

CANADA / JUDGMENT

Halvorson v. West

2021 BCSC 1322

COURT

Supreme Court of British Columbia

DECIDED

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2021 BCSC 1322 Halvorson v. West

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Halvorson v. West,

2021 BCSC 1322

Date: 20210708

Docket: M33884

Registry: Chilliwack

Between:

Debbie Ruth Halvorson

Plaintiff

And

Vincent John West and Louise Fay Podann

Defendants

Before: The Honourable Mr. Justice Blok

Reasons for Judgment

Counsel for the Plaintiff:

J.L. Zacharias

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Counsel for the Defendants:

R. Doran

C. Ho

Place and Dates of Trial:

New Westminster, B.C.

September 28-30 and

October 1 ,2, 5-9, 2020

Place and Date of Judgment:

Chilliwack, B.C.

July 8, 2021

I. Introduction

- [1] On October 11, 2016, Debbie Halvorson was injured when she was struck by the defendant West's pickup truck as she was at work as a landscaper, clearing a parking lot of leaves.
- [2] Both liability and damages are at issue. The defendants say the plaintiff is fully liable for the accident because she was a pedestrian on a "highway" and was therefore obliged to keep a careful lookout and yield the right of way to a motorist. The plaintiff says that she was in a parking lot where pedestrians should be expected, she was wearing a brightly-coloured safety vest, she was located to the side of the roadway, and the defendant driver struck her even though he had seen her and knew she was there.
- [3] On damages, the primary issue is the degree and duration of the plaintiff's injuries, and the extent to which her psychological issues were pre-existing or were caused or exacerbated by the accident.
- [4] The plaintiff indicated that she prefers to be addressed as "Mrs.", and so I refer to her as such.

II. Liability

A. Debbie Halvorson

- [5] Mrs. Halvorson, who was 60 years old at the time of the accident, said that on October 11, 2016, she and her husband were doing landscaping work at a McDonald's restaurant on Yale Road in Chilliwack. They had a contract for regular maintenance at that location and had attended there once a week for the prior five years. They typically worked for two and a half hours on these attendances.

- [6] The parking lot of this restaurant is large and open. There are two access ways or driveways, one on the north side of the lot and one on the south side. Each of those driveways leads to streets running generally east-west. The southerly driveway is the location where the collision occurred. There is a curb on the west side of the south driveway (the curb runs north-south), which delineates one side of the driveway, and there is a grassy area to the west of that curb. There was no evidence about any measurement of the length of that curb, but from the Google images put in evidence it appears to be perhaps four to five car lengths long.
- [7] Mrs. Halvorson said the collision occurred at around 11:30 a.m. She was wearing a bright yellow safety vest which had prominent reflective stripes on it, as well as dark pants, a hat and steel-toed shoes.
- [8] Their job was to clear the parking lot of leaves. They carried this out by blowing the leaves generally east to west, and then onto the grassy area at the southwest portion of the lot.
- [9] Mrs. Halvorson said they never used cones when clearing leaves in the lot. She said there was no need to do so as the area is very wide open. They only used cones in the drive-through lane of the restaurant.
- [10] In the moments prior to the collision, she was operating a loud, gas-powered leaf blower, facing south and moving in a southerly direction along the curb of the south driveway. She said she said she was one to two feet away (that is, east) from the curb, blowing the leaves gathered against the curb onto the grassy area. She estimated she was 14 feet from the north end of the curb at the point of the collision.
- [11] As she proceeded, she was hit from behind "extremely hard". She said, "I flew through the air, landing on my elbows and knees, with the blower under my chest". She landed next to the curb, with her right arm partly on the curb and grass. Her eyeglasses flew off and were broken.
- [12] Initially, she was disoriented and did not know what had hit her, but she came to realize she had been hit by a vehicle. She saw a green truck leaving via the south driveway. She took steps to memorize the license number as she thought the vehicle was leaving the scene.
- [13] The truck did stop, however, and the driver walked back to her and spoke to her husband, who had arrived from nearby. She heard the driver say "she backed into me", although by the end of the discussion the driver said "I really didn't see her".
- [14] Mrs. Halvorson said she did not see the defendant's vehicle prior to impact.
- [15] In cross-examination, the plaintiff said:
- a) she agreed that in some circumstances the use of cones might offer them better protection when working on a road, but not in this case given the location;

- b) the McDonald's owner/operator did not allow them to use cones to block the driveways. She said that she saw no point in using cones there anyway given the open nature of the area;
- c) she was "mostly facing south"; when asked if she was facing south and west, she said "at an angle";
- d) the leaves that she was blowing were not located away from the curb as they had been blown right to the curb already. She was blowing them onto the grass;
- e) she agreed that the noise of the leaf blower affected her ability to hear traffic;
- f) she fell in the same direction as she was facing; and
- g) she denied that she stepped into the pathway of the defendant's vehicle.

B. Cal Halvorson

- [16] Mr. Halvorson is the plaintiff's husband. He was 67 years old at the time of the collision and was 71 at trial.
- [17] Mr. Halvorson confirmed that he and his wife attended at this location on a weekly basis, perhaps more, and had done so for some years.
- [18] That day, they had a pickup truck (with a canopy) and a trailer. Both were parked on the grassy area, with the truck and trailer facing east. He estimated that the front of the truck was 10 to 15 feet away from the north-south curb of the south driveway.
- [19] At the time of the collision, Mr. Halvorson was at the tailgate of his truck, working on a piece of equipment. He said he "heard something" and then he peered to the right of his truck and saw his wife lying on the road. At his location at the tailgate of his truck he was about 22 feet away from his fallen wife.
- [20] Mr. Halvorson said that both he and Mrs. Halvorson were wearing reflective safety vests. He said they only used cones at the drive-through lane next to the restaurant, or, on occasion, when they were pruning trees. He had never had any safety concerns about working at that location.
- [21] Mr. Halvorson said the weather was sunny and clear. They arrived at the McDonald's parking lot around 9 a.m. Vehicle traffic at the restaurant was light.
- [22] After he saw Mrs. Halvorson on the ground, he ran straight to her. She was lying on the roadway, with her right arm on the curb and partly on the grassy area. Her head was to the south of her feet. He said her body was about 14 feet from the north end of the curb. He attended at the scene about a week later and measured that distance.
- [23] When he arrived to assist the plaintiff, she tried to convey letters, evidently meaning a license plate number. He then noted a dark green Chevrolet Sonoma pickup truck about 10 feet south of the plaintiff's head, facing south.

- [24] In cross-examination, Mr. Halvorson was asked whether he picked up some cones before he left with the plaintiff for the hospital. Mr. Halvorson said he did not; what he picked up was the two leaf blowers. He added that he "left the one cone in place", picking it up later, but from the context it appears that he was referring to a cone that they used in the drive-through area.
- [25] When asked if they could have put out cones without blocking the driveway he said "there is room for two cars to pass [in the driveways]. I guess you could, but I don't know if it would do anything".

C. Vincent West

- [26] Mr. West, the defendant driver, is a now 77 year old retired commercial truck driver.
- [27] Mr. West is blind in his right eye, and he was blind in that eye at the time of the subject collision.
- [28] Mr. West also has problems with his left eye, although he said he had 20/20 vision in that eye at time of the collision. He said he had a history of glaucoma in both eyes, at the time of the accident he was taking what I understood to be glaucoma-related medication, and he was under the general care of an eye specialist. He said, however, that his specialist in 2016 had not expressed to him any concern about his ability to drive.
- [29] Mr. West said he was driving his 1995 Chevrolet Sonoma pickup truck on the day in question. He had parked in a parking spot in the McDonald's restaurant parking lot as he was having some difficulty locating a window store located on nearby Railway Avenue (which is the east-west street to the south of the parking lot), and he had parked his truck so he could set out on foot to locate that store.
- [30] Mr. West said that it was late morning, it was "pretty overcast" but visibility was "perfect".
- [31] Mr. West said he accessed the McDonald's parking lot from the north entrance and proceeded to the south side of the lot that is close to Railway Avenue. After parking his truck, he walked over to Railway Avenue and located the premises he was looking for, but discovered that the store was closed permanently. He then walked back to his truck and proceeded to leave, intending to go home. His intent was to use the south exit in order to access Railway Avenue. The front of his truck was facing north, and so he pulled forward and then turned left and came to a "T" junction in the lot. He came to a complete stop at that point. He said there were no traffic control devices around, although there were some "pylons" near the north side of the parking lot. There were no pylons directly in front of him. He then observed a lady on the road. He said, "I noticed her before I stopped. She was right in front of me". When asked how far away she was, he said "not very far, 10 to 12 feet, I don't know". He added that "she seemed to be dithering around". He said he made eye contact with her, then he signalled and started his turn to the left.

- [32] When asked if he noticed her clothing, he said "no, not really". He did not recall if she was carrying anything.
- [33] Mr. West testified that once he started his turn the woman was out of his view. He said "the next thing I know she is up at the side of my vehicle, by the passenger window". He said he felt a slight bump. He stopped his truck about a vehicle length away.
- [34] Mr. West said that the "bump" occurred after he had already completed his turn. He added that he heard a slight "thump" at the passenger window at a point when he was looking "dead ahead". He estimated his speed at 5 to 6 mph at most.
- [35] Mr. West testified that he did not know what caused the bump, but since it was "something unusual" he stopped his truck.
- [36] Mr. West got out of his truck and looked back. He saw a lady half on the road and half over the curb, lying on her stomach. There was a leaf blower on her left side, lying in the grass. Her head was facing west, with her feet to the east. Mr. West went up to her and noticed that her clothing was pushed up a little, and he saw a broken skin mark on her lower back. At that point no other person was present, but another man soon came up and helped the woman to her feet. Both men then helped walk her to the other man's pickup truck. Mr. West was not sure where the other man's truck had been, that is, whether the other man had driven there or whether he was parked just to the north. The other vehicle proceeded to the hospital with the injured woman and Mr. West followed them to the hospital in his own vehicle. Before the other man departed, he (the other man) picked up a row of cones at the corner and threw them in the truck.
- [37] Mr. West said he attended at the parking lot a few days prior to trial. He said he parked in the same stall and then took some measurements. He started a measurement at the north end of the curb, and measured 25 feet, which was the limit of his tape measure. He said, however, that the plaintiff was located further south than that. He said that within that 25-foot distance, there had been some pylons, but the woman was well outside them at the time of the collision.
- [38] In cross-examination, Mr. West said:
- a) he has a history of glaucoma in both eyes. He has had surgery in both eyes, with tubes being inserted in both. These eye surgeries started in 2008, with the goal of keeping the pressure in his eyes at a normal level;
 - b) he acknowledged an observation made by his eye specialist in 2017 that he had had "long-standing hazy vision" in his left eye. He said that was true. He said it was "just a very slight haze" and did not affect his daylight vision;
 - c) he also had cataracts in both eyes, but these were removed well before the time of the collision;

- d) visibility was good that day;
- e) if there were people walking to or from the restaurant he did not see them as the restaurant was a long way away;
- f) the last time he saw the woman involved in the accident she was walking away from him towards the grass;
- g) when it was put to him that he never mentioned making eye contact with the woman either in his statement to the insurer or on his discovery, he said "I don't recall";
- h) he adopted as true his answer on discovery that two and a half to three seconds elapsed between last seeing the woman and the actual impact, although he said he was now uncertain of that time;
- i) the woman was "dead ahead" of him when he first saw her;
- j) he was looking in the direction that was going, so he was looking left as he did his turn;
- k) his turn was complete when the impact occurred and therefore he was driving straight to the exit when the impact occurred;
- l) he has no explanation why he did not see her;
- m) referencing his comment that he "made eye contact" with the plaintiff, it was put to him that he said on discovery "she certainly wasn't facing me" and "I am quite sure she was back towards me". He said "I don't think I said that because it was not what happened"; and
- n) he acknowledged as true an answer he gave on discovery that he stopped his truck "a good 10 yards from the exit point, I don't know".

