

CANADA / JUDGMENT

Johnson v. Heer

2020 BCSC 1168

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 1168 Johnson v. Heer

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Johnson v. Heer,

2020 BCSC 1168

Date: 20200810

Docket: M168613

Registry: Vancouver

Between:

Kristen Johnson

Plaintiff

And

Gurbakash Heer

Defendant

Corrected Judgment: The front page of the judgment was corrected on August 26, 2020.

Before: The Honourable Justice Majawa

Reasons for Judgment

Counsel for the Plaintiff:

J. S. Grewal

H. Dhillon

Counsel for the Defendant:

M. Dorner

Place and Date of Trial:

Vancouver, B.C.

June 29-30 and July 2-3, 2020

Place and Date of Judgment:

Vancouver, B.C.

August 10, 2020

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INTRODUCTION

- [1] This action arises from a motor vehicle accident that occurred on November 6, 2014. The plaintiff was the driver of a vehicle that was rear-ended by the defendant. Liability has been admitted.
- [2] The plaintiff claims that as a result of the accident, she suffered injuries to her neck, shoulders and back that have caused her ongoing neck and back pain, headaches and sleep disturbances. She claims for non-pecuniary damages, loss of past income and loss of future earning capacity, special damages, costs of future care, and loss of housekeeping capacity. The defendant concedes that the plaintiff sustained some injuries to her neck and back and that she suffered headaches as a result of the accident; however, the defendant takes issue with the amount and heads of damages claimed.
- [3] The Court heard evidence from the plaintiff Ms. Johnson, her husband Christopher Johnson and her mother, Donna Stark. The plaintiff also called two expert witnesses: Dr. Raphael Chow, a physiatrist, and Christopher Nguyen, a functional capacity evaluator. The defendant elected not to call any evidence.
- [4] The defendant's cross examination of Ms. Johnson's mother and husband was short and did not elicit any contradictory evidence. The cross-examination of Ms. Johnson was also limited and the defendant concedes that Ms. Johnson is a credible witness.
- [5] I have no trouble in finding the plaintiff and the lay witnesses to be credible and reliable. Ms. Johnson accurately described her circumstances and symptoms before and after the accident without embellishment. Although details were lacking on certain points, I do not find those deficiencies to affect her credibility. Similarly, I find the lay witnesses who testified for the plaintiff to be candid and their testimony to be without embellishment or exaggeration. The plaintiff's and the lay witnesses' testimony was "consistent with the probabilities affecting the case, both as a whole and in existence at the time" and I accept their testimony having regard to the factors set out in *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, *aff'd* 2012 BCCA 296.

ISSUES

- [6] The issues are whether Ms. Johnson is entitled to non-pecuniary damages, and damages for loss of past income and loss of future earning capacity, special damages, damages for the costs of future care, and damages for the loss of housekeeping capacity.

FACTS AND SUMMARY OF EVIDENCE

Prior to the Accident

- [7] Ms. Johnson is 39 years old and resides in Surrey, British Columbia. She was born in New Westminster and raised with her brother in Coquitlam. Music has been a large part of Ms. Johnson's life since she was a child. She testified that music is her passion and that it is a

great way for her to connect with others. She started playing piano at the age of seven. She eventually achieved the Grade 10 level from the Royal Conservatory of Music which I understand to be the highest level that one can achieve in that program. During high school, Ms. Johnson's recreation activities mostly involved music including singing, playing the piano and learning music history. Ms. Johnson also partook in some long distance running during her school years.

- [8] After graduating from high school, Ms. Johnson attended Douglas College where she was enrolled in the university transfer program. She then attended UBC for a year as an Arts student before transferring to the University of Victoria where she enrolled in the Bachelor of Music program and the Post Degree Program ("PDP") for teaching. She obtained her Bachelor of Music degree in 2004 and her PDP in 2005. The PDP permitted Ms. Johnson to teach music to students from kindergarten to Grade 12. According to Ms. Johnson, teaching music to children was a perfect fit for her because it combined her love of children and music.
- [9] Ms. Johnson has been employed as a music teacher, one way or another, since 2005. She taught in Kimberley, British Columbia, for approximately three years following graduation. In Kimberley, Ms. Johnson's time was divided between two elementary schools, a middle school and a high school. In addition to her teaching duties, Ms. Johnson was also responsible for rebuilding the music program in the Kimberley school system. She is rightfully proud of the success she achieved in quadrupling the number of students enrolled in the choir and band programs by the time she left in 2008.
- [10] In 2008, she returned to the Lower Mainland and was hired by the Burnaby School District on temporary and Teacher on Call positions. She was eventually placed in a permanent position and taught at the Marlborough Elementary School as the kindergarten to Grade 4/5 music teacher and the Grade 7 band teacher. Ms. Johnson worked full time at Marlborough Elementary until she went on maternity leave in spring 2018.
- [11] In addition to, or sometimes as part of, her teaching responsibilities, Ms. Johnson was required to undertake a number of activities that involved physical activity such as moving instruments and tables around the classroom and relocating a piano. She was also required to stand, dance and walk around or crouch down on the floor to be closer to the children as there were no assigned desks in the music room. As the Grade 7 band teacher, Ms. Johnson was regularly required to stand for long periods of time while conducting the band during class and performances.
- [12] Ms. Johnson testified that before the accident she participated in activities such as walking, jogging, running, yoga and swimming. Ms. Johnson testified that prior to the accident, she had no major physical ailments and described her health as "fairly good". This was confirmed by both her husband Mr. Johnson and her mother Donna Stark, neither of whom observed that Ms. Johnson had any physical restraints prior to the accident.

- [13] Ms. Johnson stated that she did not take any extended time off work prior to the accident. She testified that she had been in one other motor vehicle accident prior to the accident at issue in this matter but it did not result in any injuries to her. I find that the plaintiff's health prior to the accident was generally good and that she did not suffer from any major physical restraints.
- [14] Ms. Johnson testified that she did have some anxiety prior to the accident which she described as "social" or "generalized anxiety" that she experienced in new or unfamiliar settings or when meeting new people. Ms. Johnson generally engages in breathing and "grounding exercises" to alleviate her anxiety symptoms. The anxiety that Ms. Johnson experienced before the accident was not so severe as to prevent her from engaging in her daily activities or from pursuing any employment related opportunities. For example, she would get nervous about school music performances and going to social gatherings where she didn't know many people. Both the plaintiff's husband and mother gave similar evidence.

