
CANADA / JUDGMENT

Kaur v. Tse

2020 BCSC 1072

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 1072 Kaur v. Tse

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Kaur v. Tse,

2020 BCSC 1072

Date: 20200722

Docket: M177123

Registry: Vancouver

Between:

Ranjit Kaur

Plaintiff

And

Kin Man Tse and Jody Quan Lin Wong

Defendants

Before: The Honourable Madam Justice Tucker

Reasons for Judgment

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Place and Date of Trial:

Vancouver, B.C.

June 8-12, 2020

Place and Date of Judgment:

Vancouver, B.C.

July 22, 2020

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I. Introduction

[1] The plaintiff, Ranjit Kaur, seeks damages for injuries sustained in a motor vehicle accident (the "accident") in February of 2016.

[2] Ms. Kaur was a passenger in a vehicle being driven by her husband. They were struck from behind while stopped at a red light. Liability is admitted.

[3] This is an expedited action under Rule 15-1(1)(a) of the Supreme Court Civil Rules, B.C. Reg. 168/2009.

[4] Ms. Kaur says she suffers chronic neck and low back pain as a result of the accident and that her injuries and symptoms impact all aspects of her life. She seeks non-pecuniary damages, awards for loss of future earning capacity and past and future loss of domestic capacity, and special damages.

[5] Special damages have been agreed to in the amount of \$9,632.46. This amount includes the funds for repayment to Pacific Blue Cross.

II. background facts

A. Pre-Accident

[6] As of the time of trial, Ms. Kaur was 45 years of age with two children, aged 18 and 14.

[7] Ms. Kaur and her husband grew up and married in Singapore.

[8] Ms. Kaur began working in the banking industry in Singapore. She took evening classes and obtained a business administration diploma in 1998. By the time Ms. Kaur left Singapore to immigrate to Canada, she had worked her way up to the position of assistant manager.

- [9] The family immigrated in 2007. Shortly after arrival, Ms. Kaur obtained an entry-level position with Vancity Credit Union ("Vancity"). Given her experience, Ms. Kaur applied for more responsible positions and quickly worked her way up. In 2010, she successfully applied for the Coordinator position in the Community Business department ("Community Business"). While in that position, she took a college and on-line course that would help her move into an analyst role. In 2014, she successfully applied for the Special Compliance Analyst ("SCA") position in Community Business. She was in that position at the time of the accident.
- [10] Ms. Kaur testified that she had no limitations or ongoing concerns regarding her back or neck prior to the accident. She regularly attended a chiropractor, approximately four times a year, for what she describes as "alignment maintenance". She also took advantage of her registered massage therapy work benefits each year for relaxation purposes. Ms. Kaur said she took no medications prior to the accident, other than an Advil "every now and then" for tension or headaches.
- [11] She indicated she had no restrictions on her ability to sit or stand, no restrictions that affected her ability to perform her work duties, and no restrictions on her ability to perform domestic work prior to the accident.
- [12] Ms. Kaur does have issues with her left foot. She did not argue at trial that her foot issues were caused by the accident.
- [13] She described her pre-accident activities as going to the park and the playground, playing tennis and going to water parks with the kids. She said that they often took family road trips to places like Oregon and Kelowna. She attended a Sikh temple, which generally involved sitting on the temple floor for an hour or so, perhaps twice a month. Ms. Kaur testified that she really enjoys walking, saying that in the summer she would walk every day for up to an hour, and in other seasons, she would walk when it was dry.
- [14] In 2015, the family moved out to Delta and into a 2500 square-foot house with a 3000 square-foot yard. The house is a split-level, with bedrooms upstairs and a laundry on a lower floor. The yard is large, but paved in part.
- [15] Vancity's head office is located in Vancouver, near Science World. After the move to Delta, Ms. Kaur, who uses public transit to get to and from the office, had a one hour commute each way by SkyTrain and bus. She testified that public transit is quite busy during the relevant time periods and she often has to stand.
- [16] The plaintiff testified that prior to the accident she did most of the housework. She noted that the children were young, and while her husband would help somewhat, she did the bulk of it. She generally set aside a half day each week to do household cleaning. She said her husband generally did the yard work, but that she would weed and sometimes mowed the lawn.

- [17] The plaintiff sponsored her mother's immigration to Canada. While Ms. Kaur's mother appears to have split time between Singapore and Canada for a considerable period, the plan was that she would eventually live permanently with Ms. Kaur and her family. When she was staying with the family, Ms. Kaur's mother would do the cooking.

B. The Accident

- [18] The plaintiff said she jerked forward towards the dash and was stopped by her seatbelt. She said her collarbone and neck hurt immediately, but generally she just felt shocked. Her husband got out and spoke with the other driver while she waited in the car. They drove the car home.
- [19] She awoke very sore the next day, especially her collarbone, lower back and shoulder areas. She thinks she took some Advil. Two days later she went to a walk-in clinic where she reported her pain. She was prescribed Celebrex and recommended physiotherapy.

C. Post-Accident

1. Treatment

- [20] Once back at work, Ms. Kaur went to another walk-in clinic near the Vancity office, Coast Medical Clinic. The doctor there, Dr. Gan, gave her a pain cream and referrals for massage therapy and physiotherapy.
- [21] A few weeks after the accident, on March 2, 2016, Ms. Kaur told Dr. Gan that she felt "down", frustrated, exhausted and irritable, and that she felt she was taking her mood out on the children. Dr. Gan did not make any related referral.
- [22] Ms. Kaur went to the chiropractor and for massage therapy, both of which provided her with some short term relief.
- [23] Although physiotherapy was recommended to her by both the first clinic doctor and then again by Dr. Gan shortly after the accident, she didn't take any physiotherapy treatment until August 2016. The plaintiff attended physiotherapy 11 times between August 2016 and December 7, 2016. Both the clinic records and Ms. Kaur's testimony indicate that this course physiotherapy treatment was for her foot issues. After taking physiotherapy for her foot in 2016, Ms. Kaur sought further foot treatment from a podiatrist for most of 2017.
- [24] In 2017, Ms. Kaur found a family physician out in Delta, Dr. Ajaere. Dr. Ajaere recommended she take physiotherapy and massage therapy, and said it was "okay" to continue chiropractic treatment. Dr. Ajaere also recommended an active rehabilitation program.
- [25] Ms. Kaur testified that she believed chiropractic and massage treatments were working at that point, and that when she raised that with Dr. Ajaere, he indicated it wasn't necessary for her to do more at that point in time. The plaintiff testified that she didn't want to take any more time off work. She also testified her son has ADHD and demands a lot of her time, and she felt there was too much to do. In an April 2019 independent medical consultation

interview with a physiatrist, Ms. Kaur reported that she had not gone to active rehabilitation when it was recommended because her massage therapist thought she should not try too many different things at once.

2. Work

- [26] The accident occurred on a Friday night. Ms. Kaur did not miss much, if any, work as a result of the accident. She says she continued to work, but found it hard to sit all day, even taking Celebrex and Advil, and that she needed to get up and move around and to stretch. She said prior to the accident, she didn't get up and do those things consciously while at work. She agreed that her job permits her to get up and move about as she pleases while in the office. She adjusted her computer screens, but did not otherwise alter her workstation. There are standing desks available for use in the Vancity office and she used one for an hour or so on whatever days she saw fit.
- [27] Vancity has an established employee review system. Ms. Kaur and her manager each completed detailed performance reports for the years 2016-2019. These reviews are uniformly complimentary, with both Ms. Kaur and her manager rating Ms. Kaur's work performance and achievements as "exceeding expectations".
- [28] In 2016 and 2017 in particular, Ms. Kaur undertook substantial projects aimed at developing and improving Vancity processes. These projects appear to have been demanding, but were highly successful. Ms. Kaur was clearly a highly valued asset in Community Business during these years.
- [29] At some point in 2017, the Community Business manager, Sarah Russell, granted Ms. Kaur's request for permission to work from home one day a week. At some point in 2018, Ms. Russell agreed to extend the arrangement to two days a week (Mondays and Fridays).
- [30] Ms. Kaur testified that working from home enabled her to take breaks, change positions, do work standing at her kitchen island, and made it easier for her to attend treatment appointments. Ms. Kaur said that she didn't ask Ms. Russell if she could work from home earlier than 2017 because it was not a normal practice at Vancity. She said that after her request was granted, she tried to keep her arrangement on the "down-low" with respect to others at Vancity, and made a point of being responsive so as not to call any attention to the fact that she was working from home.
- [31] Two senior positions that interested Ms. Kaur came open in 2018. Both were in the same Vancity salary "pay band" (8), which was several steps up from her SCA position. The positions were Senior Finance Consultant Analyst in the Finance department ("Finance") and Portfolio Manager in Community Business. The plaintiff said working in Finance would have been a good addition to her resume and that Finance is desirable because it interfaces with many other departments. She also said she might have been able to negotiate a higher than base salary for the Finance position because of her Singapore experience.

