
CANADA / JUDGMENT

Kellett v. Stam

2018 BCSC 1127

COURT

Supreme Court of British Columbia

DECIDED

6 July 2018

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

2018 BCSC 1127 Kellett v. Stam

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Kellett v. Stam,

2018 BCSC 1127

Date: 20180706

Docket: M152695

Registry: Vancouver

Between:

Karen Kellett

Plaintiff

And

Jacobje Stam

Defendant

Before: The Honourable Madam Justice Gerow

Reasons for Judgment

Counsel for Plaintiff:

J.M. Green

Counsel for Defendant:

R.F. Shirreff

Place and Date of Trial:

Vancouver, B.C.

April 9-13 & 16, 2018

Place and Date of Judgment:

Vancouver, B.C.

July 6, 2018

Table of Contents

Introduction. 3

Issues. 3

Background. 4

What are the nature and extent of the injuries suffered in the 2014 accident?. 5

Plaintiff's Position. 5

Defendant's Position. 6

Relevant Law. 7

Application of the Law to the Facts. 7

What is the appropriate award of general damages for pain and suffering?. 17

Applicable Law. 17

Application of the Law to the Facts. 18

Loss of Income or Income Earning Capacity. 21

Applicable Law. 22

Analysis. 24

Loss of Housekeeping Capacity. 27

Applicable Law. 27

Application of the Law to the Facts. 28

Cost of Future Care. 30

Applicable Law. 30

Analysis. 31

Mitigation. 33

Legal Parameters. 34

Application of the Law to the Facts. 34

Special Damages. 35

In-trust Claim.. 35

Conclusion. 36

Introduction

- [1] The plaintiff, Karen Kellett, was injured in a motor vehicle accident on March 10, 2014. The accident occurred at or near Britton Avenue and Sheffield Street in Chilliwack, B.C. when a vehicle driven by the defendant Jacobje Stam struck Ms. Kellett's vehicle. Ms. Kellett commenced this action against Mr. Stam seeking damages for the injuries she alleges she sustained in the accident.
- [2] Mr. Stam has admitted liability for the accident. As well, Mr. Stam concedes Ms. Kellett was injured in the accident. However, he disagrees about the nature, extent and impact of her injuries. Mr. Stam takes the position that Ms. Kellett has failed to mitigate her damages by not following medical recommendations for the treatment of her injuries.

Issues

- [3] The issues raised by the pleadings and submissions are:
1. What are the nature, extent and duration of the injuries Ms. Kellett suffered in the accident?
 2. What is the appropriate award for general damages for pain and suffering?
 3. What is the appropriate amount for loss of future income or future income earning capacity?
 4. What is the appropriate award for the cost of future care?
 5. What is the appropriate award for the loss of housekeeping capacity?
 6. What is the appropriate award for the "in trust" claim?
 7. Should the amount of damages awarded be reduced because of Ms. Kellett's failure to mitigate her damages?
- [4] The parties have agreed to the past wage loss in the amount of \$43,000. As well, special damages in the amount of \$2,000 have been agreed upon.

Background

- [5] Ms. Kellett is 61 years old and works as a social worker for the Ministry of Child and Family Development providing family support and child protection services. She has two adult sons and lives in Chilliwack, B.C.
- [6] As noted, Mr. Stam admits liability for the accident. Ms. Kellett testified that Mr. Stam ran a stop sign and she hit his car. The airbags in Ms. Kellett's vehicle deployed during the collision. Ms. Kellett does not recall being struck by the air bag but went to the hospital after the accident complaining of pain in her chest, neck, back, and hands.
- [7] Ms. Kellett testified that she was in good health prior to the accident and was able to meet her job requirements. Ms. Kellett and her co-workers all testified that the job of a child protection social worker can be very physical. Often they have to remove children from their families in stressful situations. From time to time they get into a threatening situation. Ms. Kellett testified that she did not have any problem with the job demands prior to the motor vehicle accident, including picking up and carrying children and car seats, taking notes, and driving to appointments.
- [8] Following the motor vehicle accident, Ms. Kellett's injuries required her to take nine months off work. She testified that she was bedridden for almost a month after the accident and required help from her son to dress. After the accident, Ms. Kellett's son, James Mason, moved into her house with his wife and four children. The evidence is that since moving in, Mr. Mason and his wife do most of the work around the house and yard.
- [9] Despite numerous treatments since the accident, Ms. Kellett continues to complain of ongoing physical symptoms, particularly in her hands and her back. Ms. Kellett says her ongoing symptoms restrict her work, household, community and physical activities, and have prevented her from baking and drawing.
- [10] Ms. Kellett testified that she has a hard time sitting or standing for any length of time since the accident. As well, she says she is not as emotionally strong as she was prior to the accident, and complains of mood problems.
- [11] Ms. Kellett had a subsequent motor vehicle accident in April 2017, when she ran over a road cone that was in the middle of the road. It hit the front of Ms. Kellett's car and travelled underneath. There was some damage to her vehicle. Ms. Kellett's evidence is that she tensed up when she saw the road cone and had extremely sore arms, hands and low back as a result. After the accident, Ms. Kellett missed a few days from work. The soreness in her legs resolved, and her hand pain and back pain returned to the same status as prior to the 2017 accident.

What are the nature and extent of the injuries suffered in the 2014 accident?

Plaintiff's Position

- [12] Ms. Kellett's evidence was that since the 2014 accident, she has suffered from debilitating thumb pain in both hands, and intermittent back pain that flares when she does activities, which previously did not cause her any problems, like yard work. Her pain has caused her to end activities that previously brought her joy, such as drawing, cake decorating, volunteering, and going for walks with her friends. Her pain causes her to leave work early and deprives her of the motivation to leave the office to go on visits to homes and schools. The pain saps her energy and she is exhausted when she gets home from work.
- [13] Ms. Kellett's ongoing hand and back pain have imposed and will likely permanently impose, a significant restriction on her enjoyment of life, both in its personal and work-related dimensions. There has been a marked restriction in her ability to join in family activities and participate fully in the lives her grandchildren. She is in at least continual discomfort in the home and workplace settings and her normal job functions increase her pain and discomfort. Living in Chilliwack, she must drive and driving causes her pain.
- [14] The effects of Ms. Kellett's injuries have been life changing. They have devastated her lifestyle and left her incapable doing the activities she most enjoyed. Although there are some prospects for improvement in her severe pain, those prospects are uncertain, and she is unlikely to ever be permanently free of pain, including in both her hands and in her lower back. Her injury has led to a change in her personality. Her friends and family have described her as less active and depressed since the accident. The accident has had negative effects on her relationships with her children, grandchildren, and friends.
- [15] Without surgery Ms. Kellett's hand problems will not improve. With surgery, she faces a real and substantial risk that it may be unsuccessful, coupled with long periods of casting, physiotherapy, and time off work.

Defendant's Position

- [16] The defendant concedes that the plaintiff suffered multiple injuries due to the motor vehicle accident. The defendant says the most significant areas of injury pertain to the carpometacarpal (CMC) joints of both her hands and her lower back. The defendant says the CMC joint condition of both hands is by far the most significant of the injuries sustained. The defendant says there is medical consensus that the motor vehicle accident caused a previously asymptomatic degenerative condition in the Ms. Kellett's hands to become symptomatic. The defendant submits the injuries to Ms. Kellett's hands have affected her life far more than any of the other injuries she sustained in the accident. Given the impact on Ms. Kellett's life of her hand injuries she should have taken advantage of all treatment modalities that offered pain relief and function improvement but she has failed to do so.

