

CANADA / JUDGMENT

Glass v. Dhaliwal

2020 BCSC 186

COURT

Supreme Court of British Columbia

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2020 BCSC 186 Glass v. Dhaliwal

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Glass v. Dhaliwal,

2020 BCSC 186

Date: 20200214

Docket: M172562

Registry: Vancouver

Between:

Cassidy Glass

Plaintiff

And:

Gurpreet Singh Dhaliwal and Gurtej Singh Dhaliwal

Defendants

Before: The Honourable Mr. Justice D.M. Masuhara

Reasons for Judgment

Counsel for the Plaintiff:

P.R. Bisbicis

Counsel for the Defendants:

S.Q. Karim

N. Tam

Place and Dates of Trial:

Vancouver, B.C.

September 16-19, 2019

October 8-11, 2019

Place and Date of Judgment:

Vancouver, B.C.

February 14, 2020

I. Introduction

- [1] The purpose of these proceedings is to determine the quantum of damages to be awarded to the plaintiff in respect to injuries sustained in a motor vehicle accident that occurred on April 22, 2016 at the intersection of West Railway Street and Essendence Avenue in the City of Abbotsford (the "Accident"). Liability is admitted.
- [2] The plaintiff Ms. Glass was a seat-belted passenger in an Infinity sport utility vehicle driven by her then boyfriend Mr. Ham. They were at a full stop facing northbound on West Railway at the said intersection when the vehicle immediately behind them driven by the defendant Mr. Dhaliwal failed to stop and rear-ended the Infinity. The plaintiff testified that the impact lifted her out of her seat and that she heard a crunching sound from the rear of the vehicle.
- [3] Damage to the vehicle in which the plaintiff was a passenger is admitted to have been \$5,533.39.
- [4] Ms. Glass says her injuries from the Accident were:
- (a) headaches;
 - (b) neck pain;
 - (c) shoulder pain;
 - (d) clicking in wrist;
 - (e) upper back pain;
 - (f) left arm pain;
 - (g) nausea;
 - (h) anxiety; and
 - (i) Temporomandibular Joint Disorder (TMD).

- [5] The defence acknowledges that the injuries were caused by the Accident, with the exception of the plaintiff's TMD claim, but disputes the quantum of the plaintiff's claim under the various heads of damage. Failure to mitigate is also pleaded by the defence.

II. Issues

- [6] The issues to be determined are:

- (a) Did the Accident cause Ms. Glass's TMD?
- (b) What quantum of damages is the plaintiff entitled to in respect of general damages; loss of past earning capacity; loss of future earning capacity; loss of housekeeping capacity; cost of future care, and special damages?
- (c) Has an in-trust claim been established in relation to the plaintiff's mother's assistance?; and
- (d) Has the defence established a failure to mitigate on the part of the plaintiff?

III. Witnesses

- [7] The witnesses in the case were:

A. Plaintiff

- Ms. Glass, the plaintiff;
- Ms. Harpe, the plaintiff's mother;
- Dr. Epstein, expert in oral medicine, including TMD;
- Dr. Paramonoff, physiatrist - expert;
- Mr. Benning, economist - expert;
- Ms. Ditson, occupational therapist - expert;
- Mr. David Seabrook, friend; and
- Mr. Gord Atti, manager/employer.

B. Defence

- Mr. Ham, plaintiff's former boyfriend and driver of car in which she was a passenger;
- Dr. Wong, physiatrist - expert; and
- Mr. Dhaliwal, the defendant driver of other car.

IV. Background

- [8] The plaintiff was 20 years old at the time of the Accident. She is now 23 years old. This action was commenced on March 30, 2017.

- [9] At the time of the Accident, the plaintiff and Mr. Ham were cohabitating in Abbotsford. They had been dating since the summer of 2013. Mr. Ham is a Korean citizen who was raised by a Canadian family. The two had moved in together a few weeks prior to the Accident. The plaintiff was not employed at the time. Mr. Ham did all of the driving for himself and the plaintiff, and was the driver at the time of the Accident.
- [10] After exchanging information with the defendant driver, Mr. Dhaliwal, Ms. Glass and Mr. Ham drove home in their vehicle. That evening both Mr. Ham and Ms. Glass began to feel pain and attended the local hospital to be examined. At the hospital, Ms. Glass was told she had suffered whiplash injuries, placed in a neck brace, given pain medication, and discharged later that evening.
- [11] Ms. Glass testified that over the first one to three months following the Accident she experienced continuous neck and shoulder pain, lower back pain, headaches, and jaw pain which worsened over time. Ms. Glass testified that she also experienced wrist pain which went away after a couple of weeks. However, she continues to suffer from her other injuries. The worst is her jaw pain. Ms. Glass testified that she experiences jaw pain every day and that the pain is particularly bad at the end of every work day because she has to carry heavy trays which put a strain on her shoulders and neck, aggravating her jaw. She also continues to experience neck pain at the base of her skull/top of her neck with tension also felt between her shoulder blades and resulting headaches, as well as lower back pain.
- [12] In October 2017, Mr. Ham was called for mandatory military training and service and returned to Korea for two years. Shortly after his departure the two had a short communication and it appears that from this point the two went their separate ways. There has been little contact between the two since they broke up. In July 2019, Mr. Ham returned to reside in Canada.
- [13] In terms of medical treatment, the plaintiff went to her family physician shortly after the Accident. Physiotherapy was recommended and the plaintiff attended physiotherapy sessions once or twice a week and was given instructions for various exercises by a kinesiologist. She states she was discharged after about six months in early 2017. I note neither her clinical records nor the treatment she received deal with jaw complaints specifically. She also received five sets of trigger point injections in her neck area from her family physician over the course of the first half of 2019.
- [14] The first entry in Ms. Glass' family physician's clinical records of jaw pain is September 7, 2017, about a year and a half after the Accident. The plaintiff says she complained of jaw pain much earlier. The plaintiff stated that her doctor recommended essential oils as a treatment. Her family physician also made a referral for TMD pain on December 12, 2017.

- [15] On December 7, 2017 the plaintiff saw an oral and maxillofacial surgeon, Dr. Singh. Dr. Singh showed her some stretching exercises for her jaw and recommended that she do them three times a week, a recommendation which the plaintiff says she undertook. Dr. Singh also recommended that she eat softer foods. Dr. Singh made a referral for TMD to a pain clinic. In February 2018, he recommended she wear a night guard.
- [16] In June 2018, her orthodontist who had treated her in the past for unrelated matters saw her in respect to chronic jaw pain and limited jaw movements. At an appointment in December 2018, the plaintiff described having "moderate" symptoms. He took a mold of her mouth and made a night guard for her to use when she slept.
- [17] She states that she gets headaches three to four times a week, which generally take on one of two forms: one which radiates from her neck into the sides of her head, and the other which radiates from her jaw into her temples. Sometimes she experiences these types of headaches simultaneously and it is hard to distinguish the pain.
- [18] The plaintiff testified that she experiences low back pain two or three times a week, which generally occurs with activities like lifting heavy items as well as leaning over.
- [19] To ease her jaw, neck and back pain she regularly takes Tylenol, Advil, and more recently Naproxyn.
- [20] She states that by about 3:00 p.m. at work, she feels drained and wants to go home.
- [21] In terms of non-physical symptoms, she states she experiences "quite high anxiety" when driving in a car. Since the Accident, the plaintiff has obtained her learners licence several times, but has failed the road test required to upgrade her licence twice, as well as receiving a 'fail' a third time for not showing up to the scheduled road test, and has also let the licence expire. However, since these setbacks, she has recently obtained her learners licence again and is practicing driving with her mother. In addition, she states she experienced depressed moods for a long time after the Accident, which still occur to this day. She testified that initially after the Accident she found herself very sad all of the time, would cancel plans with friends, and stay at home most of the time in bed. She testified that while this now occurs less frequently, she continues to be socially withdrawn.
- [22] She has also received comments to the effect that she has recently become more forgetful. She says she forgets things that have happened the week before. She also states that she sometimes slips up in remembering customer's orders.
- [23] The plaintiff was quite active prior to the Accident. She would exercise at the gym, liked to socialize and go out to dance at clubs, and in the summer she would go swimming and hiking outdoors. She also enjoyed playing an interactive video dance game.

