

CANADA / JUDGMENT

Jefferson v. Virk

2020 BCSC 306

COURT

Supreme Court of British Columbia

DECIDED

5 March 2020

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2020 BCSC 306 Jefferson v. Virk

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Jefferson v. Virk,

2020 BCSC 306

Date: 20200305

Docket: M157378

Registry: Vancouver

Between:

Mary Grace Jefferson

Plaintiff

And

Gurinder Singh Virk

John Doe

Jane Doe

Insurance Corporation of British Columbia

Defendants

Before: The Honourable Mr. Justice Harvey

Reasons for Judgment

Counsel for the Plaintiff:

J. Sarophim

N. Kelly

Counsel for the Defendants:

Masa Jeftic

Milos Jeftic

Place and Dates of Trial:

Vancouver, B.C.

November 25-29, 2019

Place and Date of Judgment:

Vancouver, B.C.

March 5, 2020

Introduction

- [1] The 41-year-old plaintiff, Mary Jefferson, was injured in a motor vehicle accident on March 25, 2014 (the "accident") when her vehicle was struck by the defendant, Mr. Virk, while she was parallel parking her vehicle. Liability for the collision has been admitted by the defendant Mr. Virk.
- [2] The major issue in this proceeding is the extent of the plaintiff's injuries and the impact, if any, on her capacity to earn income both from the accident until trial and beyond.
- [3] The plaintiff is and was a nurse in the neuro-science ward of Vancouver General Hospital ("VGH"). Prior to the accident, she worked numerous on-call shifts at Royal Columbian Hospital ("RCH") in New Westminster. The plaintiff continued working full time at VGH without interruption following the accident but, gradually, over the course of several years, began reducing her shifts at RCH.
- [4] At the same time as the reduction in her hours at RCH, the plaintiff began picking up extra overtime shifts at VGH. For the latter shifts, she was paid overtime rates under the collective agreement between her union and Coastal Health.
- [5] At the zenith of her employment, she recorded over 3000 hours of work per year between the two hospitals, mainly at straight time. Gradually her total hours reduced but, by trial, she was working her full shift at VGH and all of the allowable overtime hours at VGH under the terms of the union contract. Currently, such is 572 hours in excess of the regular full-time hours required of a nurse.

- [6] The plaintiff's current income is slightly reduced from what it was at the time of the accident despite having received pay increases in each of the intervening years as a result of the collective agreement.
- [7] The plaintiff testified she has been left with chronic, disabling pain that has left her incapable of working the same hours that she worked pre-accident as a nurse, unable to effectively or painlessly attend to the household chores she managed prior to the accident, and, finally, less able, by virtue of her ongoing pain, to enjoy recreational activities that she engaged in before the accident occurred.

The Accident

- [8] On March 25, 2014, the plaintiff was reversing her vehicle curbside near her home in Vancouver. She described observing the defendant's vehicle, a Dodge Magnum, pulling away from the curb across the street, performing a U-turn and then begin travelling along the street whereupon the right front corner of his vehicle struck the left rear of hers. The defendant fled the scene.
- [9] At the moment of impact, the plaintiff had her foot on the gas, gently backing up, and was turned looking over her right shoulder when the collision occurred.
- [10] She sustained injuries to her neck, back, and shoulder. She also stated she became nervous when driving as a result of the accident. Although her neck and shoulder pain resolved quite soon after the collision, her back pain persists. The plaintiff no longer experiences anxiety when she drives.
- [11] The plaintiff argues that the lingering effects of her injuries have caused a reduction in her income post-accident to trial and will carry on impacting her earning capacity until she retires at age 65.
- [12] She also asserts the effects of the accident have interfered with her day-to-day enjoyment of life and her ability to perform household tasks as she was prior to the accident.

Issues

- [13] The following issues were raised at trial:
 - a) What is the appropriate award for the plaintiff's non-pecuniary loss?
 - b) What impact have the plaintiff's injuries had on her capacity to earn income since the accident and will the loss, if any, continue into the future?
 - c) Is an award for loss of housekeeping warranted?
 - d) What are the plaintiff's special damages?
 - e) What, if any, are the costs of future care?

The Plaintiff Pre-Accident

- [14] Following her graduation from high school, the plaintiff began acquiring additional credentials, first obtaining certification as a dental and medical office assistant while working full-time in the evening, and later enrolling in the nursing program at Langara College where she was initially waitlisted. She began her nursing studies in 1999.
- [15] As she studied for her nursing degree, she worked full time as a support worker. The plaintiff enjoyed and continues to enjoy working with people and helping them when in need.
- [16] In 2000, she began working at RCH as she continued her studies. She carried on working on a casual, on call basis at RCH following completion of her credential as a registered nurse until the time of the collision and for approximately three years after.
- [17] She obtained her registered nursing credential in 2002 and began her preceptorship in the nursing program in the neuroscience unit at VGH. Upon completion of the program she accepted a full-time position with the neuroscience unit and has worked full-time in that position ever since.
- [18] Presently, the plaintiff is in a full-line rotation at VGH, which requires her to work four 12-hour shifts with days off between those rotations. She also works considerable overtime in excess of her normal required work hours.
- [19] Prior to the accident, the plaintiff's combined hours at VGH and RCH reached a combined total of 3064, most of which were paid at straight time.
- [20] The plaintiff is married to Matthew Jefferson. They met in 2001 and married in 2005. They have three children together. Owing to the then ages of their children and the fact that Mr. Jefferson, a teacher, has set hours Monday to Friday from early in the morning to dinner time, the plaintiff chose to work night shifts so as to provide flexibility of daycare for their children as they age.
- [21] She testified that the night shifts are not so attractive now that her children are older and that she would, but for the effects of the accident, prefer a 'normal shift' of two days and two nights per rotation rather than continuous nights. Night shifts, however, are less physically demanding and the plaintiff testified she can better adapt her workload during a night shift than a day shift because of the different demands of each shift.
- [22] Night shifts carry a financial premium with them.
- [23] In addition to what can only be described as a Herculean work schedule prior to the accident, the plaintiff testified that she was active physically and often went to the gym after completing a shift and was also the parent primarily responsible for the homemaking duties in their five-person family.

- [24] The family home has a garden which she maintained with Mr. Jefferson. Her husband described the plaintiff as a "neat freak" who is constantly tidying or tending to requirements of the house when she was not working.
- [25] She testified that she did 80-90 percent of the inside household chores prior to the accident and that she assisted her husband with yard work, including tree trimming.
- [26] Both Mr. and Ms. Jefferson described participating in physical activities both as a pair and with their family. Family activities included hiking the Grouse Grind, running with her husband and attendances at the gym. The plaintiff had no physical restrictions and was able to perform all of the tasks described above without discomfort.
- [27] According to her evidence and others, the accident changed that.
- [28] Presently, while the plaintiff still enjoys frequent workouts at her gym, she has changed her routine of long runs to less demanding workouts on a treadmill and routes with less gradation. She has reduced her participation in family outings such as hikes and walks over uneven or sloped terrain. The family used to do the Grouse Grind together but she testified she can no longer do it because of limitations caused by the accident.

