

CANADA / JUDGMENT

Jossy v. Johnson

2016 BCSC 1023

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Supreme Court of British Columbia

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2016 BCSC 1023 Jossy v. Johnson

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Jossy v. Johnson,

2016 BCSC 1023

Date: 20160607

Docket: 50622

Registry: Vernon

Between:

Katherine Elaine Jossy

Plaintiff

And:

Amanda Evelyn Carol Johnson and Lorissa Larose

Defendants

And:

Insurance Corporation of British Columbia

Third Party

Before: The Honourable Mr. Justice Skolrood

Reasons for Judgment

Counsel for the Plaintiff:

R.M. Moffat

Counsel for the Defendants:

No Appearance

Counsel for the Third Party:

R.D. Shaw

S.K. Padmanabhan

Place and Date of Trial/Hearing:

Vernon, B.C.

February 29 - March 4 and

March 7-11, 2016

Place and Date of Judgment:

Vernon, B.C.

June 7, 2016

Introduction

- [1] The plaintiff, Katherine Jossy, claims damages for injuries sustained in a motor vehicle accident that occurred on February 6, 2011 in Vernon, B.C. (the "accident").
- [2] Liability for the accident is admitted.
- [3] The Insurance Corporation of British Columbia [ICBC] took the position that the defendants were in breach of their insurance and accordingly ICBC appears as a statutory third party pursuant to s. 77 of the Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231. The defendants did not appear or otherwise participate in the trial.
- [4] Ms. Jossy's partner, Barrett Coatsworth, who was driving the vehicle in which Ms. Jossy was travelling at the time of the accident, was initially named as a defendant but the claim against him has been discontinued.
- [5] The parties have reached an agreement on the claims for past income loss and special damages. With respect to the remaining heads of damage, ICBC acknowledges that Ms. Jossy was injured in the accident but takes issue with the effect and consequences of those injuries and the quantum of the damages claimed, particularly with respect to loss of future earning capacity and cost of future care.

Summary of the Evidence

The Plaintiff's Pre-Accident History

- [6] Ms. Jossy was born in 1977. She was 33 years old at the time of the accident and is currently 38.
- [7] She has been in a common law relationship with Barrett Coatsworth since 2002, although according to Mr. Coatsworth, they only started cohabiting on a full-time basis in about 2009.
- [8] Ms. Jossy has four sons, born in 1995, 2001, 2005 and 2008. Mr. Coatsworth is the father of her two youngest sons.
- [9] Ms. Jossy did not initially graduate from high school as her education was interrupted when she became pregnant with her first child. However, she ultimately obtained her grade 12 equivalency in 2001 through an adult learning program.
- [10] From 2003 up until late 2010, Ms. Jossy worked at different times for Pacific Regeneration Technologies ("PRT"), a nursery company that provides young trees to tree planting companies. Ms. Jossy described the work at PRT as physically demanding as it involved lifting and manoeuvring large flats of young trees. She says that she had no difficulty meeting those physical demands. Mr. Coatsworth similarly testified that he had not observed Ms. Jossy experiencing any physical limitations prior to the accident.
- [11] Also during that period, she returned to school at Sprott Shaw College and studied to become a care aide. She graduated from that program in April 2008. According to Ms. Jossy, she enjoyed the program and did well in it. She had previously taken a similar program at Okanagan University College in or around 1999 but she failed the practicum component.
- [12] After graduating, she worked for a brief period of time as a casual, on-call care aide and then for North Okanagan Handicapped Association ("NOHA"), working with handicapped adults. That program was terminated by the Interior Health Authority in late 2008 after Ms. Jossy had worked for about six months.
- [13] Her youngest child was born in November 2008 and after her maternity leave ended in the fall of 2009, she looked for further work as a care aide but was not successful in obtaining a position. Accordingly, in May 2010, she returned to work for PRT on a series of short-term contracts that lasted until December 2010 when she was laid off. Ms. Jossy remained laid off in February 2011 at the time of the accident. She says that her intention had been to return to work at PRT in the spring of 2011 while continuing to look for work as a care aide.
- [14] The parties agreed on a summary of Ms. Jossy's historical income dating back to 2004. Her income earned from employment, as distinct from employment insurance and other benefits, is as follows:

2004 \$6,973

2005 \$2,671

2006 No income tax information available

2007 No income tax information available

2008 \$13,038

2009 On maternity leave-no employment income

2010 \$8,259

[15] Ms. Jossy has not worked since the accident in February 2011.

[16] Ms. Jossy agreed that the most that she has ever earned from employment was in 2008, although she points out that the bulk of her income that year came from the NOHA where she only worked for six months. Her seasonal employment with PRT paid, at best, about half that amount.

[17] Ms. Jossy was cross-examined at some length on the part-time and seasonal nature of her work at PRT. It was suggested to her that this arrangement worked well for her as it gave her more flexibility to care for her children. However, Ms. Jossy maintained that she did not need that flexibility as she and her partner, Mr. Coatsworth, worked together to manage their family's needs.

[18] Ms. Jossy also testified that her long-term goal was to return to school in order to become a licensed practical nurse (LPN). She said that her care aide program provides her with some of the necessary qualifications and that she would need about one more year of school in the LPN program to qualify. Given how well she did in the care aide program, Ms. Jossy said that she had little doubt that she would succeed in the LPN program as well. Ms. Jossy agreed that she had taken no steps to enrol in the program but said that she was waiting until she and her husband had saved enough money.

[19] Prior to the accident, Ms. Jossy had experienced periods of emotional or psychological difficulty. She was referred to a report prepared by Dr. Milanese, a psychiatrist retained by ICBC, which sets out her psychiatric history and she agreed that it is generally accurate.

[20] That history includes emotional and physical abuse by her mother and stepfather, the suicide of her fiancé in 2000 and her own attempted suicide in 2002, which resulted in her being referred for a six-week psychiatric day program.

[21] Ms. Jossy said that she has had periods of generalized worry throughout much of her life. While Dr. Milanese refers to this as anxiety, Ms. Jossy said that she did not know what true anxiety was until after the accident and that what she experienced in the past was much less severe. She has also had periods of what she characterizes as depression on and off, although she says the episodes were always of short duration. For example, she said that she experienced postpartum depression following the birth of her third child in 2005. There is also a family history of depression.

- [22] Despite this difficult past, Ms. Jossy said that her emotional health was good in the period leading up to the accident. Mr. Coatsworth similarly testified that there were no issues with her emotional health in the period before the accident, although he agreed that she had experienced problems in the past.

The Accident

- [23] As noted, the accident occurred on February 6, 2011. Ms. Jossy was travelling as a passenger in a car driven by Mr. Coatsworth.
- [24] Ms. Jossy provided no details about the accident and Mr. Coatsworth testified about it only briefly. He was driving and Ms. Jossy was in the passenger seat. Conditions were poor and there was snow on the road. As they drove around a curve, a car in the other lane coming towards them crossed the centre line and hit them head on.
- [25] Beyond that, Mr. Coatsworth was vague on the details apart from saying that his airbag deployed and he was able to get out of the car and speak to the other driver. He does not remember if Ms. Jossy got out of the car. He recalls seeing blood on the face of the other car's passenger but does not know if Ms. Jossy saw it.

The Plaintiff's Post-Accident Condition

- [26] Ms. Jossy was taken to the hospital by ambulance. The next day, February 7, 2011, she underwent open reduction and internal fixation surgery on her left ankle. Since that time, she has had five additional ankle surgeries, two more on her left ankle (May 25, 2011 and June 11, 2013) and three on her right ankle (September 25, 2012, June 11, 2013 and April 8, 2014).
- [27] In addition to problems with her ankles, Ms. Jossy said that she experiences pain in her neck, shoulders and low back as well as regular headaches. She said that her physical symptoms have remained constant since the time of the accident.
- [28] Ms. Jossy said that she has also experienced significant emotional and psychological upheaval as a result of the accident. In May 2014, she was hospitalized due to severe panic attacks. When she was released from the hospital, she was referred to a psychiatric in-patient program where she stayed for about two months.
- [29] Ms. Jossy testified that she continues to experience the following physical symptoms from the injuries sustained in the accident:
- a) Headaches - Ms. Jossy said that three or four days per week she suffers from "normal" or low grade headaches that she typically treats with Advil. In addition, one or two times per week she gets migraine headaches which she describes as "brutal" and debilitating;

- b) Neck pain - Ms. Jossy said that her headaches are associated with pain in her neck which radiates into her upper back and often down her left arm. She said that her neck and upper back are always stiff and tight and that they get worse with activity;
 - c) Low back - Ms. Jossy regularly experiences pain and tightness in her low back, just above the buttocks. Occasionally, when walking, it radiates through her buttocks and down her left leg. Her leg will also bother her if she sits for too long; and
 - d) Ankles and feet - As noted, Ms. Jossy has had three surgeries on each ankle. With respect to her left ankle, she has very limited mobility and has difficulty flexing it in any direction. For example, she cannot bend it to go up or down stairs and she has no balance when standing on her left foot. Her right ankle is somewhat better in that it has greater flexibility but it too stiffens up with activity.
- [30] Ms. Jossy said that these various physical issues have rendered her far less active than she used to be, as a result of which she has put on considerable weight.
- [31] Ms. Jossy said she also continues to experience significant emotional and psychological issues related to the accident. She is often anxious and suffers panic attacks. She has difficulty being in a car, particularly as a passenger. She finds it difficult to leave the house and often feels a sense of hopelessness related to her physical issues and limitations.
- [32] Mr. Coatsworth testified about the changes he has observed in Ms. Jossy since the accident. He described her as a fun, vibrant person before the accident who was full of potential. He said that now she is a shell of that person.
- [33] Brenda Jossy is Ms. Jossy's mother. She also testified about Ms. Jossy's emotional state since the accident. She described her daughter as feeling helpless because she cannot do many of the things she could before the accident. She said Ms. Jossy gets emotional very quickly.
- [34] Brenda Jossy also testified about her involvement in helping Ms. Jossy and her family after the accident. She said that she came to the home as soon as Ms. Jossy returned from the hospital and was there virtually five days a week for the first three years, helping to cook, clean, organize the house and care for the children. Her involvement has become less frequent more recently, but she still goes over to do laundry regularly because Ms. Jossy has difficulty standing and lifting the laundry basket.
- [35] Savannah Babay is Mr. Coatsworth's younger sister. She has been close to Ms. Jossy (and her brother) since well before the accident, often coming to their house to help with the kids and household chores. She has continued to help out since the accident and she gave similar evidence about the change in Ms. Jossy's emotional state.
- [36] Kimberley Gillis runs a home care business that Ms. Jossy worked for briefly following her graduation from her care aide program. After the accident, at Ms. Jossy's request, Ms. Gillis' company was retained to provide home support for Ms. Jossy.

