that Dr. McConkey suggested that hip surgery was "an option" notwithstanding his lack of certainty as to what was really causing her hip pain.
- [41] Ms. Flores confirmed in cross-examination that had the motor vehicle accident not occurred, her plan was to work part-time for two to three days a week until her daughter reached school age, which I gather is about five years of age when she starts kindergarten.
- [42] Ms. Flores was asked a few questions about how her previously active lifestyle has been curtailed, but there was no suggestion she was malingering or embellishing the difficulties she has had in trying to maintain her lifestyle at the pre-accident level.

PRESENT CIRCUMSTANCES

- [43] As I have mentioned, Ms. Flores testified that prior to the accident, she was a very active young woman. She and her husband travelled extensively to Latin America. She enjoyed scuba diving, surfing, swimming, softball, volleyball, long hikes and similar outdoor activities. She testified that from an early age she was simply unable to sit still and was always wanting to keep busy and not be idle. Much of this activity has been significantly curtailed because of the pain in her hip.

- [44] As far as work is concerned, there is no suggestion she is anything but a stellar employee in the eyes of her long-time employer, Dr. Van Gyn, who, in an affidavit that was admitted by consent, deposed Ms. Flores has "an amazing work ethic" and is "the best dental assistant I have had in all my years as a dentist."
- [45] There is no doubt that Ms. Flores is an exceptional dental assistant and loves her work. I accept her evidence that she plans to work as a dental assistant for some time in the future. She has testified that her "plan" is to work until age 65 but of course there are many variables when it comes to how long one will remain fully engaged in the work force. By the same token, as Ms. Flores has said, she and her husband want to balance work with life experiences and that was the reason why he encouraged, if not demanded, that she cut back from working three days a week to two days a week when her pain was preventing her from participating in after-work social activities with him and their daughter. This is not to say that she would not work to age 65, but no one has a crystal ball as to what the future holds.
- [46] In the end, I have no hesitation in accepting Ms. Flores's testimony as to how the accident and resulting pain have affected her life, both at home with her family and at work, from the date of the accident to the present time. Given the defendant's acceptance of Ms. Flores's testimony as to the effect the accident has had on her life, I simply acknowledge the similar sentiments expressed in the affidavits of Ms. Flores's mother, Ms. O'Neill, her mother-in-law, Ms. Pereira-Babichuk, and three co-workers, which were admitted by consent, with little reference to their contents. The defendant called no witnesses.

NON-PECUNIARY DAMAGES

- [47] The purpose of non-pecuniary damages is to compensate a plaintiff for pain, suffering, loss of enjoyment of life and amenities (*Trites v. Penner*, 2010 BCSC 882 [Trites] at para. 188) and provide "reasonable solace for [the plaintiff's] misfortune" (*Lindal v. Lindal*, [1981] 2 S.C.R. 629 [Lindal] at 636).
- [48] The Court of Appeal outlined the proper approach to the assessment of non-pecuniary damages in *Stapley v. Hejslet*, 2006 BCCA 34, leave to appeal ref'd. [2006] S.C.C.A. No. 100, at paras. 45-46. The factors to be considered include the plaintiff's age, the nature of her injuries, the severity and duration of her pain, disability, emotional suffering, loss of enjoyment of life, the impairment of family, marital and social relationships, the impairment of physical and mental abilities, and loss of lifestyle. A stoic nature is also to be considered and a plaintiff's stoicism should not penalize her. I find that Ms. Flores is relatively stoic, and her stoicism ought not to result in a lesser award.
- [49] Ms. Flores is a 33-year-old plaintiff who has experienced injuries to her hip and shoulder that still significantly affect her today, six years after the accident.
- [50] Ms. Flores has clearly endured a significant amount of pain as a result of the 2014 collision, and even though she has achieved some recovery, especially after the May 2018 PRP injection, I am satisfied that based on the medical evidence, it is likely that she will always

have some pain in her hip unless and until the ongoing PRP injections alleviate her hip pain, or she has successful surgery. I am satisfied she will have some ongoing pain in her shoulder for a relatively brief period of time, although to a much lesser extent than the pain in her hip. Her headaches and neck pain have largely resolved.

- [51] Work is obviously fundamentally important to Ms. Flores, and the effects of the pain in her hip have reduced her ability to work four days a week at the present time. On this point, the defendant acknowledged Ms. Flores currently has ongoing impairment. However, the defendant submits her activity level has increased since the accident and that in due course, the PRP injections, the passage of time, exercise and possible surgery, will permit Ms. Flores to recover such that she can increase her work schedule significantly, and at the same time, not impede an appropriate work-life balance similar to what she enjoyed before the accident. Finally, Ms. Flores's counsel has fairly acknowledged that Ms. Flores is likely going to learn to live with her chronic pain such that the impact of the collision will be reduced over time.
- [52] Although at the present time she is able to participate in more recreational and physical activity than she was prior to receiving the PRP injections, Ms. Flores's injuries have clearly affected her recreational pursuits and her pre-accident active lifestyle
- [53] When it comes to awards for non-pecuniary damages in motor vehicle cases, there is no "tariff." An award must reflect the specific circumstances of each individual case: Lindal at 637. Both counsel have presented authorities which they argue support their respective positions on what would be a fair assessment for non-pecuniary damages. While an assessment is an individual process, awards made in somewhat similar cases can be of assistance in arriving at a fair award for non-pecuniary damages. They do however serve only as a guide to what is appropriate compensation. In this analysis I must consider the pain, suffering and loss of enjoyment experienced by this particular plaintiff. At the same time, it is important to remember, the award must be fair and reasonable to both parties (Trites at para. 188).
- [54] Ms. Flores submits that a fair award for non-pecuniary damages would be in the range of \$100,000 to \$130,000, citing the following authorities:

Young v. Insurance Corp. of British Columbia, 2018 BCSC 138: award \$110,000;

Raptis v. Chalabiani, 2017 BCSC 1548: award \$95,000;

Slater v. Gorden, 2017 BCSC 2265: award \$135,000;

Scelsa v. Taylor, 2016 BCSC 1122: award \$125,000;

Odian v. Carriere, 2016 BCSC 112: award \$100,000; and

Thomasson v. Moeller, 2014 BCSC 2465, aff'd 2016 BCCA 14: award \$95,000.

