
CANADA / JUDGMENT

Mladjo v. Etheridge

2019 BCSC 950

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2019 BCSC 950 Mladjo v. Etheridge

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Mladjo v. Etheridge,

2019 BCSC 950

Date: 20190613

Docket: M179597

Registry: Vancouver

Between:

Elissa Peterson Mladjo

Plaintiff

And

Curtis Etheridge

Defendant

Before: The Honourable Madam Justice Francis

Reasons for Judgment

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Place and Dates of Trial:

Vancouver, B.C.

May 13-17, 2019

Place and Date of Judgment:

Vancouver, B.C.

June 13, 2019

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I. introduction

- [1] This proceeding arises from a motor vehicle accident that occurred on February 12, 2016 (the "Accident"). Liability has been admitted by the defendant and the matter proceeded to trial on the issue of damages only.
- [2] The plaintiff, Elissa Peterson Mladjo, was 52 years of age at the time of the Accident. She suffered injuries to her neck, back, knees, shoulder and ankle. Ms. Mladjo claims that she is partially disabled as a result of the defendant's negligence, and that her capacity to pursue her career and to enjoy her life have been diminished.
- [3] The defendant concedes that Ms. Mladjo suffered injuries in the Accident but says that she has substantially recovered from these injuries. Causation is an issue in this case as the defendant takes the position that pre-existing conditions are the cause of any ongoing pain suffered by Ms. Mladjo. The defendant also argues that any damages awarded to Ms. Mladjo should be reduced because her injuries are partially attributable to a later car accident in which she was involved. Finally, the defendant argues that Ms. Mladjo failed to mitigate her damages by failing to follow the advice of her medical practitioners and as such any damage award to which she would be entitled should be reduced. The defence agrees that Ms. Mladjo is entitled to a modest non-pecuniary damages award and some special damages.

II. ISSUES

- [4] The matters for determination are:
 - (a) Did the Accident cause or contribute to injuries suffered by the plaintiff?
 - (b) Did the plaintiff mitigate damages by following the medical treatment advice of her doctors?
 - (c) What amounts, if any, are payable to the plaintiff for damages for non-pecuniary loss, past income loss, loss of future earning capacity, cost of future care and special damages?

III. Background Facts

A. Prior to the Accident

- [5] Ms. Mladjo was born in Bulgaria in 1963 and lived there until she moved with her husband and two children to Canada in 2000. She had obtained a Master's degree in automotive engineering in Bulgaria and for ten years taught automotive engineering at a secondary school there. Upon first arriving in Canada, the family lived in Winnipeg for a period of time. They settled in Coquitlam in 2003 where they continue to reside today.
- [6] Ms. Mladjo has held a number of jobs since arriving in Canada. She obtained her Class 1 driver's license in 2003 and worked part-time as a driving instructor from 2004 to 2009. Since 2003, she has taught intermittently at a Bulgarian language school. For 12 years this was something she did once a week, on Saturdays, although in recent years she only teaches on call when needed. Over the years she has held a number of different part-time jobs, including pastry chef at Tim Horton's, assistant manager at Fabricland, customer service at Canadian Tire and working in a pizza restaurant.
- [7] In addition to her paid employment outside the home, Ms. Mladjo is an avid baker and has at times run a small business from her home selling baked goods. Before the Accident, she took care of all aspects of domestic life for her family, including cooking, cleaning, gardening and laundry.
- [8] From 2006 to 2016, Ms. Mladjo worked full-time for a real estate management company, Veranova Properties Limited ("Veranova") as a property coordinator. This job involved looking after foreclosure properties by coordinating the various work that was required to get properties ready to be sold. This was a desk job that had her sitting at a computer in an office most of the time. Her salary in the year prior to the Accident was approximately \$40,000.
- [9] On January 4, 2016, a little over a month before the Accident, the employees of Ms. Mladjo's company received notice that the B.C. office of the company was closing on March 31, 2016. Ms. Mladjo understood that she would need to find a new job at that point.
- [10] Much was made at the hearing about Ms. Mladjo's plans with respect to her future career, and the extent to which those plans were derailed by the Accident. Ms. Mladjo testified that she had always hoped to become a teacher, as this was what she had done professionally in Bulgaria. She testified that in March 2016, after her job was terminated, she would have liked to have started teacher's training, but she had neither the funds to pay for the required university courses, nor was she able to withstand the rigours of a two-year university program given her post-Accident injuries.
- [11] On cross-examination, Ms. Mladjo admitted that she had not taken any concrete steps to obtain teaching credentials prior to the Accident. It appears that in 2007, she did some research on what it would take to become qualified as a teacher in B.C., and she went so far as to interview for a position at a private school in North Vancouver. However, when that interview did not go well, Ms. Mladjo appears to have temporarily set aside the aspiration to

become a teacher and, while I accept her evidence that teaching is still something she would very much like to do, I do not find that there was a reasonable likelihood that she would have applied to a university teacher training program had the Accident not occurred.

- [12] I find it is more likely that Ms. Mladjo's plan, once she learned in January 2016 that Veranova was going to close its doors in B.C. in March 2016, was to wait and see what happened in terms of job opportunities that arose after Veranova shut down. She testified that there was some talk amongst Veranova employees that they may be able to find positions with clients of the company and she was hopeful that an opportunity of that nature may arise for her. She attended at WorkBC in January 2016 upon learning of Veranova's imminent closing but was told that they could not assist her with finding work until she was on EI. I find that from the time that she learned of the closing of Veranova to the time of the Accident, the plaintiff had not formed any firm plans about what she would do once Veranova closed, although she certainly appears to have contemplated a number of options. She testified that those options included driving a long-haul truck and working as a bus driver for Translink.
- [13] Prior to the Accident, Ms. Mladjo was in reasonably good health. While she was overweight, she regularly participated in Bulgarian folk dancing and did a "boot camp" style fitness class with her daughter a few times a week. She had ongoing issues with pain in her right knee (diagnosed in 2014 as being associated with osteoarthritis) and migraine headaches but neither of these conditions impacted her ability to work, socialize, or to participate in her fitness workouts or her dancing activities, so long as she wore an elastic knee brace for strenuous activities.
- [14] Ms. Mladjo's daughter, Sylvia George, testified about her mother's routine and activities before and after the Accident. Ms. George testified that before the Accident, Ms. Mladjo regularly hosted other families in her home on weekends and enjoyed socializing with friends.
- [15] Ms. George testified that the family was very close. Even after Ms. George grew up and moved out of the family home, Ms. Mladjo, her husband and their two adult children regularly spent weekend days together, often taking long walks together or hiking on the North Shore.
- [16] Ms. George described her mother as an "alpha female". She had the opportunity to observe her mother not only in the family context but also as her teacher at the Bulgarian school, where Ms. George attended, and as her driving instructor. She testified that her mother has a very strong personality and has historically been a person who is reluctant to show vulnerability.

B. The Accident

- [17] The Accident happened at around 5:00 pm on February 12, 2016 at the intersection of 51st Avenue and Victoria Drive.

- [18] In addition to Ms. Mladjo's testimony about the Accident, a dashcam video of the Accident was put into evidence.
- [19] Immediately prior to the Accident, Ms. Mladjo had stopped at a gas station at 52nd Avenue and Victoria Drive to refuel, and when she left the gas station she turned northbound onto Victoria Drive. She planned to make a left turn onto 51st Avenue westbound. She went into the left lane to do so. There was a line of vehicles in the right lane but she testified that the left lane was clear. She was slowing down in preparation for her left hand turn when a vehicle came through the stopped vehicles in the right hand lane and hit her car.
- [20] Ms. Mladjo testified that on impact, she felt a kick back to her ankle, her knees hit the dashboard and she felt the impact in her wrists which were on the steering wheel. She testified that the primary point of pain on impact was her ankle although in the moments after the Accident she started to feel pain in her shoulder, chest, neck and wrists. The police attended the scene of the Accident and Ms. Mladjo refused an ambulance. The next day, upon waking up with a swollen and bruised ankle and foot, she went to the hospital where she was given painkillers and referred back to her family doctor.

