

CANADA / JUDGMENT

Huang v. Li

2020 BCSC 1096

COURT

Supreme Court of British Columbia

DECIDED

27 July 2020

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2020 BCSC 1096 Huang v. Li

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Huang v. Li,

2020 BCSC 1096

Date: 20200727

Docket: M182300

Registry: Vancouver

Between:

Ya-Ling Huang

Plaintiff

And

Zhong Li

Defendant

Before: The Honourable Madam Justice Wilkinson

Reasons for Judgment

Counsel for the Plaintiff:

E.A. Orr-Ewing

Counsel for the Defendant:

R. LaPlante

Place and Dates of Trial:

Vancouver, B.C.

June 15-19, 2020

Place and Date of Judgment:

Vancouver, B.C.

July 27, 2020

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Introduction

- [1] This is a motor vehicle personal injury claim where liability is admitted by the defendant. These reasons reflect my decision on the appropriate award of damages. The plaintiff was involved in a motor vehicle collision on January 18, 2017.

- [2] The plaintiff was 31 years old at the time of the accident. She was a passenger in the front seat of a vehicle driven by her husband. They were progressing through an intersection on a green light. Their vehicle was hit by the defendant's vehicle as it turned left in front of them. The plaintiff was wearing her seatbelt at the time. The plaintiff's seat front airbag deployed. The plaintiff's vehicle was rendered a total loss and the defendant's vehicle had approximately \$9,000 in damage.
- [3] The plaintiff claims she suffered various injuries at the time of the collision, some of which she says are resolved. These are a right knee contusion, now resolved, a right hip strain, now resolved, cervicothoracic (neck and back) musculoligamentous (muscle and ligament) strain/sprain, and lumbar sprain/strain, which she says are chronic, persistent headaches attributable to whiplash, and anxiety. The defendant agrees that the plaintiff suffered soft tissue injuries to her right knee, neck, upper and lower back, right shoulder, right hip, and headaches as a result of the collision, but the extent to which those injuries continue to affect the plaintiff is disputed.
- [4] The plaintiff claims losses under the following heads of damages:
- a) non-pecuniary damages;
 - b) past loss of earning capacity;
 - c) future loss of earning capacity;
 - d) loss of housekeeping capacity;
 - e) cost of future care;
 - f) an in-trust claim for services provided by her husband, Ian Chen; and
 - g) special damages. This amount has been agreed to in the sum of \$3,526.62.
- [5] The defendant argues that I should draw an adverse inference from the fact that the plaintiff did not call any physiotherapist or kinesiologist or any of the two family doctors she saw for post-accident treatment.
- [6] The plaintiff seeks a total award under all heads of damages of \$411,432.62. The defendant argues a more appropriate award is between \$55,879.12 and \$74,129.12. The defendant argues that there should be no award for loss of housekeeping capacity, an in-trust claim, or past wage loss and a range of zero to a modest amount for future wage loss.

Background

- [7] The plaintiff was born in 1985 in Taiwan. She is now 35 and a mother of a young son born in October 2018. She now lives with her husband and son in Surrey. The plaintiff graduated from high school in 2003 in Taiwan. In 2007, she obtained her Bachelor of Business Administration at the Department of Logistics and Shipping Management at the Kainan University, also in Taiwan. She had a part-time job while at university.
- [8] Prior to graduation, the plaintiff was offered a position with a shipping company in Taiwan where she then worked for three years after graduation. At that job she dealt with many clients and colleagues from around the world. During that time she realized she needed to improve her English and applied to study abroad since she wanted to experience new cultures. She ultimately chose Canada as she liked the Canadians she dealt with through her job. She applied to, and in 2011 was enrolled in, King George International College and completed the 8-week English language studies program and subsequently the 25-week business management and practicum program. She finished these studies in June 2012. Her student visa allowed her to work and she obtained a position with Starbucks at the Vancouver International Airport, working there for eight months.
- [9] The plaintiff's student visa expired in November 2012 and she returned to Taiwan. Wanting to return to Canada, she applied for a working holiday visa which was granted in November 2013. The plaintiff returned to Canada and was rehired by Starbucks. She worked there for almost one year. The plaintiff met her now husband through this job as he worked at the airport as well, and they soon moved in together. She had to return to Taiwan on the expiration of her visa, but given the new relationship she applied for a visitor's visa in order to return. She did return in March 2015, and she and her now husband were married in August 2015 in Vancouver. The plaintiff returned again to Taiwan on the expiration of this visa in September 2015. She obtained a job there to save money while her husband began the process of sponsoring her to come to Canada as a permanent resident.
- [10] While the immigration process was underway her husband travelled to Taiwan to visit and they held a second wedding there in September 2016 with the plaintiff's family in attendance.
- [11] The plaintiff testified that while growing up she enjoyed yoga, biking and reading. She and her family would often take family trips on weekends to get away from the city. When she came to Canada she continued to practice yoga and take bike rides and read a lot. She and her husband would go to the movies once or twice a week, and he taught her to swim which she enjoyed. They also took day trips outside of their home in Richmond to other places in the Lower Mainland to explore the area and take walks.

- [12] The plaintiff testified that she essentially did all of the house chores, saying she is a clean person and wants to keep the house clean. This included cooking, doing the dishes and laundry, mopping the floor, cleaning the bathroom including scrubbing the tub, and doing the grocery shopping.
- [13] The plaintiff testified that she had no physical limitations before the accident, nor did she experience any anxiety or low mood.
- [14] At the time of the accident, the plaintiff was on her way to a job interview. The plaintiff did not go to that interview due to the accident, and it appears that she was no longer offered the interview when she informed the company she had been in an accident. As planned, she did go to Taiwan for Chinese New Year from approximately January 23, 2017 to February 22, 2017. She did obtain a job with a law firm, beginning March 1, 2017, first as a filer and then in October 2017 she was promoted to be a file opening and closing administrative assistant. She worked in the latter position until taking parental leave on August 2, 2018. After not being able to secure a daycare position for her son, the plaintiff notified her employer she would not be able to return to work as planned for in October 2019.
- [15] The plaintiff remains unemployed but is enrolled in a Grade 12 English equivalency course to be completed at the end of June 2020. The plaintiff's first language is Mandarin. Passing this course is required for processing her applications to enroll in either the Vancouver Community College or Kwantlen University Legal Administrative Assistant ("LAA") course in September 2020.

