
CANADA / JUDGMENT

Marois v. Pelech

2007 BCSC 1969

COURT

Supreme Court of British Columbia

DECIDED

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2007 BCSC 1969 Marois v. Pelech

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Marois v. Pelech,

2007 BCSC 1969

Date: 20071005

Docket: M031895

Registry: Vancouver

Between:

Gail Marois

Plaintiff

And:

Sandra Maria Pelech and

Dueck Chevrolet Oldsmobile Cadillac

Defendants

Before: The Honourable Mr. Justice Smart

Oral Reasons for Judgment

October 5, 2007

Counsel for Plaintiff

L. Trach

Counsel for Defendants

S. Read

Place of Trial:

April 2,3,4,5,11 and12;

July 24 and 25, 2007-11-27

Vancouver, B.C.

I. INTRODUCTION

- [1] On April 27, 2001, the plaintiff, Ms. Marois, was injured in a motor vehicle accident ("the accident"). The vehicle she was driving was struck a number of times from the rear by a vehicle driven by the defendant Pelech. The plaintiff's vehicle was pushed into oncoming traffic where it was struck by a third vehicle. The driver of the third vehicle is not a party to this litigation. Liability is admitted on behalf of the defendant Pelech. What are at issue are the physiological and psychological consequences of this accident to the plaintiff. Central to these issues is her credibility as a witness.
- [2] Although the damage to the plaintiff's vehicle from the accident was not extensive, of a value of approximately \$10,000, and the ambulance crew report describes the accident as a "low speed impact", the plaintiff alleges that the accident "has severely diminished her quality of life" and left her unable to work and properly care for herself, and that these consequences will likely continue for the remainder of her life. She seeks damages totaling \$821,000.
- [3] The defendants submit that the damages sought by the plaintiff are excessive and far beyond what she is entitled to receive. They submit that the plaintiff has exaggerated and embellished her injuries and the psychological consequences of the accident on her; that she has been untruthful in her testimony; and that she omitted relevant information and provided inaccurate information to some of the medical experts during her interviews with them. This last submission, they argue, undermines the weight I should give to the evidence of these experts concerning the plaintiff's injuries and disabilities and her future prognosis.
- [4] The defendants also argue that health problems the plaintiff displayed prior to the accident, and a motor vehicle accident she was involved in after the accident, should reduce the amount of damages I award. Finally, the defendants submit the plaintiff has failed to mitigate her damages and this too should reduce the damages I award.
- [5] I will begin by providing some further background to the issues raised in this litigation. I will then review some of the evidence of the pivotal witnesses, the plaintiff and her two daughters, Natasha and Sarah, and provide my assessment of their credibility as witnesses. Next, I will review some of the medical evidence and address the following questions: did the plaintiff suffer a mild traumatic brain injury as a result of the accident; does she suffer from depression and chronic pain as a result of the accident; what effect does her

subsequent accident in September 2002 have on her claim for damages for this accident? Finally, I will address the various heads of damages, counsel's submissions with respect to the damages I should award under those heads, and my analysis for arriving at the decisions I have.

- [6] In discussing the evidence I have been selective. There is other evidence that I will not review in these reasons, but which form part of the body of evidence that my decision is based upon. For example, there was much evidence given by the plaintiff and her daughters concerning the plaintiff's life before and after the accident. I will not review all of that evidence. Much of it is contained in the plaintiff's written argument.

II. BACKGROUND

- [7] The plaintiff was driving her 1998 Mazda 626 automobile at approximately 45 to 50 kilometres per hour, southbound on Knight Street approaching East 49th Avenue, when her vehicle was struck a number of times in the rear by a vehicle driven by the defendant Pelech. The plaintiff's vehicle was pushed into the oncoming northbound traffic where it was struck again by a northbound vehicle. The cost of repairing the damage to the plaintiff's vehicle was approximately \$10,000. The cost of repairing the damage to the defendant's vehicle, a 1998 Chevrolet Cavalier, was a similar amount. The cost of repairing the damage to the northbound vehicle, a Nissan Pathfinder, was approximately \$5,500.
- [8] The plaintiff testified about how frightened she was during the accident and that she believed, as she was being pushed into the oncoming traffic, she was going to die. After the accident, she was removed from her vehicle by Emergency Health Services paramedics and fire department personnel. She was transported to Vancouver General Hospital and assessed in the Emergency Department. Hospital records state that she was agitated and complained of pain in her neck, back, hip, abdomen, chest and ribs. They also state that she complained her teeth felt rough on her tongue. The Emergency Health Services crew report records similar complaints as well as "ankle pain". It describes her state of consciousness as "confused".
- [9] The plaintiff was discharged from Vancouver General Hospital a few hours after her admission. She testified that the immediate effects of the accident left her crying and shaking. She said she had tingling, bruising, neck pain, sore legs and hips, and other injuries. She said that she suffered from nausea and dizziness for about six months, could not eat, and had stomach problems.
- [10] The plaintiff testified that after the accident she became more and more depressed. She said she was in pain, was moody and upset, could not sleep, and at times, was suicidal. She described in detail the effect of the accident on her memory and her ability to make decisions, as well as a myriad of other difficulties she said she experienced as a consequence of the accident. She said that at the time of the accident she had just started working at a restaurant called Zorba's. She said she has not been able to work since the accident, other

than during a relatively brief and apparently unsuccessful effort to do so in 2003, at a restaurant owned and operated by her family.

- [11] The plaintiff testified that her sister calls her stupid. I infer from this evidence that this remark reflects her sister's assessment of how the accident has affected the plaintiff. It is unfortunate that the plaintiff called no family members to testify, other than her daughters.
- [12] The plaintiff has owned a home in White Rock since 1984. The evidence is that she has essentially abandoned this residence since her daughter, Sarah, left and moved into Vancouver in 2002. After Sarah left, Ms. Marois soon followed and began living at Sarah's new residence. More recently, Ms. Marois has been living in a basement suite at her mother's residence in the Kitsilano area of Vancouver.
- [13] Both the plaintiff and her daughters testified to the run-down and neglected condition of the White Rock residence. Mary Richardson's report (exhibit 2-5) provides a similar description. Ms. Marois's home and property, which she once carefully maintained, are now in such a state of disrepair and disarray that the home is virtually uninhabitable.
- [14] The plaintiff and her daughters described in detail the stark contrast between the plaintiff's life before the accident and the plaintiff's life after the accident. In some respects, a comparison can be drawn between the state of the plaintiff's home and property in White Rock and the state of the plaintiff's life before and after the accident. Both changed dramatically.
- [15] The plaintiff was involved in another motor vehicle accident after the accident that is the subject of this litigation. That accident occurred on September 28, 2002. The damage to her vehicle was approximately \$3,700. ICBC assessed Ms. Marois to be at fault. Ms. Marois testified that she intended to appeal ICBC's decision but forgot to do so.
- [16] When the accident occurred in 2001, Ms. Marois was 49 years of age. While her medical history demonstrates a pattern of relatively regular visits to her physician and to her chiropractor for treatment for a variety of complaints, Ms. Marois led a physically active life until the accident.
- [17] Essentially as a single mother, she raised two children. At the time of the accident, one child was in Grade 11 and the other was in third-year university. At the time of the accident, Ms. Marois was self-sufficient. She did her own yard work and home repairs. She was active in her community. In addition to caring for and maintaining her home and property and being actively involved in her children's lives, she was responsible for three properties that she owned in Vernon; a lot, an orchard (which she leased out), and a duplex (which she rented out). During the summers she did a variety of activities, including spending many hours picking fruit in her orchard. At her home she gardened, raised bees, played music, did crafts and enjoyed many activities with her children.