- [32] Ms. Kaur applied for both and was granted an interview for both. She declined the interview with Finance.
- [33] Ms. Kaur testified that she discussed the open Finance position with the Finance manager, who indicated that she did not want the position under a work from home arrangement at present, but said she might agree to one in relation to it at a future point in time.
- [34] Ms. Kaur testified that she knew that if she took the Portfolio Manager position and remained in Community Business, Ms. Russell would allow her to keep her existing work from home arrangement. She said she was also concerned that Finance would require her to work make-up time for attending appointments, whereas her work from home arrangement allowed her to run her own calendar and schedule appointments during the work day so long as she completed her work.
- [35] Asked to describe how the accident had changed her career goals, Ms. Kaur said Community Business knows her and accommodates her, and that she doesn't want to risk losing her work from home arrangement by moving to a different team or department.
3. Ms. Kaur's Mother
- [36] As noted above, the plaintiff's mother had left Singapore to come live with Ms. Kaur's family. Sadly, in September 2018, her mother was diagnosed with colon cancer. She had an initial surgery, but the cancer had metastasized. She opted to forego chemotherapy.
- [37] Ms. Kaur's mother remained active for a considerable period of time post-diagnosis, but began to seriously deteriorate in April 2019. About that time, Ms. Kaur's mother ceased doing the family cooking. Through April and May, as her mother deteriorated, Ms. Kaur began acting as her care-provider.
- [38] In June 2019, her mother fell down several times and Ms. Kaur described her mother as never really being the same after that. At that point, Ms. Kaur sought and was granted permission to work from home full-time in order to look after her mother. Care-taking involved various weight-bearing actions that aggravated Ms. Kaur's neck and back. There was little time available for Ms. Kaur to take chiropractic or massage therapy treatment during this period. The plaintiff's mother was eventually admitted to hospice, but then Ms. Kaur was at the hospice whenever possible as her mother did not speak English. Her mother died on August 31, 2019.
- [39] Ms. Kaur, her husband and her close friend (Andy Khaira) all testified that Ms. Kaur had a very close relationship with her mother. Ms. Kaur's husband testified that he and the children were also very fond of Ms. Kaur's mother, and that her illness and passing greatly affected the entire family.
- [40] Ms. Kaur was grief stricken following her mother's death and took a leave from work during September and October 2019. She sought out mental health counselling for grief at this time.

- [41] In mid-September 2019, Ms. Kaur resumed taking treatments for her neck and back. At this time, she had a course of physiotherapy treatment for her neck and back that she described as "very beneficial" and she testified in court that she was recovered back to her pre-caretaking status (her "March 2019 Position") in two months (i.e., by mid-November 2019).
- [42] In November 2019, the plaintiff returned to full-time work as Portfolio Manager, but continued to work from home two days a week in accordance with her pre-existing arrangement with Ms. Russell.

D. Current Condition

- [43] In direct, Ms. Kaur testified that she has difficulty sitting or standing for long periods of time, as well when bending over and that pain from the accident was impacting virtually every aspect of her life.
- [44] On cross-examination, and only after being faced with her March 7, 2019 discovery testimony, the plaintiff conceded that, at present, her neck causes her pain a few times a week, her lower back causes her pain every few weeks, and that she takes Advil or Celebrex a couple of times a month. I find this to be an accurate description of her symptoms and condition at the time of trial. I also find it to have been an accurate description of her symptoms and condition at the time of discovery (i.e., her March 2019 Position).
- [45] The plaintiff started a course of active rehabilitation around February 2020, but has only gone twice. She has continued to go to physiotherapy after finding the 2019 treatment beneficial. She described massage and chiropractic treatment as continuing to be helpful in terms of tension release, but the relief as only short-term.
- [46] The plaintiff said that her family helps more with housework now than before the accident, but that she eventually hired a cleaner to come in twice a month as she found it stressful to push the children and her husband to do it properly. With regard to the impact on the family dynamic, the plaintiff said it was hard to get teenagers to clean and that her husband wanted to rest, so she cut back on her expectations about every chore being done every week.
- [47] Between early 2018 and the onset of Covid, a cleaner performed two hours of housework every two weeks at the cost of \$100 a month (i.e., \$25 an hour). The cleaner mops the floors, does the washrooms and dusts. Ms. Kaur said she did not get help earlier than 2018 because she was reluctant to spend the money. Asked what the cleaner does that she cannot do herself, the plaintiff said she finds it difficult to bend down to clean the bathtubs and that mopping the entire house at once is too much for her. She said before she hired the cleaner, she would break up the mopping over the course of the week. Presumably, she went back to that approach in March 2020 when the cleaner ceased to attend due to Covid.
- [48] Ms. Kaur testified that her daughter now does much of the family cooking.

- [49] Ms. Kaur said that while the family used to do a lot of weekend road trips, they have not done much post-accident. She said she now finds the 24 hour flight (including stop over) to and from Singapore challenging.
- [50] The plaintiff said that she continues to enjoy hiking and walking through Watershed Park, but does not "go as much" or for "as long" as she used to, and that she will be sore afterwards if she overdoes it. She says she continues to walk as much as she can, usually three to four times a week when the weather is good, but stays on flatter ground than before. She described her walks as being between 45 and 60 minutes.
- [51] Ms. Kaur says that when she is in pain, she gets agitated and frustrated more easily, and finds it more difficult to deal with her son's attention deficit issues. She said she believes she is short-tempered with the children and feels guilty about it. She indicated that she feels "down" and depressed about failing her family.
- [52] On cross-examination, and again only after being taken to her testimony at discovery, Ms. Kaur conceded that at her March 2019 discovery, she denied any emotional issues arising from the accident and noted only some work-related stress. Ms. Kaur said that she had testified that way on discovery because she is culturally unaccustomed to raising emotional issues and feels expected to carry on without complaint.
- [53] The plaintiff said her daughter is learning how to drive, but she is too anxious to go driving with her.
- [54] She says that she now has her husband or son carry the laundry basket for her and that while she used to mow the lawn sometimes, she now asks her son to do any mowing. With regard to kitchen duties, she said she now needs help carrying out heavy dishes when they have a large family meal or company for dinner, and that she needs help reaching items high up and low down in the kitchen cabinets. With regard to the impact on her social life, she indicated that she goes for drinks with friends and to dinners. She very vaguely suggested that her injuries have impacted her sex life.
- [55] She said that her injuries cause her to worry about her ability to be a care-provider in the future, should something happen to a family member.
- [56] She testified that she regards this as an important time in terms of her career advancement, but did not indicate a particular goal. She suggested that a team manager position might be a logical next step for her, but said there are various Vancity departments of interest to her. She expressed concern about being able to advance in her career while needing to work from home due to her injuries.