- [17] The medical doctors who have examined Ms. Kellett have recommended steroidal injections to the CMC joints and the use of thumb splints. Despite the pain and disability Ms. Kellett suffers, she has not elected to pursue certain recommended medical procedures to alleviate those issues.
- [18] The defendant concedes that Ms. Kellett suffers from mechanical lower back pain as a result of the accident, and that she is going to continue to experience intermittent annoying and possibly limiting lower back pain, especially with heavy lifting, heavy labour and sustained or repetitive bending, on a permanent basis.

Relevant Law

- [19] In order to establish causation Ms. Kellett must prove on a balance of probabilities that but for the accident she would not have suffered the injury she complains of.
- [20] The Supreme Court of Canada considered causation in *Clements v. Clements*, 2012 SCC 32. The Court confirmed that the basic test for determining causation remains the "but for" test articulated in *Snell v. Farrell*, [1990] 2 S.C.R. 311 and *Athey v. Leonati*, [1996] 3 S.C.R. 458. The plaintiff bears the burden of proving that but for the negligent act or omission of the defendant the injury would not have occurred.
- [21] The plaintiff is not required to establish that the defendant's negligence was the sole cause of his or her injuries. The tortfeasor must take his or her victim as the tortfeasor finds the victim, and is liable even if other causal factors, for which the defendant is not responsible, result in the victim's losses being more severe than they would be for the average person. At the same time, the tortfeasor need not put the victim in a better position than the victim would have been in, and need not compensate the victim for the effects of a pre-existing condition that the victim would have experienced in any event: *Athey* at paras. 34-35.

Application of the Law to the Facts

- [22] All of the doctors who examined Ms. Kellett agree she was injured in the accident and that her ongoing complaints are a result of the injuries she sustained.
- [23] Ms. Kellett's family doctor, Dr. Bradley Dueck, testified that Ms. Kellett had a herniated disc in 2006 in her back but recovered. In 2010, Ms. Kellett had a flare up of back pain from which she recovered without any invasive treatment. For the four years prior to the accident, Ms. Kellett had not complained of any back pain. Dr. Dueck's evidence is that prior to the accident, Ms. Kellett had never complained of thumb pain.
- [24] Dr. Maziar Badii, an expert in rheumatology with a special interest in the spine, provided an expert report and testified at the trial. Dr. Badii conducted an independent medical examination (IME) of Ms. Kellett on November 28, 2017 at the request of her counsel. Dr. Badii's opinion is that the accident rendered Ms. Kellett's previously asymptomatic osteoarthritis in the CMC joints of both hands symptomatic. As well, the accident produced

carpal tunnel syndrome in both hands and her right forearm, and aggravated her degenerative disc disease. Finally, his opinion is that the accident caused whiplash associated soft tissue injuries to her neck and back, and seatbelt related soft tissue injuries to Ms. Kellett's anterior chest and abdomen.

- [25] Dr. Badii notes that Ms. Kellett complains that her worst symptoms are in her hands. Dr. Badii believes the pain at the base of Ms. Kellett's thumbs is likely due to osteoarthritis in the CMC joints which was rendered symptomatic by the accident. The second type of hand symptoms Ms. Kellett reports are neurological in nature, in the form of numbness, tingling and weakness in the hands, with the right hand being worse. Dr. Badii's opinion is that the neurological symptoms are likely due to carpal tunnel syndrome (compression of the median nerve).
- [26] Dr. Badii's opinion is that Ms. Kellett sustained soft tissue injuries as well as aggravation of degenerative changes in her neck. These were accompanied by cervicogenic headaches during the first few months. Dr. Badii's opinion is that Ms. Kellett's lower back pain is likely due to aggravation of pre-existing degenerative disc disease and facet osteoarthritis. As well, she likely had aggravation of pre-existing foraminal stenosis (narrowing of the spinal canal) producing radicular pain (due to nerve root compression or irritation within the spinal canal). The leg pain has resolved. Ms. Kellett's continued right lower back pain is likely due to the aggravation of pre-existing degenerative changes and accident associated soft tissue injuries.
- [27] Dr. Badii's opinion is that Ms. Kellett has reached maximal medical improvement. In his opinion, Ms. Kellett will always have pain in the base of the thumbs. As well, she will always have a similar pattern of numbness and tingling in her right hand and mechanical pain in her lower back in the future with a baseline of tolerable pain and more severe flare ups with prolonged sitting or standing, and with strenuous physical activities.
- [28] Dr. Badii outlined the treatment options for Ms. Kellett's hands, including anti-inflammatory medication, topical anti-inflammatory medication, steroid injections around the CMC joints, a CMC brace, and surgical options. The anti-inflammatory is not recommended because Ms. Kellett suffers from gastrointestinal reflux. Surgery options include joint fusion or joint replacement. For her low back pain, Dr. Badii recommends physiotherapy and an exercise program. There is also the possibility of facet blocks and/or epidural steroid injections in her low back. Any benefit from the injections would not be expected to last more than three to six months and would have to be repeated at regular intervals.
- [29] Dr. Badii testified that the treatments for CMC joints are not that satisfactory. General pain medications can help to reduce the pain. He tries to stay away from injections because you can only get one or two drops into the area. Braces can be fairly effective for pain reduction but limit mobility and can get in the way of fine movements. Surgical options are only looked at in the most serious cases. Until recently, there was only an option to fuse the joint which creates a loss of function. Now there is surgery to replace the joints but it takes a long

time to rehabilitate. It would take a year for both hands if things went well.

- [30] Dr. Badii testified there is the possibility of injections to the facet joints for low back pain but injections to the disc are more difficult. Ms. Kellett's back pain is not just coming from the facet joints but also from the disc. Dr. Badii's experience is that patients will have 70% to 80% reduction in pain for a while. Dr. Badii's opinion is that it is safe to have injections every 4-6 months. Patients only have reduced pain for the first 2 ½ months after the injection. According to Dr. Badii injections are as limited as possible because if a person has too many injections they can have a build up of steroids in the system which can result in loss of bone mass. An acceptable risk for injections into the bone, which would be necessary in Ms. Kellett's case, is twice a year.
- [31] Dr. Zeeshan Waseem, an expert in physical medicine and rehabilitation, testified and provided an expert report. Dr. Waseem conducted an IME of Ms. Kellett on August 14, 2017, at the request of her counsel. Dr. Waseem reported that Ms. Kellett's thumb pain in both hands is her primary complaint. Ms. Kellett also complained of low back pain in the right sacroiliac joint region. Ms. Kellett reported to Dr. Waseem that she had initially experienced neck, right breast, chest and right leg pain, and headaches which have resolved. Ms. Kellett reported ongoing trouble sleeping due to pain and sleep apnea.
- [32] Dr. Waseem found the range of motion in both Ms. Kellett's cervical and thoracic spine was within normal limits and symmetric, and there was no notable muscle stiffness, increased muscle tone, spasms, taut bands or trigger points. Dr. Waseem also found no pain in palpation of the lumbar spine, or notable increased muscle tone, muscle stiffness, spasms, taut bands or trigger points in the area. He found pain to palpitation in the right sacroiliac joint (SI) and hypomobility in the SI joint. In his opinion, the asymmetry in the SI joints is indicative of SI joint dysfunction. Right lumbar bending was reduced by 5% with the remainder of the lumbar spine within normal range of motion. As well, Ms. Kellett reported increased pain in her right SI joint with lumbar spine movements. Range of motion was normal in Ms. Kellett's hips, knees and ankles.
- [33] Ms. Kellett reported pain when Dr. Waseem palpated the CMC joints of her hands, and with active and passive movement of the thumbs. Ms. Kellett had reduced movement and range of motion in her thumbs.
- [34] Dr. Waseem's states that based on his review of the records and her history, Ms. Kellett appears to have initially sustained sprain/strain injuries to her cervical and lumbar spines, bilateral thumbs, anterior chest wall and right breast, and developed headaches as a result of the accident. The headaches and injuries to her cervical spine, chest and breast have resolved. However, she continued to experience low back and thumb pain leading up to the accident in 2017. She reinjured her back and thumbs in the 2017 accident, temporarily exacerbating her symptoms, before the pain returned to her prior baseline. Dr. Waseem's opinion is that the injuries sustained in the 2014 accident have resulted in chronic mechanical low back pain secondary to right sacroiliac joint dysfunction and chronic

bilateral thumb pain secondary to CMC joint osteoarthritis. The accident rendered Ms. Kellett's previously asymptomatic osteoarthritis symptomatic.

