

CANADA / JUDGMENT

# Khakh v. Josol

2020 BCSC 286

## COURT

Supreme Court of British Columbia

## DECIDED

2 March 2020

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2020 BCSC 286 Khakh v. Josol IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Khakh v. Josol, 2020 BCSC 286 Date: 20200302 Docket: M171689 Registry: Vancouver Between: Kulwinder Kaur Khakh Plaintiff And Clicerio Urbano Suma Josol Defendant

- and - Docket: M178018 Registry: Vancouver Between: Kulwinder Kaur Khakh Plaintiff And Harefa Naebkhil and Mohammad Naebkhil Defendants Corrected Judgment: The text of the judgment was corrected at paragraph 115 on March 11, 2020. Before: The Honourable Mr. Justice E. M. Myers Reasons for Judgment Counsel for Plaintiff" Cindy K. Wong Brad D. Garside Counsel for Defendants: Soye T. Brown Ankit D. Batra Place and Date of Trial: Vancouver, B.C. January 20-24 and 27-31, 2020 Place and Date of Judgment: Vancouver, B.C. March 2, 2020 Table of Contents Paragraph I. OVERVIEW [1] II. FACTUAL OVERVIEW [5] A. The First Accident - March 6, 2015 [10] B. The Second Accident - October 17, 2015 [17] III. ANALYSIS [29] A. Liability for the Second Accident [29] B. What injuries did Ms. Khakh sustain as a result of the Accidents [35]
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- [1] The plaintiff, Ms. Khakh claims for soft tissue injuries she says she sustained in two motor vehicle accidents in 2015.
- [2] The first accident occurred on March 6, 2015. Ms. Khakh was rear-ended by the defendant, Mr. Josol when she was waiting to merge from Nordel Way onto the Highway 1 connector. Mr. Josol has admitted liability for the accident. I will refer to this as the First Accident.
- [3] The second accident was on October 17, 2015. Ms. Khakh was parked at a strip mall in front of the Kumon Learning Centre in Surrey. The defendant, Ms. Naebkhil, was parked next to her. When Ms. Naebkhil was backing out of her spot, her car made contact with Ms. Khakh's vehicle. While Ms. Naebkhil admits the accident occurred, she says that Ms. Khakh was not in the car at the time of the incident and denies liability. I will refer to this as the Second Accident.
- [4] Ms. Khakh claims general damages, past income loss, loss of income earning and housekeeping capacity and cost of future care. The defendants say that several of the injuries she complains of existed before the accident and at most, the accident exacerbated them and intervening events took place after the accident, breaking the chain of causation. The defendants deny all of the claims except for general damages. II. Factual Overview
- [5] I note at the outset that most of the clinical observations I set out below were admitted by the defendants and that, except where noted, the medical providers did not testify at the trial or provide expert reports.
- [6] Ms. Khakh is 46 years old, married and has two children. She was born in India. Before moving to Canada in 1997, she received a Bachelor of Commerce and Master of Arts in Economics in India, as well as a diploma in Business Management.
- [7] In Canada, she earned a certificate for Early Childhood Education while working part-time for Zellers. After she finished that program, she was hired by the YMCA for a childcare position. In 2011 Ms. Khakh was hired to work at the Boys and Girls Club and soon after, the Delta School District.
- [8] The evidence as to Ms. Khakh's work schedule at the time of the accident was somewhat confusing because she worked for a number of different early childhood education or childcare programmes for different shifts in any given week. Moreover, some of the work done for the same programme was at different schools. Her employment included working as a facilitator for the Delta School District Strong Start programme from 8:30 a.m. - 12:30 p.m., five days a week. She also worked at several programmes run by the Boys and Girls Club involving kindergarten readiness. She said she was working five afternoons a week.