III. Positions of the Parties - Liability

A. Plaintiff

- [39] The plaintiff says that liability should be found against the defendant driver. She says the defendant was a poor witness. He was forgetful, had a poor memory, and gave a substantially different account of the accident at trial than he did on discovery.
- [40] The plaintiff notes the Motor Vehicle Act, R.S.B.C. 1996, c. 318 [Act], includes parking lots in its definition of "highway" and therefore the usual rules of the road apply. Here, the defendant was bound to use due care and attention while driving (s. 144(1) of the Act) and, despite the pedestrian rules set out in ss. 178, 179 and 180, a driver must exercise due care to avoid colliding with a pedestrian who is on the highway (s. 181).
- [41] The plaintiff notes there is a heightened duty on a driver to exercise due care to avoid colliding with pedestrians where the "highway" is a parking lot, since one can expect pedestrians to be using that space: *Russell v. Parks*, 2014 BCCA 104 [Russell].

- [42] The plaintiff argues that she was "there to be seen" and was wearing a bright reflective vest, operating a loud leaf blower, and she emphasizes that the defendant did in fact see her. She submits the only plausible explanation for the collision is that the defendant was simply not paying attention.
- [43] The plaintiff also argues that the defence submission concerning the usage of cones is irrelevant here. The reason why cones would be used would be to alert drivers to the worker's presence, but here, the defendant admits he saw the plaintiff and so he already knew she was there.

B. Defendants

- [44] The defendants say the plaintiff is wholly at fault for the accident. Alternatively, if there is to be negligence on the part of both parties, the plaintiff should be found 75 percent responsible.
- [45] The defendants emphasize that he had the right of way. They say the plaintiff's evidence that she did not see Mr. West's vehicle prior to the collision shows she was not keeping a constant lookout while working, as she asserted. He acted prudently by stopping at a T-junction, signalling, looking both ways and seeing the plaintiff. He then took his eyes off her as he turned. He argues the plaintiff stepped back into the passenger side of his vehicle as it passed.
- [46] If liability is to be apportioned, then the plaintiff should bear the greater fault because she failed to keep a proper lookout, was obliged to yield the right of way to the defendant and failed to follow proper work rules including the use of traffic cones to maintain a safe work zone.

C. Discussion - Liability

- [47] I agree with the plaintiff that there were some concerning aspects with the defendant's testimony, the most striking of which was his differing versions of events between his examination for discovery and trial. On discovery, he said that when he was stopped at the T-junction, the plaintiff had her back to him and he did not see her face. At trial, he said she was facing him and made eye contact with him.
- [48] I also found it hard to accept the accident occurred as the defendant said it did. He said that when he was stopped, the plaintiff was "dead ahead" of his vehicle. He then carried out a 90-degree turn to proceed out the south driveway, and the collision occurred when he had fully completed that turn. It is very difficult to see how basic geometry would allow such a scenario to play out without the plaintiff covering quite a distance in just a few seconds. There is no evidence establishing she did anything of the sort.

- [49] It is concerning as well that the defendant did not recall some significant features about the plaintiff, the most important of which were that she was wearing a brightly-coloured safety vest and she was operating a leaf blower.
- [50] For these reasons, I find that I cannot rely on the defendant's evidence. I find the plaintiff's evidence, which was corroborated in some important respects by Mr. Halvorson, to be much more reliable. Although Mr. Halvorson is not a disinterested witness in this case, nonetheless I found him to be an honest, credible and reliable witness.
- [51] Mr. Halvorson found the plaintiff lying in a location that he later measured to be about 14 feet from the northern end of the curb, and close enough to the curb that her right arm was partly on the curb and partly on the grass. By way of brief explanation, the northern end of that curb, which borders on the grassy area, marks the essential start of the southerly exit roadway.
- [52] From these facts, and from the evidence generally, I conclude that the plaintiff was blowing leaves with her leaf blower at a location that was near the beginning of the curbed roadway (meaning the south exit), and probably no more than about two or three feet away from the curb. In other words, although the plaintiff was on the roadway, she was off to the side of it. She was wearing a brightly-coloured safety vest. Most importantly, the defendant saw the plaintiff.
- [53] Although I accept that a pedestrian who is crossing a "highway" has a duty to yield the right of way to a vehicle (s. 180 of the Act), I also accept that a driver of a vehicle must exercise due care to avoid colliding with a pedestrian on the highway (s. 180), and that the latter duty is heightened where the "highway" is a parking lot. As the Court of Appeal said in Russell:
- [16] Where, as in this case, there are no crosswalks, ss. 180 and 181 are more appropriate. Section 180 imposes a duty on the pedestrian to yield the right of way to a vehicle when crossing a highway at a point not in a crosswalk. Under the Motor Vehicle Act, a parking lot falls within the definition of "highway". Mr. Russell was crossing through a parking lot and it is clear that he was not using a crosswalk, therefore s. 180 applies. Section 181 imposes a corresponding duty on a driver "to exercise due care to avoid colliding with a pedestrian on a highway." The standard of "due care" will obviously be higher in a parking lot than, for example, on a freeway, because one can expect pedestrians to be using that space. This approach is consistent with *Bohati v. Jewell* (1996) 84 B.C.A.C. 161, another "parking lot" case, where this court relied on what are now ss. 180 and 181 to apportion liability. Sections 180 and 181, rather than s. 179(2), have also been relied upon in lower court decisions involving parking lots: see *Gray v. Ellis*, 2006 BCSC 1808, and *Davidson v. Donnelly*, [1996] B.C.J. No. 800 (S.C.).

- [54] In the case at bar, the plaintiff was struck in an open and unobstructed parking lot, which at the time was not very busy and where visibility was good. She was wearing a brightly-coloured safety vest and, critically, the defendant did in fact see her. However, even though he saw the plaintiff, he still directed his vehicle in such a way that he struck her. Put another way, although he saw the hazard, he failed to take adequate steps to avoid it.
- [55] I reject the suggestion that the plaintiff stepped backward or otherwise maneuvered herself into the path of the defendant's vehicle, as there is no evidence to support it.
- [56] A similar situation arose in *Comeau v. Siemens*, 1996 CanLII 8514 (B.C.S.C.) [Comeau], where three women walked across a parking lot and one of them stopped to pick up a glove she had dropped. The plaintiff's companions testified that the defendant entered the lot at a brisk pace and struck the plaintiff. The defendant said he saw the three women and so he came to a complete stop and waited for them to pass. He said he then proceeded but realized only two women had passed him, and that was when he struck the stooping plaintiff. The court said:
- [18] Even if I were to accept his evidence the accident is entirely his fault. As he describes the events the plaintiff was clearly visible in an empty parking lot ahead and to his left (ie on the driver's side of the vehicle). It is inconceivable that a driver taking even the most basic of care and maintaining a rudimentary lookout would have hit Ms. Comeau. This is not a case of contributory negligence and I find the defendants wholly at fault.
- [57] The situation here is, if anything, more strongly in favour of the plaintiff than it was in *Comeau*. In *Comeau*, the crouching or stooped plaintiff was arguably less visible to the defendant driver than was the plaintiff in this case. Here, the plaintiff was always fully upright and visible, but the defendant driver still struck her.
- [58] Given the circumstances here, I conclude that the defendant is wholly at fault for the accident.

IV. Damages - Plaintiff's Witnesses

A. The Plaintiff

Background

- [59] Mrs. Halvorson was 60 years old at the time of the accident and was 64 at trial. She is married and has two children and two stepchildren, all of whom are in their 30s or 40s. She is originally from Alberta and moved to British Columbia in 2006.
- [60] Mrs. Halvorson worked as a dental assistant for over 30 years. For about 10 years she combined that with part-time work organizing local events for a fast food chain. In 2006, she and her husband began working with her brother in his landscaping business, and in 2007 they began their own landscaping business, which I will discuss in more detail later.

Pre-Accident Health

- [61] Mrs. Halvorson said the physical nature of the landscaping work brought her to very good physical condition. She said she was muscular and strong, "110 percent physically" and in the best shape she had ever been in.
- [62] She had no prior problems with her neck, shoulders, back or hips. She had a problem with her knees at one point because she had been doing a lot of crouching and kneeling, but this cleared up "just about immediately".
- [63] Mrs. Halvorson acknowledged she had issues with anxiety and depression in the past, issues that she attributed to a difficult first marriage, but these issues resolved. They reappeared in 2016 when her mother became ill (she passed away in August 2016) as she was very close to her mother. Her doctor prescribed medication to deal with her depression at that time.
- [64] She also acknowledged that she had anxiety, beginning in childhood, associated with being left alone at home. This was an ongoing issue right up to the time of the subject accident. She was given some relaxation strategies by her family doctor, together with a prescription for Zoloft. Her husband was supportive, having a dog helped, and she said her house was a very safe house to live in. That anxiety did not have any impact on her pre-accident functioning.
- [65] Mrs. Halvorson also acknowledged she drank to excess following the loss of a close friend, which I took to have taken place in or around 2014. She raised this with her doctors, and they counselled her and gave her other guidance. She stopped drinking to excess after her mother died. She emphasized that her drinking did not affect her ability to function, or to work.

Pre-Accident Social and Recreational Life

- [66] Prior to the accident, Mrs. Halvorson enjoyed golf, jogging, dancing, crafting and socializing. She said she golfed three or four times a month "in better months" and, starting around 2007, she and her husband held an annual golf tournament for their landscaping clients. She would jog for perhaps 30 minutes while walking the dog. She danced at special events such as weddings and anniversaries, and at the Legion on weekends. She also enjoyed the relaxing pastime of crafting, which in her case involved making centrepieces, decorations and ornaments. Her social life consisted of friends or family get-togethers perhaps four times each month.
- [67] Mrs. Halvorson was also very involved with the local Legion, where she helped with Legion events and special dinners.

Pre-Accident Employment

- [68] As noted earlier, Mrs. Halvorson and her husband ran their own landscaping business, Green and Gold Landscape Maintenance. They had both commercial and residential clients. The work was seasonal, with the March-June and September-October time periods being the busiest. They also did some snow removal in winter. The equipment they used included trailers, trimmers, blowers, mowers, an aerator, and so on. They had plenty of work. At one point they had several employees because their company had a contract with a large strata development, but that ended in or around 2012. After that, it was just the two of them.
- [69] At the time of the accident she was working about 26 to 30 hours per week. Her husband did the books, together with their accountant. She and her husband split the profits equally.
- [70] Mrs. Halvorson said she loved the work as it was outdoor work and involved a lot of freedom, and she liked the clients. She said she also enjoyed "strenuous work and challenges".
- [71] Mrs. Halvorson said the two of them planned to work to 65, depending on how they felt, and then cut back to just a small number of clients. They had it in mind that they would then reside in Mexico for four months of the year and they would also have more time to play golf and enjoy their grandchildren.

The Accident

- [72] Mrs. Halvorson said the impact from the defendant's truck sent her flying. She landed on her elbows and knees, with the leaf blower under her chest. She said it was an "extremely hard" impact. The actual impact was to her back and buttocks. She thought she might have hit her head. Her glasses were broken. She was disoriented after the collision, but attempted to see and remember the licence plate of the vehicle that she thought was about to leave. She thought she might have lost consciousness but given her disoriented state "it was hard to tell".
- [73] At the scene, she felt pain in her elbows, knees, lower back and chest. She said she was "totally in shock, shaken to death and in pain".
- [74] Both her husband and the defendant helped her into her husband's truck and she was taken to the hospital, where she was examined and x-rayed. On discharge she was given Naproxen and Tylenol 3s.
- [75] The next day she was "so sore" and "seized up". She still had a lot of shock, and had tears and crying because she was scared she would not walk again.