C. After the Accident

- [21] Ms. Mladjo testified that there were some injuries that emerged a week or more after the Accident. These included numbness in her right hand and lower back pain. She also started to have headaches which she testified were distinct from migraine headaches, from which she has suffered for some time.
- [22] While some of Ms. Mladjo's symptoms improved quite quickly after the Accident, others took longer to resolve and some were still problematic for her at the time of trial. The injuries to her shoulder, chest, ankle and left knee resolved themselves within a matter of months. She testified that at the time of trial she continued to suffer pain in her back, her neck and her right knee. The headaches, though less frequent, continue. There are certain positions, such as squatting and kneeling, that she is unable to do.
- [23] Because of the circumstances of her employer winding down its operations in March 2016, Ms. Mladjo was unable to take much time off from work after the Accident. She took a couple of weeks of sick leave and then went back to work in late February 2016. She worked abridged hours until the company ceased operations in late March 2016. She then went on EI sickness benefits until August 2016, and was on regular EI from August 2016 until the end of March 2017.
- [24] From December 5, 2016 until the end of November 2017, Ms. Mladjo studied at Sprott Shaw College to qualify as a teacher's assistant. She completed this course in November 2017 with an A+ average. Since January 2018 she has been working full-time in the public school system as a teacher's assistant earning an income of approximately \$32,000 per year.

- [25] Ms. Mladjo and her daughter Ms. George both testified about the ongoing nature of Ms. Mladjo's injuries and their impact on her life.
- [26] Ms. Mladjo testified that her active social life was "completely shut down" after the Accident. She was unable to participate in Bulgarian dancing or other social activities. These activities have started to come back for Ms. Mladjo but she remains limited in her ability to engage in physically taxing activities such as Bulgarian dancing.
- [27] Ms. Mladjo testified that after the Accident she could no longer do heavy housework such as vacuuming and that she continued to be impaired in her ability to do housework as at the date of trial. Ms. George testified that Ms. Mladjo's home had not been well maintained since the Accident and that heavy housework like laundry, vacuuming and cleaning the bathroom does not generally get done. Ms. George testified that this was a contrast from before the Accident when her mother kept the home neat and tidy.
- [28] Ms. George testified frankly about the mental and emotional impact of the Accident on her mother. She testified that her mother had changed drastically as a person since the Accident. Ms. George observed her mother's physical symptoms that manifested themselves after the Accident, particularly her headaches and decreased mobility. She also observed that her mother's mood became very depressed post Accident. She noticed that her mother gained a considerable amount of weight in the months after the Accident and ceased her previous activities such as Bulgarian dancing and attending boot camp classes.
- [29] Ms. George also testified about the state of family relationships and her parent's marriage. Since the Accident, and particularly since Ms. Mladjo stopped doing housework, tensions arose in Ms. Mladjo's relationship with her husband. The family stopped engaging in most family activities together and there was talk of separation. According to Ms. George, Ms. Mladjo's relationship with her husband remained strained at the time of trial.
- [30] Ms. George also testified that Ms. Mladjo has developed a hoarding problem since the Accident and the home has become cluttered with empty containers and other refuse.
- [31] Ms. Mladjo was cross-examined on two medical conditions that she had prior to the Accident, migraine headaches and osteoarthritis in her right knee, and how those conditions manifested themselves after the Accident.
- [32] With respect to the migraine headaches, Ms. Mladjo testified that the migraines she had suffered from for many years were qualitatively different from the headaches she had after the Accident. The migraines were associated with nausea and the pain was located in the front part of her head. The timing of the migraines was associated with her menstrual cycle. The post-Accident headaches were described by Ms. Mladjo as being located in the back of her head and usually being accompanied by a stiff neck. She testified that the post-Accident headaches were much less frequent now and that sometimes she goes a whole month without a headache, but they have not gone away completely.

- [33] Ms. Mladjo was diagnosed with osteoarthritis in her right knee prior to the Accident. In the fall of 2014, Ms. Mladjo saw her doctor about her knee pain and an x-ray was taken on September 30, 2014. Notes from her doctor on October 9, 2014 and December 24, 2015 suggest that the knee pain from her osteoarthritis was at least significant enough on those two dates that she discussed the pain with her doctor.
- [34] Ms. Mladjo testified that prior to the Accident her knee pain was "manageable" and that she used an elastic brace if her knee ever became a problem. Her daughter testified that she was unaware that her mother even wore a brace on her knee when they went to exercise classes together. After the Accident, Ms. Mladjo's mobility was significantly impaired by the pain in her right knee and, while it has improved since the Accident, she testified that she still has to avoid kneeling, squats and other positions that put pressure on her right knee.
- [35] In terms of other ongoing injuries from the Accident, Ms. Mladjo testified that her neck still bothers her and she suffers from stiffness on the right side of her neck. Her back pain is also something that comes and goes. Her primary ongoing sources of pain appear to be her neck, her back and her right knee. She is unable to sit for long periods of time nor is she able to stand for long periods of time. This impacts her ability to work, to do housework and to engage in leisure activities.
- [36] Ms. Mladjo was involved in another accident in October 2018. Her car was rear ended while stopped in traffic on Highway 1. She testified that she was not seriously hurt in this accident but her neck and back pain were worse after it happened.

IV. credibility

- [37] The factors to be considered in assessing credibility and reliability are set out by Dillon J. in *Bradshaw v. Stenner*, 2010 BCSC 1398, aff'd 2012 BCCA 296, leave to appeal ref'd [2012] S.C.C.A. No. 392:
- [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.); *Farnya v. Chorny*, [1952] 2 D.L.R. 152 (B.C.C.A.) [Farnya]; *R. v. S.(R.D.)*, [1997] 3 S.C.R. 484 at para.128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (Farnya at para. 356).

- [38] Counsel for the defendant made submissions about the credibility and reliability of the plaintiff's evidence but, when asked whether he was seeking for the Court to make an adverse credibility finding against the plaintiff, he advised that the defendant was not seeking for the Court to make such a finding.
- [39] Ms. Mladjo struck me as a highly credible witness. She clearly has a restrained temperament and was reluctant to appear weak or vulnerable, even when doing so would have assisted her case. She discussed her injuries and their impact on her life without embellishment, indeed at times she seemed to understate her evidence. I find her evidence about the symptoms she continues to suffer from her injuries, and the impact of those symptoms on her work and her life, to be wholly credible and reliable. I also find Ms. George to be a reliable and credible witness with respect to her observations of the impact of the injuries on her mother.

V. Expert Evidence

- [40] Opinion evidence from two medical doctors was tendered at trial. The plaintiff tendered the report of Dr. Hou and the defendant tendered the report of Dr. Tansey. The plaintiff also tendered opinion evidence from Dr. Jung, a chiropractor and expert in chronic pain, and Jasmine Shivji, an occupational therapist.