Treatment

- [16] The plaintiff primarily treated her injuries through physiotherapy, active rehabilitation, and massage therapy, and performing exercises and stretches at home and in the workplace as recommended by her treating professionals. From the agreed statement of facts and special damages claim, in the approximately 40-month period from the accident to trial, she had 27 visits with family doctors, 30 physiotherapy sessions, 2 general therapy sessions in Taiwan after the accident, 12 massage therapy sessions, and 12 kinesiology sessions.
- [17] The defendant points out that the plaintiff's treatment history includes a significant period of time in which the plaintiff stopped receiving physiotherapy, active rehabilitation, and massage. The plaintiff did not attend for physiotherapy or active rehabilitation for a period of almost two years between January 30, 2018 and January 23, 2020. During that same period, she had two massage therapy treatments on July 11, 2019 and July 24, 2019 respectively, then no further massage therapy or physiotherapy until 2020.

- [18] In that time period she was pregnant and went to Taiwan to give birth to her son. The plaintiff testified that she stopped attending physiotherapy because she had dizziness and nausea symptoms in relation to her pregnancy. She explained that she did not attend physiotherapy or active rehabilitation after giving birth because she was in Taiwan until May 2019. When asked if physiotherapy or active rehabilitation were available in Taiwan, she responded that massage therapy is available there but that she did not receive any there.
- [19] The plaintiff testified that she wished to return to physiotherapy when she came back to Canada in May 2019. She obtained referral notes from Dr. Tony Lee on August 30, 2019 and December 4, 2019 but did not attend physiotherapy until January 2020, which she stated was due to childcare duties.

Assessment of the Evidence

Credibility of the Plaintiff's Evidence

- [20] Justice Dillon sets out the well-known factors on assessing credibility in *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, *aff'd* 2012 BCCA 296:

186 Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet* (Township) (1919), 1919 CanLII 11 (SCC), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis*, [1926] 31 O.W.N. 202 (Ont. H.C.); *Faryna v. Chorny*, 1951 CanLII 252 (BC CA), [1952] 2 D.L.R. 354 (B.C.C.A.) [Faryna]; *R. v. S.(R.D.)*, 1997 CanLII 324 (SCC), [1997] 3 S.C.R. 484 at para.128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (*Faryna* at para. 356).

- [21] As Justice Dardi provides in *Midgley v. Nguyen*, 2013 BCSC 693 at para. 21, more than mere speculation or innuendo is required to successfully make out an accusation of deliberate deceit.
- [22] I found the plaintiff to be credible. She was forthright and well considered in her answers. There was no attempt to exaggerate. She was prepared to make admissions against interest specifically with respect to symptoms that had resolved. Under cross-examination she took more time and asked for more clarifications but I do not find she was evasive as defence counsel would have me find. Part of the issue may have been the fact that she did testify with the assistance of an interpreter and so the need for more clarifications may have been coloured by that factor. In any event, the clarification requests and need for defence counsel

to rephrase questions or repeat some does not render the plaintiff's testimony less credible.

- [23] Also, under cross-examination the defendant says the plaintiff's testimony was inconsistent on one point. That is, she stated at her examination for discovery on February 5, 2020 that her future goals were to currently stay focussed on caring for her child but if she wanted to in the future, she would focus on an assistant-type job. This, the defendant says, is inconsistent with her testimony that she is now planning to attend a LAA course and work in a law firm. The plaintiff testified that she gave that answer previously because she had not decided which courses or schools to apply to and she was still doing research. She had not settled on a plan and in her words, "until I take steps I cannot say it is my plan". She took those steps after the examination for discovery. While the steps were taken within a month after the examination, this is not proof of an inconsistent statement.
- [24] The testimony of the plaintiff's other lay witnesses, including former co-workers, some of whom are now friends, was also consistent with or did not contradict the testimony of the plaintiff with regard to her good work ethic, ability to learn quickly, professionalism, physical limitations, post-accident anxiety when in a car, speaking Mandarin as an asset for working in a law firm, English language competency skills being good enough to work as an LAA, and previous and post-accident recreational activities. One witness spoke to their experience of what was required to complete the LAA course, and that witness, along with another former co-worker, testified as to their experiences of the job demands of working as an LAA. None appeared to have any memory issues and none of them were aware of the details of the plaintiff's claim. While they may have been attempting to help the plaintiff, I find their testimony to be truthful.
- [25] The testimony of the plaintiff's husband was also consistent with that of the plaintiff but, importantly, also consistent with the plaintiff's other lay witnesses regarding the plaintiff's pre- and post-accident recreational activities, personal drive to succeed, and post-accident physical limitations and anxiety. He also corroborated the plaintiff's testimony with regard to the change in intimacy between them, the plaintiff's often not wanting to be touched after the accident, and her low mood which had a negative impact on their relationship. His cross-examination did not raise any credibility concerns. Of course the plaintiff's husband has an interest in the success of the plaintiff's claim, but I find his testimony to be truthful as well.
- [26] The defendant's lay witness, the business manager from the law firm where the plaintiff previously worked, also testified as to the plaintiff's good work ethic, that she was a fast learner, she is professional and not a complainer, and that speaking Mandarin is an asset for LAA work. She had a lower assessment of the plaintiff's ability to work as an LAA due to her view that the plaintiff did not have the level of English conversational skills needed for that job. She also did not observe that the plaintiff had any physical limitations doing the work in her previous position. This witness did not directly supervise the plaintiff and was in charge of 60 employees at that time and had last dealt with the plaintiff in the fall of 2018. She was not aware that the plaintiff was taking additional English language course work.