Injuries

- [76] She saw her family doctor six days after the accident. She reported to him problems with her knees, neck, shoulders, arms, chest (sharp pains), buttocks and back. All these were the source of "major pain". She continued to attend on her doctor after that first visit. At two points her doctor sent her to neurologists; the first time, for major spasms in her neck, and the second time, for pain in her left arm radiating to her face and left leg weakness. In each case, the neurologists found nothing from a neurological point of view.
- [77] When asked to list her injuries, Mrs. Halvorson said they were:
- a) Headaches: these started right after the accident and continued without interruption for quite a while. They improved a lot, and then "levelled out" after 18 months. She still gets headaches three or four times each months, often brought on by exercise or things she does around the house. When they arise, she deals with them by taking Tylenol (3s, or regular Tylenol), applying heat or having Epsom baths.
 - b) Neck pain: this arose right after the accident. It was near-constant at first, then it improved and became less intense. She still gets neck pain "just about every day". It flares up with certain exercises, yard work and household work. Flare-ups last "a good five hours". She addresses these through stretching, massages, Epsom baths, IMS treatment and medication.
 - c) Shoulders: this is both shoulders. The right one was worse at first, but now they "take turns". Shoulder pain started within days of the accident. It is a sharp or stabbing pain, a burning pain and a throbbing pain. This pain got a lot better after a couple of years but can be intense still. Shoulder pain is aggravated by most housework, including washing floors and vacuuming. Treatments include IMS, massage, heat, stretches and medication.
 - d) Arms: this involves both arms, from her shoulder to her elbows. Again, they "take turns", although sometimes both arms hurt. Neck and arm pain are related. She gets this pain "just about every day". Sometimes she is unable to even lift a coffee pot in the morning, or lift herself out of a chair. When the pain is bad she gets "tingly" fingertips. Flare-ups are caused by housework or exercises. Treatment is the same as for other areas.
 - e) Low back pain: this was a jabbing pain that started right after the accident. It was a severe pain that went down to her right buttock. It improved and became stable after two years. It is "not too bad" at present, but she will still get a spasm or a bad ache "out of nowhere" on occasion. Exercise aggravates it, but most importantly, she has to limit her sitting to 30 minutes. It is alleviated by most of the same treatments.
 - f) Hips: this involves both hips and it started about five days after the accident. She said "it's like they are seized up, they are achy and super-tight". She said she has had this issue five days a week over the last six months. This issue is best managed by being active and not sitting too much, although she uses the other treatments as well.

- g) Knees: this is throbbing and burning in her kneecaps, the right worse than the left. At the outset, she had knee pain every day. Her knees have given out on her three times, causing her to fall. This issue has improved 70 percent since the accident. Currently, she will feel knee pain if she does certain exercises or walks for too long.
- h) Chest pain: this pain started right away. She attributed this to falling on the leaf blower after the collision. At the outset it was an achy, sharp pain. It is mostly better now, although she still gets "spasms in her clavicles".
- i) Sleep: she acknowledged she had sleep problems prior to the accident. These were relieved by medication. Her post-accident sleep problems were caused by pain, as they either keep her up or wake her up several times during the night. In the months after the accident she averaged perhaps three hours of sleep a night. Her sleep has improved, and currently she still wakes up twice a night due to arm pain, and she does not get a restful sleep.
- j) Walking and balance: she could not walk without assistance for two weeks. On her doctor's recommendation she acquired a walker, which she used from October 2016 to January 2017. She did not walk her dog for four months, and when she resumed, those walks were only for short distances. She now uses a cane when she goes out, although she does not use it in the house or for short walks. She said her balance was bad because she had no strength in her legs. She can now walk for 60 to 90 minutes. Without a cane, she can only walk for about two blocks.
- k) Sitting: as noted earlier, her sitting tolerance is about 30 minutes. If she sits too long her hips and lower back seize up and she finds it hard to move. This has improved a little bit over time.
- l) Lifting: prior to the accident, she could lift 60 pounds. After the accident, she essentially could not lift anything. Her neck, arms and shoulders were and are the limiting areas. Now, following an exercise program, she is able to lift a lot more, probably up to 20 pounds, but any more than that and she will "pay for it".

Mrs. Halvorson acknowledged some video of her that was taken when she was shopping. She acknowledged that she was seen lifting a hanging flower basket into her cart ("they are mostly peat moss") and that she lifted a bag of dog food labelled "15.9 kg" into her cart, and then unloaded the items at her home. She said she now shops at a different retailer as that one will carry the dog food out to her car for her, and her husband unloads it. She said she is careful to limit the amount of groceries that are put into each grocery bag, for example.

- m) Driving: she was unable to drive for four months after the accident, due to being in pain and on medication.
- n) Weight gain: she has gained 23 pounds since the accident. Formerly, she was very active, but the accident left her unable to exercise. She said she is self-conscious and embarrassed about her weight.

- o) **Fatigue:** she had no problem with energy before the accident, but now she always feels drained. Her energy level has improved, but if she has pain on any given day "it takes it all out of me".
- p) **Depression:** she had feelings of depression that started about a week after the accident. It was a total lifestyle change, and she was devastated at what had happened to her. She was crying all the time, asking "why me?" Her doctor has put her on anti-depressant medications, which have helped, and she tried counselling, which she discontinued because the counsellor was not compatible. Recently, she tried counselling again, which has helped. She feels her depression is stable now.
- q) **Patience:** she was a patient person before, but now she does not have patience for people who try to help her.
- r) **Anxiety:** she has more anxiety now than she did prior to the accident. She is particularly anxious in parking lots. She acknowledged that this issue is a lot better now.
- s) **Concentration:** she finds that people have to repeat things to her. She feels the pain makes it hard for her to concentrate, and she finds she has wandered off mentally.
- t) **Personality:** formerly she was bubbly, active and happy-go-lucky, always wanting to help and liked to entertain a lot. Now she does not want to go out, and she will watch others play a game rather than participate herself. She is less inclined to talk to people. She puts on a "happy face" because she does not want people to feel sorry for her. She said "it upsets me deep inside, I'm crying inside, because I want to be as I was before". She said she hates her new life.

Treatments

- [78] Mrs. Halvorson said she has had various treatments and forms of exercise since the accident: physiotherapy, massage, aquafit/lifefit and dog walking.
- [79] She started massage treatments in late 2016. Currently she has massage every two weeks. She finds this relieves her symptoms for about 10 days, and she feels this is a necessary treatment.
- [80] She began physiotherapy in early November 2016, and currently goes every two weeks. She would like this to continue as it gives her relief.
- [81] She began kinesiology sessions in January 2017 with a local clinic, but later obtained similar treatment from her kinesiologist son. He gave her exercises and stretches to do. She goes to his gym when they visit family in Edmonton.

- [82] She started aquafit/lifefit in November 2016. These provide strength and conditioning activities in 45-minute or 60-minute sessions. These were all shut down due to the pandemic, but when they are again available she would like to go once a week. She said she does stretches and exercises at home.
- [83] She said the treatment expenses have been hard on them financially, with her husband getting upset at the magnitude of the expenses.

Post-Accident Recreational and Social Life

- [84] Mrs. Halvorson said she has not golfed since the accident. At most, she will ride in a golf cart while others play. She said that golf was one of the activities she hoped to pursue in retirement.
- [85] She no longer does any jogging with her dog, as it hurts her hips and back. Any dancing she does is very mild (waltzes, for example), and is much less frequent than it was pre-accident. She has limited interest in her former crafts hobby, although she has done it to a limited extent. She said she no longer has any desire or interest in it. She prefers to do word puzzles instead.
- [86] Her social life is much more limited. She no longer has the same interest in it, or the energy to do it. Any company they have over is much smaller in terms of number of people, and instead of organising the event and shouldering most of the work, she now leaves all of that up to others.
- [87] She has given up much of her involvement with the Legion, although she kept her role as membership chair.
- [88] Post-accident, their regular schedule has taken them to Mexico every two years (although once it was to Costa Rica), where they stayed for a couple of months at a time. She required a day to recover from each flight.
- [89] They have also travelled to visit family in Edmonton and Victoria. Formerly they drove to visit family in Edmonton, but now they usually fly there. They travel there four or five times a year. She plans massage, physiotherapy and kinesiology sessions in Edmonton so that she can have these treatments while she is there. She said their children have been very supportive. They have eight grandchildren, ranging in age from toddlers to adults. She said she formerly did active things with the younger children, including "wrestling" or racing, but not any more.

Post-Accident Personal Care and Housekeeping

- [90] Mrs. Halvorson said that after the accident she needed help for showers, baths, doing her hair and cutting her nails. At times, her husband has to help her dress, particularly if the clothing has to go over her head or involves things behind her back.

- [91] Mrs. Halvorson said the accident was very hard on her relationship with her husband. She could no longer cook and clean, and Mr. Halvorson grew frustrated with cooking, and she was unhappy that he did not clean the house the way she liked. She is now cooking again, but she is only able to do minimal cleaning. She said "I can't do anything with my arms". She is able to cook, dust, do laundry and dishes, but she is unable to vacuum, clean windows, wax the floors or clean the bathrooms. She said her husband spends perhaps two hours each week doing the chores she used to do.
- [92] Prior to the accident, Mrs. Halvorson did 75 percent of the yard work around their house. Post-accident, she did none at all for quite some time, but now she does some light gardening. Her husband now does all that work, spending perhaps four or five hours a week on these tasks.

Post-Accident Employment

- [93] Mrs. Halvorson said she has not done any landscaping work since the accident. She said "there is no way" she could do the necessary tasks. She has tried to "putter" in her own garden, but had to quit due to spasms.
- [94] Her husband continued with the business for 18 months after the accident. He said he could not keep it going. They considered hiring an employee, but she said it involves WorkSafeBC and insurance issues, and they did not want to have to "babysit" an employee. The business closed in late October 2018. Mrs. Halvorson found this very upsetting.
- [95] She continued with a home-based sales enterprise, which markets through home parties, putting on sales parties once every three months. She garnered a small amount of income from this, less than \$2,000 per year. This was shut down during the pandemic. She has also continued her involvement with the local boat and sportsmen's show, which is an annual three-day event that garnered pay of \$16 per hour, although I assume that this too has not taken place during the pandemic.

Overall Impact

- [96] Mrs. Halvorson said she now has a "totally different lifestyle" from pre-accident times. The pain drains her, and she has no ability to do what she wants. She said she is frustrated, "devastated", but is determined to get better.

Cross-Examination

- [97] Mrs. Halvorson acknowledged that when she saw a new family doctor in March 2016 she told him she had a high alcohol intake and was then drinking five or six bottles of wine per week. At trial, she denied that her drinking was out of control. She said her new doctor told her she had a mood disorder or depression, with anxiety. She acknowledged that the notes indicated she had had a problem with alcohol "at least 10 years" but said "I don't know why he would say that". He also noted her report of having a "bad temper" and was "not her usual bubbly

self", and she agreed she must have said these things.

[98] She agreed that her prior physician, Dr. Parkin, made references in his clinical notes to her "persistent alcohol misuse" and "interrupted sleep" and that he had prescribed medications for anxiety, depression and sleep problems.

[99] Mrs. Halvorson also said:

- a) Her ability to lift heavier objects has gradually improved and continues to improve;
- b) Her neck pain and hip pain continue to improve. Mrs. Halvorson said "everything continues to improve". She attributed the improvement to physiotherapy, exercise and medication, and noted "it costs a lot of money to do this";
- c) She agreed she had suffered from anxiety long before the accident. She agreed that her depression started prior to the accident, but said "it came from a different source [then]";
- d) She began suffering from two hernias in mid-2018, and they gradually got worse. Eventually she had corrective surgery, which took place in January 2020. She said her recovery time was six weeks at most;
- e) In May 2018 she was kicked during an aquasize class, which made her feel "like I got hit all over again". It took three months for her to recover enough to get back to the pool;
- f) When it was suggested to her that there was no medical reason for her to use a cane, she said she needed it for balance, as her medications make her "a bit wobbly" and "my hips and back situation make me need a cane too";
- g) She and her husband were content with the level of activity of their business and had no intention of increasing it. Their plan was to reduce their work to two or three days a week on reaching 65;
- h) When clinical notes from October 3, 2017 were put to her, showing her report of 6-7/10 for "quality of life" and 2/10 for pain, Mrs. Halvorson said "obviously I was having a good day";
- i) She was unaware that her tax returns showed no income for her from the landscaping business from 2011 to 2015. She said she left this to her husband and the accountant, but said "all I know is we split the income"; and
- j) In a typical day she will walk for an hour, exercise for 20-30 minutes and do stretches for 20-30 minutes.

