

CANADA / JUDGMENT

Lavoie v. Purwonegoro

2021 BCSC 1511

COURT

Supreme Court of British Columbia

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2021 BCSC 1511 Lavoie v. Purwonegoro

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Lavoie v. Purwonegoro,

2021 BCSC 1511

Date: 20210803

Docket: M190596

Registry: New Westminster

Between:

Melanie Lavoie

Plaintiff

And

Indriati Purwonegoro, Yulyento Budi Thamtoro

and Min-Sun Kim

Defendants

Corrected Judgment: The text of the judgment at paragraphs 9, 25, 82, 84, 89, 101, 111, 114, 118, and 166 has been corrected on August 9, 2021. The Table of Contents and paragraph numbering issue after Heading VII - Causation & Injuries have also been rectified on August 9, 2021

Before: The Honourable Madam Justice Tucker

Reasons for Judgment

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Place and Dates of Trial:

New Westminster, B.C.

October 26-30, 2020

Place and Date of Judgment:

New Westminster, B.C.

August 3, 2021

Table of Contents

I. Introduction. 3

II. Background Facts. 3

A. Pre-Accident 3

B. The Accident 5

C. Post-Accident 5

III. Lay Witnesses. 7

A. Leo Archembault 7

B. Michele Campbell 7

C. Susan Colosie. 8

IV. Plaintiff's Expert Witnesses. 9

A. Dr. Catherina Du Plessis, Family Physician. 9

B. Dr. Pamela Squire, Complex Pain Management 9

C. Nicholas Altieri, Occupational Therapist 11

V. Defendants' Expert Witnesses. 13

A. Dr. Todd Bentley, Physiatrist 13

VI. Credibility. 14

VII. Causation & Injuries. 20

VIII. Damages. 22

A. Positions of the Parties. 22

B. Non-Pecuniary Damages. 23

a) Comparable and Placement on the Range. 23

b) Alleged Failure to Mitigate. 25

C. Loss of Earning Capacity. 27

a) Past Loss of Earning Capacity. 28

b) Future Loss of Earning Capacity. 29

D. Loss of Domestic Capacity. 32

E. Cost of Future Care. 34

F. Special Costs. 37

IX. Summary. 38

X. Tax, Interest and Costs. 38

I. Introduction

- [1] The plaintiff, Melanie Lavoie, was in a motor vehicle accident while driving in Surrey, BC, on May 29, 2015 ("the accident"). The defendants admit liability and concede the plaintiff was injured in the accident. In dispute are the nature and severity of her injuries, the extent to which they continue to impact her, and the appropriate damages.
- [2] The matter proceeded under Rule 15-1(1)(a) of the Supreme Court Civil Rules, B.C. Reg. 168/2009 [Rules] by agreement of the parties.

II. Background Facts

A. Pre-Accident

- [3] The plaintiff was 37 years old at the time of the accident and 42 at trial. She was born in Quebec. She began working full-time at age 16 and did not complete secondary school. She worked as a waitress, a bartender, and in various other positions, from age 16 up until moving out to BC.
- [4] The plaintiff and her partner, Leo Archembault, moved to Vancouver together after visiting friends and "falling in love" with BC. They have been together for 23 years.

- [5] Mr. Archembault was 62 years old at trial. He is a qualified sheet metal worker and could already speak English when they moved. He was readily able to find trade work in the Lower Mainland. The plaintiff spoke next to no English when they arrived, but she worked at it and learned quickly. She testified in English with ease.
- [6] The plaintiff worked to make herself employable on arrival in BC. In addition to learning English, she took a cake decorating course, participated in a government-sponsored job search program, and earned her GED certificate. She soon secured a bakery position at a Fairway Market grocery store. When the store closed, she worked at an IGA grocery store briefly, but then took advantage of her bilingualism to obtain a position at an HSBC Bank Canada call centre.
- [7] In September 2007, she started working as the forms clerk for Ascent Property Management ("Ascent"). Her primary responsibility was assembling the documentation required in the buying and selling of managed strata properties. It was a desk job and largely consisted of keyboarding (data entry and search, as opposed to typing) and like functions. Her starting salary was \$30,000. It had incrementally increased up to \$38,000 by 2014.
- [8] The plaintiff and Mr. Archembault have been renters in BC. They found a duplex unit they liked in Surrey and stayed there long term. They were especially fond of outdoor recreational activities such as camping, hiking and canoeing, and were generally sociable.
- [9] The plaintiff and Mr. Archembault decided to have a child. Searching thought went into the decision. Among other things, there were financial considerations. They would require in vitro fertilization ("IVF"), which would cost them \$17,000. If they had a child, they both wanted the plaintiff to be at home until the child was two, an age they considered appropriate for daycare. There were cost implications to her taking that amount of time off work.
- [10] Deciding to proceed, they formed a financial plan to save and raise enough to pay for IVF and enable the plaintiff to take two years off work. As part of the plan, Mr. Archembault would sell his Harley Davidson motorcycle. They would also sell a car.
- [11] Although two years off would take the plaintiff beyond the term of her maternity leave, she was confident Ascent would make an effort to re-employ her and, if they could not, that she had enough experience to get a similar position.
- [12] The pregnancy went well and the plaintiff went on maternity leave at the end of 2014. Ayden was born in January of 2015. The plaintiff had no post-partum health issues and was doing well at the time of the accident.
- [13] There is no assertion that the plaintiff had any material injuries, health conditions or physical limitations at the time of the accident. She had no pre-accident history of significant headaches or migraines.

[14] There is, however, a matter of note. The plaintiff fractured her ankle in 2002. She subsequently required an ankle surgery, after which she developed chronic ankle pain. She participated in pain self-management classes. She was referred to the Jim Pattison Pain Clinic ("Pain Clinic") and underwent a nerve injection and, later, several nerve blocks in 2012. When the pain persisted, she tried dextrose injections and, subsequently, pulse radiofrequency treatments. In January 2013, she had a deep peroneal nerve block done. Her ankle pain subsequently resolved.[1]

B. The Accident

- [15] The plaintiff was driving a 2008 Nissan Rogue. She was struck from behind while stopped at a red light. The Nissan was pushed forward and collided with the vehicle in front. The plaintiff immediately felt pain in her neck, upper back, and shoulder areas.
- [16] Police and fire services attended the scene, but the plaintiff required no immediate medical attention and did not go to a hospital.

C. Post-Accident

- [17] The plaintiff testified that she presently experiences both sharp and aching pain in her neck and upper back, and that her pain, while worsening by aggravation, is near constant. The pain has a burning feeling when it is severe. It is aggravated by sitting or standing in the same position for more than 30 minutes, and mitigated by changes in position. Putting her arms out in front of her body continues to be particularly aggravating.
- [18] If she persists in an aggravating activity or posture for more than 30 minutes, she will begin to develop a headache.
- [19] She experiences numbness in her upper limbs, but only at night, only when on her side, and only on the side her weight is on. The numbness affects her arm and her hand. It is not painful, but does interfere with her sleep.
- [20] She has headaches about three or four times a week, depending on her level of activity. The more aggravating activity she engages in, the more frequent her headaches are. Her more severe headaches are throbbing in nature and cause light and sound sensitivity and nausea. She treats her headaches by taking Advil, laying down, and applying cold compresses. A headache may last longer than a day.
- [21] Her sleep continues to be significantly disrupted by pain. While her pain still wakes her, THC enables her to fall back asleep more quickly. As noted, she finds Nabilone less effective for this than THC oil.

