

CANADA / JUDGMENT

Krepiski v. Valenciano

2023 BCSC 2089

COURT

Supreme Court of British Columbia

DECIDED

29 November 2023

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2023 BCSC 2089 Krepiski v. Valenciano

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Krepiski v. Valenciano,

2023 BCSC 2089

Date: 20231129

Docket: M195484

Registry: Vancouver

Between:

Kandes Tamara Krepiski

Plaintiff

And

Morgan Leanna Valenciano and

Romeo Valenciano

Defendants

Before: The Honourable Justice K. Loo

Reasons for Judgment

Counsel for the Plaintiff:

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Place and Dates of Trial:

Vancouver, B.C.

October 3-6 and 10-13, 2023

Place and Date of Judgment:

Vancouver, B.C.

November 29, 2023

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- [1] In this action, the plaintiff Kandes Krepski advances a claim for damages arising out of a motor vehicle accident which occurred on August 16, 2018, in south Vancouver. Sole liability for the accident is admitted by the defendants, Morgan Valenciano and Romeo Valenciano. These reasons address this Court's assessment of damages.

Background

- [2] The factual circumstances of this case will be addressed in greater detail below when I deal with the legal issues in dispute, but in order to put those issues into the proper context, I will set out a summary of some of the relevant facts.

The Plaintiff's Circumstances Prior to the Accident

- [3] The plaintiff was born on September 15, 1980, in Vernon, B.C. She went to Okanagan University College, although not immediately after high school. She took two years of pre-requisite courses to enter a dietician program at the University of British Columbia, but did not complete that program.

- [4] In 2005, she took a certificate course which qualified her to be a Medical Device Reprocessing Technician ("MDRT").
- [5] The plaintiff moved to Vancouver in 2008. From approximately 2009 to 2012, she worked at Lions Gate Hospital as an MDRT. This job required her to decontaminate and sterilize medical scopes and other devices used at the hospital and to repackaging the clean devices for later use.
- [6] Due to her work as an MDRT at Lions Gate Hospital, which involved repetitive movements, the lifting of heavy medical devices, and bending over a low sink for many hours at a time, the plaintiff suffered from right-sided neck, back and shoulder pain.
- [7] After being denied compensation by the Workers' Compensation Board, the plaintiff made an application to Great West Life in 2011 or 2012 for disability benefits. Starting in April 2012, she received benefits for about two years.
- [8] While Ms. Krepski was on disability leave from her position at Lions Gate Hospital, she was entitled to, and did pursue, work as an MDRT at private clinics and at Vancouver General Hospital, where the facilities were better than those at Lions Gate Hospital from an ergonomic perspective. She worked for about a year at Cambie Surgery Centre in a temporary managerial role for which she turned out to be ill-suited. During this time, the plaintiff also attended Langara College and completed photography courses.
- [9] Ms. Krepski was married in December 2014. At that time, she had an opportunity to work as an MDRT again but decided against it because the job would expose her to harsh chemicals which could potentially cause birth defects. As Ms. Krepski and her husband were contemplating having children at the time, she instead worked remotely for a company called "Mmodal", performing quality control for hospital transcriptions. She gave birth to two daughters in 2015 and 2016 but continued to work at MModal.
- [10] The plaintiff testified that prior to the accident she was active - that she hiked, skied and snowboarded, walked and jogged. She also taught figure skating. The arrangements between Ms. Krepski and her husband were that she would bear primary responsibility for the children and the upkeep of the house, so that he could focus on earning income as a realtor. Between 2014 and 2018, those arrangements were generally followed.

The Accident

- [11] The plaintiff was driving east along Marine Drive in a Honda Odyssey when Ms. Valenciano pulled out of a parking spot in a Mazda 6 on the right-hand side of the road, striking the plaintiff's car in or around the front wheel on the passenger side. Mr. Valenciano was not involved in the accident but was the registered owner of the Mazda 6.
- [12] The collision caused the plaintiff's car to stop abruptly and to be pushed into the next lane.

- [13] There is conflicting evidence between Ms. Krepski and Ms. Valenciano about the speed at which Ms. Valenciano pulled out of the parking spot and about the severity of the impact. Photos of the two vehicles show that both vehicles were damaged, although the damage appears to have largely consisted of scrapes along the bumper of the defendants' vehicle and of damage to the wheel well and the side of the plaintiff's vehicle. Both cars were driveable after the accident.

The Plaintiff's Injuries and Treatment

- [14] The plaintiff testified that she felt shaky immediately following the accident. She suffered a cut to her leg, a sore ankle, and pain in her knees and elbows. She suffered from neck and shoulder pain on her left side. She had sore ribs and back pain. She also suffered bruises on her left buttock and left hip. She said that she had a headache and felt dizzy and off balance.
- [15] It appears that the plaintiff initially had a concussion. Her doctor recommended her to rest and advised that she should avoid using computer screens.
- [16] Immediately following the accident, the injuries to her neck and back were particularly painful. The plaintiff described searing pain from the top of her head to her tailbone. Treatment for her injuries included painkillers, massage and physiotherapy. She was recommended counselling for anxiety.

The Plaintiff's Circumstances Following the Accident

- [17] Many of the plaintiff's issues described above resolved within a month or two. The issues that have persisted are neck and back pain, headaches, and mental health issues, particularly anxiety and symptoms of depression.
- [18] The plaintiff testified that the nature and intensity of her headaches have changed, but they have not wholly resolved. She testified that she still gets headaches that she had never gotten before. While these headaches do not last as long as they did previously, they generally occur three or four times per week at the end of the day.
- [19] The plaintiff testified that she also suffers from daily neck pain. She said that she feels a pinching in her neck - that "when I turn my head to the left I can feel it". She testified that her neck hurts when her children pull or lean on her. This neck pain impacts her ability to push and pull, or to reach overhead. She testified that it hurts to put her hands above her head.
- [20] The treatment for the plaintiff's neck pain has consisted largely of physiotherapy and massage, both of which are continuing. She exercises and does stretches. Since the accident, she has taken a variety of medications, including painkillers and muscle relaxants, and she has also been treated with acupuncture. She testified that she has gotten better, but the pain is still there. She estimated that her neck pain is about 70% better.

