

---

CANADA / JUDGMENT

## Leung v. Draper

2020 BCSC 219

---

COURT

Supreme Court of British Columbia

DECIDED

19 February 2020

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

---

2020 BCSC 219 Leung v. Draper

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Leung v. Draper,

2020 BCSC 219

Date: 20200219

Docket: M165126

Registry: Vancouver

Between:

Amy Janny-Yat Fung Leung

Plaintiff

And

Isla Reta Larue Draper

Defendant

Before: The Honourable Madam Justice Tucker

Reasons for Judgment

Counsel for the Plaintiff:

S.N. Collins

N.W. Peterson

Counsel for the Respondent:

D.R. Lewthwaite

Place and Date of Trial/Hearing:

Vancouver, B.C.

July 22 - 26, 29 & 30, 2019

Place and Date of Judgment:

Vancouver, B.C.

February 19, 2020

Table of Contents

I. INTRODUCTION. 4

II. THE PLAINTIFF PRE-ACCIDENT. 4

III. THE ACCIDENT. 7

IV. THE PLAINTIFF POST-ACCIDENT. 7

- a. Treatment History. 8
- b. Life Events. 9
- c. Employment 10
- d. Household and Childcare. 11
- e. Mood. 12

V. LAY WITNESSES. 13

- a. Mrs. Lok Leh Leung. 13
- b. Kenzie Wong. 14
- c. Delaney Wicken. 15
- d. Mr. Alfredo Young. 16
- e. Maggie Leung. 16
- f. Annie Chung. 17
- g. Elizabeth Lemieux. 18
- h. Dr. Joyce Sun. 19

VI. PLAINTIFF'S EXPERT WITNESSES. 20

- a. Dr. Donald Cameron, Neurologist 20

b. Dr. Chris Babbage, Psychiatrist 21

c. Dr. Andrei Krassioukov, Psychiatrist 23

VII. DEFENDANT'S EXPERT WITNESSES. 24

a. Dr. Barry Tessler, Neurologist 24

b. Dr. Kulwant Riar, Psychiatrist 24

c. Dr. Joseph Wong, Psychiatrist 26

VIII. ANALYSIS. 27

a. Causation. 28

b. Injuries. 29

c. Damages. 32

i. Duty to Mitigate. 32

ii. Parties' Positions on Heads of Damage. 37

iii. Non-Pecuniary Damages. 38

iv. Past Loss of Earning Capacity. 40

v. Future Loss of Earning Capacity. 42

vi. Cost of Future Care. 50

vii. Loss of Domestic Capacity. 56

viii. Special Damages. 61

IX. SUMMARY. 61

X. TAX, INTEREST & COSTS. 61

**I. INTRODUCTION**

[1] The plaintiff, Amy Leung, seeks damages arising from personal injuries she sustained in a car accident on December 17, 2015 ("the accident").

[2] Liability is admitted. These reasons deal with the cause, nature and duration of any injuries suffered by the plaintiff and the quantum of damages.

[3] The plaintiff claims damages under the following heads:

a. Non-pecuniary;

b. Past loss of earning capacity;

- c. Future loss of earning capacity;
- d. Past loss of housekeeping capacity;
- e. Future loss of housekeeping capacity;
- f. Cost of future care; and
- g. Special.

[4] The defendant asserts the plaintiff had pre-existing injuries and that she failed in her duty to mitigate. All of the plaintiff's damages claims, other than special damages, are contested.

## II. THE PLAINTIFF PRE-ACCIDENT

- [5] Ms. Leung was 37 years old at the time of accident and 40 at the time of trial. She is the single mother of two children: K, born in 2008, and J, born in December of 2016. Ms. Leung has sole custody of K and shares custody of J with his father.
- [6] Ms. Leung graduated secondary school with good grades. She enrolled in first year sciences at the University of British Columbia, but found the course load overwhelming and discontinued. She later began business administration courses at Simon Fraser University, but discontinued there as well. After a few years at various jobs, she enrolled in financial management courses at the British Columbia Institute of Technology ("BCIT"). In 2005, while attending BCIT, she took a summer job with Worksafe, after which Worksafe offered her a full-time position. She accepted the offer and left BCIT. She has been employed by Worksafe ever since.
- [7] Ms. Leung describes herself as a healthy person prior to the accident. While K was a caesarian birth, she recovered within weeks. She describes herself as being "generally pretty happy" prior to the accident. A few years before the accident, she had an ectopic pregnancy that reduced her chances of further children. She was sad for the several months following, but then recovered her normal mood. She had never been diagnosed with depression prior to the accident.
- [8] Ms. Leung has lived in Richmond for the last 10 years or so. She currently lives in a three story townhouse. The bottom floor has a garage, an entry area and a washroom; the middle has the kitchen, living room and laundry area; and the top has bedrooms and bathrooms. Prior to the accident, she had no limitations on her ability to perform household activities. She did all of the household chores herself, including the cooking and cleaning. If she worked overtime, her mother would help out by picking up K from school and looking after him.

- [9] Ms. Leung had no physical limitations prior to the accident. She was able to work, go to the gym and exercise classes, and engage in social outings without difficulty. She was fully able to play with K and regularly participated in his play dates, swimming outings and various classes. She was able to travel with K, going places like Disneyland, without any assistance.
- [10] Ms. Leung testified that prior to the accident she went to the chiropractor a few times a year for "maintenance and relaxation", and occasionally had massage therapy on the same basis. She rarely had headaches before the accident, having one maybe every three months or so, usually at the end of a long day. She had no sleep issues outside of specific stressors such as, for example, anxiety about an important event the next day.
- [11] Since 2009, Ms. Leung has been a Work Rate Officer ("WRO"), a position that involves setting Worksafe claimants' wage loss benefits. WRO work requires her to use a computer, speak over the phone with employers and claimants to gather information, and to attend weekly work conferences.
- [12] She works 7.25 paid hours a day. Her employment is covered by a collective agreement and her seniority puts her at the top of the pay grid for a WRO. She was earning about \$32 per hour at the time of the accident. Worksafe provides her with an employment benefit plan that includes extended health benefits and a pension plan. Ms. Leung testified that Worksafe does not provide short term disability benefits, but she earns sick pay benefits that she can draw down on when absent from work. Her evidence is that her earned sick pay benefits accumulate in an account for future use.
- [13] Ms. Leung's more recent Worksafe employment earnings were as follows:
- 2015 - \$62,895
  - 2016 - \$63,753
  - 2017 - \$12,457 (maternity leave)
  - 2018 - \$70,462.
- [14] The plaintiff had no limitations on her ability to perform WRO work prior to the accident. She described her work prior to the accident as easy and "like second nature" to her.
- [15] Prior to 2016, overtime for WROs was generally only available one or two times a year outside of the month of December, but offered frequently in December to clear backlog before year end. Prior to the accident, Ms. Leung generally accepted overtime when it was available to her. Her overtime work is compensated at 1.5 times her standard hourly rate for the first four hours, and as double time thereafter.

- [16] As noted, Ms. Leung is employed in a unionized bargaining unit. She has about 15 years seniority, which she described as putting her "near the middle", in that there are about the same number of people senior to her in the unit as there are junior. Ms. Leung said that prior to the accident she had intended to apply for higher positions internally with Worksafe and, in particular, that she had hoped to become a Disability Awards Officer ("DAO"), a clerical position somewhat higher than WRO in terms of pay grade.

### III. THE ACCIDENT

- [17] The collision came as a shock to Ms. Leung. She initially assumed K had been in the car and looked around for him following the impact until it set in that she had yet to collect him from school.
- [18] She felt chest and neck pain at the scene. Responding firefighters stabilized her neck until paramedics arrived. After examination, the paramedics concluded there was no fracture and gave her the option of going to emergency or going straight home. Ms. Leung says she felt drained, scared and disoriented, and just wanted to go home. She phoned her sister, Maggie, who picked up K and then picked the plaintiff up at the scene.
- [19] Ms. Leung couldn't sleep that night as she kept flashing back to the accident. The next day, she had neck, back, shoulder, chest and leg pain, as well as a headache, and went to see her family physician, Dr. Joyce Sun.

### IV. THE PLAINTIFF POST-ACCIDENT

- [20] The plaintiff missed eight working days after the accident. She was in a lot of pain and her left leg was tingling and cold. She had nightmares and flashbacks for a period. These resolved fairly quickly, but she continued to have generally interrupted sleep due to pain. Her sleep was significantly improved within two years of the accident, but she still wakes from pain if she maintains one position too long.
- [21] Ms. Leung testified that, as of the date of trial, her chest, shoulder joint and leg pain had fully resolved. The chest pain resolved within a few weeks of the accident. Her leg numbness resolved within the first couple of years. She said that her shoulder pain, as it relates to the shoulder joint itself, resolved within two years, but that she continues to have pain in her general shoulder girdle area.
- [22] She testified that she cannot differentiate between her back pain and her shoulder girdle area pain and experiences them as interconnected. I will adopt her use of the term "back pain" as an umbrella term for that area of pain. Her back pain and neck pain were unresolved as of trial. Ms. Leung testified that she generally treats her neck and back pain with ibuprofen, but sometimes uses a combination analgesic/muscle relaxant.

- [23] Ms. Leung describes her current back pain as "daily" and "intense", with her lower back being the most affected area. While physiotherapy treatment provided gradual improvement in the pain up to a certain degree, her back pain has held at its present level for about three years.
- [24] Her headaches also continue, although they have reduced by about half since the accident. For the last few years, she has had headaches on three or four days of each week. She described these as arising from her neck and back pain and as generally lasting a few hours. She sometimes has two on the same day. She says the headaches increase her anxiety and stress. She treats them with ibuprofen.
- a. Treatment History
- [25] Ms. Leung found physiotherapy helpful, but slow. She said she did not attend more regularly because her work and childcare responsibilities left her little time. She tried going on her lunch break, but found the travel time reduced her treatment time to 40 minutes. She also testified that she felt overwhelmed and unmotivated following the accident and had difficulty making and following through with plans.
- [26] She found massage therapy would help lessen the pain somewhat, but the lessening effect only lasted a few days. She started going to her chiropractor once or twice a month, which again only lessened the pain somewhat and only for a matter of days. Ms. Leung testified that her employment benefit provider, Pacific Blue Cross, had sent her written notice that it would seek repayment for treatments covered by its plan should she succeed in this case.
- [27] Ms. Leung went to a few active rehabilitation sessions where she worked on back strengthening exercises. She stopped attending when she began to feel overwhelmed. When she looked into resuming, she was told she needed a new referral. After she got a referral, the clinic told her they would look into the funding and get back to her. However, the clinic never got back to her and Ms. Leung did not follow up. However, she does home exercises almost daily, using the movements and stretches she learned at her physiotherapy and active rehabilitation sessions.
- [28] The plaintiff went for three or four sessions with a registered psychologist in 2016, but stopped because she found she had too many things to do, was unable to cope, and became generally overwhelmed.
- [29] In January of 2019, Dr. Sun diagnosed her with depression and prescribed her an antidepressant medication. Ms. Leung found it made her heart race and breathing constricted, and that the medication, along with her anxiety about having taken it, kept her from sleeping. She called in sick to work the next morning and never tried the medication again. Ms. Leung didn't tell Dr. Sun that she stopped taking the medication. She says she raised the issue of the negative side effects with a resident physician she spoke to at her doctor's office, but that he treated the matter as unimportant. The plaintiff also failed to follow up on a referral to a psychologist made by Dr. Sun in January of 2019.

b. Life Events

- [30] In March of 2016, the plaintiff became pregnant and miscarried. She was sad and depressed, but continued working. She became pregnant again very shortly after, and J was born by caesarean delivery in December of 2016. For six weeks following J's birth, Ms. Leung's mother looked after K and did the household cooking and cleaning.
- [31] J's father, David, moved in to the townhouse in February of 2016, but out again in April of 2017. Ms. Leung testified that the break up and ensuing custody dispute resulted in a very stressful seven or eight month period for her. Custody terms were established giving David three consecutive days each week with J and residing with Ms. Leung the rest of the time.
- [32] The plaintiff does not deny that the events above caused significant stress and tumult in her life, but says matters resolved by the end of 2017 and there have been no further disruptions to her life.

c. Employment

- [33] Ms. Leung's pain makes it difficult to sit at a desk without changing positions every 30 minutes or so. Worksafe has provided her with a sit-stand desk, but she still needs to take breaks and do stretching exercises. She finds the computer work hard on her neck.
- [34] Ms. Leung says she cannot focus and concentrate as before and she takes longer to process claims. Unlike before, she finds it hard to complete her work. She feels demoralized and pessimistic about her work performance. She is concerned about her job security.
- [35] Worksafe provides each WRO with a weekly report that shows the daily average number of claims processed over the last week by members of the Wage Rate Unit (i.e., all WROs) and the daily numbers for that WRO ("WRO Report"). Ms. Leung testified that prior to the accident her individual numbers were generally better than average. No pre-accident WRO Reports were put into evidence, but a number of the plaintiff's 2018 and 2019 WRO Reports were. Ms. Leung testified that her post-accident WRO Reports indicate her current performance is inferior to her pre-accident performance. Ms. Leung says that her supervisor has spoken with her about her work performance post-accident, something that had never happened to her before.
- [36] Far more WRO overtime was offered in 2018 and 2019 than in previous years. There was no evidence provided as to why nor about how long the current practice might continue.
- [37] Ms. Leung says she did work some overtime post-accident, but found it hard on her physically and the effort rendered her unable to function the next day. She says that when she worked a Saturday as overtime, she had to take the next Monday off to recuperate. She ceased taking overtime.