The Accident

- [15] On November 6, 2014, Ms. Johnson was on the way from her home to her place of employment at Marlborough Elementary School. She was driving on King George Boulevard on what she described as a "busy" traffic day when the driver in front of her stopped suddenly. Ms. Johnson applied her brakes and was successful in avoiding a collision with the vehicle in front of her; however, the vehicle behind her driven by the defendant was not able to stop and it collided with her. Ms. Johnson's evidence that she was wearing her seatbelt and had the headrests adjusted to the appropriate height was not challenged and I find that she was doing so.
- [16] Immediately after the collision, Ms. Johnson and the defendant got out of their vehicles, exchanged information and surveyed the damage. Ms. Johnson stated that it was still quite dark at the time of the accident and testified that she saw a "scratch" on her vehicle and did not notice whether there was damage to the other vehicle. Mr. Johnson testified that he surveyed the vehicle for damage when Ms. Johnson returned home that evening. In addition to some scratches, he could see a crease in the rear bumper and noticed that the exhaust had been pushed in and tucked up under the rear bumper. The parties agree that the plaintiff's vehicle sustained damage in the amount of \$1,502 as a result of the accident.
- [17] Immediately following the accident, Ms. Johnson spoke to her husband on the telephone and continued to drive to work in her vehicle. Ms. Johnson felt mostly shocked and scared but did not immediately feel too much pain physically. She reports that soreness and tightness in her upper back and neck started when she arrived at work. She was not sure if she had a headache immediately or if it came on later that day. When Ms. Johnson arrived at school she spoke to the principal and explained she had been in an accident and may need some time off.

After the Accident

- [18] The day after the accident, Ms. Johnson took the day off work and saw her family physician, Dr. Mudie, who recommended that she look into physical therapy and to try and use Advil for the pain. In subsequent visits to Dr. Mudie, which Ms. Johnson recalls being every three months or so, she would obtain referrals for massage and physical therapy.
- [19] Ms. Johnson described the injuries she suffered as a result of the accident as being:
- a) headaches;
 - b) neck pain;
 - c) shoulder pain;
 - d) pain in the upper, mid and low back (although the low back pain has gotten better over time);
 - e) nausea and dizziness; and
 - f) driving related anxiety.
- [20] Although Ms. Johnson reports that the nausea and dizziness have resolved with no residual effects, I did not receive evidence of the nature and extent of these symptoms while they were occurring. Neither the plaintiff's husband nor mother testified to having observed Ms. Johnson experience nausea and dizziness.
- [21] Ms. Johnson testified that the accident has had a significant impact on her life. Although the intensity ebbs and flows, she reports being in pain every day. She finds it very challenging to experience pain while doing things she normally would have done before the accident without pain.
- [22] Ms. Johnson reported ongoing headaches, pain in her neck, shoulders and upper and mid back from the time of the accident to the present. These symptoms affected the recreational activities that she was able to perform and required her to make modifications to the way in which she did her job. They also resulted in her sleep being frequently interrupted. Furthermore, she and her husband testified that her injuries have affected her ability to do household chores and the way in which she interacts with her infant son. She finds it difficult to hold her son for longer than 15-20 minutes, lift his stroller, put him in and take him out of his crib and play with him on the floor.
- [23] Ms. Johnson testified that her symptoms improved for the first two to three years following the accident but have since plateaued. Her headaches have improved, reducing in frequency from daily to approximately one to two times per week. The intensity of her neck pain has decreased but she continues to regularly have flare ups, particularly when she lifts or moves heavy objects at work or when she lifts or carries her toddler. Ms. Johnson's upper and middle back continues to cause her pain and although the intensity has decreased since the first two to three years after the accident, the pain is intensified when she participates in

activities such as lifting her son which she is required to do on a regular basis. Ms. Johnson's sleep is often disrupted due to her pain and discomfort.

- [24] Ms. Johnson testified that before the accident she participated in activities such as walking, jogging, running, yoga and swimming. However, I received very little evidence as to the duration or frequency of her participation in these activities. Ms. Johnson did state on a number of occasions during her testimony that she was not a sports person and that music was / is her main outlet.
- [25] The plaintiff's husband, Christopher Johnson, testified. He met the plaintiff in the summer of 2011, they moved in together in the summer of 2012 and married in October 2013. Mr. Johnson testified that prior to the accident, he and the plaintiff would go on long walks together and would sometimes go on hikes in places such as Whistler. He described those hikes as being about two hours long. For a couple of years, the couple also trained together for the Sun Run which consisted of a weekly course on Saturdays and two runs per week on their own. Both Mr. and Ms. Johnson testified that the plaintiff has been able to return to taking some longer walks and some easier hikes.
- [26] It was not clear from the testimony of either witness when the couple began running / jogging, how long the Sun Run training program continued, or how frequently they would go on longer hikes. Given Ms. Johnson's description of herself as not being into sports, I find it unlikely that she was involved in regular jogging before she met her husband. I find that the plaintiff did engage in jogging approximately one to two days per week for the two years leading up to the accident but that jogging was not an activity that brought the plaintiff particular joy. I find that the extent that Ms. Johnson participated in the above-noted activities would have been minimal to moderate.
- [27] Ms. Johnson testified that she has not jogged since the accident and admitted that she had not attempted to do so. Ms. Johnson's evidence was not specific in respect of the frequency she participated in Yoga and swimming both before and after the accident. She stated that since the accident, she has resumed some Yoga "here and there" and has "not done a lot of swimming". On the evidence before me, I do not find that Yoga and swimming were a large part of the plaintiff's life before the accident and I find that the impact on her ability to continue with these activities after the accident is minimal to moderate.
- [28] Since the accident, Ms. Johnson has experienced some anxiety related to being a driver or a passenger in a motor vehicle. She did not experience this kind of anxiety before the accident and she describes it as being different than the generalized anxiety that she experienced before the accident.
- [29] Music and playing the piano are clearly important to Ms. Johnson. These activities bring her joy and help her to relax. Since the accident, Ms. Johnson has been able to resume playing the piano although she states that she cannot play for as long as she used to because of her injuries. Although the evidence was not specific as to how often she played the piano before and after the accident and for how long at a time, I have no trouble finding that Ms. Johnson

is unable to play for as long as she used to and that this has a moderate to major impact on her enjoyment of life.

