

CANADA / JUDGMENT

Mayede v. Dominguez

2020 BCSC 982

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 982 Mayede v. Dominguez

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Mayede v. Dominguez,

2020 BCSC 982

Date: 20200702

Docket: M164535

Registry: Vancouver

Between:

Bonnie Tomoko Mayede

Plaintiff

And

Nathaniel F. Dominguez, Rita Rattan, Hans Demolition & Excavating Ltd., Karen Ellen O'Brien
and David Michael O'Brien

Defendants

Before: The Honourable Mr. Justice G.C. Weatherill

Reasons for Judgment

Counsel for the Plaintiff:

M.J. Holroyd

N.J. Hopewell

J. Foster, Articled Student

Counsel for the Defendants:

L.G. Harris, Q.C.

Place and Dates of Trial:

Vancouver, B.C.

June 8-11, 15-16, 2020

Place and Date of Judgment:

Vancouver, B.C.

July 2, 2020

Introduction

- [1] The plaintiff claims damages for chronic pain injuries arising out of two motor vehicle collisions (collectively, the "Accidents"). Liability has been admitted in respect of each accident. Counsel for the defendants has confirmed that all of the injuries found to have been caused by the Accidents are indivisible and that an apportionment of damages amongst the various defendants is not required.
- [2] The first of the two collisions (MVA #1) occurred on December 27, 2014 when the plaintiff's vehicle was hit head-on by a vehicle owned and operated by the defendant Nathaniel Dominguez after Mr. Dominguez lost control and his vehicle crossed a raised median and entered the plaintiff's lane of traffic.
- [3] The second collision (MVA #2) occurred on February 19, 2016 when a vehicle owned by the defendant, Hans Demolition & Excavating Ltd. and driven by the defendant, Rita Rattan (the "Rattan vehicle"), rear-ended a vehicle) owned by the defendants, Karen O'Brien ("Karen") and David O'Brien and being driven by Karen (the "O'Brien vehicle"). The O'Brien vehicle was pushed forward and rear-ended the plaintiff's vehicle while it was stopped at a train crossing. Counsel for the defendants advised the court at the outset of the trial that the admission of liability in respect of MVA #2 arises from fault on the part of Rattan and that the O'Briens were not at fault.
- [4] By agreement during the trial, the action was dismissed as against the O'Briens without costs.

Evidence at Trial Tendered by the Plaintiff

The Plaintiff

- [5] The plaintiff is a 58-year-old registered nurse. She chose that vocation after being laid off from her ten-year job in the field of legal document searching and filing. She testified that she decided to seek employment in the field of health care because she wanted to help people.
- [6] In 2000, after taking a six-month college program, the plaintiff became a lab technician at the Royal Columbian Hospital in New Westminster, British Columbia ("Royal Columbian"). It was there that she met a registered nurse named Garnet Lythgoe ("Garnet") whom she married in 2006.
- [7] In 2005, with the encouragement of Garnet, the plaintiff left her employment and enrolled at Langara University in a three-and-a-half year Bachelor of Science degree program in nursing. The plaintiff graduated with high marks in 2008 and, after a celebratory three-week trip to New Zealand with Garnet, commenced full-time employment as a Registered Nurse in the Cardiac Step-Down Unit at Royal Columbian. She testified that she found the job physically demanding but enjoyed it because it had been her dream to work in a cardiac unit.
- [8] In 2009, the plaintiff completed a four-month full-time High Acuity Training program at British Columbia Institute of Technology.
- [9] In May 2010, the plaintiff suffered an injury to her left wrist when she fell while rushing to attend to a cardiac patient. She was diagnosed as having sustained "complex region pain syndrome" and was off work for approximately three months. After completing a graduated return to work program, she returned to her full-time work with no functional limitations other than a slightly diminished grip, intermittent redness and swelling and nerve sensations in her non-dominant left hand. She testified that these ongoing symptoms initially impacted her ability to fully function at work but not anymore.
- [10] In September 2012, the plaintiff transferred to the Admitted Cardiac Intervention Unit ("ACIU") at Royal Columbian where she worked two 12-hour day shifts followed by two 12-hour night shifts each week. She enjoyed the work but struggled with the night shifts because she was unable to adjust her sleeping patterns and get adequate sleep between her shifts.
- [11] In March 2013, the plaintiff was caring for a cardiac patient in the back of an ambulance while it was transferring the patient from Royal Columbian to another hospital. The ambulance was involved in an accident (the "Ambulance Accident"). The plaintiff suffered a concussion as well as myofascial injuries to her neck and back. Her concussion symptoms included severe light sensitivity, blurriness, nausea and "cloudiness" in her brain. She was off work until April 8, 2013 at which time she started a gradual return to work program. She returned to work full time on June 17, 2013. She testified that her concussion symptoms completely resolved within seven months of the Ambulance Accident.

- [12] In June 2014, the plaintiff transferred to Royal Columbian's Day Cardiac Intervention Unit ("DCIU") because of her difficulty adjusting to the night shifts required in the ACIU. Her 8-hour shifts in the DCIU required that she work days and evenings only. She began sleeping well again. She testified that, by early December 2014, she had no Ambulance Accident-related injury symptoms other than occasional pain in her neck and back. She described these injuries as having been 90-95% resolved and that, despite some residual muscle tightness, her ability to fully function and enjoy both her work and her life generally was not limited. She regularly attended massage therapy in order to "maintain" her functionality.
1. MVA #1
- [13] MVA #1 occurred on December 27, 2014, when the plaintiff was returning home from a massage therapy treatment. She described the impact of the collision with Mr. Dominguez' vehicle as "violent". She testified that she thought she was going to die. Her vehicle was written off.
- [14] The plaintiff testified that she felt an immediate "jarring" in her right shoulder and right hip as well as chest pain from her seat belt. A short time later she also began to experience pain in her neck and right leg. She was taken to Royal Columbian by ambulance where she was examined, given pain medication and discharged.
- [15] The plaintiff testified that she went home and began the process of tending to her injuries. In the days and weeks that followed her pain symptoms worsened, primarily in her right shoulder, right hip, lower back and right leg. She described the pain as constant and "unbearable". She had headaches and could not sleep because of the pain. She was extremely anxious regarding seriousness of MVA #1 and what could have happened to her.
- [16] The plaintiff began a regime of deep tissue massage therapy, physiotherapy and, later, acupuncture, all of which provided some temporary relief from her pain symptoms and helped the plaintiff to function.
- [17] The plaintiff was off work due to her MVA #1 pain-related symptoms until March 9, 2015, by which time she had exhausted her sick time and leave of absence benefits. The intensity of her pain symptoms had "waxed and waned" such that she was able to commence a graduated return to work program. She returned to work full-time on March 30, 2015.
- [18] The plaintiff testified that, although her symptoms had improved such that she was able to return to work, they did not resolve. She was unable to lift patients or the heavier hospital equipment as she had prior to MVA #1. She was fortunate to be working in a unit that fostered a "team approach" and her co-workers, who were supportive of her and her condition, assisted her with those heavier tasks.