- [22] The plaintiff describes her anxiety as largely related to financial matters. She experiences constant concern about their ability to cover basic expenses. But she also feels anxious in social situations, concerned that she will begin to feel unwell and how that will impact Ayden. She finds that CBD helps her be less anxious.
- [23] The plaintiff has not worked since the accident, nor has she attempted a return to work. When asked why she did not at least seek part-time work, she said it was simply not feasible. Her neck and back pain were constant and her headaches were unpredictable, making it unrealistic to represent to an employer that she could work for several days in a row or would be able to work at a particular time. This continues to be the case at present. She has considered taking some type of retraining, but working on a computer is very aggravating as it involves sitting and moving her arms around out in front of her body.
- [24] The plaintiff and Mr. Archembault struggled financially in the period that followed the accident. They ran up significant credit card debt after the plaintiff did not return to work. In 2019, the duplex was sold and they were unable to find anything in the Lower Mainland at a comparable rent and they could not afford to pay more. They resolved to return to Quebec where the cost of living is much lower. They took up residence in Lachine in May 2019.
- [25] Mr. Archembault works as a delivery driver in Lachine. His trade qualifications are no longer sufficient to perform sheet metal work in Quebec. He earns about two-thirds of what he made in BC. The plaintiff's parents and Mr. Archembault's mother have made substantial cash gifts to keep their finances afloat. They entered a debt repayment plan regarding their credit card debt. They live in a small, one-bedroom suite in the basement of Mr. Archembault's brother's house. Mr. Archembault described their circumstances as humiliating.
- [26] The plaintiff and Mr. Archembault both gave evidence that the plaintiff's injuries have dramatically impacted them as a couple. They are rarely intimate. The plaintiff is no longer a dynamic, adventurous personality. She is always tired, and generally irritable. Mr. Archembault has slept on the sofa "for years now" due to the the plaintiff's sleep issues.

III. Lay Witnesses

A. Leo Archembault

- [27] Mr. Archembault's evidence is canvassed above.

B. Michele Campbell

- [28] Ms. Campbell was the plaintiff's direct supervisor at Ascent. She left Ascent in 2015. She was called as a witness by the plaintiff.

- [29] Ms. Campbell described the plaintiff as a "work friend". They have had minimal social interaction outside of the Ascent workplace. She described the plaintiff as an excellent employee--a team player, someone willing to do whatever was asked, who made a real effort to be helpful and who, "if she missed work, you knew she was sick". Ms. Campbell's impression was that the plaintiff enjoyed working and intended to keep working.
- [30] Ms. Campbell had no recollection of the plaintiff telling her prior to starting her leave that she intended to take two years off work, but says that she may well have. The forms clerk position was eliminated after the plaintiff went on leave. Ms. Campbell said that had the plaintiff returned from maternity leave, she would have been given an administrative assistant position.
- [31] Ms. Campbell called the plaintiff during her leave and the plaintiff said she was going to take a second year off. Ms. Campbell told her to call Ascent when she was looking to return. Ms. Campbell said that if the plaintiff had called at the end of the second year, she would have tried to find her a position.
- [32] Ms. Campbell agreed that Ascent tries to accommodate employees, referring to the possibility of some ergonomic equipment and some flexibility in the setting daily start and end times. To her knowledge, part-time employees were very rare at Ascent, and she knew of no part-time administrative assistants.

C. Susan Colosie

- [33] Ms. Colosie has been with Ascent for 20 years, the last 18 as controller and part of the management team. She was called as a witness by the defendants.
- [34] Ms. Colosie considered the plaintiff a good employee and a hard worker. She considered her qualified to return as an administrative assistant and said the forms clerk and administrative assistant positions were comparably paid. The gross annual salary for an administrative assistant at the time of trial was \$48,000.
- [35] Ms. Colosie agreed that Ascent permits employees with children to vary their start times as a form of accommodation, but could not recall anyone working anything other than a five-day-week. While Ascent employees worked remotely during COVID, that was not an option prior to COVID and might not continue post-COVID.

IV. Plaintiff's Expert Witnesses

A. Dr. Catherina Du Plessis, Family Physician

- [36] Dr. Du Plessis has been the plaintiff's family physician since 2005.

- [37] In her opinion, the plaintiff suffered soft tissue injuries in the accident and they continue to impact her. In particular, she has muscle pain, spasms, some tingling and numbness, and needs to change positions frequently. When the plaintiff exerts herself or increases her level of activity, she suffers increased symptoms for days afterward. In Dr. Du Plessis' opinion, her recovery is plateaued and she will suffer ongoing chronic myofascial pain.
- [38] Dr. Du Plessis recommends physiotherapy and massage therapy on an ongoing basis to manage pain and stiffness, and a gentle exercise program to maintain range of motion. She recommends that the plaintiff try the drug Cymbalta, but notes that little benefit was obtained from the comparable medications she has already tried.
- [39] In her view, cognitive behavioural therapy might help the plaintiff cope with her pain and occupational therapy could help her learn strategies to reduce aggravation.

B. Dr. Pamela Squire, Complex Pain Management

- [40] Dr. Squire is a family physician with special interest in pain management. Since 2009, her practice has been restricted to referral-based complex pain management. She assessed the plaintiff on July 22, 2020 and provided a written report dated August 2, 2020.
- [41] In Dr. Squire's opinion, the plaintiff has mild to moderate chronic neck and upper back soft tissue pain, mostly likely as myofascial pain. She carried out testing that she says indicates central sensitization in the areas between the plaintiff's neck and shoulders, and says this contributes to her pain:

The sensitization is usually secondary to an underlying problem, commonly and [sic] nerve injury; a joint condition; or myofascial pain. Treating the underlying condition resolves the element of central sensitization.

- [42] In her view, the plaintiff suffers mild to moderate intermittent headaches and these are likely triggered by referred myofascial neck pain.
- [43] In her opinion, the plaintiff's arm numbness is likely due to "tension or compression of nerves" during prolonged side-lying. As the plaintiff's nerve conduction studies were normal and the numbness is intermittent, Dr. Squire believes it stems from myofascial adhesions.
- [44] Dr. Squire notes the plaintiff has mild to moderate anxiety with irritability. She offered an opinion on diagnosis, but deferred to any psychiatric or psychological opinions provided.
- [45] While the plaintiff has mild limitations in range of motion, these do not significantly impact her functional abilities. In Dr. Squire's view, the plaintiff's main issue is pain:

Ms. Lavoie is predominantly disabled by her inability to tolerate the pain she experiences with prolonged sitting, standing or any activity that involves the prolonged use of her arms in front of her, particularly if it involves lifting anything of weight.

- [46] She finds the plaintiff's reported issues with vacuuming and other heavy household duties consistent with her difficulty performing activities involving repetitive use of her arms in front of her body or heavy lifting. She described her as having "mild limitations with regard to some recreational activities", but able to engage in activities such as yoga, swimming, or cycling with an appropriate handlebar set up. She described her as "able to hike with duration limitations".
- [47] Dr. Squire does not recommend further massage therapy, physiotherapy, active rehabilitation, or like treatments. She does recommended access to a recreational centre to participate in exercise within her capabilities.
- [48] Dr. Squire recommends a diagnostic suprascapular nerve block and, in the event the local anaesthetic involved should provide good pain relief, a therapeutic injection with a steroid. She recommends 12 sessions of fascial manipulation known as "the Stecco method" as a treatment for myofascial pain.
- [49] Like Dr. Du Plessis, Dr. Squire recommends the plaintiff try duloxetine (aka Cymbalta) for chronic pain, noting that it may also assist with anxiety. She considers duloxetine preferable to medical cannabis, but if duxelotine does not assist, then she recommends continuing medical cannabis at a higher dosage.