A. Dr. Frank Hou

- [41] Dr. Hou testified as an expert in family medicine qualified to express opinions on the effects of soft tissue injuries.
- [42] Dr. Hou was the plaintiff's family doctor, although he only started treating her after the Accident. In his report, he opined that Ms. Mladjo suffered acute cervical muscle strain, acute back strain and acute injury to her right knee as a result of the Accident. He further opined that Ms. Mladjo will continue to suffer pain, and will be partially disabled with respect to heavy lifting and low level activities such as squatting and kneeling, for the foreseeable future.
- [43] Dr. Hou testified at the trial. At trial, he corrected one of the assumptions in his report, namely that Ms. Mladjo's degenerative knee condition had been asymptomatic prior to the Accident. This assumption was not correct, as the medical records show that Ms. Mladjo saw her family doctor for knee pain in October 2014 and December 2015 and had an x-ray done on her knee on September 30, 2014. At trial, Dr. Hou maintained that even though his assumption that Ms. Mladjo's knee was asymptomatic prior to the Accident was not correct, he would not change his opinion that Ms. Mladjo's current knee pain is primarily attributable to the Accident.
- [44] On cross-examination, Dr. Hou was pressed by counsel to characterize the plaintiff's injuries as minor, moderate or major and he testified that he would classify the injuries as moderate to major on the basis that they impact the ability of Ms. Mladjo to enjoy her life and to work.

B. Dr. Stanley Jung

- [45] Dr. Jung was qualified as an expert in the diagnosis, management and treatment of chronic pain. Dr. Jung is a chiropractic consultant in physical and occupational rehabilitation whose practice focuses on patients with chronic pain issues arising from motor vehicle accidents. Dr. Jung examined Ms. Mladjo on May 1, 2018.
- [46] In his report, Dr. Jung opined that Ms. Mladjo suffered from the following:
- 1) Soft tissue injuries to her neck, mid-back and low-back;
 - 2) Facet joint injuries to her neck, mid-back and low-back;
 - 3) Costovertebral joint injury;
 - 4) Sacroiliac joint injury; and
 - 5) Chronic headaches attributable to whiplash injury.
- [47] Dr. Jung based his conclusions on a physical examination of Ms. Mladjo as well as on her self reported symptoms as she described them to him. Dr. Jung performed a number of tests to determine the cause of Ms. Mladjo's ongoing pain including assessing her range of motion in her neck, assessing her strength on either side of her neck, determining pain sensitivity in different parts of the neck and back and jamming or loading the facet joints and performing a thoracic distraction test on the same area.
- [48] Dr. Jung expressly did not assess Ms. Mladjo's knee or provide any opinion about its condition or prognosis as he stated that it was generally outside the scope of his practice.
- [49] Dr. Jung made a number of recommendations for treatment of Ms. Mladjo's back and neck injuries, including physiotherapy, massage therapy, spinal manipulation, interventional treatment, exercise and the use of a number of clinical aids, including a fitness monitoring device, an exercise ball, a water-based pillow, a TENS device, and vitamin D supplements.

C. Ms. Jasmine Shivji

- [50] Ms. Shivji is an occupational therapist who was qualified as an expert to express opinions on the cost of care needs of patients.
- [51] Ms. Shivji prepared a cost of future care report that was not delivered 84 days before trial in accordance with Rule 11-6 of the Supreme Court Civil Rules. At trial, counsel for the plaintiff brought an application for an order allowing for the late delivery of this report. I allowed that application on the condition that certain segments of the report, which raised issues about which the defendant did not have sufficient time to respond, be redacted.

- [52] Ms. Shivji attended Ms. Mladjo's home and conducted an evaluation on April 2, 2019. She also interviewed Ms. George, Ms. Mladjo's daughter. Part of her evaluation involved assessing the functional ability of Ms. Mladjo in her home doing regular household tasks such as cooking and cleaning. Her cost of future care report quantifies the cost associated with many of the treatments and devices recommended by Dr. Jung as well as recommending other items, such as housekeeping support, on the basis of her assessment.

D. Dr. Patrick Tansey

- [53] Dr. Tansey is an orthopedic surgeon who was qualified at trial as an expert in orthopedics. His practice consists of evaluating patients with muscular skeletal injuries. He has a specialization in lower limb injuries, specifically knees, feet and ankles.
- [54] Dr. Tansey did not examine Ms. Mladjo personally and his report and testimony were based on a review of the expert reports of Dr. Hou, Dr. Jung and a third medical report by a Dr. Hirsch that was not put into evidence by either party.
- [55] Dr. Tansey opined that Ms. Mladjo sustained soft tissue injuries consistent with myofascial strain in her neck, her back, her knees, her right ankle and her right hand but that she had made a full recovery from the injuries to her right hand, right ankle and left knee. He opined that Ms. Mladjo has degenerative disease in her right knee and her spine which pre-existed the Accident and to which Ms. Mladjo's ongoing pain can be attributed. On the whole, his opinion was that Ms. Mladjo has fully recovered from the soft tissue injuries she suffered in the Accident and that any ongoing pain she has relates to her degenerative conditions and is not Accident related.
- [56] Dr. Tansey's opinions, and particularly his critique of Dr. Jung's conclusions, were grounded in what he called an absence of objective evidence for the primary conclusion reached by Dr. Jung, namely that Ms. Mladjo continued to suffer from Accident related impairments for which she requires treatment. Specifically, he noted that there were no scans or other physical tests to support Dr. Jung's conclusions about injury to the facet joints, the costovertebral joints or the sacroiliac joints. In the absence of such objective evidence, Dr. Tansey questions whether Ms. Mladjo continues to have any ongoing injury related to the Accident.
- [57] Dr. Tansey's explanation for Ms. Mladjo's ongoing neck pain is his hypothesis that she suffers from degenerative disease of the spine. While his conclusion that Ms. Mladjo suffers from degenerative knee pain was grounded in the fact that pre-Accident x-ray reports show degenerative osteoarthritis in her knee, no such scans were reviewed by Dr. Tansey with respect to the neck. On cross-examination, Dr. Tansey stated that he inferred that Ms. Mladjo had degenerative disease of the spine causing her neck pain based on his experience dealing with patients of her age, and that degeneration of the spine is a normal part of aging. It gives me pause with respect to the reliability of Dr. Tansey's opinion that, on the one hand, he disputes those diagnoses posited by Dr. Hou and Dr. Jung that are based on Ms.

Mladjo's self reporting and their physical examination of her because they lack the necessary objective evidence, and on the other hand he is prepared to make a diagnosis of degenerative disease in Ms. Mladjo's neck based only on a general view of what is common in patients her age.

- [58] I find that Dr. Tansey's focus on objective evidence fails to recognize the reality of the ongoing pain suffered by Ms. Mladjo. In fairness to Dr. Tansey, this is not his area of expertise. On cross-examination he was asked whether he thought Ms. Mladjo was lying or exaggerating about her symptoms. He denied this and said that his job was limited to looking for objective evidence of an ongoing problem related to an injury. He stated that "the whole field of pain is a separate minefield." His response was candid and suggests the limits of what he was able to opine on as an orthopedic specialist with no special training in chronic pain.
- [59] Dr. Jung's conclusions about Ms. Mladjo's ongoing injuries were based on his physical examination of the patient and her self reporting, which together formed legitimate and reasonable bases for his conclusions. He is an expert in chronic pain arising from motor vehicle accidents and I found his report, and his testimony at trial, helpful in elucidating the complex nature of ongoing pain arising from injuries such as those sustained by Ms. Mladjo.
- [60] With respect to prognosis, I am persuaded by the evidence of Dr. Hou and Dr. Jung that it is unlikely that Ms. Mladjo will return to her pre-accident status in the foreseeable future.