- [30] Following the accident, Ms. Johnson continued to work full time at Marlborough Elementary School until she went on maternity leave in the spring of 2018. According to Ms. Johnson, including the day immediately following the accident, she missed approximately 25 days of work for reasons related to the accident.
- [31] Ms. Johnson testified that her job as an elementary school music teacher is an intense one. In addition to teaching, she must move instruments, stand for long periods of time and crouch and bend down to be with students. As a music teacher, she does not spend her entire day with the same set of students; rather, she has taught up to six or seven classes a day with those students coming in and out of her room. The classes she teaches provide her with no downtime and she described herself as being "on" from the time she starts in the morning until the end of the day. For example, there are no periods where her students are engaged in silent reading and because she volunteers to lead activities such as the choir which takes place outside of the usual instruction time, she loses many of her opportunities for breaks throughout the day.
- [32] Since the accident, Ms. Johnson has not had the same amount of energy she had before the accident. She testified that the pain affects how much energy she has and what she can do on any given day at work and at home. She has difficulty moving and lifting objects and instruments in the classroom. She also has difficulty getting down on the floor to be with the younger children. Her symptoms have required her to modify what she does in the classroom; although she has not requested formal accommodations from her employer.
- [33] Ms. Johnson is clearly a dedicated and passionate music teacher who cares deeply about her students. Given the short amount of time she gets to spend with her students, she testified that she would prefer to go to work even when experiencing pain and other symptoms because she is concerned that her students will not get the same quality of music instruction from Teachers on Call who are often not music teachers and who will sometimes not provide music instruction at all. I find that Ms. Johnson is a stoic person who was reluctant to take time off work and would occasionally work through pain in order to minimize her absences.
- [34] Shortly after the accident, Ms. Johnson began attending physiotherapy sessions and typically attended these once per week until the COVID-19 public health emergency resulted in the cessation of such services. Ms. Johnson found that the physiotherapy sessions provided her with a couple of days of relief from the pain and tightness.
- [35] In January 2015, Ms. Johnson began seeing a massage therapist and she generally saw the massage therapist once per week. She also found that these treatments provided her with some short term relief from her pain symptoms.

- [36] In November 2018, Ms. Johnson began an active rehabilitation program under the direction of a Kinesiologist. She attended these sessions approximately once per week. Among the activities were squats, push-ups and core stability exercises. Ms. Johnson was also doing some strength building exercises at home and her and the Kinesiologist were planning to discuss whether she should continue with the in-person sessions when the COVID-19 public health emergency began. At the time of trial, Ms. Johnson had not attended at physiotherapy, massage therapy or the active rehabilitation since the public health emergency began in or around March 2020.
- [37] In September 2017 Ms. Johnson became pregnant with her son. She began her parental leave in or around April 2018 and her son was born in May 2018.
- [38] Following her maternity leave, Ms. Johnson returned to teaching music in September 2019; however, she chose to move from the Burnaby School District to Surrey School District where she began a music teaching position at A.J. McLellan Elementary School. At A.J. McLellan, Ms. Johnson worked 3.5 days per week teaching general music to the students in various grades. Ms. Johnson moved to the Surrey School District despite the fact that it resulted in the loss of some seniority because it was closer to home and made it easier for her and her husband to provide and obtain childcare for their infant son. The shorter commute was also better for her because she wanted to spend less time driving which she now finds uncomfortable for longer periods of time. Ms. Johnson found that working 3.5 days per week allowed her to recover more and reduced the amount of time she needed to take off of work such that she has not taken any sick days related to the accident since reducing her schedule to 3.5 days per week.
- [39] Ms. Johnson's contract at A.J. McLellan concluded in June 2020. In May 2020, Ms. Johnson successfully applied for a permanent elementary school music teacher position at Frost Road Elementary School, also in Surrey. She will begin that position in September 2020 and will be working just over four days per week. Ms. Johnson testified that she applied for a job that is four days per week because it provides her with a certain level of security within the school district such that she would not be subject to being moved to a different school.

EXPERT EVIDENCE

- [40] The plaintiff called expert testimony from two individuals: Dr. Raphael Chow, a physiatrist, and Christopher Nguyen, a functional capacity evaluator. The defendant did not call any expert witnesses nor did he require Ms. Johnson to undergo an independent medical examination.

Dr. Raphael Chow

- [41] Dr. Chow was qualified as an expert in the area of physical medicine and rehabilitation. Dr. Chow is licensed to practice medicine in Ontario and British Columbia and he has been qualified to give evidence in BC on a number of occasions. He is an assistant professor at the

University of Toronto and has an in-patient and out-patient practice. He described 50% of his work being related to his clinical practice and 50% of his work being medical-legal.

Although the defendant did not object to Dr. Chow's qualification as an expert, counsel for the defendant submitted that I should give Dr. Chow's report no weight to the extent of his conclusions in respect of Ms. Johnson's functional status and prognosis.

- [42] On cross-examination, Dr. Chow admitted that he does not practice in British Columbia in the usual sense of the word. Rather, Dr. Chow comes to Vancouver approximately once per month for one or two weeks at a time to conduct medical examinations for the purposes of litigation. During these visits, Dr. Chow sees approximately four-to-five patients per day. Each appointment is scheduled for two hours but they average approximately one hour and 15 minutes each.
- [43] Dr. Chow examined Ms. Johnson on January 17, 2019. Ms. Johnson completed a standard intake form immediately before seeing Dr. Chow. In the intake form, Ms. Johnson provided a summary of the accident and a description of her symptoms (headaches, neck and shoulder pain, mid and low-back pain, anxiety and sleep disturbance). She also described both passive and active treatments since the accident and a description of her health before the accident. In addition, Ms. Johnson described her physical activity before and after the accident. As is his normal practice, Dr. Chow would not have been present while Ms. Johnson completed the form. Dr. Chow's practice is to review the completed intake form with the patient and then conduct a physical examination. Dr. Chow's physical examination included range of motion and pressure tolerance tests in the cervical, thoracic and lumbar spine areas. He also conducted a number of tests in the shoulders and lower body. Dr. Chow also conducted what appears to be a basic neurological examination. In addition to his examination and the history provided to him by Ms. Johnson, Dr. Chow also reviewed medical records from Ms. Johnson's General Practitioner, Medical Services Plan records and records from her visits to the massage therapist and physiotherapist.
- [44] Dr. Chow concluded that Ms. Johnson has impairment and soft-tissue injuries of the cervical, thoracic and lumbar spine. He concluded that she had the following injuries:
- a) chronic headaches most likely of the tension or cervicogenic type;
 - b) chronic neck, shoulder girdle pain related to soft-tissue injuries to the cervical spine;
 - c) chronic mid-back pain related to soft-tissue injuries to the thoracic spine; and
 - d) chronic low back pain due to soft tissue injury to the lumbar spine.

Dr. Chow noted that her anxiety was aggravated after the accident but deferred to the appropriate mental health expert to opine.

- [45] Dr. Chow also opined on Ms. Johnson's functional limitations:

Functionally she has not returned to her pre-accident level since she has pain with some of the normal life activities. She has not returned to jogging. She has pain with work activities and has to take time off here and there.

Excessive force or load on the neck and back would aggravate her symptoms and it would be best to avoid any prolonged exertion.

Her functional limitation is in regard to her cervical, thoracic and lumbar spine. Prolonged static and dynamic neck and trunk tasks and physical activities that require spinal support which will include sitting, standing, walking, carrying, lifting, pulling, pushing, crouching, stair climbing, performed in multiplanar mode beyond the occasional-mid frequent rate likely would exceed her limit. Physical demand tasks beyond the light-medium level likely would exceed her limit.

