

CANADA / JUDGMENT

Kim v. Wood

2021 BCSC 2135

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2021 BCSC 2135 Kim v. Wood

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Kim v. Wood,

2021 BCSC 2135

Date: 20211102

Docket: M211064

Registry: New Westminster

Between:

So Yeon Kim

Plaintiff

And

Angela Dawn Wood and Daken Lidder

Defendants

Before: The Honourable Justice Kirchner

Reasons for Judgment

Counsel for the Plaintiff:

A.S. Dhillon

Counsel for the Defendants:

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Place and Dates of Trial:

New Westminster, B.C.

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Introduction

- [1] This is an action for damages arising out of two motor vehicle accidents. The plaintiff, So Yeon Kim, was hit from behind in both accidents and liability is admitted. Ms. Kim claims to have suffered soft tissue injuries to her neck, shoulder, and back, and ongoing headaches since the accident. She claims for non-pecuniary damages and loss of housekeeping capacity. She also claims her injuries have rendered her unable to work and seeks compensation for loss of earning capacity, past and future.
- [2] While the defence acknowledges Ms. Kim is entitled to some amount of non-pecuniary damages and some past loss of earning capacity, it largely denies the remainder of her claim, arguing she has not proven her injuries are as severe as she reports, that she is not incapable for working, and she has failed to mitigate her damages by refusing to follow medical treatments recommended by her doctor.

Facts

- [3] Ms. Kim, is 47 years old. She was 42 at the time of the first accident. She lives in Langley, B.C. with her husband and three children. She has a fourth child from a previous marriage who is an adult and no longer lives with her.
- [4] Ms. Kim was born in Korea where she completed high school. She started university but left after she met her first husband. She immigrated to Canada in 1994 and started working as a waitress around 1998. She left that job around 2003 when she met her current husband, Jun Moon Lee. Since then, and prior to the accidents, she worked for a local Korean newspaper called Kyocharo doing various tasks such as answering phones and helping with advertising. She also worked at a credit union.
- [5] Ms. Kim married Mr. Lee in 2005 and they have three children: a daughter who is now 15, a son who is 13, and another daughter who is 6. Ms. Kim stopped working when the elder daughter was one. She was a stay-at-home mom until after the accident when she returned to the paid workforce between 2018 and 2020.

- [6] Before the accidents, Ms. Kim did all the family's housework and cooking. Her recreational activities tended to focus on her kids, playing badminton, basketball, or other games with them at the park. She had a fairly active social life with a network of friends she has known for over 20 years. She would have tea or brunch with them and they would go to one another's homes for dinner or dine out together. She also socialized with other parents in the neighbourhood.
- [7] Ms. Kim was an active volunteer in her church prior to the accident and attended services each Sunday.
- [8] She reports no health problems before the accident and there is no evidence of any.

The Accidents

- [9] The first accident occurred on March 8, 2017 on Highway 10 Near Glover Road in Langley, B.C. Ms. Kim was driving her 2016 Honda Odyssey minivan to pick up her son from Langley Fine Arts School. She was travelling at what she described as a "normal" speed on Highway 10 approaching Glover Road when she was hit from behind by the defendant, Angela Dawn Wood. Physical damage to her vehicle was minimal with the cost of repairs estimated at \$746.89. Damage to Ms. Wood's vehicle was more substantial, estimated at \$3,336.07.
- [10] Ms. Kim claims to have suffered pain in her neck, leg and both shoulders from the first accident. She had a family doctor at the time but did not seek medical treatment or advice. She testified the pain seemed to come and go and she managed it with Tylenol and massages from her husband. She thought she was getting better. She testified she had trouble with housework after the first accident so her husband and, to some extent, her kids began helping out. Her social life did not change.
- [11] The second accident occurred on August 24, 2017 on 200th Street on the Langley-Surrey border near 72nd Avenue. Ms. Kim was in the same 2016 Honda Odyssey minivan driving home from a friend's house with her son and younger daughter. She was stopped at the light at 72nd Avenue when she was hit from behind by the defendant, Daken Lidder, who was driving a 2017 Dodge Ram 3500 truck. The damage to her vehicle was more significant than in the first accident.
- [12] Following the second accident she complained of pain in her neck, upper back, and shoulders. She testified she also suffered a bad headache. She said she also felt coldness in her right leg and tingling on her right side down to her toes. She drove home after the accident and lay down on the bed. She took Tylenol and her husband massaged her neck.
- [13] Neither accident involved a particularly severe impact but it is well settled that assumptions are not to be drawn about injuries from the force of the impact or the amount of vehicle damage: *Greenway-Brown v. MacKenzie*, 2019 BCCA 137 at paras. 27-30.

Medical Condition Post-Accident

- [14] Ms. Kim claims the second accident exacerbated the injuries she suffered in the first. She suffered the same neck, shoulder, and back pain but with more severity. She said she was having trouble cutting vegetables and stirring pots. She also had difficulties with sleep.
- [15] She did not immediately seek medical treatment, again thinking she would get better on her own. However, after about a month, on September 26, 2017, she started seeing Dr. Eva Idanwekhai, a general practitioner. She did not see her family doctor because, apparently, he does not involve himself with ICBC claims. She continued to see Dr. Idanwekhai, albeit somewhat sporadically, over the next three-and-a-half years. Dr. Idanwekhai provided the only expert medical evidence at trial.
- [16] In her first consult with Dr. Idanwekhai, Ms. Kim complained of neck and back pain, numbness of her left hand with burning feeling in her fingers. She did not report problems with her shoulder or hip. Nor did she report problems with headaches. She reported she was unable to stand for a long time due to pain.
- [17] On examination, Dr. Idanwekhai noted tenderness in the muscles of the neck and upper and lower back, but with good range of motion albeit with some stiffness. Sensation of the limbs, gait, and reflexes were normal. His assessment was Ms. Kim suffered neck and back myofascial pains. He recommended massage therapy, active rehabilitation and he prescribed an anti-inflammatory gel, pills and muscle relaxants. He advised her to follow-up in one week.
- [18] Ms. Kim did not attend for massage therapy. Nor did she take the recommended anti-inflammatory gel, pills, or muscle relaxants. She testified her husband gave her massages to help relieve the pain and stiffness in her neck. She also took Tylenol (one regular strength) but said it did not help as the pain would return after a few hours.
- [19] She began taking chiropractic treatments starting in September 2017, physiotherapy starting in October 2017, and active rehabilitation starting in December 2017. She did not pursue any of these treatments past August 2018.
- [20] Ms. Kim next saw Dr. Idanwekhai on October 3, 2017 reporting persistent neck and back pains with tingling in her fingers and toes. She told him driving caused pain in her neck and back and she had difficulty carrying her children and standing upright to cook. Dr. Idanwekhai diagnosed tender paraspinal muscles of the neck and back with slightly limited range of motion. He again diagnosed neck and back myofascial pains. He recommended physiotherapy and that she take the medications he had prescribed earlier. While Ms. Kim began a round of physiotherapy treatment, she did not take the recommended medications.

