

CANADA / JUDGMENT

Khan v. Bhangoo

2020 BCSC 2053

COURT

Supreme Court of British Columbia

DECIDED

22 December 2020

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2020 BCSC 2053 Khan v. Bhangoo

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Khan v. Bhangoo,

2020 BCSC 2053

Date: 20201222

Docket: M175321

Registry: New Westminster

Between:

Sophia Khan

Plaintiff

And

Sukhvir Bhangoo

Defendant

- and -

Docket: M198243

Registry: New Westminster

Between:

Sophia Khan

Plaintiff

And

Ceayra Basran and

Henry Le

Defendants

- and -

Docket: M224464

Registry: New Westminster

Between:

Sophia Khan

Plaintiff

And

Jesween Kaur Sandhu, Ameenna Chantelle Massir and

Bhagat Singh Sandhu

Defendants

Corrected Judgment: The text of the judgment was corrected at paragraph number 24 where a change was made on December 30, 2020.

Before: The Honourable Madam Justice Norell

Reasons for Judgment

Counsel for the Plaintiff:

S. Ballard

A.S. Dhillon

Counsel for the Defendants:

A. Du Plessis

Place and Dates of Trial:

New Westminster, B.C.

October 13-15 and 19, 2020

Place and Date of Judgment:

New Westminster, B.C.

December 22, 2020

- [1] The plaintiff, Ms. Khan, was injured in three motor vehicle accidents in 2013, 2016, and 2018. Liability has been admitted for all three accidents. The issues to be decided are the quantification of Ms. Khan's claims for damages for: pain, suffering and loss of enjoyment of life (non-pecuniary damages); past and future loss of earning capacity; past and future loss of domestic capacity; cost of future care; and out of pocket expenses (special damages).

Ms. Khan's evidence

Background

- [2] Ms. Khan is 39 years old. She was born in Fiji and graduated high school there. She immigrated to Edmonton, Alberta in 2001 at the age of 19. She described working at a number of jobs in Edmonton, all paying about minimum wage. No evidence was given as to whether she was working full-time or part-time. From August 2001 until 2002, she worked at three different locations of McDonald's. From the summer of 2002 until near the end of that year, she worked at a clothing store. In 2003, she worked at Bowring as a stocker for several months until her work permit expired. She next worked three or four months later, after she obtained another work permit, at a Husky gas station for 10 months and then at London Drugs for two or three months.
- [3] Ms. Khan's first daughter was born in November 2004, and her second daughter was born in December 2005. In late 2007, Ms. Khan started working in the evenings at Walmart as a cashier. She worked a few months until she was fired because she could not always attend shifts. Ms. Khan said she did not have childcare for her daughters. In 2007, Ms. Khan's relationship with her daughters' father ended, and after the separation, the father stopped looking after their daughters. After finding childcare, Ms. Khan worked at a Michael Hill jewellery store for eight or nine months before she left that job in May 2009 to move to Surrey, B.C.
- [4] Once in Surrey, Ms. Khan attended school to obtain a better job. She was interested in working with computers, and in the summer of 2009 she obtained a diploma from the Universal Learning Institute in Richmond, B.C. No evidence was given as to the title of the diploma or the length of this course. Ms. Khan learned JavaScript and other programs to design websites. At that time, she had found a childcare service, and her older daughter was in kindergarten.
- [5] After Ms. Khan obtained the diploma, she had difficulty finding a job. She said she could not work full-time because she had to be available for her second daughter who had behavioural difficulties. While Ms. Khan was taking the course, she received a few phone calls, sometimes by 9:00 a.m., to pick up her daughter from childcare because of her behaviour. This continued when her daughter was in school. A couple of months after obtaining the diploma, Ms. Khan started doing freelance work from home. She coded, and created or updated websites. When asked how many hours she worked freelancing, she did not give

any quantification, but stated she worked whenever she was available. Without her daughters' father, she did not have any other family help. She found work on websites such as craigslist.org or UsedVancouver.com. When asked to quantify the number of jobs she did, she said she did quite a few, but could not provide a specific number. She estimated that she earned a total of between \$6,000 and \$10,000 up until the late spring of 2012. She stopped working at that time because she was pregnant with her son, and she was having bad morning sickness. Her son was born in February 2013.

- [6] She has received social assistance since she moved to B.C. in May 2009. Other than freelance work, social assistance has been her only source of funds from 2009 to date. None of the freelance income was declared on her tax returns. Many of the jobs were paid in cash and she has no record to show what she was paid.
- [7] Prior to the first accident, she did not have any difficulty performing household chores. She was the mother of three young children, one of whom had a disability. She was always active with cooking, doing laundry, shopping, and changing diapers. She did not have a yard, but had a few flowerpots outside.
- [8] As for recreation, Ms. Khan rollerbladed and bicycled with her children, took them to parks and beaches, and went on long walks or drives with friends. She started driving in 2012, and in December of that year, took her daughters to Victoria. They went on other drives to Whistler and around the Fraser Valley. In June 2013, she took the children to Banff and Jasper. She did not own a TV, and she described the games she played with the children. They had "a lot of fun". Ms. Khan had many friends whom she met through school, work, and parenting programs at the library. She loved to socialize, and stated that she still does. She had a busy family and social life and was "always out and about".
- [9] She described her condition before the first accident as being "very healthy". She was not on any medications. She would get "normal headaches", and during her pregnancy, she had backache. Apart from daily stress, she said she did not have any mental health problems, but there was a time when she saw some counsellors because life in Canada was different and she was struggling.

First accident

- [10] The first accident was on December 6, 2013. Ms. Khan was driving with her 10-month-old son. She was travelling through the intersection of Scott Road and 80th Avenue in Surrey when the defendant turned left in front of her, causing her vehicle to collide with the defendant's vehicle.

- [11] Ms. Khan thinks she lost consciousness for a couple of seconds after impact. Immediately after the accident, she felt pain in her right arm. The airbags had deployed and she heard her son crying, but could not help him because of the pain in her arm. She was taken to hospital. She does not recall any other pain at the scene because the pain in her arm was so great, but when she was at the hospital, her back hurt as well.
- [12] Ms. Khan suffered a fracture of the radius of her right forearm (she is right-handed) and she had surgery the next morning. A plate and screws were inserted. These have not been removed. She woke up after surgery in a lot of pain. She remained in hospital for seven days. At discharge, she was given Tylenol 3 for back and arm pain. She took the pills every three to four hours.
- [13] She described the first six months after the accident, which was until June 2014. She said she saw her family doctor, Dr. Sabir, once or twice a month. She had pain in her arm, back, neck and shoulders, and was always in pain. She had difficulty sleeping. She obtained regular refills of Tylenol 3. She also was prescribed naproxen for a burning sensation and pain in her back, and took Advil and extra strength Tylenol.
- [14] She went to physiotherapy and rehabilitation sessions. She was given some exercises to do at home. In examination in chief, she was shown the summary of the physiotherapy and kinesiology charges. Based on the records, she stated she attended 12 sessions of physiotherapy and another 10 sessions of rehabilitation. The summary of her physiotherapy and kinesiology visits indicate she attended three physiotherapy sessions in October 2014, and 10 sessions between June 2015 and October 2015. There was no evidence she attended any other physiotherapy or rehabilitation session.
- [15] Her circle of friends became smaller. Her closest friends helped her clean her home for the first few months after the accident, but started drifting away, telling her that she complained too much and that they could not help her. She started to feel isolated. Her friends did not answer her phone calls. The friendships slowly ended.
- [16] She had difficulty doing most of the chores at home. She said she was not able to cook any more, but later described difficulty chopping hard vegetables such as potatoes, carrots and onions. If she did this, she would get a burning sensation and tiredness in her arm and could not do anything after that. She said even getting up and making a cup of tea in the microwave was challenging, but later described the difficulties she had with vacuuming, describing how she would get pain in her back from pushing the heavy vacuum back and forth. She said she was not able to do anything that required any strength. She could not wash the dishes. She could not change her son's diaper or lift him up. She was not able to take her children anywhere or play with them. Her eldest daughter, who was then nine years old, had to "grow up and take on a lot of responsibility". Her daughter would cook, while Ms. Khan would stir and help as much as she could.