C. Nicholas Altieri, Occupational Therapist

- [50] Mr. Altieri provided a work capacity evaluation report dated April 2, 2020, based on an interview and testing on January 30, 2020.
- [51] Mr. Altieri finds the plaintiff able to perform jobs that require some reaching, handling, fingering and/or feeling, keyboarding, writing, and upper limb coordination skills, but not able to reach forward for more than a short period, including the forward reaching posture required to use a keyboard.
- [52] In testimony, he spoke to the distinction between a "work intensive sitting posture" (or "active sitting"), such as used in keyboarding, and sitting as a neutral posture. Active sitting is not neutral, but rather mild stooping. He described neutral posture sitting as "social sitting". Similarly, "active standing", such as used in keyboarding at a standing desk, has a stooping element.
- [53] The plaintiff is not suited for prolonged periods of stooping activity, including active sitting and active standing. He says that the plaintiff is capable of some work functions like these, and thus of work involving sedentary and light lifting demands, but only subject to tolerances.
- [54] In his view, the plaintiff has a sitting tolerance of 30-45 minutes. Thus, she is functional for some sitting jobs provided she can take short breaks (five minutes) to stand and walk about at those intervals. She is able to stand for periods of up to 60 minutes before requiring a break. She is capable of intermittent short periods of walking, but not continuous walking.

Her tolerance for standing and walking deteriorates with exposure to static standing, sustained neck flexion, sustained stooping, lifting activity, and sustained forward reaching activity. In his view, the plaintiff is capable of flexible part-time work, but within these functional limitations.

- [55] However, performing functions within her capability produces a rebound period of aggravated symptoms (or "symptom response"). In Mr. Altieri's opinion, the plaintiff's level of symptom response interferes with her ability to perform functions on successive days.
- [56] In his view, her deterioration and symptom response create a functional limitation in the form of "lack of durability". In his view, her lack of durability would need to be accommodated for her to successfully return to work:

Based on the results of testing, Ms. Lavoie meets the full individual physical demands of her pre-accident job as an Office Assistant. However, given her observed difficulties related to prolonged or accumulated sitting demands, particularly work intensive sitting postures, it is my opinion that she would have difficulties durably maintaining work participation. While she would benefit from ergonomic recommendations such as a sit/stand work station, and appropriate accessories such as a document holder, slant board, and height adjustable monitor stand, based on observations during testing, she would continue to have difficulties with the computer/desk based work activity due to the associated prolonged neck flexion and prolonged forward reaching demands). Based on her symptom response, and deterioration over the course of testing, she would require an accommodating employer, that would allow her to take frequent breaks, and days off, allowing her not to work back to back days, maximizing her tolerance for work activity.

[Emphasis added.]

- [57] Mr. Altieri recommends 10-12 supportive treatment sessions (e.g., massage therapy and physiotherapy) per year for symptom management and flare-ups to maintain current function. He recommended vocational counselling to help identify appropriate work options and occupational therapy support upon any return to work to obtain ergonomic recommendations. He also recommended she continue to follow a home exercise regime and pursue a walking program.
- [58] Mr. Altieri opines that the plaintiff has the ability to perform less physically demanding household activities by using pacing strategies, but will continue to require assistance with more physically demanding tasks such as lifting heavier household chores and, should they move into their own home, yard tasks.
- [59] In his view, while able to participate in recreational activities, the plaintiff has limitations on the range of activities she can do and the intensity of her participation is limited in comparison to her historical pattern.

V. Defendants' Expert Witnesses

A. Dr. Todd Bentley, Physiatrist

[60] Dr. Bentley was called as an expert by the defendants and his August 7, 2020 report is based on an evaluation done on July 23, 2020.

[61] Dr. Bentley diagnosed the following conditions as likely caused by the accident:

- Whiplash Associated Disorder (WAD) Type II with cervicogenic headache - impairment in cervical spine range of movement; secondary restriction in bilateral shoulder range of movement with no suggestion of intrinsic shoulder pathology; normal neurological examination; no evidence of upper motor neuron pathology
- Thoracic sprain/strain - no impairment in thoracic spine range of movement

[62] He agrees that her chances of improvement are guarded. He did not recommend further facility-based treatment (e.g., physiotherapy, massage therapy) and recommended "continuing with her current analgesic regime" for future pain management.

[63] He noted that she reported a persisting partial disability in the domains of heavier housekeeping and physical/recreational activity. In testimony, he indicated that she could address the issue with pacing techniques.

[64] The following portion of Dr. Bentley's report is of particular note:

6. Please include your opinion as to the Plaintiff's present and future ability to work and your opinion as to how much time off work would be reasonable in light of the Plaintiff's injury and his job duties.

From strictly Physical Medicine perspective, it is this assessor's opinion that there are no impairments or conditions related to the subject accident that would result in a disability from Ms. Lavoie's pre-accident employment.

[65] Dr. Bentley did not have an opportunity to review the Altieri report before testifying. On cross-examination, he was advised that a functional capacity evaluation had been done and of the conclusions reached. Dr. Bentley responded that, provided relevant ergonomic supports were used in the testing, he would defer to a functional capacity evaluation report with respect to functional disability. He also agreed that pain could constitute a functional disability, and that returning to work was unlikely to improve the plaintiff's existing pain and could make it worse.

[66] With regard to central sensitization, Dr. Bentley observed that it is generally of concern with strokes, brain damage, and spinal cord surgery. He described Dr. Squire's testing for it in the context of myofascial injury as unorthodox (but not inappropriate). In his view, Dr. Squire's report indicated that she had tested for it as a symptom, but offered no corresponding diagnosis.

VI. Credibility

- [67] The parties agree that credibility is central here. The court has addressed credibility assessment in the context of subjective complaints and self-reported symptoms on numerous occasions. In *Afework v. Correa*, 2019 BCSC 1672, Justice Giaschi provided an overview:
- [10] The defendants refer me to *Karim v Li*, 2015 BCSC 498 at paras. 86-89; *Dhaliwal v. Greyhound Canada Transportation Corp.*, 2015 BCSC 2147 at paras. 280-282, varied on other grounds at 2017 BCCA 260, *Edmonson v. Payer*, 2011 BCSC 118 at paras. 36-37, *aff'd* 2012 BCCA 114, and various other cases for the principles applicable to an assessment of credibility where there is little objective evidence of a plaintiff's self-reported symptoms. I have considered those cases and accept that the plaintiff's evidence must be carefully scrutinized, in particular, her injuries of subjective complaints. However, as set out in *Bradshaw v. Stenner*, 2010 BCSC 1398, at para. 186, *aff'd* 2012 BCCA 296, the overriding consideration is whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time:
- [186] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis* (1926), 31 O.W.N. 202 (Ont.H.C.); *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.) [*Farnya*]; *R. v. S.(R.D.)*, [1997] 3 S.C.R. 484 at para. 128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (*Farnya* at para. 356).
- [68] I agree that these are the relevant cases and principles. The following principles outlined in *Karim v Li*, 2015 BCSC 498, are also of assistance:
- [89] In addition, the following principles should be taken into account by the trier of fact:
- no one can expect compensation in the absence of convincing evidence that complaints of pain are true reflections of a continuing injury: *Price v. Kostyba* (1982), 70 B.C.L.R. 397 at 399 (S.C.);
 - every injured person has a different understanding of his or her own complaints and injuries and it falls to judges to translate injuries to damages: *Price* at 397;

- where there is little or no objective evidence of continuing injury and where complaints of pain persist for long periods extending beyond the expected resolution, the court should be exceedingly careful to assess assertions in light of the surrounding circumstances including the medical evidence: Price at 399; Tai v. De Busscher, 2007 BCCA 371 at para. 41;
- it is the doctor's function to take the patient's complaints at face value and offer an opinion based on them and it is for the court to assess credibility. If there is a medical or other reason for the doctor to suspect the plaintiff's complaints are not genuine, are inconsistent with the clinical picture or are inconsistent with the known course of such an injury, the court must be told of that. But it is not the doctor's job to conduct an investigation beyond the confines of the examining room: Edmondson v. Payer, 2011 BCSC 118 at para. 77, aff'd 2012 BCCA 114; and
- in the absence of objective signs of injury, the court's reliance on the medical profession must proceed from the facts it finds, and must seek congruence between those facts and the advice offered by the medical witnesses as to the possible medical consequences and the potential duration of the injuries: Fan (Guardian ad litem of) v. Chana, 2009 BCSC 1127 at para. 73, aff'd 2011 BCCA 516.

