

CANADA / JUDGMENT

## Martin v. First Truck Centre Vancouver Inc.

2020 BCSC 240

COURT

Supreme Court of British Columbia

DECIDED

24 February 2020

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2020 BCSC 240 Martin v. First Truck Centre Vancouver Inc.

N THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Martin v. First Truck Centre Vancouver Inc.,

2020 BCSC 240

Date: 20200224

Docket: M181531

Registry: New Westminster

Between:

Brittny Marie Martin

Plaintiff

And

First Truck Centre Vancouver Inc., and Cam Clark Ford Lincoln Ltd., and Lauren Miller

Defendants

- and -

Docket: M216860

Registry: New Westminster

Between:

Brittny Marie Martin

Plaintiff

And

Darryl Finnigan and B.C. Furnace Service Ltd.

Defendants

Before: The Honourable Mr. Justice Brundrett

Reasons for Judgment

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Place and Date of Trial/Hearing:

New Westminster, B.C.

July 29-31,

August 1, 2, 6, 7, 8 & 20, 2019

Place and Date of Judgment:

New Westminster, B.C.

February 24, 2020

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## INTRODUCTION

- [1] The plaintiff, Ms. Martin, seeks damages for personal injury arising from two motor vehicle collisions which occurred on July 4, 2014, and September 29, 2017. Liability in both accidents is admitted, and apportionment between the two events is not in issue. The only issue is the appropriate quantum of damages, with a loss of earning capacity being the majority of the claim for damages.

- [2] The plaintiff is a licensed practical nurse ("LPN") who was 26 years old at the time of trial. The first collision occurred in 2014 when she was 21. That collision involved a vehicle driven by Lauren Miller, owned by the defendant First Truck Centre Vancouver Inc. and leased by Cam Clark Ford Lincoln Ltd. The plaintiff suffered soft tissue injuries to her back and neck as well as headaches, shoulder pain, dizziness with headaches and nausea after that event.
- [3] The plaintiff was also rear-ended in her second collision on September 29, 2017. She was 24 at the time. The defendant Darryl Finnigan was the driver of a van that rear-ended the plaintiff as she had come to a stop at a street light in Surrey. The defendant's vehicle was owned by B.C. Furnace Service Ltd. That incident left the plaintiff with more significant impairments, including exacerbation of her neck and shoulder injuries from her first accident. The defendants concede the plaintiff was injured from the two collisions to some extent but dispute the extent of her injuries.
- [4] With respect to damages, the main dispute between the parties is the degree of impact upon the plaintiff's ongoing lost earning capacity as a result of the two collisions. The plaintiff alleges that the car accidents have significantly affected her earning capacity and diminished her hope of becoming a registered nurse ("RN"). The defendants submit that many of the plaintiff's symptoms are due to other causes, that she is not completely disabled, and that she has not suffered a significant loss of earning capacity. The defendants also resist any claim for psychiatric or psychological injury attributable to the accidents, which it says was not specifically pleaded.
- [5] The parties are far apart in their overall positions. The plaintiff seeks total damages of \$1,248,591.11, including an award of \$847,119 for loss of future earning capacity. The defendants suggest a total award of between \$50,045.03 and \$117,770.03 after a reduction for failure to mitigate.

## CREDIBILITY OF WITNESSES

- [6] Subject to the qualifications below, I generally accept the plaintiff's evidence. I found her evidence to be convincing, responsive, and logical for the most part. She made concessions where appropriate and, while I would be cautious in certain specific areas, did not appear to exaggerate the extent of her injuries. The evidence of her injuries, her work, and her attempts to secure treatment and cope with her ailments while working or going to school made sense. Her evidence as to the impact of her injuries upon her physical health, her ability to work, and her personal life was corroborated by other observers whose evidence I accept.
- [7] The defendants suggested that the complainant exaggerated and was inconsistent in her evidence. I do not agree with the defendants' characterization of the plaintiff's evidence. Except for some minor or peripheral matters, her evidence was largely internally and externally consistent. I do not find the differences in her accounts to medical service providers to be remarkable or sufficiently concerning to undermine her overall credibility.

The plaintiff was subjected to a thorough cross-examination, and her credibility remained largely intact.

- [8] I also find that the plaintiff's collateral witnesses were generally credible. This includes the plaintiff's co-workers, Chantelle Young and Hailey McGrail; her mother, Cindy Martin; her boyfriend, Daniel Beeger; and her former employer, Frank Jutten. These witnesses were able to credibly articulate their observations of the plaintiff's injuries and their effect upon her life. While I am alive to the possibility of bias and embellishment, I detected little or no sign of exaggeration in their evidence, and I found their evidence to be credible.
- [9] As to the other witnesses, including the medical and vocational experts, I will make comments on their evidence within my findings of fact below.

## PRE-ACCIDENT HISTORY

- [10] The plaintiff was, for the most part, free of physical symptoms prior to the first accident. Growing up, she played softball competitively as a pitcher and exercised daily or nearly daily. She was a pitcher for her team and competed at a high level in sports; however, she gave up that activity prior to the accident. The plaintiff remained still active in other ways such as running three to four times a week. She also had a personal trainer for a time prior to her first accident, and I find that she was previously substantially free of health problems and at least moderately fit.
- [11] It appears that the plaintiff was diagnosed with nerve palsy at one point as a child, but I cannot find that the condition accounted for any of the plaintiff's symptoms that are claimed to result from her two motor vehicle accidents.
- [12] The plaintiff previously had a tonsillar abscess but had her tonsils removed in 2012.
- [13] The plaintiff has been in a relationship with Daniel Beeger since February 2014. She would often spend time with Mr. Beeger or her friends prior to the first accident.
- [14] Historically, the plaintiff was prone to anxiety prior to her motor vehicle accidents. She was bullied in elementary and high school. This may at least partially account for her unexceptional grades in high school. Nevertheless, she overcame issues with bullying, and I find that once free from that environment upon graduation from high school, she did not suffer from the effects of bullying.
- [15] The plaintiff's anxiety was well-managed after she left high school. This condition became more acute in the early part of 2014, but she never sought professional counselling until 2019 when she attended counselling for her pain and anxiety. She was never prescribed medication for anxiety prior to the first accident. The plaintiff is, however, susceptible to becoming anxious. When that occurs, her heart races, her chest flutters, and she can become tearful.

- [16] As Mr. Beeger verified, her anxiety can occur when she experiences physical pain, such as that from her motor vehicle accident-related injuries from her second accident.
- [17] The plaintiff's mother testified that prior to the first accident, the plaintiff completed chores such as vacuuming, doing dishes, and maintaining her bedroom without any difficulty.
- [18] The plaintiff testified, and I accept, that she had long wanted to become a registered nurse working with children since she was very young. Toward that end, she volunteered at the Maple Ridge Hospital in the maternity ward while still in high school. She also obtained employment in early 2009 at the Building Blocks Childcare Center, where she was employed part-time to assist in looking after children until December of 2013.
- [19] Following her high school graduation in 2010, the plaintiff learned that the waiting list for the RN program was five years long. She accepted the recommendation of a vocational counsellor that she attend the LPN program first, then attempt to bridge into the RN program.
- [20] The plaintiff met her boyfriend in December 2013. He described her as lacking in health issues prior to her first accident.
- [21] Despite modest success with her grades in high school, the plaintiff successfully upgraded her studies in 2011, 2012, and 2013 by taking math, biology, anatomy and physiology courses, and she was able to gain acceptance into the LPN program in March 2014. The plaintiff started work at another child care centre in February 2014 and worked there while waiting for her LPN program to commence. She was employed there on July 4, 2014, at the time of her first accident, and continued her employment until August 2014. She started nursing school in September 2014.
- [22] Overall, it appears from her history that the plaintiff is a hard worker who was disposed to being active in both her social, educational, and work lives. She started working part-time while still in high school and has consistently attempted to find employment or upgrade her education. The plaintiff developed an interest in working with children from an early age and has successfully and consistently pursued a path of employment in pediatric nursing.

## THE FIRST ACCIDENT, JULY 4, 2014

- [23] The first accident occurred on July 4, 2014. The plaintiff was travelling south on Golden Ears Way in Surrey, B.C. driving her vehicle. She came to a stop at a red light in the left turning lane. She was then rear-ended by a Ford van operated by the defendant Lauren Miller and leased by the defendant, Cam Clark Ford Lincoln Ltd., from the defendant, First Truck Centre Vancouver Inc.
- [24] The impact was forceful upon the plaintiff. This may have been in part because the defendant driver admitted that the van was weighed down with a significant amount of equipment in the back of the van.

- [25] The plaintiff felt stiffness in her neck and shoulders immediately after this collision.
- [26] After going home, the plaintiff attended a walk-in clinic with her mother and sister. The physician who attended to the plaintiff recommended massage therapy, Advil and Tylenol.
- [27] The plaintiff attended her long-time family doctor, Dr. Hasham, on July 7, 2014. Dr. Hasham testified before me. He initially recommended massage and physiotherapy. He provided her with a prescription for anti-inflammatory medication.
- [28] The plaintiff's neck and shoulder pain were associated with pain in her neck and the left side of her head. The pain on her left side at the base of her skull would work its way down into the top of her shoulders. She had difficulty sleeping. She later experienced headaches daily, of varying intensity, which would cause her nausea and dizziness.
- [29] The plaintiff attended one massage therapy appointment with Sydney Smith at Centre Point Massage Therapy on August 28, 2014. The plaintiff testified that the session increased her pain, and she did not immediately return. It appears that the user fee and time requirements were also factors in her not attending further massage therapy until nine months later.
- [30] The plaintiff started college in September of 2014. Her program was an 18-month course with four terms and finished in February of 2016, after which she wrote the LPN exam in the summer of 2016. Her coursework was competitive and demanding. She also commuted five days per week from Maple Ridge to downtown Vancouver, leaving at 5:30 a.m. to arrive for classes running from 8:00 a.m. to 3:30 p.m., when she would return to Maple Ridge and, after dinner, study again until 11:00 p.m.
- [31] The defendants are critical of the plaintiff for not attending further physio or massage therapy during her LPN course which involved long hours and further coursework at night. During her studies, the plaintiff experienced headaches as well as neck and shoulder pain, but she coped with her symptoms as best she could. During her schooling, she would take breaks and walk around. She also took Tylenol and Advil to manage her pain. Her mother, father, and boyfriend assisted her by giving her massages. The plaintiff had some difficulties with the physical tasks during her course works, but she "pushed through it" and self-managed.
- [32] The plaintiff tried running after her first accident, but it was painful, and she ceased that activity.
- [33] The plaintiff did eventually continue her massage therapy in April and May of 2015 at Centre Point Massage Therapy, though this was many months following her first accident.
- [34] On June 10, 2015, the plaintiff again saw her general practitioner, Dr. Hasham. She reported that her pain had worsened, making it difficult to sleep. She was then referred to Dr. Dawson, a physiatrist.