- [21] On October 19, 2017, Ms. Kim reported no change in the pain in her neck but she was feeling worse in her back and hip area. She reported physiotherapy gave her no relief. She also reported she was busy with domestic tasks and did not have much time for physical therapy. Dr. Idanwekhai diagnosed neck and back myofascial pains with hip tendonitis (acute inflammation to the tendon). He recommended she continue with physiotherapy but stop massage therapy (which she had not actually started) due to a lack of time.
- [22] On November 7, 2017, Ms. Kim reported pain in the right side of her neck and shoulders was interfering with her sleep. This is the first she reported problems with her shoulder. Dr. Idanwekhai recommended she continue with chiropractic therapy and physiotherapy. He ordered X-rays of the neck and shoulder with a follow-up appointment in two weeks.
- [23] The X-rays showed a straightening of the cervical lordotic curve. Dr. Idanwekhai testified when there is stiffness in the neck, a person will pull on the spine and over time the natural curve in the neck becomes straight. He therefore suggests this straightening of the cervical lordotic curve is an objective sign of Ms. Kim's soft-tissue injuries to her neck.
- [24] Although Dr. Idanwekhai recommended Ms. Kim follow up with him two weeks after the November 7, 2017 visit, she did not see him again until July 17, 2018. At that visit she reported her neck was getting worse and she was having trouble shoulder checking while driving. She said she had tried physiotherapy but it did not help. Dr. Idanwekhai recommended active rehabilitation, massage therapy, and that she continue with the chiropractor.
- [25] Ms. Kim reported generally the same conditions on her next visit, August 15, 2018, Dr. Idanwekhai recommended chiropractic therapy, home exercises and active rehabilitation. He suggested she follow up with him in four weeks but she did not see him again for more than a year.
- [26] Her next visit was November 14, 2019 when she reported she had been busy and did not attend massage therapy. Dr. Idanwekhai assessed her with continuing myofascial pain in her neck and back and right shoulder tendinopathy (meaning chronic tendonitis in the shoulder). He ordered an ultrasound of the shoulder which came back indicating "no definite bony, joint or soft tissue abnormalities". He again recommended continued chiropractic and massage therapy, which Ms. Kim did not do at this point.
- [27] On February 19, 2020 Ms. Kim reported to Dr. Idanwekhai that her neck pain was worsening. She reported she had quit her job as a cashier because she could not stand for long periods of time. She was taking Tylenol but said it provided no relief. Dr. Idanwekhai recommended she continue physiotherapy, massage therapy, and chiropractic therapy and ordered another ultrasound of the right shoulder. He again prescribed anti-inflammatory gel, which she did not use, and advised her to follow-up in four weeks.

- [28] The second ultrasound was done on June 3, 2020 and indicated probable calcific tendinopathy of the subscapularis. Dr. Idanwekhai explained this as a build-up of calcium in shoulder that develops as the body produces calcium to try to heal the shoulder, again providing some objective evidence of Ms. Kim's injuries.
- [29] Ms. Kim did not see Dr. Idanwekhai again until March 17, 2021, more than a year after her previous visit. Presumably, the purpose of this visit was to permit Dr. Idanwekhai to prepare his report for trial with an updated assessment. She reported no change in her symptoms and she had not attended any therapy sessions since August 2018. She reported that she thinks that all therapies are a waste of her time. In her evidence, Ms. Kim testified she found no improvement in her condition as a result of the therapies and thus she stopped pursuing them. Once again, Dr. Idanwekhai prescribed anti-inflammatory gel and pills which Ms. Kim did not take.
- [30] In his expert report, Dr. Idanwekhai opined that Ms. Kim suffered soft tissue injuries to her neck, upper and lower back, and cervical radiculopathy. She later developed a strain in her right shoulder. Over time, he diagnosed her with myofascial pain in the neck/upper back and lower back, and calcific tendinopathy (a build-up of calcium crystals) in the right shoulder. He opined her prognosis for recovery is poor because if there is not a full recovery of myofascial pain within two to three years of the trauma, it is likely to be a permanent impairment.
- [31] He opined that Ms. Kim is totally disabled from the work she was doing in 2018-2020, but testified in cross-examination that he thought she could do some sedentary jobs using her hands. In his report, he recommended she explore the services of an occupational therapist who could assess and make recommendations on what she requires to function properly at work. In cross-examination he described this recommendation as "very important."
- [32] Dr. Idanwekhai also suggests an occupational therapist can coordinate the services of the kinesiologist who would help with strengthening exercises for Ms. Kim's neck, shoulder, and back. He also suggests she would benefit from activities such as yoga, Pilates, or aquatic exercises. Ms. Kim has not pursued any of these recommendations.
- [33] In his report, Dr. Idanwekhai repeats his consistent recommendations that Ms. Kim pursue physiotherapy, chiropractic therapy, and massage therapy. Ms. Kim never took the massage therapy treatments. Her husband regularly massages her neck and shoulders but he is not a therapist. She ceased all other therapies by August 2018. She considered them a waste of time as they provided temporary relief but no long-term relief. She also testified that she could not find someone to look after her youngest daughter while she was attending treatments and did not want to bring her along.
- [34] Dr. Idanwekhai testified these treatments are most important in the first six to 12 months after injury when they can assist in realigning the muscle fibres injured in the trauma. After that period, the treatments become palliative, providing relief from pain rather than healing.

