

CANADA / JUDGMENT

Johnson v. Randhawa

2020 BCSC 708

COURT

Supreme Court of British Columbia

DECIDED

7 May 2020

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2020 BCSC 708 Johnson v. Randhawa IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Johnson v. Randhawa, 2020 BCSC 708 Date: 20200507 Docket: M32339 Registry: Chilliwack Between: Tracy Johnson Plaintiff And Steven Paul Randhawa, Marisa Alicia Fancello, Maclure's Cabs (1984) Ltd. and Samar Uppal Defendants Before: The Honourable Mr. Justice Ball Reasons for Judgment Counsel for Plaintiff: W. K. Briscoe T. Baradziej Counsel for Defendants: K. Jenkins Place and Date of Trial: New Westminster, B.C. February 11-15, 2019 Place and Date of Judgment: Chilliwack, B.C. May 7, 2020 Table of Contents Introduction.. 3 Issues.. 9 Factual Review... 9 Prior to the First Collision. 9 After the First Collision. 10 After the Second Collision. 11 Treatment. 13 Employment. 13 Expert Evidence.. 14 Dr. H Finlayson. 14 Dr. J. Hawkeswood. 16 Lay Witnesses for the Plaintiff. 19 Kimberly Bryant. 19 Lisa Maddocks. 19 Laura Schwaegle. 21 Ted Pennell 22 Rhiannon Carpentier. 23 Megan Perry. 23 Lay Witnesses for the Defence.. 24 Marissa Fancello. 24 Samar Uppal 24 Causation.. 25 Non-Pecuniary Damages.. 25 Law Regarding Minimal Vehicle Damage. 25 Past Wage Loss.. 30 Past Loss of Earning Capacity. 30 Loss of Future Earning Capacity.. 32 Cost of Future Care. 35 Loss of Housekeeping Capacity.. 37 Special Damages.. 38 Summary.. 38

Introduction

- [1] These are reasons for judgment in the case of two motor vehicle accidents in which the plaintiff was injured and claims damages; in both cases, liability is admitted.
- [2] In order to protect the privacy of young persons referred to in these reasons, the Court has expressed the names of the young persons by their initials.
- [3] The parties filed an Agreed Statement of Facts as follows, which has been edited slightly for grammar/clarity: AGREED STATEMENT OF FACTS
1. The parties to this action agree that the following facts are admitted for the purpose of dispensing with proof thereof on the trial.
 2. Nothing in this Agreement shall limit or restrict the rights of any party to produce evidence or prove facts in any manner that might otherwise be permitted if this Agreement had not been made.

3. Nothing in this Agreement shall prevent any party from objecting to the entry into evidence of any fact on the ground of relevancy, privilege, or any other ground not in conflict with this Agreement. Plaintiff's History/Education
1. The Plaintiff is 43 years of age [45 when these reasons are released], having a birthdate in 1975.
2. The Plaintiff resides in Abbotsford, BC, with her boyfriend, Edmund "Ted" Pennell. He owns the home in which they reside.
3. The Plaintiff has two children, who are young adults, J.P. (age 21) and D.P. (age 19). They mostly reside with their father. Her youngest son, D.P., occasionally spends the night at the Plaintiff and Ted Pennell's residence.
4. Ted Pennell has shared parenting of his two children. His daughter, T.P., is 15 years old and his son, T.P., is 12 years old. These two children reside with Ted Pennell and the Plaintiff 50% of the time.
5. The Plaintiff has a Grade 12 education. Motor Vehicle Collision May 2, 2015 (the "First Collision")
6. On May 2, 2015, the Plaintiff was on her way home, after work at the High Point Equestrian Centre and was travelling northbound on 216th Street at 40th Avenue in Langley BC. This intersection had a 4-way stop. The Plaintiff had stopped at the stop sign and waived another vehicle through the intersection which had also been stopped at the intersection. After that person left the intersection, the Plaintiff began proceeding through the intersection at which time she saw the lights of a vehicle approaching the intersection from the right, which did not stop at the stop sign and collided with the Plaintiff's vehicle on the right rear passenger side and right rear panel of the Plaintiff's vehicle. The vehicle that collided with the Plaintiff's vehicle was driven by the Defendant, Marisa Alicia Fancello (the "Defendant Fancello") and owned by the Defendant, Steven Paul Randhawa (the "Defendant Randhawa").
7. The Defendant Fancello and the Defendant Randhawa have admitted liability for the First Collision.
8. The Plaintiff's motor vehicle was a white 2013 Ford Focus, license plate [removed].
9. There was \$3,904.39 in damage to the Plaintiff's 2013 Ford Focus.
10. The Defendant Randhawa's vehicle was a 2014 Dodge Journey, license plate [removed].
11. There is no estimate available for the damage to the Defendant Randhawa's vehicle. Motor Vehicle Collision November 15, 2016 (the "Second Collision")
12. On November 15, 2016, the Plaintiff was a passenger in a Ford pickup truck owned and driven by her boyfriend, Ted Pennell. They were on their way to a Canucks game at Rogers Arena in Vancouver, BC. They were travelling westbound on First Avenue, in the right lane near Station Street. Ted Pennell's vehicle was stopped at a traffic light, with two vehicles

ahead of his vehicle at the same light. The light turned green and the first vehicle proceeded through the light but the vehicle directly ahead of Ted Pennell's vehicle was indicating to turn right and stopped to allow a pedestrian to cross the street. Ted Pennell stopped his vehicle behind the vehicle ahead and the Defendant, Samar Uppal (the "Defendant Uppal"), driving a taxicab, rear-ended Ted Pennell's vehicle in which the Plaintiff was a passenger. The Defendant, Maclure's Cabs (1984) Ltd. (the "Defendant Maclure's"), is the owner of the taxi cab.

13. The Defendant Uppal and the Defendant Maclure's have admitted liability for the Second Collision.
14. Ted Pennell did not repair his Ford pickup truck.
15. The Defendant Maclure's vehicle was a blue 2015 Toyota Sienna, license plate [removed].
16. There was \$2,762.34 in damage to the Defendant Maclure's 2015 Toyota Sienna. Injuries
17. The Plaintiff suffered the following injuries caused by the First Collision and aggravated by the Second Collision: Headaches; Neck pain and stiffness; Trapezius/shoulder area pain; and Driving-related Anxiety. Treatment Physiotherapy
18. The Plaintiff attended approximately 26 physiotherapy sessions at Langley Physiotherapy between May 11, 2015 and May 24, 2016.
19. The Plaintiff attended approximately 7 physiotherapy sessions at Abbotsford Sports & Orthopaedic Physiotherapy from November 27, 2017 to January 19, 2018. Chiropractor
20. The Plaintiff attended approximately 57 chiropractic sessions with Dr. Dustin Freund from May 11, 2015 to November 4, 2016.
21. The Plaintiff attended approximately 63 chiropractic sessions with Dr. Dustin Freund from November 18, 2016 to January 3, 2019 and she continues to attend approximately every 2 weeks at a cost of \$48.00 per visit. Massage Therapy
22. The Plaintiff attended approximately 16 massage therapy sessions at Glover Road Massage Therapy Clinic from June 10, 2015 to November 17, 2015. Acupuncture
23. The Plaintiff attended approximately 15 acupuncture/trigger point injection sessions with Dr. Vallee at Sumas Mountain Chiropractic & Wellness Clinic from June 6, 2017 to September 11, 2017. Active Rehabilitation
24. The Plaintiff attended approximately 14 active rehabilitation sessions at HealthX Physical Therapy from August 5, 2016 to November 8, 2016.
25. The Plaintiff attended approximately 29 active rehabilitation sessions at HealthX Physical Therapy from November 17, 2016 to June 9, 2017. Counselling

