

CANADA / JUDGMENT

Lakatos v. Lakatos

2017 BCSC 1990

COURT

Supreme Court of British Columbia

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2017 BCSC 1990 Lakatos v. Lakatos

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Lakatos v. Lakatos,

2017 BCSC 1990

Date: 20171103

Docket: M130827

Registry: Vancouver

Between:

Melinda Lakatos

Plaintiff

And

Gyorgy Lakatos

Defendant

- and -

Docket: M151413

Registry: Vancouver

Between:

Melinda Lakatos

Plaintiff

And

Shane Sterling Holloway

Defendant

Before: The Honourable Mr. Justice Steeves

Reasons for Judgment

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Place and Date of Trial:

Vancouver, B.C.

May 29 - 31, 2017

June 2, 5, 6, 8, and 16, 2017

Place and Date of Judgment:

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November 3, 2017

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A. INTRODUCTION

[1] The plaintiff was injured in two serious motor vehicle accidents on February 27, 2011 ("Accident 1") and then on September 23, 2014 ("Accident 2"). The first was a roll-over at speed and the second was a head-on collision.

- [2] The plaintiff attributes to Accident 1 the following injuries: traumatic brain injury, deep vein thrombosis (clot), pulmonary contusion, bruising, fractures of the ribs, neck pain, low back pain, right shoulder pain, headaches, depression and soft tissue. She was off work but returned in January 2012 to full time duties.
- [3] With respect to Accident 2, the plaintiff says it aggravated her injuries from Accident 1 and she also suffered new injuries including post concussion syndrome, bilateral knee pain, broken ribs and broken right ankle. She has not worked since the September 2014 accident.
- [4] The plaintiff claims damages under the following heads: non-pecuniary, specials, past and future wage loss, future cost of care, housekeeping and an in-trust claim.
- [5] Liability is admitted by both defendants for both accidents.
- [6] The defendants have separate counsel and they challenge the amount of damages claimed by the plaintiff. They also differ between themselves about the apportionment of fault between the two accidents. Both defendants say the plaintiff was contributorily negligent because she was not wearing her seat belt for Accident 1.

B. BACKGROUND

- [7] The plaintiff turned 52 years old during this trial. She was born in Hungary where she was trained as a nurse and dental assistant. She was married there and then she moved to Ontario with her husband in 1990, then to British Columbia in 1993. They have two children, a daughter aged 30 and a son aged 24 years old.
- [8] The family lived in the Vancouver area for many years where the husband worked as an auto body technician. The plaintiff, her husband and their youngest child moved to Kelowna in May 2015. The daughter, Linda Bartnik, lives in Mission. She is currently on maternity leave and in daily contact with the plaintiff.
- [9] The plaintiff worked at Walmart for many years. This began in 1994 on a part-time basis and she ultimately worked as an overnight manager for about 13 years. During this time she looked after the youngest child during the day while also looking after the home and cooking for the family. She also managed to find some time to sleep, sometimes with the help of medication. Her husband testified that she gave 110% to her work and she would work even if she was sick.
- [10] The plaintiff testified that, before the motor vehicle accidents, she decided that the night work was taking a toll on her body. In 2008 she was able to obtain day-time work as the manager of the photo-lab department. She received less money and had less responsibility but she had a "happy" and "normal life," as she described it in her evidence.

- [11] Her daughter, Ms. Bartnik, testified that the plaintiff loved gardening and would "spend all day on her hands and knees." Ms. Bartnik would follow her mother around and talk with her and hear stories. The plaintiff also enjoyed family trips and vacations with her family. The son-in-law, Mac Bartnik described the plaintiff as very energetic before the accidents, keeping a "spotless" home and preparing large meals with everything prepared by her.
- [12] Previous medical history includes blood clots in the legs since a young age and high blood pressure. She took medication for both conditions. She had some difficulties with sleep before the accidents. In about 2004 she had a minor accident at work when a pallet fell against her left ankle, she had stitches and she was off work for about four to five weeks because it became infected. Dr. Edmond Low has been her family physician for a number of years and he described the plaintiff as "relatively healthy and active" before the two accidents.
- (a) The first accident: February 27, 2011
- [13] Accident 1 occurred on February 27, 2011.
- [14] The plaintiff, her husband and her brother-in-law were returning from a trip to Kelowna and were on the highway near Hope. There was snow on the road. Her husband was driving and her brother-in-law was in the front, passenger seat.
- [15] The plaintiff was in the back seat, by herself. She testified that she did not have her seat belt on because she was stretching her legs because of her blood clots. She had put the seat belt on in Kelowna but she undid it around Hope with the intention of re-fastening it once she had stretched her legs. She could not recall how long she had the belt unfastened.
- [16] The husband testified that he was trying to bring the car back from sliding sideways in the snow into the next lane. The first thing the plaintiff noticed was that it started shaking. She recalled a memory of "flying to heaven." She then remembered lying on the ground, outside the car in the snow and she was very cold. Dr. Low's expert report of March 5, 2017 records that the plaintiff had "a significant loss of consciousness" at the time of the accident and "no recall of the accident."
- [17] The next thing the plaintiff remembered was that she was in the hospital and she was scared that she would die. She told the doctor she wanted to say good-bye to her children. Her head and legs were "filling up with something," she "could hardly breathe" and she had intense pain in her chest. Photographs demonstrate significant damage to the car the plaintiff was travelling in, obviously having rolled at least once.
- [18] She was transferred to a hospital near her residence where she stayed for about four days. She testified that she was taking "a lot of pain medication," sleeping a lot and eating very little. She remembered still finding broken glass in her hair while in the hospital.

- [19] In his expert report of March 5, 2017 Dr. Low, the plaintiff's family physician, described a number of investigations in the hospital including the skull, cervical spine, chest and lower right extremity. A scan of the chest revealed fractures of the third through ninth ribs but no displacement at the fracture sights and no other injuries. A scan of the head revealed "a moderately large right posterior scalp hematoma" with some healing around the outside. There was also a very large right leg hematoma and concerns that the swelling might affect the blood supply. Surgery was not required and by March 2, 2011 the scalp hematoma was improved. However, there was worsening right leg pain and she was hospitalized again on March 10, 2011 with a deep vein thrombosis ("DVT"). No further extension was noted on March 17, 2011.
- [20] Ms. Bartnik, the daughter, testified that the plaintiff could not laugh or cry without pain when she saw her mother in the hospital. The daughter described the plaintiff at one point in the hospital saying there were bugs on the privacy curtains. This was reported to the hospital staff and a brain scan was done. This was negative. The plaintiff went home in a wheelchair and used a hospital bed there. She had complications with her blood clots. She found it emotionally very difficult because she "did not know how to deal with how my life changed." She had recurring dreams about the accident happening.
- [21] The husband suffered a neck injury from the accident.
- [22] The plaintiff saw Dr. Low, her general physician, the first time after the February 2011 accident on March 7, 2011. According to his records the diagnoses were: concussion, multiple fractures of ribs 3-9, pulmonary contusion, right scalp hematoma, major contusion and hematoma on the right calf (with lateral compartment syndrome), soft tissue injury in the neck and multiple contusions. On March 14, 2011, following increased pain in the right leg, a diagnosis of posttraumatic DVT was added. Dr. Low saw the plaintiff a number of times over March, April and May 2011 with symptoms such as headaches, difficulty concentrating, dizziness and decreased memory.
- [23] On June 7, 2011 Dr. Low recorded improvement with intermittent headaches but her neck and shoulders were still painful and stiff. Psychologically she was having problems with memory including forgetting how to cook. She fatigued very quickly and post-concussive syndrome was diagnosed as was post traumatic stress disorder ("PTSD"). By July 12 and 27, 2011 there was no change in her symptoms. She was attending rehab therapy and massage therapy, and counselling was arranged. On October 25, 2011 there was decreased range of motion in the lower back with pain on flexion and left rotation.
- [24] The plaintiff was off work for about nine months as a result of the February 2011 accident. Dr. Low recorded slow improvement on November 8, 2011 and he thought a graduated return to work was appropriate. This commenced on November 14, 2011 and the plaintiff was working full time by January 2012. During this time Dr. Low's chart records a number of visits and on going symptoms including lower right leg pain. In addition, on April 11, 2013, she was "quite depressed" and "complaining of always being moody and feeling down."

[25] Dr. Low saw the plaintiff on June 17, 24 and November 12, 2013 and he recorded complaints of stiffness and soreness in the neck. The complaints continued on visits on March 4, and April 2, 2014. In his expert report of March 5, 2017 Dr. Low records the following from visits on May 7 and June 10, 2014, the last visits before Accident 2 in September 2014:

She had complaints of right upper quadrant pain, neck pain, and shoulder pain. Ultrasound and blood work was performed and did not reveal any abnormalities. The pain is most likely due to scar tissue from her previous fractured ribs.

[26] In his oral evidence Dr. Low confirmed that "previous fractured ribs" related to the February 2011 accident. He also stated that prior to the second accident the plaintiff suffered from headaches, neck pain, rib pain, low back pain and right calf pain as a result of the 2011 accident. He was not aware of any ongoing anxiety.

[27] For her part, the plaintiff testified that she agreed she felt better and happy in the summer of 2014 but she had not fully recovered from the February 2011 accident when the second one occurred in September 2014. She ended a course of chiropractic treatment in 2013 and training with a kinesiologist ended about the same time.

[28] She started working full time in January 2012 and she obtained a promotion a few months before the September 2014 accident. The promotion meant working different shifts, including evenings and weekends.

[29] By summer 2014 she was only seeing her family doctor as required. She had headaches "once in a while" but the pain in the right rib area went away. She did not have problems with blood clots. Noise from the public announcement speakers at work bothered her as did the bright lighting at work. She continued to look after the family home as well as work.

(b) The second accident: September 23, 2014

[30] On September 23, 2014 the plaintiff was in the front passenger seat of a car driven by her husband, returning from a visit to her daughter. She was wearing a seat belt. A car coming from the other direction crossed into their lane causing a head-on collision. The husband testified that there was no chance to turn away.

[31] The plaintiff testified that it "happened so fast" that she did not see very much. She could "see smoke" and later found out that was from the air bags engaging. She described being unable to get out of the car until her husband helped her out and laid her on the ground. She said she "felt like I was going to die" and she told her husband that. She believed she had been lucky with the first accident and "this is my time." She described pain "everywhere."

[32] The plaintiff was taken to the hospital where a number of tests were performed. She had broken ribs on the right side, a fractured ankle, injured knees, bruising in both legs and she testified that her whole body hurt. She also believed she hit her head but not as badly as in the first accident. She "could not believe" this was happening a second time. The husband had injuries to his back, knees and shoulder from the accident.

- [33] She was in the hospital for about four days and then returned home in a wheelchair. The daughter described the plaintiff as "beside herself with pain." In a visit to Dr. Low on September 30, 2014 she complained of headaches, severe central chest pain, abdominal pain, bilateral knee pain, back pain and right ankle pain. In his report Dr. Low stated that the plaintiff was still recovering from the 2011 accident with symptoms of neck pain, shoulder pain, lower back pain, fatigue and depression. She was diagnosed with a new concussion, soft tissue injury to the neck, multiple fractures to right ribs 3-6, contusion on the lower left ribs, severe seatbelt bruising of chest and lower abdomen, contusion to arms, right ankle fracture and severe contusion to both knees.
- [34] The plaintiff saw Dr. Low a number of times with continued complaints as well as agitation; she was reliving the accident, she was not sleeping well and not doing well psychologically. In November 2014 there was worsening of the lower back pain bilaterally. By December 17, 2014 she was walking more with a walker but was very stiff and sore. In January and February 2015 she still had pain but the right ankle was improving and she was walking better. She reported that she "freaks out" whenever she is in a car and she was not able to drive. During other visits to Dr. Low her pain continued as did things like difficulty sleeping. She was doing some rehab at a recreational centre in August 2015 but she felt her depressive symptoms were worse. There was some improvement in her pain in October 2015 but she had poor energy and was very fearful as a passenger. She was seeing a psychologist.
- [35] In her evidence the plaintiff described re-commencing occupational and physical therapies. She took pain medication for about two to three months and was using a cane until about June 2015. She had panic attacks and "horrible" dreams about being hit again "from nowhere." She described major anxiety and she saw a psychologist in Surrey three or four times. This stopped with the move to Kelowna in May 2015. She was taking anti-depression and anti-anxiety medication.