- [38] Ms. Leung says she participated in some Worksafe job competitions for higher rated positions after the accident, but did not succeed in any. She conceded that employees senior to her may have also applied, but asserted that her anxiety and inability to concentrate impeded her during the evaluation process. Ms. Leung indicated she would consider applying for a lateral position (i.e., one at the same grade as WRO), should a position she was more able to perform be posted.
- [39] In January of 2019, Dr. Sun gave Ms. Leung a medical note for her employer stating that Ms. Leung had depression and should be assigned a lighter claim load. Ms. Leung chose not to provide the medical note to Worksafe. She says she was afraid the note might injure her chances in future internal job competitions.
- d. Household and Childcare
- [40] Ms. Leung testified that her neck and back pain and headaches render her unable to complete her household chores without assistance. She cooks and does light cleaning, but takes care not to overreach. She needs help to get the laundry hamper downstairs to the laundry room. She sits on a stool to use the washer and needs help transferring the laundry to, and then removing it from, the dryer. Mopping and vacuuming make her back pain flare, and she cannot deep clean the kitchen. She can change bed sheets, but needs help moving the mattresses to do so. She can clean a bathroom on her own, but needs to spread it out over several days as a project. She takes out small bags of garbage, but cannot carry a large one and cannot push the bins out for collection. She says she needs help to lift things, to unload the dishwasher, and to do grocery shopping beyond picking up a few basics.
- [41] Ms. Leung says she cannot play with her children as she would like to for fear of aggravating her pain. She struggles to pick up J, who is now a toddler, so she tries to distract him instead whenever possible. She seeks help to lift him if she possibly can.
- [42] Ms. Leung, and various other witnesses, have provided estimates of the amount of time spent by them, David or K, providing household assistance to Ms. Leung in various ways at various times.
- [43] Ms. Leung says her mother assists with laundry and the dishwasher. She estimated that prior to J's birth, her mother spent about 5 hours a week doing housework the plaintiff would have normally done but for her injuries and K spent about 5 hours a week.
- [44] After she recovered from her caesarian, Ms. Leung estimated her mother was helping about 10 to 12 hours a week, that David was doing about two hours when he was living there, and that K was doing 8-10 hours a week, but noted that it would take an adult half the time to do what K does.

[45] Since July 2017, her cousin and his partner, Mr. Young and Ms. Wicken, have been living with the plaintiff and have done much of the cooking, some of the heavier housekeeping and helped with the children. The plaintiff testified that after they moved in, her mother continued to provide assistance for about five hours in total each week. The latter assistance focussed on J, but also included laundry and spot cleaning.

e. Mood

[46] The plaintiff describes her current state as sad, anxious and depressed, with some days being worse than others. She says she has felt this way consistently for the last year.

[47] She finds work demoralizing. She feels she is unable to be a good mother, cannot keep up at home and that her inabilities are negatively impacting K's childhood. She considers K's household responsibilities excessive for his age and feels guilty that he does chores during time he would otherwise spend playing.

[48] Ms. Leung says she became anxious almost immediately after the accident. She has felt a consistent level of anxiety over the past year, largely arising from her inability to keep up with her responsibilities. She finds her worry and sadness impair her motivation.

[49] Although initially afraid, Ms. Leung now drives again, but is extremely cautious and avoids high traffic areas. She finds driving triggers her neck and back pain. She chooses to be a passenger whenever she can and she sometimes uses public transit notwithstanding the time inefficiency.

[50] Ms. Leung finds her ability to cope with stress is diminished. Prior to the accident, she dealt with stress by venting and moving on. Even though she vents more now than she did before and has learned some breathing exercises, she finds it difficult to get past things and becomes sad easily.

## V. LAY WITNESSES

a. Mrs. Lok Leh Leung

[51] Mrs. Leung is the plaintiff's 63 year old mother. She lives about 15 minutes' drive from the plaintiff's townhouse. Mrs. Leung does not work and her husband frequently travels, so she is often home alone. She readily agreed that she gets lonely and very much likes to visit her grandchildren.

[52] Mrs. Leung has a close relationship with her daughters. Before the accident, she generally saw them every weekend, either for lunch or shopping. She says that while before the accident, Ms. Leung was a happy and lively person without limitations, afterwards she was sad and needed assistance at the townhouse. Mrs. Leung estimated that in the period between the accident and J's birth, she spent about eight hours each week helping the plaintiff with basic housework such as laundry, dishes and cleaning the bathrooms.

[53] After J's birth, Mrs. Leung helped by changing diapers, bathing and feeding J - anything the plaintiff had trouble doing. Mrs. Leung would pick up K and J from their schools and continued to spend about eight hours a week doing household work. After Ms. Leung went back to work in 2018, Mrs. Leung continued to do laundry, as well as bathroom and kitchen cleaning and mopping of floors at the townhouse for about seven hours a week. Mrs. Leung testified that she did not do similar things for her other daughter, as she is capable and also has the help of her husband.

[54] Mrs. Leung described the plaintiff's physical condition at the time of trial as not as good as before the accident, noting in particular that Ms. Leung now does things slowly, but as better than it was after the accident. Mrs. Leung said that while the plaintiff has had pain over the past year, it was better now than before. With regard to the plaintiff's mood, Mrs. Leung described it as "okay now".

b. Kenzie Wong

[55] Mr. Wong has been the plaintiff's romantic partner since February of 2018. They both joined Worksafe in 2005 and had some initial training together, but have worked in different areas since. Prior to starting their relationship, they occasionally had lunch together or saw one another at events like children's parties. Mr. Wong has two children of his own, aged 9 and 15. Mr. Wong says Ms. Leung was a happy and very easy going person without limitations prior to the accident. His impression was that she was motivated to succeed at Worksafe.

[56] Mr. Wong says the plaintiff complains of back and neck pain if she sits or is on the phone for too long, noting the pain shows in her face and body posture. As Ms. Leung finds it difficult to sit through a movie, they sit at the very back so she can get up and move without blocking others. He says driving fatigues her. If they go to the townhouse for lunch on a workday, he tries to do heavier tasks like moving the laundry and unloading the dishwasher while he is there.

[57] Mr. Wong says K has a lot of chores and that he would not expect as much from his own children. He said K sometimes complains about the amount of time he spends on chores.

c. Delaney Wicken

[58] Delaney Wicken is the partner of the plaintiff's cousin, Alfredo Young. Ms. Wicken and Mr. Young moved into the plaintiff's townhome in July 2017.

[59] She says they rented from Ms. Leung on the general understanding that they had to help with household tasks. She says they later worked out that she and Mr. Young would, in addition looking after their own bedroom and bathroom, have the heavier tasks such as vacuuming, mopping and deep cleaning the kitchen as their "official duties", but that they also did things like unloading the dishwasher and tidying up. On cross-examination, she agreed that she and Mr. Young enjoyed cooking and made the most use of the kitchen and that it was appropriate for them to be responsible for cleaning it.

- [60] Ms. Wicken said she was not aware of the plaintiff's condition when they moved in, but came to understand she had back problems. Ms. Wicken said the plaintiff is not one to complain or talk about herself, but she noticed Ms. Leung would often have her hand to her back while going about the house, which Ms. Wicken interpreted as a pain indicator.
- [61] Ms. Wicken estimated that she and Mr. Young - "between the two of us" - spent 10 or 12 hours a week doing household tasks (including cooking and lighter tasks). She said of those, five or seven might be spent on the heavier tasks.
- [62] Ms. Wicken described K as "virtually always on call" to help the plaintiff with household tasks or J. She agreed that K and J are loving siblings who enjoy spending time together, but noted that K is often resentful when he is called away from play to come and do chores.
- d. Mr. Alfredo Young
- [63] Mr. Young is the plaintiff's cousin and the partner of Ms. Wicken. His testimony was generally consistent with Ms. Wicken's, however, his estimate was that he and Ms. Wicken spend two to three hours a week cleaning and, following the shared custody agreement, about one or two hours assisting with childcare for Ms. Leung's children. Thus, his evidence is that collectively he and Ms. Wicken spend six to 10 hours a week assisting with cleaning and children.
- e. Maggie Leung
- [64] Maggie Leung is the plaintiff's younger sister. Maggie lives in Burnaby with her husband and their two children, aged 5 years and 18 months at trial. Maggie is close with Ms. Leung and saw her regularly both before and after the accident.
- [65] Maggie describes the plaintiff as an outgoing and active person who kept her home very neat and clean without any difficulty prior to the accident. She says, comparatively speaking, Ms. Leung's home is now cluttered, with laundry and various other things lying about.
- [66] Maggie describes the plaintiff as a person who doesn't complain. However, following the accident, she observed her holding her hand to her back and having a pained expression when going up or down stairs, getting up and down from a seated position or putting away groceries. Maggie said Mrs. Leung regularly does household work for the plaintiff and helps out with J, as does K. Maggie agreed Mrs. Leung comes to her own home at least once a week as well, but that she plays with their children and does not do any housework at their home.
- [67] When asked to describe the changes to the plaintiff, Maggie said she is more anxious, easily stressed, and is notably less efficient in terms of her time management. Maggie has observed no improvement in the plaintiff over the last year. She said while the plaintiff used to invest time on healthy food selection and cooking for the family, now she generally does whatever is easiest and often gets takeout.

[68] Maggie said that prior to the accident, if Ms. Leung wanted to work overtime either she or Mrs. Leung would look after K for her.

[69] With regard to K's household chores, Maggie said, while she believes it is good for a child to help out, she would not ask her own children to do as much as K has been doing.

[70] On cross-examination, Maggie agreed that the increased number of people residing in the townhouse would naturally increase the amount of "things" in the house, but maintained that the clutter reflected Ms. Leung's lesser abilities. She agreed that the home was merely untidy, and not dirty.

f. Annie Chung

[71] Ms. Chung, like Ms. Leung, is a WRO at Worksafe. She has known the plaintiff for about 12 years and they have occupied back-to-back work stations for the last 10 years or so.

[72] Ms. Chung was on maternity leave at the time of the accident and only returned to work in August of 2015. She described Ms. Leung as an average worker prior to the accident. Post-accident she has noticed that the plaintiff has difficulty maintaining an appropriate attitude and tone at work when on the phone for more than 30 minutes or so. She said that, if anything, the plaintiff's work performance has continued to deteriorate over the last year.

[73] Mrs. Chung described the WRO position as requiring a lot of sitting, but no lifting. She noted that Ms. Leung has begun making more use of the capabilities of her sit-stand desk. She described their work pace as busy and the plaintiff as struggling to keep up now.

[74] Ms. Chung described Worksafe as an "average" employer, but agreed Worksafe pays well and tries to accommodate its employees.

g. Elizabeth Lemieux

[75] Ms. Lemieux is now a manager of client services at Worksafe, but was the plaintiff's manager from March 2010 through April 2016. Ms. Lemieux testified that during that period, she had between 37-44 employees under her supervision and she would see the plaintiff almost every day that both were at work.