- [37] According to Ms. Gillis, her company provided assistance to Ms. Jossy for approximately three years after the accident. Initially, she or one of her workers attended the home for three to four hours per week, but that amount of time diminished as Ms. Jossy became more mobile. They assisted with housekeeping, cleaning, laundry and similar chores.
- [38] Ms. Gillis testified that following the accident, Ms. Jossy had limited mobility and often appeared depressed.

Plaintiff's Expert Evidence

- [39] Ms. Jossy led evidence from a number of medical experts. I do not propose to review all of the medical evidence in great detail. However, I will highlight some of the key findings and opinions of the medical experts.

Dr. Gavin Smart

- [40] Dr. Smart has been Ms. Jossy's family doctor since February 1996. He prepared a report dated April 24, 2015. Dr. Smart notes in his report that his opinion is based on his clinical chart notes and that he has not been provided with any medical legal reports prepared by other professionals. He clarified in his testimony, however, that his clinical notes include consult reports received from other doctors over the years.
- [41] Dr. Smart reports Ms. Jossy as having suffered the following injuries in the accident:
1. bimalleolar fracture of her left ankle;
 2. right talar fracture; and
 3. grade 2 cervical, thoracic and lumbar strains.
- [42] Much of Dr. Smart's report is comprised of a chronicle of Ms. Jossy's visits at his office from February 2011 to March 2015, although he also includes sections on relevant past musculoskeletal history and past relevant psychiatric history. Her musculoskeletal history is unremarkable but Dr. Smart does report a significant history of past emotional and psychological issues. He summarizes the significance of that history in these terms:

Ms. Jossy was exposed to multiple severe emotional and physical traumas in childhood, adolescence and adulthood through sexual, verbal and physical abuse. In my opinion, her history of repetitive abuse predisposed her to recurrent episodes of depression and overwhelming anxiety as an adult. The events surrounding the death of the father of her second child also represented a significant trauma which further reinforced her neurophysiologic susceptibility to severe anxiety and depression.

- [43] Dr. Smart then goes on to offer his opinion as to the relationship of that history to the injuries sustained in the accident:

In my opinion, the physical incapacitation, chronic pain and loss of independence that she experienced following her February 6, 2011 motor vehicle accident ultimately reactivated her anxiety to a severity that she had never experienced previously, necessitating hospitalization in May 2014. In my opinion, the severity and level of incapacitation of her anxiety that she experienced in May 2014 were amplified by her past history of extensive abuse but may have occurred to lesser severities in the absence of a past history of abuse and resultant anxiety and depression, due in isolation to the severities of her MVA related physical incapacitation, chronic pain and loss of independence.

[44] Dr. Smart described her status as of March 25, 2015 as follows:

Ms. Jossy continues to experience bilateral ankle pain and stiffness with significant limitations in her ability to stand for prolonged periods of time or walk significant distances. Her improvement has plateaued and I am not optimistic that she will make further significant gains in function or symptom reduction with either ankle. Her neck, shoulder and back symptoms have also plateaued and she continues to attend physiotherapy twice weekly. Her physiotherapy sessions provide her with symptomatic improvement for 1 to 2 days which she regards to be essential to her physical and emotional recoveries.

Ms. Jossy's anxiety continues to improve with psychotherapy and medication. She acknowledges that she has made significant improvement in her ability to recognize triggers for her anxiety and use cognitive behavioural tools to minimize and abrupt her symptoms.

Dr. Willem Bester

[45] Dr. Bester is a family physician who has been involved in Ms. Jossy's care since February 2013, specifically with respect to treating her pain. When he initially assessed her on February 13, 2013, he diagnosed the following:

1. Cervicogenic headaches with migraine features, this means her headaches were triggered by causative factors involving the neck;
2. Mechanical neck pain involving the third to the 6 vertebrae in the neck bilaterally;
3. Myofascial (soft tissue) pain affecting the muscles of the neck as well as the muscles around the shoulder blades both sides;
4. Anxiety disorder that was previously diagnosed; and
5. Increased risk of opioid misuse on assessment.

[46] Dr. Bester's treatment of Ms. Jossy has involved injections into her neck to block the pain, which he describes as "C3-C5 medial branch nerve blocks, occipital nerve blocks and trigger point injections". Dr. Bester describes the results of this treatment and his future recommendations in his report dated September 1, 2015 as follows:

She has been achieving good pain relief from both headaches and neck pain since the injection therapy was initiated. Her posture has improved and she noticed decreased frequency in headaches at the most recent assessment, on August 4, 2015. The length of time that she has achieved pain relief has varied and as such no definite timeframe can be stated at this time.

Given the benefit that Ms. Jossy has experience [sic] with interventional treatment, I would encourage ongoing treatment and hopefully she will continue to get longer periods of relief between treatments. Research has shown that 60-70% of patients show at least 50% improvement in pain scores with interventional treatment and she has definitely responded in a positive way.

Interventional treatment is not curative but with decreased pain, patients are able to more successfully rehabilitated [sic].

Dr. Gillian Acton

[47] Dr. Acton is a psychiatrist who has treated Ms. Jossy since August 2014, following her hospitalization in May 2014 and subsequent involvement in the in-patient program. Dr. Acton prepared a report dated October 13, 2015 as well as two addendum reports dated December 9, 2015 and January 3, 2016.

[48] In her October 13, 2015 report, after reviewing Ms. Jossy's presenting complaints and course of treatment, Dr. Acton stated:

Ms. Jossy is severely disabled at this point, from Posttraumatic Stress Disorder, and Major Depressive Disorder, as well as chronic pain. Her prognosis for recovery is poor, given the severity of her illness, her complicated history, the co-occurrence of anxiety, depression, and chronic pain, and the difficulty she has had with tolerating first-line pharmacological treatments for mood disorders. Her response to trauma-specific therapy is yet to be determined, but will be more complex because of her previous history of childhood abuse. Even with the prior therapy that she has done related to her childhood abuse, it is likely that the abuse will be linked to the therapy processing the motor vehicle accident, with the commonality of emotional experiences of helplessness and fear. The duration of therapy that required will likely be lengthy because of her complicated situation, and may be in the range of a year or two more.

Active treatment for Posttraumatic Stress Disorder in general, is effective in one third of cases, with resolution of symptoms. Another third of patients have some degree of improvement, and the last third show little change despite active management with both therapy and medications. Ms. Jossy's prognosis is poor, in view of the complexity of her history, and the presence of anxiety, depression, and chronic pain with physical disability. She also has a higher longer-term risk of suicide, because of the presence of depression as well as anxiety, chronic pain, and the significant limitations that she is now experiencing related to functionality in work and personal activities. As mentioned previously, active therapy will not necessarily lead to cure or improvement in her condition.

Dr. Stanley Semrau

[49] Dr. Semrau is a psychiatrist who assessed Ms. Jossy on October 29, 2015 at the request of her counsel. He prepared a report dated November 19, 2015 based on his personal interview of Ms. Jossy and his review of available records. He subsequently prepared a second report dated January 1, 2016 in which he comments on additional records that he has been provided, including a report by Dr. Milanese, the psychiatrist retained by ICBC, dated December 29, 2014.

[50] Dr. Semrau provides the following principal diagnoses in his initial report:

- a) moderate vehicle travel anxiety/avoidance in very partial remission;
- b) Post Traumatic Stress Disorder in partial remission;
- c) Generalized Anxiety disorder in partial remission; and
- d) major Depressive Disorder in partial remission.

[51] With respect to these latter two conditions, Dr. Semrau's describes them as moderately severe.

[52] He also says the following with respect to causation:

Everything considered, the causation of Ms. Jossy's post-accident emotional problems amounts to a fairly rich and interwoven mixture of all of the above factors, including some continuing from pre-Accident, some likely directly or indirectly Accident-related (with the above caveat that it is beyond my particular specialty expertise to determine the extent to which Ms. Jossy's physical symptoms might be Accident-related vs unrelated), and to some extent due to independent unrelated post-Accident factors.