V. Employment History

- [24] The plaintiff graduated high school in 2013 and began her first job as a server at a sushi restaurant in Chilliwack in 2014, where she was employed until March 2016. She worked between four to eight hours, five days a week. The plaintiff left her serving job when she and Mr. Ham moved to Abbotsford to cohabitate. The plaintiff's next job followed the Accident. She worked as an office assistant in a medical office in Abbotsford which she began in late April or early May 2016. The job lasted only for a few weeks, as she was terminated during her probationary period. She stated that there was a mutual parting of the ways and that the pain from her injuries caused her to be unable to focus on her job duties.
- [25] Her next job was as a host and room service attendant at a White Spot restaurant attached to a hotel in Abbotsford. She started in June 2016 and worked there until October 2016. She worked a seven-hour shift, Monday to Friday, 7:00 a.m. to 2:00 p.m. She would greet and seat guests, provide menus and clear tables. She would also deliver meal orders to hotel room guests using a trolley. She performed her duties well. She quit that job as the lease for her residence in Abbotsford was expiring and she decided to move back to an apartment in Chilliwack with Mr. Ham but lived with her mother until the apartment become available.
- [26] In March 2017, she began working 20 hours a week as a server at a small restaurant called Little Beetle Bistro in Chilliwack. While she was offered a 35 hour per week full-time position, she declined the job because of her pain. Her duties were to greet and serve customers, make different coffees and teas, clean the expresso machine, sweep and mop the floor, set up chairs, and take dishes to the kitchen sink, etc.
- [27] In August 2018, in an effort to earn more money, she quit her job at Little Beetle to work at the Townhall Pub in Chilliwack as a server. However, she left Townhall after about 1.5 months as she did not get past her probation period. She described her work there as involving carrying very heavy trays of food and drinks. She stated that this placed strain on her neck and back which led to headaches and jaw pain. She received few hours and did not earn as much as she expected.
- [28] After working at Townhall Pub she began her current job as a server at the Shandhar Hut in Chilliwack. The owner had gone to school with both of the plaintiff's parents. The owner's son Mr. Atti hired and trained the plaintiff. She started in October 2018. Her starting hours were from 11:00 a.m. to 7:00 p.m. However, her hours were reduced in January 2019, to 11:00 a.m. to 5:00 p.m. by her manager, Mr. Atti. Mr. Atti's evidence is that Ms. Glass' performance dropped during the dinner shift. Takeout orders and table orders would get "messed up," and calls to the restaurant would be left off the hook. However, I take it that customers still received good service as a whole and Mr. Atti described the plaintiff as a great worker, dedicated, honest, and good with customers.

- [29] Mr. Atti also stated that he hired a second server for the afternoon shift, but his testimony indicated that it may have been more to do with the fact that Mr. Atti is now transitioning out of his parent's restaurant business into his own business and cannot spend as much time at the restaurant. The plaintiff has been given the authority by Mr. Atti to direct the second server on the afternoon shift on tasks to be performed.
- [30] It is apparent that the Shandhar Hut is a popular and busy restaurant, and has received dining awards. He mentioned that a second Shandhar Hut restaurant has been contemplated. He stated that with him leaving the restaurant, the plaintiff would be a top contender as a manager but that he has not raised the topic with the plaintiff because of the limitations on the hours she can work.

VI. Medical Evidence

A. Dr. Epstein

- [31] The plaintiff provided medical evidence from Dr. Joel Epstein, who appeared to speak to his report dated April 10, 2018, and addendum dated July 3, 2019.
- [32] He diagnosed the plaintiff with mild to moderate TMD:
- that contributes to her headaches in addition to cervicogenic origin of headache. She has had significant impact of pain associated with TMD. The headaches are classical tension-type with progression to migraine. These symptoms are chronic and regional and therefore chronic regional pain is present and probable central desensitization is ongoing. Sleep dysfunction and mood disorder also may need to be addressed.
- [33] Dr. Epstein acknowledged that while there could be other causes, based on the history he reviewed and his examination of the plaintiff, his conclusion is that the plaintiff's TMD arose from the Accident. Though his prognosis is guarded, he opined that if the plaintiff followed his recommended treatment, the plaintiff could experience a moderate level of recovery. In this regard, he opined that the prognosis would be improved:

with ongoing comprehensive physical and medical therapy with focus on rehabilitation, relaxation, sleep dysfunction and any mood changes. Physical therapy may be supplemented with adjuncts such as TENS, IMS and Low Level Laser Therapy (photobiomodulation therapy) may be valuable in her ongoing management. Invasive treatments such as surgical therapy for jaw symptoms are not indicated.

- [34] In terms of recommended treatment he states:

She will likely require ongoing use of a bruxism appliance, with current fees of \$1000 for a new appliance, which may be required on a 5 to 10 year basis and follow-up evaluation and management of TMD is currently billed at \$225 to \$350 per visit depending upon the time required or procedures performed. Once treatment interventions are provided on a focused basis, the time between visits is extended from 1 to 3 monthly to six to twelve monthly and

ultimately on an annual basis. She will therefore require ongoing assessment and management if symptoms persist. Over time she will become more aware of self-management techniques including diet modification and limitations that may persist and self management with use of the oral appliance and possibly home Low Level Light Laser therapy and medical management directed by her physicians.

[35] Under cross-examination he testified that it would be uncommon for TMD to arise 1.5 years after an incident. He also testified that the plaintiff's chronic cheek biting could aggravate her condition and the persistence of the condition. He stated that bio feedback therapy is a treatment for this.

B. Dr. Paramonoff

[36] The plaintiff also provided expert evidence from Dr. Paramonoff, a physical medicine and rehabilitation specialist. Her report addresses the complaints of the plaintiff other than TMD, and her mood related symptoms/psychological issues.

[37] In terms of injuries from the Accident, Dr. Paramonoff diagnosed:

- (a) Musculoligamentous injuries at the neck and myofascial injuries at the upper to mid-back regions; and
- (b) Multifactorial Headaches, likely contributed to by neck sprain/strain injuries; muscle tension and pain from soft tissue injuries; and jaw symptoms.

[38] In terms of functioning, Dr. Paramonoff opined that the plaintiff does not have a medical condition that would prohibit her from participating in activities as a result of the soft tissue injuries sustained from the Accident. However, she states that "consistent with residual clinical presentation, Ms. Glass [does] require some activity adaptations"; and while the need for these adaptations are "more likely than not to decrease [over time] [they] are unlikely to be eliminated".

[39] The adaptations she mentions would include: taking micro breaks from activities that require her to be in a the same position for a prolonged period of time; pacing and prioritizing activities, including breaking down larger/heavier tasks into smaller tasks; and ensuring optimal ergonomics and optimal mechanics of movement.