- [35] Dr. Dawson first saw the plaintiff on July 10, 2015. He diagnosed her with myofascial pain through the neck and shoulder, as well as scapular dyskinesis. He gave the plaintiff a handout with recommended exercises to be performed at home. She performed these exercises, but they did not improve her symptoms.
- [36] In February 2016, the plaintiff graduated from the LPN program with a final grade point average of 3.94.
- [37] While completing her licensing requirements, the plaintiff started working for Cottonwood's Childcare Centre in March of 2016.
- [38] During this time, she continued to experience neck pain, shoulder pain and headaches with dizziness and nausea. When the pain in her neck was intense, she would experience numbness and tingling in her hands. She also had difficulty sleeping, particularly with falling asleep, due to her pain levels. She had some difficulties with physical tasks such as patient transfers during her LPN training, but she was still able to complete them.
- [39] The plaintiff took Advil, Tylenol or over the counter muscle relaxants and Tylenol 3 for her headaches and neck pain. She took amitriptyline for her sleeping difficulties. She also used Diclofenac, a topical cream that she would apply to her neck and shoulders. When the pain was very severe, she took Tylenol 3 up to three to five times per week.
- [40] Prior to the second accident, the plaintiff was able to complete her household chores.
- [41] On July 14, 2016, the plaintiff began attending a different massage therapist at Pitt Meadows Wellness Centre.
- [42] The plaintiff also wrote her LPN licensing exam in the summer of 2016. During that four hour exam, she suffered from head and neck pain. Ultimately, however, she passed.
- [43] In August 2016, the plaintiff began attending the Golden Ears Physiotherapy for physiotherapy treatment with Shannon Blackburn. She had several appointments there but found that physiotherapy increased her pain.
- [44] The plaintiff subsequently left her employment at the child care centre. In October 2016, she began her first LPN position at AgeCare Harmony Court. This position involved working with adults. Her desire was to work with children. She worked three days at the centre and then resigned.
- [45] In December of 2016, the plaintiff started a new position with the Jutten family caring for Nolin, then a four-year-old child with NANS Deficiency. NANS deficiency is a muscle-related condition which makes an individual extremely dependent upon caregivers. Nolin requires help with every aspect of his life including eating, sleeping, standing, and attending to his hygiene. This involves one-on-one, 24-hour nursing care.

- [46] During her time with Nolin, the plaintiff had to administer medication, transfer Nolin to various pieces of equipment multiple times a day, bathe, change, feed and burp him. When she first started on his care team, Nolin weighed only 25 pounds and only mildly active. That changed over time as Nolin grew, acquired a swimming pool through the Make-a-Wish foundation, and his activity requirements increased.
- [47] In terms of other activities, the plaintiff would use a stationary bicycle and do stretching at home. For recreation activities, the plaintiff started to go fishing with her boyfriend. They would go to restaurants, socialize with friends, go on walks, and watch movies.
- [48] Prior to the second accident, she still experienced pain in her neck and shoulders, as well as headaches, but her neck and shoulder pain were easier to manage, and her headaches were not occurring as frequently.
- [49] The plaintiff was not missing time from work with the Jutten family prior to the second accident. In fact, her employer Mr. Jutten was unaware of her initial motor vehicle accident.
- [50] Although she had bouts of anxiety in her earlier life, the plaintiff did not report developing anxiety after her first accident. Nor did Dr. Hasham recall the plaintiff having anxiety symptoms proximate in time to her first motor vehicle accident.
- [51] Overall, although the first accident had a significant impact on her life, it is fair to characterize the plaintiff's symptomology after the first accident as less severe than that after the second.

## **THE SECOND ACCIDENT, SEPTEMBER 29, 2017**

- [52] Ms. Martin's second accident occurred on September 29, 2017. She was heading home travelling northbound on 160th Street in Surrey in her 2017 Hyundai vehicle and had come to a stop at Fraser Highway for a red light. As she waited for the light, the plaintiff's vehicle was rear-ended by the defendant, Darryl Finnigan, who was driving a 2008 GMC van owned by the defendant, BC Furnace Service Ltd.
- [53] The plaintiff described the impact as "quite hard." The defendants pointed to the relatively modest amount of damage in the plaintiff's two accidents, but I do not accept this as a yardstick that could necessarily predict the extent of the plaintiff's injuries or detract from the plaintiff's credibility on the facts of this case. As with the first accident, liability is admitted.
- [54] The plaintiff described being "really shaken up" from the collision. She was shaking, had trouble breathing, had immediate pain in her neck and shoulders, and suffered a headache. The pain was more intense than in her first accident. She had difficulty moving her left shoulder initially.
- [55] After the second accident, Ms. Martin's mother came to pick her up and took her to a walk-in clinic in Maple Ridge.

- [56] The plaintiff testified, and I accept, that following the second accident her symptoms in her neck and shoulders were aggravated. At times, the pain was quite intense. She also had pain in her lower back. When the pain was severe, she would also experience pain in the back of her legs. She also suffered difficulty sleeping after the second accident.
- [57] As a result of the second accident, the plaintiff started to suffer from periods of anxiety. This included driving anxiety and anxiety associated with her pain. When it occurs, she gets shaky, her heart starts to race, and she feels overwhelmed. She can also become tearful and cry. Much of this anxiety is due to her experiencing pain on a regular basis.
- [58] The plaintiff saw Dr. Hasham on October 2, 2017. He recommended massage and physiotherapy. He also recommended that the plaintiff take a month off work, which she did.
- [59] On October 4, 2017, the plaintiff attended Pitt Meadows Wellness for her first massage therapy appointment after her second accident. On October 11, 2017, she also began attending physiotherapy at Pitt Meadows Wellness. She continued to regularly attend Pitt Meadows Wellness for physiotherapy and, more often, massage therapy, through the rest of 2017, throughout 2018, and into the spring of 2019.
- [60] On October 25, 2017, the plaintiff returned to work for the Jutten family. She worked shorter shifts at first. Her employer made accommodations for her and helped her with Nolin's care when he could, though often, this was not possible.
- [61] The plaintiff was prescribed Tylenol 3 and Cyclobenzaprine following her second accident. She also continued to take Advil and Tylenol for her pain, an over-the-counter muscle relaxant, and the topical Diclofenac cream.
- [62] In January 2018, the plaintiff registered for the English composition pre-requisite course for the RN program at the University of the Fraser Valley. Due to her pain, full-time work, and attendance at appointments, she had to request an extension but eventually completed the course in November 2018.
- [63] In February 2018, the plaintiff attended for acupuncture and chiropractic treatment at Pitt Meadows Wellness. She did not find relief from this treatment. She also continued to attend massage therapy.
- [64] In October 2018, Dr. Dawson talked to the plaintiff about physiotherapy causing her pain. He encouraged her to change physiotherapists and gave her strengthening exercises.
- [65] Dr. Hasham subsequently referred the plaintiff to the Change Pain Clinic in Vancouver, which she attended in October 2018. By this time, the plaintiff was upset because she did not appear to be getting better. She received recommendations for light yoga, stretching and strengthening exercises, and small doses of THC to assist her with sleeping.

- [66] Through the pain clinic, the plaintiff received trigger point injections in her neck, the base of her skull, and in her lower back. However, her symptoms did not improve, and she would experience pain after each treatment.
- [67] By 2018, the plaintiff still struggled with pain. At work, Nolin received a new feeding tube and started to gain weight. This made her work much more physically demanding. He also became more active and had acquired a swimming pool, which in turn, required the nurses to shower him twice per day after a swim. As a result, Ms. Martin's job responsibilities changed. She was no longer required to sit and feed Nolin for long periods each day, but she was required to perform more lifts and transfers on the order of 15-20 times per day.
- [68] In April 2018, the plaintiff began missing work as a result of her injuries. At variable intervals, I accept that she continued to miss work due to her injuries well into 2019.
- [69] The plaintiff had to take two biology pre-requisite courses for her RN program. I accept that she did not do so because her ongoing pain inhibited her.
- [70] On April 2, 2019, Dr. Hasham recommended that the plaintiff pursue counselling for her emotional symptoms and her chronic pain.
- [71] Also in April 2019, Dr. Hasham advised the plaintiff to reduce the amount of lifting she was performing at work. As a result, the plaintiff requested to work the same shifts as Chantelle Young in order to have help with the lifting and transferring of Nolin. The plaintiff began reducing her hours at work and began working night shifts because there was no lifting or transfers involved. In May and June 2019, the plaintiff continued to work night shifts and reduced hours.
- [72] The plaintiff saw Dr. Hasham again on June 28, 2019. The plaintiff reported experiencing anxiety and being unable to cope with it. She was struggling with all of her appointments, the pain resulting from various procedures, and missing time from work. Dr. Hasham placed the plaintiff on medical leave. She remained on medical leave at the time of trial in late July 2019.

