

CANADA / JUDGMENT

## Heo v. Kennedy

2020 BCSC 464

### COURT

Supreme Court of British Columbia

### DECIDED

30 March 2020

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2020 BCSC 464 Heo v. Kennedy

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Heo v. Kennedy,

2020 BCSC 464

Date: 20200330

Docket: M163960

Registry: Vancouver

Between:

Heesook Heo

Plaintiff

And:

Keenan Kennedy and Kelvin Daniel Kennedy

Defendants

Before: The Honourable Justice Morellato

Reasons for Judgment

Counsel for the Plaintiff:

P.R. Bisbicis

E. Yacout

Counsel for the Defendants:

G. Ritchey

Place and Date of Trial:

Vancouver, B.C.

September 9-26, 2019

Place and Date of Judgment:

Vancouver, B.C.

March 30, 2020

## I. INTRODUCTION

- [1] Mrs. Heo claims damages for personal injuries sustained in a motor vehicle accident which occurred on June 15, 2015 in Surrey, British Columbia ("Accident"). While Mrs. Heo was driving, she was rear-ended by the defendants, causing her to rear-end the vehicle in front of her. Liability is admitted.
- [2] Mrs. Heo suffered neck and lower back injuries, along with other symptoms including chronic pain and depression. The defendants have admitted that Mrs. Heo's neck injury was caused by the Accident and also that the neck injury required surgery. However, the defendants raise issues of credibility and causation; they submit that following the neck surgery and with the passage of time, Mrs. Heo has recovered from any disabling accident-related symptoms. They argue that her current symptoms have not been proven to be causally related to the Accident.
- [3] Mrs. Heo claims the usual categories of damages: non-pecuniary damages for pain and suffering, loss of past income earning capacity, loss of future income earning capacity, cost of future care, loss of housekeeping capacity and special damages. She also makes a claim for an in trust award for services provided by her husband as a result of her injuries. The parties have agreed to special damages in the amount of \$15,077.26.

## II. FACTUAL BACKGROUND AND SUMMARY OF EVIDENCE

### A. Overview

- [4] Mrs. Heo is 53 years old and was 48 years old at the time of the Accident. She married Mr. Jeff Heo in 1992 in Korea and her son, Kane, was born there in 1994. The family immigrated to Canada in 1996.
- [5] Both Mrs. Heo and Mr. Heo testified with the assistance of an interpreter. On several occasions, Mrs. Heo took issue with the accuracy of the interpreter's translation but these concerns were resolved.

- [6] When the Accident occurred, Mrs. Heo was stopped in traffic and her vehicle was rear-ended. There was a second impact, as she was pushed into the vehicle in front of her. Police and an ambulance were called to the scene. She did not lose consciousness. She was not taken to the hospital and did not attend a clinic. She experienced a sore back, a sore neck, sore shoulder and headaches after the Accident, as well as dizziness and numbness in her arms and legs.
- [7] In November 2017, Mrs. Heo underwent neck surgery due to injuries she sustained in the Accident. The neck surgery successfully addressed certain symptoms.

## B. Pre-Accident

- [8] Mrs. Heo testified she led a very active and full lifestyle before the Accident: she exercised every day, either on her treadmill at home, or by going for runs outdoors; she practiced yoga at home and loved to dance; she worked, full-time or part-time; she cleaned her home, shopped and cooked without difficulty. She stated she spent approximately 6 or 7 hours a week cleaning her home.
- [9] Mrs. Heo testified that although she had a prior accident in 2003 or 2004, she was not injured as a result. Prior to the Accident in 2015, she did not have the symptoms she has now: no neck or low back pain; no numbness or tingling sensations in her body; no discomfort in her throat or changes in her voice. She testified she was happy and did not suffer from depression.
- (i) Employment
- [10] In 1998, Mrs. Heo completed a one-year hairdressing course and began working as a hairdresser. Between 1998 and 2002, she worked part-time, full-time and also took time off. Her earnings as a hairdresser were very modest; she earned minimum wage plus tips.
- [11] In 2002, Mrs. Heo began working full-time at a family-owned tutoring company, Etum Academy. Her husband managed the finances of the family business. For the first two years the company made "little money", and thus she received a very modest income; from 2005 to 2008 Mrs. Heo states she made between \$25,000 to \$30,000 per year. During this time, Mrs. Heo was actively engaged in recreational and work activities. She also cooked, cleaned and took care of her home.
- [12] Mrs. Heo testified that when she worked at Etum Academy with her husband, she was responsible for a number of administrative tasks. She was also responsible for sales. She would speak to parents and persuade them to enroll their children.
- [13] Mr. Heo became seriously ill in 2008 and Etum Academy ceased operations. He was misdiagnosed as having terminal cancer. Within approximately six months of Mr. Heo's cancer diagnosis it was determined that his diagnosis was incorrect. Mrs. Heo did not return to any form of work until April 2010. After his recovery, and prior to 2010 when he started a new business, Mr. Heo worked from home as a tutor, to assist with the family finances. Mrs.

Heo did not testify about the reason she chose to not work after Mr. Heo's recovery and before April 2010.

- [14] Mrs. Heo started working again in April 2010 along with her husband, when she and her husband opened a new business named Sung Moon Learning Centre ("Sung Moon"). The business was first located in Langley. In 2012, they moved the business to Abbotsford. No records were produced with respect to income earned in the period Sung Moon operated in Langley. Mr. Heo testified that this business made "little money" in the early years, approximately \$10,000 to \$20,000. He testified that the income earned by Sung Moon was split equally between himself and Mrs. Heo.
- [15] In 2012, Mrs. Heo and her husband moved Sung Moon to Abbotsford. She and her husband continued to operate that business after the Accident until 2017, when it closed.

### C. Post-Accident

#### (i) Pre-surgery

- [16] Mrs. Heo testified that after the Accident she experienced constant neck and lower back pain, as well as headaches and dizziness. She testified that she also developed pain in her shoulders and tingling sensations in her arms and legs. She testified that she "could be driving, sitting in a chair - it makes [her] restless because it hurts all the time". She testified that she could not sit on a sofa and watch TV, or sit at a table and have dinner because of the pain. She testified that she would sometimes rather not eat because sitting caused her too much pain.
- [17] Mrs. Heo testified that after the Accident, she constantly felt dizzy. She testified that because of her dizziness, she could not "even think about running" or resuming her pre-Accident lifestyle. She stated that she also became depressed. She felt numbness in her feet, especially in the toes, and also experienced weakness in her legs.
- [18] Mrs. Heo testified that because of the constant neck pain, she required pain medication. She explained that the medication she has been prescribed made her dizzy and forgetful, and also made her feel "dreamy". While the medication alleviates the pain in her neck and back temporarily, the pain always returns. She testified that if she did not take her medication, she felt like she "could die".
- [19] Mrs. Heo testified that after the Accident, both her arms began to feel very hot, almost like they were burning. She testified that because of that sensation she could no longer wear long sleeves. She testified that if anything touched her arm it felt like her arm was burning. Mrs. Heo testified that she also had a tingling sensation that began in her left shoulder and radiated down her whole body. She had trouble sleeping at night because of the pain.

#### (ii) Post-Surgery

- [20] Mrs. Heo testified that before the surgery, "the pain was much worse", and that her symptoms improved after her surgery. She acknowledged that after her surgery, the frequency of her headaches declined. She testified that she now experiences fewer headaches, 3 or 4 times per week. She stated that sometimes the headaches go away when she sleeps but other times the headaches will continue into the morning.
- [21] Mrs. Heo testified that after the surgery, the tingling sensations were limited to her left shoulder area as opposed to her entire back. She experienced dizziness less frequently, but testified she continues to experience dizziness whenever she has a headache.
- [22] Mrs. Heo testified that since the surgery, she still gets numbness in her feet and her legs continue to feel weak. She testified that sometimes while driving, she loses sensation in her feet and must ask herself "do I have my foot on the gas pedal".
- [23] Mrs. Heo testified that after the surgery she developed additional symptoms that were not present before: she started feeling pressure around her neck, making it difficult to breathe and difficult to speak. Mrs. Heo describes it as a "choking sensation". She testified she lost her normal tone of voice. She testified she can only vocalize very low tones of voice or high tones; this was not apparent during her days on the witness stand.
- [24] Mrs. Heo continues to take medication for pain but she struggles with the effect of the medications, which she stated make her feel dizzy or foggy, and affect her concentration. She also struggles with depression.