26. The Plaintiff attended approximately 9 counselling sessions regarding driving anxiety from June 22, 2018 to December 18, 2018 with Dr. Zohreh Behboodi, Registered Psychologist, at Dr. Goldsmith & Associates. Plaintiff's Income Before the First Collision
27. When the Plaintiff's children were young and she was still in a relationship with their father, Todd Skinner, she operated a daycare out of their home and did the bookkeeping for his landscape design business. She also assisted from time to time with the actual landscaping such as spreading bark mulch in the gardens, planting plants or helping with laying sod.
28. The Plaintiff separated from the father of her two children in February 2014. She continued to do books for his business for a period time but that did not continue due to their separation. They had a shared parenting agreement.
29. The Plaintiff did not receive child support or spousal support from Mr. Skinner. She needed to work to support herself and her two sons.
30. The Plaintiff began her housekeeping business and also providing services such as child care, pet sitting and working at parties/events. She charged \$20 per hour. She was using her contacts to build up a customer base.
31. The Plaintiff invoiced clients for housekeeping, babysitting and party services at \$20 per hour for the following clients during the months of March and April 2015: MARCH 2015 HOUSEKEEPING Date Name Number of hours @ \$20 Total Mar. 2/15 Lisa Maddocks 8 160.00 Mar. 3/15 Laura Schwagele 4 80.00 Mar. 5/15 Marcia Bowers 4 80.00 Mar. 6/15 Linda Holt 4 80.00 Mar. 7/15 Lisa Maddocks 8 160.00 Mar. 10/15 Laura Schwagele 4 80.00 Mar. 12/15 Marcia Bowers 4 80.00 Mar. 13/15 Joyce Holt 2 40.00 Mar. 16/15 Lisa Maddocks 8 160.00 Mar. 17/15 Laura Schwagele 4 80.00 Mar. 19/15 Marcia Bowers 4 80.00 Mar. 20/15 Linda Holt 4 80.00 Mar. 23/15 Lisa Maddocks 8 160.00 Mar. 24/15 Laura Schwagele 4 80.00 Mar. 26/15 Marcia Bowers 4 80.00 Mar. 27/15 Joyce Holt 2 40.00 Mar. 30/15 Lisa Maddocks 8 160.00 Mar. 31/15 Laura Schwagele 4 80.00 March 2015 Total 1,760.00 APRIL 2015 HOUSEKEEPING April 2/15 Marcia Bowers 4 80.00 April 3/15 Linda Holt 4 80.00 April 3/15 Lisa Maddocks 4 80.00 April 6/15 Lisa Maddocks 8 160.00 April 7/15 Laura Schwagele 4 80.00 April 8/15 Lisa Maddocks 8 160.00 Apr. 9/15 Marica Bowers 4 80.00 Apr. 10/15 Joyce Holt 2 40.00 Apr. 13/15 Lisa Maddocks 8 160.00 Apr. 14/15 Laura Schwagele 4 80.00 Apr. 16/15 Marcia Bowers 4 80.00 Apr. 17/15 Linda Holt 4 80.00 Apr. 20/15 Lisa Maddocks 6 120.00 Apr. 21/15 Laura Schwagele 4 80.00 Apr. 23/15 Marica Bowers 4 80.00 Apr. 24/15 Joyce Holt 2 40.00 Apr. 27/15 Lisa Maddocks 8 160.00 Apr. 28/15 Laura Schwagele 4 80.00 Apr. 30/15 Marcia Bowers 4 80.00 Subtotal 1,800.00 PARTY SERVICE Apr. 4/15 Lisa Maddocks 8 160.00 Apr. 16/15 Lisa Maddocks 6 120.00 Subtotal 280.00 BABYSITTING Apr. 15/15 Lisa Maddocks 6 120.00 Apr. 18/15 Lisa Maddocks 8 160.00 Apr. 25/15 Lisa Maddocks 6 120.00 Subtotal Total \$400.00 April 2015 Total \$2,480.00

32. The Plaintiff was also employed by the High Point Equestrian Centre for 6 months prior to the First Collision doing cleaning (5 hours each Sunday) plus extra hours hostessing, working in the café and working events at \$20 per hour. Plaintiff's Income After the First Collision
33. Following the First Collision, the Plaintiff was not able to continue with the work that she was doing at the time of the collision because it was too physical.
34. The Plaintiff began working for BC Assessment as a Property Information Collector on a temporary contract on May 31, 2016, 4 days per week, 8.5 hours per day. BC Assessment has extended her contracts since then.
35. The Plaintiff's current temporary contract of employment with BC Assessment ends on March 29, 2019. She currently earns \$23.21 per hour, 8.5 hours per day, 4 days per week. She has not been advised if her contract will be extended.
36. Pursuant to the Plaintiff's Income Tax Returns, she reported the following income: YEAR GROSS BUSINESS INCOME NET BUSINESS INCOME EMPLOYMENT INCOME UNIVERSAL CHILD CARE BENEFIT TOTAL INCOME (line 150) 2010 \$22,000 \$9,715 \$307.66 2011 \$6,095 \$2,280 \$2,280 2012 NOT FILED 2013 \$1 \$1 2014 \$7,256 \$6,502 \$6,502 2015 \$5,209.60 \$4,199.87 \$769.60 \$1,200 \$6,097.99 2016 \$23,450.59 \$23,450.59 2017 \$39,419.81 \$39,419.81 Past Wage Loss
37. But for the First Collision, the Plaintiff would have continued to work in housekeeping and hostessing and earned a gross business income of approximately \$2,120 per month (an average of March and April 2015) until she started her job with BC Assessment on May 31, 2016 or 13 months. $\$2,120 \text{ per month} \times 13 \text{ months} = \$27,560$ gross business income = \$22,048 net business income. The Insurance Corporation of British Columbia paid the Plaintiff \$15,120 in Total Temporary Disability payments during the period November 2015 to May 2016. Therefore, her past wage loss between the First Collision and May 31, 2016 is $\$22,048 - \$15,120 = \$6,928.00$.
38. The Plaintiff had to take unpaid time off of work from BC Assessment as a result of the collisions as follows:
- (a) July 28, 2017 (medical appointment): 7am to 11:45am. 4.75 hours @ \$20.27 per hour = \$96.28 gross = \$85.69 net;
- (b) September 1, 2017 (medical appointment): 7am to 4pm. 8.5 hours @ \$20.27 per hour = \$172.30 gross = \$153.34 net;
- (c) September 8, 2017 (medical appointment): 7am to 4pm. 8.5 hours @ \$20.27 per hour = \$172.30 gross = \$153.34 net;
- (d) February 11, 12, 13, 2019 (Trial - 2 paid flex days, 3 unpaid days). 8.5 hours @ \$23.21 = \$591.85 gross = \$526.75 net. $\$85.69 + \$153.34 + \$153.34 + \$526.75 = \$919.12$

39. Therefore, the parties agree that the Plaintiff has a net past wage loss of $\$6,928.00 + \$919.12 = \$7,847.12$.
40. The Plaintiff is also seeking a past wage loss of opportunity which is not agreed to by the Defendants. Special Damages
41. The parties agree that the Plaintiff has incurred Special Damages in the amount of \$8,235.02.
42. The Plaintiff is also seeking reimbursement for two vacuum cleaners that she purchased following the First Collision, which the Defendants do not agree to:
 - (a) the Roomba vacuum cleaner (robotic) was purchased on June 16, 2015 for \$379.99; and
 - (b) the Dyson Animal cordless vacuum was purchased for approximately \$350.00.