[40] Asides from noting that the plaintiff's headaches were likely associated in part with her jaw-related symptoms, Dr. Paramonoff did not comment on the plaintiff's jaw injuries further and stated that she would defer to dentistry experts in this area. In respect of the plaintiff's complaints of neck, shoulder and back pain, Dr. Paramonoff opined that:

It is my opinion that Ms. Glass will likely have a prolonged course of recovery, given the cumulative effect of soft tissue injuries, post-MVA muscle Imbalance/decondition, and confounding factors.

Notwithstanding the time elapsed since the MVA, it is my opinion that Ms. Glass's prognosis for moderate symptomatic improvement is positive.

Such improvement will require the implementation and regular maintenance of an increased independent exercise program;

and with management of the confounding factors.

It is my opinion that such management and symptom improvement will not eliminate the symptoms, and that Ms. Glass will likely have a residual baseline of symptoms that she will need to manage, due to the superimposed injuries and sequelae from the MVA.

[41] In terms of what she meant by a "prolonged course of recovery", Dr. Paramonoff testified that the plaintiff's recovery period would likely span two years from trial.

[42] She recommended an exercise program to manage soft tissue symptoms as well as the symptoms associated with post-MVA muscle imbalance/deconditioning; adjunctive treatment; medication; referral to an occupational therapist; and the services of a psychologist or psychiatrist.

[43] In summary, Dr. Paramonoff concluded that:

The difficulties Ms. Glass describes are consistent with being secondary to the MVA-related injuries and sequelae. However, it is my opinion that Ms. Glass' prognosis to gradually increase to full-time work is positive

As such, it is my opinion that Ms. Glass has had a partial temporary disability; however, that the prognosis for full-time work in the future is positive, notwithstanding that she will likely still need some adaptations to improve comfort with aggravating activities.

C. Dr. Wong

[44] The defence called Dr. Wong, a physical medicine and rehabilitation specialist.

[45] Dr. Wong noted the complaints of the plaintiff in his examination. His report dated May 17, 2019, states:

Ms. Glass complained of pain located in the neck, upper back, jaw and headache; however, her examination today is normal with both digital palpation and using an algometer. Range of motion in the neck and back is normal. There is no nerve damage found. I did not find any objective reproducible abnormal physical findings to account for her discomfort in the neck and back [m]ovement of the facial muscles are normal. Movements of the temporomandibular joints are normal. Examination of her jaws did not reveal any particularly tender areas in the jaw capsule or any swelling. She was able to open her mouth by six centimetres.

[46] In terms of work, Dr. Wong states that the plaintiff "has continued to work as a waitress after the car accident until now and, therefore, no accident related problems prevent her from this work."

- [47] In terms of recreation, Dr. Wong states that the plaintiff said "she enjoyed going to the gym at times but now has no time to go to the gym as she does not have a driver's license and therefore has to use public transit and it is difficult for her to get to the gym. There are no accident-related problems to prevent her returning to her previous recreational activities."
- [48] He stated that the plaintiff's prognosis for recovery "is good as her examination today is normal." He also stated that the plaintiff "does not require any more physiotherapy as her examination is normal. She can continue the exercises she learned from CBI and practice them at home."
- [49] He agreed that Dr. Epstein had greater experience than him in the area of TMD.

VII. Functional Capacity Evaluation

- [50] The plaintiff tendered a functional capacity evaluation report dated June 21, 2019, and addendum dated July 4, 2019, authored by Ms. Jerica Ditson. Ms. Ditson conducted an eight-hour assessment. She was called as a witness in respect to her report.
- [51] The report states the medical documentation relied upon were the reports of Dr. Epstein dated April 10, 2019, and Dr. Paramonoff dated June 4, 2019. She did not have the benefit of Dr. Wong's report which was completed May 17, 2019. However, it was available when she was requested to provide her addendum, but no reference was made to it.
- [52] She summarized her findings as follows:

Ms. Glass demonstrated the ability to perform work at up to a Light strength level over full body range. However, if loads were handled between floor and waist level only, she demonstrated the ability to perform work in Modified Medium strength range.

She did not demonstrate any significant functional limitations with activities requiring grasping, standing, walking, brief periods of repetitive squatting and balancing.

Ms. Glass demonstrated limitations with respect to activities involving increased stress on the neck and upper back including mild to moderate limitations with forward and overhead reaching, especially when performed in combination with sustained head and neck postures.

Ms. Glass demonstrated limitations with respect to activities involving increased stress on the lower back including mild limitations with sustained sitting and mild to moderate limitations with bending, stooping and sustained crouching.

Her ability to climb stairs was mildly limited when her lower back and neck symptoms were elevated.

This writer is unable to provide an opinion regarding her ability to perform handling/dexterity tasks, as Ms. Glass was observed to have long artificial nails that likely negatively impacted her dexterity during the assessment.

With respect to active range of motion testing, she was below average for cervical range of motion testing.

With respect to upper and lower extremity manual muscle testing, her strength was normal with full resistance in all movements.

Overall, test findings reveal that should a position be available, Ms. Glass is likely not competitively employable on a part-time or full-time basis as an Office Worker. However, she would likely be able to perform such work on a part-time basis in an accommodated environment. It is likely that Ms. Glass would be able to perform the sitting requirements of this work with the natural body positional changes that are typically required of this work (i.e. standing up to use the photocopier, to greet guests/customers, etc.). However, in order for Ms. Glass to remain functional, she will require an accommodating employer that allows provisions to shift and change positions to help manage her neck and upper back symptoms with the sustained neck positioning that is required for performing computer work and paperwork. Additionally, she would likely require shorter days and/or days off in between her work shifts in order to manage her neck and upper back symptoms. Ms. Glass reported difficulties with focusing and concentrating during the assessment when her reported headache symptoms were elevated and was also observed to make errors and demonstrated reduced productivity when her reported headache symptoms were elevated. This writer would defer to experts in the field of neurology/headaches to provide a full opinion on her ability to work in relation to her headaches. However, there were observed functional limitations with her performance that corresponded with reported increases in her headache symptoms. Based on the information above, her ability to compete against her cohorts for other Office Worker positions has been reduced due to her ongoing functional limitations related to her neck and upper back.

Overall, test findings reveal that Ms. Glass is likely not competitively employable on a part-time or full-time basis as a Server. However, she would likely be able to perform such work on a part-time basis in an accommodated environment. She will likely require shorter days and/or days off in between her work shifts in order to manage her symptoms and to also facilitate participation in her avocational activities. Additionally, in order for Ms. Glass to remain functional, she will require an accommodating employer that allows provisions to take additional breaks to help manage her neck, upper back and lower back symptoms. Ms. Glass reported difficulties with focusing and concentrating during the assessment when her reported headache symptoms were elevated and was also observed to make errors and demonstrated reduced productivity when her reported headache symptoms were elevated. This writer would defer to experts in the field of neurology/headaches to provide a full opinion on her ability to work in relation to her headaches. However, there were observed functional limitations with her performance that corresponded to reported increases in her headache symptoms. Based on the information above, her ability to compete against her cohorts for other Serving positions has been reduced due to her ongoing functional limitations related to her neck, upper back and lower back.

- [53] Ms. Ditson's finding with respect to the plaintiff's personal care was that "at the present time she can safely manage all of her basic Activities of Daily living independently with appropriate pacing techniques."