C. EXPERT REPORTS

- [36] The plaintiff relies on the following experts:
- (a) Psychiatry: Dr. Alexander Levin, report dated March 12, 2017.
 - (b) Neurology: Dr. Donald Cameron, report dated December 12, 2016.
 - (c) Physiatry: Dr. Zeeshan Waseem, report dated December 12, 2016.
 - (d) Orthopaedic surgery: Dr. Fadi Tarazi, report dated January 24, 2017.
 - (e) Family medicine: Dr. Edmond Low, report dated March 5, 2017.
 - (f) Occupational medicine: Dr. Gurdeep Parhar, report dated April 20, 2015.
 - (g) Kinesiology: Michael Sung, report dated August 25, 2015.
 - (h) Vocational rehabilitation: John Lawless, report dated December 12, 2016.

(i) Economics: Darren Benning, reports dated August 4, 2016, February 16, 17, 2017.

[37] All of the plaintiff's experts were cross-examined.

[38] The defendants rely on the following experts:

(a) Psychology/Vocational rehabilitation: Dr. Colleen Quee Newell, report dated April 10, 2017.

(b) Orthopaedic surgery: Dr. Donald Werry, reported dated October 20, 2014.

(c) Orthopaedic surgery: Dr. Peter Kokan, reported dated October 4, 2016.

(d) Neurology: Dr. Oscar Benavente, reported dated March 20, 2015.

(e) Occupational therapy: Linda Waithman, reported dated April 11, 2017.

(f) Economics: Mark Gosling, reported dated April 12, 2017.

[39] All of the defendants' experts were cross-examined except for Dr. Werry.

[40] The following is my summary of the salient parts of the expert reports that describe the condition of the plaintiff as recently as the dates of the reports permit. There is no dispute that the plaintiff continues to suffer from symptoms from the two accidents. A review of medical reports from 2014 to 2016 follows.

[41] The last visit recorded in the March 5, 2017 report of Dr. Low, the plaintiff's family physician, gives a general view of the plaintiff's condition on January 24, 2017:

She continued to complain of pain in her neck and shoulders, ribs right greater than left, lower back pain to both hips, left knee, and right lower leg and ankle. She was doing limited short drives. She reported getting anxious in traffic. She was receiving massage weekly. Examination of her neck revealed some tenderness along the midline and she had decreased range of movement in all directions. Examination of her back revealed mild tenderness along the midline with good range of movement. Examination of her knees did not reveal any swelling or instability. It was felt that she possibly had Fibromyalgia secondary to all of her previous injuries. Her antidepressant, Trintellix was increased, and she was put on Nortriptyline at bedtime for her chronic pain. It was recommended that she see counselling for her PTSD. She was to be referred to a physiatrist with regards to her chronic pain and possible fibromyalgia.

[42] In his oral evidence Dr. Low could not recall if the referral to a physiatrist had been made.

[43] In his report of December 12, 2016, Dr. Cameron, a neurologist retained by the plaintiff, opined that the plaintiff suffered from a mild case of post traumatic brain injury syndrome from both accidents, Accident 2 being more serious. He also stated:

49. Mrs. Lakatos suffered repeat chest injuries and fractured ribs, 3 through 6, on the right side at the time of the second accident. She also suffered repeat soft tissue musculoskeletal injuries to head, neck, shoulders, and back sustained at the time of the second accident.

50. The records that I have reviewed document that Mrs. Lakatos has had significantly more clinical problems following the second accident as a result of these injuries sustained at the time of accident of September 23, 2014.
51. Mrs. Lakatos has also suffered with significantly increased degree or severity of cognitive problems following the second accident.
52. Mrs. Lakatos' has been assessed by a psychiatrist, Dr. H. Lari. Dr. Lari has provided a report, dated March 27, 2015. Dr. Lari has diagnosed Mrs. Lakatos as suffering with significant psychological problems in the form of clinical depression and post traumatic stress disorder following these two accidents, particularly the accident of September 23, 2014.
53. The clinical records that I have reviewed document that Mrs. Lakatos has had significant physical disabilities which have interfered with her ability to return to work in any capacity and prohibited her from resuming work related activities or chores around the house since the accident. She is limited to light activities around the house since this accident.
54. As of the date of my neurological assessment of Mrs. Lakatos [November 23, 2016], she has not been able to return to work in a competitive fashion at any job due to ongoing cognitive problems, ongoing psychological problems, as well as physical limitation as a result of pain and discomfort present as a result of the accumulative effect of the soft tissue musculoskeletal injuries that she sustained at the time of these two motor vehicle accidents.
55. Patients improve up to approximately two years following any type of physical injury including traumatic brain injury. I have assessed Mrs. Lakatos in neurological consultation in November of 2016 over two years following the second motor vehicle accident of September 23, 2014.
56. As I have indicated above, Mrs. Lakatos remains unable to return to work as a result of the clinical problems that I have outlined above in this report, secondary to these two motor vehicle accidents and particularly the second motor vehicle accident of September 23, 2014.

[44] A neurologist retained by the defendants, Dr. Benavente, opined in his report of March 20, 2015 (following an examination on March 5, 2015), that:

Ms. Lakatos had symptoms related to the first MVA (February 27, 2011), which produced a post-concussion syndrome. While the symptoms were improving, but not completely resolved, she was involved in a second MVA and according to the patient, this exacerbated her prior symptoms.

I am uncertain about the details of the second MVA on September 23, 2014; therefore, I am unable to formulate an opinion.

[45] The plaintiff was assessed by Dr. Levin, a psychiatrist retained by the plaintiff, on February 16, 2017, and he stated in his report dated March 12, 2017:

71. In conclusion, I would like to reiterate that, in my clinical opinion, as a result of the motor vehicle accidents on February 27, 2011 and September 23, 2014, Ms. Lakatos sustained repeated concussions (mild traumatic brain injuries) complicated by a rapid onset of a so-called "post-traumatic depression." As time progressed, Ms. Lakatos seems also to have developed protracted depressive symptomatology related to the accident-related stressors and experiences of pain. As a result of the motor vehicle accident on September 23, 2014, Ms. Lakatos developed post-traumatic stress disorder symptomatology characterized by prominent symptoms of amotivation, apathy and lack of enjoyment in everyday life, which further complicated the clinical course of Ms. Lakatos' depression.
72. At the present time, Ms. Lakatos presents with a combination of clinically significant depressive/anxiety symptomatology that represents comorbid, persistent depression and residual PTSD. The combination of Ms. Lakatos' post-concussive symptomatology, depression, anxiety and PTSD should be viewed as a negative prognostic factor. A protractive clinical course of Ms. Lakatos' above reported psychological, emotional and cognitive difficulties most likely also resulted in Ms. Lakatos' experiences of feeling as if she became a different person. Her statement could suggest the presence of a so-called personality change due to a combination of the above-mentioned factors (including MTBI, protracted depression, PTSD and ongoing fear of repeated injuries, etc.).
73. Given the above-described psychiatric diagnosis and Ms. Lakatos' ongoing clinically significant psychiatric disturbances, she requires a more intense psychopharmacological intervention (perhaps an augmentation of her psychopharmacological regimen, with Abilify). It is most likely that a simply supportive psychotherapy (as it was described in Ms. Lakatos' medical file) was not sufficient or adequately efficient in Ms. Lakatos' case and she would require 18 to 24 sessions of cognitive behavioural psychotherapy with a specifically-trained psychologist followed by CBT maintenance on a monthly basis for approximately a year.
74. During the interview in my office, Ms. Lakatos described her desire to return to her previous workplace. However, because of her chronic depressive/anxiety symptomatology and experiences of fatigue, I am concerned that Ms. Lakatos would be able to work only part-time hours.
- [46] The plaintiff was assessed by a physiatrist retained by the plaintiff, Dr. Waseem, on November 24, 2016. In his report of December 12, 2016 Dr. Waseem opined that the plaintiff suffered traumatic brain injury; sprain/strain of the cervical thoracic and lumbar spine; pulmonary contusion, right rib 3-9 fractures; and right calf subcutaneous hematoma from Accident 1. With respect to Accident 2, Dr. Waseem believed the plaintiff suffered minor head injury/cerebral concussion; sprain/strain to the same areas of the spine as in Accident 1; chest contusion and right rib 3-6 fractures; bilateral knee contusions; and right ankle undisplaced medial malleolar fracture. Injuries from both accidents were considered to be chronic myofascial pain syndrome of the cervical, thoracic and lumbar spines and the right calf and left knee pes anserine bursitis; and right ankle capsulitis and tibialis anterior

tendinitis.

[47] With respect to prognosis Dr. Waseem stated:

Prognosis is poor for complete symptomatic recovery. Her physical condition is chronic, unremitting and permanent. She will continue to experience pain into the future. She is at substantial and real risk of developing post-traumatic arthritis of the right ankle in the future.

She is limited in her ability to lift/carry moderate to heavy weight, reach and bend repetitively and in a sustained manner, and walk, sit or stand for prolonged periods of time.

Given the extent of her injuries and ensuing impairments, she is permanently disabled from work in any capacity. Pain and reduced functional tolerances prevent her from being gainfully employed.

The injuries have altered her capacity to meet the physical demands of heavier household chores and usual recreational activities previously enjoyed.

It does not appear that pre-existing condition(s) have, or are, contributing to her current limitations.

[48] A contrasting view of prognosis is from Dr. Werry, an orthopaedic surgeon retained by the defendants:

6. It is probable that Ms. Lakatos will continue to experience neck pain and stiffness, low back pain and stiffness and possibly right chest and right leg discomfort for the foreseeable future. Ms. Lakatos' musculoskeletal symptoms are likely to continue to be affected by activity but also by stressors such as the increased responsibilities in her new job. Persistent pain can be a complex psychosocial biological phenomenon. Persisting pain can lead to depression but unrecognized or insufficiently treated depression can worsen the pain experience. From a musculoskeletal point of view, an ongoing regular self directed fitness program including stretching and strengthening routines and aerobic conditioning is a mainstay in the management of chronic myofascial pain. Ms. Lakatos has not maintained a regular fitness program. If she were able to maintain a regimen of regular fitness activities, she would probably experience some improvement in comfort and overall activity tolerance.

1.[sic] From a musculoskeletal point of view, it is probable that Ms. Lakatos would be able to continue working in a managerial position in the retail industry. She currently has the sitting, standing and walking tolerance necessary for her job. Requirements for bending and lifting are infrequent. Her ability to manage her musculoskeletal symptoms will be influenced by her ability to obtain refreshing sleep and possibly by psychological factors such as depression.

[49] Dr. Werry's opinion of diagnosis was of soft tissue injury to the neck; large hematoma of the head; very visible hematoma over the lateral aspect of the right leg; bleeding in the scalp aggravated by blood thinning medication taken before the accident; fractures of seven ribs; undiagnosed discomfort and pain in the scalp; degenerative cervical disc changes at two

levels of the neck that pre-existed the accident; right shoulder discomfort without any intrinsic pathology; persisting right chest discomfort; non-specific mechanical back pain; and undiagnosed right leg discomfort. Dr. Werry examined the plaintiff the day of, but before, Accident 2 and, as discussed below, that is obviously significant evidence about the condition of the plaintiff just before Accident 2.