From a physical perspective in my opinion she likely would not be able to perform tasks or jobs that require activities or physical demand as described above. Furthermore, she has headache, anxiety and sleep disturbance with tiredness and fatigue which will affect her overall functional ability. She is able to do her job as a music teacher but has pain. She has to modify some of the work tasks and also pace her activities.

[46] Dr. Chow concluded that Ms. Johnson's recovery had plateaued and that she had reached "maximal medical improvement" meaning that in his opinion, Ms. Johnson would not experience further recovery of her injuries or improvement of her symptoms. He went on to describe a number of treatment recommendations in order to manage pain and maintain function including sleep consultation to improve her sleep, occupational therapy, and training in the "pain concept" of harm vs. hurt. He noted that she continues passive treatments such as physiotherapy and massage therapy and notes that it is not recommended except when she experiences flare ups of her neck and back pain. Dr. Chow also recommends that she continue with exercises to strengthen the core muscles, back and neck. He recommends over-the-counter non-steroidal anti-inflammatory medications and pain killers.

[47] Dr. Chow concludes that Ms. Johnson's prognosis is poor:

It is now more than four years following the accident and she has ongoing symptoms. She has reached maximal medical recovery. She has chronic headache, neck and back pain. She has permanent impairment of her cervical, thoracic and lumbar spine.

[48] Dr. Chow goes on to make the rather dire prognosis that Ms. Johnson's symptoms will likely get worse as she ages:

It is also likely that she will experience worsening of her symptoms and deterioration of functional ability with time and the aging process (APPENDIX II). It is unlikely that she will be able to maintain her current level of functional ability in the future. She may have to cut down on her work hours in the future.

- [49] Counsel for the defendant submits that I should give no weight to the conclusions in Dr. Chow's report. My understanding of his argument is that Dr. Chow was not thorough in his examination of Ms. Johnson and that his report is largely conclusory.
- [50] For example, counsel notes that Dr. Chow admitted that he did not state or ask when the plaintiff's recovery plateaued or when she last experienced improvement and thus, his conclusion that Ms. Johnson was unlikely to recover any further should be given little weight. Dr. Chow explained that in his opinion, it is not relevant exactly when a patient last improved in circumstances such as the plaintiff's where they are being examined more than two or three years after the accident. Dr. Chow's evidence on cross-examination is that since it had been more than four years since the accident and there were ongoing symptoms, then in his experience he could safely conclude that further recovery would not be likely. Dr. Chow did state that it would be relevant to his conclusion on maximal medical recovery if Ms. Johnson had reported having plateaued a week before his examination. However, there is no evidence that Ms. Johnson's recovery plateaued a week before she was examined by Dr. Chow. Her uncontroverted evidence is that her recovery plateaued approximately two to three years after the accident which is more than one year before Ms. Johnson was examined by Dr. Chow.
- [51] Counsel for the defendant further challenges Dr. Chow's prognosis because, on cross-examination, Dr. Chow admitted that he did not know specifically which soft tissues of the plaintiff had been injured. Although his diagnosis in this respect does appear to be somewhat conclusory, Dr. Chow explained that he concluded that Ms. Johnson's soft tissue injuries likely included injuries of the muscles, ligaments, tendons, joint capsules and facet cartilage without being more specific because one cannot specifically see such injuries on such a physical examination. According to Dr. Chow, medical imaging would not provide further information about ligament injuries. Dr. Chow explained that his conclusion was based upon his review of Ms. Johnson's reported history, his examination of her, his experience and research including autopsies of individuals with soft-tissue injuries. Although Dr. Chow admitted that a diagnostic facet block could have provided more definitive information on damage to the facet cartilage, he does not recommend conducting such a test in the circumstances.
- [52] Dr. Chow had what appeared to be reasonable explanations in response to the questions raised by counsel for the defendant. He explained that those patients who have not recovered within three years of the accident fall into the 20% of patients with soft-tissue injuries that have long standing chronic pain. In the absence of expert evidence contrary to Dr. Chow's opinion and testimony, and in light of the fact that I accept the plaintiff's testimony that her symptoms have not improved since more than two and half years before trial, I accept Dr. Chow's prognosis that Ms. Johnson has reached maximal medical recovery.
- [53] However, I come to a different conclusion with respect to Dr. Chow's prognosis that the plaintiff's functional ability will likely deteriorate and that she will likely experience a worsening of her symptoms. This conclusion appears to be almost entirely based upon

scientific literature referenced by Dr. Chow in his report. Dr. Chow explained that the literature shows that approximately 30% of injured patients functionally deteriorated over time. He also explained that 18% improved. However, he did not provide a persuasive reason as to why he concluded that the plaintiff would likely fall into the group that functionally deteriorated as opposed to the group that improved or stayed the same. Ms. Johnson did not testify to a worsening of her symptoms; rather, she testified that they had not improved since approximately two to three years after the accident. Thus, I do not accept Dr. Chow's prognosis that Ms. Johnson will further functionally deteriorate and experience worsening of her symptoms.

- [54] I also agree with counsel for the defendant that Dr. Chow's conclusions on Ms. Johnson's functional abilities should be given less independent weight. Dr. Chow admitted that no functional ability testing was conducted and that such testing would be necessary to verify Ms. Johnson's self reported activity tolerance. Nonetheless, Dr. Chow's conclusions on Ms. Johnson's functional status are generally consistent with the conclusions of the functional capacity evaluator, Christopher Nguyen.
- [55] In cross-examination, counsel for the defendant spent considerable time in challenging Dr. Chow for not having a complete set of the plaintiff's medical records. For example, he noted that Dr. Chow only had the General Practitioner's records up until March 2018 and that he did not review records of the plaintiff's active rehabilitation treatment. Nonetheless, Dr. Chow was aware of the plaintiff's participation in the active rehabilitation program and he relied upon her reporting of its benefits. The gap in the General Practitioner's records from March 2018 to January 2019 has not been explained. Nonetheless, Dr. Chow had General Practitioner records for approximately three and one half years after the accident. Given that I accept the plaintiff's testimony that her recovery plateaued two to three years after the accident, and this was not challenged by the defendant during cross examination, the records of the General Practitioner from March 2018 to January 2019 would, on balance, be unlikely to have any significant impact on Dr. Chow's conclusions.
- [56] The report that Ms. Johnson provided in Dr. Chow's intake form is consistent with the testimony that I have already found to be credible. Therefore, although the brevity of Dr. Chow's examination does cause me some pause, I am cognizant that Dr. Chow's conclusions are based in no small part upon the report provided by Ms. Johnson on the date of her examination, and I find that the basis of the conclusion is sound.
- [57] Counsel for the defendant noted that Dr. Chow has been the subject of adverse judicial commentary in this Court and he identified three cases in this regard. He made much of the fact that Dr. Chow came to similar conclusions using similar language in those cases. However, this is not surprising considering that the cases brought to my attention also involved women in their late thirties to early forties with soft tissue injuries and chronic pain. Furthermore, the findings with respect to Dr. Chow in those cases were based on the specific evidence before the court, all of which I am not aware and it appears that some of the issues identified with Dr. Chow's reports in those cases are not present in this case.