VIII. Economic Evidence

- [54] The plaintiff tendered an economic report authored by Mr. Darren Benning. He was also called as a witness in respect to his report. The report provided the usual information about present values and employment contingencies in a general sense.

IX. Findings and Discussion

- [55] I will start with determining the issue of whether the plaintiff's TMD was caused or contributed to by the Accident. The fact that the plaintiff suffers from TMD is not disputed.
- [56] Causation is established where the plaintiff proves that the defendant caused or contributed to the TMD: *Athey v. Leonati*, [1996] 3 S.C.R. 458. The usual test for causation is the "but for" test.
- [57] The defence points to the fact that the first documented reference to jaw pain is in the plaintiff's family physician's clinical records, September 7, 2017. It is then that tenderness in the Temporo Mandibular joints was identified with ongoing neck and jaw pain. This is about one and half years after the Accident. The defence notes that Dr. Epstein reported that the CL 19 form completed by the plaintiff's family physician on December 12, 2016, based upon an examination in May 2016, noted several ailments including headaches, and diagnosis of WAD Grade 1 of the neck, upper and low back. However, jaw pain was not identified in this list of ailments. Dr. Epstein also notes in his report that the physiotherapy clinic that Ms. Glass attended for her whiplash condition did not identify TMD or facial pain.
- [58] The defence also points to the fact that despite the plaintiff's testimony stating that she complained of jaw pain to her physician early on, that it is not noted in her records, and the physiotherapy treatment that her physician referred her for did not reference jaw pain. The defence also noted the absence of dental records that would have provided more information regarding causation.
- [59] The defendant also points to the testimony of Dr. Epstein, who commented that one and a half years is a long delay, that it was "uncommon" for the development of TMD so distant from the Accident, and that it was more likely to develop closer or in a shorter time frame from the causative event.
- [60] The defence also submits that there is a need for caution against drawing an inference that since one event follows another in time, the first event must be the cause of the second.

- [61] The plaintiff testified that she complained of jaw pain from an early stage, and that she experienced this pain approximately two to three months after the Accident. Her mother, Ms. Harpe, testified that Ms. Glass complained of jaw pain the night of the Accident.
- [62] I discount somewhat Ms. Harpe's testimony regarding her observations of the difficulties that her daughter suffers. Ms. Harpe is a very supportive mother and, as most parents are wont to do, is eager to help her child. In this case, that support went so far as manifesting itself in Ms. Harpe's testimony that on the evening of the Accident, the plaintiff was complaining of a headache, sore back and sore neck; and added that the plaintiff stated to her that her jaw pain was so intense it was "killing her" -- resulting in Ms. Harpe imploring the plaintiff to visit the hospital.
- [63] There is no question that the plaintiff attended the hospital and received care, however, there is nothing to support a complaint of jaw pain which was "killing her". This goes against the general tenor of the evidence, including the plaintiff's and Mr. Ham's testimony, of the evening of the Accident. The evidence which I find likely is that the jaw pain developed over time. In my view, the approach to Ms. Harpe's testimony requires some caution given her desire to do the best she can to support her daughter's claim.
- [64] Though there are difficulties with the plaintiff's evidence surrounding the TMD, as noted above, Dr. Epstein notes the plaintiff's complaints, shortly after the Accident, of headaches in the temples. Dr. Epstein states that a headache of this nature is consistent with headaches associated with TMD. Dr. Epstein also noted that the plaintiff became aware of her jaw clenching both at night and during the day subsequent to the Accident, that the plaintiff stated her jaw pain became apparent to her about three to four months following the Accident, and also identified the presence of a sleep disorder that "may lead to a delayed onset of TMD."
- [65] With respect to Mr. Ham, I note that he was called by the defence. He testified in direct that Ms. Glass complained of pain in her neck, shoulders and hand immediately following the Accident. He stated that at about the time he was scheduled to leave for his mandatory military service in 2018, he thought Ms. Glass's pain was localized to her neck and jaw. He seemed uncertain as to this from my observation; however, when asked about jaw pain, in cross by Mr. Bisbiciis, he stated that he thought it started about three to four months following the Accident.
- [66] My view of the evidence is that, on balance, the plaintiff has established, albeit on a narrow margin, that her TMD was caused by the Accident to her TMD.
- [67] I now turn to discuss the extent of the injuries.

[68] In a case such as this, I am mindful of the comment in *Butler v. Blaylock Estate*, [1981] B.C.J. 31 (B.C.S.C.), that "the Court should be exceedingly careful when there is little or no objective evidence of continuing injury and when complaints of pain persist for long periods extending beyond the normal or usual recovery:" p. 399. I also note the comment by McEachern C.J. in *Price v. Kostryba*, 70 B.C.L.R. 397 (S.C.) at 397:

The assessment of damages in a moderate or moderately severe whiplash injury is always difficult because plaintiffs, as in this case, are usually genuine, decent people who honestly try to be as objective and as factual as they can. Unfortunately, every injured person has a different understanding of his own complaints and injuries, and it falls to judges to translate injuries to damages.

[69] I have considered the testimony of the various witnesses, the reports and documents tendered, and addenda. My view of the evidence is that Ms. Glass has suffered from the injuries claimed; however, she is not as limited as asserted. She testified to headaches; jaw, neck and back pain; anxiety; low mood; reduced social life and activity; and insomnia -- injuries and symptoms which operate to limit and restrict her in her daily living and working activities. She also testified at to the level of assistance she now requires and the impact of various medications she must now take. The submission is that she is severely limited, an entirely changed person, and is only capable of part-time, accommodated work, now and into the future. While the defence acknowledges the plaintiff has suffered injury, which I agree is the case, there remain aspects in the evidence that detract from the degree of the plaintiff's asserted negative circumstances; which leads me to find that the plaintiff's capacity for improvement will be greater than asserted.

[70] I have listed various aspects which collectively operate to dilute the extent of the injuries asserted. No single aspect here is determinative.

- (a) The plaintiff to her credit has sought out employment shortly after the Accident and has been regularly employed, for most of the time, on a permanent basis to the present.
- (b) She worked at a White Spot in Abbotsford, as a host including providing room service in the hotel that it attached to, working fulltime, seven hours a day, five days a week. She left the job after about five months, because she had decided to move back to Chilliwack.
- (c) She gets up early each morning to get to work 10-15 minutes early to be able to prepare the restaurant for opening. She walks to and from her place of work everyday, which take about 45 minutes and puts in virtually a full day of work.
- (d) While working at Little Beetle in Chilliwack, she walked to work everyday -- about 45 minutes each way. While she testified that she had difficulties working there as a result of her condition, I find that she left this job to make more money as a server at a busy restaurant pub, the Townhall Pub. That is, she left a lighter duty job to a more vigorous job. Ms. Ditson's report indicates the plaintiff left Little Beetle because she did not like her boss. Either way, it was not as a result of her difficulty in working as a server. However, because

she ended up receiving fewer hours as a server at the Townhall Pub, she sought and obtained a job as a server at a busy restaurant --Shandhar.