- [18] Her employment history in the years leading up to the accident was somewhat inconsistent. She worked part-time at the family restaurant. She worked certain months and then applied for, and received, Employment Insurance benefits during the summer and early fall. During these months she supplemented her income by selling produce and fruit from her orchard and garden and honey from her beehives. She received this income, described as "cash sales", while also receiving Employment Insurance benefits.
- [19] Ms. Marois estimates her cash sales amounted to approximately \$5,000 to \$8,000 annually. Her tax returns for the years 1995 to 2000 state that her total income from her employment and her Employment Insurance varied between \$11,000 and \$15,000 annually.
- [20] For a period of time in the late 1990s, Ms. Marois also worked at a greenhouse business.
- [21] Ms. Marois and her daughters testified that her active life and self-sufficient existence effectively ended after the accident. In the summer of 2002, her eldest daughter, Natasha, moved to Asia, and her youngest daughter, Sarah, moved to a residence in Vancouver to attend the University of British Columbia. Ms. Marois soon followed Sarah and moved in with her, essentially uninvited. She continued to reside with Sarah until Sarah left Vancouver in June 2006 to enter university in Israel.
- [22] Ms. Marois now lives alone in a basement suite in her mother's residence. She receives some assistance caring for herself from her family. Her activities include driving, doing some volunteer work, and attending medical appointments and treatment. She states that she remains depressed, in pain, and unable to work or care for herself beyond very basic needs and simple housekeeping duties. She testified that her relationship with her mother is different now and she does not talk with her sister.
- [23] She states that she has been improving since she began seeing Dr. Foran, in the summer of 2006. Her daughters testified that they have also noticed some improvement in their mother since then.

III. THE EVIDENCE OF GAIL, NATASHA AND SARAH MAROIS

- [24] The defendants vigorously challenge the credibility of the plaintiff. They also challenge the evidence of her two daughters. I will therefore address the credibility of these three central witnesses for the plaintiff.
- [25] Credibility includes both a witness's honesty and the reliability of his or her evidence. The evidence of a dishonest witness will rarely be reliable but the reverse is not necessarily true. The evidence of an honest witness may, despite his or her honesty, be unreliable.
- [26] There are various tests judges apply in assessing the honesty of a witness and the reliability of his or her evidence. Some of these tests include: the witness's attitude and demeanor; whether the witness has a motive or bias; whether the witness's evidence is internally consistent; whether the witness's evidence is consistent with other evidence; and the inherent probability or reasonableness of the witness's evidence. This latter test was

described many years ago in *Faryna v. Chorny*, [1952] 2 D.L.R. 354 at p.357, 4 W.W.R. (N.S.) 171 (B.C.C.A.), where O'Halloran J.A. said the following:

The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanor of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

- [27] It is necessary to remember that a witness's attitude and demeanor can be an unreliable measure for assessing credibility. It is important to scrutinize a witness's evidence by applying a number of the tests for assessing credibility, recognizing the significance of the inherent probability of the witness's evidence in the context of all of the evidence.
- [28] In assessing Ms. Marois's credibility, I find her to be a witness whose evidence I must approach with caution. Mr. Read, on behalf of the defendants, provided me with a number of examples of the plaintiff's inaccurate answers, or answers that are inconsistent with other evidence or previous statements she has made. I agree with many of his examples. Some of her answers cause me to question her honesty as a witness. Her explanation for going to see Dr. McLaughlin a few weeks before he was called as a witness seemed disingenuous. Her explanation for telling Dr. McLaughlin in the 1990s that she was suffering from "fuzzy thinking" seemed insincere.
- [29] Her regular pattern of obtaining Employment Insurance benefits during the summer while at the same time selling fruits and vegetables and honey for cash; her letter in August 2001 to the Employment Insurance office stating they had put her "into financial hardship with my 15-year-old daughter under duress to provide food for us"; and her statement to Dr. Tomita that she "made up complaints" in order to receive free massages from Dr. McLaughlin; are all examples of conduct that suggest a pattern of dishonesty for financial gain.
- [30] With respect to her statement to Dr. Tomita, it is not clear to me whether she was being untruthful with Dr. McLaughlin, or being untruthful with Dr. Tomita.
- [31] While I am concerned with Ms. Marois's honesty as a witness, I believe that some of the inconsistencies and inaccuracies in her evidence are the product of her poor memory and her difficulties in comprehending and processing information. I believe she is genuinely embarrassed by this and at times gave answers to questions she did not really understand in an effort to avoid appearing "stupid" - a word she used to describe herself. At times she gave answers to questions that were not only inaccurate but which were answers that functioned to her detriment rather than her benefit.

- [32] I believe the weaknesses in Ms. Marois's credibility are primarily based on the reliability of her evidence, rather than her honesty, but the result is that I must look for independent evidence, or additional facts or circumstances, to support her evidence before I can rely on it.
- [33] Mr. Trach, counsel for the plaintiff, submits that I can find such support or corroboration in the evidence of her daughters. While Mr. Read does not challenge their honesty, he does challenge the reliability of their evidence. I will therefore now discuss their evidence and whether I find it to be reliable. I will for ease of reference refer to them by their first names.