VI. Causation

- [61] A significant causation issue in this case concerns the cause of the pain Ms. Mladjo presently suffers in her right knee. A second causation issue was raised by the defendant in his closing argument. The defendant took the position in his submissions that there should be a reduction in any award on the basis that some of the plaintiff's injuries may be attributable to a later vehicle collision that took place on October 19, 2018. I will deal with each of these issues separately.

A. Pre-existing knee injury

- [62] The defendant says that Ms. Mladjo has a pre-existing condition, namely the osteoarthritis for which Ms. Mladjo sought treatment at least twice prior to the Accident, in October 2014 and December 2015. He further argues that Ms. Mladjo's discomfort and impairment of mobility in her right knee is attributable to this condition and not the Accident. His position is supported by the opinion evidence of Dr. Tansey.
- [63] The plaintiff argues that her right knee symptoms were primarily caused by the Accident. This position is supported by the opinion evidence of Dr. Hou.

- [64] The plaintiff must establish on a balance of probabilities that the defendant's negligence caused or materially contributed to an injury. The defendant's negligence need not be the sole cause of the injury. As long as a defendant is part of the cause of an injury, the defendant is liable, even though his act alone was not enough to create the injury: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at paras. 13-17.
- [65] The primary test for causation is the "but-for" test: but for the defendant's negligence, would the plaintiff have suffered the injury? The principles governing causation as it pertains to pre-existing conditions were recently summarized by Adair J. in *Rabiei v. Oster*, 2019 BCSC 733 [Rabiei]:
- [133] The defendant "takes the victim" as the defendant finds her, and is therefore liable even though a plaintiff's losses are more dramatic than they would be for the average person. On the other hand, the defendant need not compensate the plaintiff for any debilitating effects of a pre-existing condition which the plaintiff would have experienced in any event. If there is a measurable risk that the pre-existing condition would have detrimentally affected the plaintiff in the future, regardless of the defendant's negligence, then this can be taken into account in reducing the overall award. The general rule is that the plaintiff must be returned to the position she would have been in, with all of its attendant risks and shortcomings, but for the defendant's negligence, and not a better position. See: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at paras. 17, 19-20, 24 and 34-35
- [66] Unfortunately, the matter of determining whether Ms. Mladjo's pre-existing right knee injury is the cause of the pain she presently suffers is complicated by the fact that Dr. Hou did not consider the records relating to Ms. Mladjo's pre-Accident complaints of knee pain when he prepared his report. At trial, he testified that this evidence did not change his view that Ms. Mladjo's knee pain is entirely attributable to the Accident.
- [67] While the medical opinion evidence is by no means consistent, the evidence of Ms. Mladjo and her daughter about the impact of her knee pain on her life before and after the Accident most certainly supports the finding that the Accident significantly exacerbated whatever pre-existing condition Ms. Mladjo may have had. Prior to the Accident, she was able to do high intensity boot camp classes, Bulgarian dancing and heavy housework. Those activities have been significantly curtailed or eliminated since the Accident as a result of knee pain. Ms. Shivji noted in her report that at the time of her assessment in April 2019, Ms. Mladjo remained unable to sit in a kneeling position.
- [68] Dr. Tansey admitted on cross-examination that the x-ray of the plaintiff's knee, pre-Accident, was consistent with the degeneration one would expect in the knees of a woman over the age of fifty. Ms. Mladjo testified that her knees were a problem for her pre-Accident, and she had physio to assist and wore a knee brace for some activities. But on the evidence, the impact of this condition was quite different from what she has experienced since the Accident, where most of her daily activities, including dancing, exercise and housework, are impeded by knee pain.

- [69] I find that it is highly unlikely that, had the Accident not occurred, Ms. Mladjo's pre-existing knee injury would have detrimentally affected Ms. Mladjo in the way that she has suffered since the Accident. While it is likely that her osteoarthritis predisposed her to feel more pain than she would otherwise feel from her injury (a proposition that was put to Dr. Tansey in cross-examination and he agreed with), the fact that her injury was greater because of her pre-existing condition does not mean that the pre-existing condition was the causative factor for her ongoing knee pain.
- [70] Notwithstanding Dr. Hou's fairly significant oversight in failing to include the pre-existing knee injury in his assumptions, I prefer the opinion evidence of Dr. Hou to that of Dr. Tansey with respect to the primary cause of Ms. Mladjo's current knee pain. As such, I find that the "but for" test has been met; Ms. Mladjo has satisfied me that the defendant's negligence caused or materially contributed to her right knee injury.

B. Subsequent collision in 2018

- [71] Ms. Mladjo was cross-examined at trial about the October 19, 2018 car accident in which her car was rear ended on Highway 1. She did not go to emergency after this accident although she did see Dr. Hou approximately ten days later on October 29, 2018 and made complaints of pain in her neck and back.
- [72] In submissions, the defendant asked the Court to reduce the amount of any award payable to the plaintiff by 15% on the basis that Ms. Mladjo's injuries are partially attributable to the later accident. The defendant's counsel was unable to provide me with any case authority to support this proposition. No party advanced expert evidence, or any evidence, about whether Ms. Mladjo's injuries could be attributed to the second accident and it is not clear what the basis is for the defendant's suggestion of a 15% reduction.
- [73] In *Bradley v. Groves*, 2010 BCCA 361 [Bradley], the Court of Appeal dealt with how the Court ought to determine liability for injuries caused by both a defendant's tortious act and a subsequent event:
- [37] We are also unable to accept the appellant's submission that "aggravation" and "indivisibility" are qualitatively different, and require different legal approaches. If a trial judge finds on the facts of a particular case that subsequent tortious action has merged with prior tortious action to create an injury that is not attributable to one particular tortfeasor, then a finding of indivisibility is inevitable. That one tort made worse what another tort created does not automatically implicate a thin or crumbling skull approach (as in *Blackwater*), if the injuries cannot be distinguished from one another on the facts. Those doctrines deal with finding the plaintiff's original position, not with apportioning liability. The first accident remains a cause of the entire indivisible injury suffered by the plaintiff under the "but for" approach to causation endorsed by the Supreme Court of Canada in *Resurfice Corp. v. Hanke*, 2007 SCC 7. As noted by McLachlin C.J.C. in that case, showing that there are multiple causes for an injury will not excuse any particular tortfeasor found to have caused an injury on a "but-for"

test, as "there is more than one potential cause in virtually all litigated cases of negligence" (at para. 19). It may be that in some cases, earlier injury and later injury to the same region of the body are divisible. While it will lie for the trial judge to decide in the circumstances of each case, it is difficult to see how the worsening of a single injury could be divided up.

- [74] In *Estable v. New*, 2011 BCSC 1556, at para. 55, Gropper J. summarised indivisible injuries as those that cannot be separated, "such as aggravation or exacerbation of an earlier injury, an injury to the same area of the body, or global symptoms that are impossible to separate", citing *Bradley and Athey*.
- [75] I must therefore determine whether Ms. Mladjo's neck and back injuries from the October 2018 accident are indivisible or divisible from her neck and back injuries from the Accident at issue in this proceeding.
- [76] The only medical evidence I have that even mentions the October 2018 vehicle collision is a single handwritten note in Dr. Hou's records. There is no evidentiary basis on which I could assess the impact of the second accident on Ms. Mladjo and whether it aggravated her symptoms from the first accident. However, even if there were, this would clearly be a case of an indivisible injury. Ms. Mladjo has suffered and continues to suffer from ongoing neck and back pain as a result of the Accident. If those symptoms were aggravated by a second accident, that would be precisely the kind of injury referred to by the Court of Appeal in *Bradley* as being indivisible.
- [77] As I have concluded that, to the extent there are any injuries arising from the October 2018 accident, they are indivisible, there is joint and several liability amongst the tortfeasors: *Bradley*, at para. 32. The defendant may seek contribution and indemnity from the driver in the second vehicle collision if he believes he can make out such a claim, but this does not limit his liability to Ms. Mladjo.