- [35] Dr. Idanwekhai's report also recommends Ms. Kim take anti-inflammatory medication (such as Naproxen), anti-inflammatory gel, and muscle relaxants (Robaxacet). This advice has been consistent since her first visit with him in 2017 but she has not followed it. She says she is concerned that her body will grow used to those medications and she will then require stronger medications over time. The only medication she takes is a single regular strength Tylenol (or occasionally Advil) which she takes only when needed, perhaps three or four times a week and no more than once a day.
- [36] The defence called no expert evidence of its own to respond to Dr. Idanwekhai's opinion or otherwise independently assess Ms. Kim's medical condition.

Present Condition

- [37] At trial, Ms. Kim described her neck and shoulder pain as continuing and constant throughout the day. She said the pain in her neck radiates down to her back. She said it is particularly acute when she is driving or using her arms or shoulders. She said it was more severe when she was working but got a little better after she quit her job. She also feels numbness in her right arm and down to her foot. She complains of serious headaches, though there is no report of this in Dr. Idanwekhai's records. She says the pain in her right shoulder is also continuing and it too was more severe when she was working.
- [38] Ms. Kim testified she has been unable to do most housework after the second accident. She was able to handle easier tasks like folding light laundry but other tasks were divided between Mr. Lee and their children. She testified Mr. Lee does the vacuuming, wipes the floor, and does the laundry at a laundromat. The children do dishes and clean their own washroom. She says she is no longer able to cook and Mr. Lee has learned to do the cooking under her direction. Mr. Lee does much of the grocery shopping but Ms. Kim still does some large-item shopping at Costco, usually without Mr. Lee.
- [39] Ms. Kim says since the second accident, she has been unable to play with her kids as previously. When she goes to the park with them, she is unable to play. She said she does not socialize with friends as much because she needs to drive to meet them and is scared to drive. She continues to attend church on Sundays, but sits in the back so that she may stand when she becomes uncomfortable. She is unable to volunteer as she did prior to the accident. However, I heard no evidence from any of Ms. Kim's friends or church colleagues. Ms. Kim argues her husband is in the best position to observe her injuries and her daily activities, but he has an obvious interest in the outcome of this case.
- [40] Ms. Kim testified that when her family goes out for dinner, it is difficult for her to sit and so they now usually just get take out.

- [41] Ms. Kim continues to drive extensively every day. From the time of the accident to sometime in 2020, she drove her eldest daughter to daily dance classes in Port Coquitlam. More recently, she drives her son to dance classes on Main Street near downtown Vancouver three or four days a week. This means at least two hours of driving per day, including on the highway and in busy city traffic.

Employment

- [42] Ms. Kim was not working at the time of the first or second accidents. After the accidents, she worked as a baker, making cookies, at Inno Foods from March 2018 to June 2018 where she earned \$17.00 per hour. She was working 40 hours per week.
- [43] She testified she could not continue doing that job because of her injuries so in July 2018, she started working as a cashier at Hannam Supermarket. There she earned \$14.00 per hour and worked about 40 hours a week plus some overtime. She remained in that job for over a year-and-a-half, leaving in March 2020. She never missed work or called in sick because of her injuries.
- [44] She said she quit that job partly because of the pain she was enduring while working and partly because of the COVID-19 pandemic which required her to be at home to assist her children when schools closed.
- [45] The evidence was unclear on when Ms. Kim quit her job at Hannam Supermarket. She said it was February or March but could not remember the precise date. She was firm in her evidence that she quit for two reasons: her injuries and the COVID-19 pandemic. The COVID-19 pandemic was not declared until March 2020, and it was not known until sometime shortly after that time that schools would be closed.
- [46] Dr. Idanwekhai's clinical notes for February 19, 2020 state Ms. Kim quit her job as a cashier because she could not stand for long periods and she would be working in an office starting the following month. Though not in evidence for the truth of their contents, these provide some clarity on when Ms. Kim quit work at Hannam Supermarket.
- [47] Over the 19 months she worked at Hannam Supermarket, Ms. Kim never saw her doctor about how her injuries might be affecting her work, although her clinical records for chiropractic treatment indicate she had more pain while at work.
- [48] Ms. Kim returned to the bakery job at Inno Foods in August 2020 but lasted only about a month. She says she was unable to continue because of her injuries. She has no plans to return to any form of work at present. She said she does not think she could work right now. She confirmed that Hannam Supermarket offers part-time work but she thought it would not reduce the intensity of her work.

Analysis

Credibility and Injuries

- [49] As in many motor vehicle accident cases, much turns on Ms. Kim's subjective reporting of her injuries which in turn relies on the credibility and reliability of her evidence. As Justice Smith observed in *Sekhon v. Gill*, 2019 BCSC 811 at para. 43:
- [43] By its very nature, pain is subjective, variable, and highly personal. It cannot always be objectively confirmed by medical testing and both medical professionals and the court must rely on the plaintiff's evidence. If that were not the case, no plaintiff could ever be compensated for pain. As the court said in *Dunne v. Sharma*, 2014 BCSC 1106:
- [87] In a matter such as this, where her complaints are really not easily amenable to objective verification, the court is obliged to take considerable care in examining all of the evidence in order to be satisfied that the plaintiff's reports of injury and discomfort are credible. That said, I do not understand it to be the case that there should be a presumption that such claims are without merit.
- [50] The leading case in British Columbia discussing the factors to consider when assessing credibility is *Bradshaw v. Stenner*, 2010 BCSC 1398, aff'd 2012 BCCA 296 where Justice Dillon stated at para. 186:
- [186] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis*, [1926] 31 O.W.N. 202 (Ont.H.C.); *Farnya v. Chorny*, [1952] 2 D.L.R. 152 (B.C.C.A.) [*Farnya*]; *R. v. S.(R.D.)*, [1997] 3 S.C.R. 484 at para.128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (*Farnya* at para. 356).
- [51] In *Deplanche v. Leggat Pontiac Buick Cadillac Ltd*, 2008 CarswellOnt 2107, Justice Gray wrote the following for the Ontario Superior Court: "Of singular importance is the inherent probability or reasonableness of a particular version of the facts, against the backdrop of uncontroverted facts".