- [27] The plaintiff's expert, Dr. David Flaschner, was qualified as a medical doctor with specialization in Physical Medicine and Rehabilitation. He is qualified to provide expert opinion as set out in his expert reports, including but not limited to, expert opinion on musculoskeletal injuries, myofascial pain, and chronic pain disorders, including diagnoses, causation, an effect on functioning, impairment, disability, prognoses, and treatment. For the last 14 years he has specialized in diagnosing and treating chronic pain and musculoskeletal and neuromuscular disorders. He assessed the plaintiff on February 20, 2020. His observations were consistent with her reported symptoms. The plaintiff's continuing injuries were confirmed both by increased muscle tone and tension observable on Dr. Flaschner's physical examination of the affected area.
- [28] His opinion is discussed later under the causation portion of my decision.

Adverse Inference

- [29] The defendant argues that the failure of the plaintiff to call any evidence from any treating physiotherapist, massage therapist, kinesiologist or family doctor should result in a finding of adverse inference with respect to the extent of the plaintiff's chronic pain symptoms and functional limitations.
- [30] The defendant says it is noteworthy that an unfiled trial brief listed Dr. Lee, a family physician to the plaintiff, as providing an expert report, yet the plaintiff amended her trial brief to strike that out. The defendant submits that Dr. Lee, or the plaintiff's previous family physician, could have shed some light on why the plaintiff has had no treatment for anxiety. When the plaintiff was asked in cross-examination whether she discussed the anxiety with her doctor she stated that she reported it to Dr. Lee and he told her it would go away with time and did not prescribe any treatment. The hearsay evidence is admissible for the purpose of the fact that he told her that and not for the truth of the opinion expressed in the response.
- [31] The plaintiff submits that it was open to the defendant to call the evidence of the treatment providers. The plaintiff listed Dr. Lee as a possible witness, but chose not to due to the agreed upon five-day time limit for the trial. The plaintiff points out that they obtained an independent medical examination from Dr. Flaschner which is more current and served that expert evidence upon the defendant in accordance with the Rules and this evidence opined on the issues of causation and diagnoses and other matters. The plaintiff produced medical and clinical records to the defendant from those treating her. Furthermore, the plaintiff's first family physician post-accident retired in 2018, and her subsequent physician, when found, was only seen four times, the last being in December 2019.
- [32] The defendant cites *Barker v. McQuahe* (1964), 49 W.W.R. 685 (B.C.C.A.), *Buksh v. Miles*, 2008 BCCA 318, and *Andrews v. Mainster*, 2014 BCSC 541 in support of my drawing an adverse inference. The plaintiff primarily cites *Nitamo v. ICBC*, 2003 BCSC 608, and *Niessen v. Emcom Services Inc.*, 2018 BCSC 1410.

[33] In *Buksh*, at para. 35, the Court of Appeal set out a number of factors to consider as to whether an adverse inference ought to be drawn:

whether, given the evidence before the court, given the explanations proffered for not calling the witness, given the nature of the evidence that could be provided by the witness, given the extent of disclosure of that physician's clinical notes, and given the circumstances of the trial (e.g., an initial agreement to introduce clinical records that work contrary to the inference, or incorporation of that witness's views or observations in the report of a witness called by the other side) a juror could reasonably draw the inference that the witness not called would have given evidence detrimental to the party's case.

Also see *Andrews* at para. 176.

[34] In *Andrews*, Mr. Justice Pearlman found that the plaintiff's history of complaints was unreliable. That is not the case here.

[35] The defendant had the treatment records and if they saw anything inconsistent in those records it was open to them to call evidence from those providers.

[36] The main issue between the parties is not whether the plaintiff suffered any injuries; it is the extent of those injuries and how, if they still exist, they affect her earning capacity and daily life. The only injury which is disputed from the onset is anxiety. None of the plaintiff's treatment providers were specialists in psychological disorders. Her family physicians were referring the plaintiff to the treatment providers for continued treatment. Dr. Flaschner diagnosed the plaintiff with anxiety to be addressed by psychology/psychiatry.

[37] The plaintiff provided an adequate explanation for not calling the plaintiff's retired family physician and current family physician. Kinesiology records and a report and numerous physiotherapy and massage therapy records were disclosed.

[38] I do not find it likely that the treatment providers would have given harmful testimony to the plaintiff.

[39] I decline to exercise my discretion to draw an adverse inference in this case.

Causation

[40] The defendant did not challenge the plaintiff's claim that the plaintiff's injuries were a result of the accident, nor the opinion of Dr. Flaschner on that point.

[41] In Dr. Flaschner's February 20, 2020 report, he canvassed Ms. Huang's pre- and post-collision history before opining that as a result of the collision Ms. Huang sustained injury from the collision resulting in the following diagnoses:

- a) Right knee contusion, resolved;
- b) Right hip strain, resolved;

- c) Cervicothoracic musculoligamentous sprain/strain, chronic;
- d) Lumbar sprain/strain, chronic;
- e) Persistent headache attributable to whiplash; and
- f) Anxiety, to be addressed by psychology/psychiatry.

[42] In terms of causation, Dr. Flaschner opines:

Given the absence of musculoskeletal complaints prior to the collision of January 18, 2017, the current presentation more likely than not represents a direct consequence of the injuries sustained in the collision in question.

[43] In terms of prognosis, Dr. Flaschner opines:

Ms. Huang is presenting three years post injury. She will have reached maximal medical improvement. Ongoing symptoms at this point in time will be expected to require long-term management.

[44] In terms of the impairments caused by the collision-related injuries, Dr. Flaschner opines:

Ms. Huang's report of increased symptoms with repetitive household cleaning, kitchen work and while carrying her child is consistent with the injury described above. Given the chronic sprain/strain injuries, there is a reasonable expectation that heavier lifting, carrying, repetitive bending, reaching and prolonged static postures may exacerbate pain.

With respect to employment, there is an expectation that Ms. Huang's competitive employability for work that requires heavier physical demands or that does not offer the opportunity to change position and posture throughout the day will be compromised. Chronic pain conditions are known to reduce productivity and result in higher rates of absenteeism from work.

[45] In terms of diagnosis, prognosis, impairments, and disability related to chronic pain, Dr. Flaschner, who has specific expertise in chronic pain, is highly qualified to opine on the impact of chronic pain on the plaintiff, and specifically, the functional impact of the collision-related injuries on the plaintiff.