B. Cal Halvorson

[100] As noted earlier, Mr. Halvorson ran to assist his wife. The defendant came over to help, and they assisted the plaintiff to a sitting position. She said she was really sore in her upper area. He assisted her into his truck and drove her to the hospital. At the hospital, she said her back was very painful and her arms and shoulders were bothering her.

- [101] She did not progress very well over the next few weeks. She could not walk without assistance for a week or more, and she would cry. She tried to be stoic but he could tell she had issues. He had to help her with dressing and personal care. She used a walker until mid-January 2017.
- [102] Mr. Halvorson said his wife was very strong and active prior to the accident. She was strong enough to lift a 50-pound bag of fertilizer and lift bags of clippings into the work trailer. She had no physical limitations.
- [103] As of six months prior to trial, she still had limitations as she could only lift things weighing less than 20 pounds, and movements involving her upper body are problematic. These include washing windows, dusting of upper areas or lifting her arms over her shoulders while getting dressed. She is able to do light gardening when the plants are at arm or waist height. She is able to do the laundry (though he carries the basket) and she can now do grocery shopping on her own. She cannot do seasonal cleaning, as she is unable to do the windows or move any furniture. Formerly she did all the yard work, now he does most of it. He estimated he spends five or six hours each week doing household chores formerly done by his wife, and two or three hours of yard work formerly done by her.
- [104] The plaintiff had "really bad" balance problems for 18 months after the accident, and though these have improved a lot she still has some problems with balance. He knows she has fallen several times due to her left knee giving out.
- [105] Prior to the accident, the plaintiff was "high energy" and would do anything and try anything. She would work all day and then take care of the house at night. In the home, she did everything but the dishes.
- [106] Post-accident, her energy level was not good at all. It gradually came back but is still not the same. She had sleep problems before the accident in that she had difficulty getting to sleep, but after the accident she also had problems staying asleep because she would wake up with upper body pain. He rubs her shoulders to help get her back to sleep.
- [107] The plaintiff was an avid golfer before, but she has not golfed since the accident.
- [108] Their regular vacations were to visit family in Edmonton, and extended trips to Mexico every two years. They last went to Mexico in 2019, but they were unable to do a lot of things. They formerly did active things and socialized but on this trip they kept things pretty quiet. As for the Edmonton trips, they used to drive, but 11 or 12 hours in a car was far too much for the plaintiff, and so now they fly there.
- [109] They had an active social life prior to the accident. He described the plaintiff as a "social butterfly". There were family get-togethers, and frequent visits to the Legion. Post-accident, the plaintiff does not participate in any active games, and instead she watches.

- [110] Mr. Halvorson acknowledged that his wife had pre-accident problems with anxiety and depression, but he associated these with specific events, as when a friend of theirs died while on one of their Mexico trips, and when her mother died. Her depression never affected her level of functioning or ability to work. In the immediate aftermath of the accident, the plaintiff would just start crying. This seldom happened prior to the accident. Her mood has improved in the months leading up to the trial, but her low mood is still there.
- [111] Mr. Halvorson said his wife is not longer very patient, for example, with his housework, or at the level of contact the children maintain with them. This caused him to "steer clear" of her, and their relationship has suffered. He said it breaks his heart to see her crying and worrying about not being able to do things.
- [112] Mr. Halvorson also acknowledged that his wife "drank too much sometimes", but said this did not affect her functioning either. Her alcohol intake has now "dropped right off".
- [113] Mr. Halvorson described the nature of their landscaping business in essentially the same terms as did the plaintiff, so I will not repeat that here. He said he did all the invoicing and paid all the suppliers, and then took all the paperwork to accountants for them to prepare the tax returns. He had no involvement in the latter. His understanding was that they were to split the profits 50-50.
- [114] Mr. Halvorson kept the business going until 2018, but then gave it up. He did not consider hiring a replacement employee as he did not want to "babysit someone" and, in any event, there was little income to work with in terms of paying anyone.
- [115] In cross-examination, Mr. Halvorson said:
- a) In the two years prior to the accident the plaintiff was having low moods. This was sporadic and lasted two or three days at a time;
 - b) The plaintiff was devastated by her mother's passing, and she went through a rough patch of anxiety and depression, but she seemed okay after the funeral;
 - c) Currently, her walks with the dog are 60 to 90 minutes at the longest. He goes with her once in a while; and
 - d) The plaintiff's excessive drinking began around 2013 or 2014.

C. Valerie Patterson

- [116] Ms. Patterson is the plaintiff's older sister. She was a long-time resident of Edmonton but moved to Chilliwack in December 2015. She provided "before and after" evidence concerning the plaintiff.

- [117] Prior to the accident, the two of them shopped together, attended gatherings with friends and had family dinners. They both belonged to the Legion and put on various social events. She described her sister as vibrant, "happy-go-lucky", very organized and always willing to help out. According to Ms. Patterson, the plaintiff had no mood issues prior to the accident.
- [118] The plaintiff was in great pain after the accident and they had to cut shopping trips short due to her limitations.
- [119] Ms. Patterson has noticed some improvement in her sister's limitations. She now "moves a lot better" and tries to have a better mood. She said the plaintiff is very dedicated with her exercises.
- [120] Ms. Patterson said the plaintiff's mood and demeanour has changed, and her memory "has gone downhill". They have perhaps 10 family dinners each year and formerly the plaintiff was very lively and entertaining, but now her demeanour is very quiet and she does not participate in games or, if she does participate, she lacks focus on the games.
- [121] In cross-examination, Ms. Patterson agreed that from 2006 to late 2015 she saw her sister perhaps two to four times. All other contact was by telephone. Ms. Patterson was unaware of any problems the plaintiff had with depression prior to the accident, aside from that associated with the loss of their mother. She agreed that the plaintiff took that loss hard, and worse than she (Ms. Patterson) did.
- [122] Ms. Patterson indicated that she herself is a light drinker and said the plaintiff was the same pre-accident. She did not know that, prior to the accident, the plaintiff was drinking five or six bottles of wine each week.

D. Ryan Cocks

- [123] Mr. Cocks is the plaintiff's son. He is 34 years old and lives in Victoria. Until August 2013 he lived in Chilliwack, as did his mother, and he saw her three or four times each week. In 2013 he joined the Canadian Armed Forces and was posted to Newfoundland, so he did not see his mother in person but spoke to her frequently on the phone. In 2015 he was posted to Esquimalt, where he currently works.
- [124] Mr. Cocks confirmed much of the plaintiff's evidence about her pre-accident activities. He said she had no physical limitations. After the accident, he noted many limitations, including difficulties putting on shoes, getting in and out of a car and walking. He said he has seen improvements in her abilities, but said "she is still quite limited".
- [125] Mr. Cocks and his wife have four children, currently aged between five and ten years old. Prior to the accident, the plaintiff was "very hands-on" and playful with the children, wrestling with them, going to the park, going down the slide with them, and always physically active with them. After the accident, her interactions with the children were more limited.

[126] Mr. Cocks said his mother was very adventurous and outgoing prior to the accident. He never observed her to have any mood problems. Now, she is a lot less adventurous and not as "free spirited" or willing to do new things. He said her mood and personality have improved by about 50 percent over time, "but she is not where she was".

E. Darren Benning - Economist

[127] Mr. Benning prepared a report dated June 30, 2020, addressing income losses both before and after trial. He based his report on certain instructions or assumed facts, and presented his results on a present value basis. He also did present value calculations for cost of future care.

F. Other Collateral Witnesses

Terry Mackie

[128] Ms. Mackie is a retired teacher. She was a customer of the plaintiff's landscaping business, starting in 2008. She saw the plaintiff once a week when the plaintiff and her husband came to cut her lawn. She also saw the plaintiff at other times, because Ms. Mackie's daughter lives next door to the plaintiff and Ms. Mackie would see the plaintiff when Ms. Mackie visited her daughter.

[129] Ms. Mackie described the plaintiff prior to the accident as being "so gung-ho, perky and active", and she was kind and happy. She said the plaintiff was strong and she could move heavy objects and bags of clippings, as well as operate a gas-powered weed cutter. They removed some trees for Ms. Mackie at one point, and the plaintiff was strong enough to haul away the branches and other material from trees having eight-inch trunks.

[130] Ms. Mackie took a gift basket to the plaintiff after the latter's accident, and she noted the plaintiff "took forever" to get to the door. When Ms. Mackie visited her daughter post-accident, the plaintiff was using two canes, and did not talk for the same amount of time as before. Since then, Ms. Mackie has noticed some improvement and the plaintiff is now down to one cane, but she is "sheltered and protective" and "nowhere near what she used to be".

[131] After the plaintiff's accident, Mr. Halvorson did one more season of landscaping work for Ms. Mackie, "but you could tell it was too much for him".

[132] In cross-examination, Ms. Mackie said she had not seen the plaintiff for at least six months and, post-accident, has seen the plaintiff perhaps 10 times in all.

Sandra Dehnke

- [133] Ms. Dehnke was another customer of the landscaping business, but she is also a neighbour, having lived across the street from the plaintiff since 2006. Prior to the plaintiff's accident, the two of them would see one another once a week, "chatting at the mailbox" or in similar interactions. They also socialized at barbecues, dinners and gatherings every couple of months.
- [134] Ms. Dehnke described the plaintiff as a "very energetic, vibrant person", who had a "lot of get up and go". She was a good hostess and loved having people around. She did not notice any mood problems with the plaintiff. The plaintiff's landscaping work for Ms. Dehnke involved edging, weeding and light pruning. She observed no limitations in the plaintiff's physical abilities.
- [135] When she first saw the plaintiff after her accident, the plaintiff could barely get up from a sitting position. She was very unhappy and depressed, and she was in a lot of pain.
- [136] Ms. Dehnke said the plaintiff's mobility is much better now, though she still uses a cane, and she has more energy and does more walks. She has seen the plaintiff doing some light gardening, looking after her flowers. She is also happier now, but the plaintiff is not the same person she was.
- [137] In cross-examination, Ms. Dehnke agreed there was been a substantial gap in her interactions with the plaintiff due to the pandemic. She saw her a bit more in the summer of 2020. In September 2020 she saw the plaintiff walking her dog, and "she seemed more like her old self, to a degree", though she was walking with her cane.

V. Damages - Plaintiff's Medical Witnesses**A. Dr. Harpreet Sangha - Physiatrist**

- [138] Dr. Sangha is a specialist in physical medicine and rehabilitation. He prepared a report dated April 4, 2019.
- [139] Dr. Sangha listed the plaintiff's complaints as reported by her:
- a) Chest wall: constant pain over her anterior chest wall, as well as a stabbing pain or spasm, aggravated by certain movements. She reported 70 percent improvement of this condition since the accident.
 - b) Mid and lower back: constant pain throughout her low back, with occasional referred pain in her left buttock. This interferes with her ability to sit, bend and lift. She estimated this had improved by 60 percent since the accident.
 - c) Neck: constant, sharp pain throughout cervical spine at the base, made worse by left rotation. She estimated this had improved by 70 percent since the accident.

- d) Arms: constant, sharp, aching pain throughout both arms. Improved by about 50 percent from the accident date.
- e) Knees: pain in both knees, with right knee feeling like it will "give out" due to pain. This is 70 percent improved.
- f) Hips: aching pain in both hips, worse on the right side. Her right hip feels stiff and has an occasional sharp pain. This is 70 percent improved since the accident.
- g) Headaches: she has what she describes as "major headaches" three times per month, which are aggravated by stress. These resolve with Tylenol and stress reduction techniques. The frequency of these headaches has improved 90 percent since the accident.
- h) Psychological: she reported difficulty with anger, depression and anxiety.