- [9] Ms. Khakh also worked on an on-call basis at the Brilliant Butterflies Learning Centre - a daycare centre - which was owned by her Boys Club supervisor, Diane Canning. A. The First Accident - March 6, 2015
- [10] As I noted above, the First Accident occurred on March 6, 2015, when Ms. Khakh was rear-ended by Mr. Josol. She was on her way to pick her children up at their school. She recalled being in shock after the impact. She called her brother, 911, and her father. An ambulance came to the scene and she was noted to have very high blood pressure. She had neck pain immediately after the collision.
- [11] Ms. Khakh declined to go to the hospital with the ambulance. She made a few calls to arrange for her children to be picked up from school and then went to her family doctor, Dr. Bhagat Singh, at Bear Creek Medical Clinic in Surrey.
- [12] Ms. Khakh said she told Dr. Singh about pain in her neck, back and shoulder. It was admitted by the defendants that she had also reported chest pain and that on examination, Dr. Singh found her to have tenderness in the right trapezius and cervical spine muscles, and tenderness in the lumbar spine and lumbar spinal musculature bilaterally. His assessment was that, as a result of the accident, Ms. Khakh had a lumbar sprain, cervical spine sprain, chest pain and raised blood pressure.
- [13] Ms. Khakh saw a chiropractor, Dr. J.S. Basra, on March 3, 26 and 30, 2015. In his report to ICBC, Dr. Basra said that she complained of neck pain, thoracic pain, back pain and secondary symptoms described as right upper back/shoulder bilateral pain.
- [14] Dr. Malcolm Leon at the Cedar Hills Medical Clinic saw Ms. Khakh on March 27, 2015. In a "Motor Vehicle Accident-Initial Assessment" form, he noted that she described the circumstances of the accident and reported that she had back pain, neck pain, headache and tingling her feet and hands.
- [15] Over the first few months following the accident, Ms. Khakh testified that she struggled with her right shoulder at work and that it hurt to reach up. She had difficulty with bending down and standing for long periods of time. She stated that it was hard to keep up with her duties at work and at home with her injuries.
- [16] Ms. Khakh said that her pain made it difficult for her to drive her children to and from school. Each trip took approximately 45 minutes. B. The Second Accident - October 17, 2015
- [17] As I noted above, the Second Accident occurred on October 17, 2015 in a parking lot. Ms. Khakh and Ms. Naebkhil were parked next each other facing Kumon.
- [18] Ms. Khakh said that she was waiting in her car for her son's lesson at Kumon to end. Her seat was fully reclined, so she was in a lying-down position, or close to it. She said she heard a noise; somebody had "pushed hard on my vehicle". She did not see the accident.

- [19] Ms. Naebkhil said that she was in a tight parking space and wanted to move to another spot because the next car's door (which was Ms. Khakh's) would not be able to open enough to let the driver in. As she backed out of her spot, her passenger-side door "scratched" the rear left bumper of Ms. Khakh's car. As soon as she heard or felt the contact she stopped and therefore had only got part way out of her spot. Before Ms. Naebkhil could get out, Ms. Khakh walked over from in front of Kumon and told Ms. Naebkhil she had scratched her car.
- [20] Ms. Naebkhil's evidence was inconsistent with her evidence at discovery. In her discovery, she said she got out of her vehicle after it contacted Ms. Khakh's vehicle and went to the rear to see the damage. It was only then that she was approached by Ms. Khakh. She also said that the reason she wanted to move her car was to go to the Dollarama Store while waiting for her daughter, who was also at Kumon. The Dollarama store was in the same shopping complex, one building down and therefore a very short walk. Her direct evidence regarding the angle at which she exited the spot was inconsistent with heading towards the Dollarama store.
- [21] Ms. Khakh acknowledged that the Second Accident was less major than the First Accident, but said that after the Second Accident she began to get headaches that she had not had before. Further, her neck and back were sore for many days after.
- [22] On January 19, 2016 and October 21, 2017, Dr. Singh referred Ms. Khakh to Dr. J.S. Jaworski, physical medicine and rehabilitation specialist, primarily to assess and treat her neck, upper back and shoulder pain.
- [23] Ms. Khakh was also referred to Dr. Kenny Lee, an orthopedic surgeon, to assess and treat her right shoulder injury. At Dr. Lee's recommendation, Ms. Khakh had cortisone shots for her shoulder. Although it gave her temporary relief, she found the injection painful, had a phobia of needles and did not continue with further recommended shots.
- [24] In January 2016, Ms. Khakh was referred to massage therapy.
- [25] Ms. Khakh testified as to the physical demands of childcare work. It involves bending to change diapers and collect/clean toys. She found all of those more difficult after the accident and had to ask co-workers to assist or take over those tasks.
- [26] Several of her co-workers and her supervisor testified how Ms. Khakh was a hard-working, cheery and dedicated worker before the accident. They said that after the First Accident, she was noticeably in pain when doing the tasks noted in the prior paragraph; and the co-workers would step in and do them for Ms. Khakh. Both Ms. Khakh and one of her co-workers, Ms. Purie, testified that before the accident they had discussed opening up a daycare business in the basement of Ms. Purie's home. After the accident, it was apparent to both of them that Ms. Khakh would not be able to pursue that because of her physical limitations.