[46] Dr. Flaschner also testified that he often treats mood disorders. The majority of his patients who have chronic pain also have mood disorders. He stated that he has reviewed the literature in connection with chronic pain and you cannot separate the psychological part from chronic pain treatment. He often diagnoses anxiety and depression and treats them regularly unless the main driving force is a major depressive disorder. Here, he diagnosed the plaintiff with anxiety caused by the accident, but recommends that a psychologist or psychiatrist evaluate the anxiety and recommend any treatment.

[47] I accept the evidence of Dr. Flaschner. Dr. Flaschner has extensive experience in diagnosing and treating soft tissue injuries resulting in chronic pain, as well as the symptoms which come along with these injuries. No contrary evidence was admitted.

Damages

Non-pecuniary Damages

[48] I am guided to the considerations cited when assessing non-pecuniary damages in *Stapley v. Hejslet*, 2006 BCCA 34. In that case, *Kirkpatrick J.A.*, at para. 46, sets out an "inexhaustive list of common factors" to be considered, being the:

- 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).

[49] *Kirkpatrick J.A.* cites *Lindal v. Lindal*, [1981] 2 S.C.R. 629 for the underlying purpose of non-pecuniary damages:

[45] Before embarking on that task, I think it is instructive to reiterate the underlying purpose of non-pecuniary damages. Much, of course, has been said about this topic. However, given the not-infrequent inclination by lawyers and judges to compare only injuries, the following passage from *Lindal v. Lindal*, *supra*, at 637 is a helpful reminder:

Thus the amount of an award for non-pecuniary damage should not depend alone upon the seriousness of the injury but upon its ability to ameliorate the condition of the victim considering his or her particular situation. It therefore will not follow that in considering what part of the maximum should be awarded the gravity of the injury alone will be determinative. An appreciation of the individual's loss is the key and the "need for solace will not necessarily correlate with the seriousness of the injury" (*Cooper-Stephenson and Saunders, Personal Injury Damages in Canada* (1981), at p. 373). 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* at p. 284 of S.C.R.).

[Emphasis added in *Stapley*.]

- [50] In *Peterson v. Verma*, 2014 BCSC 2622, at para. 69, Dickson J. (as she then was) spoke to the fairness component of non-pecuniary damages awards:
- [69] Non pecuniary damages are awarded to compensate a plaintiff for pain, suffering, loss of enjoyment of life and loss of amenities. The compensation awarded should be fair to all parties. Fairness is measured against awards made in comparable cases which, though helpful, serve only as a rough guide to appropriate compensation. Each case depends on its own unique facts: *Trites v. Penner*, 2010 BCSC 882.

Pain, Suffering, Loss of Enjoyment and Loss of Amenities

- [51] The collision was not minor. Immediately after the collision, Ms. Huang was in shock. She remembers how her knee hit the dashboard and the airbag hitting her. Soon after she felt pain in her neck, shoulders, chest, upper back, right knee and hip area. She felt nauseous and dizzy. She was assisted into an ambulance and taken to the Richmond hospital for assessment.
- [52] Over that day and night she had headaches and pain in her neck, back, shoulders, right knee, right hip, dizziness, and anxiety. She had difficulties sleeping because she would get flashbacks of the accident.
- [53] Over the next few weeks, her symptoms progressed. Her pain increased over the same areas. Bending, lifting, and any type of exertion-type movement would cause pain, bad headaches, and poor sleep.
- [54] The plaintiff was not able to do several homemaking tasks like cleaning the bathtub, toilet, vacuuming, or carrying heavier grocery bags. These were all tasks she regularly did before the accident. She was also cooking much less as she could not tolerate the long standing involved.
- [55] The plaintiff began working at the law firm just over a month after the collision. Her duties included filing a wide variety of documents, requests for documents on behalf of lawyers, and re-shelving shelves of binders. This position involved long periods of time at the computer and picking up, arranging, and moving files and binders.
- [56] She continued to experience ongoing pain and sleep problems due to not being able to be comfortable in bed, and felt that she was too tired at the end of the day to do anything but rest. She suffered from driving-related anxiety. While the business manager gave her satisfactory performance evaluations and she earned a promotion and raises, she felt her work productivity was lower than she could do because of her symptoms from the accident.
- [57] In describing her typical work life post-collision, the plaintiff testified that sitting at her desk for prolonged periods caused flare-ups of her pain. In her position as file opener and closer, every Friday was file closing day. The plaintiff had to retrieve binders, carry them to the office kitchen, pack them into boxes and stack those boxes so that they would be ready for pick up to go into storage. This consisted of picking up (often picking up binders off the

floor), arranging, and moving binders and files. Her flare-ups were the worst on Fridays because some of the binders were too big and heavy for her to lift.

- [58] The plaintiff testified that she regularly asked her colleagues for help on file closing days. Witnesses testified to regularly providing this assistance since she started this position due to her back pain. She needed assistance re-arranging shelves and binders when she was in the filer position.
- [59] The plaintiff testified that there was so much work to do that there were not a lot of opportunities to take breaks. She only took breaks when she had to use the washroom and when it was lunch time. She stated that her physiotherapist recommended taking a tennis ball to roll on her hip when she is sitting at her desk but that did not help.
- [60] The plaintiff testified that she did not take time off from work due to her injuries from the collision nor did she ask for accommodations from her supervisor. I believe her when she says she did not do so because she wanted to make a good impression given this was her first administrative job in Canada. The job was extremely important to her. She did not want her employers to think the accident impacted her ability to do the job. She did her best to push herself to get through her days.
- [61] The plaintiff testified that at the end of the working week her symptoms were quite aggravated and she was exhausted. As a result of this pain and being exhausted, during week nights and on weekends she would usually stay home and not make plans in order to rest.
- [62] One year after the accident, at her kinesiology assessment in January 2018, the plaintiff exhibited some small improvements in some reaching and lifting functions but I do not find them to be significant.
- [63] The plaintiff became pregnant in February 2018. She and her husband were worried that the pregnancy would worsen her back pain. She worried her right knee problems would return. Her plan was to start parental leave in September 2018 but she decided to take her maternity leave early on August 2, 2018 after consulting with her husband and family doctor. She testified that in addition to dizziness and tinnitus, her lower back pain became worse due to the pregnancy. While she tried to continue to push herself, the combination of her pain and the pregnancy was too much for her to continue working. I accept that her pregnancy did worsen her lower back pain later on in her pregnancy, which in turn worsened her sleep.
- [64] During her pregnancy the plaintiff had bleeding episodes and was advised by her gynecologist not to carry anything over 10 pounds or climb ladders. She provided a note to her employer to ask for relief from these tasks and was granted that accommodation. When asked why she was not afraid to ask for formal accommodation, the plaintiff stated she thought of it as temporary and the employer would be compassionate and understand that it was pregnancy-related.