- [21] Similarly, the plaintiff testified about her back pain which still exists but has gotten "70% to 80% better". She testified that she still has episodes of back pain. Physiotherapy and rest have helped her manage this issue. However, she testified that her back pain still interferes with day-to-day activities, such as unloading the dishwasher, or anything that involves bending and pulling.
- [22] More generally, the plaintiff testified that there are many things that she used to do that she no longer does. Among these are physical activities with the children, such as tobogganing in the winter, rollerblading and playing with the children in the park.
- [23] Mr. Krepski testified about the share of the housework and childcare that he took on as a result of the plaintiff's injuries. He said that in 2018, following the accident, he was with the children for 10 to 12 hours a day. Instead of bearing 10% of the housekeeping and childcare load, which was the case before the accident, he bore 90% of those duties. He said that he continued to service the residential real estate clients that he had, but he did not pursue new business. He said that he basically stopped working unless it was necessary.
- [24] Mr. Krepski testified that in 2019, the plaintiff began to resume more of the household and childcare duties. He said that his share of the duties for that year was approximately 70%. The plaintiff started doing some tasks but nothing repetitive and heavy. During the period 2018 to 2019, the plaintiff and her husband hired a housekeeping service. At first, this assistance consisted of two hours once a week, then less after that.
- [25] Between 2020 and the date of the trial, the share of housework and childcare duties borne by the plaintiff slowly increased. Her share had increased to 80% by 2021 and to 85% by the time of the trial.
- [26] Mr. Krepski testified that the plaintiff is now able to do most of what she did before - at least in terms of housework and childcare - but these tasks take more time, and she is often uncomfortable doing them. He said that things are not the same as how they used to be - for example, the housework is not always done to the standard that it was pre-accident - but that they have learned to live within their "new routine".

Witnesses, Credibility and Evidentiary Issues

- [27] Plaintiff's counsel called five lay witnesses, including the plaintiff. The defence only called Ms. Valenciano, the driver of the defendants' vehicle.
- [28] The factors to be considered when assessing the credibility of witnesses were summarized by Justice Dillon in the well-known decision in *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, *aff'd* 2012 BCCA 296, as follows:

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.); *Faryna v. Chorny*, [1952] 2 D.L.R. 152 (B.C.C.A.) [*Faryna*]; *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 (*Faryna* at para. 356).

[29] Further, in my view, para. 10 from Justice Dickson's decision in *Hardychuk v. Johnstone*, 2012 BCSC 1359 is of assistance in this case:

The typical starting point in a credibility assessment is to presume truthfulness: Halteren. Truthfulness and reliability are not, however, necessarily the same. A witness may sincerely attempt to be truthful but lack the perceptive, recall or narrative capacity to provide reliable testimony. Alternatively, he or she may unconsciously indulge in the human tendency to reconstruct and distort history in a manner that favours a desired outcome. There is, of course, also the possibility that a witness may choose, consciously and deliberately, to lie out of perceived self-interest or for some other reason. Accordingly, when a witness's evidence is demonstrably inaccurate the challenge from an assessment perspective is to identify the likely reason for the inaccuracy in a cautious, balanced and contextually sensitive way.

[30] As is often the case in proceedings where the plaintiff's injuries are self-reported, the reliability and the credibility of the plaintiff's evidence are particularly important. The defendants argue that Ms. Krepski has exaggerated both her injuries and the impact of the accident.

[31] In my view, the witnesses in this proceeding were generally forthright and gave their evidence in a straightforward manner. Specifically, it is my view that the plaintiff was a generally honest witness. She was argumentative at times, making her testimony far from perfect in this regard, but I accept that the accident was traumatic for her and that she suffered significant and long-lasting injuries as a result. Given the impact that the accident has had on her life, it is not entirely surprising that her perception of relevant events lacked some measure of objectivity.

[32] There is some basis, however, to question the reliability of some aspects of the plaintiff's evidence. In particular, it is difficult to reconcile her description of the accident with the other evidence in the case. She described the accident as involving a "huge impact" and said that the collision was "deafening" and "super, super loud". By contrast, the photos of the vehicles show what appear to be fairly minor scrapes and scratches. Further, the defendant and her colleague had a tray of drinks from a fast food restaurant that did not spill.

- [33] The defendants also sought to challenge Ms. Krepski's assertions of neck and back pain, but their efforts in this regard were not particularly persuasive. As an example, the plaintiff was confronted with a photo posted on social media showing her older daughter sitting on her shoulders. She testified that she does not deny being able to lift things - only that it causes her pain. She testified that she really wanted to have this photo, and so the photographer and the plaintiff's husband lifted the child onto her shoulders.
- [34] I am mindful of the caution, as stated in *Hardychuk*, that a witness "may unconsciously indulge in the human tendency to reconstruct and distort history" (para. 10), and I am also mindful that the evidence of a witness who is self-reporting her injuries is particularly important. To alleviate any concerns about the reliability of the plaintiff's evidence, I intend to look to the other witnesses and the overall factual context for corroboration on significant issues. In particular, I found Mr. Krepski to be a reliable witness. He testified in a straightforward manner and spoke candidly on issues which did not necessarily assist his wife's case.

Expert Evidence

- [35] Two expert witnesses testified at trial as part of the plaintiff's case. Their reports were entered without objection, and they were both qualified as experts in their respective fields. The defendants did not adduce any expert evidence in response. The evidence given by the two experts can be summarized as follows.

Dr. Mitchell Spivek--Psychiatrist

- [36] Dr. Spivek is a psychiatrist who was retained by the plaintiff to prepare an expert report on psychiatric or psychological injuries that may have occurred as a result of the plaintiff's accident.
- [37] Dr. Spivek was qualified without objection as a medical doctor capable of giving expert evidence in the field of psychiatry. He prepared a single report dated June 7, 2023.
- [38] In his report, Dr. Spivek opined that the plaintiff's symptoms are "most consistent with a diagnosis of an adjustment disorder with anxious distress". He stated that prior to the accident, the plaintiff did not consider herself to be a particularly worried individual, nor did she experience a period in her life where she felt overwhelmed by depression or anxiety symptoms. By contrast, post-accident, she developed "a pattern of worrying, which manifested more prominently for the first two years with concurrent depressive symptoms".
- [39] It was Dr. Spivek's view that Ms. Krepski's symptoms were likely precipitated by the accident. He opined that her present level of impairment is mild and that her prognosis is fair. The plaintiff's symptoms were more limiting during the first two years after the accident. Dr. Spivek recommended a course of 8 to 12 sessions of psychotherapy. Under cross-examination, he said that more sessions may be required, but this was a "good average".

Dr. Tony Giantomaso--Physiatrist

- [40] Dr. Giantomaso is a physiatrist who was retained to assess the plaintiff in August 2020 and again in June 2023. He was qualified to provide expert evidence in this regard without objection. He prepared two reports, corresponding to his two assessments of the plaintiff.
- [41] Dr. Giantomaso stated that in 2020, the plaintiff's "maximal area of discomfort" was in her neck and upper back region. The plaintiff reported experiencing constant mild to moderate pain that increased with overhead activities, lifting, pushing and pulling manoeuvres, and housework and other similar activities.
- [42] Consistent with the plaintiff's evidence, Dr. Giantomaso's report stated that any overhead movements, movements with impact, or higher-level physical activities could trigger neck pain and headaches.
- [43] He listed four diagnoses which he found were "likely causally related to the [accident]":
- (1) Post-traumatic cervical sprain/strain injury consistent with a WAD-II injury. Chronic.
 - (2) Post-traumatic thoracic sprain/strain injury grade 1-2. Chronic.
 - (3) Post-traumatic right anterior hip pain consistent with psoas strain. Chronic.
 - (4) Post-traumatic headaches mostly without migrainous features.
- [44] WAD-II refers to whiplash-associated disorder, which is rated on a five-point scale. Dr. Giantomaso testified that "chronic" does not mean indefinite. He recommended an active rehabilitation program and management of the plaintiff's symptoms through medication.
- [45] In his June 2023 report, Dr. Giantomaso stated that the plaintiff had "similar ongoing issues to her initial independent medical evaluation of August 14, 2020". He concluded that there was "no amplification or exaggeration of features" and opined that "in all likelihood she will continue to experience chronic pain to some degree long-term into the future". He also concluded that she would be "employable in a sedentary to light work field as long as she is able to change position regularly and has an ergonomic work assessment".