- [17] In cross-examination, she agreed that about four months after the accident, the Ministry of Children and Family Development ("MCFD") removed her children from her care. The children were returned to her 11 months later. She agreed that "part of" the reason for this was because she was not able to clean her home and do laundry. There was no other evidence about why the MCFD removed her children. She said her children were returned to her care because her eldest daughter assisted her and she was able to keep her home cleaned to a level acceptable to the MCFD. Her friends also helped, but her children did most of the work.
- [18] There was no specific evidence about Ms. Khan's condition or what she was doing from six months after the first accident until the time of the second accident.

Second accident

- [19] The second accident took place on January 22, 2016, just over two years after the first accident. Ms. Khan was driving with her three children. She was travelling west on 104th Avenue attempting to make a left-hand turn on to Whalley Boulevard. The defendant's vehicle was travelling east on 104th Avenue and collided with Ms. Khan's vehicle.
- [20] Ms. Khan said that after the second accident, both her legs and shoulders hurt, but it was mostly her back that was painful. When at the hospital after the accident, she also had a lot of burning pain in her arm. After the accident, she took Tylenol 3. She was prescribed another medication, the name of which she does not recall. She resumed taking naproxen for back pain.
- [21] After the second accident, she started to see Dr. Ahmed as a family physician. Ms. Khan said she also saw Dr. Sabir, her first family physician.
- [22] Ms. Khan was asked to describe the first six months after the second accident. She said household chores became difficult for her. On some days, it was hard to get out of bed. Her children missed a few days of school because she could not get them ready or drive them to school. She was not the same person any more. It became very difficult to look after her children. She was always in pain and did not want to do anything. She had a hard time sleeping. She could not do grocery shopping. Her eldest daughter would come home from school, and go on her bicycle to do grocery shopping. Ms. Khan was not able to do recreational activities with her children. Her children started to call her boring because she could not do anything with them. Their relationship changed.
- [23] There was no specific evidence about Ms. Khan's condition from six months after the second accident until the time of the third accident.
- [24] In January 2018, the MCFD removed her three children from her care, and the children have not lived with her since. There was no evidence about why the MCFD removed the children at this time. Since that time, Ms. Khan has lived alone.

Third accident

- [25] The third accident took place on April 22, 2018, over two years after the second accident. Ms. Khan was a front-seat passenger in a vehicle that entered the intersection at 68th Avenue and 130th Street in Surrey, and collided with the defendant's vehicle. Ms. Khan was on her phone and did not see the accident.
- [26] Ms. Khan stated she had a headache almost right away, and has been getting headaches ever since. In the six months after the third accident, she had constant headaches, for which she saw her family doctor a few times. Her neck and shoulders were very stiff, and she struggled to move around. Her back always hurt.

Present condition

- [27] Ms. Khan stated she is constantly in pain. Her back is always hurting. She has difficulty sitting and standing for long periods of time. Almost every day, she has neck and shoulder stiffness and pain, and headaches. She stated she cannot wake up and say she is not going to have a headache that day. She has difficulty sleeping. She has right arm pain most days. When it gets bad, it feels like someone is drilling through her bones and she is not able to move her arm, and the pain travels up to her shoulder. She has difficulty taking a four-litre jug of milk out of the fridge. Typing an email makes her arm sore. If she picks up her laptop or tries to sweep, she gets arm pain. She has difficulty finding the strength to wash her hair. If she has excruciating pain, her arm swells up and looks purplish-blue and she is not able to move it. It did not swell like this after the first accident, but in the last few years, has swelled about six times. Her arm gets extremely tired if, for example, she carries groceries. She has been prescribed gabapentin for the arm pain and it has helped to reduce the pain. Her left arm now hurts, sometimes as much as the right arm. She sometimes has numbness, which she indicated was near her elbow.
- [28] She has tried different medications for her headaches, and back and arm pain. She is taking naproxen and Tylenol 3 and "a couple of other drugs" to help her relax with her headaches, and for depression. She agreed that Dr. Ahmed prescribed her a new medication in July 2020 for the headaches, and it helps. She thinks a conditioning program would benefit her and she would like to attend one.
- [29] She is able to do some chores around her home, but other chores she cannot do. She has difficulty bending down and picking up things. She can put cleaned clothes away. She can do ironing on good days. She can dust. She cannot vacuum or wash the floor, and she is unable to move a table or a couch to vacuum underneath it. Sometimes, she craves a food but cannot make it because she cannot cook. She can make a cup of tea, and make soup in the microwave. She has difficulty chopping carrots, peeling potatoes and cutting up meat. She said that sometimes just the strength it takes to slice through one small chunk of meat causes arm pain. Sometimes she cannot do the dishes. Simple tasks require a lot of time.

- [30] She now lives alone in a suite. She has a friend, Mr. Jason Boudreau, who helped her move. Since October 2018, Mr. Boudreau comes to her home after work every day from Monday to Friday for a couple of hours before going home. He prepares meals and they eat together. She cooks when Mr. Boudreau is there so she can have help. He cleans the dishes before leaving. Mr. Boudreau also comes to her home for three to four hours each Saturday and Sunday to help her. He does almost all of the household chores at her home. She estimates he does a couple of hours of work each day. He takes her grocery shopping, helps with laundry and changing sheets, cleans the top shelf of the fridge, sweeps and mops the kitchen floor, cleans the bathtub, and vacuums once a week. He has taken her to doctor's appointments, and ensures she takes her pills. He always checks up on her. He has complained that since starting to help her, he does not have his own social life.
- [31] Ms. Khan was cross-examined on her ability to do chores. She can put clothes in the washing machine, but she is unable to bend or reach down to remove them. She disagreed that she can use her left hand to vacuum. She said she has tried. Her examination for discovery evidence was put to her where she stated she used her left hand mostly for vacuuming. She confirmed that was true. She tried to vacuum with her left hand, but she cannot complete all of the vacuuming. She agreed that she can chop soft vegetables and she can stir. She agreed that in the daytime, she does her own cooking, but states all she makes is noodles, rice, and macaroni and cheese. When Mr. Boudreau helps her with shopping, he mostly helps her with heavy shopping bags. She can take out garbage only if the bags are small. When it was suggested that she could manage household activities without Mr. Boudreau's assistance prior to October 2018, she said she had her children with her.
- [32] As for future work, she would like to do website design and programming, but because she cannot sit and type for long, she does not think she can do it. She would like a job where she does not have to lift or bend too much. She would like to work, but feels that at this time, she would not be a reliable employee because of her symptoms. When her arm swells, she is not able to do much with her hand, and sometimes she cannot get out of bed because of back pain.
- [33] In cross-examination, it was put to her that she has not applied for any work after 2016. She said she was attending courses with WorkBC in 2016 and 2017, and she "agreed with that plan". She said she wanted to go back to work. She had to apply for jobs and "they checked every couple of weeks" that she was doing that. She did not find any work. No evidence was given about what those courses were or where she applied for work. This was the only evidence of what Ms. Khan was doing in the period from six months after the second accident until the time of the third accident, other than the children being removed in early 2018. Ms. Khan has not applied to work in any of the types of jobs she did in Edmonton as she said she went to school to work with computers. When it was put to her that she had no clear plans for work, she said she has a basic idea of what she wants, but there are challenges with not being able to do things because of her back and arm pain.