[19] The plaintiff testified that, despite the improvement in her pain symptoms and the assistance she received from her co-workers, she continued to struggle at work. At the suggestion of her manager, she began looking for a part-time position in the DCIU. She felt that working fewer hours would give her an opportunity to catch up on her sleep and, as well, get the therapy she needed in order to recover.

[20] The plaintiff testified that, immediately prior to MVA #2, she continued to have pain in her back, right hip, and right shoulder. She was also unable to sleep well due to this pain.

2. MVA #2

[21] As she was stopped at a railway crossing waiting for a train to pass, the plaintiff described hearing a "screech", followed by a crash and then her vehicle being impacted. She felt her head "jerk back and forth". She immediately felt pain in her neck and upper back. Her vehicle sustained only minor damage and she drove herself to the hospital where she was examined, given anti-inflammatory and pain medication, and discharged.

[22] The plaintiff testified that by the time she arrived home, her pain symptoms had worsened, as had the residual symptoms from MVA #1. She was off work for approximately one week after which she returned to her full-time position.

[23] The plaintiff testified that, in the weeks and months that followed MVA #2, she saw some improvement in her pain symptoms but continued to struggle at work due to the pain. On March 29, 2016, the plaintiff accepted a temporary part-time position that had become available in the DCIU. Her work hours were reduced by approximately 50%. Working part time enabled her to catch up on her sleep and focus on her recovery and rehabilitation. She added chiropractic treatments to the regime of therapies she was receiving. She testified that her neck pain improved significantly and she also saw some improvement in her back and right hip pain symptoms. Her sleep issues did not improve.

[24] While the plaintiff was working part-time, she and Garnet made a road trip to Yosemite National Park in California. The plaintiff testified that she found the prolonged sitting in their vehicle to be very difficult and the trip was not as enjoyable as it would have been had her pain symptoms not been present.

[25] The plaintiff continued worked part-time until June 2, 2017 when her part-time position was taken by someone with higher seniority. The plaintiff returned to her full-time job. She did so because she thought that she was on the road to recovery. However, her symptoms worsened which she attributes to her having less time available to attend her rehabilitation sessions.

- [26] In 2018, the plaintiff and Garnet travelled to Greece for a sailing holiday. The plaintiff testified that both the flight and her time aboard the boat were very difficult and uncomfortable for her. Her pain symptoms were aggravated, particularly those in her lower back and hip. She testified that she went on the trip despite her condition because Garnet enjoyed travelling and that "I did it for him".
- [27] The plaintiff testified that, by late 2019, her mood had deteriorated because she was exhausted and she despaired as she was not getting better. In December 2019, her family doctor, Dr. Eric Watts, referred to her a psychologist.
- [28] During the period from January 2017 to December 2019, the plaintiff applied for every part-time position that came available in the DCIU but was unsuccessful at securing any of them until late 2019 when she was the successful bidder for a permanent part-time position in the DCIU. She gave up her permanent full-time position. She started working in her new part-time position on January 2, 2020.
- [29] On cross-examination the plaintiff agreed that, as a registered nurse, she is entitled to apply for and be accommodated in any nursing position in the region but that she focused on finding a job within Royal Columbian's cardiac units and, in particular, the DCIU because she loves her job and the people she works with. She testified that, although she spoke to her manager and to the BC Nurse's Union Steward about her options, none of the few they mentioned appealed to her. All the options they suggested involved either a change in her unit or hospital and she was concerned that her new co-workers would not be as supportive of her as those in the DCIU. She testified that she had no interest in applying for a job that she would not enjoy.
- [30] The plaintiff testified that the permanent part-time position she moved to in January 2020 was very beneficial for her because it gave her time to both catch up on her sleep and increase her rehabilitation sessions. She began to incorporate yoga, cardio-exercises (walking) and stretching into her rehabilitation regime. Her back and right hip pain symptoms improved somewhat and there was significant improvement in her shoulder symptoms. She described her ongoing neck pain as "coming along".
- [31] In March 2020, the plaintiff began seeing a psychologist, Dr. Marianne Gareau, regarding her low mood.
- [32] Also in March 2020, the COVID-19 pandemic resulted in the closure of all of the treatment facilities that the plaintiff was relying on for her rehabilitation. She testified that, as a result of not being able to access these treatment modalities, her physical condition deteriorated and she became "extremely sad". Her anxiety level increased. She began to have problems concentrating at work. She became forgetful and very emotional--she would cry "at the drop of a hat". She attributed her emotional trauma to the feeling that she may never recover from her injuries.

- [33] Both Dr. Watts and Dr. Gareau told her that, given her mental condition, she was not fit to respond adequately to the needs of patients. They recommended that she go on a leave of absence from work. She was prescribed anti-depressant medication. The plaintiff testified that this medication has improved her mood and she now feels "more normal" but it causes her drowsiness and her mind to become foggy. Her level of anxiety remains high and her physical pain symptoms continue as before.
- [34] The plaintiff has been on a leave of absence from her work since April 2, 2020. Dr. Watts initially recommended that the plaintiff remain off work for three weeks. He then extended it to six weeks and then to three months. On cross-examination, the plaintiff steadfastly denied that she went on her leave of absence as a result of stress induced by the COVID-19 pandemic and this lawsuit, although she agreed that both added to her already existing anxiety and feelings of vulnerability and confusion.
- [35] The plaintiff testified that she always considered herself to be a strong person but, as a result of the Accidents, feels "broken" and only a "fraction" of the person she was before they occurred. She testified that she is trying her best to get stronger but "is not there yet". She plans to return to her permanent part-time position at Royal Columbian when her anxiety level decreases and she is able to return to her pre-COVID-19 therapy treatments.
- [36] The plaintiff testified that, prior to the Accidents, she and Garnet enjoyed travelling, biking, and mountainous hiking. As a result of the Accidents, she is no longer able to bike with Garnet and limits her walking to flat surfaces, otherwise she suffers for days afterwards.
- [37] The plaintiff testified that, prior to the Accidents, she performed most of the household chores, including cleaning, laundry, vacuuming and meal preparation. As a result of the Accidents, the household chores are split between her and Garnet, with him doing the heavier tasks and her limiting herself to the lighter duties.
- [38] The plaintiff testified that her Accidents-related pain symptoms have had a profound impact on her relationship with Garnet. They have not slept in the same since MVA #1 and their intimacy has suffered. She testified that she does not feel she is as strong a partner as she was for him prior to the Accidents.