[53] Dr. Semrau recommends ongoing psychological therapy of one hour every two weeks for an indefinite period which he defined in his testimony to mean three to five years.

[54] Dr. Semrau describes Ms. Jossy's prognosis as guarded for a number of reasons, including:

- a) substantial illness severity and chronicity, with multiple significant physical and mental health problems;
- b) deficient response to psychopharmacological treatments;
- c) slow and limited response to psychological counselling/psychotherapy treatments; and
- d) significant persisting physical symptoms and related occupational disability.

[55] According to Dr. Semrau, in terms of Ms. Jossy's work and educational capacities, she will "suffer substantial permanent impairment on the basis of ongoing chronic mental health symptoms including depression, anxiety and posttraumatic stress".

[56] In his second report, Dr. Semrau also noted comments on the report of Dr. Milanese and takes issue with a number of Dr. Milanese's opinions. For example, he disagrees strongly with Dr. Milanese's opinion that Ms. Jossy has chronic PTSD secondary to childhood trauma. On this point, Dr. Semrau states:

Although it is clear that Ms. Jossy did have some posttraumatic stress symptoms pre-MVA, the available history information quite clearly indicates that these symptoms had been in substantial remission pre-MVA. Therefore the characterization of "chronic PTSD secondary to childhood trauma" is in my opinion incorrect. Instead, Ms. Jossy has suffered substantially new symptoms of PTSD related to this MVA, even though it is true that Ms. Jossy's vulnerability to symptoms arising from this MVA was significantly increased by pre-MVA vulnerability factors. However the existence of pre-MVA vulnerability is quite different from the (incorrect) notion of mental health symptoms having been chronic pre-MVA.

[57] Dr. Semrau also disagrees with Dr. Milanese's characterization of Ms. Jossy's symptoms as mild. He states:

it is completely clear that Ms. Jossy's ongoing mental health symptoms are both serious and substantially disabling I also note that virtually every other mental health assessor who has dealt with Ms. Jossy has also appraised her overall mental health condition as far worse than "mild." I cannot find any reasonable basis for Dr. Milanese's characterization of Ms. Jossy's mental health symptoms as overall "mild".

[58] Lastly, Dr. Semrau "strongly disagrees" with Dr. Milanese's characterization of Ms. Jossy's prognosis as excellent and his opinion that Ms. Jossy's symptoms of PTSD will "resolve over the next four to six months". According to Dr. Semrau, this positive prognosis is "not supported by past treatment responsiveness information, the recovery trajectory to date or the remaining intensity, chronicity and severity of Ms. Jossy's ongoing mental health symptoms".

Dr. Tony Giantomaso

[59] Dr. Giantomaso is a specialist in physical medicine and rehabilitation (physiatrist) who examined Ms. Jossy on December 13, 2013 at the request of her counsel and who prepared a report dated December 24, 2013. In preparing his report, Dr. Giantomaso conducted a history and physical examination of Ms. Jossy and reviewed various medical records made available to him.

[60] Dr. Giantomaso provided the following diagnoses related to the accident:

- a) post-traumatic left ankle bimalleolar/distal tibia-fibula fractures with various interventions and complications;
- b) post-traumatic osteochondral fracture of the right ankle requiring various interventions;
- c) post-traumatic cervical sprain/strain injury, consistent with a WAD II injury-chronic;

- d) post-traumatic cervicogenic headaches;
- e) post-traumatic lumbar spine/strain injury, grade I-II-chronic; and
- f) decreased left L5 nerve root sensation and mild weakness in left ankle dorsiflexion and inversion.

[61] Dr. Giantomaso makes a number of recommendations as follows:

1. follow-up with Dr. Ball concerning ongoing bilateral ankle pain to determine whether further surgery would help;
2. consider cortisone shots to relieve ankle pain due to osteoarthritis;
3. use of compression stockings;
4. referral to a chronic pain clinic for her ongoing post-traumatic soft tissue pain;
5. referral to an orthotist for proper footwear;
6. ongoing support through a psychologist or psychiatrist for her post-traumatic mood and anxiety issues;
7. an MRI of the lumbar spine to determine if there is a left-side disc herniation at L4-5 or L5-S1 that may be causing persistent numbness in her foot; and
8. extensive, active rehabilitation guided by a kinesiologist or certified trainer.

[62] In Dr. Giantomaso's opinion, Ms. Jossy is likely to experience chronic pain and walking dysfunction permanently in the future but if his recommendations are followed, her pain can hopefully be decreased and her function increased.

Dr. Alistair Younger

[63] Dr. Younger is an orthopaedic surgeon who examined Ms. Jossy on June 16, 2015 at the request of her counsel. Dr. Younger has a particular interest and expertise in foot and ankle conditions. He prepared two reports dated June 16, 2015 and December 23, 2015 which were entered into evidence. Dr. Younger was not required to appear for cross-examination.

[64] The key elements of Dr. Younger's opinion, taken from his June 16, 2015 report are as follows:

I think her primary complaint currently is the ongoing instability in the left ankle. I think this is the cause of her main discomfort. To this end, I think it needs to be treated. I think that she would benefit from physiotherapy, strengthening and bracing to her left ankle. I think this would stabilize her ankle and reduce her discomfort. If this fails, I think she would require repeat ankle arthroscopy on the left side, lateral ligament reconstruction, removal of the bone fragments as demonstrated on CT scan, and inspection of the peroneal tendons. I think more likely than not that this surgery will be required.

I think that this will improve her discomfort on the left side and improve her physical function. I think this would allow her to potentially return to work and also improve her enjoyment of life. At the current time, I think this is her most limiting area and this would be my recommended surgical treatment, should it be required.

I think she would benefit from the surgery. If she had the surgery she will require to be nonweight bearing for 2 weeks. She would require 4 months of rehabilitation and she would need to be wearing a walker boot or brace for 10 weeks after the surgery.

I think a brace would help and would be permanent if she does not have surgery.

I do not think these injuries will render her susceptible to future insult or injury. I do, however, think that she is at increased risk of requiring an ankle fusion on the right side. The osteochondral injury here may require further treatment. On occasion, an osteochondral injury leads to ankle fusion.

In the meantime, I think that physiotherapy, strengthening and range of motion would be beneficial.

Dr. Kate Ball

[65] Dr. Ball is an orthopaedic surgeon who performed a number of the surgeries on Ms. Jossy's ankles. Dr. Ball prepared a report dated September 24, 2015 that was entered into evidence. Dr. Ball was not required to appear for cross-examination.

[66] After describing the surgeries and the results of the most recent physical examination, Dr. Ball states as follows under the heading "Future limitations and prognosis":

I feel that Ms. Jossy's right ankle may give her intermittent symptoms over time however I would expect that she could maintain a reasonable level of function on the right side given the response she had to her third arthroscopic debridement.

With respect to her left ankle the prognosis is more guarded. Intra operatively I noted an extremely tight joint space on the left side which was different than the right. Even under anesthetic I was unable to overcome this tightness and lack of range of motion. Now, over four years after the injury range of motion is very difficult if not impossible to restore back to normal. A stiff ankle can increase your risk of developing tendinosis around the hind foot including the Achilles tib post as well as metatarsalgia and plantar fasciitis. There are non operative treatments that can help such as rocker bottom shoes, physiotherapy, orthotics and braces.

Based on my intraoperative assessment and ongoing clinical assessment of Ms. Jossy's left ankle I did not feel that I could provide intervention that would give her lasting benefits on the left side. With appropriate bracing, physiotherapy, including strengthening, and proprioceptive training, the left ankle function may improve over time but will likely limit her activities to some extent. I would recommend that when considering future employment she factor in her ankle injuries and if possible, select a job that requires minimal lifting and standing.

Dr. Gordon Robinson

- [67] Dr. Robinson is a neurologist with a particular interest in headache disorders. He examined Ms. Jossy at the request of her counsel on March 6, 2015 specifically with respect to her headaches and he prepared a report dated May 13, 2015. Dr. Robinson was not required to attend trial for cross-examination.
- [68] Based on his examination of Ms. Jossy and his review of medical records, Dr. Robinson diagnosed Ms. Jossy as suffering from chronic posttraumatic headache related to her neck injury sustained in the accident. According to Dr. Robinson, her headaches are aggravated by emotional and psychological factors like anxiety, depression and insomnia.
- [69] Dr. Robinson suggests Botox as a possible treatment for Ms. Jossy's headaches as well as trigger point or neurotoxin injections.

Sharina Zantingh

- [70] Ms. Zantingh is a physiotherapist who has treated Ms. Jossy since shortly after the accident in 2011. She prepared a report dated October 26, 2015.
- [71] According to Ms. Zantingh, Ms. Jossy's current physical limitations are primarily due to the pain in her left foot and ankle, although she also frequently complains of headaches, neck pain and low back pain.
- [72] Ms. Zantingh states in her report:

Ms. Jossy needs to continue both physiotherapy and massage therapy to allow her to maintain and improve her lumbar spine pain as well as neck pain and headache. Unless further intervention is taken with her ankles then physiotherapy will be involved with pain management there as well. Ms. Jossy needs to find a type of exercise that will allow her to strengthen her postural muscles as well as maintain good cardiovascular fitness. I feel at this point we are only maintaining but not improving Ms. Jossy's symptoms. Ms. Jossy's on-going headaches and bilateral foot pain result in perpetuating the pain cycle. Ideally if Ms. Jossy could find success with a yoga or pilates based program then we could continue with physiotherapy two times a week. Ms. Jossy would benefit from private sessions until it is ensured that Ms. Jossy is performing the exercises properly. If Ms. Jossy is able to make progress then it is possible that we could decrease physiotherapy to once a week in the future; however if Ms. Jossy maintains the status quo with her physical condition then a minimum of twice a week is needed to maintain Ms. Jossy's quality of life. If there is no improvement with Ms. Jossy's current presentation then Ms. Jossy will need physiotherapy for the remainder of her life.