[76] Ms. Lemieux described the plaintiff as a good WRO - "the higher end of average" - in terms of production results, quality of work, collegiality and customer service and complimented her documentation skills. She confirmed Ms. Leung was asked to mentor some new WROs during their introductory weeks of work in 2014 and 2015. In terms of WRO Report performance while she was manager, Ms. Lemieux described the plaintiff as "closer to the average or maybe above average on a regular basis". On cross-examination, Ms. Lemieux agreed that Ms. Leung had not been a top employee, but simply better than average.

[77] With regard to the plaintiff's career prospects at Worksafe, Ms. Lemieux said she would have encouraged the plaintiff to apply in internal job competitions, but that it would be hard to say whether she would have succeeded. Ms. Lemieux described Worksafe job competitions

as very competitive and noted that the recruiting criteria change frequently. On cross-examination, Ms. Lemieux clarified that she did not mean she would have encouraged Ms. Leung to apply for particular positions, but rather that it was her general management practice to encourage good employees to participate in the process.

- [78] Ms. Lemieux was asked about the consequences of a series of poor work performance reviews at Worksafe. She said the practice could vary somewhat from department to department and would also depend on how long the employee had been in the position, but the first stage would be an informal talk with the employee to see if there was something inhibiting their performance. If it was a longer term performance problem, Worksafe would "coach for success", which she described as a "what can we do to help?" approach to improvement.
- [79] If coaching did not result in improvement, the next step would be to involve the human resources department, and possibly to consider whether the employee would be better suited to a different position. She said Worksafe often learns that there is a medical issue in play at this point in the process. If so, Worksafe looks for medical input on what can be done to assist the employee to succeed. Should it turn out the performance problem is attributable to a permanent medical disability, the next step is typically to either see if the work and/or hours of the position can be modified to enable the employee to continue in that position or to try to identify other positions that might provide a long-term solution.
- [80] Ms. Lemieux agreed that if the ultimate accommodation reached was the existing position with a permanently modified work week that was less than full-time, the employee would be paid only for the hours actually worked, but noted that sick time and long terms disability benefits could provide supplementary pay in some circumstances. With regard to identifying a different, more suitable position as an accommodation, she described that as a team process involving the union. The goal is to identify a suitable position at the same pay grade as the original position, but if that is not successful, the accommodation may be a lower paying position.
- [81] Ms. Lemieux said Worksafe attempts to do all it can within reason to help struggling employees succeed. On redirect, she was asked what "within reason" meant in the context of a permanent disability. She stated that the focus would be whether the employee is able, with coaching and the involvement of the union disability team, to perform the core competencies of a position.
- [82] Ms. Lemieux also testified that after the first year of employment, the value of the benefit package provided to Worksafe employees constitutes roughly 10% of their total remuneration.

h. Dr. Joyce Sun

- [83] Dr. Sun was called as a lay witness. She has been the plaintiff's family physician for over 20 years. She testified that that Ms. Leung had had no treatment for headaches, neck or back pain, depression or anxiety, nor suffered any musculoskeletal injury, in the five years prior to the accident. She said Ms. Leung is a "low maintenance" patient who attends regular appointments, but does not come in for minor things. On the whole, Dr. Sun's evidence regarding the plaintiff's reported and Dr. Sun's observed symptoms from the accident through trial was consistent with Ms. Leung's evidence.
- [84] She confirmed that when Ms. Leung attended counselling in April and May 2016, she only went for about three sessions. She agreed that more sessions than that are typically required to address issues and said she did not know why Ms. Leung stopped going.
- [85] With regard to Ms. Leung's limited participation in active rehabilitation, Dr. Sun observed that her notes indicate Ms. Leung had been dealing with her custody dispute regarding J at that time. Dr. Sun agreed that although she referred Ms. Leung to a clinical counsellor when she diagnosed her with depression in January of 2019, Ms. Leung never went. Dr. Sun confirmed that Ms. Leung did not tell her that she was not taking the antidepressant Dr. Sun prescribed, and agreed that a wide range of antidepressants are available for trial use.

#### VI. PLAINTIFF'S EXPERT WITNESSES

a. Dr. Donald Cameron, Neurologist

- [86] Dr. Cameron provided a report dated February 10, 2019 concluding Ms. Leung suffered soft tissue and musculoskeletal injuries to her neck, shoulders and back in the accident, but neither a concussion nor any injury to her nervous system. In his opinion, Ms. Leung has a chronic pain condition with associated cervicogenic headaches and is a candidate for prophylactic medications like gabapentin and Lyrica and for botox injection therapy. Noting the amount of time passed, he is of the view the chronic pain and headaches will be permanent, but that his recommended treatments may reduce her symptoms.

b. Dr. Chris Babbage, Psychiatrist

- [87] Dr. Babbage opined on the plaintiff's psychiatric issues and made recommendations for rehabilitation, treatment and care. His assessment interview was conducted on November 7, 2018.
- [88] Dr. Babbage says Ms. Leung's chronic physical pain has evolved into a psychiatric condition, Somatic Symptom Disorder ("SSD"), with pain as the predominant focus. He says Ms. Leung has significant cognitive and mood symptoms that act as factors in her pain. In his view, her chronic pain and psychological symptoms have been intertwined for a number of years now and are mutually aggravating. He notes that she has persistent negative thoughts, feelings and behaviours about her pain and its effects on her daily life. In his opinion, her psychological factors play a significant role in the distress she experiences with regard to her physical pain.

- [89] He notes that in the context of her SSD, Ms. Leung has irritability, insomnia, loss of energy and some cognitive symptoms, as well as similar neurovegetative symptoms associated with her chronic physical pain. In his opinion, these symptoms have led her to worry excessively about her vulnerability to losing her job and her perceived lack of opportunity for promotions.
- [90] In his opinion, Ms. Leung also meets the diagnostic criteria for adjustment disorder with anxiety ("ADA"), which reduces her overall ability to cope with stress and also contributes to low energy, easy fatigability and decreased motivation. He says if her physical pain worsens, her ADA symptoms will worsen as well.
- [91] Dr. Babbage says having SSD and ADA put Ms. Leung at risk of developing major depressive disorder. (I note that while Dr. Babbage's report is dated March 9, 2019, his assessment interview with the plaintiff was done November 7, 2018, i.e., prior to Dr. Sun's January 2019 depression diagnosis).
- [92] Dr. Babbage states while SSD lacks a well-delineated natural course, negative prognostics include depressive symptoms and a sense of bodily weakness, both of which Ms. Leung has. He noted that while antidepressant medication and regular reassurance are used to treat SSD, only partial response is expected where the SSD is persistent. He says Ms. Leung is likely to have enduring symptoms and that his treatment recommendations are intended to maintain her "current level of function with future stress rather than remit her depressive, anxiety and cognitive symptoms".
- [93] Dr. Babbage recommends 12-24 sessions of psychotherapy for her ADA, to be followed yearly by about six maintenance sessions. Should her anxiety worsen or she develop clinically significant depressive symptoms, he recommends antidepressants. He also recommends exercise with a personal trainer or kinesiologist to help her with coping and physical management of her SSD and ADA.
- [94] On cross-examination, Dr. Babbage confirmed that SSD can wax and wane in accordance with stressors and pain levels, but said that once SSD is persistent, it is very hard to break the cycle between the physical and psychological aspects of SSD by treatment.
- [95] In his opinion, both Ms. Leung's ADA and SSD are a direct result of the injuries suffered in the accident. Although questioned at length about the role and impact of the post-accident events, Dr. Babbage remained solidly of the view that Ms. Leung's pain and SSD reduced her ability to cope with additional stressors post-accident, rendering her more vulnerable than she would otherwise have been. He noted that prior to the accident, Ms. Leung had been a quite resilient person.

[96] Dr. Babbage's opinion includes his views on the plaintiff's functional capacity to perform her job at Worksafe. I accept that it is within Dr. Babbage's purview to express a view on whether the plaintiff has, for example, difficulty concentrating and, if so, whether that difficulty amounts, in his opinion, to an impairment. However, I have given little weight Dr. Babbage's opinion where he has commented on the plaintiff's ability to perform the specific duties of the WRO position.

c. Dr. Andrei Krassioukov, Physiatrist

[97] Dr. Krassioukov provided expert evidence in the field of physical medicine and rehabilitation. In his opinion, Ms. Leung suffers from the following as a result of the accident: a concussion, cervicogenic headaches, soft tissue injuries (head, neck, shoulders, chest, lower back, and legs), left iliotibial band syndrome, chronic pain, depression, anxiety and post-traumatic distress order.

[98] He believes Ms. Leung initially suffered post-traumatic headaches, but agrees her current headaches are cervicogenic. For her neck and back pain, he recommends an ongoing home-exercise program and a trial of trigger point injections into the affected muscles. For her left leg, he recommends physiotherapy and anti-inflammatory medications and, if necessary, corticosteroid injections. For her chronic pain, he recommends a chronic pain management program (public or private) to learn self-management skills. He also recommends follow-up treatment with a physiatrist.

[99] Dr. Krassioukov says Ms. Leung's return to full-time work is a major positive prognostic factor of recovery, but also identified the following negative factors: (1) chronic pain (described as a major negative factor), which he believes she will have for the foreseeable future; (2) the unlikelihood of any meaningful reduction in her pain in the future; and (3) depression and anxiety (in his opinion, she already has moderate symptoms of both).

[100] Dr. Krassioukov disagreed with the suggestion that Ms. Leung had pre-existing conditions that contribute to her symptoms. He acknowledged her pre-accident chiropractor and massage therapy records could signal potential "aches and pains", but flatly rejected the suggestion the records could provide a basis for any medical diagnosis.

[101] Dr. Krassioukov testified that diagnosing concussion, depression and anxiety are part of his regular practice, but said he would defer to neurologists and psychiatrists with regard to treatment and prognosis on those matters.

## VII. DEFENDANT'S EXPERT WITNESSES

a. Dr. Barry Tessler, Neurologist

[102] Dr. Tessler provided a report dated January 23, 2019 based on his January 21, 2019 assessment of Ms. Leung. He found no evidence of nerve root or spinal cord injury and opined that the plaintiff had soft tissue injuries. He did not dispute the plaintiff's assertion that her pain is continuous and concluded it was likely her pain would "persist into the future in recurring sporadic fashion".

[103] Dr. Tessler agreed that memory is multi-factorial and pain, lack of sleep, depression, anxiety and medication can all impact memory, but was of the view that the memory difficulties reported by the plaintiff were of the everyday variety.

b. Dr. Kulwant Riar, Psychiatrist

[104] Dr. Riar provided an expert report dated April 20, 2019, based in part on a two hour assessment interview done April 3, 2019.

[105] The assumed facts portion of Dr. Riar's report includes the following paragraph, which he testified was based on information Ms. Leung provided during her assessment interview (emphasis added):

After the accident, she started to clean her house compulsively. It became her obsession in spring 2017. This was still going on at the time of my interview with her. She acknowledged that she is overdoing the cleaning and it is not needed, but she cannot help herself. Sometimes when at work she would leave and go home during lunch to clean. Also, at the time of going to bed, she would be thinking about these things. As she is spending so much time cleaning, she does not find time for other activities. She also loses time where when she gets absorbed in something, she cannot keep track of the time. By doing so, she is always late in going places. She is also excessively slow, although she feels rushed for everything. She always has something to do. When she is busy, she does not feel as anxious, depressed or sad.

[106] In Dr. Riar's opinion, Ms. Leung did not suffer a concussion in the accident and does not have either acute stress disorder or post-traumatic stress disorder. In his view, she has generalized anxiety disorder and depression, with the depression most likely being adjustment disorder with depressed mood or an unspecified depressive disorder. He considers her anxiety to be moderate and her depression to be mild. He was of the view that her anxiety disorder had transformed into an obsessive compulsive disorder (with her obsession being cleaning) of at least moderate intensity following J's birth. In his opinion, her memory problems and changes in demeanour were "part and parcel of her anxiety and depression", rather than from any other cause. In his view, she was unlikely to have developed anxiety and depression but for the accident.

[107] Dr. Riar concurred with Dr. Babbage's SSD diagnosis, and also agreed that it was rooted in the chronic pain resulting from her accident injuries. In his view, the stress of the post-accident events played a significant part in "perpetuating" and "aggravating" her SSD. He said her SSD was mild as of the date of his assessment interview (April 3, 2019), given that "she is able to work full-time and run her household, as well as take care of her two young children".