## PRESENT SYMPTOMS

- [73] As of the date of trial, the plaintiff is still struggling daily with pain. She is still getting daily headaches and soreness in her neck and back. The intensity of her headaches varies depending upon the pain level in her neck. Her neck pain, in turn, is dependent upon her activity level. Ms. Martin's shoulder pain has decreased, but if her neck pain is severe, the pain still affects her shoulder as well.
- [74] The plaintiff has difficulty sleeping that she did not have before. Her anxiety increases when she experiences pain, though she has suffered from anxiety related to other developments in her life as well.

- [75] Ms. Martin's accidents have adversely affected her mood, pain levels, and social life. Her relationship with her boyfriend has suffered because she is preoccupied with pain management. She is more "grumpy," more negative and less intimate. Her accidents have also adversely impacted her relationship with her mother who has had to deal with her daughter's distress over her pain.
- [76] Most recently, the plaintiff has been taking Tylenol 3, a muscle relaxant, an anti-depressant, Diclofenac cream, and occasionally, Ativan (lorazepam).
- [77] The plaintiff has been seeing a chiropractor and going to massage therapy. She also began seeing a counsellor for her pain and anxiety.
- [78] I accept that Ms. Martin's ability to engage in activities has been impaired by her accident. She is less able to do housework and less active socially and recreationally. She has lost a certain degree of enjoyment of life.
- [79] As noted, the plaintiff received accommodations at work in 2019 and had to reduce her hours. However, she stopped working entirely as of June 29, 2019, and was off work as of the date of trial. Due to her ongoing symptoms, this was inevitable at some point, given that Nolin's increased weight and activity level were making her job increasingly difficult. The plaintiff's physician, Dr. Hasham, has recommended that she pursue a less demanding position in nursing; however, such positions fall outside the plaintiff's desire to work with children. The evidence presented to me was that the plaintiff is capable of performing a variety of tasks that an LPN would normally do, but that she will struggle with the physical aspects of the job and her endurance has been significantly diminished.

## THE MEDICAL EVIDENCE

### Dr. Hasham, Family Physician

- [80] The plaintiff tendered an expert report from Dr. Amin Hasham. He has been the plaintiff's family physician since her birth. He practices family medicine in Port Coquitlam.
- [81] Dr. Hasham's opinion, which I accept, is that the plaintiff sustained a whiplash injury involving the soft tissue of the neck in the July 4, 2014 accident and an exacerbation of her injuries in the September 2017 accident as well as a soft tissue injury to her lower back. He opined that these injuries have progressed into chronic pain despite various treatments. He stated that the prognosis for the plaintiff's full recovery is guarded.
- [82] Dr. Hasham's report dated April 2, 2019, concludes as follows:

she has had persistent and ongoing pain since the motor vehicle accidents and her symptoms [are] often made worse by the type of work that she is doing. As a result, she has had to reduce her work hours to about 24-30 hours per week. She is presently undergoing further treatment for pain management, but it is possible she will have to limit her work in the number of hours as well as the number of days that she works per week due to her chronic pain. This will likely affect

her capacity to earn income in the future as it is unlikely that she will be able to work on a full-time basis [S]he is already struggling with activities that are physically demanding. It is therefore likely that she will continue to be restricted in doing those tasks as this will aggravate her symptoms.

In terms of general disability, it is likely that the injuries that she has sustained, and the resultant chronic pain, will likely interfere with her activities of daily living such as participating in recreational activities and doing her household chores such as cleaning and laundry. It is also likely that these injuries will affect her ability to participate in social activities as she may need to take time off to rest and lie down in order to manage her chronic pain.

- [83] Testifying at trial, Dr. Hasham presented as a knowledgeable, careful, and credible witness. I agree with the defendants that some caution is in order given Dr. Hasham's admission that he saw his role in part as acting as a medical advocate for the plaintiff. However, I would reject the defendants' challenges to the evidence of Dr. Hasham that he was highly biased in his reporting, that he "cherry-picked" content for his report, and that his opinions were unreliable or lacking in credibility.
- [84] I do not accept Dr. Hasham's opinion, brought out in cross-examination, that the plaintiff developed an anxiety disorder. I would disregard this aspect of his evidence because the plaintiff did not attempt to rely on such a formal diagnosis at trial, the diagnosis is unsupported by other experts, and the conclusion is outside the areas in which Dr. Hasham was qualified as an expert. However, I do accept his evidence and that of others that the second motor vehicle accident led the plaintiff to experience anxiety-related symptoms.
- [85] Dr. Hasham opined that it is likely that the plaintiff will need ongoing treatment to manage her chronic pain in the future. His report states that "patients that develop chronic pain after a motor vehicle accident usually have persistent ongoing pain which may increase in intensity at times due to physical activity or emotional turmoil."
- [86] Dr. Hasham opined that while it is possible the plaintiff may be able to continue working in her vocation and do all of her activities, she will have limitations and will have to limit her work in terms of hours and days due to her chronic pain. He stated that physically demanding activities would likely exacerbate her symptoms. He recommended massage therapy, physical therapy, analgesics, trigger point injections, and that the plaintiff remain as active as possible.

### **Dr. Waseem, Physiatrist**

- [87] Dr. Zeeshan Waseem has been practicing as a physiatrist since 2001. He examined the plaintiff on March 7, 2019, and prepared an expert medical report on March 21, 2019, which was tendered at trial and supplemented by his testimony.

- [88] Dr. Waseem found demonstrable objective evidence of injury upon his examination of the plaintiff. This included stiffness and tightening in the muscles supporting the plaintiff's neck, and pain upon palpation.
- [89] Dr. Waseem concluded that the plaintiff appeared to have initially sustained spring/strain soft tissue injuries of the cervical spine and developed headaches as a result of the July 4, 2014 accident. She then re-injured her cervical spine, worsened her headaches and suffered new sprain/strain soft tissue injuries to the lumbar spine in the second accident, thereby aggravating her underlying physical condition.
- [90] Dr. Waseem concluded that these injuries resulted in chronic myofascial pain of the cervical and lumbar spine, cervicogenic headaches with migraine features and generalized deconditioning.
- [91] Dr. Waseem testified that the plaintiff's prognosis for a full recovery was poor and that her physical condition would be considered chronic and unremitting, and, therefore, permanent.
- [92] Dr. Waseem wrote that physically demanding tasks worsen the plaintiff's physical condition and that she has more pain at the end of the workday. He testified that the plaintiff was capable of working, but needed to take time off from work to recuperate from her injuries. He testified that the plaintiff would likely have pain for the rest of her life. He said that the plaintiff could get better, but at this point, the fact that she is still experiencing ongoing pain means that she is unlikely to make a full recovery. He further stated that in his experience, for young patients such as the plaintiff, "it gets harder and harder for them to continue to do what they want to do and their resiliency deteriorates with time."
- [93] Dr. Waseem's final prognosis is as follows:

The prognosis for a full symptomatic recovery is poor for the following reasons: her neck pain and headaches have been long-standing in nature persisting for over 4.5 years and her lower back pain has lingered for about 1.5 years despite appropriate conservative measures and medical attention; her condition has worsened over time; she continues to have objective physical findings on examination suggesting her recovery will probably be refractory to medical management; reported psychological symptoms have led to emotional stress and hampered her physical recovery; disturbed sleep has complicated her recovery; deconditioning has made it harder for her to recover; the physical demands of her occupation make her physical condition worse; and there has been a cumulative toll on her physical health from the two subject accidents thereby stalling her recovery. While some further improvement with the outlined treatment recommendations is possible, she will continue to experience pain. Her physical condition would be considered chronic and unremitting and, therefore, permanent.

- [94] I do not accept the defendants' arguments going to the credibility or reliability of Dr. Waseem's opinions, including the criticisms that Dr. Waseem clearly missed relevant information, selectively reported facts, used unnecessarily dramatic language, or acted as an advocate for the plaintiff.
- [95] I accept Dr. Waseem's evidence though I am aware of the defendants' challenges to his facts, assumptions and choice of language. In my view, he made concessions where appropriate and was careful in his opinions. Overall, I found Dr. Waseem's evidence to be very credible.

### **Dr. Dawson, Physiatrist**

- [96] Dr. Andrew Dawson, a physiatrist, testified as to his observations of the plaintiff. He was not qualified as an expert witness and therefore did not provide opinion evidence.
- [97] Dr. Dawson saw the plaintiff three times. On July 10, 2015, he observed her to have a limited range of motion in her cervical region. She was tender on palpation through her left cervical muscles and upper trapezius. He could feel trigger points or knots in the plaintiff's muscle tissue upon palpation.
- [98] Dr. Dawson also saw the plaintiff on February 18, 2018. At that appointment, he observed the plaintiff to have tenderness in her neck muscles and lower lumbar muscles. At both the first and second appointments, Dr. Dawson recommended the plaintiff perform exercises but did not specifically refer her to physiotherapy.
- [99] Dr. Dawson last saw the plaintiff on October 11, 2018. Upon examination, she had tenderness in her lower lumbar. At this appointment, Dr. Dawson recommended the plaintiff consider changing physiotherapists to focus more on movement and strengthening.

### **Dr. Marks, Orthopaedic Surgeon**

- [100] Dr. Paul Marks, an orthopaedic surgeon with impressive qualifications, examined the plaintiff on March 20, 2019, in preparation for an independent medical-legal assessment that was tendered at trial. Dr. Marks also testified at trial.
- [101] Dr. Marks wrote that Ms. Martin's orthopaedic and musculoskeletal examination was within normal limits. He found that the plaintiff did suffer soft tissue injuries to her cervical and thoracolumbar spine, but he characterized those injuries as "uncomplicated" soft tissue injuries that she should have been able to recover from.
- [102] Dr. Marks could not objectively substantiate some of the plaintiff's subjective complaints during his examination of her. He also thought the plaintiff was engaging in active resistance on some of the range of motion tests. He found some of the plaintiff's complaints anomalous compared to what he could objectively verify.