- [35] It is Dr. Waseem's opinion that Ms. Kellett's current pain and limitations impact her ability to perform the more physically demanding aspects of her pre-accident household tasks. As well, Ms. Kellett's limitations resulting from her injuries have caused her to curb or stop activities she used to enjoy, and have impacted her ability to perform her job duties.
- [36] Dr. Waseem's opinion is that Ms. Kellett's prognosis for full recovery is poor. Some further improvement with treatment is possible, but in his opinion, Ms. Kellett will continue to experience pain. Pending any future surgical interventions, her physical condition will be permanent. Over the next 5 - 10 years there is a substantial risk of progression of the osteoarthritis of her thumbs, resulting in increased pain and loss of function.
- [37] Dr. Waseem recommended steroid injections into Ms. Kellett's CMC joints and right SI joint be considered. If conservative treatments or injections into the CMC joints fail to resolve her pain he recommends referral to a hand surgeon for a consideration of surgical options (fusion versus excisional arthroplasty). Dr. Waseem noted that if Ms. Kellett underwent surgery she would need up to 3 months off work and 6-8 weeks of hand therapy for each hand.
- [38] Dr. Waseem testified that if Ms. Kellett had a favourable response to the initial injection to the right SI joint, then the injections can be repeated at intervals of 3 - 6 months. If she did not have a favourable response she should not continue with them. Dr. Waseem's evidence is that the injections can be quite painful, there can be complications such as bleeding, and damage to nerves or blood vessels. Dr. Waseem testified he does the injections regularly and his patients have not had any complications. He tries to minimize the pain to the patient. If there is some improvement with the injections, further injections will be recommended. It is not uncommon to have two or three trial sessions.
- [39] Dr. Bertrand Perey, an expert in orthopaedic surgery, conducted an IME of Ms. Kellett on September 17, 2017, at the request of her counsel. Dr. Perey provided a report dated October 25, 2017, and was not required for cross examination. In his examination, Dr. Perey found localized tenderness to the CMC joints of both Ms. Kellett's thumbs. Stressing the joints caused crepitus and discomfort. Dr. Perey diagnosed Ms. Kellett with bilateral basilar joint arthritis in both her thumbs. Dr. Perey's opinion is that the accident caused her pre-existing asymptomatic arthritis in her thumbs to become symptomatic and was instrumental in accelerating the onset of her symptoms. Dr. Perey stated that once patients become symptomatic, they rarely become asymptomatic. Dr. Perey's opinion is that Ms. Kellett could have resolution of her thumb symptoms with surgery. After the surgery she would require six weeks of casting followed by another six weeks of physiotherapy. The likelihood of complete or near complete resolution of her symptoms is approximately eighty-five percent. Dr. Perey does not recommend intervention for the neurological symptoms in Ms. Kellett's hands. In his view, the relationship between the neurological symptoms and the motor

vehicle accident was unclear, and he does not believe they are related to the injuries to her neck.

- [40] Dr. Barry Vaisler, an expert in orthopaedic surgery, conducted an IME of Ms. Kellett on September 19, 2017, at the request of the defendant. Dr. Vaisler provided a report dated October 16, 2017. He was not required for cross-examination. He states that Ms. Kellett probably sustained a soft tissue injury to her neck and low back and developed the premature onset of symptomatic osteoarthritis of the CMC joint in both thumbs in the 2014 motor vehicle accident. In his opinion, it is possible that Ms. Kellett also sustained a contusion of the median nerves in the carpal tunnels of both hands as a result of the 2014 accident. At the time Dr. Vaisler assessed her, Ms. Kellett was no longer experiencing neurological symptoms and his opinion is that it is unlikely she have any future symptoms related to carpal tunnel. As well, the evidence was that Ms. Kellett had pre-existing intermittent pain in her neck on an occasional basis prior to the 2014 accident. Ms. Kellett's neck injury had returned to its pre-accident state.
- [41] Dr. Vaisler's opinion is that had not the accident occurred, it is more likely Ms. Kellett would have continued to experience occasional low back pain referred down her right leg on a permanent basis with no significant limitation. In the 2014 accident, Ms. Kellett sustained a soft injury to her low back. As a result she suffered from low back pain. Typical low back symptoms following a motor vehicle accident consist of low back pain with prolonged sitting and standing, sustained or repetitive bending, heavy lifting, heavy labour, fatigue at the end of the day and increased psychological stress. At the time Dr. Vaisler examined her, Ms. Kellett was experiencing persistent back pain three years post accident. Dr. Vaisler's opinion is that it is more likely than not that Ms. Kellett sustained a soft tissue injury to one or more lumbar facet joints as a result of the 2014 accident. Dr. Vaisler recommends that Ms. Kellett carry out a regular program of exercise, including a regular low impact fitness routine such as swimming, Pilates or yoga. Dr. Vaisler also recommends Ms. Kellett attend an active rehabilitation program to teach her how to minimize the pain she is experiencing. In Dr. Vaisler's opinion, even if she has further treatment Ms. Kellett will continue to experience intermittent annoying and possibly limiting low back pain, especially with heavy lifting, heavy labour and sustained or repetitive bending on a permanent basis, more intensely and more frequently than the back pain she was experiencing prior to the 2014 accident.
- [42] Dr. Vaisler's opinion the 2014 accident resulted in the premature onset of pain in Ms. Kellett's CMC joints of both thumbs. Typically symptoms associated with osteoarthritis of the CMC joint of the thumb consists of pain at the base of the thumb occurring especially with grip, grasp and pinch. Weakness of grip, grasp and pinch are commonly present and, as the range of motion becomes restricted as the osteoarthritis progresses, there is a reduced ability to grasp wide objects. Dr. Vaisler recommends Ms. Kellett be fitted with splints for both thumbs to restrict the movement of the thumb, and take anti-inflammatory medication and have occasional steroid and local anesthetic injections into the thumbs. In

his view, Ms. Kellett's persistent thumb pain for three years make it more likely that her thumb symptoms and limitations will persist and she will likely need reconstructive surgery on one or both hands within the next three to five years.