III. lay witnesses

A. Sarah Russell - Vancity

- [57] Ms. Russell has been with Vancity for about 27 years, and is currently Director of Operations for Impact Banking. Prior to moving to Impact Banking in 2018, Ms. Russell was in Community Business. She has known Ms. Kaur for about eight years. From 2014-2018, they were both in Community Business, and from 2016-2018, Ms. Russell was Ms. Kaur's manager. That said, Ms. Russell is not significantly senior to Ms. Kaur. They were peers in Community Business between 2014-2016, at which time Ms. Russell was the "Process Enhancement Manager" for Community Business. The Process Enhancement Manager position, since renamed to Portfolio Manager, is same the position Ms. Kaur currently holds.
- [58] Ms. Russell described the plaintiff as diligent, thorough, knowledgeable, approachable, helpful, supportive and as a valuable asset to Vancity. Ms. Russell testified that she considers broad experience across many departments an asset when she is involved in hiring decisions, but added that depth of experience is also important. She added that different Vancity managers have different views on the topic.
- [59] Ms. Russell testified that under Vancity policy (at least as it stood pre-Covid), department managers enjoy broad discretion to permit employees to work from home or out of a branch office. She agreed that work from home arrangements were uncommon at Vancity at the time she allowed Ms. Kaur's, but noted that there was at least one other at that time. With regard to the exercise of the managerial discretion, she noted that certain Vancity departments are more "office-based" than others due to their "clientele" and thus would be less likely to authorize work from home arrangements. She gave Finance as an example of a more office-based department. She agreed that pre-Covid, Vancity's attitude towards work from home arrangements was growing more liberal. She agreed that Covid had caused a sudden jump forward in that respect, but said she was unable to speak to how Vancity would operate post-Covid beyond expressing a personal belief that a "head office" concept would continue to exist.
- [60] With regard to Ms. Kaur's initial request to work from home one day a week in 2017, Ms. Russell testified that she understood the request as primarily based on making it easier for Ms. Kaur to attend appointments, but that it also enabled Ms. Kaur to move about freely in her home and to avoid the commute. She said she granted Ms. Kaur's request because she believes flexibility should be extended to employees who have proven themselves to be valuable assets.

B. Janet Lee - Massage Therapist

- [61] Ms. Lee has seen the plaintiff as a client since 2011. She indicated that prior to the accident, Ms. Kaur was not asking her to treat specific injuries or areas, and that her file notes generally indicate objective indicia of hypertonicity in Ms. Kaur's back, neck and shoulders. She said that post-accident, Ms. Kaur's objective symptoms have continued to be hypertonicity. She said the basic treatment for hypertonicity is Swedish massage to relieve

tension and occasional application of compression. She described her pre-accident and post-accident treatment of Ms. Kaur as "the same but more".

- [62] Ms. Lee's clinical notes specifically record that in 2018 Ms. Kaur told Ms. Lee that she was back to walking an hour a day.

C. Palakrishna Mahendra (Michael) Krishna - Husband

- [63] Mr. Krishna said that prior to the accident, Ms. Kaur did almost all of the inside housework. He said that she also mowed the lawn on occasion and did some weeding and gardening. He described her as very particular about house-cleaning, describing her as "technically OCD". He indicated that he and the children find doing housework in accordance with her standards and directions trying.
- [64] With regard to heavier chores, such as carrying the laundry basket and mowing the lawn, Mr. Krishna described Ms. Kaur as able to do these things, but as complaining about soreness afterwards when she does.
- [65] Mr. Krishna asserted that Ms. Kaur drinks alcohol to excess now, which he testified was a matter of "huge" significance for their entire family. It was unclear what, in Mr. Krishna's opinion, amounts to drinking "a lot". Notably, Ms. Kaur did not address the topic of drinking in her evidence and was not asked any questions on the subject by her counsel. It is evident from Dr. Waseem's reports that Ms. Kaur reported no drinking issues to him during his interviews. One of Ms. Kaur's closest friends, Ms. Khaira, was called as a witness, but not asked anything about Ms. Kaur's drinking.
- [66] I found Mr. Krishna's evidence on the point of Ms. Kaur's drinking not only unpersuasive, but indicative of a general willingness to exaggerate facts in order to support Ms. Kaur's claim.
- [67] Mr. Krishna agreed that Ms. Kaur's mother's death was emotionally hard for the entire family.

D. Inderpal (Andy) Khaira Padda

- [68] Andy Khaira describes herself as a close friend of Ms. Kaur's. They have known each other for about 20 years, but then became much closer following the plaintiff's 2015 move to Delta. Ms. Khaira lives a short distance from Ms. Kaur's house and they frequently walk together. Ms. Khaira described their friendship as one built around walking and watching movies together. As it is nearby their houses, she and Ms. Kaur often walked in Watershed Park, but they walked in the general neighbourhood as well.

- [69] Ms. Khaira said they continue to walk together, and continue to walk in Watershed Park, but now generally stay on the flatter parts as opposed to the hills. They now sometimes go to Serpentine Park, which she described as generally flat. They also continue to walk the neighbourhood.
- [70] Ms. Khaira said that before the accident, their walks were brisk and about 45-60 minutes in length. She described their walks now as "a little bit slower", not as long and not as often, and said they will take a break during a walk if Ms. Kaur's back begins to bother her. She said that when they walk to temple together, Ms. Kaur sits on one of the available benches now, rather than on the temple floor as she did before the accident.
- [71] She described Ms. Kaur as very close to her mother and agreed that Ms. Kaur took her mother's death very hard.

IV. Expert Evidence

A. Dr. Zeeshan Waseem - Physiatrist

- [72] Dr. Waseem provided two expert reports.

1. Report #1

- [73] His first report is dated April 26, 2019 ("Report #1") and is based, in part, on his interview and physical examination of Ms. Kaur on April 14, 2019. He also reviewed her medical records and her pre-accident chiropractic and massage therapy treatment records.
- [74] Having reviewed Ms. Kaur's chiropractic and massage therapy records, Dr. Waseem opined that the plaintiff's pre-accident treatment had been for tense muscles, and not in relation to any specific injuries.
- [75] Dr. Waseem noted that while Ms. Kaur's family doctor had recommended active rehabilitation, she reported that she had not attended "after being advised by massage therapist not to try too many treatments concurrently." Ms. Kaur reported her current exercise program as stretching at work and several days a week. Ms. Kaur also reported that she had not followed up frequently with Dr. Ajaere because "her condition has stabilized and no further treatment recommendations have been forthcoming from him."
- [76] Ms. Kaur reported having neck pain that had "slightly improved since onset and stable for at least the past several months" and lower back pain that was localized to her coccyx and had "slightly improved since onset and was continuing to improve."
- [77] She reported her neck and lower back pain both to him as occurring several times a week, lasting up to the whole day, and as, at times, being severe.
- [78] Dr. Waseem also indicates that Ms. Kaur reported pain in her left heel that "began one year ago for unexplained reasons". On his physical examination, Dr. Waseem noted "evidence of left plantar fasciitis (non-accident related)".

- [79] Ms. Kaur reported depressed mood and frustration to Dr. Waseem. She reported that she could tolerate sitting for up to 60 minutes, standing for up to 15 minutes, and walking for up to 45 minutes. He specifically notes that she reported having resumed driving and that, while unable to shovel snow, she had "otherwise resumed her normal tasks, though at a reduced frequency and with taking breaks" and had hired "external assistance for completion of tasks".
- [80] Dr. Waseem concluded there were objective indicators (e.g., muscle tone, spasms, taut bands and trigger points) of chronic myofascial pain in several muscles pertaining to the neck. He found no objective indicators regarding Ms. Kaur's lower back pain, but noted that localized coccyx pain was reported.
- [81] Based on the results of a screening questionnaire, Dr. Waseem made a recommendation that Ms. Kaur be evaluated for depression. Dr. Waseem was clear in his testimony that he did not make a diagnosis of depression, and that doing so would be outside his expertise.
- [82] His diagnosis was chronic myofascial pain of the cervical spine, chronic lower back pain secondary to coccydynia and generalized deconditioning. He opined that the injuries were biologically plausible with the described mechanism of injury. He described her abilities to perform her normal household tasks as "hindered" and noted that she could not participate in some activities as frequently as she could have prior to the accident due to ongoing symptoms.
- [83] His Report #1 prognosis was brief and to the point:

Her prognosis hinges on her response to active rehabilitation, the cornerstone of treatment for the types of injuries she incurred in the accident. Should she remain symptomatic despite this treatment modality, she will likely to continue to experience pain into the future.