[108] On cross-examination, it was put to Dr. Riar, with regard to his categorization of the plaintiff's SSD as mild, that Ms. Leung struggles with her work, housework and childcare and is being assisted by others. Dr. Riar stated that the fact that she is able to function with some assistance is consistent with his characterization of her SSD as mild. He agreed, however, that if the plaintiff ceased to have that help available to her, her SSD would worsen, causing her function to further decline and making her more anxious.

[109] In Dr. Riar's opinion, the plaintiff has not yet been adequately treated for her psychiatric problems. He recommends an exercise conditioning program, psychotropic medications (especially antidepressants), and 12 sessions of cognitive behavioural therapy.

[110] On prognosis, Dr. Riar stated as follows:

As far as disability, I do not believe that Ms. Leung was disabled due to psychiatric reasons, but because of her psychiatric symptoms, some aspects of her life were not attended to. As far as short term psychiatric prognosis that is for the next four to six months, it is guarded, but with the above mentioned interventions, her functioning can be improved and the course of illness can be changed. As far as her long term prognosis, I tend to believe she will achieve remission from her presentation symptoms, but is it hard for me to say when. Once there is improvement in her anxiety, depression and obsessive compulsive behaviours, there will be improvement in her somatic symptom disorder significantly.

[111] Dr. Riar agreed that some people with SSD do not recover. In his view, the larger the psychiatric component of SSD is, the more likely the person will respond to treatment, but noted that every case is different.

[112] With regard to Ms. Leung's unnecessary cleaning, Dr. Riar rejected the suggestions that she meant she needed to bring the cleaning done by others up to her standards or that she knew she should clean less given her injuries. With regard to the objective state of her household, he noted that obsessive cleaning was not necessarily effective cleaning.

[113] Dr. Riar indicated that people with SSD often struggle to get treatment due to the associated feelings of being overwhelmed, unmotivated and fatigued, adding that confusion about the treatments available can be a significant obstacle for SSD sufferers and that their treatment should be actively managed by a physician.

c. Dr. Joseph Wong, Psychiatrist

- [114] Dr. Wong was qualified as an expert in physical medicine and rehabilitation and provided a report dated February 9, 2019. The gist of his report is that although his examination of Ms. Leung was compatible with some mild soft tissue injuries, her current pain stems from pre-existing conditions and is not related to the accident. He opined that Ms. Leung had pre-existing neck, back, leg and headache problems, a conclusion he based largely on his examination of her pre-accident chiropractic and massage therapy records.
- [115] To observe that Dr. Wong did not fare well on cross-examination is a significant understatement. The following is a non-exhaustive list of the problems with his evidence.
- [116] During cross-examination it became apparent that the report before the court had not been completed very shortly after the assessment as Dr. Wong had testified in direct and the date on his report indicated, but rather some two months later and after obtaining additional records from defendant's legal counsel. (I note that the defendant was represented at trial by different legal counsel.) It also came to light that there were draft reports that had not been disclosed in his expert file.
- [117] The handwritten chiropractic records relied on by Dr. Wong in his opinion were put before him on cross-examination, and it was evident that his reading of those records involved, in large part, guesswork. The plaintiff's treating chiropractor and the author of the notes, Dr. Richard So, was then called to speak to the records. Dr. So's reading of his notes and his evidence about the treatment he provided to Ms. Leung confirmed her pre-accident chiropractic treatment was preventative and not directed at any pre-existing injury or pain. The massage therapy records relied upon by Dr. Wong were, as noted by Dr. Krassioukov, not even remotely diagnostic.
- [118] While on cross-examination Dr. Wong did ultimately concede that the likely cause of Ms. Leung's pain and limitations was the accident, his demeanour, tone and responses on the road to that concession were inconsistent with that of an objective expert seeking to assist the court.
- [119] With respect to Dr. Wong's evidence, I accept only his ultimate concession on causation. To the credit of defendant's trial counsel, he did not much argue otherwise.

## VIII. ANALYSIS

- [120] As noted, the defendant conceded Ms. Leung was a credible witness. That said, it is evident from the defendant's position on a number of issues that the concession related to Ms. Leung's honesty and did not extend to her reliability. The distinction was succinctly noted by Horsman J. in *Derkson v. Insurance Corporation of British Columbia*, 2019 BCSC 2009:

[78] Credibility and reliability are different. While credibility is concerned with the veracity of a witness's evidence, reliability is concerned with its accuracy. A credible witness may give unreliable evidence if there is, despite the witness's honesty, reason to doubt the accuracy of their testimony of relevant events. Accuracy engages consideration of the witness's ability to accurately observe, recall, and recount: *R. v. H.C.*, 2009 ONCA 56 at paras. 41-42.

[121] I share the view that Ms. Leung is an honest witness. She was careful and measured in her testimony, and made an effort to describe things as accurately and fairly as she could. Her evidence was given without hyperbole or exaggeration. She answered responsively and was willing to make admissions against interest. She conceded that some of her injuries resolved fairly quickly and readily took responsibility for her decisions to discontinue or not pursue some treatments.

[122] There are, however, some reliability issues with her evidence. I will address these as I come to them.

a. Causation

[123] There is no dispute between the parties regarding the law of causation. Both parties accept the law as set out in *Athey v. Leonati*, [1996] 3 S.C.R. 458 at paras. 13-14, 17 and 19-20; *Chambers v. Goertz*, 2009 BCCA 358 at para. 22; and *Shongu v. Jing*, 2016 BCSC 901 at para. 162-63.

[124] The Defendant's closing submissions include the following:

The Plaintiff admits that the arrival of J and all that resulted was a stressful situation and that stress played a role in the Plaintiff's psychological difficulty. Moreover, the addition of a second child into the Plaintiff's family placed more time pressure on the Plaintiff which has in turn hindered her ability to seek treatment for her physical and mental conditions.

All that said the bulk of the medical evidence is consistent with the motor vehicle accident being at least a cause of the Plaintiff's injuries. In the result, it matters not if there are other contributing causes or aggravators of those injuries (*Athey et al*).

[125] The concession is well made. I find the accident is the cause of those of the plaintiff's injuries established on the evidence. While her post-accident life events may have contributed to some of her injuries and symptoms, they did not cause them.

[126] I also accept Mr. Leung's testimony regarding her pre-accident physical and mental status, the injuries she suffered in the accident (both as to those resolved and those persisting), as well as her subjective description of her pain. Her testimony in these respects was consistent with that of her supporting witnesses, both professional and lay.

b. Injuries

- [127] I find Ms. Leung suffered significant soft tissue and musculoskeletal damage to her neck, back, shoulder area and, less seriously, to her legs and chest, as a result of the accident. At trial, her persisting injuries caused Ms. Leung to suffer back (including the shoulder girdle area) and neck pain, as well as associated cervicogenic headaches. I find that Ms. Leung's chest, shoulder joint and leg injuries resolved in accordance with the timelines described in her testimony.
- [128] Notwithstanding Dr. Krassioukov's evidence, I do not find Ms. Leung suffered a concussion. As noted by Dr. Riar, she has clear and detailed recall of the aftermath of the accident and testified that her only point of impact with the car was with her airbag. The fact that she is a single mother who often drives with children in the car and was driving K's school route at the time of the accident is part of the context in which her instinct on impact was to look for K. In any event, the plaintiff is not relying on Dr. Krassioukov's concussion diagnosis as a basis for damages. She says that if she did sustain a concussion, it resolved.
- [129] I also reject Dr. Krassioukov's diagnosis of left iliotibial band syndrome. I accept Ms. Leung's evidence that her leg pain and numbness were resolved by trial.
- [130] I also reject Dr. Krassioukov's diagnosis of post-traumatic stress disorder. I consider that diagnosis beyond his scope of expertise. With regard to the depression and anxiety diagnoses, Dr. Krassioukov said he used some standard screening tests and testified that he deals with these issues regularly in the course of his practice. However, there are two reports filed in this matter by highly qualified psychiatrists providing detailed diagnoses. In the circumstances, I place no reliance on Dr. Krassioukov's psychiatric diagnoses.
- [131] I accept that Ms. Leung's back and neck injuries have resulted in chronic pain syndrome with associated cervicogenic headaches as described by Drs. Cameron and Krassioukov, as well as their evidence that neither her chronic pain nor her headaches are likely to ever go away. However, I agree that the fact Ms. Leung has kept working is a strong positive prognostic factor. Further, while her pain and headaches may be permanent, I agree with Dr. Cameron her symptoms can be lessened by taking the steps and medications recommended by him and by pursuing reconditioning and counselling regarding pain management as recommended by Dr. Krassioukov.
- [132] I accept that the plaintiff has SSD - a diagnosis Drs. Babbage and Riar agree upon, although they differ on prognosis.
- [133] Dr. Riar categorized Ms. Leung's SSD as mild. He believes Ms. Leung has a positive prognosis for her psychiatric problems, describing her short-term prognosis as "guarded", while indicating that in the longer term he thought it likely she would reach remission. With regard to the latter, he was unable to give any time frame for how long it might take.

- [134] Dr. Babbage described the impact of Ms. Leung's SSD on her as "significant" and sufficient to impact her daily functional capacity. Noting that SSD lacks a well-delineated course, he focussed on prognostic factors. He concluded that Ms. Leung's SSD is already established as persistent and, while strongly recommending treatment, he described the core mission as maintenance and not remission.
- [135] As outlined above, Drs. Babbage and Riar agree that Ms. Leung has a constellation of adjustment, anxiety and depression related disorders, although their diagnoses were not identical. Dr. Babbage interviewed Ms. Leung on November 7, 2018; Dr. Sun diagnosed Ms. Leung with depression in January 2019; Dr. Riar interviewed her on April 3, 2019. The diagnoses made have significant overlap, and the differences in them may reflect the fluidity of Ms. Leung's situation as much as variation in opinion. On the whole of the evidence, I conclude that, in addition to SSD, Ms. Leung has anxiety and depression disorders, currently trending more toward depression.
- [136] Dr. Riar's diagnosis of obsessive compulsive disorder, however, stands alone. There is nothing similar in Dr. Babbage's report and no lay witness described obsessive cleaning or any other obsessive behaviour. Mrs. Leung spent a great deal time with Ms. Leung in the period following J's birth, but noted nothing. Ms. Wicken and Mr. Young lived with Ms. Leung for years, and neither described repeated or unnecessary cleaning behaviour. Mr. Wong testified when they went from work to Ms. Leung's house for lunch, he would try do some heavier chores while there, but didn't indicate Ms. Leung was going there to do lunch hour cleaning.
- [137] I accept Dr. Riar's evidence that Ms. Leung spoke to him about her cleaning. I do not think he misunderstood and I am certain he did not make it up. That said, if Ms. Leung was obsessively cleaning, she managed to keep it a secret notwithstanding the amount of time she spends in the company of others. The compulsion would have to be relatively mild to allow obsessive behaviour to go undetected. I find that she made the statements and that she did so with some basis, but that her compulsion is far less extreme than Dr. Riar understood from what she said.
- [138] I accept Dr. Riar's opinion that Ms. Leung's SSD is mild as she has been able to work and look after her household and children, albeit with assistance. I accept that she can achieve at least significant remission by taking the medication and counselling and reconditioning programs recommended. I am also satisfied her other psychiatric issues, and in particular her depression, can be significantly improved by taking the recommended medications and counselling.
- [139] In my opinion, Dr. Babbage's prognosis regarding Ms. Leung's SSD and other psychiatric issues fails to adequately consider the fact that her back and neck pain can be lessened.

[140] I agree with Dr. Tessler's opinion that Ms. Leung's memory problems are of the everyday variety. She testified at length without any notable lapses or difficulties with word finding. Depression, lack of sleep and pain can impair concentration, but in Ms. Leung's case these underlying issues are amenable to treatment. As discussed, her pain can be improved; Dr. Babbage's evidence is that both her depression and sleep issues can be addressed with antidepressants.