- [43] The surgery is carried out on a day care basis. Post-operatively the thumb would have to be protected by a wrist and thumb splint for approximately six weeks after which she would have physiotherapy. Recovery takes four to six months with an expected 85% to 90% improvement in pain. Strength and range of motion usually improve following surgery. Dr. Vaisler recommends a custom thumb splint that would allow full movement of the wrist but would be awkward to wear when writing, typing and fine precision handling. If Ms. Kellett undergoes the surgery, she will likely be off work for three to four months followed by a graduated return to work over the following one to two months, for each thumb. Dr. Vaisler opines that Ms. Kellett will probably have a 15% to 20% permanent loss of grip, grasp and pinch strength if she has surgery for her thumbs. As a result of her back symptoms from the injuries in the 2014 accident, there is a possibility that Ms. Kellett will have permanent limitations with respect to heavy lifting, heavy labour and sustained or repetitive bending.
- [44] Dr. Terry Estrin, an expert in psychology, prepared a report and testified. Dr. Estrin saw Ms. Kellett on December 22, 2017, for an independent psychological examination. Dr. Estrin subsequently conducted additional testing and a phone interview with Ms. Kellett. In Dr. Estrin's opinion, Ms. Kellett is suffering from driving-related anxiety related to the 2014 accident. Although Ms. Kellett does not meet all of the criteria for post traumatic stress syndrome and depression, Dr. Estrin is of the view she is suffering from mood symptoms that include dysphoria, anxiety and loss of pleasure. Dr. Estrin opined that Ms. Kellett suffers from profound exhaustion due to chronic pain which in turn limits her overall functioning. In his opinion, fatigue has dramatically lowered Ms. Kellett's quality of life. Dr. Estrin recommends Ms. Kellett would benefit from attending a nine week program in Mindfulness Based Stress Reduction, participation in a trauma therapy treatment and psychological counselling to aid her in adapting to her injuries.
- [45] Stephanie Chauhan, an occupational therapist, provided a report on Ms. Kellett's functional capacity. Ms. Kellett attended a full day of functional capacity testing on December 14, 2017. Ms. Chauhan conducted functional tests of Ms. Kellett's hands and found that she demonstrated reduced grip strength and increased pain during grip strength testing. As well, she suffered from pain in her hands and back when performing a wide range of movements.
- [46] Ms. Chauhan concluded that, based on Ms. Kellett's reported function and her demonstrated abilities during the functional capacity evaluation, she is partially disabled from functional activities, including work, self-care, housework and leisure. The main impediment is Ms. Kellett's hands. Her dexterity and strength is limited to the point where it interferes with her ability to open containers, hold a cup, clean her glasses, do up a zipper etc. She has a limited tolerance for writing and typing. Ms. Kellett continues to drive, with pain and limitations. As well, Ms. Kellett continues to work with pain and accommodations. Based on Ms. Kellett's

lifting, carrying and grip strength demonstrated during the functional capacity evaluation, Ms. Chauhan concluded that she would likely have difficulty with carrying a child or safely securing a car seat by herself. As well, Ms. Kellett would have difficulty completing all household maintenance, meal preparation, and yard work.

- [47] Based on my review of the expert evidence, I find that Ms. Kellett suffered soft tissue injuries to her neck, chest and lower back, as well as injuries to her hands in the 2014 accident. Ms. Kellett also suffered from headaches as a result of the 2014 accident. While she has recovered from a number of the injuries, the injuries she sustained in the 2014 accident have result in chronic pain in her low back and hands, and ongoing mood and psychological symptoms.
- [48] There is no evidence that Ms. Kellett was suffering from pain from her osteoarthritis in her hands before the accident. Given the lack of symptoms prior to the accident, I find the 2014 accident activated Ms. Kellett's pre-existing degenerative condition in her CMC joints.
- [49] While Ms. Kellett had some earlier problems with her lower back, the evidence is that she had not complained of back pain for the four years preceding the 2014 accident. All reports are that Ms. Kellett was active in the community and able to fulfill her job requirements prior the 2014 accident. Her job required extensive driving and as noted earlier, is physical, as she often had to carry children and car seats. The lay witnesses are consistent in their evidence that there was a marked change in Ms. Kellett following the 2014 accident. Ms. Kellett's evidence is that despite her attempts, she has not been able to return to many of her pre-accident activities and interests, or all of her job duties.
- [50] None of the experts suggest Ms. Kellett's symptoms will completely resolve regardless of the treatments she receives, or steps she takes. In my view, the medical evidence supports a finding that Ms. Kellett will likely experience some improvement over time with further physical and psychological treatment, but will not have a complete resolution of her symptoms or a return to her pre-accident condition.
- [51] As noted by Dr. Vaisler, the defence expert, if Ms. Kellett undergoes surgery to her thumbs with the attendant year of recovery, she will likely have a substantial lessening of the pain but be with left with a 15% to 20% permanent loss of grip, grasp and pinch strength. As well, according to Dr. Vaisler, as a result of her back symptoms, there is a possibility that Ms. Kellett will have permanent limitations with respect to heavy lifting, heavy labour and sustained or repetitive bending as a result of the injuries she sustained in the 2014 accident.
- [52] Accordingly, I find on a balance of probabilities that as a result of the 2014 accident Ms. Kellett will continue to suffer from limitations and pain in her hands and her low back. As well, she will continue to suffer from mood symptoms as a result of the chronic pain and limitations she is suffering.

What is the appropriate award of general damages for pain and suffering?

[53] Ms. Kellett seeks an award of \$150,000 for general damages. The defendants submit an appropriate award for general damages is \$90,000 to \$95,000 after a reduction is made for Ms. Kellett's failure to mitigate her damages.

Applicable Law

[54] A plaintiff is entitled to reasonable damages for her pain and suffering. The plaintiff should be placed in the same position she would have been if the accident had not occurred, but not in a better position: *Parypa v. Wickware*, 1999 BCCA 88 at para. 29.

[55] In *Stapley v. Hejslet*, 2006 BCCA 34 at paras. 45 and 46, the court noted that a non-pecuniary award will vary to meet the specific circumstances of each case, and set out the factors to be considered in making such an award:

[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).

[56] Ms. Kellett relies on *Power v. White*, 2010 BCSC 1084, and *Sommerville v. Munro*, 2018 BCSC 457, to support the argument that the appropriate award for general damages is \$150,000.

[57] The defendants rely on *Burke v. Schwetje*, 2017 BCSC 2098 and *Dobre v. Langley*, 2011 BCSC 1315, to support the argument that the appropriate award for general damages is \$90,000 to \$95,000.

[58] While the cases cited are helpful, as noted in *Stapley* at para. 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.).

Application of the Law to the Facts

- [59] As stated earlier, Ms. Kellett suffered soft tissue injuries to her neck and back, and injuries to her hands in the 2014 accident. Most of her soft tissue injuries have resolved, but she is still suffering from chronic low back pain. As well she is suffering from ongoing pain and limitations in both hands, and mood problems as a result of her chronic pain, including depression and anxiety. It is clear from both the expert evidence and the evidence of the Ms. Kellett and the lay witnesses that her injuries impact every aspect of her life.
- [60] The defendant's submission regarding the appropriate award for non-pecuniary damages are predicated on Ms. Kellett's hand pain being her most significant complaint, and that there will be a resolution of both her hand pain and back pain as a result of the surgery and injections. However, the evidence does not bear that out.
- [61] Although there is a prospect of decreased pain with surgery, each hand has to be operated on separately. After surgery her hand will need to be casted for at least six weeks, followed by physiotherapy. As reported by Dr. Vaisler, recovery from the surgery takes four to six months and it will have to be done twice, once for each hand. The best case scenario for surgery will provide an 80% to 90% improvement in pain, but will leave Ms. Kellett with a 15% to 20% permanent loss of grip, grasp and grip strength.
- [62] As well, at best injections can provide some temporary relief of back pain and will have to be repeated on a regular basis every six months. The evidence is that injections are not always effective, and the patient usually has recurrence of pain about 2 ½ months after the injection. As noted earlier, the defendant's expert, Dr. Vaisler opines that as a result of the accident Ms. Kellett has chronic low back pain and permanent limitations with respect to heavy lifting, heavy labour and sustained the repetitive bending.