[Emphasis added]

- [84] The underlined portion above clearly indicates that at the time of writing Report #1, Dr. Waseem was of the view that active rehabilitation had the potential to alleviate, in whole or in part, the plaintiff's symptoms.
- [85] He recommended a three month supervised exercise therapy program as a course of active rehabilitation.
- [86] He recommended passive modalities intermittently at the frequency of once a month to maintain current level of function as well as continued occasional use of analgesics.
- [87] He recommended a coccyx donut, which he described as a specialized pillow that redirects pressure away from the coccyx when seated) to improve her sitting tolerance.
- [88] He recommended a psychiatric work-up in light of the screening questionnaire results.

2. Report #2

[89] Report #2 is dated February 27, 2020, and followed upon a follow-up interview and physical examination of Ms. Kaur conducted on February 24, 2020.

[90] The "Subsequent History" portion of Report #2 indicates Ms. Kaur reported that:

Assisting her mother with transfers and personal care and tending to her after her frequent falls placed a toll on her body and caused a worsening of her neck and lower back pain that continue to remain elevated.

[Emphasis added.]

[91] Ms. Kaur also reported that her ability to engage in household tasks had declined since her first assessment, and that she was now "largely unable to attend to her domestic household chores due to pain." She reported that she was increasingly working from home due to her "worsening pain".

[92] Report #2 contains an update regarding Ms. Kaur's foot issues, indicating that she reported it had resolved. Dr. Waseem includes the following regarding her feet:

The medical records indicate Ms. Kaur has undergone the following diagnostic investigations:

- X-ray bilateral feet on October 5, 2017; bilateral small plantar calcaneal spurs; hypertrophic changes heads of the 1st metatarsals bilaterally; cortical irregularity in the later aspect of the right 1st metatarsal may be related to degenerative changes.

[93] Dr. Waseem noted that in regard to his Report #1 recommendations, Ms. Kaur had attended two active rehabilitation sessions, had not tried the recommended coccyx donut, and had not undergone a mental health assessment.

[94] In the "Opinion" portion of Report #2, Dr. Waseem states as follows:

The need to attend to her terminally ill mother in 2018/2019 increased her neck and lower back pain and served as a barrier to attending rehabilitation.

I would have expected either temporary relief of symptoms or long-term improvement with the interventions listed in my previous report. However, given her diagnosis of chronic pain and her overall trajectory post-accident, more likely than not pain would have persisted despite these treatments.

I would recommend the treatments outlined in my earlier report.

With the above interventions, I am hopeful she will improve to the extent that she can work more from the office, increase her involvement in her household chores and return to most of usual recreational activities.

[Emphasis added.]

- [95] On cross-examination, Dr. Waseem was advised that Ms. Kaur had testified in court that the physiotherapy taken after her mother's death had been very beneficial and that she had, in fact, regained her March 2019 Position by mid-November 2019. Asked whether that information would have been material to his opinion, Dr. Waseem agreed that it would have.

V. Discussion

A. Credibility

- [96] There are many cases that deal with credibility in the context of subjective complaints and self-reported symptoms in particular. In *Afework v. Correa*, 2019 BCSC 1672, Justice Giaschi provided a listing of the relevant cases:
- [10] The defendants refer me to *Karim v Li*, 2015 BCSC 498 at paras. 86-89; *Dhaliwal v. Greyhound Canada Transportation Corp.*, 2015 BCSC 2147 at paras. 280-282, varied on other grounds at 2017 BCCA 260, *Edmonson v. Payer*, 2011 BCSC 118 at paras. 36-37, *aff'd* 2012 BCCA 114, and various other cases for the principles applicable to an assessment of credibility where there is little objective evidence of a plaintiff's self-reported symptoms. I have considered those cases and accept that the plaintiff's evidence must be carefully scrutinized, in particular, her injuries of subjective complaints. However, as set out in *Bradshaw v. Stenner*, 2010 BCSC 1398, at para. 186, *aff'd* 2012 BCCA 296, the overriding consideration is whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time:
- [186] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 1919 CanLII 11 (SCC), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis* (1926), 31 O.W.N. 202 (Ont.H.C.); *Faryna v. Chorny*, 1951 CanLII 252 (BC CA), [1952] 2 D.L.R. 354 (B.C.C.A.) [*Farnya*]; *R. v. S.(R.D.)*, 1997 CanLII 324 (SCC), [1997] 3 S.C.R. 484 at para. 128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (*Farnya* at para. 356).
- [97] I agree that these are the relevant cases and principles for the assessment of credibility in this matter.
- [98] This case turns primarily on the credibility of Ms. Kaur and, to a much lesser degree, that of her husband, Mr. Krishna.

[99] The following outline of principles provided by Justice Abrioux (as he then was) in *Karim v Li*, 2015 BCSC 498, is of assistance:

[89] In addition, the following principles should be taken into account by the trier of fact:

- no one can expect compensation in the absence of convincing evidence that complaints of pain are true reflections of a continuing injury: *Price v. Kostyba* (1982), 70 B.C.L.R. 397 at 399 (S.C.);
- every injured person has a different understanding of his or her own complaints and injuries and it falls to judges to translate injuries to damages: *Price* at 397;
- where there is little or no objective evidence of continuing injury and where complaints of pain persist for long periods extending beyond the expected resolution, the court should be exceedingly careful to assess assertions in light of the surrounding circumstances including the medical evidence: *Price* at 399; *Tai v. De Busscher*, 2007 BCCA 371 at para. 41;
- it is the doctor's function to take the patient's complaints at face value and offer an opinion based on them and it is for the court to assess credibility. If there is a medical or other reason for the doctor to suspect the plaintiff's complaints are not genuine, are inconsistent with the clinical picture or are inconsistent with the known course of such an injury, the court must be told of that. But it is not the doctor's job to conduct an investigation beyond the confines of the examining room: *Edmondson v. Payer*, 2011 BCSC 118 at para. 77, *aff'd* 2012 BCCA 114; and

in the absence of objective signs of injury, the court's reliance on the medical profession must proceed from the facts it finds, and must seek congruence between those facts and the advice offered by the medical witnesses as to the possible medical consequences and the potential duration of the injuries: *Fan (Guardian ad litem of) v. Chana*, 2009 BCSC 1127 at para. 73, *aff'd* 2011 BCCA 516.

[100] I find Ms. Kaur's testimony extremely problematic. On several critical points her testimony in court differed significantly from that given at her March 2019 discovery, and her court testimony was then reluctantly walked back by her after being confronted with her earlier statements.

[101] Further, while Ms. Kaur testified that she knew and understood that it was important to provide full and accurate information to Dr. Waseem, and testified that she had done so, I find she did not.

[102] I have already made findings regarding her March 2019 Position. Ms. Kaur's interview for Report #1 took place on April 14, 2019. Thus, she either overstated her actual symptoms to Dr. Waseem at the time of that interview or she failed to advise him that her symptoms had only been very recently worsened in caring for her mother. Either way, Dr. Waseem was given an inaccurate picture of her recovery trajectory.