- [27] Around the end of 2015, Ms. Khakh applied to G4S Secure Solutions for a job as a security screener at Vancouver International Airport ("YVR"). She heard positive things about the work, including better pay. She was accepted in March 2016, and began a two-month training programme. She continues to work there.
- [28] In June 2016, Ms. Khakh quit her job at Butterflies Daycare since she found the work more physically demanding than the airport work, and it paid less. III. Analysis A. Liability for the Second Accident
- [29] Liability has been admitted for the First Accident.
- [30] Dealing with liability for the Second Accident, as I noted above, Ms. Naebkhil's evidence was contradictory. I do not find it to be reliable. I do not say she intentionally misrepresented the evidence; rather I think she was confused.
- [31] On the other hand, I find Ms. Khakh to have been generally credible and reliable. I do not find the inconsistencies with respect to what she told her physicians - something relied on by the defendants - to be due to a lack of honesty. Rather, they are relatively minor and the types of things one frequently sees in lengthy clinical records.
- [32] Ms. Naebkhil points to Dr. Lee noting that Ms. Khakh seemed to be over-exaggerating her pain. However, I did not take that to be indicative of someone "building a case"; rather it is indicative of someone who may be focussing too much on their pain.
- [33] The fact that Ms. Khakh only gave one medical note to G4S with regard to medical leave I also do not find to undermine Ms. Khakh's credibility, as the defendants suggest. She was able to use her trading of shifts as an accommodation.
- [34] I find Ms. Naebkhil liable for the Second Accident. That said, as I set out below, the Second Accident is probably a red-herring in terms of any major effect on Ms. Khakh. B. What injuries did Ms. Khakh sustain as a result of the Accidents
- [35] I begin by noting - as the defendants emphasize - that Ms. Khakh had pre-existing injuries which have to be considered.
- [36] The first pre-existing condition is back pain. In 2014, Ms. Khakh fell on her staircase and hurt her back and received chiropractic treatment for it. In September 2014, she saw Dr. Singh and he noted that she "struggles with exercise due to back pain".
- [37] She also had pre-existing shoulder pain. On January 7, 2015, Dr. Singh noted that she reported two weeks of right shoulder pain without having experienced any trauma.
1. Medical Experts
- [38] Ms. Khakh called Dr. Najam Mian, a specialist in physical medicine and rehabilitation and pain medicine. The defendants called Dr. Osama Gharsaa, an orthopaedic surgeon.
- a) Dr. Mian - May 2019 evaluation

- [39] Dr. Mian prepared two reports. His second report addressed an MRI of Ms. Khakh's lumbar spine done on October, 2019 and Dr. Gharsaa's report.
- [40] Dr. Mian's conducted his examination in May, 2019. Dr. Mian noted that Ms. Khakh complained to him of:
- a) Lumbar pain;
  - b) Right shoulder pain;
  - c) Headaches;
  - d) Neck pain and weakness;
  - e) Sleep disturbance; and
  - f) Mood disturbance.
- [41] What Ms. Khakh told Dr. Mian, with respect to the functional impact of her complaints, was largely consistent with what she said in her direct evidence.
- [42] Dr. Mian reviewed the prior imaging of Ms. Khakh which included an X-ray of her lumbar spine, and an ultra-sound and CT scan of her right shoulder.
- [43] Dr. Mian concluded that the following were due to both accidents:
- a) Cervical sprain/strain with persistent, chronic, mechanical cervical pain. Potential pain generators include the myofascial structures, facet joints, ligaments and intervertebral discs;
  - b) Thoracolumbar sprain/strain with persistent, chronic, mechanical thoracolumbar pain. Potential pain generators include the facet joints, ligaments, intervertebral discs and overlying myofascial structures;
  - c) Right subacromial impingement with features of subacromial subdeltoid bursitis;
  - d) Chronic insomnia disorder;
  - e) Mood disturbance; and
  - f) He could not rule out lumbosacral radiculopathy. A subsequent MRI is relevant to this and I will return to it later.
- [44] Dr. Mian said that he expected Ms. Khakh to experience some degree of chronic pain for the remainder of her life, with some partial improvements with recommended treatments.
- [45] With respect to the impact on her work he opined: In my opinion, she can continue in her occupations as an airport screening officer as well as a school program facilitator but would encounter difficulties in more physically demanding tasks. Tasks that may be difficult due to her right shoulder rotator cuff syndrome include overhead activities, as well as lifting or pushing/pulling. Due to her chronic cervical/thoracic/lumbar pain, tasks such as prolonged

standing, sitting, or repetitive movements of the neck, back, and low back can be difficult. She would require more frequent breaks during work and/ or assistance from her co-workers. During flares of pain, she may require days off work. At some point, a functional capacities evaluation (FCE) through an occupational therapist may help quantify her limitations in terms of lifting and positioning. I do not expect any cognitive limitations. Her sleep disturbance may result in fatigue that may contribute to reduced workplace productivity.