[50] Dr. Tarazi, an orthopaedic surgeon retained by the plaintiff, summarized the findings of his assessment on January 24, 2017 in his report of the same date, as follows:

The two motor vehicle accidents of February 27, 2011 and September 23, 2014, have caused multiple injuries to the neck, back, shoulders, chest wall, knees, right lower leg and right ankle. Despite conservative therapy and partial improvement in her overall symptoms, she remains quite disabled. Her residual disability is so significant that she is practically unemployable in the future, because of her accident injuries. This disability will most likely continue indefinitely. She will have to modify her activities in the future to accommodate for her symptoms. This will also include modifications at home and recreationally. The two motor vehicle accidents have been life changing events for her, as they will cause permanent pain and disability.

[51] As can be seen the plaintiff's symptoms were very similar with respect to the two accidents. As well, Accident 2 may have aggravated or accelerated the plaintiff's symptoms but it is clear that her symptoms were worse after Accident 2 than after Accident 1. This latter point is relevant to apportionment between the two accidents, discussed below.

D. ANALYSIS

[52] With the above in mind, the following issues are raised by the plaintiff and are considered below:

- (a) Special damages
- (b) Past loss of income
- (c) Non-pecuniary damages
- (d) Future loss of income
- (e) Cost of future care
- (f) Housekeeping services
- (g) In-trust claim
- (h) Contributory negligence and mitigation.
- (i) Divisibility and apportionment

[53] My discussion of those issues follows.

- (a) Special damages

- [54] The parties are not agreed on special damages.
- [55] According to the plaintiff, total special damages in the amount of \$15,192.62 are appropriate in this case, for both accidents. These are for items such as physiotherapy, massage therapy, medication and taxis.
- [56] The defendant Lakatos submits that an appropriate amount for special damages for both accidents is \$12,471 in total, a portion of which should be reduced by 25% for the contributory negligence of the plaintiff in Accident 1. The defendant Holloway submits that the total special damages for both accidents should be \$11,669.
- [57] Following a review of the receipts provided by the plaintiff I conclude that some expenses claimed must be disallowed, as described in the submission of the defendant Lakatos. These are:
- (a) The cost for taxis that were paid for by the insurance carrier.
 - (b) The cost for sleep medication for sleep problems that pre-existed the two accidents.
 - (c) There is a modest claim for gas and mileage for the same trip. The claim for gas is disallowed.
 - (d) The amount of \$97 is claimed for an ankle cast that was sent to the insurance carrier for reimbursement.
 - (e) The claim for mileage for a trip that was in an ambulance is disallowed.
- [58] The result is that I accept the calculation of the defendant Lakatos for total special damages of \$12,471. Using the dates of receipts this amount is divisible between the two accidents, \$8,040 for Accident 1 and \$4,431 for Accident 2. A deduction for the contributory negligence of the plaintiff is also applicable, discussed below. The full details of these damages are set out in the summary below.
- (b) Past loss of income
- [59] A claim for past loss of earnings is for the loss of earning capacity or the loss of the value of the work that the plaintiff would have performed but was unable to perform because of the injury (*Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30). The assessment is of the loss of earning capacity rather than the loss of actual income, although the loss of income can be a way to measure loss of capacity. This is described in *Personal Injury Damages in Canada* at p. 205-06 as follows:

The essence of the task under this head of damages is to award compensation for any pecuniary loss which will result from an inability to work. "Loss of the value of work" is the substance of the claim - loss of the value of any work the plaintiff would have done but for the accident but now will be unable to do. The loss framed in this way may be measured in different ways. Sometimes it will be measured by reference to the actual earnings the plaintiff would have received; sometimes by a replacement cost evaluation of tasks which the plaintiff will now be unable to

perform; sometimes by an assessment of reduced company profits; and sometimes by the amount of secondary income lost, such as shared family income.

[Emphasis in original.]

[60] The majority of the Court of Appeal in *Rowe* at para. 32 also adopted the following from an Australian decision (*Arthur Robinson (Grafton) Pty Ltd. v. Carter* (1968), 122 C.L.R. 649 at p. 658 [1968] H.C.A. 9):

The respondent is not to be compensated for loss of earnings but for loss of earning capacity. However much the valuation of the loss of earning capacity involves the consideration of what moneys could have been produced by the exercise of the respondent's former earning capacity, it is the loss of that capacity, and not the failure to receive wages for the future, which is to be the subject of fair compensation. In so saying, I realize that many statements may be found in the reported cases where loss of earnings has been the description of this element in special damages. But I do not find that in these it was necessary to consider or draw the distinction between the loss of earnings and the loss of earning capacity. But where in Australia attention has been drawn to the distinction, authoritative expressions with which I respectfully agree have indicated that it is loss of earning capacity and not loss of earnings that is to be the subject of compensation. But though this is I think the recognized position in Australia, the wages which would have been earned between the receipt of the injury and the date of trial are somewhat illogically, as I think, calculated and treated as special damages. In my opinion, it would be better that they should not be so treated for amongst other things, such treatment tends to plant in the mind the idea that it is the loss of the earnings which is to be compensated. On the other hand, not to so treat them would help to emphasize that it is the loss of earning capacity which is the subject of the damages. However, in most cases they may have but small practical significance; and in this case, in relative terms, none.

[61] In addition, a claim for past (or future) lost earning capacity is an assessment rather than a calculation, it requires considerations of fairness and reasonableness and all negative and positive contingencies are to be taken into account (*Abbott v. Gerges*, 2014 BCSC 1329 at para. 165).

[62] In the subject claim, the plaintiff seeks \$189,868 for past loss of earning. This is comprised of \$34,379 for salary and benefits for Accident 1 and \$152,489 for salary and benefits for Accident 2. The expert report of Mr. Benning is relied on. Lost bonuses in the amount of \$3,000 for the second accident are also claimed.

[63] The defendant Lakatos accepts there was a past wage loss from Accident 1 but salary continuance and deductions for EI and income tax should be made. The result is \$12,422 for past wage loss apportioned for Accident 1 and \$81,000 for Accident 2. The total is \$93,422. According to the defendant Holloway, the expert report of Mr. Gosling should be relied on and a global amount of \$121,479 damages for past wage loss is notionally appropriate for both accidents. However, salary continuance benefits and tax have to be deducted for Accident 1 and the salary claimed by the plaintiff for Accident 2 is disputed.

- [64] I generally accept the expert economic report of Mr. Benning. The report of Mr. Gosling, an economist retained by the defendant Holloway, contains relevant points but the report of Mr. Benning is more consistent with the usual expert opinions on these matters. I also accept Mr. Benning's inclusion of a wage increase effective April 8, 2011 and his assumption that this would have continued but for the plaintiff being on leave. The plaintiff's claim for bonuses is not supported in the evidence.
- [65] As for any income continuation benefits, I accept that this is a valid deduction if the plaintiff does not have to repay those benefits to her employer (*Herlehy v. Taylor*, 2015 BCSC 1323 at paras. 158, 163). On the other hand, no allowance should be made for saved tax and employment premiums because they have been paid (*Ho v. Dosanjh*, 2010 BCSC 845 at para. 53). Other than these comments, the calculation of adjustments for income continuity, tax and EI are referred to the parties. If they cannot agree on the calculations (as well as tax gross-up) I retain jurisdiction to decide them.
- [66] In the result the plaintiff is entitled to \$186,868 as a global amount for past loss of earning (subject to deductions). It is divisible because the evidence about the earning history permits a division. It is comprised of \$34,379 for salary and benefits for Accident 1 to which the contributory negligence of the plaintiff must be accounted for. Past wage loss for Accident 2 is \$152,489 for salary and benefits. The details, including apportionment, are explained in the summary below.
- (c) Non-pecuniary damages
- [67] An award of non-pecuniary damages "acts as a substitute for the pleasure and enjoyment which has been lost and endeavours to alleviate, as far as possible, the pain and suffering that the plaintiff has endured and will have to endure in the future" (*ter Neuzen v. Korn*, [1995] 3 S.C.R. 674 at para. 106). The broad framework for the assessment of non-pecuniary damages has been set out by the Court of Appeal (*Stapley v. Hejslet*, 2006 BCCA 34, leave to appeal to S.C.C. refused 2006 CanLII 35804):
- [46] The inexhaustive list of common factors cited in *Boyd* [*Boyd v. Harris*, 2004 BCCA 146] that influence an award of non-pecuniary damages includes:
- (a) age of the plaintiff;
 - (b) nature of the injury;
 - (c) severity and duration of pain;
 - (d) disability;
 - (e) emotional suffering; and
 - (f) loss or impairment of life;

I would add the following factors, although they may arguably be subsumed in the above list:

- (g) impairment of family, marital and social relationships;
 - (h) impairment of physical and mental abilities;
 - (i) loss of lifestyle; and
 - (j) the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff: *Giang v. Clayton*, [2005] B.C.J. No. 163 (QL), 2005 BCCA 54). [Emphasis omitted.]
- [68] The ability to work is relevant to non-pecuniary damages because it may impact a person's enjoyment of life and work is one of the most fundamental aspects of one's life (Ken Cooper-Stephenson, *Personal Injury Damages in Canada*, 2nd ed. (Scarborough: Carswell, 1996) at p. 553; in *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313 at p. 368; and *Boyd v. Harris*, 2004 BCCA 146 at para. 54).
- [69] In the subject claim, the plaintiff was 52 years of age at trial. She seeks damages for non-pecuniary loss in the range of a global amount for both accidents of \$200,000 to \$250,000. She relies on the following previous judgments: *Scoates v. Dermott*, 2012 BCSC 485; *Best v. Thomas*, 2014 BCSC 1033; *Bransford v. Yilmazcan*, 2010 BCCA 271; and *Chowdry v. Burnaby (City)*, 2008 BCSC 1337.
- [70] The defendant Lakatos submits that an appropriate global amount for non-pecuniary damages is \$130,000 to \$150,000 but a 10% reduction should be made to reflect the plaintiff's failure to mitigate her psychological injuries. The remainder should be apportioned as \$39,000 to \$45,000 for Accident 1 and \$70,200 to \$81,000 for Accident 2. The following authorities are relied on: *Grewal v. Naumann*, 2015 BCSC 1147; *Gulati v. Chan*, 2015 BCSC 431; *Han v. Chahal*, 2013 BCSC 1575; *Langille v. Nguyen*, 2013 BCSC 1460; and *Morena v. Dhillon*, 2014 BCSC 141.
- [71] According to the defendant Holloway, a global amount of \$130,000 to \$150,000 is appropriate for non-pecuniary damages. The authorities relied on are the same ones relied by the defendant Lakatos.
- [72] Turning to the evidence in the subject case the plaintiff was 52 years old at trial. She worked hard at home to look after her family and she worked hard at her employment. Her work was secure, it helped support the family and she received promotions. It also gave her considerable personal satisfaction and she developed friendships at work. Since Accident 2 the plaintiff has not worked with the result that she has lost these personal and economic benefits.
- [73] I have summarized the medical evidence above. In my view that evidence supports the following conditions that are related to the two accidents:
- (a) Pain and mechanical difficulties in the neck, shoulders, lower back, left knee, right lower leg. These are noted to various degrees by all examining doctors.