- [63] The evidence is that the symptoms arising from the injuries have impacted every aspect of Ms. Kellett's life. Ms. Kellett testified that she can no longer draw, bake or carry her grandson. She is not as social and does not participate in the community functions the way she did before the accident.
- [64] Prior to the accident, Ms. Kellett volunteered in the community. The evidence is that Ms. Kellett was passionate about helping people and families in need in the community. She would gather up used clothing from the lost and found departments at the local schools at the end of the year, wash the clothes, and distribute them to families in need. Ms. Kellett testified she can no longer gather clothing because she can't carry the heavy bags of clothing or do the washing. Ms. Kellett would also collect food weekly and household items year round, and deliver the food and items to families. She testified that she is no longer able to do that as a result of her symptoms.
- [65] Ms. Kellett's son, Mr. Mason testified regarding his observations of the impact of her injuries on his mother. Mr. Mason testified that he started living with his mother about two months after the 2014 accident. At the time, she was unable to do housework or care for herself so he and his family moved in to his mother's house. Mr. Mason testified that before the accident, his mother used to garden and mow the lawn. He observed his mother struggling with the dishes, vacuuming and yard work following the 2014 accident. As well, since the 2014 accident she has difficulties dressing herself. Mr. Mason testified that since the 2014 accident his mother no longer draws or bakes ornate cakes which are activities she did prior to the accident.
- [66] Ms. Kellett's daughter in law, Crystal Mason testified that prior to the accident Ms. Kellett did physical work around the house, and played with the grandchildren. As well, Ms. Kellett baked very elaborately iced cakes. Ms. Kellett can no longer bake in the same way because she can't hold the piping bag with icing and squeeze it to decorate a cake. Ms. Mason testified she has observed a marked change in Ms. Kellett's behaviour with the grandchildren. She can no longer play with them in the same way. When she comes home from work, Ms. Kellett has very little energy, and she just wants to sit down and watch television or go to bed. Ms. Mason testified this is very different from before the 2014 accident.
- [67] Two of Ms. Kellett's friends, Penny Marcotte and Susan Goforth testified regarding their observations of Ms. Kellett prior to and after the 2014 accident. Ms. Goforth has known Ms. Kellett since 1994 when they met at a single mother's drop in. Ms. Goforth testified that before the 2014 accident, they would go shopping or walking, or visit each other at their houses. Prior to the 2014 accident, Ms. Goforth participated with Ms. Kellett in volunteer activities. Ms. Goforth testified that Ms. Kellett was key in the community, and was very strong. She recounted a time when Ms. Kellett brought her a dishwasher in her car, and removed it from the car and put in the house. Ms. Kellett used to wash the clothing they collected and hang the clothing on the line. Ms. Goforth testified that since the 2014 accident, Ms. Kellett moves slowly and sits a lot, and is no longer involved in the volunteer

activities for the community.

- [68] Ms. Marcotte testified she had observed a difference in Ms. Kellett's energy level after the 2014 accident. Prior to the 2014 accident Ms. Kellett was very active and now she lacks energy.
- [69] I have reviewed the various cases regarding the appropriate range for general damages. The cases relied on by the defendants are premised on the argument that Ms. Kellett's main problems are her hands and can be resolved with surgery. However, as stated earlier, that is not borne out in the evidence. Although Ms. Kellett's hands are the main problem, she also has chronic low back pain which is exacerbated by prolonged sitting, standing and doing heavy lifting or labour. As well, as set out earlier, even with hand surgery, Ms. Kellett's pain will not entirely resolve and she will be left with significant limitations in her hands. As a result, I find the cases relied on by Ms. Kellett to be more relevant to the assessment of non-pecuniary damages.
- [70] As noted in Stapley, the assessment of non-pecuniary damages depends on the particular circumstances of the plaintiff in each case. Having considered Ms. Kellett's age, the nature of her injuries, her symptoms and the fact they have been ongoing for three years with little improvement, the impact on her life, her mood and psychological problems, and the guarded prognosis for full recovery, as well as the authorities, I am of the view that the appropriate award for non-pecuniary damages is \$135,000.

Loss of Income or Income Earning Capacity

- [71] The parties have agreed that the appropriate award for past loss of income or income earning capacity is \$43,000, net of taxes.
- [72] Ms. Kellett is advancing a claim for loss of future income earning capacity in the amount of \$600,000. The defendant takes the position that the appropriate award for loss of future income earning capacity is \$100,000, taking into account Ms. Kellett's failure to mitigate her damages.

Applicable Law

- [73] In *Perren v. Lalari*, 2010 BCCA 140, the court set out the law regarding a claim for loss of future income earning capacity. The first inquiry in dealing with a claim of this nature is whether a substantial possibility of future income loss exists. The court stated at para. 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.

- [74] The award for future loss of earning capacity represents compensation for a pecuniary loss. It is an assessment rather than mathematical calculation; however, it involves a comparison between a plaintiff's likely future earnings before and after the accident: *Rovsold v. Dunlop*, 2001 BCCA 1 at paras. 11-12. Using the capital asset approach, a trial judge may begin by comparing the present value of the difference between the plaintiff's earnings before and after the injury, but that is not conclusive.
- [75] In *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144, the Court discussed the assessment of an award for a loss of future income as follows:
- [32] In my view comparator cases are of limited utility in the assessment of awards for future losses, generally. It is well settled that an individual's earning capacity is a capital asset: *Parypa v. Wickware*, 1999 BCCA 88 at para. 63. An award for future loss of earning capacity thus represents compensation for a pecuniary loss. It is true that the award is an assessment, not a mathematical calculation. Nevertheless, the award involves a comparison between the likely future of the plaintiff if the accident had not happened and the plaintiff's likely future after the accident has happened: *Rovsold v. Dunlop*, 2001 BCCA 1 at para. 11; *Ryder v. Paquette*, [1995] B.C.J. No. 644 (C.A.) at para. 8. The degree of impairment to the plaintiff's earning capacity depends upon the type and severity of the plaintiff's injuries and the nature of the anticipated employment at issue.
- [33] In valuing the award, the judge must consider the likely duration of the plaintiff's prospective working life and must account for negative and positive contingencies which are unique to each case. The final award must be fair and reasonable in all the circumstances. This assessment requires a very fact-intensive, case-specific inquiry. I am persuaded by what Macfarlane J.A. said in *Lawin v. Jones*, 98 B.C.L.R. (2d) 126, [1994] B.C.J. No. 2107 at para. 35, about the lack of utility in comparisons to other cases:

[G]iven the fact that we cannot foresee the future, it is impossible in a case like this to find any comfort in resort to other cases where the future may be more predictable. Judges will differ, perhaps widely, in making assessments in cases which have been said to depend on what may be seen in a crystal ball. What is certain is that a trial judge who hears and observes the witnesses is in a much better position than an appellate judge to come to a conclusion as to what is fair and reasonable in the circumstances. ...

- [76] In determining a plaintiff's loss of future income earning capacity, some of the factors to be considered in making the assessment include:

- Has the plaintiff been rendered less capable overall from earning income from all types of employment?

- Is the plaintiff less marketable or attractive to an employer as an employee?
- Has the plaintiff lost the opportunity to take advantage of all job opportunities since he or she was injured?
- Is the plaintiff 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; Perren at para. 11.