VII. DUTY TO MITIGATE

- [78] A plaintiff has an obligation to take all reasonable measures to reduce her damages, including undergoing treatment to alleviate or cure injuries: *Danicek v. Alexander Holburn Beaudin & Lang*, 2010 BCSC 1111, at para. 234.
- [79] The duty to mitigate is a positive duty but if a defendant's position is that the plaintiff could reasonably have avoided some part of the loss, the defendant bears the onus of proof on that issue: *Graham v. Rogers*, 2001 BCCA 432, at para. 35.
- [80] A defendant who wishes to establish that a plaintiff has failed to mitigate her loss 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 she acted reasonably: *Chiu v. Chiu*, 2002 BCCA 618 [Chiu], at para. 57.
- [81] The defendant argues that the plaintiff failed to mitigate her loss for the following reasons:
- 1) The plaintiff was overweight before the Accident and she did not lose weight, as recommended by a number of clinicians, until the second year after the Accident;
 - 2) The plaintiff did not do various active therapies such as active rehabilitation, swimming and exercise in the first two years post-Accident;
 - 3) The plaintiff stopped doing physiotherapy after April 2017;
 - 4) After completing her program of active rehabilitation at Nova Active Rehab ("Nova"), the plaintiff was told to do more active rehabilitation and she did not; and
 - 5) In July 2018 Dr. Jung's report recommended that the plaintiff do more physical activity and she did not.
- [82] I do not agree with the way in which counsel for the defendant has characterized the evidence on this issue. Ms. Mladjo testified at length about the therapies she has undertaken and the efforts she has made to recover from her injuries.
- [83] With respect to her weight, the plaintiff has made changes to her diet and exercise routine and those changes have resulted in significant weight loss as evidenced by the more than seven kilograms she appears to have lost between March 2015 and Dr. Jung's examination of her in April 2018.
- [84] With respect to the recommended therapies, Ms. Mladjo testified that financial circumstances precluded her from undertaking all recommended therapies. I find that the choices she made, particularly to focus her financial resources on paying for massage which provides her with immediate pain relief, were reasonable in the circumstances. It is not correct, as the defendant has stated, that Ms. Mladjo has declined active therapies in favour of passive ones. She completed her course of active rehabilitation with Nova and shortly thereafter, resumed classes at Pro Fit Boot Camp on a modified routine. She made the choice to invest more of her limited resources in the therapies that provided her the most pain relief and I find this was reasonable in the circumstances.
- [85] I therefore find that the defendant has failed to satisfy the onus of proof on the first part of the test set out in *Chiu*. The defendant has not demonstrated that the plaintiff acted unreasonably in eschewing the recommended treatment. Indeed I find that she did not eschew the recommended treatment. To the extent that some treatments were not done right away, there was a financial impediment that made Ms. Mladjo's decision to defer some treatment entirely reasonable.
- [86] I therefore find that there is no basis to reduce the damages payable to the plaintiff on the basis of failure to mitigate and I decline to do so.

VIII. Damages

[87] I next address Ms. Mladjo's claim for damages under the following headings:

- 1) Non-pecuniary damages;
- 2) Loss of past earning capacity;
- 3) Loss of future earning capacity;
- 4) Cost of future care; and
- 5) Special damages.

A. Non-pecuniary damages

[88] Ms. Mladjo seeks an award of \$80,000 - \$90,000 for non-pecuniary damages. The defence submits the non-pecuniary damages should be assessed in the range of \$20,000 - \$30,000.

[89] Non-pecuniary damages are awarded to compensate a plaintiff for pain, suffering, loss of enjoyment of life and loss of amenities. In assessing non-pecuniary damages, the Court may look to awards made in analogous cases. However, each case must turn on its own unique facts. No two personal injury claims are identical and awarding damages involves an exercise of judgment: *Kapelus v. Hu*, 2013 BCCA 86, at para. 16.

[90] In *Stapley v. Hejslet*, 2006 BCCA 34 [Stapley], at para. 46, the Court of Appeal enumerated the factors to be considered in assessing non-pecuniary damages. The factors to be taken into account include: the plaintiff's age; the nature of the injury; the severity and duration of pain; disability; emotional suffering; impairment of family, marital and social relationships; impairment of physical abilities; loss of lifestyle; and the plaintiff's stoicism.

[91] Counsel for the plaintiff put the following cases before the Court in support of the position that the plaintiff should be awarded non-pecuniary damages in the \$80,000 - \$90,000 range:

· *Palangio v. Tso*, 2017 BCSC 1573: this case involved a 45-year-old male scaffolder who suffered injuries in multiple motor vehicle accidents. His inability to work as a scaffolder caused him to become depressed. He trained to become a health and safety officer. He continued to suffer from depression on an ongoing basis but demonstrated a significant measure of stoicism in terms of his return to work and retraining for a new position. The prognosis for improvement was poor. The plaintiff was awarded \$90,000.

· *Willett v. Rose*, 2017 BCSC 627: this case involved a 44-year-old female real estate agent who suffered injuries to her mid-back, low-back, neck, right shoulder and right hip as well as aggravation of a pre-existing migraine headache condition. Her symptoms improved over time but did not resolve. In particular, she complained of ongoing stiffness and pain in her neck. While she was able to continue work as a real estate agent, and suffered no demonstrable wage loss, she had done this by working through pain. However, it was not likely that she would be able to continue to do this indefinitely. Non-pecuniary general damages were awarded in the sum of

\$90,000.

· *Schulze v. Tull*, 2017 BCSC 781: this case involved a male 50-year-old auto mechanic who suffered injuries to his neck, upper back, mid-back, low-back, left shoulder, as well as numbness in his hands and feet. As a result of his continued difficulties in working as a mechanic, he retrained as a refrigerator technician. The retraining caused financial stress and hardship. It was found that his ongoing symptoms would likely be permanent and his ongoing limitations would impact his employment income in the future. The court awarded \$85,000 for his non-pecuniary general damages.

· *Dosangh v. Xie*, 2017 BCSC 1937: the plaintiff was a 50-year-old airport screener who suffered from pain in her left shoulder, between her shoulder blades, her chest, her back, right hip, and headaches. She was off work for two months and then began a graduated return to work. She had anxiety and was referred to counselling. Her symptoms were not expected to fully resolve and the court awarded \$70,000 for non-pecuniary general damages.

[92] Counsel for the defendant relied on the following cases in support of the submission that non-pecuniary damages should be assessed in the \$20,000 - \$30,000 range:

· *Robinson v. Anderson*, 2009 BCSC 1450: the plaintiff was a 47-year old female with soft-tissue injuries to her neck, back, right knee, right leg, right hip, and right arm. The plaintiff claimed flare-ups in the lower back when working or doing housework, and never being pain-free. Her injuries were found not to be permanent and her recovery continuous. The plaintiff was awarded \$25,000 in general damages.

· *Kelly v. Yuen*, 2010 BCSC 1794: the plaintiff was a 63 year-old female with injuries to her neck, back, left shoulder, and right knee. The neck, back and shoulders were found to be moderate soft-tissue injuries that resolved within a reasonable period of time prior to trial. The plaintiff was awarded \$30,000 in general damages.