- (b) Cognitive problems, a post concussion syndrome, post-traumatic disorder, headaches and depression. The neurologist Dr. Cameron described significantly increased severity of cognitive problems after Accident 2 with continuing problems up to the November 2016 assessment. The neurologist for the defendants, Dr. Benavente was "uncertain about the details" of Accident 2 and unable to provide an opinion. He did accept there was a post concussion syndrome after Accident 1. There is evidence that these conditions, or some of them, will be with the plaintiff for the rest of her life.
- (c) Mild traumatic brain disorder. This may have been in recovery prior to Accident 2 but certainly it was fully formed after Accident 2. Dr. Levin, the psychiatrist believed the plaintiff sustained repeated concussions "mild traumatic brain injuries" complicated by a rapid onset of a "so-called 'post-traumatic depression.'" She presently (March 2017) suffers from "clinically significant depressive/anxiety symptomology that represents comorbid persistent depression and residual PTSD." These symptoms will also continue indefinitely.
- [74] There is evidence of the plaintiff's point of view as recorded by others. For example, as recorded in Dr. Levin's report of March 12, 2017, an occupational therapy assessment on April 1, 2011 (Accident 1 was on February 27, 2011) described the plaintiff as "very emotional and teary" and she expressed fear of pain. She considered herself usually very active and independent but was having trouble accepting that she needs assistance with basic tasks. On April 18, 2011 there were debilitating headaches, fatigue, dizziness, difficulties focusing, decreased memory which were "probably the result of her concussion." This was "highly consistent" with a diagnosis of mild traumatic brain injury and related post-traumatic depression. Despite this, the occupational therapy discharge report (March 22, 2012) described "excellent progress" in all areas.
- [75] A chart note from a physiotherapist on April 28, 2011 said that the plaintiff looked "terrific" and she was improving slowly. However, she still needed "to rest during the day and have her quiet time." She was also having trouble concentrating when she watched sports on television. On June 7, 2011 Dr. Low recorded the plaintiff as forgetting how to cook, something she had done for the family for many years. On April 11, 2013 the plaintiff was recorded as being quite depressed, "moody and feeling down."
- [76] The plaintiff returned to work on a graduated basis in November 2011 and then was working full-time in January 2012. She testified that it was hard, she found it difficult to work under fluorescent lighting and to be around noise from the PA system. But she liked the work, it gave her considerable personal satisfaction, she apparently did well and she was promoted. She could complete her household work although it took longer and she was more tired. The last time that Dr. Low saw the plaintiff before Accident 2 was June 10, 2014 and he recorded complaints of pain in the right upper quadrant. Dr. Werry examined the plaintiff on September 23, 2014, coincidentally the day of Accident 2, for the purposes of an assessment for the defendants. The examination took place before Accident 2. His findings are similar to those of Dr. Low in June 2014 and Dr. Werry also noted fatigue, loss of energy, mood changes, depression and anxiety. Those findings are set out below as they are also relevant

to the issue of divisibility of the plaintiff's injuries.

- [77] After Accident 2 on September 14, 2014, the plaintiff was suffering from major depressive and cognitive symptoms. A psychiatric examination on March 27, 2015 described "post-traumatic stress disorder, chronic and major depressive disorder, recurrent, moderate, without psychotic features recurrent, is based on reported depressive symptomology that [the plaintiff] experienced following the first motor vehicle accident in 2011."
- [78] She was anxious about driving and Dr. Low recorded her as saying in January and February of 2015 that she "freaks out" whenever she was in a car. This has improved considerably but anxiety remains. The heavy traffic in Surrey may have been one reason for the move to Kelowna but she also continued to have thrombosis in her lower right leg which is a concern with driving. On October 7, 2015 Dr. Low recorded the plaintiff as "very fearful as a passenger" and on January 24, 2017 he recorded her as being "quite anxious in traffic."
- [79] The plaintiff continues to garden in Kelowna but not as much as before the accident or as much as she would like to do. Her husband and son now help. She continues to clean and cook but her family now helps with this as well. She has not been motivated to undergo exercise or other programs in Kelowna.
- [80] She has not returned to her pre-injury work or any work since the September 2014 accident. She has not looked for work in Kelowna. She is currently on long term disability through her benefit plan at work. When she was asked about references in the expert reports about trying to return to work at some position (including part-time work) she replied that she gets too tired, she has problems with concentration and being around people causes her anxiety. She also questioned what positions would let her stop work every half hour to stretch. As discussed below, I have found that the plaintiff has some modest residual capacity to work, based on the medical reports, including those tendered by the plaintiff.
- [81] In her testimony the plaintiff said she currently has pain in her right chest and right leg. There is evident bruising in the latter. The right ankle is "mostly better" but bad weather and extensive walking aggravates it. She sees her family physician and occupational therapist "occasionally." The latter has recommended outside activities such as a cooking class but the plaintiff has not done this because she has "so much depression" and it is difficult to be around people.
- [82] The daughter and son-in-law described the plaintiff as enjoying her two grandchildren very much (aged 3 years and eleven months). However, she is obviously exhausted after spending time with them and she holds herself back from some physical activities with them. The son-in-law described the plaintiff as having aged well beyond the years that have passed since the accidents because of the pain and stress she is experiencing. The husband described the plaintiff as always being in pain and without the energy she had before the accidents. He testified that "it feels like I have lost my wife she needs my support."

[83] A recent report from Dr. Low, the family physician, dated March 5, 2017, describes the development of the plaintiff's limitations to a recent date from a medical point of view.

Mrs. Lakatos was a fully functioning, fully employed individual prior to her motor vehicle accidents. She was barely just recovering from her first motor vehicle accident when she was involved in the second devastating accident. Since then she has not been able to work. She still continues to have headaches, neck pain, shoulder pain, back pain, rib pain, knee pain, and right leg and ankle pain. She is fearful of driving and this has generalized to being fearful in crowds. The persistent pain and loss of function has caused her to develop a major depressive illness. She also now suffers from fatigue and tires easily with any type of exertion. She also reports that she continues to have problems with concentrating and memory. She used to be a manager at Walmart but presently she can barely manage at home.

It has been five years from the first accident and two and a half from the second. She still continues to have these symptoms. I expect that her pain will possibly improve somewhat over time, however it is unlikely that they will resolve completely. She will most likely suffer a permanent disability.

I believe that Mrs. Lakatos will suffer a significant disability from the injuries suffered in her motor vehicle accidents. Her quality of life has definitely been impacted. It is unlikely that she will be able to return to any employment.

Mrs. Lakatos will require further physical therapies to help minimize her symptoms and maximize her function. She would also benefit from seeing a psychologist/counsellor to help resolve her PTSD symptoms, and help her with her depression. I have also referred her to a physiatrist to determine whether she has developed fibromyalgia (even though this will not change her treatment). If her chronic pain and fatigue continues she would benefit from further homecare services.

[84] Considering the authorities presented by the parties, it is axiomatic that the dynamics of every accident are different, each person has unique injuries from similar accidents and each person also has individual circumstances of work and family. With those authorities in mind and in light of the above discussion of the plaintiff's situation, I conclude that non-pecuniary damages in the amount of \$185,000 is appropriate in this case.

(d) Future loss of earning

[85] The following sets out the general approach to the assessment of future earning capacity (Tsalamandris v. McLeod, 2012 BCCA 239 at para. 31):

[31] The appellants do contest how the trial judge then went about assessing that loss [of future earning capacity]. The trial judge set out to apply the principles canvassed in Rosvold v. Dunlop, 2001 BCCA 1, saying at para. 259:

The principles that govern the measurement of damages for loss of earning capacity were thoroughly discussed in *Rosvold v. Dunlop*, 2001 BCCA 1, 84 B.C.L.R. (3d) 158. The principles set out in that case can be summarized as follows:

1. the assessment of damages is not a precise mathematical calculation but a matter of judgment;
2. a plaintiff is entitled to be put in the position she would have been but for the accident;
3. an award for loss of earning capacity recognizes that the ability to earn income is an asset and the plaintiff deserves compensation if this asset has been taken away or impaired;
4. since these damages must often be based on a hypothetical, the standard of proof of a hypothetical is "real and substantial possibility" and not mere speculation;
5. the court must consider the real and substantial possibilities, and give weight to them according to the percentage chance they would have happened or will happen;
6. one starting approach to valuation may be to compare the likely future of the plaintiff had the accident not happened, and the likely future of the plaintiff after the accident has happened, and to consider the present value of the difference between the amounts earned under these two scenarios. (I note that in using the word "likely", the Court on this point was meaning what hypothetical was a real and substantial possibility);
7. however, the overall fairness and reasonableness of the award must be considered, taking into account all of the evidence.

[86] Loss of future earning capacity can be quantified on an earnings approach or a capital asset approach: *Perren v. Lalari*, 2010 BCCA 140 at para. 32. The two approaches were summarized by Warren J. in *Hosseinzadeh v. Leung*, 2014 BCSC 2260 as follows:

[126] The earnings approach is generally appropriate where the loss is more easily measured, such as where the plaintiff has some earnings history or where the court can otherwise reasonably estimate what the plaintiff's likely future earning capacity will be: *Perren*, at para. 32; *Clemas v. Gabrlik*, 2013 BCSC 1412 at para. 170. This approach typically involves an assessment of the plaintiff's estimated annual income loss multiplied by the remaining years of work and then discounted to reflect current value, or alternatively, awarding the plaintiff's entire annual income for a year or two: *Pallos v. Insurance Corp. of British Columbia* (1995), 100 B.C.L.R. (2d) 260 (C.A.) at para. 43; *Gilbert v. Bottle*, 2011 BCSC 1389 at para. 233; *Clemas*, at para. 170. While there is a more mathematical component to this approach, the assessment of damages is still a matter of judgment not mere calculation.

[127] The capital asset approach, typically used in cases where the plaintiff has no clear earnings history, involves consideration of a number of factors such as whether the plaintiff has been rendered less capable overall of earning income from all types of employment, is less marketable or attractive as a potential employee, has lost the ability to take advantage of all job opportunities that might otherwise have been open, and is less valuable to herself as a

person capable of earning income in a competitive labour market: *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 (S.C.) at para. 8.

[87] The capital asset approach is not restricted to cases where the plaintiff has no clear earnings history. It is more appropriate than the earnings approach in any case "where the loss, though proven, is not measurable in a pecuniary way": *Perren*, at para. 12. One example is *Kwei v. Boisclair* (1991), 60 B.C.L.R. (2d) 393 (C.A.), which was discussed in *Perren* at para. 11 as follows:

... In *Kwei*, where it was not possible to assess damages in a pecuniary way as was done in *Steenblok* [(1990), 46 B.C.L.R. (2d) 133 (C.A.)], Taggart J.A., speaking for the Court, held that the correct approach was to consider the factors described by Finch J., as he then was, in *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353. Mr. Kwei had suffered a significant head injury with significant permanent sequelae that impaired his intellectual functioning. However, both before and after the accident, he worked at a variety of low paying jobs, thus making it difficult for him to demonstrate a pecuniary loss. Mr. Justice Taggart cited the *Brown* factors with approval:

[25] The trial judge, as I have said, referred to the judgment of Mr. Justice Finch in *Brown v. Golaiy*. Future loss of earning capacity was at issue in that case. It stemmed from quite a different type of injury than the injury sustained by the plaintiff in the case at bar. But I think the considerations referred to by Mr. Justice Finch at p. 4 of his reasons have application in cases where loss of future earning capacity is in issue. I refer to this language at p. 4 of Mr. Justice Finch's judgment:

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.

[88] In the subject case, it is agreed that the plaintiff has a loss of future earnings and that it should be calculated on a loss of earnings basis using her income while working at Walmart.

[89] According to the plaintiff, the loss of her future earning capacity justifies damages in the amount of \$700,000 to \$800,000.