[77] In conducting the analysis under this head the court then has to consider the contingences, both positive and negative, which are applicable in arriving at a final sum.

Analysis

- [78] Ms. Kellett was working as a front line social worker in Agassiz prior to the 2014 accident. Her job duties included office work, field work which could involve child removals, child transportation to various appointments, court appearances and meetings. As noted earlier, the evidence is that the job is physical and requires a lot of driving given the district she is employed in. Ms. Kellett started her social work career later in life after suffering a setback in her plan to become a mechanic. As a result, she is not entitled to full pension until she is 70 years old. The evidence of both Ms. Kellett and her co-workers is that Ms. Kellett was able to perform her job duties prior to the 2014 accident.
- [79] Immediately after the accident, Ms. Kellett had to take nine months off work. Since returning to work, Ms. Kellett has struggled with the demands of her job.
- [80] Penny Trites, the senior supervisor for Ms. Kellett, testified that prior to the accident, Ms. Kellett was someone you could count on to find things for people who needed them. Her passion was helping people living in poverty. If a family needed clothes or furniture or other items, Ms. Kellett would source it through her connections, take a truck, load it up and deliver it the next day. Ms. Kellett would also gather food on her flex days and deliver it to families in need.
- [81] Ms. Trites testified that prior to the accident Ms. Kellett had a large case load. When Ms. Kellett was injured, Ms. Trites took over her case load and found it challenging. Since the accident, accommodations have been made for Ms. Kellett, but even with the accommodations she is unable to meet the demands of her job and the quality of her work has diminished. For example, she is unable to write reports in the way she could before the accident, and does not go out of the office. Ms. Kellett often has to leave work early which puts additional demands on other staff. Ms. Trite's evidence is that Ms. Kellett is clearly not meeting her job requirements, and Ms. Trites is concerned because she has received some complaints.

- [82] Erin Stellingwerff, another of Ms. Kellett's supervisors also testified. Her evidence is that Ms. Kellett is currently not very effective at her job. She has observed Ms. Kellett in pain and rubbing her hands. The office she works in services a large area and Ms. Kellett has driving restrictions which limit her ability to go into client's homes. As well, her injuries to her hands limit Ms. Kellett's ability to take notes. Note taking is a large part of the job, and according to Ms. Stellingwerff, Ms. Kellett is not able to perform that part of the job. Ms. Stellingwerff testified that Ms. Kellett should be partially in the community, going to the community school and meeting community development needs. Ms. Kellett is not performing those duties because of her physical limitations and long absences from work. Ms. Stellingwerff's evidence is that Ms. Kellett no longer carries a full case load and has a significant amount of work absences. Ms. Stellingwerff testified that it concerned her that Ms. Kellett is not able to do as much of the work. Two of the employees she supervises have complained to Ms. Stellingwerff that the current situation is unfair.
- [83] As noted earlier, Ms. Chauhan performed a functional capacity evaluation of Ms. Kellett, and concluded she would likely have difficulty removing a child and carrying a car seat. As well, she has numerous deficits in her hands which would be expected to impact her ability to take notes, type and hold items in her hands. Ms. Kellett reported back pain with lifting, sitting and walking.
- [84] The medical evidence is that even with an operation, Ms. Kellett will have ongoing pain and limitations in her hands, and pain in her back which make it unlikely she will be able to carry out her job functions.
- [85] In my view, the evidence establishes there is a real and substantial possibility of a future event leading to an income loss. Both of her supervisors have indicated they have accommodated her as much as possible. It is clear from the evidence of her supervisors that Ms. Kellett is not currently meeting her job demands, and the medical evidence is that she will continue to have limitations in the future.
- [86] The evidence is that if Ms. Kellett undergoes surgery on her hands, it is likely she will be absent from work for a few months with each hand. The evidence is that Ms. Kellett will continue to suffer chronic pain in her low back and hands, even if she has operations on her hands or injections into her back and hands. As noted earlier, even if there is a reduction in her hand pain, she will still have limitations in her hands, and chronic back pain made worse by physical activity. It is unlikely in the circumstances, that she will be in a position to meet her job demands even with surgery and injections into the facet joints and discs of her back.

- [87] In my opinion, the evidence establishes that Ms. Kellett has been rendered less capable overall from earning income from all types of employment, she is less marketable and attractive as an employee, and she may not be able to take advantage of all job opportunities. As was evident from her testimony, Ms. Kellett is less valuable to herself as a person as a result of her diminished capacity, and in particular her inability to perform her duties in a job she is passionate about.
- [88] Ms. Kellett relies on a report authored by Christiane Clark, an economist, in suggesting an award in the amount of \$600,000 is appropriate. Ms. Clark projects a loss of earnings and benefits to age 70 years and 11 months of \$612,366, based on an annual wage of \$70,145. Ms. Clark states in her report that if Ms. Kellett worked full time to age 65 her future loss of earnings would be \$363,000. If she works 90% of full time to her age 65 given the accidents her future loss is estimated at \$387,900. If she works 80% of full time until age 65 her future loss is estimated at \$412, 900. She would also lose approximately \$8,800 in benefits, excluding pension. The estimates of earnings and non wage benefits have not been reduced for the potential impacts of negative labour market contingencies of labour market withdrawal, unemployment or part-time work.
- [89] There is no indication Ms. Kellett will not be able to work at least part time until 65. Ms. Kellett has been working full-time, albeit with accommodations and not meeting her job demands, since nine months after the accident. As well, there is evidence that Ms. Kellett's osteoarthritis might have become symptomatic regardless of the accident, and that she had back pain in the past. Having considered the positive and negative contingencies, including the evidence that she could have some improvement in symptoms with further treatment, I am of the view that an award of \$350,000 for future loss of income earning capacity is appropriate.

Loss of Housekeeping Capacity

- [90] Ms. Kellett is advancing a claim for past loss of housekeeping capacity in the amount of \$31,328 and future loss of housekeeping capacity in the amount of \$96,372. The defendants take the position that the appropriate award for this head of damages is \$25,000.

Applicable Law

- [91] The Court of Appeal in *O'Connell v. Yung*, 2012 BCCA 57, reiterated that loss of housekeeping capacity is distinct from future care costs, stating:
- [67] As noted by Madam Justice Huddart in *McTavish*, at para. 16, the case was concerned with the development of principled restraints on claims for loss of housekeeping capacity. One of the principles approved in *Kroeker* came from *Fobel v. Dean* (1991), 83 D.L.R. (4th) 385 at 407, [1991] 6 W.W.R. 408 (Sask.C.A.), in which it was said that it is not necessary for a plaintiff to prove that someone will be employed to do the work in the future to be entitled to an award for loss of housekeeping capacity. As I understand the principle, it is the loss of a

capacity - an asset - that is compensated. Accordingly, because the award reflects the loss of a personal capacity, it is not dependent upon whether replacement housekeeping costs are actually incurred. Damages for the cost of future care serve a different purpose from awards for loss of housekeeping capacity. Unlike loss of housekeeping capacity awards, damages for the cost of future care are directly related to the expenses that may reasonably be expected to be required (Krangle at para. 22).