Analysis of Damages**Overview**

- [46] The plaintiff claims damages under the following headings:
- a) non-pecuniary damages;
 - b) past loss of income;
 - c) future loss of earning capacity;
 - d) cost of future care; and

e) special damages.

[47] In addition, the plaintiff advances an "in trust" claim arising from household and childcare responsibilities undertaken by Mr. Krepski following the accident.

Causation and Pre-Existing Condition

[48] The defendants argue that the back and neck issues suffered by the plaintiff starting in approximately 2012 are relevant to the assessment of damages in this case.

[49] In *Kallstrom v. Yip*, 2016 BCSC 829 at para. 318, this Court summarized the law of causation in personal injury cases, citing the well-known decision in *Athey v. Leonati*, [1996] 3 S.C.R. 458, 1996 CanLII 183:

The basic legal principles respecting causation are found in the seminal case of *Athey v. Leonati*, [1996] 3 S.C.R. 458, repeated many times since, and which include:

1. the general, but not necessarily conclusive test for causation is the "but for" test requiring the plaintiff show his injury and loss would not have occurred but for the negligence of the defendant;
2. this causation test must not be applied too rigidly. Causation need not be determined by scientific precision as it is essentially a practical question of fact best answered by ordinary common sense;
3. it is not necessary for the plaintiff to establish that the defendant's negligence was the sole cause of the injury and damage. As long as it is part of the cause of an injury, the defendant is liable; and
4. apportionment does not lie between tortious causes and non-tortious causes of the injury or loss. The law does not excuse the defendant from liability merely because causal factors for which he is not responsible also helped to produce the harm.

[Emphasis in original.]

[50] As pointed out by the Court in *Kallstrom*, however, it is important to recognize the distinction between principles of liability and principles related to the assessment of damages in tort. The latter requires a consideration of conditions or events unrelated to the tort which occurred either before or after the plaintiff's injury which impact the nature or extent of the compensation that should be awarded for that tort.

[51] In *Athey*, at para. 35, the Court held:

The defendant need not put the plaintiff in a position better than his or her original position. The defendant is liable for the injuries caused, even if they are extreme, but need not compensate the plaintiff for any debilitating effects of the pre-existing condition which the plaintiff would have experienced anyway. The defendant is liable for the additional damage but not the pre-existing damage: *Cooper-Stephenson*, supra, at pp. 779-780 and *John Munkman*, *Damages for Personal*

Injuries and Death (9th ed. 1993), at pp. 39-40. Likewise, if there is a measurable risk that the pre-existing condition would have detrimentally affected the plaintiff in the future, regardless of the defendant's negligence, then this can be taken into account in reducing the overall award: *Graham v. Rourke*, [1990] O.J. No. 2314 *supra*; *Malec v. J.C. Hutton Proprietary Ltd.*, *supra*; *Cooper-Stephenson*, *supra*, at pp. 851-852. This is consistent with the general rule that the plaintiff must be returned to the position he would have been in, with all of its attendant risks and shortcomings, and not a better position.

[Emphasis in original.]

- [52] It follows from these authorities that this Court is required to determine whether there is a measurable risk that a pre-existing condition would have detrimentally affected the plaintiff in the future, regardless of the defendants' negligence.
- [53] In this regard, there was a substantial amount of evidence regarding injuries suffered by the plaintiff in or around 2012 due to her work as an MDRT at Lions Gate Hospital. As discussed above, this work involved repetitive movements and bending over a low sink for many hours at a time. The plaintiff testified that the medical device processing facilities at Lions Gate Hospital were particularly poor from an ergonomic perspective. Following that work, the plaintiff suffered from right-sided neck and back pain and filed a disability insurance claim with Great West Life.
- [54] The defendants argue that this injury constituted a pre-existing injury that should reduce the plaintiff's claim for damages. However, the plaintiff argues that the injuries she suffered in 2012 were mostly resolved by 2018 and that any residual injuries had not otherwise affected her functioning or enjoyment of life by 2018.
- [55] The focus of the defendants' argument and the evidence during the course of the trial regarding this issue was on the period ending in 2014. The defendants point out that a functional capacity evaluation ("FCE") performed on the plaintiff in September 2014 showed that she had ongoing neck and back pain complaints at the time. In a questionnaire filled out by the plaintiff prior to the FCE, she checked boxes adjacent to statements that "I cannot do my usual work" and "I can hardly do any recreational activities because of pain in my neck".
- [56] However, the FCE was conducted more than four years before the accident. There was little evidence which demonstrated a pre-existing condition in 2018. The evidence of both Ms. Krepski and her husband was that the plaintiff was not functionally limited before the accident.
- [57] In my view, the defendants have not established that the plaintiff had a pre-existing condition which contributed to her present impairment. Although she was physically impaired between 2012 and 2014 as a result of her work as an MDRT at Lions Gate Hospital, and there is some evidence that the impairment had not resolved by 2014, there is no clear evidence of a pre-existing injury as at August 2018 when the accident occurred.

- [58] With respect to the issue of a pre-existing condition, an evidentiary issue arose during the trial when the defendants complained that the plaintiff's disability file from Great West Life had not been produced in its entirety. I understand from the parties' submissions that the file was requested at the plaintiff's examination for discovery in June 2022, at which time the plaintiff was represented by different counsel than her counsel at trial. Counsel corresponded on this issue in the months leading up to trial. Ultimately, on September 23, 2023, an urgent written request for the file was made by plaintiff's counsel to Great West Life. However, Great West Life did not produce the file in time to be used at the trial, and the defendants argue that I should draw an adverse inference from the fact that the plaintiff was dilatory in causing the file to be produced.
- [59] In my view, such an adverse inference is not appropriate in these circumstances. Although plaintiff's counsel did not act promptly, they did send a request as required. Defendants' counsel could have advanced an application for production from Great West Life at any time. In any event, as discussed above, it is my view that the plaintiff's disability arising from events in 2012, more than six years before the accident, had little bearing on the outcome of this case. The remainder of the file, if produced, is unlikely to have shed any light on the plaintiff's condition in 2017 or 2018.
- [60] Also related to the issue of a pre-existing condition is a statement made by Dr. Giantomaso in the course of his testimony under cross-examination. He volunteered that even absent the accident, "it was unlikely that [the plaintiff] would have been able to return to work as a full-time medical processor without accommodations and modifications of her work".
- [61] The defendants take the position that this opinion should lead this Court to conclude that the plaintiff's damages ought not to be assessed on the basis that the plaintiff could have returned to work as an MDRT. However, in my view, Dr. Giantomaso's opinion on this issue should not be regarded as conclusive, and his opinion was qualified in any event.
- [62] Specifically, Dr. Giantomaso testified that Ms. Krepski was unable to do the MDRT job at Lions Gate Hospital (as it existed in 2012) without accommodation or modification. It does not appear that he was informed that she had continued to work as an MDRT at Vancouver General Hospital, which had a better setup from an ergonomic point of view, or that Lions Gate Hospital has since built an entirely new facility for medical device processing, based at least in part on complaints from MDRTs such as the plaintiff. Dr. Giantomaso's opinion on this issue, which was not stated in his written reports, does not persuade me that the plaintiff is now incapable of working as an MDRT in an ergonomically suitable environment.