Natasha Marois

- [34] Natasha is now 29 years of age. She graduated in 2002 from the University of Ottawa with a Bachelor of Arts degree. She is currently living and working in Malaysia. In recent years, she has seen little of her mother although she has attempted to communicate with her regularly by telephone and e-mail.
- [35] Natasha testified that she was 12 years of age when her parents separated. Her father moved to Toronto. Although he provided financial support for her and her sister, they saw little of him. It was their mother who played the central role in their lives thereafter. Natasha described the active and full life her mother lived before the accident. She described her mother's interest in music, various crafts, gardening and other outdoor activities. She described how her mother cared for their home and yard and did repairs and maintenance herself. She described the elaborate meals her mother would make for family functions and the many activities the family did together. In short, she described a woman dedicated to her children and who lived an active and full life.
- [36] Natasha testified that virtually all of this ended after the accident.
- [37] Natasha was attending the University of Ottawa when the accident occurred. She was in her third year of university. She returned to White Rock at the end of May that year and lived at home with her mother and sister. She left at the end of the summer and returned to Ottawa to complete her degree. After graduating in the spring of 2002, she again returned home and lived with her mother and sister for several months before leaving to live and work in Japan. In 2003 or 2004, her mother visited her in Japan. Natasha also spent some days with her mother prior to testifying and had the opportunity to visit the White Rock property.
- [38] Natasha described in detail her perception of her mother's physical and emotional health during the summers of 2001 and 2002 and during her mother's visit to Japan. She testified that during the summer of 2001, her mother was largely bedridden and incapacitated. She would lie in bed "incoherent, almost childlike". She was in constant pain. Natasha described the dramatic changes in her mother's life and activities that summer and the following and the dramatic change in their relationship that occurred as a result of the changes in her mother's physical and mental health.

- [39] On several occasions while testifying, Natasha became emotional. In particular, this occurred when she described the changes in her relationship with her mother after the accident. She described her mother's visit to Japan. She testified that during this visit her mother spent most of her time sleeping. Natasha began crying when she described her mother's lack of interest in what she, Natasha, was doing. She testified that this was in stark contrast to her mother's keen interest in her life before the accident. I am satisfied that the emotion Natasha displayed during her testimony was genuine.
- [40] Natasha described her mother's difficulties in remembering phone numbers and dialing a phone number. She said it was as if her mother was "a bit retarded". She described her mother's poor memory, her poor motor skills, and her tendency to make mistakes, mix things up, and be easily confused. She said her mother had lost any interest in how she, her mother, looks and dresses. Again, this was in sharp contrast to the mother she knew before the accident.
- [41] Natasha described her recent visit to the White Rock residence. She said the house was run-down and in disrepair. She said it was overflowing with boxes of junk that her mother was incapable of deciding whether to discard or not. The boxes had accumulated to the point where it became difficult to move around in the house.
- [42] Natasha testified that before the accident her mother was her best friend. She confided in her mother about almost everything. She said that her mother was her biggest supporter. She said that after the accident all of this had been lost. Talking to her mother now was like talking to an empty shell.
- [43] It is clear that the plaintiff is not the only person affected by the accident. It has profoundly affected Natasha's life.
- [44] Natasha has noticed some improvement in her mother's health over the last year.

Sarah Marois

- [45] Sarah's evidence was similar to her sister's. She was 16 at the time of the accident. She was in Grade 11. She too had a very close relationship with her mother. She too now lives thousands of miles away from her mother. She is taking a Master's Degree in Middle Eastern history at a university in Israel. She left Vancouver in June 2006, after graduating from the University of British Columbia.
- [46] Sarah's opportunities to observe her mother's physical, emotional, and mental health since the accident has obviously been more extensive than Natasha's. She lived with her mother for the first five years following the accident.
- [47] Sarah described the dramatic changes in her mother and her mother's activities after the accident. She described not only the changes in her mother's physical health, but also her difficulties with her memory, with making decisions, and with concentration. She too described her mother as a shell of her former self. She became emotional when describing

the consequences of the accident on her mother and her mother's relationship with her. Again, I am satisfied that this emotion was genuine. Natasha and Sarah testified that as a result of the accident they had lost their best friend - their mother.

[48] Sarah described moving out of their home in the summer of 2002 to be closer to UBC for her first year of university and her mother following her and moving in,

essentially uninvited. Sarah testified that it was "like our roles were reversed". She described her observations of her mother's health and behaviour in the years following the accident.

[49] I believe that it is no coincidence that both Sarah and Natasha have moved thousands of miles away from their mother. Although they love their mother, I believe they found being near her after the accident so upsetting, so depressing, and so demanding that they concluded that they needed to move away in order to live their own lives.

[50] Since the accident, Sarah herself has suffered from depression. It is likely that her depression is directly related to the consequences of the accident on her mother and on her relationship with her mother.

[51] Mr. Read cross-examined both Sarah and Natasha in an effort to demonstrate that there were areas of their mother's life they knew little or nothing about. Counsel highlighted their lack of knowledge of their mother's complaints before the accident to Dr. McLaughlin about her health, her dispute with Employment Insurance, and the statements she made to Employment Insurance in her letter of August 2001. I am not surprised that there were areas of the plaintiff's life that she did not discuss with her daughters, or, if she did, that they do not now remember.

[52] I appreciate the bias that Natasha and Sarah have as witnesses in this trial. The plaintiff is their mother. Sarah may receive damages for housekeeping she did for her mother. I also appreciate that memories can become distorted with the passage of time. I recognize that at times they used similar words to describe their mother. However, I find they are both intelligent women who did their best to honestly describe the effects of the accident on their mother, and indirectly on them.

[53] I have weighed their evidence together with the medical evidence and the report of Mary Richardson. Ms. Richardson's description of the plaintiff's emotional state, dress and the state of the White Rock residence in December 2006 is consistent with the evidence of Sarah and Natasha.

[54] I also think it is significant to consider the life the plaintiff has lived over the last six years since the accident. In particular, where she has lived, what has happened to her home and property in White Rock, the loss of the quality of life she once enjoyed and the activities she once did, the loss of her sense of self-worth, and the loss of her relationship with her daughters. Is this all a ruse? Has she given up all of these things that were so important to her in a deceitful effort to avoid working part-time and to obtain a larger award of damages? When one looks at Ms. Marois's life before the accident, it is inconceivable to me that the life

she has lived since the accident is a fiction.

[55] Despite my concerns regarding the plaintiff's credibility, I accept the evidence of Natasha and Sarah and find that this accident has profoundly affected Ms. Marois physically, emotionally, and mentally.

[56] I will now review some of the medical evidence and the assessments and opinions of the various medical experts in relation to the reasons of these profound changes in the plaintiff's life and the likelihood she will improve in the future.

IV. THE MEDICAL EVIDENCE

Dr. Petrovic

[57] Dr. Petrovic has been the plaintiff's family physician since 1997. He provided two reports - one dated August 11, 2005, the other dated December 19, 2006. He also testified. Although not a medical specialist, he knows the plaintiff well. She has been his patient for ten years and visited him many times over that period of time.

[58] Dr. Petrovic summarizes some of his observations of the plaintiff and her complaints to him since the accident. These observations and complaints are consistent with the evidence of the plaintiff's daughters. Although Dr. Petrovic initially thought the accident likely caused a closed head injury, he has resiled from that opinion. I also note his evidence that individuals who suffer from depression are often volatile and may have good days and bad days. Assessments of them should be made over a period of time, not on the basis of how they are feeling on any particular day.