[46] He recommended:

- a) Ultrasound guided injections for the shoulder;
  - b) Tricyclic anti-depressant;
  - c) Six months active rehabilitation; and
  - d) Referral to a chronic pain psychologist.
- b) Dr. Gharsaa - March 2019 evaluation

[47] Dr. Gharsaa examined Ms. Khakh in March 2019 on behalf of the defendants.

[48] Dr. Gharsaa noted that the symptoms Ms. Khakh reported were of the soft tissue injury type which typically resolve "within three months". Presumably he was referring to three months after the cause of the injury.

[49] With respect to Ms. Khakh's shoulder, Dr. Gharsaa said: Ms. Khakh had an MRI done of her right shoulder which showed signs of chronic changes including tendinopathy and a small rotator cuff tear. In my opinion, this tear is not related to the subject motor vehicle accident given the mechanism of injury and her clinical presentation. It seems that she did have some right shoulder pain just a few months prior to the subject motor vehicle accident that may have been exacerbated by the subject motor vehicle accident. [Emphasis added.]

[50] He observed that Ms. Khakh had discomfort in her right shoulder in the last few degrees of forward flexion and abduction. He attributed that to underlying tendinopathy and not the accidents.

[51] Dr. Gharsaa said that he did not identify any radiculopathy.

[52] While he did not discount that Ms. Khakh suffered some residual pain, he thought she should be reassured that it was not due any ongoing impairment or physical disability resulting from the accident. He recommended that she undertake a self-directed exercise programme and that she be educated in the difference between pain that hurts versus pain that harms.

[53] In cross-examination, Dr. Gharsaa acknowledged that he was not a specialist in pain management. He did, however, agree that people who do not recover from their pain within three months go on to develop chronic pain syndrome.

## c) MRI - October 2019

- [54] Dr. Singh ordered an MRI of Ms. Khakh's lumbar spine which was done in October, 2019. The findings were: Findings: There are four lumbar-type vertebral bodies with sacralisation of the fifth lumbar vertebrae. T11/12: There is mild disc desiccation. T12/L1: There is disc desiccation and shallow posterior disc bulging. L1/2: There is a mild posterior disc bulging with mild facet arthropathy. No significant central annular tear without significant foraminal narrowing. L2/3: There is a broad-based disc bulging with mild facet arthropathy with a central annular tear without significant foraminal narrowing. L3/4: There is broad-based disc bulging with somewhat eccentric disc extension onto the left. There is a mild left greater than right facet arthropathy. L4/5: There is a large central and left subarticular recess disc material which compresses the thecal sac and left greater than right L5 nerve root. There is sacralization of the L5 vertebral body with a rudimentary L5/S1 disc. The conus medullaris terminates at T12/L1. There is end plate changes seen at L4/5. Impressions: Four lumbar-type vertebral bodies with a large central and left subarticular recess disc extrusion at L4/5 with other changes of lumbar spondylosis as described above".

## d) Dr. Mian's Supplementary Report - October 2019

- [55] Dr. Mian prepared a further report to address the MRI of Ms. Khakh's lumbar spine and Dr. Gharsaa's report.
- [56] I noted above that in his initial report, Dr. Mian stated that he could not rule out lumbosacral radiculopathy. In his supplemental report he opined that the MRI confirmed symptomatic left L5 radiculopathy. He wrote that "her clinical symptoms, physical examination maneuvers, and MRI imaging all suggest she has an active, symptomatic left L5 radiculopathy". He explained that radiculopathy occurs when there is compression or irritation of the nerve root as it exits the spine and can cause both motor symptoms, such as weakness, and sensory symptoms, such as pain.
- [57] Dr. Mian went on to state that in his opinion: it is more likely than not that the current imaging findings are either a direct result of MVA #1 and MVA #2, or that the current imaging findings are due to an exacerbation of previous asymptomatic spinal pathology.
- [58] In cross-examination, Dr. Mian said he did not notice pain exaggeration.