[140] Dr. Sangha made the following diagnoses:

- a) Cervical strain with likely mid-cervical facet pain and dysfunction, with superimposed myofascial impairment;
- b) Lumbar strain with likely lower left lumbosacral facet and left sacroiliac joint pain and dysfunction, with superimposed diffuse, widespread, chronic myofascial impairment;
- c) Post-traumatic headaches, likely cervicogenic;
- d) Psychoemotional distress, which he said requires further assessment by a mental health practitioner, "although I suspect that this is contributing to her physical manifestations of pain";
- e) Disordered sleep; and
- f) Right post-traumatic patellofemoral syndrome.

[141] Dr. Sangha said the plaintiff "did not present with any indication of pain amplification". He added:

The fact that she has not fully recovered is in my opinion not surprising when considering the nature of the injuries and her age. She does have some degenerative changes consistent with an individual in her age category which are likely contributing factor[s] to a delayed and incomplete recovery.

[142] Dr. Sangha said that the plaintiff's "accident-related impairments have left her with diminished physical and functional intolerances" and noted that while she attempts many tasks she does so "with a great level of difficulty". He said he would expect her to have difficulty with the following types of activities: (1) activities that include repetitive and sustained postures, particularly those that involve lifting, bending, pushing and pulling; (2) activities that involve vigorous use of the arms; (3) activities that put strain through the neck, and upper and lower back; and (4) activities that involved weight-bearing and range of motion through the right knee, including walking, crouching, kneeling and bending.

[143] As for prognosis, Dr. Sangha said:

It is now approaching 2½ years since the time of Mrs. Halvorson's accident. She presents with continued pain and functional limitation. The nature of her injuries and the longstanding duration of her problems point to an incomplete recovery. I believe her prognosis is best listed as guarded. The likelihood of a complete resolution at this late date is unlikely. She has been left with ongoing significant symptomatology and while by her admission there has been some improvement in most areas, her injury profile has now plateaued. Her recovery arc is not atypical for a subset of individuals who suffer these types of events. It is likely that she will be at risk for chronic exacerbations depending on the activities she engages in.

[144] Dr. Sangha made the following treatment recommendations: (1) her right knee issue might benefit from a topical anti-inflammatory and a quad muscle strengthening program, and intra-articular injections ought to be trialled; (2) trigger point injections to her trapezius "would likely be beneficial"; (3) cervical and lumbar branch blocks; (4) an in-home assessment for education, assistive devices and coping strategies; and (5) psychological assessment and treatment.

[145] In cross-examination, Dr. Sangha said he was not given any pre-accident clinical records. He agreed that if the plaintiff had a pre-accident history of depression and anxiety, and of related medications, these would be important in terms of his overall impression, particularly his prognosis. He agreed that pre-existing anxiety and depression could be impacting the complaints of pain but also said her pre-accident history of these issues would have made her susceptible.

[146] He said the imaging that was available to him showed nothing of consequence. He agreed this showed degenerative changes but said whether these were clinically active is a clinical call. He agreed they could become symptomatic in the future, but said everyone of in that age group has degenerative changes and they have a 50 percent chance of having at least some symptoms from them.

[147] Dr. Sangha agreed the plaintiff had been seen by a neurologist, who noted that there was no neurological cause here.

[148] When it was suggested that the plaintiff had no medical need for a cane, Dr. Sangha said some people who have pain feel unsteady, and if a cane makes them feel more secure, then it is okay to use one.

[149] Dr. Sangha said that he would not expect significant improvement from a course of active rehabilitation as it would be primarily palliative in nature, although she might have some gains from targeted treatment of certain muscles.

B. Dr. Hiram Mok - Psychiatrist

[150] Dr. Mok prepared a report dated May 27, 2020 following an assessment of the same date.

- [151] Dr. Mok said that as a result of the accident, Mrs. Halvorson developed somatic symptom disorder with predominant pain ("SSD"), which he assessed as moderate in its current severity, and major depressive disorder with anxious distress, acute exacerbation ("MDD"), with a current severity of "severe". He noted she had a pre-existing history of MDD with anxious distress, chronic, "that seems to be acutely exacerbated" by the accident. He noted she was active and fully functional at the time of the accident.
- [152] As for the prognosis for her psycho-emotional injuries, Dr. Mok said he would rate her prognosis as "guarded to poor", even if his treatment recommendations are followed.
- [153] He agreed with Dr. Sangha's comments concerning her future disability from employment.
- [154] As for treatment, Dr. Mok said she should receive follow-up care from a psychiatrist for her SSD, recognizing the "bidirectional relationship" between SSD and MDD over time. As for her "residual symptoms of MDD with anxious distress, he recommended an increased dose of antidepressant medication, and if the response was not adequate, another medication in addition. Finally, Dr. Mok recommended a course of concurrent individual psychotherapy through a registered clinical psychologist, using a cognitive behavioural approach. He suggested 12 one-hour sessions, subject to a further review thereafter.
- [155] In direct examination, Dr. Mok explained that SSD means the person has physical symptoms that are distressing and are causing persistent excessive thoughts and behaviours, including anxiety or involving spending an excessive amount of time of them. Major depressive disorder is diagnosed according to a catalogue of certain symptoms, as listed in the DSM-V reference work. Later, he said the plaintiff had eight of the nine listed symptoms.
- [156] In cross-examination, Dr. Mok acknowledged that he interviewed the plaintiff by Zoom and that this was not as effective as an in-person interview. He said that all outpatients were being dealt with that way during the pandemic.
- [157] Dr. Mok also acknowledged that pre-accident records showed alcohol abuse, emotional issues and issues with low mood, for which she was prescribed antidepressant and anti-anxiety medications, but he said "they were not at all convincing" and he was not convinced the plaintiff had clinical depression prior to the accident. He felt that although there were mood swings prior to the accident, there was no clinical basis to give her antidepressants. He also said that although there were increases in the dosages prescribed by the family doctor, there was no documentation of sufficient symptoms to justify those dosage increases.
- [158] Dr. Mok agreed the plaintiff does not focus unreasonably on pain, but he noted she has an anxious preoccupation with pain insofar as she was concerned that it would be with her for the rest of her life.

[159] Dr. Mok agreed that alcohol abuse has an impact on the treatment of depression, and said she might benefit from counselling that focused specifically on that issue. He also agreed that the death of her mother in 2016 could have been a major factor in her life, but when he saw her in 2020 she did not make much of it. He said that perhaps she had dealt with it between 2016 and 2020. He agreed this was an important factor, and acknowledged that he may have missed it as an important factor.

C. John Lawless - Vocational Rehabilitation

[160] Mr. Lawless provided a report dated June 8, 2020. Mr. Lawless based his opinion on the available medical evidence (including the reports of Dr. Sangha and Dr. Mok) and his own vocational testing. He said it was clear she was disabled from working at her prior vocation as a landscaping worker. He also did not see her returning to her long-time former occupation as a dental assistant.

[161] Mr. Lawless noted that any employment appropriate for the plaintiff would "need to be sedentary and with very forgiving circumstances, which probably means part-time hours". He said her limited computer skills were another barrier to employment. He noted that even retail workers have to spend most of their shifts on their feet, and her mood issues could interfere with her ability to work with the public. He concluded that "even the least demanding jobs, such as parking lot attendant" would be problematic given her spectrum of issues.

[162] Mr. Lawless noted the probability of a return to work after injury diminishes sharply after six months out of work, and after 24 months her chances for return to employment in any capacity "approaches nil", and Mrs. Halvorson "is well past that point now". He concluded she is competitively unemployable.

[163] In cross-examination, Mr. Lawless agreed the plaintiff expressed no interest in retraining, but he noted that even after retraining her odds of getting back to competitive employment would be long.

D. Theresa Wong - Occupational Therapist

[164] Ms. Wong provided a cost of future care report. I will leave the details of her recommendations to a later discussion.

VI. Damages - Defendants' Case

A. Dr. Eugene Okorie - Psychiatrist

Evidentiary Ruling

- [165] The plaintiff objected to the admissibility of the report of Dr. Okorie, a psychiatrist retained by the defence. Counsel made submissions on the issue and, the following day, I ruled that Dr. Okorie's report was admissible, with reasons to follow. I now provide my reasons for that ruling.
- [166] The plaintiff's objection was essentially based on two grounds: (1) Dr. Okorie did not conduct a clinical interview of the plaintiff; and (2) Dr. Okorie based his opinion on clinical and other records and reports, some or most of which were hearsay in nature.
- [167] In this regard, the plaintiff relied on several case authorities, beginning with *Dhaliwal v. Bassi*, 2007 BCSC 549 [Dhaliwal], where the Court said:
- [2] The role of an expert is to assist the Court. I am not assisted by receiving the "opinion" from a psychiatrist who has not seen a person and who bases his opinion only on documentation made available to him where much of that documentation will ultimately not be in evidence. Ordinarily, counsel will provide the factual assumptions to the expert that counsel will then proceed to prove in evidence. Those factual assumptions should be clearly stated in the statement of the expert. It is not for an expert to merely review a number of documents, many of which will not be in evidence and make certain findings of fact. In this regard, I adopt the statement of Meredith J. in *Hennessy v. Rothman* (1988), 26 B.C.L.R. (2d) 322 (B.C.S.C.):

I note that Dr. Rockerbie seems to have been furnished with a good many documents, most of which are not even included in the sworn testimony before the Court. I refer in particular to Minutes of Evidence of several witnesses, a statement of the plaintiff herself, an "opinion report" and a letter. It seems that Dr. Rockerbie was given this material so as to base some opinion upon it. But it is not for Dr. Rockerbie to be gleaning facts from this kind of evidence. The factual assumptions should be stated clearly to Dr. Rockerbie by counsel, and he asked to give his opinion on those facts. They are facts that counsel will then proceed to prove in evidence. Otherwise, the Judge simply sits as sort of a Court of Appeal over Dr. Rockerbie's opinion. And even though the opinion is based upon material unknown to the Judge. This is to be distinguished from the evidence given by a medical doctor as to his opinion relating to the physical or mental condition of a patient.

So one main objection is that Dr. Rockerbie is invited to base his opinion upon his own findings of fact. Surely this is wrong. It is not his function to find facts. (at p. 325)

- [3] As well, the Court has commented a number of times on it being inadvisable to rely on the opinion of a medical advisor who has not seen a plaintiff: see for instance *Parish v. Scott*, [1996] B.C.J. (Q.L.) No. 2839 (B.C.S.C.) at paras. 5 and 29. I am satisfied that an opinion from a professional in the field of psychiatry requires more than a review of medical and other records and that an opinion must be based at least in part on the observations of the person that the psychiatrist has met and observed. On that ground alone, the report of Dr. Smith

should be inadmissible.

- [168] In Dhaliwal, the psychiatrist's report was ruled inadmissible, though under the rules of expert evidence of the time, the psychiatrist was nonetheless permitted to give opinion evidence by way of oral testimony.
- [169] As to the necessity of a clinical interview for a psychiatric opinion, the plaintiff relies on the evidence of her own expert, Dr. Mok, who in testimony said a clinical interview is "very important" and "you cannot do a report without one".
- [170] When asked whether the court should perhaps first hear from Dr. Okorie about his views about the necessity for an interview, the plaintiff said there was no need to do so because Dr. Mok had already provided the court with the information it needed on that subject.
- [171] The plaintiff cited two other cases. In *Preston v. Koutzmanis*, 2015 BCSC 2219, the court commented on the admissibility of an expert, Dr. Boyle who, it appears, was an orthopedic surgeon. The court admitted the expert report, but said:
- [126] Dr. Boyle readily acknowledged that he was not asked to and did not meet with, examine or interview the plaintiff.
- [127] Dr. Boyle reviewed documents and information provided by counsel and wrote his report.
- [128] These documents and that information included clinical records of various medical professionals.
- [129] This is a process that is unlikely to assist the court in any material way. The first concession is invariably, and was in this case, that interviewing, examining and getting a personal history is important to providing an accurate and complete assessment.
- [130] This is a trend that appears to have been of relatively recent origin.
- [131] It is also a trend which has drawn adverse comment from judges of this court. *Dhaliwal v. Bassi* 2007 B.C.S.C. 549 (Burnyeat, J. at paras. 2-3); *Ruscheinski v. Biln* 2011 B.C.S.C. 1263 (Walker, J. at paras. 85-87); *Rizotti v. Doe* 2012 B.C.S.C. 1330 (Tindale, J. at para. 35).
- [132] To these I would add my own comments. Where an expert chooses to prepare a report as he did here, expecting this court to accept and rely on it. He is presenting a report in which he effectively asserts that he accepts as true and accurate the factual base on which his opinions are based.
- [133] Where he does so without seeing, examining or taking a personal history he chooses to offer his opinion on the basis of hearsay. Worse still he chooses to offer it on the basis of his interpretation of hearsay recorded by others.