The Plaintiff Post-Accident

- [29] Following the accident, the plaintiff immediately noticed pain in her neck, back and shoulders. She also says she became nervous while driving, although the neck and shoulder pain and the nervousness while driving resolved within three months of the accident. Her low back pain has lingered now some five years since the accident.
- [30] The plaintiff's family doctor is Dr. Sun. The plaintiff attended Dr. Sun immediately following the accident and embarked upon the usual modalities of treatment for what were diagnosed as soft tissue injuries. She began a course of physiotherapy, including acupuncture and IMS, then underwent an active rehabilitation program as recommended by Dr. Sun. She also took occasional massage therapy treatments, which provided short-term relief from her symptoms but nothing that lasted.
- [31] Ms. Jefferson's physiotherapist provided her with a series of stretches and strengthening exercises designed to alleviate her symptoms. She has continued that regime but has not noticed any long-term improvement to her back pain.
- [32] In her direct examination, she described the back pain as level 3 to 4 out of 10, more or less constantly, with flare-ups to 7 of 10 following aggravation by activity. At work, the plaintiff described how she has modified her work requirements to try and manage her pain, but notes her job, whether day shift or night shift, requires her to physically move patients who are partially or totally disabled. Physical activity aggravates her back pain. Because of pain, she says she is less able to accept additional shifts than she otherwise was. While not specific as to what time period she was referring to, she testified that she had turned down overtime shifts at VGH as a result of on ongoing pain from the accident. Eventually, in 2017, she

stopped working at RCH altogether. Again, the rationale was accident-related pain.

- [33] That said, it emerged through the evidence of Ms. Gabriele, a staffing co-ordinator for Vancouver Coastal Health, that the plaintiff worked the maximum allowable number of overtime hours at VGH in 2019: 572, by the time the trial had commenced.
- [34] The plaintiff stopped active treatment in the fall of 2016 but returned in September 2019 to her physiotherapist for further treatment. Her attendance on Dr. Sun became sporadic after the fall of 2016.
- [35] Plaintiff's counsel explains the lack of medical intervention as evidence of the plaintiff's stoicism. According to the plaintiff, she does not vocalize her complaints but simply goes about living her life even when aggravated by pain in her low back.
- [36] She testified she can no longer maintain her home to the standard she previously did. Certain chores aggravate her symptoms more than others. She has purchased a lighter vacuum and moved the laundry facilities within the family home to allow her to maintain what were her pre-accident responsibilities but still cannot perform tasks to the same level she did before. She rarely gardens and has not been able to assist her husband with the tree trimming of the large trees on her property.
- [37] Both the plaintiff and her husband testified that he has now taken over the majority of the housekeeping tasks.
- [38] On a recreational level, the plaintiff is no longer able to go on runs as she used to. She now runs on a treadmill with her husband in the gym so that she can run at either a reduced rate or walk. She does continue exercising at the gym, but no longer engages in some of her former family activities such as hikes up the Grouse Grind or hiking over rough terrain. She described herself as having less energy to engage in social activities.
- [39] Perhaps most importantly, from the standpoint of this litigation, the plaintiff says she has reduced her total work hours as a result of the effects of the accident.
- [40] A chart was provided showing the summary of hours worked by the plaintiff commencing in 2012 and thereafter in each year up to July 2019.
- [41] Below is a copy of the summary of hours worked by the plaintiff.

Pay Ranges

RCH

VGH

Total

Dec. 23, 2011-Dec. 20, 2012

1008

1991

2999

Dec. 21, 2012-Dec. 19, 2013

1234.5

1740.7

2975.2

Dec. 20, 2013-Dec. 18, 2014

1360.5

1704.25

3064.75

Dec. 19, 2014-Dec. 17, 2015

994

1942

2936

Dec. 18, 2015-Dec. 15, 2016

396

1974

2370

Dec. 16, 2016-Dec. 14, 2017

275

2075.58

2350.58

Dec. 15, 2017-Dec. 31, 2018

--

2133

2133

Jan. 1, 2019-July 25, 2019

--

1316.75

1316.75

- [42] The plaintiff testified that she stopped accepting shifts at RCH in 2017 as a result of the increasing strain working such hours caused her. In the fall of 2017, RCH increased the number of hours required of casual employees such as the plaintiff from 275 to 400.
- [43] The plaintiff says she felt unable to keep up that pace, so she quit working at RCH entirely. She testified she would still work some shifts at RCH but for the 400-hour minimum. In my view, this displays unused capacity.
- [44] I note that RCH is governed by a different contract which pays less and that by working two different shifts at different hospitals she was, for the vast majority of shifts, paid at straight time. Now the plaintiff works 572 hours of overtime at VGH, the maximum allowed, most of which is paid at double time.
- [45] Ms. Gabriele testified that the cap on overtime through Vancouver Coastal Health is to prevent worker fatigue. Ms. Gabriele stated Vancouver Coastal Health would not know of the hours an employee worked at Fraser Health (or indeed elsewhere) but, presumably, the same fatigue factors would be of concern.
- [46] The plaintiff said she worked these Herculean hours both before and for several years post-accident due to financial need. She is now working about 2400 hours annually and making somewhat less money than in years prior to the accident.
- [47] The plaintiff testified that she felt a strong connection to RCH as she worked as a care aid while training to get her RN. Despite the lengthy drive, she carried on working the equivalent of 2/3 of full time employment, mostly at her basic hourly wage. She said that because of the deductions from her overtime pay at VGH, which was presumably taxed at a higher rate, she felt working at RCH for a lesser hourly wage was equally as financially beneficial. Until two years prior to trial, overtime at VGH was capped at 270 hours annually.
- [48] There is no basis in fact for the plaintiff's belief she received favourable tax treatment by earning separate paycheques from different employers. The total annual income of a person is taxed at a marginal rate dependent on the highest dollar earned, not where the taxpayer earned the income. Given the plaintiff's testimony that she worked all the extra shifts out of financial need, it is difficult to understand how previously she would work so many hours at RCH if overtime was available at VGH that would have paid the plaintiff more for those hours.
- [49] Following the report of the accident, Dr. Sun originally gave the plaintiff a medical note to take to her supervisor suggesting accommodations at her workplace would be necessary. The plaintiff said she delivered it to a supervisor but that no corresponding adjustment to her duties followed. Thereafter, she implemented her own accommodations, which apparently have endured for the past five years. The plaintiff acknowledged that VGH is

required to accommodate its employees and that were she to be more proactive about her present requirements, a more formalized schedule of accommodations could be put in place for her.

- [50] No one from VGH was called to provide evidence respecting the plaintiff's duties or job performance since the accident or the extent to which any disabilities could be accommodated by her employer.
- [51] Since the date of the accident, the plaintiff has taken only six sick days. She was unable to connect any of these to the effects of the motor vehicle accident, despite her statement to doctors discussed below that she took two days off following the accident.
- [52] Mr. Benning, the plaintiff's economist, assumed all missed days were a result of the plaintiff's symptoms from the accident. He offered no attribution for that assumption but, on the evidence, it is unsustainable.

The Medical Evidence

- [53] The plaintiff argues that the medical evidence led on behalf of the plaintiff demonstrates that she is partially and chronically disabled as a result of her injuries such that she experiences ongoing limitations sitting, standing, lifting and carrying that impact all areas of her life, both vocational and recreational.
- [54] The defence called no medical evidence, arguing instead that the plaintiff has failed to discharge her burden of proof as to both past and future loss of earning capacity.

Dr. Joyce Sun

- [55] The plaintiff's family physician, Dr. Sun, is the plaintiff's family physician and has been since 2002. She testified that the plaintiff was in good health prior to the accident and did not attend upon her often. She also described the plaintiff as someone who does not share much about her personal life.
- [56] Following the March 2014 collision, Dr. Sun described the various examinations she performed of the plaintiff at the approximately 20 visits since the collision. Some of the attendances on Dr. Sun were for unrelated matters.
- [57] The plaintiff testified that she truthfully relayed her complaints to Dr. Sun upon each of those attendances and took no issue with the medical entries that attributed commentary to her.
- [58] Dr. Sun testified that she could elicit pain in the plaintiff's low back on physical examination and that there was objective evidence of injury upon examination. Improvement was noted to the upper back, but the plaintiff's low back complaints have remained the same.