- [103] It is patently evident that the information she provided to Dr. Waseem in February 2020 for his Report #2 was misleading. As she testified in court, Ms. Kaur had, in fact, regained her March 2019 position by mid-November 2019. I find her February statements to Dr. Waseem in February 2020 were knowingly and deliberately misleading.
- [104] Ms. Kaur's suggestion that she denied having any emotional issues from the accident at her March 2019 discovery because she felt culturally obliged to be stoic is not credible. A few weeks after the accident, she readily told Dr. Gan that she felt down, frustrated and guilty. She obtained a note from Dr. Ngui to support her assertion of care-giver burnout in support of her request to work from home full-time while looking after her mother. She applied for leave from work and disability benefits based on her emotional state after her mother's death. She attended grief counselling after her mother's death. I find Ms. Kaur's answer on discovery was accurate, not stoic.
- [105] With regard to Ms. Kaur's unwillingness to supervise her daughter's efforts to learn how to drive, the task is objectively stressful, and likely more so than usual given that her daughter suffers from anxiety.
- [106] The evidence as to whether Ms. Kaur has herself resumed driving is conflicting - she told Dr. Waseem in 2019 that she had, but denied both the statement and the fact in court. No explanation was proffered as to why Dr. Waseem would have made a specific note of something that she did not say. In any event, there is no evidence before me about how much she drove before the accident or whether she was ever a confident driver.
- [107] The evidence discloses that her mother's illness and death were exceptionally hard on Ms. Kaur and the family. Ms. Kaur was very close to her mother, cared for her personally throughout most of her illness, and was grief-stricken following her death. The entire family had to adjust to these circumstances. For example, prior to April 2019, Ms. Kaur's mother did most of the cooking. Ms. Kaur's daughter stepped up to that task when her grandmother deteriorated, while Ms. Kaur was, in turn, called upon to act as her mother's care-provider.
- [108] Aside from the practical and emotional impacts of Ms. Kaur's mother's illness and death during 2018 and 2019, the testimony regarding family dynamics discloses no more than the friction and inconvenience of everyday life. As Mr. Krishna observed, teenagers are teenagers. Children are traditionally given more responsible chores as they age. Ms. Kaur's children were 14 and 18 at the time of trial, whereas they were 10 and 14 at the time of the accident. It is not surprising that they contribute more to the household now than they did in 2015, especially given Ms. Kaur need to act as a care-provider during her mother's illness and her emotional condition following her mother's death.

[109] I am generally reluctant to put much weight on Mr. Krishna's evidence regarding the impact of Ms. Kaur's injuries on her or the family. His testimony tended to be overstated and even hyperbolic. For example, he described their daughter's childhood as having been "stolen" from her by the premature assignment of household responsibilities. I have already commented on his portrayal of Ms. Kaur's drinking.

B. Causation & Injuries

[110] There is no dispute regarding the general law of causation. Both parties accept that there is a "but for" test, and that only a substantial connection between the injury and the negligence needs to be established: *Athey v. Leonati*, [1996] 3 S.C.R. 458. It is agreed that "substantial" requires something outside of the de minimus range.

[111] I accept Dr. Waseem and Ms. Lee's evidence that Ms. Kaur's pre-accident massage and chiropractic treatments do not indicate pre-existing injuries.

[112] I accept Dr. Waseem's evidence that Ms. Kaur suffers from chronic myofascial cervical pain and chronic mechanical pain localized on her coccyx. Dr. Waseem testified these injuries were caused by the accident and the defendants did not dispute the assertion.

[113] Ms. Kaur's statements to Dr. Gan about being down and frustrated are typical complaints made shortly following an injury. I find Ms. Kaur suffered no mood disturbances or emotional issues as a result of the accident.

[114] With regard to the prognosis for the plaintiff's neck and lower back injuries, I conclude that the misleading information given to Dr. Waseem deprives his Report #2 of evidentiary value.

[115] As above, I have also concluded that the plaintiff did not provide Dr. Waseem with full and accurate information for Report #1. However, I accept the prognosis set out in Dr. Waseem's Report #1 is nonetheless of general application. Ms. Kaur has yet to complete a course of active rehabilitation, which Dr. Waseem described as the cornerstone treatment for her injuries and which he opined could eliminate some or all of her symptoms. Dr. Waseem's Report #1 indicates significant potential for symptom improvement by active rehabilitation. (As does, for that matter, even his Report #2.)

[116] With regard to her localized coccyx pain, Ms. Kaur has not tried the coccyx donut recommended by Dr. Waseem. The recommendation is easily enough followed. While Ms. Kaur claims an inability to sit for extended periods as a core impairment to her lifestyle, she has not seen fit to try the donut. In my view, this reflects poorly on her assertion that sitting does, in fact, cause anything more than quite modest discomfort.

[117] Finally, I note again the plaintiff's admission on cross-examination as to the frequency of her pain at present: i.e., neck pain a few times a week and lower back pain every few weeks, for which pains she takes Advil or Celebrex a couple times each month. On the evidence that Ms. Kaur's symptoms are presently mild and there is significant potential for improvement from there.

1. Future Contingencies

[118] The possibility the plaintiff's condition will improve in the future should be taken into account. Hypothetical events, such as what would have happened but for the accident, and what may happen in the future are assessed according to the framework set out in *Grewal v. Naumann*, 2017 BCCA 158:

[48] . A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation. If the plaintiff establishes a real and substantial possibility, the Court must then determine the measure of damages by assessing the likelihood of the event

[119] As above, I am satisfied, on the basis of the medical evidence, that there is a real and substantial possibility the plaintiff's symptoms will significantly improve in the future. In my opinion, that possibility is easily 50 percent.

2. Duty to Mitigate

[120] The defendants assert that Ms. Kaur should have taken physiotherapy treatment and active rehabilitation when they were first recommended to her following the accident. It is further submitted that she ought, in any event, to have completed a course of active rehabilitation following Dr. Waseem's Report #1.

[121] A plaintiff is required to take all reasonable steps to reduce her damages, including taking recommended treatments. Whether the plaintiff acted reasonably is a question of fact to be determined in all of the circumstances: *Gilbert v. Bottle*, 2011 BCSC 1389 at paras. 201 and 202.

[122] A reduction may be made for the failure to mitigate where the defendant meets the two-part test set out in *Chiu v. Chiu*, 2002 BCCA 618:

[57] The onus is on the defendant to prove that the plaintiff could have avoided all or a portion of his loss. In a personal injury case in which the plaintiff has not pursued a course of medical treatment recommended to him by doctors, the defendant must prove two things: (1) that the plaintiff acted unreasonably in eschewing the recommended treatment, and (2) the extent, if any, to which the plaintiff's damages would have been reduced had he acted reasonably. These principles are found in *Janiak v. Ippolito*, [1985] 1 S.C.R. 146.

- [123] It was not unreasonable for Ms. Kaur not to immediately pursue the physiotherapy recommendations made by the walk-in clinic physician and by Dr. Gan. Ms. Kaur testified that Dr. Gan said he was content with her putting physiotherapy off while she tried chiropractic and massage therapy treatments. There is no evidence to the contrary.
- [124] However, later in 2016, the plaintiff attended physiotherapy for her foot. At that time, both of the doctors she had seen had specifically recommended physiotherapy for her neck and back and she had resisted because she did not want to add more treatments, but at this point she was going to physiotherapy anyway. It was unreasonable not to seek treatment for her neck and lower back when she was going for physiotherapy in any event. The fact that the physiotherapy taken in 2019 was very beneficial leads me to conclude that it would also have been beneficial at that earlier point of time.
- [125] When Ms. Kaur began seeing Dr. Ajaere in 2017, he recommended physiotherapy and active rehabilitation. Again, the plaintiff testified that she told Dr. Ajaere that she was taking chiropractic and massage therapy treatments and that she did not want to take too many treatments at the same time.
- [126] In April 2019, Ms. Kaur told Dr. Waseem that she did not follow up regularly with Dr. Ajaere because "her condition ha[d] stabilized and no further treatment recommendations have been forthcoming from him." That is inaccurate. Dr. Ajaere had recommended physiotherapy and active rehabilitation, and the plaintiff had actively resisted in favour of other treatments. It was apparent during 2018 that, as Ms. Kaur testified, chiropractic and massage treatments were providing only short term relief and Ms. Kaur wasn't progressing in her recovery. Dr. Ajaere's recommendations remained outstanding. I find it was unreasonable for her not to have pursued Dr. Ajaere's recommendations by at least mid-2018.
- [127] Dr. Waseem's Report #1 is dated April 26, 2019, which is approximately the same time Ms. Kaur's mother began to markedly deteriorate. After her mother's death, Ms. Kaur started active rehabilitation as recommended by Dr. Waseem, but only attended two sessions. I accept that Ms. Kaur's failure to pursue active rehabilitation treatment under Report #1 until several weeks after her mother's death was reasonable in the circumstances. However, Dr. Ajaere's recommendations for physiotherapy and active rehabilitation had been outstanding since he made them in 2017.
- [128] I note that Ms. Kaur's work from home arrangement started in 2017, and that Ms. Russell testified that she agreed to the arrangement in order to make it easier for Ms. Kaur to attend treatments. Ms. Kaur's failure to pursue physiotherapy and active rehabilitation during 2018 was unreasonable. I will discuss the impact of Ms. Kaur's failure to mitigate under the relevant heads of damage.