(iii) Activities after the Accident

- [25] Mrs. Heo testified that since the Accident, she has been unable to run or exercise. She testified that she cannot exercise because it makes her pain worse. She explained that being unable to exercise makes her sad.
- [26] Mrs. Heo testified that she can no longer do home exercises or aerobics like she once did because; when she moves, she experiences headaches, dizziness and pain. Mrs. Heo testified that prior to the Accident she would spend free time socializing with friends or exercising but now she just stays at home.
- [27] Mrs. Heo testified that since the Accident she has been unable to be intimate with her husband. She stated:

In the beginning we did try but my neck pain was excruciating, lower back pain was really bad too. Later on I became afraid of him touching me. Like I mentioned earlier, both arms--I was getting this burning sensation when my husband even by accident touched my arm, I got angry, I got frustrated I was irritable because of the pain.

[28] Mrs. Heo testified that she is unable to clean her current house because of the physical pain she experiences and her depression. During her testimony she stated that "I get up and do a little bit and then I get dizzy and that repeats one [day] after another and then I don't want to bother anymore". After the Accident her husband started cooking but, after a few years, he stopped cooking and orders take- out. She further testified that now, they eat instant noodles.

(iv) Employment

[29] Following the Accident, Mrs. Heo worked on a reduced hours basis at Sung Moon. After her surgery, she did not work for about a year. In 2018, from March to June, Mrs. Heo travelled to Korea with her husband to visit family and friends. Mr. Heo stayed in Korea longer to explore business opportunities.

[30] In December of 2018, Sung Moon closed. Throughout her years at Sung Moon, Mrs. Heo's income was modest, ranging from a low of approximately \$3,400 to a high of \$22,073.

[31] In December 2018, Mrs. Heo and her husband opened their sushi bar ("Sushi Bar"). This is a small sushi bar, located in a grocery store; it is part of the deli and food area of the grocery store.

[32] Mrs. Heo has been allocated a monthly income from proceeds of the Sushi Bar business. The income allocation has varied over time and is determined by her husband. Mrs. Heo does not receive any paycheques, rather, moneys are simply deposited into their joint account from the business. From the commencement of the business in December 2018 until July 31, 2019, the amount of income allocated to Mrs. Heo was \$12,905.44.

[33] Mr. Heo testified that when the Sushi Bar first opened, she would start working at 6:30 a.m. and would stay until 5:30 or 6:00 p.m. However, she stated that in May, June, July and August 2019, she worked reduced hours due to her pain level and her income was reduced.

[34] She testified she now works from about 7:30 a.m. (sometimes later) to 11:00 or 11:30 a.m., leaves for a while and then goes back to work. There are some days she cannot return to work, or her husband sends her home because she is in pain.

[35] Mrs. Heo testified that "these days, I don't believe I'm much help anymore I do minor tasks". An employee was hired at the Sushi Bar and does the work she used to do before she reduced her hours; that employee is paid to \$14.25 an hour. Mrs. Heo testified that before the Accident, she planned to work until her late 60's or 70's.

[36] Mrs. Heo also testified that if the Accident had not happened, she would have several employment opportunities working outside of her husband's businesses. She testified that she could work as a counselor for a tutoring school, she could work as a waitress at a sushi restaurant, or she could make sushi at a restaurant.

(v) Treatment

- [37] Mrs. Heo has attended many physiotherapy and message therapy sessions since the Accident. To the date of trial, she had attended 283 such treatment sessions. Presently, she is attending counseling for what her legal counsel described as "emotional mental symptoms".
- [38] Mrs. Heo testified that while the physiotherapy improves her neck and back pain, the treatment provides temporary relief only.

#### D. Lay Witnesses

- [39] Mrs. Heo's husband testified, along with her friend, Danka Lakomy, a Sushi Bar employee, and her son. The evidence of these lay witnesses largely echoed her evidence: she was a healthy, happy, productive and active woman prior to the Accident, but has suffered from chronic neck and back pain since the Accident.
- [40] Mr. Heo testified that in the months following the Accident, his wife's symptoms "got worse and worse - I was very worried". Her activity level was compromised both at home and work and it was clear she was experiencing pain; he could see her grimacing and frowning. There were three instances before her neck surgery when he witnessed his wife collapse from weakness and pain; she required immediate bed rest.
- [41] Like his father, Mrs. Heo's only son, Kane, witnessed significant changes in his mother after the Accident. Before the Accident, she was very active, exercised regularly, took meticulous care of their home, worked and cooked for the household. The family also boarded three Korean home-stay students; Mrs. Heo cooked and cleaned for the students. While Kane Heo testified that income was generated from this activity, no evidence was led in this regard by any witness. Mrs. Heo did not testify about the work she did in regard to home-stay students, how much income was received, or who received it.
- [42] Kane Heo testified that his mother's personality has changed significantly since the Accident. She is more emotional now, less happy, and less focussed during everyday conversations. He also noticed, when he worked with her at their Sushi Bar in May 2019, that she was in pain and was not very productive. For example, for every four rolls he made, she made only one. Their employee, Mr. Pyoho, who also worked with Mrs. Heo at the Sushi Bar, testified that Mrs. Heo was "very slow" at work.
- [43] No lay witnesses were called by the defendants.

#### E. Expert Witnesses

##### (i) Dr. Thomas Park

- [44] Dr. Park testified as a fact witness and as an expert witness in this action. He has been Mrs. Heo's family doctor since 2005. He was qualified to provide opinion evidence in the diagnosis, treatment, prognosis and causation of injuries that are treated by a family medicine practitioner, including injuries and conditions arising from motor vehicle collisions.

[45] Dr. Park opined that Mrs. Heo suffered from the following injuries as a result of the Accident: cervical strain and cervical radiculopathy; tension headaches; lumbar strain; concussion/post-concussion syndrome; and depression /adjustment disorder. He concluded that:

Mrs. Heo's prognosis for recovery from her injuries remains guarded. It has been 4 years since her accident and she remains quite symptomatic still, particularly with headaches and neck pain. I suspect her recovery has plateaued for now.

[46] Dr. Park explained that Mrs. Heo suffered a concussion in the Accident and that it caused a number of symptoms including mood changes, irritability, dizziness, and vertigo. He also diagnosed Mrs. Heo with an adjustment disorder as a result of the trauma of the Accident; he explained the particular diagnosis as one where Mrs. Heo has trouble coping with day-to-day life and its stressors.

[47] Dr. Park testified that when he treated Mrs. Heo from 2005 and for the intervening 10 years before the Accident, she did not complain of headaches, neck pain, depression or mood swings. She suffered from no soft tissue injuries prior to the Accident, except for one occasion when she reported low back pain.

[48] Dr. Park testified that prior to the Accident Mrs. Heo never cried during her office visits. After the Accident, during office visits with him, they would discuss the "situation about her pain and how she was coping and she would become tearful". Dr. Park described Mrs. Heo before the Accident as "pleasant, outgoing & happy", but as "distraught, upset, frustrated, in pain, and having difficulties with her situation" after the Accident.

[49] Dr. Park testified that Mrs. Heo is currently on Cymbalta, an anti-depressant, also used for pain control. She is also on Gabapentin, which is a pain killer for nerve pain. She is taking Tramacet episodically, which is a pain killer similar to Tylenol 3. She occasionally takes cyclobenzaprine, a muscle relaxant and she is also taking Celebrex, an anti-inflammatory medication for musculoskeletal pain. Dr. Park testified that the medication Mrs. Heo is taking can cause her to feel "zoned out" and fatigued.