[141] Overall, I am satisfied that the injuries and associated symptoms that I have accepted above all flow from the defendant's negligence causing the accident. There is a substantial connection between Ms. Leung's injuries and the accident and I am satisfied that but for the negligence of the defendant Ms. Leung would not have suffered her injuries. Ms. Leung's back and neck pain and headaches are chronic and likely permanent, although her symptoms can be lessened. Her SSD and other psychiatric disorders can also likely be meaningfully improved, provided she takes the recommended treatments for both her physical and mental conditions.

c. Damages

i. Duty to Mitigate

[142] The duty to mitigate requires a plaintiff to take all reasonable measures to reduce her damages, including taking treatment to alleviate or cure injuries: *Danicek v. Alexander Holburn Beaudin & Lang*, 2010 BCSC 1111 at para. 234. Whether the plaintiff acted reasonably is a factual question involving a consideration of all of the circumstances: *Gilbert v. Bottle*, 2011 BCSC 1389 at para. 202.

[143] The onus is on a defendant to establish a failure to mitigate. The defendant must meet the two-part test set out by the Court of Appeal 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.

[144] A summary of the proper approach was provided by Dickson J. (as she then was) in *Cummings v. Hitt*, 2015 BCSC 530:

[104] A defendant will not be held liable for loss and damages the plaintiff could have reasonably avoided. Accordingly, a plaintiff has a positive duty to mitigate by taking all reasonable measures to reduce the loss and damages caused by the defendant's negligence. This duty includes an obligation to undertake reasonably available treatment that would assist in alleviating or curing his or her related injuries: *Hsu. v. Williams*, 2011 BCSC 1412; *Gilbert v. Bottle*, 2011 BCSC 1389, para. 201.

- [105] Once the plaintiff establishes the defendant is liable for causing his or her injuries, the burden of proof shifts to the defendant. To succeed on a mitigation defence, the defence must prove: i) a rehabilitative program would have reduced or eliminated the effect of the injuries; ii) a reasonable plaintiff in the same circumstances would have followed such a program; iii) the plaintiff unreasonably failed to follow such a program; and iv) the extent to which the plaintiff's damages would have been reduced if he or she had followed such a program: *Harris v. Zabar*, 2010 BCSC 97.
- [106] The plaintiff's personality and condition before and after the accident are relevant circumstances for consideration in a mitigation analysis. The law does not require a plaintiff to do that which cannot be controlled, nor does it require perfection in the pursuit of rehabilitation. However, the law does require the plaintiff to make contextually reasonable and sincere efforts to limit his or her damages and loss: *Gilbert*, para. 203.
- [145] Dickson J. went on to apply the test to the facts. Her application provides a helpful illustration of what the duty to mitigate does and does not require in a personal injury case:
- [107] Counsel for Ms. Hitt submits that Ms. Eimer failed to mitigate her damages and loss by maintaining an active exercise program. In support of this submission, he notes Ms. Eimer made good progress in her recovery with physiotherapy and exercise in early 2008, but failed to continue the recommended exercise program at a local gym. Thereafter, she failed to follow medical advice to engage in active exercise because doing so caused her physical discomfort. According to her doctors, however, Ms. Eimer's accident-related pain and disability would have been reduced if she had exercised regularly, as advised. In consequence, Ms. Hitt submits, a reduction of 10 per cent to 33 per cent in Ms. Eimer's non-pecuniary damages award is warranted.
- [108] Counsel for Ms. Eimer submits there is no convincing evidence that her condition would have improved had she followed various treatment recommendations made by experts she consulted. He also emphasizes her limited financial means, which, in turn, limited the realistic treatment options available to her. All things considered, he says Ms. Hitt's mitigation argument is no more than speculative. Alternatively, he submits only a modest reduction is warranted.
- [109] I accept that Ms. Eimer was not obliged to undertake each and every treatment option recommended by the experts. For example, options such as trigger point injections, Botox and intramuscular stimulation were not consistently recommended and are not, on balance, proven reasonable measures to reduce her loss and damages. However, the same cannot be said of an ongoing active exercise program. Without exception, all experts testified, and I accept, that Ms. Eimer could and should have exercised regularly, despite the discomfort. Taking into account her early success with this approach, I also accept that she unreasonably failed to continue actively exercising regularly, which, had she done so, would have reduced her loss and damages.

[110] Given the foregoing, I conclude that Ms. Eimer's non-pecuniary damages award should be reduced for failure to mitigate. However, the evidence does not clearly demonstrate that her loss would have been reduced to a substantial extent had she exercised more actively, as she should have done. Taking into account all of the evidence, including Ms. Eimer's relatively better state in 2008 at the point she was discharged from the active rehabilitation program, I find her symptoms would have improved by at least 10 per cent had she exercised more vigorously and regularly. Accordingly, I would reduce the non-pecuniary damages award by 10 per cent to account for her failure to mitigate.

(See also *Wahl v. Sidhu*, 2012 BCCA 111 at para. 32; and *Morgan v. Galbraith*, 2013 BCCA 305 at para. 78.)

[146] The defendant asserts Ms. Leung either failed to pursue at all, or failed to pursue sufficiently, various treatment recommendations made to her. I will consider the arguments on the different treatment recommendations separately.

[147] Ms. Leung's evidence is that she tried physiotherapy, chiropractic treatment and massage therapy, but either found they offered only short-term temporary relief (e.g., massage therapy) or helped her improve for a period of time but then seemingly plateaued in terms of benefit (e.g., physiotherapy). Her actions in this regard are not unreasonable, especially given the limited amount of time she had available and the fact that the treatments failed to make any lasting difference. In any event, there is no evidence before me that continuing these particular treatments or sessions for a longer period of time would have reduced the plaintiff's claim for damages. The defendant's argument fails on both parts of the Chiu test.

[148] The defendant notes that the plaintiff failed to attend a kinesiology program recommended by Dr. Sun in March of 2016. However, the plaintiff miscarried in March of 2016 and became pregnant again in April of 2016. Dr. Sun's notes indicate that Ms. Leung was involved in a custody dispute with David around the time she stopped attending active rehabilitation sessions in 2018. I do not find it unreasonable for the plaintiff to give priority to motherhood and custody over treatment in these circumstances. In any event, the plaintiff did not fail or cease to exercise, but rather did exercises at home. She testified that she did exercises almost daily at home using the exercises and stretches that had been taught to her in physiotherapy and active rehabilitation. As discussed above, it is appropriate to consider what a reasonable person in the plaintiff's circumstances would have done. I am not prepared to conclude that she conducted herself unreasonably. The defendant's argument fails on the first part of the Chiu test.

[149] The plaintiff did not follow up on the mental health referral provided by Dr. Sun in January 19, 2019. She not only discontinued the anti-depressant prescribed due to side-effects, she failed to advise Dr. Sun that she had discontinued. The essence of Ms. Leung's evidence on the point is that she was overwhelmed and unable to cope at that point in time. At first blush, her conduct does seem unreasonable. However, both psychiatrists gave evidence that SSD significantly impairs motivation and reduces the ability to cope. Dr. Riars

testimony was that SSD patients are generally unable to manage the challenges and confusion of treatments and medications, and should be actively care-managed by a medical professional. Ms. Leung's treatment records and history disclose no such support or oversight.

[150] I find Ms. Leung's conduct in January 2019 was not unreasonable given her personal circumstances at the material time, including her medical condition at that time. In *Cassells v. Ladolcetta*, 2012 BCCA 27, the Court of Appeal said:

[26] I agree that if, by virtue of the injury sustained in an accident, a plaintiff is unable to make a reasonable decision about treatment, the plaintiff is in no different position with respect to mitigating the loss suffered than would be the case if, for other reasons unrelated to the accident, the plaintiff's capacity to make reasonable decisions about treatment was lacking. But I cannot accept that means the law prescribes a subjective test, modified or otherwise. *Janiak* is clear; the test is objective. I consider that if a plaintiff had the capacity to make the decision about treatment it is said ought to have been made, and the advice was sound, the mitigation question in each instance must be what would be expected of a reasonable person in the circumstances having regard for the plaintiff's medical condition at the material time and the advice given concerning treatment. If, through no fault of his own, the plaintiff did not have the capacity to make the decision the question would not arise.

[Emphasis added.]

[151] Our Court of Appeal has emphasized that the assessment is of what a reasonable person in the plaintiff's particular personal circumstances would do. In *Gill v. Lai*, 2019 BCCA 103, the Court said:

[26] In my view, under the subjective/objective test for the reasonableness of mitigation efforts, the trial judge was entitled to look to the respondent's personal circumstances to determine whether the course of action she took was reasonable. The subjective component of that test does allow a court to look beyond just whether the individual understood, appreciated, and was capable of following the advice given, and to look to their personal circumstances and ability to follow that advice. Further, the objective component of the test entitles the judge to look to what a reasonable person in that plaintiff's circumstances would do. ...

[Emphasis added.]

[152] This leaves the defendant's complaint that Ms. Leung attended only three or four sessions when she was referred to a psychologist back in 2016. This was an opportunity foregone either prior to or in the early stages of SSD. While there is no evidence indicating continued attendance would have been a panacea, I am satisfied that further counselling at that time would have put Ms. Leung in a better position than she finds herself at present.

[153] Psychological counselling is unlike massage therapy. It was not reasonable for Ms. Leung to decide for herself whether therapy was worth continuing. It was unreasonable for her to discontinue without discussing it with Dr. Sun. On the evidence, had she been consulted, Dr. Sun would have informed Ms. Leung that she had not taken enough sessions to obtain a benefit and advised her to continue.

[154] It is difficult to assess the degree to which continuing counselling in 2016 might have reduced Ms. Leung's damages. I accept that her back and neck pain and headaches would have been permanent in any event. The decision to discontinue counselling impacted her subsequent mental deterioration and her ability to cope with the pain. In the circumstances, I consider it appropriate to consider the issue of mitigation separately in respect of each head of damage: see *Mullens v. Toor*, 2016 BCSC 1645 at para. 107, *aff'd* 2017 BCCA 384.

## ii. Parties' Positions on Heads of Damage

[155] The plaintiff seeks the following:

Non-pecuniary

\$105,000

Past Loss of Earning Capacity

\$10,869 (gross)

Future Loss of Earning Capacity

\$140,000

Cost of Future Care

\$130,000

Past - Housekeeping Capacity

\$20,000

Future - Housekeeping Capacity

\$90,000

Special Damages

\$8,306

[156] The defendant argues for the following:

Non-pecuniary

\$50,000-70,000

Past Loss of Earning Capacity

10 days (if sick time is compensable)

Future Loss of Earning Capacity

\$0-25,000

Cost of Future Care

\$9,000

Past - Housekeeping Capacity

(subsumed in non-pecuniary)

Future - Housekeeping Capacity

(subsumed in non-pecuniary)

Special Damages

not disputed

### iii. Non-Pecuniary Damages

[157] Non-pecuniary damages are awarded to compensate for pain, suffering, loss of enjoyment of life and loss of amenities. The award should be fair to all parties and fairness is measured against comparable cases, keeping in mind that every case has a unique combination of facts: *Trites v. Penner*, 2010 BCSC 882 at paras. 188-189.

[158] I have considered the factors set out in *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46. I have taken into account, among other things, Ms. Leung's age at the time of the accident, the nature of her injuries as I have found them to be, and the impact on her life, work and relationships.

[159] Ms. Leung has almost constant pain and although the evidence is that it can be lessened and she can learn to cope with it better, there is no expectation she will be pain-free. Her sleep is disturbed and she is easily fatigued and irritated, however there are recommended treatments that should improve these symptoms, including medication to help her sleep. Both psychiatrists have indicated her depression should be treated with medication. She has anxiety, but the expert evidence indicates that medication and psychotherapy can help her with that as well. Although doing so makes her anxious, she still drives.

[160] She has missed quality time with her young children and feels guilty about not being the better mother she would have been absent the accident. She cannot play with her children as she would like to, and she feels her injuries and the obligations her injuries have imposed on K have negatively impacted his childhood.