[55] The defendant submits that something in the range of \$80,000 to \$100,000 is a proper assessment, relying on the following cases:

Patterson v. Solymosi, 2019 BCSC 1508 [Patterson]: award \$95,000;

Combs v. Moorman, 2012 BCSC 1001: award \$90,000; and

Macdonald v. Hazel, 2012 BCSC 2079: award \$80,000.

[56] The plaintiff says the defendant's suggested range is a "little bit shy," given the impact the pain, primarily in Ms. Flores's hip, has had on her quality of life since the collision.

[57] I have considered all the authorities counsel has provided, and while they are of some assistance, each has distinguishing facts that are not insignificant. Given the totality of the circumstances and the lack of any suggestion that Ms. Flores is anything but a forthright and credible witness when describing her pain and suffering and loss of enjoyment of life over the last several years, I find an award of \$115,000 is, for both parties, a fair and reasonable assessment for non-pecuniary damages.

LOSS OF EARNING CAPACITY

[58] Ms. Flores seeks significant damages for past and future loss of earning capacity as a result of the injuries she received in the accident.

[59] Claims for both past and future loss of earning capacity are subsumed under an award of damages for loss of earning capacity, and are to be assessed in the same manner: Falati v. Smith, 2010 BCSC 465 at para. 39, aff'd 2011 BCCA 45. Past income losses are, however, net of income tax and any amounts actually earned during the relevant period: Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231, s. 98; Riding-Brown v. Jenkins, 2014 BCSC 382 at para. 27.

[60] The plaintiff must initially demonstrate both impairment to her earning capacity, and a "real and substantial possibility" that the impairment has resulted, or will result, in pecuniary loss: see Donovan v. Parker, 2014 BCSC 668 [Donovan] at para. 44; Perren v. Lalari, 2010 BCCA 140 at para. 32 [Perren]; Grewal v. Naumann, 2017 BCCA 158 [Grewal] at paras. 42, 48.

[61] The purpose of an award for loss of earning capacity is to "provide the plaintiff with full compensation for all pecuniary losses ... to restore, as best as is possible with a monetary award, an injured plaintiff to the same position he or she would have been in had the negligence not occurred": Grewal at para. 42, quoting the remarks of the trial judge. See also Lines v. W & D Logging Co. Ltd., 2009 BCCA 106 at para. 185, appeal ref'd [2009] S.C.C.A. No. 197 [Lines]; Sandher v. Hogg, 2010 BCSC 1152 at para. 87.

[62] Such loss is to be quantified using either an earnings approach or a capital asset approach, depending on the facts of any given case: Perren at para. 32. These approaches were summarized by the Court in Donovan as follows:

- [51] The earnings approach is generally used in cases where the evidence allows for easy measurement, such as in cases where the plaintiff had already embarked on a career path or had steady employment and a known rate of pay prior to the accident.
- [52] The capital asset approach is usually applied in situations where the uncertainty of the plaintiff's future renders quantification difficult. It asks whether the plaintiff's earning capacity, as a capital asset, has been diminished because a) the plaintiff has been rendered less capable overall of earning income from all types of employment; b) has been rendered less marketable or attractive as an employee to future employers; c) has lost the ability to take advantage of job opportunities which might otherwise have been open to him; or d) is less valuable to himself as a person capable of earning income in a competitive labour market: *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 (S.C.) at para. 8. Although quantification under this heading may be more difficult, this does not mean that the assessment is entirely at large: the court should consider these factors and make findings of fact as to the nature and extent of the loss of capacity and its relation to the plaintiff's ability to earn income: *Morgan v. Galbraith*, 2013 BCCA 305 at para. 56.
- [63] Any assessment must take into account both negative and positive contingencies to recognize the possibility that the assumptions on which the award is based may prove to be inaccurate: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 at 79 (S.C.), *aff'd* (1987), 49 B.C.L.R. (2d) 99 (C.A.) [*Milina v. Bartsch*].
- [64] As the Court of Appeal said in *Grewal* at para. 49:
- [49] The assessment of past or future loss requires the court to estimate a pecuniary loss by weighing possibilities and probabilities of hypothetical events. The use of economic and statistical evidence does not turn the assessment into a calculation but can be a helpful tool in determining what is fair and reasonable in the circumstances: *Dunbar v. Mendez*, 2016 BCCA 211 at para. 21.
- [65] Ultimately, the court must assess these damages based on what is fair and reasonable in all of the circumstances: *Parypa v. Wickware*, 1999 BCCA 88 at para. 70; *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 11.

Past Loss of Earning Capacity

- [66] In *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 [Rowe] at para. 30, the Court of Appeal explained that a claim for what is often described as "past loss of income" is actually a claim for past loss of earning capacity, that is, "a claim for the loss of the value of the work that the injured plaintiff would have performed but was unable to perform because of the injury." The value of the loss may be measured in different ways: for example, by actual earnings the plaintiff would have received, or by a replacement cost evaluation of tasks that the plaintiff is now unable to do: *Rowe* at para. 31. The test to be applied to hypothetical events, whether past or future, is whether there is a real and substantial possibility that the events would or will occur and that the event occurring is not based upon mere speculation: *Athey v.*

Leonati, [1996] 3 S.C.R. 458 [Athey] at para. 27; Smith v. Knudsen, 2004 BCCA 613 [Smith] at para. 29; Grewal at paras. 43-46; Rousto v. MacKay, 2018 BCCA 29 at para. 14. Such events are to be given weight according to the relative likelihood that they would have occurred or will occur: Athey at para. 27; Smith at para. 29.

- [67] In the present case, the defendant accepts that Ms. Flores has suffered a loss of past earnings from the date of the accident to the date of trial. Ms. Flores was not challenged as to her ability to work more than she has said she can tolerate at the present time. In addition, the defendant agrees Ms. Flores's actual losses can be measured by taking her hourly wage at various times since July 2014 to the present (now \$40 an hour) and multiplying the hourly wages by the number of days she would have otherwise worked, but for the accident, and subtracting from this the number of hours she did work. In these circumstances, both parties have agreed that \$60,000 would be a reasonable assessment for past loss of earning capacity. There will be an award of \$60,000 for past loss of earning capacity.