[50] Dr. Park testified that Mrs. Heo is awaiting treatment for her vertigo problem and also to be treated by a physiatrist. The evidence did not establish a clear or understandable reason for the delay in treatment. Dr. Park indicated Mrs. Heo needed to be cleared by a neurosurgeon first; he testified that there is currently a 2 year wait to see a neurosurgeon. Dr. Park also testified that he has not yet referred Mrs. Heo to a physiatrist because she needed to be cleared by a neurosurgeon for this referral as well. Mrs. Heo indicated she wished to see a neurosurgeon during the last two years. She suggested Dr. Nikolakis refused to see her. Dr. Nikolakis confirmed on the stand that he would be willing to see her and that he had not refused to see her. I accept Dr. Nikolakis' evidence.

- [51] On cross-examination, Dr. Park acknowledged that he relied heavily on what Mrs. Heo told him when assessing and treating her. He also acknowledged that his clinical notes in December 2017 through February 2018 indicated that Mrs. Heo appeared to be improving after her neck surgery, although he noted she reported having ongoing aches and "generalized myalgias".
- [52] Dr. Park did not see Mrs. Heo from February 2018 until August 2018. He stated that after this break she reported painful and limited movement in her lower back. She also complained about chronic hoarseness in her voice and so Dr. Park referred Mrs. Heo to an ear, nose and throat specialist.
- [53] Overall, Dr. Park agreed that Mrs. Heo made "a pretty good recovery" from her neck surgery.

(ii) Dr. Sahjpaul

- [54] Dr. Sahjpaul was qualified as an expert in neurosurgery, including expertise relating to spinal disorders and soft tissue injuries. He concluded that Mrs. Heo suffered a disc protrusion as a result of the Accident. He explained that a disc protrusion can also be described as a disc herniation or bulge.
- [55] Dr. Sahjpaul opined that Mrs. Heo also currently suffers from: headaches and neck pain due to a combination of myofascial pain, mechanical pain and discogenic pain; dizziness; low back pain; and what he referred to as "extremity symptoms." He also concluded that "more likely than not, Mrs. Heo's current symptoms will continue on an ongoing basis."
- [56] Dr. Sahjpaul testified that surgery will typically relieve nerve-related pain but it is not effective at managing soft tissue pain. He stated that Mrs. Heo had a two-level cervical arthroplasty (at C4/C5 and C5/6) which entailed a disc replacement. He explained that this surgery involves making an incision to the right of the voice box, and down the spine to the disc that is removed. He explained that the trachea or voice box is one of the "important structures" which a surgeon is required to work around.

(iii) Jerica Ditson

- [57] Ms. Ditson was qualified as an occupational therapist with expertise in Functional Capacity Evaluations and Cost of Future Care Assessments.
- [58] Ms. Ditson conducted a functional capacity evaluation and assessed Mrs. Heo's functional capacity post-surgery. She acknowledged relying on Mrs. Heo's self-reports of her history and symptoms. She also reviewed the medical legal reports of Dr. Park and Dr. Sahjpaul. She concluded that overall test findings reveal that "Mrs. Heo is likely not competitively employable on a part-time or full-time basis as an Academic Counsellor/tutor". Ms. Ditson opined, however, that Mrs. Heo is likely able to perform sushi restaurant work on a part-time basis, in an accommodated environment.

(iv) Mr. Derek Nordin

[59] Mr. Nordin was qualified as an expert in vocation rehabilitation. He opined:

It is my opinion that the 2014 accident has compromised Ms. Heo's ability to work full-time in a self-employment context. She is, consequently, not able to work as many hours as she could have absent the subject accident

[60] Mr. Nordin also opined:

it is [in] Ms. Heo's best interests to remain in a self-employed capacity, and to continue working as best she can.

[61] Mr. Nordin effectively opined that Ms. Heo would be best and more easily accommodated within the context of the family's Sushi Bar business.

[62] No expert witnesses were called by the defendants.

### III. NON-PECUNIARY DAMAGES

[63] It is well established that, in determining non-pecuniary damages, each case must be assessed based on the particular facts before the court and in light of the following factors delineated in *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46:

[46] The inexhaustive list of common factors cited in *Boyd* that influence an award of non-pecuniary damages includes:

- (a) age of the plaintiff;
- (b) nature of the injury;
- (c) severity and duration of pain;
- (d) disability;
- (e) emotional suffering; and
- (f) loss or impairment of life;

I would add the following factors, although they may arguably be subsumed in the above list:

- (g) impairment of family, marital and social relationships;
- (h) impairment of physical and mental abilities;
- (i) loss of lifestyle; and
- (j) the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff: *Giang v. Clayton*, [2005] B.C.J. No. 163 (QL), 2005 BCCA 54).

[64] As noted by the Court of Appeal in *Moskaleva v. Laurie*, 2009 BCCA 260 at para. 95, the amount of the non-pecuniary award should compensate for more than just direct injuries:

[95] The underlying purpose of non-pecuniary damages is to "make life more endurable" and should be seen as compensating for more than just a plaintiff's direct injuries. [T]he quantum of an award is determined through a functional approach and should not necessarily correlate with the gravity of the injury.

[Citations omitted.]

[65] Accordingly, the amount of an award for non-pecuniary damage should not depend solely on the seriousness of the injury but must also reflect how the injury affects the condition of the plaintiff, in his or her particular situation. The gravity of the injury alone will not be determinative. An appreciation of the individual's loss is key; consolation or solace for his or her distress is embodied in the compensation award: *Lindal v. Lindal*, [1981] 2 S.C.R. 629 at 636-637. In dealing with an award of this nature, it will be impossible to develop a "tariff". An award will vary in each case "to meet the specific circumstances of the individual case": *Thornton v. Board of School Trustees of School District No. 57 (Prince George)*, [1978] 2 S.C.R. 267 at 284.

[66] I have examined each of the factors in *Stapley* and our Court of Appeal's functional analysis in *Moskaleva*, in light of the circumstances of this case. I have also taken into account the specific submissions of the parties regarding the factors that ought to inform my analysis in assessing non-pecuniary damages. In doing so, I have, for example, examined the nature of the injuries that Mrs. Heo sustained as a result of the Accident, including whether and to what degree her various injuries have persisted. As discussed further below, I have concluded that Mrs. Heo suffered injury to her neck and low back as a result of the Accident, and that this pain has persisted to a lesser extent following her surgery. I also find that she suffered a concussion and continues to experience some headaches and numbness in her lower extremities.

[67] Further, I have also concluded that Mrs. Heo's overall health, recreational activities and general lifestyle have been impaired as a result of the Accident. I have considered how her injuries, functional losses and continuing symptoms have curtailed her ability to maintain the active lifestyle she once did, including working full-time, exercising, cooking and cleaning her home, including Mrs. Heo's loss of housekeeping capacity: *Kim v. Lin*, 2018 BCCA 77 at para. 33; *Riley v. Ritsco*, 2018 BCCA 366 at para. 100. I also accept her evidence that she has suffered from depression and continues to do so as a result of her injuries.

[68] Counsel for Mrs. Heo asserts that the non-pecuniary damages in this case should be \$200,000. Counsel for the defendants submit that a fair award would be fall within the range of \$75,000 to \$130,000. The \$75,000 award is based in part on the defendants' argument that Mrs. Heo has essentially recovered from the injuries sustained in the Accident. Counsel for the defendants argues that Mrs. Heo's soft tissue injuries have resolved in large measure that that she has exaggerated the extent of her ongoing symptoms, particularly following the neck surgery which, he submits, largely resolved Mrs. Heo's complaints. He submits that Mrs. Heo's evidence of significant ongoing symptoms is not credible and is not supported by

the contemporaneous medical evidence; as a result, little if any weight should be given to the medical opinion evidence tendered supporting her evidence.