[59] Since the accident, Dr. Sun prescribed the plaintiff physiotherapy and active rehabilitation. Beginning in 2016, Dr. Sun's advice changed and she directed that the plaintiff should focus on exercise and seek treatment as needed for flare-ups. Post-September 2016 no treatment was sought until the fall of 2019.

[60] The first medical report offered by Dr. Sun notes:

In summary, Ms. Jefferson sustained soft tissue injuries to her neck and back as a result of her motor vehicle accident on March 25, 2014. Her symptoms of neck, shoulders and lower back pain are consistent with the diagnosis of soft tissue injuries as a result of a whiplash type of injury to her neck and back. Her treatments included physiotherapy, massage therapy and daily home exercises. She also completed Active Exercise program with a kinesiologist. In my opinion, these treatments which she had undertaken to date have been reasonable. [] Her residual limitations include lifting/carrying and standing/sitting tolerances which affect her ability to perform household chores such as vacuuming at home and doing charting at work. Her pain also prevented her from enjoying recreational activities such as running. []

Her prognosis for full and complete recovery to her pre-injury level of function is guarded. It has been more than two years since her accident. It is usually seen that soft tissue injuries which persist for greater than two years will become a permanent source of chronic pain and partial disability. Further treatment provided by physiotherapist, acupuncturist, massage therapist and chiropractors will not change the outcome but may provide symptom management of flare-ups. Her optimum recovery will require her to maintain regular exercise program on a life-long basis.

[61] That report is notable, in my view, for its lack of commentary on the plaintiff's capacity at work and any reported interference with the plaintiff's ability to carry on with her work-related duties at her pre-accident pace.

[62] In a follow-up report dated August 17, 2019, Dr. Sun provided the following:

Just prior to my last report, Ms. Jefferson continued to experience intermittent low back pain and remained partially disabled.

Unfortunately, there is no improvement in her low back pain and she has reached a plateau in her recovery.

As per my last report, her prognosis for full and complete recovery to her pre-injury level of function remains guarded. It has been more than two years since her accident. It is usually seen that soft tissue injuries which persist for greater than two years will become a permanent source of chronic pain and partial disability. ... I would agree with Ms. Tencha's recommendation that she may benefit from hired help for house and seasonal cleaning and gardening tasks. She would also benefit from purchasing a lightweight vacuum.

I am in agreement with Ms. Tencha's opinion that Ms. Jefferson "requires intermittent use of passive modalities for symptom management" and she needs to "continue to perform her exercise program on an independent basis to maintain her functional abilities". Future care cost

recommended by Ms. Tencha is reasonable and medically justified and I concur with her recommendations for physiotherapy, kinesiology and massage therapy on an intermittent basis for management of flare ups of pain and ongoing membership at a fitness facility to allow her to maintain her exercise program on a life-long basis. She may require medications such as Tylenol, non-steroidal anti-inflammatory medication, muscle relaxants and topical diclofenac for symptoms management of flare ups.

- [63] Once again, the report is notable for its lack of reference to the residual injuries impacting the plaintiff's capacity to work as a registered nurse in the same fashion as prior to the accident.
- [64] A review of Dr. Sun's records reveals that from as early as June 2015, the plaintiff reported that her right low back pain was on and off and getting better. She reported her highest pain level was 5 of 10 (not 7 and 8) when bad and complained of pain following or during prolonged driving. She was taking Tylenol twice a month, exercising daily, working night shift with light duties, and not vacuuming at home. Vacuuming was the only chore the plaintiff reported as being beyond her capabilities.
- [65] In August 2015, she reported her pain was 6 to 7 because of a long plane ride and a drive but had returned to 2 to 3 of 10; the seeming baseline.
- [66] By December 8, 2015, the plaintiff reported to Dr. Sun that she was 80 percent improved and that her low back pain was triggered by prolonged sitting or standing for greater than 10 minutes. She reported working full time but had not yet returned to running.
- [67] Over her three visits in 2016, she complained of intermittent back pain aggravated by prolonged sitting or driving. She was exercising daily at the gym.
- [68] When assessed again, in December 2016, the plaintiff expressed no limitations to her home activities and reported she was working full-time night shifts only. She reported to Dr. Sun that the majority of her work was doing paperwork.
- [69] Her next recorded visit was February 2018, when she reported she had seen Dr. Giantomaso at the instance of her counsel and that Dr. Giantomaso had recommended an MRI. Dr. Giantomaso denied such a recommendation when he testified. She reported 'flare-ups' with pain of 3 out of 10 at this visit. She made no mention of any impact of her injuries on her work. In particular, she did not tell Dr. Sun that she had stopped working at RCH because of the combined effect of her diminished durability as a result of accident symptoms and the change in RCH's causal labour requirements.
- [70] Her next appointment was in April 2018, where the plaintiff reported that her pain comes and goes. Sitting continued to aggravate her pain. She made two further visits in September 2018 and January 2019 for unrelated complaints, and made no mention of the accident symptoms at these times.

[71] The plaintiff next attended Dr. Sun in September 2019 and reported difficulties with heavy lifting, vacuuming and gardening. She was taking Tylenol or ibuprofen intermittently and working full time at VGH. From her 'retirement' from RCH in late 2017 until trial, the plaintiff never reported to Dr. Sun that she was unable, by virtue of her symptoms, to continue working at RCH.

[72] In concluding her July 2018 report, Dr. Sun stated:

Her residual limitations include lifting/carrying and standing/sitting tolerance which affect her ability to perform household chores such as vacuuming at home and charting at work. Her pain also prevented her from enjoying recreational activities such as running. However, she missed only two days of work after the accident and was able to continue full time, performing full duties but with limitation in prolong (sic) sitting and heavy lifting. In my opinion, her length of total and partial disability is reasonable given the nature of her soft tissue injuries.

[73] Dr. Sun gave no description of to what she was referring when she referenced "total disability". On the evidence before me, there was no period of total disability. The plaintiff carried on working after the accident at a level consistent with her pre-accident employment until 2016 when she significantly reduced her hours at RCH. Her only stated concern at this point regarding housework related to vacuuming. Similarly, there are no specifics as to what 'two days of work' Dr. Sun is referring to.

Kelly Ross

[74] Ms. Jefferson's treating physiotherapist is Kelly Ross. Ms. Ross first saw the plaintiff on March 31, 2015, for an assessment and then treated her regularly until December 2015 when funding for the physiotherapy 'expired'.

[75] Ms. Ross did not see the plaintiff again until September 2019. At each appointment, Ms. Ross took a subjective history and performed an assessment. Over the 60+ treatments that the plaintiff attended, Ms. Ross described her as demonstrating pain and limitations with her right lower back.

Dr. Tony Giantomaso

[76] Dr. Giantomaso is an expert in physical medicine and rehabilitation. He assessed the plaintiff in June 2017 and March 2019. In those assessments, he conducted an interview with the plaintiff and performed a physical examination and review of the medical records.

[77] He opined that Ms. Jefferson suffers from (a) post-traumatic lumbar sprain-strain injury Grade 1-2 chronic; (b) post-traumatic right SI joint dysfunction chronic; (c) post-traumatic cervical and thoracic sprain-strain injuries that resolved within a year of the accident. Presumably, the latter history was taken from the plaintiff. She actually recovered from her sprain-strain injuries within 3 months.