Loss of Future Earning Capacity

- [68] In addition to the general principles that are applicable to both past and future loss of earning capacity, a claim for loss of future earning capacity involves two fundamental questions. First, has the plaintiff's earning capacity been impaired by their injuries and, if so, what compensation should be awarded for the resulting financial harm that will accrue over time: Hoy v. Williams, 2014 BCSC 234 [Hoy] at para. 153. This is an assessment of loss based on the evidence, and is not the application of a purely mathematical calculation: Hoy at para. 153.
- [69] Ms. Flores's claim under this head of damages is however presented as a straightforward, mathematical calculation. Ms. Flores says that at the present time she is only able to work two days a week. Moreover, although no one knows what the future may hold, her claim is based on the premise she will be unable to work more than half time, or two days a week, until she retires at age 65. Her counsel suggests Ms. Flores is only able to work 16-19 hours a week, which is "50% of full time," consistent with the view expressed by Ms. Flores's functional capacity evaluator.
- [70] In his loss of earnings analysis, counsel submits Ms. Flores would have worked part-time until her daughter "reached middle school" but then would have worked 38 hours a week spread over a four-day work week, or nine and one-half hours a day. I pause to note that in my view, the evidence is insufficient to support a conclusion that Ms. Flores regularly worked nine and one-half hour shifts before the motor vehicle accident. Be that as it may, because Ms. Flores has testified that she will not consider arthroscopic surgery to repair what might be a labrum tear in her right hip unless there is a 100 percent guarantee that it will be successful, counsel submits there is "no evidence" she will be able to work more than two days a week until she retires at age 65. Working only two days a week for 32 years, her loss of future earning capacity adds up to \$1,158,080, according to counsel's arithmetic.

- [71] In calculating Ms. Flores's suggested future loss of earning capacity, counsel has assumed Ms. Flores would have worked two and one-half days a week, but for the accident, until September 2021, when her child starts kindergarten, on the basis that Ms. Flores testified she planned to work "two or three days" a week during this time period. The defendant however points out that at her examination for discovery on July 9, 2019, Ms. Flores testified that until her daughter was in full-time school, in Grade one, she would have worked "[p]robably the two days, just part-time [m]aybe three."
- [72] The next timeframe counsel refers to is from 2021 to 2027. In written submissions, counsel states at para. 129(f): "Once her daughter reached school age, she planned on increasing her work schedule to 30 hours per week, and by the time [her daughter] had reached middle school, to 4 days per week." Given the reference to a four-day work week from 2027 onwards, in my view the only reasonable inference to be drawn from this submission is that until September 2027, Ms. Flores was going to work 30 hours over three days a week, a submission which is not supported by the evidence.
- [73] The final timeframe in counsel's calculation is from September 2027 to 2052, when Ms. Flores will be 65 years of age. Here counsel says, but for the accident, Ms. Flores would have worked four days a week, at nine and one-half hour shifts, or 38 hours a week for a full 52 weeks, resulting in a projected income of \$80,000 a year. Instead, "with injury," she will only be able to work two days a week, one-half of what she would otherwise have worked, for an annual loss of \$40,000. Multiply this annual loss by 25 years and there is a loss of \$1,000,000, for a total loss of future earnings of \$1,158,080 over the next 32 years.
- [74] Conversely, although the defendant does not argue a failure to mitigate, he does say determining a fair assessment under this head of damages is "a very difficult exercise," given the unchallenged evidence of Dr. Stothers who has written the success rate of arthroscopic surgery to repair what might be a labrum tear is "generally good," and as the defendant argues, if Ms. Flores elected to have surgery, she might very well have 100 percent recovery. In other words, the defendant says if Ms. Flores was to elect to have surgery, she may have no ongoing loss of earning capacity, given the significant possibility "her disability may be eradicated completely." While the defendant acknowledges that at the present time Ms. Flores suffers an ongoing impairment to her future earning capacity, he says it is not reasonable to conclude the status quo will remain forever. The defendant says, because of the uncertainty surrounding Ms. Flores's future work capabilities, a reasonable assessment for loss of future earning capacity, based on the capital asset approach, would be in the range of \$150,000 to \$200,000, once various positive and negative contingencies are factored into the analysis, especially the surgical option that may well afford significant, if not complete, recovery.
- [75] In discussing the question of loss of future earning capacity, Garson J. said in *Gregory v. Insurance Corp. of British Columbia*, 2011 BCCA 144 [Gregory]:

- [32] It is well settled that an individual's earning capacity is a capital asset: *Parypa v. Wickware*, 1999 BCCA 88 at para. 63. An award for future loss of earning capacity thus represents compensation for a pecuniary loss. It is true that the award is an assessment, not a mathematical calculation. Nevertheless, the award 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: *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 11; *Ryder v. Paquette*, [1995] B.C.J. No. 644 (C.A.) at para. 8. The degree of impairment to the plaintiff's earning capacity depends upon the type and severity of the plaintiff's injuries and the nature of the anticipated employment at issue.
- [33] In valuing the award, the judge must consider the likely duration of the plaintiff's prospective working life and must account for negative and positive contingencies which are unique to each case. The final award must be fair and reasonable in all the circumstances. This assessment requires a very fact-intensive, case-specific inquiry.
- [76] The fact that the assessment of damages is a matter of judgment, not a strict mathematical calculation, was highlighted some time ago by McLachlin J., as she then was, in *Milina v. Bartsch* at 93:

A final question of principle concerns the use of actuarial evidence in assessing lost future earnings. Where the assumptions upon which the calculations are made are relatively certain, precise mathematical calculation of lost earnings may be possible. Where, however, they cannot be ascertained with some degree of precision, the court must take a more general approach and "assess such sum for loss of future income as may be determined from a reasonable appraisal of the evidence. "

- [77] As mentioned, the two possible approaches to assessment of loss of future earning capacity are the earnings approach and the capital asset approach: *Brown v. Golai* (1985), 26 B.C.L.R. (3d) 353 (S.C.), Perren at paras. 11-12.
- [78] The earnings approach will generally be more useful when the loss is easily measurable, for instance where a mathematical calculation can be used to demonstrate the future loss, while the capital asset approach is more appropriate where the loss "is not measurable in a pecuniary way": Perren at paras. 12, 32.
- [79] In *Hoy*, Kent J. said:
- [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.