- [52] I generally found Ms. Kim to be a credible witness but I find some of her evidence regarding the impact of her injuries overstated. I find it particularly hard to reconcile the fact Ms. Kim worked for almost two years after the second accident, mostly without seeing her doctor, with her present claim that she is now completely disabled from any work. It is also hard to reconcile this with her claim that she is substantially limited in her ability to perform housekeeping chores, including cooking.
- [53] I also note there is a lack of independent evidence, apart from her husband, corroborating her symptoms of pain or her pre-accident conditions and social and leisure activities. I heard no evidence from any friends or co-workers. Her husband, Mr. Lee, was generally a credible witness but not a disinterested one: *Rogalsky v. Harrett*, 2014 BCSC 1255 [Rogalsky] at para. 43.

Causation

- [54] Ms. Kim must establish on a balance of probabilities the defendants' negligence caused or materially contributed to her injuries. The negligence need not be the sole cause of the injury so long as it is part of the cause beyond the minimalist range. Causation need not be determined by scientific precision: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at paras. 13-17; *Farrant v. Laktin*, 2011 BCCA 336 at para. 9.
- [55] The primary test for causation asks whether the plaintiff would have suffered the injuries but for the plaintiffs' negligence. The "but-for" test recognizes that compensation for negligent conduct should only be made where a substantial connection between the injury and the defendant's conduct is present: *Resurface Corp. v. Hanke*, 2007 SCC 7 at paras. 21-23. The plaintiff must be placed in the position she would have been if not for the defendant's negligence, no better or worse: *Blackwater v. Plint*, 2005 SCC 58 at para. 78.
- [56] I am satisfied the accident has caused the injuries described by Ms. Kim and Dr. Idanwekhai. By all indications, Ms. Kim was healthy prior to the accidents. There were no pre-accident medical records made available at trial or for Dr. Idanwekhai, but Ms. Kim testified she had not visited her family doctor in a long time before the accident. There is no evidence to suggest Ms. Kim was anything but completely healthy before the accident and there are no intervening events that might have caused the injuries. Dr. Idanwekhai testified the injuries are related to the accident and the defendants' acknowledgment that Ms. Kim is entitled to some measure of damages is supportive of causation.

Loss of Earning Capacity

Legal Principles

- [57] In *Rab v. Prescott*, 2021 BCCA 345 at para. 47 the Court of Appeal recently restated the analysis for assessing a future loss of earning capacity, articulating it as a three-step process:

- [47] From these cases, a three-step process emerges for considering claims for loss of future earning capacity, particularly where the evidence indicates no loss of income at the time of trial. The first is evidentiary: whether the evidence discloses a potential future event that could lead to a loss of capacity (e.g., chronic injury, future surgery or risk of arthritis, giving rise to the sort of considerations discussed in *Brown*). The second is whether, on the evidence, there is a real and substantial possibility that the future event in question will cause a pecuniary loss. If such a real and substantial possibility exists, the third step is to assess the value of that possible future loss, which step must include assessing the relative likelihood of the possibility occurring--see the discussion in *Dornan* at paras 93-95.
- [58] In *Grewal v. Naumann*, 2017 BCCA 158, Justice Goepel, dissenting but not on this point, discussed how this analysis is to be applied in the context of both past and future loss of earning capacity:
- [48] In summary, an assessment of loss of both past and future earning capacity involves a consideration of hypothetical events. The plaintiff is not required to prove these hypothetical events on a balance of probabilities. A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation. If the plaintiff establishes a real and substantial possibility, the Court must then determine the measure of damages by assessing the likelihood of the event. Depending on the facts of the case, a loss may be quantified either on an earnings approach or on a capital asset approach: *Perren v. Lalari*, 2010 BCCA 140 at para. 32.
- [49] The assessment of past or future loss requires the court to estimate a pecuniary loss by weighing possibilities and probabilities of hypothetical events. The use of economic and statistical evidence does not turn the assessment into a calculation but can be a helpful tool in determining what is fair and reasonable in the circumstances: *Dunbar v. Mendez*, 2016 BCCA 211 at para. 21.
- [59] The choice of adopting the earnings approach or the capital asset approach generally turns on whether the loss is easily measurable: *Parker v. Lemmon*, 2012 BCSC 27 at para. 42. If the capital asset approach is taken, courts generally consider the factors set out in *Brown v. Golaiv* (1985), 26 B.C.L.R. (3d) 353 (S.C.) [*Brown*] as follows:
- [8] The means by which the value of the lost, or impaired, asset is to be assessed varies of course from case to case. Some of the considerations to take into account in making that assessment include 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.

[60] Ultimately, the overall fairness and reasonableness of the award must be considered, taking into account all the evidence: *Rosvold v. Dunlop*, 2001 BCCA 1

The Parties' Positions

[61] Ms. Kim seeks an award for past loss of earnings and future loss of earning capacity. She seeks \$20,000 for past loss of earnings from September 2020 to the date of trial. This amount is based on her 2018 and 2019 after-tax income. She seeks an award for future loss of earning capacity in the amount of \$313,440 which is calculated by applying the same average past annual income multiplied by 18 years, being the number of years she would have worked before retiring if she retired at 65, and using the CIVJI multiplier of 15.672 to arrive at a present value.

[62] Central to Ms. Kim's claim is her assertion that she is now disabled from doing any type of work. She relies on Dr. Idanwekhai's opinion that she is disabled from doing the work she was doing up to September 2020. In his report, he states the following in a response to a question put to him in counsel's letter of instructions:

In your opinion, what is the period of total disability to date, i.e. The period during which the patient has been unable to work?

Opinion: Ms. Kim Stopped working March 2020 due to mixed reasons ranging from her daughter being home schooled, to the pains she as experiencing. She started another job in August 2020 but was only able to work for a month and had to quit the job due to MVA related pains. Total disability is from September 2020 to present.

[63] The defence acknowledges Ms. Kim is "entitled to modest compensation for loss of earnings [from July 2018 until February 2020] as a result of leaving Inno Foods for employment at Hannam Supermarket". I take this as a concession that she was unable to perform the more physical and higher-paid Inno Foods job during that period because of her injuries.

[64] However, the defence argues Ms. Kim has suffered no other loss of earning capacity. It says she only left her job at Hannam Supermarket to look after her children at home during the pandemic school closure and she has chosen not to go back since. Although she tried working again in September 2020, this was at the more onerous Inno Foods job and not the Hannam Supermarket job she did for almost 19 months post-accident. She did not attempt any other type of work.