- [90] The defendant Lakatos says there was no loss of future income from Accident 1. With respect to Accident 2 it is submitted that the plaintiff has some residual capacity to earn income and damages for future wage loss of \$269,000 are appropriate. The defendant Holloway also says that the plaintiff is capable of some work and an opportunity to return to her pre-injury work was available to her. On this basis damages for future income loss of \$315,726 is appropriate.
- [91] Turning to the evidence, first of all, there are competing expert opinions on the calculation of future loss, Mr. Benning for the plaintiff and Mr. Gowling for the defendant Holloway. The defendant Lakatos uses the calculations of Mr. Benning. As above, I acknowledge the criticism by Mr. Gowling of Mr. Benning's calculations but I find the latter is generally in line with the type of reports from economists. I will proceed using the calculations of Mr. Benning.
- [92] In his report of August 4, 2016 Mr. Benning describes the plaintiff's future income loss as \$515,466. This is calculated by using the plaintiff's previous earning history to estimate 2017 income of \$59,548 then applying a multiplier of 8.656. This assumes that the plaintiff would have continued to work at Walmart (or a similar employer) until her retirement no later than 65 years of age. It also is prior to any court-ordered interest and after deductions for income tax and saved employment insurance premiums.
- [93] As can be seen the \$515,466 calculated by Mr. Benning, the plaintiff's expert, is significantly less than the \$700,000 to \$800,000 actually claimed by the plaintiff. This is explained by saying that the figure of \$515,466 is a minimum amount and an upward adjustment is required in order to reflect the plaintiff's individual circumstances. These include an overly conservative estimate of increases in income by Mr. Benning, no reflection of profit-sharing by him and failure to use a retirement age of "well beyond age 65."
- [94] The following judgments are relied on by the plaintiff: Perren, at para. 32; Reilly v. Lynn, 2003 BCCA 49 at para. 101; Clemas v. Gabrlik, 2013 BCSC 1412 at paras. 169-170; Jurczak v. Mauro, 2013 BCCA 507; Westbroek v. Brizuela, 2014 BCCA 48 at para. 57-66. These appear to be in support of the applicable general principles rather than support for claiming substantially more than the plaintiff's expert has calculated.
- [95] I am unable to find a basis for going beyond the figure calculated by Mr. Benning, \$515,466. This is the maximum amount the plaintiff could have expected to earn if she continued to work at Walmart. It is possible she could have worked some other place for more money but it is very clear from her evidence that, but for the two accidents, she would have worked at Walmart until her retirement. Work there beyond age 65 is apparently available but it is also clear that the plaintiff had not turned her mind to that. At best, it was an idea. I find that age 65 is an appropriate age of retirement to calculate loss of future earnings in this case. I also prefer the calculation of the plaintiff's expert of the plaintiff's earnings over the submissions of her counsel.

- [96] The result is estimated income of \$59,548 in 2017 dollars and, assuming no future earning capacity, and applying a multiplier of 8.656, a present day value of damages for future loss of earnings is close to \$515,466, as calculated by Mr. Benning.
- [97] I next turn to the question as to whether the plaintiff has any residual earning capacity following her two accidents. She takes the position that she is unemployable. The two defendants accept there are limitations on her employability as a result of the two accidents but they say she can still do some work.
- [98] Looking first of all at the evidence of the plaintiff on this point, Dr. Parhar, a physician with specialized training in occupational medicine and functional capacity evaluation, provided an expert report dated April 20, 2015. Among other things he stated: "I believe it would be challenging to find [the plaintiff] an alternative career; however, I believe an attempt should be made." The challenges were considered to be the ability to acquire and retain news skills and knowledge with the plaintiff's decreased concentration and decreased memory. As well Dr. Parhar described restrictions on the plaintiff's ability to sit or stand for prolonged durations which would also make it difficult to attend classes for retraining. The expertise of a rehabilitation consultant was recommended.
- [99] I note that the medical evidence is that the plaintiff's condition has improved since she was seen by Dr. Parhar in April 2015: for example, she was using a cane when she saw Dr. Parhar and she now does not use one.
- [100] Dr. Tarazi, an expert in orthopaedic surgery for the plaintiff, stated in his report of January 24, 2017 that the plaintiff could do the lighter portions of her assistant manager work and "[s]he can do office work as long as she has the ability to get up and stretch frequently."
- [101] In contrast, Dr. Levin, a psychiatrist retained by the plaintiff, stated in his report of March 12, 2017 that the plaintiff described to him her desire to return to her previous work. He then said: "However, because of her chronic depressive/anxiety symptomology and experiences of fatigue, I am concerned that [the plaintiff] would be able to work only part-time hours."
- [102] As further context, Dr. Levin was asked about this in cross-examination and he explained that the plaintiff was easily exhausted, she told him that the pain was not getting better and she said she was not good with computers. He also described the plaintiff questioning "what job will let me stop and stretch every one-half hour?" He agreed that a return to work after Accident 1 helped to improve the plaintiff's psychological symptoms.
- [103] For his part, Dr. Low, the plaintiff's family physician, in his report of March 5, 2017, opined that the plaintiff's pain will possibly improve somewhat over time but will not resolve completely and there will be a significant disability. As well, "[h]er quality of life has been impacted. It is unlikely that she will be able to return to any employment."

- [104] Dr. Cameron, a neurologist retained by the plaintiff, also opined in his report of December 12, 2016 (based on an examination on November 23, 2016) that the plaintiff was unable to return to work as a result of clinical problems secondary to the two accidents, particularly Accident 2.
- [105] Mr. Lawless, a vocational consultant retained by the plaintiff, stated in his report of December 12, 2016 that the plaintiff has few residual options. Without formal qualifications, at age 51 (at the time of the assessment) and with "a modicum of English language skills" she is not competitive for clerical occupations. He noted that disabled persons who have been out of the workforce for two or more years usually do not ever go back to work. Further, "it's more likely she will never work again. At best she might work in some marginal service jobs but it's more likely that she will remain as she's been since her second accident, unemployed."
- [106] Two responses to Mr. Lawless' report are appropriate. First, while the plaintiff's first language is not English she did not demonstrate in her evidence any difficulty understanding, speaking or reading in English. She also worked in English in a supervisory position for a number of years. Much to her credit, she has achieved what appears to be something close to fluency in English, at least for speaking and listening. As well, Mr. Lawless' opinion is primarily based on the April 2015 opinion of Dr. Parhar. However, as discussed above, Dr. Parhar is of the opinion that the plaintiff can perform some work. As well, Dr. Parhar's opinion is based on an assessment some time ago and there has been demonstrable improvement since then.
- [107] The evidence of the defendants is that the plaintiff has limitations from the two accidents but she nonetheless retains the ability to do some work. Dr. Werry has opined that the plaintiff could continue to work in a managerial position in the retail industry. However, that opinion was given before Accident 2 and it cannot account for any affect of that second accident. Dr. Kokan, in a report dated October 4, 2016 (much redacted for reasons of relevancy and opinions not related to orthopaedic surgery) stated that a "physical source of the plaintiff's inability to work is not identifiable "
- [108] Dr. Quee Newell, a vocational rehabilitation consultant retained by the defendant Lakatos, provided a response report, dated April 10, 2017, to Mr. Lawless' report. She opined that the plaintiff has the "capacity to perform job duties requiring average general learning ability, average verbal ability, average numerical ability, low average spatial perception, low average form perception, average clerical perception, low average motor coordination, low average finger dexterity and low average manual dexterity." Various entry level positions were considered appropriate for the plaintiff, including receptionist, file clerk, office assistant, administrative assistant, customer service clerk and information clerk. The range of earnings for these positions is given as low, median and high for each position and the range for the low figures is \$12.00 to \$14.00; the median range is \$16.83 to \$22.00; and the high range is \$23.00 to \$28.85. In truth this is a very limited skill set and correspondingly low income.

- [109] Taken overall, the expert evidence, including some of the experts retained by the plaintiff, support a real and substantial possibility that the plaintiff can return to some work. The negative contingencies include the plaintiff's age, the time she has been out of the workforce and, most significantly, her demonstrated physical and psychological limitations. The positive contingencies are her strong work ethic and her past long service with her previous employer, including promotions.
- [110] The question then is what positions are appropriate for the plaintiff given her significant physical and psychological limitations and the negative contingencies. Using the figures provided by Dr. Quee Newell as an approximate guide, I conclude that part-time work of 15 hours per week at \$15.00 per hour is an appropriate assessment of the future earnings capacity of the plaintiff for a yearly income of \$10,800.
- [111] Using Mr. Benning's multiplier of 8.656, the present day value of this part-time work is \$93,484 and, deducting that from the figure of \$515,466, the damages for the plaintiff's future loss of earnings is \$421,982. The details of these damages are set out in the summary, including the issues of divisibility and apportionment.
- (e) Cost of future care
- [112] The broad purpose of an award for future cost of care has been previously described as "to restore, as best as possible with the monetary award, the injured person to the position he would have been in had the accident not occurred" (*Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at para. 29).
- [113] A more specific statement of the current law with respect to the cost of future care is as follows (*Prempeh v. Boisvert*, 2012 BCSC 304):
- [107] The assessment is to be based on what is reasonably necessary on the medical evidence to preserve and promote the plaintiff's mental and physical health: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.) at 78, aff'd (1987), 49 B.C.L.R. (2d) 99 (C.A.); *Williams v. Low*, 2000 BCSC 345 at paras. 58-62. In assessing what is reasonably necessary to promote the plaintiff's health the court should consider whether the plaintiff would likely use the items or services in the future: *Penner v. Insurance Corporation of British Columbia*, 2011 BCCA 135 at paras. 12-14.
- [108] The assessment of damages for cost of future care necessarily entails the prediction of future events: *Courdin v. Meyers*, 2005 BCCA 91 at para. 34; *Krangle* (*Guardian ad litem of*) *v. Brisco*, 2002 SCC 9, [2002] 1 S.C.R. 205 at para. 21. The courts have long recognized that such an assessment is not a precise accounting exercise and that adjustments may be made for "the contingency that the future may differ from what the evidence at trial indicates": *Krangle* at para. 21; *X. v. Y.* at para 267. The extent, if any, to which a future care costs award should be adjusted for contingencies depends on the consideration of the specific care needs of the plaintiff and the expenditures that reasonably may be expected to be required - taking into account the prospect of any improvement in the plaintiff's condition or

conversely the prospect that additional care will be required: O'Connell v. Young, 2012 BCCA 57 at paras. 67-68; Gilbert v. Bottle, 2011 BCSC 1389 at para. 253.

- [114] In the subject claim, some loss of future care is agreed. The plaintiff seeks damages for future care in the total amount of \$185,461 for both accidents. Loss of housekeeping capacity and in-trust claims are submitted as separate items, as discussed below.
- [115] Included in this amount are projected evaluations of the plaintiff, projected therapeutic modalities, health and strength maintenance, drug/supply needs, support services and home furnishings/accessories as described in Mr. Sung's report of August 25, 2015. These amount to \$5,280-\$5,410 in one-time costs and \$8,752 in annual costs. The present value of the annual costs, using the calculations of Mr. Benning, is \$251,956.
- [116] The plaintiff also seeks "other likely future expenses, some not specifically costed." These include an ankle brace, trigger point injections and a muscle relaxant. The cost of these items is estimated at \$7,000.
- [117] According to the plaintiff these figures total \$185,461 and that amount is claimed as the "combined" cost of future care. However, there is at least one error in arithmetic here since the present value of the costs recommended by Mr. Sung alone are \$251,956. In addition, the current value of expenses alone is \$110,461 (costs of Mr. Sung's recommendations of \$103,461 plus the value of "other likely future expenses" of \$7,000).
- [118] The plaintiff also relies on recommendations for future care from Dr. Tarazi, Dr. Waseem, Dr. Levin and Dr. Low.
- [119] The defendant Lakatos says that the plaintiff had no future care needs after Accident 1 and before Accident 2 occurred. Damages in the amount of \$43,552 to \$46,225 for cost of future care for Accident 2 are appropriate.
- [120] According to the defendant Holloway an appropriate amount of future care damages for the plaintiff, \$44,144, is indivisible. Both defendants rely on expert reports of Dr. Quee Newell and Ms. Waithman. The latter is a response report to Mr. Sung. I note that Dr. Quee Newell and Ms. Waithman conducted a records' review and they did not meet or interview the plaintiff.
- [121] Beginning with some general comments, Mr. Sung's recommendations are based on Dr. Parhar's assessment in April 2015 and the plaintiff's condition has improved since then. Some consideration of that improvement is required. This is a matter of weighing Mr. Sung's report with that in mind rather than giving it no weight at all. For example, as will be seen, his identification of various categories of care are useful as are his estimates of the appropriate time and expense. This is particularly true in the absence of similarly detailed reports from the defendants. As will be seen, I do not accept all of Mr. Sung's recommendations.