- [161] Several witnesses described Ms. Leung as someone who does not complain. The fact that she has continued to work since the accident does not mean it does not cause her pain and require her to spend time recuperating. She cannot engage in recreational and social activities the way she did before and this has impacted her life and the way she spends time with her children. To her credit, she continues to be socially engaged, as evidenced by her relationship with Mr. Wong.
- [162] The plaintiff cites *Cumpf v. Barbuta*, 2014 BCSC 1898; *Wong v. Draaistra*, 2019 BCSC 908 [Wong]; and *English v. Jao*, 2016 BCSC 1975 in support of non-pecuniary damages in the range of \$105,000. The defendant argues in favour of the \$50,000 to \$75,000 range, citing *Luck v. Shack*, 2019 BCSC 1172 [Luck]; *Lamont v. Stead*, 2010 BCSC 432 [Lamont]; *Bissonette v. Horn*, 2012 BCSC 518; and *Harris v. Zabaras*, 2010 BCSC 97. I have reviewed the cited cases. They provide guidance but, as always, ultimately each turn on a unique combinations of facts.
- [163] Generally, the defendant's cases involve injuries less serious than Ms. Leung's. None involve SSD, which is a significant complicating factor: Wong, paras. 46 and 48. Ms. Leung's SSD causes her pain to seem worse. She also has developed anxiety and depression disorders and is no longer the happy, easy-going person she was pre-accident.
- [164] In Wong, the plaintiff had both psychiatric and physical injuries and was awarded \$120,000. However, Ms. Wong's chronic pain included thoracic outlet syndrome, and her social life was far more severely impacted than Ms. Leung's. Notwithstanding those notable differences, in other respects Wong has strong parallels with the present case. I find it appropriate in the circumstances to take the Wong award and adjust it downward to accord with my assessment of this case. I do so keeping in mind that the plaintiff in Luck was awarded \$75,000 in circumstances that would be comparable to this case but for Ms. Leung's psychiatric injuries.
- [165] I find the appropriate non-pecuniary award here to be \$90,000. However, this is a head of damages to which Ms. Leung's failure to mitigate is relevant. If she had continued her 2016 counselling, she would not have been without pain, but she would have better able to deal with it and her psychiatric issues might not be as developed as they are. It is hard to put a number on such a concept, but I am satisfied that if is fair to apply a 10% reduction, resulting in a non-pecuniary award of \$81,000.

#### iv. Past Loss of Earning Capacity

- [166] A helpful overview of the law regarding past loss of earning capacity was set out by MacDonald J., in Luck:
- [169] In *Smith v. Knudsen*, 2004 BCCA 613, the Court of Appeal set out the legal principles regarding past wage loss. The Court summarized the legal principles as follows:

[28] There are a number of decisions of this Court which accord with what was said by the Supreme Court of Canada concerning proof of future and hypothetical events. One of those cases is *Steenblok v. Funk* (1990), 46 B.C.L.R. (2d) 133, [1990] 5 W.W.R. 365. In that case, Hutcheon J.A., for the majority, after making reference to a number of authorities including *Mallett v. McMonagle*, supra; *Janiak v. Ippolito*, supra; *Schrump v. Koot* (1977), 18 O.R. (2d) 337; and *Kovats v. Ogilvie*, [1971] 1 W.W.R. 561, referred with approval to Smith and Bouck, Civil Jury Instructions (1989) on the instructions to be given to a jury about the different standards of proof. The instruction, which is set out below, was said to be modelled on what was said by Lord Diplock in *Mallett v. McMonagle*, supra:

### COMPARISON WITH STANDARD OF PROOF FOR ACTUAL EVENTS

5. In deciding what actually happened in the past, you must weigh the evidence and reach conclusions on a balance of probabilities. Anything more probable than not you should treat as certain. When you are asked to determine (what might happen in the future/what would have happened in the past but for the injury/loss), you must use a different method of proof. First you must decide if the event (is/was) a real possibility, you must then determine the actual likelihood of its occurring (at 138).

[29] That instruction accurately reflects the distinction made in the case authorities between proof of actual events and proof of future or hypothetical events. What would have happened in the past but for the injury is no more "knowable" than what will happen in the future and therefore it is appropriate to assess the likelihood of hypothetical and future events rather than applying the balance of probabilities test that is applied with respect to past actual events.

[Emphasis added.]

[170] To determine compensation for past wage loss, I must consider what the plaintiff likely would have earned, not what she could have earned, if she had not sustained her injuries. It is not a mathematical formula: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30; *Lui v. Bipinchandra*, 2016 BCSC 283 at para. 135; and *Hoy v. Williams*, 2014 BCSC 234 [Hoy] at para. 141.

[171] A plaintiff is only entitled to recover the net amount of their damages: s. 98 Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231; and *Lines v. W & D Logging Co. Ltd.*, 2009 BCCA 106 at paras. 152-186.

[167] The plaintiff quantifies her past loss of earning capacity as follows:

1. Initial period of 58 hours (eight days) at \$32/hour plus 1.5 hours of OT [overtime] at \$48/hour = \$1940
2. 2016 up to maternity leave as 5 days (36.25 hours) at \$32/hour = \$1,160
3. January to present leave of 5 days (36.25 hours) at \$37.22 = \$1349.23

4. August 2018 to present missed OT of 115 hours at \$55.83/hour = \$6,420.45

This combines to a total past gross loss of \$10,869.

[168] Ms. Leung's collective agreement was not put into evidence, but she testified without challenge that she accumulates sick leave days and can use them for income continuation in the manner of short term disability benefits should need arise. Ms. Leung is only 40 and may well need to draw upon her sick leave bank in the future. She is entitled to be compensated for the days drawn down from her sick bank after the accident: *Bjarnson v. Parks*, 2009 BCSC 48 at paras. 55-66. Her claim that she would have worked 1.5 hours of overtime in that same period is unchallenged. Accordingly, the \$1940 claim under plaintiff's subparagraph 1 is allowed.

[169] I agree with the defendant that the plaintiff has failed to prove any entitlement to the claims under subparagraphs 2 and 3 on the balance of probabilities. There is no evidence regarding the days claimed nor any linking of the claimed days to injuries sustained in the accident.

[170] With regard to subparagraph 4, the plaintiff put into evidence copies of emails sent by Worksafe announcing the availability of overtime. The plaintiff's evidence was that she removed the hours relating to days that J would have been in her care under the custody agreement. I accept that the plaintiff generally worked overtime when it was available prior to the accident, but a new and far more liberal regime for WRO overtime was in place during 2018 and 2019. Although her mother and sister readily assisted her with K under the old regime, it is unlikely that they would invariably have been available under the new one. Similarly, I find it unlikely that Ms. Leung would have been able to work all available hours. While the plaintiff has established the real and substantial possibility that she would have worked some of the overtime offered during this period, it is not realistic to suppose she would have worked overtime every time J was at his father's. Keeping in mind that this is an assessment and not a calculation, I would award her \$4000 for missed overtime.

[171] Thus, under past loss of earning capacity, I award the \$1940 and \$4000 for a total of \$5940.

[172] This head of damages is unaffected by the plaintiff's failure to mitigate.

v. Future Loss of Earning Capacity

[173] A detailed overview of the law of future earning capacity was helpfully set out by Kent J. in *Hoy v. Williams*, 2014 BCSC 234:

[153] A claim for loss of future earning capacity raises two key questions: 1) has the plaintiff's earning capacity been impaired by his or her injuries; and, if so 2) what compensation should be awarded for the resulting financial harm that will accrue over time? The assessment of loss must be based on the evidence, and not an application of a purely mathematical calculation. The appropriate means of assessment will vary from case to case: *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 (S.C.); *Pallos v. Insurance Corp. of British*

Columbia (1995), 100 B.C.L.R. (2d) 260 (C.A.); Pett v. Pett, 2009 BCCA 232.

- [154] The assessment of damages is a matter of judgment, not calculation: Rosvold v. Dunlop, 2001 BCCA 1 at para. 18.
- [155] Insofar as possible, the plaintiff should be put in the position he or she would have been in but for the injuries caused by the defendant's negligence: Lines v. W& D Logging Co. Ltd., 2009 BCCA 106 at para. 185. The essential task of the Court is to compare the likely future of the plaintiff's working life if the accident had not happened with the plaintiff's likely future working life after the accident: Gregory v. Insurance Corp. of British Columbia, 2011 BCCA 144 at para. 32.
- [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.
- [158] The capital asset approach involves considering factors such as i) whether the plaintiff has been rendered less capable overall of earning income from all types of employment; ii) whether the plaintiff is less marketable or attractive as a potential employee; iii) whether the plaintiff has lost the ability to take advantage of all job opportunities that might otherwise have been open; and iv) whether the plaintiff 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.); Gilbert v. Bottle, 2011 BCSC 1389 at para. 233; Morgan v. Galbraith, 2013 BCCA 305 at paras. 53& 56.
- [159] Though the capital asset approach is not a "mathematical calculation", the trial judge must still explain the factual basis of the award: Morgan v. Galbraith, 2013 BCCA 305 at para. 56.
- [160] The principles that apply in assessing loss of future earning capacity were summarized by Low J.A. in Reilly v. Lynn, 2003 BCCA 49 at para. 101:

The relevant principles may be briefly summarized. The standard of proof in relation to future events is simple probability, not the balance of probabilities, and hypothetical events are to be given weight according to their relative likelihood: Athey v. Leonati, [1996] 3 S.C.R. 458 at para. 27. A plaintiff is entitled to compensation for real and substantial possibilities of loss, which are to be quantified by estimating the chance of the loss occurring: Athey v. Leonati, *supra*, at para.

27, *Steenblok v. Funk* (1990), 46 B.C.L.R. (2d) 133 at 135 (C.A.). The valuation of the loss of earning capacity may involve a comparison of what the plaintiff would probably have earned but for the accident with what he will probably earn in his injured condition: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 at 93 (S.C.). However, that is not the end of the inquiry; the overall fairness and reasonableness of the award must be considered: *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 11; *Ryder v. Paquette*, [1995] B.C.J. No. 644 (C.A.) (Q.L.). Moreover, the task of the Court is to assess the losses, not to calculate them mathematically: *Mulholland (Guardian ad litem of) v. Riley Estate* (1995), 12 B.C.L.R. (3d) 248 (C.A.). Finally, since the course of future events is unknown, allowance must be made for the contingency that the assumptions upon which the award is based may prove to be wrong: *Milina v. Bartsch*, *supra*, at 79.

[161] The plaintiff may be able to prove a substantial possibility of future loss of income despite having returned to his or her usual employment and even where he has received a raise or obtained a promotion: *Perren v. Lalari*, *supra*; *Combs v. Bergen*, 2013 BCSC 321. There is no principle of law requiring the medical evidence to establish an impairment of earning capacity; rather, such impairment is established on the totality of the evidence: *Miscisco v. Small*, [2001] B.C.J. No. 2042.

[174] In addition, as indicated in *Luck*:

[176] Subjective fears and theoretical concerns are not enough to ground a claim for loss of earning capacity. As explained in *Kim v. Morier*, 2014 BCCA 63 [Kim]:

[8] In my view, the trial judge here did err in equating the loss of capital asset here with the plaintiff's own perception. As the cases demonstrate, that is not enough. The plaintiff must show that it is a realistic possibility she will be less able to compete in the marketplace - with economic consequences, not merely psychological ones. In my view as well, the trial judge's statement made after the award was pronounced, that Ms. Kim "may" be less capable of maintaining her disciplined approach to work also fell short. As we suggested to counsel this morning, the word "may" is essentially speculative and does not equate to a finding of a real possibility.

[175] The plaintiff argues the award for loss of future earning capacity should take into account the likelihood that she would have succeeded in obtaining a higher paying position, such as DAO. She says she had a 50% probability of obtaining a higher position through Worksafe's internal job competition process. She says that now, instead of that rising career path, she is at risk of losing her present WRO position.

[176] I am unable to accept either of those propositions on the evidence before me.

[177] There is no evidence about how often internal competitions are held, about the number of DAO and comparable positions that exist at Worksafe or how often those positions might be posted, nor of the number of applicants likely to apply if they were posted. There is no evidence that the plaintiff is a relatively competitive applicant for any of the positions she has identified.