[65] The defence argues Ms. Kim has not established a basis for loss of future earning capacity arguing "[t]here is no evidence to show the plaintiff has suffered any measurable functional limitations" and that "[h]er actual level of limitation is speculative."

- [66] Counsel for the defence does not rationalize its position on the future loss of earning capacity claim with its acknowledgment that Ms. Kim is entitled to some compensation for having to leave the Inno Foods job for the lower-paying Hannam Supermarket job.

Analysis

- [67] While I find that Ms. Kim has suffered some diminishment in her earning capacity, past and future, I am not satisfied she has proven she is completely unable to work. I accept she quit her job at Inno Foods because her injuries made that type of work unbearable. She has twice attempted that job and each time she lasted only a matter of weeks or a couple of months before her injuries compelled her to leave. The fact she left for a lower paying job at Hannam Supermarket provides objective evidence supporting this finding.
- [68] However, I am not satisfied that Ms. Kim has established she is fully disabled from working the cashier job at Hannam Supermarket or some other similarly paying job. She worked some 19 months at Hannam Supermarket after the accident and did so mostly without seeing her doctor about any pain, except in the early stages. She reported to her chiropractor in 2018 that her pain was worse when she was at work, but those records end when she stopped attending treatments in August 2018. She worked full-time at Hannam Supermarket, plus some overtime, for another year-and-a-half after that.
- [69] She reported to Dr. Idanwekhai in February 2020 that she quit her job at Hannam Supermarket because her injuries were bothering her but she was going to look for work in an office, which she did not do.
- [70] I accept Ms. Kim suffered some pain and discomfort while working at Hannam Supermarket but, given her 19 months of full-time work there, together with the lack of any assessment of her capabilities by an occupational therapist or a vocational consultant (something I discuss in a moment), I am not persuaded she is completely disabled from working at that or another job. The pain she endures while working is properly compensated through non-pecuniary damages.
- [71] I accept Ms. Kim's capacity to work is diminished to some extent. She must work with some pain and discomfort. She may need to work reduced hours or seek some other kind of accommodation. In this respect I note Dr. Idanwekhai's opinion that Ms. Kim:

will likely have restrictions with any employment or recreational activities that involve lifting, repetitive movements of the the low back, standing or sitting for a long time. Also she cannot do activities that involve overhead movements or throwing.

- [72] However, in cross-examination, Dr. Idanwekhai emphasized it is not his role as a general practitioner to assess Ms. Kim's capacity for work. He testified he does only a "rough assessment", and her needs and capabilities for work should be assessed by an occupational therapist, as recommended in his report. He described this as being "very important."

- [73] Yet Ms. Kim has not seen an occupational therapist and I have no evidence from one. Nor is there evidence from a vocational consultant who might opine on the types of work Ms. Kim is or is not capable of doing. I therefore have no evidence, beyond Dr. Idanwekhai's "rough assessment", of what work Ms. Kim might be capable of doing or what accommodations might be needed for her to work or work more comfortably at Hannam Supermarket or elsewhere. The evidence does not establish, even as a real and substantial possibility, that Ms. Kim is completely disabled from doing any job for which she might be qualified. It certainly does not support her claim for compensation equivalent to full-time work to age 65.
- [74] Ms. Kim's counsel asks the Court to infer that her potential for any employment is substantially limited. He points to her limited capacity with English, her grade 12 education, and the nature of her injuries. However, without evidence of an occupational therapist or a vocational consultant, Dr. Idanwekhai's "rough assessment" is an insufficient factual underpinning for that inference.
- [75] Furthermore, Ms. Kim has not tried the anti-inflammatory medications recommended by her doctor or continued with the chiropractic and other treatments he suggested. She has never taken the recommended massage therapy treatments and I do not accept that her husband's massages are a reasonable substitute for those of a professional. I acknowledge Dr. Idanwekhai's evidence that, at this stage, these treatments would be palliative rather than curative but presumably he has recommended them for a reason. Since she has not tried the recommended medications or all the treatments, it cannot be known whether these would alleviate her pain and discomfort at work, or might do so in the future. I will say more about this when dealing with mitigation but, for the present purposes, I observe this is another point that precludes the Court from assessing Ms. Kim's full abilities to work.
- [76] Ms. Kim has also not attempted to work reduced hours at the supermarket. Nor has she tried other types of work, such as the office job she was apparently contemplating.
- [77] Ms. Kim bears the onus of proving her loss of earnings claim. She must show she was unable to work in the past and there is a real and substantial possibility she will be unable to do so in the future. I accept she has established that her capacity to work is diminished. I am satisfied she was unable to work the Inno Foods job which involves lifting of some heavy goods. That job paid \$3.00 per hour more than the Hannam Supermarket job. To that extent, she has proven a past loss of earning capacity. She has also shown a real and substantial possibility that she will be unable to do this job in the future, although this could change over time and with the treatments and medications her doctor has recommended.
- [78] I also accept she has proven a diminished capacity to do other jobs, including potentially the cashier job at Hannam Supermarket to its full extent, and this results in a real and substantial possibility of some future loss. She has shown, through Dr. Idanwekhai's evidence, that she will likely have difficulties standing or sitting for long periods of time and doing repetitive motions or lifting heavy objects. Having regard to the factors set out in

Brown v. Golaiy at para. 8, this will necessarily reduce the range of jobs that may be open to her, make her less marketable or attractive as an employee and less valuable to herself as a person capable of earning income in a competitive market.