- [80] In the present case, the plaintiff says the earnings approach is appropriate because Ms. Flores has no plans to change her occupation and as such all I need to do is multiply her hourly wage times the number of hours she says she planned to work but for the accident and subtract from that the number of hours she will be able to work.
- [81] As I have noted, the plaintiff says because she will only be able to work two days a week, her total future loss of earnings as of the date of the trial to retirement at age 65 will be \$1,158,080. Using the present value factor as outlined in a letter dated February 10, 2020 from Mr. Wickson, an economist, this equates to a present value claim of \$836,050, based on Mr. Wickson's acceptance of Ms. Flores's assumptions as to her annual loss of earnings every year from now to the age of 65. Accordingly, the plaintiff is seeking damages for lost earning capacity in the amount of \$836,050.
- [82] The defendant resists this approach and says because we do not know how long Ms. Flores will only be able to work two days a week, and because it is impossible to look into the future with any certainty, the capital asset approach is more appropriate.
- [83] Although the defendant agrees that the plaintiff's accident-related deficits have impaired her capacity to earn income which will lead to future pecuniary loss, he says Ms. Flores will not require three days away from work to rest, recuperate, or undergo treatments, every week for the rest of her working life. The defendant says the totality of evidence in this case falls short of establishing that Ms. Flores's capacity to earn income has been impaired to such a dramatic extent.
- [84] In this analysis, the defendant emphasized that a proper assessment of Ms. Flores's future loss of earning capacity must take into consideration the positive and negative "vagaries of life": Lines at para. 57. Relevant contingencies can include such things as the potential for improvement in health, opportunities for advancement, decline in the economy and loss of employment, as well as the usual changes and hazards of life: Trites at para. 228. In the present case, the defendant submits a surgical option is a significant positive contingency which undermines to a great extent the bleak assessment of Ms. Flores's potential to work more hours in the future. However, in this analysis, Ms. Flores's counsel says the various contingencies, "both positive and negative, are mostly and substantially speculative" such that any adjustment "should be modest." I cannot agree with this submission. To the contrary, when I consider all the evidence, I am satisfied positive contingencies, such as improvement from further PRP injections or surgery, will likely increase Ms. Flores's productivity over time and far outweigh any negative contingencies. However, as the defendant has acknowledged, I accept Ms. Flores will be forced to miss some work for a reasonably lengthy period of time, perhaps a day or two a week for several years, but not for the rest of her working life.
- [85] As a result, I am not satisfied the evidence is sufficient to enable me to conclude that Ms. Flores's future earning capacity has been diminished to the extent that she claims.

- [86] In addition, I have significant difficulty with the plaintiff's monetary calculations due to the inconsistent and somewhat equivocal nature of the evidence relating to Ms. Flores's hours of work, both before the accident and her evidence as to what she says she "might" have worked, but for the accident.
- [87] The uncertainty as to how many hours Ms. Flores worked before the accident is illustrated by the fact that para. 11 of the agreed statement of facts reads: "at the time of the Collision, the Plaintiff averaged 38 hours per week in the years leading up to the Collision." As I stated to counsel, I appreciate this has been accepted by both parties as a fact and I must accept it as such. What is troubling however is in her direct examination, Ms. Flores testified that before the accident she worked four days a week from "8:00 a.m. to 4:00 p.m. with a half hour for lunch." That is, she worked 32 hours a week.
- [88] Adding to this uncertainty are the plaintiff's written submissions. At para. 83, it says, "At the time of the collision, Ms. Flores was working 38 hours per week (over 4 days)" Conversely, at para. 85, it states: "At the time of the collision, the plaintiff was working full time 30 hours/week." In addition, Ms. Phillips, a physiotherapist and rehabilitation consultant retained by the plaintiff, interviewed Ms. Flores and completed a physical assessment on November 6, 2019. In her report, marked as an exhibit, Ms. Phillips reported that "Ms. Flores was working as a dental assistant 34 hours per week pre-accident for Dr. Van [Gyn] ." Mr. Kyi, the occupational therapist retained by Ms. Flores, writes in his functional capacity evaluation reports, both entered as exhibits, that "[i]mmmediately prior to her car accident, Ms. Flores was working full time two 9-hour and two 8-hour shifts per week (34 hours/week, which was considered full time in her field)."
- [89] In submissions, counsel acknowledged the basis for his submission that Ms. Flores's future projected earnings should be based on 38 hours a week is the ICBC "Certificate of Earnings" form, prepared by someone at Ms. Flores's place of employment but signed by Dr. Van Gyn and included in the parties' agreed statement of facts, at Exhibit 22. Under the heading, "HRS/WK," it states: "average 38 hrs." I also note the brief notation from Ms. Flores's employer, in Exhibit 23, "8 x 4 days + 6," with no explanation as to what the number six represents. While one could speculate this refers to a fifth day at six hours, after four days of eight hour shifts, this is inconsistent with the evidence presented that overwhelmingly supports the conclusion Ms. Flores worked four days a week before the accident. Moreover, this note is also inconsistent with counsel's suggestion Ms. Flores had worked nine and one-half hour shifts for four days per week.
- [90] Finally, and perhaps most importantly, the uncertainty surrounding the question of how many hours Ms. Flores would have worked in the future if not for the accident is highlighted by her testimony at trial. In response to a question of how many hours she would have worked, but for the accident, after her daughter enters full-time school, Ms. Flores testified, "I think I would have been up to 30-38 hours."