- (e) After the Accident, she agreed that she and Mr. Ham shared the work duties around their home equally. Though the evidence indicates that she had difficulties, I infer she was able to do her share. The evidence indicates Mr. Ham did more of the housework as he was not fully employed. Mr. Ham worked part-time as a translator. I also understand that Mr. Ham also experienced some difficulties from the Accident.
- (f) The plaintiff stated that her family doctor did not recommend massage therapy for her because her doctor felt it might harm her. Given that her family doctor referred Ms. Glass for physiotherapy, I do not find this explanation satisfactory or reliable.
- (g) Her mother testified that the plaintiff is not able to do her own laundry and fold things, clean her apartment, vacuum, or sweep, and that she does a good amount of this regularly for the plaintiff. However, at Shandhar Hut, the plaintiff testified that she folds towels on a daily basis, waters plants, sweeps and mops the entire restaurant, clears and wipes tables and seats, rolls cutlery into napkins, loads and unloads the dishwasher, sets up tables and chairs in the outdoor patio in the summer, washes windows, carries in beer cases, stocks beer in the refrigerators, carries up to nine copper cups full of water in one tray. I also note, aspects of such chores were required of her in her prior jobs.
- (h) While the plaintiff testified that she drops things and mixes up orders, Mr. Atti testified that Ms. Glass is an excellent and dedicated worker, which I accept is the case.
- (i) The plaintiff testified that she was referred for physiotherapy and massage therapy in June 2016, but did not start attending until November 2016, about 5 months later; which brings into question as to whether her difficulties were as pressing as she asserted.
- (j) I find curious the plaintiff's testimony that she experiences anxiety when getting into a car and also driving, when just prior to Mr. Ham leaving for Korea, she purchased a car. The car remains at her mother's home and apparently undriven by her. My sense is that the plaintiff in making the purchase had and has a belief in her ability to obtain a permanent driving license.
- (k) The plaintiff's inability to obtain her permanent driver's licence pre-existed the Accident--she had failed her road test twice prior to the Accident.
- (l) Her mother testified that the plaintiff was eager to get her driver's licence, took all opportunities to drive, and was a good driver prior to the Accident. However, the plaintiff stated that she was confident driving before the Accident, even if her mother did not think so.
- (m) The plaintiff had six years prior to the Accident to obtain her permanent licence, yet did not; despite her eagerness to be able to drive.

- (n) Notwithstanding the evidence that she was eager to drive and took every opportunity to do so, the plaintiff did not attempt to do this during her relationship with Mr. Ham, which pre-existed the Accident, as she testified Mr. Ham did all the driving during the relationship.
- (o) The plaintiff agreed that she told Dr. Paramonoff that she had not driven since the Accident and gets anxious and has no confidence; yet she testified at trial that she has driven since the Accident and had actually taken some driving lessons.
- (p) The plaintiff testified that she requires the assistance of her mother in housekeeping chores. Yet since moving into her two-bedroom apartment, she has taken on the responsibility to care for four cats, 50-70 plants, and three large fish tanks with fish. The plaintiff grew up in a family home with fish tanks and would have known the level of work required to clean and maintain them. Ms. Ditson reports that: "[The plaintiff] reported that currently she lives independently in a large rented one bedroom basement suite in Chilliwack. She reported that she is responsible for all the cleaning tasks. She reported that she waits until her days off to perform the cleaning tasks and that she requires breaks while she is performing her cleaning activities due to her symptoms. She reported that the cleaning tasks get done less often than she would like (i.e. the dishes in the kitchen pile up) and she is embarrassed to have people come over to her home due to the mess." The plaintiff also appears to have told Dr. Wong "she lives by herself and is able to perform her household duties" and "that she has no housekeeper and she said she is able to perform household duties despite the pain. She said "she is slower than before due to her pain." I note that Ms. Glass now rents a two bedroom apartment on the third floor of an apartment building with no elevator.
- (q) There is also an indication that she told Dr. Paramonoff that she did not participate in any outdoor recreational activities before the Accident and primarily lived a sedentary lifestyle; contrary to her evidence at trial.
- (r) The Plaintiff has received the name of a physiotherapist to treat her jaw symptoms, yet has not contacted that person;
- (s) The Plaintiff missed appointments with her family doctor for trigger point injections without a real explanation. Again, this discounts the degree of difficulties Ms. Glass was encountering.
- (t) She asserts forgetfulness, anxiety and mood problems, yet has not sought professional advice or care. I also note she testified to experiencing anxiety prior to the Accident. The plaintiff also appears to have denied having any psychological problems to Dr. Wong.
- (u) She testified as a result of her injuries she is withdrawn and has stopped seeing friends. She advised Ms. Ditson that she "is not actively searching for friends" yet she also testified at trial she had been on dating websites and had found a boyfriend as a result. Her second after Mr. Ham. The evidence indicates she sees her current boyfriend regularly and has overnights with him. I assume the same was the case with the previous boyfriend. I also note that the plaintiff went on a trip with Mr. Ham to Disney World in the summer of 2017 and on a

vacation to Cancun with her family recently in March. I also note that she is described by her employer as a great worker, great with customers, and a well-rounded person.

- (v) There is also some evidence of exaggeration by the plaintiff. She did not contest that she told Dr. Wong that she took Tylenol No. 1 about 20 tablets a week and alternates with Aleve about every other week.
 - (w) The plaintiff's statement that her appointment with Dr. Wong only lasted five to 10 minutes appears to be a serious underestimation given Dr. Wong's report and his testimony that his examination and interviews are usually 30 to 50 minutes. I note a chaperone was present at the appointment.
 - (x) There is a difference in the plaintiff's ability to open her mouth. Dr. Epstein measured 3.6 cm whereas Dr. Wong measured 6 cm which indicates that her ability is variable.
 - (y) I also find her assertions that Dr. Wong did not measure the opening of her mouth, and that he did not examine her jaw at all, questionable. Dr. Wong was not challenged on Ms. Glass' assertions.
 - (z) The medical opinion of Dr. Paramonoff that the plaintiff has only a partial temporary disability and that the prognosis for full-time work in the future is positive.
- (aa) Though Ms. Ditson reports a "near full level of physical effort during testing" she reports "one or two instances in testing where a low or variable level of effort was provided" and that she had to discuss with the plaintiff the lack of effort.
- (bb) I also note from Ms. Ditson's report that the plaintiff did not demonstrate any significant limitations with activities requiring grasping, standing, walking, brief periods of repetitive squatting and balancing, and the limitations found were generally mild to moderate.
- (cc) There is evidence that there are times when the plaintiff is symptom-free, as found during Dr. Wong's examination.
- (dd) While the plaintiff testified that she has difficulty sleeping, she agreed at her examination for discovery that she no longer had sleep issues. I take her testimony of sleeplessness as being more recent and as a result of the tension related to her court case. I find that her Accident related sleep problems were resolved by at least her examination for discovery.
- [71] As to her complaint of memory loss, low mood and driving anxiety, the plaintiff, relying upon *Sadaati v. Moorehead*, 2017 SCC 28, submitted that damages for mental injury can be awarded without a recognized psychiatric condition or medical/expert evidence. I agree with this statement of the law.
- [72] In *Sadaati*, at para. 37, the court held that to establish mental injury, the claimants must show:

that the disturbance suffered by the claimant is "serious and prolonged and rise[s] above the ordinary annoyances, anxieties and fears" that come with living in civil society

[73] However, my assessment of the evidence is that the forgetfulness complained of is relatively minor, and the anxiety she experiences regarding driving, and her depressed mood are not at the level stated in Sadaati. I have not been persuaded of a causal connection between these things with the Accident. The plaintiff's difficulties advancing her driving competence pre-dated the Accident. The plaintiff's evidence that she is withdrawn and anti-social is tempered by the fact that she has taken several holidays, sought out relationships on social networks, continues to have meaningful relationships, and is described as having a positive attitude at work and with customers. I also note she testified to pre-Accident anxiety with respect to meeting new people.