- [69] Counsel for the defendant points to admissions against interest made by Mrs. Heo to Dr. Nikolakis after he performed her neck surgery, to the effect that her symptoms significantly resolved following the surgery. Mrs. Heo expressly disputed the accuracy of statements attributed to her by Dr. Nikolakis. In any event, I find there is a greater degree of similarity between Dr. Nikolakis' evidence and that of Mrs. Heo than either party acknowledges.
- [70] Of note, Dr. Nikolakis testified and confirmed that his reports were dictated within minutes of his clinical examinations with Mrs. Heo, affirming he was careful to accurately record these visits. Dr. Nikolakis' Report of January 17, 2018 provides:
- a) Overall, Mrs. Heo indicated that her symptoms are "significantly improved relative to before surgery."
  - b) The pain in the rear and sides of Mrs. Heo's neck radiating into her shoulder muscles had resolved.
  - c) The pain radiating into her arms had resolved.
  - d) The headaches had resolved.
  - e) She had not noticed any motor or sensory changes in her arms or legs.
  - f) She complained she was feeling discomfort deep in her neck, likely in the bone, in the cervical spine.
  - g) She also indicated her voice was slightly changed since her surgery but she was eating and drinking fine.
  - h) On physical examination, Mrs. Heo's voice sounded normal, although her husband indicated it was slightly lower than before. She was able to swallow her saliva without difficulty and her upper and lower extremity motor function was formal. She felt light touch through the upper extremities. Her gait was normal and she could stand on her heels and toes without difficulty.
  - i) Mrs. Heo's "wound has healed beautifully."

[71] In his report of Report of July 31, 2018, Dr. Nikolakis observed in part as follows:

- a) She had good strength and sensation in her upper extremities. The discomfort in her neck was dramatically better than before the surgery.
- b) She felt she still has an altered voice.
- c) She had a tingling numbness starting in front of her shins and extending down the medial aspect of both feet and under the soles and the first metatarsal/phalangeal joint.

- d) She denied any gait change, any bowel or bladder functional change, or any saddle anesthesia.
- e) Her cervical range of motion was excellent with no pain on palpation of the cervical spine. Her neurological examination in the upper extremities was completely normal. Tone, bulk, power sensation and reflexes were completely normal.
- f) She had "subjective hypoesthesia" running up and down the front of her shins, and then over the medial aspect of her ankles and feet down under the bottom of her foot and into the area of her first metatarsal-phalangeal joint. This feeling of numbness was symmetrical from right to left and Mrs. Heo could still feel light touch to these areas, it just did not feel as sensitive as the rest of her lower extremities. Mrs. Heo could stand on her heels, toes and perform a partial squat.

[72] As regards to a treatment plan moving forward, Dr. Nikolakis states:

I have told her I believe the numbness is benign. Should it progress I have asked her follow-up with her family physician, but based on her symptoms today she does not have a lumbar radiculopathy syndrome.

Lastly, I have sent her for flexion and extension x-rays of the cervical spine just to make sure that the cervical arthroplasty is still functional. If there are any concerns I will call her back in my office. If not, I have told her it is safe to resume all normal activities starting today.

[73] Following this report, no evidence was led at trial regarding a dysfunctional cervical arthroplasty. I also accept Dr. Nikolakis' testimony that he would have seen Mrs. Heo if any other symptoms required treatment or his intervention.

[74] While I appreciate that Mrs. Heo's evidence does not entirely align with the evidence provided by Dr. Nikolakis or others, I am unable to conclude that Mrs. Heo's evidence regarding the nature and extent of her symptoms is essentially unreliable or that she is, fundamentally, not a credible witness. While she was at times evasive, dramatic and combative, Mrs. Heo ultimately acknowledged during cross-examination that her neck surgery improved her symptoms. Nor am I able to disregard the evidence of Dr. Nikolakis. Although Mrs. Heo testified her symptoms were more severe, Dr. Nikolakis acknowledged Mrs. Heo had ongoing symptoms and he documented those. I found he did so diligently. I should also say that I found Dr. Nikolakis to be objective and thoughtful; he was a very credible and impressive witness.

[75] On the basis of Mrs. Heo's evidence and the totality of the evidence before me, I find that the neck surgery was a success overall. I also find that Mrs. Heo continues to have some residual neck pain caused by the Accident, numbness, hoarseness in her voice, and the other conditions documented and later affirmed by Dr. Nikolakis on the witness stand (as set out above). I do not find that these ongoing symptoms are as debilitating as Mrs. Heo indicated, although I accept they are present.

- [76] In summary, I find that Mrs. Heo continues to suffer from some residual and continuing neck and low back pain caused by the Accident, and that the pain has lessened following the surgery and over time. I also find that she suffers with headaches from time to time, some hoarseness in her voice, and some numbness in her lower extremities. I accept that her depression continues, and that she continues to have difficulty coping with day-to-day life.
- [77] I have considered the cases counsel have drawn to my attention, as well as the above referenced case law: see also *Felix v. Hearne*, 2011 BCSC 1236; *Shongu v. Jing*, 2016 BCSC 901; *Mandra v. Lu*, 2014 BCSC 2199. In this light, and having regard to the specific circumstances before me, I am of the view that an award of \$150,000 is fair and reasonable.
- [78] This conclusion is informed not only by the applicable authorities but also by my conclusion that Mrs. Heo sustained significant injuries as a result of the Accident and that, while the neck surgery alleviated some of Mrs. Heo's disability and pain, a number of symptoms (as articulated above) have not resolved and are likely to continue indefinitely.

#### IV. PAST LOSS OF EARNING CAPACITY

- [79] Assessments of loss relating to past and future earning capacity are subject to the same legal test and involve consideration of hypothetical events. In essence, a plaintiff is not required to prove these hypothetical events on a balance of probabilities. Rather, future or hypothetical possibilities will be taken into consideration as long as they constitute real and substantial possibilities and not mere speculation: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 27; *Morlan v. Barrett*, 2012 BCCA 66 at para. 38. Where the plaintiff establishes a real and substantial possibility of past loss of earning capacity, the Court must weigh the hypothetical or future event according to its relative likelihood: *Athey* at para. 27; *Gao v. Dietrich*, 2018 BCCA 372 at para. 37.
- [80] Greater clarity on the application of these principles is provided by our Court of Appeal in *Grewal v. Naumann*, 2017 BCCA 158:
- [45] The governing authority in this Court is *Smith v. Knudsen*, 2004 BCCA 613 (CanLII). In *Smith*, this Court, after an extensive review of the authorities, rejected the proposition that a claim for past loss of opportunity had to be established on a balance of probabilities. Rowles J.A. wrote for the court. She explained that the plaintiff in the first instance was required to establish both liability and causation on a balance of probabilities. This required the plaintiff to establish that the respondent's negligence, in whole or in part, caused the accident, and that the injuries the appellant sustained in the accident caused or contributed to the loss for which damages were sought (para. 26).
- [46] Rowles J.A. then went on to discuss the assessment of damages. She noted that the same test applies regardless of whether you are assessing past or future loss of earning capacity. In both situations the judge is considering hypothetical events. She reasoned:

- [29] What would have happened in the past but for the injury is no more "knowable" than what will happen in the future and therefore it is appropriate to assess the likelihood of hypothetical and future events rather than applying the balance of probabilities test that is applied with respect to past actual events.
- [81] A trial judge must consider these guiding principles in light of the relevant factors found within the evidence as a whole: *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 10. Such factors include:
1. Whether the plaintiff has been rendered less capable overall from earning income from all types of employment;
  2. Whether the plaintiff is less marketable or attractive as an employee to potential employers;
  3. Whether the plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to her had she not been injured; and
  4. Whether the plaintiff is less valuable to herself as a person capable of earning income in a competitive labour market.
- [82] I am in agreement with counsel for Mrs. Heo that she must demonstrate that the injuries she suffered in the Accident and the resulting symptoms have, on a balance of probabilities, impaired her ability to earn income and, further, that there is a real and substantial possibility that her diminished earning capacity has resulted or will result in a pecuniary loss. As discussed below, I have concluded that Mrs. Heo has satisfied these legal tests.