- [178] Ms. Leung testified that she did poorly on the performance evaluation component in the competitions she has participated in since the accident. However, there is no evidence of the positions she applied for or whether she would have been realistically competitive for them but for the accident. There is also no evidence that the plaintiff did comparatively well on evaluation components in the competitions she participated in before the accident. I note that she has not fared well in academic settings in the past.
- [179] Ms. Lemieux was clear that she would have encouraged the plaintiff as a matter of general policy, not because she thought Ms. Leung would succeed in applying for any particular position. When asked, Ms. Lemieux declined to venture an opinion on whether Ms. Leung would have succeeded in any competitions, saying it depends on who else applies and how the recruiting criteria are set at any given time.
- [180] On the evidence before me, the proposition that Ms. Leung might have succeeded in some job competition for some position at some point of time is entirely speculative.
- [181] I am also unable to accept that Ms. Leung is actually at risk of losing her WRO position. Again, I find her to be an honest witness: she is genuinely concerned about it. However, her assessment of her work situation is coloured by her pain, frustration, depression and anxiety. As noted by Dr. Babbage, her symptoms have "led her to worry excessively about her vulnerability to losing her job and her perceived lack of opportunity for promotions" (emphasis added).
- [182] Ms. Leung said her supervisor has spoken with her about her work performance. On Ms. Lemieux's description of Worksafe's employment practices, the interaction was an informal and non-disciplinary one directed at supporting Ms. Leung in her position. The plaintiff did not enter any post-accident performance job reviews into evidence nor was Ms. Leung's current supervisor called as a witness. It is no part of Ms. Chung's position to review the work performance of other WRO's and Ms. Lemieux was not complimentary of Ms. Chung's own performance as an WRO, which undercuts the suggestion that Ms. Chung is in a position to credibly assess the performance of others.
- [183] With regard to the WRO Reports, Ms. Leung said that the time taken to process a claim can vary significantly, some are time-consuming while others are relatively straightforward, meaning the reports provide at best a partial measure of productivity.
- [184] Further, WRO reports do not provide feedback on whether daily "targets" were achieved - they report daily averages. By definition, individual WROs will fall on either side of the group daily average. In the post-accident WRO Reports put in evidence, Ms. Leung is sometimes below and sometimes above the group average. In many, she is only slightly below or only slightly above the group average. At worst, Ms. Leung's performance, to the extent it is measurable by these reports, appears to be solidly average. Average work performance cannot be achieved in the absence of core competency in a position, nor is it a ground for termination.

[185] The expert opinion given by the plaintiff's vocational rehabilitation consultant, Mr. Lawless, assumes that: Ms. Leung's job security is at risk due to lack of productivity; that Ms. Leung has cognitive impairments that significantly affect her job performance; and that Ms. Leung's capabilities are such that she is at risk of being terminated notwithstanding Worksafe's legal obligation to accommodate her disability. As these assumptions are inconsistent with my findings, his report is of little assistance.

[186] I am satisfied that Ms. Leung will very likely continue as a full-time WRO employee with Worksafe for the foreseeable future, and I am also satisfied that is what she would have done but for the accident.

[187] The defendant asserts that Ms. Leung has failed to establish any real and substantial chance of loss of future earnings, pointing to the following cases. I find these cases factually distinguishable:

- Chaban v. Chaban, 2009 BCSC 87: Ms. Chaban was less seriously injured; had a better prognosis, excelled on her return to work, and had returned to social and recreational activities albeit with some pain.

- Love v. Lowden, 2007 BCSC 1007: Mr. Love suffered lower back pain that minimally affected his comfort at work: paras. 73 and 74.

- Graydon v. Harris, 2014 BCCA 412: Mr. Graydon's personality, work history, current duties and age (65 at the time of trial) satisfied the court that Mr. Graydon's work would not be impacted nor his working life shortened: paras. 24 and 25.

- Smith v. Wirachowsky, 2009 BCSC 1434: the medical evidence did not establish a real and substantial possibility that the plaintiff would suffer pain or disability in the future: para. 96.

- Lamont v. Stead, 2010 BCSC 432 [Lamont]: Ms. Lamont's employer successfully modified her position so that Ms. Lamont could perform it without pain (paras. 44-47), limiting her potential future loss to the possibility of her voluntarily leaving that particular employer.

[188] In comparison, Ms. Leung is only 40, her prognosis includes permanent pain, she has compounding psychiatric conditions, and it is not possible to modify her WRO position or other clerical work so she can perform it free of pain (as noted by Mr. Lawless, all clerical positions require significant periods of sitting and/or standing in the same position).

[189] On the facts of this case, I find that there is a real and substantial possibility that Ms. Leung will suffer loss of earning in the future even if she continues as an WRO in that:

1. she will continue to experience back and neck pain and headaches;
2. she is primarily suited for clerical work, which involves sitting, standing and computer activities, and thus work will continue to trigger her pain;

3. constant pain takes a toll and becomes more difficult to tolerate with age (see *Morlan v. Barrett*, 2012 BCCA 66 at para. 41);
4. she is likely to draw on her sick bank at times when she would not have but for the injuries from the accident (thus reducing her sick bank availability for unrelated health matters);
5. her injuries place her at increased risk of further injuries;
6. she will likely continue to decline some overtime that she would have worked but for the accident;
7. if, for some reason (e.g., family relocation), she should need to find a new job, her injuries will give her a reduced value in the market place (e.g., as an employee who cannot perform mandatory overtime) (see *Lamont*, where \$25,000 was awarded to address the possibility of re-entering the job market).

[190] As found by Pearlman J. in *O'Brien v. Cernovec*, 2016 BCSC 1881 [O'Brien] at paras. 132-155 and Hinkson C.J. in *Walker v. Leung*, 2014 BCSC 1623 at para. 138-146, this type of factual scenario lends itself to the capital asset approach.

[191] There are additional negative and positive contingencies to take into account.

[192] Ms. Leung's job at Worksafe provides her with a pension and she testified the pension date is determined by a formula and she has a considerable amount of service years already. However, I am satisfied that as a single mother with two children, the latter of which was born when she was 38, Ms. Leung is likely to work to age 65 regardless of her pension eligibility age, but that it is unlikely that she will continue past age 65.

[193] It is possible that Ms. Leung, either with or without union assistance, may identify and obtain a lateral position that is suitable to her clerical skill set, but involves less pain to perform (e.g., one with less telephone time or less data entry time).

[194] I am satisfied that Ms. Leung would work a fair amount of overtime if it was available and she was capable of it. Further, as her children age, it would likely become easier for her accept overtime. However, there was no evidence as to why Worksafe has offered significantly increased WRO overtime in the last two years as compared to historically. It seems likely WRO overtime will continue at the present level for at least some time and, should it change, unlikely that it would be discontinued altogether as opposed to reverting back to the historical level.

[195] Looking at all of the contingencies, and taking into consideration that non-pecuniary damages have already been awarded to Ms. Leung, in my judgment an award of about 18 months wages is appropriate here. At the plaintiff's current level of remuneration, 18 months wages is about \$105,000.

[196] Taking the number \$105,000 and considering it in light of the factors supporting the factual finding of a real and substantial possibility of loss (i.e., missed overtime, additional sick time, and loss of value in the event of a return to the job market), I am satisfied that the amount is reasonable and fair to both parties.

[197] I am of the view that no deduction for the failure to mitigate should be made with respect to this head of damages. The failure to mitigate was a failure to continue psychological treatment at an earlier point in time. The factors supporting the finding of real and substantial loss under this heading can be supported by the plaintiff's physical injuries alone and, in particular, by her chronic pain syndrome.

#### vi. Cost of Future Care

[198] The applicable law was recently summarized by Mr. Justice Kent in *Dzumhur v. Davoody*, 2015 BCSC 2316 at para. 244:

[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.

See *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229; *Krangle v. Brisco*, 2002 SCC 9; *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.), *aff'd* (1987), 49 B.C.L.R. (2d) 99 (C.A.); *Aberdeen v. Langley Township*, 2008 BCCA 420; *Gregory v. ICBC*, 2011 BCCA 144; *Jacobsen v. Nike Canada Ltd.* (1996), 19 B.C.L.R. (3d) 63 (S.C.); *Penner v. ICBC*, 2011 BCCA 135; *Shapiro v. Dailey*, 2012 BCCA 128.

- [199] Madam Justice Sharma built upon that summary in *Sharma v. Chui*, 2019 BCSC 2115, adding the following paragraphs regarding adjustments and contingencies:
- [120] Assessment of damages under this head is complicated by the necessity to predict the future based on the evidence, but also make adjustments for contingencies: *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at para. 21. In *Bystedt v. Hay*, 2001 BCSC 1735 at para. 163, the court stated that the claim for cost of future care must be supported by evidence that demonstrates what a reasonable person of ample means would provide to meet the reasonable needs of the plaintiff. This is assessed on an objective basis that is fair to both parties.
- [121] However, the court must have some assurance that the plaintiff will incur the costs. Damages should not be awarded under this head if it is unlikely the plaintiff will avail herself of the services in future: *Maltese v. Pratap*, 2014 BCSC 18 at para. 78. In addition, whether adjustments are necessary to account for contingencies that are either positive (improvement in the plaintiff's condition) or negative (additional care will be required) depends on the specific care needs of each plaintiff: *Langille v. Nguyen*, 2013 BCSC 1460 at para. 234.
- [200] In closing argument, Ms. Leung's counsel anticipated the defendant would argue in favour of a "medical necessity" standard over a "medical justification" standard. In closing argument, counsel for the defendant cited paragraph 205 of the *Luck* decision, in which MacDonald J. quotes paragraphs 157 and 158 of *Brewster v. Li*, 2013 BCSC 744 [Brewster]. While the term "medically required" appears in the quoted portion of *Brewster*, counsel for the defendant did not advance an argument regarding the appropriate standard. In any event, I agree that medical justification is the applicable standard: see, for example, *Laliberte v. Jarma*, 2019 BCSC 968 at paras. 94 and 95.
- [201] The plaintiff submitted an expert report on future care by Jacqueline Abdel-Barr, occupational therapist and life care planner. Ms. Abdel-Barr's report is based in part on the plaintiff's medical reports and in part on her personal observation of the plaintiff at her townhouse. The plaintiff's economist, Mr. Benning, provided evidence regarding the present cost values for Ms. Abdel-Barr's recommendations.
- [202] The plaintiff did not seek all of the future care costs and items recommended by Ms. Abdel-Barr, but rather submitted that the following list of items and costs from her report were born out as reasonable on the evidence at trial:

Item

Duration

Present Value

Advil

Life Expectancy

2,682

Perching stool (x2)

One time

995

Vocational counselling

20 hours

1,403

Pain clinic

One time

15,059

Initial Psych Couns

One time (12-24 sessions)

3,563

Ongoing Psych Couns

Year 2 to age 67 (6/year)

17,975

Massage/ Chiro

Life Exp x (50% for

Pre-collision attendance)

12,759

Initial Case Manager

One time

3,919

Ongoing Case Manager

Year 2 to age 67

26,364

Childcare

First Year

4,200

Childcare

Years 2-10

25,697

Initial Kinesiology

One time

3,542

Kinesiology/Yoga

Life Expectancy

25,205

Plaintiff's global position

\$130,000

[203] The defendant, in response, says the plaintiff only reasonably needs the following:

Physiotherapy

25 sessions

1,975

Massage therapy

12 sessions

960

Chiropractor

25 sessions

1,325

Kinesiology

25 sessions

1,872

Psychological Counselling

18 sessions (\$125 per)

2,160

Medication

500

Defendant's global position

\$8,792

- [204] Ms. Leung attended chiropractic sessions and massage therapy before the accident and I find she would have continued to do so in a similar manner had there been no accident. However, she is now likely to do both more frequently and, in particular, to do so while re-conditioning her body through exercise. She may also attend physiotherapy during her re-conditioning period. I am satisfied that 50% of the amount claimed for chiropractic/massage is justified, with that total amount being for massage, chiropractic and any physiotherapy. The awarded amount, rounded up, is \$6300.
- [205] Drs. Babbage and Riar both strongly recommend psychological counselling. Dr. Riar described starting counselling as the paramount concern in treating Ms. Leung's psychiatric issues and Dr. Babbage indicated that counselling would also help with stress management, relaxation and coping abilities, all of which need to be addressed. Dr. Babbage recommended 12-24 sessions and "availability of some yearly maintenance sessions long term". Dr. Riar recommended "about 12 sessions". Dr. Riar said nothing about maintenance, but did say it wasn't possible to say how long it would take to achieve any remission and agreed that addressing her mood disorders was key to improving her SSD. Given the significance of this treatment in terms of her overall recovery, I consider the 24 months recommended by Dr. Babbage justified. Yearly maintenance for a period of time is also justified on the evidence, but not a need for that maintenance to continue to age 67. I find the \$200/session cost claimed by Ms. Leung to be reasonable as it is the same amount paid by Ms. Leung under the 2016 referral made by Dr. Sun.
- [206] The \$3560 claimed for initial counselling treatment is allowed. Only 30% of the amount claimed for maintenance counselling is justified. That amount rounds up to \$5400.
- [207] The evidence establishes Ms. Leung needs to be in an exercise program to re-condition and that oversight is required to ensure it is done properly. The involvement of a kinesiologist is justified with funding for an initial intensive year and annual follow-up evaluations. The plaintiff seeks 48 sessions for the initial period at \$73/session. The defendant values kinesiology sessions comparably. I am satisfied that an initial period of 48 sessions, along with an annual follow up to age 65 is warranted, for a rounded total of \$5300.
- [208] With regard to yoga, Ms. Leung attended a gym and exercise classes regularly before the accident. Ongoing kinesiology sessions have been awarded. I find a separate award for yoga is not justified.