## 2. Discussion

- [59] Doctors Gharsaa and Mian's assessment were done after both accidents had occurred. Neither of them distinguished between the two accidents.
- [60] I think it is correct to focus on the First Accident. While it cannot be assumed that a collision with minor vehicle damage has minor effect on a plaintiff, the circumstance of an accident can be taken into account in determining its potential effect on a plaintiff. In fact, I am not sure that the Second Accident can be called a "collision". It was a brush of a car door exiting a parking space against the rear left bumper that only caused a scrape to the bumper. The

speed had to be at near idol, because both Ms. Khakh and Ms. Naebkhil said that Ms. Naebkhil had stopped at almost the exact impact point; she was only about halfway out of the parking spot. As I said above, Ms. Khakh said the Second Accident was not as severe as the First Accident and that its main effect was to give her headaches. The Second Accident is therefore somewhat of a red herring in terms of it having any major effect of Ms. Khakh (whether immediate or ongoing).

a) Back & Neck Issues

[61] I will deal first with back pain.

[62] In support of their argument that the accidents did not cause any back injury, the defendants rely on Ms. Khakh having previously had back pain. As I noted above, she had a fall in 2014 and hurt her back, for which she saw her chiropractor. In September 2014, Dr. Singh mentioned that she struggled with exercise due to back pain. The defendants note that Dr. Mian said he could not rule out lumbosacral radiculopathy, and although the subsequent MRI showed radiculopathy, Dr. Mian said he could not be certain it did not pre-exist the accident because there was no prior MRI.

[63] There are two things to note here. First, Dr. Mian explained that although radiculopathy is an irritation of the nerve at the level of the spine, it manifests in symptoms felt in the leg. Ms. Khakh did not have prior complaints of pain or weakness in her leg but reported those issues to Dr. Singh after the First Accident. Second, Ms. Khakh - both according to her own evidence and that of her co-workers and supervisor - had no issues doing her early childhood education jobs prior to the accident. Issues arose following the accident.

[64] In his examination of Ms. Khakh, Dr. Mian noted signs of radiculopathy, later verified by the MRI. Dr. Gharsaa did not. That affects the weight to be given to Dr. Gharsaa's opinion on this point.

[65] I accept Dr. Mian's opinion in his second report: Ms. Khakh's back issues were either the direct result of the accident or are due to an exacerbation of previous asymptomatic spinal pathology. I also accept his opinion regarding cervical sprain and strain caused by the accident.

b) Shoulder Issues

[66] The defendants argue that Ms. Khakh's shoulder issues pre-existed the accident. As I noted above (para. 37), this is based on her having complained to Dr. Singh of shoulder pain in January 2015. In her cross-examination Ms. Khakh said she could not remember if her shoulder pain had resolved by the time of the March accident.

[67] Dr. Gharsaa, as I said above, acknowledged that pre-existing shoulder pain may have been exacerbated by the accident. The defendants, in argument, challenged that conclusion; one made by their own expert.

[68] Once again, any pre-existing shoulder condition was not interfering either with Ms. Khakh's work or home life. Any pre-existing condition was therefore exacerbated by the accident.

c) Neck Pain

[69] There is no evidence of any prior neck issues. The defendants do not disagree that Ms. Khakh's neck pain was caused by the accident.

d) Chronic pain

[70] As noted above, Dr. Mian concluded that Ms. Khakh would suffer some degree of chronic pain for the rest of her life. That is not something she suffered before the accident.

e) Failure to Mitigate & Intervening Events

[71] The defendants say Ms. Khakh did not mitigate her loss because, for example, she waited 18 days to get physiotherapy after her doctor's advice and she remained "clothed during massage and thereby minimising the effect of the therapy".

[72] The onus of proving Ms. Khakh's failure to mitigate is on the defendants. They must show that the plaintiff acted unreasonably and that the alleged missed recovery steps would have improved her situation: *Gill v. Lai*, 2019 BCCA 103. I find that the plaintiff made her best efforts to recover. Even if that were not the case, it is not sufficient to simply point to medical advice that was not perfectly followed. The defendants have adduced no medical opinion - nor is there sufficient evidence - to allow me to conclude that the alleged missed steps would have made a difference.