- [172] Lastly, the plaintiff cited *Turner v. Dionne*, 2017 BCSC 1924, where the plaintiff objected to the admissibility of a defence psychiatrist's report. That report had been prepared based on a records review and the reports of others, but without an interview of the plaintiff. The court concluded that without an interview of the plaintiff the report could not be of any assistance and thus it failed to meet the "necessity" requirement in *R. v. Mohan*, [1994] 2 S.C.R. 9.
- [173] Here, the plaintiff argued that it is particularly important that a psychiatrist meet with the subject, since that assessment is of the person and does not involve, for example, the review of x-rays, MRIs or other diagnostic imaging.
- [174] The defendants say Dr. Okorie's report is a response report, which in this context I took to mean a critique of Dr. Mok's report. While acknowledging that Dr. Okorie reviewed records, the defendants emphasize that Dr. Okorie accepted Dr. Mok's findings, but he came to different conclusions based on those same findings.
- [175] The defendants rely on three cases: *Wark v. Kang*, 2018 BCSC 173 [Wark]; *Noftle v. Bartosch*, 2018 BCSC 7766 [Noftle]; and *Rizzotti v. Doe*, 2012 BCSC 1330 [Rizzotti]. *Wark* involved objections made to the reports of both an otolaryngologist and a neurosurgeon. Neither specialist had examined the plaintiff, but both experts accepted the findings of their expert counterparts, who had provided reports for the plaintiff. The court concluded that the admissibility objections went to weight, not admissibility. Similar conclusions were reached in *Noftle* and *Rizzotti*.
- [176] I begin my analysis by noting that several of the cases cited by the plaintiff are critical of the experts for relying on clinical records or other documents - in other words, hearsay - which were not part of the evidence at trial. Importantly, those criticisms appear to form part of the basis of the decisions to exclude the reports. This, however, does not accord with *Mazur v. Lucas*, 2010 BCCA 473, where the Court of Appeal summarized the relevant law as follows:
- [40] From these authorities, I would summarize the law on this question as to the admissibility of expert reports containing hearsay evidence as follows:
- An expert witness may rely on a variety of sources and resources in opining on the question posed to him. These may include his own intellectual resources, observations or tests, as well as his review of other experts' observations and opinions, research and treatises, information from others - this list is not exhaustive. (See Bryant, *The Law of Evidence in Canada*, at 834-835)
 - An expert may rely on hearsay. One common example in a personal injury context would be the observations of a radiologist contained in an x-ray report. Another physician may consider it unnecessary to view the actual x-ray himself, preferring to rely on the radiologist's report.

- The weight the trier of fact ultimately places on the opinion of the expert may depend on the degree to which the underlying assumptions have been proven by other admissible evidence. The weight of the expert opinion may also depend on the reliability of the hearsay, where that hearsay is not proven by other admissible evidence. Where the hearsay evidence (such as the opinion of other physicians) is an accepted means of decision making within that expert's expertise, the hearsay may have greater reliability.

- The correct judicial response to the question of the admissibility of hearsay evidence in an expert opinion is not to withdraw the evidence from the trier of fact unless, of course, there are some other factors at play such that it will be prejudicial to one party, but rather to address the weight of the opinion and the reliability of the hearsay in an appropriate self-instruction or instruction to a jury.

[177] In brief, the fact that an opinion is based on hearsay does not render the opinion inadmissible and it merely goes to weight.

[178] With this component of the admissibility objection having been addressed, the only remaining basis for the objection is the absence of a clinical interview. In this case, Dr. Okorie accepted Dr. Mok's findings, though he disagreed that those findings were a sufficient basis to conclude the plaintiff has somatic symptom disorder or SSD.

[179] That is an important difference. Dr. Okorie did not purport to diagnose the plaintiff; what he did is critique Dr. Mok's conclusion about SSD by taking Dr. Mok's own clinical findings and concluding that these did not meet the requirements for a diagnosis of SSD. Accordingly, an interview of the plaintiff was not an essential part of this process.

[180] It is for these reasons I admitted Dr. Okorie's report and informed the parties that the plaintiff's objections went to weight, not admissibility.

Dr. Okorie - Evidence

[181] Dr. Okorie prepared a report dated August 13, 2020. He addressed somatic symptom disorder as follows:

A certain level of emotional or psychological distress accompanies any painful experience. Additional standalone psychological syndrome can only be diagnosed when the emotional distress reported by a person in pain exceeds proportionate/reasonable dysphoria and frustrations associated with their pain and related limitations.

Somatic Symptom Disorder with predominant pain can only be diagnosed in a person with chronic pain who feels extreme, exaggerated, and unreasonable anxiety about their pain. In such a patient, pain becomes such a central, all-consuming focus of their life that it is hard to function due to extreme activity avoidance and endless search for more serious basis for their pain. Such a patient invests an inordinate amount of time and effort into their pain such that they are left with inadequate time or energy to attend to other important aspects of their life.

The patient with Somatic Symptom Disorder in the context of chronic pain is the one that develops an extremely maladaptive relationship with their pain when compared with other patients who have a similar condition.

[182] Dr. Okorie noted that Dr. Sangha found Mrs. Halvorson's functional disabilities to be consistent with her injuries and pain. He noted that despite her pain, she participates in various community and domestic activities. In light of this, Dr. Okorie concluded she did not meet the DSM-V criteria for the additional standalone diagnosis of SSD with predominant pain.

[183] Dr. Okorie agreed with Dr. Mok that Mrs. Halvorson has persistent depressive disorder with anxious distress that was aggravated by the subject accident. He said it was not possible to quantify the degree of that aggravation of her depression. He said he used the term "persistent" rather than "major", as Dr. Mok did, because the symptoms have lasted beyond two years and thus met the definition of "persistent" under the DSM-V. While he did not disagree with Dr. Mok's assessment of the severity of her depression as "severe", he noted Mrs. Halvorson's functional status was much better than that of an average severely depressed 64 year old woman. He was of the opinion that Mrs. Halvorson's depression would not itself prevent her from being competitively employable.

[184] Dr. Okorie agreed with Dr. Mok's treatment recommendations. He was of the view that treatment based on the recommendations would enhance her prognosis for improvement of her depression.

[185] In cross-examination, Dr. Okorie disagreed that he had measured the plaintiff's situation against criteria that were more stringent than those set out in the DSM-V. He said his phrasing of the criteria was intended to be explanatory, not merely to parrot those of the DSM-V, and his explanations were entirely consistent with the DSM-V and the clinical application of its criteria.

B. Eugene Keats - Private Investigator

[186] Mr. Keats oversaw video surveillance of the plaintiff on May 11, 2018 and May 11, 2020. Essentially, the video showed the plaintiff fuelling her car, shopping at Costco and putting out her garbage bins.

C. Dr. Thuan Ta - Family Physician

[187] Dr. Ta has been the plaintiff's physician since April 2016. He did not provide expert evidence, but instead testified about various matters set out in his clinical records.

[188] Dr. Ta said Mrs. Halvorson filled out a new patient questionnaire in March 2016. He also made notes on that questionnaire after first seeing the plaintiff.

- [189] Dr. Ta said he learned she had a history of anxiety, which he described as "mild to moderate" in severity, though in his notes he later rated it as "moderate to high". She also had a history of mild to moderate depression, though he did not know its full history. She was on a mood disorder medication at the time. She also acknowledged to him that she was drinking too much, seven or eight glasses of wine or beer each day, or five to six bottles of wine each week.
- [190] In May and June 2016 he saw her primarily for her mood disorder. The plaintiff reported to him problems with her drinking and her unsuccessful attempts to quit. She complained she was "easily annoyed", anxious and was having trouble relaxing.
- [191] In October 2016 the plaintiff reported that her mother had passed away in August. At that time she reported drinking four drinks a day. Dr. Ta's screening assessment showed her depression in the mild range and her anxiety at "very minimal".
- [192] Dr. Ta saw the plaintiff in May 2018 as a result of the plaintiff having been kicked in a water aerobics class. She had gone to the hospital and been prescribed Dilaudid, a synthetic morphine. She was very sore with back pain and pain in her right buttock and leg. He saw her a week later and she was doing better, though she was still "quite tender". By June 2018 she reported her right buttock pain had improved through trigger point injections. In July 2018 she reported further improvement, and she was able to walk without a cane. She had received dry needle injections (which I took to be the same as intramuscular stimulation acupuncture), which "really helped her". She had good range of motion in her shoulders and she was walking freely.
- [193] Dr. Ta was asked about several future care items. He said he did not recommend, or recall recommending: (1) a yoga mat; (2) CBD oil; (3) foot treatment; (4) travelling to Edmonton to get kinesiology treatment; (5) matcha green tea; or (6) Epsom salts. He said he might have recommended cefixime (though it is an antibiotic typically prescribed for urinary tract infections) and a handrail, as she was unstable.
- [194] In cross-examination, Dr. Ta said the last reference in his notes to the pool injury is dated June 13, 2018.

VII. Damages - Positions of the Parties

A. Plaintiff

- [195] Counsel submits the plaintiff was a credible witness, and that prior to the accident she was an active, high energy, positive individual who was in "the best shape of her life". She suffered various injuries that have had a serious effect on her life and lifestyle. For a few months post-accident she required a walker for mobility, and she still uses a cane. Her injuries have curtailed most of her pre-accident activities and they have taken a toll on her mental health. Dr. Mok diagnosed two psychological disorders, somatic symptom disorder with predominant pain and an exacerbation of her major depressive disorder with anxious

distress. She has been forced into a complete lifestyle change and her relationships have been severely impacted. Her symptoms are unlikely to resolve and the best that can be hoped for is some element of symptom management.

- [196] The plaintiff claims non-pecuniary damages in the range of \$150,000 to \$160,000, relying on the following authorities: *Cornish v. Khunkhun*, 2015 BCSC 52; *Hauk v. Shatzko*, 2020 BCSC 344; and *Senner v. GE Canada Leasing Services Company*, 2017 BCSC 1939.
- [197] On the matter of past income loss, the plaintiff posits three different scenarios. The first is based on Mrs. Halvorson's share of business income, calculated by Darren Benning as a percentage of the gross income of the business. From the date of the accident to trial the loss is \$41,293.
- [198] The second scenario is based on the assumption that the business closed due to the accident. Here, the plaintiff calculates the first two years of the loss in the same way as under the other scenario, but after that she says the loss should be calculated based on the loss of all of the gross revenue of the business to the date of trial, citing *Hans v. Volvo Trucks North America Inc.*, 2018 BCCA 410 [Hans]. This sum totals \$62,454.
- [199] The third scenario is based on the assumption that there was a reduced income to the landscaping business in 2017 and 2018. If this is established, then the plaintiff says a further \$8,115 must be added to the damages awarded.
- [200] As for loss of future earning capacity, the plaintiff says the evidence shows she was rendered competitively unemployable by the accident. The plaintiff says that she and her husband planned to work on a reduced basis after she turned 65 and so there is a loss on the basis of full operations from the trial date until February 2021 (when the plaintiff turned 65) and then a further loss after that on the basis of a reduced operating level.
- [201] Again, the plaintiff puts forward several scenarios. These are as follows:
- a) Working at the same pace until age 65, then at a reduced pace to age 70: this brings about a present value loss of about \$40,000, comprised of \$10,664 (based on the entire loss to the business) to age 65 and about \$6,800 per year after that;
 - b) Retiring outright at age 65: the loss would be \$10,664, based on the entire loss of the business;
 - c) If the Court does not accept that the entire business loss should be awarded: the loss would be half of the last figure, or \$5,332; and
 - d) Making an award on the basis of a loss of capital asset: based on the full earnings of the business, a two-year capital asset assessment would be \$54,692, and if just half the net earnings are considered appropriate, then the figure is \$27,346.