[59] At p.2 of his December 2006 report, he summarizes his opinion concerning Ms. Marois:

Thus in summary, Ms. Gail Marois was the driver of a vehicle that was rear-ended by another car on the date of April 27, 2001. Fortunately a proper three-point restraint seatbelt was worn at the time of impact. As a result of this MVA, she received a closed head injury and brain injury that has produced significant residual cognitive impairment with memory, concentration, and mental functioning. She has also suffered post-traumatic stress and depression for which she is receiving anti-depressant medication as therapy. She has also suffered significant physical injuries to her neck, upper back, lower back, and resulting tension headaches as well as tinnitus. Despite numerous therapies that have included physiotherapy, chiropractic treatment, numerous anti-inflammatories, analgesics, as well as anti-depressant medications, she has residual significant physical and mental impairments that impair her functioning and lifestyle to the point of being unemployable for five and a half years post-injury. A vocational assessment to assess her employment capabilities may be of benefit to see whether she is capable of work in any reduced capacity. Furthermore, a multi-disciplinary approach to further management may be of benefit as she has numerous physical and mental impairments. This I would leave up to ICBC to consider as a future possibility that may aid in her recovery. It is on this basis that both my short and long term prognosis remains quite poor as the patient continues to suffer ongoing and significant

physical and mental deficits.

Dr. Anderson

[60] Dr. Anderson provided an independent psychiatric assessment of the plaintiff. His report is dated October 13, 2006. I am mindful that during his interview of the plaintiff he was not informed about her health problems prior to the accident.

[61] At p.7 of Dr. Anderson's report he provides a summary of his assessment of Ms. Marois. He has numbered the paragraphs of his summary. I begin at para. 2:

2. As a result of the MVA Ms. Marois developed physical, cognitive and emotional difficulties.
3. With respect to her physical difficulties I will defer the etiology, diagnosis and prognosis to physical medicine specialists.
4. Cognitively, Ms. Marois has experienced concentration, memory and multitasking difficulties since the MVA occurred. Her cognitive functioning has improved during the past year with the lessening of her neck pain. However, she continues to have significant cognitive difficulties. Although it is possible that she may be experiencing ongoing cognitive difficulties from MTBI [mild traumatic brain injury], a more likely explanation is that they are due to other factors including pain, anxiety, depression, insomnia, fatigue, tinnitus and general stress.
5. Emotionally, in addition to chronic pain disorder, Ms. Marois developed a major depressive disorder shortly following the MVA. She continues to have a chronic major depressive disorder of moderate severity. Ms. Marois also likely developed a posttraumatic stress disorder (PTSD), shortly following the MVA. Her PTSD symptoms have reduced significantly over time but she continues to have ongoing symptoms consistent with chronic PTSD in partial remission.
6. Ms. Marois' difficulties listed above are likely due to the MVA of April 27th, 2001.
7. Ms. Marois would not likely have developed her present constellation of physical, cognitive and emotional difficulties if she has not been injured in the MVA of April 27th, 2001. Ms. Marois has had other unrelated stressors since the MVA occurred, including her daughter's depression, but she coped well with stressors prior to the 2001 MVA occurring.
8. As a result of her difficulties Ms. Marois has had marked decrease in the overall quality of her life. For example, Ms. Marois has difficulty doing recreational activities (e.g. swimming) because of her neck pain. Ms. Marois has had difficulty keeping her house clean and she should be assessed in the home by an occupational therapist to determine whether homemaking assistance is required.
9. There has been a strain placed on Ms. Marois' relationship with her family and others because of her emotional changes following the MVA (e.g. irritability).

10. Ms. Marois has not been able to work since the 2001 MVA occurred. Ms. Marois is not likely competitively employable due to the nature and extent of her physical, cognitive and emotional difficulties. Ms. Marois may be able to work part-time for a sympathetic employer in a low-stress, sedentary job.
11. I would like to make the following recommendations for further assessment and treatment of Ms. Gail Marois. ...

[62] At para.12, Dr. Anderson provides his long term prognosis for Ms. Marois:

12. Long-term prognosis for Ms. Gail Marois, from a psychiatric point of view, is guarded. In general, the longer psychiatric disorders last the less likely they are to respond to treatment.

Ms. Marois has had significant anxiety and depressive symptoms for over five and a half years. Despite further treatment and the passage of time, Ms. Marois will likely continue to have anxiety and depressive symptoms and not return to her premorbid level of emotional functioning. Ms. Marois will likely continue to be emotionally vulnerable and at risk of developing PTSD in future if she is exposed to further trauma.

In general, patients who have a chronic pain disorder for more than two years in duration continue to be symptomatic. Ms. Marois, however, has had a lessening of her pain during the past year since she started seeing Dr. Foran and I will defer the prognosis regarding her physical symptoms to physical medicine specialists. As long as Ms. Marois has significant pain, anxiety, depression, insomnia, tinnitus and fatigue she will likely continue to have cognitive difficulties. Given Ms. Marois' age and the nature and extent of her physical, cognitive and emotional difficulties, it is unlikely that she will be able to return to competitive employment in future.

[63] I found both Dr. Anderson and Dr. Petrovic to be reliable witnesses.

Dr. O'Connor

[64] Dr. O'Connor is a physiatrist. His reports are dated November 21, 2006 and March 8, 2007. I quote from p.2 of his November 21, 2006 report where he states the following:

It is my opinion that as a result of the motor vehicle accident she suffered the following problems.

1. Musculo ligamentous strain to the neck, mid-back and low back - She has gone on to develop a chronic myofascial pain condition involving the upper neck musculature, mid back and low back. This accident likely flared preexisting pain in the neck, shoulder and low back. Her pain in these areas in the past that was chronic likely predisposed her to chronic pain that she currently experiences. It does appear that her overall level of function declined after the accident and this decline is at least in part due to neck, mid-back and low back pain.

Prognosis - Given the longstanding nature of her symptoms, the likelihood or probability of spontaneous resolution of her symptoms is low and I suspect her symptoms will continue to be chronic. That is not to say there is no room for improvement as her treatments to date have been mostly passive except for the early days where physio did not seem to help.

[65] Dr. O'Connor provided his recommendations. He reviewed the chronic headaches and wrist pains, the soft tissue injury to the right knee, the post-traumatic depression, and the anxiety symptoms. He addressed the issue of whether she suffered a mild traumatic brain injury and at p.5 stated the following:

I cannot completely exclude the possibility of mild traumatic brain injury, given her immediate symptoms of confusion, headache and subsequently ringing in the ears but I suspect that the majority of these symptoms were related to her upper neck pain, referral symptoms from myofascial musculoskeletal pain, headache and mood and anxiety symptoms. That is not to say that any deterioration in her level of function is less relevant or valid in either situation.