Non-Pecuniary Damages

- [63] The plaintiff seeks non-pecuniary damages as well as damages for loss of housekeeping capacity.

Legal Principles

[64] The legal principles applicable to assessing non-pecuniary damages are well established. In *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46, the Court of Appeal outlined the factors to be considered in making such an award:

- a) age of the plaintiff;
- b) nature of the injury;
- c) severity and duration of pain;
- d) disability;
- e) emotional suffering;
- f) loss or impairment of life;
- g) impairment of family, marital and social relationships;
- h) impairment of physical and mental abilities;
- i) loss of lifestyle; and
- j) the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff).

The Parties' Positions on Non-Pecuniary Damages

[65] The parties have cited cases which they submit set out the appropriate range of non-pecuniary damages in this case.

[66] The plaintiff cites four decisions of this Court for the proposition that the appropriate range of non-pecuniary damages in this case is between \$100,000 to \$150,000.

[67] One of the cases cited by the plaintiff is *Wishart v. Mirhadi*, 2023 BCSC 627, in which the plaintiff was 31 years of age at the time of the accident and 36 at the time of trial. She had a history of waxing and waning neck and thoracic pain but was working full-time before the accident, and she was the primary caregiver for her children. Recreationally and socially, the plaintiff was active and played on a soccer team, worked out in a home gym, hiked and camped and was unrestricted in her physical activity.

[68] Following the accident, as in this case, there was a temporary role reversal of household duties with her husband. She no longer played soccer or used the home gym. Like in this case, the plaintiff's participation in active family events (like skiing) after the accident was limited.

[69] The Court found that as a result of the accident, the plaintiff suffered from increased neck and thoracic pain, mild costochondritis in her upper chest, and anxiety and low mood, all of which persisted to the date of the trial.

- [70] In those circumstances, the plaintiff in Wishart was awarded \$102,000 for non-pecuniary damages (reduced from \$120,000 after accounting for negative contingencies), as well as \$27,500 for loss of housekeeping capacity.
- [71] In *Quigley v. Jonsen*, 2019 BCSC 1812, aff'd 2021 BCCA 33, the plaintiff was 42 years of age at the time of the trial. She was involved in three motor vehicle collisions within a fifteen-month period. She suffered from cervicogenic headaches and soft tissue injury to her upper thoracic area leading to chronic pain, anxiety and somatic symptom disorder. At the time of the trial, the plaintiff continued to experience frequent headaches, triggered by spasm-like sensations that came on with activity such as looking down, reaching or lifting. In those circumstances, the Court awarded non-pecuniary damages in the amount of \$110,000.
- [72] The plaintiff has also cited other cases where, in my view, the plaintiff's injuries were clearly more serious than in the case at bar. For example, in *Johnstone v. Rogic*, 2018 BCSC 988, aff'd 2019 BCCA 469, where the Court awarded non-pecuniary damages in the amount of \$145,000, the plaintiff's ongoing chronic pain was described as "severe", which, in my view, cannot be said in this case.
- [73] On the other hand, the defendants cite a number of cases which they say establish that the appropriate range for non-pecuniary damages in this case is between \$60,000 and \$80,000.
- [74] They rely particularly on *Callow v. Van Hoek-Patterson*, 2023 BCCA 92, a recent decision of our Court of Appeal. In that motor vehicle action, the trial judge had awarded non-pecuniary damages of \$35,000. At para. 22, the Court of Appeal described Mr. Callow's situation, at a "high level of abstraction", as follows:

A person in their 20s who sustained moderate soft tissue injuries to their neck, back, and shoulders which, despite treatment, remained symptomatic for years. Although their condition has improved, they will continue to experience some pain flare-ups and the likelihood for future improvement is poor. With caution, [they] can continue to participate in previous activities while monitoring physical exertion for pain.

- [75] On the basis of a review of the authorities, the Court of Appeal held at para. 23:

For a person in Mr. Callow's situation, I am of the view that the judge's award was inordinately low. On the basis of the awards I have reviewed, particularly the more recent ones, and bearing in mind it will always be possible to find higher or lower awards, I am of the view that the present range for non-pecuniary damages in the type of case I have just described is \$50,000 to \$60,000. Further, I consider the mid-point of that range to be fair to both parties.

Analysis of Non-Pecuniary Damages

- [76] In my view, it is clear that the plaintiff has suffered soft tissue and psychological injuries which were caused by the accident and have affected her enjoyment of life. I accept that while she is now probably able to do most work and housework that she did prior to the accident (to be addressed below), she has suffered, and will continue to suffer, discomfort and pain as a result.
- [77] I accept her evidence and that of her husband that the accident has prevented her from participating in play and other activities with her family. During her testimony, Ms. Krepski repeated numerous times that her children had become closer to their father because, since the accident, he has played with them more and does the "fun stuff" with them. The plaintiff was not able to teach her children to skate, even though she taught figure skating in the past.
- [78] Both the plaintiff and Mr. Krepski have also testified that the plaintiff's injuries have had an impact on their relationship, a result of the pain and her mood, irritability and issues with anxiety.
- [79] Further, I accept the evidence of Kirsten Khorsand, who met the plaintiff when they were both employed as MDRTs at Lions Gate Hospital in 2012. Ms. Khorsand testified that she met with the plaintiff in 2019 for the first time after a number of years and observed that the plaintiff seemed delicate and not as confident, robust or jovial as when they worked together. They have since seen each other two to three times per year, and Ms. Khorsand testified that whenever she asks how things are, the plaintiff almost invariably refers to her neck and back.
- [80] In my view, the appropriate damages award in this case lies somewhere between the awards in Wishart and Quigley on one hand, and Callow on the other.
- [81] Callow and the decisions cited in it, in my view, do not involve the same level of psychological impact as in this case. Specifically, the level of psychological impact in this case is greater. On the other hand, most of the cases cited by the plaintiff involve more serious or more persistent injuries, although in some instances the differences are not substantial.
- [82] It is well-established that although the fairness of non-pecuniary damages is to be measured against awards in comparable cases, such cases, although helpful, serve only as a rough guide, and each case depends on its own unique facts: *Montazamipoor v. Park*, 2022 BCSC 140 at para. 60. In all of the circumstances of this case, I find that Ms. Krepski is entitled to non-pecuniary damages in the amount of \$100,000.