- [79] I am therefore satisfied Ms. Kim has met the first two steps in the Rab v. Prescott analysis but only to the extent of having a diminished work capacity. She has established her chronic neck and shoulder pain disclose a potential loss of earning capacity as a real and substantial possibility. It diminishes the capital value of her ability to work.
- [80] However, this does not mean she is incapacitated. Indeed Dr. Idanwekhai testified that Ms. Kim is probably capable of working in a more sedentary job using her hands. I do not take him to mean a completely sedentary position since he opines she would be unable to sit for long periods of time. However, I understood him to mean that she could probably do an office-type job that might permit her to move around a bit. This seems to be what she was doing pre-accident while working at Kyocharo.
- [81] However, Ms. Kim has not shown a real and substantial possibility that she is fully disabled from any type of work. The lack of evidence from an occupational therapist or vocational consultant, the fact Ms. Kim worked for two years post-accident, the fact she has not tried the medications recommended by her doctor, Dr. Idanwekhai's testimony that she could do a more sedentary job working with her hands, and the fact Ms. Kim has not attempted other work or part-time work lead me to this conclusion.
- [82] The Court is at a disadvantage in quantifying Ms. Kim's diminished work capacity because of the state of the evidence. I have no evidence of the range of jobs that might still be open to her, with or without accommodations, and what rates of pay might be expected for those jobs. It appears the Hannam Supermarket job paid minimum wage so if there is any other job that Ms. Kim can do full-time, there can be no loss in that respect. There may be office jobs she is capable of doing that pay more than Hannam but again there is no evidence on this point, apart from Dr. Idanwekhai's testimony that she is probably capable of doing a more sedentary job using her hands. I reiterate that it is Ms. Kim's onus to prove her claim and her loss. In these circumstances I can do little more than make a rough assessment of the value of Ms. Kim's loss or earning capacity, and do so in a manner that is fair and reasonable to all parties.

Past Loss of Earning Capacity

- [83] Using the evidence I have, I find Ms. Kim's past loss of earning capacity is best quantified by assessing the difference in value between the higher paying Inno Foods job and the Hannam Supermarket job. Inno Foods paid \$3.00 per hour more than the Hannam Supermarket. Based on a 40-hour week, Ms. Kim's inability to do the Inno Foods job works out to an annual pre-tax loss of \$6,000 or \$500 monthly.

- [84] Ms. Kim left Inno Foods to work at the lower paid Hannam Supermarket job in July 2018. She worked there until February 2020, a total of 19 months. She was then at home with her kids during the school closure to September 2020 collecting CERB. She makes no claim for loss of income for this period. She tried to go back to Inno Foods in September 2020 but quit shortly thereafter because of her injuries. She did not work from October 1, 2020 through to trial in September 2021.
- [85] I assess Ms. Kim's damages for past loss of earning capacity to be the difference in pay between the Inno Foods job and the Hannam Supermarkets job for a total of 31 months. The gross value of that difference at \$500 per month is \$15,500. Assuming this would be taxed at a rate of about 15% (based on working 40 hours per week at Inno Foods for \$19/hr), I assess Ms. Kim's past loss of earning claim at \$13,175.

Loss of Future Earning Capacity

- [86] I assess Ms. Kim's future loss of earning capacity on the same basis. I accept she would work to age 65, 18 years from now. I thus apply the CIVJI multiplier for 18 years to an annual loss of \$6,000 to arrive at a present value.
- [87] I consider this approach to be the most logical, as well as fair and reasonable, on the evidence that is before the Court. In taking this approach, I have regard to the fact that Ms. Kim is likely capable of working at some jobs as Dr. Idanwekhai stated in his evidence, but also to the fact that the range of jobs available to her is now likely more limited. I also consider as a possibility that not all the jobs that Ms. Kim may be capable of doing are necessarily at the same rate of pay as Hannam Supermarkets, which appears to be minimum wage. I also consider that, if Ms. Kim were to follow the medication and treatment recommendations of her doctor, there is a real and substantial possibility that she could better tolerate work, including the supermarket job. Indeed, the range of jobs open to her might well widen.
- [88] Applying the CIVJI multiplier rate for 18 years (15.6726) to the annual loss of \$6,000 generates a present value of \$94,035, which is what I award as damages for loss of future earning capacity.

Non-Pecuniary Damages

Legal Principles

- [89] Non-pecuniary damages are awarded to compensate the plaintiff for pain, suffering, loss of enjoyment of life, and loss of amenities. The compensation awarded should be fair to all parties, and fairness is measured against awards made in comparable cases. However, such cases serve only as a rough guide since each case depends on its own facts: *Trites v. Penner*, 2010 BCSC 882 at paras. 188-189.

- [90] A common but non-exhaustive list of factors typically considered is the plaintiff's age; the nature of the injury; the severity and duration of the pain; disability; emotional suffering; loss or impairment of life; loss or impairment of family, marital or social relationships, impairment of physical and mental abilities, loss of lifestyle and the plaintiff's stoicism: *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46.
- [91] The assessment of non-pecuniary damages is necessarily influenced by the plaintiff's personal experiences in dealing with the injuries and their consequences: *Dilello v. Montgomery*, 2005 BCCA 56 at para. 25.

Ms. Kim's Position and Cases

- [92] Ms. Kim seeks an award of non-pecuniary damages in the range of \$100,000 to \$120,000. She relies primarily on *Baird v. Lam*, 2020 BCSC 615 [Baird], as well as *Merko v. Plummer* [Merko], 2016 BCSC 1403, and *Leach v. Jesson*, 2017 BCSC 577 [Leach].
- [93] In *Baird*, the plaintiff was involved in two minor motor vehicle accidents within about six months of each other. She was 45 years old at the time of the accidents and 50 at trial. She was a mother of three children, the youngest being 15, and worked part-time in food services in a seniors' care home.
- [94] Like Ms. Kim, Ms. Baird did not seek medical attention after the first accident, believing her injuries - which included neck, shoulder, and arm pain as well as headaches - would subside. After the second accident, she saw her family doctor and reported a sore shoulder and neck, headaches, and difficulty sleeping. She experienced numbness in her left arm and hand when driving long distances. She suffered from anxiety due to her inability to work and contribute financially to the family, and she worried her fatigue and irritability post-accident would affect her family relationships. She was diagnosed with whiplash injuries and thoracic outlet syndrome which were exacerbated in the second accident. Her symptoms persisted through to the trial which was almost five years post-accident and Justice Murray found she is unlikely to be cured.
- [95] Prior to the accident, Ms. Baird was "pretty active" with her kids. She went to dinner and coffee with her friends, walked regularly, went to yoga and Pilates, and swam, boated and tubed at a family cabin. She also kept a meticulously clean house. Following the accident had to adjust her activities to minimize discomfort and pain. She could not walk as frequently and socialized less. She suffered arm pain when driving long distances, as she was often required of her to take her daughter to gymnastics competitions. Justice Murray found Ms. Baird to be a very credible witness who tended to "downplay her issues" but that she was "constantly in pain", exhausted, and irritable. Her evidence was supported by the testimony of a friend who, though sympathetic, had no direct interest in the outcome. Justice Murray awarded Ms. Baird \$95,000 in non-pecuniary damages. There was no separate award for loss of housekeeping capacity, past or present, but it is evident this was a factor in Murray J.'s assessment of non-pecuniary damages.