[122] It is also true, as submitted by the defendant Lakatos, that the plaintiff was using minimal if any treatments after Accident 1 and just before Accident 2. However, as demonstrated in the assessment by Dr. Werry before Accident 2, she clearly had not recovered from Accident 1.

[123] With the above in mind, I will consider each of the items for future care using Mr. Sung's structure, but with changes and adding other items as appropriate, as follows:

(i) Evaluations

[124] In light of my conclusion that the plaintiff can do some minimal work I accept vocational assistance as a reasonable expense. Dr. Quee Newell has recommended a training program to broaden the plaintiff's employment prospects. It will be two, four hour sessions with a total one-time cost of \$1,920.

[125] I also accept some occupational therapy is appropriate but not in the amount sought by the plaintiff of \$750. A one-time cost of \$500 is awarded to, again, assist the plaintiff in returning to some work.

[126] Total cost for evaluations on a one-time basis is \$2,420.

(ii) Therapeutic modalities

[127] It is agreed that sessions with a kinesiologist are appropriate with the differences between the parties being the amount of time.

[128] The plaintiff had previous kinesiology sessions in 2015-2016. The kinesiologist, Mat Cole, testified and his chart is in evidence, that on a standard effort test there were positive and negative findings but Mr. Cole told the insurance carrier that there was no attempt by the plaintiff to deceive. In a discharge report dated August 11, 2016 Mr. Cole stated that he believed "a significant amount of [the plaintiff's] reported symptoms to be non-organic/psychological in nature" and clinical counselling was recommended.

[129] In light of this evidence the defendants submit that only an annual refresher of one to two sessions for kinesiology is appropriate, as recommended by Dr. Low in his evidence. In contrast the plaintiff seeks the cost of six to eight sessions as a one-time cost.

[130] I accept that some kinesiology is appropriate in this case. However, in light of evidence of Mr. Cole and Dr. Low I do not agree with the amount claimed by the plaintiff. I find that four sessions at \$65 per session is appropriate with a one-time cost of \$260. As Dr. Parhar points out, at some point the plaintiff should be able to do exercises on her own.

[131] The plaintiff seeks, on the basis of Dr. Parhar's and Mr. Sung's reports, 12 sessions with a psychologist. However, the expert psychiatrist retained by the plaintiff, Dr. Levin, opined in his report of March 12, 2017 that supportive psychotherapy was not sufficient and he recommended 18-24 sessions of cognitive behavioural therapy ("CBT").

- [132] I agree with Dr. Levin's prescription of CBT (as do the defendants) and I find that 20 sessions are appropriate with a cost of \$165 for each session. Total one-time cost for CBT is \$3,300.
- [133] There is little evidence of support for modalities such as physiotherapy and much of that is general support. For example, Dr. Tarazi recommends range of motion exercises with a physiotherapist to break down scar tissue in both shoulders. This is an activity that can be addressed by the kinesiologist and carried on by the plaintiff on her own.
- [134] There is support for some massage therapy especially as the plaintiff becomes more active and begins some modest work. I accept the calculation of the defendant Holloway that six visits over a year are appropriate with a cost of \$75 per visit. This is a one-time cost of \$450.
- [135] Total cost for therapeutic modalities is \$4,010.

(iii) Health and strength maintenance

- [136] Mr. Sung's report recommends a monthly gym membership pass. The defendant Holloway accepts that support for exercise is appropriate but not at that level. The defendant Lakatos says the active rehabilitation program that the plaintiff already underwent in 2015-2016 was sufficient.
- [137] The plaintiff is not by nature an active person in the sense of regularly attending gyms and participating in other exercise opportunities. There are also psychological issues as identified by Mr. Cole, the kinesiologist.
- [138] Having said that I conclude that the plaintiff should be provided with the opportunity to increase her physical strength. This would improve the quality of her day to day life and assist in her adjustment to some work activities.
- [139] I conclude that a one-time payment of \$438 for a one-year gym pass is appropriate. Again, after that time it will be up to the plaintiff to keep up her exercises.

(iv) Drug/Supply needs

- [140] The plaintiff requires medication for her pain, depression and for other purposes.
- [141] I accept the calculation of the defendant Lakatos of an annual cost of \$800 per year for the cost of medication, with a rounded present day value of \$20,000 (using the tables of Mr. Benning).
- [142] Support for the plaintiff's use of over the counter Tylenol and Flexeril medication is also appropriate. I accept the calculation of the defendant Holloway of an annual cost of \$85. Again using the tables of Mr. Benning, the present day value is \$2,044.
- [143] Trigger point injections can be paid for by the Medical Services Plan after consideration by Dr. Low or another doctor. The same applies to muscle relaxation medication.
- [144] Total, present day cost for all medications is \$22,044.

(v) Support services

- [145] The plaintiff seeks home care assistance of four hours per week as described by Mr. Sung and referenced in the report of Dr. Parhar. Using a cost of \$100 per visit the annual cost is \$4,800 (based on a 48-week year and accounting for holidays).
- [146] The defendants accept some assistance is needed but they question the amount needed and they question why the husband cannot do more of the home care. Ms. Waithman uses a lower unit cost and fewer units than Mr. Sung and calculates an annual cost of \$980. Mr. Sung's cost of \$100 per hour is obviously high.
- [147] The plaintiff's family is a traditional one with the plaintiff cleaning, cooking and caring for the children while also working. In the years before the accidents the plaintiff would work graveyard shift and still carry out these duties. The ability to provide these duties to the family was an important part of the self-esteem of the plaintiff, as well as the viability of the family. Even when she was injured from the first and then second accidents she attempted to maintain this pace. As the plaintiff's daughter grew up she helped a good deal. The daughter is now very supportive although she now has her own family in a different town.
- [148] The accidents have meant that the family has had to adjust so that everyone does some of the house work. Nonetheless the pride of the plaintiff requires her to attempt some activities that she should not undertake. Dr. Tarazi records the plaintiff as saying she still cleans the bathroom. Other factors include the fact that the children are grown up and the family have moved to a smaller house.
- [149] I assess an amount of \$20,000 as the present day value of home care for the plaintiff. This represents an annual cost closer to the estimate of Ms. Waithman.
- [150] There is agreement on the need for seasonal cleaning assistance but, again, there are differences on the amount. I assess the present day cost of seasonal cleaning assistance at \$6,000, again using figures that approximate those of Ms. Waithman.
- [151] Overall the plaintiff is entitled to an amount of \$26,000, representing the present day value for support services of home care assistance and seasonal cleaning.

(vi) Home furnishings

- [152] The plaintiff seeks the costs of a cervical pillow, bed mattress and mattress overlay. These are taken from the report of Mr. Sung and total \$279 as a yearly cost. The recommendation for them originates in the April 2015 report of Dr. Parhar. Ms. Waithman does not comment on them in her response report. Nor do Drs. Levin and Tarazi.
- [153] While there has been improvement in the plaintiff's condition since she was seen by Dr. Parhar, complications with her sleep remain. However, there is evidences that the problems with sleep pre-existed both accidents, as recorded by Dr. Tarazi.
- [154] I consider a one-time payment of \$279 for sleep aids appropriate here.

(vii) Other

[155] These items are not from the reports of Dr. Parhar or Mr. Sung. And the fact that the plaintiff has not costed these items complicates things further.

[156] Dr. Waseem, a physiatrist retained by the plaintiff, recommends a custom right ankle brace "to provide further proprioceptive support." This was apparently on the basis of right ankle pain and reduced dorsiflexion on the right side. However, "[s]he did not have ankle instability or laxity." Counsel for the plaintiff estimates the cost of such a brace at \$1,000 but there is no evidence of that.

[157] No other medical professional has recommended this and there is clear evidence that after the April 2015 assessment by Dr. Parhar the plaintiff stopped using a cane to support her right side. Dr. Tarazi estimates the risk of osteoarthritis in her right ankle as less than 10%. On the other hand, increasing the mobility of the plaintiff is a medically supportive objective.

[158] There will be a one-time payment of \$400 for the cost of one ankle brace.

[159] Total one-time cost in this "Other" category is \$400.

[160] The total amount for all future care items is \$55,591.

(f) Loss of housekeeping capacity

[161] The plaintiff seeks significant damages for loss of future housekeeping capacity. However, the subject matter of this claim has been considered and awarded as a matter of future care, above.

[162] There is also a claim for past housekeeping services but any damages for that will be covered with the claim for in-trust damages, as discussed below.

[163] The plaintiff's claim for housekeeping services is dismissed.

(g) In-trust

[164] A recent judgment by Justice Choi summarized the legal principles related to an in-trust claim (*Wright v. Mistry*, 2017 BCSC 239):

[89] In *Bradley v. Bath*, 2010 BCCA 10 at para. 56, Mr. Justice Tysoe set out the basis for an in-trust award:

[43] An in-trust award is one made to a plaintiff in trust for one or more of his or her family members, who are not named as parties to the action, as compensation to the family members for additional work done by them as a result of the impaired capacity of the plaintiff to perform housekeeping chores or to care for themselves. It was affirmed as a recoverable award by this Court in *Kroeker v. Jansen* (1995), 123 D.L.R. (4th) 652, 4 B.C.L.R. (3d) 178 (C.A.).

In-trust awards are available for pre-trial losses. These awards are usually made to a plaintiff without conditions: *Dykeman v. Porohowski*, 2010 BCCA 36 at para. 28.

[90] There are, however, limits on these awards. A spouse cannot recover for care or housekeeping services unless they are "beyond those normally expected in a marital or familial relationship": *Tan v. Mintzler and Miller*, 2016 BCSC 1183, citing *Ellis v. Star*, 2008 BCCA 164.

[91] To guide courts when assessing in-trust claims, the court in *Frankson v. Myre*, 2008 BCSC 124 at para. 51 summariz[ed] the relevant factors:

- (a) the services provided must replace services necessary for the care of the plaintiff as a result of a plaintiff's injuries;
- (b) if the services are rendered by a family member, they must be over and above what would be expected from the family relationship;
- (c) the maximum value of such services is the cost of obtaining the services outside the family;
- (d) 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;
- (e) quantification should reflect the true and reasonable value of the services performed taking into account the time, quality and nature of those services;
- (f) the family members providing the services need not forego other income and there need not be payment for the services rendered.

[165] There other summaries in other judgments (*Farand v. Seidel*, 2013 BCSC 323 at paras, 99-100; citing *Ellis v. Star*, 2008 BCCA 164 at paras. 18-21; and *Bystedt (Guardian ad litem of) v. Bagdan*, 2001 BCSC 1735 at para 180, aff'd 2004 BCCA 124).

[166] In the subject case, the plaintiff seeks \$10,000 as damages for a claim of in-trust damages, \$5,000 for each accident.

[167] According to the defendant Lakatos a global amount of \$2,500 for the plaintiff's in-trust claim is appropriate. However, this should be reduced by 10% to reflect the plaintiff's failure to mitigate her damages. The result would be \$750 apportioned to Accident 1 and \$1,500 to Accident 2. The defendant Holloway accepts that an in-trust award of \$2,500 is appropriate.