C. Assessment of Damages

1. Loss of Future Earning Capacity

- [129] The plaintiff asserts that she has suffered a loss of future earning capacity and seeks damages based on a capital asset approach: *Hoy v. Williams*, 2014 BCSC 234 at paras. 153-60. She asserts that an award approximating two years of her current salary is warranted.
- [130] As set out in *Perren v. Lalari*, 2010 BCCA 140, in order to be entitled to an award for loss of earning capacity a plaintiff must prove the following:
- [32] A plaintiff must always prove, as was noted by Donald J.A. in *Steward*, by Bauman J. in *Chang*, and by Tysoe J.A. in *Romanchych*, that there is a real and substantial possibility of a future event leading to an income loss. If the plaintiff discharges that burden of proof, then depending upon the facts of the case, the plaintiff may prove the quantification of that loss of earning capacity, either on an earnings approach, as in *Steenblok*, or a capital asset approach, as in *Brown*. The former approach will be more useful when the loss is more easily measurable, as it was in *Steenblok*. The latter approach will be more useful when the loss is not as easily measurable, as in *Pallos* and *Romanchych*. A plaintiff may indeed be able to prove that there is a substantial possibility of a future loss of income despite having returned to his or her usual employment. That was the case in both *Pallos* and *Parypa*. But, as Donald J.A. said in *Steward*, an inability to perform an occupation that is not a realistic alternative occupation is not proof of a future loss.

[Emphasis in original.]

- [131] There is no evidence that Ms. Kaur was, is or will be unable to perform full-time work duties at the office. During the first year following the accident - her most symptomatic period - Ms. Kaur continued to work in the office. Ms. Russell allowed Ms. Kaur to work from home in 2017 to make it easier for her to attend appointments. A less sympathetic manager might equally have suggested she arrange for her treatments to take place closer to the office.
- [132] There is no convincing evidence that Ms. Kaur needed to work from home, as opposed to found it convenient. She agreed that she can take breaks and move around as she likes while working in the office, and that the office has stand up desks available for her use.
- [133] Nor is there evidence that Ms. Kaur is unable to commute. As noted above, she did so during the first year after the accident. She agreed she could use a rolling case for her laptop, and that there are courtesy seats on public transit.
- [134] In my view, Ms. Kaur is attempting to reverse engineer the fact that Ms. Russell was an accommodating manager, into evidence that she requires a medical accommodation. She then, in turn, asserts that her ongoing need for medical accommodation impairs her employment opportunities. In fact, Ms. Russell gave Ms. Kaur a discretionary benefit - she accommodated a favoured employee, not a medical disability. That the Finance manager was not equally flexible is not evidence of disadvantage.

[135] As it has not been established on the evidence that Ms. Kaur needs to work from home due to injury, it is unnecessary to consider whether working from home part-time might impair her career advancement.

[136] The evidence does not establish a real and substantial likelihood that Ms. Kaur's career will be stifled as a result of the accident. It similarly fails to establish a real and substantial possibility that she has been rendered less able to continue to work or less valuable as an employee as a result of her injuries.

[137] No future loss of earning capacity has been established.

2. Past and Future Loss of Housekeeping Capacity

[138] Both parties cite the law as set out in *Kim v. Lin*, 2018 BCCA 77:

[27] This case requires the Court to again consider the proper approach to the somewhat vexing issue of valuing loss of housekeeping capacity. The difficulty with these types of cases arises from the challenge of understanding the true nature of the loss a plaintiff suffers when they are unable to perform household tasks.

[28] In *McTavish v. McGillivray*, 2000 BCCA 164, this Court observed that loss of housekeeping capacity could be compensated by a pecuniary or non-pecuniary award: at para. 73. The types of circumstances which may determine whether a loss is more properly considered pecuniary or non-pecuniary were recently discussed by this Court in *Liu*:

[26] It lies in the trial judge's discretion whether to address such a claim as part of the non-pecuniary loss or as a segregated pecuniary head of damage. In *McTavish* at paras. 68-69, the Court suggested that treating loss of housekeeping capacity as non-pecuniary loss may be best suited to cases in which the plaintiff is still able to perform household tasks with difficulty or decides they need not be done, while remuneration in pecuniary terms is preferable where family members gratuitously perform the lost services, thereby avoiding necessary replacement costs.

...

[30] Professors Cassels and Adjin-Tetty in *Remedies: The Law of Damages*, 3d ed (Toronto: Irwin Law Inc., 2014) at 187-188, draw a distinction between cases of pecuniary and non-pecuniary loss on the basis of whether a plaintiff has actually lost the capacity to perform housework:

Where the plaintiff continues to perform the tasks but with difficulty, requires more time to complete tasks, or manages to get by without doing or intending to do these tasks, the loss may be compensated for as part of non-pecuniary damages for pain and suffering and loss of amenity. Specifically, compensation is intended for the plaintiff's pain in persevering with housework, loss of satisfaction in not contributing to the upkeep of one's home, and/or for having to live with a disordered and perhaps not a well-functioning home. There may be a fine line between situations of diminished capacity to perform tasks and when the plaintiff completes tasks with difficulty. Care needs to be taken in making these distinctions to ensure fairness to both plaintiff and

defendant. A pecuniary award may be appropriate where the evidence indicates that a reasonable person in the plaintiff's circumstances should not be expected to continue to perform the tasks in question due to their injuries. Such a position avoids prejudicing plaintiffs who are stoic, or are unable to benefit from gratuitous services or afford to hire replacement services prior to trial.

[Footnotes omitted.]

[Emphasis added.]

[139] The evidence discloses that Ms. Kaur is capable of performing her usual household activities, but needs to pace herself to accomplish certain tasks. This is consistent with Ms. Kaur's testimony in court, and with what Ms. Kaur told Dr. Waseem in her Report #1 interview.

[140] To the extent that the children now have household chores, those responsibilities are consistent with their increased maturity.

[141] To whatever extent it might be argued that cooking is a significant responsibility for an 18 year old, it is a situation that arose out of Ms. Kaur's mother's illness, Ms. Kaur's care-taking responsibilities and Ms. Kaur's reaction to her mother's death, not a consequence of the accident.

[142] Ms. Kaur prefers to have household duties and cleaning in particular carried out in a particular way and on a particular schedule, and she is currently unable to do them herself in the same way that she did before the accident. That is a matter for non-pecuniary damages. There is no award for loss of housekeeping capacity.

3. Cost of Future Care

[143] The applicable law regarding cost of future was neatly summarized by Mr. Justice Kent in *Dzumhur v. Davoody*, 2015 BCSC 2316 at para. 244:

[244] The principles applicable to the assessment of claims and awards for the cost of future care might be summarized as follows:

- the purpose of any award is to provide physical arrangement for assistance, equipment and facilities directly related to the injuries;
- the focus is on the injuries of the innocent party... Fairness to the other party is achieved by ensuring that the items claimed are legitimate and justifiable;
- the test for determining the appropriate award is an objective one based on medical evidence;
- there must be: (1) a medical justification for the items claimed; and (2) the claim must be reasonable;
- the concept of "medical justification" is not the same or as narrow as "medically necessary";

- admissible evidence from medical professionals (doctors, nurses, occupational therapists, et cetera) can be taken into account to determine future care needs;
- however, specific items of future care need not be expressly approved by medical experts..... It is sufficient that the whole of the evidence supports the award for specific items;
- still, particularly in non-catastrophic cases, a little common sense should inform the analysis despite however much particular items might be recommended by experts in the field; and
- no award is appropriate for expenses that the plaintiff would have incurred in any event.