However, the mere fact that Dr. Chow's conclusions have been questioned or accepted by this court in the past, without more, cannot form the basis of my treatment of Dr. Chow's report. Not surprisingly, counsel for the plaintiff also directed me to circumstances where Dr. Chow's evidence has been accepted by this Court. As explained above, Dr. Chow's report has caused me some concern and I have accepted some but not all of Dr. Chow's conclusions. However, I am not willing to go as far as the defendant urges me to and reject his report in its entirety, particularly without the defence having called any expert evidence that expresses an opinion contrary to Dr. Chow's.

Christopher Nguyen

- [58] Christopher Nguyen was qualified as an expert in conducting functional capacity evaluations. Mr. Nguyen has approximately 18 years of experience conducting functional capacity evaluations and estimates that he has completed over three thousand of them in his career. The purpose of a functional capacity evaluation ("FCE") is to measure an individual's overall function through various tests and to determine how the individual's demonstrated ability affects the employability of the individual in their specific job or generally. Mr. Nguyen conducted a FCE of Ms. Johnson on June 20, 2019, and prepared a report dated September 3, 2019. Mr. Nguyen spent approximately eight hours conducting the FCE of Ms. Johnson. I found Mr. Nguyen to be a careful and credible witness.
- [59] Mr. Nguyen performed various tests related to Ms. Johnson's functional abilities. He found that the plaintiff provided full effort during the testing and that her test results were reliable. His testing found that Ms. Johnson was reliable as a historian of reporting her pain and that the description of her job demands were also reliable. Mr. Nguyen was unable to rely upon standard job demands for Ms. Johnson's work as an elementary school music teacher because the standardized descriptors are of a classroom teacher. Thus, although an elementary school teacher is generally categorized as a job requiring "light strength", the specific duties of the music teacher require medium strength. Counsel for the defendant advised the Court that he had no issue with the requirements of the plaintiff's job as a music teacher as they were described by Ms. Johnson and applied by Mr. Nguyen.
- [60] Mr. Nguyen identified a number of functional limitations during his testing. He concluded that Ms. Johnson did not have the adequate physicality to meet the full physical demands of her job as an elementary school music teacher. He concluded that she did not demonstrate the ability to safely perform any job in the medium to heavy strength categories. He concluded that she would likely:

encounter difficulties or functional barriers when performing her present occupation without accommodations. She has inadequate strength/stamina to maneuver the piano, to lift or move heavy music equipment, and to move or position tables weighing up to 50 lbs on an occasional basis, which qualifies it within a medium (S3) strength category

[61] In addition, Mr. Nguyen concluded that Ms. Johnson did not demonstrate the following abilities required for her occupation as a music teacher:

- a) Standing - Ms. Johnson is required to stand for long periods of time frequently but only demonstrated the ability to do this occasionally.
- b) Bending, stooping and crouching - although this is required on a frequent basis, Ms. Johnson demonstrated the ability to do this only occasionally.

[62] Ultimately, Mr. Nguyen concluded that:

If Ms. Johnson were to lose her current job or be unable to return to her position for any reason, she will most likely have occupational barriers from working in most trade or trade-like occupations and manual/labour jobs since most of these labouring jobs will be physically demanding and will most likely fall within the medium (S3) or heavy (S4) strength categories- these strength categories are beyond her demonstrated ability.

From an occupational perspective, it is this evaluator's opinion that Ms. Johnson's competitive employability has been compromised as she exhibited a functional decline in conjunction with increased pain symptoms during this evaluation. Thus, she will be at a competitive disadvantage for occupations that are beyond the light (S2) strength category and that require low or high-level reaching or overhead reaching beyond an occasional basis, as all are bodily postures (B4) beyond her demonstrated ability of occasional. These limitations may render her less competitively employable to future employers in comparison with other applicants with a similar occupational skill set and work experience, and who are pain-free and without any physical or functional limitations

[63] Mr. Nguyen opines that Ms. Johnson's decreased level of function will likely have an adverse effect on her ability to participate in some recreational pursuits such as running and more intense hikes. He opines that Ms. Johnson would benefit from participating in further active rehabilitation under the guidance of a kinesiologist for ten to twelve sessions over the course of three to four months.

[64] The defendant accepts Mr. Nguyen's conclusions in respect of Ms. Johnson's functional capacity. However, he argues that her limitations are due to her lack of adequate physicality due to her "deconditioned" state as opposed to injuries sustained or pain experienced as a result of the accident. In his report, Mr. Nguyen had noted that the plaintiff was in poor cardiovascular condition and described her as being "very deconditioned". On cross-examination, Mr. Nguyen admitted that this indicates that she has room for improvement. I understood this to mean that she had room for improvement in her cardiovascular conditioning and that Mr. Nguyen was not opining that Ms. Johnson had "room to improve" her demonstrated abilities nor to improve the prognosis of her medical condition which he expressly deferred to medical professionals.

[65] Moreover, there is no evidence that the limitations Ms. Johnson demonstrated during her FCE testing existed before the accident. To the contrary, Ms. Johnson testified that prior to the accident she did not have any limitations with respect to her job duties and this evidence was not challenged on cross-examination. I do not agree with counsel for the defendant that Ms. Johnson's limitations are somehow related to her recovery from her caesarian section or from her pregnancy. I am satisfied that the limitations identified by Mr. Nguyen in his report are as a result of the injuries Ms. Johnson sustained during the accident.

CAUSATION

[66] The plaintiff must establish on a balance of probabilities that the defendant's negligence caused or materially contributed to an injury before damages are assessed. The defendant's negligence need not be the sole cause of the injury so long as it is part of the cause beyond the range of de minimus. Causation need not be determined by scientific precision: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at paras. 13-17; *Farrant v. Laktin*, 2011 BCCA 336 at para. 9.

[67] There are no issues of causation in this case. As I stated at the outset, the defendant concedes that Ms. Johnson's injuries and her resulting symptoms were caused by the accident. The evidence before me established that Ms. Johnson was relatively healthy and pain-free prior to the accident. I find that on a balance of probabilities that the accident caused her soft tissue injuries and the resulting neck, shoulder and back symptoms as well as the related headaches.

DAMAGES

Non-Pecuniary Damages

[68] Non-pecuniary damages are awarded to compensate the plaintiff for pain, suffering, loss of enjoyment of life and loss of amenities. The compensation awarded should be fair to all parties, and fairness is measured against awards made in comparable cases. Such cases, though helpful, serve only as a rough guide. Each case depends on its own unique facts: *Trites v. Penner*, 2010 BCSC 882 at paras. 188-189.