[74] Also, notwithstanding the assertion of Ms. Harpe that the plaintiff is a completely changed person, there is an absence of evidence of the plaintiff seeking counselling or medical advice with respect to such a change. This is in contrast to the plaintiff obtaining physiotherapy, active rehabilitation, trigger point injections, and orthodontic treatment for her physical complaints.

[75] In summary, I find that the Accident caused or contributed to the injuries Ms. Glass has identified. However, I find that her injuries are not as great as asserted. I do not accept, given all of the available evidence, that the impact on the plaintiff's functional capacity and competitive employability is as negative as asserted. I also find that with reasonable diligence in following the care and treatment plans recommended, aspects of her condition that limit her capacity will not be as prolonged as asserted and she will improve to a level greater than asserted.

X. Damages

[76] The determination of damages in cases such as this engages the principle of *restitutio integrum* is engaged. Namely, I am asked to assess what is required to restore the plaintiff to her status quo ante as far as money can do so. Ultimately, an award must be fair and reasonable to the parties.

[77] I now turn to the various heads of damages claimed

A. Non-pecuniary damages

[78] The purpose of an award for non-pecuniary damages is to compensate the plaintiff for pain, suffering and disability as experienced to the date of trial, and as will be experienced into the future. The award is intended to permit the plaintiff to substitute other life amenities for those lost as a result of the defendant's negligence.

- [79] Awards made in other cases involving similar circumstances and injuries provide guidance. However, each case requires an assessment on its own specific circumstances. Assessments under this head are guided by many factors and a non-exhaustive list of considerations is listed in *Stapley v. Hejslet*, 2006 BCCA 34, at para 46: age of the plaintiff; nature of the injury; severity and duration of pain; disability; emotional suffering; impairment of life; impairment of family, marital and social relationships; impairment of physical and mental abilities; loss of lifestyle; and the plaintiff's stoicism (which should generally not detract from the award).
- [80] The plaintiff submits that the range applicable for this case is \$120,000 to \$140,000.
- [81] Cases handed up by the plaintiff for guidance are: *Rizzolo v. Brett*, 2010 BCCA 398; *Sadaati v. Moorhead*, 2017 SCC 28; *Parfitt v. Mayes*, 2006 BCSC 125; *Evans v. Keil*, 2018 BCSC 1651; and *Miller v. Marsden*, 2014 BCSC 2331.
- [82] The defence submits that the reasonable range under this head is \$30,000 to \$35,000.
- [83] Cases handed up by the defendant for guidance are: *Tisalona v. Easton*, 2015 BCSC 565, appeal dismissed 2017 BCCA 272; *Eng v. Titov*, 2012 BCSC 300; *Anderson v. Dwyer*, 2010 BCSC 526; and *Lidher v. Toews*, 2009 BCSC 1055.
- [84] The evidence indicates that Ms. Glass had a pre-Accident lifestyle that was consistent with an active young adult. She enjoyed going out and participating in recreational activities. The pain from her soft tissue injuries are chronic. Her activities have been curtailed to a degree. Given my findings regarding the injuries of the plaintiff, and my view of the room for improvement the cases handed up by the plaintiff deal with circumstances more severe than the plaintiff.
- [85] In my view, I assess damages as \$65,000 under this head.

B. Special Damages

- [86] The plaintiff seeks \$1,100 under this head. The defendants admit the list of special damages claimed by the plaintiff, with the exception of the dual lam splint expense of \$400.
- [87] The defence challenges the dual lam splint expense on the basis that the plaintiff's jaw condition is unrelated to the Accident.
- [88] Having found that there is a causative relationship between the Accident and the plaintiff's jaw condition and that the appliance was recommended by an orthodontist for her jaw condition, I conclude that the cost is a proper claim under this head.
- [89] As a result, the total special damages awarded is \$1,100.

C. Loss of Earning Capacity

- [90] Under this head of damages, the onus is on the plaintiff to demonstrate an impairment to their earning capacity; and a real and substantial possibility that the diminishment in earning capacity will result in a pecuniary loss.
- [91] The determination under this head involves consideration of future or hypothetical possibilities that are real and substantial possibilities, not just mere speculation. If there are such possibilities, then an assessment or weighing of the likelihood that such possibilities would have manifested in the absence of the injuries is to be made. The exercise is not to be in the abstract but also has been described as "gaz[ing] deeply into the crystal ball:" *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229 at 251.
- [92] Depending on the facts, the quantification is either determined on an earnings approach or on a capital asset approach: *Perren v. Lalari*, 2016 BCCA 211 at para. 21.
- [93] The earnings approach is more useful when the loss is more easily measurable. The capital asset approach will be more useful when the loss is not easily measurable. With respect to the latter approach, Finch J. (as he then was) in *Brown v. Golaiv*, (1985), 26 B.C.L.R. (3d) 353 (S.C.), identified several considerations for assessing loss, namely, whether: the plaintiff has been rendered less capable overall from earning income from all types of employment; the plaintiff is less marketable or attractive as an employee to potential employers; the plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to them, had they not been injured; and the plaintiff is less valuable to themselves as a person capable of earning income in a competitive labour market.
- [94] Under any approach to assessing damages, the court is to make an assessment, as opposed to applying a mechanical mathematical or statistical exercise. Ultimately, the court must base its decision on what is fair and reasonable in the circumstances.
- [95] The defence submits that the plaintiff has not discharged the burden of proving that the Accident injuries caused a real or substantial possibility of a future event leading to a loss of income. The defendants argue that there has not been and will not be loss of earning capacity. In this regard, the defence points to the evidence that the plaintiff has continued to work full-time since the Accident in the line of work which she prefers. The defence points out that the plaintiff was working five days a week for five-hour shifts at Seven Sushi before the Accident. Taking this as a baseline for work capacity, it is argued that she has not worked at any position for less than 25 hours per week (At Little Beetle, her range was 20-25 hours per week) and has had numerous full-time 35-40 hours per week positions since the time of the Accident. The defence also points out that the plaintiff is currently working at a busy restaurant during the lunch rush five days a week for five-seven hours each shift for a total of 30-35 hours each week. This, the defence argues, dispels the findings of Ms. Ditson that the plaintiff is not competitively employable on a part-time or full-time basis as a server.

- [96] My view of the evidence leads me to conclude that the plaintiff suffered an impairment to her earning capacity as a result of the Accident and that a real and substantial possibility of past and future income loss assessment has been established. She has jaw, neck and back pain which has impaired her capacity to a degree.
- [97] As stated earlier, my view is that Ms. Glass is not as debilitated as asserted and that her prognosis for return to full capacity, albeit with some residual pain, with the benefit of the care items, is more positive than asserted. This is reflected in my assessment.

D. Past Capacity Loss

- [98] The plaintiff seeks damages between \$11,366.72 and \$13,906.72 for damages under this head.
- [99] The plaintiff submits that for the period August 7, 2018, through September 30, 2018, she would have earned \$1,900 per month at Little Beetle but only earned a total of \$612.72. As a result, she argues that her lost earnings are calculated as $\$1900/\text{month} \times \text{three months} - \$612.72 = \$5,087.22$. She says she was offered full-time hours but declined because of her pain.
- [100] The plaintiff submits that from October 1, 2018, she was working 11-7:30, 35 hours a week on average. Mr. Atti reduced her hours to 30 hours a week.
- [101] Mr. Atti testified that he would not have reduced the plaintiff's hours if she could handle the hours and would have offered her eight hours a day if she could have sustained her work ability.
- [102] In my view, Ms. Glass suffered income loss due to her injuries from the Accident. I prefer the plaintiff's loss of calculation for the period January 1, 2019 to October 10, 2019 at Shandhar Hut of \$6,279.50.