Garnet Lythgoe ("Garnet")

- [39] Garnet is the plaintiff's husband. He is currently 61 years old. He met the plaintiff at Royal Columbian in approximately 2000 where he worked as a registered nurse and the plaintiff was working as a lab technician. He observed her caring and friendly manner towards patients and was attracted to her. Their relationship developed over the next several years. They moved in together in 2005 and were married in 2006.
- [40] Garnet encouraged and supported the plaintiff while she obtained her Bachelor's degree in nursing because he wanted her to fulfill her dream of becoming a nurse.

- [41] Garnet testified that, prior to the Accidents, he and the plaintiff enjoyed several activities together including speed walking and bike riding. They also loved travelling. They visited Europe, Japan, Cuba, Hawaii, and Mexico where they spent much of their time walking. He testified that the plaintiff did most of their housekeeping and cooking with "zero" limitations.
- [42] Although Garnet readily conceded on cross-examination that the plaintiff has some numbness associated with her work-related hand injury in 2010 as well as some ongoing occasional pain and discomfort from her Ambulance Accident-related injuries, he testified that the plaintiff displayed no physical impairment immediately prior to MVA #1 and that neither the Ambulance Accident nor MVA #1 limited her ability to function and enjoy their life together. He testified that he and the plaintiff planned to retire at age 65 and thereafter fulfill their dream of traveling once or twice per year and to continue to enjoy their simple life.
- [43] Garnet testified that the plaintiff was very shaken up as a result of MVA #1. She was trembling, emotional and obviously in significant pain. In the days and weeks that followed, she was unable to engage in any significant activity and spent most days laying on the couch, icing her injuries. Her sleep was disrupted by her pain. Eventually, and continuing to this day, Garnet has slept in a separate bedroom because the plaintiff's moving throughout the night in an attempt to become comfortable in bed woke him and he too was becoming sleep deprived.
- [44] Garnet testified that, after the plaintiff returned to work in March 2015, she returned home exhausted and unable to engage in any other significant activity. He observed little, if any, improvement in the plaintiff's condition. He performed all of the housekeeping and cooking tasks.
- [45] After MVA #2, Garnet saw little improvement in the plaintiff's condition even after she moved from working full-time to part-time. He testified that she was able to go for short walks with him on flat surfaces but struggled.
- [46] Garnet testified that, when the plaintiff returned to working full-time in 2017, her condition deteriorated. Her mood and energy levels were low. She spent her weekends at home recuperating and preparing all of their meals for the ensuing week so that she would not have to prepare anything after work.
- [47] Garnet testified that, although he and the plaintiff traveled after the Accidents to Greece and made a road trip to Yosemite National Park as well as other trips to Whistler and Harrison Hot Springs, they did not enjoy themselves as much as they would have had had the plaintiff not been in pain.

- [48] Garnet testified that he noticed that plaintiff's mood improved initially after she went back to part-time work in January 2020, but she soon began to return home from work exhausted. She started seeing a rehabilitation specialist but when those sessions were cancelled due to the COVID-19 pandemic, her anxiety level increased and, in his words, "she suffered a meltdown".
- [49] Garnet testified that he has not observed any significant improvement in the plaintiff's physical condition since the Accidents. He testified that his and the plaintiff's retirement plans are on hold because she first wants to get better physically and return to work. He plans to work longer in order to help her do so.
- [50] Garnet testified that the plaintiff is able to perform some of the household duties but is limited to those that are not physically demanding.

Nemanja Jevremovic ("Nash")

- [51] Nash has been a full-time registered nurse in Royal Columbian's DCIU since June 2010. He has been one of the plaintiff's co-workers since she started working there.
- [52] Nash described the plaintiff prior to MVA #1 as a colleague who was cheerful, high energy, reliable, helpful and professional. She was attentive to and had a keen eye for detail. She did not "gloss over things". She often caught errors made by others, thereby averting potentially critical problems. He did not observe the plaintiff having any physical limitations that impaired her day-to-day functioning as a nurse. The plaintiff did not request assistance from other nurses beyond what the job normally dictated. Although the plaintiff appeared to have some residual post-trauma stress disorder-like stress after the Ambulance Accident, she was able to fully carry out her nursing duties.
- [53] Nash testified that there was a change in the plaintiff's demeanour after MVA #1. She appeared to be depressed and in pain. Her gait was noticeably "stiffer". She complained of pain in her lower back. Her pain complaints increased after MVA #2.
- [54] Nash gave evidence regarding a relatively easy hike he went on with the plaintiff and Garnet in approximately 2018. The terrain was primarily flat but they had to make frequent stops for the plaintiff. They turned around when the path became more inclined.
- [55] Nash testified that the plaintiff appeared more energetic and was able to function in 2020 after she commenced working part-time, but continued to be limited in her ability to perform heavier tasks.
- [56] Nash testified that there is a low supply and high demand for light duty, day-shift jobs in the DCIU, whether full-time or part-time.
- [57] Nash gave evidence regarding the retirement entitlement for nurses in the DCIU. The earliest a nurse can retire is at age 55 and receives approximately 50% of salary. The entitlement increases to approximately 2/3 of salary at age 59 and ¾ of salary at age 65.

Heiko Blasig, Registered Massage Therapist

- [58] Mr. Blasig is a registered massage therapist who treated the plaintiff on 161 occasions between January 2014 (after the Ambulance Accident) and March 2018 when he moved to Maple Ridge. His treatments take one hour and always comprise a comprehensive, full body deep-tissue massage with a focus on the areas of complaint.
- [59] Mr. Blasig testified that the plaintiff presented in January 2014 with back pain as well as overall body aches and pains. He described the plaintiff as motivated to get better. He testified that, over the course of the 22 treatments he provided to the plaintiff prior to MVA #1, she showed marked improvement and seemed pleased with the progress she was making and the relief she was deriving from the treatments.
- [60] Mr. Blasig saw the plaintiff approximately one week after MVA #1. He testified that there was a significant set-back in her progress. He treated her more than 75 times between then and MVA #2. He testified that, after MVA #2, the plaintiff's condition deteriorated significantly, as did her mood. Her overall demeanour changed from being excited about her improving condition to feeling like she was "stuck" with the pain. Although the plaintiff appeared to derive pain relief from his treatments, the relief was only temporary.
- [61] Mr. Blasig last saw the plaintiff on March 24, 2018. He described her mood as "low" and her physical presentation as showing no significant improvement.