· *Ahmadi v. West*, 2014 BCSC 2050: this case involved a 50-year old plaintiff with soft-tissue injuries to the neck, shoulders, arms and back. The injuries were found to be largely resolved by trial. The plaintiff was awarded \$35,000 in general damages, which included \$5,000 for loss of housekeeping capacity.

· *Co v. Watson*, 2010 BCSC 950: The plaintiff suffered from shoulder pain, back pain, neck pain and some sleep disturbance. The court specifically found that the plaintiff's injuries were not chronic and did not have an ongoing effect on the plaintiff. The plaintiff was awarded \$27,500 in non-pecuniary damages.

[93] I have considered the cases cited by both counsel. Generally, I note that the defendant's authorities involved injuries that were for the most part resolved by the time of trial and that did not have an ongoing impact on the plaintiff's life. This makes the cases cited by the defendant quite different from the case before me.

- [94] Earlier in these reasons, I set out my findings on the progression of Ms. Mladjo's symptoms and their impact on her day to day life. Based on the medical evidence, I find it is more likely than not that her condition will indefinitely continue to cause her pain and discomfort.
- [95] I find that the injuries sustained by Ms. Mladjo have caused her pain and suffering and have adversely impacted her functioning in a number of different areas of her life. Her working life, her social and leisure activities and most significantly her marriage and family life have all been affected by the injuries arising from the accident. While she presents as a very stoic person who is reluctant to show weakness, the impact of her injuries has clearly been significant and detrimental.
- [96] Having reviewed all of the authorities provided by counsel and considering Ms. Mladjo's particular circumstances in light of the factors set out in Stapley, I conclude that a fair and reasonable award for non-pecuniary damages is \$80,000.

B. Past loss of earning capacity

- [97] Ms. Mladjo seeks net compensation of \$60,000 for past loss of earning capacity. The defendant submits that there should be no award made for past loss of earning capacity.
- [98] Compensation for past loss of earning capacity is to be based on the value of the work that the injured plaintiff would have performed but was unable to perform because of the injury: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141, at para. 30.
- [99] A plaintiff is entitled to recover damages only for her past net income loss. In other words, the Court must deduct the amount of income tax payable from lost gross earnings: *Hudniuk v. Warkentin*, 2003 BCSC 62. The Court has discretion to determine what period or periods of time are appropriate for the determination of net income loss: *Lines v. W & D Logging Co. Ltd.*, 2009 BCCA 106 [Lines], at paras. 181-186.
- [100] The assessment of loss of both past and future earning capacity is complicated by the fact that the assessment involves a consideration of hypothetical events. As such, the authorities state that the normal standard of proof of balance of probabilities does not apply when considering hypothetical possibilities of what a plaintiff would have done had the Accident not occurred. Rather, a hypothetical possibility will be taken into account as long as it is a real and substantial possibility and not mere speculation: *Athey* at para. 27.
- [101] It is uncontroverted that prior to the Accident, the plaintiff earned a salary of approximately \$40,000 per year. The complicating factor in determining her loss of income earning capacity is that approximately one month before the Accident she learned that her company, Veranova, would be closing in March 2016 and she would be out of work. Therefore, irrespective of the Accident, she was facing unemployment in March 2016 and that must be accounted for in calculating her past loss of income earning capacity.

- [102] In order to determine past loss of income earning capacity, I therefore must consider both the question of how long Ms. Mladjo would likely have been unemployed had the Accident not occurred and what kind of work she would have done had the Accident not occurred. The second part of the inquiry, namely what work Ms. Mladjo would have done had the Accident not occurred, is also a central factor in determining loss of future earning capacity.
- [103] In or around October 2016, the plaintiff made the decision to go back to school and train to be a teacher's assistant. She testified that she made this decision on the basis that her injuries left her unable to either sit or stand for long periods of time, and she required a job that would allow her to move positions regularly. As a result, many jobs that she was qualified for, including bus driver, property coordinator or driving instructor, were not available because they required constant sitting.
- [104] Counsel for the defendant spent a considerable amount of time on cross-examination seeking to have the plaintiff admit that she had no clear plan, when she learned of Veranova's imminent closing in January 2016, to go to teacher's college. It is evident that in January 2016 the plaintiff had no specific plan to become a teacher in the BC school system. However, it does not follow that there were not other remunerative opportunities available to her that she had a real and substantial possibility of pursuing.
- [105] Ms. Mladjo impressed me as an extremely hard working individual. Prior to the Accident, she had never been out of the workforce and has frequently held down multiple jobs at a time. She obtained a Class 1 driver's license shortly after arriving in Canada in order to maximize her employment opportunities in the transportation field, an area in which she had obtained a masters level degree in Bulgaria. However, the Accident rendered her incapable of performing jobs that involve excessive sitting or extensive standing, climbing or kneeling. Jobs that Ms. Mladjo could have done but for the Accident would likely include property administration, which she did before the Accident, and all manner of jobs in the transportation industry which she had the potential to access with her Class 1 driver's license: bus driver, chauffeur, truck driver, or driving instructor.
- [106] Counsel for Ms. Mladjo has asked me to quantify past loss of income earning capacity as a simple calculation of the difference between Ms. Mladjo's salary at Veranova and her current salary, with reference to the reasonable period of time she would have been out of work in any event.
- [107] There are a wide range of career options that Ms. Mladjo may reasonably have pursued upon the closing of Veranova. This introduces uncertainty into any calculation of past loss of income earning capacity. Consequently, I agree that the reasonable way to approach the calculation is the one suggested by counsel for the plaintiff, on the assumption that the most likely career path Ms. Mladjo would have pursued had the injury not occurred would be something similar to what she was doing before, namely property management at a company like Veranova, unless she could find work in her areas of interest (being

transportation and education) for a similar salary.

- [108] Using her previous salary from Veranova of \$40,000 as a baseline, and making allowances for the fact that she needed to find employment in any event owing to the loss of the Veranova job, plaintiff's counsel has asked to me to assume that but for the Accident, the plaintiff would have been unemployed for approximately three months after Veranova closed in March 2016. This would mean that the lost wages attributable to the Accident would run from June 2016 until January 2018 when Ms. Mladjo commenced employment as a teaching assistant. Ms. Mladjo's Veranova salary for that 18 month period would be approximately \$60,000.
- [109] Also, counsel for the plaintiff has asked me to award an additional \$8,000, which is the difference in one year's salary between the plaintiff's job at Veranova (\$40,000) and her current position as a teacher's assistant (\$32,000) to account for past wage loss from January 2018 to January 2019. This would mean her gross award would be \$68,000 for past loss of earning capacity.
- [110] I agree with counsel's methodology and calculation of past loss of income earning capacity except that I would reduce the gross award from \$68,000 to \$63,000 for the reason noted below.
- [111] While it is possible that the plaintiff would only be out of work for a few months, I think there is a substantial possibility that, but for the Accident, it would have taken the plaintiff more than three months to find suitable work in the \$40,000 salary range after the closing of Veranova. In order to account for this contingency, and bearing in mind that the assessment of loss of earning capacity is an exercise of judgment and not a mathematical calculation, I find that it is fair and reasonable in all of the circumstances to award Ms. Mladjo \$63,000 for past loss of income earning capacity.
- [112] In order to calculate the net amount payable to the plaintiff for past loss of income earning capacity, counsel for the plaintiff has suggested I deduct 13% from the award on account of income tax and EI premiums. While I agree that the proper approach, pursuant to Lines, is to deduct income tax and EI premiums from the gross award for past loss of income earning capacity, I am concerned about ascribing a number to the net deductions from the award without having heard fulsome submissions on the matter from both counsel. I therefore leave it to the parties to agree as to whether 13%, or some other number, is the appropriate deduction to make from the \$63,000 award to account for the income tax and EI premiums the plaintiff would have had to pay had she earned this income in the normal course. If the parties cannot agree on this point, they have leave to appear before me to address the issue and have me make a determination.