- [78] Upon physical examination, Dr. Giantomaso noted objective findings including spasm upon joint provocation and trigger points eliciting painful responses. He also noted complaints of painful range of motion and pain on palpation in the low back and gluteal region.
- [79] He testified that he conducted a number of tests aimed at providing consistency in diagnosis and that the plaintiff's reactions were consistent throughout with no indication of overreaction or overstating her pain. The doctor opined that her stated limitations at work and home were reasonable given the nature of her injuries. He recommended active rehabilitation, topical creams or medications and injections (which she steadfastly refused to have), as well as occasional passive therapies to allow her to maintain her current level of function. He noted that none of the recommendations are curative, but will assist her in maintaining function.
- [80] That said, Dr. Giantomaso was not told the plaintiff had previously worked over 3000 hours annually and, by trial, had reduced those hours to an approximate 2400. He endorsed the plaintiff's complaints only insofar as her complaints related to increased discomfort as a result of certain activities; not that she was restricted from them.
- [81] He testified the injections, which the plaintiff declined, are successful in only about 50 percent of patients. Even when successful, there is a risk of side effects. Eventually, the injections lose their efficiency over time.
- [82] Dr. Giantomaso opined that she will be left with her collision-related symptoms for the duration of her life, given that 85 percent of people with chronic pain, that is pain lasting two years, never reach full recovery. After three years from the date of recovery "it is very improbable that they will improve".
- [83] He, too, was told the plaintiff missed two shifts following the accident "but otherwise did not miss major time off work other than for appointments." The belief the plaintiff missed two days of work following the accident is unfounded and the statement she "did not miss major time off work other than appointments" is at odds with the plaintiff's submission that, since 2017, she has lost somewhere from 600 to 700 hours of work annually as a result of her symptoms.
- [84] He concludes his second report dated March 21, 2019 with the following:
- She notes limitations in driving tolerance and tolerance for travelling in planes. She notes limitations with repetitive flexion-extension maneuvers at home with household chores. She notes occasional pain and sleep disruption due to low back and buttock pain.
- [85] While acknowledging the chronicity of her injuries, Dr. Giantomaso offered no opinion as to their effect on her capacity to work at pre-accident levels or her future durability.

Haley Tencha

[86] Ms. Tencha is an occupational therapist. She performed an evaluation of the plaintiff's occupational performance on June 6, 2019 in anticipation of preparing a cost of care analysis. Ms. Tencha testified that physical demands and capacity testing revealed the following deficits and limitations:

19.1 There were measured restrictions with neck and lumbar extension during active range of motion testing

19.2 There was measured weakness with right hip flexion and right hip abduction during manual muscle strength testing.

20.1 Unable to lift more than 20 lbs., with two hands, to hip level. Unable to lift more than 15 lbs. safely, with two hands, to waist level. Unable to lift more than 10 lbs. unilaterally with her right or left hands to hip or waist level. Unable to carry more than 10 lbs., with two hands, over approximately 50 feet.

20.2 Limitations with tolerating prolonged static standing postures. She took breaks to walk around and stretch after three to five minutes of standing in one spot. She was noted to bear more weight on her left lower extremity while standing statically.

20.3 Limitations with tolerating sustained seated postures. She was observed in dynamic standing postures for most of the interview and assessment. The total time she spent sitting was 26 minutes and the maximum continuous time she spent sitting was 12 minutes with observed difficulties including shifting in her seat and bearing more weight on her left buttocks.

20.4 Limitations with tolerating tasks requiring prolonged and repetitive stooping and repetitive squatting. She relied upon external support when assuming and recovering from low-level postures.

[87] Ms. Tencha went on to opine:

Ms. Jefferson presents with physical limitations that contribute to a reduced functional capacity. While she has been able to return to work full-time in her pre-injury position as a nurse at Vancouver General Hospital, she has been unable to sustain her casual position as a nurse at Royal Columbian Hospital. She has been unable to keep up with completing her share of her household and yard work tasks including vacuuming, mopping, cleaning the bathtub, cleaning at lower-levels, gardening and trimming trees. She has been unable to return to more physically demanding leisure activities such as running and hiking. She has been unable to return to prolonged driving which has limited her ability to drive her children to extracurricular activities and go on road trips with her family.

Limitations that contribute to the aforementioned functional changes include reduced functional strength capacities, reduced balance on her right lower extremity and reduced tolerances for static sitting, static standing, prolonged and repetitive stooping and low-level postures

Position of the Parties

- [88] The plaintiff argues that she has suffered a significant life-altering injury which has impacted all aspects of her life.
- [89] The plaintiff seeks a non-pecuniary damages award in the range of \$85,000 to \$100,000 to compensate the plaintiff for her loss of amenities of life.
- [90] Further, plaintiff's counsel argues that the plaintiff has suffered income loss, both past and future, as a result of the impairment to her back. The plaintiff argues she has been rendered less capable overall of earning employment income, arguing since the accident she has suffered a loss of earning capacity estimated by the economist Mr. Benning to be \$68,575 after taking into account the plaintiff's proper year-to-date income and attributing the plaintiff's six missed days of work since the accident to the accident.
- [91] Mr. Benning calculated the future income loss of the claimant, based on the reduction in her ability to work less than the 3000-plus hours she worked in 2013 and 2014, as \$743,459. The loss is founded primarily on the decline in the plaintiff's casual hours at RCH after December 2014 until she ceased altogether in 2017.
- [92] Using the multiplier provided by Mr. Benning to calculate the future wage loss, the amount varies from \$466,046 to \$579,691 depending on whether provision is made for labour market forces such as part time work, unemployment or voluntary removal from the work force.
- [93] The plaintiff seeks an award for cost of future care and loss of homemaking capacity based on the report of Ms. Tencha. Ms. Tencha's recommendation, based on present-day values prepared by Darren Benning, total \$186,000 (rounded). The plaintiff acknowledges that a gym pass cost should be excluded given the plaintiff routinely purchased same prior to the accident. The plaintiff also acknowledges a reduction in the amount for massage therapy and regular cleaning is appropriate. The claim, as advanced by counsel in submissions, is \$114,000 (rounded).
- [94] Special damages are claimed at \$3,318.48.
- [95] The defendant acknowledges the plaintiff suffered injuries in the accident but says that they are overstated both in terms of the extent of her injuries and the impact of them on her capacity to earn income.
- [96] The defendant submits that the plaintiff's evidence should be viewed with great scrutiny given her remaining complaints are predominantly subjective, the lack of medical treatment, the lack of the use of analgesics to control pain and the fact she continues to work an exceptional amount of hours, well in excess of the required yearly amount at VGH, mostly at double time. The defendant notes the plaintiff acknowledged further capacity to work, but said she could not because of the 400-hour requirement set by RCH and, implicitly, the fact she had worked the maximum allowable hours at VGH by the trial's commencement in November 2019.