### A. Position of the Plaintiff on Past Loss of Earning Capacity

- [83] Counsel for Mrs. Heo proposes that her lost of past earning capacity ought to be assessed against her basic potential earning ability of \$30,000 per year for each of 2015, 2016 and 2017, less her actual earnings for those years, as follows:
- 2015:  $\$30,000 - \$22,073 = \$7,927$
- 2016:  $\$30,000 - \$15,211 = \$14,789$
- 2017:  $\$30,000 - (\$92,000 + \$715) = \$29,193$
- [84] Mrs. Heo submits that because she underwent surgery at the end of November 2017 and did not begin to work again until December of 2018 she is entitled to compensation for a full year of capacity loss, at an additional \$30,000.
- [85] Essentially, counsel for Mrs. Heo argue that there is a real and substantial possibility that but for the Accident, Mrs. Heo would have gone out and worked full-time earning approximately \$15.00/hour, or \$30,000 per year.

[86] From January to May 2019, Mrs. Heo was earning approximately \$2,000 per month. In June, July & August, Mrs. Heo's wage was reduced to approximately \$1,000, when her hours decreased.

[87] Counsel submit that a reasonable assessment for Mrs. Heo's loss from January to August 2019 can also be assessed against Mrs. Heo's basic earning ability of \$30,000/ year or \$2,500 per month, as follows:

- i. January-May 2019: \$2,500 per month - \$2,000 per month earned = \$500 loss for each month; and
- ii. June-August 2019: \$2,500 per month - \$1,000 per month earned = \$1500 loss for each month.

[88] The total loss for each period outlined above is \$2,500 and \$4,500 respectively for a total loss of \$7,000 in 2019 to the date of trial.

[89] Counsel for Mrs. Heo argue that the \$30,000 against which she is measuring her loss of past earning capacity is fair and reasonable given the following contingencies. Her counsel:

If Sung Moon did not continue to increase its profits, Mrs. Heo would have sought employment elsewhere earning minimum wage of \$15.00/hour or approximately \$30,000 per year.

Mrs. Heo's expenses would decrease, in which case her net profit would have increased without of an increase in business revenue. At its peak, before the Accident, Sung Moon Academy was earning \$70,196 in gross revenue.

[90] As explained by Mr. Heo in his testimony, the net profits reported on Mrs. Heo's tax returns are her half-share of the net profits.

[91] In sum, counsel for Mrs. Heo, submits the total amount of loss of past earning capacity is \$88,909, representing the following annual losses:

2015: \$7,927

2016: \$14,789

2017: \$29,193

2018: \$30,000

2019: \$7,000

## **B. Position of Defendants on Past Loss of Earning Capacity**

[92] Counsel for the defendants takes issue with these calculations, claiming Mrs. Heo is not entitled to any compensation for past loss of earning capacity. In the alternative, counsel submits Mrs. Heo's damages for past loss of earning capacity should be limited to \$13,500.

- [93] The defendants argue that even if Mrs. Heo establishes a real and substantial possibility of the loss, that is not the end of the matter. In particular, they submit that establishing a real and substantial possibility of a loss does not mean the entire value of that loss is recoverable. Counsel argues that the assessment of the loss (the damages recoverable) must take into account both the value of the prospective loss and the likelihood that the event (loss) would have, in fact, occurred but for the Accident. It is a two step process, he argues, the second step of which has two components: Athey at para. 27; Perren v. Lalari, 2010 BCCA 140 at paras. 31-32; Kathuria v. Wildgrove, 2015 BCCA 186 at paras.19-24.
- [94] I agree with counsel for the defendants that if a loss of capacity is established, there are two common approaches to the quantification of the loss. The plaintiff may prove the quantification of the loss of earning capacity, either on an earnings approach, as in Steenblok v. Funk (1990), 46 B.C.L.R. (2d) 133 (C.A.) or through a capital asset approach, as in Brown v. Golaiy, (1985), 26 B.C.L.R. (3d) 353. The former approach will be more useful when the loss is more easily measurable, as it was in Steenblok. The latter approach will be more useful when the loss is not as easily measurable, as in Pallos v. Insurance Corp. of British Columbia (1995), 100 B.C.L.R. (2d) 260 (C.A.) and Romanchych v. Vallianatos, 2010 BCCA 20. Of course, an inability to perform an occupation that is not a realistic alternative occupation is not proof of a future loss: Steward v. Berezan, 2007 BCCA 150 at paras. 14-17; Kathuria at paras. 33-34.
- [95] Within this analytical framework, counsel for the defendants submits that Mrs. Heo's work history provides the best evidence as to what the future would have held for her, if the Accident had not occurred. He underscores that:
- a) From the time Mrs. Heo obtained her hairdresser's certificate in 1998 to 2002, she worked in various hair salons earning minimum wage plus tips. She testified she worked at four different salons. She confirmed that some of the employment between salons was continuous while on one occasion she had a period of unemployment between jobs (1999 to 2000).
  - b) There is no documentation regarding Mrs. Heo's income while working with her husband at Etum Academy from 2002 to 2008. As noted above, Mrs. Heo states the company earning "little" income from 2002- 2004 and that she made between \$25,000 and \$30,000 per year from 2005 to 2008.
  - c) After Etum Academy was closed in 2008, Mrs. Heo did not work until 2010. It is noteworthy that Mr. Heo testified that during the period of Mr. Heo's recovery he tutored at home because they needed money. Nonetheless, the plaintiff did not return to work of any form until they began operating Sung Moon in Langley in April 2010. Counsel for the defendant submits there is no explanation available on the evidence as to why, if there is a real and substantial possibility Mrs. Heo would have sought alternative employment in the future, she did not seek alternative employment in 2009 and into 2010 when she was unemployed.

- d) While, Mrs. Heo produced income records for 2013 to 2017, those records establish Sung Moon earned limited net income in each of the following calendar years:

2013 \$6,708

2014 \$5,590

2015 \$44,146

2016 \$30,422

2017 \$184

- e) These amounts were allocated to Mrs. Heo and her husband on a 50/50 basis, resulting in Mrs. Heo's business income for each year equalling one-half of the above amounts. Notably, even before the Accident, Mrs. Heo's income was significantly less than \$30,000 a year.
- f) Mrs. Heo also earned additional \$715 working at a sushi restaurant in 2017. Mrs. Heo testified that she took this job to gain some familiarity with the sushi business because her husband had expressed an interest in opening such a business.

[96] Counsel for the defendants submits there is no reliable evidence that Mrs. Heo ever earned more than \$22,073 in employment/business income in a given year. He argues that while Mrs. Heo and her husband gave some viva voce evidence of estimated higher earnings before 2008, there is no independent evidence to support those claims. Counsel underscores that there is no evidence Mrs. Heo ever earned more than the amount \$22,073 between 2008 and the date of the Accident. He further submits there is no evidence Mrs. Heo was prevented from seeking to work independently from her husband, on a full time basis, at any time between 2008 and the date of the Accident, or even after the date of the Accident; however, she never attempted to do so.

[97] Mrs. Heo agreed in cross-examination that if the Accident had not occurred she intended to continue working with her husband in joint business ventures. She did not testify that she had any thought or intention of seeking employment in any other form. Notably, no business losses were advanced by Mrs. Heo.

## C. Discussion

[98] Based on the preponderance of the evidence tendered, coupled with the applicable principles of law set out above, I am of the view that Mrs. Heo has clearly suffered a loss of past earning capacity. I have already concluded that the Accident caused Mrs. Heo injuries and symptoms. I also accept the evidence of Ms. Ditson and Mr. Nordin, along with the evidence of Mrs. Heo, that her ability to work has been compromised. More specifically, I find that Mrs. Heo's income earning capacity increased after the surgery but that she is not capable of working at the same capacity she did before the Accident; as such, she requires accommodations to her work environment including reduced hours accommodation.

[99] In assessing her loss, I am not persuaded that I should look solely to Mrs. Heo's past earnings to inform my assessment. Indeed, our Court of Appeal has cautioned against doing so: Rosvold at para. 8. Accordingly, I have reviewed all the evidence, including but not limited to Mrs. Heo's employment history, work patterns and her past earning capacity. I have also considered, for example, Mrs. Heo's education and acquired skill set, along with the evidence regarding her plans and intentions for the future had the Accident not occurred. All considered, I am not satisfied that there is a real and substantial possibility that Mrs. Heo would have earned \$30,000 a year had the Accident not occurred. I find that a fair and reasonable assessment of Mrs. Heo's past income earning potential, but for the Accident, would be about \$24,000 per year. That is, there is a real and substantial possibility she would have earned this annual income from 2015 to the date of trial.