- [91] Given my concerns surrounding the less than certain evidence as to how many hours Ms. Flores worked before the accident and would have worked in the future, I find that any future earnings assessment should be based on a 32-hour work week.
- [92] My other concern with the approach taken by the plaintiff is that the plaintiff's calculations are based on the status quo remaining in place for the rest of Ms. Flores's working life. That is, she will only be able to ever work two days a week until age 65. I am unable to accept this proposition. On the contrary, given the totality of the evidence, I am satisfied Ms. Flores will in due course be able to work more than two days a week. I am also unable to agree with the plaintiff's submission that "[a]ny suggestion that Ms. Flores will be able to increase to more than two days per week is entirely unsupported by the evidence and is therefore speculative." In my view the evidence is more than sufficient for me to conclude Ms. Flores will be able to eventually work more hours a week than she is presently capable of doing, given what I find is the real and substantial probability of improvement with future PRP injections, her dedication to an exercise regime, her strong work ethic, and the potential for successful surgery once her daughter is of school age, if she elects to take that option.
- [93] With respect to the possibility of future surgery, I note the reasons for Ms. Flores currently declining surgery may no longer be present several years from now. For instance, Dr. Childs' observation in his February 27, 2018 note to Dr. Filbey reads that while Dr. McConkey "felt surgery is an option," the reason Ms. Flores declined surgery at that time was because "the 12 weeks post op non weight bearing would be impossible for her with her 2 yr old." In addition, in his November 2019 report, Dr. Childs wrote: "She may consider a surgical option for a labral tear in the future should the PRP no longer control her symptoms." I also take into consideration Dr. Stothers' statement that surgery to repair a labrum tear is quite often successful, that is, the success rate is "generally good." Finally, there is the evidence of Dr. Filbey who has reported that a hip replacement is another possible surgical option that may provide significant relief when Ms. Flores is 40 or 50, "if all else fails."
- [94] All in all, as Butler J. (as he then was) stated in *Provost v. Bolton*, 2018 BCSC 1090, echoing the defendant's submission in the present case, "the assessment of the loss in this case is extremely difficult. This is because lifetime earnings cannot be predicted, with or without the accident, with any certainty." (para. 100).
- [95] If I was to adopt the plaintiff's submission that the earnings approach is appropriate, applying the applicable principles to the totality of the circumstances, and taking into consideration the various contingencies, both positive and negative, the assumptions I would use would be dramatically different from those suggested by Ms. Flores. For instance, I would accept that Ms. Flores is capable of working only two eight-hour shifts a week, for seven years, until 2027. After that, I would find Ms. Flores capable of working a three-day, 24-hour work week for the next five years. At the end of this 12-year period, I would assume Ms. Flores will return to her pre-accident routine of working eight-hour shifts, four days a week. That is, she will be able to return to full-time employment.

- [96] However, in this case, I have not received any present value factors pertaining to loss of future earning capacity that would assist me in calculating her damages, based on a projected annual loss of earning capacity for the next 12 years, given my assumptions in the preceding paragraph.
- [97] As a result, having rejected the assumption upon which the plaintiff's calculations are made, that is, that Ms. Flores will be restricted to working two days a week until she retires, and the uncertainty as to how many hours Ms. Flores would have worked but for the accident, coupled with the absence of present value factors, I am satisfied it is appropriate to adopt the capital asset approach, as suggested by the defendant, when assessing Ms. Flores's future loss of earning capacity.
- [98] In *Patterson, Skolrood J.* adopted the capital asset approach and utilized the following formula:
- [104] In other cases in which it has been difficult to assess the actual likely income loss, and the capital asset approach has been applied, courts have awarded the equivalent of one, two or more years of salary to compensate for the diminishment in the plaintiff's capital earnings asset: *Strilec v. Leila*, 2015 BCSC 1515 at para. 93; *Cooper v. Canada (R.C.M.P.)*, 2001 BCSC 1788 at para. 75; *Brown [Brown v. Golaiy (1985), 26 B.C.L.R. (3d) 353]* at para. 11.
- [99] In the present case, given the totality of the evidence, I am satisfied the equivalent of four years of estimated earnings will properly compensate Ms. Flores for the diminishment in her capital asset. Using this approach, and considering the various positive and negative contingencies, and calculating Ms. Flores's annual earnings at \$66,560 a year, based on 32 hours a week at \$40 an hour, for 52 weeks, I assess Ms. Flores's loss of future earning capacity at \$266,240. In my view, this assessment is fair and reasonable to both parties.

COST OF FUTURE CARE

- [100] Damages for cost of future care compensate for expenses to be incurred to sustain or promote a plaintiff's mental or physical health: *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229 [Andrews] at 241-242. The services and items provided for within this head of damages must be reasonable, both in the sense of being medically required or justified, and in the sense that the plaintiff will be likely to incur them. See: *Penner v. Insurance Corporation of British Columbia*, 2011 BCCA 135; *Milina v. Bartsch* at 84; (*Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at paras. 21-22; *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at paras. 28-30; *O'Connell v. Yung*, 2012 BCCA 57 at paras. 55-56. There must be some evidentiary link between the physician's assessment of pain, disability, and recommended treatment and the future care item or service recommended by a qualified health care professional: *Gregory* at para. 39; *Gao v. Dietrich*, 2018 BCCA 372 at paras. 68-70.