Dr. Gordon Wallace

- [73] Dr. Wallace is a registered psychologist and vocational consultant retained by Ms. Jossy. He prepared an interim vocational report dated January 29, 2015 and then a more detailed report dated November 20, 2015. He subsequently prepared three additional reports dated December 10, 2015, January 12, 2016 and January 21, 2016 commenting on additional records that were provided to him.
- [74] Dr. Wallace's principal opinions are set out in his November 20, 2015 report and are based on his personal interview with Ms. Jossy, a number of psychological and vocational tests and his review of available records.
- [75] The principal elements of Dr. Wallace's opinion are as follows:
- a) Ms. Jossy cannot meet the physical demands of her pre-accident occupations as a nursery worker or a care aide;
 - b) The most realistic direct entry alternative occupations would be entry level clerical and service positions such as General Office Receptionist, Call Centre Agent, Data Entry Operator, Customer Service Representative and Self-Service Gas Bar Attendant, however she would need work place accommodations to allow for her physical challenges;
 - c) Ms. Jossy's psychological issues would interfere with her ability to meet the three foundational skills common to all forms of competitive employment, being i) attending a jobsite when scheduled, ii) interacting appropriately with coworkers, supervisors and customers, and iii) completing job duties in an efficient and effective manner; and
 - d) Ms. Jossy's intellectual abilities would allow her to complete a postsecondary educational training program at the college certificate level which may allow her to access more advanced sedentary occupations like Bookkeeping Clerk, Accounts Payable/Receivable Clerk, Office Assistant, medical Office Assistant or Dental Receptionist. However, her current psychological issues would not allow her to succeed in this pursuit.
- [76] In Dr. Wallace's opinion, the primary limiting factor for Ms. Jossy is her psychological condition. If that condition improves, she could then undertake some vocational counselling as well as an educational upgrading program with a view to enhancing her employability.
- [77] Dr. Wallace agreed that Ms. Jossy faced employment challenges even without the accident given her lack of an established career path, her modest earnings history and the past history of psychological issues. He also agreed that it would have been difficult for her to complete the LPN program in that she would have needed to upgrade certain high school courses and well as handling the academic requirements of the program. He would not rule out Ms. Jossy completing the program but said that it would have been a challenge.

Mary Richardson Carman

[78] Ms. Carman is an occupational therapist who undertook a physical capacity evaluation of Ms. Jossy on March 10, 2015. She prepared a report dated November 13, 2015. Ms. Carman also prepared a number of reports addressing Ms. Jossy's future care needs and the associated costs. I will deal with those aspects of her evidence when I address Ms. Jossy's claim for future care costs below.

[79] Ms. Carman's assessment involved subjecting Ms. Jossy to a number of physical capacity tests over the course of approximately seven hours. In addition, Ms. Carman reviewed a number of medical reports. Based on her assessment, it was her opinion that Ms. Jossy has some degree of restriction with respect to sitting for prolonged periods, standing and walking for sustained periods, stooping and bending, crouching and kneeling, climbing/balance, upper extremity use and strength.

[80] In terms of employability, Ms. Carman opined:

In my opinion, with consideration only to her present physical capacity, Ms. Jossy is considered to be employable (i.e. with some physical restrictions) on a part-time or full-time basis, with the potential to work in limited and light strength occupations.

Her physical restrictions relate primarily to any work that requires sustained sitting, prolonged demands for sustained weight bearing, significant use of body dexterity, frequent climbing, significant balancing demands, and repeated or sustained use of neck flexion or extension while working with her hands.

[81] It was also Ms. Carman's opinion that Ms. Jossy does not meet the physical demands of either of her former positions as a nursery worker or a care aide. Ms. Carman noted further that while her assessment focussed on Ms. Jossy's physical capacity, her emotional and psychological issues could also negatively affect her employability.

Robert Carson

[82] Mr. Carson is an economist who prepared expert reports setting out past and future income loss projections for Ms. Jossy as well as future care cost calculations. I will return to his evidence below when addressing these heads of damage.

ICBC's Expert Evidence**Dr. Milanese**

[83] Dr. Milanese is a psychiatrist who assessed Ms. Jossy at the request of ICBC on December 11, 2014. Dr. Milanese prepared a report dated December 29, 2014, as well as a supplementary report dated January 10, 2016 which was based on a review of additional medical information.

[84] Based on his history and interview of Ms. Jossy and his review of medical records, Dr. Milanese in his initial report provided a diagnosis for Ms. Jossy of PTSD secondary to childhood trauma, with mild ongoing symptoms at the time of his assessment. He described her condition in these terms:

In my opinion, Ms. Jossy has experienced lifelong symptoms of PTSD that originated in her childhood. She developed chronic PTSD secondary to severe childhood trauma, consisting of emotional, physical and sexual abuse. Her PTSD symptomatology has involved a combination of anxiety and depressive features. She has had some periods of time when her PTSD has been subclinical [no overt symptoms], but throughout adulthood there have been multiple exacerbations of her PTSD resulting in acute anxiety, heightened sensitivity, a sense of foreboding, depressed mood, social withdrawal, impulsivity and emotional dysregulation.

[85] In Dr. Milanese's opinion, the accident exacerbated her chronic PTSD:

In my opinion, Ms. Jossy did sustain a psychiatric injury as a result of the MVA. In my opinion she had an exacerbation of chronic PTSD following the MVA. This recurrence of PTSD symptomatology included significant symptoms of anxiety and depression. In my opinion the trauma of the MVA precipitated this recurrence, and the subsequent physical injuries resulting in limited mobility and pain symptoms, also perpetuated the PTSD symptomatology.

[86] Dr. Milanese goes on to state:

In my opinion Ms. Jossy was totally psychiatrically disabled to perform the duties of any job following the MVA. This psychiatric disability was due to significant anxiety and mood instability. These symptoms interfered with her capacity to reliably and effectively interact with others, as well as her ability to consistently focus on a given task throughout a workday. Since this summer she had significant treatment gains and in my opinion reached a capacity of being employable at 50% level by September 1, 2014. In my opinion her psychiatric disability improved further and she became fully employable, from a psychiatric viewpoint, by November 1, 2014.

[87] In Dr. Milanese's view, Ms. Jossy's prognosis to achieve stable mental functioning is "excellent" and she is likely to reach a subclinical state of her chronic PTSD within four to six months. Given that Dr. Milanese's report was dated December 29, 2014, he apparently would have expected her symptoms to have largely resolved by May or June 2015.

[88] As noted, Dr. Milanese subsequently reviewed additional medical information for the purposes of his January 10, 2016 report. In his second report, he expressly disagrees with the opinions of Dr. Acton and Dr. Semrau that Ms. Jossy's prognosis is poor and he confirms that his original opinion remains intact.

Dr. Duncan Laidlow

- [89] Dr. Laidlow is a physiatrist who examined Ms. Jossy on July 6, 2015 at the request of ICBC. He prepared a report dated July 21, 2015. Dr. Laidlow took a detailed history from Ms. Jossy, conducted a physical examination and reviewed other medical records. He reports his findings as follows:
- a) a significant bimalleolar fracture to the left ankle resulting in early osteoarthritic change in the ankle. According to Dr. Laidlow, this is Ms. Jossy's main source of ongoing pain at the time of his examination;
 - b) an osteochondral fracture of the right ankle resulting in a change of the structural surface of the ankle making her prone to joint symptoms;
 - c) low back pain resulting from a musculoligamentous strain of the lumbar spine; and
 - d) neck pain and headaches resulting from a musculoligamentous strain of the cervical spine.
- [90] According to Dr. Laidlow, both ankles are likely to continue to develop osteoarthritic change and surgery may be required for both. In his view, given her related problems with prolonged standing or being on an uneven or hard surface, she could not manage work in a tree nursery or as a care aide.
- [91] With respect to her neck and back issues and headaches, Dr. Laidlow recommends a stretching program to be developed with the assistance of a trainer. He believes that those symptoms should settle if she engages in such a program and loses weight.
- [92] Dr. Laidlow states in his report that he does not recommend further physiotherapy or massage therapy, although he does not explain why in the report. However, in cross-examination, he said that those types of therapies do not lead to improvement in Ms. Jossy's underlying condition but rather perpetuate an ongoing cycle of dependency. As Dr. Laidlow noted, Ms. Jossy has had extensive physiotherapy and massage therapy in the five years since the accident with little reported improvement, other than short-term pain relief.
- [93] In Dr. Laidlow's opinion, Ms. Jossy would benefit from an active and structured exercise program designed initially with assistance from an expert but which she could then pursue on her own. In his view, it is important that patients such as Ms. Jossy take responsibility for their own treatment and improvement rather than remaining stuck in the cycle of dependency.