[73] The defendants say that most of the same factors amount to intervening events breaking the chain of causation. Once again and for similar reasons, this argument has no substance.

f) Conclusion on Injuries

[74] While Ms. Khakh had some pre-existing conditions, they were not symptomatic at the time of accident. Either the accident caused new injury or worsened and made symptomatic her pre-existing conditions. Ms. Khakh did not have chronic pain prior to the accident. Under the principles set out in *Athey v. Leonati*, [1996] 3 S.C.R. 458, the defendants are liable for the full extent of Ms. Khakh's alleged injuries. C. General Damages

[75] I have already described in detail Ms. Khakh's injuries and ongoing pain issues.

[76] Ms. Khakh testified that before the accident she loved sewing and made Indian dresses for herself, her daughter and relatives, if they asked. She can no longer do that because it requires too much concentration. She did not elaborate on why the accident interferes with her concentration. She no longer takes walks through the neighbourhood.

[77] I agree with Ms. Khakh that the appropriate range of general damages is \$90,000-\$100,000 based on the following cases which involve similar circumstances:

- a) Lewis v. Wang, 2020 BCSC 16;
- b) Cummings v. Tellier, 2019 BCSC 2067;
- c) Flore v. Jongkind, 2018 BCSC 721;
- d) Domijan v. Jeon, 2018 BCSC 1988;
- e) McCarthy v. Davies, 2014 BCSC 1498;
- f) Doho v. Melnikova, 2011 BCSC 703; and
- g) Gosal v. Singh, 2009 BCSC 1471.

[78] The cases cited by the defendant were for significantly milder injuries and some of the case were quite old.

[79] I award Ms. Khakh \$90,000 in general damages. D. Loss of past and future Income Earning Capacity

[80] Ms. Khakh testified that she had intermittently taken days off from her job at the Delta School District when she was in pain or had to see a specialist. She also explained that she ended up going back to work because she found out that there was no substitute for her at the Strong Start programme and she felt it was not fair that she not facilitate the program and disappoint people.

[81] Another reason Ms. Khakh continued to work through her pain was because she was desperate to secure a permanent position with the Delta School District. Ms. Canning confirmed that these are difficult to obtain because there are only seven positions in the district. She also noted that there is not much turnover.

[82] Ms. Khakh also said that she worked through her pain to gain credits toward her seniority.

[83] Another reason Ms. Khakh gave for continuing to work was financial pressure her family was under due to a large debt her husband had incurred to Revenue Canada.

[84] As I said above, in March 2016, Ms. Khakh started work for G4S at YVR as a screening officer. She testified that she has difficulties standing during her job and that she tended to put more weight on her right side due to the back pain radiating down to her left leg and foot.

[85] The G4S job at YVR is a union position and the employees can bid for "lines" in a schedule. There are full-time lines and part-time lines. The full-time lines come with a fixed-dollar cost of living COLA benefit. Employees are also free to trade their shifts with co-workers.

[86] From the time of her employment at YVR, Ms. Khakh was scheduled for part-time lines and full-time lines. She testified that she gave away shifts that she could not do due to her pain and injuries. In particular, when she was scheduled for a full-time line, she gave away her Monday shifts permanently because she wasn't able to work to that full extent because of her pain. She stated that she would work whatever she could and then give away the rest.