[69] I found the plaintiff to be a straightforward witness and I generally accept her testimony. I appreciate that her claim is significantly based on her subjective reports of pain. I note that her previous issue with her ankle may suggest a low tolerance for pain. Should that be the case, it does not make her experience of pain any less real.

[70] For the most part, I accept that she experiences the degree and type of pain she has described. The plaintiff testified without any tendency toward overstatement or exaggeration. She demonstrated perspective and made appropriate concessions. Her evidence was internally consistent, and consistent with her historical reports to physicians and consultants and her post-accident conduct.

[71] The following findings are part of the framework for my findings on credibility. I am satisfied that the plaintiff would have returned to work if she could.

[72] First, she has supported herself since she was 16, generally in demanding jobs, without any unexplained periods of unemployment. Her effort to make herself employable in BC was determined and admirable. Both Ascent witnesses described her work and work ethic in stellar terms. There is nothing remarkable or suspicious about her having decided to stay at home until her child was an age she and her partner consider appropriate for daycare. She and Mr. Archembault came up with a plan to make that time off financially feasible. She did intend to return to work--at Ascent, if they had space, or elsewhere if need be. Indeed, she needed to return to work--her return was necessary to finance their household.

[73] Second, the plaintiff and Mr. Archembault were loathe to return to Quebec. The plaintiff had learned English and had become an administrative assistant. They had set down roots in BC. He no longer had trade qualifications sufficient to work as a sheet metal worker in Quebec. They ran up substantial credit card debt in their attempt to stay in BC. Further, had they

been inclined to return to Quebec to raise Ayden, they would have done so earlier as IVF is an insured procedure for Quebec residents. They went back to Quebec because they could not afford to stay, and they could not afford to stay because the plaintiff was unable to work.

[74] Third, there is no evidence suggesting the plaintiff is a malinger. She overcame chronic ankle pain by concerted effort. Following the accident, she approached her recovery in a like manner. She saw multiple specialists, tried recommended treatments, tried prescribed drugs, completed active rehabilitation, adhered to a home exercise routine, and returned to the Pain Clinic. Due to her financial circumstances (e.g., being unable to afford Cymbalta), her difficulty getting medical treatment and referrals in Quebec, and the COVID pandemic (e.g., the lockdown of her recreational centre), her effort has encountered some obstacles. However, she consistently did what she could to recover, but did not succeed.

[75] The defendants argue the following points demonstrate the plaintiff's lack of credibility and reliability:

- a) The plaintiff failed to call any collateral witnesses, aside from Mr. Archembault, to testify with respect to her pain and limitations.

The plaintiff had a minimal social life following the accident. Her time was primarily taken up caring for Ayden, and those isolating circumstances were then compounded by COVID. She has no co-workers to call. While the addition of a collateral witness might have improved her case, there is no basis for an adverse inference in the circumstances.

- b) The plaintiff testified the Nissan and the motorcycle were sold when she could not return to work, while Mr. Archembault said these were sold as part of the plan to fund the plaintiff's two year period off work.

While the assets were sold, there is no evidence of specifically when. As the plaintiff was in the Nissan in the accident, it was clearly not sold in anticipation of her leave. As there is always a market for used vehicles, it would make at least as much sense to sell them as and when money was needed, as to convert them into cash before she went on leave. As the accident was less than six months after the plaintiff started her leave, the motorcycle was likely, as the Nissan was, sold after the accident.

For the plaintiff, testifying five years after the fact, to describe the vehicles sold after the accident as having been sold as a result of the accident is an understandable error.

The defendants submit the plaintiff was misleading in order to portray financial hardship. However, the evidence that they fared poorly after the plaintiff did not return to work is abundant: e.g., they accumulated significant credit card debt, their relatives began contributing financial support, they moved to Lachine to obtain the benefit of a lower cost of living. There would be little point to the alleged attempt to mislead.

- c) The plaintiff and Mr. Archembault failed to acknowledge the loss of the duplex and the cost of childcare as factors in their decision to return to Quebec.

Both the plaintiff and Mr. Archembault said their inability to find a comparable rental situation put them in a financial bind. Moving to another space in the Lower Mainland would increase their cost of living and they could not afford that. However, it does not follow that they would not have been able to manage a rent increase had the plaintiff returned to work.

The defendants assert that the plaintiff and Mr. Archembault could never have afforded the childcare required to enable the plaintiff to return to work. The assertion suffers from multiple flaws. First, it presumes the cost of commercial childcare, which would not necessarily be used. Second, it is based on the plaintiff's 2014 salary. Ms. Colosie confirmed that Ascent salaries increase annually and that the plaintiff would have earned \$48,000 by the date of trial. Finally, even if the plaintiff's net earnings outpaced the cost of childcare by a relatively small margin, they had a practical need for whatever margin could be cleared.

- d) The plaintiff and Mr. Archembault's claims of wanting to stay in BC are inconsistent with their failure to look for affordable housing outside of the Lower Mainland.

Mr. Archembault testified that sheet metal work is abundant in the Lower Mainland because of the nature and amount of construction done here. He said he would find it difficult to get full-time hours in the Interior or on Vancouver Island. It is reasonable to account for a corresponding impact on earnings in determining what amounts to affordable housing.

- e) The plaintiff and Mr. Archembault fail to acknowledge the benefits of living in Quebec.

This assertion assumes a significant benefit in being physically proximate to family members in terms of having assistance with Ayden. The plaintiff and Mr. Archembault both testified about their family dynamics. The assumption is not borne out on the evidence.

- f) The plaintiff testified (and reported to her treating physicians and consultants) that she had improved about 15-30% (as measured against her condition shortly after the accident), while Mr. Archembault testified that he had noticed no improvement in the plaintiff's symptoms.

The plaintiff said she improved shortly following the accident and that the improvement was primarily in range of motion. She said her pain had improved a little in that same period, but then substantially plateaued. Mr. Archembault's evidence--which was a brief and general comment--is a third person perspective as of five years after accident. Considered in that context, I consider Mr. Archembault's statement essentially consistent with the plaintiff's evidence. In particular, I would not expect him to provide an answer that emphasized her recovery in range of motion.

- [76] For the reasons above, I reject the assertion that there are material inconsistencies in the plaintiff's evidence.