[168] As above, the evidence is that the plaintiff takes considerable pride in looking after the family home. Not being able to do that as a result of her injuries caused and causes her anxiety. She currently does most of the housework although her husband now helps with some of the heavier tasks and cleaning on the weekends. Her adult daughter is married with her own family living away from the family home. The son was of limited help for a long time. He lives at home and has recently undertaken some work to assist in the home.

- [169] The result is that, by dint of hard work on the part of the plaintiff in the difficult circumstances of recovering from her injuries and because of the traditional family structure, the family did not perform housekeeping or other services to any significant degree.
- [170] Nonetheless they did some work to replace the contribution of the plaintiff and I assess an amount of \$5,000 for the plaintiff's in-trust claim.
- (h) Contributory negligence and mitigation
- [171] It is not disputed that the plaintiff was not wearing the available seat belt at the time of Accident 1. She testified that she was in the back seat and had taken the belt off to massage blood clots in her legs. She could not remember how long the belt was off. She was then thrown out of the vehicle during the accident. Dr. Waseem testified that the plaintiff's rib fractures would not have been as serious if she had been wearing a seat belt but he also stated that the dynamics of the accident were relevant.
- [172] This is a very unfortunate but clear case of contributory negligence on the part of the plaintiff. She must bear some responsibility for her injuries and I find that 20% liability is an appropriate amount.
- [173] The finding of contributory negligence clearly applies to any damages the plaintiff is entitled to under Accident 1. However, the plaintiff was wearing her seat belt at the time of Accident 2 and, therefore, there is no issue of contributory negligence for that accident. As to whether the contributory negligence affects damages for Accident 2, I conclude it does not.
- [174] However, a complication in the law arises: what is the affect of the finding of contributory negligence in Accident 1 on the damages the plaintiff is entitled to under Accident 2? For example, should the contributory amount of 20% in Accident 1 also apply to damages from Accident 2? This is an intricate matter and not without some uncertainty, but I conclude that this should not be the result. The defendant Holloway must be taken to have accepted the plaintiff as she was at the time of Accident 2. This is also complicated because of the indivisibility of many of the injuries suffered by the plaintiff. For example, the evidence is that Accident 2 aggravated the injuries from Accident 1 so drawing hard lines is not possible. But, again, I conclude that the 20% contributory negligence of the plaintiff applies only to the damages she is entitled to from Accident 1.
- [175] The defendants also raise as a defence that the plaintiff failed in her duty to mitigate her injuries. While the onus of proving a failure to mitigate lies with a defendant it is well-established that a plaintiff must act reasonably in order to limit her loss. And there must be evidence that the plaintiff's injuries would have been reduced if she had acted reasonably (*Chiu v. Chiu*, 2002 BCCA 618 at paras. 53-57, 66-67; *Thomasson v. Moeller*, 2016 BCCA 14 at paras. 39, 47-52).

- [176] In the subject case, the defendants submit that the plaintiff did not pursue all recommended courses of treatment. Specifically, she did not continue with gym exercises after active rehabilitation completed in August 2016 and she did not take as many counselling sessions as she could have.
- [177] In the context of the very serious accidents and injuries in this case I do not agree that the treatment decisions the plaintiff made should be second-guessed. There are always other or more treatment options available but that does make it unreasonable for a plaintiff to decline them. In any event, there is no medical evidence that there would have been a reduction in the plaintiff's injuries if she had done what the defendants say she should have done.
- [178] The defence of the defendants that the plaintiff failed to mitigate her damages is dismissed.
- (i) Apportionment and divisibility
- [179] The potential for apportionment and divisibility arises in this case because of the two accidents and the nature of the plaintiff's injuries.
- [180] Divisible injuries are those capable of being separated out and having their damages assessed independently. On the other hand, indivisible injuries are those that cannot be separated or have liability attributed to the constituent causes (Bradley v. Groves, 2010 BCCA 361 at para. 20).
- [181] As it happened the plaintiff was examined by Dr. Werry the day of, but before, Accident 2. He was conducting a medical examination for the defendant Lakatos with respect to a claim by the plaintiff for Accident 1. I reproduce his report of October 20, 2014, which records his findings of the September 23, 2014 examination--literally the day of Accident 2:

OPINION:

I. Symptoms reported by Ms. Lakatos.

6. Ms. Lakatos had no musculoskeletal symptoms before the motor vehicle accident February 27, 2011 with respect to her neck, shoulders, chest, low back or lower extremities.
7. Ms. Lakatos' musculoskeletal symptoms following the motor vehicle accident included: pain and tenderness over the posterior aspect of her head; neck pain and stiffness radiating in particular to the right shoulder; right side chest pain and tenderness; low back pain; swelling, bruising and pain in her right leg. She was generally stiff and sore with very limited mobility for approximately two months following her motor vehicle accident.
8. Ms. Lakatos' musculoskeletal symptoms and mobility improved so that she was independent outside of the home by approximately May 2011. She continued to experience neck pain chest pain, low back pain and right leg pain. In addition to her musculoskeletal symptoms, fatigue and loss of energy was a significant problem as well as depression, and anxiety while riding as a passenger and driving a car.

9. Ms. Lakatos' current musculoskeletal symptoms include persistent neck stiffness and discomfort which radiates to the right shoulder, right chest discomfort, intermittent low back pain, and variable right leg discomfort. She reports persisting significant fatigue, mood change and anxiety riding in a car.
- [182] This evidence and Dr. Werry's findings support a conclusion that the injuries from the two accidents are indivisible. That is, it is not possible to separate out the parts of non-pecuniary damages that are attributable to each accident.
- [183] The medical reports cited above record that the plaintiff made very good progress after Accident 1 and she had returned to work full-time by January 2012. But the reports also describe problems with concentration when, for example, watching sports on television. And she had difficulty working under fluorescent lighting and hearing amplified voices at work. Also set out above are Dr. Low's findings on examining the plaintiff between the two accidents.
- [184] The parties differ significantly as to what to do about this situation. The plaintiff's contributory negligence in Accident 1 is a further complicating factor.
- [185] According to the defendant Lakatos, special damages are divisible between Accident 1 and Accident 2, with the Accident 1 amount apportioned on the basis of contributory negligence with 75% liability for the defendant Lakatos and 25% liability for the plaintiff. In contrast the defendant Holloway says that special damages are indivisible. There are similar differences between the two defendants with respect to non-pecuniary damages and the plaintiff's in-trust claim. For future income loss, the defendant Lakatos says all of it should be attributed to the defendant Holloway but the latter says it is indivisible. For some heads of damages, the defendant Lakatos includes a 10% amount for the contributory negligence of the plaintiff. There are similar disagreements on the other heads of damages.
- [186] For her part the plaintiff takes no specific position and a general discussion of some previous judgments is provided (see *Bradley; Scoates v. Dermott*, 2012 BCSC 485). If there is an issue of contributory negligence, the plaintiff takes no position on apportionment as between the two defendants.
- [187] I turn to the authorities as they are instructive in how to approach indivisibility and apportionment.
- [188] In *Bradley* the Court of Appeal considered an appeal involving two accidents. The plaintiff was 80% recovered from the first accident when the second one occurred and the second one aggravated injuries from the first one. The trial judge had noted the evidence of the plaintiff that the second accident "set her back to square one in terms of her recovery" and found the two accidents were the indivisible causes of the injuries to the plaintiff (cited at para. 9 of Court of Appeal judgment). An appeal by the defendant was dismissed on the issue of apportionment (but allowed on costs).

- [189] The primary ground for the appeal in Bradley was that aggravation of a pre-existing "tortiously-caused injury" is not the same as an indivisible injury. According to the appellant, a trial judge must identify and disentangle any earlier tortiously-caused injury from later harm, assess damages separately for each injury and find liability only to the extent caused by each injury (para. 11). Essentially the concept of indivisibility was challenged.
- [190] The appeal division described the issue before it as whether a judgment of the Supreme Court of Canada (*Athey v. Leonati*, [1996] 3 S.C.R. 458) had overturned a line of cases where damages were considered divisible. A leading case was *Long v. Thiessen* (1968), 65 W.W.R. 577 (B.C.C.A.). In *Bradley* the Court of Appeal concluded that *Long* was no longer applicable to indivisible injuries; it had been effectively overturned by *Athey*. The approach that each defendant is responsible only for its share of the injury and a plaintiff can only recover the appropriate portion from each tortfeasor was considered to be incompatible with the concept of indivisibility as described in *Athey* (*Bradley*, at para. 33). Any issue of fairness with respect to indivisibility among tortfeasors with different levels of liability was considered to have been addressed by the Supreme Court of Canada in *Athey* (*Bradley*, at para. 36). Whether damage is divisible as between multiple tortfeasors is a question of fact (at para. 29; citing *B.P.B. v. M.M.B.*, 2009 BCCA 365 at para. 74).
- [191] The result in *Bradley* was that, in light of the trial judge's finding of indivisibility, a conclusion of joint and several liability followed.
- [192] As a final matter on *Bradley*, it is also useful in providing some guidance on the use of the terms "divisibility" and "apportionment":
- [34] If an injury cannot be divided into distinct parts, then joint liability to the plaintiff cannot be apportioned either. It is clear that tortfeasors causing or contributing to a single, indivisible injury are jointly liable to the plaintiff. This in no way restricts the tortfeasors' right to apportionment as between themselves under the Negligence Act, but it is a matter of indifference to the plaintiff, who may claim the entire amount from any defendant.
- [193] As I read that paragraph, divisibility relates to the injuries a plaintiff may suffer and apportionment relates to the assignment of liability for those injuries. For example, in the subject case there are two defendants and apportionment is a significant issue. It is an issue even where the injuries are indivisible. Justice Harvey also discusses this in *Bilanik v. Ferman*, 2014 BCSC 732, as below.
- [194] In another judgment, *Scoates*, Justice N. Smith considered a situation where a plaintiff had been significantly injured in a motor vehicle accident. He was then injured in three subsequent accidents, each less serious than the one before. He had a permanent disability and could not return to his former career. Liability was found against the four defendants.

- [195] Divisibility among the accidents was an issue in *Scoates*. The reference in *Bradley* to joint liability among tortfeasors once there is a finding of indivisibility was noted (para. 157). However, some aspects of the plaintiff's condition were divisible such as a significant wrist injury from the first accident. A worsening or acceleration of a back injury by the second accident was also in evidence. But, applying *Bradley*, the conclusion was that an injury cannot be classified as divisible merely because it is only an exacerbation or aggravation.
- [196] The result in *Scoates* was a finding of divisibility as between some accidents as they related to different heads of damages. For example, income loss and loss of earning capacity were divisible as between the second and third accidents. As well, three defendants were found to be jointly and severally liable for non-pecuniary damages, past income loss was to be divided between before and after the second accident and one defendant was jointly and severally liable only for losses in the latter period (at paras. 168, 169).
- [197] In a third judgment, *Langille v. Nguyen*, 2013 BCSC 1460, the plaintiff was involved in three motor vehicle accidents. With respect to the second accident Justice Fitzpatrick concluded that the plaintiff was 60% liable (for not activating her emergency flashers immediately after the accident; at paras. 115-120).
- [198] In *Langille*, Justice Fitzpatrick found that \$110,000 was appropriate on a global basis for non-pecuniary damages. However, because the plaintiff was contributorily negligent it was necessary to award different sums for the three accidents. Damages for the second accident were found to be \$55,000 and the plaintiff was entitled to 40% of that, or \$22,000 (at paras. 164-167, 259). With respect to other damages claimed, the conclusion was that there was no past income loss (at para. 199). Damages for future income loss, future care and an in-trust claim were given as global figures taking into account the plaintiff's contributory negligence in the second accident (at paras. 230, 243, 256).
- [199] A final judgment that is instructive is *Bilanik* where there were two vehicle accidents. Liability was admitted for the first accident. An added complication arose from a conclusion that the plaintiff was found to be contributorily negligent in the second accident (for leaving her lane of traffic; at para. 107). The injuries were found to be indivisible and a global assessment of non-pecuniary damages was ordered.
- [200] However, in assessing the degree of responsibility of each party in *Bilanik*, Justice Harvey concluded that the defendant's failure to keep a proper lookout was substantially more blameworthy than the plaintiff's failure to see the approach of the defendant's vehicle. On this basis liability was apportioned in the amount of 20% against the plaintiff and 80% against the defendant, for the second accident (at paras. 107, 111).
- [201] In apportioning damages between the two accidents Justice Harvey relied on *Bradley* and disagreed with the defendants that he should apportion damages as best he could between the two accidents. He set out a lengthy quote from *Bradley* and noted that *Athey* required joint and several liability for indivisible injuries. Once a decision has been made that the injuries are indivisible the tortfeasors are jointly liable to the plaintiff. The defendants " can

seek apportionment (contribution and indemnity) from each other, but absent contributory negligence, the plaintiff can claim the entire amount from any of them" (emphasis added). (Bradley, at para. 32; Bilanik, at para. 172).