- [101] Justice Dardi summarized the law under this head of damages in *Smith v. Moshrefzadeh*, 2012 BCSC 1458 at para. 123:
- [123] The quantification of damages for the cost of future care is an assessment and not a precise accounting exercise. Since the assessment necessarily entails the prediction of future events, adjustments must be made for contingencies. The extent, if any, to which a cost of future care award should be adjusted for contingencies depends upon the specific care needs of the plaintiff and the expenditures that reasonably may be expected to be required. The assessment must take into account the prospect of any improvement in the plaintiff's condition or, conversely, the prospect that additional care will be required: *O'Connell v. Yung*, 2012 BCCA 57 at paras. 67-68; *Gilbert v. Bottle*, 2011 BCSC 1389 at para. 253.
- [102] In the present case, Ms. Flores says the evidence of Dr. Childs and Dr. Filbey relating to assessment of Ms. Flores's pain, disability, and recommended treatment provide the fundamental basis for the recommendations of Ms. Phillips, an occupational therapist "dedicated to maximizing the function of individuals with varying degrees of disability." As a result of her testimony and the medical evidence, Ms. Flores says the recommendations of Ms. Phillips are medically justified and reasonable.
- [103] While Ms. Flores is not claiming the full value of the items listed in Ms. Phillips' report, which, with the addition of PRP injections for the next 10 years, is \$166,400 (including housecleaning and yard and garden maintenance costs, which I will address separately in a section on loss of housekeeping capacity), she does submit that an award of approximately \$147,000 for costs of future care is reasonable. On the other hand, while the defendant agrees that some of the recommended items are appropriate, he says some of the recommendations of Ms. Phillips are inconsistent with the evidence or not justified, and the award should be somewhere in the area of \$35,000 (including housecleaning and yard and garden maintenance costs). Ms. Phillips' cost of future care report features ongoing services and medication until Ms. Flores is 67 years old, with no explanation as to why that is the recommended end date, instead of her planned retirement age of 65, or sometime earlier.
- [104] Be that as it may, in non-catastrophic cases, "a little common sense should inform claims under this head, however much they may be recommended by experts in the field": *Penner* at para. 13, after quoting *Travis v. Kwon*, 2009 BCSC 63 at paras. 109-111:
- [109] Claims for damages for cost of future care have grown exponentially following the decisions of the Supreme Court of Canada in the trilogy of decisions usually cited under *Andrews v. Grand & Toy, Alberta Ltd.*, [1978] 2 S.C.R. 229, [1978] 1 W.W.R. 577.

- [110] While such claims are no longer confined to catastrophic injury cases, it is useful from time to time to remind oneself that damages for future care grew out of catastrophic injuries and were intended to ensure, so far as possible, that a catastrophically injured plaintiff could live as complete and independent a life as was reasonably attainable through an award of damages.
- [111] This is worth mentioning because the passage of time has led to claims for items such as, in this case, the present value of the future cost of a long-handed duster, long-handed scrubber, and replacement heads for the scrubber, in cases where injuries are nowhere near catastrophic in nature or result.
- [105] In addition, in *Andrews, Dickson J.* (as he then was) stated at 242 that damages for future care must "be moderate and fair to both parties."

Rehabilitation Treatment

- [106] The first claim under cost of future case was initially for \$43,858.80 for "Rehab treatment," that is the cost of physiotherapy, massage therapy and chiropractic treatment, based on "24 sessions per year, ongoing" at \$75 per session. Ms. Flores has attended and plans to continue to attend for massage and chiropractic treatment as she says these help alleviate her pain, at least temporarily. While I accept Ms. Flores's testimony that passive treatment like massage and chiropractic care relieves to a certain degree her discomfort, when one considers she has been having these sessions for almost six years and yet is still only able to work two days a week, it is clear that these treatments are not improving her ongoing symptoms to any great degree. Moreover, as the defendant emphasizes, Dr. Filbey testified these sessions need not be "a regular strategy," but rather be reserved for when Ms. Flores has "flare-ups" of her symptoms. In addition, Ms. Flores's counsel candidly acknowledged that in all likelihood Ms. Flores will not be going to such sessions "in her 70's," (even though the end date used by Ms. Phillips is 67 years of age), as in his experience plaintiffs "get used to the pain" and learn to "live with it."
- [107] With respect to the physiotherapy treatment, Ms. Flores testified she is not attending physiotherapy, contrary to the claim advanced in the plaintiff's written submissions and even though physiotherapy was included as part of the 24 annual sessions claimed by the plaintiff in counsel's written submissions. Nevertheless, even without physiotherapy sessions, counsel submits that for two sessions a month of either massage or chiropractic treatment, at an annual rate of \$1,800, an award of \$35,000 is reasonable.
- [108] In response, the defendant says the opinion of Dr. Filbey is clear and undermines, to a certain extent, the plaintiff's submission on this issue. Dr. Filbey writes:

There are no indications for ongoing physiotherapy or chiropractic treatments on a regular basis. At this stage, self-directed management is the treatment of choice. Occasional access to a treatment of her choice, for acute or chronic exacerbations is not unreasonable. That being said, however, with her response to PRP, if she were to have further injections, there would be no clear indication for such treatments.

[109] As a result, the defendant says the medical evidence does not justify such a significant amount for these therapies in the future, but does suggest \$10,000 would be appropriate.

[110] On this point, during submissions I mentioned to counsel the fact that Ms. Flores's extended health plan provides for \$300 a year for massage and \$300 a year for chiropractic sessions, and that in all likelihood she will continue to receive these benefits as a valued employee. Nevertheless, both counsel agreed that whatever amount is awarded for these therapies, it should not be reduced because of Ms. Flores's extended health benefits.

[111] Given the evidence of Dr. Filbey, I am satisfied the evidence supports an award for the cost of periodic massage and chiropractic treatments for occasional "exacerbations" for a reasonable period of time, but not for the next 32 years. Notwithstanding Ms. Flores's positive response to PRP, as noted by Dr. Filbey, I am satisfied two "rehab" sessions per month for either massage or chiropractic treatment for 20 years until age 53 is reasonable. At \$1,800 per year multiplied by Mr. Wickson's present value factor of 16.521, this results in a sum of approximately \$29,700 for these sessions. I award Ms. Flores \$29,700 for "rehab treatment."

Gym Membership

[112] In written submissions, Ms. Flores initially claimed the cost of a gym membership to the age of 67, at \$450 a year for a total of \$11,247. However, in oral submissions, counsel acknowledged Ms. Flores would "probably" have accessed a gym in any event, as she testified that prior to the accident she was going to a gym "on a regular basis." In fact, depending on the time of year, Ms. Flores testified she visited a gym three to four times a week. As such, counsel says this claim is a "bit rich." He suggests this claim should be reduced to \$7,500.