Lydia Phillips

- [94] Ms. Phillips is an occupational therapist who conducted a functional capacity evaluation of Ms. Jossy at the request of ICBC. She assessed Ms. Jossy on June 29 and 30, 2015 and prepared a report dated November 2, 2015. Ms. Phillips also prepared subsequent reports dated December 10, 2015, in which she comments on Ms. Carman's cost of care recommendations, and February 9, 2015 in which she reviews additional medical information.
- [95] Based on her assessment of Ms. Jossy and her review of the requirements of Ms. Jossy's previous jobs, it is Ms. Phillips' opinion that Ms. Jossy is not suited to pursue employment as a care aide and that she is capable of some but not all of her pre-accident job tasks/requirements at PRT. However, Ms. Phillips is also of the view that Ms. Jossy is better suited to work in jobs where sitting is the main postural requirement.
- [96] Given her view that Ms. Jossy is capable of some of the requirements associated with the work at PRT, in order for Ms. Jossy to return to PRT, Ms. Phillips suggests a return to work program involving:
- a) a job site visit and recommendations for job modifications to reflect her limitations;
 - b) a gradual return to work program with grading of time at work and tasks done at work; and
 - c) weekly check-ins with a return to work supervisor with proactive interventions provided as required.
- [97] Recognizing, however, that Ms. Jossy is not capable of meeting all of the PRT job requirements, Ms. Phillips also recommends vocational counselling or job coaching to assist her in identifying and obtaining work that she can perform year round on a full time basis.

Dr. Colleen Quee Newell

- [98] Dr. Quee Newell is a registered clinical counsellor and vocational rehabilitation consultant who conducted a vocational assessment of Ms. Jossy on October 14, 2015 at the request of ICBC, the results of which are summarized in a report dated November 30, 2015. As was the case with Dr. Wallace, the assessment involved a personal interview, a number of vocational tests and a review of available medical records.
- [99] Based on her assessment, Dr. Quee Newell was of the opinion that but for the accident, Ms. Jossy likely would have continued with seasonal employment at PRT for a period of time until she obtained work as a care aide at some point in the future. With respect to Ms. Jossy's stated plan of pursuing the LPN program, Dr. Quee Newell is of the view that given Ms. Jossy's educational history and her vocational test results, that plan, while a possibility, was unlikely to be successful.

- [100] Going forward, given Ms. Jossy's limitations resulting from the accident and the anticipated progressive deterioration in her ankles, Dr. Quee Newell suggests that a return to PRT is unlikely to be viable, despite Ms. Phillip's opinion that Ms. Jossy can fulfill some of the job requirements for that employment.
- [101] In Dr. Quee Newell's opinion, Ms. Jossy is best suited for retraining to become a medical office assistant, or alternatively, a dental receptionist or nail technician. She is of the view that Ms. Jossy would experience greater success if she pursued retraining on a part time basis followed by part-time employment, at least initially. Dr. Quee Newell also believes that Ms. Jossy would benefit from some vocational counselling.

Mark Szekely

- [102] Mr. Szekely is an economist who was asked by ICBC to comment on Mr. Carson's income loss and cost of future care calculations. I will deal with his reports when addressing those heads of damage below.

The Role of Expert Evidence

- [103] As can be seen by the above summary of the evidence, both parties rely extensively on expert opinion evidence, something that is common in cases of this nature.
- [104] In considering the opinions of the various doctors, it is useful to address a point raised in the cross-examination of Dr. Acton as it is relevant to the assessment of the expert evidence more generally.
- [105] Dr. Acton was questioned about certain ethical principles published by the Canadian Academy of Psychiatry and the Law ("CAPL") which suggest that a treating psychiatrist should not appear as an expert witness in a legal proceeding involving his or her patient because a treating psychiatrist is an advocate for the patient and therefore potentially in a position of conflict.
- [106] Dr. Acton is not a member of CAPL and was not familiar with its guidelines. It was her view that a treating psychiatrist could provide objective evidence to assist the court but she also acknowledged the value of an independent assessment.
- [107] While I understand the concern underlying the CAPL guidelines, I would not endorse a rule limiting the ability of any treating physician, including a psychiatrist, to testify in a legal proceeding involving his or her patient, as to do so would deprive the court of the evidence of the physician with likely the best and most thorough understanding of the patient's condition. That understanding is often developed on the basis of numerous appointments and interactions with the patient, occurring over many months or years, unlike "independent" medical experts who typically provide an opinion based on a single visit with the patient and a review of available records.

[108] Further, the concern about a physician assuming an advocacy role applies with equal measure to those physicians retained and paid by the parties, or their counsel, to provide an opinion in a litigation context as it does to a treating physician.

[109] In *Meghji v. Lee*, 2011 BCSC 1108 at para. 214, varied on other grounds 2014 BCCA 105, Mr. Justice Johnston provided the following useful observation about evaluating medical evidence given by such non-treating physicians:

Where causation of injuries is in issue, and the bulk of the medical proof of a plaintiff's injuries is derived from experts retained and instructed by counsel, a trier of fact must spend more time evaluating the evidence in order to determine how much weight should be given to it. A physician who thoroughly examines a patient soon after an accident, and who regularly follows that patient with further examinations is in a better position to opine on causation than is a physician who examines months or even years after an accident. Evaluation of the expert opinion evidence is made more difficult in this case because each expert has been provided with masses of documentary material generated by the other experts, most of whom have been retained and instructed by counsel. A trier of fact must at least consider whether providing this much material is intended to influence each new expert's opinion, and evaluate each expert's opinion in order to determine whether the opinion is the product of the expert's independent examination and thought, or has been swayed by the opinions of others or their sheer volume, and, if so, to what extent.

[110] This is not limited to medical evidence in personal injury cases but applies in virtually all areas in which expert evidence is relied on. For example, accountants and actuaries often rely on economic assumptions to formulate their opinions on damages issues, and it is not uncommon for them to choose assumptions that are more favourable to the party who retained them.

[111] The fact is that the court expects all expert witnesses to comply with the duties set out in Rule 11-2 of the Supreme Court Civil Rules to assist the court and to refrain from being an advocate for either party.

[112] In *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23 [Abbott], the Supreme Court addressed the role of expert witnesses and the duties attendant to that role. Mr. Justice Cromwell, speaking for the Court, said at para. 32:

Underlying the various formulations of the duty are three related concepts: impartiality, independence and absence of bias. The expert's opinion must be impartial in the sense that it reflects an objective assessment of the questions at hand. It must be independent in the sense that it is the product of the expert's independent judgment, uninfluenced by who has retained him or her or the outcome of the litigation. It must be unbiased in the sense that it does not unfairly favour one party's position over another. The acid test is whether the expert's opinion would not change regardless of which party retained him or her: P. Michell and R. Mandhane, "The Uncertain Duty of the Expert Witness" (2005), 42 Alta. L. Rev. 635, at pp. 638-39. These concepts, of course, must be applied to the realities of adversary litigation. Experts are generally

retained, instructed and paid by one of the adversaries. These facts alone do not undermine the expert's independence, impartiality and freedom from bias.

[113] The point of this is that the court should not automatically favour the opinion of a non-treating physician over a treating one, or vice versa. Rather, each opinion must be assessed to determine whether it meets the requirements of impartiality, independence and absence of bias. Assuming it does, it must then be considered alongside all of the other evidence, expert and non-expert alike, to arrive at the findings of fact necessary to determine the issues that arise.

[114] In this case, while I may prefer the evidence of certain physicians on various points, I am satisfied that all provided their evidence in accordance with the requirements of the Rules and the principles set out by the Supreme Court in *Abbott* and similar cases.

Findings With Respect to Ms. Jossy's Condition

[115] There is no question that Ms. Jossy suffered significant injuries to both ankles in the accident which have resulted in three surgeries to each. Of the two ankles, the evidence is uniform that the right one has improved to a greater degree than the left. For example, both Dr. Ball and Dr. Younger report that Ms. Jossy has reasonably good function in her right ankle, although she may continue to experience intermittent symptoms. That said, I accept Ms. Jossy's evidence that she frequently experiences pain and swelling in that ankle.

[116] With respect to her left ankle, Dr. Ball was of the view that there was nothing further that she could do surgically and that the ankle will continue to cause Ms. Jossy problems into the future, mitigated somewhat by the use of proper bracing and strengthening through physiotherapy. Dr. Younger was more optimistic that further improvement can be achieved through additional surgery. Dr. Younger is a foot and ankle specialist so there is reason to favour his opinion. Nonetheless, it is apparent that Ms. Jossy's left ankle will continue to limit her activities in the future.

[117] With respect to her headaches and neck and back pain, I am satisfied that Ms. Jossy suffered musculoskeletal or soft tissue injuries to her neck and low back and that her neck pain is the major contributing factor to her headaches. That is the opinion of both Dr. Robinson and Dr. Laidlow, although both also acknowledge the role of Ms. Jossy's emotional issues in aggravating her headaches.

[118] While I accept Ms. Jossy's evidence that she continues to experience these problems, I accept Dr. Laidlow's evidence that her symptoms are likely to settle if she engages in an active and focussed exercise program. While she may continue to experience some symptoms in the future, they are unlikely to have a significant limiting impact on her.

[119] The picture with respect to Ms. Jossy's emotional and psychological condition is less clear as there are differing opinions about the severity of her symptoms and her prognosis.