- [97] The defendant notes the majority of the plaintiff's injuries healed uneventfully within months after the accident. The only remaining problem is her low back.
- [98] The plaintiff argues that the award for non-pecuniary loss should be in the range of \$35,000 to \$40,000.
- [99] The defendant denies the plaintiff has suffered any economic loss, specifically capacity to earn income, noting that she worked more hours at RCH and VGH in 2014 than in any other year and, in the year following, still maintained her statistical average of working approximately 2950 hours.
- [100] The drop in productivity (hours worked) did not occur until 2016, when her hours at RCH dropped precipitously from 994 in 2015 to 396 in 2016, 275 in 2017, and none thereafter.
- [101] It was not until RCH changed the requirements for casual nurses from 200 to 400 hours that the plaintiff stopped working there. She conceded this at trial and at her examination for discovery. At about the same time as the plaintiff ceased work at RCH, VGH increased the amount of overtime available to its nurses from 270 to 572 hours annually.
- [102] As to cost of future care, the defendant suggests this should be limited to providing for modest physiotherapy in the future along with over-the-counter pain medications.
- [103] The defendant suggests an amount less than \$20,000.
- [104] As to housekeeping capacity, the defendant submits the effect of the injuries on the plaintiff's ability to do housework is modest as was referred to a number of times in the medical records of Dr. Sun. The plaintiff is to avoid vacuuming, but little else was complained of by her until June 2019 in the vocational assessment.
- [105] The defendant argues that the proper approach is to factor loss of housekeeping capacity into the assessment of non-pecuniary damages.
- [106] Finally, the defendant argues that the plaintiff has failed to mitigate by unreasonably failing to undertake the treatment recommended by Dr. Giantomaso. The evidence, according to the defendant, demonstrates the plaintiff did not adopt any of the recommendations made by Dr. Giantomaso and failed to provide valid reasons for doing so. Dr. Giantomaso confirmed he can only help a patient if that patient complies with the recommendations.
- [107] The defendants agree to special damages in the amount of \$1,998.72.

Credibility

- [108] Despite the confidence of both Dr. Giantomaso and Dr. Sun in their findings that objectively, the plaintiff continues to experience chronic low back pain, the defendant asks that I consider a variety of matters in assessing her overall credibility, particularly as it relates to the matter of income or capacity loss.

- [109] I was referred to *Bradshaw v. Stenner*, 2010 BCSC 1398, where at paras. 186 and 187, Madam Justice Dillon discussed the assessment of credibility/reliability as follows:
- [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), 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.); *Farnya v. Chorny*, [1952] 2 D.L.R. 152 (B.C.C.A.) [Farnya]; *R. v. S.(R.D.)*, [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 (*Farnya* at para. 356).
- [187] It has been suggested that a methodology to adopt is to first consider the testimony of a witness on a 'stand alone' basis, followed by an analysis of whether the witness' story is inherently believable. Then, if the witness testimony has survived relatively intact, the testimony should be evaluated based upon the consistency with other witnesses and with documentary evidence. The testimony of non-party, disinterested witnesses may provide a reliable yardstick for comparison. Finally, the court should determine which version of events is the most consistent with the "preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions" (*Overseas Investments (1986) Ltd. v. Cornwall Developments Ltd.* (1993), 12 Alta. L.R. (3d) 298 at para. 13 (Alta. Q.B.)). I have found this approach useful.
- [110] Further reference was made to *Price v. Kostyba* (1982), 70 B.C.L.R. 397 (S.C.), where Chief Justice McEachern, sitting as a trial judge, quoted his previous statement in *Butler v. Blaylock*, decided October 7, 1981, Vancouver No. B781505 (unreported):
- [6] I am not stating any new principle when I say that the court should be exceedingly careful when there is little or no objective evidence of continuing injury and when complaints of pain persist for long periods extending beyond the normal or usual recovery.
- [7] An injured person is entitled to be fully and properly compensated for any injury or disability caused by a wrongdoer. But no one can expect his fellow citizen or citizens to compensate him in the absence of convincing evidence - which could be just his own evidence if the surrounding circumstances are consistent - that his complaints of pain are true reflections of a continuing injury.

- [111] The defendant submits I can find the plaintiff to be credible but still an unreliable historian: *Marois v. Pelech*, 2007 BCSC 1969 at paras. 25 and 26, aff'd 2009 BCCA 286.
- [112] The defendant acknowledges the plaintiff is a hard-working, pleasant person, but notes a number of inconsistencies in important aspects of the plaintiff's testimony at trial, the documentary evidence, and her evidence from discovery. These inconsistencies, the defendant submits, undermine the reliability of the plaintiff's evidence in key areas, particularly in relation to the plaintiff's claimed economic loss.
- [113] The plaintiff testified that she reported her symptoms and concerns truthfully to her general practitioner Dr. Sun. Dr. Sun confirmed that she contemporaneously made notes of the plaintiff's reports of pain and function on each visit made. I accept that the notes, for the most part, accurately synthesize and record the plaintiff's reports and concerns at her attendances.
- [114] The plaintiff testified that she missed two days of work following the accident. She told Drs. Giantomaso and Dr. Sun the same. This is not borne out by the clinical records or the records of absenteeism produced at trial.
- [115] The plaintiff never reported to Dr. Sun that she was working reduced hours from those she had previously worked. Neither did she report that her injuries were causing her restrictions in performing housework, save that she specifically reported difficulty with heavy vacuuming. There are consistent notations from 2015 forward in the clinical notes of Dr. Sun noting that there were no other limitations at home.
- [116] The reports to Dr. Giantomaso and Ms. Tencha seemed to indicate that the plaintiff reported constant low back pain. The plaintiff acknowledged in cross-examination that this must be incorrect because she recalled reporting the pain as "on and off". She confirmed in cross-examination that her pain comes three to four times a month. She treats it with Tylenol or other over-the-counter analgesics once to twice a month.
- [117] At trial the plaintiff testified she had difficulty gardening, but at her examination for discovery she testified that no other household activities other than vacuuming were of concern. Her suggestion in cross examination that she misunderstood the question at discovery seem disingenuous given that there were different passages put to her wherein she consistently answered that her only significant limitation was that of heavy vacuuming to which she responded by purchasing a lighter vacuum.
- [118] At discovery, she was asked whether she had worked the night shift before the accident and she indicated she had and had never changed her schedule. Her evidence in direct was that she would now like to work two days and two nights despite the resultant drop in pay she would receive.

- [119] At trial, the plaintiff testified she took two sick days following the accident. There is nothing in the record of Dr. Sun confirming this. At discovery, the plaintiff denied that she missed any work as a result of her accident-related injuries. She explained that discrepancy again by saying that she misunderstood the question. Again, I do not find that response persuasive. The question, as posed, was straightforward and the plaintiff's answer unequivocal.
- [120] The consistent complaint throughout the clinical records of Dr. Sun is that the plaintiff has difficulty sitting for extended periods of time, be they at a desk or in a car. Anecdotally, she reported a significant increase in pain following a plane trip to Florida followed by a long drive.
- [121] She estimated that charting work which requires her to sit during the evening shift is about 30 percent of her shift. Further, she acknowledged there is a sit/stand desk that she can use to accommodate a changing position.
- [122] The plaintiff testified she immediately began reducing her hours of work at RCH the year of the accident. The chart setting forth her hours indicates this is not the case. The most hours the plaintiff ever worked at RCH were recorded between December 20, 2013 and December 18, 2014. No individualized records showing days worked were produced which might have borne out the plaintiff's testimony that her hours reduced after the March 25, 2014 accident.
- [123] Although the plaintiff told Ms. Tencha that she went on fewer trips with her family, her evidence at discovery was that she had not missed any such trips. Again, she explained the difference in answer by saying the question was unclear. In my view, it was not.
- [124] Ms. Tencha reported complaints of pain in the plaintiff's neck when no such complaints had been made by her for years leading up to Ms. Tencha's assessment.
- [125] While the plaintiff testified at trial that her decision to stop working at RCH was due solely to her symptoms, on discovery she testified it was due to policy changes requiring casual employees to work 400 hours. She stated she would still possibly be working there if the requirement was only 200 hours and in cross-examination stated she would "absolutely" be working at RCH if there was no minimum.
- [126] Hence, it is clear the plaintiff considers herself to have residual capacity beyond the approximately 2400 hours annually she is now working; just not 400 hours of residual capacity.
- [127] Only when Ms. Gabriele testified was it made clear that the plaintiff was working every available hour allowed under the collective agreement at VGH.