Mr. Jason Boudreau's evidence

- [34] Mr. Boudreau has known Ms. Khan since 2011. He is interested in coding and animation and helped her with some computer projects. He works at a shredding company. Prior to the car accidents, he saw Ms. Khan "here and there" for computer projects at her home and they went hiking together two or three times. Once, he drove Ms. Khan and her children to Whistler and they walked through the village and trails. He did not notice that Ms. Khan had any pain or physical limitations. She was always active with her daughters. She rollerbladed and bicycled.
- [35] Two years ago, Ms. Khan moved closer to his home. They were in contact again. He saw her struggling and in need, and now he sees her every day. When he drives home from work, he stops by her house and helps her for a couple of hours. His assistance became a daily routine. They do not have a romantic relationship.
- [36] He described what he does for Ms. Khan, consistent with Ms. Khan's evidence. While he is at work, he checks in with her and asks if she needs anything. He will watch a TV show with her and ensure she takes her medication and goes to bed. He described that Ms. Khan has back pain, and when the weather changes, her arm swells and turns red and purple along the white scar of the forearm. He saw the colour change during the week he testified. He has seen her faint because of pain. Once when she was putting groceries away, she had back pain and sat down and was kind of "out of it". He has taken her to the hospital emergency room for pain. If Ms. Khan uses her arm, it bothers her for two to three days. He described Ms. Khan as having "a bit of OCD - she likes everything clean and tidy". She wants cleaning done everyday even though Mr. Boudreau does not think it needs to be done. She wants her floor washed by hand rather than with a mop. He cleans the floors for her this way "because it gives her ease" and "so it is not going through her head and not bugging her". Most days, Ms. Khan sleeps a lot because she is depressed. She gets mood swings, and is frustrated and irritated because she cannot do things and because her children are not there. She is lonely and has no one to see her, so he socializes with her and takes her out because otherwise she is stranded at home. Sometimes, he spends the night there because she is in so much pain. Ms. Khan has bought a cushion for seating, and she uses it when they drive together. It was suggested that a lot of the time he is with Ms. Khan is socializing. He said it is not all chores, but also him driving and doing errands.
- [37] He knows Ms. Khan deals with the MCFD on a daily basis, and sends them emails, and there is a pending court case. He does not ask about it because he does not want to get involved.

Expert evidence of injuries

Dr. Hala Ahmed

- [38] Dr. Hala Ahmed has been a family doctor since 2006. She was qualified to give evidence as a family doctor. Ms. Khan filed a report authored by Dr. Ahmed dated July 16, 2020, and Dr. Ahmed was cross-examined.
- [39] Dr. Ahmed opined that Ms. Khan suffered a right forearm fracture and soft tissue injuries to the neck and back, and likely suffers from Chronic Regional Pain Syndrome ("CRPS") in the right forearm. CRPS is a condition with continuing regional pain that is seemingly disproportionate to the usual course of an injury, and in which there are certain abnormal findings.
- [40] Dr. Ahmed has not continuously been Ms. Khan's family physician. Dr. Ahmed first saw Ms. Khan on June 11, 2014, about six months after the first accident. At that time, Ms. Khan complained of a five-day history of burning pain in her right forearm at the surgical scar, and hypersensitivity of the skin, but no tingling or numbness. Ms. Khan's symptoms raised the possibility of CRPS. On examination, Dr. Ahmed found tenderness, but the skin was normal. Dr. Ahmed advised Ms. Khan to monitor the pain and return if it persisted or worsened. In the two subsequent visits in 2014 and one in 2015 that concerned the accident injuries, Ms. Khan complained of mid and low back pain and stiffness. Ms. Khan was referred to physiotherapy. Ms. Khan also reported worsening of her right arm pain after pulling a door handle.
- [41] Dr. Ahmed then did not see Ms. Khan for over two years. During this time, Ms. Khan was involved in the second accident. Dr. Ahmed reviewed Dr. Sabir's records for this time period. Dr. Sabir had referred Ms. Khan for physiotherapy, and there is a note from the physiotherapist that Ms. Khan did not attend in 2016. This is hearsay of potential business records that are not in evidence, so I have not considered it.
- [42] When Ms. Khan resumed care with Dr. Ahmed in July 2017, she reported right forearm swelling and burning pain and that she continued to be bothered by back pain. Dr. Ahmed referred Ms. Khan to physiotherapy. Dr. Ahmed agreed she did not do an examination of Ms. Khan's arm at that time. After the third accident in April 2018, Dr. Ahmed again referred Ms. Khan to physiotherapy, but Ms. Khan did not attend as she told Dr. Ahmed she could not afford it. Dr. Ahmed agreed that the sooner a person pursues rehabilitation, the better the prognosis and chance of improvement will be.
- [43] Since 2017, Ms. Khan has continued to report right forearm pain and developing tingling in addition to the swelling and burning. Dr. Ahmed made a "likely diagnosis" of CRPS and prescribed gabapentin for neuropathic pain. Ms. Khan reported some improvement, and Dr. Ahmed advised Ms. Khan to increase the dosage of gabapentin. In Dr. Ahmed's opinion, Ms. Khan's symptoms are reasonably controlled by gabapentin. Dr. Ahmed did not think it was necessary to refer Ms. Khan to a neurologist or to explore other treatment options.

- [44] Dr. Ahmed was cross-examined on her likely diagnosis of CRPS. The diagnosis was based on symptoms Ms. Khan had - swelling, cold sensation, tingling and numbness. It is a clinical diagnosis and there is no test that can be done to confirm the diagnosis. She agreed that she never observed Ms. Khan's forearm to have excessive sweating, changes in skin texture, abnormal hair growth, muscle wasting, or altered temperature. These are signs that may be found with CRPS.
- [45] Dr. Ahmed opined that the CRPS and the prolonged nature of Ms. Khan's symptoms makes it likely that Ms. Khan will rely on medications for a long time. Ms. Khan's gender and recurrent soft tissue injuries from multiple accidents also negatively impact her prognosis. Medications, physiotherapy, and active rehabilitation can help improve her quality of life and her chances of recovery.
- [46] Dr. Ahmed opined that Ms. Khan is capable of carrying out activities of daily living, and needed support for household cleaning. Ms. Khan is unable to perform activities that are extremely physically demanding. Dr. Ahmed agreed her opinion is based on what Ms. Khan told her about not being able to do household activities. Dr. Ahmed opined Ms. Khan has not been able to resume any type of work since 2013, and her chronic forearm pain will likely affect her ability to join the workforce for the foreseeable future. Dr. Ahmed agreed that her opinion is based on Ms. Khan's report to her that she cannot do any work. She does not know what Ms. Khan did for work prior to the accidents, but thought it was a desk job. Dr. Ahmed said it is difficult to opine regarding Ms. Khan's return to work, but the prognosis is guarded. Some patients with CRPS improve, and some do not.

Dr. Robin Rickards

- [47] Dr. Robin Rickards obtained his medical degree in 1978 and completed his orthopaedic surgeon training in 1987. He was qualified to give evidence as an orthopaedic surgeon with specialty training in the management of chronic pain. He stopped clinical practice in 2017 and now confines his practice to medical-legal assessments. The defendants filed a report authored by Dr. Rickards dated May 26, 2020, and Dr. Rickards was cross-examined.
- [48] Dr. Rickards assessed Ms. Khan on May 22, 2020 for approximately 1.5 hours. The right forearm scar was non-tender to palpation. There was decreased range of motion in the right shoulder. There was pain on palpation of the right trapezius and paraspinal muscles, mostly on the right side. Forward flexion of the back was limited to 10% of normal with acute pain. There was diffuse pain on palpation and from any movement of all regions of the lower back, with no obvious muscle spasm. In Dr. Rickards' opinion, Ms. Khan suffers from adhesive capsulitis (frozen shoulder) of the right shoulder, and soft tissue symptoms of the posterior neck, thoracic, and lumbar spine. There was no evidence to suggest bony, disc, nerve root or facet injury in any of these areas. Appropriate treatment includes a structured exercise program focused on building muscles. There is no evidence that there has been specific treatment for Ms. Khan's right shoulder. The back symptoms have not been addressed appropriately as a structured exercise regime has not been applied. With

appropriate treatment, Ms. Khan's symptoms would be expected to resolve, usually within nine months of treatment for the shoulder, and six months for the other soft tissue injuries, and no permanent difficulties would be anticipated. Dr. Rickards noted that Ms. Khan is also underweight with poor dental health, and would benefit from the advice of a nutritionist and proper diet for weight gain and muscle strength. Dr. Rickards found that she was deconditioned.