Issues

- [4] The following issues remain for determination:
 - a) did the plaintiff suffer a past wage loss of opportunity;
 - b) the quantum of non-pecuniary damages;
 - c) the amount of damage to motor vehicles in the collisions;
 - d) the quantum of loss of future earning capacity;
 - e) the quantum of loss of housekeeping capacity; and
 - f) whether the plaintiff's purchase of two vacuums is compensable as special damages.
- [5] The parties have agreed that the quantum of past wage loss, aside from the claim for past wage loss of opportunity, is \$7847.12, and the quantum of special damages, aside from the two vacuums, is \$8,235.02. Factual Review Prior to the First Collision
- [6] In the case at bar, prior to the First Collision, the plaintiff was a 41-year-old mother of two. She had a Grade 12 education and was, at the commencement of the trial, employed by the British Columbia Assessment Authority in a temporary position. The temporary position was based on an employment contract, which began in 2016 and had been regularly renewed from time to time.
- [7] Prior to the collisions, she was an active and healthy woman who had no particular health issues. Unrelated to the collisions, she had a minor surgical hernia repair in 2014, which healed successfully. Otherwise, she enjoyed many recreational activities including running, hiking, boating, riding a bicycle, riding a four-wheel-drive vehicle and riding roller coasters. Some of these activities did not take place recently before the First Collision or on a regular basis.
- [8] Prior to the First Collision, she resided in Abbotsford with her boyfriend Mr. Pennell, who had two children who lived with them 50 percent of the time. After the First Collision

- [9] As noted above, the First Collision occurred at a four-way stop in Langley, BC while the plaintiff was driving home from a work day at the High Point Equestrian Centre. The defendant driver acknowledged that she failed to stop at a stop sign and failed to see the plaintiff's vehicle. The defendant's vehicle struck the right rear passenger door and panel of the plaintiff's vehicle. The plaintiff did not exit from her vehicle. She felt an immediate headache following the collision. Emergency vehicles did not attend at the scene and no emergency treatment was sought by the plaintiff.
- [10] The plaintiff and the defendant, Fancello, had a brief conversation at the roadside. The plaintiff requested that the defendant write an acknowledgement by the defendant, Fancello, of her responsibility for the collision. That document was prepared by the defendant and was marked Exhibit 3 on the trial.
- [11] The plaintiff drove to her home in her vehicle, which was driveable. She attended a drop-in medical clinic the next day and over-the-counter medication was recommended. No immediate hospitalization nor radiographic imaging was ordered.
- [12] The plaintiff gave evidence that she felt a headache immediately after the First Collision in the top left "corner" of her head. She went home and had a bath with Epsom salts to calm down.
- [13] The plaintiff testified that she woke up the next morning with pain in her neck and trapezius/shoulder area that went down to the shoulder blades. She described the pain as sharp, aching, hot, tense and tight. Her headache had worsened. She gave evidence that she had not experienced pain like that before.
- [14] The plaintiff gave evidence that she experienced headaches, neck pain and tingling down her arms that lasted a month or two, sporadically. After the Second Collision
- [15] The Second Collision occurred on November 15, 2016, while the plaintiff was a passenger in Ted Pennell's pick-up truck, as they were on their way to a Vancouver Canucks game. The pick-up was stopped at a red light in front of a taxi driven by the defendant, Samar Uppal. When the light turned green, the taxi accelerated, but the vehicle driven by Mr. Pennell did not move forward, and the taxi collided with the rear bumper of the pick-up.
- [16] The plaintiff and Mr. Pennell both went to the hockey game after the Second Collision. However, the plaintiff gave evidence that after the Second Collision, her neck and trapezius area pain started to worsen so they left the hockey game and went home. Following the Second Collision the plaintiff continued to experience neck pain and trapezius/shoulder area pain. She described the neck pain as being at the base of her skull/top of her neck and going down both sides of her neck into the shoulder blades. She gave evidence that she had not been 100 percent pain free since the First Collision.

- [17] The plaintiff gave evidence that she has restricted neck range of motion. She described that she can turn to a certain point and only for a certain time before it gets irritated. She testified that she has to adjust her body so that she can look straight at people, rather than turning her head. She described how she experiences neck pain if she turns her head in either direction and holds her head in a turned position for more than 20 or 30 seconds.
- [18] The plaintiff testified that she no longer sleeps through the night because of neck pain. She described that she can no longer lie on her back because of the pressure exerted on her neck at the base of the skull. She can only lay for a limited period on one side before she wakes up with pain and has to turn to the other side.
- [19] The plaintiff testified the pain she experienced increased while lifting, leaning forward where her neck is not in line with her body, reaching, turning her head and having anything touching her shoulders. She testified that any jarring movements, including in vehicles, causes pain in her neck.
- [20] The plaintiff testified there has been an improvement in headaches. She gave evidence that the headaches were almost every day for months after the First Collision. Since then, the plaintiff testified that she began to experience headaches only once or twice each month. The plaintiff estimated that when she feels a headache coming on, she can prevent it from becoming severe or can stop it altogether by taking Tramadol, a prescribed medication.
- [21] The plaintiff gave evidence that she experienced driving-related anxiety following the First Collision. She described that she was having a hard time thinking about not getting into another collision, especially when she was coming to an intersection. She found that counselling sessions with a psychologist improved her anxiety symptoms.
- [22] The plaintiff gave evidence that her pain and injuries have affected her employment, recreational and social activities.
- [23] The plaintiff testified that she continues to experience chronic pain from the collisions. As noted later, neither of the expert doctors used the term chronic in the diagnosis given by them. Treatment
- [24] The plaintiff gave evidence that she first sought medical treatment the morning after the First Collision when she went to a walk-in clinic. No records from that clinic have been produced.
- [25] She gave evidence regarding numerous treatment modalities, which included:
- a) Physiotherapy;
 - b) Chiropractic treatment;
 - c) Massage Therapy;
 - d) Acupuncture and Trigger Point Injections;

- e) Active Rehabilitation;
- f) Counselling; and
- g) Freezing Injection.

- [26] The plaintiff's evidence supports that she was motivated to do what might be necessary to get better and the plaintiff submits that she has taken steps to mitigate her loss. Employment
- [27] When the plaintiff's children were young and she was still in a relationship with their father, Todd Skinner, she operated a daycare out of their home and did the bookkeeping for his landscape design business. She gave evidence that she also assisted from time to time with the actual landscaping, such as spreading bark mulch in the gardens and planting plants. The plaintiff testified that she was not paid for bookkeeping or landscaping during her relationship with Mr. Skinner.
- [28] The plaintiff separated from Mr. Skinner in February 2014. She gave evidence that she did not receive child or spousal support from him and needed to find employment.
- [29] The plaintiff began a housekeeping business and also provided services to friends and acquaintances such as child care, pet sitting and assistance at parties/events. She charged \$20 gross per hour for these services.
- [30] The plaintiff was also employed by the High Point Equestrian Centre for six months prior to the First Collision doing cleaning, hostessing, working in the café and working events at \$20 gross per hour, but had no additional employment benefits of any kind.
- [31] The plaintiff enjoyed the housekeeping-type work that she was doing just prior to the First Collision. The plaintiff testified that the injuries the plaintiff suffered from the First Collision caused pain which prevented her from performing housekeeping.
- [32] The plaintiff gave evidence that she was unemployed from the time of the First Collision until she began working for BC Assessment as a Property Information Collector on a temporary contract on May 31, 2016. The position she accepted was a full time position, four days per week, eight and a half hours per day. BC Assessment has extended her contracts since then. Expert Evidence Dr. H Finlayson
- [33] Dr. Finlayson was called by the plaintiff. Dr. Findlayson is a physiatrist and an expert in physical medicine and rehabilitation, who practices and teaches medicine at UBC. She examined the plaintiff and took a history from the plaintiff on March 8, 2018. She was of the opinion that the plaintiff suffered injuries to her neck, with neck pain and stiffness, due to cervical facet arthropathy, occipital neuralgia and myofascial pain. The doctor defined cervical facet arthropathy as pain originating in facet joints of the cervical spine. She stated the forces caused by a whiplash injury cause microscopic injuries to the joints of the cervical spine that lead to pain. The plaintiff's description of pain at the back of her neck, made worse when she turned her head from side to side, was found by the doctor to be typical of cervical facet joint pain.