- [209] Ms. Leung claims for child care to enable her to attend her related appointments and treatments. As J is very young and at least some appointments will likely be outside Ms. Leung's working hours, some childcare costs to enable her to attend medical, treatment and exercise appointments are warranted. I am satisfied she will need childcare for these purposes during the first 18 months of her recovery program. I award her \$6300, on the basis that is sufficient for the first 18 months and for occasional childcare requirements thereafter. Her treatment commitments will be concentrated in the first 18 months and K will soon be mature enough to look after J for short periods of time.
- [210] The cost of a private pain clinic is sought on the basis that publicly funded clinics have waiting lists of up to a year. A pain clinic provides an amalgam of related medical services, such as physiatry, psychology, physiotherapy and active rehabilitation sessions. Here, Drs. Babbage and Riar have recommended intensive counselling therapy and other medical services such as physiotherapy and active rehabilitation have been claimed and awarded separately. Notably, the pain clinic was recommended by Dr. Krassioukov, the physiatrist, who did not make separate recommendations for psychological counselling.
- [211] The private pain clinic claim is not justified. In light of the other treatments sought and awarded, it is not unreasonable for the plaintiff to put her name on a list to attend a publicly funded pain clinic, which clinic may or not be of use to her after her other treatments.
- [212] I am satisfied there is justification for a limited period of case management over Ms. Leung's recovery program. Dr. Riar indicated that SSD patients are generally overwhelmed by attempting to manage the recovery process. It is reasonable for someone to organize and co-ordinate treatments and medications and to ensure that appointments are attended and alternatives are explored. The claim for 18 months of case management at 3 hours per month and \$110/hour is allowed for a total of \$5940. I find there is no medical justification for case management services on an indefinite basis. It is the organization of appointments and trials of drugs and treatments that require oversight. Once the more intensive part of the recovery period is over and a regime is established, a manager is not warranted.
- [213] The plaintiff has testified that ibuprofen provides some relief from her pain and headaches. Her claim for \$2500 posits that she will likely take 1 to 2 pills every day for the rest of her life. While the defendant has countered with \$500 as a limit for over the counter medications, no basis was provided for that calculation. I am satisfied the plaintiff's \$2500 claim is a reasonable and justified.
- [214] The plaintiff seeks funds for two perching stools. One is said to be for use in her office. The claim for one (at \$450) is justified in light of Ms. Leung's evidence that she now does some chores while seated, however ergonomic office furniture is employment accommodation and should be available through Worksafe.

[215] The claim for vocational training is unjustified given the unlikelihood of Ms. Leung's leaving Worksafe, and the evidence that her qualifications and capabilities are limited to clerical and office jobs in any event.

[216] The total award for cost of future care is as follows:

Massage, Chiro and Physiotherapy:

6,300

Initial and Maintenance Counselling:

8,960

Kinesiology:

5,300

Childcare:

6,300

Case management:

5,940

Ibuprofen:

2,500

Perching stool (1):

450

TOTAL:

\$35,750

[217] I conclude that a 5% deduction for failure to mitigate should be applied to damages under this heading. The majority of these costs would be supported based on Ms. Leung's chronic pain syndrome alone. There is no evidence that her continued attendance at counselling in 2016 would have eliminated her need for counselling at this point in time, however, it can be fairly concluded that Ms. Leung's need for counselling would be less intensive now as compared to how it would have been had she continued in 2016.

[218] The total award for future care costs after deduction for the failure to mitigate is \$33,962.

#### vii. Loss of Domestic Capacity

[219] This head of damages was most recently addressed by the Court of Appeal in *Kim v. Lin*, 2018 BCCA 77, where Bauman CJBC, writing for the court, stated:

- [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.
- [29] In *McIntyre v. Docherty*, 2009 ONCA 448, the Ontario Court of Appeal appears to have gone farther and recognized that in some cases of loss of housekeeping capacity that pecuniary and non-pecuniary losses may be interdependent, and that a non-pecuniary award may be granted in addition to a pecuniary award:
- [59] In order to provide guidance for future cases, I now turn to consider the nature of the damages that arise in each of the scenarios of housekeeping losses outlined above in para. 21. I approach the scenarios mindful that pecuniary and non-pecuniary losses are often interdependent, so that a plaintiff's pecuniary award for a particular loss may have an impact on the non-pecuniary award in relation to the same loss.
- [60] At the same time, I observe that a plaintiff may not be fully compensated by a pecuniary award for past housekeeping losses, even one that provides for the complete costs of a notional or substitute homemaker. Despite such a pecuniary award, for complete compensation, the plaintiff may additionally require recognition in the non-pecuniary award of her or his loss of self-worth resulting from the inability to contribute personally to the well-being of the household.
- [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.]

- [31] This distinction is consistent with this Court's decision in *O'Connell v. Yung*, 2012 BCCA 57, where Kirkpatrick J.A. clarified that loss of housekeeping capacity was just that, a loss of capacity, or the loss of an asset that should be compensated as a pecuniary loss regardless of whether the replacement services which are used to value the loss and determine the quantum of the award are actually purchased:
- [33] Therefore, where a plaintiff suffers an injury which would make a reasonable person in the plaintiff's circumstances unable to perform usual and necessary household work -- i.e., where the plaintiff has suffered a true loss of capacity -- that loss may be compensated by a pecuniary damages award. Where the plaintiff suffers a loss that is more in keeping with a loss of amenities, or increased pain and suffering, that loss may instead be compensated by a non-pecuniary damages award. However, I do not wish to create an inflexible rule for courts addressing these awards, and as this Court said in *Liu*, "it lies in the trial judge's discretion whether to address such a claim as part of the non-pecuniary loss or as a segregated pecuniary head of damage": at para. 26.
- [34] Whichever option a court chooses, when valuing these different types of awards, courts should pay heed to the differing rationales behind them. In particular, when valuing the pecuniary damages for the loss of capacity suffered by a plaintiff, courts may look to the cost of hiring replacement services, but they should ensure that any award for that loss, and any deduction to that award, is tied to the actual loss of capacity which justifies the award in the first place.
- [220] Ms. Leung claims for both past and future loss of housekeeping capacity.
- [221] The defendant disputes both claims. With respect to the housekeeping done by Ms. Wicken and Mr. Young, the defendant says those services were provided as part of an arrangement under which they obtained discounted rent. The evidence did indicate household services were part of the rental arrangement from the outset.

- [222] With regard to K, the defendant says K's tasks are, for the most part, in the realm of "chores" as opposed to things the plaintiff would have ever paid someone to perform. With regard to Mrs. Leung, the defendant says she did nothing that she would not have done for Ms. Leung as a daughter in any event. Finally, the defendant says if Ms. Leung was, in fact, obsessively cleaning, she has no claim for loss of housekeeping capacity at all.
- [223] I have already addressed Dr. Riar's obsessive compulsive diagnosis. Further, even if Ms. Leung performed some tasks obsessively, it would not follow that she could therefore do all cleaning tasks without restrictions.
- [224] The defendant's position on Ms. Wicken and Mr. Young's rent seems self-defeating. If they were given a reduced rent in exchange for providing household services, that would amount to the plaintiff's monetizing their services. However, there was no evidence as to market rent and thus no basis for a finding.
- [225] With regard to K, I agree that it is reasonable for him to contribute as a household member. However, numerous witnesses testified that K contributes more than would generally be expected of a child his age. He has been providing at least some level of assistance that is attributable to the accident, although that contribution is countered somewhat by his relative inefficiency.
- [226] I agree that the vast majority of Mrs. Leung's contributions were things she would have done for the plaintiff in any event of the accident, especially given that Mrs. Leung had time on her hands while Ms. Leung is a working mother of two (including a newborn). This is especially true in relation to Mrs. Leung's intensive assistance during Ms. Leung's recovery period after J's birth.
- [227] Finally, the same factors that render Ms. Leung vulnerable to seeing her employment at risk may be at play in her view of her ability to perform housework. I agree with the defendant that it is appropriate to approach Ms. Abdel-Barr's assessment of Ms. Leung's needs with caution to extent they are based on subjective reporting.
- [228] Contrary to the factual findings urged by the plaintiff, I am satisfied that the plaintiff can significantly better her current symptoms if she undertakes the recommended medical treatments and actively and diligently pursues a re-conditioning program. Nonetheless, I am satisfied that there are some things she cannot do at all at present, some things that she is unlikely to ever be able to do alone, and that K is doing more than should be reasonably expected in the way of household chores for a child his age.
- [229] In the result, I am satisfied that, in relation to the period following the accident through to two years from the date of trial, the plaintiff is entitled to a pecuniary award for her loss of capacity to perform housekeeping. The plaintiff is likely unable to do strenuous household tasks, such as moving furniture, cleaning carpets or rotating things in storage, indefinitely.

- [230] Various witnesses have attempted to give estimates of hours of assistance provided in various different time periods, however, the plaintiff's household has essentially been in flux since the accident. People have moved in and out; more people does entail more cleaning and more clutter. There is no evidentiary foundation for a mathematical approach.
- [231] Ms. Leung seeks \$20,000 for the period from accident to trial. The amount reflects her estimate of the additional time she would have spent on housekeeping if not restricted by her injuries. In light of the offsetting factors above, I award her \$6,600. I am awarding a further \$6,600 in relation to the next two years to account for the fact that much of her off-work time will be spent in appointments and sessions rather than doing what she can, and for strenuous household tasks during that period.
- [232] With regard to strenuous household tasks long-term, the award of a further \$6,500 is warranted. I note that this amount approximates \$250/year at Mr. Benning's present value multiplier of 25.901.
- [233] The total award for past and future loss of housekeeping capacity is \$19,700 (6,600 + 6,600 + 6,500).
- [234] As this head of damages would be justified based on the plaintiff's chronic pain syndrome alone, there is no reduction for her failure to mitigate.

#### viii. Special Damages

- [235] With regard to collateral benefits, I accept Ms. Leung's evidence that her extended health benefits provider has requested repayment of her health expenses recovered from the collision.
- [236] With regard to special damages, the claim of \$8306 is undisputed and is therefore awarded in that amount.

#### IX. SUMMARY

- [237] The damages awarded under the various heads, as adjusted for the plaintiff's failure to mitigate, are as follows:

##### Non-pecuniary:

81,000

##### Past loss of earning capacity:

5,940

##### Future loss of earning capacity:

105,000

Cost of future care:

33,962

Loss of domestic capacity:

19,700

Special damages:

8,306

TOTAL:

\$253,908

## **X. TAX, INTEREST & COSTS**

[238] I leave it to the parties to consider the results in this judgment and address any tax and interest implications. Should they be unable to reach agreement on these matters, they are at liberty to make further submissions, with the plaintiff providing written submissions to the Court within 28 days of this judgment, and the defendant responding within 21 days thereafter.

[239] Absent any further submissions from the parties respecting costs, costs will follow the event and be awarded to the plaintiff to be assessed under Scale B of Appendix B to the Supreme Court Civil Rules. Should either party seek a different disposition of costs, that party is at liberty to make written submissions within 28 days of this judgment. The other party may respond within 21 days thereafter.

"Tucker, J."

---

## **Source & reproduction note**

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

**ORIGINAL SOURCE**      <https://www.bccourts.ca/jdb-txt/sc/20/02/2020BCSC0219.htm>

**CASE PAGE**              <https://chat.esheria.ai/case-law/canada/leung-v-draper-2020>

Prepared on 24 October 2026 · Esheria