- [49] Ms. Khan did not report symptoms of numbness or tingling in either arm. Ms. Khan reported intermittent swelling and discolouration involving her right forearm that is not necessarily associated with activity. On examination, there was no abnormal skin temperature, hair growth, or swelling. Dr. Rickards testified that he was looking for signs of CRPS because Ms. Khan said she had been diagnosed with it.
- [50] In cross-examination, Dr. Rickards agreed Ms. Khan's family physician, Dr. Ahmed, had more exposure to Ms. Khan and would have the advantage of a better overall assessment and longitudinal view.
- [51] Dr. Rickards read Dr. Ahmed's report after he wrote his report and saw that Dr. Ahmed recorded complaints of forearm symptoms. He agreed that gabapentin is prescribed to control symptoms of nerve pain. Dr. Rickards was taken to the several clinical records he reviewed and the visits mentioned in Dr. Ahmed's report that document right arm symptoms. This was compared to the last sentence of his opinion where he states that the "right forearm fracture has healed with no evidence of ongoing difficulties of any nature associated with this initial bony injury". When asked if that sentence was inaccurate, Dr. Rickards stated that when he saw Ms. Khan, there was no abnormality of her right forearm. She had discomfort in the arm that came and went. His statement was based on his objective examination and not her subjective presentation. He agreed Ms. Khan had subjective complaints of pain. He agreed the sentence is not accurate. The words objective and subjective do not appear in his conclusion. His report should say no objective evidence of ongoing difficulties associated with the right arm fracture.
- [52] Dr. Rickards was asked whether, if he had noted pain, tingling and swelling of the right forearm, he would agree with Dr. Ahmed's likely diagnosis of CRPS. He stated that he would not. For a diagnosis of CRPS, there would have to be a number of hallmarks such as pain out of proportion, localized swelling, stiffness of the joints above and below the affected area, skin changes including excess or no hair growth, tight shiny skin, and changes with respect to sensation. The clinical records suggest Ms. Khan has changes in sensation, but he saw none of these other hallmarks. A diagnosis of CRPS requires much more than pain, localized swelling, and altered sensation. He agreed that if she has CRPS, gabapentin would be one aspect of her care. Pain triggered by activity is not a hallmark of CRPS. With CRPS, pain would be present even at rest. Symptoms of CRPS can wax and wane, but they do not disappear one day and come back the next. Ms. Khan's symptoms are more consistent with ongoing soft tissue injuries.

- [53] He is aware of central sensitization syndrome. After an injury, a patient can develop pain and altered sensation, even on the side opposite to the injury. However, Ms. Khan does not have symptoms or the presentation of this condition.
- [54] He had not read the functional capacity expert report, but would defer to a functional capacity assessor regarding Ms. Khan's ability to work and do household chores. He accepts Ms. Khan's complaints of pain, which are of a long-standing nature. Ms. Khan is not exhibiting exaggerated pain behaviour. If Ms. Khan were to return to the workforce, she would have to slow her pace due to pain and deconditioning. If Ms. Khan's symptoms of pain are real, she would be commended for working even half-time. She should avoid heavy lifting to avoid pain exacerbation. If a person has chronic pain, depression, and a right arm injury, he agreed it would be reasonable to have assistance with household chores.
- [55] Ms. Khan has not fully recovered. Dr. Rickards noted that Dr. Ahmed's opinion that Ms. Khan's prognosis is guarded depends on what treatments have been applied so far. Poor prognostic factors include the duration of pain, the severity of the pain at outset, and repeated injuries. Ms. Khan told him she suffers from depression.

Mr. Manouch Amel

- [56] Mr. Amel has been a practicing kinesiologist since 1996 and has been trained to conduct functional capacity evaluations since 1998. He was qualified to provide evidence in that capacity. Ms. Khan filed a report authored by Mr. Amel dated May 28, 2020, and Mr. Amel was cross-examined.
- [57] Mr. Amel assessed Ms. Khan during one day of testing on May 28, 2020. Ms. Khan's testing suggested the presence of near full levels of physical effort. There were minor inconsistencies in the reliability and accuracy of her reports of pain and disability. Based on Ms. Khan's statement that she was planning to become a nurse at the time of the first accident, Mr. Amel chose the requirements of that job as a baseline to identify Ms. Khan's abilities. Ms. Khan did not give evidence that she had considered becoming a nurse. Ms. Khan fainted for 15 seconds during the interview. This happened one hour after testing started.
- [58] Ms. Khan is five feet tall and weighs 93 lbs. She is poorly conditioned. She has poor: strength; muscular endurance; cardiovascular conditioning; core stability; posture; standing tolerance (static and dynamic); squatting; and crouching. She had difficulty lifting weights from floor to waist or shoulder levels. She had difficulty with pushing, pulling and carrying. She had no difficulties with sitting. She may be able to work at sedentary or light-duty jobs that do not require lifting more than 5-10 pounds or standing (static or dynamically) for more than 5-10 minutes, and jobs that do not require special training or high levels of education.

- [59] The testing of assembly and disassembly of items at table height while standing showed she worked at a competitive rate, but Ms. Khan indicated she was in pain and "tried to sit at any opportunity". She has poorly developed and tight lower back muscles. Her strength testing for pushing and pulling was below the 10th percentile and her lifting generally was below the 5th percentile. She reported pain with movement of her wrist. Her dominant right hand was weaker than her left hand on grip-strength testing.
- [60] Mr. Amel opined that Ms. Khan would definitely benefit from an active rehabilitation program under the supervision of an experienced kinesiologist. He recommended massage therapy for the first part of an active program because she is very deconditioned, and a work conditioning program after the rehabilitation program.
- [61] Mr. Amel noted throughout his report that Ms. Khan variously: shook out her hands (repetitively opening/clenching); massaged her right shoulder and forearm and elbow; held, massaged or stretched her lower back; made facial grimaces and winced; held her breath/sighed; leaned on the table; had poor tolerance to standing and dynamic, whole-body movement; lacked concentration and was easily distracted; reported pain and fatigue; and was easily tired. She was also observed to demonstrate signs of competitive test performance.

Analysis

- [62] Before discussing the heads of damages, there are two matters that require comment.
- [63] First, while I accept that Ms. Khan has pain, I find that some of her evidence regarding her disabilities is inconsistent. For example, she made a broad statement that she was not able to cook, but also described the difficulty she had when she was cooking. She described seemingly inconsistent abilities, saying she could not do anything that required any strength, but then described activities that required strength. For example, she said getting up and making tea in the microwave was challenging, but then described the difficulty she had pushing and pulling a heavy vacuum.
- [64] Second, there are some gaps in the evidence. The most significant gap concerns the reasons why Ms. Khan's children were twice removed by the MCFD. Although there was some evidence to conclude that Ms. Khan's injuries contributed to the removal of the children in 2014, no evidence was given of the other reason or reasons for their removal at that time. Ms. Khan has not proven that but for her injuries the children would not have been removed in 2014. There was no evidence at all about why the children were removed in January 2018 and have not been returned to Ms. Khan's care since that time. Ms. Khan did not argue that the removal in 2018 was related to her injuries, nor did she make any claim based on the removal of the children at that time. For example, she did not argue that the 2018 removal is an aspect of her non-pecuniary damages claim, or that she requires homemaking assistance to have her children returned to her care. The evidence concerning the MCFD was very sparse, and came up in an odd way. It was not mentioned until the very end of Ms. Khan's

examination in chief, when she was asked a leading question to confirm that her children were removed in January 2018. She confirmed this was true in a one-word answer, and then the questioning continued on to a different subject without any exploration of why the children were removed. The evidence regarding the removal of the children for 11 months starting in 2014 only came up in cross-examination, and even then it was defendants' counsel who suggested that "part of" the reason the children were removed was because Ms. Khan was unable to clean her home and do laundry. Ms. Khan did not give any further explanation of the other reasons then or in re-examination. That was the totality of the evidence on this subject. As a result, the Court is left to assess Ms. Khan's complaints of pain, disability and inability to do housework and work, in the context of what would be very significant and upsetting events, without any claim that the removal in 2018 is related to her injuries, or any evidence of what else was transpiring. However, I have considered the effect of Ms. Khan's injuries on her relationship with her children and the difficulty in caring for them, while they were in her care.