- [34] The doctor also opined that the plaintiff probably experienced occipital neuralgia. Occipital neuralgia is pain from the occipital nerve, a nerve that travels from the upper neck across the base of the skull, which provides sensation to the back of the head. The doctor found that pain responses by the plaintiff to palpation over the occipital nerve was highly supportive of the diagnosis of occipital neuralgia.
- [35] Myofascial pain said to affect her neck and upper shoulder areas refers to pain originating in the soft tissue structures such as muscles, tendons, and ligaments. On physical examination, the plaintiff had markedly taught bands ("knots") in muscles at the back of her neck and upper shoulder area that support this diagnosis.
- [36] Dr. Finlayson also diagnosed cervicogenic headaches caused by a problem originating in the neck area. The doctor states that these headaches suffered by the plaintiff were likely due to a combination of cervical facet joint pain, occipital neuralgia and myofascial pain. It was noted that these headaches are reported to have features of migraine headaches, including visual auras and sound sensitivities.
- [37] The doctor also noted that the plaintiff had symptoms of anxiety while driving, which Dr. Finlayson described as "mild anxiety" arising from the First Collision and exacerbated by the Second Collision.
- [38] Dr. Finlayson stated that the plaintiff was "probably unable to work at physically-demanding jobs, including housekeeping and hostessing (assuming this required carrying heavy food and beverage trays), after the First Collision. The doctor opined that it was reasonable and appropriate for the plaintiff to be off work entirely after the First Collision on May 2, 2015.
- [39] As at the date of her report, Dr. Finlayson stated that the plaintiff was capable of full-time work that is sedentary or has light physical demands, as long as she has an ergonomically optimized workstation. Her current employment at BC Assessment has such workstations. The doctor noted that her usual recreational pursuits were curtailed.
- [40] Dr. Finlayson recommended a number of treatments or potential treatments, many of which had not been attempted or completed at the time of trial. The doctor recommended low impact aerobics and core strengthening exercises, which would be expected to aid pain management.
- [41] Dr. Finlayson finally opined that it was "unlikely that Ms. Johnson has reached maximum medical improvement. There is potential for improvement in her symptoms with the interventions outlined above." Further, the doctor opined that it was unlikely the plaintiff would require surgery as a direct consequence of the injuries sustained in the two collisions.
Dr. J. Hawkeswood
- [42] Dr. Hawkeswood is an expert in physical medicine and rehabilitation. At the request of the defendants, he performed an independent medical assessment of the plaintiff on August 2, 2018.

- [43] Dr. Hawkeswood agreed that the plaintiff suffered post-traumatic neck pain secondary to a whiplash-associated disorder. The plaintiff also had a prominent myofascial component based on a generalized distribution of neck pain which possibly originated from facet joint irritation.
- [44] Dr. Hawkeswood noted that the plaintiff's clinical presentation was complicated by a fair amount of "guarding" in view of a displayed profound restriction in neck range of motion placed against a normal cervical spine x-ray. He opined that the plaintiff may have developed a degree of central sensitization, which can make an individual sensitive to touch. In cross-examination, Dr. Hawkeswood agreed a patient may experience pain in absence of orthopedic injury; in this case, both neck X-rays and an MRI were negative for injury.
- [45] Dr. Hawkeswood also noted the headaches reported by the plaintiff featured light sensitivity and the need to rest, suggesting migraines which first occurred shortly after the First Collision. At the time of the examination these headaches had largely subsided, and were estimated to occur once or twice per month in association with aggravated neck pain.
- [46] Dr. Hawkeswood opined that the First Collision triggered the plaintiff's neck pain and headaches, which were of a more severe nature than any prior headaches. The doctor stated that he found it more likely than not some of her current headaches probably reflected a worsening of a pre-morbid headache condition, which was worsened in the setting of trauma.
- [47] Dr. Hawkeswood also opined that the plaintiff's upper body pains were probably worsened by the Second Collision, but that given the minor nature of the Second Collision, that accident contributed relatively less to her current symptoms.
- [48] Dr. Hawkeswood recommended a treatment plan in relation to the plaintiff's musculoskeletal pain symptoms to include (1) range of motion exercises for the neck to be performed regularly throughout the day, with stretches of the trapezius, levator scapulae, rhomboids and cervical paraspinal musculature; (2) postural and scapular stabilizing exercises; (3) non-impact aerobic activity, such as, recumbent exercise biking, using an elliptical machine, and swimming for most days of the week; and (4) maintenance of an optimal body mass index. The plaintiff did not describe doing any of these activities in her evidence.
- [49] Dr. Hawkeswood recommended access to a gymnasium to allow the plaintiff a gradual and cautious approach to the suggested exercise program. The doctor also recommended that while the plaintiff has completed an active rehabilitation program, some ongoing access to kinesiology for the purpose of a "tune-up" was also reasonable in the circumstances.
- [50] While the plaintiff reported favourable clinical responses to chiropractic treatments, Dr. Hawkeswood was not convinced these treatments lead to meaningful or lasting clinical gains. Under the heading "Overall Prognosis and Expectations" of his report, Dr. Hawkeswood opined that with further time for recovery and progression with a

rehabilitation program, he expected the plaintiff would experience improvements in her overall clinical condition and that it was unlikely she would continue to experience profound restriction in neck range of motion on an ongoing and indefinite basis. However, if she continued to keep her neck "splinted", then it will continue to be stiff and sore on an ongoing basis. The doctor testified that to improve range of neck motion, muscles must be lengthened and, if not used, muscles will shorten and exacerbate pain responses.

- [51] With respect to headaches, he opined that her headache prognosis is favourable because of reported improvements and that progress should be made with a treatment plan leading to an extended range of neck motion and improved conditioning, reducing pain levels. Dr. Hawkeswood also noted that a complete resolution of all of Ms. Johnson's pain symptoms has a probability of less than 50 percent.
- [52] Dr. Hawkeswood opined that Ms. Johnson would benefit from a few months of self-directed reactivation before returning to household chores. He also stated that while a return to hiking and running may initially aggravate her symptoms, these activities would be medically beneficial for her provided she stretched afterwards and avoided carrying a heavy backpack.
- [53] The time taken off work by the plaintiff because of the collisions was viewed as reasonable and medically appropriate. Dr. Hawkeswood noted the recent sedentary work in an ergonomic workstation has been tolerated well.
- [54] The capacity of the plaintiff for full-time household cleaning has been compromised, but the doctor did not view her as permanently disabled from working as a housekeeper in absolute terms. He felt housekeeping should be avoided in order to facilitate clinical improvements, except for a slow and gradual reintroduction of that activity as her range of motion and general fitness improve.
- [55] As a general observation, neither of the experts concluded that, at the time of trial, the condition of the plaintiff was chronic or permanent. Both noted improvement was likely with appropriate rehabilitation steps being followed by the plaintiff. Lay Witnesses for the Plaintiff Kimberly Bryant
- [56] Kimberley Bryant, the sister of the plaintiff, testified that before the First Collision, her sister was an active, adventurous woman. She was very physical, working around the house on tasks like painting, pushing a lawnmower, planting in excess of 100 trees, and helping build a fence, all on a five-acre property.
- [57] She explained that, after the First Collision, her sister changed. Before the First Collision, Ms. Bryant said her sister was a really calm, relaxed person, and now she "seems a lot more irritated and irritable".
- [58] Ms. Bryant gave evidence that she helped the plaintiff move to several new residences, and prior to the first accident, the plaintiff could "basically move anything except a couch".

- [59] Ms. Bryant also testified that for the plaintiff's second and third moves between residences - both of which were after the First Collision - the plaintiff "basically just told people where to put stuff" and that "she wasn't able to lift boxes", though she might have helped move some lighter things like lamps.
- [60] In examination in chief, Ms. Bryant testified she observed the plaintiff become more easily irritated with Ted Pennell after the First Collision than before the First Collision. Ms. Bryant acknowledged in cross-examination that the plaintiff did not know Ted Pennell prior to the First Collision and that the plaintiff did not meet Mr. Pennell until after the First Collision.
Lisa Maddocks
- [61] Ms. Maddocks testified that she has known the plaintiff for 15-20 years. Initially, the plaintiff provided child care at her home for Ms. Maddocks' son from when he was four months old, for about a year and a half. They became friends and about 11 years ago, they vacationed at Disneyland with their children.
- [62] Before the First Collision, Ms. Maddocks and the plaintiff took a class in staging and redecorating homes. For a brief period of time ending in 2014, the plaintiff assisted Ms. Maddocks in three or four staging contracts. Ms. Maddocks described this business as "going gangbusters", which seemed an overstatement in the actual circumstances. In 2014, there was no need for this business in the real estate community and the business ceased. There is no evidence that the plaintiff obtained any contracts for home staging or redesign of homes on her own behalf, either before or after the collisions. In the home staging business, the plaintiff only worked at \$20.00 per hour on contracts obtained by Ms. Maddocks.
- [63] Before the First Collision, Ms. Maddocks explained that she saw the plaintiff move couches and tables, set up riding arenas, and move heavy boards around in the set-up of horse shows.
- [64] Ms. Maddocks testified that before the First Collision, the plaintiff worked for her in several capacities, including providing child care and dog sitting services, helping out at the home or business of Ms. Maddocks, and working as a cleaner at Ms. Maddocks' home. In cross-examination, Ms. Maddocks testified that in the year prior to the First Collision, the plaintiff provided child and dog sitting services for Ms. Maddocks on three or four occasions.
- [65] In fact, the plaintiff was leaving her job with Ms. Maddocks' business, Highpoint Equestrian Club, the night of the First Collision; however, in the six months prior to that event, the plaintiff's entire net earnings were \$783.57.
- [66] After the first accident, Ms. Maddocks testified the plaintiff did not return to work at Highpoint. She did not return to cleaning Ms. Maddocks' house, and she did not provide childcare again. Ms. Maddocks testified that she has hired someone new to clean her house. She testified she now pays the new housekeeper \$120 for four hours - \$10 more an hour than the plaintiff was making as a housecleaner.