Housekeeping Capacity

- [83] The plaintiff seeks a past loss of housekeeping award in addition to an award for non-pecuniary damages. In *McKee v. Hicks*, 2023 BCCA 109 at para. 112, the Court stated:

To sum up, pecuniary awards [for loss of housekeeping capacity] are typically made where a reasonable person in the plaintiff's circumstances would be unable to perform usual and necessary household work. In such cases, the trial judge retains the discretion to address the plaintiff's loss in the award of non-pecuniary damages. On the other hand, pecuniary awards are not appropriate where a plaintiff can perform usual and necessary household work, but with some difficulty or frustration in doing so. In such cases, non-pecuniary awards are typically augmented to properly and fully reflect the plaintiff's pain, suffering and loss of amenities.

- [84] As will be seen below, the plaintiff is entitled to the cost of a housekeeping service retained in 2018 and 2019 which she has claimed as special damages. Further, she has advanced an in-trust claim on behalf of her husband for housekeeping and childcare duties that he had to undertake as a result of the accident. To the extent that the plaintiff seeks an award for not being able to perform household duties, such an award would be duplicative of those claims.
- [85] Further, to the extent that she seeks a non-pecuniary award for having some difficulty and frustration in doing household tasks, I have considered that issue in my determination of non-pecuniary damages above, and it would be duplicative to award a further amount on that basis.
- [86] As a result, I am not prepared to make a separate award in favour of Ms. Krepski for loss of housekeeping services.

Past Income Loss

Legal Principles

- [87] The legal principles that apply to the calculation of damages in relation to an injured plaintiff's past loss of income from the time of the accident to the time of the trial require the court to assess what income the plaintiff would have earned but for the accident.
- [88] These damages do not have to be proven on a balance of probabilities. Instead, the assessment of past loss requires the court to estimate a pecuniary loss by weighing possibilities and probabilities of hypothetical events. In *Grewal v. Naumann*, 2017 BCCA 158, the Court of Appeal held as follows:
- [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.

The Parties' Positions on Past Income Loss

- [89] The plaintiff claims damages for past income loss incurred from the date of the accident to the date of the trial, spanning a period of more than five years. After accounting for some nominal income that she earned doing birth photography during this period, the plaintiff's claim for past income loss totals \$105,185.
- [90] The plaintiff argues that but for the accident, she would have either found work which would have provided her with an income similar to the one that she earned from Mmodal, or she would have worked part-time as a photographer.
- [91] In response, the defendants observe that on or about November 30, 2018 - after the plaintiff's condition improved sufficiently that she could return to the type of work done for Mmodal - the plaintiff received an email from Mmodal stating that her contract with Mmodal had been terminated due to a shortage of work. After being terminated from Mmodal, she did not seek out similar or equivalent forms of employment.
- [92] Further, the defendants argue that the plaintiff never took the idea of a photography business seriously and there is insufficient proof to establish a loss on that basis.
- [93] For these reasons, the defendants take the position that the plaintiff is only entitled to damages for past loss of income for the period between the date of the accident and the date that the Mmodal job was eliminated.

Analysis of Past Income Loss

- [94] In my view, the assessment of past income loss in this case is appropriately divided into three different time periods: 1) the time between the accident and the elimination of the plaintiff's Mmodal job; 2) the time between the elimination of the Mmodal job and when the plaintiff's children started school; and 3) the time between the date the plaintiff's children started school and the date of the trial.
- (1) Accident to the Elimination of the Mmodal Job
- [95] The first period encompasses the time between the accident and the elimination of the Mmodal job. The parties agree that damages are owed for this period. In the seven-and-a-half months that the plaintiff worked for Mmodal in 2018, she earned \$22,486. This equates to approximately \$2,998 per month.

- [96] I find that for the period between the accident on August 16, 2018 and the elimination of her Mmodal job on November 30, 2018, the plaintiff is entitled to damages for past wage loss totalling \$10,493 (3.5 x \$2,998).
- (2) Elimination of Mmodal Job to Children Starting School
- [97] The second period encompasses the time between the date the plaintiff's Mmodal job was eliminated and the date on which her two children started attending school. This latter date is relevant because the couple's plan was for Ms. Krepski to return to full-time work outside of the home once the children were in school.
- [98] The Mmodal job was flexible and was particularly suited to someone who was also caring for young children. The plaintiff testified that she could do the job while she was doing household chores or while the children were napping.
- [99] In my view, the preponderance of the evidence demonstrates that the plaintiff would not have worked as an MDRT during this period, absent the accident. To do so would have been inconsistent with the plan that she would care for the children until they were in school.
- [100] I accept that when her Mmodal position was eliminated, the plaintiff probably hoped to have another flexible job like the Mmodal job, but there was no evidence that she actively sought one. Further, there was no evidence regarding any such jobs for which she was qualified. Therefore, I am unable to conclude that there is a real and substantial possibility that she would have earned an income in a position similar to the one she had with Mmodal, but for the accident.
- [101] The plaintiff testified that but for her injuries, she would have done photography work part-time but was precluded from doing so because the camera equipment was heavy and caused her neck and back pain. She appears to have taken some steps to try out this line of work, despite being injured, and earned a total of \$1,200 during the period between the accident and the trial.
- [102] In my view, however, this evidence is not sufficient to demonstrate a reasonable and substantial possibility that the plaintiff would have established a significant photography income, absent the accident. She testified that she never charged more than \$300 per session for the photography work she did for friends and family post-accident. It is plausible that she might have established a successful business, but this Court is not to engage in speculation. I also note that the COVID-19 pandemic fell within this period. This further diminishes the likelihood that a new and successful photography business could have been established at that time.
- [103] Accordingly, I find that the plaintiff is not entitled to damages for past wage loss for the period between late November 2018 and the date on which the plaintiff's children started school.