[202] The plaintiff also seeks a separate award for loss of housekeeping capacity. She proposes \$21,900 as an appropriate amount for past loss under the head of damages, calculated on the basis of one hour per day at \$15 per hour for four years. For her future loss, she arrives at a figure of \$73,000 using the same calculation but utilizing a present value approach over 20 years.

[203] As for cost of future care, the plaintiff claims the sum of \$112,732, being the present value of all the items listed by the occupational therapist, Ms. Wong.

[204] Finally, the plaintiff claims special damages in the amount of \$24,285.61, as set out in tab 17 of Exhibit 2.

[205] The plaintiff's claims are summarized as follows:

Non-pecuniary damages:

\$150,000.00 to \$160,000.00

Past loss of income (gross):

41,293.00 to 70,569.00

Loss of future earning capacity:

10,000.00 to 50,000.00

Past and future loss of housekeeping capacity:

95,000.00

Cost of future care:

90,000.00 to 110,000.00

Special damages:

24,285.61

Total:

\$410,578.61 to \$509,854.61

B. Defendants

[206] The defendants were critical of the plaintiff's credibility, noting that she complained of pain of such intensity that it would require hospitalization, yet she was captured on video pulling garbage bins to the curb, lifting flower baskets with one arm and putting them in a shopping basket, and retrieving a 35 pound bag of dog food from a waist-high shelf and placing it into the lower rack of a shopping cart.

- [207] The defendants also pointed to a number of other areas which, they say, should cause the Court to question the plaintiff's credibility. In general, the defendants noted the plaintiff's tendency to downplay any and all prior health issues, including mental health issues. They also noted that despite the plaintiff's professed need to have a cane, she rarely used it and, at trial, she wore shoes with heels of two inches or more in height, which calls into question her concerns about balance.
- [208] The defendants were also very critical of Dr. Sangha and Dr. Mok. With Dr. Sangha, the defendants say he failed to review pre-accident clinical records, failed to take into account observed degenerative changes in the plaintiff's lumbar spine, relied unduly on the plaintiff's own subjective complaints, and failed to adequately explain why further improvement was not likely given the improvement that had in fact taken place. In the case of Dr. Mok, he too failed to review pre-accident records before he wrote his report which, in the case of the plaintiff's mental health history in particular, was an important omission. The defendants also allege Dr. Mok was evasive in his testimony at trial and he was not neutral in his approach.
- [209] The defendants submit the evidence shows the plaintiff suffered no more than scrapes to her elbows and knees and mild soft-tissue injuries to her neck, back and knees. At the time of the accident, she suffered from a lengthy and significant history of anxiety, depression, alcoholism and sleep disorder, all of which were active at the time of the accident. The accident caused an aggravation of those conditions, but she settled back to her pre-accident baseline. The defendants also say the plaintiff has had two intervening events, the kick from another pool exercise participant, and her hernia problems and subsequent surgery. The defendants say the plaintiff is no longer functionally limited because she participates in thrice-weekly aquafit classes, twice-weekly lifefit classes, daily walks, and both household and yard chores. The surveillance video, the defendants submit, shows she is more physically capable than she led the Court to believe.
- [210] The defendants say the appropriate range of non-pecuniary damages is \$50,000 to \$70,000, relying on the following cases: *Maddex v. Sigouin*, 2013 BCSC 1338; *Hubbard v. Saunders*, 2008 BCSC 486; *Pichugin v. Stoian*, 2014 BCSC 928; *Zaluski v. Verth*, 2015 BCSC 1902; *Matias v. Lou*, 2015 BCSC 544; *Shearsmith v. Houdek*, 2008 BCSC 997; and *Middleton v. Morcke and Lee*, 2007 BCSC 804.
- [211] On the matter of past income loss, the defendants say the plaintiff was substantially, if not wholly, recovered from her injuries by May 2018. Even if not, she had two periods of disability unrelated to the accident, those being the kick in the pool and her later hernia, which grew more serious over time and ultimately required surgery. The defendants argue that the income earned by the business during her disability should be included in the assessment as the plaintiff and her husband shared profits equally regardless of hours worked. The defendants also submit the business would likely have shut down in March 2020 due to the pandemic, but add that the plaintiff and her husband ought to have sold the business rather than simply wind it down. Finally, the defendants note the effect of the

accident on the revenues of the business are fairly minor, and utilize this relatively small decrease as the basis for their submission that her loss is just \$2,820, or \$2,256 after accounting for taxes.

- [212] On the issue of lost future income-earning capacity, the defendants repeat their submission that the plaintiff was not disabled from her employment after May 2018 and, in any event, the plaintiff and her husband would have ceased operations in March of 2020.
- [213] The defendants say the Court should reject the plaintiff's claim that she and her husband would have continued to run the business at a reduced level once she turned 65. They note that by this point, Mr. Halvorson would be "well into his 70s" and so this suggestion is not plausible, particularly given the fact that the plaintiff herself said on discovery that she intended to retire outright at age 65. Accordingly, the defendants submit there is no proven loss of future income-earning capacity.
- [214] On cost of future care, the defendants were critical of the report of Ms. Wong, noting that she did not review any pre-accident records, conduct a functional capacity evaluation or resolve conflicts in the available information about the plaintiff's level of functioning. The defendants argue that Ms. Wong's recommendations for future care appear to be based on the information provided to her by the plaintiff, which information is not credible.
- [215] The defendants say, alternatively, the plaintiff's complaints and functional limitations are "very modest" and therefore any household or yard duties that she once did can be accomplished by her with appropriate pacing and adaptive equipment. The defendants submit the plaintiff has not proven a need for any award for cost of future care. In any event, any award under this head of damages should be reduced by one-third as her evidence was that she and her husband planned to be in Mexico for four months of the year, and she would not need rehabilitation services or support services during this time.
- [216] The defendants argue the plaintiff has not proven a loss of housekeeping capacity, but argue in the alternative that no award should be made under a separate heading as she has not suffered a true loss of capacity but merely a loss of amenities or increase to her pain and suffering.
- [217] Finally, the defendants note that there are a number of items in the list of special damages that should not be allowed. They submit an appropriate award would be \$20,000.
- [218] The defendants say the following awards should be made in this case:

Non-pecuniary damages:

\$50,000 to \$70,000

Past income loss (net):

2,256

Loss of future earning capacity:

0

Cost of future care:

0

Loss of housekeeping capacity

0

Special damages:

20,000

Total:

\$72,256 to \$92,256

VIII. Discussion

A. Credibility

[219] There is no doubt that Mrs. Halvorson's credibility is key to the major issues in this case. I found that she was credible in some respects, but I have substantial concerns about her testimony when it came to her health, and particularly her pre-accident health. As I will explain when I discuss my findings, I accept that she suffered various injuries that have had a significant effect on her, but I also found that she downplayed her pre-accident mental health difficulties to an unreasonable extent. As for her post-accident status, although in her testimony she conceded she had "good days and bad days", she mentioned little of her status during "good days" and, instead, the general tenor of her testimony was of serious unrelenting pain at all times, which I conclude was not an accurate picture.

[220] I wish to be clear that I do not find the plaintiff to be a malingerer, as the defendants suggest. Instead, I find that, for whatever reason, she had and has an unduly positive view of her pre-accident health, and an unduly negative view of her post-accident health. The only advertent credibility issue I observed was her stubbornness in admitting she did not lose consciousness at the time of the accident, as the records indicate. She did not come off well on that point.

[221] As noted earlier, I found her to be credible on the matter of the accident itself.

[222] I will not go through all of the witnesses, but I will remark that I felt Cal Halvorson was a credible witness who did not shade his evidence one way or the other.

B. Findings

- [223] I find that the plaintiff suffered physical injuries as generally described by Dr. Sangha in his report. These have caused her significant pain in her neck, shoulders, arms, chest, low back, hips and knees, and have caused her to have headaches. These areas have improved over time, in general by about 70 percent, but still cause her pain, functional limitations and distress. I accept Dr. Sangha's description of her functional limitations and his "guarded" prognosis. I accept as well that further substantial improvement is unlikely as she has more or less "plateaued", although some of his recommended treatments may help and counselling may help her to better manage her pain and limitations.
- [224] I do not accept the defendants' argument that her current state may be attributable to degenerative changes in her spine. As Dr. Sangha said, every person in their 60s has degenerative spinal changes but not all are symptomatic. Prior to the accident, Mrs. Halvorson was in very good physical shape and was performing very physical work with no limitations, and so any degenerative changes she had were asymptomatic.
- [225] I also do not accept the defendants' argument that the plaintiff was fully recovered from the effects of the accident by May 2018, the date of the first of the video surveillance. The video - which is really very brief - shows the plaintiff with some modest capabilities, and although it is not consistent with the degree of limitation she generally described, it is hardly proof of full recovery. It may well be that the video was taken on one of her "good days", as the plaintiff said, or it may simply reflect the plaintiff's unduly negative view of her functional status, as discussed above. From the evidence as a whole, I conclude that the plaintiff's limitations are as generally described by Dr. Sangha, whose evidence was not contradicted by any opposing expert evidence.
- [226] I find that the incident in the pool exercise class set the plaintiff back by about three months. I also accept that her later hernia and related surgery would have taken her out of employment even if the accident had not happened. I will take this into account when assessing past income loss.
- [227] I also find that the plaintiff was rendered competitively unemployable as a result of the accident. Her physical limitations, including her limited sitting tolerance, her age (60 at the time of the accident) and her lack of transferable skills all support Mr. Lawless' opinion, which I accept.
- [228] Finally, I address the plaintiff's mental health issues. I do not accept the plaintiff's testimony that, prior to the accident, she was always "bubbly" and "happy-go-lucky". She had a history of mild to moderate depression and had been on medication for that affliction for some time, she had a long history of anxiety, and she was drinking to excess, perhaps for as long as 10 years earlier. Importantly, Mr. Halvorson testified that in the two years prior to the accident the plaintiff was experiencing sporadic bouts of low mood lasting two or three days at a time.

- [229] Dr. Mok opined that the plaintiff had a pre-existing history of major depressive disorder, with anxious distress, which was exacerbated by the accident, a conclusion Dr. Okorie agreed with. I find that to be the case. I note that, pre-accident, the plaintiff was functional despite that condition. I also suspect the plaintiff's depression is a factor that causes her to view her situation more negatively than it is.
- [230] I do not accept that the plaintiff developed SSD as a result of the accident. In a general sense, the diagnostic criteria for SSD require that the person have excessive thoughts and behaviours concerning their injuries or pain and which are disproportionate to the situation. I felt Dr. Mok was evasive when it was suggested to him that the plaintiff's reactions were in fact proportionate to the degree of pain and disability she was reporting, as Dr. Okorie believed. Dr. Mok did not defend that part of his opinion at all well in cross-examination and this has left me unable to accept it. Accordingly, I conclude the plaintiff has failed to prove she developed the psychological disorder of SSD as a result of the accident.