Dr. Eric Watts, General Practitioner

- [62] Dr. Watts is a general practitioner who at all material times has been the plaintiff's family physician. He was qualified without debate as an expert in the field of general and family medical practice.
- [63] Dr. Watts provided the court with two reports, dated June 2, 2018 and March 1, 2020 respectively.
- [64] Dr. Watts' continuous care of the plaintiff dates back to before her hand injury in 2010. He opined that the plaintiff's ongoing symptoms from her hand injury are limited to a weakness of grip and have not impaired her ability to fully function. He confirmed that, during his consultations with the plaintiff in the six months immediately preceding MVA #1, the plaintiff did not complain of any injury or pain related to the Ambulance Accident. On cross-examination, Dr. Watts stated that it was clear to him that the plaintiff was fully functioning and that any pain and discomfort she was experiencing was not limiting her abilities. He added that, in contrast, after MVA #1, the plaintiff complained to him of pain symptoms she had never mentioned to him before MVA #1.
- [65] In Dr. Watts' opinion, the plaintiff suffered the following injuries as a result of the Accidents:
- a) cervical strain (soft tissue injury) in MVA #1 that was exacerbated by MVA #2;

- b) tear and associated painful spasm of the Trapezius and Rhomboid muscles of both shoulders but primarily her right shoulder;
- c) muscle contraction headaches;
- d) strain of the left forearm and wrist (resolved within months);
- e) lumbar strain with sacroiliac joint dysfunction in MVA #1 which was exacerbated by MVA #2; and
- f) sleep disturbance.

[66] In December 2019, Dr. Watts observed that the plaintiff's low mood and anxiety symptoms had increased significantly and that she was "clearly struggling emotionally". He was concerned about her mental health. He referred her to a clinical psychologist, Dr. Marianne Gareau.

[67] On April 2, 2020, Dr. Watts prescribed anti-depressant medication for the plaintiff. He also recommended that the plaintiff take a leave of absence from work. The main reason he did so was the plaintiff's anxiety and pain symptoms, although her concerns regarding the COVID-19 pandemic at work were also a "small factor".

[68] Dr. Watts opined that the plaintiff will likely experience her ongoing pain symptoms for many years to come. In Dr. Watts' opinion, working part-time is the only way that the plaintiff will be able to adapt to her chronic pain symptoms.

[69] Dr. Watts opined that the plaintiff will need to have periodic treatment with over-the-counter and prescription medications as well as ongoing access to physical therapy, massage and chiropractic treatments in order for her to deal with any flare-ups in her pain symptoms. Dr. Watts expects that the plaintiff will need weekly physical treatments for 4-12 visits several times per year. Access to these medications and treatments will be required on an intermittent but indefinite basis.

[70] Dr. Watts' opinions were not impugned on cross-examination.

Dr. Zeeshan Waseem, Psychiatrist

[71] Dr. Waseem is a psychiatrist who was qualified as an expert in that field without objection. Dr. Waseem conducted an examination of the plaintiff on November 10, 2019. His report is dated November 22, 2019.

[72] Dr. Waseem testified that he reviewed that plaintiff's medical records before his examination. At the examination itself, he spent approximately 60 to 75 minutes with the plaintiff discussing her pre- and post-Accidents history, including her medical care and therapies and functioning. He then conducted a physical and neurological examination of the plaintiff, which lasted approximately 15 to 30 minutes.

[73] On page 3 of his report, Dr. Waseem wrote that the plaintiff:

had no prior ongoing concerns of a musculoskeletal nature. Headaches, back pain and rib pain notes in the pre-accident records had resolved.

[74] On cross-examination, Dr. Waseem confirmed that he had read Mr. Blasig's clinical records which disclosed that immediately prior to MVA #1 the plaintiff had reported headaches, a tight neck and a sore back. He testified that he did not make any mention of these records in his report because the plaintiff told him these symptoms had resolved prior to MVA #1. He stated that he used his "clinical judgment" and gave more emphasis to what the plaintiff told him than to what was disclosed in the clinical records and therefore "didn't consider [the records] germane".

[75] Dr. Waseem opined that the plaintiff suffered the following injuries in the Accidents:

- a) sprain/strain soft tissue injuries of the cervical and lumbar spine;
- b) chronic lower back pain secondary to right sacroiliac joint function with a secondary myofascial component; and
- c) chronic myofascial pain of cervical spine & deconditioning.

[76] Dr. Waseem recommends that the plaintiff engage in the following treatment measures:

- a) active rehabilitation with an experienced, regulated health professional for three months, two to three times per week, with the goal of training the plaintiff to perform core strengthening exercise, deep neck flexor strengthening and pelvic and hip strengthening exercises with the intent of developing for the plaintiff a program that she can maintain independently following conclusion of formalized care;
- b) chiropractic treatment and/or massage therapy, once or twice per month;
- c) continue to use over-the-counter analgesics;
- d) trigger point injections for her chronic myofascial pain of the cervical spine;
- e) image-guided right sacroiliac joint steroid injections for her chronic lower back pain; and
- f) psychiatric or psychological work-ups.

[77] On cross-examination Dr. Waseem testified that the active rehabilitation he has recommended will help the plaintiff's deconditioning, while the passive rehabilitation modalities will help her deal with pain symptoms.

[78] Dr. Waseem opined that the plaintiff's prognosis for recovery is poor, given the long-standing and persistent nature of her injuries, despite treatment modalities. He opined that her recovery will likely be refractory to medical management and that her deconditioning will make it difficult for her to recover. However, he opined that with implementation of the treatments he has recommended, some further improvement is possible. Regardless, she will continue to experience pain.

Ashea Neil, Occupational Therapist

[79] Ms. Neil is an occupational therapist who was qualified without objection as an expert in that field as well as in the fields of functional capacity evaluation and the cost of future care.

[80] On January 17, 2020 Ms. Neil attended at the plaintiff's home for the purpose of conducting a cost of future care assessment. The assessment took approximately four hours. On January 27, 2020 she conducted a functional capacity evaluation ("FCE") of the plaintiff at her office. That evaluation took approximately seven hours at the end of which the plaintiff reported she was in pain. Ms. Neil followed up with the plaintiff by telephone a few days later. The plaintiff reported she was experiencing pain flare-ups as a result of the FCE.

[81] Ms. Neil's expert report is dated February 27, 2020.

[82] Ms. Neil's evaluation of the plaintiff was, by any measure, thorough and exhaustive. She found that the plaintiff provided a consistently acceptable level of physical effort during the FCE. Indeed, she found the plaintiff to be willing and competitive throughout the evaluation. She testified that the plaintiff's subjective reports of pain and her perceived level of disability were generally consistent with her objective findings and that she considered them reliable. Ms. Neil observed that the plaintiff was disappointed when some of the results of her physical efforts were not as good as she thought they would have been. The plaintiff was tearful at the end of the FCE when she realized that she was limited in her functionality.