One of the factor that suggest that a lot of her current cognitive dysfunction is related to the myriad of pain symptoms and her mood status is the fact that her cognitive symptoms have improved recently with improvement in her headaches and neck pain. She attributes this improvement to recent chiropractic treatments with Dr. Foran. This suggests that some of these cognitive symptoms are pain related. In addition she says her cognitive symptoms have improved since her daughter has left. I cannot explain improvement on this on the basis of a brain injury.

Disability

Overall, her global level of function has deteriorated as she is not currently competitively employable and I agree with this statement. She is not able to function at her previous level, working at two jobs and being able to multi-task or do several things at once. I do suspect that eventually she may be capable of some form of light duties in a structured environment, which may be possible down the road but currently her level of function and her ongoing mood and stress symptoms and chronic pain I think would preclude this.

Prognosis

Given the duration and degree of her ongoing symptoms, I suspect that return to her previous level of function is not going to happen. I do not suspect her symptoms will completely resolve. Dr. Anderson has commented on the prognosis with regard to her mood and psychological state. I think it is unlikely that her chronic neck, low back pain and headaches are going to completely resolve. Over the last six months of treatment with Dr. Foran she has noticed some improvement in her neck pain and headaches and for this reason I think there is still room for improvement. This, combined with a more regular active exercise program is probably her best chance for slow and continued improvement in the long term.

[66] I found Dr. O'Connor also to be a reliable witness. As with Dr. Anderson, I recognize that he was not provided certain information by the plaintiff and I must take that into account when assessing the weight to give to their evidence.

[67] In his report of March 8, 2007, Dr. O'Connor considered the Cost of Future Care report prepared by Mary Richardson. He states at p.1 of his report the following:

It is my opinion that the majority of the impairment likely relates to her cognitive and emotional difficulties. It is also my opinion that the majority of her cognitive difficulties are directly related to the emotional problems that are outlined in Dr. Anderson's report, including chronic pain disorder, post traumatic stress disorder, anxiety, depression and insomnia.

There are no medical contraindications to any physical duties around the home, recreationally or vocationally. The main determinant of whether she is able to return to these duties I think is going to be related to her psychological state and the success of treatment in this regard.

Dr. Hepburn

[68] Dr. Hepburn provided reports dated February 14, 2006, and March 13, 2007.

Dr. Hepburn also testified. In his report of February 14, he provides the following opinion beginning at p.11:

As regards current orthopaedic injuries, as far as I can determine Ms. Marois has not sustained serious orthopaedic injury in relation to her axial or appendicular skeleton. It does appear that she has likely strained and sprained the muscles and joints in the cervicothoracic area and possibly the thoracolumbar area. It does not appear that she has sustained serious axial injury in terms of disc prolapses in her axial spine. She had recently had a CT scan examination and I do not have the results of that.

As regards her complaints of headache, confusion, memory loss, alopecia, visual disturbance, and hearing problems I would defer to the others who have expertise in those fields. I only have a small amount of Dr. Smythe's opinion available in the documentation. However from the very tense and intense nature of Ms. Marois' presentation today, it is likely that at least part of her headaches may relate to tension neck and head ache. It does not appear that she has any indication that she has any significant radicular problems in relation to her upper and lower limb symptoms. I was not able to find any specific orthopaedic findings in relation to her appendicular skeleton that conform to any orthopaedic injury. It does appear that she may have from EMG tests, bilateral carpal tunnel syndromes and that may well be a multifactorial problem.

[69] He continues at p.12 of his report:

As regards the causation of these injuries, Ms. Marois certainly claims all of her symptoms subsequent to the accident relate to the accident itself. However, there was a subsequent accident in September 2002, as documented. That [may] well have exacerbated any preexisting symptoms she may have had subsequent to the accident of 2001. Also there is documentation on the 19th of January 2000, of a sore neck, shoulders and back, which was likely felt to be related to muscle pain, for which stretching and strengthening exercises were suggested as well as massage.

[70] At the bottom of this page, he writes:

It would seem therefore that previous collisions have caused similar symptoms though possibly Ms. Marois may have been largely asymptomatic at the time of her involvement in this collision. This may have initiated her symptoms, although these may well have been exacerbated by the other motor vehicle collision in September 2002.

In regards to prognosis, certainly in the absence of indication of serious orthopaedic or neurological findings, one would normally expect that strains and sprains in most individuals would gradually improve with time and with the appropriate stretching and strengthening programs. Ms. Marois however does not seem to have been [a] particularly active individual. She tells me she does do some exercises but she is very protective of her neck and shoulder girdle area and may tend to not do anything that she feels may exacerbate her pain. This may in fact not be beneficial in the long run. It does appear for reasons that are unclear that in about the last six months there has been an improvement in many of her symptoms.

As regards to disability though, Ms. Marois feels symptomatic in the areas noted, I certainly could not define any serious orthopaedic or neurological findings which would lead me to believe that she [is] physically disabled at this time from any employment that she would wish to undertake. Therefore I do not think that Ms. Marois is or would become permanently disabled.

[71] After receiving Ms. Marois's chiropractic records from Dr. McLaughlin and Dr. O'Connor's earlier report, Dr. Hepburn states at p.1 of his report of March 13, the following:

The chiropractic documents record Ms. Marois' attendance with Brian McLaughlin over many years with symptoms throughout the axial skeleton including the head, neck, shoulders, and with complaints of headaches and difficulty in thinking.

These records confirm that Ms. Marois has had very similar symptomatology for many years antecedent to her involvement in the collision of 2001 for which she saw the chiropractor on a regular basis for chiropractic treatment.

[72] Dr. Hepburn concludes at p.2 of this report:

As regards the cost of future care analysis, I do not believe Ms. Marois is physically disabled and I do not feel the recommendations in that report are appropriate.

Dr. Tomita

[73] Dr. Tomita testified in addition to providing a report dated March 15, 2007. He also is a psychiatrist and provided an independent psychiatric assessment. In his report he responds to certain questions asked of him by counsel. I quote the first question and part of his response:

1. Whether or not Ms. Marois did suffer a brain injury in the index accident.

It is unlikely that Ms. Marois sustained a brain injury in the motor vehicle accident of April 27, 2001. I base this conclusion on the fact that there is a lack of clear evidence of significant cerebral concussion and that Ms. Marois is suffering from other conditions, chronic pain disorder and major depressive disorder that are the likely sources of her current physical and cognitive problems .

There is data to suggest that Ms. Marois may have had pre-existing cognitive problems associated with painful conditions. The records from Ms. Marois's chiropractor, Dr. Brian McLaughlin, note that when Ms. Marois went for treatment of neck pain and back pains she also reported problems such as "brain feels "fuzzy""; "can't think straight"; and "thoughts cloudy" with these complaints dating back to 1997. This raises the possibility of pre-existing cognitive problems related to cognitive interference from painful conditions.