E. Future Capacity Loss

- [103] The plaintiff seeks damages of \$433,296 for future loss. This value is put forth using the earnings approach and assumes a permanent lasting capacity loss.
- [104] Under the plaintiff's approach, the starting wage for a manager is \$3,000 and grows to \$3,500 salary per month at Shandhar Hut. The plaintiff submits that an average of \$3,250 per month is a reasonable average.
- [105] Shandhar Hut also pays a manager a bonus of \$200 to \$400 per month in bonuses. The plaintiff submits that \$300 per month is a reasonable average.
- [106] There is also the opportunity to earn tips by doing serving shifts, which Mr. Atti testified was flexible at the discretion of the manager. Tips average \$80 to \$100 per day, with \$90 per day as the average. The plaintiff submits that three days of serving per week, 12 days per month, is a reasonable estimate. The total average is \$1,080 (12 days per month $\times$ \$90 per day).

- [107] Therefore, the total monthly earnings of a manager at Shandhar Hut, based on the plaintiff's assessment, is $\$3,250 + \$300 + \$1,080 = \$4,630$ per month. The annual total is \$55,560.
- [108] Ms. Glass's current earnings at Shandhar Hut was \$13,209 for the period from January 1, 2019 to September 1, 2019. Mr. Atti testified that the monthly earnings are consistent, so the court may simply divide $\$13,209 / \text{eight months}$ to reach an assessment of monthly earnings equal to \$1,651.12. Ms. Glass testified that her monthly tips are approximately \$900. This results in approximate total monthly earnings of \$2,551.
- [109] Her annual earnings estimate is \$30,612 (12 months x \$2,551 per month).
- [110] Therefore, the plaintiff's loss of future earnings may be assessed at $\$55,560 - \$30,612 = \$24,948$.
- [111] Mr. Benning's multiplier for Ms. Glass for future income loss, which Mr. Benning testified includes substantial negative contingencies because of Ms. Glass's age, gender and education, is the economic multiplier of 17,368.
- [112] Therefore, the present value of the future earnings capacity loss using the earnings approach would be \$433,296 ($\$24,948 \times 17,368 / 1,000$).
- [113] The defendants submit that loss under this head has not been established. It is argued that there is no future loss as the plaintiff has continued to work full-time since the Accident in the line of work she prefers. Further, she only worked part-time hours before the Accident and has not established a capacity or capability to work more than that pre-Accident.
- [114] The defence submits that though Ms. Ditson's report states that the test findings indicate that the plaintiff is likely not competitively employable on a part-time or full-time basis as a server, this opinion does not hold up as the plaintiff has occupied several different serving positions in two different cities without any significant gaps in working since the Accident which occurred over three years ago; including her current job at a busy restaurant during their lunch rush five days a week for five-seven hours each shift for a total of 30-35 hours each week.
- [115] Alternatively, the defence submits that a capital asset approach should be applied by using one to two years of her current earnings. This would be about \$20,000/year. At two years this would amount to \$40,000.
- [116] The earnings approach requires the weighing of possibilities and an assessment of the probabilities of hypothetical events. The proposed loss submitted by the plaintiff does not adjust for the contingency of whether a managerial position would be available; and whether she would have succeed in obtaining such a position. She does not have training or experience in that role; however, I find that her longer-term prospects for a managerial position is real and possible. The plaintiff's analysis also does not account for any improvement in her condition and real possibilities for other more remunerative positions.

Taking these into account, my assessment on either an earnings approach or a capital loss approach of a fair and reasonable amount is \$75,000.

F. Cost of Future Care

[117] The plaintiff seeks damages of \$68,026.10 under this head. The costs for the various items were covered by Ms. Ditson and the lump sum present value was determined in the report of Mr. Benning. The plaintiff's present value calculations were based on the information below.

Item

Costs

Frequency

(a)

Pain Management

Oral appliance

\$1,000

Every 7 years

(b)

Mobility/Transportation

Driving Assessment

\$1,060

Year 1

(c)

Household Management

Indoor Housekeeping

\$1,651

Years 1-3

(d)

Housekeeping during Pregnancy

\$1,651

Years 4-6

(e)

Rehabilitation/Health

TENS machine

\$195

Every 7 years

(f)

TENS replacement electrodes

\$36

Annual

(g)

Low Level Light Therapy Machine

\$2,649

Year 1

(h)

TMD Specialist follow-up

\$2,213

Year 1

(i)

Kinesiology

\$1,323

Year 1

(j)

Gym Pass - Adult

\$531

Annual to Age 65

(k)

Gym Pass - Senior

\$415

Annual from Age 65

(l)

Adjunctive Treatment

\$529

Year 1

(m)

Adjunctive Treatment - for Pregnancy

\$529

Years 4-6

(n)

Occupational Therapy

\$375

Year 1

(o)

Psychological Assessment

\$1,170

Year 1

(p)

Medication

Tylenol

\$36

Annual

TOTAL AMOUNT

\$15,363

The plaintiff in closing submissions replaced the Tylenol amount with Naproxyn. The revised amount sought is \$4,877.10.

[118] An award under this head is governed by the principles set out in *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.); aff'd (1987), 49 B.C.L.R. (2d) 99 (C.A.), namely that: (a) there must be a medical justification for the claim; and (b) the claim must be reasonable.

- [119] While a physician need not testify to the medical necessity of every item of care that is claimed, there must be some evidentiary link drawn between the physician's assessment of the plaintiff's condition on the one hand, and the recommended treatment and the care recommended by a qualified health care professional on the other.
- [120] The assessment also is to consider the likely need and utility of a particular item and reflect contingencies to the extent they are determined to apply.
- [121] The defendants submit all future care recommendations are unnecessary except the recommendation made by Dr. Wong and Dr. Paramonoff for an independent exercise program at home and the refresher course with an occupational therapist to more effectively conduct the home exercise program.
- [122] More specifically, the defendants submit that:
- (a) Ms. Ditson's recommendation for a gym pass priced out until the age of 64 is not consistent with the potential needs of the plaintiff. A one to two year gym pass is a more reasonable time frame given the improvements that are to be expected in accordance with the evidence given by Dr. Paramonoff. The defendants further submit that a home exercise program better fits the sedentary lifestyle of the plaintiff and she has been keeping up with a similar program already. Without access to a vehicle, the defendants take the position that a home program would be more beneficial than a gym pass.
 - (b) Any recommendations made with respect to a potential pregnancy in the next one to two years for the plaintiff are purely speculative and unrealistic given the plaintiff's evidence that she is currently on birth control and has offered no evidence to support a conclusion that she intends to have a child at her current stage of life.
 - (c) With respect to Dr. Epstein's recommendations regarding the plaintiffs TMD, the defendants submit that causation for these injuries is in dispute.
 - (d) With respect to a driving assessment as recommended by Ditson, the defendants say that the plaintiff was already having issues driving before the Accident and was unable to pass her road test. The defendants further argue that it is speculative that the plaintiff would be able to eventually pass her road test post-Accident.
 - (e) While Dr. Paramonoff recommended assistance with heavier seasonal cleaning, and Ms. Ditson prices out these recommendations in her report, in her evidence at trial, Dr. Paramonoff stated that she was not told by the plaintiff that assistance for heavier seasonal cleaning was required. This was just a non-specific recommendation based on what most people like to do. Therefore, the defendants submit that this recommendation is purely speculative and not necessary.