[83] Ms. Neil opined that, during the FCE, the plaintiff did not demonstrate the capacity to meet the physical demands of a full-time registered nurse, but did demonstrate the capacity to do the job on a part-time basis at the DCIU with the assistance and accommodations of co-workers for lifting tasks. She wrote:

Ms. Mayede demonstrated a physical demand capacity of: occasional sitting, walking, bending and twisting of the neck and waist, squatting, kneeling, bilateral power grasping, left-hand fine manipulation, pushing and pulling, and reaching above and below shoulder level; frequent standing and simple left-hand grasping; constant repetitive hand use and simple right-hand grasping; and light-occasional lifting, and sedentary-occasional carrying. In respect to a career path as a registered nurse, Ms. Mayede is limited for walking, standing, bending at the neck, and lifting anything over 15lbs. She would not be suitable for a job that required prolonged sitting of more than an hour at a time. Her physical demand capacity is most suitable for a part-time job that requires a combination of dynamic and static standing, walking, and minimal sitting.

[Emphasis added.]

- [84] Ms. Neil also opined that the plaintiff demonstrated challenges that will likely limit her ability to work in a competitive environment/workplace and would not likely sustain durable employment working full-time consecutive days. Ms. Neil opined that sedentary tasks were one of the plaintiff's greatest limitations.
- [85] Ms. Neil's opinions were not impugned during cross-examination, but she did agree that the plaintiff was deconditioned and that active rehabilitation for the plaintiff was warranted more than passive rehabilitation. She provided the court with the costs of the rehabilitation modalities that were recommended by Dr. Waseem.

Sergiy Pivnenko, Economist

- [86] Mr. Pivnenko is an economist whose two reports dated March 11, 2020 were put in evidence by agreement without the need for him to be called as a witness. Mr. Pivnenko provided the usual calculations regarding the present value of future cost of care items and services and past and future earnings projections, discounted for contingencies.

Evidence at Trial Tendered by the Defendants

Karen O'Brien ("Karen")

- [87] Karen was in the vehicle that was rear-ended by the Rattan's vehicle and, in turn, rear-ended the plaintiff's vehicle during MVA #2. Karen testified regarding the impact of the respective collisions. She testified that, upon her vehicle being struck by the Rattan's vehicle, her head snapped back and forth and that she "has problems with her neck and shoulders still today".
- [88] Karen testified that the impact of her vehicle hitting the plaintiff's vehicle was "not severe at all as far as I'm concerned". She does not recall having any discussion with the plaintiff regarding their respective injuries.

Credibility and Reliability

- [89] The following quote from *Bradshaw v. Stenner*, 2010 BCSC 1398 provides a succinct summary of the law regarding the assessment of the credibility of witnesses:
- [186] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the

demeanour of a witness generally (Wallace v. Davis (1926), 31 O.W.N. 202 (Ont. H.C.); Faryna v. Chorny (1951), [1952] 2 D.L.R. 354 (B.C. C.A.) [Faryna]; R. v. S. (R.D.), [1997] 3 S.C.R. 484 (S.C.C.) at para.128). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (Faryna at para. 356).

- [90] As is generally the case in personal injury actions, the most important witness is the plaintiff herself. Once an assessment of the credibility and reliability of the plaintiff's evidence has been made, the court is generally in a position to determine causation, usually with the assistance of opinion evidence from qualified medical experts.
- [91] A plaintiff who accurately describes her symptoms and circumstances before and after the collision without minimizing or embellishing them can reasonably anticipate that the court will find her evidence to have been credible and reliable.
- [92] The plaintiff was a sincere, forthright, genuine witness. If anything, I found she tended to understate the magnitude of her physical and emotional wellbeing. Her evidence was consistent throughout and was not impugned on cross-examination. Counsel for the defendants took no issue with the general credibility of the plaintiff, merely suggesting that she had downplayed the residual pain symptoms from the Ambulance Accident. However, she conceded that she was only 90 to 95% recovered from those injuries at the time of MVA #1. I disagree that she downplayed them. I have no hesitation accepting the plaintiff's evidence in its entirety.
- [93] Each of Garnet, Nash, and Mr. Blasig was an honest, forthright, forthcoming, genuine and reliable witness who I found to be sincere in giving his testimony. None of them was prone to exaggeration and their evidence was not undermined during cross-examination. Each was a good witness and I have no hesitation accepting their collective evidence in its entirety.
- [94] Each of Dr. Watts and Ms. Neil was an impressive witness. Each was the epitome of an objective expert who both understands and objectively carries out his or her role in the proceedings, namely, to assist the court rather than to advocate for one party or the other. Each was prepared, articulate and helpful. I accept their evidence in its entirety.
- [95] Despite his credentials, I was less impressed with Dr. Waseem because of the manner in which he attempted to downplay Mr. Blasig's clinical record of the plaintiff's pre-MVA #1 pain symptoms reported very shortly before MVA #1 occurred. It was obvious to me that Dr. Waseem either had not read the clinical record or had forgotten about it when he took the plaintiff's history and wrote his report. It would have been preferable had he simply said so. Nevertheless, Dr. Waseem's opinions on the plaintiff's prognosis were not impugned during cross-examination and I therefore accept them.
- [96] Karen was a genuine witness who testified in an honest manner. I have no difficulty accepting her evidence as a truthful rendition of her best recollection.

Causation

- [97] The legal test for causation is the "but-for" test--the plaintiff must prove on a balance of probabilities that, but-for the defendant's negligence, she would not have suffered her injuries. The defendant's negligence must have been a necessary cause of the injury. This test was summarized and affirmed by the Supreme Court of Canada in *Clements v. Clements*, 2012 SCC 32 at paras. 8-10; *Ediger v. Johnston*, 2013 SCC 18 at paras. 28-29; and *Resurface Corp. v. Hanke*, 2007 SCC 7 at paras. 21-23.
- [98] The classic statement of the law of causation was stated by Mr. Justice Sopinka in *Snell v. Farrell*, [1990] 2 S.C.R. 311 at 328: "causation need not be determined by scientific precision". It is a practical question of fact that can often be answered by ordinary common sense. The plaintiff need only establish a "substantial connection between the injury and the defendant's conduct" in order to establish causation: *Snell* at 327. A substantial connection is something beyond the de minimus range: *Farrant v. Laktin*, 2011 BCCA 336 at paras. 9-11.
- [99] In this case, little is needed beyond the application of ordinary common sense to determine causation. The evidence is overwhelming and uncontroverted that the Accidents caused the deterioration in the plaintiff's physical health and outlook on life, which in turn negatively impacted her ability to function as a nurse. I find that MVA #1 was the primary cause of the plaintiff's pain symptoms and resulting disabilities. MVA #2 exacerbated those symptoms.