[74] Dr. Tomita answered two further questions and then responded at p.5 of his report to the fourth question:

4. Whether you agree with the rather guarded and pessimistic prognosis of Dr. Anderson with regard to treatment and recovery.

[75] His answer, in part, is as follows:

Ms. Marois's prognosis for recovery from her major depressive disorder is fair.

The prognosis for Ms. Marois's chronic pain disorder is more guarded but I expect further functional improvement even if her chronic pain symptoms persist.

Ms. Marois had pre-existing difficulties with neck pain, back pain and headaches. Based on the file information, Ms. Marois appears to have had a similar constellation of physical problems following the index accident; however, it was the cognitive problems with memory and concentration and depressive symptoms that appear to have aggravated her pain conditions and led to major psychiatric functional impairment. Therefore, I would expect that with the remission of her depression, Ms. Marois will continue to experience neck pain, back pain and headaches but that there will be a substantial improvement in her overall functioning. This is based on the improvement in functioning that she has had in the three weeks prior to my interview with her. I anticipate that Ms. Marois will continue to have improvement in house functioning, social functioning and recreational functioning.

[76] I have reviewed and considered Mary Richardson's report. I have also reviewed and considered the clinical records provided to me, including Dr. McLaughlin's records.

[77] I have considered the plaintiff's letter of August 29, 2001 to Employment Insurance where she states that the delays in processing her application had caused her "severe distress, emotional upset and depression and crying spells". The period of time she is referring to in her letter pre-dates the accident. I also note that the letter is a coherent, well written document. However, it is unclear how much assistance she received in preparing this letter from a lawyer who has since passed away.

[78] I will now turn to certain issues raised by Mr. Read in his closing submissions.

Did The Plaintiff Suffer From A Mild Traumatic Brain Injury?

[79] This issue is, of course, important to Ms. Marois's prognosis for future recovery. For the reasons Mr. Read advances at para. 5 of his written submissions, I find that it is unlikely that the plaintiff suffered a mild traumatic brain injury in this accident.

Does the Plaintiff Suffer From Significant Depression

And Chronic Pain As A Result Of This Accident?

[80] Despite Mr. Read's careful submissions on this issue, I find that she does. I find her complaints to Dr. McLaughlin and the symptoms he noted, prior to the accident, are consistent with her active, and at times physically demanding, work and lifestyle. Her complaints of fuzzy thinking are somewhat perplexing, but I accept that whatever caused these complaints and symptoms did not prevent her from engaging in a busy and active life. It was after the accident that her life changed dramatically.

[81] If what was recorded concerning her health, prior to the accident, made her more vulnerable to the injuries and the other consequences she suffered from the accident, this does not alter the defendants' responsibility to compensate her for those injuries and consequences. I appreciate that some of this information, as well as other information, was not provided to some of the experts, but I do not find that this significantly changes the collective weight of the opinions of Dr. Petrovic, Dr. Anderson and Dr. O'Connor, all of whose evidence I generally accept.

[82] I agree that the plaintiff's letter to the Employment Insurance office is troubling, but weighing its significance in light of all of the evidence, I find it more indicative that she is prepared to embellish or exaggerate for financial gain. This is why, as I stated earlier, I must assess the sincerity and reliability of her evidence carefully. I am mindful that she enrolled in a training course at the Surrey Women's Counselling Centre in the summer of 2001 but the evidence does not disclose that this was a demanding course or that the plaintiff did more than simply attend. One can spend most of the day in bed and get out for a few hours to attend a program or a medical treatment. No doubt attending such programs was what she was encouraged to do.

[83] Similarly, the fact that she worked for a period of time in 2003 at her family's restaurant does not mean that she was recovered and capable of joining a workforce where non-family members would be prepared to employ her. I also find that notwithstanding her pre-accident health complaints, she did suffer serious psychological and physiological consequences from this accident. I accept that they continue to cause her chronic pain as stated in Dr. O'Connor's report, and the other consequences as stated in the reports of Dr. Anderson and Dr. Petrovic.

Subsequent Accident

[84] I will now address the motor vehicle accident that occurred in September of 2002. This accident was on September 28. I have reviewed Mr. Read's written submissions at paras. 23 to 36. I am not satisfied that this accident had any significant adverse effect on the plaintiff's recovery from the accident. The damage to her vehicle was not extensive. I appreciate the complaints she made to Dr. Timmerman and Dr. Petrovic after the accident and I appreciate the clinical records show some improvement by her prior to this accident. However, as Dr. Petrovic said, individuals like the plaintiff who suffer from depression are volatile and will have good days and bad days.

[85] Dr. Hepburn stated that this accident may have exacerbated her symptoms from the first accident. I accept that it may have but I do not conclude that it did in any significant way. The plaintiff has had, at times, better days and better weeks, but the consequences of the April 2001 accident have remained relatively consistent and constant, at least until 2006.

[86] If I am wrong on this point, I would apply the reasoning of Shaw J. in *Ashcroft v. Dhaliwal*, 2007 BCSC 533, 47 C.C.L.T. (3d) 294 with respect to this issue of the consequences of the second accident. As he states at para. 44 of his decision:

The injuries [the plaintiff] suffered in the first accident were the foundation upon which the injuries in the second accident caused exacerbation and aggravation.

V. DAMAGES

1. Non-Pecuniary Damages

[87] Mr. Trach, in his written submissions, refers to portions of the reports of Dr. Anderson, Dr. Petrovic, Dr. O'Connor, Dr. Foran, and Dr. Tomita and distinguishes Dr. Hepburn's assessment. At p.18 of his submissions, he enumerates the consequences he submits the plaintiff has suffered as a result of the accident. He submits that the appropriate award under this head of damages is \$190,000.

[88] Mr. Read, in his written submissions, stresses the following points on this issue: the evidence does not support a finding that the plaintiff suffered a brain injury; the opinion and diagnosis of the experts are to a large extent dependent upon the credibility of the plaintiff and she is not a person whose word can be trusted; her pre-accident health problems and the September 2002 accident should significantly reduce any award of damages I might make; and there has been a lack of mitigation of her damages by the plaintiff.

[89] As I understand Mr. Read's oral submission, he suggests a range of between \$25,000 and \$40,000 for non-pecuniary damages, but fairly concedes that if I accept the plaintiff's claim with respect to the injuries she has suffered and find that the September 2002 accident is not a factor in determining the appropriate award, the range is between \$100,000 and \$120,000.

[90] As stated, I am not satisfied that the plaintiff suffered a mild traumatic brain injury. I am also not satisfied that the September 2002 accident had any significant effect on her injuries, physical or psychological. I also do not find that she has failed to mitigate her damages, particularly given that she is suffering from depression.