- [120] As noted, Dr. Acton describes her condition as severe and requiring ongoing therapy for at least one or two more years. Even with such therapy, Dr. Acton is of the opinion that Ms. Jossy's prognosis is poor.
- [121] Dr. Milanese takes a more positive view, suggesting that her symptoms are mild and her prognosis excellent.
- [122] Dr. Semrau falls somewhere in the middle. In his view, Ms. Jossy's ongoing symptoms are moderate and her prognosis is guarded, due in part to her complicated psychological history.
- [123] I accept Dr. Semrau's opinion that Ms. Jossy is likely to continue to experience symptoms and to require psychological counselling over the next three to five years. However, as a number of the experts noted, there is a relationship between Ms. Jossy's pain and her psychological condition, and as her physical condition improves, there is likely to be a corresponding improvement in her mental condition.

Damages

- [124] As noted at the outset, the parties have agreed on damages for past income loss and special damages. What remains to be determined are Ms. Jossy's claims for non-pecuniary damages, loss of future earning capacity, cost of future care, loss of housekeeping and an in trust claim.

Non-Pecuniary Damages

- [125] The factors that the court must consider when assessing non-pecuniary damages are well known and have been set out in a number of cases, including by the Court of Appeal in *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46. I have taken those factors into consideration.
- [126] Awards of non-pecuniary damages in other cases provide a useful guide to the court, however the specific circumstances of each individual plaintiff must be considered. This is because any award of damages is intended to compensate for the pain and suffering experienced by that specific plaintiff. Moreover, the compensation award must be fair and reasonable to both parties; see *Trites v. Penner*, 2010 BCSC 882 at paras. 188-189; *Miller v. Lawlor*, 2012 BCSC 387 at para. 109 citing *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229, 83 D.L.R. (3d) 452.
- [127] Ms. Jossy submits that an award of \$200,000 for non-pecuniary damages is warranted in this case. In support of this position, she cites:
- a) *Schucknecht v. Singh et al.*, 2006 BCSC 1025;
 - b) *Chowdhry v. Burnaby (City of)*, 2008 BCSC 1337;
 - c) *Zawadzki v. Calimoso*, 2011 BCSC 45;

- d) Felix v. Hearne, 2011 BCSC 1236;
- e) Verge v. Chan, 2012 BCSC 876; and
- f) Redmond v. Krider, 2015 BCSC 178.

[128] The range of non-pecuniary damages awarded in these cases was \$125,000-200,000. Ms. Jossy submits that the constellation of physical injuries and psychological issues that she suffers as a result of the accident justify an award at the very top of this range.

[129] ICBC submits that an award of \$150,000 is more appropriate. It cites the following cases where the range of damages awarded was \$131,000-\$158,000 (adjusted for inflation):

- a) Meghji v. Lee, 2011 BCSC 1108, varied on other grounds 2014 BCCA 105;
- b) Cebula v. Smith, 2013 BCSC 1939; and
- c) Tarasevich v. Samsam, 2013 BCSC 1914.

[130] Considering the impacts of the accident on Ms. Jossy, including the physical and emotional symptoms that she has experienced and will continue to experience, the principles emanating from Stapely and the case authorities cited by the parties, I find that an award of \$180,000 for non-pecuniary damages is appropriate.

Loss of Future Earning Capacity

[131] The Court of Appeal has on numerous occasions set out the principles that will govern a claim for loss of earning capacity. In Morgan v. Galbraith, 2013 BCCA 305 [Morgan], the court, citing its earlier decision in Perren v. Lalari, 2010 BCCA 140 [Perren], described the approach to be taken by the trial judge as follows at para. 53:

in Perren, this Court held that a trial judge must first address the question of whether the plaintiff had proven a real and substantial possibility that his earning capacity had been impaired. If the plaintiff discharges that burden of proof, then the judge must turn to the assessment of damages. The assessment may be based on an earnings approach or the capital asset approach,

[Emphasis in original.]

[132] The earnings approach is generally appropriate where the plaintiff has some earnings history and where the court can reasonably estimate what his or her likely future earning capacity will be. This approach typically involves an assessment of the plaintiff's estimated annual income loss multiplied by the remaining years of work and then discounted to reflect current value, or alternatively, awarding the plaintiff's entire annual income for a year or two: Pallos v. Insurance Corp. of British Columbia (1995), 100 B.C.L.R. (2d) 260, 53 B.C.A.C. 310 at para. 43 [Pallos]; Gilbert v. Bottle, 2011 BCSC 1389 at para. 233 [Gilbert]. While there is a more mathematical component to this approach, the assessment of damages is still a matter of judgment not mere calculation.

[133] The capital asset approach, which is typically used in cases in which the plaintiff has no clear earnings history, involves consideration of a number of factors such as whether the plaintiff:

- i. has been rendered less capable overall of earning income from all types of employment;
- ii. is less marketable or attractive as a potential employee;
- iii. has lost the ability to take advantage of all job opportunities that might otherwise have been open; and
- iv. is less valuable to him or herself as a person capable of earning income in a competitive labour market: *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 at para. 8 (S.C.) [Brown]; Gilbert at para. 233.

[134] Here, I am satisfied on the evidence that Ms. Jossy has established a real and substantial possibility that her future earning capacity has been impaired. The experts are uniform in their view that Ms. Jossy will not be able to return to work as a care aide due to her physical limitations. While Ms. Phillips was of the view that Ms. Jossy could perform some of the requirements of her former work at PRT, she thinks that Ms. Jossy is better suited to alternate, more sedentary employment, which corresponds with the views of most of the other experts (Ms. Carman, Dr. Wallace and Dr. Quee Newell).

[135] A central element of Ms. Jossy's claim for loss of future earning capacity is her claim that but for the accident, she would have returned to school and obtained her LPN certification.

[136] She acknowledges that it is not a certainty that she would have achieved that goal but she submits that it is a real possibility that must be accounted for in assessing her loss of future earning capacity.

[137] While I do not doubt Ms. Jossy's sincerity in expressing a desire to pursue qualification as an LPN, in my respectful view, it is highly unlikely that she would have succeeded in that objective even in the absence of the accident. I say this for the following reasons:

- a) Both vocational experts, Dr. Wallace and Dr. Quee Newell, were doubtful about Ms. Jossy's ability to complete the requirements of the LPN program because of her history and her academic abilities as revealed in the vocational testing;
- b) Ms. Jossy had taken no concrete steps to pursue enrolment in the LPN program;
- c) While she testified that she and Mr. Coatsworth were saving money to enable her to pursue the program, her evidence on this point was vague, for example she did not testify to a specific, targeted saving plan or an anticipated time line; and
- d) Ms. Jossy has no established history of working in a sustained manner in full-time employment. Moreover, she has never earned more than approximately \$13,000 in any one year.

- [138] A claim for loss of future earning capacity must, in my view, be based on more than a hope and an optimistic belief about a possible future opportunity. There must be an air of reality about the likelihood of that opportunity being realized. Put another way, the purpose of an award of damages for loss of future earning capacity is not to provide redress for unrealized hopes and dreams but rather to compensate an injured party for actual losses caused by a defendant's negligence.
- [139] In this regard, while the "real and substantial possibility" test is typically used, as in Morgan and Perren, to assess whether a plaintiff has suffered a loss, as distinct from the measure of damages for that loss, where the assessment of the loss turns on hypothetical events or occurrences, such as the pursuit of a new and unproven business or, as in this case, a new career, the court must determine whether there is a real and substantial possibility of those events or occurrences materializing: *Reilly v. Lynn*, 2003 BCCA 49 at para. 101.
- [140] In light of the factors set out above, I conclude that Ms. Jossy has not established a real and substantial possibility that she would have successfully qualified as an LPN and obtained full time employment in that field.
- [141] What then was her likely career path absent the accident? In her report, Dr. Quee Newell suggested that Ms. Jossy would likely have continued with her seasonal work at PRT until she obtained work as a care aide at some point in the future. Dr. Wallace did not address this point in his evidence.
- [142] The Court of Appeal has held that a person's past earnings are a significant factor that must be considered in assessing a loss of earning capacity: *Vaillancourt v. Molnar Estate*, 2002 BCCA 685 at para. 72.
- [143] In this regard, as noted, much of Ms. Jossy's pre-accident employment was seasonal work with PRT. While she qualified as a care aide, apart from the approximately six months she worked following her graduation from that program, she has minimal actual work experience in that field due to her inability to find a care aide position.
- [144] Nonetheless, I accept her evidence that her intention but for the accident was to return to work at PRT while searching for work as a care aide. Having successfully completed the care aide program, it is reasonable to assume that she would have pursued and ultimately obtained employment in that field. However, given her history, it is also reasonable to assume that she would have returned to her "back up" seasonable work with PRT from time to time due to layoffs or other interruptions in her care aide employment.
- [145] In his report, Mr. Carson projects the cumulative future earnings of a care aide, from January 1, 2012 to be \$667,100, inclusive of benefits. Mr. Szekely provides a slighter lower projection, based on different assumptions concerning unemployment rates and part-time factors. His projection is \$612,597. As neither economist was cross-examined, it is difficult for the court to choose between the two projections. Accordingly, it is reasonable to pick the mid-point of \$639,848.50.