VII. Causation & Injuries

- [77] The test for causation is a "but-for" test and only a substantial connection between the injury and the negligence needs to be established: *Athey v. Leonati*, [1996] 3 S.C.R. 458. "Substantial" requires something outside of the de minimus range.
- [78] The dispute here relates to the extent of injury rather than causation.
- [79] The defendants initially took issue with the time of onset of the plaintiff's headaches. Their expert, Dr. Bentley, concurred that the time of onset of muscle-injury based headaches is commonly some time after the injury. The issue of causation was not pursued in closing arguments.
- [80] Dr. Du Plessis, Dr. Squire, and Dr. Bentley all agreed that the plaintiff sustained soft tissue injuries to her neck, shoulder area, and upper back and she now suffers myofascial pain. None of them foresee any significant possibility of improvement. I agree.
- [81] I accept, in particular, Dr. Squire's comprehensive and detailed report as it relates to the diagnosis, prognosis, and treatment of the plaintiff's myofascial pain.
- [82] I also accept the experts' more or less uniform diagnosis and prognosis regarding cervicogenic headaches. I note that Dr. Bentley agreed that cervicogenic headaches can be severe and debilitating whether or not they are technically migraines. I accept that the plaintiff's headaches are often intense and non-infrequently severe, and that they sometimes last in excess of a day.
- [83] I reject Dr. Squire's opinion as it relates to central sensitization. I agree with Dr. Bentley that testing for central sensitization in the circumstances amounts to searching for a symptom untethered to causation.
- [84] I accept the plaintiff's evidence that her arm goes numb when she sleeps on her side and also that this is only since the accident. The explanation for the numbness may be that offered by Dr. Squire--myofascial adhesions--but I find it is, in any event, a consequence of the accident and an additional interference with her sleep. There is no persuasive evidence of a nerve injury of any kind.
- [85] Dr. Squire's opinion as to whether the plaintiff does or does not suffer from anxiety disorder or another mood disorder is rejected as outside the scope of her expertise. I do accept, however, the plaintiff is now an anxious person and that her anxiety is a consequence of the accident.
- [86] Her sleep is significantly disrupted by pain and the numbness in her arms. Her pain and disrupted sleep have, in combination, adversely affected her disposition, making her generally irritable and disinclined to socialize.

- [87] I accept Mr. Alteri's report and his evidence respecting functionality. Mr. Altieri testified that the tests were done using all relevant ergonomic supports. It is within his expertise to determine what constitutes optimal ergonomic support. In my view, his evidence readily withstood cross-examination. I found him a particularly knowledgeable and convincing witness.
- [88] As already noted above, on cross-examination, Dr. Bentley testified that he would defer to Mr. Altieri's functional capacity evaluation provided it was conducted with appropriate ergonomic support.
- [89] In closing, the defendants argued that Dr. Bentley was unaware of a number of (asserted) deficiencies in Mr. Altieri's testing and approach. The defendants are in an unenviable position. Dr. Bentley was content to defer. I accept Mr. Altieri's qualifications and his test results. If the defendants wanted Dr. Bentley to offer a nuanced disagreement with Mr. Altieri's report, they ought to have given it to him for review. As it is, Dr. Bentley deferred with one qualification. I find that qualification met.
- [90] On the evidence of Dr. Du Plessis and Mr. Altieri, I accept that the plaintiff is significantly impacted by symptom response. The defendants submit that Mr. Altieri ought to have assessed her symptom response earlier than he did. Determining the appropriate amount of time is within Mr. Altieri's expertise. I also find it highly unlikely that, as the defendants speculate, the plaintiff engaged in other strenuous activity between her testing and Mr. Altieri's symptom response follow-up.
- [91] The plaintiff's symptom response means that aggravating her injuries on a given day will generally cause her to experience an elevated base pain level on the following day. This makes it increasingly difficult for her to perform straining activities over a set of back to back days.
- [92] In summary, the plaintiff's pain, while not severe, is near constant and debilitating. While she is capable of the discrete functions needed to perform a light and sedentary position, she needs breaks more frequently than every hour, deteriorates notably over a less than eight hour period and will suffer a significant symptom response. The aggravation of her injuries triggers headaches, and those headaches can be severe and can be long-lasting.
- [93] I accept that the pain caused by aggravation to her injuries is significant, and that there is little likelihood of any significant improvement.

VIII. Damages

A. Positions of the Parties

- [94] The plaintiff seeks damages as follows:
- a) non-pecuniary damages: \$125,000 to \$150,000;
 - b) past loss of earning capacity: \$147,363;

- c) future loss of earning capacity: \$725,000;
- d) costs of future care (including domestic assistance): \$135,000; and
- e) special damages: \$8669.71.

[95] The defendant submits that only the following are appropriate:

- a) non-pecuniary damages: \$60,000 to \$70,000 (with a 30% reduction due to a failure to mitigate); and
- b) special damages (excluding medical cannabis expenses).

B. Non-Pecuniary Damages

[96] Non-pecuniary damages are awarded to compensate for pain, suffering, loss of enjoyment of life and loss of amenities. The amount awarded should be fair to all parties. While fairness is assessed against comparable cases, every case presents a unique combination of facts: *Trites v. Penner*, 2010 BCSC 882 at paras. 188-189.

[97] In *Stapley v. Hejslet*, 2006 BCCA 34, the Court of Appeal identified a number of factors for consideration in assessment: age, nature of the injuries, the severity and duration of pain, disability, emotional suffering, loss or impairment of life, impairment of family or social relationships, impairment of physical or mental abilities and loss of lifestyle. Stoicism should not penalize the plaintiff.

- a) Comparable and Placement on the Range

[98] The plaintiff submits that an award of \$125,000 to \$150,000 is appropriate and relies on the following comparables:

· *Reely v. Zhu*, 2020 BCSC 1520 - Ms. Reely, 29 years old at the time of injury, had soft tissue injuries and was likely to suffer daily back pain, shoulder pain every other day, neck pain about once or twice a week. She had difficulty sleeping. She had to stop working care aide and could no longer become a licensed practical nurse, but had successfully returned to work as a customer service assistant. She no longer engaged in the physically vigorous recreational activities she had previously. Her injuries had negatively impacted her ability to play and interact with her daughter and weighed against having additional children. She was awarded \$100,000.

· *MacLeod v. Whittemore*, 2018 BCSC 1082 - Ms. MacLeod, 28 years old at the time of injury, had myofascial injuries to her neck and upper back, ulnar nerve sensitivity and suffered near constant pain. She could not continue as a dental assistant and would need to retrain. Caring for her newborn was challenging, and her recreational life and social life were virtually non-existent. She suffered anxiety, sleeplessness, sadness and irritability. There was still a 30% possibility of improvement. She was awarded \$135,000.

· Hosseinzadeh v. Leung, 2014 BCSC 2260 - Ms. Hosseinzadeh, 43 years of age at the time of injury, suffered chronic pain and/or fibromyalgia in her neck and lower back. She was permanently disabled from her position as a daycare worker. Her pain was significant and unlikely to improve. Her sleep was impaired and her mood was adversely impacted. Family members now did housework she had previously done and she had to pace herself in the chores she continued. Her social life had centred on cooking and hosting dinners and like events and thus was significantly diminished. She was awarded \$125,000.

[99] The defendants submit that the appropriate range is \$60,000 to \$70,000. They cited the following cases as comparables:

- Dosangh v. Xie, 2017 BCSC 1937;
- Riely v. Ritsco, 2017 BCSC 925;
- Morgan v. Allen, 2017 BCSC 1958;
- Kaur v. Tse, 2020 BCSC 1072;
- Johnson v. Randawa, 2020 BCSC 708;
- Abraha v. Suri, 2019 BCSC 1855.

[100] I find the defendants' cases to be of no assistance. They involve lesser injuries with lesser consequences. They also generally involve older plaintiffs.

[101] The plaintiff in the case at bar was 37 years old at the time of injury and had a newborn child. Her injuries made her childcare responsibilities challenging and painful. She has been and will be unable to be an active, fully engaged parent.

[102] She can only engage in comparatively modest versions of her former activities. Her symptom response and lack of durability impact her abilities. Camping now means driving somewhere to stay in a sleeper camper. Whereas she was previously very focussed on demanding outdoor activities, she is now recommended yoga and gentle swimming with guarded use of her arms.