- [65] As mentioned earlier, the plaintiff started parental leave in August 2018. She travelled to Taiwan to have the baby there as she would have the assistance of staying with her family who would take care of household chores while she could devote time to take care of her baby. She was ready and able to return to work at the end of her parental leave in October 2019 but could not due to lack of daycare space.
- [66] The plaintiff testified she could no longer do certain tasks in the home as it would cause flare-ups. Instead, her husband stepped in to complete them; for example, cleaning, cooking, and carrying heavier groceries. Before the accident, the plaintiff was responsible for doing the majority of the household tasks and preparing meals. She was and continues to be limited in her ability to vacuum, clean the washroom, carry heavy grocery bags, and stand for long periods to wash dishes.
- [67] After the accident, the plaintiff testified that her relationship with her husband was affected. They argue more often. The plaintiff became more emotional, which is another reason why she often argued with her husband. They are less intimate.
- [68] The plaintiff and her husband no longer go to the movies together as her shoulders and back hurt from sitting for long periods. They tried once in late March or early April 2017 and the experience was too difficult for her due to the pain and they left before the movie finished. Her husband found the incident too upsetting. She has not tried again. They used to explore different parts of the city together but now they rarely go out as most of what the plaintiff wants to do is stay home and rest. She feels she is no longer herself.
- [69] The plaintiff testified that carrying and lifting her son was and is difficult. She especially found bath time difficult as she would have to lower her son into the tub and this hurt her back. Her son started to crawl in September 2019 and then started to walk in January 2020. This caused even more flare-ups in her back since she had to follow him around, bend down, and pick him up.
- [70] As a result of the ongoing pain and flare-ups of this pain, the plaintiff now avoids many activities completely. The plaintiff has now given up hiking and other recreational activities are materially reduced.
- [71] The plaintiff testified that she was planning a family trip to visit her family in Taiwan for Chinese New Year. They cancelled the trip as the plaintiff did not think she could manage the long flight due to back pain and having to constantly carry and pick up her son. This was a very disappointing decision as they could not spend Chinese New Year with her family in Taiwan which is normally a family gathering, and she was unable to provide her son with an opportunity to connect with his Taiwanese family and roots.

- [72] The plaintiff's recreational activities now involve going out for dinner and going on short walks, some of which she has to cut shorter due to pain. She reduced her social activities as she is tired and just wants to rest. She no longer has the energy to pursue the activities she enjoyed before the accident. All of her energy goes toward her current studies and child care.
- [73] The defendant points out that Dr. Flaschner opined that physiotherapy and active rehabilitation treatments can be used for temporary symptomatic relief. The defendant suggests that the plaintiff's decision to mostly forego those treatments for a period of almost two years are factors which tend to suggest a more moderate degree of pain or some reduction in pain symptoms. I disagree. As stated above, the plaintiff was advised to lighten her activities while pregnant, and she was a new mother occupied with caring for her infant son. The plaintiff continued to do the home exercises recommended by her treating professionals. The plaintiff has now resumed physiotherapy and massage therapy, although she has not yet found daycare for her son. Her husband testified that he takes her to therapy sessions on his days off and he takes their son with them so he can look after him. This behaviour is consistent with the stoicism which I find the plaintiff exhibits.
- [74] The plaintiff continues to suffer from ongoing chronic pain in all of the previously mentioned areas, save for her right knee and hip pain which have resolved. I find these chronic pain symptoms are of a functionally limiting nature. She suffers from anxiety related to being in a car.
- [75] The plaintiff is relatively young. She is living with considerable and pervasive chronic pain. She has her entire life ahead of her with at least one child. She is precluded from doing activities she once enjoyed, or now does much less but with pain. The activities she would have done with her family as they grow together have been impacted in a material way. I find she is a responsible career-driven person, and she will likely be relegated to a setting requiring some form of ongoing accommodations. The plaintiff is driven to succeed with a strong work ethic, however her ability to do the hard work to succeed in achieving her goals has been impaired. The plaintiff has been a self-sufficient person for a long time. Her identity and sense of self-worth is closely linked with her success in her employment. Her pain, while likely to be temporarily relieved with treatments, is likely permanent.
- [76] Prior to the collision, the plaintiff took pride in having a clean and tidy home, and taking on those chores herself in order to ensure she had a clean home. She was also the cook in the household. She is and can no longer be that person who does those activities around the home as she once used to do.
- [77] I accept that the plaintiff's injuries resulted in loss of enjoyment of life, physical and psychological pain and suffering, inconvenience, and loss of amenities.