- [67] Ms. Maddocks gave evidence that she and the plaintiff used to see each other regular and did many activities together. She testified that she has only seen the plaintiff a handful of times since the First Collision. Laura Schwaegele
- [68] Ms. Schwaegele is the Regional Assessor for the BC Assessment Authority and conducts supervision of the Surrey and Abbotsford offices of the Assessment Authority. She is the plaintiff's cousin and encouraged the plaintiff to apply for an available posted job position with the Assessment Authority. The plaintiff was successful in obtaining that position, and although she and her cousin work for the same Authority, they occupy different offices on most occasions, and they see one another approximately five times each month.
- [69] Ms. Schwaegele testified that the plaintiff was also under her employ as a housecleaner prior to the First Collision, and that she paid the plaintiff \$20 an hour for her cleaning services for four hours a week. Sometimes she would ask her to do more, like window cleaning. The plaintiff has not cleaned for her since the First Collision.
- [70] Ms. Schwaegele testified that she has a new cleaner now, whom she pays \$25 an hour. Ms. Schwaegele explained that the new housekeeper's rate was \$20 an hour when she started, but she has since increased her rates because the new cleaner asked for a raise a year ago. In Ms. Schwaegele's words, \$25 an hour is still a "really good deal", and if she wanted to switch to a better cleaner than her current cleaner, she could expect to pay \$32-\$40 an hour.
- [71] Ms. Schwaegele also testified that the plaintiff, with whom she shared camping trips, hiking, and boating over the years, can no longer enjoy those activities they used to enjoy at Cultus Lake. She observed the plaintiff on a boat only once since the First Collision after promising the plaintiff they would go slow and avoid the middle of the lake. On that boat ride, she testified she observed the plaintiff tensing up, that she could see her discomfort, and she suggested that they end their excursion. This is in stark contrast to Ms. Schwaegele's evidence that, prior to the First Collision, the plaintiff was seen tubing behind the boat, sometimes with one of the kids, which is "quite bouncy". Ted Pennell
- [72] Mr. Pennell, who started dating the plaintiff in November 2015, was at the time of trial, a 43-year-old power lineman. He was driving the vehicle in which the plaintiff was a passenger during the Second Collision. He testified that the impact of the rear-end collision was light. There was no damage to the corporate pick-up truck that he was driving.
- [73] He testified that he was sore after that collision, and that he went to physiotherapy eight or ten times. He and the plaintiff continued on to the Vancouver Canucks game, but they left before the end of the game because the plaintiff was sore.
- [74] Mr. Pennell assisted the plaintiff when she moved to Abbotsford and she did no heavy lifting, nor lifting of moving boxes.

- [75] In 2017, Mr. Pennell and the plaintiff took a motorcycle ride together from Abbotsford to Whistler. The plaintiff was so uncomfortable by the time she arrived at Whistler that she had to arrange to be driven home in another vehicle because she found the use of the helmet and riding a motorcycle very painful.
- [76] The plaintiff and Mr. Pennell have done some camping together, but apart from some hiking, there has been little in the way of activities beyond sitting around a campfire. The intimate life of this couple has not been aided by the plaintiff's injuries.
- [77] Mr. Pennell testified that the plaintiff's injuries have had an impact on all levels of their relationship, but as they have a good relationship, they have learned to cope with these circumstances. Rhiannon Carpentier
- [78] Ms. Carpentier testified that she was the plaintiff's supervisor from April 2018 to the end of December 2018, however, throughout that period, they worked in different offices. She confirmed, during the period she supervised the plaintiff, Ms. Carpentier only met face-to-face with the plaintiff for approximately 30 minutes and, therefore, did not have an opportunity to observe the plaintiff at work on a regular basis.
- [79] Ms. Carpentier testified that, of the dozens of property information collectors, all but five are on temporary contracts, which are renewed usually on the three-month basis. Megan Perry
- [80] Megan Perry is one of the plaintiff's direct supervisors in the same office at the BC Assessment Authority. Ms. Perry checks in with the plaintiff at the beginning of the day and usually three or four times during the day. Until being asked to testify in this trial, Ms. Perry was not aware that the plaintiff had been injured in a motor vehicle accident. From her location in the office, she is unable to see the desk where the plaintiff works, and is aware the plaintiff moves about the office from time to time. This movement is normal, given the duties of the staff in the office.
- [81] Ms. Perry testified that she considers the plaintiff a good employee. Ms. Perry would give her a good work reference if she asked for it. Ms. Perry also testified that the plaintiff has regularly demonstrated a willingness to step in and help other staff.
- [82] In terms of work, Ms. Perry explained that the plaintiff's duties vary in terms of posture, and she is able to move around through the day. She is able to sit, stand, and help customers while standing at the front counter, or stand while scanning or photocopying.
- [83] In cross-examination, Ms. Perry confirmed that the plaintiff works at the lower level of the administrative team in the office. She had not asked Ms. Perry for any accommodation or change in work assignments within the office. Ms. Perry confirmed that she assigns tasks to staff based on their skills and abilities and there is no note in the plaintiff's performance review that she has been unable to perform any assigned task. Lay Witnesses for the Defence Marissa Fancello

- [84] Marissa Fancello was the defendant driver in the First Collision. She testified that she came to a full stop at a stop sign where she remained for several seconds. Ms. Fancello believes that while at the stop sign the plaintiff's vehicle was in her blind spot. She then proceeded into the intersection, but did not travel very far before she saw the plaintiff's vehicle in front of her. Ms. Fancello braked, but nevertheless her vehicle struck the plaintiff's vehicle on the passenger side. Ms. Fancello estimated her speed in the intersection at 7 km/h at impact.
- [85] It was Ms. Fancello's evidence that both she and the plaintiff exited their vehicles to exchange information and she acknowledged signing Exhibit 3, the document which admits liability. Ms. Fancello testified that when she asked the plaintiff how she was feeling, the plaintiff responded that she felt fine.
- [86] Ms. Fancello did not observe any damage to the front of her vehicle and, as a result, did not seek any repairs. Ms. Fancello did not suffer any injuries as a result of the First Collision and drove her vehicle from the scene of the collision. Samar Uppal
- [87] Samar Uppal was the defendant driver of the taxi-cab which rear ended the pick-up truck driven by Mr. Pennell at the time of the Second Collision.
- [88] Both vehicles were stopped in the line of vehicles at a red light. Mr. Uppal acknowledged that when the stoplight turned from red to green, he accelerated his vehicle, striking the rear bumper of the truck driven by Mr. Pennell. Mr. Uppal did not observe any damage to the plaintiff's truck. After exchanging information with Mr. Pennell, he drove away from the scene. Mr. Uppal did not suffer any injuries. Causation
- [89] The Supreme Court of Canada decision in *Resurfice Corp. v. Hanke*, 2007 SCC 7, at paras. 18-29, reaffirmed the decision of *Athey v. Leonati*, [1996] 3 S.C.R. 458, on the test for determining causation in negligence cases. The Court stated the "but for" test should be the default, with a "material contribution" test used in situations when the "but for" test is unworkable.
- [90] The defendants have admitted that the plaintiff suffered the following injuries caused by the First Collision and aggravated by the Second Collision:
- a) Headaches;
 - b) Neck pain and stiffness;
 - c) Trapezius/shoulder area pain; and
 - d) Driving-related Anxiety. Non-Pecuniary Damages Law Regarding Minimal Vehicle Damage
- [91] In the case at bar, the first accident caused a limited amount of damage to the plaintiff's vehicle, with total repair costs of \$3,904.39. The vehicle driven by the defendant, Fancello, had no damage.