- [128] The plaintiff's evidence that she had turned down shifts at VGH is, at best, disingenuous in that she may have turned down a specific shift knowing she would work the maximum allowable well before the end of the year. The plaintiff never offered that there was no more work available to her at VGH after she completed the 572 hours of overtime. It is not clear how early in the year such was achieved. The earlier she was able to complete all available hours of work, the less likely one could conclude the injuries were impacting her capacity.
- [129] In direct examination the plaintiff testified that while working she laid down during most of her breaks due to back pain. When put to her in cross-examination that such would mean she was experiencing back pain much more frequently than the three to four days per month she had expressed, she conceded that sometimes she lay down at work simply to rest.
- [130] When a clinical entry suggesting she had improved by 80 percent by the end of 2015 was put to her, the plaintiff responded it must have been a "good day".
- [131] On direct examination, the plaintiff stated that on a bad day her pain ranged from 7 to 8 out of 10 and on a good day from 3 to 4 out of 10. Again, when it was put to her that such would suggest daily pain, she explained that by saying she has a "high pain tolerance" and that 3 to 4 out of 10 would not limit her in any way.
- [132] That said, the plaintiff agreed on discovery that her pain was episodic and exacerbated by physical exertion.
- [133] As to the reason given initially for the high level of hours the plaintiff was working, she reported that "they needed the money" and life in Vancouver was "expensive". When asked in cross-examination why she did not work more overtime at VGH, given most of it is at double time or, at the very least, time-and-a-half, she indicated that it was not about money and that she enjoyed working at RCH because that is where she started her nursing career. A trip to RCH required some 45 minutes of driving and she gave that as a major reason why she gave up working at RCH.
- [134] The plaintiff testified, and it is apparent from the plaintiff's report found in Dr. Sun's clinical records, that Dr. Giantomaso recommended to her she undergo an MRI for her lumbar spine. Dr. Giantomaso testified that he did not make such a recommendation and described an MRI for injuries such as hers as "useless".
- [135] The plaintiff reported to a physiotherapist in May 2014 that her GP had suggested she take time off work. Dr. Sun denied this. In the May 21, 2014 visit to Ms. Ross, when presumably her pain was still at its worst, she reported to Ms. Ross that pain was 5 to 6 out of 10 when at its worst.
- [136] Her visits to Dr. Sun were sporadic at best from 2016 to 2019. Her treatment consisted of occasional massage therapy, stretching and exercising as prescribed by the physiotherapist and the occasional use, once or twice a month, of analgesics to control pain.

[137] Finally, the plaintiff's stated reasoning for working at two locations as opposed to getting overtime at one seemed misguided given her rationale of less tax being paid on straight time at RCH as opposed to double time in VGH. Clearly, such is not the case. She was taxed at year-end on her total earnings, and withholdings are an entirely separate matter.

[138] Overall, I find the plaintiff's testimony raises significant issues regarding her reliability and credibility. While I have no doubt she experiences some back pain, she provided inconsistent answers to similar questions posed about the duration and severity of her pain and the impact this pain has had on her life. She was also not forthcoming about her reasons for working her current hours. As a result, I have not placed significant weight on her subjective evidence; particularly as it relates to her functional capacity.

Non-Pecuniary Damages

[139] To begin, I conclude that the plaintiff has suffered a soft tissue injury which has interfered with her enjoyment of life. Physical activity, at the extreme end of the range, causes flare-ups of pain. The plaintiff, however, still manages to work well in excess of what would be considered normal work hours, participates daily in exercise and, with some degree of discomfort, still participates in the performance of many household tasks, albeit with the risk of increased symptoms.

[140] I reach that conclusion primarily on the basis of the medical assessment of Dr. Giantomaso and, to a more limited extent, on the evidence of Ms. Tencha.

[141] That said, I have commented adversely on the reliability of the plaintiff's evidence and, to some extent, that ameliorates my reliance on the medical evidence given the doctor and occupational therapist relied on the plaintiff's expressions of physical discomfort.

[142] As noted in the plaintiff's brief, non-pecuniary damages are intended to compensate the plaintiff for pain, suffering and loss of enjoyment of life both to the date of trial and in the future. Awards are based on an individual assessment of the impact of particular injuries on the individual before the court, although comparable cases provide a guide to assessing damages.

[143] In *Stapley v. Hejslet*, 2006 BCCA 34, the Court of Appeal set out the following non-exhaustive list of factors to be considered:

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, 2005 BCCA 54).

[144] Plaintiff's counsel notes that the plaintiff is not to be penalized for stoicism and asserts, here, the plaintiff has stoically accepted her injuries and soldiered on.

[145] I accept that general comment and confirm my view that the plaintiff has "soldiered on" given my acceptance that she has a constant low-grade pain in her hip and buttock aggravated in certain circumstances as result of physical effort.

[146] The plaintiff referred me to a variety of cases: *Blackman v. Dha*, 2015 BCSC 698; *Jellis v. Lukinuk*, 2019 BCSC 1577; *Clark v. Kouba*, 2012 BCSC 1607; *Khademolhosseini v. Ji*, 2019 BCSC 854; and *Stoneson v. Testa Estate*, 2015 BCSC 1549, which, according to the plaintiff's submission, suggest a range of damages from \$85,000 to \$107,000.

[147] The plaintiff submits the appropriate range here is \$85,000 to \$100,000.

[148] The defendant argues that the injuries, while chronic, are less severe than stated by the plaintiff.

[149] The defendant notes that the plaintiff's driving apprehension, neck pain and shoulder pain resolved quickly.

[150] The remaining injury is to her low back and hip. The defendant characterizes the ongoing injury as one that has plateaued at essentially 80 percent of recovery, but that the plaintiff still experiences low back pain three to four times monthly. Such does not interfere with her ability to work and she is for the most part able to carry on with her physical activities both recreationally and at home.

[151] Save for the treatment in 2019, the plaintiff has not engaged in any formal treatment since July 2016. She continues to attend the gym with the same frequency as before the accident and does her own self-guided exercise and stretching.

[152] She treats her symptoms with over-the-counter medication, either Tylenol or ibuprofen, once or twice a month.

- [153] The defendant referred me to *Rogalsky v. Harrett*, 2014 BCSC 1255; *Pond v. Bucsis*, 2013 BCSC 2001; and *Erwin v. Buhler*, 2017 BCSC 362.
- [154] The range in those three cases was from \$30,000 to \$40,000. The defendant suggests \$35,000 to \$40,000 as the appropriate range.
- [155] I note *Pond* is a 2013 decision involving chronic pain. The award was \$30,000. In *Erwin*, the plaintiff's symptoms had mostly resolved and he suffered intermittent pain.
- [156] Here, I have concluded that the plaintiff has low-grade discomfort in her low back and hip on a more or less continual basis, with flare-ups where pain increases to a level of 3 or 4 out of 10. Her day-to-day activities are modestly interfered with. She still exercises but not at the same level of intensity as before the accident.
- [157] In my view, the plaintiff's injuries that linger are more severe than those described in the cases provided by the defendant.
- [158] I am of the view the plaintiff's ongoing symptoms, which are likely to be permanent, are more in the nature of something short of the extent of the impairment suggested by the plaintiff but more significant than those cases referenced by the defendant.
- [159] Accordingly, it is my view that the appropriate award for non-pecuniary damages is \$75,000.