[113] The defendant likewise noted Ms. Flores had been going to a gym prior to the accident and likely would have continued to do so even without the accident. Nevertheless, the defendant agrees Ms. Flores is entitled to some award for a gym membership. He suggests I should simply cut in half the initial claim of \$11,247 and award \$5,600. Given the likelihood Ms. Flores would have incurred this cost irrespective of the accident, I find the defendant's submission more than reasonable. There will be an award of \$5,600 for future gym membership.

Kinesiologist

- [114] The next claim is for four "ongoing" annual sessions with a kinesiologist, once again until Ms. Flores reaches the age of 67. Contrary to Ms. Flores's initial claim of \$7,456 as outlined in her written submissions, in oral submissions counsel again fairly acknowledged it is "difficult to see" Ms. Flores attending four sessions a year "forever," and suggested \$3,500 is a more reasonable amount, based on four sessions a year at \$75 a session.
- [115] The defendant suggests an award of 20 percent of the original claim is reasonable and rounds it to \$1,500.
- [116] In my view, once Ms. Flores has seen a kinesiologist four times a year for five years, she will be well versed in what would be an appropriate exercise and fitness regime to aid her in reducing any ongoing physical difficulties. Five years of sessions with a kinesiologist at \$300 per year, with a present value factor of 4.754, results in an award of \$1,500.

Positional Aids

- [117] There is no evidence Ms. Flores has successfully used "positional aids" such as an orthopedic pillow or Obus high back support, which Ms. Phillips suggests she should have every three years and every five years, respectively, "ongoing," to the age of 67, with a present value of approximately \$2,500. I pause to note that counsel's calculations are predicated on Ms. Flores requiring both the orthopedic pillow and Obus high back support every three years ongoing, although this contradicts Ms. Phillips' recommendation of Ms. Flores receiving a new Obus high back support every five years.
- [118] In written submissions, counsel writes, "although Ms. Flores has not benefitted from these particular positional aids, she has purchased other pillows/supports. Whether the specific products listed by Ms. Phillips or others, Ms. Flores will require positional aids in the future to improve her sleep and tolerance for sitting" and suggests \$2,500 would still be reasonable. The defendant however points out that the second functional work capacity evaluation report of the occupational therapist Mr. Kyi states Ms. Flores tried an "ergonomic pillow and Obusforme back support," following his recommendations in his June 2017 report, but "did not find them significantly helpful." Accordingly, Mr. Kyi removed these positional aids from his July 2019 report recommendations.
- [119] Given this evidence and the absence of information as to what these specific non-positional pillows/supports may be, apart from the usual everyday pillow one would ordinarily use, and no evidence as to their cost, I am unable to agree there should be a sum awarded for positional aids.

Celebrex

- [120] The evidence has clearly established that Celebrex has proven to be effective in alleviating Ms. Flores's hip pain and as such, Ms. Phillips suggests the use of Celebrex on an "ongoing" basis. The plaintiff's written submissions had initially calculated future use of Celebrex on the basis of a cost of \$151.60 per year, resulting in a claim for \$4,870.76. The defendant however says this calculation overlooks the fact that when Ms. Flores receives a PRP injection, she is unable to take Celebrex for two weeks prior to the injection and for six weeks after the injection. Moreover, the defendant quite properly points out that Ms. Flores's improvement from the first PRP injection was such that she did not need Celebrex for eight or nine months after the injection. In addition, the defendant read Ms. Phillips' recommendation as amounting to \$1,500 for Celebrex to age 67. As such, the defendant submitted half of that or \$750 would be reasonable for the future cost of Celebrex.
- [121] In subsequent submissions, plaintiff's counsel acknowledged that the calculations respecting the cost of Celebrex are incorrect and that the initial submission was at odds with Ms. Phillips' own recommendations where she states that Ms. Flores relies on Celebrex "on occasion" and estimates the cost for 10 tablets a month at \$47.38 annually, to age 67. With a present value factor of 24.366 to age 67, this would equate to approximately \$1,150, not the \$4,870 originally suggested by counsel. Acknowledging the error, counsel says this updated calculation is a fair assessment as it takes into consideration the likelihood Ms. Flores will not be using Celebrex on a daily basis, due to her having ongoing PRP injections. I accept this is a reasonable assessment.
- [122] However, counsel says that unless the PRP injections provide 100 percent relief in the future, or significant improvement occurs that alleviates the need for future use of Celebrex on a regular basis, because the injections are "probably" going to end sometime within the next 10 years, it would be reasonable to add an additional cost of Celebrex for when the PRP injections stop. Whilst this submission ignores the possibility that some surgical intervention may alleviate the need for Celebrex altogether, I accept this submission as reasonable. There will be an additional \$500 added to this award for a total of \$1,650.

PRP Injections

- [123] Ms. Flores has had three prior PRP injections, the last one on January 21, 2020. It is too early to tell how beneficial this injection will prove to be. The first one performed in May 2018 was very successful, with Ms. Flores experiencing 75 to 80 percent improvement over several months. The second injection in July 2019 provided a 50 percent improvement, but only for about two months. Ms. Flores testified that she believes the PRP injections are more than a "temporary fix." Nevertheless, her counsel submitted that ongoing PRP injections are "speculative" and resiles from his written submission that the cost of two injections at \$650 each for the next 10 years, with a present value factor of 9.046, for a total of \$11,760, would be reasonable, and instead suggests the number of injections "will taper off," so Ms. Flores is "not asking for the full amount." I accept counsel's submission that it is

unlikely that Ms. Flores will have two injections every year for the next 10 years, but I am equally satisfied the medical evidence justifies a conclusion there is a real possibility Ms. Flores will be using PRP injections for several years. Even though Ms. Flores says the PRP injections are painful, she plans to take them as long as they prove beneficial, which, given the success of the first injection, and to a lesser extent, the second injection, in my view is quite probable.

[124] The defendant agrees there should be some cost for ongoing PRP injections for several years and suggests \$7,500 is reasonable. Given the evidence, I am satisfied it is appropriate to award the cost of future PRP injections for seven years. Applying a present value factor of 6.524 to \$1,300 a year, this equates to an award of approximately \$8,450. I award \$8,450 for PRP injections.