- [78] The plaintiff seeks an award for non-pecuniary damages of \$100,000. While each case turns on its own facts, counsel refers me to *Davidge v. Fairholm*, 2014 BCSC 1948, *Sekhon v. Gill*, 2019 BCSC 811, *Carlisle v. Vanthof*, 2015 BCSC 2427, and *Blackman v. Dha*, 2015 BCSC 698 for guidance.
- [79] In *Davidge*, the plaintiff was working full-time in a role the court found was better suited to him absent the collision. The court stated as follows:
- [3] These symptoms have continued sufficiently in time that it is likely that Mr. Davidge will continue to suffer from some neck pain and continued low back pain throughout his life, with the back pain being more severe than the neck pain.
- [221] I have looked at the cases referred to by counsel and no two cases are alike: either the injuries are more or less severe or have a greater or lesser impact on the person's quality of life. Here Mr. Davidge is a relatively young man facing what should be the prime years of his adult life with chronic pain in his neck and back. His injuries will impact on all aspects of his daily life, preventing his full enjoyment of experiences he used to enjoy, and limiting his enjoyment of new experiences, including that of being a father and husband. In all the circumstances here, I consider an appropriate award of non-pecuniary damages to be \$90,000 [Current value being \$97,335].
- [80] In *Sekhon*, the plaintiff was a 25-year-old university student at the time of trial. She was involved in three motor vehicle accidents which resulted in ongoing chronic soft tissue injuries and was at risk for psychological symptoms in the future. The court found that the plaintiff's pain was likely to be permanent, although variable in its severity, and that the plaintiff was at high risk for aggravation of her symptoms in the event of future trauma or stress. The court held:
- [77] Having said that, I place particular weight on the plaintiff's young age and the poor prognosis for recovery from her chronic pain. She will always have to struggle to manage her pain, with varying degrees of success, but it is likely to always be present to some degree. In that context, the risk of psychological symptoms becoming more severe in the future must be taken seriously.
- [81] The court awarded \$110,000 in non-pecuniary damages.
- [82] In *Carlisle*, the plaintiff was 34 years old and was active in the outdoors and gym-based activities prior to the accident. Post-accident she suffered from chronic pain. She was able to manage full-time work that was sedentary in nature. She suffered flare-ups in her symptoms when active. Her condition was expected to wax and wane to different degrees indefinitely. None of the medical doctors recommended she restrict her activities however the court found the plaintiff is restricted from fully engaging in her former activities given the associated flare-ups:

[112] Before the Accident, she was in excellent physical shape and was able to function at a high level without restriction. She must now pick and choose her activities. Pain continues to cause fatigue and sleep deprivation. She takes pain medication and relies on massage and physiotherapy. If she works a full day, her gas tank is empty and she doesn't have the energy to do more. If she travels, she must rest and recover before she can move on. Others provide assistance that she didn't need before.

[113] I accept that the plaintiff's pain continues to affect her function on a daily basis and that it will probably affect her indefinitely.

The plaintiff was awarded \$90,000 (\$98,880 in current value).

[83] In Blackman, the 37-year-old plaintiff experienced intermittent and mild neck pain and headaches following a collision that occurred five years before the trial. The medical prognosis was to the effect that this mild intermittent pain would continue into the future. The plaintiff continued to work full-time since the collision, and was able to participate in recreational and family activities. The court held:

[77] I have considered the impact of the injuries on Ms. Blackman's general well-being in coming to a decision on the appropriate award under this category. Ms. Blackman is a stoic and determined person. Despite the recurring neck pain and resulting headaches, she has continued to work full-time, participate in some recreational activities and raise a family. I accept that Ms. Blackman has dealt with the intermittent pain for over four years and will continue to experience some periodic mild pain....

[84] The plaintiff remained stoical and determined in the face of her pain. The court awarded \$80,000 in non-pecuniary damages (\$88,619 in current value).

[85] The defendant suggests a range of \$50,000 to \$60,000 as an award for non-pecuniary damages. Counsel refers me to *Jones v. McLerie*, 2016 BCSC 763, *Brass v. Chudentiz*, 2020 BCSC 343, and *Dennison v. Jensen*, 2019 BCSC 725.

[86] In *Jones*, the plaintiff was 36 years old at the time of the collision. He was moderately active prior to the accident. He was able to tolerate full-time work with minimal limitations, but still had ongoing low back pain symptoms at three years post-accident. He had limitations in recreational activities, but also curtailed his physical activities and treatment in part because of time limitations after his son was born. Non-pecuniary damages were assessed at \$45,000.

[87] In *Brass*, the plaintiff was 24 years old at the time of trial. She had ongoing pain symptoms in her neck and left shoulder, which were likely to improve but would likely never fully recover. After the accident, she was able to continue building her business performing eyelash extensions, but was restricted in her recreational and social activity. Non-pecuniary damages were assessed at \$50,000.

- [88] In Dennison, the plaintiff was 36 years old at the time of the accident. Prior to the accident she was active in hiking, golf, and dance. She did not miss any time from work but had ongoing minor lower back pain at the time of trial despite extensive physiotherapy, massage therapy, and other treatments. She was limited in her previous recreational activities and her injuries affected her relationship with her husband to the point that they nearly separated. Non-pecuniary damages were assessed at \$50,000.
- [89] The defendant submits that an appropriate award for non-pecuniary damages in this case is in the range of \$50,000-\$60,000.
- [90] As noted above, I accept that the plaintiff's injuries resulted in loss of enjoyment of life, physical and psychological pain and suffering, inconvenience, and loss of amenities. Unlike in Jones, the plaintiff in the instant case has ongoing injuries in addition to low back pain. In Brass, the prognosis for the plaintiff was that she would continue to experience her symptoms indefinitely but that they would improve. There was no resulting anxiety and the plaintiff coloured her evidence and was not entirely forthright. In Dennison, the plaintiff experienced only minor problems with work tasks.
- [91] I find the circumstances in this case are more similar to those in the cases cited by the plaintiff than the defence. Having regard to my findings and the above decisions, I assess the plaintiff's non-pecuniary damages in the amount of \$90,000.

Past Loss of Earning Capacity

- [92] In Smith v. Knudsen, 2004 BCCA 613, at para. 28, the Court of Appeal confirmed that while a plaintiff must prove that an injury had an effect on their past ability to earn income on a balance of probabilities, once it has been established on a balance of probabilities that there was an effect, past hypothetical events - like future hypothetical events - by necessity can only be proven on the basis of real possibilities and the likelihood of the possibilities occurring.
- [93] The plaintiff is entitled to recover the loss of the value of the work that she would have performed but was unable to perform because of her injury: Rowe v. Bobell Express Ltd., 2005 BCCA 141 at para. 30.
- [94] With respect to past loss of earnings, a plaintiff is only entitled to recover the net amount of their damages as per s. 98 of the Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231.
- [95] The plaintiff seeks an award for the loss of earning capacity for the period between the accident and the time she started her position at the law firm in March 2017. She reduces that time period to exclude time for the trip to Taiwan that was pre-planned.
- [96] The plaintiff also seeks an award for the period of work she lost due to taking her parental leave one month early.