Assessment of Damages

Pre-Existing Injuries

- [100] The overall assessment of damages can be reduced if there is a measurable risk that a plaintiff's pre-existing condition would have detrimentally affected her in the future regardless of the Accidents: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at 473-74.
- [101] The defendants concede that the plaintiff's pre-existing hand injury left her with no functionality issues that should be taken into consideration in this case. However, they submit that the plaintiff's residual Ambulance Accident-related injuries are a pre-existing condition that must be considered. I disagree.
- [102] I find that both had largely, although not entirely, resolved by the time of MVA #1 and neither had any residual impact on her ability to function, work in her vocation and enjoy her life. She was working full-time at a job that she loved and was living a full and happy life with her husband. I find that all of the losses now claimed by the plaintiff are entirely attributable to the Accidents.
- [103] On the basis of the evidence as a whole, I accept that, while the plaintiff's Ambulance Accident-related injuries were not fully resolved at the time of MVA #1, they had no residual impact on her ability to function, work full-time, and enjoy her personal life. I decline to reduce my assessment of the plaintiff's damages on the basis of a pre-existing condition.

Non-pecuniary Damages

- [104] The assessment of non-pecuniary damages takes into account the well-established factors from *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46. An award under this head is intended to compensate the plaintiff for pain, suffering, loss of enjoyment of life, and loss of amenities. Factors commonly taken into account include the age of the plaintiff, nature of the injury, severity and duration of pain, extent of any disability, extent of emotional suffering and impairments to the plaintiff's life, including impairments to family, marital, and social relationships, physical and mental abilities, and loss of lifestyle.
- [105] Each plaintiff must be assessed individually, although reference to previous similar cases can be helpful: *Zamora v. Lapointe*, 2019 BCSC 1053, at para. 56.
- [106] Prior to the Accidents, the plaintiff was an energetic, hard-working, diligent, and conscientious person who was dedicated to her nursing job. She was an active, outdoors-oriented individual who enjoyed hiking, walking, travelling and working in their small garden. The plaintiff's work as a registered nurse was very important to her and gave her a sense of pride and fulfillment.
- [107] The impact of the Accident-related injuries on her day-to-day living and, in particular, her ability to function both at work and at home, was significant. She tried to work through her pain and return to her normal life with the help of a significant number of massage, acupuncture and chiropractic treatments. Ms. Neil's evidence that the plaintiff was upset about not performing as well as she had hoped in the functional capacity evaluation was telling.
- [108] I find that, as a result of her Accidents-related injuries, the plaintiff no longer enjoys the simple pleasures of life as she did prior to the Accidents, such as hiking, walking and biking with Garnet. She suffers from constant pain, sleep dysfunction and fatigue. Her mood is depressed. She has feelings of hopelessness. Her relationship with Garnet has been adversely affected to a significant degree.
- [109] The uncontroverted evidence, which I accept, is that the plaintiff was and continues to be a person with a strong work ethic and sense of loyalty and dedication to her nursing profession. Her struggle after the Accidents to continue working is praiseworthy but has come at a cost to her previous happy mood. She is fatigued at the end of her work day. Her passion for life has been eroded or at least significantly curtailed by the Accidents.
- [110] While the plaintiff's neck and back pain waxes and wanes to some degree, it is aggravated by daily tasks. Ms. Neil's opinion is that the plaintiff does not have the physical capacity to work full-time. Rather her physical capacity is limited to a part-time job that requires a combination of dynamic and static standing, walking, and minimal sitting.

[111] Dr. Watts' prognosis is unchallenged. I accept the respective opinions of Drs. Watts, Waseem, and Ms. Neil that the plaintiff's pain symptoms will likely improve if she commits to an appropriate course of active rehabilitation with qualified guidance.

[112] Counsel for the plaintiff seeks a non-pecuniary award of \$120,000, relying on the decisions of this court in *Karst v. Foster*, 2019 BCSC 1043; *Merko v. Plummer* 2016 BCSC 1403; *Popove v. Attisha*, 2019 BCSC 1587, and *Kelly v. Kalra* 2019 BCSC 1305. Each involved a similarly aged plaintiff and similar facts:

- In *Karst*, the Court awarded \$90,000 in non-pecuniary damages to a 57-year-old federal corrections officer who suffered chronic lower back pain in a vehicle accident. As a result, he could no longer engage in the recreational activities he had previously enjoyed and his sleep was impacted resulting in constant fatigue. He was unable to perform his job duties and his sense of self-worth was diminished. The Court found that the plaintiff's pre-existing back injury was not a significant factor in his present condition.

- *Merko* involved a highly productive 52-year-old district office clerk who was happiest when she was busy with multiple tasks to complete, whether at work or with her numerous crafts and hobbies. She took pride in these activities. She suffered chronic neck and shoulder pain as a result of an accident. Most of her pre-accident activities were diminished and she lost her passion for them. The court found that her life had been drastically altered by her injuries and awarded \$95,000 for non-pecuniary damages.

- In *Popove*, a 68-year-old plaintiff was awarded \$120,000 in non-pecuniary damages. She sustained injuries to her neck, shoulder, upper back and lower back in an MVA. Despite extensive treatment her symptoms did not resolve and she continued to experience constant pain in her neck and shoulders. Her activities had been significantly curtailed and she had difficulty with housekeeping chores and garden maintenance. The court declined to reduce the award for a pre-existing degenerative back condition on the basis of a determination that she could have remained asymptomatic indefinitely absent the trauma of the accident.

- *Kelly* involved a 54-year-old plaintiff who had been an energetic homemaker and full-time licensed practical nurse. She suffered constant chronic pain in her neck, shoulders and back which led to sleep disturbance, anxiety and depression. She had had intermittent upper back pain prior to the accident but it had not interfered with her ability to function at work or at home. As a result of the accident, she was unable to enjoy most of her physical activities and, although she was able to continue to work full time, she found her employment exhausting. Her pain symptoms also adversely affected her relationship with her husband.

[113] The defendants submit that an award of \$80,000 is appropriate in this case on the basis of the plaintiff's pre-existing Ambulance Accident-related condition. They rely on the following decisions of this Court: *Yannacopoulos v. Cronk*, 2015 BCSC 1154; *A.J.G. v. Mann*, 2020 BCSC 180; and *Safdari v. Buckland*, 2020 BCSC 769.

- In Yannacopoulos, a 55-year-old accountant had a number of pre-accident conditions including hypertension, high cholesterol, obstructive sleep apnea, obesity and chronic low back pain. He was easily fatigued. The accident caused injury to his head, neck, back, left arm, right wrist and a broken tooth. It also caused depressive symptoms. The court awarded \$80,000 in non-pecuniary damages which were reduced to \$60,000 because of his pre-existing conditions (which the defendants concede were more significant than those of the plaintiff in this case).
- A.J.G. involved a 28-year-old female teaching assistant who suffered from fibromyalgia prior to the accident which the court concluded was only mildly symptomatic prior to the accident and did not interfere with her everyday functioning. The accident resulted in her suffering soft tissue injury to her neck, middle back and low back. The court awarded \$90,000 in non-pecuniary damages.
- Safdari involved a 40-year-old male interior designer who had pre-existing chronic low back pain which the plaintiff asserted had fully resolved. The accident injured his neck, left shoulder and upper and lower back. The court found that the plaintiff's pre-existing chronic pain was likely to manifest sometime in the future. The non-pecuniary award of \$90,000 was reduced by 25% for his pre-existing condition.