C. Loss of future earning capacity

- [113] With respect to loss of future earning capacity, the plaintiff seeks an award equivalent to two years of her pre-Accident income. The defendant submits that the plaintiff has not met the burden of proof in establishing that she has suffered a diminishment of her future earning capacity attributable to the Accident and says nothing should be awarded to the plaintiff under this head of damages.
- [114] In *Rabiei*, Adair J. helpfully summarized the correct approach in assessing a claim for damages for loss of earning capacity:
- [159] There are two stages in assessing a claim for damages for loss of earning capacity. First, a plaintiff must prove that the injuries suffered in the accident and the resulting symptoms impaired her ability to earn income and that there is a real and substantial possibility that her diminished earning capacity has resulted or will result in a pecuniary loss. A plaintiff may be able to prove that there is a substantial possibility of a future loss despite having returned to his or her usual employment. If the plaintiff satisfies that burden, and therefore establishes an entitlement to compensation, then the second stage requires an assessment of the loss. A plaintiff may prove the quantification of that loss either on an earnings approach or a capital asset approach. Both are correct. The capital asset approach is often more appropriate where the pecuniary loss is not easily measured (as is the case here). See generally *Perren v. Lalari*, 2010 BCCA 140, at paras. 21 and 32. Either way, the court must endeavour to quantify the financial harm accruing to the plaintiff over the course of her working career, taking into account relevant and realistic negative and positive contingencies.
- [115] With respect to the first stage of the test, I am satisfied that Ms. Mladjo has proven that the injuries suffered in the Accident and the resulting symptoms have impaired her ability to earn income and there is a real and substantial possibility that her diminished earning capacity will result in a pecuniary loss.
- [116] As discussed above under the analysis of past loss of income earning capacity, but for the Accident, Ms. Mladjo would have had an array of career options available to her upon the closing of Veranova. She has a master's degree from Bulgaria and she has professional experience in a broad array of fields, including truck driving, language teaching, driver education and professional baking.
- [117] Given the broad array of skills and experience that Ms. Mladjo has, there is a substantial possibility that, but for the Accident, she would have obtained long term employment that was at least as remunerative as the work she did at Veranova. I specifically reject the defendant's argument that the plaintiff's only option after Veranova closed was to become a teacher's assistant, irrespective of the Accident. At a minimum, there is a reasonable possibility that after Veranova closed, she would have been able to find work doing what she did at Veranova for a similar salary. As such, she has proven that her income earning capacity has been impaired by her injuries.

- [118] With respect to the second branch of the test, I must quantify Ms. Mladjo's loss on the basis of either an earnings approach or a capital asset approach. As in *Rabiei*, this is a case where the lost future income is not easily quantifiable and as such, the capital asset approach may be the most practical. In submissions, counsel for the plaintiff argued that the final number reached under either an earnings approach or a capital asset approach would be similar. In any event, I agree with counsel for the plaintiff that in these circumstances the capital asset approach is the most appropriate given the difficulties involved in precisely measuring Ms. Mladjo's future loss.
- [119] The capital asset approach involves considering factors such as: 1) whether the plaintiff has been rendered less capable overall of earning income from all types of employment; 2) whether the plaintiff is less marketable or attractive as a potential employee; 3) whether the plaintiff has lost the ability to take advantage of all job opportunities that might otherwise have been open; and 4) whether the plaintiff is less valuable to herself as a person capable of earning income in a competitive labour market: *Brown v. Golaiv* (1985), 26 B.C.L.R. (3d) 353 [Brown]; *Morgan v. Galbraith*, 2013 BCCA 305, at paras. 53 and 56.
- [120] A plaintiff is entitled to be compensated for real and substantial possibilities of loss, which are to be quantified by estimating the chance of the loss occurring. The valuation of loss of earning capacity may involve a comparison of what the plaintiff would probably have earned but for the Accident with what she will probably earn in her injured condition. The overall fairness and reasonableness of the award must be considered and the task of the Court is to assess the losses, not to calculate them mathematically. 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: *Reilly v. Lynn*, 2003 BCCA 49, at para. 101.
- [121] Ms. Mladjo has claimed damages for loss of the capital asset of employability. Her counsel argues that had the Accident not occurred, she would have been able to pursue more lucrative job options than being a teacher's assistant. While I have found that Ms. Mladjo had no clear plan prior to the Accident of what she was going to do once Veranova closed, it does not flow from that her only option was to be a teacher's assistant. Given her broad training and skills in a number of different areas, I find it likely that a number of career paths would have been open to Ms. Mladjo upon the closing of Veranova had the Accident not occurred.
- [122] I find that the Brown factors are applicable here and particularly I find that the limitations caused by her injuries have rendered Ms. Mladjo less capable overall from earning an income, have rendered her a less marketable employee and have taken from her the ability to take advantage of all job opportunities that might otherwise have been open to her. It is notable that not only did Ms. Mladjo have more options in terms of jobs available to her prior to the Accident but she also had a history of working more than one job at a time in order to earn extra income. This option is no longer available to her due to her injuries from the Accident.

- [123] There was no evidence on the record as to what income Ms. Mladjo would make as a Translink bus driver, or a long distance trucker, or a driving instructor. Nor is there evidence before me as to what Ms. Mladjo would earn had she pursued her longer term dream of becoming a teacher. There was of course evidence of what Ms. Mladjo earned prior to the Accident, \$40,000 a year, and I think the difference between this amount and Ms. Mladjo's current salary is a helpful number to consider when calculating the impairment of the capital asset of the plaintiff's employability.
- [124] At the time of trial Ms. Mladjo was almost 55 years old and can be expected to work for another ten years. Factoring in the prescribed discount rate of 1.5%, utilizing the present value table at Appendix E of CIVJI: Civil Jury Instructions, 2nd ed. (Vancouver: Continuing Legal Education Society of British Columbia, 2009) which gives a multiplier of 9.2222 for a ten year period, the present value of an annual loss of \$8,000 for the next ten years to age 65 is approximately \$73,777.
- [125] In all the circumstances, and considering the Brown factors, I find that a reasonable assessment of the loss of Ms. Mladjo's future earning capacity using the capital asset approach is \$75,000.

D. Cost of future care

- [126] Ms. Mladjo's counsel presented a claim for cost of future care based on calculations derived from Ms. Shivji's report. He provided a table that sets out the present value of the various one time and ongoing therapies and devices recommended by Ms. Shivji. Those claims are set out in the table below:

One Time Costs

Average

Counselling

\$5,000.002

Physiotherapy - short term

\$1,320.00

Supervised Exercise program

\$650.00

Occupational Therapy

\$1,500.00

Message Therapy - short term

\$1,080.00

Weight loss program

\$402.48

Total one time costs:

\$9,952.48

Reoccurring Costs

To Age

Cost

Exercise Program

75

\$4,076.41

Gym Pass to age 64

64

\$3,296.48

Massage Therapy

80

\$27,236.02

Ongoing Pain Management Therapies

66

\$7,635.21

Housekeeping - Regular

75

\$21,071.90

Housekeeping - Seasonal

75

\$14,047.94

Neck Pillow

75

\$744.73

Back Support

75

\$179.16

TENS

75

\$203.80

electrodes

75

\$2,038.21

Eletriptan/Advil/Tylenol

\$1,000.00

Vitamin D3

75

\$228.91

Total Reoccurring Costs:

\$81,758.77

[127] The defendant has agreed to some but not all of the items claimed for cost of future care. Specifically, the defendant agrees to three years only of massage at \$4,152.80, pain management therapies at \$833.34 and a neck pillow, back support and one year of electrodes. The total value of what the defendant is prepared to agree to in terms of cost of future care is \$8,152.04.