- [103] Dr. Marks was also critical of other care providers in this regard. He was also critical of what he perceived to be the lack of thorough physical exams of the plaintiff by other care providers. He opined that relying upon a diminished range of motion and tenderness on palpation was not alone sufficient to provide a basis for an opinion.
- [104] The inconsistency of Dr. Marks' findings compared to other treatment providers is difficult to reconcile. It appears that the plaintiff was quite anxious before and during the appointment and that Dr. Marks was running late that day. While I find no fault with Dr. Marks' examination of the plaintiff, it appears the physician-patient dynamic during the examination was less than ideal. He also saw the plaintiff over a very brief period of time. It may be that the plaintiff's injuries were not as apparent to Dr. Marks as they were, for instance, to others who saw the plaintiff on more than one occasion or to Mr. McNeil, who observed the plaintiff over a period of several hours during various work simulation exercises.
- [105] I am also alert to Dr. Hasham's evidence that underlying soft tissue injuries may not always be objectively discernible in a musculoskeletal exam. I found Dr. Marks' evidence at this trial to be somewhat overconfident in his denials of the plaintiff's purported injuries and his contention that he was better qualified to offer opinion evidence than other experts. In this regard, I agree with the comments of Mr. Justice Saunders in *Khudabux v. McClary*, 2016 BCSC 1886 at para. 92 which are apt here:
- [92] There is a tendency common to many orthopaedic surgeons who provide expert opinion reports in soft tissue injury cases before this court to express their opinions without qualification - specifically, without acknowledging the extent to which their opinions are shaped by or restricted to the narrow field of their own expertise. In the result, many such reports come before this court that, in substance, say "I have examined this patient, and nothing is wrong with them," when what is really meant is, "I have examined this patient, and I am unable to diagnose any orthopaedic injury". Expert witnesses who provide opinions in such stark terms without explicitly stating the limitations of their opinion may, if their opinions contrast with complaints of pain and suffering that are found to be genuine, and are at odds with contrary opinion evidence from another medical expert, risk creating confusion. They may also leave themselves vulnerable to a finding of bias if the unstated limitations of their opinions are not drawn out at trial.
- [Emphasis added.]
- [106] Dr. Marks' findings are not consistent with that of other medical witnesses who were able to confirm the existence of objective indicators of injuries to the plaintiff through observable trigger points, restricted range of motion, and muscle spasm or stiffness. Further objective evidence of injury arises from the plaintiff's colleagues at work and family members who testified as to her diminished post-accident ability to perform various physical tasks. These impairments cannot be attributed to causes other than injuries arising from the plaintiff's two motor vehicle accidents.

[107] While Dr. Marks is well-qualified, and I am fully cognizant of his inability to verify the plaintiff's injuries, the bulk of the evidence from all sources establishes that the plaintiff suffered and continues to suffer from significant and chronic soft-tissue injuries. I prefer that evidence over Dr. Marks' opinion, and accordingly, I do not accept Dr. Marks' opinion in this case.

### **Shannon Blackburn, Physiotherapist**

[108] Ms. Blackburn is a physiotherapist who treated the plaintiff at Golden Ears Physiotherapy in 2016. She has not seen her since. Ms. Blackburn testified as a fact witness on behalf of the defendants.

[109] Ms. Blackburn had no independent recollection of treating the plaintiff but confirmed the accuracy of her notes that were admitted into evidence. Using her notes, Ms. Blackburn was able to confirm that she treated the plaintiff on August 22, 2016, as a result of her ongoing injuries in the July 2014 accident. the plaintiff presented with left neck pain, headaches, mild back pain, upper cranial vertebral pain, and shoulder pain. Ms. Blackburn saw the plaintiff again on August 31, 2016, and gave her exercises to do at home. She saw the plaintiff again later several times in September and once in October, but did not see her afterward. Ms. Blackburn agreed that the treatment she provided the plaintiff was in the nature of an active program.

### **THE VOCATIONAL EVIDENCE**

#### **Mr. Jutten**

[110] Frank Jutten was the plaintiff's employer up to the time of trial. Starting in December 2016, he employed the plaintiff as an LPN to care for his high-needs son, Nolin.

[111] He confirmed that Nolin was approximately 25 pounds when the plaintiff started working for him, but that, as of the time of trial, he was closer to 40 pounds. As a result of a change to his feeding regimen, Nolin is now more active during his feeds, more mobile, and his activity level has increased.

[112] Mr. Jutten described the plaintiff as a great employee who interacted with his son well and motivated him to be active. In his view, she was one of the better nurses whom he had hired.

[113] When the plaintiff began working for Mr. Jutten, she earned \$25 per hour working 3-4 days a week, between 32 and 36 hours. She worked 12-hour shifts, and her typical hours were 8:00 a.m. to 8:00 p.m. He confirmed that the plaintiff missed 15 days of work following her second car accident and intermittently missed work up until her medical leave.

- [114] Mr. Jutten testified that Ms. Martin's availability became restricted in February 2019 and more restricted as time went on. She would not be available when attending her therapies later in the week and would sometimes not be able to work because of the pain resulting from her therapies. He stated that she was working shortened shifts as of April 2019. By May 2019, she stopped working 12-hour shifts. the plaintiff instead began working more night shifts when no lifting was involved and shared her shifts with Chantelle Young.
- [115] Mr. Jutten testified that he had concerns about Ms. Martin's ability to care for Nolin safely because, in addition to the physical demands of the position, Nolin has episodes of epileptic seizures, or could have a coughing fit--all situations that require the nurses to react quickly.

### Chantelle Young

- [116] Ms. Chantelle Young is an educational assistant and a co-worker of the plaintiff's. She described her observations of the plaintiff's limitations at work after the accident. She was very credible, and I accept her confirmation of the plaintiff's evidence despite her friendship with the plaintiff.
- [117] Ms. Young testified that in May 2019, the plaintiff changed to working mostly at night because she could not stay for a full 12-hour shift. During the night shift, Ms. Young had to do all of the lifting and transfer of Nolin because the plaintiff was unable to perform that work. Ms. Young testified that since the second accident, she has watched the plaintiff break down crying at work as her stress, anxiety, and pain increased. She described the plaintiff as having difficulty being on her feet for long periods of time.
- [118] It is apparent, too, from the evidence of Ms. Young and Mr. Jutten, that care for Nolin would be increasingly challenging for the plaintiff as he grows and gains weight. His greater size and activity level will require greater physicality on the part of his caregivers--something which the plaintiff is increasingly unsuited for.

### Ms. McGrail

- [119] Ms. Hailey McGrail is a registered nurse who completed her Bachelor's of Science in nursing. She has been employed part-time with the Jutten family since January 2018 and full-time at Abbotsford Regional Hospital.
- [120] The plaintiff's limitations were quickly observed by Ms. McGrail on her first shift. She observed the plaintiff being stiff when holding Nolin. Ms. McGrail confirmed that the duty of caring for Nolin was physically demanding, involving carrying Nolin to the shower or bathroom, changing him, and lifting him up to 15 times a shift. She also confirmed that Nolin had gained weight after switching to a new feeding tube.
- [121] Ms. McGrail also described the RN program at the University of the Fraser Valley, where she attended. The program is a four-year program comprising eight semesters. She testified that her nursing work at the surgical unit at Abbotsford Regional Hospital involved moving

patients that ranged in weight from 130 to 320 pounds, something the plaintiff would clearly struggle with. She testified that there were more specialized areas of nursing that were less physical, but it was common for registered nurses to perform generalized medical and surgical work early in their careers, which can be quite physically demanding.

### Ms. Sandhu and Ms. Quee-Newell

[122] Ms. Rimal Sandhu was a vocational rehabilitation professional and registered clinical counsellor who testified for the plaintiff. She conducted a vocational assessment on the plaintiff on February 28, 2019, and prepared a report dated April 26, 2019.

[123] Ms. Sandhu conducted a clinical interview with the plaintiff, reviewed clinical records, and prepared a vocational assessment. Ms. Sandhu concluded that:

[i]f she is struggling with tasks as an LPN, it is likely she will struggle with similar tasks in other medical service positions. Additionally, from a vocational rehabilitation perspective, Ms. Martin would struggle with occupations in the childcare industry if working with children up to and under the age of 12 years, given that she continues to struggle with tasks of an LPN working with a 7-year old autistic child in her current employment, as a result of her accident associated physical pain symptoms and limitations.

In my opinion, Ms. Martin's most realistic path in terms of employment would be to remain in her current position on an accommodated basis and attempt to manage her ongoing difficulties for the foreseeable future. A possible scenario, albeit with a possible downward adjustment to earnings, may include reducing her work hours further and/or taking on a nursing role with fewer physical work demands in order to better manage her symptoms and improve the quality of her work life.

[124] The defendants suggested that Ms. Sandhu made a number of "rookie mistakes" in her vocational assessment as well as proving her opinion respecting the plaintiff. They argued that Ms. Sandhu did not acknowledge certain medical information in terms of job fitness, failed to request various records, and overstepped her role by providing a diagnosis and prognosis as to the plaintiff's complaints.

[125] The defendants called Ms. Colleen Quee-Newell, another vocational consultant, to comment on Ms. Martin's test results. Ms. Quee-Newell did not provide her own opinion but testified as to certain evidentiary weaknesses in Ms. Sandhu's opinion and methodological errors by Ms. Sandhu in her testimony.

[126] For the most part, I find that the substance of Ms. Sandhu's evidence remained intact despite these criticisms. I do not find that she stepped into the role of a physician. Rather, she appears to have relied upon the medical opinions available to her. I have substantially accepted the medical opinions upon which Ms. Sandhu relied. The other purported flaws in Ms. Sandhu's opinions are not significant and do not detract from the rather common-sense propositions that Ms. Sandhu ultimately arrived at based upon the information available to

her.