[103] The defendants note that the plaintiff has flown between Vancouver and Montreal several times for the litigation. She testified that while she is able to do it, she needs to frequently get out of her seat and walk about in the plane and the sitting aggravates her pain.

[104] She continues to do most household tasks with pacing, but it aggravates her pain at the time and afterward. There are also household tasks that she cannot do. While she can participate in social activities, she will need to change positions frequently and guard against getting a headache. She often declines to socialize due to lowered mood and lack of sleep.

- [105] Her relationship with Mr. Archembault has been negatively impacted. She is anxious about their financial situation and disheartened at moving back to Quebec. She is discomfited by relying on their families for financial assistance and for an affordable place to live. Her overall emotional well-being has been significantly impacted.
- [106] Finally, the plaintiff is still relatively young. She is likely to be coping with the consequences for a long time yet.
- [107] The Hosseinzadeh decision is a solid comparator. It has substantial parallels in terms of nature and severity of injury, adverse consequences and age. As it is a decision from 2014, the amount awarded should be adjusted to account for inflation. The plaintiff is awarded \$135,000 in non-pecuniary damages.
- b) Alleged Failure to Mitigate
- [108] The defendants assert that the plaintiff's non-pecuniary award should be reduced by 30% due to a failure to mitigate by taking proper treatment.
- [109] A plaintiff is obliged to take reasonable steps to reduce her damages, including taking recommended treatments. Whether the plaintiff has acted reasonably is a question of fact in all of the circumstances: *Gilbert v. Bottle*, 2011 BCSC 1389 at paras. 201-202.
- [110] A reduction may be made for a failure to mitigate if a defendant meets the two-part test set out in *Chiu v. Chiu*, 2002 BCCA 618:
- [57] The onus is on the defendant to prove that the plaintiff could have avoided all or a portion of his loss. In a personal injury case in which the plaintiff has not pursued a course of medical treatment recommended to him by doctors, the defendant must prove two things: (1) that the plaintiff acted unreasonably in eschewing the recommended treatment, and (2) the extent, if any, to which the plaintiff's damages would have been reduced had he acted reasonably. These principles are found in *Janiak v. Ippolito*, [1985] 1 S.C.R. 146.
- [111] The defendants say the plaintiff should have taken cognitive behavioural therapy or other counselling for her anxiety. Her anxiety does not constitute a psychological injury and is not disabling. Her anxiety is situational and, moreover, an appropriate response to her actual situation. In short, she does not need counselling; she needs to have less to be rationally worried about.
- [112] I am also prepared to assume that the plaintiff, being unable to afford to take a full dosage of her pain medication, was not in a position to pay for psychological therapy or counselling.
- [113] It is said that she ought to have tried Cymbalta. She testified that she could not afford to do so. I accept that evidence.

- [114] Further, even if Cymbalta and medical cannabis were of equal cost (and I find on the evidence that they are not) and it was a matter of choosing one of the two to spend her funds on, I would consider it reasonable for her to choose medical cannabis in the circumstances. Having limited funds, she would be choosing between a drug she knew was of some assistance (medical cannabis) and a drug that was unlikely to assist (Cymbalta) given her past response to similar medications. The former is a sensible investment.
- [115] The defendants say the plaintiff ought to have joined a gym or recreational centre given that Dr. Wang's primary recommendation was regular exercise. The plaintiff regularly followed a recommended home exercise routine. She also did use the Lachine recreational centre until it was closed due to COVID. I find she followed her physician's recommendations regarding regular exercise.
- [116] The defendants rely on the fact that Dr. Waspe made two recommendations that the plaintiff did not pursue (i.e., Scalene stretches and Feldenkrais Therapy).
- [117] First, Dr. Waspe was not called to give evidence and there is no evidence indicating that these two recommendations were of particular import or promise. Second, the plaintiff saw Dr. Waspe for a second opinion. She underwent the nerve-related tests and scans recommended by Dr. Waspe, but when they were negative she attended the Pain Clinic as recommended by Dr. Wang. Thereafter, she took guidance from the Pain Clinic. Finally, the defendants' expert witness, Dr. Bentley, took no issue with the plaintiff's not having tried those particular treatments. To the contrary, he noted that the plaintiff had had appropriate treatment.
- [118] The defendants submit that the plaintiff failed to follow Dr. Squire's August 2, 2020 recommendations regarding Stecco treatment and a scapular nerve block. This is adequately explained by the difficulties the plaintiff has encountered in getting treatment referrals in Quebec, the impact of COVID (especially given the timing of the recommendations), and/or the plaintiff's financial restrictions.
- [119] The defendants have failed to establish any failure to mitigate.

C. Loss of Earning Capacity

- [120] Loss of earning capacity has past and future aspects: *Ibbitson v. Cooper*, 2012 BCCA 249 at para. 19; *Falati v. Smith*, 2010 BCSC 465 at para. 39, *aff'd* 2011 BCCA 45. As outlined in *Midgley v. Nguyen*, 2013 BCSC 693, at paras. 236-240, under both past and future forms:
- a) the plaintiff must establish an impairment and a real and substantial possibility the impairment has and/or will result in pecuniary loss;
 - b) positive and negative contingencies must be accounted for as hypothetical events and given weight according to their relative likelihood, and

- c) a contingency should to be taken into account wherever the evidence establishes its occurrence is a realistic, as opposed to speculative, possibility.

[121] It is impossible to value a loss of opportunity with calculated precision: *Erickson v. Sibble*, 2012 BCSC 1880 at para. 271. There is no mathematical formula; the fairness and reasonableness of amount should be considered and positive and negative contingencies accounted for: *Schenker v. Scott*, 2014 BCCA 203 at para. 53.

a) Past Loss of Earning Capacity

[122] I accept Mr. Altieri's report. On that basis, the plaintiff could not have successfully performed the administrative assistant position at Ascent or any similar position between the date of the accident and the date of trial. After her initial recovery resulting in improved range of motion, she was likely capable of performing the functionality she demonstrated during the Altieri testing. However, she needed a position that accommodated the durability limitations outlined in the Altieri report.

[123] There is no evidence that Ascent could or would have made the kind and degree of accommodations required. There is no evidence of another employer or another position that might have met those requirements such that she ought to have made an application.

[124] The plaintiff submits that her hypothetical capacity (what she could have earned but-for the accident) can be assessed here by reference to what she would have earned had she returned to Ascent as an administrative assistant in 2017. I agree.

[125] Ascent would have made an effort to hire her in 2017. If it could not, it would have given her strong references to seek similar employment elsewhere. Administrative assistant positions are abundant. It is virtually certain that she would have found one.

[126] The salary she would have earned at Ascent is reliable evidence of the salary market for an administrative assistant at her level in general. Ms. Colosie's evidence is that Ascent regularly monitors salary levels in the market, and that while Ascent aims to be competitive, it makes no attempt to lead the market.

[127] Ascent's administrative assistants earned a \$48,000 gross annual salary at the date of trial. The plaintiff was earning \$38,000 in December of 2014. That suggest an incremental increase somewhere in the range of \$2000 a year.

[128] Accordingly, had the plaintiff returned to Ascent in 2017, her earnings would have been approximately as follows:

Year

Income

2017

\$42,000

2018

\$44,000

2019

\$46,000

2020*

\$48,000

9.5 months = \$36,000

Total (Gross)

\$168,000

[129] The plaintiff's loss is the net income that would result from these gross earnings: *Rizzolo v. Brett*, 2009 BCSC 732 at para. 72, aff'd 2010 BCCA 398.