See *Andrews v. Grand & Toy Alberta Ltd.*, 1978 CanLII 1 (SCC), [1978] 2 S.C.R. 229; *Krangle v. Brisco*, 2002 SCC 9; *Milina v. Bartsch* (1985), 1985 CanLII 179 (BC SC), 49 B.C.L.R. (2d) 33 (S.C.), aff'd (1987), 49 B.C.L.R. (2d) 99 (C.A.); *Aberdeen v. Langley Township*, 2008 BCCA 420; *Gregory v. ICBC*, 2011 BCCA 144; *Jacobsen v. Nike Canada Ltd.* (1996), 1996 CanLII 3429 (BC SC), 19 B.C.L.R. (3d) 63 (S.C.); *Penner v. ICBC*, 2011 BCCA 135; *Shapiro v. Dailey*, 2012 BCCA 128.

[144] Adjustment and contingencies must be accounted for in an award of future costs, as noted by Madam Justice Sharma in *Sharma v. Chui*, 2019 BCSC 2115:

[120] Assessment of damages under this head is complicated by the necessity to predict the future based on the evidence, but also make adjustments for contingencies: *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at para. 21. In *Bystedt v. Hay*, 2001 BCSC 1735 at para. 163, the court stated that the claim for cost of future care must be supported by evidence that demonstrates what a reasonable person of ample means would provide to meet the reasonable needs of the plaintiff. This is assessed on an objective basis that is fair to both parties.

[121] However, the court must have some assurance that the plaintiff will incur the costs. Damages should not be awarded under this head if it is unlikely the plaintiff will avail herself of the services in future: *Maltese v. Pratap*, 2014 BCSC 18 at para. 78. In addition, whether adjustments are necessary to account for contingencies that are either positive (improvement in the plaintiff's condition) or negative (additional care will be required) depends on the specific care needs of each plaintiff: *Langille v. Nguyen*, 2013 BCSC 1460 at para. 234.

[145] Ms. Kaur's claim for cost of future care is based on annual chiropractic and massage therapy treatments.

[146] As noted above, she receives a number of these treatments through her Vancity extended healthcare coverage. The defendants argued, without citing any authority, that any award should take into account Ms. Kaur's use of massage therapy and chiropractic treatment benefits under her employer plan.

[147] The plaintiff cites the principle established in *Cunningham v. Wheeler*, [1994] 1 S.C.R. 359. Justice Dardi recently provided an overview of British Columbia cases considering the principle in the context of future care costs awards in *Brooks v. Habib*, 2019 BCSC 1398:

[362] Any potential reduction in an award for future care cost is rooted in the fundamental principle for compensation in tort law that a plaintiff is only entitled to be placed in the position they would have been in absent the defendant's negligence. The application of the private insurance exception operates as an exception to the strict application of the compensation principle.

[363] The private insurance exception was expounded upon by Justice Cory, for the majority, in *Cunningham v. Wheeler*, [1994] 1 S.C.R. 359 at 401 [Cunningham]:

Recovery in tort is dependent on the plaintiff establishing injury and loss resulting from an act of misfeasance or nonfeasance on the part of the defendant, the tortfeasor. I can see no reason why a tortfeasor should benefit from the sacrifices made by a plaintiff in obtaining an insurance policy to provide for lost wages. Tort recovery is based on some wrongdoing. It makes little sense for a wrongdoer to benefit from the private act of forethought and sacrifice of the plaintiff.

[364] More recently, Mr. Justice Cromwell in *IBM Canada Limited v. Waterman*, 2013 SCC 70 [Waterman] clarified that the private insurance exception applies not only to insurance benefits in the strict sense but to other benefits to which an employee has contributed. He affirmed the core principle that benefits received by a plaintiff through private insurance are not deductible from damage awards (at para. 41).

[365] I also observe that if health care costs may be paid by a third party in the future and that party has a right of subrogation or could require repayment, no issue of double recovery arises and therefore there is no sound basis for reducing an award: *Kanters v. Galasinao*, 2015 BCSC 1532 [Kanters].

[366] There is a dearth of appellate consideration in B.C. of the impact of benefits payable pursuant to a health insurance plan upon an award for the cost of future care. The jurisprudence in this Court on the point is unsettled.

[367] In determining a reasonable award for future care costs, some courts have applied a deduction if a plaintiff had health benefits plan or health insurance through their employment: *Chappell* at para. 276; *Clayton v. Barefoot*, 2018 BCSC 239 at paras. 232-233; *Harvey v. Yanko*, 2007 BCSC 216 at para. 92. In *Chappell*, I note that the private insurance exception does not appear to have been raised by the parties in the context of the future care costs claim.

[368] In *McCartney v. McArthur*, 2014 BCSC 2164, the Court refused to make an award for future care costs because the plaintiff was entitled to benefits under an extended health care benefits plan.

[369] In *Tabet v. Hatzis*, 2013 BCSC 1167, Madam Justice Dickson (when she was a member of this Court) held that future health care benefits "should not be deducted from the cost of future care award based on the principles enunciated in *Cunningham*". Other cases in which the court has rejected the applicability of any deduction in the future care cost award on account of the plaintiff's health care insurance include *Bains v. Prasad*, 2005 BCSC 1694; *McLeod v. Goodman*, 2014 BCSC 839; *Dhanji v. Holland*, 2015 BCSC 1351; and *Provost v. Bolton*, 2018 BCSC 1090.

[370] In *Kanters*, Mr. Justice Blok instructively observed:

[321] First, extended health coverage was a benefit associated with Ms. Kanters' employment. Collateral benefits are not deducted from an award where an employee has paid or contributed to the cost of coverage. As noted in *Cooper-Stephenson, Personal Injury Damages in Canada*, 2nd ed. (Scarborough: Carswell, 1996) at p. 608: "It will now be very rare for a court to hold that benefits in the nature of insurance were not in some way contributed to by an employee". The defendant did not refer to or lead evidence suggesting otherwise. Second, a sample claim form in evidence at trial requires the employee to disclose whether the claim results from a motor vehicle accident, and if so, it requires that the claim be first submitted to the automobile insurer. This suggests the insurer would subrogate or require repayment in some fashion. Third, there is a right of subrogation at common law and so the absence of an express subrogation provision in the plan may not be determinative of the issue

[Emphasis added.]

[371] In my view, the weight of the authorities supports the proposition that future benefits from a health insurance plan for which a plaintiff has paid or contributed through his or her employment are collateral benefits that fall directly within the private insurance exception and are not properly deducted from the cost of a future care award.

[148] The fact that Pacific Blue Cross has sought repayment for the chiropractic and massage therapy treatments to date satisfies me that Ms. Kaur's work benefits should be considered collateral insurance benefits.

[149] In oral testimony, Dr. Waseem recommended intermittent passive treatment at eight sessions per year. Dr. Waseem was not asked to revisit that number in light of Ms. Kaur's testimony regarding her symptoms as at March 2019 and at the time of trial. I am satisfied that the number should be adjusted to take her actual frequency of symptoms into account. I find four to be a reasonable number of annual treatments in the circumstances.

[150] As Dr. Waseem framed it simply as a passive modality treatment of choice, I will allow \$90 per treatment resulting in \$360 per year up to age 65. The present value of that amounts to \$6,120.

[151] As above, I have assessed Ms. Kaur's real and substantial possibility of improvement post-trial at 50 percent, and thus the award for cost of future care is to be reduced accordingly, for an award of \$3,060.