- [92] The plaintiff submitted that the law is clear that the extent of damage to a vehicle is not determinative of injuries sustained.
- [93] In *Larson v. Bahrami*, 2017 BCSC 2308, Madam Justice Adair set out the principles:
- [107] I am also, implicitly, being asked to draw an inference, based on the evidence of Mr. Bahrami and Mr. Mooney, and the minimal amount of damage done to the Subaru and the Volvo, that the collision is unlikely to have caused the extent of the losses and damage asserted by Mr. Larson. However, as has been observed many times, this does not follow either as a matter of logic or legal principle.
- [94] The plaintiff also cited *Clark v. Kouba*, 2012 BCSC 1607, at para. 62, for a similar statement.
- [95] In assessing non-pecuniary damages, the leading case is *Stapley v. Hejslet*, 2006 BCCA 34:
- [45] Before embarking on that task, I think it is instructive to reiterate the underlying purpose of non-pecuniary damages. Much, of course, has been said about this topic. However, given the not-infrequent inclination by lawyers and judges to compare only injuries, the following passage from *Lindal v. Lindal*, *supra*, at 637 is a helpful reminder: Thus the amount of an award for non-pecuniary damage should not depend alone upon the seriousness of the injury but upon its ability to ameliorate the condition of the victim considering his or her particular situation. It therefore will not follow that in considering what part of the maximum should be awarded the gravity of the injury alone will be determinative. An appreciation of the individual's loss is the key and the "need for solace will not necessarily correlate with the seriousness of the injury" (*Cooper-Stephenson and Saunders, Personal Injury Damages in Canada* (1981), at p. 373). In dealing with an award of this nature it will be impossible to develop a "tariff". An award will vary in each case "to meet the specific circumstances of the individual case" (*Thornton* at p. 284 of S.C.R.).
- [46] In other words, in assessing non-pecuniary damages, it is not only a matter of comparing the injuries suffered but also the effect of those injuries on the lifestyle and personality of each person.
- [96] In *Clark*, the court stated the following with respect to the law of non-pecuniary damage assessments:
- [71] In *Hartnett v. Leischner*, 2008 BCSC 1589, [2008] B.C.J. 2242, Russell J. provides a helpful summary of the law with respect to general or non-pecuniary damages:
- [80] The purpose of non-pecuniary damage awards is to compensate the plaintiff for "pain, suffering, loss of enjoyment of life and loss of amenities": *Jackson v. Lai*, 2007 BCSC 1023, [2007] B.C.J. No. 1535 at para. 134; see also *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229; *Kuskis v. Tin*, 2008 BCSC 862, [2008] B.C.J. No. 1248. While each award must be made with reference to the particular circumstances and facts of the case, other cases may serve as a guide to assist the court in arriving at an award that is just and fair to both parties: *Kuskis* at para. 136.

- [81] There are a number of factors that courts must take into account when assessing this type of claim. Justice Kirkpatrick, writing for the majority, in *Stapley v. Hejslet*, 2006 BCCA 34, 263 D.L.R. (4th) 19, outlines the factors to consider, at para. 46: The inexhaustive list of common factors cited in *Boyd* [*Boyd v. Harris*, 2004 BCCA 146] 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 (B.C.C.A.)).
- [97] The plaintiff submits that she is entitled to non-pecuniary damages for pain and suffering and loss of enjoyment of life. Again, the defendants did not dispute this claim, although the parties disagree on the quantum of non-pecuniary damages. Each party submitted a selection of cases which provide some assistance in determining the quantum of non-pecuniary damages.
- [98] The plaintiff submitted that the range of non-pecuniary damages in the case at bar should be between \$100,000 and \$110,000.
- [99] Based on the agreement between the expert reports of Drs. Finlayson and Hawkeswood, I accept the evidence that Ms. Johnson's condition is not considered permanent or chronic, and that her condition is expected to improve. I also accept Dr. Finlayson's opinion that the plaintiff did not have chronic pain syndrome at the time of trial.
- [100] The plaintiff relied on several cases regarding the quantum of non-pecuniary damages. *Sharma v. Macdonald*, 2017 BCSC 2121, involved a forceful rear-end collision where the plaintiff's vehicle was pushed forward, striking the vehicle in front of it. As a result, the plaintiff suffered two distinct impacts, and received injuries to her arm, shoulder, and hand, but also a concussion and thoracic outlet syndrome. There was objective evidence of spinal damage, which is not present in the case at bar. In addition, evidence was led that Ms. Sharma experienced a major depressive disorder. The plaintiff was awarded \$100,000 in

non-pecuniary damages. Sharma clearly considered injuries more serious than those discussed in the case at bar, and is therefore distinguishable.

- [101] The case of *Larson v. Bahrami*, 2017 BCSC 2308, involved a plaintiff in a forceful rear-end collision who was rendered unconscious at the accident scene by contact with the steering wheel. Injury was found to have been caused to the lumbar, thoracic and cervical spine, and there were pain symptoms of sufficient duration to have become chronic. Mr. Larson also was diagnosed with a concussion. The plaintiff was awarded \$80,000 in non-pecuniary damages. Again, this is a case which involves more serious injuries than those in the case at bar.
- [102] The remainder of the cases referred to by the plaintiff involve chronic or permanent injuries which were not diagnosed in the case at bar and are therefore distinguishable.
- [103] The defendants submitted that the range for non-pecuniary damages in this case is from \$65,000 to \$85,000.
- [104] The defendants cited the case of *Buckle v. Raworth*, 2015 BCSC 989, a case where a 63-year-old was injured while a front seat passenger in a vehicle driven by the plaintiff's husband. Following the accident, Ms. Buckle had severe migraine headaches, which radiated down to her neck and into her right arm; the pain was described as excruciating and "almost like lightning bolts". She was also diagnosed with soft tissue injuries in her thoracic and lumbar spine. Although she had x-ray evidence of degenerative disc disease, Ms. Buckle had no symptoms prior to the accident. She received treatments from a pain management physician, including neural acupuncture, which improved her neck pain and headaches. However, an unsuccessful cortisone shot resulted in the return of her migraines and neck pain, and an exacerbation of pain in her right arm and shoulder.
- [105] At the time of trial, Ms. Buckle was experiencing migraine headaches two or three times a week, continued to have back and shoulder pain, as well as a pain in her muscles and upper arms, and she had to curtail swimming and exercising at the gym because of arm pain. She had to discontinue gardening activity because it was too painful in her arms and neck. Her expertise at cake decorating was something she could no longer do because she could not use her arms to roll out fondant or use a cake decorating bag. Mrs. Buckle lost her relationships with her grandchildren and was unable to attend school events involving them. She was unable to return to work at her church, either as an employee or as a volunteer. The court ultimately concluded that the appropriate award for nonpecuniary damages in that case was \$65,000.
- [106] The second case cited by the defendants was *Kagrimanyan v. Weir*, 2018 BCSC 1458. In that case, the vehicle driven by the plaintiff was struck from behind by a student driver under the supervision of his parents, causing the plaintiff to strike her head against a headrest, with sufficient force to break a hair clip holding Ms. Kagrimanyan's hair. The force was also sufficient to dislodge the stereo unit from the centre console and cause buckling and cracking to the rear bumper of Ms. Kagrimanyan's vehicle. She obtained medical treatment,

including medication, physiotherapy, and massage following the accident. On a first visit to her family doctor in B.C., she was prescribed painkillers and a course of treatment in connection with her neck, upper back, lower back and soft tissue injuries. In the following appointment, right leg numbness was added as an injury.