Past Wage Loss and Past Loss of Earning Capacity

- [160] Counsel are agreed that the legal principles respecting the assessment of past wage loss or past loss of earning capacity are set out in *Piper v. Hassan*, 2012 BCSC 189.
- [161] In *Piper*, Justice Pearlman summarize the legal principles to be considered when assessing a claim for past economic loss:
- [153] The assessment of damages for past loss of income is properly characterized as an assessment of damages for loss of past earning capacity: *Lines v. W & D. Logging Co. Ltd.*, 2009 BCCA 106 at para. 153, leave to appeal ref'd [2009] S.C.C.A. No. 197 (S.C.C.).
- [154] Compensation for past loss of earning capacity is to be based on what the plaintiff would have, not could have, earned but for the injury caused by the defendant's negligence: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141; *M.B. v. British Columbia*, 2003 SCC 53.
- [155] Pursuant to s. 98 of the Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231, a plaintiff is entitled to recover damages for only his or her past net income loss. This means that in the ordinary course the court must deduct the amount of income tax payable from lost gross earnings: *Hudniuk v. Warkentin* (2003), 9 B.C.L.R. (4th) 324.

- [156] The burden of proof of actual past events is a balance of probabilities. An assessment of loss of both past and future earning capacity involves consideration of hypothetical events. The plaintiff is not required to prove these hypothetical events on a balance of probabilities. The future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation: *Athey v. Leonati*, at para. 27.
- [162] As to actual loss experienced over the period from the accident to trial, the plaintiff submitted a letter from Coastal Health dated August 9, 2019, indicating total employee wages and benefits lost from June 3, 2016 to July 29, 2019 equated to \$6,710.17. Such is said to relate to time off work because of a "past actual event" namely sick hours used by the plaintiff. However, there is no evidence to substantiate that assertion.
- [163] That position was abandoned during submissions given the inability of the plaintiff to connect the hours lost to the accident. Were it not abandoned, I am satisfied that the actual time away from work is not proven by the plaintiff, on the balance of probabilities, to relate to symptoms arising from the accident. The plaintiff was asked specifically whether she took time off work following the accident to which she answered "no". Further, the plaintiff logged the most hours she ever worked, combined between RCH and VGH, during the year of the accident when her pain, based on her own evidence, was at its highest.
- [164] I agree with the defendant that modification of her duties, as described by the plaintiff, does not give rise to a loss of income. The plaintiff acknowledged that she was stoical and could work through pain. She has done so admirably, but such results in the previously-discussed non-pecuniary damages, not income loss.
- [165] As to past hypothetical events, the plaintiff also claims that she should be compensated for missed hours of work at RCH. It is the plaintiff's hypothesis that the plaintiff would have worked hours similar to that which she did prior to the accident but for the accident's occurrence.
- [166] I repeat, the plaintiff worked more hours at RCH and VGH combined than in any other year between December 2013 and December 2014, the year in which the accident occurred. Gradually, since the date of the accident, the plaintiff's hours at VGH have increased while her hours at RCH decreased. Such is reasonable in view of the fact that the plaintiff's RCH hours were paid at straight time while overtime hours at VGH are paid mostly at double time.
- [167] It is notable that the plaintiff's hours of work did not noticeably diminish until the period from December 2015 to December 2016; over two years post-accident when, by her own acknowledgment, the plaintiff's symptoms were improved from those she experienced immediately following the accident.
- [168] By 2016, the plaintiff's attendance upon Dr. Sun and any ongoing treatment had, for the most part, come to a halt.

- [169] In my view, the plaintiff has not satisfied her evidentiary burden of showing the real and substantial possibility that the reduction in her RCH hours was related to any accident symptoms. There is no temporal connection between the decision to stop working at RCH and the accident symptoms, which the plaintiff agreed have improved in some measure since the spring of 2014.
- [170] The drop to 2370 hours in 2016 is not in keeping with any medical advice or opinion by any medical expert that, despite the diagnosis of pain, the plaintiff was unable to perform her duties as she did before the accident.
- [171] I reject the plaintiff's explanation that she just wore down over the course of the two years following the accident such that she was unable to continue working at the level she had up to and including December 15, 2015. She agreed that but for the requirement of 400 hours for casual workers implemented in 2017 at RCH, she would absolutely still be working there.
- [172] In 2016/17, the year her RCH hours were reduced to 275, VGH changed its policy to increase the maximum number of hours of overtime the plaintiff could work from 270 hours to 572 hours. I agree with the defendant that the decision to stop working at RCH in 2017 was because of the availability of a significant amount of overtime at twice the rate she could earn at RCH. Accordingly, I make no allowance for an award for past economic loss.

Future Loss of Earning Capacity

- [173] The test for establishing a claim for loss of future earning capacity is set out in *Perren v. Lalari*, 2010 BCCA 140, where Garson J.A. summarized the law as follows:
- [32] A plaintiff must always prove, as was noted by Donald J.A. in *Steward*, by Bauman J. in *Chang*, and by Tysoe J.A. in *Romanchych*, that there is a real and substantial possibility of a future event leading to an income loss. 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, as in *Steenblok*, or a capital asset approach, as in *Brown*. 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* and *Romanchych*. A plaintiff may indeed be able to prove that there is a substantial possibility of a future loss of income despite having returned to his or her usual employment. That was the case in both *Pallos* and *Parypa*. But, as Donald J.A. said in *Steward*, an inability to perform an occupation that is not a realistic alternative occupation is not proof of a future loss.
- [174] In *Kim v. Morier*, 2014 BCCA 63 at para. 8, the Court of Appeal noted it was insufficient to show that the plaintiff "may" be less capable in certain aspects of his or her employment as the word may is essentially speculative and does not equate to a finding of a real possibility. Further, the plaintiff's own perception of limitations on his or her ability should not be equated to the loss of the capital asset.

- [175] In *Tisalona v. Easton*, 2015 BCSC 565 at paras. 102-105, aff'd BCCA 272, Madam Justice Wedge found that the plaintiff had failed to prove real and substantial possibility of a future event leading to income loss. She considered: the plaintiff's failure to lead evidence that the accident-related injuries interfered with her ability to perform her job duties; consistent salaries in the years following the accident; positive performance reviews from her supervisor; that the plaintiff had not sought and received accommodations following the accident; and the absence of a functional capacity evaluation to establish whether certain occupations were foreclosed to the plaintiff.
- [176] Here, many of those factors are present. While the plaintiff may have suffered some diminishment in income, it is modest given the increase in income from overtime hours at VGH. Additionally, neither Dr. Sun nor Dr. Giantomaso endorsed the notion that the plaintiff was incapable of performing her duties as a nurse.
- [177] The plaintiff received a letter from Dr. Sun seeking accommodations at her workplace immediately following the accident. She seemingly never pursued it, although she did present it to a supervisor. She has instead provided for her own accommodations and as a result, she has not missed time from work and been able to work the maximum allowable overtime.
- [178] Ms. Tencha described various physical tasks related to chores at home, which she opined were disabling. However, it is unclear to me whether Ms. Tencha was ever made aware of the hours Ms. Jefferson has been able to continue with and her tasks at work, which include lifting immobile patients, often with assistance.
- [179] Further, the impairments suggested by Ms. Tencha go far beyond those described by the plaintiff herself both to Dr. Sun and in response to questions posed on discovery.
- [180] Similarly, no functional capacity assessment was done of the plaintiff that would provide me with a foundation that she was no longer able, or less able than before, to perform some of the tasks required at work.
- [181] In terms of durability, I am satisfied that the plaintiff had worked every hour of overtime available to her by the commencement of trial. She conceded that but for the 400-hour minimum required by RCH, she would pick up casual shifts there in addition to the hours she worked at VGH.
- [182] The evidence of Ms. Gabriele made clear that there were safety factors involved in the ceiling for overtime at VGH. Ms. Gabriele was not specifically asked about the impact of the plaintiff working additional hours at RCH on top of her overtime hours at VGH.