[69] The factors that should be considered in making an award of non-pecuniary damages are well established and were set out by our Court of Appeal in *Stapley v. Hejslet*, 2006 BCCA 34. They include the plaintiff's age, nature of the injury, severity and duration of the pain, disability, emotional suffering, loss or impairment of life, family, marital and social relationships, impairment of mental and physical abilities, loss of lifestyle and the plaintiff's stoicism.

[70] The defendant does not allege that the plaintiff has failed to mitigate her injuries.

[71] I have thoroughly described the injuries and their effect on Ms. Johnson earlier in these reasons. For the present purposes I will highlight the following. Ms. Johnson experiences pain on a daily basis for which she occasionally takes over-the-counter analgesics and

passive therapies such as physiotherapy and massage therapy. I have found that her symptoms are not likely to resolve entirely and being 39 years of age, she will be required to live with her symptoms for a relatively long period of time. Although she has experienced some improvement since the accident, her recovery has plateaued and remained the same for more than two years.

- [72] Ms. Johnson now experiences anxiety when in a motor vehicle, although this has not reached the level of a clinical diagnosis.
- [73] Ms. Johnson has resumed some yoga, walking and light hiking but her symptoms have affected her ability to participate in recreational activities that she used to enjoy such as jogging and long hikes. It has also affected her ability to play the piano, an activity which brings her much enjoyment.
- [74] Although Ms. Johnson is still able to work, and I acknowledge that she has not asked for any formal workplace accommodations, Ms. Johnson nonetheless regularly works with pain and modifies her duties at work in order to do her job.
- [75] By all accounts, Ms. Johnson is an excellent mother to her young son. However, she has lost the ability to interact and take care of her son (i.e. playing on the floor and lifting and holding him) without pain due to the injuries she suffered from the accident.
- [76] Prior to the accident, Mr. and Ms. Johnson shared the household duties. I accept that Ms. Johnson's ability to perform household tasks has diminished since the accident and that her limitations are consistent with Mr. Nguyen's summary where he stated that she had slight to moderate limitations in the ability to perform domestic chores and home maintenance. As discussed later in these reasons, I have concluded that it would be appropriate to include damages for the plaintiff's loss of housekeeping capacity in the non-pecuniary award.
- [77] I find Ms. Johnson to be a stoic individual. She has made efforts to minimize the impact of her injuries on her life.
- [78] Ms. Johnson cites four cases in support of an award of non-pecuniary damages in the range of \$80,000 to \$90,000:

Willett v. Rose, 2017 BCSC 627

Kwong v. Leonard, 2012 BCSC 1818

Mladjo v. Etheridge, 2019 BCSC 950

Foran v. Nguyen et al, 2006 BCSC 605

- [79] The defendant submits that an award in the range of \$50,000 to \$60,000 is more appropriate and relies on the following cases:

Chalmers v. Russell, 2010 BCSC 1662

Best v. Jerzyk, 2015 BCSC 1877

Richmond v. Osztovits, 2019 BCSC 1984

- [80] In my view, the decisions that are most like the case at hand are Kwong, where the plaintiff was awarded \$75,000 (\$83,500 in 2020 dollars) and Richmond, where the plaintiff was awarded \$70,000.
- [81] Considering the principles and factors set out in Stapley and in the authorities provided by counsel and considering Ms. Johnson's circumstances and prognosis, I find that an award of \$75,000 is appropriate.

Past Loss of Income

- [82] Ms. Johnson's claim for past loss of income is a claim for actual lost income as it is limited to the amount of sick days that she used related to symptoms arising from the injuries suffered in the accident. The loss of days from the plaintiff's sick bank are compensable and no deduction should be made for income tax in accordance with ss. 95 and 98 of the Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231: Bjarnson v. Parks, 2009 BCSC 48 at paras. 56 and 66.
- [83] In preparation for trial, Ms. Johnson reviewed her absences from work in the time from her accident in November 2014 until she commenced her maternity leave in spring 2018 with a view to identifying which absences were on account of her accident related injuries. The absence report for this period showed that Ms. Johnson was absent for 65 $\frac{3}{4}$ days. Unfortunately, she did not create any contemporaneous records of the reasons for any given absence and thus she resorted to employing a methodology to estimate what was accident-related. Ms. Johnson cross referenced her absences with available medical records and removed absences correlated with a documented or recollected non-accident related reason. This resulted in a significant amount of absences being identified as non-accident related. She acknowledged that she would usually not be absent for multiple days in a row for accident related reasons and therefore eliminated days where she was absent for two or more days in a row. Applying this methodology, Ms. Johnson testified that she missed 25 days of work related to the accident which totals \$9,537.78. (The parties are at agreement on the rate of pay applicable to the various absences.)
- [84] The defendant submits that I should reduce the amount for past income loss because Ms. Johnson is unable to definitively say which absences were accident related. Counsel submits that deduction of 50% would be appropriate. He also notes that her post-accident absences were not compared with her pre-accident absences, which, in his view would have better substantiated her claim.

- [85] Ms. Johnson's pre-accident absence history was not tendered by the plaintiff nor did counsel for the defendant cross-examine Ms. Johnson on it. Thus, I can make little of his argument that I should take it into account. In any event, I am not persuaded that a comparison with her pre-accident absences would have been of much utility.
- [86] I am not persuaded that a reduction of 50% is warranted. While it is likely that Ms. Johnson's calculation is not entirely accurate, I am of the view that the evidence is sufficient for me to conclude, on balance, that she has suffered the income loss she has claimed. The cross-examination on this area yielded little and although it is likely that some absences have been miscategorised as being accident related, it is, in my view, also likely that some absences which have been categorized as non-accident related were accident related. In light of the injuries and symptoms described by Ms. Johnson, it is not unreasonable that she took between four and nine days off work per year in the three and one half years since the accident. Ms. Johnson is entitled to an award for past loss income in the amount of \$9,537.78.