[130] I do not consider it appropriate to make any adjustments for contingencies. The probability of her having earned this amount is approaching certainty.

b) Future Loss of Earning Capacity

[131] As noted by Justice Kent in *Hoy v. Williams*, 2014 BCSC 234:

[156] There are two possible approaches to assessment of loss of future earning capacity: the "earnings approach" from *Pallos*, and the "capital asset approach" in *Brown*. Both approaches are correct. The "earnings approach" will generally be more useful when the loss is easily measurable: *Perren v. Lalari*, 2010 BCCA 140 at para. 32. Where the loss "is not measurable in a pecuniary way", the "capital asset" approach is more appropriate: *Perren* at para. 12.

[157] The earnings approach involves a form of math-oriented methodology such as i) postulating a minimum annual income loss for the plaintiff's remaining years of work, multiplying the annual projected loss by the number of remaining years and calculating a present value or ii) 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.); *Gilbert v. Bottle*, 2011 BCSC 1389 at para. 233.

[132] The plaintiff was content in an administrative assistant position. She did not view the position as a stepping stone. She had obtained her GED and worked to learn English, but her keyboard and computer skills were moderate at best and she did not aspire to upgrade her skills or obtain further training. She was unlikely to seek or get a position with more hours or more responsibility. It is very likely that she would have worked as an administrative assistant indefinitely. An earnings approach adjusted for contingencies is appropriate in the circumstances.

[133] Multiplying a \$48,000 annual salary by the CIVJI multiplier of 19.3309 (23 years at a discount rate of 1.5%^[2]) results in \$927,883. That amount represents the present value of the plaintiff's but-for earning capacity from the trial through age 65.

[134] Turning to contingences:

- a) Cymbalta might assist with the plaintiff's pain, but neither recommending doctor expressed optimism. Both the plaintiff's personal experience and Dr. Squire's report indicate it would help to take a full dosage of medical cannabis, however, she was taking a higher dosage while she was in BC and the effect did not eliminate her need for accommodation.
- b) Dr. Squire did not indicate how likely it was that Stecco treatment might help or the degree of assistance to be hoped for. Presumably, then, no significant improvement is expected.
- c) The plaintiff and Mr. Archembault are not people of means. The plaintiff is in her 40s and Ayden is very young. Mr. Archembault is approaching 65 and will need to retire at some point, leaving the plaintiff as the sole breadwinner. In the circumstances, I consider it very likely that the plaintiff will work to age 65 and quite likely that she will continue beyond that.
- d) The most significant contingency here is that the plaintiff may find work that will accommodate her limitations. She has a residual earning capacity, the question is whether she will be able to find a way to exercise it. Employers willing and able to provide the kind and degree of accommodation required will be limited. The plaintiff needs not only to identify such a position and employer, but then to successfully obtain that position.
- e) The plaintiff is open to retraining, but that begs the question of what she could retrain to be and whether she can find a position and accommodating employer. While COVID has (at least temporarily) advanced the acceptability of remote work as an option, remote work is not a per se solution for the plaintiff. It would not, for example, eliminate her challenges with keyboarding, active sitting and working to a schedule acceptable to an employer.
- f) As always, there are the standard contingencies with regard to mortality rates and labour market conditions.

[135] The plaintiff submits that a best-case scenario under Mr. Altieri's limitations would enable her to work 18 to 24 hours a week. I agree. Against a \$48,000 gross salary, that would enable her to earn \$21,600 to \$28,800 a year. Using the CIVJI multiplier from above (19.3309), results in a best-case residual earning capacity of \$417,547 to \$556,730.

[136] But the odds of realizing a best-case scenario are long. The plaintiff submits that a 60% negative contingency should be applied to the best-case residual earning capacity calculation to account for the improbability. Doing so produces an actual residual earning capacity of \$167,018 to \$222,692.

[137] In my view, the best-case scenario may well be even less likely than the plaintiff posits.

[138] I have also concluded that she would be likely to work beyond age 65, which would increase her but-for earning capacity. Further, the plaintiff's but-for and best-case comparator figures do not account for employment benefits notwithstanding that part-time positions generally come with fewer or no employment benefits.

[139] On the whole, I am satisfied that an award of \$733,028 (\$927,883 - \$194,855) is fair and reasonable in the circumstances.

D. Loss of Domestic Capacity

[140] The relevant law is set out in *Kim v. Lin*, 2018 BCCA 77:

[27] This case requires the Court to again consider the proper approach to the somewhat vexing issue of valuing loss of housekeeping capacity. The difficulty with these types of cases arises from the challenge of understanding the true nature of the loss a plaintiff suffers when they are unable to perform household tasks.

[28] In *McTavish v. McGillivray*, 2000 BCCA 164, this Court observed that loss of housekeeping capacity could be compensated by a pecuniary or non-pecuniary award: at para. 73. The types of circumstances which may determine whether a loss is more properly considered pecuniary or non-pecuniary were recently discussed by this Court in *Liu*:

[26] It lies in the trial judge's discretion whether to address such a claim as part of the non-pecuniary loss or as a segregated pecuniary head of damage. In *McTavish* at paras. 68-69, the Court suggested that treating loss of housekeeping capacity as non-pecuniary loss may be best suited to cases in which the plaintiff is still able to perform household tasks with difficulty or decides they need not be done, while remuneration in pecuniary terms is preferable where family members gratuitously perform the lost services, thereby avoiding necessary replacement costs.

...

[30] Professors Cassels and Adjin-Tetty in *Remedies: The Law of Damages*, 3d ed (Toronto: Irwin Law Inc., 2014) at 187-188, draw a distinction between cases of pecuniary and non-pecuniary loss on the basis of whether a plaintiff has actually lost the capacity to perform housework:

Where the plaintiff continues to perform the tasks but with difficulty, requires more time to complete tasks, or manages to get by without doing or intending to do these tasks, the loss may be compensated for as part of non-pecuniary damages for pain and suffering and loss of amenity. Specifically, compensation is intended for the plaintiff's pain in persevering with housework, loss of satisfaction in not contributing to the upkeep of one's home, and/or for having to live with a disordered and perhaps not a well-functioning home. There may be a fine line between situations of diminished capacity to perform tasks and when the plaintiff completes tasks with difficulty. Care needs to be taken in making these distinctions to ensure fairness to both plaintiff and defendant. A pecuniary award may be appropriate where the evidence indicates that a reasonable person in the plaintiff's circumstances should not be expected to continue to perform

the tasks in question due to their injuries. Such a position avoids prejudicing plaintiffs who are stoic, or are unable to benefit from gratuitous services or afford to hire replacement services prior to trial.

[Footnotes omitted.]

- [141] The plaintiff addressed household assistance as an element of future care costs. In my view, the damages sought are better conceived of as damages for loss of domestic capacity.
- [142] The defendants argue that the plaintiff has already been compensated by the award of non-pecuniary damages. They characterize her as able to perform domestic tasks, albeit with pain and pacing strategies. That characterization does not accord with the evidence. The plaintiff's pacing strategy has only been successful to a point. I note also that the non-pecuniary award given in Hosseinzadeh, which I accepted as a comparable in making a non-pecuniary award here, also included a separate award of damage for loss of homemaking capacity (see paras. 141-144).
- [143] The plaintiff testified, for example, that some weeks she cannot vacuum at all. When that occurs, the vacuuming is not done that week and there is an accumulation into the next. Mr. Archembault may or may not step in to address the accumulation. Further, this is the case even now in their small, one-bedroom suite. The challenge will be greater should they get a second bedroom for Ayden. It will also be more challenging if she starts retraining or working and her symptom response becomes a bigger factor.
- [144] Similarly, when Mr. Archembault is not available to come with her, she orders groceries online, has the store load the car, and leaves everything that does not need to be put in the refrigerator to sit until Mr. Archembault comes home. She will be equally restricted from performing heavier yard tasks should they rent a house or duplex.
- [145] Mr. Altieri found the plaintiff had restrictions and recommended two hours a week of household support for a two year period and thereafter, if there has been improvement in her symptom management, three to four hours a month of support. Dr. Squire also expressed the view that she was restricted from performing heavier domestic activities, including yard work should they move, and recommended two hours of domestic assistance every two weeks.
- [146] Based on those recommendations, the plaintiff seeks one hour a week at \$25 a hour through to age 75 ($\$1,300 \times \text{CIVJI } 23.9886$ (33 years at a discount rate of 2%^[3])). The reasonableness of an award for loss of capacity can be assessed by comparison to a rough estimate of the cost of replacement services: Hosseinzadeh at para. 144.
- [147] The plaintiff is awarded \$31,185 (present value) as damages for loss of future domestic capacity.