- [92] The Court of Appeal in *Kim v. Lin*, 2018 BCCA 77, considered the proper approach to valuing loss of housekeeping capacity. The Court stated at para. 33 and 34:
- [33] Therefore, where a plaintiff suffers an injury which would make a reasonable person in the plaintiff's circumstances unable to perform usual and necessary household work -- i.e., where the plaintiff has suffered a true loss of capacity -- that loss may be compensated by a pecuniary damages award. Where the plaintiff suffers a loss that is more in keeping with a loss of amenities, or increased pain and suffering, that loss may instead be compensated by a non-pecuniary damages award. However, I do not wish to create an inflexible rule for courts addressing these awards, and as this Court said in *Liu*, "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": at para. 26.
- [34] Whichever option a court chooses, when valuing these different types of awards, courts should pay heed to the differing rationales behind them. In particular, when valuing the pecuniary damages for the loss of capacity suffered by a plaintiff, courts may look to the cost of hiring replacement services, but they should ensure that any award for that loss, and any deduction to that award, is tied to the actual loss of capacity which justifies the award in the first place.
- [93] The Court went on to consider the cautionary approach for awards under this head of damage suggested in *Kroeker v. Jansen*, [1995] 6 W.W.R. 5 (B.C.C.A.), and concluded at para. 37:

In fact I see the above framework I described as entirely consistent with this Court's admonition above that "[i]t will be the duty of trial judges and this Court to restrain awards for this type of claim to an amount of compensation commensurate with the loss." So long as the award is justified on the basis of evidence of the plaintiff's incapacity it will be commensurate with the plaintiff's loss.

- [94] In *Lin*, the Court of Appeal upheld a substantial award in the amount of \$418,000 for loss of housekeeping capacity. I note at the trial level, 2016 BCSC 2405, the court disallowed claims under cost of future care for household chores and yard work as they duplicated the claim for loss of housekeeping capacity.

Application of the Law to the Facts

- [95] Ms. Kellett testified she has lost the ability to do numerous housekeeping tasks, and that her son and his family had to move in with her to take care of the house and garden.
- [96] The damage award Ms. Kellett is seeking under this head is based on one hour per day of help at \$22 per hour until the age of 75, or 19 years of housekeeping, or \$7,832 per year. Ms. Kellett argues that given the fact she has back pain while performing many household tasks, no reduction should be made for the possibility of her pain improving.
- [97] As set out in the case law, loss of housekeeping or homemaking capacity is a loss of capacity claim and not a claim for future care. It is to reflect the diminished capacity of a plaintiff to take care of her household, not the cost of provision of services by others.
- [98] In this case, Ms. Kellett is advancing claims under cost of future care for housekeeping and seasonal cleaning, indoor and outdoor maintenance, and gardening and lawn care. As well, she is advancing an "in trust" claim to compensate son and daughter-in-law for assisting her following her injuries.
- [99] While it is apparent that Ms. Kellett has a diminished housekeeping capacity, the evidence is that she has residual housekeeping capacity. Ms. Kellett testified that she does her own laundry, shops and does some of the cooking. Ms. Kellett still bakes, albeit not the ornately decorated cakes she used to bake. As well, as noted earlier, there is potential for improvement in Ms. Kellett's functioning with surgery and additional treatment.
- [100] It is unlikely however that Ms. Kellett will be able to return to her pre-accident capacity. She will be limited from doing heavier chores around the house, gardening and home maintenance even if she has surgery and other additional treatment due to the ongoing limitations from her back injury and the pain and disability in her hands. As well, it is unlikely Ms. Kellett will be able to do chores that require grip, grasp or pinch strength.
- [101] Having considered the evidence, it is apparent Ms. Kellett has suffered diminished capacity in her housekeeping capacity. Although she seeks one hour a day based on \$22 per hour, as noted earlier Ms. Kellett has residual abilities to care for herself and her home. Based on evidence it is my view that an amount based on five hours a week of assistance at a rate of \$15 per hour as endorsed in *Kim and Campbell v. Banman*, 2009 BCCA 484, or \$3,900 per year is appropriate. Accordingly, I have concluded it is appropriate to make some award under this head of damages. In my view, an award of \$15,600 is appropriate under this head to compensate Ms. Kellett for her past loss of capacity, and \$45,500 for her future loss of housekeeping capacity to age 75.

Cost of Future Care

[102] Ms. Kellett is advancing a claim for cost of future care in the amount \$282,000 for cost of future care. The loss of housekeeping capacity overlaps with the claim for the cost of future house keeping and seasonal cleaning, indoor and outdoor home maintenance and gardening and lawn care. Ms. Kellett is relying on a report authored by Jennifer Lane, an occupational therapist with an expertise in cost of future care assessments, and the report of Ms. Clarke for the present value of the future care costs.

[103] The defendant submits that many of the items Ms. Kellett is claiming are neither medically justified nor reasonable. The defendants take the position that the appropriate award for cost of future care is \$20,000, taking into account Ms. Kellett's failure to mitigate.

Applicable Law

[104] Cost of future care is established if there is a medical justification for the claim, and the claim is reasonable: *Aberdeen v. Zanatta*, 2008 BCCA 420 at para. 42.

[105] In *O'Connell*, the Court of Appeal discussed cost of future care:

[55] The law is settled as to the appropriate approach to be taken in assessing future care costs. In *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at paras. 21-22, [2002] 1 S.C.R. 205, referred to by the trial judge, the Court articulated the test:

21 Damages for cost of future care are a matter of prediction. No one knows the future. Yet the rule that damages must be assessed once and for all at the time of trial (subject to modification on appeal) requires courts to peer into the future and fix the damages for future care as best they can. In doing so, courts rely on the evidence as to what care is likely to be in the injured person's best interest. Then they calculate the present cost of providing that care and may make an adjustment for the contingency that the future may differ from what the evidence at trial indicates.

22 The resulting award may be said to reflect the reasonable or normal expectations of what the injured person will require. Jane Stapleton, "The Normal Expectancies Measure in Tort Damages" (1997), 113 L.Q.R. 257, thus suggests, at pp. 257-58, that the tort measure of compensatory damages may be described as the "'normal expectancies' measure", a term which "more clearly describes the aim of awards of compensatory damages in tort: namely, to reposition the plaintiff to the destination he would normally have reached ... had it not been for the tort". The measure is objective, based on the evidence. This method produces a result fair to both the claimant and the defendant. The claimant receives damages for future losses, as best they can be ascertained. The defendant is required to compensate for those losses. To award less than what may reasonably be expected to be required is to give the plaintiff too little and unfairly advantage the defendant. To award more is to give the plaintiff a windfall and require the defendant to pay more than is fair.

(Emphasis in original)

[106] Damages for loss of future care are directly related to expenses that it is reasonably expected will be required. Services that a plaintiff is unlikely to avail themselves of should not be awarded: O'Connell, at para. 68.

Analysis

[107] The defendant concedes that the cost of future surgery and rehabilitation, including hand therapy and physiotherapy in the amount of \$3,500 is appropriate, with an additional amount of \$2000 for future intermittent sessions of physiotherapy. Ms. Kellett is claiming \$21,225 for medications, physiotherapy and hand therapy for life or until age approximately age 87. As well, she is claiming \$1,359 for hand surgery and physiotherapy following hand surgery. The physiotherapy of \$14,885 is for 12 sessions annually or \$750 a year based on Dr. Badii's recommendation. As well, Dr. Badii recommends the use of Voltaren for her hand pain. That has been costed at \$5,876 for indefinite use of Voltaren. However, the evidence is that surgery could alleviate some of that need. Having considered the evidence, it is my view that an award in the amount of \$15,000 is appropriate for future surgery, medications, physiotherapy and hand therapy.

[108] Ms. Kellett is also claiming \$549 for a hand splint. However, Ms. Kellett's evidence is that she has used one for a month and stopped using it because it did not assist but instead caused more pain. Accordingly, I make no award for this item.