- [96] In *Merko* a 46-year-old plaintiff suffered soft-tissue injuries and chronic myofascial pain in her neck, upper back, and shoulders which was unlikely to resolve with further treatment. She also suffered severe headaches. She had a history of headaches pre-accident but Justice Griffin found they became more severe as a result of the accident. Prior to the accidents, the plaintiff was a "highly productive person who was happiest when she was busy with multiple tasks to complete": para. 6. She was diligent in her efforts to get better, trying "nearly every therapy available for her neck, back and shoulder symptoms" that required "considerable time and effort, and some treatments [that] were exhausting and very painful (such as injections)": para. 24. She was awarded \$95,000 in non-pecuniary damages plus another \$4,000 in loss of housekeeping capacity.
- [97] In *Leach*, the 46-year-old Plaintiff (50 at trial) suffered severe neck and shoulder injuries, low back pain and almost daily headaches in a "violent" collision that broke his seat. He experienced periodic "shooting pain" in his back. The accident prevented him from undertaking heavier work he did in his home renovation business and the normal activities of his daily life wore on him. His injuries also impeded his ability to do his pre-accident activities such as an intensive fitness program, landscaping and gardening, riding his motorcycle, and going out with his friends. He was awarded \$110,000 in non-pecuniary damages.

Defendants' Position and Cases

- [98] The defendants rely on *Kaur v. Tse*, 2020 BCSC 1072, var'd 2021 BCCA 137 and *Rogalsky v. Harrett*, 2014 BCSC 1255.
- [99] The plaintiff in *Kaur* was 45 years old at the time of the accident in which she suffered injuries as a passenger in a vehicle that was hit in the rear-end collision. Prior to the accident, she went to the park in the playground with her children, played tennis, walked daily, took family road trips, and attended a temple. She suffered neck and back pain following the accident, though less frequently than Ms. Kim. The trial judge found the plaintiff's testimony was "extremely problematic" noting significant inconsistencies between her testimony at trial and her discovery evidence. She also found the plaintiff overstated her symptoms to the medical expert who provided a report for the case, stating that she had "knowingly and deliberately" misled the doctor. However, she accepted that the plaintiff suffers from chronic myofascial cervical pain and chronic mechanical pain located on her coccyx but there was a real and substantial possibility that the symptoms would improve in the future. The trial judge found, overall, the plaintiff's injuries were minor from the outset and she had only intermittent pain at significant intervals by the time of trial. She awarded \$17,000 in non-pecuniary damages (after a \$3,000 deduction for lack of mitigation) but this was increased to \$35,000 on appeal, subject to a 15% deduction for lack of mitigation.
- [100] In *Rogalsky*, the 53-year-old plaintiff (58 at trial) suffered injuries to her neck, back, and shoulder in an accident in which she T-boned a car making an illegal left turn in front of her. Justice Verhoeven accepted the evidence of a physiatrist called by the plaintiff who

opined she suffered acute soft-tissue injuries to her neck, shoulders and upper back, acute sleep disruption, and post-traumatic headaches, all of which gradually improved with treatment but were unlikely to completely resolve. However, Verhoeven J. was "very troubled" by the plaintiff's decision not to call evidence from her doctor, whom she had seen after the accident and had prepared a report that was not produced. He drew an adverse inference from this. The plaintiff also called little in the way of corroborative evidence, apart from her husband who Verhoeven J. noted was "an obviously interested person." He was also critical of the plaintiff for not pursuing recommended treatments. Verhoeven J. found the accident had somewhat restricted the plaintiff's work, domestic, and leisure or recreational activities and diminished her enjoyment of life. She was not as happy and sociable after the accident and was not able to enjoy many of her pre-accident activities, including boating, sports, walks, church activities, and travel. She was also less able to do heavy housework and yard work, and her husband had to take over more of that. She was awarded \$35,000 in non-pecuniary damages (about \$40,000 in today's back values).

Analysis

- [101] I accept Ms. Kim suffered and continues to suffer pain in her neck, shoulder, and back as a result of the accident and this affects her daily life and her ability to perform housekeeping functions. I accept she suffered some headaches, probably related to her neck pain, but I am not persuaded that these are regular or severe given there is no notation of them in Dr. Idanwekhai's records. Nor, as I have said, do I accept Ms. Kim's injuries are as debilitating as she suggests given that she was able to work, albeit with pain and discomfort, for almost two years after the accident.
- [102] I also find the accident has impacted some of her social, recreational, and family activities. Both before and after the accident, Ms. Kim's children have been the focus of her life and that has changed somewhat since the accident. She cannot engage with them in recreational activities in the same way she did previously. However, she has continued to drive them to their extra-curricular activities and, in particular, her son's dance classes.
- [103] I accept Ms. Kim is now more nervous when she drives but this fear is not incapacitating given her long daily drives taking her son to dance class. I do not accept that driving much shorter distances is an impediment to meeting with her friends or doing other local social activities.
- [104] I accept her social activities have diminished somewhat, as has her church volunteer work, although I note there is a lack of independent evidence from any friends or church colleagues on these points.

[105] I also accept the injuries have made it more challenging for Ms. Kim to do housework and her family members have taken over many of the household chores. Again, though, the fact she worked some 19 months at the supermarket with her injuries leads me to conclude the housekeeping challenges are not as severe as her evidence suggests. Nevertheless, I make some provision for this by addressing it as part of the non-pecuniary damage award as was done in Baird.

[106] Having regard to these factors and the authorities cited by counsel, I award Ms. Kim \$70,000 in non-pecuniary damages. I include in this her past and future loss of domestic capacity.