- [65] There are some other gaps. There was no evidence from Dr. Sabir, in the form of clinical records, an expert report, or testimony, even though he was Ms. Khan's family physician for her worst injuries. I do not draw any adverse inferences against Ms. Khan, as Dr. Sabir could have been called by the defendants as well. There was no specific evidence of Ms. Khan's symptoms in the year and a half following the first six months period after the first accident or the second accident, nor any evidence in examination in chief of what she was doing during those times. In cross-examination, Ms. Khan said she was in a WorkBC program in 2016 and 2017, but this was not explored. There are no records of this in evidence. There was also no evidence regarding what, if any, involvement Ms. Khan had with the fathers of her children during this time, and how her injuries may have affected those relationships.
- [66] The result of all of the above, is some caution in assessing Ms. Khan's evidence regarding the extent of her disabilities caused by the accidents. In *Bradshaw v. Stenner*, 2010 BCSC 1398, aff'd 2012 BCCA 296, Madam Justice Dillon reviewed the factors grounding an assessment of credibility at paras. 186-187. Those factors include inconsistencies in evidence, and whether the "evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time". Here, there is little evidence of the context in which to assess Ms. Khan's evidence.

Non-pecuniary damages

- [67] The purpose of non-pecuniary damages is to compensate the plaintiff for pain, suffering, loss of enjoyment of life, and loss of amenities. The amount does not depend solely upon the seriousness of the injury, but upon the court's assessment of loss and its ability to provide solace and ameliorate the condition of the plaintiff in his or her particular circumstances. While awards in other cases provide guidance, each case must be determined on its own facts. A list of factors to consider in determining awards is set out in *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46. Those include the: age of the plaintiff; nature of the injury; severity and

duration of pain; disability; emotional suffering; loss of impairment of life; impairment of family, marital and social relationships; impairment of physical and mental abilities; and loss of lifestyle.

- [68] There is no dispute on the expert evidence, and I find: that Ms. Khan suffered a mid-shaft fracture (known as a Galeazzi fracture) of her right forearm and that the bone has healed; and that she suffered soft tissue injuries of the shoulder, neck, and back, and has headaches, which all continue to be symptomatic, although the extent of these injuries are in issue. Causation is not in issue. I find the first accident caused the right forearm fracture and all three accidents caused or aggravated the soft tissue injuries to the shoulder, neck, and back, and the headaches. I accept Dr. Rickards' evidence that Ms. Khan has developed a frozen right shoulder. The experts differ on the diagnosis of Ms. Khan's right arm symptoms and the prognosis for her injuries.
- [69] Dr. Ahmed and Dr. Rickards differ on whether Ms. Khan has CRPS. I prefer Dr. Rickards' opinion over that of Dr. Ahmed's, primarily because of his extra training in chronic pain, and because Dr. Ahmed's diagnosis is largely based on Ms. Khan's report of symptoms rather than findings of objective signs of CRPS on examination. Dr. Ahmed does not report the presence of temperature changes, sweating, changes to skin texture, hair growth or muscle wasting, or decreased range of motion at the joints above and below the site. Counsel for the defendants refers to *McCaffery v. Arguello*, 2017 BCSC 1460, where the Court reviewed the evidence of an expert regarding the criteria for CRPS. The reported evidence in that case cannot be relied upon as evidence in this case. Dr. Rickards gave similar, but not as detailed, evidence regarding CRPS.
- [70] In this case, it is the symptoms that Ms. Khan is experiencing and her prognosis that are more important than the label of the diagnosis. Despite that I do not find that Ms. Khan has CRPS, I accept her evidence that she has pain in her right forearm, and that on six occasions over the past three years, she has had swelling in the arm and that it turned a darker colour and felt cool. I also accept that she has headaches and pain in her back, shoulder, and neck, but not to the degree that she cannot do most day to day activities. A few times during her testimony, she rubbed her arm and back, and had to stand up, but as discussed previously, I find that her evidence as to the extent of her disability was sometimes inconsistent.
- [71] Dr. Rickards and Mr. Amel opined that Ms. Khan is deconditioned, and I accept those opinions, which are consistent with Ms. Khan's evidence that she has been quite inactive for the past three years. I find that some of her disability is a result of her significantly deconditioned state. Dr. Rickards, Dr. Ahmed, and Mr. Amel opine that Ms. Khan requires an active rehabilitation program. I accept Dr. Rickards' opinion that Ms. Khan has not been appropriately treated, not because appropriate treatment was not prescribed, but because she has not participated in the active rehabilitation program that has been recommended to her.

- [72] Dr. Rickards and Dr. Ahmed opine that Ms. Khan would improve if she participated in active rehabilitation, but they differ on the extent of that improvement and prognosis. On this issue, I prefer Dr. Ahmed's opinion over Dr. Rickards', primarily because Dr. Ahmed has had the benefit of more overall and longitudinal observations of Ms. Khan. I also note the significant omission in Dr. Rickards' report where he concluded the "right forearm fracture has healed with no evidence of ongoing difficulties of any nature associated with this initial bony injury", which he explained as referring to only a lack of objective evidence. Dr. Rickards agrees that the endurance of Ms. Khan's symptoms and the severity of pain she reported at the outset are negative prognostic factors. Based on the expert opinions, I find that it is likely that Ms. Khan will improve and would have improved earlier if she had participated in active therapy. However, given the chronicity of her symptoms, I find it is likely her symptoms will never completely resolve.
- [73] Defence counsel argues that Ms. Khan has failed to mitigate by failing to attend physiotherapy when it was recommended. He argues that the fact that her pain levels decreased during and after functional testing by Mr. Amel is a good indication that she would have benefited from rehabilitation. I do not agree that Ms. Khan reporting marginally better pain later in the day of testing and the next day is a sign she will improve, but as stated above, I do accept Dr. Rickards' and Dr. Ahmed's opinions that an active rehabilitation program will likely improve Ms. Khan's symptoms. I find Ms. Khan's symptoms would have improved earlier if she had participated in the active rehabilitation recommended to her. On this issue, I refer only to Dr. Ahmed's recommendations and not the hearsay evidence of what Dr. Sabir may or may not have recommended.
- [74] Ms. Khan's counsel argues that Ms. Khan tried physiotherapy when it was recommended after the first accident, and visited her doctor regularly. He argues that Dr. Ahmed testified that if Ms. Khan took medication and attended treatment, it would not necessarily have improved her chances to return to work. Counsel points out that Ms. Khan had three accidents and was injured and reinjured, and her attempts at rehabilitation must be viewed in that context.
- [75] In *Graham v. Rogers*, 2001 BCCA 432, Madam Justice Rowles set out the nature of a plea of failure to mitigate and the onus of proof:
- [35] Mitigation goes to limit recovery based on an unreasonable failure of the injured party to take reasonable steps to limit his or her loss. A plaintiff in a personal injury action has a positive duty to mitigate but if a defendant's position is that a plaintiff could reasonably have avoided some part of the loss, the defendant bears the onus of proof on that issue. *Red Deer College v. Michaels* (1975), [1976] 2 S.C.R. 324 at 331, 57 D.L.R. (3d) 386 at 390, and *Asamera Oil Corp. v. Sea Oil & General Corp.* (1978), [1979] 1 S.C.R. 633, 89 D.L.R. (3d) 1, provide support for that proposition.