[100] I conclude that a fair and reasonable assessment of loss for the 2015-2017 period, taking into account what Mrs. Heo actually earned those years, is \$34,000. As regards 2018, counsel for Mrs. Heo argues that she is entitled to compensation for being off work the entire year. In light of the evidence before me, I am unable to agree. The evidence does not support the conclusion that Mrs. Heo was not capable of working for all or most of 2018. I find a reasonable estimate of loss for 2018 is \$12,000. As regards 2019, I find that a fair and reasonable assessment of her loss, taking into account what she actually earned, is \$3,000 to the date of trial.

[101] In total, I assess the plaintiff's past income loss at \$49,000.

## V. FUTURE LOSS OF EARNING CAPACITY

[102] As noted above, in order to receive an award for loss of future earning capacity, a plaintiff must prove that there is a real and substantial possibility of a future event leading to an income loss: Athey at para. 27; O'Connell v. Yung, 2012 BCCA 57 at para. 56. If the plaintiff discharges that burden of proof, then depending upon the facts of the case, the plaintiff may prove the quantification of that loss of earning capacity, either on an earnings approach or a capital asset approach: Perren at para. 32.

[103] In Pololos v. Cinnamon-Lopez, 2016, BCSC 81, Justice Voith conveniently summarizes the applicable first principles as follows:

[133] The relevant legal principles are well-established:

- a) To the extent possible, a plaintiff should be put in the position he/she would have been in, but for the injuries caused by the defendant's negligence; Lines v. W & D Logging Co. Ltd., 2009 BCCA 106 at para. 185, leave to appeal ref'd [2009] S.C.C.A. No. 197;
- b) The central task of the Court is to compare the likely future of the plaintiff's working life if the Accident had not occurred with the plaintiff's likely future working life after the Accident; Gregory v. Insurance Corporation of British Columbia, 2011 BCCA 144 at para. 32;

- c) The assessment of loss must be based on the evidence, but requires an exercise of judgment and is not a mathematical calculation; *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 18;
  - d) The two possible approaches to assessment of loss of future earning capacity are the "earnings approach" and the "capital asset approach"; *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 at para. 7 (S.C.); and *Perren v. Lalari*, 2010 BCCA 140 at paras. 11-12;
  - e) Under either approach, the plaintiff must prove that there is a "real and substantial possibility" of various future events leading to an income loss; *Perren* at para. 33;
  - f) The earnings approach will be more appropriate when the loss is more easily measurable; *Westbroek v. Brizuela*, 2014 BCCA 48 at para. 64. Furthermore, while assessing an award for future loss of income is not a purely mathematical exercise, the Court should endeavour to use factual mathematical anchors as a starting foundation to quantify such loss; *Jurczak v. Mauro*, 2013 BCCA 507 at paras. 36-37;
  - g) When relying on an "earnings approach", the Court must nevertheless always consider the overall fairness and reasonableness of the award, taking into account all of the evidence; *Rosvold* at para. 11.
- [104] Essentially, when a plaintiff has injuries which limit her capacity to perform certain activities and consequently impair her future income earning capacity, she is entitled to compensation. What is being compensated is not lost projected future earnings but the loss or impairment of earning capacity as a capital asset.
- [105] Counsel for Mrs. Heo submit that she is entitled to a range of damages for future loss of earning capacity between \$267,392-\$345,506. Counsel for the defendants submits that Mrs. Heo is not entitled to any loss in this regard or, in the alternative, should the Court not accept the defendants' position on credibility and causation, that she is entitled to \$75,000 for loss of future earning capacity.
- [106] This is not an easy assessment to undertake, particularly in a case such as this where Mrs. Heo's income earning capacity has been a function of various vocational and business aspirations, including a wide variance in annual income. I have also considered that even when Mr. and Mrs. Heo's working life was not impacted by Accident or illness, there were periods of time when she chose not to work full-time or at all. Of course, I have considered that simply because Mrs. Heo continued working to some degree following the Accident, that this does not necessarily preclude her from having suffered a loss of earning capacity.
- [107] I wish to make it clear that in assessing future loss of earning capacity, I have assessed whether there is a real and substantial possibility that Mrs. Heo would have worked outside the family business. For many years now she has chosen, freely, to work beside her husband, both before and after the Accident. Mrs. Heo also acknowledged her intentions to continue working with her husband into the future, had she not been injured. Nevertheless, in assessing her future losses, I have accepted her assertion that she would also choose to find other employment if her husband chose not to operate a business. Indeed, she has a

history of working independently from her husband. I find that there is a real or substantial possibility she would have continued working, even if her husband did not.

- [108] I am satisfied that as a result of the Accident: Mrs. Heo is less capable overall of earning income from all types of employment opportunities; less marketable as an employee; less able to take advantage of all employment opportunities (which had she not been injured, would have been available to her); and less valuable to herself as a person capable of earning income in a competitive labour market. The more difficult question is how best to assess the loss arising from these findings, particularly given the difficulty in assessing her earning potential.
- [109] Having carefully considered the submission of both parties and the evidence on point, I am of the view that the complexity of this case warrants an assessment of loss of capacity on a capital asset basis. As the court reasoned in *Perren*, the capital asset method of assessment is more appropriate in cases such as these where the loss is not easily measurable.
- [110] In cases where the capital asset approach has applied, the court has awarded the plaintiff's entire annual income for one or more years: see *Da Silva v. Pollard*, 2019 BCSC 2249 at para. 151; *Pallos*; *Perren*. In the instant case, I am of the view that assessing Mrs. Heo's loss of future earning capacity on the basis of three years' earnings is fair and reasonable. I am satisfied, in light of the totality of the evidence before me, including increases in minimum wages, that the appropriate annual income in the context of this particular case is \$30,000 per year. Accordingly, Mrs. Heo is entitled to an award of \$90,000 for loss of future earning capacity.

## VI. COST OF FUTURE CARE

- [111] In *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9, the Supreme Court of Canada provides the following guidance on assessing damages for cost of future care:
- [21] Damages for cost of future care are a matter of prediction. No one knows the future. Yet the rule that damages must be assessed once and for all at the time of trial (subject to modification on appeal) requires courts to peer into the future and fix the damages for future care as best they can. In doing so, courts rely on the evidence as to what care is likely to be in the injured person's best interest. Then they calculate the present costs of providing that care and may make an adjustment for the contingency that the future may differ from what the evidence at trial indicates.
- [22] The resulting award may be said to reflect the reasonable or normal expectations of what the injured person will require . . . .
- [112] The test for determining the appropriate award for cost of future care is an objective one based on the evidence and on costs reasonably necessary to restore the plaintiff to her pre-accident condition insofar as possible. The costs must also be reasonable in the sense that they are costs the plaintiff will likely incur: see *Pololos* at para. 144; *Loeppky v. Insurance*

Corporation of British Columbia, 2012 BCSC 7 at para. 109; *Peters v. Ortner*, 2013 BCSC 1861 at para. 141; and *Tsalamandris v. McLeod*, 2012 BCCA 239 at paras. 62-63. Each case must be determined on its own unique evidentiary matrix and the assessment of damages for cost of future care is not a precise accounting exercise: *Krangle* at para. 21; *Peters* at para. 144.

[113] In *Dzumhur v. Davoody*, 2015 BCSC 2316, Justice Kent summarizes the law, providing further guidance as follows:

[244] The principles applicable to the assessment of claims and awards for the cost of future care might be summarized as follows:

- the purpose of any award is to provide physical arrangement for assistance, equipment and facilities directly related to the injuries;
- the focus is on the injuries of the innocent party... Fairness to the other party is achieved by ensuring that the items claimed are legitimate and justifiable;
- the test for determining the appropriate award is an objective one based on medical evidence;
- there must be: (1) a medical justification for the items claimed; and (2) the claim must be reasonable;
- the concept of "medical justification" is not the same or as narrow as "medically necessary";
- admissible evidence from medical professionals (doctors, nurses, occupational therapists, et cetera) can be taken into account to determine future care needs;
- however, specific items of future care need not be expressly approved by medical experts... It is sufficient that the whole of the evidence supports the award for specific items;
- still, particularly in non-catastrophic cases, a little common sense should inform the analysis despite however much particular items might be recommended by experts in the field; and
- no award is appropriate for expenses that the plaintiff would have incurred in any event.