Special Damages

[107] The parties agree that Ms. Kim is entitled to special damages in the amount of \$2,587.20

Mitigation

Parties' Positions

[108] The defence argues Ms. Kim has failed to mitigate her losses by refusing to take the pain relief and anti-inflammatory medications prescribed by Dr. Idanwekhai and by failing to follow the full course of treatment he recommended.

[109] Ms. Kim argues she did not unreasonably refuse to take the medications as she was concerned that her body would grow accustomed to them such that, over time, she would require stronger and stronger medications. She argues she pursued most of the recommended treatments in the year after the second accident, which, according to Dr. Idanwekhai, was the more critical time for curative treatment. She says she stopped these treatments because they were giving her only temporary relief, but she also testified her child care obligations made it challenging to attend for these therapies. She also relies on the fact her husband gave her massages at home such that massage therapy was unnecessary.

Legal Principles

[110] The onus is on the defendants to prove Ms. Kim failed to mitigate her damages. The test the defendants must meet is set out in *Chiu v. Chiu*, 2002 BCCA 618 at para. 57:

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

[111] In *Gilbert v. Bottle*, 2011 BCSC 1389 Justice Dickson (then of this court) summarized the law on mitigation in these terms:

- [201] The plaintiff has a positive duty to mitigate by taking all reasonable measures to reduce loss and damages caused by the defendant's negligence. This duty includes an obligation to undertake reasonably available treatment that would assist in alleviating or curing his or her injuries. The principle of mitigation is based on the general proposition that a defendant should not be held liable for loss and damages the plaintiff could have reasonably avoided: *Janiak v. Ippolito*, [1985] 1 S.C.R. 146; *Danicek v. Alexander Holburn Beaudin & Lang*, 2010 BCSC 1111.
- [202] Once a plaintiff has established that the defendant is liable for causing his or her injuries, the burden of proof shifts to the defendant. To succeed on a mitigation defence, the defence must prove that the plaintiff acted unreasonably and reasonable conduct would have reduced or eliminated the loss. Whether the plaintiff acted reasonably is a factual question. Its answer depends on consideration of all of the surrounding circumstances: *Byron v. Larson*, 2004 ABCA 398.
- [203] A relevant circumstance in cases such as this is the plaintiff's personality and condition before and after the accident. The law does not require a plaintiff to do that which cannot be controlled, nor does it require perfection in the pursuit of rehabilitation. In addition, the defendant must take the victim as found, which may affect what is to be reasonably expected. For example, a person who has struggled with life-long obesity may not be expected to lose substantial weight to discharge the duty to mitigate, even though weight loss would assist recovery. What the law requires is that the plaintiff makes contextually reasonable and sincere efforts to limit his or her damages and loss: *Qiao v. Buckley*, 2008 BCSC 1782; *Antoniali v. Massey*, 2008 BCSC 1085.

[Emphasis added]

Analysis

- [112] I find the defendants have established that Ms. Kim has not mitigated her damages by failing to follow the course of treatment recommended by Dr. Idanwekhai. Ms. Kim's choice not to use the anti-inflammatory medications was not reasonable. Her explanation is not supported by any medical evidence led at trial. Nor is there evidence of her discussing this concern with Dr. Idanwekhai. Instead, she took no more than a single regular strength Tylenol or Advil, no more than once a day, three or four days a week. She testified this was not effective but still refused the prescribed medications.
- [113] Ms. Kim argues she was not required to take these medications to mitigate her damages. She points to *Hollyer v. Gaston*, 2016 BCSC 1401 where the court found the plaintiff had not acted unreasonably in declining to take anti-depressant medication because of side-effects. However, there is no evidence that the medications Dr. Idanwekhai prescribed have any side effects.

- [114] Likewise, while Ms. Kim initially sought chiropractic treatment, physiotherapy, and active rehabilitation, including during the important six to 12 month period post accident, she did not continue with it, contrary to Dr. Idanwekhai advice. She never pursued the recommended massage therapy treatment. I do not accept that massages from her husband are a reasonable substitute for professional massage therapy recommended by her doctor.
- [115] I acknowledge that both the anti-inflammatory medication and the physical treatments (at least past the 12-month point) are palliative rather than curative, but that does not mean they are without value to alleviate Ms. Kim's condition. As Dickson J. said in *Gilbert v. Bottle*, at para. 202, the duty to mitigate involves taking all "available treatment that would assist in alleviating or curing his or her injuries" [emphasis added]. This point was also considered in *Jacobi v. Monteith*, 2020 BCSC 218 where the court found that a rehabilitation program, though not curative, would likely have had some benefit given that it was recommended by the plaintiff's doctor:
- [57] First, even though Dr. Giantomaso did not see the plaintiff until almost four years after the accident, he was nonetheless of the opinion that a rehabilitation program would improve his function even if it would not be curative. In other words, it was the opinion of the plaintiff's only expert that he would derive a benefit from an exercise program even if he were to undertake it four years post-accident.
- [59] Because both of the medical practitioners, his family doctor and Dr. Giantomaso, were of the opinion that an active rehabilitation program would have provided some relief, the only conclusion is that it would have been of some benefit.
- [62] I accept Dr. Giantomaso's evidence that the plaintiff's function will improve but his symptoms will not be completely alleviated. I find that a ten percent deduction from the non-pecuniary damages award on account of the plaintiff's failure to mitigate his damages is appropriate.
- [Emphasis added]
- [116] I conclude a similar deduction of 10% is appropriate in this case. I apply the deduction only to the award of non-pecuniary damages because I have already factored in Ms. Kim's lack of mitigation in quantifying her loss of earning capacity. Further, the special damages I have awarded are for the very types of treatments Ms. Kim ought to have pursued so a deduction for those would not be appropriate.

Conclusion

[117] I award the plaintiff damages in the following amounts:

Head of Damage

Amount

Non-pecuniary (including loss of housekeeping function)

Less 10% for failure to mitigate

Total

\$70,000

-\$7,000

\$63,000

Past loss of earning capacity

\$13,175

Loss of future earning capacity

\$94,035

Special Damages

\$2,587.20

Total

\$172,797.20

[118] Subject to hearing from the parties on the matter, I would award Ms. Kim her costs for this action at Scale B. If there is need to hear further from the parties on that issue, they may advise me through the registry and I will give direction on how submissions on costs may be made.

"Kirchner J."

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