- [76] To establish a failure to mitigate, the defendant has the burden of proving the plaintiff acted unreasonably and that reasonable conduct would have reduced or eliminated the loss. Whether the plaintiff acted reasonably is a factual issue to be determined on a consideration of all the relevant surrounding circumstances. The law does not require "perfection in the pursuit of rehabilitation", but "contextually reasonable and sincere efforts" to limit loss: *Gilbert v. Bottle*, 2011 BCSC 1389 at paras. 202-203.
- [77] I find that the defendants have established that Ms. Khan failed to mitigate her damages. I find that Ms. Khan unreasonably did not attend the physiotherapy or active rehabilitation that was recommended to her by Dr. Ahmed. The total amount of her rehabilitation treatment was three sessions of physiotherapy in October 2014 and 10 sessions from June to October 2015. This is not sufficient considering what she states were the severity of her symptoms. Dr. Ahmed states Ms. Khan told her she could not afford it, but Ms. Khan did not give this evidence, and there is no evidence she sought funding. I also find that had Ms. Khan engaged in an appropriate active rehabilitation program, her symptoms likely would have improved, and her chances of recovery would have increased.
- [78] Ms. Khan's counsel submits that non-pecuniary damages should be assessed at between \$135,000 and \$150,000. Counsel refers to: *Farand v. Seidel*, 2013 BCSC 323 [Farand]; *William v. Ross*, 2017 BCSC 2200 [William]; and *Cumpf v. Barbuta*, 2014 BCSC 1898 [Cumpf]. Defendants' counsel submits that non-pecuniary damages should be assessed at between \$44,326 and \$66,300, but that this amount should be increased by another \$25,000 to reflect any possible loss of capacity to earn income and any loss of domestic capacity, which should be included in the non-pecuniary award rather than under separate heads of damages. Counsel refers to: *Perez (aka Gillespie) v. City of Vancouver*, 2002 BCSC 1773 [Perez]; *Michaud v. Machtaler*, 2004 BCSC 829 [Michaud]; *Rezaei v. Leland*, 2013 BCSC 1650 [Rezaei]; and *Pringle v. Pringle*, 2020 BCSC 75 [Pringle].
- [79] In *Farand*, the 28-year-old plaintiff suffered fractures of the tibial plateau (knee), sacrum and pelvis, and soft tissue injuries to her spine. She required surgery on the knee, was in hospital for 12 days, and used a wheelchair for several months. She had chronic neck and back pain and would likely need a knee replacement in 15-20 years. Non-pecuniary damages were assessed at \$130,000 (\$145,325 in today's dollars).
- [80] In *William*, the 55-year-old plaintiff suffered fractures of the knee and toe, and soft tissue injuries to her neck, back, and shoulder. The knee fracture required surgery and she spent 30 days in hospital, and six months in a wheelchair. The accident caused her diabetes to worsen. A knee replacement was recommended. Non-pecuniary damages were assessed at \$125,000 (\$131,303 in today's dollars).

- [81] In Cumpf, the 44-year-old plaintiff had neck pain, burning pain in both shoulders radiating into her arms, back pain radiating to her right leg, headaches, an adjustment order, and depressed mood, all of which continued four years later and significantly affected her activities and relationships. She had chronic pain syndrome. Non-pecuniary damages were assessed at \$150,000 (\$163,820 in today's dollars).
- [82] In Perez, the 42-year-old plaintiff fractured her non-dominant hand, requiring surgery. She developed frozen shoulder, pain, reduced range of motion, and stiffness in the hand from osteoarthritis. She was scheduled for further surgery. The Court expressed reservations regarding her credibility. Non-pecuniary damages were assessed at \$50,000 (\$67,935 in today's dollars).
- [83] In Michaud, the 19-year-old plaintiff suffered a fracture of the scaphoid bone in his non-dominant wrist that was treated with a cast, and soft tissue injuries to his lower back and neck. The Court found he overstated the effect of his injuries, some of which improved within a year. Non-pecuniary damages were assessed at \$35,000 (\$45,746 today's dollars), which took into account the plaintiff's failure to mitigate.
- [84] In Rezaei, the 47-year-old plaintiff suffered a fracture of the radius and ulna near the wrist in his dominant arm, which required surgery. The plaintiff was a self-employed mechanic who returned to work the next day at a reduced capacity. The plaintiff suffered pain in his wrist, exacerbated by use, which resulted in a weaker grip and limited his ability to do heavier aspects of his work without pain. His life revolved around his work. Non-pecuniary damages were assessed at \$45,000 (\$50,305 in today's dollars).
- [85] In Pringle, the 31-year-old plaintiff suffered a fracture of the wrist of his non-dominant hand. The fracture required surgery and a procedure six weeks later to remove hardware and apply a cast. The plaintiff suffered permanent reduced range of motion in his wrist with associated discomfort. He was unemployed at the time of the accident. Non-pecuniary damages were assessed at \$50,000.
- [86] In my view, the cases cited by Ms. Khan's counsel involved more serious injuries than those suffered Ms. Khan, and likewise the cases cited by defendants' counsel involved less serious injuries, or instances where the credibility of the plaintiff was questioned or the plaintiff had failed to mitigate. The cases are guides only. I must assess the effect on Ms. Khan specifically. Ms. Khan was relatively young. She was involved in three accidents. She has suffered pain, and at times significant pain, but I also find that overall it is not as disabling as she stated. Gabapentin has helped the pain, and she recently has tried a medication that helps her headaches. She has failed to mitigate her damages by not embarking on an active rehabilitation program, and if she had done so, it is likely her symptoms would have improved. Her lifestyle has been affected. She has lost her former friends. She has suffered emotionally, but much of that is likely due to the removal of her children in 2018, which her counsel does not argue is related to her injuries. The children were also removed for a time starting in 2014, and part of the reason was Ms. Khan's difficulty in caring for the children.

She has not established that the children would not have been removed but for the injuries, however, the relationship with her children was negatively affected by her injuries. She now has a relationship of some dependency on Mr. Boudreau. I find it is likely her condition will improve, but not completely resolve, if she engages in active rehabilitation. I have also considered the possibility that she will not improve with therapy, but given the opinions of the experts, find this very unlikely.

[87] Considering all of the above, including a small deduction for failure to mitigate in the past two and a half years, as well as the discomfort Ms. Khan does and will experience in doing daily domestic chores, I assess non-pecuniary damages at \$90,000.

Past and future loss of work capacity

[88] Ms. Khan is entitled to be put in the position she would have been in had the accidents not occurred. The burden of proof relating to actual past events is a balance of probabilities. However, the test to be applied for both past and future hypothetical events is whether there is a real and substantial possibility that the events in question would occur. They are given weight according to their likelihood: *Rousta v. MacKay*, 2018 BCCA 29 at paras. 13-16. Positive and negative contingencies are considered. The overall fairness and reasonableness of the award must be considered: *Rosvold v. Dunlop*, 2001 BCCA 1 [Rosvold] at para. 11.

[89] In *Shongu v. Jing*, 2016 BCSC 901, Mr. Justice Sewell summarized the principles for assessment of future loss of capacity:

[186] The applicable principles in assessing loss of future income earning capacity have been the subject of a number of recent decisions of our Court of Appeal. In *Parker v. Lemmon*, 2012 BCSC 27, at para. 42, Savage J, as he then was, succinctly summarized the principles set out in *Perren v. Lalari*, 2010 BCCA 140:

- (1) A plaintiff must first prove there is a real and substantial possibility of a future event leading to an income loss before the Court will embark on an assessment of the loss;
- (2) A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation;
- (3) A plaintiff may be able to prove that there is a substantial possibility of a future income loss despite having returned to his or her employment;
- (4) An inability to perform an occupation that is not a realistic alternative occupation is not proof of a future loss;
- (5) It is not the loss of earnings but rather the loss of earning capacity for which compensation must be made;
- (6) If the plaintiff discharges the burden of proof, then there must be quantification of that loss;

- (7) Two available methods of quantifying the loss are (a) an earnings approach or (b) a capital asset approach;
- (8) An earnings approach will be more useful when the loss is more easily measurable;
- (9) The capital asset approach will be more useful when the loss is not easily measurable.