[109] Ms. Kellett is claiming \$2,421 for the cost of future psychological counselling and mindfulness based therapy based on the recommendations of Dr. Estrin. The defendant submits that an award in the amount of \$2000 is appropriate for psychological treatment. While the defendant appears to take issue with the mindfulness based therapy, both psychological counselling and mindfulness based therapy have been recommended by Dr. Estrin to assist Ms. Kellett in dealing with the chronic pain and limitations she has experienced as a result of the accident. According, I am of view that an award in the amount of \$2,421 is appropriate under this head of damages.

[110] Ms. Kellett is claiming the amount of \$47,480 for yoga, a gym pass and kinesiology sessions. The defendant submits the appropriate award for yoga, gym and kinesiology is \$4000. The amount of \$16,844 for kinesiology is based on 12 sessions annually (\$860 per year) for life. However, the recommendation is that Ms. Kellett have supervised exercise once every six months after the first year.

[111] Ms. Kellett's evidence is that she has never tried yoga despite it being recommended to her. As well, apart from when she was attending active rehabilitation, Ms. Kellett has not attended the gym and has not looked into going to the gym. At trial, she testified she was interested in both doing yoga and going to the gym, and it has been recommended that she participate in an ongoing exercise program for her back. However, given the evidence about her participation in exercise to date, I find it unlikely Ms. Kellett will participate in yoga and

go to the gym until age 87. Having considered the evidence and the contingencies, it is my opinion that an award of \$10,000 is appropriate for yoga, gym pass and kinesiology.

- [112] Ms. Kellett is claiming the amount of \$609.35 for various equipment, some of which she already has, such as an ergonomic keyboard. Her evidence is that she has many of the items on the list. Ms. Kellett testified she had an ergonomic keyboard at work, and does not need one at home. Based on the limited evidence about what equipment she already owns, and the lack of medical recommendations for those items, I am of the view that \$150 is appropriate for equipment.
- [113] Ms. Kellett is claiming the amount of \$38,622 for housekeeping services, and the amount of \$7,192 for seasonal cleaning. She is also claiming \$8,422 for indoor and outdoor home maintenance and \$13,486 for gardening and lawn care. The total amount she is claiming for housekeeping, maintenance and gardening and lawn care is \$60,530 to age 80. The defendant submits the appropriate awards are \$6,000 for housekeeping and maintenance, \$1,000 for yard/garden maintenance and \$2,000 for home maintenance.
- [114] Ms. Kellett's claim is based on the recommendations by Ms. Chauhan that if Ms. Kellett was to live on her own she would need assistance with those items. Ms. Kellett indicated that she would like to live on her own, but there are no plans for Mr. Mason and his family to move out. The evidence is that Ms. Kellett's residence has been renovated to accommodate Mr. Mason's family. As well, Ms. Kellett's evidence is that she may move house when she retires. As noted earlier, there must be regard for the real and substantial possibility that the expense may be incurred and an allowance for the contingency that the cost may not be incurred. In my view, there has been no real and substantial possibility that the costs associated with the yard care and gardening will be incurred past the age of 70 even if Ms. Kellett's family moves out.
- [115] As well, there is duplication between the claim for loss of housekeeping capacity and the cost of future care being claimed for housekeeping and seasonal cleaning. Having considered the possibility that the expenses may not be incurred and the duplication in the claims, it is my view that the amount submitted by the defendant of \$9,000 is appropriate for cost of future care associated with the house and yard.

Mitigation

- [116] The defendant takes the position that Ms. Kellett has failed to mitigate her damages by following the recommended treatment, and in particular the recommendation that she have injections into her CMC joints and her back, and have hand surgery. The defendant takes the position that damages should be awarded in the amount he suggests because of Ms. Kellett's failure to mitigate.

- [117] Ms. Kellett submits that she has followed recommendations except for the injections. Surgery has only recently been suggested and she is considering it. Ms. Kellett submits that the defendant has not established that she will not have significant disability even if she has surgery on her hands.

Legal Parameters

- [118] There is no question that every plaintiff has an obligation to take reasonable steps to reduce the damages flowing from a tort. In order to be successful in discharging the burden of proving that Ms. Kellett has failed to mitigate, the defendant must establish that Ms. Kellett failed to undertake a recommended treatment, that by following the recommended treatment Ms. Kellett would have overcome the problem, and that the refusal to take the treatment was unreasonable: *Chiu v. Chiu*, 2002 BCCA 618 at para. 57; *Wahl v. Sidhu*, 2012 BCCA 111, at para. 32.

- [119] The mitigation test is a subjective/objective test. In *Gregory* at para. 53, the Court reiterated the following test from *Chiu*:

In *Chiu v. Chiu*, 2002 BCCA 618 at para. 57, this Court set out the test for failure to mitigate as follows:

- [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.

Application of the Law to the Facts

- [120] I agree with the defendant that Ms. Kellett did not follow the recommendation to have injections into her CMC joints and back. However, as noted earlier, Dr. Badii's evidence is that injections into the CMC joints are not generally recommended. Injections into the facet joints of the back may give some temporary relief to her back pain, but need to be repeated.
- [121] As well, as set out earlier, there is no evidence that Ms. Kellett will have a complete resolution of her hand issue if she undergoes the recommended surgery. The evidence of the defendant's expert, Dr. Vaisler, is that while she will likely have an improvement in her pain but not a complete resolution, she will be left with a 15% to 20% permanent loss of grip, grasp and pinch strength in her hands. In other words, even if the surgery, with the attendant time off work, rehabilitation and pain, is successful, Ms. Kellett will continue to experience pain and disability in her hands. As well, as noted earlier, the defendant's expert, Dr. Vaisler's opinion is that Ms. Kellett will continue to experience intermittent, annoying and possibly limiting low back pain with heavy lifting, heavy labour or sustained and repetitive bending on a permanent nature as a result of the 2014 accident.

[122] While Ms. Kellett will likely have some improvement with the recommended treatment, the evidence does not support the conclusion that Ms. Kellett will have received substantial benefit which would have reduced her damages had she had injections into her hands and back. The evidence is that regardless of surgery or injections, Ms. Kellett will be left with a permanent partial disability to her hands which impact her grip, and a permanent partial disability to her back which will impact her ability to stand or sit for lengths of time, and limit her from returning to her pre-accident activities.

[123] In the circumstances, I have concluded that the defendant has not established that the awards for non-pecuniary damages or future loss of income earning capacity or future care should be reduced on the basis that Ms. Kellett failed to mitigate her damages.

Special Damages

[124] The parties have agreed to an amount of \$2,000 for special damages.

In-trust Claim

[125] Ms. Kellett has conceded that any in-trust claim for the services her son provided is a duplication of the loss of housekeeping capacity claim and if an award is made under that head, no award should be made for the in trust claim. Accordingly, I am not awarding any amount under this head of damages.

Conclusion

[126] In summary, I am awarding the following amounts:

- Non-pecuniary damages: \$135,000
- Loss of housekeeping capacity: \$61,100
- Past income loss: \$43,000
- Loss of future income earning capacity: \$350,000
- Cost of future care: \$36,571
- Special damages: \$2,000

Total: \$627,671

[127] Ms. Kellett is entitled to pre-judgment interest on the special damages. Ms. Kellett is also entitled to her costs of this action at Scale B, subject to submissions.

"Gerow J."

Source & reproduction note

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

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/18/11/2018BCSC1127.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/kellett-v-stam-2018>

Prepared on 29 October 2026 · Esheria