[91] I refer again to Shaw J.'s decision in Ashcroft. At paras. 54 to 56, he states the following:

In assessing the non-pecuniary damages, I take into account the facts and the medical reports set out above. In brief summary, Mrs. Ashcroft had a pre-existing spinal condition that was asymptomatic, but which might have become symptomatic in 10 to 15 years' time; otherwise she was in excellent health prior to the first accident. There is no evidence to suggest that when or if the pre-existing disc degeneration should become symptomatic, the symptoms would be anywhere near as serious as the symptoms caused by the accident.

As a result of the accidents, Mrs. Ashcroft's life has changed drastically for the worse. She is in constant pain. She is depressed and suffers from PTSD. She was a woman of enormous energy who thrived on her work outside and inside the home. Her essential identity has been taken from her. Her life was full of interest and joy; that has been taken from her. She is no longer that woman. Her prospects of improvement are uncertain.

I set non-pecuniary damages at \$120,000.00.

[92] Here, the plaintiff's employment was less significant to her. However, she lived a full and busy life. This has been lost over the last six years. It will continue to be impacted in the future. It is difficult to determine the extent of the impact given the nature of her health issues and given the concerns with respect to her credibility that I have already discussed. She appears to be improving. The video, surreptitiously filmed over several days and introduced into evidence, shows that she is improving. However, her prospects for further improvement are uncertain. I find that non-pecuniary damages should be assessed at \$130,000.

2. Past Loss of Earnings

- [93] Mr. Trach submits that I should award \$86,325 for loss of past income. He includes, under the title "mismanaging the plaintiff's rental properties", her farm and White Rock residence, which he submits could have generated significant rental income. He calculates the plaintiff's average wage loss over the last six years, including Employment Insurance benefits, adds to her evidence that she earned approximately \$5,000 in "cash sales" of fruit, vegetables and honey, and adds loss of rental revenue. He reduces the total to reflect the average foreign born female working in British Columbia with a high school education. He then reduces that figure further to take into account contingencies and taxes of 20 percent.
- [94] As I understand Mr. Read's oral submissions, while not resiling from his position with respect to the plaintiff's credibility and the consequences of the second accident, he submits the range is between \$10,000 and \$60,000, depending on my findings of fact.
- [95] I do not find the statistical averages helpful. I am not going to consider both cash sales and Employment Insurance benefits in assessing income loss. I also note that while the plaintiff averaged certain amounts of income over the six years prior to the accident, she was earning less than that average in the months leading up to the accident. Her employment at Zorba's restaurant was uncertain. It is not clear to me that given her age and her financial means that she would have been motivated to work full-time, or even as much as she had worked in the years leading up to the accident.
- [96] I must attempt to calculate an amount that is fair to the plaintiff, and fair to the defendants. Taking into account contingencies and taxes, I find that a reasonable estimate is \$65,000. I make that award.

3. Future Loss of Income

- [97] For the reasons I have expressed concerning calculating past income loss, calculating future income loss is a difficult exercise. Further, there is the potential for the plaintiff's health to improve. I refer to two decisions provided to me by Mr. Read.
- [98] The first decision is *Maslen v. Rubenstein* (1993), 83 B.C.L.R. (2d) 131, [1994] 1 W.W.R. 53 (C.A.). It is a decision of our Court of Appeal. Mr. Read directs me to the basic principles identified by Taylor J.A. beginning at para. 7. I will refer to a portion of the decision referred to me by Mr. Read, beginning at para. 15:

Mr. Justice Spencer in my view puts the over-all test quite correctly, in the course of his discussion of the "chronic benign pain syndrome" when he says:

From [the] cases I gather, and Mr. O'Grady frankly conceded, that there may be cases where a chronic benign pain syndrome will attract damages. That will happen where the plaintiff's condition is caused by the defendant and is not something within her control to prevent. If it is true of a chronic benign pain syndrome, then it will be true also of other psychologically-caused suffering where the psychological mechanism, whatever it is, is beyond the plaintiff's power to control and was set in motion by the defendant's fault.

[99] Justice Taylor continues:

The judge went on to find, on the balance of probabilities, that this was the case with Ms. Maslen's problems.

With respect to the evidence required in order to meet the onus lying on a plaintiff in such cases, Chief Justice McEachern (then sitting as a trial judge) in *Price v. Kostryba* (1982), 70 B.C.L.R. 397 (S.C.), repeating his observations in *Butler v. Blaylock* (October 7, 1981, Vancouver B781505 (B.C.S.C.)), put it thus:

I am not stating any new principle when I say that the court should be exceedingly careful when there is little or no objective evidence of continuing injury and when complaints of pain persist for long periods extending beyond the normal or usual recovery.

An injured person is entitled to be fully and properly compensated for any injury or disability caused by a wrongdoer. But no one can expect his fellow citizen or citizens to compensate him in the absence of convincing evidence -- which could be just his own evidence if the surrounding circumstances are consistent - that his complaints of pain are true reflections of a continuing injury.

So there must be evidence of a "convincing" nature to overcome the improbability that pain will continue, in the absence of objective symptoms, well beyond the normal recovery period, but the plaintiff's own evidence, if consistent with the surrounding circumstances, may nevertheless suffice for the purpose.

[100] Mr. Read also referred me to *Schellak v. Barr*, 2003 BCCA 5, 8 B.C.L.R. (4th) 245, another decision of our Court of Appeal. The judgment for the Court was given by Thackray J.A. I refer to para. 29 where Thackray J.A. states:

The appellants further submit that the test in *Yoshikawa v. Yu*, [1996] B.C.J. No. 623 (C.A.) has not been met. The principal issue in that case was the circumstances in which damages should be awarded with respect to chronic benign pain syndrome. This issue was argued as one of causation and the application of the decision in *Maslen v. Rubenstein* (1993) 83 B.C.L.R. (2d) 131 (C.A.).

In *Maslen*, Mr. Justice Taylor, for the Court, set forth the matters to be considered in assessing the issue of causation for chronic pain. The first is that it must be established that the pain is real. The second is that the plaintiff must establish that his or her psychological problems have their cause in the defendant's unlawful act. The "overall test" is set forth as follows

[101] After quoting from Taylor J.A.'s decision, Thackray J.A. continues at para. 32:

Counsel for the appellant on this appeal argues that the following passage from *Maslen* was not met by the trial judge:

Views expressed by doctors on the plaintiff's reliability, truthfulness or motivation cannot be decisive, for the law requires that these matter be decided by the court itself, and that they be decided on the basis of the evidence given at trial, which is often more extensive than, and sometimes different from, that on which medical witnesses have formed their opinions.

[102] Having referred to these cases, I add that while I have quoted extensively from these medical reports and have placed reliance upon them, I recognize that it is my responsibility to determine credibility and determine damages, not that of the experts. I have done so in this case with their assistance, but based on my assessment of the evidence as a whole.

[103] Mr. Trach has submitted that I should conclude that the plaintiff would have worked until she was at least 67 years of age. In his written submissions, he argues that an appropriate award under this heading of damages is approximately \$270,000.