(3) Children Starting School to the Date of Trial

- [104] The third period encompasses the time between the date on which her two children started attending school and the date of the trial.
- [105] Because of the COVID-19 pandemic, both children started school at the beginning of September 2021. The plaintiff sought an award for past income loss on the basis that she would have worked either as an MDRT or a photographer after the children started school.
- [106] I am of the view that but for the plaintiff's injuries caused by the accident, the plaintiff would have sought to go back to work once the two children were in school, in accordance with the couple's plan.
- [107] However, after September 2021, the plaintiff did not in fact take any steps to go back to work. She said that she did not want to start the ball rolling and then not be able to do the job. She testified: "It was being held for me. If I couldn't do it they would hold it anymore. I had no hours to build up LTD [long-term disability] or sickness benefits."
- [108] In my view, the Court's task in determining damages for this period requires it to consider what would have happened if the plaintiff had tried to go back to work in September 2021. In that context, it is necessary to determine whether there is a real and substantial possibility that, even if she had tried, she would not have been able to return to work due to the accident, and to assess the relative likelihood of that possibility.
- [109] There is limited evidence before the Court regarding the plaintiff's condition in September 2021, but Dr. Giantomaso opined, as at August 2020, that Ms. Krepski "relates ongoing activity limitations and participation restrictions in avocational, vocational and recreational realms". After describing those limitations and restrictions, he opined that they are "reasonable given her post-traumatic injuries".
- [110] On the basis of this evidence, and Ms. Krepski's evidence, I find that there was a real and substantial possibility that she would have not been able to return to work as an MDRT in September 2021 because of her injuries caused by the accident, notwithstanding the couple's plan.
- [111] On the other hand, Dr. Giantomaso opined in August 2020 that the plaintiff could "return to at least part-time sedentary work".
- [112] Further, in response to an email from a recruiter in June 2020 that the plaintiff received through the networking platform, LinkedIn, the plaintiff wrote that she "could be interested in a part time position as I have two kids who are young". The plaintiff did not hear from this recruiter again, and while I do not fault her for not following up, the correspondence is, in my view, evidence that she was open to a part-time position at the time but for her children, who started school in September of that year.
- [113] The plaintiff testified that she did not want to try and then fail, given her limitations. That, of course, was her decision to make, but the defendants are not required to bear all of the consequences for that decision. The plaintiff put great emphasis on the fact that a job was

being saved for her, but the job at Lions Gate Hospital was not the only MDRT job for which she was qualified. She had a good work record and, by all accounts, was a diligent and hard-working MDRT. In my view, even if she tried and was not immediately able to do the job at Lions Gate Hospital, she could have sought other MDRT work at a later date.

- [114] For these reasons, it is not certain that the accident-related injuries prevented her from working as an MDRT or in an equivalent position, as planned, during the period from the date that the children started school to the date of trial, and it is appropriate to quantify the measure of damages to reflect that uncertainty.
- [115] In my view, the real and substantial possibility that the plaintiff would not have been able to do the MDRT job or carry on an equivalent-earning photography business during the 25-month period from September 2021 to October 2023 due to her accident-related injuries ought to be quantified at 50%. That 50% award is appropriately valued at 25 months at \$25,000 per year x 50%, which equals \$26,042.
- [116] A deduction of \$1,200 shall be made from the damages award to reflect the plaintiff's actual earnings from birth photography during the post-accident period until the trial. I find that the appropriate award of damages for Ms. Krepski's past income loss between September 2021 and the date of the trial is \$24,842.

Future Loss of Earning Capacity

Legal Principles

- [117] Like with past wage loss, assessing a plaintiff's prospective loss of earning capacity requires an examination of two hypothetical futures: one in which the accident had not happened, and one in which it did. This Court's central task is to compare the plaintiff's likely earnings and working life with and without the accident: *Ploskon-Ciesla v. Brophy*, 2022 BCCA 217 at para. 33, citing *Pololos v. Cinnamon-Lopez*, 2016 BCSC 81 at para. 133; *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 32. The degree of impairment to the plaintiff's earning capacity depends upon the type and severity of the plaintiff's injuries and the nature of the anticipated employment at issue: *Gregory* at para. 32.
- [118] The Court of Appeal prescribed a three-step test for assessing future loss of earning capacity in a trilogy of cases decided in 2021: *Dornan v. Silva*, 2021 BCCA 228; *Rab v. Prescott*, 2021 BCCA 345; and *Lo v. Vos*, 2021 BCCA 421. The questions to be asked were summarized in *Rab* at para. 47 as follows:
- 1) Is there a potential future event that could lead to a loss of earning capacity?
 - 2) Is there a real and substantial possibility that the future event in question will cause a pecuniary loss?
 - 3) If such a possibility exists, what is the value of that possible future loss?

- [119] Valuation of the loss can be done using either the "earnings approach" or the "capital asset approach": *Brown v. Golaiy*, 26 B.C.L.R. (3d) 353, 1985 CanLII 149 (S.C.) at para. 7; *Perren v. Lalari*, 2010 BCCA 140 at paras. 11-12, 32. Under either approach, the plaintiff must prove that there is a "real and substantial possibility" of future events leading to an income loss: *Perren* at paras. 11-12, 32-33. The earnings approach involves a calculation of the present value of a plaintiff's annual loss of income over the remaining years of employment, and is more appropriate when the loss is more easily measurable: *Westbroek v. Brizuela*, 2014 BCCA 48 at para. 64, citing *Perren* at para. 32. By contrast, the capital asset approach involves a consideration of a person's lost ability to work in a certain position in their field of work as the loss of an income-earning asset, and is more appropriate where the loss is less easily measurable: *Park v. Targonski*, 2017 BCCA 134 at para. 123.
- [120] Where the plaintiff has been completely disabled by an accident, the first two questions stated in *Rab* are readily answered. However, where the plaintiff is likely able to return to work, the assessment is more difficult. The authorities state that these types of cases are particularly amenable to a capital asset approach. In *Rab*, the Court held as follows:
- [30] But in other cases, assessing the possibility of a future income loss is less straightforward. Among these are cases involving plaintiffs whose injuries have led to continuing deficits, or have exposed them to future problems, yet whose income at the time of the trial is at or near the level of earnings they enjoyed before the accident. These tend to be cases that lend themselves to the capital asset approach to quantifying the loss. *Grewal* was such a case, as were *Pallos*, *Brown* and *Perren*.
- [34] there is no doubt that the assessment of damages for loss of future earning capacity in cases where there is no clear loss of income, favouring a capital asset analysis, can be a difficult area.

The Parties' Positions on Future Loss of Earning Capacity

- [121] The plaintiff argues that she has been rendered less capable of earning income from all types of employment, that she is less marketable and attractive as an employee to potential employers, and has lost the ability to take advantage of all job opportunities which might otherwise have been open to her had she not been injured: *Rab* at para. 35, citing *Brown* at para. 8. Her counsel argued that a capital asset approach is a reasonable approach and sought a total of \$300,000 for loss of future earning capacity.
- [122] When challenged by the Court regarding this claim, counsel for the plaintiff related this figure to other case authorities which she submitted were analogous. However, the plaintiff's submissions on this issue did not relate the award sought to the particular facts of her own case.
- [123] On the other hand, the defendants argue that both the plaintiff's own testimony and that of her husband negated any claim for future income loss. The plaintiff testified: "I realize I'm just going to probably have to go back to work with the pain in my neck, and it's not going to

go away. Dr. Giantomaso says that it will be chronic, so I guess I'm just going to have to go back to work anyway. So now that my husband's getting back on track, we plan for me to go back in 2024. And I'm hoping that the headaches and backaches and neck aches are a little better by then". Mr. Krepski similarly testified: "She wants to go back to work. I see no reason why she can't go back to work. I think we're holding off until next year for that to happen".