Future Loss of Earning Capacity

- [87] The Court must answer two questions to determine a plaintiff's claim for loss of future earning capacity: 1) has the plaintiff's earning capacity been impaired by her injuries; and, if so 2) what compensation should be awarded for the resulting financial harm that will accrue over time? While it is somewhat attractive to try and apply a mathematical calculation, the assessment of the loss is a matter of judgment and must be based on the evidence as a whole: *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 18. The way in which the assessment is carried out will vary from case to case: *Brown v. Golaiv* (1985), 26 B.C.L.R. (3d) 353 (S.C.); *Pallos v. Insurance Corp. of British Columbia* (1995), 100 B.C.L.R. (2d) 260 (C.A.); *Pett v. Pett*, 2009 BCCA 232.
- [88] The first step in determining whether the plaintiff is entitled to an award under this head of damages is for the court to determine whether there is a "real and substantial possibility that [the plaintiff's] earning capacity ha[s] been impaired": *Morgan v. Galbraith*, 2013 BCCA 305 at para. 53.
- [89] The assessment of the loss of future earning capacity requires the consideration of hypothetical events. The Court of Appeal discussed the approach and the principles in *Grewal v. Naumann*, 2017 BCCA 158 at paras. 48-49 and 66. Whether or not a hypothetical event will occur need not be proven on a balance of probabilities; rather, hypothetical events are proven on the basis of simple probability. There must be a real and substantial possibility that goes beyond mere speculation in order for the court to take that hypothetical event into consideration. The court then assesses the damages by estimating a pecuniary loss based upon the relative weighing of the possibilities and probabilities of hypothetical events.

- [90] There are two possible approaches to assessment of loss of future earning capacity: the "earnings approach" from Pallos, and the "capital asset approach" in Brown. Both approaches are correct. The "earnings approach" will generally be more useful when the loss is easily measurable: Perren v. Lalari, 2010 BCCA 140 at para. 32. Where the loss "is not measurable in a pecuniary way", the "capital asset" approach is more appropriate: Perren at para. 12.
- [91] Finally, a plaintiff is not excluded from an award for loss of future earning capacity simply because she is still able to work after the accident and even where her records of employment show that her income has been steady or increased since the accident. In Willett v. Rose, 2017 BCSC 627, Justice Smith held:
- [69] Even in circumstances where employment data appear to show no reduction or even an increase in income following an injury, where a plaintiff continues to suffer to some degree from the effects of an accident which have an impact on his work, there is an impairment of earning capacity. For example, in Cheung v. MacDonald et al, 2004 BCSC 222, it was argued that the plaintiff's income following the accident was higher than it had ever been. Mr. Justice Ehrcke said at paras. 84 and 85:
- [84] As logically rigorous as that approach seems to be, it ignores the reality that Dr. Cheung continues to suffer to some degree from the effects of the accident, and that these effects have an impact on his work. While he may have demonstrated that he can, if he wills himself to, carry on and produce billings as high as before, one must ask whether it is reasonable to expect him to do so in the face of the pain he must endure.
- [85] The proper question under this head of damages is not simply whether a plaintiff will suffer an actual wage loss, but rather whether there has been an impairment of his income-earning capacity. This latter approach treats the ability to earn income as a capital asset, and the proper question is then whether that asset has in any way been diminished by reason of the defendant's negligence.
- [92] Ms. Johnson submits that the capital asset approach is the appropriate methodology to assess her damages under this head. She submits that factors identified for consideration in Brown weigh in favour of an award.
- [93] The plaintiff submits that she has consistently lost income as a result of the accident in the range of four to nine days per year between the date of the accident and when she left on maternity leave in spring 2018. Ms. Johnson has not been absent from work for reasons related to the accident since she returned to work in September 2019. She says this is because she returned to work at 3.5 days per week and that not working five days per week permitted her to better manage her symptoms. Ms. Johnson will begin a new position in September 2020 where she will work just slightly more than four days per week (0.85 FTE). Ms. Johnson acknowledges that part of the reason she returned to work part-time instead of full-time was related to her son's childcare. However, she also stated that part of the reason is due to her injuries.

- [94] Ms. Johnson submits that an appropriate award using the capital asset approach should be based upon her most recent full year of full-time income wherein she earned gross income of \$75,642 and net income of \$63,315. With reference to the approach set out in Pallos, she submits that an appropriate award would represent 1.5 years of her earnings in that year. Therefore, she requests an award in the amount of \$113,500 based on her gross earnings or \$95,000 based on her net income.
- [95] The defendant submits that there is no real and substantial possibility of a future event leading to a loss of income, and therefore, he argues that Ms. Johnson should not be awarded any amount for future loss of earning capacity. He argues that the plaintiff maintained full time employment at Marlborough Elementary School for 3.5 years following the accident. He notes that Ms. Johnson testified that she plans to work as a music teacher within the British Columbia School system for the remainder of her career. He contends that Ms. Johnson has no other realistic alternative occupations that are foreclosed to her as result of the accident. He argues that her competitiveness and marketability has not been adversely affected because hiring in the school district is based on seniority. To this end, he notes that the plaintiff has successfully applied for two different positions within the Surrey School District since the accident, without ever disclosing any limitations or asking for any accommodations from her employer.
- [96] In the alternative, the defendant submits that should I find that Ms. Johnson is entitled to an award of damages under this head, the appropriate amount would be much less than the plaintiff's submission. The defendant's alternative position is based upon Ms. Johnson's highest income earning year in which her gross earnings were \$79,769 and her net earnings were \$64,470. He submits that an appropriate award would represent six months of the plaintiff's earnings in that year: approximately \$40,000 gross or \$32,000 net.
- [97] My consideration of the factors set out in Brown leads me to conclude that Ms. Johnson has suffered a loss of a capital asset. I find that Ms. Johnson has:
- a) to a low or moderate degree been rendered less capable overall from earning income from all types of employment as a result of the chronic pain and headaches caused by the accident;
 - b) to a low degree, as a result of her limitations, her marketability as an employee generally has been impacted;
 - c) to a low degree her ability to take advantage of all job opportunities has been impacted; and
 - d) as a result of her symptoms and physical limitations she is less valuable to herself as an elementary school music teacher.
- [98] I am satisfied on the evidence that there is a real and substantial possibility that Ms. Johnson's earning capacity has been impaired. In particular, there is a real and substantial possibility that the plaintiff will not be able to take on full-time employment as an elementary school music teacher without experiencing significant pain resulting from her

injuries. Although I do not accept Dr. Chow's conclusion that Ms. Johnson is likely to deteriorate over time, I do find that she is not likely to improve. I accept the plaintiff's testimony that she experienced more frequent flare-ups of her symptoms when working full-time which required her to be absent from her employment. Therefore, part-time work is likely the reality for Ms. Johnson for the foreseeable future.

- [99] I agree with the defendant that Ms. Johnson is not permanently disabled from being an elementary school music teacher and that she can perform her job with the modifications that she has designed. In fact, Ms. Johnson readily admitted this and did not embellish or exaggerate the effect of the accident on her ability to do her job. I find that there is not a real and substantial possibility that Ms. Johnson will not be able to perform the duties of an elementary school music teacher, with modifications. Nonetheless, Ms. Johnson continues to suffer from the effects of her injury and they have impacted the ability for her to do her job. The defendant's submission ignores the fact that Ms. Johnson experienced more frequent flare-ups of her symptoms when working full time. As in Willett, in my view, it is not reasonable to expect her to "will herself" to carry on without compensation.
- [100] I accept that Ms. Johnson's intention is to continue to work as an elementary school music teacher for the remainder of her career. Ms. Johnson conceded that her salary and job opportunities are largely determined by seniority. And, as submitted by the defendant, Ms. Johnson has successfully obtained two positions as a music teacher since the accident. Thus, I do not find that there is a real and substantial possibility that Ms. Johnson will suffer an income loss related to the inability to obtain a higher paying position or a promotion.
- [101] In all the circumstances and given that Ms. Johnson acknowledges that part of the reason she chose to work part-time was due to her son's childcare arrangements, I have concluded that it is fair and reasonable to assess Ms. Johnson's claim for loss of future income earning capacity at \$40,000 which is approximately equivalent to six months of her gross annual salary.