- [107] Ms. Kagramanyan's headaches and dizziness resolved in a matter of months; but as of the date of trial for four and one-half years later, she continued to experience pain as a result of soft tissue injuries to her neck and back. A physiatrist opined that her injury recovery had likely plateaued more than three years after the accident. As Riley J. noted, he was dealing with a case that involved soft tissue injuries, which resulted in chronic pain and deconditioning suffered by Ms. Kagramanyan over a period of years. The plaintiff was ultimately awarded \$75,000 in non-pecuniary damages.
- [108] Kagramanyan bears significant similarities to the case at bar. One of those similarities is that, in the case at bar, there is "little or no evidence of continuing injury", despite complaints of pain persisting for a long period of time. Courts must be particularly careful when assessing non-pecuniary damages in these scenarios: *Price v. Kostryba* (1982), 70 B.C.L.R. 397 (S.C.).
- [109] While in the case at bar, the evidence of the plaintiff's pain is not entirely subjective, there is little objective evidence that persists, particularly given negative x-ray and MRI results. It is also evident that the plaintiff, in the case at bar, has become deconditioned over time, but her effort to retain or restore a positive level of condition has been minimal.
- [110] At para. 58 of Kagramanyan, Riley J. notes that the quantum of damages assigned took into account the plaintiff's claim for loss of housekeeping capacity, which was stated in that case to be best addressed under the rubric of non-pecuniary damages. I agree with that treatment of loss of housekeeping capacity in the case at bar.
- [111] I find that an award of \$70,000 is appropriate compensation for the non-pecuniary damages suffered by the plaintiff in this case. Past Wage Loss
- [112] The defendants have agreed that the plaintiff incurred net past wage loss in the amount of \$7,847.12. Past Loss of Earning Capacity
- [113] Compensation for past loss of earning capacity is based on what the plaintiff would have, not could have, earned, but for the injury that was sustained: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141, at para. 30; *M.B. v. British Columbia*, 2003 SCC 53, at para. 49.
- [114] Section 98 of the Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231, provides that a plaintiff is entitled to recover damages for only his or her past net income loss. Thus, a plaintiff is required to deduct the amount of income tax payable from lost gross earnings: *Hudniuk v. Warkentin*, 2003 BCSC 62; *X. v. Y.*, 2011 BCSC 944, at para. 187.

- [115] The legal principles surrounding a claim for past income loss are set out in the case of *Grewal v. Naumann*, 2017 BCCA 158, at paras. 45 - 48, and summarized by Riley J. in *Kagrimanyan*, at para. 60:
- (a) The principles applicable to a claim of past loss of earning capacity are the same as the principles applicable to a claim of future loss of earning capacity: *Grewal* at para. 46, citing *Smith v. Knudsen*, 2004 BCCA 613 at para. 29.
 - (b) In either case, i.e. a claim for either past or future loss, the plaintiff must establish (i) impairment of earning capacity, and (ii) a real and substantial possibility of an event resulting in a loss: *Grewal* at para 48.
 - (c) To the extent that the analysis requires a consideration of hypothetical events, the plaintiff is not required to prove these events on a balance of probabilities; what is required is a "real and substantial possibility, and not mere speculation": *Grewal* at para 46-48 citing *Smith v. Knudsen* at para. 29.
 - (d) Where the court finds both impairment of earning capacity and a real and substantial possibility of an event resulting in loss, damages must then be assessed. The damages are to be valued using either the earnings approach or the capital asset approach: *Grewal* at para. 48.
- [116] Here, the plaintiff submits she has a past loss of earning capacity and that the appropriate amount of damages is eight hours per week, at \$20 per hour, for a total amount claimed of \$17,000.00. This claim is based on the assertion that the plaintiff would have worked extra hours on her days off. She testified that she would be doing extra jobs to earn money, but could not because it would hurt her neck and shoulder area too much.
- [117] The first problem with this claim is that the amount of \$20.00 per hour is, on the evidence, the gross income of the plaintiff, and income tax must be deducted from that sum.
- [118] The second matter for consideration is that the plaintiff already worked eight and a half hours for each of four days per week (or 34 hours per week) at BC Assessment Authority. She claims damages for a further eight hours per week for a total of 42 hours per week.
- [119] There was no evidence before the Court that the plaintiff had worked 42 hours per week at any time in the recent past. For the year prior to the First Collision, the plaintiff had worked approximately 23 hours per week at \$20.00 gross per hour. For about six months of that period she had worked approximately five hours per week for \$20.00 gross per hour at High Point Equestrian.
- [120] Following the two collisions, there was no evidence that once the plaintiff began working at the BC Assessment Authority, she made any attempt to work more than the 34 hours per week available at BC Assessment. The plaintiff is not limited to perform sedentary work, as evidenced by her work at BC Assessment Authority. Indeed, she makes more per hour doing non-physical work at BC Assessment Authority than in her previous work as a

housekeeper. In other words, there was no evidence that the plaintiff made any attempt to work more days than those eight and a half hour days, four days each week.

- [121] I do not find the plaintiff would have worked an extra day housekeeping absent the two collisions. In this regard, the claim for past loss of earning capacity has not been proven and is therefore dismissed. Loss of Future Earning Capacity
- [122] As noted above, the evidence before the Court is that the plaintiff is earning more in her position at BC Assessment than she was earning prior to the collisions.
- [123] The plaintiff did not take the position that she cannot do her job at BC Assessment. She has performed that job without further accommodations. Rather, the plaintiff submitted that she is unable to work at housekeeping in the hours outside of her work at BC Assessment. She submitted that because she "would" have continued working at housekeeping in those hours, she has a loss of future earning capacity. The plaintiff also submits that damages for loss of future earning capacity should be calculated on a capital asset approach.
- [124] In Clark, the court summarized the law with respect to loss of future earning capacity:
- [76] In Rosvold v. Dunlop, 2001 BCCA 1, [2001] B.C.J. No. 4, the Court of Appeal summarized the approach that a trial judge should take in assessing damages for loss of income earning capacity:
- [8] The most basic of those principles is that a plaintiff is entitled to be put into the position he would have been in but for the accident so far as money can do that. An award for loss of earning capacity is based on the recognition that a plaintiff's capacity to earn income is an asset which has been taken away: Andrews v. Grand & Toy Alberta Ltd., [1978] 2 S.C.R. 229; Parypa v. Wickware (1999), 65 B.C.L.R. (3d) 155 (C.A.). Where a plaintiff's permanent injury limits him in his capacity to perform certain activities and consequently impairs his income earning capacity, he is entitled to compensation. What is being compensated is not lost projected future earnings but the loss or impairment of earning capacity as a capital asset. In some cases, projections from past earnings may be a useful factor to consider in valuing the loss but past earnings are not the only factor to consider.
- [9] Because damage awards are made as lump sums, an award for loss of future earning capacity must deal to some extent with the unknowable. The standard of proof to be applied when evaluating hypothetical events that may affect an award is simple probability, not the balance of probabilities: Athey v. Leonati, [1996] 3 S.C.R. 458. Possibilities and probabilities, chances, opportunities, and risks must all be considered, so long as they are a real and substantial possibility and not mere speculation. These possibilities are to be given weight according to the percentage chance they would have happened or will happen.

[10] The trial judge's task is to assess the loss on a judgmental basis, taking into consideration all the relevant factors arising from the evidence: *Mazzuca v. Alexakis*, [1994] B.C.J. No. 2128 (S.C.) at para. 121, *aff'd* [1997] B.C.J. No. 2178 (C.A.). Guidance as to what factors may be relevant can be found in *Parypa v. Wickware*, *supra*, at para. 31; *Kwei v. Boisclair* (1991), 60 B.C.L.R. (2d) 393 (C.A.); and *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 (S.C.) per Finch J. They include:

1. whether the plaintiff has been rendered less capable overall from earning income from all types of employment;
2. whether the plaintiff is less marketable or attractive as an employee to potential employers;
3. whether the plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to him, had he not been injured; and
4. whether the plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market.