[114] After considering the factors set out in Stapley, the evidence as a whole, the submissions of counsel, as well as the case authorities they rely upon, I conclude that an appropriate award of non-pecuniary damages in this case is \$100,000. The award includes an allowance for the plaintiff's loss of capacity to perform housekeeping tasks.

Past Loss of Earning Capacity

[115] During the course of closing arguments, counsel advised that they have reached an agreement on the quantum of damages to be awarded under this head should be \$82,770, net of income tax deductions and employment insurance premiums.

Future Loss of Earning Capacity

[116] An award for future loss of earning capacity recognizes that a plaintiff's capacity to earn income is an asset that has been taken away. If a plaintiff's permanent injury limits her capacity to perform certain activities and consequently impairs her income-earning capacity, she is entitled to compensation: *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 8. The plaintiff must demonstrate both impairment to her earning capacity and a real and substantial possibility that the impairment will result in a pecuniary loss. The standard of proof is simple probability, not the balance of probabilities: *Reilly v. Lynn*, 2003 BCCA 49 at para. 101.

[117] Once that threshold is met, the plaintiff may prove the amount of loss by one of two calculation approaches, as set out by the British Columbia Court of Appeal in *Perren v. Lalari*, 2010 BCCA 140 at para. 32:

[32] A plaintiff must always prove, as was noted by Donald J.A. in *Steward v. Berezan*, 2007 BCCA 150, by Bauman J. in *Chang v. Feng*, 2008 BCSC 49, and by Tysoe J.A. in *Romanchych v. Vallianatos*, 2010 BCCA 20, that there is a real and substantial possibility of a future event leading to an income loss. If the plaintiff discharges that burden of proof, then depending upon the facts of the case, the plaintiff may prove the quantification of that loss of earning capacity, either on an earnings approach, as in *Steenblok v. Funk* (1990), 46 B.C.L.R. (2d) 133 (C.A.), or a capital asset approach, as in *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 (S.C.). The former approach will be more useful when the loss is more easily measurable, as it was in *Steenblok*. The latter approach will be more useful when the loss is not as easily measurable, as in *Pallos v. Insurance Corp. of British Columbia* (1995), 100 B.C.L.R. (2d) 260 (C.A.) and *Romanchych*. A plaintiff may indeed be able to prove that there is a substantial possibility of a future loss of income despite having returned to his or her usual employment. That was the case in both *Pallos* and *Parypa v. Wickware*, 1999 BCCA 88. But, as Donald J.A. said in *Steward*, an inability to perform an occupation that is not a realistic alternative occupation is not proof of a future loss.

[Emphasis in original.]

See also *Mills v. Graham* 2019 BCSC 641 at para. 87.

[118] As is the case with past loss of earning capacity, the task of the court is to assess the future loss of income-earning capacity, not a calculation according to some mathematical formula. Since the course of the 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. The proper deduction (usually a percentage) will depend on the facts of each case, including the plaintiff's occupation, but generally it will be small: *Brewster v. Li*, 2013 BCSC 774 at para. 142, quoting *Reilly* at para. 101; *Raikou v. Spencer*, 2014 BCSC 1 at para. 83.

[119] Where an award of damages based upon the permanency of an injury or functional incapacity is sought, it is incumbent upon the plaintiff to demonstrate the permanency of her injuries with cogent evidence. The court is entitled to rely on common sense to determine if there is a real and substantial possibility of future loss of income: *Morlan v. Barrett*, 2012 BCCA 66 at para. 41:

[41] In my view, it was open to the trial judge to find - essentially as a matter of common sense - that constant and continuous pain takes its toll and that, over time, such pain will have a detrimental effect on a person's ability to work, regardless of what accommodations an employer is prepared to make.

[120] These principles were applied by this court in *Merko* at para. 99:

[99] When I consider the totality of the evidence, the fact that Mrs. Merko's pain is chronic and as severe as it is, and the fact that her job is as intense as it is, I conclude that there is a real and substantial possibility her injuries will lead to her having to reduce the hours or years that she works in the future. This is so even though to date she has carried on full-time. This has been based on pure force of will, but there is a real possibility that will diminish as she ages and as the cost to the rest of her personal life becomes more and more pronounced.

[121] The plaintiff bears the burden of proving that:

- a) her accident-related injuries have impaired her capacity to earn income;
- b) those injuries are likely to persist into the future; and
- c) there is a real and substantial possibility she will suffer a loss of income as a result.

[122] In my view, she has met that burden.

[123] I do not accept that the plaintiff is anything other than a hard-working, dedicated and enthusiastic nurse who wants nothing more than to be able to work in the job she trained for and loves. I do not accept that she went on a leave of absence from her employment on April 2, 2020 because of COVID-19 or trial-induced anxiety.

[124] I also do not accept the defendants' submissions that the plaintiff's award should be reduced because she failed to seek accommodation from her employer (as she was entitled to do under the Collective Agreement) for a position in an alternate unit or hospital that would enable her to work full-time. There is no cogent evidence that any such position was available to her on any basis, reasonable or otherwise. It is nothing other than mere speculation that she would have been able to be accommodated in an alternative full-time position.

[125] I am confident that, given the rehabilitation she was receiving prior to the COVID-19 pandemic is once again available to her, she will soon be back in a position where she will be able to work up to her planned retirement at age 65. However, I accept Ms. Neil's opinion that there is a real and substantial possibility she will only be able to do so on a part-time basis.

[126] I agree with plaintiff's counsel that the earnings approach is appropriate in this case because the earnings the plaintiff would have received absent the Accidents and the earnings she will likely receive working part-time are easily determined. The plaintiff's earnings in 2018 and 2019 (when she worked full-time) were \$91,903 and \$90,412, respectively. For the purpose of calculating the plaintiff's future loss of earning capacity, I find that, but-for the Accidents, there is a real and substantial possibility that she would have earned \$92,000 per year working full-time. I also find that, as a result of the Accidents, there is a real and substantial possibility she will only earn 50% of that amount working part-time until her retirement at age 65.