- [146] Mr. Carson does not provide a projection for cumulative earnings for nursery and greenhouse workers, to account for the possibility that Ms. Jossy would have continued her work at PRT. Mr. Szekely projects those earnings to be \$399,265.
- [147] Given my finding that but for the accident Ms. Jossy was most likely to pursue work as a care aide, with some period of fall-back employment with PRT, or something similar, I assess her likely career earnings absent the accident at \$590,000. I arrive at this figure by assigning an 80% likelihood to her working as a care aide for her career and a 20% likelihood of her working as a nursery or greenhouse worker, and multiplying those percentages by the career earnings as set out above. In my view, this is a reasonable assessment of Ms. Jossy's likely future earnings but for the accident, taking account of the various possible scenarios.
- [148] The next step is to determine what, if any, residual earning capacity Ms. Jossy has. Her position is that she is completely disabled and has no residual earning capacity. In contrast, ICBC submits that Ms. Jossy will successfully re-enter the workforce in a more sedentary capacity, perhaps with some retraining.
- [149] Both Dr. Wallace and Dr. Quee Newell are of the view that there are a number of direct entry jobs that would be available to Ms. Jossy and that, with some retraining, she may also be capable of working in positions such as a medical or dental office assistant. The limiting factor from Dr. Wallace's opinion is her psychological condition. As noted above, he raised a concern about Ms. Jossy's ability to fulfill key foundational skills common to all forms of employment.
- [150] In my respectful view, there is no direct evidence to support Dr. Wallace's concern. As the evidence demonstrated, Ms. Jossy has attended a myriad of medical appointments and treatment sessions in recent years and the uniform evidence of the physicians was that she has been regularly on time and pleasant and cooperative throughout. While these attendances do not replicate the requirements of regular participation in the workforce, they also do not support Dr. Wallace's somewhat speculative concern that Ms. Jossy will be unable to do things like attend a worksite regularly and interact appropriately with coworkers and customers.
- [151] In my view, the most likely scenario for Ms. Jossy is that she will attend school for some retraining and then obtain employment in a position like that identified by Dr. Wallace and Dr. Quee Newell. That said, given the guarded prognosis offered by Dr. Semrau, there are likely to be interruptions in her employment due to periodic relapses in her psychological condition.
- [152] In his report, Mr. Szekely provides future wage calculations for eight different classes of occupations. Based on the opinions of Dr. Wallace and Dr. Quee Newell, I have calculated the average of Ms. Szekely's figures for three categories in order to arrive at Ms. Jossy's anticipated future earnings: college diplomas of less than one year duration (\$593,005), receptionists (\$500,046) and data entry clerks (\$565,337). The average cumulative earnings

for these three categories are \$552,796. I note that Mr. Szekely's figures run from July 1, 2017 for the first two of these categories and from the date of trial for the third.

[153] Because of this, the cumulative wage figures, and my average figure, arguably overstate Ms. Jossy's anticipated future earnings because it is unlikely that she will be able to return to work until she has undergone some of the treatment recommended by the doctors, including further psychological counselling and a structured exercise program. I would therefore reduce the figure for Ms. Jossy's anticipated future earnings to \$500,000 to reflect this likely delayed return to work.

[154] I would then reduce that figure further to reflect the fact, as noted above, that Ms. Jossy's future employment is likely to be interrupted from time to time due to her psychological condition. While it is impossible at this stage to predict with any certainty what the impacts of such interruptions will be, I think it reasonable to assume that Ms. Jossy's earnings will be reduced by at least 25%. Applying that reduction, I find that Ms. Jossy's likely future earnings will be \$375,000.

[155] The difference between this figure and the figure of \$590,000 which is what I have found Ms. Jossy likely would have earned but for the accident, is \$215,000. I award Ms. Jossy this amount for loss of future earning capacity.

Cost of Future Care

[156] In *Liu v. Bipinchandra*, 2016 BCSC 283, Mr. Justice Voith provided a concise summary of the principles governing a claim for future care costs at para. 158:

A plaintiff is entitled to compensation for the costs of their future care based on what is reasonably necessary to restore that plaintiff to his or her pre-accident condition to the extent that is possible. The test for determining an appropriate award under this head of loss is an objective one based on medical evidence. An award for the costs of future care must be supported by medical evidence that justifies the claims being made, or the costs being sought. In addition, those costs must be reasonable; *Milina* at 84.

[157] Mr. Justice Voith's reference to *Milina* is to the oft-cited decision in *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.), aff'd (1987) 49 B.C.L.R. (2d) 99 (C.A.).

[158] The parties advance dramatically different positions with respect to this head of damage. Ms. Jossy proposes an award of \$664,000 whereas ICBC proposes \$107,000. The principal points of departure between the parties are the range of services and treatments that are reasonably necessary for Ms. Jossy and the duration of those services and treatments. On the latter point, Ms. Jossy's claim is premised on many of the services and treatments continuing for the balance of her life whereas ICBC projects a more limited time frame.

[159] I will consider each of the various items claimed by Ms. Jossy in turn.

Psychological Counselling

- [160] Ms. Jossy is currently receiving regular counselling from Dr. Acton which is covered by the provincial Medical Services Plan ("MSP"). However, Dr. Acton is contemplating retirement within the next couple of years and Ms. Jossy is concerned that similar counselling services will not be available from a qualified psychiatrist covered by MSP. She therefore claims for the cost of private treatments to age 65, which she estimates to be \$93,000.
- [161] ICBC's position is that, at most, Ms. Jossy will require ongoing treatment for a period of three to five years (according to Dr. Semrau). If Dr. Acton retires in two years, ICBC submits that similar publicly funded counselling can be provided, for example by Dr. Williams who Ms. Jossy saw in connection with her 2014 hospitalization. If private counselling is required, the cost will be in the range of \$145-170 per hour, which amounts to approximately \$5,000 over the course of Dr. Semrau's projected time frame.
- [162] I do not accept that Ms. Jossy will require regular psychological treatments for the balance of her life. Not even Dr. Acton, who is most pessimistic about Ms. Jossy's prognosis, makes that recommendation.
- [163] In my view, Dr. Semrau's opinion that Ms. Jossy will likely need ongoing psychological counselling for the next three to five years most accurately reflects her current treatment needs. It is not clear on the evidence, however, that those needs will be met through the public MSP system as Dr. Acton noted the need for specialized counselling skills which are difficult to find in the region where Ms. Jossy resides. It is therefore reasonable to assume that at least some of Ms. Jossy's treatments will have to be paid for directly. Additionally, given the guarded prognosis for Ms. Jossy's future psychological condition, for the reasons outlined by Dr. Semrau, it is likely that she will need periodic future counselling as well.
- [164] In the circumstances, I award \$10,000 as a reasonable sum for future psychological counselling.

Physiotherapy and Massage

- [165] There is a range of opinions in the evidence as to Ms. Jossy's need for ongoing physiotherapy and massage treatments. Dr. Younger and Dr. Ball recommend some physiotherapy to strengthen and increase the range of motion in her ankles. Dr. Smart notes that Ms. Jossy gets some temporary relief from physiotherapy treatments to her neck, shoulders and back, an observation also made by Ms. Zantingh who is of the view that both physiotherapy and massage should continue indefinitely in order to maintain Ms. Jossy's quality of life.

[166] It is useful to also note Ms. Zantingh's comment in her report that the current physiotherapy treatments are maintaining but not improving Ms. Jossy's symptoms. This is consistent with Dr. Laidlow's opinion that passive therapies can result in a cycle of dependency that impedes rather than enhances the likelihood of improvement. Ms. Phillips made a similar point.

[167] I found Dr. Laidlow's evidence on this point compelling and I agree that the evidence does not support ongoing physiotherapy and massage treatments for the balance of Ms. Jossy's life. In this regard, I endorse the comments of Mr. Justice Silverman in *Ho v. Dosanjh*, 2010 BCSC 845 at para. 91:

I reject the notion that ongoing treatment that would provide the plaintiff with periodic temporary relief, but little to no additional improvement, should be something for which compensation should be paid for the rest of the plaintiff's life. As previously noted, this loss has been considered as an aspect of non-pecuniary damages.

[168] I also agree with Dr. Laidlow that Ms. Jossy would benefit from an active rehabilitation exercise program, something also recommended by Dr. Bester and Dr. Giantomaso. I will address the cost of such a program below.

[169] In my view, some ongoing physiotherapy is warranted for Ms. Jossy's ankles as recommended by Dr. Younger and Dr. Ball. ICBC suggests three years of physiotherapy at a cost of \$5,760, which in my view is reasonable. It is also acknowledged that if she does undergo further surgery on her left ankle, some post-surgery physiotherapy will be required.

[170] In addition, recognizing that Ms. Jossy does get some relief for her pain symptoms from physiotherapy and massage, I think it reasonable to provide for some ongoing treatments while she pursues a more active exercise program over the next year. Balancing this with Dr. Laidlow's concern about dependency, I would award a further \$6,000 which covers the approximate cost of weekly physiotherapy and massage treatments for a one year period, based on a per appointment cost of \$70.

[171] Adding an amount for post-surgery physiotherapy, I award \$14,000 for future physiotherapy and massage treatments.

Kinesiology and Gym Pass

[172] As noted, a common recommendation is for Ms. Jossy to pursue a structured, active exercise program. Ms. Carman and Ms. Phillips agree that 24 sessions with a kinesiologist to establish such a program is warranted, at a cost of \$1,440. Thereafter, both also recommend three to six sessions per year to allow some monitoring of Ms. Jossy's progress and updating of her program.

[173] In order for such a program to be effective, Ms. Jossy is likely to need access to a suitable gym. ICBC suggests that she can do much of the work at home but in my view, that is not realistic.

[174] Allowing for the kinesiology sessions outlined above and an annual gym pass for Ms. Jossy, I award \$15,000 under this head.