[11] The task of the court is to assess damages, not to calculate them according to some mathematical formula: *Mulholland (Guardian ad litem of) v. Riley Estate* (1995), 12 B.C.L.R. (3d) 248 (C.A.). Once impairment of a plaintiff's earning capacity as a capital asset has been established, that impairment must be valued. The valuation may involve a comparison of the likely future of the plaintiff if the accident had not happened with the plaintiff's likely future after the accident has happened. As a starting point, a trial judge may determine the present value of the difference between the amounts earned under those two scenarios. But if this is done, it is not to be the end of the inquiry: *Ryder (Guardian ad litem of) v. Jubbal*, [1995] B.C.J. No. 644 (C.A.); *Parypa v. Wickware*, *supra*. The overall fairness and reasonableness of the award must be considered taking into account all the evidence.

[77] In *Perren v. Lalari*, 2010 BCCA 140, the court considered a number of cases, and summarized the basic principles that a court should consider in assessing damages under this head:

[30] Having reviewed all of these cases, I conclude that none of them are inconsistent with the basic principles articulated in *Athey v. Leonati*, [1996] 3 S.C.R. 458, and *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229. These principles are:

1. A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation [*Athey* at para. 27], and
2. It is not loss of earnings but, rather, loss of earning capacity for which compensation must be made [*Andrews* at 251].

[31] Furthermore, I conclude that there is no conflict between *Steward* and the earlier judgment in *Pallos*. As mentioned earlier, *Pallos* is not authority for the proposition that mere speculation of future loss of earning capacity is sufficient to justify an award for damages for loss of future earning capacity.

- [132] 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.
- [125] In *Kuskis v. Tin*, 2008 BCSC 862, at paras. 151-155, the court reviewed the principles above and added that a court should also consider general and specific contingencies.
- [126] Here, the plaintiff submits that the appropriate award for her future loss of earning capacity is \$120,000. This would represent more than five years of pre-accident income for the plaintiff.
- [127] While I find this case is close to the line adverse to the plaintiff, I am satisfied that the plaintiff has proved that there is a potential for future loss of earning capacity. However, that potential loss is very modest given the number of hours, about 23 per week, that the plaintiff worked before the two collisions and the fact that the plaintiff demonstrated no attempt to work any more than 34 hours per week at anytime after the two collisions.
- [128] The plaintiff's submission that she cannot return to housekeeping, at least for the present, does not support a claim for loss of future opportunity if it is not a realistic alternative occupation: *Steward v. Berezan*, 2007 BCCA 150, at para. 18.
- [129] I have considered the fact that the plaintiff's current job with BC Assessment is on a temporary contract. While this contract has been renewed so far, there is no guarantee that it will be renewed indefinitely. There was also no suggestion the practice of renewing the contract would not continue. I have also considered the possibility that the plaintiff's condition will improve, allowing her to perform her previous housekeeping tasks with little to no restriction, and that the plaintiff may be able to find another job that allows her to maintain a sedentary position.
- [130] In all the circumstances, I conclude an award of \$22,500 fairly compensates the plaintiff for any potential loss of future earning capacity. Cost of Future Care
- [131] The plaintiff submitted that she is entitled to costs of future care as follows: Chiropractic treatment twice/month for 10 years at \$48/session x 2 x 12 x 10 \$11,520 Gabapentin \$267/year x 10 years \$2,670 Tramadol \$375/year x 10 years \$3,750 Pillow Replace every 3 years so 14 replacements (\$180 x 14) \$2,520 Total: \$20,460

[132] In Kuskis, the court wrote:

[164] An award for the cost of future care is notional and imprecise in nature: Strachan (Guardian ad Litem of) v. Reynolds, 2006 BCSC 362. The court must consider evidence regarding what care is likely in the injured person's best interest and calculate its present cost, with appropriate adjustment for contingencies in all of the circumstances of the case: Courdin v. Meyers, 2005 BCCA 91.

[165] In making an award for future care costs the court must take into account both what is medically required and what expenses the plaintiff will likely incur. Items and services that the plaintiff is unlikely to use in the future cannot be justified as reasonably necessary aspects of the cost of future care: Izony v. Weidlich, 2006 BCSC 1315.

[133] In Clark, Madam Justice Power stated:

[89] As noted by Bennett J.A. in Gignac v. Rozylo, 2012 BCCA 351, at paras. 29 and 30:

[29] The purpose of the award for costs of future care is to restore, as best as possible with a monetary award, the injured person to the position he would have been in had the accident not occurred.

[30] The award is "based on what is reasonably necessary on the medical evidence to promote the mental and physical health of the plaintiff": (Milina v. Bartsch (1985), 1985 CanLII 179 (BC SC), 49 B.C.L.R. (2d) 33 (B.C.S.C.) and adopted in Aberdeen v. Zanatta, 2008 BCCA 420 at para. 41).

[90] It is necessary as trial judge to determine some evidentiary link between the physician's assessment of pain, disability and recommended treatment: Gignac, para. 32.

[134] The defendants submit that the individual costs claimed by the plaintiff are excessive and have not been tied to the particular advice of expert witnesses. Specific items do not necessarily need to be approved by medical experts, but the advice of medical experts can be taken into account: Dzumhur v. Davoody, 2015 BCSC 2316, at para. 244.

[135] Dr. Finlayson recommended chiropractic treatment one to two times per month for at least one year. Based on that recommendation, a claim as made for ten years is excessive. The claim for chiropractic care is allowed for a period of two years, resulting in an award of \$2304.00.

[136] Likewise, there is no evidence that the plaintiff could or should be taking prescriptions for Gabapentin or Tramadol for a period of ten years. Both drugs have notable side-effects, and there is no medical evidence to support their use for this length of time. I am satisfied an award of 10 percent of the amount claimed is reasonable, resulting in an award of \$267 and \$375, respectively.

- [137] Finally, the plaintiff is claiming for a pillow at \$180 each, to be replaced every three years. While the pillows being claimed may have unique features desirable for the plaintiff, she would have paid some amount for a pillow in any event. The defendants should only be responsible for the difference in cost between a regular pillow and the medicinal pillow. In addition, the use of a unique pillow for the next 42 years is not justified by the evidence heard in this case. I award \$300.00 for the future replacement of the plaintiff's pillow.
- [138] Based on a review of the claimed costs of future care, the appropriate award is \$3,246.00.
Loss of Housekeeping Capacity
- [139] Loss of housekeeping capacity has been included in the award for non-pecuniary damages in this case. Special Damages
- [140] The defendants have admitted that the plaintiff has incurred special damages in the amount of \$8,235.02.
- [141] The plaintiff also seeking reimbursement for two vacuum cleaners that she purchased following the First Collision:
- a) a Roomba vacuum cleaner (robotic) was purchased on June 16, 2015, for \$379.99; and
 - b) a Dyson Animal cordless vacuum was purchased for approximately \$350.00.
- [142] The plaintiff testified that she was not able to vacuum her floors because her former upright vacuum was too heavy so she purchased the robotic vacuum to help clean her condo and manage with her injuries. This worked well in the condo.
- [143] The plaintiff testified that she purchased the battery-operated Dyson for \$350 because the robotic one takes a long time and the Dyson allows the plaintiff to spot clean the floors, which works well in her current home. These features may be attractive to the plaintiff, but she purchased the Roomba and it worked well. That is sufficient to compensate for this loss. The purchase of the Dyson was not reasonable in these circumstances.
- [144] I allow the cost of the Roomba vacuum cleaner in the amount of \$350.00. The total amount of special damages awarded in this case is \$8,585.02. Summary
- [145] In summary, I award the plaintiff the following amounts: Non-pecuniary Damages \$70,000.00 Past Wage Loss \$7,847.12 Past Loss Earning Capacity Nil Loss of Future Earning Capacity \$22,500.00 Cost of Future Care \$3,246.00 Loss of Housekeeping Capacity Nil Special Damages \$8,585.02 Total \$112,178.14
- [146] The plaintiff is also entitled to interest, pursuant to the Court Order Interest Act, R.S.B.C. 1996, c. 79.
- [147] The plaintiff is entitled to her costs at Scale "B" as a matter of ordinary difficulty. If the parties wish to make submissions on costs, leave is granted. Necessary arrangements to appear should be made through Supreme Court Scheduling. "Ball J."

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