[114] I have also considered that, in awarding future care costs, there is a duty to be reasonable and the cost must be fair to both parties: *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 SCR 229 at 241-242.

[115] Counsel for Mrs. Heo asserts that the reasonable cost of future care in this case is \$201,664. Counsel for the defendant asserts that Mrs. Heo is not entitled to any costs of future care, arguing Mrs. Heo has failed to prove a causal link between her symptoms and the Accident. In the alternative he argues the cost of future care should be set at \$101,000.

[116] I am satisfied that Mrs. Heo is entitled to some cost of future care. As discussed below, I have concluded that the sum of \$127,820 is reasonable and medically justified.

## A. Housekeeping Costs

[117] I am satisfied that an award of housekeeping costs is justified in the case. Ms. Ditson recommended four hours of assistance, once a week. Counsel for Mrs. Heo asserts that based on the expert evidence of Mr. Benning, the cost of this support, until Mrs. Heo is 80 years old, is \$128,423.

[118] Counsel for the defendant underscores that, on cross-examination, Ms. Ditson acknowledged a number of contingencies which could justify a reduction in the cost of future housekeeping costs:

- a) if Mrs. Heo worked less at the Sushi Bar than she was working at the time her functional assessment, she may be able to do more housekeeping;
- a) if Mrs. Heo moved into a smaller home, she would likely require less housekeeping assistance;
- b) if Mrs. Heo undertook a recommended exercise program and her strength and endurance improved, she may be able to do more housekeeping; and
- c) even if the Accident had not occurred, as Mrs. Heo aged she may have required housekeeping assistance in any event.

[119] Counsel for the defendants submitted that, while none of these factors are certain, they are all real and substantial possibilities which support a contingency deduction. I agree.

[120] Counsel for the defendants notes that at the time of Ms. Ditson's functional/ work capacity assessments in February and April 2019, Mrs. Heo reported she was at the Sushi Bar six to ten hours per day, seven days per week; Mrs. Heo took issue with this aspect of the report but she also stated that she started to work less at the Sushi Bar as the year progressed.

[121] Counsel for the defendants also argues that downsizing from a very large home at some point in the future is a logical step, particularly since Mr. and Mrs. Heo have been living alone in a six-bedroom home. He asserts that, even if the Accident had not occurred, there is a gradual and increasing need for homemaking assistance at an earlier age than 80 (the age Mr. Benning chose to end his loss calculation).

[122] Counsel also points out that Mrs. Heo used commercial cleaners before the Accident; her evidence was that she stopped using the cleaners, not because she did not want their assistance but, rather, because of the expense. Counsel notes the evidence establishes that this was a service Mrs. Heo was prepared to use even when she was fully capable of maintaining her home herself.

[123] The defendants submit that a reduction of Mrs.'s Heo claim by 33% is appropriate to reflect all of these various contingencies. This would result in an award of \$85,000 (rounded). I agree this is a reasonable approach and assessment. I so order.

## B. Multidisciplinary Pain Management Program

[124] Counsel submit that such a program would assist Mrs. Heo in developing independent self-management strategies to manage her pain and reduce her reliance on "passive therapies". This recommendation was not made by either Dr. Park or Dr. Sahjpaul. While I acknowledge it was made by Ms. Ditson, I am not persuaded on the totality of the evidence before me that it is medically justified. I find this is not a proper basis for awarding future care costs.

## C. Gym passes

[125] Dr. Park opined that Mrs. Heo could benefit from a regular exercise program. Mrs. Heo testified she did not like to attend a gym and would not do so; she preferred to exercise at home by, for example, relying on exercise videos. I find that there is no real or substantial possibility that she would attend a gym in the future. This is not a proper basis for awarding future care costs.

## D. Passive Treatment Modalities

[126] Dr. Park was of the view that Mrs. Heo would continue to attend physiotherapy and massage therapy. Ms. Ditson recommended 10-12 session per year in order to assist Mrs. Heo when she experiences flare-ups. Counsel for Mrs. Heo submits, based on Mr. Benning's calculations that the future cost of this treatment would be \$26,820 over Mrs. Heo's life time. This is a reasonable and justified expense and I so order.

## E. Medication

[127] I find that Mrs. Heo requires medication. Counsel for Mrs. Heo asserts the net present value of this cost is \$21,307. I am not satisfied on the evidence before me that there is a real and substantial possibility that Mrs. Heo requires the level of pain medication reflected in this total. I agree with counsel for the defendants that an appropriate and reasonable reduction of approximately 25% is justified, for an award of \$16,000 for this cost of future care.

## VII. LOSS OF HOUSEKEEPING CAPACITY

[128] Counsel for Mrs. Heo rely on the decision of the Court in *Suthakar v. Humble*, 2016 BCSC 155 where Justice Ballance awarded the plaintiff \$35,000 after concluding that loss of housekeeping capacity should be compensated. They also argue, based on para. 109 of Justice Ballance's reasons, that the question of whether the plaintiff used replacement services in the past, or is likely to hire such assistance in the future is one that does not inform this particular analysis. I agree.

- [129] Counsel further submit that there is a sufficient basis for a discrete award for loss of housekeeping since Mrs. Heo's injuries have placed a significant limitation on her ability to perform her domestic chores. Accordingly, Mrs. Heo is asking for \$35,000 as compensation for loss of housekeeping capacity.
- [130] The defendants do not dispute the general principles applicable to such awards. However, they point out that in *Firman v. Asadi*, 2019 BCSC 270, Justice Verhoeven reasoned at para. 235, that judges have the discretion to address such a claim as part of the non-pecuniary loss or as a segregated pecuniary head of damage: *Kim* at para. 33; *Riley* at para. 100.
- [131] In *Riley*, Justice Groberman reasons:
- [101] It is now well-established that where a plaintiff's injuries lead to a requirement that they pay for housekeeping services, or where the services are routinely performed for them gratuitously by family members or friends, a pecuniary award is appropriate. Where the situation does not meet the requirements for a pecuniary award, a judge may take the incapacity into account in assessing the award for non pecuniary damages.
- [102] I acknowledge what was said in *Kroeker* about segregated non-pecuniary awards "where the special facts of a case" warrant them. In my view, however, segregated non-pecuniary awards should be avoided in the absence of special circumstances. There is no reason to slice up a general damages award into individual components addressed to particular aspects of a plaintiff's lifestyle. While such an award might give an illusion of precision, or suggest that the court has been fastidious in searching out heads of damages, it serves no real purpose. An assessment of non-pecuniary damages involves a global assessment of the pain and suffering, loss of amenities, and loss of enjoyment of life suffered by a plaintiff. By its nature, it is a rough assessment and not a mathematical exercise.
- [132] In *Firman*, Justice Verhoeven addresses the discretion of the trial judge in discerning how to address this loss, and he underscores the importance of avoiding duplication of compensation:
- [236] Duplication in the award must be avoided. Where potential costs for housekeeping assistance are awarded, in the context of costs of future care, then the case for a separate pecuniary award for loss of housekeeping capacity is lessened and perhaps eliminated, depending on the specific facts of the case. In this case a minor award for housekeeping assistance has been made.
- [237] With these comments in mind, and after consideration of the evidence in this case, I am not satisfied that the evidence supports a distinct pecuniary award for loss of housekeeping capacity in this case. The evidence establishes only that the plaintiff is limited in her ability to do housework, and a result her house is now untidy compared with before. There is no particular reason to distinguish this loss from her other limitations, which are reflected in the non-pecuniary award.