Occupational Therapy

[175] Ms. Jossy submits that she requires an occupational therapist case manager to recommend and manage her care program, liaise with treating professionals, assist in setting goals and monitor her progress. Ms. Carman recommends such services in her report. In her opinion, Ms. Jossy would benefit from two to three hours in the first year followed by twelve hours in the following year and periodic or intermittent services in the future. Using Mr. Carson's cost of care multiplier, Ms. Jossy submits that \$25,000 is reasonable under this head. That amount includes an allowance for travel given that the occupational therapist who has been working with Ms. Jossy travels from Kelowna.

[176] Ms. Phillips does not agree that an occupational therapist case manager is needed but says that in any event, such services are available through MSP.

[177] In my view, ongoing occupational therapy is not required or justified on the evidence. As set out above, the cost of future care award includes kinesiology services intended to establish a structured exercise program for Ms. Jossy that will be supervised for a period of time. In addition, as discussed below, there will be some allowance for vocational rehabilitation or retraining. Additional occupational therapy services would, in my view, be largely duplicative. I therefore decline to make an award for future occupational therapy costs.

Vocational Rehabilitation

[178] As discussed under the loss of future earning capacity heading, the evidence establishes that Ms. Jossy is not capable of returning to work as a care aide and a return to PRT is unrealistic. Both Dr. Wallace and Dr. Quee Newell suggest a number of sedentary positions that she would be capable of with retraining, subject again to Dr. Wallace's concern about her psychological condition. ICBC acknowledges that some retraining or vocational rehabilitation is warranted and both parties suggest \$10,000 as a reasonable figure. I accept that suggestion and accordingly award \$10,000 under this head.

Homemaking Assistance-House and Yard Work

[179] Ms. Jossy submits that her physical and emotional difficulties have impaired, and will continue to impair, her ability to carry out normal household tasks. Ms. Carman recommends four hours of homemaking assistance per week for the near term but then notes that it is difficult to predict what Ms. Jossy's needs will be in the future. Ms. Carman therefore sets out six possible cost scenarios ranging from less assistance to more than the

four hours per week. Ms. Carman also recommended eight to sixteen hours of seasonal cleaning help per year as well as four to five hours of house and yard maintenance assistance.

[180] In her submissions, Ms. Jossy put forward a range of costs for housekeeping assistance and seasonal cleaning to age 65 of between approximately \$130,000-234,000 plus \$55,000 for annual house and yard maintenance.

[181] Ms. Phillips does not recommend any homemaking assistance for Ms. Jossy. In her view, while Ms. Jossy does experience difficulty with some homemaking tasks, she can continue to perform those tasks with some degree of adaptation. With respect to home and yard maintenance, Ms. Phillips recommends some adaptive equipment as well as 10-20 hours of assistance for heavier tasks. ICBC proposes an award of \$46,000 under these heads.

[182] On the evidence, I accept that in her current condition, Ms. Jossy is experiencing difficulty with various tasks around the home and that some assistance is justified. I do not agree, however, that such assistance should be maintained over her lifetime or even until age 65. Based on the treatment recommendations made by the physicians, for which allowance has been made, Ms. Jossy's physical condition is expected to improve. It should also be noted that Ms. Jossy and her family have recently moved into a smaller townhome and there was minimal evidence about what their future living arrangements might look like, for example once the children move out.

[183] Allowing for some regular homemaking assistance in the near term, reducing in frequency thereafter, and providing for some seasonal house and yard maintenance, I find that a reasonable award under these heads is \$60,000.

Injection Therapy, Rhizotomy and Botox

[184] Ms. Jossy has achieved some relief of her headache pain through the injections administered by Dr. Bester. She has also expressed a willingness to try other therapies like Botox or nerve ablation (rhizotomy). She submits that an award of \$75,000 is reasonable for headache treatments.

[185] ICBC submits that rhizotomy and Botox were raised by Dr. Bester and Dr. Robinson as possible treatments in the event that injection therapy ceased to be effective. It submits further that rhizotomy is covered by MSP and therefore available to Ms. Jossy free of charge, if it is determined to be an appropriate therapy for her.

[186] In my view, the evidence does not establish that these therapies are reasonably necessary to treat Ms. Jossy's condition. I therefore decline to make any award for these costs.

Treatment Aids, Etc.

[187] Ms. Jossy seeks an amount to cover things like compressions stockings, orthotics, special footwear and an ankle brace which are recommended by the experts. Ms. Jossy submits that \$20,000 is reasonable for these items whereas ICBC proposes \$12,500. I award \$15,000.

Mobility Aids

[188] Ms. Jossy claims \$30,000 under this head, which includes a motorized scooter and related lift. I agree with ICBC that the evidence does not establish that a scooter will be required for Ms. Jossy. However, as ICBC acknowledges, given the ongoing ankle issues that Ms. Jossy is likely to experience, some amount is warranted for adaptive and mobility aids. I accept Ms. Phillips' figure of \$5,200.00.

Medications

[189] Ms. Jossy testified that she primarily uses over the counter medications such as Advil and Voltaren Emulgel to deal with her pain. Ms. Carman estimates the annual cost of these to be about \$1,000. She also uses prescription medications for her anxiety and related psychological symptoms at an annual cost of about \$800. She seeks an award of \$56,000 to cover these medication costs for the balance of her life.

[190] ICBC submits that Ms. Jossy's pain is likely to improve with exercise and with the possible further left ankle surgery which will reduce her use of pain medications. ICBC submits further that some of the prescription medications she uses for her psychological issues are ones that she would have needed even absent the accident due to her complex psychological history. It proposes \$10,000 under this head.

[191] I agree that Ms. Jossy's need for pain medication is likely to diminish going forward. The same is likely true for her use of medications for her psychological issues, given the planned course of treatment. In the circumstances, I think an award of \$15,000 is reasonable.

Summary of Future Care Costs

[192] In summary, Ms. Jossy is entitled to the following in respect of future care costs:

(a) Psychological counselling

\$10,000

(b) Physiotherapy and massage

\$14,000

(c) Kinesiology and gym pass

\$15,000

(d) Vocational rehabilitation

\$10,000

(e) Homemaking assistance/ House and yard work

\$60,000

(f) Treatment Aids

\$15,000

(g) Mobility Aids

\$5,200

(h) Medications

\$15,000

Total:

\$144,200

In Trust Claim

[193] Ms. Jossy advances an in trust claim with respect to the assistance provided by her mother, Brenda, since the accident. This assistance has included personal care after the accident and at various times following Ms. Jossy's surgeries when she was largely immobile as well as assistance with household duties such as food preparation, cleaning, laundry and transporting children. Ms. Jossy claims \$25,000 under this head.

[194] ICBC acknowledges that an in trust award is justified but submits that a fair amount is \$7,000 for all family members. ICBC submits that the evidence as to the extent of the assistance provided by Ms. Jossy was vague and that, in any event, much of what she did was pursuant to her role as mother and grandmother.

[195] In *Frankson v. Myre*, 2008 BCSC 795, Mr. Justice Savage, as he then was, summarized the key principles governing an in trust claim at paras. 50-51:

[50] The law of "in trust" claims is governed by the principles set out by the British Columbia Supreme Court in *Bystedt (Guardian ad litem of) v. Bagdan* 2001 BCSC 1735 at para. 180, aff'd 2004 BCCA 124.

[51] The six relevant factors are:

- (a) the services provided must replace services necessary for the care of the plaintiff as a result of a plaintiff's injuries;
- (b) if the services are rendered by a family member, they must be over and above what would be expected from the family relationship;
- (c) the maximum value of such services is the cost of obtaining the services outside the family;

- (d) where the opportunity cost to the care-giving family member is lower than the cost of obtaining the services independently, the court will award the lower amount;
- (e) quantification should reflect the true and reasonable value of the services performed taking into account the time, quality and nature of those services;
- (f) the family members providing the services need not forego other income and there need not be payment for the services rendered.

[196] Ms. Jossy submits that her mother provided extensive assistance to her both in terms of personal care and help around the home and with Ms. Jossy's family. She says that her mother went over and beyond what would normally be expected of a family member in the circumstances. Ms. Jossy seeks an in trust award of \$25,000.

[197] ICBC submits that the evidence led by Ms. Jossy on this issue lacked specificity in terms of the types of assistance provided by her mother. For example, there was no evidence of the number of hours that Ms. Jossy's mother spent helping out. ICBC also points to the fact that Brenda Jossy agreed in her testimony that some of what she did was because it made her feel good and that helping out was part of the "give and take" of being in a family.

[198] I am satisfied that Brenda Jossy provided considerable assistance to Ms. Jossy, particularly in the periods following the accident and her subsequent surgeries. The evidence was that Brenda Jossy left her own employment, where she worked with her husband, and spent considerable time assisting Ms. Jossy.

[199] In the circumstances, an in trust award of \$20,000 is reasonable.

Conclusion

[200] In summary, Ms. Jossy is awarded the following:

(a) Non-pecuniary damages

\$180,000

(b) Past income loss (by agreement)

\$55,000

(c) Loss of future earning capacity

\$215,000

(d) Cost of future care

\$144,200

(e) In trust claim

\$20,000

(f) Special damages (by agreement)

\$13,000

Total

\$627,200

[201] Unless there are circumstances of which I am unaware, Ms. Jossy is entitled to her costs at Scale B. If the parties cannot agree, they may make arrangements to speak to the matter. Each party will provide a written submission, not to exceed ten pages, one week in advance of any further hearing into costs.

"Skolrood J."

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