- [97] The plaintiff submits it can be inferred that she would have been hired at the seafood wholesaler where she was going for her interview at the time of the collision. The defendant submits it is pure speculation to find that the plaintiff would have gotten the job. The defendant further points out that it was only two days later that the plaintiff started the interview process with the law firm and that the back and forth exchanges respecting that position, and her time in Taiwan, was the reason that position did not start until March 1, 2017. Although the plaintiff stated she would have returned from Taiwan earlier for the wholesaler position, the fact is she did not do that for the law firm position.
- [98] I agree with the defendant that the plaintiff's claim for loss of earning capacity in early 2017 is not made out. Her claim with regard to having to take early parental leave however is made out. I find that without the existing injuries caused by the collision, the plaintiff would have been able to work until her planned parental leave date in October 2017. I grant a past loss of earning capacity at \$2,750 gross.

Future Loss of Earning Capacity

- [99] Following *Rosvold v. Dunlop*, 2001 BCCA 1 and the Court of Appeal's summary of the approach a trial judge should take in assessing damages for loss of income, the plaintiff is entitled to be put into the position she would have been but for the accident (at para. 18). Furthermore:
- [8] What is being compensated is not lost projected future earnings but the loss or impairment of earning capacity as a capital asset. In some cases, projections from past earnings may be a useful factor to consider in valuing the loss but past earnings are not the only factor to consider.
- [10] The trial judge's task is to assess the loss on a judgmental basis, taking into consideration all the relevant factors arising from the evidence [citations omitted]. They 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 him, had he not been injured; and
 4. whether the plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market.
- [100] *Perren v. Lalari*, 2010 BCCA 140, at para. 32, discusses the two approaches to the assessment of loss of future earning capacity: the "earnings approach" and the "capital asset approach". The capital asset approach is better suited to cases where the loss is not easily measurable: *Perren*, at para. 12. That is the case here. Under this approach the *Rosvold* factors are at the forefront of consideration, as the assessment is not one that is math-oriented.

[101] On the totality of the evidence, I find that there is a real and substantial possibility that the plaintiff will experience future income loss for the following reasons:

- a) She continues to suffer from chronic pain affecting her daily and limits her in nearly all activities, including at work, in her household activities, child rearing, and recreational activities.
- b) The plaintiff's ongoing limitations and reduced tolerance for maintaining sustained postures (sitting and standing) will likely continue in the future and are likely permanent.
- c) The plaintiff is limited in bending, lifting, and carrying activities.
- d) The plaintiff has not driven since the collision due to driving-related anxiety which would impact her ability to pursue jobs in certain parts of the Lower Mainland, although with psychological treatment this is likely to be resolved within a period of time.
- e) The plaintiff would require accommodations from an employer where she could, for example, take numerous breaks throughout the day and have assistance from other employees.
- f) The plaintiff is likely to continue to push herself to complete her coursework and job, impairing her ability to "recharge" for the coming school and work week.
- g) The plaintiff is only 35 years of age and she will have to compete with healthy counterparts in the open job market, quite possibly at multiple points, before she would retire, 30 plus years from now.
- h) Ongoing pain takes a toll on people, irrespective of accommodations, and one's ability to tolerate chronic pain diminishes with age (see *Davidge* at para. 166 and *O'Brien v. Cernovec*, 2016 BCSC 1881 at para. 140 and *Morlan v. Barrett*, 2012 BCCA 66 at para. 41).
- i) The plaintiff still has 30 plus years of her working career ahead of her and there is a real and substantive possibility that she will not be able to work that long due to her chronic pain condition.

[102] The plaintiff submits that given the evidence of her personal drive, work ethic, and ability to learn quickly, there is a real and substantial possibility she will obtain the LAA position at some point in the future. The defendant disagrees, arguing that the plaintiff's English language skills are not and will not enable her to complete an LAA course or otherwise work in that field. The defendant's position is not supported by the evidence on the whole and my assessment of the plaintiff's abilities and personal drive. I find that the plaintiff is likely to successfully enroll in and complete the LAA course and gain employment as an LAA, in spite of her injuries.

- [103] The plaintiff submits that I should use the average LAA figures of \$52,500 to \$65,000 per year per the experiential evidence of what an LAA is on average paid in the Lower Mainland. The plaintiff further claims a loss of three years of earnings to reflect the loss of her capital asset but also to reflect that due to the toll that chronic pain takes on a person over their lifetime, the plaintiff may have to cease her work life early. The total range is \$157,500 to \$195,000 in future loss of earning capacity.
- [104] The defendant submits, given the plaintiff's history of not taking sick leave or formal accommodations at work, she would continue in that vein and have limited impact by the need to only take occasional days off work because of her pain. They submit that a modest one-quarter to one-half annual income award, assuming she could only achieve employment at her previous pay level of \$33,000. That award would be \$8,250 to \$15,000.
- [105] The defendant's position assumes that the pain is not severe nor truly chronic, and I have found that it is. I agree that the impact of such a condition would impact the long-term employability of the plaintiff in her suited work area, that of an LAA or similar administrative position.
- [106] In my view, it is fair and reasonable to value the plaintiff's loss of income earning capacity as equivalent to two years of salary. Since two years better reflects her history of not taking time off, three years would over compensate. But that salary would be at the lower end of the LAA range, at \$52,500 because this better reflects the contingency that she will not become an LAA. Accordingly, I award her \$105,000.

Loss of Housekeeping Capacity

- [107] The plaintiff submits this is an appropriate case to make an award for loss of housekeeping services. The plaintiff's ability to perform housekeeping services is diminished by reason of the injuries sustained, and domestic services she once provided have value. This is true even if the replacement services have been provided gratuitously by the plaintiff's husband: *McTavish v. McGillivray*, 2000 BCCA 164, at para. 63 and *Liu v. Bains*, 2016 BCCA 374 at paras. 17 and 25-29.
- [108] The defendant takes the position that there has been no evidence that any such incapacity will result in actual expenditures. But that is not required. The evidence of the plaintiff and her husband was that he spends three to four hours per week on household chores which the plaintiff would otherwise have done if she were able. Alternatively, the defendant says that the plaintiff's husband is just doing what any family member would do in the division of family responsibilities. The fact is he did not do that work prior to the accident and their arrangement was such that it was not likely to change.