### **Mr. Russell McNeil, Occupational Therapist**

- [127] Mr. Russell McNeil is an occupational therapist whose experience is mainly in industrial and vocational rehabilitation, but he also focusses on secondary issues such as the cost of future care.
- [128] Mr. McNeil conducted a functional capacity evaluation ("FCE") on the plaintiff after putting her through various standardized tests over a 5.5 hour period on March 26, 2019, to evaluate whether her productivity met industrial standards. Within the FCE, the plaintiff completed a work simulation, and he observed her performance over the course of the day. I found his testing of the plaintiff to be insightful and beneficial to a comprehensive understanding of her work-related abilities.
- [129] Of note, the plaintiff managed to perform lifts and transfers of a mannequin in the morning of the testing; however, by the afternoon during the second trial, he observed her reporting increased neck and back pain, and he saw her using accommodations to use her right arm. She became unable to manage the lift and transfer on her own and required assistance.
- [130] Mr. McNeil opined that the plaintiff demonstrated restrictions in her capacity to perform her work as an LPN full-time at a competitively employable work pace. He stated that she had not demonstrated the physical capacity to be well-suited for her present duties. His opinion was that she is already exceeding her strength capacity, which is placing her at increased risk for injury.
- [131] Mr. McNeil stated that Ms. Martin's opinions for working within her field are limited and that her physical capacity is not well suited for working in areas where personal patient care is needed, such as in acute care and extended care.
- [132] I do not accept the defence criticisms of Mr. McNeil's credibility and the reliability of his opinions. In my view, Mr. McNeil's opinions were arrived at after a thorough examination of the plaintiff and with the benefit of informed knowledge of the plaintiff's vocation. I did not find Mr. McNeil to be biased in his opinions or unnecessarily verbose in his report and in his testimony. I accept as reasonable Mr. McNeil's decision to stop the testing after 5.5 hours because the plaintiff was reporting pain, and there was no point in further testing. Mr. McNeil's results were arrived at sensibly and with appropriate controls, and are consistent with what is reliably known about the plaintiff's abilities from other collateral sources.

### **RECOVERY FOR ANXIETY-RELATED SYMPTOMS**

- [133] The parties are divided as to whether the plaintiff ought to be able to recover for anxiety-related symptoms, which is a condition allegedly brought on by the second motor vehicle accident.

- [134] The defendants say that the first time anxiety was raised was in an examination for discovery after the second accident. The plaintiff's discovery completed relatively late in the proceedings on July 10, 2019, less than three weeks before the commencement of the trial. The defendants sought counselling records but did not receive them before trial. The defendants submitted that anxiety was not pleaded and that because they have no counselling records from the plaintiff, they are "going in blind." I was told that the defendants raised their concerns and applied for an adjournment of the trial on this basis, but the application for adjournment was denied. At the proceeding before Master Keighly, the plaintiff's counsel assured this Court that there was no medical diagnosis or expert report on which the plaintiff would rely to prove anxiety. Counsel also noted that the anxiety was not associated with the first accident, and had come to the surface more recently. The plaintiff has not attempted to resile from these positions at trial.
- [135] Counsel for the plaintiff said that while there was no specific pleading of anxiety in relation to the second motor vehicle accident, there was a claim for "such other injuries and conditions as will be particularized in medical reports and/or records as they become available (collectively the 'Injuries')." As well, the plaintiff's amended Notice of Civil Claim on New Westminster file M216860 filed February 11, 2019, stated that "[t]he Injuries have caused and continue to cause the plaintiff pain, suffering, loss of enjoyment of life, permanent physical disability, loss of physical, mental and emotional health." [Emphasis added.] This language appears to me to be more than sufficient.
- [136] The wording of the plaintiff's pleadings here is similar to those in *Saadati v. Moorhead*, 2017 SCC 28. In that case, at paras. 9-12, the Court reasoned that sufficiency of pleadings was an instance of natural justice under which each party was entitled to know and respond to the case that it had to answer. Therefore, in assessing whether the plaintiff's pleadings were deficient, I must consider whether the defendants have had the opportunity to respond to the plaintiff's claim of psychological injury.
- [137] The plaintiff has never attempted to plead a recognizable psychiatric illness. The plaintiff has not asked to be compensated for counselling or psychological services, and I have eschewed Dr. Hasham's diagnosis of an anxiety disorder. In fact, the plaintiff's counsel was abundantly clear in her submissions to Master Keighly that they would not be pleading a diagnosis of emotional anxiety or driving anxiety. In such subjective claims of mental injury without a psychiatric diagnosis, credibility comes to the fore (*Saadati* at para. 22):
- [22] Certainly, concerns about "subjective" symptoms or about feigned or exaggerated claims of mental injury are -- like most matters of credibility -- questions of fact best entrusted to the good sense of triers of fact, upon whose credibility determinations of liability and even of liberty often rest.

[138] The defendants have had ample opportunity to challenge Ms. Martin's credibility and have done so at trial. In light of the language in the notice of civil claim above, and of the fact that the issue was clarified before Master Keighly, there appears to me to have been more than sufficient notice for the defendants to know and respond to the mental injury claim. Hence, in these particular circumstances, I do not regard anxiety as something that needed to be more specifically plead or unbundled more clearly than has been the case here.

[139] In these circumstances, therefore, I cannot give effect to the defendants' argument that the plaintiff ought not to be able to recover for anxiety-related symptoms caused by the second accident. Some aspects of these symptoms are compensable, and others are not. I will address this later while assessing non-pecuniary damages.

#### NON-PECUNIARY DAMAGES

##### General Award

[140] In assessing the factors impacting an award of non-pecuniary damages, I would have regard to the commonly cited list of factors in *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46; see also, *Boyd v. Harris*, 2004 BCCA 146:

[46] The inexhaustive list of common factors cited in *Boyd* that influence an award of non-pecuniary damages includes:

- (a) age of the plaintiff;
- (b) nature of the injury;
- (c) severity and duration of pain;
- (d) disability;
- (e) emotional suffering; and
- (f) loss or impairment of life;

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

- (g) impairment of family, marital and social relationships;
- (h) impairment of physical and mental abilities;
- (i) loss of lifestyle; and
- (j) the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff: *Giang v. Clayton*, [2005] B.C.J. No. 163 (QL), 2005 BCCA 54).

[141] The defendants submit that the plaintiff "has seriously exaggerated the nature and extent of the symptoms she suffers in connection with her soft tissue injuries." I do not agree. I accept the plaintiff's evidence, and the corroboration from collateral sources and the available medical evidence, as to the nature and extent of her injuries.

- [142] I accept that the plaintiff has been left with permanent injuries in the form of moderately severe soft tissue injuries to her neck and lower back. These injuries have left her with chronic pain that has substantially impacted her life and will continue to do so. She experiences associated and frequent headaches and has difficulty sleeping as a result of her pain.
- [143] I find as a fact that these injuries were caused by the two collisions the plaintiff was involved in and for which the defendants have admitted liability.
- [144] The plaintiff historically suffered from intermittent social anxiety, which is not recoverable, and which was under control before her two accidents. She did not experience elevated anxiety-related symptoms after the first motor vehicle accident, though there are occasional references in her medical records to anxiety, particularly after the second accident. After the second accident, the plaintiff's anxiety reoccurred and became much more apparent in early 2019 when she sought counselling. The plaintiff testified that her anxiety symptoms were closely associated with her physical pain. Her boyfriend described the plaintiff's anxiety as coming on when the plaintiff experienced neck pain and headaches. The plaintiff suffered from other anxiety, such as anxiousness about testifying, that is not compensable and not associated with pain.
- [145] I accept that the plaintiff has suffered from compensable anxiety and distress, partly as a result of her pain arising from her injuries sustained in her two motor vehicle accidents. However, I also accept that other aspects of the plaintiff's anxiety are non-compensable and in any event likely to resolve after she gets past the adversarial process of dealing with compensation for her injuries.
- [146] The defendants suggest an award for non-pecuniary damages in the range of \$45,000 to \$65,000 less a reduction for failure to mitigate. The defendants cite: *Cummings v. Hitt*, 2015 BCSC 530; *Gartner v. Baumeister*, 2019 BCSC 1291; *Nguyen v. Bhatti*, 2017 BCSC 1537; and *Lin v. Yim*, 2019 BCSC 1071.
- [147] The plaintiff suggest an award between \$130,000 and \$160,000. The plaintiff relies on the following cases: *Blackman v. Dha*, 2015 BCSC 698; *Larson v. Bahrami*, 2017 BCSC 2308; *Duda v. Sekhon*, 2015 BCSC 2393; *Rabiee v. Rendleman*, 2015 BCSC 595; *Saadati v. Moorhead*, 2017 SCC 28; *Stapley v. Hejslet*, 2006 BCCA 34; *Lim v. Busha*, 2019 BCSC 1223; *Khosa v. Kalamatimaleki*, 2014 BCSC 2060; *Ferguson v. Watt*, 2018 BCSC 1587; *Bellaisac v. Mara*, 2015 BCSC 1247; and *Clayton v. Barefoot*, 2018 BCSC 239.
- [148] To these authorities, I would add the decision in *Walks v. Cody*, 2019 BCSC 1371, in which \$90,000 was awarded for non-pecuniary damages to a plaintiff with injuries similar to the plaintiff's.
- [149] The assessment of non-pecuniary damages comprises a global assessment of damages from pain and suffering, loss of amenities, and loss of enjoyment of life suffered by a plaintiff: *Riley v. Ritsco*, 2018 BCCA 366 at para. 102.

- [150] The plaintiff sought a separate award of \$40,000 for loss of housekeeping capacity. I accept here that the plaintiff has lost an asset in the form of her ability to perform household tasks that would have been of value to her and others in her family unit, such as her boyfriend or mother, but for the accident. As the plaintiff ages, her chronic pain will make it more challenging for her to complete household tasks. This will result in the plaintiff having to pay for housekeeping services or such services being routinely performed by family members or friends. As such, I am satisfied that some award is appropriate: *Riley* at para. 101; *Kim v. Lin*, 2018 BCCA 77 at paras. 33-34. However, as suggested in *Riley* at para. 102, I do not find it necessary to provide for a segregated award for loss of housekeeping capacity in this case.
- [151] Having regard to principles in *Stapley* and the awards and ranges established in the above cases, I would award the plaintiff \$95,000 for non-pecuniary damages inclusive of her loss of housekeeping capacity.