[187] In *Jurczak v. Mauro*, 2013 BCCA 507, the Court explained that while assessing an award for future loss of income is not purely mathematical, if available the Court should use factual mathematical anchors as a starting foundation to quantify the future loss of income.

See also *S.R. v. Trasolini*, 2013 BCSC 1135 at paras. 175-176.

[90] In this case, given Ms. Khan's earnings history, her counsel submits that the capital asset approach rather than the earnings approach is more useful for assessing her loss. The factors considered in a loss of capacity approach were set out in *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 (S.C.) [Brown]. These are whether:

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

[91] Ms. Khan's counsel filed an expert report of Mr. Darren Benning, an economist, and Mr. Benning was cross-examined. Mr. Benning was asked to calculate past and future absent-accident employment earnings assuming Ms. Khan would have realized employment income commensurate with that of the average B.C. female with a high school education who would have worked from the time of the first accident until age 67, and applying average labour market contingencies. Mr. Benning calculated the past income to the date of trial, net of taxes, to be \$168,477, and the present value of future income to be \$708,311. Mr. Benning stated that these figures are illustrative only, and based on the assumptions given to him.

[92] Ms. Khan's counsel acknowledges it is very likely that Ms. Khan would have taken some time off from the workforce absent the accidents. He argues a fair assessment would be to award her 60% of the amount calculated by Mr. Benning or approximately \$100,000 for the past loss. He argues Ms. Khan had small children, and had progressed from working at minimum wage positions to freelance computer work, and there is no reason to assume Ms. Khan would have moved backwards into minimum wage positions after taking the diploma course. Just because Ms. Khan left the workforce to care for her family does not mean that she would not have returned to the workforce when her children were older. Counsel

referred to *Grimm v. Young*, 2019 BCSC 1549, where Mr. Justice Riley stated:

- [108] However, before considering any contingency associated with future improvement of her condition, Ms. Grimm must first establish a realistic possibility that, but for her injuries, she would have returned to work on a full time or near-full time basis. This situation is complicated by the fact that subsequent to her injury, Ms. Grimm left the work force to become the primary care giver for her children.
- [109] On this particular point, the plaintiff relies on the reasoning of Madam Justice Griffin in *Tsalamandris v. MacDonald*, 2011 BCSC 1138 at para. 263-266. In considering whether there was a real and substantial possibility that the plaintiff would return to work after having children, Griffin J., as she then was, cautioned against giving "excess weight" to the plaintiff's absence from the workforce due to maternity. On the one hand, it is possible that a woman may choose not to return to full time employment after having a child. On the other hand, "long gone are the days when a woman had to make a choice between paid employment or having children", and similarly, "gone are the days when a woman who made a choice to take time off from paid employment in order to have children could find only lesser paid work" upon her return to the workforce. In this context, Griffin J. warned against "residual stereotypes" and lingering "prejudices" that may unfairly influence the court's analysis.
- [110] In my view, one important means of avoiding such unfair influences is to ensure that, to the greatest extent possible, the fact finding process is driven by the evidence rather than assumptions or suppositions.
- [93] As for future loss, Ms. Khan's counsel argues that the Court should award an amount based on 40-50% of Mr. Benning's calculations, which would be \$283,324 to \$354,156. Positive contingencies include Ms. Khan's drive to enhance her skills and earn an income where possible, and negative contingencies include that her injuries may not improve and she may never re-enter the workforce on a more than casual basis. Ms. Khan's counsel argues the future award should be \$350,000.
- [94] Defendants' counsel argues that Ms. Khan's evidence regarding her disabilities do not accord with the testing done by Mr. Amel. Ms. Khan sat for a total of approximately three hours during the day. She was able to stand for nearly two hours. Testing which measured her ability to assemble and disassemble, and which required dexterity and sustained standing, showed that Ms. Khan performed at better than the industrial standard. These are objective tests as opposed to Ms. Khan's subjective complaints. Neither Dr. Ahmed nor Dr. Rickards opined that Ms. Khan could not return to the workforce. Mr. Amel opines that Ms. Khan is capable of sedentary to light-duty jobs. Defendants' counsel again argues Ms. Khan has failed to mitigate by not participating in rehabilitation, and if she had done so, it would have facilitated her return to the workforce. Defendants' counsel also argues the best evidence of Ms. Khan's willingness to work is her past work history. Ms. Khan has no real attachment to the workforce. She did not work in the four years prior to the first accident. There is no

documentary evidence of earnings from freelance work, and her evidence was vague. She was unable to work outside the home because of her second daughter's behavioural difficulties. Defendants' counsel argues Ms. Khan has not established a loss of past or future earning capacity. In the alternative, defendants' counsel argues that if the Court is inclined to make an award, it should be minimal and included in the non-pecuniary award. He argues it should be \$20,000, based on \$10,000 per year for two years.

- [95] Given Ms. Khan's work history, a capital asset approach is appropriate. I find that Ms. Khan suffered injuries that have rendered her: less capable overall from earning income from all types of employment; less marketable or attractive as an employee to potential employers; and less valuable to herself as a person capable of earning income in a competitive labour market.
- [96] I find there is no real and substantial possibility that Ms. Khan would have worked in a manner consistent with the assumptions given to Mr. Benning. Ms. Khan did not have pre-accident earnings consistent with those of an average B.C. female with a high school education. I also find that for reasons unrelated to the accidents, in particular, the care for her children before they were removed and an attachment to the workforce which was not strong, there is no real and substantial possibility Ms. Khan would have worked full-time or even part-time up to the time of trial, absent the accidents. When Ms. Khan worked in Edmonton, she did not have children. After she had children, Ms. Khan did not have any jobs outside the home except for one job for two or three months at Walmart, but that stopped when she separated from her partner as she did not have childcare. There was no evidence she ever worked full-time before or after she had children. Given the nature of the positions she described, I find it was likely that she did not work full-time. Once in B.C., Ms. Khan's income tax returns show she earned an income of \$542 in 2009 and earned no income from then until the first accident in December 2013. She was in receipt of social assistance throughout that time. I accept Ms. Khan did some freelance work sometime between 2010 and early 2012, but there is no documentary evidence to corroborate that she made between \$6,000 and \$10,000 over the two years. I find she has not proven on a balance of probabilities that she made that amount of money. I acknowledge she took the diploma course to obtain better work, but she had not done any freelance work for nearly two years at the time of the first accident. She also said she worked as she was available and she could not work full-time because she had to be available for her second daughter who had behavioural difficulties. She said she was constantly busy with her children. Her son was born in 2013, and then her children were removed later in 2014 for 11 months and again in January 2018. I therefore dismiss Ms. Khan's claim for past loss of work capacity.
- [97] As for future loss of capacity, I again find Ms. Khan has established a loss of capacity based on the factors in Brown, and the issue again is whether there is a real and substantial possibility that she would have exercised that capacity. I find that if Ms. Khan had not been injured, there is a real and substantial possibility she would have eventually returned to the workforce. Although she did not demonstrate a strong attachment to the workforce, this was

in part because she had children living with her until they were removed. As for how much she would have worked, given her work history, I find that there is a real and substantial possibility she would have returned part-time starting at about the time of trial. I have considered the possibilities that she would have worked full-time, or not at all, and find those much less likely given her previous level of attachment to the workforce, and her diploma course taken to get a better job. As for the amount of her earnings, even if it were accepted that she made \$6,000 to \$10,000 in the more than two year period after her diploma course and until she stopped freelance work, this is less than \$5,000 per year. If she were to work 20 hours per week at minimum wage, this would be approximately \$15,000 per year. Against this, I must consider Ms. Khan's residual work capacity. I have already found that if she participates in an active work rehabilitation program, her symptoms will improve but not completely resolve, and thus her capacity to work will improve but she will continue to have some work limitations.