C. Non-Pecuniary Damages

- [231] I will not repeat all the findings I have made. Briefly, I am satisfied that, as a result of the accident, the plaintiff has been left with chronic pain that waxes and wanes somewhat, but which limits her functioning to a substantial extent and has rendered her competitively unemployable. The accident also exacerbated her pre-existing persistent depressive disorder. Her injuries had a severe effect on her life for a considerable time, requiring her to use a walker for about three months, although they are much improved since then. She is still limited in such activities as heavier household tasks, extended sitting, or gardening beyond the tending of raised flower beds. She has less energy and is less social than before.
- [232] The authorities cited by the plaintiff involved wholesale changes in those plaintiffs, with complicating aspects such as mild traumatic brain injury and post-traumatic stress disorder. In general, those cases did not reflect the degree of pre-accident depression or mental health issues that the plaintiff had here.
- [233] The authorities cited by the defendants involved plaintiffs with much milder injuries and full recoveries after two years or so. Those authorities were also a bit dated. For those reasons, they were largely unhelpful.
- [234] Taking into account the various factors listed in *Stapley v. Hejslet*, 2006 BCCA 34, I assess non-pecuniary damages at \$110,000.

D. Past Income Loss

- [235] Mr. Benning prepared a report quantifying the losses of the landscaping business and consequent loss to the plaintiff. He noted that while pre-accident business revenues were relatively consistent at about \$35,000 per year prior to the accident (including the accident year), in 2017 revenues fell by about 30 percent to \$24,300. He assumed that, but for the

accident, revenues would have continued to increase by about five percent per year from 2016 to 2020. Against that, he deducted the gross business income actually earned, but he set the value in 2017 at nil "given that Ms. Halvorson did not work in the business after the accident" and because all the later revenues were attributable to Mr. Halvorson's efforts. Applying the plaintiff's historic share (30 percent) of the gross business income results in a total income loss, net of taxes, of \$41,293.

- [236] I accept the validity of that general approach, but I am unable to accept that the gross business income must be ignored after the accident. Both worked in the business pre-accident, and their efforts garnered revenues of about \$35,000 per year. After the accident, gross revenues fell to \$24,334 (2017) and \$18,617 (2018). To exclude any business revenue after the accident appears to distort the loss by assuming all revenues were lost, which was not the case.
- [237] I also do not accept that business revenues would have increased by five percent per year. I acknowledge that Mr. Halvorson said he increased some of his rates each year while holding others steady, but total revenues were in fact very flat for 2014, 2015 and 2016, being \$34,055, \$35,712 and \$34,649, respectively.
- [238] Assuming a more modest increase of perhaps \$1,000 every other year, and including all revenues of the business until it ceased operations, brings about "without accident" gross business income of about \$177,000 versus "with accident" actual business income of \$77,600, a difference of approximately \$100,000. The plaintiff's share of net business income has been about 30 percent (as noted by Mr. Benning), so the loss to her is about \$30,000 (30 percent of \$100,000).
- [239] Using the proportions reflected in Mr. Benning's figures to calculate a loss net of tax brings about an income loss, net of taxes, of \$25,680. I would round that down to \$25,000 to reflect the fact that the plaintiff's hernia and subsequent hernia surgery would likely have left her unable to work for a time, but I have made only a minimal adjustment for that because her hernia surgery took place in winter, the slowest time for the landscaping business.
- [240] The plaintiff argues that the decision in *Hans* means that the loss should be based on the loss of all business income to the date of trial. However, in *Hans*, the limitations of that working couple were such that one could not work without the other (at paras. 98-102). Here they could, or at least Mr. Halvorson could, as he continued in the business for two more years. *Hans* is therefore distinguishable.
- [241] Finally under this heading, the defendants argue that the business would have ceased in March 2020 in any event, due to the pandemic. I do not accept that this necessarily would have occurred. Outdoor work such as landscaping might well have been one of the limited types of work that would have been unaffected by the pandemic and its associated shutdown. I do not consider this to be a factor in this case.

E. Loss of Future Earning Capacity

- [242] The primary issue here is how long the plaintiff would have continued to work, had the accident not occurred. The plaintiff and her husband both said they would have scaled back when the plaintiff turned 65 (which happened in February 2021), but they would have continued to work.
- [243] I am not convinced the plaintiff and her husband would have continued to work beyond that date. Mr. Halvorson was 71 years old at the time his wife turned 65, and the landscaping work they were doing was heavy work. The fact that he gave up the business in 2018 when he was 69 years old, and at that point working on a much reduced basis, seems to suggest that he would not have carried on for much longer even with the plaintiff's involvement. It also seems to conflict with their stated desire to spend four months of the year in Mexico, to travel to countries other than Mexico, to golf more, and to maintain their close family ties through extended visits to family in Edmonton and Victoria. Most importantly, it conflicts with the plaintiff's answer on discovery that she planned to retire at age 65.
- [244] I accept that there is at least some prospect they would have carried on for a time, on a reduced basis, and so some modest award is warranted. There is also the matter of the interval between the trial date and the plaintiff's 65th birthday in February 2021, although I note the evidence in this case was that the landscaping business is largely done for the season by the end of October. Given these circumstances, I consider the sum of \$6,500 to be an appropriate award for loss of future earning capacity.

F. Loss of Housekeeping Capacity

- [245] The law relating to loss of housekeeping capacity has been addressed by the Court of Appeal in both *O'Connell v. Yung*, 2012 BCCA 57 [O'Connell] and *Kim v. Lin*, 2018 BCCA 77 [Kim].
- [246] In *O'Connell*, the court said:
- [67] As I understand the principle, it is the loss of a capacity - an asset - that is compensated. Accordingly, because the award reflects the loss of a personal capacity, it is not dependent upon whether replacement housekeeping costs are actually incurred. Damages for the cost of future care serve a different purpose from awards for loss of housekeeping capacity. Unlike loss of housekeeping capacity awards, damages for the cost of future care are directly related to the expenses that may reasonably be expected to be required .
- [247] In *Kim*, the court said:
- [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.

- [248] The plaintiff claims a pecuniary award for both past loss of housekeeping capacity and future loss of housekeeping capacity. It is not clear on what basis a past pecuniary award is sought, as no expense was incurred. Past housekeeping tasks formerly done by the plaintiff were done by her husband.
- [249] In Kim, the Court of Appeal said this type of situation is essentially an "in trust" claim, though no mention of that was made by the plaintiff in this case. The court in Kim said "an 'in trust' claim of this sort is in respect of services over and above what would be expected from the family relationship" (at para. 51). I do not see the services provided by Mr. Halvorson, as helpful as they were, as being over and above what would be expected from a spouse.
- [250] As for the future aspect of the claim, the plaintiff says an award for housekeeping services should be based on one hour each day, every day, at \$15 per hour, for 20 years. The defendants say the plaintiff is not disabled but, in any event, her loss is a loss of amenities and not a true loss of capacity.
- [251] I conclude that the plaintiff has suffered a true loss of capacity here because she is unable to do the heavier tasks or tasks that involve working with raised arms. Although to this point Mr. Halvorson has done this work instead, the evidence indicates the plaintiff and her husband probably do not have the money available to pay for outside housekeeping services. I conclude a pecuniary-based award is warranted.
- [252] I consider that assistance with heavier housekeeping would be reasonably needed twice each month, for seven months of the year, to reflect the fact that the plaintiff and her husband would be away in Mexico for four months a year, and visiting relatives that would have them away from home for the equivalent of an additional month each year. I would also base this award on 12 years of accident-related need, in light of my conclusion that the plaintiff (who would then be 76 years old) and her husband (83) would have needed housekeeping assistance by that point even if the accident had not occurred.
- [253] Using a figure of \$200 for each visit results in an annual cost of \$2,800 (\$400 per month x seven months). Using Mr. Benning's multipliers brings about a present value over 12 years of about \$28,400, which is the award I make under this head of damages.

G. Cost of Future Care

- [254] The plaintiff bases her claim for cost of future care on the recommendations of Dr. Sangha and Ms. Wong. She submits two different approaches to quantification: (1) a present value of all of the recommended items, which brings about a total of \$112,732; and (2) an assessment based on her average care expenses already incurred (\$5,000 per year), the present value of which is \$89,800.
- [255] I pause to remark that the second option suffers from the obvious flaw of overstating future expenses because care costs are typically greater in the earlier stages of recovery. I also note there is a duplicated claim for housekeeping assistance within the claim for future care costs.
- [256] As noted earlier, the defendants maintain the plaintiff has little or no need for future care and they have numerous criticisms of Ms. Wong's report.
- [257] In assessing damages for cost of future care I have taken into account the well-established principles for the assessment of these costs, as reflected in the authorities cited by counsel. Of course, the findings I have made earlier form the basis for my assessment.
- [258] I comment on some of the major items as follows:
- a) In-home OT assessment: this was recommended by Dr. Sangha. Although I conclude it is likely the plaintiff's functional status has improved somewhat since the date of Dr. Sangha's assessment, I am persuaded that this item still ought to be allowed. This is a one-time cost of \$850.
 - b) Psychological assessment and counselling: this was recommended by Dr. Sangha, Dr. Mok and Dr. Okorie. Both of the psychiatrists recommended 12 sessions. I allow this at \$2,400.
 - c) Treatments for pain management: Ms. Wong noted that the plaintiff has continued with passive treatments (massage and IMS) for symptom management, receiving treatment every two weeks. Ms. Wong assessed that cost at cost at \$1,920 to \$2,400 for 24 sessions each year. Although Ms. Wong lists this item under "recommendations", she does not discuss the need for this treatment, or the need for this level of treatment, other than to note that this is the treatment the plaintiff is currently receiving. Notably, Dr. Sangha did not make any recommendations for passive treatment.

I accept that recommendations for treatment can be made by an occupational therapist, but here there is no actual discussion of the topic. I accept as well that the plaintiff testified she felt symptom relief from receiving passive treatments every two weeks, but from long experience in cases of this sort I am well aware that modern medical thinking is not generally in favour of passive treatments without end. In these circumstances, I consider it appropriate to require a much more specific and better-justified recommendation before the cost of this level of passive treatment would be allowed.

I accept the need for occasional symptom relief, perhaps five or six treatments a year. Based generally on the present value table of Mr. Benning, I allow \$6,000 for this item.

- d) Medications: this claim is made complicated by the fact that the plaintiff was on most of the same medications prior to the accident and was likely to have continued them even if the accident had not occurred.

Ms. Wong costs these medications at \$688 annually. The majority of the expense appears attributable to the medications she was already taking. Doing the best I can on the basis of limited information, I would attribute three-quarters of that cost to pre-existing issues, leaving one quarter to the accident. Applying the present value table results in the sum of \$3,100, which is the amount I allow under this item.

- e) Fitness facility: I accept the need for the plaintiff to have access to a fitness facility. Ms. Wong costs this at \$402 per year. The present value of that cost to age 85 is \$6,200, which is the sum I allow.
- f) Yard maintenance: Ms. Wong recognized that the regular maintenance of the yard was now being done by Mr. Halvorson exclusively. Both the plaintiff and her husband testified that prior to the accident she did most of the yard work. Ms. Wong's recommendations are relatively modest, calling for some additional assistance only and not wholesale replacement of services. I accept those recommendations in a general sense. I assess this item at \$5,000.

[259] The total amount allowed for cost of future care is \$23,550.

H. Special Damages

[260] There is relatively little difference between the parties on this aspect, with the plaintiff claiming special damages in the rounded amount of \$24,286 and the defendants arguing that \$20,000 would be an appropriate sum.

[261] There are some questionable items, including a pedicure and items of exercise clothing that might well have been incurred in any event. Also, whether 68 massage treatments were medically justifiable is an open question. Finally, it appears all medication expenses are claimed, yet the plaintiff was already on some of these same medications at the time of the accident.

[262] Given these considerations, I conclude the sum suggested by the defendants is appropriate. I award \$20,000 for special damages.

IX. Conclusion

[263] I assess damages in this matter as follows:

Non-pecuniary damages:

\$110,000

Past income loss:

25,000

Loss of future earning capacity:

6,500

Loss of housekeeping capacity:

28,400

Cost of future care:

23,550

Special damages:

20,000

Total:

\$213,450

[264] The parties have leave to address any adjustments that may have to be made to the award.

[265] Unless there are matters the parties wish to bring to my attention, the plaintiff will have her costs.

"Blok J."

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