- [87] Ms. Khakh says she has, in effect, made her own accommodations at her G4S job. She also adjusts her work by requesting "bypass" positions, which allow her to sit.
- [88] As noted above, Ms. Khakh stated that when she secured the G4S job, she decided to quit her position at Butterflies Daycare because the latter was more physically demanding.
- [89] Mr. Thomas Watson, an occupational therapist, prepared a Functional Capacity Evaluation. He opined that Ms. Khakh had the capacity to partially meet the physical demands of both her types of work. Regarding the airport work, he said: Ms. Khakh is limited for work as an Airline Baggage Agent by her reduced capacity for prolonged standing and walking; increased pain in her right shoulder when completing repetitive manual dexterity tasks (i.e. grasping and manipulating objects) such as when searching passenger baggage; and difficulty with maintaining reaching at above shoulder and lower levels such as when wandering passenger's entire bodies.
- [90] With regard to her early childhood education work, he said: Ms. Khakh is limited for work as an Early Childhood Educator by her reduced capacity for prolonged standing and walking; reduced capacity and increased pain with the postural demands for kneeling, crouching and stooping, and anticipating difficulty with transferring from small children sized chairs, increased pain in her right shoulder when completing repetitive manual dexterity tasks (i.e. grasping and manipulating objects); difficulty with maintaining reaching at above shoulder and lower levels such as when reaching for craft supplies in cupboards; and reduced performance for performing tasks requiring fine and medium manual dexterity. She meets most of the strength demands for this occupation but does not meet the full strength demands if she was required to lift heavier children, most of which would likely be at least 50 lbs. I note here that most - if not all - of the children Ms. Khakh would be required to lift are below 50 lbs in weight.
- [91] I set out above (para. 45) Dr. Mian's opinion regarding the impact of Ms. Khakh's injuries on her work. To summarise and reiterate, he said she could continue with her work in both occupations with some difficulty doing physically demanding tasks.
- [92] Ms. Khakh's current work schedule is:
- a) Strong Start at Hellings Elementary School, Monday-Friday from 8:30 a.m. - 12:30 p.m.;
  - b) Parent Drop-In program at the Ladner Hub on Monday afternoons from 12:30 p.m. - 3:00 p.m.;
  - c) Granny Group program at Hellings Elementary School on Thursday afternoons from 12:30 p.m. - 3:00 p.m.; and
  - d) Shifts at YVR on Saturday and Sunday from 2:00 p.m. - 10:00 p.m.
- [93] With respect to past income loss, Ms. Khakh argues that she ought to be awarded the loss from the G4S shifts she gave away for a net amount totalling \$21,894. Regarding work for the Delta School District, Ms. Khakh argues that she is entitled to the depletion of her sick bank

benefits: *Dhaliwal v. Meerdink*, 2014 BCSC 2418. She calculates this at \$750. Finally, Ms. Khakh says she gave away one afternoon shift per week at the Boys and Girls Club. She calculates this at \$3,276. Rounded, this results in a total past income loss claim of approximately \$26,000.

- [94] All that being said, Ms. Khakh's income has gone up since the accident and the defendants say on that basis alone she has suffered and will suffer no loss of income earning capacity. Her total income (all from employment) from 2010-2018 was: Year Earnings 2010 12,925 2011 22,802 2012 24,916 2013 26,455 2014 25,590 2015 31,377 (accident March 6) 2016 57,099 (started with G4S) 2017 57,107 2018 64,415
- [95] Both pre and post-trial losses may be viewed as a loss of income earning capacity: *Falati v. Smith*, 2010 BCSC 465 at para. 39. The fact that Ms. Khakh's income has increased since the accident does not in and of itself foreclose an argument for loss of earning capacity, past or future: *Ibbitson v. Cooper*, 2010 BCSC 1916 aff'd. 2012 BCCA 249; *Morlan v. Barrett*, 2012 BCCA 66; *Brown v. Bevan*, 2013 BCSC 2136; and *Watts v. Lindsay*, 2019 BCSC 2239. The issue is whether, but for the accident, Ms. Khakh would have been better able to perform in her positions. The simplest example of this would be if she would have been able to work more hours at G4S but for the accident.
- [96] In my view, Ms. Khakh has suffered a loss of income earning capacity.
- [97] With respect to her past loss of income earning capacity, while I accept that Ms. Khakh did give away some shifts due to her pain, I am not convinced that was the case for all shifts she says she gave away. Rather, I think some shifts were given away for personal reasons. Taking income tax into account, I assess Ms. Khakh's past loss of income earning capacity at \$21,000.
- [98] Turning to loss of future income earning capacity, Ms. Khakh assesses her claim based on her G4S claimed loss of approximately \$5,000 per year and taking that forward to a retirement age of from 65-70. Reducing that to a net present value results in a claim of \$78,000-\$95,000.
- [99] I have already said that I did not agree that all the shifts given up at G4S were as a result of the accident. Dr. Mian's conclusion that Ms. Khakh could continue with her work in both occupations with some difficulty doing physically demanding tasks, and that she can be accommodated at G4S is also to be borne in mind. However, a plaintiff who "toughs it out" to make the same or better income has still suffered a loss of earning capacity: *Ibbotson*.
- [100] Ms. Khakh points out that she lost her dream of opening a daycare centre. Referring to it as a "dream" overstates the matter somewhat; things only went as far as having some discussions with a work associate. No evidence was called as to what a daycare owner might make.
- [101] Taking all of these factors into account, I assess Ms. Khakh's future income loss at \$65,000.
- IV. Loss of Housekeeping Capacity