- [98] Neither counsel referred to *M.B. v. British Columbia*, 2003 SCC 53 regarding the deductibility of social assistance benefits from an award for loss of work capacity. There was no evidence about the type of social assistance benefits Ms. Khan receives and what assets and income she would be permitted to earn and still receive benefits. Given the amount of the award I am making, and the above circumstances, I do not find a deduction is required.
- [99] As discussed in *Rosvold* at para. 11, a court must assess damages, not calculate them according to a mathematical formula, although that may be used as a starting point. In all the circumstances, I assess Ms. Khan's loss at \$5,000 per year. The multiplier to age 65 is 21.3986, resulting in a calculated loss on that basis of \$107,000. This is not the end of the inquiry. The overall fairness and reasonableness of the award must be considered taking into account all the evidence. Doing so, I find this is an appropriate award, and I assess future loss of capacity in that amount.

Past and future loss of domestic capacity

- [100] In *Riley v. Ritsco*, 2018 BCCA 366, the Court stated:
- [101] It is now well-established that where a plaintiff's injuries lead to a requirement that they pay for housekeeping services, or where the services are routinely performed for them gratuitously by family members or friends, a pecuniary award is appropriate. Where the situation does not meet the requirements for a pecuniary award, a judge may take the incapacity into account in assessing the award for non-pecuniary damages.
- [101] In *Kim v. Lin*, 2018 BCCA 77, after reviewing the authorities at paras. 27-32 to guide the analysis of how those damages should be assessed, the Court concluded:
- [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.

- [102] Ms. Khan seeks a separate award for loss of domestic capacity based on 14 hours per week at \$25 per hour, starting on the date of the first accident for the remainder of Ms. Khan's life. There is no evidence supporting this cost of housekeeping assistance, but counsel submits this hourly rate can be justified on the basis of *Amini v. Mondragao*, 2014 BCSC 1590, which used a rate of \$25 per hour, and which has been endorsed in several cases: *Layton v. Perales*, 2019 BCSC 2227 at para. 98. There was also no evidence of normal life expectancy, but with the consent of defendants' counsel, Ms. Khan's counsel refers to life expectancy tables from Statistics Canada. A normal life expectancy for a female Ms. Khan's age is an additional 45.9 years. Based on these assumptions, Ms. Khan's counsel calculates the past amount to the date of trial as being \$124,950, and the present value of the future amount to be \$536,722, both before any positive or negative contingencies. He acknowledges that the Court may find that 14 hours may not be required, or that Ms. Khan may not require that much assistance over her lifetime, but argues that the Court should make a "robust" award and it should be \$400,000.
- [103] Defendants' counsel submits the loss of domestic capacity award should be \$5,000 and accounted for in non-pecuniary damages. He argues there are no special circumstances that would warrant a separate award for loss of housekeeping capacity. He argues that Mr. Amel's testing shows that Ms. Khan can do housework. Mr. Amel did not indicate that Ms. Khan needed housekeeping assistance, however, I note that it is not clear that Mr. Amel was asked to address this. Dr. Ahmed states that the plaintiff is unable to perform activities that are "extremely physically demanding". The plaintiff lives in a suite. There was no evidence she was required to do any heavy outside seasonal cleaning, but there would be cleaning inside. Defendants' counsel argues there was no clear evidence of the hours that Mr. Boudreau works, and the assertions regarding the hours he spends doing chores is not credible. Ms. Khan lives alone and there is no reason she would require this level of housekeeping work. He refers to Mr. Boudreau's evidence that he is cleaning to Ms. Khan's standards.
- [104] I find that Ms. Khan has established difficulty in carrying out some housekeeping tasks and an inability to perform heavier tasks. I find it is very unlikely that she will be required to do heavier outdoor work given that she lives in a suite, but she requires assistance for heavier indoor tasks. I find that if she engages in active rehabilitation, her ability to do domestic work will improve, but she will likely always have symptoms requiring some assistance for "extremely physically demanding" work as opined by Dr. Ahmed. Ms. Khan and Mr. Boudreau have a friendly relationship. I am not persuaded that Ms. Khan's injuries are such that she requires Mr. Boudreau to do all of the things he does for her, and that she cannot

do them. Mr. Boudreau is of assistance to Ms. Khan, but I do not find that her injuries make it necessary for him to do those tasks.

- [105] Ms. Khan should only be given a separate award for tasks she cannot do, as opposed to those she finds uncomfortable. I have already compensated her for the tasks she can do but which she finds painful, in the non-pecuniary damages award. Ms. Khan described the difficulties she had caring for her children for the first four months after the first accident until they were removed, and the six months after the second accident. I find that 14 hours per week is a reasonable estimate of the lost domestic capacity she could not perform during those two periods, and that two hours per week is a reasonable estimate for the other times the children were in her care. Given that she lives alone in a suite, her failure to mitigate in the past two and half years, and her expected improvement with rehabilitation, I assess her loss of domestic capacity at one hour every two weeks when the children have not been in her care in the past, and for the future. In coming to this, I have considered positive and negative contingencies that she may improve more or less than expected by the experts. I have also considered that Ms. Khan may require more assistance for the first year as she rehabilitates. I have also considered the possibility the children may be returned to her care and her loss of capacity could increase until her youngest child is grown in another 10 years. As for far into the future, in *Penner v. ICBC*, 2011 BCCA 135 at para. 15, the Court used age 70 as an end point for heavier tasks. A person may reasonably be expected to require assistance after that age for extremely physical work, and I have assumed that end date. Making the calculations on the above findings, and taking all of the foregoing positive and negative contingencies into account, I assess the loss at \$40,000.

Cost of future care

- [106] The principles applicable to an assessment of any future care award are discussed in *Dzumhur v. Davoody*, 2015 BCSC 2316 at para. 244, and in *Woelders v. Gaudette*, 2016 BCSC 1066 at paras. 159-161. In summary, these damages are intended to provide a plaintiff with physical care or assistance in order to maintain or promote the plaintiff's health as a result of injuries. There must be medical justification for the items claimed, which does not mean medical necessity, and the items claimed must be reasonable. The court must take into account positive and negative contingencies: *Morlan v. Barrett*, 2012 BCCA 66 at para. 76; *Tsalamandris v. McLeod*, 2012 BCCA 239 at paras. 64-72. The standard of proof for an award of future care is the determination of the real and substantial future possibilities: *Anderson v. Rizzardo*, 2015 BCSC 2439 at para. 209.
- [107] All three experts opine that Ms. Khan should embark on an active rehabilitation program. Mr. Amel estimates the cost to be \$2,720 including four massage sessions, but not including a work-conditioning program. Ms. Khan seeks \$3,920 which includes the cost of a work-conditioning program. Defendants' counsel argues the award should be \$2,720, which is the cost of the active rehabilitation program only.

[108] In my view, Mr. Amel's recommendation is modest and is medically justified. I find there is a real and substantial possibility that Ms. Khan will actually require significantly more rehabilitation than this. It appears she may need encouragement for rehabilitation and work conditioning. I therefore assess these damages at \$6,000, which is about one and a half times what Mr. Amel recommends.

Special damages

[109] The parties agreed on outstanding special damages of \$172.90 for physiotherapy and mileage of \$145.00 to attend those appointments, for a total of \$317.90, and I award that amount.

Orders

[110] In summary, Ms. Khan is entitled to damages against the defendants collectively in the following amounts, which have already taken into account the failure to mitigate in the past:

a)

Non-pecuniary damages

\$90,000.00

b)

Future loss of capacity

\$107,000.00

c)

Past and future loss of domestic capacity

\$40,000.00

d)

Cost of future care

\$6,000.00

e)

Special damages

\$317.90

Total:

\$243,317.90

[111] Unless there are any formal offers to settle that should be taken into account, Ms. Khan will have her assessable costs at Scale B. If the parties need to make submissions on costs, they may arrange to do so within the next two months through Supreme Court Trial Scheduling.

"Norell J."

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