[128] A plaintiff is entitled to compensation for the cost of future care based on what is reasonably necessary to restore her to her pre-Accident condition, to the extent that is possible. Any award must have a medical justification and be reasonable: *Tsalamandris v. McLeod*, 2012 BCCA 239, at para. 63.

[129] Future care costs must be both medically necessary and likely to be incurred by the plaintiff. If a plaintiff has not used a particular item or service in the past it may be inappropriate to include its cost in a future care award. However, if the evidence shows that previously rejected services will not be rejected in the future, the plaintiff can recover for such services: *O'Connell v. Yung*, 2012 BCCA 57, at paras. 54-61.

[130] The defendant raises a number of points with respect to Ms. Mladjo's claim for cost of future care:

- a) Ms. Mladjo has not been diagnosed with any form of mental illness, nor did Dr. Jung recommend counselling, so this item should be disregarded as a cost of future care as it does not have a medical justification;
- b) Treatments for "kinesophobia" are unwarranted as this is a diagnosis made by Dr. Jung who is not a medical doctor;
- c) The plaintiff's history suggests that she will not avail herself of the therapies recommended by Ms. Shivji, particularly physiotherapy, active rehabilitation and going to the gym;
- d) A weight loss program is not justifiable since Ms. Mladjo was overweight prior to the Accident; and
- e) Housekeeping is not properly awarded as part of an award for cost of future care.

[131] With respect to the defendant's position on the counselling recommendation, I am satisfied that on the basis of the evidence before me, particularly the evidence of Ms. Mladjo and her daughter Ms. George, that the plaintiff has established that she suffers from depression. Counsel for the plaintiff correctly pointed out in reply that a claimant in a personal injury action need not prove that their condition meets the threshold of "recognizable psychiatric illness" in order to prove a mental injury: *Saadati v. Moorhead*, 2017 SCC 28, at paras. 35-38.

[132] However, the inquiry involved in determining reasonable cost of future care does not end with me determining that Ms. Mladjo has suffered a mental injury. I find that she has suffered a mental injury. But in order to allow the proposed counselling costs, I must also find a medical justification for the expenditure itself. In other words, someone with medical authority must have recommended it or I must be able to conclude on the evidence before me that an expenditure is reasonably necessary to restore the patient to her pre-Accident condition. I simply do not have that evidence before me as it pertains to the cost of counselling and I must decline to allow the counselling expenditure as a cost of future care.

[133] With respect to the defendant's submission about kinesophobia, I find that Dr. Jung, as a qualified expert in chronic pain, was qualified to opine about kinesophobia which rather than being a medical condition simply means "fear of pain". Dr. Jung's observation that some patients fail to do active rehabilitation exercises because of their fear of associated pain, and his consequent recommendation that Ms. Mladjo work with a physiotherapist or occupational therapist with some understanding of these issues, are matters about which he is well situated to testify. I find that the cost of future care expenses associated with dealing with Ms. Mladjo's kinesophobia are justified.

[134] As to the defendant's argument that some therapies should be disallowed because Ms. Mladjo did not avail herself of them in the past, Ms. Mladjo testified about her reasoning for stopping certain therapies, including active rehabilitation and physiotherapy. Her reasoning was financial. Should she have the funds to pursue these therapies and achieve greater comfort and mobility, I find it is likely that she will avail herself of the opportunity. I

decline to find, as the defendant urges me to do, that Ms. Mladjo should not receive the physiotherapy, active rehabilitation and exercise opportunities recommended by the experts on the basis that she did not undertake these opportunities in the past.

[135] With respect to weight loss, I am not persuaded that Ms. Mladjo is likely to participate in a weight loss program, nor that she necessarily needs one. Both she and her daughter testified that she has met with success in modifying her diet and making healthy eating choices and her weight has gone down since 2017 such that she now weighs less than she did in October 2015, before the Accident. A weight loss program does not appear to be a reasonably necessary expense to restore the plaintiff to her pre-Accident condition.

[136] I am persuaded that the therapies and devices recommended by Dr. Jung that were costed by Ms. Shivji are reasonable and medically justified. Therefore, with the exception of the discrete items discussed above, and housekeeping as discussed below, I would allow the cost of future care claim of the plaintiff.

[137] With respect to housekeeping assistance, the defendant is correct that compensation for loss of homemaking capacity is distinct from cost of future care. I have dealt with housekeeping under a separate heading below.

[138] In summary, I award the following amounts for cost of future care:

One-Time Costs

Physiotherapy (short term)

\$1,320.00

Supervised Exercise Program

\$650.00

Occupational Therapy

\$1,500.00

Massage Therapy

\$1,080.00

Total One-Time Costs

\$4,550.00

Recurring Costs

Exercise Program

\$4,076.41

Gym Pass (to age 64)

\$3,296.48

Massage Therapy

\$27,236.02

Ongoing pain management therapies

\$7,635.21

Neck Pillow

\$744.73

Back Support

\$179.16

TENS

\$203.80

Electrodes

\$2,038.21

Electripan

\$1,000.00

Vitamin D3

\$228.91

Total Recurring Costs

\$46,638.93

TOTAL COST OF FUTURE CARE

\$51,188.93

E. Loss of housekeeping capacity

[139] In *McTavish v. MacGillvray*, 2000 BCCA 164, at paras. 19-50, the Court of Appeal clarified that an award for housekeeping costs, properly considered, is an award for loss of capacity and is distinct from a cost of future care claim. This is because the award for loss of homemaking capacity is not dependent on whether homemaking service providers are likely to be hired by the plaintiff.

[140] An award ordered for homemaking is for the value of the work that would have been done by the plaintiff but which he or she is incapable of performing because of the injuries at issue. The plaintiff has lost an asset: his or her ability to perform household tasks that would have been of value to him or herself as well as others in the family unit but for the Accident: *Westbroek v. Brizuela*, 2014 BCCA 48 [Westbroek], at para. 74.

[141] Notwithstanding the fact that the plaintiff has claimed loss of homemaking capacity under an incorrect heading, I find that she has established on the evidence that due to her injuries, she has lost the asset of her ability to do housework. For that she is entitled to reasonable compensation on the basis of the value of those services.

[142] A modest award for loss of homemaking capacity, consistent with the approach mandated in *Westbroek* and commensurate with the loss, is justified in this case and I award \$10,000.

F. Special damages

[143] I understand from the parties' submissions that they agree on the amount of special damages in the following amounts:

a)

Special damages

\$5,924.33

b)

Mileage

\$1,441.23

Total

\$7,365.56

IX. conclusion

[144] The defendant is liable to Ms. Mladjo for damages in the following amounts:

1)

Non-pecuniary

\$80,000

2)

Past loss of earning capacity

(the net amount of which is to be agreed to by the parties or spoken to in Court)

\$63,000

3)

Future loss of earning capacity

\$75,000

4)

Cost of future care

\$51,188.93

5)

Loss of housekeeping capacity

\$10,000

6)

Special damages

\$7,365.56

X. costs

[145] If the parties are unable to agree on costs, they may make arrangements through Supreme Court Scheduling to appear before me to speak to the issue.

"Francis J."

The Honourable Madam Justice Francis

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