- [102] At the time of the First Accident, Ms. Khakh was living in a home with her husband and children. After the accident she found it too difficult to drive her children to work and the couple bought a condominium in Ladner, BC closer to one of the children's schools. Her mother alternates living with Ms. Khakh and her brother when she is not in India. Ms. Khakh's husband continued to live in the house.
- [103] Ms. Khakh testified that before the accident, she did all of the housework except the gardening with some help from her mother when she was there. After the accident her husband took over. The children were not asked to help because the parents wanted them to focus on their school work. Mr. Khakh and their son essentially gave the same evidence.
- [104] However, Mr. Watson stated: Based on the findings of this assessment Ms. Khakh mostly meets the physical demands for regular household cleaning of the Ladner condominium. By sharing and completing household chores with her children, mother and husband; through energy conservation techniques such as pacing; and by using adaptive equipment, Ms. Khakh remains independent with these activities. Currently, she does not meet the full physical demands for seasonal yard maintenance and home maintenance, but these are the responsibilities of the strata and therefore assistance is not required in these areas. As Ms. Khakh reports spending the majority of her time at the Ladner condominium, this writer did not assess Ms. Khakh in the Surrey home, and Ms. Khakh reports that her husband maintains the Surrey home. This writer has not provided costs for services for the Surrey home.
- [105] Peter Sheldon, an economist, employed a study (which he acknowledged to be outdated) valuing housework, including shopping, done by a female living in an apartment with a mother. Adjusting for today's dollars, the value from the First Accident to the date of trial would be \$44,100 and from trial until Ms. Khakh's assumed life expectancy \$455,000. That is the total value of the work. The issue, then, is the extent of her impairment, and how long it will last. The plaintiff argues for \$30,000-\$50,000 for future loss.
- [106] I accept that Ms. Khakh has suffered some degree of loss of homemaking capacity and this will continue for at least the next few years. But Mr. Watson's evidence is significant. Even if Ms. Khakh moves from the condominium back to the home, her husband has always been responsible for most of the yard care and home maintenance.
- [107] I assess Ms. Khakh's past and future loss of homemaking capacity at \$30,000. V. Cost of future care
- [108] An award for cost of future care must be medically justified and reasonable.
- [109] Mr. Watson recommended and costed the following items:
- (a) pain management;
  - (b) registered massage therapist/physiotherapist;

- (c) kinesiology;
- (d) psychology;
- (e) Tylenol Extra Strength;
- (f) Advil Extra Strength;
- (g) Amitriptyline/Nortriptyline;
- (h) cervical pillow;
- (i) heating pad;
- (j) foam roller;
- (k) exercise ball;
- (l) TENS machine and pads;
- (m) duster;
- (n) handy scrub;
- (o) long handle reacher;
- (p) Swiffer mop;
- (q) toilet brush;
- (r) heavy seasonal cleaning;
- (s) heavy seasonal yard care; and
- (t) gym passes. These are either based on Dr. Mian's recommendations or Dr. Mian has said they are reasonable and necessary.

[110] Mr. Sheldon has determined that the net present value of these items is from \$69,000-\$160,000.

[111] Recommended or not, the fact is that Ms. Khakh has made use of almost none of these and is unlikely to do so. She is exercise-averse. The cleaning items would all be required by anyone cleaning their house, irrespective of injury. Any cost difference between, for example, a long-handle Swiffer versus a regular one would be de minimis. Yard care was done by her husband before the accident. That said, chronic pain management would be helpful and she will no doubt use Tylenol or Advil. Seasonal cleaning has already been taken into account in the loss of housekeeping capacity award.

[112] Taking all of these factors into account, I award Ms. Khakh \$7,500 for cost of future care. VI. Special Damages

[113] Special damages of \$10,512 have been agreed to. VII. Conclusion

- [114] The defendants - represented by the same counsel - did not ask me to apportion damages between the First and Second Accidents if I found Ms. Naebkhil to be responsible for the Second Accident.
- [115] To summarise, Ms. Khakh is entitled to the following, after taking into account taxation:  
General damages \$ 90,000.00 Loss of past income earning capacity \$ 21,000.00 Loss of future income earning capacity \$ 65,000.00 Loss of housekeeping capacity \$ 30,000.00 Cost of future care \$ 7,500.00 Agreed special damages \$ 10,512.00 Total \$224,012.00
- [116] Ms. Khakh is entitled to her costs. If there are offers to settle that need to be brought to my attention, the parties may make submissions, in writing. "E.M. MYERS J."

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