E. Cost of Future Care

[148] The law in relation to damages for cost of future care was concisely set out by Justice Kent in *Dzumhur v. Davoody*, 2015 BCSC 2316:

[244] The principles applicable to the assessment of claims and awards for the cost of future care might be summarized as follows:

- the purpose of any award is to provide physical arrangement for assistance, equipment and facilities directly related to the injuries;
- the focus is on the injuries of the innocent party... Fairness to the other party is achieved by ensuring that the items claimed are legitimate and justifiable;
- the test for determining the appropriate award is an objective one based on medical evidence;
- there must be: (1) a medical justification for the items claimed; and (2) the claim must be reasonable;
- the concept of "medical justification" is not the same or as narrow as "medically necessary";
- admissible evidence from medical professionals (doctors, nurses, occupational therapists, et cetera) can be taken into account to determine future care needs;
- however, specific items of future care need not be expressly approved by medical experts..... It is sufficient that the whole of the evidence supports the award for specific items;
- still, particularly in non-catastrophic cases, a little common sense should inform the analysis despite however much particular items might be recommended by experts in the field; and
- no award is appropriate for expenses that the plaintiff would have incurred in any event.

[149] Adjustment and contingencies are to be taken into account: *Sharma v. Chui*, 2019 BCSC 2115 at paras. 120 and 121.

[150] Dr. Squire and Dr. Bentley both opine there is no value in continuing with massage therapy, physiotherapy, active rehabilitation or similar treatments. Dr. Du Plessis and Mr. Altieri recommend massage therapy and physiotherapy for maintenance, including with respect to the range of motion. In Mr. Altieri's opinion, these modalities may assist in the future should a return to work produce flare-ups.

[151] Dr. Squire is a pain specialist and Dr. Bentley is a physiatrist. I prefer their opinions and accept that there is no benefit in continuing these forms of treatment.

[152] Dr. Squire does recommend 12 sessions of Stecco treatment. She made no recommendation for ongoing Stecco treatment. The plaintiff is willing to try Stecco treatment and Dr. Squire has identified a provider in the Lachine area. The plaintiff is awarded \$2,280 (present value) for Stecco treatments.

- [153] Mr. Altieri recommended a continuing home exercise program. Dr. Du Plessis recommends a gentle exercise program. Dr. Squire recommended recreational centre facilities for exercise. The plaintiff used the Lachine recreational centre facilities until they were closed due to the COVID. Finally, the defendants submitted, as part of their mitigation argument, that joining a gym or recreational centre was necessary in order to follow the medical recommendations made.
- [154] The plaintiff seeks \$11,514 for a gym pass. The evidence does not justify a gym membership, but does justify a recreational centre pass. No evidence regarding the cost of such a pass is before me, but I estimate it at roughly one-half of the cost of a gym membership sought. The plaintiff is awarded \$5,750.
- [155] Dr. Du Plessis and Dr. Squire both recommend a trial on Cymbalta, but note the plaintiff's poor response to similar medications. The plaintiff is willing to try Cymbalta and testified that she has not done so to date because of the expense involved. The defendants submit there is no evidence regarding the specific cost of Cymbalta. That is true, although there is general evidence that it is comparably expensive.
- [156] The defendants take issue with the plaintiff's use of medical cannabis. She uses it at the recommendation of a dedicated Pain Clinic pharmacist and as prescribed by Dr. Gordon and a Quebec physician. Dr. Du Plessis testified that it assists with anxiety and insomnia and can be effective for pain, although not typically recommended for myofascial pain. While Dr. Squire recommends Cymbalta in preference, but expressly supports the continued use of medical cannabis if Cymbalta does not help. The plaintiff has testified that medical cannabis does, in fact, help with her pain, her ability to sleep and her anxiety.
- [157] There appears to be only very modest medical hope regarding Cymbalta. Should the Cymbalta trial go well against the odds, the plaintiff will presumably continue to use it. Should Cymbalta not assist, she will definitely continue with medical cannabis.
- [158] Given the relative cost of Cymbalta and medical cannabis, I consider it appropriate to award the plaintiff damages based on the recommended dosage of THC/CBD oil (\$1095 annually to age 75), without any deduction for contingencies. The plaintiff is awarded \$26,267.
- [159] Mr. Altieri recommended vocational counselling. I am satisfied this is justified. Identifying a vocation that meets her skills and has the potential to meet her accommodation needs will be key to any retraining and/or return to work. The plaintiff is awarded \$2,280 for vocational counselling sessions on the understanding that is sufficient for 12-15 sessions.

[160] In summary, I award the following cost of future care:

Item

Cost

Annual/

Total

Frequency

Present Value

Stecco

Approx.

\$190/ session

\$2,280

12 sessions total

\$2,280

Recreational Centre Access

Up to age 75

\$5,750

Housework

\$25/hour

\$1,300

Annually up to age 75

\$31,185

THC/CBD Oil

\$75/bottle

\$1,095

Annually up to 75

\$26,267

Counselling

Approx. \$150-190/

session

\$2,280

12-15 sessions total

\$2,280

Total

\$67,762

F. Special Costs

[161] Special costs are claimed in the amount of \$8,660. Of the claimed amount, \$7,311 are agreed upon.

[162] Of the agreed upon amount, \$4,039 has already been paid to the plaintiff.

[163] The defendants dispute \$1,358 of the amount claimed. The amount in dispute represents the cost of medical cannabis.

[164] Medical cannabis was recommended to the plaintiff by qualified medical professionals and obtained by prescription. No valid basis for objection has been advanced.

[165] The plaintiff's full special costs are allowed as claimed (subject to deduction of the amount already advanced).

IX. Summary

[166] In summary, based on the findings above, the plaintiff is awarded the following damages:

a) non-pecuniary:

\$135,000

b) past loss of earning capacity:

\$168,000 (gross)

c) future loss of earning capacity:

\$733,028

d) loss of future domestic capacity:

\$31,185

e) cost of future care:

\$67,762

f) special costs

\$8,660

Total

\$1,143,635

X. Tax, Interest and Costs

- [167] I leave it to the parties to address any tax and interest implications. Should they be unable to reach an agreement on these matters, they are at liberty to make further submissions by arrangement through the Registry.
- [168] Absent considerations I am presently not aware of, costs will follow the event in accordance with R. 15-1(15). Either party may contact the Registry regarding further submissions if they wish to seek a different disposition of costs.

"Tucker J."

- [1] See: Expert Report of Dr. Todd Bentley at pp. 12-13.
- [2] In BC, 1.5% is the rate of interest that must be used to calculate the present value of any future income loss: Law and Equity Act, R.S.B.C. 1996, c. 253, s. 56; Law and Equity Regulation, B.C. Reg. 352/81.
- [3] The figure of 2.0% applies to calculate future losses other than future income loss; e.g., cost of loss of domestic capacity and cost of future care: *ibid*.

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