[104] The issue of future wage loss was addressed by Brown J. in a recent decision, *Erickson v. Bowie*, 2007 BCSC 1465, [2007] B.C.J. No. 2140 (QL). I refer to her decision beginning at para. 38 where she states:

I turn first to future loss, or loss of capacity. I am satisfied that the plaintiff has suffered a significant loss, whether the loss is termed a loss of opportunity or a loss of capacity. In the words of Finch J.A. (as he then was) in *Pallos v. Insurance Corp. of British Columbia*, [1995] 3 W.W.R. 728 at 737, 100 B.C.L.R. (2d) 260 (C.A.), Mr. Erickson has a permanent injury, which limits his capacity to perform certain activities and impairs his income earning capacity. The difficulty in this case is quantifying the loss.

[105] Brown J. continues at para. 47 and quotes again from *Pallos*:

The cases to which we were referred suggest various means of assigning a dollar value to the loss of capacity to earn income. One method is to postulate a minimum annual income loss for the plaintiff's remaining years of work, to multiply the annual projected loss times the number of years remaining, and to calculate a present value of this sum. Another is to award the plaintiff's entire annual income for one or more years. Another is to award the present value of some nominal percentage loss per annum applied against the plaintiff's expected annual income. In the end, all of these methods seem equally arbitrary. It has, however, often been said that the difficulty of making a fair assessment of damages cannot relieve the court of its duty to do so.

[106] She continues at paras. 48-49:

The Court of Appeal has repeatedly warned against taking "too mathematical" an approach when assessing damages for loss of capacity.

The principles that apply are set out in *Rosvold v. Dunlop*, 2001 BCCA 1, 84 B.C.L.R. (3d) 158 at paras. 8, 11, and 18:

The most basic of those principles is that a plaintiff is entitled to be put into the position he would have been in but for the accident so far as money can do that. An award for loss of earning capacity is based on the recognition that a plaintiff's capacity to earn income is an asset which

has been taken away: *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229; *Parypa v. Wickware* (1999), 65 B.C.L.R. (3d) 155 (C.A.). Where a plaintiff's permanent injury limits him in his capacity to perform certain activities and consequently impairs his income earning capacity, he is entitled to compensation. What is being compensated is not lost projected future earnings but the loss or impairment of earning capacity as a capital asset. In some cases, projections from past earnings may be a useful factor to consider in valuing the loss but past earnings are not the only factor to consider.

The task of the court is to assess damages, not to calculate them according to some mathematical formula: *Mulholland (Guardian ad litem of) v. Riley Estate*, (1995), 12 B.C.L.R. (3d) 248 (C.A.). Once impairment of a plaintiff's earning capacity as a capital asset has been established, that impairment must be valued. The valuation may involve a comparison of the likely future of the plaintiff if the accident had not happened with the plaintiff's likely future after the accident has happened. As a starting point, a trial judge may determine the present value of the difference between the amounts earned under those two scenarios. But if this is done, it is not to be the end of the inquiry: *Ryder (Guardian ad litem of) v. Jubbal*, [1995] B.C.J. No. 644 (C.A.) (Q.L.); *Parypa v. Wickware*, *supra*. The overall fairness and reasonableness of the award must be considered taking into account all the evidence.

The assessment of damages is a matter of judgment, not calculation.

[107] I must take into account taxes and contingencies. I must also take into account the fact that the plaintiff may not have been motivated to continue to work given her other interests, her properties, and her relative financial independence. I conclude that an award of \$120,000 is appropriate, and I make that finding.

4. Future Loss of Housekeeping and In-Trust Claim for Sarah Marois

[108] The plaintiff refers me to Burnyeat J.'s decision in *McTavish v. MacGillivray*, [1997] B.C.J. No. 1693 (S.C.) (QL), approved by our Court of Appeal at 2000 BCCA 164, 74 B.C.L.R. (3d) 281. She seeks an award of \$36,000 for herself and \$20,000 for Sarah.

[109] I agree with the trust claim for Sarah. I make that order for the reasons submitted by Mr. Trach.

[110] I do not agree with the amount claimed by the plaintiff for herself. She has done minimal housekeeping. She is not able to. This is the reason that it was necessary for Sarah to do most of the housekeeping and why the damages I have awarded for her are, in my view, appropriate. It is the reason that her family continues to assist her now. It is the reason that the White Rock residence is in the state that it is.

[111] In the circumstances, I make an award for housekeeping to her of \$6,000.

5. Cost of Future Care and Future Housekeeping

[112] I now address cost of future care and future housekeeping. Mr. Trach submits that an appropriate award is \$210,000. He refers me to the reports of Dr. Anderson, Dr. Petrovic, Dr. O'Connor and the plaintiff's life expectancy of almost 30 additional years. Mr. Read submits that there is insufficient evidence to prove that the need for any ongoing treatment is related to this accident. For the reasons I have already stated, I disagree. On the other hand, the plaintiff is improving and may continue to improve in the future, at least to the extent of being able to care for herself. It would have been helpful to have had evidence from a family member, in addition to her daughters, on this issue.

[113] The economist has provided a "low-cost scenario" of approximately \$130,000 and a "high-cost scenario" of approximately \$290,000. Mr. Trach suggests the midpoint of \$210,000. I am satisfied that the low-cost figure is appropriate given her recent progress since seeing Dr. Foran and her improvement in carrying out simple tasks as demonstrated in the video. I therefore award an amount of \$130,000. With respect to tax gross up, the plaintiff has requested that the parties be allowed to speak to this issue after judgment. I will therefore defer this issue.

6. Special Damages

[114] The plaintiff seeks special damages of \$8,670.40. The defendants submit that the plaintiff would have sought chiropractic treatment in any event, given her past history of doing so. While that may be correct, it is somewhat speculative to estimate how often she would have attended if she had not been in the accident. I will, however, reduce the amount to \$1,500, approximately one-half of the total for Dr. Foran and the other chiropractor. The special damages therefore are \$7,170.40.

VI. CONCLUSION

[115] To summarize, I have awarded damages in the following amounts:

Non-pecuniary damages \$130,000.00

Past income loss \$ 65,000.00

Past loss of housekeeping \$ 6,000.00

In-trust for Sarah Marois \$ 20,000.00

Loss of future capacity \$120,000.00

Future care and housekeeping \$130,000.00

Special damages \$ 7,170.40

The total amount I award therefore is \$478,170.40.

[116] I found this a difficult case to assess damages, particularly with respect to the future, given my findings concerning the plaintiff's credibility and her lack of candour with some of the medical witnesses. On the other hand, I found the evidence of her daughters convincing and reliable. I found it consistent with the life the plaintiff has lived for the last six years and the life she lost after the accident. I found it supported by much of the medical evidence.

"Smart J."

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