Loss of Housekeeping Capacity

- [102] Damages for loss of housekeeping capacity can be assessed as either non-pecuniary or pecuniary damages. In *Kim v. Lin*, 2018 BCCA 77 at para. 33, the Court of Appeal held that

[W]here a plaintiff suffers an injury which would make a reasonable person in the plaintiff's circumstances unable to perform usual and necessary household work -- i.e., where the plaintiff has suffered a true loss of capacity -- that loss may be compensated by a pecuniary damages award. Where the plaintiff suffers a loss that is more in keeping with a loss of amenities, or increased pain and suffering, that loss may instead be compensated by a non-pecuniary damages award.

- [103] Affirming the Court of Appeal's conclusion in *Liu v. Bains*, 2016 BCCA 374, the Court in *Kim* stated that the above is not an inflexible rule and held that it is within the trial judge's discretion to determine whether the claim should be assessed as part of the non-pecuniary damages or as a segregated pecuniary head of damages.
- [104] In his submissions, counsel for the plaintiff conceded that any compensation for Ms. Johnson's diminished ability to perform housekeeping duties should not be made under a separate pecuniary head of damages. Nonetheless, he has provided a specific amount that he argues is appropriate: that amount being \$15,000.
- [105] Counsel for the defendant submits that the plaintiff has not suffered a true loss of capacity; rather, he submits that any impairments in this respect are more akin to a loss of amenities. Consequently, he submits that a segregated pecuniary award should not be made.
- [106] I agree with both parties that Ms. Johnson's loss of housekeeping capacity is not appropriate for an award under a separate pecuniary head of damages. The evidence is that Ms. Johnson has suffered a slight to moderate loss in her ability to perform certain domestic tasks as opposed to a true loss of capacity. In these circumstances, I have decided to exercise my discretion to compensate Ms. Johnson for her loss of housekeeping capacity as part of the amount awarded to her for non-pecuniary damages and as such I decline to accept counsel for the plaintiff's invitation to further specify the amount awarded.

Cost of Future Care

- [107] The plaintiff is entitled to compensation for the cost of future care based on what is reasonably necessary to restore her to her pre-accident condition in so far as that is possible. When full restoration cannot be achieved, the court must strive to assure full compensation through the provision of adequate future care. The award is to be based on what is reasonably necessary on the medical evidence to preserve and promote the plaintiff's mental and physical health: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.); *Williams v. Low*, 2000 BCSC 345; *Spehar v. Beazley*, 2002 BCSC 1104; *Gignac v. Rozylo*, 2012 BCCA 351 at paras. 29-30.
- [108] It is not necessary that a physician testify to the medical necessity of each item claimed; however, there must be some basis in the evidence whereupon the trier of fact can draw a link between the professional's assessment of pain and disability with the recommended treatment: *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 38 citing with approval *Jacobsen v. Nike Canada Ltd.* (1996), 19 B.C.L.R. (3d) 63, 133 D.L.R. (4th) 377 (S.C.) at para. 182.
- [109] I also note that an assessment of damages for cost of future care is not a precise accounting exercise: *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at para. 21.

- [110] Ms. Johnson submits that the amount of \$10,000 is an appropriate cost of future care award. Her submission is based upon the ability for her to access physiotherapy and massage therapy each approximately 12 times per year for a period of ten years to address flare-ups of her pain symptoms. The plaintiff's calculation is based upon the historical out of pocket costs that Ms. Johnson has paid for in the past. It is also based upon the costs associated with completing a course of 12 further active rehabilitation sessions as recommended by Mr. Nguyen.
- [111] The defendant concedes that the evidence supports that the plaintiff would benefit from massage and physiotherapy for flare-ups of her pain symptoms and that she would benefit from a further 10 to 12 sessions of active rehabilitation. He submits that an appropriate award would be \$2,000. However, he gives no reasons as to the basis for that amount or why he submits that amount is appropriate.
- [112] I find that the amounts claimed by the plaintiff are generally reasonable and medically justified in the circumstances. Historically, since the accident, Ms. Johnson has received physical or massage therapy approximately once per week. In Dr. Chow's opinion, these passive therapies are only recommended to address flare-ups. The plaintiff's testimony is that these treatments provide her with some relief when her symptoms are flaring up. Thus, it is reasonable that an award be made to access these services on a periodic basis. Ms. Johnson's out of pocket cost for physiotherapy and massage therapy has been \$35 and \$65, respectively. Given her relatively young age, an award of \$9,500 would permit Ms. Johnson to access these services on a periodic basis to address flare-ups as they occur.
- [113] Ms. Johnson's active rehabilitation sessions are a net cost of \$25 per session. Mr. Nguyen has recommended that the plaintiff undertake 10-12 further active rehabilitation sessions under the direction of a kinesiologist. The plaintiff testified that she had planned to discuss the plan for her active rehabilitation sessions with her kinesiologist before the COVID-19 public health emergency was declared. She also testified that her strength and endurance improved as a result. Twelve sessions at \$25 per session is \$300 and I award that amount.
- [114] The plaintiff is awarded \$9,800 in total for the cost of her future care.

Special Damages

- [115] Special damages have been agreed to in the amount of \$13,174.40 and I award that amount.

CONCLUSION

- [116] Ms. Johnson's claim for damages is allowed. In summary, I award the following:

a) Non-Pecuniary Damages

\$75,000

b) Past Loss of Income

\$9,537.78

c) Future Loss of Earning Capacity

\$40,000

d) Cost of Future Care

\$9,800

e) Loss of Housekeeping Capacity

Included in Non-Pecuniary Damages Award

f) Special Damages

\$13,174.40

Total

\$147,512.18

[117] In the event they are unable to agree, the parties have leave to bring typical post-trial topics before me such as the deductibility of collateral benefits, healthcare recovery costs, tax gross-ups and application of the Court Order Interest Act, R.S.B.C. 1996, c. 79.

COSTS

[118] Subject to circumstances of which I am unaware, the plaintiff is entitled to her costs of the action at Scale B. Should the parties wish to make submissions on costs, they may make arrangements with Supreme Court Scheduling to speak to the issue within 60 days.

"Majawa J."

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