- [123] Given my findings regarding Ms. Glass's condition and my view that with appropriate investment in care over the near term and reasonable adherence to the recommended rehabilitation programs, the plaintiff's condition should improve materially and the future care requirements will reduce substantially over time.
- [124] In this regard, it is my view that a reasonable period to assess annual care items (except where a lesser period is recommended) is four years.
- [125] However, longer term provision should be made with respect to a supply of Tylenol #1, Naproxyn, and oral appliances. I have averaged the costs of Tylenol and Naproxyn and present valued the three items for the full term sought but have reduced the frequency over time for the drugs.
- [126] In my view, the justification for the following items have not been made out: a driving assessment; housekeeping during pregnancy; a gym pass as a senior; adjunctive treatment for pregnancy; and psychological assessment.
- [127] Overall, under this head I assess (as opposed to calculate) the amount of \$21,000 to be reasonable.

G. Loss of Housekeeping Capacity

- [128] The plaintiff seeks \$35,000 under this head. Claims of this type are for loss of personal capacity and an award may be made for either past or future losses, or both. They are distinct from cost of future care. The plaintiff need not prove she will hire someone to perform household tasks in order to be compensated for the loss of capacity: *MacTavish v. McGillivray*, 2000 BCCA 164; *Campbell v. Banman*, 2009 BCCA 484; and *Kim v. Lin*, 2016 BCSC 2405.
- [129] It is submitted that while the plaintiff is not completely incapacitated from doing her household chores, she is unable to do the majority of her household chores. She relies heavily on her mother to help her with laundry and keeping her apartment clean. Though she has a laundry machine on the floor of her apartment, she says her symptoms prevent her from carrying heavy loads of laundry to and from her apartment to the machine. Folding clothing after they are washed is said to be a problem for her and her mother has to fold her clothes. The plaintiff also submits that cleaning out water from her fish tanks and emptying and filling them by carrying buckets to and from her bathroom poses difficulties for her.
- [130] The defence submits that the plaintiff has not discharged her burden of proving damages under this head and as a result has no entitlement under this head.
- [131] Following the Accident, it is apparent that Ms. Glass shared the housekeeping chores with Mr. Ham during the time they cohabited.

- [132] I was not persuaded by Ms. Glass' evidence that she is unable to take her laundry to the machine on her floor, or carry garbage and kitty litter out of her apartment. I appreciate that her mother provides assistance for housekeeping; however, in my view it is largely more out of motherly instincts to assist than a loss of capacity. Also, the activities which Ms. Glass performs at her workplace as well as her decision to acquire, post-Accident, her numerous plants, fish and fish tanks, and cats, diminishes this claim.
- [133] Ultimately, I find that Ms. Glass lives independently and is able to do housekeeping, but at present does experience some limitations.
- [134] In my view, some loss of capacity has been established. However, I find her condition is not as extensive as asserted and will not be a long-term problem. As a result, I award \$2,000 under this head of damages.

H. In-Trust Claim

- [135] The plaintiff seeks damages of \$4,321 under this head. She argues that this is for her mother who has provided her considerable assistance in cleaning and tidying her apartment, doing her laundry, folding her clothing, and driving her to appointments.
- [136] Ms. Harpe testified that she spends a total of six hours per week doing chores for her daughter which is above and beyond what a normal mother would do for her daughter. This has been the pattern she testified for the past year. By multiplying the minimum wage of \$13.85 per hour, six hours per week, and 52 weeks, the plaintiff arrives at \$4,321.
- [137] The defence opposes an "in-trust" award on that basis that the assistance provided by Ms. Harpe are not over and above the type of services undertaken by friends and relatives out of love, friendship, or family duty. It is submitted that the Ms. Harpe is motivated to assist her daughter in driving her in large measure because the plaintiff lives on her own in one of the roughest parts of Chilliwack; that the laundry assistance is motivated because the machine at the plaintiff's apartment requires money; and that the plaintiff's laundry has been stolen when she uses the laundry machine in her apartment.
- [138] The factors to be considered when assessing an in-trust claim are described in *Bystedt v. Hay*, 2001 BCSC 1735 at para. 180, aff'd 2004 BCCA 124:
- (a) the services provided must replace services necessary for the care of the plaintiff as a result of a plaintiff's injuries;
 - (b) if the services are rendered by a family member, they must be over and above what would be expected from the family relationship;
 - (c) the maximum value of such services is the cost of obtaining the services outside the family;
 - (d) where the opportunity cost to the care-giving family member is lower than the cost of obtaining the services independently, the court will award the lower amount;

- (e) quantification should reflect the true and reasonable value of the services performed taking into account the time, quality and nature of those services; and
- (f) the family members providing the services need not forego other income and there need not be payment for the services rendered.

[139] My assessment of the evidence is that Ms. Harpe is a diligent and caring mother who is willing to help her daughter as much as possible. Her willingness to provide help transcends just helping out beyond what is necessary in the context of the plaintiff's injuries. Given, my view that while Ms. Glass has suffered injuries, she is not as incapable as asserted. I find Ms. Harpe's testimony regarding Ms. Glass's condition to be overly pessimistic.

[140] In my view, Ms. Harpe has provided some services, but the extent to which this assistance is over and above what is expected from her family relationship, or necessary in relation to the level of injury sustained by the plaintiff, I find that an award of \$1,000 is reasonable.

XI. Failure to Mitigate

[141] The defence submits that the plaintiff has failed to mitigate her damages and thus some deduction should be applied to any award. In this regard, the defence submits that if the plaintiff was undergoing jaw pain right after the Accident, she did not seek out specific treatment, and as a result it became worse over time. The defence argues that a factor of 10-20% should be applied to further reduce non-pecuniary damages.

[142] The plaintiff submits that the defence has not established that reasonable steps could have been taken to mitigate loss. It is argued that there is no evidence to show the plaintiff did not follow treatment recommendations, or any evidence how much better she would be if such steps were taken.

[143] In my view, the plaintiff sought out medical and dental advice and treatment for her condition. The TMD was a developing problem for her. She did not fail to ignore the advice she was given. In the circumstances, the defence has not made out its failure to mitigate defence.

XII. Conclusion

Based on the forgoing, I find that the plaintiff's jaw condition is TMD. I also find that this TMD was caused by the Accident, along with the plaintiff's chronic condition in relation to her neck, upper and mid-back, and her continued headaches. However, I also find these injuries to be more mild than moderate.

[144] Given my findings that the plaintiff's conditions are not as debilitating as asserted, I also find that with ongoing comprehensive physical and medical therapy the prognosis for improvement is greater than argued.

[145] In taking a look overall at the damages assessed, I conclude that an award that is fair and reasonable to all parties is as follows:

(a)

Non-pecuniary:

\$65,000

(b)

Special damages:

\$1,100

(c)

Past loss of earning capacity:

\$11,367

(d)

Future loss of earning capacity:

\$75,000

(e)

Cost of Future Care:

\$21,000

(f)

Loss of Housekeeping capacity:

\$2,000

(g)

In-Trust:

\$1,000

TOTAL:

\$176,467

[146] If there are submissions to be made regarding tax, other calculation matters or costs, an appearance should be arranged through trial scheduling.

"The Honourable Mr. Justice Masuhara"

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