4. Non-Pecuniary Damages

[152] Non-pecuniary damages are awarded to compensate for pain, suffering, loss of enjoyment of life, and loss of amenities. The award should be fair to all parties. Fairness is assessed as against comparable cases, but keeping in mind that every case necessarily presents a unique combination of facts: *Trites v. Penner*, 2010 BCSC 882 at paras. 188-189.

[153] The proper approach and a non-exhaustive list of factors for consideration were set out in *Stapley v. Hejslet*, 2006 BCCA 34:

[44] Thus, we are left to apply the so-called "horizontal" comparative approach outlined in *Boyd* at para. 41:

[41] Our first task is to determine whether the decisions cited by the appellant are reasonably comparable to this case and whether they suggest a range of acceptable awards. Then, we must determine whether this award is within that range and, if not, whether it falls so substantially outside the range that it must be adjusted.

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

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

[Emphasis original.]

[46] The inexhaustive list of common factors cited in *Boyd* that influence an award of non-pecuniary damages includes:

- (a) age of the plaintiff;
- (b) nature of the injury;
- (c) severity and duration of pain;

- (d) disability;
- (e) emotional suffering; and
- (f) loss or impairment of life;

I would add the following factors, although they may arguably be subsumed in the above list:

- (g) impairment of family, marital and social relationships;
- (h) impairment of physical and mental abilities;
- (i) loss of lifestyle; and
- (j) the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff: *Giang v. Clayton*, [2005] B.C.J. No. 163 (QL), 2005 BCCA 54).

[154] The plaintiff seeks an award in the range of \$80--100,000 and cites the following cases:

- *Merko v. Plummer*, 2016 BCSC 1403 - award of \$95,000: the plaintiff suffered from chronic myofascial pain in the neck, upper back and shoulder areas that put extreme limitations on what she could manage to do and her life had been "drastically altered by her injuries".
- *Odian v. Carriere*, 2016 BCSC 112 - award of \$100,000: the plaintiff experienced ongoing neck pain and headaches and had given up much of her previous recreational activities. Her relationships with her husband and children were impacted and she experienced a loss of confidence in self and career abilities.
- *Blackman v. Dha*, 2015 BCSC 698 - award of \$80,000: the plaintiff experienced recurring neck pain and resulting headaches but was a stoic person. She continued to work full-time but experienced intermittent pain which had some impact on her recreational activities, relationships and emotions.

[155] The defendants rely on the following cases in the range of \$30,000--50,000:

- *Pond v. Bucsis*, 2013 BCSC 2001 - award of \$30,000 (\$33,000 today): the plaintiff was a 45 year old part-time care aide at the time of the accident. After the accident she moved to Alberta and obtained a similar employment position. The plaintiff sustained persistent soft tissue injuries to her neck and shoulder area that were neither severe nor constant, but were chronic and permanent. The injuries had a modest effect on her recreation activities and family relationships. There were no significant changes to her lifestyle.
- *Erwin v. Buhler*, 2017 BCSC 362 - award of \$40,000: the plaintiff was a 53 year old journeyman working for the Vancouver School Board at the time of the accident. He suffered neck, shoulder and low back injuries from the accident. These symptoms had mostly resolved within one year of the accident, except for intermittent back, neck and shoulder problems related to activity. The plaintiff's compensable injuries were found to co-exist with his non-compensable injuries, namely trochanter bursitis. The court found that his neck and back injuries would continue to affect him in the future.

· Cegielka v. Grace, 2020 BCSC 115 - award of \$40,000: the plaintiff was 32 year old male carpenter with mild ongoing neck and back pain resulting from the accident. The court found that the plaintiff had overstated the impact of the accident and understated the impact of other unrelated events in his life, including his wife's difficult pregnancy and his first child's illness.

· Thorson v. Vandop, 2016 BCSC 221 - award of \$50,000: The plaintiff was a 35 year old addictions counsellor at the time of the accident. The plaintiff would continue to experience periodic, mild pain in her neck and shoulders, often causing headaches. The plaintiff's relationship with her husband had suffered as a result of increased irritability caused by her pain and stress over the situation. The plaintiff's recreational activities had also been curtailed. Prior to the accident she was engaged in an "aggressive" fitness regime, whereas she now did a low impact maintenance program. The plaintiff continued to perform household chores, albeit with increased difficulty and discomfort. The plaintiff continued to work full-time.

· Brass v. Von Chudentiz, 2020 BCSC 343 - award of \$50,000: The plaintiff was a 20 year old female involved in a single accident. The court found that the plaintiff had and would continue to experience upper back and left shoulder pain, but that with a well-managed active rehabilitation, her symptoms would become more manageable. The plaintiff's injuries were found to impact all aspects of her life including her work, social life, and recreational activity. Household capacity was addressed in her non-pecuniary award.

[156] Ms. Kaur has few and minor limitations as a result of the accident. She continues to work as before, but now consciously changes her position during the course of the day and takes breaks to stretch or walk. She makes occasional use of a stand up desk or raised work surface. She says she cannot remain seated for long in a chair or a car seat, but the fact that she has not been motivated to try the recommended coccyx donut persuades me that any actual impact is modest.

[157] Ms. Kaur's favourite activity is walking. Her evidence is that she used to walk 45-60 minutes on weather-permitting days. In 2018, she reported to her massage therapist that she was back to walking an hour a day. Ms. Khaira testified that the walks they presently go on are 45-60 minutes long. Ms. Khaira testified that she and Ms. Kaur do not walk as long, go as often, or proceed as briskly as they used to, and that they avoid hilly areas.

[158] Between the date of the accident and the date of trial, Ms. Kaur was hampered by plantar fasciitis, which she described as so painful to her that at times she could not put her foot down on a carpeted floor. She had physiotherapy treatment on her foot from mid through late 2016, and then saw a podiatrist for further treatment for a significant portion of 2017.

[159] While she claimed in testimony that her foot pain resolved in 2017, in April 2019 she told Dr. Waseem that her foot had been causing her pain for the last year. Dr. Waseem made an objective observation of plantar fasciitis in his Report #1. On the evidence, I conclude that notwithstanding her testimony, her foot caused her pain for a period of at least 12 months during 2018-2019.

- [160] In total, Ms. Kaur suffered unrelated foot pain over at least two and a half years of the four year period between accident and trial. I find that pain would have negatively impacted her participation in recreational and other activities (e.g., walking, tennis, and snowshoeing) irrespective of the accident.
- [161] Ms. Kaur can perform household duties, although presently not in the same manner and on the same schedule as prior to the accident. I accept that Ms. Kaur is very particular about the state of her home and that her inability to keep house as she did before causes her frustration. However, the amount of time she was called upon to dedicate to looking after her mother in 2019 would also have been a contributing factor.
- [162] I have concluded Ms. Kaur has no emotional issues as a result of the accident, and that the accident has had no impact on her relationships.
- [163] Overall then, Ms. Kaur's injuries were minor from the outset and she currently has only intermittent pain at significant intervals. Further, her present symptoms - such as they are - are likely to be significantly improved by taking recommended treatment.
- [164] The facts of this case are somewhat similar to those in Pond, but they are also akin to those in Cegielka, in that the plaintiff's post-accident situation has been very significantly impacted by facts and events wholly independent of the accident. The defendants are only responsible to the extent that they added to the burden that would have existed in any event.
- [165] I consider the amount of \$20,000 appropriate. Applying the 15 percent deduction for the failure to mitigate found above, the non-pecuniary award is \$17,000.

VI. Conclusion

[166] In summary, I make the following awards:

Special Damages: \$9,632.46

Loss of Earning Capacity: No award warranted

Loss of Housekeeping Capacity: No award warranted

Cost of Future Care: \$3,060

Non-Pecuniary Damages: \$17,000

Total \$29,692.46

[167] Absent considerations I am presently not aware of, costs will follow the event and in accordance with R. 15-1(15). Either party may contact the Registry regarding further submissions if they wish to seek a different disposition of costs.

"Tucker J."

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