- [124] On the basis of this evidence, the defendants submit that no award for future earning capacity would be appropriate. In the alternative, they submit that the Court could award a portion of the plaintiff's yearly salary as was done in *Saidy v. Louzado*, 2019 BCSC 281 (50% of the plaintiff's annual salary), *Horne v. Goglia*, 2020 BCSC 122 (25% of the plaintiff's average income over three years), or *Jenkins v. Oliver*, 2020 BCSC 773 (50% of the plaintiff's current net income). They propose that if a real and substantial possibility of a future loss is found, an appropriate order would be six months' salary.

Analysis of Future Loss of Earning Capacity

- [125] In my view, the plaintiff's earning capacity has been diminished but not drastically. Dr. Giantomaso, in his June 2023 report, opined that "in all likelihood she will continue to experience chronic pain to some degree long-term into the future". Further, as discussed above, he opined that "activity limitations and participation restrictions in avocational, vocational and recreational realms" reported by the plaintiff were "reasonable given her post-traumatic injuries".
- [126] On the other hand, as indicated above, Mr. Krepski testified that by 2023, the plaintiff was able to do what she was able to do vocationally before the accident, albeit with some discomfort, and he saw no reason why she could not return to work. Ms. Krepski testified that she could go back to work, but would be working with pain.
- [127] In my view, this case is analogous to *Rab* and to *Pallos v. Insurance Co. of British Columbia*, 100 B.C.L.R. (2d) 260, 1995 CanLII 2871. In *Rab*, the Court of Appeal held at para. 68:

The plaintiff in *Pallos*, while suffering chronic injuries, continued to work in his pre-accident employment without any loss of income, and would continue to do so. Where there was found to be a loss of capacity that gave rise to a reasonable possibility of loss in the future, the question was how to assess it in the circumstances.

- [128] In *Rab*, the plaintiff was pursuing new business ventures at the time of the accident, and the Court found that the potential earnings from those ventures were largely speculative. The Court assessed the value of the plaintiff's potential loss at \$100,000, equating to an average income of approximately \$25,000 per annum per venture over two years. The Court then reduced this amount by 60% to take into account the relative likelihood of the possibility of loss occurring, resulting in an award of \$40,000 for loss of future earning capacity. In this regard, the Court noted, among other negative contingencies, the absence of any history of income from these ventures, the lack of any evidence of the kind of

profitability that might be expected from such ventures, and the prospect that the ventures could as easily fail as succeed.

- [129] In *Rozendaal v. Landingin*, 2013 BCSC 24, the Court was faced with a situation in which a plaintiff continued working in her pre-accident area of employment with the future prospect that her ability to maximize her income in that field would be limited by her injuries. In that case, the Court considered one year's earnings to be an appropriate award.
- [130] Based on the foregoing, I conclude that although the plaintiff is now capable of returning to work, there is a real and substantial possibility that she will be unable to work; will have a reduced capacity to work; or will be unable to maximize her income as a result of her accident-related injuries.
- [131] I conclude that an appropriate amount that would compensate the plaintiff for her future loss of earning capacity is \$25,000, based on one year of her pre-accident MDRT income. This award is intended to account for both positive and negative contingencies - in particular, that she might not lose any future work at all, or that her injuries might significantly reduce her ability to work. I considered whether it might be more appropriate to base this award on her 2018 Mmodal income, but on the evidence, it does not appear likely that she will return to Mmodal work.

Mitigation

- [132] The defendants seek a reduction in the total amount awarded to the plaintiff based on a failure to mitigate. Specifically, the defendants argue that the plaintiff failed to follow the recommendations of Dr. Giantomaso and other physicians.
- [133] In 2020, Dr. Giantomaso recommended a course of active rehabilitation. He did so again in 2023. However, it appears that the plaintiff did not complete either course of treatment. Dr. Giantomaso testified that there is no way of knowing with certainty what effect the treatment would have had, but he would have expected to see improvement.
- [134] Further, the plaintiff's family physician, Dr. MacDonald, and Dr. Spivek have both recommended counselling. The plaintiff attended between 6 and 10 sessions of psychotherapy with three different clinicians but did not continue that treatment. She testified that she has never liked counselling and associates such counselling with counselling that her parents forced her to undergo after they divorced. It was suggested to Dr. Spivek that her mental health issues caused by the accident would have been resolved by psychotherapy, but he could not be certain. Dr. Spivek also testified that people sometimes get better without treatment.

- [135] To succeed in their argument on this issue, the defendants must prove, on a balance of probabilities, that the plaintiff acted unreasonably in not undertaking the recommended treatments, and they must prove the extent to which her damages would have been reduced if she had done so: Quigley at paras. 30-31. The reasonableness of mitigation efforts is tested on the basis of what a reasonable person in this plaintiff's circumstances would do: Quigley at para. 30.
- [136] The defendants have not persuaded me that the plaintiff's decision not to attend counselling was unreasonable, or that attending counselling would have made a significant difference to the outcome.
- [137] However, in my view, the plaintiff's failure to follow Dr. Giantomaso's recommendations for active rehabilitation warrants a reduction in the amount awarded for loss of future earning capacity. In this regard, I find that she did not undertake the treatment recommended by Dr. Giantomaso, and that it is likely the treatment would have resulted in some improvement. As a result of the plaintiff's failure to mitigate her damages, the award in respect of future earning capacity ought to be reduced by 10%, thereby decreasing that award to \$22,500.

Cost of Future Care

- [138] The principles regarding the assessment of damages for cost of future care were summarized by Justice Gomery in *Gill v. Borutski*, 2021 BCSC 554:
- [107] The purpose of an award for the cost of future care is, so far as is possible with a monetary award, to restore the plaintiff to the position she would have been in had the accident not occurred. The award is based on what is reasonably necessary on the medical evidence to promote the mental and physical health of the plaintiff; *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 [Gignac] at paras. 29-30, citing *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.) and *Aberdeen v. Zanatta*, 2008 BCCA 420 at para. 41.
- [108] Each part of the claim must be supported by the medical evidence. If the plaintiff relies on the report of an occupational therapist or rehabilitation consultant, there must be an evidentiary link between the medical evidence and the recommendations in the report; *Gignac*, at paras. 31-32. If the plaintiff has not used or sought out a service in the past, it will usually be difficult for her to justify a claim in respect of that service; *Warick v. Diwell*, 2018 BCCA 53 at para. 55.
- [109] At the end of the day, an award for the cost of future care is assessed, not mathematically calculated; *Uhrovic v. Masjhuri*, 2008 BCCA 462 at paras. 28-31.
- [139] The parties agreed that counselling sessions recommended by Dr. Spivek are appropriate. In this regard, I award \$3,000, which is intended to pay for 12 sessions at \$250 per session.