Summary of Cost of Future Care Awards

Rehabilitation treatment

\$29,700

Gym membership

\$5,600

Kinesiologist

\$1,500

Celebrex

\$1,650

PRP Injections

\$ 8,450

Total

\$46,900

HOUSEKEEPING CAPACITY

[125] Both parties addressed housekeeping assistance and yard and garden maintenance as two separate awards within the "cost of future care." While I am reluctant to interfere with how counsel have outlined their case, I have opted to address these claims within loss of housekeeping capacity, which I treat as its own head of pecuniary damages, noting the Court's comments in *Kim v. Lin*, 2018 BCCA 77:

[33] Therefore, where a plaintiff suffers an injury which would make a reasonable person in the plaintiff's circumstances unable to perform usual and necessary household work -- i.e., where the plaintiff has suffered a true loss of capacity -- that loss may be compensated by a

pecuniary damages award. Where the plaintiff suffers a loss that is more in keeping with a loss of amenities, or increased pain and suffering, that loss may instead be compensated by a non-pecuniary damages award. However, I do not wish to create an inflexible rule for courts addressing these awards, and as this Court said in Liu [Liu v. Bains, 2016 BCCA 374], "it lies in the trial judge's discretion whether to address such a claim as part of the non-pecuniary loss or as a segregated pecuniary head of damage": at para. 26.

- [34] Whichever option a court chooses, when valuing these different types of awards, courts should pay heed to the differing rationales behind them. In particular, when valuing the pecuniary damages for the loss of capacity suffered by a plaintiff, courts may look to the cost of hiring replacement services, but they should ensure that any award for that loss, and any deduction to that award, is tied to the actual loss of capacity which justifies the award in the first place.
- [126] In the present case, Ms. Flores claims approximately \$49,000 for "monthly" and "seasonal" housekeeping assistance until age 67 and an additional \$16,500 for annual yard and garden maintenance.

Housekeeping Assistance

- [127] The monthly housekeeping claim is based on Ms. Flores's testimony that she is unable to wash the floor and do some other heavier tasks in the home such as getting down on her hands and knees to clean the bath tub, carrying the vacuum and carrying a heavy laundry basket. I am satisfied the evidence has established that the pain in her hip has resulted in some limitations on her ability to do these tasks and that she relies on her husband for these heavier tasks.
- [128] In light of the evidence, I accept that for some time Ms. Flores will have some difficulty in maintaining her home and that she will need some assistance in addition to the help her husband can provide. On this point, the defendant emphasizes that Ms. Flores testified she can do most of the housework she did prior to the accident, including washing the windows, and while not determinative to this claim, also notes that she and her husband have not had to hire "professional" assistance since the accident in order to maintain and clean their present accommodation.
- [129] As far as seasonal assistance is concerned, Dr. Filbey simply states: "[i]t is likely that she will require assistance for heavier seasonal tasks around her home as time progresses," although Dr. Filbey does not define what constitutes a heavier seasonal task.
- [130] Ms. Flores gave an example of not being able to wash an outside deck. In my view, a heavier outdoor chore such as this can be done by Mr. Flores without triggering an in-trust claim. It is reasonable that a spouse is expected to provide some assistance in doing various chores in and around the house; this is a reasonable allocation of family resources in a shared relationship, especially so when Mr. Flores operates his Information Technology business primarily from home, as opposed to being away from home for extended periods of time

for work purposes.

[131] When considering a claim for seasonal housecleaning, again whatever that may entail, I find the position adopted by Bracken J. in *Thomasson v. Moeller*, 2014 BCSC 2465, aff'd 2016 BCCA 14, apropos the present circumstances:

[112] I make no allowance for seasonal cleaning in addition to the weekly cost as that assistance provided together with the assistance of her husband should be sufficient.

[132] Given these circumstances, the defendant suggests \$10,000 under this head of damages, which in my view is reasonable. There will be an award of \$10,000 for loss of housekeeping capacity as related to monthly housekeeping assistance. I make no award for seasonal housekeeping assistance.

Yard and Garden Maintenance

[133] Even though Mr. Flores owned property prior to 2014, at the present time they are renting their home. They say they "plan" to re-enter the market and buy a house sometime in the future. According to Mr. Flores, this would be when the real estate market "corrects," whenever that might be, maybe five to 10 years, according to Mr. Flores. As such Ms. Flores says it is reasonable to award her \$16,500 for annual yard and garden maintenance, starting in five years and then "ongoing," which, according to Ms. Phillips' report, should again be until Ms. Flores is 67 years old. On this point, Ms. Phillips says in her report that "Ms. Flores' pain level is exacerbated by heavy weekly and seasonal cleaning and yard maintenance," even though as tenants Ms. Flores and her husband have had few, if any, yard and garden duties since 2014.

[134] The defendant says this claim is simply too speculative. The evidence is that Mr. and Ms. Flores merely "plan" at the present moment to buy a home in five to 10 years. The speculative nature of this claim is further illustrated by Dr. Filbey's observation that Ms. Flores "may have difficulties with lawn cutting in the future depending upon the size of the lawn and the nature of any slopes or hills, etc." Leaving aside any assistance Mr. Flores could provide, this assumes they do in fact buy a home with a large lawn. As this particular claim is dependant on Mr. and Ms. Flores purchasing property when and if the real estate market in Victoria corrects, I agree with the defendant that the evidence is insufficient to justify an award for future yard and garden maintenance. I make no award for future yard and garden maintenance.

[135] In conclusion, under loss of housekeeping capacity, I award \$10,000 as related to monthly housekeeping assistance.

SPECIAL DAMAGES

[136] The amount of special damages is agreed to at \$29,884.

SUMMARY

[137] In conclusion, I award the following:

Non-pecuniary damages

\$115,000

Past loss of earning capacity

\$60,000

Future loss of earning capacity

\$266,240

Cost of future care

\$46,900

Housekeeping capacity

\$10,000

Special damages

\$29,884

Total

\$528,024

[138] Ms. Flores is entitled to costs at Scale B.

[139] Counsel have acknowledged they will be able to agree on all post-judgment matters.

"The Honourable Mr. Justice B.D. MacKenzie"

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