### Failure to Mitigate

- [152] The defendants submit that I should reduce the award of non-pecuniary damages by 10-15%, though in closing argument, this was amended to 10-20%.
- [153] The test for mitigation of damages was described in *Chiu v. Chiu*, 2002 BCCA 618 at para. 57 in which Low J.A. writing for the Court stated as follows:
- [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.
- [154] In *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144, Garson J.A. for the Court further discussed the nature of the test as follows:
- [56] I would describe the mitigation test as a subjective/objective test. That is whether the reasonable patient, having all the information at hand that the plaintiff possessed, ought reasonably to have undergone the recommended treatment. The second aspect of the test is "the extent, if any to which the plaintiff's damages would have been reduced" by that treatment. The *Turner* case, on which the trial judge relies, uses slightly different language than this Court's judgment in *Chiu*: "there is some likelihood that he or she would have received substantial benefit from it ...".

[Emphasis in original.]

- [155] In *Senger v. Graham*, 2018 BCSC 257 at para. 80, the Court added that "the defendant has the burden of proving not only that the plaintiff acted unreasonably in not attending recommended treatment but also the extent, if any, to which the plaintiff's damages would have been reduced had she received the recommended treatment."
- [156] The defendants argue that the plaintiff failed to mitigate her damages by only attending for one massage therapy appointment in the 10 months after her first accident. She then did only eight further passive treatments the following year, and only began physiotherapy 25 months after the first accident, in August 2016, after Dr. Hasham recommended it again. She then stopped that physiotherapy after five visits.
- [157] The defendants argue that the medical evidence indicates the plaintiff would have done better if she had been more aggressive early on with her attendance at an active physiotherapy program. For instance, Dr. Waseem, a physiatrist, testified that the plaintiff would potentially have had a better outcome with more prompt and comprehensive treatment. It was impossible to know if the treatment would have led to her recovering completely, but he thought she would have done better. On the other hand, her family physician, Dr. Hasham, testified that he was unable to opine as to whether the plaintiff's treatment contributed to a delay in the healing of her soft tissue injuries.
- [158] One difficulty with the defendants' submission is that the plaintiff seemed to be recovering well on her own after the first accident by getting on with her life, doing exercises at home, attempting to move around and maintain her activity level notwithstanding her busy study schedule, and receiving massages from friends and family members. Her injuries, as she reported to her pain clinic, were substantially improved by the time of her second motor vehicle accident. It appears to me that the plaintiff's deficiencies in following Dr. Hasham's recommendation for physiotherapy have not been shown to have had an effect upon her recovery. It was her second accident that really set her back.
- [159] In terms of the reasonableness of the plaintiff's actions, I would not be critical of the plaintiff for not taking more massage therapy or physiotherapy during her schooling. the plaintiff had found that the one massage appointment she did attend actually increased her pain. At the age of 21, the plaintiff was still relatively young at the time of her first accident. This was her first accident, she was fairly resilient at the time, and she had been previously physically active. It was not unreasonable for her to expect that she could "push through" her symptoms, as she termed it, without the aid of further physiotherapy. As well, I accept that time and cost factors constrained her ability to attend physiotherapy from 2014 into 2015.
- [160] It appears to me that the plaintiff managed her pain in other ways during her busy school schedule. She used a stationary bike at home, took breaks and walked around when possible. She also took Advil and Tylenol. She was attempting to resume her normal activities. She was not sedentary; rather, she was going to school, moving around, walking between classes and carrying her books. In late 2014 and early 2015, there is no convincing

evidence that more treatments in the form of massage therapy or physiotherapy would have reduced her symptomology beyond short-term gains or temporary symptom relief.

[161] When she first saw Dr. Dawson, her treating physiatrist, in July 2015, he gave her a handout of exercises to do at home, which she performed on a daily basis for months. He suggested that if she had ongoing difficulty, she could go to physiotherapy, which she later did in 2016 as well as in 2017 and 2018. In these particular circumstances, I cannot find that the plaintiff acted unreasonably in failing to manage her symptoms after the first accident.

[162] In the particular circumstances here, the defendants have not met the burden of establishing that the plaintiff's loss would have been reduced had she acted differently, such as taking more active physiotherapy early on after her first accident.

### LOSS OF EARNING CAPACITY - LEGAL PRINCIPLES

[163] In *Grewal v. Naumann*, 2017 BCCA 158, Goepel J.A. writing in dissent (with the majority agreeing with his analysis) summarized the proper analysis of past and future diminished earning capacity at paras. 44-50:

[44] With respect, I cannot agree. The appellants' submission conflates the way courts deal with alleged past events and the way courts deal with hypothetical events, past or future. This fundamental distinction was explained in *Athey v. Leonati*, [1996] 3 S.C.R. 458:

[27] Hypothetical events (such as how the plaintiff's life would have proceeded without the tortious injury) or future events need not be proven on a balance of probabilities. Instead, they are simply given weight according to their relative likelihood: *Mallett v. McMonagle*, [1970] A.C. 166 (H.L.); *Malec v. J. C. Hutton Proprietary Ltd.* (1990), 169 C.L.R. 638 (Aust. H.C.); *Janiak v. Ippolito*, [1985] 1 S.C.R. 146. For example, if there is a 30 percent chance that the plaintiff's injuries will worsen, then the damage award may be increased by 30 percent of the anticipated extra damages to reflect that risk. A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation: *Schrump v. Koot* (1977), 18 O.R. (2d) 337 (C.A.); *Graham v. Rourke* (1990), 74 D.L.R. (4th) 1 (Ont. C.A.).

[28] By contrast, past events must be proven, and once proven they are treated as certainties. In a negligence action, the court must declare whether the defendant was negligent, and that conclusion cannot be couched in terms of probabilities. Likewise, the negligent conduct either was or was not a cause of the injury. The court must decide, on the available evidence, whether the thing alleged has been proven; if it has, it is accepted as a certainty: *Mallett v. McMonagle*, *supra*; *Malec v. J. C. Hutton Proprietary Ltd.*, *supra*, *Cooper-Stephenson*, *supra*, at pp. 67--81.

[29] This point was expressed by Lord Diplock in *Mallett v. McMonagle*, *supra*, at p. 176:

The role of the court in making an assessment of damages which depends upon its view as to what will be and what would have been is to be contrasted with its ordinary function in civil actions of determining what was. In determining what did happen in the past a court decides on the balance of probabilities. Anything that is more probable than not it treats as certain. But in assessing damages which depend upon its view as to what will happen in the future or would have happened in the future if something had not happened in the past, the court must make an estimate as to what are the chances that a particular thing will or would have happened and reflect those chances, whether they are more or less than even, in the amount of damages which it awards.

- [45] The governing authority in this Court is *Smith v. Knudsen*, 2004 BCCA 613. In *Smith*, this Court, after an extensive review of the authorities, rejected the proposition that a claim for past loss of opportunity had to be established on a balance of probabilities. Rowles J.A. wrote for the court. She explained that the plaintiff in the first instance was required to establish both liability and causation on a balance of probabilities. This required the plaintiff to establish that the respondent's negligence, in whole or in part, caused the accident, and that the injuries the appellant sustained in the accident caused or contributed to the loss for which damages were sought (para. 26).
- [46] Rowles J.A. then went on to discuss the assessment of damages. She noted that the same test applies regardless of whether you are assessing past or future loss of earning capacity. In both situations the judge is considering hypothetical events. She reasoned:
- [29] ... 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.
- [47] I note that neither *Reynolds* nor *Ostrikoff* referenced *Smith*. To the extent that those decisions could be read to hold that a past hypothetical event must be proven on the balance of probabilities, they must be regarded as *per incuriam*.
- [48] In summary, an assessment of loss of both past and future earning capacity involves a consideration of hypothetical events. The plaintiff is not required to prove these hypothetical events on a balance of probabilities. A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation. If the plaintiff establishes a real and substantial possibility, the Court must then determine the measure of damages by assessing the likelihood of the event. Depending on the facts of the case, a loss may be quantified either on an earnings approach or on a capital asset approach: *Perren v. Lalari*, 2010 BCCA 140 at para. 32.

[49] The assessment of past or future loss requires the court to estimate a pecuniary loss by weighing possibilities and probabilities of hypothetical events. The use of economic and statistical evidence does not turn the assessment into a calculation but can be a helpful tool in determining what is fair and reasonable in the circumstances: *Dunbar v. Mendez*, 2016 BCCA 211 at para. 21.

[Emphasis added.]

[164] Justice Kent described the two approaches to assessing loss of earning capacity as follows in *Hoy v. Williams*, 2014 BCSC 234, at paras. 156-60:

[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.

[165] In *Perren*, at para. 12, Garson J.A. noted the capital asset approach may be more appropriate for a young plaintiff whose career path is uncertain. Additionally, in *Knapp v. O'Neill*, 2017 YKCA 10, the Yukon Court of Appeal discussed the two approaches to assessing loss of earning capacity:

[17] Both the capital asset and earnings approaches are valid methods of assessing the loss of earning capacity... However, in my view, even where a judge determines the capital asset approach is indicated on the record, the court should ground itself as much as possible in factual and mathematical anchors. Adopting the capital asset approach does not justify an undisciplined approach.

[18] It can be helpful under either approach for the judge to consider the quantum of the award in light of the range of possibilities indicated by economic analysis. Mathematical aids and economic analysis facilitate a "bracketing" exercise that indicates the high and low extremities of possible awards in a given case ....

[19] Courts, where they can, should endeavor to use factual and mathematical anchors as a foundation to quantify loss of future earning capacity, including economist reports and a plaintiff's pre-accident employment history, training, and capabilities... In addition, a plaintiff's personality, work ethic, and attitude should all be considered where possible; it may constitute an error to ignore such factors.

...