[140] Dr. Giantomaso recommended a variety of therapies going forward, including active rehabilitation and physical therapy:

- a) He said that "ongoing support through active rehabilitation is reasonable" but did not expressly recommend a particular frequency or duration of treatment. The plaintiff seeks 24 sessions and the defendants take the position that 15 sessions would be reasonable. I award \$2,000, which is intended to pay for 20 sessions at \$93 per hour.
- b) He also said that "passive therapy such as physical therapy, chiropractic, massage therapy and acupuncture at this point are unlikely to change the overall prognosis; however, in my opinion can be accessed on occasion to decrease the intensity and duration of a flare up if one occurs".

The plaintiff seeks \$6,000 for ongoing passive therapy sessions at a frequency of once per month for five years.

The defendants observe that the plaintiff attended massage therapy for relaxation before the accident and argue that no such award should be made for massage. On this issue, the Court of Appeal held as follows in *Warick v. Diwell*, 2018 BCCA 53 at para. 24:

While [a plaintiff's] health and happiness are intertwined, [an award of damages for future care costs] is not intended to account for the cost of amenities "which serve the sole function of making the plaintiff's life more bearable or enjoyable": *Milina* at paras. 199–201; *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at para. 30; *Andrews* at 242.

Dr. Giantomaso's recommendation was for therapy sessions - which included both massage and other forms of physical therapy - to be accessed on occasion to decrease the intensity and duration of a flare-up if one occurs, and not on a regular basis. I award \$1,200, which is intended to pay for 12 sessions of passive therapy, such as physical therapy, chiropractic, massage therapy and acupuncture at \$93 per hour.

[141] The plaintiff has also sought costs of retraining and an FCE. Given the findings that I have made above regarding her ability and willingness to return to MDRT work, it is my view that these costs are not reasonably necessary.

[142] Based on the foregoing, I award the plaintiff \$6,200 for counselling, active rehabilitation and passive therapy sessions.

In-Trust Claim

[143] The plaintiff also advances an "in trust" claim arising from the fact that Mr. Krepski took time away from work to care for the children and to do housework.

[144] In *Popove v. Attisha*, 2019 BCSC 1587 at para. 57, this Court held:

Claims for household duties and other services rendered by immediate family members are allowable where the plaintiff demonstrates the need for such services as a consequence of the injuries sustained. The plaintiff must satisfy the Court, on a balance of probabilities, that the family member providing the services suffered a direct pecuniary loss (because of the time and effort put into those services) or that the family member's efforts replaced housekeeping expenses that would have otherwise have been incurred: *Star v. Ellis*, 2008 BCCA 164 at para. 17.

[145] In *Popove*, the Court also held that where the opportunity cost to the care-giving family member is lower than the cost of obtaining the services independently, the Court will award the lower amount: para. 58.

[146] Mr. Krepski testified that before the accident, the plaintiff took care of more than 90% of the housework and childcare. As stated above, the couple's arrangement was that he would focus on his career as a residential realtor, which was more financially lucrative than the plaintiff's. Mr. Krepski testified that in the four months following the accident, he bore 95% of the household and childcare duties. He testified that "I tried to do what Kandes did. I was more involved and more overwhelmed than I ever have been. I basically stopped working unless necessary. I was servicing whatever clients I had, but I was not pursuing new work."

[147] Mr. Krepski testified that he was still doing about 70% of the household and childcare tasks in 2019. In 2020 and 2021, the plaintiff began to resume more of these responsibilities, and the balance shifted back towards its pre-accident status in which the plaintiff bore closer to 90% of those duties.

[148] I am satisfied that at least for the balance of 2018 and through 2019, Mr. Krepski did much more housework than he had previously, contrary to the arrangement he made with the plaintiff at the beginning of their relationship.

[149] Further, Mr. Krepski's tax assessments show that his income decreased significantly in 2019 and 2020. He has also testified to that effect. Although his income in 2018 was relatively high, I accept that he could have earned even more that year, absent the accident. I am satisfied that Mr. Krepski suffered a direct pecuniary loss because of the time and effort that he put into household and childcare duties.

[150] Neither party provided me with any specific calculations which would assist me in assessing what the cost of obtaining the equivalent of Mr. Krepski's services externally would have been. The plaintiff sought an award of \$15,000, relying on the decision in *Popove* (where the Court awarded \$10,000 in respect of services provided by the plaintiff's husband) and the decision in *Gill* (where the Court awarded \$20,000 in respect of services provided by the plaintiff's son).

[151] In light of these submissions, and in the absence of a specific calculation upon which to base this award, I am satisfied that an appropriate in-trust award given the circumstances of this case is \$12,000.

Special Damages

- [152] A plaintiff is entitled to recover the reasonable out-of-pocket expenses that they incurred as a result of a motor vehicle accident. These are known as special damages.
- [153] In this case, the plaintiff claims special damages totalling \$15,122.40. Of this amount, the defendants agree that \$7,527.82 for special damages is appropriate.
- [154] The defendants take the position that the plaintiff's accident-related injuries had largely resolved by August 2020, when she was first seen by Dr. Giantomaso, and that any treatment received after that date was therefore unrelated to the accident. However, that submission is not supported by the evidence.
- [155] In his August 2020 report, Dr. Giantomaso stated that Ms. Krepski "relates ongoing activity limitations and participation restrictions in avocational, vocational and recreational realms". After describing those limitations and restrictions, he opined that they were "reasonable given her post-traumatic injuries". While Dr. Giantomaso opined that she could likely return to at least part-time sedentary work in August 2020, he does not say that she was in essentially the same condition she was in before the accident, as asserted by the defendants.
- [156] In my view, all of the special damages contested by the defendants on the basis that they were incurred post-August 2020 were reasonable.
- [157] Further, the defendants contest the purchase of a car seat, which was replaced following the accident upon an insurer's recommendation, and the cost of a U-Haul, which was necessitated by the accident to complete a residential move for Mr. and Ms. Krepski at the time. In my view, both of those expenses were caused by the accident and were reasonably incurred.
- [158] As a result of the foregoing, the plaintiff is awarded a total of \$15,122.40 in special damages.

Conclusion

- [159] In summary, Ms. Krepski is awarded damages under the following headings:

Non-pecuniary damages:

\$100,000.00

Past loss of income:

\$10,493.00

\$24,842.00

Future loss of earning capacity:

\$22,500.00

Cost of future care:

\$6,200.00

In-trust claim:

\$12,000.00

Special damages:

\$15,122.40

TOTAL

\$191,157.40

Costs

[160] Unless there are settlement offers or other matters relevant to costs of which I am not aware, the plaintiff will have her costs of this action at Scale B. If the parties need to address costs or any other matters arising from these reasons, they may make arrangements through the registry.

"The Honourable Justice Loo"

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Prepared on 26 October 2026 · Esheria