[133] I agree with counsel for the defendants that there is a sound basis for this Court to follow the same approach as Justice Verhoeven did in *Firman*.

[134] Mrs. Heo testified her house has been very messy since the Accident. She also testified no one assists her, and so she has not been able to keep her home clean and tidy as she once did. This evidence indicates Mrs. Heo's loss is more in keeping with the residual pain from her injuries and it therefore has been subsumed within, and accounted for, in her non-pecuniary damage award. I am not persuaded that a distinct and additional award is warranted, given the specific facts before me. Furthermore, her cost of future care includes the costs of housekeeping services. Accordingly, she has been compensated for both her non-pecuniary and her pecuniary losses. In the final analysis, providing an additional, distinct sum for loss of housekeeping capacity would be duplicative; it would not, I find, result in an amount of compensation commensurate with her loss.

### VIII. IN TRUST CLAIM

[135] Mrs. Heo is seeking compensation for household duties, and other services rendered by her immediate family. Her counsel submit this is allowed when a plaintiff establishes the need for such services as a consequence of the injury, provided that the services are rendered to or on behalf of the plaintiff. Counsel further submits that in such cases, the plaintiff must prove on a balance of probabilities that:

1. the family member providing the series experiences direct economic loss because of the time and effort that went into performing those duties; or
2. the family member's efforts result in replacing expenses which would otherwise have been incurred such as hiring a housekeeper.

[136] In *Bystedt v. Hay*, 2001 BCSC 1735 at para. 180, aff'd 2004 BCCA 124, the Court identified the following factors to be considered when assessing an in-trust claim:

- a) the services provided must replace services necessary for the care of the plaintiff as a result of a plaintiff's injuries;
- b) if the services are rendered by a family member, they must be over and above what would be expected from the family relationship;
- c) the maximum value of such services is the cost of obtaining the services outside the family;
- d) where the opportunity cost to the care-giving family member is lower than the cost of obtaining the services independently, the court will award the lower amount;
- e) quantification should reflect the true and reasonable value of the services performed taking into account the time, quality and nature of those services;
- f) The family members providing the services need not forego other income and there need not be payment for the services rendered.

- [137] Mr. Heo testified that from the date of Accident to the time of surgery, he drove Mrs. Heo to her various treatment and doctor appointments. From the time of the Accident to the time of the surgery, Mr. Heo would drive Mrs. Heo to her physiotherapy appointments. He testified that it took 20 minutes to get to the clinic and 20 minutes to drive back home. He testified that he would usually wait for her in the car or take a stroll around the parking area. He testified that the physiotherapy appointments are usually 45 minutes long.
- [138] Mr. Heo testified that sometimes he would attend the physiotherapy clinic with his wife so that he could translate for her. He would also accompany Mrs. Heo to her appointments with medical specialists to translate. Mr. Heo stated that he would spend on average 3-3.5 hours per week doing these additional tasks. He explained that prior the Accident, he did not drive Mrs. Heo around or attend various clinics to translate.
- [139] Mr. Heo also testified that prior to the Accident he did not perform any cooking or housekeeping tasks. Mr. Heo testified that since the Accident and until the time of surgery he would spend thirty minutes to one hour per week on housekeeping and cooking tasks. He stated that the time he spent doing these various tasks and the time spent looking after his wife increased immediately after the surgery because Mrs. Heo was not doing well. Mr. Heo stated that he continues to drive Mrs. Heo and assist with housekeeping but that since starting the Sushi Bar business he has less time available.
- [140] Counsel for Mrs. Heo underscores that Mr. Heo's role in the household became very different after the Accident. He testified that after the Accident he spent on average 4.5 hours per week or 18 hours a month driving Mrs. Heo, translating for her and performing housekeeping tasks. Counsel asserts this amounts to 18 hours/week for 29 months, or in total, 552 hours.
- [141] Counsel for Mrs. Heo acknowledged that after the surgery, and when Mr. Heo started the Sushi Bar, the number of hours dedicated to assisting Mrs. Heo decreased. Based on an average calculation of 2.25 hours per week for that period, Mr. Heo spent approximately 181 hours since the surgery performing additional task for Mrs. Heo that he did not have to perform before the Accident (9 hours per month for 21 months). Accordingly, the total time spent since the Accident on additional tasks is 733 hours.
- [142] Counsel asserts that the amount of time Mr. Heo is dedicated to cooking, assisting with housekeeping, driving Mrs. Heo to and from appointments and translating for her at these various appointment goes above and beyond what is expected of a spouse. The value of one hour is estimated at \$25.00 making the total value of the additional work, performed by Mr. Heo since the Accident, \$18,325.
- [143] Mr. Heo's testimony was not consistent with that of Mrs. Heo. She testified that no one helped her with her housekeeping and she, in fact, introduced a number of photographs supporting her testimony that her house was very messy. She also testified that, at first, Mr. Heo did some cooking but then, he started ordering "take-out" or would make instant noodles. I accept Mrs. Heo's evidence in this regard. I am not persuaded Mr. Heo did the

degree of cleaning or cooking around the home he asserted. Mr. Heo's evidence at best, was not persuasive in this regard.

- [144] Counsel for the defendants does not dispute the statement of factors to be considered in addressing in trust claims, as advanced by counsel for Mrs. Heo. However, the defendants do disagree with the purported application of those principles.
- [145] Counsel for the defendants submits there are two factors that are particularly pertinent. The first is that the services must be over and above what would be expected from the family relationship. The second is that when the opportunity cost to the care-giving family member is lower than the cost of obtaining the services independently, the court will award the lower amount. Regarding the first of these factors, counsel argues there can be no doubt the law recognizes that, as part of the familial relationship, family members are expected to provide services to their injured relative which would not be provided if the person was not injured. Such additional services do not support an "in trust" award unless they are over and above what a loving and caring family member would normally be expected to do. In that sense, there is an objective element to the analysis.
- [146] In regard the claim for compensation for driving Mrs. Heo to and from physiotherapy and medical appointments, and performing one-half hour of cleaning services once per week, the defendant submits such services are not above what would be normally expected. He argues that if those services are sufficient to support an in trust award, it would be difficult to conceive of what services would not be. That is particularly so when one considers that there was no evidence from Mr. Heo of any opportunity cost of providing such services, such as an interference with work demands, or social demands, or recreational demands. Equally, it is particularly so when the evidence establishes that the Mrs. Heo and her husband have worked together for many years before the Accident. Furthermore, counsel points out that when Mr. Heo was misdiagnosed with lung cancer, outside of the context of litigation, Mrs. Heo ceased working to assist with Mr. Heo's care. Counsel submits, that fact, in itself, provides strong evidence of what would be normal in this particular familial relationship.
- [147] Counsel submits that the second factor relied upon by the defendants limits, if not eliminates, any in trust award; that is, the requirement that court awards reflect the lower of the cost of obtaining services independently or the opportunity cost to the family member. In this case, as already mentioned, there is no evidence of any opportunity cost to Mr. Heo for driving and spending time cleaning. In the absence of evidence of an opportunity cost, it is submitted by the defendants that there is no basis to make any "in trust" award.
- [148] Having carefully considered the evidence before me, the applicable case law, and the arguments of the parties, I am not persuaded that an in trust award is appropriate in this case. Mr. Heo's "services" were not necessary, nor were they over and above what would be expected of a family member.

## IX. SPECIAL DAMAGES

[149] The parties have agreed that the special damage award in this case ought to be \$15,077.26.

## X. DISPOSITION

[150] Mrs. Heo is entitled the following damage awards:

1.

Non-pecuniary Damages:

\$150,000.00

2.

Loss of Past Earning Capacity:

\$49,000.00

3.

Loss of Future Earning Capacity:

\$90,000.00

4.

Cost of Future Care:

\$127,820.00

5.

Special Damages as agreed:

\$15,077.26

TOTAL:

\$431,897.26

[151] Subject to any submissions the parties may wish to make, and absent any circumstances of which I am unaware on the question of costs, Mrs. Heo is entitled to her costs at Scale B.

"MORELLATO J."

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Prepared on 24 October 2026 · Esheria