[21] In my view, it is generally preferable to first assess past income loss, then move on to assess loss of future earning capacity. Although assessing either [sic] involves hypotheticals, proceeding in this manner involves moving from something generally better known and understood (i.e., historical income loss) to something generally less well known and understood (i.e., loss of future earning capacity).

[Internal citations omitted; emphasis added.]

[166] Finally, I repeat and adopt the summary of the legal principles applicable to the assessment of lost earning capacity set out by Voith J. in *Pololos v. Cinnamon-Lopez*, 2016 BCSC 81 at para. 133:

[133] The relevant legal principles are well-established:

- a) To the extent possible, a plaintiff should be put in the position he/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, leave to appeal ref'd [2009] S.C.C.A. No. 197;
- b) The central task of the Court is to compare the likely future of the plaintiff's working life if the Accident had not occurred with the plaintiff's likely future working life after the Accident; *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 32;
- c) The assessment of loss must be based on the evidence, but requires an exercise of judgment and is not a mathematical calculation; *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 18;
- d) The two possible approaches to assessment of loss of future earning capacity are the "earnings approach" and the "capital asset approach"; *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 at para. 7 (S.C.); and *Perren v. Lalari*, 2010 BCCA 140 at paras. 11-12;
- e) Under either approach, the plaintiff must prove that there is a "real and substantial possibility" of various future events leading to an income loss; *Perren* at para. 33;
- f) The earnings approach will be more appropriate when the loss is more easily measurable; *Westbroek v. Brizuela*, 2014 BCCA 48 at para. 64. Furthermore, while assessing an award for future loss of income is not a purely mathematical exercise, the Court should endeavour to use factual mathematical anchors as a starting foundation to quantify such loss; *Jurczak v. Mauro*, 2013 BCCA 507 at paras. 36-37.
- g) When relying on an "earnings approach", the Court must nevertheless always consider the overall fairness and reasonableness of the award, taking into account all of the evidence; *Rosvold* at para. 11.

[167] Sections 95, 97 and 98 of the Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231, combine to require the past loss to be assessed on a "net income" basis.

## PAST LOSS OF INCOME

[168] Past loss of income is a component of loss of earning capacity. The plaintiff is entitled to compensation for her past loss of earning capacity that resulted from her injuries sustained in the two motor vehicle accidents.

[169] The plaintiff seeks an award of \$13,155, being the net past loss of earnings in 2014 and 2017-2019 for a gross figure of \$16,732. These amounts are based upon Mr. Jutten's testimony at trial, Ms. Martin's nursing schedule, and her day timer entries showing the days she worked in the past.

- [170] The defendants concede that the plaintiff missed three shifts following her first motor vehicle accident. However, she has been reimbursed for her net income loss from those shifts in 2014. There is no further income loss attributable to the first motor vehicle accident from any employer.
- [171] The defendants also concede that the plaintiff missed 15 shifts comprising 12 shifts from October 2-25, 2017, the initial period after her second accident, and three sporadic shifts thereafter in 2018. The defendants suggest that the gross amount of this loss is \$4,762.68. The defendants also concede lost income for February 4 and 26 and March 29, 2019, for the amount of \$1,067.04, which totals to a concession in the amount of \$5,829.72. They submit that the plaintiff's additional absences are not compensable because they have not been shown to be caused by her accidents. In particular, the defendants submit that the plaintiff's medical leave from employment at the end of June 2019 is suspect and not compensable. They point out that the plaintiff took a vacation from June 28 to July 2.
- [172] I agree with the defendants to some degree that some of the plaintiff's past absences from work are not proven to be caused by accident-related symptoms. The plaintiffs provide many specific dates in the April to June 2019 period, and most of the month of July 2019, on which the plaintiff allegedly missed work due to the accident. I would not parse the cause of the plaintiff's time off work in the April to July 2019 period so precisely. I would award the plaintiff loss of wages for the three shifts on July 15, July 23 and July 24, for which there is clear evidence of missed work, which amounts to an additional gross pay of \$1,067.04. I would also make some allowance for the plaintiff working reduced hours or shorter shifts in April through June of 2019 due to her injuries.
- [173] Based on the foregoing, I award the plaintiff a gross total of \$8,000 for past lost wages. In the absence of further submissions about adjusting the gross value, I use a "rough-and-ready approach to income tax deduction" to estimate that the net past wage loss is \$6,800: see *Laxdal v. Robbins*, 2010 BCCA 565 at para. 26; *Moini v. Liang*, 2016 BCSC 702 at para. 85.

#### FUTURE LOSS OF INCOME

#### Positions of the Parties

- [174] The defendants submit that the plaintiff is capable of continuing to work full-time as an LPN. They point out that it is only in very recent months that the plaintiff has expressed the need for accommodations. They argue that the timing of these accommodations is suspicious in that they coincide with her visits to independent medical-legal examination appointments.

- [175] The defendants submit the plaintiff is not entitled to an award of future loss of earning capacity because 1) she unilaterally chose not to pursue her desired career without medical evidence to support such a decision, and 2) it is entirely hypothetical and does not rise above mere speculation that the plaintiff would have been accepted into the Bachelor of Science in Nursing or RN program given its competitive admission requirements and the argument that she would not meet the academic requirements.
- [176] In the alternative, the defendants submit that the capital asset approach is the proper approach to determining the loss of capacity. Using the four-factored approach in *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 (S.C.), they submit that it is arguable whether the plaintiff has been rendered less capable of earning income. The defendants also dispute that the plaintiff missed out on an opportunity to become an RN. Finally, the defendants say that with proper treatment, the plaintiff's future is far more positive than the pessimistic view of Dr. Waseem.
- [177] The defendants submit that if an award for future earnings is made, it should be a minor award given the past performance of the plaintiff in her chosen employment. The defendants submit any award should not exceed a year's salary as an LPN, or \$45,000, at the highest.
- [178] The plaintiff submits that the evidence establishes a real and substantial possibility that she will suffer a loss of income in the future as a result of the two accidents. The plaintiff points to evidence that the plaintiff intended to pursue her Bachelor of Science in Nursing degree and took steps toward such a career.
- [179] The plaintiff further points to Dr. Hasham's evidence, which I accept, that the plaintiff will have to limit her work in terms of the number of hours and the number of days she works due to her chronic pain.
- [180] The plaintiff submits that the evidence shows that the plaintiff will not be able to successfully complete a Bachelor of Science degree in Nursing as a result of her injuries and that she is not capable of working full-time hours as an LPN. The plaintiff says the evidence establishes that there is a real and substantial possibility that she will suffer future income loss.
- [181] The plaintiff submits that the earnings approach offers an appropriate approach to use in assessing her loss of earning capacity. It points to the evidence of Mr. Peever, an economist, in which he estimated future losses of earnings and benefits. Using the calculations provided, it suggests that the present value of Ms. Martin's future loss of earnings and benefits is \$847,119.00.

## Analysis of Future Earning Capacity

- [182] In measuring what is fair and reasonable in the assessment of the loss of future earning capacity, I would turn first to the available mathematical anchors under an earnings approach. The calculations assume the plaintiff will retire at age 70.
- [183] As I note below, I assess that, but for her two accidents, the plaintiff had a real and substantial possibility of becoming a registered nurse and achieving a higher level of income. I do not regard this possibility as merely speculative or hypothetical. I accept that the plaintiff's prospects of becoming an RN and maintaining employment in that position have been substantially, though perhaps not entirely, impaired by her two accidents.
- [184] Mr. Peever estimated that but for the injury, the total present value of future earnings for the plaintiff, applying average risk and choice contingencies, would have been \$1,518,300 as a registered nurse from June 1, 2022, through age 70 or \$1,746,045 with non-wage benefits equivalent to 15% of her wages.
- [185] The present value of her earnings if she works as a full-time LPN over the period between trial and retirement is \$1,189,600. With an injury reducing her to part-time work of 24 hours per week, the present value of her earnings over the same period would have been \$881,300, and an amount of \$898,926 when adjusted to add non-wage benefits equivalent to 2% of her wages. These values are adjusted for risk and choice contingencies.
- [186] If the plaintiff's earning capacity was reduced by 25% from a full-time LPN schedule because of her accident, her adjusted earnings would be \$892,200 over the same period. This represents a reduction of \$297,400 from what she could have made as a full-time LPN, or between \$626,100 and \$853,845 less than what she would have made as an RN.
- [187] The collateral sources confirm that the plaintiff cannot lift as much, she tires more easily, and she has developed chronic physical pain as a result of her injuries. Despite attempts at treatment, these symptoms persisted for a prolonged period after her second accident and, in my estimation, are likely to continue. Her symptoms are likely to reduce her ability to perform any more physical aspects required of an LPN or, indeed, in other types of employment.
- [188] But for the accidents, the plaintiff would have been engaged in substantially more full-time work. While her injuries may not prevent her from working entirely given appropriate accommodations, they will very likely result in substantially reduced hours and difficulty in finding and maintaining suitable employment. Gaps in her employment may occur due to her recurring pain. Where she is able to maintain work, accommodations will often be necessary. I accept Dr. Waseem's evidence that even with young patients, resilience tends to deteriorate over time. Furthermore, it is likely that if the plaintiff does find full-time employment, maintaining that employment and fulfilling her employment tasks will be more challenging due to her injuries.