- [183] The plaintiff received a letter from Dr. Sun seeking accommodations at her workplace immediately following the accident but never seemingly pursued it although she did present it to a supervisor. She has, instead, provided for her own accommodations and, in the result, she has not missed time from work and been able to work the maximum allowable overtime.
- [184] While I am satisfied the plaintiff experiences occasional discomfort at work requiring some modification and intermittent resting, none of that has resulted in a loss of income to date and I find there is no real and substantial possibility of a loss in the future. Pain and discomfort has been recognized in the award of non-pecuniary damages earlier made.
- [185] Accordingly, I make no award for loss of future earning capacity.

Cost of Future Care

- [186] The established test for proving costs of future care is set out in *Milina v. Bartsch*, [1985] B.C.J. No. 2762 (S.C.). The test for determining the appropriate award is objective based on medical evidence. There must be medical justifications for the claims for the cost of future care and the claims must be reasonable. The plaintiff is not entitled to an award for expenses that would have occurred in any event: *Shapiro v. Dailey*, 2012 BCCA 128 at para. 55. Additionally, if the evidence shows the plaintiff is unlikely to use the services recommended, awards for those services should not be made: *Izony v. Weidlich*, 2006 BCSC 1315 at para. 74.
- [187] The approach for assessing cost of future care was summarized in *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9:
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 cost of providing that care and may make an adjustment for the contingency that the future may differ from what the evidence at trial indicates.
- [188] Here, the plaintiff relies on the report of Ms. Tencha as setting out the required care for the plaintiff. Dr. Sun endorsed the Tencha report as being medically reasonable.
- [189] The defendant notes that the plaintiff has, for the most part, been disinterested in active treatment since July 2016. She performs exercises through a gym membership that she had in any event and I find she would have continued to maintain the membership but for the accident. She treats herself with over-the-counter analgesics once or twice a month and is unlikely to change her course of treatment.

- [190] When first assessed by the physiatrist in June 2017, a number of medical recommendations were made that, in the mind of Dr. Giantomaso, would have provided the plaintiff with some relief. The plaintiff has not pursued any of the recommended treatment.
- [191] It is established that further physiotherapy, massage therapy and chiropractic treatment is unlikely to lead to any improvement to the plaintiff's long-term situation. However, they may provide some relief during flare-ups. Flare-ups, as described by the plaintiff, are occasional. It is notable she attended only one physiotherapy session in the three years from September 2016 to September 2019.
- [192] Presumably, the plaintiff is the best gauge of the frequency with which treatment is needed, not Ms. Tencha.
- [193] The plaintiff confirmed she has no intention of undergoing steroidal injections nor has she purchased an SI joint belt since the recommendation was made two years ago.
- [194] I am satisfied that the plaintiff has had to purchase and will have to re-acquire, over the course of time, a lighter appliance for vacuuming. Save for occasional physiotherapy for flare-ups and some modest allowance for non-prescriptive medication, I am not satisfied that the plaintiff will avail herself of the other modalities of medical treatment and/or assistive equipment listed in the report of Ms. Tencha.
- [195] Accordingly, in respect of the cost of future care, I award the sum of \$2,500 for future cost of medication and appliances as well as an allowance of \$3,000 for future passive therapy modalities such as physiotherapy or massage therapy.

Lose of Homemaking Capacity

- [196] Based on the report of Ms. Tencha, the plaintiff seeks an award of approximately \$95,000 to assist her with regular house cleaning, seasonal cleaning, tree and a hedge trimming and gardening tasks.
- [197] The principles respecting an award for loss of homemaking capacity were recently assessed in *Kalstrom v. Yip*, 2016 BCSC 829 by Mr. Justice Kent:
- [429] 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; the court should have regard for whether any particular expense will actually be incurred and an allowance can be made for any contingency, any real and substantial possibility, that the cost may not in fact be incurred;
- in motor vehicle cases, given the distinction between mandatory and discretionary benefits under s. 88 of Part 7 of the Insurance (Vehicle) Regulation, BC Reg. 447/83 and the requirement of mandatory deductions under s. 83 of the Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231, it is desirable for the trial court, where possible, to assign specific amounts for each future care item claimed;
- properly considered, homemaking costs are awarded for loss of capacity and are distinct from future cost of care claims; and
- no award is appropriate for expenses that the plaintiff would have incurred in any event.

[198] Loss of housekeeping capacity is, like an award for costs of future care, an assessment not a mathematical exercise.

[199] In the past, the plaintiff has not seen fit to hire anybody to perform the tasks she otherwise said she was able to perform without a problem.

[200] She told Dr. Sun, repeatedly, that her greatest difficulty was with vacuuming. A trial she spoke of difficulties doing laundry and major household cleanup as well as an inability to assist her husband with yard work as she had previously done.

[201] As was stated in Kalstrom, in non-catastrophic cases, such as this, "a little common sense should inform the analysis, despite however much particular items might be recommended by experts in the field; the court should have regard for whether any particular expense will actually be incurred and an allowance can be made for any contingency, any real and substantial possibility, that the cost may not in fact be incurred". Further, no award is appropriate for expenses the plaintiff would have incurred in any event.

- [202] Mr. Benning's assessment is that the plaintiff would have performed all of the tasks for which Ms. Tencha now suggest support should be provided, for the remainder of her life or until age 80.
- [203] While I accept, as I have done with her employment, that the performance of certain tasks result in discomfort, I do not accept that discomfort alone requires replacement by paid professionals. The plaintiff is part of a family of five, and the children are now at an age where many of the tasks which Ms. Jefferson says she can no longer perform ought to be performed by other members of the household. No claim was advanced for an in trust award.
- [204] I accept there are certain areas where she has difficulty, specifically vacuuming and seasonal cleaning.
- [205] In my view, an award of \$20,000 is appropriate in respect of her claim for loss of homemaking capacity.

Special Damages

- [206] The parties noted to me they had agreed on special damages but then suggested different amounts in submissions. No justification was provide such that I can choose between the two numbers.
- [207] If the parties cannot agree on the amount of special damages, they are permitted to provide written submissions of no more than three pages in length addressing where the modest difference lies and submit them to me through Trial Scheduling.

Summary of Damages

[208] I make the following damage awards:

Non-Pecuniary Damages:

\$75,000

Past Loss of Earning Capacity:

none

Future Loss of Earning Capacity:

none

Cost of Future Care:

\$5,500

Loss of Homemaking Capacity:

\$20,000

Special Damages:

as agreed or upon further submission of counsel

TOTAL:

\$100,500

Costs

[209] The plaintiff is entitled to her costs at Scale B unless there have been offers to settle which may affect an award of costs.

"Harvey J."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/20/03/2020BCSC0306.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/jefferson-v-virk-2020>

Prepared on 29 October 2026 · Esheria