- [127] Mr. Pivnenko's expert report dated March 11, 2020 calculates the present value of that loss to be \$270,000 (rounded).
- [128] However, based upon the plaintiff's evidence that she was able to derive improvement in her pain symptoms after only four active therapy sessions with a kinesiologist commencing in February 2020 (after Ms. Neil's assessment of her), I find that that loss should be reduced by a modest amount on the basis of the contingent possibility (albeit low) that the plaintiff will be able to return to full-time employment before she retires. In my view, a reduction of 15% (\$40,500 rounded to \$40,000) is warranted.
- [129] Taking all of the foregoing into consideration, I assess the plaintiff's loss of future earning capacity at \$230,000.

Future Care Costs

- [130] The purpose of an award for costs of future care is to restore, as best as possible with a monetary award, the plaintiff to the position she would have been in had the Accidents not occurred: *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at para. 29. Any award should reflect the reasonable or normal expectations of what the plaintiff will require: *Spehar (Guardian ad litem of) v. Beazley*, 2004 BCCA 290 at para. 19; *Peters v. Ortner*, 2013 BCSC 1861 at paras. 141-144.
- [131] The plaintiff must demonstrate an evidentiary link between her pain symptoms and the recommended treatment and care.
- [132] In *Gignac* at para. 54, the court declined to award the plaintiff counselling fees despite evidence that it would be of considerable assistance because the plaintiff was only "considering" going to counselling.
- [133] The plaintiff submits that the following categories of future care costs are justified in this case:
- a) medications and supplies;
 - b) occupational therapy and psychology assessments;
 - c) therapeutic modalities (chiropractor, occupational therapist, psychologist and massage therapy;
 - d) kinesiology and a gym/pool pass.
- [134] Counsel for the plaintiff conceded during his closing submissions that the projected number of massage therapy sessions should be reduced by 50%.

- [135] In this case, the plaintiff's future care needs are set out in the reports of Drs. Watts, Waseem and Ms. Neil. She seeks the lower end of the present value cost range as calculated by Mr. Pivnenko (Table 1-A). Both Drs. Watts and Waseem recommend continuing active rehabilitation therapy.
- [136] The present value of these care costs, including taxes, as calculated by Mr. Pivnenko over the plaintiff's estimated remaining lifetime is \$85,221.
- [137] In my view, there is a real and substantial possibility that the plaintiff will require ongoing over-the-counter and prescription medications but only those supported by the medical evidence. CryoDerm, Benadryl, Zoplicone and A535 were not. The remainder were. The present value calculation will be reduced by \$7,970.
- [138] Counsel for the defendants accepts the plaintiff's future care costs submissions regarding the occupational therapy assessment and therapy and the psychological therapy (but not the assessment as it has already taken place).
- [139] The defendants take issue with the claims for the costs of ongoing passive therapy treatments (massage and chiropractic) on the basis that none of these treatments provided any therapeutic benefit in the past and therefore would not be of any benefit in the future. The plaintiff's evidence was that these therapies provided her with temporary relief of her pain symptoms and enabled her to function. Drs. Watts and Waseem opined that they should continue in the future, but the plaintiff should focus on more active rehabilitation therapies such as kinesiology and exercise. Ms. Neil's evidence was consistent with this recommendation.
- [140] In my view, except as set out above, the future care costs claimed by the plaintiff in the amount of \$77,251 are justified on the basis of the evidence. However, as with the plaintiff's claim for loss of future earning capacity, I find that the claim for costs of future care should be reduced on the basis of the contingent possibility that the plaintiff's symptoms will improve once she begins earnest, active rehabilitation. In my view a reduction of 15% (\$11,588 rounded to \$11,600) is warranted.
- [141] I assess the plaintiff's entitlement under this head of damages to be \$65,651.

Loss of Housekeeping Capacity

- [142] Where a plaintiff suffers an injury which would make a reasonable person in the plaintiff's circumstances unable to perform usual and necessary household work--i.e., where the plaintiff has suffered a true loss of capacity--that loss may be compensated by a pecuniary damages award. Where the plaintiff suffers a loss that is more in keeping with a loss of amenities, or increased pain and suffering, that loss may instead be compensated by a non-pecuniary damages award. It lies in the trial judge's discretion whether to address the claim as a part of the non-pecuniary loss or as a segregated pecuniary head of damages: *Kim v. Lin*, 2018 BCCA 77 at para. 33.

[143] Whichever option is chosen, when valuing the different types of awards, courts should pay heed to the differing rationales behind them. In particular, when valuing the pecuniary damages for the loss of capacity suffered by the plaintiff, courts may look to the cost of hiring replacement services, but they should ensure that any award for that loss, and any deduction to that award, is tied to the actual loss of capacity which justifies the award in the first place: Kim at para. 34.

[144] During the course of his closing argument, counsel for the plaintiff conceded that a separate award under this head of damages is not justified in this case but rather should be included in the award for non-pecuniary damages. Accordingly, I have done so.

Special Damages

[145] The plaintiff claims special damages in the total amount of \$42,629.21 comprised of:

a) Physiotherapy treatments:

\$27,341.91

b) Acupuncture treatments:

\$855.00

c) Chiropractic treatments:

\$6,510.00

d) Non-prescription medication:

\$548.33

e) Parking:

\$25.50

f) Car rental:

\$1,036.44

g) Medical supplies:

\$61.59

h) Dr. Watts' form fees

\$100.00

i) Prescription medication:

\$573.93

j) Kinesiologist:

\$548.10

k) Clinical psychologist counselling:

\$1,400.00

l) Car mileage @ \$0.30/km

\$3,628.41

Total:

\$42,629.21

[146] The defendants do not take issue with the plaintiff's assertion that each of these expenses was incurred by her. Rather they submit that, although the plaintiff derived some transitory benefit from the passive therapy treatments, she has not demonstrated on the balance of probabilities they were a reasonably necessary expense incurred as a result of the Accidents. The plaintiff submits that the costs of these treatments should be reduced by 40%.

[147] The uncontroverted evidence of the plaintiff and Mr. Blasig was that the passive therapy treatments the plaintiff claims, although numerous, did provide benefit to her such that she was able to function in her job and life generally. There was no evidence to the contrary. I am not persuaded that there should be any discount from the amount claimed.

Conclusion

[148] The plaintiff is entitled to judgment against each of the defendants, jointly and severally, in the total amount of \$521,051, calculated as follows:

a) Non-pecuniary damages:

\$100,000

b) Past loss of earning capacity:

\$82,770

c) Future loss of earning capacity:

\$230,000

d) Cost of future care:

\$65,651

e) Special damages:

\$42,630

TOTAL

\$521,051

[149] The plaintiff is entitled to court ordered interest on the awards for past wage loss and special damages, in accordance with the Court Order Interest Act, R.S.B.C. 1996, c. 79.

[150] Subject to any submissions counsel wish to make, the plaintiff is entitled to her costs of this action at Scale B.

"G.C. Weatherill J."

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