[109] I find that the plaintiff has established an award for future loss of housekeeping. There was evidence that independent housekeepers would charge a rate of \$25 an hour but the plaintiff proposes a more conservative \$20 rate. Based on a rate of \$20 per hour for three hours a week, and taking into account the discount rate and negative contingencies, I award a total of \$30,000 for both past and future loss of housekeeping capacity.

Cost of Future Care

[110] The plaintiff is entitled to be returned to the position she was in had the accident not occurred. The court must attempt to assure full compensation through the provision of adequate future care required as a result of the collision. Such an award should be based on what is reasonably necessary on the medical evidence to promote the plaintiff's mental and physical health: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.); *Williams (Guardian ad Litem of) v. Low*, 2000 BCSC 345. The costs must also be reasonable.

[111] Assessment of the cost of future care is not a precise accounting exercise: *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9.

[112] The plaintiff submits, based on the recommendations of Dr. Flaschner, that she should be compensated for the costs of ongoing active rehabilitation with more sessions up front and then "refresher" kinesiologist sessions to review exercise regimes and make corrections as necessary, a gym membership to facilitate those exercises, manual therapies (like massage therapy) for temporary symptomatic relief to enable vocational and avocational needs toleration, some medication for pain and sleep, and Botox treatment once and, if successful, additional Botox treatments thereafter. The plaintiff submits that for such up front regular and reduced long term treatments for 30 years assuming she works until the age of 65, and taking into consideration negative contingencies, an award of \$40,000 is warranted.

[113] The defendant points out that Dr. Flaschner opined that active rehabilitation and massage therapy are not curative. I agree and that is because he did opine that the plaintiff's pain was chronic. He, however, also recommended the treatments as they provided temporary relief. The plaintiff has had active-rehabilitation sessions and was receiving in-person physiotherapy treatment this year until COVID-19 restrictions were put in place and replaced with on-line sessions. She also received massage therapy as recent as the summer of 2019. These treatments provided her with temporary relief. I find that she would continue to undergo these treatments as recommended.

[114] The defendant also submits that the plaintiff has not used pain medication apart from it being prescribed when she initially sought medical attention at the time of the collision. I do note that the plaintiff has not claimed any special costs for medication since that time. Dr. Flaschner recommends she try some topical analgesics and a low dose of a sleeping aid to assist her at night. There is a negative contingency due to the fact that the Botox may not benefit the plaintiff. When prescribed in the past, the plaintiff did take medication to

alleviate her symptoms and I find that she would take the medications as now recommended.

- [115] Evidence of the costs of the recommendations was presented by Dr. Flaschner, through plaintiff's costs incurred to date, and reference to Insurance (Vehicle) Regulation, B.C. Reg. 447/83 which sets out a schedule of payments by the Insurance Corporation of British Columbia for treatment benefits.
- [116] The defendant submits an appropriate award for cost of future care would be for a limited number of physiotherapy and massage therapy based on extremely low costs amounts to a total of \$2,352.50.
- [117] I do not find that a gym membership is required as the plaintiff has been able to do the exercises recommended to date in her home. I find that the other recommendations of Dr. Flaschner establish a reasonably medically necessary need for an award in the amount of \$30,000 for the cost of future care.

In-trust Claim

- [118] In *Bradley v. Bath*, 2010 BCCA 10, the court explained an in-trust award as follows:
- [43] An in-trust award is one made to a plaintiff in trust for one or more of his or her family members, who are not named as parties to the action, as compensation to the family members for additional work done by them as a result of the impaired capacity of the plaintiff to perform housekeeping chores or to care for themselves. It was affirmed as a recoverable award by this Court in *Kroeker v. Jansen* (1995), 1995 CanLII 761 (BCCA), 123 D.L.R. (4th) 652, 4 B.C.L.R. (3d) 178 (C.A.).
- [119] As noted above in the loss of housekeeping capacity discussion, I heard evidence surrounding the plaintiff's husband stepping in to either assist or completely take over household tasks the plaintiff previously did due to her ongoing pain and limitations. The plaintiff claims, in-trust on behalf of her husband, \$12,436.
- [120] The defendant cites *Campbell v. Banman*, 2009 BCCA 484 which in turn cites *Star v. Ellis*, 2008 BCCA 164, cautioning that a relatively minor adjustment of duties should not attract a discreet assessment of damages. The defendant further submits it was the birth of their son that resulted in the plaintiff's husband taking over those chores. I find that this is not a case of a relatively minor adjustment of duties. The plaintiff's husband has taken over the majority of the household chores due to the plaintiff's injuries. The birth of their son would only increase those duties the plaintiff would otherwise have taken on, and does not detract from the work previously done by him post-collision. He did not, however, take on those duties while the plaintiff was in Taiwan receiving assistance from her family.

[121] I find it appropriate to award an in-trust award for the extra services provided by the plaintiff's husband as it was over and above what would normally be expected from a family member and is not compensated for within the plaintiff's own capacity loss claim which is compensation for her own asset loss. I award an in-trust award for the plaintiff's husband of \$5,000.

Special Damages

[122] The parties agreed that an award for special damages should be \$3,526.62 and I make that award.

Conclusion

[123] In summary, I make the following orders in accordance with the reasons above.

Non-pecuniary damages

\$90,000.00

Past loss of Income (gross)

\$2,750.00

Future loss of earning capacity

\$105,000.00

Loss of housekeeping capacity

\$30,000.00

Cost of future care

\$30,000.00

In-trust claim

\$5,000.00

Special damages

\$3,526.62

Total

\$266,276.62

[75] If the parties wish to make submissions on costs they may do so provided they contact Trial Scheduling within 30 days of receiving this decision to schedule a costs hearing. If they do not do that, then I award the plaintiff costs at Scale B.

"Wilkinson J."

The Honourable Madam Justice Wilkinson

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Prepared on 25 October 2026 · Esheria