- [202] Justice Harvey noted the reference to contributory negligence in Bradley and he took from it that, if a plaintiff is contributorily negligent, she loses the right to a joint and several judgment; "that is, the judgment is issued severally and she may only recover the respective damages that each tortfeasor is at fault for" (emphasis added). The distinction between "causation" and "fault" was critical (Karran v. Anderson, 2009 BCSC 1105 at paras. 106-107) and "Bradley should not be interpreted as standing for the proposition that because a plaintiff was contributorily negligent, the injuries are divisible and subject to apportion based on causation" (at paras.173-174). Simply put, apportionment of damages is to be based on fault and not causation.
- [203] In Bilanik the injuries were found to be indivisible and a global amount for non-pecuniary damages was confirmed. The "necessary inquiry" was then to determine the degree of fault of each of the defendants and the plaintiff. Significantly, "[t]he defendants are not jointly liable for the global assessment of damages" (at para. 175). As well, the plaintiff is entitled to the global amount of damages (subject to any contributory negligence) and apportionment is "a matter of indifference" to the plaintiff (Bradley, at para. 34; Bilanik, at para. 172).
- [204] On the facts in Bilanik the first accident was considered less severe than the first one with the first involving a major lapse of care by the defendant. The plaintiff's symptoms from the first accident returned and worsened following the second accident and the residual complaint at trial (headaches) arose from the second accident. The 20% liability of the plaintiff in the second accident was noted but she was less blameworthy and her lapse in conduct was minor, comparatively (at paras. 175-176).
- [205] On this basis fault non-pecuniary damages in Bilanik were apportioned 15% for the plaintiff, 70% for the defendant in the second accident and 15% for the defendant in the first accident (at para. 177). Special damages and nominal damages for future care (\$400 for medication) were wholly attributable to the second accident and subject to the 80/20 apportionment of liability for that accident (at paras. 193, 198). As will be seen in the summary below, I have used a very similar approach in the subject case.
- [206] In Bilanik Justice Harvey also relied on the Negligence Act, R.S.B.C. 1996, c. 333, in his analysis of apportionment (at para. 108):

Apportionment of liability for damages

- (1) If by the fault of 2 or more persons damage or loss is caused to one or more of them, the liability to make good the damage or loss is in proportion to the degree to which each person was at fault.

- (2) Despite subsection (1), if, having regard to all the circumstances of the case, it is not possible to establish different degrees of fault, the liability must be apportioned equally.
- (3) Nothing in this section operates to make a person liable for damage or loss to which the person's fault has not contributed.

[207] In *Athey Justice Major* (for the court) discussed this type of legislation in the context of tortious and non-tortious causes (at para. 22; cited at para. 20 of *Bradley*):

(1) Multiple Tortious Causes

[22] The respondents argued that apportionment between tortious and non-tortious causes should be permitted just as it is where multiple tortfeasors cause the injury. The two situations are not analogous. Apportionment between tortious causes is expressly permitted by provincial negligence statutes and is consistent with the general principles of tort law. The plaintiff is still fully compensated and is placed in the position he or she would have been in but for the negligence of the defendants. Each defendant remains fully liable to the plaintiff for the injury, since each was a cause of the injury. The legislation simply permits defendants to seek contribution and indemnity from one another, according to the degree of responsibility for the injury.

[208] Taking these judgments together, it is clear enough from *Athey*, *Bradley* and *Bilanik* that, once injuries from two or more accidents are found by the trial judge to be indivisible, then joint and several liability applies between the defendants. I note that an aggravation or acceleration of a previous injury does not make it divisible.

[209] I agree with Justice Harvey's interpretation of *Bradley* that, if contributory negligence on the part of the plaintiff is also proven, she no longer has the benefit of joint and several liability (see also *Leischner et al. v. West Kootenay Power and Light Company Limited et al.* (1986), 70 B.C.L.R. 145, at para. 95 (C.A.); *Wells v. McBrine* (1988), 33 B.C.L.R. (2d) 86, at para. 22 (C.A.)). At that point the degree of fault is to be assessed and damages apportioned on the basis of fault (not causation), as described in *Bilanik* and as was done in *Langille*. Further, as in *Scoates*, there can be some injuries and damages that are indivisible and some that are divisible among different accidents involving the same plaintiff. These would be questions of fact.

[210] I acknowledge there is some risk that this analysis will have the complex results required by *Long* and which was effectively overturned by *Athey*. However, in cases of genuine divisibility and especially when there is an issue of contributory negligence, it is difficult to see a different approach.

[211] Considering Dr. Werry's findings on the day before Accident 2 with the evidence of other medical professionals such as Dr. Low along with the evidence of the plaintiff herself, it is clear that the injuries caused by the two accidents are indivisible. Major issues such as mechanical pain in the same areas, depression and traumatic brain injury were aggravated and/or accelerated. Only the broken ankle and left knee bruising were caused solely by Accident 2.

E. SUMMARY

[212] As a result of the negligence of the defendants in the two accidents on February 27, 2011 and September 23, 2014 the plaintiff suffered significant injuries. These include mechanical pain in many areas of the body, depression, traumatic brain injury and other injuries. Many of these injuries continue although there has also been some improvement. Each accident was serious and even life-threatening and it is much to the credit of the plaintiff that she has recovered as well as she has.

[213] In the first accident the plaintiff was not wearing her seat belt and a finding of contributory negligence on her part is required. The plaintiff is assessed at 20% fault and that finding also means she loses the right to joint and several judgments.

[214] The injuries from the second accident were essentially an aggravation of the injuries from the first accident. For this reason, subject to consideration of specific heads of damages, they are indivisible and the two defendants are not jointly liable for the global assessment of damages.

[215] Divisibility and apportionment are as follows:

(a) Special damages: global amount of \$10,863

[216] On the basis of the receipts, these damages are divisible between the two accidents and the 20% contributory negligence of the plaintiff applies to the damages for the first accident only.

[217] The details of this are:

Accident 1

\$8,040

Less 20%

\$1,608

Total

\$6,432

Accident 2

\$4,431

Total

\$10,863

[218] The defendant Lakatos is liable for \$6,432 and the defendant Holloway is liable for \$4,431.

(b) Past loss of income: global damages of \$179,993 (subject to deductions)

[219] The plaintiff is entitled to \$186,868 as a global amount for past loss of earning (subject to deductions). It is divisible because the evidence about the earning history permits a division. The plaintiff's contributory negligence is applicable to the damage amount for Accident 1.

[220] The details are:

Accident 1

\$34,379

Less 20%

\$6,875

Total

\$27,504

Accident 2

\$152,489

Total

\$179,993

[221] The defendant Lakatos is liable for \$27,504 and the defendant Holloway is liable for \$152,489.

(c) Non-pecuniary damages: global damages of \$185,000

[222] The injuries cannot be divided into distinct parts for this head of damages. It is, therefore, indivisible and the global amount of damages stands as the total that the plaintiff is entitled to.

[223] However, apportionment of fault as between the two accidents is required as a result of the finding of contributory negligence on the part of the plaintiff. It also follows that the defendants are not jointly liable for the global amount of damages of \$185,000.

[224] Comparing the two accidents, Accident 1 was caused when defendant Lakatos, the driver of the vehicle, lost control in snowy conditions. In contrast, Accident 2 was caused when defendant Holloway crossed from his lane of traffic into the lane of traffic of the vehicle where the vehicle was a passenger. I conclude that the degree of fault in Accident 2 was significantly more than in Accident 1, a head-on collision in the wrong traffic lane versus a loss of control in poor conditions.

[225] Of course, as a passenger in both accidents the plaintiff was not at fault for either accident. Nonetheless she was responsible for the additional injuries she suffered when she did not wear her seat belt in Accident 1.

[226] I conclude that the following is an appropriate apportionment of fault for the purposes of non-pecuniary damages in this case:

Plaintiff

10%

\$18,500

Defendant Lakatos

30%

\$55,500

Defendant Holloway

60%

\$111,000

Totals

100%

\$185,000

[227] The defendants are severally liable for the above specific amounts; the defendant Lakatos for \$55,500 and the defendant Holloway for \$111,000.

(d) Future loss of income: global damages of \$421,982

[228] The loss of earnings for the plaintiff, assuming no residual earning capacity is \$515,466. I concluded above that the plaintiff has some modest residual earning capacity amounting to \$10,800 per year. Applying a multiplier, the present day value is \$93,484 and the net global amount for loss of earnings is \$421,982.

[229] With respect to apportionment of fault as between the two accidents the plaintiff had returned to work after Accident 1. She also obtained a promotion after she returned to work, again much to her credit. She did not return to work after Accident 2. In these circumstances I conclude that there is no loss of future earning capacity attributable to Accident 1.

[230] The defendant Holloway is solely liable for loss of future earnings damages of \$421,982. Further, as discussed above, the plaintiff's contributory negligence in Accident 1 does not carry over to Accident 2 and reduce her damages for future loss of future earnings.

(a) Future care: global damages of \$55,591

[231] As above the plaintiff is entitled to global damages in the indivisible amount of \$55,591 for future care. The components of this are evaluations, therapeutic modalities, health and strength maintenance, drug/supply needs, support services, home furnishings and other expenses.

[232] With respect to apportionment between the two accidents, the plaintiff continued to have significant symptoms after Accident 1 but she was back to work (and received a promotion) and attempting to have something approaching her previous life. However, since Accident 2 the plaintiff has not worked and, while she manages to do some activities, her symptoms are much more severe. The contributory negligence of the plaintiff also has to be considered.

[233] In these circumstances I apportion fault for the cost of future care as follows:

Plaintiff

10%

\$5,559

Defendant Lakatos

30%

\$16,677

Defendant Holloway

60%

\$33,355

Totals

100%

\$55,591

[234] The defendant Lakatos is liable for \$16,677 and the defendant Holloway is liable for

\$33,355.

(e) In-trust: global damages of \$5,000

[235] There was some in-trust care as part of the recovery from Accident 1 but it was much less significant than for Accident 2.

[236] Apportionment for fault for the global amount of \$5,000 damages for in-trust is as follows:

Plaintiff

10%

\$500

Defendant Lakatos

20%

\$1,000

Defendant Holloway

70%

\$3,500

Totals

100%

\$5,000

[237] The total for all damages is \$866,912.

[238] I retain jurisdiction to decide any implementation issues arising from this judgment including any deductions pursuant to s. 83 of the Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231, and income tax gross-up and investment management fees.

[239] The plaintiff has been substantially successful and, subject to any application made within 60 days of this judgment (or appeal judgment), she is entitled to her costs at scale B against the defendants.

The Honourable Mr. Justice Steeves

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