- [189] I do not agree with the defendants that the plaintiff lacked the adequate aptitude and abilities to gain entry and pass the competitive BSN program but for her injuries. While she had modest academic success in high school, once freed of the effects of bullying and other social malaises of her adolescence, the plaintiff excelled in her LPN program, where she achieved impressive academic success while commuting long distances and studying late into the night.
- [190] I find that the plaintiff had the aptitude, ability, and desire to progress at some point into the RN program where her earning prospects were greater. I accept that at the time of her second accident, there was a real and substantial possibility, and indeed a likelihood, that the plaintiff could have progressed to become an RN in accordance with her stated plans. However, I postulate that given the competitiveness of the RN program, achieving her higher qualification would likely have taken slightly longer than the plaintiff projects.
- [191] I accept that her goal of becoming an RN is still a possibility, though her prospects of doing so have been substantially impaired, and I would estimate the reduction in her prospects of her becoming an RN to be on the order of 50% or more. Even if she does achieve this higher qualification, the plaintiff is likely to accomplish this goal much later in life and only after she has developed an ability to manage the pain resulting from her injuries.
- [192] Mr. Peever acknowledged that some of his projections were based upon female statistics only and that the inclusion of males in his statistics could affect his results, for instance, if males and females have different rates of participation in the labour market. The defendants point to the decision in *Crimeni v. Chandra*, 2015 BCCA 131 at paras. 23-25 for the proposition that the use of female earning statistics may incorporate gender bias into the assessment of damages. While that may be so in certain instances, the nursing profession remains substantially female-dominated, and many of the positions are unionized. Therefore, I find that the concerns over possible bias in the underlying statistics do not substantially undermine the weight that ought to be afforded to Mr. Peever's calculations in this particular context.
- [193] I would attempt to use the anchors available under a lost earnings approach but apply slightly more optimistic assumptions than the plaintiff's counsel suggested, including allowing for the likelihood of the plaintiff being able to continue to work but likely at a reduced level and likely only with accommodations, and not entirely eliminating the possibility of the plaintiff becoming an RN. Applying these assumptions, I would estimate that the net present value of the plaintiff's loss of future earning capacity to be \$425,000.
- [194] Using a capital asset approach, I find on a balance of probabilities that the plaintiff's earning capacity in all types of employment has been and will continue to be impaired for the foreseeable future. Specifically, her functional capacity to work as an LPN or potentially as an RN has been significantly impaired as a result of the two motor vehicle accidents, with particular emphasis on the second accident. I accept Dr. Waseem's evidence that she will have pain for the rest of her life, and that she may be able to get better, but she is

unlikely to make a full recovery. I also accept Ms. McGrail's evidence the work of registered nurses can be quite physically demanding, especially early on in their careers.

- [195] Generally, I find that the plaintiff has lost a moderately significant portion of her capacity to work, that this loss of capacity will undermine her ability to earn income, and it will endure well into the future.
- [196] In terms of her future outlook, I accept that the plaintiff has been rendered less capable of earning income from all types of employment, is less marketable or attractive as a potential employee, that she will be less able to take advantage of all job opportunities open to her, and that she is less valuable to herself as a person capable of earning income in a competitive labour market: *Brown; Gilbert v. Bottle*, 2011 BCSC 1389 at para. 233; *Morgan v. Galbraith*, 2013 BCCA 305 at paras. 53, 56.
- [197] Using a capital asset approach, I would arrive at a similar result as that under a loss of earnings approach; that is to say, an estimate of the plaintiff's present value of future lost earning capacity inclusive of non-wage benefits in the range of \$400,000-\$450,000.
- [198] Overall, in my opinion, a fair and reasonable award for the plaintiff's loss of future earning capacity is \$425,000, and I award that amount.

## COST OF FUTURE CARE

- [199] As conveniently summarized by Voith J. in *Brewster v. Li*, 2013 BCSC 774 at para. 158, the following principles apply to an award for future care costs:
- [157] The test for determining the appropriate award for the costs of future care is an objective one based on medical evidence. For an award of future care: 1) there must be a medical justification for claims for costs of future care; and 2) the claims must be reasonable: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 at 84 (S.C.), aff'd (1987), 49 B.C.L.R. (2d) 99 (C.A.). In *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at paras. 21-22, [2002] 1 S.C.R. 205, while addressing the assessment of costs of future care, Chief Justice McLachlin confirmed that courts rely on "evidence as to what care is likely to be in the injured person's best interest", and that the measure of such care is "objective, based on the evidence". That same test was recently reaffirmed in *Shapiro v. Dailey*, 2012 BCCA 128 at para. 51, 31 B.C.L.R. (5th) 78.
- [158] The following additional legal principles govern an award for future care costs:
- Awards for costs of future care must be reasonable, both in the sense of being medically required and in the sense of being costs that, on the evidence, the plaintiff will be likely to incur; see *Loepky v. Insurance Corporation of British Columbia*, 2012 BCSC 7 at para. 109.
  - The weight to be given to an opinion on future care will depend on the extent to which recommendations for items like psychological counselling and physiotherapy are supported by the evidence of experts within the relevant field of expertise: see, for example, *Frers v. De*

Moulin, 2002 BCSC 408 at para. 191, 1 B.C.L.R. (4th) 131; and O'Connell v. Yung, 2010 BCSC 1764 at para. 98, costs of future care award varied on appeal 2012 BCCA 57; the trial judge erred in concluding that "future care costs are payable whether or not they may be incurred in the future" (para. 68).

- c) An award of future care costs should be reasonable and the award must be moderate and fair to both parties; see *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229 at 241 - 242.
- d) Common sense should inform claims for the costs of future care, however much they may be recommended by experts in the field; see *Penner v. Insurance Corporation of British Columbia*, 2011 BCCA 135 at para. 13, 17 B.C.L.R. (5th) 244.
- e) In considering any particular item of future care, the test is whether a reasonable person of ample means would incur the expense; see *Brennan v. Singh*, 1999 CanLII 6932 at para. 78, [1999] B.C.J. No. 520 (S.C.).

[159] There are numerous decisions of this court where, absent objective evidence of what future care items might cost, the court has declined to make any award, see *McGough v. Keuhn*, [1998] B.C.J. No. 1361 at para. 42 (S.C.); *Cumpstone v. Johnson*, 2012 BCSC 386 at para. 109, 7 C.C.L.I. (5th) 292; and *Chan v. Kao*, 2009 BCSC 626 at para. 85.

[160] Notwithstanding the foregoing authorities, there are also some cases where, on being satisfied that some item was necessary for the future care of the plaintiff, the court was willing to "ball park" that figure or "do the best it can" see, e.g. *Chaban v. Chaban*, 2009 BCSC 87 at paras. 65-73; and, *Loewen v. Bernardi* (1994), 45 B.C.A.C. 190, 93 B.C.L.R. (2d) 242 at paras. 24 - 27.

[200] Both parties note that the court must be satisfied only that the future care is medically justified as opposed to medically necessary: *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 39.

[201] In terms of pain management, the plaintiff seeks a body pillow every two years, a contoured pillow every two years, and a heating pad every two years for life.

[202] She further seeks homemaking assistive devices in the form of a lightweight vacuum, a steam mop every five years, and a long-handled scrubber every five years. I would discount the amounts for these devices to some extent because the plaintiff would have purchased similar but not specialized items in any event.

[203] In addition, the plaintiff seeks compensation for occupational therapy and travel therefrom, massage therapy for life, and exercise with a kinesiologist for life. The estimated present value for an exercise program with a kinesiologist for life is between \$69,176 and \$103,765, though I cannot find medical justification in the expert evidence for lifelong kinesiology and would only allow for an award for two years of kinesiology.

- [204] The plaintiff seeks massage therapy for life, which would run between \$36,841 and \$73,681; however, Dr. Waseem recommended massage therapy indefinitely, not for life, and an award toward the lower end of the range is medically justified.
- [205] Finally, the plaintiff seeks compensation for medication in the form of Advil or Tylenol, THC, and Tylenol 3, for life. The evidence was that the plaintiff received a recommendation that she take THC for sleep and took it to take her mind off her pain, but the recommendation for THC was unsupported by medical evidence and, hence, I would discount it.
- [206] The total cost of future care claims amount to \$140,487 for low-cost estimates and \$222,561 for high-cost estimates. The plaintiff suggests a middle point for a total of \$181,524.
- [207] The defendants concede that the recommendation for a kinesiologist-guided active rehabilitation program may be medically justified, though it says it appears highly unlikely the plaintiff will pursue this treatment.
- [208] The defendants submit that two to three years of prescription medications in the range of \$500-\$1,000 is appropriate.
- [209] As for massage therapy, the defendants submit that lifelong access to massage therapy is not justified or reasonable.
- [210] The defendants dispute the award for a body pillow, contour pillow, lightweight vacuum, long-handled scrubber, or steam mop. The defendants would allow for one additional heating pad.
- [211] The defendants say the sessions with an occupational therapist for household chores is not supported by the evidence and not medically justified. They submit a total cost of future care award in the range of \$525 to \$3,000 is appropriate.
- [212] Having regard to all the circumstances, I would make an award \$2,500 for pain management, \$900 for assistive devices, \$5,000 for kinesiology, \$40,000 for massage therapy, and \$18,000 for medication. The sum total of these amounts and the total award for future care is \$66,400.

## SPECIAL DAMAGES

- [213] It is well established that an injured person is entitled to recover the reasonable out-of-pocket expenses he or she incurred as a result of an accident. This is grounded in the fundamental governing principle that an injured person is to be restored to the position he or she would have been in had the accident not occurred: *X. v. Y.*, 2011 BCSC 944 at para. 281; *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 at 78 (S.C.), *aff'd* (1987), 49 B.C.L.R. (2d) 99 (C.A.).

[214] The plaintiff asks for an award of \$6,793.11 for special damages comprising treatment costs, medication, mileage and other costs. The defendants concede about \$5,440 of the claimed amounts are justified and contests the remainder based mostly on irregularities in the receipts.

[215] I am satisfied that the plaintiff has demonstrated a reasonable basis for these costs, and I would award the figure of \$6,793.11 in special damages.

## CONCLUSION

[216] I award the plaintiff the following amounts:

ITEM

AWARD

1.

Non-pecuniary damages

\$95,000

2.

Loss of past income earning capacity

\$6,800

3.

Special damages

\$6,793.11

4.

Loss of future income earning capacity

\$425,000.00

5.

Cost of future care

\$66,400

TOTAL

\$599,993.11

[217] There will be judgment to the plaintiff for \$599,993.11.

[218] I am inclined to grant costs in the cause, but if the parties wish to make submissions, they may contact the registry to make arrangements to speak to the issue.

"Brundrett J."

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